

# *SemCrude*, Setoff, and the Collapsing Triangle: What Contract Parties Should Know

NORMAN S. ROSENBAUM, ALEXANDRA STEINBERG BARRAGE, AND  
JORDAN A. WISHNEW

*Recently, the U.S. Bankruptcy Court for the District of Delaware held that a valid, prepetition contract cannot vitiate the strict mutuality requirement found in Section 553(a) of the Bankruptcy Code. The authors explain the court's decision and conclude that, after this ruling, contract parties should not rely on a negotiated cross-affiliate setoff — the triangle is no longer as sturdy as it may have once seemed.*

On January 9, 2009, the Honorable Brendan L. Shannon of the U.S. Bankruptcy Court for the District of Delaware held in *SemCrude*<sup>1</sup> that a valid, prepetition contract cannot vitiate the strict mutuality requirement found in Section 553(a) of the Bankruptcy Code. In light of *SemCrude*, enterprises, such as energy trading and marketing companies, who rely on contractually based cross-affiliate or “triangular setoff” provisions as a means of setting off amounts owed among various entities should re-examine their agreements and reassess their counterparty bankruptcy risk. As *SemCrude* illustrates,<sup>2</sup> parties should also understand all of the legal remedies — including the potential applicability of the safe harbor provisions — that may be available to them under the Bankruptcy Code.

## SETOFF AND TRIANGULAR SETOFF DEFINED

A setoff in bankruptcy, as defined by Section 553(a) of the Bankruptcy Code, involves the offset of mutual, valid, and enforceable prepetition debts between the same parties in the same capacities — i.e., a prepetition debt owing by a creditor (“Party A”) to a debtor (“Party B”) against a prepetition claim of Party A against Party B.<sup>3</sup> The requisite elements of a Section 553 setoff are as follows:

- The creditor holds a claim against the debtor that arose before the commencement of the case;
- The creditor owes a debt to the debtor that also arose before the commencement of the case;
- The claim and debt are mutual; and
- The claim and debt are each valid and enforceable.<sup>4</sup>

Setoff, in effect, elevates an unsecured claim to secured status, to the extent that the debtor has a mutual, prepetition claim against the creditor.<sup>5</sup> Section 553 does not define “mutual.” The most common use of “mutual” includes the requirement that the prepetition claim and debt be owed among the “same parties” and that the parties be acting in the same “capacity.”<sup>6</sup>

By comparison, a triangular setoff typically involves the setoff of a debt owing from Party A to Party B against a debt of Party B owing to an affli-

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Norman Rosenbaum is a partner in the Bankruptcy and Restructuring Group of Morrison & Foerster LLP in its New York office. Mr. Rosenbaum has extensive experience representing creditors as well as public and private debtors in transactional, litigation, and advisory work relating to Chapter 11 cases, and non-bankruptcy workouts. Alexandra Steinberg Barrage is counsel in the firm’s office in Washington, D.C. Her practice focuses on bankruptcy and distressed debt trading. Jordan Wishnew is a senior associate in the firm’s New York City office. His practice focuses on representing creditors, creditors’ committees and other parties in interest in bankruptcy cases and workouts. The authors can be contacted at [nrosenbaum@mfo.com](mailto:nrosenbaum@mfo.com), [abarrage@mfo.com](mailto:abarrage@mfo.com), and [jwishnew@mfo.com](mailto:jwishnew@mfo.com), respectively.

ate of Party A, rather than directly to Party A.<sup>7</sup> In the energy trading marketplace, triangular setoff is used to manage risk among multiple affiliates trading under the same ultimate parent. Triangular setoff is considered to be a much more efficient means of managing credit exposure and maximizing the efficiency of collateral than limiting setoff to the obligations of the parties under each contract.<sup>8</sup> The need for triangular setoff is even more acute when affiliates share the same guarantor of their obligations.<sup>9</sup>

## SUMMARY OF JUDGE SHANNON'S DECISION

Despite the appeal and convenience of triangular setoff, the *SemCrude* decision should cause contract parties to re-evaluate the risk that triangular setoffs will not be enforceable against a debtor-in-possession. In *SemCrude*, the court denied the motion of Chevron Products Company (“Chevron”) for relief from the automatic stay in order to set off the balances owed by SemFuel, L.P. (“SemFuel”) and SemStream, L.P. (“SemStream”) to Chevron against the sum Chevron owed to SemCrude, L.P. (“SemCrude”). Specifically, Chevron owed SemCrude approximately \$1.4 million for the sale and purchase of crude oil, SemFuel owed Chevron approximately \$10.2 million for the delivery and purchase of gasoline, and SemStream owed Chevron approximately \$3.3 million for the delivery and purchase of butane.<sup>10</sup> Each of the agreements among Chevron and the SemCrude parties contained identical netting provisions that provided in pertinent part:

[I]n the event either party fails to make a timely payment of monies due and owing to the other party, or in the event either party fails to make timely delivery of product or crude oil due and owing to the other party, the other party may offset any deliveries or payments due under this or any other Agreement between the parties and their affiliates.<sup>11</sup>

SemCrude and at least seven other parties filed objections to Chevron’s motion. The primary focus of these objections was that the triangular setoff sought by Chevron was impermissible because the Bankruptcy Code does not permit parties to contract around the “mutuality” require-













