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Anthology and 'In-Court' Liability Management Transactions: What to Know

A Practical Guidance® Article by
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This article discusses the tactics used in liability management type transactions (LMTs) that have made their way to bankruptcy cases, including non pro rata debtor-in-possession (DIP) rollups, leading to objections from non-participating lenders. Most recently, this issue arose in the bankruptcy of Anthology. While the law on this topic is still developing, Anthology may be a preview of things to come.

'In-Court' LMTs

"In-court" liability management type transactions (i.e., transactions favoring certain lender groups over others) are appearing in bankruptcy cases as lenders use a variety of tactics to improve their potential recovery. While a relatively new mechanism, the non pro rata DIP rollup has gained popularity and notoriety.

Generally, the opportunity to participate in the syndication of DIP loans is offered to all similarly situated creditors and any corresponding rollup applies to every creditor's prepetition claim pro rata. However, certain lenders are challenging the status quo by proposing DIP financing that excludes select lenders and only rolls up the prepetition debt of a favored group. As seen in the pending bankruptcy cases of Anthology Inc. and its debtor affiliates (Anthology), these types of transactions have the potential to lead to more lender-on-lender disputes.

Case law on how courts will treat in-court LMTs, how they should be structured, and how lenders will litigate them, is still emerging. Litigation arising from the bankruptcies of American Tire, Serta, and ConvergeOne, all of which dealt with LMTs, provide helpful guidance as to how courts may treat in-court LMTs.

Serta

While not directly addressing an in-court LMT, one of the most significant cases on a pre-bankruptcy up-tier transaction (which resembled a non pro rata DIP rollup) was the US Court of Appeals for the Fifth Circuit's 2024 opinion in In re Serta Simmons Bedding LLC, 125 F. 4th 555 (5th Cir. 2024). Analyzing Serta's 2020 up-tier transaction that issued new super-priority debt to some (but not all) of its lenders, the Fifth Circuit found the transaction was not permissible under the applicable credit agreement as it did not qualify as an "open market purchase."

Serta's 2016 credit agreement protected the sacred right of pro rata sharing but included an exception for "open market purchases" which participating lenders relied upon to execute the up-tier transaction. In re Serta Simmons Bedding, LLC, 125 F. 4th 555, 568 (5th Cir. 2024). As "open market purchase" was not defined in the credit agreement, the Fifth Circuit scoured dictionaries, case law, and analyzed how the term is used by the Federal Reserve before concluding that an open market purchase occurs on a market generally open to

buyers and sellers, where prices are set by competition. Serta, 125 F. 4th at 579–80. In the case of first-lien debt, the Fifth Circuit found that such an open market would be the secondary market for syndicated loans. Serta, 125 F. 4th at 580. The Serta LMT did not satisfy this standard because Serta chose "to privately engage individual lenders outside of this market" and take part in a private debt exchange only with select lenders. Accordingly, the Fifth Circuit found that Serta's up-tier transaction was prohibited, as it did not fall within the open market exception.

American Tire

The 2024 bankruptcy case of American Tire is one of the rare occurrences where a dispute regarding an in-court LMT was not resolved behind closed doors. American Tire signaled that bankruptcy courts were not prepared to rubber stamp non pro rata DIP rollups and a rollup can be considered a paydown of prepetition debt, even if it is technically a cashless exchange.

Provided by a select group of prepetition lenders, American Tire's proposed DIP facility consisted of $250 million of new cash with a $750 million rollup component. The syndication of the DIP facility was not offered to all lenders, and those participating in the DIP would receive select benefits not available to the broader lender group. Non-participating lenders, on the other hand, would be primed by the DIP facility's super-priority liens and would not share pro rata in the rollup of prepetition debt.

The non-participating lenders objected to the DIP financing on the basis that, among other things, the rollup of the prepetition debt constituted a pay down and was subject to the provision in the prepetition credit agreement providing for pro rata sharing of any repayment among all lenders. Proponents of the DIP facility argued that the rollup was an exchange of prepetition debt on a cashless basis that was not subject to pro rata sharing. The credit agreement contained a "Serta blocker" provision, which would prevent non pro rata up-tier transactions, but this provision contained an exception for DIP loans.

At the hearing on the final DIP order, Judge Craig Goldblatt stated that the proposed rollup likely violated the prepetition credit agreement and that he would require any final DIP order to preserve the rights of the non-participating lenders to sue for breach of contract. In re American Tire Distributors, Inc., No. 24-12391 (CTG), (Bankr. D. Del.), H'rg Tr. (Nov. 19, 2024), at 111:14-15 [Dkt. No. 312]. Judge Goldblatt noted if a rollup is a "draw on the DIP to pay down the prepetition credit agreement," it must "pay down the prepetition debt in accordance with the prepetition agreement, including its pro rata sharing agreement." Id. at 116:2-9 [Dkt. No. 312].

The court was unpersuaded by attempts to label the rollup as an exchange on a cashless basis that did not provide any payments on account of the lenders' prepetition loans. Id. at 117:13-21 [Dkt. No. 312]. The court also suggested that while the exception in the Serta blocker provision of the credit agreement would permit a DIP that offered priming liens to only a portion of lenders, it does not override the pro rata sharing requirement in connection with the retirement of the prepetition debt through the rollup.

After hearing the court's commentary, lenders requested a continuance of the hearing and returned with a deal—a modified form of final order which removed the rollup at issue.

ConvergeOne

Building upon Serta, the case of ConvergeOne scrutinized an in-court LMT and suggests that even when lenders provide new value, exclusive incentives will be scrutinized under the Bankruptcy Code's equal treatment requirements.

ConvergeOne filed for bankruptcy in April 2024 with a prepackaged chapter 11 plan that included a $245 million equity rights offering backstopped by a majority group of first-lien lenders. In exchange for the backstop, participating lenders were given the exclusive opportunity to buy discounted equity in the reorganized company in connection with the debtors' plan, resulting in the participating lenders receiving higher total recoveries than non-participating lenders. The non-participating lenders were not given any opportunity to participate in the negotiations or discussions leading to the plan and, as a result, objected to plan confirmation. The non-participating lenders argued that their exclusion from the backstop opportunity violated the equal treatment requirements of the Bankruptcy Code, specifically 11 U.S.C. § 1123(a)(4).

ConvergeOne's plan of reorganization was confirmed over the non-participating lenders' objection, but the District Court reversed the confirmation order on appeal. In re ConvergeOne Holdings, Inc., No. 4:24-CV-02001 (S.D. Tex.) [Dkt. No. 54]. The District Court found the plan resulted in unequal treatment among creditors in the same class and therefore violated Section 1123(a)(4) because participation in the backstop opportunity was not offered to all class members, nor was the investment opportunity market tested (i.e., exposed to some competition). Id. [Dkt. No. 54 at pg. 21–22].

Anthology's Proposed DIP Facility

The issue of whether a non pro rata DIP rollup should be approved most recently arose in the bankruptcy case of

Anthology. Anthology, an education technology company, filed for chapter 11 on September 29, 2025. The next day, Anthology filed a motion seeking approval of DIP financing provided by an ad hoc group of its prepetition lenders.

The proposed $100 million DIP facility consisted of $50 million in new money loans and up to $50 million in rolled up loans. Vector Capital Credit Opportunity Master Fund LP and Vector Investment Partners I LLC (Vector)—a first-lien creditor—was not given the opportunity to participate in the syndication of the DIP facility. This exclusion may have been the result of certain prepetition disputes as Vector had declined to fund its portion of a $100 million draw request because of an alleged uncured event of default.

Facing the possibility of being primed by similarly situated creditors and excluded from the rollup, Vector objected to final approval of the DIP facility. Drawing upon Serta, ConvergeOne, and American Tire, Vector's objection raised several arguments which may serve as a blueprint for other lenders contesting LMTs.

Vector's Objection

Initially, Vector focused on the prepetition credit agreement itself, arguing the proposed rollup would breach the prepetition credit agreement by violating its pro rata sharing requirement. In re Anthology Inc., No. 25-90498 (S.D. Tex.) [Dkt. No. 158 at ¶¶ 15 –16]. Characterizing the proposed rollup as a payment of a prepetition debt with the proceeds of a post-petition loan, Vector relied upon *American Tire* to advance the position that such a paydown must be consummated in accordance with the prepetition credit agreement. Id. [Dkt. No. 158 at ¶¶ 17 –19]. Additionally, Vector asserted its first-out liens would be subordinated by the ad hoc group's DIP priming liens, a violation of the credit agreement's anti-subordination agreement. Id. [Dkt. No. 158 at ¶¶ 20–21].

The remainder of Vector's objection focused on how the proposed DIP facility violated the Bankruptcy Code. First, Vector argued the DIP was not negotiated in good faith as required by Section 364 of the Bankruptcy Code and discriminated against Vector for no legitimate business reason. Id. [Dkt. No. 158 at ¶¶ 24, 29]. Vector cited *ConvergeOne* and *Serta* in support and advanced the position that the DIP facility was akin to the private, non-open market transactions scrutinized in both cases. Id. [Dkt. No. 158 at ¶34]. Specifically, Vector argued that "[t]he proposed DIP Loans, negotiated with and provided solely to a closed group of lenders holding identical first-out claims as Vector, are the same kind of closed-market restructuring prohibited under *ConvergeOne* and *Serta*." Id. [Dkt. No. 158 at ¶ 34].

Second, Vector maintained that the DIP facility functioned as an impermissible sub rosa plan because it was an arrangement that predetermined plan treatment (i.e., by splitting identically situated first-out lenders into separate classes). Id. [Dkt. No. 158 at ¶ 36]. Per Vector's objection, this would qualify as disparate treatment in violation of Section 1123(a)(4) of the Bankruptcy Code. Id. [Dkt. No. 158 at ¶ 40].

Anthology and the ad hoc group did not file a response, but the declaration of Anthology's investment banker indicates that if they had litigated this issue, they would likely have focused on allegations that Vector was a defaulting lender. Id. [Dkt. No. 22 at ¶ 17]. See Declaration of Brent Herlihy [Dkt. No. 22 ¶ 17] ("[T]he DIP Facility is available to all non-defaulting Lenders under the First Lien Credit Agreement who are party to the RSA and have not breached their obligations under the Prepetition Superpriority First Lien Credit Agreement.").

A settlement was ultimately reached before these issues could be litigated. Embodied in the final DIP order, the parties agreed Vector was permitted to provide new money term loans to Anthology and enjoy the benefits of the related rollup.

Takeaways

The case law on non pro rata DIPs (and non pro rata transactions, more generally) is still developing and it is possible more litigation is to come. Accordingly, both lenders maneuvering to improve their relative recoveries and those excluded from material benefits or incentives (e.g., rollups, participation premiums, etc.) should be ready to defend their positions. While settlement is a common theme in these types of disputes, strong arguments premised upon the language of the relevant credit documents and the Bankruptcy Code may provide the necessary leverage to obtain a favorable outcome. It is not clear what 2026 has in store, but lenders should be mindful of the following:

- Drafting matters: cases addressing in-court LMTs and LMTs more generally have looked closely at the applicable credit agreements and the relevant blockers at issue
- The case law is still developing: while the cases cited above are certainly helpful, written opinions addressing non pro rata DIP rollups are yet to come
- Bankruptcy judges are gatekeepers: as seen in American Tire, a bankruptcy judge who scrutinizes an LMT will likely force parties to negotiate, and ultimately, to settle
- LMT strategies are evolving: lenders are not afraid to take aggressive stances both out-of-court and in-court to improve their priority and potential recovery
- Specifically, with respect to in-court LMTs:
    - Bankruptcy courts will scrutinize rollups and whether such arrangements violate the pro rata sharing provisions of prepetition credit agreements

- Arrangements that give only certain class members an opportunity to contribute new value that provides them with a greater recovery than other class members may violate the Bankruptcy Code's prohibition against disparate treatment among creditors in the same class

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