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Second Circuit Holds Momentive Noteholders May Be Entitled to Market Interest Rate on Replacement Notes, Not Entitled to Make-Whole Premium

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In a much-anticipated decision, on October 20, 2017, the U.S. Court of Appeals for the Second Circuit concluded that (1) the Bankruptcy Court erred in not determining whether an efficient market existed to calculate the interest rate under the cramdown standard for secured creditors and (2) the senior lien noteholders were not entitled to payment of a make-whole premium. To the relief of senior secured creditors, the Second Circuit's decision adopts a two-part test of applying a market interest rate, if an efficient market exists, to take-back debt in a cramdown, and applying the *Till* formula method only if an efficient market does not exist. At the same time, the decision introduces a circuit split on make-whole payments, compared to last year's *Energy Future Holdings* decision by the Third Circuit, which required the payment of a make-whole premium under similar circumstances to *Momentive*. Additionally, the decision continues the recent trend of eroding the equitable mootness doctrine by holding that the payment of additional annual interest of $32 million for seven years would not threaten Momentive, if a market-interest rate were applied to the replacement notes.

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.

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