

2019

The Problem with Present-Value: How Local Bankruptcy Rules Impose Heavy Burdens on Chapter 13 Debtors

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THE PROBLEM WITH PRESENT-VALUE: HOW LOCAL BANKRUPTCY RULES IMPOSE HEAVY BURDENS ON CHAPTER 13 DEBTORS

ABSTRACT

When Congress created the Bankruptcy Code in 1978, it left open several gaps that needed to be resolved through the judicial system. One of these gaps concerns the process behind the present-value analysis required by Section 1325, which states that debtors must pay creditors the present value of their claims over the course of the debtor's Chapter 13 bankruptcy plan. This process implicitly dictated that debtors must pay a discount rate to properly compensate their creditors. Because Congress never indicated how this discount rate should be calculated, bankruptcy courts created several different solutions to the problem. This left the bankruptcy system in a state of chaos as the rules varied substantially from district to district.

In Till v. SCS Credit Corp., the Supreme Court attempted to tackle this problem and bring clarity to the situation but was unable to do so. The Court was split 4-4-1, which seemingly left the process for creating the Chapter 13 discount rate unclear. While many courts chose to treat the plurality decision as binding precedent, some bankruptcy courts created local rules that set a presumptive Chapter 13 discount rate to be used in all bankruptcy cases.

These courts failed to see that Till did in fact reach a majority holding: A Chapter 13 debtor is presumed to satisfy their present-value burden when they pay a discount rate that is greater than or equal to the national prime rate. The creditor then bears the burden of showing that the discount rate should be higher. By setting a presumptive rate, the local rules created by bankruptcy courts shift at least part burden of proof onto the shoulders of debtors, who do not have reliable access to the information they need to litigate the claim and lower the discount rate.

This Comment argues that these local rules violate the Rules Enabling Act because they alter the substantive rights of debtors. Burdens of proof are substantive aspects of a litigant's claim, and rulemaking committees that shift this burden are encroaching on Congress's rulemaking power. By setting a presumptive discount rate and giving the debtor burden to change it, debtors may be forced to pay more money over the course of their plans, therefore affecting their ability to repay their debts and obtain the financial relief that they are entitled to receive.

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INTRODUCTION

When Congress passed the Bankruptcy Reform Act of 1978, commonly referred to as the Bankruptcy Code, one of its primary goals was to create uniform laws to govern the bankruptcy process.¹ While Congress was largely able to accomplish this goal, the Bankruptcy Code still contains several gaps that must be filled by the judicial system.² One of these gaps concerns the Chapter 13 present-value analysis, which has led courts to create a variety of potential solutions in an attempt to bring clarity to the situation.³

When debtors file a Chapter 13 bankruptcy plan, they promise to pay back their creditors over a period of three to five years using their future income.⁴ The Bankruptcy Code requires that over the course of the debtor's plan, secured creditors should receive the present value of their claim and unsecured creditors should receive the present value of the amount each creditor would receive if its claim was liquidated in Chapter 7.⁵ This places a burden on debtors by requiring them to show that they can pay each of their creditors the amount they are owed in order to confirm their plan.⁶ This "present-value analysis" essentially requires bankruptcy courts to select a "discount rate," which accounts for factors such as inflation and opportunity cost, in order to determine whether the debtor's stream of future payments to creditors has a present value equal to the amounts to which the Bankruptcy Code entitles them.⁷

¹ Adam J. Wiensch, *The Supreme Court, Textualism, and the Treatment of Pre-Bankruptcy Code Law*, 79 GEO. L.J. 1831, 1831 (1991) ("The new Rules were also intended to achieve uniformity in bankruptcy practice, which varied greatly from district to district and refereee.").

² See Matthew H. O'Brien, *Tilling the Cram Down Landscape: Using Securitization Data to Expose the Fundamental Fallacies of Till*, 59 VAND. L. REV. 257, 258 (2006).

³ Rafael I. Pardo, *Reconceptualizing Present-Value Analysis in Consumer Bankruptcy*, 68 WASH. & LEE L. REV. 113, 115 (2011) ("No uniform rule of decision has emerged on this issue. Instead, a multitude of approaches has proliferated within and across circuits.").

⁴ 11 U.S.C. § 1322(a)(1) (2012) (stating that the debtor must submit "all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan"); *id.* § 1322(a)(2) ("The plan ... shall provide for the full payment, in deferred cash payments, of all claims."); *id.* § 1322(d)(1) (for above median debtors "the plan may not provide for payments over a period that is longer than 5 years"); *id.* § 1322(d)(2) (for below median debtors, "the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years").

⁵ *Id.* § 1325(a)(5)(B)(ii) ("[W]ith respect to each allowed secured claim ... the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim."); *id.* § 1325(a)(4) ("[T]he value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim [may not be] less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.").

⁶ *Id.* § 1325(a)(4).

⁷ *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004) (plurality opinion).

While the Bankruptcy Code places this burden on the debtor, it does not give guidance on how to calculate a discount rate that satisfies it.⁸ Over time, circuit courts developed four different methods to fill this gap in the Bankruptcy Code: the formula approach, the coerced loan approach, the presumptive contract approach, and the cost-of-funds method.⁹ These differing approaches resulted in vastly different discount rates, which forced similarly situated debtors to pay their creditors varying amounts and potentially affected their ability to repay their debts.¹⁰ Importantly, a failed Chapter 13 bankruptcy plan could lead a court to dismiss the case or convert it to a Chapter 7 case, in which the debtor's assets would be liquidated to satisfy creditor claims.¹¹

In *Till v. SCS Credit Corp.*,¹² the Supreme Court attempted to solve this issue and bring clarity to the Chapter 13 present-value analysis.¹³ Unfortunately, it failed.¹⁴ The Justices split 4-4-1 on the issue, thus failing to come to a majority consensus on which method to adopt.¹⁵ Justice Thomas disagreed with the other eight Justices about whether it was appropriate to include a debtor-specific risk adjustment in the discount rate, and thus did not join either side.¹⁶ Although the Court ultimately used the formula approach to calculate the discount rate,¹⁷ its apparent failure to reach a majority decision meant that some bankruptcy courts did not treat it as binding precedent.¹⁸

Till has drawn criticism from commentators, many of whom believe that the Supreme Court spoiled “a marvelous opportunity to impose some much-needed

⁸ *Id.* at 473–74.

⁹ Emma J. Guido, *Till v. SCS Credit Corporation: A “Prime-Plus-Plus” Method Tilling Courts to Consider Efficient Market Evidence*, 38 CARDOZO L. REV. 269, 279–82 (2016); see also *Till*, 541 U.S. at 373–74.

¹⁰ Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 437 (2012).

¹¹ *Till*, 541 U.S. at 479.

¹² *Id.* at 465.

¹³ *Id.*

¹⁴ See Ralph Brubaker, *Cramdown Interest Rates: Disarray Dominates Till...?*, 24 No. 8 Bankr. L. Letter 1, Aug. 2004, at 1.

¹⁵ The plurality advocated for the formula approach, *Till*, 541 U.S. at 479–80, the dissent advocated for the presumptive contract rate approach, *id.* at 494 (Scalia, J., dissenting), and Justice Thomas, the lone holdout, argued that the discount rate should not include a risk adjustment, *id.* at 486 (Thomas, J., concurring).

¹⁶ Justice Thomas ultimately sided with the plurality's 9.5% discount rate because it gave the closest valuation to the risk-free rate of interest. See *id.* at 491 (Thomas, J., concurring).

¹⁷ *Id.* at 479–80 (plurality opinion) (“[T]he ... formula rate best comports with the purposes of the Bankruptcy Code.”). The formula approach calculates the discount rating by adding a debtor-specific risk adjustment to a national prime rate of lending, which is meant to ensure that the discount rate accounts for both general economic conditions and the specific financial record of individual debtors. *Id.* at 478–80.

¹⁸ See Bankr. D. Ut. LBR 2083-2(D)(1) (setting the initial discount rate equal to the parties' contractual interest rate rather than the prime rate).

order and predictability on these determinations” by failing to reach a majority decision.¹⁹ The Supreme Court seemingly did nothing to solve the present-value analysis problem, and many believed its only real accomplishment was that it eliminated two of the four methods that bankruptcy courts had previously applied to *Till*.²⁰

Since the Court was seemingly unable to conclusively decide the proper approach to conducting the present-value analysis, bankruptcy courts once again looked to fill in this gap in the Bankruptcy Code.²¹ Some courts have created local rules that govern how they will calculate the discount rate used in the Chapter 13 present-value analysis.²² While these rules generally follow the formula-approach framework laid out by the *Till* plurality, the problem is that the rules created a district-wide presumptive discount rate for all Chapter 13 cases that does not account for the individual debtor’s financial situation.²³

Even though the rules include provisions that allow each party to rebut this presumptive rate,²⁴ this system is biased against debtors because they have less access to relevant information.²⁵ Creditors receive all relevant information about the debtor’s financial background in the bankruptcy filing, but debtors do not have the same knowledge of lending markets because they are not active participants.²⁶ The *Till* plurality supported the formula method because it places the burden of proof on the creditor, the party with better access to information about lending markets.²⁷ These local rules shift this burden to debtors, who now must present evidence about the factors bearing on the present-value analysis—

¹⁹ Brubaker, *supra* note 14, at 1; *see also* Robert K. Rasmussen, *Creating a Calamity*, 68 OHIO ST. L.J. 319, 319 (2007) (asserting that the Justices did not “underst[and] the basic functioning of bankruptcy law”).

²⁰ Brubaker, *supra* note 14, at 1.

²¹ Pardo & Watts, *supra* note 10, at 437.

²² *Id.* at 436–37 (“The Court’s failure to announce a rule with nationwide effect has given bankruptcy courts the leeway to ... [fashion] their own approaches to administering the Code’s present-value provision.”).

²³ *See* Bankr. D. Haw. R. 3015-1(h)(2) (predetermining the formula approach’s risk adjustment to be 1.5%); Pardo & Watts, *supra* note 10, at 437–38 (“[T]he differences cannot be attributed to any geographical variance in inflation, opportunity costs, or the risk of nonpayment.”).

²⁴ *E.g.*, Bankr. W.D. Mo. R. 3084-1(G)(3) (“Parties may introduce evidence to determine what the applicable market rate of interest might otherwise be, on a case-by-case basis.”); Bankr. D.S.C. R. 3015-6(c) (“A party in interest objecting to the interest rate proposed in a chapter 13 plan ... must do so before expiration of the deadline.”).

²⁵ *Till v. SCS Credit Corp.*, 541 U.S. 465, 484 (2004) (plurality opinion) (“[A]ny information debtors have about any of these factors is likely to be included in their bankruptcy filings, while the remaining information will be far more accessible to creditors ... than to individual debtors.”).

²⁶ *Id.*

²⁷ *Id.* at 484–85 (“[T]he formula approach, which begins with a concededly low estimate of the appropriate interest rate and requires the creditor to present evidence supporting a higher rate, places the evidentiary burden on the more knowledgeable party, thereby facilitating more accurate calculation of the appropriate interest rate.”).

which they likely do not have—if they desire to lower the discount rate.²⁸ This runs counter to the *Till* plurality’s assertion that the prime rate of interest is presumed to satisfy the debtor’s burden of proving that creditors receive adequate present value on their claims, unless the creditor proves otherwise.²⁹

It also runs counter to an unrecognized majority holding contained in *Till*. While there was no true five-Justice majority advocating for a single method, there were five Justices that agreed on a major issue—namely, that the prime interest rate presumptively satisfies a debtor’s present-value burden.³⁰ On a case-by-case basis, creditors may argue that the prime rate is not high enough to account for the riskiness of an individual debtor, but the burden is fully on the creditor to do so.³¹ Once debtors establish that they are paying the prime rate, the burden shifts onto the shoulders of their creditors.³²

This approach of using local rules is problematic for two reasons. First, these local rules create the same non-uniformity problems that prevailed in the pre-*Till* circuit split. The variation in those rules forces similarly situated debtors to pay different discount rates due solely to the fact that the debtors filed for relief in different jurisdictions.³³ These rates are not based on factors that are debtor specific, like geographical market conditions or the debtor’s actual risk of nonpayment, but instead are entirely based on the general formula that these courts have promulgated through their local rules.³⁴

Second, these local rules violate the Rules Enabling Act because they affect the substantive rights of debtors.³⁵ The Supreme Court has repeatedly held that the burden of proof is a substantive aspect of a claim.³⁶ By shifting the burden of proof from the creditor to the debtor, these courts have created substantive laws that impact how much debtors will pay back over the course of their plan.³⁷

²⁸ *Id.* at 484.

²⁹ *See id.* (“[W]e principally differ with the dissent ... over which party (creditor or debtor) should bear the burden of rebutting the presumptive rate (prime or contract, respectively).”); *id.* at 479 (noting that the formula approach “places the evidentiary burden squarely on the creditors”).

³⁰ *Infra* notes 292–297 and accompanying text.

³¹ *Infra* notes 292–297 and accompanying text.

³² *Id.*

³³ Pardo & Watts, *supra* note 10, at 436–37.

³⁴ *Id.* at 437.

³⁵ *See* 28 U.S.C. §§ 2071(a), 2075 (2012); Pardo & Watts, *supra* note 10, at 437 (“[C]ourts are using their local rulemaking processes to enact rules or to promulgate official forms that affect substantive rights.”).

³⁶ *See, e.g.,* *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 20–21 (2000) (“Given its importance to the outcome of cases, we have long held the burden of proof to be a ‘substantive’ aspect of a claim. That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it.” (citations omitted)).

³⁷ Pardo & Watts, *supra* note 10, at 438 (“[A]ll else being equal, debtors subject to a higher discount rate

These rules also affect debtors' ability to repay their debts because some debtors will have to arbitrarily pay a higher amount each month based solely on this predetermined rate.³⁸ Because Chapter 13 plan denial or failure can cause debtors to lose their homes, their vehicles, or other important assets,³⁹ the stakes are so high that even small differences in the amounts debtors pay each month could have dire consequences on their quality of life.

Since some bankruptcy courts use local rules and local forms to implement these presumptive Chapter 13 discount rates, they must abide by the limitations established by the Rules Enabling Act.⁴⁰ Congress created the Rules Enabling Act to establish clear boundaries between the rulemaking power of federal courts and Congress's power to create substantive law.⁴¹ This is important because it maintains the separation of powers principle that is a cornerstone of the U.S. government.⁴²

The Rules Enabling Act provides that local rules "shall not abridge, enlarge, or modify any substantive right."⁴³ By creating local rules that set a presumptive Chapter 13 discount rate, these bankruptcy courts have modified the substantive rights of debtors by shifting the burden of proof by forcing them to argue that a lower rate satisfies the present-value analysis. To fix this problem, these courts need to repeal their local rules and follow the *Till* plurality's guidance by placing the burden of adjusting the discount rate on creditors rather than debtors.

This Comment is based on a survey of the ninety-four U.S. bankruptcy courts' local rules and local forms to identify those courts that have promulgated local rules establishing presumptive discount rates in Chapter 13 cases. To demonstrate how such rules violate the Rules Enabling Act, this Comment will proceed in four parts. Part I overviews the source of bankruptcy rulemaking

must pay more to creditors to obtain Chapter 13 relief.”)

³⁸ *Id.* at 437–38. While debtors are able to challenge this rate during a bankruptcy hearing, the relative impact of the discount rate is less than the impact of other issues—such as the value of property of the bankruptcy estate—so debtors will likely forgo litigating the discount rate in favor of allocating resources to litigating these other issues. *Infra* notes 330–331 and accompanying text.

³⁹ If a debtor's plan is denied or fails, their case may be converted to Chapter 7 bankruptcy wherein their assets are subject to being sold in order to pay off their debts. 11 U.S.C. § 1307(c) (2012).

⁴⁰ 28 U.S.C. § 2072 (2012).

⁴¹ Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1106–07 (1982) (“The 1924 Senate Hearing and contemporary literature confirm that ‘procedure’ and ‘substantive rights,’ as used in the Cummins bill, were understood to demarcate the spheres of lawmaking appropriate for the Supreme Court acting as rulemaker and for Congress.”).

⁴² *Id.*

⁴³ 28 U.S.C. § 2072(b). This language is mirrored in the Bankruptcy Rules Enabling Act, which extends the Court's rulemaking power by allowing it to create bankruptcy rules. *Id.* § 2075.

powers and discusses limitations imposed by the Rules Enabling Act. Part II describes the history of the Chapter 13 discount rate, including the pre-*Till* circuit split, the *Till* case itself, and the implications of the Supreme Court's failure to clearly select a present-value approach. Part III shows the extent to which bankruptcy courts use local rules to calculate the discount rate and how these differing rules affect similarly situated debtors. Part IV discusses how these rules violate the Rules Enabling Act by shifting the burden of proof and presents other, softer issues that these rules cause. It also discusses possible reforms that would keep courts from running afoul of the Bankruptcy Code and protect debtors from the problems caused by these rules.

I. SOURCES OF AND LIMITATIONS ON BANKRUPTCY RULEMAKING POWERS

When Congress passed the Rules Enabling Act in 1934, it did so with the intention of delegating some of its rulemaking power to the Supreme Court to help improve court procedures.⁴⁴ In 1964, Congress expanded this power by allowing the Court to create rules governing the procedure of bankruptcy cases.⁴⁵ Since then, bankruptcy courts have used this power to make rules controlling various aspects of bankruptcy proceedings, including the present-value analysis.⁴⁶ The following Sections detail the rulemaking power granted to bankruptcy courts and the limitations imposed on this power by the Rules Enabling Act.

A. Sources of Bankruptcy Rulemaking Power

A court's power to create local rules is governed by Rule 9029 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").⁴⁷ Bankruptcy Rule 9029 provides that each district court "may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction."⁴⁸ Such rules must be consistent with the Bankruptcy Rules and other "Acts of Congress," and they must be created pursuant to Rule 83 of the Federal Rules of Civil Procedure (the "Federal Rules").⁴⁹ Further, Bankruptcy Rule 9029 allows each district court to delegate its local bankruptcy

⁴⁴ *Id.* § 2072; Burbank, *supra* note 44, at 1106.

⁴⁵ 28 U.S.C. § 2075; Act of Oct. 3, 1964, Pub. L. No. 88-623, 78 Stat. 1001.

⁴⁶ *See, e.g.*, Bankr. D. Haw. R. 3015-1(h)(2).

⁴⁷ FED. R. BANKR. P. 9029.

⁴⁸ *Id.* § (a)(1).

⁴⁹ *Id.*

rulemaking power to the district’s bankruptcy judges, as long as the procedure for rulemaking still complies with Federal Rule 83.⁵⁰

Similarly, bankruptcy rulemaking power can be found within 28 U.S.C. § 2075 (the “Bankruptcy Rules Enabling Act”).⁵¹ While this statute is meant to give the Supreme Court the power to create procedural bankruptcy rules, it poses limitations that also apply to all bankruptcy courts in general.⁵² The most important limitation requires that the rules be procedural in nature, and shall not “abridge, enlarge, or modify any substantive right.”⁵³ This means that all bankruptcy rules must be purely procedural and may not create or alter substantive law.⁵⁴

B. *Substance vs. Procedure*

While “substance” and “procedure” may appear to be two distinct concepts, in practice the difference between them is unsettled.⁵⁵ Congress originally created this substantive-versus-procedural dichotomy to allocate lawmaking power between the Supreme Court and Congress.⁵⁶ The legislative history of the Rules Enabling Act suggests that Congress meant the term “substantive right” to be construed broadly so that the Supreme Court would not infringe on Congress’s legislative powers.⁵⁷

Prior to the 1998 amendment to the Rules Enabling Act, courts interpreted the phrase “substantive right” narrowly, which gave them a substantial amount of rulemaking power.⁵⁸ When Congress amended the Act, it once again stated

⁵⁰ *Id.*; see FED. R. CIV. P. 83.

⁵¹ 28 U.S.C. § 2075 (2012).

⁵² This means that decisions from cases that interpret the Bankruptcy Rules Enabling Act also apply to the local bankruptcy rules created by each district. *Id.*; LAWRENCE R. AHERN, III & NANCY F. MACLEAN, BANKRUPTCY PROCEDURE MANUAL: FEDERAL RULES OF BANKRUPTCY PROCEDURE ANNOTATED § 9029:2 (2019 ed.).

⁵³ 28 U.S.C. § 2075; *In re Adams*, 734 F.2d 1094, 1099 (5th Cir. 1984); Pardo & Watts, *supra* note 10, at 437.

⁵⁴ See AHERN, III & MACLEAN, *supra* note 52; RULE 83: BANKRUPTCY RULE 9029—LOCAL BANKRUPTCY RULES § 5:316, Westlaw BKRLIT (database updated Sept. 2018).

⁵⁵ Leslie M. Kelleher, *Taking “Substantive Rights” (in the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 105 (1998) (“[I]f commentators and the courts can agree on nothing else, they can agree that the terms ‘substance’ and ‘procedure’ have no plain meaning.”).

⁵⁶ Burbank, *supra* note 41, at 1106.

⁵⁷ *Id.* at 1120–21 (“Where a doubt exists as to the power of a court to make a rule the doubt will surely be resolved by construing a statutory provision in such a way that it will not have the effect of an attempt to delegate to the courts what is in reality a legislative function.” (quoting S. REP. NO. 1174, at 11 (1926))).

⁵⁸ Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 HARV. L. REV. 2294, 2297–98 (1998) [hereinafter *Harvard Note*].

its desire to have the phrase interpreted broadly by alluding to the idea that the Rules Enabling Act is not restricted to protecting rights directly conferred by substantive law, but that it also prevents court rules from altering remedies available under those laws.⁵⁹ Congress's repeated effort to restrict the courts' rulemaking power shows that it meant to preserve its rulemaking authority and only delegate enough power to them as was necessary to improve court procedures.⁶⁰ The Supreme Court has not often followed this guidance.⁶¹ In fact, the Supreme Court has never overturned a court rule because it violated the Rules Enabling Act.⁶² The Court often relies on the reasoning that nearly any court rule that is meant to be purely procedural will likely incidentally impact a person's substantive rights as well.⁶³

While the Court has not articulated a clear test to determine what is a substantive right since the Rules Enabling Act was amended in 1998, it has explained some of the factors to consider when making such an inquiry. Courts must look at the "actual function and effect of the rule" to determine whether it is substantive or procedural.⁶⁴ If the rule "governs only the manner and means by which the litigants' rights are enforced," then it is procedural.⁶⁵ If the rule alters "the rules of decision by which [the] court will [adjudicate] those rights," then it is substantive.⁶⁶ In other words, if the local bankruptcy rule merely regulates the manner in which the bankruptcy court carries out its responsibilities, then it is procedural; otherwise, it creates substantive law.⁶⁷

Even though the Supreme Court has never overturned a rule, it has suggested a willingness to do so under the right circumstances.⁶⁸ In *Cooter & Gell v. Hartmarx Corp.*,⁶⁹ the Court established that court rules should be interpreted "in light of the scope of the congressional authorization" given in the Rules

⁵⁹ H.R. REP. NO. 99-422, at 21-22 (1985) ("[P]roposed section 2072 contains independent limitations on supervisory court rulemaking, which Congress has the power to impose and which have the effect of delegating only a portion of Congress' power."); Kelleher, *supra* note 55, at 103.

⁶⁰ See *Harvard Note*, *supra* note 58, at 2305.

⁶¹ See *id.* at 2297-98.

⁶² *Shady Grove Orthopedic Assocs., v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010).

⁶³ *Id.* ("The test is not whether the rule affects a litigant's substantive rights; most procedural rules do."); *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 445 (1946) ("Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants.")

⁶⁴ *Associated Dry Goods Corp. v. EEOC*, 720 F.2d 804, 809 (4th Cir. 1983).

⁶⁵ *Shady Grove*, 559 U.S. at 407.

⁶⁶ *Id.*; AHERN, III & MACLEAN, *supra* note 52.

⁶⁷ See *Shady Grove*, 559 U.S. at 407; AHERN, III & MACLEAN, *supra* note 52.

⁶⁸ Kelleher, *supra* note 55, at 105.

⁶⁹ 496 U.S. 384 (1990).

Enabling Act.⁷⁰ The Court has also construed court rules narrowly to avoid an interpretation that impacts substantive rights.⁷¹

Importantly, the Supreme Court has also held that the burden of proof is a substantive aspect of a claim.⁷² Similarly, the Court has also found presumptions to be substantive.⁷³ These considerations are critical to the adjudication of a claim because the initial presumption, which sets the burden of proof, can have a profound impact on the outcome of a case. A rule that alters either of these elements fundamentally changes the way a case is litigated, which substantially impacts the rights of the litigants.

II. *TILL v. SCS CREDIT CORPORATION*: A COLOSSAL FAILURE TO BRING CLARITY TO THE CHAPTER 13 PRESENT-VALUE ANALYSIS

One area of bankruptcy law impacted by local rules is the Chapter 13 present-value analysis. As mentioned previously, the present-value analysis entails creating a discount rate that debtors will pay creditors over the course of their Chapter 13 plan.⁷⁴ This discount rate compensates the creditor for factors such as inflation, opportunity cost, and risk of the debtor's nonpayment of their debts.⁷⁵ The Bankruptcy Code is silent as to how to calculate this discount rate, so courts created different methods to fill in this gap.⁷⁶ When the Supreme Court failed to clearly resolve this issue in *Till v. SCS Credit Corp.*, bankruptcy courts later created local rules to further refine this analysis.⁷⁷ Part III will analyze the scope and effect of these rules. To set a helpful backdrop for this analysis, this Part first describes the different methods bankruptcy courts once used to conduct the present-value analysis. Thereafter, this Part details the background and holding of *Till* and then examines the implications of the Supreme Court's failure to clearly select a discount rate method.

⁷⁰ *Id.* at 391.

⁷¹ Kelleher, *supra* note 55, at 49.

⁷² See *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20–21 (2000) (“Given its importance to the outcome of cases, we have long held the burden of proof to be a ‘substantive’ aspect of a claim. That is, the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it.” (citations omitted)).

⁷³ *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 446 (1959).

⁷⁴ *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004) (plurality opinion); Guido, *supra* note 9, at 279–83.

⁷⁵ Guido, *supra* note 9, at 279–83.

⁷⁶ *Id.*

⁷⁷ See Bankr. D. Haw. R. 3015-1(h); Bankr. D. Ut. LBR 2083-2(D).

A. Present-Value Analysis Prior to Till

Prior to the Supreme Court's plurality decision in *Till*, bankruptcy courts were divided into four competing schools of thought over how to calculate the present value of a stream of future payments by a debtor.⁷⁸ Each approach sought to compensate the creditor for opportunity costs, inflation, and the risk of nonpayment, but differed over how exactly to calculate that risk.⁷⁹ This led to non-uniform treatment of debtors, as they would have to pay different discount rates based entirely on the jurisdiction in which they filed their Chapter 13 plan.⁸⁰

The first approach, often referred to as the "coerced loan" method,⁸¹ directed bankruptcy courts to apply the "market rate of interest" for "loans of equivalent duration and risk."⁸² In effect, this approach is analogous to a scenario in which the creditor made a new loan to the debtor for the value of the collateral, which provided the creditor "market interest" on this hypothetical loan.⁸³ Courts that followed the coerced loan method looked at "similar loans" made in the region and the original contract rate itself in order to determine the appropriate interest rate.⁸⁴ Opponents of this method asserted that it provided too high of a discount rate because it included factors irrelevant to the repayment of a debt in bankruptcy.⁸⁵

Similarly, the "cost of funds" method set the interest rate at the rate that "the creditor would have to pay to borrow the amount equal to the collateral's value."⁸⁶ Advocates for this method believed that it best reflected the present value of a creditor's claim because it compensated the creditor for the money the creditor would need to pay back if it were to acquire the same amount of capital.⁸⁷ Despite the perceived accuracy of this method, many courts chose not to follow it because of the high costs involved in its implementation.⁸⁸ Further,

⁷⁸ Guido, *supra* note 9, at 279–83.

⁷⁹ *Till*, 541 U.S. at 474 ("A debtor's promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment."); Guido, *supra* note 9, at 279–83.

⁸⁰ O'Brien, *supra* note 2, at 259–60.

⁸¹ Guido, *supra* note 9, at 279–80.

⁸² *Koopmans v. Farm Credit Servs. of Mid-Am.*, ACA, 102 F.3d 874, 875 (7th Cir. 1996).

⁸³ *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 67 (3d Cir. 1993).

⁸⁴ *Id.* at 67–68.

⁸⁵ *Till v. SCS Credit Corp.*, 541 U.S. 465, 477 (2004) (plurality opinion).

⁸⁶ *In re Till*, 301 F.3d 583, 589 (7th Cir. 2002).

⁸⁷ *In re Valenti*, 105 F.3d 55, 64 (2d Cir. 1997).

⁸⁸ *Id.*; Guido, *supra* note 9, at 281–82.

some courts believed that this method overemphasized the creditworthiness of the creditor and did not take the actual risk of the debtor's nonpayment into consideration.⁸⁹

A third method, the “presumptive contract rate” approach, created a rebuttable presumption that the rate the creditor and the debtor agreed to in the original contract adequately calculated the present value of the claim.⁹⁰ Either party could rebut this presumption and request a different rate by presenting evidence related to the debtor's risk of nonpayment.⁹¹ Proponents of this method argued that it provided the most accurate assessment of the debtor's risk of nonpayment because it reflected both parties' beliefs about the creditworthiness of the debtor.⁹² Further, this presumption decreased both the frequency and duration of disputes related to the discount rate because the discount rate started at a number that both parties had previously agreed to.⁹³ A major disadvantage to this approach was that it relied heavily on the prior interactions between the debtor and creditor, which may have forced similarly situated debtors to pay “vastly different [discount] rates.”⁹⁴

The fourth and final method is the “formula approach,” which determined the discount rate by first looking to the national prime rate to set a baseline and then adding a risk adjustment to reflect the debtor's risk of nonpayment.⁹⁵ This risk adjustment was based on the individual debtor's creditworthiness, which was determined after a bankruptcy hearing between both parties.⁹⁶ Those who favored this method believed it adequately compensates the creditor for the risk it is taking on while also ensuring that the rate is not set so high that it will “doom the plan.”⁹⁷ They believed that this method would produce the fairest outcome because it starts with an independent analysis that does not take into account the prior interactions between the two parties.⁹⁸ Opponents of this method contended that it fails to adequately compensate the creditor for the debtor's risk

⁸⁹ See, e.g., *Till*, 541 U.S. at 478 (“The cost of funds approach ... mistakenly focuses on the creditworthiness of the creditor rather than [the creditworthiness of] the debtor.”).

⁹⁰ *Till*, 541 U.S. at 492 (Scalia, J., dissenting); O'Brien, *supra* note 2, at 274.

⁹¹ *Till*, 541 U.S. at 499 (Scalia, J., dissenting) (“[T]he most relevant factors bearing on risk premium are (1) the probability of plan failure; (2) the rate of collateral depreciation; (3) the liquidity of the collateral market; and (4) the administrative expenses of enforcement.”); *Gen. Motors Acceptance Corp. v. Jones*, 999 F.2d 63, 70–71 (3d Cir. 1993); O'Brien, *supra* note 2, at 274.

⁹² *Till*, 541 U.S. at 492 (Scalia, J., dissenting).

⁹³ *Id.* at 492, 499.

⁹⁴ *Id.* at 477–78 (plurality opinion).

⁹⁵ *Id.* at 478–79.

⁹⁶ *Id.*

⁹⁷ *Id.* at 479–80.

⁹⁸ *Id.*

of nonpayment because it does not properly account for the costs a creditor takes on if a debtor defaults.⁹⁹

As can be seen by the variety of approaches to calculating the Chapter 13 discount rate, the Supreme Court badly needed to bring clarity to the situation.¹⁰⁰ When *Till v. SCS Credit Corp.* rose up through the Seventh Circuit in 2004, the Court finally took the opportunity to do so.¹⁰¹ Unfortunately, the Court was unable to reach a consensus about which approach to use, which left Chapter 13 bankruptcy in a state of flux.¹⁰²

B. *The Factual Background and Procedural History of Till*

In *Till v. SCS Credit Corp.*, the Tills filed for Chapter 13 bankruptcy in order to retain possession of a used truck that they had purchased the prior year.¹⁰³ The purchase agreement, which was assigned to SCS Credit Corporation immediately following the purchase, stipulated that the Tills would pay back their debt with a 21% interest rate and gave SCS the right to repossess the truck if the Tills defaulted on their payments.¹⁰⁴ When the Tills filed for bankruptcy, they still owed \$4,894.89 to SCS Credit Corporation.¹⁰⁵ At the bankruptcy hearing, the parties both agreed that the truck was only worth \$4,000, leaving SCS Credit Corporation with a \$4,000 allowed secured claim and a \$894.89 allowed unsecured claim against the truck.¹⁰⁶ The only issue in the case was deciding the discount rate that would give SCS the full present value of its allowed secured claim.¹⁰⁷

The Tills advocated for a discount rate created using the formula approach, which was 9.5%.¹⁰⁸ They reached this number by adding a 1.5% risk adjustment to the national prime rate of 8%.¹⁰⁹ The Tills argued that their risk of nonpayment should be fairly low, since a bankruptcy judge will only confirm a

⁹⁹ *Id.* at 503–04 (Scalia, J., dissenting).

¹⁰⁰ See Brubaker, *supra* note 14, at 1; Pardo, *supra* note 3, at 115–16.

¹⁰¹ *Till*, 541 U.S. at 479–80 (plurality opinion).

¹⁰² *Id.* at 465; Rasmussen, *supra* note 19, at 319.

¹⁰³ *Till*, 541 U.S. at 469–70.

¹⁰⁴ *Id.* at 470.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; see 11 U.S.C. § 506(a) (2012) (“An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor’s interest or the amount so subject to setoff is less than the amount of such allowed claim.”).

¹⁰⁷ *Till*, 541 U.S. at 469.

¹⁰⁸ *Id.* at 471.

¹⁰⁹ *Id.*

bankruptcy plan if he or she believes that the debtor will be able to make all payments required under the plan.¹¹⁰ SCS Credit Corporation objected to this proposed rate, asserting that the coerced loan method was the correct standard to use.¹¹¹ SCS Credit Corporation contended that the 21% interest rate to which the parties agreed in the purchase agreement accurately represented the rate that SCS could obtain if it was able to reinvest the \$4,000 “in loans of equivalent duration and risk” and therefore gave the true present value of the claim.¹¹²

The procedural history of *Till* highlights the differences surrounding how bankruptcy courts calculated the Chapter 13 discount rate. The bankruptcy court sided with the Tills and confirmed their proposed plan, finding that the formula approach gave the most accurate valuation because it is “closely tied to the condition of the financial market and independent of the financial circumstances of any particular lender.”¹¹³ The bankruptcy court also believed that the formula approach produced a “very reasonable” discount rate given that Chapter 13 plans “are supposed to be financially feasible” and that setting too high of a rate would severely hinder the Tills’ ability to pay back their debt.¹¹⁴

The district court overturned this decision and changed the plan’s discount rate to 21%, holding that the coerced loan approach should be used because it best represented the overall market for subprime loans.¹¹⁵ The discount rate should not be tied to the financial circumstances of the debtor, but should represent the value the creditor could get from the market as a whole.¹¹⁶

The U.S. Court of Appeals for the Seventh Circuit agreed in a 2-1 opinion that the inquiry should focus on the interest rate a creditor could obtain by making a similar loan and that the contract rate generally represents that interest rate, but chose to modify the district court’s ruling by turning the contract rate into a rebuttable presumption.¹¹⁷ This approach would allow both the debtor and creditor to offer evidence showing that that the contract rate did not accurately represent the risk of default by the debtor.¹¹⁸

¹¹⁰ *Id.* at 471–72; see 11 U.S.C. § 1325(a)(6) (“[T]he court shall confirm a plan if ... the debtor will be able to make all payments under the plan and to comply with the plan.”).

¹¹¹ *Till*, 541 U.S. at 471–72.

¹¹² *Id.*

¹¹³ *Id.* at 472.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 472–73.

¹¹⁸ *Id.*

The dissenting opinion by Judge Rovner considered yet another methodology, the cost of funds method.¹¹⁹ While Judge Rovner ultimately advocated for the formula approach, she also stated that the cost of funds method used a straightforward inquiry that would adequately compensate the creditor for its claim.¹²⁰

The courts were so badly divided over how to correctly calculate the Chapter 13 discount rate that all four potential approaches were considered within the history of one single bankruptcy case.¹²¹ The Supreme Court granted certiorari to resolve this issue once and for all, but its fractured holding left the bankruptcy system in a state of flux.¹²²

C. *The Supreme Court's (In)decision in Till*

The plurality opinion, authored by Justice Stevens, began its analysis by breaking down the discount rate into three component parts: opportunity cost, inflation, and risk of nonpayment.¹²³ Justice Stevens then stressed the need for an objective inquiry that “treat[s] similarly situated creditors similarly” by disregarding “the creditor’s individual circumstances, such as its pre-bankruptcy dealings with the debtor or the alternative loans it could make if permitted to foreclose.”¹²⁴ Using this framework, the plurality rejected the coerced loan,¹²⁵ presumptive contract rate,¹²⁶ and costs of funds¹²⁷ approaches because each focuses on making the creditor whole rather than assessing the individual debtor’s ability to repay.

¹¹⁹ *In re Till*, 301 F.3d 583, 595 (7th Cir. 2002) (Rovner, J., dissenting).

¹²⁰ *Id.* (“Strictly speaking, the debtor’s retention of the collateral does not preclude the creditor from making a new loan, it simply deprives the creditor of an asset that the creditor could convert into money and use to fund the new loan. A straightforward way to account for that deprivation is to ask what it would cost the creditor to obtain the cash equivalent of the collateral from an alternative source.”).

¹²¹ *Till*, 541 U.S. at 469 (plurality opinion).

¹²² Brubaker, *supra* note 14, at 1.

¹²³ *Till*, 541 U.S. at 474 (plurality opinion) (“A debtor’s promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment.”).

¹²⁴ *Id.* at 476–77.

¹²⁵ *Id.* at 477 (“[T]he coerced loan approach requires bankruptcy courts to consider evidence about the market for comparable loans to similar (though nonbankrupt) debtors—an inquiry far removed from such courts’ usual task of evaluating debtors’ financial circumstances”).

¹²⁶ *Id.* (“[T]he presumptive contract rate approach improperly focuses on the creditor’s potential use of the proceeds of a foreclosure sale.”).

¹²⁷ *Id.* at 478 (“The cost of funds approach ... mistakenly focuses on the creditworthiness of the creditor rather than the debtor.”).

The plurality advocated for the formula approach because it entailed a “straightforward, familiar, and objective inquiry” that “depends only on the state of financial markets, the circumstances of the bankruptcy estate, and the characteristics of the loan.”¹²⁸ Further, the formula approach “places the evidentiary burden squarely on the creditors,” the party whom the plurality believed has better access to information about the market.¹²⁹

The dissenting opinion, authored by Justice Scalia, agreed with the plurality’s assessment of the three component parts to the discount rate (opportunity cost, inflation, and risk of nonpayment), but disagreed over what method accurately compensates the creditor for the debtor’s risk of default.¹³⁰ Justice Scalia believed that the formula method would “systematically undercompensate secured creditors for the true risks of default” and that the presumptive contract rate is a better indicator of the actual risk to the creditor.¹³¹ A debtor in bankruptcy has already demonstrated that he or she has a higher risk of nonpayment than the average subprime borrower simply by filing for bankruptcy.¹³² The dissent argued that a creditor should be fully compensated for this extra risk, and courts should “adopt a valuation method that has a realistic prospect of enforcing that directive.”¹³³ The presumptive contract rate does this by starting with the contract rate originally agreed to by both parties—which represents the parties’ beliefs about the debtor’s ability to repay the loan¹³⁴—and allows both parties to introduce evidence to reduce the risk factor to an appropriate level.¹³⁵

The plurality addressed this argument by pointing out that Chapter 13 debtors are, in theory, not more likely to default than non-bankruptcy debtors because bankruptcy courts are only allowed to confirm plans if they have a high probability of success.¹³⁶ Rather than systematically raising all discount rates to absurdly high rates because bankruptcy debtors have shown prior inability to repay their loans, bankruptcy courts should just not confirm plans that they believe might fail.¹³⁷

¹²⁸ *Id.* at 479.

¹²⁹ *Id.*

¹³⁰ *Id.* at 491 (Scalia, J., dissenting) (“Our only disagreement is over what procedure will more often produce accurate estimates of the appropriate interest rate.”); Pardo, *supra* note 3, at 128–29.

¹³¹ *Till*, 541 U.S. at 491–92 (Scalia, J., dissenting).

¹³² *Id.* at 493.

¹³³ *Id.* at 508.

¹³⁴ *See id.* at 494 (“[T]he contract rate reasonably reflects actual risk at the time of borrowing.”).

¹³⁵ *Id.* at 498.

¹³⁶ *Id.* at 482–83 (plurality opinion); *see* 11 U.S.C. § 1325(a)(6) (2012).

¹³⁷ *Till*, 541 U.S. at 482–83 (plurality opinion).

Further, the plurality asserted that both the presumptive contract rate and formula approaches should yield the same result if the court had perfect access to information.¹³⁸ Because the court does not have such access to information, the creditors, who have the best information about lending markets, should bear the evidentiary burden of changing whatever discount rate is initially set by the bankruptcy court.¹³⁹

Justice Thomas, the lone concurrence, had the opportunity to resolve the issue by choosing between the formula and presumptive contract rate approaches, but instead chose to advocate for an entirely new valuation method: the “risk-free” discount rate.¹⁴⁰ Relying on the plain meaning of the statute,¹⁴¹ Justice Thomas argued that the Bankruptcy Code requires courts to apply a discount rate that only accounts for the value of the property to be distributed to the holder of an allowed secured claim, not the value of the *promise* to distribute that property to such a creditor.¹⁴² In other words, the risk of a debtor’s nonpayment should never be considered when calculating the discount rate because that risk has nothing to do with the actual value of the distributed property.¹⁴³ Further, creditors are already protected from the risk of a debtor’s nonpayment by the method used to appraise the debtor’s property¹⁴⁴ and by specific provisions in the Bankruptcy Code.¹⁴⁵

Both the plurality and dissent agreed that the “risk-free” approach was incorrect.¹⁴⁶ Pointing out that the entire weight of circuit authority compensates creditors for risk, the Court also found that the present-value analysis should take a debtor’s risk of nonpayment into consideration.¹⁴⁷ Justice Scalia further argued that the plain meaning of the statute does not support the “risk-free” approach because the context of § 1325(a)(5)(B)(ii) demonstrates that the

¹³⁸ *Id.* at 484.

¹³⁹ *Id.* at 484–85.

¹⁴⁰ *Id.* at 486 (“[T]he statute that Congress enacted does not require a debtor-specific risk adjustment that would put secured creditors in the same position as if they had made another loan.”).

¹⁴¹ *See id.* at 486, 489 (Thomas, J., concurring) (referring to the “clear text” and the “plain language” of the statute).

¹⁴² *Id.* at 485–86.

¹⁴³ *See id.* at 487 (“The statute only requires the valuation of the ‘property to be distributed,’ not the valuation of the plan . . .”).

¹⁴⁴ *Id.* at 489 (noting that bankruptcy courts utilize a creditor friendly “replacement-value” standard rather than the lower “foreclosure-value” standard).

¹⁴⁵ *Id.* at 489–90.

¹⁴⁶ *Id.* at 483 (plurality opinion); *id.* at 506 (Scalia, J., dissenting).

¹⁴⁷ *Id.* at 506 (Scalia, J., dissenting) (“Circuit authority uniformly rejects the risk-free approach . . . [A]ll of them require some compensation for risk.”).

provision is meant to be overprotective of creditors.¹⁴⁸ The risk-free approach would not compensate the creditors for any of the risk of the debtor's nonpayment, so it is not supported by the provision's context.¹⁴⁹

While some legal scholars advocate using Justice Thomas' risk-free discount rate,¹⁵⁰ the majority of commentators agree that Justice Thomas mishandled the case by sticking to his purely textual argument.¹⁵¹ Rather than creating a single rule to use in all future Chapter 13 plan confirmation hearings, the Court appeared to leave open the one issue it had set out to resolve.

D. Implications of the Supreme Court's Indecision

The Supreme Court Justices, and especially Justice Thomas, were criticized by commentators for their failure to adopt a definitive approach to calculating the Chapter 13 discount rate.¹⁵² A major critique of the Court was that the Justices made no attempt to "giv[e] effect to Congress's intent" on the matter, but instead chose to "forg[e] their own path" by reaching their conclusions based on the consequences of their decision.¹⁵³ As a result, the Court failed to reach a clear majority decision and many questions about the Chapter 13 discount rate were left unresolved.

1. Minor Questions Resolved by Till

Despite these flaws in the Court's holding, it was able to resolve some other minor questions surrounding the discount rate. The Court ruled 8-1 that every present value analysis should include a risk adjustment that accounts for the debtor's risk of nonpayment of the claim.¹⁵⁴ Despite Justice Thomas' assertion that the plain language of the statute only gives the creditor the right to the present value of the property itself,¹⁵⁵ the Court sided with the weight of legal

¹⁴⁸ See *id.* at 505 (noting that the two other routes to confirmation besides the cramdown option are both creditor protective, and thus it is unlikely that the cramdown option was meant to be under-protective).

¹⁴⁹ See *id.*

¹⁵⁰ See Pardo, *supra* note 3, at 118–19 (“[T]he Bankruptcy Code compels the use of a discount rate that accounts solely for expected inflation, but that does not take into account opportunity cost or the risk of nonpayment.”).

¹⁵¹ See, e.g., Brubaker, *supra* note 14, at 4–5; Guido, *supra* note 9, at 282; O’Brien, *supra* note 2, at 265–74.

¹⁵² See, e.g., Brubaker, *supra* note 14, at 1; Rasmussen, *supra* note 19, at 321–22 (calling the Supreme Court's failure to come to a majority opinion a “calamity”).

¹⁵³ Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 434 (2008).

¹⁵⁴ *Till*, 541 U.S. at 508 (Scalia, J., dissenting).

¹⁵⁵ *Id.* at 487 (Thomas, J., concurring) (“The statute only requires the valuation of the ‘property to be

authority and gave the creditor compensation for the risk of the debtor's nonpayment.¹⁵⁶

Further, the Court unequivocally rejected both the coerced loan and the cost of funds approaches to calculating the discount rate.¹⁵⁷ Given that neither the plurality nor the dissent advocated for these methods—and that the plurality explicitly ruled them out—*Till* can be seen as an implicit mandate to stop applying these methods.¹⁵⁸ While some commentators believed that bankruptcy courts would continue to use both the formula and the presumptive contract rate approaches,¹⁵⁹ most courts have understood the *Till* decision as supporting the formula approach over all other methods.¹⁶⁰ Even with this general understanding of the *Till* decision, some bankruptcy courts still follow the presumptive discount rate approach.¹⁶¹

2. *Burden of Rebutting the Initial Discount Rate*

One of the main assertions in the plurality's opinion was that the creditor should bear the burden of rebutting the initial discount rate set by the court.¹⁶² The plurality reasons that a debtor already discloses all the information he or she has that is relevant to determining the risk premium in their bankruptcy filings.¹⁶³ Creditors have better access to all other relevant information, which makes them the more knowledgeable party and therefore more capable of facilitating an accurate calculation of the discount rate.¹⁶⁴ By choosing the formula approach, the plurality intends the inquiry to begin with a low initial discount rate and force creditors to present evidence about the debtor's riskiness if they desire to receive a higher rate.¹⁶⁵

distributed,' not the valuation of the plan (i.e., the promise to make the payments itself).")

¹⁵⁶ *Id.* at 483 (plurality opinion).

¹⁵⁷ *Id.* at 477.

¹⁵⁸ O'Brien, *supra* note 2, at 265–67.

¹⁵⁹ *Id.* at 265, 267–68, 274.

¹⁶⁰ *In re Garner*, 663 F.3d 1218, 1219 (11th Cir. 2011) (affirming the bankruptcy court's judgment that the discount rate is calculated by using the formula method); *In re Nichols*, 440 F.3d 850, 859 n.8 (6th Cir. 2006) ("The Court endorsed the use of the formula approach."); *see also In re MPM Silicones*, 874 F.3d 787, 800 (2nd Cir. 2017); *In re Sunnyslope Housing*, 859 F.3d 637, 646 (9th Cir. 2017) (each of which extends the formula method to Chapter 11 bankruptcy cases). *Contra In re Tex. Grand Prairie Hotel Realty*, 710 F.3d 324, 331 (5th Cir. 2013) (limiting the formula approach to cases which have the same facts as *Till*).

¹⁶¹ *Infra* Section III.A.2.

¹⁶² *Till*, 541 U.S. at 484–85 (plurality opinion).

¹⁶³ *Id.* at 484.

¹⁶⁴ *Id.* at 484–85.

¹⁶⁵ *Id.* at 484.

While the debtor still bears the overall burden of proving that secured creditors receive the present value of their allowed secured claims under the Chapter 13 plan,¹⁶⁶ the plurality essentially presumes that the prime rate, along with the addition of any risk premium,¹⁶⁷ satisfies this burden unless the creditor proves otherwise.¹⁶⁸ By arguing for the risk-free approach—that the prime rate alone adequately compensates creditors—Justice Thomas concurs with this presumption, even though he disagrees with the inclusion of a risk premium.¹⁶⁹ If the prime rate alone satisfies the debtor’s burden, then the addition of the risk premium also must satisfy that burden.¹⁷⁰ Therefore, *Till* can be interpreted to create a rebuttable presumption that the prime rate plus any risk premium satisfies the debtor’s burden. It then shifts the burden to the creditor, who now must prove the inadequacy of the prime rate to account for the debtor’s risk of nonpayment.

3. *The Creation of Local Present-Value Analysis Rules*

Instead of following this approach, some bankruptcy courts have used local rules to create their own method for calculating both the prime rate and the risk premium, which essentially creates an entirely new presumptive rate.¹⁷¹ For example, the Western District of Missouri calculates the prime rate using the five-year treasury note rate and tacks on a risk premium of 3% interest, no matter the circumstances of the individual debtor.¹⁷² In the Western District of North Carolina, bankruptcy courts take the prime rate of interest from the *Wall Street Journal* and add a 2% risk adjustment.¹⁷³ Both of these bankruptcy courts give the debtor the opportunity to argue for a reduction of the discount rate at a hearing,¹⁷⁴ but these rules are problematic because they shift some of the burden

¹⁶⁶ *Id.* at 486 (Thomas, J., concurring).

¹⁶⁷ The plurality declined to identify a minimum threshold for the risk premium. *Id.* at 480 (plurality opinion). While the plurality identified that lower courts typically select risk premiums in the range of one to three percent, its explicit decision not to decide a range means that the risk premium could conceivably be any value. *See id.*

¹⁶⁸ *Id.* at 479 (noting that the formula approach “places the evidentiary burden squarely on the creditors”); *see also id.* at 484 (“[W]e principally differ with the dissent . . . over which party (creditor or debtor) should bear the burden of rebutting the presumptive rate (prime or contract, respectively).”).

¹⁶⁹ *Id.* at 487 (Thomas, J., concurring).

¹⁷⁰ *See id.* at 491.

¹⁷¹ Pardo & Watts, *supra* note 10, at 436–37.

¹⁷² Bankr. W.D. Mo. R. 3084-1(G)(1) (“[T]he interest rate shall be the 5 year treasury note rate as of the preceding June 1, plus 3% nominal interest rate per annum.”).

¹⁷³ Bankr. W.D.N.C. LBR 3001-2(a) (“The presumptive interest rate for use in calculating the value of payments to secured creditors for the entire term of the Chapter 13 plan is the composite prime interest rate plus two percent (the ‘*Till* Rate’).”).

¹⁷⁴ Bankr. W.D. Mo. R. 3084-1(G)(3); Bankr. W.D.N.C. LBR 3001-2(f).

of proof from the creditor to the debtor—specifically, by requiring the debtor to present evidence in support of a reduced discount rate. Considering that both presumptions¹⁷⁵ and burdens of proof¹⁷⁶ are substantive aspects of claims, these local rules may run afoul of the Rules Enabling Act.

These local rules also create a non-uniformity problem because debtors will end up paying different rates based on the district where they reside.¹⁷⁷ In the above examples, debtors who reside in the Western District of Missouri and the Western District of North Carolina will have different initial discount rates and different burdens for lowering them.¹⁷⁸ Even if debtors residing in these two districts have the same financial history, the same debt, and the same ability to repay their loans, they likely will pay different amounts over the duration of their Chapter 13 plan.¹⁷⁹ This difference is not tied to “any geographical variance in inflation, opportunity costs, or the risk of nonpayment,” but instead is solely due to the differences in these courts’ local rules.¹⁸⁰ This lack of uniformity poses problems of access to justice because these debtors will have separate burdens of proof and therefore unequal opportunity to receive a favorable rate.

III. HOW DIFFERING LOCAL BANKRUPTCY RULES IMPACT SIMILARLY SITUATED CHAPTER 13 DEBTORS

While it is easy to note that there are differences in these local rules and envision the effects that they have on debtors, it is difficult to understand the actual effects the rules have without knowing the varied procedures that they create. Little research has been done to show the differences between these rules or identify the courts that have created them.¹⁸¹ This Part attempts to tackle this issue by presenting the results of a survey of the ninety-four U.S. bankruptcy courts’ local rules and forms.¹⁸² First, this Part classifies these results to identify the number of bankruptcy courts that utilize local rules to create presumptive discount rates and the various rules they have created. Next, this Part examines

¹⁷⁵ *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 446 (1959).

¹⁷⁶ *Raleigh v. Ill. Dep’t of Revenue*, 530 U.S. 15, 20–21 (2000); *Dick*, 359 U.S. at 446.

¹⁷⁷ Pardo & Watts, *supra* note 10, at 437–38.

¹⁷⁸ *Supra* notes 170–171 and accompanying text.

¹⁷⁹ Pardo & Watts, *supra* note 10, at 438.

¹⁸⁰ *Id.* at 437–38.

¹⁸¹ The research that has been done only identified some courts that created presumptive rates through local rules to show that there are differences between them. *See, e.g.*, Pardo & Watts, *supra* note 10, at 437–38. It does not identify every such court, nor does it thoroughly explain the differences between the rules. *See, e.g., id.*

¹⁸² This includes the local bankruptcy rules create by Guam, the Virgin Islands, and the Northern Mariana Islands, which handle all bankruptcy matters in their district courts.

the effects that these rules have on debtors by presenting examples based on actual bankruptcy cases. This serves to highlight the problems caused by the non-uniformity that results from courts' differing local rules while also showing how a presumptive discount rate might force debtors to make higher interest payments under their Chapter 13 plans.

A. *Compiled Information About the Scope of Bankruptcy Courts Using Local Bankruptcy Rules to Set the Chapter 13 Rate*

This Part surveys each district's local bankruptcy rules to properly determine which districts created local rules affecting Chapter 13 discount rates. Some courts have not created a specific local rule that discusses the Chapter 13 discount rate, but instead they have created provisions in their local bankruptcy forms that have the same effect.¹⁸³ To account for these scenarios, this Part also surveys each district's local form for a Chapter 13 plan, if it has one, to determine whether it incorporates a presumptive Chapter 13 discount rate.

The research findings are divided into three categories. Local bankruptcy rules in the first category comply with the *Till* plurality's use of the formula approach, but create a presumptive Chapter 13 discount rate by setting a predetermined risk adjustment for the entire district.¹⁸⁴ The second category contains local bankruptcy rules that follow the *Till* dissent's use of the presumptive contract rate approach rather than the formula approach to determine the Chapter 13 discount rate.¹⁸⁵ The final category comprises two bankruptcy courts that do not use either approach, but instead create a presumptive Chapter 13 discount rate in another manner.¹⁸⁶

1. *Districts That Use the Formula Approach But Set a Predetermined Risk Adjustment*

The local bankruptcy rules in the following districts apply the formula approach to set the Chapter 13 district rate, which is the method that the *Till* plurality adopted. This method starts with a prime rate and then adds a risk

¹⁸³ See U.S. Bankr. Court for the Dist. of Idaho, *Chapter 13 Plan and Related Motions* (Jan. 1, 2016), https://www.id.uscourts.gov/Content_Fetcher/index.cfm/Proposed_National_Rule/Form_Changes-_Ch_13_Plan_2669.pdf%3FContent_ID%3D2669+%&cd=1&hl=en&ct=clnk&gl=us (providing that the Chapter 13 discount rate "shall be the non-default contract rate of interest provided in the contract between each Creditor and Debtor(s)").

¹⁸⁴ See, e.g., Bankr. D. Haw. R. 3015-1(h); Bankr. D. Neb. R. 3023-1.

¹⁸⁵ See, e.g., Bankr. D. Ut. LBR. 2083-2(D); Bankr. D. Vt. LBR 3012-1.

¹⁸⁶ See Bankr. S.D. Ga. R. 3001-2; Bankr. D.S.C.R. 3015-6.

adjustment to account for the debtor's risk of nonpayment.¹⁸⁷ The bankruptcy courts in these districts diverge from the *Till* plurality because they set a different presumptive discount rate by creating a predetermined risk adjustment, which shifts some of the burden of proof from the creditor to the debtor.

District of Hawaii: The local bankruptcy rule in Hawaii¹⁸⁸ divides each calendar year into two six-month long periods and then creates different Chapter 13 discount rates for each period.¹⁸⁹ The Chapter 13 discount rate for each period is calculated by finding the national prime rate of interest listed in the *Wall Street Journal* on the first day of that period and then adding a risk adjustment of 1.5%.¹⁹⁰ While the rule gives debtors and creditors the ability to propose a different discount rate, this may still be problematic because many debtors likely will not take this opportunity.¹⁹¹

District of Nebraska: The local bankruptcy rule in Nebraska¹⁹² starts with the national prime rate of interest listed in the *Wall Street Journal* "on the last day prior to the confirmation hearing."¹⁹³ Bankruptcy courts are then directed to add a risk adjustment of 2% to the prime rate.¹⁹⁴ Interestingly, the language used in the local rule could lead to a scenario where two debtors file their Chapter 13 petitions on the same day, but pay different discount rates solely because one of the debtor's hearing was delayed.¹⁹⁵

Western District of North Carolina: The local bankruptcy rule in the Western District of North Carolina¹⁹⁶ also uses the national prime rate of interest

¹⁸⁷ *Till v. SCS Credit Corp.*, 541 U.S. 465, 474 (2004) (plurality opinion).

¹⁸⁸ Bankr. D. Haw. LBR 3015-1(h)(1) ("[T]he clerk will set and publish a standard interest rate applicable to secured and other claims under a confirmed chapter 13 plan.").

¹⁸⁹ Bankr. D. Haw. R. 3015-1(h)(2).

¹⁹⁰ *Id.* ("[T]he standard interest rate is the national prime rate of interest, as published in the *Wall Street Journal* on the first business day of that period, plus 1.5%.")

¹⁹¹ Bankr. D. Haw. R. 3015-1(h)(1) ("The setting of a standard interest rate does not bar a debtor or creditor from proposing a different interest rate."); *infra* notes 330–331 and accompanying text.

¹⁹² Neb. R. Bankr. P. 3023-1 (When determining "the value, as of the effective date of a plan, of property to be distributed under a plan ... there is a presumption that the appropriate interest rate shall equal the national average of the prime rate ... stated as a simple interest rate per annum, plus two percentage points.").

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Generally, the confirmation hearing occurs between twenty and forty-five days after the meeting of the creditors. 11 U.S.C. § 1324 (2012). However, a bankruptcy court may delay the date of the confirmation hearing if any of the creditors has objections to the proposed Chapter 13 Plan. *Id.* If creditors in one case delay the date of the confirmation through multiple objections, that debtor may end up paying a different discount rate if the prime rate changes within that time span. Neb. R. Bankr. P. 3023-1.

¹⁹⁶ Bankr. W.D.N.C. LBR 3001-2(a) ("The presumptive interest rate for use in calculating the value of payments to secured creditors for the entire term of the Chapter 13 plan is the composite prime interest rate plus two percent (the 'Till Rate').").

listed in the *Wall Street Journal*,¹⁹⁷ but it divides the valuation of the prime rate based on the month that each claim is filed and then adds a 2% risk premium.¹⁹⁸ Neither the Eastern District nor the Middle District of North Carolina uses this formulation as both follow the guidelines set by the *Till* plurality.¹⁹⁹

Eastern District of Missouri: Similar to the District of Hawaii, the local rule in the Eastern District of Missouri²⁰⁰ divides each year into two six-month periods.²⁰¹ The prime rate is determined based on the national prime rate of interest on first day of the month that precedes each period.²⁰² Then the rules require the bankruptcy court to add a 1.5% risk adjustment in order to set the Chapter 13 discount rate.²⁰³

Western District of Missouri: The local bankruptcy rule in the Western District of Missouri²⁰⁴ significantly differs from the rule in the Eastern District. The rule divides each year into two six-month periods but opts to base its prime rate on the five-year treasury note rate rather than using the national prime rate of interest.²⁰⁵ The rule then requires the court to add a 3% risk adjustment in order to get the final Chapter 13 discount rate.²⁰⁶

The difference between the Eastern and Western Districts of Missouri demonstrates the problems with these local rules. Debtors that reside in neighboring counties, with the exact same debt, similar financial situations, and that file on the same date will have to pay different amounts over the course of their Chapter 13 plan purely because of the differences in the local rules.²⁰⁷ Considering that debtors generally only file for bankruptcy when they are

¹⁹⁷ The rule itself does not state that the prime rate shall be taken from the *Wall Street Journal*, it merely gives a link to the court's webpage and says that the court will provide the appropriate determination of the prime rate at this link. Bankr. W.D.N.C. LBR 3001-2(c). The webpage itself states that the composite prime rate shall be taken from the *Wall Street Journal. Prime Rates*, NCWB.USCOURTS.GOV, <https://www.ncwb.uscourts.gov/prime-rates> (last visited Nov. 25, 2018).

¹⁹⁸ Bankr. W.D.N.C. LBR 3001-2(b) (“The composite prime interest rate as published on the first business day of the calendar month will be used as the basis for calculating the Till Rate for all cases filed during the same calendar month.”); Bankr. W.D.N.C. LBR 3001-2(a).

¹⁹⁹ See Bankr. E.D.N.C. LBR; Bankr. M.D.N.C. LBR.

²⁰⁰ Bankr. E.D. Mo. R. 3015-2(E).

²⁰¹ *Id.* (“Absent evidence to the contrary, the applicable interest rate [on secured claims] shall be the rate posted and published by the Clerk of Court as prescribed herein.”).

²⁰² See Bankr. E.D. Mo. R. 3015-2(E)(1) & (2).

²⁰³ *Id.*

²⁰⁴ Bankr. W.D. Mo. R. 3084-1(G)(1) & (3) (“The posted ‘CHAPTER 13 RATE’ shall be determined by the standing Chapter 13 trustee The posted Chapter 13 rate is, absent evidence to the contrary, presumed to be the applicable rate.” (emphasis omitted)).

²⁰⁵ Bankr. W.D. Mo. R. 3084-1(G)(1).

²⁰⁶ *Id.*

²⁰⁷ *Infra* Section III.B.2.

struggling financially, differences in plan payments can have great effects on a debtor's ability to purchase necessities and may cause some debtors to default on their plan and lose their property.²⁰⁸

The Northern Mariana Islands: The rule created by the Northern Mariana Islands²⁰⁹ follows the same structure as the Eastern District of Missouri rule, but has different time periods.²¹⁰ The rule starts the inquiry with the national prime rate listed in the *Wall Street Journal* at the beginning of each period and then adds a 1.5% risk adjustment.²¹¹

While these rules technically follow the guidance of the *Till* plurality by using the formula approach, the problem is that they are shifting the burden of proof by changing the presumption that the prime rate adequately compensates the creditor.²¹² This could force debtors to pay higher interest payments on their Chapter 13 Plan, which increases the chance of default and could have dire consequences for the debtor such as losing their home,²¹³ their only form of transportation, or other important assets. It could also mean that some debtors' Chapter 13 Plans will never be confirmed in the first place, which would deny them an opportunity to try and save these assets.²¹⁴

2. *Districts That Use the Presumptive Contract Rate Approach*

The bankruptcy courts in these districts have created local rules that use the presumptive contract rate approach to set the Chapter 13 discount rate. As mentioned previously, this method equates the Chapter 13 rate with the interest rate contained in the original agreement between the debtor and the creditor.²¹⁵ Proponents of this method believe that it is the best indicator of the debtor's risk

²⁰⁸ Consequences for failing to make plan payments include dismissal of the case or conversion to Chapter 7. 11 U.S.C. § 1307 (2012).

²⁰⁹ D. N. Mar. I. Bankr. R. 3015-1(h).

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Till v. SCS Credit Corp.*, 541 U.S. 465, 484 (2004 (plurality opinion)).

²¹³ In this scenario, a debtor has an increased chance of defaulting on their plan due to the higher interest payment on debts other than their mortgage, therefore leading to plan dismissal. Given the Bankruptcy Code's anti-modification provision, a Chapter 13 plan may not modify claims "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2) (2012). Therefore, presumptive discount rates will only have an indirect impact on a debtor losing their home. *See id.*

²¹⁴ 11 U.S.C. § 1325(a)(6) ("The court shall [only] confirm a plan if the debtor will be able to make all payments under the plan and to comply with the plan."). If a plan is not confirmed, the only relief a debtor can seek is through Chapter 7 Bankruptcy, which does not allow them to retain most of their assets. *See* 11 U.S.C. § 522(d) and 541(a).

²¹⁵ *Supra* notes 88–89 and accompanying text.

of nonpayment because the parties have contractually agreed that this rate accurately represents the debtor's creditworthiness.²¹⁶

District of Utah: The local bankruptcy rules for the District of Utah²¹⁷ divide secured claims into two categories: (1) Secured claims that are either excluded from 11 U.S.C. § 506²¹⁸ or for which the debtor requests a court valuation of the secured portion of the claim²¹⁹ and (2) all other secured claims.²²⁰

For claims in the first category, if the Chapter 13 plan does not designate a discount rate, then “interest shall accrue at the rate set forth on line 9 of the filed proof of claim [form].”²²¹ The ninth line of the proof of claim form requires the claimant to provide information regarding the property securing the claim, including the interest rate at which the debtor would repay the claim: in other words, the contractual interest rate.²²² If the claimant fails to designate the interest rate for its claim, then “interest shall accrue at 6% per annum.”²²³ The debtor does not seek to modify the interest rate paid on claims in the second category, so the present-value analysis does not apply.²²⁴

District of Vermont: The local bankruptcy rules for the District of Vermont²²⁵ state that: “[A] creditor’s proof of claim shall control for purposes of establishing ... the interest rate to be paid on [the] allowed secured claim.”²²⁶ If the creditor does not file a timely proof of claim form, then the debtor is allowed propose a different discount rate in part 3.2 of the Chapter 13 Plan by

²¹⁶ *Till*, 541 U.S. at 492 (Scalia, J., dissenting).

²¹⁷ Bankr. D. Ut. LBR 2083-2(D)(1).

²¹⁸ A secured claim is excluded from § 506 if “the creditor has a purchase money security interest securing the debt that is the subject of the claim” and either (a) “the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle acquired for the personal use of the debtor” or (b) “the collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.” 11 U.S.C. § 1325(a) (2012) (the “hanging paragraph” of § 1325).

²¹⁹ 11 U.S.C. § 506.

²²⁰ Bankr. D. Ut. LBR 2083-2(D)(1). The local rule divides the claims based on what part of the Chapter 13 Plan that they are listed in. Part 3.1 of the plan refers to uncontested secured claims that the debtor does not wish to modify, Part 3.2 refers to claims for which the debtor “request[s] that the court determine the value,” and Part 3.3 refers to claims excluded by 11 U.S.C. § 506.

²²¹ *Id.*

²²² *Official Form 410, Proof of Claim*, U.S. COURTS (2016), http://www.uscourts.gov/sites/default/files/form_b_410_16.pdf.

²²³ Bankr. D. Utah LBR 2083-2(D)(1).

²²⁴ *Supra* note 217.

²²⁵ Bankr. D. Vt. R. 3012-1.

²²⁶ Bankr. D. Vt. R. 3012-1(a).

seeking a court valuation of the interest rate.²²⁷ If the debtor fails to do this, the debtor must file a motion to amend the Plan to be eligible to receive a different discount rate.²²⁸

Similar to the courts that predetermine the risk adjustment, these rules are problematic because they are shifting the burden of proof onto the debtor. Rather than “starting from a concededly low estimate and adjusting upward,” therefore putting the burden on the creditor,²²⁹ these rules start at a high initial discount rate and force the debtor to present evidence to lower it.²³⁰ This burden is difficult to overcome when considering that the anchoring effect created by such a high presumptive rate will likely cause judges to stick close to the higher rate.²³¹ This means that debtors in these districts will generally pay higher discount rates, thereby forcing them to pay more money to satisfy their debts which could adversely affect the Chapter 13 Plan’s chances of succeeding.

3. *The District of South Carolina and the Southern District of Georgia*

The two districts in this category, the District of South Carolina and the Southern District of Georgia, each set a presumptive discount rate that does not follow any previous approach and is inconsistent with the unrecognized holding of *Till*.²³²

District of South Carolina: The local rule²³³ states that “a presumed effective interest rate ... will be set by the Court with the assistance of a committee of trustees and members of the consumer bar.”²³⁴ If this rate is applied to a secured claim in a Chapter 13 case, there is a rebuttable presumption that the discount rate is reasonable and that the debtor is paying the present value on such claims.²³⁵ According to the bankruptcy court’s website, the Chapter 13 discount rate is currently set at 6%.²³⁶

²²⁷ Bankr. D. Vt. R. 3012-1(b).

²²⁸ *Id.*

²²⁹ *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (plurality opinion) (emphasis omitted).

²³⁰ O’Brien, *supra* note 2, at 274.

²³¹ A study was conducted which presented bankruptcy judges with a present-value analysis scenario. Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge’s Mind*, 86 B.U.L. REV. 1227, 1233–37 (2006). Some bankruptcy judges were informed of the original contract rate but were told it was irrelevant to the analysis. *Id.* at 1235. On average, these judges set rates that were 0.8–1.46% higher than judges that were not given the original contract rate. *Id.*

²³² See Bankr. D.S.C. R. 3015-6; Bankr. S.D. Ga. R. 3001-2.

²³³ Bankr. D.S.C. R. 3015-6.

²³⁴ Bankr. D.S.C. R. 3015-6(a).

²³⁵ Bankr. D.S.C. R. 3015-6(a), (b).

²³⁶ *Interest Rate in Chapter 13 Cases*, U.S. BANKR. CT. DIST. S.C. (Jan. 26, 2018, 1:29 PM), <http://www.>

The problem with this rule is that it does not require the court to use any particular methodology to create the discount rate.²³⁷ The “Chapter 13 Interest Rate Committee” may increase or decrease the rate whenever it wishes and may use whatever methodology it desires. The bankruptcy court’s website does not mention how the committee determines the rate, so debtors and creditors have no way of knowing how it was done.²³⁸ While the rule gives debtors and creditors the ability to rebut this presumption,²³⁹ it likely is difficult for them to do so without knowing the reasoning for the Committee’s determination.

Southern District of Georgia: The local bankruptcy rule²⁴⁰ directs the Chapter 13 trustee to “pay interest at a rate of 12% per annum on all allowed secured claims” unless otherwise ordered by the bankruptcy court.²⁴¹ This discount rate is not based on the formula approach, the presumptive contract rate approach, or any other methodology used prior to *Till*. It also does not change to stay in line with the lending market, which is the reason for tying the Chapter 13 discount rate to the prime rate.²⁴² Instead, this rule allows a bankruptcy court to set the discount rate at either 12% or any other rate it deems to be warranted.²⁴³

Both of these rules give their respective court too much power to prescribe the discount rate for Chapter 13 debtors. They allow the bankruptcy judge to make his or her determination based solely on the evidentiary record with few standards to frame their decision.²⁴⁴ This places a great burden on debtors because they not only have to produce sufficient evidence to lower the rate, but they also must do so without a clear understanding of what factors the judge will consider.

B. How Differing Local Rules Affect Similarly-Situated Debtors

To demonstrate how presumptive Chapter 13 rates shift the burden of proof onto debtors, this Part draws from examples found in Chapter 13 bankruptcy cases with confirmed plans. Each scenario compares discount rate contained in the plan to the prime rate, which is the rate at which the debtor satisfies its

scb.uscourts.gov/bulletin/1517584067.

²³⁷ See Bankr. D.S.C. R. 3015-6.

²³⁸ See Interest Rate, *supra* note 239.

²³⁹ See Bankr. D.S.C. R. 3015-6(c) (describing the process for how a party in interest may rebut the presumed Chapter 13 discount rate).

²⁴⁰ Bankr. S.D. Ga. R. 3001-2.

²⁴¹ *Id.*

²⁴² See *Till v. SCS Credit Corp.*, 541 U.S. 465, 479 (2004) (plurality opinion).

²⁴³ Bankr. S.D. Ga. R. 3001-2.

²⁴⁴ The District of South Carolina’s local rule does not even indicate how often the Committee is supposed to meet, so presumably it can do so whenever it desires. See Bankr. D.S.C. R. 3015-6.

present-value burden under *Till*. For the purposes of this Section, the “*Till* Rate” is 5%.²⁴⁵

1. *Presumptive Discount Rate vs. Till Rate*

Mr. Elliot is a resident in the Western District of North Carolina who filed a Chapter 13 case on June 18, 2018, in order to seek relief from his debts.²⁴⁶ While his case involves a number of different claims, the most relevant is the secured claim in part 3.2 of the plan which represents \$28,400 worth of debt on a 2015 Toyota Tacoma.²⁴⁷

In the Western District of North Carolina, bankruptcy cases that were filed on or after June 14, 2018, had a presumptive Chapter 13 discount rate of 7%.²⁴⁸ Using this rate, Mr. Elliot needs to pay \$562.35 each month over the course of his five-year plan.²⁴⁹ Mr. Elliot will pay \$5,341.24 in interest payments due to this presumptive discount rate.²⁵⁰

If the hypothetical *Till* Rate was used, Mr. Elliot would only have to pay a 5% discount rate on these claims. This would lower Mr. Elliot’s monthly payments to \$535.94 and his total interest payments to \$3,756.58.²⁵¹ This would amount to a difference of \$26.41 per month and \$1,584.66 over the course of the plan. While his monthly payment is not substantially higher under the presumptive rate, it is important to note that Mr. Elliot is unemployed due to a disability.²⁵² He only brings in \$3,843.68 each month, solely from Social Security and VA disability benefits.²⁵³

²⁴⁵ This is equal to the prime rate for the period between June 14 and September 27, 2018, during which each bankruptcy plan discussed was filed. *Historical Prime Rate*, JPMORGAN CHASE & CO., <https://www.jpmorganchase.com/corporate/About-JPMC/historical-prime-rate.html> (last visited Nov. 25, 2018).

²⁴⁶ *Chapter 13 Plan*, BLOOMBERG LAW, (June 18, 2018), <http://bloomberglaw.com> (search “4:18-bk-40237” in the search bar; filter by North Carolina Courts, follow the “Brandon Lee Elliott ...” hyperlink; select Entry #9, “Chapter 13 Plan ...”) [hereinafter “Elliot Plan”].

²⁴⁷ *Id.* at 2–3.

²⁴⁸ *Id.* at 3.

²⁴⁹ *Loan Calculator*, BANKRATE, <https://www.bankrate.com/calculators/mortgages/loan-calculator.aspx> (last visited Nov. 23, 2018) (enter “28,400” as the Loan amount, “5” as the Loan term in years, and “7” as the Interest rate per year).

²⁵⁰ *Id.*

²⁵¹ *Loan Calculator*, *supra* note ²⁵² (enter “28,400” as the Loan amount, “5” as the Loan term in years, and “5” as the Interest rate per year).

²⁵² *Official Form 106I*, BLOOMBERG L. (July 2, 2018), <http://bloomberglaw.com> (search “4:18-bk-40237” in the search bar; filter by North Carolina Courts, follow the “Brandon Lee Elliott ...” hyperlink; select Entry #8, “Statement of Income ...”; scroll down to “Official Form 106I”) [hereinafter “Elliot Form 106I”].

²⁵³ *Id.* at 2; *Official Form 106J*, BLOOMBERG L., (July 2, 2018), <http://bloomberglaw.com> (search “4:18-bk-40237” in the search bar; filter by North Carolina Courts, follow the “Brandon Lee Elliott...” hyperlink; select Entry #8, “Statement of Income...”; scroll down to “Official Form 106J”) [hereinafter “Elliot Form

This scenario illustrates how shifting the burden of proof by creating a presumption can lead to higher monthly payments for the debtor. Because Mr. Elliot is unemployed and is unable to work, he has very little room for error when it comes to making plan payments.²⁵⁴ Even so, the increase in monthly payments is not very great, and Mr. Elliot might forgo the opportunity to fight for a lower discount rate in favor of allocating his limited resources to litigating an issue that has a more sizable impact on his plan payments.²⁵⁵

2. *Western District of Missouri vs. Eastern District of Missouri*

Mr. and Mrs. O'Brien filed a Chapter 13 case in the Western District of Missouri on August 23, 2018.²⁵⁶ In Part 3.2 of the plan, the O'Briens sought relief from a \$50,739.46 claim, using their car as collateral.²⁵⁷ Because the car is only valued at \$31,469, the claim is only secured for that amount.²⁵⁸

The Western District of Missouri calculates its Chapter 13 discount rate by adding a 3% adjustment rate to the applicable five-year treasury note rate.²⁵⁹ For bankruptcy cases filed between July 1, 2018 and December 31, 2018, the Chapter 13 discount rate was 5.74%.²⁶⁰ Using this number, the O'Briens will pay \$604.59 each month and \$4,806.20 in interest payments over the course of their five-year plan.²⁶¹

106J”].

²⁵⁴ Elliot Form 106I, *supra* note 255, at 1.

²⁵⁵ Considering that Mr. Elliot, as a bankruptcy debtor, likely does not have access to all the information about lending markets that is relevant to the court’s analysis about the risk premium, it is unlikely that he could present enough evidence to lower the discount rate. *Till v. SCS Credit Corp.*, 541 U.S. 465, 484 (2004) (plurality opinion).

²⁵⁶ *Chapter 13 Plan*, BLOOMBERG L. (June 29, 2018), <http://bloomberglaw.com> (Search “18-bk-50355” in the search bar; filter by Missouri Courts, follow the “Sean Thomas O’Brien ...” hyperlink; select Entry #2, “Chapter 13 Plan ...”) [hereinafter “O’Brien Plan”].

²⁵⁷ *Id.* at 2.

²⁵⁸ 11 U.S.C. § 506(a)(1) (2012) (“An allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor’s interest in the estate’s interest in such property ... and is an unsecured claim to the extent that the value of such creditor’s ... is less than the amount of such allowed claim.”).

²⁵⁹ Bankr. W.D. Mo. L.R. 3084-1(G)(1)(a) (“For cases with the initial plan filed between July 1 and December 31, the interest rate shall be the 5 year treasury note rate as of the preceding June 1.”) The corresponding five-year treasury note rate for August 1, 2018 (the preceding June 1, 2018 rate) was 2.74%. *Daily Treasury Yield Curve Rates*, TREASURY.GOV, <https://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yield> (last visited Nov. 23, 2018).

²⁶⁰ O’Brien Plan, *supra* note 259.

²⁶¹ *Loan Calculator*, *supra* note 252 (enter “\$31,469.00” as the Loan amount, “5” as the Loan term in years, and “5.74” as the Interest rate per year).

If the O'Briens lived in the Eastern District of Missouri, just 200 miles to the east, they would be forced to pay a higher discount rate on this claim. The Eastern District formulates its Chapter 13 discount rate by adding a 1.5% risk adjustment to the prime rate.²⁶² For bankruptcy cases filed between July 1, 2018 and December 31, 2018, the Chapter 13 discount rate is 6.25%.²⁶³ With this rate, the O'Briens would pay \$612.05 each month and \$5,253.93 in interest over the course of their plan.²⁶⁴

While this is not a significant increase in plan payments, it is important to note the O'Briens' financial situation. The O'Briens are a family of five²⁶⁵ with a mother who works and a father who is unemployed due to disability.²⁶⁶ They are below-median debtors, which means that they make less than the median income for a family of the same size that resides in Missouri.²⁶⁷ The O'Briens take home \$5,358 each month, which represents a combination of \$1,292 in wages, \$551 in VA disability benefits, and \$3,513 in Social Security payments.²⁶⁸ Similar to Mr. Elliot, the O'Briens are in a difficult financial position; every additional dollar spent on plan payments may drastically increase the chance that they default on their plan, and they also likely will not spend resources to litigate the discount rate.

3. Presumptive Contract Rate Approach vs. Formula Approach

On July 6, 2018, the Giffords filed a Chapter 13 case in the District of Vermont.²⁶⁹ In Part 3.2 of their Chapter 13 plan, the Giffords seek relief from a \$83,891.66 secured claim.²⁷⁰ Because Vermont uses the presumptive contract

²⁶² Bankr. E.D. Mo. R. 3015-2(E)(2) ("For petitions filed between July 1 and December 31 of each year, the interest rate shall be the prime rate on June 1 of the current year, plus 1.5%.").

²⁶³ The prime rate on June 1, 2018 was 4.75%. *Historical Prime Rate*, *supra* note 248.

²⁶⁴ *Loan Calculator*, *supra* note 252 (enter "\$31,469.00" as the Loan amount, "5" as the Loan term in years, and "6.25" as the Interest rate per year).

²⁶⁵ *Official Form 106J*, BLOOMBERG L. (Aug. 23, 2018), <http://bloomberglaw.com> (search "18-bk-50355" in the search bar; filter by Missouri Courts, follow the "Sean Thomas O'Brien ..." hyperlink; select Entry #1, "Chapter 13 Voluntary Petition ..." and scroll down to Official Form 106J) [hereinafter "O'Brien Form 106J"]. Further, one of the O'Brien's children is disabled. *Id.*

²⁶⁶ *Official Form 106I*, BLOOMBERG L. (Aug. 23, 2018), <http://bloomberglaw.com> (search "18-bk-50355" in the search bar; filter by Missouri Courts, follow the "Sean Thomas O'Brien ..." hyperlink; select Entry #1, "Chapter 13 Voluntary Petition ..." and scroll down to Official Form 106I) [hereinafter "O'Brien Form 106I"].

²⁶⁷ 11 U.S.C. § 1322(d)(2) (2012); *id.* § 101(39A); *Quick Facts: Missouri*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/mo> (last visited Nov. 10, 2019).

²⁶⁸ O'Brien Form 106I, *supra* note 269, at 1.

²⁶⁹ *Chapter 13 Plan*, BLOOMBERG L. (July 6, 2018), <http://bloomberglaw.com> (search "2:18-bk-10278" in the search bar; filter by Vermont Courts, follow the "John Pearl Gifford ..." hyperlink; select Entry #8, "Chapter 13 Plan ...") [hereinafter "Gifford Plan"].

²⁷⁰ *Id.* at 3.

rate approach to calculate the Chapter 13 discount rate, the Giffords will have to pay the interest rate provided in their original contract with the creditor unless they are successfully able to challenge the rate.²⁷¹ Based on their Chapter 13 plan, it appears that the original contract stipulated that they pay 6% interest on the debt.²⁷² Based on these numbers, the Giffords will have to pay \$1,621.86 per month, and \$13,419.99 in interest on this claim over the course of their plan.²⁷³

If the Giffords lived in a district that followed the *Till* holding, they would pay significantly less over the course of their plan—only \$1,583.14 per month and \$11,096.69 over the course of the plan.²⁷⁴ This amounts to a difference of over \$2,000 in additional interest payments solely because the District of Vermont’s local rule shifts the burden of proof onto the Giffords. While the Giffords have a net monthly income of \$4,060.70, they are spending \$3,952.84 of it on bankruptcy payments each month.²⁷⁵ Even though the *Till* Rate would only allow the Giffords to keep an extra \$38.52 each month, it would allow them extra flexibility in case of an unexpected emergency.

Every dollar matters for bankruptcy debtors, and presumptive discount rates unfairly force them to spend more money on plan payments than they should have to. This not only increases the chance that these debtors will default on their plans, it also takes away money that could be used to help them get back on their feet and get the fresh start that they deserve.

4. Summary of the Impact of Presumptive Interest Rates on Debtors

These presumptive rules create a non-uniformity problem in the bankruptcy court system, which forces debtors in these districts to pay more in interest payments than they might otherwise have to. This problem is exacerbated by an “anchoring effect,” which makes it more likely that a bankruptcy judge will choose a discount rate that is close to the presumptive rate.²⁷⁶

²⁷¹ O’Brien, *supra* note 2, at 274.

²⁷² Gifford Plan, *supra* note 272.

²⁷³ *Loan Calculator*, *supra* note 252 (enter “\$83,891.66” as the Loan amount, “5” as the Loan term in years, and “6” as the Interest rate per year).

²⁷⁴ *Id.* (enter “\$83,891.66” as the Loan amount, “5” as the Loan term in years, and “5” as the Interest rate per year).

²⁷⁵ *Official Form 106J*, BLOOMBERG L. (July 6, 2018), <http://bloomberglaw.com> (search “12:18-bk-10278” in the search bar; filter by Vermont Courts, follow the “John Pearl Gifford ...” hyperlink; select Entry #1, “Chapter 13 Voluntary Petition ...” and scroll down to Official Form 106J) [hereinafter “Gifford Form 106J”]; Gifford Plan, *supra* note 272.

²⁷⁶ *Infra* notes 327–331 and accompanying text.

The Elliot case and the Gifford case demonstrate the fundamental unfairness of using a presumptive discount rate. Solely because Mr. Elliot and the Giffords reside in districts that predetermine the risk adjustment for the Chapter 13 discount rate, they are forced to pay additional expenses in the form of interest payments.²⁷⁷ Considering that Mr. Elliot is unemployed and unable to work,²⁷⁸ and the Giffords are spending nearly every dollar of their net income on plan payments,²⁷⁹ even a small difference in plan payments may greatly affect the success of their plans. While other Chapter 13 debtors may not have the same restrictions as Mr. Elliot or have as high of plan payments as the Giffords, they may be similarly affected by changes in their monthly payments.

Additionally, the O'Brien case²⁸⁰ illustrates the fact that the rules governing presumptive discount rates are not created based on circumstances unique to the districts' geographical location, but instead seem to be made almost arbitrarily. It is difficult to imagine that debtors residing in the Western District of Missouri are systematically more likely to default on their plans than those residing in the Eastern District. While there are certainly differences between debtors in the two districts, there are also differences between debtors in cities like Kansas City and St. Louis and those residing in other cities in Missouri.²⁸¹ Nevertheless, debtors residing in the Eastern District are being forced to pay to pay higher discount rates and higher total interest payments as if the location of their residence determines how likely they are to default on their Chapter 13 payments.²⁸²

IV. PROBLEMS CREATED BY LOCAL RULES THAT SET PRESUMPTIVE RATES

By creating presumptive discount rates through local rules, these districts greatly affect how much each debtor will pay in Chapter 13 Bankruptcy.²⁸³ Because these local bankruptcy rules are shifting the burden of proof onto debtors, they are altering "the rules of decision by which [the] court will [adjudicate]" the debtor's rights.²⁸⁴ Thus, these rules are creating substantive law, they are in violation of the Rules Enabling Act, and they must be repealed. The following sections detail the restrictions contained in the potential issues

²⁷⁷ *Supra* Sections III.B.2 and III.B.3.

²⁷⁸ Elliot Form 106I, *supra* note 255 at 1.

²⁷⁹ Gifford Form 106J, *supra* note 278 at 2.

²⁸⁰ *Supra* Section III.B.2.

²⁸¹ *2016 Average Annual Wages*, MO. ECON. RES. & INFO. CTR., <https://meric.mo.gov/media/pdf/2016-average-annual-wages> (last visited Sept.13, 2019).

²⁸² *Supra* notes ²⁶⁴, ²⁶⁷ and accompanying text.

²⁸³ *Supra* Part III.

²⁸⁴ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010).

concerning the Rules Enabling Act and non-uniformity problems, and then examine what could be done to fix these issues.

A. *Violation of the Rules Enabling Act*

While these local rules may appear to merely govern the procedure for how the discount rate is determined, the rules alter substantive law by shifting the burden of proof in the courts' present-value analyses. The Supreme Court has never held that a court rule violates the Rules Enabling Act,²⁸⁵ but it has held that both burdens of proof²⁸⁶ and presumptions²⁸⁷ are substantive law. These elements are so critical to the adjudication of a claim that altering them fundamentally changes the way a case is litigated.²⁸⁸ Therefore, any local rule that shifts the allocation of the burden of proof is violating the Rules Enabling Act because it alters the substantive rights of litigants.

To determine whether local bankruptcy rules that create presumptive rates shift the burden of proof, it is necessary to determine who initially bears this burden. Section 1325 of the Bankruptcy Code sets forth the requirements for confirmation of a Chapter 13 plan,²⁸⁹ and the debtor bears the burden of proving that the proposed plan satisfies these requirements.²⁹⁰ This includes the burden of proving that the debtor is paying the creditor the present-value of their allowed claims.²⁹¹ The four present-value methodologies were merely different tests used to determine the threshold rate that a debtor must pay to satisfy this burden, at which point the burden shifts to the creditor to demonstrate that the threshold rate is insufficient. Thus, the ultimate issue in *Till* was not determining which methodology to use, but rather to ascertain where this threshold lies.

If *Till* is viewed through this lens, it is possible to get a majority holding from the fractured decision. Under the test established in *Marks v. United States*, when the Supreme Court fails to reach a five-Justice majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."²⁹² While Justice Thomas

²⁸⁵ *Id.*

²⁸⁶ *See* *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20–21 (2000).

²⁸⁷ *Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437, 446 (1959).

²⁸⁸ *See Raleigh*, 530 U.S. at 20–21.

²⁸⁹ 11 U.S.C. § 1325 (2012).

²⁹⁰ *See, e.g., In re Hill*, 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001) ("The debtor, as the chapter 13 plan proponent, has the burden of proof on all elements of plan confirmation.").

²⁹¹ 11 U.S.C. § 1325(a)(5)(B)(ii).

²⁹² *Marks v. United States*, 430 U.S. 188, 193 (1977). In other words, in a plurality opinion, lower courts should look to the most basic issued agreed upon by 5 or more Justices to find the binding precedent. *See id.*

wrote separately from the plurality to express his view that a risk premium is unnecessary, he agreed with the plurality (creating a *Marks* majority) on one critical issue: A debtor presumptively satisfies its present-value burden of proof by paying the prime rate.

The plurality viewed the present-value analysis as a two-step process: (1) create a “presumptive rate” and then (2) give one of the parties the burden of rebutting it.²⁹³ The plurality chose to start with the prime rate and then “place[] the evidentiary burden squarely on the creditors” to prove is the rate’s inadequacy.²⁹⁴ By shifting the burden from the debtor to the creditor at this point, the plurality implicitly held that a debtor satisfies his or her present-value obligation by proposing to use the prime rate as the applicable discount rate.²⁹⁵ Thus, in the plurality’s view, the debtor is presumed to meet his or her present-value burden by paying the prime rate, and thereafter the burden falls on the creditor to prove that the prime rate does not adequately account for the debtor’s risk of nonpayment.

Justice Thomas also adopted the view that a debtor satisfies his or her present-value burden by using the prime rate as the discount rate; his concurrence essentially stands for the proposition that such a showing by the debtor cannot be rebutted.²⁹⁶ Under his view, the prime rate will always satisfy the debtor’s burden, and the burden will never shift to the creditor.²⁹⁷ While this difference was enough to warrant a separate opinion, Justice Thomas and the plurality agree on the “narrow grounds” that the prime rate initially satisfies the debtor’s present-value burden, therefore creating a majority opinion on this point.

By predetermining the risk adjustment (or in some cases the entire discount rate) used in Chapter 13 cases, local bankruptcy rules shift at least part of the burden onto the debtors. This alters a debtor’s substantive rights by requiring him or her to litigate the discount rate in order to lower it, even though the burden of proof should already be satisfied. Using this framework, this Part proceeds to identify how each category of local rules identified in Part III shifts the burden of proof and violates the Rules Enabling Act.

²⁹³ *Till v. SCS Credit Corp.*, 541 U.S. 465, 484–85 (2004) (plurality opinion).

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 486 (Thomas, J., concurring).

²⁹⁷ *Id.* at 487.

The following chart attempts to visualize how these local rules shift the burden of proof from creditors to debtors. Each line in the chart corresponds to the following discount rates: (a) the prime rate, which satisfies the debtor's burden under *Till*; (b) the rate created by using formula method with a 2% risk adjustment, as used in the Elliot case; (c) a presumptive contract rate of 6%, as used in the Gifford case; (d) the 6% discount rate used by South Carolina bankruptcy courts; and (e) the 12% discount rate used by courts in the Southern District of Georgia.²⁹⁸ The solid bar represents the prime rate, the dotted bar represents the creditor's burden to raise the discount rate, and the vertical line represents the discount rate created by each type of local rule. The debtor's burden of lowering the discount rate back to the prime rate, which is only created when local rules alter the initial discount rate, is depicted with diagonal lines.



Local rules that create a predetermined risk adjustment (shown in Figure I(b)) shift the burden of proof partially onto the shoulders of the debtor because they create a higher starting point for the present-value analysis.²⁹⁹ Rather than forcing the creditor to present all the relevant information, debtors now must incur high costs to obtain information about lending markets because they do not have the same access as creditors.³⁰⁰ Considering that there is not much payoff to lowering the discount rate,³⁰¹

²⁹⁸ The O'Brien case is not included in this chart because it compares two different local rules to each other rather than comparing a local rule to the prime rate.

²⁹⁹ *Supra* note 215 and accompanying text.

³⁰⁰ See *Till v. SCS Credit Corp.*, 541 U.S. 465, 484 (2004) (plurality opinion).

³⁰¹ Recall the case of Mr. Elliot, who would be forced to pay an extra \$400.52 over the course of his plan due to his district's presumptive discount rate. *Supra* Section III.B.1. While this is not a large amount of money,

debtors will likely choose not to litigate the present-value analysis so that they may allocate their resources to an issue that may have a larger effect on the size of plan payments.³⁰² This means that debtors in this district may systematically end up paying higher discount rates due to this presumptive risk adjustment.

Local rules that follow the presumptive contract rate approach (Figure I(c)) heavily shift the burden of proof onto the debtors because the present-value analysis starts at a potentially extremely high initial rate and forces the debtor to present evidence to lower it.³⁰³ This is the exact opposite of the scheme envisioned by the *Till* plurality.³⁰⁴ While these debtors may have a large incentive to litigate this issue when facing an unreasonably high contract rate,³⁰⁵ they face the same limited access to information that could help them lower the discount rate.³⁰⁶ This problem is exacerbated by an “anchoring effect,” which negatively impacts the debtor’s ability to lower the rate.³⁰⁷

Further, when a creditor sets an interest rate on a loan, it is not solely attempting to create a rate that accurately captures the debtor’s risk of nonpayment—the creditor is also trying to make a profit on the loan.³⁰⁸ In some cases, a creditor may exploit people with poor financial record by setting unreasonably high interest rates and default interest rates.³⁰⁹ Often, those who accept these high interest rates have nowhere else to turn and are forced to accept unfair terms.³¹⁰ This means that the presumptive discount rate will often start at

it still has a substantial impact on his finances. *Supra* Section III.B.1.

³⁰² *Infra* notes 327–329 and accompanying text.

³⁰³ *Till*, 541 U.S. at 499 (Scalia, J., dissenting); O’Brien, *supra* note 2, at 274.

³⁰⁴ *Till*, 541 U.S. at 479 (plurality opinion). Because Justice Thomas advocates for a methodology that will always produce lower discount rates than both the formula approach and the presumptive contract rate approach, this burden shift also runs afoul of his scheme as well. *See id.* at 491 (Thomas, J., concurring).

³⁰⁵ Because the presumptive contract rate approach typically creates discount rates significantly larger than the formula approach, lowering the discount rate may have a substantial effect on plan payment amounts. *See supra* Section III.B.3.

³⁰⁶ *Till*, 541 U.S. at 484 (plurality opinion).

³⁰⁷ Even though both the formula approach and the presumptive contract rate should theoretically produce the same discount rate, anchoring effects tend to influence judges to set higher discount rates. *Id.*; *infra* notes 327–329 and accompanying text.

³⁰⁸ Ryan Fuhmann, *How Banks Set Interest Rates on Your Loans*, INVESTOPEDIA (Nov. 18, 2017), <https://www.investopedia.com/articles/investing/080713/how-banks-set-interest-rates-your-loans.asp> (“The truth is, [creditors] are looking to maximize profits . . .”).

³⁰⁹ Bill Fay, *What is Predatory Lending?*, DEBT (Sept. 21, 2017), <https://www.debt.org/credit/predatory-lending/> (“[Predatory Lenders] prey on people who need immediate cash for emergencies such as paying medical bills, making a home repair or car payment. These lenders also target borrowers with credit problems or people who recently lost their jobs [that] could disqualify them from conventional loans or lines of credit.”).

³¹⁰ *Id.*

the highest point possible and debtors—who have the entire burden of proof—will have a much tougher time getting a fair rate.

The rules in the District of South Carolina (Figure I(d)) and the Southern District of Georgia (Figure I(e)) shift the burden of proof, and thus violate the Rules Enabling Act, by changing the presumptive rate.³¹¹ Because neither of these rules follow the holding under *Till*, nor do they describe the methodology behind how the rates are set,³¹² debtors are not given a clear understanding of what factors judges consider when hearing their case. This creates an even bigger burden on debtors, who now must gather a wider range of information to argue their case. Considering that debtors do not have ready access to such information,³¹³ these rules may significantly alter the substantive rights of debtors in these districts.

As shown in Figure I, all local bankruptcy rules that create a presumptive Chapter 13 discount rate shift the burden of proof onto debtors. Even though the *Till* Court held that the prime rate should satisfy the debtor's present-value burden, debtors residing in districts with such rules must litigate to lower their discount rate back to the prime rate. Considering that burdens of proof are substantive aspects of a debtor's claim, these rules are modifying the substantive rights of debtors.³¹⁴ Thus, these rules violate the Rules Enabling Act. They must be abolished, and a clear, nationwide rule for conducting a present-value analysis should be articulated in their place.

B. Non-Uniformity

Further, these local rules are problematic because they create non-uniformity in the bankruptcy court system. While it is plausible that debtors residing in different districts should have to pay different discount rates based on the economic conditions in their location, these rules are not meant to account for these conditions.³¹⁵ For example, it is hard to conceive of a reason why the Eastern and Western Districts of Missouri should have different rules for conducting the present-value analysis. Nevertheless, residents of the Eastern District of Missouri are given a higher initial discount rate than their neighbors in the Western District.³¹⁶

³¹¹ *Supra* Section III.A.3.

³¹² *See* Bankr. D.S.C. R. 3015-6; Bankr. S.D. Ga. R. 3001-2.

³¹³ *Till v. SCS Credit Corp.*, 541 U.S. 465, 484 (2004) (plurality opinion).

³¹⁴ *See* 28 U.S.C. § 2075 (2012); *Raleigh v. Ill. Dep't of Revenue*, 530 U.S. 15, 20–21 (2000).

³¹⁵ *Pardo & Watts*, *supra* note ¹⁰, at 437–38.

³¹⁶ *Supra* notes 259–267 and accompanying text.

These non-uniformity issues, combined with other factors that impact a debtor's ability to change the applicable discount rate, lead to an imbalance in debtors' access to justice. Debtors in districts that set a presumed rate likely will not expend the resources to litigate this issue because it does not have a large impact;³¹⁷ however, it will force them to pay more money over the course of their plans.³¹⁸ Districts that create a high initial discount rate may accidentally create anchoring effects which influence bankruptcy judges to set higher discount rates, even if the evidence suggests that a lower rate still adequately compensates the creditor. Also, debtors residing in the District of South Carolina or the Southern District of Georgia bear higher information costs because these districts' local rules do not specify the methodology that bankruptcy judges should use to conduct the present-value analysis.³¹⁹

Bankruptcy courts should strive to ensure that similarly situated debtors pay the same amount over the course of their plans. That does not mean that debtors should all pay the same rate, nor does it mean that a debtor's geographical location should not be accounted for in the present-value analysis. Rather, courts should attempt to create uniformity by following a single, nationwide present-value methodology, with the same starting point for every Chapter 13 debtor. This will help ensure that each debtor receives a discount rate and monthly payment amount that are based on the debtor's financial situation, rather than ones that are influenced by factors they cannot control.

C. Access to Justice

Even if these local rules do not violate the Rules Enabling Act and non-uniformity was acceptable, they are still problematic because they deny equal access to justice to some debtors. Presumptive discount rates create biases in the minds of both bankruptcy judges and debtors, which lead to systematically higher discount rates for debtors that reside in districts that have them. Bankruptcy judges "anchor" their final determination to the initial discount rate,³²⁰ and debtors "lump" their decision-making by choosing not to litigate these claims due to their relatively small impact on plan payments.³²¹

³¹⁷ *Infra* notes 334–335 and accompanying text.

³¹⁸ *See supra* Section III.B.1.

³¹⁹ *See* Bankr. D.S.C. R. 3015-6; Bankr. S.D. Ga. R. 3001-2.

³²⁰ Rachlinski, Guthrie & Wistrich, *supra* note 234, at 1233–37.

³²¹ *See* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 124–25 (1974).

Bankruptcy judges are heavily influenced by the initial starting point of the discount rate, which leads them to overweigh its importance relative to other factors.³²² In 2006, a team of researchers conducted a study, based on the same facts that are in *Till*, to determine the effect that anchoring has on bankruptcy judges when they administer a present-value analysis.³²³ The judges were split into two groups—a control group that was not given the debtor’s original contract interest rate and an “anchor” group that was.³²⁴ Both groups were reminded of *Till*’s holding and were told that the original interest rate is irrelevant to the court’s determination of the Chapter 13 discount rate.³²⁵ Even with this reminder, judges in the anchor group set rates that were 0.8–1.46 percentage points higher than judges in the control group.³²⁶ This difference could force debtors to pay hundreds or even thousands of dollars more in interest payments over the course of their bankruptcy plans.³²⁷

While this study was limited to examining the effects of the original contract interest rate, it is likely that these same effects will occur in districts that predetermine the formula method’s risk adjustment. Considering that 17.1% of bankruptcy judges “engaged in no adjustment” by selecting either the prime rate or the original contract rate, it is likely that some bankruptcy judges in these districts will accept the presumptive rate without conducting a proper present-value analysis.³²⁸ Because bankruptcy judges have this tendency to anchor their analysis to the initial rate, debtors residing in districts with presumptive rates will not have the same chance of receiving a fair discount rate that is based on an analysis of their financial situations.

Further, while these amounts are high enough to make a significant difference in plan payments, they are still low enough that debtors may choose to forgo litigating this issue in order to focus on more high-impact arguments.³²⁹ Because there are high costs associated with litigation, debtors will choose to spend their resources litigating other claims, such as the value of the debtor’s property, which could lower plan payments significantly more than a change to the discount rate.³³⁰ Considering that debtors usually enter bankruptcy when

³²² Rachlinski, Guthrie & Wistrich, *supra* note 234, at 1236.

³²³ *Id.* at 1233–34.

³²⁴ *Id.* at 1235.

³²⁵ *Id.*

³²⁶ These percentages were reached after excluding judges who “engaged in no adjustment” by accepting the prime rate alone as the appropriate discount rate. *Id.*

³²⁷ *Id.*

³²⁸ *See id.* at 1235 n.46.

³²⁹ *See Galanter, supra* note 324, at 124–25.

³³⁰ *See id.*

they are in dire financial straits, it makes little sense for a debtor to dedicate a portion of their limited resources to fight over a few hundred dollars.

Because presumptive rates create cognitive biases which disenfranchise already vulnerable debtors, the local rules creating them are unjust. The combination of anchoring and lumping effects systematically force debtors to pay higher discount rates because judges are prone to set higher rates and debtors will opt to forgo reducing them. This means that debtors residing in districts that set presumptive rates through local rules are forced to make higher plan payments and suffer a higher risk of defaulting on their plans, thus increasing the chance that they will lose their property.³³¹ These debtors do not have an equal opportunity to vindicate their rights granted by Chapter 13 bankruptcy solely because they live in a district that enforces these local rules.

D. Implications

Because the local rules violate the Rules Enabling Act, they should be repealed. Bankruptcy rulemaking committees do not have the power to create laws that alter the substantive rights of debtors.³³² Once this has been done, all bankruptcy courts should begin following the currently unrecognized majority holding established by *Till* by setting the initial discount rate equal to the national prime rate, and then placing the entire evidentiary burden on the creditors to prove it is inadequate. This will not only put these courts in compliance with *Till*'s holding, it will also promote uniformity in the bankruptcy court system by helping to ensure that every Chapter 13 debtor undergoes the same analysis and receives similar treatment, no matter where they reside.

The downside to leaving this change to the court system is that it would likely take a lot of time and expense to come to fruition. The local rules will remain in effect until each bankruptcy court voluntarily repeals their rules, each local rule is successfully challenged in court, or the Supreme Court reaffirms the unrecognized holding in *Till* as binding precedent in a new case. While this process is ongoing, the present-value analysis landscape will remain fractured, and many Chapter 13 debtors will continue to suffer from the defects created by current local rules.

³³¹ If a debtor fails to make payments on his or her plan, it may be converted to Chapter 7 bankruptcy wherein all of his or her assets are sold to pay creditors. 11 U.S.C. § 1307(c) (2012).

³³² 28 U.S.C. § 2075 (2012); *In re Adams*, 734 F.2d 1094, 1099 (5th Cir. 1984); Pardo & Watts, *supra* note 10, at 437.

To alleviate this problem and ensure speedy compliance by bankruptcy courts, Congress should codify the *Till* approach in the Bankruptcy Code. This amendment should state that unless the parties agree otherwise, the present-value analysis requires a discount rate that (i) is greater than or equal to the national prime rate and (ii) accounts for the debtor's risk of nonpayment. Each debtor would always pay a discount rate equal to the prime rate, unless either the parties agree to a different rate or the creditor challenges the prime rate in court. The creditor would then bear the full burden of proving that the prime rate inadequately accounts for the risk that the debtor will not pay back his or her debts.

Alternatively, if Congress finds that the prime rate will never adequately compensate a creditor for its claims, then it could alter the approach created by the *Till* majority holding. This could be done by choosing a higher starting point for the analysis or by selecting a different present-value method altogether. By codifying a uniform methodology in the Bankruptcy Code, Congress would have the flexibility to create an ideal present-value approach.

It is preferable that Congress finds a solution to this issue rather than leaving it to the courts so that uniformity is achieved in a timely manner. No matter what methodology it selected, amending the Bankruptcy Code to specify a single, nationwide approach will place every Chapter 13 debtor on a level playing field. While Congress would not be able to account for the subjective thoughts of every bankruptcy court judge, a unified process would improve consistency between districts and give every debtor the same ability to vindicate his or her rights. This should be done quickly so that debtors will no longer have to bear the burden imposed on them by the current system.

CONCLUSION

When the Supreme Court failed to reach a majority opinion in *Till v. SCS Credit Corp.*, it appeared to leave a major gap in the Bankruptcy Code unresolved. Justice Thomas nobly tried to make the discount rate as low as possible while still fairly compensating creditors, but his decision to create his own approach left the bankruptcy court system in a state of confusion. Bankruptcy courts did not recognize that Justice Thomas agreed with the majority on a critical point: The debtor satisfied its present-value burden by paying a discount rate greater than or equal to the prime rate of interest. Instead, they viewed the *Till* Court's failure to select a specified discount rate approach as a failure to fill the gap in present-value analysis.

This uncertainty led some bankruptcy courts to use local rules to fill in this perceived gap by creating a presumed discount rate. These rules set the initial discount rate higher than the prime rate, which effectively places the burden of proof onto the debtor to lower it. Because five Justices on the *Till* Court agreed that the debtor fulfilled its burden by paying the prime rate—at which point the entire burden shifts to the creditor to raise it—these rules violate the Rules Enabling Act by impermissibly shifting the burden of proof.

Because these rules violate the Rules Enabling Act, they should be repealed. Bankruptcy courts should begin following the unrecognized holding in *Till* by starting their present-value analysis at the prime rate and then placing the burden on the creditor to show the prime rate does not adequately capture the debtor's risk of nonpayment. Alternatively, Congress can amend the Bankruptcy Code to either codify the *Till* holding or to select a different methodology entirely. No matter how it is done, Congress and the courts should strive to create a single, nationwide present-value approach so every debtor will be given a fair chance to obtain the bankruptcy relief they deserve.

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* Emory University School of Law, 2020; The Ohio State University, 2017; I want to extend my sincerest appreciation to my comment advisor, Professor Rafael Pardo for his guidance as I wrote this Comment. Thank you to Cai Roman, Molly Billings, John Parker, Rashmi Borah, and everyone else who helped contribute to my work. Finally, I'd like to thank my parents, John and Shelly, and my brother Ryan for all their love and support.