Revlon: It's Worth a Double Take (Part II: Borrower Considerations)

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In last week's edition of *FFF*, we discussed the *Revlon* case involving an erroneous payment by an administrative agent to the syndicate lenders, which is currently up on appeal before the Second Circuit Court of Appeals. To catch up on the case, click **here**. We outlined the district court's decision in that case, which has been quite unsettling for administrative agents in the syndicated loan market, and discussed how administrative agents have responded: since the ruling came down, it has become market standard for administrative agents to include protective provisions in their credit agreements outlining exactly what would happen and what rights the administrative agent would have in the event it makes an erroneous payment to a lender. And, as the provisions seek to protect the administrative agent, last week we detailed some of the reactions we are seeing from syndicate lenders to the new protective provisions.

But the lenders aren't the only other parties to the credit agreement and aren't the only ones with something to say about the new provisions. In this week's installment, we'll detail some of the feedback we are seeing from borrowers.

LSTA Erroneous Payment Provisions

As we discussed last week, in response to the district court's ruling, in March of this year, the Loan Syndications and Trading Association (the "LSTA") published model language for loan agreements in order to protect an administrative agent in a syndicated lending transaction where such agent makes an erroneous payment (*i.e.*, an unintended payment) to one or more lenders in the syndicate. On June 16, 2021, the LSTA issued revised erroneous payment provisions with a blackline showing how the language has evolved from the original suggested language. We have seen a variety of comments from the borrower side. Here are several examples.

Borrower Concerns

- *Borrower obligations.* While erroneous payments provisions are intended to address the relationship between an administrative agent and a lender who has received an erroneous payment, some borrowers have sought to clarify this by adding in text stating that under no circumstances will the borrower or any other credit party have any obligations (payment or otherwise) with respect to an erroneous payment transmitted to a lender.
- *Clawback of borrowings*. Given the broad rights afforded to the administrative agent under the erroneous payment provisions to clawback erroneous payments, some borrowers have sought to add clarifying language that in no event shall the funding of a borrowing or any other payment to a credit party be deemed an erroneous payment, with the exception of certain enumerated potential errors.
- *Source of funds for erroneous payment.* We have seen comments from the borrower side intended to address the theoretical possibility that an administrative agent take payments made by the borrower and erroneously pay them out disproportionately to one or more lenders (we note this is not consistent with the facts of the *Revlon* case, where the administrative agent wired out its own funds erroneously). The borrowers have stated they are concerned that under those circumstances the payment it made would not discharge and satisfy its obligations. To that end, borrower's counsel has added clarifying language that under this fact pattern, the borrower's payment will be applied in satisfaction of its debt.
- *Limiting Assignability Consistent with Existing Assignability Provisions*. In the event that an erroneous payment is not recovered by the administrative agent from the applicable lender in the prescribed time, the new provisions typically provide that the applicable lender will be deemed to have assigned its loans (but not its commitments) with respect to which the erroneous payment was made to the administrative agent. To that end, the administrative agent then has the right to sell any loans acquired pursuant to this mechanism in accordance with the assignment provisions of the credit agreement. As with any assignment, borrower's counsel has sought to limit the assignment of loans such that loans under these circumstances cannot be assigned to parties that would not otherwise be eligible to become a lender under the facility (*i.e.*, competitors, etc.).
- *Availability of Commitments*. While the erroneous payments provisions specifically state that an administrative agent's exercise of its rights under the erroneous payment provisions shall not reduce the commitments of a lender and its commitments are to remain available in accordance with the terms of the credit agreement, we have seen

additional clarifying language from borrower's counsel to provide extra comfort that notwithstanding any situation with an erroneous payment, the commitments remain available to the borrower.

- *Wholesale Deletion*. Finally, counsel on the borrower side may try to delete erroneous payment provisions entirely. We are not aware of any administrative agent accepting this approach.

Looking Ahead

We will continue to follow all developments in the *Revlon* case and keep you updated on the appeal pending before the Second Circuit.

Women in Fund Finance: Fund Liquidity Solutions

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Women in Fund Finance this week hosted "Fund Liquidity Solutions," a virtual event that looked at some of the most innovative liquidity structuring and solutions being employed across the private markets. The panel brought together industry experts who are at the forefront of structuring these solutions and discussed the latest trends in capital raising and how structured liquidity solutions are being used by private markets managers to manage their portfolios.

Francois Aguerre, a partner and Head of Origination at Coller Capital, shared his insights as one of the most successful secondary managers in the market using some of these technologies. Richard Golaszewski, CFA, a Managing Director at 17Capital, provided perspective from the lender side on how GPs are creatively thinking about how to use debt and pref liquidity. Matt Kerfoot, Americas Head of Fund Financing and Investments at UBS Securities LLC, gave great insight from his current post as well as sharing examples from his extensive experience as a deal lawyer working on complex financial transactions and structured products as a partner at Dechert LLP. Matt Ruggiero, a Managing Director in the Strategic Advisory Group at PJT Partners, rounded out the panel with perspective from his investment banking background, which included a focus on structured financing. The panel was moderated by our very own Samantha Hutchinson, a partner in Cadwalader's fund finance group.

The session focused on two key themes: how managers are using structured finance solutions as part of their capital-raising programs to raise liquidity and where are the drivers coming from; and how NAV and pref products are being used by GPs to unlock value in portfolios. Some observations coming out of the panel:

- Some of the most interesting developments in capital raising and value realization involve the use of securitization structures and techniques to harness capital from insurance companies as well as providing structures to allow managers and investors to realize value from their portfolios.
- These structures are rapidly evolving and are part of an exciting evolution in the fund finance market. Those who have been in the market long enough will recall when sublines were an "edgy" thing to use. That is precisely where these deals are now, and the market is growing.
- Some sponsors are asking for these transactions because they have limited partners who have expressed interest in investing in a rated securitized vehicle. Sometimes these deals are driven by reverse inquiry from LPs to GPs. There is also an element of momentum; as more GPs do these transactions and LPs have a good experience, the more of these deals are happening. There is also an element of GPs exploring these structures to get distributions to their LPs more quickly.
- From the investor side, the appetite for this paper is growing. The buyer base was nascent just three or four years ago. Now investors that buy paper in securitizations in traditional markets are interested in investing in the notes in these deals. Investors include insurance companies, large institutional fixed income and structured credit papers. All of this presents an opportunity for GPs to increase their assets under management. IR groups at sponsors are doing a lot of education on these structures and using it as a tool to raise capital. Rather than having just an equity offering, they can also offer potential investors with an additional option in the form of a structured note. This paper is an exciting investment opportunity for yield-hungry investors. Investors are viewing NAV finance and other structured solutions as some of the most compelling opportunities for risk-adjusted returns. NAV finance is the next sub-asset class and investors are seeing this as a great place to invest their capital.

The panel wrapped up with predictions for the future. Each panelist was excited about the creative thinking and evolving structures they are seeing in the market. It seems that with more liquidity opportunities, funds can consider what fits their needs best based on the particularities of their investor base and their investments. The panel gave the following predictions:

- More new ideas coming into the system with more liquidity as the market continues to grow. An opportunity for "positive chaos" as new structures come to the market.
- The potential for opportunity in the market as funds leverage a combination of NAV lending, pref equity, and fund finance to best serve the broader fund strategy. As investors see this as a successful strategy, they will look for managers who are nimble and opportunistic when it comes to using different credit strategies.

- The ability to rate PE portfolios will open up lots of new opportunities that we will be talking about in a few years. These products are relatively simple, but creative sponsors and investors can utilize these products in different and unexpected ways.
- As more sponsors, investors, and lenders think creatively around liquidity structuring and solutions, it continues to be an exciting time to be part of the the fund finance market.

WFF Networking Boat Cruise

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Women in Fund Finance announced a Networking Boat Cruise event in connection with the Fund Finance Association's 11th Annual Global Fund Finance Symposium in Miami, Florida. The cruise is scheduled for February 16, 2022 at 12 p.m. For more information, click **here**.

Maples Group – Global Fund Finance Market Newsletter

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This past Tuesday, Maples Group released its July 2021 edition of *FUNDed: An Industry Newsletter for the Global Fund Finance Market*, which can be accessed **here**. The newsletter highlights the healthy growth the industry continues to see throughout 2021, as well as new and innovative industry-wide trends, such as increases in ESG initiatives and NAV transactions. In addition, the July 2021 edition features reviews on the Fund Finance markets in the United States, Europe and Asia, as well as discussions on Golden Share structures in the Cayman Islands, Investment Limited Partnerships in Ireland, Limitations on Distributions covenants from a Luxembourg perspective and granting security in the Channel Islands, Jersey.

Brickfield Careers in Fund Finance Series

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Brickfield Recruitment published another edition of its Careers in Fund Finance Series, this time interviewing Michael Mbayi of Wildgen in Luxembourg. To view the article, click **here**.

Fund Finance Hiring

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Fund Finance Hiring

SMBC is hiring an Executive Director for its Subscription Secured Finance group for the Asia Pacific region. For information, click **here**.