



AMERICAN
BANKRUPTCY
INSTITUTE

Winter Leadership Conference

Holy Cow, Batman! Real Estate Is Back in Trouble!

Erin A. West, Moderator

Godfrey & Kahn, S.C.; Madison, Wis.

Ivan M. Gold

Allen Matkins Leck Gamble Mallory & Natsis LLP; San Francisco

Patricia B. Jefferson

Miles & Stockbridge; Baltimore

David Levy

Keen-Summit Capital Partners LLC; Chicago

WINTER Leadership CONFERENCE

FAIRMONT SCOTTSDALE PRINCESS
SCOTTSDALE, ARIZONA



NOV. 30 - DEC. 2, 2023



WINTER Leadership CONFERENCE

Holy Cow Batman! Real Estate is Back In Trouble

Erin A. West, Moderator
Godfrey & Kahn, S.C.; Madison, Wis

Patricia B. Jefferson
Miles & Stockbridge; Baltimore

Ivan Gold
Allen Matkins Leck Gamble
Mallory & Natsis LLP; San Francisco

David Levy
Keen-Summit Capital Partners LLC; Chicago



WINTER Leadership CONFERENCE

CRE Market Overview



WINTER Leadership CONFERENCE

Enormous Sales Volume Drop-Off



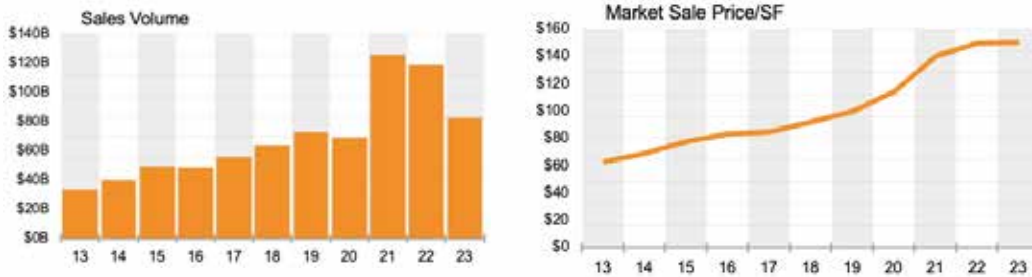
- Sales volume rebounded +11 following '20 Covid Shut down Era
- Trailing 12 months '23 down 58% from '21 high
- Raising interest rates + declining values = Limited trade activity

Source: CoStar



WINTER Leadership CONFERENCE

Industrial: Remains Strong



- While sales volume inevitably cooled from '21 & '22 peaks, Price/SF has increased 32% from 2020
- Demand for industrial space remains strong

Source: CoStar

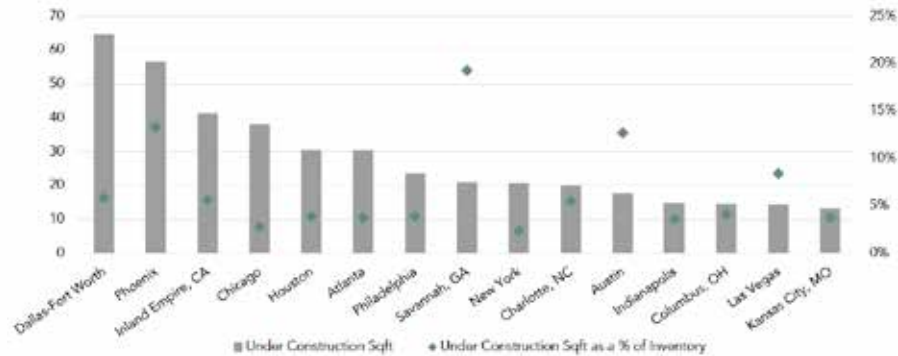


WINTER Leadership CONFERENCE

Industrial Growth Markets

Top 15 Cities With the Most Industrial Square Footage Under Construction

Industrial Sqft Under Construction in Millions (Left Axis), Industrial Sqft Under Construction as a % of Existing Inventory (Right Axis)



CoStar, Jun. 2023

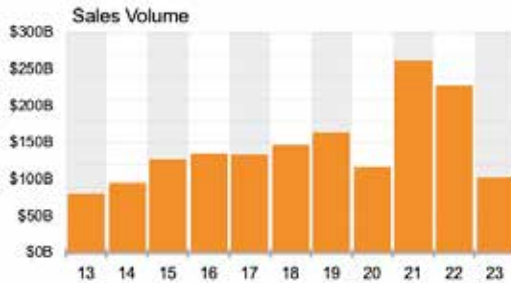
@KanterDeNeroLLP





WINTER Leadership CONFERENCE

Multi-Family: New Construction Price Pressure



- Demand increased during covid, leading to new construction, particularly in the suburbs
- Surplus in supply placing downward pressure on price/unit sales.

Source: CoStar



WINTER Leadership CONFERENCE

986,000 Multifamily Apartment Units are Under Construction, a New Record, but Permits Are Falling

New Privately-Owned Housing Units Under Construction: Units in Buildings with 5 Units or More, SA Thousands of Units



Source: Census Bureau, Jul. 2023

@KaiserSnyder @insanidize

© 2023 Insanidize. All rights reserved. No part of this publication may be reproduced without prior written permission.



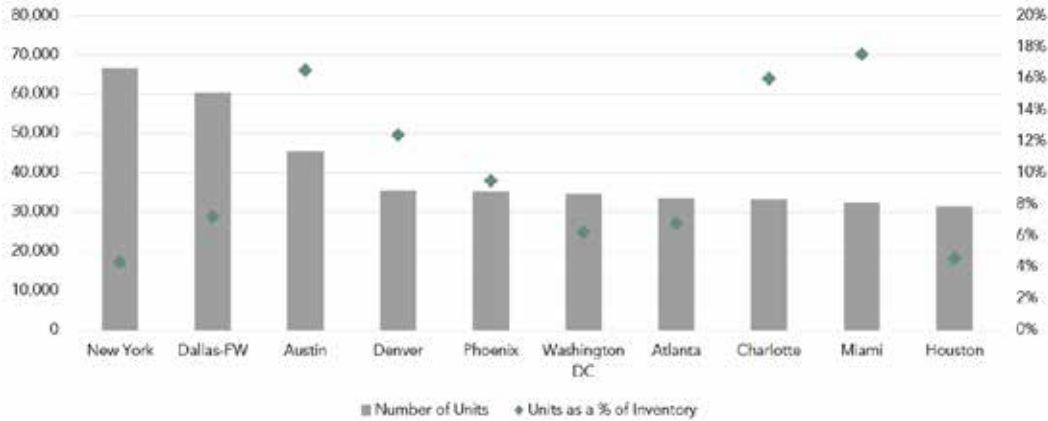


WINTER Leadership CONFERENCE

Migration to Warmer Weather, Lower Taxes

Cities With the Greatest Number of Apartment Units Under Construction

Apartment Units Under Construction (Left Axis), Units Under Construction as a Percent of Existing Inventory (Right Axis)



WINTER Leadership CONFERENCE

Retail: General Retail Benefitting from Consumer Spending



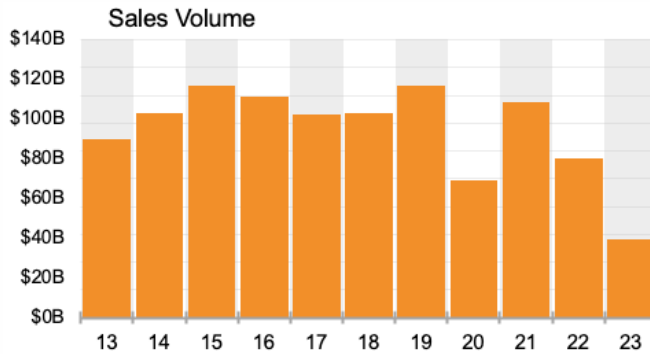
Source: CoStar

- General Retail: Wal-Mart, Target, Home Depot, Kroger, Costco
- Overall CRE sales volume -33% from '21-'22
- Strong consumer spending has boosted sector making investments attractive
- Sector beating CapRate Trends as limited trades favor cash-rich investors for credit tenant NNN investments



WINTER Leadership CONFERENCE

Office: WFH Has Decimated Demand for Space



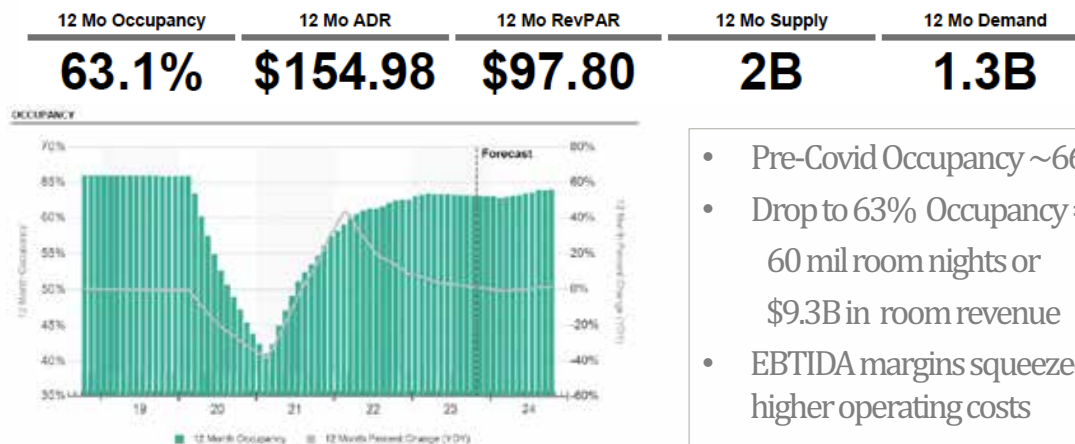
- Sales volume down 67% from \$117B in '19 to \$39B in '23
- Remote work has dramatically reduced overall demand for office space
- Kastle data shows occupancy highest level post-pandemic at 50.4%
- Hybrid working model has taken hold, Tuesday occupancy risen to 60%

Source: CoStar



WINTER Leadership CONFERENCE

Hospitality: Recovery Stalled + Cost Increases



Source: CoStar

- Pre-Covid Occupancy ~66%
- Drop to 63% Occupancy = 60 mil room nights or \$9.3B in room revenue
- EBTIDA margins squeezed by higher operating costs



WINTER Leadership CONFERENCE

Debt Maturity Crisis Brewing



WINTER Leadership CONFERENCE

Value Vaporization: CapRates Increasing While NOI Falling

		Increase in CapRates								
		5.5	5.7	5.9	6.1	6.3	6.5	6.7	6.9	7.1
Percent Change in NOI	0%	0%	-4%	-7%	-10%	-13%	-16%	-18%	-21%	-23%
	-2%	-2%	-6%	-9%	-12%	-15%	-17%	-20%	-22%	-24%
	-4%	-4%	-8%	-11%	-14%	-16%	-19%	-21%	-24%	-26%
	-6%	-6%	-10%	-13%	-16%	-18%	-21%	-23%	-25%	-27%
	-8%	-8%	-12%	-15%	-17%	-20%	-22%	-25%	-27%	-29%
	-10%	-10%	-13%	-16%	-19%	-22%	-24%	-26%	-29%	-31%
	-12%	-12%	-15%	-18%	-21%	-23%	-26%	-28%	-30%	-32%
	-14%	-14%	-17%	-20%	-23%	-25%	-27%	-30%	-32%	-34%
	-16%	-16%	-19%	-22%	-25%	-27%	-29%	-31%	-33%	-35%
	-18%	-18%	-21%	-24%	-26%	-29%	-31%	-33%	-35%	-37%
	-20%	-20%	-23%	-26%	-28%	-30%	-33%	-35%	-36%	-38%
	-22%	-22%	-25%	-28%	-30%	-32%	-34%	-36%	-38%	-40%

Source:
KC Conway, ACRE



WINTER Leadership CONFERENCE

Value Vaporization

CoStar – 5.9.22

“Average decline in value of 42%...”

New York City Hotel Investment Activity Accelerates

3.1.23 – *The Real Deal*

Purchased for \$55.4M 2019, Sold for \$24.9M!

LaSalle sells OC office building at 55% loss

3.21.23 – *GlobeSt.*

Hughes Center acquired 2013 for \$13 billion!

Blackstone Stops Making Payments on \$325M Las Vegas Office Loan

4.18.23 - *The Real Deal*

Construction cost \$2.5 billion!

Century Plaza’s price tag? \$1 billion

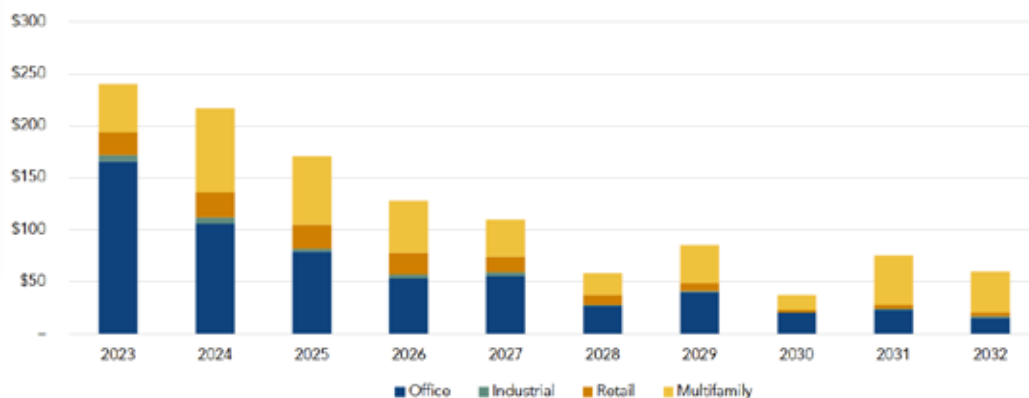
Rueben Brothers acquire Century Plaza for 40% of development cost



WINTER Leadership CONFERENCE

Meaningful Amounts of Distressed Debt set to Mature Between Now and 2025

Mortgage Maturities for Properties With LTV > 80%, by Asset Class



Source: Newmark Group Inc., Aug. 2023

[@VanderSnyder](#) [@FirstAmEcon](#)

42

©2023 First American Financial Corporation and/or its affiliates. All rights reserved. • WFLC 1/23





WINTER Leadership CONFERENCE

Smaller Banks Have Greater Concentrations of CRE Loans than Larger Banks

Proportion of Banks (Y-Axis) with Varying CRE Loan Concentrations (Color), by Bank Size (X-Axis)



Source: FDIC, Moody's Analytics, Mar. 2023

@KandiceDayden @FedAmI.com

©2023 American Bankruptcy Institute. All rights reserved. #WLC23



WINTER Leadership CONFERENCE

Lease Assumption and Assignment: Insurance Issues



WINTER Leadership CONFERENCE

- Section 365(b)(1)(C) and (f)(2)(B) – proposed assignee must demonstrate adequate assurance of future performance
- Unexpired real property leases assumed *cum onere*, i.e., with all benefits and burdens --
“Section 365(b)(1) is intended to provide protection to the non-debtor lessor to insure that he receives the full benefit of his bargain in the event of assumption.” *In re Bon Ton Restaurant & Pastry Shop, Inc.*, 53 B.R. 789, 793 (Bankr. N.D. Ill. 1985)
- “[T]he cost of assumption is nothing short of complete mutuality and requires performance in full as if bankruptcy had not intervened.” *In re Frontier Properties, Inc.*, 979 F.2d 1358, 1367 (9th Cir. 1992).
- “If the debtor decides to assume a lease [], it must generally assume all the terms of the lease and may not pick and choose only favorable terms to be assumed.” *In re Buffets Holdings, Inc.*, 387 B.R. 115, 119 (Bankr. D. Del. 2008).



WINTER Leadership CONFERENCE

“Slip and Fall”

What about a “slip and fall” occurring on the premises prior to the assignment of the lease that is not asserted until after the effective date of the assignment?

Is it enough to rely on the claims bar date?



WINTER Leadership CONFERENCE

Landlord bargained for indemnification in lease – consider a typical provision:

Except for Lessor's gross negligence or willful misconduct, Lessee shall indemnify, protect, defend and hold harmless the Premises, Lessor and its agents, Lessor's master or ground lessor, partners and Lenders, from and against any and all claims, loss of rents and/or damages, liens, judgments, penalties, attorneys' and consultants' fees, expenses and/or liabilities arising out of, involving, or in connection with a Breach of the Lease by Lessee and/or the use and/or occupancy of the Premises and/or Project by Lessee and/or by Lessee's employees, contractors or invitees . If any action or proceeding is brought against Lessor by reason of any of the foregoing matters, Lessee shall upon notice defend the same at Lessee's expense by counsel reasonably satisfactory to Lessor and Lessor shall cooperate with Lessee in such defense. Lessor need not have first paid any such claim in order to be defended or indemnified.



WINTER Leadership CONFERENCE

- If injured party sues landlord in ordinary premises liability suit, who does landlord tender to post-assignment?
- Is it enough that landlord was “additional insured” under occurrence-based insurance coverage?
- What about the deductible or self-insured retention? Didn’t landlord bargain for “first dollars” indemnity, i.e., hold harmless?



WINTER Leadership CONFERENCE

Insurance Issues to Consider

- Does the landlord even have a current certificate of insurance?
 - Was debtor-assignor's insurance coverage claims-made or occurrence-based?
 - What is size of deductible or self-insured retention?
 - Is debtor-assignee continuing in business following lease assignment (i.e., still maintaining insurance for its ongoing business) or is it being liquidated?
 - Is "tail" coverage being proposed?
 - Will assignee assume indemnification obligations for pre-closing or pre-effective date occurrences?
- Most form Asset Purchase Agreements attempt to disclaim pre-assignment liabilities and claims.



WINTER Leadership CONFERENCE

Is Debtor-Assignee Entitled to Section 365(k) Release

"Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment." 11 U.S.C. §365(k).

"[W]here an agreement between the debtor and assignee attempts to limit the obligations assumed by the assignee only to obligations arising after the closing, there has not been a complete assignment and the debtor is not entitled to the protections of section 365(k)." *American Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 81 (3d Cir. 1999).



WINTER Leadership CONFERENCE

The Landlord is Still Not Out of the Woods

- What does the plan say?
- How should a landlord respond to this plan language?

For the avoidance of doubt: (a) to the extent any insurance policy or other claim service agreement is assumed, the applicable insurer's claim for any expenses shall be paid by the Reorganized Debtors and shall not constitute an Allowed General Unsecured Claim under the Plan; (b) nothing in this Plan shall be construed to limit, extinguish, or diminish the insurance coverage that may exist or shall be construed as a finding that liquidates any Claim payable pursuant to an insurance policy; (c) nothing herein relieves any Entity from the requirement to timely file a Proof of Claim by the applicable Claims Bar Date; and (d) the workers' compensation policies issued to the Debtors by Insurer shall be assumed by the Reorganized Debtors as of the Effective Date without modification, and the parties' respective rights and/or obligations thereunder shall not be stayed or impaired in any manner.



WINTER Leadership CONFERENCE

The Landlord is Still Not Out of the Woods

A possible solution:

For the avoidance of doubt: (a) to the extent any insurance policy or other claim service agreement is assumed, the applicable insurer's claim for any expenses shall be paid by the Reorganized Debtors and shall not constitute an Allowed General Unsecured Claim under the Plan; (b) nothing in this Plan shall be construed to limit, extinguish, or diminish the insurance coverage that may exist or shall be construed as a finding that liquidates any Claim payable pursuant to an insurance policy; (c) nothing herein relieves any Entity from the requirement to timely file a Proof of Claim by the applicable Claims Bar Date; ~~and~~ (d) the workers' compensation policies issued to the Debtors by Insurer shall be assumed by the Reorganized Debtors as of the Effective Date without modification, and the parties' respective rights and/or obligations thereunder shall not be stayed or impaired in any manner; **and (e) nothing in this Plan or the Confirmation Order shall be deemed or construed to waive, limit, modify, or impair the indemnification rights and remedies of a counterparty to an assumed Unexpired Lease and the Reorganized Debtors' performance of such obligations.**

Faculty

Ivan M. Gold is Of Counsel to Allen Matkins Leck Gamble Mallory & Natsis LLP in its San Francisco office, where he represents clients in all areas of real estate-related litigation in state and federal courts, as well as contested matters and adversary proceedings in bankruptcy court. He has experience in breach-of-lease and unlawful-detainer litigation, as well as pre-litigation counseling and negotiation involving a wide variety of commercial real estate, including neighborhood and regional shopping centers, office buildings, warehouse and industrial properties, data centers, restaurants and hotels. Mr. Gold represents shopping center developers and landlords of office and data center properties in major bankruptcy proceedings throughout the U.S. He also has utilized alternative dispute resolution in a wide variety of disputes, including arbitration, mediation and private judge proceedings. Prior to joining Allen Matkins, Mr. Gold was senior counsel at Brobeck, Phleger & Harrison LLP and a partner in the San Francisco law firm of Berg, Ziegler, Anderson & Parker. He has spoken at continuing education programs sponsored by ABI and the International Council of Shopping Centers, State Bar of California, Bar Association of San Francisco and California Continuing Education of the Bar on such topics as landlord/tenant disputes, the treatment of leases in bankruptcy proceedings, alternative dispute resolution and real estate-related litigation. Mr. Gold received his B.S. from American University and his J.D. from the University of California, Hastings College of the Law.

Patricia B. Jefferson is a principal at Miles & Stockbridge P.C. in Baltimore in its Creditors' Rights and Bankruptcy Group, as well as the Real Estate and Commercial Finance Group. She represents diverse clients (lenders, unsecured creditors, potential asset-purchasers, trustees and other interested parties) in all aspects of bankruptcy cases, including cash collateral, debtor-in-possession financing, asset sales, dischargeability litigation, claims objections, avoidance actions and lease disputes. Additionally, she represents and advises secured lenders in formulating and executing workout strategies outside of bankruptcy. In addition to her bankruptcy experience, Ms. Jefferson regularly advises clients regarding distressed real estate and commercial foreclosures and receivership actions. She has served on the panel of chapter 7 bankruptcy trustees for the U.S. District Court for the District of Maryland since 2019, and has been appointed as a receiver under Maryland's Uniform Commercial Receivership Act. Ms. Jefferson is a regular speaker at legal education seminars and has been recognized as a leading bankruptcy lawyer in Baltimore by *Chambers USA* since 2015. In addition, she was included in the *Maryland Daily Record's* "VIP List: Successful before 40" in 2018, and was recognized as an emerging leader by The M&A Advisor in 2019. Ms. Jefferson received her J.D. with honors from the University of Maryland School of Law, where she was elected to the Order of Barristers and served as an associate editor of *The Business Lawyer* and as vice-president of the Moot Court Board.

David Levy, CAI, CCIM is a managing director at Summit Investment Management and Keen-Summit Capital Partners and heads its combined Chicago/Midwest office. He is responsible for all aspects of business development and execution in connection with the company's distressed-debt acquisitions and opportunistic credit transactions. Mr. Levy has more than 15 years of experience in real estate advisory and transactions, with particular expertise in workout, bankruptcy and other special situations. He holds both the Certified Commercial Investment Member (CCIM) and Certified Auctioneers Institute (CAI) designations and is a frequent speaker and moderator on real estate

restructuring programs. Mr. Levy is a licensed real estate broker and auctioneer and serves as the Special Projects – Education Leader for ABI’s Real Estate Committee. He received his M.B.A. from Miami University in Oxford, Ohio.

Erin A. West is a shareholder with Godfrey & Kahn, S.C. in Madison, Wis., and has more than 10 years of experience helping lenders, trade vendors, committees, debtors, buyers and other creditors navigate all facets of insolvency, bankruptcy and financial distress. This includes pre-bankruptcy advising and workouts, bankruptcy, and state court receivership proceedings. Prior to joining Godfrey & Kahn, Ms. West practiced bankruptcy and commercial litigation at a Madison law firm for five years, where she frequently appeared as counsel for a chapter 7 panel trustee. She is admitted to practice in Wisconsin and Minnesota, and before the Third and Seventh Circuit Courts of Appeals, and the U.S. District Courts for the Northern, Central and Southern Districts of Illinois, District of Minnesota, Eastern and Western Districts of Wisconsin and the Northern and Southern Districts of Indiana. Ms. West serves as the treasurer of the Western District Bankruptcy Bar Association and the IWIRC-Wisconsin Network. She also co-chairs ABI’s Real Estate Committee and the TMA Milwaukee Committee, and she is a 2022 ABI “40 Under 40” honoree. Ms. West is listed in *Super Lawyers* as a Wisconsin Rising Star (2011-present) and is recognized in *The Best Lawyers in America* as one of its “Ones to Watch” for Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law from 2021-present. She received her B.S. from the University of Wisconsin-Madison in 2006 and her J.D. *cum laude* from the University of Minnesota Law School in 2009.