



AMERICAN
BANKRUPTCY
INSTITUTE

2021 Virtual Annual Spring Meeting

Current Issues Facing Creditors' Committees

Kimberly A. Brown

Landis Rath & Cobb LLP; Wilmington, Del.

Robert J. Feinstein

Pachulski Stang Ziehl & Jones; New York

David MacGreevey

AlixPartners, LLP; New York

Cullen Drescher Speckhart

Cooley LLP; Washington, D.C.

CURRENT ISSUES FACING CREDITORS' COMMITTEES: MAXIMIZING YOUR CONSTITUENCIES RECOVERIES

American Bankruptcy Institute
2021 Annual Spring Meeting
April 15, 2021

WELCOME AND INTRODUCTION OF PANELISTS

Moderator

Kimberly A. Brown
Landis Rath & Cobb LLP
Wilmington, Delaware

Panelists

Cullen Drescher Speckhart
Cooley LLP
Washington, D.C.

Robert J. Feinstein
Pachulski Stang Ziehl & Jones LLP
New York, New York

David MacGreevey
AlixPartners, LLP
New York, New York

CREDITORS' COMMITTEES: THEIR ROLE AND OVERCOMING PROBLEMS IMPACTING THEIR CONSTITUENCIES' RECOVERIES

THE ROLE OF THE CREDITORS' COMMITTEES

- ❖ 11 USC § 1103(c)(2) – sets forth the basic powers of a chapter 11 creditors' committee, including investigation of the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, any other matter relevant to the case or to the formulation of a plan.
- ❖ The debtor controls the process in a chapter 11 case and the creditors' committee has a reactive role in that process. The creditors' committee's goals are to:
 - Enhance value
 - Generate value
 - Mitigate loss of value to creditors

OVERCOMING PROBLEMS IMPACTING UNSECURED CREDITOR RECOVERIES

- How can a creditors' committee effectively look out for its constituencies in sale cases where unsecured creditors are hopelessly out of the money or, even worse, where the debtors are administratively insolvent?
 - Chapter 11 sale cases like Sears, Toys R Us, ShopKo, and Barneys present additional challenges for a creditors' committee to obtain recoveries for its constituencies.
 - In these scenarios, in addition to working with the debtors to obtain the highest or otherwise best price for their assets, the creditors' committee should be seeking to have the purchaser:
 - assume liabilities (like 503(b)(9) claims and postpetition accounts payable obligations)
 - keep as many locations open as possible to not only save jobs, but also provide trade vendors with an ongoing business partner
 - designate as many leases as possible for assumption and assignment
 - pay all cures associated with assumption and assignment of contracts and leases
 - leave behind claims and causes of action unrelated to the ongoing business operations

OVERCOMING PROBLEMS IMPACTING UNSECURED CREDITOR RECOVERIES (CONT'D)

- Is it okay for the creditors' committee to advocate for the payment of administrative claims like 503(b)(9) claims?
 - It is settled law that creditors' committees owe a fiduciary duty to all general unsecured creditors, but not to a debtor's estate as a whole or to the individual members of the creditors' committee.
 - Additionally, each committee member owes a fiduciary duty to all general unsecured creditors and to other committee members, and is obligated not to act in a way that benefits only the committee member's narrow individual interests.
 - However, creditors' committee and their members are not bound to act only in a way that benefits all creditors equally.
 - In a plan scenario, administrative claims (like 503(b)(9) claims) generally must be paid in full before unsecured creditors may receive any distribution under the plan. As such, it arguably is not inconsistent with a creditors' committee's fiduciary duties to advocate for the payment of administrative claims so that any residual value can then be distributed to unsecured creditors.

WHAT CAN BE DONE BY THE COMMITTEE TO MAXIMIZE VALUE TO UNSECURED CREDITORS

MAXIMIZING VALUE – INVESTIGATIONS

- ❖ To maximize value, the creditors' committee should:
 - Review the debtor's indebtedness and all alleged liens on the debtor's assets
 - Investigate potential actions against insiders
 - Analyze other potential causes of action based on preferential and/or fraudulent transfers
- ❖ The creditors' committee can rely on the following tools for its investigations:
 - information from the debtor
 - its own analysis of the debtor's schedules/statements and other filings
 - FRBP 2004 examinations and other discovery
 - 11 USC 341 meeting of creditors

MAXIMIZING VALUE – DURING SECTION 363 SALE PROCESS

- ❖ During a sale process, the creditors' committee can maximize value by:
 - Negotiating and, if necessary, objecting to the debtor's proposed bidding procedures. Topics for negotiation include, among other things:
 - the proposed timeline
 - the bidding requirements
 - any special protections proposed to be provided to Stalking Horse
 - the assumption/rejection of executory contracts/leases and payment of cure costs
 - consent rights to modifications of the bidding procedures
 - consultation party status
 - Being active in the sale process to ensure it is fair and maximizes value for the unsecured creditor constituency
 - Negotiating for value extraction if sale proceeds are insufficient to pay secured creditors in full

MAXIMIZING VALUE – DURING PLAN NEGOTIATIONS

- ❖ During the plan process, the creditors' committee can maximize value by:
 - Evaluating potential plan structures
 - In a reorganization scenario, the creditors' committee should take into consideration the debtor's ability to reorganize and the debtor's viability as a reorganized entity
 - In a liquidation scenario, the creditors' committee should consider appropriate post-effective date governance structures and advocate for an unsecured creditor voice on any such governing body
 - Employing creative solutions
 - Using potential influence on plan acceptance as leverage

WHAT CAN BE DONE BY FINANCIAL ADVISORS TO MAXIMIZE VALUE TO UNSECURED CREDITORS

MAXIMIZING VALUE – DURING SECTION 363 SALE PROCESS

- In a sale process, the financial advisors can assist in maximizing value by:
 - Making sure the process is open, that the debtor is not wedded to the stalking horse and considers all bids
 - Confirming that the debtors' investment banker has marketed the company to the full universe of potentially interested parties
 - Negotiating for flexible bid procedures, including, among other things, ensuring the procedures provide for:
 - ability to buy a company in whole or parts
 - reasonable deposit (i.e., market has come down from 10% to 5% for larger companies)
 - release back-up bidder at date certain (i.e., no open-ended back-up obligations)
 - force allocation of sale price among encumbered and unencumbered assets (non-obligor / non-guarantor entities, disreect assets, Chapter 5 / preference actions, etc.)

MAXIMIZING VALUE – DURING SECTION 363 SALE PROCESS (CONT'D)

- if a no-shop clause exists, the creditors' committee's financial advisor will need to be proactive in outreach to the most likely potential buyers
- get buyers to assume liabilities (Is Lifecare still good law?)
- Promote outcomes that are the highest OR otherwise best, taking into account the interests of its constituencies (vendors, landlords, employees etc.)
- Coordinate with creditors' committee members where applicable
- Clarify the process and value attributed to contract cures
- Deal with preferences

MAXIMIZING VALUE – DURING PLAN OF REORGANIZATION

- In a plan scenario, the creditors' committee's financial advisor can maximize value by:
 - coordinating with Committee members regarding:
 - supplier / plan sponsor negotiations with respect to future trade terms
 - landlord / plan sponsor negotiations with respect to future rent concessions
 - Interest by unsecured bondholders in funding New Co via rights offering, new debt or reinstated debt
 - understanding obligations related to underfunded or terminated pensions, including future affordability and termination premiums
 - Providing support and analysis to committee members involved in renegotiation of collective bargaining agreements

MAXIMIZING VALUE – DURING PLAN OF REORGANIZATION (CONT'D)

- forcing allocation of sale price / plan value among encumbered and unencumbered assets (non-obligor / non-guarantor entities, discreet assets, Chapter 5 / preference actions, etc.)
- vetting debtor's business plan to form independent views on valuation and feasibility to support plan negotiations
- vetting short-term cash flow projections to inform assessment of case milestones

MAXIMIZING VALUE – MAINTAINING SEPARATE ESTATES

- ❖ The creditors' committee may also maximize value by considering whether it makes sense to maintain deconsolidated estates under the facts and circumstances of the case (*Windstream*)
 - Allocation of value among legal entities vs. substantive consolidation often promotes value accruing to suppliers, landlords and pensioners with claims at OpCo boxes as opposed to funded debtholders

GENERATING VALUE – LITIGATION BASED RECOVERIES

- ❖ The creditors' committee may also maximize value by analyzing and, if necessary, prosecuting potential claims and causes of action. To that end, the creditors' committee should:
 - investigate claims against lenders under the DIP order
 - investigate insiders with respect to breach of fiduciary duty, self-dealing, excessive compensation, etc.
 - Investigate any significant prepetition transactions that may be considered fraudulent transfers, including:
 - dividend recaps
 - exchanges of debt from unsecured to secured
 - below market asset sales and movements of assets among the organizational structure (i.e. solvency / REV analysis)

MAXIMIZE VALUE TO UNSECURED CREDITORS BY MINIMIZING CHAPTER 11 COSTS & PRESERVING ASSETS

MINIMIZING COSTS - DIP FINANCING

- At the outset, the creditors' committee and its professionals must assess the appropriateness of the debtor's proposed postpetition financing to determine, among other things, how to save the estates cash or preserve assets for the benefit of unsecured creditors.
- **DIP Fees & Interest**
 - analyze the debtor's proposed postpetition financing to evaluate the appropriateness and reasonableness of the fees and interest rates proposed to be charged thereunder.
 - Recently, in *Sugarfina Inc., et al.*, Case No. 19-11973 (MFW) (Bankr. D. Del.), the debtors sought court approval of a \$4 million DIP facility (inclusive of a \$600,000 rollup) on terms that were characterized by parties in interests as "shocking the conscience." Specifically, the DIP facility included the following features:
 - an effective interest rate on the loan that exceeded seventy-five percent (75%) after adding together all of the fees and interest
 - a "success fee" arrangement that would have allowed the proposed stalking horse purchaser (a minority \$1 million participant in the DIP facility) to credit bid the second lien lender's \$11 million second lien debt (prior to the expiration of the challenge period)

MINIMIZING COSTS - DIP FINANCING

- **Marshalling Assets**
 - challenge the DIP financing to cause the lenders to look first to certain encumbered assets before realizing on unencumbered assets (that otherwise may be potential sources of recovery for unsecured creditors)
- **Adequate Protection Measures**
 - object to adequate protection measures that will diminish value available for unsecured creditors
- **Lien Challenges**
 - investigate the validity and enforceability of the prepetition liens of the secured lenders and determine whether such liens were properly perfected
- **The Budget**
 - confirm that the DIP Budget is adequate and sufficient for the creditors' committee to perform its lien investigation
 - analyze whether the other amounts in the DIP Budget are necessary and sufficient and should push for inclusions of things left out like the payment of stub rent and 503(b)(9) claims

AVOIDING LEAKAGE IN FIRST AND SECOND DAY ORDERS AND OTHERWISE

- In addition to ensuring the terms of the DIP Order are fair and reasonable, the creditors' committee also should ensure that the amounts the debtors seek to pay under their first and second day orders (or otherwise throughout the course of the bankruptcy cases) are appropriate under the facts and circumstances.
 - For example, the creditors' committee should be checking:
 - the Employee Wage Motion to see if the debtors are seeking to make any bonus or severance payments that are either unreasonable, unwarranted or to any insiders;
 - any KEIP/KERP Motion to prevent excessive or duplicative incentive based and/or retention based payments;
 - the OCP Motion to see if the professionals identified to be retained really are necessary on a postpetition basis and whether the amounts proposed to be paid are appropriate for an OCP generally and the particular OCP in light of the services anticipated to be provided postpetition; and
 - any motion where the debtors seek to transfer value to non-debtors to either prevent any such transaction or set-up approval requirements before any such transfers are completed.
- The creditors' committee also should be monitoring payments made by the debtors pursuant to such orders and, to that end, request that any such orders include language requiring the debtors to provide periodic reports of amounts paid.

PRESERVING AND PROSECUTING OUTBOUND CLAIMS

- The creditors' committee should carefully analyze and determine whether to oppose any releases the debtors propose to provide parties to determine if the estates are receiving sufficient consideration in exchange for such release.
- Additionally, where the debtor either is incapable or unwilling to pursue certain claims and causes of action, the creditors' committee may seek standing to do so. *See, e.g., In re Official Committee of Unsecured Creditors of Cybergenics Corp. v. Chinery*, 330 F.3d 548, 580 (3d Cir. 2003) (en banc); *Scott v. National Century Enterprises, Inc. (In re Baltimore Emergency Services II Corp.)*, 432 F.3d 557, 560 (4th Cir. 2005); *In re Commodore Int'l Ltd.*, 262 F.3d 96 (2d Cir. 2001).
 - Courts following *Cybergenics* have granted derivative standing where a creditor or creditors' committee demonstrates:
 - a colorable claim;
 - a debtor's unjustified refusal to pursue that claim; and
 - permission of the bankruptcy court to commence the action.
 - The burden is on the creditor or the creditors' committee to demonstrate that these requirements have been met.
 - Note, however, that recent caselaw stemming from *CMLV, LLC v. Bax*, 6 A.3d 238 (Del Ch. 2010) significantly curtails the ability of a creditors' committee to assert breach of fiduciary duty claims on behalf of creditors when the debtors are an LLC or LP. *See Gavin/Solmonese LLC v. Citadel Energy Partners LLC (In re Citadel Watford City Disposal Partners)*, 2019 Bankr. LEXIS 1375 (Bankr. D. Del. May 2, 2019); *HH Liquidation, LLC*, 590 B.R. 221, 282-855 (Bankr. D. Del. 2018).



CURRENT ISSUES FACING CREDITORS' COMMITTEES: CREDITORS' COMMITTEE PRACTICE DURING THE PANDEMIC (OR, PERHAPS MORE APT, WHAT HAPPENED LAST YEAR?)

American Bankruptcy Institute
2021 Annual Spring Meeting
April 15, 2021

WELCOME AND INTRODUCTION OF PANELISTS



Kimberly A. Brown
Landis Rath & Cobb LLP
Wilmington, Delaware



Cullen Drescher Speckhart
Cooley LLP
Washington, D.C.



Robert J. Feinstein
Pachulski Stang Ziehl & Jones LLP
New York, New York



David MacGreevey
AlixPartners, LLP
New York, New York

BUDGETING DURING AN INTERNATIONAL PANDEMIC

THE COVID BUDGET

- ❖ As the number of Covid cases rose, governments had to take extraordinary measures for public safety, including, among other things, issuing stay at home orders, mandating business closures and/or severe capacity restrictions and moving court proceedings online.
- ❖ With forced shut downs, certain industries saw their revenue lines plummet to zero overnight.
- ❖ How do you create a workable budget under these conditions? What do you pay and when?



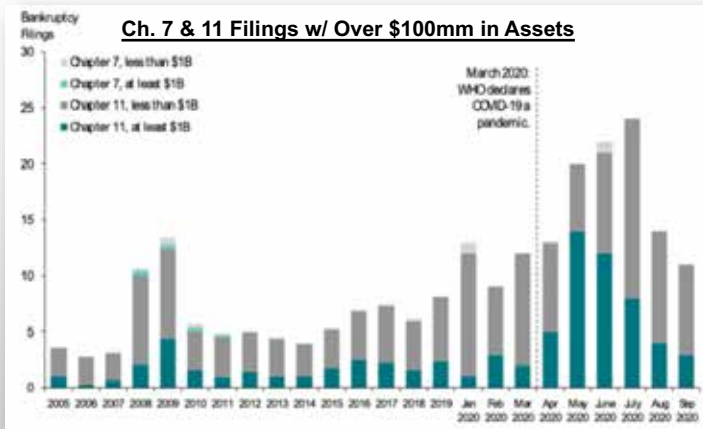
THE ELEPHANT IN THE BUDGET: RENT

- ❖ Rent became one of the hottest topics early on.
 - ❖ Rise in 365 rent abatement litigation.
 - ❖ Pier 1
 - ❖ Modell's
 - ❖ J. Crew
 - ❖ Ascena
 - ❖ Issues with budgeting stub rent (and 503(b)(9)'s). Put in and, if so, when?
 - ❖ Admin rent carved out of surcharge waivers.
 - ❖ What role should the UCC play in advocating for landlords and vendors in this context? Given how underwater cases are, is it OK for the UCC to be advocating for administrative claimants?



INCREASED FILINGS & GLOBAL DEALS

INITIAL UPSWING IN FILINGS



- ❖ Voluntary Chapter 11's typically file in one of three scenarios – pre-packaged, pre-planned or freefalls.
- ❖ As Covid cases increased, so did the number of pre-packs, or at least faster ones like Belk Inc., the southern department store chain, that pulled off a rare one-day Chapter 11 restructuring in Texas.
- ❖ We saw many pre-planned cases accelerate their filing dates in light of the pandemic.
- ❖ The cataclysmic shutdown of the US economy caused many freefall cases.

SAVING COMPANIES THROUGH GLOBAL DEALS

- ❖ Covid had a major impact on how bankruptcies are conducted.
- ❖ Parties embraced a pragmatic approach and worked together to reach deals to save companies.
 - ❖ Oftentimes, deals were struck at the time of the final DIP.
 - ❖ Concessions made that might not have been given in the "Before Times".
- ❖ Will this pragmatism be the wave of the future, or when the economy fully reopens will we return to bare-fisted battling over many issues the parties accepted this year?



CHANGES TO THE COMMITTEE FORMATION PROCESS

COVID & THE IN-PERSON FORMATION MEETING

- ❖ Covid marked the end of the in-person committee formation meeting.
- ❖ In the “Before Times,” practice varied by jurisdiction (and sometimes even within the same district) depending on the size of the case and the perceived level of interest in a committee.
- ❖ In the “After Times,” committee formation meetings moved online and over the phone.
- ❖ What will the future hold for the in-person formation meeting?



PROS & CONS OF THE IN-PERSON COMMITTEE FORMATION MEETING



- ❖ Some USTs prefer to look “creditors in the eyes” when vetting their claims and ability/willingness to serve.
- ❖ Prospective committee members can limit their initial time commitment to 1 full day for formation.
- ❖ The 1-day in-person meeting and hiring of professionals allows the committee to hit the ground running on day 1.



- ❖ Drain on creditor resources to travel at its own expense to the jurisdiction the debtor filed to participate in the process, which also chills participation.
- ❖ Inability or reluctance to travel to formation meeting leads to use of proxies.
- ❖ In-person meetings allow for face-to-face “cold calling” and other shenanigans.

OTHER COVID CHANGES TO COMMITTEE PRACTICE

THE EVER-EVOLVING PRACTICE

- ❖ Running a sale process during Covid
 - ❖ Is it workable?
 - ❖ How has the process changed?
- ❖ Plan Projections
 - ❖ What adjustments were made to account for Covid?
 - ❖ Are business models revamping to account for changes that will stick, like more work from home and less need for commercial real estate and less business travel?
- ❖ Interactions with the Court and others
 - ❖ Zoom hearings and trials
 - ❖ Conferences with Chambers
 - ❖ Conference calls vs. Zoom meetings



QUESTIONS?



Faculty

Kimberly A. Brown is a senior associate with Landis Rath & Cobb LLP in Wilmington, Del., and concentrates her practice in the area of Corporate Bankruptcy and Restructuring and Bankruptcy Litigation. She has worked with teams representing chapter 11 debtors, official and unofficial creditors' committees, financial institutions, secured lenders and other secured creditors, indenture trustees and bondholders, asset-purchasers, liquidation trusts and other significant creditors, chapter 15 foreign representatives, and other parties in interest in a variety of national bankruptcy cases. Ms. Brown represents clients in a wide range of industries, including retail, food and beverage, oil and gas, and manufacturing. She chairs the International Women's Insolvency and Restructuring Confederation - Delaware Network and served as the past vice chair and social chair of the network, and was a Rising Star Award finalist for 2017. She also is a *Super Lawyers* "Delaware Rising Star" for 2018 and a member of the Delaware State Bar Association, ABI and the Delaware Bankruptcy American Inn of Court. She was selected as one of only 40 bankruptcy practitioners to participate in the National Conference of Bankruptcy Judges (NCBJ) fifth annual Next Generation Program. Ms. Brown is admitted to practice in the Supreme Court of Delaware and the U.S. District Court for the District of Delaware. Before joining Landis Rath & Cobb, she clerked in the Superior Court for the State of Delaware for Hon. Mary M. Johnston and at the Office of Disciplinary Counsel of the Supreme Court of Delaware. Ms. Brown received her B.A. in government and politics with a minor in accounting from Widener University in 2005 and her J.D. in 2008 from Widener University School of Law.

Robert J. Feinstein is the managing partner of the New York office of Pachulski Stang Ziehl & Jones LLP, which he opened in 2011. He represents debtors, creditors' committees, equity committees, acquirers and examiners in business reorganizations and related litigation. He also represents debtors, foreign representatives and other case constituencies in cross-border insolvency cases. Mr. Feinstein's recent engagements include lead counsel to the official creditors' committees appointed in the chapter 11 cases of J Crew, Whiting Petroleum, Ascena (Ann Taylor/LOFT/Lane Bryant), Ditech, Payless ShoeSource, The Weinstein Company, Barney's Inc., Aeropostale and Jevic Holding Corp. (appearing on behalf of the creditors' committee in the U.S. Supreme Court). On the debtor side, he has represented Digital Domain Media Group, former world heavyweight champion Mike Tyson and *Penthouse* magazine publisher General Media, Inc. in their chapter 11 cases. Mr. Feinstein is a Fellow of the American College of Bankruptcy and an adjunct professor in the St. Johns University LL.M. Program, and he frequently writes and lectures on bankruptcy topics. He is ranked among Bankruptcy/Restructuring attorneys by *Chambers USA* and is a member of the International Insolvency Institute, and he served as an officer of the Insolvency Section of the International Bar Association. Mr. Feinstein received his B.A. from Lafayette College and his J.D. *magna cum laude* from Boston University School of Law.

David MacGreevey, CIRA, CPA is a managing director and head of Creditor Services at AlixPartners, LLP in New York, and has more than 20 years of experience advising stakeholders on strategic transactions. He has advised creditor committees, management teams, boards of directors, lenders and investors on more than 75 complex transactions across a variety of industries. Mr. MacGreevey has experience advising clients on all aspects of distressed transactions, including financial and operational restructurings, exchange offers, asset sales, distressed financing and valuation opinions.

Since 2015, he has advised more than 50 creditor committees, including the official committees in NRA, CBL Properties, Remington Outdoor, Chesapeake Energy, Extraction Oil & Gas, 24 Hour Fitness, Exide, Boy Scouts of America, Murray Energy, EP Energy, Windstream, Tops Holdings, Takata, Commonwealth of Puerto Rico, Alpha Natural Resources, Haggen, A&P, Chassix and Caesars Entertainment. Mr. MacGreevey joined AlixPartners pursuant to its acquisition of Zolfo Cooper in 2018, where he had served as head of creditor services for seven years. Prior to Zolfo Cooper, he spent 10 years at Chanin Capital Partners and Macquarie Capital, where he was a senior vice president in each firm's restructuring and special situations group. He began his career at Ernst & Young. Mr. MacGreevey received his B.S.B.A. in accounting from the University of Richmond.

Cullen Drescher Speckhart is a partner with Cooley LLP in Washington, D.C., and chair of the firm's business restructuring & reorganization practice. She has experience in corporate restructuring and financial litigation across a broad range of industries, and she represents a wide range of parties to insolvency proceedings, including debtors, creditors, creditors' committees, trustees and foreign representatives. Ms. Speckhart has represented clients in some of the largest bankruptcy cases filed. She has led numerous engagements in the energy sector, representing clients in various roles. In addition to her work in significant bankruptcy matters, Ms. Speckhart provides tactical guidance to corporations in all aspects of solvency strategy, contingency planning, risk-mitigation and portfolio improvement through acquisitions and sales of assets and other distressed transactions. In this role, she advises public and private companies, including high-growth firms, in devising proactive approaches to the expansion and protection of valuable business resources. Ms. Speckhart has presented to national audiences on various legal considerations, including those surrounding corporate insolvencies, banking technologies and regulatory compliance. In 2017, she was honored as one of ABI's inaugural "40 Under 40," and in 2015, she co-authored ABI's *Chapter 15 for Foreign Debtors*. Ms. Speckhart serves on the advisory board of the Institute for Restructuring Studies at the University of Pennsylvania. Before entering private practice, she clerked for Hon. Stephen C. St. John, Chief Judge of the U.S. Bankruptcy Court for the Eastern District of Virginia. During law school, she was the first-prize winner of ABI's inaugural Bankruptcy Law Student Writing Competition and the first law student ever to receive the Thatcher Prize for Excellence, which is presented annually to a William & Mary graduate student of outstanding scholarship, service and character. Ms. Speckhart received her B.A. in politics and economics from Georgetown University and her J.D. from the College of William & Mary, Marshall-Wythe School of Law, and she is a candidate for an ALM in management and a Professional Certificate in Corporate Finance from the Harvard Extension School at Harvard University.