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INTERCREDITOR AGREEMENTS – U.S. AND EUROPEAN APPROACHES

In this article, the authors clarify the approaches adopted in intercreditor arrangements, particularly second-lien agreements, and some of the differences between the U.S. and Europe. They discuss differences, and some similarities, in parties to the agreements, enforcement of lien subordination, payment blockages, releases of collateral, limitations on first-lien obligations, amendment restrictions, purchase options and credit bidding, and bankruptcy waivers.

By R. Timothy Bryan and Carl Winkworth *

As borrowers have searched for additional sources of financing, and in many cases with greater leverage than traditional senior lenders typically tolerate, a variety of structures involving multiple lenders with subordination features have evolved. The most common of these are first-lien/second-lien structures, senior/mezzanine facilities, split collateral structures, and unitranche facilities:

- (i) **First-Lien/Second-Lien Structures** – these typically involve two sets of lenders (the “First-Lien Lender” and the “Second-Lien Lender”), each with separate facilities and documentation, with each having a lien on substantially the same collateral, and the liens (but not the debt) of the junior lenders subordinated through an intercreditor agreement.
- (ii) **Senior/Mezzanine Structures** – these involve two sets of lenders, each with separate facilities and

documentation, with the mezzanine lender often, but not always, having a lien on substantially the same collateral as the senior lender, with the debt and any liens of the junior lenders subordinated through an intercreditor agreement.

- (iii) **Split-Collateral Structures** – using this approach, each set of lenders typically has their own separate facility and documentation, and often involve an asset-based lender secured by a first-priority lien on inventory and receivables, a term lender with a first-priority lien on remaining assets (including real estate, equipment, intellectual property, and equity of subsidiaries, and each set of lenders having a second lien on the priority collateral of the other lender.
- (iv) **Unitranche Facilities** – this structure involves a single credit facility with a single set of documents

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