

**Schulte Roth&Zabel**

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**DISTRESSED INVESTING HOT TOPICS**

# **Trading Next Generation Products**

**Tuesday, June 27, 2017**

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# **About the Speakers**



## **Christopher Catalano**

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Christopher is a Director of Burford's underwriting and investment arm. Prior to joining Burford, Christopher was a Vice President and Assistant General Counsel at JPMorgan Chase & Co., where he managed class actions and investigations involving the mortgage bank.

Christopher began his legal career as a litigator at Kirkland & Ellis, where he handled antitrust and other complex commercial litigation. He then joined Wilson Sonsini Goodrich & Rosati, litigating antitrust, commercial, and patent cases primarily for technology clients. Later, at O'Melveny & Myers, he defended banks, healthcare payers, retirement-plan service providers, and consumer-product and other companies in class actions and other complex litigation.

Christopher graduated from Wesleyan University and the University of Chicago Law School.



## **Bradly Schwab**

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Brad Schwab is managing director and head of special investments, Cowen's non-securities affiliate focused on global special situations. Brad joined Cowen in 2016 as part of the acquisition of various businesses from CRT Capital. At CRT, he was co-head of the special investments team responsible for identifying, analyzing, and actively making markets in bankruptcy, liquidation, class action, and other illiquid, non-correlated opportunistic transactions and oversaw the team's principal investment activities.

Prior to joining CRT, Brad was a principal at Triax Capital Advisors and a partner with Debt Acquisition Group. Earlier in his career, he was a member of AIG's private equity division and spent three years in fixed income sales and trading at Bankers Trust and Bear Stearns.

Brad received his M.A. in international business from the Fletcher School at Tufts University and his B.A., *cum laude*, from the University of Rochester.





## **Lawrence V. Gelber**

Partner

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Larry concentrates his practice in the areas of corporate restructuring, creditors' rights, distressed mergers & acquisitions, debtor-in-possession financing and litigation financing. Larry's extensive experience in Chapter 11 reorganization cases includes his representation of, among others, secured and unsecured creditors, lenders, investors and acquirers. His lender and creditor representations have included Ableco Finance LLC, Cerberus Business Finance LLC and TPG Specialty Lending, Inc. Investor and acquirer representations include Mount Kellett Capital Management LP, Fortress Investment Group, Cerberus Capital Management LP and Axar Capital Management LP. Litigation financing engagements have included Burford Capital and TRGP Capital Management, LLC.

In recognition of his professional excellence and his contributions to the fields of restructuring and insolvency, Larry was inducted as a fellow in the 25th Class of the American Bankruptcy College. He has also been recognized by *The Legal 500 United States* as a leader in his field. Larry is an active member of the American Bankruptcy Institute, the American Bar Association's Section of Business Law, the New York City Bar Association and the Turnaround Management Association. He is a regular contributor to *The Bankruptcy Strategist*, *Bankruptcy Law360* and *Norton Bankruptcy Law Adviser* and has spoken at conferences sponsored by the Practising Law Institute, American Bankruptcy Institute, the William J. O'Neill Great Lakes Regional Bankruptcy Institute and other organizations. Some recent presentation topics include "Distressed Retail: Challenges and Opportunities," "Impact of Retail Bankruptcies on Bank Lenders" and "Equitable Subordination and Recharacterization of Loans: Avoiding Pitfalls for Lenders, Creditors and PE Sponsors."

Larry received his J.D., *cum laude*, from New York University School of Law and his B.A., *magna cum laude*, from Tufts University.



**Adam C. Harris**

Partner

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Adam is chair of the Business Reorganization Group and a member of the firm's Executive Committee. His practice includes corporate restructurings, workouts and creditors' rights litigation, with a particular focus on the representation of investment funds and financial institutions in distressed situations. Adam has represented a variety of clients in connection with distressed acquisitions by third-party investors or existing creditors through "credit bid" or similar strategies, as well as in court supervised and out of court restructurings. In addition to representing creditors and acquirers in distressed situations, Adam has represented Chapter 11 debtors, as well as portfolio companies in out-of-court exchange offers, debt repurchases and other capital restructurings.

Adam is recognized as a leading bankruptcy and restructuring lawyer by *Chambers USA* and *Chambers Global* and as a leading business reorganization lawyer by *The Legal 500 United States*. He is also a member of the New York City Bar Association.

Adam received his J.D., *magna cum laude*, from Georgetown University Law Center and his B.A. from Emory University.



## **David J. Karp**

Partner

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David leads the firm's Distressed Debt & Claims Trading Group, which provides advice in connection with U.S., European and emerging market debt and claims trading matters. His practice focuses on special situations and distressed investments, and distressed mergers and acquisitions. David represents investment funds, private equity funds and broker-dealers in connection with the sale, financing and trading of distressed, non-performing and esoteric assets across a wide range of issuers and in jurisdictions around the globe. He is often called upon to develop secondary market risk transfer structures for illiquid assets and claims including oil and gas royalties, liquidating trusts, litigation claims and many others.

Recognized as a leading lawyer by *New York Super Lawyers*, and by the founder of *Reorg Research* as "undoubtedly one of the best in the field at what he does best: making sure funds and their investments are protected when transacting and executing trades in distressed debt and claims," David is an active member of the American Bankruptcy Institute, Loan Market Association, Asia Pacific Loan Market Association, INSOL Europe, Emerging Markets Trade Association, National Association of Royalty Owners and the Loan Syndications and Trading Association. He is a frequent author and speaker on distressed investing and oil and gas topics and recently wrote articles including "Investing in Oil and Gas Royalties: Distressed Counterparty Risk Considerations," "Structuring Winning Bids: European NPL Portfolio Transactions," "Bank Debt Trading on the Modern Day Back of the Napkin" and "Trade Dispute Litigation: Debtor vs. Secondary Market Claims Purchaser."

David earned his J.D. from Fordham University School of Law, his B.S. from Cornell University and his Energy Finance and Management Certification from the University of Denver.



**F. Xavier Kowalski**

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Xavier represents issuers, sponsors and investment banks in initial public offerings, high-yield financings, equity-linked financings, and other domestic and international capital markets transactions. He also counsels clients in general corporate and securities law matters. His practice includes a broad range of cross-border transactions across a number of targeted industries, including health care, media and entertainment, and technology. He also brings significant experience in private equity and leveraged finance transactions.

Xavier received his J.D. from the University of Virginia School of Law and his B.S. from the University of Florida.



## **Boris Ziser**

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Boris is co-head of the firm's Structured Finance & Derivatives Group. With over 20 years of experience across diverse asset classes, Boris focuses on asset-backed securitizations, warehouse facilities, secured financings and commercial paper conduits. His practice encompasses a variety of asset classes, including life settlements, equipment leases, structured settlements, lottery receivables, timeshare loans, litigation advances and financings, loans to law firms, and cell towers, in addition to other esoteric asset classes such as intellectual property and other cash flow-producing assets. He also represents investors, lenders, hedge funds, private equity funds and finance companies in purchases and dispositions of portfolios of assets and financings secured by those portfolios.

Boris serves as outside general counsel to the Institutional Longevity Markets Association (ILMA). He is listed in *Chambers USA* and is recognized by *The Legal 500 United States* for his work in structured finance. He is also a member of the Structured Finance Committee of the New York City Bar Association, the New York State Bar Association, and the Esoteric Assets Committee and Risk Retention Task Force of the Structured Finance Industry Group. A frequent speaker at securitization industry conferences, Boris has conducted various securitization and life settlement seminars in the United States and abroad.

Boris received his J.D. from the New York University School of Law and his B.A., with honors, from Oberlin College.

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# **SRZ Capabilities**

## Bankruptcy Litigation Funding

As the preeminent law firm in the investment management and alternative investment space, we regularly counsel hedge funds, private equity funds and others as investors and lenders in bankruptcy litigation funding matters. With the participation of creditors, judges and other interested third parties, litigation funding in the bankruptcy context is unlike litigation funding outside of bankruptcy. Our lawyers have the unique skillset required to understand how the bankruptcy overlay impacts these transactions. Moreover, we are able to leverage our extensive bankruptcy litigation experience to counsel clients on the merits of the underlying causes of action.

### Select Representative Experience

- Represented two affiliates of a multi-billion dollar capital provider in connection with their investment in litigation brought by a post-effective date litigation trust. The trust, which has been pursuing claims for more than \$1 billion against a syndicate of banks, was virtually out of cash on the eve of trial. Working under severe time constraints, SRZ worked with our clients to negotiate and document all aspects of their investment in the litigation, facing several opposing constituencies, each with a different agenda. If successful, the proceeds of the litigation would provide a meaningful return for the trust beneficiaries — primarily the prior debtor's general unsecured creditors — and a significant return on the clients' investment.
- Represented a litigation funder in connection with its investment in patent litigation being prosecuted by a distressed company. In addition to negotiating all aspects of the complex underlying investment in the patent litigation, SRZ attorneys were required to evaluate the condition of, and future prospects for, the company itself, and develop a strategy as to how best to protect our client's investment should the company become a Chapter 11 debtor prior to completion of the litigation. Working closely with our clients, a small team of SRZ lawyers with specialized expertise in finance, restructuring and intellectual property formulated and implemented a commercial solution that provided our client with the comfort to make its investment in the litigation.
- Represented investors in connection with financing to a Chapter 7 trustee of a former bank holding company. The trustee was embroiled in litigation with the FDIC regarding ownership of approximately \$400 million of tax refunds. We represented investors who agreed to advance \$12 million to the trustee to fund its litigation against the FDIC in exchange for a portion of the debtor's recovery of the tax refunds, if any. The funding proposal met fierce resistance from the FDIC, which alleged that the deal entitled the investors to a disproportionate return on their investment. The bankruptcy court approved the deal over the FDIC's strong objection, concluding that the arrangement represented an appropriate exercise of the Chapter 7 trustee's business judgment. After receiving favorable rulings from the bankruptcy court and Third Circuit in the underlying tax refund litigation, the Chapter 7 trustee reached a settlement with the FDIC that provided for the payment of approximately \$135 million to the investors.
- Represented investors and lenders in connection with a \$15-million financing (split evenly between an investment facility and a term-loan facility) to a reorganized Chapter 11 debtor. Similar to the matter described above, the underlying litigation concerned which entity — the debtor or the FDIC — was the rightful owner of more than \$500 million of tax refunds and securities claims. Under the investment facility, the investors agreed to fund the debtor's disputed asset litigation in return for a portion of the debtor's recovery of the disputed assets, if any. The term loan was a traditional financing arrangement — the lenders received repayment of principal with interest in exchange for loans to help fund the implementation of the debtor's reorganization plan. The bankruptcy court approved the deal over the objection of the FDIC, which argued that the deal would impermissibly transfer control of the underlying disputed asset litigation from the debtor to the funding parties.

## Distressed Debt & Claims Trading

Schulte Roth & Zabel's Distressed Debt & Claims Trading Group has extensive experience advising broker-dealers, hedge funds, investment banks, CLOs and private equity funds on a wide range of U.S., European, Asia-Pacific and emerging markets debt and claims trading matters. When not managed properly, trade and transfer risk issues can push a potentially winning investment into losing territory. Our lawyers understand our clients' goals and have the transaction skills and commercial sense required to facilitate execution and settlement of trades. The Group advises clients in structuring, preparing and negotiating deal-specific transaction documentation, including trade confirmations, debt and post-reorganization equity purchase and sale agreements, claim assignment agreements, participation agreements, proceeds letters, confidentiality agreements, "big boy" letters and bid procedure documentation.

Working on your global LSTA, LMA and APLMA Distressed Debt Trading Matters are an important part of our relationship. We are cost effective and find the pitfalls impacting your investment success and downstream liquidity that other firms miss. But we advise traders on so much more (including the untradeable...)

- Post Reorganization Equity
- Non-Performing and Non-Core Asset Portfolios
- Litigations Claims
- Liquidating Trust Interests
- Mortgage Loans
- Life Settlement Claims
- Oil & Gas Royalties
- Medical Lien Claims
- Limited Partnership Interests
- Receivable Puts
- Bankruptcy Claims

The Distressed Debt & Claims Trading Group's lawyers often play a central role in transactions having a trading component while working closely with lawyers from the firm's other practice groups, including distressed investing, M&A and securities, finance, investment management, business reorganization, structured finance & derivatives, litigation, regulatory & compliance and tax.

### Bank Debt Auctions

We advise clients participating as buyers or sellers in auctions for bank debt portfolios. We prepare bid documentation, collect bids, assist our clients in evaluating bids and guide them through the bidding and settlement process, including negotiating and finalizing transaction documentation. When acting for buyers, we analyze and advise on issues relating to the underlying claim documentation and negotiate claims transfer documentation.

### Bulk Transfers and Portfolio Analysis

Our lawyers advise our clients as both buyers and sellers in bulk transfers of claim and debt portfolios and provide a full analysis of the underlying claims recovery, credit review and transfer issues.

### Rights Offerings

The Group advises clients as participants or backstop parties of debt and equity rights offerings in connection with a debtor's plan of reorganization. When our clients are the beneficial, but not the record, holder of the debt or equity entitled to participate, our lawyers ensure that their right to participate is thoroughly documented and protected. We understand how crucial it can be for our clients to receive the proceeds of a purchase of access to a



rights offering as soon as possible. Accordingly, subsequent to the successful rights offering, we ensure that the transfers of any proceeds are settled in a timely and complete manner.

## **Bank Debt Trading**

We regularly advise buy-side and sell-side clients at each stage of a debt or claims transaction. In addition to highlighting the trade risks associated with any given trade and formulating the optimal settlement or structuring options, we represent clients in the negotiation of trade confirmations, purchase and sale agreements, participation agreements, proceeds letters, and “big boy” letters. Our lawyers based in New York and London provide prompt and efficient responses to issues arising in any time zone, while working cohesively to achieve a timely settlement of trades.

Our lawyers are active members of the Loan Syndications and Trading Association (LSTA), Loan Market Association (LMA) and Asia Pacific Loan Market Association (APLMA) and have long-standing familiarity with the protocols and recommended documentation advocated by each association. We have a comprehensive understanding of the U.S., European, Asian-Pacific and emerging secondary loan markets and how to facilitate transfers of loans worldwide. With extensive expertise in analyzing all forms of credit documents, we are able to quickly and thoroughly locate and identify commercial and legal complexities that exist on a trade-by-trade basis.

## **Bankruptcy Claims Trading**

The Group advises buyers and sellers on all aspects of bankruptcy claim trading transactions ranging from bilateral transfers to complex multi-party claims auctions. The Group’s lawyers structure, prepare and negotiate the transaction documents, review and analyze the underlying proofs of claim and supporting documentation, and file any transfer notices. Our lawyers expertly address the various risk silos that can impact claims trades, including notional, recovery and counterparty risk, to meet our clients’ requirements. The Group guides each client’s understanding of the critical terms of the trade to be negotiated at each step of the deal process in order to maximize leverage.

## **Club Syndications of Claims**

We regularly advise clients in structuring and participating in club syndication deals and joint-venture claim participations. We negotiate and structure each transaction step to appropriately address recovery, notional amount, and counterparty credit risk, voting, control and information rights.

## **Leverage Opportunities**

We design structures that enable our clients to leverage their bankruptcy claims positions. In conjunction with SRZ’s Finance and Structured Finance & Derivatives Groups, we advise clients on leverage opportunities where the clients’ claims serve as collateral for a loan or structured product. Using a cross-departmental approach, our lawyers analyze the underlying claims and any transfer documents to protect our client’s interests and simultaneously achieve the best possible financing terms.

## **Claims Trade Auctions**

We advise sellers and buyers in auctions of bankruptcy claims. For sellers, the Group’s lawyers prepare bid documentation, collect bids, assist in evaluating bids and guide them through every stage of the bidding and settlement process. When acting for buyers, we analyze and advise on issues relating to the underlying claim documentation and negotiate claims transfer documentation.

## **Compliance**

SRZ regularly provides regulatory and compliance advice on the interaction between LSTA and LMA guidelines and U.S. and European securities laws. The Distressed Debt & Claims Trading Group stays up-to-date with regulatory legislation that is in effect or in development, and continually monitors the interplay between securities laws in the

United States and Europe and the position of bank debt and claims as an asset class. Our lawyers routinely advise clients on trading in different levels of a company's capital structure, the relationship between a company's equity and bank debt, and their position when trading on the basis of syndicate confidential information and borrower confidential information.

## **Post-Reorganization Equity Trading**

In conjunction with the M&A and Securities and Regulatory & Compliance Groups, SRZ's Distressed Debt & Claims Trading Group guides clients through the oft-novel intricacies of trading and settling post-reorganization equity trades. Many compliance and logistical considerations can affect the liquidity and settlement of securities when a company issues new equity under a Chapter 11 plan, an English law scheme of arrangement, or another form of restructuring. The new equity holders (who are often debt traders), the reorganized company and transfer agents, will often be unaccustomed to settling post-reorganization equity trades, and unfamiliar with the governing terms of the new equity instruments or the provisions in the underlying stockholders' agreement. The Group's lawyers understand the unique issues facing the various parties in settlement of post-reorganization equity transactions and will work with them and their respective advisers to establish consensus on all necessary transfer documents and steps, including, if required, any securities law opinions.

## **North American Credits**

Ablest Inc., ACA Financial Guaranty Corp., Acadia Healthcare Company, Inc., Airosaru Drilling LLC, Allied Universal Holdco LLC, Allnex USA, Inc., Alpha Natural Resources Inc., American Axle & Manufacturing Inc., Ameriforge Group, Inc., AMR Corporation, Arch Coal Inc., Ascent Resources, Avaya Inc., Aveos Holding Co., Bennu Blocker Inc., Bernard L. Madoff Investment Securities, BI-LO, LLC, Bluestem Group Inc. (formerly known as Capmark Financial Group), C&J Energy Services Ltd., Cactus Wellhead, Caesar's Entertainment Operating Company Inc., Caledonian Bank Limited, Carey International Inc., CavTel Holdings, LLC, Cengage Learning Inc., Charter Communications, Cinram International Inc., Citadel Broadcasting Corp., Chemours, Chrysler LLC, Chrysler Financial Services Americas LLC, Clear Channel Communications Inc., Consolidated Container Co., Contura Energy Inc., Dana Holding Corp., Data Intensity, LLC, Delphi Corp., Delta Air Lines Inc., Dex Media West, Downey Financial Corp., Education Management, Energy & Exploration Partners, Energy Future Holdings/TXU Energy, FairPoint Communications Inc., Fieldwood Energy, Ford Motor Co., Freedom Communications Inc., Freescale Semiconductor Inc., GateHouse Media Inc., Generac Holdings Inc., General Growth Properties Inc., General Motors Corp., Georgia Gulf Corp., Ginn-LA Conduit Lender Inc., Global Green Products, Hawaiian Telecom, Inc., Hawker Beechcraft Corp., Hawkeye Renewables, Hexion Specialty Chemicals Inc., HMH Publishing Inc., Hostess Brands, Inc., Husky Injection Molding Systems Ltd., Idearc Inc., iHeartCommunications, Indiana Toll Road, International Automotive Components Group North America, LLC, iPayment Investors L.P., Jaguar Holding Company II, KIK Custom Products Inc., Las Vegas Sands Corp., Lear Corp., Lee Enterprises, Lehman Brothers Holdings Inc. (and its affiliated U.S., U.K. and Bermuda debtors), Life Time Fitness Inc., LightSquared, Longview Power, MacDermid Inc., Marsico Holdings, Metroglass Finance Ltd., MGM, Millennium Health, NII Holdings, Nortel Networks Inc., Oriental Trading Company, Overseas Shipholding Group, Inc., Pacific Ethanol Inc., Payless ShoeSource Inc., Peabody Energy Inc., Penton Media Inc., Pope & Talbot Ltd., PRV Aerospace, LLC, Quiznos, Quality Home Brands Holdings, Quicksilver Resources, Real Mex Restaurants Inc., Realogy Group LLC, Republic Airways Holdings Inc., Residential Capital, Riviera Holding Corp., Sabine Oil & Gas Corp., Samson Investment Company, San Antonio Oil and Gas Services Ltd., SemGroup Corp., Semiconductor Components Industries, Simmons Bedding Co., Sonifi Solutions (formerly known as LodgeNet), Spectrum Brands Inc., SquareTwo Financial Corp., Stallion Oilfield Services Ltd., Stanford International Bank, Station Casinos, Targus Group International, Inc., Toys "R" Us, Transdigm, Inc., Travelport, Tribune Media Co., Tropicana Entertainment, Twin River Worldwide Holdings, Inc., Ultra Petroleum Corp., United Air Lines Inc., Univision Communications Inc., US Airways Group Inc., US Power Generating Company, Value Creation Inc., Vertellus Specialties Inc., Veyance Technologies, Inc., Visteon Corp., W3 Co. (Total Safety), Walter Energy Inc., White Birch Paper Company, Xerium Technologies Inc., Young Broadcasting Inc. and YRC Worldwide, Inc.

## **EMEA Credits**

Aarkad PLC, AbitibiBowater Inc., Ahmad Hamad Algozaibi & Brothers Company (AHAB), Aleris International Inc., Allnex S.ar.l., Arcapita Bank B.S.C., Autobar, AWAL Bank B.S.C., Bank of Cyprus, Barchester Holdco Ltd., Belvedere, BLT (Gold Bridge Shipping Corporation), Cattles, Centro Properties Group, CIFG, ColorOz Midco, Concrete Investment I S.C.A., Connaught, Consolis Group, Cortefiel, S.A., Cucina Acquisition (U.K.) Ltd., Drillships, Driving Assist UK Ltd., Druck Chemie, Dubai World Group Finance Limited, Earth Holdco 1 S.a.r.l., Eircom Group Ltd., Endeka Ceramics Holdings 1, S.L.U. Essent Trading International SA, Estro Group B.V., Gala Group PE, GHG Group PLC, Glitnir Bankhf., Goldbridge Shipping Corporation, Hellenic Republic, Hibu Connect S.A. (yell), Hilding Anders, IMOM Limited (Isle of Man Steam Packet Holdings Limited), Incisive Media, Infigen Energy Finance, Infigen Energy Limited, The Investment Dar Company K.S.C.C., Ivg Immobilien AG, Ivg Immobilien-Management Holding AG, Kaupthing Bank hf., Kion Group AG, Klakki EHF (EXISTA), La Seda de Barcelona, Landsbanki Íslands hf., Lyngen Midco AS, Lyondell Basell-Equistar Chemicals, LP, Materis SAS, McCarthy & Stone, Mediannuaire Holding SA, MEP II S.a.r.l., MF Global Limited (UK), MF Global UK, Novartex Holding Luxembourg S.C.A., OW Bunker & Trading A/S, Paw Luxco II S.a.r.l., PHS Group, Q Cells, Quinn Group Ltd., SAAD Investments Company Ltd., Safety Global Lux S.a.r.l., Seadrill Partners, Seat Pagine Gialle, Sofia LP (Sanitec), Stemcor Holdings Ltd., Swiss Air SA/AG, Syncora Holdings, Tele Columbus, Tele Pizza, Terreal Holding SAS, Towergate, Travelport Finance S.a.r.l., Truvo Belgium Comm. V., Vivarte, WHA Holdings and Wheelabrator Allevard.

## **South American Credits**

Banco Cruzeiro do Sul, OGX, SIF Limited, and Transtel Intermedia S.A.

## Business Reorganization Group

The Business Reorganization Group at Schulte Roth & Zabel represents domestic, foreign and international secured creditors, unsecured creditors, debtor-in-possession lenders, acquirers, equity holders, plan sponsors and others in Chapter 11 reorganizations and out-of-court workouts, and regularly advises on acquisitions and divestitures of troubled companies and their assets.

With market-leading capabilities on both sides of the Atlantic, SRZ's Business Reorganization Group prides itself on accessibility to clients and responsiveness to their needs. The Group is well-positioned to represent domestic and international clients in all aspects of business reorganization — in-court and extrajudicial, transactional and adversarial — and our global clients benefit from the broadened perspective this brings to the handling of their matters. Because our lawyers are able to tap into such an extensive vein of experience, they are able to provide more than just technical expertise, but also develop effective, creative and efficient strategies to best achieve clients' business objectives.

### Creditor Representations

- Secured and unsecured
- Creditors' committees
- Indenture trustees
- Bondholders in workouts and reorganization cases
- Secured lenders in debtor-in-possession and reorganization-plan financing
- Commercial lessors (real estate, equipment)

### Acquisitions and Divestitures of Troubled Entities

- Formulate reorganization plans
- Represent reorganization-plan equity sponsors
- Structure and negotiate merger, acquisition and divestiture transactions
- Represent financial and strategic buyers and sellers in domestic and cross-border transactions across a wide variety of business sectors, including airlines, banking, chemicals, financial services, health care, investment management, real estate, manufacturing, hospitality and telecommunications

### Reorganizations and Debt Restructurings

- Out-of-court debt and equity restructurings
- Bankruptcy reorganizations and liquidations
- Formulate reorganization plans and representation of reorganization plan equity sponsors
- Foreclosures, deeds in lieu of foreclosure, and recovery of rents and other income
- Real estate restructurings, including non-judicial workouts and Chapter 11 reorganizations

## **Bankruptcy Litigation**

- Defend claim challenges (preference, fraudulent transfer, equitable and contractual subordination, recharacterization deepening insolvency claims and lender liability suits)
- Litigate leasing, financing and cash collateral, valuation and insolvency, assumption and rejection, true-sale, lien priority and jurisdictional disputes
- Counsel directors of troubled companies regarding their fiduciary duties
- Handle retention and compensation matters for professional firms (financial advisory, accounting and law)
- Prosecute and defend breach of fiduciary duty claims
- Litigate contested plan confirmations and disputes involving stay relief, adequate protection, substantive consolidation, turnover and reclamation
- Defend insider and tax litigation
- Arbitration, mediation
- Testify and consult as expert witness

## **Transaction Counseling**

- Analyze and formulate corporate, real estate, finance and other transaction structures to minimize potential bankruptcy and related risks
- Individual asset protection (e.g., exemption counseling)

## **Real Estate Restructuring**

- Non-judicial workouts
- Real estate reorganizations

## **Financially Troubled Companies**

- Represent financially troubled entities in out-of-court restructurings and Chapter 11 reorganizations
- Formulate prepackaged and prearranged reorganizations

## **Distressed Debt and Claims Trading**

- Represent buyers and sellers of distressed debt
- Negotiate and close LSTA and LMA distressed debt purchase and sale transactions
- Provide legal analysis and due diligence on distressed companies and related indentures and credit facilities

## **Prime Broker and Counterparty Issues**

- Advise prime brokerage customers with respect to risks, rights and remedies associated with financially troubled broker-dealers
- Advise participants to financial markets contacts with respect to counterparty insolvency risks

## Distressed Investing

### Practice Highlights

- Awarded “Special Situation M&A Deal of the Year” (above \$750 million) by Global M&A Network for work on The Innkeepers USA Trust Chapter 11 reorganization and sale to Cerberus Capital Management LP and Chatham Lodging Trust
- Awarded the Global M&A Deal of the Year for our role in the sale and reorganization of Chrysler LLC
- Structured a series of refinancing transactions for which NewPage received the “High-Yield Bond Deal of the Year” award from *International Financing Review*
- Acquisition of Caritas Christi Health Care was awarded the North America Private Equity Deal of the Year by Global M&A Network and named *Investment Dealers’ Digest* magazine’s Deal of the Year award in the health care category
- Partners in the Distressed Investing Group are consistently recognized by leading legal directories including *Chambers USA*, *The Legal 500 United States* and *International Financial Law Review*

**As the premier brand in investment management in the world’s two major financial markets — New York and London — Schulte Roth & Zabel is recognized as a key player in both the mature U.S. distressed investment market and the still-developing European distressed investment market. We have the experience and expertise to provide clients with comprehensive representation and advice in all manners of large and complex distressed situations across a wide range of industries and opportunities.**

With market-leading capabilities on both sides of the Atlantic, our Distressed Investing Group provides business-savvy solutions by strategically blending expertise from our business reorganization, finance, investment management, mergers & acquisitions, real estate, tax and other practice areas. Our superior knowledge of the investment management industry and experience developing and implementing the structures and products that a distressed investor analyzes results in substantial synergies and gives us an insider’s edge. Well-known for our distressed investing work, we advise on, and have extensive experience with, out-of-court transactions, navigating bankruptcies (including bankruptcy acquisitions, debt restructurings, loan-to-own strategies and debtor-in-possession and exit financings), distressed real estate, capital structure analysis and trading issues.

Structuring or restructuring a deal may also require collaboration by our clients with one or more other parties who have aligned interests in order to achieve their investment objectives. We regularly advise consortiums and syndicates in joint investments, whether those investments are structured as club deals or the group acts together as an informal, ad hoc committee, or otherwise. We are experienced in defining, negotiating and navigating those working relationships and managing the complex governance and tax issues that arise.

### **Out-of-Court Restructuring**

SRZ advises clients in complex out-of-court restructurings of financially troubled companies, including debt or operational restructuring, refinancing, workout, recapitalization, acquisition or divestiture. While bankruptcy may be the best means for restructuring a company that has significant labor, pension or environmental concerns, or that requires significant contractual concessions or terminations, in many cases, an out-of-court solution is a more effective, less expensive, lower risk and less public alternative. We assist in determining whether an out-of-court restructuring is viable by thoroughly analyzing the capital structure and existing creditor, intercreditor and inter-lender relationships and provide comprehensive advice on every aspect of the restructuring process, including structuring the transaction, managing corporate governance and securities law issues, negotiating amendments, consent solicitations and exchange offers (including strategies to address potential hold-outs) and the related tax implications of the restructuring. These representations frequently involve amending loan agreements or bond indentures, exchanging debt for equity, selling assets and negotiating with stakeholders across various levels of the capital structure.

### **Acquisitions Under Section 363 and Plans of Reorganization**

We advise on distressed M&A activities, including Section 363 sales (whether as a “stalking horse bidder” or as an auction participant) and acquisitions by way of sponsored or stand-alone reorganization plans. We also guide investors in crafting and implementing alternative investment and financing tactics, including “loan-to-own” strategies like using senior debt claims to credit bid on distressed assets or existing debt securities to confirm a plan of reorganization and emerge with equity. We provide practical solutions to the complicated corporate governance issues that increasingly are arising from diverse post-transaction shareholder bases, and also provide creative tax structures to minimize a target’s cancellation of indebtedness income and to preserve net operating losses. Our interdisciplinary approach enables us to offer a team of experienced professionals with across-the-board expertise in dealing with the unique structuring, strategic, diligence, finance and documentation issues that arise in distressed M&A transactions.

### **Debtor-in-Possession and Exit Financing**

SRZ is a nationally recognized leader in complex, multi-faceted financings, including lending to bankrupt borrowers. We are experienced in structuring, negotiating and managing financing transactions in bankruptcy cases, including debtor-in-possession financings and exit facilities implemented through Chapter 11 plans of reorganization, providing advice on transactions across the debtor’s capital structure, including senior and junior secured debt, term and revolving loans, bridge facilities, and subordinated or mezzanine debt. We advise on all types of debt financing to distressed debtors, whether they are roll-ups of existing debt or new loans. We assist numerous clients in successfully consummating these transactions on accelerated timetables. We also have a successful track record representing clients in troubled real estate financing deals and bankruptcy situations. We’ve represented secured and unsecured creditors, loan servicers, special servicers, acquirers and other interested parties in workouts, debt and equity restructurings and recapitalizations, mortgage foreclosures, deeds in lieu of foreclosure, defaulted-loan litigation, receiverships, Chapter 11 cases, cramdowns, and distressed debt and property dispositions.


### **Global**

Our clients include domestic and international buyers and sellers in joint venture, LLC and partnership transactions. Our transatlantic presence and deep multinational experience is particularly sought by domestic and international investors who are increasingly looking at U.K. and European opportunities involving cross-border insolvencies, restructurings and distressed mergers and acquisitions. We also have significant experience representing global investors, including private equity real estate funds and REITs, and developers, in the acquisition and development of distressed real estate, whether single-asset or multi-property, developed or undeveloped, and commercial or residential, and with the related capital markets transactions, from subordinated financings and intercreditor arrangements to equity financings. Our attorneys’ global range of expertise includes multilingual and multicultural proficiencies that allow us to deliver seamless high-quality service to our clients. Our interdisciplinary teams set us apart from other firms our size, allowing us to work seamlessly on matters and address cross-border tax, collateral and insolvency issues in relation to a distressed investment.

# Distressed Investing Transactions



Acquisition



Acquisition




Reorganization and Auction



Foreclosure on Equity Interests



Acquisition and Debt Restructuring



Acquisition




Debt Restructuring



Exit Financing

The Great ATLANTIC & PACIFIC Tea Company

Acquisition




Acquisition



Debt Financing



Exit Financing




Acquisition




Acquisition



Reorganization



Exit Financing



Reorganization



Debt Financing




Acquisition




Reorganization and Acquisition




Acquisition



Acquisition



Acquisition



Auction



<b>Representative Clients</b>			
	Cerberus Capital Management	Wellspring Capital Management	Owl Creek Asset Management
			
Centerbridge Capital Partners	Appaloosa Management	Wells Fargo Capital Finance	Fortress Investment Group
			
Aurelius Capital Management	Davidson Kempner Capital Management	Black Diamond Capital Management	Anchorage Capital Group

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## Leveraged Credit Investment Products

With an approach to trading and investments in leveraged debt products built on deep experience and active innovation, Schulte Roth & Zabel advises leading market participants with investments in and trading of all types of financial products — from secured and unsecured loans and loan participations (both par and distressed), mortgage loans, illiquid debt and equity, to more complex structured credit products. By combining the expertise from our structured finance, derivatives, trading agreement and distressed debt trading practices, SRZ is able to offer a seamlessly integrated, multidisciplinary, U.S. and European capability that is widely recognized both for its market leadership and for the results that it delivers to our clients.

SRZ's team counsels a diverse client base, including investment managers, hedge funds, private equity funds, ERISA plans, registered investment companies, UCITS, SICAV funds, broker-dealers and financial institutions. Our approach to representing our clients blends technical expertise, an understanding of current market conditions and sophisticated legal and commercial analysis of each transaction with a deep knowledge of our clients and their objectives. As credit markets begin to recover from the global financial crisis, we believe that our approach is the most effective way to create solutions tailored to a client's individual needs.

We assist our clients with the acquisition and financing of investments from the initial due diligence and analysis of underlying documentation to the negotiation and preparation of financing facilities for both borrowers and lenders, including:

- Warehouse lending agreements
- Total return swaps and other derivatives
- Repurchase agreements
- Credit agreements
- Capital call lines and subscription facilities

Our lawyers are well-versed in the many types of transactional documents that clients may encounter in this market, from market-standard trade documentation, where our expertise includes broad familiarity with forms published by industry trade groups such as the International Swaps and Derivatives Association (ISDA), the Loan Syndications and Trading Association (LSTA), the Loan Marketing Association (LMA), the Emerging Market Trade Association (EMTA), the Securities Industry and Financial Markets Association (SIFMA) and the International Securities Lending Association (ISLA), to heavily customized and negotiated agreements specific to a particular transaction or counterparty.

SRZ's team also works closely with other areas of the firm — including tax, regulatory, investment management, bankruptcy and restructuring — to bring specialized U.S. or U.K. law expertise to legal issues affecting our clients in the current market environment, including issues arising under the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act (and SEC/CFTC regulations thereunder) and the U.K. Financial Services Act (and FSA regulations thereunder).

The recovery in global credit markets has resulted in an increasing number of opportunities to invest in both pre-crisis and new-issuance debt products, but the fundamental risks to investors has not changed. SRZ can help you navigate the potential pitfalls in the secondary loan market by providing a comprehensive, fully-integrated approach to each client and each transaction in an efficient and cost-effective manner.

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# **Post-Reorganization Equity Outline**

# Post-Reorganization Equity

The purpose of this outline is to provide a broad overview of key legal considerations to keep in mind when holding or trading post-emergence equity.

## I. Post-Emergence Equity Trading

### A. Plan Securities

1. Bankruptcy Code Section 1145 exempts securities issued under a plan (“plan securities”) from the registration requirements of the securities laws if such plan securities are issued (a) “in exchange for a claim” or (b) “principally in such exchange and partly for cash or property.”<sup>1</sup> However, if (a) equity is issued in exchange for a combination of (i) a claim and (ii) any newly contributed cash or property and (b) the value of such cash or property exceeds the value of the claim, then the registration exemption in Section 1145 will not be available.
2. Plan securities are deemed to be issued in a public offering. Accordingly, they generally are freely tradable under the securities laws and may be traded on any exchange.
3. Plan securities are not freely tradable by an “underwriter,” which for purposes of Section 1145 is an entity that:
  - (a) Purchases claims with a view toward distribution of plan securities;
  - (b) Offers to sell plan securities for recipients;
  - (c) Offers to buy plan securities from holders with a view toward distribution; or
  - (d) Is an issuer (i.e., the debtor) or affiliate of the issuer.
4. If the transaction is an “ordinary trading transaction,” an underwriter that is not affiliated with the debtor may be eligible for an exception to the underwriter carve-out from Section 1145. SEC no-action letters clarify that a trade may be an “ordinary trading transaction” if:<sup>2</sup>
  - (a) The issuer is a company that files SEC reports;
  - (b) The trade is executed on either a national exchange or in the over-the-counter market; and
  - (c) The transaction does not involve:
    - (i) A concerted action by recipients of the plan securities or by a distributor on their behalf;
    - (ii) The use of informational documents used to market the plan securities; and
    - (iii) Special compensation to brokers and dealers in connection with the sale of the plan securities.

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<sup>1</sup> 11 U.S.C. § 1145 (2010).

<sup>2</sup> See, e.g., AWS Reorg, Inc., SEC No-Action Letter, 1997, SEC No-Act. LEXIS 965 at \*7-9 (October 27, 1997); UNR Industries, Inc., No-Action Letter, 1989, SEC No-Act. LEXIS 799 at \*20-21 (July 11, 1989); Manville Corp., SEC No-Action Letter, 1986, SEC No-Act. LEXIS 2763 at \*10-11 (Aug. 28, 1986).

## B. Private Sale Securities

1. Not all securities issued in a reorganization are issued under Section 1145 of the Bankruptcy Code. Some securities issued pursuant to a Chapter 11 may not satisfy the rule's "in exchange for a claim" requirement, such as the sale of securities in a rights offering under a Chapter 11 plan for the purpose of raising fresh equity capital.
2. To the extent that Section 1145 is unavailable, two other registration exemptions are often used for the resale of reorganization equity: Rule 144A and Section 4(a)(7) of the Securities Act.
  - (a) Rule 144A generally provides an exemption for the offer or sale of a security that is not fungible with any class of securities listed on a national securities exchange or quoted on a U.S.-automated inter-dealer quotation system to "qualified institutional buyers" (as defined in Rule 144A) that have access to certain prescribed information about the issuer, if seller takes reasonable steps to make buyer aware that seller may be relying on Rule 144A as a registration exemption for the resale.
  - (b) In 2015, the FAST Act introduced a new provision of the Securities Act, Section 4(a)(7), allowing resale offers to "accredited investors" (as defined in Rule 501) subject to certain restrictions, including making sure that the offer is made without any publicity or other general solicitation and the requirement that the class of securities have been authorized and outstanding for at least 90 days. Prior to the FAST Act, holders followed similar procedures to permit resales using a combination of Section 4(a)(1) and Section 4(a)(2) under the Securities Act, which was generally referred to as "Section 4(1 ½)." There are a few small distinctions between Section 4(a)(7) and Section 4(1 ½), and Section 4(1 ½) is still available as well, if needed.

## C. Practical Trading Considerations

1. Often, the transfer procedures for a company's post-reorganization equity are not clearly established or communicated to the market, and the procedures required by a particular company or its transfer agent may vary significantly between different post-reorganization companies. For instance:
  - (a) Some companies require an opinion of counsel, stating that the transfer is not subject to registration under the securities laws. Some companies require a seller certification to this effect and some companies do not require either an opinion or a certification.
  - (b) Some companies require special forms and particular execution mechanics, such as medallion signature guarantees or notaries.
  - (c) Depending on the particular circumstances, the parties to the trade may expect a share purchase agreement that sets forth the terms and conditions of the transaction, including representations and warranties that will need to be negotiated by the parties' respective counsels.

## II. Post-Emergence Equity Governance

- A. The governance issues that arise with respect to the post-emergence entity vary depending on whether the issuer will be private or public post-emergence.
- B. If the issuer is public pre-emergence, but will have a smaller shareholder base post-emergence, the issuer may choose to "go dark" post-emergence to avoid the costs and risks associated with being a public company.

1. In order to go dark, the issuer will make certain filings with the SEC to delist and deregister its securities.
  2. After going dark, the issuer will no longer file reports with the SEC.
- C. In a private post-reorganization entity, the pre-bankruptcy debt holders that will be post-emergence shareholders may negotiate for, among other things:
1. Minority protections;
  2. Drag-along rights;
  3. Tag-along rights;
  4. Consent/veto rights over fundamental or extraordinary transactions; and
  5. Certain larger shareholders may also negotiate for seats on the board of directors or board of managers of the issuer.
- D. In a public post-reorganization entity, the pre-bankruptcy debt holders that will be post-emergence shareholders may negotiate for, among other things:
1. Board seats provide access to material, non-public information which will restrict trading ability outside of certain open trading windows (typically around the filing of the issuer's Form 10-Qs or Form 10-Ks).
  2. If the shareholder's beneficial ownership exceeds five percent and the shareholder has a board seat, it will likely have to file on the more onerous Schedule 13D rather than Schedule 13G.
  3. A board seat also may subject the shareholder to the Section 16 profit disgorgement rules based on a "director-by-deputization" theory.
- E. Holders that will have a control interest in the post-emergence entity should also be mindful that controlling stockholders have special fiduciary duties to minority stockholders in many jurisdictions, including under Delaware law (e.g., sales of control blocks by controlling stockholders are subject to the "entire fairness" test under Delaware law). Affiliate transactions between controlling stockholders and the company may be subject to enhanced scrutiny by directors and stockholders and, in extreme cases, by Delaware courts.

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# **Litigation Finance Opportunities Outline**

# Litigation Finance Opportunities

## I. Litigation Funding

### A. What Is Litigation Funding?

1. The term litigation funding is sometimes used to describe several forms of funding transactions, some of which do not involve the actual funding of a litigation.
2. We represent clients that are in one or more businesses that fall into the general category of litigation funding. Such clients are often looking for capital to deploy in these areas.
3. The opportunity is to invest in an uncorrelated asset that, while complex, is not generally exposed to market volatility.

### B. Transaction Types

#### 1. Pre-Settlements

- (a) Advancing funds to personal injury litigation plaintiffs, who use the funds to pay medical expenses or for other purposes.
- (b) Each individual advance is fairly small, so pre-settlement companies originate a large number of fundings (hundreds or thousands).
- (c) Each advance will earn an accrual based on amount of time outstanding.
- (d) The risk is binary. The plaintiff is obligated to repay an advance only if there are proceeds from a judgment or settlement.
- (e) Funder does not have the right to control the litigation. The plaintiff's lawyer is obligated to do what is best for his or her client, which is the plaintiff.

#### 2. Post-Settlements

- (a) As the name implies, these fundings are made after a settlement has been finalized and the funded party is awaiting distribution of proceeds.
- (b) The advances can be made to a plaintiff or to a law firm that's entitled to a contingency fee to be paid from the settlement proceeds.
- (c) One example of a type of post-settlement funding business is in the class action sector, like the NFL concussion settlement. The settlement is final and is currently in the implementation stage.
- (d) Another example is the Deepwater Horizon BP Settlement.
- (e) The two settlements are good examples of how they can vary.
  - (i) The BP settlement requires a more complicated assessment of recovery entitlement.
  - (ii) The NFL settlement is based on a grid.



3. Medical Liens (also known as Letter of Protection Fundings)
  - (a) The advances are made to medical professionals.
  - (b) Such medical professionals provided medical care to the plaintiffs and are entitled to be paid from recoveries under the related litigation.
  - (c) "Letter of Protection" refers to the letter signed by the plaintiff's attorney acknowledging the entitlement to payment.
4. Loans to Law Firms
  - (a) Can be secured by fees from one case or multiple cases.
  - (b) Can be full recourse, non-recourse or limited recourse.
  - (c) Can be a pre-settlement or a post-settlement.
  - (d) Has often been done in the class action or other personal injury context, but can also be in commercial tort or other types of cases.
5. Investment in Cases
  - (a) One might say this is the purest form of litigation funding.
  - (b) Advancing money to a plaintiff to prosecute the litigation.
  - (c) One well-publicized recent example was Hulk Hogan's case against Gawker.
  - (d) This type of arrangement can be used in different types of cases, e.g., pharmaceutical, medical devices, patent infringement, matrimonial and others.
  - (e) There is a waterfall for distributing proceeds among the plaintiff, the attorneys and the funder.
  - (f) Some legal issues are usury and champerty.

## **II. Bankruptcy Litigation Funding**

### **A. Who Might Seek Litigation Funding?**

1. The following entities might seek litigation funding in the bankruptcy context:
  - (a) Debtors-in-possession.
  - (b) Creditors' committees.
  - (c) Liquidation/litigation trusts.
  - (d) Chapter 7/11 trustees.

## B. What Litigation Will They Fund?

### 1. Types of litigation matters to be funded may include:

- (a) Fraud/fraudulent transfer/preference actions.
- (b) Other avoidance actions (i.e., Chapter 5 causes of action).
- (c) Breach of fiduciary duty claims against directors, officers and advisers (often targeting D&O insurance).
- (d) Tax liability/allocation issues.
- (e) Alter ego/piercing the corporate veil.
- (f) Patent infringement and/or other IP enforcement rights.
- (g) Antitrust violations.
- (h) Monetization of judgments (e.g., *MagCorp*).
  - (i) Pre-existing litigation or judgment.
  - (ii) Judgment obtained during bankruptcy case.

## C. When Do They Need Litigation Funding?

### 1. During pendency of bankruptcy case (e.g., commencement of an adversary proceeding or continued prosecution of pre-bankruptcy litigation).

- (a) Debtor-in-possession.
- (b) Creditors' committees (may seek/obtain standing to bring certain actions).
- (c) Chapter 11 trustee (if appointed).
- (d) Chapter 7 trustee (if case is converted to Chapter 7).

### 2. Post-confirmation/consummation of a Chapter 11 plan.

- (a) Plan administrator.
- (b) Trustee for a litigation or liquidation trust formed pursuant to a Chapter 11 plan.

## D. Where Is Litigation Funding Venued?

### 1. In the bankruptcy court, if during pendency of case.

- (a) Bankruptcy Code requires court approval for debtor or trustee to obtain credit outside ordinary course of business.
- (b) Bankruptcy court approval of litigation financing is not a "slam dunk" (e.g., *DesignLINE*).

2. In or out of bankruptcy court, following consummation of plan.
  - (a) Depends on terms of liquidation/litigation trust agreement.
  - (b) Chapter 11 plan can permit bankruptcy court to retain jurisdiction (though subject to other defenses).

#### E. Why Do Litigants Seek Funding?

1. Maximize value of litigation claims for benefit of creditors.
2. Funding may not be available from traditional sources (debtor's assets, secured creditors or other creditors) because:
  - (a) Debtor and its estate may have few traditional assets remaining/available to monetize to fund litigation.
  - (b) Secured creditors may not be interested (particularly if litigation will primarily benefit unsecured creditors or others) or may have already been paid in full and be out of the bankruptcy case.
  - (c) Other creditors may not be in a position to provide litigation funding (e.g., environmental creditors, retirees, corporations that do not typically make these types of investments, or many creditors holding small claims).
  - (d) Debtor would prefer to use remaining/available capital and/or assets for other business purposes.
3. Generally non-recourse — no downside to borrower if it loses litigation.
4. Minimize difficulty of locating/engaging contingency counsel.
5. Provide for earlier distributions to creditors.
6. Create efficiencies and alignment of interests.

#### F. Why Provide Funding?

1. Funding/purchasing/trading litigation claims — possible logical next step for claims traders or other investors who traditionally have purchased/traded bankruptcy claims.
2. Court approved and supervised.
3. More efficient and timely resolution of litigation due to more appropriate alignment of interests between plaintiff and its counsel.
4. Return on capital:
  - (a) Returns largely untethered to wider markets.
  - (b) Pension funds, university endowments, family offices, etc. have invested.

## G. How to Become a Litigation Funder

1. Litigants or their counsel often will market the investment opportunity.
  - (a) Established players in this field.
  - (b) Investment firms interested in alternative investments/opportunities.
  - (c) Attorney referrals.
  - (d) Brokers/investment bankers.
2. Potential funders must diligence the litigation.
  - (a) Evaluate the merits of the underlying litigation claims and appropriate measure of damages.
    - (i) In-house.
    - (ii) Consult litigation counsel.
    - (iii) Consult experts.
  - (b) Assess additional factors such as:
    - (i) Litigation expenditures (including volume of discovery).
    - (ii) Availability of insurance to defendant.
    - (iii) Jury vs. bench trials.
    - (iv) Likely duration.
    - (v) Probability of one or more appeals.
    - (vi) Collection risk.
      - (1) Ability to satisfy judgment.
      - (2) Foreign enforcement risks.
      - (3) Priority encumbrances.
      - (4) Potential bankruptcy filing.
3. Structure, negotiate and document the financing:
  - (a) Percentage recovery of litigation proceeds or multiple of amount invested.
  - (b) Interest rate (if investment is structured as a loan or after some specified period of time).
  - (c) Repayment terms, timing and process.
  - (d) Maturity date, if any.

- (e) Budget (pre-approval by, or consultation with, funder?).
  - (f) Notifications/updates.
4. Court approval (if necessary).
- H. Issues for Consideration
1. Champerty
- (a) Common law doctrine (codified in some states) aimed at precluding frivolous litigation by preventing the “commercialization of or trading in litigation.” *Bluebird Partners v. First Fidelity Bank, N.A.*, 731 N.E.2d, 581, 582 (N.Y. 2000).
  - (b) See, e.g., New York Judiciary Law § 489(1): “... no corporation ... shall solicit, buy or take an assignment of ... a bond, promissory note, bill of exchange, book debt, or other thing in action, or any claim or demand, with the intent and for the purpose of bringing an action or proceeding thereon.”  
  
Safe harbor exception: New York Judiciary Law § 489(2): 489(1) “shall not apply ... if such assignment, purchase or transfer ... [has] an aggregate purchase price of at least five hundred thousand dollars ... .”
  - (c) Litigation funding generally not champertous if there are limits on funder’s ability to:
    - (i) Influence/control the litigation and strategy.
    - (ii) Hire/terminate counsel.
    - (iii) Make settlement decisions.
2. Privilege/Work Product/Confidentiality Issues
- (a) Risk that sharing information with third-party litigation funder waives attorney-client privilege and work-product protections.
  - (b) May limit the diligence that funder can conduct, but funder can receive documents that are not privileged and/or will likely be disclosed to the adversary in discovery and receive updates that are publicly available or already disclosed to the adverse party.
- I. Case Study: Motors Liquidation Avoidance Action Trust (Bankr. S.D.N.Y.)
- 1. In 2016, MLAAT required funding to continue to pursue \$1.5 billion avoidance action.
  - 2. Negotiated private litigation funding arrangement and sought court approval.
    - (a) \$15 million proposed investment by funder.
    - (b) Only terminable if existing DIP lenders were to provide funding on terms materially more favorable to MLAAT.
  - 3. DIP lenders offered alternative funding deal.

4. MLAAT then sought and obtained approval of \$15MM-facility from DIP lenders.
5. In 2017, MLAAT required additional funding to continue litigation.
6. MLAAT entered into private capital provision agreement with litigation funders.
  - (a) Up to \$15 million investment.
  - (b) Second lien (behind DIP Lenders) on proceeds of litigation.
  - (c) Subject to court approval (hearing scheduled for June 30, 2017).

J. Case Study: *In re Magnesium Corporation of America* (Bankr. S.D.N.Y.)

1. Facts:

- (a) Chapter 7 trustee for MagCorp won \$213 million fraudulent transfer judgment.
- (b) Defendant appealed.
- (c) Trustee had less than \$1 million on hand for appellate litigation against well-funded defendant.
- (d) Trustee conducted auction for portion of litigation proceeds — strategically timed to occur between filing of litigant’s opening appellate brief in March 2016 and oral argument in the fall of 2016.
- (e) Auction process resulted in funder paying approximately \$26 million for approximately \$50 million-share of judgment (funder to receive repayment after payment of certain other commissions and financing arrangements).
- (f) Under funding agreement, Chapter 7 trustee retained sole authority to make decisions regarding settlement and pursuit of litigation without interference/supervision/management/control from funder.

2. Outcome for litigant:

- (a) Obtained highest/best offer for small stake in litigation proceeds.
- (b) Obtained guaranteed minimum recovery for creditors.
- (c) Hedged against exposure to loss on appeal.
- (d) Enabled trustee to defend and prevail on appeal to the Second Circuit.

3. Outcome for funder:

Nearly 100 percent return on capital within six months of providing funding.

K. Case Study: *In re DesignLINE Corp.* (Bankr. W.D. N.C.)

1. Facts:

- (a) Pursuant to debtors’ Chapter 11 plan, debtors’ assets (including causes of action) were transferred to liquidating trust.

- (b) Post-effective date, liquidating trust sued 18 former officers and directors on numerous causes of action.
- (c) Liquidating trustee retained counsel on contingency basis.
- (d) A year in, with discovery barely underway, costs had become “monumental” and counsel was unwilling to continue solely on contingency basis.

2. Litigation Funding Terms:

- (a) Liquidating trustee sought approval of arrangement with litigation funding company under which a portion of the proceeds of the litigation was sold to funder in exchange for funder advancing legal costs and expenses.
- (b) Liquidating trustee required to make regular (quarterly) funding requests, which funder could deny.
- (c) Liquidating trustee required to seek funder’s input on and approval of strategic decisions.
- (d) Funder consent required to increase litigation budget, select replacement counsel.
- (e) Funder retained right to cut off funding.

3. Court Holding:

- (a) Bankruptcy court for W.D.N.C. refused to approve funding arrangement.<sup>1</sup>
- (b) Funding arrangement violated North Carolina’s public policy/champerty law because funder retained excessive control over the litigation:
  - (i) Funder could cease providing additional funding at any time as the liquidating trustee had to seek additional funds on a quarterly basis, giving the funder an opportunity each time to decide whether it wanted to continue funding.
  - (ii) Liquidating trustee had to obtain funder’s approval to increase the litigation budget, which directly affected how the claims would be prosecuted.
  - (iii) Liquidating trustee had to consult with the funder to change attorneys.
- (c) Bankruptcy court had not seen this type of arrangement before and was skeptical that such arrangements were widespread because of scarcity of reported decisions.
- (d) Additionally, bankruptcy court had previously required that all terms of funding agreement (other than proposed litigation budget) be made publicly available.

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<sup>1</sup> See Order Denying the Liquidating Trustee’s Motion to Obtain Litigation Financing, Jan. 20, 2017, No. 13-31943.

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# **PowerPoint Presentation**

































































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