LAW AND ECONOMICS IN DETERMINING APPROPRIATE INTEREST RATES IN CONSUMER CRAMDOWNS

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One of the strongest provisions of a consumer bankruptcy involves the "cramdown" procedure available pursuant to Chapter 13. According to the National Consumer Law Center, the Chapter 13 cramdown provision represents "perhaps the greatest powers to affect the rights of secured creditors* * *.[1]

Under Chapter 13's "cramdown" procedures[2] "the debtor's plan may 'modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence* * *.'"[3] In order for a modification of a secured creditor's rights to occur over the creditor's objection, a consumer must comply with the standards of Section 1325(a)(5), among others.[4] The cramdown procedure is set forth at §1325(a)(5)(2), which states that a plan may be approved over a creditor's objection if

> (B)(i) The plan provides that the holder of the claim retain the lien securing such claim; and (ii) 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.[5]

NCLC explains the requirement that the "value" be "not less than the allowed amount of (the) claim":

> To meet the requirements of section 1325(a)(5), the plan must also provide that the present value of the payments to be made to the creditor under the plan equals the amount of the allowed secured claim. What this means is that if payments are to be made over time, the creditor must received interest on the amount of the secured claim so that the amount it ultimately receives is equivalent economically to what it would have received if the allowed secured claim had been immediately paid in cash.[6]

As becomes apparent, therefore, the key issue is what interest rate might be appropriate. As NCLC notes, "creditors, naturally, have argued for high interest rates* * *while debtors have attempted to secure lower rates."[7]

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[1] National Consumer Law Center, Consumer Bankruptcy Law and Practice, sec. 11.6 (4th ed. 1992).

[2] For a general discussion of the Code's cramdown procedures, see, Klee, "All You Ever Wanted to Know About 'Cram Down' Under the New Bankruptcy Code," 53 Am. Bankruptcy LJ. 133 (1979). (hereinafter Klee). The cramdown procedure is complex at best. One commentator states: "Any attempt to provide a sufficiently detailed analysis of cramdown would be absurd.* * *While in theory a definitive analysis of cramdown might be possible, it would take on the proportions of an offering to a beginning chess player the appropriate moves to world championship victory." R. Aaron, Bankruptcy Law Fundmentals, at 12-48 - 12-49 (1984).

[3] NCLC Bankruptcy, supra note 1, at §11.6, quoting, Bankruptcy Code, §1322(b)(2) (1991).

[4] For a discussion of what standards must be met in addition to that of Section 1325(a)(5), see generally, NCLC Bankruptcy, supra note 1, at §11.6.1.3.

[5] Section 1325(a)(5) provides in the alternative that a plan may be approved if the holder of the claim has accepted the plan or if the debtor surrenders the property securing the claim to the holder.

[6] Id., at §11.6.1.3.

[7] Id.

The purpose of this article is to examine the various interest rates that are available, to explore the justification of using one over another from the consumer's perspective, and to recommend a rate that is most appropriate. For this purpose, "appropriate" is defined to include three standards: (a) the rate must be justifiable in law and economics; (b) the rate must promote the consumer's welfare, while doing justice to the creditor; and (c) the rate must be subject to reasonable proof available to low-income advocates.

The determination of compliance with the present value test is not at all an easy question.[8] Any consideration of what the "present value" of any stream of payments is depends foremost upon the discount rate[9] employed[10] A stream of annual $10,000 payments discounted over 20 years at 15 percent, in other words, yields a different, and smaller, present value than the same stream of payments discounted at 10 percent.[11]

I. CHOOSING AN APPROPRIATE INTEREST RATE: SOME GOVERNING PRINCIPLES.

A great deal of confusion exists over the choice of the appropriate interest rate to use in determining whether the "present value" test of evaluating a cramdown plan is met. An interest rate is required so as to allow the numerical computation to find out if the stream of proposed payments equals at least the current value of the collateral. The basic question, therefore, is: of all the interest rates available, which one is the proper one? The Code, and the little statutory interpretation that is available on the point, provide only the smallest glimmer of what Congress intended.[12]

Courts have adopted a variety of approaches to the choice of an appropriate interest rate for use in cramdown cases. Some courts have adopted a state statutory rate.[13] Others have

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[8] See generally, Carbiener, "Present Value in Bankruptcy: The Search for an Appropriate Cramdown Discount Rate," 32 S.D. L.Rev. 42 (1986).

[9] For purposes of this article, the term "discount rate" and the tern "interest rate" will be used interchangeably.

[10] "`Present value' or the `time value of money' is not a legal concept, but rather it is a term of art in the financial community. It simply means that a dollar received today is worth more than a dollar to be received in the future. To compensate the creditor for not receiving its money today, the debtor is charged an additional amount of money. That charge is based on a rate of interest called a 'discount rate.' The discount rate is used to calculate how much the creditor should be paid so it will have the same amount of money in the future as it would have had if it did not have to wait to be paid." In Re. Fisher, 29 Bankr. 542, 543 (Bank. Kansas 1983), citing E. Grant and W. Ireson, Principles of Engineering Economy, 35 (1964).

"Put another way, present value reflects the financial reality that a dollar that is received in the future is not worth the same as a dollar in hand today. Not only does inflation deflate the value of what a dollar may purchase in the future, but a party that has a dollar today may invest it in a variety of investments that would yield a return." In Re. Fi-Hi Pizza, 40 Bankr. 258, 261 (Bank. Man. 1984).

[11] For the precise mathematical present value formula, see, Fi-Hi Pizza, 40 Bankr. at 261.

[12] The intent is to make the present and the face value identical. In Re. Nite Lite Inns, 17 Bankr. 367, 372 (Bank. Ca. 1982),, quoting H.R. Rep. 95-595, U.S. Code Cong. Admin. News 1978, p. 6370.

[13] See e.g., In Re. Lum, 1 Bankr. 186 (Bank. Tenn. 1979); In Re. Crockett, 3 Bankr. 365 (Bank. 111. 1980); but see, In Re. Mitchell, 39 Bankr. 690 (Bank. Ore. 1984); In Re. Willis, 6 Bankr. 555 (Bank. 111. 1980).

adopted one or another federal statutory rates.[14] Some cases adopt a "market rate" which is based upon some nationally reported surrogate like the prime rate, the treasury bill rate, or a rate on one or another index of bond yields, otherwise unadjusted for risk.[15] Others adopt a market rate surrogate generally thought to be "risk free", such as the treasury bill rate,[16] with the addition of one or more points to account for risk.[17] Some courts adopt the contract rate on the loan in question.[18] Others adopt the rate on current loans available to the borrower[19] Finally, some courts adopt a rate to be "the" market rate "on the street."[20]

As shown by these cases, a great deal of variety exists in making an interest determination. Nevertheless, several principles can be distilled from these judicial constructions to guide the choice. First, the decisions seek to find an easily ascertainable rate[21]. The Kansas court endorsed a rate in part because it was "certified to the Director of the Administrative Office of the United States Courts* * *and is reported in newspapers including the Wall Street Journal."[22] The courts also universally agree that the appropriate discount rate is to reflect current market[23] or current economic[24] conditions.

Even when decisions diverge on the facts, the principle of responsiveness to current market conditions is articulated. Courts differ, for example, on the use of the interest rate chargeable by the Internal Revenue Service for delinquent taxes.[25] The Texas court found it to be "reasonably responsive to current economic conditions (and) subject to periodic revision* * *."[26] In contrast, the Washington court found the IRS rate to be "an artificial

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[14] These statutory rates are usually taken either from 28 U.S.C. 1961 or 16 U.S.C. 6621. See e.g., In Re. Tacoma Recycling, 23 Bankr. 547, 550 (Bank. Wash. 1982) (28 U.S.C. sec. 1961 In Re. Johnson, 8 Bankr. 503 (Bank. Texas 1981); accord, Fisher, 29 Bankr. at 548. (16 USC sec. 6621).

[15] In Re. Bay Area Services, 26 Bankr. 811 (Bank. Fla. 1982) (prime rate plus 10 percent); In Re. Jewell, 25 Bankr. 44 (Bank. Kansas 1982) (Treasury Bill rate); Tacoma Recycling, 23 Bankr. 547 (Treasury Bill); in Re. Wolf, 61 Bankr. 1010 (Bank.Iowa 1986) (corporate bond index).

[16] For a description of these securities, see generally, U.S. General Accounting Office, "U.S. Treasury Securities: The Market's Structure, Risks and Regulations," GAO/GGD-86-80BR (August 1986).

[17] Fisher, 29 Bankr. 542 (Treasury Bill or prime plus risk premium).

[18] In Re. Monnier Bros., 755 F.2d 1336 (8th Cir. 1985); In Re. Anderson, 69 Bankr. 105 (9th Cir. BAP 1986).

[19] In Re. Benford, 14 Bankr. 157 (Bank. Ky. 1981); In Re. Landmark at Plaza Park, 7 Bankr. 653 (Bank. N.J. 1980).

[20] Memphis Bank and Trust v. Whitman, 692 F.2d 427 (6th Cir. 1982), Accord, In Re. Coburn, 36 Bankr. 550 (Bank. W.D. Mo. 1983).

[21] "* * *it seems preferable to choose an easily ascertainable rate rather than subject all parties to complex computations before a plan can be completed." Johnson, 8 Bankr. at 506; see also, Willis, 6 Bankr. at 563 - 64; Fi-Hi Pizza, 40 Bankr. at 268.

[22] Jewell, 25 Bankr. At 46 (52 week Treasury Bills). "Moreover," the couted noted, "the rate is available in a recorded message at the Treasury Department." Accord, Tacoma Recycling, 23 Bankr. at 550; Nite Lite Inns, 17 Bankr. at 373.

[23] See e.g., Re. Connecticut Aerosols, 42 Bankr. 706, 707, 711 (Bankr. Conn. 1984); Tacoma Recycling, 23 Bankr. at 549.

[24] See e.g., Johnson, 8 Bankr. at 506; accord, In Re. Ziegler, 6 Bankr. 3 (Bank. Ohio 1980); see also, Fisher, 29 Bankr. at 543; Benford, 14 Bankr. at 159; In Re. Stafford, 24 Bankr. 840, 842 (Bank. Kansas 1982.).

[25] 26 U.S.C. sec 6621 (1991).

[26] Johnson, 9 Bankr. at 506. Contrast, Nite Lite Inns, 17 Bankr. at 373 (absent a showing that the current rate is not indicative of then-existing economic conditions, such rate should be accepted as prima facie evidence of the appropriate discount factor.

rate, which was static during a period when there was significant fluctuation in the average prime rate."[27] Several courts have adopted the 52 week treasury bill rates specifically because of their reflection of current market conditions.[28]

A third uniting principle found by many of the courts is that while there has been a cornucopia of approaches suggested, and while the argument over which interest rate is "best" has become quite involved, the workload of the interest rate is nevertheless still limited simply to compensating the lender for getting future payments instead of current payments[29] The purpose of the new interest rate is to compensate the secured creditor for not receiving the liquidation value of his collateral at the time of the plan, while instead getting a stream of payments stretching into the future.[30]

As a result, most courts have rejected the notion that the discount rate may be used to convert the stream of proposed future payments into the equivalent of the old contract. Several of the factors inherent in the old contract are inappropriate in setting the discount rate.[31] The Tennessee court noted, for example, that it "is not aiming to produce a lender's profit but only to protect the creditor from loss caused by its being paid over a period of time."[32] So, too, did the Texas court find that "* * *contract interest rates are determined by many factors other than simply the time value of money, including* * *overhead costs."[33] The Kansas court found that the contract rate would include depreciation and collection costs.[34] In short, the old contract is gone, and with it went the old interest rate.

Two of the major issues running through the litigation of appropriate discount rates in a Chapter 13 proceeding involve how to assess the risk of the stream of payments and how to measure a market rate of interest for any particular loan. Each of these issues is

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[27] Tacoma Recycling, 23 Bankr. at 550. The court noted that the IRS rate could be above or below the rate dictated by the current market. Id.

[28] See e.g., Jewell, 25 Bankr. at 46 ("the court is of the opinion that a discount factor tied to the action of treasury bills best reflects the value of money to creditors in today's market place.") So, too, did the Washington court find that the 52 week Treasury Bill rate "due to its frequent adjustment, is indicative of existing economic conditions." Tacoma Recyling, 23 Bankr. At 550; see also, Mitchell, 39 Bankr. at 702.

[29] Fisher, 29 Bankr. at 543; "As the Bankruptcy Courts around the country have dealt with this issue (of appropriate discount rates) they have come up with a number of suggested rates, such as legal rate, prime rate, Federal Reserve discount rate, and 3 month Treasury Bill Rate. It is suggested that each of these rates is inappropriate because it does (sic) not address the problem, which is, compensating the secured creditor for the delay in enabling him to enjoy the fruits of his security agreement. He is entitled to the present value of the collateral plus the value of the difference between present enjoyment and future enjoyment." Willis, 6 Bankr. at 563.

[30] The discount rate, it has been held, is that factor that "when utilized to determine defeffed payments, places a party in 'as good a position' as if it had received its claim now, rather than later." Fi-Hi Pizza, 40 Bankr. at 262.

[31] So, too, have the courts found that certain elements used in setting the interest rate for late tax payments are irrelevant to the calculation of an appropriate discount rate to use in present value analysis. See e.g., Fi-Hi Pizza, 40 Bankr. at 269 - 70.

[32] Id.

[33] Johnson, 8 Bankr. at 505. The Johnson court held that "A Chapter 13 debtor need not guarantee in the plan that a creditor's speculative investment be successful* * *." Id. See also, Matter of Doud, 74 Bankr. 865, 869 (Bankr.S.D. Iowa 1987).

[34] Fisher, 29 Bankr. at 544,545 - 46; but see, United States v. Neal Pharmacal, 789 F.2d 1283, 1288 (8th Cir. 1986) (elements such as profit and administrative costs are "difficult to calculate and* * *negligible.").

presented in greater detail below. The appropriate measure of risk in fixing an interest rate will first be examined. The appropriate "market" to use in setting interest rates will be the next inquiry.

II. A MODEL FOR EVALUATING THE RISK OF A BANKRUPT DEBTOR.

The determination of an appropriate interest rate is based primarily on an assessment of the risk of the loss of revenue due to default and an allocation of that risk over all customers. Risk spreading counsels that a risk premium be charged on all loans of a particular type. The sum of these risk premiums must be adequate, but no more than adequate, to offset the losses on that fraction of the loans which are involved in default and on which losses are accrued.[35] In considering the proper level of the risk premium to be included in the interest rate, two determinations must be made: (1) the precise definition of the risk; and (2) an objective measure of the payment required to account for that risk.

The definition of risk has been well documented[36]. Analytically speaking, the risk of default[37] involves all of the different possible types and combinations of default: big, little, partial, total, temporary and permanent[38] The probability that each will occur, and the loss to the lender were each to occur, are factored into the analysis.[39] Each individual probability is multiplied times the amount of the loss if that particular event occurs. The value of the total expected loss equals the sum of these products. That sum is the appropriate risk of default premium to charge.[40] It should be remembered, however, that the "risk of default" is an elliptical term. The ellipsis relates to the amount of the loss entailed by various types, values, and lengths of time involved.

Unfortunately, the data to support an objective analysis of the actual risk-of-default does not exist in organized form and is thus generally unavailable to the researcher.[41] As a

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[35] In addition, under the market value approach, only the direct risk of default losses are compensable. Indirect or consequential losses not reflected in the market valuation of risk are not cognizable because they involve factors which are unique to a particular lender, or a subset of lenders, which the market registers (or rather fails to register) as "inefficiencies." Such local inefficiencies should not be passed on to borrowers in competitive markets. Impacts on interest rates that involve a lender specific characteristic not common in the market should not be included in a market analysis.

[36] See e.g., J. Weston and E. Brigham, Essentials of Managerial Finance, 237 - 41 (1982) (hereinafter Weston and Brigham). According to this analysis, risks include: (1) financial risk; (2) interest rate risk; (3) purchasing power risk; (4) liquidity or\ marketability; (5) taxability; and (6) relative yields.

[37] Notwithstanding the multi-varied elements to "risk," the courts, in discussing appropriate discount rates, have devoted themselves almost exclusively to a discussion of the risk of default.

[38] The risk of default, it should be clear, is only a significant problem to the extent that it is not "set right" after the fact, and even then, only to the extent that it entails a loss to the lender. A default is not, in other words, necessarily a permanent loss of the entire remaining balance of payments.

[39] E.Brigham and J.Pappas, Managerial Economics, 56 - 62 (1972). (hereinafter Brigham and Pappas).

[40] The mathematics of calculating a risk premium are set out in several finance textbooks. See e.g., Brigham and Pappas, supra note 39, at 68 - 70; see also, Weston and Brigham, supra note 36, at 314 - 337.

[41] This data includes the number of defaults classified by type (e.g., total default with all further payments foregone, late payment, partial payment); the number of total defaults and the average per period; the

result, while the conceptualization of the analysis in this way may be useful to understanding the relationship between the variables, a practical solution must be sought elsewhere.

III. "MARKET RATES" UNDER THE CODE.

A. The Definition of a "Market Rate."

Unfortunately, courts have most often tended to gloss over what precisely they mean conceptually when they refer to a "market rate" in bankruptcy decision[42] The term has been invoked as a limiting factor rather than as a definitional factor of what the Code requires. This failure to directly address what is being sought causes a great deal of difficulty. The concept has most often been used to distinguish rates that move with market forces from statutory rates and from rates that are institutionally set.[43] Even in these situations, however, often no definition of what affirmatively constitutes the market rate is advanced.[44] Accepting that the requirement instructs that the rate must move with current market forces, a great many alternatives still remain. [45]

Recent formulations of what interest rate best approximates the prevailing market rate tend to concentrate on loans of comparable risk and term.[46] The "current market" conceptualization seeks to find an objective evaluation of the risk inherent in any given loan. This quest assumes that "the market" will value the loan given a particular determination of risk and term.[47]

Two conflicting approaches have been developed to this process of assessing risk. On the one hand, economic doctrine counsels that the larger and more comprehensive the market, the more likely that an objective measure will be determined.[48] The larger market is less subject to manipulations, subjectivities, idiosyncracies, and quasi-monopoly forces

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average loss per default, and the total loss by type of default. This data will allow the calculation of the total expected loss per period. When this figure is summed with the base payment per period, it is then a simple step to calculating the risk premium.

[42] The proper discount rate is unarguably a question of fact. Fisher, 29 Bankr. at 551; see also, Neal Pharmacal, 789 F.2d at 1289, n. 12; Connecticut Aerosols, 42 Bankr. at 711.

[43] These types of rates are also sometimes called "administered." See e.g., Connecticut Aerosols, 42 Bankr. at 707; accord, Neal Pharmacal, 789 F.2d at 1286 - 87.

[44] The courts have not used the term to derive or defend a particular rate out in the world as "the" market rate.

[45] "Of course, the use of the term 'market rate' may narrow but does not end this Court's analysis. The Court must still determine the appropriate 'market rate.'" Fi-Hi Pizza, 40 Bankr. at 262.

[46] Neal Pharmacal, 789 F.2d at 1286; In Re. Monnier Bros., 755 F.2d at 1339; In Re. Camino Real Landscape MaintenanceContractors, 818 F.2d 1503, 1506 (9th Cir. 1987). Some courts have broadened this slightly to include the quality of the security as a relevant factor. Fi-Hi Pizza, 40 Bankr. at 263.

[47] "The market interest rate is the product of supply and demand, and is influenced by the prime rate, discount rate, commercial paper rate, Treasury Bill rate and so on. It therefore reflects the interaction of economic variables that affect the cost of lending money. In that sense it is the most accurate indicator of the present value of deferred payments." Benford, 14 Bankr. at 160.

[48] This doctrine is encompassed in discussions of "pure competition." See generally, Brigham and Pappas, supra note 39, at 257 – 262.

often prevalent at the local level.[49] At the other end of the continuum is an analysis concentrating on a single creditor. Known as the "coerced loan theory,"[50] this doctrine counsels that the risk premium should reflect how much a particular creditor would require to make a loan in that particular creditor's circumstances to a non-bankrupt debtor with similar terms, risk and the like. Each of these approaches should be assessed in light of the function which a market interest rate performs.The purpose of the interest rate analysis is to determine whether a proposed stream of deferred payments is equal to the value of the collateral. This analysis can be divided into two parts: first, to determine whether the payment stream provides sufficient value over capital recoupment to offset the loss of the time value of money; and second, to determine if the stream of payments is sufficiently large to offset the risk to the repayment of principal and interest.[51] Several questions march forward as soon as the issue is posed in these terms. For example, time preferences vary from person to person. While one lender might feel adequately compensated for having to accept a deferred payment stream of certain specified dimensions by receiving ten percent, another might demand twelve percent.[52] Even for an individual lender, the time preference of money is subjective in the sense that it is determined by, and varies with, numerous psychological forces that do not lend themselves to legal analysis in any very satisfying way. So, too, is the time preference of a corporate lender determined and redetermined on a day-to-day basis by a complex of variables only partially controlled in a discernible way by objective factors in broad external markets. Were this path thus chosen, objective proof of the appropriate time value of money would be reduced to ipse dixit on the part of creditor.[53]

The problem is the same with the assessment of risk. Different individuals have different levels of risk adversity.[54] In addition, as with the time preference of money, not only does the risk preference differ between individuals, but for each individual the levels vary with a number of factors, most of which are psychological and most of which are not easily verifiable in the legal context.\[55] Again, too, the same general logic appears to

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[49]In economic terms, each participant in the market is a "price taker" as opposed to a "price maker." See generally, Brigham and Pappas, supra note 39, at 257; see also, R. Bilas, Microeconomic Theory, 173 (1971) (hereinafter, Bilas).

[50] The theory of the "coerced loan" holds that a creditor is making an involuntary loan to the bankrupt for the term of the plan. Fisher, 29 Bankr. at 544; accord, Landmark at Plaza Park, 7 Bank. 653; Fi-Hi Pizza, 40 Bankr. at 262 - 63.

[51] It is for these reasons that the discount factor is divided into two components: a risk free component and a risk premium.

[52] In theoretical terms, the reason for this revolves around the different utility, or satisfaction, which each derives from a particular interest rate. See generally, Bilas, supra note 49, at 37 - 43.

[53] A parallel of all this lies in the valuation of assets for eminent domain purposes. In such proceedings, even though the compensation is designed to make whole the dispossessed seller, the measure of compensation is not based upon the demand of that seller. Rather, eminent domain proceedings seek to find the market value of the property.

[54] For example, some individuals will play the lottery even knowing that the expected value of playing entails a net loss. Others would not bet ten dollars on the flip of a coin (where over the course of many bets, the expected value is even). See generally, Bilas, supra note 49, at 110 - 111; see also, M. Blaug, Economic Theory in Retrospect, 332 - 33 (1968). (hereinafter Blaug).

[55] For an excellent discussion of the psychological underpinnings of the levels of risk adversity, see, Blaug, supra note 54, at 332 -338.

apply to corporate behavior. Some corporations require only modest premiums to engage in risky behavior while others remain staunchly conservative.

On each level, the time preference of money and the risk adversity, it is unclear what person is to serve as the standard against which the appropriate interest rate is to be measured in deciding upon what interest rate is "fair and equitable." Two alternatives become immediately apparent: (1) the "standard lender" implicit in the market; and (2) the particular lender at the bar. In the parlance of bankruptcy, these two alternatives are represented by the "market" interest rate and the "coerced loan."

It is necessary at this point to directly address the subtle problem set out in Collier's "coerced loan" theory. Collier would posit that since it is the creditor who is particularly and individually being "coerced," it is the creditor who is entitled to be compensated for his individual time preference and risk, computed not on the basis of a rate determined in the broad and vigorous national market, but rather based on individual characteristics.[56]

A good deal of space has been devoted to analyzing the problems which arise through the use of rates based on individual lender characteristics. The problems of proof are substantial. It is difficult, if not impossible, to obtain an objective measure of such subjective lender characteristics as risk adversity and time preference. The problem of the manipulation of lender-specific rates must be considered as well. More fundamental, however, is the observation that using lender characteristics to choose a discount factor would mean that identical deferred payment streams, with identical terms and identical risk, may wind up being tested using different rates. The conceptual problem with this is illustrated by a hypothetical secondary market where "low rate" lenders would sell loans near default to "high rate" lenders so that the high rate scale would prevail in reorganization. It is inconceivable that the Bankruptcy Code would countenance this type of predatory manipulation of the system. Just as fundamental is the conclusion that the lender-specific rate is in no way a "market" rate at all, since it embodies only supply side characteristics. A market rate must reflect the interaction of demand-side factors as well to arrive at a market clearing rate.

The alternative to this trek in swampy country is to suggest that while the lender is entitled to compensation for foregone time preference and the risk of default, the value of the compensation should not be decided according to the lender's individual characteristics, but instead on the basis of the market's determination of the appropriate rate. Seen in this light, it becomes clear that: (1) market determined rates based on broad and vigorous market action, and (2) rates based on lender specific characteristics, are mutually exclusive.

This conflict puts the "coerced loan" proponents in a bind. Either they hold to the position that the presence of a "coerced loan" means that lender characteristics are the relevant foundation for the choice of a rate, or they step back and agree that even though the

[56] The Pennsylvania bankruptcy court, in In Re. Mitchell, 77 Bankr. 524 (Bankr. E.D. Pa. 1987), picked up on this analysis. That decision noted that the Collier analysis of the cramdown provision “presents a “credit vantage point.” 77 Bankr. At 527.

"loan" is coerced, the proper valuation of the compensation due to the lender is to be determined by the market without special recourse to lender characteristics. Unfortunately, adoption of the market valuation approach leaves the "coerced loan" adherents with a rate that is invariant with respect to whether the loan is "coerced" or not. The market does not care whether any particular lender "wanted" to make any particular loan; the rate for the loan, whether "coerced" or not, will be the same. As a result, an attempt to create a "coerced loan" category worthy of special treatment with respect to the choice of discount factors cannot be maintained. All that is left is some pejorative terminology without a valid categorical or analytical raison detre.

Concentrating on the characteristics of the plan and of the debtor assumes that particular lender-specific attributes are subsumed in the larger market. In a properly functioning market, lenders who lend at a rate that is low relative to the market-justified rate will be led by the discipline of the market to adjust their rates upward. On the other hand, lenders who seek "too high" of a rate relative to the market-justified rate will be unable to find borrowers unless their rates are lowered. In this way, the market enforces a certain discipline by continually testing rates and rejecting those rates that are either high or low. Lenders who are out of step with market conditions will thus be eliminated from the market, and the rates that emerge will be rates which are reasonable within the locus of market conditions.

It thus becomes clear that if the market based approach was chosen to obtain the benefit of the market in determining valid rates, then it inexorably follows that the best market to use is the one which is open to the fullest range of market forces and subject to the most vigorous market discipline leading to rates reflecting the fewest imperfections.[57] What is sought by this process, in other words, is the market that will provide the best determination of the appropriate rate, not the market which best approximates the local market of the debtor and lender.

Choosing a rate derived from the broadest and most vigorous market available has other advantages as well. It would produce rates which are valid from the perspective of economic theory. In addition, since imperfect markets will almost always produce higher than appropriate rates, \[58]58\ rates determined in fuller scale markets will generally be lower and more rehabilitative. Moreover, use of a broad market also eliminates the problem that rates varying by lender, or by local market, have the potential to produce rates on individual claims of similar risk, duration and collateralization, which are substantially different one from another.

[57] Several market models exist. At one end of the continuum is the pure monopoly. Pure monopoly is represented by a market situation in which there is a single seller of a product for which there are no substitutes. Bilas, supra note 49, at 199. At the other end of the continuum is pure competition. This model is characterized by the presence of many firms, all of which sell the same product, none of which is so large as to be able to affect the price being established in the market. Bilas, supra note 49, at 173. There are numerous intermediate models, including, for example, oligopoly and monopolistic competition. Id. Each of these intermediate models, as well, have attributes which interfere with the disciplinary functions of the market.

[58] See e.g., Bilas, supra note 49, at 224.

Reduced to principle, while the objectively determined rate will vary with borrower characteristics, it should not vary with lender characteristics not already reflected in the market.\[59]59\ This conclusion is examined in more detail in the following section.

B. The Determination of a Market Rate.

The judicially-accepted approaches to determining an appropriate "market rate" of interest can be generally categorized into three alternatives: (1) direct surrogates; (2) contract rates; and (3) street rates. Each will be examined in turn.

1. Direct surrogates.

The prime lending rate and one of the various treasury bill rates \[60]60\ comprise the most often discussed direct surrogates for a market rate. The prime rate is the lowest rate offered by commercial banks to their best corporate customers,\[61]61\ and is widely considered to be reasonably fluid with respect to current economic forces.\[62]62\ Moreover, part of the Kansas court's rationale for choosing a rate based on a lagged prime was "due to the (court) having a special regard for its almost daily experience with the rates charged by actual commercial lenders and other financier's (sic) of chapter 11 debtors" that "range from one to three percent over prime* * *."[63]\63\

The treasury bill rates have much the same attributes as the prime rate. Courts adopting this standard have generally accepted either the weekly[64] or quarterly[65] auction rate of treasury bills as the appropriate surrogate. The universal attribute of this standard is its responsiveness to current market forces. In addition, treasury note, bill and bond rates taken as a group form a much more comprehensive standard than the prime rate.

Both the prime rate and the treasury bill rates are objectionable, however, for several quite good reasons. First, both the prime rate and the treasury bill rates are for short term

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[59] In Re. Camino Real Landscape Maintenance Contractors, 818 F.2d 1503,1506 (9th Cir. 1987); The Matter of Wichmann, 77 Bankr. 718, 720 (Bankr. D. Neb. 1987) (chapter 12). The notion that creditor characteristics should not be considered is supported, as well, by the universal application of the doctrine that a uniform discount rate is to be applied in each case regardless of how that rate is determined. See e.g., Willis, 6 Bankr. at 555; Lum, 1 Bankr. at 186; In Re. Weaver, 5 Bankr. 522 (Bank. Ga. 1980); In Re. Strong, 12 Bankr. 221 (Bank. Tenn. 1981); Johnson, 8 Bankr. 503.

[60] Interest on debt offered by the United States differs on the basis of the term of the debt. Interest rates for various maturities are available within the broad categories of "bonds" with maturities of more than ten years; "notes" with maturities of more than one but less than ten years; and "bills" with maturities of one year or less.

[61] Fi-Hi Pizza, 40 Bankr. at 268; accord, Fisher, 29 Bankr. at 548, citing, D. Thorndike, Thornidike's Encyclopedia of Banking and Financial, Table XXIX (1980); but see, note 67, infra, (some corporations get below prime loans).

[62] Fi-Hi Pizza, 40 Bankr. at 271. In Fi-Hi Pizza, however, the court noted that "granted* * *there may be rates that are more reflective of the current market in the short-term* Id.

[63] Fi-Hi Pizza, 40 Bankr. at 271.

[64] See e.g., Fisher 29 Bankr. at 551.

[65] See e.g., Willis, 6 Bankr. at 555.

borrowing.[66] Second, while the prime rate is purported to be the lowest rate at which banks lend to their best corporate customers, in fact it is not. .[67] Moreover, neither the prime rate nor the treasury bill rates involve risks analogous to those associated with the typical chapter 13 debtor[68] The treasury standard's weakness, in particular, is that all the rates involved are for securities with essentially zero risk of default, which is a clear bar to their use unless further adjusted.[69]

Courts generally address the incomparability of a bankruptcy proceeding to the low-risk or risk free investment represented by the prime rate and the treasury bill rate by adding a risk premium. This addition recognizes that an interest rate has two elements: a risk free component designed to compensate for the time value of money, and a risk premium designed to compensate for the possibility of default.[70] Some courts thus simply accept these rates as surrogates for the first element.[71]

The problem inherent in starting with the market determination of either rate and then adding a premium to account for risk, is the difficulty of determining what the premium should be, and then providing a reasoned justification for the particular value chosen. The risk premiums which have been adopted have varied widely: the three month treasury bills plus one-half of one percent;[72] the 52 week treasury bill plus one percent;[73] the treasury bill rate increased by two percent for risk and then decreased one percent for the security;[74] the lagged prime under 26 U.S.C. sec. 6621 plus 2.5 percent; [75] the prime plus two to three percent; [76] the treasury note rate plus three to four percent;[77] the prime rate plus one-tenth of the prime.[78]

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[66] See e.g., Welco Industries, 60 Bankr. 880, 883(9th Cir. BAP 1986) (Treasury Bills and notes short-term); Wilkerson,, 33 Bankr. 933, 936 (Bankr. N.Y. 1983) (52 Week Treasury Bills short term). With out addressing whether the observation was relevant, most courts label Treasury bills as "short-term" rates See e.g., Fisher, 29 Bankr. at 543; Jewell, 25 Bankr. at 46.

[67] " A Greenwich Research Study showed that nearly 70 percent of large corporations are offered below-prime loans. The staff of the committee on Banking, Finance and Urban Affairs of the House of Representatives released a report in April concluding that "the once clear barometer of interest rates has become a murky, ill-defined term that rarely reflects the lowest rates available to corporate customers." Cox, Bankers Desk Reference, at 16 (1982) as quoted in Fisher, 29 Bankr. at 548.

[68] For a rejection of the prime rate on the grounds that it is not the closest commercial equivalent to a risk free rate as claimed, see Fisher, 29 Bankr. at 548; Fi-Hi- Pizza, 40 Bankr. at 2268. For a rejection on the grounds that the unadjusted prime rate is not reflective of the appropriate risk level, see also Fi-Hi Pizza, 40 Bankr. at 268.

[69] Monnier Bros. 755 F.2d at 1339; see also, Southern States Motor Inns, 709 F.2d 647, 651 - 53 (11th Cir. 1983). In a minority position, however, is the adoption of the unadjusted treasury Bill rate in In Re. Connecticut Aerosols, 42 Bankr. 706 (Bank. Conn. 1984).

[70] Fisher, 29 Bankr. at 543.

[71] " A universally accepted riskless rate of interest is the interest paid on United States government bonds or bills because they are not considered subject to default." Fisher, 29 Bankr. at 543, citing J. Weston and E. Brigham, Managerial Finance, 244-71 (1978): R. Higgins, Financial Management Theory and Application, 51 (1977).

[72]Willis, 6 Bankr. at 555.

[73] Fisher, 29 Bankr. at 551.

[74] In Re. Camino Real Landscape Maint. Contractors, 818 F.2d 1505, 1508 (9th Cir. 1987).

[75] Fi-Hi Pizza, 40 Bankr. at 271.

[76] In Re. Hopkins, No. 85-0079W, slip opinion, at 15 (Bank.lowa 1986); In Re. 360 Inns Ltd., 76 Bankr. 573 (N.D. Tex. 1987).

More recently, Judge Jackwig, in Mauer of Doud, a chapter 12 case in the Southern District of Iowa, has improved on the treasury plus risk approach.[79] In Doud, Judge Jackwig tailored the rate to maturity by tying it to the treasury bond rate corresponding to the average maturity of the amount to be repaid.[80] The final rate established in Doud consisted of the "yield on a treasury bond with a remaining maturity matched to the average amount outstanding during the term of the allowed claim plus a 2% upward adjustment to account for risk* * .[81] Unfortunately, this Jackwig approach still provides no explanation of the choice of the risk premium.

While each case provides some justification for choosing either the prime rate or one of the treasury rates as the "risk free" basis, there is a problem common to all. Not one provides any citable empirical justification for the choice of the particular risk increment chosen. In Bay Area, for example, the court's "industry practice" assertion was expressly disputed by a different court.[82]

The rate of interest found in the rejected contract represents a second type of standard to use in making a determination of discount rates for Chapter 11 reorganizations. Use of the contract rate in setting a discount factor has been adopted by courts in several cases[83]. The Eighth Circuit, for example, refused to overturn the use of the contract rate in In Re Monnier_Brothers,[84] finding that that rate "was the rate agreed upon in an arms length bargain between businessmen" and "presumably reflected the prevailing cost of money" (at least at the time of the loan), "the prospects for appreciation or depreciation of the security, and the risks inherent in a long-term agricultural loan."[85] The arms length bargaining aspect was important to the Ohio court in In Re Anderson [86] as well. That

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[77] Id.

[78] Bay Area Services, 26 Bankr. at 814. The Bay Area court indicated that it adopted this rate as it was the "industry practice for determining the present value of a claim." Id. at 814.

[79] 74 Bankr. 865 (Bankr. S.D. Iowa 1987).

[80] Id., at 868; accord, Matter of Wichmann, 77 Bankr. 718 (D. Neb. 1987) (chapter 12).

[81] Id., at 869 - 70; compare, In Re. Mitchell, 77 Bankr. 524 (Bankr. E.D. Penn. 1987) (interest rate is "the lesser of (1) the contract rate or (2) the rate of yield for Treasury bills due to mature on the date of the termination of the Debtors' Plan (rounded off to the nearest quarter percent"); 77 Bankr. at 529.

[82] The Massachusetts court noted not only that "the Bay Area Court* * *did not cite any support for this practice," but went on to assert that "this Court is unaware of any such industry practice." Fi-Hi Pizza, 40 Bankr. at 264.

[83] See e.g., In Re. Cooper, 11 Bankr. 391 (Bank. Ga. 1981); accord, In Re. Clements, 11 Bankr. 38 (Bank. Ga. 1981); In Re. Kauffunger, 16 Bankr. 60 (Bank. N.J. 1981).

[84] 755 F.2d at 1339, but see, contra, In Re. Dunavant and Son Dairy, 73 Bankr. 328, 336 (M.D.Tenn. 1987) (expressly rejecting Monnier).

[85] 755 F.2d at 1339. The Court found that since only 20 months had elapsed between the time the contract was made and the time the reorganization plan was confirmed, the contract rate and current market rate were not likely to significantly differ. Other cases, too, have approved use of the contract rate. In Re. Smith, 6 Bank. Dec. 424 (E.D.N.Y. 1980); In Re. Rogers, 6 Bank. Dec. 1214 (S.D. Iowa 1980); In Re. Benford, 14 Bankr. 157 (Bank. Ky. 1981).

[86] 6 Bank. Dec. 1155 (S.D. Ohio 1980); see also, In Re. Patel, 21 Bankr. 101, 105 (Bank. Fla. 1982). ("This court believes that where a seller negotiates a fixed rate with a buyer for a purchase money mortgage on a particular piece of property, that rate is far more persuasive than the money market or other sources of financial data.")

court adopted the contract rate so long as it was not "imposed by the lender to exploit a naive, unsophisticated debtor or a debtor in desperation." [87]

Neither of these cases, however, addresses the fatal flaw inherent in the use of the contract rate. The touchstone of providing present value of a claim to be paid in the future is responsiveness to current market conditions.[88] There is no reason to suppose a priori that the interest rate in the market at the time of plan confirmation will in any way approximate the contractual rate agreed upon at some earlier date.

In addition to this fundamental weakness in the use of the contract rate, a series of other equally valid objections exist[89]. There is, for example, no reason that the risk involved with the plan will be the same as the original contract, just as there is no reason to suppose that the term of repayment under a plan will be the same as, or even close to, the term of the loan at the time it was contracted. In addition, use of the contract rate permits the creditor to recover inappropriate cost items from the bankrupt debtor. Finally, using the contract rate would leave open the possibility that identically situated debtors[90] would be forced to pay sharply different interest rates based not on conditions at the time of the plan, but instead on conditions which only obtained momentarily at some point in the past.[91]

The only appropriate use for a contract interest rate in a cramdown proceeding was recognized in the Pennsylvania case of In Re. Mitchell.[92] Holding that "use of the contract rate has no historical or logical support," the Mitchell court found that it should be used only as a cap on what the lender may collect.[93]

A creditor, the court held, "should not be permitted to profit and increase its contract interest rate, to the detriment of the debtor and other creditors, because the debtor has filed bankruptcy."[94]

2. **The "Street Rate."**

The third type of standard to use in making an interest rate determination involves inquiries into three different types of rates: one based upon the creditor's own current borrowing rate; one based on the creditor's current contract rate for loans of the same type, duration and risk; and one based upon a survey of the rates of other local lenders. Faced with these claims, the courts have responded with decisions that have reflected a certain diversity of approach. This suggests that the theoretical bases for making choices in this area are not well developed. The various approaches are discussed below.

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[87] Id., at 1160.
[88] Benford, 14 Bankr. at 159.
[89] See generally, Fisher, 29 Bankr. at 544 - 45.
[90] This would mean, for example, that there is the same collateral, the same risk and the same loan term.
[91] Under this theory, different creditors of the same debtor would be entitled to different contract rates, a result that has been firmly and universally rejected by the courts.
[92] 77 Bankr. 524 (Bankr. E.D. Penn. 1987).
[93] Id., at 527.
[94] Id.

a. **Lenders Borrowing Rate:** Several courts have devised interest rates based on the cost to the lender of obtaining lendable funds.[95] This approach adopts the rate paid by the lender when that lender is acting as a borrower on its own account.[96] The underlying logic of this approach is that the cost to the creditor of not getting paid immediately is the cost of acquiring substitute funds over the interim. This cost can be represented by the creditor's cost of borrowing. This logic might be appealing except for the fact that it only deals with compensating the creditor for the time value of money and ignores all other relevant factors.

The Ninth Circuit appropriately rejected this approach.[97] That court noted that the rate at which a lender can borrow is determined by the credit characteristics of the loan and the lender. There is no reason to suppose that the characteristics of the Chapter 13 creditors will be at all similar to the Chapter 13 debtor.[98] To use this rate, therefore, would be to ignore all of the debtor and plan characteristics that are relevant.[99]

b. **Lender's Current Lending Rate**: The rate at which the creditor would currently make the "loan" proposed in the plan to a similar debtor under identical terms has also been endorsed as an appropriate rate.[100] What recommends this approach is that such a measure would incorporate the particular characteristics of the debtor, while measuring the rate with respect to a creditor with whom the debtor has previously done business. This standard would also avoid the problems of the contract rate in that it is reflective of current market conditions.

Despite its advantages, this rate does not comport with the requirements of an appropriate market rate. When the particular rate charged by a particular institution becomes the standard, the debtor is at the mercy of any and all idiosyncracies in the rate setting of that single creditor. The market only validates rates which have been through the sorting discipline of the market. Not all rates charged by all lenders would be competitive under a broad market test. Yet by tying the debtor to the current rates of a particular lender, any reliance on the validating function of the market has been abandoned. Indeed, adopting the current lending rate not only eliminates the ability of the market to eliminate local manipulation, it affirmatively provides an incentive to creditor manipulation of rates to justify higher rates of return in cramdown situations.

It was for this very reason that the Iowa court rejected this approach in In Re Wolf.[101] The court held that the creditor-specific interest rates[102] were not comparable to the "risks

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[95] See e.g., In Re. Miller, 6 B.C. Dec. 410 (S.D.Ca. 1980); accord, Willis, 6 Bankr. at 555.
[96] Willis, 6 Bankr. at 563; accord, Mitchell, 39 Bankr. at 696.
[97] Welco Industries, 60 Bankr. at 880; accord, In Re. Camino Real Landscape Maint. Contractors, 818 F.2d 1503, 1506 (9th Cir. 1987).
[98] Id., at 883; accord, In Re. Cooper, 11 Bankr. 391, 394 (Bankr. Ga. 1981).
[99] As discussed above, the most important of these are the term of the loan and the risk.
[100] In Re. Cooper, 11 Bankr. 391 (Bank. Ga. 1981); see also, Landmark at Plaza Park, 7 Bankr. at 657 - 58; see also, Comment, "Bankruptcy Reform Act of 1978: Chapter 13 Cramdown of the Secured Creditor," 1981 Wis. L.Rev. 333, 357 - 58 (1981).
[101] 61 Bankr. 1010 (Bank. Iowa 1986).

and terms" of the cramdown case before the court. As with all creditor specific rates, adopting such a standard allows the possibility, and the likelihood, that for the same debtor (or for different debtors with the same risk characteristics) with loans of identical security, term and risk, the rates may vary substantially between loans.[103]

The need to avoid allowing such variation is especially high when market imperfections impair borrower mobility. In the farm belt, the market for funds is stratified both geographically and institutionally. The geographical stratification occurs where there is a reluctance on the part of local lenders to make loans to farmers from outside their self-defined lending area. This tends to funnel local customers to local lenders, insulating the local lending institution from competitive forces and the discipline of the market.

Markets are also stratified institutionally. Farmers eligible for Farmer's Home Administration loans at reduced rates will patronize the FmHA if they are willing to tolerate the loan conditions. Other farmers will borrow from the Production Credit Association rather than local banks when PCA rates are lower. It should be noted, however, that this institutional "competition" is not really competition at all, since many of the rates are set institutionally. This is true not only with respect to the Farm Credit System lenders, but with respect to some chain banks as well.

c. **Local and Regional Lender Rates:** A step away from the non-market end of the spectrum is a standard based on a series of local or regional rates collected from a cross-section of lenders. The Sixth Circuit adopted a regional market rate in Memphis Bank and Trust v. Whitman.[104] The Memphis decision, however, should not be construed to endorse a regional rate as opposed to a rate determined in a larger market. The Sixth Circuit indicated that its preference for the regional market rate was in the context of rejecting "arbitrary" non-market rates and not in the context of rejecting national rates in favor of regional rates.

> The reason we do not use an arbitrary rate is that such a rate may vary widely from the current market rate. The theory of the statute is that the creditor is making a new loan to the debtor in the amount of the current value of the collateral. Under this theory, the most appropriate interest rate is the current market rate for similar loans at the time the new loan is made, not some other arbitrary rate.[105]

The difficulties of the regional market rate are the same as those discussed above. The rates will vary from lender to lender, which is to say they are lender specific and not market rates. The rates are usually only haphazardly, if at all, connected to a rational system for categorizing risk and term. There is no system in the determination of what constitutes the "relevant" area so the definition of "regional market" or "local market"

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[102] The creditor offered testimony on its current contract rates on other loans. 61 Bankr. at 1012.
[103] See, generally, Benford, 14 Bankr. at 160.
[104] 692 F.2d 427 (1982) (Chapter 13). "* * *we hold that in the absence of special circumstances, bankruptcy courts should use the current market rate of interest used for similar loans in the region." 692 F.2d at 431.
[105] Id., at 431.

remains arbitrary. And perhaps most importantly, since the task at hand is to determine the appropriate market interest rate for discounting purposes, and not in order to place a loan, factors affecting the local or small-regional banking industry, but which are not reflected as strongly (or possibly not at all) in a broader market, should not be allowed to influence the rate determination process.

IV. DISCUSSION AND RECOMMENDATIONS.

One bankruptcy decision noted that "[f]ew other issues under the bankruptcy code have produced so many opinions with such varied results as has the issue of the appropriate interest rate for determining present value."[106] Considering the breadth of situations bankruptcy courts address, this conclusion should not be surprising. Several conclusions, however, can be drawn.

First, the Bankruptcy Code dictates that the cramdown discount rate is to address the question of whether the proposed payment stream equals, in present value terms, the current value of the collateral. What is required, therefore, is the choice of an appropriate discount factor to test the deferred payment stream.[107] This is an analytical problem.[108] The discount factor to be used to make this test is a factor produced in a market subject to the most general and vigorous sifting and sorting of market forces. Only in this way will the discount factor with the fewest imperfections be obtained. To complicate the choice, however, there are many discount factors prevailing simultaneously in the market, all of which are differentiated by risk level and term. For cramdown proceedings, therefore, the choice of discount rates should be based on a matching of the risk level and term of the reorganization plan with the corresponding discount rate in the market.

Second, the statute dictates the date on which a discount rate should be determined when it requires present value to be calculated as of the effective date of the plan. There is, in addition, a good deal of case law holding that the "current" market rate is most appropriate. As a result, those rates which do not vary freely with the daily flow of the market, i.e., rates which are "administered", along with all rates that are not based on current market conditions, must be excluded as cramdown options. In addition, statutory rates that are computed on some formula basis rather than being based on current market rates should be rejected; they would produce a rate matching the current market rate only by happenstance.

Third, all of the relevant factors relating to lender characteristics are incorporated into the "supply" part of the "supply and demand" interaction. Individual lender characteristics, or the characteristics of groups of lenders, are included in the process leading up to the

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[106] In Re. Jones, 32 Bankr. 951, 958, n. 12 (Bank. Utah 1983).

[107] In this regard, although the terms have been used interchangeably in this article, a “discount rate” differs from an “interest rate.”

[108] Having come this far, it is necessary now to pause to deal with the distinction between the "discount factor" involved with the cramdown proceeding and an "interest rate." The cramdown present value test is to be used simply in testing the deferred payment plan proposed by the debtor. It is not to provide the creditor a profit, nor is it to compensate the creditor for administration costs or for any of the other elements found in an "interest rate." Testing, in other words, requires the use of a "discount factor."

resultant market clearing rate. For this reason, ex post adjustments to the market determined rate to provide some extra credit to lenders with specific characteristics would thus be inconsistent and illogical. The fact that some individual lenders would have loaned money at a rate lower than market is irrelevant as is the fact that some lenders would only loan at a higher rate. If the market is to mean anything, it is that the rate produced in a broad and vigorous market, subject to all of the tides and eddies of supply and demand, produces a market clearing rate that would universally prevail in all transactions were there no market imperfections. Finally, the decisions have recognized certain fundamental principles in making any discount rate determination. The following policy values appear to have played an important role in the choice of an appropriate rate:

- The rate should be beyond the power of any party to manipulate;
- The rate standard should be sufficiently comprehensive such that major variations in the term of the repayment plan can be reflected in the actual value derived;
- The rate standard should be sufficiently comprehensive such that the general level of risk associated with the debtor's operation can be reflected in the actual value derived;
- The benefits to be derived from obtaining very specific information about debtor risk and security characteristics should be balanced against the problem of finding an authoritative standard by which to value these variations;
- The standard should not include inappropriate cost factors such as profit, collection costs, overhead and the like. And
- The standard should be consistent from case to case.[109]

Finally, the courts have generally held that discount rates should involve fixed rates rather than variable rates.[110]

[109] "We intend to apply the market interest rate for consumer loans across the board, so on any given day on which more than one plan is confirmed the rate will be the same on all secured claims for all debtors. Unlike what could result if we used the rate the individual creditor was charging, the debtor would not be subjected to widely varying* * *interest rates." Benford, 14 Bankr. at 160.

[110] The use of a variable interest rate would contravene the statutory requirement that the present be established "as of the date of the plan." Neal Pharmacal, 789 F.2d at 1286; but see, Fi-Hi Pizza, 40 Bankr. at 271 - 72. In addition, the calculation of a variable interest rate would be administratively difficult. Fisher, 29 Bankr. at 551; Stafford, 24 Bankr. 840.