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THE *ULTRA* EFFECT: LITIGATING MAKE-WHOLE PREMIUMS AND POST-PETITION INTEREST

In this article, the authors explore the Fifth Circuit's recent decision in the Ultra Petroleum *case interpreting the Bankruptcy Code regarding (1) interest "on" or "as part of" claims; (2) make-whole clauses; and (3) ipso facto provisions.*

By Matthew Warren and Sarah Primrose *

On January 17, 2019, the U.S. Court of Appeals for the Fifth Circuit issued its opinion in *In re Ultra Petroleum Corporation* disallowing a claim relating to a make-whole premium by construing the make-whole premium to be unmatured interest.[1] In its holding, the court cast the broadest net yet with regard to invalidating make-whole premiums — finding, as the first circuit court to directly address the issue, that premiums that "walk, talk, and act like unmatured interest" are disallowed under Section 502(b)(2) of the Bankruptcy Code. Importantly, unlike the number of circuit court decisions over recent years validating or invalidating make-whole premiums in bankruptcy, the Fifth Circuit's ruling was not based on issues of specific drafting in the underlying documentation, but rather on the Fifth Circuit's interpretation of the Bankruptcy Code itself and a "substance over form" approach. While the Fifth Circuit's opinion touches on a variety of other key issues, including whether impairment by the Bankruptcy Code constitutes impairment of a claim and the potential for a "solvent-debtor" exception, this article will specifically explore issues related to the court's conclusions regarding (1) interest "on" a claim and opposed to "as part of" a claim, (2) whether the make-whole clause should be permitted as a valid liquidated damages clause, and (3) the applicability of *ipso facto* clauses in a debt instrument.[2] These three key pillars to the Fifth Circuit's opinion may ultimately have broad impact for oversecured, undersecured, and unsecured creditors alike.

BACKGROUND

Pre-Ultra *Case Law*

The well-known decisions in *AMR*,[3] *Momentive*,[4] and *Energy Future Holdings*[5] established certain ground

[1] *In re Ultra Petroleum Corp.*, 913 F.3d 533 (5th Cir. 2019).

[2] Notably, the court expressed doubt that the so-called "solvent-debtor" exception survived the enactment of Section 502(b)(2), as Section 1112(b) addresses concerns over bad-faith filings. This article will not explore that aspect of the holding.

[3] *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013).

[4] *In re MPM Silicones, LLC*, 874 F.3d 787 (2d Cir. 2017).

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

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