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ABI Talks

Forever Chemicals

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Chapter 7 Clawbacks in Fraud Cases

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Teneo; New York

Distressed Investing Update

Jack Butler

Birch Lake Holdings, LP; Chicago

The Changing Landscape of Chapter 11

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PFAS as “Forever Chemicals” – Litigation and Bankruptcy Considerations

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APRIL 19, 2024

What Are PFAS?



- Per- and Polyfluorinated Substances
- ~15,000 related chemicals, including:
 - PFOS (Perfluorooctanesulfonic acid)
 - PFOA (Perfluorooctanoic acid)
- Dubbed “forever chemicals” in the media
- Subject of significant media attention recently, but PFAS-related litigation has been around for nearly 25 years



What Are PFAS Used For?



- Used to make coatings, products that resist heat, oil, stains, grease, and water
- Because of their useful properties, PFAS have been used in numerous products and applications since 1940s
- PFAS may be directly emitted from manufacturing sites or from product use and degradation (*e.g.*, leeching from landfills)



What Is the Problem With PFAS?



- Certain types of PFAS persist in the environment and bioaccumulate
- EPA and others have claimed exposure to certain levels of particular types of PFAS may lead to various health problems, including:
 - Increased risk of some cancers, including kidney and testicular cancers
 - Ulcerative colitis, thyroid disease, reproductive issues, increased cholesterol levels and other issues
- There is no scientific consensus on exposure levels required to cause illness, but regulators have adopted conservative approach



Environmental Working Group's Map of "Known" PFAS Contamination Sites

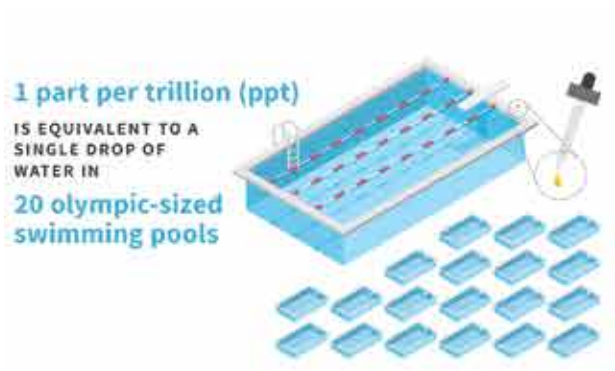
U.S. Regulators Have Adopted Increasingly Strict PFAS Standards



- **2002:** 3M phases out PFOS
- **2006:** 8 leading fluorosurfactant manufacturers agree to **phase out** PFOA products by 2015 through EPA PFOA Stewardship Program
- **2009:** EPA sets provisional **Health Advisory Level** for PFOS/PFOA in drinking water at **70 ppt**
- **2016:** EPA issues drinking water health advisories for PFOS/PFOA
- **2020:** NJ becomes first state to set enforceable PFOA drinking water standards (**14 ppt**), other states like NY (**10 ppt**) follow
- **2022:** EPA proposes rule to **designate** PFOS/PFOA as **hazardous substances** under CERCLA
- **2024:** EPA finalizes enforceable **Maximum Contaminant Level (MCL)** for PFOS/PFOA at **4.0 ppt**, non-enforceable health-based goal at **zero**



PFAS Regulations Around the Globe



■ Global PFOS/PFOA drinking water guidelines or limits vary widely:

- **United States:** 4 ppt
- **Canada:** 600 ppt (PFOS), 200 ppt (PFOA)
- **EU:** 500 ppt
- **UK:** 100 ppt for “wholesome” water, but treatment required if PFOA/PFOS >10 ppt
- **Australia:** 7 ppt (PFOS), 560 ppt (PFOA)

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Plaintiffs have characterized PFAS as a “trillion”-dollar issue

Trillions in PFAS Liabilities Threaten Corporate Bankruptcy Wave

DEEP DIVE



Alex Wolf
Reporter

- Companies across multiple industries face risks to bottom line
- Alleged liabilities expected to reach trillions of dollars

Companies targeted or implicated for contributing to the proliferation of “forever chemicals” face an uncertain future and a growing risk of being forced into bankruptcy

Search by Law Firm

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Lewis Brisobol Bogard & Smith

Baker & Hostetler

Skadden PC

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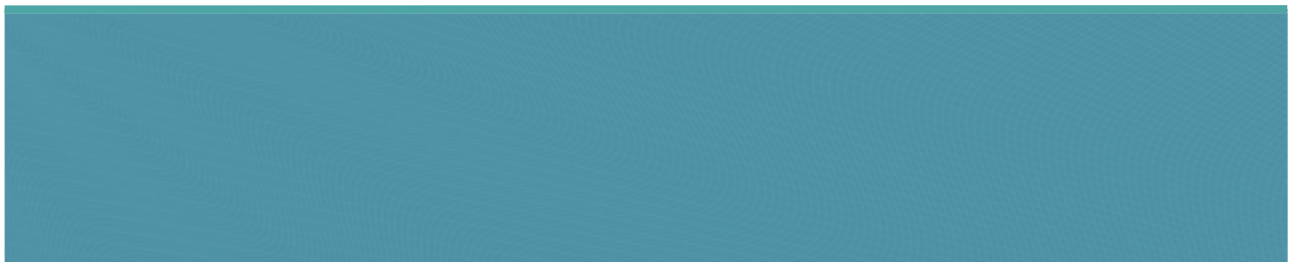
EPA Estimates Pale in Comparison to Plaintiffs' Projections



- **Apr. 2024:** EPA publishes **cost-benefit analysis** for new PFAS regulation, estimating:
 - **\$1.5 billion annual** costs of compliance with the rule (including monitoring, remediation)
 - **4,100 to 6,700** water systems (6-10%) may have to take action to reduce PFAS
 - **9,600** deaths and **30,000** serious illnesses prevented by rule
- Water systems will have **5 years** to comply
- U.S. government has also made **>\$20 billion** available via Bipartisan Infrastructure Law and Drinking Water State Revolving Fund to help states/communities with drinking water impacted by PFAS and for general drinking water improvements
- EPA's estimated compliance costs already "paid for" across decades by combined water provider settlements (~\$14 billion) and this federal funding



Phases of PFAS Litigation



Phase One: PFAS Manufacturers ("Hot Spots")



3M Company pioneered PFAS starting in the 1940s, dominated PFAS manufacturing until phasing out PFOS in 2002. Announced phase out of all PFAS by 2025



DuPont in the 1970s developed a new way to make PFAS—telomerization—which is now the prevailing process for creating PFAS

Phase One: PFAS Manufactures



- **1999: First PFAS lawsuit** filed by a farmer in West Virginia against **DuPont**
- **2001: First PFAS class action** filed against **DuPont** relating to contamination from Washington Works facility in West Virginia
- **2004: DuPont settles first class action** (*Leach*) for \$400 million to fund water filtration, health studies, and medical monitoring
- **2012: C8 Science Panel** (established through DuPont *Leach* settlement) releases reports finding "**probable link**" between PFOA and 6 diseases:
 - Kidney & testicular cancer, thyroid disease, ulcerative colitis, pregnancy-induced hypertension, elevated cholesterol
- **2017: DuPont settles 3,500 Washington Works personal injury cases** for \$671 million
- **2018: 3M settles lawsuit with Minnesota** for \$850 million
- **2020: Jury awards \$40 million to plaintiff** who alleged drinking water contaminated by **DuPont's** Washington Works caused his cancer
- **2021: Honeywell, others agree to pay ~\$100 million to settle Hoosick, NY water system, property value, and medical monitoring claims** (direct PFOA emissions from manufacturing plants)
- **2023: DuPont, others agree to settle Ohio's Washington Works contamination claims** for \$110 million



Phase Two: AFFF Claims



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Phase Two: Categories of AFFF Claims



- Public/private water providers alleging PFAS contamination of water systems
- **600+ MDL actions**



- Individuals claiming 100+ different types of personal injuries, property damage caused by PFAS
- **6,500+ MDL actions**
 - ~30,000 individual plaintiffs, including firefighters, drinking water consumers



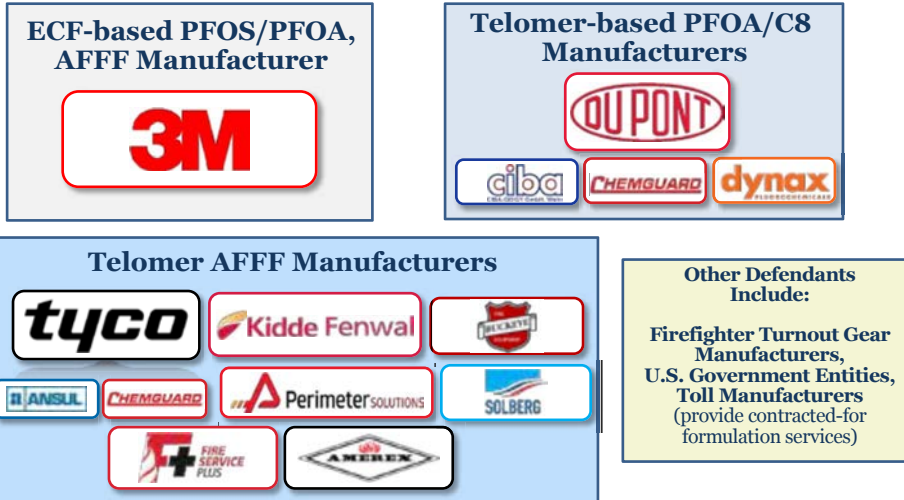
- State Attorneys General suing to recover for alleged natural resource, property damages
- **20+ MDL actions**

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Phase Two: Categories of AFFF Defendants



Phase Two: AFFF Litigation Timeline



- **2016:** First AFFF lawsuits filed
- **2018:** AFFF MDL consolidated in South Carolina covering three main categories of claims
- **2019-2023:** AFFF defendants engage in **extensive discovery**
- **2023:** First AFFF **water provider bellwether trial** scheduled (postponed)
- **2024:** Next AFFF **water provider bellwether trial** scheduled (expert discovery concludes in July for the 2 water provider bellwether candidate cases; trial anticipated in September)
- **2025:** **Personal injury bellwether trial(s)** anticipated for claims alleging one of four so-called “Leach” illnesses (kidney & testicular cancer, thyroid disease, ulcerative colitis).



Phase Two: MDL Court Moving Aggressively to Address Claimed Personal Injury Associations



- “Leach” illnesses represent small minority of AFFF MDL personal injury claims
- **Third bellwether track** commenced for personal injury claims alleging liver or thyroid cancer
- For claims based on any **other illness** (i.e., non-Leach diseases or not liver/thyroid cancer), MDL court ordered plaintiffs to **dismiss** (without prejudice) such “Unlisted” claims within 90 days of April 24
 - To re-file “Unlisted” claims, plaintiffs required to file **complete medical records** and **expert reports** establishing specific/general causation



Phase Two: Major Water Provider Settlements



- **June 2023:**
 - **DuPont/Chemours/Corteva** agree to resolve public water provider class claims for **\$1.185 billion**
 - **3M** agrees to resolve public water provider class claims for **\$10.5 billion to \$12.5 billion**
 - **Feb.-Mar. 2024:** MDL Court grants final approval of DuPont, 3M settlements
- **Apr. 2024:** **Tyco/Chemguard** announce **\$750 million** settlement to resolve public water provider class claims

What to Expect in 2024 and Beyond



- Decade or more of further litigation to resolve remaining claims, including opt-outs from settlements
- Further resolutions in **AFFF MDL**
 - Water provider, personal injury bellwether trials
 - Advancement of Sovereign claims
 - Claims against additional categories of defendants, including U.S. government and firefighter turnout gear defendants
- **Non-AFFF PFAS litigation**
 - Lawsuits and class actions are being filed against wide array of defendants, across multiple industries:
 - Fast food chains (food packaging)
 - Cosmetics companies (waterproof makeup, hygiene products)
 - Clothing retailers (waterproof apparel)
 - Paper mills, other non-3M/DuPont facilities (manufacturing contamination)
 - Landfills (leeching)

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New Wave of Chapter 11 Filings?



Comparison to Other Mass Torts



- ~100 companies involved with asbestos manufacturing/products have filed for Chapter 11 protection
 - Asbestos associated with “signature” illness (mesothelioma)
 - 1999-2017: As many as **280,000** Americans died from asbestos exposure
 - Today, **15,000 to 40,000** people in U.S. die annually from asbestos-related illnesses
 - Trusts have paid over \$10 billion to claimants, ~\$30 billion is believed to remain; insurers have paid around \$32 billion
- Purdue Pharma faced ~3,000 lawsuits at the time it filed for Chapter 11 protection in 2019
 - As many as **50-80,000** people died of opioid-related overdoses annually from 2017-21
 - Settlement reached in 2023 would provide \$10 billion to creditors (state and local governments, individual victims of additions, hospitals, others)



Examining Kidde-Fenwal



- **KFI** is a **fire protection company** that manufactured and sold AFFF from 2007 to 2013 through its **National Foam** business
 - ~\$200 million in total annual revenue, ~\$300 million in total assets
- KFI is a wholly-owned subsidiary of Carrier Corporation
- By May 2023, KFI faced **massive overhang** from ~4,000 **AFFF-related lawsuits**
- On May 14, 2023, KFI filed for **Chapter 11 relief** in Delaware



Kidde-Fenwal's Chapter 11 Proceedings



- KFI's Chapter 11 proceedings are at the forefront of PFAS litigation and potential future PFAS-related bankruptcies that will need to consider similar issues
- May be the first case in which various complex issues are resolved, including:
 - Claim valuation, testing of defenses
 - Insurance disputes, indemnification
 - Estate causes of action, scope of release





ABI Talks: Distressed Investing



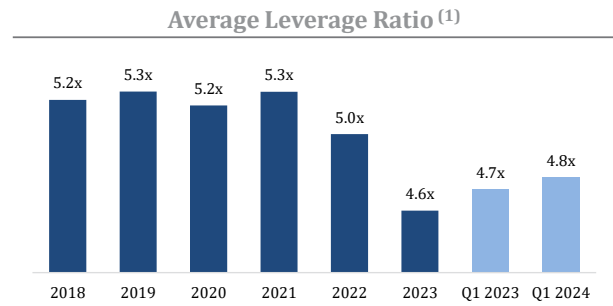
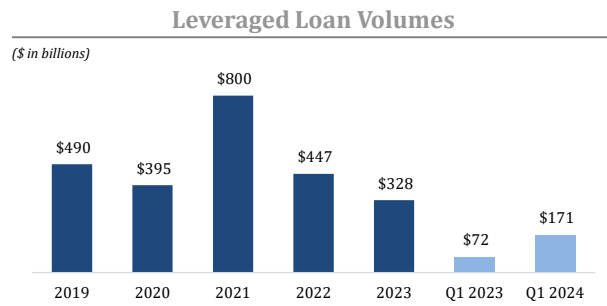
Jack Butler
Founder & CEO
Birch Lake Holdings LLC





Debt Financing Market

The financing market has opened back up in 2024; however, leverage ratios have compressed due to lender risk appetite, higher cost to service debt, and compression of M&A multiples



Sources: Pitchbook LCD

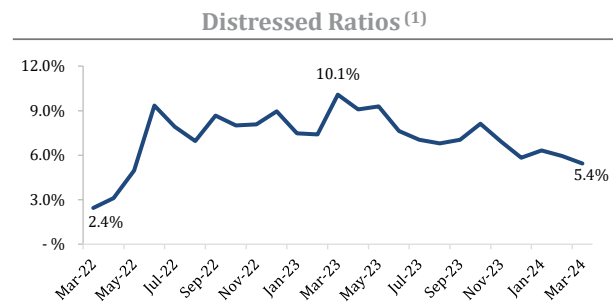
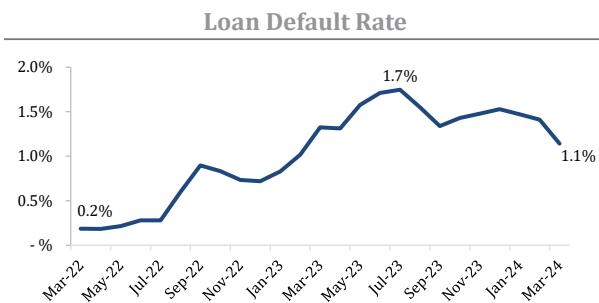
(1) Average debt / EBITDA ratio for all leverage loans

2



Distressed Debt Market

While distressed levels have tempered, they remain at elevated levels



Sources: Pitchbook LCD

(1) % of loan count in S&P US High Yield Corporate Bond Index trading below 80

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Current Market Environment Considerations

- Moderate interest rate environment (but feels high to many)
 - 2024 will not see meaningfully lower interest rates
 - Investors, company managers, lenders, and professionals under 45 do not have experience investing in high interest rate environment (1.5% average fed funds rate over past 20 years)
- Uncertain presidential election with potential impact on:
 - Capital markets
 - Global trade
- Geopolitical uncertainty

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Considerations with Debt Financing

Trends Impacting Businesses

- Softer financial performance
- Liquidity concerns
- COVID / post-COVID earnings bumps rolling off
- Supply chain disruptions
- Labor shortages
- Out of favor industries
- Ability to raise growth capital
- Increased industry competition

Lender Trends

- Difficult fundraising environment
- Limited capital deployment due to slow financing markets
- Elevated funding costs
- Lower risk tolerance
- Syndication risks
- Reduced hold sizes
- Amend and extend

3





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What Distressed Investors Look for in a Deal

- The FULL story upfront (i.e., no surprises during diligence)
 - Can navigate complexity, but need all the facts from the start to maintain trust
- Inspiring augmented management team
- Business narrative and plan supported by data
- Thoughtful and comprehensive sources and uses
- Third-party expert validation of key underwriting information (e.g., quality of earnings and appraisals)
- A feasible path to exit / liquidity
- Returns commensurate with risk – understanding MOIC vs. IRR targets

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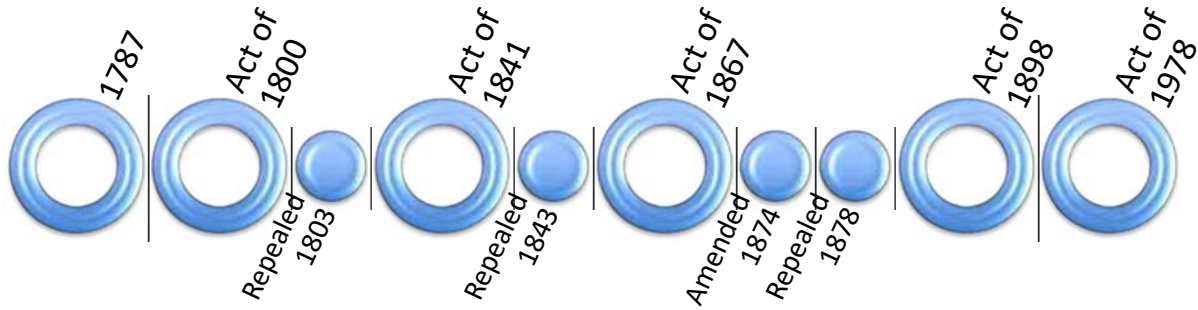




Chapter 11 Landscape
Ericka Johnson, Bayard, P.A.



Bankruptcy Timeline



Source: Federal Judicial Center



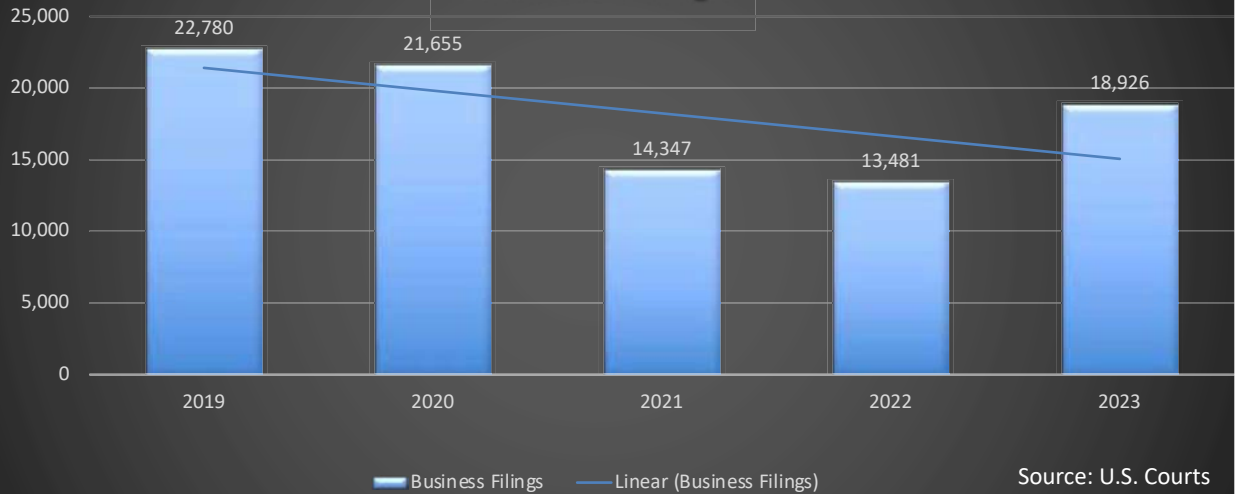
Trends 1787 – Present

1. High Costs
2. Protecting the Process
3. Congress & Bankruptcy Practitioners



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Business Filings



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Prepackaged Bankruptcies





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Subchapter V Cases

- No Appointed Committee
- No Absolute Priority Rule
- No Competing Plans
- No Disclosure Statement
- Shorter Plan Deadline
- No Creditor Consent Required

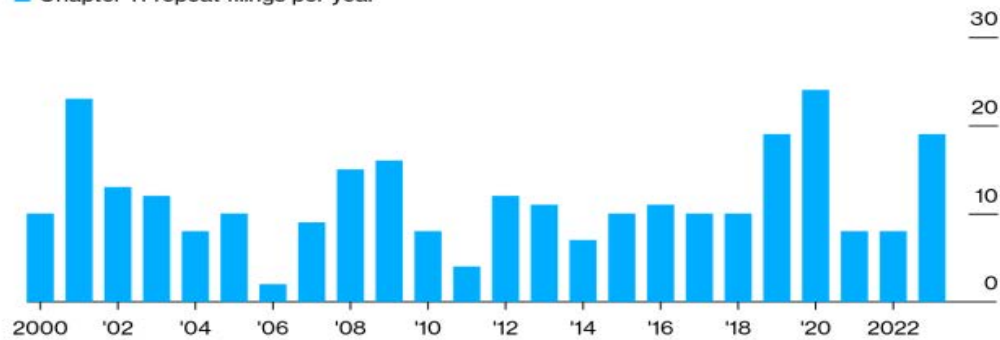


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Chapter 22s at a Near High

Repeat Chapter 11 filings in 2023 were among highest in years

■ Chapter 11 repeat filings per year



Source: BankruptcyData

Notes: Filings are businesses with \$10 million or more in liabilities. Chapter 22s are counted in the most recent year they filed.

Bloomberg Law



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Third Party Releases



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Good Faith





Faculty

John “Jack” Wm. Butler, Jr. is the CEO of Birch Lake Partners, L.P., a Chicago-based merchant bank, and its investing, consulting and advisory business units. He has been one of the principal architects of restructuring solutions for companies across a diverse range of industries, including Delphi Corp., Kmart Corp., Masonite International Inc., Per-Se Technologies Inc., Rite Aid Corp., Sprint Corp., Warnaco Group Inc., Xerox Corp. and on behalf of creditors in the American Airlines’ reorganization and merger with US Airways Group, Inc. Mr. Butler co-founded the corporate restructuring practice at Skadden, Arps, Slate, Meagher & Flom LLP, where he was a practice leader for 23 years and previously served on the executive leadership team at Hilco Global. His recent transactions at Birch Lake include leadership of merchant banking relationships in the food and legal tech industries, among others. Mr. Butler is a member of the *M&A Advisor* Hall of Fame and the Turnaround, Restructuring and Distressed Investing Industry Hall of Fame. He is also a recipient of the prestigious Ellis Island Medal of Honor, which is awarded to Americans who exemplify outstanding qualities in both their personal and professional lives. In 2016, Mr. Butler received the Harvey R. Miller Outstanding Achievement Award for Service to the Restructuring Industry. A founder and past chairman of the Turnaround Management Association, he has served in leadership positions for many other industry organizations, including ABI, American Board of Certification, Commercial Finance Association and its Education Foundation, INSOL International and the New York Institute of Credit. He is also a Fellow in the American College of Bankruptcy and International Insolvency Institute. Mr. Butler received his A.B. *magna cum laude* from Princeton University in 1977 and his J.D. from Michigan University in 1980.

James S. Feltman, CPA is a senior managing director with Teneo’s Financial Advisory business, based in New York. He has more than three decades of experience leading fiduciary and restructuring matters, as well as providing clients with key litigation support and expert witness testimony. As an advisor, Mr. Feltman has worked primarily on debtor-side assignments. As one of the nation’s leading multi-jurisdictional bankruptcy fiduciaries, he has experience acting as a chapter 11 trustee, examiner, chapter 7 trustee, mediator, arbitrator and monitor. His industry specialization includes agriculture, retail, manufacturing and distribution, real estate/construction, aviation, health care, financial services and other industries. He also has served on the boards of numerous privately held businesses. Mr. Feltman concentrates his work on issues of insolvency, Ponzi schemes, money-laundering, asset-tracing and recovery, accounting and financial statement reporting issues, causes of action against officers, directors and third parties, securities fraud, misrepresentation and hedging and trading in complex securities schemes. He has experience leading cross-border forensic and investigative engagements on behalf of U.S. and foreign government agencies, and he is an established expert in determining the underlying fact pattern, establishing liability and determining damages in myriad engagements. He recently served as the lead financial advisor to the U.S. Government in the bankruptcy of Purdue Pharma. Mr. Feltman also served as an appointed fiduciary with a branch of the U.S. Department of Justice for nearly 30 years. He has been appointed as an advisor by both federal (U.S. district and U.S. bankruptcy) and state courts, served as an arbitrator and mediator, and has been appointed as a monitor by the U.S. Federal Trade Commission. Prior to joining Teneo, Mr. Feltman served as a managing director with Kroll for seven years. He spent over two decades with Big 4 accounting firms and was previously a partner at Mesirow Financial, Arthur Andersen LLP

and KPMG LLP. Mr. Feltman is a member of the American Institute of Certified Public Accountants and Florida Institute of Certified Public Accountants. He also is a Fellow of the American College of Bankruptcy and from 2002-08 was an ABI Board member. In addition, he was honored as one of the 2015 Consultants of the Year by *Consulting Magazine*. Mr. Feltman received his B.A. from the University of Wisconsin, Madison and his M.P.S. from Cornell University.

Brian D. Glueckstein is a partner with Sullivan & Cromwell LLP in New York in the firm's Litigation Group. His practice focuses on bankruptcy litigation and complex commercial litigation, as well as restructuring matters. Mr. Glueckstein has experience handling adversary proceedings, contested matters, and all aspects of both debtor and creditor representations in bankruptcy proceedings. He also has experience representing clients in commercial litigation in both federal and state courts, as well as in regulatory investigations before federal and state agencies. In addition, he has experience representing the special litigation committee of a board of directors conducting internal investigations. Mr. Glueckstein has been recognized by *Chambers USA* for his work in bankruptcy and restructuring, and was recently named a "Next Generation Lawyer" by *The Legal 500 United States*. He also was named to *Benchmark Litigation's* "40 & Under Hot List" in 2018, as a "Rising Star" by *IFLR1000* and *Law360*, and to *Turnarounds & Workouts'* list of outstanding young restructuring lawyers from 2014-16. Mr. Glueckstein received his B.S. in 2000 from Cornell University and his J.D. in 2003 from New York University School of Law.

Ericka F. Johnson is a director at Bayard, P.A. in Wilmington, Del., and chair of its restructuring and reorganization practice. She is well-versed in bankruptcy litigation matters, including preference, fraudulent transfer, turnover, and breaches of contract and fiduciary-duty actions. Ms. Johnson regularly litigates contested matters, including involuntary bankruptcies, motions for the appointment of chapter 11 trustees, claim objections, plan confirmation objections, and dismissal/conversion motions. Her diverse practice spans a wide range of industries, and her clients include debtors, creditors' committees, trustees and governmental units through the restructuring process. Ms. Johnson formerly worked for a leading bank holding company, where she managed consumer finance operations and internal risk assessments and audits from the U.S. Office of the Comptroller of the Currency. She is active in the legal community and has held positions locally and nationally in various organizations, including the International Women's Insolvency & Restructuring Confederation (IWIRC), for which she has served on its board of directors and is currently serving as the chair of the Delaware Network and chair of the IWIRC at the Shore conference. She also sits on ABI's Board of Directors and serves on its Education Committee, through which she assists with the planning of ABI's Annual Spring Meeting and Winter Leadership Conference and ABI's panels at the National Conference of Bankruptcy Judges. She also is a published author and a frequent speaker on issues and developments in bankruptcy and insolvency law. Ms. Johnson received her B.A. from the University of Delaware and her J.D. from Delaware Law School, where she was a member of the Phi Kappa Phi Honor Society, president of the Moot Court Honor Society and a member of the *Delaware Journal of Corporate Law*, and received the Outstanding Service Award.