



## Lowenstein Bankruptcy Lowdown Video 34 – ConvergeOne Decision: Fifth Circuit Weighs in on Unequal Treatment & Plan Finality

By [David M. Posner](#) and [Gianfranco Finizio](#)

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### Gianfranco Finizio:

Another court from the Fifth Circuit has issued a ruling that will impact what was once a standard practice in Chapter 11 and has again raised issues regarding plan finality. On September 25<sup>th</sup>, the District Court for the Southern District of Texas reversed the bankruptcy court's confirmation of ConvergeOne's prepackaged Chapter 11 plan and held that exclusive backstop and equity subscription rights granted to a subset of first lien creditors violated Section 1123(a)(4) of the Bankruptcy Code by granting unequal treatment to similarly situated creditors.

### David M. Posner:

The background is unremarkable and a structure we see all the time. For starters, the debtors executed an RSA, the majority of its first and second leading lenders. The plan raised \$245 million through an equity rights offering that was backstopped by certain majority lenders for a 10% fee. Critically, the opportunity to participate in the backstop and to purchase discounted equity tied to it was offered exclusively for the majority lenders and was not market tested.

### Gianfranco Finizio:

The minority lenders, who were excluded from the negotiations and denied access to the backstop and related equity purchases, objected to the plan and argued that the plan resulted in disparate treatment of similarly situated creditors. The Bankruptcy Court approved the prepackaged plan over their objection, and the minority lenders filed an appeal. On appeal, the District Court reversed that portion of the confirmation order that authorized the exclusive backstop and discounted equity rights and held that those features violated Section 1123(a)(4) absent a market test. In so holding, the District Court determined that the opportunity to participate in the backstop constituted treatment of the

prepetition loans that generated materially higher recoveries for some class members, but not all.

**David M. Posner:**

The holding has shades of *Serta Simmons* and is an example of the serious litigation risks of non-pro-rata transaction structures, even after a plan is confirmed. To that point, the District Court drew guidance from the *Serta Simmons* opinion and found that case to be instructive for the principle that a plan must provide an equality of opportunity, even if quality of recovery does not necessarily result.

The District Court further cited *Serta* as requiring a market test of the backstop fee. However, it did not define what may constitute a sufficient market test. Nonetheless, had the majority lenders terms been market tested, the case likely would have come out differently.

**Gianfranco Finizio:**

On October 22nd, 2025, the debtors filed a notice to appeal the District Court's decision to the Fifth Circuit.

Thanks for listening and stay tuned because there's more to come.