

# HEADS-UP: JUSTIN D. LEE

The global head of Weil's liability management and strategic capital solutions group

Justin D. Lee in New York spoke to GRR about the lesser-discussed conciliatory side of liability management exercises (LMEs) and how more conservative lenders are coming around to increasingly controversial transactions.



Lee started his career as an associate at Weil over 15 years ago after earning his JD from the New York University School of Law, and rose through the ranks to make partner in 2019 before he took over as co-head of the firm's US banking and finance group last year. In January, he was appointed global head of Weil's new liability management group.

He tells GRR that his "bread and butter" over the course of his career has been creditor-side representations and bank financing in both syndicated and direct lending markets. "I coordinate a lot with my restructuring team and that was probably the entree into liability management," he says.

The "very complex, very creative, very forward leaning and super interesting" world of LMEs helped convince him to take on the global liability leadership role at Weil last year, he says. "I'm 41 years old, I'm always happy to take on a new challenge and to help build."

Lee is looking to position the Weil brand at the forefront of LMEs. "Some of the largest LMEs like **J Crew**, which was one of the first ones we did, and **Serta**, were ground breaking transactions. We were involved in a lot of these marquee transactions," he says. "We didn't tell the market much about them and some of our competitors were maybe a little bit more adept at telling folks what they were up to."

LMEs aren't always the aggressive and controversial transactions they are made out to be, Lee tells

GRR, adding that a lot of LMEs go unreported as direct lenders and sponsors go about "righting the ship" among themselves.

He notes that the smaller universe of private credit, where the same lenders are usually working on a whole host of deals together, means that direct lender transactions are usually more conciliatory for fear of retaliation to a hostile action in one deal in reaction to being crammed down in another.

But he says that these types of transactions aren't always going to be the solution for every type of company.

"If you have a plan, a long-term strategy to improve performance, to find synergies, do some creative M&A and retool the business plan – that all makes sense," Lee says. "If you just have a brand that is on the decline, an LME is probably just going to give you more time and if you're going to continue to decline, you'll keep declining."

### **How have case dynamics shifted since you started practising?**

The overall trend line has been that documentation has become more complex and more favourable. That's a product of the syndicated market and when deals are just flying off the shelf, things are oversubscribed, and underwriters are looking to hold on to a business when some of it is being chipped away towards the private credit sphere.

The limited number of opportunities for syndicated and direct lenders is going to accrue to the benefit of the sponsor who was able to run a competitive

process and get documentation with the best commercial terms. Credit agreements have gone from being bank forms that were “fill in the blank” and ran 50 to 90 pages long, to sponsor forms where some of them are absolute monsters with 300- page credit agreements. It’s almost mind-numbing understanding everything that lives under those credit agreements and how much that impacts negotiations.

One of the very interesting things about finance is that those credit agreements are active for years. You often have people trying to think around the corner of what’s coming down the pipe and how they preserve maximum flexibility. You also have sponsors who are doing deals in both syndicated and direct markets, and they try to preserve a lot of the precedents so, even if it’s a direct lender deal, it’s not going to look vastly different from what they just did in the syndicated market. There are always going to be some things that direct lenders are going to offer that the syndicated market can’t offer right now, like paid in kind (PIK) interest as a solution.

The way that plays into LMEs is that the complexity of the documentation and the sponsor-friendly nature of a lot of credit agreements allows for a lot of optionality. Transactions that folks have come up with in the lab – drop downs, uptiers, double dips, pari plus – are coming out of the level of flexibility that lives under those documents. To be clear, it’s negotiated flexibility.

When you are putting together an initial syndication and you provide that US\$1,000 worth of value can

go to an unrestricted subsidiary, you shouldn’t really be surprised when someone uses that flexibility because you decided at the outset that was fine with you. Some of the litigation that has come out of recent LMEs goes to the evolution of the market, and the question now is whether syndicated banks and direct lenders will shut down LME capacity. The answer has been a resounding ‘no’ so far. We’ve seen deals clear the market where the level of flexibility is much higher than it was even six months ago, but obviously there are headwinds now.

### **Why has there been more flexibility in the past six months following the *Serta Simmons* and *Mitel* rulings?**

I was in Mexico with my family for my husband’s 40th birthday when Serta and Mitel came down and I got a text from someone asking whether LMEs are over now. I obviously said “no”.

When courts are looking at documentation, they’re trying to figure out what everyone intended and what the documents actually say: what are the four corners? I’m a four corners guy: the documents say what they say and if that’s not what you intended, then sorry. Out of those decisions there have been modifications to how folks approach LMEs. You’ve seen different structuring, but also substantially similar results.

One thing that we try to do at Weil is approach each company as a specific engagement that is different from anything we’ve done before. A company’s makeup is going to influence how you approach it and there’s also going to be the matter of their

appetite for pushing the envelope. What are their objectives? What's their risk tolerance? LMEs are only going to be a creative solution; they're not going to be non-controversial.

Over the course of time, LMEs have become less controversial because more people are doing them; transactions are getting done (so there's a track record / precedent), and lenders are coming to the table. But, there's always going to be an overhang of risk because you may have people who are not involved in the transaction who try to throw stones at it. Even if they don't have a great argument under the documents, when people feel aggrieved by what has happened, they'll want to challenge that.

**At the annual Insolvency Law Academy conference in India in March, Hilco Global vice chairman James Sprayregen told attendees it's "a dirty little secret that 80 to 90% of them [LMEs] fail and end up in full restructurings later on." Do you agree? If so, what's the point of completing an LME?**

One thing I would say is that not all LMEs are distressed. Some are opportunistic, but, in this space of distressed LMEs, you have a company that is at an inflection point to figure out what they want to do next. If they don't have a strategy to turn the ship around then they probably should restructure. It's all about folks thinking about the long term and figuring out what makes the most sense for the company. If you're a sponsor and you see that all of the other sponsors are considering LMEs and are willing to engage counsel and

advisers to evaluate an LME strategy, you need to at least listen to those discussions to figure out whether that fits the story that you have.

We have some companies where an LME doesn't make sense and we'll walk through and say here's the flexibility in your document and maybe we should be having a different discussion. Again, that comes back to the selection bias of companies that are underperforming. The LME is not going to solve that underperformance, it's going to provide a little bit more time to fix it.

I also think there are plenty of LMEs that are not reported on that are not in that 80% that are successful. In the private credit world, for example, you can have plenty of things that are LMEs behind the scenes that will never be reported on because they're basically righting the ship among themselves and figuring out a strategy forward. One of the trends we've seen is how consensual an LME is going to be. How many people are going to be invited to participate in the LME, what's going to be the differential in what folks get in those different tiers of participation and who is going to be left in the stub? We've seen LMEs that get to 97% to 100% participation so that ends up being pretty consensual. If you look at some of the very early LMEs, it was like 51% vs 49%.

**What is LME 3.0 and what does the future of the LME market look like?**

It's a little bit more opportunistic. Folks look at LME solutions earlier in the process – we've seen

at least one LME deal that had a delayed draw term loan component to it to fund a future M&A. That's almost antithetical to the way you think about most LMEs, which is that you shut down the documents to a large extent.

You have to look at the path forward; if the path forward is a creative M&A then maybe, as an LME provider, wherever you sit in the capital stack, providing some capital for them to do that is actually in your benefit. The minority are going to be looking at opportunities to buck the trend of majority groups. You have the existing majority, the minority, and then you have deal- away folks and the level of competition between those various groups is always going to lead to better terms for the borrower.

One thing the majority can always offer that these other groups can't is that they can actually change the document. That is a pole position. The other groups have to do things to make themselves competitive. When we work on the debtor side, we focus on the various stakeholders and people who are interested in engaging on a transaction and then put all of those options on the table to make sure people feel that competitive dynamic so there are better terms across the table. I would not be surprised if co-op groups start to get a little too big for their britches and we get some more deal aways or minority deals.

**What are some of the key differences between LMEs in the US and European markets? Are there any structural hurdles in the way of a mature LME market developing outside the US?**

My hot take from the US is that I think the documents just look different. For example, if you're doing an English law credit agreement, your senior facilities agreement may be English law, your covenants may be New York law and your intercreditor agreement may also be English law. When you put all those things together, there are unintended or intended differences that may enhance or preclude you from doing what you'd like to do.

I think it's a misstatement to say LMEs are only just "coming to" Europe, but I do think there are less participants in the market who are looking to do that. There's a tremendous overlay of restructuring processes and the level of creativity that you can achieve in the UK based on creative structuring like schemes of arrangement, pre-packs, etc. When you have different jurisdictions that are implicated or potentially implicated you just have to look at what's in the toolbox for that particular jurisdiction or jurisdictions. It's only a matter of time until the proliferation that has happened in the US becomes contagious to the European market. We have looked for a number of European sponsors that are very well coordinated with our London team to find opportunities because these are folks want to understand the optionality.

Five years ago, there were a small number of sponsors in the US who would entertain the possibility of an LME. Now, that pool has grown to include some relatively conservative sponsors who are willing to look at LMEs, perhaps something

that's a little bit less aggressive, but they certainly want to hear about it. At the end of the day, they're the fiduciary for their investors and they need to know that they've checked all the boxes and have really done their homework to know what's on the table.

**Do private credit providers behave differently than lenders under a syndicated facility? How does that inform the nature of an LME transaction?**

A lot of private credit LMEs happen consensually behind the scenes, so you don't hear about it as much. Pluralsight is the one counterexample, you actually heard a lot about Pluralsight and people were surprised about it. There are now more LMEs happening in the private credit space so there are not as many leaks or as much reporting, generally.

One thing you don't see as much in the private credit space is people being played off each other. Part of that is that it's a smaller universe, both in terms of the deal itself, but also the number of players. If you are a direct lending private credit capital provider and you know that sometimes you're in the majority, sometimes you're the minority and you do 10 portfolio deals with the same counterparties, you're not going to do something that is super aggressive because you're worried they'll do the same to you in a subsequent iteration.

They find ways to be a little bit more forward leaning, which goes back to private capital providers saying they offer a long-term solution and are more

of a partner because when you're dispersed out to the syndicated market, you don't have those relationships.

**If you were an investor in distressed markets, where would you be putting your money right now?**

I don't have a good answer for that, but I think finding opportunities to be opportunistic and to hop into debt and to provide creative solutions is very intriguing. The co-ops so far have been pretty good at having credible alternatives to the deal away such that professionals are a little bit frustrated that they keep doing the work and then not getting the deal.

There's only been a small amount of actually effectuated deal aways. I don't think that necessarily has to be true, and I think that the larger the co-ops get and the more they are immovable, the more likely that people will do a deal away.

As of right now, I would probably say investors should look at deal aways or at opportunities to be involved in debt transactions to purchase at a discount and then hop into active roles when it comes to LMEs. If you're creative and smart, you can look around the corner and see what's coming and if you're a first mover in that space, you may be able to capture some discount from the folks who are less interested in being friends.

### **Do you think the tariffs announced by President Trump will increase work for you in terms of either LMEs or restructuring?**

Businesses are going to have to sort how tariffs impact them and they're going to have to have a base case; not only them, but also their customers, whether that be other businesses or actual direct consumers. Then they're going to have to sort out what their business look like pro forma for those tariffs. They're going to have to revise their business plans to show how they're impacted. Like anything that would implicate a particular industry, tariffs are going to be front and centre for anyone to whom they apply, and they most likely will have to recut a business plan to figure out what the new world looks like, and be proactive in managing their businesses.

### **How do you like to unwind outside of the office?**

I just went to Italy with my daughter and my husband because she has a little brother on the way, and we were doing a last vacation as a family of three. My husband Michael, my daughter Maya, and my French bulldog Tucker are my main escape.

We do lots of things together at the weekend like cooking and going on day trips.

I think it's good to have great people in your life who are not in the legal finance world. It's just good to decompress. It's similar to when you're in law school, I used to love to talk to people who are not in law school so you can forget about law school for a little bit. My husband's actually in finance so we compare notes every now and then, but I think we also realise that sometimes you just need some trashy reality TV or a dinner out to escape from it all.

### **Any particular reality TV shows?**

That is confidential information because they're ridiculously trashy, but I like Traitors and I like some of the Housewives. Guilty pleasures!