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BANKRUPTCY ALERT

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Bankruptcy Court in New Jersey Restricts Lender's Interest Rate

When a Debtor seeks to obtain approval of a Chapter 11 plan over a secured lender's objection ("cram-down"), the debtor must pay the lender a stream of payments having a present value equal to 100% of the lender's allowed secured claim as if such claim was to be paid in cash on the plan confirmation date. Although the Bankruptcy Code is silent on what interest rate to use to determine present value, in Chapter 11 business cases, the interest rate is generally at least the lender's contract rate of interest.

Chapter 13 cases, in which individuals reorganize, are different. In Till v. SCS Credit Corp. ("Till"), the Supreme Court provided instruction to determine an appropriate interest rate for providing a secured claimholder present value in a Chapter 13 cram-down scenario. The Supreme Court disregarded the lender's contract rate. Instead, the Court endorsed an approach based upon the prevailing prime rate and thereafter applied additional criteria to add basis points to the prime rate, such as "the circumstances of the estate, the nature of the security, and the duration and feasibility of the bankruptcy plan." Till suggested that courts generally add 1-3% to the prime rate based on the application of the above risk factors.

Although the holding in Till was limited to Chapter 13 cases, there is a growing trend among bankruptcy courts to adopt Till's approach in Chapter 11 cases. Most recently, a bankruptcy court in New Jersey significantly reduced a lender's rate under a Chapter 11 plan from 12% to prime plus 1%, finding that Till applied to Chapter 11 cases. Thus, secured lenders face increasing risk that the rate bargained for under the loan agreement may not be what they end up with should the borrower file a Chapter 11 proceeding. Other arguments, nevertheless, remain available to lenders seeking to defeat a cram-down. Accordingly, it remains to be seen whether borrowers will be able to successfully use the threat of bankruptcy as leverage to negotiate reductions in the interest rate currently paid to their lender.

For further information regarding these or other bankruptcy issues, you may **contact Andrew C. Gold at 212-592-1459 or email at agold@herrick.com.**