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VALCON 2022

Hot Topics in Valuation

Katherine M. Fix, Moderator

Robinson & Cole LLP | Philadelphia

Heather Barlow

Dundon Advisers LLC | New York

William P. Hrycay

NERA Economic Consulting | New York

Craig A. Jacobson

B. Riley Advisory Services | New York

Hon. Brendan L. Shannon

U.S. Bankruptcy Court (D. Del.) | Wilmington



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Panelists:

Hon. Brendan L. Shannon, *Bankr. D. Del.*

Heather Barlow, *Dundon Advisors, LLC*

William B. Hrycay, *NERA Economic Consulting*

Craig Jacobson, *B. Riley Advisory Services*

Moderated by: Katherine M. Fix, Robinson & Cole LLP



The Latest Market Factors Affecting Valuation



Latest Market Factors Affecting Valuation

- *Effects of inflation*
- *Potential reversal of globalization*
- *Liquidity*
- *"Democratization" of accessibility to the markets*

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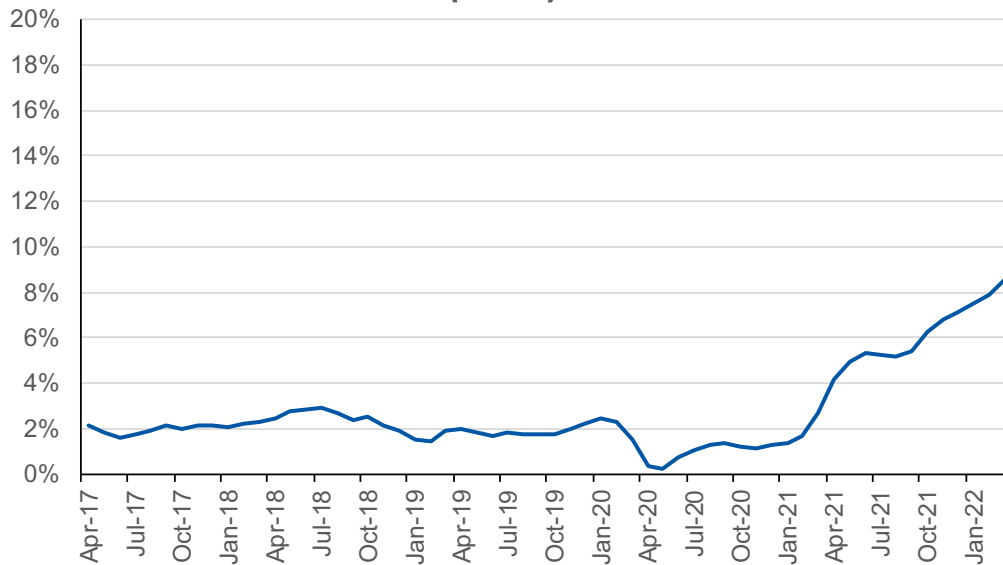


Effects of Inflation*

- *Can price increases be passed on short-term? Long-term?*
- *Expected v. Unexpected Inflation*
- *Real Growth v. Nominal Growth*
- *Impact on Margins*
- *Supply Chain Issues – what is temporary and what is permanent?*

** Something Never Seen by Most Current Market Participants!*

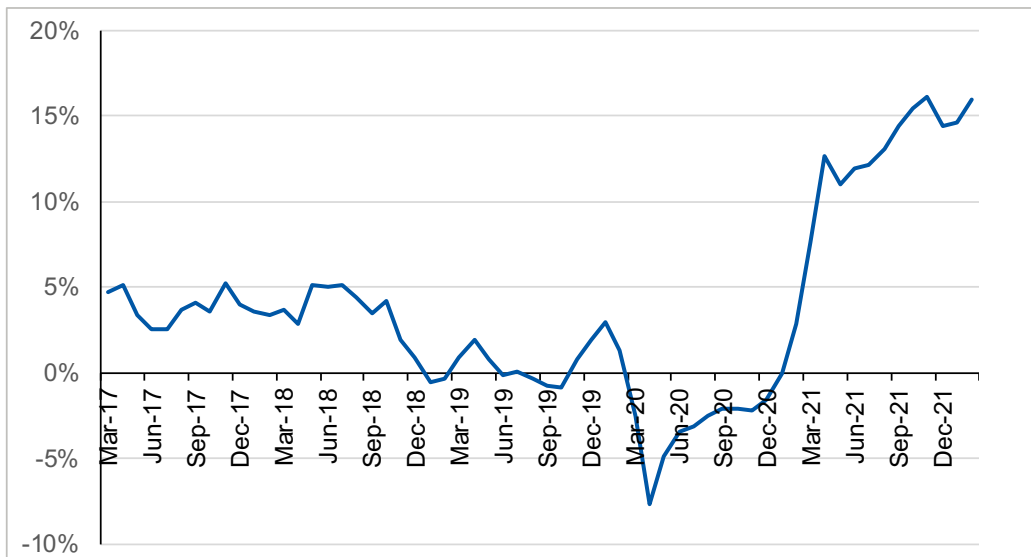
Inflation Rate (CPI): 2017 to 2022



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Consumer Price Index for All Urban Consumers: All Items in U.S. City Average, Index 1982-1984=100, Monthly, Seasonally Adjusted.

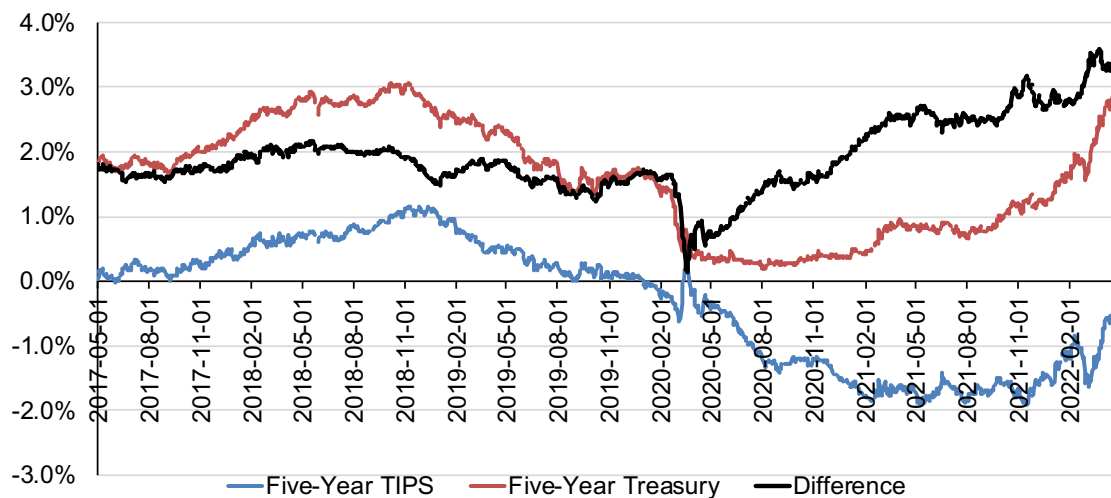
Producer Price Index: 2017-2022



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Source: Federal Reserve of St. Louis, Producer Prices Index: Total Consumer Goods for the United States.

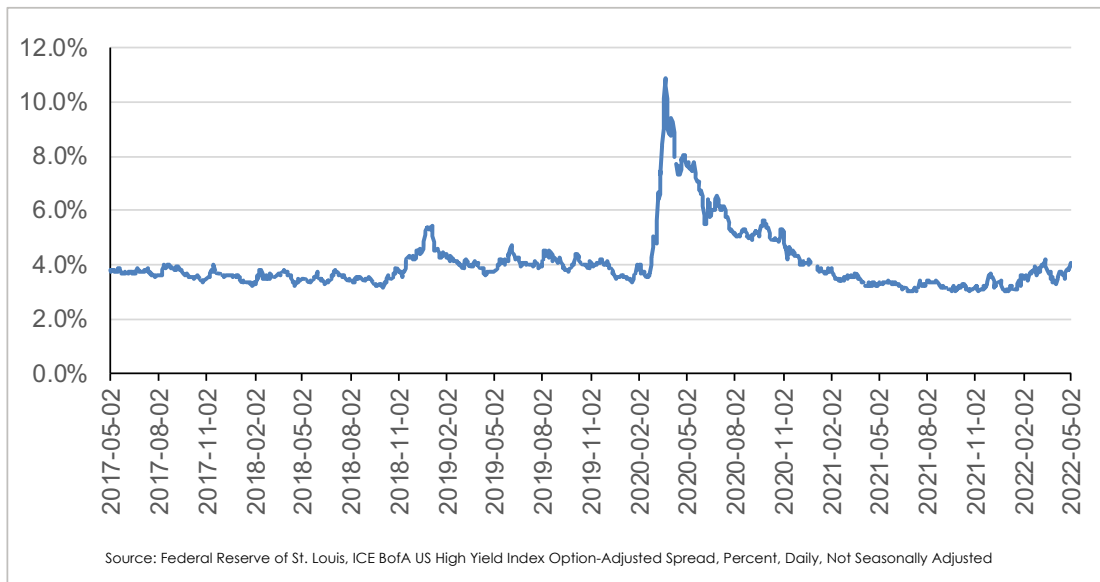
Difference between Five-Year Treasury Rate and Five-Year TIPS



Source: Federal Reserve of St. Louis, Market Yield on U.S. Treasury Securities at 5-Year Constant Maturity, Inflation-Indexed and Market Yield on U.S. Treasury Securities at 5-Year Constant Maturity, Percent, Daily, Not Seasonally Adjusted.

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Effective Yield on 5-Year BB Debt



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S&P 500 Returns During Rate Hike Cycles

Source: Daily S&P 500 price return 2/27/1925 - present
@KennethL.Fisher

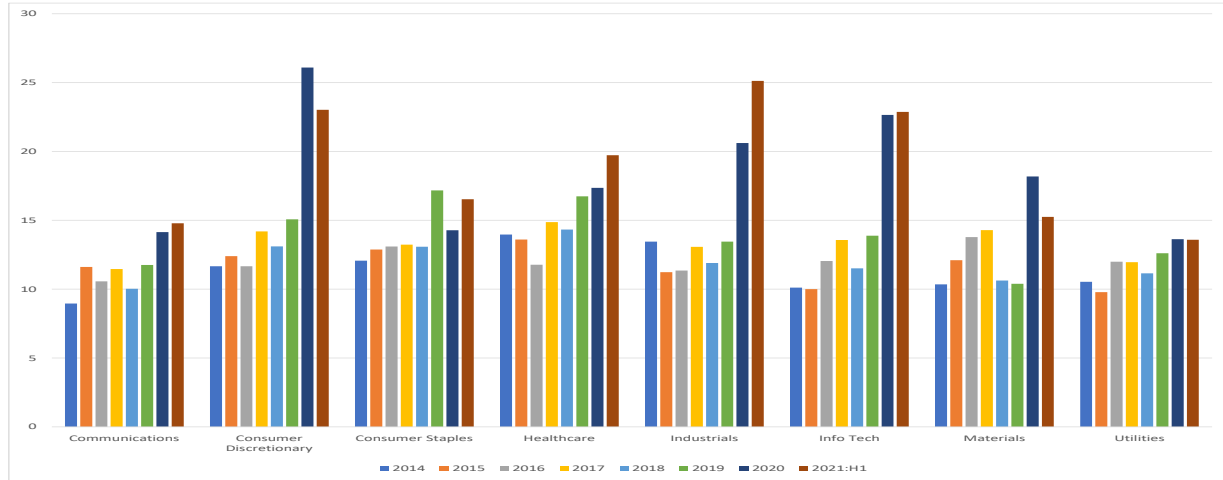
Found in: *What Rising Interest Rates Really Mean
For Your Stocks In 2022 and Beyond*, available at
<https://seekingalpha.com/article/4496496-rising-interest-rates-for-stocks-in-2022-and-beyond?source=ios-mail>

Disclaimer: Historical performance not necessarily a predictor of the future.

Start of Tightening Cycle	End of Tightening Cycle	S&P 500 Annualized Return
2/27/1925	1/8/1926	23.2%
2/3/1928	8/9/1929	38.2%
4/25/1946	1/16/1953	5.2%
4/15/1955	8/23/1957	7.0%
9/12/1958	9/11/1959	18.4%
7/17/1963	12/6/1965	12.1%
11/20/1967	4/4/1969	7.1%
1/15/1973	4/25/1974	-19.7%
8/31/1977	2/15/1980	7.4%
9/26/1980	5/5/1981	5.2%
9/4/1987	1/1/1990	4.8%
2/4/1994	2/1/1995	0.1%
6/30/1999	5/16/2000	7.8%
6/30/2004	6/29/2006	5.6%
12/16/2015	12/20/2018	6.0%
Average		8.6%



S&P 500 EV/EBITDA Multiples in the U.S. 2014 to 2021



Other Current Valuation Considerations

- *The age-old debate: Price v. Value*
- *Recent Increase in Multiples – Sustainable?*



Legal Developments Affecting Valuation



Legal Developments Affecting Valuation

- *Texas Two-Steps*
- *Third-party releases*
- *Section 363 sales*



Texas Two-Step

- Old LLC converts to a Texas LLC and enters into a Funding Agreement with Parent Affiliate, with Old LLC as payee and Parent Affiliate as payor
- Old LLC effects a "divisional merger" under the Texas merger statute
 - Old LLC ceases to exist
 - Two new Texas limited liability companies—Debtor LLC and New LLC—are created
- All of the assets and liabilities of Old LLC are allocated between Debtor LLC and New LLC, with certain of Old LLC's assets, all of Old LLC's personal injury liabilities, and Old LLC's rights as payee under the Funding Agreement allocated to Debtor LLC
- Debtor LLC converts from a Texas LLC to a n LLC in its preferred bankruptcy jurisdiction, and New LLC converts to an LLC in Old LLC's original jurisdiction
- Funding Agreement and various other intercompany agreements of Debtor LLC, including secondment and services agreements, are amended and restated to reflect the names of the parties to those agreements at the conclusion of the Texas Two-Step



Texas Two-Step Cases

- **Bestwall LLC**, No. 17-31795 (Bankr. W.D.N.C.), filed June 18, 2020, presided over by Hon. Laura T. Beyer (Georgia-Pacific)
- **DBMP LLC**, No. 20-30080 (Bankr. W.D.N.C.), filed January 23, 2020, presided over by Hon. J. Craig Whitley (CertainTeed)
- **Aldrich Pump LLC and Murray Boiler LLC**, No. 20-30608 (Bankr. W.D.N.C.) (Jointly Administered), filed June 18, 2020, presided over by Hon. J. Craig Whitley (Trane and Ingersoll-Rand)
- **LTL Management LLC**, No. 21-30589 (Bankr. N.J.), filed October 14, 2021, presided over by Hon. Michael B. Kaplan (Johnson & Johnson)



Issues Arising From the Texas Two-Step

- Fraudulent Conveyances
- Insolvency determinations
 - Transfer timing
 - Funding agreements
- Bad Faith
- Preliminary Injunctions



Third-Party Releases

- Main concern: permitting entities to control bankruptcy outcomes without having to submit to the limitations of bankruptcy.
- A common test is "necessary for the success of the reorganization." *In re Seaside Eng'g and Surveying, Inc.*, 780 F.3d 1070, 1078 (11th Cir. 2015).
- Third Party Releases permitted by statute under section 524(g) of the Bankruptcy Code in asbestos context.



Third-Party Releases: Case Law

- Four main views on third-party releases (outside of the Section 524(g) asbestos context):
 - Rejected: Fifth, Ninth, and Tenth Circuits
 - *In re Pacific Lumber Co.*, 584 F.3d 229, 252 (5th Cir. 2009); *In re Lowenschuss*, 67 F.3d 1394, 1401-02 (9th Cir. 1995); *In re W. Real Estate Fund*, 922 F.2d 592, 600 (11th Cir. 2015).
 - Constitutional authority: Third Circuit
 - *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126, 133-40 (3d Cir. 2019).
 - Section 105 standing alone: Fourth and Eleventh Circuits
 - *Nat'l Heritage Found Inc. v. Highbourne Found Inc.*, 760 F.3d 344, 350 (4th Cir. 2014); *In re Seaside Eng'g & Surveying*, 780 F.3d 1070, 1076-79 (11th Cir. 2015).
 - Section 105(a) plus 1123(b)(6): Sixth and Seventh Circuits
 - *In re Dow Corning Corp.*, 280 F.3d 648, 661 (6th Cir. 2012); *In re Airadigm Commc'ns., Inc.*, 519 F.3d 640, 657 (7th Cir. 2008).
 - Not weighed in: First, Eighth, and DC Circuits



Third-Party Releases: Case Law

- Recent Cases:
 - ***In re Purdue Pharma, L.P.*, 635 B.R. 26 (S.D.N.Y. 2021), certificate of appealability granted, No. 21 CV 7532 (CM), 2022 WL 121393 (S.D.N.Y. Jan. 7, 2022):** Court concluded no statutory authority for third party releases.
 A Bankruptcy Court "could not order the non-consensual release of third-party claims against non-debtors unless some provision of the Bankruptcy Code aside from Section 105(a) authorized it to do so. For the reasons stated above, I conclude that there is no such section, and so no such authority." *Id.* at 115.
 - ***Patterson v. Mahwah Bergen Retail Grp., Inc.*, 636 B.R. 641, 668 (E.D. Va. 2022):** Court concluded that before a plan containing third party releases could be confirmed, a bankruptcy court had to determine whether it had jurisdiction over those claims pursuant to *Stern v. Marshall*. *Id.* at 668. Further, while non-consensual third party releases may, when jurisdiction exists, be approved, they must satisfy the Fourth Circuit's seven factor test in *Behrmann v. Nat'l Heritage Found., Inc.*, 663 F.3d 704 (4th Cir. 2011), and even then, they should be used "cautiously and infrequently." *Id.* at 681.



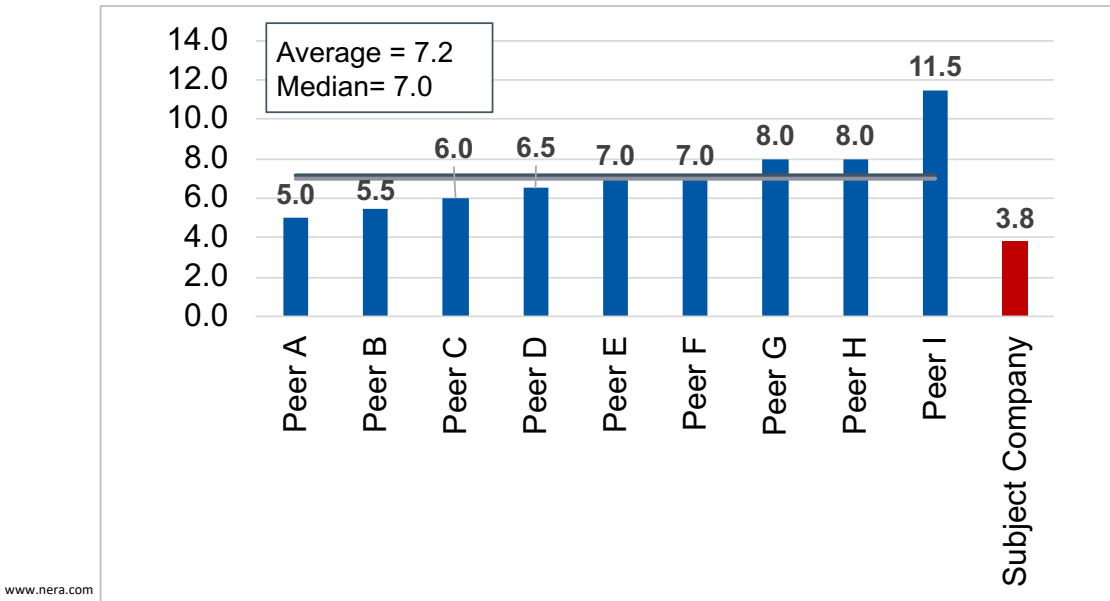
Changing Trends in Valuation Methodology



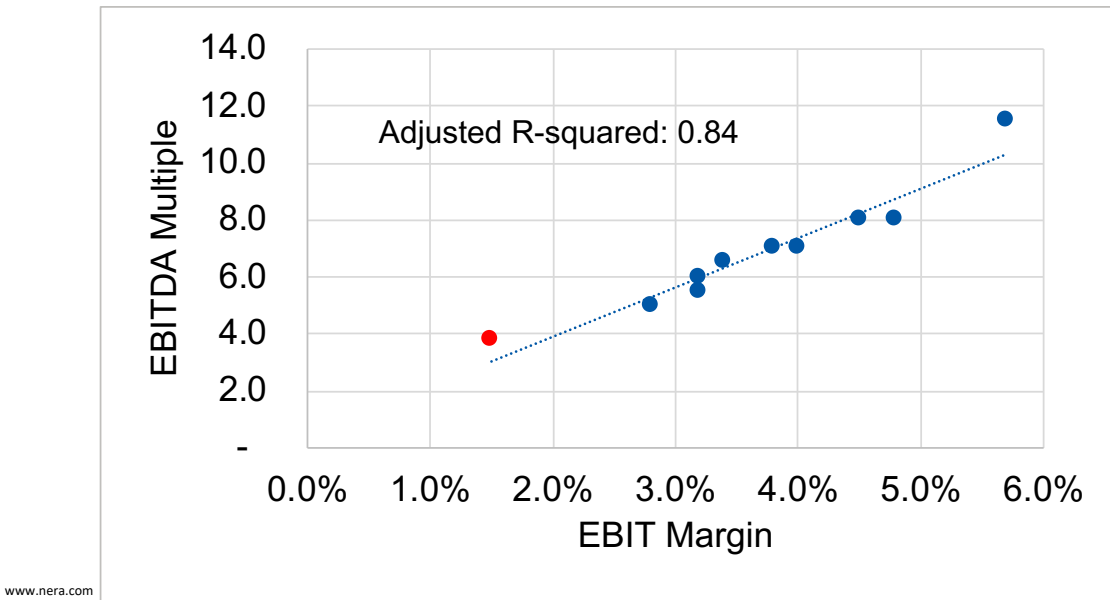
Changing Trends in Valuation Methodology:

- *Evolving use of big data and analytics*
- *New/adjusted methodologies, metrics, analytics, and tools*
- *Concerns regarding liability issues*

Is This EV/ EBITDA Multiple Reasonable?



Is This EV/ EBITDA Multiple Reasonable?



Faculty

Heather Barlow is a managing director at Dundon Advisers LLC in New York, where she manages some of the firm's most complex chapter 11 cases. Her current casework includes serving as a financial advisor to the official committee of unsecured creditors in the chapter 11 cases of Mallinckrodt plc, *et al.* and the commercial creditors committee in the chapter 11 case of the Archdiocese of New Orleans. Ms. Barlow is a veteran restructuring advisor and has successfully represented institutional, trade creditors, lenders and debtors in large and midsize complex restructuring matters. Her chapter 11 experience includes notable successful outcomes for clients as an advisor to official committees of unsecured creditors and investor ad hoc groups, as well as debtors and other constituents. Ms. Barlow has recently been selected as the trustee of the Mallinckrodt General Unsecured Creditors Trust, to be formed upon the company's emergence from bankruptcy. Her prior professional experience includes positions as both a restructuring investment banker at CIBC World Markets, Chase Manhattan Bank and boutique advisory shops, as well as being a buy-side credit research managing director in a distressed focused credit fund at Harbert Management Corp. Ms. Barlow is a member of ABI, the Turnaround Management Association (for which she serves on the 2022 Governance Committee for TMA's New York City chapter), IWIRC and INSOL. She received her B.A. and M.P.A. from New York University.

Katherine M. Fix is counsel in Robinson & Cole LLP's litigation department in Philadelphia within its Bankruptcy + Reorganizations and Business Litigation groups. She concentrates her practice on bankruptcy and corporate restructuring matters, encompassing the representations of companies and creditors in chapter 11 reorganizations, including special situations that require both transactional and litigation proficiency. Ms. Fix's experience includes both debtor and creditor representations of committees, corporate entities and individuals across a variety of industries, including the energy, maritime, retail and manufacturing industries. She has particular familiarity with representing clients in contested matters and adversary proceedings. Ms. Fix has a broad range of experience handling litigation matters in federal courts, including preferential and fraudulent transfers, declaratory judgments and injunctive relief, and breach-of-fiduciary-duty actions. She is a member of ABI and the American, Pennsylvania and Philadelphia Bar Associations. She also is a member of the Turnaround Management Association and was selected as a Rising Star in *Pennsylvania Super Lawyers* for 2020 and 2021. Within her firm, she won the Robinson+Cole Mentor of the Year Award in 2021. Ms. Fix is admitted to practice in Pennsylvania and New Jersey. She received her B.S. in accounting from Pennsylvania State University and her J.D. from Villanova University School of Law, where she worked on the *Jeffrey S. Moorad Sports Law Journal*.

William P. Hrycay, CFA is associate director of NERA Economic Consulting's Global Securities and Finance Practice in New York. He specializes in expert analysis relevant to bankruptcy litigation and litigation pertaining to complex securities. Mr. Hrycay has performed analyses in complex litigations related to bankruptcies, valuation disputes, derivative securities, mergers and acquisitions, and other complex financial matters. His areas of expertise include analysis of business enterprise valuation, equity valuation of public and privately held companies, analysis of debt and synthetic credit ratings, valuation of options, warrants and complex financial instruments, structured products and credit derivative instruments, financial benchmarking, analysis of business plans as prepared by

company management, investment banks, consultants, or other third parties for reasonableness and reliability, and the use of illiquidity and marketability discounts and premium for controlling interest, as applicable. Prior to joining NERA, Mr. Hrycay was a vice president at Duff & Phelps in its Dispute Consulting Practice, where he managed numerous projects related to litigation pertaining to bankruptcy, fraudulent conveyance, mergers and acquisitions, mortgage-backed securities, fairness opinions, business valuations, joint ventures, lost profits, management options, and cross-border intercompany debt. He also managed other projects concerning valuation of carve-outs, liquidity stress testing for financial institutions, goodwill impairment testing, purchase price allocations, and tax valuations. Mr. Hrycay received his B.A. in economics from Wesleyan University and his M.B.A. in finance from New York University.

Craig A. Jacobson is a managing director with B. Riley Advisory Services in New York and has 30 years of experience in valuation, litigation support services and transactions consulting. Prior to joining GlassRatner in 2014, he was a principal at a regional CPA firm providing valuation and litigation support services, and prior to that, he held a senior position with Willamette Management Associates. Mr. Jacobson began his career at a boutique investment banking and consulting firm, where he provided valuations, mergers and acquisitions, and litigation support services. His experience includes performing valuations for financial reporting, tax and corporate planning purposes; investment banking services including mergers, acquisitions and fairness opinions; pre-Initial Public Offering services, including valuations and assistance in the preparation of SEC filings; intellectual property valuation and litigation support services, including irreparable harm calculations; calculating economic damages, including lost profits and lost enterprise value; dissenting shareholder litigation and transactions; change-in-control disputes; failed real estate developments; and failed mergers and acquisitions litigation. Mr. Jacobson has worked in a large number of industries, including investment companies, manufacturers, distributors, financial services, and professional and other services. He also has worked on many international engagements, including companies in Japan, China, Russia, the Caribbean, Italy, Cyprus and Indonesia. Mr. Jacobson's clients include law firms, corporations, partnerships and wealthy individuals. In addition, he has testified as to his findings in deposition, arbitration, mediations, and in court, and he frequently writes and lectures on fairness opinions, solvency opinions, intellectual property valuation and infringement damages, and valuation, among other topics. Mr. Jacobson received his B.S. in economics and computer science from the State University of New York at Albany and his M.B.A. in finance from New York University's Stern School of Business.

Hon. Brendan L. Shannon is a U.S. Bankruptcy Judge for the U.S. Bankruptcy Court for the District of Delaware in Wilmington, appointed in 2006. He manages a full chapter 11 docket and also handles all chapter 13 consumer bankruptcy cases filed in Delaware. He served as Chief Judge from 2014-18. Prior to his appointment to the bench, Judge Shannon was a partner with Young Conaway Stargatt & Taylor, LLP in Wilmington, Del., where he primarily represented corporate debtors and official committees in chapter 11 cases. He is an adjunct professor in the Bankruptcy LL.M. Program at St. John's University School of Law in New York, and at Widener School of Law in Delaware. He also serves on the board of editors of *Collier on Bankruptcy* (16th ed.) and is a contributing author for *Collier Forms* and for several chapters covering the Federal Rules of Bankruptcy Procedure. In addition, he serves on the editorial board of the *American Bankruptcy Institute Law Review*. In 2011, Judge Shannon was appointed to serve as a member of the National Bankruptcy Conference. In 2020, he was inducted as a member of the American College of Bankruptcy. Judge Shannon is a

member of the Delaware State Bar Association, the American Bar Association, ABI and the Rodney Inns of Court in Wilmington, Del. He is also a member of the board of directors of the Delaware Council on Economic Education. Judge Shannon received his undergraduate degree from Princeton University and his J.D. from the Marshall-Wythe School of Law at the College of William and Mary.