Simpson Thacher

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Minority Creditors Win Some, Lose Some—Serta Applied With Varying Results

In this edition of *Simpson Thacher's Liability Management Expresso*, we examine two recent post-*Serta Simmons* decisions and their potential impact on the LME landscape: *ConvergeOne* and *Wesco Aircraft (Incora)*. For a quick refresher on *Serta* and Serta blockers, take a look at our prior coverage here.

These decisions from the U.S. District Court for the Southern District of Texas, issued or announced within about a week of the other, each find their footings in *Serta* but come to quite different results as to the impacted minority lenders.

In This Edition

U.S. Liability Management Developments

So, what's the deal with *ConvergeOne*?

ConvergeOne Holdings, Inc. filed for chapter 11 in April 2024 in the Southern District of Texas. It had approximately $1.8 billion in secured debt and filed with a fully negotiated chapter 11 plan, backed by a restructuring support agreement (RSA).

The deal included a $1.6 billion debt for equity exchange and a $245 million infusion from an equity rights offering. The rights offering was backstopped by a group of majority secured lenders, who got 35% of the shares and a 10% backstop fee/put option premium.

Sounds like a backstop... what's the problem?

A group of minority lenders opposed the plan on the basis of their exclusion from the backstop, which amounted to a 30% better recovery for the included majority lenders. They argued the plan violated the equal treatment requirements for confirmation, in part because there was no market test to show the backstop economics and recovery were on account of new value and not the majority lenders' prepetition claims.

The debtors disagreed, pointing to their investment banker's analysis of other transactions with backstops to support the terms and demonstrate that the additional recovery was on account of the backstop commitment. The bankruptcy court, in keeping with countless precedents approving backstop arrangements, sided with the debtors.

Then why is everyone talking about *ConvergeOne*?

Things got interesting on appeal when, relying in part on application of the reasoning in the *Serta* decision, the district court found the exclusive backstop and rights offering violated the equal treatment requirements for confirmation and reversed those sections of the confirmation order.

The district court focused on the requirement that a plan "provide the same treatment for each claim or interest of a particular class" and found that "treatment" of prepetition secured claims included the opportunity to participate in the backstop because the majority lenders gave no additional consideration for such opportunity other than their prepetition loans. In other words, the district court agreed with the minority lenders that, absent a market test, the debtors could not show the 30% better recovery was on account of the backstop commitment and not the prepetition secured claims.

The application of the "equal opportunity and equal result" requirement delineated in *Serta* to a separately negotiated backstop marks a clear expansion of the potential scope of that decision. *Serta* involved the examination of distributions under a plan, but the *ConvergeOne* decision signals there may be heightened scrutiny of transactions and resulting consideration more generally, even prepetition agreements for exit capital.

The debtors and majority lenders in *ConvergeOne* appealed the district court ruling to the Fifth Circuit but subsequently entered into a stipulation opening up the backstop opportunity to minority lenders and resolving this dispute.

Okay, so what about *Wesco Aircraft (Incora)*?

About a week before the *ConvergeOne* decision, another district court judge made a surprising announcement from the bench, indicating he was prepared to overturn a 2024 bankruptcy court decision in favor of minority noteholders in the *Wesco Aircraft* bankruptcy. That announcement was followed by a decision issued on December 8, 2025, doing just that.

The *Wesco Aircraft* dispute involved a minority lender challenge to a prepetition uptier transaction in which the company issued new notes to get around a consent

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threshold in the underlying documents. The indenture contained a two-thirds consent requirement for any amendment that "had the effect" of stripping liens.

The bankruptcy court concluded that this restriction prevented the company from issuing new notes to get around that threshold and issued a "report and recommendation" that the district court conclude the same and find the minority noteholders' rights, liens and interests currently exist as they did prior to the uptier transaction. The majority noteholders objected, and the district court sustained the objection and disagreed with the bankruptcy court, finding no breach of the indenture.

The district court indicated from the bench that it was an unfortunate result for the minority noteholders but found they simply did not have a sacred right akin to *Serta*, placing a serious limitation on "effect of" provisions in debt documents. Without a sacred right, the majority was permitted to issue new notes and transact as they saw fit once they reached the two-thirds threshold. The minority noteholders appealed the decision to the Fifth Circuit.

Soon, we may have another bankruptcy court weighing in on the efficacy of sacred rights and non pro-rata transaction structures. STG Logistics, Inc. filed for chapter 11 in the District of New Jersey on January 12, 2026. That filing was preceded by a year of litigation in New York state court brought by minority lenders who did not participate in a drop-down double dip transaction. The STG debt documents had similar "effect of" protections for changing priority or non pro-rata treatment. The plaintiff-lenders argued those protections were violated by amendments approved with the consent of the majority lenders that permitted the drop-down of collateral into unrestricted subsidiaries, as well as other features of the transaction.

At the motion to dismiss stage, in a decision issued on January 3, 2026, the New York state court declined to dismiss, in large part, the minority lenders' complaint and indicated a willingness to consider sacred rights challenges when assuming the various steps constituted a single, integrated transaction. Given the bankruptcy filing, the litigation is likely to shift venue with yet another jurisdictional bankruptcy court to add to the mix. Both *Wesco* and *STG* highlight the ongoing litigation overhang of non pro-rata transaction structures.

What does it all mean?

- ***Litigation will remain unpredictable.*** Not surprisingly given the multiple venues and unique language in the various debt documents, litigation outcomes remain unpredictable, and issuers and creditors must navigate these competing decisions thoughtfully. *ConvergeOne* upends (in the Fifth Circuit at least) what was largely an accepted market practice of inside-ad hoc groups receiving additional economics through backstop and commitment fees (see below). *Wesco Aircraft*'s reversal of the bankruptcy court decision applies a strict construction of the indenture's sacred rights, which may give issuers further comfort when they look to garner the necessary consents to implement an out-of-court restructuring. The *STG* state court decision casts some doubt on that more literal interpretation but the bankruptcy court overseeing *STG*'s bankruptcy may weigh in too. All that is to say, it is challenging to predict with certainty how litigation will come out.

- **Are backstops dead?** Probably not, but they may take different forms or debtors (and their RSA counterparties) may explore alternative chapter 11 venues. Bankruptcy courts have viewed the increased recoveries to backstop parties as in exchange for assurance that the offering is fully funded, as opposed to a violation of equal treatment. Courts may also see the fees partly

as compensation for the time and effort that the backstop parties expended in reaching a deal with the debtor. It remains to be seen whether courts outside of the Southern District of Texas will widely follow *ConvergeOne* and so parties may file outside of Houston if the non pro-rata backstop fee is critical. That being said, courts are generally taking a closer look at non pro-rata deal mechanics. See, for example our prior coverage on the non pro-rata DIP financing roll-up in *American Tire Distributors* filed in Delaware.

In any event, it is unlikely that *Converge One* changes a fundamental tenet of deals—the group of creditors at the table that control the vote will always push for (and often get) additional compensation. So, parties are likely to structure around the decision. For example, backstop fees may be "market" tested to comply with the court's dictate. Although the court provides no guidance as to what suffices (other than noting the debtors in *ConvergeOne* did not satisfy the requirement), debtors may validate the fees through a market check led by their investment banker (similar to DIP financing). While yet to be seen, the rationale could also extend to other compensation, such as equity allocation carveouts or backstop rights in other contexts, such as DIP financing.

- **Ongoing structural litigation risk.** These decisions highlight the litigation tail around non pro-rata structures. Companies and majority parties should be aware that even confirmed plans are not safe from challenge and, conversely, minority lenders have a potential source of additional leverage. This risk will need to be weighed and considered by companies and lenders pursuing restructuring transactions and, as is to be expected, investors will likely address this risk in the deal economics.

A London Perspective

What is the view from across The Pond on similar non pro-rata structures? Is there a formal requirement for equality of opportunity and treatment of claims within a class?

Unlike chapter 11, schemes of arrangement and restructuring plans (the U.K.'s two core processes for cross-border and domestic restructurings) do not impose a statutory requirement for equality of treatment for claims or interests in a particular class. As a result, differential economics within a class—or leaving certain creditors outside the scheme altogether—is not inherently impermissible.

However, the courts will assess any unequal treatment through the lens of class composition (for voting on the scheme) and fairness. It is well established that the courts will test whether differential treatment:

- should result in creditors voting in separate classes (referred to as "fracturing the class"); or
- acts as a "blot" on the scheme such that the court should not exercise its discretion to sanction the scheme (because the proposal is sufficiently unfair on a particular subset of claims or interests).

A classic example is the right to participate in new money/capital injections under the scheme. It is common practice to provide that all members of a class are given an opportunity to participate in the new money/capital (typically on a pro-rata basis relative to existing claims) to avoid significant scrutiny from the court.

However, it is also commonplace for schemes and restructuring plans to include non pro-rata features in favor of the supportive ad hoc group—such as work fees, backstop fees and other economic-enhancing

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features. But these features must be justified by reference to objective commercial benefit(s), such as risk assumed, capital committed, or value delivered to the restructuring as a whole, and not so significant such as to fracture the class. For instance, backstop fees payable to an ad hoc group are a typical feature in schemes that provide for backstopped new money/capital. In this regard, a core question that the court will consider is whether such additional fees are broadly in line with market rates or whether there is an element of unjustifiable "bounty" going above those market rates.

Is judicial scrutiny of non pro-rata features increasing? How is the market responding?

Recent restructuring plans have seen a greater willingness by the courts to interrogate the fairness of the proposed restructuring (for further reading, see our article here). In light of this, it is likely that non pro-rata treatment—including work fees and backstop fees—and even pro-rata features (such as new money/capital where all lenders in a class may participate, but where the new money is provided on above market terms) could become subject to greater scrutiny in the future.

We are seeing the consequences of this change in practice, with a heightened interest by interested parties in solutions that keep transactions out of court altogether. Many of our discussions with clients now center around solutions that can be delivered via:

- the latest liability management technology; and/or
- intercreditor drags, where the distressed disposal provisions in an English law intercreditor agreement are used to implement a range of solutions from vanilla amend & extends (with the sponsor retaining the equity) through to debt for equity swaps with non pro-rata economics.

These routes rely on a deep understanding of, and considered sequencing under, existing permissions and mechanics in the finance documents, which may allow stakeholders to achieve their desired outcomes without having to test the boundaries of fairness in a formal court setting.

Updates From Asia: Enforcement

Enforcing Your Rights in China: What Investors Need to Know

A common question from investors in mainland China ("**Mainland**") is whether their rights are sufficiently protected and, if an investment sours, whether they will be able to recover amounts owed. While there is often no straightforward answer to these questions, recent developments in the cross-border recognition of Hong Kong-appointed liquidators, through which many foreign investors structure their Mainland investments, have made the recovery process more accessible.

What is the PRC–Hong Kong Cooperation Mechanism?

In 2021, the PRC Supreme People's Court and the Government of Hong Kong signed the Mutual

Recognition of and Assistance to Bankruptcy (Insolvency) Proceedings between the Courts of the Mainland and Hong Kong. The Supreme People's Court simultaneously issued an opinion, launching a pilot cooperation mechanism (the "**Cooperation Mechanism**") that allows Hong Kong insolvency officeholders to seek recognition and judicial assistance from Intermediate People's Courts in Shanghai, Shenzhen, and Xiamen to enforce offshore rights onshore.

Who can apply for enforcement against Mainland assets and what must they show?

Hong Kong liquidators or provisional liquidators may seek recognition. To succeed, they must demonstrate that the debtor's center of main interests ("**COMI**") has been located in Hong Kong for at least six months (this requirement is automatically satisfied if the debtor is incorporated in Hong Kong). The courts will also consider other factors, such as the debtor company's principal office, principal place of business, and the location of its principal assets.

The debtor must also have a meaningful Mainland nexus, such as assets, a place of business, or operations in one of the pilot jurisdictions.

How have investors used it so far?

Since 2021, courts in Shanghai, Shenzhen, and Xiamen have approved several high-profile recognition requests, unlocking Mainland assets for Hong Kong liquidators and safeguarding creditors' invested value.

Shanghai: Hong Kong Fresh Water

On March 17, 2021, the Hong Kong High Court issued a winding-up order against Hong Kong Fresh Water International Group Limited, a Cayman Islands-incorporated and Hong Kong-listed company, at the request of a creditor. The liquidators subsequently applied under the Cooperation Mechanism to facilitate the liquidation of the company's assets in Mainland, where it holds significant interests through four wholly-owned Shanghai subsidiaries and a key Shaanxi subsidiary.

In support of their application, the liquidators submitted: (1) a Letter of Request from the Hong Kong Court, seeking recognition and assistance in the winding-up proceedings; (2) evidence confirming the commencement of the winding-up process and the appointment of liquidators; (3) evidence establishing COMI in Hong Kong; and (4) evidence of Mainland assets, debt, and operations.

On March 30, 2023, the Shanghai Court issued its ruling and authorized the liquidators to manage, take over, and dispose of the company's assets in Mainland, as well as to conduct investigations.

Shenzhen, Xiamen, and more . . .

In *Samson Paper*, the Shenzhen Court recognized the Hong Kong liquidation after the Hong Kong Court had determined COMI to be in Hong Kong and issued a letter of request to the Shenzhen Court. The Shenzhen Court authorized asset recovery, subject to local rules, including Mainland online auction procedures.

In *Re Husk's Green Technology Holding Co Ltd (in Liquidation)*, the Hong Kong liquidator sought assistance from the Xiamen Court to protect four Xiamen subsidiaries through a letter of request issued by the Hong Kong Court under the Cooperation Mechanism. The Xiamen Court confirmed the Hong Kong liquidation, the

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liquidator's status, and the company's COMI to be in Hong Kong, and then granted the requested judicial assistance.

More recent cases, including *Re PPLive Sports International Ltd (in Liquidation)* (2024) and *Re Hong Kong Lee Yuan International Group Limited* (2024), have seen the issuance of letters of request by the Hong Kong Court. These cases also demonstrate an increasing level of sophistication, with the pilot court in Xiamen, most notably in *Lee Yuan*, coordinating with enforcement bodies and facilitating cross-border settlements.

What does this mean for investors?

For investors operating across Asia, or those outside the region deploying capital into Hong Kong–Mainland structures, the Cooperation Mechanism reshapes how recoveries are evaluated and priced. The emergence of a formal pathway for recognizing Hong Kong liquidators in Shanghai, Shenzhen, and Xiamen introduces a degree of predictability for enforcement against Mainland assets, supports tracing cash flows, accessing subsidiaries, and preserving value, and makes it easier to participate in deals that once carried higher sovereign or procedural risk. It also facilitates comparative analysis: investors can now evaluate Hong Kong–Mainland recoveries using tools and expectations more consistent with other cross-border regimes where judicial cooperation is established.

The mechanism bridges the common law-based insolvency regime with Mainland procedural rules, reducing the need for investors to navigate disjointed legal frameworks across the region.

KEY CONTACTS

Nicholas Baker
Partner
New York
+1-212-455-2032
nbaker@stblaw.com

Adam Gallagher
Partner
London
+44-(0)20-7275-6358
adam.gallagher@stblaw.com

Justin M. Lungstrum
Partner
New York
+1-212-455-2755
jlungstrum@stblaw.com

Marisa D. Stavenas
Partner
New York
+1-212-455-2303
mstavenas@stblaw.com

Dirk Behnsen
Associate
Hong Kong
+852-2514-7622
dirk.behnsen@stblaw.com

Catherine C. Ciriello
Partner
New York
+1-212-455-3471
catherine.ciriello@stblaw.com

Elisha D. Graff
Partner
New York
+1-212-455-2312
egraff@stblaw.com

Daniel Margulies
Partner
Hong Kong
+852-2514-7537
daniel.margulies@stblaw.com

James Watson
Partner
London
+44-(0)20-7275-6419
james.watson@stblaw.com

Rachael Foust
Associate
New York
+1-212-455-3423
rachael.foust@stblaw.com

Carol Daniel
Partner
London
+44-(0)20-7275-6546
cdaniel@stblaw.com

William Gwyn
Partner
London
+44-(0)20-7275-6290
william.gwyn@stblaw.com

Nicholas J. Shaw
Partner
London
+44-(0)20-7275-6558
nshaw@stblaw.com

Patrick R. Wolff
Partner
New York
+1-212-455-2314
patrick.wolff@stblaw.com

Echo Qian
Associate
Hong Kong
+852-2514-7659
echo.qian@stblaw.com

Moshe Fink
Partner
New York
+1-212-455-3261
moshe.fink@stblaw.com

Matthew Hope
Partner
London
+44-(0)20-7275-6517
matthew.hope@stblaw.com

Toby Smyth
Partner
London
+44-(0)20-7275-6185
toby.smyth@stblaw.com

David Zylberberg
Partner
New York
+1-212-455-3702
david.zylberberg@stblaw.com

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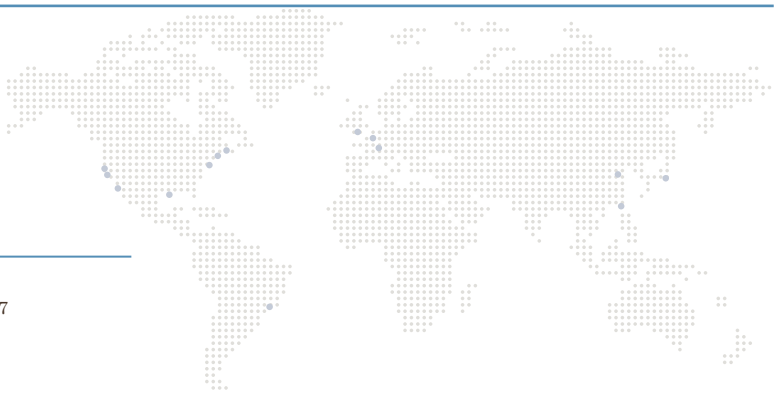

UNITED STATES

New York
425 Lexington Avenue
New York, NY 10017
+1-212-455-2000

Boston
855 Boylston Street, 9th Floor
Boston, MA 02116
+1-617-778-9200

Houston
1000 Main Street, Suite 2900
Houston, TX 77002
+1-713-821-5650

Los Angeles
1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto
2475 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

San Francisco
One Market Plaza
Spear Tower, Suite 3800
San Francisco, CA 94105
+1-415-426-7300

Washington, D.C.
900 G Street, NW
Washington, D.C. 20001
+1-202-636-5500

EUROPE

Brussels
Square de Meeus 1, Floor 7
B-1000 Brussels
Belgium
+32-2-504-73-00

London
CityPoint
One Ropemaker Street
London EC2Y 9HU
United Kingdom
+44-(0)20-7275-6500

Luxembourg
Espace Monterey
40 Avenue Monterey
L-2163 Luxembourg
Grand Duchy of Luxembourg
+352-27-94-23-00

SOUTH AMERICA

São Paulo
Av. Presidente Juscelino
Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000

ASIA

Beijing
6208 China World Tower B
1 Jian Guo Men Wai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong
ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo
Ark Hills Sengokuyama Mori Tower
9-10, Roppongi 1-Chome
Minato-Ku, Tokyo 106-0032
Japan
+81-3-5562-6200