Business: DIP Financing

Is It Back, and if So, Who Is Playing and on What Terms?

Concurrent Breakout

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DEFENSIVE DEBTOR-IN-POSSESSION FINANCING

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I. INTRODUCTION

This paper will address some of the issues that arise in connection with the negotiation and documentation of a "defensive" debtor-in-possession financing. A "defensive" DIP financing is one in which the pre-petition secured lender is motivated to provide the DIP financing primarily by a desire to protect its pre-petition liens and claims. The paper assumes that the financial institution providing the debtor-in-possession financing (hereinafter, "DIP financing") does so on a senior secured basis and is also the debtor's pre-petition secured lender.

The provision of DIP financing by the pre-petition secured lender may be viewed by it as an acceptable risk to assume in order to maximize the recovery on its pre-petition claim. This paper discusses some of the reasons that motivate a pre-petition secured lender to offer a "defensive" DIP financing, provides an overview of financing options to a debtor under § 364 of the Bankruptcy Code, and outlines some of the negotiation and drafting strategies in a "defensive" DIP financing.

II. REASONS FOR PROVIDING "DEFENSIVE" DIP FINANCING

When the debtor's bankruptcy appears to be a likely occurrence, the pre-petition secured lender should begin its internal assessment whether to offer DIP financing to the debtor. That decision may be made easy, or difficult, depending upon the debtor's overall objectives in the Chapter 11 case and the pre-petition secured lender's assessment of the integrity and competence of the debtor's management. If the debtor's primary objective is to conduct an orderly sale of the business in the Chapter 11, and the pre-petition secured lender believes such a disposition to be consistent with its goals in realizing upon the collateral, the lender may be predisposed to provide the necessary DIP financing to achieve that purpose. If, on the other hand, the debtor's goal is to reorganize and the pre-petition secured lender believes that objective to be unachievable, the lender may be less inclined to offer any financing or may provide limited financing in the hope that, before the lender's collateral position has eroded too significantly in the Chapter 11 case, the debtor's deteriorating financial performance will convince the debtor's management, the committee and the bankruptcy court of the need for an orderly wind-down and sale of assets.

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In other cases, the pre-petition secured lender may feel that its position is well secured and that, irrespective of the debtor's goals under Chapter 11, the provision of financing is a relatively safe proposition and essential to warding off a potential priming lien or cash collateral fight.

Of course, it is frequently the case that the debtor and DIP lender have a shared perspective on rehabilitation of the business. For example, they may look upon Chapter 11 as an effective means to resolve a highly leveraged financial condition resulting from the debtor's issuance of pre-petition bonds or subordinated notes. In such a case, the lender may be highly confident that the debtor's reorganization efforts will be successful and, therefore, may be prepared to offer both DIP financing and (following confirmation of a reorganization plan) exit financing.

In a defensive DIP financing, the pre-petition secured lender as DIP lender will be influenced by a whole host of business, legal and financial considerations, including the following potential benefits to be derived from a DIP financing:

1. any use of cash collateral by the debtor will be restricted and regulated by the financing order;

2. the DIP lender will continue to receive collateral reports from the debtor and may retain dominion of cash;

3. the debtor may be required by the DIP financing agreement to remain "in formula" for both pre-petition and post-petition loans;

4. the DIP lender may be able to achieve a refinancing or "rollover" of the pre-petition loans in connection with the provision of DIP financing;

5. the DIP lender, through the financing order, may prevent, or limit the impact of, surcharges, priming liens and unfavorable reorganization plans;

6. through financial covenants, DIP lender may prevent an unchecked, downward spiral of the debtor's operations;

7. the debtor may be required to provide a mutually agreed upon level of adequate protection for the DIP lender's pre-petition liens and claims without the necessity of an adequate protection contest;

8. the debtor's authority to sell collateral outside the ordinary course of business may be limited by the DIP financing agreement and financing order; and

9. the DIP lender may negotiate a time period by which, if no challenges are raised to its pre-petition liens or claims, those liens and claims may be insulated from attack.

III. FINANCING OPTIONS UNDER 11 U.S.C. § 364

A. Overview of § 364

Section 364 of the Bankruptcy Code describes the conditions that must be satisfied for a debtor to incur post-petition debt and, when appropriate, grant a security interest in estate property. Four financing options are available under §364, each of which involves a progressively greater number of protections for the proposed DIP lender. As the protections afforded to the proposed DIP lender (and the correlative burdens upon the debtor's estate) increase, there is a corresponding increase in the burden upon the debtor to demonstrate to the bankruptcy court and interested parties the justification for such protections. The hierarchy of options is as follows:

(a) unsecured credit obtained in the ordinary course of business and allowable under § 503(b)(1) as an administrative expense;

(b) unsecured credit obtained outside of the ordinary course of business and allowable under § 503(b)(1) as an administrative claim;

(c) credit having a super-priority administrative expense status and/or secured by a junior lien on encumbered estate property or by a first lien on unencumbered estate property; and

(d) credit secured by a senior or equal lien on encumbered property.

This hierarchy is devised to encourage the debtor to make every effort to obtain credit by a means that imposes the least burden on the debtor's estate. Thus, the propriety of the debtor's obtaining financing under any one of these options is contingent upon the debtor's inability to obtain financing under an option that imposes less burdens upon the debtor's estate.[1]

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[1]See, *In re Snowshoe Co.*, 789 F.2d 1085 (4th Cir. 1986); *In re Reading Tube Industries*, 72 B.R. 329 (Bankr. E.D. Pa. 1987).

B. Credit With Superpriority Claim Status, Junior Liens on Encumbered Assets and/or Liens on Unencumbered Assets - § 364(c)

1. General

Section 364(c) provides that, if the debtor is unable to obtain unsecured credit under paragraphs (a) or (b) of § 364,[2] the bankruptcy court, after notice[3] and a hearing, may authorize the debtor to provide the DIP lender with additional credit enhancements, as follows:

(a) the conferral of so-called "superpriority" administrative expense status, having priority over all administrative claims set forth in §§ 503(b) and 507(b);

(b) the grant of a lien on estate property that is not otherwise subject to a lien; and/or

(c) the grant of a junior lien on estate property that is subject to a lien.

Section 364(c) of the Bankruptcy Code is the most frequently utilized statutory basis for a DIP financing. Subsection (c) of § 364, however, falls short of the power granted under subsection (d) in that it does not allow the debtor to interfere with or affect the rights of pre-petition secured creditors.[4]

2. Superpriority Claim Status Under § 364(c)(1)

Pursuant to § 364(c)(1), a court may grant a so-called "superpriority"

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[2] See *In re The Crouse Group, Inc.*, 71 B.R. 544 (Bankr. E.D. Pa. 1987) (financing denied because debtors did not demonstrate they had exhausted all sources of unsecured credit).

[3] See *In re Blumer*, 66 B.R. 109 (9th Cir. BAP 1986) (an *ex parte* order authorizing DIP financing secured by real estate mortgage was voided because creditors received no notice).

[4] "The priorities granted under this subsection [§ 364(c)] do not interfere with existing property rights." Report of the Committee on the Judiciary, Bankruptcy Law Revision, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 347 (1977) (hereinafter "House Report"); Report of the Committee On the Judiciary, Bankruptcy Reform Act of 1978, S. Rep. No. 95-989, 95th Cong., 2d Sess. 58 (1978) (hereinafter "Senate Report").

administrative expense status for credit extended to a debtor. The priority status is superior to both the § 503(b) administrative claim priority and the super-priority afforded a creditor under § 507(b) who receives adequate protection that is later determined to be inadequate. Therefore, § 364(c)(1) provides the DIP lender with a superior position to those who extend credit under either §§ 364(a) or (b) and pre-petition secured creditors for whom adequate protection of their pre-petition liens later proves to be insufficient.[5]

Despite its so-called superpriority claim status, some courts have ruled that a DIP financing protected under § 364(c)(1) is inferior to the priority status given to administrative expenses incurred in a Chapter 7 case to which a previously filed Chapter 11 case is converted.[6] DIP lenders on occasion will attempt to address this issue by including in the proposed form of financing order a provision that the § 364(c)(1) superpriority claim is superior to any administrative expenses incurred in a superseding Chapter 7 case. However, there do not appear to be any decisions passing upon the effectiveness of such a provision, and provisions that would purport to rearrange the priorities set forth in the Bankruptcy Code may be adjudged to be unenforceable.[7]

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[5]Where the debtor proposes to retain and use a secured creditor's collateral during the course of a bankruptcy case, the secured creditor is entitled to adequate protection of its interests in the estate property. 11 U.S.C. §§ 361 & 363. Where that protection later proves to be inadequate, a creditor may be entitled to recover the resulting loss in the value of its interest in the estate property as a superpriority administrative expense under 11 U.S.C. § 507(b).

[6]Section 726(b) provides that § 503(b) administrative expense claims which arise out of a Chapter 7 case subsequent to its conversion from another chapter have priority over any § 503(b) claims under any other chapter prior to conversion. A number of courts have held that this section essentially renders the Chapter 7 administrative expense a super-super priority claim having priority over claims under § 364(c). See, e.g., *In re Sun Runner Marine, Inc.*, 134 B.R. 4 (9th Cir. BAP 1991); *In re Visionaire Corp.*, 290 B.R. 348 (Bankr. E.D. Mo. 2003); *In re Samoa Airlines, Inc.*, 70 B.R. 352 (Bankr. D. Hawaii 1987); *In re Kaleidoscope of High Point, Inc.*, 56 B.R. 562 (Bankr. M.D.N.C. 1986). See also, *In re Blanton-Smith Corp.*, 81 B.R. 440 (Bankr. M.D. Tenn. 19874); *In re Island Aviation, Inc.*, 35 B.R. 20 (Bankr. D. Hawaii 1983). But see, *In re Energy Cooperative, Inc.*, 55 B.R. 957 (Bankr. N.D. Ill. 1985) (*dicta*).

[7]See *In re Visionaire Corp.*, 290 B.R. 348 (Bankr. E.D. Mo. 2003) (court modified final financing order pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, at Chapter 7 trustee's request following conversion of Chapter 11 case, to make clear that Chapter 7 administrative expenses were prior in right of payment to §364(c)(1) priority claim under financing order).

The grant of superpriority claim status under § 364(c)(1) also raises certain interesting questions regarding the timing of repayment of the DIP financing. Typically, the ultimate object of a Chapter 11 case is the rehabilitation of the debtor's business through the confirmation of a reorganization plan.[8] To satisfy the requirements of confirmation, a reorganization plan must call for the payment of all administrative claims in cash, in full, on the effective date of the plan unless the holder of the administrative claim agrees otherwise.[9] Hence, unless otherwise agreed by the DIP lender, a DIP financing will have to be paid in full on the confirmation of a reorganization plan. In those rare instance where a bankruptcy court allows the superpriority claim to extend to both the DIP lender's pre-petition claim and DIP financing, such a requirement provides the DIP lender with substantial leverage in connection with the confirmation of a reorganization plan.

3. Liens Granted Under § 364(c)(2) and (3)

Sections 364(c)(2) and (3) provide the option of securing the DIP financing with liens on estate property other than priming liens. Liens granted pursuant to these sections are subordinate to any liens in existence on the date of the commencement of the Chapter 11 case.

The DIP lender generally will not be concerned that the liens granted to secure the DIP financing are subordinate to its own pre-petition liens with respect to estate property in existence on the date of the commencement of the Chapter 11 case. In any event, the DIP lender who is also the pre-petition secured lender may consent to a priming lien to secure the DIP financing.

C. Credit Secured by Senior or Equal Liens on Encumbered Property - § 364(d)

1. General

As a final credit enhancement option, § 364(d) allows a bankruptcy court to

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[8]While rehabilitation of debtor's business is usually the objective of a Chapter 11 case, Chapter 11 cases may also be used for the purpose of pursuing an orderly liquidation of part or all of a debtor's assets. Thus, debtor may propose what is generally referred to as a liquidation plan. Some bankruptcy courts have been reluctant to allow the Chapter 11 process to be used for the purpose of an orderly liquidation prior to confirmation of a reorganization plan if the sole beneficiary of the process is to be a secured creditor holding a blanket lien upon substantially all estate assets.

[9]11 U.S.C. § 1129(a)(9)(A).

authorize a so-called priming lien, which is a lien having a priority senior to or equal with liens that existed on the date of the bankruptcy filing. A priming lien may only be granted upon a showing that:

(a) the debtor is unable to obtain financing under any other terms; and

(b) the interests of existing lienholders are adequately protected.

The debtor bears the burden of proof with regard to each of these issues.[10] Because a priming lien under § 364(b) has the effect of altering the priorities of pre-existing lienholders, the debtor's burden of proof for authorizing a lien under § 364(d) is a heavy one.

A DIP lender requesting a priming lien should insure that the financing order makes clear that the priming lien secures not only the DIP financing but also all fees, costs, and expenses incurred in connection therewith (including legal fees). Otherwise, the priming lien may not extend to all amounts that may be owed to the DIP lender under the DIP financing agreement.[11]

2. Inability to Obtain Financing on Other Terms

Section 364(d) expressly requires that the debtor be "unable to obtain such credit otherwise."[12] In order to satisfy this requirement of proof, evidence must be adduced to convince the bankruptcy court that diligent efforts were undertaken by the debtor to obtain DIP financing on less onerous terms than those associated with a priming lien. Parties to the potential DIP financing must present detailed testimony regarding efforts to obtain or negotiate alternative financing, including the identity of alternative financiers and

[10] 11 U.S.C. § 364(d)(2); see *In re Sky Valley, Inc.*, 100 B.R. 107 (Bankr. N.D. Ga. 1988), aff'd, 99 B.R. 117 (N.D. Ga. 1989).

[11] *In re Bono Development, Inc.*, 8 F.3d 720 (10th Cir. 1993) (DIP lender could not claim attorneys' fees as financing order allowed priming lien only for specified amount of DIP financing).

[12] See, e.g., *In re SGS Studio, Inc.*, 256 B.R. 580 (Bankr. N.D. Tex. 2000); *In re Reading Tube Industries*, 72 B.R. 329 (Bankr. E.D. Pa. 1987) (where debtor failed to approach any other lender, but relied solely upon testimony of its chairman that no other financing was available, the court found that debtor had failed to show "even minimal effort in seeking credit" and denied the priming lien).

the results of each effort.[13]

In evaluating this element of § 364(d), courts have approached the issue on a case-by-case basis, rejecting inflexible minimums or thresholds.[14] The amount of effort necessary to satisfy the requirements will likely depend on the type of loans sought, the industry and market for such loans and the most likely candidates for such loans given the community in which the debtor is located.[15]

3. Adequate Protection of Pre-Existing Lienholders

The most likely area of disagreement between the debtor and pre-existing lienholder whose interests are to be primed is the nature and extent of protection necessary to afford adequate protection of the lienholder's interests. Under § 364(d), the debtor has the burden of showing that the interests of pre-existing lienholders will be adequately protected in connection with the granting of any priming liens.[16] The concept of adequate protection is not unique to § 364(d). Courts applying the standard under § 364(d) often resort to the analysis employed under other Bankruptcy Code sections.[17] While generally adequate protection is considered to be a flexible concept subject to determination on a case-by-case basis, a consideration of this issue in the context of § 364(d), at minimum, should include the following:

(a) the existence of a "value cushion" (i.e., an excess of collateral value above the amount of the pre-existing liens to be primed);[18]

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[13] See *In re Phase-I Molecular Toxicology, Inc.*, 285 B.R. 494 (Bankr. D.N.M. 2002).

[14] Compare *In re Sky Valley, Inc.*, 100 B.R. 107 (Bankr. N.D. Ga. 1988), aff'd, 99 B.R. 117 (N.D. Ga. 1989) (debtor approached only four potential DIP lenders) and *In re Ames Dept. Stores, Inc.*, 115 B.R. 34 (Bankr. S.D.N.Y. 1990) (debtor contacted four potential DIP lenders) with *In re Beker Industries, Inc.*, 58 B.R. 725 (Bankr. S.D.N.Y. 1986) (debtor contacted 20 potential DIP lenders after bankruptcy filing).

[15] See, e.g., *In re Sky Valley, Inc.*, 100 B.R. 107 (Bankr. N.D. Ga. 1988), aff'd, 99 B.R. 117 (N.D. Ga. 1989).

[16] *In re 495 Cent. Park Ave. Corp.*, 136 B.R. 626 (Bankr. S.D.N.Y. 1992).

[17] See *In re Sky Valley, Inc.*, 99 B.R. 117 (N.D. Ga. 1989); *In re Stanley Hotel*, 15 B.R. 660 (D. Colo. 1981); *In re Stratbucker*, 4 B.R. 251 (Bankr. D. Neb. 1980).

[18] See *In re Phoenix Steel*, 39 B.R. 218 (D. Del. 1984); *In re Snowshoe Co.*, 789 F.2d 1085 (4th Cir. 1986).

(b) the amount of the debt secured by the priming lien in comparison to the value cushion and the amount of the pre-existing liens;[19]

(c) the terms of repayment of the proposed financing to be secured by the priming lien;[20]

(d) the intended purpose of the financing to be secured by the priming lien, such as the enhancement or preservation of the estate property that secures the pre-existing liens;[21]

(e) the provision to the affected lienholder of an additional or replacement lien;[22] and

(f) the debtor's financial performance and the prospects for a successful reorganization.[23]

Courts have frequently approved priming liens in circumstances where a large value cushion exists in relationship to existing liens and the proposed amount of the priming loan.[24] Nevertheless, the existence of a value cushion alone may not necessarily

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[19]See *In re Dunes Casino Hotel*, 69 B.R. 784 (Bankr. D.N.J. 1986) (court approved a priming lien given the existence of an equity cushion in the amount of $26.2 million and the size of the loan, i.e., $700,000).

[20]See *In re Sky Valley, Inc.*, 100 B.R. 107 (Bankr. N.D. Ga. 1988), aff'd, 99 B.R. 117 (N.D. Ga. 1989).

[21]See *In re First South Savings Assn.*, 820 F.2d 700 (5th Cir. 1987); *In re Southerton Corp.*, 46 B.R. 391 (M.D. Pa. 1982); *In re Sky Valley, Inc.*, 100 B.R. 107 (Bankr. N.D. Ga. 1988), aff'd, 99 B.R. 117 (N.D. Ga. 1989).

[22]See *In re Beker Indus. Corp.*, 58 B.R. 725 (Bankr. S.D.N.Y. 1986); *In re Besler*, 19 B.R. 879 (Bankr. D.S.D. 1982).

[23]See *In re Aqua Associates*, 123 B.R. 192 (Bankr. E.D. Pa. 1991).

[24]See *In re Dunes Casino Hotel*, 69 B.R. 784 (Bankr. N.J. 1986); *In re Phoenix Steel Corp.*, 39 B.R. 218 (D. Del. 1984). See also *In re Snowshoe Co.*, 789 F.2d 1085 (4th Cir. 1986). Contra, *In re Alyucan Interstate Corp.*, 12 B.R. 803 (Bankr. D. Utah 1981). Whether or not an equity cushion will constitute "adequate protection" to existing lien creditors must be determined on a case-by-case basis. *In re C.B.G. Ltd.*, 150 B.R. 570 (Bankr. M.D. Pa. 1992).

result in a finding of adequate protection.[25] The bankruptcy court may consider erosion of the value cushion as a result of the accrual of interest and fees on the priming loan, the threat of depreciation in value of the property over time, the intended use of the loan, the prospect of any increase or maintenance in the value of the property as a result of the priming loan and the general prospects for a successful reorganization of the debtor.

A finding of adequate protection for a secured creditor whose interest is to be primed by a senior lien securing DIP financing should be premised on facts or on projections that are grounded on a firm evidentiary basis. Accordingly, it has been held that speculative benefits to an undersecured creditor from the Chapter 11 debtor's successful development of real estate did not provide the required level of "adequate protection" for the undersecured creditor's interest because any increase in value as a result of development was dependent upon a whole host of contingencies, including procuring necessary permits and obtaining adequate financing for the development.[26]

A major difficulty in determining adequate protection lies in the vagaries of calculating the present and future value of estate property. In part, the determination of value depends upon the threshold question of what valuation method should be employed. The standard of valuation for determining adequate protection is not specified under § 364(d). In most cases, existing lienholders will argue for the use of a liquidation value on the grounds that the true test of adequate protection only occurs in liquidation when the existing lienholder's interest is exposed to the greatest threat of impairment. The debtor will often urge that a "going concern value" of the collateral be employed on the grounds that the DIP financing will provide the necessary assistance to rehabilitate the debtor and obtain the greatest return on the collateral. Other valuation methodologies that may be advanced include the book value of property, fair market value, auction value or a value derived from

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[25] See *In re Aqua Associates*, 123 B.R. 192 (Bankr. E.D. Pa. 1991); *In re C.B.G. Ltd.*, 150 B.R. 570 (Bankr. M.D. Pa. 1992) (equity cushion below 20% does not provide "adequate protection to existing creditors' liens in partially developed real estate).

[26] *In re Mosello*, 195 B.R. 277 (Bankr. S.D.N.Y. 1996). But see, *In re Bono Development, Inc.*, 8 F.3d 720 (10th Cir. 1993) ($87,500 priming loan authorized for emergency winterization, preservation and maintenance); *In re Hubbard Power & Light*, 202 B.R. 680 (Bankr. E.D.N.Y. 1996) (priming loan to clean up real property so that it was in compliance with state law was allowed over objection of county holding lien on property to secure $1,000,000 incurred by county in fighting fire on real estate, where evidence showed value of county's lien was between $0 and (at best) $275,000).

See *In re Phoenix Steel Corp.*, 39 B.R. 218 (D. Del. 1984) (fair market value used for debtor's inventory where debtor's plan was to find a purchaser for its business).

a combination of some or all of the foregoing.[27]

The valuation standards adopted by courts under § 364(d) differ from case to case, leaving this issue essentially unresolved.[28] As a result, litigants are free to urge whatever valuation best fits their respective positions. However, the selection of a valuation method under § 364(d) is not without its risks. As a practical matter, the valuation method urged early in the case may have an impact on the treatment of a claim or the valuation of collateral at a later point. Accordingly, the selection of a valuation method should be considered with an eye towards other issues, including, but not limited to, recovery of post-petition interest and attorneys' fees,[29] relief from the stay, use of cash collateral and "cram down" in connection with a reorganization plan.

A pre-existing lienholder with notice that its lien is to be primed should take timely and appropriate steps to register any objection it has to the proposed priming lien. Otherwise, the lienholder may be deemed to have waived its rights to obtain adequate protection as a condition to the court's approval of the priming lien.[30] However, at least one case held that a DIP lender was not authorized to rely upon a court order approving a priming lien when the order did not explicitly find that the pre-existing lienholder's interests were adequately protected, even though the lienholder did not object to the

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[27] See, e.g., *Associates Commercial Corp. v. Rash*, 117 S. Ct. 1879, 520 U.S. 953 (U.S. 1997) (replacement cost is the proper valuation standard to be used in the context of cram down of a Chapter 13 plan, but the Bankruptcy Code provides that different valuation standards may be used in different circumstances "in light of the purpose of the valuation and of the proposed disposition or use of such property"); *In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017 (11th Cir. 1984) (an undersecured creditor, which provided floor-plan automobile financing to the debtor prior to bankruptcy, was entitled to receive from the debtor's post-petition sale of automobiles only the wholesale value, rather than the retail value, as adequate protection because the amount that the creditor would receive by its commercially reasonable means of disposition would be the wholesale value).

[28] Compare *In re Phoenix Steel Corp.*, 39 B.R. 218 (D. Del. 1984) (mean of liquidation value and going concern value) with *In re Beker Indus. Corp.*, 58 B.R. 725 (Bankr. S.D. N.Y. 1986) (going concern value approved).

[29] Section 506(b) of the Bankruptcy Code limits the recovery of post-petition interest and attorneys' fees on a pre-petition claim to instances in which the creditor's claim is oversecured.

[30] See, e.g., *In re Sky Valley, Inc.*, 99 B.R. 117 (N.D. Ga. 1989).

financing order that authorized the priming lien.[31]

IV. NEGOTIATION AND DRAFTING STRATEGIES

A. Retrading the Deal

The savvy DIP lender realizes that it will likely have to negotiate the terms of the proposed DIP financing on two occasions. The first negotiation will take place with the debtor (and possibly the U.S. Trustee) and will resolve most of the terms of the proposed financing. Round two of the negotiations usually occurs after entry of the interim financing order and the appointment of a committee. The committee's counsel will often seek revisions to the DIP financing agreement and the financing order in order to more fully protect the interests of unsecured creditors.[32] To gain negotiating leverage, the committee may object or threaten to object to those provisions in the DIP financing that protect or enhance the DIP lender's pre-petition liens and claims and that were the motivating factor for the DIP lender's willingness to provide the financing. At times, the negotiations between counsel for the DIP lender and counsel for the committee can approach a level of brinksmanship, with the DIP lender threatening to pull the proposed financing and object to use of cash collateral if the bankruptcy court sustains the committee's objections and the committee professing indifference "if there's nothing in it for the unsecured creditors."

In many cases, the debtor will appear to be a "soft sell" on some of the more controversial terms that the DIP lender may seek to include in the DIP financing agreement and financing order and that are discussed below. Recognizing that the committee will have a "second bite" on most of these issues, the debtor's counsel may simply defer the matter for negotiation by the committee's counsel. While most counsel for debtors will seek to press many of these points to conclusion in round one of the negotiations, the reality is that the committee's counsel will have another opportunity to negotiate the same issues. Hence, it is not uncommon for the DIP lender's counsel to hold on to a few terms that it can "give up" in final negotiations with the committee.

B. Term of DIP Financing

In some Chapter 11 cases, the length of the committed term of the DIP financing will be one of the most negotiated terms of the proposed credit facility. From the DIP lender's perspective, the term of the DIP financing should be driven by the debtor's cash flow

[31] *In re T. M. Sweeney & Sons LTL Services, Inc.*, 131 B.R. 984 (Bankr. N.D. Ill. 1991).

[32] In many jurisdictions, the U.S. Trustee will review and provide at least preliminary comments on the proposed DIP Financing prior to entry of the interim financing order.

projections and a realistic estimate of the time within which the debtor can achieve its stated business objectives in the Chapter 11, whether those objectives entail a rehabilitation of the business or a sale of all or a substantial part of the debtor's assets as a going concern. The size of the case (in terms of assets, liabilities and number of creditors), the complexity of the issues presented and the backlog of cases in the district where the Chapter 11 case is filed will affect the estimated length of the case. The debtor's 120-day exclusivity for filing a reorganization plan is a factor to be considered, but it is commonplace for the exclusivity period to be extended on successive occasions, absent serious objections from a substantial constituency in the case. While taking into account all of those considerations, the DIP lender may also wish to provide a disincentive to the debtor's procrastination in moving ahead expeditiously with implementation of its stated goals.

A shorter committed term may be offered in so-called "prepackaged" or "pre-planned" Chapter 11 cases, but in such cases the DIP lender generally makes available a commitment to provide exit financing as well.

The duration of the DIP financing will also affect the amount of fees that the DIP lender may be able to charge for the financing. The shorter the term, the greater the difficulty the DIP lender will encounter in justifying a large closing fee.

The committee will review the term of the proposed financing primarily to insure that it provides ample time for the debtor to reorganize or effect a sale of its assets as a going concern. In DIP financings that provide for prepayment fees or early termination charges, the committee may urge a shorter term if it believes that the Chapter 11 case is likely to be concluded prior to the committed term of the credit facility that is offered by the DIP lender.

Notwithstanding the term of the financing, the DIP financing agreement and financing order should provide that all commitments to provide financing will terminate and all outstanding credit under the DIP financing will mature on the sale of all or substantially all of the debtor's assets pursuant to § 363 of the Bankruptcy Code or upon confirmation of a reorganization plan. Upon confirmation of a reorganization plan, unless otherwise provided in the plan itself or the confirmation order, all property of the estate is vested in the reorganized debtor pursuant to § 1141(b) of the Bankruptcy Code, which changes the landscape to the extent that the DIP lender will not want to be committed to lend under a pre-confirmation DIP facility.

C. Scope of Collateral

Most courts are unhesitant in allowing a DIP lender to obtain, as security for its DIP financing, a lien upon virtually all estate property. As a general rule, therefore, forward cross-collateralization is permitted for DIP financings, meaning that the DIP financing may be secured by estate property in existence prior to the commencement of the Chapter 11 case petition as well as estate property created, acquired or arising post-petition. On the other hand, so-called "backward cross-collateralization," which is discussed below, may not be approved by the bankruptcy court.

The only limitation that some courts will place on the scope of the estate property to secure DIP financing is that such financing may not be secured by avoidance claims or the proceeds of avoidance recoveries.[33] There are two reasons advanced for the disinclination to allow a debtor to encumber avoidance claims or recoveries. The first articulated reason is that the debtor's estate should not expend its efforts, including professional expenses, to recover on avoidance claims solely for the benefit of a secured creditor, even if the secured creditor is the DIP lender. A corollary principle is that a Chapter 11 reorganization case should assure that there is some benefit for unsecured creditors, and that benefit may consist solely of recoveries on avoidance claims. A second articulated reason is that the encumbrance of avoidance claims results in a lien upon collateral that may not be enforceable by the DIP lender for lack of standing to prosecute the claims absent a showing that the prosecution will benefit the estate generally.[34]

D. Priority of Liens

As noted earlier, the DIP financing may be secured by liens on unencumbered property, by junior liens on property that is encumbered at the time of the DIP financing, and by priming liens on estate property that is encumbered. Restrictions in pre-petition agreements entered into by the debtor that would condition or prohibit the debtor from granting liens on its assets will not be effective to prevent the granting of liens on estate property pursuant to § 364 of the Bankruptcy Code.

In cases where the DIP lender is also the pre-petition secured lender to the debtor, the DIP lender may bargain for, as security for the DIP financing, a first priority security interest

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[33] While court-approved liens on avoidance claim recoveries as security for DIP financings are not uncommon, see *In re Tennessee Wheel & Rubber Co.*, 64 B.R. 721 (Bankr. M.D. Tenn. 1986), courts have consistently held that such claims are not subject to pre-petition security interests or other liens. See, e.g., *In re Thompson Boat Co.*, 252 F.3d 852 (6th Cir. 2001) (pre-petition liens on property of the debtor did not attach to post-petition preference proceeds recovered by a bankruptcy trustee); *In re Sun Island Foods, Inc.*, 125 B.R. 615 (Bankr. D. Haw. 1991).

[34] See, e.g., *In re Qualitech Steel Corp.*, 2003 WL 21314073 (S.D. Ind. 2003) rev'd sub nom. *Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290 (7th Cir. 2003) (under the circumstances, pursuit of avoidance actions by secured lenders was warranted by benefit obtained by the estate from the post-petition loans from the secured lenders).

upon all unencumbered assets, and a junior security interest in all other assets that were in existence on the date of commencement of the Chapter 11 case and that were otherwise encumbered by valid, duly perfected, and unavoidable liens. Where the DIP lender is successful in obtaining a so-called "rollover," the DIP lender usually will not require that the liens given to it for the DIP financing prime its pre-petition liens. However, if there is a pre-petition security interest, junior to that of the DIP lender's pre-petition liens, which encumbers a substantial amount of the estate property, that security interest will likely be elevated to a first priority position with respect to any remaining assets subject to such lien or subject to any adequate protection lien granted during the Chapter 11 case. As a result, after payment in full of the DIP lender's pre-petition claim, the DIP financing would be secured by liens subordinate to the pre-petition liens of the junior secured party. Hence, the DIP lender may require the junior secured party to subordinate the priority of its security interest or seek a priming lien *vis-à-vis* the liens of the junior secured party. If the DIP lender and the pre-petition junior secured creditor were parties to a pre-petition intercreditor agreement that subordinated the junior secured creditor's liens to any and all liens at any time granted in favor of the DIP lender (including liens granted during the pendency of any bankruptcy case), then the DIP lender may have properly positioned itself prior to the commencement of the Chapter 11 case to provide the DIP financing without concern that a rollover will elevate to a first position the lien of the junior secured creditor.[35]

E. Cross-Collateralization

The term "backward cross-collateralization" is sometimes used to refer to the debtor's use of post-petition estate property to secure a DIP lender's pre-petition claim as part of the consideration for extending DIP financing to the debtor.[36] In *In re Texlon Corp.*,[37] a Bankruptcy Act case, the Second Circuit ruled that bankruptcy courts may not authorize cross-collateralization of a pre-petition claim on an *ex parte* basis. The court left unanswered when (if ever) backward cross-collateralization is appropriate. Many cases since *Texlon* have permitted cross-collateralization of a pre-petition claim when appropriate notice is given and when the record confirms that (1) absent the proposed financing, the debtor will not survive, (2) the debtor is unable to obtain alternative financing on acceptable terms, (3) the proposed DIP lender refuses to lend on less preferential terms, and (4) the proposed financing is in

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[35]See *In re Amret, Inc.*, 174 B.R. 315 (M.D. Ala. 1994) (application of clear and unambiguous pre-petition subordination agreement resulted in subordination of post-petition debt and claim).

[36]See *In re Beker Indus. Corp.*, 58 B.R. 725 (Bankr. S.D.N.Y. 1986) (approval of both pre-petition and post-petition debt cross-collateralization).

[37]596 F.2d 1092, 1098 (2d Cir. 1979).

the best interest of the general creditor body.[38] Once cross-collateralization is properly noticed and approved, courts have been willing to protect the financing arrangements.[39]

Many practitioners believe that backward cross-collateralization is prohibited in the Eleventh Circuit (Georgia, Florida and Alabama) under all circumstances by virtue of the Eleventh Circuit's decision in *In re Saybrook Mfg. Co.*[40] In *Saybrook*, the debtors owed the bank approximately $34,000,000. The claim of the bank was secured by collateral having a value less than $10,000,000. Therefore, the bank's claim was undersecured by $24,000,000. Pursuant to the financing order, the bank agreed to provide up to $3,000,000 in DIP financing to the debtors, in exchange for which the bank was granted a security interest in all of the debtors' pre-petition and post-petition assets to secure both the $3,000,000 in DIP financing and the bank's $34,000,000 pre-petition claim. The Eleventh Circuit found that this arrangement "enhanced [the bank's] position *vis-a-vis* other unsecured creditors . . . in the event of liquidation."[41] It reasoned that, "because the bank's pre-petition debt was

[38]See *In re Roblin Industries, Inc.*, 52 B.R. 241, 244 (Bankr. W.D. N.Y. 1985). See also, *In re FCX, Inc.*, 54 B.R. 833, 841 (Bankr. E.D.N.C. 1985) (permitting cross-collateralization to allow operations to continue); *In re Tom McCormick Enterprises, Inc.*, 26 B.R. 437 (Bankr. M.D. Tenn. 1983); *In re General Oil Distributors, Inc.*, 20 B.R. 873 (Bankr. E.D.N.Y. 1982) (permitting cross-collateralization where cross-collateral rights applied only to accounts receivable); *In re Borne Chemical Co.*, 9 B.R. 263 (Bankr. D.N.J. 1981) (permitting cross-collateralization and the granting of superpriority administrative expense status to pre-petition debt); *In re Tri-Union Development Corp.,* 253 B.R. 808, 814 (Bankr. S. D. Tex. 2000) (while it is generally improper for a debtor to "cross-collateralize or 'refinance and re-collateralize' a prepetition secured debt," this principle does not prevent payment of cash collateral to secured creditor to reduce pre-petition claim). Cf. *In re Antico Mfg.*, 31 B.R. 103 (Bankr. E.D.N.Y. 1983) (approving collateralization of post-petition indebtedness with pre-petition collateral). But see, *In re Monach Circuit Industries, Inc.*, 41 B.R. 859 (Bankr. E.D. Pa. 1984) (suggesting that cross-collateralization of pre-petition debt with post-petition collateral may be *per se* impermissible).

[39]See *Khan & Nate's Shoes No. 2 v. First Bank of Whiting*, 908 F.2d 1351, 1355 (7th Cir. 1990) (where debtor sought to set aside financing order and subordinate DIP lender's interest, court stated, in *dicta*, that debtor should not be allowed to modify financing order after a DIP lender's reliance thereon); *In re Ellingsen MacLean Oil, Inc.*, 98 B.R. 284, 289-94 (Bankr. W.D. Mich. 1989) (preference recoveries and partnership distributions were held to be within the description "all of the property of these estates and all proceeds thereof" in the agreed financing order and, therefore, subject to the liens granted to the DIP lenders).

[40]963 F.2d 1490 (11th Cir. 1992).

[41] Id. at 1491

undersecured by approximately $24,000,000, it originally would have shared in a pro rata share distribution of the debtors' assets along with the other unsecured creditors."[42] As a result of the backward cross-collateralization, however, the bank's pre-petition claim "became fully secured by all of the debtors' assets."[43] On these facts, the Eleventh Circuit concluded that such cross-collateralization was impermissible, as being beyond the scope of the bankruptcy court's "inherent equitable power because it is directly contrary to the fundamental priority scheme of the Bankruptcy Code."[44]

While cross-collateralization for a pre-petition claim has been approved in some cases outside of the Eleventh Circuit,[45] vigorous debate continues regarding the appropriateness of the arrangement.[46] However, if the DIP lender's pre-petition claim is indisputably oversecured, then cross-collateralization will not result in an impermissible

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[42] Id.

[43] Id.

[44] Id. at 1495. It is not clear whether the *Saybrook* court intended to disallow backward cross-collateralization in cases where the pre-petition secured lender's claim is indisputedly oversecured. In those circumstances, the "fundamental priority scheme" of the Bankruptcy Code is not altered, as such cross-collateralization does not improve the position of the pre-petition secured lender at the expense of other creditors.

[45] See, e.g., *Matter of Keystone Camera Products Corp.*, 126 B.R. 177 (Bankr. D.N.J. 1991); *In re FCX, Inc.*, 54 B.R. 833 (Bankr. E.D.N.C. 1985); *In re Roblin Industries, Inc.*, 52 B.R. 241 (Bankr. W.D.N.Y. 1985); *In re Vanguard Diversified, Inc.*, 31 B.R. 364 (Bankr. E.D.N.Y. 1983); *In re Borne Chemical Co.*, 9 B.R. 263 (Bankr. D.N.J. 1981).

[46] Compare Tabb, "Emergency Preferential Orders in Bankruptcy Reorganizations," 65 Am. Bankr. L.J. 75 (1991) (opposes cross-collateralization); Tabb, "A Critical Reappraisal of Cross-Collateralization in Bankruptcy," 60 S. Cal. L. Rev. 109 (1986) (opposes cross-collateralization across the board), and Comment, "Initial Financing Restrictions in Chapter XI Bankruptcy Proceeding," 78 Colum. L. Rev. 1683, 1693-95 (1978) (same), with Bohm, "The Legal Justification for the Proper Use of Cross-Collateralization Clauses in Chapter 11 Bankruptcy Cases," 59 Am. Bankr. L.J. 289 (1985) (approves of Cross-Collateralization practice); Weintraub & Resnick, "Cross-Collateralization of Prepetition Indebtedness as an Inducement for Post-Petition Financing: A Euphemism Comes of Age," 14 U.C.C. L.J. 86, 89-90 (1981) (same), and Ordin, "*In re Texlon Corp.*: Finality of Order of bankruptcy court," 54 Am. Bankr. L.J. 173, 177-78 (1980) (same).

improvement in the DIP lender's pre-petition position and should be approved.[47]

F. Use of Proceeds and the "Rollup"

The DIP financing agreement, as well as the financing order, may contain DIP lender-imposed restrictions on the debtor's use of proceeds from the DIP financing. As a general rule, proceeds from the DIP financing may be used to pay expenses incurred by the debtor in the ordinary course of its business during the pendency of the Chapter 11 case. On occasion, the DIP lender may seek to limit the debtor's use of proceeds to categories of expenses shown on a budget and in amounts that do not exceed (or exceed by only a certain percentage) those shown on the budget.

If the DIP lender has issued letters of credit prior to the commencement of the Chapter 11 case, the DIP lender may wish to insert provisions in the financing order authorizing the disbursement of proceeds under the DIP financing to satisfy the debtor's reimbursement obligations with respect to letters of credit drawn upon after the petition date.

DIP financing proceeds typically may not be used to pay any pre-petition claim, other than the claims of certain "critical vendors" and, in certain circumstances, the pre-petition secured claim of the DIP lender. Sometimes referred to as a "rollup," the retirement of a pre-petition secured claim with proceeds of a DIP financing is sanctioned in some jurisdictions when the DIP lender's pre-petition secured claim is demonstrably oversecured, the rollup does not occur until after the entry of the final financing order, the committee does not object and the likelihood of a successful reorganization appears to be high (as, for example, when the Chapter 11 case is "pre-packaged" or a reorganization plan has been negotiated with the major constituents prior to filing). There are, however, some potential disadvantages to a rollup, which are discussed later in this paper.

Further, the DIP lender who is also the pre-petition lender may wish to prohibit the use of proceeds to pay professionals in challenging the pre-petition liens or claims of the pre-petition lender. Some bankruptcy courts disallow such restrictions on the use of proceeds to pay professionals of the committee in connection with their initial investigation into the validity of the pre-petition lender's loan documents or the validity, priority, extent or avoidability of the pre-petition lender's liens. In other words, usually, a committee will be permitted to use some proceeds of loans or collateral, subject to a cap, to perform a pre-litigation investigation of the pre-petition lender's liens and claims.

[47]See, e.g., *In re FCX, Inc.*, 54 B.R. 833 (Bankr. E.D. N.C. 1985).

G. The "Dive"

In bankruptcy parlance, the term "dive" refers to a provision in a financing order by which the debtor stipulates to, and agrees not to challenge, the validity, enforceability, or perfection of the pre-petition lender's liens and claims and acknowledges and agrees that there are no offsets, defenses, or counterclaims that could be asserted against the claims of the pre-petition secured lender. The DIP lender's purpose in requiring a dive is to lay to rest all potential disputes regarding its pre-petition liens and claims as part of the *quid pro quo* for the DIP financing. From the DIP lender's perspective, neither the debtor nor other creditors of the debtor's estate can reasonably expect the DIP lender to increase its exposure to the debtor through DIP financing when the debtor and the committee retain the right to challenge its pre-petition liens and claims.

Opponents of the dive argue that the DIP lender's desire for certainty with respect to its pre-petition liens and claims must be balanced against the potential for abuse by a DIP lender that seeks to eliminate substantial claims by offering DIP financing in limited amounts or for a relatively short term. In at least one early decision under the Bankruptcy Code, the bankruptcy court refused to approve the dive in the face of objection on the grounds that a purported waiver of defenses was in the nature of a settlement, which could only be approved on a proper showing and that the adjudication of the validity, priority, and extent of the pre-petition lender's liens and claims required an adversary proceeding.[48] In addition, the court suggested that granting blanket waivers of unspecified rights in the early stages of a complex case might violate the debtor's fiduciary duties to the creditors of the estate.

Over time, the practice has developed in many courts to permit the dive, but with full reservation of rights to the committee to challenge the pre-petition liens and claims of the DIP lender within a specified period of time (say, 60 days after the committee's appointment), failing which the pre-petition liens and claims of the DIP lender are forever "blessed." Such a procedure was sanctioned in *In re FCX, Inc.*,[49] where the court approved the dive, but granted the committee 60 days within which to assert claims against the DIP lender and 30 days within which to object to the validity of the DIP lender's pre-petition claim.

H. Adequate Protection and the "Rollover"

If the DIP lender is also the pre-petition lender, the DIP lender will usually attempt to include in the financing order various provisions affording adequate protection of its interests

[48] *In re Roblin Industries, Inc.*, 52 B.R. 241 (Bankr. W.D. N.Y. 1985).

[49] 54 B.R. 833 (Bankr. E.D. N.C. 1985).

as pre-petition secured lender in estate property in existence on the date of commencement of the Chapter 11 case. Those protections may include the granting of a replacement lien on estate property that is created, acquired or arising after the commencement of the Chapter 11 order to protect against any diminution in the value of the pre-petition lender's interests in estate property in existence on the date of bankruptcy resulting from the debtor's use, sale or other consumption of such estate property. The DIP lender will seek to include in the financing order a provision to the effect that, if the protection afforded the DIP lender's pre-petition liens proves to be inadequate, then to the extent of any diminution in the value of the pre-petition liens, the DIP lender is entitled to a superpriority claim under § 507(b) of the Bankruptcy Code.[50]

In addition, the DIP lender may bargain for the right to apply proceeds of pre-petition accounts receivable and inventory to the pre-petition claim of the pre-petition lender. If the DIP financing is essentially a continuation of a pre-petition asset-based lending arrangement, the effect of applying proceeds of pre-petition collateral to the pre-petition claim will be to create availability under the DIP financing arrangement and to "roll over" the pre-petition claim into a post-petition claim enjoying cross-collateralization and superpriority claim status.

In many jurisdictions, a component of adequate protection may include payment of interest accruing during the pendency of the Chapter 11 case with respect to the pre-petition claim of the pre-petition secured lender, provided that the pre-petition claim is oversecured. Under § 506(b) of the Bankruptcy Code, interest may be paid on a pre-petition claim only to the extent and for so long as the pre-petition claim is oversecured. The holder of a pre-petition claim that is undersecured is not entitled to receive interest, fees or other charges accruing after the date of the commencement of the Chapter 11 case.[51]

While a "rollup" results in the immediate repayment of a pre-petition secured claim, a "rollover" may result in the retirement in full, over time, of the pre-petition claim of the pre-petition secured lender. While there are benefits to a complete "rollover," as noted above, there are also some potential disadvantages. First, a complete rollover (as well as an

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[50]*LNC Investments v. First Fidelity Bank,*247 B.R. 38 (S.D.N.Y. 2000) (allowing superpriority claim under § 507(b) in the amount that the debtor's collateral usage during the period of the automatic stay diminished the value of the collateral, but only to the extent that such diminution exceeded the adequate protection received the lender).

[51] In the Court of Appeals for the Eleventh Circuit (which comprises Georgia, Florida and Alabama), interest may accrue, but may not be paid, on a pre-petition claim that is oversecured until the end of the case. *In re Delta Resources, Inc.*, 54 F.3d 722 (11th Cir. 1995).

immediate rollup) may result in the loss of benefits of a pre-petition debt subordination, by which a pre-petition creditor has subordinated its claim to the payment in full of the claim of the pre-petition secured lender. The existence of subordinated debt may, in certain circumstances, facilitate confirmation of a reorganization plan. In addition, a complete rollover (as well as an immediate rollup) will take away the pre-petition secured lender's ability to cast a vote with respect to the debtor's reorganization plan. The DIP lender's claim for DIP financing is an administrative claim, is not subject to classification (see §1123 (a)(1)), and may not be voted with respect to the reorganization plan. The pre-petition secured lender's voting of its pre-petition claim may be essential, in some Chapter 11 cases, to satisfaction of the requirement under § 1129 of the Bankruptcy Code that at least one impaired class of claims votes to accept the reorganization plan.

I. Events of Default

In addition to the defaults typically included in financing agreements in a non-bankruptcy context, a well drafted DIP financing agreement will contain a number of bankruptcy-related defaults. Those bankruptcy-related defaults generally include the appointment of a trustee,[52] the appointment of an examiner with expanded powers, the dismissal of the Chapter 11 case, the conversion of the Chapter 11 case to Chapter 7, the reversal or modification of the financing order on appeal or otherwise, the stay of the financing order on appeal, or the failure of the bankruptcy court to enter the final order on or before a specified date (say, 45 days after entry of the interim financing order).

Some of the more controversial defaults include those based upon any challenge by any interested party (including the debtor or the committee) to the pre-petition liens or claims of the DIP lender, the granting of relief from stay in favor of third parties holding liens upon any of the estate property securing the DIP financing, the entry of any order authorizing the debtor's use of cash collateral after default, the entry of an order authorizing the conferral of a priming lien upon any of the estate property except as otherwise allowed by the DIP financing agreement, the filing of a motion to sell all or a substantial part of estate property subject to the lien of the DIP financing on terms that are not acceptable to the DIP lender, the failure of the debtor to meet a deadline for the sale of estate assets,[53] or the filing of any reorganization plan by the debtor or any other interested party containing terms of payment with respect to the pre-petition claims of the DIP lender on terms that are unacceptable to the

[52]*In re Ames Department Stores, Inc.*, 115 B.R. 34 (Bankr. S.D.N.Y. 1990) (financing order would not be approved where appointment of a trustee or examiner was a default, thereby entrenching existing management).

[53]See *In re Farmland Industries, Inc.*, 294 B.R. 855 (Bankr. W.D. Mo. 2003).

DIP lender.[54] The committee will likely argue, and the bankruptcy court may find, that some of these provisions confer an undue degree of "case control" upon the DIP lender.[55]

J. Professional Fees and the "Carve-Out"

The fees and expenses of professional persons retained by the debtor and each committee are paid from assets of the debtor's asset, subject to bankruptcy court approval after notice and a hearing. If approved, professional fees and expenses are entitled to administrative priority under § 503(b) of the Bankruptcy Code. If, however, the assets of the debtor's estate are fully encumbered, either by pre-petition liens or liens securing a DIP financing, then there is a substantial risk that professionals will not be paid if a default occurs and estate assets must be liquidated to satisfy pre-petition liens and the DIP financing.

Although there is no express requirement in the Bankruptcy Code to do so,[56] the practice has developed in most jurisdictions for DIP lenders to agree to carve out from the estate property securing the DIP financing (and to provide a similar carve out from the pre-petition liens) a specified amount for the allowed fees and expenses of professional persons.[57] In cases where the DIP financing is afforded to superpriority claim status, the carve-out should also extend to subordinate the superpriority claim to the allowed fees and expenses of professionals.[58] Absent the provision of a carve-out, the debtor may be unable to attract competent professionals to represent it during the case and the committee may argue that it is severely inhibited in its ability to obtain effective representation. Indeed, some bankruptcy courts view a carve-out or other set aside for professional persons as

[54]Id.

[55]*In re Tenney Village Co.*, 104 B.R. 562, 567-68 (Bankr. D.N.H. 1989) (rejecting provision authorizing DIP lender to terminate financing upon confirmation of a plan over the lender's rejection, which would practically give the lender "the ultimate say over the goal of [the] Chapter 11 case").

[56] See, e.g., *In re Hotel Syracuse, Inc.*, 275 B.R. 679 (Bankr. N.D. N.Y. 2002) (rejecting committee's argument that a carve-out for the debtor's counsel, but not for the committee counsel, violated the priority scheme in the Bankruptcy Code and effectively denied certain constituency's effective legal representation).

[57]See *In re IBI Security Service, Inc.*, 133 F.3d 205, 208 at n.4 (2d Cir. 1998).

[58]See *In re Flagstaff Foodservice Corp.*, 739 F.2d 73 (2d Cir. 1984) (superpriority claim under § 364(c) is superior to claim for professional fees under § 330 of the Bankruptcy Code).

essential to ensure that professional persons will be actively engaged in the case, the debtor and committee will be vigorously represented and the adversary system contemplated by the Bankruptcy Code will be preserved.[59]

If the DIP financing is an asset-based lending arrangement, then the DIP lender will normally reserve the amount of the carve-out from the debtor's borrowing availability. Hence, as long as the carve-out does not unduly restrict borrowing availability, the DIP lender will likely be indifferent to the amount of the carve-out.

Except in some mega-cases, the amount of the carve-out will be the subject of much negotiation with counsel for the debtor and counsel for the committee. Because the amount of the carve-out is often reserved against the debtor's availability under the DIP financing agreement, the debtor will be sensitive to a large carve-out. It is not uncommon for there to be a carve-out that is available for unpaid professional fees accrued prior to an event of default and a smaller carve-out that applies after an event of default and termination of the DIP financing agreement. The post-default carve-out should be in an estimated amount necessary to enable the professionals to wind up the affairs of the estate or transition to a Chapter 7 case following conversion, while the DIP lender either liquidates the collateral or finances the debtor's orderly liquidation of the collateral.

In order to minimize the amount of the carve-out and the adverse impact on borrowing availability under the DIP financing agreement, DIP lenders sometime insist upon inclusion of a provision in the financing order that authorizes all professionals to submit monthly statements to the debtor and obligating the debtor to draw down on the DIP financing in an amount equal to the monthly billings, with such draw downs to be deposited into an escrow accounts with the debtor's counsel pending periodic approval of all billing statements by the bankruptcy court.

In consideration of the carve-out, the DIP lender normally insists upon a restriction on the use of proceeds derived from the carve-out to pay professionals. The restriction prohibits the use of carve-out proceeds to pay the fees and expenses of counsel incurred in connection with any challenge to the pre-petition liens or claims of the DIP lender. In some jurisdictions, such as Delaware, the bankruptcy courts may require that proceeds from the carve-out be available to pay the fees and expenses of committee counsel incurred in connection with the investigation of the pre-petition liens of the DIP lender and the existence of potential claims against the DIP lender for pre-petition conduct. The DIP lender may attempt to negotiate a mutually agreed upon budget with counsel for the committee to fix an upper limit on the amount of fees and expenses that may be incurred for such an

[59]*In re Tenney Village Co.*, 104 B.R. 562, 568-569 (Bankr. D.N.H. 1989). See also *In re Ames Department Stores, Inc.*, 115 B.R. 34 (Bankr. S.D. N.Y. 1990) (DIP financing approved after parties agree to "reasonable" carve-out of $5,000,000).

investigation.

K. Section 506(c) Considerations (the "Surcharge Waiver")

Section 506(c) of the Bankruptcy Code provides that the debtor may recover from property securing a secured claim the "reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim." The cases have been consistent in holding that a secured creditor's collateral may not be surcharged beyond the amount of actual benefit conferred upon the secured creditor by the debtor's incurrence of administrative expenses that are the subject of the surcharge.[60] As a general rule, creditors holding oversecured claims do not benefit from efforts to preserve their collateral, since they will be paid in any event.[61]

While it is clear that a surcharge may be made against collateral of a pre-petition secured lender, it is not so clear under the Bankruptcy Code or existing case law that a surcharge is ever permitted with respect to collateral securing DIP financing that constitutes a superpriority claim. According to some cases, the debtor may surcharge collateral only for expenses that have been actually incurred and paid by the debtor, and the recovery of the expenses through the surcharge are intended to benefit the debtor's estate generally.[62] If a DIP

[60]See, e.g., *In re Grimland, Inc.*, 243 F.3d 228 (5th Cir. 2001) (surcharge of proceeds derived from sale of secured party's personal property collateral was inappropriate where expenses consisted of an administrative claim of a landlord to cover the costs of removing waste oil from premises where the secured party's personal property collateral had been stored, because the waste oil did not contaminate any of the personal property collateral, the storage of the personal property on the premises did not benefit the secured creditor, and the secured creditor was entitled to repossess and auction off its collateral, and the trustees doing so did not afford the secured party any benefit beyond what it could have recovered on its own); *Kivitz v. CIT Group/Sales Finance*, 272 B.R. 332 (D.Md. 2000) (debtor's attorney not authorized to receive surcharge under § 506(c) as the services performed by the attorney conferred no special benefit upon the secured creditor, but simply were in furtherance of the general goal of reorganization).

[61]See, e.g., *In re United Foods & Produce Co.*, 242 B.R. 295 (Bankr. W.D. Pa. 1999).

[62]See, e.g., *In re K&L Lakeland, Incorporated*, 128 F.3d 203 (4th Cir. 1997) (surcharge is appropriate only if the debtor has actually paid the expenses at issue). But see, *In re Debbie Reynolds Hotel & Casino, Inc.*, 255 F.3d 1061 (9th Cir. 2001) (the party that has rendered a benefit to a secured creditor is properly reimbursed for that benefit directly from the surcharge proceeds, as such surcharge is not an administrative claim but rather an assessment against collateral, with the surcharge proceeds deriving not from the estate but rather directly from the secured party's collateral).

lender holds a superpriority claim, the monies derived from the surcharge would arguably have to be turned over the DIP lender as the holder of the superpriority claim, rendering any surcharge pointless.[63]

In light of the potential for surcharge, DIP lenders often include anti-surcharge language in their drafts of the financing order. Depending upon the predilections of the bankruptcy court in question, such language may be allowed. The validity of an anti-surcharge provision has not been finally decided by the courts. While there are some cases that have held such provisions to be unenforceable as against public policy,[64] there are other cases upholding such provisions.[65]

L. Amendments to DIP Financing Agreement

In the course of a DIP financing, the parties may desire to enter into various amendments to the terms governing the DIP financing and to provide waivers, including waivers of default. Despite the fact that the DIP financing agreement may contain provisions authorizing amendments and waivers, it is not always clear that the bankruptcy court's approval of the DIP financing confers blanket authority upon the parties to enter into amendments that materially alter the terms of the originally approved DIP financing, especially in circumstances where such amendments may impact adversely on the rights of creditors and other interested parties.

Because of that uncertainty, the DIP lender and debtor may wish to include in the financing order a provision giving them authority to enter into certain types of non-material amendments without bankruptcy court approval, provided that notice of the amendment is given to the U.S. Trustee and the committee promptly after the amendment is executed. Other amendments, however, would require bankruptcy court approval after notice and hearing.[66] The debtor and DIP lender may seek to limit the amendments requiring

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[63] *In re JKJ Chevrolet, Inc.*, 26 F.3d 481 (4th Cir. 1994); *In re Ben Franklin Retail Store*, 210 B.R. 315 (Bankr. N.D. Ill. 1997).

[64] See, e.g., *In re Brown Bros., Inc.*, 136 B.R. 470 (W.D. Mich. 1991).

[65] See, e.g., *In re Molten Metal Technology, Inc.*, 244 B.R. 515 (Bankr. D. Mass. 2000) (finding that previously approved § 506(c) waiver was *res judicata*).

[66] See *In re Farmland Industries, Inc.*, 294 B.R. 855 (Bankr. W.D. Mo. 2003) (court approval was sought for amendments to DIP financing after alleged defaults, which amendments included reduction in amount of borrowing availability and imposition of deadline for debtor's asset sales, and amendments were opposed by committee on grounds no

bankruptcy court approval to those that would increase the maximum amount of the financing,[67] increase rates of interest or the amount of fees payable to the DIP lender, enlarge the defaults, make more restrictive on the debtor any financial covenants contained in the DIP agreement, or broaden the categories of estate property subject to the DIP lender's liens.

default had actually occurred and financing under the proposed amendments was not in best interests of estate and its creditors).

[67]*In re Bono Development, Inc.*, 8 F.3d 720 (10th Cir. 1993) (where a bankruptcy court authorized debtor to obtain loan of $87,500 secured by priming lien, lender was not authorized to recover more than the maximum amount of the loan and interest from a subsequent sale of the collateral, even though the DIP lender incurred expenses for insurance, security, cleanup and weed control for the property and the deed of trust, which, together with other DIP financing documents, was approved by the financing order and authorized the recovery of such advances, as the notice to creditors of the proposed financing did not indicate a priming lien was sought for more than the original loan plus interest).