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Private Investment Funds in Distress: Guidance for Institutional Investors

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Active Management of Private Investment Funds in Distress

Louis H. Singer

Active Management of Portfolio Funds: Initial Assessment by Limited Partners

- Assessment of the economic environment for particular alternative investment asset classes, sectors, and strategies
  - Uncertain business environment likely to remain
  - Investors' outlooks unlikely to be uniform
- Portfolio analysis
  - Measuring underperformance of particular funds
  - Diversification
  - Cash flow
  - Legal audit

General Partner Response to Investor Concerns: Recent Noteworthy Action

- Reduction of commitments subject to a penalty
- Reduction of commitments without penalty
- Hedge fund limitations on redemptions

Legal Audits: General

- Parallel to business audit
- Key strategic decision: collective versus individual action
- Distinguish from “workouts”: no payment defaults, financial covenants, acceleration, or foreclosure
- Resolutions and recoveries

Legal Audits: Key Provisions in Limited Partnership Agreements

- GP clawbacks:
  - Clawbacks defined
  - Timing
  - Enforceability of guarantees
  - Separate agreements
  - Who can enforce?
  - Trades between GPs and LPs (e.g., reduced management fees, purchasing LP interests)

Legal Audits: Key Provisions in Limited Partnership Agreements (cont.)

- Termination of commitment period
- No-fault dissolution or GP removal
- For-cause dissolution of fund or removal of GP
- LP givebacks
- Distribution waterfall

Potential GP Defaults

- Affiliate transactions and conflicts of interest (e.g., each of the portfolio companies has contracts with vendors owned by principals of the GP)
- Breaches of investment restrictions or concentration limits
- Breach of fiduciary duty: duty of care and duty of loyalty

Sources of Information

- Review of the fund's books and records
- Litigation docket search
- Selected portfolio company analysis
- Secondary market activity
- Discussions with auditors

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Managing the Sale of Investment Fund Interests

Jedd H. Wider

Initial Assessment of Investment Fund Interests by Investors

- Assessment of the current performance of the Fund
- Assessment of the future performance of the Fund and its portfolio companies
  - Evaluation of existing and future market conditions
- Evaluation of the Investor's investment portfolio and performance
  - Evaluating a Fund interest's fit in the Investor's portfolio and portfolio construction
  - Change in investment thesis with respect to holding a Fund interest
- Determination to sell Fund interests

Who Are Likely Buyers of Investment Fund Interests?

- Existing Investors in Fund
- Secondary Funds
  - "Secondary Funds" are private investment funds formed to (i) purchase limited partnership interests in existing private investment funds from existing limited partners and/or manage those interests through special structured arrangements, (ii) make direct investments into private investment funds, and (iii) make direct investments into portfolio companies

Types of Secondaries

- Direct Secondary
- Portfolio Secondaries
- Early Secondaries
- Stapled Transactions
- Secondary Directs – “Buy-In’s” or Synthetics
- Secondary Directs – “Spin-Outs”

Two Significant Manners in Which LP Interests Are Sold

- Private individually negotiated sales
- Auctions

Stages of a Typical Secondary Transaction

- Discussion with GP of the Fund Interests to be sold
- Confidentiality agreement
- Pricing of the LP Interests
- Letter of Intent
- Purchase and Sale Agreement
- Assignment and Assumption Agreements
- Subscription Agreement

Purchase and Sale Agreement – Issues and Concerns

- Purchase Price
- Certain Seller's Representations and Warranties
- Conditions and Closing
  - MAC Clause
  - ROFR's and Assignments of Economic Interest
- Indemnification
  - Standard Seller Indemnities
  - Standard Buyer Indemnities
  - Standard Buyer and Seller Indemnities with respect to the Fund
- Legal Opinions

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Bankruptcy Issues

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Fund Fraud – Risk of Clawback of Fraudulent Transfers

- Redemption payments to investors may be recovered by trustee in the event of fund's bankruptcy
- Overview of fraudulent transfer law
  - Two main categories of fraudulent transfers under Code § 548:
    - Actual fraud – Transfers made by the debtor with the purpose and intent to hinder, delay or defraud the debtor's creditors
    - Constructive fraud – Transfers made while the debtor fund was insolvent which do not provide reasonably equivalent value

Fund Fraud – Risk of Clawback of Fraudulent Transfers (cont.)

- Two-year reachback under Code § 548
- Incorporation of state fraudulent transfer statutes with longer reachback periods. Code § 544(b). New York provides at least six-year reachback period. CPLR § 213(8)
- Special case of transfers to general partners under Code § 548(b). No requirement to show fraudulent intent or lack of value
- Good Faith/Value Defense under Code § 548(c)

Fund Fraud – Risk of Clawback of Fraudulent Transfers (cont.)

- Recent Bayou Group decisions: *In re Bayou Group, LLC*, 362 B.R. 624 (Bankr. S.D.N.Y. 2007); *In re Bayou Group, LLC*, 396 B.R. 810 (Bankr. S.D.N.Y. 2008)
  - Background: Investors of hedge fund/Ponzi scheme redeemed principal and profits prior to funds' bankruptcy filings. Trustee sued to recover these payments as fraudulent transfers
  - All transfers held to be fraudulent. Investors asserted good faith/value defense. Court rejected defense entirely as to profits and allowed defense for principal only as to those investors who did not redeem on account of red flags of fund fraud

Fund Fraud – Risk of Clawback of Fraudulent Transfers (cont.)

- Questionable holding
  - "Value" provided by investors in exchange for redemption payments may not have been equal to principal if investors were held to be equity holders
  - Standard of "good faith" creates perverse incentive not to conduct thorough diligence and to ignore red flags, or concoct an excuse why redemption was requested independent of fraud

Bankruptcy of Fund Manager – Removal of Manager

- Generally, contracts governing funds permit removal of manager/advisor in the event of its bankruptcy
- Management agreement is likely an executory contract under bankruptcy law subject to § 365 of the Code
  - Debtor is generally entitled to "assume" or "reject" an executory contract
  - Personal services contracts may not be assumed by a trustee and cannot be assigned in bankruptcy. Code § 365(c)(1).

Bankruptcy of Fund Manager – Removal of Manager (cont.)

- Contract provisions conditioned on the occurrence of the debtor's bankruptcy may be unenforceable *ipso facto* clauses. Code § 365(e)(1).
  - However *ipso facto* clause may be enforced if the contract is found to be a personal services contract. Code § 365(e)(2).
    - ➢ *In re Cardinal Industries Inc.* — *ipso facto* clause in partnership agreement providing for removal of general partner not enforced
      - – Contract was for personal services but nonetheless court held the trustee could assume it because the debtor continued to perform its responsibilities albeit under the supervision of the trustee
      - – Because the contract could be assumed, the court invalidated the *ipso facto* clause

Bankruptcy of Fund Manager – Removal of Manager (cont.)

- *Gould v. Antonelli* (*In re Antonelli*), 4 F.3d 984 (4th Cir. 1993) – Fourth Circuit affirmed confirmation of plan which assigned debtor/general partner's management duties to a plan committee controlled by creditors
  - Partnership agreement was found to no longer be personal in nature because it involved "matured" projects and remaining management duties did not depend on debtor himself
  - Court was not faced with *ipso facto* clause for removal of a fund manager, but in allowing assignment of debtor's duties, court clearly would have invalidated any such *ipso facto* clause

Bankruptcy of Fund Manager – Removal of Manager (cont.)

- Relief from Automatic Stay for Cause
  - Automatic stay will prevent partners from exercising other contractual rights to remove the debtor as manager where *ipso facto* clause is invalidated. However, under limited circumstances, the investors may be entitled to relief from the automatic stay for "cause" to exercise such rights
  - In order to obtain relief from the stay for cause, movants are required to show specific post-petition harm that outweighs the potential harm to the debtor

Fund Audits

- Investors may have contractual and state law rights to demand an audit of the fund's books and records
- Recent events have shown that a fund's retention of custody of fund assets is a key indicator of a lack of adequate oversight
  - Where fund assets are maintained by a reliable and independent third party, their existence and amount are readily verifiable
  - Conversely, where fund assets are maintained solely by fund's principals and controlled entities, the ability to perpetuate a fraud is significantly increased
  - The fund's managers should honor reasonable requests to conduct an audit. Inexcusable delay or improper refusals may themselves suggest improper conduct

Availability of Ch. 15 Relief for Funds Incorporated Off Shore

- History of Chapter 15 of the Bankruptcy Code
  - Long-standing concern with difficulty of coordinating multinational insolvency proceedings
  - A commission established by the UN proposed a model law in this regard
  - In 2005, as part of its comprehensive bankruptcy reform legislation, Congress adopted this model law as Chapter 15 of the Bankruptcy Code

Availability of Ch. 15 Relief for Funds Incorporated Off Shore (cont.)

- Substance of Chapter 15
  - Allows foreign entities to get various relief from U.S. bankruptcy courts in support of their insolvency proceedings abroad
  - If the debtor's center of main interests is abroad, then the foreign proceeding is a "foreign main proceeding," and the automatic stay and other U.S. Bankruptcy Code protections are automatic
  - If the debtor maintains only an "establishment" abroad, then the foreign proceeding is "nonmain," and the U.S. Bankruptcy Code protections are discretionary

Availability of Ch. 15 Relief for Funds Incorporated Off Shore (cont.)

- Application of Chapter 15
  - Until recently, the general presumption was that a foreign bankruptcy trustee would be entitled to protection under Chapter 15 whether "main" or "nonmain," at least if there was no substantial opposition
    - *In re SPHINX, Ltd.,* 371 B.R. 10 (Bankr. S.D.N.Y. 2007)
    - *Amerindo Internet Growth Fund*, Chapter 15 Case No. 07-10327, (Bankr. S.D.N.Y. March 7, 2007)

Availability of Ch. 15 Relief for Funds Incorporated Off Shore (cont.)

- However, *Bear Stearns* placed this view in serious doubt. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.,* 374 B.R. 122 (Bankr. S.D.N.Y. 2007), *aff'd* 389 B.R. 325 (Bankr. S.D.N.Y. 2008)
  - The funds were registered in the Caymans, but had no employees or managers there; books and records, and all liquid assets were in the U.S. (Cayman location just "a letter box")
  - Court held that debtor's center of main interests was in U.S. and further that the debtor had no "establishment" in the Caymans. Thus, the debtor could not invoke Chapter 15 at all
- In similar cases, the only insolvency option in the U.S. may be a plenary Chapter 7 or 11 proceeding

Exercise of Investor's Redemption Rights and Elevation to Status of Creditor

- Recent Cayman Islands case addresses issue under Cayman law. *In re Strategic Turnaround Master Partnership, Ltd.* (Cayman Islands Court of Appeal, Dec. 12, 2008)
  - Background: Investor submitted a redemption request to fund. After the redemption date but before the investor had been paid or removed from the register, the fund suspended redemptions. The investor filed a petition to wind up the fund on the basis that it was unable to pay its debts
  - The Cayman Court held that a redeeming investor will become a creditor *on the redemption date*, even if payment of his debt is subsequently suspended
    - Court stated in dicta that such redeeming but unpaid investors will rank ahead of other investors in liquidation but behind general unsecured creditors

Exercise of Investor's Redemption Rights and Elevation to Status of Creditor (cont.)

- In order to maintain the relative priority of investors in the event of a liquidation, Cayman funds may be more apt to suspend redemption payments, in appropriate cases, *before* the redemption date

- Outcome might be different under U.S. law
  - U.S. cases have held that an equity interest in the debtor with a right of redemption is not elevated to a creditor's claim unless the right to receive a cash payment has "matured" prior to the bankruptcy filing. *See In re Search Fin. Servs. Acceptance Corp.*, 2000 WL 256889 (N.D. Tex., March 7, 2000); *In re Baldwin-United Corp.*, 52 B.R. 549, 550 (Bankr. S.D. Ohio 1985)

Exercise of Investor's Redemption Rights and Elevation to Status of Creditor (cont.)

- However, these cases also state that the rights of investors to redeem are not guaranteed but depend on the solvency of the entity
  - Thus, under the facts of Strategic Turnaround, where the fund suspended payments, it is likely that a U.S. court would find the redemption right had not matured and remained an equity interest
  - Further, if the fund is insolvent, redemption payments would be improper much less guaranteed. In such cases, a redeeming investor is likely to remain an equity holder under U.S. law

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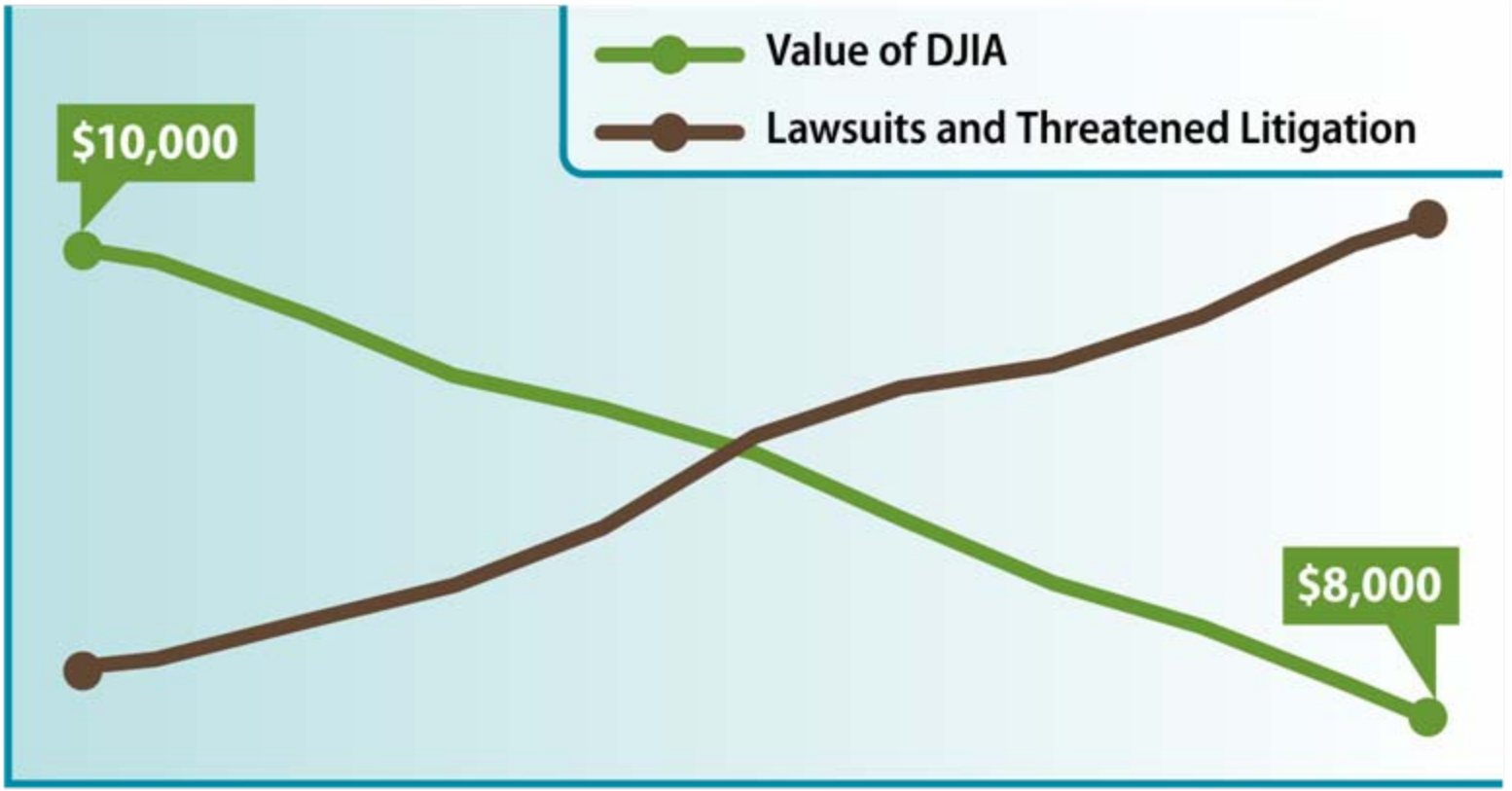
The Litigation Landscape

James F. Moyle

Troubled Funds: The Litigation Landscape



Declining Markets and Litigation Go Hand-in-Hand

Troubled Funds: The Litigation Landscape

- Important Background
  - Contractual Limitations on Liability
  - Indemnification
  - Derivative vs. Direct Claims
    - Demand Requirement
    - Special Litigation Committee

Troubled Funds: The Litigation Landscape

- Typical Investor Claims
  - Breach of Contract
  - Breach of Fiduciary Duty
  - Gross Negligence
  - Fraud

Troubled Funds: The Litigation Landscape

- Potential Remedies
  - Damages
  - Rescission
  - Injunctive Relief

Troubled Funds: The Litigation Landscape

- Examples
  - *Treasurer of State of Connecticut v. Forstmann Little & Co. Equity Partnership VI L.P.* (D. Conn. 2002) remanded to Connecticut Supreme Court (November 1, 2002)
    - Allegation: Deviation from investment guidelines
    - Damages: $1 Billion
    - Claims:
      - Breach of Contract
      - Breach of Fiduciary Duty
      - Fraud
      - Breach of Covenant of Good Faith & Fair Dealing
      - Connecticut Securities Laws
      - Gross Negligence
    - Result: Verdict for CT, but . . . .
    - Defenses:
      - Ratification
      - Reliance on Advice of Counsel

Troubled Funds: The Litigation Landscape

- *San Diego County Employees Retirement Ass'n v. Amaranth Partners LLC et al*. (S.D.N.Y. 2007)
  - Facts: Hedge Fund lost $6 billion from wrong-way energy bets
  - Allegations: Defendants misled public pension plan regarding the nature and value of Amaranth investments
  - Damages: $150 million
  - Claims:
    - Fraud
    - Gross Negligence
    - Breach of Contract
    - Breach of Fiduciary Duty
    - Securities Exchange Act
  - Status: Motions to Dismiss pending
  - Defenses:
    - Certain claims are derivative not direct
    - Failure to plead fraud with particularity

Troubled Funds: The Litigation Landscape

- *I-Enterprise Co. LLC v. Draper Fisher Jurvetson Mgmt. Co. V LLC* (N.D. Cal. 2005)
  - Limited partner sued fund's General Partner and adviser for alleged misrepresentations regarding the fund's investment style, the G.P.'s track record and the G.P.'s capital contributions to the fund
  - Damages: Sought more than $40 million
  - Claims:
    - Fraud
    - Breach of Contract
    - Breach of Fiduciary Duty
    - Conversion
    - Negligent Misrepresentation
    - State Securities Law
  - Result: Partial summary judgment for defendant
    (Previously, several claims for breach of fiduciary duty and breach of contract were dismissed as derivative in nature, not direct.)

Troubled Funds: The Litigation Landscape

- *Forsythe v. ESC Fund Management Co. (U.S.), Inc.* (Del. Ch. 2007)
  - Limited partners in private equity fund brought derivative action against General Partner, fund adviser and CIBC alleging fund was used by CIBC as dumping ground for poor-performing investments
  - Damages: $550 million fund lost 75% of initial value and over half of its investments were written down or written off
  - Claims:
    - Breach of fiduciary duty
  - Defense:
    - No demand and no demand futility
    - Statute of Limitations
    - Waiver
  - Holding: Demand excused. No waiver. Statute of limitations tolled.

Troubled Funds: The Litigation Landscape

- *Katell v. Morgan Stanley Group, Inc*. (Del. Ch. 1995)
  - Limited partners in private equity fund brought derivative claim alleging general partners engaged in self-dealing with respect to two portfolio companies
  - Damages: Plaintiffs sought unspecified damages for GP's transfer of fund assets at an inadequate price
  - Claim: Breach of fiduciary duty
  - Defense: Special litigation committee declined to proceed – business judgment rule
  - Status: Case dismissed

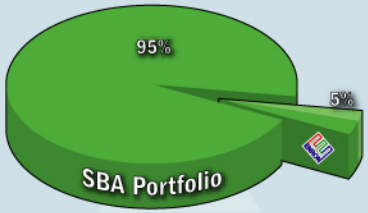
Troubled Funds: The Litigation Landscape

- Defenses
  - Gross negligence very difficult to prove
  - Demand Requirement (Derivative Claim)
  - Statute of Limitations
  - Waiver
  - Laches
  - Standing
  - Modern Portfolio Theory
    - *Florida State Board of Administration v. Alliance Capital* (Fund adviser case – essentially same considerations)
      - $2 Billion claim
      - Enron and other losses
      - Breach of Contract
      - Breach of Fiduciary Duty
      - Gross Negligence
      - State statutes
      - Fraud
      - Difficult facts
      - Jury pool
      - Jury verdict for …

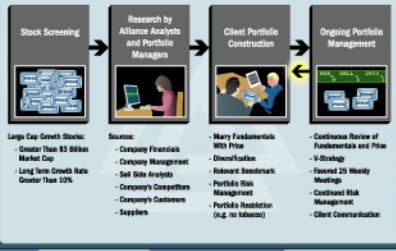
Florida State Board of Administration v. Alliance Capital

Most Analysts Concluded That Enron Was Worth More Than Its Market Price AND Annie Tsao Always Thought So

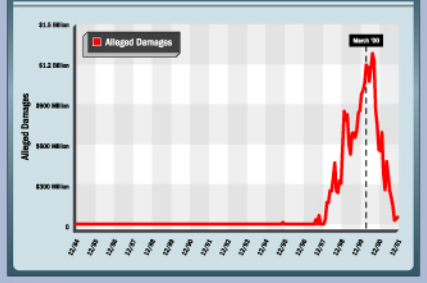
Enron's Maximum Share Was Never More Than 5% of the SBA Portfolio



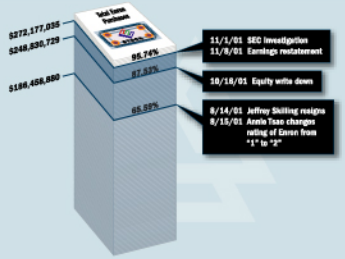
Alliance Capital's Large Cap Growth Group's Investment Process



Dr. Brown's Damages Analysis

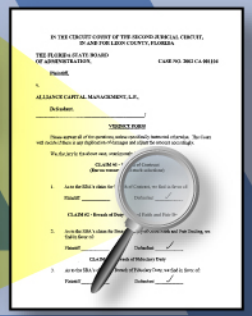


Percentage of Enron Shares Purchased



Contract, we find in favor of:

Defendant _____✓_____

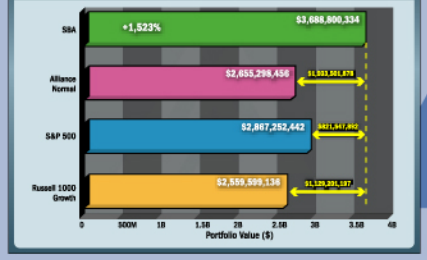


Companies in the Top 30 of the Fortune 500 Reported Losses in "Other Comprehensive Income"

Like Enron, these Fortune 500 Companies also had at least two years of losses in "Other Comprehensive Income" between 1998-2000

Ford · SBC · Texaco · Chevron · Morgan Stanley · ExxonMobil · Wal-Mart · GM · GE · Citigroup · AT&T · Verizon · Philip Morris · Bank of America · Boeing · Duke Energy · AIG · Home Depot · Merrill Lynch · ConAgra

Al Harrison Beat the Benchmark and Other Indices (1984-2001)



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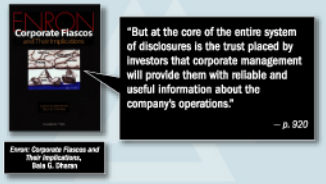
Enron: Corporate Fiascos and Their Implications



"But at the core of the entire system of disclosures is the trust placed by investors that corporate management will provide them with reliable and useful information about the company's operations."

– p. 920

Troubled Funds: The Litigation Landscape

- Other Considerations

Troubled Funds: The Litigation Landscape

- Other Representative Cases
  - Claims by Merger Partners Against Private Equity Funds:
    - *United Rentals v.RAM Holdings* (Del. Ch. 2007)

      (Denying specific performance and avoiding reverse break-up fee)
    - *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.* (Del. Ch. Sept. 2008)

      (Banks must honor acquirer's commitment to buy Huntsman)

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- **HOWARD S. BELTZER is co-chair of Morgan Lewis' global Restructuring Group**. He focuses his practice on major Chapter 11 proceedings and multinational insolvency cases. He has been counsel to Linens 'N Things and Mervyn's, two of the largest retailers to file in the current bankruptcy cycle. He is also representing one of the major creditors of Lehman Brothers in Lehman's Chapter 11 and SIPC proceedings. He recently represented a major international bank in reviewing its miscellaneous relationships with the various Wall Street Firms, including Bear, Stearns. He is actively involved in several ongoing restructurings of large nationwide real estate developers. He has also taken lead roles in some of the largest multinational restructurings effected to date. Mr. Beltzer is listed as one of the world's leading bankruptcy and insolvency lawyers in the 2004, 2006 and 2007 editions of *IFLR 1000*. He is also listed in *Chambers USA: America's Leading Lawyers for Business* (2005-2008), *The Best Lawyers in America* (2008-2009), and *Legal 500 USA* (2006-2008). Mr. Beltzer received his J.D. from Yale Law School in 1982 and his B.A., magna cum laude and Phi Beta Kappa, in government from Harvard College in 1979.

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- **Andrew D. Gottfried is a partner in Morgan Lewis's Business and Finance Practice, and a member of the Bankruptcy and Financial Restructuring Practice.** Mr. Gottfried has extensive experience in all aspects of creditors' rights law, including bankruptcy, reorganization, work-outs, creditor litigation and restructuring. Mr. Gottfried has represented major financial institutions, creditors committees and trustees in significant bankruptcy cases and has obtained leading Court decisions in many areas of creditors' rights law. He also acted as lead borrower's counsel for American Cellular Corporation in connection with the restructuring of $1.6 billion of its debt pursuant to a tender offer and back-up prepackaged Chapter 11.
- Mr. Gottfried has served on bar association committees on bankruptcy and reorganization, and has spoken to business groups on creditors' rights and bankruptcy restructuring issues. He previously practiced for 24 years with Zalkin, Rodin & Goodman LLP until that firm's practice was combined with Morgan Lewis in 1999.
- Mr. Gottfried is admitted to practice in New York.

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- **James F. Moyle is a partner in Morgan Lewis's Litigation Practice and leader of the firm's Commercial Litigation Practice in New York.** Mr. Moyle's practice covers a broad range of matters, focusing on commercial litigation and securities class actions. He has represented a variety of corporate clients, including financial institutions, investment advisors, and insurance companies in federal and state courts, before regulatory bodies, and in sensitive internal investigations.
- Mr. Moyle is featured as one of New York's leading lawyers in the Legal 500 and in *Chambers USA,* which describes him as "highly client-focused and responsive."
- Prior to joining Morgan Lewis, Mr. Moyle was a partner in the litigation and dispute resolution practice of an international law firm, where he was a member of the firm's 13-person governing board. While there, Mr. Moyle obtained a jury verdict in a case that was recognized by *The National Law Journal* as one of the "Top Ten Defense Wins of the Year."
- Mr. Moyle received his J.D., magna cum laude, from Albany Law School of Union University in 1991, where he was an editor for the *Law Review*. He received his B.A., with honors, in English from the State University of New York at Binghamton in 1988.
- Mr. Moyle is admitted to practice in New York and before the U.S. Supreme Court as well as numerous U.S. Circuit Courts of Appeals and District Courts.

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- **Louis H. Singer is a partner in Morgan Lewis's Business and Finance Practice and head of the firm's Private Investment Funds Practice.** Mr. Singer's clients include life insurance companies, public and private pension funds, private investment funds, investment managers, universities and family offices. He is a member of the firm's Advisory Board.
- Mr. Singer represents private equity funds in both fund formation and investment and domestic and international investors in virtually every type of private investment fund, including buyout, venture capital, real estate opportunity, corporate governance, hedge, distressed assets and mezzanine funds. He has an extensive background in the formation of funds-of-funds and co-investment funds and in their investment activities.
- Mr. Singer's practice also focuses on the representation of life insurance companies and other investors in direct debt and equity investments, including the purchase of senior and subordinated notes, mezzanine investments, buyouts, venture capital investments and structured financings. He has represented life insurance companies and other financial institutions for over 25 years.
- Mr. Singer served as a trustee of the American College of Investment Counsel for nine years and as president of that organization. He is a member of the board of governors of the Association of Life Insurance Counsel. He was elected to membership in the Private Investment Funds Forum and serves on the Committee on Private Investment Funds of the Association of the Bar of the City of New York.

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- **Jedd H. Wider is a partner in Morgan Lewis's Business and Finance Practice and a member of the firm's Private Investment Funds Practice.** Mr. Wider concentrates his practice in the structuring and formation of and investment in international and domestic private investment funds, particularly global private equity funds, hedge funds, real estate funds, mezzanine debt funds, venture capital funds and funds-of-funds and in the subsequent representation of these funds in their investment activities. He represents leading financial institutions and investment banks as well as financial boutiques in their roles as sponsors, placement agents, and investment entities. He also has an extensive background in complex financial structurings and transactions and joint ventures.
- Mr. Wider's views on the hedge fund and private equity fund industries and capital markets are frequently sought by members of the international media. His analysis can be found in publications such as *The Wall Street Journal, The Economist*, and the *Financial Times,* as well as on television networks such as Bloomberg and CNN. Mr. Wider also regularly lectures and serves as a panelist on private investment fund topics for trade programs and organizations. Recent speaking engagements include presentations to the Hedge Fund Institutional Forum, Dow Jones Private Equity Analyst Limited Partners Summit, Endowments & Foundations Roundtable, Association of Life Insurance Counsel, National Association of Public Pension Fund Attorneys (NAPPA), West Legalworks, the Third Annual Euromoney Summit of European Hedge Funds in London, the Capital Roundtable 2008 New York Conference: Fundless Equity Sponsors - How to Raise a Dedicated Private Equity or Mezzanine Fund, the American College of Investment Counsel, the On Point Investor & Hedge Fund Risk Summit, and the New Frontiers in Hedge Fund Due Diligence Conference.

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