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CHAPTER 1:
The History and Statutory Basis of Debtor-in-Possession Financing

I. The Statutory Basis for Debtor Financing under the Bankruptcy Code

Businesses that have filed for bankruptcy protection under chapter 11 of the Bankruptcy Code often need access to new credit in order to continue operating as going-concerns and to fund their reorganizations. Indeed, the prospect of access to new financing is often a motivation for filing for bankruptcy.[1] Unlike chapter 7, under which a trustee generally takes possession of the bankrupt debtor's estate,[2] debtors who file under chapter 11 generally remain in possession of the estate's assets for the duration of the chapter 11 case.[3] The Bankruptcy Code defines chapter 11 debtors who remain in pos-

1 *See* George G. Triantis, "A Theory of the Regulation of Debtor-in-Possession Financing," 46 *Vand. L. Rev.* 901, 901 (1993).

2 *See* 11 U.S.C. §§ 701-704.

3 *See, e.g.*, 7 *Collier on Bankruptcy* § 1101.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) ("Upon the commencement of a chapter 11 case, the debtor automatically becomes a debtor in possession. The debtor will remain a debtor in possession until such time, if any, as the court orders the appointment of a chapter 11 trustee.... Trustees in

session of estate assets as "debtors in possession,"[4] and new credit extended to a chapter 11 debtor is commonly called "debtor-in-possession financing" or "DIP financing." Because lenders might be wary of extending this type of new credit to a bankrupt entity, the Bankruptcy Code provides a variety of mechanisms designed to facilitate a debtor's access to new credit.[5]

The section of the Bankruptcy Code that most directly governs a debtor's ability to obtain new credit while in bankruptcy is 364. Subsections (a) through (d) of § 364 provide a hierarchy of increasingly attractive incentives that a debtor, under appropriate circumstances, can use to entice skeptical lenders to provide the debtor with needed financing.

Subsections 364(a)[6] and (b)[7] both deal with unsecured credit. Each subsection provides an incentive to lenders to extend unsecured credit to the debtor by according such post-petition unsecured debt the status of "administrative expense." Under the Bankruptcy Code, administrative expenses receive a higher priority than general unsecured claims,[8] and lenders are thus more likely to extend credit on an unsecured basis as a result of their ability to obtain administrative expense treatment than they otherwise would be if they were not accorded such treatment.

Specifically, subsection 364(a) deals with unsecured debt that a debtor incurs "in the ordinary course of business." Courts apply a number of different tests in order to determine whether a debt is incurred in "the ordinary course of business,"[9] with some courts requiring that the relevant transaction be con-

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chapter 11 cases are the exception rather than the rule, and in most chapter 11 cases the debtor serves as debtor in possession for the duration of the case.").

4 *See* 11 U.S.C. § 1101(1) ("In this chapter...'debtor in possession' means debtor except when a person that qualified under section 322 of this title is serving as trustee in the case....").

5 *See, e.g.*, *In re Jartran Inc.,* 732 F.2d 584, 586 (7th Cir. 1984); *In re Glover Inc.,* 43 B.R. 322, 324-25 (Bankr. D.N.M. 1984).

6 Section 364(a) provides: "If the trustee is authorized to operate the business of the debtor under section 721, 1108, 1203, 1204, or 1304 of this title, unless the court orders otherwise, the trustee may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under section 503(b)(1) of this title as an administrative expense."

7 Section 364(b) provides: "The court, after notice and a hearing, may authorize the trustee to obtain unsecured credit or to incur unsecured debt other than under subsection (a) of this section, allowable under section 503(b)(1) of this title as an administrative expense."

8 *See* 11 U.S.C. § 507.

9 *See* 3 *Collier on Bankruptcy*, *supra* note 3, § 364.02.

sistent both with the debtor's pre-petition transactions and with transactions in the industry in which the debtor is engaged,[10] and other courts looking merely to the "reasonable expectations" of the creditors providing the financing.[11]

In practice, courts have generally interpreted financing in the ordinary course of business narrowly and usually limit it to trade credit.[12] The debtor does not need court approval in order to obtain such credit. By contrast, § 364(b) allows the debtor to incur unsecured debt that is *not* in the ordinary course of business. In order for a debtor to obtain new credit outside of the ordinary course of business, court authorization, following notice and a hearing, is required.

Even if new lenders' claims would be accorded administrative expense status, lenders may still be reluctant to extend credit to a debtor in bankruptcy.[13] Although administrative expense claims are paid before general unsecured claims pursuant to the hierarchy set forth in § 507 of the Bankruptcy Code, they are nonetheless payable only out of the value that remains in the bankruptcy estate after all secured creditors have recovered the full value of their collateral.[14] Further, a post-petition lender with administrative expense status also needs to share from the available pool of assets with other administrative expense creditors.[15]

Because it may be difficult for a debtor to thus secure credit, § 364(c)[16] provides additional incentives to post-petition lenders in the event the debtor

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10 *See, e.g.*, *Burlington N. R.R. v. Dant & Russell Inc.* (*In re Dant & Russell Inc.*), 853 F.2d 700, 704 (9th Cir. 1988); *Rajala v. Langer* (*In re Lodge Am. Inc.*), 259 B.R. 728, 732 (D. Kan. 2001); *Poff v. Poff Constr. Inc.* (*In re Poff Constr. Inc.*), 141 B.R. 104, 106 (W.D. Va. 1991); *In re Blessing Indus. Inc.,* 263 B.R. 268, 272 (Bankr. N.D. Iowa 2001); *Huennekens v. Marx* (*In re Springfield Contracting Corp.*), 154 B.R. 214, 222 (Bankr. E.D. Va. 1993); *In re C.E.N. Inc.,* 86 B.R. 303, 305 (Bankr. D. Me. 1988).

11 *See, e.g., Martino v. First Nat'l Bank of Harvey* (*In re Garofalo's Finer Foods Inc.*), 186 B.R. 414, 425-26 (N.D. Ill. 1995); *see also In re Husting Land & Dev. Inc.,* 255 B.R. 772, 779-80 (Bankr. D. Utah 2000), *aff'd*, 274 B.R. 906 (D. Utah 2002).

12 Triantis, *supra* note 1, at 905 (citing *In re Massetti,* 95 B.R. 360, 363 (Bankr. E.D. Pa. 1989); *In re Lockwood Enters. Inc.,* 52 B.R. 871, 874 (Bankr. S.D.N.Y. 1985)).

13 *But see id.* at 902 (suggesting that banks are not as reluctant to extend credit to bankrupt debtors as is often assumed).

14 *See* Robert J. Rosenberg, et al., *A Lender's Participation in a Chapter 11 Case,* 26 (2009).

15 *See id.* at 25.

16 Subsection 364(c) provides:

> If the trustee is unable to obtain unsecured credit allowable under section 503(b)(1) of this title as an administrative expense, the court, after notice and a

cannot obtain credit under subsection 364(b). Specifically, subsection 364(c) allows a court to give an unsecured post-petition lender's administrative expense claim priority over other administrative expense claims. Section 364(c) also allows a debtor, with court authorization, to incur *secured* debt. A court can authorize the debtor to grant a post-petition creditor a lien on previously unencumbered property of the estate,[17] or to grant a junior lien on already-encumbered property.[18]

Lastly, § 364(d)[19] provides the most drastic means by which a bankrupt debtor may secure new credit. Specifically, in the event that the inducements contained in § 364(c) fail to attract lenders, the court may then authorize the debtor to incur debt secured by a lien equal or senior to existing liens on already-encumbered property. Debtors in possession typically propose this arrangement, known as "priming," only when substantially all of their assets are encumbered.[20] In order to "prime" existing pre-petition liens in this manner, the debtor must show not only that it is unable to obtain credit otherwise, but also that the interests of the existing secured creditors will be "adequately protected,"[21] meaning that the new liens will not result in a diminution in the value of the existing creditors' interests in the collateral.[22]

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hearing, may authorize the obtaining of credit or the incurring of debt—
(1) with priority over any or all administrative expenses of the kind specified in section 503(b) or 507(b) of this title;
(2) secured by a lien on property of the estate that is not otherwise subject to a lien; or
(3) secured by a junior lien on property of the estate that is subject to a lien.

17 11 U.S.C. § 364(c)(2).

18 *Id.* § 364(c)(3).

19 Section 364(d) provides:
(1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—
(A) the trustee is unable to obtain such credit otherwise; and
(B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.
(2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

20 Triantis, *supra* note 1, at 907.

21 *Id.* at 908.

22 *See, e.g., In re Beker Indus. Corp.,* 58 B.R. 725, 736 (Bankr. S.D.N.Y. 1986); *In re Reading Tube Indus.,* 72 B.R. 329, 333 (Bankr. E.D. Pa. 1987).

Under § 361 of the Bankruptcy Code, adequate protection can take various forms, including (1) requiring the debtor in possession to make cash payments to displaced creditors in an amount sufficient to compensate the displaced creditors for any decrease in the value of their interests; (2) requiring the debtor in possession to provide displaced creditors with replacement liens that will compensate the displaced creditors for any decrease in the value of their interests; or (3) requiring the debtor in possession to provide displaced creditors with the "indubitable equivalent" of their interests in the collateral.[23] Courts have emphasized that § 364(d) is "a provision to be invoked only in the most compelling and extraordinary circumstances."[24]

II. A Brief History of Debtor Financing

Bankruptcy Code § 364's finely calibrated mechanisms for providing bankrupt debtors with new financing are the product of a long historical evolution. Although many of the basic features of what we now know as "debtor-in-possession," or DIP, financing developed remarkably early in the history of U.S. bankruptcy law, the details of the relevant financing mechanisms have changed over time. In particular, § 364 provides significantly more protection to the interests of pre-bankruptcy secured creditors than did the common law practices from which it evolved, and also even more protection than did the relevant pre-Bankruptcy Code statutes. Furthermore, many of § 364's more detailed provisions can be viewed as guidance on specific issues that had proven to be persistent sources of confusion and controversy in the era before the passage of the Bankruptcy Code.

A. The Common Law Origins of Debtor Financing in Railroad Receiverships

The modern Bankruptcy Code's DIP financing provisions are codifications of practices developed in the common law era prior to the enactment of a national bankruptcy law. In fact, debtor financing remained largely a matter of common law even following the initial passage of the Bankruptcy

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23 11 U.S.C. § 361; *see also In re Chi.,* Mo. & W. Ry., 90 B.R. 344, 360 (Bankr. N.D. Ill. 1988), *rev'd on other grounds*, 109 B.R. 308 (N.D. Ill. 1989).

24 *In re Dunckle Assocs. Inc.,* 19 B.R. 481, 485 (Bankr. E.D. Pa. 1982).

Act in 1898, the predecessor to the modern Bankruptcy Code. Express debtor financing provisions were first incorporated into the Bankruptcy Act in 1934.

Instead of having their origins in the Bankruptcy Act, modern DIP financing techniques grew out of practices developed in the context of nineteenth century railroad receiverships, which were governed by a special body of common law.[25] When a large railroad became insolvent in the nineteenth century—as they often did—railroad bondholders would move to have the court appoint a receiver, who took control of the railroad's property as a "hand of the court."[26] Like the automatic stay under the modern Bankruptcy Code, the resulting equity receivership served to stay the collection of debts and thus to preserve the debtor railroad's assets while a recapitalization was being formulated.[27]

In its order appointing a receiver, the court often would authorize the receiver to issue new debt in the form of "receivers' certificates."[28] In order to make these certificates attractive to potential investors, the court's order would generally authorize the certificates to be secured by a first lien on the bankrupt railroad's property.[29] Insofar as these receivers' certificates "primed" existing liens, they resembled the most extreme form of contemporary debtor-in-possession financing, namely the granting of super-priority liens pursuant to § 364(d).

Strictly speaking, receivers' certificates issued in the context of railroad receiverships did not constitute "debtor-in-possession" financing because the certificates were obligations of the receiver, not the debtor.[30] As a factual matter, however, a railroad's existing management generally continued to operate the railroad even while the railroad's property was nominally in the hands of the receiver.[31] Furthermore, the receivers' certificates were paid out of the assets of the debtor's estate, as is the case with modern DIP financing.[32]

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25 *See* David A. Skeel, Jr., "The Past, Present and Future of Debtor-in-Possession Financing," 25 *Cardozo L. Rev.* 1905, 1905 (2004).

26 *Am. Brake Shoe & Foundry Co. v. Pere Marquette R.R. Co.,* 205 F. 14, 18 (6th Cir. 1913).

27 *See* Harvey J. Baker, "Certificates of Indebtedness in Reorganization Proceedings: Analysis and Legislative Proposals," 50 *Am. Bankr. L.J.* 1, 7 (1976).

28 Skeel, *supra* note 25, at 1911.

29 *See, e.g., Wallace v. Loomis,* 97 U.S. 146, 162 (1877).

30 Baker, *supra* note 27, at 3.

31 *See* David A. Skeel Jr., *Debt's Dominion: A History of Bankruptcy Law in America,* 119.

32 *See* Skeel, *supra* note 25, at 1905, 1911-12; Skeel, *supra* note 31, at 62.

Thus, debtor-in-possession financing essentially existed as a practical reality even before it was acknowledged or enacted in a statute.

Although "receivership" itself was a well-established concept, the use of receivers to operate large-scale enterprises for an extended period of time was a novel development in the mid-nineteenth century, and the receivers' practice of issuing new debt certificates that primed existing liens initially was controversial.

As a matter of first impression, the Supreme Court approved the use of receivers' certificates in *Wallace v. Loomis*,[33] a case involving a failed Southern railroad initially financed with first-lien mortgage bonds guaranteed by the State of Alabama. In that case, prior to its insolvency, the railroad's property also was encumbered by second-lien mortgage bonds. When the railroad became financially distressed, the governor of Alabama and other senior creditors sought a court order appointing receivers "with the power to raise money to make necessary repairs."[34] A court proceeding resulted, at which the proponents of the receivership produced evidence "showing the necessity of immediate interposition of the court to save the property from absolute destruction."[35]

Accordingly, the court issued an order appointing three receivers to operate the railroad. The order also provided that these receivers "might raise money to an amount limited in the order...upon certificates...which should be a first lien on the property."[36] Thereafter, one of the second-lien mortgage bondholders objected to the issuance of the receivers' certificates on the grounds that they created a lien senior to that of the first-mortgage bonds, thus lowering the second-mortgage bondholder's own level of priority.

Nevertheless, the Supreme Court approved the use of the certificates, justifying the issuance of the super-priority certificates by analogizing the receivership to a trust, and the court, whose powers were exercised by the receiver, to a trustee: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of encumbrances, and to authorize such receivers to

33 97 U.S. at 162.
34 *Id.* at 150.
35 *Id.* at 151.
36 *Id.* at 152.

raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the court, by which it is its duty to protect and preserve the trust funds in its hands."[37] By analogizing receivership to a form of trust, the Supreme Court seems to have anticipated the language and structure of modern bankruptcy law, in which the debtor's estate is administered by either a "trustee" or a debtor in possession acting in the trustee's place.

Even after the Supreme Court gave its seal of approval to the issuance of super-priority receivers' certificates, however, courts consistently recognized that this financing device should be used cautiously because of the potential resulting harm to existing creditors. Already in *Wallace* itself, the Supreme Court warned that a court's equitable power to prime existing liens was "to be exercised with great caution."[38] Decades later, the court in *American Brake Shoe & Foundry Co. v. Pere Marquette Railroad Co.* likewise stated that "[t]he authority...to disturb existing liens...should be exercised with great caution, and should be carried no further than actually necessary to attain the desired result."[39]

Some courts even placed more specific limitations on receivers' power to issue new debt with super-priority status. For instance, in *Central Bank & Trust Corp. v. Cleveland*, the Fourth Circuit noted that receivers' certificates were generally appropriate under only two circumstances: (1) where existing lienholders consented, or (2) where "necessity" dictated the granting of super-priority status, namely where such financing was "actually required for necessary expenditures incident to administering the assets and preserving the [debtor's] property from deterioration pending the winding up of the business and the settlement of the receivership."[40]

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37 *Id.* at 162.

38 *Id.* at 163.

39 *Am. Brake Shoe & Foundry Co. v. Pere Marquette R.R. Co.,* 205 F. 14, 19 (6th Cir. 1913).

40 *Central Bank & Trust Corp. v. Cleveland,* 252 F. 530, 533 (4th Cir. 1918). The *Central Bank* court did acknowledge exceptions to this general rule, however, stating for example that a receiver could be directed to operate a business where the income of the operation would exceed the outgo and the operation would therefore be beneficial to the secured creditors. *Id.* The court also acknowledged that the general rule had been modified in the case of public utility corporations, especially railways. *Id.*

The Fourth Circuit's definition, in *Central Bank & Trust*, of the type of "necessity" that justified the issuance of receivers' certificates in terms of the amount of financing needed to "*preserv[e]* the property from deterioration pending the *winding up* of the business" reflects an understanding of the function of debtor financing that was, arguably, already antiquated by the time the opinion was issued.[41] It is true that *traditionally*, receivership had been a legal device used merely to preserve the value of a bankrupt debtor's property pending foreclosure (*i.e.,* liquidation of the debtor's assets).[42] However, railroad property was a novel form of collateral in that railroads often had greater (potential) value for even their secured creditors as going concerns than they would have had in a liquidation.[43] Thus, the true, economically rational goal of the railroad receiverships was often reorganization rather than liquidation, and the function of the financing provided to receivers was, as a practical matter, not merely to preserve the railroad's assets in anticipation of a foreclosure auction but, rather, to finance the ongoing operation pending sale or recapitalization.[44]

Courts adapted to the practical, reorganizational goals of the railroad receiverships in two ways, both of them exemplified by the case of *American Brake Shoe*.[45] One response was to continue using the language of "preservation" but vastly expand the types of expenditures deemed to fall under this term.[46] Thus, while purporting only to "preserve" the value of existing assets, courts in fact allowed costs associated with what appear, in retrospect, to have been fairly major new capital expenditures. *American Brake Shoe* involved an insolvent railroad operating in Michigan, Ohio, Indiana, Illinois and Ontario, and among the items for which the court found there was a "crying need" in order to preserve the railroad were "new equipment," "three new engine houses," new coaling plants and "additional yard room."[47] The Sixth Circuit, and the district court whose approval of the receivers'

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41 *Id.* (emphasis added). As noted above, however, the court did acknowledge modern exceptions to this somewhat antiquated understanding of the nature of receivership.

42 *See* Skeel, *supra* note 31, at 57.

43 *See id.* at 62; *see also In re Chi., Mo. & W. Ry.,* 90 B.R. 344, 356 (Bankr. N.D. Ill. 1988) ("As a general proposition a railroad—even a railroad in a financially precarious situation—is worth significantly more operating than shut down."), *rev'd on other grounds*, 109 B.R. 308 (N.D. Ill 1989).

44 *See* Skeel, *supra* note 25, at 1905, 1912; Skeel, *supra* note 31, at 62.

45 205 F. 14 (6th Cir. 1913).

46 Skeel, *supra* note 25, at 1905, 1913.

47 *Am. Brake Shoe*, 205 F. at 19-20.

certificates the Sixth Circuit affirmed, found ingenious ways to justify such new expenditures—and thus to further the goal of reorganization—by, for example, equating a failure to make needed improvements with a destruction of the railroad's value: "The depriving of a road of immediate and necessary improvements, such as station houses, such as road beds, is simply another way of dissipating and destroying the value of the road."[48]

Secondly, courts created an express exception to the requirement that new financing be used only to preserve the debtor's assets rather than to operate the debtor's business. This exception applied only to railroads, however, and it was justified based on the railroads' perceived status as public utilities.[49] More generally, during the common law era, super-priority debtor financing was deemed appropriate only to rescue entities that "serve[d] the public."[50]

Like the distinction between preservation and operation, the distinction between "public" and "private" proved somewhat unstable, however. Most railroads were in fact private for-profit enterprises, but some courts got around this difficulty by simply stating that the railroads were "quasi-public."[51] By way of example, the court in *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.* stated that "[a] railroad corporation is a *quasi* public institution, charged with the duty of operating its road as a public highway. If the company becomes embarrassed and unable to perform that duty, the courts...will operate [the railroad] by a receiver, and make the expense incident thereto a first lien. This is done on account of the peculiar character of the [railroad] property. It is generally mortgaged to secure bonds, and persons who invest in such securities know that the mortgage rests upon property previously impressed with a public duty. Private corporations owe no duty to the public, and their continued operation is not a matter of public concern."[52]

If *American Brake Shoe* exemplifies the lengths that courts will go to provide new financing to companies perceived to be public utilities, *Farmers' Loan & Trust Co.* demonstrates the unsympathetic treatment given to debtors not perceived to serve a public function. The debtor in *Farmer's Loan* was a coal mining company that had defaulted on the interest payments on bonds

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48 *Id.* (citation omitted).
49 *See, e.g., Central Bank & Trust Corp. v. Cleveland,* 252 F. 530, 533 (4th Cir. 1918).
50 *Am. Brake Shoe*, 205 F. at 19.
51 *See, e.g., Farmers' Loan & Trust Co. v. Grape Creek Coal Co.,* 50 F. 481, 482 (S.D. Ill. 1892).
52 *Id.* (emphasis added).

secured by two coal mines and other land. A receiver was appointed, who subsequently sought court authorization to issue receivers' certificates to finance the continued operation of the mines. The receiver claimed that with the capital from the certificates, he would be able to operate the mines at a profit.[53]

Seventy-five percent of the bondholders joined in the receiver's motion for authorization to issue the certificates. Despite this overwhelming show of creditor support, however, the court sided with the 25 percent of bondholders who opposed the issuance of certificates priming their mortgages. In pertinent part, the court held that the "limited power which courts may exercise in displacing the liens of railroad mortgages should not and cannot be extended to mortgages executed by private corporations."[54] As the legislators who later introduced debtor financing into the Bankruptcy Act apparently came to realize, this common law rule that super-priority financing was available only to railroad debtors was somewhat arbitrary. For this reason, the common law "public" versus "private" distinction was one of the major casualties of the introduction of debtor financing into the Bankruptcy Act in the 1930s.[55]

B. Initial Codifications of DIP Financing

In 1898, Congress enacted the Bankruptcy Act,[56] which remained in force with various amendments until the passage of the Bankruptcy Code in 1978. Initially, however, the Bankruptcy Act did not apply to railroad reorganizations, and thus railroads continued to be reorganized by way of equity receiverships. Accordingly, such receiverships and their use of receivers' certificates continued to develop separately from, but parallel to, the Bankruptcy Act. The distinction between these two parallel systems began to break down in 1933, when Congress enacted section 77 of the Bankruptcy Act, a provision that, for the first time, brought railroads under the jurisdiction of the bank-

53 *Id.* at 481.

54 *Id.* at 483.

55 Prior to the codification of the reorganization methods developed in the equity receiverships, courts appear to have been generally skeptical of reorganization, rather than liquidation, in the non-railroad context. In *Shapiro v. Wilgus*, 297 U.S. 348, 356 (1932), for example, the Supreme Court indicated that reorganization was permissible in railroad cases because a railroad was a "public service corporation," but that reorganization was not necessarily appropriate in other contexts. *See* Skeel, *supra* note 31, at 105.

56 *See, e.g.*, *id.* at 23.

ruptcy courts.[57] One subsection of section 77, namely subsection (c)(3), provided for the issuance of certificates of indebtedness by the debtor in railroad cases. The following year, Congress passed the Bankruptcy Act amendments of 1934, which, in section 77B,[58] for the first time provided for the use of certificates of indebtedness in large *non*-railroad corporate reorganizations.[59]

The amendments of 1934 were rapidly followed by additional reforms in the form of the Chandler Act in 1938. Under the Chandler Act, section 77(c)(3) remained unchanged and continued to govern the issuance of certificates of indebtedness in railroad cases.[60] However, the 1934 provision governing non-railroad financing, section 77B(c)(3), was split into two different provisions. One such provision was contained in chapter X of the Chandler Act, which at that time was supposed to govern large corporate reorganizations, and the other was contained in chapter XI, which at that time was supposed to govern the reorganization of smaller firms.

The Chandler Act was one of the Roosevelt administration's signature New Deal reform measures, and it was passed largely to address perceived conflicts of interest that had existed in the common law receivership system, particularly as a result of the fact that, as noted above, a debtor's existing management generally remained in *de facto* control of the company for the duration of the receivership. Chapter X of the Chandler Act

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57 Jacob I. Weinstein, *The Bankruptcy Law of 1938: A Comparative Analysis Prepared for the National Association of Credit Men,* 175 (1938); *see also* Act of March 3, 1933, ch. 204, 47 Stat. 1474 (1933).

58 "Former Section 77B(c)(3), 11 U.S.C. § 206(c)(3) (1934)[,] provided that: '[T]he judge... (3) may, for cause shown, authorize the debtor or the trustee or trustees, if appointed, to issue certificates for cash, property or other consideration approved by the judge for such lawful purposes, and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, as may be *lawful* in the particular case.'" Baker, *supra* note 27, at 3 n.10 (alterations in original); Weinstein, *supra* note 57, at 200.

59 *See* Skeel, *supra* note 25, at 1915.

60 Section 77(c)(3), former 11 U.S.C. § 205(c)(3), provided: "The judge may, upon not less than fifteen days' notice published in such manner and in such newspapers as the judge may in his discretion determine, which notice so determined shall be sufficient, for cause shown, and with the approval of the [Interstate Commerce] Commission, in accordance with section 20(a) of the Interstate Commerce Act, as now or hereafter amended, authorize the trustee or trustees to issue certificates for cash, property or other consideration approved by the judge, for such lawful purposes and upon such terms and conditions and with such security and such priority in payments over existing obligations, secured or unsecured, or receivership charges, as might in an equity receivership be lawful." *See* Weinstein, *supra* note 57, at 405.

addressed this perceived problem by requiring that, in corporate reorganizations involving at least $250,000 in liabilities, an independent trustee had to be appointed to manage the debtor corporation.[61] Section 116(2) governed the issuance of certificates of indebtedness in chapter X.[62] As revised by the Chandler Act,[63] the section read:

> Upon the approval of a petition, a judge may also... [a]uthorize a receiver, trustee or debtor in possession,[64] upon notice and for cause shown, to issue certificates of indebtedness for cash, property or other consideration, as may be approved by the judge, upon the terms and conditions and with such security or priority over existing secured or unsecured obligations as in the particular case may be equitable....[65]

In contrast to chapter X, which required the appointment of an independent trustee, chapter XI allowed the debtor's existing management to remain in control during the bankruptcy process.[66] Furthermore, even though the intent of the Chandler Act was for large corporations to file under chapter X and for only smaller firms to use chapter XI, the Act, apparently due to a drafting error,[67] failed to provide any express language

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61 *See* Skeel, *supra* note 31, at 119. Section 156 of the Bankruptcy Act, as amended by the Chandler Act, provided that "[w]here the liquidated and non-contingent indebtedness of a debtor is $250,000 or over, the judge shall, upon the approval of the petition, appoint one or more disinterested trustees.... Where the indebtedness is less than $250,000, the judge may appoint one or more such trustees or may continue the debtor in possession." Weinstein, *supra* note 57, at 213. The mandatory trustee provision did not apply in the case of railroad reorganizations, however. *See* Skeel, *supra* note 31, at 125.

62 *See* Baker, *supra* note 27, at 3.

63 The Chandler Act made some clarifying revisions to the language of what had previously been clause (3) of subd. c of sec. 77B of the Bankruptcy Act. *See* Weinstein, *supra* note 57, at 200.

64 This reference to chapter X debtors in possession can be explained by the fact that trustees were required only in chapter X cases where the debtor's liquidated and noncontingent indebtedness was $250,000 or over; in cases with less debt, it was possible for a judge to "continue the debtor in possession." Specifically, section 156 of the Chandler Act read: "Where the liquidated and non-contingent indebtedness of a debtor is $250,000 or over, the judge shall, upon the approval of the petition, appoint one or more disinterested trustees.... Where such indebtedness is less than $250,000, the judge may appoint one or more such trustees or may continue the debtor in possession." *Id.* at 211-12.

65 *Id.* at 200.

66 *See* Skeel, *supra* note 31, at 162.

67 *Id.* at 163.

limiting larger corporations' access to chapter XI.[68] As time went on and this loophole was recognized, increasing numbers of firms of all sizes chose to file under chapter XI, which allowed the debtors to remain in possession, rather than under chapter X.[69] As a result, chapter XI of the Chandler Act evolved into the true precursor to the modern Bankruptcy Code's chapter 11, and its debtor-financing provisions were the true antecedents of today's debtor-in-possession financing techniques.[70]

Section 344 of chapter XI governed the issuance of certificates of indebtedness.[71] The provision was added by the Chandler Act and was modeled after § 116(2) of chapter X (discussed above). Section 344 provided:

> The court may, during the course of a proceeding or, where the court has retained jurisdiction (sec. 368) after the confirmation of an arrangement, authorize, if cause is shown, the receiver or trustee or the debtor in possession[72] to issue certificates of indebtedness for cash, property or other consideration approved by the court, upon such terms and conditions and with such security and priority in payment over existing obligations as in the particular case may be equitable.

There are two notable differences between chapter X's § 116(2) and chapter XI's § 344. First, § 344 does not expressly provide for notice[73] to affected creditors of the proposed issuance of certificates, while § 116(2) does require such notice. Second, § 116(2) expressly permits the certificates issued

68 *Id.* at 162.
69 *Id.* at 127.
70 As one court stated after passage of the Bankruptcy Code, "Section 364(d) is derived from Section 344 of the old Bankruptcy Act," which was contained in chapter XI. *In re Dunckle Assocs. Inc.,* 19 B.R. 481, 484 n.7 (Bankr. E.D. Pa. 1982).
71 *See* Baker, *supra* note 27, at 3.
72 Under chapter XI, the default was for the debtor to remain in possession, unless a receiver or trustee was appointed. Section 342 of the Chandler Act read: "Where there is no receiver or trustee, the debtor shall continue in possession of his property and shall have the title and exercise the powers of a bankruptcy trustee (sec. 44), subject, however, to the control of the court and to the limitations, restrictions, terms and conditions which the court may, from time to time, prescribe." Weinstein, *supra* note 57, at 275.
73 *See Otte v. Mfrs. Hanover Commercial Corp.* (*In re Texlon Corp.*), 596 F.2d 1092, 1098 (2d Cir. 1979) (noting "the absence from § 344 of the specific requirement of notice contained in § 116(2)").

in chapter X to bear priority in payment over existing obligations both "secured or unsecured," while § 344 omits any express mention of priority over "secured or unsecured" obligations.[74]

The initial codifications of debtor financing by way of the Bankruptcy Act and the Chandler Act brought about some significant changes vis-à-vis the practices that had developed in the equity receiverships. One major effect of these codifications was that "debtor-in-possession" financing, in the strict sense, came into being. The Act contained express provisions allowing debtors' existing management to remain in place for the duration of a bankruptcy case, and courts expressly recognized that a debtor who continued in possession of the business by court order occupied a position analogous to the one formerly occupied by a receiver in equity.[75] Because of chapter X's mandatory trustee provision, however, debtor control did not immediately become the norm in large corporate reorganizations administered under the Act, as it later would under the Bankruptcy Code.

Another major effect of the 1934 and 1938 codifications was to largely eliminate the common law rule that certificates of indebtedness could be issued only in the bankruptcies of "public" or "quasi-public" entities.[76] This change could be seen in the fact that the statutes provided for the issuance of certificates in both railroad and non-railroad bankruptcies. Nonetheless, a distinction between public and private entities remained in terms of what types of debtors were entitled to incur new *super-priority* debt that would impair existing secured creditors. Although nothing in the Chandler Act required such a distinction, a number of courts continued to cite pre-Chandler Act precedents in holding that existing creditors could be subjected to a greater degree of impairment in railroad cases than in non-railroad cases because the super-priority debt issued in railroad cases allegedly served the "public interest."[77] The "public interest" rationale for impairing the rights of existing creditors would not meet its demise until the introduction of the "adequate protection" provisions in the modern Bankruptcy Code.

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74 Baker, *supra* note 27, at 4.

75 *See, e.g., In re Avorn Dress Co.,* 79 F.2d 337, 337 (2d Cir. 1935).

76 *See* Baker, *supra* note 27, at 3, 16.

77 *See, e.g.*, *In re Chi., Milwaukee, St. Paul & Pac. R.R.,* 611 F.2d 662, 666-67 (7th Cir. 1979); *In re Chi., Rock Island & Pac. R.R.,* 545 F.2d 1087, 1090 (7th Cir. 1976); *Melniker v. Lehman* (*In re Third Ave. Transit Corp.*), 198 F.2d 703, 707 (2d Cir. 1952).

In spite of the major expansion in the availability of debtor financing that occurred as result of these early codifications, the Bankruptcy Act's debtor financing provisions remained, in some respects, somewhat rudimentary compared to those we use today. For one thing, the only type of debtor financing expressly provided for in the Bankruptcy Act was the issuance of certificates of indebtedness, which appear in retrospect to have been an unnecessarily limited financing instrument compared to the loan agreements typically used in DIP financing today. In spite of this statutory limitation, courts began, on their own initiative, to authorize bankruptcy trustees to incur other forms of debt not tied to certificates.[78] Because §§ 116(2) and 334 mentioned only certificates, courts did not claim to derive their authority to authorize these other types of financing from these sections of the Bankruptcy Act, but instead based this authority on their "general powers."[79]

Courts apparently used their "general powers" to accord administrative expense priority to new debt incurred by the trustee,[80] in spite of the absence of any express provisions in the Act permitting administrative expense priority for new debt. In this regard, courts, even after the passage of the Bankruptcy Act, appear to have continued to create and/or approve additional financing devices on a common law basis, creating an additional body of judge-made law that ultimately would be incorporated into the Bankruptcy Code.

Perhaps more problematically, the Bankruptcy Act's provisions governing certificates of indebtedness, as quoted above, provided courts with virtually no guidance as to the standards for approving their issuance, nor did the Bankruptcy Act provide any guidance on when it was appropriate to allow such certificates to prime existing liens. As one court noted after the Bankruptcy Code had been enacted:

> Under section 344 [of chapter XI of the Bankruptcy Act], it was beyond dispute that the statute granted to

78 *See, e.g., In re Del. Hosiery Mills Inc.,* 202 F.2d 951, 952-53 (3d Cir. 1953); *see also* Baker, *supra* note 27, at 5 ("In Chapter proceedings...claims of creditors who deal with the post-petition debtor are customarily treated as expenses of administration, regardless of whether such claims are evidenced by certificates of indebtedness." (footnote omitted)).

79 *In re Del. Hosiery Mills*, 202 F.2d at 953.

80 *See id.* at 952-53; *see also* Baker, *supra* note 27, at 5 ("In Chapter proceedings...claims of creditors who deal with the post-petition debtor are customarily treated as expenses of administration, regardless of whether such claims are evidenced by certificates of indebtedness." (footnote omitted)).

> the bankruptcy court the power to authorize the trustee or debtor in possession to issue certificates of indebtedness. Yet, there was considerable dispute whether these certificates could interfere [sic] or displace the rights and priority positions of secured creditors.[81]

The "prevailing view"[82] on this issue appears to have been that a bankruptcy court did have the power to nonconsensually subordinate preexisting liens to certificates of indebtedness issued under § 344 in a chapter XI case, but only in those instances where subordination was essential for preserving the encumbered property.[83] This was one of the major controversies that the more explicit provisions of the Bankruptcy Code, particularly § 364(d), would later help to resolve.

C. Debtor-in-Possession Financing under the 1978 Bankruptcy Code

In 1978, Congress passed the current Bankruptcy Code. One of the major effects of the new Code was the elimination of the Chandler Act's distinction between chapter X and chapter XI by consolidating all of the provisions governing corporate reorganizations into what became chapter 11 of the Bankruptcy Code. As under chapter XI of the Chandler Act, chapter 11 of the Bankruptcy Code allowed for a corporate debtor's existing management to remain in place during the bankruptcy case.[84] Nor was there any longer even the attempt, as there had been in chapter X of the Chandler Act, to impose the appointment of mandatory trustees in place of the DIPs in cases involving large corporate reorganizations. Thus, the true heyday of "debtor-in-possession" financing in the literal sense begins only with the passage of the Bankruptcy Code.

In one major respect, the Bankruptcy Code's DIP financing provisions represented a significant departure from debtor financing practices under both the Bankruptcy Act and the common law. Starting with the railroad receiver-

81 *In re Dunckle Assocs. Inc.,* 19 B.R. 481, 484 n.7 (Bankr. E.D. Pa. 1982) (citations omitted); *see also* Baker, *supra* note 27, at 17.

82 *In re Barser Const. Corp.,* 7 B.R. 499, 501 (D.P.R. 1980).

83 *In re Dunckle Assocs.*, 19 BR at 484 n.7; *see also Weems v. Scandia Builders Inc.* (*In re Scandia Builders Inc.*), 446 F.Supp. 115, 118 (N.D. Ga. 1978).

84 *See* Skeel, *supra* note 31, at 181.

ships and as described above, courts authorized receivers to issue super-priority certificates impairing the rights of existing secured creditors by decreasing the value of their liens. Courts justified this practice based on the overriding "public interest" in the continued functioning of the railroads. Nothing in the Bankruptcy Act forbade this type of impairment of existing creditors, and in fact the Bankruptcy Act made such impairment possible even in non-railroad cases where no perceived "public interest" was at stake. Section 364(d) of the Bankruptcy Code, however, added the requirement that "adequate protection" be provided to any existing secured creditor whose pre-petition security interest was impaired or "primed" by new post-petition secured debt.

Following the passage of the Bankruptcy Code, railroad debtors in possession continued to argue, based on precedents going back to the railroad receiverships, that the "public interest" should allow them to incur new secured debt even where there was a risk that this new debt would impair the rights of existing secured creditors.[85] Courts quickly concluded, however, that there was "an unavoidable conflict between the former public interest standard and the concept of adequate protection."[86] As noted above, § 364(d) allows for priming liens only if there is "adequate protection" for the property interests of existing secured creditors; § 361, in turn, defines "adequate protection" to include cash payments, replacement liens or the grant of "such other relief as will result in the realization by [the existing secured creditor] of the 'indubitable equivalent' of [its] interest" in the debtor's property.[87]

While railroad debtors in possession attempted to argue that the public interest allowed them to circumvent the express statutory requirement that they provide pre-petition secured creditors with the "indubitable equivalent" of their pre-petition property interests, courts rejected this argument, holding that "[t]he use of 'indubitable equivalent' requires something more than the rather amorphous consideration of the public interest."[88] In this respect, the Bankruptcy Code was much more protective of secured creditors' rights than were either its common law or its statutory predecessors. Furthermore, the Bankruptcy Code finally did away permanently with the distinction between "public" and "private" debtors when it came to debtor financing, as adequate

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85 *See In re Chi., Mo. & W. Ry.,* 109 B.R. 308 (N.D. Ill. 1989).

86 *Id.* at 313.

87 *In re Chi., Mo. & W. Ry.,* 90 B.R. 344, 360 (Bankr. N.D. Ill. 1988), *rev'd on other grounds*, 109 B.R. 308 (N.D. Ill. 1989).

88 *In re Chi., Mo. & W. Ry.*, 109 B.R. at 313.

protection was required before any priming liens would be allowed, "whether for a railroad [*i.e.,* a "quasi-public" utility] or for a widget manufacturer [*i.e.,* a purely private, for-profit enterprise]."[89]

Aside from this one fundamental shift, many of the Bankruptcy Code's debtor-in-possession financing provisions are best understood as clarifying issues that had been persistent sources of confusion and controversy under the Bankruptcy Act. For example, as discussed above, a major flaw in the Bankruptcy Act provisions governing debtor financing was that they provided no guidance as to what constituted the "cause shown" necessary to persuade a court to authorize a trustee to issue super-priority certificates.[90] Section 364 of the Bankruptcy Code, by contrast, provided courts with much more guidance as to the circumstances under which such financing was appropriate.[91] As one court noted shortly after passage of the Bankruptcy Code, "The Bankruptcy Court's discretion under the Bankruptcy Code is far less than that which it had under the Act. [Bankruptcy] Code [§] 364 is much more explicit in its terms than the rather vague provisions of Act §§ 116(2), 344 and 446."[92]

Another way in which the Bankruptcy Code closed a gap in the Bankruptcy Act was by requiring notice and a hearing before a DIP could incur new debt outside of the ordinary course of business, thus eliminating the former difference between § 116(2), which required notice, and § 344, which did not.[93] This was a needed change, as there seems to have been no obvious reason for the differing notice requirements in §§ 116(2) and 344, and courts

89 *Id.* at 314.

90 Baker, *supra* note 27, at 35.

91 *See Gen. Elec. Capital Corp. v. Hoerner* (*In re Grand Valley Sport & Marine Inc.*), 143 B.R. 840, 851 (Bankr. W.D. Mich. 1992) (noting that the debtor financing provisions of the Bankruptcy Act were "much less specific than § 364" and that "'[Section 364] is largely based upon Section 116(2)...of the [prior Bankruptcy] Act but is considerably more detailed'" (alterations in original) (citation omitted)).

92 *In re Glover Inc.,* 43 B.R. 322, 326 (Bankr. D.N.M. 1984). More recently, another court noted that "[t]he Act [was] relatively unclear as to the procedural requirements for credit acquisitions with such protections as there were being judge made." *In re Lehigh Valley Prof'l Sports Clubs Inc.,* 260 B.R. 745, 751 (Bankr. E.D. Pa. 2001) (citing *In re City Wide Press Inc.,* 102 B.R. 431, 436 (Bankr. E.D. Pa. 1989), *aff'd*, 110 B.R. 710 (E.D. Pa. 1990)). Section 446 governed the issuance of certificates of indebtedness in chapter XII of the Chandler Act, which dealt with the specialized case of "debts which are secured by the real property or chattels real of an individual or partnership." Weinstein, *supra* note 57, at 296.

93 *See Otte v. Mfrs. Hannover Commercial Corp.* (*In re Texlon Corp.*), 596 F.2d 1092, 1098 (2d Cir. 1979).

had in any case already begun to read a notice requirement into § 344 in order to reconcile this inconsistency between the two sections.[94]

Additionally, the Bankruptcy Code's new debtor financing provisions no longer recognized certificates as the only means by which a DIP could obtain new financing. As the Senate Report on § 364 of the new Bankruptcy Code stated, "This section is derived from provisions in current law governing certificates of indebtedness, but is *much broader*. It governs all obtaining of credit and incurring of debt by the estate."[95]

Sections 364(a) and 364(b) exemplify the Bankruptcy Code's broader approach to debtor financing. Through these provisions, the Bankruptcy Code finally codified the practice of allowing debtors to incur new unsecured debt that carried an administrative expense priority, a practice that, as noted above, courts had already begun to authorize pursuant to their "general powers."[96] Thus, § 364 helped to complete the process that was essentially commenced via the 1934 and 1938 amendments to the Bankruptcy Act by codifying and clarifying judge-made debtor financing techniques developed under the common law.

Since being codified in its current form in the Bankruptcy Code, DIP financing has become an increasingly important tool that creditors can utilize to influence the course of a bankruptcy case.[97] In many cases, it is common for a debtor's major pre-petition lenders to provide or participate in a DIP loan. By acting as DIP lenders, such pre-petition creditors can use the terms of the DIP financing agreement to direct or constrain the debtor's management.[98] Provisions in a DIP loan agreement might, for example, require the debtor to meet certain cash-flow targets[99] or sell certain assets.[100] The agreement might

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94 *See, e.g.*, *id.*

95 S. Report No. 95-989, at 57 (1978), *reprinted in*, 1978 U.S.C.C.A.N. 5787, 5843.

96 *In re Del. Hosiery Mills Inc.,* 202 F.2d 951, 952-53 (3d Cir. 1953).

97 *See* David A. Skeel, Jr., "Creditors' Ball: The "New" New Corporate Governance in Chapter 11," 152 *U. Pa. L. Rev.* 917, 925 (2003).

98 *See id.*

99 *See, e.g.*, Marilyn Adams, "Low-Cost Carrier Plan Trips Up UAL," *USA Today*, Mar. 14, 2003, at 3B (cited in Skeel, *supra* note 97, at 926 n.34 (discussing the cash-flow targets in the DIP financing agreement in the United Airlines case)); *see also In re UAL Corp.,* No. 02-48191 (Bankr. N.D. Ill. filed Dec. 9, 2002).

100 *See, e.g.*, Susan Carey, "American Airlines' TWA Financing Plan Is Approved, Although Rivals Call Foul," *Wall Street Journal*, Jan. 29, 2001, at A3 (cited in Skeel, *supra* note 97, at 929 n.45 (describing the DIP financing agreement in the TWA airline bankruptcy, where

even require the debtor to liquidate if it has failed to confirm a plan of reorganization within a specified period of time.[101] Similarly, if a lender wishes to actually acquire the debtor company, the lender may structure the DIP lending arrangement as a *de facto* takeover by, for example, negotiating for seats on the debtor's board or for a percentage of the reorganized company's stock.[102] Thus, whereas under the Chandler Act a mandatory trustee was supposed to ensure that a large corporate debtor's assets were managed for the benefit of creditors, DIP lenders have increasingly come to play a somewhat analogous role under the Bankruptcy Code,[103] using their leverage as post-petition financiers to give chapter 11 an increasingly "creditor-oriented cast."[104]

While traditionally DIP lenders were often banks, in recent years other entities have started to step into this role. For example, in the 2009 bankruptcies of both chemical manufacturer Lyondell Chemical Company[105] and aluminum manufacturer Aleris International,[106] private-equity firms and hedge funds made major contributions to the DIP facilities,[107] arguably marking the beginning of a larger trend toward increased private-equity and hedge fund participation in DIP financing. In both the Chrysler LLC[108] and the General Motors Corp.[109] bankruptcies, the U.S. Treasury provided the DIP loan—in

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DIP financing was conditioned on a sale of TWA to American Airlines)); *see also In re Trans World Airlines Inc.,* No. 01-0056 (Bankr. D. Del. filed Jan. 10, 2001).

101 *See* "FAO Schwarz Inc.: Reorganization Plan Calls for the Closing of 83 Stores," *Chicago Tribune*, Feb. 4, 2003, at 2 (cited in Skeel, *supra* note 97, at 926 n.34 (describing the interim financing agreement in the first FAO Schwarz bankruptcy, which called for liquidation unless the debtor confirmed a reorganization plan by a specified date)); *see also In re ZB Co.,* No. 03-13672 (Bankr. D. Del. filed Dec. 4, 2003).

102 *See* Micheline Maynard, "US Air's Chief Lender Threatens the Ultimate," *New York Times*, Dec. 7, 2002, at C1 (cited in Skeel, *supra* note 97, at 926 n.34 (discussing the financing agreement between US Airways and the Retirement Systems of Alabama, which was structured as a "partial takeover" in which the Retirement Systems would hold seven seats on the thirteen-member board and acquire 37.5 percent of the stock in the reorganized company)); *see also In re US Airways Grp. Inc.,* No. 02-83984-SSM (Bankr. E.D. Va. filed Aug. 11, 2002).

103 *See* Skeel, *supra* note 25, at 1906.

104 Skeel, *supra* note 97, at 918.

105 *In re Lyondell Chem. Co.,* Chapter 11 Case No. 09-10023 (Bankr. S.D.N.Y. filed Jan. 6, 2009).

106 *In re Aleris Int'l Inc.,* Chapter 11 Case No. 09-10478 (Bankr. D. Del. filed Feb. 12, 2009).

107 Jarrod B. Martin, et al., "Freefalling with a Parachute that May Not Open: Debtor-in-Possession Financing in the Wake of the Great Recession," 63 *U. Miami L. Rev.* 1205, 1216-17 (2009).

108 *In re Old Carco LLC* (*f/k/a Chrysler LLC*), Chapter 11 Case No. 1:09-BK-5002 (Bankr. S.D.N.Y. filed Apr. 30, 2009).

109 *In re Motors Liquidation Co., et al. f/k/a General Motors Corp.,* Chapter 11 Case No. 09-50026 (Bankr. S.D.N.Y. filed June 1, 2009).

Chrysler's case, in the amount of approximately $4.5 billion,[110] and in General Motors' case, to the tune of $30 billion.[111] Thus, beginning with its origins as a makeshift common law device for preserving the value of insolvent railroads, DIP financing has grown to become an increasingly central element in modern bankruptcy practice, and an element in which a surprisingly diverse range of players are involved. An awareness of the issues that gave rise to the Bankruptcy Code's detailed provisions on this topic, and a familiarity with these provisions' common law and statutory predecessors, can aid in understanding and navigating this complex but fascinating area of bankruptcy law.

110 Christopher Scinta, et al., "Chrysler Wins Interim Approval of $4.5 Billion Loan," *Bloomberg* (May 4, 2009), *available at* www.bloomberg.com/apps/news?pid=newsarchive&sid=aBckuBUzOWhw&refer=home.

111 Micheline Maynard, et al., "A Primer on the G.M. Bankruptcy," *New York Times*, June 1, 2009, at B8.