AMERICAN BANKRUPTCY INSTITUTE

New York City Bankruptcy Conference

CONCURRENT SESSION

Recent Trends in Liability Management: Structuring and Jurisprudence

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Recent Trends in Liability Management

Introduction

Why are we here?	• Companies are becoming more and more sophisticated in the ways they implement capital structure and liquidity solutions by taking advantage of the "looseness" that exists from a covenant and amendment perspective in most credit agreements and indentures. • These "liability management" transactions can be both utilized by, and harmful to, existing debtholders. • This presentation will highlight recent and historic trends in liability management transactions, along with explanations for how these transactions came about.
Why does it matter?	• Companies are implementing liability management transactions at earlier and earlier stages, oftentimes prior to an inflection point, and so it is important to understand what transactions are possible under credit agreements and indentures. • By understanding how companies have historically implemented liability management transactions, investors can mitigate their exposure by proactively taking steps to protect their investments, including by proposing their own liability management transactions or finding likeminded institutions to block them. In the same vein, companies can proactively manage their capital structures and liquidity positions, including by considering liability management transactions that may be permitted under their credit agreements and indentures.

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Applicable Agreements and Terms

Documents	• Credit agreements and indentures are at their most basic level contracts. • As a condition to loaning money to a company, investors will look to employ safeguards, which serve to limit a company's ability to take certain actions and help protect their investment. • The extent to which these safeguards restrict a company depends on the nature of the credit agreement or indenture (*i.e.*, high yield vs. investment grade; secured vs. unsecured) and the economics (*i.e.*, floating rate bank debt vs. high yield bonds).
Covenants	• Affirmative and negative covenants in credit agreements and indentures govern a company's actions. • As a general matter, the closer a company is to becoming stressed or distressed, the more onerous the company's covenant package. • Alternatively, many indentures and credit agreements are considered "covenant-lite," meaning that they give companies a relatively meaningful amount of freedom to take actions. • While this freedom can be positive in a good economic environment by allowing companies to grow, it can also be manipulated to dilute the interests of existing debtholders and to extract value in favor of equityholders, at the debtholders' expense.

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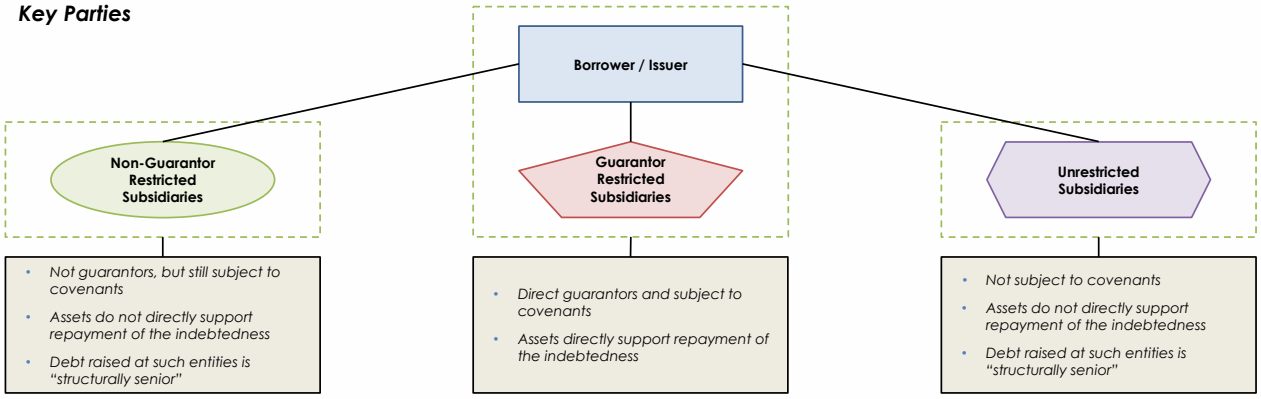
Applicable Agreement and Terms *(Cont'd)*

Key Parties



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Negative Covenants

Liability management transactions are implemented by taking advantage of existing provisions in credit agreements and indentures, largely through the use (or amendment) of capacity contained in negative covenants ("basket capacity").

Sample Language:

*Each Borrower covenants and agrees with each Lender that, until the Termination Date, unless the Required Lenders shall otherwise consent in writing, **the Borrowers will not, nor will they permit any of the Restricted Subsidiaries, to** . . . "incur, create, or assume any Indebtedness" . . . "create, incur, or assume any Lien" . . . "make any Investment" . . . "declare or pay any dividend or make any other distribution " . . . **EXCEPT**:*

The default position is that a company is prohibited from incurring debt and liens or making investments or restricted payments, unless expressly authorized to do so.

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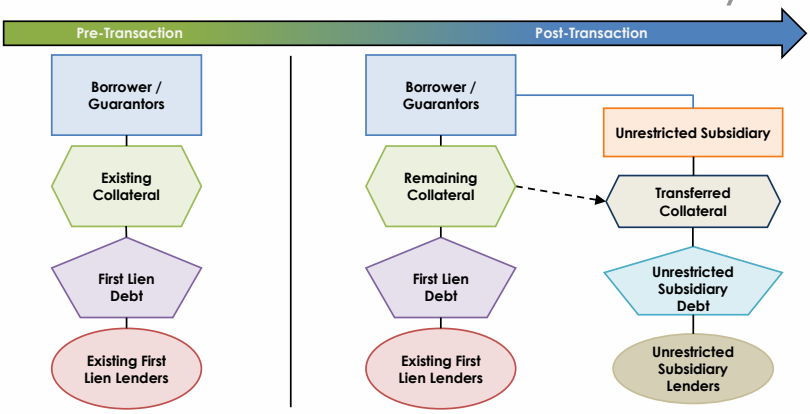
Negative Covenants (Cont'd)

Investment, Restricted Payment, Debt, and Lien Baskets	• Liability management transactions are generally implemented through the use of permitted actions (which may be subject to limitations), typically referred to as "baskets" under the negative covenants (whether already existing or added via amendment). • These baskets allow companies to move assets (using investment and restricted payment capacity) or incur debt (using debt and lien capacity), up to a stated amount (i.e., the total capacity available under a basket). • Credit agreements and indentures may not provide the capacity necessary to implement a particular transaction, but companies will work with a group of debtholders to amend their credit agreements and indentures (which typically require a majority or supermajority vote, depending on the document) to open up flexibility (or "basket capacity") to implement transactions.
Sacred Rights	• While most credit agreements and indentures can be amended with a majority or supermajority vote, there are certain provisions that require either all lender consent or affected lender consent. • These provisions – which are usually found in the amendment sections of credit agreements and indentures – are called "sacred rights" provisions. • The scope and protection of "sacred rights" vary, but certain protections (e.g., against extending maturities, increasing commitments, releasing all or substantially all collateral) are relatively uniform. Others, like prohibitions on amending a document's waterfall or pro rata sharing requirements, appear in the majority of amendments sections of credit agreements, but are sometimes left out. • One protection that has historically been omitted from sacred right protections is anti-subordination protection, which has the effect of allowing companies to amend a credit agreement or indenture with a simple majority to allow for the incurrence of incremental priming indebtedness.

Transaction Types

Unrestricted Subsidiary Transactions



Considerations

- In an unrestricted subsidiary transaction, a company transfers (or "drops down") assets into an unrestricted subsidiary using existing investment and restricted payment capacity.
- Once the assets are owned by the unrestricted subsidiary, the assets are no longer subject to any of the covenants under a credit agreement or indenture and thus there is no limitation on what can be done with such assets.
- More recent credit agreements and indentures have implemented various forms of "drop down" protection.
- Even if drafted well, however, "drop down" protection is typically limited to the movement of material intellectual property – a protection created in direct response to the J. Crew Transaction (which is described further on the next slide) – which may not protect against transfers of the most valuable assets of most companies.

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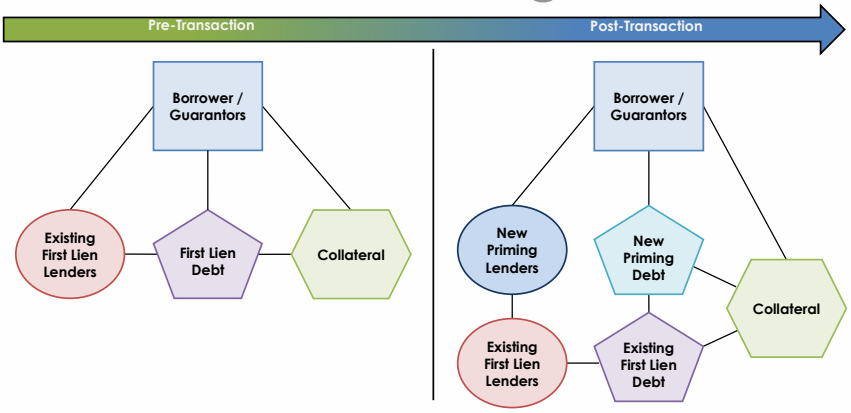
Priming Transactions



Considerations

- In the absence of subordination protections, a company and a majority of lenders under a credit agreement (or two thirds under most indentures) agree to consent to a priming facility.
- Given the priming position enjoyed by the lenders under a priming facility, a priming facility increases a company's chances of incurring the priming debt on beneficial economic terms.
- At its core, a priming transaction is a liquidity enhancing transaction, but if structured differently (namely on a non-pro rata basis), it can also be used to exchange debt at a discount and effectuate a deleveraging.
- Various lawsuits are currently pending that challenge non-pro rata priming exchanges.

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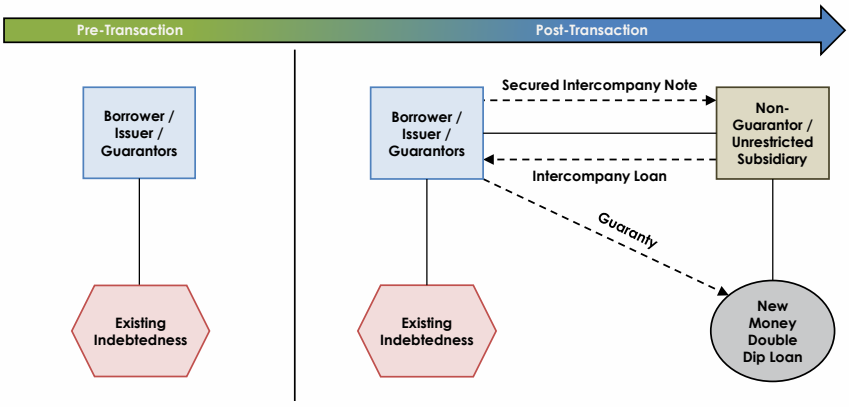
"Double Dip" and Credit Enhancement Transactions



Considerations

- In a "double dip" transaction, a company forms or utilizes an existing non-guarantor subsidiary to incur new money indebtedness.
- This non-guarantor then moves the proceeds of this new money back to the borrower / issuer / guarantors through an intercompany loan.
- The borrower / issuer / guarantors then issues (on a dollar-for-dollar basis) (i) a secured intercompany note to the non-guarantor and (ii) a guaranty on the new money financing, both of which serve as security for the new money financing.
- The end result is that those providing the new money financing effectively have two separate secured claims against the borrower / issuer / guarantors (one direct, and one indirectly through the intercompany loan), which increases their prospects of recovery (relative to existing debtholders that have only a single claim).

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Recent Transactions

	2013 – 2019	2020	2021	2022	2023	2024
Unrestricted Subsidiary Transactions	Caesars, claire's, iHeart Radio, J.Crew, Neiman Marcus, Shutterfly	Travelport, Hornblower, Party City, Revlon, cineworld		Bausch Health, Envision, Wesco Aircraft, AMSURG	Shutterfly, Carvana, U.S. Renal Care	dish, rackspace
Priming Transactions	Shutterfly, Murray Energy Corporation	TriMark, Serta, Boardriders		Mitel, USG, Wesco Aircraft, DN	Travelport, Rodan+Fields, Robertshaw	GoTo, The RealReal, Loparex, Apex
"Double Dip" and Credit Enhancement Transactions				AMSURG, An Envision Healthcare Solution	Rayonier, Sabre, Trinseo, at home, Wheel Pros	
Entry Consents	windstream	Revlon	TPC Group	Wesco Aircraft		

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Case Study – Unrestricted Subsidiary Transactions

J.CREW

Background	• In 2017, J. Crew (the "***Company***") faced operational and financial headwinds due to decreased demand in the retail market and an inability to address the upcoming maturity for ***$500 million*** of the Company's unsecured payment-in-kind notes (the "***PIK Notes***"). • Lacking any "regular-way" options for raising liquidity, as substantially all of the Company's assets were already pledged as collateral under the Company's ***~ $1.567 billion*** credit facility (the "***Credit Agreement***"), the Company began to look at other ways in which it could create the value necessary to address the PIK Notes. • The Company implemented one of the first instances of an unrestricted subsidiary "drop-down" transaction, which moved a substantial portion of its material intellectual property to an unrestricted subsidiary (the "***J. Crew Transaction***").
Transaction Description	• On December 5, 2016, J. Crew International, Inc. ("***J. Crew International***"), a wholly owned subsidiary of J. Crew Operating Corp. ("***J. Crew OpCo***"), contributed and assigned an undivided 72.04% interest in certain trademarks (valued at ***$250 million***) (the "***IP Assets***") to J. Crew International Cayman Limited ("***J. Crew Cayman***") (a non-loan party restricted subsidiary). • Immediately upon receipt of the IP Assets, J. Crew Cayman contributed the IP Assets to J. Crew Brand Holdings, LLC ("***Brand Holdings***") (an unrestricted subsidiary), which then contributed the IP Assets to a number of intermediary unrestricted subsidiaries (the "***Brand Entities***") until the IP Assets were eventually held by J. Crew Domestic Brand, LLC ("***Domestic Brand***") (also an unrestricted subsidiary). • Domestic Brand, the Brand Entities, and J. Crew Cayman then entered into an exclusive, non-transferable license agreement with J. Crew International that allowed J. Crew International to continue using the IP Assets in exactly the same way as it had prior to the J. Crew Transaction.

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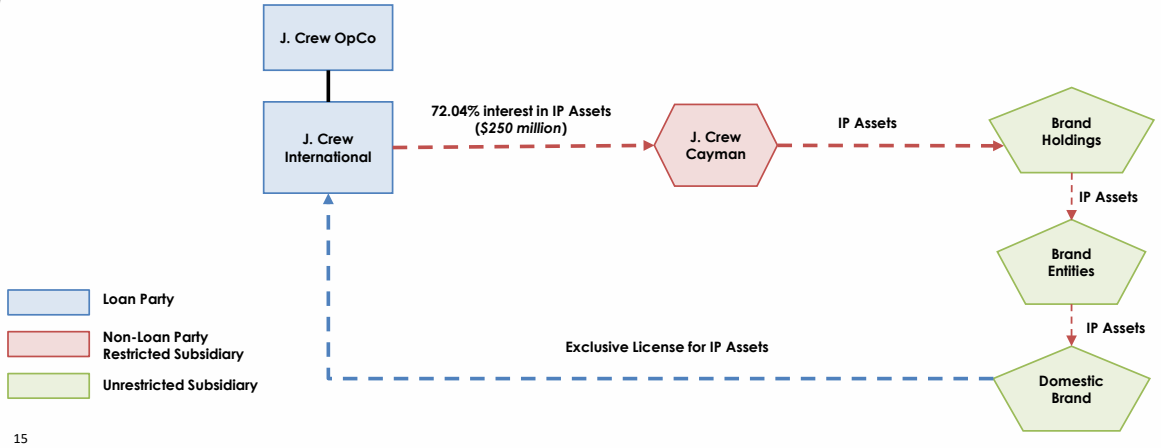
J.CREW *(Cont'd)*



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J.CREW *(Cont'd)*

Implementation	• To implement the J. Crew Transaction, the Company relied on a number of baskets under the Credit Agreement, namely:
	  • A general investment basket, which permitted investments up to the greater of ***$100 million or 3.25% of total assets*** (the ***"General Investment Basket"***);
	  • A non-loan party investment basket, which permitted investments in non-loan party restricted subsidiaries up to the greater of ***$150 million or 4% of total assets*** (the "***Non-Loan Party Investment Basket***"); and
	  • An investment basket, which permitted non-loan party restricted subsidiaries to make investments "to the extent such Investments [were] financed with the proceeds received by such Restricted Subsidiary from an Investment in such Restricted Subsidiary made pursuant to [the Permitted Investments Baskets]" (the "***Trap Door Provision***").

Explanation	• The novel aspect of the J. Crew Transaction was not the use of the General Investment Basket, which could have been used to directly transfer assets to Domestic Brand or one of the other Brand Entities (each of which were Unrestricted Subsidiaries) in any event; instead it was the use of the so-called Trap Door Provision to move assets from J. Crew Cayman (a non-loan party restricted subsidiary) to Domestic Brand, an unrestricted subsidiary, which was not governed by the Credit Agreement's restrictions. • To use the Trap Door Provision, the Company argued that the IP Assets were the "proceeds" of investments that had been made in J. Crew Cayman in full compliance with the Credit Agreement's investment baskets. • This essentially allowed the Company to transform a basket that was intended only to allow investments in non-loan party restricted subsidiaries into an investment basket that could transfer assets to unrestricted subsidiaries (i.e., the "Trap Door").

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J.CREW(Cont'd)

Legal Challenges and End Result

- Subsequent to the consummation of the J. Crew Transaction, an ad hoc group of term lenders organized and pressured the then existing administrative agent (Bank of America) to resign, and replaced Bank of America with an agent (WSFS) that would challenge the movement of the IP Assets and/or declare an event of default as a result of the J. Crew Transaction.
- The Company then instituted a suit for declaratory judgment in the Supreme Court of New York seeking an order declaring the J. Crew Transaction valid (with WSFS filing various counterclaims in response).
- At the same time, the Company began negotiations with holders of the PIK Notes (the "***PIK Noteholders***"), eventually settling on a transaction through which the PIK Noteholders would exchange the PIK Notes into a combination of: (a) up to ***$250 million*** of senior secured notes issued by certain of the Brand Entities (secured by the IP Assets) (the "***IP Notes***"); (b) up to ***$190 million*** of non-convertible perpetual preferred stock issued by the Company's ultimate parent ("***J. Crew Parent***"); and (c) up to ***15%*** of common equity issued by J. Crew Parent (the "***PIK Exchange Offer***").
- As part of the PIK Notes negotiations, the Company also negotiated the parameters of a potential amendment to the Credit Agreement, which would: (a) see the remainder of the IP Assets held by J. Crew International (**27.96%**) transferred to an unrestricted subsidiary; (b) raise ***$30 million*** of debt under the Credit Agreement (the "***New Term Loans***"); (c) raise ***$97 million*** of new money in the form of additional notes secured by the IP Assets (on the same terms as the IP Notes) (the "***Private Placement IP Notes***"); (d) direct WSFS to dismiss, with prejudice, all litigation related to the J. Crew Transaction; and (e) use a combination of cash on hand, the New Term Loans, and the Private Placement IP Notes to fund a ***$150 million*** paydown of the term loans (collectively, the "***Term Loan Amendment***").
- Eventually, the Company was able to obtain consents from more than ***88%*** of the term lenders for the Term Loan Amendment (ending any majority term lender led litigation) and more than ***99.95%*** of the PIK Notes for the PIK Exchange Offer.
  - While the success of the Term Loan Amendment resolved all majority term lender led litigation, certain minority term lenders continued to pursue claims against the Company (and WSFS), though they were eventually unsuccessful.

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J.CREW(Cont'd)

J. Crew Protections

Provision	Examples	Considerations

J. Crew Protections	• **Example 1:**
	  • "[N]o Unrestricted Subsidiary may hold Intellectual Property that is material to the operations of Intermediate Holdings and its Subsidiaries taken as a whole."
	• **Example 2:**
	  • "The Borrowers shall not, and shall ensure that their Restricted Subsidiaries shall not, sell or otherwise transfer Material Intellectual Property to any Unrestricted Subsidiary or designate as an Unrestricted Subsidiary any Restricted Subsidiary that owns Material Intellectual Property; *provided that* this sentence shall not restrict a sale or transfer in the form of a non-exclusive license or an exclusive license entered into for legitimate business purposes that is entered into to effect a bona fide joint venture with a third party that is not an Affiliate of any Borrower."
	  • "***Material Intellectual Proper***ty" shall mean any Intellectual Property (other than customer lists) owned by the Borrowers and their Subsidiaries that is material to the business of the Borrowers and their Subsidiaries, taken as a whole (whether owned as of the Closing Date or thereafter acquired) ***as determined by the Administrative Borrower in good faith.***
	• **Example 3:**
	  • "Notwithstanding anything herein to the contrary, none of the Borrower or any of its Restricted Subsidiaries will make any Investment consisting of Material Intellectual Property in any Unrestricted Subsidiary."
		• Of the three examples presented, ***Example 1*** is probably the best form of J. Crew protection because it ensures that unrestricted subsidiaries cannot "hold" material intellectual property.
		• The other two examples are helpful, but incomplete because while they keep restricted subsidiaries from transferring material intellectual property to unrestricted subsidiaries, they do not have a general prohibition on unrestricted subsidiaries "holding" material intellectual property.
		• In other words, if you can find a way to get material intellectual property to an unrestricted subsidiary outside of a transfer from a restricted subsidiary, the J. Crew protections in **Example 2** and **Example 3** will be ineffective.
		• At the end of the day, J. Crew protection will never be complete protection against a "drop down" transaction if it only applies to material intellectual property.
		• Some market participants have pushed for broader "crown jewel" protection (*i.e.*, a prohibition on transferring material assets to an unrestricted subsidiary).

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Case Study - Priming Transactions

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Serta Simmons Bedding

Background	• In April 2020, facing liquidity constraints brought on by the pandemic, Serta Simmons Bedding, LLC ("***Serta***") engaged in negotiations with a minority group of term lenders (the "***Minority Group***") under the Company's first lien credit agreement (the "***First Lien Credit Agreement***") and began to explore raising debt secured by Serta's valuable royalty streams and intellectual property that would be transferred to an unrestricted subsidiary (the "***Drop-Down Transaction***"). • Seeking to eliminate the risk presented by the Drop-Down Transaction, a competing group of term lenders constituting a majority (the "***Majority Group***") under the First Lien Credit Agreement also organized and submitted their own proposal to Serta premised on the issuance of super senior (*i.e.*, priming) debt (the "***Priming Transaction***"). • Serta eventually terminated its negotiations with the Minority Group and chose to proceed with the Majority Group's proposal, including the Priming Transaction.

Transaction Description	• On June 8, 2020, Serta announced that it had reached a deal with the Majority Group, which provided for a comprehensive recapitalization of Serta's balance sheet through the Priming Transaction.
	• The Priming Transaction contemplated two new facilities, each of which ranked senior to Serta's existing first and second lien debt, including:
	  • A ***$200 million*** first-out, super senior new money term loan (the "***First-Out Tranche***") provided by certain of Serta's first and second lien lenders (the "***New Money Lenders***"); and
	  • An ***$875 million*** second-out facility issued in exchange (at a discount) for first and second lien loans held by the New Money Lenders (the "***Second-Out Tranche***").
	• The Priming Transaction also pre-wired a third-out debt tranche (also ranking ahead of Serta's existing first and second lien debt), which could be used for similar exchanges in the future (the "***Potential Third-Out Tranche***").

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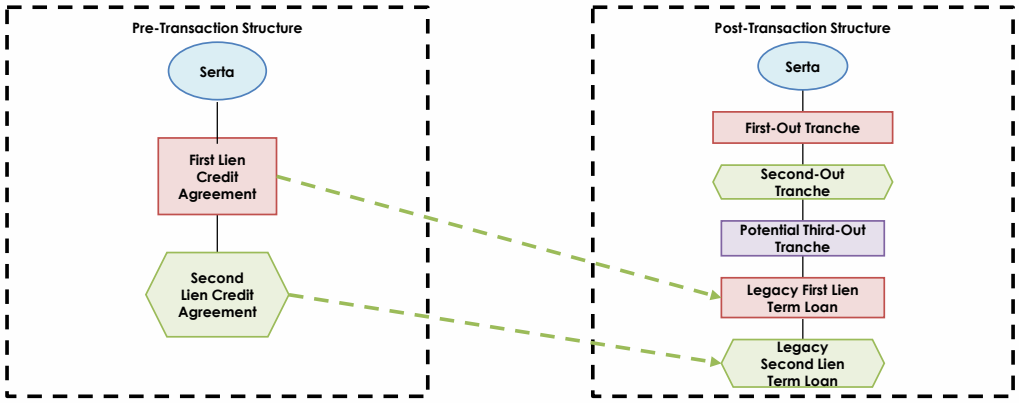
Serta Simmons Bedding (Cont'd)



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Serta Simmons Bedding (Cont'd)

How did they do it?	• The key to implementing the Priming Transaction was the lack of "anti-subordination" protection in the sacred rights protections of the credit agreements governing the existing first and second lien debt, meaning that a simple majority of lenders could enter into amendments that would permit the incurrence of priming indebtedness. • The incurrence of a priming facility was relatively standard practice by June 2020, but the Priming Transaction took it a step further by implementing a non-pro rata up-tier exchange of the first and second lien loans of the Majority Lenders (the "***Up-Tier***"). • What complicated the Up-Tier was that the First Lien Credit Agreement provided that any prepayments of the first lien loans are subject to "pro rata" sharing principles. • This "pro rata" requirement was also a "sacred right" and therefore could not be amended without each affected lender's consent. • To circumvent the pro rata sharing protections, the Up-Tier was effectuated through so-called "open market purchases," which, as is fairly common in looser credit agreements, were expressly carved out of the pro rata sharing requirements (*i.e.*, "open market purchases" were expressly permitted on a non-pro rata basis).
Explanation	• Prior to the Priming Transaction, many investors believed that pro rata sharing requirements would protect them against a transaction like the Up-Tier. • The key in *Serta* was the fact that the First Lien Credit Agreement not only allowed for "open market purchases," but (a) it did not specify whether the purchase consideration by the company needed to be in the form of cash (versus non-cash consideration in the form of priming debt) and (b) it specifically excluded "open market purchases" from the pro rata sharing requirements. • In these circumstances, the Company took the position that the First Lien Credit Agreement permitted both the Priming Transaction and the Up-Tier because it was "purchasing" in the "open market" the New Money Lenders' first and second lien loans, using loans under the Second-Out Tranche as purchase consideration.

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Serta Simmons Bedding (Cont'd)

Legal Challenges and End Result

- In June 2020, prior to closing, the Minority Group brought an action in New York State Supreme Court (the "***State Court***") seeking to enjoin the Priming Transaction, arguing, among other things, that the Priming Transaction violated the pro rata provisions under the First Lien Credit Agreement (the "***State Court Action***").
  - The State Court denied the injunctive relief, determining, among other things, that the First Lien Credit Agreement permitted the Priming Transaction as an "open market" transaction and that the Priming Transaction did not appear to implicate any of the sacred right protections.
- In May 2021, the Minority Group filed a second lawsuit in the United States District Court for the Southern District of New York (the "***District Court***"), arguing that the Priming Transaction breached the First Lien Credit Agreement, as well as the implied covenant of good faith and fair dealing (the "***Federal Action***").
  - The Federal Action survived a motion to dismiss, with the District Court determining that the term "open market purchase" was ambiguous and so discovery was necessary to determine whether the Up-Tier was permissible and that the Minority Group adequately pled a cause of action for a breach of the implied covenant of good faith and fair dealing.
- On January 23, 2023, the Company commenced bankruptcy cases in the United States Bankruptcy Court for the Southern District of Texas and immediately commenced proceedings to have the court validate the Priming Transaction, and in particular, as an "open market purchase."
- The bankruptcy court determined that (1) the Up-Tier fell within the meaning of "open market purchase" and (2) because the parties were aware of the flexibility under the original debt documents, the Up-Tier also did not violate the implied covenant of good faith and fair dealing. The bankruptcy court's decision is now on appeal.
- The impact of the bankruptcy court's decision remains to be seen, as multiple lawsuits in different jurisdictions have come to competing conclusions.

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Serta Simmons Bedding (Cont'd)

While not entirely new, the Priming Transaction encouraged lenders to implement various forms of "Serta" protections in credit agreements.

Provision	Examples	Considerations
Serta Protections	• No waiver, amendment, or modification shall: • **Example 1:** • "***Subordinate any of the Obligations hereunder to any other Indebtedness or other Obligations*** in any transaction or series of transactions or ***subordinate the Liens on the Collateral securing the Obligations to Liens securing any other Obligation*** in any transaction or series of transactions (including, without limitation, Indebtedness issued under this Agreement) without the written consent of each Lender directly affected thereby." • **Example 2:** • "***Contractually subordinate the Obligations hereunder, or the Liens granted hereunder*** or under the other Loan Documents, ***to any other Indebtedness or Lien on all or substantially all of the Collateral***, as the case may be, except (i) indebtedness that is expressly permitted by this Agreement as in effect as of the Closing Date to be senior to the Obligations and/or be secured by a Lien that is senior to the Lien securing the Obligations, (ii) *any "debtor in-possession" facility* (or similar financing under applicable law) or (iii) ***any other Indebtedness so long the opportunity to participate in such Indebtedness is offered ratably to all adversely affected Lenders, in each case, without the written consent of each Lender directly and adversely affected thereby***." • **Example 3:** • "***Subordinate the Liens*** on the Collateral granted to or held by the Administrative Agent under any Collateral Documents to the Liens on such Collateral securing any other Indebtedness for borrowed money or ***subordinate the right of payment of the Obligations*** to the right of payment of any other Indebtedness for borrowed money, ***except*** (w) any Indebtedness that is expressly permitted under the Loan Documents as in effect on the Closing Date to be secured by a Lien that is senior to the Lien securing the Obligations, (x) *any "debtor-in-possession" facility*, (y) ***any other Indebtedness exchanged for the Obligations so long as such Indebtedness is offered ratably to all Lenders holding the Obligations*** or (z) any Indebtedness incurred pursuant to any customary asset based, factoring, securitization or other similar facility, the incurrence of which is otherwise approved by the Required Lenders."	• **Example 1** is total Serta protection in that it prohibits any type of subordination. • While effective in guarding against a non-pro rata exchange, this type of provision may be too limiting as there may be scenarios when raising priming debt would be beneficial for a distressed company. • **Example 2** is more commercial in that it permits priming to the extent the opportunity is offered ratably to all lenders, but it can leave lenders exposed in that the protection only applies to subordination "to any Indebtedness or Lien on all or substantially all the Collateral." • An argument could be raised, therefore, that as long as a priming facility was secured by less than all or substantially all of the collateral, the Serta protection does not apply. • **Example 3** is a much better example of Serta protection as it does not have a materiality qualifier, and also permits priming debt so long as it is offered up ratably to all lenders.

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Case Study - Entry Consents

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Wesco Aircraft

Background	• In 2020, Wesco Aircraft Holdings Inc. (Incora) (the "***Company***") was taken private by Platinum Equity Advisors. The leveraged buyout was financed through ***$650 million*** of secured notes due 2024 (the "***2024 Secured Notes***"), ***$900 million*** of secured notes due 2026 (the "***2026 Secured Notes***"), and ***$525 million*** of unsecured notes due 2027 (together with a separate ***$25 million*** unsecured promissory note issued to an affiliate of Platinum, the "***Unsecured Notes***"). • By 2021, the Company faced headwinds due to the long-term effects of the pandemic. The Company began to explore transactions to address its deteriorating liquidity. With existing liens on substantially all of its assets, however, the Company considered other ways to incentivize lenders. • The Company needed two-thirds supermajority consent of the 2024 Secured Notes and of the 2026 Secured Notes in order to impair or release the security interests in the collateral securing such notes. The ability to obtain such consent was in the hands of a group of noteholders that established a blocking position in the 2026 Secured Notes to protect against lien stripping transactions that the market suggested were under consideration by the Company.
Transaction Description	• Lacking the consent of the requisite supermajority of the 2026 Secured Notes, the Company issued $250 million of fungible add-on notes, which then gave the participating noteholders the two-thirds supermajority position in the 2026 Secured Notes. • The 2024 Secured Notes and the 2026 Secured Notes were amended to effectively release the collateral in order to secure new first-lien notes due 2026 (the "***New 1L Notes***") into which the participating noteholders exchanged their 2024 Secured Notes and 2026 Secured Notes. In addition, participating noteholders (including Platinum) were given the opportunity to exchange their Unsecured Notes into new junior secured notes due 2027 (the "***New 1.25L Notes***"). • As a result, the notes held by the excluded noteholders were either relegated to unsecured status or left behind at the bottom of the capital structure.

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Wesco Aircraft (Cont'd)

Implementation

- The transaction was implemented in stages, namely:
  1. The Company amended the indentures to allow for the issuance of $250 million in additional 2026 Secured Notes (the "***Additional Notes***"), which only required the consent of a simple majority.
  2. The Company issued the Additional Notes to the participating noteholders for $250 million in cash.
     - By issuing the Additional Notes to the participating noteholders, the Company was able to dilute the holdings of the excluded noteholders and effectively give the participating noteholders the two-thirds supermajority vote necessary to strip the liens that secured the 2026 Secured Notes. That vote occurred on the same day that the Additional Notes were exchanged and cancelled.
  3. The indentures for the 2024 Secured Notes and the 2026 Secured Notes (and the Unsecured Notes) were amended to remove numerous protections, including those against lien stripping transactions.
  4. The Company offered the participating noteholders the opportunity to exchange (1) 2024 Secured Notes and 2026 Secured Notes (including the Additional Notes) for New 1L Notes and (2) Unsecured Notes for New 1.25L Notes.

Explanation

- The novel aspect of the transaction is the predicate step to amend the debt documents to allow for the dilutive issuances of debt for the purpose of creating the requisite vote.
- The new dilutive notes, sometimes called "phantom notes," were simultaneously issued and retired and were intended to dilute the holdings of the excluded noteholders.
- This allowed the Company to overcome the excluded noteholders' blocking position and convert the participating noteholders into the supermajority necessary to consent to the ultimate transaction.

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Wesco Aircraft (Cont'd)

Legal Challenges and End Result

- Subsequent to the consummation of the transaction, excluded noteholders filed lawsuits in New York state court challenging the validity of the transaction (including the issuance of the Additional Notes to gain the requisite consents), arguing, among other things, that the non-pro rata nature of the exchange breached the pro rata redemption provision under the indentures and that the Company's equity sponsor (Platinum) tortuously interfered with the excluded noteholders' contractual rights. Seeking to nullify the transaction, they argued that the notes issued for the purpose of gerrymandering a vote should be excluded from the vote.
- On June 1, 2023, the Company commenced bankruptcy cases in the United States Bankruptcy Court for the Southern District of Texas and commenced proceedings to ultimately validate the transaction (excluded noteholders filed counterclaims in response). All parties moved for summary judgment.
- The bankruptcy court determined that factual disputes existed as to (1) whether the transaction constitutes a redemption subject to the pro rata principles under the indentures or instead constitutes an "open market or privately negotiated transaction" that is not subject to the pro rata principles under the indentures and (2) whether the series of steps to the transaction, including the issuance of the Additional Notes to create the supermajority consent, should be treated as a "single, integrated transaction," which the court explained "will be based on the parties' intentions." In addition, the court allowed the tortious interference claims to survive because such claims depend on the broader factual analysis that is necessary for the contractual claims.
- The court's decision to allow the breach of contract and the tortious interference claims to proceed to trial represents a departure from Serta.
- The impact of the bankruptcy court's decision remains to be seen. The trial has been closely watched.

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Faculty

Kristopher M. Hansen is co-chair of the Financial Restructuring practice at Paul Hastings LLP in New York. Throughout his career, he has guided clients through proceedings in bankruptcy and appellate courts across the country, as well as through many out-of-court situations. Mr. Hansen helps sophisticated investors in distressed credit formulate and execute complex strategies involving mergers and acquisitions, financing and litigation in and outside of actual bankruptcy. He represents official creditors' committees in complex corporate chapter 11 cases, and corporate debtors in connection with formal bankruptcy proceedings and informal negotiations to restructure their debt obligations. Mr. Hansen is admitted to practice before the courts of the State of New York, the Southern and Eastern Districts of New York, the U.S. Courts of Appeals for the Second and Third Circuits, and the U.S. Supreme Court. He frequently lectures and has published articles on the distressed marketplace. Mr. Hansen received both his B.S. in finance in 1992 and his J.D. in 1995 from Fordham University.

Hon. Michael B. Kaplan is Chief U.S. Bankruptcy Judge for the District of New Jersey in Trenton, initially appointed on Oct. 3, 2006, and named Chief Judge on May 1, 2020. Prior to taking the bench, Judge Kaplan served as a standing chapter 13 bankruptcy trustee, as well as a member of the chapter 7 panel of bankruptcy trustees, where he received case appointments as both a chapter 11 and chapter 12 trustee. His private practice included the representation of institutional lenders consumer debtors (under both chapters 7 and 13), business debtors and individuals undergoing reorganization pursuant to chapter 11. Judge Kaplan is a Fellow of the American College of Bankruptcy and has been appointed by the director of the Administrative Office of the U.S. Courts (AOUSC) to a term as the Third Circuit representative to the Bankruptcy Judges Advisory Group, in addition to appointments as the bankruptcy judge representative for the Risk and Finance Management Advisory Council, Human Resources Advisory Council and Budget & Finance Advisory Council to the AOUSC. As a member of the National Conference of Bankruptcy Judges, Judge Kaplan has served as treasurer and executive board member. He serves currently as a member of the Judiciary Advisory Council for the Rabiej Litigation Law Center. Over the past 30 years, he has spoken to numerous bar associations and business organizations, and since 2009 he has taught as an adjunct professor at Rutgers University School of Law. Judge Kaplan has authored several articles relating to bankruptcy issues and is a co-author of West's *Consumer Bankruptcy Manual* and *Consumer Bankruptcy Handbook*. He received the NCBJ President's Award for Excellence, the Conrad B. Duberstein Memorial Award given by the New York Institute of Credit, the Judicial Service Award from the Association of Insolvency and Restructuring Advisors, the National Association of Chapter 13 Trustees' 2006 Distinguished Service Award and New Jersey State Bar Association's 1999 Legislative Recognition Award. Prior to taking the bench, Judge Kaplan served as mayor and councilman for the Borough of Norwood, N.J., and as a member of the Norwood Planning Board. He received his A.B. from Georgetown University in 1984 and his J.D. from Fordham University School of Law in 1987.

Lorenzo Marinuzzi is a partner with Morrison & Foerster in New York and global co-chair of its Business Restructuring & Insolvency Group. He represents debtors, creditors and creditors' committees in complex bankruptcy cases, workouts and litigation, and his cases have spanned the U.S. as well as countless industries, such as airline and cargo transportation, mortgage origination and servicing, retail, banking and finance, energy, oil and gas, and telecommunications. Mr. Marinuzzi has rep-

resented unsecured creditors' committees in numerous recent chapter 11 cases, including Windstream Holdings Inc., Cloud Peak Energy, Westmoreland Coal Co. Inc., The NORDAM Group Inc., Avaya Inc., Armstrong Energy Inc., 21st Century Oncology Holdings Inc., Peabody Energy Inc., Energy Future Holdings Corp. and UCI International Inc. He also recently represented Maxus Energy Corp. and HOVENSA LLC in their chapter 11 cases. Mr. Marinuzzi is listed as a leading lawyer in *Chambers USA* and has also been recommended by *The Legal 500 US*. He was also designated by *Turnarounds & Workouts* magazine as an Outstanding Restructuring Lawyer for his accomplishments in 2016 and 2017. Mr. Marinuzzi received his B.A. from Fordham University in 1993 and his J.D. from Fordham University School of Law in 1996, where he was a staff member of the *Fordham Urban Law Journal*.

Mohsin Y. Meghji, CTP is the founder of M3 Partners LP in New York. His more-than-30-year career as a turnaround professional has focused primarily on reviving companies experiencing financial, operational or strategic transitions to maximize value for stakeholders through management and/or advisory roles in partnership with some of the world's leading financial institutions, private-equity and distressed hedge fund investors. Mr. Meghji has led some of the most significant financial restructurings in recent years, including serving as CRO of Sears Holdings Corp., Barney's Inc., Real Alloy Intermediate Holdings, Sanchez Energy Corp. and Capmark Financial Group. In 2021, he was appointed to the board of directors of the Nassau County Interim Finance Authority (NIFA) by New York State Governor Andrew Cuomo at the recommendation of Senate Majority Leader Andrea Stewart-Cousins. Prior to founding M3 Partners, Mr. Meghji served as executive vice president and head of Strategy at Springleaf Holdings, LLC, as well as CEO of its captive insurance companies. At Springleaf, he was a key member of the management team that transformed the struggling consumer lender into a highly successful IPO in late 2013. Prior to Springleaf, Mr. Meghji co-founded Loughlin Meghji + Co., a financial and restructuring advisory firm that became one of the leading restructuring boutiques in the U.S. Earlier in his career, he spent 12 years with Arthur Andersen & Co. in the firm's London, Toronto and New York offices, eventually becoming partner in its Global Corporate Finance group. Mr. Meghji recently served as a director on the corporate boards of, among others, Frontier Communications, Toys "R" Us, Philadelphia Energy Solutions Refining and Marketing LLC and SHOPKO Corp. He also previously has served as a director of, among others, Mariner Health Care Inc., Cascade Timberlands, LLC, Dan River, Inc. and MS Resorts. Mr. Meghji is a director of Equity Group International Foundation, which provides funding for underprivileged high-potential students in Kenya, and he previously served on the boards of The Children's Museum of Manhattan from 2012-18 and HealthRight International from 2004-12. Mr. Meghji is a graduate of the Schulich School of Business, York University, Canada and has taken executive courses at the INSEAD School of Business in France. He has qualified as a U.K. and Canadian Chartered Accountant as well as a U.S. Certified Turnaround Professional.

Gabriel Sasson is a partner in the Financial Restructuring group at Paul Hastings, LLP in New York, where he concentrates his practice on bankruptcy proceedings and out-of-court restructuring transactions. He has experience representing ad hoc groups of bondholders, secured lenders and other creditors, DIP lenders, official committees of unsecured creditors, indenture trustees, equityholders and debtors in connection with in-court and out-of-court restructurings. He also has experience in representing large insurance companies, as creditors, in chapter 11 and chapter 7 bankruptcy proceedings. Mr. Sasson has been listed in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law for 2024, by The M&A Advisor as an "Emerging Leader"

for 2023, and as a *Super Lawyers* "Rising Star." He received his B.A. in 2006 from the University of Pennsylvania and his J.D. in 2009 from Fordham University School of Law.

Robert J. Stark is a partner with Brown Rudnick LLP in New York and the practice group leader for the firm's Bankruptcy & Corporate Restructuring Practice Group. He leads the firm in some of the largest and most important chapter 11 cases in the U.S., many of which often require contests over the value of the bankruptcy estates, complex avoidance or other bankruptcy-related litigation, a change in the case dynamic and philosophy, or arguments toward a change in the case law. Mr. Stark has experience representing debtors/borrowers, secured and unsecured creditors, official creditor/equity committees, and other significant parties-in-interest in large corporate insolvency matters. He has been recognized and profiled by numerous directories and publications, including *Chambers Global*, *Chambers USA*, *The Legal 500 US*, *The Best Lawyers in America*, *Benchmark Litigation*, *Law360*, *Turnarounds & Workouts*, *Global M&A Network*, *IFLR1000*, *Lawdragon*, *Who's Who Legal*, *Super Lawyers*, *PLC Which Lawyer*, *National Law Journal* and Bloomberg/Business Week. In addition to his case work and many recognitions, Mr. Stark is a contributing editor of the nation's leading treatise on restructuring law, *Collier on Bankruptcy* (LexisNexis 2020), and he was the lead editor of two other legal treatises, *Contested Valuation in Corporate Bankruptcy* (LexisNexis 2011) and *Admitting Expert Valuation Evidence Before the U.S. Bankruptcy Courts* (ABI 2017). He has written or co-written articles in the *American Bankruptcy Law Journal*, *Business Lawyer*, *California Law Review* and the *Journal of Corporation Law*, which have been quoted/cited in trial and appellate court decisions and in the published writings of leading legal scholars. In addition, he has guest-lectured on restructuring topics at numerous seminars and graduate schools around the country. Mr. Stark is admitted to the Bars of New York and New Jersey, the U.S. District Courts for the Southern and Eastern Districts of New York, the District of New Jersey and the Eastern District of Michigan, and the U.S. Court of Appeals for the Third Circuit. He received his B.A. in 1992 from Lafayette College and his J.D. in 1995 from Vanderbilt University Law School.

Stephen D. Zide is a Financial Restructuring partner with Dechert LLP in New York and represents a diverse range of clients in chapter 11 bankruptcy and out-of-court restructuring matters. He has led numerous high-profile restructurings across a number of industries, and his clients include both official and ad hoc creditor and equity committees, debtors, bondholders, investors and secured lenders. On the creditor side, Mr. Zide advises clients on distressed and bankrupt companies with complex corporate and capital structures. He provides analysis and advice regarding fraudulent conveyance, fiduciary duty, intercreditor and valuation disputes; developing, negotiating and confirming chapter 11 plans; negotiating and litigating cash-collateral orders, debtor-in-possession financing and equity commitment agreements; and developing and implementing rights offerings. Mr. Zide's practice representing creditors is complimented by his experience representing distressed companies, and assisting debtors in navigating the complex legal, financial and operational issues that arise in chapter 11. He is consistently recognized as a leading lawyer by *Chambers USA* for bankruptcy/restructuring. The M&A Advisor recognized him as "Legal Advisor of the Year" in 2020, and in 2019, he was named one of *Turnaround & Workouts*' "Outstanding Restructuring Lawyers." Mr. Zide has been regarded as a rising star for bankruptcy by some of the most prominent legal and industry publications, including *Turnaround & Workouts*, *Law360* and The M&A Advisor. He also was recognized as a *New York Super Lawyer* from 2019-21 and was a *Super Lawyers* "Rising Star" from 2014-17. Mr. Zide received his B.A. *magna cum laude* in political science in 1999 from Queens College, The City University of New York, and his J.D. *magna cum laude* in 2004 from Brooklyn Law School, where

he served as notes and comments editor of the *Journal of Law and Policy*, received the CALI Excellence for the Future Awards in Securities Arbitration and New York Civil Practice and The American Bankruptcy Award Journal Student Prize, and was a Carswell Merit Scholar.