

# Client Alert

Global Finance and Restructuring Practice Groups

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## Resolution of Intercreditor Dispute in Favor of ABL Lenders in the RadioShack Bankruptcy Case

On May 11, 2016, the Delaware bankruptcy court issued an opinion in the RadioShack bankruptcy case addressing an intercreditor dispute between Salus Capital Partners, LLC, the “last out” lender in RadioShack’s pre-petition \$250 million term loan facility, and the lenders under RadioShack’s pre-petition \$585 million ABL facility.<sup>1</sup> Salus argued that a pre-petition restructuring of the ABL facility violated the intercreditor agreement between the ABL lenders and the term loan lenders in a manner that reduced the amount the ABL lenders could receive from the proceeds of their collateral prior to the term loan lenders (which included Salus). The bankruptcy court disagreed and held that the pre-petition restructuring of the ABL facility was permissible under the intercreditor agreement and therefore the ABL lenders’ first lien rights in their collateral were not waived or otherwise impaired.

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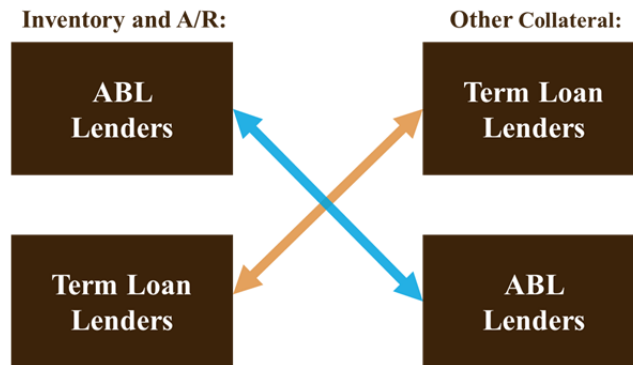
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### *Background*

Fourteen months prior to the bankruptcy, in December 2013, RadioShack entered into separate financing arrangements with the original ABL lenders and the term loan lenders. The original ABL lenders provided RadioShack with a \$585 million ABL facility, consisting of a \$535 million revolving credit facility and a \$50 million term loan. The term loan lenders, which included Salus, provided RadioShack with a \$250 million term loan.

The intercreditor agreement provided for the original ABL lenders to have a first lien on RadioShack’s inventory and accounts receivable and a second lien on substantially all of RadioShack’s remaining assets. The term loan lenders, in turn, had a second lien in RadioShack’s inventory and accounts receivable and a first lien in such other assets. This type of arrangement is known as “crossing liens” as depicted in the chart on the following page.

## *Crossing Liens*



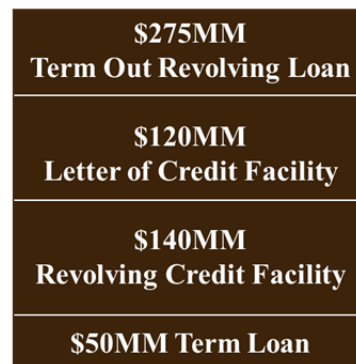
In October 2014, the original ABL lenders sold their interests under the original ABL credit agreement to substitute ABL lenders. RadioShack and the substitute ABL lenders then amended the original ABL credit agreement by restructuring the \$535 million revolving credit facility into (i) a \$275 million term out revolving loan that could not be reborrowed once repaid, (ii) a \$120 million letter of credit facility, and (iii) a \$140 million revolving credit facility as depicted in the following chart.

## *ABL Credit Agreement*

### Original ABL Credit Agreement:

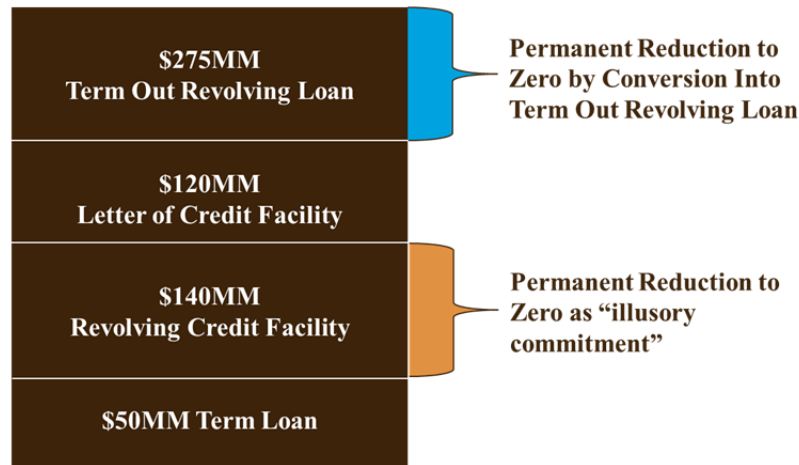


### Amended ABL Credit Agreement:



On February 5, 2015, RadioShack and seventeen affiliated debtors each filed for voluntary bankruptcy. During the course of the bankruptcy, the substitute ABL lenders received over \$232 million from proceeds of the ABL collateral pursuant to their first lien position under the amended ABL credit agreement. Challenging the substitute ABL lenders' entitlement to those proceeds, Salus filed an adversary proceeding asserting that the amended ABL credit agreement made two "permanent reductions" to the aggregate amount secured under the ABL facility: (1) the aggregate revolving loan commitments secured under the facility were permanently reduced by \$275 million when \$275 million of the revolving loans were converted into a \$275 million term out revolving loan because there was no further commitment to fund borrowings by that amount; and (2) the aggregate amount secured under the ABL facility was further reduced by \$140 million because the \$140 million revolving credit facility was an "illusory commitment" given RadioShack's financial condition at the time of the amendment as depicted in the chart on the following page.

## *Salus Claim Against ABL Lenders*



### ***Bankruptcy Court's Holding***

The bankruptcy court granted a motion by the substitute ABL lenders to dismiss the claims made by the term loan lenders, ruling that the senior lien rights of the substitute ABL lenders were not waived or otherwise impaired as a result of the amended ABL credit agreement. The bankruptcy court determined that the amendment provision in the intercreditor agreement provided broad rights to the substitute ABL lenders to amend the original ABL credit agreement. Furthermore, the bankruptcy court noted that Salus failed to demonstrate that its position was unfairly changed as a result of the amendments to the original ABL credit agreement. In particular, the obligations upon which the substitute ABL lenders were paid were already outstanding at the time of the amendment to the original ABL credit agreement. Accordingly, the bankruptcy court granted the substitute ABL lenders' motions to dismiss Salus' complaint.

### ***Conclusion***

The dispute between Salus and the substitute ABL lenders in the RadioShack bankruptcy case highlights the importance of ensuring specificity and clarity when drafting senior-debt-cap provisions and amendment provisions in intercreditor agreements. A senior lender that is a party to an intercreditor agreement should carefully consider these provisions when undertaking a significant restructuring of its loans. The senior lender should draft any amendment in a manner that ensures the preservation of the protections afforded to the senior lender under the intercreditor agreement.

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<sup>i</sup> Salus Capital Partners, LLC v. Standard Wireless Inc. (*In re RadioShack Corp.*), Adv. No. 15-50239, 2016 Bankr. LEXIS 2006, at \*3 (Bankr. D. Del. May 11, 2016).