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***MOMENTIVE* AND THE “EFFICIENT MARKET”: THE CRAMDOWN SAGA CONTINUES**

*By Paul D. Leake and Cameron M. Fee**

INTRODUCTION

The Second Circuit's recent decision in *In re MPM Silicones, L.L.C.*¹ (“*Momentive*”) will likely keep alive one of the more contentious debates in bankruptcy law in recent years. At issue before the court was the appropriate method for calculating the interest rate to apply where a debtor seeks to “cram-down” a class of secured creditors under Bankruptcy Code section 1129(b)(2)(A)(i).² That section allows a debtor to confirm a plan over the dissent of a secured creditor class if each holder receives on account of its claim deferred cash payments having a present value equal to the allowed amount of its claim.³ At the heart of this statutory requirement is the applicable discount rate for determining the present value of such claim. In order to ensure that a secured creditor receives the present value of its secured claim under a plan, the proposed deferred payments must carry an appropriate interest rate. In *Momentive*, the court held that this interest rate must be a market rate if an “efficient market” exists, but if

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¹*Matter of MPM Silicones, L.L.C.*, 874 F.3d 787, Bankr. L. Rep. (CCH) P 83176 (2d Cir. 2017), cert. denied, 2018 WL 1317658 (U.S. 2018) and cert. denied, 2018 WL 1317694 (U.S. 2018).

²All section references herein are to title 11 of Chapter 11 of the United States Code (the “Code”).

³§ 1129(b)(2)(A)(i)(II) (requiring that “each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property”).

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such a market does not exist, then the formula rate should be applied.⁴

At first blush, this standard may seem like a clear victory for the secured creditor community. Faced with the risk of being crammed down with take-back paper at below market interest rates as a result of non-market-based interest rate methodologies certain courts have applied, secured creditors seemingly now have a direct path to obtaining a market rate of interest. Sophisticated financial institutions have a significant financial stake in obtaining such a rate as changes in a cramdown interest rate can amount to a substantial change in recovery for a secured creditor.⁵ As a result of the *Momentive* decision, in the Second Circuit, in order to obtain a market rate of interest, a secured creditor must now demonstrate that an “efficient market” exists. The problem, however, is that *Momentive* offers little guidance in determining whether an efficient market exists in any given circumstance. The court quotes one sentence from another circuit on the topic: “Courts have held that markets for financing are ‘efficient’ where, for example, ‘they offer a loan with a term, size, and collateral comparable to the forced loan contemplated under the cramdown plan’ ”⁶ and concludes that a market is efficient if it “generates an interest rate that is . . . acceptable to sophisticated parties dealing at arms-length.”⁷

This article explores how practitioners might seek to determine whether an efficient market exists under *Momentive*. Part I of this article introduces the basics of Chapter 11 and the mechanics for a debtor to cramdown a

⁴In re MPM, 874 F.3d at 800 (“[T]he market rate should be applied in Chapter 11 cases where there exists an efficient market. But where no efficient market exists for a Chapter 11 debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality.” (quoting *In re American HomePatient, Inc.*, 420 F.3d 559, 568, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005))).

⁵For instance, in *Momentive*, the first-lien noteholders estimated that using a market rate instead of the formula rate applied by the bankruptcy court would result in them receiving \$150 million more in aggregate interest payments. In re MPM, 874 F.3d at 800.

⁶874 F.3d at 800 (quoting *In re Texas Grand Prairie Hotel Realty, L.L.C.*, 710 F.3d 324, 337, 57 Bankr. Ct. Dec. (CRR) 177, Bankr. L. Rep. (CCH) P 82438 (5th Cir. 2013)).

⁷874 F.3d at 801.

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class of secured creditors under section 1129(b)(2)(A)(i). Part II discusses the seminal decision *Till v. SCS Credit Corp.*⁸—a decision upon which *Momentive* relied heavily in adopting its two-pronged approach. As explained in Part III, it was the famous footnote 14 in *Till*, in which the Court stated “when picking a cramdown rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce[,]”⁹ that led the Second Circuit to conclude that the existence of an efficient market determines whether to use a market rate or formula rate in Chapter 11.

Part IV argues that determining what constitutes an “efficient market” should begin with Supreme Court precedent, and accordingly, explores Supreme Court jurisprudence on the efficiency of markets in the context of Rule 10b-5 under the Securities Exchange Act of 1934 (“Rule 10b-5”). Part IV ends with a discussion of a well-known group of factors—the Cammer Factors (as defined below)—developed by lower courts to assess market efficiency under Rule 10b-5.

Part V of this article concludes that the Cammer Factors used to evaluate market efficiency in the context of Rule 10(b)-5 litigation over conduct in public equity markets—even if modified to account for, or apply to, debt markets—should not be applied in bankruptcy. First, the key assumptions of the economic theory underlying the Cammer Factors, the Efficient Capital Market Hypothesis (the “ECM Hypothesis”), do not apply to, and should not be assumed in, the bankruptcy context. Compared to equity markets, the typical market to which the ECM Hypothesis has been applied, distressed debt markets generally in bankruptcy have far fewer participants, little analyst coverage, and less frequent trading. Second, if the relevant market being assessed for efficiency is the even more limited market for exit financing in bankruptcy, applying the Cammer Factors to determine market efficiency is even more problematic: the market for exit financing, by definition, is not a trading market, which is a fundamental premise underlying the Cammer Factors. Part V concludes by positing that *Till* and *Momentive* teach that a Cammer

⁸*Till v. SCS Credit Corp.*, 541 U.S. 465, 124 S. Ct. 1951, 158 L. Ed. 2d 787, 43 Bankr. Ct. Dec. (CRR) 2, 51 Collier Bankr. Cas. 2d (MB) 642, Bankr. L. Rep. (CCH) P 80099 (2004).

⁹*Till*, 541 U.S. at 476 n.14.

Factors-type analysis should not be applied to assess market efficiency in determining the cramdown interest rate under section 1129(b)(2)(A)(i). Indeed, dicta in *Momentive* strongly suggests that obtaining offers from only three exit lenders may be sufficient to show an efficient market exists.

I. CHAPTER 11 CRAMDOWN

The Code provides two paths by which a Chapter 11 plan can be confirmed—consensually or non-consensually—depending on how creditor classes vote. The statutory path to consensual plan confirmation is laid out in the sixteen subsections of section 1129(a). A plan can be confirmed consensually if every one of those subsections is satisfied, including section 1129(a)(8), which requires that each class either accept the plan, or be left unimpaired.¹⁰ If an impaired class does not accept the plan, it can be confirmed non-consensually over the dissent of a non-accepting impaired class. By satisfying all of the section 1129(a) requirements, except section 1129(a)(8), a debtor can confirm a plan non-consensually under section 1129(b) if it “does not discriminate unfairly, and is fair and equitable” with respect to the dissenting class.¹¹ In the lexicon of bankruptcy practitioners, this latter confirmation method is colloquially referred to as “cramdown.”

Section 1129(b)(2)(A) sets forth three ways to satisfy the “fair and equitable” requirement for cramming down a class of secured claims.¹² Among those examples, a plan satisfies the fair and equitable requirement if the secured creditor (i) retains its lien and (ii) receives deferred cash payments having a present value equal to the allowed amount of the secured creditor's claim.¹³ “[A] creditor receives the ‘present value’ of its claim only if the total amount of the deferred payments includes the amount of the underlying claim plus an appropri-

¹⁰ A class of claims accepts a plan if voting holders of such claims vote to accept the plan by at “least two-thirds in [dollar] amount and more than one-half in number [of claims].” § 1126(c).

¹¹ § 1129(b)(1).

¹² § 1129(b)(2)(A)(i)–(iii).

¹³ § 1129(b)(2)(A)(i); see H.R. Rep. No. 95-595, at 414 (1977) (“This [section 1129(b)(2)(A)] contemplates a present value analysis that will discount value to be received in the future.”), reprinted in App. Pt. 4(d)(i). (“The property is to be valued as of the effective date of the plan, thus recognizing the time-value of money.”).

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ate amount of interest to compensate the creditor for the decreased value of the claim caused by the delayed payments.”¹⁴ The central inquiry under this present value calculation is what interest rate (i.e., discount rate) to apply to the debtor's deferred cash payments so that the sum of such payments equals the allowed amount of the secured creditor's claim.

Despite the discount rate playing such a central role under section 1129(b)(2)(A)(i),¹⁵ the Code is silent as to how to determine the appropriate rate. Courts understand that, as a general proposition, the discount rate reflects that a “debtor's promise of future payments is worth less than an immediate payment of the same total amount because the creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays, and there is always some risk of nonpayment.”¹⁶ Accounting for these concerns is a complicated exercise.¹⁷ The only firmly rooted guiding principles for arriving at this rate are at polar extremes: on one end of the spectrum, it is universally agreed that under the fair and equitable requirement a secured creditor is not entitled to receive more than the allowed amount of its claim;¹⁸ and at the other end of the spectrum, a plan does not satisfy the fair and equitable requirement where the deferred cash payments “bears no interest.”¹⁹

These outer limits are not helpful in calculating an interest rate that ensures the present value of the debtor's deferred

¹⁴*Rake v. Wade*, 508 U.S. 464, 472 n.8, 113 S. Ct. 2187, 124 L. Ed. 2d 424, 24 Bankr. Ct. Dec. (CRR) 533, 28 Collier Bankr. Cas. 2d (MB) 983, Bankr. L. Rep. (CCH) P 75275 (1993).

¹⁵See 874 F.3d at 798 (citing *Rake v. Wade*, 508 U.S. at 472 n.8) (“To ensure the creditor receives the full present value of its secured claim, the deferred payments must carry an appropriate rate of interest.”).

¹⁶*Till*, 541 U.S. at 474.

¹⁷See 541 U.S. at 474 (“The challenge for bankruptcy courts reviewing such repayment schemes, therefore, is to choose an interest rate sufficient to compensate the creditor for these concerns.”).

¹⁸E.g., *In re Exide Technologies*, 303 B.R. 48, 61, 42 Bankr. Ct. Dec. (CRR) 108 (Bankr. D. Del. 2003); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 612–18, 38 Bankr. Ct. Dec. (CRR) 112 (Bankr. D. Del. 2001); *In re P.J. Keating Co.*, 168 B.R. 464, 469 (Bankr. D. Mass. 1994).

¹⁹7 Colliers on Bankruptcy ¶ 1129.03[4][a][i][C] (Richard Levin & Henry J Sommer, eds.-in-chief, 16th ed. 2018).

cash payments equals the allowed amount of the secured creditor's claim. Consequently, courts have developed a number of different approaches for determining the discount rate, including the cost of funds rate, coerced loan rate, presumptive contract rate, formula rate, and even a debtor-specific interest rate.²⁰ Further complicating the analysis, such approaches often differ in application depending on the circumstances of the specific case and the location of the proceedings.²¹

In 2004, when *Till* reached the Supreme Court, judicial methodologies for calculating an appropriate cramdown interest rate were all over the map. Indeed, the lower court proceedings in *Till* were emblematic of the state of the law; by the time the *Till* case reached the Supreme Court, the bankruptcy court, district court, court of appeals majority, and dissenting judge had each endorsed a different discount rate approach.²²

II. *TILL*: ANSWERING THE APPROPRIATE CRAMDOWN INTEREST RATE APPROACH IN CHAPTER 13

The issue before the Court in *Till* was the appropriate method for calculating the cramdown interest rate under section 1325(a)(5)(B)(ii).²³ In *Till*, the Chapter 13 debtors had purchased a used truck from Instant Auto Finance for \$6,395.²⁴ The debtors had financed the purchase price by entering into a retail installment contract with Instant Auto Finance at a 21% interest rate, which was immediately assigned to SCS Credit Corporation (“SCS”). SCS retained a

²⁰7 Colliers on Bankruptcy ¶ 1129.05[2][c] [ii] (describing various approaches pre-*Till*).

²¹See Jason A. Pill, *Untill the Footnote Was Written: The Effect of Till v. SCS Credit Corporation on 11 U.S.C.A. § 1129(b)(2)*, 26 Emory Bankr. Dev. J. 267, 274–75 (2010) (remarking that “among the reported cases, one can find authority to support almost any method of calculating the appropriate rate”) (internal quotation marks and citation omitted).

²²*Till*, 541 U.S. at 469.

²³As with Chapter 11, Chapter 13 allows a debtor to provide a secured creditor with deferred cash payments whose total “value, as of the effective date of the plan, . . . is not less than the allowed amount of such claim.” § 1325(a)(5)(B)(ii).

²⁴*Till*, 541 U.S. at 469.

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purchase money security interest in the truck that gave SCS the right to repossess the truck if the debtors defaulted.²⁵ Eventually, the debtors defaulted on this contract, filed for relief under Chapter 13, and sought to cram down SCS.

In a plurality decision, the Court held that the formula rate approach is the appropriate cramdown method in Chapter 13.²⁶ At the outset of its analysis, the Court observed that the Code offers little guidance as to the proper method for calculating this interest rate, but acknowledged that the cramdown interest rate must account for the fact that the “creditor cannot use the money right away, inflation may cause the value of the dollar to decline before the debtor pays” and the risk of nonpayment.²⁷ The Court stated that the bankruptcy court's job is to choose an interest rate that compensates the creditor for these concerns.²⁸

In making this determination, the Court concluded that three considerations should govern. First, the Code includes many provisions that require a court to discount deferred payments to their present value. The Court noted that Congress “likely” intended bankruptcy courts “to follow essentially the same approach” when determining an appropriate “interest rate under any of these provisions.”²⁹ In support of this inference, the Court mentioned, as it did at many places in its decision, that the preferred approach is one that “minimizes the need for expensive evidentiary proceedings.”³⁰

Second, the Court noted that Chapter 13 allows a bankruptcy court to modify the rights of a secured creditor's claim. Under section 1322(b)(2), a court has clear authority to modify the timing, number, or amount of the payments in an install-

²⁵541 U.S. at 470.

²⁶541 U.S. at 478–80. Under the formula rate approach, the bankruptcy court first looks to the daily press to find the current national prime rate. 541 U.S. at 478–80. Next, the court takes this rate and augments it for the greater risk of nonpayment presented by the debtor, resulting in a “prime-plus” rate. 541 U.S. at 479. The appropriate amount of adjustment is to be determined based on evidence presented at the confirmation hearing. 541 U.S. at 479.

²⁷541 U.S. at 474.

²⁸541 U.S. at 474.

²⁹541 U.S. at 474.

³⁰541 U.S. at 474–75.

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ment contract. Indeed, there may be a need to make such changes because of a change in the debtor's circumstances—a debtor that was forced to file for bankruptcy because of its debt burden is now under court supervision with a risk of default that is somewhat reduced.³¹

Third, the cramdown interest rate approach requires an objective rather than subjective inquiry. The Court explained that section 1325(a)(5)(B) does not require that a creditor be “subjectively indifferent between present foreclosure and future payment.”³² By definition, a creditor that is crammed down is forced to accept a loan instead of foreclosing or receiving immediate payment. Instead, the focus should be on treating similarly situated creditors similarly and on an “objective economic analysis” that the debtor's deferred payments “will adequately compensate . . . creditors for the time value of their money and risk of default.”³³

Based on these considerations, the Court adopted the formula approach because it was the only method that best aligned with these considerations and the purposes of the Code.³⁴ The formula approach “entails a straightforward, familiar, and objective inquiry, and minimizes the need for potentially costly additional evidentiary proceedings.”³⁵ In contrast, the coerced loan, presumptive contract rate, and cost of funds approaches violate these considerations because each of them is “complicated, imposes significant evidentiary costs, and aims to make each individual creditor whole rather than to ensure the debtor's payments have the required present value.”³⁶

In the aftermath of *Till*, courts have split over its application in Chapter 11.³⁷ The confusion primarily stems from the decision's internal inconsistencies. In discussing how a credi-

³¹ 541 U.S. at 475.

³² 541 U.S. at 476.

³³ 541 U.S. at 476–77.

³⁴ 541 U.S. at 478–80.

³⁵ 541 U.S. at 479.

³⁶ 541 U.S. at 477.

³⁷ See generally Thomas R. Fawkes & Steven M. Hartmann, Revisiting *Till*: Has a Consensus Emerged in Chapter 11s, *Am. Bankr. Inst. J.*, July/Aug. 2008, at 28, 28–29 (noting that post-*Till* courts inconsistently applied various cramdown interest rate approaches).

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tor subject to cramdown would prefer to foreclose rather than receive future payments, the Court included one of the most written about footnotes in bankruptcy law. In footnote 14, the Court stated, in relevant part:

Because every cramdown loan is imposed by a court [in chapter 13] over the objection of the secured creditor, there is no free market of willing cramdown lenders. Interestingly, the same is *not* true in the Chapter 11 context, as numerous lenders advertise financing for Chapter 11 debtors in possession. *Thus, when picking a cram down rate in a Chapter 11 case, it might make sense to ask what rate an efficient market would produce.* In the Chapter 13 context, by contrast, the absence of any such market obligates courts to look to first principles and ask only what rate will fairly compensate a creditor for its exposure.³⁸

This footnote is difficult to reconcile with the rest of the *Till* decision. The Court concluded that the formula approach applied in the Chapter 13 case before it and stated that Congress “likely” intended courts to “follow essentially the same approach when choosing an appropriate interest rate under any of these [present value] provisions,”³⁹ including section 1129(b)(2)(A)(i)(II). At the same time, footnote 14 suggests incongruently that that a different cramdown interest approach may be better suited in Chapter 11, where an “efficient market” may exist.

Relying on footnote 14, some courts have held that a market rate of interest is required in Chapter 11 if an efficient market exists,⁴⁰ while others have determined that footnote 14 is too slim of a reed on which to require a market-based approach given the rest of the Court's opinion.⁴¹ Recently, in

³⁸*Till*, 541 U.S. at 476 n.14 (emphasis added, in part).

³⁹541 U.S. at 474 (internal citations omitted).

⁴⁰See, e.g., *In re American HomePatient, Inc.*, 420 F.3d 559, 568, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005); *In re Prussia Associates*, 322 B.R. 572, 588–89, 44 Bankr. Ct. Dec. (CRR) 160 (Bankr. E.D. Pa. 2005); *Mercury Capital Corp. v. Milford Connecticut Associates, L.P.*, 354 B.R. 1, 11 (D. Conn. 2006).

⁴¹See, e.g., *In re MPM Silicones, LLC*, 2014 WL 4436335, *28 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015), aff'd in part, rev'd in part and remanded, 874 F.3d 787, Bankr. L. Rep. (CCH) P 83176 (2d Cir. 2017), cert. denied, 2018 WL 1317658 (U.S. 2018) and cert. denied, 2018 WL 1317694 (U.S. 2018) (“I conclude that such a two-step method, generally speaking, misinterprets *Till* and *Valenti* and the purpose of sec-

Momentive, the Second Circuit weighed in on the applicability of *Till* in Chapter 11.

III. *MOMENTIVE*: ANSWERING THE *TILL* SPLIT

Momentive Performance Materials Inc.'s (“MPM”) financial troubles began in 2006 soon after it was acquired in a leveraged buyout.⁴² In the years that followed, MPM became substantially over-levered and ultimately filed for relief under Chapter 11 in April 2014. MPM's plan had three classes of notes: (1) \$1.1 billion of first-lien secured notes and \$250 million of 1.5-lien secured notes (together, the “Senior-Lien Notes”); (2) approximately \$1 billion in springing second-lien notes (the “Second-Lien Notes”); and (3) \$500 million in subordinated unsecured notes (the “Subordinated Notes”).⁴³ Under MPM's plan, the Senior-Lien Notes could choose between (a) accepting the plan and receiving full payment in cash, but without any make-whole claim, and (b) rejecting the plan, preserving their right to litigate the make-whole claim, and “receiving replacement notes with a present value equal to the Allowed amount of such holder's Claim.”⁴⁴ The Senior-Lien Notes overwhelmingly voted to reject the plan, thereby invoking the latter option. Consequently, MPM moved under section 1129(b)(2)(A)(i) to confirm its plan by cramdown of the non-accepting Senior-Lien Notes class.

At confirmation, the Senior-Lien Notes argued that MPM's use of the formula rate to set the discount rate was improper because, among other things, the resulting cramdown interest rate failed to comply with section 1129(b)(2)(A)(i). The Senior-Lien Notes argued that fair and equitable treatment under section 1129(b)(2) required the application of ascertain-

tion 1129(b)(2)(A)(i)(II) of the Code based on the clear guidance of those precedents.”), aff'd, 531 B.R. 321 (S.D.N.Y. 2015), aff'd in part, rev'd in part and remanded sub nom. *Matter of MPM Silicones, L.L.C.*, 874 F.3d 787, Bankr. L. Rep. (CCH) P 83176 (2d Cir. 2017), cert. denied, 2018 WL 1317658 (U.S. 2018) and cert. denied, 2018 WL 1317694 (U.S. 2018); *In re Mirant Corp.*, 334 B.R. 800, 821 (Bankr. N.D. Tex. 2005).

⁴²In re MPM, 874 F.3d at 791.

⁴³874 F.3d at 791–92.

⁴⁴874 F.3d at 792 (alteration in original). In the parlance of bankruptcy practitioners, this sort of option is colloquially referred to as a “death trap.”

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able market rates for similar debt obligations.⁴⁵ The bankruptcy court disagreed, holding that the formula rate was the appropriate cramdown methodology under section 1129(b)(2)(A)(i).⁴⁶ After the district court affirmed the bankruptcy court,⁴⁷ the Subordinated Notes and Senior-Lien Notes appealed.

In a matter of first impression, the issue before the Second Circuit was the appropriate methodology for determining the appropriate interest rate to apply to MPM's deferred payments so that the present value of those payments would equal the allowed amount of the Secured-Lien Notes' claims.⁴⁸ The parties' arguments focused on the interpretation of *Till*. Likewise, the Second Circuit's decision rested on its interpretation of *Till*. Relying heavily on footnote 14 of *Till*, the court held that where an “efficient market exists” that generates an interest rate “acceptable to sophisticated parties dealing at arm's length[,]” that market rate should be used instead of a formula-based rate.⁴⁹ In calculating the appropriate cramdown interest rate, the *Momentive* court adopted the two-step process for selecting an interest rate in a Chapter 11 cramdown under section 1129(b)(2)(A)(i) set forth in the Sixth Circuit decision in *In re American HomePatient, Inc.*⁵⁰ (the “HomePatient Standard”): “The market rate should be applied in Chapter 11 cases, where there exists an efficient market. But where no efficient market exists for a Chapter 11

⁴⁵874 F.3d at 793.

⁴⁶The factual and legal recitation herein is tailored to focus only on the cramdown interest rate issue. The other two principal issues before the bankruptcy court were whether the Subordinated Notes were subordinated to the Second-Lien Notes and whether the Senior-Lien Notes were entitled to a make-whole premium. See *In re MPM Silicones, LLC*, 2014 WL 4436335, at *2–19. The court concluded that the Subordinated Notes were subordinate to the Second-Lien Notes under the applicable indentures and that the Senior-Lien Notes were not entitled to a make-whole premium. 2014 WL 4436335, at *2–19. Both of these conclusions of law were affirmed by the district court and Second Circuit. *In re MPM Silicones, LLC*, 531 B.R. 321, 326–31, 335–38 (S.D.N.Y. 2015), *aff'd*, 874 F.3d at 794–97, 801–05.

⁴⁷*In re MPM Silicones*, 531 B.R. at 324, 338.

⁴⁸*In re MPM*, 874 F.3d at 794, 798–800.

⁴⁹874 F.3d at 801.

⁵⁰*In re American HomePatient, Inc.*, 420 F.3d 559, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005).

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debtor, then the bankruptcy court should employ the formula approach endorsed by the *Till* plurality.’”⁵¹ The Second Circuit briefly discussed why the HomePatient Standard complies with *Till* and the dictates of section 1129(b)(2)(A)(i) and why this approach “‘best aligns with the Code and relevant precedent.’”⁵² The court reasoned that ignoring efficient market rates would depart from long-standing precedent that teaches that “the best way to determine value is exposure to a market.”⁵³ Relying on *Bank of America Nat. Trust and Sav. Ass’n v. 203 North LaSalle Street Partnership*,⁵⁴ the court explained that the Supreme Court expressed “disfavor for decisions untested by competitive choice . . . when some form of market valuation may be available.”⁵⁵

The HomePatient Standard that the Second Circuit adopted in *Momentive* is easy enough to apply in theory: a market rate applies if an efficient market exists; if not, then the formula approach applies. Under this standard, the presence of an efficient market obviously plays a pivotal role. But *Momentive* offers little guidance as to what constitutes an “efficient market,” other than briefly observing that “courts have held” markets are efficient where “they offer a loan with a term, size, and collateral comparable to the forced loan contemplated under the cramdown plan’”⁵⁶ and if they “generate[] an interest rate that is . . . acceptable to sophisticated parties dealing at arms-length.”⁵⁷

⁵¹In re MPM, 874 F.3d at 800 (quoting *In re American HomePatient, Inc.*, 420 F.3d 559, 568, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005)).

⁵²874 F.3d at 800.

⁵³874 F.3d at 800. (quoting *Bank of Am.*, 526 U.S. at 457–58); *U.S. v. 50 Acres of Land*, 469 U.S. 24, 25 n.1, 105 S. Ct. 451, 83 L. Ed. 2d 376, 21 Env’t. Rep. Cas. (BNA) 2105, 15 Env’t. L. Rep. 20117 (1984).

⁵⁴*Bank of America Nat. Trust and Sav. Ass’n v. 203 North LaSalle Street Partnership*, 526 U.S. 434, 119 S. Ct. 1411, 143 L. Ed. 2d 607, 34 Bankr. Ct. Dec. (CRR) 329, 41 Collier Bankr. Cas. 2d (MB) 526, Bankr. L. Rep. (CCH) P 77924 (1999).

⁵⁵In re MPM, 874 F.3d at 800.

⁵⁶874 F.3d at 800. (quoting *In re Tex. Grand Prairie Hotel Realty*, 420 F.3d at 568).

⁵⁷874 F.3d at 801.

IV. “EFFICIENT MARKET”: ANOTHER OPEN QUESTION IN THE CRAMDOWN SAGA

While *Momentive* brings some clarity to the general analytical framework to be applied to determine an appropriate cramdown interest rate, it leaves unanswered a difficult question in the section 1129(b)(2)(A)(i) debate: What constitutes an “efficient market”? Neither *Till* nor *Momentive* offer helpful instruction as to how to answer that critical question. According to *Till*'s footnote 14, the existence of an efficient market distinguishes Chapter 11 from Chapter 13 and may be grounds to apply a different interest rate approach. Understanding what *Till* meant by an “efficient market” should start with an analysis of Supreme Court precedent on the topic.

A. SCOTUS'S Understanding of an “Efficient Market”

The phrase “efficient market” is not foreign to the Court. In the securities law context, the Court has discussed efficient markets generally and the vitality of the ECM Hypothesis⁵⁸ in two principal decisions. In the seminal decision *Basic Inc. v. Levinson*,⁵⁹ the question before the Court was whether a plaintiff asserting a Rule 10b-5 action⁶⁰ is entitled to a presumption of reliance on the theory that, in a non-face-to-face transaction, he relied on the market price of the security

⁵⁸ “[The] ECM Hypothesis [holds] that the prices of securities traded in public capital markets fully reflect all information concerning those securities.” Lawrence A. Cunningham, *From Random Walks to Chaotic Crashes: The Linear Genealogy of the Efficient Capital Market Hypothesis*, 62 *Geo. Wash. L. Rev.* 546, 559 (1994).

⁵⁹ *Basic Inc. v. Levinson*, 485 U.S. 224, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988).

⁶⁰ In order to plead a securities fraud class action under Rule 10b-5, among the elements a plaintiff must prove is reliance. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 131 S. Ct. 1309, 1317, 179 L. Ed. 2d 398, Fed. Sec. L. Rep. (CCH) P 96249, 62 A.L.R. Fed. 2d 737 (2011). The elements of a securities fraud class action are “(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.” 131 S.Ct. at 1317. In general, the reliance element requires that a plaintiff show that a specific misstatement induced the investor's decision to engage in the transaction.

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in determining its actual value.⁶¹ The Court held that a rebuttable presumption of reliance upon misstatements made by a corporation may apply.⁶²

The Court primarily rested this conclusion upon the fraud-on-the-market theory. The foundation of this theory is the ECM Hypothesis.⁶³ The fraud-on-the-market theory “is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business.”⁶⁴ To invoke the fraud-on-the-market's “rebuttable presumption of reliance,” a plaintiff must show, among other things, that the market for a particular stock was “impersonal [and] well-developed.”⁶⁵ (Today, the Court refers to this market as an “efficient market.”)⁶⁶ In support of its adoption of this rebuttable presumption, the Court relied upon “[r]ecent empirical studies [that] have tended to confirm Congress' premise that the market price of shares traded on well-developed markets reflects all publicly available information, and, hence, any material misrepresentations.”⁶⁷

A few years ago, the Court rebuffed a direct attack on the fraud-on-the-market theory espoused in *Basic*. In *Halliburton Co. v. Erica P. John Fund, Inc.*, the defendant, Halliburton, argued that *Basic* should be overruled because, among other

⁶¹Basic, 485 U.S. at 242–45.

⁶²485 U.S. at 242–45.

⁶³485 U.S. at 253 n.4 (White, J., dissenting).

⁶⁴485 U.S. at 242 (internal quotation marks and citation omitted).

⁶⁵485 U.S. at 246.

⁶⁶See *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, 568 U.S. 455, 461–62, 133 S. Ct. 1184, 185 L. Ed. 2d 308, Fed. Sec. L. Rep. (CCH) P 97300, 84 Fed. R. Serv. 3d 1151 (2013) (“In *Basic*, we held that if a market is shown to be efficient, courts may presume that investors who traded securities in that market relied on public, material misrepresentations regarding those securities.”); *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 131 S. Ct. 2179, 2185, 180 L. Ed. 2d 24, Fed. Sec. L. Rep. (CCH) P 96323, 79 Fed. R. Serv. 3d 945 (2011) (“It is common ground, for example, that plaintiffs must demonstrate that the alleged misrepresentations were publicly known (else how would the market take them into account?), that the stock traded in an efficient market, and that the relevant transaction took place ‘between the time the misrepresentations were made and the time the truth was revealed.’”) (internal citation omitted).

⁶⁷Basic, 485 U.S. at 246.

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things, the ECM Hypothesis has been undermined by recent economic theory.⁶⁸ Halliburton asserted that *Basic*'s reliance upon the ECM Hypothesis and “a robust view of market efficiency” is no longer tenable, for “overwhelming empirical evidence now suggests that capital markets are not fundamentally efficient.”⁶⁹ The Court rejected Halliburton's challenge of *Basic*'s reliance on ECM Hypothesis because Halliburton had not refuted the “modest premise underlying the presumption of reliance”⁷⁰ that “public information generally affects stock prices.”⁷¹ “Even though the efficient capital markets hypothesis may have garnered substantial criticism since *Basic*, Halliburton has not identified the kind of fundamental shift in economic theory that could justify overruling a precedent on the ground that it misunderstood, or has since been overtaken by, economic realities.”⁷²

At bottom, the Court supported the central premise underlying ECM Hypothesis that capital markets generally consider most publicly announced material statements about companies.⁷³ However, the Court has not provided a test to determine market efficiency;⁷⁴ consequently, lower courts have had to develop their own standards to assess market efficiency.

B. An “Efficient Market” Under *Basic*'s Progeny

In the aftermath of *Basic*, courts have routinely used the following factors to evaluate whether an efficient equity market exists:

- (1) the average weekly trading volume expressed as a percent-

⁶⁸ *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2408, 189 L. Ed. 2d 339, Fed. Sec. L. Rep. (CCH) P 98003, 88 Fed. R. Serv. 3d 1472 (2014).

⁶⁹ 134 S. Ct. at 2408. (internal quotation marks and citation omitted).

⁷⁰ 134 S. Ct. at 2409.

⁷¹ 134 S. Ct. at 2409.

⁷² 134 S. Ct. at 2409. (internal quotation and citation marks omitted).

⁷³ See *Basic*, 485 U.S. at 246–47; *Halliburton*, 134 S. Ct. at 2410.

⁷⁴ See Carol R. Goforth, *The Efficient Capital Market Hypothesis—an Inadequate Justification for the Fraud-on-the-Market Presumption*, 27 Wake Forest L. Rev. 895, 928–40 (1992) (“The Supreme Court provided very little guidance to lower courts regarding how to determine whether a market is efficient.”).

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age of total outstanding shares; (2) the number of securities analysts following and reporting on the stock; (3) the extent to which market makers and arbitrageurs trade in the stock; (4) the company's eligibility to file SEC registration Form S-3 (as opposed to Form S-1 or S-2); (5) the existence of empirical facts “showing a cause and effect relationship between unexpected corporate events or financial releases and an immediate response in the stock price.”⁷⁵

These factors are commonly known as the Cammer factors (the “Cammer Factors”) after the seminal decision *Cammer v. Bloom*.⁷⁶ “Almost every court to consider” whether a market is efficient under Rule 10b-5 “has adopted the [Cammer Factors].”⁷⁷ None of these factors are dispositive and not all of them may be necessary in assessing whether a market is efficient. Rather, they are “weighed analytically, not merely counted, as each of them represents a distinct facet of market efficiency.”⁷⁸ Unsurprisingly, many of these factors have their roots in the assumptions underlying the ECM Hypothesis.

The Cammer Factors have also been used to determine whether a company's debt is traded in an efficient market.⁷⁹ In this context, courts modify the Cammer Factors to account

⁷⁵*Unger v. Amedisys Inc.*, 401 F.3d 316, 323 (5th Cir. 2005) (citing *Cammer v. Bloom*, 711 F.Supp. at 1286); see, e.g., *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 368 (4th Cir. 2004) (applying the Cammer Factors); *Binder v. Gillespie*, 184 F.3d 1059, 1065 (9th Cir. 1999) (same); *Hayes v. Gross*, 982 F.2d 104, 107 (3d Cir. 1992) (same); *Freeman v. Laventhol & Horwath*, 915 F.2d 193, 198–99 (6th Cir. 1990) (same).

⁷⁶*Cammer v. Bloom*, 711 F. Supp. 1264, Fed. Sec. L. Rep. (CCH) P 95211 (D.N.J. 1989).

⁷⁷*In re Countrywide Fin.*, 273 F.R.D. at 610.

⁷⁸*Unger*, 401 F.3d at 323.

⁷⁹*In re Petrobras Securities*, 862 F.3d 250, 276, Fed. Sec. L. Rep. (CCH) P 99811, 98 Fed. R. Serv. 3d 195 (2d Cir. 2017), petition for certiorari filed (U.S. Nov. 1, 2017) (“A test based on the so-called, Cammer factors, has been routinely applied by district courts considering the efficiency of equity markets, and has also been applied, in modified form, to bond markets with a recognition of the differences between the manner in which debt bonds and equity securities trade.”) (internal quotation marks and citation omitted); *In re Enron Corp. Securities*, 529 F. Supp. 2d 644, 748 (S.D. Tex. 2006), subsequent determination, 236 F.R.D. 313 (S.D. Tex. 2006), rev'd and remanded on other grounds, 482 F.3d 372, Fed. Sec. L. Rep. (CCH) P 94173, 67 Fed. R. Serv. 3d 882 (5th Cir. 2007) (applying modified Cammer Factors to debt securities).

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for the unique attributes of stocks and bonds.⁸⁰ Unlike equity securities, the primary determinants of a debt instrument's price—namely, the risk of default and value of the coupon payments—are the key drivers of value.⁸¹ Generally, corporate bonds have predictable cash flows, fixed upside opportunities, and do not benefit from the issuer's potential upside in the same way as equity instruments. Corporate bonds often trade less frequently than stocks because macroeconomic factors have less of an impact on bond pricing than stock pricing.⁸² The coverage of equities analysts also differs from debt analyst coverage.⁸³ Credit rating agency reports on debt securities “provide less nuanced information than analysts' reports, appear to issue less often than analysts' reports [on equity instruments], and may lag behind the market's knowledge.”⁸⁴ Thus, when applying the Cammer Factors to debt securities, the analysis is conducted “with a view to their distinctive nature and to the kinds of news that would move their market price in contrast to the kind of information that might affect the more volatile stock market, as well as the manner in which that movement would occur.”⁸⁵

⁸⁰See *In re HealthSouth Corp. Securities Litigation*, 261 F.R.D. 616, 635–36 (N.D. Ala. 2009) (“Information that may be material to a stock price, such as the announcement of a dividend, may not be material for a bond investor whose fixed return would not be affected. In contrast, the price of bonds may be affected by general, non-company specific information, such as changes in risk-free interest rates, that would not affect stock prices.”).

⁸¹*In re Countrywide Fin.*, 273 F.R.D. at 610.

⁸²See Michael Hartzmark et. al., *Fraud on the Market: Analysis of the Efficiency of the Corporate Bond Market*, 2011 Colum. Bus. L. Rev. 654, 676 (2011)

⁸³See *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 206 n.12, Fed. Sec. L. Rep. (CCH) P 94878 (2d Cir. 2008) (noting that “there are reasons why a district court may conclude that rating agencies less directly impact the price of bonds in comparison to analysts who follow an equity, directly relate information to buyers, and engage in the act of selling”).

⁸⁴*In re Countrywide Fin. Corp.*, 273 F.R.D. at 610.

⁸⁵*In re Enron Corp. Securities*, 529 F. Supp. 2d 644, 748-50 (S.D. Tex. 2006), subsequent determination, 236 F.R.D. 313 (S.D. Tex. 2006), rev'd and remanded, 482 F.3d 372, Fed. Sec. L. Rep. (CCH) P 94173, 67 Fed. R. Serv. 3d 882 (5th Cir. 2007); see Hartzmark, *supra* note 82, at 712 (“Careful application of bond pricing theory requires adjustments to a Cammer-type examination of turnover and the relative transaction sizes, frequency of trade,

V. CAMMER FACTORS DO NOT PROVIDE A USEFUL ANALOG IN CHAPTER 11

Looking to securities law jurisprudence to assist in determining whether an efficient market exists under *Momentive's* formula for determining an appropriate cramdown interest rate has logical appeal. A substantial body of caselaw exists evaluating market efficiency and applying the Cammer Factors to non-distressed public markets. However, applying the Cammer Factors in the bankruptcy context is problematic for two fundamental issues. First, the relevant markets in bankruptcy that must be assessed for “efficiency”—namely, either the distressed debt markets in bankruptcy generally or the more limited market for issuance of Chapter 11 exit financing—are incompatible with how the Cammer Factors test market efficiency. Second, *Till* and *Momentive* teach that a full-blown Cammer Factors analysis is not the type of analysis that should be employed in determining market efficiency for purposes of calculating the cramdown interest rate under section 1129(b)(2)(A)(i).

A. The Cammer Factors Are Not Designed to Assess Market Efficiency in Bankruptcy

Although some courts have adjusted the Cammer Factors to account for debt securities,⁸⁶ bankruptcy presents a host of unique circumstances that undercut their applicability.⁸⁷ “There are many reasons to believe that markets in the debt of bankruptcy debtors are not efficient markets capable of reflecting all relevant information about a bankruptcy debtor.”⁸⁸ Unlike equity securities, corporate debt is often sold privately because it qualifies for various exemptions under

as well as analyst reporting and cause-and-effect to accommodate the salient differences between bonds and stocks.”).

⁸⁶See *In re Petrobras Sec.*, 862 F.3d at 276 (remarking that the Cammer Factors have been applied, in modified form, to bond markets); *In re Enron Corp. Sec.*, 529 F.Supp.2d at 748–49 (applying modified Cammer Factors to debt securities).

⁸⁷See Thomas S. Green, *An Analysis of the Advantages of Non-Market Based Approaches for Determining Chapter 11 Cramdown Rates: A Legal and Financial Perspective*, 46 *Seton Hall L. Rev.* 1151, 1180–97 (2016) (discussing the panoply of issues that arise with applying the Cammer Factors in bankruptcy).

⁸⁸Bruce A. Markell, *Fair Equivalent and Market Prices: Bankruptcy Cramdown Interest Rates*, 33 *Emory Bankr. Dev. J.* 91, 118 (2016).

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the Securities Act of 1933. As such, that type of debt is not registered with the SEC and can only trade based on applicable SEC rules. Under SEC Rule 144A, unregistered securities can only be bought and sold by “Qualified Institutional Buyers.”⁸⁹ Even if the corporate debt is registered, “the market is primarily composed of institutional traders . . . [and] most [of the] transactions take place over-the-counter, where the potential bond trader cannot observe quotes on a centralized or electronic exchange.”⁹⁰ For trades that are conducted over-the-counter (“OTC”), a buyer must either call one or more dealers for quotes or have access to certain electronic platforms, such as Bloomberg, that list bonds that are being traded by dealers.⁹¹ Bankruptcy then adds a further layer of complexity and opacity because “securities of bankruptcy firms often trade infrequently.”⁹²

The relevant distressed markets in bankruptcy—the distressed debt markets generally or the Chapter 11 exit financing market—do not lend themselves to market efficiency scrutiny and analysis under the ECM Hypothesis based framework. The distressed debt market (as opposed to the corporate debt market more broadly) is not a market known for reflecting all relevant information. There are a limited number of investment professionals, and distressed debt investing represents a narrow segment of the overall bond market. Inefficiencies exist in the trading of distressed securities because, in part, there is a lack of research coverage and

⁸⁹SEC Rule 144A(a) defines a “Qualified Institutional Buyer” as any institution that manages at least \$100 million in securities, including banks, savings and loans institutions, insurance companies, investment companies, employee benefit plans, or an entity owned entirely by qualified investors. Also included are registered broker-dealers owning and investing, on a discretionary basis, \$10 million in securities of non-affiliates. 17 C.F.R. §§ 230, 144A(a)(1) (2018).

⁹⁰Hartzmark, 2011 Colum. Bus. L. Rev. at 668; see *Enron Corp.*, 529 F. Supp. 2d at 748 (“Bonds are usually traded in the over-the-counter market.”).

⁹¹Hartzmark, 2011 Colum. Bus. L. Rev. at 668.

⁹²Stuart C. Gilson, Edith S. Hotchkiss & Richard S. Ruback, *Valuation of Bankrupt Firms*, 13 Rev. Fin. Stud. 43, 43–44 (2000) (internal citations omitted).

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delisting.⁹³ The smaller number of market participants also creates a greater risk of pricing inefficiencies and can enable one or more players to manipulate pricing and the market as a whole.

If the relevant market to be evaluated for efficiency is the market for exit financing coming out of bankruptcy, the Cammer Factors similarly are inapposite. There is no secondary trading in exit financing offers, which creates an obvious issue with applying the Cammer Factors in the exit financing context.⁹⁴ The Cammer Factors look to evaluate whether there is robust and transparent trading in the securities of the issuer (i.e., the debtor) to assess how information about the issuer is impacting the bid and ask price, and more generally, the efficiency of the market in those securities.⁹⁵ There is no such robust public and transparent market in the issuance of exit financing of a particular debtor or even of all debtors in the Chapter 11 universe—every exit financing negotiation and deal is unique to the facts and circumstances of the debtor and the Chapter 11 case.

Indeed, to the point of market efficiency, informational and bargaining asymmetries are particularly acute in bankruptcy. Lenders providing exit financing to a debtor in Chapter 11, often have considerable influence “in setting the loan's terms and may base their pricing models on factors unrelated to the

⁹³See Robert J. Stark, Jack F. Williams & Anders J. Maxwell, Market Evidence, Expert Opinion, and the Adjudicated Value of Distressed Businesses, 68 Bus. Law 1039, 1059–60 (2013).

⁹⁴In re Countrywide Fin., 273 F.R.D. at 610 (“A working model of informational efficiency is necessary to implement Basic. Almost every court to consider the issue has adopted the [Cammer Factors].”); 273 F.R.D. at 611 (“The first four Cammer factors indirectly assess market efficiency by evaluating whether the attributes of the market for that security are conducive to informational efficiency.”); see also In re Petrobras Sec., 862 F.3d at 276 (“The fraud-on-the-market theory rests on the premise that certain well developed markets are efficient processors of public information, meaning that the market price of shares will ‘reflect all publicly available information.’”) (internal citation and quotation marks omitted).

⁹⁵See 5 Alan R. Bromberg & Lewis D. Lowenfels, Bromberg & Lowenfels on Securities Fraud and Commodities Fraud § 7.431 (2d ed. 2004) (“[N]ew issue markets can rarely be efficient when they begin. They are one way [selling] rather than two way [buying and selling] markets. A single price is commonly fixed by the underwriters and issuers, although usually with reference to the prevailing market for similar securities.”).

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loan itself.”⁹⁶ As one prominent commentator noted about the negotiation dynamics in bankruptcy, “[reorganization debt] is typically the subject of litigation and negotiation between and among the relevant parties—with the motives and the offers and counteroffers remaining private. A debtor in possession, for example, may offer or accept an interest rate not because it bears some symbiotic relationship to a market rate, but because it is a compromise for give and take on other issues.”⁹⁷ These highly individualized negotiations have led “most studies [to] just assume a lack of any efficient market given the individualized negotiations that occur in bankruptcy when reaching terms on reorganization debt.”⁹⁸

Collectively, the foregoing issues raise substantial doubts as to whether the Cammer Factors should be applied to answer the market efficiency question in the bankruptcy cramdown context. If these issues by themselves are not enough to dissuade the use of the Cammer Factors in bankruptcy, *Till* and *Momentive* strongly suggest that a more simplified, straightforward approach should be applied.

B. *Till* and *Momentive* Propound a Simplified Approach To, And Limited Definition Of, “Efficient Market”

Upon close scrutiny, *Till* and *Momentive* instruct that a Cammer Factors-type analysis should not be used to determine market efficiency under the HomePatient Standard. *Till* repeatedly emphasized that the formula for determining the appropriate cramdown interest rate should not involve one that is complex, costly, and outside the bankruptcy court's area of expertise. Federal courts have little experience applying the Cammer Factors to debt securities⁹⁹—let alone any familiarity with accounting for the unique characteristics of

⁹⁶Green, *supra* note 87, at 1194.

⁹⁷Markell, 46 Seton Hall L. Rev. at 121.

⁹⁸Markell, 46 Seton Hall L. Rev. at 121.

⁹⁹While courts have applied the Cammer Factors to debt markets with certain adjustments, as a general matter, there is a paucity of caselaw analyzing what constitutes an efficient debt securities market. See *In re Countrywide Fin. Corp.*, 273 F.R.D. at 609 (“Further, experts on both sides agree that the debt securities' presence in this litigation raises reliance concerns not frequently addressed by the courts.”); *In re Enron Corp. Sec.*, 529 F. Supp. 2d at 748 (“[N]o standard at all appears to have been

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bankruptcy, including distressed debt markets.¹⁰⁰ Regardless of how the Cammer Factors could be (or should be) adjusted to apply to the distressed debt markets generally (and to the distressed debt markets in bankruptcy, in particular), that analysis is complicated, often contradictory, expensive for the parties, and requires a substantial evidentiary record.¹⁰¹ This is precisely the sort of analysis that *Till* rejected. The *Till* Court rejected the coerced loan, presumptive contract rate, and cost of fund approaches because, in part, they “were complicated [and] impose[d] significant evidentiary costs.”¹⁰² In rejecting the cost of funds approach, the Court stressed that it imposed a “significant evidentiary burden . . . [because a debtor] must introduce expert testimony about the creditor’s financial condition.”¹⁰³

In contrast, in adopting the formula approach in *Till*, the Court stated that “Congress would favor an approach that is familiar in the financial community and that minimizes the need for expensive evidentiary proceedings.”¹⁰⁴ Many of the factors used to make adjustments to the appropriate interest

established for measuring market efficiency for debt securities. Adding to that difficulty, thus far there is little scholarly literature about, and only a few courts have addressed, market efficiency for bonds.”)

¹⁰⁰In *Basic*, Justice White argued that “[c]onfusion and contradiction are inevitable when traditional legal analysis is replaced with economic theorization by the federal courts.” *Basic*, 485 U.S. at 252 (White, J., dissenting). According to one commentator, time has proven Justice White largely correct because federal courts inconsistently adjudicate market efficiency and come to opposite conclusions on very similar facts. See Geoffrey Christopher Rapp, *Proving Markets Inefficient: The Variability of Federal Court Decisions on Market Efficiency in Cammer v. Bloom and Its Progeny*, 10 *Univ. Miami Bus. L. Rev.* 303, 304–05(2002) (“Expensive experts with complex equations and long computer printouts are highly likely to reach opposite conclusions about market efficiency.”) (internal citation and quotation marks omitted).

¹⁰¹See, e.g., Paul A. Ferrillo et. al., *The “Less Than” Efficient Capital Markets Hypothesis: Requiring More Proof from Plaintiffs in Fraud-on-the-Market Cases*, 78 *St. John’s L. Rev.* 81, 81–83 (2004) (“In the years since the Supreme Court decided *Basic*, courts have struggled with the fraud on the market theory, fashioning their own theories, concepts, and tests to determine when a stock can be found to have traded in an “efficient” market.”); Rapp, *supra* note 100, at 319–20.

¹⁰²*Till*, 541 U.S. at 477.

¹⁰³541 U.S. at 478.

¹⁰⁴541 U.S. at 574.

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rate under the formula approach—such as the debtor's circumstances, the feasibility of the reorganization plan (or risk of nonpayment), and the nature of the security—“fall squarely within the bankruptcy court's area of expertise.”¹⁰⁵ While a bankruptcy court must hold a hearing under the formula rate approach at which evidence about the appropriate risk adjustment may be presented, some of this information would already be included in a debtor's bankruptcy filing and, thus, these parties “may not incur significant additional expense.”¹⁰⁶ In short, the Court concluded that the formula approach was preferable because it involved “a straightforward, familiar, and objective inquiry, and minimize[d] the need for potentially costly additional evidentiary proceedings.”¹⁰⁷

Momentive seems to define “efficient market” differently and substantially more narrowly than has been assumed in the securities law context. In describing what constitutes an efficient market, the court explained that “courts have held that markets for financing are ‘efficient’ where, for example, ‘they offer a loan with a term, size, and collateral comparable to the forced loan contemplated under the cramdown plan’”¹⁰⁸ and concluded that a market is efficient if it “generates an interest rate that is . . . acceptable to sophisticated parties dealing at arms-length.”¹⁰⁹ These definitions are substantially narrower than the robust open and transparent trading markets required by courts in the securities law context.

Moreover, the *Momentive* court observed that it adopted the HomePatient Standard because it “best aligns with the

¹⁰⁵541 U.S. at 479; see 541 U.S. at 477 (noting that an infirmity with the coerced loan approach was outside a bankruptcy court's bailiwick because “evidence about the market for comparable loans similar . . . to the debtors—[is] an inquiry far removed from such courts' usual tasks of evaluating debtors' financial circumstances”).

¹⁰⁶541 U.S. at 479.

¹⁰⁷541 U.S. at 480.

¹⁰⁸In re MPM, 874 F.3d at 800 (quoting In re Tex. Grand, 710 F.3d at 337)

¹⁰⁹874 F.3d at 801 (“[W]here, as here, an efficient market may exist that generates an interest rate that is apparently acceptable to sophisticated parties dealing at arms-length, we conclude, consistent with footnote 14, that such a rate is preferable to a formula improvised by a court.”).

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Code and relevant precedent.”¹¹⁰ Quoting the well-known Supreme Court decision *203 North LaSalle Street Partnership*, the Second Circuit stated that the “ ‘best way to determine value is exposure to a market.’ ”¹¹¹ In *203 North LaSalle Street Partnership*, the Court held that the debtors' prepetition interest holders could not, over the objection of a senior class of impaired creditors, receive ownership in the reorganized debtor without allowing others to compete for that equity.¹¹² Old equity should not be provided an exclusive opportunity “free from competition and without benefit of market valuation.”¹¹³ As for the appropriate form of market testing, the Court intimated that it may be by an opportunity to offer competing plans or a “right to bid for the same interest sought by old equity.”¹¹⁴

Between *Momentive's* more limited definition of an efficient market and its heavy reliance on *203 North LaSalle Street Partnership*, the Second Circuit seems to view the examination of market efficiency differently than it is understood in the securities law context. Although MPM obtained offers from only three exit lenders and did so in a manner that concerned the bankruptcy court,¹¹⁵ the Second Circuit concluded that if the bankruptcy court had credited the expert testimony regarding the exit financing available to the debt-

¹¹⁰ 874 F.3d at 800.

¹¹¹ 874 F.3d at 800 (quoting *203 North LaSalle Street Partnership*, 526 U.S. at 457).

¹¹² *203 North LaSalle Street Partnership*, 526 U.S. at 456–58.

¹¹³ 526 U.S. at 458.

¹¹⁴ 526 U.S. at 458.

¹¹⁵ *In re MPM Silicones, LLC*, 2014 WL 4436335, *27 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015), aff'd in part, rev'd in part and remanded, 874 F.3d 787, Bankr. L. Rep. (CCH) P 83176 (2d Cir. 2017), cert. denied, 2018 WL 1317658 (U.S. 2018) and cert. denied, 2018 WL 1317694 (U.S. 2018) (“In this case, for example, the evidence shows that there were only three available exit lenders to the debtors, who eventually combined on proposed backup takeout facilities while seeking to keep confidential their fees and rate flex provisions.”); 2014 WL 4436335 at *29 (observing that the market process to obtain the backup takeout loans “was relatively opaque and involved only three lenders who ultimately combined to provide the commitments on a semi-confidential basis”).

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ors, it “would have established a market rate.”¹¹⁶ Thus, the Second Circuit implicitly suggested that such facts constitute an efficient market because, under the HomePatient Standard, a market rate only applies if an efficient market exists.

CONCLUSION

The Second Circuit's adoption of the HomePatient Standard to determine an appropriate cramdown interest rate will invariably result in litigation over what constitutes an efficient market. Sound reasons exist for not importing Rule 10b-5 jurisprudence on market efficiency into a calculation of cramdown interest rates under section 1129(b)(2)(A)(i). Dicta in *Till and Momentive* suggests that a more straightforward, uncomplicated, and less expensive approach should be applied. *Momentive* seemingly adopted a market-based approach whereby a market rate of interest should be applied to a cramdown loan based on, and derived from, a debtor obtaining exit financing offers (potentially as few as three) acceptable to sophisticated parties. While *Momentive* may have settled the question concerning the applicable cramdown interest rate methodology in Chapter 11 in the Second Circuit, it left unresolved a critical element of that methodology: what constitutes an “efficient market”? The *Momentive* decision assuredly will not be the last word on the issue.

¹¹⁶In re MPM, 874 F.3d at 801.