PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16-1351

In re: ENERGY FUTURE HOLDINGS CORP.,
a/k/a TXU Corp. a/k/a TXU Corp a/k/a/ Texas Utilities, et al.,

Debtors

DELAWARE TRUST COMPANY,
f/k/a CSC Trust Company of Delaware, as Indenture Trustee,

Appellant

v.

ENERGY FUTURE INTERMEDIATE HOLDING
COMPANY LLC; EFIH FINANCE INC.;
AD HOC COMMITTEE OF EFIH UNSECURED
NOTEHOLDERS

Nos. 16-1926, 16-1927 & 16-1928

In re: ENERGY FUTURE HOLDINGS CORP.,
a/k/a TXU Corp. a/k/a TXU Corp a/k/a Texas Utilities, et al.,

Debtors

COMPUTER TRUST COMPANY, NA &
COMPUTERSHARE TRUST COMPANY OF CANADA,

Appellants

v.

ENERGY FUTURE INTERMEDIATE HOLDING
COMPANY LLC; EFIH FINANCE INC.

Appeal from the United States District Court
for the District of Delaware
(D.C. Civil Action Nos. 1-15-cv-00620, 1-15-cv-01011,
1-15-cv-01014 & 1-15-cv-01015)
District Judge: Honorable Richard G. Andrews

Argued September 27, 2016

Before: AMBRO, SMITH, *
and FISHER, Circuit Judges

(Opinion filed November 17, 2016)

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OPINION OF THE COURT

Ambro, Circuit Judge

We address what happens when one provision of an indenture for money loaned provides that the debt is accelerated if the debtor files for bankruptcy and while in bankruptcy it opts to redeem that debt when another indenture provision provides for a redemption premium. 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.

I. BACKGROUND

A. The Notes

Energy Future Intermediate Holding Company LLC and EFIH Finance Inc. (collectively, "EFIH") borrowed in 2010 approximately $4 billion at a 10% interest rate by issuing Notes due in 2020 and secured by a first-priority lien

on their assets (the "First Lien Notes"). To protect (at least in part) the lenders' anticipated interest-rate yield, the Indenture governing the loan (the "First Lien Indenture") provides in § 3.07, captioned "Optional Redemption," that "[a]t any time prior to December 1, 2015, [EFIH] may redeem all or a part of the Notes at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium . . . and accrued and unpaid interest" (emphasis in original). "Applicable Premium" is what we shall call the make-whole, or yield-protection, contractual substitute for interest lost on Notes redeemed before their expected due date.

The First Lien Indenture contains an acceleration provision in § 6.02 that makes "all outstanding Notes . . . due and payable immediately" if EFIH files a bankruptcy petition. The same provision also gives the First Lien Noteholders the right to "rescind any acceleration [of] the Notes and its consequences[.]"

EFIH borrowed funds again in 2011 and 2012 by issuing two sets of Notes secured by a second-priority lien on its assets (the "Second Lien Notes"). As with the First Lien Noteholders, EFIH promised to pay holders of the Second Lien Notes (the "Second Lien Noteholders") a make-whole premium—in a provision essentially identical to the one quoted above—if it chose to redeem the Second Lien Notes, at its option, on or before a date certain (May 15, 2016 for Second Lien Notes set to mature in 2021 and March 1, 2017 for those maturing in 2022).

The Indenture for the Second Lien Notes (the "Second Lien Indenture") contains an acceleration provision different from § 6.02 of the First Lien Indenture: if EFIH files a bankruptcy petition, "all principal of *and premium, if any*, interest . . .[,] and *any other monetary obligations* on the

outstanding Notes shall be due and payable immediately[.]" Second Lien Indenture § 6.02 (emphases added). Like the First Lien Noteholders, the Second Lien Noteholders have the right to "rescind any acceleration [of] the Notes and its consequences" under § 6.02.

B. Refinancing the First Lien Notes

When market interest rates went down, EFIH considered refinancing the Notes. Refinancing outside of bankruptcy would have required it to pay the make-whole premium. *See In re Energy Future Holdings Corp.*, 527 B.R. 178, 188 (Bankr. D. Del. 2015). By filing for bankruptcy, however, EFIH believed it might avoid the premium. So on November 1, 2013, it filed an 8-K form with the Securities and Exchange Commission "disclosing [its] proposal [whereby] . . . EFIH would file for bankruptcy and refinance the Notes without paying any make-whole amount." *Id.* (internal quotation marks omitted).

Six months later, on April 29, 2014, EFIH and other members of its corporate family filed Chapter 11 bankruptcy petitions in the Bankruptcy Court for the District of Delaware. Once in bankruptcy, EFIH sought to "take advantage of highly favorable debt market conditions to refinance," beginning with the First Lien Notes. *Id.* at 189. It asked the Bankruptcy Court for leave to borrow funds to pay them off and to offer a settlement to any of its First Lien Noteholders who agreed to waive their right to the make-whole. *Id.* at 182, 189.

Fearing loss of the income stream EFIH had promised, the Trustee for the First Lien Noteholders—Delaware Trust Company—filed an adversary proceeding on May 15, 2014. It sought a declaration that refinancing the First Lien Notes would trigger the make-whole premium.

EFIH's bankruptcy filing caused the "[First Lien] Notes [to] be[come] due and payable immediately" under Indenture § 6.02, subject to the right of their holders to rescind acceleration. So the Trustee also requested a declaration that it could rescind the First Lien Notes' acceleration without violating the automatic stay of creditors' acts to enforce their remedies once bankruptcy occurs, 11 U.S.C. § 362. However, should the stay apply, the Trustee asked the Court to lift it.

When the Bankruptcy Court did not act, on June 4, 2014, the holders of a majority of the principal amount of the First Lien Notes sent a notice to EFIH rescinding acceleration, contingent on relief from the automatic stay. Two days later, the Bankruptcy Court granted EFIH's motion to refinance. It ruled, however, that the refinancing would not prejudice the First Lien Noteholders' rights in the pending adversary proceeding.

On June 19, 2014, EFIH paid off the First Lien Notes and refinanced the debt at a much lower interest rate of 4.25%, saving "an estimated $13 million in interest per month." *In re Energy Future Holdings Corp.*, 527 B.R. at 189. This of course disadvantaged the First Lien Noteholders, who had contracted to receive interest at 10% until the Notes' full maturity in 2020. EFIH did not compensate the loss set by contract by paying the make-whole, which would have been approximately $431 million.

C. Refinancing the Second Lien Notes

Shortly after entering bankruptcy, EFIH declared in an SEC 8-K filing that it "reserve[d] the right to . . . redeem . . . some or all of the outstanding . . . Second Lien Notes" but asserted that it "[wa]s under no obligation to do so." *See In Re Energy Future Holdings Corp.*, No. 14-50363 (Bankr. D.

Del.), Docket Entry 181, A-222. Aware of this, as well as the First Lien Noteholders' predicament, the Trustees for the Second Lien Noteholders—Computershare Trust Company, N.A. and Computershare Trust Company of Canada—filed their own adversary proceeding on June 16, 2014.

Like the First Lien Trustee, the Second Lien Trustees sought a declaration that EFIH would have to pay the make-whole if it chose to refinance the Second Lien Notes. The Second Lien Noteholders also issued a notice rescinding acceleration of that debt and requested retroactive relief from the automatic stay so that the rescission could take effect.

With the Bankruptcy Court's permission, EFIH refinanced a portion of the Second Lien Notes on March 10, 2015—again without paying the yield-protection amount.

D. First Lien Make-Whole Litigation

Nine months after granting leave to refinance the First Lien Notes, the Bankruptcy Court considered whether EFIH had to pay the make-whole. *In re Energy Future Holdings Corp.*, 527 B.R. at 191-95. The holding was that it did not. *Id.*

Although EFIH's obligation to pay the make-whole appears in § 3.07 of the First Lien Indenture, the Court focused its reasoning on the acceleration provision in § 6.02. Because it took effect when EFIH entered bankruptcy but made no mention of the make-whole, the Court concluded that none was due. [1]

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[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

It further held that the automatic stay prevented the First Lien Noteholders' attempt to rescind the Notes' acceleration. *Id.* at 197. Finally, after trial in 2015, it denied the Trustee's motion to lift the stay retroactively "to a date on or before June 19, 2014, to allow the Trustee to . . . decelerate the Notes." *In re Energy Future Holdings Corp.,* 533 B.R. 106, 116 (Bankr. D. Del. 2015).

These rulings put the First Lien Noteholders in a Catch-22. When EFIH filed for bankruptcy, the maturity of its debt accelerated. This, according to the Bankruptcy Court, cut off the First Lien Noteholders' right to yield-protection. Rescission of the acceleration would have restored that right. But rescission was blocked by the automatic stay, which the Court refused to lift.

The District Court for the District of Delaware affirmed the Bankruptcy Court's rulings in February 2016. *In re Energy Future Holdings Corp.*, No. CV 15-620 RGA, 2016 WL 627343, at *1–3 (D. Del. Feb. 16, 2016).

E. Second Lien Make-Whole Litigation

The Second Lien Noteholders fared no better than the First Lien Noteholders. Six months after EFIH refinanced a portion of the Second Lien Notes, the Court considered the Second Lien Noteholders' entitlement to the make-whole. In construing the Second Lien Indenture's provisions, the Court adopted its findings and conclusions from the make-whole litigation for the First Lien Noteholders. After rejecting arguments based on the few differences between the First and

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full." *In re Energy Future Holdings Corp.*, 527 B.R. at 183. 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.

Second Lien Indentures' texts, the Court held that the Second Lien Noteholders also were not entitled to yield-protection. *In re Energy Future Holdings Corp.*, 539 B.R. 723, 733 (Bankr. D. Del. 2015). The District Court again affirmed. *In re: Energy Future Holdings Corp.*, No. CV 15-1011-RGA, 2016 WL 1451045, at *4 (D. Del. Apr. 12, 2016).

* * * * *

The First and Second Lien Trustees brought appeals on behalf of their respective Noteholders, which we consolidated. They argue the Bankruptcy and District Courts erred by holding that the Indentures did not require payment of the make-whole when EFIH redeemed the Notes after their maturity had accelerated.

II. JURISDICTION AND GOVERNING LAW

We have jurisdiction to hear appeals from the Bankruptcy and District Courts in this Circuit under 28 U.S.C. §§ 158 and 1291. Statutory construction and contract interpretation are legal questions reviewed anew by us. The contracts at issue—the Indentures that control the Notes—are governed by New York law. First Lien Indenture § 13.08; Second Lien Indenture § 13.08.

"When interpreting state law, we follow a state's highest court; if that state's highest court has not provided guidance, we are charged with predicting how that court would resolve the issue." *Illinois Nat. Ins. Co. v. Wyndham Worldwide Operations, Inc.*, 653 F.3d 225, 231 (3d Cir. 2011). "To do so, we must take into consideration: (1) what that court has said in related areas; (2) the decisional law of the state intermediate courts; (3) federal cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issue." *Id.*

Here we look to the New York Court of Appeals, which has held that "[t]he fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent." *Greenfield v. Philles Records, Inc.*, 780 N.E.2d 166, 170 (N.Y. 2002) (internal citations and quotation marks omitted). "The best evidence of what parties to a written agreement intend is what they say in their writing." *Id.* "It is the role of the courts to enforce the agreement made by the parties—not to add, excise or distort the meaning of the terms they chose to include, thereby creating a new contract under the guise of construction." *NML Capital v. Republic of Argentina*, 952 N.E.2d 482, 489–90 (N.Y. 2011). "Adherence to these principles is particularly appropriate in a case like this involving interpretation of documents drafted by sophisticated, counseled parties and involving the loan of substantial sums of money." *Id.*

III. ANALYSIS

A. The First Lien Indenture

Although both Indentures contains many provisions, this case centers on the words of but two: §§ 3.07 and 6.02.[2] The former, noted earlier as titled "Optional Redemption," states when the make-whole is due: "At any time prior to December 1, 2015, the Issuer may redeem all or a part of the

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[2] In Sections A and B, we refer for convenience to the First Lien Indenture simply as the "Indenture." Likewise, we mean the First Lien Notes and First Lien Noteholders when we refer to "the Notes" or "the Noteholders" in these Sections. Thereafter the two terms mean all debt instruments and their holders under both the First Lien and Second Lien Indentures, which themselves may be referred to collectively as the "Indentures."

Notes at a redemption price equal to 100% of the principal amount of the Notes redeemed plus the Applicable Premium [*i.e.*, the make-whole] . . . and accrued and unpaid interest" (emphasis in original). Indenture § 3.07. The premium decreases annually on a sliding scale between December 1, 2015 and November 30, 2018. From December 1, 2018 until the Notes' maturity date in 2020, the Notes may be optionally redeemed without payment of a premium. *See* Indenture §§ 1.01 (defining "Applicable Premium" and providing formula for its application) & 3.07(d) (setting premium amount for redemptions after December 1, 2015).

Section 6.02 provides that on the filing of a bankruptcy petition by EFIH "all outstanding Notes shall be due and payable immediately without further action or notice." Indenture § 6.02; *see also id.* § 6.01 (defining bankruptcy as an event of default).

Any duty to pay the make-whole comes from § 3.07. 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?

Section 3.07 does not define "redemption." As a redemption "usu[ally] refers to the repurchase of a bond before maturity," Black's Law Dictionary 1390 (9th ed. 2009), EFIH contends that we should limit the term to mean only repayments of debt that pre-date the debt's maturity. Section 6.02 accelerated the Notes' maturity to the date EFIH entered bankruptcy—April 29, 2014. It refinanced the Notes several weeks later. Thus it argues that its post-maturity refinancing was not a redemption.

But contrary to that position, New York and federal courts deem "redemption" to include both pre- and post-maturity repayments of debt. *See e.g.*, *Chesapeake Energy*

Corp. v. Bank of N.Y. Mellon, 773 F.3d 110, 116 (2d Cir. 2014) (in interpreting New York law, to "redeem" is to "repay[] . . . a debt security . . . at or before maturity" (quoting *Barron's Dictionary of Finance and Investment Terms* 587 (8th ed. 2010)); *Treasurer of New Jersey v. U.S. Dep't of Treasury*, 684 F.3d 382, 388 (3d Cir. 2012) (discussing regulations permitting bondholders to "present . . . long-matured savings bond[s] for redemption"); *Fed. Nat'l Mortg. Ass'n v. Miller*, 473 N.Y.S.2d 743, 744 (N.Y. Sup. Ct. 1984) ("debtor may redeem" mortgage by "pay[ing] . . . accelerated debt"); *see also* N.Y. U.C.C. § 9-623, Official Comment No. 2 ("To redeem the collateral . . . of a secured obligation [that] has been accelerated, it would be necessary to tender the entire balance."). Accordingly, EFIH's June 19, 2014 refinancing was a "redemption" within the meaning of § 3.07.

Whether the redemption was "[o]ptional" is next up. EFIH argues that refinancing the Notes was not optional because § 6.02 made them "due and payable immediately without further action or notice" once it was in bankruptcy. 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. It chose not to do so, and instead followed the path laid out six months before in its SEC 8-K filing.

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).

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. *In re Energy Future Holdings Corp.*, 527 B.R. at 189. And after filing for bankruptcy, it produced another 8‑K stating that it may, "but [wa]s under no obligation" to, redeem the similarly situated Second Lien Notes. *In Re Energy Future Holdings Corp.*, No. 14-50363 (Bankr. D. Del.), Docket Entry 181, A-222.

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. *In re Energy Future Holdings Corp.*, 533 B.R. at 108. When EFIH redeemed the Notes, it did so "on a non-consensual basis," that is, over the Noteholders' objection. J.A. 1214. Logic leaves no doubt this redemption of the Notes was "[o]ptional" under § 3.07.

And, only to close the loop, all this occurred before December 1, 2015. Hence § 3.07 on its face requires that EFIH pay the Noteholders the yield-protection payment.

B. The Relationship Between §§ 3.07 And 6.02 (Or Whether § 6.02, Once Triggered, Annuls § 3.07)

At oral argument, EFIH's counsel described §§ 3.07 and 6.02 as "different pathways" that we must choose between. Only the latter is relevant, the argument goes, because it addresses post-maturity payment more specifically than § 3.07, and specific contract provisions govern over

more general ones. *See Muzak Corp. v. Hotel Taft Corp.*, 133 N.E.2d 688, 690 (N.Y. 1956).

It is not obvious why EFIH believes § 6.02 addresses the consequences of the June 2014 redemption more specifically than § 3.07 or why we must choose between them. The two sections simply address different things: § 6.02 causes the maturity of EFIH's debt to accelerate on its bankruptcy, and § 3.07 causes a make-whole to become due when there is an optional redemption before December 1, 2015. Rather than "different pathways," together they form the map to guide the parties through a post-acceleration redemption. In any event, § 3.07 is the only provision that specifically addresses redemptions.

To support its position, EFIH looks primarily to *In re AMR Corp.*, 730 F.3d 88 (2d Cir. 2013). It focused on an indenture's acceleration provision to determine whether a make-whole was due. Crucially, however, that provision addressed outright whether a make-whole would be due following acceleration.

> "[I]f an Event of Default referred to in . . . Section 4.01(g) [*i.e.*, the voluntary filing of a bankruptcy petition] . . . shall have occurred and be continuing, then and in every such case the unpaid principal amount of the Equipment Notes then outstanding, together with accrued but unpaid interest thereon and all other amounts due thereunder **(but for the avoidance of doubt, without Make–Whole Amount)**, shall immediately and without further act become due and payable without presentment, demand, protest or notice, all of which are hereby waived.

Id. at 99 (emphasis added).

AMR is the easy case; just follow the text. The litigants took a route suggested by the New York Court of Appeals in *NML Capital v. Republic of Argentina*: parties that want obligations to cease when accelerated should say so in their agreement. 952 N.E.2d at 490 ("Had Argentina 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.").

In our case, § 6.02 makes no mention of the make-whole. EFIH argues that this silence saps § 3.07's effect. On a general note, that reading would cross cords with our duty to "give full meaning and effect to all of [the Indenture's] provisions." *Chesapeake Energy Corp.*, 773 F.3d at 113-14 (internal quotation marks omitted). "Contracts are . . . to be interpreted to avoid inconsistencies and to give meaning to all [their] terms." *Barrow v. Lawrence United Corp.,* 146 A.D.2d 15, 18 (N.Y. App. Div. 1989). More specifically, EFIH's interpretation conflicts with the New York Court of Appeals' statement that "[w]hile it is understood that acceleration advances the maturity date of the debt," there is no "rule of New York law declaring that other terms of the contract not necessarily impacted by acceleration . . . automatically cease to be enforceable after acceleration." *NML Capital*, 952 N.E.2d at 492. Accordingly, § 3.07 stands on its own, unswayed by the Indenture's other provisions.

EFIH alternatively argues that §§ 6.02 and 3.07 are in conflict, so that only one may apply to the June 2014 redemption. Subsection 3.07(e) prescribes detailed notice procedures for EFIH to follow before redeeming the Notes, while § 6.02 makes the Notes "due and payable immediately without further action or notice." If the notice procedures were not followed, no redemption could follow. Yet EFIH

offers no reason why it could not have complied with § 3.07(e)'s notice procedures. In any event, it cannot use its own failure to notify to absolve its duty to pay the make-whole. Any conflict between the two provisions in this instance is illusory.

We know no reason why we should choose between §§ 3.07 and 6.02 when both plainly apply. 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.

C. The Second Lien Indenture's Additional Language

As mentioned above, the Second Lien Indenture's acceleration provision contains words not present in the First Lien Indenture. These additions make explicit in the Second Lien Indenture the link between acceleration under §6.02 and the make-whole for an optional redemption per § 3.07. While for the First Lien Indenture these concepts are without cross-reference and separate, in the Second Lien Indenture they are tied together. Sections 3.07 and 6.02 are not merely compatible but complementary. 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.

When EFIH filed its bankruptcy petition, Second Lien Indenture § 6.02 caused "all principal of and *premium, if any*, interest . . . [,] and any other monetary obligations on the outstanding [Second Lien] Notes [to] be[come] due and payable immediately" (emphasis added). Compare First Lien Indenture § 6.02 ("all outstanding Notes shall be due and payable immediately"). The words "premium, if any," are

most naturally read to reference § 3.07's "Applicable Premium"—that is, the make-whole.

The most EFIH musters is that the Second Lien Indenture could have been even more specific by replacing "premium, if any," with "a premium owed under section 3.07" or "Applicable Premium or other premium owed as if repayment under this section were an Optional Redemption under section 3.07." EFIH's Br. at 24-25. But we see no reason to demand such exactness. Indeed, EFIH has not suggested any other "premium" the drafters could have had in mind.

True, in a case called *Momentive*, the Bankruptcy Court for the Southern District of New York held the words "premium, if any," were not specific enough to require payment of a make-whole in similar circumstances. *In re MPM Silicones, LLC*, No. 14-22503-RDD, 2014 WL 4436335, at *13 (Bankr. S.D.N.Y. Sept. 9, 2014), *aff'd*, 531 B.R. 321 (S.D.N.Y. 2015) ("*Momentive*"). 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.

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. The latter is explicit that a premium is in play, and the only relevant premium provision is the former. Thus both remained applicable following bankruptcy, and, pursuant to the agreement struck with the Second Lien Noteholders, they are entitled to the make-whole.

D. The Effect of Acceleration on Make-Whole Provisions

Notwithstanding the result dictated by § 3.07's text in both Indentures, EFIH asserts that it should not have to pay the make-whole because § 6.02 caused the Notes' maturity to accelerate before it paid them off. Citing a New York trial court opinion, *Nw. Mut. Life Ins. Co. v. Uniondale Realty Assocs.*, 816 N.Y.S.2d 831, 836 (N.Y. Sup. Ct. 2006) ("*Northwestern*"), it argues that courts must close their eyes to make-whole provisions once a debt's maturity has accelerated.

In interpreting laws of a state, we need not follow the judgments of its trial courts. *See MRL Dev. I, LLC v. Whitecap Inv. Corp.*, 823 F.3d 195, 203 (3d Cir. 2016) ("The Superior Court of the Virgin Islands . . . is not the highest court of the Territory or even an intermediate appellate court, but rather a trial court. Accordingly, we are not bound by Superior Court decisions" (internal brackets, citations, and quotation marks omitted)). But even if we were inclined to do so here, EFIH's interpretation of *Northwestern* conflicts with the pronouncements of New York's highest court, which we follow on questions of New York law. *See Illinois Nat. Ins. Co.*, 653 F.3d at 231.

As we noted above, the New York Court of Appeals stated unequivocally in *NML Capital v. Republic of Argentina* that "[w]hile it is understood that acceleration advances the maturity date of the debt, [it was] 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." 952 N.E.2d at 492. Put

differently, contract terms like § 3.07 that are applicable before acceleration remain so afterward.

In *NML Capital*, New York's highest Court answered several questions certified to it by the U.S. Court of Appeals for the Second Circuit. *Id.* at 486. Among them was "whether Argentina's obligation to make [certain contractually established interest] payments to bondholders continued after maturity or acceleration of the indebtedness[.]" *Id.* at 486. Argentina contended that, after the maturity of its debt had accelerated, bondholders were entitled only to their principal and any accrued interest. *Id.* at 490. Acceleration, it argued, terminated its duty to make biannual interest payments mandated by the bond documents. *Id.* at 487.

In rejecting those assertions, the New York Court of Appeals held that "in New York the consequences of acceleration of the debt depend on the language chosen by the parties in the pertinent loan agreement." *Id.* at 492. "Had Argentina . . . 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." *Id.* at 490. For example, the bond documents could have specified that the payment "obligation continued 'until' the maturity date" or could have provided "that interest payments were to be made until the principal was due, thereby referring back to the loan maturity date." *Id.* However, because the bond language that Argentina pay biannual interest payments made no reference to acceleration or maturity, it remained effective following the bonds' acceleration. *Id.* at 493. 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.

Despite the New York Court of Appeals' holding in *NML Capital* and still riding the *Northwestern* horse, EFIH contends that we should decline to require payment of the

make-whole because the trial court declared that a "prepayment premium will not be enforced under default circumstances in the absence of a clause which so states[.]" *Northwestern*, 816 N.Y.S.2d at 836. It held that a mortgage lender who chose to foreclose following default was not entitled to a "prepayment premium" because foreclosure had advanced the debt's maturity date. *Id.* "[P]repayment is a payment *before* maturity[,]" but after foreclosure prepayment is impossible as the debt has become due and payable immediately. *Id.* at 837 (emphasis in original). According to EFIH, *Northwestern* sets a rule that, unless an agreement clearly provides for it, no make-whole payment is due after a note's acceleration.

No doubt prepayment premiums are the price of "an option voluntarily to prepay the loan and terminate the mortgage before the maturity." *In re S. Side House, LLC*, 451 B.R. 248, 267 (Bankr. E.D.N.Y. 2011), *aff'd sub nom*, *U.S. Bank Nat. Ass'n v. S. Side House, LLC*, No. 11-CV-4135 ARR, 2012 WL 273119 (E.D.N.Y. Jan. 30, 2012); *accord Northwestern*, 816 N.Y.S.2d at 836. "[A]cceleration, by definition, advances the maturity date of the debt 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. *Matter of LHD Realty Corp.*, 726 F.2d 327, 330–31 (7th Cir. 1984); *D.I.S., LLC v. Sagos*, 832 N.Y.S.2d 581, 582 (N.Y. App. Div. 2007) ("prepayment" penalty did not apply to tender of mortgage principal and interest following acceleration because post-acceleration payments are not "prepayments").

Unlike prepayment, however, "redemption" of "a debt security" may occur "*at* or before maturity." *Chesapeake Energy Corp.*, 773 F.3d at 116 (emphasis added). Thus, while a premium contingent on "prepayment" could not take effect

after the debt's maturity,[3] a premium tied to a "redemption" would be unaffected by acceleration of a debt's maturity.

Our understanding of New York law is that it follows a logical path: prepayments cannot occur when payment is now due by acceleration of the debt's maturity. If parties want to mandate a "prepayment" premium following acceleration, they must clearly state it in their agreement. This is the *Northwestern* rule.

Recently, however, bankruptcy courts, including the Bankruptcy Court here, have stretched *Northwestern* beyond its language and applied its clear-statement rule to yield-protection payments not styled as prepayment premiums. In the *Momentive* case we mentioned in our discussion of the Second Lien Indenture, a Bankruptcy Court considered language similar to that of both Indentures and nearly identical to the text of the Second Lien Indenture. Like the Indentures here, the *Momentive* indenture required payment of a make-whole on optional redemptions occurring before a particular date. *Momentive*, 2014 WL 4436335, at *13. The Court, however, disallowed the lenders' claim for a make-whole, declaring it "well-settled law in New York" that a make-whole, like a prepayment premium, will only be due on a default and acceleration "when a clear and unambiguous clause calls" for it. *Momentive*, 2014 WL 4436335, at *12-*13 (citing *Northwestern*). The Delaware Bankruptcy Court followed the same line, declining to enforce the make-whole provision because "an indenture must contain express

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[3] Even though a debtor cannot prepay what is already due, courts have enforced prepayment premiums after acceleration when the debtor has intentionally defaulted in order to avoid the premium. *See e.g., In re S. Side House, LLC*, 451 B.R. at 269; *Northwestern*, 816 N.Y.S.2d at 836.

language requiring payment of a prepayment premium upon acceleration; otherwise, it is not owed." *In re Energy Future Holdings Corp.*, 527 B.R. at 192 (construing First Lien Indenture); *accord In re Energy Future Holdings Corp.*, 539 B.R. at 733 (construing Second Lien Indenture).

By denying the make-whole after the Notes' acceleration, the Bankruptcy Court pushed the *Northwestern* rule beyond its language and underlying policy concerns. First, its application of the rule is off point because § 3.07 in the Indentures does not use the word "prepayment." *Northwestern* responds, in part, to the linguistic paradox created by the idea of a *pre*payment following acceleration. "Once the maturity date is accelerated to the present, it is no longer possible to prepay the debt before maturity." *Northwestern*, 816 N.Y.S.2d at 834. That is why, if parties want a "prepayment" premium to survive acceleration and maturity, they must clearly state it.

The Indentures here present no linguistic tension to resolve. Nothing in § 6.02 negates the premium § 3.07 requires if an optional redemption occurs before a stated date. Acceleration here has no bearing on whether and when the make-whole is due.

EFIH argues that, even though § 3.07 does not use the word "prepayment," the make-whole is in substance a prepayment premium, and thus the *Northwestern* rule should apply. But we must give effect to the "words and phrases" the parties chose. *Chesapeake Energy Corp.*, 773 F.3d at 113–14; *NML Capital*, 952 N.E.2d at 489–90. By avoiding the word "prepayment" and using the term "redemption," they decided that the make-whole would apply without regard to the Notes' maturity.

Moreover, beneath the *Northwestern* holding was a policy concern that lenders should not be permitted "to recover prepayment premiums after default and acceleration in order to preserve an income stream . . . absent any 'voluntary' prepayment." *Northwestern*, 816 N.Y.S.2d at 836. There the mortgagee seeking the prepayment premium had elected to foreclose in order to recoup its investment immediately. *Id.* at 833. Ordinarily, by electing to accelerate the debt, a lender forgoes its right to a stream of payments in favor of immediate repayment. *Matter of LHD Realty Corp.*, 726 F.2d at 331 & n.4. The *Northwestern* Judge was concerned that lenders should not be able to seek immediate repayment and pile on by also receiving a premium. 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.

Finally, to repeat what we said at the outset, by declining to enforce § 3.07 after acceleration, the Bankruptcy Court ran afoul of New York authority by failing to enforce a contract provision—§ 3.07—not affected by acceleration. *NML Capital*, 952 N.E.2d at 492. To reach its conclusion, it followed *Momentive*, which described "automatic acceleration clauses" as "negating" the effect of make-whole redemption provisions. *Momentive*, 2014 WL 4436335, at *14. That is not what *NML Capital* tells us.

EFIH answers that the Noteholders should have taken note of bankruptcy courts' novel application of *Northwestern* and insisted on clearer language in the Indenture. *See e.g., In re Anchor Resolution Corp.*, 221 B.R. 330, 334 (Bankr. D. Del. 1998) ("If the maturity of any Series B Note shall be accelerated . . . [,] there shall become due and payable . . . as compensation to the holders . . . a premium equal to the Make-Whole Amount."). But this puts the burden backward;

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 § 6.02 trumps § 3.07. *See NML Capital*, 952 N.E.2d at 490. The burden to make that showing is with EFIH. To place it on the Noteholders for EFIH's decision to redeem the Notes is a bridge too far.

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Our "primary objective . . . is to give effect to the intent of the parties as revealed by the language of their agreement." *Chesapeake Energy Corp.*, 773 F.3d at 113–14. The language of the First Lien Indenture requires EFIH to pay a make-whole if it redeems the First Lien Notes at its option before December 1, 2015, and the Second Lien Indenture requires the same for redemptions of Second Lien Notes before May 15, 2016 or March 1, 2017 (depending on the initial maturity date of the particular debt instruments). EFIH redeemed the First Lien Notes at its option on June 19, 2014 and redeemed a portion of the Second Lien Notes on March 10, 2015. Redemptions, not prepayments, occurred here, they were at the election of EFIH, and they occurred before the respective dates noted. Statements of New York law by its highest Court and the federal Circuit Court in New York reinforce our conclusion that EFIH must pay the make-whole per the Indenture language before us.[4]

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[4] Because we hold that the Noteholders are entitled to the make-whole, we do not reach the Trustees' alternative arguments that the Bankruptcy Court should have lifted the automatic stay to permit rescission of the Notes' acceleration or that the Court should have allowed the Noteholders a contingent claim for the make-whole or a claim for contract damages.

The judgments of the District Court are reversed with instructions to remand to the Bankruptcy Court for further proceedings consistent with this opinion. Any future appeals shall return to this panel.