

ENFORCEABILITY OF INTERCREDITOR AGREEMENTS IN BANKRUPTCY

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Introduction

With the increasing popularity and complexity of sophisticated real-estate mortgage transactions involving multiple lenders, such as mezzanine financing and multi-tranched securitized loans, intercreditor and subordination agreements have become commonplace. These agreements set forth the respective rights and obligations of the parties with respect to matters such as lien priority, priority of payment from cash flow, effect of rating agency downgrades, priority of access to insurance and condemnation proceeds, amendments to loan documents, notice of default and cure, control, additional advances, standstill and forbearance agreements, and permitted refinancing. *See HSBC Bank USA v. Dr. Ben J. Branch (In re Bank of New England Corp.)*, 364 F.3d 355, 361 (1st Cir. 2004) (“Subordination agreements are essentially inter-creditor arrangements [citation omitted]. They are designed to operate in a wide range of contingencies, one of which is insolvency. As a hedge against the ravages of a future bankruptcy, subordination agreements typically provide that one creditor will subordinate its claim against the debtor (the putative bankrupt) in favor of the claim of another creditor. This subordination alters the normal priority of the junior creditor's claim so that it becomes eligible to receive a distribution only after the claims of the senior creditor have been satisfied [citation omitted]).

With the recent decline in the economy, senior lenders have become more concerned about the exercise of remedies in general and the effect of bankruptcy on the rights and obligations of the respective lenders in particular. Therefore, senior lenders have begun to insert clauses in intercreditor and subordination agreements that require the subordinated lender to assign its voting rights to the senior lender if the mortgagor files (or there is filed against the mortgagor) a bankruptcy proceeding. The efficacy of these types of provisions is uncertain, because of the risk that bankruptcy courts will find that they violate certain provisions of the Bankruptcy Code (“Code”) or the Federal Rules of Bankruptcy Procedure (“Bankruptcy Rules”).

The 203 North LaSalle Decision

In *In re 203 N. LaSalle Street Partnership*, 246 B.R. 325 (Bankr. N.D. Ill. 2000), the bankruptcy court dealt specifically with the rights of parties to an intercreditor agreement. Along with Bank of America (“Bank”), which held a \$93 million nonrecourse first mortgage on the secured property of the limited- partnership debtor, the debtor's general

partner was also a secured creditor in this case. As of the filing date of the debtor's bankruptcy petition, the debtor owed its general partner \$11.3 million, secured by a nonrecourse mortgage.

The bankruptcy court originally set the value of the secured property, which was the debtor's sole asset, at \$54.5 million. Since the total indebtedness owed to the Bank was \$93 million, the general partner's claim was worthless outside of bankruptcy. However, under §1111(b) of the Code, a nonrecourse deficiency claim such as the general partner's is recognized in Chapter 11.

The general partner's mortgage contained language expressly subordinating it to the Bank's nonrecourse mortgage. At the time of the Bank's loan, the general partner also entered into an intercreditor agreement with the Bank that explicitly stated that the general partner's loan was subordinate to the Bank's loan. In addition, the parties had signed a "Consent and Subordination Agreement" as part of a subsequent loan workout, under which the general partner agreed that the Bank could vote the general partner's subordinated claim in a subsequent bankruptcy or insolvency proceeding filed by or against the partnership. (The agreement stated that the Bank could "file, prove, and vote or consent in any such proceedings with respect to, any and all claims of [the general partner] relating to the Junior Liabilities").

To head off a dispute over the enforceability and scope of the aforementioned agreements between the general partner and the Bank, the Bank filed a declaratory relief action with the bankruptcy court seeking confirmation that (1) the general partner's claim was subordinate to the amount of the Bank's claim, including its deficiency claim (in short, nothing would be paid on the general partner's claim until both the secured and unsecured portions of the Bank's claim were paid); and (2) the Bank could vote the general partner's claim in accordance with the contractual agreement of the parties.

The bankruptcy court confirmed the subordinated nature of the general partner's claim, rejecting the general partner's contention that the subordination agreements entered into by the parties only covered subordination of secured claims, not non-recourse deficiency claims (which only exist in bankruptcy). The court stated that "the nonrecourse features of the loan simply impose a limitation on collection actions," and noted that "there was still liability under the note for the full amount of the principal and interest, and the full amount of that liability was given senior stature by the subordination agreements that [the general partner] executed." *Id.* at 329.

The court also rejected the debtor's argument that the subordination of the entire claim should not be permitted because the application of the subordination to a deficiency claim was not explicit. The court found that the "Rule of Explicitness" did not apply, because the subordination of the general partner's claim was expressly provided for in the general language covering all "liabilities," i.e., no special degree of explicitness is required. The court also noted that the Rule of Explicitness applies only to the right of an unsecured creditor to receive post-petition interest, and not with respect to the payment of an unsecured deficiency claim as in the present case.

The Rule of Explicitness

The Rule of Explicitness is an equitable doctrine that some bankruptcy courts have invoked, under federal common law, that prevents a senior lienholder from obtaining post-petition interest pursuant to a subordination or intercreditor agreement unless there is language in the agreement that is “precise, explicit and unambiguous” with respect to the ability of the senior lender to collect such amounts. *See First Fid. Bank v. Midatlantic Nat’l Bank (In re Ionosphere Clubs, Inc.)*, 134 B.R. 528, 533-34 (Bankr. S.D.N.Y. 1991); *Chem. Bank v. First Trust of N.Y. (In re Southeast Banking Corp.)*, 93 N.Y.2d 178, 184-86 (N.Y. 1999); *Chem. Bank v. First Trust of N.Y. (In re Southeast Banking Corp.)*, 156 F.3d 1114, 1125 (11th Cir. 1998). *But see In re Bank of New England Corp, supra*, 364 F.3d at 365 (ruling that § 510(a) of the Code extinguishes the Rule of Explicitness where the state has not adopted the rule as one of general applicability as opposed to one that applies only in bankruptcy, and rejecting the eleventh circuit’s holding in *Southeast Banking Corp., supra*, that New York had adopted the Rule of Explicitness, stating that “[n]othing in that decision persuades us that the Rule of Explicitness is otherwise a part of the armamentarium of interpretive principles generally available to the courts under New York law”). *See also* James J. Tencredi and Honor S. Heath, *The Ingenuity of Subordinated Debt*, 28 *A.B.I. J.* 10 (1999); Alan N. Resnick and Brad Eric Schler, *The Right of a Senior Creditor to Receive Post-Petition Interest from a Subordinated Creditor’s Distributions: Did the Rule of Explicitness Survive the Enactment of the Bankruptcy Code?*, 32 *Uniform Comm. Code L.J.* 466 (2000); Heather J. VanMeter, *How Explicit Do You Need to Be? An Analysis of the Rule of Explicitness after Southeast Banking*, 105 *Comm. L.J.* 35, 36 (2000); Richard E. Mikels, Adrienne K. Walker, and Sara R. Bollerup, *Subordination Agreement Case Highlights Conflict with State Law*, 23 *ABI J.* 12 (December/January 2005) (discussing effect of *In re Bank of New England Corp, supra*); Jo Ann J. Brighton, *Silent Second Lien Filings, Part II: Are They Enforceable?* 24 *ABI J.* 22 (March 2005) (discussing cases dealing with rule of explicitness and enforceability of subordination agreements in bankruptcy).

Assignment of Voting Rights

Turning to the second issue in the case, the bankruptcy court rejected the Bank's requested relief with respect to voting. The court found that § 510(a) of the Code, which provides that a subordination agreement is enforceable in bankruptcy to the same extent enforceable under nonbankruptcy law, "does not allow for waiver of voting rights under Section 1126(a)." Section 1126(a) of the Code provides that “[t]he holder of a claim” may vote to accept or reject a plan under Chapter 11. According to the court, since voting is covered explicitly by §1126(a), its provisions trump contrary provisions in private pre-petition agreements -- much like the Code does not permit a debtor to contract away its discharge -- and “[s]ubordination thus affects the order of priority of payment of claims in bankruptcy, but not the transfer of voting rights.” *Id.* at 331. The court further stated, “it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply.” *Id.*

The court also held that § 3018(c) of the Bankruptcy Rules does not allow the secured creditor to vote a subordinated creditor's claim. This rule provides that “the creditor or equity security holder or an authorized agent” must sign an acceptance or rejection of a Chapter 11 plan. The court dismissed the Bank's argument that it was an "agent" of the general partner pursuant to the written agreement, because in voting the claim it would be acting in its own interests and not the general partner's. The court looked to the substance of the relationship, and found that the parties cannot contract in advance for this status consistent with either §1126(a) or § 3018 of the Bankruptcy Rules.

Scope and Extent of Lien Subordination

The bankruptcy court's holding in *203 N. LaSalle* with respect to the issue of the extent and scope of the junior lienholder's subordination is undoubtedly correct, and is in accord with the intention of the parties as well as existing case law. *See, e.g., In re Ionosphere Clubs, Inc.*, 134 B.R. 528, 532 (Bankr. S.D.N.Y. 1991) (“Under 11 U.S.C. § 510(a), full effect must be given to pre-bankruptcy subordination agreements”); *In re Envirodyne Industries, Inc.*, 161 B.R. 440, 445 (Bankr. N.D. Ill. 1993) *aff'd* 29 F.3d 301 (7th Cir. 1994) (ruling that interpretation of subordination clause is determined by state law and is not affected by bankruptcy proceedings). *See also* Robert M. Zinman, *Under the Spreading Bankruptcy: Subordination and the Codes*, 2 Am. Bankr. Inst. L. Rev. 293 (1994); *Note: The Outer Fringes of Chapter 11: David Kravitz, Nonconsenting Senior Lenders' Rights Under Subordination Agreements in Bankruptcy*, 91 Mich. L. Rev. 281 (1992).

Nonetheless, attorneys representing first mortgage lenders may wish to add additional language to subordination and intercreditor agreements that specifically subordinates the junior party's claim to the entire indebtedness (including post-petition interest) of the first priority lienholder, whether such claim is secured or unsecured and whether or not it is created solely as a result of any provision of the Code. Counsel for first mortgage lenders may also wish to consider obtaining, at the time the intercreditor or subordination agreement is entered into, a present written assignment of the junior lienholder's claim (including voting rights to the claim in a subsequent debtor bankruptcy proceeding), which could be held by the first lienholder or placed in escrow with a third party. Alternatively, the intercreditor or subordination agreement could provide that upon the occurrence of a subsequent debtor bankruptcy, the junior lienholder would immediately assign its claim against the debtor to the first lienholder, pursuant to an agreement in form and content approved by the first lienholder (which form could be attached as an exhibit to the intercreditor or subordination agreement or be contained in a separate agreement).

Assignment of Voting Rights

The bankruptcy court's refusal to enforce the consensual transfer of the subordinate lender's voting rights in *203 North LaSalle* is problematical, and does not appear to be warranted by either the facts of this case or other case law in this area. Unlike pre-petition agreements between the debtor and a secured creditor providing for automatic lift of the stay or the waiver of other rights by the debtor or the consent to certain actions of

the first mortgage lender by the debtor (e.g., to not oppose a reorganization plan submitted by the secured creditor), the agreement in *203 North LaSalle* was voluntarily entered into solely by creditors of the bankruptcy estate, i.e., the debtor was not a party to the agreement. No public policy is violated in this factual situation, especially since there is no expectation of any recovery for the subordinate lienholder. (In *203 North LaSalle*, the Bank's first-position secured lien was valued at \$54.5 million, and the indebtedness owed to the Bank by the debtor was \$93 million).

The trading in and assignment of claims among creditors is common and is supported by case law, as well as the Code and Bankruptcy Rules. Although a bankruptcy court may invalidate a vote that was not made or obtained in good faith, a creditor is not prohibited from assigning or transferring its vote, or right to vote, to another person or entity after a bankruptcy petition has been filed by or against the debtor. Section 1126(e) of the Code permits a court to disqualify the votes of any entity whose acceptance or rejection of a plan was not incurred in good faith. Under the Bankruptcy Rules, the courts are authorized and empowered to resolve disputes and enter appropriate orders in connection with such transfers and assignments. Section 3001(e) of the Bankruptcy Rules restricts the bankruptcy court's role to the adjudication of disputes regarding the transfers of claims. For the most part, if the transferor does not object, then the transfer is automatically approved without a court order. Section 3001(e) of the Bankruptcy Rules is not intended either to encourage or discourage post-petition transfers of claims or to affect any remedies that are otherwise available to a transferor or transferee under non-bankruptcy law, such as the remedy for misrepresentation in connection with the transfer of a claim. In general, purchasing claims is permitted if full and proper disclosure is made and if the purpose of the purchase is not to increase the creditor's recovery at the expense of the other creditors.

Although case law is sparse in this area -- probably because most disputes are resolved through voluntary and consensual compromises as to the respective positions and recoveries of the parties in order to prevent costly and time-consuming litigation -- other bankruptcy court decisions generally have held that voting rights may be transferred to another creditor as part of an intercreditor or subordination agreement, and that such assignments are valid and enforceable as bargained-for contractual rights. In *In re Curtis Center Ltd. Partnership*, 192 B.R. 648, 659-60 (Bankr. E.D. Pa. 1996), the subordinate lienholder had entered into a subordination agreement with language remarkably similar to that contained in the intercreditor agreement executed by the first and second lienholders in *203 North LaSalle* (i.e., providing that the first lienholder was authorized, on behalf of the junior lienholder, to file all claims and proofs for the full outstanding amount of the junior debt and to "prove and vote or consent in any proceedings with respect to [the junior] debt"). The court ruled that the junior lender could not vote on the debtor's plan because of the "plain and unambiguous" language in the subordination agreement, the clear language of Section 510(a) of the Code as to the validity and enforceability of intercreditor agreements, and the inapplicability and irrelevance of the junior lienholder's implied argument that it could ignore the plain language of the subordination agreement because it was to be paid, as part of the debtor's plan, from some "source other than the debtor." See also *In re Itemlab, Inc.* 197 F.Supp. 194, 197-98

(Bankr. E.D.N.Y. 1961) (holding that where senior creditor would not recover full amount of its claim and junior creditor would therefore receive nothing, junior creditor was deemed to have made an equitable assignment of its claim and senior lender was entitled to vote junior lender's claim even though subordination agreement was silent as to voting of claims in bankruptcy proceedings); *In re Inter Urban Broadcasting of Cincinnati, Inc.*, 1994 WL 646176 (Bankr. E.D. La., Nov. 16, 1994) (approving assignment of voting rights in subordination agreement); *In re Southland Corp.*, 124 B.R. 211, 225-27 (Bankr. N.D. Tex. 1991) (holding that notwithstanding § 3018 of the Bankruptcy Rules, which grants record holders of claims right to vote on Chapter 11 reorganization plans, beneficial owners of securities, not record holders, were actual "holders" of right to vote within meaning of § 1126(b) of the Code).

However, other courts have refused to enforce provisions in intercreditor or subordination agreements that permitted the senior lender to vote the bankruptcy claim of a junior lender, or have strictly construed the language in such agreements to prevent the senior lender from exercising the junior lender's right to vote. *See, e.g., In the Matter of Alda Commercial Corp.*, 300 F.Supp. 294, 296 (Bankr. S.D.N.Y. 1969) (permitting junior creditors to vote for trustee at first meeting of creditors, before determination of whether some creditors were subordinated as to eventual payment); *Beatrice Foods Co. v. Hart Ski Mfg. Co., Inc. (In re Hart Ski Mfg. Co., Inc.)*, 5 B.R. 734, 736 (Bankr. D. Minn. 1980) (stating, in *dicta*, that regardless of subordination the subordinate lender retains the right to "to assert and prove its claim" and to "participate in the voting for confirmation or rejection of any plan of reorganization"); *First Nat'l Bank of Hollywood v. American Foam Rubber Corp.*, 530 F.2d 450, 454-56 (2nd Cir. 1976) (upholding right of subordinated creditor to discharge an unmatured subordinated indebtedness without consent of senior creditor, and stating that "if the senior creditor would prohibit a discharge because of such remote contingencies, he should so provide in the subordination agreement").

In *In re Sentry Operating Co. of Texas, Inc., et al.*, 264 B.R. 850 (Bankr. S.D. Tex. 2001), the debtors had entered into a \$20 million credit facility with two banks for the acquisition and operation of several small-town funeral homes. The banks held liens and security interests against the properties pursuant to a credit agreement with the debtors. In addition, certain other bank equity investors had purchased \$2 million worth of senior subordinated notes issued by the debtor ("Notes"). The Notes contained an explicit provision stating that during the continuance of any default in payment of the senior secured indebtedness, the noteholders would subordinate their right to payment until the senior lienholders were paid in full. The Notes also contained a provision that if the borrower-debtors were liquidated any payment otherwise due to the subordinate lienholders would be paid to reduce the senior indebtedness. The Notes further provided that the noteholders would not vote their claims "in a manner inconsistent with the terms of this Section." Notwithstanding this express language, the subordinated investors voted against the Chapter 11 bankruptcy plan approved by the senior lienholders. The senior lienholders filed a motion to disqualify the votes of the subordinated investors, alleging that the clear language of the subordination provision in the Notes prohibited them from voting against the plan so long as the senior indebtedness had not been paid in full. The

court acknowledged that subordination agreements are enforceable in a bankruptcy case and that the subordinate noteholders had clearly subordinated their claims.

However, the court noted that the proposed plan provided for greater payment to trade creditors (who were placed in their own class and would receive 100% of their claims, as opposed to the subordinate noteholders who were placed in a separate class and would receive 1% of their claims). The court found that the subordination provision in the Notes only provided for subordination to payment of the senior indebtedness, not to a plan that allowed payment of trade debt in preference to payment of the subordinated investors; i.e., the subordination provision in the Notes explicitly provided that the claims of the subordinated noteholders were not subordinated to other unsecured claims. Therefore, the court ruled, the subordinated noteholders were “not prohibited from voting against a plan that subordinates them to trade creditors of equal rank.” *Id.* at 858. Because the plan provided for greater payment to trade creditors than to the subordinate investors, the court held that “[t]his violates the [the subordination section] of the Notes. Consequently, a vote against such plan is in accordance with [the subordination section of the Notes], not violative of it.” *Id.* The court acknowledged that the subordinate investors would be prohibited from voting against a plan that provided for payment of all funds to the secured senior lenders or that provided for equal payment to trade creditors and other secured creditors. This case clearly illustrates the importance (as noted earlier in this article) of drafting clear and comprehensive language in subordination agreements to reflect the intent of the parties. *See generally* Daniel C. Cohn, *Subordinated Claims: Their Classification and Voting Under Chapter 11 of the Bankruptcy Code*, 57 Am. Bank. L.J. 293 (1982)

Effect of Agency Relationship; Loan Participation Agreements

Based on that portion of the court’s ruling in *203 N. LaSalle* that prohibited the Bank from voting the subordinated creditor’s claim because no agency relationship existed (or would be deemed to exist) between the parties, some commentators have suggested that creditors who wish to exercise such rights insert a provision in the intercreditor or subordination agreement expressly appointing the senior creditor as the agent of the subordinate creditor for purposes of voting the subordinate claim, in addition to an assignment by the subordinate lender of the right to vote the claim. *See* Bruce H. White and William L. Medford, *Subordination Agreements and Voting Rights: Will Your Intercreditor Agreement Be Enforced?* 20 ABI J. 32, 33 (2001). However, this strategy may be problematic as a court may construe it as a transparent and impermissible attempt to avoid the court’s ruling in *203 N. LaSalle* regarding application of the express language of § 1126(a) of the Code and § 3018 of the Bankruptcy Rules. As noted above, the court in *203 N. LaSalle* held that the parties cannot contract in advance for agency status consistent with either §1126(a) or § 3018 of the Bankruptcy Rules, because in voting the claim the senior creditor would be acting in its own interests and not those of the subordinated creditor.

A “lead” or “agent” bank will often agree with another bank or financial institution, or several banks or financial institutions, to “participate” the loan, i.e., to transfer an interest in a portion of the mortgage loan and the underlying debt obligation either prior

to the closing of the loan or after the loan has closed. The lead lender will commonly retain a portion of the loan and be the mortgagee of record, hold the debt instrument (or instruments) in its possession, and will be responsible for maintaining and servicing the loan, collecting the debt payments and enforcing the terms of the loan documents. The lead lender also will be responsible for delivering to each participant its proportionate share of the loan payments that it collects from the borrower, and will assume certain disclosure and other obligations to the participant(s), all as contained in the participation agreement between the lead lender and the participant(s). The relationship between the lead lender and the participating lender or lenders may involve an underlying loan that is either secured or unsecured. Lenders should be aware that the characterization of a participation interest might affect the ability of the lead lender, or a participant, to deal with the collateral when the loan is in fact secured by an interest in real property.

A loan participation agreement is generally construed as an arms-length commercial contractual relationship that will be enforced in accordance with its terms. *See, e.g., In re Colocotronis Tanker Securities Litigation*, 447 F. Supp. 828, 833 (S.D.N.Y. 1978) (“[Participation] agreements are arms length contracts between relatively sophisticated financial institutions and do not establish fiduciary relationships...”); *Natwest USA Credit Corp. v. Alco Standard Corp.*, 858 F.Supp. 401, 407-08 (S.D.N.Y. 1994) (“A participation is not a loan. To the contrary, a participation is a contractual arrangement between a lender and a third party whereby the third party, labeled a participant, provides funds to the lender. . . The participant is not a lender to the borrower and has no contractual relationship with the borrower”).

However, a court conceivably could characterize the parties’ contractual relationship as one of agency, whereby the participant is deemed to be the principal and the lead lender an agent of the participant with respect to (at a minimum) collection of payments due under the loan.

Although bank groups (especially groups involving both foreign and domestic banks) usually execute an agency agreement, the agent or lead lender may not always be acting (or be obligated to act) in the best interests of, or at the direction of, each of the participants. Such agency agreements commonly provide for a majority vote as opposed to a unanimous vote. If the agent votes the claims of the members of the group in a bankruptcy proceeding, could a dissenting member claim that the voting of its individual claim against its wishes violated the bankruptcy court’s ruling in *203 N. LaSalle* (which tactic could result in extensive litigation and possible objection to confirmation of the plan based on the placement of several banks’ claims and interests into one class of creditors)? The answer to this question may depend on whether the loan participants are in fact deemed by a bankruptcy court to have discrete claims that may be asserted separately from the claim asserted on behalf of the group by the agent or lead lender.

In *In re Okura & Co.*, 249 B.R. 596 (Bankr. S.D.N.Y. 2000), the bankruptcy court held that the participation agreement between the lead or “agent” bank and another lender was a “true loan participation,” which did not result in a partial assignment of the lead lender’s right to payment from the debtor or otherwise give the participating bank lender any right to payment from the debtor. The court ruled that the participating bank was entitled only to share in the

proceeds upon the debtor's repayment of the loan, and that the participating bank did not have any "claim" against the debtor which would give it "creditor" status in the debtor's Chapter 11 bankruptcy proceeding. The court noted that the participation agreement between the lead lender and the participating bank contained language stating that the lead lender retained the exclusive right to assert a claim against the debtor and that the participating bank would have no interest in the collateral for the loan. According to the court, "One aspect of loan participations that makes them attractive is the delegation of administrative tasks, like origination costs and servicing responsibilities to a lead lender (citations omitted)." *Id.* at 608. The court further ruled that the loan participation agreement did not constitute a tenancy in common under New York law, because only the lead lender had entered into the underlying loan agreement with the debtor.

The *Okura* case contains a discussion of the law of participation agreements in general, including the difference between participation agreements (which the court characterizes as "true participations"), interbank loans, and syndication agreements. According to the court:

"The most common multiple lending agreement is the loan participation agreement, which involves two independent, bilateral relationships; the first between the borrower and the lead bank and the second between the lead bank and the participant (citation omitted). As a general rule, the participants do not have privity of contract with the underlying borrower (citation omitted). In an interbank loan, one bank lends the funds of another bank, which, in turn, lends to the borrower. In a syndication agreement, the banks jointly lend money (citation omitted)."

Id.

See also In re Autostyle Plastics, Inc., 269 F.2d 726, 737-38 (6th Cir. 2001) (stating that "[t]he facts indicate that the parties intended the transactions to be true participation agreements," and that the participation agreements were valid, legal, and enforceable and gave the lead lender "the sole right to seek legal recourse against the borrower").

Conclusion

In mortgage loan transactions involving more than one lender, it is important to state clearly and completely, in intercreditor and subordination agreements entered into by the lenders, the rights and obligations of the respective parties if a bankruptcy proceeding is subsequently filed by or against the mortgagor. Such agreements should be enforced by bankruptcy courts in accordance with their terms, as provided in Section 510(a) of the Code. However, a provision in an intercreditor or subordination agreement providing for a consensual transfer of the subordinate lender's voting rights as a claimant in the bankruptcy proceeding to the senior lender may be deemed by some bankruptcy courts to be an impermissible and unenforceable violation of other provisions of the Code and the Bankruptcy Rules. As noted earlier in this article, there are steps that the senior

lender can take to attempt to minimize this risk, but based on existing case law it is uncertain whether these strategies will be successful.