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Make Wholes: Have Bankruptcy Courts Identified the Yellow Brick Road Language that Leads to Creditor Oz?

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I. Introduction

Make-whole and no-call provisions in loan documents protect lenders' expectation of an uninterrupted stream of interest payments by either prohibiting early repayment or by requiring the borrower to pay the lender a premium to compensate for the lost interest. [1] With make-wholes, bankruptcy courts must weigh the desire of the debtor and other constituencies to reduce debt overhang against arguments that a "deal is a deal."

It is a basic tenet of bankruptcy law that the filing for bankruptcy relief automatically accelerates any debt. [2] Because make-wholes are pre-maturity remedies (*i.e.*, a debtor's obligation to pay arises only upon early payment), borrowers have argued that no make-whole payment is due after the filing date. To neutralize such argument, lenders have added language in indentures and loan documents providing for make-whole payments even if a bankruptcy case is filed. Courts have recently concluded that a make-whole cannot be enforced in bankruptcy absent clear and specific language in the indenture that a make-whole premium is still due upon automatic acceleration of the maturity date of the debt. [3]

Bankruptcy courts have recently exercised their discretion to disallow make-whole claims under section 502 of the United States Code (the "Bankruptcy Code"). Section 502(b) disallows claims for liquidated damages, and courts have likened make-wholes to liquidated damages. [4]

Recent bankruptcy court decisions have also called into question earlier cases that held that debtor solvency is a basis for paying contractual make-whole premiums in full. [5] Lenders have claimed a right to rescind the acceleration that occurs upon the bankruptcy filing. [6] It appears that courts are more willing to side with debtors at least early in a case when solvency is an open question, and not allow lenders to rescind. [7]

II. Make-Whole Enforcement After Bankruptcy Acceleration

Corporate bond instruments come in many varieties to account for risk appetite and market conditions. Make-wholes encourage lenders to agree to pre-payment clauses in loan documents by promising a stream of payments at a set interest rate and a premium if the borrower seeks to prepay. Make-wholes and other call protection provisions are generally enforceable outside of bankruptcy. [8] Courts outside of bankruptcy have ruled that these premiums are deemed consideration or a quid pro quo for the option to pre-pay. [9]

The rationale for upholding a make-whole premium is the "perfect tender" rule, which provides that "'a [borrower] has no right to pay off his obligation prior to its stated maturity date in the absence of a prepayment clause.'" [10] Under established New York law, [11] however, a lender forfeits the right to a premium for early payment if the lender itself accelerates the balance of the

loan [12] because "acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is a payment made after maturity." [13] Further, "[o]nce the maturity date is accelerated to the present, it is no longer possible to prepay the debt before maturity." [14] Therefore, make-wholes are not due and owing after acceleration. [15]

Historically, there have been two exceptions to the pre-default aspect of make-wholes. The first is when the debtor intentionally defaults in order to trigger acceleration to evade the prepayment premium. In such cases, the debtor will remain liable for the make-whole notwithstanding acceleration of the debt. [16]

The second exception is when a clear and unambiguous clause calls for the payment of a prepayment premium or make-whole even in the event of acceleration of, or the establishment of a new maturity date for, the debt. [17]

In *In re Chemtura Corporation*, [18] the bankruptcy court was asked to determine the reasonableness of a settlement providing certain bondholders with approximately 40% of their make-whole premiums. The pertinent portions of the make-whole provision in *Chemtura* provided:

> At any time and from time to time prior to the Maturity Date, the Company may, at its option, redeem all or any portion of the Securities at the Make-Whole Price plus accrued and unpaid interest to the date of redemption.

The *Chemtura* make-whole analysis came in the context of an application filed under Federal Rule of Bankruptcy Procedure 9019(a), [19] which sought approval of the settlement imbedded in the debtor's plan. [20] Certain parties opposed the settlement, contending the bondholders should receive nothing on account of the make-whole and no-call provisions contained in the loan documents. [21]

In a thorough and comprehensive analysis of the issues, the bankruptcy court concluded that the settlement was well within the lowest range of reasonableness. [22] The court determined that the bondholders had a "substantially better argument" on applicability of the make-whole since the provision required the debtor to pay the make-whole whenever the debt is repaid prior to its *original* maturity. The court noted that the underlying indenture defined "Maturity Date" and "Maturity" separately, with Maturity Date being defined as a date certain and that the acceleration of the debt by the bankruptcy filing did not advance the Maturity Date upon which the make-whole claim arose. [23]

In *U.S. Bank Trust Nat'l Ass'n v. AMR Corp.* (*In re AMR Corp.*) ("*AMR*"), [24] the Second Circuit denied the lenders' demands for a prepayment premium, agreeing with the lower courts that there was no clear and unambiguous clause that called for the prepayment. In *AMR*, the debtors filed a motion for authorization, pursuant to section 364(c) of the Bankruptcy Code, to obtain post-petition financing in the amount of $1.5 billion, acknowledging that the reason that they were doing so was to take advantage of low interest rates available in the market. [25] The debtors also requested authorization, under section 363(b) of the Bankruptcy Code, to use the new financing to "repay certain existing prepetition obligations secured by the Aircraft, including obligations under the Prepetition Notes … without the payment of any Make-Whole Amount …." [26]

The bankruptcy court had previously concluded that AMR Corp.'s bankruptcy filing was an event of default that automatically accelerated the debt under a plain reading of the indenture [27] and that, under such circumstances, AMR Corp. did not owe any make-whole amount in connection with repayment of the accelerated debt still owed. The indenture provided that no make-

whole amount was due upon an automatic default. [28] The indenture trustee argued that it could waive the bankruptcy default and deaccelerate the notes, placing AMR Corp. in the position it would have been had it sought to refinance the notes before filing for bankruptcy. [29] On appeal, the Second Circuit found that AMR Corp. owed and continued to owe the outstanding principal and any unpaid interest on the accelerated debt, but no make-whole amount. [30]

The Second Circuit affirmed the bankruptcy court's conclusion that any attempt by the indenture trustee "to rescind acceleration now — after the automatic stay has taken effect — is an effort to affect American's contract rights, and thus the property of the estate, [31] and denial to grant the indenture trustee relief from the automatic stay so that it could rescind the acceleration. [32] Even though AMR Corp. confirmed a plan of reorganization that paid unsecured creditors in full and provided for a distribution to equity, the Second Circuit concluded that granting relief from the automatic stay was not justified, noting, "[w]e find no abuse of discretion in the bankruptcy court's conclusion that lifting the automatic stay would serve only to increase the size of U.S. Bank's claim (to an amount greater than that to which it is entitled pursuant to the Indentures), harming the estate and American's other creditors." [33]

Within the last year, decisions have emerged from bankruptcy courts in the Second and Third Circuits that have solidified this trend. In the Second Circuit, the chapter 11 cases filed by *Momentive Performance Materials Inc.* and its affiliates ("*Momentive*" or "*MPM Silicones*") produced key rulings on make-whole issues. [34] In the Third Circuit, the Delaware bankruptcy court issued several rulings in *Energy Future Holdings* in denying make-whole claims, [35] and prevented the lenders from rescinding acceleration of the debt and asserting a make-whole claim even though the obligor-debtor was presumed solvent. [36]

In *Momentive*, noteholder indenture trustees sought payment of a make-whole premium or, in the alternative, common law damages for the debtors' payment of the pre-petition notes (through the issuance of replacement notes under a plan) prior to the maturity date. [37]

The *Momentive* bankruptcy court examined the language of the indenture and found that the acceleration clause did not unambiguously call for the payment of the make-whole premium in the event of an acceleration of debt. The acceleration clause provided, in relevant part: "If an Event of Default specified in Section 6.01(f) or (g) with respect to MPM [which includes the debtors' bankruptcy] 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." [38] According to the court, the language in the indenture was insufficient to create an unambiguous right to a make-whole payment. [39] The court noted that unlike in *Chemtura*, the indentures at issue did not expressly provide for payment of a make whole premium if the loans were paid prior to their *original* maturity date. [40]

The court then turned to the noteholders' argument that they were entitled to a common law damages claim for the debtors' violation of the no-call provisions contained in the indentures. [41] The *Momentive* court could have denied the indenture trustee's request by relying on the decision in *HSBC Bank USA, N.A. v. Calpine Corp,* [42] ("*Calpine*"), where the District Court for the Southern District of New York confirmed that no-call provisions are unenforceable in bankruptcy and, as such, "liability cannot be incurred pursuant to an unenforceable contractual provision …." [43] *Calpine* held that noteholders are not entitled to an unsecured claim for damages resulting from a solvent debtor's breach of a no-call provision. According to *Calpine*, since the noteholders did not have an allowed valid claim for damages under section 502(b) of the Bankruptcy Code, they did not have a claim under section 506(b) of the Bankruptcy Code. [44]

The *Momentive* court, however, in a thorough analysis, observed that the law is split as to the allowability of a claim for a breach of a make-whole provision (some allow them as a claim for liquidated damages, rather than for unmatured interest disallowed under section 502(b)). [45] Since the indenture did not provide for liquidated damages, the court calculated that the damage claim would have been the difference between the future payments under the notes and the amounts provided by the replacement notes, [46] which amounted to unmatured interest and not allowed under the Bankruptcy Code. [47] At the same time, the court recognized the absence of a specific liquidated damages clause in the indenture and the fact that the debtor was not solvent, indicating that its analysis may have changed if either of these factors were different. [48]

The *Momentive* and *Chemtura* decisions make clear that even if the underlying documents contain express and specific language allowing for a make-whole even after a bankruptcy filing, bankruptcy courts will also engage in fact specific inquiries in determining whether the make-whole may be characterized as unenforceable unmatured interest or allowable liquidated damages. In so doing, the court will explore the equities, including the actual amount of the damages and the overall financial health of the debtor.

In *Energy Future Holdings*, the Delaware bankruptcy court issued several rulings in connection with three separate requests for make-whole premiums. First, the indenture trustee for certain first lien noteholders (the "EFH First Lien Trustee") commenced an adversary proceeding seeking to enforce the first lien noteholders' rights to payment of a $665.2 million in make-whole premium in connection with their secured claims. [49] The EFH First Lien Trustee argued that the early prepayment of the notes constituted a redemption that gave rise to the make-whole. [50]

The *Energy Future Holdings* court adopted the rationale of *Momentive* and other cases where courts held that no make-whole obligation arose under the acceleration provisions, [51] and concluded there was no clear and express provision in the indenture requiring payment of a premium upon acceleration. [52]

In addition to the first lien noteholders, the *Energy Future Holdings* court recently issued decisions in connection with make-whole premiums asserted by the indenture trustees for second lien holders (the "EFH Second Lien Trustee"), [53] and holders of unsecured senior payment-in-kind ("PIK") notes (the "EFH PIK Trustee"). [54] Their respective indentures provided the following identical language upon an event of a default:

> [A]ll 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. [55]

The inclusion of "premium, if any" and "other monetary obligations" language was not present in the EFH First Lien Trustee's indenture. The *EFH* court noted, however, that the language was virtually identical to the language in the *Momentive* indenture, [56] and adopted the *Momentive* court's reasoning in concluding that the phrase "premium, if any" to be paid upon prepayment was not specific enough to meet the specificity requirement … for the make-whole or prepayment claim to be payable post-acceleration." [57]

These recent decisions on make-wholes make clear that if lenders seek make-whole premiums in bankruptcy cases, at the very minimum, the loan documents must contain express language that the make-whole premiums will be due even after default and acceleration. Such express provisions overcome the general limitation that make-wholes are a pre-maturity date remedy. [58]

III. Attempts to Rescind the Bankruptcy Code Automatic Acceleration of Debt

If the indenture does not provide clear and specific language for the payment of make-wholes upon automatic acceleration, bankruptcy courts are unlikely to allow the make-wholes. Lenders, however, have sought creative solutions to address the acceleration issue. One solution is to decelerate the debt. A creditor may seek to file a notice of rescission after the bankruptcy filing date where the language of the indenture provides for no-make whole upon automatic acceleration. The reason for doing this is to restore the note to pre-maturity status, attempting thereby to revive the make-whole obligation. The automatic stay under section 362(a) of the Bankruptcy Code [59] arguably bars lenders from deaccelerating the debt. [60] Thus, before attempting to do so, lenders would have to obtain relief from the automatic stay authorizing rescission of the acceleration of debt, or declaratory relief.

The Bankruptcy Code authorizes bankruptcy courts to grant relief from the stay for "cause." [61] Courts determine "cause" based on the totality of the circumstances in each particular case. [62]

Solvency plays a role in the outcome of a motion to vacate the automatic stay [63] so as to rescind acceleration and enforce a make-whole provision. [64] If the debtor is solvent, a lender should have a stronger argument for vacating the automatic stay. At least the early cases so held. [65] Within the last year, however, the *Energy Future Holdings* bankruptcy court has downplayed the significance of a debtor's solvency in the context of a motion to vacate the automatic stay. [66]

In *EFH II*, in addition to seeking enforcement of the make-whole obligation, the EFH First Lien Trustee sought a declaratory judgment that it was not violating the automatic stay by issuing a notice rescinding the acceleration. In the alternative, the Trustee requested modification of the automatic stay to allow it to decelerate. [67] The *EFH II* court focused on whether a lender can vacate the automatic acceleration of the debt without obtaining stay relief the automatic stay.

While the bankruptcy court concluded that a claim based on a make-whole provision may be enforceable on equitable grounds if the debtor is solvent, the court was unwilling to enter judgment without further analysis, including an evidentiary hearing on the issues. [68] After trial, the *EFH II* court concluded that the facts did not warrant enforcing the make-whole obligation and declined to grant relief from the automatic stay even though the applicable debtors were presumed solvent. Notwithstanding the debtors' solvency, the court held that the automatic stay created an obligation to safeguard the estates, including the rights of shareholders who would be harmed if make-wholes were immediately paid under the indentures. [69] "Lifting the automatic stay would, thus, cause nearly half a billion dollars to leave the estate … there can be no dispute that hundreds of millions of dollars is a substantial amount of distributable value and the [] Debtors' estate will be greatly prejudiced by the loss of that amount." [70] The court therefore denied the motion for relief from the automatic stay, and granted judgment for the debtors. [71]

Similarly, the *Momentive* bankruptcy court dealt with the indenture trustees' request for relief from the automatic stay so that they could issue a notice of rescission of the occeleration of debt. [72] The bankruptcy court ruled that the automatic stay applied to prohibit the issuance of a notice of rescission under the indentures. [73] According to the Court, through a rescission notice, the noteholders were seeking "to control property of the estate" and "recover a claim against the debtors" by exercising a contract right and, thus the automatic stay applied under sections 362(a)(3) and (6) of the Bankruptcy Code. [74]

The indenture trustees also argued that sending the recession notice was allowed under section 555 of the Bankruptcy Code, which provides the automatic stay does not apply to efforts to liquidate a securities contract. [75] The *Momentive* bankruptcy court

disagreed, noting that the indenture did not qualify as a "securities contract" as defined in section 741(7)(A) of the Bankruptcy Code. [76] In addition, sending a notice of rescission did not qualify as an act to liquidate a claim. [77]

Finally, the *Momentive* bankruptcy court concluded that the indenture trustees did not establish "cause" to grant relief from the automatic stay under section 362(d)(1) of the Bankruptcy Code. The bankruptcy court found that granting relief from the automatic stay and allowing the indenture trustees to send a rescission notice decelerating the debt would significantly impact the debtors' estates and creditors "by enhancing claims potentially by hundreds of millions of dollars." [78] Accordingly, relief from the automatic stay was held not to be appropriate.

Lenders may risk violating the automatic stay if they act unilaterally in filing a notice of rescission. As the District Court in *Momentive* stated, "[i]t matters not that the Senior Lien Noteholders' right to rescind the acceleration of the debt was canceled by the application of the automatic stay pursuant to Section 362 of the Bankruptcy Code." [79] Rather, "all contracts signed among the parties operate against the backdrop of the relevant Bankruptcy Code provisions." [80] When parties sign a contract, there is an implicit bargain that one might file for bankruptcy and invoke the automatic stay. [81]

IV. Damages and Interest Calculation

Even if the language is clear and expressly allows for payment of the make whole obligation upon bankruptcy acceleration, a make-whole is not necessarily enforced. A bankruptcy court will first determine whether the make-whole is due and enforceable under state law. If due under state law, a bankruptcy court will next examine the appropriate claim amount under bankruptcy law, including whether the make-whole at issue represents unmatured interest (not allowable under Bankruptcy Code section 502) or liquidated damages (allowable in bankruptcy).

Section 502 of the Bankruptcy Code governs whether a claim is allowable in bankruptcy. Section 502(a) of the Bankruptcy Code states that a claim as filed is deemed allowed absent an objection. [82] Claims under this section are determined "as of the date of the filing of the petition." [83] A bankruptcy court first considers whether the claim would be valid under applicable nonbankruptcy law, and, if so valid, whether there is any limitation on, or provision for, disallowance of the claim under section 502(b) of the Bankruptcy Code. [84] Section 502(b) contains exceptions reflecting Congress' intent to effectuate a fresh start. Most relevant, the Bankruptcy Code disallows claims for unmatured interest. [85]

By contrast, the Bankruptcy Code imposes no prohibition on liquidated damages. Upon reviewing state law, one bankruptcy court observed that liquidated damages are appropriate where: (1) actual damages may be difficult to determine and (2) the sum stipulated is not "plainly disproportionate" to the possible loss. [86]

Indentures that have make-whole provisions typically have another component, in addition to the make-whole premium: an above market-rate interest rate. With other types of indentures, the borrower has remedies if the interest rate is too high. The borrower, for example, may be able to prepay the debt, substituting a new loan with a much lower interest rate. The point of make-wholes, however, is to discourage prepayment by requiring a hefty premium. [87]

In *In re Premier Entertainment Biloxi LLC,* [88] the bankruptcy court rejected the noteholders' contention that the make-whole provision gave rise to a secured claim, but ultimately allowed an unsecured claim for breach of the no-call provision in the indenture. In *Premier Entertainment*, the debtor was solvent and, according to the court, "when a debtor is solvent, bankruptcy courts will generally enforce the debtor's contractual obligations to the extent they are valid under applicable state law." [89] The noteholders were awarded a damages claim based on actual loss incurred, calculated by determining the present value difference

between the market interest rate and the contract interest rate at the time the notes were repaid.[90] The court also concluded that the noteholders were entitled to interest on the amount of premium owed and considered several potential interest rates in calculating the noteholders' damages.[91] The court considered the contract non-default rate (10.75%), the contract default rate (11.75%), state law judgment rate (9%) and the federal judgment rate (approximately 0.25%), and ultimately determined that the federal judgment rate was appropriate in light of delay caused by the noteholders.

Solvency was also the main consideration in *In re General Growth Props.* ("*GGP*"),[92] where the court awarded default interest consistent with "the increasing reluctance" of courts in construing the requirement of section 506(b) to modify private contractual arrangements imposing default interest rates except where: (i) there has been creditor misconduct; (ii) application of the contractual interest rate would cause harm to the other unsecured creditors in the case; (iii) the contractual interest rate constitutes a penalty; or (iv) its application would impair the debtor's fresh start.[93] *GGP*, while not a make-whole decision, shows a court's willingness to enforce the terms of a contract after it is clear that the debtor's reorganization is successful.

The *GGP* court was mindful of the facts of the case, that the:

> [D]ebtors are highly solvent, [the GGP debtor] has confirmed a Plan, and it emerged from bankruptcy months ago. [The GGP debtor's] ability to exercise its right to file for bankruptcy was not impaired, nor was its ability to enjoy a fresh start.[94]

In *GGP*, the act of filing for bankruptcy relief triggered a default of the indenture. The debtor wanted to reinstate the loan under section 1124 of the Bankruptcy Code, but argued that the contractual rate of interest, and not the default rate, should apply.[95] The court considered the factors above and set the rate at the default rate.[96]

Debtors do not always seek to reinstate loans. The influential *Till* case[97] has informed how to establish the interest rate for an insolvent debtor that is seeking to replace a make-whole loan with a lower-interest rate loan. *Till* was a chapter 13 case, but has been applied to chapter 11 cases. In a plurality decision, the Supreme Court addressed the appropriate method for determining the interest rate on the secured portion of a claim that was bifurcated under section 506. The debtor, in its chapter 13 plan, proposed a 9.5% interest rate on the secured portion of the claim, calculated using a "formula rate."[98] In *Till*, the creditor argued that the 21% contract rate should apply.[99]

The Supreme Court highlighted that "[b]ecause bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly."[100] A plurality of the court decided that the formula approach is the appropriate method for calculating interest on the secured portion of a loan.[101] The Supreme Court in *Till* defined the formula approach as the national prime rate plus an additional risk adjustment rate, which accounts for the debtor's risk of nonpayment.[102]

The Supreme Court opined that an efficient market might exist for loans sought by debtors in chapter 11 cases, and that the market can establish the proper interest rate for cramdown.[103] Prior to *Till*, the Sixth Circuit—unlike the Second Circuit—had applied the efficient market approach in determining the appropriate cramdown rate in chapter 11 cases.[104] Because *Till* did not explicitly require the abandonment of the efficient market approach in the chapter 11 context, the Sixth Circuit decided to continue this approach, as articulated in *In re American HomePatient*.[105]

The Second Circuit had taken a different approach. In the pre-*Till* interest rate case of *In re Valenti*, [106] the Second Circuit rejected the efficient market approach for determining interest rates, stating that courts adopting such an "approach misapprehend[s] the 'present value' function of the interest rate." [107] The court stated that the cramdown interest rate is meant "to put the creditor in the same economic position that it would have been in had it received the value of its claim immediately. The purpose is not to put the creditor in the same position that it would have been in had it arranged a 'new' loan." [108] The court continued: "the value of a creditor's allowed claim does not include any degree of profit. There is no reason, therefore, that the interest rate should account for profit …. Otherwise, the creditor will receive more than the present value of its allowed claim." [109]

In this regard, the *Momentive* bankruptcy court observed that the lending market and exit financing market for chapter 11 cases are not perfect markets. "[T]here are far more lenders and borrowers for auto loans, with access to more public data, than lenders and borrowers with respect to DIP or exit financing in chapter 11 cases. In this case, for example, the evidence shows that there were only three available exit lenders to the debtors, who eventually combined on proposed backup takeout facilities while seeking to keep confidential their fees and rate flex provisions." [110]

In another decision examining the appropriate rate of post-petition interest to apply, the Delaware bankruptcy court in *Energy Future Holdings* recently held that a debtor need not pay post-petition interest, even at the federal judgment rate, to unsecured noteholders of a solvent estate. [111] The court stated that it would be "inequitable" to allow payments of post-petition interest, especially when those payments would reduce payments of principal owed to "lower priority creditors." [112]

What if lenders proffer evidence of wide credit availability, signaling that a debtor can pay back even default interest? This may be sufficient under the *Momentive* analysis to require the payment of a make-whole. This same showing may not, however, be sufficient under the equitable analysis in *Energy Future Holdings*, which requires a review of lower priority creditors.

V. Conclusions About Make-Wholes in Bankruptcy Cases

The recent trend in the Second and Third Circuits in connection with make-whole provisions favors debtors, who can lower their debt burdens, current suppliers and creditors, who desire more competitive and stable contract counterparties, and junior creditors, managers, and equity holders, who appreciate a larger stake in the reorganized entity. On the other hand, bondholders and debt purchasers may be deprived of their bargained-for premium. On a more global basis, the debt markets may adjust interest rates and terms for healthy and unhealthy companies alike to account for increased risk if make-wholes are routinely canceled in bankruptcy cases.

This article can only paint with broad brush strokes the potential issues that may arise in the complex topic of make-wholes. It is clear that courts continue to focus on the facts of the case and goal of a successful reorganization. Even when debtors are solvent, courts may find reason to reduce or eliminate make-wholes, or adjust contractual interest rates downward. In the meantime, circuit court decisions regarding make-wholes remain rare and the case law surrounding make-wholes continues to evolve such that even well-reasoned bankruptcy opinions concerning make-wholes may be revisited, questioned, or overturned.

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Footnotes

1 This Article discusses several decisions in the Energy Future Holdings Corp. cases ("*Energy Future Holdings*") dealing with make-whole provisions, including: In re Energy Future Holdings Corp., 513 B.R. 651, 59 Bankr. Ct. Dec. (CRR) 265 (Bankr. D. Del. 2014) ("EFH I"); In re Energy Future Holdings Corp., 527 B.R. 178 (Bankr. D. Del. 2015) ("EFH II"); In re Energy Future Holdings Corp., 533 B.R. 106 (Bankr. D. Del. 2015) ("EFH III"); In re Energy Future Holdings Corp., 539 B.R. 723, 61 Bankr. Ct. Dec. (CRR) 200 (Bankr. D. Del. 2015) ("EFH IV"); In re Energy Future Holdings Corp., 540 B.R. 96 (Bankr. D. Del. 2015) ("EFH V") and In re Energy Future Holdings Corp., 540 B.R. 109 (Bankr. D. Del. 2015) ("EFH VI").

2 See In re Manville Forest Products Corp., 43 B.R. 293, 297, 11 Collier Bankr. Cas. 2d (MB) 735, Bankr. L. Rep. (CCH) P 70062 (Bankr. S.D. N.Y. 1984), order aff'd in part, rev'd on other grounds in part, 60 B.R. 403, 14 Collier Bankr. Cas. 2d (MB) 1312, Bankr. L. Rep. (CCH) P 71107 (S.D. N.Y. 1986) ("This Court agrees [with the lenders] that the debt due them was automatically accelerated by the filing of the bankruptcy petition. It is a basic tenet of the Bankruptcy Code that 'bankruptcy operates as the acceleration of the principal amount of all claims against the debtor.'").

3 EFH II, 527 B.R. at 192–193 (listing cases).

4 In re MPM Silicones, LLC, 2014 WL 4436335 at *16–17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015) (discussed in further detail below); In re South Side House, LLC, 451 B.R. 248, 270, 55 Bankr. Ct. Dec. (CRR) 26 (Bankr. E.D. N.Y. 2011), order aff'd, Bankr. L. Rep. (CCH) P 82170, 2012 WL 273119 (E.D. N.Y. 2012) ("Courts review prepayment consideration terms that are triggered by default and acceleration under the standards applicable to liquidated damages. That is, courts consider whether the amount due is an unenforceable penalty").

5 See EFH III, 533 B.R. at 118–19; In re Energy Future Holdings Corp., 540 B.R. 109 (Bankr. D. Del. 2015).

6 EFH III, 533 B.R. at 108.

7 *EFH III*, 533 B.R. at 125.

8 Make-wholes are enforceable under New York law. See Northwestern Mut. Life Ins. Co. v. Uniondale Realty Associates, 11 Misc. 3d 980, 816 N.Y.S.2d 831, 834 (Sup 2006) (citing Poughkeepsie Galleria Co. v. Aetna Life Ins. Co., 178 Misc. 2d 646, 648, 680 N.Y.S.2d 420 (Sup 1998); In re United Merchants and Mfrs., Inc., 674 F.2d 134, 140 n.7, 6 Collier Bankr. Cas. 2d (MB) 321, Bankr. L. Rep. (CCH) P 69005 (2d Cir. 1982)).

9 Northwestern Mut., 816 N.Y.S.2d at 834.

10 EFH II, 527 B.R. at 199 (quoting Arthur v. Burkich, 131 A.D.2d 105, 106, 520 N.Y.S.2d 638 (3d Dep't 1987)).

11 Since most of the relevant decisions refer to instruments interpreting New York law, this Article focuses on New York and federal bankruptcy law.

12 In re MPM Silicones, LLC, 2014 WL 4436335 at *12 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

13 Matter of LHD Realty Corp., 726 F.2d 327, 330–31 (7th Cir. 1984).

14 Northwestern Mut. Life Ins. Co. v. Uniondale Realty Associates, 11 Misc. 3d 980, 816 N.Y.S.2d 831, 834 (Sup 2006) (quoting Rodgers v. Rainier Nat. Bank, 111 Wash. 2d 232, 237, 757 P.2d 976 (1988)).

15 In re Solutia Inc., 379 B.R. 473, 488, 49 Bankr. Ct. Dec. (CRR) 38 (Bankr. S.D. N.Y. 2007) ("Prepayment can only occur prior to the maturity date.").

16 In re Premier Entertainment Biloxi LLC, 445 B.R. 582, 591 (Bankr. S.D. Miss. 2010) ("If an Event of Default occurs … by reason of any willful action … with the intention of avoiding the prohibition on redemption of the Notes … an additional premium shall also become due.").

17 South Side House, 451 B.R. at 268 ("[A] lender is not entitled to prepayment consideration after a default unless the parties' agreement expressly requires it.").

18 In re Chemtura Corp., 439 B.R. 561 (Bankr. S.D. N.Y. 2010).

19 See Fed. R. Bankr. P. 9019(a). The *Chemtura* court's analysis was rendered in the context of the Second Circuit's ruling in In re Iridium Operating LLC, 478 F.3d 452, 47 Bankr. Ct. Dec. (CRR) 243, Bankr. L. Rep. (CCH) P 80874 (2d Cir. 2007), finding that a settlement approved under Bankruptcy Rule 9019 does not require the strict adherence to the absolute priority rule. Chemtura, 439 B.R. at 594 n.148 ("The Second Circuit explained the difference between the two 'fair and equitable' inquiries for the purpose of approving a settlement as part of a chapter 11 plan. The court noted that '[t]he "fair and equitable" analysis using the Rule 9019 factors, however, does not assess whether a plan conforms to the absolute priority rule.'") (citing In re Iridium Operating LLC, 478 F.3d 452, 463, 47 Bankr. Ct. Dec. (CRR) 243, Bankr. L. Rep. (CCH) P 80874 (2d Cir. 2007)). But see Matter of AWECO, Inc., 725 F.2d 293, 295–98, 11 Bankr. Ct. Dec. (CRR) 953, Bankr. L. Rep. (CCH) P 69722 (5th Cir. 1984) (rejecting settlement of lawsuit against debtor that would have transferred $5.3 million in estate assets to an unsecured creditor despite the existence of outstanding senior claims and holding that "fair and equitable" standard applies to settlements, and "'fair and equitable'" means compliant with the priority system).

20 Most decisions on make-whole provisions are rendered prior to confirmation of a plan. A debtor may seek to pay notes prior to confirmation of a plan, for example pursuant to a refinancing or sale, pursuant to section 363(b) of the Bankruptcy Code. Under a section 363(b) transaction, a debtor need only determine that it has complied with a business judgment standard, rather than demonstrating that it has met the panoply of requirements under plan confirmation. That is exactly what happened in *Iridium*, where the Second Circuit allowed the debtor to restructure a major debt under section 363. See Iridium, 478 F.3d at 466. But see In re Braniff Airways, Inc., 700 F.2d 935, 940, 10 Bankr. Ct. Dec. (CRR) 933, 8 Collier Bankr. Cas. 2d (MB) 522 (5th Cir. 1983) (denying approval of an asset sale because the debtor "should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with a sale of assets.").

21 Chemtura, 439 B.R. at 596–97. The parties opposing the Chemtura settlement and payment of make-whole and no-call damage claims argued that the make-whole provisions in the indentures were not specific enough to warrant a claim upon bankruptcy acceleration. The court acknowledged that the make-whole provisions before it contained "more generalized language". Chemtura, 439 B.R. at 598.

22 Chemtura, 439 B.R. at 605–06. In approving the settlement, the bankruptcy court found that, regardless of the standard in the Second Circuit, the settlement met the standard under section 1129 and was "well within the 'range of reasonableness." Chemtura, 439 B.R. at 605–06.

23 Chemtura, 439 B.R. at 601.

24 In re AMR Corp., 730 F.3d 88, 58 Bankr. Ct. Dec. (CRR) 122 (2d Cir. 2013), cert. denied, 134 S. Ct. 1888, 188 L. Ed. 2d 913 (2014).

25 AMR, 730 F.3d at 99.

26 AMR, 730 F.3d at 95.

27 AMR, 730 F.3d at 96.

28 The pertinent *AMR* make-whole provisions provided:

> [I]f an Event of Default [including bankruptcy filing] … shall have occurred and be continuing, *then and in every such case* the unpaid principal amount of the … Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder (but for the avoidance of doubt, without Make-Whole Amount), *shall*

> *immediately and without further act become due and payable* without presentment, demand, protest or notice, all of which are hereby waived.

AMR, 730 F.3d at 94–95. The indentures also provided that "[n]o Make-Whole Amount shall be payable … as a consequence of or in connection with an Event of Default or the acceleration of the … Notes." AMR, 730 F.3d at 100.

29 AMR, 730 F.3d at 102.

30 AMR, 730 F.3d at 99.

31 AMR, 730 F.3d at 102–03.

32 AMR, 730 F.3d at 112.

33 AMR, 730 F.3d at 112.

34 In re MPM Silicones, LLC, 2014 WL 4436335 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015). These rulings are currently on appeal before the Second Circuit Court of Appeals.

35 EFH II, 527 B.R. at 183–84 (denying make whole claim to holders of first lien notes); In re Energy Future Holdings Corp., 539 B.R. 723, 61 Bankr. Ct. Dec. (CRR) 200 (Bankr. D. Del. 2015) (denying make whole claim to holders of second lien notes).

36 EFH III, 533 B.R. at 110–11.

37 In re MPM Silicones, LLC, 2014 WL 4436335 at *11 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

38 In re MPM Silicones, LLC, 2014 WL 4436335 at *13 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015) (emphasis added).

39 The bankruptcy court concluded that the phrase "premiums, if any," to be paid upon prepayment was "not specific enough … to overcome the requirement of New York law … for a make-whole or prepayment claim to be payable post-acceleration." In re MPM Silicones, LLC, 2014 WL 4436335 at *15 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

40 In re MPM Silicones, LLC, 2014 WL 4436335 *14–15 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

41 In re MPM Silicones, LLC, 2014 WL 4436335 at *16 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015). This argument is premised on New York's common law of the perfect tender rule.

42 HSBC Bank USA, Nat. Ass'n v. Calpine Corp., 2010 WL 3835200 (S.D. N.Y. 2010).

43 The *Calpine* court made clear that damages could have been recovered if the loan documents contained express language creating a payment obligation upon acceleration. In re MPM Silicones, LLC, 2014 WL 4436335 at *17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

44 Section 506(b) provides that oversecured creditors shall have an allowed claim for "interest on such [oversecured] claim, and any reasonable fees, costs, or charges provided for under the agreement … under which such claim arose." 11 U.S.C.A. § 506(b).

45 In re MPM Silicones, LLC, 2014 WL 4436335 at *17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015) (citing In re Trico Marine Services, Inc., 450 B.R. 474, 480–81 (Bankr. D. Del. 2011) (claim for breach of make-whole provision is a claim for liquidated damages, not unmatured interest and allowed under the Bankruptcy Code) and In re Doctors Hosp. of Hyde Park, Inc., 508 B.R. 697, 705–06 (Bankr. N.D. Ill. 2014) (claim for breach of contractual yield maintenance premium is claim for unmatured interest)). See also Scott K. Charles & Emil A. Kleinhaus, "Prepayment Clauses in Bankruptcy," 15 Am. Bankr. Inst. L. Rev. 537, 580 (Winter 2007) (hereinafter, "Charles & Kleinhaus") ("Most cases to consider the issue have concluded that claims based on prepayment clauses are not claims for unmatured interest …. The minority view is that a claim based on a prepayment fee is a claim for unmatured interest …. The same logic has been applied to damages for breach of a no call, which are likewise intended to compensate lenders fully for lost interest income.").

46 In re MPM Silicones, LLC, 2014 WL 4436335 at *17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

47 In re MPM Silicones, LLC, 2014 WL 4436335 at *17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

48 In re MPM Silicones, LLC, 2014 WL 4436335 at *17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015). The court distinguished *Premier Entertainment* and *Chemtura* because these cases had solvent estates.

49 See EFH I, 513 B.R. at 654.

50 EFH II, 527 B.R. at 191.

51 EFH II, 527 B.R. at 194–95. The EFH II court noted that the relevant indenture language did not create a make-whole obligation in the following cases:

> • *Calpine*. "In the case of an Event of Default specified in clause (10) or (11) of Section 6.01 [which includes a bankruptcy filing], all outstanding Notes will become due and payable immediately without further action or notice."
>
> • *Premier Entertainment*: "In the case of an Event of Default specified in clause (j) [commencement of a voluntary bankruptcy case] … of § 6.01 hereof, with respect to Premier … all outstanding Notes will become due and payable immediately without further action or notice."
>
> • *Momentive*. "If an Event of Default specified in Section 6.01(f) or (g) [which includes a bankruptcy filing] with respect to the Company 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."
>
> • *Solutia*: [2] If an Event of default specified in 6.01(7) occurs with respect to the Company or any Subsidiary Guarantor [which includes filing a bankruptcy petition] the principal of and premium, *if any, and accrued interest, if any, on the Notes then outstanding shall become and be immediately due and payable without any declaration or other act* on the part of the Trustee or any Holder.'"

EFH II, 527 B.R. at 192–193 (citations omitted).

52 EFH II, 527 B.R. at 192–193. The court noted that the indenture in question was negotiated at arm's length between sophisticated parties who were represented by counsel, EFH II, 527 B.R. at 192, and was "unwilling to 'read[] into agreements between sophisticated parties provisions that are not there.'" EFH II, 527 B.R. at 192 (quoting In re Solutia Inc., 379 B.R. 473, 485 n.7, 49 Bankr. Ct. Dec. (CRR) 38 (Bankr. S.D. N.Y. 2007)).

53 See In re Energy Future Holdings Corp., 539 B.R. 723, 61 Bankr. Ct. Dec. (CRR) 200 (Bankr. D. Del. 2015).

54 See In re Energy Future Holdings Corp., 540 B.R. 96 (Bankr. D. Del. 2015).

55 See In re Energy Future Holdings Corp., 539 B.R. 723, 61 Bankr. Ct. Dec. (CRR) 200 (Bankr. D. Del. 2015) (italics in original).

56 In re Energy Future Holdings Corp., 539 B.R. 723, 61 Bankr. Ct. Dec. (CRR) 200 (Bankr. D. Del. 2015).

57 In re Energy Future Holdings Corp., 539 B.R. 723, 61 Bankr. Ct. Dec. (CRR) 200 (Bankr. D. Del. 2015).

58 Compare Matter of LHD Realty Corp., 726 F.2d 327, 330–331 (7th Cir. 1984) (citations omitted) ("For one, the lender loses its right to a premium when it elects to accelerate the debt …. [T]his is so because acceleration, by definition, advances the maturity date of the debt so that payment thereafter is not prepayment but instead is payment made after maturity.").

59 The automatic stay affords one of the fundamental debtor protections provided by the bankruptcy laws. It maintains the status quo and protects the debtor's ability to formulate a plan for the sale or other disposition of property of the estate. Among other things it bars a creditor from taking actions to exercise control over property of the estate or assess claims against the estate. 11 U.S.C.A. § 362(a)(2).

60 In re AMR Corp., 485 B.R. 279, 294, 57 Bankr. Ct. Dec. (CRR) 146 (Bankr. S.D. N.Y. 2013), aff'd, 730 F.3d 88, 58 Bankr. Ct. Dec. (CRR) 122 (2d Cir. 2013), cert. denied, 134 S. Ct. 1888, 188 L. Ed. 2d 913 (2014) ("Any deceleration of these notes, however, is barred by the automatic stay imposed by the filing of this bankruptcy."); Solutia, 379 B.R. at 485 ("[W]here the indenture provides for an automatic acceleration any attempt at deceleration would violate the automatic stay.").

61 11 U.S.C.A. § 362(d)(1).

62 In re Wilson, 116 F.3d 87, 90, 30 Bankr. Ct. Dec. (CRR) 1284, Bankr. L. Rep. (CCH) P 77422 (3d Cir. 1997); In re Sonnax Industries, Inc., 907 F.2d 1280, 23 Collier Bankr. Cas. 2d (MB) 132 (2d Cir. 1990).

63 See Claughton v. Mixson, 33 F.3d 4, 5, 31 Collier Bankr. Cas. 2d (MB) 1426, Bankr. L. Rep. (CCH) P 76048 (4th Cir. 1994); In re Premier Automotive Services, Inc., 343 B.R. 501, 521 (Bankr. D. Md. 2006); In re Novak, 103 B.R. 403, 413–15, 19 Bankr. Ct. Dec. (CRR) 1191, Bankr. L. Rep. (CCH) P 73039 (Bankr. E.D. N.Y. 1989); In re Texaco Inc., 81 B.R. 804, 805, 17 Bankr. Ct. Dec. (CRR) 8 (Bankr. S.D. N.Y. 1988).

64 In EFH III, the EFH First Lien Trustee argued that the debtors' solvency on its own was sufficient for the court to find "cause" and grant relief from the automatic stay. EFH III, 533 B.R. at 118. The Delaware bankruptcy court disagreed. EFH III, 533 B.R. at 118

65 Claughton, 33 F.3d at 6 (lifting the automatic stay to require distribution of marital property to an ex-spouse as the debtor was solvent).

66 See EFH III, 533 B.R. at 118.

67 EFH III, 533 B.R. at 108. In Energy Future, without first obtaining relief from the automatic stay, the EFH First Lien Trustees delivered a notice of rescission two months after the debtors' chapter 11 filings. EFH III, 533 B.R. at 108. The lift-stay hearing was held to determine whether "cause" existed to grant relief from the automatic stay retroactively.

68 EFH I, 513 B.R. at 660–61.

69 EFH III, 533 B.R. at 118.

70 EFH III, 533 B.R. at 119.

71 EFH III, 533 B.R. at 126.

72 In re MPM Silicones, LLC, 2014 WL 4436335 at *19 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

73 In re MPM Silicones, LLC, 2014 WL 4436335 at *19 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

74 In re MPM Silicones, LLC, 2014 WL 4436335 at *19 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

75 In re MPM Silicones, LLC, 2014 WL 4436335 at *20 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015); see also 11 U.S.C.A. § 555.

76 In re MPM Silicones, LLC, 2014 WL 4436335 at *21 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015). The bankruptcy court rejected the broad interpretation of the term "securities contract" adopted by other courts. See In re Bernard L. Madoff Inv. Securities LLC, 773 F.3d 411, 417–19, 60 Bankr. Ct. Dec. (CRR) 106, 72 Collier Bankr. Cas. 2d (MB) 1295, Bankr. L. Rep. (CCH) P 82737 (2d Cir. 2014), cert. denied, 135 S. Ct. 2858, 192 L. Ed. 2d 910 (2015) and cert. denied, 135 S. Ct. 2859, 192 L. Ed. 2d 910 (2015) (noting the "extraordinary breadth" and "broad definition" of the term "securities contract"); In re Lehman Bros. Holdings Inc., 469 B.R. 415, 438–39, 56 Bankr. Ct. Dec. (CRR) 94, 67 Collier Bankr. Cas. 2d (MB) 1077 (Bankr. S.D. N.Y. 2012) ("The plain language of section 741 (7) is very broad in its application and encompasses virtually any contract for the purchase or sale of securities … and a wide array of related contracts including security agreements and guarantee agreements.").

77 In re MPM Silicones, LLC, 2014 WL 4436335 at *21–22 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

78 In re MPM Silicones, LLC, 2014 WL 4436335 at *23 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

79 MPM Silicones, 531 at 337, n.12.

80 MPM Silicones, 531 at 337, n.12.

81 MPM Silicones, 531 at 337, n.12.

82 11 U.S.C.A. § 502(a). All claims are allowed unless specifically proscribed by one of the nine exceptions listed in section 502(b) of the Bankruptcy Code. See Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. 443, 449, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, 57 Collier Bankr. Cas. 2d (MB) 314, Bankr. L. Rep. (CCH) P 80880 (2007) (holding that surety's attorney fees in litigating surety's rights in connection with bonds issued to debtor are allowed, as no express exception is cited under section 502).

83 11 U.S.C.A. § 502(b).

84 In re MPM Silicones, LLC, 2014 WL 4436335 at *12, 16–17 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015) (citing Ogle v. Fidelity & Deposit Co. of Maryland, 586 F.3d 143, 147–48, 52 Bankr. Ct. Dec. (CRR) 89, 62 Collier Bankr. Cas. 2d (MB) 1247, Bankr. L. Rep. (CCH) P 81617 (2d Cir. 2009)).

85 11 U.S.C.A. § 502(b)(2) (excluding unmatured interest as a claim).

86 In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 129, 40 Bankr. Ct. Dec. (CRR) 30 (Bankr. E.D. N.Y. 2002).

87 EFH III, 533 B.R. at 115 (“Make-whole payments are typically calculated pursuant to a standard formula consisting of a lump sum payment equal to the present value of the total of the remaining interest payments until a specified date, plus a ‘premium’ above the face amount of the notes that would be payable by the issuer upon its redemption of the Notes on that First Call Date.”)

88 In re Premier Entertainment Biloxi LLC, 445 B.R. 582 (Bankr. S.D. Miss. 2010).

89 Premier Entertainment Biloxi LLC, 445 B.R. at 636.

90 Premier Entertainment Biloxi LLC, 445 B.R. at 642.

91 Premier Entertainment Biloxi LLC, 445 B.R. at 644.

92 In re General Growth Properties, Inc., 451 B.R. 323, 55 Bankr. Ct. Dec. (CRR) 6, 65 Collier Bankr. Cas. 2d (MB) 1351 (Bankr. S.D. N.Y. 2011)

93 GDP, 451 B.R. at 328.

94 *Id*. at 331.

95 GDP, 451 B.R. at 326.

96 The court distinguished its decision in In re Northwest Airlines Corp., 2007 WL 3376895 (Bankr. S.D. N.Y. 2007), where default interest was not awarded. GGP, 451 B.R. at 329. There, “[t]he equitable factors typically used in determining a rate for ‘interest’ under § 506(b) were applied, and the § 506(b) claim for default interest was denied because the notice required to accelerate the debt had never been given, the debtor was insolvent, and payment of interest at the default rate would have come at the expense of the unsecured creditors.” GGP, 451 B.R. at 329

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

98 Till, 541 U.S. at 471.

99 Till, 541 U.S. at 470–71.

100 Till, 541 U.S. at 477.

101 Till, 541 U.S. at 479–80.

102 Till, 541 U.S. at 476.

103 Till, 541 U.S. at 476 n.14. The Supreme Court noted that in a chapter 13 context, every cramdown loan is imposed by a court over the objection of the secured creditor, and therefore there is no free market of willing cramdown lenders. However, the Court stated that the same is not true in the chapter 11 context, as numerous lenders advertise financing for chapter 11 debtors in possession. Till, 541 U.S. at 476 n. 14.

104 In re MPM Silicones, LLC, 2014 WL 4436335 at *28 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015) (citing In re American HomePatient, Inc., 420 F.3d 559, 45 Bankr. Ct. Dec. (CRR) 47, Bankr. L. Rep. (CCH) P 80341, 2005 FED App. 0345P (6th Cir. 2005)).

105 In re Am. HomePatient, 420 F.3d at 567–68 (finding Till did not hold the formula approach is required in the chapter 11 context).

106 In re Valenti, 105 F.3d 55, 30 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 77251 (2d Cir. 1997).

107 Valenti, 105 F.3d at 63.

108 Valenti, 105 F.3d at 63–64.

109 Valenti, 105 F.3d at 64. In *Momentive*, in dealing with the issue of appropriate cram-down interest rate, the bankruptcy court was bound by *Valenti*, but stated that the lending market and exit financing market for chapter 11 cases are not perfect markets. In re MPM Silicones, LLC, 2014 WL 4436335 at *27 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

110 In re MPM Silicones, LLC, 2014 WL 4436335 at *27 (Bankr. S.D. N.Y. 2014), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015).

111 In re Energy Future Holdings Corp., 540 B.R. 109 (Bankr. D. Del. 2015) (The court also found, however, that it could exercise its equitable power to require payment of post-petition interest under section 1129).

112 In re Energy Future Holdings Corp., 540 B.R. 109 (Bankr. D. Del. 2015).

25 No. 1 JBKRLP-NL Art. 4