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Great Debates: The Circuit Split Edition

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Resolved: The automatic stay terminates automatically after a repeat filing only to property of the debtor, and not to estate property.

Resolved: A "makewhole" provision may be enforced against a debtor and is not disallowed as "unmatured interest" pursuant to Bankruptcy Code § 502(b)(2).

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MAJORITY VIEW: The automatic stay for repeat filers terminates with respect to the debtor thirty days after the most recent filing, but it does not terminate with respect to estate property.

I. Introduction

If an individual's case under chapters 7, 11 or 13 has been dismissed within one year, section § 362(c)(3)(A) of the Bankruptcy Code provides that the automatic stay in Section 362(a) terminates 30 days after the most recent filing "with respect to any action taken with respect to a debt or property securing such debt . . . *with respect to the debtor* . . . ." [Emphasis added.]. 11 U.S.C. § 362(c)(3)(A).

The "majority view" interpretation, which has been adopted by a majority of lower courts around the country, as well as the Fifth Circuit, has held that section 362(c)(3)(A) only terminates the automatic stay as to the debtor and property of the debtor, but not as to property of the estate. *See, e.g.*, *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 231 (5th Cir. 2019); *In re Holcomb*, 380 B.R. 813, 816 (10th Cir. B.A.P. 2008); *In re McGrath*, 621 B.R. 260, 266-67 (Bankr. D.N.M. 2020); *In re Markoch*, 583 B.R. 911, 914 (Bankr. W.D. Mich. 2018); *In re Pope*, 351 B.R. 14, 16-17 (Bankr. D.R.I. 2006); *In re Brandon*, 349 B.R. 130, 132 (Bankr. M.D.N.C. 2006); *In re Gillcrese*, 346 B.R. 373, 377 (Bankr. W.D. Pa. 2006). Courts should adopt the majority view when analyzing this issue.

In *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226 (5th Cir. 2019), the debtor had filed bankruptcy four times to prevent the foreclosure of her home. While her last bankruptcy was still pending, the debtor sued the mortgage lender in district court, contending that the Texas four-year statute of limitations on foreclosure had lapsed. Whether the statute had lapsed depended on how many days the statute had been tolled on account of bankruptcy.

The debtor argued that the automatic stay was in place with regard to the home for only 135 days. If that were so, the statute would have lapsed before the lender began foreclosure. The lender took the view that the stay as to the house was effective for the entire 269-day duration of the debtor's four bankruptcies. The parties conceded that the home was estate property.

On cross motions for summary judgment, the district judge ruled in favor of the lender, holding that the statute was tolled for all 269 days the debtor was in bankruptcy. The district judge followed opinions by bankruptcy courts in Texas and Louisiana that had adopted the majority view and ruled that Section 362(c)(3)(A) does not terminate the stay 30 days after filing as to estate property.

Based on "the plain language of the provision," the Fifth Circuit affirmed, adopting the majority view and disagreeing with the First Circuit, which articulated the "minority" view. When considering this statute, courts should adopt the majority view and hold that when a debtor is a repeat filer, the automatic stay shall terminate with respect to property of the debtor, but does not terminate with respect to property of the estate.

II. The Plain Language of the Statute is Clear That the Termination of the Automatic Stay Applies Only to Property of the Debtor

First, the language in the section 362 of the Bankruptcy Code is clear and unambiguous. Section 362(c)(3)(A) is clear that the stay shall terminate only "*with respect to the debtor*." 11 U.S.C. 362(c)(3)(A). The language of the statute is clear, and there is "no mention of the bankruptcy estate" in the statutory language. *Rose*, 945 F.3d at 231.

As a starting point, courts should look at the statute's text. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). If the text is unambiguous, the court applies its plain and ordinary meaning, *see Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020), with an eye toward avoiding absurd results, *see O'Kane v. Apfel*, 224 F.3d 686, 691 (7th Cir. 2000). Courts strive to give meaning to every word in the statute and avoids treating any language as surplusage. *Duncan*, 533 U.S. at 174.

The text references the "stay under subsection (a)," which is the automatic stay of other actions against the debtor when he files bankruptcy. *See* 11 U.S.C. § 362(a). It serves as a protection for the debtor. *Midlantic Nat. Bank v. N.J. Dept. of Envtl. Prot.*, 474 U.S. 494, 503 (1986). It stays actions in three categories: those against (1) the debtor; (2) the debtor's property; and (3) the property of the bankruptcy estate. *In re Smith*, 910 F.3d at 580; *see Rose*, 945 F.3d at 230. Congress enacted the stay to apply to these categories under 11 U.S.C. § 362(a) expressly, using the specific category's name. *See Rose*, 945 F.3d at 230. For instance, subsection (a)(1) stays actions "against *the debtor*," subsection (a)(2) stays actions "against *the debtor* or against *property of the estate*," and subsection (a)(5) stays actions "against property of the debtor." This isn't exhaustive; there are numerous other references to the categories throughout subsection (a). Therefore, the language of the statute of clear that the stay terminates solely with respect to property of the debtor.

III. Congress Knows How to Differentiate Between Property of the Debtor and Property of the Estate, and Did So Elsewhere in the Statute

Second, a review of the statute underscores the fact that Congress is capable of differentiating between property of the debtor and property of the estate. Congress knows full well the difference between the debtor and the estate and could have added "and the property of the estate" as it did multiple times in § 362(a), *see* 11 U.S.C. §§ 362(a)(2), (a)(3), & (a)(4), but it made a deliberate choice to not reference "property of the estate" when drafting. Courts should not add that language in their interpretation of the statute or presume, in the guise of "interpreting" the statute, that this gloss should be added to it. *See Keene Corp. v. United States*, 508 U.S. 200 (1993) ("Where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted); *Evans v. Portfolio Recovery Assocs., LLC*, 889 F.3d 337, 346 (7th Cir. 2018) ("our task is to interpret the words of Congress, not add to them") (citation omitted).

Similarly, Congress could have eliminated "with respect to the debtor" and thus written a statute that terminated the entire stay after 30 days, but in its wisdom Congress didn't. *See In re Brandon*, 349 B.R. at 132.

Congress knew how to eliminate the stay in its entirety when it desired to do so; indeed, it automatically terminated the entire stay in 11 U.S.C. § 362(c)(4)(A)(i) when it said, "the stay under subsection (a) shall not go into effect" in certain scenarios. Notably absent from that subsection is any limiting language. In contrast, in § 362(c)(3)(A) Congress chose to include such limiting language and evinced its plain intent to end the stay to a lesser extent—that is, only with respect to the debtor, not the estate's property. *See In re Harris*, 342 B.R. at 279-80; *see United States v. Melvin*, 948 F.3d 848, 852 (7th Cir. 2020) ("We presume that the use of different words in the same statute is evidence that Congress intended different meanings.").

If Congress had intended to eliminate the automatic stay for repeat filers for both debtor property *and* property of the estate, Congress would have done so explicitly. Its failure to do so implies that the decision was intentional.

IV. Chapter 7 Implications Require Courts To Limit Termination to Property of Debtor

Although the vast majority of cases interpret the termination of the automatic stay through the lens of a chapter 13 debtor, eliminating the stay The Bankruptcy Court for the Eastern District of California considered the issue from the chapter 7 perspective in *In re Thu Thi Dao*, 616 B.R. 103, 106 (Bankr. E.D. Cal. 2020). In this case, the Court underscored the fact that preserving the stay with respect to property of the estate was critical to preservation of the bankruptcy estate and operation of chapter 7 bankruptcy cases. In *Thu Thi Dao*, the pro se debtor's first chapter 7 petition had been dismissed on January 31, 2020, for failure to file schedules. The debtor filed again under chapter 7 on February 10, 2020.

Having reason to believe that the debtor was concealing property, the chapter 7 trustee was concerned that the automatic stay would terminate entirely within 30 days, allowing a few creditors to benefit from the assets that could benefit all creditors. Therefore, the trustee filed a motion requesting that the Court rule, among other things, that the stay would not terminate as to estate property, whether it was disclosed or not.

The Court disagreed with the Ninth Circuit Bankruptcy Appellate Panel's decision in *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (B.A.P. 9th Cir. 2011), and agreed with the reasoning articulated by the Fifth Circuit. The Court bluntly stated: "From the chapter 7 perspective, inferentially extending stay termination to property of the estate amounts to throwing the baby out with the bath water." *In re Thu Thi Dao*, 616 B.R. at 106.

Judge Klein devotes the bulk of his opinion to explaining how the minority's rule would have the practical effect of precluding a chapter 7 trustee from protecting estate property from the clutches of one or a few creditors. For instance, the stay would terminate before the Section 341 meeting and possibly before the debtor even files schedules. In other words, the stay would terminate before the trustee could find out if there was estate property to protect. Likewise, the stay would terminate as to estate property that the debtor did not disclose. Absent Section 362(c)(3), the stay would remain as to undisclosed property, even after discharge. Furthermore, the trustee would face an insurmountable burden in obtaining an extension of the stay because Section 362(c)(3)(B) requires a showing that the new case was "filed in good faith as to the creditors to be stayed."

Among other things, Judge Klein points out how there is no good faith requirement imposed on a chapter 7 filing. And even if the debtor did not file in good faith, the debtor's bad intentions should not bar a trustee from recovering property for the benefit of all creditors. According to Judge Klein, the majority sees no ambiguity in Section 362(c)(3) and follows the plain meaning of the statute. He describes the minority as finding the statute ambiguous, allowing them to infer an extension beyond the language of the statute "consistent with the Congressional purpose of thwarting bad-faith manipulations of bankruptcy."

Likewise, the stay would terminate as to estate property that the debtor did not disclose. Absent Section 362(c)(3), the stay would remain as to undisclosed property, even after discharge. Furthermore, the trustee would face an insurmountable burden in obtaining an extension of the stay because Section 362(c)(3)(B) requires a showing that the new case was "filed in good faith as to the creditors to be stayed."

Terminating the automatic stay with respect to property of the estate has serious implications for chapter 7 debtors, as well as chapter 7 trustees. The chapter 7 implications give substantial credence to maintaining the automatic stay for property of the estate.

V. Conclusion

The existence of a circuit split does not mean that there is statutory ambiguity. All factors demonstrate that the Court should terminate the automatic stay for repeat filers only with respect to property of the debtor, and not property of the estate. Therefore, courts should adopt the majority view, as adopted by the Fifth Circuit, and hold that the automatic stay terminates solely with respect to property of the debtor upon a repeat filing, and not with respect to property of the estate.

MINORITY VIEW: The automatic stay for repeat filers terminates in its entirety thirty days after the most recent filing, absent the court extending the stay.

I. Introduction.

Several courts, including the United States Court of Appeals for the First Circuit, adopt a different reading of section 362(c)(3)(A). Representative of the so-called "minority view," these courts hold that the entire automatic stay terminates thirty days after the petition date for second-time filers who re-file within a year of the dismissal of a prior bankruptcy case. *See, e.g.*, *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 591 (1st Cir. 2018); *St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 143-45 (D. Mass. 2013); *In re Samuels*, 2019 WL 1012526, at *1 (1st Cir. B.A.P. Feb. 28, 2019); *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 365-73 (9th Cir. B.A.P. 2011); *In re Goodrich*, 587 B.R. 829, 849 (Bankr. D. Vt. 2018); *In re Akwa*, 2016 WL 67219, at *1 (Bankr. D. Md. Jan. 5, 2016); *Conn. Housing Fin. Auth'y v. Wilson (In re Wilson)*, 2014 WL 183210, at *1 (Bankr. D. Conn. Jan. 15, 2014) (disagreeing with the District Court in *In re Weil*, 2013 WL 1798898, and adopting the reasoning of *Reswick*, 446 B.R. 362); *In re Jackola*, 2011 WL 2518930, at *3 (Bankr. D. Haw. June 22, 2011); *In re Furlong*, 426 B.R. 303, 307 (Bankr. C.D. Ill. 2010); *In re Daniel*, 404 B.R. 318, 321-26 (Bankr. N.D. Ill. 2009); *In re Curry*, 362 B.R. 394, 398-402 (Bankr. N.D. Ill. 2007); *In re Jupiter*, 344 B.R. 754, 757-62 (Bankr. D.S.C. 2006). Under this reading, in "repeat filer" cases where a party has not successfully invoked the procedure for extending the stay under section 362(c)(3)(B), the stay terminates and actions against the debtor, the debtor's property, and property of the bankruptcy estate may proceed notwithstanding the pending bankruptcy.

Courts espousing the minority view analyze the statutory text, the statutory context, and Congress's intent in enacting BAPCPA. This approach is compelling given the lack of precision in the drafting of the provision. In sum, courts should adopt the minority view when analyzing this issue.

II. ***Smith v. Maine Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576 (1st Cir. 2018).**

In *Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576 (1st Cir. 2018), an individual debtor had filed three Chapter 13 bankruptcy petitions as follows: (a) a case filed in August 2011, dismissed in October 2014 for failure to make plan payments; (b) a second case filed in December 2014, dismissed in November 2016 for failure to make plan payments; and (c) a third case filed on December 28, 2016 (i.e., the case giving rise to the issues on appeal before the First Circuit). *See Smith v. Me. Bureau of Revenue Servs. (In re Smith)*, 910 F.3d 576, 579 (1st Cir. 2018). Because the debtor filed his December 2016 case within one year of the dismissal of his prior case, section 362(c)(3)(A) applied. *See id.* In addition, neither the debtor nor any "party in interest" moved for "continuation of the automatic stay." *See id.* Therefore, thirty days after the filing of the December 2016 petition, it was undisputed that some aspect of the automatic stay had terminated by operation of section 362(c)(3)(A). The debtor and a significant priority creditor, Maine's Bureau of Revenue Services ("MRS"), disagreed, however, regarding the extent to which the automatic stay had terminated. *See id.*

MRS argued that the automatic stay had terminated in full, such that MRS would be free to bring an action outside of bankruptcy court to collect estate property if the debtor were to default on his plan payments. *Smith*, 910 F.3d at 579. The debtor argued in opposition – essentially the view representative of the majority of courts – that the phrase in the statute – "with respect to the debtor" – meant that the stay terminated only with respect to actions against the debtor and the debtor's property, such that the stay continued in effect as to actions against property of the estate. *See id.*

MRS moved before the bankruptcy court for an order under section 362(j) to confirm the extent to which the automatic stay had terminated. *See id.* The bankruptcy court, 573 B.R. 298 (Bankr. D. Me. 2017) (Michael A. Fagone, J.), found that the automatic stay had terminated in full, including as to property of the estate. *See id.* The district court affirmed, 590 B.R. 1 (D. Me. 2018). The First Circuit affirmed the lower courts, holding that section 362(c)(3)(A) operates to terminate the stay in its entirety.

III. The Text of the Statute is Ambiguous and the Phrase – "With Respect to the Debtor" – Does not Dictate One Clear Reading.

First, the language of section 362(c)(3)(A) is ambiguous and, contrary to the majority's view, the phrase – "with respect to the debtor" – does not dictate one clear reading. Indeed, wrestling with the statute's "complex verbiage[,]" the First Circuit first "conclude[d] that the text of § 362(c)(3)(A) does not lend itself to one clear reading." *Smith*, 910 F.3d at 581-82. The Court rejected the debtor's argument that the use of the phrase – "with respect to the debtor" –plainly and unambiguously limits the scope of the stay's termination and, instead, entertained MRS's view that the phrase is superfluous. *Id*.

In practical terms, if the phrase – "with respect to the debtor" – was intended to limit the scope of the stay's termination, the phrase "would most naturally be read to terminate the stay only for actions against the debtor, and not . . . for actions against both the debtor and the debtor's property." *Smith*, 910 F.3d at 581-82 (citing cases which observe this anomaly). Tellingly, however, no court has read section 362(c)(3)(A) this way. *Id*. (citing *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 367-68 (9th Cir. B.A.P. 2011)). Moreover, it does not logically follow that the phrase – "with respect to the debtor" – plainly excludes estate property if it is read to include debtor property. *Id*. at 582-83. Indeed, the statute references "the stay under subsection (a)" (which stays actions against both property of the debtor and property of the estate). *Id*.

Courts should reject the majority view which promotes strict application of the interpretative canons given that, at best, the statute lacks precision and, at worst, suffers from inartful drafting. *Smith*, 910 F.3d at 583-84 (citing *King v. Burwell*, __ U.S. __, 135 S.Ct. 2480, 2492, 192 L.Ed.2d 483 (2015) (discussing the rule against superfluities and warning against rigorous application of the canons where a provision may be poorly drafted). As to the statute's drafting, as the First Circuit noted, "Section 362(c)(3)(A) is not an exemplar of precision . . . The provision is a collection of 'with respect to' phrases, and it is not obvious how the phrases relate to each other, or how the phrases connect to other related provisions." *Id*. at 584. For this reason, the phrase – "with respect to the debtor" – should be construed as "an example of the imprecision and redundancy" in the text of the statute and not – as the majority contends – "the key to reading § 362(c)(3)(A)." *Id*. at 585.

IV. Context is Key: Section 362 Legislates a Progressive Approach to Repeat Filers Where the Stay's Protections Dwindle as Serial Filings Increase.

Because the statute is ambiguous, competing interpretations should be analyzed in light of the statutory context. *Smith*, 910 F.3d at 582, 586-89. Throughout section 362, "the automatic stay operates differently for first-time, second-time, and subsequent filers." *Id*. at 586. "Section 362(c) seems to establish a system of progressive protections[.]" *Id*. On one end of the spectrum, first-time filers get the benefit of an automatic and permanent stay for the duration of the case or until the court acts to lift the stay. *See* 11 U.S.C. §§ 362(a)(1)-(2) and § 362(d); *Smith*, 910 F.3d at 586. On the other extreme, no stay goes into effect upon the filing of a third or subsequent case with respect to a debtor who has filed three or more petitions pending in a single year. See 11 U.S.C. § 362(c)(4); *Smith*, 910 F.3d at 586.

Given that section 362(c)(3)(A) deals with "second-time" filers (i.e., the middle ground between first-time filers and serial filers (three or more cases)), it follows from the progression of

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the statute that the stay protections should fall "somewhere in the middle." *Smith*, 910 F.3d at 586. Therefore, "the most sensible middle ground, and the one most likely intended by Congress[,]" is that "second-time filers get the benefit of the stay, but only temporarily (albeit with a procedure to seek the stay's continuation)." *Id.* at 586; *see Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 367 (9th Cir. B.A.P. 2011) ("Because reading the phrase in context, rather than in isolation, better comports with principles of statutory construction, the minority interpretation is more persuasive"). This reading is also consistent with the provisions governing extensions of the automatic stay for second-time filers. *Smith*, 910 F.3d at 588 (noting that any "party in interest" may request a continuation of the stay and further that "Section 362(c)(3)(B) reflects an attempt by Congress to ensure that certain second-time filers who meet an enhanced burden have an escape route from the termination of the entire automatic stay, including as to actions against estate property"). In sum, this reading of the statute (i.e., that the stay terminates in full with an opportunity to extend the stay) "fits better with the operation of the stay for all types of filers." *Id.* at 587.

V. In Section 362(c)(3)(A), Congress Intended to Mandate the Expiration of the Stay for Bad Faith Repeat Filings, Not Carve-Out Distinctions Between Debtor Property and Estate Property.

In interpreting section 362(c)(3)(A), it is critical to also consider congressional intent in enacting BAPCPA. *Smith*, 910 F.3d at 589. The impetus underlying BAPCPA's consumer bankruptcy reforms, among them the enactment of Section 362(c)(3)(A), was to "deter serial and abusive bankruptcy filings." H.R. Rep. No. 109-31(I), at 2 (2005). Notably, "Congress described [Section 362(c)(3)(A)] as an 'amend[ment to] section 362(c) of the Bankruptcy Code to terminate the automatic stay within 30 days in a chapter 7, 11, or 13 case filed by or against an individual if such individual was a debtor in a previously dismissed case pending within the preceding one-year period.'" *Smith*, 910 F.3d at 589-90 (quoting H.R. Rep. No. 109-31(I), at 69 (2005)). The goal of discouraging bankruptcy abuse and bad faith repeat filings "is best achieved by interpreting § 362(c)(3)(A) to terminate the entire stay, including as to estate property." *Id.* at 590; *see St. Anne's Credit Union v. Ackell*, 490 B.R. 141, 145 (D. Mass. 2013) ("The evident purpose of § 362(c)(3) is to discourage serial filings that are made simply to obtain the benefit of the automatic stay, and it accomplishes that purpose by denying a serial filer the benefit of the stay for any more than thirty days unless the court finds special circumstances to continue it").

VI. Conclusion.

The split among courts demonstrates that the statute is unclear and ambiguous. Consideration of the statutory text, the statutory context, and congressional intent leads to the conclusion that the automatic stay should terminate in its entirety for repeat filers absent an extension. Similarly, the extension provisions are intended to afford debtors the full protections of the stay if the case is filed in good faith. Therefore, courts should adopt the minority view, as espoused by the First Circuit, and hold that the automatic stay terminates in all respects under section 362(c)(3)(A).

ABI NORTHEAST GREAT DEBATES

Resolution II: Whether a "makewhole" provision may be enforced against a debtor and is not disallowed as "unmatured interest" pursuant to Bankruptcy Code section 502(b)(2).

Makewhole claims can dramatically increase the amount of claims under a bond indenture,[1] and thus have the potential to alter the outcome of chapter 11 cases for debtors with large outstanding notes. Yet, there is no consistent approach to this issue in the reported decisions at either the bankruptcy court or appellate level, with some courts focused on state-law contractual interpretation and the availability of liquidated damages, while others focus on bankruptcy issues such as unmatured interest and equitable concerns. Additionally, different courts have drawn different conclusions from similar indenture provisions, leading to conflicting decisions and potential forum-shopping issues. After a brief introduction to makewhole provisions, we will lay out the issues that parties and courts have raised in recent cases regarding makewholes with respect to contractual interpretation and bankruptcy and state law.

I. Introduction to Makewhole Provisions

A makewhole is a contractual provision that permits the borrower to prepay or redeem a note prior to maturity, upon the payment of a premium derived from a formula based on the net present value of future coupon payments. Many jurisdictions, including New York (which provides the governing law for most indentures), have a "perfect tender in time" rule that prohibits prepayment or redemption prior to maturity (similar to a "no-call" provision) absent a

[1] Makewholes may be found in loan agreements as well, although the formula for the premium is generally based on a fixed percentage of the amount prepaid, rather than actual damages, as calculated from present value of future interest. For this reason, makewholes in loan agreements do not typically the same types of disputes in bankruptcy cases as makewholes in indentures.

specific contractual provision permitting it.[2] A makewhole provision provides both flexibility for a borrower, giving it the option to prepay its debt if it becomes economically able and efficient to do so, and protection for a lender, which is compensated for economic loss suffered as a result of the prepayment.

Makewholes are generally enforceable outside of bankruptcy. However, while most indentures provide for the automatic acceleration of debt upon a bankruptcy default, many are silent or ambiguous as to whether a bankruptcy default triggers a makewhole premium. The Second Circuit and Third Circuit have adopted contrasting interpretations of New York law on this issue. Moreover, while makewhole premiums are generally considered liquidated damages provisions, they are typically calculated to compensate lenders for unpaid future interest, leading to splits among courts as to whether such premiums ought to be disallowed under Section 502(b)(2) of the Bankruptcy Code as the economic equivalent of unmatured interest.

In *In re Chemtura Corporation*,[3] the Bankruptcy Court for the Southern District of New York set provided a roadmap for analyzing makewhole claims. Such analysis, according to that court, should take place in two "layers." Under the first layer, involving matters of state law, the court examines whether, as a matter of contractual interpretation, the makewhole is triggered, and whether the makewhole premium is appropriate in amount ("whether the 'punishment fits the crime'"),[4] or whether the court should disallow the makewholeas a penalty or reduced. If the first-layer analysis would allow the makewhole, the court then embarks upon a second layer of

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2 Indentures frequently have both "no-call" provisions and makewhole provisions. Working together, these establish some period of time during which prepayment is prohibited, and some period of time during which prepayment is allowed subject to the payment of the makewhole premium.

3 439 B.R. 561 (Bankr. S.D.N.Y. 2010).

4 *Id*. at 600.

analysis: whether the Bankruptcy Code requires disallowance of the makewhole (even if it may otherwise be valid under non-bankruptcy law).[5] We follow that roadmap here.

II. Is a Makewhole Premium Owed As Of The Petition Date?

a. Typical Contractual Language

In determining whether makewhole claims are allowable in bankruptcy, bankruptcy courts examine the wording of certain indenture provisions, including the makewhole provision itself (a "Optional Redemption Provision"), and the provisions that provide for acceleration of the debt upon an event of default (an "Acceleration Provision"). Generally, indentures provide for makewhole premiums upon the optional "redemption" or "prepayment" of debt. Which of these terms is used can affect whether the acceleration of the debt pursuant to a bankruptcy default terminates the availability of the premium, and therefore whether the indenture uses the term "redemption" or "prepayment" can be critical to whether the premium is allowed or disallowed, at least in the Third Circuit. In the Energy Future Holdings ("EFH") bankruptcy case, the Third Circuit distinguished between "redemption" and "prepayment," noting that "prepayment" refers to payment prior to maturity, but "redemption" could occur prior to maturity *or after maturity*.[6] Because EFH's bankruptcy filing had triggered the indenture's Acceleration Provision, the debt had matured as of the petition date, and "prepayments" could no longer occur. The Optional Redemption Provision, however, referred to "redemption" rather than "prepayment," and the court held that because, under the terms of the indenture, redemption

5 Section 502(a) of the Bankruptcy Code provides that "claims" (as defined in the Code) are allowed, except to the extent they are disallowed under section 502(b) of the Code. Section 502(b)(1) disallows claims that are "unenforceable . . . under any agreement or applicable law," and section 502(b)(2) disallows claims based on "unmatured interest."

6 *Delaware Trust Co. v. Energy Future Intermediate Holding Co. (In re Energy Future Holdings Corp.)*, 842 F.3d 247 (3d Cir. 2016).

could occur after maturity, "a premium tied to a 'redemption' would be unaffected by acceleration of a debt's maturity."[7]

Indentures also differ with respect to the specificity of the Acceleration Provision, which can alter the treatment of makewhole payments by courts in a bankruptcy case. Certain indentures, for example, explicitly provide that no makewhole premium is due after automatic acceleration caused by a bankruptcy filing.[8] More commonly, indentures require the payment of "all principal and premium, if any" upon default (including acceleration). Although the Third Circuit found this language to be specific enough to trigger a makewhole under New York law,[9] the Second Circuit found that it was not,[10] opening a narrow circuit split on the issue.[11]

b. Additional State-Law Analysis of Makewhole Provisions

Parties arguing against makewhole provisions (which may include debtors, junior creditors, or equity holders—i.e., those who may see their position harmed by an increased senior debt obligation) generally raise the following contractual and equitable issues: (i) any payment on a debt in bankruptcy is made after acceleration of maturity, and thus is not a "prepayment" or an early redemption that would trigger a makewhole premium under an Optional Redemption Provision; (ii) such payments are not "optional" or "voluntary" prepayments or redemptions; or (iii) Chapter 11 distributions are not "redemptions," as that term is typically used in indentures.

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7 *Id*. at 259.
8 *Id*. at 259.
9 *In re Energy Future Holdings Corp*., 842 F.3d at 257-58.
10 *Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, LLC)*, 874 F.3d 787, 803 (2d Cir. 2017).
11 The New York Court of Appeals has not ruled on the issue, and, therefore, it cannot be certified to the United States Supreme Court.

First, and most simply, where indentures condition payment of the makewhole premium on "prepayment" or redemption *at or prior to maturity*, the makewhole premium is not triggered (and cannot be triggered): under a typical Acceleration Provision, a bankruptcy filing advances the maturity date to the Petition Date, such that a debtor can no longer prepay the debt or redeem the debt prior to or at maturity.[12] Under New York's "perfect tender" law, borrowers do not have the right to prepay debt. If parties wish to amend this general rule by contract in order to create a post-acceleration makewhole obligation, they can do so, but they must do so clearly, specifically, and unambiguously.[13] Where contracting parties have not *specifically* agreed that the lender is entitled to a makewhole upon an event of default (that is, unless an Acceleration Provision creates a separate and independent entitlement to a makewhole premium, apart from an Optional Redemption Provision), "premium, if any" language in an Acceleration Provision is insufficient to require a makewhole premium.[14] Arguments to the contrary may be circular: no premium is due under an Acceleration Provision unless the Optional Redemption Provision is triggered. As the appellees in *EFH* put it, "[i]n other words, 'if any' only means a premium is due in this circumstance if a premium obligation arose elsewhere. Here, none did."[15] Thus, to hold that the Optional Redemption Provision is triggered by an Acceleration Provision's "premium, if any" language *assumes* that the makewhole premium is due.

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12 *See, e.g., In re AMR Corp.*, 730 F.3d at 103 (payment of a debt following acceleration is a "post-maturity payment not a voluntary redemption"); *In re Solutia Inc*., 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007) ("Because the 2009 Notes were automatically accelerated [ ] payment will be a post maturity date repayment.").

13 *See In re MPM Silicones, LLC*, No. 14-22503-rdd, 2014 WL 4436335, at * 12 (Sept. 9, 2014) *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015), *aff'd in part, rev'd in part and remanded sub nom. Matter of MPM Silicones, L.L.C.*, 874 F.3d 787 (2d Cir. 2017); *see also U.S. Bank Nat'l Ass'n v. South Side House, LLC*, No. 11-cv-4135(ARR), 2012 WL 273119, at *5 (E.D.N.Y. 2012); *In re Solutia*, 379 B.R. 473, 488 (Bankr. S.D.N.Y. 2007); *Northwestern Mutual Life Ins. Co. v. Uniondale Realty Assocs*., 816 N.Y.S.2d 831, 835 (N.Y.Sup.Ct. 2006);

14 *See Momentive*, 874 F.3d at 803-04; Appellees' Br. at 26; *but see EFH*, 842 F.3d at 257.

15 *See Momentive*, 874 F.3d at 803.

Second, under New York law, payment of a debt after an automatic acceleration is not optional.[16] Makewholes are intended to provide the debtor with the opportunity to prepay, if economically efficient to do so, and to provide the lender with protection in the event the debtor makes that election. When, by operation of the Acceleration Provision, the debt becomes due and payable as of the Petition Date, the debtors have not exercised any option at all. While payment may be due and owing at a date other than the specified maturity date, that is by operation of the Bankruptcy Code itself, not the debtors' choice. Indeed, Acceleration Provisions generally specify that a bankruptcy filing renders a debt immediately due and payable, and, moreover, indentures generally provide that failure to pay upon an acceleration is an independent event of default. Moreover, while the Bankruptcy Code generally provides debtors with a mechanism to reinstate debt, rather than to repay it, as part of a plan of reorganization,[17] that does not mean that any such repayment is "optional" *under the terms of the indenture*, as would be necessary to trigger the Optional Redemption Provision. As a practical matter, in several recent large bankruptcy filings, debtors have negotiated restructuring support agreements with "loan-to-own" or "last-out" lenders under indentures refinanced shortly before the petition date, which indentures include a large makewhole premium. In such deals, the makewhole premium balloons the value of the lenders' claims to increase the hurdle and ensure that lenders end up with the equity bargained for under the restructuring support agreement.[18] In no way is the extra equitization demanded by a lender under such an indenture truly a redemption at the *debtor's* option.

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[16] *See In re AMR Corp.*, 730 F.3d at 103*; In re Solutia*, 379 B.R. at 484.
[17] *See EFH*, 842 F.2d at 255.
[18] *See, e.g., In re Chesapeake Energy Corp.*, 20-33233-DRJ (Bankr. S.D. Tex. 2020).

Third, even under the Third Circuit's rubric in EFH (where a debt can be "redeemed" post-maturity), a payment pursuant to a Chapter 11 plan may not amount to a "redemption" under an indenture. Redemptions are typically subject to various procedural hurdles under an indenture, which govern the amount of a note that can be redeemed, the time when it can be redeemed, when and to whom notice of redemption must be given and the form of such notice, and the deposit of the redemption price. As none of these indenture requirements are generally satisfied in a Chapter 11 plan, payment of a debt in bankruptcy is not a "redemption" as that term is used in indentures.

c. State-Law Arguments in Favor of Makewholes

Section 502(b)(1) of the Bankruptcy Code indicates that courts must look to state law to determine whether a claim arising from a makewhole provision is enforceable in bankruptcy. Under New York law, which is applicable under most debt instruments, makewhole provisions are often analyzed under the same rubric as liquidated damages provisions.[19] Liquidated damages are "[i]n effect ... an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement."[20] "The soundness of such a clause is tested in light of the circumstances existing as of the time that the agreement is entered into rather than at the time that the damages are incurred or become payable."[21]

There are strong arguments for why a makewhole provision should be enforceable as a form of a liquidated damages provision. For example, at the point of prepayment, the lender loses all future interest under its instrument, with that loss of future interest ordinarily offset by

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[19] *JMD Holding Corp. v. Cong. Fin. Corp*., 4 N.Y.3d 373, 795 N.Y.S.2d 502, 828 N.E.2d 604, 609 (2005).
[20] *Truck Rent-A-Ctr. v. Puritan Farms 2nd*, 41 N.Y.2d 420, 424, 393 N.Y.S.2d 365, 361 N.E.2d 1015 (N.Y. 1977).
[21] *Walter E. Heller & Co. v. Am. Flyers Airline Corp*., 459 F.2d 896, 898 (2d Cir. 1972).

the reinvestment of the prepaid proceeds in an alternative investment. However, analyzing that alternative investment and the economic consequences of it raises numerous factual questions regarding the investment decision, the relevant markets, and anticipated yields. This indicates that liquidated damages may be an apt description and that the state law requirements for allowing such provisions may be met.[22]

In 2019, the Southern District of New York bankruptcy court upheld a makewhole provision in *In re 1141 Realty Owner LLC*.[23] After the debtor defaulted, the trustee for the commercial mortgage-backed securities accelerated the debt and demanded immediate repayment. The court explained that although a lender that accelerates a loan following a default forfeits a prepayment premium, two exceptions exist: (1) if a contract clause clearly and unambiguously requires a prepayment premium even after default and acceleration, the clause will be analyzed as a liquidated damages clause; and (2) if the borrower intentionally defaults to trigger acceleration and evades the prepayment premium. The court found that the premium was enforceable as a liquidated damages provision because actual damages were difficult to determine, and the amount of the premium was not plainly disproportionate to the possible loss.

III. Is a Makewhole Claim A Claim For "Unmatured Interest"?

a. Makewhole Claims Are Claims For "Unmatured Interest" Disallowed By §502(B)(2)

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[22] *In re Ultra Petroleum Corp.*, 624 B.R. 178, 184–85 (Bankr. S.D. Tex. 2020) ("Although the Code does not define the term unmatured interest, interest is widely understood as consideration for the use or forbearance of another's money accruing over time." *see Love v. State of New York*, 78 N.Y.2d 540, 544, 577 N.Y.S.2d 359, 583 N.E.2d 1296 (N.Y. 1991); Interest, Black's Law Dictionary, (11th ed. 2019). The Make-Whole Amount is an enforceable liquidated damages provision which compensates the Note Claimants for any actual loss suffered due to prepayment of the notes.").

[23] *In re 1141 Realty Owner LLC*, 598 B.R. 534, 541–42 (Bankr. S.D.N.Y. 2019).

First and foremost, automatic acceleration of a debt maturity as of the petition date does not transform unmatured interest into matured interest: "whether interest is matured as of the petition date is determined without reference to acceleration clauses triggered by a bankruptcy petition."[24]

It is a basic principle of bankruptcy law that courts may, and should, evaluate transactions based on their economic substance, rather than their form.[25] At their essence, makewhole premiums are designed to make a lender whole with respect to interest payments it will not receive if the debt is prepaid.[26] Indeed, the formula to derive makewhole claims is generally based on total expected interest (subtracting the principal being repaid). As many courts have recognized, a makewhole premium is therefore a proxy for unmatured interest,[27] and is thus disallowed under Section 502(b)(2) of the Bankruptcy Code.

Indeed, the legislative history of Section 502(b)(2) supports the disallowance of makewhole claims. Congress enacted Section 502(b)(2) to disallow claims for original issue discount ("<u>OID</u>"): that is, the difference between the face amount of debt (at maturity) and the

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[24] *In re Ultra Petroleum Corp*., 624 B.R. at 188 (citing *In re ICH Corp*., 230 B.R. 88, 94 (N.D. Tex. 1999)).

[25] *See In re Oakwood Homes Corp.*, 449 F.3d 588, 599 (3d Cir. 2006) (analyzing "economic reality of the transaction"); *In re Pengo Indus., Inc*. 962 F.2d 543, 546 (5th Cir. 1992) (holding that original issue discounts are disallowed under Section 502(b)(2) as the "economic equivalent of unmatured interest); *In re Doctors Hosp. of Hyde Park, Inc*., 508 B.R. 697, 705 (Bankr. N.D. Ill. 2014 ("[C]ourts look to the economic substance of the transaction to determine what counts as interest."); *see also Pepper v. Litton*, 308 U.S. 295, 305 (1939) (noting that bankruptcy courts have equitable powers to be invoked "to the end . . . that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.").

[26] 4 Collier on Bankruptcy ¶ 502.03[3][a] (16th ed. 2018); *see In re Ultra Petroleum Corp*., 913 F.3d 533, 547 (5th Cir. 2019), *opinion withdrawn and superseded on reh'g*, 943 F.3d 758 (5th Cir. 2019)

[27] *See, e.g., In re Ultra Petroleum Corp.*, 913 F.3d at 548n.6 ("[O]ur precedent interpreting § 502(b)(2) does not require the Make-Whole Amount to *be* unmatured interest; it requires only that it walk, talk, and act like unmatured interest."); *Momentive*, 874 F.3d at 801-02 (makewholes provide "additional compensation to make up for the interest [lenders] would not receive if the Notes were redeemed prior to their maturity date."); *EFH*, 842 F.3d at 251 (makewhole provision is a "contractual substitute for interest lost on Notes redeemed before their expected due date"); *In re Chemtura Corp*., 439 B.R. 561, 596 (Bankr. S.D.N.Y. 2010) (make-whole provisions "compensate the lender for the loss of anticipated interest"); *see also HSBC Bank USA, N.A. v. Calpine Corp*., No. 07-cv-3088(GBD), 2010 WL 3835200 (S.D.N.Y. Sept. 15, 2010) (rejecting argument that "prepayment premiums and damages for breach of no-call provisions do not constitute unmatured interest").

value of the proceeds of that debt at the time of its issuance.[28] Makewhole premiums are analogous to OID: the only difference is that, in the case of makewholes, the compensation to the lender for the use and forbearance of the funds is added to the face amount of the debt when the makewhole is triggered after issuance, rather than being deducted from the initial distribution to the lender.[29] When viewed in terms of economic substance, therefore, makewhole claims ought to be disallowed under Section 502(b)(2) just as OID claims are.

Framing makewhole claims in terms of liquidated damages does not alter the economic substance of these claims. In October 2020, the Bankruptcy Court for the Southern District of Texas, on remand from the Fifth Circuit in the *Ultra Petroleum* case, ruled that makewholes are permissible because "Section 502(b)(2) disallows claims for unmatured interest, not amounts that parties contract to pay instead of interest."[30] This is precisely the kind of form-over-substance reasoning that the Supreme Court cautioned bankruptcy courts against upholding.[31] Nor does framing a makewhole as an "actual pecuniary loss"[32] alter the fact that what has been lost is *the opportunity to receive the unmatured interest*: that is, the opportunity to receive interest payments for the duration of the note. As other courts have recognized, allowing a makewhole

[28] "For example, a claim on a $1,000 note issued the day before bankruptcy would only be allowed to the extent of the cash actually advanced. If the original discount was 10 percent so that the cash advanced was only $900, then notwithstanding the face amount of note, only $900 would be allowed. If $900 was advanced under the note some time before bankruptcy, the interest component of the note would have to be pro-rated and disallowed to the extent it was for interest after the commencement of the case." [legislative history]

[29] *See In re Doctors Hosp*., 508 B.R. at 705-06 ("Both OID and [makewholes] are one-time charges to compensate the lender for lending: that is, the price of money received now in terms of money received later. If an original issue discount is interest, then so is a [makewhole premium].").

[30] *See In re Ultra Petroleum Corp*., 624 B.R. 178, 195 (Bankr. S. D. Tex. 2020).

[31] *Pepper v. Litton*, 308 U.S. at 305.

[32] *See In re Ultra Petroleum Corp*., 624 B.R. at 192.

claim under this reasoning would allow parties to contract around the Bankruptcy Code by labeling unmatured interest as liquidated damages.[33]

Ultra Petroleum was a solvent debtor, and it remains to be seen whether the bankruptcy court's decision will be upheld in the context of an insolvent debtor. The addition of a makewhole premium to a noteholder's claim can raise the hurdle to unsecured creditor recovery, potentially by hundreds of millions of dollars. Therefore, courts ought to think long and hard about the equitable effects on a debtor's entire bankruptcy estate before allowing a makewhole premium, at least in an insolvent case.

b. Makewholes Are Not Unmatured Interest Because They Are Not Interest

The Bankruptcy Code does not define "interest," but the term is generally understood to refer to compensation to a creditor for a borrower's use of that creditor's money over a period of time.[34] A makewhole provision, which attempts to quantify impossible to estimate damages, does not fit the commonplace definition of interest. A focus on the economic underpinnings of the makewhole provision to equate it to a similar measurement as lost interest ignores that, using the well-accepted meaning of interest, a makewhole premium does not compensate the lender for the use of a lender's money over time. Rather, a makewhole premium provides compensation for the estimated losses a lender is likely to suffer when the borrower *stops* using the lender's

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[33] *See, e.g., In re Wiston XXIV Ltd. P'ship*, 170 B.R. 453, 462 (D. Kan. 1994) (disallowing a "liquidated damages amount" that "was calculated to include post-petition interest over the life of the loan," because "unmatured interest is not recoverable by an undersecured creditor as part of its claim."); *HSBC Bank USA, N.A. v. Calpine Corp.*, 2010 WL 3835200 at *5 (holding that damages for breach of a no-call provision compensate the lender for the loss of unmatured interest payments and are therefore disallowed under Section 502(b)(2)); *Cont'l Sec. Corp. v. Shenandoah Nursing Home P'ship*, 188 B.R. 205, 207-08, 213-14 (W.D. Va. 1995) (similar); *In re MPM Silicones, LLC*, 2014 WL 4436335, at *17 (noting that a claim for breach of New York's perfect tender rule or a non-call right would be disallowed as unmatured interest); *In re Ridgewood Apts of DeKalb Cnty., Ltd.*, 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994) ("Absent actual prepayment by the Debtor, [lender's] claim for a prepayment penalty could be no more than a contingent liability. Further, because the contingent claim is for interest which is not yet due at the time the bankruptcy was filed. . . it would not be allowed to an undersecured creditor [under Section 502(b)(2)]").

[34] *Hall v. United States*, 566 U.S. 506, 511-12 (2012).

money—in some ways, the opposite of what interest is intended to compensate.[35] Indeed, recharacterizing a makewhole premium as interest is particularly strained with the parties' contract indicates an intent to compensate the borrower for a lost investment opportunity and uncertain damages, not lost (easily quantifiable) interest, thus requiring a rewriting of the parties' intent at the time of contracting to reach a different conclusion.

The injury, moreover, is not simply the lost interest that would have accrued but for early payment, but rather the loss to the lender from having committed funds to that investment and foregoing other investment opportunities, particularly when economic opportunities are subject to change. Makewhole premiums compensate for that opportunity cost and, therefore, are more similar to a loan commitment fee or break-up fee—two liquidated damages concepts familiar in bankruptcy cases—than interest.

Further, unlike interest, a makewhole premium is not accrued over time, but rather becomes fully due and payable when the debtor chooses, or is forced, to stop using the lender's money. The relevant distinction between "interest" and a one-time "fee" is evident from section 506(b). In defining what amounts can be included in the secured portion of a claim, section 506(b) distinguishes "interest" from "fees, costs, or charges." As the Supreme Court recognized, Congress intended "interest" and "fees, costs, or charges" to be considered two distinct claim categories.[36] Converting the makewhole into interest may blur these distinct categories without adequate justification.

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[35] *Feldman v. Kings Highway Savs. Bank*, 102 N.Y.S.2d 306, 307 (N.Y. App. Div. 2d Dep't 1951), aff'd, 102 N.E.2d 835 (N.Y. 1951) ("prepayment privilege charge" was "not in consideration of the making of a loan or of forbearance of money" but rather "[i]t was the converse, that is, for the making of a new and separate agreement, the termination of indebtedness" and "[a]ccordingly, it was not a payment of interest and therefore could not be the basis of a claim for usury").

[36] *United States v. Ron Pair Enters*., 489 U.S. 235, 242 (1989) ("By the plain language of the statute, the two types of recovery are distinct."); *Imperial Coronado Partners, Ltd. v. Home Fed. Savs. & Loan Ass'n (In re Imperial*

Finally, even if a makewhole premium is recharacterized as interest, section 502(b)(2) still does not apply because a debtor's obligation to pay the premium was not matured as of the bankruptcy filing. Interest is "unmatured" when it is "not yet due and payable."[37] The exact language at issue in the makewhole provision is key to how courts interpret this issue, but strong arguments exist that automatic acceleration upon a bankruptcy filing is not an ipso factor clause issue. An ipso facto clause is a clause that "modifies the relationship of contracting parties due to the filing of a bankruptcy petition."[38] But rather than changing the relationship of parties, an automatic acceleration provision is often one of many remedies or contracted-for consequences between the parties upon an event of default, not a limitation on a debtor's rights in bankruptcy such as an automatic relief from stay provision.[39]

IV. Contracting Around the Split:

It would be easy enough for borrowers and lenders to draft contractual language that would resolve the split between the Second and Third Circuits. Parties would specify either that an automatic acceleration due to a bankruptcy filing triggers the obligation to pay a makewhole premium, or that it does not. Indeed, parties may also be able to get around the unmatured interest issue by drafting a formula for the premium that does not rely on or very closely approximate future interest. That this has not yet occurred is not surprising, however: parties who initially draft and negotiate these provisions are generally not the parties who end up with an economic interest in the ultimate bankruptcy case. It may be a matter of time before the

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Coronado Partners, Ltd.), 96 B.R. 997, 1000 (B.A.P. 9th Cir. 1989) (finding that "prepayment premium is clearly a 'charge provided for under the agreement"' within the meaning of section 506(b)).

[37] *In re Moore*, 307 B.R. 394, 397 (Bankr. S.D.N.Y. 2004).

[38] U*.S. Bank Trust Nat'l Ass'n v. AMR Corp. (In re AMR Corp.)*, 730 F.3d 88, 91 n.1 (2d Cir. 2013); *see also* Black's Law Dictionary (10th ed. 2014) (defining an "ipso facto clause" as a "contract clause that specifies the consequences of a party's bankruptcy") (emphasis added).

[39] *AMR*, 730 F.3d at 106.

parties at the table draft clearer makewhole provisions; in the meantime, bankruptcy courts will continue to weigh these issues.

Faculty

Hon. Frank J. Bailey was appointed as a U.S. Bankruptcy Judge for the District of Massachusetts in Boston on Jan. 30, 2009, and served as Chief Judge from December 2010 until December 2015. He also serves on the First Circuit Bankruptcy Appellate Panel. Previously, Judge Bailey clerked for Hon. Herbert P. Wilkins of the Massachusetts Supreme Judicial Court from 1980-81 and was an associate at the Boston office of Sullivan & Worcester LLP until 1987, where he practiced in its litigation and bankruptcy departments. He spent the next 22 years as a partner at Sherin and Lodgen LLP, where he chaired its litigation department and was a member of its management committee. His practice focused on complex business litigation and creditors' rights, and he often represented clients in medical device, pharmaceutical and high-technology businesses. Judge Bailey served as the consul for the Republic of Bulgaria in Boston before his appointment to the bench, and he has participated in many international judicial programs. In 2013, he taught at the Astrakhan State University School of Law in south central Russia, and he has also taught courses in Sofia, Bulgaria and Tashkent, Uzbekistan. In addition, he taught legal writing and research at Boston University School of Law from 1981-93 and currently teaches business reorganizations at Suffolk University Law School in Boston. Judge Bailey was appointed by the First Circuit to oversee the financial restructuring of the City of Central Falls, R.I. He has served on the Board of Governors of the National Conference of Bankruptcy Judges and was its Education Committee Chair in 2017. He is currently president of the National Conference of Bankruptcy Judges. In addition, he is past chair of the National Conference of Federal Trial Judges of the American Bar Association, for which he currently serves as the Judicial Member at Large on the ABA Board of Governors and a member of the House of Delegates, and recently served as the chair of the Committee on the Profession, Public Service and Diversity. Judge Bailey received his B.S.F.S. from Georgetown University's School of Foreign Service and his J.D. from Suffolk University School of Law.

Shari I. Dwoskin is an associate with Brown Rudnick LLP in Boston and practices in its Bankruptcy & Corporate Restructuring Department. She represents debtors, bondholders, unsecured creditors' committees, and official and ad hoc committees of creditors and equity interest-holders in both chapter 11 restructurings and litigation arising from related disputes. Ms. Dwoskin has experience managing many facets of the restructuring process, including negotiating restructuring support agreements, plans and DIPs; plan-confirmation trials; avoidance actions; bankruptcy auctions; the claims-resolution process; and related motion practice and litigation. She also regularly consults with the firm's Corporate and Intellectual Property Groups on bankruptcy-related provisions of intellectual property licenses, and with the Real Estate Group on landlords' rights in tenant bankruptcies. Prior to joining Brown Rudnick, Ms. Dwoskin worked as a judicial intern to Chief Judge Richard W. Roberts, U.S. District Court for the District of Columbia. She received her B.A. in 2002 from McGill University, her M.A. in 2006 from Harvard University and her J.D. in 2014 from Harvard University, where she was editor-in-chief of the *American Criminal Law Review* and was a member of the Georgetown Law Barristers' Council, Appellate Advocacy Division.

Kellie W. Fisher is an attorney with Drummond Woodsum in Portland, Maine, and represents secured and unsecured creditors, equityholders, debtors, liquidating and litigation trustees, DIP lenders, and official and ad hoc committees of creditors and equityholders in many aspects of restructuring and insolvency, including litigation. She represents a wide array of stakeholders in chapter 7, 11, 12 and 13 cases and other restructuring transactions, and advises clients on all aspects of the restructuring process, including plan negotiation and drafting, DIP lending, § 363 sales, adversary proceedings and contested matters, fraudulent conveyance and preference litigation, and other debtor/creditor litigation. Ms. Fisher is admitted to practice in Maine, Massachusetts and New York, and before the U.S. District Courts for the Districts of Maine and Massachusetts. She has been recognized as a "One to Watch" in Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in The Best Lawyers in America, and she is a board member of the International Women's Insolvency & Restructuring Confederation (IWIRC New England) and a member of ABI and the Turnaround Management Association. Prior to joining Drummond Woodsum, Ms. Fisher maintained a restructuring practice at an international law firm in Boston. She received her B.A. in 2012 from Colby College and her J.D. in 2015 from Boston College School of Law.

Kate P. Foley is an associate in Mirick O'Connell DeMallie & Lougee, LLP's Creditors' Rights, Bankruptcy, and Reorganization Group in Westborough, Mass., and assists with all aspects of the group's practice. She primarily focuses on creditors' rights, bankruptcy and business restructuring. She frequently represents court-appointed trustees, chapter 11 debtors, secured lenders, commercial landlords and other creditors in bankruptcy and restructuring matters. She also has experience representing commercial landlords in retail bankruptcies and mortgage lenders in defending title claims and avoidance actions in bankruptcy. Ms. Foley is admitted to practice before the U.S. District Court for the District of Massachusetts. Since 2018, she has served on the board of the New England Chapter of the International Women's Insolvency & Restructuring Confederation (IWIRC) and on the steering committee of the Boston Bar Association's Bankruptcy Section. Ms. Foley received her B.A. *magna cum laude* in political science and religious studies in 2006 from the College of the Holy Cross, her M.A.R. *magna cum laude* in ethics from the Yale Divinity School in 2008, and her J.D. *cum laude* in 2011 from Boston College Law School, where she was articles editor of the *Boston College Journal of Law & Social Justice*.

Hon. Julie A. Manning is the Chief Bankruptcy Judge for the District of Connecticut in Bridgeport, initially sworn in on Sept. 9, 2013, and named Chief Judge on Sept. 9, 2014. Prior to her appointment, she was in private practice for 25 years, representing corporations, partnerships, financial institutions and insurance companies in bankruptcy and commercial litigation cases throughout the U.S. From 1999 until her judicial appointment, she was a partner with the law firm of Shipman & Goodwin, LLP, where she chaired the firm's Bankruptcy and Creditor Rights Group, co-chaired the firm's Finance and Investment Practice Group, and was a member of the firm's Partnership Review Committee and Compensation Committee. As a practicing attorney, Judge Manning was listed in the Bar Register of Preeminent Women Lawyers, was repeatedly named a *Connecticut Super Lawyer* and *New England Super Lawyer*, and was listed as one of *The Best Lawyers in America* in the area of Bankruptcy and Creditor/Debtor Rights. She is a member of ABI, the Connecticut Bar Association and the National Conference of Bankruptcy Judges, for which she serves on its Public Outreach Committee and Endowment for Education Board. During law school, Judge Manning clerked with the Office of the U.S. Trustee. She received her B.A. from Fairfield University and her J.D. from Suffolk University School of Law.

Adam R. Prescott is a shareholder with Bernstein, Shur, Sawyer & Nelson, P.A. in Portland, Maine, and has experience in a broad range of industries, including health care, hospitality, food and beverage, manufacturing, retail, technology, transportation and banking. His bankruptcy and restructuring practice focuses on representing debtors, lenders, trade creditors, and many other constituents in chapter 11 reorganizations, business disputes and litigation, out-of-court restructurings, and numerous other matters. Mr. Prescott's recent bankruptcy experience includes serving as debtor's counsel in multiple chapter 11 cases across northern New England and Delaware, including counsel to Vermont's Federally Qualified Health Center (FQHC) in a chapter 11 health care case, counsel to New Hampshire paper mills that successfully completed a § 363 asset sale in the U.S. Bankruptcy Court for the District of Delaware in December 2020, and counsel to multiple Maine small-business chapter 11 debtors, including in the hospitality, transportation and logging industries, that confirmed plans of reorganization in the U.S. Bankruptcy Court for the District of Maine in 2020, including representing both debtors in the first cases filed in Maine under the Small Business Reorganization Act of 2019 (SBRA). In addition to his bankruptcy and restructuring practice, he has handled numerous litigation matters in state courts, federal district and appellate courts, and bankruptcy courts. Mr. Prescott has represented clients in litigation involving a broad array of business, commercial and antitrust disputes, and has litigated preference claims, relief-from-stay motions, fraudulent-transfer lawsuits and claim objections. He also is at the forefront of electronic discovery technology and practices and was a founding editor of the firm's *E-Discovery Field Guide*, and in spring 2019 he was an adjunct professor at the University of Maine Law School, where he taught a course on litigation and e-discovery practice. In addition, Mr. Prescott has experience advising clients on antitrust and competition matters, including from his time practicing at WilmerHale in Washington, D.C., before joining Bernstein Shur. His experience includes litigating Sherman Act claims and representing clients in civil and criminal antitrust investigations brought by the Department of Justice and state attorneys general. Mr. Prescott received his B.S. in 2009 with honors in economics from Trinity College, and his J.D. summa cum laude in 2012 from William & Mary School of Law, where he was admitted to the Order of the Coif and ranked first in his graduating class.