



LOWENSTEIN BANKRUPTCY LOWDOWN

Lowenstein Bankruptcy Lowdown Video 25 – Are Make-Whole Claims Allowable in Bankruptcy? The Impact of the Hertz Decision in the Third Circuit

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Daniel B. Besikof: Welcome to this edition of the [Lowenstein Bankruptcy Lowdown](#). Today, we're going to be discussing the Third Circuit's recent decision on make-wholes in the Hertz bankruptcy case. But before we jump into the decision, Franco, what is a make-whole?

Gianfranco Finizio: A make-whole is a yield maintenance provision in an indenture or a credit agreement that compensates lenders for the time they will not earn interest as a result of an early repayment. These make-whole claims can be big dollars. So the issue of whether they are allowable in bankruptcy is a critical one that has resulted in a great deal of litigation.

Hertz is the most recent decision on this topic, and it's highly consequential since it comes from the Third Circuit, home to both Delaware and New Jersey. Let's dive into the case.

Daniel B. Besikof: Hertz filed for bankruptcy in 2020 during the pandemic. By the time it emerged from bankruptcy, its value had ballooned such that equity was granted \$1 billion in recoveries. The plan treated the noteholders' claims as unimpaired, but it deprived the noteholders of \$270 million in value relating to their make-whole claims and their claims for postpetition interest at the contract rate, rather than the federal judgment rate of just 15 basis points.

After post-effective date litigation, the Bankruptcy Court ruled that the make-whole was on matured interest as contemplated under section 502 (b)(6) of the Bankruptcy Code, and therefore was disallowed. The Bankruptcy Court also held that the federal judgment rate, rather than the contract rate, was appropriate.

Gianfranco Finizio: On appeal, the Third Circuit joined the Fifth Circuit and other courts in ruling that make-wholes were in fact unmatured interest. However, because Hertz was solvent, the Third Circuit still required Hertz to pay the make-whole amount and directed postpetition interest to be paid at the contract rate under the so-called solvent debtor exception.

Judge Ambro focused on the payment to equity and found that it would violate the absolute priority rule to give equity \$1 billion in value, while giving the noteholders a haircut to the tune of \$270 million.

In so holding, Judge Ambro cited the Supreme Court's holding in *Jevic* for support that the absolute priority rule must be applied to all aspects of the bankruptcy.

Daniel B. Besikof: Hertz is a significant decision that will make it more difficult for noteholders to establish make-whole claims outside the context of solvent debtor cases, which are rare. We expect that it will drive more traditional insolvent debtor cases involving make-whole claims to Third Circuit venues, given the Third Circuit's debtor friendly ruling on this issue.

Thank you for watching. We will see you on the next edition of the [Lowenstein Bankruptcy Lowdown](#).