Chapter 18

Intercreditor Agreements

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§ 18:1 Chapter overview

This chapter discusses the enforceability of intercreditor agreements in bankruptcy. The term “intercreditor agreement” is a generic phrase that has come to refer to a form of agreement, between creditors holding claims against a common debtor, that confirms or modifies the pre-existing priority rankings of those claims relative to each other and, additionally, modifies, waives or assigns various contract, statutory or common law rights or remedies against the debtor that otherwise would have flowed from the claim with the junior ranking. The intercreditor agreement may confirm...
and supplement the pre-existing relative priority of two
secured claims against common collateral owned by the
debtor or it may reverse that order of priority (as when a
senior lien is agreed to be junior to an otherwise junior lien).
In the case of claims with identical priority (such as general
unsecured claims), it may render the claim of one creditor
junior to that of the other. An intercreditor agreement is a
type of “subordination agreement,” governing the relative
priority of “interests” that are claims. ¹

As a general matter, a senior creditor is entitled to be
paid, either as an unsecured creditor or from the proceeds of
shared collateral, before a junior creditor. But many other
issues may arise prior to actual payment that affect the
interests of the two creditors. In recent years, particularly
since the development of “second lien” debt as an acceptable
financing mechanism, intercreditor agreements have focused
on these other issues, limiting the remedies that the junior
creditor might otherwise exercise upon default by and/or
bankruptcy of the debtor. Thus, intercreditor agreements
frequently include bankruptcy-specific restrictions on the
junior creditor’s enforcement of rights that might interfere
with or impede the senior from obtaining prior payment.
These may limit the junior’s rights to enforce its claim, to
object to the debtor’s use of shared cash collateral, to object
to debtor-in-possession financing, to demand adequate
protection for interests in collateral, to seek appointment of
a trustee or examiner, to challenge the senior lien, to object

¹Black’s Law Dictionary defines “subordination agreement” as:
An agreement by which one who holds an otherwise senior interest agrees to
subordinate that interest to a normally lesser interest, usu. when a seller
agrees to subordinate a purchase-money mortgage so that the buyer can obtain
a first-mortgage loan to improve the property.
Black’s Law Dictionary (9th ed. 2009). In addition, “subordination”
is defined to mean:
 n. 1. The act or an instance of moving something (such as a right or claim) to
a lower rank, class, or position <subordination of a first lien to a second
lien>.
Black’s defines “interest” to mean, in relevant part:
A legal share in something; all or part of legal or equitable claim to or right
in property <right, title, and interest>. Collectively, the word includes any ag-
gregation of rights, privileges, powers, and immunities; distributive, it refers to
any one right, privilege, power or immunity.
Black’s Law Dictionary (9th ed. 2009).
to seniors’ exercise of remedies, to object to a debtor’s § 363
sale of collateral, to file a reorganization plan, to vote on a
plan or to receive distributions absent payment in full of the
seniors (including, perhaps, payment of interest on the senior
debt accruing during the bankruptcy case).

In drafting such waivers within intercreditor agreements,
presumably, counsel for both the senior and junior creditors
have identified the provisions of the Bankruptcy Code that
specify rights that the junior creditor might otherwise
exercise, have made a determination of the potential value
(or cost) to their clients of the potential exercise of such
rights, and have insisted upon or agreed to the waiver or
preservation of each right in light of that determination.
Thus, these waivers fairly may be considered part of the eco-
nomic bargain and the price a junior creditor agreed to pay
for whatever return and other advantages it expected from
its investment in junior debt.

Nevertheless, a certain amount of litigation and commen-
tary has arisen concerning the enforceability of such
bankruptcy-related waivers. The issues raised in such litiga-
tion generally fall into two classes: (i) does the negotiated
waiver actually bar the remedy invoked by the junior credi-
tor; and (ii), if it does, is the waiver enforceable or contrary
to some overriding law or policy.

Despite warnings by commentators, the case law suggests
that well-drafted waivers will generally be enforced by the
bankruptcy courts. Courts have upheld waivers of the right
to exercise bankruptcy-specific remedies;\(^2\) to challenge the
senior lien;\(^3\) to object to § 363 sales consented to by seniors;\(^4\)

\(^2\)In re Erickson Retirement Communities, LLC, 425 B.R. 309, 315–16
n.9, 52 Bankr. Ct. Dec. (CRR) 238, 63 Collier Bankr. Cas. 2d (MB) 1577
(Bankr. N.D. Tex. 2010) (enforcing intercreditor agreement prohibiting
junior from exercising any rights or remedies or taking any action to
enforce its subordinated debt and finding that junior’s motion to appoint
an examiner was in effect such an exercise of rights or remedies or taking
of an action prohibited by the intercreditor agreement).

Dec. (CRR) 140 (Bankr. S.D. N.Y. 2009) (enforcing waiver of junior’s right
to challenge senior’s lien under intercreditor agreement).

(CRR) 223 (11th Cir. 2006) (noting that the bankruptcy court made the
legal ruling that the junior waived its right to object to the sale in the
to object to cash collateral orders consented to by seniors;\(^5\) and to object to plan confirmation.\(^6\) The main type of waiver that has troubled courts has been the assignment by the junior to the senior of the right to vote the junior claim with respect to a plan, but even such assignments have been enforced.\(^7\)

However, whether a junior actually will be “silenced” on an issue as to which it has waived its rights may depend on the specific language of the intercreditor agreement, the existence of financing orders limiting rights of the debtor and the junior to take certain actions and compliance with various technical requirements of the Bankruptcy Code and Rules and intercreditor governing documents. In particular, courts appear reluctant to enforce waivers peremptorily; recent decisions upholding them, in belt and suspenders fashion, nevertheless address the substantive claims raised by the “silenced” juniors.\(^8\) On the other hand, a few courts have raised the specter of potential liability for breach of intercreditor agreement); \(\text{In re GWLS Holdings, Inc.}, 51 \text{ Bankr. Ct. Dec. (CRR) 72, 2009 WL 453110, }^{*6}\) (Bankr. D. Del. 2009) (noting that intercreditor agreement granted rights to seniors to the exclusion of junior in denying junior’s objection to sale of debtor’s assets).

\(^5\) \(\text{Aurelius Capital Master, Ltd. v. Tousa Inc.}, 2009 WL 6453077, ^{*8}\) (S.D. Fla. 2009) (affirming bankruptcy court’s order approving cash collateral order consented to by senior over junior’s objection because junior was deemed to have also consented to cash collateral order pursuant to intercreditor agreement).

\(^6\) \(\text{In re Ion Media Networks, Inc.}, 419 B.R. 585, 597, 52 \text{ Bankr. Ct. Dec. (CRR) 140 (Bankr. S.D. N.Y. 2009) (junior lacked standing to object to plan confirmation pursuant to intercreditor agreement).}


\(^8\) \(\text{In re Erickson Retirement Communities, LLC, 425 B.R. 309, 316–17, 52 Bankr. Ct. Dec. (CRR) 238, 63 Collier Bankr. Cas. 2d (MB) 1577 (Bankr. N.D. Tex. 2010) (addressing bona fides of junior examiner motion after holding that junior was precluded from filing such a motion under the}\)
contract, which may deter some juniors from trying to assert waived rights.9

This Chapter discusses the various issues relating to whether bankruptcy-specific waivers in an intercreditor agreement are enforceable, including issues of interpretation of the Bankruptcy Code, so-called bankruptcy “policies,” the bankruptcy courts’ jurisdiction and the procedures for enforcement. This Chapter also discusses important decisions relating to those subjects and identifies issues that have been litigated in the past and others that might be raised in the future.

§ 18:2 The effect of Section 510(a)—Is a waiver part of the “subordination agreement?”

The Bankruptcy Code does not use the phrase “intercreditor agreement.” Section 510(a) provides that a “subordination agreement is enforceable in [bankruptcy cases] to the same extent that such agreement is enforceable under applicable nonbankruptcy law.” Irrespective of the label given to the agreement, the courts have tended to enforce agreements waiving or assigning ancillary bankruptcy rights under § 510(a).1 The arguments in favor of this position would include the fact that such waivers are common ele-

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*In re Avondale Gateway Center Entitlement, LLC, 2011 WL 1376997, *4 (D. Ariz. 2011) (affirming bankruptcy court order enforcing subordination agreement through Section 510(a) pursuant to which senior was subrogee of junior and entitled to vote junior’s claim); *In re Coastal Broadcasting Systems, Inc., 2012 WL 2803745, *8 (Bankr. D. N.J. 2012) (enforcing agreement through Section 510(a) pursuant to which voting rights were assigned); *In re Erickson Retirement Communities, LLC, 425 B.R. 309, 316, 52 Bankr. Ct. Dec. (CRR) 238, 63 Collier Bankr. Cas. 2d
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