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Recent Developments with Make-Whole Provisions in Chapter 11 Cases

JD Supra

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A make-whole provision (also known as prepayment premium or call protection) in a loan agreement usually requires a debtor to pay a penalty based on a fixed percentage of the amount of a loan balance the debtor voluntarily prepays. The primary purpose of such provisions is to protect a creditor from the loss of interest-related profit resulting from a debtor's prepayment of a loan. Although make-whole provisions are generally enforceable outside of bankruptcy, most courts have held that, absent specific terms in a loan agreement requiring the payment of a make-whole premium upon bankruptcy-induced debt acceleration, no make-whole premium is due as long as a debtor repays the underlying debt in while the debtor is in bankruptcy. *See, e.g., Bank of N.Y. Mellon v. GC Merch. Mart, LLC (In re Denver Merch. Mart, Inc.),* 740 F.3d 1052 (5th Cir. 2014) (affirming bankruptcy court's disallowance of creditor's $1.8 million claim for prepayment consideration under note).

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