Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT® FEBRUARY/MARCH 2017

LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 13 NUMBER 2 FEB./MAR. 2017

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:
Kent K. B. Hanson, J.D., at 415-908-3207
Email: ..... kent.hanson@lexisnexis.com
For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3000
Fax Number . . . . . (518) 487-3584
Customer Service Web site . . . . . http://www.lexisnexis.com/custserv/
For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (518) 487-3000

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)
ISBN: 978-0-7698-7988-8 (eBook)
ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] Pratt's Journal of Bankruptcy Law [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 Pratt's Journal of Bankruptcy Law 349 (2014)

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2017-Pub.4789)

Editor-in-Chief, Editor & Board of Editors

Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway, No. 18R, Floral Park, NY 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to bankers, officers of financial institutions, and their attorneys. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, Attn: Customer Service, 9443 Springboro Pike, Miamisburg, OH 45342-9907.

Third Circuit Enforces Post-Acceleration Make-Whole Premium

By Adam C. Harris, Lawrence V. Gelber, Michael L. Cook, and Lucy F. Kweskin*

The U.S. Court of Appeals for the Third Circuit recently held that certain debtors had effectuated optional redemptions entitling the lenders to receive their contractual make-whole payment despite the automatic acceleration of the notes upon the bankruptcy filing. The authors of this article discuss the decision, which is at odds with recent cases finding that so-called "make-whole premiums" are only due if the governing indenture clearly provides for them.

The U.S. Court of Appeals for the Third Circuit recently held that a debtor's refinancing of its first and second lien notes during its Chapter 11 case triggered the obligation to satisfy the "make-whole" payments contemplated to be more than $431 million by at least one of the indentures.[1] Reversing the lower courts, the Third Circuit held that the debtors had effectuated optional redemptions entitling the lenders to receive their contractual make-whole payment despite the automatic acceleration of the notes upon the bankruptcy filing.[2] This decision may have a profound impact on Energy Future Holdings' "E-side" reorganization plan because of the huge liability now imposed on the debtors.[3] The decision is also at odds with recent cases finding that so-called "make-whole

---

* Adam C. Harris is chair of the Business Reorganization Group at Schulte Roth & Zabel LLP and a member of the firm's Executive Committee. Lawrence V. Gelber is a partner at the firm concentrating his practice in the areas of distressed mergers and acquisitions, debtor-in-possession financing, corporate restructuring, creditors' rights and prime brokerage insolvency/counterparty risk. Michael L. Cook, of counsel at the firm and a member of the Board of Editors of *Pratt's Journal of Bankruptcy Law*, served as a partner at the firm for the past 16 years, devoting his practice to business reorganization and creditors' rights litigation, including mediation and arbitration. Lucy F. Kweskin is an associate at the firm practicing in the areas of bankruptcy, corporate restructuring, distressed investment, and creditors' rights. The authors may be reached at adam.harris@srz.com, lawrence.gelber@srz.com, michael.cook@srz.com, and lucy.kweskin@srz.com, respectively.

[1] *In re Energy Future Holdings Corp.*, No. 16-1351, 2016 U.S. App. LEXIS 20601, at *3, 7 (3d Cir. Nov. 17, 2016) ("*Energy Future*").

[2] *Id.* at *13–17.

[3] Energy Future Holdings' "E-Side" plan of reorganization, whose confirmation hearing is scheduled to begin December 1, 2016, requires the make-whole obligations be disallowed prior to the effective date. *See* No. 14-10979 (Bankr. D. Del.) [DKt. No. 9612].

premiums" are only due if the governing indenture clearly provides for them.[4]

FACTS

The *Energy Future* debtors had entered into separate indentures, each governed by New York law, for their first-priority secured notes ("First Lien Notes") and second-priority secured notes ("Second Lien Notes," and collectively, the "Notes").[5] The First Lien Indenture required the debtors to pay a redemption price of 100 percent of the outstanding principal balance plus the "Applicable Premium" (the make-whole) if the First Lien Notes were redeemed at the debtors' option before December 1, 2015.[6] The Second Lien Indenture similarly required a make-whole payment if the debtors made an optional redemption prior to May 15, 2016 or March 1, 2017 (depending on the maturity of the notes redeemed).[7] Each indenture provided for automatic acceleration of the debt upon the borrower's bankruptcy filing.[8]

Seeking to take advantages of lower interest rates, the debtors disclosed in an 8-K filed with the Securities and Exchange Commission their intention to file Chapter 11 petitions and refinance their outstanding notes "without paying any make-whole amount."[9] Six months later, the debtors commenced their Chapter 11 cases in Delaware, and thereafter sought and obtained bankruptcy court approval to obtain post-petition financing to refinance the First Lien Notes and a portion of the Second Lien Notes without paying the make-whole premiums.[10] The indenture trustees for each of the First Lien Notes and Second Lien Notes sued, asserting an entitlement to the make-whole premiums.

LOWER COURTS

The bankruptcy court held that the debtors' bankruptcy filing had automatically accelerated the Notes, so that the bankruptcy filing date became the

---

[4] *See, e.g.*, *In re MPM Silicones, LLC*, No. 14-22503 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015); *In re Calpine Corp.*, (S.D.N.Y. Sept. 15, 2010) (breach of no-call provision was unenforceable after bankruptcy filing accelerated debt and plain language of debt instruments did not provide for payment of premiums after acceleration).

[5] *Energy Future*, at *4–5.

[6] *Id.* at *3.

[7] *Id.* at *4.

[8] *Id.* at *4–5.

[9] *Id.* at *5.

[10] *Id.* at *5–7.

new maturity date for the Notes.[11] Relying on recent make-whole decisions from other circuits, the court found that the post-acceleration repayment of the Notes was not an "optional redemption" and that the indentures did not include "clear and unambiguous" language requiring payment of the make-whole following acceleration.[12] The district court affirmed.[13]

DECISION

Optional Redemption of Notes

The Third Circuit first posed three specific questions regarding the First Lien Notes: (1) was there a redemption; (2) was it optional; and (3) if yes to both, did it occur before December 1, 2015?[14]

First, the court found that New York and federal law deem a "redemption" to include repayments of debt occurring both prior to or after maturity.[15] Thus, the refinancing of the First Lien Notes was a redemption.[16]

Second, the refinancing was optional because the debtors had voluntarily sought Chapter 11 protection and could have chosen to reinstate the Notes rather than paying them off.[17] The court also noted the debtors' statements in its SEC filings that outlined their intention to redeem the Notes despite being "under no obligation" to do so.[18] Further, the court said the debtors redeemed the Notes "over the Noteholders' objection."[19]

Third, the repayment of the First Lien Notes had occurred prior to December 1, 2015, the trigger date in the indenture.[20]

The Third Circuit then rejected the debtors' argument that the acceleration

---

[11] *In re Energy Future Holdings Corp.*, 527 B.R. 178, 191–95 (Bankr. D. Del. 2015); *In re Energy Future Holdings Corp.*, 539 B.R. 723, 729–733 (Bankr. D. Del. 2015).

[12] *Id.*

[13] *In re Energy Future Holdings Corp.*, No. CV 15-1011(D. Del. April 12, 2016).

[14] *Energy Future,* at *13. Like the lower courts, the Third Circuit presumed the debtors were solvent and did not "consider whether insolvency might have affected [the Debtors'] obligations." *Id.* at *8–9.

[15] *Id.* at *13–14.

[16] *Id.* at *14.

[17] *Id.* at *14–15.

[18] *Id.* at *15.

[19] *Id.* at *16.

[20] *Id.*

provision in the indenture conflicted with its optional redemption provisions.[21] According to the court, the two sections "simply address different things."[22] Moreover, the holding of *In re AMR Corp*.[23] was inapplicable because the indenture in that case explicitly said that upon acceleration, the make-whole would not become due.[24]

Second Lien's Entitlement to Make-Whole

While the above reasoning also applied to the Second Lien Notes, the court reasoned that the Second Lien Indenture's make-whole provision was even more "explicit" because the acceleration clause provided that "all principal of *and premium, if any*, . . ." became immediately due and payable upon the bankruptcy filing.[25] Relying on the *Momentive* decisions out of the Southern District of New York,[26] the debtors argued that the reference to "premium, if any," was not "specific enough" to require payment of the make-whole upon acceleration, but the Third Circuit said there was no reason to "demand such exactness."[27]

The burden was on the debtors, not the noteholders, to make the indenture language clearer, noted the court.[28] If the debtors wanted their "duty to pay the make-whole on optional redemption to terminate on acceleration of its debt," they should have made it clear that the acceleration language primed the

---

[21] *Id.* at *16–19.

[22] *Id.* at *16.

[23] 730 F.3d 88 (2d Cir. 2013).

[24] *Id.* at *17. The indenture trustees had also sought stay relief to rescind the acceleration of the debt, which the bankruptcy court denied. *Id.* at *6, 8, 9. Because it had already held that the noteholders were entitled to the make-whole, the Third Circuit did not address rescission. *Id.* at *30.

[25] *Id.* at *19–20. In contrast, the First Lien Indenture provided that, upon the bankruptcy filing, "all outstanding Notes" would automatically become due and payable. *Id.* at *4.

[26] In *Momentive*, the court denied payment of a make-whole premium upon a voluntary note redemption after the notes were automatically accelerated by virtue of the borrower's bankruptcy filing. *In re MPM Silicones, LLC*, No. 14-22503 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015). Absent clear and unambiguous language to the contrary, the acceleration had advanced the maturity date so that the debt repayment was not an elective redemption. *Id.* The decision is currently on appeal in the Second Circuit.

[27] *Id.* at *20. EFIH had argued the make-whole would only be payable post-acceleration if more specific language had been used such as "a premium owed under section 3.07" or a specific reference to the "Applicable Premium" and "Optional Redemption." *Id.* at *20.

[28] *Id.* at *29.

optional redemption provisions.[29]

"Redemption" versus "Prepayment"

The Third Circuit also rejected the debtors' argument that "courts must close their eyes to make-whole provisions once a debt's maturity has accelerated."[30] Instead, it relied heavily on *NML Capital v. Republic of Argentina*, in which the New York Court of Appeals held that the borrower had to continue to make interest payments on its debt after acceleration and maturity.[31] As the *NML* court explained, while "acceleration advances the maturity debt of the debt . . . [it was] unaware of any rule of New York law declaring that other terms of the contract not necessarily impacted by acceleration . . . automatically cease to be enforceable after acceleration."[32] Thus, reasoned the Third Circuit, the "optional redemption" provision applied "no less following acceleration of the Notes' maturity than it would to a pre-acceleration redemption."[33]

The Third Circuit differentiated between a "prepayment," which "could not take effect after the debt's maturity" and a "redemption," which "would be unaffected by acceleration of a debt's maturity."[34] Thus, "if parties want a 'prepayment' premium to survive acceleration and maturity, they must clearly state it."[35] Because nothing in the acceleration language of the indentures "negate[d] the premium . . . [b]y avoiding the word 'prepayment' and using the term 'redemption' . . . the make-whole would apply without regard to the Notes' maturity."[36]

The Third Circuit rejected the debtors' further argument that the make-whole was "in substance a prepayment premium," instead giving effect to the "'words and phrases' the parties chose."[37] The court also distinguished the *Northwestern* case[38] relied on by the debtors, for in that case, the lender had foreclosed on his collateral and sought a prepayment premium. In *Energy*

---

[29] *Id.*

[30] *Id.* at *21.

[31] 952 N.E.2d 482, 492 (N.Y. 2011) ("*NML Capital*").

[32] *NML Capital*, at 492.

[33] *Energy Future,* at *23–24.

[34] *Id.* at *25.

[35] *Id.* at *27.

[36] *Id.*

[37] *Id.*

[38] *Nw. Mut. Life Ins. Co. v. Uniondale Realty Assocs.*, 816 N.Y.S.2d 831, 836 (N.Y. Sup. Ct. 2006) ("*Northwestern*").

Future, though, the Noteholders had not sought immediate payment.[39]

Criticism of *Momentive*

The Third Circuit also criticized the *Momentive* decisions, finding them to be unpersuasive.[40] The indentures in the *Momentive* case had also required payment of a make-whole upon the occurrence of an optional redemption (not a prepayment) before a particular date.[41] The *Momentive* courts held that the words "premium, if any," were not specific enough to require payment of a make-whole.[42] The Third Circuit disagreed, finding that "the result in *Momentive* conflicts with that indenture's text and fails to honor the parties' bargain."[43] The *Momentive* decision is currently on appeal in the Second Circuit.[44]

TAKEAWAYS

The Third Circuit gave a clear warning to borrowers who think Chapter 11 will help them avoid their obligations to pay make-whole premiums. As the court noted, a different outcome may result if the make-whole is characterized as a "prepayment" (as opposed to a "redemption"). Further, given lower court decisions like *Momentive*, drafting a clear right to a post-acceleration make-whole is still a lender's best bet.

---

[39] *Energy Future*, at *28.

[40] *Id.* at *21.

[41] *Id.* at *26.

[42] *Id.* at *20.

[43] *Id.* at *21.

[44] *In re MPM Silicones, L.L.C.*, No. 15-1682.