



AMERICAN
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2023 Annual Spring Meeting

A Bankruptcy Crisis Hiding in Plain Sight: The Juxtaposition of Failing Health Care Systems with Consumer Patients Driven into Bankruptcy by Medical Debt

*Hosted by the Consumer Bankruptcy
& Health Care Committees*

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A Bankruptcy Crisis Hiding in Plain Sight: The Juxtaposition of Failing Health Care Systems with Consumer Patients Driven to Bankruptcy with Medical Debt

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Pamela Foohey (Cardozo School of Law, Yeshiva University)

James J. Mazza, Jr. (Skadden, Arps, Slate, Meagher & Flom LLP)



Learning Objectives

- Explore industry trends and commonalities between these two parallel bankruptcy practices.
- Discuss and debate what will happen when these two debtor groups overwhelm the bankruptcy system.
- Gain an understanding of the challenges that health care debtors and consumer debtors face in these challenging times.
- Learn how practitioners across the various insolvency disciplines involved in these industries can plan for the future with these trends on the horizon.



Agenda

- Medical Contributors and Consumer Bankruptcy Filings
- Implications for Consumers
- Healthcare Provider Landscape



Medical Contributors and Consumer Bankruptcy Filings

Research from the Consumer Bankruptcy Project

www.consumerbankruptcyproject.org

Pamela Foohey (Cardozo School of Law, Yeshiva University)

Robert Lawless (University of Illinois College of Law)

Deborah Thorne (University of Idaho, Department of Sociology)



2013-2022 Consumer Bankruptcy Project

- National random sample taken in waves of 200 filings every three months
- 8,000 individual chapter 7 and 13 cases
- Data instruments: court records, written questionnaire (2,101; 26% response rate)



Bankruptcy Filers, Financials (medians)

	All Cases	Chapter 7s	Chapter 13s
Total assets	\$34,306	\$24,162	\$91,991
Total debts	\$99,504	\$88,145	\$131,293
Secured debts	\$22,758	\$13,739	\$58,081
Unsecured debts	\$43,416	\$48,631	\$31,793
Annual Income	\$48,120	\$43,956	\$58,560
Total debts/total assets	2.1	2.6	1.5
Total debts/yearly income	2.1	2.1	2.2



Reasons for Filing, Medical Contributors

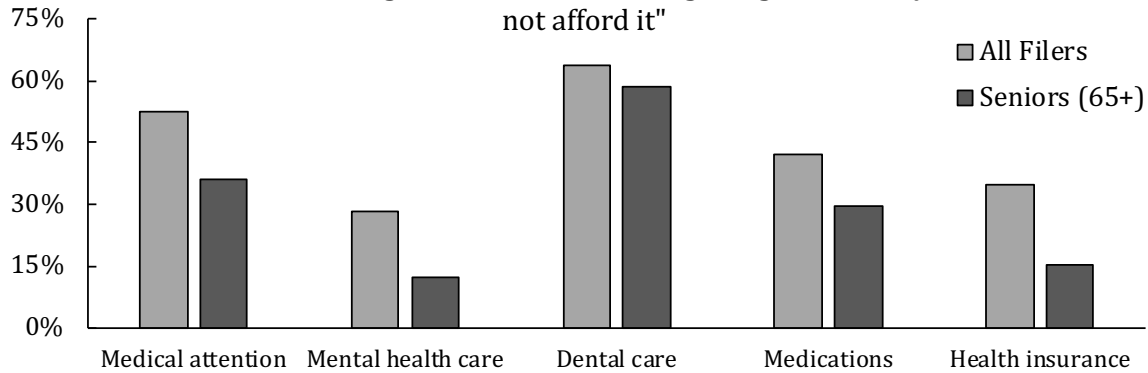
	All Cases	Seniors (65+)
Medical expenses	56%	56%
Illness-related work loss	45%	43%
Expenses OR work loss	64%	66%

Note: Table reports % of respondents who indicated they “very much” or “somewhat” agreed that a reason contributed to their bankruptcy filing.



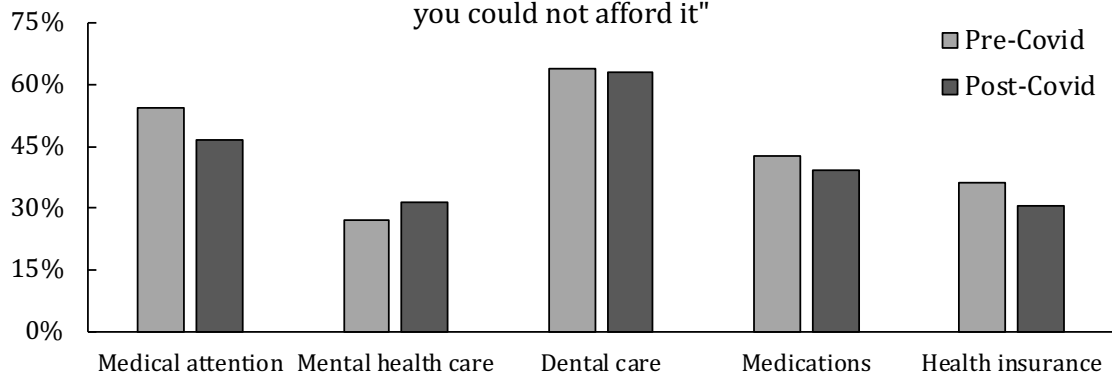
Pre-Filing Health Privations

"During the two years before your bankruptcy, did you or others in your household have to" go without the following things "because you could not afford it"



Pre-Filing Health Privations

"During the two years before your bankruptcy, did you or others in your household have to" go without the following things "because you could not afford it"





Bankruptcy Filers and Health Insurance

	All Cases	Pre-Covid	Post-Covid
Went without health insurance during 2 years before filing	40%	42%	34%
Did <u>not</u> have health insurance when filed	25%	27%	20%



Sources – Consumer Bankruptcy Project

- *Medical Bankruptcy: Still Common Despite the Affordable Care Act*, 109 American Journal of Public Health 431 (2019), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304901>
- *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, Sociological Inquiry (online version September 2019), <https://onlinelibrary.wiley.com/doi/10.1111/soin.12323>
<https://ssrn.com/abstract=3226574>
- *Portraits of Bankruptcy Filers*, 56 Georgia Law Review 573 (2022), <https://ssrn.com/abstract=3807592>
- Consumer Bankruptcy Project website: <http://consumerbankruptcyproject.org/>



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No Health Insurance?

Advise for clients:

1. Wait and obtain health insurance before filing
2. File chapter 13 (with option of converting to chapter 7 later)



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Breadth of the Healthcare Industry

- The healthcare sector employs 14% of American workers.
- Over the next three years, a shortage of more than 200,000 nurses and 50,000 physicians is expected.
- Health insurance is the largest component of nonwage compensation for American workers.
- U.S. healthcare expenditure per capita and as a percentage of GDP is the highest in the world.
- Healthcare is growing as a share of the economy and government budget.
 - In 2021, national health expenditure grew 2.7% to \$4.3 trillion, or about \$12,914 per person, and accounted for 18.3% of GDP.
 - The rate of growth in 2021 was slower than the 10.3% increase in national health expenditure in 2020, with such decrease driven by a 3.5% decline in federal expenditures after the height of the COVID-19 pandemic.
 - National health spending is projected to grow at an average annual rate of 5.1% for 2021-2030, and the national health spending share of GDP in 2030 is projected to be 19.6% (similar to the 19.7% in 2020).
 - McKinsey & Company estimates that from 2022 through 2027, national health expenditure could grow at a rate of 7.1%, compared to a rate of 4.7% for expected GDP growth over the same period. In 2023, specifically, national health expenditure could exceed GDP by as much as 5.9% due to staffing shortages, inflation, and anticipated lower economic growth in 2023.
- Healthcare is one of the largest categories of consumer spending, with the Consumer Price Index for healthcare services growing an average of 3.4% per year (compared to 2.4% per year for various goods and services) over the past 20 years.



Access to Health Care

Rural Hospitals

- 35% of all hospitals in U.S.
- Half have 25 or fewer beds
- 16% have more than 100 beds
- Acute care occupancy is 37% (compared to 62% for urban hospitals)
- 35% are owned by state and local governments



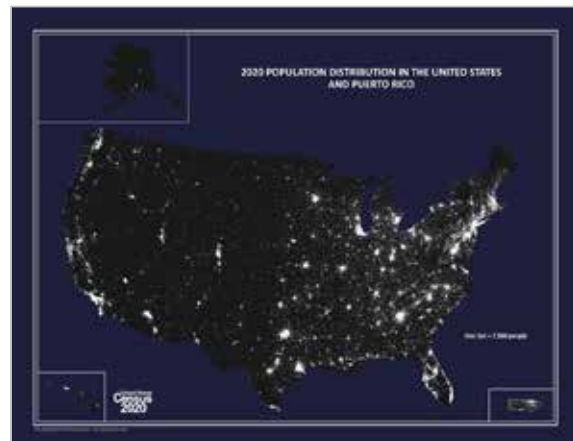
Where are Rural Hospitals?

Lower population density areas

Resulting in lower patient volume

Higher than average percentage of patients:

- Older
- Uninsured
- More sick, due to delay in care

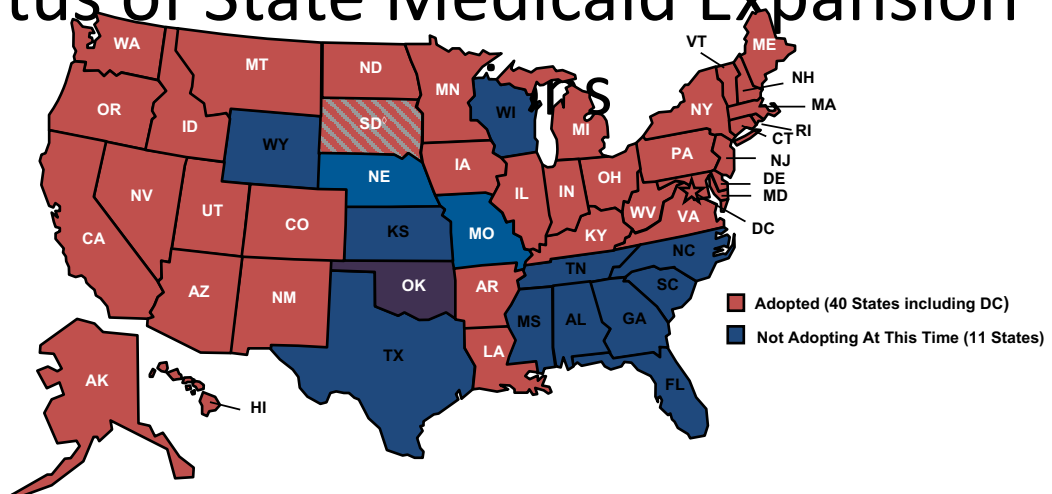




Rural Hospital Problems

- Staffing Shortages
- Regulatory Overload
- Low Reimbursement

Status of State Medicaid Expansion



NOTES: Current status for each state is based on KFF tracking and analysis of state activity. 0Expansion is adopted but not yet implemented in SD. See link below for additional state-specific notes.

SOURCE: "Status of State Action on the Medicaid Expansion Decision," KFF State Health Facts, updated February 16, 2023. <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/>



Rural Hospital Closures

2010 to 2021 – 136 closures
2020 – 19 closures



Hope on the Horizon?

Consolidated Appropriations Act (12/2020) includes creation of “Rural Emergency Hospital”

- Will receive fixed monthly payment from Medicare
- No inpatient beds – ER and observation
- Transfer agreement with Level I or II trauma center
- Other outpatient services



The No Surprises Act

- In an effort to reduce some of the burdens of healthcare costs on consumers, Congress passed the No Surprises Act (the “**Act**”), which went into effect on January 1, 2022. The Act bans so-called “surprise” medical bills, which are often very large and extremely burdensome for consumers.
- Surprise medical billing occurs when an individual unknowingly or without choosing receives services from an out-of-network provider or out-of-network facility. The out-of-network provider or facility may bill the individual for the difference between the billed charge and the amount the individual’s health insurance plan pays (“**balance billing**”). The individual may also need to pay the out-of-network cost-sharing expenses, such as coinsurance or copayments.
- The Act bans surprise medical bills for people under group and individual health plans who receive services in the following categories: (i) most emergency services; (ii) non-emergency services from out-of-network providers at in-network facilities; and (iii) services from out-of-network air ambulance service providers.

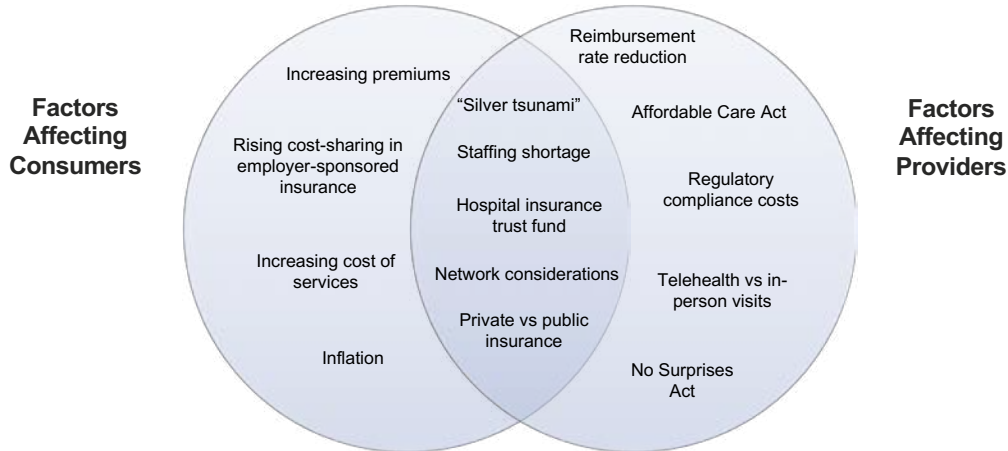


The No Surprises Act (Cont’d)

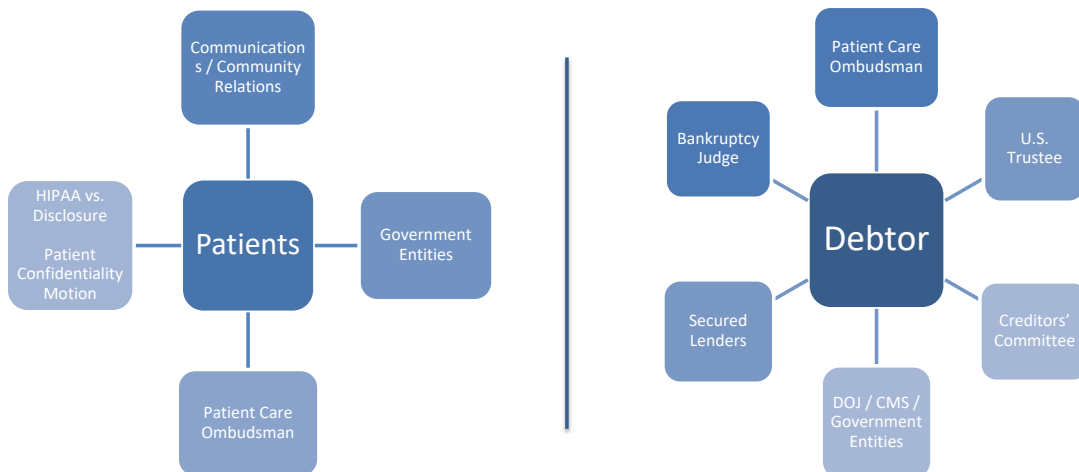
- Other components of the Act include the following:
 - An independent dispute resolution process (the “**IDR**”) to resolve subsequent disputes between plans and providers.
 - The Act only applies to individuals insured privately and not those insured through either Medicare or Medicaid; the Act also generally does not apply to ground ambulance services.
 - Patients may waive the Act’s protections for certain out-of-network services if the patients have received notice and consent to balance billing for such services.
 - Patients paying out-of-pocket must receive a “good faith estimate” of the cost of care.
- The Act has had a collateral effect on healthcare providers and facilities, including providers with a significant portion of out-of-network patients, such as air ambulance providers, emergency practitioners, and anesthesiologists, and providers with a high volume of patients, such as hospitals.
 - Increased administrative burdens due to both the IDR and the “good faith estimate” requirements as well as inconsistent coding practices to identify claims subject to the Act.
 - Lack of payment from insurers while claims are pending in a potentially years-long IDR backlog.
 - Decreased revenue from out-of-network patients as well as potential effects on other balance sheet components.



Distress in the Healthcare Industry



Healthcare Bankruptcies are Different





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- Centers for Medicare & Medicaid Services, *National Health Expenditures 2021 Highlights*, last accessed Mar. 21, 2023, <https://www.cms.gov/files/document/highlights.pdf>.
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- Ron Southwick, *Insurers say No Surprises Act helps millions, hospitals say aspects remain flawed*, CHIEF HEALTHCARE EXECUTIVE, Nov. 27, 2022, <https://www.chiefhealthcareexecutive.com/view/insurers-say-no-surprises-act-helps-millions-hospitals-say-aspects-remain-flawed>.
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- <https://www.aha.org/system/files/media/file/2022/09/rural-hospital-closures-threaten-access-report.pdf>
- KS Hospital Association: <https://www.kha-net.org/CriticalIssues/AccessToCare/RuralIssues/>

Faculty

January M. Bailey is a shareholder at Prelle Eron & Bailey in Wichita, Kan., where she focuses primarily on bankruptcy matters. She obtained her first job after law school by talking about the movie *Office Space* and the red stapler that her future boss had on his desk; the job involved bankruptcy practice, and since that time, she has been actively involved in the local and state bankruptcy communities. Ms. Bailey currently serves on the District of Kansas Bankruptcy Bench Bar Committee and as chair for the local (Wichita) bankruptcy practice committee, both of which she has done for the last several years. She was named a “Rising Star” in bankruptcy by *Super Lawyers* in 2019 and was selected to participate in NCBJ’s NextGen program in 2018. Ms. Bailey is the editor of ABI’s *Best of ABI 2021: The Year in Consumer Bankruptcy*, and she is Board Certified in Consumer Bankruptcy Law by the American Board of Certification. She received her B.S. in business administration and B.A. in French from the University of Kansas, and her M.B.A. and J.D. from the University of Cincinnati.

Hon. Mary Grace Diehl is a retired U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, appointed in February 2004 and retired in 2018. She is currently serving on recall status. Prior to taking the bench, Judge Diehl was a partner in the litigation section of Troutman Sanders LLP and chaired its Bankruptcy Practice Group. During her years in private practice, she was consistently named in *The Best Lawyers in America* and *Chambers US: America’s Leading Business Lawyers*. Judge Diehl is a past president of the National Conference of Bankruptcy Judges, and serves on the Boards of Directors of ABI, the Turnaround Management Association and IWIRC. She is also a Fellow of the American College of Bankruptcy and formerly served as vice president of its board of directors; she has also served on the boards of ABI, the Turnaround Management Association and the International Women In Restructuring Confederation (IWIRC). Judge Diehl received the Woman of the Year in Restructuring Award in 2008 from IWIRC (International Women in Restructuring Confederation), the David W. Pollard award for professionalism from the Atlanta Bar in 2013 and the Atlanta Bar Woman of Achievement Award in 2017, and she is a regular speaker at CLE programs. She served as a trustee of Canisius College from 2008-14 and received the outstanding alumni contributor award from Canisius in 2013. She has been an adjunct professor of law at Emory Law School and is a frequent speaker at national, regional and local educational programs. Judge Diehl received her B.A. *summa cum laude* from Canisius College in Buffalo, N.Y., and her J.D. *cum laude* from Harvard Law School.

Prof. Pamela Foohey is a professor of law at Indiana University at Bloomington Maurer School of Law, where her research centers on bankruptcy, commercial law and consumer law. Her work primarily involves empirical studies of bankruptcy and related parts of the legal system, combining quantitative and qualitative, interview-based research. Prof. Foohey is a co-investigator on the Consumer Bankruptcy Project, a long-term research project studying persons who file bankruptcy. The results of this research have been featured in top media outlets, including *The New York Times*, *Financial Times*, *NPR*, *U.S. News & World Report* and *The Washington Post*. Prof. Foohey’s work in business bankruptcy focuses on nonprofit entities, with a particular emphasis on how churches and other religious organizations use bankruptcy. The results of this research likewise have been featured in media outlets such as Bloomberg, CBS News “Moneywatch” and “Reveal.” She has assisted mem-

bers of Congress and federal and state agencies in the areas of bankruptcy and consumer credit. Prof. Foohey also is a contributor to the blog Credit Slips, a discussion on credit, finance and bankruptcy. She is the past chair of several Association of American Law Schools (AALS) sections (Commercial and Consumer Law, Creditors' and Debtors' Rights, Law and the Social Sciences, and Real Estate Transactions), and she is on the executive committees of several other AALS Sections. Prof. Foohey is a co-organizer of the Law & Society Association's Household Finance CRN, serves on the editorial advisory board of the *Law & Society Review*, and recently completed a three-year appointment to the editorial advisory board of the *American Bankruptcy Law Journal*, a peer-reviewed academic law review published by the National Conference of Bankruptcy Judges. She also is an active member of ABI and has served as part of the ABI Diversity Working Group since its formation. In 2019, the ABI named her a "40 Under 40" Emerging Leader in Insolvency Practice. Prof. Foohey joined the Cardozo School of Law in 2021 from the Indiana University Maurer School of Law, where she taught bankruptcy, contracts, corporations and secured transactions, and chaired the Center for Law, Society & Culture's advisory board. During her time at IU, she received the Gavel Award for outstanding contribution to the graduating class, the IU Trustees' Teaching Award for excellence in teaching, and the Leon H. Wallace Teaching Award, the highest teaching honor given to Maurer School of Law faculty. Prior to teaching, Prof. Foohey clerked for Hon. Thomas L. Ambro of the Third Circuit Court of Appeals, worked as an associate in the Bankruptcy and Financial Restructuring Group of Dorsey & Whitney LLP in Minneapolis, and clerked for Hon. Peter J. Walsh of the Bankruptcy Court for the District of Delaware. She received her B.S. in 2004 from New York University and her J.D. in 2008 from Harvard University.

James J. Mazza, Jr. is a partner in the Corporate Restructuring Department of Skadden, Arps, Slate, Meagher & Flom LLP in its Chicago office, where he represents debtors, creditors, asset-purchasers and private-equity investors in corporate restructuring transactions, both in and out of court, involving clients' interests across the globe. His experience extends to a wide variety of industries, including automotive, airlines, energy, financial services, health care, gaming, real estate and retail. He also regularly advises companies' management and boards of directors regarding fiduciary duty issues in financially distressed situations. Mr. Mazza's representative clients include TridentUSA Health Services, a nationwide mobile diagnostics health care provider; SunEdison, Inc., a renewable energy project developer, in its chapter 11 case (the largest filed in 2016) and successful emergence from bankruptcy; Exide Technologies, a global transportation and industrial battery manufacturer, in its successful chapter 11 restructuring of more than \$600 million of debt; C&S Wholesale Grocers as the co-chair of the official committee of unsecured creditors in the second chapter 11 case of the Great Atlantic and Pacific Tea Company (A&P), a grocery store chain; Unified Grocers as co-chair of the official committee of unsecured creditors in the chapter 11 case of Haggen, Inc., a grocery store chain; and Dynegy Inc. in connection with certain corporate transactions. Prior to joining Skadden in 2012, his representative matters included handling major chapter 11 cases for Visteon Corp. (auto supplier), A&P (grocer), Calpine Corp. (power producer) and UAL Corp. (parent of United Airlines). In 2014, Mr. Mazza was recognized as one of the nation's "Outstanding Young Restructuring Lawyers" by *Turnaround & Workouts*. He also has been named to *Chambers USA*, *The Best Lawyers in America* and *IFLR1000*, where he is listed as Highly Regarded. Mr. Mazza received his B.A. *cum laude* in 1997 from Vanderbilt University and his J.D. *magna cum laude* in 2001 from the University of Illinois College of Law.