American Bankruptcy Institute

Health Care Program

Liability Management Transactions and Out-of-Court Workouts

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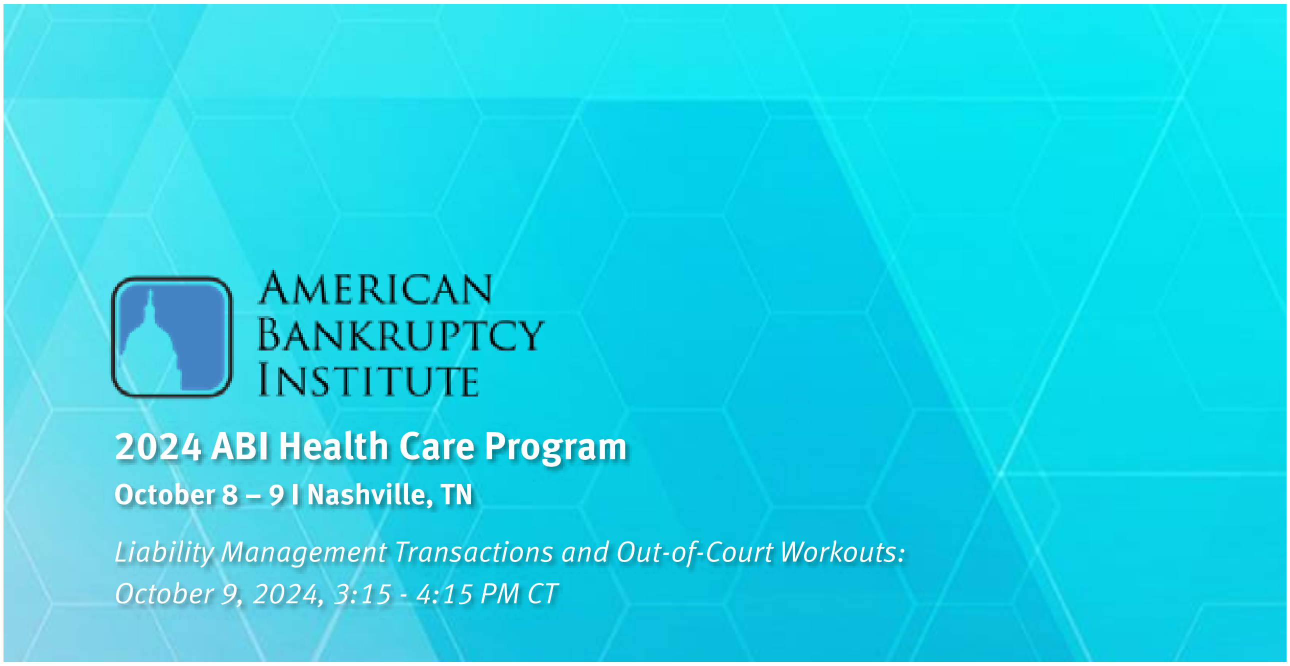
2024


American
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Liability Management Transactions and Out-of-Court Workouts:
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Presenters

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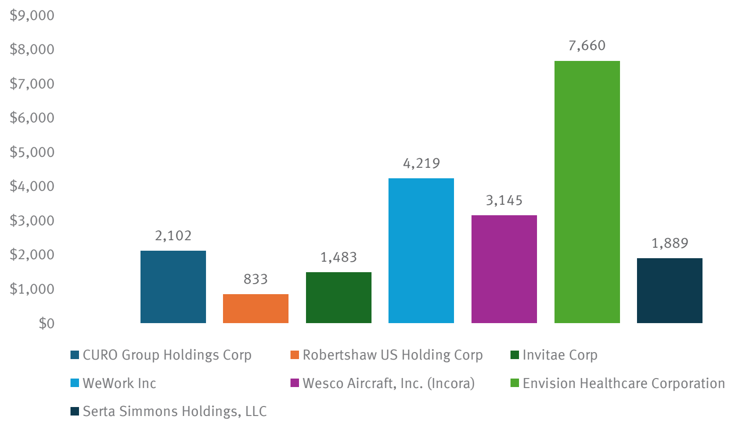
Liability Management Overview

Recent trends in capital markets, including extended leverage profiles, bespoke structuring and loose covenant packages have allowed for creative liability management solutions for companies facing financial distress

- **Liability management transactions encompass a broad array of strategies a company may pursue to manage capital structure and liquidity needs as market and business-specific challenges emerge**
  - Liability management structures may provide an opportunity for existing stakeholders or new investors to deploy capital to support the business and achieve suitable risk-adjusted returns on investment
- **These strategies can be pursued opportunistically based on an attractive dislocation in market conditions and company fundamentals or preemptively to avoid a broader, more costly restructuring**
- **The complexity of the situation and stakeholders will help inform the range of public or private capital alternatives, which includes utilizing the existing asset base or capital structure to generate liquidity or reduce leverage, structuring an injection of new capital or pursuing a more holistic restructuring out-of-court or in-court**
- **A company and its advisors must consider a variety of factors in evaluating solutions including company stress, corporate governance, stakeholder management, structuring limitations imposed by the existing capital structure, tax implications and litigation risk, among others**

Common Liability Management Goals	
✓ Extend maturity runway or address near-dated maturities	✓ Preemptively address anticipated covenant defaults
✓ Provide source of new money to support the business	✓ Capture attractive return on debt retirements
✓ Deleverage the balance sheet	✓ Free up collateral and assets to unlock value
✓ Reduce debt service burden	✓ Modify existing debt documents

Recent Chapter 11 Filings Involving LMTs



Case	Petition Date	Case Status	Liabilities
CURO Group Holdings Corp	25 Mar 2024	Confirmed	2,102
Robertshaw US Holding Corp	15 Feb 2024	Confirmed	833
Invitae Corp	13 Feb 2024	Confirmed	1,483
WeWork Inc	6 Nov 2023	Confirmed	4,219
Wesco Aircraft, Inc. (Incora)	1 Jun 2023	Pending	3,145
Envision Healthcare Corporation	15 May 2023	Confirmed	7,660
Serta Simmons Holdings, LLC	23 Jan 2023	Confirmed	1,889

Source: Debtwire

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Healthcare Chapter 11 Filings YTD Through October 1, 2024

Case	Filling Date	Filing Strategy	Pre-Petition Debt (USDm)	Debtor Legal Advisor	Debtor Financial Advisor	Subsector	Court	Judge
Biolase Inc.	1 Oct 2024	PreFiling Sale Process	16	Pillsbury Winthrop Shaw Pittman	B. Riley Advisory Services / SSG Capital Advisors	Medical Tech	Delaware	Karen B. Owens
Tarrant County Senior Living Center	1 Oct 2024	PrePack Plan	207	Butler Snow		Hospital / Treatment Center	Texas Northern	Scott W. Everett
Nuvo Group USA Inc.	22 Aug 2024	Free Fall	24	Hughes Hubbard & Reed	Intrepid Investment Bankers / Teneo	Pharmaceuticals	Delaware	Mary F. Walrath
Guardian Elder Care at Johnstown LLC	29 Jul 2024	PreFiling Sale Process	79	Saul Ewing LLP	Eisner Advisory Group	Hospital / Treatment Center	Pennsylvania Western	Jeffery Deller
Midwest Christian Villages Inc.	17 Jul 2024	Free Fall	76	Dentons	B.C. Ziegler & Company	Hospital / Treatment Center	Missouri Eastern	Kathy Suratt-States
DermTech Inc.	18 Jun 2024	PreFiling Sale Process		Wilson Sonsini Goodrich & Rosati	Cowen & Company	Equipment / Services	Delaware	JohnT. Dorsey
Vyaire Medical Inc.	9 Jun 2024	PreFiling Sale Process	534	Kirkland & Ellis, LLP	AlixPartners, LLP	Equipment / Services	Delaware	Brendan L. Shannon
Optio Rx LLC	7 Jun 2024	Pre-Arranged Plan	128	Chipman Brown Cicero & Cole, LLP	Paladin Management Group, LLC	Equipment / Services	Delaware	Thomas Horan
LaVie care Centers LLC	2 Jun 2024	Free Fall	682	McDermott Will & Emery, LLP	Stout Capital, LLC	Hospital / Treatment Center	Georgia Northern	Paul Baisier
South Hill Operations LLC	17 May 2024	PreFiling Sale Process	61	Whiteford Taylor & Preston, LLP	Ankura Consulting	Hospital / Treatment Center	Pennsylvania Western	Grace E. Robson
Gamida Cell Inc.	13 May 2024	PrePack Plan	79	Cooley	Moelis & Co.	Pharmaceuticals	Delaware	J. Kate Stickles
ProSomnus Inc.	7 May 2024	Pre-Arranged Plan	38	Polsinelli	Gavin / Solmonese	Medical Tech	Delaware	John T. Dorsey
Steward Health Care System LLC	6 May 2024	Free Fall	1176	Weil Gotshal & Manges	Cain Brothers & Company / Lazard Freres & Co. / Leerink Partners	Hospital / Treatment Center	Texas Southern	Christopher M. Lopez
Tampa Life Plan Village Inc.	5 Apr 2024	PreFiling Sale Process	87	Akerman, LLP	Colliers International Florida, LLC	Hospital / Treatment Center	Florida Middle	Roberta A. Colton
Acorda Therapeutics. Inc.	1 Apr 2024	PreFiling Sale Process	207	Baker & Mckenzie	Ducera Partners / Leerink Partners	Pharmaceuticals	New York Southern	David S. Jones
Eiger BioPharmaceuticals Inc.	1 Apr 2024	PreFiling Sale Process	42	Sidley Austin	Alvarez & Marsal; SSG Capital Advisors	Pharmaceuticals	Texas Northern	Stacey Jernigan
Petersen Health Care Inc.	20 Mar 2024	Free Fall	296	Winston & Strawn	Getzler Henrich & Associates	Hospital / Treatment Center	Delaware	Thomas Horan
miR Scientific LLC	15 Mar 2024	PreFiling Sale Process	14	Forman Holt		Medical Tech	New Jersey	Christine M. Gravelle
Invitae Corp	13 Feb 2024	PreFiling Sale Process	1483	Kirkland & Ellis, LLP	Moelis & Co.	Services	New Jersey	Michael B. Kaplan
Sientra Inc.	12 Feb 2024	PreFiling Sale Process	73	Kirkland & Ellis, LLP	Stifel Financial / Miller Buckfire	Services	Delaware	John T. Dorsey
The Center for Special Needs Trust Administration	9 Feb 2024	Free Fall		Stichter Riedel Blain & Postler PA	Nperspective Advisory Services	Services	Florida Middle	Roberta A. Colton
Senior Choice Inc	8 Feb 2024	PreFiling Sale Process	16	Duane Morris	FTI Consulting	Hospital / Treatment Center	Pennsylvania Western	Jeffery Deller
Cano Health, LLC	4 Feb 2024	Pre-Arranged Plan	1233	Weil Gotshal & Manges	Houlihan Lokey / AlixPartners	Hospital / Treatment Center	Delaware	Karen B. Owens
NanoString Technologies Inc.	4 Feb 2024	Free Fall	282	Willkie Farr & Gallagher	AlixPartners; Perella Weinberg Partners / Tudor	Medical Tech	Delaware	Craig Todd Goldblatt
DMK Pharmaceuticals Corporation	2 Feb 2024	Free Fall	14	Nelson Mullins Riley & Scarborough	Rock Creek Advisors	Pharmaceuticals	Delaware	Mary F. Walrath
Neuragenex Treatment Centers LLC	26 Jan 2024	Free Fall		Tiffany & Bosco	Legion Financial		Arizona	Eddward P. Ballinger
Eye Care Leaders Portfolio Holdings LLC	16 Jan 2024	Free Fall	123	Gray Reed & McGraw	B. Riley Advisory Services	Services	Texas Northern	Michelle V. Larson
Athersys Inc.	5 Jan 2024	PreFiling Sale Process	44	McDonald Hopkins	Outcome capital	Pharmaceuticals	Ohio Northern	Jessica E. Price Smith
Humanigen Inc.	3 Jan 2024	PreFiling Sale Process	44	Potter Anderson & Corroon	SC&H Group	Pharmaceuticals	Delaware	Brendan L. Shannon

Source: Debtwire

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Non-Pro Rata Uptier: Serta Simmons

The Transaction	▪ **After receiving competing proposals for two different types of LMTs, Serta effected a non-pro rata uptier transaction whereby the Company:** — Incurred newly funded superpriority first out debt; — Exchanged existing first lien loans at 74% and second lien loans at 39% into new second out debt; and — Created a basket for superpriority third-out debt which would rank ahead of pre-existing first lien debt ▪ **This transaction was effected by the use of the "open market purchase" provisions of the existing debt documents. This effectively resulted in a debt-for-debt exchange without triggering a requirement that such exchange occur on a pro-rata basis**
Court Ruling	▪ **Overruling objections by non-participating lenders, the court found parties were aware that the credit documents were "loose" and the implications of such flexibility in the language** ▪ **The court found that sophisticated parties know what words they want to choose in these agreements, and this "could have easily been avoided" by adding a sentence or two in the documents** ▪ **"Sophisticated financial titans engaged in a winner-take-all battle. There was a winner and a loser."**
Key Drafting Takeaways	▪ **Pay attention to flexibility and carve-outs, especially with regard to "sacred rights."** — Lenders should consider including an anti-subordination provision, which blocks the ability to incur priming debt ▪ **Lenders should consider including restrictions on non-pro-rata open market purchases used in connection with a debt exchange** — For example, limiting such purchases to cash or up to a capped amount, or prohibiting altogether — "Open market purchase" was not a defined term in Serta Simmons, and ambiguity may not always benefit the lenders

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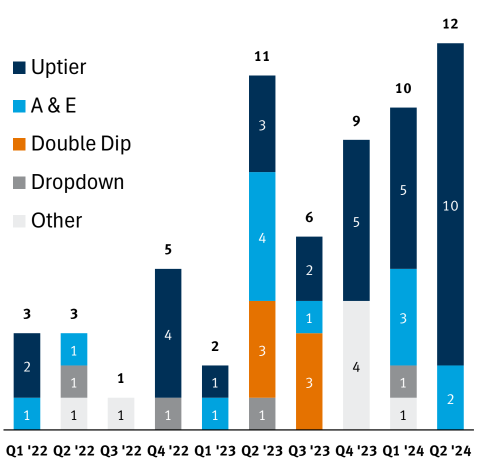
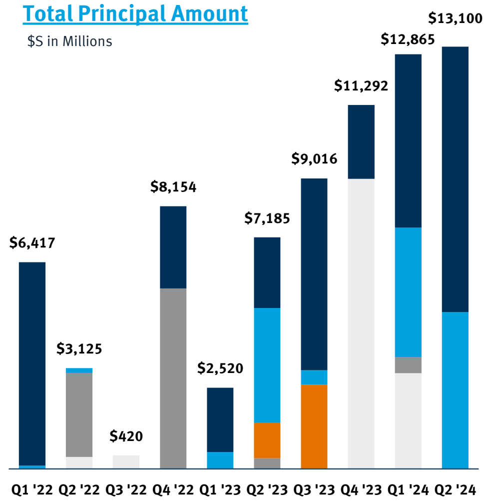
Drop Down: J. Crew

The Transaction	▪ **J. Crew effected a drop-down transaction by which the Company distributed its trademarks (its most valuable asset) to a foreign non-Guarantor Restricted Subsidiary, pursuant to a clause in the Credit Agreement which permitted unlimited investments in such subsidiaries** ▪ **Using "trap door" baskets, the non-Guarantor Restricted Subsidiary then transferred the trademarks to an Unrestricted Subsidiary** — These baskets allowed (i) intercompany investments by loan parties in restricted subsidiaries that were not loan parties, and (ii) investments by non-loan party restricted subsidiaries, financed with the proceeds received from intercompany investments in such non-loan party restricted subsidiaries ▪ **The Unrestricted Subsidiary issued notes secured by the trademarks to the holders of the parent company's debt. This resulted in the previously unsecured debt having a first priority lien on the Company's most valuable asset**
Key Drafting Takeaways	▪ **Most lenders are now keenly aware of the "trap door" basket risk and how to mitigate it:** — Restrictions on the types of assets that can be transferred (i.e., prohibit the transfer of material IP or other "crown jewel" assets); and — Restrictions on investments, including the party in which the investment can be made (i.e., prohibit investments by non-loan party restricted subsidiaries in unrestricted subsidiaries) ▪ **Lenders should consider other protective measures against leakage, including:** — Clearly defined parameters on designating unrestricted subsidiaries; — A cap on the assets held or generated by unrestricted subsidiaries; — Limit the ability to transfer any assets to non-loan parties that are scheduled as material or is material to the underlying business of the borrower; and — Prohibit automatic lien release when collateral is transferred to non-loan parties or affiliates

Growth in LM Activity

LMEs are increasingly prevalent, with increasingly creative structures (such as drop downs and double dips)





Of the four drop downs since the start of 2022, three have occurred in healthcare

Sources: Proprietary BRG analysis utilizing Reorg LME Tracker and Debtwire data

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Types of Out of Court LMEs

There are numerous types of LMEs, each with their own considerations

	Basket Capacity	New Money	Discount Capture	Rate Relief	Execution Risk	Reputational Risk
Amend and Extend	○	◔	○	◔	🟢	🟢
Uptier	○	◑	◑	◑	🟡	🟡
Double Dip	●	●	◔	◔	🟡	🔴
Drop Down	●	●	●	●	🔴	🔴

Drop Down Consideration

There are many considerations to take into account when determining the feasibility of a drop down transaction

Key Considerations

- Ability for drop down assets to operate independently
- Determining the allocation and valuation methodology to distribute shared services costs
- Potential for additional business expenses (e.g., tax filings, audit, tracking shared services, potential additional FTEs)
- Establishing funding mechanisms and accounting protocols to provide required funds
- Determining any intercompany loan arrangement and associated interest expense
- Calculating the fair market value for all balance sheet items transferred after separation
- Navigating any state and local business license and tax implications
- Identifying and negotiating any lease agreements that would require landlord approval for assignment
- Establishing an appropriate and feasible timeline for when financial statements will be produced for new and existing debtholders
- Identifying, reviewing, inventorying, and assigning agreements and contracts
- Identifying and establishing the new G/L structure to handle changed accounting and intercompany activity needs
- Establishing new processes and procedures for inventory accounting, billing, and payment processing
- General legal entity business clean up

Borrower and Capital Structure Considerations – Life Sciences / Biotech

Typical Characteristics

- **Public companies with a mix of institutional and retail investors, typically more retail in distressed / low market cap situations**
- **Vast majority of companies have pre-revenue products in development awaiting data read-outs**
- **Significant liquidity required to fund development and commercialization**
  - Costs can include the outsourcing of testing and manufacturing to CROs / CMOs
- **Dependent on the performance of a single or limited number of drugs / products**
- **Board and management tend to have strong scientific and medical backgrounds**
- **Employee compensation weighted toward equity**
- **Limited collateral, the value of which may be difficult to realize in a distressed sale process**
  - Tends to consist of intellectual property, clinical data, equipment and leases
- **Reliant on equity capital markets to meet funding needs**
- **Limited traditional debt capital, mostly private unitranche venture debt from one or two investors**
  - Secured Term Loans
    - Small in size; narrow universe of lenders that require equity features
    - Covenant-lite, including MAC / MAE clauses, DACAs and min. liquidity
  - Unsecured Convertible Bonds
    - Covenant-lite with returns tied to equity upside

Signs of Stress

- **Market capitalization < cash**
- **Distressed trading prices for debt with equity-like yields**
- **Unfavorable data for key drugs**
- **Turnover of senior leadership**
- **Inability to fund ongoing cash needs through next testing milestone**
- **Inability to access traditional equity capital markets**
- **Resorting to non-traditional sources of liquidity:**
  - ATMs
  - PIPEs
  - Reverse merger
  - Vendor financing
  - Out-licensing core IP
  - Clinical development agreement

Stakeholder Considerations & Best Practices

Secured Lenders	▪ **Tend to be few in number, making negotiations more straightforward** ▪ **Very sensitive to liquidity and focused on recovering (or protecting) par** ▪ **Lack of collateral value in a distressed situation will drive aggressive behavior** — Can seek to sweep cash via DACA using MAC / MAE ▪ **Timing and tone of discussions are very important so as not to accelerate aggressive behavior** ▪ **Usually unwilling to provide additional capital or allow new capital that dilutes existing collateral**
Convertible Bondholders	▪ **Likely to be more amenable to funding the business** ▪ **Can be a source of liquidity and deleveraging via up-tier exchange** — Can "trade" for favorable new money terms in return for higher up-tier exchange rate and warrants • Some bondholders prefer to work directly with the borrower or with a limited number of holders
"Technical" Equity Investors	▪ **Can be a source of rescue or bridge capital but with significant dilution to existing equity** — Less focused on fundamentals and seek to create option value via warrants by quickly selling equity to recover the underlying investment — Will result in significant dilution and trading volatility in the Issuer's stock — Usually limited in amount and impact, but can buy precious time

Best Practices

- **Confirm DACA is in full effect**
- **Confirm the location of cash and understand where data is stored both internally and externally**
- **Evaluate relevant covenants, including MAC / MAE clauses**
- **Evaluate obligations to third-party contractors and vendors**
- **Determine funding needs for next testing or business millstone**
  - Determine "red line" for a "safe landing" in ch. 11 or other process
    - Ch. 11 preparation and case costs (assume no DIP)
    - D&O tail policy
  - Determine if any repaid obligations can be re-borrowed
  - Evaluate ability to repay some or all outstanding secured debt if it helps with capital raise or if at risk of cash sweep
- **Talk to advisors as early as possible to determine the range of options and ability to protect the board and management in a downside scenario**
  - The ability to conduct parallel processes for financing, M&A and restructuring will increase the probability of a successful outcome
- **If an out-of-court solution requires approval from shareholders (e.g., sale / change of control), evaluate the impact of an unsuccessful vote and what a "Plan B" might look like**
  - Hard to predict outcome if shareholders are predominantly retail investors
  - Timing for a vote will impact liquidity

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Importance of Third-Party Processes

Overview	▪ **Over the last few years, we have observed a high correlation between successful out-of-court restructurings involving certain healthcare companies and the presence of a third-party marketing process** — This has been more common with smaller capital structures and lender groups in the Life Sciences and MedTech space, but we have also observed this in senior housing deals where the lenders are highly coordinated and aligned
Benefits	1 **When dealing with sophisticated stakeholders (lenders and shareholders), a third-party marketing process or limited market check can help with obtaining material concessions** — Depending on timing and sensitivities around the Company's situation, this can include a traditional debt or equity capital raise in parallel with a sale of the Company • It can also include a more limited approach to generate faster feedback and potential interest, which can be used to determine whether a more fulsome process is warranted 2 **The results of the process will provide the board with an independent assessment of the Company's prospects and allow the advisors to craft an appropriate strategy for addressing stakeholders while setting realistic expectations** 3 **When dealing with stakeholders, the process results will provide real-time market data that can be evaluated in connection with restructuring discussions** — Creditors will have greater clarity as to their options and will better understand why they are being asked to support or participate in a restructuring • This can result in more favorable terms for a lender-supported restructuring if a competitive process is conducted — Shareholders who may have been reluctant to provide incremental capital in lieu of a third-party solution may be more willing to fund the Company rather than be diluted — Board and management can rely on the success of the process or lack thereof to support a transaction that may adversely impact or dilute shareholders

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Faculty

Alexander V. Rohan, CFA, CPA is a managing director of Miller Buckfire & Co., LLC in New York and has more than 25 years of investment banking, legal and financial advisory experience, most of which has involved all aspects of complex corporate restructurings. He has held senior investment banking positions at B Riley FBR, Guggenheim Securities and Jefferies, where he advised companies, creditors, shareholders, boards, management teams and organized labor. Prior to that, he held various roles at Genworth Financial/GE Asset Management, Paul Weiss and Ernst & Young. Mr. Rohan has advised on approximately 125 transactions representing more than $150 billion in liabilities as both advisor and principal involving balance-sheet restructurings, M&A, capital-raising, amendments, waivers, consents, tenders, direct investments, business unit dispositions and collective bargaining agreements. During his time at Genworth Financial, he was responsible for approximately $500 million of hedge fund and private-equity investments. Mr. Rohan is a former restructuring attorney. He serves on the board of directors of the May Ellen and Gerald Ritter Foundation, BuildOn! and Stamford Police Foundation, and is an honorary member of the Association of Professional Flight Attendants (APFA), which represents around 26,000 employees of American Airlines. Mr. Rohan received his a B.B.A. in public accounting from Pace University and his J.D. from NYU School of Law.

Erin Ryan is an associate with Fried, Frank, Harris, Shriver & Jacobson LLP in New York, where she advises clients on domestic and cross-border restructuring matters across multiple industry sectors. Counseling both the debtor and creditor side, she has experience representing creditor groups, official committees and debtors in large, complex chapter 11 cases and out-of-court restructurings. In addition to debtor representations, Ms. Ryan has been involved in the representation of ad hoc groups comprised of hedge funds, financial institutions, and other sophisticated investors, special committees of independent directors, an official committee of tort claimants, official committees of unsecured creditors, and an asbestos trust in a complex bankruptcy litigation. She previously was an associate with Willkie Farr & Gallagher LLP and served as a judicial intern to Hon. Mark A. Kearney of the U.S. District Court for the Eastern District of Pennsylvania in Philadelphia. Ms. Ryan received her undergraduate degree in 2015 from Pennsylvania State University and her J.D. in 2018 from the University of Pennsylvania Carey Law School.

Andy Serbe is a senior legal reporter at Debtwire in Los Angeles, and provides ongoing coverage of U.S. Bankruptcy Court proceedings and federal financial litigation, including live hearings and major filings. He also serves as the host of the Legal Lens podcast, a monthly interview show focused on distressed industry trends featuring experts, as well as breaking news, reacting to and covering major rulings and filings as they happen. Mr. Serbe previously was an aerospace and industrials reporter with Mergermarket, a labor and employment reported with the Daily Journal Corp., and a litigation reporter, as well as an associate web editor with CDW. He received his B.A. in communication in 2015 from the University of Illinois Urbana-Champaign.

Rob Shapiro is a managing director of Corporate Finance at Berkeley Research Group, LLC in Boston, where he specializes in liquidity management abd balance-sheet restructurings, He has successfully executed numerous in-court and out-of-court transactions for companies and their equity sponsors in the pharmacy, health care, media, consumer products and retail spaces. Mr. Shapiro's expertise in short-term liquidity management includes preparing weekly cash forecasts, identifying liquidity levers for immediate improvement, and managing the business against budget. He also develops long-term plans and has successfully worked with private-equity-owned companies and their lenders to drive restructurings. Previously, Mr. Shapiro was a director in FTI Consulting's Corporate Finance/Restructuring Practice, and he worked in the restructuring group of Carl Marks, where he was engaged in a number of in-court and out-of-court transactions. He holds FINRA 7, 63 and 79 licenses. Mr. Shapiro received his B.A. from Colorado College.