Schulte Roth & Zabel

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About the Speakers

Kirby Chin
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Kirby focuses his practice on financing and debt transactions, working primarily in the areas of finance, distressed investing and energy. He has substantial experience representing clients in transactions involving private and public debt financings, working with special distressed asset situations, and structuring and executing multi-layered debt tranches. Kirby represents finance firms, public and private companies, and hedge and private equity funds on matters that have included debtor-in-possession and exit financings; workouts and restructurings; private equity portfolio financings, including acquisition and leveraged buyout financings; traditional asset-based and working capital financings; cash flow financings; factoring and related transactions; term "B" financings; second lien and first-out/last-out financings; investment fund financings, including fund-of-funds financings; capital call and liquidity facility transactions; and subordinated and mezzanine debt offerings. He recently represented a U.S. finance company as agent in a syndicated senior secured revolving credit financing facility to a privately owned independent exploration and development company operating in the Appalachian region and an investment fund in a senior secured split collateral term loan financing facility to a firearms manufacturer.

Kirby has been recognized by *The Legal 500 United States*, a listing of top lawyers by practice area. A member of the American Bar Association and the Commercial Law and Uniform State Laws Committee of the New York City Bar Association, he is often invited to speak at industry events. He most recently presented on energy funds as a new growth area for private investment funds, and on the annual financing and lending outlook for distressed markets.

Kirby earned his J.D. from New York University School of Law and his B.A., *cum laude*, from New York University.

Brian C. Crumley

Co-Founder
Vortus Investments

Brian has over 17 years of investment experience in the energy industry including private equity as well as public equity and debt investing. In 2013, he and Jeff Miller co-founded Vortus Investments in Fort Worth, Tex. Vortus is a private equity partnership focused on lower middle market investment opportunities, providing development capital in partnership with successful owner/operators in the domestic onshore E&P market. Prior to Vortus, Brian was a founding partner of LKCM Private Discipline Partners LP, which started in 2006 under the umbrella of Luther King Capital Management, a $15-billion asset management firm in Fort Worth. From 2002 to 2005, Brian had primary responsibility for energy industry investments at Sirios Capital Management in Boston, where assets grew from under $1 billion to approximately $2.5 billion. He started his energy investment career at Natural Gas Partners (NGP) in the offices of Richard Rainwater from 1998 to 2000.

Brian graduated with a B.A. from Princeton University in 1996 in the Program in Political Economy and earned his M.B.A. from Stanford University in 2002.

Lawrence V. Gelber
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Larry focuses his practice on distressed mergers and acquisitions, debtor-in-possession financing, corporate restructuring, creditors' rights and prime brokerage insolvency/counterparty risk. His extensive experience in Chapter 11 reorganization cases includes his representation of debtors, secured and unsecured creditors, lenders, investors and acquirers, and Larry's debtor representations have included Quigley Company Inc., NTL Inc., Safety-Kleen Corp., Fansteel Inc. and CAI Wireless Systems Inc. Among his lender and creditor representations are Ableco Finance LLC, Cerberus Business Finance LLC, TPG Specialty Lending Inc., Tennenbaum Capital Partners LLC, Burford Capital and Wells Fargo Capital Finance. His investor and acquirer representations include Mount Kellett Capital Management LP, Petra Capital Management LP, Cerberus Capital Management LP and Prentice Capital Management LP, and he has also represented the Amalgamated Health Fund and National Retirement Fund in numerous Chapter 11 cases.

In recognition of his professional excellence and his contributions to the fields of restructuring and insolvency, Larry was inducted as a fellow in the 25th Class of the American Bankruptcy College. He has also been recognized by *The Legal 500 United States* as a leader in his field. Larry is an active member of the American Bankruptcy Institute, the American Bar Association's Business Law Section, the New York City Bar Association and the Turnaround Management Association. He is a regular contributor to *The Bankruptcy Strategist*, *Bankruptcy Law360* (where he has served on the editorial advisory board) and *Norton Bankruptcy Law Adviser*, and he has spoken at conferences sponsored by the Practising Law Institute, American Bankruptcy Institute, the William J. O'Neill Great Lakes Regional Bankruptcy Institute and other organizations. He most recently co-authored "3rd Circuit Grants More Flexibility to Section 363 Acquirers" in *Law360* and "U.S. Supreme Court Preserves Bankruptcy Court Power to Hear Disputes" in *Pratt's Journal of Bankruptcy Law*.

Larry obtained his J.D., *cum laude*, from New York University School of Law and his B.A., *magna cum laude*, from Tufts University.

Alan R. Glickman
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Alan's practice focuses on complex commercial, bankruptcy and creditors' rights, mergers and acquisitions, securities, shareholder derivative, RICO, accountants' liability, intellectual property and class action defense litigation.

Some of his significant cases include representation of creditors in bankruptcy litigation (*In re Downey Financial Corp.*, *In re Colonial BancGroup, Inc.* and *In re Washington Mutual, Inc.*); representing a large private equity fund in defending against a claim that it improperly invoked a material adverse change clause in terminating a billion-dollar agreement to acquire portions of a hotel chain (*In re Innkeepers USA Trust*); the defense of a former senior executive of Bear Stearns in class actions brought in the wake of the firm's collapse and acquisition (*In re Bear Stearns Securities and Derivative Litigation*); and the defense of a major Olympic international sports federation in an antitrust litigation (*WSF v. International Skating Union*).

Recently Alan won a significant victory in the U.S. Court of Appeals for the Third Circuit on behalf of creditors with respect to treatment of a large tax refund as property of the Downey Financial Corp. bankruptcy estate. He has also conducted numerous internal investigations, including on behalf of the boards of directors of a major pharmaceutical company and a major food wholesaler/distributor relating to alleged accounting improprieties.

In practice for more than 30 years, Alan is listed in *Best Lawyers in America* and *New York Super Lawyers*, which recognizes the top five percent of attorneys within the New York metro area. For the last five years, he has co-authored "Elements of an Insider Trading Claim" and "Tender Offers" in the *Insider Trading Law and Compliance Answer Book* (Practising Law Institute), and he recently presented on court decisions affecting distressed investors, and securities enforcement and related civil litigation.

Alan received his J.D. from New York University School of Law and his B.A., *cum laude*, from Harvard University.

Robert Goldstein
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Rob is chair of the firm's private equity M&A practice, and he focuses on private equity and leveraged buyout transactions, mergers and acquisitions, PIPE transactions, and capital markets and general corporate representations. Some of Rob's recent M&A representations include Baker & Taylor Inc. in the sale of its warehouse and marketing businesses to Readerlink Distribution Services LLC and the sale of an academic library business to EBSCO Information Services; Pouschine Cook Capital Management LLC in its sale of Great Lakes Caring Home Health & Hospice to Wellspring Capital Management; private equity fund Castle Harlan Partners V LP in its acquisition of Gold Star Foods Inc.; NextMedia Group Inc. in its sale of 33 radio stations to Digity Inc. and its separate sale of its outdoor advertising business to Lamar Advertising Co.; the sale of Pretium Packaging Corporation to GenStar Capital; Morton's Restaurant Group Inc. in its sale to affiliates of Tilman J. Fertitta; the sale of Ames True Temper to Griffon Corporation; the sale of Associated Packaging Technologies to Sonoco Inc.; and NewPage Corp. in its acquisition of the North American business of Stora Enso Oyj.

Rob has been recognized by *The Legal 500 United States* as a leading lawyer handling private equity buyouts and is often invited to write and speak on topics of interest to the industry. He co-authored "Distressed M&A: Lots of Distress and Not Much M&A — But Some Interesting Opportunities for Creative Private Equity Dealmakers" for *SRZ Private Equity Developments*, and he recently presented on distressed investment opportunities in oil and gas; energy funds as a new growth area for private investment funds; due diligence and minimizing post-acquisition disputes; and current trends in M&A PIPEs and co-investment transactions.

Rob received his J.D., *cum laude*, from Tulane University School of Law and was elected into the Order of Barristers, and his B.A. from Columbia University.

Adam C. Harris
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Adam is chair of the firm's Business Reorganization Group and a member of the firm's Executive Committee. He practices in the areas of corporate restructurings, workouts and creditors' rights litigation, with a particular focus on representing investment funds and financial institutions in distressed situations. Adam represents a variety of clients in connection with distressed acquisitions by third-party investors or existing creditors through "credit bid" or similar strategies, as well as in court-supervised and out-of-court restructurings. In addition to representing creditors and acquirers in distressed situations, he has represented Chapter 11 debtors, as well as portfolio companies, in out-of-court exchange offers, debt repurchases and other capital restructurings. His recent representations include advising Cerberus Capital Management LP in connection with the Chapter 11 bankruptcy of RadioShack Corp., Mount Kellett Master Fund II LP in the Chapter 11 case of The Great Atlantic and Pacific Tea Company (as both lender and equity holder), and a group of private equity funds in the Allied Systems Holdings bankruptcy, in their capacity as first lien lenders, in a successful challenge to the efforts of a private equity sponsor that tried to acquire a controlling interest in the first lien debt.

Numerous ranking publications, including *The Best Lawyers in America*, *Chambers Global*, *Chambers USA*, *The K&A Restructuring Register* and *The Legal 500 United States*, have recognized Adam as a leader in his field. He has co-authored publications addressing cramdown plans, redemption option value, priming DIPs, out-of-court restructurings and proposals to reform Chapter 11. He also contributed to *Distressed Investing M&A*, a report created by SRZ in association with Mergermarket and Debtwire, and he co-authored "Health Care Business Restructuring for Secured Lenders," an SRZ guide republished by *Bloomberg BNA – Bankruptcy Law Reporter*. For the last five years Adam has co-authored "Out-of-Court Restructurings, the Bankruptcy Context, and Creditors' Committees" in PLI's *Insider Trading Law and Compliance Answer Book*. He presents frequently on topics of concern to the distressed investing community, including, most recently, structuring credit funds, distressed investing in the health care sector, fraudulent conveyance laws and distressed private equity investments.

Adam received his J.D., *magna cum laude*, from Georgetown University Law Center and his B.A. from Emory University.

David M. Hillman
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David practices in the areas of corporate restructuring and creditors' rights litigation, with an emphasis on representing secured and unsecured creditors and other parties in Chapter 11 bankruptcy cases in industries including retail, manufacturing, radio broadcasting, automotive, pharmaceutical, telecom, energy and aviation. He is currently representing Cerberus Capital Partners LP as a secured creditor in connection with the Chapter 11 case of RadioShack Corp. and is representing first lien noteholders and debtor-in-possession lenders in the Chapter 11 case of Allied Systems Holdings in connection with a contested plan confirmation dispute and intra-lender litigation. David has significant experience litigating issues involving solvency, valuation, plan confirmation, financing and cash collateral disputes, contested 363 sales, fraudulent transfers, preferences, equitable subordination, recharacterization, substantive consolidation, breach of fiduciary duty and similar disputes.

Listed as a "leading individual" in Bankruptcy/Restructuring by *Chambers USA*, David was praised by interviewees as "very effective" and recognized as an "excellent litigator and strategist." He has also been recognized as a leader in his field by *New York Super Lawyers*. A member of the American Bankruptcy Institute, David speaks frequently on bankruptcy-related topics, including recent decisions affecting secured creditor rights and preparing creditors for bankruptcy risks. His recent publications include co-authoring "U.S. Supreme Court Preserves Bankruptcy Court Power to Hear Disputes" in *Pratt's Journal of Bankruptcy Law*, "'Redemption Option Value': Mandatory Distributions to Out-of-the-Money Stakeholders" in *The Bankruptcy Strategist*, and "Health Care Business Restructuring for Secured Lenders," an SRZ guide republished by *Bloomberg BNA – Bankruptcy Law Reporter*. Other of his articles have appeared in *Westlaw Journal – Bankruptcy*, *Reorg Research*, *Bankruptcy Court Decisions* and *NYU Journal of Law and Business*.

David received his J.D., *cum laude*, from Albany Law School and his B.A., *cum laude*, from New York State University at Oneonta.

David J. Karp
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David leads the firm's Distressed Debt & Claims Trading Group, which provides advice in connection with U.S., European, emerging market debt and claims trading matters, special situations and distressed investments, and distressed mergers and acquisitions. David frequently represents broker-dealers, hedge funds and private equity funds in connection with investments in distressed, non-performing assets and NPL portfolios across a wide range of industries and in jurisdictions around the globe. He also advises investment funds in connection with oil and gas royalty investments and leases and distressed energy credit investments. His recent energy representations include investors in Alpha Natural Resources Inc., Walter Energy Inc., Sabine Oil & Gas Corporation, Samson Resources Co., Stallion Oilfield Services Ltd., Seahawk Drilling Inc. and ATP Oil & Gas Corporation.

David is an active member of the American Bankruptcy Institute, Loan Market Association, Emerging Markets Trade Association, National Association of Royalty Owners and the Loan Syndication and Trading Association. He is a frequent contributor to *The Hedge Fund Law Report*, *Bloomberg*, *The Bankruptcy Strategist* and *Corporate Rescue and Insolvency*, and he recently wrote articles including "Structuring Winning Bids: European NPL Portfolio Transactions," "Investing in Oil and Gas Royalties: Distressed Counterparty Risk Considerations" and "Investing in Oil and Gas Royalties: Tail Risk Roadmap."

David earned his J.D. from Fordham University School of Law and his B.S. from Cornell University.

Michael M. Mezzacappa
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Michael's practice focuses on finance transactions and distressed investing matters, debt restructuring and workouts. He represents agents, lenders and borrowers in a variety of complex financings and credit arrangements, acquisition financings (including sponsor-led and strategic acquisitions and "going private" transactions), dividend recapitalization financings, asset-based loans, cash flow loans, special situations loans, DIP loans, bridge financings and cross-border and multi-currency loans. He has extensive experience representing agents and lenders in multi-tiered financing facilities, second lien and unitranche loan facilities (including "B" loans and other "last-out" structures), mezzanine and subordinated debt facilities, distressed debt facilities and intercreditor and subordination agreements.

Michael is a member of the American Bar Association's Business Law Section, the New York City Bar Association, the Commercial Finance Association and the Turnaround Management Association. He is often invited to share his expertise at financial industry events, giving presentations on the leveraged loan market, out-of-court restructurings of distressed debt and post-credit crunch deal terms. He is also the co-author of "Health Care Business Restructuring for Secured Lenders," an SRZ guide republished by *Bloomberg BNA – Bankruptcy Law Reporter*.

Michael obtained his J.D., *magna cum laude*, from New York Law School and his B.S., with honors, from City University of New York.

Michael A. O'Hara
Managing Member and Chief Executive Officer
Consensus

Michael is the founder and managing member of Consensus. Since forming Consensus in February 2006, he has advised a wide range of companies ranging from early-stage consumer products companies to publicly traded retailers to leading multinational commercial lenders.

In the past year, Michael has played a leading role in engagements on behalf of Spence Diamonds Ltd., Aerosoles, Diamlink (a subsidiary of Gitanjali), Love Culture, Conway Department Stores, XCEL Brands, Frederick's of Hollywood, Danier Leather, Gemvara, Sequential Brands Group and Karmaloop. He also led Consensus' engagement on behalf of Charlesbank Capital and Webster Capital in their recent acquisition of One Stop Plus, an $800-million multibrand direct marketing retailer.

Michael also has extensive experience serving in a fiduciary capacity. From 2006 to 2009, he served on the board of directors of Footstar Inc., a publicly traded footwear company, and he currently serves on the board of directors of Arena Brands Inc., the company that owns luxury Western-wear business Lucchese. In August 2012, he was appointed the lead independent director of HMX Group, the parent company of Hickey Freeman and Hart Schaffner Marx, among other brands. Michael oversaw the sale of HMX Group to an affiliate of Leonard Green Partners in December 2012. He was appointed the Chief Restructuring Officer of Alpha Omega Jewelers, Casual Male Corp. and The Rugged Bear Company and the post-effective trustee to the Crescent Jewelers Unsecured Creditors Trust. He has also advised eight official committees of unsecured creditors in bankruptcy proceedings and several ad hoc committees outside of bankruptcy.

Michael is the architect of Consensus' Retailer Health Ratings® product, an innovative tool for benchmarking retail business (see www.retailerhealth.com), and he hosts The Next Great Consumer Brands conference, which is co-sponsored by Nasdaq.

Prior to forming Consensus, he served as a Managing Director of Financo Inc., where he provided services to such clients as Gadzooks Inc., The Container Store, Whitehall Jewelers, Lifetime Brands, Wilsons The Leather Experts Inc. and Rosy Blue. In May 2002, he was appointed the President and CEO of Casual Male Corp. and its 16 direct and indirect subsidiaries, effectively serving as their chief restructuring officer during the company's Chapter 11 reorganization. Prior to this, he served as First Senior Vice President of Corporate Affairs and General Counsel of Casual Male Corp. and its predecessor, J. Baker Inc., a $1-billion publicly traded retail conglomerate. From April 1996 to January 2000, Michael served national specialty retailer Brookstone Inc. as the head of its real estate and legal departments. Prior to joining Brookstone, he was an attorney in the corporate law department of the Boston-based law firm Ropes & Gray, where he specialized in securities financings and mergers and acquisitions for a broad group of clients.

Michael is a graduate of the Duke University School of Law — where he was an editor of the law journal *Law and Contemporary Problems* — and of Boston College, where he graduated with the Scholar of the College and *magna cum laude* designations. He serves as a member of the Finance Commission for the Town of Westwood, Mass. and on the board of the Westwood Basketball Association. He is a member of the Bar of the Commonwealth of Massachusetts and is FINRA Series 7, 24, 63 and 79 certified.

Brian D. Pfeiffer
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Brian's practice extends to all aspects of in-court and out-of-court restructurings of financially distressed businesses, including representations of corporate debtors, official and unofficial creditors' and equity committees, bondholder committees, lenders, and purchasers and sellers of distressed assets and businesses. He has represented creditors' committees, significant creditors, lenders, purchasers and equity committees in connection with the restructuring, sale, liquidation or financing of distressed businesses in a wide array of industries. Brian's representations of official and ad hoc committees of creditors include Doral Financial, Petroplus Finance Limited, Downey Financial Corporation, Washington Mutual Inc., Colonial BancGroup Inc., FBOP Corporation, Reliant Energy Channelview LP, Dana Corp., and Pope & Talbot Inc.; and he represents or has represented significant creditors in the bankruptcy/insolvency cases of NII Holdings, Texas Competitive Energy Holdings, Bernard L. Madoff Investment Securities LLC, General Motors, Nova Scotia Finance Company, and Inland Fiber Group LLC. His company-side representations in connection with in-court and out-of-court restructurings and sale transactions include Saad Investments Finance Company (No. 5) Limited, ACA Financial Corp., Drive America Holdings Inc., Broadway Partners, Impsat Fiber Networks Inc. and ANC Rental Corp.

Known for his ability to combine legal analysis with practical business solutions, Brian is recognized in *The Legal 500 United States* and was named "Outstanding Young Restructuring Lawyer" by *Turnarounds & Workouts*. He speaks about topics related to distressed investing, including bankruptcies in financial services and bank holding company defaults, insider trading and Chapter 11 as well as restructuring, liquidation and litigation.

Brian received his J.D. from Hofstra University School of Law and his B.A. from the State University of New York at Albany.

Eliot L. Relles
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Eliot focuses his practice on commercial and corporate finance transactions. He primarily represents hedge funds, private equity funds, commercial finance companies and investment banks in domestic and cross-border secured and unsecured finance transactions. His work includes asset-based and cash flow financings; acquisition and leveraged buyout financings; subordinated and mezzanine financings; first-out/last-out, second lien and tranche B financings; and debtor-in-possession and exit financings. Eliot also counsels clients in debt restructuring and general corporate finance matters.

Elected for inclusion in *New York Super Lawyers* for multiple years, Eliot has recently represented clients in connection with secured loans, credit facilities and acquisition financings for a range of businesses, and he has spoken on distressed investing topics such as dividend recapitalizations.

Eliot received his J.D. from Hofstra University School of Law and his B.A. from the University of Michigan.

Ronald B. Risdon
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Ron's practice focuses on commercial and corporate finance, including syndicated credit facilities, public and private offerings of debt securities, asset-based lending, and restructurings and bankruptcy, including debtor-in-possession financing. He regularly advises clients, including include banks, commercial finance companies, hedge funds and private equity funds, on the analysis of complex capital structures in connection with distressed investing and restructurings. Ron also has extensive experience with high-yield bonds and with multi-jurisdictional financing transactions. Some of his recent representations include a portfolio company of a consortium of private equity and real estate investors in connection with senior secured credit facilities and senior secured notes to finance the acquisition of a major supermarket business; the portfolio company of a private equity fund in connection with senior secured credit facilities to finance the acquisition of a global provider of engineering solutions and services; and noteholders of an advanced glass fibers manufacturer in connection with an exchange offer and extension of a term loan facility.

A member of the American Bar Association and the New York City Bar Association, Ron often speaks on finance-related topics at industry events, client seminars and continuing legal education programs. He recently presented on capital structure analysis and debt trading at a distressed investing seminar, and on retail deals in the private equity space.

Ron obtained his J.D. from the University of Virginia School of Law and his A.B. in economics from The College of William & Mary.

Gregory L. Segall
Chairman and Chief Executive Officer
Versa Capital Management

Gregory has overall responsibility for Versa Capital and its investment strategies, including leadership and supervision of the investment and portfolio management activities of the firm and its affiliated investment funds. He has led Versa and its predecessors since their founding in 1992.

He has been engaged in executing and investing in business turnarounds, restructurings, reorganizations and other special situations across a wide variety of industries and circumstances for more than 25 years, and he is actively involved in overseeing all of Versa's investments.

Gregory is Chairman of the firm's Investment, Portfolio and Management Committees and is currently a director of Versa's portfolio companies Allen-Vanguard International, Avenue Stores, Bell + Howell, Black Angus Steakhouses, BridgeStreet Worldwide, Civitas Media, Hatteras Yachts, Polartec, Vestis Retail Group and Wet Seal.

Prior to Versa, Gregory was a Managing Director of Sigoloff & Associates Inc., an international crisis management advisory firm in Los Angeles. He is a member of the Chief Executives Organization (CEO) and YPO-WPO (Young/World Presidents' Organization); he is also past president (2003-2009) of the Children's Crisis Treatment Center in Philadelphia, for which service he received the Turnaround of the Year (Pro Bono) Award from the Turnaround Management Association, and a past member of the Advisory Council of the Center for Innovation, Creativity and Entrepreneurship at Wake Forest University. He is a graduate of Pepperdine University, where he received his M.B.A., and he has completed the Presidents Seminar at the Harvard Business School. Gregory is currently a member of the Director's Leadership Council of the Abramson Cancer Center at the University of Pennsylvania, and he is a member of the board of directors of the Kimmel Center for the Performing Arts (Kimmel Center Inc.).

Josh Silverstein
Senior E&P Research Analyst
Deutsche Bank

Josh joined Deutsche Bank's energy research team in 2012 and is currently the senior analyst covering oil & gas exploration and production companies. He covers over 25 upstream companies including Chesapeake Energy, Concho Resources, Range Resources, Continental Resources, Cabot Oil & Gas and Whiting Petroleum and was recognized as a Rising Star in Institutional Investor's 2015 Sell Side Analyst Rankings. Prior to joining Deutsche Bank, Josh spent three years at an energy consulting company and five years on the buy side covering the energy and power sectors. Josh earned his B.S. from Lehigh University.

Julian M. Wise
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Julian represents lenders and institutional and non-institutional investors in complex commercial real estate transactions, including asset and portfolio acquisitions and dispositions, structuring and negotiation of joint venture and preferred equity agreements, senior and mezzanine financings, co-lender and participation agreements, loan portfolio acquisitions and dispositions and restructurings. His clients include private equity firms, major financial and commercial lending institutions, and developers and owners of commercial, industrial, retail, office, hotel and large-scale residential properties. He has represented clients in some of the most high-profile real estate transactions, including the developer/owner of the Hudson Yards project; a major private equity firm in the acquisition, financing and disposition of the Innkeepers hotel portfolio; a private equity firm in connection with its acquisition of AT&T's Yellow Pages; a major national retail grocery chain in connection with its $2-billion financing of approximately 400 grocery stores and distribution centers in 14 states; and the owner/manager of 230 Park Avenue (the Helmsley Building) in its acquisition, recapitalization and financing of the property, and subsequent $1.2-billion sale.

Julian has a reputation among his peers and clients as one of the best strategic lawyers in the country and has been recognized by *Chambers USA* and *The Legal 500 United States*, as well as consistently listed as a New York Super Lawyer. Julian is a prolific writer, publishing numerous articles in the *New York Law Journal* and a variety of other publications. He is co-author of "When 'Best Efforts' Are Not the Best Effort," published by *Commercial Property Executive*, and "Descending into Perpetuity: Recent Cases and Statutes" in *Commercial Leasing Law & Strategy*. Julian is also a sought-after and active speaker at real estate industry conferences on a wide array of topics including real estate private equity, restructurings, financings and industry trends. He most recently addressed legal concerns for real estate general counsels and the 2015 commercial real estate market for investors.

Julian received his J.D. from Fordham University School of Law and his B.A. from Emory University.

Distressed Retail:
Challenges and Opportunities

Distressed Retail: Challenges and Opportunities

I. Legal Impediments to Successful Retail Reorganizations

A. Few Retailers Are Now Able to Survive the Chapter 11 Process and Successfully Reorganize

B. In Recent Chapter 11 Cases, Retail Debtors Have Tended to Liquidate Rather Than Reorganize for Both Legal and Business Reasons

C. Those Retailers That Do Survive Chapter 11 Tend to Do So by Selling Assets in Sales Under Section 363 of the Bankruptcy Code Rather Than Through More Traditional Means of Reorganizing (e.g., Debt-for-Equity Swaps)

1. Recent Chapter 11 cases resulting in the liquidation of the retail debtor's assets include:

(a) Anna's Linens Inc. (2015)

(b) Body Central Corp. (2015) (via state court)

(c) ALCO Stores (2014)

(d) Coldwater Creek (2014)

(e) Deb Shops (2014)

(f) dELIA*s (2014)

(g) Loehmann's (2013) (liquidated in second Chapter 11 filing after reorganizing in 2010)

(h) Borders (2011)

(i) Syms/Filene's Basement (2011)

(j) Goody's (2009 and 2008) (liquidated in second Chapter 11 filing in 2009 after emerging from Chapter 11 as a reorganized debtor only four months earlier)

(k) Sharper Image (2008)

(l) Circuit City (2008)

(m) Linens 'n Things (2008)

(n) Bombay Company (2007)

2. Recent Chapter 11 cases resulting in 363 sales or partial liquidations/reorganizations of retail debtors include:

(a) American Apparel (2015) (expected to reorganize via debt for equity swap and store closures)

(b) Great Atlantic & Pacific Tea Co. Inc. (2015 and 2010) (multiple 363 sales of various groups of supermarkets, but also numerous store closures)

(c) RadioShack (2015) (363 sale of major portion of chain, but also significant store closures)

(d) Ashley Stewart (2014 and 2010) (363 sale)

(e) Brookstone (2014) (363 sale)

(f) Wet Seal (2014) (363 sale)

(g) Harry & David (2011) (reorganized via debt for equity conversion)

(h) Blockbuster (2010) (363 sale of certain assets with significant store closures during Chapter 11 case and, ultimately, all stores closing shortly thereafter)

(i) Eddie Bauer (2009) (363 sale with reduced footprint)

II. Legal Impediments to Reorganization of Retail Debtors

A. Time Limitations for Debtors to Assume or Reject Non-Residential Real Property Leases

1. Section 365(d)(4) of the Bankruptcy Code (added in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")) requires debtors to decide whether to assume or reject non-residential real property leases by the earlier of (a) 120 days after the petition date or (b) the plan confirmation date, with only a single additional 90-day extension allowed for "cause," unless the landlord consents to a further extension. If the lease is not assumed within this time frame, it will be deemed rejected.

2. Prior to the enactment of BAPCPA, debtors were required to assume or reject a non-residential real property lease within 60 days of the petition date, but that period could be extended *indefinitely* for "cause."

3. The revised section 365(d)(4) "was adopted to limit the discretion of judges to extend time to assume or reject certain commercial contracts and to provide landlords with greater certainty as to such tenancies." *In re Eastman Kodak Co.*, 495 B.R. 618, 622 (Bankr. S.D.N.Y. 2013).

4. If a lease is assumed, then the debtor is responsible for all rent and other lease obligations on a going-forward basis (i.e., the lease obligations become administrative expense claims against the debtor's estate), as well as for curing any monetary and non-monetary defaults existing under the lease at the time of its assumption.

5. Prior to the enactment of BAPCPA, retailers were able to avail themselves of an extended period of time to make critical decisions regarding lease assumptions/rejections (often the cornerstone of a retail debtor's operational restructuring efforts), generally over the course of multiple seasonal (e.g., back-to-school) and/or holiday (e.g., Christmas) cycles.[1]

6. As a result of BAPCPA's change to section 365(d)(4), retail debtors are now generally forced to decide almost immediately after the commencement of their cases whether to keep stores open or close them — without being able to evaluate how stores are performing over time and without the

[1] *See, e.g.*, *In re Service Merchandise Co.*, 256 B.R. 744, 749 (Bankr. M.D. Tenn. 2000) (permitting extension of time for assuming/rejecting non-residential real property leases through March 31, 2001 for debtor who filed under Chapter 11 in March of 1999 "[b]ecause the court finds that the debtor will need time to assess its Christmas 2000 performance"); *In re Ames Department Stores, Inc.*, 136 B.R. 353 (Bankr. S.D.N.Y. 1992) (noting that the debtor's period to assume or reject non-residential real property leases was "extended by order of the court until plan confirmation").

benefit of evaluating the brand's and each location's viability through even a single complete seasonal and holiday cycle.

7. Further, because going-out-of-business sales and other inventory liquidations are generally conducted on the premises of a retailer's existing stores (though inventory may be consolidated into fewer stores during the liquidation process), the requirements of Section 365(d)(4) put additional pressure on retailers to liquidate hurriedly, before the expiration of the assumption/rejection period.

8. Section 365(d)(4)'s 210-day limit also leaves retail debtors with considerably less time to conduct a full-blown sale process for below-market leases, a process that often would bring additional funds into the estate. Prior to the 2005 enactment, debtors virtually always had the opportunity (and the time) to market and sell below-market leases if their reorganization efforts failed or if they decided to close particular stores as part of their operational restructuring. Now, however, debtors are forced to decide hastily — and perhaps prematurely — whether to assume or reject their store leases.

B. Difficulties in Obtaining DIP Financing and Restrictive Financing Terms

1. Lenders who provide DIP financing to debtors now insist upon faster liquidations of inventory, often to be commenced well in advance of the expiration of the 210-day period to assume or reject leases, leaving debtor/borrowers with little time to formulate and implement a traditional reorganization plan.

2. The lenders' stated rationale is a desire to ensure there is sufficient time for the debtor to conduct/complete liquidation sales in its existing premises (i.e., its leased store locations) in the event the company is unable to reorganize.

3. More and more frequently, DIP lenders are seeking quick returns on investment and prefer to cash out via liquidation or a fast-track 363 sale rather than continuing to finance a business with uncertain prospects while it seeks to reorganize.

4. As a result, many DIP lenders today are only willing to provide DIP financing to retailers as a bridge to an immediate 363 sale or other prompt inventory liquidation.

C. Required Payment in Full of Certain Amounts Owed to Suppliers

1. Section 503(b)(9) of the Bankruptcy Code (also added as part of BAPCPA) grants administrative expense priority for "the value of any goods received by the debtor" in the 20 days before the petition date.

2. Under Section 1129(a)(9)(A) of the Bankruptcy Code, to be confirmed, a plan of reorganization must provide for all administrative expense claims to be paid in full in cash (unless the holder of the claim agrees to a different treatment).

3. Many retail debtors do not have the cash on hand or available exit financing to enable them to pay Section 503(b)(9) claims in full upon consummation of a plan. As a result, a 363 sale or other liquidation becomes their only viable option to maximize the value of their assets.

4. For example, in Circuit City's bankruptcy case, there were approximately $350 million of section 503(b)(9) claims,[2] which undoubtedly played a major role in the company's ultimate liquidation.

D. Required Cash Deposits to Utility Providers

1. Section 366 of the Bankruptcy Code provides that utilities may alter, refuse or discontinue service if the utility does not receive "adequate assurance of payment" from the debtor during the 20-day period after the filing of its bankruptcy petition. The Bankruptcy Code defines "adequate assurance of payment" as a:

   (a) Cash deposit

   (b) Letter of credit

   (c) Certificate of deposit

   (d) Surety bond

   (e) Prepayment; or

   (f) Other form mutually agreed upon by the debtor and the utility

2. Section 366 thus compels a debtor to provide some form of payment to ensure ongoing utility services at each of its locations, thus reducing the cash available to effectuate a reorganization and requiring prompt decision-making regarding whether to keep particular locations open.

E. Limits on Exclusivity

1. After BAPCPA's enactment, Section 1121 of the Bankruptcy Code provides that the initial period in which only the debtor (as opposed to creditors, shareholders or other stakeholders) can file a plan of reorganization (known as the exclusive period) is 120 days. While the exclusive period can be extended for "cause," under no circumstances may it exceed 18 months in the aggregate.

2. Prior to the enactment of BAPCPA, debtors were able to extend exclusivity virtually indefinitely, for "cause." This afforded retail debtors the ability to retain exclusivity through one or more seasonal and/or holiday cycles as they sought to implement their operational restructurings.[3]

3. The Bankruptcy Code's current limits on exclusivity effectively reduce the time frame in which the debtor is able to retain control of its Chapter 11 case and formulate and confirm a plan of reorganization.

F. Increases in Required Payments of Prepetition Wages

1. Under sections 507(a)(4), 507(a)(5) and 1129(a)(9)(B) of the Bankruptcy Code, a plan of reorganization must provide for payment (via cash or deferred payments) of certain pre-petition amounts owed to employees, including wages and contributions to employee benefit plans.

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[2] Adam J. Levitin, "The Examiners: Eliminate Vendor Priority Claims," *Wall Street Journal* (Dec. 3, 2014).

[3] *See, e.g., In re Service Merchandise Co.*, 256 B.R. at 752 (permitting extension of debtor's exclusivity period through April 30, 2001 for debtor who filed Chapter 11 in March 1999 because, among other things, an "extension of exclusivity through the 2000 Christmas season will result in tangible benefits including continued expansion of trade terms, decreased borrowings under the debtor in possession facility, and steady inventory flow all of which translate into financially, healthier estates"); *In re Ames Dep't Stores, Inc.*, 1991 WL 259036 (S.D.N.Y. Nov. 25, 1991) (bankruptcy court's extension of exclusivity period through January 1992, for case filed in April 1990, was not an abuse of discretion and "will also allow the Ames Group to factor its Christmas season sales results into a proposed reorganization plan").

2. Under BAPCPA and other recent amendments to the Bankruptcy Code, these amounts have steadily increased. Given that retailers generally have significant numbers of employees, the requirement that a reorganization plan must provide for payment in full of priority wage and benefit claims makes reorganization that much more difficult to achieve.

III. Business Impediments to Reorganization of Retail Debtors

A. Changes in Consumer Shopping Habits and Spending Patterns

B. Substantial Competition from Internet Retailers, Who Can Compete with Bricks-and-Mortar Retailers at a Fraction of the Cost

C. Reduced Popularity of Physical Shopping Malls

D. Increase in Multiple-Tier Financing, Resulting in Virtually All of a Debtor's Assets Being Encumbered by the Time It Commences a Chapter 11 Case

E. Reduction in Value of Retail Real Estate and Leases

F. Competition from Larger Discount Retailers

G. Scarcity of Lenders Willing to Provide DIP Financing to Fund the Lengthy Stay in Bankruptcy Generally Required to Effectuate a Successful Retail Reorganization

H. Vendors Unwilling to Do Business with Debtors on Favorable Terms

I. Changing Age and Household Demographics

J. Increases to the Minimum Wage

Interlender Arrangements: Current Structures and Risks

Overview

I. Agreement Among Lenders vs. Second Lien Intercreditor Agreement vs. Split Collateral Intercreditor Agreement

A. Agreement Among Lenders

1. Used in single loan document and single lien transactions (or so-called "unitranche" facilities)

2. Agreement among agents and lenders; borrower not a party; agreement is generally not made public or provided to borrower

3. May cover topics not covered in loan document — buy-out, right of first offer and bankruptcy provisions

4. May modify topics covered in loan document — interest and fee skims, voting, ability to exercise remedies and payment priorities

B. Second Lien Intercreditor Agreement

1. Used in separate loan document and separate lien transactions

2. Agreement among agents and lenders; borrower acknowledges and agrees

3. Governs rights and obligations between lenders with respect to lien and collateral — lien subordination *not* debt subordination

C. Split Collateral Intercreditor Agreement

1. Used in transactions where each lender has first lien on separate collateral; often mutual reciprocal second liens

2. Similar to second lien intercreditor agreement except more balanced; most provisions reciprocal

II. Unitranche Facilities

A. Both first out loan and second out loan are documented in one loan document and one facility with one lien securing all of the debt — single term loan with one set of terms (from the borrower's perspective)

B. Separate terms for first out loan and second out loan are set forth in agreement among lenders — payment priority (which is effectively subordination of second out lender to prior payment in full of first out lender), economics, voting and ability to exercise remedies

III. Factors in Deciding to Use Agreement Among Lenders vs. Second Lien Intercreditor Agreement

A. Control; voting

B. Cost

C. Foreign law issues

D. Type of collateral

E. Indenture issues (anti-layering)

F. Relationship between lenders

G. Marketing of loan to borrower

Summary of Terms of Customary Agreement Among Lenders [First Out/Last Out Structure]

I. First Out Obligations

The obligations under the revolving credit facility and the first out portion of the term loan under the Credit Facility.

II. Second Out Obligations

The second out portion of the term loan under the Credit Facility.

III. Required First Out Lenders

First Out Lenders holding over 50 percent of the First Out Obligations.

IV. Required Second Out Lenders

Second Out Lenders holding over 50 percent of the Second Out Obligations.

V. Required Lenders

Lenders holding over 50 percent of the aggregate amount of the revolving credit facility and the term loan made under the credit facility.

VI. Triggering Conditions for Exercise of Remedies at Direction of Required First Out Lenders

A. Payment default with respect to a First Out Obligation;

B. Non-compliance with certain financial covenants;

C. Commencement of a voluntary insolvency proceeding; or

D. Commencement of an involuntary insolvency proceeding which remains undismissed or unstayed for a period of 60 days.

VII. Exercise of Remedies at Direction of Required First out Lenders

A. Within 45 days following receipt by the Collateral Agent of a written demand for enforcement ("*Demand Date*") issued by the Required First Out Lenders following a Triggering Condition, the Collateral Agent shall accelerate the maturity of the Obligations and exercise and diligently pursue secured creditor remedies against all or substantially all of the collateral in good faith in accordance with the terms of the loan documents and applicable law.

1. Exercise of remedies by Collateral Agent subject to:

(a) Triggering Condition not waived or cured;

(b) Good faith determination by Collateral Agent that exercise of remedies permitted under Loan Documents and applicable law;

(c) Good faith determination by Collateral Agent that exercise of remedies will not result in liability to Collateral Agent, Administrative Agent or any lenders for which indemnification, in form and substance substantially similar to the form of indemnity provided under the Credit Facility and in any event, reasonably satisfactory to the Collateral Agent, has not been provided by the First Out Lenders;

(d) Indemnification rights under Financing Agreement;

(e) Any exercise of remedies governed by Article 9 of the Uniform Commercial Code must be taken in accordance therewith.

VIII. Exercise of Remedies at Direction of Required Second out Lenders

A. Within 45 days following receipt by the Collateral Agent of a written demand for enforcement ("*Demand Date*") issued by the Required Second Out Lenders following an Event of Default, the Collateral Agent shall accelerate the maturity of the Obligations and exercise and diligently pursue secured creditor remedies against all or substantially all of the collateral in good faith in accordance with the terms of the loan documents and applicable law.

1. Exercise of remedies by Collateral Agent subject to:

(a) Event of Default not waived or cured;

(b) Good faith determination by Collateral Agent that exercise of remedies permitted under Loan Documents and applicable law;

(c) Good faith determination by Collateral Agent that exercise of remedies will not result in liability to Collateral Agent, Administrative Agent or any lenders for which indemnification, in form and substance substantially similar to the form of indemnity provided under the Credit Facility and in any event, reasonably satisfactory to the Collateral Agent, has not been provided by the Second Out Lenders;

(d) Indemnification rights under Financing Agreement;

(e) Any exercise of remedies governed by Article 9 of the Uniform Commercial Code must be taken in accordance therewith.

IX. Triggering Events for Exercise of Buy-Out Option by Second Out Lender

A. Acceleration of the obligations under the Credit Facility;

B. Any Second Out Obligations not paid when due (after giving effect to any applicable grace period);

C. Collateral Agent has exercised any secured creditor remedies other than increase in interest rates;

D. The Required First Out Lenders have failed to consent to any proposed amendment, modification or waiver of any Loan Document that has been approved by the Required Second Out Lenders but has not been approved by the Required Lenders under the Financing Agreement; or

E. Collateral Agent is required to commence the exercise of secured creditor remedies pursuant to the direction of the Required First Out Lenders.

X. Buy-Out Option

Second Out Lender shall have the right following a Triggering Event to issue a written notice ("*Committed Buy-Out Notice*") to the Administrative Agent. Buy-Out shall be completed five business days following receipt by the Administrative Agent of the Committed Buy-Out Notice. All of the First Out Lenders or, if the Triggering Event is under clause (D), then the First Out Lenders that failed to consent to any proposed amendment, modification or waiver of any Loan Document (each a "*Holdout Loan Holder*"), shall sell all, but not less than all of their right, title and interest in the First Out Obligations, the Commitments, and the Loan Documents. The purchase price shall equal 100 percent of the principal, interest, and fees then owing in connection with the First Out Obligations (other than any prepayment premium payable, if any, in connection with such prepayment), plus reimbursement of all documented expenses owing to First Out Lenders or the Holdout Loan Holders, as applicable, under the Financing Agreement.

XI. Right of First Refusal

Before any First Out Lender transfers or sells all or a portion of its rights and obligations in respect of the Obligations or the Loan Documents, or sells a participation interest in the Obligations or the Loan Documents to any third person (each such proposed transfer, sale or participation is a "*Sale*"), such lender shall offer the Second Out Lenders a right of first refusal to purchase the interest in the Obligations and/or Loan Documents subject to the Sale on the same terms and conditions as are offered in connection with such Sale to the third person. The Second Out Lenders must promptly accept or reject such right of first refusal and if any of the Second Out Lenders accept, such accepting Second Out Lenders must promptly close the purchase, which in any event must be within five business days of the Second Out Lenders' receipt of the written offer from such First Out Lender.

XII. Waterfall

A. Any proceeds of Collateral received in connection with any exercise of secured creditor remedies and/or during the existence of certain Events of Default shall be applied:

1. To the payment of any fees, expense reimbursements and other amounts then due and payable to the Collateral Agent or the Administrative Agent;

2. To the payment of interest in respect of all Collateral Agent Advances until paid in full;

3. To the payment of the principal of all Collateral Agent Advances until paid in full;

4. To pay any fees (excluding any prepayment premium), expenses and indemnities due to the First Out Lenders;

5. To pay interest then due and payable in respect of the First Out Obligations arising under the Credit Facility until paid in full;

6. To pay the principal of the First Out Obligations arising under the Credit Facility (including the Bank Product Obligations in an amount not to exceed the Bank Product Reserve together with, in the case of revolving credit loans, a permanent reduction of the revolving credit commitment) until paid in full;

7. To the payment of any fees (excluding the applicable prepayment premium), expenses and indemnities then due to the Second Out Lenders under the Loan Documents until paid in full;

8. To pay interest then due and payable in respect of the Second Out Obligations until paid in full;

9. To pay the principal of the Second Out Obligations until paid in full;

10. To pay any prepayment premium then due until paid in full; and

11. to pay all other Obligations (including the Bank Product Obligations to the extent not paid under clause (6) above) until paid in full.

B. For purposes of the foregoing, "paid in full" (other than clause (11) above) means with respect to any obligations, payment in cash (or cash collateralization in accordance with the terms of the Loan Documents) of all amounts owing under the Loan Documents in respect of such obligations, including, without limitation, fees, interest, default interest, interest on interest, expense reimbursements and indemnities, specifically including, without limitation, in each case any of the foregoing which would accrue after the commencement of any Insolvency Proceeding irrespective of whether a claim is allowed or allowable in such Insolvency Proceeding, except to the extent that default or overdue interest (but not any other interest) and fees, each arising from or related to a default, are disallowed in any Insolvency Proceeding; *provided*, *however*, that for the purposes of clause (11) above, "paid in full" means payment in cash (or cash collateralization in accordance with the terms of the Loan Documents) of all amounts owing under the Loan Documents in respect of such obligations, including, without limitation, fees, interest, default interest, interest on interest, expense reimbursements and indemnities, specifically including, without limitation, in each case any of the foregoing which would accrue after the commencement of any Insolvency Proceeding irrespective of whether a claim is allowed or allowable in such Insolvency Proceeding.

XIII. Exercise of Remedies by Required Lenders

A. The First Out Obligations may not be credit bid at the direction of Required Lenders unless:

1. The Required First Out Lenders have consented to such credit bidding; or

2. The First Out Obligations (other than default or overdue interest (but not any other interest) and fees, each arising from or related to a default, that are disallowed in any Insolvency Proceeding, and any prepayment premium) are repaid in full in cash (whether by purchase or otherwise).

XIV. Voting Agreement

A. To the extent that the initial Second Out Lenders hold at least a majority of the Second Out Obligations, the First Out Lenders agree to vote in favor of any mendment, modification, or waiver of, or a consent related to, any provision in the Credit Facility (a "***Modification***") that is approved by the Required Second Out Lenders, provided that:

1. On the date of and immediately after giving pro forma effect to such Modification, the Fixed Charge Coverage Ratio would equal or exceed 1.0 to 1.0;

2. The Modification would not result in:

    (a) The elimination of the Fixed Charge Coverage Ratio covenant; or

    (b) A Modification of the Fixed Charge Coverage Ratio covenant levels to any level less than 1.0 to 1.0 (or a Modification of the definition of Fixed Charge Coverage Ratio (or, for the purpose of calculating Fixed Charge Coverage Ratio, any defined term used therein) in a manner more favorable to the Borrowers); and

3. No First Out Lender shall be compelled to vote for or against any Modification described the Credit Facility that requires the consent of each Lender or each affected Lender.

XV. Additional Voting

A. Each Second Out Lender agrees that, without the prior written consent of the Required First Out Lenders, it shall not:

1. Vote in favor of any Modifications to certain specified sections of the Credit Facility that directly impact the First Out Obligations, in each case, to the extent such Modification would be adverse to the interests of the First Out Lenders;

2. Waive, amend or modify any condition set forth in the section listing the conditions precedent to additional fundings as a condition to making any Revolving Loan or issuing any Letter of Credit; or

3. Waive in writing the imposition of the Post-Default Rate in respect of the First Out Obligations without concurrently waiving in writing the imposition of the Post-Default Rate in respect of all Second Out Term Loans (provided such waiver shall not affect Post-Default Rate interest then accrued).

XVI. Collateral Agent Advances

Caps for advances by Collateral Agent to be agreed.

XVII. Interest Rates/Fees

A portion of interest paid on the First Out Obligations shall be paid over to the Second Out Lenders. The interest rate applicable the First Out Obligations shall be mutually agreed upon. Similar ‘allocation’ treatment vis-à-vis the portion of the closing fee and other fees / premiums payable in respect of the First Out Obligations.

XVIII. Payments

To the extent the Credit Facility is structured as a unitranche, the allocation of amortization, optional and mandatory prepayments of the Term Loans will be applied, as between the portion of such Term Loans constituting First Out Obligations and Second Out Obligations, in a manner to be mutually agreed upon.

Outline of Principal Terms of a Second Lien Intercreditor Agreement

The following summary is not complete or exhaustive but only generally describes certain provision of an intercreditor arrangements between First Lien Lenders and Second Lien Lenders under a First Lien Facility and a Second Lien Facility, respectively.

I. Purpose

To establish the relative rights and privileges of the parties with respect to collateral for the Obligations under the Second Lien Loan Agreement (the "Second Lien Obligations," including any refinancings thereof and subject to limitations on amounts to be agreed upon) and for the Obligations under the First Lien Loan Agreement (the "First Lien Obligations," including any refinancings thereof and subject to limitations on amounts to be agreed upon).

II. Priority

A. The liens securing the First Lien Obligations will have priority over the liens securing the Second Lien Obligations.

B. Nothing in the lien intercreditor agreement will constitute debt subordination and the lien priorities will apply to any liens however acquired and regardless of timing of perfection, failure to perfect (other than the failure to file UCC financing statements) or lapse of perfection or any avoidance or invalidation.

III. Remedies Block ('Standstill')

A. The First Lien Lenders will have the exclusive right to enforce rights and exercise remedies with respect to the collateral without consultation or consent from the Second Lien Lenders, except as otherwise provided below.

B. So long as any of the First Lien Obligations are outstanding, the Second Lien Lenders will not exercise or seek to exercise remedies with respect to the collateral or institute any action or proceeding seeking to exercise such rights or remedies with respect to the collateral or take other actions to hinder or delay the exercise of any rights or remedies with respect to the collateral by the agent under the First Lien Facility (the "First Lien Agent"); *except that* the agent under the Second Lien Facility (the "Second Lien Agent") may exercise remedies as to any collateral commencing TBD days after the date of the receipt by First Lien Agent of written notice from Second Lien Agent of an event of default under the Second Lien Documents and the written demand by Second Lien Lenders of the payment in full of all Second Lien Obligations (such period being referred to herein as the "Standstill Period"), *provided that*:

   1. The Standstill Period will be tolled for any period during which both the First Lien Agent and the Second Lien Agent are stayed pursuant to any Insolvency Proceeding or by any court from exercising any rights or remedies with respect to the collateral; and

   2. Second Lien Agent may exercise rights or remedies against the collateral after the end of the Standstill Period, unless the First Lien Agent is diligently pursuing in good faith the exercise of its enforcement rights or remedies against all or any material portion of the collateral.

IV. Distribution of Collateral

So long as any of the First Lien Obligations are outstanding, all collateral (including the proceeds thereof) received in connection with the sale or other disposition of, or collection on, such collateral upon the exercise or enforcement of rights or remedies, shall be applied to the First Lien Obligations as provided for in the First Lien Loan Agreement until paid in full.

V. Restrictions on Amendments

A. The Loan Documents governing the Second Lien Facility (the "Second Lien Loan Documents") may be amended, supplemented or otherwise modified in accordance with their terms and the Second Lien Loan Agreement may be refinanced, in each case, without notice to, or the consent of the First Lien Parties, all without affecting the lien subordination or other provisions set forth in the intercreditor agreement; *provided that* the holders of such refinancing debt bind themselves in a writing addressed to the First Lien Agent to the terms of the intercreditor agreement and any such amendment, supplement, modification or refinancing shall not:

1. Increase the outstanding aggregate principal amount of the loans under the Second Lien Loan Documents in excess of an amount to be agreed;

2. Increase the interest rate by more than a percentage per annum to be agreed (excluding increases resulting from the accrual of interest at the default rate) or increase the amount, or frequency of payment, of any fees provided for in the Second Lien Loan Documents;

3. Shorten the scheduled maturity of the Second Lien Loan Documents to a date prior to the scheduled maturity date of the First Lien Loan Documents;

4. Modify the terms of payment, including the regularly scheduled payments of principal or mandatory prepayment provisions of the Second Lien Loan Documents in a manner that increases the amount or frequency of any of such payments, or requires additional mandatory prepayments.

B. The Loan Documents governing the First Lien Facility (the "First Lien Loan Documents") may be amended, supplemented or otherwise modified in accordance with their terms and the First Lien Loan Documents may be refinanced, in each case, without notice to, or the consent of the Second Lien Parties, all without affecting the lien subordination or other provisions set forth in the intercreditor agreement; *provided that* the holders of such refinancing debt bind themselves in a writing addressed to the Second Lien Agent to the terms of the intercreditor agreement and any such amendment, supplement, modification or refinancing shall not:

1. Increase the outstanding aggregate principal amount of the loans under the First Lien Loan Documents in excess of an amount to be agreed;

2. Increase the interest rate by more than a percentage per annum to be agreed (excluding increases resulting from the accrual of interest at the default rate) or increase the amount, or frequency of payment, of any fees provided for in the First Lien Loan Documents;

3. Extend the scheduled maturity of the First Lien Loan Documents or any refinancing thereof;

4. Modify the terms of payment, including the regularly scheduled payments of principal or mandatory prepayment provisions of the First Lien Loan Documents in a manner that increases the amount or frequency of any of such payments, or requires additional mandatory prepayments or limits the rights of obligors with respect thereto.

VI. Release of Liens

A. So long as First Lien Obligations are outstanding, the liens of Second Lien Agent in any of the collateral will be automatically released and terminated upon:

1. The sale or other disposition of such collateral upon an exercise of remedies by First Lien Agent (both before and during any bankruptcy proceeding); or

2. any sale or disposition of collateral permitted by both the First Lien Loan Documents and the Second Lien Loan Documents.

VII. Bankruptcy

A. The terms of the intercreditor agreement will continue in any bankruptcy proceeding involving any obligor.

B. So long as any of the First Lien Obligations are outstanding, if any obligor shall be subject to any insolvency proceeding and the First Lien Agent shall desire to permit the use of "Cash Collateral" on which the First Lien Agent has a lien or any First Lien Lenders provide the obligors with financing under Section 364 of the Bankruptcy Code or any similar bankruptcy law ("DIP Financing") then the Second Lien Lenders will raise no objection to such Cash Collateral use or DIP Financing on the grounds of failure to provide adequate protection so long as such Cash Collateral use or DIP Financing meet the following requirements:

1. The aggregate principal amount of the DIP Financing plus the aggregate outstanding principal amount of First Lien Obligations does not exceed an amount to be agreed;

2. The Second Lien Agent receives adequate protection liens and replacement liens on the collateral subordinated to the adequate protection liens granted to the First Lien Agent;

3. The Second Lien Lenders receive super-priority claims subordinated to the super-priority claims granted to the First Lien Lenders;

4. The DIP Financing does not compel the obligors to seek confirmation of a specific plan of reorganization;

5. The DIP Financing does not expressly require the liquidation of the collateral prior to a default; and

6. The interest rates, fees, covenants, defaults and other terms are commercially reasonable under the circumstances.

C. Second Lien Lenders will not seek other "adequate protection" except upon terms to be agreed.

D. Second Lien Lenders will not seek relief from the automatic stay with respect to the collateral subject to their junior lien.

E. Second Lien Lenders will not object to or contest requests by the First Lien Lenders for adequate protection in the form of replacement liens on collateral.

F. The Second Lien Lenders waive any right to oppose a Section 363 sale that has been approved by the First Lien Lenders, except that the Second Lien Lenders may assert any objections that otherwise could have been asserted by unsecured creditors.

G. If the First Lien Lenders provide DIP Financing under the terms described above, the Second Lien Lenders shall not provide, or seek to provide, DIP Financing secured by security interests or liens equal or senior in priority to the security interests and liens of the First Lien Lenders without the prior written consent of the First Lien Agent.

VIII. Purchase Right

The Second Lien Lenders will have a buy-out option for all but not less than all of the First Lien Obligations upon acceleration of the First Lien Obligations, a payment default of the Second Lien Obligations, a request for Second Lien Agent to release liens on collateral, an exercise of remedies by the collateral agent under the First Lien Loan Documents and a bankruptcy. The purchase price for the First Lien Obligations shall be at par but shall exclude any premiums.

IX. Waiver of Right to Contest Liens

Neither the First Lien Lenders nor the Second Lien Lenders shall take any action to contest or challenge the validity, priority, enforceability or allowance of any liens and claims of the other party.

X. Governing Law

The State of New York without regard to principles of conflicts of laws.

Summary of Key Differences Between First Lien/Second Lien Intercreditor Agreement and Split Collateral Intercreditor Agreement

I. Reciprocal Provisions That Treat Both Lenders the Same

Should be much more balanced than second lien intercreditor agreement.

II. Defining Priority Collateral of Each Lender

A. Define Working Capital Priority Collateral; Term Priority Collateral is everything else.

B. Often issues with accounts, equity, business interruption insurance, proceeds of IP and "other."

III. Mutual or Unlimited Remedies Standstill on Non-Priority Collateral

Not controversial if each Lender treated the same.

IV. Mutual Release Provisions for Non-Priority Collateral

Potential impact on enterprise value if Working Capital Lender can force distressed sale of inventory by Borrower.

V. Application of Proceeds of Mixed Collateral Sale

Toughest issue; often silent as to how allocation of value will be determined.

VI. Mutual DIP Financing and Other Bankruptcy Provisions

Each Lender can provide DIP financing using its Priority Collateral, but no priming of other party's Priority Collateral.

VII. Working Capital Lenders Granted Rights of Access and Use of Term Priority Collateral

Time limits; indemnification; reimbursement for carrying costs.

Enforcement of Bankruptcy Waivers in Intercreditor Agreements

I. Common Bankruptcy Waivers

A. Stakeholders often engage in contentious litigation throughout the course of a bankruptcy case over a variety of issues, such as the Debtor's use of cash collateral or entry into a DIP financing facility, the sale of the Debtor's assets in bankruptcy, and the extent and scope of liens on the Debtor's assets. Looking to minimize the amount of fighting over these issues in the event of a bankruptcy, lenders typically negotiate bankruptcy waivers into Intercreditor Agreements and Agreements Among Lenders (collectively referred to herein as "Intercreditor Agreements") wherein junior lenders waive their rights to take certain actions in the event of a borrower's bankruptcy.

B. Common bankruptcy waivers include:

1. *DIP Financing/Cash Collateral* — Junior lenders may waive their rights to object to the Debtor's use of cash collateral or entry into a DIP financing facility if the senior lenders consent, or to seek adequate protection.

2. *363 Sales* — Junior lenders may waive their rights to object to a 363 sale of collateral securing the loan if the senior lender has consented to the sale or until the senior lenders have been paid in full.

3. *Lien/Claim Challenges* — Junior lenders may waive their right to contest the validity of the senior lenders' liens or claims.

II. Enforcement of Bankruptcy Waivers

A. Bankruptcy waivers found in Intercreditor Agreements and Agreements Among Lenders are enforceable under Bankruptcy Code Section 510(a) to the extent they are enforceable under applicable nonbankruptcy law.

B. Bankruptcy waivers that go beyond debt and lien subordination, however, are subject to challenge, especially the waiver of rights that are statutorily granted.

III. Standing vs. Waiver

Delaware courts have come out on both sides as to whether a subordinated creditor has standing to appear and be heard notwithstanding bankruptcy waivers found in the applicable Intercreditor Agreement or Agreement Among Lenders that would preclude the creditor's actions.

A. In *Centaur*, Judge Carey viewed the Intercreditor Agreement as a barrier to standing resulting from a waiver of rights in the Intercreditor Agreement. *See In re Centaur*, No. 10-10799 (Bankr. D. Del. 2010) (J. Carey) (finding junior lenders could not take discovery to challenge validity of first lien based on explicit waivers of such rights in Intercreditor Agreement).

B. Meanwhile, in *CyberDefender*, Judge Shannon found that subordinated lien creditors may have standing to object notwithstanding bankruptcy waivers found in the Intercreditor Agreement. *See In re CyberDefender Corp.*, No. 12-10633 (Bankr. D. Del. May 2, 2012) (J. Shannon) (finding subordinated creditors had standing to object to 363 sale based on a constitutional right to due process notwithstanding bankruptcy waivers in Intercreditor Agreement, but noting that he might not similarly rule in the future in a different case).

C. Litigants usually argue that they have standing to make their arguments notwithstanding the existence of bankruptcy waivers in the Intercreditor Agreement.

1. *Standing as Unsecured Creditor* — Intercreditor Agreements oftentimes provide junior creditors with the right to be heard in the bankruptcy case as an unsecured creditor. This carve-out has left the door open to a broad array of disputes as junior lenders assert they are making arguments that unsecured creditors have standing to assert.

2. *Standing to Assert Core Bankruptcy Rights* — Junior creditors have standing to exercise certain core rights, such as the right to vote on a reorganization plan. *See In re Centaur ,* No. 10-10799 (Bankr. D. Del. 2010). A core proceeding also has been characterized as one invoking a substantial right provided by the Bankruptcy Code or that by its nature could only arise in a bankruptcy proceeding. Even a contract dispute between two non-debtors can be "core" when it is at the "heart of the bankruptcy process."

(a) *In re Best Products Co.*, 68 F.3d 26, 31-32 (2d Cir. 1995) ("While enforcing subordination agreements is not listed as a core proceeding, the power to prioritize distributions has long been recognized as an essential element of bankruptcy law.")

(b) *In re Electroglas, Inc.*, No. 09-12416 (PJW), 2009 WL 8503455, at *1 (Bankr. D. Del. Sept. 23, 2009) (holding that the court has jurisdiction over an intercreditor dispute in the 363 sale context because such a sale "only arises in the context of a bankruptcy proceeding" and "will substantially affect the liquidation of assets of the estate").

IV. Forum Selection Clause vs. 28 U.S.C. Section 157

A. Forum selection clauses found in Intercreditor Agreements can potentially result in the standing issue being decided in a different venue. The exclusive jurisdiction of a bankruptcy court to hear all core proceedings under 28 U.S.C. Section 157, however, can trump forum selection clauses.

B. Some courts have concluded, however, that the public policy in favor of adjudicating core matters in a bankruptcy proceeding trumps the interest in respecting the forum-selection clause.

1. *In re Charys*, 443 B.R. 628, 635 (Bankr. D. Del. 2010) (J. Shannon) ("Following *Diaz* [(3d Cir.)], bankruptcy courts in this Circuit have recognized that forum selection clauses should not be enforced in core matters.")

2. *Astropower Liquidating Trust v. Xantrex Tech. Inc.*, 335 B.R. 309, 328 (Bankr. D. Del. 2005) (refusing to enforce forum selection clause as to core fraudulent transfer claims)

3. *In re Iridium Operating LLC*, 285 B.R. 822, 837 (S.D.N.Y. 2002) ("[A]lthough there is a strong policy favoring the enforcement of forum selection clauses in this Circuit, this policy is not so strong as to mandate that forum selection clauses be adhered to where the dispute is core.")

Comparison of Principal Terms of An Agreement Among Lenders, Second Lien Intercreditor Agreement and Split Collateral Intercreditor Agreement

Issue	AAL	Second Lien ICA	Split Collateral ICA
What is the scope of collateral and priority of the liens?	The first out lenders and the last out lenders share one lien on the collateral. However, the proceeds of collateral are subject to a waterfall where, generally, the first out loans are repaid in full prior to any payments of the last out loans.	The first out liens are senior in right and priority to the last out liens.	Usually, the working capital lenders have a priority lien in accounts receivable and inventory and certain related assets (the “WC Priority Collateral”) and the term lender has a priority lien in all other assets other than the WC Priority Collateral (the “Term Priority Collateral”). The working capital lenders’ liens on the WC Priority Collateral are senior in right and priority to the term lenders’ liens on the WC Priority Collateral. The term lenders’ liens on the Term Priority Collateral are senior in right and priority to the working capital lenders’ liens on the Term Priority Collateral.
What is the amount of debt that may be incurred by the first out lender?	(a) No express cap on the first out debt, but increases in the first out debt would usually require the consent of either all lenders or required lenders which would include the last out lenders.	(a) The first out obligations would be capped at a certain amount which would include a TBD cushion above the existing debt, but the cap would reduce with permanent repayments of debt. Often the cap is based on the commitment amount and borrowing base.	(a) The working capital obligations would be capped at a certain amount which would include a TBD cushion above the existing debt, but the cap would reduce with permanent repayments of debt. Often the cap is based on the commitment amount and borrowing base.
	(b) The first out obligations would exclude all disallowed default interest and fees in a bankruptcy proceeding.	(b) The first out obligations would exclude all disallowed default interest and fees in a bankruptcy proceeding.	(b) The working capital obligations would exclude all disallowed default interest and fees in a bankruptcy proceeding.
	(c) The financing agreement would include all first out debt under certain related secured obligations (which may include hedge agreements and bank products) subject to an aggregate TBD cap.	(c) All first out obligations under certain related secured obligations (including hedging agreements and bank products) would usually be subject to an aggregate TBD cap.	(c) All working capital obligations under certain related secured obligations (including hedging agreements and bank products) would usually be subject to an aggregate TBD cap.

Issue	AAL	Second Lien ICA	Split Collateral ICA
	(d) No express cap on the second out debt, but increases in the second out debt would usually require the consent of either all lenders or required lenders which would include the first out lenders.	(d) The second out obligations would be capped at a certain amount which would include a TBD cushion above the existing debt.	(d) The term lender obligations would be capped at a certain amount which would include a TBD cushion above the existing debt.
When can the lenders exercise remedies?	The first out lenders may be subject to the passage of a TBD standstill period prior to the exercise of their rights and remedies.	The first out lenders may exercise their rights and remedies at any time.	The working capital lenders may exercise their rights and remedies on the WC Priority Collateral at any time. The working capital lenders may exercise their rights and remedies on the Term Priority Collateral after the passage of a TBD standstill period. Sometimes there is a perpetual standstill period.
	The last out lenders would be permitted to exercise their rights and remedies after the passage of a TBD standstill period.	The last out lenders may exercise their rights and remedies after the passage of a TBD standstill period so long as the first out lenders have not commenced the exercise of their rights and remedies.	The term loan lenders may exercise their rights and remedies on the Term Priority Collateral at any time. The term loan lenders may exercise their rights and remedies on the WC Priority Collateral after the passage of a TBD standstill period. Sometimes there is a perpetual standstill period.
When are the lenders required to release liens?	There are no specific provisions as to lien releases. However, note that (a) all dispositions permitted under the Financing Agreement would result in a lien release, and (b) required lenders could agree to additional lien releases (subject to certain exceptions).	During the exercise of secured creditor remedies, the second out lender's liens are automatically released so long as (x) the first out lenders' liens are released, (y) the proceeds are applied to permanently repay first out loans, and (z) such exercise of remedies is conducted in a commercially reasonable manner. With respect to any disposition in the absence of any default, the last out lenders' liens are released so long as (x) the first out lenders' liens are released and (y) such disposition is permitted under the last out lenders' credit agreement. Default dispositions are often problematic.	During the exercise of secured creditor remedies, the term lenders' liens are automatically released on the WC Priority Collateral so long as (x) the working capital lenders' liens are released, (y) the proceeds are applied to permanently repay the working capital loans, and (z) such exercise of remedies is conducted in a commercially reasonable manner. With respect to any disposition in the absence of any default, the term loan lenders' liens are released on the WC Priority Collateral so long as (x) the working capital lenders' liens are released and (y) such disposition is permitted under the term loan lenders' credit agreement.

Issue	AAL	Second Lien ICA	Split Collateral ICA
			During the exercise of secured creditor remedies, the work capital lenders' liens are automatically released on the Term Priority Collateral so long as (x) the term loan lenders' liens are released, (y) the proceeds are applied to the permanently repay the term loans, and (z) such exercise of remedies is conducted in a commercially reasonable manner. With respect to any disposition in the absence of any default, the working capital lenders' liens are released on the Term Priority Collateral so long as (x) the term loan lenders' liens are released and (y) such disposition is permitted under the working capital lenders' credit agreement. Default dispositions are often problematic.
How are proceeds of collateral applied to repay the loans?	During the continuance of a waterfall triggering event, proceeds of collateral are applied in accordance with a waterfall set forth in the AAL, first, to repay the agents fees and expenses, second, to repay the first out obligations (other than any prepayment premium), third, to repay the last out obligations (other than any prepayment premium), fourth, to pay the prepayment premium applicable to the first out obligations, fifth, to repay the prepayment premium applicable to the last out obligations, and sixth, to the company.	During the continuance of an Event of Default, proceeds of collateral are applied in accordance with a waterfall set forth in the Intercreditor Agreement, first, to repay the first out obligations (other than any prepayment premium), second, to repay the last out obligations (other than any prepayment premium), third, to pay the prepayment premium applicable to the first out obligations, fourth, to repay the prepayment premium applicable to the last out obligations, and fifth, to the company.	During the continuance of an Event of Default, proceeds of WC Priority Collateral are applied in accordance with a waterfall set forth in the Intercreditor Agreement, first, to repay the working capital obligations (other than any prepayment premium), second, to repay the term loan obligations (other than any prepayment premium), third, to pay the prepayment premium applicable to the working capital obligations, fourth, to repay the prepayment premium applicable to the term loan obligations, and fifth, to the company. During the continuance of an Event of Default, proceeds of Term Priority Collateral are applied in accordance with a waterfall set forth in the Intercreditor Agreement, first, to repay the term loan obligations (other than any prepayment premium), second, to repay the working capital obligations (other than any prepayment premium),

Issue	AAL	Second Lien ICA	Split Collateral ICA
			third, to pay the prepayment premium applicable to the term loan obligations, fourth, to repay the prepayment premium applicable to the working capital obligations, and fifth, to the company. Proceeds from collateral that constitute both WC Priority Collateral and Term Priority Collateral may be allocated in accordance with an agreed to formula (e.g., based upon fair market value or book value of the assets) or may be silent.
What are the voting or veto/block rights?	In many AAL arrangements, there are specific voting arrangements in the financing agreement and the AAL. These voting arrangements are negotiated from deal to deal and are influenced by the relative size of the first out and last out loans and the party bringing the deal to the other lenders. Sometimes, the voting arrangements are such that both the first out lenders and the last out lenders are needed to constitute required lenders. The preferred arrangement, however, is for the last out lenders to control the voting and provide the first out lenders with voting rights only after the occurrence of a voting trigger event or only with respect to certain agreed-upon provisions (in addition to customary sacred voting rights).	The first out lenders may change their loan documents without the consent of the last out lenders so long as such changes do not: (a) Increase the principal amount exceeding the first out cap or increase the margin by more than a TBD percentage or provide for fees that would increase the yield by more than TBD percent; (b) Change, result in forgiving or reduce any scheduled principal payment or change any mandatory prepayment provisions in a manner adverse to the last out lenders; (c) Restrict any payments permitted to be made to the last out lenders as of the date of the intercreditor agreement or prohibit liens of the last out lenders; (d) Extend the final maturity date beyond TBD months prior to the final maturity date of the last out loans; (e) Change (or add) any covenants or defaults making them more restrictive unless the same are changed (or added) to the last out loan documents;	Generally the same as set forth for the Second Lien ICA.

Issue	AAL	Second Lien ICA	Split Collateral ICA
		(f) Change the borrowing base (or the reserves or components thereof) to make it more favorable to the obligors; or (g) Change the redemption, prepayment or defeasance provisions.	
		The last out lenders may change their loan documents without the consent of the first out lenders so long as such changes do not: (a) Increase the principal amount of the last out loans above an agreed to amount, or change to an earlier date any payments of principal or interest; (b) Increase the margin payable in cash by more than a TBD percentage or provide for fees payable in cash that would increase the yield by more than TBD percent; (c) Shorten the maturity as in effect on the date of the intercreditor agreement; (d) Restrict any payments permitted to be made to the first out lenders as of the date of the intercreditor agreement or prohibit liens of the first out lenders; (e) Change financial covenants to reduce the cushion to the correlative financial covenants in the first out credit agreement; or (f) Change the redemption, prepayment or defeasance provisions.	
What are the lender's buy-out rights?	Upon the occurrence of certain trigger events (e.g., payment default, commencement of the exercise of remedies, etc.), the last out lenders may purchase the first out lenders' loans at par, with an agreement that any premium	Upon the occurrence of certain trigger events (e.g., payment default, commencement of the exercise of remedies, etc.), the last out lenders may purchase the first out lenders' loans at par, with an agreement that any premium	Same as the Second Lien ICA.

Issue	AAL	Second Lien ICA	Split Collateral ICA
	payments made on the first out lenders' loans within TBD days after such purchase be paid over to the first out lenders. Sometimes there are mutual buy-out rights.	payments made on the first out lenders' loans within TBD days after such purchase be paid over to the first out lenders. Sometimes there are mutual buy-out rights.	
What are the lenders' rights in respect of the right of first offer?	Subject to limited exceptions, the first out lenders must provide the last out lenders with a right of first offer to the extent the first out lenders desire to sell their first out loans. Sometimes, this right is reciprocal.	None.	None.
What are the limitations in respect of Protective Advances/ Overadvances?	Protective advances/ overadvances are subject to a specific negotiated cap.	Not expressly addressed, but protective advances/ overadvances would be subject to the cap on first out loans.	Not expressly addressed, but protective advances/ overadvances would be subject to the cap on first out loans.
Bankruptcy Issues	Generally, it is better for the last out lenders to have fewer provisions governing a bankruptcy proceeding. We have done and reviewed many last out deals where there are no bankruptcy provisions. However, many recent deals have bankruptcy provisions which are extensive in scope.		
What are the lender's rights in respect of DIP financing and/or use of cash collateral?	The last out lenders will not object to the use of cash collateral or any DIP financing provided by the first out lenders on the grounds of a failure to provide adequate protection so long as:	The second out lenders will not object to the use of cash collateral or any DIP financing provided by the first out lenders on the grounds of a failure to provide adequate protection so long as:	Both the working capital lenders and the term loan lenders may propose the use of cash collateral or DIP financing on their respective WC Priority Collateral or Term Priority Collateral, with both parties agreeing not to object on the grounds of a failure to provide adequate protection so long as:
	(a) The DIP financing is capped at an amount TBD;	(a) The DIP financing is capped at an amount TBD;	(a) The DIP financing is capped at an amount TBD;
	(b) The last out lenders retain the benefit of a lien on the collateral;	(b) The second out lenders retain a subordinate lien on the collateral;	(b) The working capital lenders or the term loan lenders retain a subordinate lien on their non-priority collateral;
	(c) The last out lenders receive the benefit of a lien on the post-petition assets to the same extent granted to the first out lenders;	(c) The second out lenders receive a lien on the post-petition assets to the same extent granted to the first out lenders, with the same priority as existed prior to bankruptcy;	(c) The working capital lenders or the term loan lenders receive a lien on the post-petition assets to the same extent granted to the other lenders, with the same priority as existed prior to bankruptcy;
	(d) The last out lenders receive a priority administrative expense	(d) The second out lenders receive a priority administrative expense	(d) The working capital lenders or the term loan lenders receive a priority administrative expense

Issue	AAL	Second Lien ICA	Split Collateral ICA
	claim subordinated to the DIP;	claim subordinated to the DIP;	claim subordinated to the DIP;
	(e) The post-petition obligors are not required to seek confirmation of a specific plan of reorganization or required to liquidate collateral before a default under the DIP or cash collateral order;	(e) The post-petition obligors are not required to seek confirmation of a specific plan of reorganization or required to liquidate collateral before a default under the DIP or cash collateral order;	(e) The post-petition obligors are not required to seek confirmation of a specific plan of reorganization or required to liquidate collateral before a default under the DIP or cash collateral order;
	(f) The interest rates, fees, covenants, defaults and other terms are commercially reasonable under the circumstances; and	(f) The interest rates, fees, covenants, defaults and other terms are commercially reasonable under the circumstances; and	(f) The interest rates, fees, covenants, defaults and other terms are commercially reasonable under the circumstances; and
	(g) Such financing is subject to the terms of the AAL.	(g) Such financing is subject to the terms of the intercreditor agreement.	(g) Such financing is subject to the terms of the intercreditor agreement.
	The last out lenders will not provide any DIP financing so long as the first out lenders provide DIP financing satisfying the conditions specified above.	The second out lenders will not provide any DIP financing so long as the first out lenders provide DIP financing satisfying the conditions specified above.	Neither the working capital lenders nor the term loan lenders will provide any DIP financing on their non-priority collateral so long as the other lenders provide DIP financing satisfying the conditions specified above.
What are the lenders' rights in respect of a Plan of Reorganization?	The last out lenders retain their ability to vote on a plan of reorganization. If the last out lenders receive debt securities, such securities must be subordinated to the same extent as the last out loans.	The second out lenders retain their ability to vote on a plan of reorganization. If the second out lenders receive debt securities, the lien securing such securities must be subordinated to the same extent as with respect to the last out loans.	The working capital lenders and the term loan lenders retain their ability to vote on a plan of reorganization. If the lenders receive debt securities secured by their non-priority collateral, the lien securing such securities must be subordinated to the same extent as with respect to the last out loans.
	N/A	Separate classification.	Separate classification.

Issue	AAL	Second Lien ICA	Split Collateral ICA
What are the lenders' rights in respect of a 363 sale?	If certain trigger events have occurred, the second out lenders will not oppose a 363 sale so long as:	The second out lenders will not oppose a 363 sale so long as:	The working capital lenders and the term loan lenders will not oppose a 363 sale with respect to the other lenders' priority collateral so long as:
	(a) The first out lenders consent to such sale;	(a) The first out lenders consent to such sale;	(a) The working capital lenders consent to such sale of the WC Priority Collateral or the term loan lenders consent to such sale of the Term Priority Collateral;
	(b) The second out lenders' liens attach to the proceeds of such sale;	(b) The second out lenders' liens attach to the proceeds of such sale;	(b) The respective lenders' liens attach to the proceeds of such sale;
	(c) The proceeds are applied in accordance with the waterfall (to permanently repay the first out loans); and	(c) The proceeds are applied in accordance with the waterfall (to permanently repay the first out loans); and	(c) The proceeds are applied in accordance with the waterfall (to permanently repay the working capital loans or the term loans, as applicable); and
	(d) The sale is not to any obligor or an affiliate thereof.	(d) The sale is not to any obligor or an affiliate thereof.	(d) The sale is not to any obligor or an affiliate thereof.
	The second out lenders reserve their right to object in the capacity of an unsecured creditor on any basis that could be asserted by an unsecured creditor.	The second out lenders reserve their right to object in the capacity of an unsecured creditor on any basis that could be asserted by an unsecured creditor.	Each of the working capital lenders and the term loan lenders reserves their right to object in the capacity of an unsecured creditor on any basis that could be asserted by an unsecured creditor.
What are the lenders' rights in respect of credit bidding?	Without the consent of the required first out lenders and required last out lenders, the agent may not credit bid or purchase any Collateral, provided that the second out lenders expressly retain the right to bid for or purchase any Collateral so long as they agree to pay the first out lenders in full in cash.	The second out lenders expressly retain the right to bid for or purchase any Collateral so long as they agree to pay the first out lenders in full in cash.	Each of the working capital lenders and the term loan lenders retain the right to bid for or purchase any non-priority collateral so long as they agree to pay the other lenders in full in cash.

Distressed Energy:
What Have We Learned So Far?

Drill to Earn Joint Ventures

I. Overview of Market and Trends

A. Key Drivers to Changing Landscape in E&P Operator/Investor JVs

1. Decreasing commodity prices

2. Borrowing base redeterminations

3. Increasing number of distressed E&P operators

B. Essential Features of a "Drill to Earn" JV

1. Working interest[1] E&P owner in an acreage agrees to receive funding from an investor to develop the acreage.

2. Investor commits to fund ("carry") the development costs, either upfront or over time, in return for an agreed upon percentage of the working interest in the developed acreage.

3. Key variables

(a) Amount of carry

(b) Scope of carry (i.e., which expenses are included)

(c) Upfront investor cash payment

(d) Percentage of working interest transferred to investor

(e) Timing of working interest transfer

(f) Target return rates

(g) Amount of working interest that reverts to the operator

(h) JV Duration

C. Trends in Recent Operator/Investor JVs

1. JVs are trending towards increasingly flexible economic structures.

2. Tiered carry obligations and shifting working interests (WI) could be based on multiple on invested capital (MOIC) targets, IRR hurdles, or both.

3. Investors are receiving greater short-term working interests, while operators are receiving greater reversionary interests upon satisfaction of investors' targeted return.

[1] A working interest is "a percentage of ownership in an oil and gas lease granting its owner the right to explore, drill and produce oil and gas from a tract of property"; it is generally synonymous with the term "leasehold interest." Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Manual of Oil and Gas Terms* 1147-48 (15th ed. 2012). "[W]orking interest owners who are not the operator[s] ... are referred to as non-operating working interest owners or non-operators." *Wilson v. TXO Production Corp.* (*In re Wilson*) 69 B.R. 960, 962 (Bankr. N.D. Tex. 1987).

Recent Drill to Earn JV Trends

Deal #	Announced Date	E&P Operator	Investor	Anticipated Investor Contribution ($MM)	Initial Investor Carry Cost Obligation	Investor's Initial Working Interest	Investor's Target Return Hurdle	Investor's Working Interest After Hurdle	Duration of Anticipated Funding Commitment
1	Oct 2012	Encana Oil & Gas	Nucor Corp[2]	Up to $542 in first three years	N/A	50%	none	No shifting WI	13 to 22 years
2	July 2013	Exco	KKR	Initial $131, with option to fund additional wells	75%	75%	1.2x MOIC	Investor has obligation to sell wells back to Operator, and right to retain 15%	4 to 5 years to drill 300 wells
3	Nov 2013	Quicksilver	Eni Petroleum	$52, with option to fund additional wells	100%	100%	1.0x MOIC	Option for 50% WI, 50% Carry	N/A
4	Jan 2015	Linn Energy	GSO	Up to $500	100%	85%	15% IRR	5%	Up to 5 year commitment
5	July 2015	Legacy Reserves	TPG Special Situations Partners	Up to $150 within first year, up to $750	95%	87.5%	1.0x MOIC	63% WI until 15% IRR, then 15% WI	N/A
6	Aug 2015	Magnum Hunter Resources	Undisclosed PE Fund	Up to $430, with $40 at closing	100%	100%	Greater of 12% IRR and 1.2x MOIC	10% WI until 15% IRR, then 5% WI	N/A

[2] As an end-user of natural gas, Nucor is an atypical investor. Nucor gains a long-term hedge for its energy-consuming operations.

II. Key Deal Issues

A. Economic Terms

1. Timing of contribution commitment

(a) Upfront cash payment coupled with future funding commitment

(i) Investor pays cash up front in addition to carry commitment.

(ii) In return for its upfront cash, the investor may receive an assignment of its working interest shortly after execution of the agreement.

(b) No upfront cash payment, only a funding commitment

(i) Investor commits to fund future drilling.

(ii) No upfront payment.

(c) Either structure can include an option to invest more than the initial commitment*. A funding option provides an extra kicker for investors.* If energy prices rise, or if the acreage becomes especially productive, having the option to participate in the development of additional acreage could prove extremely valuable. [see Figure 1]

Figure 1

Deal 5. Investor commits $150M for initial carry period (12-14 months) and has option to commit up to $750M.

Deal 3. Investor commits up to $52M and has option to fund additional wells.

(d) JVs often divide development acreage into three areas to include these investor funding options.

(i) Target Acreage: Primary development area.

(ii) Non-Target Acreage: Optional development area.

(iii) Area of Mutual Interest (AMI): Optional acquisition area. AMIs give the parties the right to participate in the acquisition of any new oil and gas interests within a specified area. [see Figure 2]

Figure 2

Deal 6. Term sheet provides for possible development of non-target acreage, in which case investor would, subject to certain terms and conditions, commit additional funds. Term sheet also provides for the formation of an adjacent AMI to be developed under certain circumstances.

2. Determination of total contribution commitment

(a) Based on either (1) specific dollar amount, or (2) number of wells

(b) Limitations on commitment can be negotiated (see discussion of Off Ramp provisions), especially in light of unexpected events (such as commodity price volatility)

3. Timing of ownership transfer

(a) Transfer of working interest

(i) If investor pays cash up front, investor will likely demand assignment of working interest upon execution, or shortly thereafter.

(ii) If investor does not pay cash up front, operator may demand wellbore by wellbore assignment. [see Figure 3]

Figure 3

Deal 2. Investor received 50% interest in target acreage up front in return for $131M cash payment, will receive an additional 25% interest in target acreage wells upon funding of drilling costs, and will receive 75% interest in non-target acreage wells upon funding of drilling costs of non-target acreage wells.

Deal 5. Investor received entire 87.5% undivided working interest at closing, despite no upfront cash payment. This may reflect shifting market conditions, and investors may be demanding this for bankruptcy protection.

Deal 1. Investor receives assignment of working interest upon funding of drilling costs and effective upon production.

(b) Operator's leasehold interest may be burdened by transfer restrictions (i.e., consents, preferential purchase rights, maintenance of uniform interest provisions). When investor does not acquire the interests right away, transfer restrictions may not be discovered until drilling is set to commence. To avoid drilling delays, the investor should make sure to resolve any transfer restrictions and obtain any necessary consents as early as possible.

4. Carry costs

(a) Limitations on investors' liability for cost overruns. [see Figure 5 with Off Ramp example]

(b) The scope of carry costs should be carefully specified and vary by deal.

(i) Direct costs of drilling, equipping and completing

(ii) Indirect costs of drilling, equipping and completing (such as title opinion, well testing, and transportation costs)

(iii) These costs may include operator's pre-agreement (sunk) costs. (i.e., seismic testing) [see Figure 4]

Figure 4 – Sample Provision

Deal 1. "Costs of drilling"... means all actual direct costs plus per well drilling well rate overhead charges under the New Operating Agreement relating to the drilling of such well incurred from and after the date two (2) years prior to the Effective Date hereof (except that the two (2) year requirement shall not apply with respect to the costs of drilling the Pre-Effective Date Carry Wells), including but not limited to, costs of constructing and upgrading access roads, obtaining and preparing the Wellpad, obtaining permits and title opinions, obtaining drilling contractor services and consultants necessary for the drilling of such well, obtaining mud chemicals, pipe and supplies and all other costs and expenses associated with or incurred in moving in, rigging up, drilling, logging and testing so that a decision can be made to either attempt to set pipe and complete such well or to plug and abandon it as a dry hole.

"Costs of equipping" ... means all actual direct costs plus per well drilling well rate overhead charges to the extent properly chargeable under the New Operating Agreement incurred in the acquisition and installation of the initial equipment for such well, including, but not limited to, the acquisition and installation of wellhead and Wellpad equipment (including, but not limited to, associated flowlines, Wellpad separation facilities, Wellpad tanks and storage facilities, measurement/metering equipment, power lines and electrical facilities, and expansions and improvements of such wellhead and Wellpad equipment), regardless of when such cost is incurred.

"Costs of completing" ... means all actual direct costs plus per well drilling well rate overhead charges under the New Operating Agreement incurred in completing such well, including, but not limited to, the costs of fracture stimulation, installing lines for frac fluid, and the drilling out of frac plugs with respect to such well, regardless of when such cost is incurred.

5. Investor return and shifting working interests

    (a) Often investors agree to a capped rate of return, based on MOIC or IRR or both (whichever hurdle is greater or is reached first).

    (b) *Investors are receiving greater working interests in the short term, while operators are receiving greater reversionary interests upon satisfaction of investor's targeted return.* [see chart below]

    (c) Working interests can shift in tiers based on investor targets, thus allowing for flexible negotiations between operators and investors to match each party's particular risk profile and time horizon. Some deals show two tiers and two kinds of target hurdles (MOIC and IRR).

Investor	Deal 4	Deal 5	Deal 6
Carry Obligation	100%	95%	100%
Funding Commitment ($M)	Up to $500	$150	Up to $430, with $40 up front
First Tier WI	85%	87.5%	100% Operator can elect to participate up to 25% of WI for each unit
Second Tier Hurdle	15% IRR	1.0x MOIC	Greater of 1.2x MOIC and 12% IRR
Second Tier WI	5%	63%	10%
Third Tier Hurdle	-	15% IRR	16% IRR
Third Tier WI	-	15%	5%

6. Recent JVs characterized by *flexibility* in economic terms, especially working interest transfers, target return hurdles and reversionary interest percentages.

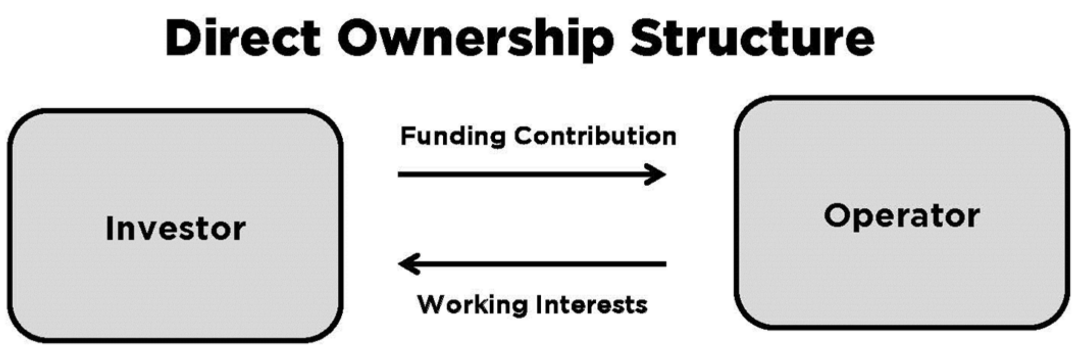
7. Operator drilling commitment

B. Legal Structures and Documentation of JVs

1. Direct ownership

(a) Investor pays funding contribution directly to operator.

(b) Operator assigns working interests directly to investor.



(c) Documents of direct ownership structure

(i) Participation Agreement (also called Joint Development Agreement or Exploration Agreement), which covers terms such as:

(1) Duration of the JV

(2) Title issues, reps and warranties, other provisions typically included in an asset acquisition agreement

(3) Carry components, development plan, budget

(4) AMI provisions

(5) Transfer restrictions, preferential purchase rights

(6) Off ramp provisions

(7) Provisions granting investor more favorable operator control than typical Joint Operating Agreement provides, such as removal provisions or a higher operator standard of care

(d) Joint Operating Agreement (JOA)

(i) Parties can use the American Association of Professional Landmen (AAPL) 1989 model form operating agreement, modified for horizontal drilling.

(ii) Participation Agreement provisions control if there is a conflict, for term of Participation Agreement.

(e) Forms of assignment

(f) Lessor consent to partial assignment of mineral lease

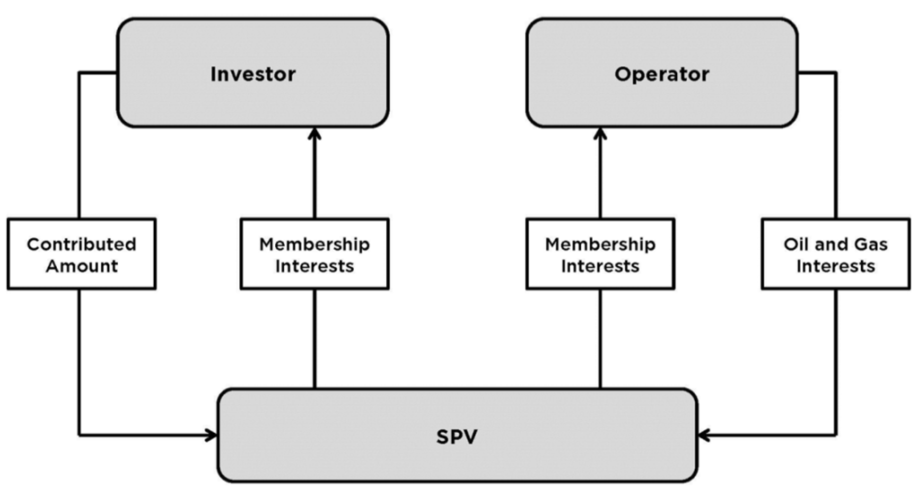
(g) Security documents (sometimes)

2. Entity Joint Venture

(a) Investor makes any initial cash contribution and pays any subsequent carry costs to special purpose vehicle (SPV) formed for the purposes of the JV. Investor receives percentage of equity interests of SPV in return for cash contribution and funding commitment.

(b) Operator contributes assets (such as leases, existing wells, units) to the SPV. Operator receives percentage of equity interests of SPV in exchange for asset contribution.

Special Purpose Vehicle Structures



(c) Typical documents of Entity Joint Ventures

(i) Contribution agreement

(ii) LLC or partnership agreement

(d) Sample Entity Joint Venture

(i) New limited partnership formed for purposes of joint venture.

(ii) Investor contributes $50M to LP and commits to make available for the first three years of the partnership an additional $15M to fund 100% of future drilling expenses and other partnership liabilities[3] in exchange for 45% LP interest.

(iii) Operator contributes leasehold interest in undeveloped acreage as well as existing wells to LP in exchange for 55% LP interest.

(iv) After Investor's $15M commitment is satisfied, either partner may elect to fund drilling costs and partnership liabilities in proportion to its share of the partnership interest. If one partner does not elect to fund its proportionate share, the other partner may fund the entire costs, in which case the percentage interests of the partners will be readjusted according to an agreed upon formula.

(v) Operator is both general partner and a limited partner of the LP, and Investor is a limited partner.

(vi) Parties execute Contribution Agreement and Partnership Agreement.

(vii) Partnership Agreement may provide for a management committee, which directs actions of the general partner.

(1) Each limited partner is entitled to elect one member to the committee to represent its interests.

(2) For ordinary transactions, a majority vote is sufficient.

(3) For extraordinary transactions, such as approval of development plans, contracts, acquisitions and sales above a specified dollar amount, a 100% affirmative vote is required.

C. Investor Protection against Commodity Volatility

1. Off ramp provisions give a party the right to suspend its obligations under the JV upon occurrence of specified triggers. [see Figure 5]

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[3] After certain revenue-raising options (such as sales of certain acreage, financing) have been exhausted. If any of this $15M commitment is used by the LP, the Investor's percentage interest in the partnership will be adjusted upward.

Figure 5

Sample Investor Off Ramp: Deal 5. "[Investor's] payment obligations can be suspended upon occurrence of certain events based on anticipated financial metrics, certain operating cost overruns and changes in commodity prices, including the West Texas Intermediate price per barrel of crude oil averaging less than $40.00 over a period of 15 consecutive days, provided that Investor will be obligated to complete funding of any wells or infrastructure in progress."

Sample Investor Exercise of Off Ramp: Deal 1. Investor temporarily suspended development when the price of natural gas fell below the parties' agreed upon trigger-point. Drilling has been suspended through the end of 2015.

Sample Operator Off Ramp: Deal 2. Operator excused from drilling obligation if "Eagle Ford Oil Price falls below $70 per Barrel for more than 45 days." Operator stopped drilling pursuant to agreement.

2. Structure agreement as option

   (a) Deals may be structured with:

      (i) Upfront investor commitment; and

      (ii) Investor option to participate in additional wells. [see Figure 6]

Figure 6

Deal 2. Investor paid $131M up front in return for 50% working interest in the target acreage and an option to fund the drilling of individual target acreage wells in return for an additional 25% working interest. Investor also has the option to fund additional wells outside the target acreage in return for a 75% working interest in the wells.

Deal 3. Investor committed $52M up front with an option to fund the drilling of additional wells.

Deal 5. Investor committed $150M for initial carry period (12-14 months) with an option to commit up to $750M.

3. Operator buy back requirement [see Figure 7]

Figure 7

Deal 2. Operator is required to buy back wells after one year of production from Investor at PV-10 minus Investor revenue.

4. Adjusting working interest based on commodities price

5. Hedging/incorporating hedging into payouts

   (a) Hedging may not be available based solely on the credit profile of the Investor's SPV holding the JV interests.

(b) Problems in obtaining hedging have recently halted or delayed the closing of some otherwise attractive deals. Sometimes these problems can be solved by parent guaranties or other credit enhancements. However, in other instances (such as in private equity-backed structures), it may be more difficult to use credit enhancements to procure hedging products.

D. Development Plan/Control

1. Most deals will include an initial development plan (attached as an exhibit to the parties' agreement). The parties will need to agree on a process for proposal and approval of future development plans, as well as what happens if no agreement is reached. The development plan must allow leeway for parties to modify based on changing circumstances while also preserving their reasonable expectations for entering into the agreement.[4] [see Figure 8]

Figure 8

Deal 2. Parties agreed to initial development plan attached to agreement as exhibit. Subsequently, operator must submit a quarterly development plan for investor's approval. Each plan is comprised of a "Next Quarter Detail Plan" and a "Quarter 2-4 Scoping Plan." Following an investor review process, the parties will meet to discuss the proposed plan. The plan will only be deemed approved if the parties agree on it, except that the plan will always include at least the number of wells anticipated to be drilled under the previous quarter's Quarter 2-4 Scoping Plan (so long as those wells meet qualifying criteria described below).

"Next Quarter Detail Plan" Requirements

1. List of all quarterly operations to be conducted and estimated associated costs and expenses
2. Specific wells to be drilled and whether those wells meet certain "Qualifying Well Criteria" (certain well length and orientation characteristics, revenue requirements, minimum distance from other wells, not subject to third-party rights, etc.)
3. A drilling calendar (estimated spud dates, fracing and stimulation days, initial production dates, any planned downtime for each well to be drilled)
4. List of wells to be put on artificial lift
5. Estimates of processing and production costs for wells already drilled

"Quarter 2-4 Scoping Plan" Requirements

1. Specific number of wells to meet Qualifying Well Criteria for each quarter
2. Specific number of wells not anticipated to meet Qualifying Well Criteria for each quarter

[4] For example, Deal 2's development plan outlined in Figure 8 below provides for an adjustment if wells no longer meet certain qualifying criteria.

2. Budget overruns

   (a) A key issue is whether the E&P will be allowed sole authority in approving budget overruns. Budget overruns may happen due to planning, funding (may not be applicable here), procurement of contractors and contractor management, estimates, changing risk appetite, regulatory issues and geopolitical challenges.[5]

   (b) For example, a partnership agreement may authorize the partnership to incur expenditures up to 110% of the costs and expenses authorized in development plan and budget.

3. Operating Committee (sometimes called Management Committee)

   (a) Reviews, approves and modifies development plans and budgets.

   (b) Each party appoints a representative(s) to the committee. In an Entity JV, each representative's voting power will correspond to the percentage interest of the partner who appointed such representative.

   (c) The committee meets at least once every calendar quarter, and either party may request additional meetings.

   (d) The committee may also be authorized to appoint subcommittees.

   (e) The committee has notice and meeting procedures similar to that of a corporation board.

E. Transfer of Assets vs. Transfer of Equity in JV

   1. Generally, there are transfer restrictions on either party's rights and obligations under the agreement, but there is some allowance to transfer acquired assets.

   2. Operators are concerned that a potential transferee will not be able to fund the drilling commitment, whereas investors are concerned that a potential transferee may not have the expertise or capability to drill and produce. [see Figure 9]

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[5] See Ernst & Young, "Oil and gas megaproject overruns to cost industry more than US$500b" (August 14, 2014), *available at* http://www.ey.com/GL/en/Newsroom/News-releases/news-oil-and-gas-megaproject-overruns-to-cost-industry-more-than-us500billion.

Figure 9

Deal 2. Both parties may transfer assets after resolution of first four operator buy back offers (about 2 years), subject to tag along and right of first offer (105%).

Deal 1. Neither party may assign, transfer, pledge or encumber in any way, in whole or in part, any of its rights or obligations without consent, unless there is a change of control or the transfer is to affiliates but the parties can transfer assets.

Deal 5. The development agreement contains customary transfer restrictions on each of the operator's and investor's ability to transfer their respective interests, including consents to transfer and a right of first offer provided to the operator." However, Investor is allowed to sell its interest in undeveloped acreage after the initial carry period (12-14 months) in certain instances, with proceeds divided under a similar structure as development profits (proceeds over 15% IRR go to operator).

Deal 6. Investor may transfer its interest after hitting a specified return or a specified period of time after the spudding of the first well, subject to operator's right of first offer.

3. In an Entity JV structure, the parties may have more flexibility to transfer their equity interests. For example, the Partnership Agreement may provide that either party may, subject to certain transfer restrictions (e.g., right of first offer, drag along), transfer its partnership interest after a one year wait period, provided that, *inter alia*:

    (a) The transferring partner must transfer its entire partnership interest.

    (b) The transferee's financial ability to meet payment obligations (evidenced by credit rating and credit support) and technical ability to participate in planning of operations must be equivalent to the ability of the transferring partner (as of the date the transferring partner became a partner in the partnership).

    (c) The transfer does not have certain securities law, Investment Partnership Act, or tax consequences.

    (d) The Partnership Agreement may also grant either partner the right to compel the sale of the entire partnership (an "Exit Event") after a specified time period (e.g., two years from the effective date of the agreement).

4. Change of control [see Figure 10]

Figure 10

Deal 1. The agreement allows either party to terminate its obligations upon a change of control.

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