

Cumulus Media Reminds Lenders to Carefully Draft Covenants in Credit Agreements

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In *Cumulus Media Holdings Inc. et al v. JPMorgan Chase Bank, N.A.*, the US District Court for the Southern District of New York determined whether a proposed restructuring intended to pay off existing senior notes violated the negative covenants contained in a credit agreement. The court, finding in favor of the lenders, determined that any debt used to refinance the senior notes that did not meet the requirements of a "Permitted Refinancing" under the credit agreement was prohibited. Although the conclusion may not be entirely surprising, the court's unique legal analysis is a reminder to lenders when structuring and negotiating credit agreements of the importance of carefully drafting negative covenants.

The Background of the Dispute and the Existing and Proposed Capital Structure

Cumulus Media Holdings, Inc. and Cumulus Media Inc., borrowed approximately \$1.81B under a term loan in a credit agreement that was secured by approximately \$1.449B in collateral issued by a syndicate of lenders where JPMorgan Chase Bank, N.A. acted as agent. The credit agreement also provided for a revolver facility of up to \$200M that was undrawn as a result of a leverage limitation that restricted Cumulus from drawing on the facility. Additionally, the credit agreement contained a provision for an optional secured incremental revolver facility that could only be exercised by the unanimous agreement of the existing lenders to the revolver.

Under financial stress with impending springing loan maturities, Cumulus proposed to the lenders a restructuring that would retire all \$610M in unsecured senior notes utilizing draws on the existing revolver facility and the incremental revolver facility. Agreeing that the proposed restructuring would have a dilutive effect on the collateral, the syndicate of lenders denied Cumulus' request for the restructuring. Cumulus brought an action against the agent and lenders in the Southern District of New York, basing its complaint on the premise that the proposed restructuring did not violate the credit agreement and, therefore, the lenders were compelled to approve the restructuring. Each party moved for summary judgment.

The Central Arguments Presented

Section 8.8 of the credit agreement contains a negative covenant which prohibited the Borrower from making certain Restricted Payments, including *"any optional payment or prepayment on the principal of the senior notes or any Permitted Refinancing of the Senior Notes..."* During oral arguments, the parties focused on the plain meaning of Section 8.8(j) of the credit agreement, which contains an exception to the prohibition on Restricted Payments. The relevant portion of Section 8.8(j) states that Cumulus *"may make payments in respect of the Senior Notes and any Permitted Refinancing thereof (i) in connection with any refinancing of the Senior Notes or any Permitted Refinancing thereof permitted pursuant to the terms hereof..."*

Cumulus contended that, based on the plain language of Section 8.8(j)(i), it was permitted to refinance the senior notes using *any debt* permitted under the credit agreement. Specifically, Cumulus pointed to (i) Section 8.2(a) of the credit agreement, which allowed the draw under the revolver facility and (ii) Section 3.2 of the credit agreement, which permitted the borrower to "finance the general working capital needs and general corporate purposes" of the borrower. Clearly, Cumulus' reading of the plain language of Section 8.8(j)(i) took on the broadest possible interpretation, where the borrower would be permitted to pick and choose relevant clauses that

favorably permitted repayment using any debt permitted under the credit agreement.

In response, the agent and the lenders argued Cumulus' interpretation of the clause was far too broad, essentially rendering the defined term "Permitted Refinancing" useless. Specifically, that portion of Section 8.8(j)(i) permitting "any Permitted Refinancing thereof permitted pursuant to the terms hereof," by its explicit language, required that any refinancing possibly undertaken by Cumulus would have to fall within the meaning of a "Permitted Refinancing" as defined in the credit agreement.

The Court's Holding

The court ruled in favor of the agent and lenders. In a departure from normal procedure, the court focused its ruling on a section of the credit agreement for which the parties engaged in minimal oral argument.

Rather than ruling on the central issues argued by the parties under Section 8.8 of the credit agreement, the court focused on Section 8.2 in finding that this narrower provision created a "negative inference" that prohibited any refinancing of senior notes that did not satisfy the requirements of a "Permitted Refinancing." Section 8.2 of the credit agreement contains a broad negative covenant which does not allow Cumulus to "create, incur, assume or suffer to exist any indebtedness." More specifically, the court then turned its attention and analysis to Section 8.2(h), which explicitly permitted the "*Indebtedness of the Borrower in respect of the Senior Notes outstanding on the Restatement Effective Date and any Permitted Refinancing thereof.*"

In its reading of Section 8.2(h), the court found that the plain language in the exception created a negative inference that prohibited any refinancing of the senior notes that is not a "Permitted Refinancing." As the court noted in its holding,

Section 8.2's permission that Cumulus borrower under a revolving credit facility and/or an incremental credit facility does not allow also that Cumulus may use those funds to refinance the Senior Notes in a refinancing that would not qualify as a [P]ermitted [R]efinancing. Any attempt to do so would conflict with Section 8.2 because it would leave Cumulus to bear an indebtedness related to refinancing of the Senior Notes that is not a [P]ermitted [R]efinancing.

In finding that Section 8.2(h) expressly limited Cumulus' ability to refinance the Senior Notes to those circumstances fitting within the definition of a "Permitted Refinancing," the court determined that even where refinancing the Senior Notes with draws on the revolver facility or incremental facility was expressly permitted under Section 8.2(a) of the credit agreement, the "use of those funds to refinance the senior notes in a refinancing ... would not qualify as a [P]ermitted [R]efinancing." Therefore, the court's holding effectively meant that even where debt repayment of the Senior Notes may have been generally permitted elsewhere in Section 8, the express limitation in Section 8.2(h) would override and govern any other contrary provision.

While focusing minimal attention on Section 3.2, the court interpreted "general corporate purposes" to be "too broad because of my concern that it would read many of Section 8's negative covenants out of the contract." In its remarks, the court makes evident two legal principles of contract interpretation: (i) the importance of reading a contract as one cohesive document, while emphasizing that (ii) specific provisions govern general provisions. In the words of the Court, "The credit agreement, as a whole, attempts to maximize Cumulus' ability to borrow and invest without compromising its financial health...what Cumulus wants me to do is to extract, to pluck assorted provisions out of context...and I am not going to do that."

Important Considerations

The courts' unique analysis in the present case offers several important considerations when drafting and negotiating a credit agreement:

- Remember the importance of understanding and clearly conveying the exceptions to the negative covenants, especially when there are separate but related covenants such as those pertaining to additional indebtedness, permitted acquisitions, permitted liens, permitted refinancings, subordinated debt and permitted payments.
- Understand the interplay and the connectedness among the covenants (individually and collectively) and the rest of the agreement.
- Consider adding a provision to the credit agreement that clearly outlines how the exceptions are to be interpreted in the document.

If you have questions or would like additional information, please contact Jennifer Santangelo (santangeloj@whiteandwilliams.com; 215.864.7199), Pat Haggerty (haggertyp@whiteandwilliams.com; 215.864.6811) or another member of the Finance Group.

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