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Safeguarding Lenders' Entitlement to Make-Whole Payments in Bankruptcy

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The purpose of this article is to provide lenders useful guidance to help preserve a right to bargained for Make-Whole Payments in the face of a borrower's bankruptcy.

Many debt agreements provide for preservation of a lender's anticipated yield in the form of a prepayment premium or other make-whole charge ("Make-Whole Payment") in the case of payment of outstanding debt amounts prior to the stated maturity date. The failure of a lender to fully consider the effect of a future insolvency proceeding of the borrower when drafting indentures, notes, credit facilities and other related debt documents ("Loan Agreements") may result in a forfeit of Make-Whole Payments. The purpose of this article is to provide lenders useful guidance to help preserve a right to bargained for Make-Whole Payments in the face of a borrower's bankruptcy.

This article also discusses:

- Make-Whole Payments in general;

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- the effect of automatic or optional acceleration of the outstanding debt under a Loan Agreement;
- particular cases where courts have found that lenders were not entitled to a Make-Whole Payment;
- cases in which properly drafted Loan Agreements resulted in the allowance of the Make Whole Payment; and
- drafting tips.

MAKE-WHOLE PAYMENTS

The purpose of a Make-Whole Payment is to enable a lender to receive the benefit of its bargained-for yield when a borrower pays a debt before maturity. The payment compensates "the lender for the risk that market rates of interest at the time of prepayment might be lower than the rate of the loan being prepaid."[1]

Lenders should note that an unconditional contractual prohibition on repayment of debt before the stated maturity or due date, such as no-call provisions in indentures, are generally unenforceable in bankruptcy.[2] In contrast, a carefully drafted Make-Whole Payment provision may be effective even though financially adverse to the borrower.

The general rule is that "[i]n order to have a valid claim in bankruptcy, a party must first have a valid claim under non-bankruptcy law."[3] Thus, state law will frequently determine the allowance of a claim for a Make-Whole Payment in bankruptcy.[4]

The majority of courts construe Make-Whole Payment clauses as liquidated damages provisions rather than unmatured interest entitlement provisions.[5] Accordingly, if the applicable bankruptcy court concludes that the lender is entitled to a Make-Whole Payment pursuant to the plain terms of the Loan Agreement, then the court would next determine whether the Make-Whole Payment satisfies applicable state law standards. For example, if New York law is the choice of law under the relevant Loan Agreement, a Make-Whole Payment would be valid and recoverable when (i) actual damages are difficult to determine, and (ii) the Make-Whole Payment is not plainly disproportionate to the possible loss.[6]

EFFECT OF ACCELERATION OF DEBT

Automatic acceleration of outstanding debt occurs by operation of law upon the filing of a bankruptcy petition.[7] Most Loan Agreements also specifically contain an acceleration clause that provides that the outstanding debt will automatically become immediately due and payable upon the event of a bankruptcy filing or other default event.[8] A lender may also bargain for the right to have the option to accelerate outstanding debt upon the occurrence of an event of default. In the case of an optional acceleration clause in a Loan Agreement, the lender is required to perform a clear unequivocal affirmative act to effect the acceleration of debt.[9]

Acceleration operates to advance the maturity date of the loan "so that payment thereafter is not prepayment but instead is payment made after maturity."[10] Further, in the event of acceleration, "interest payments that would have been due in the future are no longer due, because, after acceleration, the entire principal is immediately due and owing; in other words, future interest payments are 'unearned' because the creditor is no longer loaning the debtor the principal."[11] As further discussed, in the event of acceleration, a lender will not be entitled to a Make-Whole Payment unless the agreement is carefully drafted to preserve entitlement to the payment.[12]

CASES IN WHICH LENDERS NOT ENTITLED TO MAKE-WHOLE PAYMENT

Most recently, in the case of *In re Denver Merchandise Mart, Inc.*, the United States Court of Appeals for the Fifth Circuit, upon careful examination and analysis of Make-Whole Payment provisions in the subject Loan Agreement under Colorado law, concluded that the lender was not entitled to a Make-Whole payment.[13] The debtor borrower in the *Denver Merchandise* case defaulted under the Loan Agreement prior to the debtor's bankruptcy by failing to make timely payments under the loan.[14] The Loan Agreement provided that upon default the principal, interest, default interest, other sums as provided in the agreement and "all other moneys agreed or provided to be paid by Borrower" under the Loan Agreement would be automatically accelerated and become immediately due and payable.[15] The debtor did not repay

the outstanding loan balance after default and prior to the bankruptcy filing.[16]

In the bankruptcy proceeding, the lender sought recovery of a $1.8 million Make-Whole Payment.[17] The Make-Whole Payment provision under the Loan Agreement provided "that the Borrower may prepay the Note under certain circumstances but must also pay a Prepayment Consideration."[18] Pursuant to the terms of the Loan Agreement, the Make-Whole Payment was payable under the following three instances:

- *Permissive Voluntary Prepayment*: The debtor had the "'right or privilege to *prepay* all (but not less than all) of the unpaid principal'" of the loan subject to payment of interest, the Make-Whole Payment and other applicable sums.[19]
- *Default/Acceleration Prepayment*: The debtor was obligated to pay the entire outstanding debt plus the Make-Whole Payment in the event of a "'*prepayment* of the principal amount of [the loan] *made* during the continuance of an Event of Default or after an acceleration of the Maturity Date under any circumstances'…."[20]
- *Prepayment Savings Clause—Voluntary or Involuntary Prepayment*: The Make-Whole Payment was payable "whether the *prepayment* [was] voluntary or involuntary (including without limitation in connection with Lender's acceleration of the unpaid principal balance of the [loan]) or the Security Instrument is satisfied or released by foreclosure (whether by power of sale or judicial proceeding), deed in lieu of foreclosure or by any other means."[21]

Since Colorado law governed the Loan Agreement, the court applied that state's law to determine the enforceability and, ultimately, whether or not to allow the lender's claim under the particular facts and circumstances of the default.[22] Under Colorado law, a Make-Whole Payment is not viewed as liquidated damages, rather is it viewed as "consideration for the borrower's right or privilege to prepay,"[23] and the lender's choice to accelerate a loan acts as a waiver of its entitlement to a Make-Whole Payment unless the agreement specifies that the Make-Whole Payment is payable upon acceleration.[24] However, Colorado law also provides that a court may authorize a Make-Whole Payment despite acceleration "if there is evi-

dence that the borrower defaulted to avoid additional interest."[25] In *Denver Merchandise*, the Fifth Circuit read the Loan Agreement to require an actual prepayment as a predicate to allowance of a Make-Whole Payment, and because no prepayment was actually made, the claim was not allowed.[26]

Seven months prior to the *Denver Merchandise* decision, the United States Court of Appeals for the Second Circuit, in the case of *In re AMR Corporation*,[27] affirmed the bankruptcy court's decision that debtors American Airlines, Inc. and AMR Corporation (collectively, "American") were not required to pay a Make-Whole Payment to the lender when prepaying secured debt. The plain language of the loan documents specifically did not require any Make-Whole Payment where the default event, a voluntary bankruptcy filing, triggered the automatic acceleration of the debt.[28]

The *AMR Corporation* indentures provided that the Make-Whole Payment was payable upon a voluntary redemption of the debt by American.[29] The indentures, however, contained an automatic acceleration clause that specifically excluded entitlement to a Make-Whole Payment in the event of a bankruptcy induced acceleration: "the unpaid principal amount of the Equipment Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder *(but for avoidance of doubt, without Make-Whole [Payment])*, shall be immediately and without further act become due and payable…."[30]

The *AMR Corporation* bankruptcy court concluded that the indentures provided that (a) the filing of a voluntary bankruptcy petition by American constituted an event of default, (b) pursuant to the plain language of the indentures, this default resulted in the automatic acceleration of the debt without the need for any notice or action by the lenders, and (c) the Make-Whole Payment was not required to be paid by American after such a default and acceleration of the debt.[31]

In *In re Solutia*,[32] another Southern District of New York bankruptcy case, the debtor issued secured notes prior to the bankruptcy filing. The stated maturity date of the notes extended beyond the effective date of the debtor's Chapter 11 plan of reorganization. As of the bankruptcy petition date, the notes were fully secured.[33] Pursuant to the subject indenture, a bankruptcy filing constituted an event of default.[34] In accordance with the automatic acceleration clause of the indenture, upon the occurrence of

an event of default all amounts owed became "immediately due and payable without any declaration or other act on the part of the Trustee or any Holder."[35]

The *Solutia* secured noteholders were to receive full payment of their allowed claim on the effective date of the plan.[36] In addition to full payment of principal and accrued interest, the noteholders sought, among other things, a Make-Whole Payment — which was characterized as "expectation" damages — for the payment of the notes prior to the maturity date.[37] The indenture, however, did not contain a provision allowing payment of the Make-Whole Payment in the event of automatic acceleration. In ruling, the *Solutia* court noted that the debt was accelerated on the commencement of the bankruptcy case and thus, pursuant to the plan, was "being paid off at maturity rather than being 'prepaid' under the Plan."[38] The court denied allowance of the claim for the Make-Whole Payment.[39] The court reasoned that "[b]y incorporating a provision for automatic acceleration [in the indenture], the [noteholders] made a decision to give up their future income stream in favor of having an immediate right to collect their entire debt."[40]

In the earlier *Calpine*[41] case, the debtors sought to refinance their existing post-petition loan and to pay-off certain higher interest rate secured debt. The secured lenders holding the higher-rate debt objected to repayment, citing contractual no-call provisions which prohibited the debtors from prepaying the loan.[42] The court authorized the repayment in light of the rule that no-call provisions are unenforceable in bankruptcy.[43]

The court then was faced with the issue of what, if any, damages the secured lenders were entitled to as a result of the prepayment of the debt.[44] The agreements did not contain a provision providing for a Make-Whole Payment if the debt was prepaid in violation of the no-call provision.[45] The agreements also expressly provided that a bankruptcy filing was an event of default that resulted in automatic acceleration of the secured debt.[46] The debtors and the creditors committee argued that because the secured lenders did not bargain for a liquidated damages provision, the only form of damage recovery could be through a breach of contract theory.[47] However, they argued the secured lenders could not recover under that theory because they would receive the benefit of their bargain through receipt of the full principal and accrued interest due on the notes.[48] The court rejected that argument and

concluded that the "secured lenders' expectation of an uninterrupted payment stream has been dashed giving rise to [an unsecured claim for] damages…."[49]

Interestingly, the judge in the later *Solutia* case took issue with her colleague's decision in *Calpine*:

> This Court respectfully disagrees with *Calpine* because it reads into agreements between sophisticated parties provisions that are not there. Perhaps the parties negotiated on the subject but were unable to reach an agreement. It may simply, although less probably, be that this subject was overlooked. In either case, the court cannot supply what is absent…. Nothing in the Bankruptcy Code requires this court to provide the 2009 Noteholders with more than the Original Indenture provides. Put yet another way, they have no dashed expectations for which compensation is due.[50]

Later in 2010, the United States Bankruptcy Court for the Southern District of Mississippi disallowed a claim for a Make-Whole Payment because the indenture did not authorize a Make-Whole Payment in the event of automatic acceleration triggered by the bankruptcy filing but similar to *Calpine,* allowed the noteholders an unsecured claim for expectation damages for breach of a no-call provision.[51]

RECENT CASES IN WHICH BANKRUPTCY COURT ALLOWED MAKE-WHOLE PAYMENT

In *In re School Specialty, Inc.*, the Loan Agreement specifically provided for a Make-Whole Payment in the event of "either prepayment or acceleration of the Term Loan."[52] The U.S. Bankruptcy Court for the District of Delaware enforced the Make-Whole Payment applying New York law regarding liquidated damages — *i.e.*, the Make-Whole Payment was "not 'plainly disproportionate' to the lender's probable loss."[53]

In *In re Madison 92nd Street Associates LLC*, the Loan Agreement provided for a Make-Whole Payment in the amount of five percent of the outstanding balance of the loan upon an acceleration triggered by any event other than casualty or condemnation.[54] The United States Bankruptcy Court for the Southern District of New York allowed recovery of the Make-Whole

Payment after finding it was a valid and enforceable liquidated damages provision under New York law.[55] Other courts have reached similar conclusions in cases in which the factual predicate for the Make-Whole Payment was expressly contemplated under the Loan Agreement.[56]

KEY TAKEAWAY FROM CASES

The clear trend of these cases is a strict reading of the Loan Agreement language applied to the particular facts upon which the claim for the Make-Whole Payment is made. Courts will examine the agreement language, determine the enforceability of the Make-Whole Payment Provision under non-bankruptcy law and allow (or disallow) the claim based upon the contract parties' objective expectations. Thus, if the Loan Agreement does not specify that the lender is entitled to a Make-Whole Payment or other desired relief under the facts presented, the bankruptcy court likely will not allow the lender's claim. The key, of course, is to anticipate the widest range of possible facts under which the Make-Whole Payment will arise, consistent with enforceability under the applicable non-bankruptcy law.

DRAFTING TIPS TO SAFEGUARD ENTITLEMENT TO MAKE-WHOLE PAYMENTS

When drafting Loan Agreements, to support entitlement to Make-Whole Payments, lenders should, at a minimum, include language in each Loan Agreement that accounts for the following:

- *Default*: The Loan Agreement should provide that upon the occurrence of an event of default, the lender is entitled to (and the borrower is obligated to pay) the Make-Whole Payment to the lender.[57]
- *Acceleration*: The Loan Agreement should be clear that in the event of automatic or optional acceleration (all circumstances of acceleration) the lender is entitled to (and the borrower is obligated to pay) the Make-Whole Payment. The agreement should further provide that the Make-Whole Payment is immediately due and payable upon automatic or

optional acceleration and payment of the Make-Whole Payment is not conditioned upon actual payment of the accelerated debt.

- *Voluntary or involuntary prepayment*: The Loan Agreement should specify that the lender is entitled to (and the borrower is obligated to pay) the Make-Whole Payment upon all circumstances of voluntary or involuntary prepayment and the Make-Whole Payment is due and payable upon all circumstances of acceleration.
- *Prepayment not required*: As noted, the Loan Agreement should specify that a Make-Whole Payment is due and payable upon any and all circumstances of acceleration and/or occurrences of events of default and specifically note that actual prepayment is not a prerequisite to the lender's entitlement to the Make-Whole Payment and the borrower's obligation to pay the Make-Whole Payment.
- *No-call provision or prepayment prohibition*: The Loan Agreement should include a provision that provides for the payment of a Make-Whole Payment should a court deem any no-call or other prepayment prohibition provision unenforceable, particularly, in the event of a bankruptcy filing by the borrower.
- *Savings clause*: The Loan Agreement may include an all-encompassing savings clause that provides that the lender is entitled to the Make-Whole Payment and the Make-Whole Payment is due and immediately payable to the lender under any and all circumstances of acceleration, occurrence of an event of default, and/or prepayment.
- *Inclusion in bankruptcy claim*: The Loan Agreement should also provide that the lender may include the Make-Whole Payment in any claim filed in the bankruptcy of the borrower.
- *Calculation of Make-Whole amount*: Because the Make-Whole Payment often will not be enforceable unless it is reasonable and/or proportionate to the lender's possible loss, lenders should take care to develop a formula for calculating the Make-Whole Payment amount that will result in a reasonable, proportionate measure of expectation damages. It is also important that lenders be prepared to present evidence in court of the reasonableness of the Make-Whole Payment.[58]

CONCLUSION

The cases discussed herein reveal that courts will only grant lenders amounts they preserve entitlement to through careful contract drafting. These cases further underscore that subtle bankruptcy nuances left unaddressed in a Loan Agreement may leave a lender without protection which the lender thought it had when negotiating and documenting a loan. Employing the drafting tips discussed in this article may help to avoid many of the pitfalls that lead to disallowance of Make-Whole Payments in bankruptcy. Lenders should also consider consulting with experienced restructuring counsel to ensure all bases are covered when documenting loan transactions.

NOTES

[1] *See, e.g., In re Ridgewood Apartments of DeKalb County Ltd.,* 174 B.R. 712, 720-21 (Bankr. S.D. Ohio 1994) ("Among other things, a prepayment premium insures the lender against loss of his bargain if interest rates decline.") (*quoting In re LHD Realty Corp.,*726 F.2d 327, 330 (7th Cir. 1984)).

[2] *See*, *e.g.*, *In re Calpine*, 365 B.R. 392, 397 (Bankr. S.D.N.Y. 2007) ("It would violate the purpose behind the Bankruptcy Code to deny a debtor the ability to reorganize because a creditor has contractually forbidden it."(citation omitted)).

[3] *HSBC Bank USA, N.A. v. Calpine Corp. (In re Calpine Corp.)*, No. 07 Civ 3088(GBD), 2010 WL 3835200, at *5 (S.D.N.Y. Sept. 15, 2010).

[4] *See*, *e.g.*, *Sch. Specialty, Inc.*, No. 13-10125, 2013 WL 1838513, at * 2 (Bankr. D. Del. Apr., 22, 2013) ("The inquiry into whether a prepayment provision will be enforced in bankruptcy begins with whether the prepayment provision is enforceable under applicable state law."). It should be noted that certain debts are governed by federal or other non-state law and under the same principle, courts will look to that law to determine the bankruptcy enforceability of the claim. In this context, this article's references to "state law" encompass these other non-bankruptcy law situations.

[5] *See, e.g., In re Trico Marine Servs., Inc.*, 450 B.R. 474, 480 (Bankr. D. Del. 2011) (noting that "the substantial majority of courts considering the issue have concluded that make-whole or prepayment obligations are in the nature of liquidated damages rather than unmatured interest."). Unmatured interest is not allowable as a claim under U.S. bankruptcy law. 11 U.S.C. §502(b)(2).

[6] *See Sch. Specialty*, 2013 WL 1838513, at *5 (*citing In re South Side House, LLC*, 451 B.R. 248, 270 (Bankr. E.D.N.Y. 2011)).

[7] *See, e.g., AMR Corp. v. Am. Airlines, Inc.*, 485 B.R. 279, 290 n. 7 (Bankr. S.D.N.Y. 2013) (noting that "[T]he filing of a bankruptcy petition — even without specific contractual language –acts to accelerate all of a debtor's obligations by operation of law.") (citations omitted), *aff'd*, 730 F.3d 88 (2d Cir. 2013).

[8] These clauses, known as "ipso facto" clauses, that modify the relationship of contracting parties due to a bankruptcy filing, are unenforceable in bankruptcy unless the underlying agreement is considered a non-executory contract. *See*, *e.g.*, *id*. at 296-97 (finding automatic acceleration clause was not invalid ipso facto clause, where lender and debtors acknowledged that indentures were not executory contracts).

[9] *See, e.g., Moss v. McDonald,* 772 P.2d 626,628 (Colo. App. 1988) ("In the case of an acceleration provision exercisable at the option of the obligee, the obligee must perform some clear, unequivocal affirmative act evidencing his intention to take advantage of the accelerating provision."); *Miller v. Jones,*635 S.W.2d 360, 362 (Mo. Ct. App. 1982) (explaining that in case of optional contractual right to accelerate, lender "is required to perform some affirmative act evidencing his intention to take advantage of the accelerating provision before debtor makes tender of the amount actually due, and until holder does so, debtor may terminate the right of acceleration and cure default by proper tender of payment.").

[10] *See, e.g., In re LHD Realty Corp.*, 726 F.2d 327, 330-31 (7th Cir. 1984).

[11] *Capital Ventures Int'l v. Republic of Argentina*, 552 F.3d 289, 296 (2d Cir. 2009).

[12] *See*, *e.g.*, *Petroleum & Franchise Funding LLC v. Dhaliwal*, 688 F. Supp.2d 844, 850 (E.D. Wisc. 2013) ("[C]ourts typically enforce prepayment fees regardless of acceleration, when the prepayment provision anticipates that such fee will be paid whether as a result of election or acceleration.") (citations omitted).

[13] *Bank of New York Mellon v. GC Merch. Mart, L.L.C. (In re Denver Merch. Mart, Inc.)*, No. 13-10461, 2014 WL 291920, at *1 (5th Cir. Jan. 27, 2014).

[14] *See id*. at *1.

[15] *See id*.

[16] *See id*.

[17] *See id*.

[18] *See id*.

[19] *See id*. at *4 (emphasis added).
[20] *See id*. (emphasis in original).
[21] *See id*. at *5 (emphasis added) (*quoting* agreement).
[22] *See id*. at *3.
[23] *See id*.
[24] *See id*.
[25] *See id*.
[26] *See id*.
[27] *U.S. Bank Trust Nat'l Assoc. v. Am. Airlines, Inc. (In re AMR Corp.)*, 730 F.3d 88 (2d Cir. 2013).
[28] *In re AMR Corp.*, 485 B.R. 279, 289-90 (Bankr. S.D.N.Y. 2013), *aff'd*, 730 F.3d 88 (2d Cir. 2013).
[29] *See id*. at 302-03.
[30] *See id*. at 289-90 (emphasis added).
[31] *See id*.
[32] 379 B.R. 473 (Bankr. S.D.N.Y. 2007).
[33] *Id.* at 480.
[34] *Id.* at 478.
[35] *Id.* (*quoting* indenture).
[36] *Id.* at 482.
[37] *Id.* at 487-88.
[38] *Id.* at 483.
[39] *Id.* at 488.
[40] *Id.*
[41] *In re Calpine,* 365 B.R. at 396, *aff'd*, *In re Calpine Corp.*, 2010 WL 3835200, at *1.
[42] *Id.* at 396-97.
[43] *Id.* at 396-98, 401.
[44] *Id.* at 399.
[45] *Id.* at 398-99 (noting that "Absent a provision in the underlying agreement authorizing the payment of fees, costs or charges, the secured party is prohibited from incorporating such amounts into its allowed secured claim.") (citations omitted).
[46] *Id.* at 398.
[47] *Id.* at 399.

[48] *Id.*

[49] *Id.*

[50] *Solutia*, 379 B.R. 473, at 484 n.7.

[51] *Premier Entm't Biloxi, LLC v. U.S. Bank Nat'l Ass'n* (*In re Premier Entm't Biloxi, LLC)*, 445 B.R. 582, 629-32, 634-36 (Bankr. S.D. Miss. 2010).

[52] No. 13-10125, 2013 WL 1838513, at * 1 (Bankr. D. Del. Apr., 22, 2013).

[53] *See id*. at *5.

[54] 472 B.R. 189, 196 (Bankr. S.D.N.Y. 2012).

[55] *See id*. at 194-97.

[56] *See*, *e.g.*, *In re GMX Res. Inc.*, Case No. 13-11456 (Bankr. W.D. Okla. Aug. 27, 2013) (Make-Whole Payment was provided for under the governing credit agreement); *Kimbrell Realty/Jeth Court, LLC v. Fed. Nat'l Mortg. Ass'n*, 483 B.R. 679, 688 (Bankr. C.D. Ill. 2012) ("[T]his court is of the opinion that Illinois law permits a lender to lawfully charge a post-acceleration prepayment premium when the promissory note so provides, as the…Note does here."); *In re AE Hotel Venture,* 321 B.R. 209, 219 (Bankr. N.D. Ill. 2005) ("Because the loan documents here expressly provide for a prepayment premium even when the debt is accelerated, the premium is 'provided for under the agreement.'"); *Anchor Resolution Corp. v. State Street Bank & Trust Co. of Conn. (In re Anchor Resolution Corp.),* 221 B.R. 330, 333 (Bankr. D. Del. 1998) (allowing claim for reasonably calculated make-whole amount (minus adequate protection payments) after finding relevant agreement provided for Make-Whole Payment in event of prepayment of principal or event of default, which included filing of bankruptcy case); *In re Fin. Ctr. Assocs. of East Meadow L.P.,* 140 B.R. 829, 835 (Bankr. E.D.N.Y. 1992) (concluding that provision in credit agreement that provided for a reasonable Make-Whole Payment (24.9 percent of principal amount due) in event of lender's voluntary acceleration was valid and enforceable under New York law and Bankruptcy Code Section 506(b)).

[57] The Loan Agreement should likewise include a proviso specifying that immediately upon the occurrence of an event of default, the lender is entitled to (and the borrower is obligated to pay) the default rate of interest on the principal amount outstanding as of the occurrence date of the event of default. *See*, *e.g.*, *In re Shree Mahalaxmi, Inc. d/b/a Super 8*, Case No. 13-50040-CAG, Dkt. No. 157 (Bankr. W.D. Tex. Feb. 5, 2014) (disallowing recovery of default interest because plain language of agreement required optional/affirmative acceleration upon default and non-payment by a certain date before borrower was obligated to pay default interest).

[58] *See*, *e.g.*, *In re 400 Walnut Assocs., L.P.*, 461 B.R. 308, 321 (Bankr. E.D.Pa. 2011) (concluding that although the agreement contained an express provision for the Make-Whole Payment, the lender offered no evidence of loss in support of its make-whole claim), *rev'd on other grounds*, 473 B.R. 603 (E.D. Pa. 2012).