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Make (Whole) a Minute: A Review of the Ultra Unimpairment Decision

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Welcome to the first Akin Gump client alert sub-titled Make (Whole) a Minute. These alerts are designed to be short digestible updates or commentaries on topics of interest to the institutional investment community that take a minute (or two) to read. And who doesn't love Make-Whole and a good play on words?

It seemed appropriate to reference Make-Whole in this first Make (Whole) a Minute alert. Having just filed the latest brief in the Ultra Make-Whole and Post-Petition Interest saga in connection with the second trip to the Fifth Circuit (for a copy, click here), we are reminded of existing precedent from the Fifth Circuit's November 2019 decision regarding the meaning of unimpairment under the Bankruptcy Code.

We acknowledge that "unimpairment" doesn't sound as exciting as whether Make-Whole is disallowed under Section 502(b)(2) of the Bankruptcy Code, however, the impact of the Fifth Circuit's unimpairment decision could be far reaching.

By way of background, "unimpairment" is a classification that a debtor ascribes to a creditor class. Classes of creditors are either impaired or unimpaired under a debtor's plan of reorganization. The Bankruptcy Code provides that in order to be unimpaired, the plan must leave unaltered the legal, equitable, and contractual rights of a claim holder. See 11 U.S.C. § 1124(1).

So with that code language in mind, one might understandably assume that all rights under the contract need to be respected and fulfilled by the debtor when the debtor classifies a group of creditors as unimpaired. We think you are right. And that's what was argued by the Noteholders to the Fifth Circuit as one of the many reasons why the Ultra-Debtors (who were solvent at confirmation by the way) were obligated to pay the Make-Whole Amount and post-petition interest at the contract default rate. But the Fifth Circuit isn't fully on board with that reasoning. The Fifth Circuit held in its November 2019 decision (available here) that a claim is not impaired under Section 1124 of the Bankruptcy Code if the statute, and not the plan, does the impairing. Meaning that impairment is only evaluated after the claim disallowance provisions of Section 502(b) are applied. According to the Fifth Circuit, the Noteholder claims can therefore still be classified as unimpaired even if they do not receive Make-Whole and

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post-petition interest, which are fully enforceable under state law, if the Code would not permit such amounts as part of an unsecured creditor's claim.

This holding has greater application than just Make-Whole. It means that, at least in the Fifth Circuit, a debtor can classify a creditor as unimpaired, thus depriving them of the right to vote on the plan, but still use the Bankruptcy Code offensively to avoid certain obligations set out in a contract. Stay tuned to see how this affects claims in bankruptcy going forward and whether other Circuits follow suit. And of course stay tuned for the Fifth Circuit's decision on Make-Whole.

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