American Bankruptcy Institute
Rocky Mountain Bankruptcy Conference

Alternative Capital Structures

David A. Curfman
Brownstein Hyatt Farber Schreck, LLP | Denver

Timothy C. Mohan
Foley & Lardner LLP | Denver

Shane G. Ramsey
Nelson Mullins Riley & Scarborough LLP | Nashville, Tenn.

Engels J. Tejeda
Holland & Hart LLP | Salt Lake City

Catie Vuksich
Summit Investment Management LLC | Denver

CONCURRENT SESSION
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AMERICAN BANKRUPTCY INSTITUTE

ALTERNATIVE CAPITAL STRUCTURES

- DAVID A. CURFMAN
- TIMOTHY C. MOHAN
- SHANE RAMSEY
- CATIE VUKSICH

Moderator: Engels Tejeda

Holland & Hart

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THE Recession is Six Months Away . . .

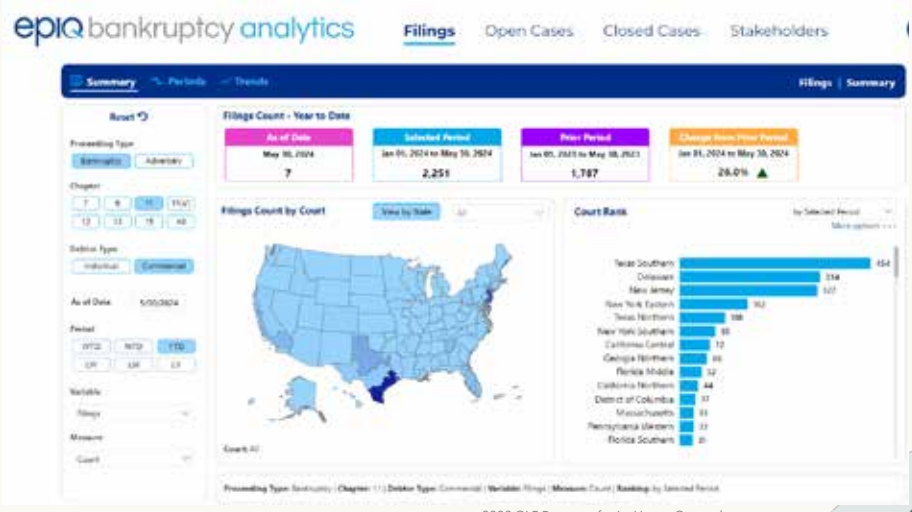
THE WALL STREET JOURNAL.

Why the Recession Still Isn't Here

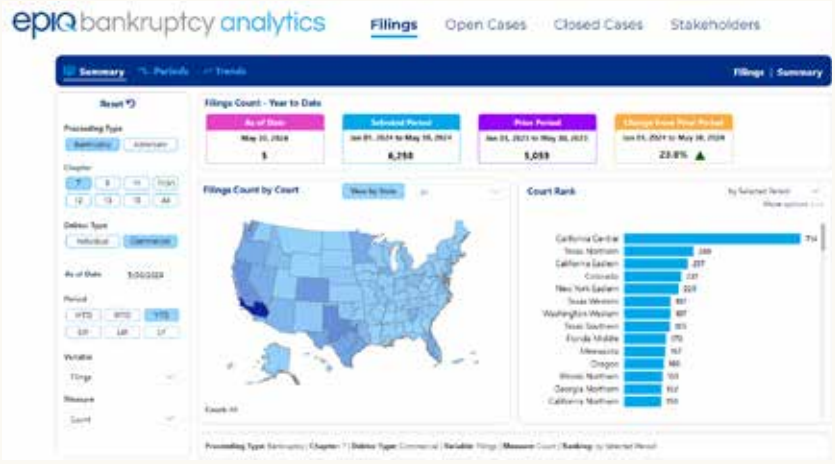
The recession, predicted by business executives, economists, and investors, refuses to show up.

WSJ June 7, 2024

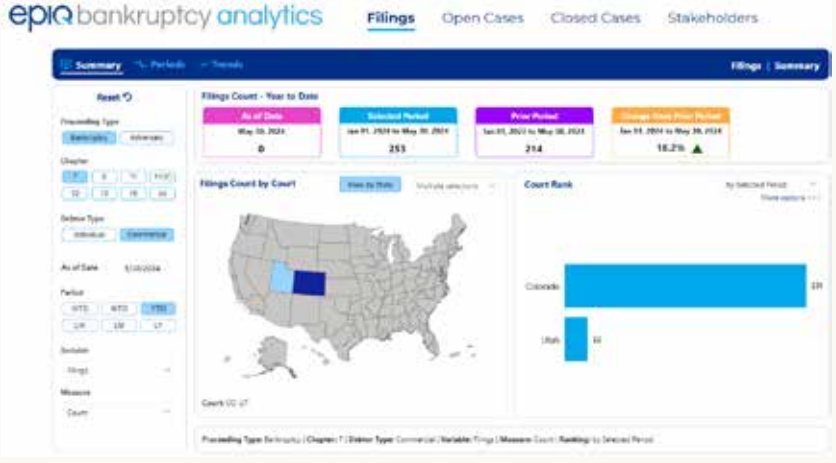
Bankruptcies by the Numbers: Chapter 11 Nationwide



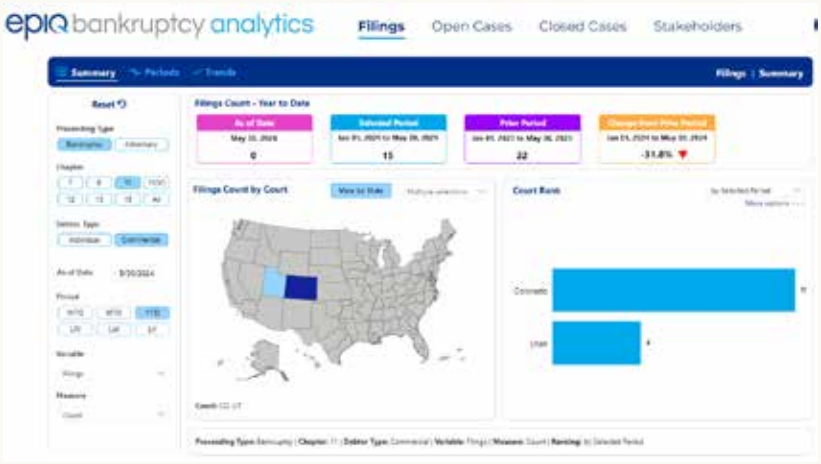
Bankruptcy by the Numbers – Chapter 7 Nationwide



Bankruptcy by the Numbers: Chapter 7 Colorado/Utah



Bankruptcy by the Numbers: Chapter 11 Colorado/Utah



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Bankruptcy Remoteness Structuring in Asset-Backed Loans

June 13, 2024

David A. Curfman

Brownstein

Special-Purpose Bankruptcy-Remote Entities

"An SPE is an entity, formed concurrently with or immediately prior to the subject transaction, that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party's insolvency." (S&P Guidelines)

Often a single-member Delaware limited liability company, but limited partnerships, multi-member LLCs and corporations can also be SPEs

Background on Non-Recourse Loans

a. Non-Recourse Loans in General
b. Basic Structuring Requirements
   i. Adequacy of Collateral (LTV)
   ii. SPE Structure
   iii. Non-Recourse Carve-Out Guaranty

Rationale for SPE Requirements

a. Bankruptcy Remoteness
b. Substantive Consolidation Concerns
   a. "Under the equitable provisions of Section 105 of the Bankruptcy Code, a court has the power to "substantively consolidate" ostensibly separate but related entities. Substantive consolidation treats the assets and liabilities of the entities as if they belonged to one, enabling the creditors of each formerly separate estate to reach the assets of the consolidated estate." (S&P Guidelines)
c. Anti-Dissolution
   i. Springing Member
   ii. Prohibition on Dissolution
   iii. Isolation from the insolvency/dissolution of a member

SPE Criteria

Specific SPE Criteria – Typically included in the entity's organizational documents:

i. Limitations on Purpose
ii. Limitations on Additional Indebtedness
iii. Separateness Covenants
iv. Independent Directors/Managers
v. Springing Members

SPE Criteria - continued

i. Limitations on Purpose: limits ownership of assets, and permitted activities

ii. Limitations on Additional Indebtedness: limits liabilities and other creditors

1. No debt other than (i) the Loan, and (ii) Permitted Indebtedness
2. Permitted Indebtedness Example:
   a) unsecured trade payables not evidenced by a note;
   b) payable not later than sixty (60) days after the original invoice date and is paid on or before the date when due; and
   c) the aggregate amount of such trade payables does not exceed 2% of the Loan

SPE Criteria - continued

iii. Separateness Covenants: intended to insulate the entity from the liabilities of other entities – prevent substantive consolidation or a piercing-the-veil argument

1. Maintain books and records separate from any other person or entity
2. Avoid commingling assets with those of any other entity
3. Conduct its own business in its own name
4. Maintain separate financial statements
5. Pay its own liabilities out of its own funds
6. Observe all organizational formalities
7. Maintain an arm's-length relationship with its affiliates
8. Avoid guaranteeing or becoming obligated for the debts of any other entity
9. Allocate fairly and reasonably any overhead for shared office space
10. Avoid pledging its assets for the benefit of any other entity
11. Hold itself out as a separate entity

SPE Criteria - continued

iv. Independent Directors/Managers: The goal is to make it harder to file for bankruptcy.

1. Organizational documents prohibit the entity from filing a voluntary bankruptcy without the consent of the Independent Directors/Managers
2. Must be truly independent (typically provided by a national provider)

iv. Springing Members: The goal is to prevent dissolution of the entity upon a withdrawal/BK/dissolution of the member.

Presenter

David A. Curfman

Shareholder
DCurfman@BHFS.com 303.223.1169
Denver

Shane G. Ramsey
Nelson Mullins Riley & Scarborough LLP
shane.ramsey@nelsonmullins.com

NELSON MULLINS

Convertible Notes - Key Features

- Convertible Notes have many features of traditional debt, including:
  - A principal balance.
  - An annual rate of interest.
  - A repayment or maturity date.
  - Priority over equity in the event of liquidation.
- But some differences include:
  - Investors view them as deferred or unpriced equity;
  - Main objective is to convert the note into same preferred equity security sold to the first institutional venture capital investor in the company's Series A round, rather than to receive their principal plus interest at maturity.
  - Their issuance may have to follow the SEC's regulations for issuing securities.

Convertible Notes

Convertible notes may convert into different types of equity on the occurrence of any of the following events:

- **Next Equity Financing Conversion**: The closing of a subsequent equity financing of at least a certain minimum size:
  - A preferred stock financing is the most common conversion trigger (though an issuance of common stock may also cause the notes to convert). This type of conversion event is often referred to as a Next Equity Financing or a qualified financing. In this scenario, the principal and interest of each note converts into the same shares of stock that a new equity investor purchases in the subsequent financing round; however, the noteholders get the benefit of the applicable note conversion price

Convertible Notes - Conversion Events

- **Corporate Transaction Conversion:** The closing of a sale of the company or substantially all of its assets:
  - If the company is sold while the notes are still outstanding (a Corporate Transaction), investors may elect to either:
  - Receive the principal and accrued interest (or sometimes the interest plus some multiple of the principal) of their notes.
  - Convert the value of their notes into shares of common stock at a discount to the price at which the acquirer has offered to purchase the company's common stock in connection with the sale transaction. The notes may alternatively convert at the price implied by the valuation cap.
  - Some convertible note documents also provide for conversion in the event of an IPO. This term is not common due to the unlikelihood of a seed-stage company going public before completing another round of private financing.

Convertible Notes - Conversion Events (cont.)

- **Maturity Conversion**: Reaching the maturity date of the notes before closing a subsequent equity financing or sale of the company:
  - If the company reaches the maturity date without having triggered a Next Equity Financing conversion or a Corporate Transaction conversion, noteholders typically have the option to:
    - Convert their notes into shares of common stock at a price based on a predetermined formula, often at the price implied by the notes' valuation cap.
    - Demand repayment (although the company would not usually be able to comply, having likely spent most of the note proceeds on building the business).
    - Leave the notes outstanding.

SAFE Notes - Overview

- The SAFE is an alternative to issuing convertible notes when a company is reluctant to issue debt for fear of reaching the maturity date before having concluded a Next Equity Financing. When a startup that has issued convertible debt reaches the maturity date, the founders generally negotiate an extension with the noteholders, who may try to extract better terms in exchange for their consent. The SAFE instrument was created to avoid this renegotiation (and the legal fees it may generate).

- Y Combinator coined the term SAFE when it released its form SAFE documents in 2013, which were then updated and re-released in 2018. However, others in the startup finance ecosystem have also created form documents very similar to the SAFE but under different names. This Practice Note adopts the Y Combinator nomenclature SAFE when referring to this type of instrument, as it has developed the most traction in the marketplace to date. Nevertheless, the substance is largely the same regardless of which form a company uses.

SAFE Notes - Similarities Between SAFEs and Convertible Notes

- The SAFE includes many of the most important features of convertible **notes**, such as:
  - Conversion events.
  - Conversion prices.
  - Priority in a liquidation.

SAFE Notes - Conversion Events

- The SAFE instrument typically includes two of the three conversion events that are found in most convertible notes:
  - The Next Equity Financing conversion (see discussion above).
  - The Corporate Transaction conversion (see discussion above).

SAFE Notes - Conversion Price

- SAFEs may include one or both of the following features related to the price at which the instrument converts into equity:
  - A discount to the stock price at conversion.
  - A valuation cap.

SAFE Notes - Conversion Price (Discount Cap)

- When notes convert at the Next Equity Financing, the price per share used to calculate the note conversion is less than the price per share of the preferred stock the company issues to the new equity investors. The rationale for giving the noteholders the benefit of this discounted price is that the startup has usually "de-risked" to some extent since the noteholders invested. Therefore, the noteholders typically expect to be compensated for having shouldered more risk than the new equity investors (who are investing later).
- Discounts in seed financings typically range between 10 to 30% off of the preferred equity price, with the most common discount being 20%. Sometimes discounts are structured to step up based on how long the notes have been outstanding. This type of step-up discount may provide for the following on a note with a two-year maturity:
  - A 10% discount if the Next Equity Financing occurs within the first six months of the term.
  - A 20% discount if the Next Equity Financing occurs during the following six months of the term.
  - A 30% discount if the Next Equity Financing has not occurred within the first year of the term.
- Instead of giving noteholders a straight percentage discount on the preferred equity price in the Next Equity Financing, it is possible (and was once common practice) to provide similar economics by issuing the noteholders warrants to purchase additional preferred shares. This practice has largely fallen out of favor due to certain adverse tax consequences of structuring the discount using warrants (stemming mainly from original issue discount issues), but warrants are still sometimes issued in conjunction with convertible notes.

SAFE Notes - Conversion Price (Valuation Cap)

- Most convertible notes also contain a ceiling, or cap, on the pre-money valuation at which the notes may convert in a Next Equity Financing. The rationale for including a valuation cap is to prevent "valuation whiplash," in a scenario where a company uses the proceeds of a small convertible note seed round to build a business that supports an outsized Series A pre-money valuation (perhaps upwards of $50 million) in its Next Equity Financing. This outcome would leave the very noteholders whose investment made that valuation possible with a much smaller ownership stake than if they had chosen to structure their investment as equity (priced at a more typical seed-round equity valuation of, say, $5 million) at the outset, instead of as convertible debt. The valuation cap ensures that noteholders still have a meaningful stake in the company if a startup achieves an unusually high valuation in its next financing round.
- When notes contain a discount and a valuation cap, the notes convert at the lesser of the price:
  - Calculated based on the discount.
  - Implied by the valuation cap.
- Valuation caps may range between $3 to 5 million on the lower end and $8 to 10 million on the higher end for a seed-stage convertible note financing, although this can vary significantly in different geographical markets and depending on investor leverage. When valuation caps are on the lower end of the spectrum, counsel should consider advising companies about the impact of phantom liquidation preference.

SAFE Notes - Priority in Liquidation

- SAFEs typically provide that, upon a dissolution or winding-up of the company (which is not in connection with a sale of the company), the SAFE holders are entitled to receive the purchase price of their SAFEs before the equityholders receive any distribution of the company's residual assets.

Differences Between SAFEs and Convertible Notes

- SAFEs lack the hallmark debt features that are found in convertible notes, namely:
  - A maturity date.
  - Accruing interest.

SAFE Notes – Maturity Date

- SAFEs do not have a maturity date or any requirement that the amount invested be returned to the SAFE holders at any point in the future (absent a sale or liquidation of the company). Until a conversion event occurs, the SAFE remains outstanding indefinitely. As a result, the SAFE lacks the maturity conversion feature that is commonly included in convertible notes

SAFE Notes – Accruing Interest

- SAFEs do not include accruing interest on the principal amount invested. SAFE investors typically only receive the right to convert the SAFE into equity at a lower price than the investors in the subsequent financing pay for their shares (based either on the discount or valuation cap in the SAFE).

Drawbacks to Investing in SAFE Notes

- There are several potential drawbacks that counsel should highlight for investors before they agree to purchase a SAFE instead of a convertible note in a seed round. These drawbacks stem mostly from the following two issues:
  - SAFEs have no maturity date.
  - The proper tax treatment of SAFEs is uncertain.

Drawbacks to Investing in SAFE Notes - No Maturity

- The maturity date of convertible debt forces the founders of a company that has not raised a Next Equity Financing by that date to reengage with its noteholders. Since, at maturity, the startup has already most likely spent all of the proceeds from the convertible note offering, the noteholders could theoretically bankrupt the company if they demanded repayment at that time (though this is a highly unlikely outcome in practice). This threat of bankruptcy gives the noteholders some leverage to renegotiate the terms of their investment in the company if it is struggling to find additional investment. For instance, they might require an amendment to increase the discount or lower the valuation cap in exchange for an extension. The lack of a maturity date therefore makes the SAFE a more company-friendly instrument than convertible notes.
- There is another situation in which the SAFE's lack of a maturity date can become a problem for investors. Assume a company takes the proceeds of a seed round in which the investors purchased SAFEs and uses it to develop a business model that generates consistently sufficient profits to reinvest in the growth of the business. This type of company may be able to continue to grow organically without needing to raise additional equity capital. It may be possible, then, that the company never triggers a Next Equity Financing conversion, leaving the SAFEs outstanding and the SAFE holders in limbo until the company is eventually sold or liquidated.
- In this scenario, if the company generates enough profit, at some point it may choose to distribute some of those earnings to its shareholders via dividends. Many SAFE documents (including Y Combinator's original SAFE documents) do not provide a mechanism for the SAFE holders to share in these distributions. However, Y Combinator included such a provision in the second version of its SAFE documents.
- If the SAFE holders had invested in convertible notes instead of SAFEs, they would have been able to take advantage of the notes' maturity conversion feature to become common stockholders and receive these dividends. However, as very few investors in technology startups expect this outcome, many of these investors have been willing to invest in SAFEs (particularly in more competitive deals) despite this risk. For an example of how counsel can draft a SAFE to avoid this outcome.

Receiverships & ABCs

- Both Receiverships and ABCs are state law creations that potentially provide a value-maximizing alternative to bankruptcy.
- Process varies by state.
- In Colorado, Receiverships are more common than ABCs due to the flexibility that Colorado Receivership precedent has developed.

Colorado Receivership Statute – C.R.C.P. 66

(a) When Appointed. A receiver may be appointed by the court in which the action is pending at any time:

(1) Before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest therein, which is the subject of the action and is in possession of an adverse party and such property, or its rents, issues, and profits are in danger of being lost, removed beyond the jurisdiction of the court, or materially injured or impaired; or

(2) By or after judgment, to dispose of the property according to the judgment, or to preserve it during appellate proceedings; or

(3) In other cases where proper and in accordance with the established principles of equity.

(b) Oath and Bond; Suit on Bond. Before entering upon his duties, the receiver shall be sworn to perform them faithfully, and shall execute, with one or more sureties, an undertaking with the people of the state of Colorado, in such sum as the court shall direct, to the effect that he will faithfully discharge his duties and will pay over and account for all money and property which may come into his hands as the court may direct, and will obey the orders of the court therein. The undertaking, with the sureties, must be approved by the court, or by the clerk thereof when so ordered by the court, and may be sued upon in the name of the people of the state of Colorado, at the instance and for the use of any party injured.

(c) Dismissal of Receivership Action. An action in which a receiver has been appointed shall not be dismissed except by order of the court.

(d) Sole Claim for Relief; Service of Process; Notice.

(1) The appointment of a receiver may be the sole claim for relief in an action. The action shall be commenced by filing a complaint, or by service of a summons and a complaint, as provided in C.R.C.P. 3(a).

(2) If the receivership is requested in connection with a mortgage, trust deed or other lien on real property, the current owner of the property, as shown by the records of the clerk and recorder, and any other person then collecting the rents and profits as a result of that person's lien on the rents or profits, shall be named as defendants.

(3) If a receiver is appointed by the court ex parte, copies of the summons, complaint, and order appointing the receiver shall be served on the defendants without delay, as provided in C.R.C.P. 4 or as directed by the court. The court, in its order for appointment of the receiver, shall direct the receiver to provide written notice of the action to any persons in possession of the property or otherwise affected by the order.

Receivership Pleadings

- A Receivership commences upon the filing of:
  - Verified Complaint;
  - Motion for Appointment of Receiver; and
  - Order Appointing Receiver (the "Receivership Order")
- The Receivership Order controls the case. As such, effective language is **VERY IMPORTANT**.
- Through the Receivership Order, we can seek protections that a debtor may receive in bankruptcy.

Receivership Order Language

- In the recent Lightning eMotors, Inc. receivership we included the following language in the Receivership Order:
  - The Receiver shall have all of the authority, powers, and duties of a general receiver under Colorado law and reasonably necessary to operate the Receivership Property, including, but not limited to, the following without further order of this Court:
    - to operate and conduct Defendants' business and any business constituting Receivership Property in the ordinary course of business, including using, selling, or leasing property of Defendants or otherwise constituting Receivership Property, incurring and paying expenses of Defendants' business or other Receivership Property, and hiring employees and appointing officers to act on behalf of Defendants;
    - to use, improve, sell, or lease any Receivership Property other than in the ordinary course of business;
    - Subject to the Plaintiff's and other secured parties' rights to credit bid their claims, to market, sell, lease, transfer or otherwise dispose of any or all of the Receivership Property as a going concern or through a liquidation or other sale process, free and clear of all liens, claims, interests, and encumbrances, (including free and clear of any right(s) of redemption by any party) pursuant to Colorado law;

Receivership Order Language (Cont.)

- The Receiver shall have all of the authority, powers, and duties of a general receiver under Colorado law and reasonably necessary to operate the Receivership Property, including, but not limited to, the following without further order of this Court:
  - to generally do such other lawful acts as the Receiver reasonably deems necessary for the effective operation and management of the Receivership Property and to perform such other functions and duties as may from time to time be required and authorized by this Court, by the laws of the State of Colorado or by the laws of the United States of America;
  - to take any other actions that are customarily taken by receivers or custodians.
- Other than the claims already asserted by Plaintiff in this action, no person or entity shall file suit against the Receiver in its capacity as Receiver, against Defendants, or against the Receivership Property, unless leave is expressly authorized in advance by this Court.

Receivership Order Language (Cont.)

- In the recent Lightning eMotors, Inc. receivership we included the following language in the Receivership Order:
  - All persons having notice of this Order, including those persons having oral or written agreements with the Defendant, or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software communication and other data services, banking services, payroll services, insurance, utility or other services to the Receivership Property, are hereby restrained until further order of this Court from interfering with the Receiver's possession of the Receivership Property, or from taking actions which adversely affect the ability of the Receiver from performing the obligations imposed on it pursuant to this Order, including from discontinuing, altering, interfering with or terminating the supply of goods or services as may be required by the Receiver.
  - This Cour shall have exclusive jurisdiction over Defendants and the Receivership Property and the Receiver appointed hereunder. All actions by any creditor, claimant, party in interest, governmental agencies, and all other persons, firms, corporations or entities seeking relief against the Receiver, the Receivership Property or the Receivership Estate are stayed and may not be pursued or continued without first seeking and obtain[ing] leave from this Court. Any such action must be brought in this Court.

Colorado ABC Statute - C.R.S. §§ 6-10-101, *et seq*.

- C.R.S. § 6-10-102 states:
  - Any person may make a general assignment for the benefit of his creditors by deed duly acknowledged. When filed for record in the office of the clerk and recorder of the county where the assignor resides or, if a nonresident, where his principal place of business is in this state, such deed shall vest in the assignee in trust for the use and benefit of such creditors all the property of the assignor, excepting only such as is by law not subject to levy and sale under execution, subject, however, to all valid and subsisting liens.

Faculty

David A. Curfman is a shareholder with Brownstein Hyatt Farber Schreck, LLP in Denver, where he represents both lenders and borrowers on complex, high-dollar real estate loans. HJe is experienced in loan origination, acquisition and disposition and hospitality, and he exceeds $1 billion in yearly loan origination. With a focus on real estate finance, Mr. Curfman advises both lenders and borrowers on a variety of loan types, including securitized, bridge and construction financing, among others. His practice has a national scope and includes asset types ranging from hospitality, office and industrial to retail, mixed use and multifamily. On the originations side, he negotiates loans ranging from single-asset acquisition loans to cross-state portfolio loans with proceeds in the hundreds of millions of dollars. Mr. Curfman shepherds all aspects of the loan process from start to finish, advising on term sheets, diligencing loan assets, negotiating loan documents and closing loan transactions. Aside from traditional real estate loans, he also advises on mezzanine and preferred equity loan structures, and he provides counsel on workout strategies and solutions for distressed or defaulted loans. Prior to joining the firm, Mr. Curfman worked as a real estate associate with Kirkland & Ellis LLP in Chicago. He has been listed in *The Best Lawyers in America* since 2023. Mr. Curfman received his B.A. *cum laude* in 2005 from Duke University and his J.D. *magna cum laude* in 2009 from Washington University School of Law, where he was admitted to the Order of the Coif.

Timothy C. Mohan is senior counsel with Foley & Lardner LLP in Denver. He is a restructuring and bankruptcy litigator who represents debtors, secured creditors, official committees of unsecured creditors, purchasers of assets, investors and other stakeholders in a broad range of restructuring matters, including chapter 11 cases, state receiverships, out-of-court workouts, acquisitions and liquidations. Mr. Mohan advises debtors and creditors in out-of-court processes and in-court restructurings across a broad range of industries, such as energy, oil and gas, manufacturing and retail. He received his B.S. magna cum laude in 2006 in finance and accounting from Tulane University and his J.D. in 2013 from Wake Forest University School of Law, where he received the CALI Excellence for the Future Award and was a staff member for the *Wake Forest Law Review*.

Shane G. Ramsey is a partner with Nelson Mullins Riley & Scarborough, LLP in Nashville, Tenn., and co-chair of its Bankruptcy and Financial Restructuring Practice Group. He regularly represents committees of unsecured creditors, indenture trustees, secured creditors, unsecured creditors, bondholders, noteholders, liquidation trustees, plan administrators, disbursing agents and other entities in bankruptcy reorganizations, liquidation proceedings and bankruptcy-related litigation. Mr. Ramsey also has experience handling complex civil litigation matters in both state and federal courts and in alternative dispute resolution settings, including arbitration and mediation. His business litigation experience includes contract disputes, business torts, breach of fiduciary duties, officer and director liabilities, and other general litigation matters. Mr. Ramsey is admitted to practice in Tennessee, Florida and Georgia, and before the U.S. District Courts for the Middle, Northern and Southern Districts of Florida, the Northern and Middle Districts of Georgia and the Eastern District of Michigan, and the U.S. Court of Appeals for the Eleventh Circuit. He is Board-Certified in Business Bankruptcy Law, and is a member of ABI's inaugural class of "40 Under 40" in 2017. Mr. Ramsey received his B.A. *magna cum laude* in 2003 from the University of Tampa and his J.D. with high honors in 2006

from Florida State University College of Law, where he was a member of the Order of the Coif and a senior articles editor of the *Florida State University Law Review*.

Engels J. Tejeda is a partner with Holland & Hart LLP in Salt Lake City. A trial lawyer, he focuses on consumer claims defense, cybersecurity and privacy litigation, banking litigation and creditors' rights in bankruptcy. Mr. Tejeda appears regularly in federal and state courts representing businesses and individuals in diverse matters, including data-breach class actions, finance disputes, claims under the Uniform Commercial Code and state foreclosure statutes, and actions under the Bankruptcy Code and the Americans with Disabilities Act. By appointment of the Supreme Court of Utah, he serves as a judge *pro tempore* in the small claims division of the Salt Lake City Justice Court. He also served as a noncommissioned officer in the U.S. Army Reserve for eight years, which included two active duty deployments to Iraq and Kosovo. Mr. Tejeda received his B.A. in 2003 from Westminster College and his J.D. in 2006 from the University of Utah.

Catie Vuksich is a director of Summit Investment Management LLC in Denver, which she joined in August 2022. Her responsibilities include deal-sourcing, underwriting and asset management. Previously, Ms. Vukasich spent 11 years at Wells Fargo primarily as a member of the Credit Resolution Group, where she focused on distressed credits. She received her B.A. from the University of Pennsylvania Wharton School of Business and her M.B.A. from Duke University Fuqua School of Business.