Cahill

A Tale of Two Cases: Bankruptcy Courts Take Divergent Approaches on Non-Pro Rata Rollups

Monday, June 29, 2026

Introduction

For Chapter 11 debtors, debtor-in-possession or "DIP" financing is a vital source of liquidity needed to fund their post-petition obligations and operate in the ordinary course of business prior to emergence from Chapter 11. Debtors will often look to their existing lenders for such financing and nearly as often incentivize the lenders' participation by agreeing to elevate the payment and/or lien priority of the lenders' existing debt claims through the rollup of such indebtedness, thereby providing the lenders with improved recoveries on their prepetition claims. While non-pro rata rollups are not novel, excluded lenders have recently sought to vigorously contest their permissibility in DIP financings. In two such matters within the Third Circuit, these disputes have produced markedly different judicial approaches that depend on nuanced interpretations of the underlying credit agreements.

During oral argument in the contested DIP hearing in the *American Tire Distributors* Chapter 11 proceedings in Delaware, Judge Goldblatt expressed his view that cashless rollups are 'payments' that would trigger the ratable sharing provisions of the prepetition credit agreement.[1]

By comparison, Judge Kaplan, sitting in New Jersey, took a contrary view earlier this year in the Chapter 11 proceedings of *Del Monte*, and held that cashless rollups are not 'payments' and that the exchange of debt occurring as part of the rollup offered to DIP lenders did not trigger credit agreement provisions mandating ratable sharing among lenders, at least at the rollup stage.[2] [3]

---

[1] *In re American Tire Distributors, et al.*, U.S. Bankruptcy Court, District of Delaware, Case No. 24-12381 (jointly administered) (hereinafter, "*American* Tire"), ECF No. 312, at 119 – 120.

[2] *Certain Members of the Ad Hoc Group of Minority Secured Lenders v. Members of the Ad Hoc Term Lender Group (In re Del Monte Foods Corporation II, Inc.)*, U.S. Bankruptcy Court, District of New Jersey, Case No. 25-16984 (Adv. Case No. 26-01018 (MBK)) (jointly administered) (hereinafter, "*Del Monte* Adversary Proceeding"), ECF No. 31, at 10.

[3] Note, however, that while Judge Kaplan found that cashless rollups are not "payments", Judge Kaplan did not dismiss Plaintiffs' declaratory judgment claim that Defendants must share pro rata future payments received on their rollup.

This divergence sets the stage for a potential split in how bankruptcy courts approach non-pro rata rollups, and highlights the careful drafting and specificity required with respect to the wording of carveouts to *Serta* blockers as well as the payment waterfall and pro rata sharing provisions in credit agreements.

Background

In October 2024, American Tire Distributors ("American Tire"), one of the largest distributors of replacement tires in North America, filed for Chapter 11 bankruptcy protection in Delaware. Prior to filing, American Tire and an ad hoc group of its creditors negotiated a restructuring support agreement ("RSA") whereby certain existing lenders (the "Priming Lenders") agreed to provide a DIP facility. The RSA provided for a rollup of approximately $750 million of prepetition obligations held by the participating lenders.[4] A group of excluded lenders that were not offered a chance to participate (the "Excluded Lenders") filed an objection to the Bankruptcy Court's entry of the interim and final DIP Orders (which included the rollup), asserting that the rollup was a non-pro rata payment that violated the Excluded Lenders' rights under the prepetition credit agreement.[5] The Priming Lenders countered that the cashless rollup merely exchanged debt for debt, and was not a "payment" triggering the ratable sharing provisions of the credit agreement. Moreover, the Priming Lenders argued that the credit agreement included a *Serta* carveout for DIP financings, which permitted non-pro rata sharing in connection with a DIP facility even if a payment did occur due to the rollup.[6] During the hearing, Judge Goldblatt expressed his deep skepticism of both arguments, stating that he viewed a cashless rollup as a

---

Id. at 18. Thus, it is possible that the ultimate repayment of a DIP with a non-pro rata rollup feature may nevertheless trigger pro rata sharing. *Id.* at 20.

[4] *American Tire*, ECF No. 674, at 41–42.

[5] *American Tire*, ECF No. 186, at 3–4 (Judge Goldblatt's analysis parses the "sacred rights" provisions of Section 10.01 of the American Tire Prepetition Term Loan Credit Agreement, highlighting in Sections 10.01(d) and (h) that no amendment or waiver was permitted to:

> "(d) change any provision of this Section 10.01 or Section 8.04 or Section 10.07(b)(ii)(F)-(J) that would alter the pro rata sharing of payments [or] ratable reduction of Loans . . . without the written consent of *each Lender directly and adversely affected* thereby;" (*emphasis added*), or
>
> "(h) (i) except to the extent the opportunity to participate as a consenting Lender [in any amendment] . . . has been offered on an *equal and ratable basis to all existing Lenders*, amend [the pro rata payment provisions] or (ii) except to the extent an opportunity to participate in [any] applicable "priming" debt has been offered to all existing Lenders on a pro rata basis, modifications that subordinating any of the Obligations to any other Indebtedness (in each case of the foregoing, except (x) Indebtedness that is permitted under this Agreement (as in effect on the Closing Date) to be senior in in right of payment to the Obligations and/or be secured by a Lien on the Collateral that is senior to the Lien securing the Obligations, as applicable or **(y) in connection with any *"debtor-in-possession"* facility (or similar financing under applicable law)), in each case without the written consent of each Lender directly and adversely affected thereby**)." (*emphasis added*).

[6] *See American* Tire, ECF No. 312, at 118 and clause (y) of Section 10.01(h) above.

"pay down", necessarily constituting a payment of the prepetition credit agreement, since the prepetition debt was functionally discharged.[7] Judge Goldblatt addressed the carveout to the *Serta* blocker for DIP financings by reasoning that though the "Required Lenders" under the prepetition credit agreement could permit priming debt to be incurred that was senior in lien and payment priority to existing obligations in connection with a DIP, the credit agreement did not allow a change to the pro rata payment provisions permitting the repayment of existing debt on a non-pro rata basis to effect a rollup.[8] Judge Goldblatt further opined that there is a layer of "commercial rationality" in these credit agreements whereby it would be "preposterous" to enter into an agreement that provided a broad exception to pro rata sharing via non-pro rata rollups.[9] Shortly after the hearing, the parties reached a settlement of the issues and Judge Goldblatt entered the Final DIP Order without issuing a written decision or formally ruling on the rollup issue.[10] However, as part of the settlement, the Debtors agreed to drop the rollup component of the DIP term loan.[11]

In July 2025, Del Monte Foods Corporation II, Inc. ("Del Monte"), an internationally known producer, distributor, and marketer of packaged food products, filed for bankruptcy protection in New Jersey.[12] A select group of Del Monte's prepetition creditors agreed to provide DIP financing that included a rollup.[13] Participation in the DIP was offered to all similarly situated prepetition lenders; however, certain lenders declined to participate in the DIP, rendering them ineligible to receive the benefit of the rollup under the terms of the RSA.[14] After the Final DIP Order was entered, the minority lenders initiated an adversary proceeding challenging the rollup, arguing, *inter alia*, that the rollup breached the prepetition credit agreement's pro rata sharing requirements[15] and violated the implied covenant of good faith and fair dealing.[16] Judge Kaplan ultimately dismissed both the breach of contract and

---

[7] *Id.* at 116.
[8] *Id.*
[9] *Id.*
[10] *See generally American Tire*, ECF No. 340.
[11] *Id.* at 30.
[12] *In re Del Monte Foods Corporation II, Inc.*, U.S. Bankruptcy Court, District of New Jersey, Case No. 25-16984 (jointly administered) (hereinafter, "*Del Monte*"), ECF No. 1230, at 23.
[13] *Del Monte* Adversary Proceeding, ECF No. 31, at 6.
[14] *Id.; see also Del Monte*, ECF No. 1230, at 10.
[15] *Del Monte* Adversary Proceeding, ECF No. 31 at 3-4 (Section 2.17 (Ratable Sharing) of the prepetition credit agreement, subject to "sacred right" amendment protections, provided that:

> "Lenders hereby agree among themselves that if any of them shall . . . receive payment or reduction of a proportion of the aggregate amount of principal, interest, fees and other amounts then due and owing to such Lender hereunder or under the other Credit Documents . . . which is greater than the proportion received by any other Lender in respect of the [amounts due] to such other Lender, then the Lender receiving such proportionality [*sic*] greater payment shall (a) notify [the] Administrative Agent and each other Lender of the receipt of such payment and (b) apply a portion of such payment to purchase participations . . . so that all such recoveries . . . shall be shared by all Lenders in proportion to the Aggregate Amounts Due to them").

[16] *Id.* at 10.

covenant of good faith and fair dealing claims, finding that a cashless rollup was not a "payment" that must be ratably shared among all lenders under the terms of the prepetition credit agreement,[17] and finding that the good faith and fair dealing claim was not factually distinguishable from the breach of contract claim.[18] However, Judge Kaplan refused to dismiss Plaintiffs' declaratory judgment claim that Defendants must share pro rata future payments received on their rollup loans.[19] Finding that the declaratory judgment claim was premised on "payments or reductions" that Plaintiffs may receive in the future, Judge Kaplan found this argument to be non-duplicative of the breach of contract claims.[20] Moreover, Judge Kaplan viewed the prepetition obligations as having "merged" into the rollup, with these prepetition obligations arguably satisfied through a subsequent actual cash payment on the rollup.[21]

Legal Analysis

Both *American Tire* and *Del Monte* describe a two-step process for challenging a non-pro rata rollup under a breach of contract theory. First, a rollup needs to be considered a "payment" in order for the ratable sharing provisions of a credit agreement to apply. This is largely where Judge Kaplan and Judge Goldblatt differ in their analyses. In the *American Tire* Final DIP Order hearing, Judge Goldblatt expressed his belief that a cashless rollup was a "draw" on the DIP, "the proceeds of which are being used to pay the existing prepetition [loan]."[22] Whereas Judge Kaplan held that the Del Monte rollup effectuated no "payment" or "reduction" of debt for purposes of the credit agreement's pro rata sharing provision,[23] "as the transactions did not involve the discharge of any debt," which is reinstated, not repaid.[24] Judge Kaplan cited two specific provisions of the prepetition credit agreement which contemplated that a "payment," in context, only means a cash payment.[25] Judge Kaplan interpreted

---

[17] The following three exceptions to Section 2.17 were highlighted by Judge Kaplan: "[t]he Provisions of this Section 2.17 shall not be construed to apply to (a) any payment made by the Borrower pursuant to and in accordance with the express terms of this Agreement (including the application of funds arising from the existence of a Defaulting Lender), (b) any payment obtained by any Lender as consideration for the assignment or sale of a participation in any of its Loans or other Obligations owed to it or (c) any payment of any fee in connection with any amendment, waiver or consent or in connection with any extension or commitment of funds." *Id.* at 4.

[18] *Id.* at 15, 17.

[19] *Del Monte* Adversary Proceeding, ECF No. 31, at 18.

[20] *Id.*

[21] *Id.*

[22] *American Tire*, ECF No. 312, at 119.

[23] Note, however, that in refusing to dismiss Plaintiffs' declaratory judgment for sharing of future payments, Judge Kaplan arguably makes an inconsistent ruling in finding that the actual rollup was not a payment of prepetition debt but then finding that the prepetition obligations have "merged" into the rollup and "arguably will be satisfied (in whole or part) through subsequent payment on the Roll-Up Loans." *Del Monte* Adversary Proceeding, ECF. No. 31, at 18 (citations omitted).

[24] *Del Monte* Adversary Proceeding, ECF No. 31, at 10.

[25] *Id.* at 11 (quoting, among other provisions, Section 2.16(a) which stated "[a]ll payments by the Borrower of principal, interest, fees and other Obligations *shall be made in Dollars* in the same day funds" and Section 2.16(c), which requires

these provisions of the credit agreement which expressly and implicitly contemplated that "payments" meant strictly cash payments, distributable among the lenders, to conclude that a cashless rollup manifestly could not be considered a payment to support a breach of contract claim.[26] Judge Kaplan cited to New York state law providing that a payment "is most sensibly construed to apply only to payments made in cash."[27] Moreover, Judge Kaplan, applying his own view of "commercial rationality," found it "nonsensical" to suggest that the non-participating lenders should be able to achieve the rollup of their prepetition loans when they took no risk participating in the DIP, which they had equal opportunity to take part in.[28]

If a challenging lender successfully argues that a rollup is a payment, then the courts must determine that the rollup violates the minority lenders' right to share ratably in any payment under the prepetition credit agreement. While Judge Kaplan's analysis begins and ends with step 1, Judge Goldblatt's dicta in *American Tire* discusses his interpretation of pro rata sharing provisions and *Serta* blockers in the American Tire credit agreement. Judge Goldblatt focuses on the precise language of the American Tire prepetition credit agreement which contained an exception to pro rata sharing of payments "(y) in connection with any 'debtor-in-possession' facility (or similar financing under applicable law)." Judge Goldblatt viewed the language as clearly indicating that a DIP loan without a rollup feature was permitted under the prepetition credit agreement.[29] However, Judge Goldblatt found the language was written in such a way that it was ambiguous whether a non-pro rata rollup should fall within this *Serta* carveout as there was no express mention of a rollup.[30] Though no ruling was issued, and the parties ultimately reached a settlement, it is clear the ambiguity in the American Tire *Serta* carveout played a significant role in Judge Goldblatt's skepticism of the non-pro rata rollup.

Drafting Considerations

Imprecise or ambiguous drafting may not provide a lender with the intended "sacred right". The competing approaches in *Del Monte* and *American Tire* reinforce how critical the drafting of pro rata sharing provisions, as well as any carveouts from a *Serta* blocker, are in a credit agreement. Judge Kaplan cited to various provisions of the Del Monte prepetition credit agreement which suggested that the drafters envisioned payments encompassing only cash consideration despite the fact that the pro rata payment provisions in question made no explicit reference to cash payments. While Judge Kaplan distinguished *American Tire* by stating that there was no final ruling issued on the minority lenders'

---

an administrative agent to "promptly distribute to each Lender . . . all payments . . . of principal and interest due hereunder").

[26] *Id.*

[27] *Id.*

[28] *Id.* at 14; *see also id.* at 17 (acknowledging in footnote 11 that the dissenting lenders argued that conditions to participate did not afford an equal opportunity to participate in the DIP, which was not addressed in Judge Kaplan's ruling).

[29] *American Tire*, ECF No. 312, at 117.

[30] *Id.* at 117–18.

objection,[31] lenders negotiating credit agreements can go a long way toward defending or prosecuting a breach of contract claim at step 1 by defining whether or not cashless rollups are included or excluded from the forms of consideration that flow through a payment waterfall and are subject to the pro rata sharing provisions of a credit agreement.

Even if a bankruptcy judge finds that a rollup is a payment that triggers ratable sharing provisions, clear drafting can potentially obviate further judicial scrutiny. Parties would be well advised when drafting carveouts to a *Serta* blocker and pro rata sharing provisions to be explicit as to whether rollups are required to be offered to every lender and are subject to the pro rata sharing provisions of the credit agreement.

Clear and unambiguous drafting is of paramount importance. As these cases demonstrate, imprecise drafting invites creative counsel and triers of fact to impose their own views on such provisions. In *Multi-Color*, a recent case also heard in front Judge Kaplan, a group of lenders excluded from participation in a DIP made the increasingly familiar argument that rolled up loans were "effectively being repaid and replaced with a different (enhanced) debt instrument."[32] Though a last minute settlement headed off a ruling in which Judge Kaplan may have expanded on his ruling in *Del Monte*,[33] it is apparent this common drafting issue is contributing to litigation, impacting major Chapter 11 cases, and creating unpredictable outcomes that may prove detrimental to lenders participating in the leveraged loan market.

* * *

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to email authors: Joel Moss (partner) at JMoss@cahill.com; Jordan Wishnew (partner) at JWishnew@cahill.com; Matt Catone (associate) at MCatone@cahill.com; and Tanner Bowen (associate) at TBowen@cahill.com.

---

[31] *Del Monte* Adversary Proceeding, ECF No. 31, at 13.
[32] *See In re Multi-Color Corporation, et al.*, U.S. Bankruptcy Court, District of New Jersey, Case No. 26-10910 (MBK) (jointly administered), ECF No. 75, at 2, 6–7 (citing to *American Tire* for the proposition that "other recent attempts to use roll-ups to improperly disadvantage participating first lien lenders have met with close scrutiny by courts").
[33] *See generally id.*, ECF No. 753.