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Make-Whole Claims in Bankruptcy

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I. INTRODUCTION

The well-established "perfect tender in time rule" dictates that debt must be repaid only upon maturity, and no earlier.[1] Under this rule, early repayments of debt are prohibited absent a contrary provision under the debt instrument. Debt instruments bar *early* repayments altogether through a "no-call"[2] provision or permit *early* repayments through a "make-whole" provision. By modifying the "perfect tender in time rule,"[3] make-whole provisions allow debtors to repay debt in advance of stated maturity, in exchange for a predetermined premium, usually based on the discounted value of the stream of future scheduled interest payments.[4]

To determine whether make-whole claims are allowed in bankruptcy, courts undertake a two-pronged analysis.[5] Because make-whole provisions are contractual, courts rely on contract construction principles to determine whether the debt instrument contains a make-whole provision, and, if so, the circumstances in which such provision is triggered.[6] If a make-whole provision is triggered, courts then proceed to determine whether such provision is enforceable under state law.[7]

If the make-whole provision is enforceable under state law, courts proceed to determine whether such provision is enforceable under bankruptcy law.[8] Section 101(5)(A) of the Bankruptcy Code[9] defines "claim" as a "right to payment," which encompasses make-whole claims. Section 502(a) provides that "claims" are allowed, except to the extent disallowed under section 502(b). In turn, section 502(b)(1) disallows "claims" that are "unenforceable . . . under any agreement or applicable law,"[10] and section 502(b)(2) disallows "claims" on account of "unmatured interest." In certain circumstances, section 506(b) allows "secured claims" to include "interest" and "any reasonable fees, costs, or charges provided for under an agreement or State statute." The confluence of these Bankruptcy Code provisions is murky.

Given that make-whole provisions, in essence, liquidate damages arising out of the loss of *future* scheduled "interest" payments, which by definition are "unmatured," the allowance of make-whole claims in bankruptcy compels a demanding analysis.

In resolving whether make-whole claims are allowed in bankruptcy, this article examines the application of contract construction principles, reconciles conflicting precedent on such principles, and construes applicable Bankruptcy Code provisions. This article recognizes that, in applying the provisions of the Bankruptcy Code, bankruptcy courts are courts of equity[11] and that considerations of bankruptcy and commercial policies, including practicality and predictability, bear on the application of such provisions. This article concludes that make-whole claims are generally not allowed in bankruptcy, unless (1) the default or "early repayment" by the debtor is "voluntary"; *or* (2) the debt instrument contains a "clear and unambiguous" provision calling for a make-whole payment in all circumstances of early repayment.

In accordance with this two-pronged analysis, the first-half of this article covers the state-law analysis, and the second-half of this article covers the bankruptcy-law analysis.

II. STATE-LAW ANALYSIS

The state-law analysis turns on (1) the application of contract construction principles to determine whether a make-whole provision is triggered; and (2) an inquiry into whether the make-whole provision is enforceable.[12] If a make-whole provision is not triggered, further analysis is moot.[13] If, however, a make-whole provision is triggered, an inquiry into the enforceability of the make-whole provision is necessary because "entitlements in bankruptcy arise *in the first instance* from the underlying substantive law creating the debtor's obligation."[14]

A. Whether the Make-Whole Provision is Triggered

Whether a make-whole provision is triggered compels a legal and factual analysis. To determine the circumstances in which a make-whole provision is triggered, it is first necessary to construe the debt instrument through the application of contract construction principles.[15] Next, the facts must be parsed to determine whether the make-whole provision is triggered.

To construe contracts, such as debt instruments, courts recognize three canons of construction. First, the best evidence of what parties to a written agreement intend is what they say in their writing.[16] Second, in the event of an inconsistency between a specific and general provision, the specific provision controls.[17] Third, a reading of a contract should avoid rendering any portion meaningless.[18]

Courts begin with the contract's "plain meaning."[19] Courts need not look outside the four corners of a complete contract to determine what the parties intended.[20] That parties offer different constructions of the same term, without more, does not make a contract ambiguous.[21]

The application of contract construction principles to construe make-whole provisions is replete with issues, particularly whether acceleration operates to deprive make-whole provisions of their vitality. Section II.A.1 of this article examines the seminal authority on the interplay between acceleration provisions and make-whole provisions. Section II.A.2 of this article reconciles the seminal authority with principles of New York law. It recognizes that courts misconstrue New York law and provides the proper construction. Finally, section II.A.3 recommends drafting techniques to mitigate the risk of litigation on the interplay between acceleration provisions and make-whole provisions.

1. ***Courts Appear Split on the Interplay Between Acceleration Provisions and Make-Whole Provisions***

In applying contract construction principles to construe debt instruments, courts appear split on the effect of automatic acceleration on other provisions.[22] This issue often presents itself where a debtor's bankruptcy default automatically accelerates debt issued under a debt instrument that is silent on whether the make-whole provision survives automatic acceleration.[23] According to the seminal cases, *In re MPM Silicones, LLC* ("*Momentive*")[24] and *In re Energy Future Holdings Corp.*,[25] the outcome turns mainly on whether the automatic acceleration provision, as a matter of law, supersedes the make-whole provision.[26] *Momentive* answers this question in the affirmative, whereas *EFH* answers to the contrary.

In *Momentive* and *EFH*, the nearly identical debt instruments each contained a make-whole provision and an acceleration provision triggered automatically by a bankruptcy default, but each was silent on whether a make-whole payment is due following acceleration.[27] The debtors filed for bankruptcy relief, and the lenders argued that, under the debt instruments, they are entitled to make-whole payments, even in the face of automatic acceleration.[28] In *Momentive*, the court concluded that automatic acceleration negates the make-whole provision, and, accordingly, disallowed the make-whole claim.[29] In *EFH*, however, the Third Circuit concluded that automatic acceleration, without more, does not negate other provisions and, therefore, allowed the make-whole claim.[30] In expressly rejecting *Momentive*, the Third Circuit explained that acceleration provisions and make-whole provisions "simply address different things" and are not mutually exclusive.[31] Accordingly, whether a make-whole provision is triggered following automatic acceleration depends on the court's analysis of the interplay between the acceleration provision and the make-whole provision, which analysis turns on the construction of these provisions under state law.[32]

i. Second Circuit Holds That Acceleration Trumps Make-Whole Provisions

In *Momentive*, the Bankruptcy Court for the Southern District of New York held that, unless the debt instrument clearly provides otherwise, automatic acceleration effectively deprives other provisions of their vitality and, therefore, forecloses any recovery under a make-whole provision.[33] *Momentive* was affirmed by the Second Circuit.[34]

This analysis, the court explained, begins with the most relevant provision, the acceleration provision.[35] The court explained that whether viewed as automatic acceleration or a voluntary exercise of an elective acceleration right,[36] lenders bargained for a provision providing for acceleration of the maturity date with the *immediate* right to collect the *entire* debt, in exchange for forfeiting the make-whole payment.[37] Upon acceleration of the debt, the court concluded, the maturity date of the debt advanced and any subsequent payment, by definition, cannot be a "*pre*payment."[38] According to the court, the debt became fully matured, and, in the absence of a contrary provision in the debt instrument, "*pre*payment" can occur only before maturity.[39] In support, the court relied principally on *Northwestern.*[40]

In *Northwestern*, a make-whole provision—labeled as a "prepayment" provision—was triggered following a default, but was silent on the effect of a lender's foreclosure.[41] The lender commenced a foreclosure action and asserted a claim for the make-whole payment.[42] The court refused to award the make-whole payment because the "wording of the subject clause [did] not reveal any intent to provide for enforcement in foreclosure . . . particularly when compared to other post-acceleration liquidated damages clauses."[43] Any contrary outcome, the court explained, would inevitably award a lender for exercising foreclosure rights—foreclosure necessarily results in early repayment, irrespective of whether there is an actual "repayment" by the debtor.[44] According to the court, a lender seeking to pile on a make-whole payment triggered by the very foreclosure it commenced must have bargained for and memorialized such rights through a "clear and unambiguous" provision.[45]

Relying on *Northwestern*, the *Momentive* court set forth two exceptions to the rule that acceleration precludes a make-whole claim: (1) an "intentional" default by the debtor to "evade" a make-whole payment; and (2) a "clear and unambiguous" provision calling for a make-whole payment upon acceleration or a change in the stated maturity date.[46]

To fall within the ambit of the first exception, the court explained, the facts must show that the debtor filed for bankruptcy relief with the *purpose* of "evading" the make-whole payment.[47] In passing, the court dismissed the applicability of this exception by concluding that the debtor's bankruptcy filing was not a "tactical device" to "evade" the make-whole payment.[48]

To fall within the ambit of the second exception, the court explained, the debt instrument must provide *explicit* language calling for a make-whole payment upon acceleration or a change in the stated maturity date.[49] According to the court, the acceleration provision's vague reference to a "premium, if any" lacked the requisite "explicitness" for the make-whole provision to survive acceleration.[50]

Accordingly, the *Momentive* court held that a "make-whole" provision, whether styled as a "prepayment" or "redemption" provision, is unenforceable following acceleration, absent an explicit provision to the contrary or an "intentional" default to "evade" payment under such a provision.[51]

ii. Third Circuit Holds That Make-Whole Provisions Survive Acceleration

Unlike the *Momentive* court, the Third Circuit in *EFH* held that, unless the debt instrument clearly provides otherwise, automatic acceleration, without more, does not impact the analysis of whether a make-whole provision is triggered and, therefore, does not foreclose remedies under other provisions, including make-whole provisions.[52] Declining to "close [its] eyes to make-whole provisions once a debt's maturity has accelerated," the Third Circuit explained that *Momentive* represents a misunderstanding of New York law.[53]

The proper analysis, the Third Circuit explained, begins with whether the debtor redeems the debt, and, if so, whether such "redemption" is voluntary.[54] If a debtor "redeems" debt voluntarily, any make-whole provision is triggered and is a basis for allowing a make-whole claim.[55] If a debtor redeems debt mandatorily, no make-whole provision is triggered.[56]

According to the Third Circuit, "redemption" includes both pre- and post-maturity repayments of debt.[57] By providing for "redemption" rights before a "date certain," the Third Circuit explained, any question of acceleration or maturity is irrelevant to the analysis.[58] In expressly rejecting *Momentive*'s "rule of explicitness," the Third Circuit relied on *NML Capital v. Republic of Argentina*.[59]

In *NML Capital*, debt was accelerated following the debtor's default, and lenders sought to collect interest that accrued post-acceleration.[60] The debtor argued that the lenders were entitled only to principal, not interest, because acceleration terminated the obligation to make interest payments.[61] The lenders, on the other hand, argued that the debtor is obligated to continue making "interest payments post-maturity or post-acceleration of the debt" until the principal is paid in full.[62] To consider such arguments, the court framed the issue as "whether [a debtor's] obligation to make [contractually-established interest] payments to bondholders continued after maturity or acceleration of the indebtedness."[63] In rejecting the debtor's argument that the lenders are not entitled to interest, the court explained:

> [I]n New York the consequences of acceleration of the debt depend on the language chosen by the parties in the pertinent loan agreement. While it is understood that acceleration advances the maturity date of the debt, we are unaware of any rule of New York law declaring that other terms of the contract not necessarily impacted by acceleration . . . automatically cease to be enforceable after acceleration.[64]

In other words, as explained by the Third Circuit, had the debtor in *NML Capital* intended that other provisions, such as the interest payment provision, become ineffective upon acceleration or maturity, "it could easily have clarified that intent in any number of ways."[65] Instead, as the Third Circuit explained, the interest payment provision in *NML Capital* was devoid of any reference to acceleration or maturity and, therefore, remained effective following acceleration.[66]

Applying *NML Capital*, the Third Circuit refused to choose between a make-whole provision and an acceleration provision and, instead, read them as operating together.[67] For the same reason that acceleration did not void the debtor's interest payment obligations in *NML Capital*, the Third Circuit explained that acceleration did not void the debtor's obligations under the make-whole provision.[68] Because debt instruments must be read as a whole to give meaning to each provision, the Third Circuit explained that any contrary position would render other provisions superfluous.[69]

While acknowledging *Northwestern* and its dictates that provisions for make-whole payments following acceleration must be clearly stated in the debt instrument (relied upon by *Momentive*) the Third Circuit distinguished the "*pre*payment" in *Northwestern* from a "redemption."[70] According to the Third Circuit, a "*pre*payment" premium is the price of "an option voluntarily to prepay the loan and terminate the [debt instrument] *before* the maturity," and acceleration advances the maturity date "so that payment thereafter is not prepayment but instead is payment made after maturity, and logically the option to prepay can no longer be exercised after maturity."[71] But a "redemption," it explained, may occur even after the debt already matured through acceleration.[72] The distinction, drawn by the Third Circuit, is that the debtor is exercising its "redemption" rights to repay the debt over the lenders' objections—the lenders are not forcing early repayment.[73] Under the Third Circuit's analysis, *Northwestern* applies to "*pre*payments" and is premised on the concern that lenders should not be able to elect to foreclose, seek immediate repayment, and "pile on by also receiving a premium."[74] Applying *Northwestern* to "redemptions," the Third Circuit reasoned, "stretch[es] *Northwestern* beyond its language."[75] The Third Circuit explained: "[b]y avoiding the word 'prepayment' and using the term 'redemption,' [the parties] decided that the make-whole [provision] would apply without regard to the Notes' maturity."[76] Thus, the Third Circuit concluded that the debtor exercised its rights of "redemption," distinct from "prepayment."[77]

Next, the Third Circuit analyzed whether such "redemption" is "optional" or "mandatory."[78] If "mandatory," the Third Circuit explained, the "redemption" provision is not triggered—this avoids awarding lenders for choosing to be compensated early.[79] Under the Third Circuit's reasoning, acceleration of debt, without more, does not compel the conclusion that a "redemption" is "mandatory."[80] The Third Circuit explained that, as a matter of law, debtors in bankruptcy have the option either (1) to invoke section 1124(2) to reinstate the accelerated debt's original maturity date; or (2) to pay off the debt immediately.[81] By opting to pay off the debt immediately over the objections of lenders,[82] the Third Circuit reasoned, the debtor's "redemption" is "optional," as opposed to "mandatory," and, therefore, the lenders are entitled to their bargained-for rights under the redemption provision.[83] A "redemption" is "mandatory," the Third Circuit explained, only if the debtor does not have such "option."[84]

After concluding that the "redemption" provision applies no less post-acceleration than it does pre-acceleration, the Third Circuit explained that an acceleration provision's reference to "premium, if any" is sufficient to cover a redemption.[85] Such language, the Third Circuit explained, is "most naturally" read to reference the "redemption" payment, rejecting *Momentive*'s demand for greater specificity.[86] For the final part of its analysis, the Third Circuit explained that the debtor "redeemed" the debt during the timeframe in which the "redemption" provision is triggered.[87]

Accordingly, the Third Circuit refused to adopt the *Momentive* court's one path to trigger a make-whole provision.[88] Instead, the Third Circuit concluded that the parties chose different language that did not turn on whether the debtor repaid the debt before maturity.[89] Relying on basic contract construction principles, the Third Circuit did not find any linguistic tension between the make-whole provision and acceleration provision, each of which remained in full force and effect.[90]

2. *Reconciling Authority on the Interplay Between Acceleration Provisions and Make-Whole Provisions*

EFH is notable in that it enforced a make-whole provision following automatic acceleration. Cases predating *EFH* appear to hold that "early repayment" following automatic acceleration does not trigger a make-whole provision, unless (1) the debtor voluntarily defaults in order to "evade" the make-whole payment—the first exception; *or* (2) a "clear and unambiguous" provision calls for a make-whole payment following automatic acceleration—the second exception. These exceptions are disjunctive: the satisfaction of either one triggers the make-whole provision, even in the face of automatic acceleration.

The inconsistent outcomes of *EFH* and the cases predating it appear based on divergent analyses. The Third Circuit in *EFH* relied on the redemption-prepayment dichotomy, whereas the court in *Momentive* relied on the "rule of explicitness."[91] In actuality, however, the inconsistent outcomes turn on principles of fairness and equity. Put differently, the competing analyses devised by the *EFH* and *Momentive* courts are merely the "means" to achieve equitable and fair outcomes. Because the *EFH* debtor's default was "voluntary" and the *Momentive* debtor's default was "involuntary," it is not a surprise that the outcomes are inconsistent.[92] Only after parsing the particular facts did the *EFH* and *Momentive* courts fashion the means to achieve the different outcomes.

The competing analyses devised by the *EFH* and *Momentive* courts are not necessary. The *EFH* and *Momentive* courts devised the competing analyses to circumvent the rigid standard derived from misconstructions of New York law. Stated differently, the *EFH* and *Momentive* courts misconstrued New York law to conclude that fashioning the means is the only way to achieve equitable and fair outcomes. Properly construed, however, New York law provides a standard that would have allowed the *EFH* and *Momentive* courts to achieve the same outcomes but without the uncertainty concomitant with fashioning the means. The correct standard—derived from the proper construction of New York law—turns on the "voluntariness" of a debtor's default. This standard achieves equitable outcomes by limiting the allowance of make-whole claims to cases arising out of de facto "voluntary" defaults.[93]

i. Misconstruction of New York Law

In a series of cases since the 1980s, many courts have relied on *Sharon Steel Corp. v. Chase Manhattan Bank N.A.*[94] to describe the first exception—a debtor's "intentional" default to "evade" the make-whole payment—as the "bad-faith conduct" exception.[95] In *Sharon Steel*, the debtor's piecemeal liquidation plan triggered a default under a debt instrument that contained a make-whole provision, and the noteholders sought to collect a make-whole payment.[96] The Second Circuit framed the issue as whether the noteholders are limited to acceleration as a remedy or may collect a make-whole payment.[97] The Second Circuit explained that if "acceleration provisions of the indentures are explicitly permissive and not exclusive of other remedies," there is "no bar . . . to [noteholders] seeking specific performance of the [make-whole] provisions where the debtor causes the debentures to become due and payable by its voluntary actions."[98] Because the debtor's "voluntary" actions occasioned the event of default underlying the acceleration, the Second Circuit concluded that the make-whole provision was triggered.[99]

The rigorous "bad-faith" standard is misplaced and imposes limitations that are nowhere to be found in *Sharon Steel.* The Second Circuit in *Sharon Steel* made no finding that the debtor deliberately chose to liquidate in order to accelerate its debt. To the contrary, the debtor plausibly construed the debt instrument to permit its piecemeal liquidation.[100] The Second Circuit's disagreement with such construction, without more, is not a finding that the debtor, with "bad faith," intentionally defaulted in order to "evade" the make-whole payment.

In fact, the District Court for the Southern District of New York in *Cash America* acknowledged that the "bad-faith" standard is derived from a "tortured reading" of *Sharon Steel.*[101] *Cash America*, like *Sharon Steel*, involved a debtor's "voluntary" actions that triggered a non-bankruptcy default for which the noteholders sought to collect a make-whole payment.[102] The court found that the make-whole provision was triggered by the debtor's "voluntary" default, even in the absence of "bad-faith" intent to "evade" the make-whole payment.[103] According to the *Cash America* court, the "bad-faith" standard "finds no support in *Sharon Steel* itself; indeed, the Second Circuit did not purport to make, and as an appellate court would have been in no position to make, a factual finding on an issue the district court did not have occasion even to reach."[104] Instead, the *Cash America* court explained, *Sharon Steel* turns on "the distinction between defaults arising from 'voluntary' actions (e.g., liquidations or spinoffs) versus 'involuntary' actions (e.g., bankruptcies)."[105] Put differently, the only criteria considered in *Sharon Steel* is whether the debtor's "voluntary" actions occasioned the default. *Sharon Steel* does not require a showing of bad-faith intent to "evade" the make-whole payment.

ii. Proper Construction of New York Law

Given that courts fail to set forth the correct standard for the first exception, a discussion of the correct standard and reconciliation of the two exceptions are necessary. Under the first exception, "prepayment consideration may be awarded upon a finding that the [debtor] defaulted intentionally in order to avoid a prepayment penalty, trigger acceleration, and repay the debt."[106] This is so "[e]ven in the absence of an express agreement"—this is an exception as a matter of law.[107] This exception protects lenders by triggering the make-whole provision if the debtor's default is "voluntary," rather than "involuntary."[108] This distinction was drawn by the court in *South Side*.[109]

In *South Side*, the court was faced with whether to enforce a make-whole provision after a lender accelerated the underlying debt and commenced a foreclosure.[110] According to the court, if "the 'accelerated payment' results from the *lender's election* to bring the foreclosure action and not the [debtor's] *voluntary* prepayment," the make-whole provision is not triggered.[111] By commencing a foreclosure, the court reasoned, the lender left the debtor with no choice but to default—far from "voluntary."[112] In fact, the debtor invoked section 1124 to reinstate the debt, underscoring the "involuntary" nature of the debtor's default.[113] If, on the other hand, the debtor's default was "voluntary"—i.e., the lender did not "force" the "involuntary" default—the make-whole provision would have been triggered.[114]

The exception for "clear and unambiguous" provisions calling for a make-whole payment in all circumstances of early repayment (the second exception), however, provides lenders with *additional* protection, in *addition* to the protection *already* provided under the first exception.[115] As explained by the *South Side* court:

> Parties may agree to an 'evasion clause' designed to provide *additional* protection to the lender in the event of this kind of intentional default . . . For example, the parties may agree that a borrower's repayment of the debt after acceleration, or in the context of a foreclosure proceeding, will be deemed an evasion of the parties' prepayment agreement and the borrower will be required to pay prepayment consideration or an equivalent amount.[116]

According to the court, "[c]lauses of this nature provide *additional* protection to the lender because when a borrower tenders payment in such circumstances, the lender does not have to address the borrower's intent."[117] Given that the second exception provides "additional" protection to that already provided under the first exception, satisfying the second exception does nothing more than relieve lenders of the costs, risks, and uncertainty in proving that a debtor's default is "voluntary."[118] By negotiating a clear and unambiguous provision calling for a make-whole payment in *all* circumstances of early repayment, lenders can rest assured that the make-whole provision will be triggered, even if the debtor's default is "involuntary."[119] Absent such provision, lenders are entitled to a make-whole payment if and only if they can show that the debtor's default is "voluntary," a showing that is often difficult and costly to make.

The second exception's standard for a "clear and unambiguous" provision that triggers the make-whole provision in all circumstances, including a debtor's "involuntary" default, is consistent with rudimentary principles of law. The "rule of explicitness" applies to provisions that contravene public policy.[120] As the Third Circuit explained in *EFH*, it is contrary to public policy to allow lenders to "force" an "involuntary" default and "pile on" by collecting a make-whole payment.[121] Accordingly, it makes sense to put the onus on the lenders to make such unfair intentions "clear and unambiguous."

The inquiry into the "voluntariness" of the default is consistent with *Northwestern*, the very authority relied upon by *Momentive* and acknowledged by *EFH*.[122] As discussed in section II.A.1 of this article, in *Northwestern*, a debtor defaulted after losing its main tenant, and the lender commenced a foreclosure and sought to "pile on" by collecting a make-whole payment.[123] In essence, the *Northwestern* court analyzed whether the debtor's default was "voluntary" or "involuntary" and found that "the cause for [the debtor's] default in mortgage payments appears related to nonpayment of rent by its sole tenant."[124] Had the facts shown that the debtor's default was a "ploy," however, the default would have been "voluntary."[125] Given that the first exception was not satisfied, the lender was left with the second exception's standard, requiring a "clear and unambiguous" provision calling for a make-whole payment in *all* circumstances of early repayment.[126] Employing a stringent application of the "rule of explicitness," the *Northwestern* court set forth a rigid standard of specificity for the second exception:

> In the event of a prepayment of the entire mortgage after a *default* and acceleration, the premium must be paid. In light of the above outlined history and examples of premium collection clauses, the language here does no more than anticipate and thwart any attempt by a [debtor] to intentionally trigger acceleration in order to secure the benefits of prepayment in a favorable market while at the same time avoiding the bargained-for premium.
>
> . . .
>
> Significantly, the subject *clause eliminates the need to prove* that prepayment after acceleration is an intentional avoidance of the premium, as prepayment after acceleration is "deemed" voluntary and an avoidance. The clause does not, however, contain language indicating prepayment application in *foreclosure*, *redemption* or any other payment. If the word "prepayment" in the subject clause was intended to include "redemption" in the context of *foreclosure*, it would be expressly included, as was done in the aforementioned examples.[127]

According to the *Northwestern* court, a provision calling for a make-whole payment "after a *default* and *acceleration*," without more, is not sufficiently "clear and unambiguous" to call for a make-whole payment in *all* circumstances, such as after *foreclosure*.[128] Had the lender negotiated the sufficiently "clear and unambiguous" provision demanded by the second exception, the lender would have been awarded a make-whole payment without the need to bear the costs, risks, and uncertainty produced by relying on the first exception.[129] In short, *Northwestern* sets forth not only the basic standard for the second exception, but also the standard of specificity under such exception.[130]

The focus on the "voluntariness" of the debtor's default is consistent with *NML Capital*, the very authority relied upon by *EFH*.[131] Recall, in *NML*

Capital, the court was faced with whether a debtor's interest payment obligations survived acceleration triggered by the debtor's default.[132] Because the debtor could have satisfied such obligations by simply raising taxes, the debtor's default was "voluntary."[133] The actual holding of *NML Capital*, however, is based on the debt instrument's "clear and unambiguous" provision dictating that the interest payment obligations remain intact "until the principal is paid," irrespective of the "voluntariness."[134] By negotiating such provision, the noteholders were relieved of the burden of showing that the debtor could have satisfied the interest payment obligations by raising taxes.

The inquiry into the "voluntariness" of the default is consistent with the "predominant rationale" of the parties. In drafting make-whole provisions, debtors and lenders painstakingly negotiate timetables to quantify make-whole payments. It defies logic to suggest that lenders and debtors intended for make-whole provisions to disappear on the happenstance of bankruptcy.[135] If, on the other hand, lenders negotiate automatic acceleration provisions "to coerce immediate repayment of a debt," such "actions establish that it preferred . . . accelerated payment," as opposed to payments over time,[136] and preferred to eliminate the risk of the automatic stay prohibiting the issuance of acceleration notices.[137] But it does not follow that the effect of such automatic acceleration is so rigid so as to preclude an analysis of the "voluntariness" of the debtor's default—this would incentivize debtors to employ evasion tactics and reward lenders for "forcing" defaults.[138]

An objective standard turning on the "voluntariness" of a default is practical. The misplaced "bad-faith" standard calls for a subjective analysis of a debtor's state of mind, intention, and purpose.[139] Given the "inherent difficulty [in] deciphering the 'intent' of a [debtor]," especially a corporate debtor, evidence establishing such "evasion" is "rarely" available.[140] And the "bad faith" standard fails to recognize that the freedom to enter into contracts comes with the concomitant freedom to breach them as well.[141] Unlike tort law, which is retributive, contract law seeks to place parties on the same footing had the contract been honored[142] and does not consider whether a breach is deliberate or intentional.[143]

iii. Standard Derived from the Proper Construction of New York Law is Consistent with the Bankruptcy Code

The standard derived from the proper construction of New York law produces an analysis that is consistent with applicable Bankruptcy Code provisions, including sections 1123 and 1124. As a practical matter, automatic acceleration triggered by a debtor's bankruptcy default, without more, does not make the default "involuntary." In bankruptcy, automatic acceleration is, in essence, a "conditional right of the lender."[144] As the Seventh Circuit explained:

> [A]t least in a Chapter 11 proceeding, acceleration appears to be a *conditional right of the lender* subject to being undone by the cure provisions of sections 1123(a)(5)(G) and 1124. Section 1124(2) of the Bankruptcy Code expressly recognizes that a debtor pursuant to a Chapter 11 plan may *reverse the ac-*

celeration of an obligation caused by his default . . .[145]

Notably, section 1124(2)(B) may be invoked only by debtors, not lenders.[146] Because the Bankruptcy Code is devoid of a provision that bestows upon lenders the authority to "deaccelerate" or undo acceleration, the option to control the fate of the debt is in the debtor's hands.[147] Given that debtors have the option to "reverse acceleration," a debtor's bankruptcy default and its resulting automatic acceleration, without more, is not "involuntary."[148] To be "involuntary," a debtor's bankruptcy default must be coupled with either (1) the debtor's demonstrated inability to "repay" or otherwise "cure" under sections 1123 and 1124;[149] or (2) overt, affirmative action by lenders to "force" early repayment so as to deprive the debtor of any option.[150]

This framework is consistent with the outcomes in *EFH* and *Momentive*, both of which impliedly turn on the "voluntariness" of the debtor's default, not the redemption-prepayment dichotomy or "rule of explicitness." In *EFH*, the debtor was presumed solvent and, therefore, in a position to repay or otherwise "deaccelerate" the debt.[151] For that matter, the *EFH* decision is riddled with references to the debtor's (1) numerous pre-bankruptcy attempts to "refinance" the debt at lower interest rates, which refinancing would have triggered the make-whole provision; and (2) apparent strategy to instead file for bankruptcy relief, refinance the debt in bankruptcy, and blame the automatic acceleration provision as a reason to avoid the make-whole provision.[152] This, the Third Circuit in *EFH* described, is the functional equivalent of an "optional redemption."[153] In *Momentive*, on the other hand, it was undisputed that the debtor was insolvent and, therefore, unable to repay or otherwise "deaccelerate" the debt.[154] The *Momentive* court explained that the debtor had the "option" to reinstate the debt,[155] but implied that its inability to do so, evidenced by its insolvency, makes its default "involuntary."[156] True, the Third Circuit in *EFH* artfully labeled "prepayment" as distinct from "redemption," and the court in *Momentive* held that automatic acceleration operates to trump the make-whole provision.[157] But these devised analyses are nothing more than the means to achieve equitable outcomes.[158] A factual inquiry into the "voluntariness" of the default, however, eliminates the uncertainty produced by courts fashioning the means to achieve equitable outcomes and is consistent with the rare cases in which equitable considerations compel deacceleration.[159]

3. *Drafting Techniques to Address the Interplay Between Acceleration Provisions and Make-Whole Provisions*

The logical market reaction to *EFH* and *Momentive* is a push for debt instruments that clearly reflect whether automatic acceleration triggers the make-whole provision. As sophisticated parties represented by top law firms, debtors and lenders are in a position to draft debt instruments to expressly provide that acceleration is survived by the make-whole provision or, even more clear, that automatic acceleration triggered by a "bankruptcy default," distinct from "early repayment,"[160] triggers the make-whole provision.[161]

Absent a *clear* provision dictating whether a make-whole provision is triggered by a bankruptcy default, thoughtful drafting may nevertheless satisfy the "clear and explicit" standard to trigger the make-whole provision in *all* circumstances, including a bankruptcy default.[162] This section of this article recommends practical drafting techniques that preserve the vitality of make-whole provisions in the face of automatic acceleration. These techniques include distinguishing "stated maturity" from "final maturity," reflecting that lenders may pursue and "preserve" alternative remedies, and defining the purposes of the make-whole provision as providing an option for "alternative performance."

i. Distinguish "Stated Maturity" from "Final Maturity"

Distinguishing "*stated* maturity" from "*final* maturity" is one method to ensure the continued vitality of a make-whole provision upon acceleration. Consistent with the canon that the use of different terms evidences intent to afford different meanings, "stated maturity" is not interchangeable and coextensive with "final maturity."[163] In these circumstances, "final" suggests that the maturity is "movable," based on acceleration, whereas "stated maturity" is an "immovable date certain," unaffected by acceleration.[164]

This drafting technique swayed the court in *Chemtura.*[165] There, the debt instrument defined the term, "Maturity," as "the date . . . principal becomes due . . . by declaration of acceleration," and separately defined the term, "Stated Maturity," as "the *fixed* date on which the principal of such security is due and payable."[166] According to the court, the "drafters considered it appropriate to provide separate definitions" because make-whole provisions tied to a *specific* maturity date—distinct from a "movable" maturity date—survive automatic acceleration.[167] This drafting, the court explained, is adequate.[168] Citing *Chemtura*, the district court in *Momentive* recognized the "optimal strategy" of negotiating provisions to require a make-whole payment if debt is repaid prior to its *original* maturity.[169] Doing so makes it clear that as long as the *stated* or *original* maturity has not accrued, make-whole provisions survive, even in bankruptcy.[170]

ii. Preserve Alternative Remedies

As impliedly derived from the reasoning of *EFH* and expressly recognized by *Cash America*, a provision for "cumulative remedies" militates against the principle that acceleration (one remedy) operates to supersede the make-whole provision (a separate remedy).[171] Cumulative remedies provisions allow lenders to pursue and "preserve" *alternative* remedies provided under debt instruments.[172] These "alternative remedies" include both acceleration and specific performance of make-whole provisions—they are not mutually exclusive.

Recall, in *Sharon Steel*, the Second Circuit explained that if "acceleration provisions of the indentures are explicitly permissive and not exclusive of other remedies," there is "no bar . . . to [noteholders] seeking specific performance of the redemption provisions."[173] Although the default in *Sharon Steel* was a non-bankruptcy default, the cumulative remedies provision granted noteholders broad discretion to seek other remedies, such as that under the make-whole provision, even though the remedy of acceleration was triggered.[174] Following *Sharon Steel*, *Cash America* relied on a cumulative remedies provision to find that a make-whole provision was triggered in the absence of acceleration.[175] *Sharon Steel* and *Cash America* thus support allowing a make-whole claim following acceleration where the debt instrument contains a cumulative remedies provision.

iii. Define and State the Purposes of Make-Whole Provisions

To preserve the vitality of make-whole provisions in all circumstances, make-whole provisions should be defined as a means for "alternative performance" through the payment of a one-time fee or charge. Make-whole provisions purposed to liquidate claims on account of "unmatured interest" are vulnerable to opposition under both bankruptcy law and New York law.[176] If clearly defined as providing an *option* for "alternative performance," make-whole provisions can be read in tandem with counterpart provisions, including provisions that *in fact* provide for "interest."[177]

a. Unconnected to Expectations of Future Interest Income

Make-whole provisions based on forgone scheduled payments of *interest* appear to provide for the "economic equivalent" of "unmatured interest" and are, therefore, less likely to withstand scrutiny under section 502(b)(2).[178] To replicate the value of "unmatured interest," these risk-laden provisions use formulas that aggregate the remaining interest payments and adjust based on a metric that flows incrementally as time progresses and in the same direction as interest.[179] It is difficult to conceive of a rationale to explain why provisions designed to replicate claims for "unmatured interest" are not per se unenforceable.[180]

On the other hand, properly-drafted make-whole provisions, by design and effect, trigger one-time "fees" or "charges" in the form of break-up, exit, or commitment fees, purposed to compensate for the losses caused by the *premature termination*, independent of the expected interest payments.[181] The expected losses caused by "alternative performance" in the form of "premature termination" (vis-à-vis "early repayment") are the product of (1) the resulting need to reinvest the debt proceeds—i.e., the injury caused by the requirement, at the time of the early repayment, that the finite capital be put back to work through the balance of the term at potentially lower rates of return;[182] (2) the deprivation of the bargain the lender could have realized by loaning the same funds to *another* debtor that did not prematurely terminate the debt instrument;[183] and (3) the possibility that, at the time of the early repayment, the debt proceeds cannot be reinvested at the same rate.[184]

Make-whole provisions should be drafted as "unconnected to any expected damages" on account of future interest payments.[185] Consider, for example, a make-whole provision that provides for a *fixed* premium that decreases in linear increments each year of the remaining term—effectively compensating lenders for their funding commitments through the balance of the bargained-for term.[186] Consider, as another example, a make-whole provision that adjusts based on the rates available *at the time of early repay-*

ment—impossible to predict with certainty at the time of entry into the debt instrument. If, during the time of *early repayment*, market rates exceed a predetermined threshold, the make-whole premium would decrease to account for the improved environment in which to reinvest the debt proceeds; whereas the make-whole premium would increase if market rates fall below the predetermined threshold.[187] Accordingly, debt instruments must clearly define make-whole provisions as the means by which to exercise an *option* for early repayment.

b. Operate in Tandem with Default Interest Provisions

In addition to increased vulnerability to attack as providing for "unmatured interest," make-whole provisions directly connected to forgone interest are vulnerable to arguments that they double count damages already captured by default interest provisions—i.e., as providing for a "duplicative recovery."[188] Commonly found in debt instruments, default interest provisions provide that, upon an event of default, interest at an elevated rate accrues on the accelerated principal, the accrued and unpaid interest, and the make-whole claim.

By providing for "interest" on the very same principal, improperly-drafted make-whole provisions remedy the very same harm remedied by default interest provisions and, therefore, produce the windfall of a double recovery. It defies logic to award lenders interest on their principal and then pile on additional damages in the form of a make-whole claim for not receiving interest on the very same principal.

This windfall of a double recovery for the very same harm is not permitted. Under New York law, liquidated damages and actual damages are mutually exclusive remedies.[189] Default interest provisions compensate for *future interest* and therefore measure "actual" damages. Improperly-drafted make-whole provisions simply "liquidate" claims for *future interest*—the very same harm compensated through default interest provisions.[190] Provisions that remedy the same harm are incompatible and cannot coexist.[191] Even from a liquidated damages standpoint, a make-whole provision that produces a double recovery defies the principle that liquidated damages provisions must reasonably approximate anticipated losses.[192] In conclusion, distinguishing the disparate economic functions of make-whole provisions and default interest provisions is important.[193]

A make-whole provision in the form of a one-time "fee" or "charge" to compensate for *early termination*, on the other hand, may be read in tandem with default interest provisions, with each compensating for a distinct purpose—i.e., "early termination" and "interest," respectively.[194] In these circumstances, the make-whole premium is the bargained-for measure of damages caused by "premature termination," and the default interest accrues when the principal, interest, and make-whole premium are delinquent—each of which is a separate remedy that addresses a *separate* harm.[195]

Drafting a make-whole provision in the form of a one-time fee or charge is not the only way to avoid double counting issues. Even if based on future forgone interest, a make-whole provision may nevertheless be read in tandem with the default interest provision if the make-whole formula deducts the hypothetical reinvestment returns from the discounted value of the aggregate remaining interest payments.[196] This drafting makes clear that the make-whole formula captures only the *excess* income over and above the returns of a hypothetical reinvestment.[197] Specifically, the default rate applies only to the delinquent "excess interest," not the hypothetical reinvested amount.[198] Accordingly, make-whole provisions that aggregate all remaining interest payments may withstand scrutiny if they recognize the returns derived from a hypothetical reinvestment.[199]

It is clear that debt instruments should reflect make-whole provisions and default interest provisions as remedying separate, distinct harms. To underscore these independent contractual components, debt instruments should distinguish (1) the make-whole provision as providing for a "fee" or "charge," like a break-up or exit fee, for exercising the option for *premature termination*;[200] and (2) the default interest provision as designed to remedy the debtor's failure to pay the delinquent principal, interest, and make-whole premium. Such drafting techniques manifest intent that the provisions operate in tandem to compensate for two separate, distinct injuries.[201]

B. Whether the Make-Whole Provision is Enforceable Under State Law

Pursuant to section 502(b)(1), courts determine whether make-whole provisions are enforceable under state law.[202] Under New York law, which is applicable under most debt instruments, make-whole provisions are analyzed as liquidated damages provisions.[203] This section of this article sets forth the liquidated damages analysis applicable to make-whole provisions.

Courts favor freedom of contract and, therefore, enforce liquidated damages provisions, such as make-whole provisions,[204] creating "an emerging presumption against interpreting liquidated damages clauses as penalty clauses."[205] As one court noted:

> Earlier cases tended to . . . find[] a presumption, in close cases, [in favor of] 'a penalty rather than liquidated damages.' The balance has now shifted towards freedom of contract, as it has become increasingly difficult to justify the peculiar historical distinction between liquidated damages and penalties. Today, the trend favors freedom of contract through the enforcement of stipulated damage provisions so long as they do not clearly disregard the principle of compensation.[206]

In short, make-whole provisions are "not to be interfered with absent some *persuasive justification*,"[207] such as "fraud, exploitive over-reaching or unconscionable conduct."[208]

Liquidated damages provisions are enforceable (1) if actual damages are difficult to quantify; and (2) if the payment stipulated is not "plainly disproportionate" to the possible loss.[209] Liquidated damages provisions are analyzed based on the circumstances existing at the time of the agreement, not at the time of the breach.[210]

1. ***Difficult to Quantify Actual Damages Produced by Early Repayment***

Actual damages caused by early repayments are difficult to quantify.[211] As a general matter, actual damages caused by early repayments are (1) the loss of bargained-for income over the life of the debt; and (2) the costs and expenses of procuring a substitute borrower.[212] Losses caused by early repayments are derived from speculative variables that rest on future events that cannot be quantified with certainty at the time of entry into the debt instrument.

Courts recognize that lenders face "the cost and expense of procuring substitute . . . borrowers and the attendant delay in lending sums."[213] These "damages for costs in relending" are difficult to quantify because they rest on speculative factors that extend far into the future—*e.g.*, the potential or consequential costs and expenses of securing a substitute borrower, and the reinvestment opportunities and market rates available at the time of early repayment.[214] Consider, for example, the difficulty of determining the mitigation offset for the income that lenders receive from reinvesting the debt proceeds in comparable investments.[215] As one court described it:

> The loss of that future interest would ordinarily be offset by the reinvestment of the prepaid proceeds in an alternative investment. However, the measurement difficulty comes from determining the selection of an alternative investment. If the perceived risk at issuance of the debt was low, may the lender quantify its reinvestment alternatives by looking at alternatives that have low risk? What if the lender invested in an industry for diversification purposes and offered a lower rate as a result? Would the reinvestment rate, at a low risk, necessarily be in the same industry? How do you measure perceived risks at the date of issuance and the date of prepayment?[216]

The unpredictable reinvestment opportunities, market rates, and mitigation factors underscore that damages caused by early repayments are difficult to quantify.[217] As discussed in section II.A.3.iii of this article, it is these very damages (not lost income) for which make-whole provisions are designed to compensate.[218]

It is clear that the anticipated loss of bargained-for income and costs of relending produced by early repayment are difficult to quantify at the time of entry into the debt instrument,[219] and a debtor cannot have the benefit of hindsight by relying on the actual damages disparity to argue that the make-whole provision is unenforceable.[220]

2. ***Not Disproportionate to the Possible Loss***

To determine whether a make-whole claim is "plainly disproportionate" to the possible loss, courts examine (1) whether the make-whole payment is calculated so that the lenders will receive their bargained-for income; and (2) whether the make-whole provision is the product of arms-length negotiations between represented, sophisticated parties.[221] The standard is whether the make-whole claim is "plainly disproportionate" to the amount of the *possible loss*, not to the amount of the debt.[222]

As a practical matter, the analysis turns on whether the make-whole claim is a true estimation of the bargained-for income.[223] The formula to calculate the make-whole claim should (1) discount to present value[224] the bargained-for income at a discount rate equal to or in excess of the rate on a comparable U.S. treasury security;[225] and (2) offset the income produced by reinvesting the debt proceeds in comparable debt.[226] Nevertheless, a formula with this level of quantitative precision is not absolutely necessary—so long as the make-whole provision is not designed to produce a "penalty" claim that is "plainly or grossly disproportionate to foreseeable probable losses."[227]

Likewise, whether the make-whole claim is the product of an arms-length transaction between sophisticated parties is determined by means of a factual inquiry.[228] Because debtors and lenders privy to debt instruments are usually sophisticated parties, courts do not hesitate to find that the underlying transaction, including the make-whole provision, was negotiated at arms-length, even if the debtor was distressed at the time of the negotiations.[229]

Because actual damages caused by early repayments are difficult to quantify, and because make-whole claims are rarely "disproportionate" to the possible loss, courts applying New York law enforce make-whole provisions,[230] even where doing so may impair a debtor's ability to reorganize.[231] In the exceptional case a make-whole provision is found to be unenforceable from a liquidated damages standpoint, the court possesses discretion to modify such provision to conform with New York law, including through reduction or reformation.[232]

III. BANKRUPTCY-LAW ANALYSIS

This half of this article discusses the second prong—the bankruptcy-law analysis. After concluding that a make-whole provision is enforceable under applicable state law, courts turn to whether the resulting make-whole claim is enforceable under the different, and generally more restrictive, requirements of the Bankruptcy Code.[233] As set forth by the Supreme Court, "entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code."[234] The "qualifying or contrary provisions of the Bankruptcy Code" applicable to make-whole claims include sections 502 and 506.[235]

Statutory provisions governing the allowance and disallowance of claims are necessary starting points. Section 101(5)(A) defines a "claim" as a "right to payment." In turn, section 502(a) provides that "a claim or interest . . . is deemed allowed," and section 502(b) goes on to provide that, upon objection, courts shall determine the amount of the "claim," except to the extent an exception enumerated is applicable.[236] The relevant exception to make-whole claims is section 502(b)(2), which disallows claims for "unmatured interest."

Further, if the debt is secured, section 506 adds another layer of analysis.[237] Section 506(a)(1) provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest" in such property. In turn, section 506(b) provides that to "*the extent that* an allowed secured claim is [over]secured . . . there shall be allowed to the holder of such claim, interest . . . and any reasonable fees, costs, or charges provided for under the agreement or state statute under which such claim arose." In short, section 506(b) provides that an *oversecured* creditor is entitled to "interest" *and* "fees, costs, or charges" in the form of a secured claim, up to the value of the collateral.

Given that the allowance of make-whole claims in bankruptcy implicates sections 502 and 506, it is necessary to construe the meaning and scope of such provisions. Section III.A. examines whether make-whole claims are proxies for "unmatured interest" claims disallowed under section 502(b)(2). Section III.B discusses the conditions that must be satisfied for make-whole claims to be allowed in the form of secured claims under section 506(b). Finally, section III.C analyzes whether make-whole claims that are ineligible for section 506(b)'s preferential treatment are nevertheless allowed as unsecured claims.

A. Whether Make-Whole Claims are Proxies for "Unmatured Interest" Claims

Under section 502(b), the amount of a "claim" should be determined "as of the date of the filing of the petition." In turn, section 502(b)(2) disallows claims for "unmatured interest," which is not defined in the Bankruptcy Code. Courts define "unmatured interest" as interest that is "*not yet due and payable* at the time of a bankruptcy filing."[238] Accordingly, claims on account of "interest" that has not accrued *as of* the petition date are disallowed under section 502(b)(2).[239]

The definition of "unmatured interest" encompasses parts of debt issued at an original discount in a debt-for-cash exchange for the full face amount of that debt—i.e., original interest discount (OID), calculated as the difference between the value of the proceeds of the debt at the time of its issuance and the face amount of the same debt at its maturity.[240] For example, if a debtor issues debt with a face value of $1,000 for an issue price of $900, the debt's OID is $100.[241] Like "interest," OID is a means to compensate a lender for the use and forbearance of the funds.[242] Despite materializing only at the maturity date of the debt, OID is, in essence, "interest."[243] Legislative history shows that Congress recognized this form of "disguised interest" and, accordingly, enacted section 502(b)(2) to disallow OID claims.[244]

As a practical matter, make-whole claims appear analogous to OID—the only distinction is that the compensation to the lender for the use and forbearance of the funds (make-whole claim) is *added* to the face amount of the debt when the make-whole provision is triggered *after* issuance.[245] In essence, make-whole claims appear to be on account of the value of the *future* scheduled interest payments—vis-à-vis interest that has not "been earned on *the date of bankruptcy.*"[246] Stated differently, make-whole claims appear to be a form of "disguised interest" or "interest accrual."[247] In practice, however, this is the exception, not the rule.[248]

1. *Economic Substance of Make-Whole Claims*

To assess whether a claim is on account of "unmatured interest" under section 502(b)(2), courts may look past the "form" of the claim to its "economic substance."[249] Under this reasoning, the "economic" purpose of the make-whole provision is to make lenders whole for any interest payments they will not receive. Certain courts, however, refuse to "base their decisions on economic theories of interest."[250] The competing theories employed by courts in applying section 502(b)(2) may impact the enforceability of make-whole claims in bankruptcy.

In *Mims*,[251] the court looked to the "economic substance" of various charges under a debt instrument to identify what it described as "disguised interest."[252] Applying state law on "conceal[ed] usury," the court examined the economic substance of each charge to determine whether each is a "bona fide" fee or "disguised interest" (vis-à-vis "merely a cloak to conceal usury") and ultimately found most charges to be "disguised interest," disallowed under section 502(b)(2).[253] The court employed a "spreading analysis" to "spread the [disguised] interest over the full term of the loan" and invoked section 502(b)(2) to disallow as "unmatured interest" the "disguised interest" that was not matured "as of the petition date."[254] The court explained:

> In the case at bar, Defendants *frontloaded* a number of fees associated with the Loan, fees which this Court has ruled within this Opinion to be disguised interest. It was the intent of the parties, and the law of Texas, that these fees be spread over the contracted-for three year term, which if they had been so spread would have kept the interest rate below the maximum eighteen percent. Thus, at the time of [the debtor] filing bankruptcy, Defendants had charged [the debtor] fees which it *not yet earned.* This *frontloaded disguised interest*, if allowed to be retained by Defendants, would allow Defendants to "collect . . . unearned interest in contravention of the policy underlying § 502(b)." Therefore, this Court will determine the total amount of matured interest *as of the date of bankruptcy*, thus disallowing those fees judicially determined to be disguised interest as unmatured interest.[255]

In effect, the court disallowed the claim under section 502(b)(2) by looking to its "economic substance."[256] Under this reasoning, the "economic substance" of make-whole claims is identical to that for OID, triggering section 502(b)(2).

Certain courts avoid inquiries into "economic theories of interest." Consider, for example, *Thrifty Oil Co. v. Bank of America National Trust & Savings Ass'n.*[257] There, the debtor and the lender entered into swaps and a term loan that, "viewed together, formed an 'integrated transaction,' designed to provide [the debtor] with fixed-rate financing."[258] This structure, according to the debtor, "transformed the *floating*-rate term loan into the economic equivalent of a *fixed*-rate loan, thereby converting the periodic swap payments into *interest*," the "unmatured" portion of which is disallowable under section 502(b)(2).[259] To reject the debtor's argument, the court explained that "[w]here the specific characteristics of a transaction create uncertainty as to whether a claim includes unmatured interest, federal courts do not base their decisions on economic theories of interest."[260]

As demonstrated in the following section of this article, most courts faced with the allowability of make-whole claims in bankruptcy do not rely on "economic theories of interest."

2. *Reluctance to Treat Make-Whole Claims as "Unmatured Interest" Claims*

According to most courts, make-whole claims are a form of "liquidated damages" because a bankruptcy default accelerates all debts, including those "unmatured."[261] Under this reasoning, the debts that are accelerated are those on account of damages suffered when the lenders' "contract rights" were frustrated.[262] In construing make-whole provisions as liquidated damages provisions, courts generally hold that automatic acceleration effectively morphs "*unmatured* interest" into "*matured* interest."[263]

Only a minority of courts hold that make-whole claims are disguised "unmatured interest" claims.[264] A make-whole provision, according to one court,

> serves the purpose of interest in economic reality because it accelerates all of the interest on the loan yet to be accrued on the note so that it is immediately due and owing, while deducting what the lender would have been able to earn by investing in risk-free securities. It is a bargained for feature of the loan that compensates the lender for possible changes in the interest rate in the future, and is thus part of the price of the money loaned now in terms of money to be paid back in the future. Both OID and [make-whole] premiums 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 [make-whole claim].[265]

Even after acknowledging the "false dichotomy" between "liquidated damages" and "unmatured interest," the court concluded that "the *timing* of when a [make-whole provision] takes effect" is dispositive.[266] Because "liquidated damages . . . fully mature at the time of the breach," the court refused to interpret section 502(b)(2) to "apply to a liquidated damages provision," such as a make-whole provision, even where the claims are, in essence, on account of "unmatured interest."[267]

Consistent with most courts, section 502(b)(2)'s companion provisions do not treat make-whole claims as proxies for "interest." As discussed in section III.B.1 of this article, section 506(b) is applied to treat a make-whole premium as a type of "charge," not "interest." Under elementary rules of statutory interpretation, the use of two different terms in the Bankruptcy Code is evidence of intent to ascribe different meanings.[268] It defies logic to treat make-whole claims as "charges" for purposes of section 506(b), but treat them as "interest" for purposes of section 502(b)(2).[269]

3. *Effect of Automatic Acceleration Triggered by Bankruptcy Default*

According to section 502(b)(2)'s legislative history, whether interest has "matured" must be determined "without reference to any *ipso facto* or bankruptcy clause creating the claim."[270] An automatic acceleration provision triggered by a bankruptcy default is an ipso facto provision.[271] In determining whether "interest" has "matured" "without reference to the automatic acceleration provision," logic compels the conclusion that a make-whole claim triggered by a bankruptcy default—i.e., claim for "future interest"—is unmatured "as of the petition date."[272]

While certain courts employ a categorical prohibition against enforcing ipso facto provisions,[273] section 365(e)(1)[274] limits this effect to ipso facto provisions that modify rights of a debtor under an "executory contract."[275] The term "executory contract" is not defined in the Bankruptcy Code, but legislative history references with approval the "Countryman definition."[276] Under the "Countryman definition," a contract is "executory" if "the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."[277]

If the debt has been fully funded, the debt instrument does not fall within the definition of an "executory contract."[278] Lenders satisfied all of their obligations by funding the debt, and the debtor already enjoyed the benefits of the debt instrument.[279] The remaining duties of an indenture trustee or administrative agent are merely incidental duties, breaches of which do not rise to the level of a material breach.[280] Under the Countryman definition, debt instruments for debt that has been fully funded do not fall within the definition of an "executory contracts."[281]

If, however, the debt has not been fully funded, the debt instrument may be treated as an "executory contract." Pursuant to section 365(e)(2), section 365(e)(1) does not apply to debt instruments committing to provide credit in the future.[282] Congress recognized that "the cost of *future credit* depends on the probability of repayment, and bankruptcy reveals that the risk of nonpayment is higher than the [lenders] likely assumed."[283] Accordingly, debt instruments of debt that has not been *fully* funded are likely treated as "executory contracts."

To reduce the probability of a finding that an automatic acceleration provision constitutes an ipso facto provision, acceleration provisions should specify "the consequences of the *acceleration of the debt*," disconnected from the circumstances that trigger acceleration. Acceleration provisions tethered to the "consequences of a debtor's *bankruptcy*" more closely resemble ipso facto provisions. Isolating the automatic acceleration provision from a bankruptcy default decreases vulnerability to arguments that the provision is an unenforceable ipso facto provision such that any make-whole claim is "unmatured" as of the petition date.

The optimal strategy to avoiding the Bankruptcy Code implications of ipso facto provisions, however, is to show that the acceleration provision was trigged by a *pre*petition default—not a bankruptcy default.[284] An automatic acceleration provision triggered by a bankruptcy default is a quintessential ipso facto provision.[285] If the make-whole claim was triggered by acceleration that occurred pre-bankruptcy, any finding by the court that the ipso facto provision is not to be given effect on the petition date would be irrelevant for purposes of allowing the make-whole claim because the make-whole claim was accelerated *before* the petition date.[286]

In conclusion, make-whole claims appear to be on account of "unmatured interest" and simply masquerade as "liquidated damages."[287] Under this reasoning, artfully labeling a make-whole provision as a "liquidated damages" provision should not be grounds to circumvent Congress's unequivocal dictates under section 502(b)(2).[288] Nonetheless, courts do not usually rely on section 502(b)(2) to disallow make-whole claims.

B. Make-Whole Claims in the Form of Secured Claims

Section 506(b), in certain circumstances, supersedes section 502(b)(2).[289] As discussed above, section 506(b) provides that an oversecured creditor is entitled to "interest" and "any reasonable fees, costs, or other charges provided for under the agreement or State statute under which such claim arose," up to the value of the collateral.[290] In effect, the secured creditor is entitled to the make-whole claim in the form of a secured claim that is not subject to dilution.

At the outset of this analysis, it must be noted that whether section 506(b) applies to make-whole claims triggered by a bankruptcy default is an open question. Specifically, the temporal scope of section 506(b) is not entirely clear. According to its plain meaning, section 506(b) applies to secured claims generally, irrespective of whether such claim accrued prepetition or postpetition. Courts analyzing section 506(b), however, categorize claims into three categories: (1) claims accrued prior to the bankruptcy filing (prepetition claims); (2) claims accrued after the bankruptcy filing but prior to the effective date of a plan (pendency claims); and (3) claims to accrue under the terms of a reorganization plan (plan claims).[291] Courts uniformly agree that section 506(b) does not govern "plan claims."[292] But, prepetition claims, according to the majority of courts, are not governed by section 506(b).[293] Make-whole claims trigged by a bankruptcy default are treated as prepetition claims, predicated on the principle that the right to payment has already been triggered. If a court takes the position that section 506(b) does not govern make-whole claims triggered by a bankruptcy default, this part of the analysis is moot.[294] This article assumes that section 506(b) governs.

Section 506(b) issues materialize most frequently in cases concerning a secured creditor's attorneys "fees." Because attorney's "fees" are listed alongside "costs" and "charges" within section 506(b), the analysis for attorneys "fees" is sufficiently analogous to apply to make-whole claims.[295] Accordingly, this section of this article refers to "claims" generally, not limited to make-whole claims.

1. *"Reasonableness" Standard Under Section 506(b)*

Most courts treat make-whole claims as liquidated damages.[296] As liquidated damages, make-whole claims are analyzed as section 506(b)'s "fees" or "charges," not "interest,"[297] and are, therefore, subject to the "reasonableness" standard.[298] As such, courts allow make-whole claims of *oversecured* creditors if such claims are "reasonable."[299] The minority of courts that equate make-whole claims to "interest," however, do not analyze such claims under section 506(b)'s "reasonableness" standard.[300]

In defining "reasonable," courts generally agree that the principal purpose of a make-whole provision is to liquidate damages and, therefore, employ a state-law analysis as a starting point.[301] The remainder of the analysis, however, is not uniform.[302] Courts are split on whether the measure of "reasonableness" requires an additional, federal analysis, unrestrained by the state-law analysis.[303] Certain courts allow claims that approximate *actual* damages and, therefore, employ an analysis similar to the state-law analysis.[304] Other courts, however, employ a similar analysis but without regard to whether the claim ultimately overcompensates lenders—the "federal standard."[305]

The "federal standard" to define "reasonable" is not clear, and courts apply many different analyses.[306] In analyzing whether a claim is "reasonable," courts rely on rudimentary bankruptcy policies and underscore that section 506(b) is not intended as a carte blanche for secured creditors to exhaust the estate.[307] As one court explained, "[a]lthough a bankruptcy court must recognize the [lender's] contractual right to charge fees and expenses relating to the loan to the [debtor's] account, the bankruptcy court has the authority under section 506(b) to scrutinize the [lender's] 'enforcement and preservation' strategy in the context of the debtor's legitimate right to take advantage of the provisions of the Bankruptcy Code."[308] This is described as an "I know it when I see it" standard. For example, the Second Circuit invalidated a liquidated damages provision because the debtor proved that no actual damages were suffered by the lender—in effect, shifting to the debtor the burden of proving that the claim is not "reasonable."[309] One court described it as a "safety valve" that is used cautiously and sparingly—applicable only if the claims surviving the state-law analysis are "so large and so unjust to the estate and its creditors."[310] Employing a more quantitative analysis, on the other hand, certain courts simply compare the claim to the percentage of the outstanding debt to determine whether it is a "penalty."[311] Accordingly, courts employing the "federal standard" under section 506(b) possess discretion to fashion remedies, usually to avoid inequitable outcomes.

It is clear that the starting point under section 506(b) is the state-law analysis.[312] Because make-whole claims oftentimes do not pass muster under the state-law analysis, courts are rarely presented with the opportunity to define "reasonable" under the distinct "federal standard." Cases shedding light on "reasonable" under section 506(b) are few and far between.

C. <u>Reconciling Section 502 and Section 506</u>

Read together, section 502(b)(1)'s allowance of claims that are enforceable, and section 506(b)'s provision of secured priority for "fees" and "charges" may imply that claims failing to pass muster under section 506(b) are nevertheless allowed as *un*secured claims.[313] In actuality, however, this is a murky issue.[314] According to the reasoning of most courts, section 506(b) does nothing more than define *additional* rights afforded to secured creditors, and the plain language of section 502(b) provides for the allowance or disallowance of *un*secured claims.[315] Under this reasoning, the components of claims that do not qualify for section 506(b)'s preferential treatment are nevertheless allowed as *un*secured claims. According to the reasoning other courts, on the other hand, these components of claims are disallowed, including as *un*secured claims.[316] This section discusses whether section 506(b) is exclusive such that claims failing its requirements are nonetheless allowed as *un*secured claims.[317]

1. *Background on the Interplay Between Section 502 and Section 506*

Whether section 506(b) operates as a per se disallowance provision or simply relegates claims to *un*secured claims is not clear. This compels an analysis of the interplay between section 502 and section 506(b). The two seminal cases that apparently shed light on such interplay are *United Savings Ass'n v. Timbers of Inwood Forest Assocs.* ("*Timbers*")[318] and *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*[319]

In *Timbers*, the Supreme Court considered whether undersecured creditors are entitled to adequate protection in the form of interest under section 362(d)(1) for the foreclosure delay caused by the automatic stay.[320] The Supreme Court concluded that section 506(b) has the "substantive effect of denying undersecured creditors postpetition interest on their claims," reasoning that a "security cushion" is the only source from which section 506(b) claims are payable.[321] In dicta, the Supreme Court opined that had Congress intended for undersecured creditors to recover claims for interest, it would have reflected such intent under section 506(b).[322]

Decades later, the Supreme Court in *Travelers* considered, but did not rule on, whether section 506(b) might, by negative implication, prevent everyone besides oversecured creditors from recovering "fees," "costs," or "charges."[323] In *Travelers*, the debtor argued that section 506(b) "authorizes claims for contractual attorney's fees to the extent the creditor is oversecured, but disallows such claims to the extent the creditor is either not oversecured or . . . completely unsecured."[324] Ruling on other grounds, the Supreme Court struck down a rule that limited section 506(b)'s application to fees incurred to litigate bankruptcy issues (distinct from non-bankruptcy issues).[325] Although ruling on such alternative grounds,[326] the Supreme Court analyzed section 502's language and section 101(5)(A)'s definition of "claim," and directed courts to "presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."[327]

Based on *Timbers* and the dicta in *Travelers*, with each pulling in a different direction, the interplay between section 502 and section 506(b) is murky. On the one hand, section 506(b) may be viewed as complementary to section 502 by providing preferential treatment to oversecured creditors—the relegation theory; on the other hand, section 506(b) arguably operates as a claims disallowance provision by disallowing, even in *un*secured form, claims that are not eligible for section 506(b)'s preferential treatment—the disallowance theory.

2. *Section 506(b) as Preferential Provision*

According to the relegation theory, claims that do not pass muster under section 506(b) are not allowed as secured claims, but are nevertheless allowed as *un*secured claims. Authority appears to interpret section 506(b) to provide additional rights to secured creditors, not to disallow unsecured claims.

As discussed above, *Timbers* stands for the proposition that an "equity cushion" is the only source from which section 506(b)'s "interest" is payable, and, therefore, section 506(b) has the "substantive effect" of precluding unsecured creditors from recovering interest.[328] *Timbers* and its description of section 506(b)'s "substantive effect," in isolation, implies that section 506(b) operates as a per se disallowance provision. But the Supreme Court disallowed the unsecured claim by relying on section 502(b)(2), not section 506(b).[329] Interpreting section 506(b) to divest unsecured creditors of rights would render superfluous section 502(b)(2)'s disallowance of claims for "unmatured interest."[330] Because section 502(b)(2) does not disallow make-whole claims, *Timbers*'s rationale for disallowance arguably has no application to make-whole claims.[331]

The Supreme Court's instructions to apply state law to determine the enforceability of the claim under section 502, together with the "federal standard" of "reasonable" under section 506(b), seem to establish that the purposes of section 502 and section 506 are distinct. Recall that *Travelers*, in dicta, discusses the interplay between sections 502 and 506 and arguably implies that claims that are enforceable under state law are allowed, unless *expressly* disallowed.[332] Based on the dicta in *Travelers*, the purpose of section 506 is to determine the extent to which a claim may be recovered from the value of the collateral, not to determine the *validity* of a claim. Section 506(b) addresses only secured claims and is silent on what happens to a claim that is not eligible for preferential treatment as a *secured* claim, whereas section 502 addresses the allowance or disallowance of *all* claims.[333] According to the Supreme Court's instructions to "presume that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed,"[334] the provisions are read in tandem, with section 502 as "general" and section 506 as "specific."[335] Where Congress intended to provide an exception to the general allowance provisions of section 502, it did so expressly in section 502(b), and claims disallowed under section 506 are not enumerated as one of the many exceptions in section 502(b).[336]

Under this relegation theory, it is appropriate to bifurcate, rather than disallow, claims by prioritizing as secured the components of claims eligible for section 506(b)'s preferential treatment and relegating the remainder as *un*secured, as expressly provided under section 506(a).[337] The portion of an undersecured claim, to the extent of the value of the collateral by which it is secured, constitutes a secured claim under section 506(a), and is thus entitled to the preferential treatment under section 506(b). Significantly, however, the portion of such undersecured claim that is not supported by collateral value is an unsecured claim (without the benefit of section 506(b)) and, independent of section 506(b), constitutes an unsecured claim governed by section 502(b).[338] Bifurcation is not a foreign concept—indeed, it is codified in section 506(a). The relegation theory endorses bifurcating and allowing claims that fail to pass muster under section 506(b).[339]

The conclusion that claims must be bifurcated, rather than disallowed, comports with fundamental bankruptcy principles, including the recognition of the Fifth Amendment property rights held by secured creditors and disincentivizing the use of bankruptcy as a "safe haven." Because bankruptcy does not intervene to impair the substantive rights of secured creditors on assets to which they hold a lien,[340] Congress enacted section 506(b) to favor secured creditors, not to impair rights.[341] In fact, the Bankruptcy Code is riddled with provisions manifesting Congress's intent to provide secured creditors with preferential treatment—sections 361, 363(e), 506, 507, and 1129(b)(2)(A) are among many such provisions.[342] Allowing claims of unsecured creditors, while disallowing *identical* claims of secured creditors, produces the absurd results of awarding unsecured creditors, penalizing oversecured creditors,[343] and incentivizing debtors to seek the "safe haven" of bankruptcy in order to avoid their obligations.[344] Rather than disallow claims, section 506(b) merely prevents lenders from asserting secured, preferential claims on account of unsecured or unreasonable claims.

3. *Section 506(b) as Disallowance Provision*

According to the disallowance theory, section 506(b) operates as an implicit bar on *unsecured* claims for contractual "fees," such as make-whole premiums. Under this reasoning, section 506(b) disallows the portion of the claim that is undersecured, unreasonable, or otherwise ineligible for section 506(b)'s preferential treatment. This reasoning relies principally on *Timbers* and the maxim of expressio unius est exclusio alterius (when one member of a class is mentioned, those not mentioned are excluded).[345]

According to the disallowance theory, *Timbers* dictates that section 506(b) has the "substantive effect of denying undersecured creditors postpetition interest on their claims."[346] Indeed, Justice Scalia explained: "If the Code had meant to give the undersecured creditor . . . interest on the value of his *collateral*, surely [section 506(b)] is where that disposition would have been set forth."[347] This reasoning relies on statutory construction and concludes that if Congress intended for unsecured creditors to receive "fees," it would have done so explicitly by authorizing unsecured creditors to collect "fees" under section 506(b).[348]

The disallowance theory interprets *Travelers* as carefully limited to striking down the distinction between fees incurred for litigating bankruptcy issues and fees incurred for litigating non-bankruptcy issues. Taking that interpretation to its logical conclusion, *Travelers*'s holding does not resolve the issue of whether unsecured creditors are entitled to "fees" as a general matter.[349] This finds support in the Supreme Court's decision to expressly reserve opinion regarding "whether, following the demise of the *Fobian* rule, other principles of bankruptcy law might provide an independent basis for disallowing" an unsecured creditor's claim.[350]

According to this reasoning, applying the maxim of expressio unius est exclusio alterius compels the conclusion that Congress did not intend to allow unsecured creditors to recover under section 506(b) because interpreting section 506(b) to afford all creditors recoveries for fees renders superfluous section 506(b)'s reference to oversecured creditors.[351] Indeed, the following provisions of the Bankruptcy Code show that Congress clearly expressed its intent to award fees to parties in several circumstances, and it intended not to do so for unsecured creditors:[352] section 330, which provides reasonable compensation for estate professionals; section 362(k), which provides for "actual damages, including attorneys' fees" to those injured by a violation of the automatic stay; section 503, which provides reasonable compensation for attorneys' services to the extent that such services benefited the estate; and section 523(d), which provides an award of reasonable attorneys' fees for a successful debtor in certain nondischargeability actions.[353]

Under the disallowance theory, interpreting section 506(b) as a disallowance provision is consistent with bankruptcy policy—allowing "certain unsecured creditors to recover postpetition attorney's fees at the expense of similarly situated claimants" is "inequitable" and "unfairly discriminates" because doing so "reduces the pool of assets available to all unsecured creditors pro rata."[354]

IV. CONCLUSION

This article demonstrates that the allowance of make-whole claims in bankruptcy is not entirely clear. The murky confluence of these Bankruptcy Code provisions, in conjunction with the inconsistent analyses employed by courts, compel a demanding analysis.

The *EFH* and *Cash America* line of cases add support to the allowance of make-whole claims, even outside of bankruptcy. Recall that *Cash America* allowed a make-whole claim in the absence of automatic acceleration.[355] Although *EFH* is devoid of references to *Cash America*, its line of reasoning is consistent. By allowing a make-whole claim—or, in the Third Circuit's terms, a "redemption" claim—following automatic acceleration, the Third Circuit suggested that, outside of bankruptcy, it is receptive to finding a "deemed redemption," without acceleration.[356] *EFH* and *Cash America* enhance rights to make-whole payments.

Importantly, this article's analysis is limited to cases of insolvent debtors. In cases of solvent debtors, courts generally eliminate equitable considerations and enforce debtors' contractual obligations under state law, even if the Bankruptcy Code provides relief.[357] Allowing a solvent debtor to invoke all the benefits of the Bankruptcy Code is "the opposite of equity" and would bestow upon the debtor rights to "escape the expressly-bargained-for result of its act."[358] It is not surprising that Congress codified exceptions applicable to solvent debtors.[359] As acknowledged by the Third Circuit in *EFH*, the allowance of make-whole claims in bankruptcy may turn, at least in part, on the solvency of a debtor.[360]

NOTES:

[1]See In re MPM Silicones, LLC ("Momentive I"), 2014 WL 4436335, at *12 (Bankr. S.D. N.Y. 2014) ("[U]nder the New York rule of perfect tender the borrower/issuer would be precluded from paying the debt early."), order aff'd, 531 B.R. 321 (S.D. N.Y. 2015), aff'd in part, rev'd in part and remanded, 874 F.3d 787, Bankr. L. Rep. (CCH) P 83176 (2d Cir. 2017) ("Momentive II"), cert. denied, 138 S. Ct. 2653 (2018) ("Momentive III") ("[U]nder the New York rule of perfect tender the borrower/issuer would be precluded from paying the debt early."); Northwestern Mut. Life Ins. Co. v. Uniondale Realty Associates, 11 Misc. 3d 980, 984, 816 N.Y.S.2d 831, 835 (Sup 2006) ("Northwestern") ("Under the perfect tender in time rule a mortgagor has no right to prepay a note prior to its maturity date 'in the absence of a prepayment clause in the mortgage or contrary statutory authority' and such 'rule has been settled law since the early 19th century.' "); In re Madison 92nd Street Associates LLC, 472 B.R. 189, 195, 56 Bankr. Ct. Dec. (CRR) 170 (Bankr. S.D. N.Y. 2012) ("[T]he lender has the absolute right to receive the bargained for income stream over the life of the loan."); Arthur v. Burkich, 131 A.D.2d 105, 106, 520 N.Y.S.2d 638, 639 (3d Dep't 1987).

[2]As a practical matter, a "no-call" provision memorializes the "perfect tender in time" rule. See In re Chemtura Corp., 439 B.R. 561, 596 (Bankr. S.D. N.Y. 2010) ("When a loan is redeemed before maturity or (sometimes) upon default, a make-whole provision requires a borrower to pay a premium to compensate the lender for the loss of anticipated interest that might result-as, for example, the loss that a lender might suffer if the bond were redeemed in an environment where prevailing interest rates are lower than those the parties bargained for at the time the bond was issued. Similarly, a no-call provision prohibits the borrower from prepaying the indenture obligations at all, again protecting the lender's yield."); In re South Side House, LLC, 451 B.R. 248, 55 Bankr. Ct. Dec. (CRR) 26 (Bankr. E.D. N.Y. 2011), order aff'd, Bankr. L. Rep. (CCH) P 82170, 2012 WL 273119 (E.D. N.Y. 2012) ("To protect this bargained-for yield, parties may also agree to 'no-call' provisions that expressly prohibit prepayment, or 'make-whole' provisions that provide for liquidated damages in default situations.") ("South Side I"; "South Side II", respectively).

[3]See Momentive I, 2014 WL 4436335, at *12 ("It is well settled under New York law, which is, again, the law governing these agreements, that the parties to a loan agreement, indenture or note can amend the general rule under New York law of 'perfect tender' to provide for a specific right on behalf of the borrower or issuer to prepay the debt in return for agreed consideration that compensates the lender for the cessation of the stream of interest payments running to the original maturity date of the loan.").

[4]Make-whole provisions protect lenders against the risk that debtors will refinance the notes as soon as interest rates decline. See Chemtura, 439 B.R. at 596 ("When a loan is redeemed before maturity or (sometimes) upon default, a make-whole provision requires a borrower to pay a premium to compensate the lender for the loss of anticipated interest that might result."); In re Solutia Inc., 379 B.R. 473, 488, 49 Bankr. Ct. Dec. (CRR) 38 (Bankr. S.D. N.Y. 2007) ("Among the policy reasons behind forbidding prepayment is that the mortgagee has bargained for a stream of income over a fixed period of time."); Northwestern, 11 Misc. 3d at 984–85, 816 N.Y.S.2d at 835 ("When a prepayment clause is included as part of the loan obligation, it is generally analyzed as an 'option' for alternative performance on the loan, and any premium is deemed consideration or a quid pro quo for the option."); Momentive I, 2014 WL 4436335, at *15 (explaining that "make-wholes are properly viewed as an option pursuant to which the parties have allocated the cost of prepayment between themselves"); Teachers Ins. & Annuity Ass'n of America v. Butler, 626 F. Supp. 1229, 1235

(S.D. N.Y. 1986) ("The purpose of such language is to protect a lender against a drop in market interest rates which induces the borrower to default in the early years of the loan, forcing the lender to accelerate the balance, and enabling the borrower to prepay the loan with a second loan obtained at the lower interest rate."); Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1053 (2d Cir. 1982) (explaining that "[t]he purpose of a redemption premium is to put a price upon the voluntary satisfaction of a debt before the date of maturity"); Madison 92nd St., 472 B.R. at 195 ("The prepayment premium is viewed as the price of the option exercisable by the borrower to prepay the loan and cut off the lender's income stream, and insures the lender against loss of the bargain if interest rates decline.") (citations omitted); see HSBC Bank USA, Nat. Ass'n v. Calpine Corp., 2010 WL 3835200, at *4 (S.D. N.Y. 2010) ("Parties frequently provide for damages in these situations precisely because acceleration deprives borrowers of the payment streams for which they contracted."); In re MarketXT Holdings Corp., 376 B.R. 390, 417 (Bankr. S.D. N.Y. 2007) ("Moreover, even if a riskier loan might justify a higher interest rate, a prepayment penalty is a liquidated damages clause designed to compensate a lender for costs incurred in connection with early payment on a long-term loan, resulting from the possibility that interest rates will be lower when the repaid funds are relent, or that the lender will not be able to rely on a stable flow of funds over a known period."); Matter of LHD Realty Corp., 726 F.2d 327, 330 (7th Cir. 1984) ("Among other things, a prepayment premium insures the lender against loss of his bargain if interest rates decline.").

[5]See Chemtura, 439 B.R. at 600 ("Determining whether the Make-Whole and No-Call Provisions of the two series of notes would support claims would require at least two layers of analysis."); Ogle v. Fidelity & Deposit Co. of Maryland, 586 F.3d 143, 147, 52 Bankr. Ct. Dec. (CRR) 89, 62 Collier Bankr. Cas. 2d (MB) 1247, Bankr. L. Rep. (CCH) P 81617 (2d Cir. 2009) ("[C]laims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed."); Momentive I, 2014 WL 4436335, at *12 ("It is well established that when considering the allowance of a claim in a bankruptcy case the court first considers whether the claim would be valid under applicable nonbankruptcy law, and then, second, if the claim is valid under applicable nonbankruptcy law, whether there is any limitation on or provision for disallowance of the claim under the Bankruptcy Code.").

[6]Chemtura, 439 B.R. at 600 ("I'd first have to determine, as a matter of contractual interpretation, whether there was a breach . . . of the Make-Whole in the first place-looking particularly at the extent to which, under the documents, there would in fact be a prepayment before 'maturity' (or whatever the documents make relevant), which would then turn on the extent to which the maturity date (or any other relevant date) could be deemed to have changed as a consequence of the bankruptcy filing, by acceleration or otherwise.").

[7]Chemtura, 439 B.R. at 600 ("The first layer would involve matters of state law-whether a payment or damages would become due, and, if so, to what extent.").

[8]Chemtura, 439 B.R. at 600; Ogle, 586 F.3d at 148 ("Claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.").

[9]Unless otherwise noted, the term "section" refers to the applicable section under title 11 of the United States Code.

[10]In re Ultra Petroleum Corp., 575 B.R. 361, 368, 64 Bankr. Ct. Dec. (CRR) 189 (Bankr. S.D. Tex. 2017), certification granted, 2017 WL 4863015 (Bankr. S.D. Tex. 2017) ("In general, if a claim is not allowed under applicable non-bankruptcy law, it is not allowed as a claim against the estate.").

[11]See Pepper v. Litton, 308 U.S. 295, 307, 60 S. Ct. 238, 245–46, 84 L. Ed. 281 (1939) ("As we have said, the bankruptcy court in passing on allowance of claims sits as a court of equity.").

[12]State law generally governs property rights in the assets of a debtor's estate. See Butner v. U.S., 440 U.S. 48, 57, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979); Raleigh v. Illinois Dept. of Revenue, 2000-2 C.B. 109, 530 U.S. 15,

20, 120 S. Ct. 1951, 1955, 147 L. Ed. 2d 13, 19, 36 Bankr. Ct. Dec. (CRR) 39, 43 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 78182, 2000-1 U.S. Tax Cas. (CCH) P 50498 (2000) (stating that "[t]he 'basic federal rule' in bankruptcy is that state law governs the substance of claims").

[13]See Chemtura, 439 B.R. at 600 ("The first layer would involve matters of state law-whether a payment or damages would become due, and, if so, to what extent.").

[14]See Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. 443, 450, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, 57 Collier Bankr. Cas. 2d (MB) 314, Bankr. L. Rep. (CCH) P 80880 (2007) ("Travelers") ("[C]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.") (emphasis added).

[15]See Chemtura, 439 B.R. at 600 ("I'd first have to determine, as a matter of contractual interpretation, whether there was a breach . . . of the Make-Whole in the first place-looking particularly at the extent to which, under the documents, there would in fact be a prepayment before 'maturity' (or whatever the documents make relevant), which would then turn on the extent to which the maturity date (or any other relevant date) could be deemed to have changed as a consequence of the bankruptcy filing, by acceleration or otherwise.").

[16]Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 963 N.Y.S.2d 613, 986 N.E.2d 430, 436 (2013); Slamow v. Del Col, 79 N.Y.2d 1016, 584 N.Y.S.2d 424, 594 N.E.2d 918, 919 (1992) ("The best evidence of what parties to a written agreement intend is what they say in their writing.").

[17]See RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967, 971, 56 Bankr. Ct. Dec. (CRR) 144, 67 Collier Bankr. Cas. 2d (MB) 483, Bankr. L. Rep. (CCH) P 82218 (2012) (recognizing the canon "that the specific governs the general").

[18]See Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 834 N.Y.S.2d 44, 865 N.E.2d 1210, 1213 (2007).

[19]In re AMR Corp., 730 F.3d 88, 98, 58 Bankr. Ct. Dec. (CRR) 122 (2d Cir. 2013) ("It is a well-established rule in this Circuit that the 'interpretation of Indenture provisions is a matter of basic contract law.' "); See Benihana of Tokyo, Inc. v. Benihana, Inc., 622 Fed. Appx. 169, 173 (3d Cir. 2015).

[20]R/S Associates v. New York Job Development Authority, 98 N.Y.2d 29, 744 N.Y.S.2d 358, 771 N.E.2d 240, 242 (2002) ("Thus, when interpreting an unambiguous contract term 'evidence outside the four corners of the document . . . is generally inadmissible to add to or vary the writing' ".); Bailey v. Fish & Neave, 8 N.Y.3d 523, 528, 837 N.Y.S.2d 600, 868 N.E.2d 956 (2007) ("[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.").

[21]Sayers v. Rochester Telephone Corp. Supplemental Management Pension Plan, 7 F.3d 1091, 1095, 17 Employee Benefits Cas. (BNA) 1917 (2d Cir. 1993) ("Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement."); In re CellNet Data Systems, Inc., 327 F.3d 242, 248, 41 Bankr. Ct. Dec. (CRR) 72, 50 Collier Bankr. Cas. 2d (MB) 27, 66 U.S.P.Q.2d 1667, Bankr. L. Rep. (CCH) P 78842 (3d Cir. 2003) ("Under New York law, ambiguity does not exist 'simply because the parties urge different interpretations.' ").

[22]Compare In re Energy Future Holdings Corp., 842 F.3d 247, 251, 63 Bankr. Ct. Dec. (CRR) 95 (3d Cir. 2016) ("EFH") with Momentive I, 2014 WL 4436335, at *12.

[23]The issue does not materialize if the debt instrument is adequately drafted. See AMR, 730 F.3d at 103 (explaining that the make-whole provision operates "except as otherwise provided in [the acceleration provision]"). In *AMR*, the debt instrument contained an automatic acceleration provision triggered by a bankruptcy default, but expressly excluded

the make-whole claim upon a bankruptcy default. The Second Circuit did not hesitate to disallow the make-whole claim. 730 F.3d at 99-01.

[24]See Momentive I, 2014 WL 4436335 (Bankr. S.D.N.Y. Sept. 9, 2014), aff'd, Momentive II, 531 B.R. 321 (S.D.N.Y. 2015), aff'd, Momentive III, 874 F.3d 787 (2d Cir. 2017).

[25]See 842 F.3d 247 (3d Cir. 2016).

[26]Momentive II, 531 B.R. at 336 ("Two separate clauses of the agreements potentially provide for a make-whole provision in the context of an acceleration of debt: first, the acceleration clause, and second, the make-whole provision itself."); EFH, 842 F.3d at 254 ("Although both Indentures contains many provisions, this case centers on the words of but two: [the Redemption Provision] and [the Acceleration Provision].").

[27]See Momentive I, 2014 WL 4436335, at *13; EFH, 842 F.3d at 257–58.

[28]See Momentive I, 2014 WL 4436335, at *12; EFH, 842 F.3d at 253.

[29]See Momentive I, 2014 WL 4436335, at *16.

[30]See EFH, 842 F.3d at 258–61.

[31]See EFH, 842 F.3d at 256–57 ("We believe, however, the result in *Momentive* conflicts with that indenture's text and fails to honor the parties' bargain.").

[32]Compare EFH, 842 F.3d at 260 (holding that automatic acceleration does not have an effect on other provisions, including the make-whole provision) with Momentive I, 2014 WL 4436335, at *16 (holding that automatic acceleration negates other provisions, including the make-whole provision).

[33]Momentive I, 2014 WL 4436335, at *16. The District Court for the Southern District of New York recently enforced a make-whole provision, even though the debt was not accelerated. See Wilmington Savings Fund Society, FSB v. Cash America International, Inc., 2016 WL 5092594 at *8 (S.D. N.Y. 2016), appeal withdrawn, 2017 WL 4863104 (2d Cir. 2017) ("Cash America").

[34]See Momentive III, 874 F.3d at 806.

[35]See Momentive I, 2014 WL 4436335, at *12; Momentive II, 531 B.R. at 336.

[36]Momentive I, 2014 WL 4436335, at *14 (explaining that automatic acceleration provisions "have the same negating effect as the voluntary exercise of an acceleration right, given that such clauses were negotiated by the parties").

[37]Momentive I, 2014 WL 4436335, at *12 ("It is also well-settled law in New York that a lender forfeits the right to such consideration for early payment if the lender accelerates the balance of the loan. The rationale for this rule is logical and clear: by accelerating the debt, the lender advances the maturity of the loan and any subsequent payment by definition cannot be a prepayment. In other words, rather than being compensated under the contract for the frustration of its desire to be paid interest over the life of the loan, the lender has, by accelerating, instead chosen to be paid early."); Momentive II, 531 B.R. at 337 ("However, this result is exactly what the Senior Lien Appellants bargained for under the 2012 Indentures. The Senior Lien Appellants agreed to accelerate the debt owed to them in the event of a default, establishing they preferred, sensibly no doubt, accelerated payment over the opportunity to earn interest from the . . . loan over a period of years.") (internal quotation marks omitted); South Side II, 2012 WL 273119, at *4 ("Generally, a lender forfeits the right to a prepayment consideration by accelerating the balance of the loan."); In re Granite Broadcasting Corp., 369 B.R. 120, 144, 48 Bankr. Ct. Dec. (CRR) 81 (Bankr. S.D. N.Y. 2007) ("As a general matter a lender can forfeit a reasonable prepayment premium by electing to accelerate the debt.").

[38]See Momentive I, 2014 WL 4436335, at *12; Momentive II, 531 B.R. at 336 ("[A]cceleration of the debt advances the maturity date of the loan, and any subsequent payment by definition cannot be a prepayment."); Momentive III, 874 F.3d at 802–03 ("Therefore, any payment on the accelerated notes following a bankruptcy filing would be a *post*-maturity pay-

ment . . . Here, Debtors' payment was *post*-maturity, not 'at or before' maturity."); Cash America, 2016 WL 5092594, at *6 ("[B]y accelerating the debt, the lender advances the maturity of the loan and any subsequent payment by definition cannot be a prepayment."); South Side II, 2012 WL 273119, at *4; AMR, 730 F.3d at 103 ("[A]cceleration 'change[s] the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract.' "); Analytical Surveys, Inc. v. Tonga Partners, L.P., 684 F.3d 36, 44, Fed. Sec. L. Rep. (CCH) P 96903, Fed. Sec. L. Rep. (CCH) P 96936 (2d Cir. 2012), as amended, (July 13, 2012) ("And if the agreement's terms require the acceleration of the debt upon default, that acceleration 'changes the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract.' ").

[39]See Momentive I, 2014 WL 4436335, at *12 ("The rationale for this rule is logical and clear: by accelerating the debt, the lender advances the maturity of the loan and any subsequent payment by definition cannot be a prepayment."); Momentive II, 531 B.R. at 336 ("However, under New York law, the payment of debt pursuant to an acceleration clause does not constitute an early redemption. Instead, the automatic acceleration of the debt under Section 6.02 of the 2012 Indentures changed the date of maturity from some point in the future . . . to an earlier date based on the debtor's default under the contract. Thus, when the event of default occurred and the debt accelerated, the new maturity date for the debt was the date of the filing of the bankruptcy case.") (internal quotation marks omitted); AMR, 730 F.3d at 103 ("Consequently, American's attempt to repay the debt in October 2012 was not a voluntary 'prepayment because prepayment can only occur prior to the maturity date.' ").

[40]See Momentive I, 2014 WL 4436335, at *15; Northwestern, 11 Misc. 3d at 982–83, 816 N.Y.S.2d at 834 ("Once the maturity date is accelerated to the present, it is no longer possible to prepay the debt before maturity.").

[41]See Northwestern, 11 Misc. 3d at 989, 816 N.Y.S.2d at 838.

[42]See Northwestern, 11 Misc. 3d at 981, 816 N.Y.S.2d at 833.

[43]Northwestern, 11 Misc. 3d at 987, 816 N.Y.S.2d at 837.

[44]See Northwestern, 11 Misc. 3d at 989, 816 N.Y.S.2d at 839.

[45]Northwestern, 11 Misc. 3d at 985, 987, 816 N.Y.S.2d at 836–37 ("The wording of the subject clause does not reveal any intent to provide for enforcement in foreclosure, whether in redemption or sale, particularly when compared to other post acceleration liquidated damages clauses providing for collection of a yield maintenance premium.").

[46]Momentive I, 2014 WL 4436335, at *13 ("There are two well-recognized exceptions to that proposition. The first is agreed not to apply here, namely when the debtor intentionally defaults in order to trigger acceleration and evade the prepayment premium or make-whole, the debtor will remain liable for the make-whole notwithstanding acceleration of the debt . . . The second exception, which is at issue here, is when a clear and unambiguous clause calls for the payment of a prepayment premium or make-whole even in the event of acceleration of, or the establishment of a new maturity date for, the debt.").

[47]See Momentive I, 2014 WL 4436335, at *13 ("The first is agreed not to apply here, namely when the debtor intentionally defaults in order to trigger acceleration and evade the prepayment premium or make-whole, the debtor will remain liable for the make-whole notwithstanding acceleration of the debt."); Chemtura, 439 B.R. at 603 n.186 ("A third layer might exist in some cases, though I don't think anyone could seriously argue that it applies here. If a bankruptcy case were filed with the purpose (or, arguably, a material purpose) of sidestepping a no-call provision, or to avoid liability for a make-whole, such a circumstance would trouble me, and I think that arguments to disallow claims based on either would be much weaker."); Northwestern, 11 Misc. 3d at 985, 816 N.Y.S.2d at 836 ("In the event that a court concludes that the borrower has defaulted intentionally in order to trigger acceleration and thereby avoid or evade a prepayment premium, the prepayment clause may be enforced, notwithstanding substantial authority which requires an explicit agreement to allow a premium after acceleration."); South Side I, 451 B.R. at 269, 271 ("Even in the absence of an

express agreement, prepayment consideration may be awarded [if] the borrower defaulted intentionally in order to avoid a prepayment penalty."); Granite Broad., 369 B.R. at 144 ("On the other hand, an intentional default by a borrower, with the intention of forcing an acceleration, may permit the lender to collect a reasonable premium.").

[48]Momentive I, 2014 WL 4436335, at *13 ("Here, even if the trustees had not conceded this point, it is clear that the debtors' bankruptcy is not simply a tactical device to deprive the first and 1.5 lien holders of a make-whole claim.").

[49]See Momentive I, 2014 WL 4436335, at *13 ("The second exception, which is at issue here, is when a clear and unambiguous clause calls for the payment of a prepayment premium or make-whole even in the event of acceleration of, or the establishment of a new maturity date for, the debt."); Momentive II, 531 B.R. at 336 ("[C]ourts recognize an exception to this rule 'when a clear and unambiguous clause . . . calls for payment of the prepayment premium.' "); Northwestern, 11 Misc. 3d at 985, 816 N.Y.S.2d at 836 ("When a clear and unambiguous clause which calls for payment of the prepayment premium or a sum equal thereto, at any time after default and acceleration is included in the loan agreement, such clause is analyzed as liquidated damages and is generally enforceable."); South Side II, 2012 WL 273119, at *7 (citing with approval a case in which "the court permitted prepayment premiums where the Note provided that 'upon [the] Lender's exercise of any right of acceleration[s] . . . Borrower shall pay to Lender, in addition to the entire unpaid principal balance outstanding . . . (B) the prepayment premium' ").

[50]Momentive I, 2014 WL 4436335, at *13–14 ("Such language is lacking in the relevant sections of the first and 1.5 lien indentures and notes; therefore, they do not create a claim for Applicable Premium following the automatic acceleration of the debt pursuant to Section 6.02 of the indentures."); Momentive II, 531 B.R. at 336–37 ("The acceleration clause does not clearly and unambiguously call for the payment of the make-whole premium in the event of an acceleration of debt. To the contrary, the acceleration clause provides the 'premium, if any' shall become immediately payable upon the triggering of the acceleration clause. This language is not sufficient to create an unambiguous right to a make-whole payment."); Momentive III, 874 F.3d at 803 ("In other words, the make-whole premium is not due pursuant to the Acceleration Clauses' reference to 'premium, if any,' for the simple reason that the more specific Optional Redemption Clauses which grant the make-whole are not triggered and thus no premium has been generated.").

[51]See Momentive I, 2014 WL 4436335, at *13.

[52]EFH, 842 F.3d at 250–51 ("Does the premium, meant to give the lenders the interest yield they expect, fall away because the full principal amount is now due and the noteholders are barred from rescinding the acceleration of debt? We hold no.").

[53]EFH, 842 F.3d at 258.

[54]EFH, 842 F.3d at 254 ("Any duty to pay the make-whole comes from [the redemption provision]. It leaves us with three questions: was there a redemption; was it optional; and if yes to both, did it occur before December 1, 2015?").

[55]See EFH, 842 F.3d at 255.

[56]See EFH, 842 F.3d at 255.

[57]EFH, 842 F.3d at 256; Treasurer of New Jersey v. U.S. Dept. of Treasury, 684 F.3d 382, 388 (3d Cir. 2012) (discussing regulations allowing lenders to "present . . . long-matured savings bond[s] for redemption").

In explaining that "redemption" includes both pre- and post-maturity repayments, the Third Circuit relied on case law within the Second Circuit. See, e.g., Chesapeake Energy Corp. v. Bank of New York Mellon Trust Co., N.A., 773 F.3d 110, 116 (2d Cir. 2014) (explaining that to "redeem" is to "repay[ ] . . . a debt security . . . at or before maturity"); Federal Nat. Mortg. Ass'n v. Miller, 123 Misc. 2d 431, 473 N.Y.S.2d 743, 744 (Sup 1984) (explaining that a "debtor may redeem . . . only by payment of the entire accelerated debt").

[58]EFH, 842 F.3d at 257 ("In any event, the result is the same no matter the Indenture-there were optional redemptions before a date certain, thereby triggering make-whole premiums.").

[59]See 17 N.Y.3d 250, 263, 952 N.E.2d 482, 492 (2011) ("NML Capital"); EFH, 842 F.3d at 256 (relying to *NML Capital* to reject the *Momentive* court's contrary position that acceleration advances the maturity date so that "other terms of the contract not necessarily impacted by acceleration . . . automatically cease to be enforceable after acceleration").

[60]See NML Capital, 17 N.Y.3d at 255, 952 N.E.2d at 486.

[61]See NML Capital, 17 N.Y.3d at 256, 952 N.E.2d at 487.

[62]NML Capital, 17 N.Y.3d at 256, 952 N.E.2d at 487.

[63]NML Capital, 17 N.Y.3d at 254, 952 N.E.2d at 486; see also EFH, 842 F.3d at 258.

[64]NML Capital, 17 N.Y.3d at 263, 952 N.E.2d at 492.

[65]See EFH, 842 F.3d at 256, 261 ("[I]f EFIH wanted its duty to pay the make-whole on optional redemption to terminate on acceleration of its debt, it needed to make clear that § 6.02 trumps § 3.07.").

[66]EFH, 842 F.3d at 256 (explaining that "parties that want obligations to cease when accelerated should say so in their agreement.").

[67]EFH, 842 F.3d at 259 ("The takeaway for us is that [the redemption provision] applies no less following acceleration of the Notes' maturity than it would to a pre-acceleration redemption.").

This is consistent with Second Circuit authority. See, e.g., In re United Merchants and Mfrs., Inc., 674 F.2d 134, 143–44, 6 Collier Bankr. Cas. 2d (MB) 321, Bankr. L. Rep. (CCH) P 69005 (2d Cir. 1982) (explaining that "there is no warrant in the statutes or in the case law for rejecting [a liquidated damage provision] merely because it is triggered by the filing of a Chapter XI petition rather than by some other event of default"); Granite Broad., 369 B.R. at 144 (explaining that "the automatic acceleration of debt occasioned by a bankruptcy filing may not result in a forfeiture" of other remedies under a debt instrument).

[68]EFH, 842 F.3d at 257 ("We know no reason why we should choose between [the redemption provision] and [the acceleration provision] when both plainly apply.").

[69]See EFH, 842 F.3d at 257 ("By its own terms, § 3.07 governs the optional redemption embedded in the refinancing and requires payment of the make-whole. It surpasses strange to hold that silence in § 6.02 supersedes § 3.07's simple script."); see also Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 834 N.Y.S.2d 44, 865 N.E.2d 1210, 1213 (2007) ("A reading of the contract should not render any portion meaningless."); Barrow v. Lawrence United Corp., 146 A.D.2d 15, 538 N.Y.S.2d 363, 365 (3d Dep't 1989) ("Contracts are also to be interpreted to avoid inconsistencies and to give meaning to all its terms."); Ruttenberg v. Davidge Data Systems Corp., 215 A.D.2d 191, 196, 626 N.Y.S.2d 174 (1st Dep't 1995) ("A court should not 'adopt an interpretation' which will operate to leave a 'provision of a contract . . . without force and effect.' ").

[70]See EFH, 842 F.3d at 259 (emphasis added). In support, the Third Circuit cited Second Circuit case law. See, e.g., Chesapeake Energy, 773 F.3d at 114 (explaining that "words and phrases in a contract should be given their plain meaning").

[71]EFH, 842 F.3d at 259 (emphasis added).

[72]EFH, 842 F.3d at 259 ("Unlike prepayment, however, 'redemption' of 'a debt security' may occur '*at* or before maturity.' ").

[73]EFH, 842 F.3d at 260 ("Here, by contrast, the Noteholders did not seek immediate payment. EFIH voluntarily redeemed the Notes over the Noteholders' objection. Hence even the policy guiding *Northwestern* does not reach this case.").

[74]EFH, 842 F.3d at 260 ("The *Northwestern* Judge was concerned that lenders should

not be able to seek immediate repayment and pile on by also receiving a premium.") (emphasis added).

[75]EFH, 842 F.3d at 259–60 ("By denying the make-whole after the Notes' acceleration, the Bankruptcy Court pushed the *Northwestern* rule beyond its language and underlying policy concerns.").

[76]In essence, the Third Circuit explained that the "rule of explicitness" applies only if the debt instrument describes the make-whole provision as a "prepayment" provision. See EFH, 842 F.3d at 257. If, however, as the Third Circuit explained, the debt instrument uses the term "redemption," the make-whole provision remains intact even in the face of acceleration. 842 F.3d at 257.

[77]EFH, 842 F.3d at 258–259 ("Thus both remained applicable following bankruptcy, and, pursuant to the agreement struck with the Second Lien Noteholders, they are entitled to the make-whole.").

[78]See EFH, 842 F.3d at 255.

[79]See EFH, 842 F.3d at 255.

[80]EFH, 842 F.3d at 255 ("EFIH contends nonetheless that any redemption was mandatory rather than optional. But this contention does not match the facts. Indeed 'a chapter 11 debtor that has the capacity to refinance secured debt on better terms . . . is in the same position within bankruptcy as it would be outside bankruptcy, and cannot reasonably assert that its repayment of debt is not 'voluntary.' "); Scott K. Charles & Emil A. Kleinhaus, Prepayment Clauses in Bankruptcy, 15 Am. Bankr. Inst. L. Rev. 537, 552 (2007) ("Charles & Kleinhaus").

The Third Circuit discussed at length the "voluntary" nature of the early repayment. EFH, 842 F.3d at 255 ("Events leading up to the post-petition financing on June 19, 2014 demonstrate that the redemption was very much at EFIH's option. To repeat, months before its Chapter 11 filing EFIH announced its plan to redeem the Notes before their stated maturity date. And after filing for bankruptcy, it produced another 8-K stating that it may, 'but was under no obligation' to, redeem the similarly situated Second Lien Notes.") (citation omitted); 842 F.3d at 255. ("The irony is that the Noteholders did not want to be paid back on June 19, 2014. They attempted to rescind the Notes' acceleration on June 4, 2014, but were blocked by the automatic stay.").

[81]See EFH, 842 F.3d at 255 ("EFIH, however, filed for Chapter 11 protection voluntarily. Once there, it had the option, per its plan of reorganization, to reinstate the accelerated Notes' original maturity date under Bankruptcy Code § 1124(2) rather than paying them off immediately.").

[82]EFH, 842 F.3d at 255 ("When EFIH redeemed the Notes, it did so 'on a non-consensual basis,' that is, over the Noteholders' objection. Logic leaves no doubt this redemption of the Notes was '*optional.*' ") (emphasis added).

[83]EFH, 842 F.3d at 255 ("[I]t had the option, per its plan of reorganization, to reinstate the accelerated Notes' original maturity date . . . rather than paying them off immediately. It chose not to do so.").

[84]See EFH, 842 F.3d at 255.

[85]EFH, 842 F.3d at 257 ("But we see no reason to demand such exactness. Indeed, EFIH has not suggested any other 'premium' the drafters could have had in mind."). The Third Circuit explained that the language, "premium, if any," operates to "make explicit . . . the link between the acceleration under [the acceleration provision] and the make-whole for an optional redemption per [the redemption provision]." 842 F.3d at 257. Although not expressly explained by the Third Circuit, the qualifier "if any" refers to the circumstances in which no premium is due—i.e., if the early repayment occurred after the "date" by which the make-whole provision is triggered (usually the last two years of the debt's term), or if the debt was reinstated under section 1124.

[86]EFH, 842 F.3d at 257 ("By including the words 'premium, if any,' in its acceleration

provision, the Second Lien Indenture leaves no doubt that §§ 3.07 and 6.02 work together.").

[87]EFH, 842 F.3d at 255 ("And, only to close the loop, all this occurred before December 1, 2015", which is the within the make-whole period).

[88]See EFH, 842 F.3d at 257 ("We believe, however, the result in *Momentive* conflicts with that indenture's text and fails to honor the parties' bargain. For these and additional reasons discussed below, we find it unpersuasive.").

[89]See EFH, 842 F.3d at 255.

[90]See EFH, 842 F.3d at 260.

[91]Compare EFH, 842 F.3d at 259 ("Thus, while a premium contingent on 'prepayment' could not take effect after the debt's maturity, a premium tied to a 'redemption' would be unaffected by acceleration of a debt's maturity.") with Momentive I, 2014 WL 4436335, at *13–14 (in finding that no make-whole payment is due, relying on case law dictating that automatic acceleration provisions have a "negating" effect).

[92]See Momentive I, 2014 WL 4436335, at *17 (distinguishing case law on the basis that "[t]he debtors in both cases (unlike here) were solvent"); EFH, 842 F.3d at 255 ("Events leading up to the post-petition financing on June 19, 2014 demonstrate that the redemption was very much at EFIH's option. To repeat, months before its Chapter 11 filing EFIH announced its plan to redeem the Notes before their stated maturity date. And after filing for bankruptcy, it produced another 8-K stating that it may, 'but was under no obligation' to, redeem the similarly situated Second Lien Notes.") (citation omitted).

[93]This assumes that the debt instrument does not contain a "clear and unambiguous" provision calling for a make-whole payment in all circumstances.

[94]See 691 F.2d 1039 (2d Cir.1982).

[95]Cash America, 2016 WL 5092594, at *7 (listing cases); see, e.g., Momentive I, 2014 WL 4436335, at *13 (describing *Sharon Steel* as holding that, "when [a] debtor intentionally defaults," as a tactical device "in order to trigger acceleration and evade the prepayment premium or make-whole, the debtor will remain liable for the make-whole notwithstanding acceleration of the debt"); Granite Broad., 369 B.R. at 144 (describing *Sharon Steel* as applicable to "an intentional default by a borrower, with the intention of forcing an acceleration"); Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 547 (explaining that *Sharon Steel* applies if "a borrower purposely defaults under a loan agreement in order to avoid the effect of the agreement's prepayment clause").

[96]See Sharon Steel, 691 F.2d at 1042–45.

[97]See Sharon Steel, 691 F.2d at 1053.

[98]Sharon Steel, 691 F.2d at 1053.

[99]See Sharon Steel, 691 F.2d at 1053 ("The default here stemmed from the plan of voluntary liquidation approved on March 26, 1979, followed by the unsuccessful attempt to invoke the successor obligor clauses.").

[100]See Sharon Steel, 691 F.2d at 1053 ("This is not a case in which a debtor finds itself unable to make required payments. The default here stemmed from the plan of voluntary liquidation approved on March 26, 1979, followed by the unsuccessful attempt to invoke the successor obligor clauses.").

[101]Sharon Steel, 2016 WL 5092594, at *6–8.

[102]Cash America, 2016 WL 5092594, at *6 ("As in *Sharon Steel*, the Indenture has both a redemption clause that requires payment of a make-whole premium as well as an acceleration clause that is 'explicitly permissive and not exclusive of other remedies' . . . And [the debtor's] default, like the default in *Sharon Steel*, was not due to bankruptcy, but to the company's 'voluntary actions' ").

[103]Cash America, 2016 WL 5092594, at *7 ("To the contrary, the Court simply observed that breach of the indentures 'stemmed from' the debtor's 'voluntary liquidation' coupled

with its rejected interpretation of the indentures . . . just as breach of the Indenture here stems from [the debtor's] voluntary spin-off coupled with its rejected interpretation of the Indenture.").

[104]Cash America, 2016 WL 5092594, at *7.

[105]Cash America, 2016 WL 5092594, at *7.

[106]South Side I, 451 B.R. at 269; South Side II, 2012 WL 273119, at *4.

[107]See South Side I, 451 B.R. at 269 ("Even in the absence of an express agreement, prepayment consideration may be awarded upon a finding that the borrower defaulted intentionally in order to avoid a prepayment penalty, trigger acceleration, and repay the debt.").

[108]See South Side I, 451 B.R. at 268.

[109]See South Side I, 451 B.R. 248.

[110]South Side I, 451 B.R. at 255 ("In January 2009, the Lender accelerated the debt and brought a foreclosure action in the U.S. District Court for the Eastern District of New York.").

[111]South Side I, 451 B.R. at 268 ("Although a borrower must pay the debt in full in order to redeem the property, prepayment consideration is not included in a judgment of foreclosure because the 'accelerated payment' results from the lender's 'election to bring the foreclosure action' and not the borrower's voluntary prepayment.").

[112]Although the *South Side* court explained "repayment after acceleration is not considered voluntary," it did so because the lender commenced the foreclosure, making it "involuntary." See South Side I, 451 B.R. at 268 ("[A] borrower's repayment after acceleration is not considered voluntary and does not trigger the lender's right to prepayment consideration.").

[113]South Side I, 451 B.R. at 268 ("This is because prepayment provisions generally address the consideration to be paid when the borrower voluntarily prepays the debt, but after a default the borrower's repayment is neither voluntary nor in the nature of a prepayment.").

[114]See South Side I, 451 B.R. at 268; see also Northwestern, 11 Misc. 3d at 985, 816 N.Y.S.2d at 836 ("In the event that a court concludes that the borrower has defaulted intentionally in order to trigger acceleration and thereby avoid or evade a prepayment premium, the prepayment clause may be enforced, notwithstanding substantial authority which requires an explicit agreement to allow a premium after acceleration.").

[115]See South Side I, 451 B.R. at 262.

[116]South Side I, 451 B.R. at 269–70 (emphasis added).

[117]See South Side I, 451 B.R. at 270 (emphasis added); In re Premier Entertainment Biloxi LLC, 445 B.R. 582, 622 (Bankr. S.D. Miss. 2010) ("Although Leucadia apparently was aware of the existence of a prepayment premium in the Indenture, the Claimants never proved that avoiding a prepayment premium was a motivating factor that led the Debtors to commence their bankruptcy cases.").

[118]See Northwestern, 11 Misc. 3d at 990, 816 N.Y.S.2d at 839 ("Significantly, the subject clause *eliminates the need to prove* that prepayment after acceleration is an intentional avoidance of the premium, as prepayment after acceleration is 'deemed' voluntary and an avoidance.") (emphasis added).

[119]The court went on to summarize the provision in that case:

> Section 9.3 states that any tender of the full amount of the debt by the Debtor after default and acceleration is deemed an evasion of the Debtor's obligation to pay prepayment consideration, and that if such tender is made, the Debtor will be required to pay prepayment consideration or its equivalent.

South Side I, 451 B.R. at 269, 272.

[120]See U.S. Bank National Association v. T.D. Bank, N.A., 569 B.R. 12, 18 (S.D. N.Y.

2017) (explaining that provisions that are contrary to public policy and reasonable expectations must satisfy the "rule of explicitness"); In re Southeast Banking Corp., 93 N.Y.2d 178, 688 N.Y.S.2d 484, 710 N.E.2d 1083, 1086, 34 Bankr. Ct. Dec. (CRR) 326 (1999) (discussing the rule of explicitness: "This practical policy consequence is a matter of legitimate concern in the common-law developmental process, especially with respect to commercial matters where reliance, definiteness and predictability are such important goals of the law itself, designed so that parties may intelligently negotiate and order their rights and duties.").

[121]See EFH, 842 F.3d at 260 ("The *Northwestern* Judge was concerned that lenders should not be able to seek immediate repayment and pile on by also receiving a premium.").

[122]See EFH, 842 F.3d at 259–60 (acknowledging on *Northwestern*); Momentive I, 2014 WL 4436335, at *15 (relying on *Northwestern*).

[123]See Northwestern, 11 Misc. 3d at 989, 816 N.Y.S.2d at 839.

[124]Northwestern, 11 Misc. 3d at 983, 989, 816 N.Y.S.2d at 834, 839.

[125]Northwestern, 11 Misc. 3d at 985, 989–90, 816 N.Y.S.2d at 836, 839 ("In the event that a court concludes that the borrower has defaulted intentionally in order to trigger acceleration and thereby avoid or evade a prepayment premium, the prepayment clause may be enforced, notwithstanding substantial authority which requires an explicit agreement to allow a premium after acceleration.").

[126]Northwestern, 11 Misc. 3d at 981, 985, 816 N.Y.S.2d at 833, 836 ("It is the applicability of this prepayment premium after default and acceleration clause which presents the only genuine issue upon summary judgment.").

[127]Northwestern, 11 Misc. 3d at 989–90, 816 N.Y.S.2d at 839 (emphasis added). The note provided in relevant part:

> In the event of a prepayment of this note following (i) the occurrence of an Event of Default . . . followed by the acceleration of the whole indebtedness evidenced by this note . . . such prepayment will constitute an evasion of the prepayment terms . . . and be deemed to be a voluntary prepayment . . . and such payment will, therefore, . . . include the prepayment fee required under the prepayment in full privilege recited above.

Northwestern, 11 Misc. 3d at 982, 816 N.Y.S.2d at 834.

[128]The "clear and unambiguous" provision must meet the specificity demanded by the *Northwestern* court. See Northwestern, 11 Misc. 3d at 985, 816 N.Y.S.2d at 836, 839–40 ("When a clear and unambiguous clause which calls for payment of the prepayment premium or a sum equal thereto at any time after default, and acceleration is included in the loan agreement, such clause is analyzed as liquidated damages and is generally enforceable.") (emphasis added).

Comparing make-whole provisions that expressly and unambiguously provide for post-foreclosure make-whole payments, the *Northwestern* court found that the provision's express and unambiguous application to post-*default* and post-*acceleration*—distinct from post-*foreclosure*—is not sufficiently clear to operate post-foreclosure. 11 Misc. 3d at 983, 816 N.Y.S.2d at 837 ("The wording of the subject clause does not reveal any intent to provide for enforcement in foreclosure, whether in redemption or sale, particularly when compared to other postacceleration liquidated damages clauses providing for collection of a yield maintenance premium.").

The *Northwestern* court explained that "the premium can be sought in foreclosure, when *expressly* so provided." 11 Misc. 3d at 989, 816 N.Y.S.2d at 838 ("The foregoing disparate clauses all include a common element which the subject clause does not. The premium or its equivalent becomes due upon default and acceleration, or may become due upon exercise of an option. There can be no argument concerning when or if the premium became due if the premium can be sought in foreclosure, when expressly so provided in the clause.").

[129]Northwestern, 11 Misc. 3d. at 985–86, 816 N.Y.S.2d at 836–37 ("However, this court

need not reach such issues at this time, as the subject clause is not applicable in foreclosure.").

[130]Indeed, provisions specifically requiring post-acceleration make-whole payments are generally enforceable. See United Merchs., 674 F.2d at 144 ("Such claims are no less enforceable than those for the principal balances of the loan, which arise from other terms of the loan agreements. In asserting these claims, appellants once again merely seek to reap the benefits of a fairly negotiated bargain.").

A vague reference to a "premium, if any" is insufficient. See In re Energy Future Holdings Corp., 527 B.R. 178, 193 (Bankr. D. Del. 2015), order aff'd, 2016 WL 627343 (D. Del. 2016), rev'd and remanded, 842 F.3d 247, 63 Bankr. Ct. Dec. (CRR) 95 (3d Cir. 2016) (listing cases); see, e.g., Momentive II, 531 B.R. at 335 (underlying debt instrument provides: "If an Event of Default specified in Section 6.01(f)" or (g) with respect to the Company "occurs, *the principal of, premium, if any,* and interest on all the . . . Notes shall ipso facto become and be immediately due and payable without any declaration or other act on the part of the Trustee or any Holders.") (emphasis added).

[131]The *NML Capital* court cited favorably to *Northwestern*, which is the very authority relied upon by *Momentive.* See 17 N.Y.3d at 262–63, 952 N.E.2d at 492.

[132]See NML Capital, 17 N.Y.3d at 257, 952 N.E.2d at 488.

[133]The debtor in *NML Capital* is the Republic of Argentina.

[134]See NML Capital, 17 N.Y.3d at 260–61, 952 N.E.2d at 490 ("Had Argentina- -the drafter of the bond documents—intended that its responsibility to pay interest twice a year cease upon maturity, it could easily have clarified that intent in any number of ways.").

[135]See Butner, 440 U.S. at 55, 99 S. Ct. at 918, 59 L. Ed. 2d at 142 ("Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.").

[136]South Side II, 2012 WL 273119, at *4 (quoting LHD Realty, 726 F.2d at 331); AMR, 730 F.3d at 101 (For the lender to coerce immediate repayment, the agreement provides for automatic acceleration of the loan because "the automatic acceleration provision in a note indenture was 'the result that [the] noteholders bargained for.' ").

Automatic acceleration provisions that expressly preclude make-whole payments upon a bankruptcy default, on the other hand, are for the benefit of all parties to the debt instrument. 730 F.3d at 101. ("[T]he automatic acceleration provision here is not solely for the benefit of one party, but simultaneously affords potential benefits to both: it accelerates the amount presently due for the purpose of the noteholders' claims against American in bankruptcy and it excludes any Make-Whole Amount from American's obligations, to American's benefit. U.S. Bank is due the outstanding principal and any applicable interest payments when American repays its debts, but 'there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties' in the circumstances here.").

[137]Premier Ent., 445 B.R. at 628 ("It allowed the contractual acceleration of the Notes without the Indenture Trustee having to give the Debtors notice of acceleration post-petition, which would have required the Indenture Trustee to seek intervention from this Court to lift the automatic stay.").

[138]See Cash America, 2016 WL 5092594, at *8 ("Indeed, if anything, Cash America's position is the inequitable one: It seeks to place itself in a better position by breaching the Indenture than it would have occupied had it honored the parties' contract."); Bi-Economy Market, Inc. v. Harleysville Ins. Co. of New York, 10 N.Y.3d 187, 856 N.Y.S.2d 505, 886 N.E.2d 127, 132 (2008) (citing authorities for the proposition that breach of contract damages seek to place the non-breaching party "in as good a position as it would have been in had the contract been performed").

[139]The "bad-faith conduct" analysis compels a demanding factual analysis. See e.g., Eyde v. Empire of America Federal Sav. Bank, 701 F. Supp. 126, 130 (E.D. Mich. 1988) ("But the facts in the present case seem to indicate there may have been an intentional default.

After all, the Plaintiffs attempted to tender payment without the prepayment premiums before they defaulted. A question is raised as to why all of a sudden, after attempting to tender full payment, the borrowers defaulted."); Clean Harbors, Inc. v. John Hancock Life Ins. Co., 64 Mass. App. Ct. 347, 833 N.E.2d 611, 620–21 (2005) (employing thorough factual analysis on issue of intentional default).

[140]See Premier Ent., 445 B.R. at 623–24 ("Not surprisingly, the Claimants did not present any direct evidence at the Adversary Trial that established the Debtors' willfulness or intention to escape the prohibition in the Indenture on the early payment of the Notes. Such evidence rarely ever would be available."); Cash America, 2016 WL 5092594, at *7 (expressing its "reluctant[ance] to introduce the issue of subjective intent into the analysis, given the inherent difficulty of deciphering the 'intent' of a company").

[141]See, e.g., E.I. DuPont de Nemours and Co. v. Pressman, 679 A.2d 436, 445 n.18, 11 I.E.R. Cas. (BNA) 1643, 132 Lab. Cas. (CCH) P 58138, 31 U.C.C. Rep. Serv. 2d 680 (Del. 1996) (explaining that "the celebrated freedom to make contracts [includes] a considerable freedom to breach them as well"); Briefstein v. P.J. Rotondo Const. Co., 8 A.D.2d 349, 187 N.Y.S.2d 866, 868 (1st Dep't 1959) ("An intention not to perform does not bring on heavier damages than actual nonperformance. The policy which runs through the fabric of the law of contracts is to bind a party by what he agrees to do whether or not he intends to do what he agrees.").

[142]See Cash America, 2016 WL 5092594, at *7 (explaining that "contract remedies are generally designed to compensate the non-breaching party, not punish the breaching party for bad intent.").

[143]Metropolitan Life Ins. Co. v. Noble Lowndes Intern., Inc., 84 N.Y.2d 430, 618 N.Y.S.2d 882, 643 N.E.2d 504, 507 (1994) ("Generally in the law of contract damages, as contrasted with damages in tort, whether the breaching party deliberately rather than inadvertently failed to perform contractual obligations should not affect the measure of damages.").

[144]See LHD Realty, 726 F.2d at 332. But the acceleration provision in *LHD Realty* is not the garden-variety automatic acceleration provision contained in most debt instruments. In re AMR Corp., 485 B.R. 279, 292 n.10, 57 Bankr. Ct. Dec. (CRR) 146 (Bankr. S.D. N.Y. 2013), aff'd, 730 F.3d 88, 58 Bankr. Ct. Dec. (CRR) 122 (2d Cir. 2013) ("For its argument, U.S. Bank also relies upon the statement in Matter of LHD Realty Corp., 726 F.2d 327 (7th Cir. 1984) that 'acceleration appears to be a conditional right of the lender. . . .' 726 F.2d at 332 (emphasis added). But that case offers no support for U.S. Bank's argument. The language of that acceleration clause provided that the lender could, 'without notice, . . . declare the remainder of the debt at once due and payable.' 726 F.2d at 331. Thus, the lender's option in LHD Realty was markedly different from the automatic acceleration clause here.").

[145]LHD Realty, 726 F.2d at 332 (emphasis added).

[146]11 U.S.C.A. § 1124 (2005).

[147]See AMR, 730 F.3d at 102–03 ("We therefore agree with the bankruptcy court that any attempt by U.S. Bank to rescind acceleration now - after the automatic stay has taken effect - is an effort to affect American's contract rights, and thus the property of the estate.").

[148]See Premier Ent., 445 B.R. at 619 (In construing a debt instrument that sets forth a standard identical to that under New York law, the court explained: "[T]he fact that the Debtors filed their Petitions voluntarily does not in itself resolve the issue. Instead, this Court must engage in a fact-specific inquiry into the particular circumstances surrounding their filings."); In re Public Service Co. of New Hampshire, 114 B.R. 813, 815–16, 20 Bankr. Ct. Dec. (CRR) 852, 114 Pub. Util. Rep. 4th (PUR) 195 (Bankr. D. N.H. 1990) ("Since the Debtor was a regulated utility whose sole source of income was subject to regulatory decisions — a situation also unique in the annals of chapter 11 reorganization proceedings — it can be said that the Debtor in this unique circumstance was in fact forced to come into the federal bankruptcy court . . . It certainly cannot be said that the chapter 11 filing here was a scheme to avoid

prepayment premiums on outstanding indebtedness.").

[149]See Solutia, 379 B.R. at 482 n.5 ("Code §§ 1123 and 1124 permit inclusion in a reorganization plan of provisions to deaccelerate debts and reinstate their original maturity date and cure defaults. The Debtors have not chosen to avail themselves of these provisions."); In re Imperial Coronado Partners, Ltd., 96 B.R. 997, 1000 (B.A.P. 9th Cir. 1989) ("Under the Bankruptcy Code, [the debtor] had the right to deaccelerate the due date of the loan as part of a plan . . . [T]he [debtor's] decision to . . . pay off the loan [in bankruptcy] was voluntary, and the prepayment premium is therefore enforceable."); Momentive I, 2014 WL 4436335, at *14 ("In addition, the debtors and the second lien holders contend that the debtors' payment of the first and 1.5 lien holders as required by the Bankruptcy Code before the original maturity of the notes . . . is not elective or voluntary, and, therefore, again, does not subject the debtors to the Applicable Premium owed upon an elective redemption under the express terms of Sections 3.02–3.03 of the indentures and paragraph 5 of the notes. The debtors have the option under section 1124 of the Bankruptcy Code, however, to reinstate the first and 1.5 lien notes rather than pay them with substitute consideration, under a chapter 11 plan."); Momentive II, 531 B.R. at 328; In re 433 South Beverly Drive, 117 B.R. 563, 569, 24 Collier Bankr. Cas. 2d (MB) 177, Bankr. L. Rep. (CCH) P 73585 (Bankr. C.D. Cal. 1990) ("The Debtor has not offered any showing of an inability to reinstate the loan under either California law or to decelerate the loan under bankruptcy law."). But see Premier Ent., 445 B.R. at 631 ("Moreover, whether the acceleration that occurred as a result of the bankruptcy filing was 'conditional' in nature because the Debtors could have decelerated the Indenture under the Plan and reinstated the Notes pursuant to § 1124 of the Bankruptcy Code also is *irrelevant*.") (emphasis added); Pub. Serv. Co., 114 B.R. at 819 (expressing its disagreement with *Coronado Partners*).

[150]It is not easy to show overt, affirmative action by lenders to "force" early repayment so as to deprive the debtor of any option—stay relief sought by lenders, without more, may not be sufficient evidence. See, e.g., Imperial Coronado, 96 B.R. at 1002.

[151]See EFH, 842 F.3d at 253 n.1 ("For the purpose of determining EFIH's duty to pay any make-whole, the Bankruptcy Court assumed that it was 'solvent and able to pay all allowed claims of its creditors in full.' We do the same. Because we do not have any briefing on the matter even without that assumption, we do not consider whether insolvency might have affected EFIH's obligations.") (citation omitted).

[152]See EFH, 842 F.3d at 255 ("Events leading up to the post-petition financing on June 19, 2014 demonstrate that the redemption was very much at EFIH's option. To repeat, months before its Chapter 11 filing EFIH announced its plan to redeem the Notes before their stated maturity date. And after filing for bankruptcy, it produced another 8-K stating that it may, 'but was under no obligation' to, redeem the similarly situated Second Lien Notes.") (citation omitted); 842 F.3d at 255 ("The irony is that the Noteholders did not want to be paid back on June 19, 2014. They attempted to rescind the Notes' acceleration on June 4, 2014, but were blocked by the automatic stay.").

[153]EFH, 842 F.3d at 257 ("In any event, the result is the same no matter the Indenture-there were optional redemptions before a date certain, thereby triggering make-whole premiums.").

[154]See Momentive I, 2014 WL 4436335, at *17, 20 (distinguishing case law on the basis that "[t]he debtors in both cases (unlike here) were solvent").

[155]Momentive I, 2014 WL 4436335, at *14 ("The debtors have the option under section 1124 of the Bankruptcy Code, however, to reinstate the first and 1.5 lien notes rather than pay them with substitute consideration, under a chapter 11 plan.").

[156]See Momentive I, 2014 WL 4436335, at *14–17, 27.

[157]See EFH, 842 F.3d at 259 ("Thus, while a premium contingent on 'prepayment' could not take effect after the debt's maturity, a premium tied to a 'redemption' would be unaffected by acceleration of a debt's maturity."); Momentive I, 2014 WL 4436335, at *14 (in finding

that no make-whole payment is due, relying on case law dictating that automatic acceleration provisions have a "negating" effect).

[158]But such creative and artful analyses only compounds the problem, for "uniformity in interpretation is important to the efficiency of capital markets." See Sharon Steel, 691 F.2d at 1048.

[159]See AMR, 730 F.3d at 101 ("In rare cases, agreements providing for the acceleration of the entire debt upon the default of the obligor may be circumscribed or denied enforcement by utilization of equitable principles."); Key Intern. Mfg. Inc. v. Stillman, 103 A.D.2d 475, 477, 480 N.Y.S.2d 528, 39 U.C.C. Rep. Serv. 1406 (2d Dep't 1984), order aff'd as modified, 66 N.Y.2d 924, 498 N.Y.S.2d 795, 489 N.E.2d 764 (1985) ("Acceleration clauses are quite common and are generally enforced according to their terms . . . It is only 'in rare cases' that the clause will be denied enforcement under equitable principles . . ."); Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 577, 415 N.Y.S.2d 800, 389 N.E.2d 113, 116 (1979).

[160]Alternatively, lenders may assert make-whole claims based on the debtor's "early repayment" of the debt during the bankruptcy case (such as by plan distributions), not based on the "bankruptcy default."

[161]However, an automatic acceleration provision trigged by a "bankruptcy default" is more vulnerable to treatment as ipso facto provision.

[162]By way of example, debt instruments may provide that make-whole provisions are triggered only "pre-maturity." See AMR, 730 F.3d at 103 (explaining that its decision to deny a make-whole claim "is reinforced by the plain text of Section 3.02, the voluntary redemption payment schedule, which provides for potential payment of a Make-Whole Amount but itself states that it operates '*except as otherwise provided in Section 3.03*,' " which deals "specifically with payments in the context of a continuing Event of Default and debt acceleration"); Momentive II, 531 B.R. at 337; EFH, 842 F.3d at 261 (explaining that "if EFIH wanted its duty to pay the make-whole on optional redemption to terminate on acceleration of its debt, it needed to make clear that [the acceleration provision] trumps [the make-whole provision].").

[163]See NFL Enterprises LLC v. Comcast Cable Communications, LLC, 51 A.D.3d 52, 60–61, 851 N.Y.S.2d 551 (1st Dep't 2008) ("The use of different terms in the same agreement strongly implies that the terms are to be accorded different meanings.").

[164]See Quadrant Structured Products Co., Ltd. v. Vertin, 23 N.Y.3d 549, 560, 992 N.Y.S.2d 687, 16 N.E.3d 1165 (2014) ("[I]f parties to a contract omit terms-particularly, terms that are readily found in other, similar contracts-the inescapable conclusion is that the parties intended the omission.").

[165]See Chemtura, 439 B.R. 561.

[166]Chemtura, 439 B.R. at 601 n.179–80 (emphasis added).

[167]See Chemtura, 439 B.R. at 601.

[168]See Chemtura, 439 B.R. at 601, 603.

[169]See Momentive II, 531 B.R. at 337 ("[F]or lenders who would like to ensure their right to a make-whole payment in the event of acceleration of debt due to bankruptcy, 'the optimal strategy is to negotiate a provision that requires the borrower to pay a prepayment fee whenever debt is repaid prior to its *original* maturity.' ").

[170]See Momentive I, 2014 WL 4436335, at *14 (explaining that the court in *Chemtura* was focusing "on a provision that was triggered off a *differently defined maturity date* than the original maturity date, thus keying liability for the make-whole back to the need . . . to state clearly that the premium would be owed notwithstanding the acceleration of the original maturity date"); Momentive II, 531 B.R. at 327 ("However, the provision at issue in *Chemtura* required a make-whole payment if the debt was repaid prior to its original maturity date . . . That is specific enough to meet the clear and unambiguous requirement.").

[171]See EFH, 842 F.3d at 259 ("The takeaway for us is that § 3.07 applies no less following acceleration of the Notes' maturity than it would to a pre-acceleration redemption."); Cash America, 2016 WL 5092594, at *6 (quoting debt instrument's cumulative remedies provision: "No right or remedy conferred or reserved to the Trustee or to the Holders under this Indenture is intended to be exclusive of any other right or remedy.").

[172]See In re Enron Corp., 302 B.R. 463, 475, 42 Bankr. Ct. Dec. (CRR) 83 (Bankr. S.D. N.Y. 2003), order aff'd, 2005 WL 356985 (S.D. N.Y. 2005) ("A provision declaring that rights granted are cumulative is intended to preserve available alternate remedies when a party initially elects to pursue other available remedies.").

[173]Sharon Steel, 691 F.2d at 1053.

[174]Sharon Steel, 691 F.2d at 1042–43 ("Each instrument contains clauses permitting redemption by UV prior to the maturity date, in exchange for payment of a fixed redemption price (which includes principal, accrued interest and a redemption premium) and clauses allowing acceleration as a non-exclusive remedy in case of a default.").

[175]Cash America, 2016 WL 5092594, at *6 ("Thus, Wilmington Savings may seek, pursuant to Section 6.03 of the Indenture, 'to enforce the performance of a provision of the Indenture' - namely, the prepayment provision. In light of the Indenture's permissive, non-exclusive acceleration clause and Cash America's voluntary breach, there is 'no bar' to that relief.").

[176]See 11 U.S.C.A. § 502(b)(2) (2005); Aardwoolf Corp. v. Nelson Capital Corp., 861 F.2d 46, 47 (2d Cir. 1988) ("In our view, New York legislation and judicial pronouncements demonstrate a consistent intent to deny a creditor the right to charge or retain interest that is unearned."); Atlas Financial Corp. v. Ezrine, 42 A.D.2d 256, 258, 345 N.Y.S.2d 36, 38 (1st Dep't 1973) ("The better rule would seem to allow the unpaid balance of the principal and the matured interest up to the time of payment, excluding the unearned interest at that time.").

[177]See Ultra Petroleum, 575 B.R. at 370–71 ("The post-petition default interest that the Noteholders seek would compensate the Noteholders for the Debtors' failure to pay the principal, unpaid interest, and Make-Whole Amount as they came due at the time of acceleration . . . Accordingly, these two forms of damages do not represent a double recovery of actual and liquidated damages for the same injury to the Noteholders.").

[178]As discussed in section III.A.i of this article, courts may disallow claims "judicially determined to be disguised interest." See In re Auto Intern. Refrigeration, 275 B.R. 789, 823–24 (Bankr. N.D. Tex. 2002), aff'd in part, rev'd in part on other grounds and remanded, 307 B.R. 849 (N.D. Tex. 2002).

[179]It is common for debt instruments to calculate the make-whole claims by discounting to present value the remaining interest payments. See, e.g., Ultra Petroleum, 575 B.R. at 364. In this form, such make-whole provision is more closely tethered to "unmatured interest." See 575 B.R. at 365. A make-whole provision turning on a metric "independent of the amount owed," however, militates against any characterization as interest. See In re Lappin Elec. Co., Inc., 245 B.R. 326, 330, 35 Bankr. Ct. Dec. (CRR) 205 (Bankr. E.D. Wis. 2000) ("In this case, the [fixed] charge is independent of the amount owed at termination, thus negating any characterization as interest.").

[180]See Mims, 275 B.R. at 823–24.

[181]See Parker Plaza West Partners v. UNUM Pension and Ins. Co., 941 F.2d 349, 352 (5th Cir. 1991) ("And where the borrower does have that right, Texas courts hold that a prepayment premium is a charge for the option or privilege of prepayment, not compensation . . . for the use or forbearance or detention of money and, as such, the charge is not interest.") (internal quotation marks omitted); Great Plains Real Estate Development, L.L.C. v. Union Cent. Life Ins. Co., 2007 WL 6908824, at *7 (S.D. Iowa 2007), aff'd, 536 F.3d 939 (8th Cir. 2008) (explaining that a make-whole payment is a "negotiated fee" that "provides the lender with compensation for the early termination of the loan"); Feldman v. Kings Highway Sav. Bank, 278 A.D. 589, 589–90, 102 N.Y.S.2d 306, 307 (2d Dep't 1951), judgment aff'd, 303

N.Y. 675, 102 N.E.2d 835 (1951) ("The [make-whole] payment of the $2,000 was not in consideration of the making of a loan or of forbearance of money. It was the converse, that is, for the making of a new and separate agreement, the termination of the indebtedness. Accordingly, it was not a payment of interest and therefore could not be the basis of a claim of usury.").

[182]See Arthur v. Burkich, 131 A.D.2d 105, 107, 520 N.Y.S.2d 638, 639 (3d Dep't 1987) (explaining that early prepayment "impose[s] daunting economic sacrifices upon a mortgagee, not the least of which include[s] . . . unanticipated costs occasioned by the need to reinvest the principal").

[183]See Cappellini v. Mellon Mortg. Co., 991 F. Supp. 31, 36 (D. Mass. 1997) ("When practices changed to allow borrowers to prepay loans in part or full, prepayment penalties or charges were developed in order to compensate lenders for costs associated with the unanticipated reinvestment of principal, presumptively at less favorable rates."); Teachers Ins. and Annuity Ass'n of America v. Ormesa Geothermal, 791 F. Supp. 401, 415–16 (S.D. N.Y. 1991) ("TIAA is thus entitled to damages equal to the discounted present value of the incremental interest income TIAA would be expected to lose as a result of the breach. Specifically, the lost interest income is measured as the difference between (a) the interest income TIAA would have earned had the contract been performed, and (b) the interest income TIAA would be deemed to have earned by timely mitigating its damages — i.e., by making an investment with similar characteristics at the time of the breach."). This raises the separate question of whether the negotiation of a liquidated damages provision eliminates the duty to mitigate damages.

[184]See In re Hidden Lake Ltd. Partnership, 247 B.R. 722, 729, 44 Collier Bankr. Cas. 2d (MB) 231 (Bankr. S.D. Ohio 2000) (recognizing "uncertainty of the availability of a suitable substitute investment opportunity for the lender").

[185]See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 581.

[186]See, e.g., Lappin Elec., 245 B.R. at 328 (providing for a make-whole premium "in an amount equal to: (a) three percent (3.0%) of the Advance Limit if such termination occurs at any time during the first year of the initial Term; (b) two percent (2.0%) of the Advance Limit if such termination occurs at any time during the second year of the initial Term; and (c) one percent (1.0%) of the Advance Limit if such termination occurs during the third year of the initial Term or during any renewal Term"); 245 B.R. at 330 ("In this case, the [fixed] charge is independent of the amount owed at termination, thus negating any characterization as interest.").

While a formula derived from a "fixed metric" (which essentially presumes a loss) is less likely a proxy for "unmatured interest," such formula's relationship to actual damages is more attenuated and is, therefore, more vulnerable under section 506(b)'s reasonableness analysis. See In re A.J. Lane & Co., Inc., 113 B.R. 821, 829, 20 Bankr. Ct. Dec. (CRR) 869, 23 Collier Bankr. Cas. 2d (MB) 576 (Bankr. D. Mass. 1990) ("To presume a loss is unreasonable . . . This prepayment formula bears even less of a rational relationship to loss than does a formula comparing the loan's projected interest yield to the projected yield from treasury notes that could be purchased at the time of prepayment; this type of formula has been properly rejected both for its failure to compare the contract rate to the current interest rate on comparable loans and for its failure to discount the lost interest yield to present value."); In re Duralite Truck Body & Container Corp., 153 B.R. 708 (Bankr. D. Md. 1993) ("The prepayment charge formula presumes a loss. It produces the same result, regardless of whether market interest rates have gone up or down since inception of the loan. It does not reflect actual changes in market interest, and it fails to discount to present value. The prepayment charge formula does not effectively estimate actual damages, and consequently the charge is unreasonable under § 506(b).").

[187]Make-whole provisions that are directly tethered to "unmatured interest" are vulnerable under New York law on liquidated damages. See The Edward Andrews Group, Inc. v. Addressing Services Co., Inc., 2005 WL 3215190, at *7 (S.D. N.Y. 2005) ("In ruling on the

enforceability of liquidated damages, courts often consider whether 'the consideration has been furnished' on the one hand, or alternatively, whether the breaching party is being asked to pay for a benefit it has never enjoyed. Thus, in lease disputes, for example, a court will deem an acceleration clause to be a penalty where the breaching tenant must both tender the balance of rent installments and vacate the premises for the remainder of the lease term. In such cases, the tenant would unfairly have to pay for a space it will no longer occupy. Similarly, where a court awards liquidated damages, it will limit the prevailing party's recovery to accrued interest because unearned interest, by nature, has never accumulated on the debt.") (citations omitted); Chaifetz v. Schreiber, 2003 WL 21738599, at *2 (E.D. N.Y. 2003) ("Based on the language of the Note, I have no doubt that the parties intended that in the event of a default, plaintiff had the right declare due all the interest, even that which was unearned. If they had intended otherwise, they would have explicitly stated (as they did in the prepayment provision) that only the accrued interest could be declared due. The rationale for the difference between the prepayment and default provisions is obvious. The Note requires payment of the unearned interest in the event of the default in order to discourage the defendants from defaulting. The provision functions as a penalty for default and is not linked to an assessment of probable damages, which would, ultimately, easily be computed based on the interest accrued from the date of default. Accordingly, under New York law, the provision is unenforceable.").

[188]See, e.g., Ultra Petroleum, 575 B.R. at 365, 370 ("The Debtors argue that the default interest rate double counts the amounts captured through the Make-Whole Amount.").

[189]See Trilegiant Corp. v. Sitel Corp., 2013 WL 2181193, at *7 (S.D. N.Y. 2013) ("Under no circumstances, however, will liquidated damages be allowed where the contractual language and attendant circumstances show that the contract provides for the full recovery of actual damages, because liquidated damages and actual damages are mutually exclusive remedies under New York law."); Vacold LLC v. Cerami, 545 F.3d 114, 130, Fed. Sec. L. Rep. (CCH) P 94871 (2d Cir. 2008) (explaining that "a liquidated damages provision precludes a party from recovering lost profits and other measures of damages"); U.S. Fidelity and Guar. Co. v. Braspetro Oil Services Co., 369 F.3d 34, 71, 159 O.G.R. 690 (2d Cir. 2004); J.R. Stevenson Corp. v. Westchester County, 113 A.D.2d 918, 493 N.Y.S.2d 819, 823 (2d Dep't 1985) (explaining that "a liquidated damages clause which is reasonable precludes any recovery of actual damages").

[190]See Agerbrink v. Model Service LLC, 196 F. Supp. 3d 412, 418 (S.D. N.Y. 2016) (explaining that "[b]ecause the liqu[id]ated damages provision in the Remedy Clause guarantees Defendants a 'minimum recovery' regardless of actual damages, while preserving their right to pursue actual damages if they so desire, the Remedy Clause is unenforceable."). But see Ultra Petroleum, 575 B.R. at 370 ("Unlike the liquidated damages provision in *Agerbrink*, the Make-Whole Amount does not lead to a double recovery of actual and liquidated damages for the same injury. The Make-Whole Amount liquidates the Noteholders' damages stemming from the early termination of their investment in OpCo.").

[191]See In re Food Management Group, LLC, 2007 WL 4352225, at *3 (Bankr. S.D. N.Y. 2007) ("In the case where a contract contains both a liquidated damages provision and a provision calling for actual damages, it is the liquidated damages provision that is read out of the contract.").

[192]See Ultra Petroleum, 575 B.R. at 372 ("Because the Make-Whole Amount does not lead to a double recovery of actual and liquidated damages for the same injury, there is no reason for the Court to conclude that this provision is in any way disproportionate or invalid only because it is higher than potentially contemplated at the time the parties entered into the Note Agreement.").

[193]See Wells Fargo Bank Northwest, N.A. v. US Airways, Inc., 33 Misc. 3d 1231(A), 943 N.Y.S.2d 795 (Sup 2011) ("In other words, in that [other] case, for the same default, the lessor would be receiving both liquidated damages and additional damages. That is not what the agreements in here provide. In the lease agreements under scrutiny, plaintiff is entitled to

liquidated damages as holdover rent if the aircraft is not returned to it in the condition required by the contracts, until such time as the aircraft meets the required return condition. The agreements further provide that plaintiff is entitled to compensatory damages for other breaches.").

[194]See In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 134, 40 Bankr. Ct. Dec. (CRR) 30 (Bankr. E.D. N.Y. 2002) ("A yield maintenance premium, such as the provision at issue in this case, is structured to provide the lender the present value of the interest which is lost as a result of prepayment. Default interest, on the other hand, is 'a means to compensate a lender for the administrative expenses and inconvenience in monitoring untimely payments.' "); Federal Nat. Mortg. Ass'n v. Bridgeport Portfolio, LLC, 150 Conn. App. 610, 620–22, 92 A.3d 966, 974 (2014) (applying Connecticut law: "A contractual provision for a penalty is one the prime purpose of which is to prevent a breach of the contract by holding over the head of a contracting party the threat of punishment for a breach. . . . A provision for liquidated damages, on the other hand, is one the real purpose of which is to fix fair compensation to the injured party for a breach of the contract . . . Contrary to the defendants' assertions, there was no evidence presented that the award of default interest and a prepayment premium resulted in a double recovery or a windfall to the plaintiff. As the provisions in the note expressly provided, and the testimony of Taylor at the hearing confirmed, the damages contemplated by each provision reflected different economic realities and were not duplicative."); In re Kimbrell Realty/Jeth Court, LLC, 483 B.R. 679, 692 (Bankr. C.D. Ill. 2012) (applying Illinois law: "Although the period of default interest partially overlaps with the discount period of the prepayment premium, that does not mean that the amounts are double compensation for the same loss. By the terms of the Note, they cover separate losses. In *Vanderveer Estates*, the court recognized the distinction between the yield maintenance premium designed to recoup lost future interest, and default interest compensating for the administrative expenses and inconvenience in monitoring untimely payments, holding they are not duplicative."). In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 40 Bankr. Ct. Dec. (CRR) 30 (Bankr. E.D. N.Y. 2002). But see Federal Nat. Mortg. Ass'n v. Coleman Towers Tenant's Ass'n, Inc., 2015 WL 6144025, at *23 (Conn. Super. Ct. 2015), on reargument, 2016 WL 1265679 (Conn. Super. Ct. 2016) (applying Connecticut law: "The court finds that the imposition of a Default Interest rate compensates the plaintiff for the loss of its 6.44% interest after default. That loss has already been compensated by the yield maintenance prepayment fee. The Default Interest rate charge and the prepayment fee would appear to be a double recovery and a windfall to the plaintiff since both are designed to compensate the plaintiff for the same loss; the right to expect 6.44% interest for this loan through August 1, 2018 as well as the aforesaid ancillary damages.").

[195]See Grobman v. Chernoff, 15 N.Y.3d 525, 529, 914 N.Y.S.2d 731, 940 N.E.2d 557 (2010) ("Damages compensate plaintiffs in money for their losses, while prejudgment interest 'is simply the cost of having the use of another person's money for a specified period.' ").

[196]See Ultra Petroleum, 575 B.R. at 371 ("Although the Make-Whole Amount references future payments that would have been due on the Notes, it also references future hypothetical reinvestment rates. It then liquidates the differences in returns as of the acceleration date.").

[197]See Ultra Petroleum, 575 B.R. at 371 ("Because the formula recognizes the hypothetical receipt of $2,957,145 of interest over the 6 months, it does not double count interest.").

[198]See Ultra Petroleum, 575 B.R. at 371 ("The default rate only applies to the non-payment of the excess interest and not to the non-payment of the hypothetical reinvested amount.").

[199]See Ultra Petroleum, 575 B.R. at 371 (finding no "double counting" issues because "the Make-Whole Amount captured only excess interest due under the Notes in a hypothetical reinvestment. The default rate only applies to the non-payment of the excess interest and not to the non-payment of the hypothetical reinvested amount.").

[200]Even if not drafted as providing for a one-time fee or charge, a make-whole provision that deducts a hypothetical reinvestment rate from the discounted rate of the aggregate remain-

ing interest payments may nevertheless pass muster. See Ultra Petroleum, 575 B.R. at 370 ("Although the Make-Whole Amount references future payments that would have been due on the Notes, it also references future hypothetical reinvestment rates. It then liquidates the differences in returns as of the acceleration date.").

[201]GFI Brokers, LLC v. Santana, 2008 WL 3166972, at *12 (S.D. N.Y. 2008) ("The provision does not provide for actual damages in addition to liquidated damages, because it only reserves rights to additional remedies that are 'available.' To the extent that New York law precludes the availability of actual damages in a contract providing for liquidated damages, they are not 'other remedies available' . . . This means that GFI may not recover actual damages for breaches of the Non-Solicitation and Non-Competition Clauses, because the liquidated damages provision already provides recovery for such breaches. But the liquidated damages provision does reserve GFI's recourse to other remedies for breaches of other parts of the Agreement not covered by the provision, such as Santana's breach of the term of employment.").

[202]See Travelers, 549 U.S. at 444 ("Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.").

[203]See United Merchs., 674 F.2d at 141–43 (analyzing a provision for a "pre-payment charge" as a liquidated damages provision); JMD Holding Corp. v. Congress Financial Corp., 4 N.Y.3d 373, 379–80, 795 N.Y.S.2d 502, 828 N.E.2d 604 (2005) ("Whether the early termination fee represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances."); In re School Specialty, Inc., 2013 WL 1838513, at *2 (Bankr. D. Del. 2013) ("Under New York law, prepayment provisions . . . are analyzed under the standards applicable to liquidated damages."); Vanderveer Est., 283 B.R. at 129–31 (explaining that, under New York law, make-whole provisions are analyzed as liquidated damages provisions); South Side I, 451 B.R. at 270 ("Courts review prepayment consideration terms that are triggered by default and acceleration under the standards applicable to liquidated damages."); Ultra Petroleum Corp., 575 B.R. at 368 ("Contractual make-whole provisions and other, similar provisions are typically considered liquidated damages provisions."); In re Saint Vincent's Catholic Medical Centers of New York, 440 B.R. 587, 594–95, 53 Bankr. Ct. Dec. (CRR) 257 (Bankr. S.D. N.Y. 2010); MarketXT, 376 B.R. at 416; In re Financial Center Associates of East Meadow, L.P., 140 B.R. 829, 835–39, 22 Bankr. Ct. Dec. (CRR) 1550 (Bankr. E.D. N.Y. 1992).

[204]See JMD, 4 N.Y.3d at 381, 828 N.E.2d at 609 ("Absent some element of fraud, exploitive overreaching or unconscionable conduct . . . to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties."); Northwestern, 11 Misc. 3d at 986, 816 N.Y.S.2d at 837 ("The Court of Appeals has 'cautioned generally against interfering with parties' agreements' citing authority which notes a trend toward 'enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation.' ").

[205]See JMD, 4 N.Y.3d at 381, 828 N.E.2d at 610 ("The rule (against penalty clauses) hangs on, but is chastened by an emerging presumption against interpreting liquidated damages clauses as penalty clauses."). But see NCSPlus Inc. v. WBR Management Corp., 37 Misc. 3d 227, 235, 949 N.Y.S.2d 317, 323–24 (Sup 2012) ("Furthermore 'any reasonable doubt as to whether a provision constitutes an unenforceable penalty or a legitimate liquidated damages clause should be resolved in favor of a construction which holds the provision to be a penalty.' "); AXA Inv. Managers UK Ltd. v. Endeavor Capital Management LLC, 890 F. Supp. 2d 373, 388 (S.D. N.Y. 2012) ("Where there is doubt as to whether a provision constitutes an unenforceable penalty or a proper liquidated damage clause, it should be resolved in favor of a construction which holds the provision to be a penalty."); L & L Wings, Inc. v. Marco-Destin Inc., 756 F. Supp. 2d 359, 364 (S.D. N.Y. 2010).

[206]GFI Brokers, LLC v. Santana, 2009 WL 2482130, at *2 (S.D. N.Y. 2009) (citation omitted).

[207]GFI Brokers, LLC v. Santana, 2009 WL 2482130, at *2 (S.D. N.Y. 2009) (emphasis added).

[208]See JMD, 4 N.Y.3d at 381, 828 N.E.2d at 609 ("Absent some element of fraud, exploitive overreaching or unconscionable conduct . . . to exploit a technical breach, there is no warrant, either in law or equity, for a court to refuse enforcement of the agreement of the parties"); Northwestern, 11 Misc. 3d at 986, 816 N.Y.S.2d at 837 ("The Court of Appeals has 'cautioned generally against interfering with parties' agreements' citing authority which notes a trend toward 'enforcement of stipulated damage provisions as long as they do not clearly disregard the principle of compensation.' ").

[209]See United Merchs., 674 F.2d at 143; Northwestern, 11 Misc. 3d at 985, 816 N.Y.S.2d at 836 ("In order to be subject to enforcement, liquidated damages must bear 'a reasonable proportion to the probable loss' and the amount of actual loss must be 'incapable or difficult of precise estimation.' "); South Side I, 451 B.R. at 270 (explaining that "a prepayment premium is enforceable where (1) actual damages may be difficult to determine and (2) the sum stipulated is not plainly disproportionate to the possible loss.") (internal quotation marks omitted); Seidlitz v. Auerbach, 230 N.Y. 167, 173–74, 129 N.E. 461, 463 (1920) ("Generally whenever the damages flowing from a breach of a contract can be easily established or where the damages fixed are plainly disproportionate to the injury the stipulated sum will be treated as a penalty.").

[210]See South Side I, 451 B.R. at 270 ("Actual damages have little relevance to the validity of a liquidated damages clause. This is because the soundness of a prepayment 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.") (internal quotation marks omitted) (citations omitted); Walter E. Heller & Co., Inc. v. American Flyers Airline Corp., 459 F.2d 896, 898 (2d Cir. 1972) ("However, we observe that under New York law, contrary to the assumption of the defendants, the actual damages suffered by the party for whose benefit the clause is inserted in the contract have little relevance to the validity of a liquidated damages clause. 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."); United Merchs., 674 F.2d at 142 ("We believe the bankruptcy court erred by using hindsight in making this determination."); Seidlitz, 230 N.Y. at 172, 129 N.E. at 462 ("In determining whether the amount of the deposit is to be treated as liquidated damages or as a penalty the agreement is to be interpreted as of its date, not as of its breach."); Fin. Ctr., 140 B.R. at 837 ("Second, the Debtor argued that viewed under the current economic climate the formula would provide the lender with a windfall. However, in making such an argument the Debtor is using impermissible hindsight.").

[211]See Ultra Petroleum, 575 B.R. at 369 (explaining that "the difficulty in forecasting damages in this case is consistent with the difficulty seen in other cases when quantifying damages under long-term debt instruments and contrasts sharply with cases in which damages could easily have been calculated at the time an agreement was created."). The need for complex formulas, standing alone, evidences such difficulty. See Fin. Ctr., 140 B.R. at 836 ("Actual damages in complicated and sophisticated transactions do not lose their character as difficult to ascertain just because formulas may serve as a useful tool to estimate them. The mere need for a formula . . . show[s] that the actual loss to be incurred 'may be difficult to determine.' ").

[212]Drafters of debt instruments must strike a balance between (1) approximating actual damages caused by early repayment; and (2) disconnecting the make-whole formula from expected interest income. The former exerts an inexorable pull towards "unmatured interest," while the latter advocates for a make-whole formula disconnected "unmatured interest."

[213]See Heller, 459 F.2d at 899.

[214]See United Merchs, 674 F.2d at 142; Heller, 459 F.2d at 899 ("As was observed by the court below, if the American transaction was not consummated the lender was faced with 'the cost and expense of procuring substitute borrower or borrowers and the attendant delay in

lending the sums to be lent to American Flyers.' ").

[215]See Ultra Petroleum, 575 B.R. at 369–70.

[216]See Ultra Petroleum, 575 B.R. at 369–70. "Indeed, the very purpose of such a clause is to avoid the hazard of unpredictability." Fin. Ctr., 140 B.R. at 836.

[217]See South Side I, 451 B.R. at 270 ("In assessing the first criterion, whether actual damages are difficult to determine, courts consider 'the loss of interest to the lender, the rate of return on any substitute loan or loans, the duration of that loan . . . the risk of the substitute loan or loans, and the extent and realizability of the collateral for the substitute loan or loans . . .' "); Vanderveer Est., 283 B.R. at 130 (explaining that "factors that render the determination of potential damages difficult include the loss of interest to the lender, the rate of return on any substitute loan or loans, the duration of that loan (or those loans), the risk of the substitute loan or loans, and the extent and realizability of the collateral for the substitute loan or loans."); Ultra Petroleum, 575 B.R. at 369 (explaining that "the difficulty in forecasting damages in this case is consistent with the difficulty seen in other cases when quantifying damages under long-term debt instruments and contrasts sharply with cases in which damages could easily have been calculated at the time an agreement was created."); Heller, 459 F.2d at 899–00 ("Moreover, Heller's conceivable losses were not subject to easy calculation. The variables inherent in a lender-borrower relationship arising out of the borrower's need for funds to purchase a nine million dollar jet airplane are numerous and uncertain. Such facts as rate of return, duration of the loan, risk, extent and realizability of collateral, and the other obvious uncertainties inherent in this particular contract combined to make it difficult to foresee, at the time the contract was executed, the extent of damages which might arise from the breach of the loan agreement. Therefore, it was reasonable that a sum for liquidated damages should be agreed to after arms-length negotiations.").

[218]See Northwestern, 11 Misc. 3d at 986, 816 N.Y.S.2d at 836 ("Lost interest, whether designated as an income stream, or contracted for yield or unaccrued or unearned interest, is not difficult to ascertain with respect to an amortized loan. Indeed, amortization schedules outline precise interest payments due over the life of the loan. Because both actual and liquidated damages are recoverable damages when the predicate for the awards 'differ in kind' . . . if it is possible to ascertain actual damages for unaccrued interest, liquidated damages for costs in relending, which may be difficult to estimate, can be provided for separately.").

[219]See South Side I, 451 B.R. at 270 ("Actual damages are difficult to determine even where loan payments are calculated based on a set formula . . . As one court explained, 'actual damages in complicated and sophisticated transactions do not lose their character as difficult to ascertain just because formulas may serve as a useful tool to estimate them.' "); Vanderveer Est., 283 B.R. at 130 ("Potential losses from prepayment of a large fixed-rate, long-term mortgage are 'not subject to easy calculation.' "); United Merchs., 674 F.2d at 143 (finding where case "involves a loan agreement between sophisticated parties for a large sum of money . . . it is apparent that the potential damages from breach of the loan agreements . . . were difficult to determine.").

[220]See United Merchs., 674 F.2d at 142 ("It thus makes no difference whether the actual damages are ultimately higher or lower than the sum stated in the clause.").

[221]See South Side I, 451 B.R. at 270–71 ("In considering the second criterion, whether the prepayment consideration is 'plainly disproportionate' to the possible loss, prepayment consideration that is calculated so that the lender will receive its bargained-for yield satisfies this test. This is because when there has been an arms-length transaction between adequately represented sophisticated businessmen . . . it would be offensive to the basic notion of freedom of contract' to allow the borrower to 'gamble with lenders' money regarding the discount rate applicable to pre-payment charges.").

[222]See In re School Specialty, Inc., 2013 WL 1838513, at *4 n.7.

[223]See Chemtura, 439 B.R. at 602 ("But if, as seems to be the case, the sophisticated parties who agreed to these provisions were trying to approximate the lenders' loss in the event

of early repayment, I think I and many other courts would be reluctant to invalidate the Make-Whole Provision (or, especially, to invalidate it in full), unless it turned out to be truly an unjustifiable penalty.").

[224]See In re Skyler Ridge, 80 B.R. 500, 505, 16 Bankr. Ct. Dec. (CRR) 1122, Bankr. L. Rep. (CCH) P 72167 (Bankr. C.D. Cal. 1987) ("The second deficiency in the formula in the promissory note is that it contains no discount for present value. Application of the formula would permit Travelers to recover its entire lost interest at the time of prepayment, rather than over the life of the loan. Because there is no recognition of the time value of money in the formula, the Court finds that this feature of the formula is also unreasonable and cannot be upheld."); In re Kroh Bros. Development Co., 88 B.R. 997, 1000–01 (Bankr. W.D. Mo. 1988) ("Moreover, there is no discount to present value, which would further reduce MBL's claim. As the court in Skyler stated, the absence of discounting allows MBL 'to recover its entire lost interest at the time of prepayment, rather than over the life of the loan.' . . . Here, the failure to provide a discount to present value, which results in a huge windfall to MBL, is alone sufficient to render the provision unreasonable and unenforceable" under Missouri law.).

[225]See In re School Specialty, Inc., 2013 WL 1838513, at *3–4 (finding that make-whole claim calculated based on U.S. treasury securities is not plainly disproportionate to lender's loss). It is wise to deduct from the discounted amounts the full, undiscounted principal amount, as if the full principal is repaid on *the date of acceleration.*

[226]Even though lenders might be able to reinvest the debt proceeds at a higher rate, courts nevertheless recognize the uncertainty associated with future damages and, therefore, enforce make-whole provisions that are tethered to a reference security that provides the lender with assurance of a "relatively stable and secure rate of return." See In re CP Holdings, Inc., 332 B.R. 380, 391 (W.D. Mo. 2005), aff'd, 206 Fed. Appx. 629 (8th Cir. 2006); Ultra Petroleum, 575 B.R. at 370 ("The parties agreed on a simple measurement. The reinvestment rate was set at 0.5% in excess of the yield reported two business days before the Settlement Date—for the most recently issued actively traded on-the-run U.S. Treasury securities having a maturity equal to the remaining tenor of the relevant OpCo Note as of the date it was accelerated."). But see Skyler Ridge, 80 B.R. at 505 ("The yield for U.S. Treasury notes runs approximately 1.3 to two percentage points below the market for first mortgages. Thus, a drop of one percent in the long-term mortgage rate would result in almost a triple recovery to Travelers; a drop of two percent would result in almost a double recovery . . . It would have been permissible for the parties to have chosen an index rate such as that for U.S. Treasury notes that differs from the market for long-term first mortgages, provided that some appropriate adjustment to bring this rate up to the first mortgage rate were included. However, the parties included no such adjustment in the formula in the promissory note. Thus the Court finds that this feature of the formula in the promissory note is unreasonable."); Kroh Bros., 88 B.R. at 1000–01 ("Here, the contract rate of interest is 13 percent and the U.S. Treasury rate is 9.34 percent . . . The court further finds that the sum set forth in the prepayment penalty clause is unreasonable, disproportionate to the amount of probable damages and oppressive to debtor.").

[227]This holds true for revolver loan agreements under which the debtor is not obligated to draw—even though the revolver may never be fully drawn down, courts recognize that lenders "contractually limit[] [their] lending activities so that the funds to be advanced to [the debtor] might be available when needed by [the debtor]." See Heller, 459 F.2d at 899. In *JMD Holding Corp.*, a revolver loan agreement provided for a make-whole claim calculated on the assumption that the full principal was drawn down, without accounting for the possibility that the debtor would never fully draw the principal. 4 N.Y.3d at 382. The court explained that the lender modified its behavior to insure availability of the full principal amount, even if the debtor never intended to draw down the full amount and, accordingly, enforced the make-whole claim. See 4 N.Y.3d at 383–85 ("Congress had to have adequate funding in place to fulfill its obligation to lend up to $40 million to JMD upon request throughout the Agreement's term. This commitment created costs for Congress as well as diminished its capacity to make profitable loans to other entities.").

[228]See Northern Shipping Funds I, L.L.C. v. Icon Capital Corp., 998 F. Supp. 2d 301, 334 (S.D. N.Y. 2014) ("The court should also consider whether 'the parties to the contract were sophisticated and represented by counsel, the contract was negotiated at arms-length between parties of equal bargaining power.' "); L & L Wings, 756 F. Supp. 2d at 365 ("Much of the traditional 'hostility to liquidated damages clauses reflects a concern that such clauses are often unconscionably imposed by the stronger, or more sophisticated party on the weaker.' ").

[229]See School Specialty, at *4 (finding arm-length negotiations even though the debtor was distressed during the negotiations); Fin. Ctr., 140 B.R. at 837 (where the "magnitude of the loan transaction and quality and quantity of the loan documents" is great, it "leave[s] little doubt that . . . we have an arms-length transaction between adequately represented sophisticated businessmen.").

[230]See, e.g., Cash America, 2016 WL 5092594.

[231]See, e.g., Hidden Lake, 247 B.R. at 728 ("Upholding this prepayment charge as a valid liquidated damages provision will seriously deter this Debtor's ability to utilize the federal bankruptcy laws to reorganize. The amount imposed by the charge will overcompensate Aetna if the Debtor's plan is confirmed and Aetna continues to receive payments on the obligation. However, the Court is not free to impose its view on this issue.").

[232]See Chemtura, 439 B.R. at 602 ("We'd then get to the subsequent issue of whether I should entirely disregard the Make-Whole Provision or cut it down to conform to existing New York law. And I think all of these issues would be subjects of fair debate."); 439 B.R. at 600 ("I'd then have to determine the appropriate damages for a violation of the No-Call, and whether, under the Make-Whole, the 'punishment fits the crime'-and if it didn't, whether the Make-Whole Premium should thus be wholly disallowed as a penalty, or simply reduced to an appropriate amount.").

[233]See Chemtura, 439 B.R. at 603.

[234]See Travelers, 549 U.S. at 450.

[235]See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 582.

[236]See Travelers, 549 U.S. at 449 ("But even where a party in interest objects, the court 'shall allow' the claim 'except to the extent that' the claim implicates any of the nine exceptions enumerated in § 502(b).").

[237]Notably, damages from breach of a "no-call" provision generally do not pass muster under section 506(b). See, e.g., Momentive I, 2014 WL 4436335, at *13; HSBC Bank, 2010 WL 3835200, at *4 ("Trustee may not recover under § 506(b) because it does not have allowed claims under § 502, and no damages were 'provided for under the agreements' in the event of repayment pursuant to acceleration."); Continental Securities Corp. v. Shenandoah Nursing Home Partnership, 188 B.R. 205, 215–16 (W.D. Va. 1995) (relying on section 506(b) to deny a make-whole claim where debt instrument was devoid of make-whole provision).

[238]See HSBC Bank, 2010 WL 3835200, at *5 ("The Bankruptcy Code does not define 'unmatured interest,' but case law has determined that unmatured interest includes interest that is not yet due and payable at the time of a bankruptcy filing, or is not yet earned.") (emphasis added); In re Alves, 2007 WL 1540264, at *4 (Bankr. W.D. N.Y. 2007) (explaining that "unmatured interest is interest that has not been earned"); In re Moore, 307 B.R. 394, 397, 2004-1 U.S. Tax Cas. (CCH) P 50243, 93 A.F.T.R.2d 2004-1875 (Bankr. S.D. N.Y. 2004) ("The Bankruptcy Code does not provide a definition for what constitutes 'unmatured interest' but case law has defined it as interest that is not yet due and payable at the time the debtor filed its bankruptcy petition . . . or that has not been 'earned' as of the filing of the bankruptcy petition."); H.R. Rep. No. 95-595, 95th Cong., 1st. Sess., at 353 (1977), reprinted in 1978 U.S.C.A.A.N. 5963, 6309.

[239]This is consistent with legislative history dictating that "interest stops accruing at the date of the filing of the petition." See S. Rep. No. 95-989, 95th Cong., 2d Sess., at 63 (1978), as reprinted in 1978 U.S.C.C.A.N. 5787, 5849.

240 See In re Chateaugay Corp., 961 F.2d 378, 380, 22 Bankr. Ct. Dec. (CRR) 1347, 26 Collier Bankr. Cas. 2d (MB) 1174, Bankr. L. Rep. (CCH) P 74550 (2d Cir. 1992) ("Original issue discount results when a bond is issued for less than its face value.").

241 See Solutia, 379 B.R. at 486 ("When bonds of face amount of $1,000 are issued for $900, the difference of $100 is the original issue discount. When and as the $100 is paid by the borrower, the 'lender' is receiving interest, not a return of capital."); Chateaugay Corp., 961 F.2d at 380 ("The discount, which compensates for a stated interest rate that the market deems too low, equals the difference between a bond's face amount (stated principal amount) and the proceeds, prior to issuance expenses, received by the issuer.").

242 See U.S. v. Midland-Ross Corp., 1965-2 C.B. 474, 381 U.S. 54, 57, 85 S. Ct. 1308, 14 L. Ed. 2d 214, 65-1 U.S. Tax Cas. (CCH) P 9387, 15 A.F.T.R.2d 836 (1965) ("Earned original issue discount serves the same function as stated interest, concededly ordinary income and not a capital asset; it is simply 'compensation for the use or forbearance of money.' ").

243 See Solutia, 379 B.R. at 486 ("When and as the $100 is paid by the borrower, the 'lender' is receiving interest, not a return of capital."); In re Allegheny Intern., Inc., 100 B.R. 247, 250, 19 Bankr. Ct. Dec. (CRR) 751, 23 Collier Bankr. Cas. 2d (MB) 71, Bankr. L. Rep. (CCH) P 72966 (Bankr. W.D. Pa. 1989) ("We hold that original issue discount is unmatured interest, as that term is used in section 502(b)(2)."); Matter of Pengo Industries, Inc., 962 F.2d 543, 546, 27 Collier Bankr. Cas. 2d (MB) 119 (5th Cir. 1992) ("The term 'unmatured interest,' which is not defined by the Bankruptcy Code, encompasses OID. The economic reality of original issue discounting bolsters this conclusion.").

Likewise, New York law requires refunds or credits for unearned OID. See Berman v. Schwartz, 59 Misc. 2d 184, 186, 298 N.Y.S.2d 185 (Sup 1968), judgment aff'd, 33 A.D.2d 673, 305 N.Y.S.2d 1019 (1st Dep't 1969) (explaining that "the unearned part of the interest must be deducted upon acceleration and payment of an indebtedness prior to maturity.").

244 Section 502(b)(2)'s legislative history provides:

> 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.

See H.R. Rep. No. 95-595, at 352–53, 1978 U.S.C.A.A.N. at 6308–09; S. Rep. No. 95-989, at 62, 1978 U.S.C.A.A.N. at 5848 ("Interest disallowed under this paragraph includes postpetition interest that is not yet due and payable, and any portion of prepaid interest that represents an original discounting of the claim, yet that would not have been earned on the date of bankruptcy.").

245 See In re Doctors Hosp. of Hyde Park, Inc., 508 B.R. 697, 705–06 (Bankr. N.D. Ill. 2014) ("Both OID and [make-whole premiums] 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 [make-whole payment].").

246 See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 581.

247 See Drs. Hosp., 508 B.R. at 705 (explaining that "courts look to the economic substance of the transaction to determine what counts as interest.").

248 See In re Trico Marine Services, Inc., 450 B.R. 474, 480 (Bankr. D. Del. 2011) ("Research reveals that the substantial majority of courts considering this issue have concluded that make-whole or prepayment obligations are in the nature of liquidated damages rather than unmatured interest, whereas courts taking a contrary approach are distinctly in the minority."); Chemtura, 439 B.R. at 604 ("Second, it's at least arguable that in bankruptcy cases, make-whole premiums and damages for breach of a no-call are proxies for unmatured interest-and that where unmatured interest must be disallowed, they likewise should be

disallowed. The cases on this are split. The majority view says that they shouldn't be disallowed, and the minority view says that they should. Acceptance of the majority view would favor lenders with such provisions, while acceptance of the minority view would favor estates and the other creditors (and as relevant here, the Equity Committee)."); In re Ridgewood Apartments of DeKalb County, Ltd., 174 B.R. 712, 721 (Bankr. S.D. Ohio 1994) ("As an attempt to compensate the lender for potential loss in interest income, Fannie Mae's claim for a prepayment penalty is not allowed under 11 U.S.C. § 502(b)(2).").

[249]See Pengo Indus., 962 F.2d at 546 ("The 'unmatured interest' bankruptcy rule and the economic notion of 'original issue discount' intersect to form the legal nexus for our decision-making. The term 'unmatured interest,' which is not defined by the Bankruptcy Code, encompasses OID. The economic reality of original issue discounting bolsters this conclusion."); Chateaugay Corp., 961 F.2d at 380 ("As a matter of economic definition, OID constitutes interest.").

[250]See, e.g., Thrifty Oil Co. v. Bank of America Nat. Trust and Sav. Ass'n, 322 F.3d 1039, 1047 (9th Cir. 2003) (listing cases).

[251]See 275 B.R. at 823–24.

[252]See Mims, 275 B.R. at 802–03 (There, the debt instrument obligated the debtor to pay various charges, including "Initial and Annual Facility Fees.").

[253]See Mims, 275 B.R. at 798–00.

[254]See Mims, 275 B.R. at 816–17.

[255]Mims, 275 B.R. at 823–24 (emphasis added) (citations omitted).

[256]On appeal, the district court affirmed the "disguised interest" holding, but reversed the holding that the "Loan was not accelerated."

[257]See Thrifty Oil Co. v. Bank of America Nat. Trust and Sav. Ass'n, 322 F.3d 1039 (9th Cir. 2003).

[258]Thrifty, 322 F.3d at 1048.

[259]Thrifty, 322 F.3d at 1049 (emphasis added).

[260]According to the court, "[n]o matter how tightly the borrower integrates the swap with its loan, the payments made under the swap cannot represent interest." Thrifty, 322 F.3d at 1049.

[261]See, e.g., Trico Marine, 450 B.R. at 481 ("This Court is persuaded by the soundness of the majority's interpretation of make-whole obligations, and therefore finds that the Indenture Trustee's claim on account of the Make-Whole Premium is akin to a claim for liquidated damages, not a claim for unmatured interest."); Premier Ent., 445 B.R. at 640; Skyler Ridge, 80 B.R. at 508 ("Liquidated damages, including [make-whole claims], fully mature at the time of breach, and do not represent unmatured interest."); In re Outdoor Sports Headquarters, Inc., 161 B.R. 414, 424, 25 Bankr. Ct. Dec. (CRR) 30, 30 Collier Bankr. Cas. 2d (MB) 710 (Bankr. S.D. Ohio 1993) ("Prepayment amounts, although often computed as being interest that would have been received through the life of a loan, do not constitute unmatured interest because they fully mature pursuant to the provisions of the contract."); United Merchs., 674 F.2d at 144 (pre-Bankruptcy Code decision enforcing prepayment premium on the basis that "[n]othing in bankruptcy law or policy counsels against recognition of [the make-whole] claims for liquidated damages."); School Specialty, 2013 WL 1838513, at *5 ("I agree with Judge Shannon and likewise conclude that the Make Whole Payment claimed by Bayside should not be disallowed as unmatured interest under Section 502(b)(2)."); Lappin Elec., 245 B.R. at 330 ("Furthermore, this court is in agreement with a majority of courts that view a prepayment charge as liquidated damages, not as unmatured interest or an alternative means of paying under the contract."); Ultra Petroleum, 575 B.R. at 368 ("Contractual make-whole provisions and other, similar provisions are typically considered liquidated damages provisions.").

[262]See United Merchs., 674 F.2d at 142; Heller, 459 F.2d at 899 ("As was observed by the court below, if the American transaction was not consummated the lender was faced with 'the cost and expense of procuring substitute borrower or borrowers and the attendant delay in lending the sums to be lent to American Flyers.' ").

[263]See, e.g., Trico Marine, 450 B.R. at 481; Premier Ent., 445 B.R. at 640; Skyler Ridge, 80 B.R. at 508; School Specialty, 2013 WL 1838513, at *5 (emphasis added).

[264]See Chemtura, 439 B.R. at 604 (finding the minority view that make-whole payments are a form of "unmatured interest" to be "rather persuasive" and explaining that it "might thus favor" it) ("Second, it's at least arguable that in bankruptcy cases, make-whole premiums and damages for breach of a no-call are proxies for unmatured interest-and that where unmatured interest must be disallowed, they likewise should be disallowed."); Ridgewood Apts., 174 B.R. at 720 ("As an attempt to compensate the lender for potential loss in interest income, Fannie Mae's claim for a prepayment penalty is not allowed under 11 U.S.C. § 502(b)(2).").

[265]Drs. Hosp., 508 B.R. at 705–06.

[266]Drs. Hosp., 508 B.R. at 706 (emphasis added).

[267]Drs. Hosp., 508 B.R. at 706. Because the make-whole claim was not triggered until three months *after* the date of the bankruptcy filing, the court explained that the make-whole claim did not satisfy section 502(b)(2)'s condition that it be "due and payable *at the time the petition was filed*." 508 B.R. at 706 (emphasis added).

[268]See I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 448 n.31, 107 S. Ct. 1207, 1222, 94 L. Ed. 2d 434 (1987) ("[T]he fact that Congress has prescribed two different standards in the same Act certainly implies that it intended them to have significantly different meanings.").

[269]Nevertheless, courts applying section 506(b) may look past the "label" and to the "economic substance." See, e.g., In re AE Hotel Venture, 321 B.R. 209, 215, 44 Bankr. Ct. Dec. (CRR) 92 (Bankr. N.D. Ill. 2005) ("Default interest is instead designed to reimburse creditors for extra costs incurred after default. Default interest, then, is not true interest at all. It is a form of late charge and thus is a charge for purposes of section 506(b).") (internal quotation marks omitted) (citations omitted).

[270]H.R. Rep. No. 95-595, at 352, 1978 U.S.C.A.A.N. at 6308; S. Rep. No. 95-989, at 62; 1978 U.S.C.A.A.N. at 5848 ("Whether interest is matured or unmatured on the date of bankruptcy is to be determined without reference to any ipso facto or bankruptcy clause in the agreement creating the claim."); Allegheny Int'l, 100 B.R. at 249–50 ("Notwithstanding the proscription of unmatured interest as an allowable claim, Fidata asserts that we must allow its claim in full. In effect, Fidata argues that because of a clause in the indenture, it may act as though the debtor was not in bankruptcy. We find such a position without merit. Fidata's argument is anomalous; it is beyond dispute that bankruptcy affects the relationship between a debtor and its creditors. Moreover, the clear legislative history to section 502(b)(2) declares that determination of the maturity of interest shall be made 'without reference to any ipso facto or bankruptcy clause in the agreement creating the claim.' Therefore the actual language of the indenture does not support Fidata's arguments. We hold that original issue discount is unmatured interest, as that term is used in section 502(b)(2).") (citations omitted); In re ICH Corp., 230 B.R. 88, 94 (N.D. Tex. 1999) ("In this context, the Code requires that the court determine the maturity of interest without reference to any ipso facto or any bankruptcy clause in the agreement creating a claim against the bankrupt entity.").

Congress limited the enforcement of ipso facto clauses to avoid penalizing debtors for filing for bankruptcy relief. See In re Moss, 1995 WL 17005342 at *3 (Bankr. S.D. Ga. 1995) ("In order to determine the appropriate method of calculating the interest rebate upon the bankruptcy filing, a determination must be made as to the state law method of calculating the unearned interest rebate to ensure that the rebate method upon filing bankruptcy does not penalize the debtor for seeking bankruptcy protection."); Matter of Bonner, 1984 WL 37542, at *3 (Bankr. M.D. Ga. 1984) ("By reference to the ipso facto clause, Congress recognized that it did not intend to penalize the debtor for filing a bankruptcy petition. Ipso facto clauses are disfavored because they discourage the filing of a bankruptcy petition by a troubled debtor and they impede a debtor's effort to rehabilitate himself under the Bankruptcy Code.").

[271]See AMR, 730 F.3d at 106 ("U.S. Bank is correct that Sections 4.01(g) and 4.02(a)(i) are indeed ipso facto clauses.").

An ipso facto provision dictates that a debtor's rights are modified based on its bankruptcy filing. See Ipso Facto Clause, Black's Law Dictionary (10th ed. 2014) ("Ipso Facto Clause") (defining ipso facto clause as a "contract clause that specifies the consequences of a party's bankruptcy.").

[272]An ipso facto provision modifies a debtor's rights based on its bankruptcy filing.

[273]The prohibition against enforcement of ipso facto clauses, according to certain courts, extends beyond those in "executory contracts." See, e.g., In re W.R. Grace & Co., 475 B.R. 34 (D. Del. 2012), stay pending appeal denied, (3rd Circ. 12-2966)(June 27, 2012) and aff'd, (3rd Cir. 12-2904)532 Fed. Appx. 264 (3d Cir. 2013) and aff'd, (3rd Cir. 12-1402)729 F.3d 311, 58 Bankr. Ct. Dec. (CRR) 113 (3d Cir. 2013) and aff'd, (3rd Cir. 12-1402)729 F.3d 332, 58 Bankr. Ct. Dec. (CRR) 112 (3d Cir. 2013) ("Numerous courts have prohibited enforcement of ipso facto clauses on more general grounds not based on either statutory provision," including section 365(e)(1).).

[274]In using the term "ipso facto clause" in the House and Senate reports, Congress was referring to one or all of the following sections 365(e)(1), 363(I), and 541(c)(1)(B)—the only provisions that reference "ipso facto clauses." As explained by the Second Circuit,

> Section 541(c)(1)(B) provides that once a bankruptcy case is commenced, any property interests of the debtor become property of the bankruptcy estate, notwithstanding any ipso facto clause that 'effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.' See id. ('An interest of the debtor in property becomes property of the estate . . . notwithstanding any provision in an agreement' that is 'conditioned on the insolvency or financial condition of the debtor' or on the commencement of a bankruptcy case 'and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property').
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> . . .
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> Finally, section 363 of the Code gives the bankruptcy trustee general powers to use, sell, or lease property of the estate, see id. § 363(b), (c), and § 363(l) makes clear that the trustee has such powers, notwithstanding any ipso facto clause, see id. § 363(l) ('Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section . . . notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor' or the commencement of a bankruptcy case 'and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property').

AMR, 730 F.3d at 106–07. Section 365(e)(1) is directly relevant to debt instruments.

[275]See AMR, 730 F.3d at 106 (The "argument that the Code categorically prohibits enforcement of [automatic acceleration] clauses - and that these clauses, in particular, are unenforceable - is without merit."); Mims v. Fidelity Funding, Inc., 307 B.R. 849, 858 (N.D. Tex. 2002) ("The Bankruptcy Court is correct in holding that 'clauses that terminate or modify a debtor's rights in an executory contract upon the filing of a bankruptcy petition are generally rendered unenforceable and are known as ipso facto clauses' . . . However, the Bankruptcy Court erred in holding the acceleration clause unenforceable in this instance because it overlooked the exception to the general rule.") (citation omitted).

[276]See H.R. Rep. No. 95-595, at 347, 1978 U.S.C.A.A.N. at 6303–04; S. Rep. No. 95-989, at 58, 1978 U.S.C.A.A.N. at 5844; N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 521–22 n.6, 104 S. Ct. 1188, 79 L. Ed. 2d 482, 11 Bankr. Ct. Dec. (CRR) 564, 9 Collier Bankr. Cas. 2d (MB) 1219, 5 Employee Benefits Cas. (BNA) 1015, 115 L.R.R.M. (BNA) 2805, Bankr. L. Rep. (CCH) P 69580, 100 Lab. Cas. (CCH) P 10771 (1984) ("The Bankruptcy Code furnishes no express definition of an executory contract, see 11 U.S.C. § 365(a) (1982 ed.), but the legislative history to § 365(a) indicates that Congress intended the term to mean a contract 'on which performance is due to some extent on both sides.' ").

[277]Vern Countryman, Executory Contracts in Bankruptcy: Part I, 57 Minn. L. Rev. 439, 460 (1973); Bildisco, 465 U.S. at 521–22 n.6.

[278]See In re PWS Holding Corp., 2002 WL 32332066, at *2 (Bankr. D. Del. 2002) (holding that a debt instrument is not an "executory contract" because it lacks mutuality of obligations); In re Zenith Laboratories, Inc., 104 B.R. 667, 672, Bankr. L. Rep. (CCH) P 73176 (Bankr. D. N.J. 1989) (finding that a debt instrument is not an "executory contract" where "no significant, future, affirmative performance was left to be performed").

In re Texaco, Inc., however, the court found that an indenture trustee's continuing obligations are sufficiently material to fall within the ambit of an "executory contract." 73 B.R. 960 (Bankr. S.D.N.Y. 1987). There, the indenture trustee sought stay relief in order to serve the debtor with an acceleration notice. The court found that section 365(e)(2)(B), which uses language identical to that used in section 365(c)(2), does not permit an indenture's ipso facto clause to modify rights of a debtor. To find that the indenture is executory, the court relied on, among other things, the indenture trustee's continuing obligation to enforce the indenture and provide notices to the noteholders.

But *Texaco* is rife with infirmities—the court neither considered whether a breach of such obligations is sufficiently material to justify the debtor's non-performance, nor addressed whether the indenture trustee's obligations are owed to the *noteholders* or the *debtor.* And *Texaco* has been criticized by many courts. See, e.g., Premier Ent., 445 B.R. at 617–18 ("Both the Debtors and the Claimants contend that the Indenture does not satisfy Professor Countryman's definition because a breach by the Indenture Trustee of its continuing obligations, such as its duty to tender notices of default to the Debtors, would not be sufficiently material to excuse the Debtors from their continuing obligation under the Indenture to make interest payments to the Noteholders. In other words, they regard the Indenture Trustee's duties to the Debtors (as opposed to those the Indenture Trustee owed to the Noteholders) as inconsequential. Both the Debtors and the Claimants recognize that this point of view conflicts with the result reached in *Texaco*, but the Debtors insist that Texaco was wrongly decided and the Claimants note that *Texaco* does not constitute controlling precedent. Consequently, it is unnecessary for this Court to decide the issue because all parties concede that the Indenture in this case was not an executory contract."); AMR, 485 B.R. at 297 (finding that ipso facto clauses are not per se invalid except when contained in an executory contract and noting that "both U.S. Bank and the Debtors admit that the Indentures here are not executory contracts").

[279]Treating certain debt instruments as "executory contracts" subject to rejection militates against the Trust Indenture Act's policy of protecting public noteholders. See 15 U.S.C.A. § 77ppp(a) (1990).

[280]Noteholders, by funding the debt, satisfied all obligations. Any remaining obligations are those of an indenture trustee, administrative agent, or similar fiduciary—but those obligations are owed to *noteholders*, not the debtor. Any obligations to the debtor are merely incidental.

Applying the *Countryman* definition to debt instruments, the court in *PWS Holding* recognized that while a debtor may have prepetition obligations to noteholders to pay the debt, the noteholders neither owed any duties nor had any obligations *to the debtor.* Accordingly, the court held that an indenture is not an executory contract because it lacks mutuality of obligations. See In re PWS Holding Corp., 2002 WL 32332066, at *2; see also Zenith Labs., 104 B.R. at 672 (finding an indenture was not an executory contract where "no significant, future, affirmative performance was left to be performed").

[281]See In re Streets & Beard Farm Partnership, 882 F.2d 233, 235, Bankr. L. Rep. (CCH) P 73067 (7th Cir. 1989). Debt instruments for debt that is secured, however, may fall within the definition of an "executory contract." See St. Vincent's, 440 B.R. at 601 (distinguishing *Texaco* on the basis that the creditors were unsecured creditors and explaining that such distinction is important because mortgages are generally not executory contracts); Hearing Transcript at 85, In re AMR Corp., No. 11-15463 (Bankr. S.D.N.Y. Nov. 29, 2012), ECF No. 5581 (although both sides agreed that indentures are not "executory contracts," Judge Lane acknowledged plausibility of contrary arguments).

[282]See 11 U.S.C.A. § 365(e)(2) (2005) ("Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor . . . if . . . such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor."). To interpret section 365(e)(2), courts look to case law interpreting the identical language of section 365(c)(2), which prevents debtors from assuming or assigning certain credit contracts.

[283]See In re United Airlines, Inc., 368 F.3d 720, 723, 42 Bankr. Ct. Dec. (CRR) 276, 51 Collier Bankr. Cas. 2d (MB) 1924, Bankr. L. Rep. (CCH) P 80095 (7th Cir. 2004) (emphasis added); H.R. Rep. 95-595, at 348, 1978 U.S.C.A.A.N. at 6304; S. Rep. No. 95-989, at 59, 1978 U.S.C.A.A.N. at 5845 ("The section permits the trustee to continue to use and pay for property already advanced, but is not designed to permit the trustee to demand new loans.").

[284]As a debtor's bankruptcy filing becomes more probable, lenders may aggressively enforce covenants with the goal of exercising elective acceleration before the bankruptcy filing. See Hidden Lake, 247 B.R. at 730 ("The problem with that argument in this circumstance, however, is that Aetna's entitlement to the prepayment charge arose upon acceleration of its debt. That event occurred many months before the Debtor filed this bankruptcy case. The charge matured at the time the debt was accelerated for default under the terms of the Amended Note. Consequently, even though the purpose for the provision was to capture the return on Aetna's investment which could be lost upon a default in payments, the charge is more than and different from an 'unmatured interest' assessment. It may in reality represent estimated interest, but it is not unmatured after December of 1998."); 247 B.R. at 730 ("Had Aetna's note contained an acceleration right exercisable upon the filing of a bankruptcy petition and had there been no prepetition acceleration, the result might be different. Under the facts of this case, however, the Court agrees with the existing case law that a prepayment charge imposed prepetition is not a claim for unmatured interest within the meaning of § 502(b)(2)."); In re Tri-State Ethanol Co. LLC, 354 B.R. 913, 918 n.6 (Bankr. D. S.D. 2006), order rev'd, 2007 DSD 9, 369 B.R. 481 (D.S.D. 2007), aff'd, 525 F.3d 649, 49 Bankr. Ct. Dec. (CRR) 276, Bankr. L. Rep. (CCH) P 81236, 34 A.L.R. Fed. 2d 819 (8th Cir. 2008) and rev'd on other grounds, 538 F.3d 920, 50 Bankr. Ct. Dec. (CRR) 114 (8th Cir. 2008) ("In any event, the prepayment charge was fully due and owing on the date Debtor filed its petition. Thus, it cannot represent unmatured interest.").

[285]See AMR, 730 F.3d at 106 ("U.S. Bank is correct that Sections 4.01(g) and 4.02(a)(i) are indeed ipso facto clauses.").

[286]See Hidden Lake, 247 B.R. at 730 ("Aetna contends that the prepayment charge is not matured, is not 'interest' and is a proper part of its claim. The Court agrees that it should look to the substance of a claim component rather than to the name given to that component. In addition, § 502(b)(2) does not allow a claim to include unmatured interest. The problem with that argument in this circumstance, however, is that Aetna's entitlement to the prepayment charge arose upon acceleration of its debt. That event occurred many months before the Debtor filed this bankruptcy case. The charge matured at the time the debt was accelerated for default under the terms of the Amended Note . . . Had Aetna's note contained an acceleration right exercisable upon the filing of a bankruptcy petition and had there been no prepetition acceleration, the result might be different. Under the facts of this case, however, the Court agrees with the existing case law that a prepayment charge imposed prepetition is not a claim for unmatured interest within the meaning of § 502(b)(2).").

[287]Analogizing section 502(b) to its counterparts manifests the fallacy of the unsupported "liquidated damages exception."

Consider, for example, section 502(b)(6), which caps lease rejection damages. As part of lease rejection claims, parties often seek to include "extras"—in the form of "liquidated damages"—that are usually disconnected from the lease rejection. Courts nevertheless cap all damages arising from lease rejection, and the decisions are devoid of any exception for "liquidated damages." See, e.g., In re Foamex Intern., Inc., 368 B.R. 383, 393, 48 Bankr. Ct. Dec. (CRR) 83 (Bankr. D. Del. 2007) ("Even courts which do not accept that rejection of the lease equates with termination would limit all of the landlord's damage claims pursuant to

§ 502(b)(6) because that is the section dealing with claims by a lessor against the estate in bankruptcy."); In re Mr. Gatti's, Inc., 162 B.R. 1004, 1013–14 (Bankr. W.D. Tex. 1994) ("Section 502(b)(6) limits a landlord's claim against the bankruptcy estate once a debtor rejects a previously unexpired lease of real property. Under the facts of this case, the damages suffered by the landlord because the Debtor's rejection of the lease and failure to perform, including its failure to perform its maintenance and repair obligations, are allowable, but are capped in the amount of $47,571.00 as the claim to be allowed against the bankruptcy estate.").

Consider, as another example, section 502(b)(7), which provides priority status to wage claims. In applying section 502(b)(7), courts do not hesitate to cap wage damages, even if artfully labeled as "liquidated damages." See, e.g., In re Protarga, Inc., 329 B.R. 451 (Bankr. D. Del. 2005) (explaining that liquidated damages under state statutory wage law are subject to section 502(b)(7)'s cap).

Like section 502(b)(6) and section 502(b)(7), section 502(b)(2) should not be treated differently based on a "liquidated damages exception."

[288]See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 581 ("Reading section 502(b)(2) to disallow a claim for unmatured interest, but not a claim for the present value of that interest, is difficult to defend.").

[289]If the claim is oversecured, section 506(b) allows for post-petition interest. See HSBC Bank, 2010 WL 3835200, at *7.

[290]See Premier Ent., 445 B.R. at 618 ("First, the charge at issue must satisfy the provisions of § 502(b)(1), that is, it must be included in a contract provision that is enforceable under applicable state law . . . If it does not, the claim is disallowed under § 502(b)(1). Second, the charge must be 'reasonable,' as determined by federal law.").

[291]See In re Milham, 141 F.3d 420, 422–23, 32 Bankr. Ct. Dec. (CRR) 581, 39 Collier Bankr. Cas. 2d (MB) 1275, Bankr. L. Rep. (CCH) P 77677 (2d Cir. 1998) ("Directly or by implication, the Bankruptcy Code provides for three categories of interest: (1) interest accrued prior to the filing of the bankruptcy petition (prepetition interest); (2) interest accrued after the filing of a petition but prior to the effective date of a reorganization plan (pendency interest); and (3) interest to accrue under the terms of a reorganization plan (plan interest).").

[292]See, e.g., HSBC Bank, 2010 WL 3835200, at *7 ("Interest under § 506(b) only accrues, moreover, from the time a petition is filed until the time of the payment of a claim or the confirmation of a reorganization plan; it does not function to compensate a lender for lost interest payments."); In re Hoopai, 581 F.3d 1090, 1099 (9th Cir. 2009) ("The temporal scope of § 506(b) is an issue of first impression for this circuit. However, the Supreme Court has remarked on the scope, albeit in dicta, and every circuit that has addressed the issue has followed the Court's statement that § 506(b) governs fees only 'until the confirmation or effective date of the plan . . . We agree.' "); In re Stringer, 508 B.R. 668 (Bankr. N.D. Miss. 2014) ("While the Creditor is clearly entitled to post-confirmation interest, this entitlement is not prescribed by § 506(b), which has no applicability beyond the plan confirmation date."); In re Joubert, 411 F.3d 452, 454, Bankr. L. Rep. (CCH) P 80302 (3d Cir. 2005) ("Section 506(b) allows oversecured creditors to add reasonable post-petition, pre-confirmation attorney fees, interest, and costs to the amount of their secured claim."); In re Garner, 663 F.3d 1218, 1220, 66 Collier Bankr. Cas. 2d (MB) 1594, Bankr. L. Rep. (CCH) P 82120 (11th Cir. 2011) ("The decisions of the bankruptcy and district courts, which held that Section 506(b) is inapplicable following confirmation, are consistent with Supreme Court and circuit court decisions interpreting the scope of Section 506(b).").

[293]Compare In re 400 Walnut Associates, L.P., 473 B.R. 603, 610, 56 Bankr. Ct. Dec. (CRR) 157 (E.D. Pa. 2012) ("However, the Bankruptcy Court's reliance on § 506(b) with respect to claims for pre-petition interest is misplaced."); In re Parker, 2015 WL 5553767, at *2 (E.D. N.C. 2015) ("The Bankruptcy Court properly began its analysis by evaluating the parties' burdens under the statutory requirements of section 502. However, the Bankruptcy Court erred when it applied equitable principles based on the statutory limitations of section 506 to GCAP's claim for pre-petition default interest under section 502. As discussed below, a cred-

itor's rights under different statutes will determine the respective limitations of courts' equitable powers to adjust the award of interest. That is, while courts may apply equitable principles to section 502, they must do so within the circumscriptions imposed by the statutes outlining creditors' rights. As section 502 currently stands, courts may not exercise their equitable powers to deny creditors' claims for pre-petition interest."); In re Wesley, 455 B.R. 383, 387, 108 A.F.T.R.2d 2011-6326 (Bankr. D. N.J. 2011) ("Accordingly, it is apparent that since an allowed secured claim under section 502 includes amounts that have accrued pre-petition, section 506(b) applies only to post-petition interest, fees and costs sought in a secured creditor's proof of claim.") (internal quotation marks omitted); In re Nunez, 317 B.R. 666, 670 (Bankr. E.D. Pa. 2004) ("We hold that section 506(b) applies only to post-petition interest, fees and costs sought as part of a secured claim. Quite simply, interest, fees and costs arising pre-petition are already a part of a secured creditor's proof of claim in the first instance rendering section 506(b) inapplicable."); In re Gledhill, 164 F.3d 1338, 1340, 33 Bankr. Ct. Dec. (CRR) 1014, Bankr. L. Rep. (CCH) P 77881 (10th Cir. 1999) ("Thus, holders of an oversecured consensual claim or an oversecured nonconsensual claim are entitled to interest, penalties, attorney fees, and costs that accrue before the debtor's bankruptcy petition is filed. Interest, fees, costs, and charges that accrue after the petition has been filed, or post-petition, are permitted only if authorized under 11 U.S.C. § 506(b) . . ."); CP Holdings, 332 B.R. at 392 ("Because the Bankruptcy Court properly concluded that the prepayment premium became due and owing at the time of acceleration, two months prior to the bankruptcy filing, the prepayment premium became part of CALPERS' claim prior to the bankruptcy filing. Therefore, Bankruptcy Code § 506(b) does not apply to CALPERS' prepayment premium claim.") with In re Welzel, 275 F.3d 1308, 1314, 38 Bankr. Ct. Dec. (CRR) 237 (11th Cir. 2001) (explaining that "[s]ection 506(b) . . . does not draw a distinction between fees vested pre- or post-petition").

[294]See Vanderveer Est., 283 B.R. at 131 ("Thus, if VE is correct, and its claim for the Yield Maintenance Premium arose upon acceleration (a pre-petition event), the allowability of the Yield Maintenance Premium is not governed by § 506(b), but by § 502.").

[295]See Gencarelli v. UPS Capital Business Credit, 501 F.3d 1, 5–6 n.1, 48 Bankr. Ct. Dec. (CRR) 210, Bankr. L. Rep. (CCH) P 81006 (1st Cir. 2007) ("[T]here is no principled basis for treating attorneys' fees differently from prepayment penalties in this context."); In re Smith, 2016 WL 7496104, at *5–6 (Bankr. D. Idaho 2016) (analyzing section 506(b)'s "costs" and "fees" together); Ogle, 586 F.3d at 146–47 ("True, the facts in *Travelers* were such that the post-petition costs related solely to litigating issues of bankruptcy law (which Ogle contends is a decisive limiting principle); but the Court's analysis and rationale would seem equally applicable to post-petition costs arising out of pre-petition contracts more generally."); Welzel, 275 F.3d at 1314. But see In re SNTL Corp., 571 F.3d 826, 840, Bankr. L. Rep. (CCH) P 81515 (9th Cir. 2009).

[296]See Ultra Petroleum, 575 B.R. at 368 ("Contractual make-whole provisions and other, similar provisions are typically considered liquidated damages provisions.").

[297]See Outdoor Sports, 161 B.R. at 424 ("Prepayment charges are encompassed in the term 'charges,' as used in § 506(b)."); Continental Securities Corp. v. Shenandoah Nursing Home Partnership, 193 B.R. 769, 775 (W.D. Va. 1996), judgment aff'd, 104 F.3d 359 (4th Cir. 1996) ("The court begins with the proposition that a typical prepayment penalty provision contained in a lending instrument is a 'charge' within the meaning of § 506(b)."); Imperial Coronado, 96 B.R. at 1000 (make-whole claim falls under section 506(b) since it is "charge provided for under the agreement"); A.J. Lane, 113 B.R. at 823 ("Whatever rubric appears in the loan documents, the statutory language compels the conclusion that this requested payment is one of the 'charges' which § 506(b) governs. Indicative is the additional use in § 506(b) of the more restrictive words 'fees, costs,' and the appearance in the following subparagraph (c) of the phrase 'costs and expenses.' Clearly, the term 'charges' in § 506(b) encompasses more than out-of-pocket expenses."); Premier Ent., 445 B.R. at 618 ("In general, a prepayment premium is recognized as encompassed in the term 'charges' [under section 506(b)]."); Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 572 ("The cases are

surprisingly uniform on this issue[.]").

[298]This is a meaningful distinction—unlike "fees" and "charges," "interest" is not subject to the "reasonableness" standard under section 506(b). See In re 804 Congress, L.L.C., 756 F.3d 368, 375, 59 Bankr. Ct. Dec. (CRR) 184, 71 Collier Bankr. Cas. 2d (MB) 1359, Bankr. L. Rep. (CCH) P 82655 (5th Cir. 2014) ("The only distinction that the text of § 506(b) draws between interest and fees, costs, or charges is that fees, costs, or charges provided for in an agreement or under a state statute must be reasonable while no such restriction is placed on interest. The Supreme Court held in *Ron Pair Enterprises* that the word 'reasonable' in § 506(b) does not modify 'interest' but does modify 'fees, costs, or charges provided for under the agreement.' "); Welzel, 275 F.3d at 1314 ("Furthermore, Congress has shown that when it wants to exempt a particular set of items from the reasonableness standard, it does so explicitly. With regard to interest payments on oversecured claims, § 506(b) conspicuously leaves out the adjective 'reasonable,' in contrast to the explicit reference to 'reasonable fees, costs or charges.' This indicates that Congress, by using 'reasonable' with respect to one set of items but not another, acted purposefully in deciding whether to include or exclude the reasonableness standard.").

But even without the "reasonableness" qualifier, courts possess discretion to modify "interest" claims. See In re Nixon, 404 Fed. Appx. 575, 579 (3d Cir. 2010) (citing case law for the proposition that "courts have used equitable considerations to modify the interest awarded oversecured creditors within the parameters of the code"); Urban Communicators PCS Ltd. Partnership v. Gabriel Capital, L.P., 394 B.R. 325, 338 (S.D. N.Y. 2008) ("Case law offers four examples of such situations: where there has been misconduct by the creditor, where application of the statutory interest rate would cause direct harm to the unsecured creditors, where the statutory interest rate is a penalty, or where its application would prevent the Debtor's fresh start.").

Additionally, section 506(b)'s "interest" need not be set forth in a written agreement. See HSBC Bank, 2010 WL 3835200, at *7 ("The 'interest' specified in § 506 refers to interest on an otherwise allowed oversecured claim, 'regardless of whether the agreement giving rise to the claim provides for interest.' "); Milham, 141 F.3d at 423.

[299]See In re Hatcher, 208 B.R. 959, 964 (B.A.P. 10th Cir. 1997), aff'd, 133 F.3d 932 (10th Cir. 1998) ("Under § 506(b) . . . secured creditors are entitled to post-petition attorney's fees provided that (i) the creditor is oversecured, (ii) the fees are reasonable, and (iii) the fees are provided for in the agreement between the parties."); Premier Ent., 445 B.R. at 618 ("First, the charge at issue must satisfy the provisions of § 502(b)(1), that is, it must be included in a contract provision that is enforceable under applicable state law. If it does not, the claim is disallowed under § 502(b)(1). Second, the charge must be 'reasonable,' as determined by federal law.").

[300]See Ogle, 586 F.3d at 148 ("In this way, section 506(b) creates a limited exception—for oversecured creditors—from the general rule in section 502(b)(2) that disallows a claim for unmatured interest."); In re 785 Partners LLC, 470 B.R. 126, 134, 56 Bankr. Ct. Dec. (CRR) 83 (Bankr. S.D. N.Y. 2012) ("The rule [section 502(b)(2)] does not, however, apply to an oversecured creditor who is entitled to post-petition interest up to the value of its collateral. This exception is now contained in 11 U.S.C. § 506(b)."); Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 574 ("There is room to argue that even a fixed prepayment fee should be treated as interest for purposes of section 506(b). In *Smiley v. Citibank (South Dakota), N.A.*, the United State Supreme Court upheld a determination by the Comptroller of the Currency that a provision in the National Bank Act under which banks may charge interest allowed by state law encompasses credit-card late-payment fees. In doing so, the Court concluded that interest can be defined broadly as any compensation allowed by law, or fixed by the parties, for the use or forbearance of money or as damages for its detention. The Court also noted that, in the relevant statutory provision, the term interest is not used in contradistinction to penalty, leaving open the possibility that a penalty could be treated as interest.") (internal quotation marks omitted).

[301]See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 558 ("Some courts have

concluded that prepayment fees have to satisfy *both* state and federal law before they can be enforced against a debtor. The rationale for these decisions is straightforward: section 502(b)(1) of the Bankruptcy Code 'requires that the validity of claims be determined according to non-bankruptcy law,' and section 506(b), rather than overriding that requirement, 'creates a supplemental requirement that the charge be reasonable.' " Other courts, without deciding whether a prepayment fee needs to pass muster under state law, have concluded that state law governing liquidated damages should be determinative in evaluating prepayment clauses under section 506(b). Finally, some courts have definitively held that state law is *not* binding under section 506(b), but have still relied on that law as a guidepost in applying section 506(b)'s 'reasonableness standard.' ").

[302]See Alice Green, To Fee or Not to Fee: Bankruptcy Courts' Struggle for Reasonableness in Prepayment Premiums, 17 Norton J. Bankr. L. & Prac. 1, 4 (2008) ("While this appears to be a straightforward 'reasonableness' test, bankruptcy courts have been uniform only in placing the burden on mortgagees to show the reasonableness of the prepayment premium. The courts have not yet agreed upon a precise way for the mortgagee to do this.").

[303]See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 557; Welzel, 275 F.3d at 1313–14 ("The point at issue concerns whether the bankruptcy court must determine if Advocate's contractually set fees constitute 'reasonable fees' under § 506(b), or whether Advocate automatically has a right to the entire fees because they vested pre-petition and were enforceable under state law . . .").

[304]See In re Latshaw Drilling, LLC., 481 B.R. 765, 806 (Bankr. N.D. Okla. 2012); School Specialty, 2013 WL 1838513, at *2 ("Under New York law, a prepayment premium must not be an unenforceable penalty; therefore the § 506(b) reasonable standard may be met in any event."); In re 804 Congress, L.L.C., 529 B.R. 213, 227 n.100 (Bankr. W.D. Tex. 2015) ("As to attorney's fees in Texas, though, the 'reasonableness' test under section 506 is virtually the same as the 'enforceability' test under state law."); Gencarelli, 501 F.3d at 6 ("It seems equally improbable that Congress would have intended to allow debtors 'to avoid otherwise valid contractual obligations under state law,' including 'prepayment penalties,' by 'filing voluntary bankruptcy petitions' and invoking section 506(b)'s reasonableness requirement."); see generally, Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 584.

[305]See Welzel, 275 F.3d at 1315 ("Therefore, even if contractually set attorney's fees owed to oversecured creditors are enforceable under state law because they are vested and comply with state notice procedures, it does not follow that the fees are per se reasonable under the Bankruptcy Code. This demonstrates, in turn, that 11 U.S.C. § 506(b) adds a new level of scrutiny to fee arrangements that goes beyond state law requirements."); In re Ryker, 2007 WL 2138590, at *4 (3d Cir. 2007) ("Because § 506(b) is applicable here, the Bankruptcy Court was not required to look to state law in determining what was reasonable."); Imperial Coronado, 96 B.R. at 1000–01 ("What constitutes a 'reasonable' charge under section 506(b) is a question of federal, not state law."); In re Morse Tool, Inc., 87 B.R. 745, 748, Bankr. L. Rep. (CCH) P 72437 (Bankr. D. Mass. 1988) (explaining that "§ 506(b) creates a *supplemental* requirement that the charge be reasonable") (emphasis added); 804 Cong., 756 F.3d at 376 (explaining that "the language of 506(b) does not indicate that just because a given fee arrangement is enforceable under state law, it should be exempt from the reasonableness standard"); Matter of 268 Ltd., 789 F.2d 674, 675, 14 Collier Bankr. Cas. 2d (MB) 904, Bankr. L. Rep. (CCH) P 71137 (9th Cir. 1986) ("We hold that § 506(b) preempts the state law . . . and that the bankruptcy court correctly engaged in an independent reasonableness inquiry."); In re Duralite Truck Body & Container Corp., 153 B.R. 708, 713 (Bankr. D. Md. 1993) ("Although Fidelcor likely has a recognizable claim for its prepayment premium under New York law, the claim must meet the federal reasonableness standard of 11 U.S.C. § 506(b) for it to be allowed in a bankruptcy case."); A.J. Lane, 113 B.R. at 825 ("Federal courts therefore write on a slate which is clear of binding state court precedent."); Skyler Ridge, 80 B.R. at 506 ("Federal bankruptcy law, and not state law, governs distribution of a debtor's assets to creditors. Thus debtor correctly claims that section 506(b) is applicable, and limits Travelers to the collection of reasonable charges. If the prepayment premium provision were

valid under Kansas law, the Court would be required to determine its enforceability under the Bankruptcy Code.").

[306]See Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 558–59.

[307]See In re Scarlet Hotels, LLC, 392 B.R. 698, 702, 50 Bankr. Ct. Dec. (CRR) 118, 60 Collier Bankr. Cas. 2d (MB) 268 (B.A.P. 6th Cir. 2008) ("This provision [section 506(b)] is not, however, a blank check for oversecured creditors to act without regard to any limits."); In re Nixon, 2009 WL 1845229 (E.D. Pa. 2009), aff'd, 404 Fed. Appx. 575 (3d Cir. 2010) (unpublished) ("Indeed, if § 506(b) applied here without regard to § 502, the requirement that fees incurred under § 506(b) be reasonable would be meaningless because Appellant's lawyers would receive all fees incurred — reasonable or not. Such a reading of the law is an invitation to abuse.").

[308]Latshaw Drilling, 481 B.R. at 799; Gencarelli, 501 F.3d at 6–7 ("Section 506(b) is designed to protect general creditors from the inequities that would occur if secured creditors were able to cloak unreasonable fees and charges with first-priority status.").

[309]See United Merchs., 674 F.2d at 143 ("While there may be explanations for UM&M's failure to propose such a non-impairment plan, we believe that the burden should be on the party seeking to defeat an otherwise valid liquidated damages clause to prove that no damages were actually suffered before it invokes an equitable doctrine to seek disallowance of such claims in bankruptcy. Here UM&M presented no evidence to contradict appellants' showing of substantial damages. There is nothing in this record from which the bankruptcy court could properly conclude that actual damages were nonexistent."). While *United Merchants* was decided under the old Act, the Second Circuit's guidance on the traditional rule on secured claims is useful. See St. Vincent's, 440 B.R. at 599 ("The Court is aware that *UM & M* was a case under the Bankruptcy Act, but the Second Circuit's statement of the regular rule regarding secured claims is useful to the Court in construing the clause setting the $42.5 million cap.").

[310]See Fin. Ctr., 140 B.R. at 839 ("At best we are willing to view the 'reasonable' standard of § 506(b) in the context of pre-payment clauses as a safety valve which must be used cautiously and sparingly as all discretionary powers that are not subject to close scrutiny and statutory standard. The situation justifying invocation of this power is not easily definable."); Outdoor Sports, 161 B.R. at 425 ("In this proceeding, the Prepayment Amount is large in comparison to the principal balance under the Note; however, considering the large amount of equity in the North Carolina Property, $378,994.42, and the absence of substantial prejudice to OSHI or other creditors, as previously discussed, the court does not find the Prepayment Amount unjust or excessive.").

[311]See Lappin Elec., 245 B.R. at 331 (explaining that a comparison of make-whole payments to the percentage of the outstanding debt is "a useful check" for purposes of section 506(b)); Kroh Bros., 88 B.R. at 1002 ("Additionally, under a guideline established by the cases as to what constitutes a reasonable charge under § 506(b), at most a 10% prepayment charge could be considered within the realm of reasonable. A 25% charge under this standard is clearly unreasonable. Thus, even if the penalty is enforceable under state law as a valid liquidated damages clause, the court holds that the prepayment penalty is an unreasonable charge within the meaning of § 506(b) and as such is unenforceable."); Vanderveer Est., 283 B.R. at 131–32 ("However, if the Yield Maintenance Premium must be allowable under § 506(b) in order to be included in VE's claim under the Plan, it satisfies that requirement . . . Here, unlike in *A.J. Lane* and *Duralite*, the Yield Maintenance Premium formula does not presume a loss, such as by charging the debtor a fixed percentage of the unpaid principal balance of the loan (which would be payable even if interest rates went up after the loan was made). Instead, it is calculated by subtracting the yield on a Treasury Note of comparable maturity from the note interest rate, applying the difference to the remaining principal balance at the time of prepayment, and discounting that amount to present value. Thus, it is an attempt to compensate the lender for the actual yield loss incurred upon prepayment. The features found unreasonable by courts disallowing pre-payment penalties, such as a formula (e.g., a fixed

percentage of the loan balance) that presumes damages regardless of any change in interest rates, or failure to discount the lost interest to present value, are not present here.").

[312]See Green, 17 Norton J. Bankr. L. & Prac. at 8–9 ("However, most courts have found that some state law analysis is necessary because the secured creditor does not have any rights under section 506(b) unless the state provides them . . . The confusion arises when courts, in applying the federal reasonableness standard, actually apply state law prepayment premium analysis").

[313]As a contrary argument, allowing a secured creditor to "resuscitate" claims as *un*secured will diminish the recovery of unsecured creditors.

[314]See Ogle, 586 F.3d at 147 ("A fair question is raised by Ogle as to whether section 506(b) of the Code amounts to an express disallowance of Fidelity's claim by negative inference or otherwise."); United Merch., 674 F.2d at 138 ("Neither [section 506(b)] nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorneys' fees."); In re: Tribune Media Company, 62 Bankr. Ct. Dec. (CRR) 117, 2016 WL 1451161, at *2 (D. Del. 2016).

[315]See SNTL, 571 F.3d at 842 ("Section 502(b), which applies to claims generally, does disallow unmatured interest (see 11 U.S.C. § 502(b)(2)); it does not specifically disallow attorneys' fees of creditors or certain other charges. Section 506(b), on the other hand, specifies what may be included in a secured claim."); Ogle, 586 F.3d at 148 ("[S]ection 506(b) does not implicate unsecured claims for post-petition attorney's fees, and it therefore interposes no bar to recovery."); Welzel, 275 F.3d at 1318 ("Reasonable fees are then to be treated as a secured claim. If a portion of the fees are deemed unreasonable, however, the fees should be bifurcated between the reasonable portion, treated as a secured claim, and the unreasonable portion, treated as an unsecured claim."); Gencarelli, 501 F.3d at 5 (explaining that "[s]ection 502, not section 506(b), affords the ultimate test for allowability, and any claim satisfying that test is, at the very worst, collectible as an unsecured claim"); In re Martin, 761 F.2d 1163, 1168, 12 Collier Bankr. Cas. 2d (MB) 1129, Bankr. L. Rep. (CCH) P 70542 (6th Cir. 1985); In re Qmect, Inc., 368 B.R. 882, 57 Collier Bankr. Cas. 2d (MB) 300 (Bankr. N.D. Cal. 2007); St. Vincent's, 440 B.R. at 603.

[316]See Tribune Media Company, 61 Bankr. Ct. Dec. (CRR) 221, 74 Collier Bankr. Cas. 2d (MB) 1295, 2015 WL 7307305 (Bankr. D. Del. 2015), motion to certify appeal granted, 62 Bankr. Ct. Dec. (CRR) 117, 2016 WL 1451161 (D. Del. 2016) ("In his report, the Mediator observed, 'it is a reasonable conclusion that Congress would not have to expressly provide for the recovery of post-petition fees by oversecured creditors if such fees were generally recoverable by all creditors.' I agree with the reasoning set forth in *Global Industrial Technologies* and the Mediator's Report; especially the conclusion that the plain language of § 502(b) and § 506(b), when read together, indicate that postpetition interest, attorney's fees and costs are recoverable only by oversecured creditors.") (explaining that "where the bankruptcy estate is unable to pay all other creditors in full, postpetition attorneys' fees are not allowable as part of an unsecured claim even where provided for in the underlying contract."), mot. to certify appeal granted sub nom. In re: Tribune Media Company, 62 Bankr. Ct. Dec. (CRR) 117, 2016 WL 1451161 (D. Del. 2016); In re Croatan Surf Club, LLC, 2012 WL 1906386, at *7 (Bankr. E.D. N.C. 2012) ("Section 506(b) provides a limited substantive right to post-petition fees. If such fees are not allowed under that section, they do not morph into an allowable unsecured claim, since there is no section of the Code other than 506(b), that permits allowance of post-petition fees."); In re Electric Machinery Enterprises, Inc., 371 B.R. 549, 554, 48 Bankr. Ct. Dec. (CRR) 142 (Bankr. M.D. Fla. 2007) (explaining that, under section 506(b), "an unsecured creditor is not entitled to include attorneys' fees, costs or similar charges incurred after the commencement of a bankruptcy case as part of an allowed unsecured claim."); In re Global Indus. Technologies, Inc., 327 B.R. 230, 239, 44 Bankr. Ct. Dec. (CRR) 282 (Bankr. W.D. Pa. 2005) (explaining that "unsecured creditors may not include postpetition attorneys' fees in their claims from a bankruptcy estate."); In re Hedged-Investments Associates, Inc., 293 B.R. 523, 526 (D. Colo. 2003); South Side I, 451 B.R. at 262 ("That is, if a creditor is oversecured, it is entitled to interest on its claim and its reasonable contractual fees and costs. And an

undersecured creditor is generally not entitled to post-petition interest, fees, costs, or charges with respect to its claim."); In re South Side House, LLC, 474 B.R. 391, 413 (Bankr. E.D. N.Y. 2012) ("South Side III") ("Section 506(b) permits an oversecured creditor to receive post-petition interest and other charges, and generally prohibits an undersecured creditor from receiving these benefits.").

[317]See generally, Charles & Kleinhaus, 15 Am. Bankr. Inst. L. Rev. at 575–80; Mark S. Scarberry, *Interpreting Bankruptcy Code Sections 502 and 506: Post-Petition Attorneys' Fees in a Post-Travelers World*, 15 Am. Bankr. Inst. L. Rev. 611–58 (2007).

[318]See United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 108 S. Ct. 626, 98 L. Ed. 2d 740, 16 Bankr. Ct. Dec. (CRR) 1369, 17 Collier Bankr. Cas. 2d (MB) 1368, Bankr. L. Rep. (CCH) P 72113 (1988).

[319]See Travelers Cas. and Sur. Co. of America v. Pacific Gas and Elec. Co., 549 U.S. 443, 127 S. Ct. 1199, 167 L. Ed. 2d 178, 47 Bankr. Ct. Dec. (CRR) 265, 57 Collier Bankr. Cas. 2d (MB) 314, Bankr. L. Rep. (CCH) P 80880 (2007).

[320]See Timbers, 484 U.S. at 370–71 ("The crux of the present dispute is that petitioner asserts, and respondent denies, that the phrase 'interest in property' also includes the secured party's right (suspended by the stay) to take immediate possession of the defaulted security, and apply it in payment of the debt. If that right is embraced by the term, it is obviously not adequately protected unless the secured party is reimbursed for the use of the proceeds he is deprived of during the term of the stay.").

[321]See Timbers, 484 U.S. at 372–73 ("Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims — just as it denies oversecured creditors postpetition interest *to the extent that* such interest, when added to the principal amount of the claim, will exceed the value of the collateral. Section 506(b) provides that to the extent that an allowed secured claim is secured by property the value of which . . . is greater than the amount of such claim, there shall be allowed to the holder of such claim, interest on such claim. Since this provision permits postpetition interest to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest.").

[322]See Timbers, 484 U.S. at 373 ("If the Code had meant to give the undersecured creditor, who is thus denied interest on his claim, interest on the value of his collateral, surely this is where that disposition would have been set forth, and not obscured within the 'adequate protection' provision of § 362(d)(1). Instead of the intricate phraseology set forth above, § 506(b) would simply have said that the secured creditor is entitled to interest 'on his allowed claim, or on the value of the property securing his allowed claim, whichever is lesser.' ").

[323]See Travelers, 549 U.S. at 455.

[324]See Travelers, 549 U.S. at 454 ("According to PG & E, [section 506(b)] authorizes claims for contractual attorney's fees to the extent the creditor is oversecured, but disallows such claims to the extent the creditor is either not oversecured or (like Travelers) completely unsecured.").

[325]See Travelers, 549 U.S. at 452 ("The *Fobian* rule finds no support in the Bankruptcy Code, either in § 502 or elsewhere.").

[326]See Travelers, 549 U.S. at 456 ("Accordingly, we express no opinion with regard to whether, following the demise of the *Fobian* rule, other principles of bankruptcy law might provide an independent basis for disallowing Travelers' claim for attorney's fees. We conclude only that the Court of Appeals erred in disallowing that claim based on the fact that the fees at issue were incurred litigating issues of bankruptcy law.").

[327]Travelers, 549 U.S. at 452.

[328]See Timbers, 484 U.S. at 372–73 ("Since this provision permits postpetition interest

to be paid only out of the 'security cushion,' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest.").

[329]See Gencarelli, 501 F.3d at 6 n.2 (explaining that *Timbers* "dealt with claims for post-petition interest, which — unlike the prepayment penalties at issue here — are made unavailable as unsecured claims by an explicit statutory provision," i.e., section 502(b)(2) (2005)).

[330]See Qmect, 368 B.R. at 885 ("If Congress, in enacting the Bankruptcy Code, had wanted to disallow claims for post-petition attorneys' fees, the logical place for it to have done so was surely in 11 U.S.C. § 502(b)."). As further support, courts rely on section 506's title, "Determination of Secured Status." 368 B.R. at 885 ("A statute so entitled would not be a logical place to provide for the disallowance of an element of an unsecured claim.").

[331]See SNTL, 571 F.3d at 844 ("Inasmuch as section 502(b) does not contain a similar prohibition against attorneys' fees, the comparison between the current issue and that presented in *Timbers* is not persuasive."); In re Dow Corning Corp., 456 F.3d 668, 682, 46 Bankr. Ct. Dec. (CRR) 222, Bankr. L. Rep. (CCH) P 80664, 2006 FED App. 0260P (6th Cir. 2006); Ogle, 586 F.3d at 148 (distinguishing *Timbers* on the basis that it relied on section 502(b)(2) "which expressly disallows a claim for interest that is unmatured"); Gencarelli, 501 F.3d at 6 n.2.

[332]See Timbers, 484 U.S. at 372–73 ("Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims — just as it denies oversecured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral . . . Since this provision permits postpetition interest to be paid only out of the 'security cushion' the undersecured creditor, who has no such cushion, falls within the general rule disallowing postpetition interest.").

[333]See SNTL, 571 F.3d at 842 ("Section 502(b), which applies to claims generally, does disallow unmatured interest (see 11 U.S.C. § 502(b)(2)); it does not specifically disallow attorneys' fees of creditors or certain other charges. Section 506(b), on the other hand, specifies what may be included in a secured claim."); Gencarelli, 501 F.3d at 5 ("There is universal agreement that whereas section 506 furnishes a series of useful rules for determining whether and to what extent a claim is secured (and, therefore, entitled to priority), it does not answer the materially different question of whether the claim itself should be allowed or disallowed. Rather, the general rules that govern the allowance or disallowance of claims are set out in section 502."); Welzel, 275 F.3d at 1317 ("We first note that § 506(b) does not state that attorney's fees deemed unreasonable are to be disallowed. In fact, the subsection is completely silent with regard to the allowance/disallowance issue. This silence suggests that § 506(b) is meant not to displace the general instructions laid down in § 502, but to be read together with § 502 in a complementary manner.").

[334]Travelers, 549 U.S. at 452; see also 804 Cong., 529 B.R. at 227 ("The Supreme Court looked to the text of section 502, and to the definition of claim in section 101(5)(A), and concluded that courts should allow claims against the estate if the claims are enforceable under substantive nonbankruptcy law, unless the enumerated exceptions contained in section 502(b) apply."); Welzel, 275 F.3d at 1318 ("The entire claim to fees is allowable under § 502 as long as the exceptions in subsection (b) do not apply." If none of these exceptions apply, the fees claim is allowed and "the fees must then be assessed for reasonableness under § 506(b).").

[335]See Welzel, 275 F.3d at 1317 ("The title of § 506, 'Determination of secured status,' indicates that the section is more narrow in focus than § 502. That is, the title shows that § 506 deals with whether a claim is secured or not, as opposed to the larger question of whether the claim is allowed or disallowed, as addressed by § 502.").

In the event of an inconsistency between a specific and general provision, the specific provision controls. See RadLAX Gateway Hotel, 132 S. Ct. at 2071, 182 L. Ed. 2d at 971 ("It is a commonplace of statutory construction that the specific governs the general."); AMR, 730 F.3d at 99 ("[A] specific provision . . . governs the circumstances to which it is directed, even in the face of a more general provision.").

[336]See SNTL, 571 F.3d at 843 ("Therefore, if section 506(b) is — as the Ninth Circuit has hinted — irrelevant to determining the allowability of an unsecured claim, we must look to section 502 to determine allowability . . . As discussed below, section 502(b) does not specifically disallow such fees."); Ogle, 586 F.3d at 148 ("But while section 502(b)(2) bars claims for unmatured interest, it does not similarly bar (or even reference) claims for post-petition attorneys' fees."); Welzel, 275 F.3d at 1318 ("The entire claim to fees is allowable under § 502 as long as the exceptions in subsection (b) do not apply." If none of these exceptions apply, "the fees claim is allowed [and] the fees must then be assessed for reasonableness under § 506(b).").

[337]See Welzel, 275 F.3d at 1318 ("Once the bankruptcy court determines that a claim is allowable, § 506 deals with the entirely different, more narrow question of whether certain types of claims should be considered secured or unsecured. Claims considered secured under § 506 get preferential treatment.").

[338]See Welzel, 275 F.3d at 1318.

[339]See United Merchs., 674 F.2d at 138 (explaining in dicta that section 506 speaks only to whether costs can be treated as secured claims); Vanderveer Est., 283 B.R. at 131–32 ("The debtor has cited no provision of § 502 nor any other provision of the Bankruptcy Code that would limit VE's right to include the Yield Maintenance Premium, as a pre-petition charge, in its claim.").

Although *United Merchants* was decided under the old Bankruptcy Act, the Second Circuit explained that section 506(b) "merely codifies pre-Code law." 674 F.2d at 138 ("UM&M asserts that the legislative history of section 506(b) indicates that the statute was intended to codify pre-Code law that only a secured creditor can assert a contractually-based right to recover collection costs. Section 506(b), however, merely codifies pre-Code law that an *oversecured* creditor can assert, *as part of its secured claim*, its right to interest and costs arising under its credit agreement."); see also H.R. Rep. No. 95-595, at 356–57, 1978 U.S.C.C.A.N. at 6312; S. Rep. No. 95-989, at 68, 1978 U.S.C.C.A.N. at 5854 (explaining that section 506(b) codifies pre-Bankruptcy Code law bestowing upon secured creditors secured priority for claims on account of reasonable fees and costs, up to the value of the collateral).

Additionally, the Second Circuit, in a different case, recognized *United Merchant*'s continued vitality in the face of *Travelers.* See Ogle, 586 F.3d at 148 ("Neither section 506(b) nor its legislative history sheds any light on the status of an unsecured creditor's contractual claims for attorney's fees. *United Merchants* is therefore dispositive if it survives *Travelers.* We conclude that it does.") (citation omitted). Other courts, however, hold to the contrary. See, e.g., Welzel, 275 F.3d at 1316 ("East Side Investors, however, applied the law as it stood prior to passage of the Bankruptcy Reform Act of 1978, of which § 506(b) was a part. Given that 1978 Act changed the legal landscape, East Side Investors no longer constitutes binding precedent.").

[340]See In re Molycorp, Inc., 562 B.R. 67, 75, 63 Bankr. Ct. Dec. (CRR) 153 (Bankr. D. Del. 2017) ("A secured creditor's interest in its collateral is a substantive property right created by non-bankruptcy law, which may not be substantially impaired when bankruptcy intervenes.").

[341]To favor secured creditors, section 506(b) classifies certain claims as secured and charges such claims against the margin by which the value of the security interest exceeds the value of the claim. See U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 245, 109 S. Ct. 1026, 103 L. Ed. 2d 290, 18 Bankr. Ct. Dec. (CRR) 1150, Bankr. L. Rep. (CCH) P 72575, 89-1 U.S. Tax Cas. (CCH) P 9179, 63 A.F.T.R.2d 89-652 (1989) ("[A]s written, [section 506(b)] directs that postpetition interest be paid on all oversecured claims. In addition, this natural interpretation of the statutory language does not conflict with any significant state or federal interest, nor with any other aspect of the Code. Although the payment of postpetition interest is arguably somewhat in tension with the desirability of paying all creditors uniformly as practicable, Congress expressly chose to create that alleged tension. There is no reason to suspect that Congress did not mean what the language of the statute says.").

[342]See Welzel, 275 F.3d at 1318 ("Claims considered secured under § 506 get preferen-

tial treatment. Sections 361 and 363(e) protect recovery of such claims from the collateral under numerous circumstances. Secured claims also do not have to line up with other claims in the order of priority enunciated in § 507. The bankruptcy court, moreover, can reject a plan under Chapter 11 or 13 if secured claims are treated improperly. §§ 1129(b)(2)(A) and 1325(a)(5). In contrast, claims that are treated as unsecured under § 506 cannot be collected from the collateral and receive ordinary treatment under the Bankruptcy Code.").

[343]See Welzel, 275 F.3d at 1319 ("*Unsecured* creditors would be privileged over oversecured creditors like Advocate in the area of contractually set attorney's fees. Not subject to § 506(b), unsecured creditors who desired to collect unreasonable contractual fees would have an allowed claim under § 502, while as oversecured creditors would have such fees disallowed entirely under § 506(b). This outcome would create an absurd result — unsecured creditors would be in a more protected position than a group of secured creditors."); 268 Ltd., 789 F.2d at 678 ("Because other creditors may claim such expenses under 11 U.S.C. § 502(b)(1) (Supp. II 1984), to bar Sanson from seeking the balance of its fees as an unsecured claim would make it worse off in bankruptcy than it would have been if its claim were unsecured."); Gencarelli, 501 F.3d at 6 ("Thus, under the statutory scheme envisioned by the debtor (and adopted by the lower courts), unsecured creditors would be permitted to reap the full benefit of their contractual bargains through the medium of section 502, while oversecured creditors would be uniquely singled out for unfavorable treatment by the operation of section 506(b). There is no conceivable explanation as to why Congress might have wanted oversecured creditors to be treated in so draconian a fashion. Creating that sort of uneven playing field would be antithetic to the general policy of the Code, which strongly favors oversecured creditors.").

[344]See Welzel, 275 F.3d at 1319 ("In addition, if we were to read § 506(b) to authorize disallowance of unreasonable fees, debtors would have a strong incentive to avoid otherwise valid contractual obligations under state law by filing voluntary bankruptcy petitions.").

[345]See Tribune Media, 2015 WL 7307305, at *3 n.14; Glob. Indus., 327 B.R. at 239; South Side III, 474 B.R. at 414 ("As explained in *Timbers*, Section 506(b) denies oversecured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral.").

[346]See Timbers, 484 U.S. at 372 ("Even more important for our purposes than § 506's use of terminology is its substantive effect of denying undersecured creditors postpetition interest on their claims — just as it denies *over*secured creditors postpetition interest to the extent that such interest, when added to the principal amount of the claim, will exceed the value of the collateral.") (emphasis added).

[347]Timbers, 484 U.S. at 373 ("If the Code had meant to give the undersecured creditor, who is thus denied interest on his claim, interest on the value of his collateral, surely this is where that disposition would have been set forth, and not obscured within the 'adequate protection' provision of § 362(d)(1).").

[348]See Tribune Media, 2015 WL 7307305, at *3 ("[B]ecause § 506(b) of the Bankruptcy Code expressly provides for the allowance of postpetition attorneys' fees for oversecured creditors, and neither § 506(b) nor any other provision of the Bankruptcy Code provides for the allowance of such fees for unsecured creditors, it follows that unsecured creditors have no clear entitlement to postpetition attorneys' fees."); Glob. Indus., 327 B.R. at 239; Elec. Mach., 371 B.R. at 551 (explaining that section 506(b)'s plain language "demonstrates the congressional intent to create an exception to the general rule that claims are to be determined as of the petition date, exclusive of post-petition interest, attorneys' fees, and other charges").

[349]See In re Seda France, Inc., 55 Bankr. Ct. Dec. (CRR) 55, 66 Collier Bankr. Cas. 2d (MB) 312, 2011 WL 3022563, at *3 (Bankr. W.D. Tex. 2011).

[350]See Seda, 2011 WL 3022563, at *3 (explaining that *Travelers* carefully limited the scope of its holding: the Bankruptcy Code "does not disallow unsecured creditors' claims for attorneys' fees based *solely* on the fact that the fees at issue were incurred litigating issues of

bankruptcy law.") (internal quotation marks omitted).

[351]See Jennifer M. Taylor, Christopher J. Mertens, Travelers and the Implications on the Allowability of Unsecured Creditors' Claims for Post-Petition Attorneys' Fees Against the Bankruptcy Estate, 81 Am. Bankr. L.J. 123, 150 (2007) (citing In re Saunders, 130 B.R. 208, 210 (Bankr. W.D. Va. 1991)) ("Taylor & Mertens").

[352]See Taylor & Mertens, 81 Am. Bankr. L.J. at 148–49.

[353]See 804 Cong., 529 B.R. at 226 (citing as examples: Seda, 2011 WL 3022563, at *1; Elec. Mach., 371 B.R. at 551; In re Pride Companies, L.P., 285 B.R. 366, 372, 40 Bankr. Ct. Dec. (CRR) 68 (Bankr. N.D. Tex. 2002)).

[354]See Tribune Media, 2015 WL 7307305, at *3; Glob. Indus., 327 B.R. at 240.

[355]See Cash America, 2016 WL 5092594, at *7–8.

[356]See EFH, 842 F.3d at 254–55.

[357]See, e.g., EFH, 513 B.R. at 658 (allowing discovery to determine whether the debtor was solvent on the basis that "even in bankruptcy, a solvent debtor cannot escape its contractual obligations but an insolvent debtor may rely on equitable principles to argue [that] the premium should be reduced or not paid."); EFH, 842 F.3d at 253 (emphasizing that it did not consider the effect insolvency might have had on its decision); Premier Ent., 445 B.R. at 626–32; Chemtura, 439 B.R. at 604–05 ("[T]hough *Premier Entertainment Biloxi* discusses how the allowance of claims for breach of a no-call may be affected by a debtor's solvency, the other cases don't-probably because cases involving solvent debtors are so rare. *Premier Entertainment Biloxi* permits allowance of such a claim under those circumstances, and in a solvent debtor situation, I think there's a good likelihood that other courts will as well.") ("With a solvent debtor, issues as to fairness amongst creditors, in sharing a limited pie, no longer apply; the allowance of claims under a make-whole provision, or for damages for breach of a no-call, no longer comes at the expense of other creditors."); In re Mirant Corp., 327 B.R. 262, 271, 44 Bankr. Ct. Dec. (CRR) 175 (Bankr. N.D. Tex. 2005) ("Even provisions of the Code which would, on their face, allow limitation of payment of creditor claims to the benefit of a debtor's estate have been construed as limited to situations where the result is enhanced return to creditors."); Debentureholders Protective Committee of Continental Inv. Corp. v. Continental Inv. Corp., 679 F.2d 264, 269, Bankr. L. Rep. (CCH) P 68724 (1st Cir. 1982) ("Where the debtor is solvent, the bankruptcy rule is that where there is a *contractual* provision, valid under state law, providing for interest on unpaid installments of interest, the bankruptcy court will enforce the contractual provision with respect to both instalments due before and instalments due after the petition was filed."); Welzel, 275 F. 3d at 1319 ("At the same time, because Advocate is oversecured and Welzel is solvent, any portion of Advocate's claim that is disallowed accrues to the benefit of Welzel, not his other creditors. Under these circumstances, debtors like Welzel would be the ones receiving a windfall if we were to read 11 U.S.C. § 506(b) as trumping state law to authorize disallowance of unreasonable fees."); In re General Growth Properties, Inc., 451 B.R. 323, 330–31, 55 Bankr. Ct. Dec. (CRR) 6, 65 Collier Bankr. Cas. 2d (MB) 1351 (Bankr. S.D. N.Y. 2011) ("There are situations in which courts have declined to enforce a bankruptcy default clause, such as where the clause may impede a debtor's ability to enjoy a 'fresh start' . . . [h]owever, there are no such concerns in this case. GGP and its affiliated debtors are highly solvent, GGP has confirmed a Plan, and it emerged from bankruptcy months ago. GGP's ability to exercise its right to file for bankruptcy was not impaired, nor was its ability to enjoy a fresh start."); Gencarelli, 501 F.3d at 6–7 (explaining that because the debtor was solvent, the make-whole claim is enforced, notwithstanding any lack of reasonableness under section 506(b)) ("When the debtor is solvent, the bankruptcy rule is that where there is a contractual provision, valid under state law . . . the bankruptcy court will enforce the contractual provision."); Dow Corning Corp., 456 F. 3d at 679 ("When a debtor is solvent, then, the presumption is that a bankruptcy court's role is merely to enforce the contractual rights of the parties, and the role that equitable principles play in the allocation of competing interest is significantly reduced. Based on this application of the absolute priority rule in solvent debtor cases, Class 4 argues that we should

enforce their rights under the contract, including their right to interest awarded at the default rate as set forth in the terms of their contract. To do otherwise (i.e., to interpret the amended plan as not requiring the payment of default interest), they argue, would violate § 1129(b)'s fair and equitable standard. We agree.").

[358]See Ruskin v. Griffiths, 269 F.2d 827, 832 (2d Cir. 1959). But the solvent debtor exception is not a per se bar against any relief under the Bankruptcy Code. See, e.g., AMR, 730 F.3d at 112 (although confirming plan providing for full recovery to unsecured creditors and partial recovery to equity, refusing to grant stay relief and explaining that "[w]e find no abuse of discretion in the bankruptcy court's conclusion that lifting the automatic stay would serve only to increase the size of U.S. Bank's claim (to an amount greater than that to which it is entitled pursuant to the Indentures), harming the estate and American's other creditors."); In re Energy Future Holdings Corp., 533 B.R. 106 (Bankr. D. Del. 2015), order aff'd, 2016 WL 627343 (D. Del. 2016), rev'd and remanded on other grounds, 842 F.3d 247, 63 Bankr. Ct. Dec. (CRR) 95 (3d Cir. 2016) ("But the Trustee has cited to no authority suggesting that solvency alone provides 'cause' to lift an automatic stay, and the Court does not agree that a solvent debtor's estate cannot suffer harm.").

[359]This solvency "exception" was recognized by Congress. For example, section 502(b)(2) does not apply to solvent cases, as reflected in sections 726(a)(5) (through section 1129(a)(7)) and 1124, their legislative history, and the Supreme Court. See Timbers, 484 U.S. at 379.

[360]See EFH, 842 F.3d at 253 (explicitly noting that it did not consider the effect insolvency might have had on its decision).