



Lowenstein Bankruptcy Lowdown

Video 1- The Legal Landscape of Make Whole Payments

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Jeffrey Cohen:

Hi, I'm Jeff Cohen, the Chair of the Bankruptcy department here at Lowenstein Sandler. I want to talk to you today about make whole premiums in Chapter 11 cases, specifically in the Third Circuit.

So until recently, lenders and investors alike thought that by going to the third circuit, it meant you'd get your make whole premium paid in full. Well, recently, Judge Dorsey in the Mallinckrodt Chapter 11 case ruled otherwise. In that case, the first lien lenders objected to confirmation of a plan because the plan reinstated their notes and didn't provide for payment of a \$94 million make whole premium. Judge Dorsey overruled that objection and said the make whole premium did not have to be paid.

Now, is this going to be a shift in the legal landscape of make whole premiums in the Third Circuit? I don't think so and here's why: one, the only default that occurred under the Mallinckrodt note was the filing of the bankruptcy case itself. The bankruptcy filing accelerated the note, making the make whole premium payable. Well, by reinstating the note under the plan, it decelerated the note, making the make whole premium not payable.

Now, why can't this be the case in all future cases? One, if any other default existed under the note, for example, failure to make a prior payment, that would have to be cured in order to reinstate the note. In addition, you're at the plan stage, you need to demonstrate to the court that you'll be able to make the payments under the reinstated note. Not all debtors are in a financial position at confirmation to, one, cure a prior non-payment under the note, and two, demonstrate financial wherewithal to make future payments under a reinstated note.

So for those reasons, I'm not so sure Mallinckrodt is the hallmark of future cases and the elimination of payment and make whole premiums in the Third Circuit. That's all we have for today; I look forward to talking to you next time.