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Navigating Intercreditor Arrangements in Commodities and Trade Finance: A Practical Guide – Part II

By Peter J. Lahny, IV*

In this multi-part article, the author examines various issues created by different forms of intercreditor agreement in detail, with a specific focus on how the priority of each lender's lien over the assets of the applicable debtor is established. In the first part, published in the October 2025 issue of The Banking Law Journal, *the author discussed transactional commodities financing transactions. In this second part, the author reviews additional issues with the form of transactional intercreditor agreement, borrowing base commodities finance lending transactions, and typical provisions negotiated into the form of transactional intercreditor agreement. The final part, to be published in the next issue of* The Banking Law Journal, *will contain the article's conclusion as well as the typical form of intercreditor agreement to be used in connection with transactional loan facilities (the Form of Transactional Intercreditor Agreement) and the typical form of intercreditor agreement to be used in connection with borrowing base loan facilities (the Form of Borrowing Base Intercreditor Agreement).*

II. ADDITIONAL ISSUES WITH THE FORM OF TRANSACTIONAL INTERCREDITOR AGREEMENT

Before moving to a brief discussion of the Form of Borrowing Base Intercreditor Agreement, this article needs to address some important issues that are not addressed directly in the Form of Transactional Intercreditor Agreement. These are issues that can potentially lead to one creditor causing harm to the recovery of all of the other creditors.

(a) "Obligations" Owing to Each Creditor Is Not a Defined Term

The Form of Transactional Intercreditor Agreement does not define the term "obligations."[53] This can lead to issues when determining the recovery amounts that are due to each Creditor following enforcement actions.[54] Paragraph 4 of the Form of Transactional Intercreditor Agreement states that "[A] Specific Security Interest of a Creditor in Collateral has priority to the extent of all obligations, direct or contingent, of the Debtor to such Creditor secured

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* The author, a partner at Wiggin and Dana LLP in New York, may be contacted at plahny@wiggin.com. Footnote numbering continues from Part I.

[53] See generally Exhibit A.

[54] See Wiener, supra note 2, at 556-57.

thereby over any General Security Interest of another Creditor in the same Collateral."[55]

Since the term "obligations" is not limited to the obligations owing by the debtor to the applicable creditor under any specific loan facility or under any specific transaction, the creditors that have "all assets" security interests securing all obligations owing to such creditor will argue that the priorities established under the Form of Transactional Intercreditor Agreement apply to all obligations owing by the debtor to such creditor, regardless of how the specific obligation was established.[56] In practice, this would mean that obligations under unrelated transactions between the debtor and the applicable creditor (i.e., foreign exchange transactions, rate swaps and other hedging arrangements, etc.,[57] all of which are common in typical commodities financing transactions) would be included as obligations for purposes of the priorities set forth in the Form of Transactional Intercreditor Agreement. This could result in the obligations of certain creditors that are doing additional business with the applicable debtor being artificially inflated for the purpose of calculating such creditor's pro rata share of the General Security Interests.[58]

The most egregious example of this may be obligations owing to a creditor under a guaranty entered into by the debtor to guarantee the obligations of one of its affiliates to the applicable creditor under a separate loan facility. As you can imagine, the size of the guaranteed facility could result in a massive dilution of the collateral pool available to all of the creditors in respect of their General Security Interests, since the pro rata share of this creditor will be based on a much higher value of the obligations owing to it.[59] To a lesser extent, the excess collateral that is subject to a creditor's Specific Security Interest in excess of the amount actually funded by such creditor (whether as a result of the excess value of the subject collateral over the amount actually advanced or otherwise), would, arguably, secure such other outstanding obligations of such creditor, and potentially remove that excess collateral from the collateral available for inclusion in respect of repayment of the other creditors' General Security Interests.[60]

Please note that these issues do not occur under the Form of Borrowing Base Intercreditor Agreement (discussed in Section III), as the terms "Direct

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[55] Exhibit A, at 2 ¶ 4; see also Wiener, supra note 2, at 556.

[56] See Wiener, supra note 2, at 556-57.

[57] See Wiener, supra note 2, at 561.

[58] See Wiener, supra note 2, at 556-57.

[59] See Wiener, supra note 2, at 562.

[60] See Wiener, supra note 2, at 556.

Obligations," "Obligations" and "Outstanding Obligations" are all clearly defined.[61] In fact, the term "Direct Obligations" is expressly limited to "(i) Obligations arising from loans or advances (whether or not payable upon demand or at a specified maturity date) made by any Creditor to, or for the account of, or overdrafts paid by any Creditor for, the Debtor; (ii) actual and contingent Obligations of the Debtor in respect of documentary and standby letters of credit issued or confirmed by any Creditor for the account of the Debtor; and (iii) Obligations of the Debtor in respect of bankers acceptance facilities (including unmatured drafts) or letters of indemnity or steamship guaranties created or provided by any Creditor for the Debtor" and expressly excludes "Obligations of the Debtor under a guaranty in favor of any Creditor of the obligations of another person, firm, corporation or other entity to such Creditor."[62] While the inclusion of these defined terms in the Form of Transactional Intercreditor Agreement would alleviate the concerns previously raised, I have not seen this done in practice.

(b) No Limitation on Enforcement Actions

Unlike the typical intercreditor agreement (or the Form of Borrowing Base Intercreditor Agreement discussed below), the Form of Transactional Intercreditor Agreement is silent with respect to (i) the providing of notice to the other creditors (A) of any event of default or (B) prior to the taking of any enforcement actions under any creditor's loan facility documentation, and (ii) any limitations on the taking of enforcement actions by any of the creditors.[63] This lack of contractual provisions regarding enforcement can lead to a "race to the courthouse" among the creditors and can create real issues for those creditors holding Specific Security Interests.[64] Also, the lack of any notice provisions compounds this issue by potentially providing the first creditor to call an event of default with a "head start" in the race to the courthouse.[65] While the typical commodities loan facility documentation will contain cross-default provisions and notice requirements for the debtor in respect of events of default, the delay can provide an advantage to the first creditor seeking to take enforcement actions.

Due to the fact that no creditor is restricted from taking enforcement actions with respect to any of the collateral, this could result in the holder of a General

[61] See generally Form of Borrowing Base Intercreditor Agreement, Exhibit B.

[62] Id. at 4.

[63] See generally Exhibit A.

[64] See Wiener, supra note 2, at 562-63.

[65] See Wiener, supra note 2, at 562-63.

Security Interest foreclosing on collateral that is subject to the Specific Security Interest of another creditor.[66] Once the proceeds of the collateral have been obtained by the holder of the General Security Interest, the burden would shift to the holder of the Specific Security Interest to prove its Specific Security Interest in the applicable collateral. While the Form of Transactional Intercreditor Agreement is very clear on the priorities of the applicable creditors in this circumstance, it would be up to the courts to sort out the priorities among the creditors, which can be a long and very costly process for everyone involved.[67]

Another common issue is created when the proceeds of collateral subject to a Specific Security Interest of one creditor is mistakenly deposited into the collection account of another creditor.[68] This can occur when two creditors both are enabling the acquisition of certain goods through advances under their respective loan facilities and the debtor's customer mistakenly pays the proceeds of collateral actually financed by one creditor into the collection account of the other creditor. This type of error can occur due to the debtor mislabeling the invoice with the wrong collection account information, a course of conduct where the customer is used to paying into the other creditor's collection account, or for any number of other reasons. Typically, the creditor into whose collections account the payment was deposited will argue that those funds were correctly deposited as they are the proceeds of collateral that is subject to its Specific Security Interest. The importance of following the procedures set forth in Section I(b) become very clear in these circumstances, as the burden will have shifted to the creditor that actually financed the goods to prove that it had enabled the acquisition of those specific goods in order to be victorious in this priority dispute.

While notices of default and limitations on enforcement actions are expressly addressed in the Form of Borrowing Base Intercreditor Agreement (as discussed in Section III), similar provisions have not yet been included in the standard Form of Transactional Intercreditor Agreement.

(c) Ability to Set Advance Rates Is Not Limited

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[66] See Wiener, supra note 2, at 563.

[67] See Stephen Ian McIntosh, Priority Contests under Artricle 9 of the Uniform Commercial Code: A Purposive Interpretation of a Statutory Puzzle, 72 Virginia L. Rev. 1155, 1159 (1986) (discussing priority disputes under U.C.C. Section 9-308 and 9-306(5) and noting that courts "have had difficulty resolving priority contests under these provisions, particularly when they have sought to apply them as rigid rules").

[68] See Wiener, supra note 2, at 568.

The fact that each of the creditors are free to set the advance rates under their individual loan facilities can create potential problems for the other creditors.[69] Whether the applicable creditor chooses to increase or decrease its advance rates, this can reduce the value of the collateral subject to the General Security Interest available to all of the creditors.[70]

To the extent the applicable creditor chooses to set its advance rates significantly lower than the other creditors, the debtor would be responsible for a greater portion of the purchase price to be paid to the applicable supplier.[71] This is an issue because the debtor may pay the deficit using its unencumbered cash reserves.[72] Such cash reserves, which would otherwise be subject to all of the creditor's General Security Interest, will now be subject to the Specific Security Interest of the creditor that is using the lower advance rates, an obvious benefit to that creditor to the detriment of the other creditors.[73]

To the extent the applicable creditor chooses to set its advance rates significantly higher than the other creditors, it would incentivize the debtor to borrow under that creditor's loan facility.[74] The more the debtor uses a facility with the higher advance rate, the more likely it becomes that it will result in the dilution of the collateral available to all of the creditors, since the cushion of excess collateral becomes smaller and smaller.[75]

While these issues are easily corrected with a change to the standard forms, it would be unusual for the creditors to agree to limit their ability to set their own advance rates in commodities financing transactions.

(d) The Form Does Not Address the Calculation of the Pro Rata Share of Each Creditor's Portion of the General Security Interests

Another obvious failing in the Form of Transactional Intercreditor Agreement is that it does not expressly address the calculation of the pro rata share of each creditor's portion of the General Security Interests.[76] This often creates issues among the creditors.

The most common of these issues arises with respect to whether a creditor holding a Specific Security Interest in certain collateral must exercise its rights

[69] See Wiener, supra note 2, at 564-65.

[70] See Wiener, supra note 2, at 564-65.

[71] See Wiener, supra note 2, at 564-65.

[72] See Wiener, supra note 2, at 564-65.

[73] See Wiener, supra note 2, at 564-65.

[74] See Wiener, supra note 2, at 565.

[75] See Wiener, supra note 2, at 565.

[76] See generally Exhibit A.

against such collateral, or at least deduct the value of such collateral, prior to calculating its pro rata share of the General Security Interests.[77] As this is not expressly addressed in the form, this issue may need to be addressed by the courts. The "marshaling" of those assets by the creditor holding the Specific Security Interest would be the likely relief sought by the other creditors.[78]

Black's Law Dictionary defines "marshaling assets," also known as the "marshaling doctrine, rule of marshaling securities, and rule of marshaling remedies" as:

> An equitable doctrine that requires a senior creditor, having two or more funds to satisfy its debt, to first dispose of the fund not available to a junior creditor. It prevents the inequity that would result if the senior creditor could choose to satisfy its debt out of the only fund available to the junior creditor and thereby exclude the junior creditor from any satisfaction.[79]

This remedy would require the creditor holding the Specific Security Interest to exercise its rights against such collateral prior to calculating its pro rata share of the General Security Interests.[80] This would be the correct outcome and in the spirit of the provisions of the Form of Transactional Intercreditor Agreement.

Issues can also arise if one creditor is granted additional collateral that was not provided to the other creditors, such as a guaranty or other credit support.[81] As discussed in Section II(a), the term "obligations" is not defined and, as such, would include guarantee obligations owing by the debtor to a creditor under a separate loan facility and could result in serious dilution of the collateral pool available to all of the creditors in respect of their General Security Interests.[82] Here too, the most equitable remedy would be the marshaling of those assets, as previously discussed.

Paul Wiener, in his article "Intercreditor Agreements in Commodities and Trade Finance Transactions," suggested adding "a supplementary provision setting forth how the pro rata sharing will be calculated" to the standard Form

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[77] See Wiener, supra note 2, at 557-58.

[78] See Wiener, supra note 2, at 557-58.

[79] Rule of Marshaling Assets, Black's Law Dictionary (12th ed. 2024); see also Matter of Cent. R. Co. of New Jersey, 45 B.R. 1011, 1019-20 (D.N.J. 1985).

[80] See Wiener, supra note 2, at 557-58.

[81] See Wiener, supra note 2, at 562.

[82] See supra Section II(a).

of Transactional Intercreditor Agreement.[83] While the inclusion of such a provision would alleviate the concerns previously raised, I have not seen this done in practice.

(e) Unperfected Liens

As previously discussed, in order for the debtor's collateral to fall within the definitions of "Specific Security Interest" or "General Security Interest," the liens of a creditor in respect of such collateral must be "perfected and enforceable."[84] It is not unusual in typical commodities financing transactions for a creditor to choose not to perfect its liens in the debtor's collateral located in foreign jurisdictions until such time as the applicable creditor agrees to actually finance the purchase of collateral located in such foreign jurisdiction.[85] Typically, a creditor will only agree to lend against collateral located in a foreign jurisdiction where the creditor is very confident that it will be able to both perfect its liens in the applicable jurisdiction and take any necessary enforcement actions as may be required to enforce its rights in the collateral located in the applicable jurisdiction.

To the extent that one creditor chooses to perfect its security interest in collateral located in a foreign jurisdiction, but the other creditors choose not to perfect their respective security interests in that same jurisdiction, the issue becomes how the proceeds of the collateral located in the applicable jurisdiction will be applied under the Form of Transactional Intercreditor Agreement.[86] As discussed in Section II(d), the Form of Transactional Intercreditor Agreement does not expressly address how each creditor's pro rata share of the General Security Interests will be calculated.[87]

The issue centers around whether all of the creditors are entitled to share in the proceeds of collateral located in such foreign jurisdiction as part of their General Security Interests or will that collateral to be treated solely as collateral of the creditor that actually perfected its security interest, separate and apart from the General Security Interests of the other creditors.[88] The definitions of

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[83] See Wiener, supra note 2, at 558.

[84] Exhibit A, at 1-2 ¶¶ 2-3.

[85] See generally Secured Lending Across Borders: Navigating the Complexities of International Transactions, Lucosky Brookman LLP, https://www.lucbro.com/news/blogs/detail/10535/secured-lending-across-borders-navigating-the (discussing cross-border perfection for intangible collateral).

[86] See Wiener, supra note 2, at 557.

[87] See supra Section II(d).

[88] See Wiener, supra note 2, at 557.

"Specific Security Interest" and "General Security Interest" make clear that a creditor must have a "perfected and enforceable" security interest in order to have rights in the applicable collateral.[89] Accordingly, proceeds of such collateral would not be included for the purpose of repayment of the General Security Interests, and the issue becomes the "marshaling" issue discussed in Section II(d).[90] If the perfecting creditor is not required to first enforce its rights in respect of the collateral located in the applicable foreign jurisdiction, the value of its pro rata share of the General Security Interests would be artificially inflated resulting in a potential windfall for the perfecting creditor.[91]

In order to avoid this issue, in addition to adding the provision referred to at the end of Section II(d),[92] it is always good practice to try to be sure that each creditor has perfected its security interest in all jurisdictions where any other creditor has chosen to perfect.

(f) Intervening Lien Issue

Another potential issue can be created by a new creditor joining the intercreditor agreement either (x) having filed its UCC-1 financing statement after another lender to the debtor that does not join the intercreditor agreement, or (y) having previously subordinated its security interest to a third-party lender that does not join the intercreditor agreement.[93] The issue, sometimes referred to as the "circular priority dilemma"[94] or the "circularity" issue, can create a great deal of uncertainty.[95] For purposes of this article, we will use the following example:[96]

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[89] Exhibit A, at 1-2 ¶¶ 2-3.

[90] See supra Section II(d).

[91] See Wiener, supra note 2, at 557.

[92] See supra text accompanying note 78.

[93] See Wiener, supra note 2, at 559-60.

[94] Duraflex Sales & Service Corp. v. W.H.E. Mech. Contractors, 110 F.3d 927, 934 (2d Cir. 1997).

[95] See Grant Gilmore, Circular Priority Systems, 71 Yale L. J. 53 (1961) ("A judge who finds himself face to face with a circular priority system typically reacts in the manner of a bull who has been goaded by the picadors: he paws the ground and roars with rage. The spectator can only sympathize with judge and bull"); see also M. Stuart Sutherland, Circular Priority Systems within the Uniform Commercial Code, 61 Tex. L. Rev. 517, 527 (explaining the "relatively simple steps" for a court to follow when resolving circularity priority disputes but noting that despite the apparent simplicity of the steps, the method "produces arbitrary and inequitable results").

[96] See also Wiener, supra note 2, at 559-60 (discussing an example from ITT Diversified Credit Corp. v. First City Capital Corp., 717 S.W. 2d 419 (Tex. App. 1986), writ granted (Dec. 10, 1986), rev'd, 737 S.W. 2d 803 (Tex. 1987)).

"Creditor A" is a new creditor joining the intercreditor agreement having filed after, or having previously subordinated its security interest to that of Creditor C. "Creditor C" is a separate lender to the debtor that does not join the intercreditor agreement. "Creditor B" shall refer to the existing parties to the intercreditor agreement. The issue will arise when Creditor A obtains a Specific Security Interest in certain collateral. At that point, (i) Creditor A's security interest in that collateral is senior to that of Creditor B, (ii) Creditor B's security interest in that collateral is senior to that of Creditor C, and (iii) since Creditor A has filed its UCC-1 behind or subordinated its security interest to, Creditor C, Creditor C's security interest in that collateral is senior to that of Creditor A. This is the "circular priority dilemma."[97]

George A. Nation III in his article "Circuity of Liens Arising from Subordination Agreements: Comforting Unanimity No More" states that "courts are split on how best to deal with the fact that C is prior to A, A is prior to B, and B is prior to C."[98] The split centers around whether the applicable court should apply the "partial subordination analysis" or the "complete subordination analysis" with respect to Creditor A's position.[99]

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[97] George A. Nation III, Circuity of Liens Arising from Subordination Agreements: Comforting Unanimity No More, 83 B.U. L. 591, 592 (2003).

[98] Id.

[99] Id. The article addresses the split as follows:

> The courts that advocate the partial subordination analysis do so for two reasons. First, these courts believe the partial subordination approach best reflects A and C's intent in entering into the subordination agreement. Second, partial subordination protects B's expectation interest, as he will get exactly what he expected – the proceeds from the sale of the collateral less A's prior claim. These courts often state that under this approach B is, quite appropriately, neither benefited nor disadvantaged by the subordination agreement because B was not a party to it.
>
> The main argument of the courts applying the complete subordination analysis focuses on the meaning of the word subordination. These courts distinguish between subordination and assignment or subrogation. A subordination indicates that one party's priority position, that of the subordinator, or A in our example, is moved lower on the list. According to these courts, the word subordination does not denote the elevation or substitution of any party's position. Thus, C cannot move up into A's position; rather, A must move down behind C. These courts often note specifically that the parties did not enter into a subrogation agreement or an assignment. Some courts even state that had the parties chosen to enter into such agreements, the result would be different.

Id.; see also AmSouth Bank, N.A. v. J & D Fin. Corp., 679 So.2d 695, 698–99 (Ala. 1996) (adopting the complete subordination approach); compare ITT Diversified Credit Corp., 717 S.W. 2d at 421 (adopting the partial subordination approach).

Due to the unnecessary uncertainty that this creates with regard to each creditor's priority in certain collateral, the creditors should take all necessary steps to ensure that this does not occur.[100] Accordingly, in order to be sure that there are no intervening filings at any time a new creditor seeks to join the intercreditor agreement, the existing creditors must require the debtor or its counsel to obtain lien searches prior to consenting to the new creditor joining the intercreditor agreement.[101] This is the most efficient way to confirm that there are no intervening security interests of parties that will not be party to the intercreditor agreement.

Paul Wiener's article also offered another solution.[102] He suggested adding "a simple supplementary provision conditioning the original lenders' subordination to the new lender's liens upon the absence of intervening liens."[103] This provision would shift the risk of any intervening liens onto the new creditor.[104] A similar provision has been included in the standard forms from time to time and will be addressed in Section IV.

III. BORROWING BASE COMMODITIES FINANCE LENDING TRANSACTIONS

Pursuant to the terms of the Form of Borrowing Base Intercreditor Agreement, the security interest of each creditor in the collateral of the debtor is equal in priority with the security interest of every other creditor in the collateral of the debtor.[105] Obviously, this greatly simplifies the treatment of the priorities of the security interests of the creditors in the collateral of the debtor from those under the Form of Transactional Intercreditor Agreement.[106]

In connection with each creditor's security interest being equal in priority, each creditor typically agrees to act as each other creditor's agent for the limited purpose of perfecting the security interest of the other creditors in certain of the debtor's assets.[107] The proceeds of any collateral that are the result of enforcement actions taken by any of the creditors are to be held in trust for the

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[100] See Wiener, supra note 2, at 559-60.

[101] See Wiener, supra note 2, at 560.

[102] See Wiener, supra note 2, at 560.

[103] See Wiener, supra note 2, at 560.

[104] See Wiener, supra note 2, at 560.

[105] Exhibit B, at 4 § 2.

[106] See generally supra Section I.

[107] Exhibit B, at 5 § 6.

benefit of all creditors.[108] All such proceeds are to be distributed on a pro rata basis among all of the creditors pursuant to the "Ratio."[109]It is important to note that, as part of this responsibility taken on by each creditor, pursuant to Paragraph 8 of the Form of Borrowing Base Intercreditor Agreement, each creditor agrees that it will "(a) permit reasonable inspection and copying by the other Creditors of all books and records maintained by such Creditor pertaining to the Collateral or any portion thereof and the Obligations to such Creditor and (b) provide a statement of account with respect to the Obligations of the Debtor to such Creditor if such a statement is requested in writing by any other Creditor."[110]

In determining each creditor's pro rata share of the "Outstanding Obligations," the form provides for certain obligations owing to the creditors to be treated as "Excluded Obligations" from the definition of "Outstanding Obligations."[111] Excluded Obligations include (i) certain obligations of the debtor to a creditor arising after the occurrence of any Event of Default,[112](ii) any Borrowing Base Overadvances,[113] and (iii) certain obligations owing to a terminating creditor.[114]

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[108] Id. at 5-6 § 5(a).

[109] "Ratio" means:

> [T]he ratio of the principal amount of Outstanding Obligations owed to such Creditor by the Debtor to the aggregate principal amount of Outstanding Obligations owed by the Debtor to all Creditors who hold Security Interests therein, said ratio to be calculated on the basis of such Outstanding Obligations as of each date Net Realizations are distributed or participations are purchased under Section 15 [of the Form of Borrowing Base Intercreditor Agreement].

Id. at 6 § 5(a).

[110] Id. at 6 § 8.

[111] Id. at 9 § 16.

[112] The "Excluded Obligations" referred to in this clause include:

> [A]ny Obligations of the Debtor to a Creditor arising after the occurrence of any Event of Default, unless such Obligations arise (A) pursuant to legal commitments existing at the time such Event of Default occurs, (B) in connection with extensions or renewals or refinancings of Outstanding Obligations in existence at the time such Event of Default occurs (including any financings of reimbursement obligations due under letters of credit or bankers acceptances issued prior to the time of such Event of Default), or (C) after such Event of Default is waived in writing by all Creditors.

Id. at 3.

[113] "Borrowing Base Overadvance" means:

> (a) [A]ny additional Obligation owed to a Creditor by the Debtor which is incurred after the time when a Borrowing Base Report of the Debtor last received by the Creditors shows a Borrowing Base Deficiency (which shall mean that the Obligations of the Debtor set forth

It is important to note that "Excluded Obligations" are initially disregarded in computing the Ratio (as defined in the Form of Borrowing Base Intercreditor Agreement) and the applicable creditor's pro rata share of any "Net Realizations"[115] and recoveries.

> in such Borrowing Base Report delivered to the Creditors exceeds the Borrowing Base as set forth therein), or (b) the portion of any additional Obligation owed to a Creditor by the Debtor which is incurred after the time when a Borrowing Base Report is received by such Creditor and which, when added to the Obligations of the Debtor set forth in such Borrowing Base Report, would cause the Obligations to the Creditors to exceed the Borrowing Base as set forth therein; provided that: (i) any extension, renewal or refinancing by a Creditor (including any financings of reimbursement obligations due under letters of credit) of any Outstanding Obligations of the Debtor that were outstanding before delivery of such a Borrowing Base Report of the Debtor and were not Borrowing Base Overadvances shall not be a Borrowing Base Overadvance; (ii) a Borrowing Base Overadvance to the Debtor shall cease to be a Borrowing Base Overadvance if, at any time after the date such Borrowing Base Overadvance is made, the Debtor delivers to the Creditors a Borrowing Base Report of the Debtor, which is materially accurate, reflecting that the Borrowing Base of the Debtor exceeds all Outstanding Obligations and all Borrowing Base Overadvances; and (iii) no loan or extension of credit by any Creditor shall be deemed to be a Borrowing Base Overadvance if prior to making such loan or extension of credit, such Creditor receives a new Borrowing Base Report of the Debtor, which is materially accurate, reflecting that after giving effect to such loan or extension of credit, the outstanding loans and extensions of credit owing to all Creditors are less than the Borrowing Base as of the date of such loan or extension of credit.

Id. at 1-2.

[114] Please note that the termination by a terminating creditor will not impair the priority of its security interests in respect of:

> (a) Obligations incurred pursuant to legal commitments existing on the effective date of such termination or (b) Obligations in existence on the effective date of such termination, and all extensions, renewals or refinancings of such Obligations (including any financings of reimbursement obligations due under letters of credit or in connection with bankers acceptances issued prior to the effective date of such termination).

Id. at 5-6 ¶ 7.

[115] "Net Realizations" is defined to mean:

> [W]ith respect to the Debtor, any amounts realized by any Creditor after an Event of Default from the Collateral of the Debtor or any portion thereof and from any collections or realizations thereof or thereon under any Security Instrument executed by the Debtor, and any amounts or proceeds derived or resulting directly from the Collateral of the Debtor or any portion thereof, whether or not such Creditor is perfected or unperfected with respect to the Collateral or any portion thereof, less any costs reasonably incurred by such Creditor, or any other party on such Creditor's behalf, in obtaining or collecting such amounts. Without limiting Section 15 hereof or the obligations of any Creditor under Section 15 hereof, Net Realizations shall be deemed to exclude any voluntary or scheduled payments made by or on behalf of the Debtor to a Creditor during any period (a) prior to

One additional feature of the Form of Borrowing Base Intercreditor Agreement is that all of the creditors will agree to use the same form of Borrowing Base Report, which will be annexed to the Form of Borrowing Base Intercreditor Agreement as Exhibit A.[116] As such, the borrowing base provisions will add a layer of complexity that can account for a great deal of negotiation among the creditors. Please also note that the agreement of the creditors to use a standard form of Borrowing Base Report does not limit the right of any creditor to determine in its sole discretion whether to modify such asset categories, eligibility criteria or advance rates.[117] Since the security interests of each creditor under the Form of Borrowing Base Intercreditor Agreement are deemed to be equal in priority, the ability to alter the advance rates does not have the same effect that it does under the Form of Transactional Intercreditor Agreement (as more specifically set forth in Section II(c)).[118]

IV. TYPICAL PROVISIONS NEGOTIATED INTO THE FORM OF TRANSACTIONAL INTERCREDITOR AGREEMENT

While the terms of the forms of intercreditor agreement previously discussed are generally standardized in their use, it has become common for the creditors engaged in typical bi-lateral commodities finance transactions to agree to add the following provisions to those standard forms in the following circumstances:

(a) Express Credit Limits for Each Creditor

Another provision that is becoming increasingly common is the limitation on the maximum aggregate amount of the debt owing to each Creditor.[119] The main reason the creditors will seek to add this provision is to try to limit the debtor's outstanding indebtedness while maintaining for the benefit of all of the creditors the collateral that is subject to the General Security Interest in excess of the creditors' aggregate outstanding debt amounts.[120] Another reason is to make sure that the creditors receive notice any time one of the creditors intends to increase its loan facility amount.

The typical provision reads as follows:

> Each of the Creditors acknowledges that the aggregate amount of

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the occurrence of an Event of Default or (b) after such Event of Default has occurred, if all Creditors agree in writing to waive such Event of Default.

Id. at 3.

[116] Id. at 2.

[117] Id. at 1.

[118] See supra Section II(c).

[119] See Wiener, supra note 2, at 564.

[120] See Wiener, supra note 2, at 564.

> the Obligations to each Creditor outstanding at any time shall not exceed the lending limits (herein called the "Limits") set forth below. Notwithstanding anything to the contrary herein, each of the Creditors agrees that (a) to the extent the total outstanding Obligations owed to it exceeds its Limits or if such Creditor shall extend credit to the Obligor in violation of the provisions of paragraph 7 hereof, such excess amount shall be disregarded in computing its pro rata share in any of the Collateral pursuant to this Intercreditor Agreement and (b) the payment of any amount in excess of its Limits or extended in violation of the provisions of paragraph 7 hereof shall be subordinated to the prior payment in full of all obligations of the Obligors to the other Creditors not exceeding the other Creditors' Limits.[121]

CREDITORS	LIMITS
A. Creditor 1	$__,000,000 in the aggregate
B. Creditor 2	$__,000,000 in the aggregate"

Accordingly, a creditor that increases its debt limit without obtaining the prior written consent of the other creditors risks having the additional increased amount subordinated to the payment of all of the creditors (up to the agreed maximum debt limits).

(b) Treatment of Funds Maintained in Deposit Accounts at a Creditor

As previously discussed, cash held in a deposit account maintained at a specific creditor will be subject to such creditor's Specific Security Interest.[122] The priority of the creditors will be determined based on how that cash was acquired by the debtor.[123] Cash that is proceeds of collateral that falls within Paragraph (b) or Paragraph (c) of the definition of "Specific Security Interest" and then deposited into such account will be subject to the senior Specific Security Interest of the creditor that originally financed the collateral, pursuant to the priority of the applicable Paragraph.[124] To the extent that neither Paragraph (b) nor Paragraph (c) apply to the applicable collateral, the creditor that maintains the deposit account into which such cash has been deposited will

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[121] This is an example of language that I have seen in my own practice.

[122] See supra Section I(c).

[123] See supra Section I(c).

[124] See supra Section I(b).

have a Specific Security Interest in such collateral based on either Paragraph (a) or Paragraph (d) of the definition of "Specific Security Interest."[125]

Many times, the creditors will want to clarify the priorities of each creditor with respect to cash on deposit at a specific creditor. These negotiations will usually fall into two categories: (A) the creditors that do not maintain deposit accounts will want to clarify that any cash maintained in a deposit account that is not either (x) proceeds of collateral subject to a creditor's Specific Security Interest or (y) cash collateral on deposit to provide additional margin in connection with an extension of credit by a creditor, will be included in the General Security Interest of all of the creditors, or (B) the creditors that maintain deposit accounts will want to clarify that any cash on deposit maintained at a creditor is subject to that creditor's Specific Security Interest and will not be included in the General Security Interest of all of the creditors.

The typical provisions read as follows:

(i) With respect to clause (A) above, a new Paragraph is often added as follows:

> Each Creditor agrees that it will not claim or assert a Specific Security Interest in any deposit accounts of the Debtor solely by virtue of Paragraph 2(d) hereof (other than in connection with the payment of the Creditor's customary fees and charges relating to any such account pursuant to its agreement with the Debtor and for the reversal of provisional credits to any such account); provided, however, that, for the avoidance of doubt, the foregoing shall not affect the right of any Creditor to claim or assert a Specific Security Interest in (i) any proceeds of Collateral subject to such Creditor's Specific Security Interest which may be deposited at any time in any deposit account of the Debtor with any Creditor or (ii) cash collateral deposited at any time in any deposit account of the Debtor with any Creditor, at or about the time of the applicable extension of credit by such Creditor, to provide additional margin in connection with such extension of credit. To the extent the funds on deposit in any account of the Debtor do not represent such proceeds of Collateral or such additional margin described in the preceding clauses (i) or (ii), all such funds shall be deemed to be subject to the

[125] See supra Section I(c) and I(d).

General Security Interests of the Creditors.[126]

(ii) With respect to clause (B) above, the modifications usually include adding an additional clause (f) to the definition of "Specific Security Interest" and adding an additional sentence at the end of Section 7 as follows:

> 2. "Specific Security Interest" means . . .
>
> > (f) Collateral which is a deposit account, securities account, commodities account or any similar account (each an "Account") and all rights of the Debtor therein in which such Creditor shall have "control" within the meaning of Sections 9-104 or 9-106 of the UCC in effect in the State of New York or any other applicable jurisdiction, as amended from time to time.
>
> 7. . . . A Specific Security Interest under Paragraphs 3(d), (e) or (f) is subordinate to any Specific Security Interest under Paragraph 3(a), (b) or (c).[127]

These types of clarifying changes are becoming more commonplace as the creditors seek more certainty while continuing to use these forms.

(c) Intervening Lien Issue / Joinder of Additional Creditors

As discussed in Section II(f), a party joining the intercreditor agreement that has previously subordinated its security interest to a third-party lender that is not party to the intercreditor agreement can create problems for the creditors.[128] As a documentary solution to the intervening lien issue, Paul Wiener suggested adding "a simple supplementary provision conditioning the original lenders' subordination to the new lender's liens upon the absence of intervening liens."[129]

The typical joinder language set forth in the standard forms of intercreditor agreement reads as follows: "[A]ny person or entity who is not a party to this Agreement initially may, with the consent of each Creditor, become a party hereto by affixing his signature to the executed counterparts of this Agreement held by each Creditor or in any other manner acceptable to each Creditor."[130]

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[126] This is an example of language that I have seen in my own practice.

[127] This is an example of language that I have seen in my own practice.

[128] See supra Section II(f).

[129] See Wiener, supra note 2, at 560.

[130] Exhibit A, at 3 ¶ 12.

In accordance with Paul Wiener's suggestion, that language is sometimes modified as follows:

> Any person or entity who is not a party to this Agreement initially may, with the consent of each Creditor, become a party hereto by affixing his signature to the executed counterparts of this Agreement held by each Creditor or in any other manner acceptable to each Creditor, provided, however, that if there is any perfected intervening security interest (an "Intervening Security Interest") with priority over that of such bank or financial institution, other than Security Interests of Creditors, the amount to which such bank or financial institution shall be entitled by virtue of the provisions herein shall be reduced by the amount of indebtedness or obligations secured by such Intervening Security Interests.[131]

By using Paul Wiener's suggested language, the risk of any intervening filing is placed squarely with the joining creditor.[132] This language would generally eliminate the intervening lien issue, but is not always successfully negotiated into the standard forms.

Another more disturbing trend is the negotiation by the debtor of a provision that allows a new creditor to join the agreement upon its execution of a joinder agreement and written notice to the existing creditors. This eliminates the requirement for the consent of each of the Creditors. This type of provision is typically requested when dealing with a large creditor group, where obtaining creditor signatures to an amendment/consent requires a great deal of time to accomplish. Happily, this provision is rarely agreed to in the typical commodities finance transaction.

* * *

Editor's note: This article will conclude in the next issue of *The Banking Law Journal.*

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[131] This is an example of language that I have seen in my own practice.

[132] See Wiener, supra note 2, at 560.