

ALI Young Scholars Medal Conference

Make-Whole Developments Outline

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- I. Make-Wholes – Concept and Significance
 - a. Generally designed for lenders to recoup projected future interest upon an acceleration or redemption
 - b. Very common in note indentures of various types (secured, unsecured) and other debt instruments
- II. Recent Lower Court Decisions
 - a. *Momentive* Bankruptcy Court and District Court summaries
 - b. *EFIH* Bankruptcy Court and District Court summaries
- III. EFIH Third Circuit Decision and Other Recent Developments
 - a. *EFIH* Third Circuit overruling of lower courts and key holdings
 - i. Post-filing refinancing was a voluntary redemption triggering makewhole
 - ii. Less strict interpretation of indenture language
 - iii. Possible role of pre-filing disclosure
 - b. *EFIH* subsequent procedural history
 - i. Make-whole claims settled, but may change based on indications today that regulators may not approve key transaction for EFIH emergence
 - c. *Cash America* decision
 - i. SDNY non-bankruptcy case holding that breach of asset purchase covenant was a voluntary redemption triggering make-whole
 - ii. Subsequent industry debate regarding existing market understandings of make-whole provisions
 - d. *Momentive* still on appeal in Second Circuit
- IV. Implications

- a. Potential for Second Circuit resolution of apparent conflicts in *Momentive* and *Cash America* holdings
- b. Potential for Second Circuit / Third Circuit split
- c. Drafting and interpretation lessons
 - i. *Momentive*, lower court *EFIH* decisions suggest clarity is paramount in drafting and interpretations will be very strict
 - ii. *EFIH* Third Circuit decision and *Cash America* indicate greater willingness of courts to construe ambiguity in favor of borrowers
 - iii. In new drafting, clarity may still avoid later interpretation disputes
- d. Industry debate over market understanding of make-wholes may continue and should inform practice going forward