



First Lien/Second Lien Intercreditor Agreements

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**""How did you go bankrupt?' Bill asked.
'Two ways,' Mike said. 'Gradually and then suddenly.'"**

-Ernest Hemingway, The Sun Also Rises, 1926



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Intercreditor Agreements

- **Purpose**
 - Used to establish respective rights and remedies of two or more Creditors of a common Borrower
- **Not standardized and scope varies widely depending on credit structure, collateral coverage and negotiating leverage**
 - **Lien Subordination:** Establishes priority as to common Collateral only, up to a negotiated Senior Debt Cap
 - **Payment Subordination:** Establishes priority as to all assets of the Borrower or any Guarantor -- whether or not such assets serve as Collateral -- up to a negotiated Senior Debt Cap
 - **Hybrids**

ABA Model Intercreditor Agreement

- **ABA Task Force has developed a "model form" covering major recurring issues in Second Lien transactions**
 - Found at **65 Bus. Law. 809 (2010)**
- **Provides alternate language for provisions where differences of opinion can be expected**
- **Used as a base for negotiations and reflects standard practices and expectations**

**"The only man who sticks closer to you
in adversity than a friend is a creditor."**

-Unknown

"Creditors have better memories than debtors."

-Benjamin Franklin

The Crux of the Matter: Advance Consent

- **DIP Financing and Use of Cash Collateral**
- **Adequate protection**
- **362 Stay Relief**
- **363 "free and clear" sale**
- **Chapter 11 plan**
 - Voting/Objection rights
 - Reorganization securities - who gets them?

Why Advance Consent Matters

- **Holders of secured claims have a variety of statutory rights to protect their interest in the borrower's property, for example:**
 - Adequate protection (362, 363 and 364)
 - Protection against a sale of collateral free and clear, unless the requirements of 363(f) are satisfied
- **Finding of adequate protection for the junior lien can be difficult or impossible to obtain**



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