American Bankruptcy Institute
New York City Bankruptcy Conference

Financing the Case: Recent Developments in DIP and Exit Financing

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CONCURRENT SESSION
2025

FINANCING THE CASE: RECENT DEVELOPMENTS IN DIP AND EXIT FINANCING

ABI New York Bankruptcy Conference

June 17, 2025

10:15 a.m.-11:30 a.m.

11:45 a.m.-1:00 p.m.

PANELISTS: 10:15 A.M. SESSION

- Hon. Sean H. Lane, U.S. Bankruptcy Court (S.D.N.Y.)
- Michael Eisenberg, *Partner*, AlixPartners LLP
- David M. Hillman, *Partner*, Proskauer Rose LLP
- Glenn E. Siegel, *Partner*, Moore & Van Allen PLLC
- Stephen D. Zide, *Partner*, Dechert LLP
- Rachel Jaffe Mauceri, *Partner*, Robinson & Cole LLP

PANELISTS: 11:45 A.M. SESSION

- Hon. Sean H. Lane, U.S. Bankruptcy Court (S.D.N.Y.)
- Todd M. Goren, *Partner*, Willkie, Farr & Gallagher LLP
- David M. Hillman, *Partner*, Proskauer Rose LLP
- Seth H. Lieberman, *Partner*, Pryor Cashman LLP
- Rachel Jaffe Mauceri, *Partner*, Robinson & Cole LLP

TODAY'S DISCUSSION

- Overview/Conceptual Thoughts: Do Pre-Negotiated DIPs/Cash Collateral Orders Dictate Case Trajectory?
- Getting Granular:
  - DIP Terms: sizing, bespoke items, defaults and remedies
  - Rescue Loans (Day one roll-ups, stalking horse DIPs)
  - Replacement DIPs
  - Lender v lender issues in DIPs (Majority led DIPs and more roll-ups)
  - Handcuffing other creditor constituencies
  - Issues in Exit Financing (rights offerings)

DEEP THOUGHTS: DO FINANCING ORDERS DICTATE THE CASE?

- Milestones that set case parameters
- RSAs
- Cash collateral orders: Are they too robust? Should they look less like DIP orders?

DIP SIZING AND DIP DEFAULTS/REMEDIES

- Sizing
  - Covering variances important, but how big is too big?
  - Line items/Bespoke items
    - Stub rent (jurisdiction specific)
    - 503(b)(9) claims
- Defaults/Remedies:
  - Automatic lifts of stay
  - Limitations on ability to contest default

DIP FINANCING: WHAT ARE WE SEEING?

- Day one roll-ups
  - *Ascend Performance Materials*
    - About $2 billion of pre-petition secured debt, including a $1.1 billion term loan, a $348 million ABL, and a $150 bridge facility
    - $900 million DIP included (i) a $500 million ABL and (ii) a $400 million term loan
      - ABL included first day approval of the roll-up of bank product/LC obligations; fees, interest, and expenses; and a "creeping roll" on other ABL obligations, with a full roll-up to follow upon entry of the final DIP order
      - Term included first day rollup-up of the bridge facility
    - Total new cash is $400 million

DIP FINANCING: WHAT ARE WE SEEING?

- Day one roll-ups
  - *DocuData Solutions/Exela*
    - About $1.4 billion of secured multi-tranche pre-petition debt, including bank debt and notes (plus $24 million of unsecured pre-petition notes)
    - DIP includes a $185 million facility, including a new money loan of $80 million, together with a first-day roll of $75 million in outstanding pre-petition secured notes, and a second day roll of $30 million

DIP FINANCING: WHAT ARE WE SEEING?

- Lender/Stalking Horse DIPs
  - *Synthego Corp.*
    - Pre-petition secured credit facility of about $73.5 million with Perceptive Credit Holdings III, LP
      - Loans included additional bridge financing of $3.5 million (March 2025) and $4.3 million (April 2025)
      - Company filed in Delaware on May 5 with a stalking horse bid APA with Perceptive in place, seeking stalking horse protections including a 1.5% break-up fee of and a $1 million expense reimbursement Perceptive also provided a $50 million DIP, including $12.5 million of new money and a $37.5 million roll-up, including a first day roll of $10 million
        - Bid of not less than $72.4 million plus up to $12,500,000 in respect of the DIP loans (so full amount of debt less $1 million)
    - Sale process underway
      - Stalking Horse expenses of up to $1 million approved; request for break fee withdrawn
      - Bids due June 24

REPLACEMENT FINANCING

- Refinancing proposed/existing DIPs
  - *GWG Holdings*
    - Upon filing, sought approval of a facility with National Founders for a $65 million facility that included an option to refinance DLP IV's and DLP VI's existing facilities, effectively shifting the policy portfolio to a new SPE
    - The Court approved the financing on an interim basis giving the Debtors access to $10 million, but raised concerns at the first-day hearing about the proposed refinancing in the DIP and the Debtors reopened the DIP marketing process, ultimately returning to court with a Blue Owl Capital-affiliated entity, Chapford, willing to lend on improved terms, and with an option that gave the Debtors an option to compel the replacement lender as a stalking horse bidder with a $610 million floor
    - Bondholders committee had limited objections to terms but generally supported a deal that removed the lender's purchase option; National Founders objected to absolute language requiring DLP IV and DLP VI to become debtors; thereafter the provision was modified and the Court entered a final DIP order
    - Thereafter, Debtors entered into negotiations with an affiliate of Obra Capital (then called Vida Capital), agreeing to an option to enter into a replacement DIP permitting the Debtors to refinance their existing DIP and prepetition facilities, and to secure exit financing of up to $630 million in lieu of a sale
    - The Court approved the replacement DIP on an interim basis in October 2022, and, after the Debtors indicated their intent to elect the option with Vida, on a final basis in December 2022, resulting in the repayment of the prepetition debt

REPLACEMENT FINANCING

- Refinancing proposed/existing DIPs
  - *Core Scientific*
    - Filed with commitments for up to $57 million and support for the syndication of $75 million; half available on an interim basis
    - 1:1 Roll Up and high fees led to objections
    - Debtors came back with a replacement DIP of up to $70 million

LENDER V. LENDER ISSUES IN DIP AND EXIT FINANCING

- Roll-Ups favoring participating lenders
  - *American Tire*
    - AT's proposed DIP financing included (i) a $1.123B superpriority DIP term loan facility and (ii) a $1.2B superpriority ABL facility, to be funded by certain priming lenders
      - The term loan included $250 million of new cash and a $750 million roll-up of the priming lenders pre-petition term loans, and a full roll-up of a $75 million FILO facility funded by the priming lenders
      - Court approved on an interim basis at the first day hearing
    - An ad hoc group of non-participating pre-petition lenders objected to a roll-up of pre-petition obligations that applied only to debt of DIP participants, arguing that it violated the ratable payment requirement of their pre-petition credit agreement
    - Priming lenders argued that the roll-up was not payment on account of pre-petition debt but consideration for the new loan
    - Court did not take issue with priming DIP generally, but drew the line at a making a finding in favor of the roll-up aspects of the loan based on contract language and on "commercial rationality"
      - At the final DIP hearing, J. Goldblatt commented that the proposed exception to pro rata sharing would turn "every prepetition agreement into . . . a game of Russian roulette such that any time you find yourself standing when the music stops, you go to zero."
    - Parties returned to the table with a consensual deal that removed the term loan roll-up, leaving only the FILO roll-up in place

HANDCUFFING OTHER CREDITOR CLASSES

- Discriminatory carve-outs/capping fees for committees
- Professional fees/events of default of out of expectation fee burn
- Events of Default for filing a challenge
- Lender releases
  - Are they an end-run around *Purdue*?

LENDER V. LENDER ISSUES IN EXIT FINANCING

- Rights Offerings
  - Holders of particular claims are given the right to purchase, in satisfaction of their claims, a prorated amount of securities as a discounted value
  - To guarantee the debtor sells the securities needed to meet funding expectations, debtors often negotiate with a subset of creditors, who agree in advance to backstop the offering, usually in exchange for a fee or premium (cash or additional securities paid in kind)
  - Creditors who are not invited to backstop often complain that they are receiving unequal treatment in violation of Bankruptcy Code section 1123(a)(4), which requires "the same treatment for each claim . . . of a particular class",
  - Courts routinely permit rights offerings, however, where debtors and the participating parties can show that the differing treatment is based on a separate right or contribution – i.e., the risk accompanying the agreement to be bound, as opposed to additional distributions on account of identical claims
- Historic Cases
  - *CHC* (2017, N.D. Texas)*:* Excluded secured creditors objected to confirmation after they were not permitted to participate in the backstop and thus not entitled to a put option premium; their view was not that it should necessarily have been open to all parties, but certainly to them
  - *Peabody* (2018, E.D. Mo.): $750 million private placement of preferred stock to "qualifying creditors" upheld by the Bankruptcy Court, the District Court, and the Eight Circuit following objections by a non-participating group of creditors whose alternative proposals were rejected

LENDER V. LENDER ISSUES IN EXIT FINANCING

- *ConvergeOne*
  - ConvergeOne filed a prepack in April 2024 with the support of about holders of about 80% of its first and 100% in voting of its second lien debt
  - Plan included takeback paper and an equity rights offering, with the supporting lenders (i) directly purchasing $85.75 of new equity at a discount and (ii) backstopping 35% of the $159.25 rights offering, subject to a 10% put option premium owed to the same parties, in exchange for a fee equal to 10% of the total equity raise
  - Objecting lenders, who had not been part of the negotiation, and who had submitted proposals post-petition, objected on several grounds:
    - Plan did not satisfy section 1129(a)(3) good faith requirement (and was subject to review under Delaware's entire fairness standard)
    - Plan violated section 1123(a)(4) under *203 N. LaSalle* because participating parties would be receiving consideration on account of their claims that others would not, and that the absence of a market test rendered the plan unconfirmable
  - Court overruled objections, finding that entire fairness did not apply, but even if it did, the Debtors satisfied it and had proposed the plan in good faith, and that *203 N. LaSalle* did not create an issue outside the cramdown context, and where the deal had not been "struck in the dark" between the debtor and equity
  - Court also found the deal passed market test muster and that the consideration being given was not on account of existing claims

LENDER V. LENDER ISSUES IN EXIT FINANCING

- *LATAM* (S.D.N.Y. 2022)
  - LATAM's proposed plan included a $5.442 billion capital raise
    - $800 million of new common stock and three series of convertible notes (Class A, B, C), all pursuant to rights offerings
    - Commitment Creditors agreed to backstop $400 million of and $3.296 billion of the Class C notes in exchange for a cash payment fee of 20% of the backstop commitments ($734m) and a holdback of 50% of the Class C notes
    - Backstop shareholders backstopped $400m of common and $1,373B of Class B, with no fee, but with expense reimbursement and indemnity benefits
  - Nonparticipating creditors objected to both backstop motion and confirmation
  - J. Garrity overruled both backstop motion and confirmation objections (an appeal of the backstop was dismissed by the District Court)
  - Confirmed a plan granting backstop parties a 20% fee ($734 million) on equity issuance and holdback of 50% of Class C convertible notes

QUESTIONS & ANSWERS

Thank you for joining us!

Faculty

Michael Eisenberg is a partner with AlixPartners, LLP in New York and has advisory experience specializing in contingency planning, liquidity management, business planning and cash-flow forecasting. He has worked in the energy, financial services and automotive sectors for large and mid-market companies. Prior to joining AlixPartners, Mr. Eisenberg worked in the Global Treasury and Capital Markets department of American International Group in various corporate finance roles, including cash management, cash-flow forecasting during the government-supported recapitalization, strategic planning, capital management and corporate development. He received his B.S. in finance from the University of Maryland Smith School of Business and his M.B.A. from New York University Stern School of Business.

Todd M. Goren is a partner in Willkie Farr & Gallagher LLP's Business Reorganization & Restructuring Department in New York. He advises clients on all facets of complex chapter 11 reorganizations, representing official committees, debtor-in-possession lenders and debtors in a number of prominent insolvency matters. Mr. Goren's restructuring experience spans numerous industries, including real estate, mortgage lending, transportation, technology, telecommunications, retail and energy. He has particular experience representing creditors' committees in the energy and aviation sectors, having represented over two dozen official committees in those industries alone. He also has experience representing both borrowers and lenders in complex financing transactions, and regularly counsels parties concerning bankruptcy matters involving § 363 sales and cross-border insolvencies, including proceedings under chapter 15 of the Bankruptcy Code. Mr. Goren was recommended by the *Legal 500 US* in 2018. He received his B.A. in 1998 from Washington University in St. Louis and his J.D. in 2002 from Georgetown University Law Center.

David M. Hillman is the global co-chair of the Restructuring Group and co-head of the Private Credit Restructuring Group of Proskauer LLP in New York. He has 30 years of experience with an emphasis on representing private credit lenders, private funds, sovereign wealth funds and other alternative lenders and distressed investors in special situations and restructurings, both in and out of court. Mr. Hillman has substantial experience in every phase of restructuring and distressed investing, including credit-bid sales under § 363, debt-for-equity swaps, chapter 11 plans, out-of-court restructurings and foreclosures, as well as navigating intercreditor issues involving liability management transactions the relative rights of majority and minority lenders. He also litigates the issues facing private credit lenders, including issues involving plan confirmation, solvency, valuation, intercreditor disputes, financing and cash-collateral disputes, fraudulent transfers, equitable subordination, recharacterization, breach of fiduciary duty and similar disputes. Mr. Hillman has been recognized as an "Outstanding Restructuring Lawyer" by *Turnarounds & Workouts*, and has been listed as a "leading individual" in bankruptcy/restructuring by *Chambers USA* and in *New York Super Lawyers* as well. An ABI member, he speaks frequently on bankruptcy-related topics, including recent decisions affecting secured creditor rights and preparing creditors for bankruptcy risks. Mr. Hillman received his B.A. *cum laude* from the State University of New York at Oneonta and his J.D. *cum laude* from Albany Law School, where he was associate editor of the *Albany Law Review*.

Hon. Sean H. Lane is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Sept. 7, 2010. He previously clerked for Hon. Edmund V. Ludwig, U.S. District Judge for the Eastern District of Pennsylvania, from 1991-92, as well as for Hon. Charles R. Richey, U.S. District Judge for the District of Columbia, from 1992-93. From 1993-97, he practiced with the law firm of BakerHostetler in Washington, D.C., and thereafter served as a trial attorney in the Department of Justice, Civil Division, National Courts Section, until 2000. From 2000 until he was appointed to the bench, Judge Lane served as an assistant U.S. attorney for the Southern District of New York and was also chief of the Tax & Bankruptcy Unit of that office. During his time in the U.S. Attorney's Office, he was awarded the Attorney General's Distinguished Service Award in 2005 and the Henry L. Stimson Medal by the New York City Bar Association in 2008. Judge Lane is a member of the Federal Bar Council and has served as an adjunct professor at both New York University School of Law and Fordham Law School. He received his B.A. from New York University College of Art & Science in 1987 and his J.D. from New York University School of Law in 1991.

Seth H. Lieberman is a partner with Pryor Cashman LLP in New York, chairs its Bankruptcy, Reorganization + Creditors' Rights Group and co-chairs its Corporate Trust Practice. He assists indenture trustees, agents, trade creditors and landlords with distressed and bankrupt companies. Mr. Lieberman takes on creditor engagements in the firm's most significant chapter 11 cases. He has first-chaired indenture trustee and agent representations in the restructurings/bankruptcies of Atlas Financial, Ion Geophysical, Mallinckrodt, Intelsat, Avianca, Carlson Travel and CBL. He also has represented the largest trade creditors as UCC members in the GBG and Neiman Marcus bankruptcies. Mr. Lieberman served on the *Law360* Bankruptcy Editorial Advisory Board in 2016 and 2022. He received his B.A. *magna cum laude* in 1999 from James Madison University and his J.D. *cum laude* from Benjamin N. Cardozo School of Law at Yeshiva University in 2004, where he served as editor-in-chief of the *Cardozo Journal of Conflict Resolution*. While in law school, Mr. Lieberman interned for the CEO of the American Arbitration Association. Prior to law school, he worked as a case manager in the Washington, D.C., office of JAMS.

Rachel Jaffe Mauceri is a partner with Robinson & Cole LLP in Philadelphia in the firm's Bankruptcy + Reorganizations Group and has more than 20 years of experience counseling clients in complex corporate bankruptcy and restructuring matters. She participates in all aspects of domestic and international restructurings and has significant transactional and litigation experience in a range of industries, including retail, health care, pharmaceutical, agriculture, energy, automotive, oil and gas, mortgage servicing, real estate and telecommunications. Ms. Mauceri's recent creditor committee representations have included the chapter 11 cases of Aldrich Pump/Murray Boiler (affiliates of Trane), Mariner Health Central, Mallinckrodt plc and Corp Group Banking S.A. She also has represented companies in pre-negotiated and traditional bankruptcy proceedings as well as out-of-court workouts; represented pension and health plans in connection with collective bargaining issues and proceedings under §§ 1113 and 1114 of the Bankruptcy Code; advised indenture trustees and second-lien lenders; represented financial institutions in the negotiation and documentation of secured lending facilities; advised stalking-horse and other bidders in distressed and bankruptcy-related transactions; and advised vendors, contract parties and other significant creditors and parties in interest on a variety of bankruptcy-related issues. Ms. Mauceri received her B.A. in journalism from Ithaca College in 1995 and her J.D. *cum laude* in 2001 from Benjamin N. Cardozo School of Law, where she was elected to the Order of the Coif and was supervising editor of its law review.

Glenn E. Siegel is a member of the Financial Restructuring Department of Moore & Van Allen in New York, where he represents shareholders, bondholders, indenture trustees, creditor committees, secured creditors, debtors, and other participants in bankruptcy and workout matters. He frequently lectures on issues pertaining to public debt-holders, including claims-trading, second-lien loans and subordination. He also frequently authors and co-authors articles on bankruptcy-related topics and developments. Previously, Mr. Siegel was with Morgan, Lewis & Bockius LLP's Business and Finance Practice in New York and co-headed the firm's Restructuring and Bankruptcy practice. He received his B.A. from Brooklyn College in 1979, his J.D. from Boston University School of Law in 1982 and his LL.M. in corporate law from New York University School of Law in 1984.

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.