Your Vote Matters! Protecting Lenders' 'Sacred' Voting Rights in Syndicated Loans

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By Jeff Bieszczak and Cauley Simmons
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The 2022 mid-term election cycle has finally drawn to a close, but voting-rights issues for lenders participating in "club" and syndicated multi-lender credit facilities are still squarely in season. These so-called "sacred" rights describe which loan document amendments, waivers and exercises of remedies require a heightened level of lender consent. The broader implications of recent court decisions in the TriMark and Bayside Capital cases on the scope of these sacred rights remain to be seen, but both decisions underscore the importance of lenders closely monitoring their voting rights in multi-lender credit facilities. While the idiosyncrasies of each credit facility require a case-by-case analysis of the sufficiency of the governing loan document's sacred-rights provisions, prudent participating lenders should generally request that amendments and waivers to the credit facility covering the following subjects be subject to the consent of all lenders (or, at a minimum, the consent of all adversely affected lenders):

Commitment Rights

Sacred commitment rights include any increase in a lender's loan commitment, extension of the maturity date of a lender's loan commitments or obligation to participate in an "accordion" or incremental credit facility that makes additional financing available under the existing loan documents.

Payment Rights

Sacred payment rights include extending the time for making any principal, interest or fee payment, or reducing or forgiving any amount payable to the lenders under the loan documents. One common exception is the right to activate (or deactivate) the "default" rate of interest, which typically is subject to the Agent's discretion or a "Required Lender" (simple majority) vote.

Security Rights

Sacred security rights include the right to release all or substantially all of the collateral or all or substantially all of the guaranties securing a loan. Depending on the nature of the loan, these rights may be more restrictive as to certain critical guaranties or critical subsets of collateral (e.g., liens on inventory and accounts receivable in asset-based finance).

Voting Rights

Sacred voting rights include changes to the loan document provisions governing amendments and waivers and critical lender-threshold definitions (such as "Required Lender" or "Supermajority Lender" terms).

Payment and Collateral-Sharing Rights

Sacred "sharing" rights include changes to the loan document provisions relating to the pro rata sharing of payments and collateral proceeds among lenders and the so-called collateral "waterfall" provisions directing the order of repayment of obligations under the credit facility and, most often, related swap and bank product offerings.

Borrowing Availability Rights

For asset-based credit facilities, sacred borrowing availability rights include modifications of any "Borrowing Base" structure or definitions that comprise such "Borrowing Base." A common compromise is to only make such changes subject to all-lender consent if the changes make more credit available to the borrower or have the effect of making the loan terms less restrictive on the borrower.

Takeaways

Lenders should also ask that any subordination of lien or payment rights relating to its debt also require its prior written consent. While these rights are not yet universally accepted as sacred lender rights, the consequences of leaving this power in the hands of a simple majority of lenders creates a real risk that the majority lenders preference their own debt to the detriment of non-consenting (and sometimes, unaware) minority lenders.

Should macroeconomic conditions continue to deteriorate, borrowers will be increasingly tempted to use gaps and ambiguities in voting provisions to unlock additional liquidity and uncover leverage against lenders. It is therefore more important than ever that lenders closely inspect the voting-rights provisions in new credit facilities and, where practicable in connection with the amendment of an existing credit facility, request amendments to the voting-rights provisions to shore up any shortcomings.