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# ENFORCEABILITY OF INTERCREDITOR AGREEMENTS IN BANKRUPTCY

*Intercreditor agreements are fixtures of modern corporate finance transactions, yet the extent to which their provisions are enforceable in bankruptcy remains the subject of ongoing controversy. This article attempts to explain the persistence of such disputes. By examining three recurring issues that have animated many recent disputes over the enforceability of intercreditor agreements in bankruptcy: (1) ascertaining the scope of fundamental intercreditor terms, such as "common collateral," "proceeds," and "exercise of remedies"; (2) the degree to which junior creditors may waive their right to participate in bankruptcy proceedings of the relevant obligor; and (3) whether the Bankruptcy Code permits a bankruptcy court to confirm a "cram-down" plan that does not comport with an otherwise enforceable intercreditor agreement.*

By Christopher M. Dressel *

In principle, one would not expect the enforcement of intercreditor agreements in bankruptcy to engender significant controversy. Such agreements are fixtures of contemporary corporate finance transactions, and defining the relative rights of creditors in bankruptcy is among their core functions. To that end, creditors almost invariably characterize their intercreditor agreements as "subordination agreements" within the meaning of section 510(a) of the Bankruptcy Code. That provision, in turn, flatly declares that "[a] subordination agreement is enforceable in a case under this title to the same extent that such agreement is enforceable under applicable nonbankruptcy law."[1] Yet the treatment and enforceability of intercreditor agreements in bankruptcy remains a topic of perennial controversy.

What explains the persistence of these disputes? Following a brief overview of intercreditor agreements and their principal functions in corporate-finance transactions, this article highlights three recurring issues that animate many disputes over the enforceability of intercreditor agreements in bankruptcy: (1) ascertaining the scope of fundamental intercreditor terms, such as "common collateral," "proceeds," and "exercise of remedies"; (2) the degree to which junior creditors may waive their right to participate in bankruptcy proceedings of the relevant obligor; and (3) whether the Bankruptcy Code permits a bankruptcy court to confirm a "cram-down" plan that does not comport with an otherwise enforceable intercreditor agreement.

[1] 11 U.S.C. § 510(a).

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