



AMERICAN
BANKRUPTCY
INSTITUTE

Southeast Bankruptcy Workshop

Pre-Bankruptcy Planning

Hon. M. Ruthie Hagan

U.S. Bankruptcy Court (W.D. Tenn.) | Memphis

Nicholas E. Haughey

Alvarez & Marsal | Atlanta

Nicolette Corso Vilmos

Berger Singerman LLP | Orlando, Fla.

Pre-Bankruptcy Planning

Presented By:

The Honorable Ruthie Hagan
United States Bankruptcy Court Western District of Tennessee

Nick Haughey, Senior Director
Alvarez & Marsal North America, LLC

Lawrence Hirsh, Independent Director

Nicolette Corso Vilmos, Partner
Berger Singerman, Orlando



Pre-Bankruptcy Planning

- When a company is facing financial difficulties, and a bankruptcy filing becomes a potential solution, there are several perspectives that should be considered to properly evaluate the turnaround and refinancing strategy:
- Company / Debtor
- Employees
- Lenders
- Board of Directors
- Equity Holders
- Vendors/Creditors
- Customers
- Court
- US Trustee
- Creditors' Committee



Possible Debtor Objectives

- Debt Restructuring
 - Business Continuity
 - Time to Develop a Plan
 - Obtain New Financing
 - Operational Restructuring
 - Reduce Costs
 - Sell or Liquidate Assets
 - Protecting guarantors
 - Maximize Value for Stakeholders
 - Consolidate or Stop or resolve Litigation and Claims
 - Avoid Liquidation
 - Facilitate a Sale or Merger
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Debtor's Business

- What kind of business? Restaurant, Trucking, Hotel, Small business, Individual, Construction
 - Impact of a Bankruptcy Filing:
 - **Industry Factors:** Different industries have varying economic cycles, regulatory environments, and competitive landscapes. For example, a technology company may face different challenges and opportunities compared to a manufacturing or retail business. Understanding these industry-specific dynamics is crucial for formulating a viable reorganization plan that can navigate industry-specific challenges.
 - **Operational Complexity:** Businesses vary in terms of their operational complexity. Some businesses may have simpler structures and fewer assets, making it easier to reorganize and streamline operations. Others, such as conglomerates with diverse subsidiaries or highly specialized businesses, may face greater challenges in consolidating operations and achieving efficiencies post-bankruptcy.
 - **Market Position and Brand Value:** The market position and brand value of a business can impact its ability to attract financing, retain customers, and negotiate with stakeholders during bankruptcy proceedings. A well-established brand with loyal customers may have better prospects for a successful reorganization compared to a business with a weaker market presence.
 - **Supply Chain and Vendor Relationships:** Businesses often rely on complex supply chains and relationships with vendors. The disruption caused by bankruptcy can strain these relationships, affecting the ability to procure goods and services essential for operations. Understanding and managing these relationships are critical for ensuring continuity during and after the reorganization process.
 - **Regulatory and Legal Considerations:** Certain industries are subject to specific regulatory requirements or legal constraints that may affect the feasibility of a reorganization plan. Compliance with industry-specific regulations and legal obligations is essential for gaining approval from creditors, regulators, and the court.
 - **Customer and Employee Considerations:** The nature of the business can influence customer loyalty and employee retention during bankruptcy proceedings. Businesses heavily reliant on ongoing customer relationships or specialized employee skills may face challenges in maintaining these relationships and retaining key talent.
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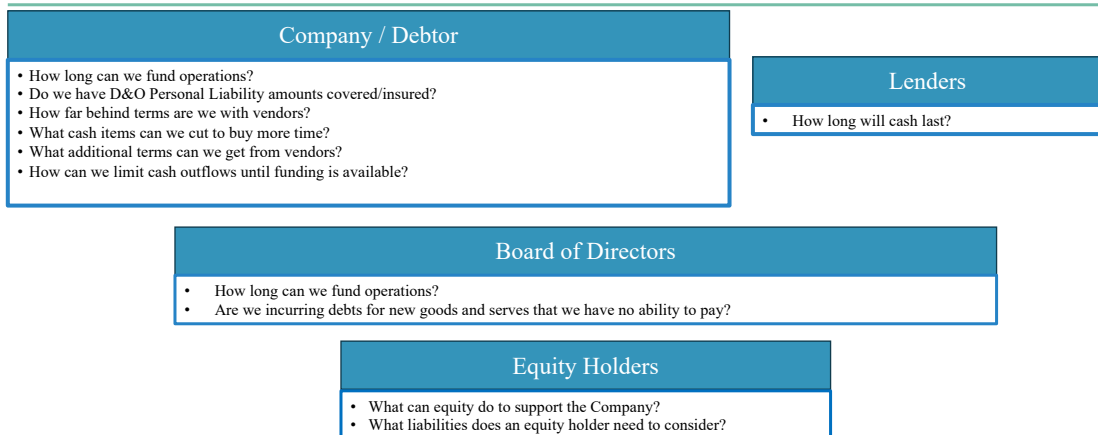


Issues Leading A Company to Consider Bankruptcy

- **Excessive Debt:** When a company has accumulated excessive debt that it cannot repay or refinance, despite efforts to negotiate with creditors or restructure its debt obligations.
- **Liquidity Problems:** Insufficient cash flow to meet ongoing operational expenses, debt payments, or other financial obligations.
- **Declining Revenue and Profitability:** Persistent declines in revenue and profitability due to factors such as economic downturns, changing market conditions, or increased competition.
- **Legal or Regulatory Issues:** Significant legal judgments, fines, or penalties that strain financial resources and threaten the company's ability to continue operations.
- **Operational Issues:** Inefficient operations, high production costs, or supply chain disruptions that impact profitability and cash flow.
- **Inability to Meet Debt Covenants:** Failure to comply with financial covenants agreed upon with lenders or bondholders, leading to defaults and potential acceleration of debt payments.
- **Pending Debt Maturities:** Upcoming debt maturities that the company cannot refinance or repay without restructuring its debt obligations.
- **Disruption or Catastrophic Events:** Events such as natural disasters, pandemics, or unforeseen circumstances that severely impact operations and financial stability.
- **Loss of Key Contracts or Customers:** Significant loss of key contracts, customers, or suppliers that disrupt revenue streams and cash flow.
- **Management and Governance Issues:** Ineffective management, governance failures, or internal disputes that impair decision-making and hinder strategic initiatives.
- **High Fixed Costs:** Companies with high fixed costs relative to revenue that cannot be quickly adjusted to align with reduced income levels.
- **Industry-Specific Challenges:** Economic downturns or structural changes within the industry that negatively impact the company's competitive position and financial performance.



Liquidity



Financing Options

Company / Debtor	<ul style="list-style-type: none"> • Is a refinancing available? • What is the right set of advisors to help?
Employees	<ul style="list-style-type: none"> • How can we support the financing process?
Lenders	<ul style="list-style-type: none"> • Can we get creative with financing terms to extend time? • Is unencumbered collateral available? • Will equity provide a contribution to buy time? • Do we allow a priming facility?
Equity Holders	<ul style="list-style-type: none"> • Is an equity infusion the only solution? • Are additional areas of financing available?



7

Strategic Alternative Considerations

The company and its Board, with the assistance of legal and financial advisors, should evaluate the range of viable strategic alternatives and select the one(s) for implementation that maximize the value of the business for the benefit of ALL stakeholders.

- Will the sale process repay full debt?
- Are we willing to take a “haircut”?
- Are we willing to roll anything into a new deal?
- Is selling the company a viable option before liquidity is exhausted?
- Are there divisions or assets that can be sold to raise cash?
- What impact would these sales have on future strategy?
- Sale of the business
- Refinancing/recapitalization of the business
- Restructuring of the business, both the balance sheet and operations
- Combination of the above strategic alternative
 - e.g., sale of some of the underlying components of the business and reorganizing around the remainder



8

Alternatives to Traditional Chapter 11

- Assignment for Benefit of Creditors
- Chapter 7
- Friendly repossession
- Sale of business
- Out of Court workout
- Sub-5 Chapter 11
- Single Asset Real Estate (SAR) case



Subchapter V Overview

- The Subchapter V Trustee: Unlike other Chapter 11 cases, a trustee is always appointed but the debtor remains in possession. Trustee's duties are limited and set forth primarily in section 1183.
- Debt limit: The extension that increased the debt limit applicable to subchapter V cases to \$7.5 million expired on June 21, 2024. Accordingly, for subchapter V cases commenced on or after June 21, 2024, the applicable debt limit is the original limit enacted in the SBRA, as adjusted per 11 U.S.C. § 104, or \$3,024,725.
- No US Trustee Fees: The debtor does not pay US Trustee quarterly fees.
- No Committee: Unless the court orders otherwise, there is no unsecured creditors' committee.
- Plan Deadlines and Exclusivity: The debtor must file a plan within 90 days of the petition date unless extended, but there is no confirmation deadline. Only the debtor may propose as plan.
- Modification/ Abrogation of Absolute Priority Rule: Subject to section 1191, a debtor may receive a discharge upon completion of a plan and equity may retain its interest notwithstanding that all creditors may not be paid in full.
- No Disclosure Statement Required: the plan may be solicited without a disclosure statement.
- Eligibility Requirements: Only a small business debtor within the meaning of section 101(51D) may elect to proceed under Sub5.
- No absolute priority.



Pre-Bankruptcy Planning Creditor Perspective

- Identify all contracts
- Review credit agreements and any security interests
- Identify collateral
- Perfect security interests- (understand preference risk)
- Terminate lease/contract
- Restructuring support agreements
- Monitor debtor's financial situation
- Engage legal counsel
- Negotiate with the debtor



Debtor Pre-Filing Considerations

- What to do with upper management
- Employees
 - Consider developing a key employee retention program (KERP)
- Hire public relations expert
 - 11 U.S.C. § 1125 (restrictions on communications under bankruptcy and non-bankruptcy law)
- Meet with employees to manage expectations
- Communicate with key customers
- Create a cash cushion
- Negotiate with creditors (pre-pack, landlords)
- New management
- Accountant
- Who will prepare schedule and MORs
- Timing of petition



Identify Potential Filing Date

Considerations include:

- Impact on business operations
- Payroll cycles
- Immediacy of crisis and management of publicity
- Payment due dates for items like bonds and other debt and pension obligations
- Payments due to suppliers
- Anticipated cash availability
- Availability of DIP financing and the use of cash collateral
- Preference periods and fraudulent transfer clawback periods
- Whether there is an immediate need to reject burdensome executory contract or lease obligations
- Whether there is an immediate need to complete a significant asset sale
- Whether the debtor will be in a position to assume or reject nonresidential real property leases within time allotted by section 365(d)(4) of the Bankruptcy Code



Due Diligence

- Entity or entities
 - Gather organizational documents
 - Partnership agreements, bylaw, operating agreements
 - Shareholder agreements- restrictions on voting
- Identify domicile of Company
- Identify partners, shareholders, owners and numbers of shares or percentage ownership
- Identify members of board of directors, members, partners
- Identify who is authorized to sign documents
- Identify any resolutions that are needed
- Identify number of employees
 - Warn Act



Due Diligence – Identify Real and Personal Property

- List of all real property and material personal property owned and leased by the Company, including vehicles, machinery, equipment, furniture and fixtures and used in or otherwise relating to the business (the “Property”)
 - List each lender for the property summary of outstanding balance owed, if currently in default, when the last payment was made, if in default, and what, if any action lender has taken to date, amount of interest and contribution reserves remaining on each loan
 - Documents of title for the Company’s real and material personal property
 - All mortgages, deeds of trust, security agreements, UCC financing statements or other documents purporting to create liens, mortgages, security interests, pledges, charges or other encumbrances on any real or personal property
 - A schedule of all leases of real and material personal property relating to or used in connection with the business to which the Company is either a lessor or lessee, specifying rental payment amounts, expiration dates and renewal options
 - Title insurance policies and surveys for all real properties owned or leased by the Company
 - Copies of any notices of default
 - List of all guarantors on each loan
 - Letters of credit
 - Whether there are necessary executory contracts on the verge of pre-petition termination
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Due Diligence – Litigation and Potential Litigation

- Description of all pending or threatened litigation, proceedings (including arbitrations), administrative proceedings, governmental investigations or inquiries or claims affecting the Company, the business or the Property
 - Notices of default
 - Notices of threatened litigation
 - Settlement agreements
 - Lien searches (including tax and judgment lien searches)
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Due Diligence- Insurance and Tax

- Copies of all insurance policies or self-insurance arrangements relating to the business or the Property, including professional liability, officers' and directors' liability, key-man life insurance, property, liability, business interruption and product liability, specifying coverage limits and other significant terms.
- All insurance claims submitted by the Company.
- All insurance claims pending or unpaid that have been made against the Company.
- Tax returns.
- Status of all tax obligations, including, employee withholding, sales and other applicable state and federal taxes.
- Accrued tax liabilities and accountants' work papers related to tax liabilities.



Due Diligence- Financial

- Most recent projected income statements, cash flow statements and balance sheets relating to the Company, including all assumptions.
- Schedule of all liabilities and obligations not appearing on the Company's balance sheet relating to the Business or the Property, including all unasserted and/or threatened claims and such matters as leases, guarantees, letters of credit, unfunded pensions, deferred payments, off-balancing sheet financings, etc., and copies of all related agreements.
- All audited financial statements for each of the last three (3) fiscal years and the latest unaudited interim monthly and quarterly financial statements prepared since the date of the most recent audited financial statements.
- Operating budgets and strategic/business plans for the Business for the past three fiscal years and any reports or papers relating to any long-term budget, capital development, restructuring program or strategic plan, including any plans regarding systems and operations.
- A list of bank accounts and lines of credit, including the most recent balance information.
- Accounting policies.
- Cash flow projections.
- Accounts payable and receivable.



Arrange DIP Financing & Cash Collateral

DIP

- Determine the amount of interim and final DIP financing needed.
- Choosing a DIP lender.
- Negotiating:
 - a DIP term sheet;
 - consents of any primed lenders and subordination agreements;
 - a DIP financing agreement; and
 - proposed interim and final DIP financing orders.

Cash Collateral

- Obtain secured lender's consent to use cash collateral;
- If exiting lenders provide DIP financing, cash collateral can be incorporated into DIP documents.



Venue

- What venues are options
- Basis for venue: governed by 28 U.S.C. 1408
- Likelihood of favorable outcomes based on established precedents
- Sophistication of the court
- Which venue will allow the type of exit being considering
- Can the court provide hearing dates needed
- Convenience of court's location



Judge's Perspective

- What is important
 - Know your judge
 - How to set first day motions
 - Notice
 - Declaration in support of first day motions (and events leading up to filing)
 - Declarations/proffer/ witness testimony (from whom)
 - Ability to read room-lender involvement/opposition
 - Judges virtual appearance rules
 - Likelihood of chambers meeting or in courtroom discussion of roadmap (tell me where you are going if you are expecting a quick 363 sale or a traditional plan)
 - What if you don't have first day motions (does the judge automatically set status conferences if non-sub v case)
 - How much did you negotiate with UST in advance?



First Day Relief

- Joint Administration: Fed. R. Bankr. P. 1015
- Notice and Case Management Procedures: § 105(a); Fed. R. Bankr. P. 2002 and 9007
- Extension of Time to File Schedules and Statements of Financial Affairs: § 105(a); Fed. R. Bankr. P. 1007(a)(4), 1007(c), and 9006(b)
- Retention of Claims and Noticing Agent: § 105(a); 28 U.S.C. § 156(c)
- Confirming Protections of Automatic Stay and Invalidating Ipso Facto Clauses: §§ 362, 365(e)
- Motion to Pay Critical Vendors: §§ 105(a), 362(d), 363(b), 364(b), 1107(a),; Fed. R. Bankr. P. 2002(a)(2); 6004(a), (h)
- Motion to Pay Employee Wages and Benefits: §§ 105, 363, 364(b), 507(a)(4), 507(a)(5), 541(d)
- Motion to Pay Possessory Lienholders: §§ 105, 362(b)(3), 363, 503(b)(1), 546(i)
- Motion to Honor Customer Programs: §§ 105, 363(c)(1), 507(a)(7), 1107(a), 1108



First Day Relief – Continued

- Motion to Continue Insurance Programs: §§ 105(a), 507(a)(8), 541(d)
 - Motion to Pay Prepetition Sales, Use, and Franchise Taxes: §§ 105(a), 507(a)(8), 541(d)
 - Motion to Approve key employee retention payments (KERPs) to Insiders: §§ 363(b), 365, 503(b)(1), 503(c); Fed. R. Bankr. P. 6003(b); 9014; 7052
 - Motion to Approve KERPs to Non-Insiders and KEIPs: § 503(c)(3)
 - Motion to Approve Adequate Assurance to Utilities: §§ 105, 366
 - Motion to Limit Claims Trading and Equity Transfers: §§ 105, 362(a)(3), 541 Fed. R. Bankr. P. 4001
 - Motion for Use of Cash Collateral: §§ 361, 363, Fed. R. Bankr. P. 4001(b)
 - Motion for Authority to Obtain Post-petition Credit: § 364; Fed. R. Bankr. P. 4001(c)
 - Continued Use of Existing Bank Accounts and Cash Management System: §§ 105, 363, 364; See also US Trustee operating guidelines
 - Motion for Waiver of Investment Guidelines: §§ 105, 345, 363
 - Motion to Reject Unexpired Leases and Executory Contracts: § 365; Fed. R. Bankr. P. 6006
 - Motion to Approve Reclamation and 503(b)(9) Procedures: §§ 503(b)(9); 546(c)
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Exit Strategies

- **Reorganization Plan:**
 - The company proposes a detailed plan to restructure its debts and operations.
 - Allows the business to continue operating while renegotiating terms with creditors to make the debt load more manageable.
 - **Debt-for-Equity Swap:**
 - Creditors agree to exchange their debt claims for equity in the company.
 - Reduces the company's debt burden while giving creditors an ownership stake, aligning their interests with the company's future success.
 - **Sale of Assets:**
 - The company sells significant assets to generate cash to pay off creditors.
 - Provides immediate funds to reduce debt and can help the company focus on its core profitable operations.
 - **Mergers and Acquisitions:**
 - The company merges with or is acquired by another company.
 - Can provide financial stability and synergies, improving the chances of successful restructuring.
 - **New Financing:**
 - The company secures new loans or investments to fund its operations and pay off existing debts.
 - Infusion of new capital can help stabilize the company and facilitate its exit from bankruptcy.
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Exit Strategies- Continued

- **Conversion to Chapter 7:**
 - The case is converted from Chapter 11 to Chapter 7, leading to liquidation of the company's assets.
 - If reorganization is not feasible, liquidation may be the best way to pay off creditors.
 - **Debt Restructuring:**
 - Renegotiation of the terms of the existing debt without necessarily exchanging debt for equity.
 - Can provide more favorable repayment terms, such as extended deadlines or reduced interest rates, helping the company manage its debt load.
 - **Operational Restructuring:**
 - Changes in the company's business operations, such as closing unprofitable divisions or reducing workforce.
 - Helps streamline operations and reduce costs, making the company more viable in the long term.
 - **Strategic Partnerships:**
 - Forming alliances or joint ventures with other companies to leverage their strengths.
 - Can provide additional resources, market access, and expertise, aiding in the company's recovery.
 - **Rights Offering:**
 - Existing shareholders are given the opportunity to purchase additional shares, usually at a discount.
 - Raises new equity capital, helping to pay down debt while allowing existing shareholders to maintain their stake.
 - **Litigation Trust:**
 - Setting up a trust to pursue litigation claims, with potential recoveries used to pay creditors.
 - Allows the company to continue operations while potential litigation recoveries provide a future source of funds for creditors.
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Thank you!

The Honorable Ruthie Hagan
United States Bankruptcy Court Western District of Tennessee

Nick Haughey, Senior Director
Alvarez & Marsal North America, LLC

Lawrence Hirsh, Independent Director

Nicolette Corso Vilmos, Partner
Berger Singerman, Orlando/Tampa



Faculty

Hon. M. Ruthie Hagan is a U.S. Bankruptcy Judge for the Western District of Tennessee in Memphis, appointed on Oct. 16, 2020. Prior to her appointment, she worked in the Bankruptcy and Commercial Restructuring group of Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C. in its Memphis office, where she primarily handled sophisticated business workouts and complex commercial bankruptcy. Judge Hagan has represented debtors, creditors, trustees, unsecured creditors' committees and equityholders in a variety of proceedings in bankruptcy court, as well as complex transactional work in the context of commercial restructurings and workouts. She also has represented more than a dozen health care debtors in complex bankruptcy cases, but the majority of her practice has been dedicated to the representation of secured and unsecured commercial creditors in a variety of matters, including liquidating and reorganizing chapter 11 bankruptcy cases, § 363 sale issues, cash-collateral issues, lien priority and avoidance actions, preference actions, rejection/assumption of executory contracts, stay-relief actions, discharge and dischargeability actions, asset recovery and disposition, contested confirmation hearings, adversary proceedings, and bankruptcy appeals to the district court and BAP, as well as the representation of secured creditors in single-asset bankruptcy proceedings. Judge Hagan served as co-chair of the Bankruptcy Section of Memphis Bar Association, director of Memphis Bar Association, Executive Council member of the Tennessee Bar Association's Bankruptcy Section, director of the Mid-South Commercial Law Institute and member of ABI, and she was named to Mid-South Rising Stars in Bankruptcy & Creditor/Debtor Rights for several years. Judge Hagan received her B.S. in chemistry from the University of Kansas, her Master's degree in higher education from the University of Arkansas, and her J.D. *cum laude* from the University of Arkansas School of Law, where she served as managing editor of the *Arkansas Law Review* and received the ABI Medal of Excellence.

Nicholas E. Haughey is a senior director with Alvarez & Marsal in Atlanta and has more than 15 years of experience in turnaround management, financial restructuring, performance improvement consulting and corporate finance. He utilizes his experience to provide financial clarity and operating improvement planning to clients through financial modeling, cash forecasting and analysis, and corporate restructuring services. Mr. Haughey is currently serving as CRO of Red Lobster. He also led the contingency planning and preparation efforts for Dean Foods. During the course of the bankruptcy, he evaluated and advised the management team and board of directors on various exit scenarios, including the sale of the majority of the operating plants to its largest supplier. All but two plants were sold as going-concern transactions. Additionally, Mr. Haughey oversaw the contingency planning and preparation efforts for GT Real Estate Holdings, a specialty real estate investment company created to develop and construct a new headquarters and practice facility for the Carolina Panthers NFL team. Mr. Haughey returned to A&M in the summer of 2019 after more than three years as vice president of Finance at Dex Media/DexYP, a national provider of software solutions and marketing services to local, independently owned businesses. During his time with Dex, he oversaw a prepackaged bankruptcy process, led the diligence and financing efforts for the \$600 million purchase of YP Holdings, and completed a \$450 million debt-funded share-repurchase program. Mr. Haughey also has worked extensively with private equity-backed companies to improve operating performance by implementing rapid reforecast tools for both cash and EBITDA monitoring and forecasting, reducing costs, and streamlining organizational structures and processes. He started his career at Ernst &

Young, working with both the assurance and transaction advisory services practices. Mr. Haughey received his Bachelor's degree in finance from Wofford College and his Master's degree in accountancy from The University of Notre Dame.

Nicolette Corso Vilmos is a partner in the Orlando and Tampa, Fla., offices of Berger Singerman LLP in the firm's Dispute Resolution and Business Regulatory Teams. She focuses her practice in the areas of complex business litigation, including bankruptcy, intellectual property, banking law, lender liability, shareholder and business disputes, real estate workouts, noncompete litigation and landlord/tenant matters. Ms. Vilmos's bankruptcy and creditors' rights practice includes the representation of secured lenders, purchasers of assets from troubled companies, fiduciaries, creditors' committees, and other stakeholders in multi-party disputes and reorganizations. In the area of intellectual property, she has litigation experience in state and federal courts and has represented clients in cases relating to patent infringement, trademark infringement, trade dress infringement, copyright infringement, anti-cybersquatting, theft of trade secrets, unfair competition, the Computer Fraud and Abuse Act, deceptive and unfair trade practices, tortious interference, breach of contract and/or breach of restrictive covenants, and other related claims. Ms. Vilmos counsels clients on various privacy and data-security issues, from systemwide network intrusions and ransomware attacks to cyber extortion, fraudulent wire transfers, email account compromises, stolen computer hardware and employee misconduct. She is president of the International Women's Insolvency & Restructuring Confederation and a member of ABI's Southeast Bankruptcy Workshop Advisory Board, the American Intellectual Property Law Association and the Federal Bar Association in Orlando. In addition, she is a graduate of Leadership Orlando, a member and mentor of the Central Florida Inns of Court, a visiting bankruptcy law professor at the FAMU School of Law and a real property adjunct professor at Valencia Community College. Ms. Vilmos has been listed in *Lawdragon's* 500 Leading U.S. Bankruptcy and Restructuring Lawyers from 2022-23, as a *National Law Review* Go-To Thought Leader in 2022, among America's Most Honored Lawyers in 2022, as one of Florida's Legal Elite by *Florida Trend Magazine* from 2021-22, in *Chambers USA: America's Leading Lawyers for Business* for Bankruptcy, and in *The Best Lawyers in America* for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law in 2023. She is rated AV-Preeminent by Martindale-Hubbell and received the Women of Achievement Award from the Women's Executive Council of Orlando. Ms. Vilmos received her B.A. *cum laude* in 1998 from Stetson University and her J.D. *cum laude* in 2000 from Stetson University College of Law.