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Bankruptcy ADVISORY ■

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Intercreditor Agreements in Bankruptcy

In *In re MPM Silicones, LLC*, Case No. 14-22503 (RDD) (Bankr. S.D.N.Y. Oct. 14, 2014) (*Momentive*), the court dismissed a senior lien creditors' suit alleging that the junior lien creditors breached an intercreditor agreement (ICA) on shared collateral by taking and supporting certain actions adverse to the senior lien creditors.

Background

In the *Momentive* main bankruptcy case, the proposed Chapter 11 plan allowed for junior lien creditors to receive new equity in the debtors in exchange for their claims. The plan also provided that senior lien creditors were to receive new debt secured by the same collateral that secured their prepetition loans. Because the senior lien creditors objected to the proposed treatment, the debtors sought to confirm the plan via a cramdown. The junior lien creditors supported confirmation of Momentive's plan. The senior lien creditors commenced litigation against junior lien creditors for breaching the ICA by taking certain positions that were adverse to the seniors, including supporting Momentive's plan.

Holding

After outlining the requisite standard for a motion to dismiss, the court found that the senior lien creditors' allegations concerning the junior lien creditors' breach of the ICA were merely conclusory recitations of the cause of action and not enough to survive a motion to dismiss. The court held that the senior lien creditors failed to adequately plead what specific actions the junior lien creditors took and what specific provisions of the ICA those actions breached.

The court went on to state that the complainants' claim based on the junior lien creditors' support of a priming lien in a third-party financing similarly failed to state what specific actions the defendants took to support the issuance of such a lien. Moreover, "the complaints' failure to identify the particular section of the Intercreditor Agreement allegedly breached takes on greater significance because … the ICA nowhere prohibits junior lien holders from supporting a priming lien financing, and counsel have not identified one." The court dismissed these causes of action without prejudice such that the senior lien creditors are able to amend their complaint to cure the deficiencies.

However, narrowly construing the limitations placed on the junior lien creditors, the court dismissed with prejudice the allegation that the junior lien creditors' opposition to the senior lien creditors' make-whole claim, as well as support for a cramdown plan, constituted taking action adverse to the senior lien creditors in contravention of the ICA.

Another cause of action advanced by the senior lien creditors was that the ICA did not allow for the defendants to take any proceeds of certain "common collateral" since the plaintiffs were receiving replacement notes (that could not be sold for the full value of their claims) and not being paid in full, in cash. The court concluded that the newly issued stock was not proceeds from the collateral, so giving such stock to the defendants did not violate the ICA.

The court also stated that the defendants' receipt of certain reimbursement of professional fees and a possible multimillion dollar fee for backstopping a rights offering was similarly not a violation of the ICA because those were not proceeds of the common collateral since the defendants received them as a party to a restructuring support agreement rather than in their capacity as secured creditors.

While the issue of a contract party's rights will always be firmly rooted in the language of the contract, this decision provides some guidance on (1) what contract language is necessary to allow a remedy when junior creditors take positions not in alignment with the senior, (2) what the courts will require for the sufficiency of facts in a complaint to survive a motion to dismiss; and (3) what does and does not constitute proceeds of common collateral.

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