

Commercial Law Newsletter

Joint Newsletter of the Commercial Finance and Uniform Commercial Code Committees



April 3, 2017

Spring 2017

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MARK YOUR CALENDARS

April 6-8, 2017 – ABA Business Law Section Spring Meeting – New Orleans, LA
Hyatt Regency New Orleans

September 14-16, 2017 – ABA Business Law Section Annual Meeting – Sheraton Chicago Hotel & Towers and The Gleacher Center Chicago, IL

November 17-18, 2017 – ABA Business Law Section Fall Meeting – Ritz-Carlton, Washington, DC

Joint Report from the Chairs

Dear Members:

In early April, Section members will gather in New Orleans for the Business Law Section's Spring Meeting. The Spring Meeting will be held on Thursday, April 6th – Saturday, April 8th, at the Hyatt Regency New Orleans. Registration is still available for this meeting and may be completed on-line at the Section's website.

We are pleased that our committees are again offering a robust number of meetings and programs. Together, the ComFin and UCC Committees are the prime sponsors of seven (7) CLE programs: (1) Current State of the Syndicated Loan Market (Thursday, April 6th, 10:30am - 12:30pm); (2) Program: All Aboard the Blockchain - Commercial Finance Issues, Applications and Impact (Friday, April 7th, 8:30am - 10:00am); (3) Avoiding the Pitfalls of Cross-border Secured Lending in China, Latin America and Western Europe (Friday, April 7th, 10:30am - 12:00pm); (4) The Role of Lawyers and Legal Ethics in Improving the Culture of Financial Services (Friday, April 7th, 2:30pm - 3:30pm); (5) Control of Electronic Chattel Paper: Technological Developments and Gaps in the Law (Saturday April 8th, 8:30am - 10:00am); (6) Financial Covenants: Understanding, Drafting and Crafting in Commercial Finance (Saturday, April 8th, 9:00am - 10:00am); and (7) Making the Intangible Untouchable: Creating, Perfecting and Enforcing Security Interests in Intangibles in Cross-Border Transactions (Saturday, April 8th, 10:30am - 12:30pm).

In addition, the Committees will hold the usual Joint Meeting on Thursday, April 6th, from 8:00am-9:30am, and a joint committee dinner at Restaurant August on Thursday evening, starting with an open bar at 7:30 pm. The joint dinner is sold out; please contact either of us to be placed on our informal wait list.

As always, our Committees and the vast majority of our subcommittees and task forces will be meeting. The entire schedule for the meeting is available on the Section's website. If you are unable to attend the meeting in person, prior to the meeting we will provide dial-in information for the various committee, subcommittee, and task force meetings.

In addition to the UCC Spotlight by Stephen Sepinuck and Carl Bjerre, this edition of the newsletter includes articles written by leading practitioners of commercial law as well as active lenders in the healthcare space. Of course, we also extend a hearty thanks to the entire CLN Editorial Board for putting this wonderful newsletter together.

Kristen and I thought it fitting to devote this edition of the Chairs' Report to honor Cheryl Stacey, who passed away on October 17, 2016. Cheryl served as chair of ComFin's Loan Documentation Subcommittee and, until her passing, was a co-chair of the Programs and Meetings Subcommittee. Cheryl was a wonderful soul, a good friend and an excellent lawyer.

Please email either of us if you have any ideas for either of the Committees or wish to participate in any project, subcommittee or leadership role. The Committees have a number of projects underway. Our subcommittees and task forces are very active and always welcome input. Please do not hesitate to volunteer!

We hope you enjoy this issue, and invite you to get involved in your committee(s).

SUBMISSIONS FOR UCC LAW JOURNAL

Dear Readers:

As the new year begins, I am writing to introduce myself as the new Editor in Chief of the Uniform Commercial Code Law Journal (UCC Law Journal). The Journal, which is published quarterly by Thomson Reuters, has a proud and distinguished tradition. Professor Louis Del Duca, who was without a doubt one of the great minds in the field of commercial law and a mentor to so many, served as the Journal's first Editor in Chief, and it is truly a privilege to follow him.

Over its history, thus far, the Journal has published articles written by many of the leading academicians and practitioners in the field of commercial law, and Principal Attorney Editor Lisa Ovsiovitch and I are very interested in hearing from prospective authors in both groups. The Journal welcomes articles relating to various aspects of the Uniform Commercial Code that may include, but are in no way limited to, such topics as each of the UCC articles, contract law, commercial arbitration, damages, the Sarbanes Oxley Act, the Truth in Lending Act, alternative payment systems in the modern era, commercial issues in gaming systems, issues related to prepaid accounts, issues related to the 2010 Article 9 Amendments, issues related to the UCC and bankruptcy, litigation, secured lending, issues related to trusts and trustees, searching and filing issues under Article 9, the CISC, etc.

The next deadline for submitting articles to be considered for publication is

June 1, 2017. I would be glad to provide additional information, including Thomson Reuters' Submission Instructions and Specifications, to anyone who is interested in having an article published in the Journal. Articles should be submitted by e-mail if possible, and the preferred format is Microsoft Word.

Very truly yours,

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Featured Articles

RECENT TRENDS IN ENFORCEMENT OF INTERCREDITOR AGREEMENTS AMONG LENDERS IN BANKRUPTCY¹

By [Seth Jacobson](#), [Ron Meisler](#), [Carl Tullson](#) and [Alison Wirtz](#)

Over the last several decades, the enforcement of intercreditor agreements ("ICAs") that purport to affect voting rights and the rights to receive payments of cash or other property in respect of secured claims have played an increasingly prominent role in bankruptcy cases. Although the Bankruptcy Code provides that "subordination agreement[s]" are enforceable in bankruptcy to the same extent such agreements are enforceable under applicable nonbankruptcy law, the handling of creditor disputes regarding such agreements has been inconsistent.²

Both ICAs and agreements among lenders ("AALs") purport to alter the rights of junior-lien creditors or subordinated creditors in a bankruptcy of their common debtors. For example, such agreements often include waivers of the right to object to bankruptcy sales, voting restrictions on plans of reorganization, and waivers of rights to object to debtor-in-possession financing and use of cash collateral. ICAs in secured transactions are generally among creditor groups that hold different tranches or classes of debt, each secured by separate but identical liens and acknowledged and agreed to by the applicable borrowers or issuers. AALs, by contrast, are typically agreements solely among the lenders under a single secured credit facility and their agent. The borrower is not party to the AAL and grants a single lien to the agent for the lenders to secure all of its obligations under the credit facility. The borrower discharges its obligations by paying required payments to the agent under the credit facility. The AAL then determines how those payments are divided among the lenders.

Bankruptcy courts have treated ICAs and AALs inconsistently. Some courts have enforced

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these agreements in accordance with their terms, others have invalidated provisions in these agreements³, and still others have enforced agreements only to the extent that it provides the best outcome for the debtor's estate. A recent trend in the case law has been to enforce ICA and AAL provisions altering creditors' rights in bankruptcy only to the extent there is clear and unambiguous language in the agreement altering such rights. In this article, we examine three recent leading cases: *Energy Future Holdings* ("EFH")⁴, *Momentive*⁵, and *RadioShack*⁶. These cases addressed whether the bankruptcy court was the proper forum for intercreditor disputes (including threshold jurisdictional issues for AALs), the ability of junior creditors to object to a sale supported by senior creditors, and whether an agreement providing only for lien subordination restricts a junior creditor's ability to receive distributions under a plan of reorganization.

Proper Forum for Intercreditor Disputes

A threshold issue in cases involving ICAs or AALs is whether bankruptcy-related intercreditor disputes (including the right to approve or object to sales, cash collateral and financing motions, vote on plans of reorganization, and receive and retain proceeds distributed by the debtor) should be decided by the bankruptcy court or another federal or state court. In both *EFH* and *Momentive*, intercreditor disputes originated in state court but were transferred to the respective bankruptcy courts administering the debtors' cases. In both cases, the bankruptcy courts held that the intercreditor disputes were "core proceedings" relating to the administration of the debtors' estates and were therefore within the scope of the bankruptcy court's jurisdiction.

Energy Future Holdings is an electric utility company with its business operations divided into two silos: a regulated electrical utility (the so-called "E side") and a non-regulated electricity generating and commodity risk management and trading entity ("TCEH," or the so called "T side"). The intercreditor dispute arose on the "T side" and was among T-side first-lien creditors regarding whether certain payments and distributions were subject to an application-of-payments provision governing sales or other dispositions of their collateral. TCEH's first lien debt included \$1.8 billion in 11.5% senior secured notes (the holders of such notes, the "Noteholders"), approximately \$22.6 billion of bank debt, and outstanding debt under certain swap and hedge agreements (the holders of bank, hedge, and swap debt together, the "Non-Noteholders").⁷

In *EFH*, the Noteholders initially filed suit to resolve a dispute over the allocation of certain adequate protection payments and eventual plan distributions in New York state court. The Non-Noteholders removed the case to the District Court for the Southern District of New York and moved to transfer the case to the Delaware bankruptcy court.⁸ The Noteholders sought to have the matter remanded back to state court. The Southern District of New York granted the motion to transfer to the bankruptcy court, reasoning that the dispute would not exist but for the bankruptcy proceeding and cash collateral order providing for adequate protection payments and that the dispute will affect the allocation of estate funds, which is a core bankruptcy function.

Momentive is a silicone and quartz manufacturer. At the time of its bankruptcy, its capital structure had first, 1.5, and second lien secured debt, as well as additional unsecured debt.⁹ The lenders negotiated an ICA that provided lien subordination of the second-lien noteholders' liens in the Common Collateral (as defined in the ICA). After Momentive declared bankruptcy, the second lien creditors entered into a plan support agreement ("PSA") with the debtors that provided the basis for the debtors' proposed plan. Under the PSA, the first and 1.5 lien noteholders would receive face value of their debt but would not receive a make-whole premium, while approximately \$1.3 billion in second-lien debt would be equitized.¹⁰ In the event that the first and 1.5 lien noteholders voted to reject the plan of reorganization, they would receive new notes at below-market interest rates on account of their secured claims¹¹ while the second lien noteholders would receive new equity in the reorganized debtor.

Similar to the result in *EFH*, the first lien and 1.5 lien noteholders filed suit in New York state court and the second lien noteholders removed the matter to District Court for the

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Southern District of New York, which automatically referred the case to the bankruptcy court. The bankruptcy court denied the senior creditors' motion to remand back to state court.

As demonstrated by these two cases, while dissenting creditors may prefer to initiate litigation in an alternate forum, these disputes are more likely than not to end up in bankruptcy courts if the disputes are viewed as core proceedings inextricably tied to the administration of the debtors' cases.¹²

Interpreting Sale-Related AAL Provisions

RadioShack, by contrast, yielded more mixed results when it came to the bankruptcy court's willingness to resolve AAL-related disputes. Nevertheless, this was the first case we are aware of where a bankruptcy court addressed, at least implicitly, the enforceability of AALs in bankruptcy.¹³ While an AAL would likely be considered a subordination agreement for the purposes of Section 510(a) of the Bankruptcy Code, debtors are not parties to AALs, which led to arguments that the AAL should be considered outside the scope of the property of the debtor's estate as "an agreement that does not impact the debtors and [has] nothing to do with the debtors' estates"¹⁴ and therefore beyond the bankruptcy court's jurisdiction.

RadioShack, a chain of electronics stores, had a complex capital structure at the time it filed for bankruptcy. RadioShack had two main groups of secured lenders, an asset-based or "ABL" lender group under a revolving credit facility and a term loan lender group. The ABL and term loan had crossing liens and a split collateral structure, with lien subordination between the ABL and term loan governed by an ICA.¹⁵ The ABL and term loan were further divided into multiple tranches, with subordination between each of these tranches of debt governed by separate AALs. The ABL lender group was divided into a first-out group, which was comprised of a number of hedge funds, and a last-out lender, an affiliate of Standard General LP ("Standard General"). For the term loan lender group, an affiliate of Cerberus Capital Management LP ("Cerberus") was the first-out lender and an affiliate of Salus Capital Partners LLC ("Salus") was the last-out lender.

Standard General, acting as the stalking horse bidder, had offered to buy approximately half of RadioShack's stores through a credit bid. Cerberus, the first-out term loan lender, initially objected to the sale but then withdrew its objection. Salus wanted to put in a competing credit bid and objected to the sale, an action Cerberus alleged was in violation of § 14(c) of the term loan AAL¹⁶, which prevented last-out lenders from objecting to a sale on any grounds that could only be asserted by a secured creditor if the first-out lenders consented to the sale. Certain ABL lenders also objected to the sale for other reasons.

Judge Shannon of the Delaware bankruptcy court interpreted the provisions of the AAL in the *RadioShack* dispute, reasoning that the AAL pertained to the "treatment of a secured creditor" and, in doing so, implicitly recognized the enforceability of AALs in bankruptcy. Accordingly, the bankruptcy court allowed Cerberus to enforce the AAL to block Salus's objections to the sale. This should provide some comfort to lenders party to AALs that their negotiated rights will be respected by bankruptcy courts to the same extent they would be under an ICA.

Plan Distributions and Lien Subordination Agreements

As mentioned above, ICAs and AALs can provide for either lien subordination or claim subordination. Under a lien subordination agreement, to the extent that there is value derived from agreed-upon collateral, the senior lender is paid first, up to the extent of its secured claim. If there are insufficient proceeds from this collateral, the senior lender would be entitled to a pro rata share of any remaining assets the borrower may have, along with other under-secured and unsecured creditors. Payment subordination, by contrast, is a more fundamental form of subordination where the senior lender's right to payment is agreed to be superior to the junior creditor's right to payment.

way to get involved with the UCC Committee and the ComFin Committee. Articles can survey the law nationally or locally, discuss particular UCC or Commercial Finance issues, or examine a specific case or statute. If you are interested in submitting an article, please contact one of the following Commercial Law Newsletter Editors [Sidney Simms](#), [Harold Lee](#), [Hilary Sledge-Sarnor](#), [Christina Goebelsmann](#), [Jennifer Wasylyk](#), [Peter Marchetti](#), [Shadi Enos](#) or [Alex Brown](#).

In *Momentive* and *EFH*, the courts were presented with subordination agreements that provided for lien subordination, rather than payment subordination. In both cases, these agreements were interpreted to not restrict plan distributions (e.g., equity of the reorganized debtor) because such distributions did not constitute common collateral or proceeds of collateral as defined in the applicable intercreditor agreement.

In *Momentive*, the first and 1.5 lien noteholders alleged that the second lien noteholders had breached § 4.2 of the intercreditor agreement, which provided the payment waterfall for the disposition of collateral or the proceeds of collateral, by retaining 100 percent of the common stock of the reorganized debtor when the more senior lien holders had not been paid in full. They argued that the stock of the reorganized debtor would be either common collateral or proceeds, as defined by § 9-102(a)(64) of the New York UCC.

The bankruptcy court concluded that the new equity of the reorganized debtor did not constitute “Common Collateral,” as defined in the intercreditor agreement, because none of the lenders had “a lien on that stock” or the parent company’s current stock. In addition the

stock did not qualify as “proceeds” of the collateral, as proceeds are defined by the New York UCC § 9-102(a)(64), because the new equity is not something a current secured party’s existing lien would attach to—the new equity is distributed on account of the second lien lenders’ secured claims, not the proceeds of the debtors’ assets. The court also noted that there had been no economic event to alter the nature of the assets, which is necessary to give rise to proceeds.

The issue in *EFH* was similar, namely whether adequate protection payments and plan distributions were distributions of collateral and/or proceeds of collateral such that the waterfall provisions of the intercreditor agreement governed their allocation.¹⁷

The proposed plan of reorganization called for First Lien Creditors to receive common equity in the reorganized TCEH, cash, new TCEH Debt, and certain other rights (the “Plan Distributions”) and extinguishing the First Lien Creditor’s liens. The First Lien Non-Noteholders argued that Plan Distributions and Adequate Protection Payments were not “collateral” or “proceeds” of collateral, as defined in the intercreditor agreement or security documents, and, as a result, should be allocated on a pro rata basis as of the Petition Date among the first lien creditors in accordance with the size of each class of creditors’ claims. In resolving this issue, the bankruptcy court built upon the reasoning set forth in *Momentive*.

In March 2016, Judge Sontchi of the Delaware bankruptcy court ruled in favor of the Non-Noteholders and held that the Petition Date Allocation Method advanced by the lower-interest-rate Non-Noteholders should be adopted. In his ruling, Judge Sontchi stressed that for the Noteholders to succeed in their proposed Postpetition Interest Allocation Method, they must show that each element of § 4.1 of the ICA, “Application of Proceeds,” is met. Otherwise, the intercreditor agreement would be inapplicable to the scenario at hand.¹⁸

The court held that Plan Distributions and Adequate Protection Payments did not constitute collateral or proceeds of collateral, and therefore failed to meet the elements of § 4.1 of the ICA. Accordingly, because no other provision of the ICA applied to plan distributions and adequate protection payments, the court held that these payments should be allocated among the First Lien Creditors on a pro rata basis based on the amounts owed as of the Petition Date.

The Noteholders asserted that the plan distributions constituted “Collateral” because under the spin-off transaction contemplated by the plan, the First Lien Creditors’ collateral would be “sold” to reorganized TCEH in exchange for reorganized common stock, along with other proceeds. However, the court did not find this argument persuasive and, adopting the reasoning in *Momentive*, held the First Lien Creditor did not have a lien on the new common stock issued as part of the debt-for-equity swap in the plan, and therefore, to consider the new stock received under the plan as proceeds of collateral would improperly add to the First Lien Creditors’ collateral. Specifically, in addressing whether the proposed spinoff transaction was a “sale or other disposition” of collateral, further relying on *Momentive*, Judge Sontchi concluded that the plan gave no indication that reorganized TCEH was “purchasing” the collateral nor that reorganized TCEH was a third-party purchaser, noting the absence of any “economic event” that would create that sort of relationship.”

Alternatively, the Noteholders asserted that the Plan Distributions were proceeds of collateral. The court did not find this argument persuasive, noting the language of the security agreement limited proceeds to (i) any consideration received from the sale/disposition of assets, (ii) value received by the debtor as a consequence of possessing the Collateral, or (iii) insurance proceeds, none of which apply to the Plan Distributions.¹⁹ Further, the court held that Adequate Protection Payments were not collateral as argued by the Noteholders, but rather constituted a protection against diminution in value of collateral.²⁰

Conclusion

Bankruptcy courts are increasingly willing to interpret ICAs and AALs and apply the plain language of these agreements to the facts of the case. Creditors should be cognizant of the fact that even if they may prefer to initiate litigation in an alternate forum, these disputes are typically viewed as core proceedings and will likely end up in bankruptcy court. This is especially notable because bankruptcy courts are courts of equity and judges often take a pragmatic approach to these disputes. Moreover, senior creditors appear to continue to bear the risk of agreements that do not limit junior creditors' rights in bankruptcy using clear and unambiguous language.

Healthcare Lenders Must Stay Nimble in Today's Market

By: [Jennifer Sheasgreen](#) and [Zachary Reed](#)

Healthcare lenders had to adjust the way they analyzed the market when the Affordable Care Act, or ACA, was enacted. Now that some of the ACA provisions have taken effect, the newly-elected administration has set forth new legislation to change the existing law, pushing those in the healthcare commercial finance space to adapt again and help their customers stay profitable through the successful management of working capital. No matter what actually passes, one constant remains in healthcare lending: there is no constant.

While the passing of any ACA repeal may take months, healthcare providers must continue to study the market and adapt and evolve alongside the government-run healthcare plans and exchanges in order to manage their working capital. Certain parts of the ACA have hindered available cash flow, while other pieces, depending on the state in which such health care providers operate, have helped tremendously. The new plan set forth by the current administration may continue to compress working capital, thus driving healthcare lenders to continue to adapt and learn the challenges that providers are facing on a day-to-day basis.

The following will discuss the impact of the ACA on healthcare, certain statistics surrounding the ACA, and proposed changes to the ACA under the current administration.

The ACA's Impact on Healthcare

The common thought about businesses throughout the country is, "more people through the doors equals more money and a more viable financial outlook." However, that is not necessarily the case for all healthcare providers. It is true, there are more people visiting hospitals and private practices under the current ACA structure than before the law was enacted, but the regulations are either making it difficult for healthcare practices to get paid or reducing the amount they receive in reimbursements.

Medicaid expansion is one of the key areas that was touted under the ACA to expand access to health insurance, which has taken place in Medicaid expansion states. The law provided states with the option to expand their Medicaid programs to include all adults with incomes that are at or below 138 percent of the federal poverty level. A total of 30 states and Washington, D.C., took advantage of this opportunity. Because of this, Medicaid enrollments have grown significantly, including in the states that have not expanded. More than 10 million additional Americans enrolled in Medicaid since the enactment of the ACA; moreover, since the ACA's first open enrollment in 2013, the number of Americans covered under Medicaid has risen by 21 percent to 71.1 million.¹ After 2013, adults who gained coverage were 55 percent more likely to have their own doctor than those who did not, and Medicaid also increased the likelihood of receiving preventive care, such as mammograms and cholesterol checks.

The proportion of patients that private practices are seeing is consistently shifting from commercial health plans to Medicaid, which sometimes compensates doctors pennies on the dollar compared to reimbursements such documents would receive under private insurance plans. Recent data shows that Medicaid visits, as a proportion of all visits to doctors, increased from 15.6 percent in 2013 to 17.7 percent in 2014, and increased again to 21.5 percent in 2015 in states that expanded Medicaid. In states that did not expand Medicaid, the proportion of visits remained largely flat at 9.4 percent for 2013, 9.2 percent for 2014 and 8.9 percent for 2015. At the same time, as certain states expanded Medicaid coverage, the proportion of commercially insured patients, either through ACA marketplace exchanges or through workplace coverage, fell in states that expanded their Medicaid programs. In those states, commercially insured patients comprised 65.2 percent of all patients in 2013, 64.4 percent in 2014 and then fell to 62.8 percent in 2015.²¹

By analyzing the facts above, it becomes apparent that physician practices will continue to feel the financial strain under the current form of the ACA as the more lucrative reimbursements received from private insurance plans will decrease as a result of the falling number of commercially insured patients in states that expanded Medicaid coverage. For example, currently reimbursement rates are already close to Medicaid rates for many ambulatory procedures. Many privately insured individuals under the ACA were bumped off their prior commercial coverage and consequently forced into an ACA exchange, which lowers provider revenue for services, including many ambulatory procedures. Finally, states that expanded their Medicaid programs have seen the proportion of Medicaid patients visiting doctor offices, as a percentage of physicians' total patient volume, increase by almost 40 percent since 2013. As doctors continue to see more patients with expanded Medicaid coverage in those states that expanded Medicaid coverage, and with Medicaid

paying much less than private coverage, less reimbursement revenue is reflected in each health provider's bottom line.

In states that expanded Medicaid programs, hospitals have witnessed a positive financial impact. Large, public hospitals in states that opted to expand Medicaid programs are finding themselves on solid financial footing for the first time in decades, and formerly uninsured patients are now getting regular care. Nonprofit hospitals located in those 30 states that expanded Medicaid programs reported on average 13 percent less bad debt from unpaid bills in 2014, according to Moody's Investors Service.²² In addition, according to the Kaiser Family Foundation, hospitals in Medicaid expansion states reported on average a 32 percent decrease in uninsured patients and a 40 percent cut in unreimbursed costs of care for patients without the ability to pay.²³ Overall, for most hospitals in Medicaid expansion states, working capital levels have improved due to lower levels of uncompensated treatments.

In contrast, states that failed to expand their Medicaid programs did not see a more positive financial outlook or a negligible change, and in fact, many accrued more bad debt. In addition to seeing an increase in bad debt, the average increase in patients covered by insurance was by less than two percent. In states that have not expanded Medicaid programs, such hospitals are still as reliant on donations to make up for their charity care as they were before. While not dictated by states like Medicaid, Medicare reform has also greatly impacted healthcare providers under the ACA. One major change to Medicare under the ACA is the reimbursement for preventative services, such as annual wellness checkups, immunizations and screen tests that are now covered without co-payments. Another significant change is the Bundled Payments for Care Improvement (BPCI) Initiative. Historically, Medicare has made separate payments to providers for each of the individual services furnished to beneficiaries for a single illness or course of treatment. The Centers for Medicare & Medicaid Services, or CMS, felt this approach resulted in fragmented care, with minimal coordination across providers and healthcare settings. Payment reimbursement traditionally rewarded the quantity of services offered instead of the quality of care.

New rules under the ACA hold hospitals accountable for Medicare patients long after they leave the hospitals, require paying a fixed price for those procedures described under the BPCI Initiative, and not reimbursing a health care provider for such procedures until the patient has been out of the hospital for 90 days. The BPCI Initiative has affected many hospital's bottom lines, as the treatment such hospitals give patients for certain procedures included in the BPCI Initiative aren't reimbursed immediately, and in some cases, hospitals aren't reimbursed at all and could end up owing Medicare because of extended stays in rehab facilities. Hospitals could, however, see eventual cost savings if the patient recovers and gets home quickly.

Hospitals currently have to budget for the delayed reimbursement from Medicare as a result of the BPCI Initiative, and should expect to see their working capital cycle increase. The BPCI, however, has incentivized hospitals to help manage what happens to patients outside the hospital walls. Realizing clinical and financial success under this new payment and incentive model means that a hospital's patient care coordinator is more active in ensuring post-hospitalization service is provided in areas such as rehabilitation, assisted living and home healthcare. As time goes on, CMS will continue to test mandatory bundled payments in other areas, which could continue to affect how a hospital must budget their working capital.

Adapting to the Future of Healthcare

Recently, Republicans of the House of Representatives have proposed legislation intended to repeal and replace the Affordable Care Act. While many provisions of this legislation will likely change between the publishing of this article and the eventual passing of a bill, there are many proposals that will change the way healthcare providers and lenders need to look at doing business.

Despite legislation designed to repeal and replace the ACA, two popular pieces of the current ACA are likely going to remain in place: dependent coverage for until the age of 26, along with coverage for people regardless of pre-existing medical conditions, effectively barring companies from charging more based on a person's health history.

Notwithstanding any repeal or replace of the ACA, Medicaid expansion will continue to affect healthcare providers and lenders. Under proposed new legislation, states that choose to expand Medicaid will continue receiving federal funding as they would under the ACA until 2020. Federal funding for people who become newly-eligible for Medicaid starting in 2020 or who leave the program and come back, however, would be reduced.²⁴

Under proposed new legislation, the Trump administration would provide more power to the states through federal block grants so that states have more autonomy over their own individual Medicaid programs. Many individuals that bought into the ACA model and purchased individual policies are finding that their premiums have increased so much, or were cancelled outright. Many states are left with a lack of choices for ACA insurers as many have exited the program. Lenders have seen traditional Medicaid revenue morph into Medicaid Managed Care or Managed Care Organizations (MCOs). Such changes have not only caused extended payment cycles, but insurers have exited the ACA marketplace. It will be critical for lenders to be aware of potential insurer exits and monitor large payors to ensure proper collateralization.

Medicare payment changes will continue to evolve from quantity to quality and require incentives for hospitals to deliver value based care at a lower cost, with the goal of producing speedy recoveries and preventing hospital readmission. Risk sharing and bundled payment models will likely continue moving forward under the new administration. Lenders should analyze changes in this payor pool with a keen eye to monitor reimbursement swings and consider those impacts when assessing success under these programs and the impact to financial statements.

The healthcare space is a dynamic and fluid part of our country's history. The need for healthcare providers and lenders to adapt quickly to change is paramount to effective business practice and long-term success. Just as other changes -- including the first HMOS in the 1970s, the privatization of healthcare in the 1980s, the cost reporting to the Balanced Budget Act of 1997, HIPAA and the ACA -- have brought the need for adaptation, healthcare lenders need to continue to stay on the forefront of future changes, monitoring their borrower's ability to be proactive to changes while making sure to protect their own collateral.

The Admissibility of Post-Contract Evidence in Canada

By: [Marco P. Falco](#)

A Court's primary goal in the interpretation of a commercial contract is to discern the parties' intentions. In Canada, Courts use a range of tools to achieve this end. They look to the ordinary meaning of the words chosen by the parties in their agreement. They also consider which interpretation of the contract will give it business efficacy or which will make the most commercial sense.

A recent debate has emerged in Canadian contract law about whether and how Courts should consider the parties' conduct in determining their contractual intentions. In a leading case, *Sattva Capital Corp. v. Creston Moly Corp.*²⁵, the Supreme Court of Canada made it clear that when interpreting a commercial agreement, the Court should consider evidence of what it calls the "factual matrix" to determine the contract's meaning.

The factual matrix "consists only of objective evidence of the background facts *at the time of the execution of the contract*, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties *at or before* the date of contracting".²⁶ [*emphasis added*]

Evidence of the factual matrix may very well include evidence of the parties' negotiations and correspondence at the time they executed the agreement. In this way, *Sattva* aligns Canadian contract law with its American counterpart.²⁷

Sattva left one key issue unresolved, however: can a Court consider evidence of the parties' conduct *after* they enter into a commercial agreement as an aid to its interpretation?

Canadian Courts have now answered this question in the affirmative, with one significant qualifier. Evidence of the parties' post-contract conduct is admissible as an aid to contract interpretation, but only in cases of contractual ambiguity. In the absence of ambiguity, the evidence is inadmissible. Even where the Court finds that evidence of the parties' "subsequent conduct" is admissible, however, it must then decide whether to accord the evidence any weight.²⁸

This approach represents a departure from the rigid position in the United Kingdom, where post-agreement conduct has long been deemed inadmissible.²⁹ In the U.K., Courts have expressed concern that if post-agreement evidence is used as a tool for contractual interpretation, the meaning of the commercial contract will change over time. This could undermine the principle of contractual certainty. As one U.K. Court put it, "one might have the result that a contract meant one thing the day it was signed, but by reasons of subsequent events meant something different a month or a year later".³⁰

In rejecting the U.K. position, Canadian Courts are not blind to the inherent dangers of using the parties' subsequent conduct to interpret a contract. In the 2016 Ontario Court of Appeal decision, *Shenbuck v. Blackmount Capital Inc.*³¹, which opened the door to the admissibility of evidence of the parties' subsequent conduct, the Court identified the perils of such evidence as follows:

- i. it would allow the meaning of the contract to fluctuate over time, as recognized by the U.K. Courts³²;
- ii. it may itself be ambiguous. The fact that a party does not enforce strict legal rights under a contract does not necessarily mean that the party never enjoyed those rights³³; and
- iii. the commercial parties may start to conduct themselves in a way that favours their interpretation of the contract. By admitting evidence of post-agreement conduct, the Courts would be rewarding this type of self-serving behavior.³⁴

Despite these concerns, the Court of Appeal in *Shenbuck* recognized that "evidence of subsequent conduct may be useful in resolving ambiguities".³⁵ That is, the parties' behaviour after the execution of the contract could support an inference regarding their original intentions at the time of contract formation.³⁶ The Court likened the evidence of post-contract conduct to a criminal's behaviour after the commission of an offence:

However, the lesson learned in Canada from the British position is that the parties' subsequent conduct is relevant only to inferentially establishing their intentions at the time they executed their contract. Like evidence of post-offence conduct in criminal matters, it is a kind of circumstantial evidence that "invokes a retrospectant chain of reasoning"; the trier of fact is invited to infer the parties' prior intentions from their later conduct...³⁷

Once admitted, however, the evidence is still subject to the Court's scrutiny. The Court must decide whether to give it any weight. In deciding the evidence's reliability, the Court will consider whether the conduct is that of both parties, it is intentional, it is consistent over time, and whether it belongs to individuals, rather than agents of corporations. The Court will also give the evidence more weight if it is unequivocal "in the sense of being consistent with only one of the two alternative interpretation of the contract".³⁸ Moreover, the closer in time to the execution of the contract, the more likely the evidence will be considered reliable.³⁹

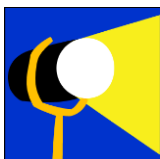
The reasoning in *Shewchuk* remains to be tested. As a recent decision of the Ontario Court of Appeal, it is not yet clear whether *Shewchuk* has injected of level of contractual uncertainty in the Canadian legal landscape.

Despite all the safeguards in place to ensure that evidence of post-agreement conduct is properly admitted and weighed by the Courts, commercial parties may be tempted to engage in self-serving behaviour after the execution of the contract knowing that there is a possibility such behaviour could support their preferred interpretation of a contractual ambiguity.

Canadian Courts will have to be on their guard and approach any evidence of the parties' post-contract dealings with caution. They must bear in mind that post-agreement conduct is generally unreliable and often undermines the parties' original contractual intentions.

UCC Spotlight

By [Carl S. Bjerre](#) and [Stephen L. Sepinuck](#)



The purpose of this column is to identify some of the most disconcerting judicial decisions interpreting the Uniform Commercial Code or related commercial laws. The purpose of the column is not to be mean. It is not to get judges recalled, law clerks fired, or litigators disciplined for incompetence. Instead, it is to shine a spotlight on analytical errors, and thereby provide practitioners and judges with reason to disregard the decisions.

ACF 2006 Corp. v. Ladendorf **[826 F.3d 976](#) (7th Cir. 2016)**

This is an interesting case about a secret lien. Unfortunately, due to a leap in logic, the court jumped to a conclusion that is highly questionable.

The relevant facts began when a lawyer, William Conour, stole more than \$4.5 million from his law firm's accounts containing funds held in trust for clients. After the thefts occurred but before they were discovered, another lawyer in the firm, Timothy Devereux, left and took 21 clients with him. The work for those clients generated \$2 million in fees and much of the case involved what portion of that amount should go to Conour's firm and what portion to Devereux's new firm. This article focuses on a subsidiary question: who was entitled to priority in whatever portion of the fees were due to Conour's firm.

There were two principal claimants to amounts received other than the firm itself: the clients who had been victimized by Conour's embezzlement and the firm's lender, which had a perfected security interest in the firm's accounts.

The victims claimed priority in the fees based on an Indiana statute that deals with the plundering of trust funds. Ind. Code § 30-4-3-22(c)(2). It gives the victims a lien, as of the date of the conversion, on the trustee's assets. The trial court refused to apply the statute on the basis that there is a difference between the Conour and his firm, but the Seventh Circuit reversed. It noted that another statute, Ind. Code § 23-1.5-2-7 provides that the relationship between a professional corporation and its client is the same as that between the individual performing professional services and the client, and from this the court concluded that the victims were entitled to a lien on the fees due to the firm as of the date of the conversion (even though Conour was apparently not involved in the work that generated the fees).

So far so good. Unfortunately, the courts' analysis of the relative priority of the victims' secret statutory lien and the lender's perfected security interest was but one sentence. Because the victims' lien on receivables is deemed to arise as of the date of the theft, and because that date predated the lender's security interest, the victim's lien has priority. 826 F.3d at 982, 983. But this reasoning is flawed because it improperly equates chronological sequence with priority. The court's conclusion that that the victims' secret statutory lien is retroactive to the date of the embezzlement means merely that the victim's lien attached before the lender's security interest. Yet a whole host of rules give priority to a lien that attaches after an earlier lien. Most of these rules deal with situations in which the later-arising lien is in fact perfected first, *see, e.g.*, U.C.C. §§ 9-322(a)(1), (2), but some give priority to the later lien even if it was not the first perfected. *See, e.g.*, U.C.C. §§ 9-324, 9-327, 9-328, 9-330.

More to the point, the court's analysis, such as it was, completely ignored the statutory provision that purports to deal with the priority issue. U.C.C. § 9-201(a), provides that "[e]xcept as otherwise provided in the [UCC], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors." *See* Ind. Code. § 26-1-9.1-201. In short, an Article 9 secured party has priority unless Article 9 provides otherwise. Article 9 does have rules that occasionally give priority to a creditor with a judicial lien, *see* U.C.C. §§ 9-317(a), 9-323(b), and even has a rule that presumptively gives priority to some possessory statutory liens on goods, *see* U.C.C. § 9-333, but nothing in Article 9 defers to the secret, nonpossessory, retroactive, statutory lien of the victims in this case.

Even if the court was correct in blithely equating chronology with priority – in other words, even if the court correctly interpreted the Indiana statute as speaking to the priority of the victims' lien – then a proper analysis would have been to resolve the conflict between that statute and § 9-201(a). However, the court did not attempt to undertake this aspect of the necessary analysis. Consequently, the decision is flawed and its conclusion is almost certainly incorrect.

In re Tuscany Energy, LLC,
561 B.R. 910 (Bankr. S.D. Fla. 2016)

This is another decision about lien priority. It arose out of an interim application for fees from the debtor's bankruptcy counsel. No one objected to the amount requested but the debtor's secured lender claimed that the law firm's retainer constituted the lender's cash collateral, and thus the fees should be paid from a different source. The court ruled for the law firm. Although this conclusion was correct, the court's analysis contains several analytical errors. These errors merit attention to ensure that they are not repeated.

The relevant facts are fairly simple and few. The debtor owed \$5 million to Armstrong Bank, which had a security interest in substantially all of the debtor's assets, including the debtor's deposit accounts. A few weeks before the debtor filed for bankruptcy protection, the debtor transferred \$200,000 from one of its deposit accounts at SunTrust Bank to its bankruptcy counsel, to be held as a retainer. The issue was whether Armstrong Bank retained a prior security interest in the retainer.

The court began its analysis by noting that a retainer provided to a law firm remains the client's property but that the firm has a security interest in the retainer. The court then characterized this as "a possessory security interest in money." *Id.* at 915. The court then cited to U.C.C. § 9-313(a) for the proposition that a security interest in money can be perfected by possession, *id.*, and from this concluded that the debtor's law firm had a perfected security interest.

The court then proceeded to analyze the rights of Armstrong Bank. Looking to U.C.C. § 9-332(b), which provides that "[a] transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party," the court concluded that the law firm took free of the bank's security interest. From this the court reasoned that the retainer was not cash collateral.

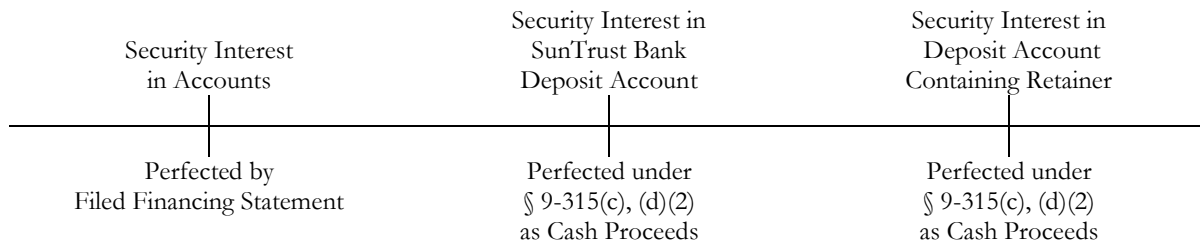
The court then added that even if Armstrong Bank could somehow claim a continuing security interest in the retainer, that interest was not perfected because: (i) the source of the retainer was a deposit account at SunTrust Bank; (ii) the only way to perfect a security interest in a deposit account is through control, *see* U.C.C. § 9-312(b)(1); and (iii) Armstrong Bank had not had control of the deposit account at SunTrust Bank. Accordingly, the law firm's perfected security interest had priority over Armstrong Bank's unperfected security interest, if indeed the bank had a security interest at all.

The court made three errors. Let us consider them in turn. First, the court was undoubtedly correct that the law firm had a security interest in the retainer and that this security interest was perfected. However, the court was incorrect to characterize this as a security interest in "money" and to treat the law firm's interest as a possessory. Money is a defined term. It means legal tender: coins and paper currency. *See* U.C.C. § 1-201(b)(24). It is exceedingly unlikely that the debtor ever had \$200,000 in bills and coins and even less likely that the law firm still did. Instead, the debtor had a deposit account at SunTrust Bank and no doubt paid the retainer by either check or wire transfer. Almost assuredly, the law firm held the retainer in a deposit account of its own, probably identified as a trust fund account. Thus, the collateral was a deposit account, not money. Nevertheless, the law firm's security interest was likely perfected under U.C.C. § 9-104(a)(3) because the deposit account was no doubt denominated in the law firm's name (*i.e.*, the law firm was the bank's customer with respect to the deposit account).

The court's second error concerned U.C.C. § 9-332(b). Although the court was correct that the law firm took the funds from the debtor's account at SunTrust Bank free of Armstrong Bank's security interest, that conclusion misses the point. If, as the court concluded at the beginning of its analysis, the debtor retained an interest in the retainer – that is, the law firm had only a security interest in the retainer, not full ownership of it – then the debtor's ownership interest in the retainer was identifiable proceeds of the SunTrust deposit account. Armstrong Bank's security interest in the SunTrust deposit account automatically attached to the debtor's interest in the retainer (assuming no problem of identifiability, as might be the case if the law firm had commingled the retainer with

either retainers provided by other clients or with client trust funds, and then disbursed some of the commingled amount). *See* U.C.C. § 9-315(a)(2).

The court's third error was in rushing to the conclusion that any security interest Armstrong Bank had in the retainer was unperfected. It is true that Armstrong Bank did not have control of either the deposit account at SunTrust Bank or whatever deposit account contained the retainer. Recall, however, that Armstrong Bank had a security interest in substantially all of the debtor's assets. The court expressly noted that the security interest covered accounts. *Id.* at 913. It is likely that the deposit account at SunTrust Bank constituted identifiable cash proceeds of accounts (or other collateral). If, as also seems likely, Armstrong Bank's security interest in the debtor's accounts was perfected by a filed financing statement, then Armstrong Bank's security interest in the deposit account, as cash proceeds of those accounts, would have been perfected even without control. *See* U.C.C. § 9-315(c), (d)(2). This automatic perfection rule for cash proceeds would then apply again, when funds were withdrawn to create the retainer. The debtor's beneficial interest in the retainer – consisting of a deposit account somewhere – would have been cash proceeds of the deposit account at SunTrust Bank. Thus, Armstrong Bank's security interest in the retainer would have been perfected. In short, if Armstrong Bank's security interest in the debtor's accounts was perfected, and if the deposit account at SunTrust Bank was identifiable proceeds of those accounts, then Armstrong Bank's security interest in that deposit account, and in whatever later deposit account held the retainer, was perfected:



Despite all these mistakes, the court's determination of priority was correct. The law firm had a security interest in the retainer – funds in a deposit account – and that security interest was perfected by control. Armstrong Bank's security interest in the retainer, even if perfected, was not perfected by control. Consequently, the law firm security interest had priority. *See* U.C.C. § 9-327(1). The key point from all this is not to skew the analysis by treating a deposit account as money. It is not.

In re Fair Finance Co.,
834 F.3d 651 (6th Cir. 2016)

When the parties to a contract agree to alter the contract's terms, the common law sometimes needs to classify the change as either an amendment or a novation, and this classification depends heavily on the intent of the parties. In this case, a trustee in bankruptcy convinced an appellate panel to indulge in unwarranted speculation about the parties' possible intent to novate, thereby forcing a lender through a trial on the merits on whether its security interest should be avoided.

Textron Financial Corp. was the lender to Fair Finance Company, which turned out to be the operator of a Ponzi scheme. The lending transaction involved two sequential sets of loan documents: the first was executed in 2002, and the second – describing itself as an amendment and restatement of the first – was executed in 2004. During the interim, Textron had become aware of at least some of Fair Finance's misdeeds, and after 2004 Textron was paid off in full. Later, as part of an involuntary bankruptcy proceeding, the trustee argued that the security interest provided by the 2004 loan documents was an actual fraudulent transfer. (The statute of limitations for a constructive fraudulent transfer cause of action had already passed, held the court, in a departure from other recent rulings.) To prevent the collateral from being held excluded from the UFTA's definition of an "asset" that is subject to "transfer," the trustee argued that the 2004 documents were a novation of the 2002 documents, rather than a mere amendment thereof, with the result that the collateral was not already encumbered by the lien of the 2002 documents. Textron moved to dismiss the trustee's claim, and the District Court (acting on a withdrawal of the reference) granted Textron's motion, holding that the 2004 documents were an amendment rather than a novation as a matter of law. The Sixth Circuit reversed, finding a triable issue of fact on the parties' intent to novate.

The grounds upon which the Sixth Circuit found this triable issue of fact were remarkably flimsy. First, the 2004 documents provided that they constituted "the entire agreement of [the parties] relative to subject matter hereof." This clause, of course, is simply a routine measure to prevent the undermining of the agreements by parol evidence, and provides no evidence at all of a terminating of the 2002 documents. Next, the 2004 documents included their own promissory note and personal guarantees rather than relying on the ones from 2002. But this is doubtless just an instance of careful documentation, engaged in to avoid interpretive questions that otherwise might have arisen about the continued efficacy of the 2002 note and guarantees. And third and relatedly, the court somehow found it

potentially probative of novation that the 2004 documents were entered into on the very date that the 2002 documents expired. Yet this fact more readily supports – if anything – an intent to amend rather than an intent to novate: after all, with the 2002 documents coming to an end under their own terms, the parties didn’t have any need to terminate them.

The Sixth Circuit also faulted Textron’s lawyers for, in effect, not using both a belt and suspenders. The District Court in its opinion below had found some support in a Florida case, *In re TOUSA, Inc.*, [2011 WL 1627129](#) (S.D. Fla. March 4, 2011), in which a second set of documents had explicitly recited the parties’ intent that the lien of a first set would remain in full force and effect. By contrast, noted the Sixth Circuit here, the 2004 documents in this case had no such clause. It is troubling that the court found fault with the documentation for omitting this single clause (which concededly would have been a helpful inclusion), while at the same time misunderstanding the clauses that the documentation did carefully include. And more fundamentally, avoidance-of-doubt clauses like the one in *TOUSA* are called “belt and suspenders” for a good reason: their whole point is to make sure that even if one device or the other fails, the pants will still stay up.

The point of a novation is typically to substitute one party for another. (For example, an obligee may agree to a novation in which an original obligor is discharged and a delegate commits to perform instead.) In this two-party setting there is no apparent reason why Textron, which clearly benefited from good legal advice and would have appreciated the importance of a continuing security interest, would have actually intended to novate rather than amend. Moreover, as a matter of sound jurisprudence, the distinction between novation and amendment should probably be ignored altogether on facts like these; for even if it is possible to conceptualize an instant of time elapsing between the discharge of one security interest and the attachment of the second, an utter technicality such as that is no reason for judicially triggering momentous substantive consequences. Of course the Sixth Circuit might have wanted to keep an arguably tainted lender from propping up a Ponzi scheme and then from walking away from all of the losses; but other viable causes of action in this case, including civil conspiracy and equitable subordination, would have been much more appropriate vehicles for imposing losses on Textron. Perhaps, on remand, the District Court would stick with its initial finding that the parties intended to amend rather than novate – but even in that event, this Sixth Circuit precedent will cast an unnecessary shadow over future perfectly sound transactions.

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Endnotes

¹Seth Jacobson, Ron Meisler, Carl Tullson and Alison Wirtz. The opinions expressed in this article are solely the opinions of the authors and not of Skadden, Arps, Slate, Meagher & Flom LLP.

²11 U.S.C. § 510(a) (2017).

³For example, some courts have found assignments of a junior creditor's right to vote on a chapter 11 plan of reorganization to be unenforceable. *See, e.g., In re 203 N. LaSalle St. P'ship*, 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000) ("Subordination . . . affects the order of priority of payment of claims in bankruptcy, but not the transfer for voting rights."); *In re SW Hotel Venture LLC*, 460 B.R. 4 (Bankr. D. Mass. 2011) (finding assignment voting rights in subordination agreement to be unenforceable), *aff'd in part, rev'd in part*, 479 B.R. 210 (B.A.P. 1st Cir. 2012), *vacated on other grounds*, 748 F. 3d 393 (1st Cir. 2014).

⁴*In re Energy Future Holdings Corp.*, 546 B.R. 566 (Bankr. D. Del. 2016).

⁵*In re MPM Silicones, LLC*, 518 B.R. 740 (Bankr. S.D.N.Y. 2014).

⁶*In re RadioShack Corp.*, 550 B.R. 700 (Bankr. D. Del. 2016).

⁷These obligations were secured by liens on substantially all of TCEH's assets and proceeds thereof and the relationship among the first lien lenders with respect to the shared collateral was governed by an ICA.

⁸Specifically, section 2.1 of the ICA provided that the scope and rank of the first-lien creditors' property rights in the collateral and proceeds thereof was *pari passu* among the Noteholders and Non-Noteholders, "except as otherwise provided in Section 4.1." *In re Energy Future Holdings Corp.*, 546 B.R. 566, 571 (Bankr. D. Del. 2016). Section 4.1 set forth the waterfall for dispositions of collateral or proceeds of collateral received in connection with the sale or other disposition of such collateral or proceeds, and contained a provision for payment of all amounts "then due and payable." *Id.* at 572. In its simplest form, the dispute was whether the waterfall applied and, if so, whether postpetition interest at the contract rate was "due and payable."

⁹*In re: MPM Silicones, LLC*, 531 B.R. 321, 324-28 at 3-6 (S.D.N.Y. 2015).

¹⁰An additional \$380 million in senior subordinated notes would be eliminated without receiving any distribution under the plan.

¹¹Under the so-called "cramdown" provisions of the Bankruptcy Code, the bankruptcy court determined that the treatment of the noteholders' claims complied with the Bankruptcy Code because such holders would retain their liens and receive an interest rate sufficient to provide for "deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property." 11 U.S.C. § 1129(b)(2)(A)(i)-(ii) (2017).

¹²*But see In re TCI 2 Holdings, LLC*, 428 B.R. 117 (Bankr. D. N.J. 2010) (confirming "cramdown" plan of reorganization proposed by second lien creditors over objection of first lien creditors despite allegations that plan violated proceeds of collateral and adequate protection provisions of ICA; holding that even if violation occurred, it would not impede confirmation of plan that complied with Bankruptcy Code).

¹³The parties in *RadioShack* consented to the bankruptcy court's jurisdiction to hear their AAL dispute. 550 B.R. at 709.

¹⁴Hr'g Tr. at 64:8-9 (Mar. 26, 2015).

¹⁵In this structure, the ABL lenders have a first lien on working capital assets and a second lien on fixed or long-term assets. The term lenders have a first lien on fixed or long-term assets and a second lien on working capital assets.

¹⁶Specifically, section 14(c) of the term loan AAL provided that no last-out lender (i.e., Salus) "shall object to or oppose any such sale . . . on any grounds that only may be asserted by [a secured lender] if [Cerberus] . . . has consented to such sale." *See* Exhibit A to Statement of Cerberus Lenders in Support of Sale to General Wireless, Inc., *In re RadioShack Corp.*, Case No. 15-10197 (BLS), Docket No. 1551-1, at 16.

¹⁷As background, among the First Lien Creditors, the Noteholders had the highest interest rate, and accordingly argued for the accrual of postpetition interest (the "Postpetition Interest Allocation Method"), regardless of whether such postpetition interest was allowed or allowable as part of their claim against the Debtors, such that the Noteholders would have received a larger share of the payments. The Non-Noteholder disagreed, arguing that the distributions should be allocated on a pro rata basis based on the amounts owed as of the Petition Date (the "Petition Date Allocation Method").

¹⁸The Application of Proceeds elements were as follows: (i) Collateral or any proceeds of Collateral are to be distributed to the First Lien Creditors; (ii) the Collateral must be "received" by the Collateral Agent; (iii) the Collateral or the proceeds of Collateral must have resulted from

a sale or other disposition of, or collection on, such Collateral; and (iv) the sale, disposition, or collection must have resulted from the exercise of remedies under the Security Documents. If any of these initial requirements were not met, the adequate protection payments and the plan distributions should be distributed outside of the ICA pursuant to the Bankruptcy Code, bankruptcy court orders and the plan.

¹⁹The Security Agreement's definition of "Proceeds" was limited as follows:

"[as such] term defined in Article 9 of the UCC and, in any event, shall include with respect to any Grantor, any consideration received from the sale, exchange, license, lease or other disposition of any asset or property that constitutes Collateral, any value received as a consequence of the possession of any Collateral and any payment received from any insurer or other Person or entity as a result of the destruction, loss, theft, damage or other involuntary conversion of whatever nature of any asset or property that constitutes Collateral, and shall include (a) all cash and negotiable instruments received by or held on behalf of the Collateral Agent, (b) any claim of any Grantor against any third party for [claims dealing with Licenses, Trademarks, and Copyright] . . . and (c) any and all other amounts from time to time paid or payable under or in connection with any of the Collateral." *In re Energy Future Holdings Corp.*, 546 B.R. at 580 (quoting Security Agreement, § 1(d)).

²⁰After the court's March 2016 ruling, the Noteholders filed an appeal to the decisions. The debtors subsequently filed and confirmed an amended plan of reorganization. Based on asserted distinction between the proposed plan at issue in the intercreditor dispute and the subsequently confirmed plan, the Noteholders also asked the bankruptcy court to vacate portions of its prior ruling. The Noteholders' motion to vacate and the appeal are currently pending in the Delaware courts.

²¹Dana Beezley-Smith, *Physicians and Health Insurance Exchange Plans*, U.S. Health Policy Gateway, September 23, 2016, <http://ushealthpolicygateway.com/vii-key-policy-issues-regulation-and-reform/patient-protection-and-affordable-care-act-ppaca/ppaca-and-the-health-industry/aca-and-physicians>.

²²Global Credit Research, *Moody's Affordable Care Act's Medicaid expansion linked with decline in U.S. hospitals' bad debt*, Moody's Investor Service, June 3, 2015, https://www.moodys.com/research/Moodys-Affordable-Care-Acts-Medicaid-expansion-linked-with-decline-in--PR_326917.

²³The Henry J. Kaiser Family Foundation, *Key Facts About the Uninsured Population*, September 29, 2016, <http://kff.org/uninsured/fact-sheet/key-facts-about-the-uninsured-population/>.

²⁴Haeyoun Park & Margot Sanger-Katz, *The Parts of Obamacare Republicans Will Keep, Change or Discard*, The New York Times, March 6, 2017, <https://www.nytimes.com/interactive/2017/03/06/us/politics/republican-obamacare-replacement.html>.

²⁵2014 SCC 53.

²⁶*Id.* at para. 58.

²⁷See e.g., *Droplets Inc. v. E*Trade Fin. Corp.*, 939 F. Supp. 2d 336 (S.D.N.Y. 2013).

²⁸*Shewchuk v. Blackmount Capital Inc.*, 2016 ONCA 912, per Strathy C.J.O. at para. 56.

²⁹See *Shewchuk*, 2016 ONCA at para. 43 (citing *James Miller & Partners Ltd. v. Whitworth Street Estate* (Manchester Ltd), [1970] A.C. 583 (H.L.), per Lord Reid at p.603; *F.L. Shuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235 (H.L.), per Lord Wilberforce at p.261.

³⁰*Whitworth Street Estates*, [1970] A.C. at 603.

³¹2016 ONCA 912.

³²*Id.* at para. 43.

³³*Id.* at para. 44.

³⁴*Id.* at para. 45.

³⁵*Id.* at para. 48.

³⁶*Id.* at para. 48.

³⁷*Id.* at para. 50.

³⁸*Id.* at paras. 53-54.

³⁹*Id.* at para. 55.