

Fifth Circuit Questions the Enforceability of Make-Whole and Postpetition Interest Claims in Bankruptcy

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On January 17 2019, the U.S. Court of Appeals for the Fifth Circuit issued a decision strongly suggesting that make-whole premiums are not payable in bankruptcy to unsecured and undersecured creditors. In *In re Ultra Petroleum Corp.*, the Fifth Circuit found “compelling” the debtors’ argument that a make-whole premium owed to certain unsecured noteholders under the prepetition notes purchase agreement should be disallowed as a claim for “unmatured interest” pursuant to section 502(b)(2) of the Bankruptcy Code. This holding departs from the majority view and creates a stark circuit split. While distressed companies may rejoice in this decision, creditors—particularly unsecured and undersecured creditors—will need to reconsider the likelihood of collection of make-whole premiums for distressed companies that are able to file for bankruptcy protection in Texas, Louisiana, or Mississippi, and to evaluate the risk that courts in other circuits follow the Fifth Circuit’s reasoning. Importantly, the *Ultra Petroleum* decision will likely create additional incentives for distressed companies to file for bankruptcy in the Fifth Circuit if potentially large make-whole premiums are payable to unsecured or undersecured creditors.

This Client Memorandum updates our previous memoranda discussing the treatment of make-whole premiums in bankruptcy, with a focus on the new state of play following the Fifth Circuit’s *Ultra Petroleum* decision, and discusses the Fifth Circuit’s guidance on rates of postpetition interest owed to unsecured creditors in solvent-debtor Chapter 11 cases.

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

Donald S. Bernstein

+1 212 450 4092
donald.bernstein@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

Brian M. Resnick

+1 212 450 4213
brian.resnick@davispolk.com

Christopher Robertson

+1 212 450 4917
christopher.robertson@davispolk.com

Damian S. Schaible

+1 212 450 4580
damian.schaible@davispolk.com

Eli J. Vonnegut

+1 212 450 4331
eli.vonnegut@davispolk.com

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