

**EISNERAMPER**



# **Distressed Hot Topics Panel 2022 Credit Smorgasboard**

## **Presented by:**

- Sydney Darling – Porzio, Bromberg & Newman, P.C.
- David Burns - Imperial Capital, LLC
- Tom Hidder – Harney Partners

## **Moderated by:**

- Robert Katz
- With Support By Henry Vargas

April 12, 2022



## Discussion Topics:

1. Evolving Status of Non-Consensual Third-Party Releases in Chapter 11 Bankruptcy Plans
2. Lender-On-Lender Controversy Continues
3. Current Operating Challenges in the Middle Market
4. Special Purpose Acquisition Company: What's Up with This Universe?



## Sydney Darling – Porzio, Bromberg & Newman, P. C.

- Of Counsel within the firm's Bankruptcy and Financial Restructuring Department
- Primary focus is on commercial bankruptcy matters, representing a variety of constituencies.
- Experience representing secured and unsecured creditors, chapter 11 trustees, liquidating trustees, creditors' committees, asset purchasers, property owners/landlords and other interested parties in bankruptcy cases.
- Wide array of experience, in both litigation and transactional matters including but not limited to the areas of business and commercial law, financial services, and distressed debt investors.
- Represented numerous clients at the trial and appellate levels of state, federal and bankruptcy courts in New Jersey and New York, including the Third Circuit Court of Appeals and New Jersey Appellate Division.

## David Burns – Imperial Capital

- Director in New York Office
- Over 15 years of experience in complex financial restructuring, distressed M&A, and special situations financing,
- Advised companies and creditors in a wide range of situations in the Americas and Europe, including Delphi, Chemtura, Fleetwood Enterprises, Anchor Glass, High Voltage Engineering, Grupo TMM, S.A., Armstrong World Industries, and Owens Corning.
- Previous advisory experience includes time at Greenhill & Co., LLC, Merrill Lynch's Global Special Situations Group, and Houlihan Lokey.
- Mr. Burns holds a BA from Vassar College, a JD from the University of Texas School of Law, and an LLM from the University of Edinburgh.

## Tom Hidder - Harney Partners

- Managing Director of Harney Partners with over 35 years of experience.
- Financial Advisor to a global consumer products company that had lost its CFO and was in default of lender payment terms and financial covenants.
- Financial Advisor for a Memphis-based paper converter experiencing financial challenges caused by poor internal operations.
- CFO for a sub-prime auto leasing and dealership franchising operation based in Detroit that was operating below its cash break-even point.
- CFO of a home furnishings rental business that had operations in nine states plus the District of Columbia.
- Member of Board of Directors of a venture capital fund focused on investing in early-stage technology companies.
- Senior Banking Executive – Led and participated in more than 25 loan workouts, both in-court and out-of-court.

## Robert Katz & Henry Vargas: EisnerAmper

- Managing Director and Manager in EA's Restructuring Group
- Expertise includes: Cash Flow Enhancements, Operations Improvements, Financial Modeling
- Executive C Suite And Corporate Board Leadership
- Assisted our clients with multimillion dollar increase in stakeholder value.
- Ask how we can do the same for you.

**Part I**

Evolving Status of Non-Consensual Third-Party Releases in Ch 11 Bankruptcy Plans



## What is a Third-Party Release?

- i. A release of claims against non-debtors such as a debtor's owners, officers, directors, lenders or employees
- ii. Not expressly authorized by the Bankruptcy Code
- iii. Types of Third-Party Releases:
  - 1. Fully consensual releases
  - 2. Pre-bankruptcy conduct release (controversial) – release and injunction for prebankruptcy acts by non-debtor third party for presently existing and future claims tied to prebankruptcy conduct – versus post-bankruptcy conduct releases (acceptable in most courts) – releases, exculpations and injunctions for Ds & Os, committee members, and professionals relating to bankruptcy proceedings
  - 3. Section 524(g) of the Bankruptcy Code – channeling injunction for asbestos-related mass tort liability



## Circuit Court Treatment

- i. Not legally permissible in Fifth, Ninth and Tenth Circuits
- ii. Permissible in Third, Fourth and Eleventh Circuits
- iii. Permissible with restrictions in Second, Sixth and Seventh Circuits
- iv. Third Circuit Standard – TPR permissible if:
  1. Fair;
  2. Necessary to the reorganization;
  3. Supported by specific factual findings; and
  4. Given in exchange for fair value. [*In re Continental Airlines*, 203 F.3d 203, 214 (3d Cir. 2000)]
  5. Additional considerations - *In re Zenith Electrics Corporation*, 241 B.R. 92, 110 (Bankr. D. Del. 1999)
- v. Second Circuit Standard – TRP permissible if the injunction plays an important part in the debtor's reorganization plan and only in rare/extraordinary/unique cases. *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 141-42 (2d Cir. 2005).

# The Non-debtor Release Prohibition Act ("NPRA")

- i. Introduced by Congress on July 28, 2021
- ii. On Nov. 3, 2021, House Judiciary Committee voted that it be considered by the full House, but vote is not yet scheduled.
- iii. Senate version still with Senate Judiciary Committee

## Recent Notable Caselaw

- i. *In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021) – no subject matter jurisdictional authority for nondebtor releases in bankruptcy cases under any circumstances
- ii. *Patterson, et al., v. Mahwah Bergen Retail Group, Inc.*, Civil No. 3:21cv167 (DJN), ECF No. 79 (E.D. Va. 2022) – bankruptcy court exceeded constitutional limits of its authority as delineated by the Supreme Court in *Stern v. Marshall*, 564 U.S. 462 (2011), ignored the mandates of the Fourth Circuit in *Behrmann v. Nat'l Heritage Found.*, 663 F.3d 704 (4th Cir. 2011), and offended the most fundamental precept of due process

**Part II**

Lender-On-Lender Controversy Continues



## Lender-On-Lender Controversy Continues

- Earlier - “Re-locating” collateral (e.g., J. Crew)
- More Recently – Up-tier Exchanges (e.g., Serta Simmons, Boardriders, TriMark)
  - Amend credit documents to permit new “super-priority” debt for a sub-set of lenders (the “required lenders”) providing new money, rolling up/exchanging existing debt (as an “open market purchase”) and effectively subordinating non-participating lenders
  - Typically do not amend any pro rata sharing provisions – try to work around “sacred rights” (so unanimous consent arguably not required)
  - May include “covenant stripping”
  - Minority/non-participating lenders typically challenge – violation of pro rata sharing (“sacred rights”), improper release of collateral or guarantees, failure of any roll-up to comply with “open market purchase” provisions, breach of covenant of good faith and fair dealing

## Lender-On-Lender Controversy Continues

- Most recent example – Sincora (f/k/a Wesco)
  - Participating lenders provided new money and rolled up existing positions into a priming position after amending indentures
  - Nuance – New money was issued as fungible/additional notes under existing indenture to get the requisite votes needed for participating holders to amend the indenture and prime non-participating holders
  - Equity sponsor up-tiered its debt position
  - Additional capacity under new 1.25 lien issue – makings of a peace offering?

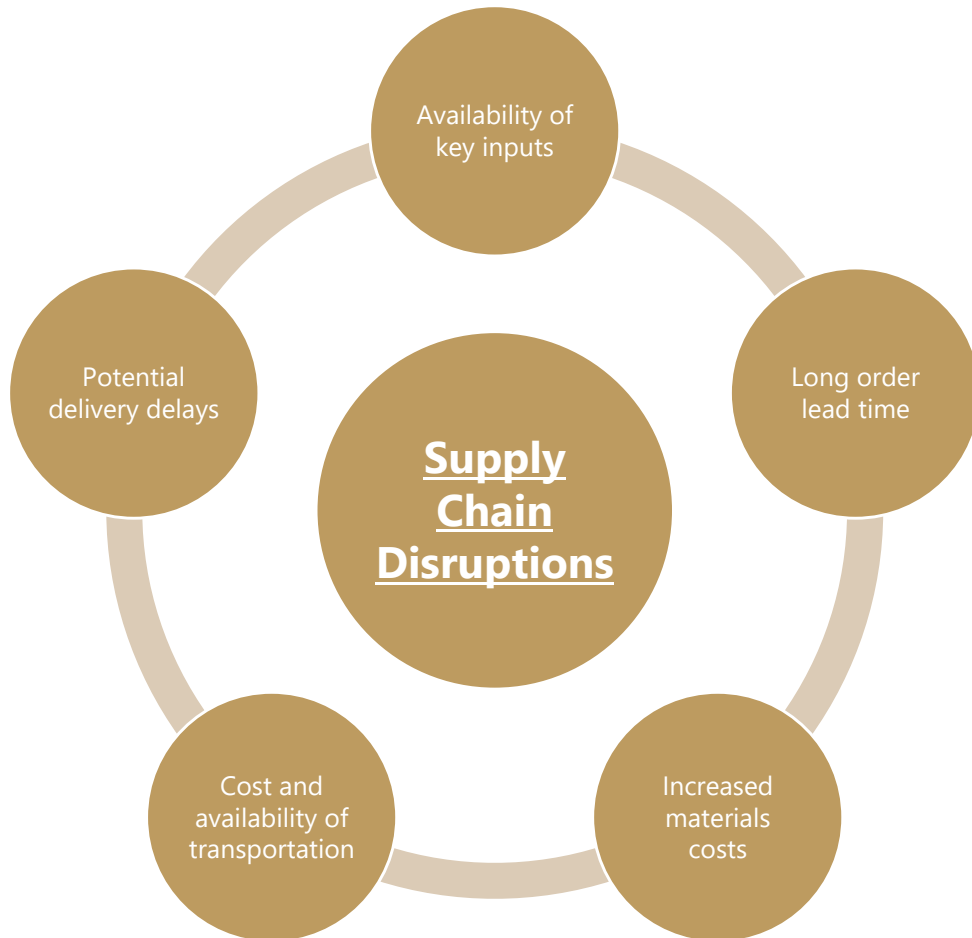
**Part III**

Current Operating Challenges in the Middle Market



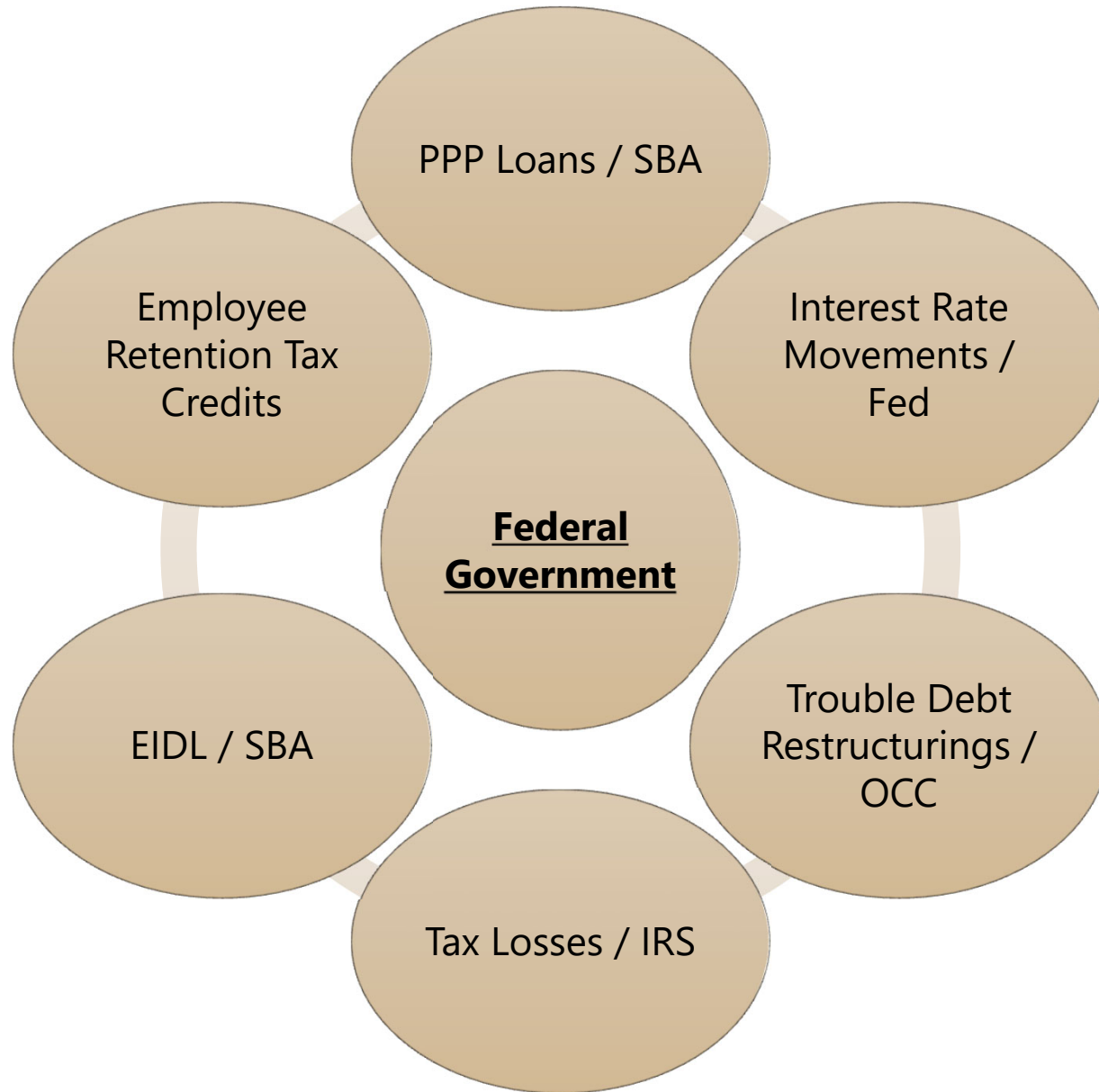
# Current Operating Challenges in the Middle Market

Factors impacting an operating company's ability to survive and prosper.





## Current Operating Challenges in the Middle Market (*Continued*)



## Current Operating Challenges in the Middle Market (*Continued*)

- What can a company do to address these challenges?
  - Focus on liquidity
  - Improve cycle times for book-to-build, build-to-ship, ship-to-bill and bill-to-collect
  - Carefully manage vendor payments
  - Step up A/R collection efforts
  - Increase transportation management efforts
  - Minimize slow-moving inventory
  - Reassess workforce planning/ shift structure/ production runs
  - Reevaluate CAPEX projects and priorities
  - Optimize outstanding loan balances

## Part IV

Special Purpose Acquisition Company:

What's Up with This Universe?





# Questions?



**EISNERAMPER**



© 2022 Eisner Advisory Group LLC

*This publication is intended to provide general information to our clients and friends. It does not constitute accounting, tax, or legal advice; nor is it intended to convey a thorough treatment of the subject matter.*

*"EisnerAmper" is the brand name under which EisnerAmper LLP and Eisner Advisory Group LLC provide professional services. EisnerAmper LLP and Eisner Advisory Group LLC are independently owned firms that practice in an alternative practice structure in accordance with the AICPA Code of Professional Conduct and applicable law, regulations and professional standards. EisnerAmper LLP is a licensed CPA firm that provides attest services, and Eisner Advisory Group LLC and its subsidiary entities provide tax and business consulting services. Eisner Advisory Group LLC and its subsidiary entities are not licensed CPA firms.*