

## Delaware Bankruptcy Court Continues Trend Narrowly Construing Make-Whole Premiums

On October 28, 2015, Judge Christopher Sontchi of the U.S. Bankruptcy Court for the District of Delaware issued an opinion<sup>1</sup> denying the make-whole claims of the EFIH Second Lien Trustee in the Energy Future Holdings bankruptcy case.<sup>2</sup> The opinion is the second such opinion in the EFH bankruptcy, with Judge Sontchi having previously denied the First Lien Trustee's make-whole claims in April. The rejection of the Second Lien Trustee's argument for a make-whole is significant in that Judge Sontchi explicitly adopted the holding of Judge Drain in the S.D.N.Y. Momentive<sup>3</sup> case with respect to "premium, if any" language contained in the indenture.

### Background and Procedural History

Energy Future Holdings Corporation ("EFH") and certain of its affiliates and subsidiaries, including Energy Future Intermediate Holding Company LLC ("EFIH"), filed voluntary petitions for relief under chapter 11 on April 29, 2014. EFIH's prepetition debt obligations included approximately \$406 million of 11% Senior Secured Second Lien Notes due 2021 and \$1.750 billion of 11.75% Senior Secured Second Lien Notes due 2022 (collectively, the "Second Lien Notes"). The Second Lien Notes were issued under a Second Lien Indenture (the "Indenture") governed by New York law.

On March 11, 2015 EFIH elected to use its remaining DIP financing to partially pay down \$750 million of principal and accrued interest under the Second Lien Notes (the "Partial Paydown"). According to the EFIH Second Lien Trustee, the Partial Paydown was an "optional redemption" that caused a make-whole premium on the Second Lien Notes to become immediately due and payable. EFIH countered that the Partial Paydown did not constitute an "optional redemption" because the Second Lien Notes had been automatically accelerated as a result of the bankruptcy filing, thereby precluding the possibility of an "optional redemption."

The Second Lien Trustee also argued that the Court should not apply the Court's previous reasoning denying a make-whole premium to the First Lien Noteholders because the Second Lien Indenture had language that the First Lien Indenture lacked, namely the inclusion of the phrase "premium, if any." The relevant Second Lien Indenture language states:

---

<sup>1</sup> Memorandum Opinion, In re Energy Future Holdings Corp., 14-50405 (CSS) (Bankr. D. Del. Oct. 28, 2015) ECF 64 (hereinafter, the "Opinion").

<sup>2</sup> In re Energy Future Holdings Corp., et al., Case No.14-10979 (Bankr. D. Del. 2014).

<sup>3</sup> In re MPM Silicones, LLC, No 14-22503-RDD, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014) aff'd, 531 B.R. 321 (S.D.N.Y. 2015) (hereinafter, "Momentive").

[I]n the case of an Event of Default arising under clause (6) or (7) of Section 6.01(a) hereof, all principal of and premium, if any, interest (including Additional Interest, if any) and any other monetary obligations on the outstanding Notes shall be due and payable immediately without further action or notice.<sup>4</sup> (emphasis added)

EFIH responded by arguing that the “premium, if any” language could not reasonably be read to require a make-whole upon acceleration and, even if this was a reasonable interpretation, New York law requires express, specific language in contracts granting make-whole premiums.

### **The Opinion**

Judge Sontchi’s opinion denied the Second Lien Trustee’s claim for a make-whole premium, granting summary judgment for EFIH. The Court incorporated its previous reasoning denying the make-whole premium to the First Lien Trustee, finding that the relevant provisions of the Second Lien Indenture and the First Lien Indenture were “substantially identical.”<sup>5</sup> The Court did, however, separately analyze the “premium, if any” language found in the Second Lien Indenture, ultimately finding that the language did not entitle the Second Lien Trustee to the make-whole premium. In so doing, the Court explicitly adopted Judge Drain’s holding in Momentive, a recent bankruptcy case from the Southern District of New York holding that “premium, if any” language was not specific enough to entitle the noteholder to a make-whole premium.<sup>6</sup>

In analyzing the Second Lien Trustee’s argument that the make-whole was due under the “premium, if any” language, Judge Sontchi followed Momentive in holding that there are only two ways to receive a make-whole upon acceleration under New York law: (i) explicit recognition that the make-whole would be payable notwithstanding the acceleration, or (ii) a provision that requires the borrower to pay a make-whole whenever debt is repaid prior to the original maturity.<sup>7</sup> Judge Sontchi found that the relevant language in the Second Lien Indenture was “identical to that in Momentive” and agreed with Judge Drain in finding that the Indenture language, including the “premium, if any” language, did not explicitly provide for a make-whole notwithstanding acceleration.

In adopting Judge Drain’s Momentive holding, Judge Sontchi rejected the Second Lien Trustee’s argument that the indenture in Momentive was distinct from the Second Lien Indenture. The Trustee argued that the “premium, if any” language in Momentive acted as the catch-all provision, a fact which dictated that Judge Drain reject it as insufficiently specific to justify the payment of a make-whole. The Trustee argued that the Second Lien Indenture also had a catch-all provision, but that it was not the “premium, if any,” language, but rather the “and any other monetary obligations” language. According to the Trustee, this was significant

---

<sup>4</sup> Opinion, at 12.

<sup>5</sup> Id., at 5.

<sup>6</sup> Momentive, at 15.

<sup>7</sup> Opinion, at 13.

because it implied that the “premium, if any” language in the Second Lien Indenture was not a catch-all, but rather a specific reference to the payment of make-whole premiums when payments were made after the maturity date. Judge Sontchi rejected this argument, holding that legal documents often contain redundant language and that the “if any” language means that the premium may not be due at all.<sup>8</sup>

### **Significance of the Opinion**

The Opinion builds on a growing body of bankruptcy opinions denying make-whole payments absent explicit and unambiguous language providing for the payment of a make-whole after a bankruptcy filing. The Delaware Court’s adoption of Judge Drain’s Momentive holding regarding “premium, if any” language provides consistency across the New York and Delaware bankruptcy courts regarding payment of make-whole premiums. To avoid disallowance of make-whole premiums in bankruptcy, lenders should ensure that the negotiated indenture includes language specifically addressing treatment of the make-whole premium after a bankruptcy filing.

\* \* \*

Please feel free to contact [James L. Bromley \(jbromley@cgsh.com\)](mailto:jbromley@cgsh.com) or any of your regular contacts at the firm if you have any questions.

---

<sup>8</sup> Opinion, at 14.

## Office Locations

### NEW YORK

One Liberty Plaza  
New York, NY 10006-1470  
T: +1 212 225 2000  
F: +1 212 225 3999

### WASHINGTON

2000 Pennsylvania Avenue, NW  
Washington, DC 20006-1801  
T: +1 202 974 1500  
F: +1 202 974 1999

### PARIS

12, rue de Tilsitt  
75008 Paris, France  
T: +33 1 40 74 68 00  
F: +33 1 40 74 68 88

### BRUSSELS

Rue de la Loi 57  
1040 Brussels, Belgium  
T: +32 2 287 2000  
F: +32 2 231 1661

### LONDON

City Place House  
55 Basinghall Street  
London EC2V 5EH, England  
T: +44 20 7614 2200  
F: +44 20 7600 1698

### MOSCOW

Cleary Gottlieb Steen & Hamilton LLC  
Paveletskaya Square 2/3  
Moscow, Russia 115054  
T: +7 495 660 8500  
F: +7 495 660 8505

### FRANKFURT

Main Tower  
Neue Mainzer Strasse 52  
60311 Frankfurt am Main, Germany  
T: +49 69 97103 0  
F: +49 69 97103 199

### COLOGNE

Theodor-Heuss-Ring 9  
50688 Cologne, Germany  
T: +49 221 80040 0  
F: +49 221 80040 199

### ROME

Piazza di Spagna 15  
00187 Rome, Italy  
T: +39 06 69 52 21  
F: +39 06 69 20 06 65

### MILAN

Via San Paolo 7  
20121 Milan, Italy  
T: +39 02 72 60 81  
F: +39 02 86 98 44 40

### HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)  
Hysan Place, 37th Floor  
500 Hennessy Road, Causeway Bay  
Hong Kong  
T: +852 2521 4122  
F: +852 2845 9026

### BEIJING

Cleary Gottlieb Steen & Hamilton LLP  
45th Floor, Fortune Financial Center  
5 Dong San Huan Zhong Lu  
Chaoyang District  
Beijing 100020, China  
T: +86 10 5920 1000  
F: +86 10 5879 3902

### BUENOS AIRES

CGSH International Legal Services, LLP-  
Sucursal Argentina  
Avda. Quintana 529, 4to piso  
1129 Ciudad Autonoma de Buenos Aires  
Argentina  
T: +54 11 5556 8900  
F: +54 11 5556 8999

### SÃO PAULO

Cleary Gottlieb Steen & Hamilton  
Consultores em Direito Estrangeiro  
Rua Funchal, 418, 13 Andar  
São Paulo, SP Brazil 04551-060  
T: +55 11 2196 7200  
F: +55 11 2196 7299

### ABU DHABI

Al Sila Tower, 27<sup>th</sup> Floor  
Abu Dhabi Global Market Square  
Al Maryah Island, PO Box 29920  
Abu Dhabi, United Arab Emirates  
T: +971 2 412 1700  
F: +971 2 412 1899

### SEOUL

Cleary Gottlieb Steen & Hamilton LLP  
Foreign Legal Consultant Office  
19F, Ferrum Tower  
19, Eulji-ro 5-gil, Jung-gu  
Seoul 100-210, Korea  
T: +82 2 6353 8000  
F: +82 2 6353 8099