Interview with Otterbourg Attorneys:

Over 100 Years of Providing Legal Expertise to the Secured Finance Industry

BY MICHELE OCEJO

TSL's **editor-in-chief sat down with Otterbourg attorneys Allen Cremer, Dan Fiorillo, Pauline McTernan and Lena Surilov, to discuss the firm's secret to success over the past 100 years, what lenders should look out for in 2025 and possible implications of the election. Based in New York City, Otterbourg represents financial institutions (including banks, asset-based lenders, hedge funds, finance companies and insurance companies) and corporations and other business enterprises.**

Please tell us a little bit about yourself, how you got started in the industry, your practice area, and any advice you would like to provide for attorneys considering representing secured lenders.

Surilov: I actually started my legal career as a corporate lawyer, but I received a taste of secured financing transactions in my second year through my then mentor, and I really loved the aspect of understanding the retail finance and what companies do from my prior experience as a consumer. I have currently been engaged in documenting a lot of ABL retail financing transactions, basically from cradle to the grave, from the front end to all the way through DIP finance and exit financing, and some of the retail companies have been through multiple bankruptcies and exits.

To anybody starting out, what helped me the most was having a great mentor because I don't think I would've ever started in this type of law if I wasn't given a chance to participate in the transactions and gain that type of exposure early in my career. I don't think I would've had as much exposure to clients and the interesting aspects of secured financing and the more complicated aspects as well, if I didn't have a mentor who involved me in every aspect of the transaction and provided an opportunity to interact with the clients. Having someone pave the path before you to show how your career trajectory can go and what you can do in this industry is invaluable.

McTernan: I'm a litigation partner here at Otterbourg. I've been here for 15 years. How I got involved in representing secured lenders was a little bit different from everyone else here because, like I said, I practice general litigation and now more restructuring and some bankruptcy as well. I first got involved as an associate. I was working on a lender liability litigation and I actually was able, through document review, to learn about asset-based lending as a "fly-on-the-wall" by reviewing the contemporaneous documents and emails at the time with the people involved in the syndicated loan facility.

In that way, I learned about the different aspects of asset-based lending relationships. With that experience I started to branch out into other representations, including in the restructuring context and cash collateral "fights" and the like, and just gained experience along the way. I have a varied and multifaceted view into asset-based lending from that experience.

In terms of advice for younger attorneys or others getting into the field, I would say specifically you should know your codes, the Uniform Commercial Code and the Bankruptcy Code, but more generally I always tell young associates to take ownership, take initiative, and don't be afraid to say yes to new opportunities because they really foster growth, as you never know what you'll fall into.

Fiorillo: I started at Otterbourg in 1996 as a summer associate, and began my first year at the firm in the fall of 1997. I currently chair Otterbourg's Workout and Restructuring Department. I had the distinct honor and pleasure to work under probably one of the best mentors in the asset-based lending community, Jon Helfat, the then

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chair of my department. As I think Jon would acknowledge, I wasn't that helpful to him at first, because learning the vernacular of asset-based lending and bankruptcy law as a first-year associate, while working with a leading expert in the field, was challenging for both of us. But Jon did something for me for which I'll always be grateful. Midway through my first year of practice, Jon sent me downstairs to work in the finance department. Jon's view, which I completely share, was that you had to learn how a financing transaction is documented before you can learn how to work out and/or restructure a deal in distress. After spending some time learning how to document the front end of various secured loan transactions, Jon pulled me back up into the workout and restructuring group, where Jon, once again, gave me career-altering advice. He would often tell me that I needed to start telling him what we should be doing on matters we were handling, instead of Jon telling me what to do, which, as a junior associate, was a revolutionary mindset shift in the way I was approaching my job. It forced me to think through all of the issues and considerations that our clients would expect its counsel to address, which accelerated my understanding and appreciation of the practical and business applications of the legal principles which I was still trying to master. Of course, I always had Jon to consult with, and Jon was excellent at following up with me on all my different projects and assignments.

I would say to any attorney that is starting out in the industry, as Pauline said, that learning the law and understanding the vernacular, navigating personalities, and managing expectations is a daunting task the first year or two of your practice. But once you put the time and effort into it, and are fortunate enough to have one or more good mentors, you will find the learning curve is accelerated.

At Otterbourg, we place a premium on exposing junior associates to taking on larger roles and responsibilities with careful supervision. If you're interested in getting into the field of secured lending, which covers so many different industries at so many levels of the market--from $1 million to $2 billion deals and everything in between--then, as Pauline said, you have to be open to taking on new challenges, diverse assignments, and obviously put the time and effort in, and hopefully you're lucky enough to wind up with a great mentor to teach you the ropes.

Cremer: I'm a partner in the banking and finance department here at Otterbourg. I actually got my start working in-house for a private commercial real estate lender handling commercial mortgage closings. Although I was getting some great transactional experience, after a couple of years I felt the pull to expand my practice into some additional areas, which is when I went down the road of law firm work.

My first two interviews at Otterbourg were with two future SFNet Hall of Famers, David Morse and Jon Helfat, and from there it was off to the races in the secured lending world, representing banks and private lenders in all types of financings with a particular focus on ABL. I was fortunate enough to work with, and learn from, a number of excellent transactional attorneys who helped me navigate the finance practice area.

I would advise younger attorneys to pay attention to the conversations around you and, especially, when you sit in on conference calls with clients and the opposing side. There are so many nuances and substantive issues to be aware of in our field and I learned a great deal from colleagues on these types of calls about how they identified issues and how they advised clients on how to deal with those issues. It's that kind of exposure to knowledge from people who really know their field that helped my development.

I would also add that if you hear something during those conversations or discussions that requires additional context or which you do not quite understand, follow up with the partner for additional feedback. It goes a long way towards your development, and it shows that you're engaged, which partners always like to see from attorneys.

Otterbourg has been practicing law for well over 100 years. What is the makeup of the firm's culture that accounts for this longevity and success?

Fiorillo: I think the secret to Otterbourg's success is its consistency. We've been a midsized law firm for over a hundred years, and for most of its existence, Otterbourg has been very specialized in the field of commercial lending transactions and workouts and restructurings. While there are a number of good law firms in the secured lending industry, I think Otterbourg is recognized as a leading law firm in the market. We've been able to maintain a high level of sophistication and expertise within a midsized law firm model because we attract, train and retain a group of very dedicated, talented attorneys who experience early professional success, and who are able to work with and learn under leading experts in secured lending law practice (as well as a few SFNet Hall of Famers).

We use leanly staffed teams of attorneys, usually comprised of a senior level attorney working with a junior or a mid-level attorney, where both attorneys have direct and constant interaction with the client, so the clients always know the attorneys who are handling their work. We also have developed departments within the firm to provide our secured lending clients with a full-service experience. So, whether the loan needs to be documented, worked out, or litigated over, we provide, as Lena said, cradle-to-grave representation for all matters that come out of our commercial lending practice. We also have excellent communication channels across the departments, so that, for example, a finance department attorney will often send to me an intercreditor agreement with a request to review the insolvency sections of the agreement to ensure that any such provisions requiring a second set of eyes are properly vetted.

While we don't have as many different practice groups as big law firms, we have established excellent relationships with a number of firms that have specialties that Otterbourg does not have. In this regard, we are very efficient in networking with firms that have those specialties that, together with Otterbourg's expertise, really gives our clients the best possible representation, as opposed to being tied to one firm that provides all types of legal services, but not, perhaps, the best in all applicable legal fields.

McTernan: I would second what Dan said, and I would also add, and Dan alluded to this, that while we have remained true to our "bread and butter" areas that we have particular experience and expertise in, we've also been nimble with the times to open ourselves up to other practices or specialties as they've come about.

I would say part of that is because people truly enjoy what they do here, so they're intellectually stimulated and interested in keeping abreast of the new movements and what's new and interesting.

Cremer: Part of what accounts for our success is that it really comes down to the basics. We have attorneys with a real storehouse of practical knowledge and experience in our areas of practice. When you combine that with the collaborative nature of our firm where our younger attorneys are given real responsibility and work closely with and learn from the more experienced attorneys, that provides real consistency and quality in the representation that we provide, and it makes all our attorneys invested in providing good outcomes for our clients.

In addition, we have a broad finance practice and work on deals of all sizes and in many different lending platforms, from middle-market deals to syndicated deals into the billions. So, for instance, when we represent banks and private lenders on traditional ABL deals, term loans, tech deals or various other types of specialty lending platforms, we have a broad knowledge of what the market is, and where it is heading, in these various areas. This market knowledge helps our clients navigate deal points and complex negotiations.

Surilov: I'm the newbie here, so I have the perspective of coming from a different firm. Coming from my prior big law experience, what makes Otterbourg unique is the sophisticated expertise we are able to offer as we typically have a senior partner specialist who is at the highest level in the field on every transaction instead of the deals being staffed with a large number of associates. What really separates Otterbourg, and is the key to its longevity, is the way that they treat people like family, which I think is what creates stickiness for the top talent.

In terms of deal structure and negotiation, I think the interplay between different credit facilities, such as term loans and ABL, will continue to evolve. Borrowers have a continued desire, understandably, to have items such as representations, covenants and default be consistent throughout their various credit facilities, and there has been an even greater push recently to mirror those provisions between the various credit facilities.

From a legal standpoint, what issues should lenders be concerned about in 2025?

Cremer: In terms of deal structure and negotiation, I think the interplay between different credit facilities, such as term loans and ABL, will continue to evolve. Borrowers have a continued desire, understandably, to have items such as representations, covenants and default be consistent throughout their various credit facilities, and there has been an even greater push recently to mirror those provisions between the various credit facilities. So, of course, that can create some push and pull of substantive issues, especially from the ABL perspective.

ABL lenders, along with their counsel, should continue to be mindful of the unique nature of revolving loans and term loans and the different stress points. ABL loans, for instance, generally require more stringent liquidity conditions for money leaving the loan party group, which is typically a bigger concern for the ABL lenders providing new revolving loans while monitoring the financial health and liquidity of its borrowers.

In addition to that, the landscape is still evolving related to liability management transactions and how they are addressed in loan documentation. We will look for continued feedback from the courts on the treatments of things such as dropdown financings and uptiering of transactions, which is still kind of working its ways through.

Fiorillo: From a workout restructuring perspective, maybe you're starting to see the results of certain deal structuring issues, similar to what folks talked about on the front end of loan documentation maybe a year or two ago. For example, there's been a lot of airplay associated with Serta provisions in loan agreements. These provisions are effectively intended to ensure that a subset of lenders within a loan facility cannot do certain things that deprives the other lenders within the facility from receiving the same pro-rata repayment rights under the loan facility. As of this interview, the 5th Circuit has yet to issue its ruling on whether the Serta provisions were complied with in connection with the Serta Simmons Bedding Chapter 11 case, but I suspect that the 5th Circuit decision will have far-reaching legal and practical implications on the secured lending industry.

In one particular case in which Otterbourg is involved, the Chapter 11 case of American Tire Distributors, we saw firsthand one of the Serta provisions being litigated over in connection with DIP financing provided by an ad hoc group of term loan lenders. The excluded term loan lenders, who were not included in the DIP financing provided by the ad hoc term lenders, objected to the extent or the breadth of the exception to the Serta provisions contained in the underlying term loan agreement relating to DIP financing that could be provided by a subset of term lenders. The issue, ultimately, was not adjudicated because a settlement broke out. I think that we will see other skirmishes and posturing between lender groups over the extent and applicability of Serta provisions over the next year, and I think that you'll see a lot of folks writing about how you can better craft the loan agreement to address the perceived holes in some of these Serta provisions to avoid the litigation that will continue over these issues in 2025.

Another legal development that I'm actually very interested in, although I may not have the best expertise in the underlying business, is the 2022 proposed amendments to the Uniform Commercial Code regarding the incorporation of digital assets. As of July 2024, I think 24 states have approved the incorporation of the digital asset amendments to the UCC. I think it is pretty exciting that a new Section 12 will be added to the UCC, in addition to changing some of the other existing sections of the Uniform Commercial Code to accommodate the proposed changes relating to these digital assets, which include things like cryptocurrencies and the use of control accounts to control and perfect liens on digital assets. I believe New York is still pending the approval of these amendments, but I have to think it will ultimately be approved.

I'd also just want to mention, although it's not a new development per se, but it may continue to evolve from a jurisprudence standpoint, is in the context of "make-whole" provisions. Make-whole provisions are not new, and they have engendered a lot of litigation, and we currently have a circuit split as it relates to whether or not these make-whole provisions are enforceable.

Currently, I believe the Fifth Circuit, which includes Texas, a hotspot for large bankruptcy filings that affect the ABL community, as well as the Third Circuit, another hotspot for bankruptcy filings being Delaware, have adverse case law as it relates to the enforceability of these make-whole provisions. Make-whole provisions are provisions in loan agreements that provide that if the loan agreement is terminated prior to its dated maturity, the lender is entitled to be compensated for, fill in the blank, lost opportunity, interest it didn't get to earn, or fees it didn't get to earn, or a combination of all that. And there are various states, including New York (Otterbourg was actually instrumental in helping form the New York law on this point) that will allow the enforceability of these make-whole provisions or otherwise known as early-termination provisions that give the lender the ability to make up for the lost opportunity associated with a prematurely terminated loan.

The recent bankruptcy court decisions in the Fifth Circuit, Third Circuit, and other courts, are basically saying, notwithstanding the state law allowing for the enforceability of these fees, these provisions that allow for these fees to be recouped as part of the loan, are not enforceable because under the Bankruptcy Code, you cannot collect unmatured interest. And some courts, including the Fifth and Third Circuits, have effectively concluded that any make-whole provision, no matter how you draft it, is deemed unmatured interest and, therefore, not enforceable in bankruptcy.

We're waiting to see if other circuits adopt this particular view of the section. It also could go up to the U.S. Supreme Court. The Supreme Court is, I would say, leaning towards a more conservative view of business transaction type legal issues. So, some creditor may want to take it up to the Supreme Court and have the highest court decide the issue in 2025.

McTernan: As Dan mentioned, the Fifth Circuit has really become a hotspot that has sort of dethroned Delaware for a little while as the main place to seek Chapter 11 relief. And with that comes ramifications for all creditors and not just secured creditors because of different perceptions of debtor friendliness in particular jurisdictions. We have also seen a rise in bankruptcies in the District of New Jersey.

I've even had a big bankruptcy in Indiana of all places. We may see this trend continue where it's not just Delaware focused and these other circuits continue to come into play, particularly since we can expect that the law at the circuit level will catch up now to be more defined in each of these areas. It will be interesting to see if that trend continues as well.

Surilov: I am expecting to see a continuing trend from 2024, which is an increase in defaults. Based on the current trends, the defaults will continue in 2025 and there will be some accommodations in this connection. A lot of borrowers were very successful in pushing out maturity in 2024, so there will not be as much concern there. That might diminish some of the defaults and some of the flexibility that the borrowers have been looking for.

With the markets being stronger, a lot of the private equity firms are going to start to look for financial flexibility in the documents and loosening up some of the covenants that were tightened up during and after COVID. We will see a lot of the older provisions and covenant-light provisions coming back that created some of the litigation Dan and Pauline were talking about.

The direct lenders in the middle market are going to stay very strong because they can focus on some of the borrowers that are not doing as well, while the banks are still going to look at the stronger borrowers who can actually dictate more terms than they've been able to in the past. I don't see as many bankruptcies as Dan sees, but I do see a lot of things that might cause bankruptcies in the future because the borrowers are going to be asking, especially sponsors, for those things that we know can be detrimental to the lenders and the precedent down the road.

There still will be some borrowers looking for repricing and refinancings, but it most likely will not create as much activity as it did this year. Some of the sectors, such as healthcare and some of the energy sectors that have been struggling in the past, are going to be able to get some better provisions in their documents. We'll see a lot of renegotiation bringing back some of the older, more borrower-friendly provisions that we haven't seen in the past three to four years.

Do you see the recent election results having any influence on your clients and/or practice?

Fiorillo: I think the short answer is I think there's going to be a lot of uncertainty initially regarding what President-elect Trump's agenda will actually be relative to what people are expecting the administration to implement that might impact the landscape in which the commercial lending clients that we represent will have to navigate.

Specifically, I know that tariffs have become a hot-button issue. I read that Trump said that he would increase tariffs against certain Chinese companies up to 60 percent or something along those lines, and it would be more or less a game-changing type of move that will have broad implications directly and indirectly against a number of industries that rely on those imports to run their businesses, and the impact that will have on prices for goods and services. You have a U.S. consumer base that's been basically beaten up over the last several years with the inflation spikes that we've all experienced. Supply chain issues have contributed to that. And now, going into 2025, we expect the interest rate environment to settle down a little bit, which should hopefully give people a break on having the ability to spend more money, but will that be enough if there are certain actions taken that could create pricing issues, and to what extent that impacts the ability of our clients' borrowers to maneuver around that challenging landscape or whether that's going to cause more bankruptcies and insolvencies, remains to be seen.

There is definitely an expectation, at least among the clients that I've spoken to, that the new administration is more business friendly, to use that overused term, and less regulation driven. I think that there's at least an expectation that under the next administration the banks will have more flexibility to operate.

I also think that there are certain things that won't change. I don't have a crystal ball, but at the end of the day the market drives a lot of political decisions and, ultimately 'it's the economy, stupid', to use that quote, and I think that if things start going south as a result of whatever the new administration wants to implement, I don't expect it to continue in a bad direction. I would expect things will normalize, hopefully within the second or third quarter of 2025 after people realize what the new landscape will be.

We represent a whole host of clients from the largest banks down to some very small specialty lending shops and folks in between, and so what might impact a large bank may not have the same impact or may have a much bigger impact on a number of our specialty finance clients.

McTernan: Following up on something Dan mentioned, I think it's likely we will see a push toward deregulation, especially of the regulatory agencies that regulate the banks. Recently, the Wall Street Journal came out with an article that said that the Trump administration is already looking to consolidate or altogether eliminate a lot of the bank regulators. I think that'll have a big impact.

Obviously, another potential impact, although the results won't be seen immediately, is the jurisprudence of Trump-appointed judges. There is likely to be a movement towards being more willing to leave matters up to the states and limit agency power.

Cremer: I think the short answer to your question is "most certainly." No matter where you fall on the political spectrum, it's hard not to notice the optimism in the business world for some of the anticipated policy changes regarding, say, corporate taxes and reduction in regulations. The potential to again prioritize traditional sources of energy production will probably have a big impact on the market as well.

These policies could translate in significant ways to the lending world. A reduction in the regulatory environment will probably lead to more credit being available, especially in connection with possible changes to capital reserve requirements and liquidity rules for banks and other financial institutions. Those changes, in turn, can have an effect on the risk tolerance for banks in providing loans. The potential is there for a loosening of credit.

The election results may also affect the continued implementation of ESG requirements and incentives, for which there has been a big push with banks and borrowers over the past few years relating to, among other things, its effect on interest rates and other loan terms. So, there is certainly potential for a decreased emphasis there due to expected regulatory rollback and court challenges.

Surilov: There will be a lot of changes in the second quarter of 2025 because the beginning will resemble the end of 2024. I think tax is obviously going to be a big issue. The Tax Cuts and Jobs Act (TCJA) and the related tax provisions are expiring at the end of 2025, so I think those will be revisited and possibly continued, and I think a lot of the things we've been seeing in the credit agreements, such as getting 100% of equity of foreign companies, which has become more common, that is going to continue because now there's certainty that the favorable tax provisions will be extended.

I think there's going to be a lot of losers and winners in some industries. Healthcare will be impacted by some of the Medicare reform that's coming down the pipeline. There are also federal staffing changes that will impact the healthcare industry. Energy is going to be another one that will be interesting to watch. I think there'll be some things that are loosened up for fossil regulations that the companies in this suffering sector have been looking for in the past year. But I think the ESG initiatives that have been in a lot of the legal documentation and have become a hot topic are going to take a back seat.

Currently, everyone is kind of hoping for the ease of inflation and a cut in the rates. Based on the current projections, the rates will not come down as much as expected, which is not what the market or certain companies have been hoping for in the coming year. I think that's going to squeeze some of those spreads that everybody's hoping to change, and it's going to push the borrowers towards the middle market and some of the direct lenders, and Otterbourg is well positioned for 2025 and beyond as we are diverse as a firm and well positioned for all types of borrowers and lenders.

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