

Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

SEPTEMBER 2022

EDITOR'S NOTE: MUCH ADO ABOUT CRYPTO

Victoria Prussen Spears

WHAT HAPPENS IN THE EVENT OF THE INSOLVENCY OF A CRYPTOCURRENCY BUSINESS CONDUCTED THROUGH A "BANK"?

Lawrence D. Fruchtmann

CELSIUS NETWORKS' PRE-BANKRUPTCY WARNINGS HIGHLIGHTED CRYPTO BANKRUPTCY RISKS

Richard J. Lee, Frederick (Rick) Hyman and Gregory Gennady Plotko

CRYPTOCURRENCY PLATFORMS THREE ARROWS CAPITAL AND VOYAGER DIGITAL RESORT TO BANKRUPTCY FOR RELIEF

Frederick (Rick) Hyman and Richard J. Lee

STATUTE OF LIMITATIONS, RES JUDICATA, AND COLLATERAL ESTOPPEL—OH MY! ASSERTING AFFIRMATIVE DEFENSES IN DELAWARE BANKRUPTCY COURT

Ronit J. Berkovich and Rebecca Richardson

INTERCREDITOR AGREEMENTS AND THE BANKRUPTCY CODE

Michael H. Goldstein, Howard Steel, Kizzy L. Jarashow and Artem Skorostensky

U.S. SUPREME COURT RESOLVES SPLIT ON U.S. TRUSTEE FEES

Garrett Fail, Candace Arthur, Zack Tripp and Alexander P. Cohen

NEED TO FORECLOSE ON A MORTGAGE? WHERE CAN YOU BRING YOUR ACTION?

Keith M. Brandofino and David V. Mignardi

MUST FOREIGN DEBTORS HAVE U.S. PROPERTY TO BE ELIGIBLE FOR RELIEF UNDER CHAPTER 15?

Rick Antonoff and Evan Jason Zucker

PROFIT MOTIVE? NOT REQUIRED FOR SUBCHAPTER V ELIGIBILITY

Dania Slim and Melissa Pettit

Pratt's Journal of Bankruptcy Law

VOLUME 18

NUMBER 6

September 2022

Editor's Note: Much Ado About Crypto Victoria Prussen Spears	251
What Happens in the Event of the Insolvency of a Cryptocurrency Business Conducted Through a "Bank"? Lawrence D. Fruchtman	254
Celsius Networks' Pre-Bankruptcy Warnings Highlighted Crypto Bankruptcy Risks Richard J. Lee, Frederick (Rick) Hyman and Gregory Gennady Plotko	263
Cryptocurrency Platforms Three Arrows Capital and Voyager Digital Resort to Bankruptcy for Relief Frederick (Rick) Hyman and Richard J. Lee	267
Statute of Limitations, Res Judicata, and Collateral Estoppel— Oh My! Asserting Affirmative Defenses in Delaware Bankruptcy Court Ronit J. Berkovich and Rebecca Richardson	270
Intercreditor Agreements and the Bankruptcy Code Michael H. Goldstein, Howard Steel, Kizzy L. Jarashow and Artem Skorostensky	278
U.S. Supreme Court Resolves Split on U.S. Trustee Fees Garrett Fail, Candace Arthur, Zack Tripp and Alexander P. Cohen	285
Need to Foreclose on a Mortgage? Where Can You Bring Your Action? Keith M. Brandofino and David V. Mignardi	289
Must Foreign Debtors Have U.S. Property to be Eligible for Relief Under Chapter 15? Rick Antonoff and Evan Jason Zucker	294
Profit Motive? Not Required for Subchapter V Eligibility Dania Slim and Melissa Pettit	299

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Ryan D. Kearns, J.D., at 513.257.9021
Email: ryan.kearns@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the “Rescue and Recovery” Culture for Business Recovery*, 10 PRATT’S JOURNAL OF BANKRUPTCY LAW 349 (2022)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

SCOTT L. BAENA

Bilzin Sumberg Baena Price & Axelrod LLP

ANDREW P. BROZMAN

Clifford Chance US LLP

MICHAEL L. COOK

Schulte Roth & Zabel LLP

MARK G. DOUGLAS

Jones Day

MARK J. FRIEDMAN

DLA Piper

STUART I. GORDON

Rivkin Radler LLP

PATRICK E. MEARS

Barnes & Thornburg LLP

Pratt's Journal of Bankruptcy Law is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2022 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Intercreditor Agreements and the Bankruptcy Code

*By Michael H. Goldstein, Howard Steel, Kizzy L. Jarashow and Artem Skorostensky**

This article is a guide for understanding the basic mechanics and strategic bankruptcy considerations in negotiating and documenting intercreditor arrangements.

There is no set of fixed rules when negotiating intercreditor arrangements as every deal is fact-specific, generally subject to significant negotiation and ultimately dependent on competing business rationales and negotiating leverage. This article is a useful tool for understanding the basic mechanics and strategic bankruptcy considerations in negotiating and documenting intercreditor arrangements.

INTERCREDITOR AGREEMENTS UNDER THE BANKRUPTCY CODE

Bankruptcy courts routinely enforce appropriately drafted intercreditor agreement (or “ICA”) provisions that subordinate the rights of junior lenders as to collateral and payments; Bankruptcy Code Section 510(a) provides that a “subordination agreement” is enforceable in bankruptcy to the same extent it is enforceable under applicable non-bankruptcy law.

In addition to enforcing the subordination of debts and liens, bankruptcy courts have enforced standstill requirements, prohibitions on challenging the validity of liens, prohibitions on objecting to the use of cash collateral and debtor in possession financing, and restrictions on voting on bankruptcy plans,

* Michael H. Goldstein (mgoldstein@goodwinlaw.com), a partner at Goodwin Procter LLP and chair of the firm’s Financial Restructuring practice, represents debtors, sponsors, bondholders, creditors, committees and purchasers of distressed assets in a variety of industries, including chemicals, consumer goods, finance, health care, hospitality, high-tech printing, municipal debt, real estate, retail and technology. Howard Steel (hsteel@goodwinlaw.com), a partner in the firm’s Financial Restructuring practice, represents debtors, sponsors, purchasers of distressed assets, creditors’ committees, bondholders, lenders, indenture trustees, landlords, and individual secured and unsecured creditors in all aspects of corporate restructuring. Kizzy L. Jarashow (kjarashow@goodwinlaw.com) is counsel in the firm’s Financial Restructuring practice representing debtors, creditors, equity holders, sponsors, special situations investors and other stakeholders in all aspects of complex corporate restructurings. Artem Skorostensky (askorostensky@goodwinlaw.com) is an associate in the firm’s Financial Restructuring practice representing corporate debtors, equity sponsors, secured and unsecured creditors, asset purchasers, committees and other parties-in-interest in out-of-court restructurings, bankruptcy proceedings and insolvency-related matters.

although the scope of such enforcement depends, in large part, on the specific contract language.

Practice Point: General rules of contract interpretation apply to ICAs. Thus, of utmost importance in negotiating an ICA is to avoid ambiguous, conflicting, and imprecise drafting language (e.g., “with respect to,” “notwithstanding,” “contravene,” “inconsistent with,” “subordinated to the same extent”). Key concepts and defined terms should be specific.

PREVALENT TYPES OF INTERCREDITOR ARRANGEMENTS

ICAs that govern lien priority can take on many forms:

- Pari Passu;
- First/Second Lien;
- Crossover or Split Collateral; or
- First Out/Last Out (agreement among lenders).

In each instance, the ICA defines the collateral that secures each tranche of debt, the relative lien priority of the debt holders, and relative enforcement rights both in and out of bankruptcy. Where unsecured debt is subject to payment subordination (whether as junior subordinated debt or structurally subordinated mezzanine debt), the ICA will govern permitted payments and enforcement rights both prior to and after a default.

Practice Point: In all instances, the relative provisions regarding available sources of recovery and enforcement rights require each party to an ICA to determine if there is an alignment between the benefits/risks of the ICA provisions and the pricing of the debt.

LIEN SUBORDINATION VS. PAYMENT SUBORDINATION

Lien subordination means that one lender (junior lender) agrees that its lien on property, which is shared collateral with the other lender (senior lender), is subordinate to the lien of the senior lender. Importantly, the relative priority of each lender’s lien on the shared collateral applies whether or not the lien is perfected, subject to avoidance, void or voidable, or never granted. This effectively turns lien subordination into payment subordination with respect to the value of the shared collateral.

Payment subordination is where the subordinated (junior) lender agrees to defer payment of some or all of its obligations until the senior lender has been paid in full (sometimes with limited exceptions for reorganization securities). Typically, junior lenders will retain the right to receive regular payments of interest on their debt as long as there is no default under the senior debt at the time the payments are made.

The distinction between lien subordination and payment subordination is material.

- If the transaction involves only lien subordination, then after the collateral is fully liquidated, the senior lender's general unsecured claim for the amount of the shortfall is *pari passu* with the general unsecured claim of the junior lender.
- If the transaction involves payment subordination, the junior debt is subordinated in right of payment to the senior debt, and the senior lender continues to receive payments that would otherwise belong to the junior lender until it is paid in full.

Practice Point: For Lien Subordination: Is the lien at issue co-extensive with the assets of the borrower, or is there leakage? Is subordination language precisely drafted so as to avoid inadvertently being subject to payment subordination?

Practice Point: For Payment Subordination: Are there any obligations, or contractual or other relationships (e.g., equity rights), that should be carved-out of the subordination provision?

Practice Point: For both: Ensure that the language works as intended and does not inadvertently waive or grant rights to the opposing lien/claimholder.

ENFORCEMENT STANDSTILL PROVISIONS

An enforcement standstill provision operates to prevent the junior lender from taking any enforcement action against the shared collateral for a specified period of time. The standstill provision is usually triggered by an event of default or other significant event in the borrower's performance of its loan agreement obligations.

After the standstill period expires, the junior lender can exercise remedies against the collateral. However, if the senior lender has commenced an enforcement action against all or a significant portion of the common collateral before the standstill period expires, it will typically retain the exclusive right to direct the exercise of remedies thus rendering the standstill permanent.

Intercreditor agreements commonly allow junior lenders to take certain actions during the standstill period to preserve their lien and enforcement rights, including:

- Accelerating their loans;
- Demanding payment from the borrower;
- Demanding payment from any guarantor;

- Commencing an action against the borrower or any guarantor for non-payment;
- Obtaining a judgment against the borrower or any guarantor (but not enforcing that judgment);
- Taking action to ensure or preserve the perfection of their liens;
- Taking action to prevent any applicable statute of limitations from running;
- Filing necessary responsive or defensive pleadings (the scope of which turning on the precise contractual language);
- Filing a proof of claim in the borrower's bankruptcy; and
- Voting on a plan of reorganization (which, depending upon the negotiated language, can be with defined limitations).

Practice Point: Pay particular attention to the definition of “enforcement action.” If the enforcement standstill provision is not limited to the “collateral,” lien subordination can transmute into payment subordination.

PAYMENT STANDSTILL PROVISION

A payment standstill provision, which is typically seen in senior/mezzanine intercreditor arrangements, operates to prevent a junior lender from receiving payments, whether made voluntarily or as a result of an exercise of remedies, for a specified period of time after an event of default.

Different types of payments are subject to different restrictions. Ordinary payments of scheduled interest or fees are typically permitted during a standstill period unless there is a default under the senior debt facility.

Practice Point: Principal and interest are always subject to payment blockage after an event of default, but fees and costs can be included in permitted payment provisions, before and after an event of default.

COMMON BANKRUPTCY SPECIFIC PROVISIONS

- Advance consent of junior lender to DIP financing and use of cash collateral.
- Advance consent of junior lender to the sale of collateral and release of liens.
- Waiver of junior lender's right to vote against or oppose a Chapter 11 plan supported by the senior lender.
- Waiver of junior lender's right to challenge the validity of the senior

lender's liens.

- Waiver of junior lender's right to seek relief from the automatic stay without consent of the senior lender.
- Waiver of junior lender's right to adequate protection and post-petition interest payments.
- Inability to file an involuntary bankruptcy case against the borrower.

Practice Point: Issues always open to negotiation include:

- DIP financing, subject to market terms, with junior lender having the right to propose junior DIP financing;
- Any sale of collateral has to be pursuant to approved sale and bidding procedures and applicable law;
- Junior lender's right to vote on a plan provided that such plan does not violate the lien priority provisions of the ICA;
- Challenge waivers do not include disputes over collateral value; and
- If senior lender receives relief from stay, or adequate protection payments, the junior creditor is entitled to the same.

RIGHTS TYPICALLY MAINTAINED BY JUNIOR LENDERS IN BANKRUPTCY CASES

- The right to file a proof of claim.
- The right to take any action, which is not adverse to the senior lender or to the senior lender's exercise of remedies, to preserve or protect its lien and rights as a junior lender.
- A general reservation of unsecured creditor rights, subject to express prohibitions in the agreement.
- The right to receive and retain reorganization securities.

Practice Point: The extent to which a junior lender retains rights in a bankruptcy case will determine whether the lien subordination is, in effect, a silent second agreement.

REORGANIZATION SECURITIES

A confirmed plan of reorganization sometimes provides for the distribution of new debt or equity securities of the reorganized debtor to the first and/or second lien lenders on account of their respective claims. The "X Clause" in an ICA serves to confirm that it is permissible for the junior lender to retain

reorganization securities before the first lien lender has been paid in cash in full. Reorganization securities are typically subject to being subordinated to the same extent that the junior debt is subordinated to the senior debt.

Practice Point: Because equity is by definition subordinated to debt, ambiguity is avoided by specifically defining what is intended by equity reorganization securities being subordinated to the same extent as the junior debt is subordinated to the senior debt.

BUYOUT RIGHT OR PURCHASE OPTION

ICAs typically include express provisions permitting the junior lender to purchase the senior debt. The junior lender's rights to purchase the senior debt is typically triggered by a list of events itemized in the intercreditor agreement—which can occur sequentially or simultaneously. The purchase price can be at par, or par plus. The documentation can follow standard assignment documentation, or be left for negotiation.

Practice Point: A buyout right or purchase option can provide a meaningful optionality to the parties in a downside scenario.

OTHER KEY PROVISIONS OF INTERCREDITOR AGREEMENTS

Limitations on Amendments to Debt Documents

ICAs will specify limitations, if any, on the ability of the senior and junior lenders to amend their existing debt documents (and define the type of amendments that require consent of the other lender). It is typical that senior debt documents cannot be amended to increase the amount of senior debt or interest rate above a certain threshold or extend the maturity date of the senior debt beyond the maturity of the junior debt.

Anti-Layering

The junior lender may prohibit amendments to the senior debt documents if they would permit financing that is junior to the first lien but senior to the second lien, or otherwise reserve its right to object to any financing (including DIP financing) that is junior to the first lien but senior to the second lien (anti-layering provisions).

Drag Rights

Actions taken by senior lenders with respect to enforcement of rights and remedies, such as waiving defaults under the senior debt, will be deemed to have also been taken by the junior lenders with respect to the junior debt. In addition, general language in an ICA can typically impose broad waivers of junior rights if not otherwise qualified.

Turnover of Proceeds

Turnover provisions ensure that the priorities established by the intercreditor agreement as to collateral and its proceeds are not evaded if payments that are not permitted by the intercreditor agreement or are inconsistent with the ranking of the claims or liens, are made to junior lenders.

Dispute Resolution

Jurisdiction, venue, subrogation and jury waivers are always included terms.

Practice Points: Amendment provisions should protect against unilateral changes to the bargained deal. The scope of the collateral and its proceeds should be well defined as it will determine allocation of value. Broad waivers inject ambiguity in the contract provisions. Jurisdiction by the bankruptcy court if there is an insolvency proceeding, and the right to assert, but not enforce, subrogation rights, should be preserved.