

# 36<sup>th</sup> ANNUAL

## Judge Alexander L. Paskay

Seminar on Bankruptcy Law and Practice

Sponsored by Stetson University College of Law and the American Bankruptcy Institute

**March 15~17, 2012**

Hyatt Regency Tampa • Tampa, Florida



STETSON LAW



## “DIP FINANCING: IS IT BACK, AND IF SO, WHO IS PLAYING AND ON WHAT TERMS?”

**Robert Grammen**

*EFO Financial Group LLC; Naples*

**Franklind Lea, Moderator**

*Tactical Financial Consulting, LLC; Atlanta*

**Hon. Catherine Peek McEwen**

*U.S. Bankruptcy Court (M.D. Fla.); Tampa*

**James (Jay)S. Rankin, Jr.**

*Parker, Hudson, Rainer & Dobbs LLP; Atlanta*

**Michael P. Richman**

*Patton Boggs LLP; New York*

# What is a DIP Loan – The Basics

- Explanation of Legal Process
- Terms and Conditions
- Standard
- Special Terms
- Avoidance actions, etc.
- What can a Debtor expect to get approved?

# Cash Collateral

- Explanation of Legal Process
- What security interest might a Lender have?
- What can a Debtor expect to get a cash collateral order approved?
- Do you need Lender approval to use the cash?
- How does a Debtor get to use it without Lender approval?
- Does the Unsecured Creditor's Committee get a Voice?

# Borrowing Vs. Use of Cash Collateral

- Is there any value to support it outside of the prepetition secured lender? (Related legal topic: describe the rights of adequate protection).

# Sponsor Equity/New Cash

- Can a sponsor get a security interest/priming lien?
- Can a sponsor get secured by possible claims against itself, avoidance actions?

***“What’s the justification for refinancing the prepetition debt into the new DIP?”***

- 1. No other chance that the estate will survive**
- 2. Provide a carve-out for admin’s**
- 3. Provide a carve-out for unsecured creditors**
- 4. B and C, but not necessarily A**
- 5. Secured Creditor was oversecured anyway**

# Offensive and Defensive DIP's

- What is a Defensive DIP?
- Standard Terms and Conditions
- What can a Debtor expect to get approved?
- Why are they made?
- How Common?
- Benchmarks/Teltronics
- What is an Offensive DIP?
- Why do Debtor's come to third party DIP lenders?
- Explanation of the Underwriting Process and Criteria Used To Evaluate

# **DIP Lending – *Where did it go? What has caused the decline?***

- 1. Bank Failures/Lender Liquidity**
- 2. Banking Regulations**
- 3. Declining Values**
- 4. Too Expensive**
- 5. Just ask for Federal Assistance like GM**

# Offensive DIP Lending – *What are Lender's looking for?*

- Yield
- Collateral
- Break Up Fees

# **Why aren't Debtor's lawyers using Offensive DIP's more?**

- 1. No need**
- 2. No equity to cover priming lien**
- 3. Don't know how to find them**
- 4. Want to avoid conflict with the current lender**

# ***DIP lending where did the money go?***

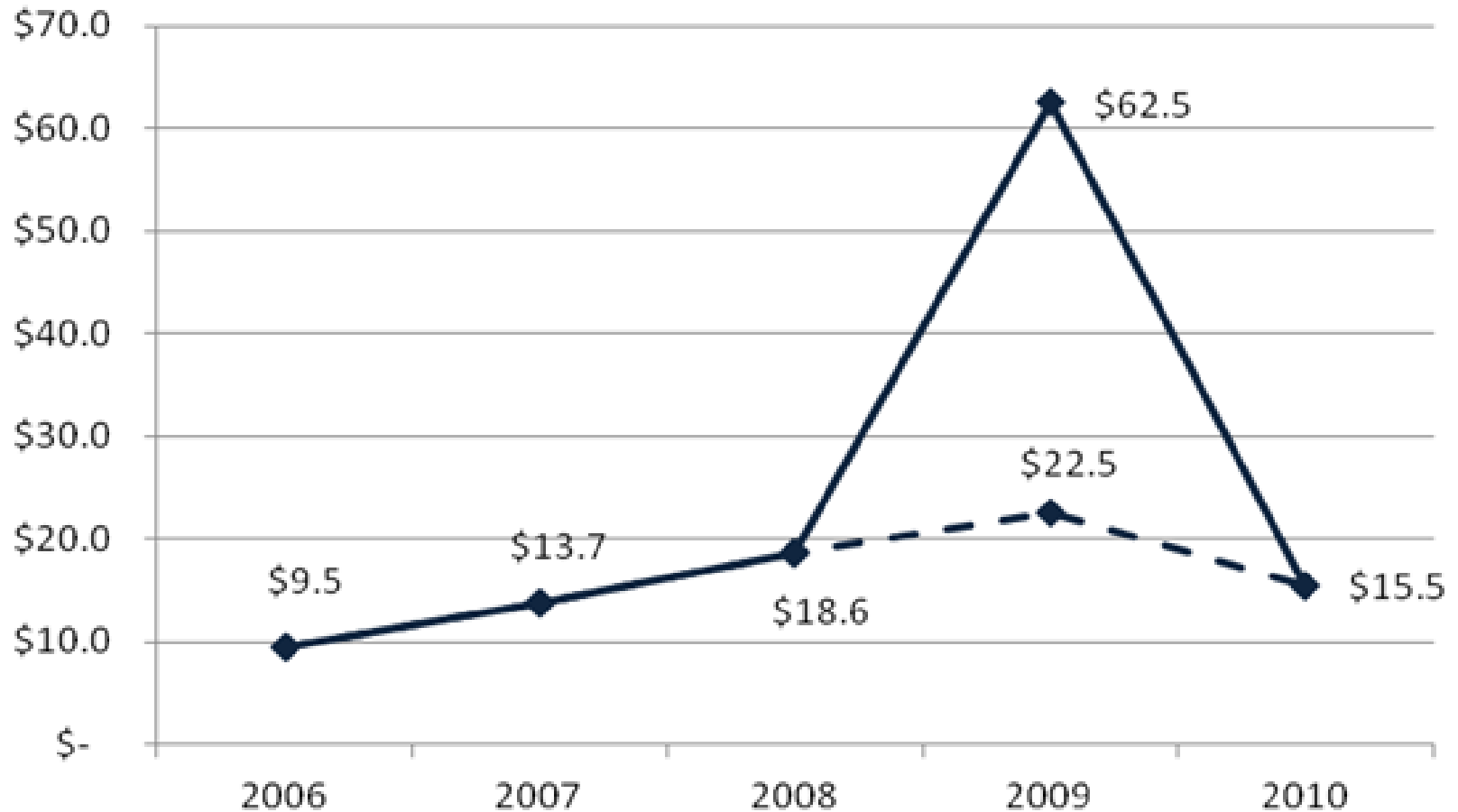
- 1. It's still there, just harder to find**
- 2. The money is there, but the conditions for making the loans are not**
- 3. It's all down out of court these days**
- 4. China**

# Status of DIP market

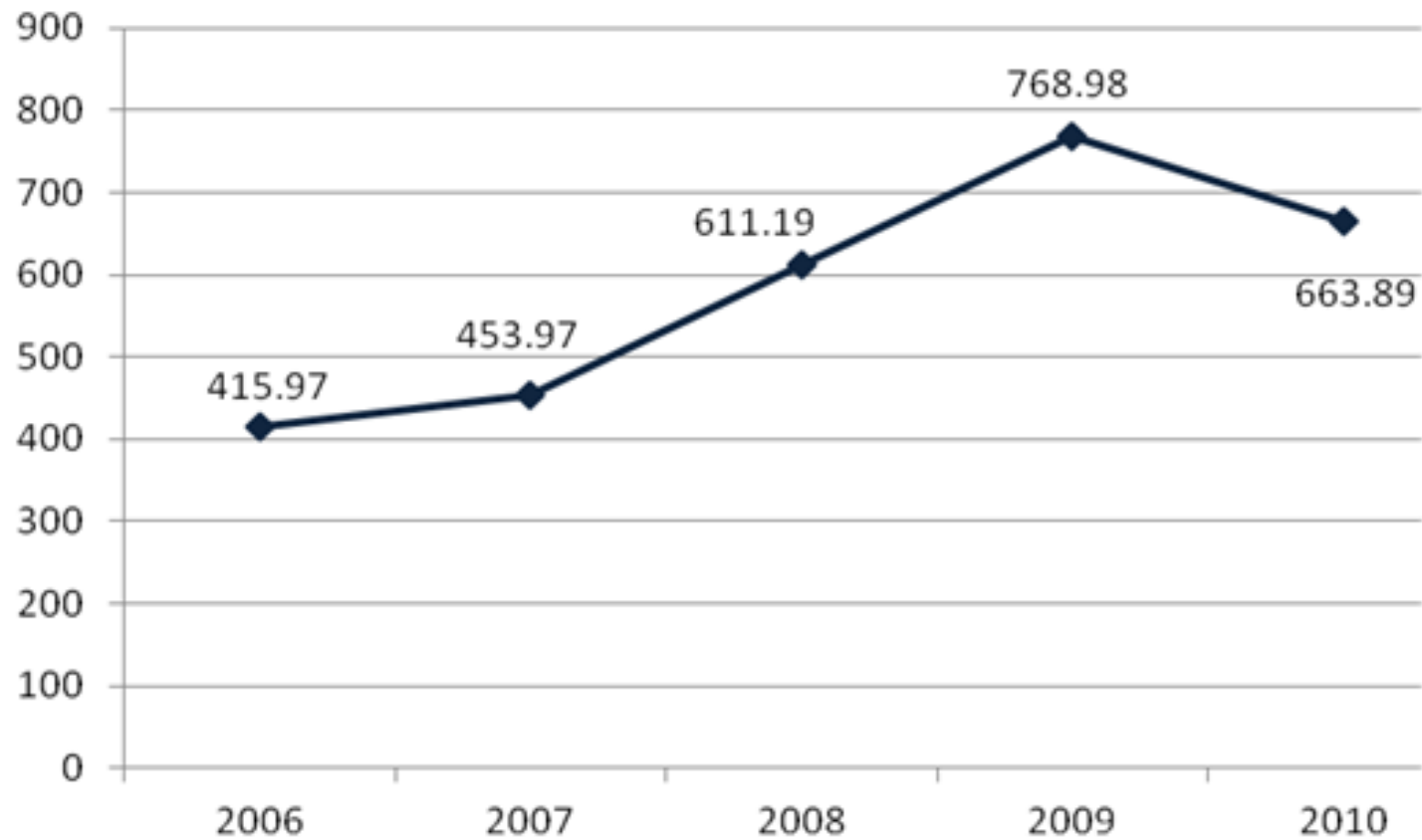
- Are people lending? What terms?
- Where do you find DIP lenders nowadays?

# Debtor-in-Possession Financing

(\$ in Billions)



# Libor + Number of Basis Points



# Credit Bidding

- Florida Grande
- The legacy of Philadelphia Newspapers and River Road: covering credit bid rights in a DIP agreement.
- Did this create some new provisions to be covered in a DIP agreement?
- Lockup Clauses in DIP Loan Agreements
- Can/Should the Credit Bid Amount set the State Court Deficiency?

***Is the bankruptcy court's  
determination concerning a lockup  
within its core power ?***

- 1. Yes**
- 2. No**
- 3. Should only be allowed in cases that are  
“too big to fail”**

# Discussion

- Safety Harbor Lock-ups – non-core

***Should counsel have to bring special or unusual terms to the attention of the Court ?***

- 1. Yes, but only Debtor's Counsel**
- 2. Yes, but only the DIP Lender's Counsel**
- 3. Yes, both Debtor's and DIP Lender's Counsel have a responsibility**
- 4. No, it's everyone's responsibility to read the documents closely**
- 5. No way, ambush the suckers!**

# Bringing special terms to the attention of the bankruptcy court

- DIP local rule – local practice
- Other first day matters
- Website

# **How much is enough of an equity cushion for priming purposes?**

- 1. 18%,**
- 2. 20%,**
- 3. 38%,**
- 4. Depends (and we don't mean adult diapers),**
- 5. All of the above**

# Are there limits to what can be funded from DIP loan?

**Is it okay to fund DIP counsel's quarterly fees from DIP priming facility?**

- Argument against: It elevates fees above regular priority.
- Argument in favor: So what? Same thing goes for the paper towel vendor and janitor service.

**How about tenant improvements?**

- A: Probably so, if the improvement is to avoid breach of a current lease or to book a new lease and maintaining the revenue stream or increasing it justifies the expenses on a NPV basis.
- Another measure would be what the lender would spend to sustain the property if the lender took the property back subject to leases.

# **36<sup>th</sup> ANNUAL**

**Judge Alexander L. Paskay**

**Seminar on Bankruptcy Law and Practice**

*Sponsored by Stetson University College of Law and the American Bankruptcy Institute*

**March 15~17, 2012**

*Hyatt Regency Tampa • Tampa, Florida*



STETSON LAW



# *Thank you for attending!*

**Robert Grammen**

*EFO Financial Group LLC; Naples*

**Franklind Lea, Moderator**

*Tactical Financial Consulting, LLC; Atlanta*

**Hon. Catherine Peek McEwen**

*U.S. Bankruptcy Court (M.D. Fla.); Tampa*

**James (Jay)S. Rankin, Jr.**

*Parker, Hudson, Rainer & Dobbs LLP; Atlanta*

**Michael P. Richman**

*Patton Boggs LLP; New York*