AMERICAN BANKRUPTCY INSTITUTE

2025 International European Insolvency Symposium

Keynote

Ryan A. Maupin, Moderator
Deloitte Turnaround and Restructuring | New York

Morgan O'Neill
Sound Point Capital Management, LP | New York

Southeast Bankruptcy Workshop

CONCURRENT SESSION

The Rise of Private Credit

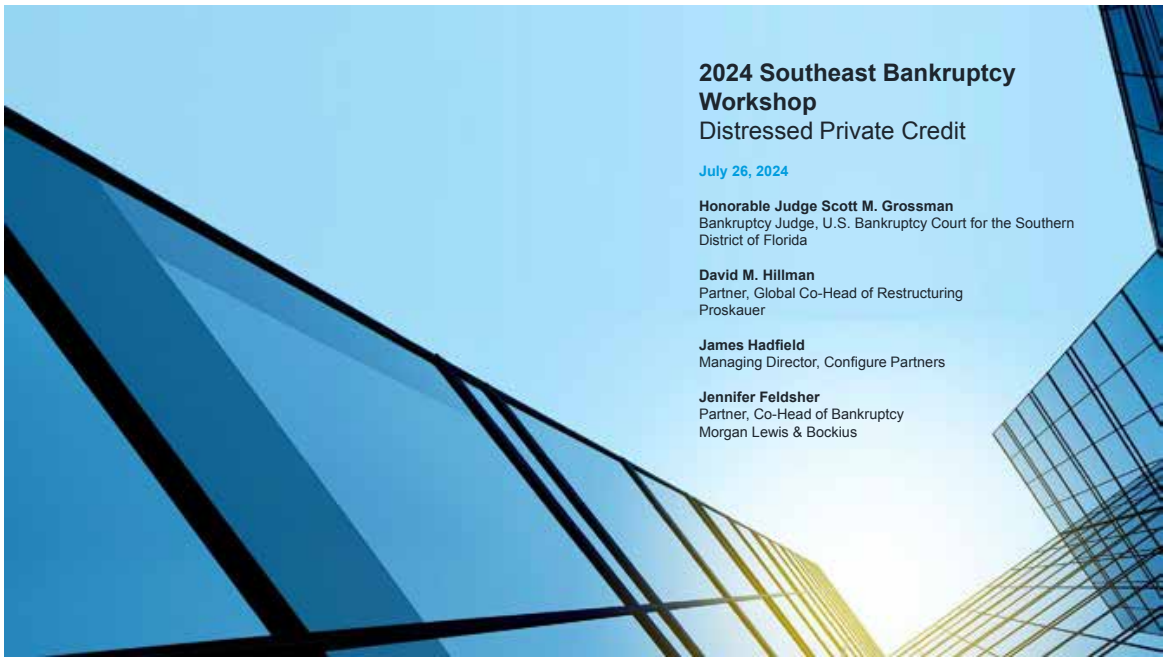
Jennifer Feldsher
Morgan, Lewis & Bockius LLP | New York

Hon. Scott M. Grossman
U.S. Bankruptcy Court (S.D. Fla.) | Fort Lauderdale

James S. Hadfield
Configure Partners, LLC | Atlanta

David M. Hillman
Proskauer | New York

2024



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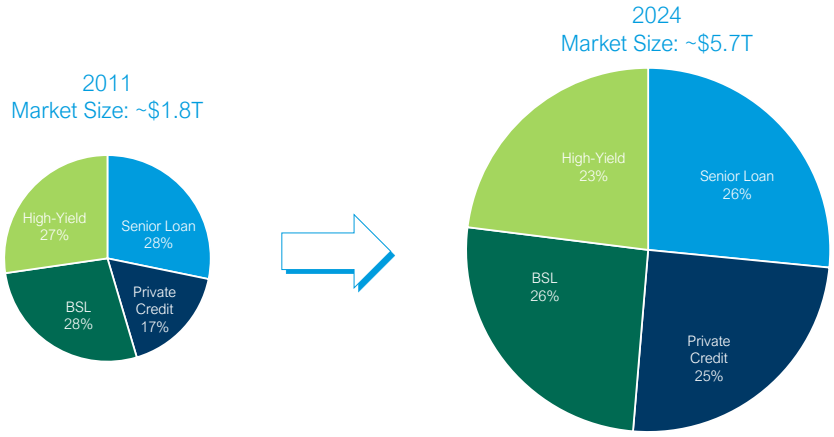
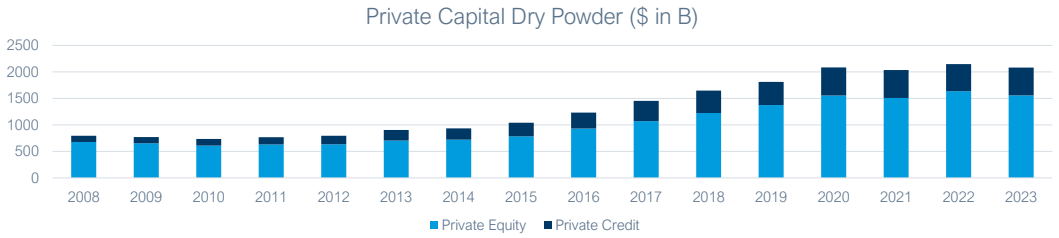
What is Private Credit?

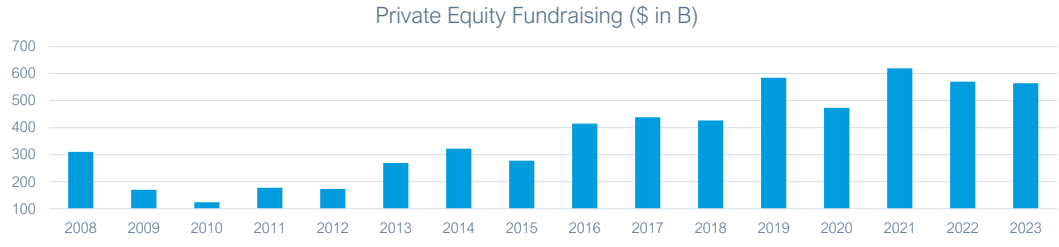


Source: Private Debt Investor, Morgan Stanley

*U.S. Debt Market sizes excluding corporate investment grade bonds

Market Statistics



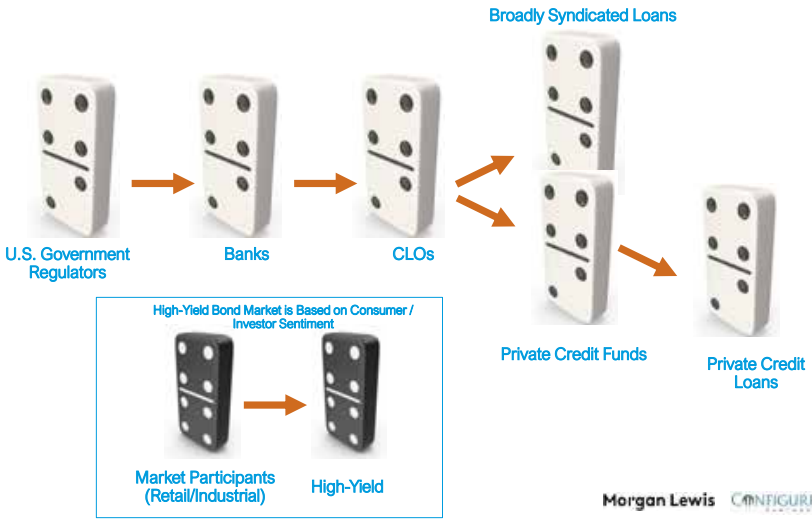


Key Differences in Private Credit vs Broadly Syndicated Loans

Key Considerations – Stakeholder Motivations			
Banks	Private Credit	Bond Holders	BSL Holders
Performing debt vs. in workout	Par holder	Par vs. 80 cent buyers vs. 50 cent buyers Advisor to bondholder group often calling shots; usually a larger financial advisor or investment bank	Par vs. 80 cent buyers vs. 50 cent buyers Advisor can be calling shots, but often 1 or 2 larger hedge funds are controlling behind the scenes

- *Stakeholders driving the process for a distressed business can have dramatically different motivations and behavior*

Ratings / Marks / Regulation



Out of Court Transactions

- Restructurings defy a one-size fits all approach because every deal is unique and different tools are required to solve different problems.
- Bankruptcy is expensive, time-consuming and introduces significant legal, financial and operational uncertainty. But also comes with advantages in asset sales or to right-size footprints or address litigation liabilities.
- In the middle of these scenarios are debt for equity transactions that can be implemented out of court through different legal structures.
- A company facing distress may have a viable restructuring path by working with its lenders to raise additional capital to bridge its liquidity needs and to eliminate funded debt from its balance sheet in an out of court change of control transaction. While this type of transaction can fix a broken balance sheet more quickly and cost effectively than chapter 11, it will not fix a broken business.

Factors Driving Success of OOC Transactions

Factors driving success of out-of-court change of control transaction involving a debt-for-equity swap:

1. Consent
   - Borrower consent and cooperation are critical features of an out of court change of control transaction.
2. Scope of Problem: Debt v. Operations
   - A debt for equity change of control transaction will not — without more — fix a company's operational problems and is therefore best suited for fundamentally sound companies that have an excessive debt relative to earnings capacity.
3. Existence of Legacy Liabilities
   - A debt for equity transaction is equally ineffective at addressing the needs of companies suffering from so-called "legacy liabilities."
4. Limited Change of Control Consequences
   - Navigating change of control implications in key contracts is critical for an out of court change of control transaction.
5. Managing Elevated Risk Profile
   - The are various risks involved in an out of court transaction, such as potential claims for successor liability and fraudulent transfer.
6. Aligning Employment Incentives
   - Lenders engaging in debt for equity transactions must work with management to recalibrate and restructure equity awards, bonuses and change in control payments.
7. Tax Efficient Structuring
   - The success of an out of court transaction may depend on whether tax risks can be successfully neutralized in a tax efficient structure.

Board Flips
How Effective is the Pre-Petition Exercise of Proxy Rights in the Face of Bankruptcy?

- What is a "Board Flip"?
  - Distress happens, even at companies that once appeared financially solid. When it does, the company, its board, and its lenders often enter into restructuring discussions in search of a consensual path forward.
  - However, in the event debt restructuring discussions are at an impasse, lenders may replace a borrower's board of directors with a new board made up of independent directors through the exercise of proxy rights.
- Should a "Board Flip" be unwound in bankruptcy?
  - Some have argued that a board flip should be unwound if the parent holding company promptly files for bankruptcy and makes a demand on the lender to relinquish voting control over the borrower, arguing that such voting control violates the automatic stay provisions of the Bankruptcy Code prohibiting creditors from controlling estate property or from attempting to collect a debt after the filing.
- The "CII Decision"
  - Judge Laurie Selber Silberstein of the United States Bankruptcy Court for the District of Delaware, in an April 2023 decision squarely rejected this position.

Golden Shares

- What is a "Golden Share"?
  - A "golden share" refers to an equity interest in a company that affords the owner a number of consent rights. A key right is the right to block a company from filing for bankruptcy. Private credit lenders may rely upon a "golden share" structure when making preferred equity investments or in connection with a loan restructuring.
- The Checkered History of the Enforceability of the "Golden Share" in Delaware
  1. *In re Intervention Energy Holdings, LLC*, 553 B.R. 258 (Bankr. D. Del. 2016)
     - The Delaware Bankruptcy Court deemed a "golden share" provision entered into between a company and a secured creditor as unenforceable, as the secured creditor was only a nominal unitholder and was primarily a creditor which, unlike a director, does not owe any fiduciary duties to the company.
  2. *In re Franchise Services of North America, Inc*., 891 F.3d 198 (5th Cir. 2018)
     - The Fifth Circuit Court of Appeals came to a different conclusion, upholding a "golden share" provision, were it was held by a preferred shareholder.
  3. *In re Pace Industries, LLC*, Case No. 20-10927-MFW (Bankr. D. Del. 2020)
     - Recently, Judge Walrath, of the Delaware Bankruptcy Court, deemed a "golden share" provision unenforceable, holding that permitting the bankruptcy filing would likely benefit the greatest number of stakeholders, while dismissing the bankruptcy case would violate federal public policy by taking away a debtor's constitutional right to bankruptcy relief.

Relationship Between Private Credit and Private Equity

- Unlike in BSL and HY environment where investment banks source product that is syndicated or sold to investors, Private Credit funds are a primary sources and issuers of credit
- Actions taken, like board flips, (especially those that become public knowledge) can therefore impact the ability of private credit funds to source business from sponsors (and other lenders)
- Why other lenders?
  - Unlike BSL where an agent investment bank syndicates, private credit is often clubbed up and therefore lenders bring other lenders into the deals. Actions one takes to advantage themselves against other lenders has reputational and sourcing consequences.
- So the key question is, what's more important to the lender. Maximum recovery or continued deployment or access to new loans to grow AUM?

Liability Management

- Debt funds are responding to an increasing number of distressed loans
- Despite the desire to stay out of court, the ability to do so may be more difficult going forward
  - Competition has stretched available collateral and with limited unencumbered assets, restructuring debt becomes more challenging
- Alongside liability management transactions, cooperation agreements continue to increase and expanding, representing a trend aimed toward broader lender consensus
- Co-op agreements have evolved into sophisticated arrangements covering a variety of aspects in a restructuring
- Similarly, private credit club deals have increased and expanded in transaction size

Southwest Bankruptcy Conference

Liability-Management Transactions

Michelle Choi
Gibson, Dunn & Crutcher LLP | Los Angeles

Hon. Michelle V. Larson
U.S. Bankruptcy Court (N.D. Tex.) | Dallas

Jordan A. Weber
O'Melveny & Myers LLP | Los Angeles

Christopher J. Wells
Alvarez & Marsal | Scottsdale, Ariz.

CONCURRENT SESSION

2025

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LIABILITY MANAGEMENT: WHERE ARE WE AND WHERE ARE WE GOING?

ABI SOUTHWEST – AUGUST 26, 2025

Introduction

Basics of Liability Management

What is an LME / LMT?

- A Liability Management Exercise (LME) or Liability Management Transaction (LMT) is one or more out-of-court transactions used by distressed borrowers to restructure their debt, extend maturities, raise new capital, or otherwise manage liabilities without a formal bankruptcy filing.
- LMEs have become a central feature of the modern credit landscape, especially as macroeconomic pressures (e.g., high interest rates, tight credit markets) have increased the risk of default for leveraged issuers.
- LMEs are highly tailored, often involving complex negotiations and creative structuring to achieve specific objectives for both issuers and participating creditors.

Different "Types" of LMEs

- **Drop-Downs:** The borrower moves valuable collateral from entities subject to existing lender claims into unrestricted subsidiaries or non-loan parties, which can then issue new debt secured by those assets. This often leaves non-participating lenders with diminished collateral.
- **Uptiers:** With the consent of a majority of lenders, a borrower amends credit documents to allow new, senior (or “superpriority”) debt to be issued, often in exchange for existing debt. Participating lenders receive higher priority, subordinating non-participants.
- **Double Dips:** A new financing structure where a lender receives two independent claims on the same or overlapping collateral pools, typically through a combination of direct and intercompany loans, enhancing recovery prospects for new money providers.

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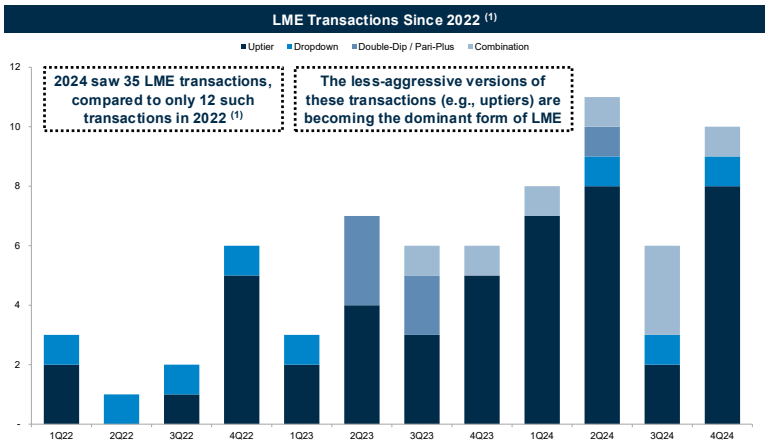
Other Variations: LME Cocktails

- **"Pari Plus" LMEs:**
  - New-money debt is provided to a nonguarantor subsidiary, which then makes an intercompany loan to the existing credit group secured pari passu by existing collateral (the "pari" component), while the new money is guaranteed by a separate entity outside the existing credit group that may also provide additional collateral (the "plus" component).
  - This gives lenders both a pari passu claim on existing assets and an exclusive structurally senior claim on additional credit support.
- **"Inside Out" LMEs:**
  - Refinancing provisions found in many credit agreements enable one or more lenders to capture "Required Lender" status from an incumbent majority.
  - Potentially available where there is little new-money incremental debt capacity.
  - Replacement term loans in some credit agreements can be implemented with the consent of the borrower and the lenders providing the replacement term loans only, with no clear requirement that they must be offered ratably to all.
  - This approach can then be paired with other LME approaches (usually uptiering) requiring Required Lender consent.

Liability Management Exercises Have Exploded in Popularity Over the Last 3+ Years

Record volume of LMEs in 2024 gave many creditors a harsh reminder of the limitations in their debt document covenants



Source: Octus/Reorg
(1) Only includes transaction types shown

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"They Mad": How LMEs End Up in the Courts

- LMEs can face legal challenges from dissatisfied non-participating or minority lenders.
- Disputes often center on whether the transaction violated "sacred rights" in credit documents, the legitimacy of amendments, or the fairness of disparate treatment among similarly situated creditors.
- Minority lenders may commence state-court actions to prosecute their claims (NY predominant venue, DE also seen).
- Litigation may move to bankruptcy court if the business fails to recover or may begin there as part of the strategy (e.g., declaratory judgment action).

Judicial Approach to LMEs

- Courts have taken varying approaches, generally relying on strict contractual interpretation under NY law but also considering equitable principles.
- Documentation is paramount and drives the outcomes.
- Litigants may see variance between state court vs. bankruptcy vs. federal appellate courts.
- If minority lenders find a sympathetic ear from a state court judge, they may succeed in obtaining injunctive relief.
- Bankruptcy judges tend to focus on quickly and efficiently resolving disputes.

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Legal Developments in Liability Management

Current state of the law

Key LME Cases

- **Serta Simmons:** The Fifth Circuit recently reversed key lower court decisions, scrutinizing the use of "open market purchase" provisions and the scope of sacred rights, with implications for the permissibility of uptier transactions and the remedies available to aggrieved creditors.
- **Wesco/Incora:** Liens restored after key language held to prohibit attempted transaction.
- **Robertshaw:** Litigation highlighted the importance of document quality and the limits of judicial remedies (monetary damages vs. unwinding transactions). The court found violations of the credit agreement but limited the remedy to damages, not equitable relief.
- **Boardriders, J. Crew, Ocean Trails:** Each case has contributed to the evolving playbook for LMEs, particularly around drop-downs (J. Crew "trapdoor"), the use of unrestricted subsidiaries, and the enforceability of blockers and sacred rights.

Other Cases and Legal Developments

- **Mitel:** NY appellate court found that Mitel's non-pro rata uptier exchange did not breach the underlying credit agreement (key language referenced any purchases, not limited to "open market purchases".
- **European LMEs (e.g., Selecta):** Availability of LME transactions approved by European courts through distressed disposals and English-law governed intercreditor agreements.
- **Divergence / Circuit Splits**

Transactional Considerations for LMEs

Risks and opportunties

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Company vs. Creditor Perspectives

- **Company/Sponsor:** LMEs are employed to extend maturities, preserve equity value, avoid bankruptcy, and/or provide operational runway without new equity infusions.
- **Creditors:** Participating creditors can achieve enhanced economics, improved collateral, and greater control over the restructuring process. Non-participants risk subordination and diminished recoveries.
- Traditional alternatives (e.g., amend-and-extend, regular way refinancing, in-court restructuring) can offer more certainty or less risk of litigation. Where those alternatives are difficult to access or otherwise infeasible, LMEs can offer further optionality for companies to address near-term pressures and extend runway.

In-Group vs. Out-Group Dynamics

- Divide between participating ("in-group") and non-participating ("out-group") creditors
- Co-op Agreements ("Co-ops")
  - Allows creditors to present a united front and negotiate from strength
  - Used both defensively and offensively
  - Not always a guarantee of pro rata treatment
  - Considerations on term of agreement and cross ownership
  - Claims of anti-trust issues have garnered attention

Transactional Risks in LME Alternatives

- Litigation
- Operational distraction to business
- Reputational risk
- Execution risk:
  - Complexity of structuring and the need for minimum consent thresholds
  - Need to reopen exchanges for minority creditors? Same or less favorable terms?
- Development of “blockers” in debt documents
- Evolving/creative structures and approaches

Market & Other External Factors

LME Evolution and Impact

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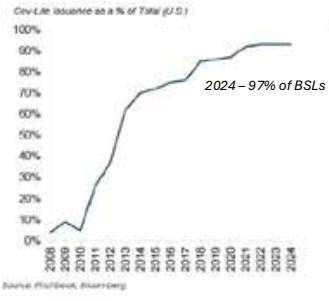
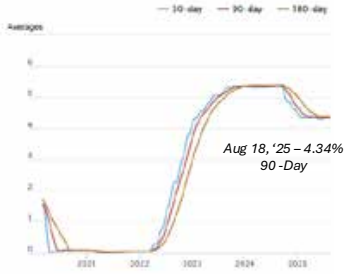
Dynamics Influencing use of LMEs

Lack of Covenants



Increase in Base Rates



Source: Federal Reserve Bank of New York

Other Factors

- Increasing LME Acceptance
- Cost of Bankruptcy
- Free option to potentially preserve equity position
- Chase for yield

Selected LME Activity In the First Quarter of 2025

Within North America, uptier transactions remained the preferred form of LME in the first quarter of 2025

Company	Month	LME Type	Principal ($M)	Notes
PSSI	January	Uptier	$307	Exchanged $307M in unsecured notes due Dec. 2025 for $275M in incremental 1l debt, including $118M in a side-car pari passu with 1L
BetterHealth	January	Uptier	$775	Ad hoc group holding 64% provide $112.5M in new capital and exchange into 1L and 2L debt at 100%, a different ad hoc exchanges into new 2L (50%) and 3L (30%) debt at 80%, while others exchange into new 2L (35%) and 3L (35%) debt at 70%
The RealReal	February	Discounted Exchange	$183	Private exchange where $183M of 1% unsecured converts due 2028 exchanged for $147M of new 4% converts due 2031
OREGON TOOL	February	Uptier / Double-Dip	$838	Two ad hoc groups holding 83% of the TLs extended their TLs and agreed to exchange into mix of 2Ls and 3Ls. Remaining TLs were lien stripped
Confluence	February	Uptier	n/a	Raised $80M, $60M under new super-priority TL and $20M in a PIK junior. Super-priority TL offered to all 1Ls, but remaining 1L is now behind it. 2Ls exchanged into 1.5Ls with two-year PIK holiday
employbridge	March	Uptier	$895	Pro rata deal with 1Ls able to participate in the FLFO, with the 1L term loan being exchanged into FLSO debt
Alvogen	March	Discounted Exchange	$727	Lenders under TLs paid about 83.5% of principal in cash, remainder exchanged into new 2L with 200bps interest rate step up. Company issues $553M of new 1L
B RILEY	March	Uptier	$123	Exchange with private investor moving $123M of unsecured notes into $88M in new 8% 2Ls

Source: Octus/Reorg

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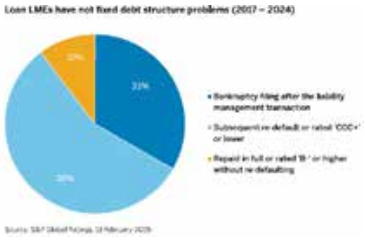
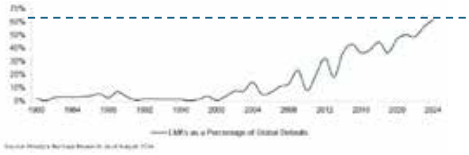
LME Impact

Higher Default Rates.....

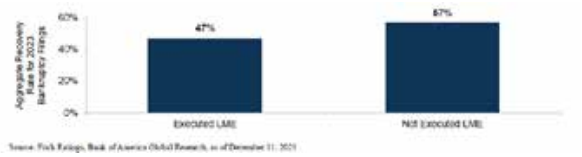
Kicking the Inevitable.....



Greater % of Defaults....



Lowering Recoveries, BUT....



What's Next?

Private Credit

- $1.7T asset class taking share from leveraged loan ($1.4T) and HY debt ($1.6T)
- Significantly more restrictive than BSLs in terms of the loose provisions that allow LMEs.
- Lender groups in private credit are not only small, but comprised of lenders who maintain close relationships with sponsors in each credit and with one another. But…
  - According to Pitchbook, the percentage of issued private credit deals with five or more lenders grew from 0.5% in 2014 to 7.5% in 2024.
- Amend/Extend, PIK, sponsor infusion of capital (26%) common in deals
- Pluralsight's private credit drop-down LME (IP) transaction occurred in June 2024

Going Global

- Fewer transactions
  - Directors Duties
  - Intercreditor Agreements
  - Restructuring Process
  - Community
- Domestic Tranche vs. Global Tranche voting (aggregate vs. separate)

Big Beautiful LME

- Volatility and Uncertainty
- Tariff Impact

Faculty

Ryan A. Maupin is a managing director with Deloitte Transactions and Business Analytics LLP in New York in its M&A and Restructuring practice. He has 20 years of experience advising boards, domestic and international company executives, secured and unsecured creditors, hedge funds and private-equity funds in restructuring situations both in court and out of court. Mr. Maupin is primarily focused on advising clients in complex financial turnarounds, § 363 sale processes, debt restructurings and liquidations. He is a member of the Turnaround Management Association (TMA), ABI and the Association of Insolvency & Restructuring Advisors (AIRA). He was selected as part of ABI's inaugural class of "40 Under 40" in 2017. Mr. Maupin received his B.S. from Millikin University.

Morgan O'Neill is a managing director and portfolio manager in the Capital Solutions Group of Sound Point Capital Management, LP in New York, where she evaluates investment opportunities for the Capital Solutions Strategy in the private credit vertical. She previously was with Sound Point and worked at HPS Investment Partners on its Specialty Loan Fund, where she underwrote and executed new investment opportunities. Prior to HPS, Ms. O'Neill was an investment banking analyst in the leveraged finance group at Bank of America Merrill Lynch. She received her B.A. in economics and B.S. in business administration *cum laude* from the University of North Carolina at Chapel Hill.