

Fund Finance at the ABA – Technical Legal Issues

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The American Bar Association Business Law Section hosted its fall meeting in San Diego earlier this month. For those readers not familiar with this event, this is a massive gathering of business law professionals from around the world. It includes more than 50 continuing legal education programs and other discussions and events that involve public officials and business law practitioners with about 4,500 attendees from more than 25 countries and more than 300 speakers leading those sessions or serving as panelists.

The ABA Business Law meetings are a chance for lawyers to convene and discuss the latest business law trends and developments. These events bring together lawyers from firms, in-house counsel, government regulators, judges and other leading business law practitioners. What makes these meetings different than a number of other meetings and conferences that take place in the fund finance and overall lending space is that they are a chance for lawyers to discuss the really substantive and technical legal aspects of our practice.

The Fund Finance Subcommittee of the American Bar Association is chaired by Elizabeth Tabas Carson, who is a partner at Sidley Austin, and Flora Go, who is a partner at Paul, Weiss and head of their Fund Finance Group, serves as the Vice-Chair for the subcommittee. Linda Filardi of Flagstar Bank founded the Fund Finance Subcommittee and now chairs the Asset Based Lending Subcommittee. Liz and Flora orchestrated two fund finance-related presentations at the meeting.

The first fund finance related presentation was at the subcommittee meeting where members of the Fund Finance Subcommittee and Asset Based Lending Subcommittees gathered. Brent Shultz, a fund finance partner at Haynes and Boone, and I presented at that meeting and, along with Liz and Flora, led a discussion that covered important legal issues in fund finance deals, thorny issues for negotiation, and technical legal issues relevant to the latest structures in the space, including items such as priority concerns and creation and perfection of security interests in deals with complex structures. We also had a lively discussion with much engagement from the audience on what the future holds for fund finance and even discussed where we may see AI come into the space. It was really delightful to hear super-seasoned and longstanding legal experts in secured transactions give their take on some of these really pressing issues.

The continuing legal education fund finance presentation was a panel discussion focused on NAV facilities and titled "Asset-Based Financing Solutions in Fund Finance: Structuring, Risk Management and Other Practical Considerations." The panel of industry experts included Liz and Flora, as well as Matthew Hays, a partner at Latham &

Watkins and global vice chair of the firm's Structured Finance & Securitization Practice; Tess Virmani, Deputy General Counsel, Head of Policy at the LSTA; Genevieve Weiner, a restructuring partner at Sidley Austin; and Richard Wheelahan, Co-Founder of Fund Finance Partners.

In this excellent and very comprehensive presentation, these experts provided an introduction to asset-based finance, a look at the state of the market and how we have seen a rise in the popularity of asset-based finance. This panel took a deep dive into NAV facilities and similar asset-based financing solutions utilized by asset managers and investment funds. They had a robust and substantive discussion about typical uses of these facilities, business rationale for them, and who is lending and investing in these deals. Their discussion also included a number of case studies which was excellent. The panel also hit on common structures and key structuring considerations, diligence and underwriting, reporting and monitoring, enforcement and restructuring considerations, as well as a look at the investor landscape and other real world considerations.

It was particularly interesting to hear a really well-rounded discussion that included perspectives from fund finance lawyers as well as a bankruptcy expert, a securitization expert, and a structuring expert. What made this presentation particularly valuable was the very technical legal considerations that the panel addressed and the thoughtful discussion of legal risks that certain structures may pose and the way that various legal protections can be used to mitigate that risk. Kudos to these experts for such an excellent panel discussion.