

Third Circuit Finds DCF Analysis is "Commercially Reasonable Determinant of Value"

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Counterparties to repurchase agreements and other contracts protected under the safe-harbor provisions the Bankruptcy Code have something new to worry about: the possible undervaluation of their damage claims based on a discounted-cash-flow (DCF) analysis of termination value in a dysfunctional market. The Third Circuit recently affirmed the U.S. Bankruptcy Court for the District of Delaware's denial of Calyon New York Branch's \$478.5 million claim in *In re American Home Mortgage Holdings Inc.* and held that a DCF analysis may constitute a "commercially reasonable determinant of value" for measuring a damage claim under an accelerated repurchase agreement under § 562 of the Code. As a result, the decision that such counterparties face upon a default (whether to sell the underlying assets into a depressed market or retain them until market conditions normalize) has become significantly more complicated, which ultimately may result in increased financing costs and a counterproductive incentive to liquidate assets prematurely into a dysfunctional market.

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