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Valuation of Collateral

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1. Introduction

Two purposes animate the Bankruptcy Code's requirement that the bankruptcy court value consumer property that is subject to a security interest or mortgage. First, §506(a)(1) provides: An "allowed claim secured by a lien on property . . . 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 . . . is less than the amount of such allowed claim." Creditors vote in bankruptcy proceedings with dollars, but only unsecured dollar claims count as votes. Thus the bankruptcy court, at the outset of a case, must value the property that the creditor claims is subject to its lien in order to see how many unsecured dollar votes the creditor has. Second, if the holder of an allowed secured claim objects to the confirmation of a Chapter 13 plan, then §1325(a)(5)(B)(iii)(I) provides that the plan must award to the creditor "the value, as of the effective date of the plan, of property to be distributed under the plan . . . [that] is not less than the allowed amount of such claim." The court must therefore value the collateral in order to decide how much a Chapter 13 plan must award to the secured creditor.

A court cannot value property without first choosing a valuation standard. Further, when the property the secured creditor receives under a Chapter 13 plan is in the form of periodic payments, which is common, these "shall be in equal monthly amounts." The court cannot determine the size of these payments without first choosing a method by which to calculate the interest rate needed to discount a payment stream to present value. Sections 506 and 1325, until recently, had been silent with respect to which valuation standard the bankruptcy courts should use when valuing collateral and which method should guide the court's choice of an interest rate. The Code today continues to offer no guidance

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on the interest rate issue. The Federal courts therefore once had to fill in the valuation blank and must still fill in the interest rate blank.

In two stunningly stupid opinions, the Supreme Court chose the criteria to guide bankruptcy courts in resolving valuation and interest rate issues. *Associates Commercial Corp. v. Rash*¹ held that the bankruptcy court should use a replacement cost standard to value liened property. Under this standard, the bankruptcy court must ask how much the debtor would have to pay to replace the collateral.² More recently, *Till v. SCS Credit Corp.*³ held that the bankruptcy court should choose an interest rate by beginning with the prime rate and then adjusting that rate to reflect the risk profile that the particular Chapter 13 debtor poses. This short Essay will consider the reasoning—charitably put—of these cases and their effect.

The ability to obtain a bankruptcy discharge partly insures persons against shocks to their income. Moral hazard and adverse selection concerns preclude the selling of market insurance against income shocks, but the discharge is a partial substitute; it permits an insolvent person to “collect” a sum equal to the debts the discharge cancels if she turns over her nonexempt assets to her creditors. The “premium” for this insurance is in the form of a higher interest rate.⁴ Full insurance would permit the insured—here the individual borrower—to keep her marginal utility constant in every state of the world. Chapter 7 cannot achieve this goal because it protects only that portion of a person’s income that equals her unpaid debts. Chapter 13 partly responds to this “coverage gap”. When the debtor would realize more utility from retaining assets than she would obtain if she yielded her assets to her creditors in return for the income that a discharge would free up, Chapter 13 permits her to make a different trade: she can retain the assets at the cost of paying her “disposable income” to her creditors during the Chapter 13 plan.⁵

The results in *Rash* and *Till*, it will be shown, reach inconsistent results from an insurance point of view. *Rash* requires Chapter 13 debtors to pay a high price to creditors for retaining collateral: the collateral’s replacement value. Raising the price to play in Chapter 13 must reduce the insurance coverage the Bankruptcy Code provides. In contrast, *Till* requires a debtor to purchase additional insurance. This result obtains because the prime rate is significantly lower than the rate that obtains in markets for consumer credit. The lower is the interest

1. 520 U.S. 953 (1997).

2. The 2005 Bankruptcy Act codified the holding in *Rash*. See §506(a)(2).

3. 541 U.S. 465 (2004).

4. See Barry Adler, Ben Polak and Alan Schwartz, *Regulating Consumer Bankruptcy: A Theoretical Inquiry*, 29 J. Legal Studies 585 (2000).

5. See §1325(b)(2).

rate, in turn, the lower is the sum of the periodic payments that the Chapter 13 plan will require. Since the payments are supposed to equal the collateral's value, when the total payment stream falls the creditor, in effect, has less collateral. The creditor will respond by raising the interest rate on the initial loan. *Till* thus requires an individual borrower to put less collateral at risk, but she must pay a higher interest rate in return: that is, she must purchase additional bankruptcy insurance. The opinions that made up the majority in *Till* did not acknowledge (recognize?) that the effect of *Till* is to require borrowers to purchase more insurance while the effect of *Rash* was to require borrowers to purchase less.

Congress also regulates incoherently. The new Bankruptcy Code requires higher income debtors to use Chapter 13 but Congress codified the *Rash* result, which discourages the use of Chapter 13 by debtors who continue to have a choice. In addition, a legislature coherently can prefer Chapter 13 only if the legislature dislikes the insurance against income shocks that a bankruptcy law can provide; for under Chapter 13 the debtor must pay much of her income to her creditors rather than have that income freed up by a discharge. The new Code, however, failed to overrule *Till*, which requires the bankruptcy court to use an interest rate standard, in Chapter 13, that *requires* consumers to purchase additional insurance. Part 2 below discusses *Rash*; Part 3 discusses *Till*; and Part 4 is a Conclusion that also comments briefly on how the lower Federal Courts should interpret the Bankruptcy Code when the Supreme Court will hear few bankruptcy cases and has only a limited competence in the bankruptcy field.

2. Associates Commercial Corp. v. Rash

Rash involved the valuation of a truck that the Chapter 13 debtors used in their business and wished to retain. The two chief contenders for a valuation standard were the foreclosure value and the replacement value. The foreclosure value represented the sum the creditor would realize if it foreclosed and then sold the collateral. Since the creditor is usually a financial institution, it will sell in the wholesale market. The Court chose the replacement value, which is higher because the price that the debtor would have to pay to purchase the collateral would reflect the retailer's costs.⁶

The Court recognized that a secured creditor who is awarded periodic payments in lieu of the collateral runs the risks that the debtor cannot

6. The Court, in note 6, added that the "creditor should not receive portions of the retail price, if any, that reflects the value of items the debtor does not receive when he retains his vehicle, items such as warranties ... and reconditioning. Nor should the creditor gain from modifications to the property ... to which a creditor's lien would not extend under state law." These clarifications will complicate some valuation hearings.

pay and that the collateral may depreciate or be damaged. The Court required the Chapter 13 debtor to pay her creditor the higher retail value rather than the lower wholesale value as the price of retaining collateral in order to compensate the creditor for these risks. An alternative response would have been to use the foreclosure standard, but then to adjust the interest rate used to equate the Chapter 13 payments to the collateral's present value to reflect the risks the particular debtor posed. The Court rejected this response because, it claimed, interest rates cannot be appropriately adjusted for risk. This claim was understandably made without reasons because it is incorrect. The claim also was implicitly rejected in *Till*. The four justice plurality there, as well as the four dissenters, all believed that the bankruptcy court could adjust an interest rate to account correctly for risk; the dividing issue in *Till* was the standard by which the court should be governed when choosing that rate.

After *Rash*, the debtor's net payoff from keeping an asset if the debtor uses Chapter 13 is the value the debtor attaches to the collateral less the price of keeping it, which is the replacement cost. Denoting the value to the debtor as v and the replacement cost as c , the debtor realizes $v - c$ when she chooses a Chapter 13 plan.⁷ A debtor who uses Chapter 7 must turn the collateral over to the secured creditor, but she can bargain with the creditor to keep the collateral. If the creditor exercised its contract right to repossess, it would realize the collateral's foreclosure value, which is denoted f . The Chapter 7 "bargaining range"—the possible surplus from eschewing repossession—therefore is $v - f$: the creditor must receive at least f , the sum it could command if the parties do not agree, and the debtor will pay no more than v . Letting α index the debtor's bargaining power in a renegotiation ($0 \leq \alpha \leq 1$), the debtor's return if the debtor renegotiates in Chapter 7 to retain a lien asset thus is her share of the surplus, or $\alpha(v - f)$.

The debtor would do better under Chapter 7 than under Chapter 13, after *Rash*, if her share of the surplus from a Chapter 7 renegotiation would exceed her net gain in Chapter 13 from keeping the collateral under a plan and paying the creditor the replacement value. Using the notation here, the debtor will use Chapter 7 when

$$\alpha(v - f) > v - c$$

It is illuminating to rewrite this inequality as

7. The value to the consumer is assumed here to exceed the replacement value because if v is less than r , the consumer will voluntarily give the asset up.

$$\alpha > \frac{v - c}{v - f}$$

To see why, realize that had the Court chosen the foreclosure standard as the valuation measure for Chapter 13, the c in the numerator of the fraction on the right hand side of the inequality would have been replaced by an f . Then the right hand side would have equaled one. Since α is bounded from above by one (the debtor cannot have more than all the bargaining power), the inequality could *never* have been satisfied: that is, the debtor would *always* have used Chapter 13 when she wanted to keep important collateral.

Regarding the intuition underlying this analysis, had the Court used the foreclosure standard, the Chapter 13 debtor would have been able to keep all of the surplus generated by permitting her to retain the collateral: the entire difference between the value of the asset to her and its value to the creditor. Under *Rash*, since c , the replacement value, exceeds the value of the collateral to the creditor ($c > f$) the Chapter 13 debtor can keep only a fraction of this surplus: the creditor necessarily gets the rest. To be sure, the Chapter 7 debtor also can retain only a fraction of the surplus; this fraction is represented by the bargaining power parameter α . However, since all is greater than a part of all, *Rash* makes Chapter 13 relatively less attractive to debtors.

After *Rash*, debtors will choose Chapter 7 when their bargaining power will permit them to command more of the surplus from avoiding repossession than they could realize under the court set Chapter 13 price.⁸ The greater the difference between the replacement value and foreclosure value, the more likely it is that consumer will gravitate towards Chapter 7. *Rash* therefore reduced the ability of Chapter 13 to make up for Chapter 7's failings as a wage insurance vehicle.⁹

8. The debtor is more likely to renegotiate in Chapter 7 to retain collateral when she has a lot of bargaining power (α is large) or when the replacement value substantially exceeds the foreclosure value.

9. The text does not claim that, after *Rash*, every debtor would be less likely to use Chapter 13. A debtor's choice of Chapter is a function of several factors, such as her preference to retain collateral and the uses to which she could put her income if she obtained a Chapter 7 discharge. This essay rather identifies a marginal effect: *Rash* reduces the attractiveness of Chapter 13 as a mechanism for retaining collateral and thus reduces the ability of the Bankruptcy Code to provide (partial) wage insurance to debtors for whom retaining particular collateral is important.

3. *Till v. SCS Credit Corp.*

The Tills had purchased a used truck. They gave a purchase money security interest to the seller, who assigned it to SCS Credit Corp. The parties agreed, in the Chapter 13 proceeding, that the truck should be valued at \$4,000 and that the Tills would be required to make periodic payments to SCS in order to retain the truck. The issue was how to choose the interest rate required to discount these payments to present value.

The two chief contenders for an interest rate standard were the prime rate and the subprime rate. When the bankruptcy court approved the Chapter 13 plan in *Till*, the prime rate was 8% and the subprime rate was 21%.¹⁰ Creditors charge the prime rate when lending to sound business borrowers. The prime rate thus is the lowest rate that borrowers who pose a risk of default pay. Creditors charge the subprime rate to borrowers, such as individual persons and small firms, who pose a more substantial risk of incurring payment difficulties. Both of these rates represent baselines. A bankruptcy court using the prime rate, for example, might adjust that rate upwards to reflect the payment risk that the particular Chapter 13 debtor posed.

The bankruptcy court chose the prime rate as a baseline, but adjusted this rate upwards to reflect its view of the payment risk that the Tills themselves posed. As a result, the Tills' Chapter 13 plan equated the payments the Tills had to make to the collateral's \$4,000 value using a discount rate of 9.5%. SCS had argued that the subprime rate should be the baseline because it best reflected the value of the truck to them as of the plan date. If SCS were allowed to repossess, it argued, then SCS would have sold the truck for \$4,000 and then used the proceeds to finance another transaction in the subprime market with a debtor no less risky than the Tills. The truck thus was worth \$4,000 lent at 21% to the creditor. The District and Circuit courts both accepted this argument and reversed the bankruptcy court. The Supreme Court, however, reinstated the bankruptcy court's order. Four justices agreed with the circuit and district courts below; four justices agreed with the bankruptcy court that the prime rate was the appropriate starting point for a consumer or small business debtor; and Justice Thomas was the swing vote that made up a majority for the prime rate.

This essay begins with Justice Thomas's opinion. Two elements constitute an interest rate, the rate must compensate the lender for the time value of money, and the rate must compensate the lender for bearing the risk of nonpayment. The former element is best approximated by the risk free rate. Justice Thomas read the Bankruptcy Code to

¹⁰. Apparently, the subprime rate also had been 21% when the Tills bought the truck.

hold that when the payments under a Chapter 13 plan are intended to equal the present value of tangible property (in this case, a truck), the Code requires the plan interest rate to reflect *only* the time value of money; but when the payments instead are intended to equal the present value of a promise to pay money (for example, a promissory note), the plan interest rate must also reflect the payment risk. The risk free rate was closer to the 9.5% rate that the four justice plurality¹¹ preferred than to the 21% rate the dissenters preferred, so Justice Thomas concurred in reinstating the bankruptcy court's opinion.

Justice Thomas recognized that awarding a lender with a security interest in tangible property only the risk free rate would under compensate the lender. Justice Thomas also seemed to believe that the risk that a debtor cannot make her Chapter 13 payments ordinarily is independent of the nature of the collateral—a truck or a note—that the plan payments are meant to equal. On this plausible view of the commercial situation, it would have been irrational of Congress to permit creditors who lend on the basis of paper to be fully compensated but not to permit creditors who lend on the basis of things to be fully compensated. According to Justice Thomas, however, the plain meaning of the Code directed this crazy result, and it is not the Court's job to rescue Congress from its mistakes. The plain meaning that Justice Thomas attributed to §1325 eluded every other judge who considered the issue so it is worth turning to the plurality opinion.

Three related reasons seem most to have influenced the plurality's choice of the prime rate. First, the plurality believed that the subprime market likely was uncompetitive.¹² Second, and in consequence of first, the administrative costs of using the subprime rate would be high relative to the costs of using the prime rate. Creditors would earn monopoly rents in an uncompetitive subprime market. Since Chapter 13 should not compensate for these rents, the bankruptcy court would have to see whether they existed in any case, and if so to filter them out when setting the interest rate. This would require a lot of hearings. In contrast, the plurality believed that the prime market was competitive so there would be fewer hearings if interest rates in that market were the baseline. Third, the information that a court would have to use in Chapter 13 rate hearings, were the subprime rate the baseline, was largely in the creditor's possession. The creditor was more likely to possess information relevant to its competitiveness and to its profits. Therefore, the creditor would have an undue advantage in the rate hearing.

11. Justice Stevens, writing for the plurality, with Justices Breyer, Ginsburg and Souter.

12. The bankruptcy court did not hold a hearing on the competitiveness of the subprime lending market, so this claim seemed more assertion than established fact.

The premise that subprime credit markets are uncompetitive is dubious, and there was evidence to the contrary. The creditor in *Till* lent at the then going market rate. Putting chance to one side, a correspondence between contract and market rates would occur when all lenders charged roughly the same rate. There are only two prices on which every creditor will coordinate. When a fair number of borrowers comparison shop, competition will cause firms to charge the competitive price. When few consumers comparison shop, every firm will charge the monopoly price. If there is a "moderate" amount of comparison shopping, there will be price dispersion. Since there was a 21% rate in the market in which the Tills borrowed, that market either was in a competitive or a monopoly equilibrium. That subprime lending markets are routinely characterized by monopoly pricing is unlikely. There are many firms in every geographical market; entry costs are low; price advertising is common; and the requirement that firms quote interest rates in a common format (the annual percentage rate) makes consumer search costs relatively low. That some local subprime markets are uncompetitive is possible; that creditors in the entire subprime market earn monopoly rents is far fetched.

The plurality's opinion collapses if its views regarding monopoly are rejected. Initially, if the subprime market is assumed to be competitive, the bankruptcy courts would not need to convert Chapter 13 hearings into antitrust cases except in unusual circumstances. In fact, there would be many fewer hearings had the Court chosen the subprime rate than there will be now. A bankruptcy court that began with the plausible premise that subprime credit markets are competitive could use the contract rate as a presumptively accurate proxy for the market rate. This presumption should be overcome—there should be an individual rate hearing—only if (a) the market interest rate had changed in the interim between the extension of credit and the time the Chapter 13 plan had to be approved; or (b) the debtor at bar appeared to pose a non-trivially different risk than the typical Chapter 13 debtor. In contrast, because the prime rate reflects the risk that a sound business borrower poses, and such borrowers are much less risky than typical individual borrowers, the prime rate will have to be adjusted *in every case in which valuation is an issue and the debtor is a natural person*. Thus, there would have been many fewer hearings had the Court permitted the bankruptcy courts to use contract interest rates as presumptively accurate Chapter 13 rates.

Turning from the opinions to the result, using the prime rate as the baseline is problematic because it requires consumers to buy more insurance than many of them would want. To see why, consider a simple illustration of the Chapter 13 valuation task. A plan, suppose, lasts for one year and requires the debtor to make one payment to the secured

lender at year's end.¹³ Beginning with the prime rate and adjusting upwards would yield a discount factor of

$$\delta_c = \frac{1}{1 + r_c}$$

where

$$r_c = (1 + \gamma)r_p$$

The subscript *c* indicates that the rate is set by the court and r_p is the prime rate. This rate, in turn, would have to be raised by the factor γ to reflect the individual debtor's payment risk.

Denote by v the value of the collateral and by x_c the required payment under a plan that uses the discount factor δ_c . Then the bankruptcy court would equate the collateral's value to the plan's required payment with the equation

$$v = \delta_c x_c$$

It is illuminating to solve for the payment that the plan would require the debtor to make at year's end. This would be

$$x_c = \frac{v}{\delta_c}$$

In the *Till* case, the prime rate was 8% and γ —the bankruptcy court's adjustment factor—was 1.5%. Using these values in our example, the

13. For readers unfamiliar with finance notation, assume that a person has a sum v today and will put it in a bank at an annual interest rate of r for one year. At year's end, the person will have the "future value (FV)" of the sum, which will be $(1 + r)v$. Since v is what the person has today it is the "present value". Then $FV = (1 + r)v$, and solving for the present value yields $v = FV/(1 + r)$. It is customary to let $1/(1 + r) = \delta$, where δ is the "discount factor". Since the interest rate is positive, δ is less than one. Thus, if someone promises to pay a person the sum $FV = \$100$ in one year, the present value of this sum is $\delta \times \$100$. As the interest rate r increases, the discount factor δ falls, reflecting the fact that the value of a future payment falls as the interest rate rises.

interest rate would be 9.5% so the discount factor would be $\delta_c = .91324$. The collateral was valued at \$4,000. Therefore, the future sum that would be equivalent to receiving \$4,000 as of the date of the plan would be $x_c = \$4,380$. The interest rate method that the Court chose would generate this payment under a Chapter 13 plan.

Suppose instead that the bankruptcy court began by using the contract rate as the proxy for the subprime market rate, and that no adjustments to this rate would have been warranted in the illustrative case. Denote the applicable discount factor as δ_m , where m refers to the market. The subprime market rate in *Till* was 21%, and this would have yielded a discount factor of .82645. As a result, the plan would have required the debtor to pay the sum $x_m = \$4,840$. The creditor thus receives \$460 less when the bankruptcy court in this example adjusts upward from the prime rate rather than begins with the contract rate.

To understand the effect that using the prime rate has on the parties at the lending stage, realize that while the bankruptcy court may begin with the prime rate, the creditor, when lending the money, will ask what the collateral would be worth to it should the debtor default. To answer this question, the creditor will discount the payment it expects to get under the plan using *its own* discount factor. Therefore, the secured creditor's expected Chapter 13 payoff when the debtor retains collateral will be

$$E(x_b) = \delta_m x_c = \delta_m \left(\frac{v}{\delta_c} \right)$$

Letting

$$\beta = \frac{\delta_m}{\delta_c}$$

the creditor who makes a secured loan will expect to receive, in the default state, *not* the collateral's market value of v , but rather the lesser sum βv . In our example, β —the ratio of the subprime market discount factor to the Court's prime market discount factor—is approximately .9.¹⁴ Hence, if the creditor expected the bankruptcy court to adjust upward

14. $.82645 / .91324 \cong .9$.

from the prime rate, the creditor would have valued the collateral at 90% of its real market value.

Perhaps a more vivid way to put this result is to realize that the creditor in the example does not expect to receive a payment of \$4,840 that equates to a present value of \$4,000 at an interest rate of 21%. Rather, the creditor expects to receive a payment of \$4,380. When the creditor discounts this payment at the market interest rate of 21% (i.e., when the creditor uses $\delta_m = .82645$), this payment equates to a present value of \$3,619.85. The creditor thus will act, when lending the money, as if it is receiving a security interest, not in property worth \$4,000, but in property worth \$3,619.85.

An objection to this analysis is that beginning with the prime rate and appropriately adjusting up for risk would yield the same discount factor as beginning with the subprime rate and appropriately adjusting down. If a debtor actually posed a true 21% payment risk, the bankruptcy court would add 13% to the 8% prime rate. Justice Scalia argued in dissent that bankruptcy courts will be unlikely to find that the debtors before them are more than 200% riskier than the required baseline. The bankruptcy court's performance in *Till* (choosing the discount factor by raising the prime rate less than 19%) is evidence for this plausible view. The phenomenon of anchoring and adjustment also likely would play a role. The bankruptcy court is a natural person, and there is much evidence that persons "anchor on"—they do not stray far from—exogenously imposed starting points for analysis. The prime rate is such a starting point. The anchoring phenomenon thus predicts that when courts must begin with this rate, they will choose nontrivially higher discount factors than courts would have chosen had they been permitted to begin with the subprime rate.¹⁵

Requiring bankruptcy courts to begin with the prime rate when choosing payment streams reduces the value of collateral and therefore raises the effective interest rate that persons must pay to borrow.¹⁶ This is because when the sum the creditor can realize on default falls, the creditor must increase the sum that the borrower must pay if she

15. The analysis above showed that creditors will calculate the value of collateral to them by multiplying the collateral's market value by the factor β , where β is the ratio of the discount factor the creditor uses to the discount factor it expects the court to use. The argument in text is that this ratio will always be less than one when bankruptcy courts must begin with the prime rate because these courts will then use above market discount factors. Therefore, *Till* always restricts the amount of collateral that debtors can offer.

16. A prime rate standard is less objectionable for business borrowers because this rate more closely approximates a corporate debtor's risk profile. For the reasons given above, however, it would be better for the court to begin with the rate that obtained in the market in which the debtor borrowed, whatever that rate was.

remains solvent.¹⁷ *Till* therefore requires borrowers to purchase additional insurance against default. The borrower no longer is able to put the full market value of her property at risk when borrowing. Rather, she can put only a fraction (in the analysis here, β) of that property at risk. The borrower must purchase this added protection against income shocks with the interest rate increase that a collateral restriction creates. A more concise way to state this effect is that the Supreme Court amended the Bankruptcy Code to reduce the ability of borrowers to secure loans.¹⁸

4. Conclusion

The Supreme Court, in *Rash*, held that a borrower who wishes to retain lien assets in Chapter 13 must pay the creditor the assets' replacement value. The Court later held, in *Till*, that when discounting this sum to present value, the bankruptcy court should begin with the prime rate and adjust that rate upwards to reflect the risk the particular debtor poses. The effect of *Rash* is to reduce the insurance against income shocks that the Code provides because requiring debtors to pay the maximum price for retaining collateral in Chapter 13 encourages debtors to use Chapter 7 if it is available to them. The debtor's ex post utility thus is lower than it would have been if the Chapter 13 price for keeping assets reflected only the value of those assets to the creditor. In

17. To be precise, letting the risk free rate be zero for convenience, if d is the sum the consumer borrows, p is the repayment probability and F is the consequent sum the creditor requires the consumer to repay if solvent, then the creditor sets F with the equation

$$F = \frac{d - (1 - p)\beta x}{p}$$

For a derivation of this equation, see Alan Schwartz, *A Normative Theory of Business Bankruptcy*, 91 Va. L. Rev. 1199, 1207-1211 (2005). Recalling that

$$\beta = \frac{\delta_c}{\delta_m}$$

the greater is the difference between the discount factor that the creditor uses (δ_m) and the discount factor that the court is expected to use (δ_c) the smaller is β and the larger is F . The effective interest rate is $F/d - 1$, so discounting Chapter 13 plan payments by beginning with the prime rate raises interest rates.

18. Four justices dissented in *Till*, there was a plurality of four in the majority and Justice Thomas's opinion did not join the plurality on any issue. Consequently, there was a majority for the result, but not a majority for the plurality's view. The case thus has little practical value.

contrast, the likely effect of *Till* is to require the borrower to purchase more insurance against a shock to her income because beginning with the prime rate reduces the amount of collateral the borrower can put at risk. The holdings in these cases remain inconsistent if other policies are attributed to the Code. Thus, *Rash* increases the borrower's incentive to exert effort to remain solvent because the case makes bankruptcy relatively less attractive. *Till* reduces the borrower's incentive to exert effort because it makes bankruptcy relatively more attractive.¹⁸

Perhaps the best explanation of these cases is that the Court did not understand the consequences of its holdings or could not keep the entire consumer bankruptcy field in its (collective) mind. For example, Justice Ginsburg wrote the majority opinion in *Rash* and joined the plurality in *Till*. This is a hard double to make for a person with a three digit IQ who knew what she was doing.

Congress codified the *Rash* result and let the *Till* result stand. It is more difficult to attribute a lack of expertise to the Congress than to the Court, but it is perhaps easier to attribute a lack of focus. The new Code contains more provisions pertaining to specific industries and particular problems (e.g., leasing, credit card debt) than the prior law, and lobbying was intense. Perhaps Congress paid too much attention to bankruptcy trees and too little to the forest.

Congress's inattention increases the importance of the Federal courts' role in interpreting a bankruptcy law that is composed largely of standards, and in harmonizing differing statutory constructions. The two cases analyzed here, as well as the very limited number of cases of every type that the Supreme Court hears, suggest that the interpretive and harmonizing functions are better performed by the lower Federal courts.¹⁹ This conclusion gives rise to a thought that is only expressed here but should be developed further elsewhere. If a unitary and competent high court had ultimate charge of the bankruptcy law, then each Federal circuit should develop those interpretations of the law that seem best to it. The highest court would then have the advantage of observing the likely full set of thoughtful positions when specifying what the

18. Without data it is difficult to know whether the insurance and incentive effects of these decisions fully offset. Both cases, however, needlessly increase the administrative costs of consumer bankruptcy: *Rash* by encouraging litigation over how to calculate replacement values and *Till* by increasing the number of interest rate hearings. The cases thus may reflect a retreat from the courts bankruptcy decisions of the 80s and much of the 90s. These decisions sought to reduce the discretion of the bankruptcy courts. See Alan Schwartz, *The New Textualism and the Rule of Law Subtext in the Supreme Court's Bankruptcy Jurisprudence*, 49 N.Y.L.S. L. Rev. 149 (2001).

19. This view is consistent with Rasmussen's claim that bankruptcy policy is better made by these courts. See Robert Rasmussen, "A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases", 77 Wash. U.L.Q. 535 (1993).

bankruptcy law says. The Supreme Court's limited jurisdiction implies that the Court can have only a partial charge of the bankruptcy law, and the decisions here, and others, indicate that the Court is not especially competent in the bankruptcy area.²⁰ These considerations suggest that the circuits should view themselves as if they were state supreme courts when interpreting the Code. When the state courts function in fields with a national scope, such as contracts, they are influenced both by what they think is best and by what other courts have done. There is an informal but real pressure to choose decisions that harmonize with the law elsewhere so that the common law can be uniform among the states. A typical state court thus requires a more serious policy conviction to choose a rule that goes against the grain than it requires to choose a rule initially. Because there is little effective high court review in the bankruptcy field, the circuits perhaps should be as influenced by what other circuits have done when interpreting the Code as the high state courts are by what other state courts have done when creating the common law. This suggestion deserves more thought than is given to it here, but is made because we now have the alternative, and it is undesirable.

20. See, e.g., Schwartz, *supra* note 18; Rasmussen, *Id.*