

The Subordinated Notes holders argue that the Fourth Proviso carves out the Second-Lien Notes from the Baseline Definition, *i.e.*, that the Second-Lien Notes are an "[i]ndebtedness or obligation of the Company . . . that by its terms is subordinate or junior in any respect to any other Indebtedness of the Company." The Subordinated Notes holders rely heavily on the "in **[**13]** any respect" language. They argue that the Second-Lien Notes are subordinate to, for example, the First-Lien Notes--because, pursuant to the Intercreditor Agreement, the liens supporting the Second-Lien Notes are junior to the liens supporting the First-Lien Notes--and that they are therefore subordinate to other Indebtedness of the company.

The lower courts rejected this argument, and concluded that the Second-Lien Notes unambiguously constitute Senior Indebtedness despite the Fourth Proviso. They did so in reliance on a distinction between "lien subordination" and "payment (or debt) subordination," concluding that the Fourth Proviso unambiguously carves out from the Baseline Definition only the latter and not the former.⁵ Because the Second-Lien Notes are not subordinate in *payment* to other note classes--but rather, the *liens* supporting their notes are subordinate--the lower courts concluded that the Second-Lien Notes are not covered by the Fourth Proviso.

⁵ The district court discussed in some detail the distinction between lien subordination and payment/debt subordination. 531 B.R. at 328. In short, "[l]ien subordination involves two senior creditors with security interests in the same collateral, one of which has lien priority over the other. . . . By contrast, in payment subordination, the senior lender enjoys the right to be paid first from all assets of the borrower or any applicable guarantor, whether or not constituting collateral security for the senior or subordinated lenders." *Id.*

We do not agree with the lower courts that the Fourth Proviso unambiguously incorporates a distinction between lien subordination and payment subordination. Rather, we conclude that the Fourth Proviso renders the definition of Senior **[**14]** Indebtedness ambiguous as to whether it includes the Second-Lien Notes. Nevertheless, we conclude that this ambiguity should be resolved in Debtors' favor given the plethora of evidence in the record that the parties intended the Second-Lien Notes to be Senior Indebtedness.

1

As discussed, the lower courts concluded that the Second-Lien Notes are unambiguously Senior Indebtedness. [HN2] Under New York law, which governs the Indenture, a fundamental objective of contract interpretation is to give effect to the expressed intention of the parties. The initial inquiry is whether the contractual language, without reference to sources outside the text of the contract, is ambiguous. Contract language is ambiguous if it is capable of more than one meaning.

We are not persuaded by the Debtors' (and lower courts') conclusion that the Fourth Proviso's reference to "subordinate . . . in any respect" unambiguously refers only to payment subordination and not to lien subordination. The Debtors read the Fourth Proviso as if it states "subordinate . . . *in right of payment*," which of course it does not. In so doing, the Debtors disregard the breadth of the term "in any respect," a term which is generally thought **[**15]** **[*796]** to be as broadly encompassing as possible.⁶ And, as a practical matter, it seems to us illogical to believe that a second-lien holder does not possess an

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