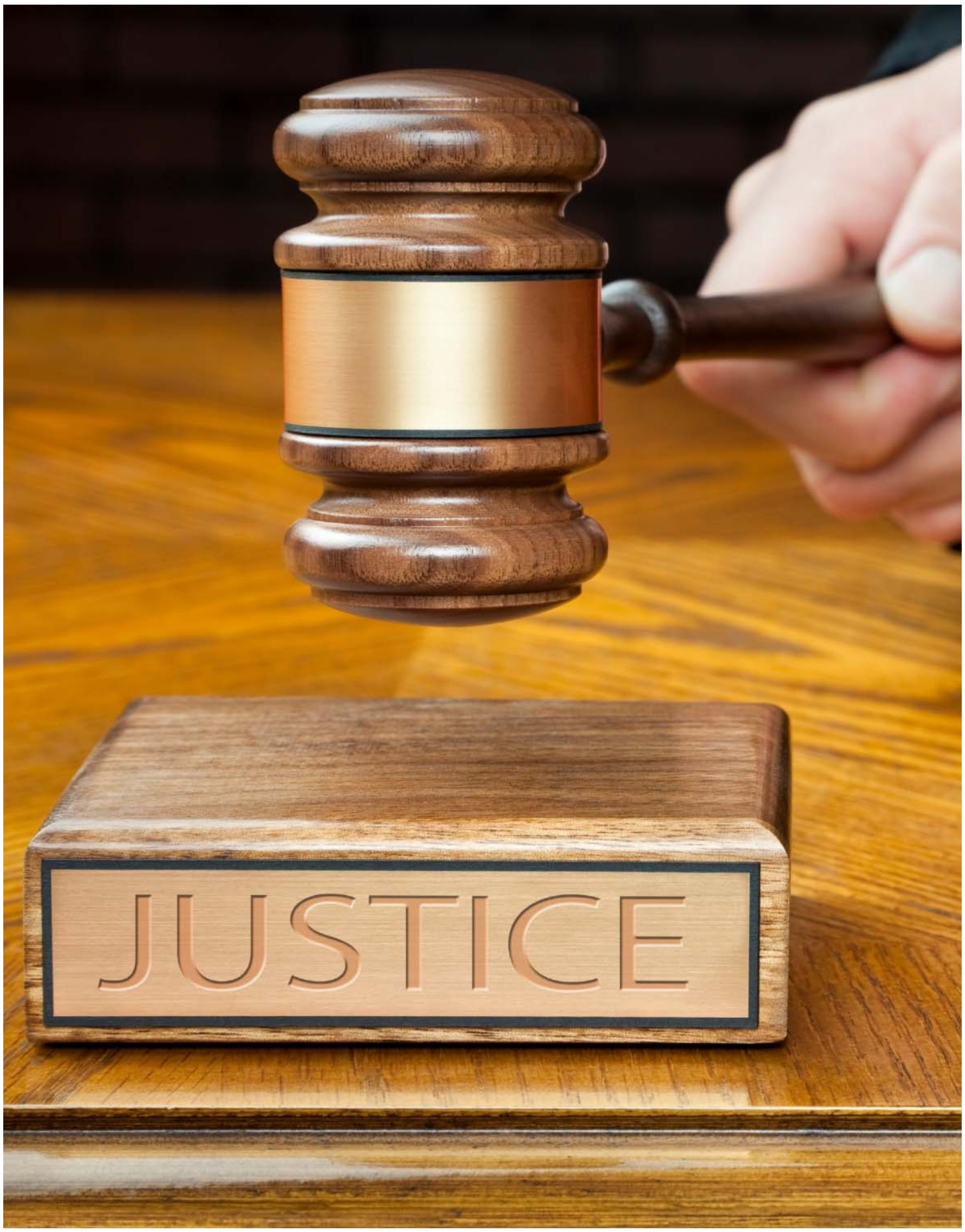
WORLD RECOGNITION OF DISTINGUISHED CONTRIBUTIONS TO THE RULE OF LAW: HARVEY MILLER & THE RESTRUCTURING PROFESSION

DIRECTORS ROUNDTABLE
Fall 2013
New York, NY



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Corporate restructuring, including workouts, recapitalizations and bankruptcy, has become a dramatically important factor in the economy, investments, employment, and the well-being of the community. In recognition of our distinguished guest of honor's accomplishments in his personal career and his leadership in the profession, we are presenting this world honor to Harvey Miller of Weil, Gotshal & Manges LLP. His career is an inspiration, not only for the practice of law, but also as an example of exceptional contributions to the broader community and rule of law. We also wish to recognize the achievements of the restructuring profession, and the many attorneys, advisors, investors and others who have made it so important. Mr. Miller's address will focus on key issues facing the profession, followed by a roundtable discussion of individual topics with the distinguished panelists. The transcript of this event will be made available worldwide in electronic copy.

The Directors Roundtable is a civic group which organizes the preeminent worldwide programming for directors and their advisors. Our activity in this important field began when our chairman organized a program 20 years ago honoring the great founders of the modern Bankruptcy/Restructuring Bar in Los Angeles, in conjunction with the National Bankruptcy Conference.

GUEST OF HONOR

Harvey R. Miller	Partner, Weil, Gotshal & Manges LLP

DISTINGUISHED PANELISTS

Jeffrey Aronson	Co-Founder, Centerbridge Partners
D.J. (Jan) Baker	Partner, Latham & Watkins LLP Chairman, American College of Bankruptcy
Antonio Alvarez	Co-CEO, Alvarez & Marsal
Alan Kornberg	Partner, Paul, Weiss, Rifkind, Wharton & Garrison LLP Chair, Bankruptcy and Corporate Reorganization Dept.
Jack Friedman (Moderator)	Chairman, Directors Roundtable

(The biographies of the speakers are presented at the end of this transcript. Further information about the Directors Roundtable can be found at our Website, directorsroundtable.com.)

TRANSCRIPT

MARCIA GOLDSTEIN: Good morning. I'm Marsha Goldstein, Harvey's partner. I want to thank you all for coming to this breakfast event and panel this morning. I would like to introduce Jack Friedman, who is the Chairman of the Directors Roundtable. He spent a lot of time organizing this and working with the panel. I'm very pleased that Jack had the idea to put this honor together for Harvey, and to bring this very esteemed panel together for our event this morning. So without further ado, I'm going to introduce Jack, who will introduce everybody else. Thank you.

JACK FRIEDMAN: Good morning. I am the Chairman of the Directors Roundtable, and I'd like to give you a moment of history. In the early '90's, I was listening to a lecture on the new Article 9 revision. Earlier, Grant Gilmore had been my professor. I went back and talked to leaders in the Bankruptcy Bar, and another professor of mine, William Warren at UCLA. I said, "Why don't we invite the National Bankruptcy Conference to schedule a meeting here in L.A. in honor of great founders of the modern Bankruptcy Bar?"

As a result, we had 550 lawyers at the Beverly Wilshire Hotel for a program in honor of these distinguished people. One of the commentators was Professor King. The panelists at that program, 20 years ago, were Harvey, Leonard Rosen, Doug Baird and Pat Murphy. They had a great discussion and we have many fine memories of the program. In particular, when Harvey and Leonard get together, they have a vigorous interaction, and so that was very entertaining and interesting. Harvey made a witty statement about how useful *Collier on Bankruptcy* is. It can be cited on both sides of any proposition.

It was a great, historic event to recognize these people. Now, after 20 years, we thought that it was timely to have a program not only recognizing the achievement of a great figure like Harvey, but also the profession as a whole. Everyone who is part of the profession should feel that we're honoring you, as well as honoring Harvey. The transcript of this event will be edited and made available electronically to 150,000 leaders nationally and globally.

Without further ado, I'd like to invite Harvey to make his opening remarks. Then we will introduce the Distinguished Panelists, and have a very interesting Roundtable discussion of the past, present and the future of the profession, and other issues. Thank you very much.

HARVEY R. MILLER: Good morning. It's always gratifying to be honored, although sometimes a daunting task is how to express appreciation without driving an audience into a stupor of intense boredom. My wife told me that such remarks should follow the three B's: you should Be sincere, Be simple, and Be gone. I'm not sure of my ability to implement those instructions with a captive audience.

As to today's honor, I am very appreciative, and I will not challenge the supreme wisdom exercised by the persons giving me the honor. Whatever I have achieved, I owe to a great many persons who gave me total support and comfort to overcome my own inadequacies; the list is much too long to recite it.

John Kennedy was once asked how he became a hero. He replied, "The Japanese sank my PT boat." I sometimes have similar thoughts about my own supposed prominence. Michael Lewis gave a graduation address at Princeton three years ago, in which he talked about the serendipitous events of life, and how you have to be lucky, but you also have to be able to seize the opportunity.

I first realized I might have achieved the unique status in the world of restructuring when the *Wall Street Journal* did a front page story about me, above the fold, entitled "Dr. Doom". At that time, my mother was in a nursing home, and she read the *Wall Street Journal*. I was afraid that when she saw that title, she would be very upset. So I called the nursing home and got her attendant. I asked if she had seen the *Wall Street Journal*, and the attendant said, "Oh, yes, she's been running around the nursing home in her little electric cart, telling everybody, 'My son finally made it—he's a doctor!'"

It's been a long time since I found out where the Bankruptcy Court was located. I have watched what was an arcane practice area develop into a vibrant, wide-ranging discipline that was to become part of the fabric and profit margin of every major law firm. It also produced a cottage industry of financial advisors and workout experts—not all of whom have been particularly beneficial to the process.

It's been an interesting journey for someone who started out as a complete neophyte with no interest in bankruptcy or restructuring, became a creditors' attorney, and then assumed the greater challenge of representing debtors. It gets me to the real subject for this morning's program: Is the reorganization paradigm still alive? To quote Yogi Berra, "The future ain't what it used to be."

I note that as part of this breakfast, CLE points are available because of the materials furnished, and I have just reviewed the listed materials, many of which caused me to spend many hours of intense work. While I am pleased that so much of my work is a part of the materials, I am reminded of my early experiences as a young attorney waiting my turn to argue my first case in the United States Court of Appeals for the 2nd Circuit. The case before mine involved the Securities Act of 1933, and required disclosure—about required disclosures. Henry Friendly, the brilliant 2nd Circuit judge, was presiding. The defendant—a noted large, iconic American corporation—was represented by Professor Louis Loss of the Harvard Law School—the country's outstanding scholar on securities laws.

As Professor Loss was making his argument, Judge Friendly interrupted and said, "Professor—I have just read your most recent *Law Review* article, and I don't understand your argument, as it contradicts every principle expressed in your article." Professor Loss responded, "Judge Friendly, it's important that you and the panel understand that I think much more clearly when I get paid for it!"

My caveat is that I wasn't paid for the production of any of those materials!

So, let's talk about the evolution of the restructuring and the reorganization practice. A long time ago, when I first started, the Federal Bankruptcy Court was not a desired place to be. Essentially, everything was worked out in what was called the Common Law Composition. The debtor had absolutely no economic power, because there was a race to the courthouse, and as long as the creditors were cooperating, that was fine. A rogue creditor could start a proceeding, get an execution and start collection process, and that was the end of the restructuring.

In the 1960's, an evolution began when people began to realize—myself among them—that there was a Bankruptcy Act that gave a distressed debtor the opportunity for time to try and work out a reorganization. At that time, the Bankruptcy Code contemplated what was called "Chapter XI"—Chapter 11—and Chapter X, in Roman numerals. The big advancement in 1979 was changing the Roman numerals to Arabic numerals.

In any event, the concept of going to the bankruptcy court, and getting protection with all the parties so that you could work out a restructuring, began to take hold in the 1960's, and what we did in the 1960's—those of us that were in the field—we expanded Chapter 11—which was intended to deal with small mom and pop businesses. We took that Chapter 11, with the help of some referees in Bankruptcy, and we expanded that so that commercial organizations of a large size could end up using the Chapter 11 process over the objection of the Securities and Exchange Commission, and restructure and reorganize and rehabilitate under that chapter. There was a lot of litigation about that, but the virtue that occurred was, everybody agreed that reorganization was better than liquidation. Liquidation produced abysmal results, whereas a rehabilitation process returned to creditors and maintained jobs and returned to the debtor an opportunity to get back into the economic world. That segment led to what ultimately became Chapter 11 of the Bankruptcy Code that was adopted in 1978 and became effective in 1979. When that code was adopted, the basic premise was that reorganization is a good thing; the purpose of reorganization is to rehabilitate a business, make it economically viable; and provide employment. In the initial cases that arose after the effective date of the Bankruptcy Code, that was the prime concert—rehabilitation, provide economic viability, provide jobs, and go back into the market and compete on an effective basis.

During the course of years since 1979, another principle arose, and that principle was maximization of the recovery for creditors. Very often, these two principles are in conflict with each other. That conflict persisted until 1991, when there was a major change in the rules. That major change was the freedom to trade claims. The trading of claims basically changed the administration of Chapter 11 cases, as you never knew at a particular time who were the actual creditors. The free exchange of claims brought a whole new element into the Chapter 11 arena. You could essentially have a handshake deal with a committee, and the next day, you would find out that every committee member had sold his or her claims, and you had a whole new crew with which to deal with different objectives.

The evolution of claims trading, and the introduction of hedge funds and private equity investors into the bankruptcy process, was a major change. In the early part of my career, when assets of a debtor were put up for sale, basically nobody showed up. Suddenly, the Bankruptcy Court became an auction process. In more recent years, we have seen the perennial visits of Carl Icahn and even Warren Buffett to the Bankruptcy Court.

So the issue that was being debated in the practice was, how do you preserve going concern values? Going concern values were preserved through reorganization. Liquidation gave you compelled, coerced pricing. Now, suddenly, because of the advent of traders and hedge funds the Bankruptcy Court became like an auction house. Suddenly, people began to think, “Maybe we are getting going concern values in bankruptcy auctions.” That was when Warren Buffett and Carl Icahn were competing with each other to buy the assets of a particular debtor. The result was that people saw going concern values being realized in Chapter 11 cases, and concluded that we don’t need this long, drawn-out process.” Some Chapter 11 cases took many years—LTV took six years; Johns Manville took four and a half years.

If you could realize the going concern value of the assets quickly, it was to the benefit of all—except there was no reorganization, essentially. That tension has permeated the bankruptcy process, the reorganization process, for the last 10 to 15 years. Value maximization, just for the recovery of claims, has changed the paradigm to the point that a number of academics have written articles, “Is there any need for Chapter 11 anymore? If you can achieve going concern values in Chapter 7 or Chapter 11 cases, why do you need a process that may extend over years? It’s good for creditors; it’s good for the economy; so is there really a need for Chapter 11, and is the reorganization paradigm still alive?”

That’s what this panel is going to talk about. Jack, I’m going to turn it over to the panel. Thank you all very much for attending.

JACK FRIEDMAN: I’d like to briefly introduce the panelists, and then we’ll get started with the discussion. On our Distinguished Panel we have Jan Baker from Latham & Watkins. He is the Chairman of the American College of Bankruptcy. Antonio Alvarez is the Co-CEO of

Alvarez & Marsal and Jeff Aronson is the co-founder of Centerbridge Partners. Alan Kornberg is a partner at Paul, Weiss, and chair of their Bankruptcy and Corporate Reorganization Department.

We will start with questions for Harvey and we will follow with the Roundtable discussion.

One of the big issues is the changing balance between the different parties, whether it's the debtor vs. creditors or new investors buying claims vs. the established parties. Could you give us a sense of how all these parties are dealing with each other? There was a time when the secured creditors would dominate the field and everybody else would walk away. Now, it's different.

HARVEY R. MILLER: Okay. What has happened over the years is first a democratization of credit. Access to credit became widespread. If you tell a real estate developer that he can borrow, it doesn't make any difference where he's building—he will borrow. He will try to develop, and if he fails, he fails. What really happened, the democratization of credit expanded the use of Chapter 11. During that process, the Bankruptcy Reform Act of 1978, which resulted in the adoption of the Bankruptcy Code, was really directed to businesses that relied upon unsecured credit. That was the objective.

Most business entities borrowed money on an unsecured basis. What has happened since 1979 is business has changed. The way we finance businesses has changed. Essentially, today, in almost every case, the credit is fully secured. All of the assets of the debtor are subject to liens and security interests. There is a belief among some that secured creditors have greater prerogatives under the Bankruptcy Code, and perhaps even have a constitutional right to greater protection.

That transformation from an unsecured credit environment to a secured credit environment has put enormous pressure on the reorganization process, because secured creditors want to realize on their collateral, or they want to foreclose and take control of the premises. That has expedited the administration of Chapter 11 cases. For example, if you take one discipline—retail—how many successful retail Chapter 11's have there been in the last five years? Practically none. Why? Because for the first time, ten or more years back, store inventory became subject to liens. It used to be that a retailer would tell its lenders, "I cannot put liens on my inventory, because I won't be able to get credit from my suppliers, because they look to the inventory as security for their payments."

When the course of business changed and retailers bought almost all of their goods offshore, that became letter of credit financing, and they had no excuse any more. The banks found out, or the lenders found out; there was a thing called the Uniform Commercial Code, and it was really very easy to get a security interest.

So now, a retailer files a Chapter 11; generally, the secured creditor is undersecured; the collateral doesn't equal the value of the loan. The secured creditor looks at the collateral, and he doesn't see blouses and skirts; he sees dollar bills. He's got to liquidate that inventory. Unfortunately, under the 2005 Amendment to the Bankruptcy Code, the debtor-in-possession only has 210 days to assume or reject executory leases of nonresidential real property. The secured creditor doesn't want to get that collateral and take it out of the stores and liquidate it. He wants to liquidate that collateral in the stores. It's a staged liquidation.

Generally what happens is that the secured lender, who turns out also to be the debtor-in-possession financier, will put conditions on DIP financing: either you refinance me out in 60 days or 30 days or you have to start the liquidation process.

If you go back to 2002, from 2002 until 2007 almost every single retailer, with the exception of one—which was a family-run operation—was liquidated. Circuit City, all of those companies, the pressure from the secured creditor just ended the Chapter 11.

That leads into the other prospect of debtor-in-possession financing. With all of your assets liened up, it's very hard to find a debtor-in-possession financier other than from the existing financiers.

Debtor-in-possession lending agreements have become somewhat onerous as we've gone on. The environment has changed from unsecured credit to secured credit, different ways of doing business. Also, in the larger Chapter 11 cases, we now live in a smaller world. We live in a global economy. When a large entity fails, it has international complications. On top of that, you have the debt traders, the hedge funds and the private equity funds. There is a big business in trade claiming. Those people who are trading want to get a return on their investment, and they want it quickly.

All of the pressures have changed. The 2005 Amendments to Chapter 11, to the Bankruptcy Code, created an abundance of safe harbors. You could say that since 1979, there has been a constant erosion in the ability of debtors to maintain and persist in Chapter 11. I don't think anybody in the panel will disagree with that. If somebody does, I will dump them with coffee!

JACK FRIEDMAN: This is the famous negotiating approach of Harvey. If you're in a tough negotiation, if you want to get out of the room, you'd better cooperate!

HARVEY R. MILLER: Well, we've created a situation where, generally, the secured creditor is undersecured, so you have all these bondholders and other creditors who are looking forward to a zero recovery. They're not very happy with the zero recovery. What is the philosophy that follows? Well, the wheel that squeaks the loudest will get something! So what we see is every creditors' committee in an undersecured situation, where there's nothing for undersecured creditors, there must be something wrong with the secured creditors' position. The liens can't be right. There must have been undue influence. They must have been complicit with the debtor.

We now have these cases where there's a lot of litigation. Litigation is very expensive, and it delays cases. But you see more litigation in the Bankruptcy Court today challenging liens, challenging the lenders, because there's nothing for them and there's nothing to lose by doing that.

JACK FRIEDMAN: I have one more question. Regarding the Internet and Internet-based companies, if there's a shakeout in the industry what is left? They have their name; their network of customers, the millions of people who go for free to their web site; the IP.

HARVEY R. MILLER: You have a lot of intangible assets, but you may have assets in broadband that are very valuable. There was a communications company restructure—NextWave, which went on for years and years because it owned a lot of the broadband. That was a real asset. But in many of these cases, there are no assets.

Think back to the dot-com era. In the early '90's, we had a rush of dot-com companies. They were basically companies that never were in business; they sold stock and they sold bonds on the expectation they would be in business. All those cases ended up with zero recoveries for everybody. You're dealing with an industry that basically doesn't have tangible assets, but may have a network and may have FCC licenses that are very valuable. That can be liquidated, although transfer of an FCC license is subject to approval by the FCC. Sometimes that can take a long time, because you've got to go through the anti-competitive business. In some cases, that's taken a year or more to get the license transferred.

JACK FRIEDMAN: I'd like to turn to the panelists. You may be on both sides on different cases, but which of you deal more with the secured creditors?

D. J. (JAN) BAKER: Jack, I think creditors do deserve some representation! But I regret to say, I do not have the privilege of representing them very often.

HARVEY R. MILLER: The best of all things, Jack, is if you can represent both sides; the cases go much faster!

JACK FRIEDMAN: Let me turn to the financial side. Jeff, tell us about the role of your company.

JEFFREY ARONSON: When I heard Harvey start to discuss private equity funds and hedge funds, I thought, "I have a conference call!"

We are an investor in a lot of Chapter 11's, both by purchasing claims, as well as by investing new money. I wrote down what Harvey said at the beginning of his remarks—there's a tension between reorganizing businesses and maximizing creditor recoveries. I completely agree with that. These cases, as we all know, are extraordinarily complicated.

What we try to do as a firm—there are lots of firms that invest in claims or what will fund bankruptcy plans—is to square the two. We're looking to maximize creditor recoveries by reorganizing and rehabilitating the business. That's a different notion than coming in, buying claims, and saying, "Let's go out and liquidate the business; let's sell everything now." There are some investors who do that but that's not what we try to do. What we try to do is go in and purchase claims. I would argue, purchasing claims sometimes can expedite a process. If you're dealing with a lot of secured lenders—as Harvey points out, most lenders these days are secured—if we were to buy a secured lender's claim, we will convert it to equity in the blink of an eye, *if* that will help reorganize the business and also maximize creditor recoveries. I would also argue that for a lot of traditional banks, that's an anathema to them. Equity, no way, they want zero interest in equity.

What we will try to do after investing in the process, either through claims and converting it to equity, or by just injecting new cash directly into the business as part of a plan, is try to rehabilitate the business, grow the business—which ultimately will lead to higher recoveries for the former creditors and the current equity holders.

It's very complex, and it really depends upon the circumstances or the particular deal.

JACK FRIEDMAN: Are there particular ways in which creditors obtain cents to the dollar they're going to get back? We could talk about whether it is through rehabilitation or buying assets. Are there other ways in which any group of creditors might enhance value? You mentioned one, which is that you're more flexible on secured claims, for example, which obviously could be good. Harvey mentioned financing. Are there other ways in which creditors can actually try to help?

JEFFREY ARONSON: You can do it by financing a business out of Chapter 11. We did this six years ago with a really large auto parts manufacturer called Dana Corporation. We didn't own a single claim, and the company was in dire straits. There was a lot of battling among creditors; big union claims—big union issues, I should say; underfunded pension plans and OPEB plans. We came in as part of the process, and funded cash into the business. It was used to defease a lot of the claims for the unfunded trusts. We became a large equity owner in the business, and we ended up replacing the entire management team. We worked for six years, in partnership with labor, to fix the business, and ultimately increased the value of the business considerably. We just exited our position within the past few months.

HARVEY R. MILLER: This is outside of bankruptcy, Jeff?

JEFFREY ARONSON: No; it was part of bankruptcy. It was part of a plan which we funded, and then we came out of bankruptcy. We were the largest equity holder in the company.

HARVEY R. MILLER: What you have to take into account is that Jeff is an enlightened investor!

JEFFREY ARONSON: There you go! Because I've been well-schooled!

JACK FRIEDMAN: Any other comments about examples where the creditors had really helped the rehabilitation?

ALAN KORNBERG: Yes, I would say that it's pretty rare, at least with the investment funds that we work with, that somebody will look at a situation and say, "We'd really like to have a liquidation here." In my experience, that is a very unusual dynamic and quite rare. More often, it is as Jeff describes, where an investment fund will look at a business. They may throw up about the capital structure, but say, "This is a sound business, and with the right management, we really think this is a great investment." They bring to the table, as Jeff mentioned, lots of skill, but also very often significant capital, and can really promote and sponsor a reorganization, whether it's in or out of court, in ways that traditional banks and bondholders are just unable to do.

We've all seen situations where there have been intransigent creditor groups that have made reorganizations extremely difficult. I agree with Harvey. Sometimes you see litigation exploding on fronts that are really ridiculous; that threaten everyone's recoveries. In most situations, the arrival on the scene of new capital and new talent can be a very positive force.

D.J. (JAN) BAKER: There's one other thing, as well. Jeff mentioned, in Dana, they replaced the entire management. If you look at the record, Dana was actually an extraordinarily successful reorganization, coming as it did in the auto sector at a time when the entire industry was in a very deep ditch. There's always a tension between do you or don't you keep management. In many cases, while it may look brutal, the fact of the matter is—and this goes to an Ira Millstein issue—in an awful lot of bankruptcies, when you really look honestly at what's happened, you have to say that the board of directors has been asleep at the switch. There have been uncorrected problems; there has been a management team that has consistently made mistakes and not been held to account for it. In many of those instances, the company ends up in Chapter 11. Companies go into bankruptcy by and large either because of extraneous events—some litigation contingency, the collapse of a market, the failure of the technology, or something else—or they go into Chapter 11 because of management mistakes. One of the virtues, much as it pains me to admit it, of PE hedge fund involvement in the process, is when they come in and take over a company, as Jeff and his firm did in Dana, there really is a new broom that sweeps everything aside; they start over. Admittedly, you may lose some good people; not everyone is culpable. Putting in a new management team and a new board very often is an incredibly important part of the process of revitalizing a failed corporation.

HARVEY R. MILLER: That holds true no matter what the cause is of the bankruptcy?

D.J. (JAN) BAKER: No, I don't think so at all.

HARVEY R. MILLER: How's that any different than hedge funds, outside of bankruptcy, buying big positions in a company and demanding a change of management? I mean, to put the blame on management all the time—how about the lenders who lend to excess?

D.J. (JAN) BAKER: No, I don't blame management all the time. I'm just saying, there are instances in which management mistakes precipitated a bankruptcy. They need to be replaced in those instances. There are many Chapter 11s where you have a great management team; look at Russ Luigs in Global Marine. I don't think their management did anything wrong.

HARVEY R. MILLER: No, but there was pressure to replace the management in that case.

D.J. (JAN) BAKER: You helped fight it off!

HARVEY R. MILLER: Yes. You helped me, also! There's been an evolution, also, in the change of relationships. It used to be that a debtor had a relationship with its lenders. If they were banks, they tended to keep the loan on the books, to work with the debtor and to assist in the restructuring of the company. There are no relationships anymore; everything is on a pure money basis. While you have people like Jeff Aronson and Centerbridge, there are also rapacious investors. Nobody wants to make an investment and pay more than they have to pay, so they're looking for a return on investment. The more liabilities wiped out, and the cheaper the assets, the better it is for the investor. That creates a dynamic that really doesn't have much oversight. It goes through very quickly. It's very small groups; the whole administration is changed. We now have a system where we used to have a debtor and a creditors' committee, and they negotiated a plan. Now we have a debtor who is marginalized because, in almost every case, there's a CRO. What is a CRO? A dictator! No, a CRO is a Chief Restructuring Officer. There's no statutory basis for it; generally, there is no corporate basis for it. But the CRO is there to give confidence to the creditors. We don't deal just with the creditors' committee anymore, because now we have ad hoc groups. They don't like the word "committee," so it's an ad hoc group, or ad hoc constituents. In big cases, they multiply. When you take a look at the cost of these cases, you begin to wonder. This is an industry that is supporting a lot of professionals. That has changed the whole dynamic of what goes on. Maybe this is good—I'm not saying that it's bad. Change is good for the world. Maybe that's what the process should be. Maybe investors ought to be invited in very quickly and maybe there should be an auction and these cases move forward very quickly, instead of drafting them out.

ANTONIO ALVAREZ: Harvey, now that the word "CRO" has been mentioned, I think I should say something! We've maligned lenders; we've maligned management; so, we might as well malign CROs!

JACK FRIEDMAN: When you visualize a totalitarian dictator who terrifies everybody as soon as they hear his name, Tony is one of them!

D.J. (JAN) BAKER: Actually, I take exception to that. I've never viewed Tony as a totalitarian dictator. I've always viewed him as a benevolent dictator!

ANTONIO ALVAREZ: Between Brian and I, one's totalitarian, one's benevolent. Figure it out.

Look, before I weigh in on the discussion, I just wanted to say, Harvey, that we at our firm are delighted that we were invited to do this. So before I argue with you, I want to give you some props, as my daughter would say. Our relationship with Harvey goes back quite a long way. Personally, I got my schooling in the bankruptcy world in a case called *W.T. Grant*, and there are some faces in here that were in that case then, like Marcia. I was a young pup, admiring these two superstars, Leonard and Harvey. That was the last debtor case of Leonard Rosen and it cured him of debtor representation!

HARVEY MILLER: That was the first and the last! He swore he'd never represent a debtor again!

ANTONIO ALVAREZ: When we formed our firm, our first client was Timex, and we recommended to our client to hire Harvey in a firefight. We were able to avoid Chapter 11, and that company is quite healthy today. Finally, fast-forward to today—my firm and Harvey have been working side-by-side on *Lehman*. So, that's all the good that you're going to get out of me, Harvey!

As far as what you are talking about, I'm reminded of what happens when we get old—we pine for the past. The reality is the reality: we have what we have. No talking about the "good old days" is going to bring back the good old days. There was a time when there was no trading of claims; banks did not want to take equity. There was a big pressure to keep companies alive. Then came trading of claims and changes in the Bankruptcy Court, and it puts a lot of pressure on management or the professionals around them to really communicate wisely the alternatives involved. You cannot put creditors in a one-size-fits-all. You cannot say "creditors are bad" for the answer, or "management is bad" for the answer. If you give me a case, I'll tell you which one was the case. I remember a case called *Phar-Mor* where there was a creditor who bought a claim, thinking that he could get a litigation claim over a hundred cents. It cost us 18 months. That was an unenlightened creditor. In the case of *Warnaco*, the creditors did not know what they wanted to do, and until we exhausted an M&A, there were two alternatives—M&A the company, or standalone. Management thought that the M&A value would not fetch much, because there were a lot of bottom trawlers trying to get a company cheap. I have a belief that there was more value in the future. There were people in the creditors' committee that bought in at a cheap price and wanted to flip. They didn't really care; they just wanted out. We had to invest seven or eight months to go through an M&A process to get the price, and *then* the creditors decided to go standalone. That company today, Warnaco, is a pretty successful company, traded on the stock exchange, had six times improvement over the price when they exited.

So I wouldn't say the creditors were irresponsible on that; the creditors needed to be informed as to the value that's awaiting them on the alternatives that are there.

The more things change, the more things remain the same. There are always three alternatives to any bankruptcy: you liquidate, going concern, or you M&A. Invariably, there is always some concern about existing management, because that's the team that brought you there. A good CRO would work with a CEO, whether it's existing or new, to rehabilitate and regain confidence of the constituencies. A good CRO communicates the options well.

Regardless of how good you are, in fact there is a reality that creditors who buy in may have different agendas, and that is the main reason why cases drag. There are creditors who go in there to flip during the pendency of the bankruptcy. There are creditors who may want to lend-to-own. Jeff, you would be one of them. Cases where there is no fulcrum control that evolves from this trading tend to take longer. Cases where somebody starts to generate enough position to drive a case, you tend to get to an answer.

It is a reality. I don't think anybody's changing the Code or trading is going to stop any time soon; so we are where we are. I do agree that there is more pressure today to do M&A transactions when they come in, that it is tougher to do a rehabilitative standalone than, say, in the past. But you cannot characterize what is happening with the one-size-fits-all, because not all investors and traders are created equally.

HARVEY R. MILLER: That's why the bankruptcy law is unique, because it is supposed to reflect the circumstances. Certainly, creditors have a great interest in return on their claims, sometimes a great interest in seeing reorganization. But you do have a change that's never going to go back to where it was, Tony, in which we started with the proposition that every debtor was entitled to a reasonable period of time to rehabilitate itself. That concept is basically dead, unless you have a debtor who happens to be in the chemical business and has all kinds of environmental problems that nobody wants to deal with. So work it out in Chapter 11. But in most cases where the assets are fairly liquid, they're going to move quickly, and that may be a good thing. Change is good. We have to take into account that we have a global economy now, and there are lots of different relationships that have to be taken into account. But as you say, some lenders are in for flipping; some lenders are in for a quick return. That's okay; that may be fine. The question is: "Who's governing over this whole situation? What is the role of the debtor-in-possession?" The role of the debtor-in-possession in today's world is very ambiguous, because the debtor-in-possession actually has no economic power. So you're dealing with a small group of distressed debt traders, perhaps, who are really directing the process. You have all those creditors out there. Who is providing the objective, disinterested approach? I'm not sure there is any of that. Maybe you don't need a debtor-in-possession; maybe there ought to be a trustee in every case. These are things that people are looking at in connection with possible reform of the Bankruptcy Code, and there are problems as to the virtue of reorganization, if you can realize, essentially, going concern value in a different method, in a different process. That's the issue.

JACK FRIEDMAN: Let me ask all the panelists here, what are some lessons learned? Beyond legal issues or repositioning the capital structure, are there guidelines or wisdom about the question of who you select with what powers, in order to actually improve a company?

ALAN KORNBERG: The process has become, frankly, far more professionalized. First of all, as Jan said, every investor is different. A lot will be attracted to situations—and we've seen this many times—because of the quality of management. The company may be distressed because of completely external reasons, but the investors are attracted to the company because of management and its skill.

What we find increasingly in large matters is that if you need additional resources, you go about it the way major corporations do; often, professional search firms are engaged; they may be looking to fill critical positions within the corporation, and also increasingly, to help replace directors on the board. In my experience, it's been a much more professional approach to dealing with the question of, is management adequate, does the corporation have the correct board to lead it out of a restructuring. A lot of time and attention is paid to that.

HARVEY R. MILLER: Well, when you say "a lot of time and attention", generally, in the first week or 10 days of a case, you're faced with the, "We don't like management. We don't have any confidence in management. We want management replaced." I get a little nervous when you say, "Alan, replace directors. You're not stockholders; you don't have the right to direct the change in directors."

ALAN KORNBERG: Well, you might be under the plan, Harvey.

HARVEY R. MILLER: We get to a plan then we've made a lot of progress in the case. The question is, how do you evaluate management? How do you know, within a very short period of time, whether management's competent, incompetent; what the process is? It all goes back to what caused the bankruptcy? What caused the problem? Is it excessive leverage? What caused that leverage? Was there an extraneous event, the markets fell; there was no access to any more credit for several months. Does that mean, automatically, that management gets pushed out? Management didn't contemplate that Lehman was going to fail. Was that an error in judgment? Maybe. Maybe they should go to jail. But you've got to have time to evaluate that, and that really doesn't happen.

ALAN KORNBERG: You shouldn't necessarily assume that the first interaction that the creditors have had with management is in the first 10 days of the case. It reminds me of what we used to see years and years ago, which is companies needed waivers; the banks would dig in and really take a look at what was going on. It wasn't uncommon in a completely pre-petition environment for the banks to say, "We're going to give you the waiver, but we really think that the financial reporting ability of this company is quite weak, and the financial controls are weak, and we'd like to see a new CFO." It's not necessarily true that the company files and in six minutes, you're making a decision that you hate management and they have to go. Often, these are folks that have had a long relationship with management and are in a position to assess their performance.

JACK FRIEDMAN: Who makes the decision, the judge, in the end?

HARVEY R. MILLER: No, not really.

JEFF ARONSON: No, ultimately, it'll be the new owners.

D.J. (JAN) BAKER: During the case, Jack, it's the board. Harvey has been, probably, the most eloquent spokesman for the pressure that the traditional Chapter 11 process has been under from creditors. It's absolutely true. But at the end of the day, if you have a board of directors that is willing to think about fiduciary duty, think about who they owe that duty to, and then make their best independent judgment as to how to maximize value for all parties, that's your best hope of staving off precipitous creditor pressure.

We're now in company-side engagements, we're increasingly finding pressure from creditors very early in the case. "Get rid of the board. Let us pick a new board. Equity is out of the money. You've got a bunch of people who were picked by old equity; they shouldn't be determining the future of this case." As Harvey said, they're creditors—they're not shareholders. That's one of the emerging battlegrounds in Chapter 11.

JACK FRIEDMAN: Who makes the decision to get replacements if the judge says he wants a new board?

HARVEY R. MILLER: It doesn't work that way, Jack. It's really a negotiation with the major creditors. I represented a company called Sunbeam, and Sunbeam got into trouble because of a guy named "Chainsaw Al", who just stripped the company. Finally the board replaced him and a new CEO came in, but it was a CEO appointed by the existing stockholders. It ended up that Sunbeam had to go into Chapter 11. A lot of the debt was held by three major banks, and we would have these endless meetings with the banks and their advisors, about "we don't think management is doing well." It was a very difficult business, Sunbeam. It had a number of different divisions; they weren't doing well; the company was trying to work it out. Finally, one day, the bank said, "We want a new CEO and we want the board replaced," and we said, "We're not going to do it." They said, "We're going to demand an audience with the board of directors." We said, "Okay, if you would like to see the board of directors, we'll arrange it."

We set this whole thing up, and these three very large, respected institutions showed up, and they said to the board, "We just wanted to express our appreciation for all the efforts you're making." It was a real shocker!

Now, I remember when we were representing Delta, three weeks into the case we kept hearing, "Maybe you ought to get rid of Gerry Greenstein," who was the CEO, who happened to be a very able guy. In the course of the *Delta* case, US Air made a hostile bid, and an ad hoc committee was formed. Alan, do you remember that ad hoc committee?

ALAN KORNBERG: Yes, I do.

HARVEY R. MILLER: I remember this wonderful meeting with the ad hoc committee, which were mostly distressed debt traders, and also they were trading in the stock, and Gerry Greenstein was a man with wonderful white hair; he had been the CEO of a number of different companies, and he was really a transitional CEO for Delta. He was sitting there, and this ad hoc committee that Alan represented, with all of these quants were on this committee. I don't think anybody was over 35 years old. The chairman of this committee looks at Gerry Greenstein and says, "You don't seem to understand, Mr. Greenstein. *We* control the company, and you're going to do what we want you do." Well, you say that to a 69-year-old man who has been a CEO for half his life, and I'm not going to tell you what he basically said to them. But Gerry Greenstein brought that company through reorganization very successfully. He had the time and he had the protection, and he did it.

Each case is different. We get involved with so many cases about valuation. Well, what is valuation? How do you determine valuation? The economists are very good; they predicted at least nine of the last two recessions! Valuation is not a science, and if I were a bankruptcy judge, I could tell you, just by looking at who is the investment banker that's representing this group, exactly where their valuation is going to come out.

JEFF ARONSON: We get involved in all this terrible litigation!

ANTONIO ALVAREZ: Harvey, again, you're right to say "one size doesn't fit all," because in answering your question—what happens during the pendency of the case, not post-reorg—during the pendency of the case, there are three possible setups, if you will: there is a public company; there is a private equity-owned company that is not public, that is going to Chapter 11; and there is just a private company owned by an entrepreneur. So those are three settings. A lot of the discussion you are probably addressing is the public company discussion.

You have situations, and let's review each one. Most public company boards *really* are worried about their litigation risk. When it goes into Chapter 11, most boards that are in a public company have their own counsel, are adequately advised, and will react and be driven by the advice that they are getting. A big piece of what's driving them is minimizing any litigation risk.

HARVEY R. MILLER: The first thing they look at is what's the D&O insurance limit?

ANTONIO ALVAREZ: The D&O, that's the litigation risk and what's driving them—and that is why they will listen to what creditors say. In the case of *Warnaco*, it was an interesting case. We had a board that, fortunately for us, two were named in the last six months, and felt no litigation risk. One of them was Harvey Golub of American Express. He became a very constructive, positive influence, and he was an active board member. You have to look at each situation. You have private equity firms who basically hire a CRO and say, "I'm out of the money; I want to do what's right; maximize the value of creditors; I don't expect to get anything; do it right." That's a different setting.

If you name the case—it's like everything, it's like management—there's good ones and bad ones. It's like lawyers, God forbid—there's good ones and bad ones!

HARVEY R. MILLER: There's no hard and fast rule. But I would say, in my experience, Tony—and I have represented a lot of public companies—I have rarely seen a board who was more concerned about its own liabilities in contrast to doing the best thing for the entity for which they are acting as directors. Jan and I have represented a lot of public companies, and we never ran into that issue.

It happens, sometimes you *should* remove the CEO. Even the government thought so in *General Motors*, when the government said to Mr. Wagoner, "You're out!" Now, Jack asked the question, if negotiation doesn't work out, what do you do? Well, you can move to terminate exclusivity and the excuse is, "We, the creditors, have lost confidence in the management. The court should vacate it so that we can propose our own plan." You can move for a trustee. There are lots of options. The objective in all of this is to do it on a consensual basis. If you do it on a consensual basis, there has to be some level of respect for the debtor, and not marginalize the debtor completely as part of the process.

The way the process is working today, the debtor-in-possession—maybe we shouldn't have debtors-in-possession. The debtor-in-possession is basically a cipher. Would you agree?

D.J. (JAN) BAKER: Absolutely. There is one other issue, Jack, though, we ought to just mention, because it's important, and we've referred to it peripherally, and that's the bankruptcy courts. At the end of the day, for better or worse, when you're in a Chapter 11, there is a federal bankruptcy judge responsible for the case. I have to say, in my experience—and I've practiced in courts all over the United States, in front of a lot of judges—people say, "You've got to be in New York or in Delaware." I love being in New York and Delaware, but having said that, we have an awful lot of terrific bankruptcy judges sitting on the bench. At the end of the day, unless a judge is brand new and just hasn't gotten his or her sea legs yet, judges figure out, *if* you bring it to them, an awful lot of what's going on regarding the part of this fight for control. As long as the judge has confidence that the debtor is trying to do the right thing, that it's trying to move forward in the best way possible, the odds are you're going to get support from the judge. If the company, or sometimes its professionals, ever lose their credibility in front of the judge, then it's all over and you're looking at a very swift end and resolution of the case.

ANTONIO ALVAREZ: Harvey, I believe we're all in consensus here, that in the recent five or ten years, the pendulum has shifted, and the wiggle room that debtors-in-possession have to rehabilitate in bankruptcy has narrowed. There won't be debate on that. That is the reality, and it just puts a lot of pressure on CEOs and CROs to communicate, to make their case and stand their ground. Unless there is legislation that you can get through Washington that puts a monitor, that puts a trustee, then that's the reality we're faced with.

It does not take away those instances where, in fact, either an existing CEO with a CRO, a new CEO, finds a communication process that persuades a group to do what's right for that group. It's a process. You need to inform them; you need to get them through their options; you've lived in *Lehman*. We had a situation there where the CEO, my partner, believed you shouldn't sell things and, in fact, did something radical and put in more money to preserve value. He had to persuade people and did it. I agree with you that we had more ability to rehabilitate internally in the past, and probably more pressure to do M&A transactions now.

It precluded the ability to do so, and it just puts a lot of pressure in managing the creditor process, understanding the motivations of who's holding it right now, and creating more transparency on the options. There is a lot more pressure on the professionals and the management than in the old days, there was a lot of time you could buy them. You could fight a creditor that has lost confidence and buy time to rehabilitate. It's just the way it is, and unless it changes through legislation, you have to have transparency and communication to lead to an answer. The CEO and the CRO use it to lead to an answer, because creditors cannot impose their will. In a *lot* of cases, you have three competing interests in creditor groups—it's not a homogenous thing! You're trying to find the fulcrum. You might have three agendas happening at the same time. A good debtor would take advantage of that!

JEFFREY ARONSON: Let me give a perspective from a creditor's or an investor's standpoint. We rarely think that we're actually going to be able to change management in Chapter 11. People who talk like your conversation with Delta—the 35-year-old who says that—that's amateur hour! It just doesn't happen. In my experience, it's really rare that a management team is replaced in Chapter 11. The best we can hope for—let's assume the management team is poor—some management teams are good, some are bad. If the management team is poor, the best that we can hope for is that Tony will come in, or one of his colleagues. That's the best that we can hope for. We're going to have to live with that management team for the pendency of the case.

In terms of our interaction with the board, I would agree with Tony's comments. If it's a public board of a public company, most board members want to do the right thing, but what they really want is to get a release and never hear the name of the company again! It becomes thankless for them. They spend countless hours on conference calls, in meetings; it wasn't what they signed up for; and while they want to do the right thing, it's painful. They'd just as soon have it go away.

It's different dealing with a private equity-backed company, where they will typically say, "We're done. We'll wash our hands. You want the keys? Go for it. We just have no further interest in spending time on this, because there's no prospect for a return."

JACK FRIEDMAN: This is just a memory of mine, but 20 years ago, when things were being resolved after Milken, I did an article for the *Wall Street Journal* for which I called virtually all the lawyers, accountants, and advisors on failed LBOs. I asked them what happened in bankruptcy? How much did people get on the dollar? The *Wall Street Journal* legal editor said that they had believed fraudulent conveyance actions in these huge cases were going to be the great litigation in the 90's. The conclusion that I had was that when you reorganize a company in Chapter 11, you can almost always position it so that the creditors could either take the litigation or take the plan, but they couldn't do both. The creditors would almost always take the plan, and settle the litigation. The editors said, "Well, that wiped out the *Wall Street Journal* theory."

The important thing is that you focus on the economics of the company and try to create something more than just an instant sale. You're going to be able to control creditors in part because they don't trust each other.

They are afraid that somebody is going to wreck the whole thing. Therefore if Harvey said, "Fellows, this is my experience," they listen. They'll trust the debtor's counsel more than they trust each other.

HARVEY R. MILLER: From your lips to God's ears! No, but what Tony is saying is essentially correct. Almost every situation is somewhat unique as to what caused the bankruptcy, when was the bankruptcy filed. The '78 Act was intended to encourage distressed companies to get into Chapter 11 earlier, rather than later, while they still had something to reorganize.

For a while there, that worked. The stigma of bankruptcy disappeared. Nowadays, bankruptcy is really the last resort, and many companies that go in just don't have the resources to exist in Chapter 11. There's got to be a very quick disposition of what is going on. You have to look at what caused it—was it some extraneous event? Was it really management? That takes some expertise. Very often—I don't dispute it, Tony, that a CRO may be the right road to go down. What types of problems—are they union problems that are almost insurmountable? How do you deal with that? Sometimes in those situations where you have labor problems, you have a group of investors who don't want to go through the fight with the union. They insist that management make a deal with the unions. Management is saying, "If you make that deal, my company is not feasible. It can't operate." The investors say, "Make the deal, file the plan; the price of claims will go up; I'll get out quickly." The most amazing thing about the market is you have a company that is insolvent; you do a plan of reorganization for a public company, and you announce, in the disclosure statement and in confirmation, the old stock is worthless. Then on the day you confirm the plan, the value, the selling price of the old stock goes up. I've never been able to figure that out. That happens frequently in those cases.

D.J. (JAN) BAKER: There's another interesting dynamic that impacts reorganization vs. sale. Increasingly, a lot of companies in America have legacy or other liabilities. They may have shortchanged their pension for years and years, or they may have had it in investments that turned out to not do well. Suddenly, you have this multi-hundred-million-dollar unfunded liability, or you have other types of claims. You can get creditors who look at that and say, "You know what? We don't want to reorganize, because if we reorganize, we're going to have to deal with these liabilities. We'd much rather you do a 363 sale, let PBGC and the other legacy creditors get in line with everybody else, because we just think it's a better outcome.

There are a lot of cases where those liabilities have a significant impact on the decision of "do you reorganize or not."

JACK FRIEDMAN: Could you folks give us an overview of the change in government involvement? There are tons of different agencies. I remember, again, 20 years ago, asking the SEC what did they do in bankruptcy. They said, "We do nothing, because it's in front of a federal judge, so we just figure it isn't worth our time." That's been changed some now.

ALAN KORNBERG: Sure, there's been a real transformation. It used to be that a lot of governmental entities in Chapter 11 cases would be asleep at the switch. Sometimes you'd get an anguished call about "can you extend the bar date, because we've forgotten to file our proof of claim." The focus was often really quite narrow.

What we've seen in a lot of cases is a much greater activism on the part of regulatory bodies and federal agencies. A couple of examples come to mind, and Harvey, your firm was involved in both, as were we.

Years ago, in the *Pacific Gas & Electric* case, we represented the Public Utility Commission, and pretty quickly concluded that being passive was going to result in an outcome which was completely inconsistent with the policies and objectives of the Commission. And because the Commission happened to hold a rather small claim for some unpaid fees, we used that as a basis to seek to terminate exclusivity, to really leverage the Commission's position in the case, to propose a plan that was consistent with state regulatory law, rather than the one that had been promoted by the debtor. That actually proceeded to the point where there were dueling confirmation hearings and, not surprisingly, with the prodding of the judge, there was a settlement.

Similarly, in New York, Harvey's firm represented the New York State Racing Association, which was in a battle royale with the state over who owned the race tracks. In that case, the state successfully opposed proposed DIP financing that would have involved granting mortgages on property that the state said the debtor didn't own; instead the state itself extended the debtor-in-possession financing, which put it in a much stronger position in terms of what was going to happen in the case.

This was at the state level. Then, of course, when you get to Chrysler and GM, you have the federal government doing things that it had never done. There's a very different attitude on the part of governmental entities saying "These cases are important; our stake in these cases is important; and we are willing to consider taking actions that we've never taken before, including proposing DIP financing and alternative Chapter 11 plans."

JACK FRIEDMAN: Are there other examples—does the SEC participate particularly?

HARVEY R. MILLER: No. With the 1978 Act, essentially the SEC was cut out. The SEC was very active prior to the Bankruptcy Reform Act, but since that time, you rarely see the SEC. If you're in a case that has regulatory issues, like the transfer of an FCC license or something involving the DOJ and antitrust issues, which Jan can speak to, you will find the government much more active on all levels—state and federal, and sometimes local. If there is a public interest involved, you'll see them very much involved, as the states' attorneys general get very involved in anything involving environmental policies. The EPA is very active.

D.J. (JAN) BAKER: The one interesting fact, Jack, about governmental involvement I can't think of a single example in which I've ever seen a federal or state agency intervene in a reorganization and advocate a position because it benefits creditors, maximizes value, or enhances the chance of reorganization. I don't say that to be either funny or critical; it's just a fact. They have a regulatory goal which they pursue once they conclude that whatever the regulatory issue or scheme may be, once it's implicated, they pursue it generally very zealously and doggedly, with a laser focus on the regulatory issues, without regard to anything else: Does it help the company? Does it hurt the company? Does it help the creditors, hurt the creditors? It doesn't matter. As an official representing, employed by the FDIC in the *MCorp* case, once admitted privately to me, they didn't care what happened to the creditors. That was immaterial. The only goal there was for the federal regulatory agency not to do anything that would bring into disrepute the agency vis-à-vis Congress, because all of the agencies, whether they're state or federal, have oversight, either from the state legislature or the federal legislature. They may privately believe that enforcement of the particular regulatory regime actually is not beneficial in the particular circumstances. The political environment has gotten so poisonous, and people are so involved in the blame game, that a lot of regulators are very reluctant to cut a debtor or creditors any slack, even though they might conclude, privately, it would make good economic sense.

HARVEY R. MILLER: If you talk about government, you have to talk about the Office of the United States Trustee, which considers itself part of the government. The Office of the United States Trustee will sometimes take positions that will shock people. Very often, you will see an argument in court, and the judge will say to the representative, US Trustee's office, "But I don't understand. You have no economic interest in the case. Everybody else has consented to this. Why are you doing this?" Because they now, the Office of the United States Trustee believes that it has to oversee the bankruptcy judges and tell the bankruptcy judges that they must enforce the Bankruptcy Code as the U.S. Trustee sees it. The U.S. Trustee's office has gotten much more aggressive and is actually prosecuting its position vigorously all along the line. In fact, yesterday, I heard an appeal in the District Court from one of the *Lehman* cases where it's just the U.S. Trustee that is pushing forward. Certainly in *American Airlines*, it's the U.S. Trustee that's taking some very hard positions.

It reminds me, I was once retained by the utility that owned Three Mile Island, after they had the nuclear problem. The nuclear plant was closed, and it provided service in New Jersey, Pennsylvania and someplace else, and we had gotten together, and it was clear that the company was going to end up in a liquidity crisis unless it could get increases. Well, to increase the rates, you had to go before the Public Utility Board. Hearings were set up, and I was supposed to be Dr. Doom. I was supposed to go in and testify that if they didn't get the rate increase, we would put the utility into Chapter 11. There was the public advocate, who was the adversary, and I was there, and a customer of this New Jersey utility said, "Well, I want to cross-examine that man." She put me up on the stand, and she asked a few questions, and then she said, "Are you being paid to be here?" I said, "Yes." She said, "How are you being paid?" I said, "On an hourly basis." She said, "What's your hourly rate?" This was a few years ago. I said, "$750 an hour." She said, "Get that man off the stand!"

JACK FRIEDMAN: I'd like to move ahead on some other different topics, but first I would like to read a letter that was sent to me by Dean David Schizer, Columbia Law School. The entire text will be part of the transcript record for this event. It's a beautiful message. He is not only the Dean, but also the Harvey R. Miller Professor of Law and Economics so he knows Harvey quite well.

On behalf of the Columbia Law School community, I would like to congratulate Harvey Miller on receiving the award of "World Recognition of Distinguished Contributions to the Rule of Law" from the Directors Roundtable. This is a very distinguished honor, and I cannot imagine anyone who deserves it more. I am sorry that I cannot join you in person to celebrate Harvey's many accomplishment. A friend who is also a bankruptcy law expert once said, "Harvey Miller is one of the five best lawyers I know, and I don't know who the other four are." Harvey's commitment to his clients and to our legal system are truly the gold standard. He is one of the reasons why Weil Gotshal is such a distinguished law firm. Harvey is also a very popular and successful teacher at Columbia Law School, whose students affectionately refer to his bankruptcy law class as "Miller time." I should also mention that in addition to serving as dean, I am also the Harvey R. Miller Professor of Law and Economics. I am extremely proud of that title. Harvey Miller is a magnificent lawyer, and an inspiration for all of us.

D.J. (JAN) BAKER: Jack, I'd like to just follow up and say one thing, because we talked a lot about bankruptcy, Chapter 11, the restructuring profession. If you remember, the materials you put together and sent out said this was to honor Harvey Miller and to honor the restructuring profession.

JACK FRIEDMAN: Right.

D.J. (JAN) BAKER: It's worth recalling that bankruptcy, as we know it today, is very unusual, in that we have a handful of people I would regard as the founding fathers—sorry, ladies—there were no women in the founding fathers.

HARVEY R. MILLER: You are in trouble now.

D.J. (JAN) BAKER: Although, happily changes in the profession are setting that to right.

HARVEY R. MILLER: That was a good rebound, Jan.

D.J. (JAN) BAKER: I'm pretty sensitive to this stuff; my wife's a lawyer, and so is my daughter. But the explosion in modern bankruptcy that began with the adoption of the Bankruptcy Code—the Bankruptcy Reform Act of 1978, coincided with the flowering of the careers and people at the peak of their, poised to take off in their careers, of an extraordinary group of bankruptcy professionals, of whom today, in particular, we honor Harvey. He was joined by such titans as Leonard Rosen, Myron Trepper, Ron Trost, Pat Murphy, and a host of others. This group of people really created the modern bankruptcy profession.

In 1974, as a young associate then practicing in Houston, I went with my wife to the first or second Southeastern Bankruptcy Law Institute in Atlanta. Leon Forman was speaking, along with Harvey, Leonard Rosen, Ron Trost, I think—I don't remember if Myron and Pat were on the Program.

HARVEY R. MILLER: George Treister.

D.J. (JAN) BAKER: Yes, George Treister, was another one. I was trying to decide, at that point, did I want to be a bankruptcy lawyer? We were flying back to Houston, where I then lived. Suzanne said, "You know, if there are people like that who do bankruptcy, you should be a bankruptcy lawyer." It's impossible to overstate the influence those people, and others like them, had on the creation of the profession, the development of standards of professional excellence, of ethics; and we owe them all an enormous debt.

Thank you, Harvey, and all of the others, who create the modern profession.

HARVEY R. MILLER: Let me just say that over the years, the elevation in the level of talent, in the level of dedication, of the people who now practice in this area, has been tremendous. Going back 25 years, it just didn't exist; this was like an under-bar profession. It has changed completely. In addition, the level of quality on the Bankruptcy Bench is just astounding. Those judges are as good as the nine people that sit up there in Washington. They are dedicated, they work very hard, and they are grossly underpaid. So we owe a lot to them, also. Thank you.

JACK FRIEDMAN: Thank you. I'd like to ask, beyond what creditors or investors get, what are some of the benefits that the community has gotten from the profession? For example, *General Motors* is truly epic for the country.

HARVEY R. MILLER: I would just say that in a credit-intensive society, you are going to have failures; they're inevitable. You have to have a place to go, a place where you can deal with those problems. The Bankruptcy Court provides a forum where people do the exact same things that Tony's been talking about, which is a good process, and so there are benefits coming out of that.

Cases like *GM* and *Chrysler* and *Lehman*, they are unique cases. It's shocking to me that here it is, almost five years after *General Motors*, in the middle of this crisis all about Syria, that tomorrow I have to go to Washington to testify about the *GM* case. You would think after four and a half years, in the middle of an international crisis, that the House Oversight Committee would not still be asking the question whether it was a good idea to do the *GM* case. That says something about government. We do a better job in the Bankruptcy Court than government does. There are a lot of benefits in society because of that.

ANTONIO ALVAREZ: This gives me an opportunity to commend—you've been commended for your lawyering and your pioneering. I was having lunch with my son about two months ago, and there was Harvey and Leonard in a restaurant close by. There are not many people that my children would say, "Papa—take a picture with those two titans!" There just aren't that many; I have the picture with me. Harvey said, "Give me a copy of that!" I've sent it to him. There just are not that many titans in our profession. There are lots of people that have been around for a long time that have improved the quality, but just not that many pioneers. What I *really* admire is this man's capacity and enthusiasm to work, when I get to be his age!

HARVEY R. MILLER: Tony, you really made me feel young!

ANTONIO ALVAREZ: There aren't that many people that I can talk like that to, so I've taken advantage of it!

JACK FRIEDMAN: Could you comment on recommended changes to the Bankruptcy Law?

HARVEY R. MILLER: As for recommended changes to the bankruptcy law, that would require much more thought. I am certain that if I gave more time to the subject, I would provide a more comprehensive list of potential amendments. The basic problem with the Bankruptcy Code is that since its effective date, every single amendment has had the effect of reducing the protections that were originally incorporated to protect debtors and afford to them a reasonable period to pursue rehabilitation. The increase of allowable administrative expenses, the pervasive effect of secured financing and the lack of a broad-based market for DIP financing have had the effect of reducing the ability to rehabilitate. Perhaps that may be beneficial to distressed debt traders, but may not support a rehabilitation objective that was originally incorporated into chapter 11. Limited to chapter 11-related provisions, the following is a preliminary first pass at suggested amendments and/or revisions:

- As a general proposition, clarify and establish the jurisdiction of bankruptcy judges and if politically doable, make bankruptcy judges Article III judges;
- Eliminate most of the safe harbor provisions in the Bankruptcy Code and, in particular, those relating to securities transactions, including derivatives;
- Repeal the 2005 amendments to section 365 of the Bankruptcy Code limiting the time within which a debtor-in-possession/trustee may assume or reject unexpired leases of nonresidential real property;
- Repeal the 2005 amendment to section 1121 of the Bankruptcy Code limiting a debtor's exclusivity to file a chapter 11 plan to 18 months and restore the previous provision and its related provisions.;
- Review and tighten provisions as to what obligations constitute administrative expenses of a chapter 11 case;

- Add to the Bankruptcy Code provisions requiring comprehensive disclosure by debt traders incorporating and elaborating the provisions contained in Bankruptcy Rule 2019;
- Add provisions prohibiting “gifting” among classes or in classes, except in compliance with the absolute priority rule or by consent;
- Provide for authority for the bankruptcy court to *sua sponte* appoint a valuation expert to serve as the focal point as to valuation under a plan or otherwise;
- Amplify provisions empowering the bankruptcy court to deal with claims or secured creditors, taking into account that, generally, most liabilities of debtors in the current economic circumstances are secured liabilities;
- Empower a bankruptcy court to *sua sponte* direct the appointment of a trustee or examiner;
- Specify in section 364 terms of DIP financing that are prohibited.

As you know, the American Bankruptcy Institute has appointed a commission to study reform of chapter 11. In 2014, the commission proposes to file its report. The studies undertaken by the commission and the subcommittees appointed by the commission are much more broad-ranging than my comments. It may well be that the objectives of bankruptcy reorganization have to be redefined in the context of how business is conducted and what benefits, if any, result from chapter 11 cases, as compared to a process that promptly arranges for the sale of the assets of a debtor. Accordingly, it is appropriate to restrain myself and others from speculating on the needs for reform pending the ABI Commission report and studies being undertaken by other organizations and academics.

JACK FRIEDMAN: To conclude our program, of the five minutes a month that you have free, what do you like to do with that time?

HARVEY R. MILLER: I like to go to the opera.

JACK FRIEDMAN: Really? Italian or German?

HARVEY R. MILLER: Italian.

JACK FRIEDMAN: Italian opera!

ALAN KORNBERG: Because there's not enough drama in the bankruptcy cases!

HARVEY R. MILLER: Everybody dies in the opera!

D.J. (JAN) BAKER: Play your cards right and hope for an invitation to sit in Harvey's box—the best seats in the Met!

JACK FRIEDMAN: Let me thank everyone. A real service that Harvey is doing here profiling the broader good that the profession does, so thank you very much.

HARVEY R. MILLER: Thank you.

Harvey R. Miller

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Weil

Harvey R. Miller currently is a partner in the New York City based international law firm of Weil, Gotshal & Manges, LLP where he had been a member of the firm's management committee for over 25 years and created and developed the firm's Business Finance & Restructuring department specializing in reorganizing distressed business entities.

From September 2002 to March 2007, he was a managing director and vice chairman of Greenhill & Co.; adjunct associate professor of Law 1974-76, and adjunct professor of Law 1976 to present, New York University Law School; visiting lecturer, Yale Law School, 1983-84; lecturer in Law 2000 to present, Columbia University School of Law; member, board of visitors Columbia University School of Law through 2002; member, Dean's Council Columbia University School of Law 2003-present; member, National Bankruptcy Conference; fellow, American College of Bankruptcy; fellow of the American Bar Foundation; trustee, Committee on Economic Development.

- **Bar Admissions**
  US Court of Appeals 1st Cir.; US Court of Appeals 2nd Cir.; US Court of Appeals 3rd Cir.; US Court of Appeals 9th Cir.; Eastern District New York; New York State; Southern District New York; US Supreme Court
- **Education**
  Brooklyn College (B.A., 1954); Columbia Law School (J.D., 1959)

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- Weil's premier position in the legal industry is recognized both by peers and by the press. The firm's four departments and over two dozen practice groups are consistently recognized as leaders in their respective fields. Weil and its attorneys have been consistently top-ranked by the most authoritative legal and financial industry directories, including those published by Chambers & Partners, Euromoney, and The Lawyer Group. Most recently, the firm was named among the "Transatlantic Elite" of international law firms for the fifth consecutive year by *The Lawyer* magazine. The latest*International Financial Law Review* recognized Weil with a multitude of IFLR America awards. Furthermore, Chambers & Partners ranked more than 100 Weil attorneys in 50 practice categories. Additionally, Weil has been included on The American Lawyer's A-List of top 20 US law firms for eight consecutive years.

- Weil has become a highly visible leader among major law firms for its innovative diversity and pro bono initiatives, the product of a comprehensive and long-term commitment which has ingrained these values into our firm culture. The firm's pro bono efforts have garnered recognition from top organizations. Weil has received both the American Bar Associate's Pro Bono Publico Award as well as the Pro Bono Institute's Pickering Award, marking the first time that one law firm held these top honors concomitantly. More recently, Weil's pro bono practice was ranked among the top 20 in the US by *The American Lawyer*'s 2012 Pro Bono Survey and was awarded the 2012 Inaugural Pro Bono Leadership Award by the National Center for Law & Economic Justice.

- Weil's innovative initiative to diversity has earned worldwide recognition from diverse groups and publications, such as *The American Lawyer*, *The Vault Guide*, *MultiCultural Law Magazine*, Human Rights Campaign's Corporate Equality Survey, the U.K.-based Black Solicitors Network, *Texas Lawyer*, and the Anti-Defamation League. The firm continues to score highly on diversity scorecards, including a "Best Law Firms for Women" designation by *Working Mother* magazine. The 2012 Vault Guide ranked Weil among the "Best 20 Law Firms for Diversity" for the fifth straight year. The firm also achieved the prestigious Vault 'Trifecta' as the only law firm in the country to be ranked in the top 10 in "Overall Prestige," "Best Law Firm to Work For," and "Diversity" for 2012.

- In sum, Weil's proven, demonstrated experience allows the firm to provide clients with unmatched legal services, which is why the world's most sophisticated clients call upon Weil to provide counsel in their most complex issues and the sound judgment to help them make the hard calls.

Mr. Jeffrey H. Aronson, JD

Jeff co-Founded Centerbridge Partners L.P in October 2005 and serves as its Managing Principal. Mr. Aronson has been an active investor in distressed securities for more than 20 years and has been deeply involved in many U.S. and overseas restructurings. He is the Co-Founder of Centerbridge Credit Opportunities Fund, L.P. and Centerbridge Capital Partners II, L.P. and serves as Managing Principal. He was a Partner at Angelo, Gordon & Co. as the Head of Distressed Debt. Mr. Aronson served as a Senior Corporate Counsel at L.F. Rothschild. Mr. Aronson was a Securities Attorney with the law firm of Stroock & Stroock & Lavan. He serves as a Trustee of Johns Hopkins University. Mr. Aronson holds a JD from New York University School of Law and graduated with honors from Johns Hopkins University.

Centerbridge Partners, L.P. is a private investment firm with offices in New York and London. The firm focuses on private equity & credit investments.

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Jan Baker is a partner in the New York office of Latham & Watkins. Mr. Baker is a member of the Finance Department and Global Co-chair of the firm's Insolvency Practice. Mr. Baker represents companies, lenders, committees, acquirors and other parties in connection with restructuring matters. He also regularly advises boards of directors of public and private companies on matters related to corporate governance and fiduciary duty.

Mr. Baker is a Fellow of the American College of Bankruptcy and currently serves as its Chairman. He frequently lectures and writes on issues involving corporate reorganization and restructuring.

Named a "key individual" by *Chambers USA 2013*, Mr. Baker is praised for his constructive and pragmatic approach to matters. He is described as "a terrific attorney and a great man." He was also recently named one of the "Most Admired Attorneys" by *Bankruptcy Law360* and was recognized by *The International Who's Who* as "most highly regarded" in the Insolvency & Restructuring Lawyers 2011 category. Mr. Baker is recognized as a leading corporate restructuring attorney by legal guides and directories such as *Chambers Global, Chambers USA, Euromoney, Legal Media Group*, *Turnarounds and Workouts* and *K&A Restructuring Register* and is a member of the International Insolvency Institute.

Bar Qualification - District of Columbia, New York

Education

- JD, University of Houston Law Center, 1973
  magna cum laude; Editor in Chief, Houston Law Review
- AB, Harvard University, 1966
  cum laude

LATHAM & WATKINS LLP

Latham is dedicated to working with clients to help them achieve their business goals and overcome legal challenges anywhere in the world. From a global platform of offices in the world's major financial, business and regulatory centers, the firm's lawyers help clients succeed.

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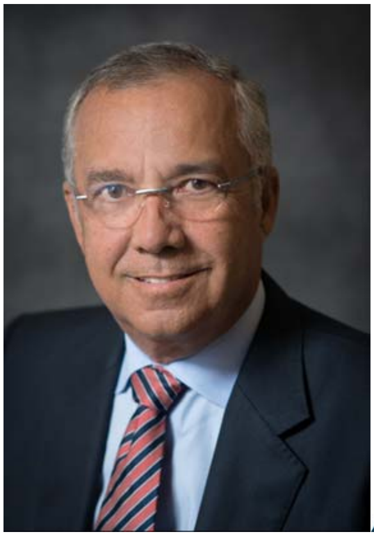

Tony Alvarez II, Co-CEO / Co-Founder, Alvarez & Marsal

In 1983, Tony Alvarez II co-founded Alvarez & Marsal (A&M), the leading independent global professional services firm, which has since grown from three employees to more than 2,000 professionals around the world.

A&M operates in 42 cities globally, with offices in major markets across 18 countries on four continents. The firm provides corporate restructuring, performance improvement and business advisory services (including mergers and acquisitions transactions, tax advisory and litigation support). A&M works with companies across the industry spectrum.

The firm has served notable clients such as: Lehman Brothers, Washington Mutual, HealthSouth, Levi Strauss, Spiegel, Movie Gallery, Amerco U-Haul, Cluett International and Republic Health, among others.

Mr. Alvarez has personally assisted clients, including Timex, Western Union, Pharmor, Resorts International, Warnaco, Levi Strauss and, most recently, Interstate Bakeries. He has served as a member of the Board of Directors for Warnaco, American Household and Resorts International.

Prior to founding A&M with co-CEO Bryan Marsal, Mr. Alvarez spent 12 years at Coopers & Lybrand, where he was a Partner and Head of the Restructuring Advisory practice in New York. Additionally, he spent two years at Norton Simon, a consumer products conglomerate, which included operating companies such as Avis, Hunt Wesson, Max Factor and others.

Mr. Alvarez earned an undergraduate degree in business from De La Salle University in the Philippines and a master's degree in business administration from New York University, Stern School of Business, where he currently serves on the Dean’s Executive Board.

About Alvarez & Marsal

Alvarez & Marsal (A&M) is a global professional services firm specializing in turnaround and interim management, performance improvement and business advisory services. A&M delivers specialist operational, consulting and industry expertise to management and investors seeking to accelerate performance, overcome challenges and maximize value across the corporate and investment lifecycles. Founded in 1983, the firm is known for its distinctive restructuring heritage, hands-on approach and relentless focus on execution and results. To learn more, visit www.alvarezandmarsal.com

Alan W. Kornberg

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Chair of the Bankruptcy and Corporate Reorganization Department, Alan Kornberg handles chapter 11 cases, cross-border insolvency matters, out-of-court restructurings, bankruptcy-related acquisitions and insolvency-sensitive transactions and investments.

EXPERIENCE

Alan's recent assignments cover a diverse range of clients and matters, including:

- The **senior secured lenders** to Australian-based Nine Entertainment Group in the restructuring of more than AUS $2 billion of debt by means of a scheme of arrangement under which the lenders became the principal equity holders of the reorganized company;
- Restaurant franchisor **Quiznos** in its out-of-court restructuring and recapitalization;
- **Houghton Mifflin Harcourt Publishing Company** and its affiliates in their prepackaged chapter 11 cases involving the restructuring of over $3 billion in debt;
- **Silver Point Capital**, as DIP and senior prepetition lender agent, in the Hostess Brands chapter 11 case;
- The senior lenders and chapter 11 plan sponsors of **Aliante Casino**;
- **Oaktree Capital** as lender and plan sponsor in the chapter 11 case of Aleris International;
- The **Unofficial Committee of Bondholders of Charter Communications** in connection with Charter's unprecedented "reinstatement" plan under chapter 11;
- **The Winding-up Board of Glitnir hf** in the former Icelandic bank's chapter 15 case; and

- A State regulatory board in the chapter 11 reorganization of the **New York Racing Association**.

Alan recently co-authored, with fellow Paul, Weiss bankruptcy partner Elizabeth McColm, a chapter in the *International Comparative Legal Guide (ICLG) To Corporate Recovery and Insolvency 2012*. Their chapter addresses the challenges involved when a company in the United States finds itself in financial difficulty and the steps that can be taken to restructure effectively. Alan co-authored a similar contribution to *Restructuring & Insolvency 2013*published by Getting the Deal Through.

In connection with his representation of the **California Public Utilities Commission** in the Pacific Gas & Electric Company chapter 11 case, *The American Lawyer* named Alan one of its Dealmakers of the Year in 2003. He has also been selected as one of the leading lawyers in the area of Bankruptcy/Restructuring by *Chambers USA*, is recognized as a leading lawyer in corporate restructuring by both *The Legal 500* and *IFLR1000*, and was chosen by his peers for *The Best Lawyers in America* in bankruptcy and creditor-rights law. Alan's work on the restructuring of Charter Communications was recognized as "Stand Out" (top tier) by *The Financial Times*' "US Innovative Lawyers 2010."

Alan has served as the Second Circuit Regent of the American College of Bankruptcy and was the Chair of the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York from 2005 to 2008. He frequently mediates bankruptcy-related disputes and lectures on bankruptcy-related topics for local, national and international organizations.

Education

J.D., New York University School of Law, 1977

A.B., Brandeis University, 1974
magna cum laude

Bar Admissions

New York
District of Columbia

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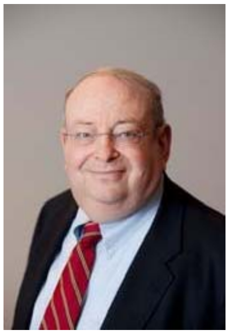
Paul, Weiss, Rifkind, Wharton & Garrison LLP

In a challenging business environment, Paul, Weiss has been a trusted advisor to companies, creditors and investors responding to rapid market and regulatory change. The bankruptcy practice leverages thorough knowledge of all aspects of bankruptcy law, representing lenders and their agents, underwriters, bondholders, and purchasers and sellers of distressed assets.



Jack Friedman
Chairman
Directors Roundtable

Jack Friedman is an executive and attorney active in diverse business and financial matters. He has appeared on ABC, CBS, NBC, CNN and PBS; and authored business articles in the Wall Street Journal, Barron's and the New York Times. He has served as an adjunct faculty member of Finance at Columbia University, NYU, UC (Berkeley) and UCLA. Mr. Friedman received his MBA in Finance and Economics from the Harvard Business School and a J.D. from the UCLA School of Law.