
WilmerHale Team Wins Precedent-Setting Third Circuit Bankruptcy Case

NOVEMBER 23, 2016

WilmerHale won a major victory on November 17, 2016 in a precedent-setting bankruptcy case before the United States Court of Appeals for the Third Circuit.

In a unanimous decision, a panel of that court held that holders of first-lien notes represented by the firm were entitled to a make-whole payment that could amount to approximately \$431 million, together with interest. The debtor-borrower had redeemed those notes in June 2014, shortly after filing for bankruptcy. The governing indenture required Energy Future Intermediate Holding Co. LLC (EFIH) to pay a make-whole (in addition to the full principal balance and any accrued interest) if it redeemed the notes before December 2015, but also specified that the notes would accelerate and become due if EFIH filed for bankruptcy. EFIH declined to pay the make-whole, contending that it did not have to do so because its bankruptcy filing had accelerated the maturity of the notes.

Rejecting that position and agreeing with arguments the firm made, the panel held that the make-whole was due under the terms of the parties' indenture. In so holding, the Third Circuit reversed contrary decisions issued by the bankruptcy and district courts. The case is *In re: Energy Future Holdings Corp., Delaware Trust Company, et al. v. Energy Future Intermediate Holding Co. LLC, et al.*, No. 16-361.

Of the victory, Partner [Philip Anker](#), who argued the case, said:

"This is a very significant decision. Make-whole and other yield protection provisions are common in indentures for high-yield and other debt. They play a critical role in preserving the benefit of the bargain that the noteholders struck with the borrower at the time the noteholders provided financing to the borrower. We are gratified that the Third Circuit agreed that the mere happenstance in this case that EFIH filed for bankruptcy did not alter or allow the debtor to undermine that bargain. There are other cases involving the application of make-wholes in bankruptcy pending, including the *Momentive* case in which we are also heavily involved, and we hope that this decision will portend a favorable trend for our noteholder clients."

In addition to Anker, the WilmerHale team on this matter included Partners [Danielle Spinelli](#) and [Charlie Platt](#), Special Counsel [Joel Millar](#), Counsel [David Gringer](#) and Senior Associate [Isley Gostin](#).

The firm represents Delaware Trust Company, the indenture trustee for the notes. It also has advised certain holders of the notes, including funds managed by or other affiliates of Cyrus Capital Partners, Halcyon Capital Management, Luxor Capital Group, Serengeti Asset Management, Stone Lion Capital Partners and VR Global Partners, LP.