Interview With Bridget Marsh, Deputy General Counsel Of The LSTA, On *Meridian Sunrise Village*

*The Editor presents the following discussion between **David Griffiths**, Senior Associate in the Business Finance & Restructuring department of Weil, Gotshal & Manges LLP, and **Bridget Marsh**, Deputy General Counsel of the Loan Syndications & Trading Association (LSTA).*

Weil previously covered the Meridian Sunrise Village[1] *case in its Bankruptcy Blog (http://business-finance-restructuring.weil.com/financial-markets/ceci-nest-pas-une-institution-financiere-existential-crisis-for-distressed-debt-focused-hedge-funds/). This case turned on a choice between two competing interpretations of "financial institution" under a $55 million loan agreement governed by Washington state law.*

Distressed debt funds in this case had sought to acquire the debt of a troubled borrower from an existing lender, something they were only able to do if they were an "Eligible Assignee" under the terms of the loan agreement between the borrower and its lenders. The distressed debt funds argued that they were Eligible Assignees, as the definition of "Eligible Assignee" in the loan agreement included "financial institutions." The borrower argued that the distressed debt funds were not financial institutions as it is commonly understood, and therefore were not "Eligible Assignees."

Ultimately, the distressed debt funds in the case were held not to be "financial institutions" by the United States District Court for the Western District of Washington and were therefore not "Eligible Assignees." The case is significant because distressed debt investors who purchase the debt of a borrower in bankruptcy, where the borrower's underlying loan agreement contains an "Eligible Assignee" restriction, may be at risk of not being able to hold such debt and exercise the rights of a lender.

Weil received a number of questions from readers of the Bankruptcy Blog, market participants, and other attorneys as to how the LSTA viewed Meridian Sunrise Village*, and the firm reached out to Ms. Marsh for her insights.*

David Griffiths

Bridget Marsh

Griffiths: Before we get into details, can you tell us a little bit about the LSTA and your role at the LSTA?

Marsh: The LSTA is the trade association for the corporate loan market. Since its formation in 1995, the LSTA has been dedicated to improving liquidity and transparency in the loan market. As the principal advocate for this asset class, we aim to foster fair and equitable market practices to advance the interest of the marketplace as a whole and promote the highest degree of confidence for investors in loans. We develop policies, guidelines, and standard documentation, and we encourage coordination with firms facilitating transactions in loans and related claims. We currently have 365 members drawn from both the sell side and buy side, as well as law firms and vendors.

I'm the deputy general counsel of the LSTA and have worked here for nine years. I head the two largest LSTA member committees – the Primary Market Committee, which is focused on documents and practices relating to the origination of loans, and the Trade Practices and Forms Committee, which deals with secondary loan market trading issues. In those roles, I'm responsible for ensuring that the LSTA's primary market and trading documentation reflects current market practice and for addressing secondary loan market trading disruptions.

Griffiths: How often do market participants document their loans on LSTA forms compared with bespoke agreements?

Marsh: I'll answer that in two parts – looking first at the secondary trading market and then at the primary market. When loans made by U.S. borrowers are traded in the secondary loan market, market participants universally use the standard LSTA confirmation and then settle those loan trades on one of the LSTA's standard documents. The primary market is a little different because the LSTA does not have a complete form of credit agreement. Instead, the LSTA has published "Model Credit Agreement Provisions" ("MCAPs"). When first published about a decade ago, the MCAPs were somewhat limited and included only administrative agency, yield protection, tax, and assignment provisions – the boilerplate language typically found at the back of a credit agreement. Over the years, these have been expanded and, following last month's release, now include provisions relating to amend-and-extend transactions, defaulting lender language, borrower and sponsor loan buybacks, and disqualified lender lists. From initial market feedback, it seems that the market is generally using these provisions, but they may, of course, be modified somewhat to reflect the nuances of each particular deal. In fact, we learned that the new "DQ Structure" found its way into deals shortly after being released to the membership as an exposure draft earlier this year. DQ Structure refers to the handling of entities that are considered to be disqualified institutions and how/when related disqualified lender lists should be shared with lenders and prospective buyers.

Griffiths: How does the LSTA balance its different constituencies when determining the right approach in its forms to restrictions on loan assignments and loan participations?

Marsh: Before responding to your question, first let me explain the LSTA's consensus-building process. As I mentioned above, the LSTA membership includes both sell- and buy-side institutions, which is rather unique for a trade association. We've worked hard over the years to ensure that those who are active in the loan market join the LSTA. It is only by having a diverse membership that we can successfully create documents that market participants will use and develop practices that market participants will adopt. When we seek to create or revise an LSTA standard document, we form a working group composed of interested members and then ensure that all constituents are represented in that group. Because so many disparate views are represented in each project's working group, negotiating a new LSTA form can take many months. After the working group completes its work, the document is distributed to the larger committee for review and comment and then to the entire membership. Although reaching consensus on a document can be tricky and time-consuming, the result is a new document that is typically widely adopted by the loan market.

We followed that same consensus-building approach when drafting the Model Credit Agreement Provisions that were published in August, and in particular, when drafting the new provisions relating to restrictions on loan assignments and loan participations that relate to disqualified institutions, i.e., those institutions that a borrower does not want in its syndicate or to hold its loan by participation ("DQ Structure"). In this instance, we carefully considered the concerns of all interested parties – borrowers, agents, and lenders – and sought to develop a DQ Structure that would not impede the liquidity of the market or contribute to delays in settling loan trades. With all those views represented in the working group, the process took about a year, but as a result, I think we've developed a sound, workable structure for handling, monitoring, and, when necessary, updating lists of disqualified institutions, which finely balances the competing demands of all interested parties, as well as the market as a whole.

Griffiths: What type of recourse provisions are typical in the LSTA form assignment agreement? If the loan assignment at issue in the *Meridian Sunrise Village* case were documented on an LSTA form, would the distressed funds (or assignee) have had recourse to the assignor in the event they were deemed not to be an Eligible Assignee?

Marsh: When parties trade a performing loan on the LSTA's Par Confirm, they settle that trade on the form of Assignment Agreement attached to the relevant credit agreement, which typically is the same as, or substantially similar to, the LSTA's form of assignment agreement. The seller makes very few representations in an assignment agreement. Typically, it represents, for example, that it is the legal and beneficial owner of the loan being assigned to the buyer and, for certain deals, that it is not a defaulting lender; however, the seller expressly assumes no responsibility with respect to the legality or enforceability of the loan documents. In fact, it is the buyer that represents that it meets all the requirements to be an assignee under the credit agreement.

I think it's important to note here one of the fundamental tenets of loan trading, i.e., once parties agree on the material terms of a trade, that trade is legally binding and must be settled. If parties cannot settle their loan trade as an assignment, they still have a binding trade and are required to settle it as a participation under LSTA documents (when settled as a participation, the seller/grantor keeps bare legal title to the loan and remains in privity of contract with the borrower, and the buyer/participant acquires an undivided 100 percent participation interest in the loan). If that, too, is not possible under the terms of the credit agreement, they must agree on an alternative structure that affords them the economic equivalent of the agreed-upon trade.

Griffiths: Does the LSTA have a recommended definition for the term "Financial Institution" that was at issue in the *Meridian Sunrise Village* case?

Marsh: No, we don't – that would exceed the scope of our MCAPs.

Griffiths: Does the LSTA have a view as to whether distressed debt funds should be considered "Financial Institutions"? Does the LSTA have a view on the *Meridian Sunrise Village* case?

Marsh: The LSTA, reflecting the view of the market, takes a broad view of the meaning of "financial institutions," and, therefore, we were concerned about the decision in *Meridian Sunrise Village* and are following it closely. Those entities that are active in the distressed debt market play an important role in the loan market by providing much-needed liquidity to other lenders seeking to sell their debt. Distressed debt funds are necessary for a properly functioning market. Any restrictions placed on such distressed debt investors is worrisome and could impede the liquidity of our market.

Griffiths: What would you recommend to LSTA participants to avoid the types of problems that arose in *Meridian Sunrise Village*?

Marsh: Loan market participants involved in negotiating credit agreements should try to ensure that the definition of "Eligible Assignee" is drafted as broadly and as clearly as possible so that loans can easily be transferred to all the different entities active in the loan market. Alternatively, where the borrower has opted to use a disqualified lender list, they should try to follow the LSTA DQ Structure and ensure that any disqualified institutions are clearly identified and that the list of such disqualified institutions is posted on the relevant electronic platform so that it may easily be accessed by lenders in the syndicate.

1. *Meridian Sunrise Village, LLC v. NB Distressed Debt Investment Fund Limited*, No. 13-5503RBL, 2014 WL 909219 (W.D. Wash. March 7, 2014).

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