Davis Polk

Make-whole enforceability in bankruptcy

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Preface

Few topics generate as much attention and commentary within the restructuring community as the treatment of make-wholes in bankruptcy.

This should come as no surprise. During the past decade, bankruptcy court, district court and circuit court decisions in *Momentive* and *EFH* have revealed stark differences in the ways that judges interpret both contractual and Bankruptcy Code provisions related to make-wholes. Even more recently, decisions in *Ultra Petroleum*, *Hertz* and *Mallinckrodt* have contributed to a growing body of case law that casts doubt on or qualifies the ability of creditors to obtain a recovery on account of make-whole claims under certain circumstances. With appeals pending or subject to stipulated dismissal in each of *Hertz* and *Mallinckrodt* at the time of the publication of this guide, it seems likely that disputes surrounding the enforceability of make-whole claims in bankruptcy will continue to figure prominently in complex chapter 11 cases for the foreseeable future.

The stakes involved in such disputes are often high. Creditors holding debt issued under loan agreements or bond indentures may stand to improve (in some cases, significantly) their recovery in a chapter 11 bankruptcy depending on whether a make-whole claim is allowed or disallowed by the bankruptcy court. In negotiations surrounding out-of-court liability management transactions, the presence or absence of a make-whole provision (and the manner in which it is drafted) in an existing debt document can influence, to varying degrees, the negotiating dynamics and leverage between issuers and borrowers, on the one hand, and creditors, on the other.[1] The language of make-whole provisions in agreements and indentures related to certain new debt issuances, exit financings and bespoke financings in special situations has evolved in parallel with developments in case law.

This guide is designed for a primarily non-lawyer audience. It is intended to be a user-friendly resource that provides an in-depth, yet easy-to-read, overview of the current state of the law on make-wholes in bankruptcy.

The guide begins with a discussion of the purpose of make-wholes and the component parts of a make-whole provision. From there, the guide describes state law (namely, New York law) applicable to make-wholes and then bankruptcy statutory and case law relating to make-wholes. Key takeaway bullets, flow charts and text boxes are included throughout the guide to simplify the analysis, while the appendices to the guide – which include individual case law summaries, a venue table and real-world examples of different formulations of make-whole provisions – and endnotes provide more detailed insights.

Top 10 takeaways

1. In order to be enforceable in bankruptcy, a make-whole provision must meet the requirements of both the Bankruptcy Code and applicable state law.
2. Make-whole provisions in the non-bankruptcy context are generally enforceable under New York law (which governs the vast majority of large-scale issued debt), as long as the premium being paid is proportional to the loss that is being compensated, and where actual damages are difficult to estimate.
3. There is no bright-line test under New York law for what constitutes an impermissibly high make-whole amount.
4. For the purpose of assessing applicability or enforceability of a make-whole in bankruptcy, the key provisions of a make-whole provision are (a) the triggers (the circumstances under which the make-whole is due), (b) the yield formula, (c) the acceleration-related language and (d) acknowledgments or waivers.
5. The Second Circuit and Third Circuit have split over the question of whether make-whole provisions that are payable upon an "optional redemption" are triggered when repayment occurs post-acceleration in bankruptcy. The Third Circuit in *EFH* held that a make-whole provision was triggered in this context, while the Second Circuit in *Momentive* declined to find that such a make-whole provision was triggered. "*Momentive*-proof" contractual language helps to avoid this issue.
6. Even if a make-whole claim is payable pursuant to the terms of the contract and enforceable under state law, the Bankruptcy Code disallows claims for "unmatured interest." Although courts had previously found that make-whole claims are not claims for unmatured interest, recent decisions in *Ultra Petroleum* and *Hertz* have held that make-wholes may be disallowed as claims for unmatured interest.
7. Even if payable pursuant to the terms of the contract and enforceable under state law, the enforceability of make-whole claims arising under secured debt documents is also analyzed under the requirements of section 506(b), which allows post-petition interest and "reasonable" fees, costs or charges on secured claims up to the collateral value.
8. Borrowers or issuers may attempt to avoid or reverse the triggering of a make-whole premium by reinstating the underlying debt in bankruptcy.
9. The solvent-debtor exception has been found to be a basis to allow make-whole claims that might otherwise be disallowable as unmatured interest.
10. A broad interpretation of ipso facto prohibitions under the Bankruptcy Code could be used as a basis to challenge make-whole premiums that trigger and become due automatically upon a bankruptcy filing.

I. Make-wholes generally

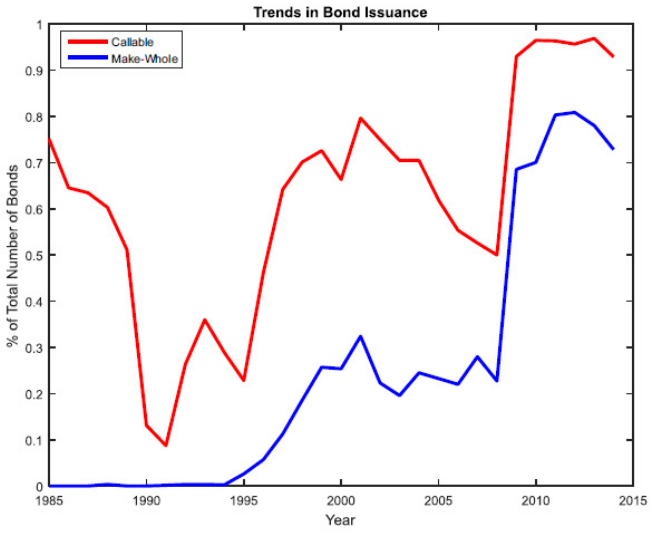
A. Overview

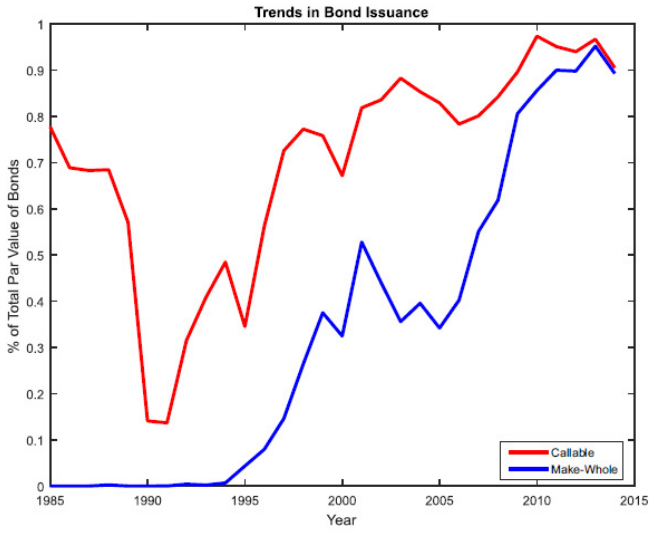
Make-wholes are contractual provisions included in debt documents that provide for a premium to be paid to creditors in the event that the debt is paid before maturity. As a form of "call protection" to protect creditors and place limitations on borrowers from making early prepayments on the debt, make-whole provisions are typically structured (and often during a specified "no-call" period) to permit a borrower to make early prepayments on the debt instrument, so long as creditors are compensated with a prepayment premium.[2]

Debt documents can contain "traditional" call protection provisions, which permit borrowers to repay debt for a fixed premium, usually expressed as a fixed percentage over par and in many cases applicable only to a prepayment within a specific time frame. Alternatively (or in addition to a call protection provision), debt documents can be structured to include a make-whole premium, calculated using a yield maintenance formula based on a present value calculation that discounts the payments that the creditor would have received had the loan remained outstanding through its stated maturity or scheduled call date.[3]

Such provisions (whether in the form of "traditional" call protection or a make-whole) give borrowers the option to call their debts early when they would otherwise not be able to do so (including under New York law).[4] Bonds containing such call options (*i.e.*, callable bonds) were initially popular in the 1980s, and dominated the public bond market at the time. One reason cited for their popularity was that callable bonds provided a way for issuers to hedge against interest rate risk by giving firms the option of refinancing their capital structure at lower, more favorable rates when interest rates fell.[5] While the prevalence of callable bonds declined somewhat in the early 1990s as over-the-counter derivatives became widely available and provided issuers with an alternative mechanism to hedge against interest rate risk (and as interest rates declined from historically high levels), callable bonds have remained a common feature of the bond market and currently represent the predominant form of bond issuances in the United States.[6]

The vast majority of recent callable bond issuances include make-whole provisions. One study surveying bond issuances from 1985 to 2014 found that over 70% of publicly offered U.S. bonds issued in 2014 contained a make-whole provision.[7] Specifically with respect to high-yield bonds, information available through Deal Point Data indicates that approximately 98% of high-yield bond issuances in 2021 included some form of make-whole provision.[8] However, make-whole provisions and their applicability in bankruptcy may vary depending on the type of issuance. Whereas in high-yield issuances, make-whole provisions traditionally do not provide for premiums to be due following a default or bankruptcy, make-whole provisions in bonds issued in insurance company private placements often do.[9]





Figures obtained from Amora Elsaify & Nikolai Roussanov, Why Do Firms Issue Callable Bonds? 1 (U. Penn. Wharton Fac. Rsch. Working Paper, 2016)

The prevalence of make-whole provisions reflects a shifting of interest rate risk by creditors back onto the borrowers, shielding creditors from the risk that borrowers will make repayments in low interest rate environments.[10] A make-whole provision will calculate a premium by discounting remaining payments payable on the debt to present value using a rate based on U.S. Treasury rates plus a specified spread,[11] replicating the tender price of the debt as if such debt had been called on a specified date. Thus, if the debt is called in a high interest rate environment, the applicable discount rate will be higher, reducing (or eliminating) the size of the make-whole amount (and conversely, the make-whole amount would increase if the debt is repaid in a low interest rate environment).

A make-whole provision ensures that creditors receive a minimum return on their investment in the applicable debt instrument, independent of when the debt instrument is repaid. Viewed another way, the make-whole amount compensates the creditor for losses (in the form of opportunity costs) incurred when debt is repaid. For example, when a lender makes a loan to a borrower, it expects that loan to remain outstanding (and accrue interest) throughout the life of that loan until its stated maturity. If the lender's expectations are upset and the loan is terminated early, due to a prepayment by the borrower or a borrower's default, the lender loses the interest income that it relied upon, and will need to redirect its capital to extend credit to other borrowers in the market, which could be in an interest rate environment that is less favorable to the lender relative to when the loan was initially made.[12]

Because a make-whole premium shifts the risk and costs associated with prepayment from the creditor to the borrower, parties can be incentivized to engage in gamesmanship to avoid bearing such risk and costs. For example, borrowers faced with upcoming maturities may look to use bankruptcy, rather than an out-of-court refinancing, as a way to potentially avoid prepayment penalties in their debt documents and refinance such debt at more favorable rates, whereas creditors may seek to call a default and accelerate debt as a borrower approaches insolvency in order to crystallize a make-whole premium even in a high interest rate environment. The body of case law on the enforceability of make-wholes can be explained, in part, as reflective of courts' efforts to police such gamesmanship.[13]

B. Anatomy of a make-whole provision

The key components of make-whole provisions that can influence the determination of whether the provision is applicable or enforceable in bankruptcy can be broken down into the following four categories:

1. **Triggers:** language that identifies the events that will result in the make-whole premium becoming due.
2. **Formula:** the yield maintenance formula that establishes how the premium will be calculated.
3. **Acceleration:** the clause in the debt document that governs what will happen once the debt has been accelerated, which can also address how the make-whole premium will be treated upon acceleration.
4. **Acknowledgments/waivers:** language that parties may include in the debt document to waive certain rights or pre-agree to certain legal treatment of the make-whole provision.[14]

Illustrative examples of these components from one recent make-whole provision are excerpted below. The following sections of this guide will discuss how courts analyze these various components when considering the applicability or enforceability of make-whole provisions in bankruptcy. An informal review by the authors of this guide of the make-whole provisions in the largest high-yield bond issuances in 2021 (involving at least $1.5 billion in amount issued, consisting of 31 issuances total) revealed that only approximately 8% of these make-whole provisions could be characterized as addressing the bankruptcy enforceability issues discussed in this guide to a moderate extent, with the remaining make-whole provisions addressing such issues to a more limited extent (if at all).[15]

Triggers: What events will trigger payment of the make-whole premium?

— **A make-whole provision will specify the types of payments or other events that would trigger the premium. Triggers may be dependent on whether the payment was optional or mandatory, or may be limited to events that occur prior to maturity or some other specified date. Acceleration can also be one of the specified trigger events.** In the following example, the make-whole premium triggers include, among other things, optional or mandatory repayments or prepayments and any accelerations of the loan obligations. The make-whole provision also contains express language that provides that the loans will be treated as if they were repaid or prepaid upon an acceleration.

— **Illustrative language:** "With respect to each ***repayment or prepayment*** [of] Loans [whether ***optional or mandatory*** pursuant to a Change of Control or issuance of Indebtedness], ***any acceleration of the Loans and other Obligations***…any repayment in connection with the 'springing' maturity date set forth in the definition of 'Maturity Date,' or any mandatory assignment of the Loans of any Lender by a Non-Consenting Lender in connection with a Repricing Transaction or any amendment, amendment and restatement or other modification of this Agreement resulting in a Repricing Transaction, the Borrower shall be required to pay with respect to the amount of the Loans repaid, prepaid, assigned or subject to a Repricing Transaction, in each case, concurrently with such repayment, prepayment, assignment or Repricing Transaction, the following amount (the 'Applicable Premium'):

  - (i) if made prior to the third anniversary of the Closing Date, the Make-Whole Amount;

- (ii) if made on or after the third anniversary but prior to the fourth anniversary of the Closing Date, a premium in an amount equal to 6.75% of the amount of the Loans being repaid, prepaid or assigned;
- (iii) if made on or after the fourth anniversary but prior to the fifth anniversary of the Closing Date, 3.375% of the amount of the Loans being repaid, prepaid or assigned; and
- (iv) if made on or after the fifth anniversary of the Closing Date, $0."

— "It is understood and agreed that ***if the Loans are accelerated or otherwise become due prior to their Maturity Date***, including without limitation as a result of any Event of Default described under Section 8.01(f) [Insolvency Proceedings], ***the Applicable Premium will also automatically be due and payable as though the Loans were being repaid, prepaid or assigned*** (or amended or otherwise modified pursuant to such amendment) and shall constitute part of the Obligations with respect to the Loans."

Formula: How is the make-whole premium calculated?

— **A make-whole provision will specify a "formula" used to calculate the premium.** In the following example, if the premium is triggered within the third year of the loan, the "Make-Whole Amount" is calculated to compensate the lenders for the interest payments they would have received had the loan remained outstanding through the third anniversary of the loan.

— The formula is calculated based on the present value of the amount that lenders would have received had the loan remained outstanding through year three, i.e., the present value of (i) principal, (ii) the "traditional" call premium of 6.75% that would be applicable if the loan is called in year three and (iii) remaining unaccrued interest payments up through year three. The treasury + 50 basis point discount rate reflects the rate at which the formula assumes lenders would be able to reinvest loan proceeds. The principal amount is subtracted from the calculation to avoid double-counting, as principal would already be due upon acceleration.

— **Illustrative language:** "'Make-Whole Amount' means, with respect to any Loan repaid or prepaid under [the mandatory or optional redemption provision], any acceleration of the Loans and other Obligations . . . any repayment in connection with the 'springing' maturity date set forth in the definition of 'Maturity Date' or any mandatory assignment of the Loans of a Non-Consenting Lender in connection with a Repricing Transaction or any amendment, amendment and restatement or other modification of this Agreement resulting in a Repricing Transaction, on the date of any such prepayment, repayment, acceleration, assignment, amendment, amendment and restatement or other modification, the greater of:

- (a) 1.0% of the principal amount of the Loan repaid, prepaid, accelerated or assigned or subject to a Repricing Transaction; and
- (b) the excess of: (i) the ***present value*** at such date of repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification of (x) the principal amount of such Loan, plus (y) the Applicable Premium on such Loan on the third anniversary of the Closing Date… plus (z) each required interest payment on such Loan from the date of such repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification ***through the third anniversary of the Closing Date*** (excluding accrued but unpaid interest to the date of such repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification), such present value to be computed using a ***discount rate equal to the Treasury Rate plus 50 basis points*** discounted to the date of repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification on a semi-annual basis… over (ii) the principal amount of such Loans."

Acceleration: Is the make-whole premium payable upon acceleration?

- **A make-whole provision may specify the treatment of the make-whole premium within the acceleration clause.** In the following example, the acceleration provision specifies the make-whole amounts that are due upon acceleration (in addition to principal and interest).
- **Illustrative language:** "If any Event of Default occurs and is continuing, the Administrative Agent shall… declare the unpaid principal amount of all outstanding Loans, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other Loan Document to be immediately due and payable (an "acceleration"), ***which amount shall include the Applicable Premium in effect on the date of such acceleration, as if such acceleration were an optional or mandatory prepayment on the principal amount of Loans accelerated***, whereupon they shall be due and payable without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by the Borrower."

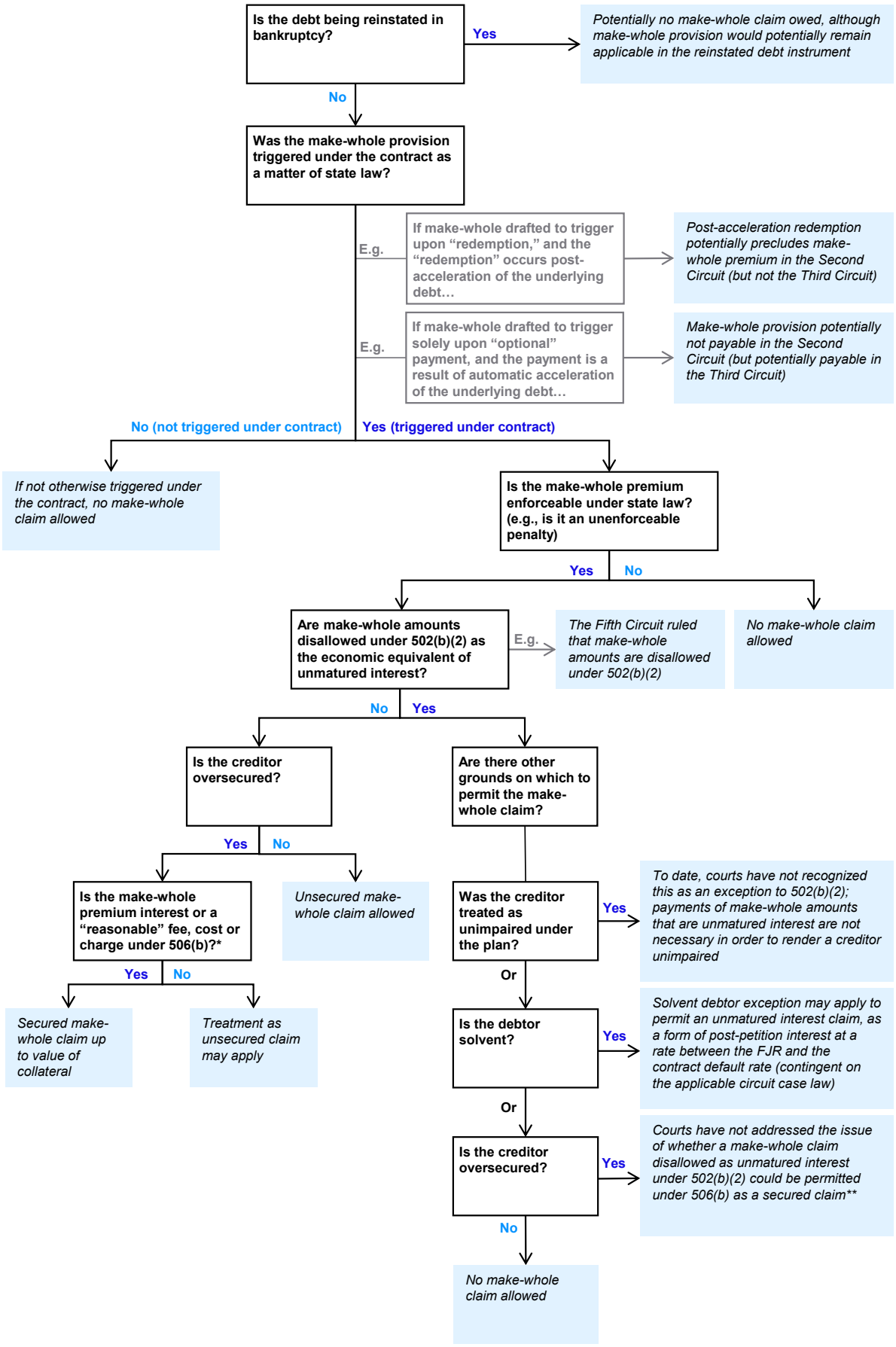
Acknowledgments/waivers: Have the parties pre-agreed to the treatment of the make-whole premium in bankruptcy?

- **Make-whole provisions may include acknowledgment or waiver language that address various issues that courts have examined regarding the enforceability of make-whole provisions**, including, but not limited to, (i) disclaiming any argument that could be made to block the enforceability of the make-whole provision, (ii) providing that the make-whole premium is intended to be a liquidated damages provision rather than a penalty and (iii) an agreement by the parties that such premium is reasonable and shall be paid regardless of the market rates at the time of the payment. The following example illustrates the types of acknowledgments or waivers that borrowers and lenders may agree to. It is unclear what, if any, effect such language may have on a Court's evaluation of the enforceability of a make-whole provision.
- **Illustrative language:** "The Borrower acknowledges and agrees that ***if payment of the Obligations is accelerated*** or the Loans and other Obligations otherwise become due prior to the Maturity Date, in each case, in respect of any Event of Default (including, but not limited to, upon the occurrence of a bankruptcy or insolvency event (including the acceleration of claims by operation of law)), ***the Applicable Premium with respect to an optional or mandatory redemption of the Loans will also be due and payable as though the Loans were redeemed and shall constitute part of the Obligations***,

in view of the impracticability and extreme ***difficulty of ascertaining actual damages*** and by mutual agreement of the parties as to a ***reasonable calculation of each Lender's lost profits*** as a result thereof. Any premium payable above shall be ***presumed to be the liquidated damages*** sustained by each holder as the result of the early redemption and the Borrower agrees that it is reasonable under the circumstances currently existing… THE BORROWER EXPRESSLY WAIVES (TO THE FULLEST EXTENT IT MAY LAWFULLY DO SO) THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION. The Borrower expressly agrees (to the fullest extent it may lawfully do so) that: (A) the premium is reasonable and is the product of an arm's length transaction between sophisticated business people, ably represented by counsel; (B) the premium shall be payable ***notwithstanding the then prevailing market rates*** at the time payment is made; (C) there has been a course of conduct between holders and the Borrower giving specific consideration in this transaction for such agreement to pay the premium; and (D) the Borrower shall be estopped hereafter from claiming differently than as agreed to in this paragraph. The Borrower expressly acknowledges that its agreement to pay the premium to Lenders as herein described is a material inducement to Lenders to make the Loans.

C. Illustrative analytical framework

As discussed in further detail in this guide, courts will evaluate a number of factors when considering the enforceability of a make-whole premium. One way to illustrate the potential factors that could be at issue, and how they may be applied, is depicted on the following page. However, it is important to note that the body of case law on make-whole enforceability is not uniform or settled, and the enforceability of a make-whole is not dependent on one specific fact or contractual provision, and various factual and legal factors can potentially be at issue.



* Section 506(b) may potentially be inapplicable to the analysis if section 506(b) is viewed as applying only to postpetition claims.
** Assuming that section 506(b) is viewed as applying to prepetition claims.

II. Enforceability of make-wholes

A. Enforceability of make-whole formulas outside of bankruptcy

— **Key takeaway:** Make-whole provisions are generally enforceable under New York law.

— **Key takeaway:** New York courts will consider whether (1) the "formula" used to calculate the make-whole amount is proportional to the creditor's loss resulting from repayment and (2) the creditor's actual damages were difficult to estimate.

One threshold question courts must address is whether a make-whole provision is enforceable as a matter of state law, which is an inquiry that focuses on the reasonableness of the "formula" that is used to calculate the make-whole amount. In chapter 11, make-whole amounts constitute claims against the bankruptcy estate, and "the basic federal rule in bankruptcy is that state law governs the substance of claims."[16] Because the vast majority of corporate financings designate New York law as governing, in this section we will focus on the enforceability of make-whole premiums under New York law.

As a general matter, make-whole provisions are enforceable under New York law. "Freedom of contract" is the guiding principle in New York.[17] Thus, contracts negotiated at arm's length among sophisticated parties are generally enforced according to their terms.[18] Because of their similarity to liquidated damages provisions, make-whole premiums payable upon breach are analyzed by New York courts under the standard governing liquidated damages provisions.[19]

New York common law mandates that a liquidated damages provision be enforced so long as it does not constitute a penalty.[20] Therefore, a make-whole will be sustained if (1) the make-whole calculation bears a reasonable proportion to the probable loss and (2) the amount of actual loss is incapable or difficult of precise estimation.[21] Courts examine such terms from the perspective of the parties as of the time they entered into the contract, not the time of breach.[22] Therefore, whether a make-whole calculation approximates the actual damages suffered by a creditor is arguably inapposite.[23] Moreover, although, as noted above, make-whole provisions can contain acknowledgment or waiver language whereby parties expressly agree in writing as to the reasonableness of a make-whole amount or the difficulty of estimating damages, the authors have identified no case law indicating whether such language will influence a court's analysis, and courts may well examine the make-whole provision without giving weight to such language.[24]

In assessing the first element – proportionality – courts look to whether a make-whole is calculated to provide for the probable loss that will be incurred by the nonbreaching party in the event of prepayment, *i.e.*, whether the premium was drafted with the creditor's bargained-for yield in mind, taking into account the opportunity for reinvestment.[25] As a general matter, make-whole provisions incorporating a reasonable discount rate, such as the yield of U.S. Treasury bonds of comparable maturity, have been found to satisfy this element,[26] whereas premiums that fail to discount to present value, do not account for market rates of interest or amount to an unreasonable percentage of principal have been deemed unenforceable.[27] Courts have

not quantified a threshold at which a prepayment premium will be considered unenforceable, and the size of prepayment premiums that courts have found enforceable under New York law has varied widely.[28]

Creditors have a strong argument with respect to the second element – whether the probable losses due to prepayment were capable of precise estimation at the time of contracting – as numerous uncertainties inhere in debt documents involving large sums of money. Courts have noted that those variables include the duration and risk profile of the subject loan, the rates of return available upon reinvestment and the realizable value of collateral securing the loan, among others.[29]

In sum, make-whole provisions are generally enforceable under New York law. Notably, the authors are aware of only one recent case, *MarketXT*, that has held a prepayment premium to be unenforceable on New York law grounds. In that case, the prepayment premium was structured to require the borrower to pay an "enormous" penalty in the amount of 76% of principal, and was payable pursuant to a bespoke instrument that the court ultimately found to be a fraudulent transfer, because the creditors had not actually "loaned" their own funds to the debtors.[30] As long as the terms are drafted *ex ante* to approximate a creditor's likely loss in the event of prepayment, courts appear wary of interfering with parties' freedom to provide for such a remedy.[31]

B. *Momentive* and *EFH*: Limitations on events that trigger make-whole premiums

- **Key takeaway:** In *Momentive*, the Second Circuit interpreted the word "redemption" to refer to prepayments (which can only be made pre-maturity), and concluded that a post-acceleration (*i.e.*, post-maturity) payment by the borrower could not be a redemption that triggered the premium.
- **Key takeaway:** In *EFH*, the Third Circuit interpreted the term "redemption" more broadly to cover both pre- and post-maturity payments, and concluded that a post-acceleration payment by the borrower could constitute a payment that triggered the premium.
- **Key takeaway:** In *Momentive*, the Second Circuit concluded that a payment made by a borrower as a result of an automatic acceleration was not an "optional" payment that could trigger the optional redemption premium.
- **Key takeaway:** In *EFH*, the Third Circuit concluded that a payment made by a borrower, even if made as a result of an automatic acceleration, was still an "optional" payment that could trigger the optional redemption premium.
- **Key takeaway:** Following the *Momentive* decision, bankruptcy courts have found that make-whole provisions were triggered where the applicable language was designed to address the interpretive issues raised by the court in that case.

Bankruptcy courts interpreting the meaning of make-whole language in debt documents look extremely closely at the text of the governing document, and courts have differed, based on the drafting of the applicable language, as to whether make-whole provisions were or were not triggered. Two high-profile cases in the Second (*Momentive*) and Third (*EFH*) Circuits have affected market practice in how market participants draft make-whole language to address the issues raised by these two cases.[32]

Pre-Momentive and *pre-EFH jurisprudence*

Prior to the Second and Third Circuit decisions in *Momentive* and *EFH*, case law on the issue of when prepayment premiums can be triggered, and whether acceleration precludes prepayment premiums from being triggered, had been characterized as "murky" and "complex."[33]

The Seventh Circuit in *LHD Realty* examined the applicability of a prepayment provision where, following the debtor's sale of property in bankruptcy, a creditor sought relief from the automatic stay to foreclose on its note against the debtor in order to enforce its claim to such sale proceeds (which the Seventh Circuit deemed to be an exercise by the creditor of its option to accelerate).[34] The Seventh Circuit reasoned that acceleration advances the maturity date of the debt, so a payment made post-acceleration using the proceeds of the sale could not be characterized as a "prepayment" that would trigger the premium.[35] Moreover, the Seventh Circuit held that the creditor, by choosing to accelerate the debt, established that it preferred the accelerated payment over the opportunity to earn interest over a period of years.[36] As such, and because a prepayment premium serves as "insurance against a decline in interest rates," the Seventh Circuit observed that a prepayment premium would not be "appropriate" in a circumstance in which the creditor voluntarily waived the unpaid interest in exchange for accelerated payment of principal, and that if a creditor wishes to preserve its right to a premium, it should forbear from exercising its acceleration option and should await the debtor's decision to repay the loan.[37]

However, *LHD Realty* acknowledged that acceleration does not always preclude a prepayment premium from being triggered, and that parties may contractually agree to a different result.[38] For example, parties can include triggers within the make-whole provisions to provide that payment of accelerated obligations "shall be deemed to be a voluntary prepayment,"[39] or may include express language in the acceleration provision that the prepayment premium shall be due upon acceleration,[40] and courts have found such prepayment premiums to be due as a matter of contract.

However, if a prepayment provision is drafted to be contingent upon a prepayment (rather than coming due automatically, or providing that a prepayment is deemed to have occurred upon acceleration), courts may require the payment to have actually occurred in order for the prepayment provision to apply.[41]

In re South Side House, LLC, 451 B.R. 248 (Bankr. E.D.N.Y. 2011)

The outcome in *South Side* is an example of how a court's determination of whether a make-whole premium is payable or not can depend on the occurrence or nonoccurrence of an actual payment. The Bankruptcy Court in the Eastern District of New York in *South Side* declined to find a prepayment provision to be triggered where prepayment did not actually occur:

Case study

South Side House LLC promissory note (2007)

Yield Maintenance

"[A]t ***any time after the date which is two (2) years*** from the first Monthly Payment Date, Borrower may… ***prepay*** the unpaid principal balance of this Note in whole, but not in part, by paying, together with the amount to be prepaid… ***an amount equal to the interest that would have accrued on the amount being prepaid after the date of prepayment*** through and including the last day of the Interest Period in which the prepayment occurs had the prepayment not been made (which amount shall constitute additional consideration for the prepayment), notwithstanding that such Interest Period extends beyond the date of prepayment, and… a prepayment consideration… equal to the greater of (i) one percent (1%) of the principal balance of this Note being prepaid and (ii) the ***Yield Maintenance Premium***…

'**Yield Maintenance Premium**' means an amount equal to the excess of (i) the sum of the present values of a series of payments payable at the times and in the amounts equal to the payments of principal and interest (including, but not limited to the principal and interest payable on the Maturity Date) which would have been scheduled to be payable after the date of such tender under this Note had this Note not been prepaid, with each such payment discounted to its present value at the date of such tender at the rate which when compounded monthly is equivalent to the Prepayment Rate (as hereinafter defined), over (ii) the then principal amount of this Note."

Acceleration

"The [Debt] shall without notice become immediately due and payable at the option of Lender if any payment required in this Note is not paid on or before the date the same is due or on the Maturity Date or on the happening of any other default…"

Because (i) the acceleration clause here was silent as to whether the prepayment premium would be due upon acceleration and (ii) the prepayment provision only applies if the borrower "prepay[s]" the note, the Bankruptcy Court for the Eastern District of New York held that the prepayment premium was not triggered where creditors had accelerated the notes and the borrowers had not attempted to make a prepayment on the notes post-acceleration.

Note also that the prepayment provision here applies "any time after" the first two years of the note (which could include post-acceleration periods), rather than applying prior to a specified maturity date. However, the applicability of the prepayment provision is arguably limited to pre-acceleration periods by the use of the language "prepay." As the Bankruptcy Court noted, absent express language to the contrary, courts have held that a repayment following acceleration of the maturity of a loan cannot be characterized as a "prepayment" of the obligation before it is due.

South Side House LLC mortgage (2007)

Prepayment

"Following an Event of Default and acceleration of the Debt, if Borrower or anyone on Borrower's behalf ***makes a tender of payment of the amount necessary to satisfy the Debt*** at any time prior to foreclosure sale… (i) ***the tender of payment shall constitute an evasion of Borrower's obligation to pay any prepayment consideration or premium due under the Note*** and such payment shall, therefore, to the maximum extent permitted by law, include a premium equal to the prepayment consideration or premium that would have been payable on the date of such tender had the Debt not been so accelerated, or (ii) if at the time of such tender a prepayment would have been prohibited under the Note had the Debt not been so accelerated, the tender of payment shall constitute an evasion of such prepayment prohibition and shall, therefore, to the maximum extent permitted by law, include an amount equal to the greater of (i) 3% of the then principal amount of the Note and (ii) an amount equal to the excess of (A) the sum of the present values of a series of payments payable at the times and in the amounts equal to the payments of principal and interest (including, but not limited to the principal and interest payable on the Maturity Date (as defined in the Note)) which would have been scheduled to be payable after the date of such tender under the Note had the Debt not been accelerated, with each such payment discounted to its present value at the date of such tender at the rate which when compounded monthly is equivalent to the Prepayment Rate (as defined in the Note), over (B) the then principal amount of the Note."

Unlike the language contained in the South Side House LLC promissory note discussed above, the prepayment provision in the mortgage seeks to bypass arguments that acceleration cuts off the applicability of the prepayment premium.

The Bankruptcy Court for the Eastern District of New York found, however, that this "fail-safe" language did not apply, because the borrowers had not fully prepaid the mortgage, and intended, pursuant to their plan of reorganization, to reinstate the loan.

In contrast to *LHD Realty*, the Second Circuit in *Sharon Steel* addressed a situation in which, rather than the creditor electing acceleration and forcing repayment, the debtor had voluntarily initiated liquidation proceedings, and observed that when it is the debtor that causes acceleration by its voluntary actions, such acceleration can trigger the redemption premium, because the "purpose of a redemption premium is to put a price upon the voluntary satisfaction of a debt before the date of maturity."[42]

Courts have found the distinction between a prepayment resulting from "voluntary" or "involuntary" actions to be relevant in analyzing whether or not a prepayment premium is triggered, which may be driven by an acknowledgment that market participants may attempt to use acceleration or bankruptcy as a way to collect or avoid premiums. The Seventh Circuit viewed the prepayment in *LHD Realty* as "involuntary" (and not triggering the premium) because acceleration was forced upon the debtors by the creditors in that case,[43] while the "voluntary" prepayment in *Sharon Steel* (caused by the debtor's liquidation of substantially all its assets) resulted in the Second Circuit's finding that the prepayment premium was triggered.[44] Similarly, a court may find optional prepayment premiums to be triggered when a debtor voluntarily elects to breach other covenants in the underlying debt document.[45] And further expanding upon this voluntary/involuntary distinction, some courts have also noted that the automatic acceleration of debt upon the filing of bankruptcy is an "involuntary" action, and have held that automatic acceleration is not the kind of acceleration that eliminates the right to a prepayment premium, so long as the prepayment premium clause is "properly drawn."[46]

Momentive and *EFH*

Make-whole jurisprudence took a leap forward, and drew the attention of market participants, when the Third Circuit and the Second Circuit ruled in *EFH* and *Momentive*, respectively. The two circuits split on the question of whether acceleration triggers payment of make-whole premiums where payment is due only upon optional redemption, and when post-acceleration redemptions could be considered "voluntary." In 2016, the Third Circuit in *EFH*[47] held that noteholders were entitled to an optional redemption premium as a result of the repayment of their notes in a bankruptcy proceeding, whereas in 2017, the Second Circuit in *Momentive*[48] held that noteholders were not.

Both *EFH* and *Momentive* involved customary optional redemption and acceleration provisions governed by New York law. In *EFH*, first-lien secured notes due 2020 and two series of second-lien secured notes due 2021 and 2022 were at issue, with optional redemption provisions providing for the payment of a make-whole premium for any redemption of the first-lien notes before December 2015, and for the second-lien notes, before May 2016 and March 2017. The *EFH* debtors filed for bankruptcy in 2014, resulting in the automatic acceleration of all of the notes, and in bankruptcy repaid and refinanced the first-lien notes in 2014, and a portion of the second-lien notes in 2015.[49] Similarly, the secured notes that were at issue in *Momentive* contained an optional redemption provision providing for the payment of a premium for redemptions prior to October 2015. The debtors in *Momentive* filed for bankruptcy and repaid the secured notes (through replacement notes) in 2014.[50] The relevant provisions from the applicable indentures discussed in *Momentive* and *EFH* are set forth in the next table.

	***EFH* (First-lien notes)**	***EFH* (Second-lien notes)**	***Momentive***
Optional redemption	"At any time prior to December 1, 2015, the Issuer ***may redeem*** all or part of the Notes at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest to, the date of redemption…" "'**Applicable Premium**' means, with respect to any Note on any Redemption Date, the greater of: (1) 1.0% of the principal amount of such Note; and (2) The excess, if any, of (a) the present value at such Redemption Date of (i) the redemption price of such Note at December 1, 2015… plus (ii) all required interest payments due on such Note through December 1, 2015 (excluding accrued but unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate as of such Redemption Date plus 50 basis points; over (b) the principal amount of such Note."	"At any time prior to May 15, 2016 (in the case of the 2021 Second Lien Notes) or March 1, 2017 (in the case of the 2022 Second Lien Notes), the Issuer ***may redeem*** each series of Notes, in whole or in part, at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest (including Additional Interest, if any) to, the applicable date of redemption…" "'**Applicable Premium**' means, with respect to any Note on any Redemption Date, the greater of: (1) 1.0% of the principal amount of such Note; and (2) The excess, if any, of (a) the present value at such Redemption Date of (i) the redemption price of such Note at May 15, 2016 . . . plus (ii) all required interest payments due on such Note through May 15, 2016 (excluding accrued and unpaid interest, if any, to the Redemption Date), computed using a discount rate equal to the Treasury Rate as of such Redemption Date plus 50 basis points; over (b) the principal amount of such Note."	"In addition, prior to October 15, 2015, the Issuer may ***redeem the Notes at its option***, in whole at any time or in part from time to time… at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest and Additional Interest, if any, to, the applicable redemption date…" "'**Applicable Premium**' means, with respect to any Note on any applicable redemption date, the greater of: (1) 1% of the then outstanding principal amount of such Note; and (2) the excess of: (a) the present value at such redemption date of (i) the redemption price of such Note, at October 15, 2015 (such redemption price being set forth in paragraph 5 of the applicable Note) plus (ii) all required interest payments due on such Note through October 15, 2015 (excluding accrued but unpaid interest), computed using a discount rate equal to the Treasury Rate as of such redemption date plus 50 basis points; over (b) the then outstanding principal amount of such Note."
Acceleration	"In the case of an Event of Default [upon the filing of a bankruptcy petition], all outstanding Notes shall be due and payable immediately without further action or notice…"	"[I]n the case of an Event of Default [upon the filing of a bankruptcy petition], all principal of ***and premium, if any***, interest (including Additional Interest, if any) and any other monetary obligations on the outstanding Notes shall be due and payable immediately without further action or notice…"	"If an Event of Default [with respect to the filing of a bankruptcy petition] occurs, the principal of, ***premium, if any***, and interest on all the Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders…"

The Third Circuit in *EFH* considered the meaning of "redeem" as used in the optional redemption provisions, and concluded that redemptions had occurred, even though the debtors refinanced the notes after the automatic bankruptcy acceleration. This reversed the decisions of lower courts, which had held that no redemptions had occurred because acceleration brought forward the maturity date and a "redemption" by definition was a repayment *prior* to maturity. The Third Circuit instead found that New York and federal courts deemed redemption to include both pre- and post-maturity repayments of debt, examining cases outside of the make-whole context where courts arguably suggested that debt could be "redeemed" after it had matured.[51]

By contrast, the Second Circuit in *Momentive* found that the term "redemption" generally refers only to pre-maturity repayments of debt (and the noteholders in that case conceded that the plain meaning of the "redemption" applied to repayments *at or before* maturity, which the Second Circuit noted does not cover repayments *after* maturity). Relying on its prior decision in *AMR*,[52] the Second Circuit also held that since acceleration of debt moves the maturity of that debt to the acceleration date, and since issuance of the replacement notes occurred post-acceleration, the issuance of the replacement notes by definition could not be a prepayment. As a result, the Second Circuit concluded that the transaction was not a redemption for purposes of the optional redemption clause in the indenture.[53]

Even when the make-whole provisions in *EFH* and *Momentive* were both drafted to trigger upon a "redemption," the two courts differed on whether such a redemption could occur post-maturity.

The debtors in *EFH* argued that the repayment of the notes was not optional, because the automatic acceleration provisions made the notes due and payable once the debtors were in bankruptcy. The Third Circuit concluded that despite the automatic nature of acceleration under the indentures, the note repayments were voluntary, particularly because the noteholders had sought to rescind the acceleration and did not want to be repaid, but the debtors had done so over the noteholders' objection.[54] Moreover, the Third Circuit noted that the debtors had the option to reinstate the accelerated notes' original maturity date, rather than pay them off immediately, but chose not to do so.[55]

The Second Circuit arrived at the opposite conclusion in *Momentive*, noting that the repayment of the notes was not at the debtors' option, because "the obligation to issue the replacement notes came about automatically by operation of [the automatic acceleration clauses]," and that a "payment made mandatory by operation of an automatic acceleration clause is not one made at [the debtors'] option."[56] Therefore, the Second Circuit concluded that, even assuming the repayment of the notes was a "redemption," such redemption would not trigger the optional redemption provisions because it was not a voluntary decision made by the debtors.[57]

Because the make-whole provisions in *EFH* and *Momentive* did not specify when a redemption would be at the debtors' option, the two courts differently interpreted the circumstances in which the redemptions occurred, *i.e.*, following an automatic acceleration.

The Third Circuit also considered the optional redemption provisions and the automatic acceleration provisions of the indentures to operate independently, and declined to adopt the Delaware Bankruptcy Court's holding that an acceleration provision must contain express language mandating a redemption premium upon acceleration in order for such premium to be payable post-acceleration. Thus, the Third Circuit did not find any textual basis in the acceleration provision for the first-lien notes, which were silent as to whether the premium was due and payable on acceleration, that would negate the premium required under the separate optional redemption provision (and the express reference to the "premium, if any" in the acceleration provision for the second-lien notes would not have been necessary for the make-whole to be payable, under the Third Circuit's analysis).

The acceleration provision did not prevent the optional redemption premium from being payable in *EFH*, but the provision's silence as to whether a premium was due and payable upon acceleration left room open for interpretation.

The acceleration provision in *Momentive* did contain an express reference to a "premium, if any" being payable upon acceleration. However, because under the Second Circuit's analysis the premium was not triggered under the more specific optional redemption provision pursuant to its own terms, the reference to "if any" in the acceleration provision weakened the argument that the provision provided a separate basis for the premium to be payable.

Post-Momentive and *post-EFH* jurisprudence

Despite the potential issues that can arise in applying *Momentive*, one bankruptcy court in the Second Circuit has subsequently reviewed a make-whole provision to determine that, by its terms, the make-whole provision avoided such "*Momentive* issues" altogether. In *1141 Realty*, make-whole provisions provided that any "payment" (rather than only a "prepayment") made post-default would be "deemed a voluntary prepayment" triggering the make-whole premium.[58] The *1141 Realty* court noted that due to this language, acceleration (and its effect on the "voluntary" nature of payments or on the maturity date) did not impact the make-whole analysis, because the terms of the contract did not cabin the make-whole premium to "prepayments" (or "redemptions," as in the case of *Momentive*).[59]

Make-whole provisions	Discussion
1141 Realty Owner LLC loan agreement (2015)	
Prepayments "If, ***following an Event of Default*** which occurs prior to Free Window date, ***payment of all or any part of the Debt*** is tendered by Borrower or otherwise recovered by Lender, such tender or recovery ***shall be deemed a voluntary payment*** by Borrower in violation of the prohibition against prepayment set forth in Section 2.3.1 and Borrower shall pay, in addition to the Debt, an amount equal to ***the Yield Maintenance Default Premium***." "'**Yield Maintenance Default Premium**' shall mean an amount equal to the greater of: (i) three percent (3%) of the principal amount of the Loan being repaid and (ii) the excess, if any, of (a) the present value (determined using a discount rate equal to the Treasury Rate at such time) of all scheduled payments of principal and interest payable in respect of the principal amount of the Loan being repaid provided that the Note shall be deemed, for purposes of this definition, to be due and payable on the Free Window Date, over (b) the principal amount of the Loan being repaid."	The Bankruptcy Court for the Southern District of New York held that because the prepayment premium here applied upon any "payment" of the debt following an event of default, the prepayment provision was due, even if the applicable payment was made post-acceleration (*i.e.*, post-maturity).[60]

Similarly, a bankruptcy court in the Fifth Circuit also found a prepayment premium to be owed where the make-whole provision (governed under Texas law) provided that any post-default or post-acceleration payment of debt would be deemed to trigger the premium.[61] Where such "*Momentive* proof" language was lacking, at least one bankruptcy court in another circuit applied *Momentive*'s reasoning to hold that an involuntary prepayment caused by acceleration precludes the payment of a make-whole premium.[62]

Continuing the line of reasoning in *EFH*, the Bankruptcy Court in the District of Delaware in *Hertz I* determined that a voluntary redemption premium on notes due in 2026 and 2028 at issue in that case were potentially payable pursuant to the terms of the applicable indenture. The *Hertz I* court disagreed with arguments that the premium was not triggered because the debtors' post-acceleration redemption of the notes was involuntary, instead finding that the redemption was voluntary because redemption was an option the debtors selected among the alternatives that were available to them in bankruptcy (including reinstatement of the notes).[63]

However, the *Hertz I* court held that a voluntary prepayment premium on notes due in 2022 and 2024 was not owed, because the prepayment provisions were not triggered under the terms of the applicable indenture. Notably, the *Hertz I* court's conclusion was not based on the definition of a "redemption" (and whether that meant the same thing as a "prepayment") or on when a redemption is "voluntary" – *i.e.*, the issues addressed in *Momentive* and *EFH*. Rather, the *Hertz I* court observed that the redemption provision for the notes due in 2022 and 2024 was drafted to apply only to redemptions made prior to "maturity," while the redemption provision for the notes due in 2026 and 2028 was drafted to apply to redemptions prior to a specified, fixed date (that had not yet passed at the time of redemption).[64] The court interpreted the use of the undefined term "maturity" with respect to the 2022 and 2024 notes to refer to the "common meaning of maturity," which includes maturity upon the acceleration caused by a bankruptcy filing, and thus found that a redemption made post-acceleration could not trigger the redemption premium under the 2022 and 2024 notes.[65]

Hertz 2022 and 2024 notes

Redemption

"The [2022 Notes / 2024 Notes] will be redeemable, at the Company's option, in whole or in part, at any time and from time to time on and after [a specified date] ***and prior to maturity thereof*** at the applicable redemption price set forth below. The [2022 Notes / 2024 Notes] will be so redeemable at the following redemption prices (expressed as a percentage of principal amount), plus accrued and unpaid interest, if any, to, but not including, the relevant Redemption Date…"

Hertz 2026 and 2028 notes

Redemption

"***At any time prior to [a specified date]***, the [2026 Notes / 2028 Notes] may also be redeemed (by the Company or any other person) in whole or in part, at the Company's option, at a price… equal to 100.0% of the principal amount thereof plus the Applicable Premium…"

"'**Applicable Premium**' means, with respect to a [2026 Note / 2028 Note] at any Redemption Date, the greater of (i) 1.00% of the principal amount of such [2026 Note / 2028 Note] and (ii) the excess of (A) the present value at such Redemption Date, calculated as of the date of the applicable redemption notice, of (1) the redemption price of such [2026 Note / 2028 Note] on [a specified date], plus (2) all required remaining scheduled interest payments due on such [2026 Note / 2028 Note] through such date (excluding accrued and unpaid interest to the Redemption Date), computed using a discount rate equal to the Treasury Rate plus 50 basis points, over (B) the principal amount of such [2026 Note / 2028 Note] on such Redemption Date…"

C. *Ultra Petroleum* and *Hertz*: Enforceability of make-whole premiums and "unmatured interest"

— **Key takeaway:** In *Ultra Petroleum IV*, the Fifth Circuit became the first circuit court to hold that make-whole premiums are disallowed under section 502(b)(2) of the Bankruptcy Code as the economic equivalent of unmatured interest.

— **Key takeaway:** In *Hertz*, the Delaware Bankruptcy Court noted that the issue of whether a make-whole premium was unmatured interest was a question of fact and held that the make-whole premium in that case was the economic equivalent of unmatured interest and thus disallowed.

Liquidated damages vs. unmatured interest

Section 502(b)(2) of the Bankruptcy Code provides that claims for "unmatured interest" are disallowed in bankruptcy, but "unmatured interest" is not defined in the Bankruptcy Code. Several courts have held that make-whole premiums are not "unmatured interest" subject to section 502(b)(2) because they constitute a form of liquidated damages approximating actual or anticipated damages, not interest.[66] As the Bankruptcy Court in the Southern District of New York noted, where "a clear and unambiguous clause requires the payment of the prepayment premium even after default and acceleration, the clause will be analyzed as a liquidated damages clause."[67]

As detailed above, liquidated damages provisions are generally enforceable under New York law unless such amount constitutes an unenforceable penalty, and courts in the bankruptcy context have routinely enforced liquidated damages provisions.[68] Perhaps because many courts treat make-whole provisions simply as liquidated damages provisions, the case law that considered how section 502(b)(2)'s reference to "unmatured interest" applies to make-whole premiums had previously been sparse.

Disallowed unmatured interest under section 502(b)(2) and potential exception under section 1124(1)

When considering whether a make-whole premium is more properly characterized as unmatured interest, rather than as liquidated damages, courts have looked beyond the contract's language[69] and analyzed whether the make-whole premium at issue is in substance the economic equivalent of unmatured interest.[70]

With respect to creditors that are treated as "unimpaired" under chapter 11 plans of reorganization, courts have considered, in tandem with section 502(b)(2)'s prohibition on unmatured interest, whether section 1124(1) nonetheless may entitle a creditor to claims for unmatured interest. Section 1124(1) requires a plan to leave all "legal, equitable, and contractual rights" of creditors unaltered in order for such creditors to be considered unimpaired. Thus, even if a make-whole claim is disallowed as unmatured interest under section 502(b)(2), creditors treated as unimpaired under a plan may have a basis to claim that they are entitled to such amounts by operation of section 1124(1).

The Ultra Petroleum Cases

In the *Ultra Petroleum* cases, Ultra Resources, Inc. issued multiple series of unsecured notes totaling approximately $1.46 billion. In 2016, Ultra Resources, Inc., along with its parent, Ultra Petroleum Corp., and certain other affiliates, filed for bankruptcy.

A fortuitous upswing in crude oil prices over the course of the debtors' bankruptcy proceedings resulted in the *Ultra Petroleum* debtors becoming solvent and enabled them to propose a plan of reorganization that purported to pay all of their creditors, including the unsecured noteholders, in full, thus rendering them unimpaired and not entitled to vote on the plan.

However, the plan did not provide for the payment of the unsecured noteholders' claim for a make-whole premium (or for the payment of post-petition interest on their claim at the contract rate). Thus, the noteholders objected to the plan, arguing that if they were to be treated by the debtors' plan as "unimpaired," section 1124 of the Bankruptcy Code[71] required the payment in full of their make-whole and post-petition interest claims. The debtors, in turn, argued that section 502(b)(2) of the Bankruptcy Code,[72] which disallows claims for "unmatured interest" in bankruptcy, precluded the noteholders' make-whole claims.

The Bankruptcy Court for the Southern District of Texas in *Ultra Petroleum I*, after holding as a threshold matter that the make-whole provision at issue was enforceable as a liquidated damages provision under New York law,[73] held that the noteholders must receive the make-whole amount in order to be deemed unimpaired under the debtors' plan. The Bankruptcy Court reasoned that a confirmed plan (through section 1141(d) of the Bankruptcy Code) results in the discharge of a debtors' debts; by discharging the noteholders' claims without paying them the make-whole amount, it was the debtors' plan that impaired the noteholders, not section 502(b)(2).

On appeal, the Fifth Circuit in *Ultra Petroleum II* reversed, and held that the *Ultra Petroleum* noteholders were not impaired.[74] The Fifth Circuit noted that unimpairment under section 1124 is defined relative to whether "the plan" leaves creditors' rights unaltered and disagreed with the Bankruptcy Court's view that it was the plan (by discharging the noteholders' make-whole claims) that rendered the noteholders impaired – rather, if the make-whole claims were disallowed as unmatured interest under section 502(b)(2), it would be the Bankruptcy Code doing the impairing. As such, the Fifth Circuit reasoned that as long as the debtors' plan gave the noteholders what the law (including the Bankruptcy Code's allowance provisions) entitled them to, they could not be considered impaired for purposes of section 1124.[75] Because the Bankruptcy Court had not reached the question of whether the make-whole amount did, in fact, constitute unmatured interest under section 502(b)(2), the Fifth Circuit remanded the case for further consideration by the Bankruptcy Court.[76]

On remand, the Bankruptcy Court in *Ultra Petroleum III* determined that the make-whole amount was not unmatured interest (or its economic equivalent) under section 502(b)(2), and therefore was an allowed claim. The court analyzed this issue as a question of fact, noting that determining whether a make-whole premium was unmatured interest depends on the specific and narrow facts of the case and cannot be generalized. The Bankruptcy Court observed that interest can be understood as "consideration for the use or forbearance of another's money accruing over time," and reasoned that because the make-whole amount did not compensate the noteholders for the use or forbearance of their money (and instead compensated them for a breach of a promise to use money, and the cost of reinvesting in a less favorable market), the make-whole amount was more properly characterized as a liquidated damages provision.[77]

Once again, the *Ultra Petroleum* debtors appealed the Bankruptcy Court's decision to the Fifth Circuit, and, once again, the Fifth Circuit reversed. In doing so, the Fifth Circuit became the first circuit court to hold that make-whole premiums are the economic equivalent of unmatured interest and may be disallowed by section 502(b)(2).[78]

The Fifth Circuit started from the premise that make-whole amounts generally, and the one at issue in *Ultra Petroleum* specifically, are "expressly designed to liquidate fixed-rate lenders' damages flowing from debtor default while market interest rates are lower than their contractual rates" and, as a result, are "nothing more than a lender's unmatured interest, rendered in today's dollars."[79] This, the Fifth Circuit reasoned, is precisely the economic equivalent of unmatured interest.

While the noteholders conceded that the value of future interest payments was the key input into the make-whole calculation, they argued that the make-whole formula—a present value calculation that discounted the interest payments that the noteholders would have received had the notes remained outstanding—does not render a liquidated-damages amount unmatured interest.

The Fifth Circuit was unpersuaded, finding instead that the make-whole formula yields precisely the economic equivalent of unmatured interest.[80] To illustrate, the Fifth Circuit posited a hypothetical "Fake-Whole Amount" that was equal to: ($\sum$ [all unmatured interest payments] + \$1.00) × 1. Observing that this calculation results in nothing more than unmatured interest plus one dollar, the Fifth Circuit compared this Fake-Whole Amount to the make-whole premium in *Ultra Petroleum*—each "[did] nothing to its unmatured interest component to render the result different in kind."[81]

The Fifth Circuit was also not persuaded by arguments made by the noteholders that adopted *Ultra Petroleum III*'s reasoning—namely, that "interest" compensates creditors for the use or forbearance of

their money accruing over time, and a make-whole premium does not compensate creditors for the use or forbearance of money. To the contrary, the Fifth Circuit opined that a make-whole premium *does* compensate creditors for the use or forbearance of their principal—it compensates them for the *future* use of their money.[82] This, the Fifth Circuit reasoned, is a different way of saying that the interest is unmatured, and unmatured interest is still interest.

Finally, the Fifth Circuit was not persuaded by the argument that if a make-whole premium is a liquidated damages provision, then it cannot be unmatured interest, instead determining that a make-whole amount can be both liquidated damages and the economic equivalent of unmatured interest.[83] The Fifth Circuit distinguished the make-whole premium in *Ultra Petroleum* from a hypothetical fixed prepayment premium, noting that while a fixed prepayment premium could compensate for a liquidated damages amount that was *not* for unmatured interest (if it "merely compensat[ed] the borrower for the search and transaction costs" of redeploying capital), the make-whole premium at issue compensated for *both* liquidated damages and the economic equivalent of unmatured interest.[84]

Ultra Petroleum IV was rendered in connection with a dispute involving unsecured claims and, therefore, left unaddressed whether disallowance of a claim for payment of a make-whole premium under section 502(b)(2) might impact an oversecured creditor's right to payment of a make-whole premium as either "interest" or "reasonable fees, costs, or charges" provided for under the relevant agreement or state law pursuant to section 506(b) of the Bankruptcy Code. Further, the Fifth Circuit's observation that the absolute priority rule under section 1129(b) "buttress[es]" its conclusion[85] could be interpreted to lend support to an unimpaired senior creditor in an insolvent bankruptcy case that seeks payment of a make-whole premium where junior creditors are receiving a recovery under a plan.

The Fifth Circuit in *Ultra Petroleum IV* found that the make-whole amount was disallowed as unmatured interest under section 502(b)(2).

The Hertz Cases

In *Hertz*, The Hertz Corporation issued multiple series of unsecured notes (due in 2022, 2024, 2026 and 2028) totaling $2.7 billion in principal amount. The Hertz Corporation and certain of its subsidiaries and affiliates filed for bankruptcy in 2020. The *Hertz* debtors' plan of reorganization (like the plan in *Ultra Petroleum*) provided for the payment in full in cash of the noteholders' allowed claims but did not provide for the payment of the make-whole premium sought by the noteholders.

After determining that the make-whole premium was potentially payable under the terms of the indentures governing the notes due in 2026 and 2028 (as a matter of contractual interpretation), the Bankruptcy Court considered whether the make-whole claims would be nonetheless disallowed as unmatured interest under section 502(b)(2).

Initially, at the motion to dismiss stage, the Bankruptcy Court observed that this was a factual question that it could not determine without further development of the record, although the court noted that it would not be enough for a make-whole claim to be characterized as a liquidated damages provision for it to escape the ambit of section 502(b)(2)'s disallowance.[86]

Subsequently, based on an established record, the Bankruptcy Court held that the make-whole premium was disallowed as the economic equivalent of unmatured interest, in accordance with the Fifth Circuit in *Ultra Petroleum IV*. The court reasoned that because each of the three components of the make-whole formula were the economic equivalent of unmatured interest,[87] if not unmatured interest outright, the output produced by the formula was also necessarily the economic equivalent of unmatured interest.[88] The court acknowledged that the outcome may have been different if certain components of the formula would have been structured differently to not have interest as a component—for example, if the premium really was intended to compensate the noteholders for costs incurred in reinvesting their prematurely returned capital, an expense reimbursement provision could have been used instead.[89]

Moreover, on the issue of unimpairment under section 1124, the *Hertz* court concurred with the Third Circuit's decision in *In re PPI Enters. (US), Inc.*, the Fifth Circuit's decision in *Ultra Petroleum II* and the Ninth Circuit's decision in *PG&E III*, holding that impairment under section 1124 applies only when creditors' legal rights are being modified by the plan of reorganization, not when such modification is by operation of the Bankruptcy Code.[90]

Hertz adds to the Fifth Circuit's holding in _Ultra Petroleum IV_ that section 502(b)(2) may disallow a make-whole premium that is calculated as the present value of future interest payment.

The primary arguments addressed by the *Ultra Petroleum* and *Hertz* courts regarding the question of whether a make-whole constitutes unmatured interest are summarized in the following table.

Issues	***Ultra Petroleum III*** **(Bankruptcy Court, 2020)**	***Ultra Petroleum IV*** **(Fifth Circuit, 2022)**	***Hertz II*** **(Bankruptcy Court, 2022)**
Whether a make-whole constitutes "interest"	"Interest" is compensation for the use or forbearance of money, and a make-whole is not consideration for the use or forbearance of money. Rather, a make-whole is a liquidated damages provision and consideration for the breach of a promise to use money and for the cost of reinvesting in a less favorable market.	"A make-whole compensates for the use or forbearance of money in that it compensates for the borrower's *future* use of creditors' money, even though that use will never actually occur. The make-whole represents future interest, *i.e.*, unmatured interest.	The dictionary definition of "interest" should not bear on the analysis, and the economic substance of the premium should govern.
Whether a make-whole constitutes "unmatured" interest	"Unmatured" interest is interest that has accrued or been earned as of a reference date. A make-whole amount is not unmatured interest just because it might equal the unmatured interest due at the time of prepayment – particularly when it might equal zero. A make-whole compensates for something different.	A make-whole constitutes interest, and because whether interest is matured at the moment of bankruptcy is determined without reference to ipso facto acceleration clauses triggered by a bankruptcy, the make-whole, which was only triggered upon the bankruptcy filing, was not matured as of that time.	Not addressed.

Whether using interest amounts as inputs to calculate a make-whole renders the make-whole unmatured interest	A make-whole does not become unmatured interest merely because it references interest rates. When a loan is paid off early, the expected interest payments that a lender will no longer receive represent the damages that the holder suffers, and the differential between the contractual interest rate and the reinvestment interest rate is the logical measure of a liquidated damages amount.	A make-whole that discounts future interest payments to present value yields precisely the economic equivalent of unmatured interest.	A make-whole formula consisting of inputs that are entirely unmatured interest results in an output that is the economic equivalent of unmatured interest.
Whether a make-whole represents liquidated damages and/or unmatured interest	A make-whole is a liquidated damages provision and is not unmatured interest. Unlike interest, which accrues over time, a make-whole is a one-time charge that fixes damages sustained at the time of prepayment. Even if unmatured interest is one "ingredient" of the liquidated damages calculation, the ultimate output is still a liquidated damages amount.	Liquidated damages amounts and amounts for unmatured interest are not mutually exclusive concepts. The make-whole constituted liquidated damages and the economic equivalent of unmatured interest.	Fees or penalties that are the economic equivalent of unmatured interest are disallowed regardless of how they are labeled.

D. Considerations for creditors of solvent debtors

— **Key takeaway:** The solvent-debtor exception has been found to permit unsecured creditors of solvent debtors to collect post-petition interest on their claims, including make-whole claims that are found to otherwise be disallowed as unmatured interest under section 502(b)(2).

— **Key takeaway:** The Fifth and Ninth Circuits have now ruled that the contractual default rate is the appropriate rate of post-petition interest on unsecured claims, although lower courts in jurisdictions not bound by such authority could still impose the federal judgment rate.

In rare cases where the debtor is solvent or becomes solvent in bankruptcy, the equitable doctrine of the "solvent-debtor exception" may also be relevant to analyzing the enforceability of a make-whole claim. Although the solvent-debtor exception has been understood to be more pertinent to the issue of when (and at what rate) post-petition interest may be owed on unsecured claims,[91] the doctrine may be relevant to make-whole premiums to the extent such amounts are found to be unmatured interest,[92] or in determining whether post-petition interest is payable on a make-whole claim.[93]

The *Hertz I* court observed that the solvent-debtor exception is relevant "if the make-whole is determined to be unmatured interest," and that such unmatured interest claim "would be subject to the same analysis as [other] claims . . . to post-petition interest."[94] Although the *Hertz I* court did not have occasion to conduct the solvent-debtor exception analysis with respect to the make-whole claims in that case, the limited discussion on this topic suggests that the scope of the solvent-debtor exception could impact the extent to which a make-whole premium (in the form of unmatured interest) may be allowed for an unsecured creditor.

The solvent-debtor exception has been interpreted by some courts to be an exception to section 502(b)(2)'s general disallowance of post-petition interest on unsecured claims. The rationale for the solvent-debt exception is that where a debtor possesses sufficient assets to pay a creditor's claims in full and without adversely impairing other creditors, such creditor should receive the post-petition interest on its claim that it would otherwise have been entitled to if not for the bankruptcy.[95] Although many courts (in the rare solvent debtor cases) have generally found that the solvent-debtor exception exists[96] and permits payments of post-petition interest to unsecured creditors of solvent debtors, courts have split on the question of the rate at which such post-petition interest should accrue. The Ninth Circuit in *PG&E* and the Fifth Circuit in *Ultra Petroleum IV* recently held that the solvent-debtor exception operates to provide unsecured, unimpaired creditors with post-petition interest at the rate provided for in the underlying contract (i.e., the default rate which is generally significantly higher than the federal judgment rate).[97] However, the Bankruptcy Court in *Hertz II* explicitly declined to follow such reasoning, instead concluding that the solvent-debtor exception permits post-petition interest only up to the federal judgment rate.[98]

While the recent circuit court decisions in *PG&E* and *Ultra Petroleum IV* regarding the application of the solvent-debtor exception and the issue of the post-petition interest rate aligned with each other, both decisions were issued over withering dissents. The *Hertz II* court also noted that these issues must "be decided by the Supreme Court or by Congress."[99] Notably, the Supreme Court has declined to hear appeals of *PG&E* and *Ultra Petroleum IV*, so it remains to be seen as to how these differing approaches will ultimately be reconciled.[100]

E. Considerations for oversecured creditors

— **Key takeaway:** Section 506(b)'s reasonableness qualifier might be an additional requirement that a make-whole provision must satisfy in order for make-whole claims to be allowed in bankruptcy.

— **Key takeaway:** Section 506(b)'s allowance of "interest" on secured claims could potentially operate as an exception to section 502(b)(2)'s disallowance of unmatured interest.

In addition to allowability under section 502(b)(2), oversecured creditors should also consider the potential effect of section 506(b) of the Bankruptcy Code on make-whole claims. Section 506(b) provides that a secured creditor will be allowed, to the extent of the oversecured portion of their claim, "interest" on such claim and any "reasonable fees, costs, or charges" provided for under the underlying agreement in which such claim arose or applicable state law.[101]

The requirements of section 506(b) could potentially be relevant in analyzing the secured or unsecured status of a make-whole claim. Under one view, which courts have characterized as the "majority view," claims that accrue prepetition are part of the underlying secured claim, and need not be authorized under section 506(b) or satisfy 506(b)'s "reasonableness" standard in order to be considered secured.[102] For example, the Bankruptcy Court for the Eastern District of New York observed that a make-whole claim that crystallized prepetition and was allowed under section 502 did not need to meet the requirements of section 506(b).[103] As such, where a make-whole amount accrues prepetition, section 506(b) might not be relevant in analyzing the enforceability of such claim because the claim is treated as part of the underlying prepetition secured claim.[104]

However, some courts have nonetheless applied section 506(b) to make-whole premiums, including those that crystallized prepetition, and have required such claims to qualify as a "reasonable fee, cost, or charge" in order for such claims to be allowed, without performing extensive analysis as to whether the make-whole premium was a pre- or post-petition claim.[105] If so, section 506(b)'s reasonableness standard can impose an additional limitation on the enforceability of a make-whole premium (even if allowed under section 502).

506(b)'s Reasonableness Standard

In applying section 506(b)'s "reasonableness" standard to make-whole premiums, some courts have acknowledged the overlap between the "reasonableness" requirement under section 506(b) and similar reasonableness standards under applicable state law (such as in New York, as discussed above). These courts have considered a make-whole claim to satisfy section 506(b)'s reasonableness requirement if it satisfies the applicable reasonableness standard for a liquidated damages provision under state law.[106]

Other courts have viewed section 506(b) as establishing a separate federal standard of "reasonableness" that is distinct from state law. These courts have considered four factors in determining the reasonableness of a make-whole premium: (1) whether the premium approximates actual damages; (2) whether the creditor will receive the full amount of its principal and will receive interest in full at the contract rate; (3) the amount of the prepayment premium as a percentage of the principal loan amount; and (4) the effect on junior creditors.[107]

1. Whether the premium approximates actual damages

Courts are more likely to find a make-whole premium that is structured to approximate damages in a way that is consistent with its economic purpose (i.e., to ensure the creditor will receive the contractual rate of return agreed upon over the life of the loan) to be reasonable. For example, make-whole premiums calculated as the present value of remaining interest payments based on a market discount rate have been found to be reasonable, because they increase as interest rates fall (i.e., when creditors are unable to reinvest at favorable interest rates) and decrease as interest rates rise.[108] By contrast, a call protection provision that provides for a fixed premium, regardless of whether market interest rates have gone up or down, and which does not discount to present value, has been found to be unreasonable under section 506(b).[109]

2. Whether the creditor will receive the full amount of its principal and will receive interest in full at the contract rate

A court may find that it would be inequitable to award a secured creditor that would receive the full amount of its principal and interest at the contract rate, with the additional payment of a make-whole premium, rather than providing for such amounts to be distributed to junior or unsecured creditors.[110]

3. The amount of prepayment premium as a percentage of the principal loan amount

Although one court has suggested that a make-whole premium amounting in excess of 10% of principal is too high,[111] the quantum of make-whole premiums that have been approved by courts as reasonable under 506(b) has varied widely.[112]

4. The effect on junior creditors

Courts may also consider the effect of the prepayment premium on junior creditors in balancing the equities in order to determine the reasonableness of a make-whole premium, which some courts have noted may be an "especially significant" factor.[113] However, it is not uncommon for junior creditors in negotiated financings to contractually agree to subordinate their claims to the make-whole amounts of senior creditors (regardless of whether the make-whole is allowed or disallowed), which could provide such senior creditors with an argument that, given that junior creditors have waived their right to a distribution that would come ahead of the make-whole, this factor weighs in favor of finding the make-whole to be reasonable.

Section 506(b) as an exception for make-wholes

Courts, including the Courts of Appeal for the First, Ninth and Eleventh Circuits, have explained that section 506(b) "does not create additional exceptions to the allowance of claims; rather it only provides for the classification of allowed claims as secured or unsecured."[114] Under this line of reasoning, section 502 governs the allowability of a make-whole claim and, only if the make-whole claim is allowed, section 506(b) determines the extent to which the allowed make-whole claim is treated as secured or unsecured.

These cases, however, have focused on the "reasonable fees, costs, or charges" prong of 506(b). Outside of the context of make-wholes, it is well settled that section 506(b) represents an exception to the rule set forth in section 502(b)(2) that unmatured interest is not an allowable claim, and provides secured creditors with a basis to collect post-petition interest on their claims during the pendency of the bankruptcy case up to the oversecured amount of their claim.[115] The recent decisions in *Ultra Petroleum* and *Hertz*, where make-wholes have been characterized as the economic equivalent of unmatured interest, raise questions as to whether, if make-wholes are in fact the economic equivalent of "unmatured interest," section 506(b)'s allowance of post-petition interest on a claim could provide a basis to allow a make-whole claim that is otherwise disallowed as unmatured interest under section 502(b)(2).

In *Hertz*, the Delaware Bankruptcy Court observed that "[t]he Bankruptcy Code expressly codified the solvent-debtor exception in section 506(b) as to oversecured creditors."[116] Although, as discussed in greater detail below in Section II.F., the *Hertz* court adopted a narrower view of the solvent-debtor exception (concluding that it permits post-petition interest on unsecured claims only up to the federal judgment rate), the Fifth Circuit in *Ultra Petroleum IV* applied the solvent-debtor exception to allow for the payment of both a make-whole claim constituting the economic equivalent of unmatured interest *and* post-petition interest at the contractual default rate to unsecured creditors, reasoning that both amounts were "valid contractual debt[s] under applicable state law" and that "[c]reditors are entitled to what they bargained for" in solvent debtor cases.[117] If section 506(b) is viewed consistently with the Fifth Circuit's interpretation of the solvent debtor exception, courts may reason that oversecured creditors, like the unsecured creditors in solvent-debtor cases, are entitled to make-whole claims (even if otherwise disallowed as unmatured interest) and to post-petition interest on the make-whole claim through the pendency of the bankruptcy.

However, case law suggests that there may be limitations on the extent to which make-whole claims that are found to be interest for purposes of section 506(b) are allowed. In *Solutia*, the Bankruptcy Court for the Southern District of New York examined a claim asserted on account of secured notes which were issued with original issue discount ("OID"), which is treated as interest under the Bankruptcy Code. The secured noteholders, with the consent of the debtors and the creditors' committee in the case, received both post-petition interest and the amount of OID that accrued during the bankruptcy case, but also sought to receive the balance of OID that remained unaccrued (between the plan effective date and the stated maturity date under the notes).

The court rejected the secured noteholders' claim for post-emergence unaccrued OID.[118] Although the court did not need to determine whether the secured noteholders were entitled to OID that accrued post-petition during the pendency of the bankruptcy cases (as the debtors and creditors' committee had conceded this point), the court made clear that any OID that remained unaccrued as of the effective date should be disallowed as unmatured interest regardless of section 506(b), observing that "[t]here are no apparent bankruptcy policy reasons to be found in the legislative history, [sections 502 or 506] of the Bankruptcy Code and the relevant case law to warrant different treatment for unsecured and secured OID… the unfairness that Congress was concerned with is just as real with a secured claim as an unsecured one—that a discounted note paid off early in its life span would therefore have a higher claim value than one paid off later, if unmatured interest was not disallowed."[119]

Make-wholes and post-petition interest

Courts have not resolved the question of whether and to what extent post-petition interest should accrue on make-whole claims, or be paid in addition to make-whole claims, which may depend on how courts resolve the question of whether a make-whole claim constitutes unmatured interest.

Arguably, if a make-whole claim is not found to be unmatured interest and instead constitutes a part of the underlying prepetition secured claim, section 506(b) should permit post-petition interest to be paid on the entire prepetition claim, to the extent oversecured. For example, the *Ultra Petroleum I* court (which held that a make-whole was a liquidated damages amount and not the economic equivalent of unmatured interest) suggested that post-petition interest should accrue on an unsecured creditor's make-whole claim in a solvent debtor case.[120]

If, however, a make-whole claim is viewed as the equivalent of post-petition interest, arguments can be made that allowing interest on a make-whole claim represents double recovery.[121] In *Ultra Petroleum IV*, the Fifth Circuit agreed with the lower Bankruptcy Court's rejection of the position that allowing post-petition interest on a make-whole amount would constitute a double recovery. The court explained that while the make-whole amount compensated creditors for the debtors' breach of contract (i.e., the debtors' early repayment of debt), post-petition interest on the make-whole amount was compensating creditors for the separate harm stemming from the debtors' delay in actually paying the make-whole amount, which validly became due on the acceleration date.[122]

F. Reinstatement

— **Key takeaway:** Borrowers can attempt to avoid or reverse the triggering of a make-whole premium by reinstating the underlying debt in bankruptcy.

Another issue of relevance to the enforceability of make-whole provisions is how make-whole provisions are treated when the underlying debt instrument is reinstated in bankruptcy. The *EFH* and *Hertz* courts suggested that a borrower has the option to avoid a prepayment premium by reinstating the underlying debt, rather than paying it off,[123] and section 1124(2) of the Bankruptcy Code provides that a class of claims is unimpaired if, among other requirements and in relevant part, a plan:

— Notwithstanding any contractual provision that entitles a holder of claims to receive accelerated payment after the occurrence of a default, cures such default (other than a default of a kind specified in section 365(b)(2) of the Bankruptcy Code); and

— reinstates the maturity of the claim as such maturity existed before the default.[124]

Although case law on the effect of reinstatement on make-whole provisions is limited, courts have observed that reinstatement under section 1124(2) can result in a make-whole premium that became due upon a debtor's bankruptcy filing no longer being payable. For example, a Texas Bankruptcy Court recently ruled that a make-whole premium that became due upon a bankruptcy filing was no longer owed following reinstatement of the underlying debt to how it existed immediately before the bankruptcy.[125] In confirming the debtors' plan in *Mallinckrodt*, the Delaware Bankruptcy Court also recently ruled as such.[126]

The debtors in *Mallinckrodt* had objected to make-whole amounts of approximately $94 million sought by holders of the debtors' first-lien notes, and $61 million sought by holders of second-lien notes (although the debtors subsequently settled with the second-lien noteholders prior to plan confirmation), arguing that because the noteholders were to be reinstated pursuant to the debtors' plan, no make-whole would need to be paid.[127] Both indentures for the first-lien and second-lien notes expressly provided that the make-whole premium would be due upon a default and acceleration caused by the debtors' bankruptcy filing.

Mallinckrodt first-lien notes

"***[U]pon the acceleration of the Notes in connection with an Event of Default [related to payment defaults or insolvency] prior*** to April 15, 2024, ***an amount equal to the Applicable Premium or optional redemption premium, as applicable***, that would have been payable in connection with an optional redemption of the Notes at the time of the occurrence of such acceleration ***will become and be immediately due and payable with respect to all Notes*** without any declaration or other act on the part of the First Lien Trustee or any holders of the Notes and shall constitute part of the Notes Obligations in view of the impracticability and difficulty of ascertaining actual damages and by mutual agreement of the parties as to a reasonable calculation of each holder's lost profits as a result thereof. ***If the Applicable Premium or other premium becomes due and payable pursuant to the preceding sentence, the Applicable Premium or other premium, as applicable, shall be deemed to be principal of the Notes and interest shall accrue on the full principal amount of the Notes*** (including the Applicable Premium or such other premium) from and after the applicable triggering event. Any premium payable pursuant to the first sentence of this paragraph shall be presumed to be liquidated damages sustained by each holder as the result of the acceleration of the Notes and the Issuers agree that it is reasonable under the circumstances currently existing. The premium set forth in the first sentence of this paragraph shall also be payable in the event the Notes or the Indenture are satisfied, released or discharged through foreclosure, whether by judicial proceeding, deed in lieu of foreclosure or by any other means.

THE ISSUERS EXPRESSLY WAIVE (TO THE FULLEST EXTENT THEY MAY LAWFULLY DO SO) THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE PREMIUM PROVIDED FOR IN THE FIRST SENTENCE OF THIS PARAGRAPH IN CONNECTION WITH ANY SUCH ACCELERATION.

The Issuers expressly agree (to the fullest extent it may lawfully do so) that: (A) the premium set forth in the first sentence of this paragraph is reasonable and is the product of an arm's-length transaction between sophisticated business entities ably represented by counsel; (B) the premium shall be payable notwithstanding the then prevailing market rates at the time acceleration occurs; (C) there has been a course of conduct between holders and the Issuers giving specific consideration in this transaction for such agreement to pay the premium; and (D) the Issuers shall be estopped hereafter from claiming differently than as agreed to in this paragraph. The Issuers expressly acknowledge that their agreement to pay the premium to holders pursuant to the first sentence of this paragraph is a material inducement to holders to acquire the Notes."

Mallinckrodt second-lien notes

"***[U]pon the acceleration of the Notes in connection with an Event of Default [related to payment defaults or insolvency]*** prior to April 15, 2024, ***an amount equal to the Applicable Premium or optional redemption premium, as applicable***, that would have been payable in connection with an optional redemption of the Notes at the time of the occurrence of such acceleration ***will become and be immediately due and payable with respect to all Notes*** without any declaration or other act on the part of the Second Lien Trustee or any holders of the Notes. The amounts described in the preceding sentence are intended to be liquidated damages and not unmatured interest or a penalty."

The principal disputes between the debtors and the first-lien noteholders with respect to the obligation to pay the make-whole claims in connection with reinstatement involved issues of statutory interpretation as to section 1124(2)'s requirements.

First, the debtors emphasized that section 1124(2) permits reinstatement and unimpairment "notwithstanding" any contractual provision that entitles the holder of a claim to "receive accelerated payment" of such claim after the occurrence of a default. The debtors argued that the make-whole provision, which entitled the noteholders to "receive accelerated payment" of future income streams (*i.e.*, the make-whole premium) following default, could not operate to bar the debtors from reinstating the notes.[128] Under the debtors' view, the make-whole provision took a contingent and unmatured obligation, and made it due immediately.[129]

The first-lien noteholders, on the other hand, disputed that the make-whole provisions resulted in any "accelerated payment." "Acceleration," the first-lien noteholders argued (citing to *Black's Law Dictionary*) refers to "[t]he advancing of a loan agreement's *maturity date* so that payment of the entire debt is due immediately," and the make-whole premium was not an obligation that had a maturity date that could be advanced. Therefore, the make-whole provision was not a contractual provision resulting in any accelerated payment, and was not a provision that could be disregarded pursuant to 1124(2)'s "notwithstanding" clause.[130]

Second, the debtors argued that section 1124(2)(A), which requires that reinstatement cure any default, other than defaults of a kind specified in section 365(b)(2) of the Bankruptcy Code, was satisfied. Section 365(b)(2) governs the circumstances in which executory contracts or unexpired leases may be assumed by a debtor, and provides that defaults relating to insolvency or bankruptcy filing (*i.e.*, ipso facto defaults) need not be cured for purposes of assumption.[131] Because the default that occurred under the indenture was an ipso facto default triggered by the debtors' bankruptcy filing, the debtors argued that there were no applicable defaults that would need to be cured in connection with reinstatement.[130]

The first-lien noteholders argued to the contrary that two defaults were at issue, (1) the ipso facto default due to breach of the provisions relating to a bankruptcy filing, and (2) a separate payment default due to breach of the debtors' obligation to pay the make-whole amount (but acknowledging that such default was a "byproduct" of acceleration), and that section 1124(2)(A) obligated the debtors to cure the latter default, which was not a default covered by the 365(b)(2) exception under section 1124(2)(A).[133]

To reinforce their position, the first-lien noteholders also argued that even if the debtors were permitted to reinstate the notes and avoid *immediate* payment of the make-whole amount, the debtors were required to include the make-whole amount as part of the principal of the reinstated notes.[134] The first-lien noteholders highlighted that the indenture provided that once the make-whole premium becomes due, it "shall be deemed to be principal" of the notes. On this basis, the first-lien noteholders argued that the make-whole premium became part of the principal owed on the notes on the acceleration date, and the debtors could only reinstate the maturity of the notes as contemplated under section 1124(2)(B), and not the principal of the notes.[135] In addition, the first-lien noteholders pointed to the various acknowledgment and waiver provisions in the make-whole language (*e.g.*, that the make-whole was reasonable and a product of an arm's-length transaction, that the debtors waived any law that prohibits the collection of the premium or that the premium was a material inducement for the holders to acquire the notes) to argue that the parties intended and fully expected for the make-whole premium to be enforceable and paid in any future bankruptcy proceeding.[136]

The debtors separately pointed out that requiring payment of the make-whole would be contrary to bankruptcy policy. The make-whole, an amount designed to compensate noteholders for not receiving future interest, combined with the interest payments that the first-lien noteholders would receive under reinstated notes, would result in a double recovery and an impermissible windfall.[137]

In confirming the debtors' plan in *Mallinckrodt*, the Delaware Bankruptcy Court ruled in favor of the debtors on the make-whole issue, noting that the make-whole provision was a contractual provision that triggers and accelerates payment of the make-whole premium after a default – "precisely the type of situation [s]ection 1124(2) is intended to address."[138] The court observed that section 1124(2) operates by "rolling back" the clock to the time before the asserted default (here, the bankruptcy filing), and as such, the make-whole provision was never triggered pursuant to its terms (but would survive in the reinstated notes and could potentially be triggered in the future).[139] Moreover, because the first-lien noteholders would be reinstated and paid in full under the debtors' plan, with all terms governing the notes remaining intact, the court viewed a make-whole payment on top of such treatment as a "penalty" and "windfall" for the noteholders solely because the debtors filed for bankruptcy protection, an impermissible result contrary to bankruptcy policy.[140]

The outcome in *Mallinckrodt* suggests that borrowers could potentially avoid payment of a make-whole premium in bankruptcy through reinstatement. The Delaware Bankruptcy Court's decision was appealed. However, in 2023, after *Mallinckrodt* commenced its second chapter 11 proceeding in two years, the parties agreed to dismiss the appellate proceedings.[141] It therefore remains to be seen whether alternative interpretations of section 1124(2) in the make-whole context will gain favor.

G. Ipso facto clauses

— **Key takeaway:** Courts have disagreed as to the scope of the Bankruptcy Code's prohibitions on ipso facto clauses.

— **Key takeaway:** A broader interpretation of ipso facto prohibitions under the Bankruptcy Code could be a basis to challenge make-whole premiums that trigger and become due automatically upon a bankruptcy filing.

Issues regarding the enforceability of ipso facto clauses in bankruptcy have also arisen in cases involving make-whole claims. Parties have argued that make-whole provisions triggered upon the filing of a bankruptcy petition should be unenforceable as ipso facto clauses prohibited under the Bankruptcy Code, pursuant to sections 365(e)(1), 541(c)(1)(B) and 363(l). Section 365(e)(1) provides that any right or obligation related to executory contracts cannot be modified by a contractual provision that is conditioned on the insolvency of the debtor or the filing of a bankruptcy case.[142] Section 541(c)(1)(B) provides that once a bankruptcy case is commenced, all property interests of the debtor become property of the bankruptcy estate, notwithstanding any ipso facto clause that "effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property."[143] Lastly, section 363(l) provides the debtor with general powers to use, sell or lease property of the estate, notwithstanding the effect of any ipso facto clause.[144]

As a general matter, courts have disagreed as to the degree to which the Bankruptcy Code prohibits the enforcement of ipso facto clauses. Under the narrower view, a court will look to the specific text of the sections of the Bankruptcy Code addressing ipso facto clauses and determine whether they apply by their plain terms to the ipso facto clause that is at issue.[145] Based on this narrower approach, courts have enforced ipso facto clauses where they are not expressly invalidated by the code.

For example, the creditors in *AMR* unsuccessfully argued that an acceleration provision, which brought forward the debt's maturity date and precluded the triggering of a prepayment premium, should be disregarded as an ipso facto provision prohibited by section 365(e)(1)(B). The court disagreed with the creditors, observing that section 365(e)(1)(B) only applies to executory contracts, unlike the indentures at issue there.[146] Additionally, the court noted that section 541(c)(1)(b) was not applicable because the ipso facto clauses did not prevent property from entering the estate, and that section 363(l) did not apply because the clauses did not preclude the debtor from using, selling or leasing estate property. The court emphasized that the Bankruptcy Code's specific provisions governing ipso facto clauses should not be interpreted to act as a broader invalidation of such clauses.[147]

By contrast, other courts have adopted a broader view of the Bankruptcy Code's prohibition on ipso facto clauses, relying on a policy-based approach to conclude that ipso facto clauses are broadly unenforceable, even where no provision of the Bankruptcy Code specifically applies.[148] For example, in *W.R. Grace*, the court declined to enforce an ipso facto clause that would have entitled unsecured creditors to default interest of 2%.[149] The court acknowledged that the credit agreement containing the ipso facto clause was non-executory and that the clause did not cause a forfeiture of estate property (i.e., that sections 365(e) and 541(c) were not implicated).[150] Nonetheless, the court declined to enforce the ipso facto clause, stating that it agreed with the "general trend of the federal courts that the prohibition against ipso facto clauses is not limited to actions based upon" sections 365(e) and 541(c), and observed that enforcing ipso facto clauses would undermine the purpose of bankruptcy of providing debtors with a fresh start.[151]

More recently, the official committee of unsecured creditors in *Intelsat* (in a bankruptcy proceeding in the Fourth Circuit) argued that ipso facto clauses that provide for default upon bankruptcy (and result in a make-whole premium being triggered) are not enforceable in the Fourth Circuit, including with respect to non-executory contracts, citing Fourth Circuit precedent adopting the broader view of the Bankruptcy Code's prohibitions on ipso facto clauses.[152] Note, however, that the Fourth Circuit authority relied upon for this argument did not involve make-whole provisions.[153] This issue in *Intelsat* was consensually resolved among the parties without further litigation.[154]

The debtors in *Mallinckrodt* also argued that make-whole claims should be unenforceable as ipso facto clauses, outlining how the specific text of the Bankruptcy Code's provisions could operate together to prohibit enforcement of the make-whole provision. The debtors characterized their right to repay the applicable notes that existed prior to bankruptcy (without incurrence of the make-whole) as property of the estate, and noted that section 541(c) of the Bankruptcy Code ensures that property comes into the estate notwithstanding any ipso facto clauses, and that section 363(l) of the Bankruptcy Code precludes the operation of any ipso facto clause that would interfere with the use of estate property.[155] This issue on ipso facto clauses in *Mallinckrodt* was not fully litigated and rendered moot due to the reinstatement of the applicable notes by the debtors' plan in that case.[156]

In *Ultra Petroleum*, the claimants argued that the make-whole amount became fixed and crystallized upon an acceleration of the notes as a result of the bankruptcy filing, and therefore, even if the make-whole constitutes interest, it is "matured" interest. The bankruptcy court rejected this argument and the Fifth Circuit, in *Ultra Petroleum IV*, concurred on the basis of ipso facto acceleration provisions being unenforceable.[157] Both the bankruptcy court and the Fifth Circuit focused on the fact that a bankruptcy filing is the cause while acceleration is the *effect*. Therefore, "a make-whole amount contractually triggered by a bankruptcy petition cannot antedate that same bankruptcy petition."[158]

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your usual Davis Polk contact.

Christian Fischer	+1 212 450 3125	christian.fischer@davispolk.com
Timothy Graulich	+1 212 450 4639	timothy.graulich@davispolk.com
Marshall S. Huebner	+1 212 450 4099	marshall.huebner@davispolk.com
Darren S. Klein	+1 212 450 4725	darren.klein@davispolk.com
Angela M. Libby	+1 212 450 4433	angela.libby@davispolk.com
Brian M. Resnick	+1 212 450 4213	brian.resnick@davispolk.com
Damian S. Schaible	+1 212 450 4580	damian.schaible@davispolk.com
David Schiff	+1 212 450 3182	david.schiff@davispolk.com
Adam L. Shpeen	+1 212 450 4169	adam.shpeen@davispolk.com
Natasha Tsiouris	+1 212 450 4361	natasha.tsiouris@davispolk.com
Eli J. Vonnegut	+1 212 450 4331	eli.vonnegut@davispolk.com
Eric Hwang	+1 212 450 4759	eric.hwang@davispolk.com

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[1] This guide addresses the enforceability of make-whole provisions in the context of both loan and bond financings. As such, terms such as "borrowers" and "issuers" or "lenders" and "creditors" are used interchangeably throughout this guide.

[2] *See* Meyer C. Dworkin & Samantha Hait, *Avoiding Traps When Documenting Make-Whole Premiums for Term Loans*, THE INT'L COMPAR. LEGAL GUIDE TO: LENDING & SECURED FINANCE 2018, at 26 (6th ed. 2018).

[3] *See* Scott Charles & Emil Kleinhaus, *Prepayment Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 537, 544–45 (2007).

[4] *See* Douglas Baird, *Making Sense of Make-Wholes*, 94 AM. BANKR. L.J. 567, 568–69 (2020); Charles & Kleinhaus, *supra* note 3, at 540–41.

[5] John C. Banko & Lei Zhou, *Callable Bonds Revisited*, 39 FIN. MGMT. 613, 613 (2010).

[6] *See* Amora Elsaify & Nikolai Roussanov, *Why Do Firms Issue Callable Bonds?* 1 (U. Penn. Wharton Fac. Rsch. Working Paper, 2016), https://repository.upenn.edu/fnce_papers/5/ (examining U.S. nonfinancial corporate bonds issued between 1986 and 2014); Banko & Zhou, *supra* note 5, at 614–15 (examining U.S. nonfinancial corporate bonds issued between 1980 and 2003).

[7] Elsaify & Roussanov, *supra* note 6, at 36.

[8] DEAL POINT DATA, https://www.dealpointdata.com/rj?vb=Action.cn&pg=sMain (last visited Mar. 24, 2022).

[9] Davis Polk Client Memorandum, *No, Not the End of Covenants* 1 (Jan. 11, 2017).

[10] *See* Baird, *supra* note 4, at 569; S. Celik, G. Demirtas & M. Isaksson, CORPORATE BOND MARKETS IN A TIME OF UNCONVENTIONAL MONETARY POLICY, OECD CAPITAL MARKET SERIES, PARIS 19 (2019), https://www.oecd.org/corporate/Corporate-Bond-Markets-in-a-Time-of-Unconventional-Monetary-Policy.htm.

[11] *See* Charles & Kleinhaus, *supra* note 3, at 544–45.

[12] As one New York court has noted, prepayment can result in "the loss of the bargained-for rate of return, an increased tax burden, [and] unanticipated costs occasioned by the need to reinvest the principal." *Arthur v. Burkich*, 520 N.Y.S.2d 638, 639 (1987).

[13] *See* Baird, *supra* note 4, at 570–71.

[14] However, it is unclear what effect such acknowledgment or waiver language will have on a court's analysis. For example, courts will look to the economic substance of a transaction, rather than how the transaction is labeled by the contract, in determining allowability of a claim in bankruptcy. *See In re Hertz Corp.* ("*Hertz*"), No. 20-11218 (MFW), 2021 WL 6068390, at *21 (Bankr. D. Del. Dec. 22, 2021); *In re Chateaugay Corp.*, 961 F.2d 378 (2d Cir. 1992). One New York court, after noting the existence of acknowledgment and waiver language in an agreement that stipulated as to the reasonableness of an early termination fee, proceeded to independently examine whether such fee was reasonable as a liquidated damages provision under New York law, with the existence of the stipulation having no bearing in its analysis. *See JMD Holding Corp. v. Cong. Fi. Corp.*, 4 N.Y.3d 373, 377–85 (2005).

[15] DEAL POINT DATA, *supra* note 8.

[16] *Travelers Casualty & Surety Co. of Am. v. Pa. Gas & Electric Co.*, 549 U.S. 443, 450 (2007) (internal citations omitted); *see* 11 U.S.C. § 502(b)(1); *see also In re Chemtura Corp.*, 439 B.R. 561, 600 (Bankr. S.D.N.Y. 2010) (explaining that a two-part analysis applies to the question of whether a make-whole provision supports a claim in bankruptcy; "[t]he first layer would involve matters of state law").

[17] *See Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.Y. 479, 485 (1910) ("Parties to contracts have the right to insert any stipulations that may be agreed to; provided that they be neither unconscionable, nor contrary to public policy.").

[18] *See NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 262 (2011) (noting that parties to a loan agreement "may direct that a party pay a prepayment penalty."); *W.W.W. Associates, Inc. v. Giancontieri*, 77 N.Y.2d 157, 163 (N.Y. 1990).

[19] *See, e.g.*, *In re United Merchants & Mfrs, Inc.*, 674 F.2d 134 (2d Cir. 1982); *In re 1141 Realty Owner LLC*, 598 B.R. 534 (Bankr. S.D.N.Y. 2019); *In re Ultra Petroleum Corp. ("Ultra Petroleum I")*, 575 B.R. 361 (Bankr. S.D. Tex. 2017); *In re Sch. Specialty, Inc.*, No. 13-10125 (KJC), 2013 WL 1838513 (Bankr. D. Del. Apr. 22, 2013); *In re Madison 92nd Street Assocs. LLC*, 472 B.R. 189 (Bankr. S.D.N.Y. 2012); *Nw. Mut. Life Ins. Co. v. Uniondale Realty Assoc.*, 816 N.Y.S.2d 831, 836 (Sup. Ct. 2006).

[20] *See JMD Holding*, 4 N.Y.3d at 379.

[21] *Id.* at 380 (quoting *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd, Inc.*, 41 N.Y.2d 420, 425 (1977)).

[22] *See United Merchants*, 674 F.2d at 142 (citations omitted).

[23] *Id.* at 142 (noting that "the bankruptcy court erred by using hindsight"); *Ultra Petroleum I*, 575 B.R. at 372 ("[T]he mere size of the Make-Whole Amount fails to prove that the Make-Whole Amount is conspicuously disproportionate to the foreseeable losses at the time the parties entered into the Note Agreement.").

[24] *See JMD Holding*, 4 N.Y.3d at 377–85 (noting the existence of language in an agreement that stipulated as to the reasonableness of an early termination fee, but independently examining whether such fee was reasonable as a liquidated damages provision under New York law without giving effect to the stipulation language).

[25] *See Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896, 899 (2d Cir. 1972); *In re Vanderveer Ests. Holdings, Inc.*, 283 B.R. 122, 130 (Bankr. E.D.N.Y. 2002); *In re Sch. Specialty*, 2013 WL 1838513, at *3.

[26] *See In re S. Side House, LLC*, 451 B.R. 248, 271 (Bankr. E.D.N.Y. 2011) ("[P]repayment consideration calculated using a discount rate based on U.S. Treasury bond interest rates satisfies [the proportionality standard of New York liquidated damages law]."); *In re Saint Vincent's Catholic Med. Ctrs. of New York*, 440 B.R. 587, 594 (Bankr. S.D.N.Y. 2010) (noting that make-wholes "influenced by U.S. Treasury bills" have been upheld by New York bankruptcy courts applying New York state law).

[27] *See, e.g.*, *In re MarketXT Holdings Corp.*, 376 B.R. 390, 416–17 (Bankr. S.D.N.Y. 2007) (holding that a prepayment penalty equal to 76% of principal was an unenforceable liquidated damages clause); *Vanderveer Ests. Holdings*, 283 B.R. at 130 (finding a make-whole enforceable under New York law because, among other things, "[i]f interest rates had risen after the loan was made . . . the premium called for under the calculations [c]ould be zero"). *Cf. In re Kroh Bros. Dev. Co.*, 88 B.R. 997, 1000–01 (Bankr. W.D. Mo. 1988) (finding prepayment premium unenforceable under Missouri law because it failed to discount to present value); *In re Skyler Ridge*, 80 B.R. 500, 505 (Bankr. C.D. Cal. 1987) (holding same, applying Kansas law).

[28] *See, e.g., Ultra Petroleum I*, 575 B.R. 361 (enforcing premium constituting 13.8% of principal); *Sch. Specialty*, 2013 WL 1838513 (enforcing 37% premium); *Madison 92nd St. Assocs.*, 472 B.R. 189 (enforcing 5% premium); *Vanderveer Ests. Holdings*, 283 B.R. 122 (enforcing 10.5% premium); *In re Fin. Ctr. Assocs. E. Meadow, L.P.*, 140 B.R. 829 (Bankr. E.D.N.Y. 1992) (enforcing 24.9% premium); *United Merchants*, 674 F.2d 134 (enforcing 8.7% premium); *see also Jefferson-Pilot Invs., Inc. v. Cap. First Realty, Inc.*, No. 10 C 7633, 2011 WL 2888608 (N.D. Ill. July 18, 2011) (finding 34% prepayment premium enforceable under Illinois law); *Double G Arrowhead Orchards Ltd. P'ship*, No. CV11–0004–PHX–DGC, 2011 WL 2912687 (D. Ariz. 2011) (finding 25% yield maintenance premium enforceable under Arizona law, and observing that a 1% fixed floor was not unreasonable because lenders incur costs when they are required by early repayment to reinvest their funds in the market).

[29] *See JMD Holding*, 4 N.Y.3d at 382; *Heller*, 459 F.2d at 899–900; *Ultra Petroleum I*, 575 B.R. at 369 (noting that "the measurement difficulty comes from determining the selection of an alternative investment"); *S. Side House*, 451 B.R. at 270.

[30] *See MarketXT Holdings*, 376 B.R. at 417.

[31] *JMD Holding*, 4 N.Y.3d at 381 (citing E. ALLEN FARNSWORTH, FARNWORTH ON CONTRACTS § 12.18, at 303–04 (3d ed. 2004)) ("Today the trend favors freedom of contract through the enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation.").

[32] "These divergent decisions [*EFH* and *Momentive*], each applying New York law, have led to uncertainty. At the same time, however, the *Momentive* decision has spawned a trend in which lenders to distressed companies have inserted '*Momentive*-proof' language in their loan documents – stating, without any ambiguity, that a make-whole will be payable regardless of acceleration and regardless of bankruptcy." 4 Collier on Bankruptcy ¶ 502.03 (16th ed. 2021).

[33] *In re Granite Broad. Corp.*, 369 B.R. 120, 144 (Bankr. S.D.N.Y. 2007); *In re AE Hotel Venture*, 321 B.R. 209, 217 (Bankr. N.D. Ill. 2005).

[34] *In re LHD Realty Corp.*, 726 F.2d 327, 329 (7th Cir. 1984).

[35] *Id.* at 330–31; *see also In re Solutia Inc.*, 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007) (holding that payments made after notes are accelerated are no longer considered "prepayments," as they occur post-maturity); *In re LaGuardia Assocs., L.P.*, No. 11-19334 (SR), 2012 WL 6043284, at *4 (Bankr. E.D. Pa. Dec. 5, 2012) (same); *In re Premier Ent. Biloxi LLC*, 445 B.R. 582, 627 (Bankr. S.D. Miss. 2010) (finding that "[t]he effect of the acceleration was to change the maturity date"); *Baybank Middlesex v. 1200 Beacon Props., Inc.*, 760 F. Supp. 957, 966 (D. Mass. 1991) (same).

[36] *LHD Realty*, 726 F.2d at 331.

[37] *Id.* at 331–32.

[38] *See, e.g.*, *In re Northbelt, LLC*, 630 B.R. 228, 264 (Bankr. S.D. Tex. 2020) (prepayment premium due where acceleration provision expressly provides that premium is payable upon acceleration); *AE Hotel*, 321 B.R. at 218–19 (noting that *LHD Realty* suggests that "the usual effect of acceleration on the enforceability of prepayment premiums [*i.e.*, to limit such premiums,] can be modified by the parties through appropriate contractual provisions") (quotations and citations omitted); *United States v. Harris*, 246 F.3d 566, 572 (6th Cir. 2001); *In re Schaumburg Hotel Owner Ltd. P'ship*, 97 B.R. 943, 953 (Bankr. N.D. Ill. 1989) (prepayment premium enforced where contractual language provided for premium to be "due and payable whether said payment is voluntary or the result of prepayment created by the exercise of any acceleration clause after a default"); *cf. HSBC Bank USA, Nat'l Ass'n v. Calpine Corp.*, No. 07 CIV 3088 GBD, 2010 WL 3835200, at *4–5 (S.D.N.Y. Sept. 15, 2010) (acceleration, on its own, cannot give a noteholder an unsecured damages claim for a prepayment premium, where prepayment provisions themselves were not triggered by acceleration and where the acceleration provision did not contain a damages provision).

[39] *AE Hotel*, 321 B.R. at 218–19.

[40] *Parker Plaza W. Partners v. UNUM Pension & Ins. Co.*, 941 F.2d 349, 355–56 (5th Cir. 1991) (holding that a prepayment premium is enforceable under Texas law where an acceleration provision expressly provides that the premium is payable upon acceleration); *Fin. Ctr. Assocs.*, 140 B.R. at 835 (holding same).

[41] *See In re Ridgewood Apts.*, 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994) (holding that although the contractual language provided that the prepayment premium would be due "whether the prepayment is voluntary or involuntary [including in connection with acceleration]," the premium would not be payable post-acceleration if the debtor had not actually prepaid the note at issue, because no "prepayment" would have actually occurred); *Bank of N.Y. Mellon v. GC Merchandise Mart, L.L.C.*, 740 F.3d 1052, 1058 (5th Cir. 2014); *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 1513123, at *8 (Bankr. M.D.N.C. June 22, 2005) (note must actually be prepaid in order for prepayment premium to be due); *U.S. Bank Nat'l Assn. v. Yashouafar*, 232 Cal. App. 4th 639 (2014) (repayment fee triggered upon occurrence of a prepayment not due until borrowers actually prepaid).

[42] *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039, 1053 (2d Cir. 1982); *see also In re Imperial Coronado Partners, Ltd.*, 96 B.R. 997, 999–1000 (B.A.P. 9th Cir. 1989) (finding that the prepayment premium was enforceable where a debtor had the option, post-acceleration, to reinstate or decelerate the applicable note, but chose to prepay such note instead).

[43] *See Imperial Coronado*, 96 B.R. at 1000 (observing that in *LHD Realty* and other cases, "it appears that the borrower had no choice but to pay the accelerated amount").

[44] *See also Granite Broad.*, 369 B.R. at 144 (defaults by borrowers with the intent of forcing an acceleration may permit the lender to collect a premium).

[45] *See Wilmington Sav. Fund Soc'y v. Cash Am. Int'l, Inc.*, No. 15-CV-5027 (JMF), 2016 WL 5092594, at *8 (S.D.N.Y. Sept. 19, 2016) (holding that the debtor's voluntary breach of negative covenants in an indenture permitted the noteholders to seek performance of the make-whole premium as a remedy for the "voluntary" non-bankruptcy default, even though the debtor made no choice to redeem the notes).

[46] *See Skyler Ridge*, 80 B.R. at 507 (observing that "[i]f automatic acceleration of a debt defeats a prepayment premium clause, such a clause could never be enforced in a bankruptcy case" and that the Bankruptcy Code does not compel "so drastic a result"). *AMR* is an example of a case in which the prepayment premium and acceleration provisions were not "properly drawn." *See In re AMR Corp.*, 730 F.3d 88, 99 (2d Cir. 2013) (prepayment premium was not enforceable following an automatic acceleration because the acceleration provision explicitly carved out the premium from amounts that become due and payable upon automatic acceleration).

[47] *In re Energy Future Holdings Corp. ("EFH")*, 842 F.3d 247 (3d Cir. 2016).

[48] *In re MPM Silicones, L.L.C. ("Momentive")*, 874 F.3d 787 (2d Cir. 2017).

[49] *See EFH*, 842 F.3d at 251–52.

[50] *See Momentive*, 874 F.3d at 801–02.

[51] *See EFH*, 842 F.3d at 255 (citing *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co.,* 773 F.3d 110, 116 (2d Cir. 2014) (examining a provision that permitted redemption at a lower, more favorable price, noting that "redeem" means to repay a debt at or before maturity); *Treas. of N.J. v. U.S. Dept. of Treas.*, 684 F.3d 382, 388 (3d Cir. 2012) (examining U.S. Treasury savings bond regulations and noting that bondholders were not precluded from redeeming savings bonds with the U.S. government for repayment after they had matured); *Fed. Nat'l Mortg. Ass'n v. Miller*, 473 N.Y.S.2d 743 (Sup. Ct. 1984) (noting in dicta that a debtor may redeem a mortgage after acceleration)).

[52] *AMR Corp.*, 730 F.3d 88.

[53] *Momentive*, 874 F.3d at 802–03.

[54] *EFH*, 842 F.3d at 255.

[55] *Id.*

[56] *Momentive*, 874 F.3d at 803.

[57] *Id.*

[58] *1141 Realty Owner*, 598 B.R. at 539.

[59] *Id.* at 542–44.

[60] *Id.* at 544.

[61] *Northbelt*, 630 B.R. at 264.

[62] *See In re Tara Retail Group, LLC*, *No.* 17-BK-57, 2018 WL 4501136, at *3 (Bankr. N.D.W. Va. Sept. 19, 2018) (holding that a lender's acceleration of debt prior to bankruptcy filing results in inability of debtor to "prepay" the debt and triggers the prepayment premium, although the language here involved a "prepayment" premium rather than a "redemption" premium).

[63] *Hertz I*, 637 B.R. at 787.

[64] *Id.* at 788–89.

[65] *Id.* at 788.

[66] *See, e.g.*, *Sch. Specialty*, 2013 WL 1838513, at *5 (holding that make-whole premium should not be disallowed as unmatured interest and instead treated as liquidated damages); *U.S. Bank Nat'l Ass'n v. S. Side House, LLC*, No. 11-CV-4135 ARR, 2012 WL 273119, at *6 (E.D.N.Y. Jan. 30, 2012) (treating prepayment provision as liquidated damages provision); *In re Trico Marine Servs. Inc.*, 450 B.R. 474, 481 (Bankr. D. Del. 2011) (reviewing cases and holding that make-whole premium is akin to a claim for liquidated damages, and not unmatured interest); *In re Hidden Lake Ltd. P'ship*, 247 B.R. 722, 729 (Bankr. S.D. Ohio 2000); *In re Outdoor Sports Headquarters*, 161 B.R. 414, 424 (Bankr. S.D. Ohio 1993); 4 Collier on Bankruptcy ¶ 502.03 (16th ed. 2021) (collecting cases). *But see In re Ultra Petroleum Corp.*, 913 F.3d 533, 548 (5th Cir. 2019) (finding make-whole amount to be the economic equivalent of interest and unmatured because whether the make-whole amount is due on the date of the bankruptcy petition should be determined without giving effect to ipso facto acceleration clauses), *opinion withdrawn and superseded on reh'g*, 943 F.3d 758 (5th Cir. 2019) (leaving the issue of unmatured interest to be decided by the bankruptcy court in the first instance); *Ridgewood Apts.*, 174 B.R. at 721 (characterizing a prepayment penalty as unmatured interest because the purpose of a prepayment penalty is to compensate the lender for lost interest, and the prepayment penalty was not yet due at the time the bankruptcy was filed).

[67] *Madison 92nd St. Assocs.*, 472 B.R. at 195–96 (citing *N.W. Mut. Life Ins. Co. v. Uniondale Realty Assocs*, 816 N.Y.S.2d 831, 836 (Sup. Ct. 2006)).

[68] *See, e.g.*, *Madison 92nd St. Assocs.*, 472 B.R. at 197; *accord In re Kimbrell Realty/Jeth Ct., LLC*, 483 B.R. 679, 685 (Bankr. C.D. Ill. 2012) (no per se prohibition on enforcing make-whole premiums under Illinois law); *River E. Plaza, L.L.C. v. Variable Annuity Life Ins. Co.*, 498 F.3d 718, 723 (7th Cir. 2007) (noting same); *Great Plains Real Est. Dev., L.L.C. v. Union C. Life Ins. Co.*, 536 F.3d 939, 945 (8th Cir. 2008) (examining fixed prepayment penalty, noting that liquidated damages provisions generally enforceable under Iowa law); *accord Skyler Ridge*, 80 B.R. at 504 (generally enforceable under Kansas law).

[69] *In re ICH Corp.*, 230 B.R. 88, 94 (N.D. Tex. 1999).

[70] *In re Pengo Indus., Inc.*, 962 F.2d 543 (5th Cir. 1992); *see also Chateaugay Corp.*, 961 F.2d 378.

[71] "[A] class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan leaves unaltered the legal, equitable, and contractual rights to which such claim or interest entitles the holder of such claim or interest…" 11 U.S.C. § 1124(1).

[72] 11 U.S.C. § 502(b)(2).

[73] *Ultra Petroleum I*, 575 B.R. at 372.

[74] *In re Ultra Petroleum Corp. ("Ultra Petroleum II")*, 943 F.3d 758, 765 (5th Cir. 2019). In an initial opinion issued by the Fifth Circuit, *In re Ultra Petroleum Corp.*, 913 F.3d 533, 537 (5th Cir. 2019), the Fifth Circuit had, among other things, suggested that the make-whole premium did constitute "unmatured interest." However, the unsecured creditors requested rehearing en banc of this decision, and on en banc review, the Fifth Circuit withdrew the initial option, superseding it with the decision in *Ultra Petroleum II*, which left the issue to be determined by the bankruptcy court in the first instance.

[75] The Third Circuit previously adopted this same distinction between impairment via the Bankruptcy Code and impairment via the proposed plan, similarly holding that section 1124 only applied to the latter. *In re PPI Enters. (US), Inc.*, 324 F.3d 197, 204 (3d Cir. 2003); *see also EFH*, 842 F.3d at 123–24. After *Ultra Petroleum II*, the Ninth Circuit adopted this position as well. *In re PG&E Corp. ("PG&E III")*, 46 F.4th 1047, 1064 (9th Cir. 2022), *cert. denied sub nom. Pac. Gas & Elec. Co. v. Ad Hoc Comm. of Holders of Trade Claims*, 143 S. Ct. 2492 (2023).

[76] *See Ultra Petroleum II*, 943 F.3d at 763–65.

[77] *See In re Ultra Petroleum Corp. ("Ultra Petroleum III")*, 624 B.R. 178, 184–85 (Bankr. S.D. Tex. 2020), *aff'd*, 51 F.4th 138 (5th Cir. 2022).

[78] *See In re Ultra Petroleum Corp. ("Ultra Petroleum IV")*, 51 F.4th 138 (5th Cir. 2022), *cert. denied sub nom. Ultra Petroleum Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors*, 143 S. Ct. 2495 (2023).

[79] *Ultra Petroleum IV* at 146; *see also EFH*, 842 F.3d at 251 (referring to a make-whole as a "contractual substitute for interest lost on [n]otes redeemed before their expected due date"); *Momentive*, 874 at 801 n.13 (same).

[80] *Ultra Petroleum IV* at 149.

[81] *Id.* at 148.

[82] *Id.* at 146.

[83] *Id.* at 149. *See also In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697, 706 (Bankr. N.D. Ill. 2014) (noting that liquidated damages provisions could potentially also include compensation for unmatured interest). *C.f. In re Harris*, No. 18-16598, 2022 WL 198852 (Bankr. N.D. Ohio Jan. 21, 2022).

[84] *Ultra Petroleum IV*, 51 F.4th 138, 149 (5th Cir. 2022).

[85] *Id.* at 159.

[86] *Hertz I*, 637 B.R. at 791. The record was subsequently further developed, but the Bankruptcy Court did not alter its legal conclusion. *In re Hertz Corp. ("Hertz II")*, Nos. 20-11218 (MFW), 21-50995 (MFW), 2022 Bankr. LEXIS 3358 (Bankr. D. Del. Nov. 21, 2022).

[87] "The first component is the unmatured interest as of the Redemption Date. The second component is the present value of all required remaining interest. The third component is the equivalent of one semi-annual interest payment." *Hertz II*, 2022 Bankr. LEXIS 3358, at *12–14.

[88] Even in *Hertz I*, without the benefit of a fully developed factual record, the Bankruptcy Court found it "significant" that the make-whole premium was calculated in large part based on the present value of remaining interest payments on the notes. *Hertz I*, 637 B.R. at 791.

[89] Transcript of Oral Argument, *In re Hertz Corp.*, Nos. 20-11218 (MFW), 21-50995 (MFW), 48:9–17, 90:4–14 (Bankr. D. Del. Nov. 9, 2022) [ECF No. 70].

[90] *Id.* at 794; *Hertz II*, 2022 Bankr. LEXIS 3358 at *18; *see also* n. 78 *supra*; *In re PPI Enters. (US), Inc.*, 324 F.3d, at 204; *PG&E III*, 46 F.4th, at 1063–64.

[91] *See generally In re Mullins*, 633 B.R. 1, 4¬–8 (Bankr. D. Mass. 2021) (providing history and background of the solvent-debtor exception).

[92] Although not in the context of a section 502(b)(2) unmatured interest analysis, courts have held that prepayment penalties are allowable in solvent debtor cases. *See Gencarelli*, 501 F.3d at 7 (prepayment penalty, even if "unreasonable" under 506(b), is allowed as an unsecured claim in a solvent debtor case); *cf. Premier Ent. Biloxi LLC*, 445 B.R. at 640 (damages for breach of a no-call provision are allowed as an unsecured claim in a solvent debtor case).

[93] *See Ultra Petroleum I*, 575 B.R. at 374–75 ("Paying post-petition interest on the Make–Whole Amount at the federal judgment rate instead of the rate within the Note Agreement would cause the Noteholders to be impaired.").

[94] *Hertz I,* 637 B.R. at 792.

[95] *In re Mullins*, 633 B.R. at 5 (collecting cases).

[96] The solvent-debtor exception, rooted in eighteenth-century English common law, required debtors "to pay interest that accrued during bankruptcy before retaining value from an estate," and that the exception was applied with regularity and "well-established" under the Bankruptcy Act (a predecessor statute to the modern Bankruptcy Code). *PG&E*, 46 F.4th at 1053. While the Bankruptcy Code is silent as to the continued existence of the solvent-debtor exception, courts generally agree that the Bankruptcy Code did not abrogate the doctrine and that it survived enactment of the Bankruptcy Code. *Id.* at 1051; *Ultra Petroleum IV*, 51 F.4th at 156; *but see PG&E*, 46 F.4th at 1065 (Ikuta, J., dissenting) (dissenting from the majority and, in reliance on Supreme Court precedent regarding statutory interpretation, arguing that the Bankruptcy Code abrogated the solvent-debtor exception entirely); *Ultra Petroleum IV*, 51 F.4th at 160 (Oldham, J., dissenting) (same). The majority opinions of both the Ninth Circuit in *PG&E* and the Fifth Circuit in *Ultra Petroleum IV* held that the solvent-debtor exception survived the enactment of the Bankruptcy Code unchanged. While the *Hertz* court agreed that the Bankruptcy Code did not abrogate the solvent-debtor exception entirely, it held that the exception would only apply "in three limited circumstances: (1) when a secured creditor is over-secured, *i.e.*, its collateral has a value in excess of its claim, (2) when a chapter 7 debtor is solvent, and (3) when an impaired creditor has not accepted the debtor's chapter 11 plan." *Hertz II*, 2022 Bankr. LEXIS 3358 at *17.

[97] *PG&E*, 46 F.4th at 1051; *Ultra Petroleum IV*, 51 F.4th at 156. In *PG&E*, the Ninth Circuit overturned lower court rulings, which applied the federal judgment rate in reliance on the Ninth Circuit's earlier decision in *In re Cardelucci ("Cardelucci")*. 285 F.3d 1231 (9th Cir. 2002). In *Cardelucci*, the solvent debtor and its creditors agreed that creditors would be entitled to post-petition interest "at the legal rate" as such term is used in section 726(a)(5) of the Bankruptcy Code which, according to the Ninth Circuit in *Cardelucci*, meant the federal judgment rate. However, in *PG&E*, the Ninth Circuit clarified that section 726(a)(5) of the Bankruptcy Code only applies to chapter 7 debtors or to impaired chapter 11 claims, but that *Cardelucci* does not require courts to impose post-petition interest at the federal judgment rate in an ordinary solvent-debtor case where the creditors are unimpaired. *PG&E*, 46 F.4th at 1057.

[98] *Hertz II*, 2022 Bankr. LEXIS 3358, at *15–19. *Hertz II* has been appealed directly to the Third Circuit, which is scheduled to hear oral arguments in October 2023.

[99] Transcript of Oral Argument, *In re Hertz Corp.*, Nos. 20-11218 (MFW), 21-50995 (MFW), 37:1–2 (Bankr. D. Del. Nov. 9, 2022) [ECF No. 70].

[100] Recent litigation in the United States Bankruptcy Court in the Southern District of New York also raises the question of whether the solvent-debtor exception applies specifically to any solvent subsidiaries of a debtor and creditors' entitlement to post-petition interest with respect to their claims at such solvent subsidiaries, even if the debtors are overall insolvent. Motion of the TLA Claimholders Group, *In re LATAM Airlines Group S.A.*, No. 20-11254 (Bankr. S.D.N.Y. Feb. 24, 2022), ECF No. 4407 (arguing that the solvent-debtor exception entitles unsecured creditors of the debtors' solvent subsidiary to post-petition interest at the contract rate).

[101] 11 U.S.C. § 506(b).

[102] *In re 400 Walnut Assocs., L.P.*, 473 B.R. 603, 610 (E.D. Pa. 2012). *See also Kimbrell Realty*, 483 B.R. at 684; *In re Wesley*, 455 B.R. 383, 386 (Bankr. D.N.J. 2011). *Cf. AE Hotel*, 321 B.R. at 217 (characterizing prepayment premium that came due post-petition as a post-petition charge, and applying 506(b)); *In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823, 827–28 (Bankr. E.D. La. 2001) (applying 506(b) to a prepayment premium that came due post-petition).

[103] *See Vanderveer Ests. Holdings*, 283 B.R. at 131 (observing that if a make-whole claim arises out of a prepetition event, section 506 is inapplicable and the make-whole premium would be included in the secured claim in the first instance, and also noting that there was no provision under section 502 that would otherwise disallow the claim).

[104] *See* Sam Lawand, *Make-Whole Claims in Bankruptcy*, 27 NORTON J. BANKR. L. PRAC. 285, 308 (2018) ("If a court takes the position that section 506(b) does not govern make-whole claims triggered [prepetition] by a bankruptcy default, [the 506(b)] part of the analysis is moot.").

[105] *See In re Amigo PAT Texas, LLC*, 579 B.R. 779, 783 (Bankr. S.D. Tex. 2017) (applying 506(b) to prepayment premium that came due upon an acceleration that occurred prepetition); *Sch. Specialty*, 2013 WL 1838513, at *4 (acknowledging that cases differ as to whether 506(b) applies to prepetition claims, but noting that assuming 506(b) did apply, the make-whole claim at issue would meet the 506(b) reasonableness standard); *In re Duralite Truck Body & Container Corp.*, 153 B.R. 708, 713 (Bankr. D. Md. 1993) (noting that prepayment premiums must meet the federal reasonableness standard under 506(b) in order to be allowed); *Kroh Bros.*, 88 B.R.at 1001 (same). Although the language of section 506(b) permits secured claims for "interest" on claims and "reasonable fees, costs, or charges," courts have typically assumed that make-whole premiums implicate and fall under the reasonable fees and charges component of section 506(b), rather than the "interest" component. *See, e.g., Imperial Coronado*, 96 B.R. at 1000 ("Here, the prepayment premium is clearly a 'charge provided for under the agreement' and, thus, subject to the reasonableness limitation."); *see also* Charles & Kleinhaus, *supra* note 3, at 557 ("Courts have consistently held (or simply assumed) that contractual prepayment fees are 'fees' or 'charges' covered by section 506(b) to the extent they are 'reasonable.' As a result, courts have not treated prepayment fees as 'interest,' despite the fact that prepayment fees largely serve as a replacement for interest when debts are repaid prior to maturity.").

[106] *See Sch. Specialty*, 2013 WL 1838513, at *5 ("Under New York law, a prepayment premium must not be an unenforceable penalty; therefore the § 506(b) reasonable standard may be met in any event."); *In re Fin. Ctr. Assocs. of E. Meadow, L.P.*, 140 B.R. 829, 839 (Bankr. E.D.N.Y. 1992) (observing that because New York state law provides for a "fairly developed, elaborate and readily applicable method" of determining the validity of prepayment clauses, with "notions of reasonableness" being "inherent" in the New York law test, a separate "reasonableness" standard under section 506(b) should only be applied sparingly and cautiously).

[107] *Amigo PAT*, 579 B.R. at 783 (collecting cases).

[108] *See, e.g., In re Anchor ADR Corp.*, 221 B.R. 330, 341 (Bankr. D. Del. 1998); *Imperial Coronado*, 96 B.R. at 1001.

[109] *Duralite*, 153 B.R. at 715; *see also In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 829 (a make-whole premium that presumes a loss is not reasonable); *Kroh Bros.*, 88 B.R. at 1000 (holding that a make-whole premium that does not discount to present value is not reasonable under 506(b)). *But see Schaumburg Hotel*, 97 B.R. at 954 (holding that a 10% fixed make-whole premium is reasonable, because the court viewed the prepayment premium to be a liquidated damages provision, and liquidated damages provisions need only be reasonable estimates of damages, and need not precisely track actual damages suffered).

[110] *In re Maywood, Inc.*, 210 B.R. 91, 94 (Bankr. N.D. Tex. 1997).

[111] *Kroh Bros.*, 88 B.R. at 1002 (examining a 25% premium under an instrument governed by Missouri law that did not discount to present value and observing that "at most a 10% prepayment charge could be considered within the realm of reasonable."); *see also In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. at 831 (holding that an 18% premium under a note governed by Louisiana law was unreasonable because the yield maintenance formula included a fixed component that did not vary based on market interest rates); *Skyler Ridge*, 80 B.R. at 507 (holding that a premium under a note governed under Kansas law that did not discount to present value and which would result in a 20–30% overcompensation of the lender was unreasonable).

[112] *See, e.g., Amigo PAT*, 579 B.R. at 785 (4.9% approved as reasonable); *In re Brandywine Townhouses, Inc.*, 518 B.R. 671, 678 (Bankr. N.D. Ga. 2014) (36% as reasonable); *Sch. Specialty*, 2013 WL 1838513, at *2 (greater than 30% as reasonable); *Lappin Elec.*, 245 B.R. at 331 (5.9% as reasonable); *Anchor ADR*, 221 B.R. at 341 (6.9% as reasonable); *Fin. Ctr. Assocs.*, 140 B.R. at 839 (25% as reasonable).

[113] *See, e.g., Maywood*, 210 B.R. at 94 (observing the adverse effect that allowing make-whole premium would have on unsecured creditors); *In re Amigo PAT Texas, LLC*, 579 B.R. 779, 783 (Bankr. S.D. Tex. 2017).

[114] *In re SNTL Corp.*, 571 F.3d 826, 843 (9th Cir. 2009) (examining attorney fees). *See also Gencarelli v. UPS Cap. Bus. Credit*, 501 F.3d 1, 5 (1st Cir. 2007) (examining prepayment penalty of solvent debtor) ("There is universal agreement that whereas section 506 furnishes a series of useful rules for determining whether and to what extent a claim is secured (and, therefore, entitled to priority), it does not answer the materially different question of whether the claim itself should be allowed or disallowed… Rather, the general rules that govern the allowance or disallowance of claims are set out in section 502… Section 502, not section 506(b), affords the ultimate test for allowability, and any claim satisfying that test is, at the very worst, collectible as an unsecured claim."); *In re Welzel*, 275 F.3d 1308, 1318 (11th Cir. 2001) (examining attorney fees) ("Section 502 deals with the threshold question of whether a claim should be allowed or disallowed. Once the bankruptcy court determines that a claim is allowable, § 506 deals with the entirely different, more narrow question of whether certain types of claims should be considered secured or unsecured.").

[115] *See In re Chateaugay Corp.*, 961 F.2d 378, 380 (2d Cir. 1992). *See also* Stephen V. Falanga et al., *How Secure Are You? Secured Creditors in Commercial and Consumer Bankruptcies* 17 (ABI, 2016).

[116] *In re Hertz Corp.*, 637 B.R. 781, 800 (Bankr. D. Del. 2021)..

[117] *Ultra Petroleum IV*, 51 F.4th at 149..

[118] *In re Solutia Inc.*, 379 B.R. 473, 486 (Bankr. S.D.N.Y. 2007).

[119] *In re Solutia Inc.*, 379 B.R. 473, 487 (Bankr. S.D.N.Y. 2007).

[120] *Ultra Petroleum I*, 575 B.R. at 374–75 ("Paying post-petition interest on the Make-Whole Amount at the federal judgment rate instead of the rate within the Note Agreement would cause the Noteholders to be impaired."). *See also In re Sublett*, 895 F.2d 1381, 1385 (11th Cir. 1990) (holding that section 506(b) permits post-petition interest on unpaid interest, and suggesting that post-petition interest on attorneys' fees allowable under section 506(b) is also payable, so long as such amounts are payable under the terms of the underlying agreement).

[121] *See In re Anchor Resolution Corp.*, 221 B.R. 330, 334 (Bankr. D. Del. 1998) (noting that make-whole claim should be decreased by the amount of post-petition interest that noteholders have been receiving on unpaid principal amounts to avoid double counting); *In re Neelkanth Hotels, LLC*, No. 20-69501-JWC, 2021 WL 4944100, at *14 (Bankr. N.D. Ga. Oct. 22, 2021) (where creditor sought a yield maintenance premium as part of its prepetition claim, as well as post-petition interest on its prepetition claim, and debtor argued that allowing both amounts would constitute a double recovery; the court noted that this issue was moot in the case at hand because the portion of the yield maintenance premium that compensated for loss of interest payments was disallowed on other grounds); *In re Kroh Bros. Dev. Co.*, 88 B.R. 997, 1002 (Bankr. W.D. Mo. 1988) (suggesting that a prepayment charge represented compensation for post-petition interest and noting that post-petition interest should be allowed only until the underlying principal amount is repaid); *In re 785 Partners LLC*, 470 B.R. 126 (Bankr. S.D.N.Y. 2012) (examining a secured creditor's claims for, among other things, post-petition default interest and a 5% fixed late payment fee to "cover administrative and related expenses incurred in handling delinquent payments" and holding that the late payment fee was not payable, including because the secured creditor would receive default interest which is "designed to compensate the lender for the same injury" as the late payment fee).

[122] *Ultra Petroleum IV.*, 51 F.4th 138, 157 (5th Cir. 2022).

[123] *EFH*, 842 F.3d at 255; *Hertz I*, 637 B.R. at 787.

[124] *See* 11 U.S.C. § 1124(2).

[125] Transcript of Trial on Confirmation of Plan at 18–20, *In re EP Energy Corp.*, No. 19-35654 (Bankr. S.D. Tex. Mar. 6, 2020), ECF No. 1025 (also noting that the make-whole provision would survive and could potentially be triggered in the future). *See also In re Carr Mill Mall Ltd. P'ship*, 201 B.R. 415, 422 (Bankr. M.D.N.C. 1996) (holding that prepayment penalties are not enforceable on notes that are reinstated through a chapter 11 plan; although the prepayment penalty provisions may live on in the notes as a technical matter, they would not be practically enforceable, because the original maturity dates of the notes have passed).

[126] *See* Transcript of Hearing at 108–09, *In re Mallinckrodt plc*, No. 20-12522 (JTD) (Bankr. D. Del. Nov. 5, 2021), ECF No. 5220.

[127] *See* Debtor Objection at 3, *In re Mallinckrodt plc*, No. 20-12522 (JTD) (Bankr. D. Del. July 30, 2021), ECF No. 3504.

[128] *See id.* at 15–16.

[129] *See* Debtor Memorandum of Law in Support of Reinstatement at 7, *In re Mallinckrodt plc*, No. 20-12522 (JTD) (Bankr. D. Del. Oct. 27, 2021), ECF No. 5020.

[130] *See* Ad Hoc First-Lien Notes Group Objection at 14, *In re Mallinckrodt plc*, No. 20-12522 (JTD) (Bankr. D. Del. Oct. 13, 2021), ECF No. 4725.

[131] 11 U.S.C. § 365(b)(2).

[132] *See* Debtor Objection at 17; Debtor Memorandum of Law in Support of Reinstatement at 10.

[133] *See* Ad Hoc First-lien Notes Group Objection at 12, 16–18.

[134] *See id.* at 15.

[135] *See id.*

[136] *See id.* at 7–8.

[137] *See* Debtor Objection at 17; Debtor Memorandum of Law in Support of Reinstatement at 8–9.

[138] *See* Transcript of Hearing at 109.

[139] *See id.* at 108–09 (citing *In re Onco Inv. Co.*, 316 B.R. 163, 167 (Bankr. D. Del. 2004)).

[140] *See id.*

[141] *Wilmington Sav. Fund Soc'y v. Mallinckrodt PLC (In re Mallinckrodt PLC),* No. 22-00337 (RGA) (D. Del. Aug. 29, 2023), ECF No. 89.

[142] 11 U.S.C. § 365(e)(1).

[143] *Id.* § 541(c)(1)(B).

[144] *Id.* § 363(l).

[145] *See, e.g., AMR Corp.*, 730 F.3d 88; *In re Gen. Growth Props., Inc.*, 451 B.R. 323 (Bankr. S.D.N.Y. 2011); *St. Vincent's Cath. Med. Ctrs.*, 440 B.R. 587.

[146] *AMR Corp.*, 730 F.3d at 106 (noting that ipso facto clauses are unenforceable under section 365(e)(1)(B) only with respect to executory contracts, and the indentures at issue were not executory contracts).

[147] *Id.* at 107.

[148] *See, e.g., In re W.R. Grace & Co.*, 475 B.R. 34, 152–54 (D. Del. 2012) (in context of default interest provision, noting the Bankruptcy Code has a general prohibition against ipso facto clauses rooted in sections 541(c) and 365(e)(1)); *Schwegmann*, 287 B.R. at 657 (E.D. La. 2002) (finding that a prepayment premium was an unenforceable ipso facto clause pursuant to section 365(e)(1)(B), but not addressing whether the underlying note was an executory contract).

[149] *W.R. Grace*, 475 B.R. at 152–54.

[150] *Id.* at 154.

[151] *Id.* at 152–54.

[152] *See* UCC Objection at 10, *In re Intelsat S.A.*, No. 20-32299 (KLP) (Bankr. E.D. Va. Oct. 15, 2021), ECF No. 3119 (citing *Riggs Nat'l Bank of Wash., D.C. v. Perry*, 729 F.2d 982 (4th Cir. 1984) (citing cases under section 365(e) of the Bankruptcy Code that held that section 365(e) should not be limited to apply only to executory contracts)).

[153] *See* Debtor Reply at 4–5, *In re Intelsat S.A.*, No. 20-32299 (KLP) (Bankr. E.D. Va. Dec. 12, 2021), ECF No. 3739.

[154] *See* Notice of Resolution, *In re Intelsat S.A.*, No. 20-32299 (KLP) (Bankr. E.D. Va. Dec. 15, 2021), ECF No. 3847.

[155] *See* Debtor Objection at 20–23.

[156] *See* Order Approving Stipulation, *In re Mallinckrodt plc, et al.*, No. 20-12522 (JTD) (Bankr. D. Del. Oct. 25, 2021), ECF No. 4969.

[157] *See Ultra Petroleum IV*, 51 F.4th at 147.

[158] *Id.*

Make-whole venue analysis

Courts have expressed potentially divergent views with respect to several issues relevant to analyzing make-whole provisions. Because these differences can play a significant role in whether a make-whole claim is enforced in the bankruptcy context, borrowers may be incentivized to commence bankruptcy proceedings in specific venues, depending on the how the make-whole provisions in their debt documents have been structured. Although the issues summarized in the following table have not been fully settled or determined, will often depend on the facts specific to each case and have not necessarily been resolved at the circuit-level within each jurisdiction,[i] they may nonetheless be considered by parties when evaluating the enforceability of make-wholes in bankruptcy.

Issues	Second Circuit	Third Circuit	Fifth Circuit	Sixth Circuit	Ninth Circuit
Is post-maturity repayment a "redemption"?	"Redemption" refers only to pre-maturity repayment of debt. Post-acceleration refinancing is not considered redemption.[ii]	"Redemption" refers to both pre- and post-maturity repayments of debt.[iii]	N/A	N/A	N/A
When is a repayment "optional"?	Payment made mandatory due to an automatic acceleration clause is not "voluntary" or optional, and thus does not trigger an optional redemption premium.[iv]	Repayment as a result of bankruptcy filing is optional, as debtors have the option to reinstate the notes rather than repay them, and thus can trigger an optional redemption premium.[v]	N/A	N/A	N/A

Appendix I

[i] Where relevant circuit-level decisions are not available, this summary reflects the decisions of lower courts in the applicable jurisdictions.

[ii] *In re MPM Silicones, L.L.C. ("Momentive")*, 874 F.3d 787 (2d Cir. 2017).

[iii] *In re Energy Future Holdings Corp. ("EFH")*, 842 F.3d 247 (3d Cir. 2016).

[iv] *Momentive*, 874 F.3d 787.

[v] *EFH*, 842 F.3d 247; *see also In re Hertz Corp. ("Hertz I")*, 637 B.R. 781 (Bankr. D. Del. 2021).

Issues	Second Circuit	Third Circuit	Fifth Circuit	Sixth Circuit	Ninth Circuit
Effect of acceleration on maturity date	Automatic acceleration moves forward the maturity date and absent contractual language providing otherwise, precludes post-acceleration payments from triggering prepayment premiums drafted to apply to prepayments made prior to maturity.[v1]	Same as Second Circuit.[vii]	Same as Second Circuit.[viii]	Same as Second Circuit.[ix]	One bankruptcy court has suggested that the effect of automatic acceleration should not be interpreted to per se defeat a prepayment premium by moving forward the maturity date, as acceleration can also be subject to deceleration in bankruptcy.[x]
Is the make-whole premium "unmatured interest" under section 502(b)(2)?	Prepayment premium does not constitute unmatured interest.[1xi]	Prepayment premium does not constitute unmatured interest.[xii] Note also that a recent bankruptcy court decision declined to conclude as a matter of law whether make-whole premiums should be disallowed under section 502(b)(2) of the Bankruptcy Code and held that this is a factual question.[xiii]	Prepayment premium constitutes unmatured interest.[xiv]	Prepayment premium does not constitute unmatured interest.[xv] However, one bankruptcy court in the Sixth Circuit held that a prepayment premium claim that was contingent and not yet due at the time of the bankruptcy filing was more appropriately characterized as unmatured interest.[xvi]	Prepayment premium does not constitute unmatured interest.[xvii]

[vi] *Momentive*, 874 F.3d 787; *In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007).

[vii] *In re LaGuardia Assocs., L.P.*, No. 11-19334 (SR), 2012 WL 6043284 (Bankr. E.D. Pa. Dec. 5, 2012).

[viii] *In re Premier Ent. Biloxi LLC*, 445 B.R. 582 (Bankr. S.D. Miss. Sept. 3, 2010).

[ix] *MSCI 2007-IQ16 Retail 9654, LLC v. Dragul*, No. 1:14-CV-287, 2015 WL 1468435 (S.D. Ohio Mar. 30, 2015).

Issues	Second Circuit	Third Circuit	Fifth Circuit	Sixth Circuit	Ninth Circuit
Are claims that are determined to be "unreasonable" fees under section 506(b) disallowed or treated as unsecured claims?	N/A	Claims that do not satisfy the "reasonable" requirement of section 506(b) are per se disallowed.[xviii]	Bankruptcy courts in the Fifth Circuit have differed on whether claims that do not satisfy the "reasonable" requirement of section 506(b) are per se disallowed,[xix] or whether they should instead be treated as an unsecured claim.[xx]	N/A	N/A
Post-petition interest rate in solvent debtor cases	N/A	Both impaired and unsecured creditors in a solvent debtor case are entitled to post-petition interest only at the federal judgment rate.[xxi]	Both impaired and unimpaired unsecured creditors in a solvent debtor case are entitled to post-petition interest at the contractual rate. [xxii]	Both impaired and unimpaired unsecured creditors in a solvent debtor case are entitled to post-petition interest at the contractual rate.[xxiii]	Both impaired and unsecured creditors in a solvent debtor case are entitled to post-petition interest only at the federal judgment rate.[xxiv]

[x] *In re Skyler Ridge*, 80 B.R. 500 (Bankr. C. D. Cal. 1987).

[xi] *U.S. Bank Nat. Ass'n v. S. Side House, LLC*, No. 11-CV-4135 ARR, 2012 WL 273119 (E.D.N.Y. Jan. 30, 2012).

[xii] *In re Sch. Specialty, Inc.*, No. 13-10125 KJC, 2013 WL 1838513 (Bankr. D. Del. Apr. 22, 2013).

[xiii] *Hertz I*, 637 B.R. 781.

[xiv] *In re Ultra Petroleum Corp. ("Ultra Petroleum IV")*, 51 F.4th 138, 146 (5th Cir. 2022), *cert. denied sub nom. Ultra Petroleum Corp. v. Ad Hoc Comm. of OpCo Unsecured Creditors*, 143 S. Ct. 2495 (2023).

[xv] *In re Hidden Lake Ltd. P'ship*, 247 B.R. 722, 730 (Bankr. S.D. Ohio 2000).

[xvi] *In re Ridgewood Apts.*, 174 B.R. 712 (Bankr. S.D. Ohio 1994).

[xvii] *In re Skyler Ridge*, 80 B.R. 500, 508 (Bankr. C.D. Cal. 1987).

[xviii] *In re Atrium View, LLC*, No. 1:07-BK-02478MDF, 2008 WL 5378293, at *3 (Bankr. M.D. Pa. Dec. 24, 2008).

[xix] *In re Amigo PAT Texas, LLC*, 579 B.R. 779, 782 (Bankr. S.D. Tex. 2017).

[xx] *In re Premier Ent. Biloxi LLC*, 445 B.R. 582, 646 (Bankr. S.D. Miss. 2010).

[xxi] *In re PPI Enters. (US), Inc.*, 324 F.3d 197 (3d Cir. 2003); *Hertz I*, 637 B.R. 781; *In re Hertz Corp. ("Hertz II")*, Nos. 20-11218 (MFW), 21-50995 (MFW), 2022 Bankr. LEXIS 3358, at *17–18 (Bankr. D. Del. Nov. 21, 2022).

[xxii] *Ultra Petroleum III*, 624 B.R. 178. *See also Ultra Petroleum IV*, 51 F.4th at 159 (affirming that unimpaired creditors receive the contract rate of interest but declining to address the proper interest rate for impaired creditors).

[xxiii] *In re Dow Corning Corp.*, 456 F.3d 668, 680 (6th Cir. 2006).

[xxiv] *In re PG&E Corp.*, 610 B.R. 308 (Bankr. N.D. Cal. 2019) (citing *In re Cardelucci*, 285 F.3d 1231, 1233 (9th Cir. 2002)).

Make-whole provision checklist

Make-whole provisions are not uniform, and the approaches that drafters take to address the enforceability issues discussed in this guide can vary depending on the circumstances of each transaction, including the relative bargaining power of the parties and market standards (which may vary based on whether, for example, the debt is issued in the investment grade or high-yield markets). The following make-whole provision checklist outlines the features of make-whole provisions that can, to varying degrees, address many of the enforceability issues examined in the case law and increase the probability that such premium would be enforced in bankruptcy. Illustrative examples of make-whole provisions seen in selected credit agreements and indentures in the market (with a focus on high-yield instruments) are also provided below, which have been categorized as "limited," "moderate" or "robust" in the extent to which they address bankruptcy enforceability for summary purposes.

Triggers

- **Types of payments covered:** The premium will trigger upon a wide range of different payment events (*e.g.*, repayment, redemption, prepayment, any payment of principal), and is not limited to only "prepayments," which by definition must be made prior to maturity. The provision will also deem such payment events to have occurred upon acceleration, addressing the issue raised in *Momentive* that prepayments cannot be made once the maturity date is brought forward upon acceleration,[i] as well as cases where courts held that a make-whole premium did not become due where a borrower did not actually tender payment.[ii] A broader definition of the triggering action is likely to increase the chances of enforceability of the make-whole provision in bankruptcy.

- **Optional or mandatory payments:** The premium will trigger regardless of whether payments are optional or mandatory, circumventing the question raised in *Momentive* of whether payments made following automatic acceleration are voluntary or involuntary.[iii]

- **Clearly defined time period:** The language will provide that a trigger can occur at any time prior to a clearly specified date, and is not cut short by acceleration. This avoids the issue raised in *Hertz*, where the court reviewed a premium triggered based on payments made prior to a "maturity" date, and interpreted the maturity date to have occurred on the date of acceleration, and thus held that the premium was no longer applicable post-acceleration.[iv]

Appendix II

[i] *In re MPM Silicones, L.L.C. ("Momentive")*, 874 F.3d 787, 802–03 (2d Cir. 2017).

[ii] *See, e.g.*, *In re Denver Merch. Mart, Inc.*, 740 F.3d 1052 (5th Cir. 2014) (finding that no prepayment premium was due absent actual payment pursuant to the terms of the note, which did not include a clear contractual provision requiring payment of the premium in the event of mere acceleration); *In re S. Side House, LLC*, 451 B.R. 248, 272 (Bankr. E.D.N.Y. 2011); *In re Ridgewood Apts. of DeKalb Cnty., Ltd.*, 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994).

[iii] *Momentive*, 874 F.3d at 803.

[iv] *Hertz I*, 637 B.R. 781; *see also* Scott Charles & Emil Kleinhaus, *Prepayment Clauses in Bankruptcy*, 15 AM. BANKR. INST. L. REV. 537, 546 (2007) ("If a lender and borrower agree to include a provision in their loan documents under which a prepayment fee is payable as long as the loan's original maturity dates have not passed, any possible tension between the fee and acceleration evaporates.").

Triggers - Illustrative examples

Selected credit agreement (2016)

"***With respect to each repayment or prepayment*** [of] Loans [***whether optional or mandatory*** pursuant to a Change of Control or issuance of Indebtedness], ***any acceleration of the Loans and other Obligations***…, any repayment in connection with the 'springing' maturity date set forth in the definition of 'Maturity Date', or any mandatory assignment of the Loans of any Lender by a Non-Consenting Lender in connection with a Repricing Transaction or any amendment, amendment and restatement or other modification of this Agreement resulting in a Repricing Transaction, the Borrower shall be required to pay with respect to the amount of the Loans repaid, prepaid, assigned or subject to a Repricing Transaction, in each case, concurrently with such repayment, prepayment, assignment or Repricing Transaction, the following amount (the 'Applicable Premium')…

It is understood and agreed that ***if the Loans are accelerated or otherwise become due prior to their Maturity Date***, including without limitation as a result of any Event of Default described under Section 8.01(f) [Insolvency Proceedings], ***the Applicable Premium will also automatically be due and payable as though the Loans were being repaid, prepaid or assigned*** (or amended or otherwise modified pursuant to such amendment) and shall constitute part of the Obligations with respect to the Loans."

Robust

- **Types of payments covered:** Applies to both repayments or prepayments, and provides that premium will be automatically due and payable upon acceleration as if repayment or prepayment occurred.
- **Optional or mandatory payments:** Covers both optional or mandatory payments.
- **Clearly defined time period:** Specifies that the premium will be due after any acceleration prior to the "Maturity Date," which is defined as a fixed date of five years from the Closing Date.

Selected indenture (2020)

"***At any time prior to September 30, 2023***, the Issuer may, ***at its option*** and on one or more occasions, ***redeem*** all or a part of the Notes… at a redemption price equal to the sum of (A) 100.0% of the principal amount of the applicable Series of Notes redeemed, plus (B) ***the Make-Whole Premium*** as of the Redemption Date, plus (C) accrued and unpaid interest, if any, to, but excluding, the Redemption Date, subject to the right of Holders of record on the relevant Record Date to receive interest due on the Notes on the relevant Interest Payment Date falling prior to or on the Redemption Date.

In the event that the Issuer redeems, repurchases or otherwise ***makes or is required to make any payments*** in respect of principal of any Initial Notes pursuant to any applicable provision of the Indenture in any manner and for any reason or, to the extent so provided in the applicable amendment or supplement to this Indenture, any Additional Notes (in each case, ***whether voluntarily, mandatorily or otherwise***, including any completed or required redemption, repurchase or other payment ***as a result of (i) an acceleration*** of the Obligations in respect of an Event of Default, (ii) foreclosure and sale of, or collection of, the Collateral as a result of an Event of Default, (iii) sale of the Collateral in any insolvency proceeding, (iv) the restructure, reorganization, or

Robust

- **Types of payments covered:** There are two sets of triggering events here, with the first, narrower provision applying to optional redemptions and the second, broader provision applying to "any payments" in respect of principal, covering a wide range of different events. The broader provision also applies to payments as the result of an acceleration.
- **Optional or mandatory payments:** The narrower provision applies only to optional redemptions, while the broader provision covers payments regardless of whether they were voluntary or mandatory.

Triggers - Illustrative examples

Selected indenture (2020) (cont.)

compromise of the Obligations by the confirmation of a plan of reorganization or any other plan of compromise, restructure, or arrangement in any insolvency proceeding and (v) the termination of this Indenture for any reason), the Issuer shall pay to the Trustee, for the ratable account of each applicable Holder the aggregate principal amount of the Notes being or required to be redeemed, repurchased or otherwise paid plus a premium (the 'Applicable Premium')…"

Robust

— **Clearly defined time period:** The narrower provision clearly fixes a date (September 30, 2023) during which the optional redemption premium is applicable. The broader provision is not limited to a specific time period, and expressly contemplates that the premium can be payable following acceleration.

Selected credit agreement (2019)

"(i) If all or any part of the principal balance of any Loan is paid on or ***prior to the fourth anniversary of the Closing Date for any reason*** (including, but not limited to, whether ***voluntary or mandatory***, and whether ***before or after acceleration*** of the Obligations or the commencement of any Insolvency Proceeding, but in any event (A) including any such prepayment in connection with (I) a Change of Control, (II) ***an acceleration of the Obligations*** as a result of the occurrence of an Event of Default, (III) foreclosure and sale of, or collection of, the Collateral, (IV) sale of the Collateral in any Insolvency Proceeding, (V) the restructure, reorganization, or compromise of the Obligations by the confirmation of a plan of reorganization or any other plan of compromise, restructure, or arrangement in any Insolvency Proceeding, or (VI) the termination of this Agreement for any reason)… Borrower shall pay to Administrative Agent, for the benefit of all Lenders entitled to a portion of such prepayment a premium as liquidated damages and compensation for the costs of being prepared to make funds available hereunder with respect to the Loans (the 'Applicable Prepayment Premium')…"

Robust

— **Types of payments covered:** Applies to any payment of the principal balance of the loan, and includes a non-exhaustive list of different payment events that trigger the make-whole premium, including acceleration.

— **Optional or mandatory payments:** Applies to both voluntary or mandatory payments.

— **Clearly defined time period:** Clearly fixes a date (the fourth anniversary of the Closing Date) during which the make-whole premium can be triggered, and specifies that acceleration will not limit this time period.

Triggers - Illustrative examples

Selected credit agreement (2021)

"The Secured Notes will be subject to ***redemption at the option of the Company***, at any time in whole, or from time to time in part, ***prior to, in the case of the 2026 Notes, June 1, 2026*** (the date that is six months prior to the maturity of the 2026 Notes (the '2026 Par Call Date')), ***and in the case of the 2028 Notes, December 1, 2027*** (the date that is twelve months prior to the maturity of the 2028 Notes (the '2028 Par Call Date')), upon not less than 10 nor more than 60 days' notice, at a redemption price equal to 100% of the principal amount of such Secured Notes plus accrued and unpaid interest, if any, to the applicable redemption date plus the 'Make Whole Premium.'"

"In the case of any Event of Default occurring by reason of any ***willful action (or inaction) taken (or not taken)*** by or on behalf of the Company or its Subsidiaries with the ***intention of avoiding payment of the premium*** that the Company would have had to pay if the Company then had elected to redeem the Secured Notes pursuant to [the optional redemption provision] of this Secured Indenture, ***an equivalent premium shall also become and be immediately due and payable*** to the extent permitted by law."

Limited

- **Types of payments covered:** Applies only to redemptions, which courts could potentially interpret to only refer to prepayments. Contains language providing that willful actions taken with the intent of avoiding the premium will also trigger the premium. This language could arguably trigger the make-whole premium for certain acceleration events, depending on the fact pattern, but the language leaves room for arguments to the contrary.
- **Optional or mandatory payments:** Applies only to optional redemptions and does not address applicability to mandatory redemptions.
- **Clearly defined time period:** Clearly fixes a date (June 1, 2026, with respect to the 2026 Notes and December 1, 2027, with respect to the 2028 Notes) during which the make-whole premium can be triggered, but does not specify whether acceleration could cut this period short.

Triggers - Illustrative examples

Selected indenture (2021)

"The Notes ***may be redeemed, in whole or in part, at any time prior to the Par Call Date, at the option of the Company*** upon not less than 30 nor more than 60 days' prior notice sent to each Holder in accordance with Section 3.03, at a Redemption Price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium as of, and accrued and unpaid interest, if any, to, but excluding, the redemption date (subject to the right of Holders of record on the relevant Record Date to receive interest due on an Interest Payment Date that is on or prior to the redemption date)."

Limited

- **Types of payments covered:** Applies only to redemptions, which courts could potentially interpret to only refer to prepayments.
- **Optional or mandatory payments:** Only applies to optional redemptions, and does not address applicability to mandatory redemptions.
- **Clearly defined time period:** Clearly fixes a date (the "Par Call Date," defined as October 1, 2027) during which the make-whole premium can be triggered, but does not specify whether acceleration could cut this period short.

Selected indenture (2021)

"Prior to the Par Call Date, the Issuer shall have the right at its ***option to redeem the Notes, in whole or in part, at any time or from time to time prior to their maturity***, on at least 10 days, but not more than 60 days, prior notice delivered to the registered address of each Holder of Notes, at a Redemption Price equal to the greater of (i) 100% of the principal amount of such Notes and (ii) the sum of the present values of the remaining scheduled payments of principal and interest on the Notes to be redeemed to the Par Call Date (exclusive of interest accrued to the Redemption Date), discounted to the Redemption Date on a semi-annual basis (assuming a 360-day year consisting of twelve 30-day months) at the Treasury Rate, plus 50 basis points for the Notes, plus, in each case, accrued and unpaid interest thereon to the Redemption Date."

Limited

- **Types payments covered:** Applies only to redemptions, which courts could potentially interpret to only refer to prepayments.
- **Optional or mandatory payments:** Only applies to optional redemptions, and does not address applicability to mandatory redemptions.
- **Clearly defined time period:** Fails to specify a defined period, and instead indicates that a make-whole may be triggered "prior to [the Notes'] maturity," which courts could interpret as excluding redemptions following acceleration.

Formula

- **Present value:** The premium will be calculated based on the present value of all (or a portion of) remaining interest payments that would have been paid on the debt, to support arguments that the premium is a reasonable approximation of the creditors' damages in the form of opportunity cost with respect to remaining interest payments.
- **Discount rate:** The discount rate will approximate the rate at which the creditor could reinvest its capital at the time the debt is repaid, to support arguments that the premium is a reasonable approximation of the creditors' damages in the form of reinvestment risk with respect to the repaid proceeds.

Formula - Illustrative examples

Selected credit agreement (2016)

"'Make-Whole Amount' means, with respect to any Loan repaid or prepaid under [the mandatory or optional redemption provision], any acceleration of the Loans and other Obligations…, any repayment in connection with the 'springing' maturity date set forth in the definition of 'Maturity Date' or any mandatory assignment of the Loans of a Non-Consenting Lender in connection with a Repricing Transaction or any amendment, amendment and restatement or other modification of this Agreement resulting in a Repricing Transaction, on the date of any such prepayment, repayment, acceleration, assignment, amendment, amendment and restatement or other modification, the greater of:

- (a) 1.0% of the principal amount of the Loan repaid, prepaid, accelerated or assigned or subject to a Repricing Transaction; and
- (b) the excess of: (i) the ***present value*** at such date of repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification of (x) the principal amount of such Loan, plus (y) the Applicable Premium on such Loan on the third anniversary of the Closing Date… plus (z) ***each required interest payment on such Loan from the date of such repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification through the third anniversary of the Closing Date*** (excluding accrued but unpaid interest to the date of such repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification), such present value to be computed using a ***discount rate equal to the Treasury Rate plus 50 basis points*** discounted to the date of repayment, prepayment, acceleration, assignment, amendment, amendment and restatement or other modification on a semi-annual basis… over (ii) the principal amount of such Loans."

Robust

- **Present value:** The formula compensates lenders based on the present value of the remaining interest payments on the loan, and is capped up through the third year.
- **Discount rate:** The formula uses a discount rate equal to the Treasury Rate plus 50 basis points. Whether this is a reasonable approximation of the rate at which lenders could reinvest proceeds would be subject to an analysis of market rates.

Formula - Illustrative examples

Selected indenture (2020)

"'Make-Whole Premium' means with respect to any Initial Note and, to the extent so provided in the applicable amendment or supplement to this Indenture, any Additional Note on any Redemption Date, the greater of:

- (1) 1.0% of the principal amount of such Note; and
- (2) the excess, if any, of (a) the sum of the ***present values*** at such Redemption Date of (i) the redemption price of such Note at September 30, 2023 as set forth in [a specified schedule], plus (ii) ***all remaining scheduled payments of interest due on such Note to and including September 30, 2023*** (excluding accrued but unpaid interest and interest to the applicable Redemption Date, with respect to each of clause (i) and (ii), calculated using a ***discount rate equal to the Treasury Rate as of such Redemption Date plus 50 basis points*** over (b) the principal amount of such Note."

Robust

- **Present value:** The formula compensates creditors based on the present value of the remaining interest payments on the loan, and is capped up through the third year.
- **Discount rate:** The formula uses a discount rate equal to the Treasury Rate plus 50 basis points. Whether this is a reasonable approximation of the rate at which creditors could reinvest proceeds would be subject to an analysis of market rates.

Selected credit agreement (2019)

"'**Make-Whole Premium**' means with respect to a prepayment or repayment of the Loans in any principal amount on any date on or prior to the first anniversary of the Closing Date, the excess of (a) (i) the sum of such principal amount prepaid on such date plus 3.00% times such principal amount, plus (ii) the ***present value on such date of all required and unpaid interest payments that would be due on such principal amount through the first anniversary of the Closing Date*** accruing at a rate equal to the Adjusted LIBOR Rate for an Interest Period of three months in effect on the third Business Day prior to such prepayment or repayment plus the Applicable Margin for LIBOR Rate Loans in effect as of such date of prepayment or repayment computed using a discount rate equal to the ***Treasury Rate as of such date plus 50 basis points***, over (b) such principal amount."

Robust

- **Present value:** The formula compensates creditors based on the present value of the remaining interest payments on the loan, and is capped up through the first year.
- **Discount rate:** The formula uses a discount rate equal to the Treasury Rate plus 50 basis points. Whether this is a reasonable approximation of the rate at which creditors could reinvest proceeds would be subject to an analysis of market rates.

Formula - Illustrative examples

Selected indenture (2021)

"[The issuer may redeem the notes at its option] at a Redemption Price equal to the greater of (1) 100% of the principal amount of the Notes to be redeemed or (2) the sum of the ***present values of the Remaining Scheduled Payments*** of the Notes being redeemed discounted, on a semi-annual basis (assuming a 360-day year consisting of twelve 30-day months), using a discount rate equal to the sum of the ***Treasury Rate plus 50 basis points***, plus accrued and unpaid interest thereon, if any, to, but not including, the Redemption Date…"

"'Remaining Scheduled Payments' means, with respect to each Note to be redeemed, the ***remaining scheduled payments of principal of and interest on such Note*** as if redeemed on the applicable Par Call Date, determined at the interest rate to be applicable on such redemption date. If the applicable Redemption Date is not an Interest Payment Date with respect to such Note, the amount of the next succeeding scheduled interest payment on such Note will be reduced by the amount of interest accrued on such Note to such Redemption Date."

Moderate

- **Present value:** The formula compensates creditors based on the present value of the remaining interest payments on the loan. Unlike the foregoing examples, the remaining interest payments are not capped to a period shorter than the remaining maturity.
- **Discount rate:** The formula uses a discount rate equal to the Treasury Rate plus 50 basis points. Whether this is a reasonable approximation of the rate at which creditors could reinvest proceeds would be subject to an analysis of market rates.

Acceleration

- **Express reference to premium:** The acceleration clause will include an express reference to the make-whole premium and provides that it will be due and payable upon automatic acceleration.

Acceleration - Illustrative examples

Selected credit agreement (2016)

"If any Event of Default occurs and is continuing, the Administrative Agent shall… declare the unpaid principal amount of all outstanding Loans, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other Loan Document to be immediately due and payable (an 'acceleration'), ***which amount shall include the Applicable Premium in effect on the date of such acceleration, as if such acceleration were an optional or mandatory prepayment on the principal amount of Loans accelerated***, whereupon they shall be due and payable without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by the Borrower."

Robust

- **Express reference to premium:** The acceleration clause of the loan expressly provides that the premium will be due upon acceleration, as if the acceleration were a prepayment of the loans.

Acceleration - Illustrative examples

Selected indenture (2020)

"[I]t is understood and agreed that ***if the Obligations are accelerated prior to the fourth anniversary of the Issue Date as a result of an Event of Default***, including because of the commencement of any insolvency proceeding or other proceeding pursuant to any applicable Debtor Relief Laws, sale, disposition, or encumbrance (including that by operation of law or otherwise), the ***Applicable Premium, determined as of the date of acceleration, will also be due and payable immediately upon acceleration as though said Obligations were voluntarily prepaid as of such date and shall constitute part of the Obligations***…"

Robust

— **Express reference to premium:** The make-whole provision expressly contemplates that any acceleration that occurs prior to year four of the issue date will be deemed to be a repayment of the debt, triggering the premium.

Selected credit agreement (2019)

"(ii) Without limiting the generality of the foregoing, it is understood and agreed that ***if the Obligations are accelerated prior to the third anniversary of the Closing Date for any reason***, including because of default, the commencement of any Insolvency Proceeding or other proceeding pursuant to any applicable debtor relief laws, sale, disposition, or encumbrance (including that by operation of law or otherwise), ***the Applicable Prepayment Premium, determined as of the date of acceleration, will also be due and payable as though said Obligations were voluntarily prepaid as of such date and shall constitute part of the Obligations***…"

Robust

— **Express reference to premium:** The make-whole provision expressly contemplates that any acceleration that occurs prior to year three of the issue date will be deemed to be a repayment of the debt, triggering the premium.

Selected indenture (2021)

"If an Event of Default… occurs and is continuing, the Trustee… or the holders of at least 25% in principal amount of the outstanding Notes may declare by notice in writing to the Issuer (an 'Acceleration Notice') the Notes to be immediately due and repayable ***at their principal amount together with accrued interest and all other amounts due*** on all the Notes. . . . If an Event of Default relating to [insolvency] occurs, the Notes will automatically become and be immediately due and payable ***at such amount aforesaid*** without the requirement for any Acceleration Notice or other act on the part of the Trustee or any holders of the Notes and, for the avoidance of doubt, any requirement for an Event of Default to be continuing will be satisfied upon such automatic acceleration."

Limited

— **Express reference to premium:** The acceleration clause, although it provides that "all other amounts due" on the notes constitute part of the accelerated obligations, does not expressly refer to the make-whole premium, and does not state that the make-whole amount will be deemed triggered upon acceleration.

[v] It is unclear what legal effect inclusion of acknowledgments or waivers have on enforceability (*e.g.*, courts may still determine that the make-whole provision should be treated as unmatured interest, regardless of how the provision is labeled in the contract). See *Hertz I*, 637 B.R. at 791.

[vi] It is not clear whether courts would be inclined to enforce such language, particularly if considered contrary to the policy considerations underlying section 1124 of the Bankruptcy Code. *See* Transcript of Hearing at 108–09, *In re Mallinckrodt plc*, No. 20-12522 (JTD) (Bankr. D. Del. Nov. 5, 2021), ECF No. 5220 (noting that permitting a make-whole premium to remain payable following reinstatement would be contrary to the "strong public policy" behind section 1124 of the Bankruptcy Code that parties should not complain once they are restored to their original position, and should not receive a windfall merely due to the occurrence of a bankruptcy).

Acknowledgments/waivers[v]

- **Treatment as liquidated damages:** Language will provide that the make-whole amount is intended to be a liquidated damages provision that approximates creditor's damages from repayment, rather than a penalty or a provision that compensates for unmatured interest.
- **Reasonableness of fee:** Language will acknowledge that the make-whole amount is a reasonable approximation of damages, to address state law and section 506(b) issues with respect to the reasonableness of a fee.
- **General enforceability waiver:** Language will generally disclaim any arguments that could be made to block enforceability of the make-whole provision.
- **Reinstatement acknowledgment/waiver:** Language will provide that the make-whole will be payable even in the event the obligations are reinstated pursuant to section 1124 of the Bankruptcy Code.[vi]
- **Deemed as principal:** Language will expressly provide that the make-whole amount, once triggered, will be deemed to be part of the principal and that interest will accrue thereon, to address issues with respect to whether post-petition interest is payable on the make-whole amount.

Acknowledgments/waivers - Illustrative examples

Selected credit agreement (2016)

"[The Applicable Premium shall be due] in view of the ***impracticability and extreme difficulty of ascertaining actual damages*** and by mutual agreement of the parties as to a ***reasonable calculation of each Lender's lost profits*** as a result thereof. Any premium payable above shall be ***presumed to be the liquidated damages*** sustained by each holder as the result of the early redemption and the Borrower agrees that it is reasonable under the circumstances currently existing… ***THE BORROWER EXPRESSLY WAIVES (TO THE FULLEST EXTENT IT MAY LAWFULLY DO SO) THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION.*** The Borrower expressly agrees (to the fullest extent it may lawfully do so) that: (A) the premium is reasonable and is the product of an arm's length transaction between sophisticated business people, ably represented by counsel; (B) the premium shall be payable ***notwithstanding the then prevailing market rates*** at the time payment is made; (C) there has been a course of conduct between holders and the Borrower giving specific consideration in this transaction for such agreement to pay the premium; and (D) the Borrower shall be estopped hereafter from claiming differently than as agreed to in this paragraph. The Borrower expressly acknowledges that its agreement to pay the premium to Lenders as herein described is a material inducement to Lenders to make the Loans."

Robust

- **Treatment as liquidated damages:** Contains language that presumes that the make-whole amount will be a calculation of liquidated damages.
- **Reasonableness of fee:** Language establishes that the liquidated damages provision is a reasonable calculation and is necessary due to the difficulty of ascertaining actual damages.
- **General enforceability waiver:** Language includes a general statement whereby the borrower waives arguments that it could make against the enforceability of the make-whole premium.
- **Reinstatement acknowledgment/waiver:** Not addressed.
- **Deemed as principal:** Not addressed.

Acknowledgments/waivers - Illustrative examples

Selected indenture (2020)

"[The Applicable Premium] shall be ***liquidated damages and compensation for the costs of making funds available*** hereunder with respect to the Initial Notes… [the Applicable Premium shall be due] ***in view of the impracticability and extreme difficulty of ascertaining actual damages and by mutual agreement of the parties as to a reasonable calculation of each Holder's lost profits as a result thereof.*** The Applicable Premium payable in accordance with the immediately preceding sentence shall be presumed to be the liquidated damages sustained by each Holder as the result of the early termination, and the Issuer agrees that it is reasonable under the circumstances. The Applicable Premium shall also be payable in the event the Obligations (and/or this Indenture or the Notes evidencing the Obligations) are satisfied or released by foreclosure (whether by power of judicial proceeding), deed in lieu of foreclosure, or by any other means. ***ISSUER EXPRESSLY WAIVES THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING PREPAYMENT PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION.*** The Issuer expressly agrees that: (A) the Applicable Premium is reasonable and is the product of an arm's length transaction between sophisticated business people, (B) the Applicable Premium shall be payable notwithstanding the then prevailing market rates at the time payment is made, (C) there has been a course of conduct between Holders and the Issuer giving specific consideration in this transaction for such agreement to pay the Applicable Premium, and (D) the Issuer shall be estopped hereafter from claiming differently than as agreed to in this paragraph. The Issuer expressly acknowledges that its agreement to pay the Applicable Premium as herein described is a material inducement to the purchasers to purchase the Initial Notes and for the Holders to hold the Initial Notes. . . . ***The parties hereto agree that the Applicable Premium provided for under this Section will not be deemed to constitute a penalty.*** The parties acknowledge that the Applicable Premium provided for under this Section is believed to represent ***a genuine estimate of the losses that would be suffered by the Holders as a result of the Issuer's breach of its obligations*** under this Section. The Issuer waives, to the fullest extent permitted by law, the benefit of any statute affecting its liability hereunder or the enforcement hereof. Nothing in this paragraph is intended to limit, restrict, or condition any of the Issuer's obligations or any of the Trustee's or Holder's rights or remedies hereunder."

Robust

- **Treatment as liquidated damages:** Contains language that establishes that the make-whole amount will be a calculation of liquidated damages.
- **Reasonableness of fee:** Language establishes that the liquidated damages provision is a reasonable calculation and is necessary due to the difficulty of ascertaining actual damages. Language further specifies that the make-whole amount is not a penalty.
- **General enforceability waiver:** Language includes a general statement whereby the issuer waives arguments that it could make against the enforceability of the make-whole premium.
- **Reinstatement acknowledgment/waiver:** Not addressed.
- **Deemed as principal:** Not addressed.

Acknowledgments/waivers - Illustrative examples

Selected credit agreement (2019)

"[The Applicable Premium shall be due] ***in view of the impracticability and extreme difficulty of ascertaining actual damages and by mutual agreement of the parties as to a reasonable calculation of each Lender's lost profits as a result thereof.*** The Applicable Prepayment Premium payable in accordance with the immediately preceding sentence shall be ***presumed to be the liquidated damages*** sustained by each Lender as the result of the early termination, and Borrower agrees that it is reasonable under the circumstances. The Applicable Prepayment Premium shall also be payable in the event the Obligations (and/or this Agreement or the Notes evidencing the Obligations) are satisfied or released by foreclosure (whether by power of judicial proceeding), deed in lieu of foreclosure, or by any other means. ***BORROWER EXPRESSLY WAIVES THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE FOREGOING APPLICABLE PREPAYMENT PREMIUM IN CONNECTION WITH ANY SUCH ACCELERATION.*** The Borrower expressly agrees that: (A) the Applicable Prepayment Premium is reasonable and is the product of an arm's length transaction between sophisticated business people, ably represented by counsel, (B) the Applicable Prepayment Premium shall be payable notwithstanding the then prevailing market rates at the time payment is made, (C) there has been a course of conduct between Lenders and Borrower giving specific consideration in this transaction for such agreement to pay the Applicable Prepayment Premium, and (D) Borrower shall be estopped hereafter from claiming differently than as agreed to in this paragraph. The Borrower expressly acknowledges that its agreement to pay the Applicable Prepayment Premium as herein described is a material inducement to the Lenders to provide the Commitments and make the Loans."

Robust

- **Treatment as liquidated damages:** Contains language that presumes that the make-whole amount will be a calculation of liquidated damages.
- **Reasonableness of fee:** Language establishes that the liquidated damages provision is a reasonable calculation and is necessary due to the difficulty of ascertaining actual damages.
- **General enforceability waiver:** Language includes a general statement whereby the borrower waives arguments that it could make against the enforceability of the make-whole premium.
- **Reinstatement acknowledgment/waiver:** Not addressed.
- **Deemed as principal:** Not addressed.

Acknowledgments/waivers - Illustrative examples

Selected credit agreement (2021)

[The Exit Fee shall be due] in view of the ***impracticability and extreme difficulty of ascertaining the actual amount of damages*** to the Lenders or profits lost by the Lenders as a result of such acceleration, and by mutual agreement of the parties as to a ***reasonable estimation*** and calculation of the lost profits or damages of the Lenders as a result thereof. THE EXIT FEES PAYABLE PURSUANT TO THIS AGREEMENT SHALL BE PRESUMED TO BE THE ***LIQUIDATED DAMAGES*** SUSTAINED BY EACH LENDER AND THE BORROWER AGREES THAT THE MAXIMUM EXIT FEE OF 6.00% (THE "MAXIMUM FEE") IS REASONABLE UNDER THE CIRCUMSTANCES CURRENTLY EXISTING. ***THE MAXIMUM FEE SHALL ALSO BE PAYABLE IN THE EVENT… THE OBLIGATIONS ARE REINSTATED PURSUANT TO SECTION 1124 OF THE BANKRUPTCY CODE.*** IF THE EXIT FEE BECOMES DUE AND PAYABLE PURSUANT TO THIS AGREEMENT, THE EXIT FEE SHALL BE DEEMED TO BE PRINCIPAL OF THE LOANS AND OBLIGATIONS UNDER THIS AGREEMENT AND INTEREST SHALL ACCRUE ON THE FULL PRINCIPAL AMOUNT OF THE LOANS (INCLUDING THE EXIT FEE) FROM AND AFTER THE APPLICABLE TRIGGERING EVENT. IN THE EVENT THE EXIT FEE IS DETERMINED NOT TO BE DUE AND PAYABLE BY ORDER OF ANY COURT OF COMPETENT JURISDICTION, INCLUDING, WITHOUT LIMITATION, BY OPERATION OF THE BANKRUPTCY CODE, DESPITE SUCH A TRIGGERING EVENT HAVING OCCURRED, THE EXIT FEE SHALL NONETHELESS CONSTITUTE OBLIGATIONS UNDER THIS AGREEMENT FOR ALL PURPOSES HEREUNDER. ***THE BORROWER EXPRESSLY WAIVES THE PROVISIONS OF ANY PRESENT OR FUTURE STATUTE OR LAW THAT PROHIBITS OR MAY PROHIBIT THE COLLECTION OF THE MAXIMUM FEE IN CONNECTION WITH ANY ACCELERATION, IN EACH CASE, TO THE MAXIMUM EXTENT SUCH WAIVER IS PERMITTED UNDER APPLICABLE LAW.*** THE BORROWER, THE AGENT AND THE LENDERS ACKNOWLEDGE AND AGREE THAT ANY EXIT FEE DUE AND PAYABLE IN ACCORDANCE WITH THIS AGREEMENT SHALL NOT CONSTITUTE UNMATURED INTEREST… THE BORROWER FURTHER ACKNOWLEDGES AND AGREES, AND WAIVES ANY ARGUMENT TO THE CONTRARY, THAT PAYMENT OF SUCH AMOUNT DOES NOT CONSTITUTE A PENALTY OR AN OTHERWISE UNENFORCEABLE OR INVALID OBLIGATION. THE BORROWER EXPRESSLY AGREES THAT (A) THE MAXIMUM FEE IS REASONABLE AND IS THE PRODUCT OF AN ARM'S-LENGTH TRANSACTION BETWEEN SOPHISTICATED BUSINESS PEOPLE, ABLY REPRESENTED

Robust

- **Treatment as liquidated damages:** Contains language that presumes that the make-whole amount will be a calculation of liquidated damages. Language further specifies that the make-whole amount shall not constitute unmatured interest.
- **Reasonableness of fee:** Language establishes that the liquidated damages provision is a reasonable estimation and is necessary due to the difficulty of ascertaining actual damages. Language further specifies that the make-whole amount is not a penalty.
- **General enforceability waiver:** Language includes a general statement whereby the borrower waives any arguments that it could make against the enforceability of the make-whole premium.
- **Reinstatement acknowledgment/waiver:** Language acknowledges that the make-whole premium will be payable even in the event the obligations are reinstated pursuant to section 1124 of the Bankruptcy Code.
- **Deemed as principal:** Language provides that the make-whole premium will be deemed principal of the loans and that interest will accrue on such amount.

Acknowledgments/waivers - Illustrative examples

Selected credit agreement (2021) (cont.)

BY COUNSEL, (B) THE MAXIMUM FEE (OR ANY OTHER EXIT FEE) SHALL BE PAYABLE NOTWITHSTANDING THE THEN PREVAILING MARKET RATES AT THE TIME PAYMENT IS MADE, (C) THERE HAS BEEN A COURSE OF CONDUCT BETWEEN THE LENDERS AND THE BORROWER GIVING SPECIFIC CONSIDERATION IN THIS TRANSACTION FOR SUCH AGREEMENT TO PAY THE MAXIMUM FEE, (D) THE BORROWER SHALL BE ESTOPPED HEREAFTER FROM CLAIMING DIFFERENTLY THAN AS AGREED TO IN THIS SECTION… (E) ITS AGREEMENT TO PAY THE MAXIMUM FEE IS A MATERIAL INDUCEMENT TO THE LENDERS TO MAKE THE LOANS AND (F) THE MAXIMUM FEE REPRESENTS A GOOD FAITH, REASONABLE ESTIMATE AND CALCULATION OF THE LOSSES OR OTHER DAMAGES OF THE LENDERS AND THAT IT WOULD BE IMPRACTICAL AND EXTREMELY DIFFICULT TO ASCERTAIN THE ACTUAL AMOUNT OF DAMAGES TO THE LENDERS."

Appendix III

Cases cited

1. *In re Ultra Petroleum Corp. ("Ultra Petroleum IV")*, 51 F.4th 138 (5th Cir. 2022) (holding, in a solvent debtor case, that (i) unsecured creditors' claims for a make-whole constituted the economic equivalent of unmatured interest and are subject to disallowance by the Bankruptcy Code; (ii) the solvent-debtor exception nonetheless operated to allow the make-whole amount, where enforceable under New York law; and (iii) post-petition interest is calculated at the contractual default rate)

2. *In re PG&E Corp.*, 46 F.4th 1047 (9th Cir. 2022) (holding that the solvent-debtor exception permits unsecured creditors to receive post-petition interest at the contractual rate or at the default state law rate)

3. *In re Harris*, No. 18-16598, 2022 WL 198852 (Bankr. N.D. Ohio Jan. 21, 2022) (examining a fixed prepayment fee of 3% and observing that such prepayment fees approximate damages resulting from the loss of expected interest, but holding that because the prepayment fee came due 20 months prior to the petition date, the "approximated interest fully matured prepetition" and was not disallowed under section 502(b)(2))

4. *In re LATAM Airlines Grp. S.A.*, 55 F.4th 377 (2d Cir. 2022), *cert. denied sub nom. TLA Claimholders Grp. v. Latam Airlines Grp.*, No. 22-908, 2023 WL 3937616 (U.S. June 12, 2023) (holding that unsecured creditors need not be paid post-petition interest in order to be considered "unimpaired" under the Bankruptcy Code)

5. *In re Hertz Corp. ("Hertz I")*, 637 B.R. 781 (Bankr. D. Del. Dec. 2021) (holding that (i) redemption of notes was voluntary because it was an option the debtors selected among the alternatives that were available to them in bankruptcy, including reinstatement of the notes; (ii) a make-whole premium due for redemptions occurring prior to "maturity" referred to the maturity date as automatically accelerated by the bankruptcy filing, and such premium would not be triggered as a result of any post-acceleration redemption, whereas a make-whole premium under a separate series of notes, due for redemptions made prior to a specified, fixed date, could be payable so long as redemption actually occurred prior to such date; (iii) whether a redemption premium was unmatured interest was a question of fact; (iv) impairment under section 1124 applies only when creditors' legal rights are modified by the plan of reorganization, not by operation of the Bankruptcy Code; and (v) in a solvent debtor case, unsecured creditors are entitled to post-petition interest at the federal judgment rate, not the contract rate)

6. *In re Neelkanth Hotels, LLC*, No. 20-69501-JWC, 2021 WL 4944100 (Bankr. N.D. Ga. Oct. 22, 2021) (limiting a yield maintenance premium to an amount the court considered reasonable under section 506(b) and considering, but not deciding, whether an oversecured creditor could receive post-petition interest on its prepetition claim for the yield maintenance premium)

7. *In re Mallinckrodt PLC*, No. 20-12522 (JTD) (Bankr. D. Del. Nov. 5, 2021) [ECF No. 5220] (holding in a bench ruling that a make-whole premium triggered by a bankruptcy filing is not due upon reinstatement pursuant to section 1124)

8. *In re Mullins*, 633 B.R. 1 (Bankr. D. Mass. 2021) (holding that post-petition interest for unsecured creditors in solvent-debtor cases is limited to the federal judgment rate)

9. *In re EP Energy Corp.*, No. 19-35654 (Bankr. S.D. Tex. Mar. 6, 2020) [ECF No. 1025] (holding in a bench ruling that a make-whole premium that became due upon a bankruptcy filing was no longer owed following reinstatement of the underlying debt but noting that the make-whole provision would survive and could potentially be triggered in the future)

10. *In re Northbelt, LLC*, 630 B.R. 228 (Bankr. S.D. Tex. 2020) (allowing a make-whole claim because prepayment penalties are valid under Texas law and the debtor tendered payment following default and acceleration, triggering a provision of the loan agreement that deemed post-default payments to be prepayments that give rise to the prepayment premium)

11. *In re Ultra Petroleum Corp. ("Ultra Petroleum III")*, 624 B.R. 178 (Bankr. S.D. Tex. 2020) (holding that (i) a make-whole amount was not unmatured interest because the make-whole did not compensate the noteholders for the use or forbearance of their money; (ii) the "solvent-debtor exception" survived enactment of the Bankruptcy Code and is derived from the equitable rights of creditors under section 1124; and (iii) unimpaired creditors in a solvent debtor case have the right to receive post-petition interest at the contractual default rate)

12. *In re 1141 Realty Owner LLC*, 598 B.R. 534 (Bankr. S.D.N.Y. 2019) (holding that a creditor was entitled to a make-whole premium under the terms of the loan agreement because the make-whole provision expressly provided that the premium would be payable upon any payment after default, not solely upon a prepayment)

13. *In re PG&E Corp.*, 610 B.R. 308 (Bankr. N.D. Cal. 2019) (holding that post-petition interest for unsecured creditors in solvent debtor cases is limited to the federal judgment rate)

14. *In re Ultra Petroleum Corp. ("Ultra Petroleum II")*, 943 F.3d 758 (5th Cir. 2019) (holding that impairment under section 1124 applies only when creditors' legal rights are being modified by a plan of reorganization, not when such modification is by operation of the Bankruptcy Code, and leaving the issue of whether a make-whole premium was unmatured interest to the Bankruptcy Court to decide)

15. *In re Ultra Petroleum Corp.*, 913 F.3d 533 (5th Cir. 2019) (suggesting that a make-whole premium could be disallowed as unmatured interest under section 502(b)(2) because it compensated the creditor for lost interest and did not fully mature at the time of the bankruptcy filing, noting that the effect of an unenforceable ipso facto acceleration clause should not be taken into account when determining whether a make-whole premium has fully matured pursuant to the terms of a contract), *withdrawn and superseded*, 943 F.3d 758 (5th Cir. 2019)

16. *In re Tara Retail Grp. LLC*, No. 17-BK-57, 2018 WL 4501136 (Bankr. N.D.W. Va. Sept. 19, 2018) (holding that a creditor was not entitled to a make-whole premium because the make-whole provision was contingent upon a "prepayment," and prepayment could no longer occur once the creditor accelerated the note and brought forward the maturity date)

17. *In re Amigo PAT Tex., LLC*, 579 B.R. 779 (Bankr. S.D. Tex. 2017) (applying a four-factor test to determine whether a prepayment premium was reasonable under section 506(b): (1) whether the prepayment premium approximates actual damages; (2) whether the creditor will receive the full amount of its principal and will receive interest in full at the contract rate; (3) the amount of prepayment premium as a percentage of the principal loan amount; and (4) the effect on junior creditors)

18. *In re MPM Silicones, L.L.C. ("Momentive")*, 874 F.3d 787 (2d Cir. 2017) (holding that (i) a make-whole premium due upon a "redemption" refers only to pre-maturity prepayments of debt, and such prepayments cannot be made once acceleration has brought forward the maturity date of the debt; and (ii) mandatory payment due to an automatic acceleration clause is not a payment made at the debtors' option, and therefore would not trigger an optional redemption premium)

19. *In re Ultra Petroleum Corp. ("Ultra Petroleum I")*, 575 B.R. 361 (Bankr. S.D. Tex. 2017) (holding that (i) a make-whole provision was an enforceable liquidated damages provision under New York law; (ii) noteholders must be paid a make-whole premium to the extent of their state law entitlement in order to be rendered unimpaired under section 1124(1), regardless of whether section 502(b)(2) would disallow a claim for such amount as unmatured interest; and (iii) noteholders were entitled to post-petition interest on the make-whole premium at the contractual rate), *rev'd in part*, 943 F.3d 758 (5th Cir. 2019)

20. *Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc.*, No. 15-CV-5027 (JMF), 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016) (holding that a debtor's voluntary breach of negative covenants in an indenture permitted the noteholders to seek payment of an optional redemption premium, even though the debtor did not actually redeem the notes)

21. *In re Energy Future Holdings Corp. ("EFH")*, 842 F.3d 247 (3d Cir. 2016) (holding that (i) a make-whole premium due upon "redemption" refers to both pre- and post-maturity repayments of debt; and (ii) repayment of notes following acceleration was a payment made at the debtors' option, as the debtors had alternatives available to them in bankruptcy, including to reinstate the notes rather than repay them)

22. *MSCI 2007-IQ16 Retail 9654, LLC v. Dragul*, No. 1:14-CV-287, 2015 U.S. Dist. LEXIS 40659 (S.D. Ohio Mar. 30, 2015) (enforcing a prepayment penalty because the loan documents were clear that the debtor would pay a premium upon an event of default and acceleration)

23. *U.S. Bank Nat'l Ass'n. v. Yashouafar*, 232 Cal. App. 4th 639 (2014) (holding that a prepayment fee on a note triggered upon the occurrence of a prepayment was not due until the borrowers actually prepaid the note)

24. *In re Brandywine Townhouses, Inc.*, 518 B.R. 671 (Bankr. N.D. Ga. 2014) (holding that a prepayment premium was reasonable despite the total penalty seeming unreasonably high (36% of the principal balance due) because it was calculated using a formula that approximated the potential loss to the lender by measuring the profits that the lender could have made had it invested the funds loaned elsewhere)

25. *Chesapeake Energy Corp. v. Bank of N.Y. Mellon Trust Co.*, 773 F.3d 110 (2d Cir. 2014) (examining a special redemption provision that allowed an issuer to redeem notes early at a more favorable price, rather than a customary make-whole provision, and holding that the plain language of the contract required both notice and redemption to occur within the specified early redemption period)

26. I*n re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697 (Bankr. N.D. Ill. 2014) (holding that a yield maintenance premium was the economic equivalent of interest because it accelerated interest on the loan yet to be accrued, and was unmatured because it was not due at the time of the bankruptcy filing, but was triggered only upon a subsequent acceleration)

27. *In re Sch. Specialty, Inc.*, No. 13-10125 (KJC), 2013 WL 1838513 (Bankr. D. Del. Apr. 22, 2013) (holding that a make-whole premium should not be disallowed as unmatured interest and treated as liquidated damages; finding that a make-whole amount was reasonable under New York law and the Bankruptcy Code as it was not plainly disproportionate to the lender's potential losses; noting that section 506(b) may not apply to prepetition make-whole claims under the majority view that section 506(b) is not applicable to interest and other charges that accrue before the filing of a bankruptcy petition)

28. *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013) (holding that (i) no make-whole premium was due following acceleration where the plain language of the acceleration provision of the indenture explicitly foreclosed such payment; (ii) no ipso facto provisions in the Bankruptcy Code were triggered because the loan agreement was not executory and did not interfere with property entering the estate; and (iii) ipso facto clauses in contracts are not broadly or categorically unenforceable pursuant to the Bankruptcy Code, and that no specific provision of the Bankruptcy Code prohibits enforcement of ipso facto clauses)

29. *Treas. of N.J. v. U.S. Dept. of Treas.*, 684 F.3d 382 (3d Cir. 2012) (examining U.S. Treasury savings bond regulations and noting that bondholders were not precluded from redeeming savings bonds with the U.S. government for repayment after they had matured)

30. *In re LaGuardia Assocs., L.P.*, No. 11-19334 SR., 2012 WL 6043284 (Bankr. E.D. Pa. Dec. 5, 2012) (disallowing claim for prepayment premium because the conditions that triggered the premium, namely, actual payment of the accelerated debt, had not occurred, and the creditor was undersecured and therefore not entitled to payment of the premium as a post-petition charge under section 506(b) of the Bankruptcy Code)

31. *In re 400 Walnut Assocs., L.P.*, 473 B.R. 603 (E.D. Pa. 2012) (citing the "majority view" that section 506(b) does not apply to interest and other charges that accrue before the filing of a bankruptcy petition because the allowability of such amounts is governed by section 502)

32. *In re Kimbrell Realty/Jeth Court, LLC*, 483 B.R. 679 (Bankr. C.D. Ill. 2012) (holding that (i) there is no per se prohibition against prepayment premiums under Illinois law; (ii) a post-acceleration prepayment premium under a note governed by Illinois law was enforceable because the note unambiguously included payments following default and acceleration in the definition of "prepayment"; and (iii) default interest was reasonable because it was provided for in the terms of the note and was within the range of interest rates historically approved by Illinois courts)

33. *In re 785 Partners LLC*, 470 B.R. 126 (Bankr. S.D.N.Y. 2012) (examining a secured creditor's claims for, among other things, post-petition default interest and a 5% fixed late payment fee to "cover administrative and related expenses incurred in handling delinquent payments" and holding that the late payment fee was not payable, including because the secured creditor would receive default interest which is "designed to compensate the lender for the same injury" as the late payment fee)

34. *In re Madison 92nd St. Assocs. LLC*, 472 B.R. 189 (Bankr. S.D.N.Y. 2012) (enforcing a make-whole premium that was equal to 5% of the principal balance due because, applying New York liquidated damages law, the premium did not constitute an unenforceable penalty)

35. *In re W.R. Grace & Co.*, 475 B.R. 34 (D. Del. 2012) (holding that a provision in a credit agreement that required payment of default interest following an event of default triggered by the filing of a bankruptcy petition was an unenforceable ipso facto clause, and observing the "general trend of the federal courts that the prohibition against ipso facto clauses is not limited to actions based upon sections 541(c) and 365(e)")

36. *NML Cap. v. Republic of Arg.*, 17 N.Y.3d 250 (2011) (holding that the parties to a loan agreement are free to include provisions directing what will happen in the event of default or acceleration of the debt, supplying specific terms that supersede other provisions in the contract if those events occur)

37. *In re S. Side House, LLC*, 451 B.R. 248 (Bankr. E.D.N.Y. 2011) (holding that (i) a make-whole amount was not due because it was conditioned upon the debtor tendering payment of debt in full, which did not occur; and (ii) prepayment consideration calculated using a discount rate based on Treasury bond interest rates satisfies the proportionality standard of New York liquidated damages law), *aff'd*, No. 11-CV-4135 (ARR), 2012 WL 273119 (E.D.N.Y. Jan. 30, 2012)

38. *In re Trico Marine Servs. Inc.*, 450 B.R. 474 (Bankr. D. Del. 2011) (noting that the substantial majority of courts have considered make-whole or prepayment obligations to be in the nature of liquidated damages rather than unmatured interest)

39. *Jefferson-Pilot Invs., Inc. v. Cap. First Realty, Inc.*, No. 10 C 7633, 2011 WL 2888608 (N.D. Ill. July 18, 2011) (examining a prepayment premium equal to 34% of the unpaid principal and holding that the premium was enforceable under Illinois law as a liquidated damages provision)

40. *In re Wesley*, 455 B.R. 383 (Bankr. D.N.J. 2011) (upholding prepetition IRS penalties as secured claims, noting that section 506(b) does not apply to amounts that accrue before the filing of the bankruptcy petition)

41. *In re Gen. Growth Props., Inc.*, 451 B.R. 323 (Bankr. S.D.N.Y. 2011) (upholding a 3% default interest provision which was triggered upon the debtor filing for bankruptcy because provisions 365(e)(1)(b), 541(c)(1)(b), and 363(l) of the bankruptcy code were inapplicable and there is no per se bar on ipso facto clauses in the Second Circuit)

42. *In re Double G Arrowhead Orchards Ltd. P'ship*, No. CV11–0004–PHX–DGC, 2011 WL 2912687 (D. Ariz. 2011) (holding that a yield maintenance premium equal to 25% of principal was enforceable under Arizona law and observing that a 1% fixed floor contained in the yield maintenance formula was not unreasonable because lenders incur costs when it is required by early repayment to reinvest their funds in the market)

43. *HSBC Bank USA, N.A. v. Calpine Corp.*, No. 07 Civ 3088 (GBD), 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010) (noting that acceleration, on its own, does not cause a noteholder to have an unsecured damages claim for a prepayment premium, where prepayment provisions themselves were not triggered by acceleration and where the acceleration provision did not contain a damages provision)

44. *In re Chemtura Corp.*, 439 B.R. 561 (Bankr. S.D.N.Y. 2010) (finding that a settlement of make-whole claims was within the "range of reasonableness," in part, because a premium was owed with regard to any payment prior to a date certain specified in the debt documents, and while "make-whole premiums and damages for breach of a no-call are arguably proxies for unmatured interest," in cases involving a solvent debtor, "the bondholders are likely to get whatever they're entitled to under state law")

45. *In re Premier Ent. Biloxi LLC*, 445 B.R. 582 (Bankr. S.D. Miss. 2010) (holding that (i) creditors were not entitled to a claim for a prepayment premium under section 506(b) because the applicable indenture did not explicitly provide for payment of the premium in the event of an acceleration following a bankruptcy default; and (ii) because the debtors were solvent, creditors were entitled to an unsecured claim for damages for breach of the no-call provision, measured as the present value of the difference between the market interest rate and the contract interest rate at the time of repayment)

46. *In re Saint Vincent's Catholic Med. Ctrs. of New York*, 440 B.R. 587 (Bankr. S.D.N.Y. 2010) (noting that make-whole provisions "influenced by U.S. Treasury bills" have been upheld as enforceable liquidated damages provisions by New York bankruptcy courts applying New York law, and enforcing an ipso facto clause requiring payment of charges and attorneys' fees to secured creditors following a bankruptcy default because provisions 365(e)(1)(b), 541(c)(1)(b) and 363(l) were inapplicable)

47. *In re Atrium View, LLC*, No. 1:07-BK-02478MDF, 2008 WL 5378293 (Bankr. M.D. Pa. Dec. 24, 2008) (disallowing a flat fee prepayment premium as unreasonable under section 506(b) because it did not approximate predicted actual losses to be incurred by the creditor upon prepayment)

48. *Great Plains Real Est. Dev., L.L.C. v. Union Cent. Life Ins. Co.*, 536 F.3d 939 (8th Cir. 2008) (finding that, under Iowa law, a prepayment premium was not a liquidated damages provision because liquidated damages apply only to breaches of contract and there is no breach if a party is prepaying pursuant to the terms of the contract, and the premium was not unreasonable because it was calculated based on prevailing market rates and attempted to calculate the actual loss of earnings resulting from prepayment)

49. *Gencarelli v. UPS Cap. Bus. Credit*, 501 F.3d 1 (1st Cir. 2007) (holding that a prepayment penalty, even if "unreasonable" under section 506(b), was allowed as an unsecured claim in a solvent debtor case under section 502)

50. *In re Granite Broad. Corp.*, 369 B.R. 120 (Bankr. S.D.N.Y. 2007) (considering, but not deciding, whether a proposal from preferred stockholders to acquire the debtors would trigger a prepayment premium under the debtors' loans by compelling the lenders to accept early repayment)

51. *In re MarketXT Holdings Corp.*, 376 B.R. 390 (Bankr. S.D.N.Y. 2007) (holding that a prepayment penalty equal to 76% of principal was an unenforceable liquidated damages clause, as "it bore no reasonable relationship to any damages that could have been suffered")

52. *River E. Plaza, L.L.C. v. Variable Annuity Life Ins. Co.*, 498 F.3d 718 (7th Cir. 2007) (holding that a yield maintenance premium did not constitute an unenforceable penalty under Illinois law and was reasonable because the ability to prepay subject to the premium, and the calculation of the premium using the interest rate on Treasury bonds as the discount rate, was an accommodation that the borrower negotiated for from the lender based on the parties' relative bargaining power)

53. *In re Solutia Inc.*, 379 B.R. 473 (Bankr. S.D.N.Y. 2007) (holding that, while the debtors' plan provided for repayment of notes in full on the effective date, noteholders were not entitled to a claim for expectation damages equal to interest at the contract rate to the stated maturity absent an explicit yield-maintenance clause in the indenture)

54. *Travelers Casualty & Surety Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443 (2007) (evaluating a claim for contractual attorney's fees and observing that the basic federal rule in bankruptcy is that state law governs the substance of claims, with Congress having "generally left the determination of property rights in the assets of a bankrupt's estate to state law")

55. *Nw. Mut. Life Ins. Co. v. Uniondale Realty Assocs.*, 816 N.Y.S.2d 831 (Sup. Ct. 2006) (holding that a premium could not be collected following an event of default because the contractual language was drafted such that the premium would only be due if the debtor intentionally triggered acceleration in order to secure the benefits of prepayment in a favorable market)

56. *In re Deep River Warehouse, Inc.*, No. 04-52749, 2005 WL 1513123 (Bankr. M.D.N.C. June 22, 2005) (holding that a lender was not entitled to a prepayment premium as part of its prepetition claim because a condition precedent provided for in the contract – unauthorized prepayment of the principal balance – had not occurred)

57. *In re AE Hotel Venture*, 321 B.R. 209 (Bankr. N.D. Ill. 2005) (observing that while a lender typically loses a right to receive a prepayment premium when it elects to accelerate the debt, the parties may contractually agree that a prepayment premium is nonetheless due post-acceleration; holding that a prepayment premium was enforceable under Illinois state law as it bore some relation to the loss)

58. *In re Holmes*, 330 B.R. 317 (Bankr. M.D. Ga. 2005) (observing that recovery of post-petition interest under section 506(b) is unqualified, unlike "fees, costs, and charges," which are allowable as a secured claim only to the extent they are "reasonable")

59. *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373 (2005) (holding that an early termination fee under a revolving credit facility was not an unenforceable penalty under New York law because the lender's damages were difficult to estimate *ex ante*, among other things)

60. *In re Onco Inv. Co.*, 316 B.R. 163 (Bankr. D. Del. 2004) (holding that senior secured notes can be reinstated without regard to the default interest rate and prepayment premium on the notes, and that subordinated noteholders are not required to turn over such amounts to the senior secured noteholders, because reinstatement "roll[s] back the clock to the time before the default existed.")

61. *In re PPI Enters. (US), Inc.*, 324 F.3d 197 (3d Cir. 2003) (examining a statutorily capped landlord's claim for unpaid rent and holding that impairment under section 1124 occurs only when creditors' legal rights are being modified by the plan of reorganization, not when such modification is by operation of the Bankruptcy Code)

62. *In re Cardelucci*, 285 F.3d 1231 (9th Cir. 2002) (holding that the federal judgment rate, not the rate provided under the parties' contract or under state law, was the proper post-petition rate applicable to an unsecured creditor's claim in a solvent debtor case)

63. *In re Schwegmann Giant Super Mkts.*, 287 B.R. 649 (E.D. La. 2002) (finding that a prepayment penalty was unreasonable under section 506(b) because it applied a fixed minimum penalty regardless of market rates and therefore did not attempt to approximate actual damages; finding that conditions precedent to incurrence of the premium had not been met because payment was not voluntary and no default had occurred because the bankruptcy petition was an unenforceable ipso facto clause pursuant to Section 365(e)(1)(B))

64. *In re Vanderveer Ests. Holdings, Inc.*, 283 B.R. 122 (Bankr. E.D.N.Y. 2002) (holding that (i) a yield maintenance provision was an enforceable liquidated damages clause under New York law because potential losses from prepayment were not easily calculated and the premium was not plainly disproportionate to the possible loss; and (ii) allowability of claims arising prepetition is governed by section 502, not the reasonableness standard of section 506(b), although the premium met that standard in any case because it represented "a reasonable estimation of the lender's damages at the time the agreement was entered into")

65. *In re Schwegmann Giant Supermarkets P'ship*, 264 B.R. 823 (Bankr. E.D. La. 2001) (disallowing a prepayment premium as unreasonable under section 506(b) because it presumed a loss and was 18% of the principal; finding that the prepayment premium was an unenforceable ipso facto clause pursuant to section 365(e)(1)(B) without addressing whether the underlying note was an executory contract)

66. *United States v. Harris*, 246 F.3d 566 (6th Cir. 2001) (upholding a prepayment premium because the agreement explicitly provided for payment of the premium in the event of acceleration of the debt or foreclosure, which occurred)

67. *In re Welzel*, 275 F.3d 1308 (11th Cir. 2001) (holding that, pursuant to sections 502 and 506, contractual attorney's fees owed to an oversecured creditor that are deemed "reasonable" constitute a secured claim, while the balance of unreasonable fees should be treated as an unsecured claim, assuming they are otherwise valid under state law)

68. I*n re Hidden Lake Ltd. P'ship*, 247 B.R. 722 (Bankr. S.D. Ohio 2000) (construing a prepayment premium provision as a liquidated damages provision; holding that a claim for a prepayment premium was not a claim for unmatured interest because a prepayment charge imposed prepetition is not unmatured interest and under the terms of the agreement the prepayment charge matured upon the acceleration of debt that occurred prior to the bankruptcy filing)

69. *In re Lappin Elec. Co.*, 245 B.R. 326 (Bankr. E.D. Wis. 2000) (holding that an early termination fee under a revolving credit facility was reasonable under section 506(b) because it was equal to 5.9% of the principal loan amount, not disproportionate in relation to the actual amount due by the debtor and negotiated by sophisticated parties)

70. *In re ICH Corp.*, 230 B.R. 88 (N.D. Tex. 1999) (examining an original issue discount and noting that the Bankruptcy Code requires that the court look beyond a contract's language when determining whether interest is unmatured)

71. *In re Anchor Resol. Corp.*, 221 B.R. 330 (Bankr. D. Del. 1998) (holding that a make-whole amount was reasonable under section 506(b) because the make-whole formula accounted for changes in the Treasury rate, decreased over time, and had no applicable minimum charge)

72. *In re Maywood, Inc.*, 210 B.R. 91 (Bankr. N.D. Tex. 1997) (refusing to enforce a prepayment fee because a lender provided no evidence that it had suffered any damage as a result of its decision to accelerate the loan, noting that the lender received the full amount of its principal and could reinvest such amounts)

73. *In re Carr Mill Mall Ltd. P'ship*, 201 B.R. 415 (Bankr. M.D.N.C. 1996) (holding that a prepayment provision was unenforceable where a debtor's plan of reorganization contemplated reinstating the parties' contractual obligations as they existed prior to the filing of the bankruptcy petition (when no prepayment premium was due), as the original maturity dates of the notes had already passed)

74. *In re Ridgewood Apts. of Dekalb Cnty., Ltd.*, 174 B.R. 712 (Bankr. S.D. Ohio 1994) (holding that (i) although contractual language provided that a prepayment premium would be due even in connection with acceleration, the premium was not payable post-acceleration if the debtor had not actually prepaid the note because no "prepayment" would have occurred; and (ii) the prepayment penalty was unmatured interest because the purpose of the prepayment penalty was to compensate the lender for lost interest, and the prepayment penalty was not yet due under the terms of the contract at the time the bankruptcy was filed)

75. *In re Duralite Truck Body & Container Corp.*, 153 B.R. 708 (Bankr. D. Md. 1993) (holding that although a prepayment premium was an enforceable liquidated damages provision under New York law, it was disallowed as unreasonable under section 506(b) because it did not effectively estimate actual damages—it presumed a loss regardless of changes in market interest rates and failed to discount to present value)

76. *In re Outdoor Sports Headquarters*, 161 B.R. 414 (Bankr. S.D. Ohio 1993) (holding that (i) a prepayment premium did not constitute unmatured interest under section 502(b)(2) because prepayment amounts fully mature pursuant to the provisions of a contract, which stated that the lender had the right to receive a prepayment fee if payment was made prior to the full term of the contract and the borrower did make payment prior to maturity; and (ii) the prepayment premium was not unreasonable under section 506(b) because the lender would not realize any economic gain from the prepayment fee and would in fact suffer an actual loss if the premium was not paid)

77. *In re Chateaugay Corp.*, 961 F.2d 378 (2d Cir. 1992) (holding that section 502(b)(2) prohibits the allowance of a claim that is the economic equivalent of unmatured interest)

78. *In re Fin. Ctr. Assocs. of E. Meadow, L.P.*, 140 B.R. 829 (Bankr. E.D.N.Y. 1992) (holding that a prepayment clause that specifically provided for payment of a premium following acceleration was enforceable and did not constitute an unreasonable penalty under either New York law or section 506(b))

79. *In re Pengo Indus., Inc.*, 962 F.2d 543 (5th Cir. 1992) (holding that section 502(b)(2) prohibits the allowance of a claim that is the economic equivalent of unmatured interest)

80. *Baybank Middlesex v. 1200 Beacon Props., Inc.*, 760 F. Supp. 957 (D. Mass. 1991) (holding that lenders were not entitled to common law "benefit of the bargain" damages for unearned interest in the absence of a make-whole provision because "when lenders accelerate the maturity of the debt, they waive their opportunity to earn, and their claim to, interest payable over a period of years in exchange for the immediate payment of the outstanding principal and accrued interest")

81. *Parker Plaza W. Partners v. UNUM Pension & Ins.* Co., 941 F.2d 349 (5th Cir. 1991) (holding that a prepayment premium is enforceable under Texas law where an acceleration provision expressly provides that the premium is payable upon acceleration)

82. *In re A.J. Lane & Co.*, 113 B.R. 821 (Bankr. D. Mass. 1990) (holding that a prepayment premium constituted an unreasonable liquidated damages provision under section 506(b) because it presumed the lender would suffer a loss, regardless of market rates, and was therefore unreasonable in light of the lender's anticipated or actual loss)

83. *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990) (holding that section 506(b) permits post-petition interest on unpaid interest, and suggesting that post-petition interest on attorney's fees allowable under section 506(b) is also payable, so long as such amounts are payable under the terms of the underlying agreement)

84. *W.W.W. Assocs., Inc. v. Giancontieri*, 77 N.Y.2d 157 (1990) (examining a cancellation clause in a contract and noting that, under New York law, when sophisticated parties reduce their agreement in a clear, complete document, "their writing should as a rule be enforced according to its terms")

85. *In re Imperial Coronado Partners*, 96 B.R. 997 (B.A.P. 9th Cir. 1989) (holding that (i) prepayment following foreclosure was voluntary, and the prepayment premium was enforceable, noting that the debtor had the choice to reinstate under state law or deaccelerate under bankruptcy law regardless of whether those options were practically feasible; and (ii) whether a prepayment premium should be allowed as part of a lender's secured claim, or as a separate unsecured claim, depends on whether the premium is reasonable under section 506(b) as determined relative to actual damages incurred by the lender)

86. *In re Schaumburg Hotel Owner Ltd. P'ship*, 97 B.R. 943 (Bankr. N.D. Ill. 1989) (holding that (i) a creditor had not waived its right to collect liquidated damages consisting of "prepayment interest" on the note by exercising the right to accelerate maturity of the note; and (ii) a 10% fixed make-whole premium was an enforceable liquidated damages provision under section 506(b) because it constituted a reasonable estimate of the damages caused by prepayment)

87. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235 (1989) (observing that recovery of post-petition interest under section 506(b) is unqualified, unlike "fees, costs, and charges," which are allowable as a secured claim only to the extent they are "reasonable")

88. *In re Kroh Bros. Dev. Co.*, 88 B.R. 997 (Bankr. W.D. Mo. 1988) (declining to enforce a prepayment premium and declaring it unreasonable because the premium did not discount to present value, resulting in a windfall to the creditor; holding that section 506(b) should be narrowly construed to provide only for actual costs, charges and fees, and not to permit a secured claim for all purported expenses, whether actual, estimated or illusory)

89. *Arthur v. Burkich*, 520 N.Y.S.2d 638 (1987) (noting that a mortgagor has no right to pay off his obligation prior to its stated maturity in the absence of a prepayment clause; observing that prepayment can result in "the loss of the [lender's] bargained-for rate of return, an increased tax burden [and] unanticipated costs occasioned by the need to reinvest the principal")

90. *In re Skyler Ridge*, 80 B.R. 500 (Bankr. C.D. Cal. 1987) (holding that a prepayment premium constituted an unenforceable penalty under Kansas law because the formula used an inappropriate reference rate and did not discount to present value; finding that the premium was an unreasonable charge under section 506(b) for the same reasons; finding that prepayment premiums do not represent unmatured interest under section 502(b) because they fully mature at the time of breach)

91. *In re LHD Realty Corp.*, 726 F.2d 327 (7th Cir. 1984) (holding that a prepayment premium was unenforceable following a lender's election to accelerate debt because acceleration, by definition, advances the maturity date of debt, making prepaying the debt impossible)

92. *Fed. Nat. Mortg. Ass'n v. Miller*, 473 N.Y.S.2d 743 (Sup. Ct. 1984) (noting in dicta that a debtor may redeem a mortgage after acceleration)

93. *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039 (2d Cir. 1982) (noting that the purpose of a redemption premium is to put a price upon the voluntary satisfaction of a debt before the date of maturity, and as such, a default caused by a debtor's plan to voluntarily liquidate resulted in a redemption premium payable by the debtor)

94. *In re United Merchs. & Mfrs., Inc.*, 674 F.2d 134 (2d Cir. 1982) (holding that a make-whole provision was a valid liquidated damages provision under New York law and that the Bankruptcy Court erred by referencing actual damages in making its determination of whether the premium was "plainly disproportionate" where it should have evaluated the provision "in light of the circumstances existing as of the time that the agreement [was] entered into")

95. *Walter E. Heller & Co. v. Am. Flyers Airline Corp.*, 459 F.2d 896 (2d Cir. 1972) (holding that a liquidated damages clause in a financing contract did not constitute an unenforceable penalty under New York law and overruling defendant's argument that the agreed-upon sum bore no relation to plaintiff's actual loss, as "the soundness of such a clause is tested in light of the circumstances existing as of the time that the agreement is entered into rather than at the time that the damages are incurred or become payable")

96. *Mosler Safe Co. v. Maiden Lane Safe Deposit Co.*, 199 N.Y. 479 (1910) (observing that, with respect to liquidated damages clauses, under New York law, parties to contracts have the right to insert any stipulations that may be agreed to, provided that they are neither unconscionable nor contrary to public policy; noting that "whenever the damages flowing from the breach of a contract can be easily established, or the damages fixed are, plainly, disproportionate to the injury, the stipulated sum will be treated as a penalty")

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