

Third Circuit Finds Noteholders Have Right to Payment of Make-Whole Premium After Bankruptcy Acceleration

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On November 17, the U.S. Court of Appeals for the Third Circuit, based in Philadelphia, held that noteholders were entitled to payment of an optional redemption premium at the make-whole price as a result of the repayment of their notes in a bankruptcy proceeding. When a make-whole is triggered in connection with a redemption, in addition to paying principal and accrued and unpaid interest, the issuer is required to pay an additional amount based on the discounted value of the stream of future interest payments, thereby making noteholders whole for the loss of the future income stream bargained for when the notes were purchased. A number of other courts had previously held that make-wholes were only payable in connection with an optional redemption and that a repayment following an acceleration in bankruptcy would not be optional and therefore not lead to the payment of a redemption premium absent explicit language to that effect. Together with the recent *Cash America* decision by the U.S. District Court for the Southern District of New York, which required payment of a make-whole premium as damages after a default by the issuer, this case introduces significant uncertainty into what issuers must pay upon default or acceleration in bankruptcy, and should encourage issuers and underwriters to address the uncertainty through explicit indenture language.

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