Make (Whole) A Minute: Takeaways from the Recent Hertz Decision on Make-Whole and Post-Petition Interest

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Happy 2022, everyone! It seems fitting to kick off our Make (Whole) a Minute Update series in 2022 with an alert on make-whole. On December 22, 2021, the Bankruptcy Court for the District of Delaware ruled in favor of the Debtor-Hertz on a Motion to Dismiss filed by Debtor-Hertz with respect to make-whole claims and post-petition interest claims filed by public bondholders, with respect to four different series of bonds. In keeping with our theme that it takes about a minute to read our updates, here are the takeaways on the *Hertz* decision for institutional investors:

1. To start, this was a decision on a motion to dismiss claims for make-whole and post-petition interest. The standard to survive a motion to dismiss is essentially whether or not the claimant stated a plausible claim. This was **not** a ruling on the merits of make-whole **nor** a decision on whether or not a make-whole is unmatured interest Section 502(b)(2) of the Bankruptcy Code. That issue is still to be decided by the *Hertz* court.[1]
2. For two series of bonds, the Court did note there was no make-whole due. Again, this was not in the context of the Court determining whether or not make-whole was unmatured interest under Section 502(b)(2) or disallowed by the Bankruptcy Code. This was a result of the governing language of the indenture. The indenture acceleration provisions did not include a specific reference to make-whole or any premium becoming due upon acceleration; the acceleration provision only referred to principal and accrued interest. However, this was not the end of the make-whole analysis, and, following Third Circuit precedent from *EFH*[2], the claimants pointed to the optional redemption provisions of the indenture. Looking at the relevant indenture language, the Court determined that only two of the four series of bonds had states a plausible claim for make-whole. Specifically, for the 2022 and 2024 bonds, the relevant indenture provisions provided that at any time after October 15, 2017 and October 15, 2019, respectively, and "prior to maturity", the notes were redeemable at a price stated in the relevant grid. The Court determined that the use of the phrase "prior to the maturity" rather than "prior to the Stated Maturity", where Stated Maturity was defined as the specific date on which the notes were set to originally mature, was dispositive. The Court held that since acceleration of the notes moved the "maturity" to the date of the bankruptcy filing, the redemption

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of the notes on the plan effective date was **after** the "maturity" of the notes and did not trigger the redemption provisions of the 2022 and 2024 indentures. The Court assumed the use of "maturity" rather than "Stated Maturity" was intentional. Had the defined term "Stated Maturity" been used, we can assume there would have been a different outcome. There is a lesson here: If terms are specifically defined, they should be used rather than more general language.

3. The Court followed Third Circuit precedent and agreed with the *Ultra* Fifth Circuit[3]decision that the classification of a creditor as unimpaired does not entitle that creditor to all of its contractual rights, even if those rights are fully enforceable under state law. Cited precedent, which the *Hertz* Court followed, holds that unimpairment is determined **after** application of the claim limitation provisions of the Bankruptcy Code, such as Section 502(b)(2). This means that in order to be part of an allowed claim, the Court will need to determine that make-whole is **neither** unmatured interest **nor** the economic equivalent of unmatured interest.
4. With regard to post-petition interest, the Court held that even though Hertz was solvent, nothing in the Code or the legislative history required a solvent debtor to pay an unimpaired creditor post-petition interest at the contract rate, and that payment of interest at the much lower federal judgment rate was sufficient. The Court rejected the argument that there could be valid equitable grounds compatible with the Bankruptcy Code that could rationalize the payment of post-petition interest at the contract rate. Notably, this does not align with the Fifth Circuit's comment in *Ultra* and decisions by other Circuits that equitable principles may support the contract rate.
5. A decision of a Delaware bankruptcy court is not binding on other bankruptcy courts within Delaware nor on other courts, including the Fifth Circuit which is currently considering similar issues in the Ultra matter (see our prior updates here and here).

Stay tuned for further make-whole news and please reach out to any of the Akin team listed below with further questions.

[1] The *Hertz* Court did note in dicta that it found significant that the make-whole was in large part calculated based on the present value of the unmatured interest due on the notes as of the redemption date. The issue of whether make-whole is part of an allowed claim or disallowed as unmatured interest by Section 502(b)(2) of the Bankruptcy Code is also at issue in the *Ultra Petroleum* case, and currently pending before the United States Court of the Appeals for the Fifth Circuit.

[2] *In re Energy Future Holdings Corp*., 842 F.3d 247 (3d Cir. 2016).

[3] *In re Ultra Petroleum Corp*., 943 F3d 758 (5th Cir. 2019).

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