AIRA Journal

Volume 34 No. 3

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Upcoming In-Person AIRA Events — See Information on p.28!

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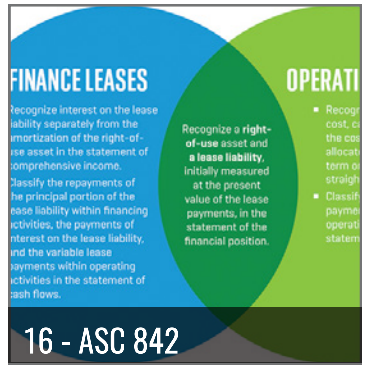
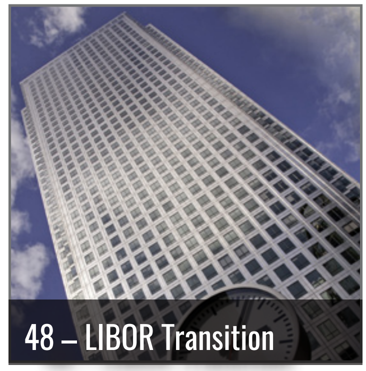
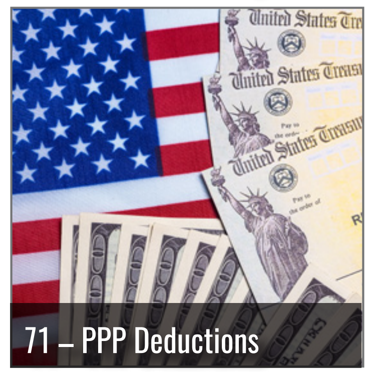






AIRA Journal is published four times a year by the Association of Insolvency and Restructuring Advisors, 221 Stewart Avenue, Suite 207, Medford, OR 97501.

From the Executive Director's Desk

JAMES M. LUKENDA, CIRA
AIRA

With the month of June behind us, my thanks go out to all who contributed to the success of AC21. From the planning committee, to the sponsors, to the panel moderators and participants, and all of you who registered for and attended sessions: Your involvement in these programs has made it possible to continue providing top-notch education important to our profession during the many months of challenge posed by the Covid-19 pandemic. I especially appreciate and thank the judges who made time in their schedules to participate as moderators and panelists—including our AC21 Judicial Chairs, **Hon. Jerrold Poslusny** and **Hon. Marc Wallace**.

Finally, to the five individuals who bore the greatest burden for the conference's success, on behalf of the Association, I thank you all: **Conference Co-chairs Shirley Cho** of Pachulski Stang **and Tom Jeremiassen** of DSI, and **AIRA's conference team: Cheryl Campbell, Mike Stull, and Michele Michael**.

AIRA anticipates next year's AC22 will be in person June 8-11, at the Hilton Cleveland Downtown, in Cleveland OH. Please reserve these dates on your 2022 calendar – I look forward to seeing you then!

In the interim, as AIRA President **Mike Lastowski** notes, AIRA is moving forward with our event plans; however, we have had to postpone the 10th Annual Energy Summit. Along with our conference co-sponsors, the staff and I are monitoring the health of the nation, so to speak, and will make adjustments as necessary to assure as safe a program as possible.

When I speak to friends, family, or colleagues, it seems 2020 was a lost year and "Oh wait, that was in 2019" is frequently heard referring to not-so-distant past events. I am personally very grateful that my family and AIRA's staff have made it through this intense period in good shape. The Association has also fared well: continuing interest in CIRA and CDBV, as well as strong support from our sponsoring firms, board of directors, and you, the members, have allowed AIRA to maintain its organizational health.

One of the shining examples of practitioners' shared thought leadership at this time is the **AIRAtaxpros io group**, moderated by **Jay Crom**, **Kimberly Lam**, **Andy Barg**, and **Bob Nistendirk**. Participants in this group share and respond to tax questions and answers as the need arises. AIRA serves as a clearing house for questions on accounting and other turnaround and restructuring issues as well as those related to taxation matters. Historically these have been addressed through telephone calls or e-mail correspondence; one of my objectives this year is to initiate a similar io (or information operations) group for non-tax issues and questions. I welcome any and all interest in assistance with launching this endeavor. I welcome any and all interest in assistance with launching this endeavor – please contact me if you are interested.

AIRA Journal volume 34-3 follows. Enjoy and learn. Stay safe and stay well.

Jim

A Letter from AIRA's President

MICHAEL R. LASTOWSKI

Duane Morris LLP

To AIRA'S members and supporters:

Thank you for your continued and enthusiastic support of AIRA. Thanks to all of you, AIRA's 37th Annual Bankruptcy and Restructuring Conference was a great success. Attendance was high and the panels received strong positive reviews. Special congratulations are due to the following members of AIRA's 2021 class of Distinguished Fellows, who were inducted at the Conference:

- David Berliner, CIRA, BDO USA, New York, NY
- Hon. Kevin J. Carey (Ret.), Hogan Lovells US LLP, Philadelphia, PA
- Stephen B. Darr, CIRA, CDBV, Huron Consulting Group, Boston MA
- Kenneth J. Malek, CIRA, CDBV, MalekRamian LLC, Libertyville, IL
- Jose M. Monge-Robertin, CIRA, Monge Robertin Advisors, LLC, San Juan, PR
- Thomas Morrow, CIRA, Evanto Group LLC, Beverly Hills, MI
- Dr. Grant W. Newton, CIRA, AIRA Executive Director Emeritus, Medford, OR
- Valda Newton, Managing Editor, *AIRA Journal*, Medford, OR
- Grant T. Stein, Alston & Bird LLP, Atlanta GA
- Teri L. Stratton, CIRA, Piper Sandler & Co., El Segundo, CA

The Distinguished Fellows designation reflects and recognizes the contributions that these individuals have made to corporate restructuring and to AIRA. They have all demonstrated excellence in their respective professions and have helped to assure AIRA's continued legacy of service to its members and to the restructuring industry in general.

As the nation continues to emerge from COVID-19 lockdown protocols, we had hoped that the Annual Conference would be the last of our "web only" events; however, the 10th Annual Energy Summit has just been postponed as this publication goes to press (new details to be announced soon). We thank you for your patience and support as we continue to make plans to "go live" at these upcoming conferences:

- TBD – 10th Annual Energy Conference – the Belo Mansion and Conference Center, Dallas TX
- October 8, 2021 – NCBJ Annual AIRA Breakfast Program – Indianapolis, IN
- November 15, 2021 – 20th Annual Advanced Restructuring and Plan of Reorganization Conference – The Union League, New York NY

Please save these dates and don't forget to register.

AIRA offers to each of you the opportunity to participate in our many activities. If you are interested in writing an article for the *AIRA Journal*, please reach out to me at mlastowski@duanemorris.com, David Bart of RSM US LLP at david.bart@rsmus.com, or Boris Steffen of Province, Inc. at bsteffen@provincefirm.com. If you are interested in participating in any of our conferences, please reach out to one of our board members, all of whom are identified on our website.

Finally, AIRA continues to offer professional certification and educational courses online. AIRA's website provides information about our CPE offerings. CIRA and CDBV training programs are also available online. For further information, contact our Executive Director, Jim Lukenda, at jlukenda@aira.org.

Once again, I thank you for all of your support and I hope to see you at future AIRA events.

Mike

WILL BANKRUPTCY TRUSTEE AND RECEIVER LITIGATION BE DIFFERENT IN THE FUTURE?[1]

JEAN-PHILIPPE POISSANT and MARÉMA DIOP
Cornerstone Research

INTRODUCTION

The disruption to the global economy that has ensued since the World Health Organization declared COVID-19 a pandemic has resulted in a sharp increase in the number of companies filing for bankruptcy. Notably, the number of U.S. bankruptcy filings by companies with over $100 million in assets increased by 84 percent during the first three quarters of 2020 compared to the same period in 2019.[2] In the second quarter of 2020, such filings reached the second-highest total for any quarter in the last fifteen years – just below the all-time high in the first quarter of 2009 during the aftermath of the 2008–2009 financial crisis (the Financial Crisis).[3]

Bankruptcy and insolvency proceedings can result in litigation filed by trustees and receivers against insiders and third parties. Such lawsuits are generally initiated several months after the beginning of the bankruptcy or insolvency proceeding due to the time needed to investigate claims. For example, a wave of trustee and receiver litigation was filed in the years that followed the Financial Crisis.

This article discusses how certain new accounting and auditing standards implemented after the Financial Crisis could affect the expected next wave of trustee and receiver litigation.

REVIEW OF HISTORICAL DATA ON TRUSTEE AND RECEIVER LITIGATIONS

Bankruptcy trustees are typically appointed by the court in (1) Chapter 7 liquidation proceedings; or (2) Chapter 11 proceedings, upon request of a party in interest or the United States Trustee, either when fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management are alleged, or if such appointment is in the interests of creditors.[4] Less frequently, the debtor's assets and operations are placed under receivership and a receiver is appointed by the court to administer or liquidate the debtor's property.[5]

Trustees and receivers have historically filed claims for fraud and breach of fiduciary duty against the insolvent or bankrupt company's former directors, officers, and/or executives as part of bankruptcy proceedings. It is also not uncommon for trustees and receivers to sue third-party service providers, such as the company's public accountants or attorneys, for professional malpractice or to seek disgorgement or repayment of professional fees. In the years following the Financial Crisis, trustee- and receiver-led lawsuits increased in tandem with the surge in bankruptcy proceedings. Based on this historical evidence, such lawsuits are expected to also arise from the COVID-19 pandemic albeit with some delay.

Trustee-Led Litigation

The number of lawsuits filed by trustees in U.S. bankruptcy courts increased significantly following the Financial Crisis, nearly tripling in 2009 compared to 2008. The number of lawsuits peaked in 2010 and remained high in 2011 – when the number of filings was five times greater than in 2008. Trustee bankruptcy lawsuits have remained above pre-2009 levels and were on a relatively stable trend between 2012 and 2019 with annual fluctuations (Exhibit 1).

The COVID-19 pandemic and the resulting global operational and financial disruptions, coupled with the

[1] This article was previously published in *The National Law Review*, Volume XI, Number 132; reprinted with permission. Available at https://www.natlawreview.com/article/will-bankruptcy-trustee-and-receiver-litigation-be-different-future.

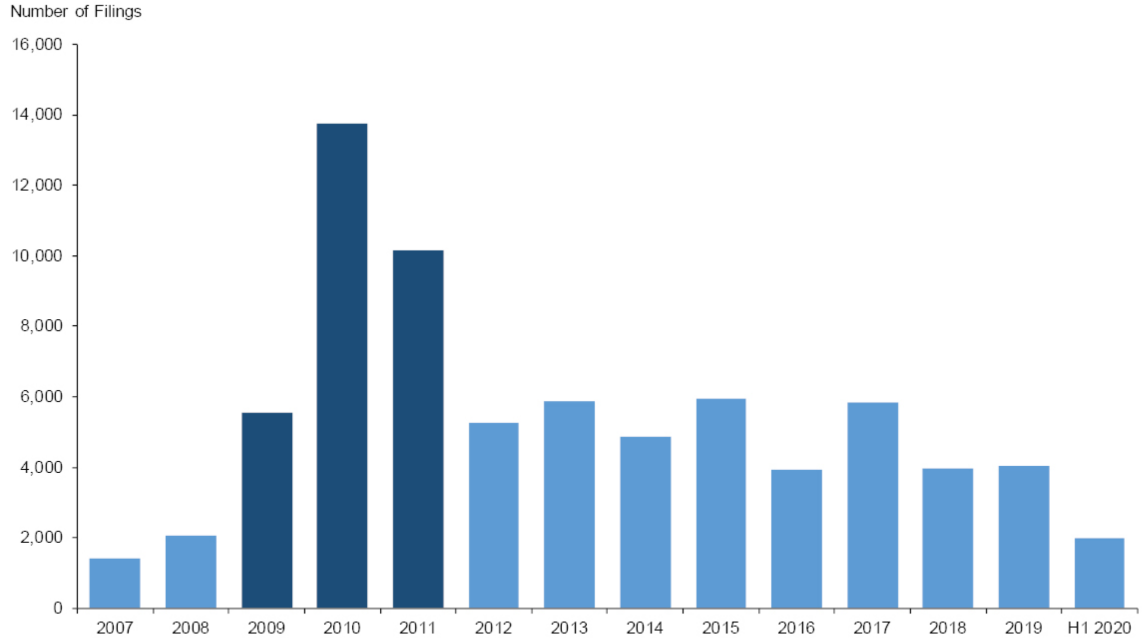
[2] Cornerstone Research, "Trends in Large Corporate Bankruptcy and Financial Distress," p. 1, https://www.cornerstone.com/Publications/Reports/Trends-in-Large-Corporate-Bankruptcy-and-Financial-Distress-2005%E2%80%93Q3-2020.pdf.

[3] *Id.* at p. 1.

[4] U.S. Code § 1104. Appointment of trustee or examiner; 11 U.S. Code § 701. Interim trustee.

[5] U.S. Code § 3103. Receivership.

Exhibit 1: Court Filings by Trustee Plaintiffs



Source: Bloomberg Law

Note: Reflects U.S.District and Bankruptcy Court filings where the Plantiff name includes the word "trustee," regardless of the nature of the claim.

large amounts of corporate debt amassed after the Financial Crisis, has put pressure on the liquidity and solvency of an increasing number of companies.[6] The number of lawsuits filed during the first half of 2020 was three times greater than the number of filings during the first half of 2008 and close to the number of filings during the first half of 2009. As the number of bankruptcy filings increases, trustee and receiver lawsuits are also expected to increase in the subsequent months and years.

Examples of trustee-led cases filed in May and June 2020 include actions brought to recover fraudulent transfers, actions brought against third-party service providers to avoid or recover fees either because the company was insolvent at the time of payment or due to alleged professional negligence, and actions seeking to enforce insurance or guaranty payments.

Receiver-Led Litigation

Although the number of lawsuits initiated by receivers is relatively lower than filings initiated by trustees,[7] a similar increase can be observed during the years after 2007. The number of lawsuits filed by receivers increased steadily in the years following the Financial Crisis. Receiver filings increased by 50 percent between 2008 and 2009, and remained high through 2014. As of June 30, 2020, about the same number of filings were registered in the first half of 2020 as during the first half of 2008. Moreover, in 2008, the majority of filings were filed by the FDIC acting as receiver for financial institutions.

Receiver-led cases filed in May and June 2020 include actions involving allegations of fraud, actions seeking relief from breach of obligations under an insurance policy, or actions seeking to recover allegedly improperly diverted funds (Exhibit 2 on p.8).

These historical trends in trustee- and receiver-led litigation suggest that the COVID-19 pandemic will trigger another wave of bankruptcy and liquidation-related lawsuits.

IMPACT OF NEW STANDARDS ON BANKRUPTCY LITIGATION

Recent changes in accounting and auditing standards may affect litigation against corporate and individual defendants. This section assesses the impact of changes related to going concern disclosures and critical audit matters.

Going Concern Disclosures

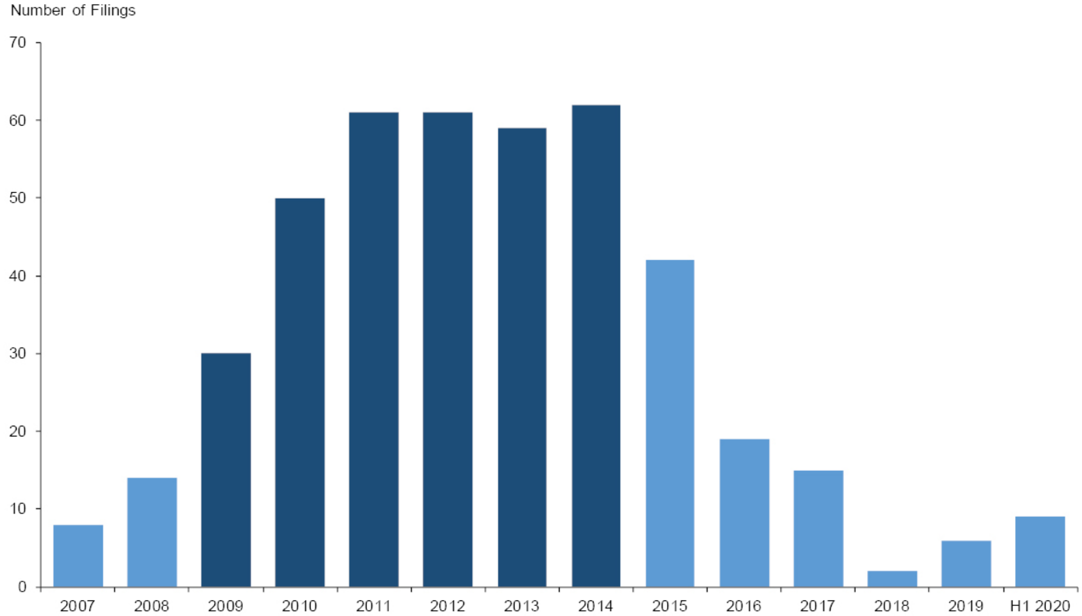
One post–Financial Crisis standard that may affect trustee and receiver litigation is the disclosure of going concern issues by reporting entities. At the time of the

[6] The debt of large companies stood at $10 trillion (48% of GDP) as of mid-2019, up from $6.6 trillion in 2008 (44% of GDP). Considering small and medium-sized companies and other businesses adds another $5.5 trillion to the U.S. corporate debt load, raising the debt-to-GDP ratio to 74%. See Mayra Rodriguez Valladares, "U.S. Corporate Debt Continues To Rise As Do Problem Leveraged Loans," *Forbes*, July 25, 2019, https://www.forbes.com/sites/mayrarodriguezvalladares/2019/07/25/u-s-corporate-debt-continues-to-rise-as-do-problem-leveraged-loans (last accessed 9/18/2020). *See also* G-20 Surveillance Note, G-20 Finance Ministers and Central Bank Governors' Meetings, July 18, 2020, pp. 6, 19–20, https://www.imf.org/external/np/g20/pdf/2020/071620.pdf (last accessed 9/18/2020).

[7] Between January 2007 and June 2020, only 320 filings were registered by receivers (in U.S. District Courts and Federal Bankruptcy Court), compared to a total of 74,535 filings by trustees (in U.S. Bankruptcy Courts).

Continued from p.7

Exhibit 2: Court Filings by Receiver Plaintiffs



Source: Bloomberg Law

Note: Reflects U.S.District and Bankruptcy Court filings where the Plantiff name includes the word "receiver," regardless of the nature of the claim.

Financial Crisis, there was no going concern disclosure guidance in Generally Accepted Accounting Principles (GAAP) for reporting entities. Instead, relevant guidance in auditing literature and federal securities law required going concern opinions by external auditors.[8] That changed when the Financial Accounting Standards Board (FASB) issued Accounting Standard Codification Subtopic 205-40, *Presentation of Financial Statements – Going Concern* ("Subtopic 205-40").[9] Subtopic 205-40 became effective for the annual period ending after December 15, 2016.

The new going concern standard brought two additional changes from the auditing standards effective during the Financial Crisis. First, the standard requires management to perform a going concern evaluation for every set of financial statements issued, including interim financial statements. As such, for public companies, management's evaluation of going concern should occur at least every quarter to comply with GAAP. The standard related to going concern effective during the Financial Crisis, however, only applied to the annual financial statement audit.[10] These additional requirements of management may affect the decision of trustees and receivers to assert claims against management and/or the external auditor.

Second, the new standard extended the period over which the entity's ability to continue as a going concern needs to be assessed. Specifically, under the prior guidance, including auditing standards issued by the Public Company Oversight Board (PCAOB), the auditor was required to evaluate whether the entity had the ability to continue as a going concern for one year beyond the date of the financial statements.[11] Under the new accounting standard, the one-year period begins on the date the financial statements are issued.[12] As such, trustees and receivers could use this change to claim a failure to disclose going concern issues in financial statements issued for a fiscal year ended more than twelve months before the bankruptcy event. For most public companies, the effects would likely be a matter of weeks. For example, large accelerated filers are required to file their 10-Ks with the SEC sixty days after the year-end.[13] The effect can be greater for private companies that sometimes issue their financial statements months after the year-end. Thus, the timing of a bankruptcy may affect when trustees and receivers assert claims in lawsuits on behalf of the bankrupt entity.

Critical Auditing Matters

A second post–Financial Crisis standard that may affect trustee and receiver litigation is the disclosure of critical audit matters (CAMs) by external auditors. Under the

[8] PCAOB, AU Section 341, The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern; The Codification of Financial Reporting Policies, Section 607.02; AICPA, Auditing Standards Section AU-C 570, The Auditor's Consideration of an Entity's Ability to Continue as a Going Concern.

[9] FASB, Accounting Standards Update No. 2014-15, August 2014.

[10] Auditors of public companies are still required to perform reviews of interim financial information in conformity with auditing standards and federal securities laws (*see* PCAOB, AS 4105: Reviews of Interim Financial Information).

[11] PCAOB, AS 2415: Consideration of an Entity's Ability to Continue as a Going Concern, at .02.

[12] Or, in certain circumstances, available to be issued.

[13] "Form 10-Q," U.S. Securities and Exchange Commission, Investor.gov, https://www.investor.gov/introduction-investing/investing-basics/glossary/form-10-q.

new standard, external auditors of public companies are required to include in their audit report a disclosure of matters that involve especially challenging, subjective, or complex auditor judgment.[14] The disclosure by the auditor generally includes a description of how the CAM was addressed in the audit, such as the audit procedures performed in response to the CAM. For fiscal years ended starting on June 30, 2019, auditors of large accelerated filers are required to evaluate the disclosure of CAMs, if any.

Assessing the ability of the entity to operate as a going concern represents one of the matters that auditors have disclosed as a CAM. An analysis of 1,451 annual reports filed with the SEC by large accelerated filers between July 1, 2019, and August 31, 2020, shows that going-concern-related CAMs as well as broader going concern disclosures have been modest for the largest public companies considering the current economic environment. Going concern was identified as a CAM for a small group of large accelerated filers that also included going concern disclosures in their financial statements. The auditors of only four of the sixteen large accelerated filers identified going concern as a CAM. Going concern was also identified as a CAM for a small group of large accelerated filers that did not include going concern disclosures in the financial statements (four large accelerated filers).[15] That means that management of these large accelerated filers concluded that there was no substantial doubt about the ability to continue as a going concern even though the auditor concluded that this evaluation represented especially challenging, subjective, or complex auditor judgment.

Given the new CAM standard, there may be a greater number of going concern CAMs in early 2021 annual filings for companies with December 15, 2020, or later fiscal year ends if the economic environment remains challenging.

The disclosure of CAMs could affect lawsuits by trustees and receivers against management and the auditor. During the standard-setting process, the PCAOB acknowledged that the new CAM standard could generally increase the risk of litigation in connection with financial disclosures. Trustee and receiver litigation represents one type of litigation that may be affected by the implementation of the CAM standards.[16]

LOOKING AHEAD

Bankruptcy and insolvency lawsuits by trustees and receivers against insiders and third parties are generally initiated months after the beginning of the bankruptcy or liquidation proceeding. The COVID-19 pandemic has created substantial uncertainty and has particularly affected certain industries such as travel, entertainment, and retail. These lawsuits may differ from past litigation due to the new accounting and auditing standards that became effective after the Financial Crisis.

The views expressed in this article are solely those of the authors, who are responsible for the content, and do not necessarily represent the views of Cornerstone Research.

[14] Greg Eastman, Elaine Harwood, Steven McBride, and Jean-Philippe Poissant, "Will PCAOB's New Audit Rule Trigger Shareholder Litigation?," *Law360*, October 16, 2019.

[15] Three of four entities prepared their financial statement pursuant to US GAAP. The other company prepared its financial statements pursuant to the international financial reporting standards ("IFRS"). The relevant IFRS guidance differs from Subtopic 205-40.

[16] "The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendments to PCAOB Standards," PCAOB Release No. 2017-001, June 1, 2017, pp. 17, 32 – 33, 41, 93, https://pcaobus.org/Rulemaking/Docket034/2017-001-auditors-report-final-rule.pdf.

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JUDICIAL OPERATIONS DURING COVID: LESSONS LEARNED THAT MAY REMAIN AFTER COVID

SHERYL P. GIUGLIANO, MARTI P. MURRAY, and DOUGLAS SPELFOGEL

With appreciation to:
THE HONORABLE ALAN S. TRUST[1]

The COVID-19 pandemic created unprecedented challenges for legal professionals and testifying experts in the courtroom. As a result, advancements in technology were dramatically accelerated, as courts and the insolvency and restructuring community sought to respond to the resulting fallout from the crisis. Many of the lessons learned and the procedures adopted during the COVID-19 pandemic may remain as courts preserve the increased flexibility and reduced costs of remote operations when they are beneficial, while returning to in-person court proceedings more generally.

COVID-19 ARRIVES

Prior to COVID-19, remote appearances by telephone were fairly routine on non-evidentiary matters. As a result of health and related issues arising from the COVID-19 pandemic, courts and professionals looked to expand remote access. This included conducting evidentiary trials and hearings via videoconferencing platforms notwithstanding objections by counsel regarding the challenges of presenting evidence remotely. For example, in November 2020, the New York State Unified Court System suspended all new jury trials and grand juries due to the resurgence of COVID-19 in areas throughout the state. Many federal courts similarly suspended in-person proceedings.

When in-person meetings, depositions, and hearings became impossible, the insolvency and restructuring community adopted new procedures and protocols for a virtual setting. The virtual world created unique challenges for legal professionals, witnesses, courts and the presiding judges. This article focuses on the advancements deployed in the legal community in response to the adverse impact on the judicial process from the pandemic, including, as follows:

- maintaining the public record;
- conducting virtual depositions, hearings, and trials, and the ethical issues and pitfalls that can arise in those settings;
- handling evidence; and
- practical pointers.

THE LEGAL FOUNDATION FOR VIRTUAL OPERATIONS

The virtual operations implemented during the COVID-19 pandemic, which allowed litigation proceedings to continue during unprecedented times, are rooted in a pre-existing legal foundation.

First, Rule 43(b)(4) of the Federal Rules of Civil Procedure provides a procedural mechanism for remote live testimony, stating that "at trial, a witness's testimony must be taken in open court," and "for good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." Fed. R. Civ. P. 43. The Advisory Committee Note on the 1996 Amendment provides that: "[c]ontemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial." The Committee found that "[t]he most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place.

[1] Disclaimer: None of the statements, facts or opinions contained in this article constitute the official policy of any judge, court, agency or government official, or quasi-governmental agency.

Continued from p.11

Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other – and perhaps more important – witnesses might not be available at a later time."

Second, Rule 30(b)(4) of the Federal Rules of Civil Procedure allows for remote depositions and reads as follows: "[t]he parties may stipulate – or the court may on motion order – that a deposition be taken by telephone or other remote means. For purposes of this rule and Rule 28(a), 37(A)(2) and 37(b)(1), the deposition takes place where the deponent answers the questions."

Third, Rule 804(a)(4) of the Federal Rules of Evidence permits the use of deposition testimony when a witness is considered unavailable due to illness, which is known as the "unavailability" hearsay rule. Fed. R. Evid. 804(a)(4).

CONDUCTING VIRTUAL DEPOSITIONS, HEARINGS, AND TRIALS

Remote depositions and hearings appear to be part of the "new normal." COVID-19 era courts found that the pandemic encouraged the use of remote depositions, because they allow discovery to go forward while keeping witnesses and professionals safe from the risks of the pandemic. *See, e.g., Rouviere v. Depuy Orthopaedics, Inc.*, 2020 U.S. Dist. LEXIS 122184 at *7 (S.D.N.Y. July 11, 2020) (denying motion to conduct in person deposition or alternatively extend discovery deadline until the COVID-19 pandemic has subsided and instead ordering the deposition to be completed by remote means and noting "conducting depositions remotely is becoming the 'new normal…' [t]he more recent court decisions [permitting remote depositions during the pandemic] build on pre-pandemic case law that liberally allowed for and encouraged remote depositions and the technology for taking depositions in a way that has improved significantly over time" (citations omitted)).

Fairly early in the COVID-19 pandemic, courts across the country acknowledged this "new normal," issuing decisions permitting remote testimony and administrative orders establishing remote trial procedures. *See, e.g., Joffe v. Kings & Spalding LLC,* 2020 U.S. Dist. LEXIS 111188, n.7 (S.D.N.Y. June 24, 2020) (denying motion for reconsideration to allow plaintiff to take third-party witnesses' out of state depositions in person and noting that "[c]ourts in this circuit have been cognizant of the risks of in-person testimony and have encouraged remote depositions as a matter of course"); *Cesari S.R.L. v. Peju Province Winery, L.P.,* 2020 U.S. Dist. LEXIS 151184 (S.D.N.Y. Aug. 20, 2020) (ordering remote deposition protocol pursuant to rules 26(c)(1), 30(b)(4) and "the Court's inherent authority to manage discovery" and stating the court reporter need not necessarily be physically present with the witness during when the deposition is being taken due to COVID-19); Order Regarding Virtual Hearings, General Order No. 4-1 (S.D. Ohio Aug. 21, 2020 (issuing remote hearing guidelines on a variety of issues including platforms to use, required equipment, exhibits and testimony, recordings, and general recommendations); Administrative Order 2020-06 (Bankr. S.D. Fla. March 19, 2020) (modifying original signature rule and establishing procedures for admission of direct evidence through declarations or affidavits during the COVID-19 pandemic).

During the COVID-19 pandemic, courts also issued decisions in pending cases permitting remote trials and finding "good cause" under Fed. R. Civ. P. 43(a) for remote live testimony. Some courts implemented protocols to govern the conduct of virtual sessions in court, in depositions, at hearings, and in trial. *See, e.g., Flores v. Town of Islip*, 2020 U.S. Dist. LEXIS 159252 (E.D.N.Y. Sept. 1, 2020) (granting motion to proceed with trial remotely despite objections that it violated Fed. R. Civ. P. 43(a) and noting COVID-19 provided good cause to permit remote testimony); Order Granting Plaintiffs' Motion for Entry of an Order Permitting the Trial to be Held Using Video-Conference Technologies and Compelling Witnesses to Appear Remotely, *Earl E. Gales, Jr. v. John Emil Alle (In re Alle)*, Case No. 2:13-bk-38801-SK, Docket (Bankr. C.D. Cal. Aug. 25, 2020) (D.E. #433); Order Setting Evidentiary Hearing by Video Conference and Establishing Related Deadlines, *In re Rubie's Costume Company, Inc.*, Case Nos. 20-71970 thru 20-71975 (Bankr. S.D.N.Y. June 8, 2020) (D.E. #109); *Argonaut Ins. Co. v. Manetta Enters.*, 2020 U.S. Dist. LEXIS 103625 at *4-5 (E.D.N.Y. June 11, 2020) (dismissing defendant's arguments regarding glitches in technology, lack of access to witnesses and hard copies of documents, and video impairing counsel's ability to cross-examine witnesses when finding that COVID-19 constituted good cause to hold a bench trial via video-conference). *But see Pilkington v. Tutor Perini Bldg., Corp.*, 2020 U.S. Dist. LEXIS 47357 at *57 (S.D.N.Y. 2020) (noting it may not be feasible to schedule an evidentiary trial on civil matters during the COVID-19 outbreak) (order establishing trial procedures and finding that remote trial had "adequate safeguards" for the purposes of FRCP 43(a) and would not violate due process).

ETHICAL CONSIDERATIONS DURING REMOTE DEPOSITIONS, HEARINGS, AND TRIALS

As we saw during the COVID-19 pandemic, although there are numerous benefits to virtual proceedings and remote appearances, they also pose unique ethical and other challenges.

New Technology. Attorneys, as well as financial advisors and other professionals practicing in this new virtual world should take time to learn about new technology being used by the courts. Model Rule 1.1, Comment 8 states that "to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." A few examples demonstrate how failing to become familiar with the requisite technology could result in ethical issues, these include: inadvertently sharing a confidential document by uploading the incorrect document; misusing a camera or microphone by failing to realize that one's microphone is on when on a break and talking to a client, or making public what one thinks is a private statement to co-counsel publicly; or preventable issues with technology causing frustrating delays or inaccurate transcripts.

Deposition Exhibits. Deposition exhibits in a virtual world raise unique issues, including when they should be transmitted and viewed. Opposing counsel may send deposition exhibits well in advance of the actual deposition. The best practice is to avoid opening the documents until the day of the deposition unless otherwise instructed by opposing counsel. Additionally, if the parties are exchanging documents by mail, and a professional is concerned they may arrive early, consider placing the exhibits in a sealed envelope or package with explicit instructions that the seal may not be broken until the time of the deposition and on camera.

Communications During Depositions. Note, the fact that a deposition is remote does not change the rules on communicating with a witness during a deposition. If the communication is not allowed during a traditional deposition, it is not allowed in a remote deposition. Attorneys are not allowed to communicate with or advise their clients during a remote deposition, with some narrow exceptions. For example, an attorney may instruct a deponent not to answer when necessary to preserve privilege, to enforce a court ordered limitation, or to present a motion. *See* Fed. R. Civ. P. 30(c)(2). Depending on the jurisdiction, attorneys may be allowed to communicate with their clients during a break from the deposition, but attorneys should be careful to ensure a secure line of communication that is not being recorded by the remote deposition software.

TIPS FOR REMOTE DEPOSITIONS, HEARINGS, AND TRIALS

In addition to avoiding ethical pitfalls inherent in remote and virtual proceedings, maintaining professionalism outside of the physical courtroom is a challenge when operating virtually. It is important to consider what the judge or factfinder hears and sees during a virtual presentation. To that end, professionals may be guided by the following tips for remote hearings and other virtual proceedings:

Setting and Preparation: Use conference rooms instead of a home environment; set-up a podium or desk for the screen; join the proceeding ten to fifteen minutes before the scheduled start time to make sure the technology is functioning properly; when testifying at home, ensure exhibits are shared with all necessary parties in advance; and ensure a reliable internet connection for the day(s) of the hearing; use easily identifiable filenames with the exhibit number and document name for ease of reference.

Controlling Audio and Visual: Consider a "neutral" background, which could include a virtual or an otherwise professional background, and make sure that the lighting in the room is appropriate for the time of day; the lighting should neither be too light or too dark, and should be flattering; test the background and lighting days in advance of an appearance; and know how to use the on/off button for the camera (if on video) and the mute/unmute buttons.

Master the Technology/Be Secure: Learn how to use the screen sharing mechanism so that you can take control of the presentation and select what is being shown to all participants; there may be multiple technologies that must be employed in a remote hearing or deposition – one technology to access the proceeding, and another technology to view exhibits. Both should be tested well in advance of the proceeding, and the participant should be comfortable that both the proceedings and the exhibits can be viewed comfortably on a simultaneous basis; use a secure and encrypted platform to prevent unwanted/unknown participants; practice using technology or take a training with the technology provider prior to the hearing; and ensure easy access to secure breakout rooms, and consider paying for a "break out room" that has a connection that is only available to you and your client.

Personal Presentation: Maintain eye contact with the judge as much as possible; manage the video camera for a respectable view; ensure outside intrusions are eliminated; wear professional attire; and keep phones and other devices on silent. Expert and fact witnesses should confirm with counsel beforehand whether it is

Continued from p.13

best to look directly into the camera when speaking, as opposed to virtually addressing counsel or the court.

Know the Rules: Check the court's website and particular judge's rules in advance of the hearing (some require signing-up in advance for remote technology); for testifying experts it may be good practice to get direction from counsel in advance as to whether it is permissible to have a clean copy of any expert reports filed in the matter, which may assist the expert in addressing issues arising, as opposed to having to scroll through a lengthy report on a screen; agree with opposing counsel on procedures to submit and exchange information and materials in advance in case of a technology failure; and if permissible, send the court an electronic copy of any slides and documents/ exhibits before the hearing;

CONCLUSION

A legal foundation for virtual hearings and other proceedings pre-existed the COVID-19 pandemic, but the ethical and practical challenges of a virtual world became much more apparent when the technology was utilized on a daily basis. Many of the remote procedures adopted during the pandemic may remain for use when they are beneficial. Some advantages of these remote procedures include the increased flexibility and reduced costs of remote operations that can help eliminate or reduce the costs of travel, especially in large matters with many participants. Yet, in-person court proceedings will resume, with the traditional costs and benefits of live interaction, such as the benefits of personal contact, in-person negotiations, and live interactions with the judge.

Some of the key lessons gleaned from this article regarding remote judicial proceedings include:

- Always have a back-up plan if the technology currently in use fails;
- Work with your clients, witnesses and opposing counsel to ensure that all parties are comfortable with the technology utilized;
- Become familiar with any new technology before using it in a deposition, hearing, or trial; and
- Keep abreast of local rules regarding remote procedures.

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AIRA Announces
Distinguished Fellows Program

The new AIRA Distinguished Fellows Program was created by AIRA's Board of Directors to recognize significant contributions to the art and science of corporate restructuring.

Purpose of Distinguished Fellows Program

- To provide a senior-level status that recognizes AIRA member achievements and contributions to the field of corporate restructuring and to AIRA.
- To distinguish AIRA members who exemplify the highest level of excellence in professional practice and whose contributions have left a significant positive legacy to the profession and the organization.

Nomination Process

Elevation to the status of AIRA Distinguished Fellow is by invitation only through a nominating process which includes:

- Submission of completed forms by any AIRA member, and
- Approval by AIRA's Board of Directors.

AIRA members who meet the following criteria are eligible to be nominated. At the time of nomination, a nominee must:

- Be an AIRA member in good standing for at least 10 years, and
- Have made contributions to the art and science of corporate restructuring and to the AIRA that may be deemed outstanding by AIRA's Board of Directors.

Recognition of Fellows

Upon approval, new Distinguished Fellows will be inducted at the AIRA Annual Conference or at AIRA's New York Plan of Reorganization Conference, and their designation will be included on AIRA's website.

Additional information about AIRA's Distinguished Fellows Program and nomination forms are available at www.aira.org.

ASC 842 AND THE IMPACT ON BUSINESS VALUATION

RYAN A. GANDRE
Stout

New lease accounting rules are shaking up corporate balance sheets. We examine how to adjust valuation models for the new assets and liabilities.

What is debt or debt-like? Is asset ownership binary? The Financial Accounting Standards Board (FASB) weighed in with the adoption of Accounting Standards Codification (ASC) Topic 842 – *Leases* (ASC 842) in 2016. Effective for all public companies since 2019, these new lease rules were expected to add more than $2 trillion of assets and liabilities to corporate balance sheets.[1]

While ASC 842 may provide investors and other financial statement users with new information, and may enhance the comparability between similar businesses, the adoption of any new accounting standard should not create or destroy value. Thus, the recognition of new assets and liabilities on corporate balance sheets requires a reorientation of valuation models.

BRIEF OVERVIEW OF ASC 842

What Hasn't Changed?

The accounting for capital leases is largely unchanged from previous generally accepted accounting principles (GAAP), with the exception that capital leases have been renamed "finance leases." Additionally, lease accounting on income statements and statements of cash flow is largely unchanged from previous GAAP. That is, rent expense will continue to be incurred for operating leases, and finance leases will continue to be recognized as depreciation and interest on the income statement, with changes in the principal portion of the finance lease liability being classified within financing activities on the cash flow statement.

What's Changed?

Under previous GAAP, only capital leases were recognized on the balance sheet. Operating leases, while subject to footnote disclosures outlining the future commitments, remained off the balance sheet.

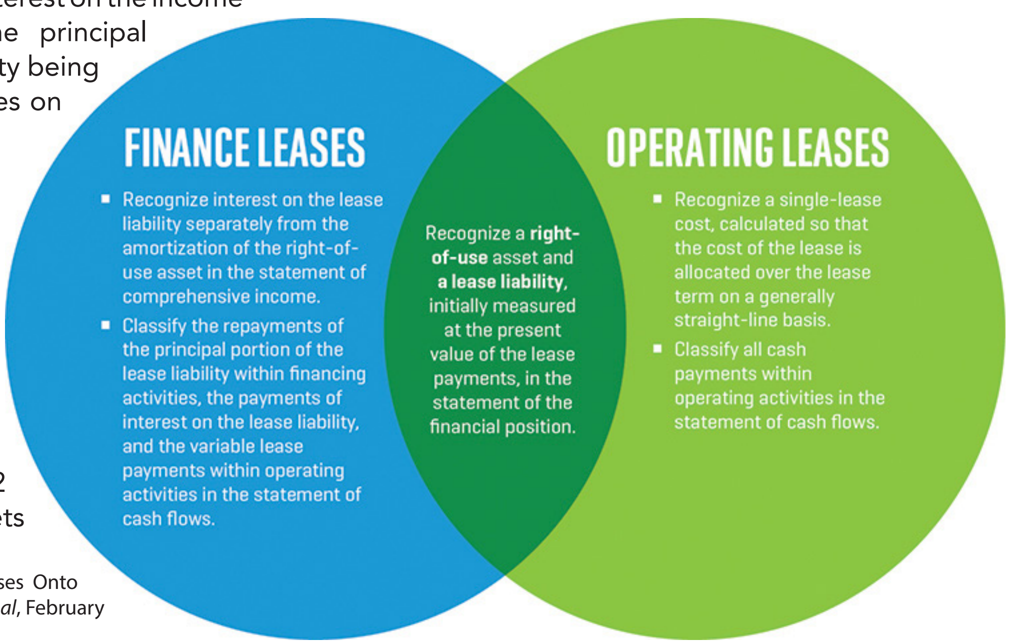
The central tenet of ASC 842 is that all leases create assets and liabilities for lessees: a right-of-use (ROU) asset representing the right to use an underlying asset for the lease term, and a lease liability representing the obligation to make lease payments.[2] The ROU asset and lease liability, measured as the present value of the lease payments discounted at the rate implicit in the lease or the lessee's incremental borrowing rate (IBR), will typically offset at lease inception.

ASC 842-20-45-1 requires finance and operating lease ROU assets and lease liabilities to be disclosed separately from each other and from other assets and liabilities. The weighted-average discount rate, segregated between those for finance and operating leases, must also be disclosed.

Effective Dates

Public companies were required to comply with ASC 842 for fiscal years beginning after December 15, 2018, and interim periods within those fiscal years. For private companies, while the FASB initially required adoption for fiscal years beginning after December 15, 2019, these deadlines have since been delayed several times. Currently, the standard will be effective for private companies and certain not-for-profit entities for fiscal years beginning after December 15, 2021 and interim

Exhibit 1: Finance vs. Operating Leases Under ASC 842



[1] Michael Rapoport, "New Rule to Shift Leases Onto Corporate Balance Sheets," *The Wall Street Journal*, February 25, 2016.

[2] In the case of leases with a term of 12 months or less, lessees are permitted to make an accounting policy election not to recognize ROU assets or lease liabilities.

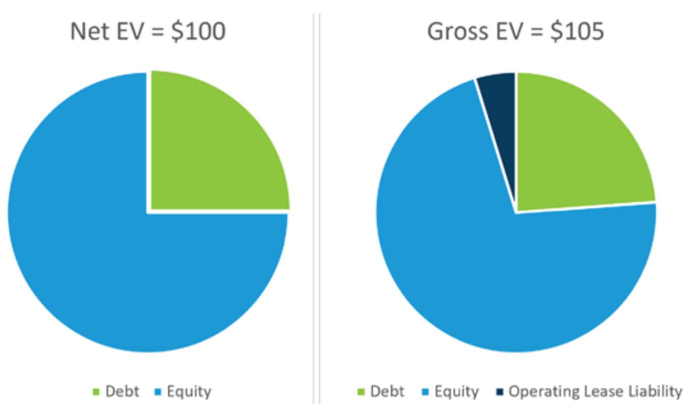
periods beginning after December 15, 2022. Early adoption is permitted.

REFRAMING ENTERPRISE VALUE

Investors and valuation professionals alike frequently determine a company's value on an enterprise basis. Enterprise value represents the total invested capital of a business, including common and preferred equity and interest-bearing debt.

Treating operating lease liabilities as debt-like requires a reorientation in thinking. Importantly, the corporate debt and equity pie is not further subdivided but rather expanded. To distinguish between the two, the traditional definition of enterprise value is referred to hereinafter as "net EV" (NEV, net of lease liabilities), and enterprise value inclusive of operating lease liabilities is referred to as "gross EV" (GEV, gross of lease liabilities), as illustrated in Exhibit 2.

Exhibit 2: NEV vs. GEV



VALUATION MULTIPLES

A multiples-based valuation approach draws comparisons between price and performance. For example, price-to-earnings (P/E) ratios compare equity prices per share to earnings (net income) per share. From an enterprise value perspective, the most widely used valuation multiple is enterprise value to earnings before interest, taxes, depreciation, and amortization (EBITDA). Importantly, when deriving and applying valuation multiples, the numerator and denominator of the multiple equation must be presented on the same basis. That is, because enterprise value reflects a debt-free measurement, it must be divided by a debt-free measure of earnings. Similarly, since equity value is measured after the consideration of debt, it must be divided by a measure of earnings that deducts interest on that debt.

This same construct extends to analyzing leases in a valuation multiple context. Theoretically, NEV reflects a company's value after deducting operating lease obligations, and therefore, NEV is divided by EBITDA, which includes a deduction for the rent expense. If, instead, we measure a company's value on a GEV basis (gross of lease liabilities), the appropriate earnings metric to consider is EBITDA *before rent* (EBITDAR). In doing so, GEV is presented prior to the consideration of either finance or operating leases, and likewise, EBITDAR is consistently presented prior to the consideration of rent on operating leases or interest and depreciation on finance leases (Exhibit 3).

To state the obvious, NEV multiples derive NEV, and GEV multiples derive GEV. Therefore, internally consistent adjustments must be considered to determine the subject company's equity value.

Net EV	**Gross EV**
Less: Traditional Debt	Less: Traditional Debt
Less: Finance Leases	Less: Finance Leases
Add: Cash	Less: Operating Leases
Equals: Equity Value	Add: Cash
	Equals: Equity Value

INCOME APPROACH

As with valuation multiples, valuing a business based on its future cash flows requires internal consistency between cash flows and the discount rate. Equity cash flows are discounted at a required return on equity, and debt-free cash flows are discounted at a debt-free discount rate.

Three Steps in Converting NEV Cash Flow Model to GEV Cash Flow Model

First, the rent expense on operating leases can be deconstructed into interest and depreciation

Exhibit 3: Analysis of Valuation Multiples NEV vs. GEV

$$\frac{\textit{Net EV (Equity - Cash + Traditional Debt + Finance Lease Liabilities)}}{\textit{EBITDA}}$$

$$\frac{\textit{Gross EV (Equity - Cash + Traditional Debt + Finance Lease Liabilities + Operating Lease Liabilities)}}{\textit{EBITDA + Rent}}$$

Continued from p.17

Exhibit 4: First Two Steps

Free Cash Flows	Net EV	Gross EV	
EBITDA	✓	✓	
(-) D&A	✓	✓	
(-) Taxes	✓	✓	
(+) D&A	✓	✓	
(-) Capex	✓	✓	
(+ / -) Change in WC	✓	✓	
(+) Interest on Op. Leases, After Tax		✓	Step 1
(-) Change in Op. Leases		✓	Step 2

Exhibit 5: Third Step

WACC	Net EV	Gross EV	
Required Return on Equity	✓	✓	
Cost of "Traditional" Debt and Finance Leases	✓	✓	
Cost of Operating Leases		✓	Step 3

components. Adding back the rent expense, and then deducting the implied after-tax depreciation of the ROU asset, would mirror the free cash flow impact of finance leases. As a practical expedient suggested by valuation professor Aswath Damodaran, one may instead add back the imputed after-tax interest on the operating lease liabilities, calculated as the operating lease liability multiplied by the IBR. Per Damodaran, "While this approach is an approximation, it dispenses with the need for computing a depreciation number. Implicitly, we are assuming that the portion of the lease expense that is not interest is also equal to the depreciation that would have accrued on the asset."[3]

Second, since the operating lease liability corresponds with the ROU asset, we must consider the change in the ROU asset over the projection period as a capital expenditure. These first and second steps are illustrated in Exhibit 4.

Third, the weighted average cost of capital (WACC) utilized in the valuation must be recalculated to consider operating lease liabilities as debt-like in the subject company's capital structure (Exhibit 5).

Illustrative Example

As shown in Exhibit 6, ABC Company, Inc. (ABC) generated $200 million in revenue with a 20.0% EBITDAR margin, and rent expense equates to 1.0% of revenue. Net working capital requirements are equal to 10.0% of revenue, and capital expenditures and depreciation are each expected to be 4.0% of revenue. ABC maintains traditional debt of approximately $118 million, and its ROU asset and operating lease liability are approximately $9.7 million; ABC does not have any finance leases. Finally, ABC expects revenue and profits to increase at a 5.0% annual growth rate into perpetuity.

We then apply the capitalized cash flow (CCF) model under three separate approaches: 1) an equity model, 2) an NEV model, and 3) a GEV model. For simplicity, we have utilized the end-of-period discounting convention.

Exhibit 7 presents discount rates for each valuation model. The equity model will utilize the required return on equity, the NEV model will utilize a traditional WACC considering only equity and traditional debt capital,

Exhibit 6: Model Inputs

Summary Financials (000s)		Year 0	Year 1
Revenue		$ 200,000	$ 210,000
Growth Rate			5.0%
Expenses, BITDAR	80.0%	(160,000)	(168,000)
EBITDAR		40,000	42,000
Margin		*20.0%*	*20.0%*
Rent	1.0%	(2,000)	(2,100)
D&A	4.0%	(8,000)	(8,400)
Taxes	26.0%	(7,800)	(8,190)
Debt-Free Net Income		**$ 22,200**	**$ 23,310**
NWC	10.0%	20,000	21,000
Capex	4.0%	(8,000)	(8,400)
Debt		(118,268)	
ROU Asset		9,721	
Lease Liability		(9,721)	

3 Aswath Damodaran, "Leases, Debt and Value," Stern School of Business, April 2009. Available at http://people.stern.nyu.edu/adamodar/pdfiles/papers/newlease.pdf.

Exhibit 7: Discount Rates for Valuation Models

Discount Rate	Equity Model	Net EV Model	Gross EV Model
Risk-Free Rate	3.0%	3.0%	3.0%
UL Beta	1.10	1.10	1.10
RL Beta	1.37	1.37	1.37
ERP x Beta	8.2%	8.2%	8.2%
RoR on Equity	**11.2%**	**11.2%**	**11.2%**
Pre-Tax Cost of Debt		7.0%	7.0%
Taxes		-1.8%	-1.8%
After-Tax Cost of Debt		**5.2%**	**5.2%**
Pre-Tax IBR			6.0%
Taxes			-1.6%
After-Tax IBR			**4.4%**
Equity Capital		75.0%	73.5%
Debt Capital		25.0%	24.5%
Lease Capital			2.0%
WACC		**9.7%**	**9.6%**

and the GEV model will include the after-tax cost of the operating lease liabilities.

- Note that the unlevered and relevered betas are identical across all three models. We assume that equity value, and by extension equity beta, is unchanged by the selected valuation approach. However, unlevering and relevering must be done consistently between the guideline public companies and the subject company. If betas are unlevered assuming operating leases are treated as debt, beta must be relevered assuming the same, and vice versa.
- Additionally, note that the relative proportion of equity and traditional debt capital remains 75% and 25%, respectively, in the NEV and GEV models (i.e., 73.5% / (73.5% + 24.5%) = 75.0%). The operating lease capital, when included in the adjusted WACC, is incremental.

Finally, Exhibit 8 presents the resulting valuation models. Relative to the NEV model, we applied the following adjustments:

- ***Equity Model***

  First, we must account for the cost of traditional debt to derive equity cash flows. Interest on debt was deducted, and taxes were adjusted accordingly.

  Second, once we select a debt to total capital assumption in our discount rate (either in the weighting between debt and equity in a WACC or through a releveraged beta), the valuation model assumes that the level of debt remains consistent throughout the projection period. Accordingly, we derive the equity free cash flows by incorporating an inflow from debt proceeds as ABC's borrowings scale according to its growth.

  Third, because we have derived free cash flows to equity, the capitalization rate is calculated based on the required return on equity.

- ***GEV Model***

  First, we add back the imputed interest on the operating lease liabilities, including the related tax effects. The imputed interest is calculated as the operating lease liability multiplied by the IBR.

  Second, as ABC grows, its operating lease liabilities and ROU assets are assumed to grow as well. Therefore, we subtract the projected change in ROU assets from free cash flows.

  Third, because we have derived free cash flows to gross EV, the capitalization rate is calculated based on the adjusted WACC that includes the cost of lease capital.

Each model results in a different level of value. While the equity model directly derives equity value, traditional debt must be subtracted in the NEV model, and both traditional debt and operating lease liabilities must be subtracted in the GEV model. As shown, the value conclusions in each model are identical.

Exhibit 8: Valuation Model Results

Valuation Models (000s)		Equity Model	Net EV Model	Gross EV Model
EBITDAR		$ 42,000	$ 42,000	$ 42,000
Rent		(2,100)	(2,100)	(2,100)
D&A		(8,400)	(8,400)	(8,400)
Interest on Debt		(8,279)	n/a	n/a
Interest on Leases		n/a	n/a	583
Taxes	26.0%	(6,038)	(8,190)	(8,342)
Net Income		**17,184**	**23,310**	**23,742**
D&A		8,400	8,400	8,400
Capex		(8,400)	(8,400)	(8,400)
Δ in NWC		(1,000)	(1,000)	(1,000)
Δ in Debt		5,913	n/a	n/a
Δ in ROU Asset		n/a	n/a	(486)
Free Cash Flows		**22,097**	**22,310**	**22,256**
Discount Rate		11.2%	9.7%	9.6%
Less: LTGR		-5.0%	-5.0%	-5.0%
Capitalization Rate		**6.2%**	**4.7%**	**4.6%**
Indicated Value		$ 354,803	$ 473,070	$ 482,791
Less: Debt		n/a	(118,268)	(118,268)
Less: Leases		n/a	n/a	(9,721)
Equity Value (Rounded)		**$ 354,800**	**$ 354,800**	**$ 354,800**

Continued from p.19

PARTING THOUGHTS

Accounting changes should not change asset values, and the examples presented in this article are intended to highlight specific model adjustments necessary to allow for valuation comparability before and after ASC 842. That being said, the adoption of the new lease accounting rules should serve to enhance comparability across firms (particularly in industries with varying lease commitments or in which there is variation in practice in terms of leasing versus owning operating assets). Furthermore, while future lease commitments and related disclosures have been available to users of financial statements prior to ASC 842, the recognition of these obligations on corporate balance sheets may better inform investors as to the future impact of lease commitments.

Big accounting changes can also result in big opportunities for analytical error. A *Wall Street Journal* article from 2019 highlighted a report from Credit Suisse Group that addressed inconsistencies in data feeds as they pertain to the recognition of operating leases and the distortion of traditional metrics found in popular investor data sources, such as return on invested capital and leverage ratios. Moreover, the report expressed concern as to whether investors are aware that their data feeds have made these adjustments.[4] These comparability and data quality issues may persist for some time, particularly between public and private companies, until all reporting entities have adopted the new standard.

[4] Mark Maurer, "New Lease Accounting Standard May Mislead Investors, Credit Suisse Says," *The Wall Street Journal*, July 10, 2019.

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WHY HAVE THERE BEEN SO FEW RESTRUCTURINGS IN THE PANDEMIC ERA?[1]

TOM GOLDBLATT
Ravinia Capital LLC

When the first pandemic lockdowns began last March and brought with them rapid, sweeping changes to both commercial regulation and consumer preferences, the professional community braced for a wave of restructuring work and distressed sales that we believed was sure to follow.

Up until this point, the past decade's financial landscape had been characterized by low costs of capital, high leverage, and growing valuation multiples. Where valuing a company at 5-6 times EBITDA was once standard, and leverage multiples (Net Debt/EBITDA) between 2 and 3 were the norm, in the years leading up to 2020, these metrics had climbed to the point at which healthy companies were commonly changing hands for 8-10 times EBITDA and often carried leverage multiples in the 3-5 range. In other words, the steady increase in market valuation and persistent, easy availability of debt financing reflected by the growth of these numbers had kept distressed activity to a minimum.

Last year, the American Bankruptcy Institute published a 40-year overview of US bankruptcy filings which helps to quantify the recent slump that restructuring professionals have been experiencing (Exhibit 1).[1] In March of 2020, it began to look as though the reckoning was finally upon us and things were about to change; yet here we are, more than year later, with no discernable, sustained uptick in distressed activity.

[1] ABI Newsroom (online), Chart of the Day, January 8, 2021. Available at https://www.abi.org/newsroom/chart-of-the-day/annual-us-total-bankruptcy-filings-1980-2020.

WHAT HAPPENED?

According to a report by Eastward Partners,[2] key trends in the restructuring industry last year included:

- The first half of 2020 saw the largest growth in the restructuring market in 20 years.
- Q3 saw the most Chapter 11 filings since the Great Recession.
- However, November filings were recorded as the lowest Chapter 11 filings in 14 years.

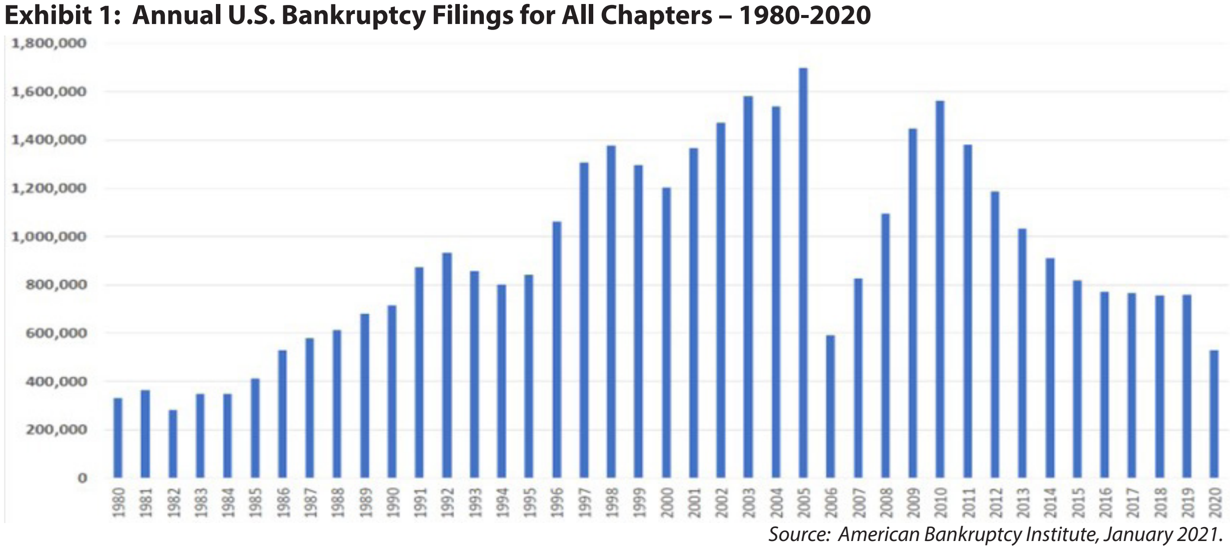
Putting this all together, the final result was that while the first half of 2020 did see an uptick in restructuring activity, multiple factors (including PPP loans, generous forbearance terms, and the abundance of dry powder present in the marketplace) caused a considerable slowdown during the latter portion of the year, ultimately giving way to a 30% annual drop in bankruptcy filings, when compared to 2019.

Though little data is yet available for the current year, early indications are that this trend is continuing more or less uninterrupted, with Bloomberg recently noting that, as of mid-April 2021, only four companies with at least $50 million of liabilities have filed for bankruptcy in the US.[3]

[2] Eastward Partners, "2020 in Review," January 2021 Restructuring Market Report. Accessed at https://www.eastwardpartners.com/thought-leadership.

[3] Jeremy Hill and Katherine Doherty, "U.S. Bankruptcy Tracker: Easy Money Mutes Distress," *Bloomberg*, April 13, 2021. Available at https://www.bloomberg.com/news/articles/2021-04-13/u-s-bankruptcy-tracker-hope-and-prayer-money-mutes-distress.

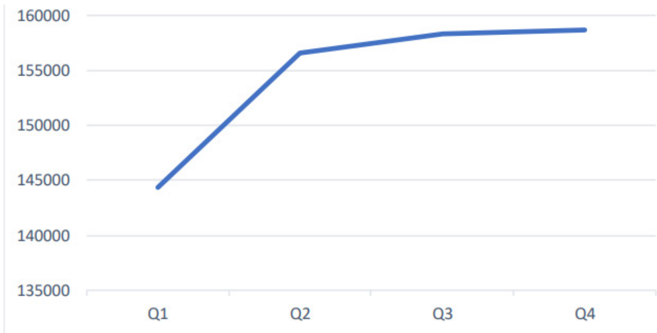
Exhibit 1: Annual U.S. Bankruptcy Filings for All Chapters – 1980-2020



Source: American Bankruptcy Institute, January 2021.

Continued from p.21

Exhibit 2: Number of Restructuring Professionals in 2020



HIRED UP FOR WORK THAT NEVER CAME

2020 was indeed a year of two halves. Third quarter bankruptcy filings were at their highest since the Great Recession but by November, they had already tapered off to their lowest monthly volume since 2006.

The consensus among restructuring professionals in early-to-mid 2020 was that valuations of companies would soon drop by roughly a third; banks began holding large reserves in the billions of dollars; the industry girded up for busy times, expecting exuberance similar to the years between 2000 and 2005 (noting a perky 2009, as well); and the work force saw a surge of professionals in restructuring and consulting. As shown in Exhibit 2, restructuring grew by about 14,000 professionals in 2020, from approximately 145,000 to 160,000.

However, contrary to prevailing expectations, not only did the highly anticipated wave of restructuring activity never arrive; in fact, the whole industry soon ground to a near-standstill. From October 2020 to February 2021, commercial bankruptcies remained at a 15-year low and valuations of companies continued to rise.

In January of this year, during a virtual seminar hosted by PitchBook,[4] I could barely believe my ears when I heard an analyst assert that 20% of recent deals in this space had been done at 20+ multiples of EBITDA. And yet, just a few months later, there is no denying the evidence that an appetite for these valuations has spread beyond the confines of private equity and has come to be reflected in the stock market (*e.g.*, Gamestop), real estate, and even cryptocurrencies (e.g., Dogecoin and NFTs) as we now find ourselves in one of the most widespread bull markets in recorded history.

As evidence to this claim, *The Wall Street Journal* recently reported that the two-year trailing average purchase-price multiple reached a record 12.8 times EBITDA in 2020, compared with just 9.4 times in 2007.[5]

SO … WHAT HAPPENS NEXT?

Perhaps the most important lesson that can be learned from last year is just how uncertain the future truly is. Still, there can be no markets without expectations, so at the end of the day, we each have no choice but to make our best educated guess and proceed with caution.

What Experts Are Saying

Indications are that it will be a very interesting summer, as US GDP growth is expected to accelerate to over 6%. We can look to a newly vaccinated population recently liberated from lockdown as a major driver of this trend, as millions of Americans, with stimulus money in-hand, will soon be getting their first taste of unbridled social freedom in over a year's time. The Fed is committed to holding steady on interest rates through this period, however, as they see the increased economic activity as an extraordinary event that is unlikely to last. In fact, at this time, the Federal Reserve maintains that it will not raise interest rates until sometime in 2023.

Naturally there is much debate surrounding these predictions. But even still, one needs to look no further than the aforementioned present bull market for equities to see that the prevailing outlook among investors seems to likewise discount the possibility of interest rates going up any time soon. The next large wave of filings won't happen until the market thinks interest rates will be raised materially: it's based on herd mentality and could take years.

What This Looks Like to Me

I believe that the next large wave of restructurings will not arrive until the market begins to receive and react to strong signals indicating a looming increase in interest rates. This will lead to money coming out of equities and, by extension, cause a corresponding reduction in valuations and the multiples commonly used to calculate them. Then, as the cost of capital increases under the dual pressures of rising interest rates and depressed valuations, a bulk of clean-up transactions will become necessary to weed out the over-levered companies that cannot adapt to this new economic environment.

As for timing, as long as the Fed sticks with its current narrative, I do not believe that the necessary catalyst for this deleveraging will be in place prior to 2023.

[4] "Predictions for Private Equity in 2021," Association for Corporate Growth, online presentation sponsored by Pitchbook, January 2021. Video available at https://vimeo.com/506224347.

[5] Miriam Gottfried and Ben Dummett, "Private-Equity Firms Regain Taste for Giant Buyouts," wsj.com, April 21, 2021. Available at https://www-wsj-com.cdn.ampproject.org/c/s/www.wsj.com/amp/articles/private-equity-firms-regain-taste-for-giant-buyouts-11618997580.

WITH A CAVEAT

No one can predict when we will reach this tipping point or what possible series of events will be responsible for the next shift in the herd mentality that drives our market economy. But the one thing that can be said for sure is that as soon as investors suspect that values are on their way down, such a shift is sure to follow soon.

ABOUT THE AUTHOR

Tom Goldblatt
Ravinia Capital LLC

Tom founded Ravinia Capital in 1998 and serves as Managing Partner.

Businesses hire Ravinia Capital to sell companies, raise senior debt, junior capital and equity; to advise sellers and buyers of businesses; and to structure, execute, and close transactions.

Tom specializes in getting deals done, and in developing creative solutions.

His background gives him a unique ability to understand the needs of the company owner and the buyer, and helps all parties navigate the inevitable complexities involved in any transaction. He has hands-on proficiency in sales, marketing, purchasing, sourcing, accounting, contracting and operations as well as proven accomplishments in cost reduction, product development, mergers and acquisitions, and business re-organization.

ANOTHER COURT ADOPTS MAJORITY VIEW IN APPROVING BANKRUPTCY TRUSTEE'S USE OF TAX CODE LOOK-BACK PERIOD IN AVOIDANCE ACTIONS

DANIEL J. MERRETT
and MARK G. DOUGLAS
JonesDay

The ability of a bankruptcy trustee or chapter 11 debtor-in-possession ("DIP") to avoid fraudulent transfers is an important tool promoting the bankruptcy policies of equality of distribution among creditors and maximizing the property included in the estate. One limitation on this avoidance power is the statutory "look-back" period during which an allegedly fraudulent transfer can be avoided—two years for fraudulent transfer avoidance actions under section 548 of the Bankruptcy Code and, as generally understood, three to six years if the trustee or DIP seeks to avoid a fraudulent transfer under section 544(b) and state law by stepping into the shoes of a "triggering" creditor plaintiff.

The longer look-back periods governing avoidance actions under various state laws significantly expand the universe of transactions that may be subject to fraudulent transfer avoidance. Indeed, under a ruling recently handed down by the U.S. Bankruptcy Court for the Western District of North Carolina, the look-back period in avoidance actions under section 544(b) may be much longer—10 years—in bankruptcy cases where the Internal Revenue Service (the "IRS") or another governmental entity is the triggering creditor. In *Mitchell v. Zagaroli (In re Zagaroli)*, 2020 WL 6495156 (Bankr. W.D.N.C. Nov. 3, 2020), the court, adopting the majority approach, held that a chapter 7 trustee could effectively circumvent North Carolina's four-year statute of limitations for fraudulent transfer actions by stepping into the shoes of the IRS, which is bound not by North Carolina law, but by the 10-year statute of limitations for collecting taxes specified in the Internal Revenue Code (the "IRC").

DERIVATIVE AVOIDANCE POWERS UNDER SECTION 544(B) OF THE BANKRUPTCY CODE

Section 544(b)(1) of the Bankruptcy Code provides in relevant part as follows:

> [T]he trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

11 U.S.C. § 544(b). Thus, a trustee (or DIP pursuant to section 1107(a)) may seek to avoid transfers or obligations that are "voidable under applicable law," which is generally interpreted to mean state law. *See Ebner v. Kaiser (In re Kaiser)*, 525 B.R. 697, 709 (Bankr. N.D. Ill. 2014); *Wagner v. Ultima Holmes (In re Vaughan)*, 498 B.R. 297, 302 (Bankr. D.N.M. 2013).

The fraudulent transfer statutes of almost every state are versions of the Uniform Fraudulent Transfer Act (the "UFTA"), which was recently amended and renamed the "Uniform Voidable Transactions Act" (the "UVTA"). States that have adopted the UFTA or UVTA most commonly provide that avoidance actions are time-barred unless brought within four years of the time the transfer was made or the obligation was incurred. Notably, New York adopted the UVTA effective as of December 2019, reducing its look-back period to four years, from six under longstanding prior law.

LONGER LOOK-BACK PERIOD FOR CERTAIN GOVERNMENTAL ENTITIES

The federal government is generally not bound by state statutes of limitations, including those set forth in state fraudulent transfer laws. *Vaughan*, 498 B.R. at 304. Instead, various federal statutes or regulations specify the statute of limitations for enforcement actions. For example, the IRC provides that, with certain exceptions, an action to collect a tax must be commenced by the IRS no later than 10 years after the tax is assessed. *See* 26 U.S.C. § 6502(a). The rationale behind a longer federal statute of limitations is that public rights and interests that the federal government is charged with defending should not be forfeited due to public officials' negligence. *Vaughan*, 498 B.R. at 304.

On the basis of the plain meaning of section 544(b), nearly all of the courts that have considered the issue have concluded that a trustee or DIP bringing an avoidance action under that section may step into the shoes of the IRS (if it is a creditor in the case) to utilize the IRC's 10-year statute of limitations. *See, e.g.*, *Murphy v. ACAS, LLC (In re New Eng. Confectionary Co.)*, 2019 Bankr. LEXIS 2281 (Bankr. D. Mass. July 19, 2019); *Viera v. Gaither (In re Gaither)*, 595 B.R. 201 (Bankr. D.S.C. 2018); *Hillen v. City of Many Trees, LLC (In re CVAH, Inc.)*, 570 B.R. 816 (Bankr. D. Idaho 2017); *Mukhamal v. Citibank, N.A. (In re Kipnis)*, 555 B.R. 877 (Bankr. S.D. Fla. 2016); *Kaiser*, 525 B.R. at 711–12.

Vaughan is apparently the only published decision to the contrary with respect to the IRS and the IRC. The *Vaughan* court reached its conclusion after considering policy and legislative intent. It noted that the IRS is not bound by state law statutes of limitations because it exercises sovereign powers and is therefore protected by the doctrine of *nullum tempus occurrit regi* ("no time runs against the king"). According to the court in *Vaughan*, Congress did not intend for section 544(b) to vest sovereign power in a bankruptcy trustee, and allowing a trustee to take advantage of the IRC's 10-year statute of limitations would be an overly broad interpretation.

In *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530, 535 (5th Cir. 2012), the U.S. Court of Appeals for the Fifth Circuit rejected a line of cases holding that the Federal Debt Collection Practices Act (the "FDCPA") can be "applicable law" for purposes of section 544(b), thereby affording the trustee use of the FDCPA statute of limitations, because the FDCPA expressly provides that "[t]his chapter shall not be construed to supersede or modify the operation of . . . title 11." *Id.* at 535 (quoting 28 U.S.C. § 3003(c)); *accord MC Asset Recovery, LLC v. Southern Co.*, 2008 WL 8832805 (N.D. Ga. July 7, 2008) ("[T]he FDCPA cannot be the 'applicable law' within the meaning of Section 544(b) of the Bankruptcy Code."). However, the IRC does not include comparable language.

The *Vaughan* minority approach has been rejected by almost all other courts. For example, in *Kipnis*, the court concluded that the meaning of section 544(b) is clear and does not limit the type of creditor from which a trustee can choose to derive rights. Moreover, because the court determined that its interpretation of the statute was not "absurd," the court did not deem it necessary to expand its inquiry beyond the express language of section 544(b) to consider legislative intent or policy concerns. *Kipnis*, 555 B.R. at 882 (citing *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'")).

The court concluded that *Vaughan*'s *nullum tempus* argument was misplaced. Because section 544(b) is a derivative statute, the *Kipnis* court wrote, "the focus is not on whether the trustee is performing a public or private function, but rather, the focus is on whether the IRS, the creditor from whom the trustee is deriving her rights, would have been performing that public function if the IRS had pursued the avoidance actions."

However, the court agreed with *Vaughan* on one point—if applied in other cases, the court's ruling could result in a 10-year look-back period in many cases. According to the *Kipnis* court, because the IRS is a creditor in a significant number of cases, the paucity of decisions addressing the issue can more likely be attributed to the fact that trustees and DIPs have not realized that this "weapon is in their arsenal."

TRIGGERING CREDITOR MUST HAVE AN "ALLOWABLE CLAIM"

Avoidance under section 544(b) is permitted only if a transfer could be avoided under applicable law by a creditor holding an "allowable" unsecured claim. The term "allowable" is not defined in the Bankruptcy Code. However, section 502(a) provides that a claim for which the creditor files a proof of claim is deemed "allowed" unless a party in interest objects. Rule 3003(b) of the Federal Rules of Bankruptcy Procedure provides that, in a chapter 9 or chapter 11 case, a creditor need not file a proof of claim if the claim is listed on the debtor's schedules in the proper amount and is not designated as disputed, contingent, or unliquidated.

Thus, if an unsecured creditor has not filed a proof of claim and if, in a chapter 9 or chapter 11 case, its claim either is not scheduled in any amount or is scheduled as disputed, contingent, or unliquidated, a handful of courts have concluded that the claim is not "allowable" and the trustee or DIP may not step into the creditor's shoes to bring an avoidance action under section 544(b). *See In re Republic Windows & Doors*, 2011 WL 5975256, *11 (Bankr. N.D. Ill. Oct. 17, 2011) (a chapter 7 trustee could not take advantage of the IRC's 10-year statute of limitations because the IRS had not filed a proof of claim in the case); *Campbell v. Wellman (In re Wellman)*, 1998 WL 2016787, *3 (Bankr. D.S.C. June 2, 1998) ("[A]s Robert McKittrick was the only creditor of these three [creditors] to file a proof of claim, he is the only one with an allowable claim into whose shoes the [chapter 7] Trustee may step pursuant to § 544(b).").

However, the majority approach is otherwise. Most courts have held that the allowability of a claim for purposes of section 544(b) should be determined as of the petition date and, therefore, that the failure to file a proof of claim does not disqualify a creditor from being the triggering creditor. *See, e.g., In re Tabor*, 2016 WL 3462100, at *2 (Bankr. S.D. Fla. June 17, 2016); *Whittaker v. Groves Venture, LLC (In re Bolon)*, 538 B.R. 391, 408 n.8 (Bankr. S.D. Ohio 2015); *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405, 432 (Bankr. E.D. Pa. 2014); *In re Kopp*, 374 B.R. 842, 846 (Bankr. D. Kan. 2007).

In *Zagaroli*, the bankruptcy court considered whether a chapter 7 trustee could step into the shoes of the IRS for purposes of section 544(b).

ZAGAROLI

In 2018, Peter *Zagaroli* (the "debtor") filed a chapter 7 case in North Carolina. The IRS filed a proof of claim in the case in the unsecured amount of approximately

Continued from p.25

$4,000. In 2020, the chapter 7 trustee sued the debtor's parents, seeking to avoid 2010 and 2011 transfers of real property by the debtor to his parents as fraudulent transfers under the North Carolina UVTA, which has a four year look-back period. *See* N.C. Gen. Stat. § 39-23.9. The defendants moved to dismiss, arguing that the challenged transfers occurred more than four years prior to the petition date. The trustee countered that he could utilize the IRC's 10-year look-back period because the IRS was a triggering creditor.

The bankruptcy court denied the motion to dismiss.

The defendants argued that, instead of focusing on the plain language of section 544(b), the court should consider the legislative history, the purpose of the provision, related provisions of the Bankruptcy Code and other relevant statutes, such as the IRC, which requires specific authorization to bring any action thereunder. *See* 26 U.S.C. § 7401. According to the defendants, limiting consideration solely to the language of section 544(b) would lead to "absurd results or conflict with other statutory provisions."

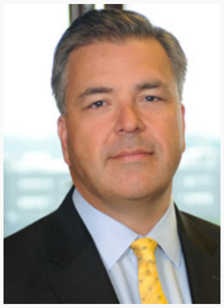
The bankruptcy court rejected those arguments. When the language of a statute is unambiguous, the court explained, "'the court's task is simple: apply the plain language'" (citation omitted). Moreover, the court wrote, "the Defendants' position would result in leaving both the Trustee and the IRS without the right to avoid offending transfers" that occurred outside the look-back period under state law. The court concluded that "the applicable law that the Trustee seeks to invoke is the [North Carolina UVTA] and the IRC, both of which the IRS could have used to seek to avoid the transfers outside of bankruptcy."

OUTLOOK

Zagaroli does not break new ground on the power of a bankruptcy trustee or DIP to bring avoidance actions under section 544(b) of the Bankruptcy Code. Nevertheless, the court's endorsement of the majority approach on the availability of a longer look-back period in cases in which the IRS is a creditor is notable. Widespread adoption of this approach could significantly augment estate avoidance action recoveries.

Furthermore, the IRS is not the only potential triggering creditor under section 544(b) with a longer look-back period. Other federal and state governmental entities may also provide that additional tool to a trustee or DIP. *See, e.g., In re 160 Royal Palm, LLC*, 2020 WL 4805478 (Bankr. S.D. Fla. July 1, 2020) (permitting a debtor under section 544(b) to take advantage of the Securities and Exchange Commission's six-year statute of limitations for fraudulent transfer claims under 28 U.S.C. §§ 2415(a) and 2416); *Alberts v. HCA Inc. (In re Greater Southeast Cmty. Hosp. Corp. I)*, 365 B.R. 293, 304 (Bankr. D.D.C. 2006) (the trustee of a liquidating trust created by a chapter 11 plan could step into the shoes of the IRS as well as the U.S. Department of Health and Human Services (six-year statute of limitations for actions to collect Medicare overpayments under 28 U.S.C. § 2415) for the purpose of bringing an avoidance action under section 544(b) and the Illinois UFTA); *G-I Holdings, Inc.*, 313 B.R. at 636 (the asbestos claimants' committee in a chapter 11 case could step into the shoes of the New Jersey Department of Environmental Protection (10-year statute of limitations for enforcement action) for purposes of section 544(b)). In addition, despite the Fifth Circuit's rejection of the FDCPA as "applicable law" for purposes of § 544(b), other courts have ruled to the contrary. *See, e.g., Gaither*, 595 B.R. at 214; *In re Alpha Protective Servs., Inc.*, 531 B.R. 889, 905 (Bankr. M.D. Ga. 2015) (citing cases). Thus, understanding the approach adopted in a particular jurisdiction is paramount for this purpose.

ABOUT THE AUTHORS



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Dan Merrett has substantial experience representing clients in some of the most significant corporate and municipal restructurings in recent years. He represents companies across a variety of industries, municipalities, secured lenders, unsecured creditors, potential purchasers, debtors, and other key constituencies in distressed situations and chapter 11. Dan's recent representations include serving as counsel to M&G USA Corporation and eight affiliates in their chapter 11 cases, and representing Georgia Power Company, on behalf of itself and the other owners of the Alvin W. Vogtle nuclear power plant, in connection the chapter 11 cases of contractor Westinghouse Electric Company and its affiliates. Dan can be contacted at dmerrett@jonesday.com.

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Postponed — 10th Annual Energy Summit

TBD, The Belo Mansion & Pavilion Dallas, TX

On behalf of AIRA, SFNet Southwest, and TMA Dallas/Fort Worth, it is with regret that we inform our members, friends, and colleagues that the 10th Annual Energy Summit, scheduled as a live event on September 9th, is being postponed.

Our planning committee decided it would be in everyone's best interest if we temporarily postpone the Energy Summit due to the shift in Covid trends in Texas. Both speakers and potential attendees are simply apprehensive about attending in-person events at this time.

Once a new date is determined, we will be back in touch to communicate all of the details.

95th Annual NCBJ AIRA Breakfast Program

October 8, 2021, Indianapolis, IN (online and virtual)

Don't miss AIRA's NCBJ Breakfast Program on **New Requirements for Reporting in Chapter 11 Cases**. The panelists will discuss the U.S. Trustee Program's final rule on "Procedures for Completing Uniform Periodic Reports in Non-Small Business Cases Filed Under Chapter 11 of Title 11" and provide an update on the results to date.

PANELISTS:

William K. Harrington, United States Trustee for Regions 1 and 2
Andrew R. Vara, United States Trustee for Regions 3 and 9
Matthew Schwartz, CIRA, Bederson LLP
Stephen Darr, CIRA, CDBV, Huron Consulting Group LLP

1 CPE/CLE credit available; for more information and registration see NCBJMeeting.org.

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PROVINCE

20th Annual Advanced Restructuring & Plan of Reorganization Conference

November 15, 2021, at The Union League Club, New York, NY

Mark your calendars and plan now to attend AIRA's Annual POR Conference! We will be back at The Union League Club for our one-day educational program, featuring five panel presentations:

- **The Travel Industry (Airlines, Cruise Lines, Hotels) & Commercial Real Estate**
- **Subchapter V**
- **Torts (Boy Scouts, Purdue, Diocese Cases)**
- **2021 – The Year in Review from the Perspectives of Judges and Attorneys**
- **Ethics in Insolvency Matters**

The conference includes a luncheon and a reception honoring the recipient of AIRA's 2021 Judicial Service Award, **The Honorable Jerrold N. Poslusny, Jr.**, U.S. Bankruptcy Court, District of New Jersey.

CPE/CLE: Up to 6.6 CPE and CLE (CLE calculated for 50-minute states); for more info and registration see AIRA.org.

37TH ANNUAL BANKRUPTCY & RESTRUCTURING VIRTUAL SERIES AWARDS & HONORS

DAVID MORK RECEIVES AIRA'S 2021 EMANUEL KATTEN AWARD

EDITOR'S NOTE: The AIRA presented the 2021 Emanuel Katten Award to David Mork during the AIRA's annual conference in June. David Mork was one of the founders of AIRA and its predecessor organizations. This article includes the presentation of the award by Ken Malek and David Mork's acceptance. Together, the presentation and acceptance remarks provide important historical background about the founding and early years of AIRA. Congratulations to David Mork on the award in recognition of his many contributions to the AIRA and to the profession.

PRESENTATION REMARKS BY KEN MALEK

Good evening, ladies and gentlemen. My name is Ken Malek, and I have the honor and privilege of introducing this year's recipient of the Manny Katten award, David Mork, one of our organization's founders, an early and long-standing leader of the profession, a nationally known receiver for banks and financial institutions, and one of our very first CIRAs. The pride David takes in his CIRA certification is exemplified by his email address: cpacira@gmail.com.

Let me please start off with some history, to help us appreciate David's contributions.

AIRA History

First, some short-term history, to put things into perspective. In 2021, the AIRA celebrates its 37th year of providing key education in the form of its Annual Bankruptcy and Restructuring Conference. This culminates over 41 years during which the AIRA and its predecessor organizations has been in the forefront of the restructuring field, serving professionals in business turnaround, bankruptcy and restructuring practice. We believe that our educational and certification programs, with broad appeal across a range of professional disciplines, provide the platinum standard of education for financial and business practitioners engaged in the distressed business field. David has been one of our leaders for many of these 41 years.

Let's roll out the way-back machine. In 1979, after the 1978 Bankruptcy Reform Act had been passed, a series of meetings – led by David Mork and Homer Bonhiver – were held in Minneapolis with professionals who wanted to start an association for accountants interested in working in the new bankruptcy area, under the new legislation. In 1982, they formed the NAAI (the National Association of Accountants in Insolvency). In 1984, a steering committee decided the organization would be based in Chicago to facilitate contributions from a greater spectrum of leadership in the profession. The organization became the AIA (the Association of Insolvency Accountants) and then adopted its current name, the Association of Insolvency and Restructuring Advisors, in 1999 to reflect the broadening of its identity as an association of professionals involved with distressed businesses.

Manny Katten Award

At its October 1999 meeting, your AIRA Board voted to establish the Emanuel "Manny" Katten Award, which is bestowed annually on an individual selected by the Board who has demonstrated exceptional leadership, dedication and service to the bankruptcy, restructuring and turnaround field. Manny was the Chairman of the first AIRA Annual Conference – held back in 1985 - and was a founding Board Member. A former partner and friend of Mr. Katten attested, "Manny was a big, affable guy who liked everyone and in return was loved by all. He left us way too soon."

Each year, the Board selects the recipient of the Manny Katten Award based on contributions that best commemorate the sprit and legacy of Manny's giving tirelessly to the restructuring profession. I had the privilege and pleasure of knowing Manny through his many years of service and financial support to the AIRA, from 1984 until he passed away in early 1999. Manny, who was partner in Charge of Spicer Oppenheim's Chicago Office, was a national leader in establishing the role of the accountant and financial advisor in bankruptcy and restructuring proceedings.

Continued from p.29

His reputation in the restructuring community and his leadership in our 1985 annual conference helped put AIRA on the map and attracted the support of many large professional services firms throughout the country.

David Mork

This year, 2021, we honor David Mork as the recipient of the Manny Katten Award. David is one of the original founders of the NAAI and a long-time AIRA Board member, who helped establish our national and international reputation, through his formation of the NAAI, serving as the AIRA's delegate to INSOL International, speaking at many AIRA annual conferences, supporting our Board activities and establishment of the nationally recognized CIRA and CDBV certifications, and – about 2-1/2 decades ago – almost singlehandedly creating the first AIRA member website.

David, you join a legion of highly regarded prior recipients of the Manny Katten Award; to name just a few: Steve Cooper (founder of Zolfo Cooper) who was our 2000 award recipient, Michael Policano (founder of Policano & Manzo which became FTI) who was our 2008 recipient, Barry Monheit (leader of Arthur Andersen's practice) who was our 2006 recipient, Grant Stein (for many years the leader of the Alston & Bird practice and a former AIRA president and chair) who was our 2014 recipient, Grant and Valda Newton in 2016, and Jay Alix in 2019, among many others.

David Mork, please accept the most sincere recognition and congratulations from the AIRA Board and its entire membership community, and please give us your thoughts on the AIRA and your history with our organization.

ACCEPTANCE REMARKS BY DAVID MORK

Ken, thank you. I am humbled and honored to receive the 2021 Manny Katten Award and to join all the icons of our industry who are prior recipients of this award, especially Homer Bonhiver, my friend and fellow Arizonan Barry Monheit, and Grant and Valda Newton.

Let me now describe some basic history as I recall it regarding the early formation of the organization of the now named Association of Insolvency & Restructuring Advisors (AIRA) from 1979 to 1989.

NAAI

In the fall of 1979, shortly after the enactment of the Bankruptcy Reform Act of 1978, I suggested to a group of friends and practicing accountants that we should meet and discuss the formation of a group to promote the profession of insolvency accountants. I proceeded to hold personal meetings with each of the chosen individual practitioners. Some had an interest, some were working as an insolvency accountant, and others were members of the CPA profession who had worked on bankruptcy cases prior to the passage of the 1978 Act.

I, along with 8 others, then met on a weekday afternoon at the Minneapolis Athletic Club in Minneapolis, Minnesota. We "clinked glasses of cognac" as a toast to forming the National Association of Accountants in Insolvency (NAAI), and held our first Board of Directors Meeting. The elected officers were:

NAAI Officers	Firm
Homer Bonhiver, President	Bonhiver & Associates
David Mork, President Elect & Vice President	Mork & Company
Thomas Dunleavy, Treasurer	Price Waterhouse
John Almquist, Secretary	Graves McKenna Lundeen & Almquist

The above officers and five others were appointed to the Board of Directors. Now, more than 40 years later, I do not recall the other names. Later, we incorporated the NAAI as a Not-For-Profit entity, and received approval from the IRS and also applied for the appropriate EIN's. We set up a dues structure and began to hold NAAI conferences annually. I was elected President of the NAAI in 1980 and held that position until 1985, when Mr. Alex Knopfler became President.

We grew from the original 9 to over 40 members in a short time, and we attracted members from the "Big 8" firms, including Price Waterhouse (Pete Gibbons of PW was an early supporter and later became President); Coopers & Lybrand; Arthur Andersen & Co.; and BDO Seidman (Alex Knopfler was also an early supporter and became President). Numerous other practitioners in the insolvency field joined us from across the USA, including Barry Monheit from AA& Co., and Manny Katten from Spicer & Oppenheim; both were early supporters and became members of the NAAI Board of Directors.

The 1984 NAAI annual conference in Minneapolis (L to R): Leonard Salter, Past President, Commercial Law League of America (became an INSOL Executive Committee member); Harry D. Dixon, Jr., First Chairman /Founder of the American Bankruptcy Institute (became an ABI Fellow); Robert J. Kressel, U.S. Bankruptcy Court Judge for the District of Minnesota, (retiring in June 2021); David Mork, President of the NAAI and Conference Chair; William Westphal, US Trustee for the District of Minnesota; Homer Bonhiver, immediate Past President of the NAAI; Miles Lord, (former Chief Judge in the Federal District Court, Minnesota).

AIA

As I mentioned, in 1980, I became President. We grew the organization to over 40 members in the early years. I continued in that role until 1985. During those 5 years, we grew from being a Minnesota members only organization, to having members from across the USA. In 1982, we became a member of INSOL International, and I attended the first ever conference of International Practitioners in Cape Cod, Massachusetts, in the fall of 1982.

We continued to hold annual and quarterly meetings, including panel discussions, attended and led by judges from the U.S. Bankruptcy Court for the District of Minnesota, the U.S. Trustee's office, and members of the legal and accounting community practicing in the area of bankruptcy. Note, the Turnaround Management Association was not even formed at this time. Several conferences included the Honorable Miles Lord, Senior Judge of the United States District Court for the District of Minnesota, who was also an early supporter of the organization.

As I remember, for the 1984 annual conference, we flew in as a main speaker from Omaha, Nebraska, the founder and current President of the American Bankruptcy Institute (ABI) Mr. Harry DIxon, who was in the initial stages of building the ABI. The AIA and the NAAI had many successful conferences, which, even though they were held in Minnesota, were well attended. I still have an early picture of one of the conferences with the above in attendance.

In 1985, we transferred the records and the headquarters of the AIA to Alex Knopfler, who was the newly elected President of the association.

CIRA

From the beginning, the NAAI, and the AIA, wanted to establish a mark of distinction that was unique for insolvency professionals. I discussed the concept of such a designation in the early 1980s, when I, as President, approached the then President of the AICPA, Mr. Rholan Larsen (another Minnesota based CPA), regarding the possibility of issuing an insolvency training designation under the umbrella of the AICPA. He reviewed the concept with the AICPA, and the result was that the AICPA did not, at that time, believe in granting another CPA or similar designation. We continued to formulate the concept for many years until 1992, when the first CIRA's were granted thanks to Grant Newton's leadership and support and leadership from AIRA officers and the Board.

A 1984 INSOL International Executive Committee meeting (L to R): Ian Strang, Canadian Insolvency Association and the 1982-1985 President of INSOL; Garth McGirr, Canadian Insolvency Association Representative; Richard Turton, INSOL President Elect and UK Insolvency Practitioners Association Representative; Dennis Cougle, Insolvency Practitioners Association of Australia Representative; Keith Otter, UK Insolvency Practitioners Association Representative; David Mork, President of the National Association of Accountants in Insolvencies.

Retirement

In 1989, I retired from the profession of accounting, insolvency, and restructuring. I also retired that year from the AIA and from my position as a member of the Executive Committee and member of the Board of Directors of INSOL International. I suggested to the AIA, and INSOL that Grant Newton should be designated as the AIA delegate to INSOL. As such, Grant attended his first INSOL meeting of the members of the Board of Directors in Vienna, Austria, in 1989. The rest is history.

Continued from p.31

In 1999 in San Francisco, California, I had the honor of presenting Homer Bonhiver with his Lifetime Achievement Award. In attendance at that meeting were his spouse, and the Honorable (Retired) Judge Miles Lord and his spouse. It was a moving moment for the awardee, the guest(s), and me.

Closing

The AIRA has been an important part of my professional life. I have cherished the many personal and professional relationships I have formed during all the years I had the pleasure of being involved in service to the AIRA. I am humbled and honored to join the ranks of all the icons of our industry who are prior recipients of the Manny Katten Award. On behalf of myself and all the prior recipients of the Manny Katten Award, we cherish and honor Manny Katten's memory and all the contributions he made to the AIRA.

David Mork and his wife Sandy in Monte Carlo for the 1985 INSOL meeting, with Ron Harmer, a UK lawyer, who later relocated to Sydney, Australia, and served as Commissioner in Charge of the General Insolvency Inquiry, undertaken by the Australian Law Reform Commission.

EDITOR'S NOTE: For those interested in additional information about AIRA's origins and early history, see the AIRA Journal, Volume 23, Number 1, April/May 2009 published at the time of AIRA's 25th anniversary and the AIRA website at https://www.aira.org/aira/history.

BOARD OF DIRECTORS SERVICE AWARD

AIRA RECOGNIZES ROBERT SWARTZ, CIRA, FOR SERVICE TO THE ASSOCIATION AND THE INDUSTRY

At the virtual annual conference on June 17, 2021, AIRA recognized and honored Robert Swartz for his service to the Association, the Certified Insolvency & Restructuring Advisor program, and the continuing education of the insolvency and restructuring profession. A managing director of PricewaterhouseCoopers LLP's U.S. Business Recovery Services practice in Boston, Rob became a member of AIRA in 2017 and received his CIRA designation in 2019. Specializing in accounting and financial reporting for restructuring transactions, Rob brought his significant experience to bear on AIRA's update and expansion of its CIRA curriculum covering Fresh Start accounting under FASB ASC 852, Reorganizations. In addition to presenting Rob with the Service Award, the AIRA is pleased to have had Rob join its Board of Directors in June.

AIRA INDUCTS 2021 DISTINGUISHED FELLOWS

EDITOR'S NOTE: The AIRA inducted the inaugural class of AIRA Distinguished Fellows during the AIRA's 2021 annual conference in June. This article includes the presentation of Distinguished Fellows and Grant Stein's acceptance on behalf of the class.

PRESENTATION REMARKS BY DAVID BART

It is my distinct pleasure to introduce the new AIRA Distinguished Fellows Program and to announce the inaugural class of new fellows.

During the past two years, AIRA's Board of Directors conceived and launched the Distinguished Fellows Program to recognize the significant contributions that AIRA's senior members have made to the art and science of corporate restructuring and to AIRA. This program is intended as an academic and professional honor for those AIRA members who exemplify the highest level of excellence in professional practice and whose contributions have left a significant positive legacy to our profession and to AIRA.

The new Fellows inducted tonight have contributed in many ways to the profession and to AIRA. They have served as a distinguished judge and educator, provided important leadership in AIRA as well as the Turnaround Management Association (TMA) and American Bankruptcy Institute (ABI), provided years of service on the AIRA board, taught the AIRA's CIRA and CDBV certification courses, presented and organized AIRA and other professional conferences, published articles and books, and most importantly, founded this organization. Congratulations to all of you on your generosity and your many professional contributions over the years.

We will now introduce all of the 2021 fellows, and then Grant Stein, a former AIRA Chair and President and a Manny Katten Award recipient, will accept on behalf of the entire class of new fellows.

With that, I am pleased to welcome our new AIRA Distinguished Fellows.

ACCEPTANCE REMARKS BY GRANT STEIN

Thank you for the honor of being able to speak on behalf of the inaugural class of AIRA Distinguished Fellows. I believe that the group has three things in common.

First, I think I can say that each of us was humbled to be nominated to be AIRA Distinguished Fellows.

Second, except for Grant Newton, who was the heart, body, and soul of Association of Insolvency Accountants when he, along with Alex Knopfler, Manney Katten, and [others] first envisioned the creation of the AIA [yes, I said the Association of Insolvency Accountants – the AIA which is what it was when it was conceived and born more than 35 years ago], the rest of us in this inaugural class of AIRA Distinguished Fellows came to a unique and special organization that had already been formed. I note that we all hoped to provide our own level of gravitas (well, at least gravitas for Judge Carey because the rest of us did not have it quite yet), enthusiasm, and commitment to the educational principles that have long served as the hallmark of the AIRA. In that regard, when the AIRA, as successor by name change to the AIA, came into existence in 1999, the goal was to include within the breadth of insolvency and restructuring advisors: turnaround professionals, lenders, investment bankers, trustees, appraisers, claims agents, claims traders, attorneys, and so many others who would grow the AIA.

That brings me to the second thing we all have in common. CIRA and CDBV have become Gold Standard credentials for our industry, and almost all our Distinguished Fellows have played material roles in formulating the course content, creating the course materials, and/or teaching the certification programs, or lecturing and organizing the annual seminar. Of course, the greatest of these contributions was made by Grant Newton.

That takes me to the third thing that all of the inaugural AIRA Distinguished Fellows have in common. When I looked at the list of the ten inaugural fellows, one thing I noted that we all had in common was a desire to give back – to provide service to the AIRA's constituency to raise the bar, so to speak, of the professionals who work in

Continued from p.33

our areas of expertise in the insolvency arena. We all have given our time and creative energies to enhance the AIRA and its purposes, and to grow the organization. And, as is often the case, we got back more than we gave

So, in conclusion, on behalf of David Berliner, Judge Carey, Steve Darr, Ken Malek, Jose Monge, Tom Morrow, Grant Newton, Valda Newton, and Teri Stratton, THANK YOU. THANK YOU for all you have done. I am humbled to be considered to be recognized along with each of you. THANK YOU from a personal level for your friendship over the years, and THANK YOU for your service to this organization.

EDITOR'S NOTE: For more about AIRA's Distinguished Fellows program, see AIRA website at https://www.aira.org/aira/fellows.

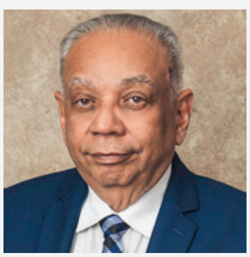
2021 Class of Distinguished Fellows

David Berliner, CIRA
BDO

Hon. Kevin J. Carey (Ret.)
Hogan Lovells US LLP

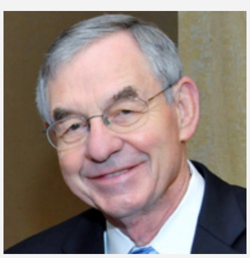
Stephen B. Darr, CIRA, CDBV
Huron Consulting Group

Kenneth J. Malek, CIRA, CDBV
Malek Remian LLC



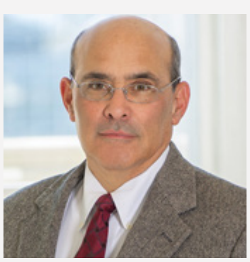
Jose M. Monge, CIRA
Monge Robertin Advisors, LLC

Thomas Morrow, CIRA
Honorary

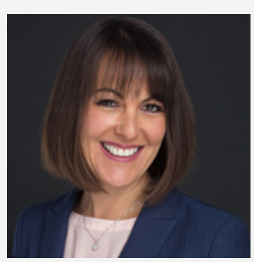


Grant W. Newton, CIRA
Honorary

Valda Newton
Honorary



Grant T. Stein
Alston & Bird LLP



Teri L. Stratton, CIRA
Piper Sandler & Co.

2021 ALIXPARTNERS CIRA AWARDS

The AlixPartners CIRA Awards and Certificates of Distinguished Performance were conferred upon candidates who earned the top composite scores for all three parts of the CIRA exam completed by end of the previous year.

1st PLACE: Nate Simon, CIRA – *AlixPartners, LLP*

Nate Simon is a Vice President in the Turnaround and Restructuring practice at AlixPartners, based in Chicago. He has advised both debtors and creditors through complex financial and operational restructurings, providing support through liquidity forecasting, business planning, and bankruptcy administration. In particular, Nate has extensive experience in the Retail and Automotive industries. Nate earned an MBA from the University of Chicago Booth School of Business with concentrations in Finance, Accounting, and Economics, and a BA from the University of Michigan with a concentration in Economics.

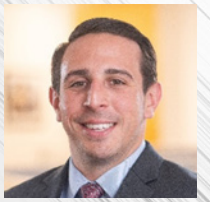
2nd PLACE: Bryan Fleming, CIRA – *Alvarez & Marsal*

Bryan Fleming is a Director with Alvarez & Marsal's North American Commercial Restructuring practice based in Atlanta. He specializes in advising executives and boards of directors of under-performing and financially distressed companies. Bryan has assisted clients across industries on forbearance negotiations, rescue financing, out-of-court restructuring transactions, distressed M&A, and Chapter 11 processes, including section 363 sales and plans of reorganization. He has led cash management and liquidity forecasting and developed business plan projections for multiple companies each with annual revenues of over $1 billion. Bryan received his bachelor's and master's degrees in electrical and computer engineering from Duke University.

3rd PLACE: Hrvoje Cizmic – *PwC*

Hrvoje is a director in PwC's Deals practice in Los Angeles. He has been involved in the financial due diligence of several hundred deals ranging from $5 million to more than $25 billion in a wide range of industries, for both financial and corporate clients including many cross border transactions. Hrvoje assists private equity and corporate clients by managing acquisition and divestiture financial diligence projects and coordinating efforts with other PwC diligence teams. Hrvoje received his Bachelor of Science in Business Administration and Masters in Accounting from the Univ. of Southern California's Marshall School of Business. Hrvoje is a licensed CPA in California and a Chartered Financial Analyst (CFA).

CERTIFICATES OF DISTINGUISHED PERFORMANCE



David Barmish
SB360 Capital Partners
Greater Boston, MA

Patrik Kast
Alvarez & Marsal
New York, NY

Continued from p.35

AIRA GRANT NEWTON EDUCATIONAL ENDOWMENT FUND 2021 SCHOLARSHIP

A Note from Dr. Farrell Gean, Business Administration Division, Seaver College, Pepperdine University: On behalf of the accounting faculty, thank you once again for the decision by AIRA to support our accounting program with the AIRA Grant Newton Scholarship. I am sending you some information about our awardee – she is one of our very best and I think you will be proud to have her association.

CONGRATULATIONS TO CHRISTEANE TACADENA

A junior from Southern California, Christeane Tacadena was selected as the scholarship recipient by Pepperdine Accounting faculty for her good academic performance and her leadership positions in multiple groups on campus. She is active in her sorority and uses her accounting skills to manage the chapter's finances as the Financial Vice President of Gamma Phi Beta. She also serves as the Executive Vice President of Pepperdine's Panhellenic Association, leading Greek Life on campus. Within the accounting sphere on campus, Christeane serves as the Social Media Coordinator for the Accounting Society. She has great organizational skills, as evidenced by her ability to maintain her grades and serve on multiple organizations on campus. Recently, she welcomed a puppy into her home and spending time with the puppy has been her favorite relaxation activity.

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THANK YOU TO OUR SPONSORS FOR THEIR GENEROUS SUPPORT OF THE AC21 VIRTUAL SERIES!

Presenting Sponsor

AlixPartners

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Presenting Sponsor

Pachulski Stang Ziehl & Jones LLP (PSZJ) is the nation's leading corporate restructuring boutique, with offices in Los Angeles, San Francisco, Wilmington (DE), New York, and Houston. PSZJ attorneys are experienced in representing all major constituencies in bankruptcy proceedings and out-of-court workouts, including debtors, committees, trustees, bondholders, asset-purchasers and third-party plan proponents. PSZJ also handles sophisticated business litigation and transactional matters as part of its renowned practice, and the firm is U.S. News & World Report's 2020 "Law Firm of the Year" in Bankruptcy and Reorganization Law.

Duane Morris LLP, a law firm with more than 800 attorneys in offices across the United States and internationally, is asked by a broad array of clients to provide innovative solutions to today's legal and business challenges. For three decades, our Wilmington office has been an integral part of the firm's national Business Reorganization and Financial Restructuring practice, serving the needs of clients in Delaware and around the world. The Wilmington office provides a wide range of corporate and commercial services, including sophisticated estate planning, trust administration and fiduciary litigation to individuals, corporate fiduciaries, business owners and charitable organizations.

FTI Consulting is an independent global business advisory firm dedicated to helping organizations manage change, mitigate risk and resolve disputes: financial, legal, operational, political and regulatory, reputational and transactional. Individually, each practice is a leader in its specific field, staffed with experts recognized for the depth of their knowledge and a track record of making an impact. Collectively, FTI Consulting offers a comprehensive suite of services designed to assist clients across the business cycle — from proactive risk management to the ability to respond rapidly to unexpected events and dynamic environments.

BKD CPAs & Advisors is a national CPA and advisory firm that helps businesses realize their goals. We have 40 offices in 18 states, with approximately 3,000 dedicated professionals serving clients in all 50 states and internationally. Through cross functional disciplines and the complement of both technical teams and industry expertise, our seasoned and experienced insolvency and restructuring professionals provide thoughtful and insightful analysis, advice and guidance coordinated to address the strategic, operating, and financial elements of recovery, reorganization, and restructuring. The BKD Experience: Unmatched Client Service®. For more information, visit https://www.bkd.com/services/restructuring-special-situations.

Continued from p.37

Epiq, a global technology-enabled services leader to the legal services and corporations, takes on large-scale, increasingly complex tasks for corporate counsel, law firms, and business professionals with efficiency, clarity, and confidence. Clients rely on Epiq to streamline the administration of business operations, class action and mass tort, eDiscovery, regulatory, compliance, restructuring, and bankruptcy matters. In the restructuring space, Epiq provides full support for all types of bankruptcy and restructuring cases for companies of all sizes including pre-filing consulting, claims management, solicitation and balloting, creditor notification, strategic communications, escrow services and disbursement, and virtual data rooms.

A powerhouse firm with the heart of a boutique, Kelley Drye & Warren LLP values the success of our clients above all. Skilled practitioners in the areas of bankruptcy and restructuring, litigation, regulatory, real estate and corporate combine talents to address the unique complexities of our clients' legal challenges. We are practical in our advice and creative in our approach. Kelley Drye is a firm of more than 300 lawyers and other professionals practicing in New York, New York; Washington, D.C.; Los Angeles and San Diego, California; Chicago, Illinois; Stamford, Connecticut; Parsippany, New Jersey; and Houston, Texas.

Privately-held since 1983, Alvarez & Marsal is a leading global professional services firm that delivers performance improvement, restructuring & turnaround and business advisory services to organizations seeking to transform operations, catapult growth and accelerate results through decisive action. We advise on every aspect of the process from strategic direction to liquidity management to business plan development, helping management, investors, or creditors seeking to accelerate performance, overcome challenges and maximize value across the corporate and investment lifecycles. We fill executive officer roles, on an interim basis, to help guide companies through crises and other challenging business or economic environments.

Province, LLC is a nationally recognized restructuring financial advisory firm specializing in corporate and creditor advisory, forensic and dispute resolutions, and trustee-related services. The firm creates exceptional value to its clients, consisting of debtors, trustees, and official creditor committees, across a wide array of sectors by providing solutions to some of the most complex business challenges imaginable. With firm offices in Los Angeles, Las Vegas, Baltimore, Stamford, and Miami, we are always looking for high-performing talent to expand our professional team.

Arent Fox LLP is internationally recognized in core industries where business and the law intersect. With more than 450 lawyers and professionals, the firm provides strategic legal counsel and multidisciplinary solutions to a global roster of corporations, governments, and trade associations.

Bederson is a full service accounting and advisory firm with offices in Fairfield and West Orange, New Jersey. The firm's West Orange office comprises six partners, professional and support staff solely dedicated to providing insolvency and litigation services. For close to ten years, the firm has attained top recognition by New Jersey's legal community for service expertise in bankruptcy, business valuations, forensic accounting and business accounting. Bederson is privileged to have helped clients in the legal community, private business and home offices reach optimal outcomes since 1937.

Huron is a global professional services firm committed to achieving sustainable results in partnership with its clients. We offer a full suite of business advisory services in key areas, including capital advisory, commercial dispute advisory, investment banking, operational improvement, restructuring & turnaround, transaction advisory, and valuation. Our senior-level team members possess deep operating experience in a range of industries, with many serving as C-level executives. This enables us to efficiently analyze a situation and apply our knowledge to identify and implement value creation strategies. Through focus, passion and collaboration, Huron provides guidance to support organizations as they contend with the change transforming their industries and businesses.

Paladin guides middle-market companies and their stakeholders through challenging financial, operational, and strategic transitions. Our team of expert consultants, from a range of disciplines, unites with our clients to deliver tailored solutions that yield tangible and lasting results. Your Mission is Our Mission.

Piper Sandler is a leading investment bank and institutional securities firm. At Piper Sandler, we help clients Realize the Power of Partnership®. Through a distinct combination of candid counsel, focused expertise and empowered employees, we deliver insight and impact to each and every relationship. We transcend transactions to define possibilities—enabling clients to achieve their short-term goals while realizing their long-term vision.

Bachecki, Crom & Co., LLP is a full-service CPA firm located in the San Francisco Bay Area specializing in complex Forensics, Valuation, and Tax matters. We have provided our clients with solutions for over forty-five years. Committed to excellence, we offer a complete array of services delivered with a personal and professional touch. We value our role as trusted advisors who know our business and respect yours. We are committed to integrity and honesty. Our dedication to the three underlying principles of professionalism, responsiveness, and quality ensures outstanding service to our clients.

Continued from p.39

Our firm efficiently resolves your legal matters by assembling an accessible team of talent to develop a strategy and take action. We measure our performance by the results we achieve.

CohnReznick LLP is one of the top accounting, tax, and advisory firms in the United States, combining the deep resources of a national firm with the hands-on, agile approach that today's dynamic business environment demands. Many of the country's top companies, lenders, law firms, and investment firms call on CohnReznick to assist in transitional, stressed, and distressed situations. With decades of industry and situation-specific experience, our professionals identify and implement financial and operational strategies that have improved clients' process, profit, and recovery, resulting in increased value and decreased risk for stakeholders. The Firm, with origins dating back to 1919, is headquartered in New York, NY with offices nationwide.

Cozen O'Connor has over 750 attorneys in 29 cities across two continents. We are a full-service firm with nationally recognized practices in litigation, business law, and government relations and our attorneys have experience operating in all sectors of the economy. Our Bankruptcy, Insolvency & Restructuring Practice focuses on domestic and international insolvency, creditors' rights, bankruptcy, out-of-court restructurings, and reorganization. Our lawyers represent parties on all sides of bankruptcy matters, enabling them to anticipate needs and priorities of divergent constituencies and devise winning strategies. They also serve as mediators in high-level disputes, making them adept at focusing negotiations and navigating potential roadblocks.

Deloitte CRG is a leader in helping organizations transform periods of financial difficulty or crisis into opportunities for resilience. Having led both large multinational organizations and mid-market companies through unprecedented challenges, we apply our unrivalled experience and superior foresight to achieve successful outcomes for our clients, their creditors and equity holders. Whether the goal is to enhance the performance of a healthy company or guide stakeholders through complex bankruptcy reorganization, our team works closely with the client to quickly understand their business and most urgent issues.

Development Specialists, Inc. (DSI) is one of the leading providers of management consulting and financial advisory services, including turnaround consulting, financial restructuring, litigation support and forensic accounting. Our clients include business owners, private-equity investors, corporate boards, financial institutions, secured lenders, bondholders and unsecured creditors. For almost 40 years, DSI has been guided by a single objective: maximizing value for all stakeholders. With our highly skilled and diverse team of professionals, offices in the U.S. and international affiliates, and an unparalleled range of experience, DSI not only achieves that objective, but has also built a solid reputation as an industry leader.

KCC Trustee and Fiduciary Services

KCC, a Computershare company, is a leading claims and noticing agent providing administrative-support services and consulting to companies undergoing corporate restructurings. KCC has set the standard for claims-administration services, with innovative technologies and the most experienced staff in the market who offer in-depth expertise and highly responsive client service. KCC provides claims administration, noticing, public securities services, strategic communications, document production, balloting and tabulation, disbursement services, and a suite of e-services on all digital platforms. KCC has integrated automated chapter 11 depository services as well as chapter 7 solutions and software as they continue to expand their suite of services.

RK | Consultants

We are a boutique consulting firm representing debtors, creditors, and trustees in all aspects of bankruptcy proceedings. We have built our business to assist parties in the most thought intensive and efficient manner. Through our experience and knowledge of the Court process, we learned parties dealing with distress and bankruptcy need an experienced team of financial professionals to provide proactive Bankruptcy Services; Litigation Support and Expert Testimony; and Forensic and Investigative Accounting.

YOUNG CONAWAY

The Bankruptcy and Corporate Restructuring Section of Young Conaway Stargatt & Taylor, LLP brings a depth of legal knowledge, technological skill, and creativity to complex and fast-paced reorganizations, restructurings, liquidations, and distressed acquisitions and sales. Our 35 bankruptcy attorneys have been able to achieve optimal results in a wide array of industries. Publications such as U.S. News and World Report and Chambers USA continue to rank Young Conaway as one of the nation's preeminent insolvency practices. Young Conaway's bankruptcy and corporate restructuring attorneys represent clients' interests in Delaware, the Southern District of New York, as well as other bankruptcy courts throughout the United States.

GOODWIN

At Goodwin, we partner with our clients to practice law with integrity, ingenuity, agility, and ambition. Our 1,400 lawyers across the United States, Europe, and Asia excel at complex transactions, high-stakes litigation and world-class advisory services in the technology, life sciences, real estate, private equity, and financial industries. Our unique combination of deep experience serving both the innovators and investors in a rapidly changing, technology-driven economy sets us apart. Goodwin's sophisticated and full-service Financial Restructuring Group is fully equipped to help clients with the most complex high profile restructurings and distressed opportunities.

PERKINS COIE
COUNSEL TO GREAT COMPANIES

Perkins Coie's national, full-service bankruptcy and restructuring practice has experience representing virtually all constituencies in distressed situations. We are a leading international law firm that is known for providing high value, strategic solutions and extraordinary client service on matters vital to our clients' success. With more than 1,100 lawyers across the United States and Asia, Perkins Coie provides a full array of corporate, commercial litigation, intellectual property and regulatory legal advice to a broad range of clients, including many of the world's most innovative companies and industry leaders as well as not-for-profit organizations.

Continued from p.41

Gibson, Dunn & Crutcher has more than 1,300 lawyers in 20 offices located in major cities throughout the United States, Europe, Asia, the Middle East and Latin America. We are committed to providing the highest quality legal services to our clients in a personal, responsive manner. We are a recognized leader in representing companies ranging from start-up ventures to multinational corporations across diverse industries from high-technology to manufacturing, financial institutions and other service companies to government entities. The firm handles every aspect of litigation, crisis management, corporate transactions and counseling, corporate governance, regulatory law, antitrust law, business restructurings and reorganizations, tax, employment and labor law, intellectual property and real estate law, and many related practice areas.

GT's professionals provide specialized expertise necessary to support parties involved in restructuring and insolvency. We serve as financial advisors to distressed companies and individuals, financial advisors to secured creditors and lenders, Chief Restructuring Officer, as well as interim CEO and CFO. In the event the client is not able to restructure, we help businesses and individuals prepare for a bankruptcy filing by serving as financial advisors or accountants to the debtor. GT also serves as Chapter 7 and 11 trustees and financial advisors to the unsecured creditor committee. GT uses its decades of experience to compile bankruptcy schedules, evaluate claims, analyze tax implications, and assist with Bankruptcy Court and United States Trustee compliance reporting. For more information, visit https://www.gtllp.com/restructuring-insolvency-consulting

KapilaMukamal (KM) provides creative and innovative solutions to our client's needs. Our collective practical acumen and expertise focuses to analyze complex business and litigation issues. KM has gained prominence and distinction by rendering restructuring, insolvency, fiduciary, forensic and investigative consulting, and litigation support services to a wide spectrum of industries. KM enjoys high credibility and recognition in providing quality and focused service. As a market leader in the areas of creditors' rights and fiduciary matters, distressed business turnaround, insolvency taxation and complex commercial litigation support to law firms, KM believes results matter and has a proven track record demonstrating that goal.

MalekRemian LLC is a team of operations, interim management, corporate transaction, valuation and litigation support professionals providing services throughout the United States. We combine decades of experience with a hands-on client service model, personal commitment and on-call attention, devoted to helping you solve your business challenges and move forward. MalekRemian's senior level expertise drives value-added results across a range of industries, including energy and power, financial services and real estate, healthcare, manufacturing, technology and transportation.

RSM US LLP is the leading provider of audit, tax and consulting services focused on the middle market, with more than 9,500 people in 90 cities nationwide. It is a licensed CPA firm and the U.S. member of RSM International, a global network of independent audit, tax and consulting firms with more than 43,000 people in over 120 countries. RSM uses its deep understanding of the needs and aspirations of clients to help them succeed. For more information, visit www.rsmus.com, like us on Facebook, follow us on Twitter and/or connect with us on LinkedIn.

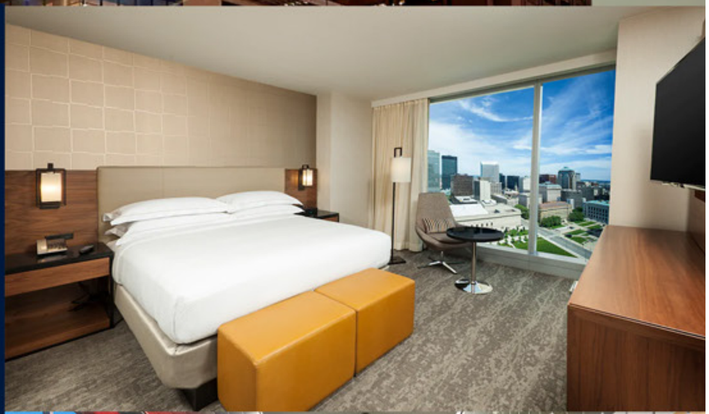
38TH ANNUAL BANKRUPTCY & RESTRUCTURING CONFERENCE

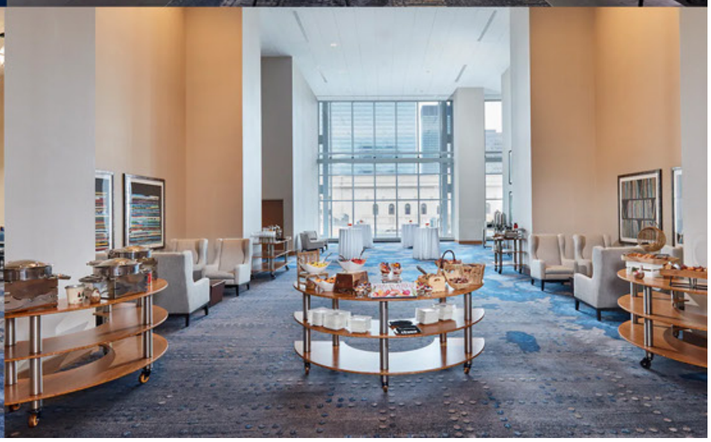
JUNE 8-11, 2022
CLEVELAND, OH

SAVE THE DATE FOR AIRA'S NEXT ANNUAL CONFERENCE ("AC22")!

THE CONFERENCE IS PLANNED TO BE HELD IN-PERSON AT THE HILTON CLEVELAND DOWNTOWN HOTEL.

MORE DETAILS COMING IN 2022.





BANKRUPTCY ACTIVITY EXPECTED TO BE STEADY AS PANDEMIC AND RECESSION PERSIST

STEVEN FLEMING, CIRA, CDBV
PwC

As we assess our outlook for turnaround and restructuring activity in 2021, it is difficult to overstate the level of disruption companies faced in 2020. Healthy, well-capitalized companies faced acute liquidity crises, and even the most prudent management teams lacked critical tools and capabilities to manage through the uncertainty. Liquidity planning, annual budgets and covenant forecasts were rendered obsolete overnight, and companies had to scramble to raise capital to weather a storm of unknown size and length.

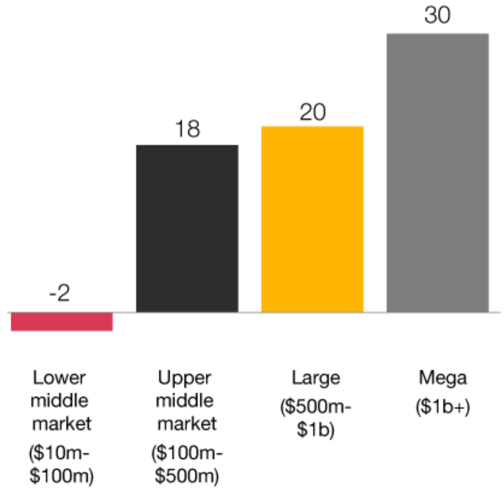
Now businesses face a crucial question: Have we closed the door on the fallout from COVID-19 and begun a new phase of recovery and growth, or are we in the calm before a storm of operational uncertainty, mandated shutdowns, and increasing leverage? Expectations for earnings projections, liquidity forecasts, and covenant analyses were set without the benefit of historical precedent or hard data on which to build assumptions. If those expectations aren't met, another round of support and flexibility may not be available from capital providers in 2021.

The second round of federal stimulus approved in December 2020 has provided much-needed support to companies through the first half of 2021, but we think there's more financial distress ahead of us than we've seen in the past year. Companies that bolstered liquidity through capital raises now must manage higher debt service and more levered balance sheets in the face of continued operational uncertainty and a challenging earnings and cash flow environment. These underlying challenges haven't yet had time to trickle through the economy and manifest in financial restructurings.

BANKRUPTCY ACTIVITY IN 2020

The number of Chapter 11 filings grew by 16.5% in 2020 — a relatively modest increase compared to the disruption companies faced during the year. While

Exhibit 1: Change in Chapter 11 Bankruptcy Filings from 2019

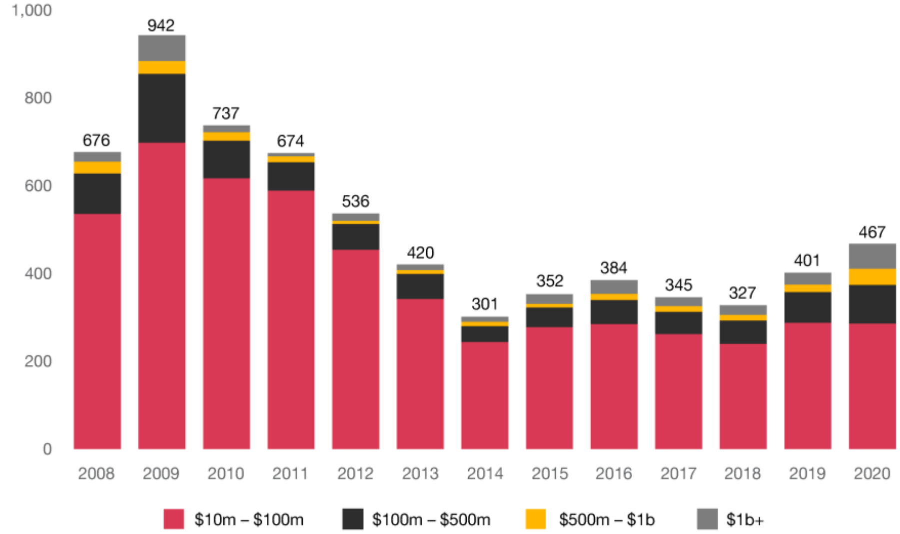


Source: Reorg Research

that volume was the highest level since 2012, it is well below the levels during and after the Great Recession of 2007 to 2009. In fact, among smaller companies that represent the largest market segment, Chapter 11 filings decreased 0.7% during 2020 (Exhibit 1). Over the past 10 years, lower middle-market Chapter 11 filings have accounted for 77% of bankruptcy filings, so changes in this segment have an outsized impact when compared to the larger company categories (Exhibit 2).

How were companies able to navigate the unprecedented financial uncertainty in 2020 and avoid restructuring? The muted impact is due, at least in part, to the swift government monetary and fiscal response in March 2020. The Federal Reserve Board's consecutive interest rate cuts stimulated credit markets and provided near-term relief to companies, as did direct support through passage of the Coronavirus Aid, Relief and Economic Security (CARES) Act and direct purchase of corporate bonds and loans through the FOMC's newly established

Exhibit 2: Number of Filings by Liability



Source: Reorg Research, The Deal

primary market and secondary market corporate credit facilities. Capital providers were keen to put money to work in a flurry of new debt issuances to shore up liquidity reserves. Lenders were also willing to underwrite debt modifications, waivers, and amendments to help companies avoid financial distress and defaults, while equity markets posted new highs.

The largest Chapter 11 filings accounted for $95.5 billion of liabilities, which is in line with the levels we've seen in recent years. These generally didn't surprise stakeholders: Nine of the ten largest companies to seek Chapter 11 protection were on distressed watchlists at the start of 2020, before the market had carefully considered the effects of COVID-19. Therefore, the virus was a contributing factor to financial restructuring, but not a primary cause (Exhibit 3).

The fact that many of the larger bankruptcies in 2020 already were distressed before the pandemic supports the notion that the elevated activity was more likely an acceleration of bankruptcies that were inevitable. The full impacts of the virus haven't yet worked their way through the economy and driven broad-based financial distress and restructuring activity.

Exhibit 3: Top 10 Chapter 11 Filings in 2020 by Liability Size ($ in millions)

Company name	Sector	Liabilities
The Hertz Corporation	Industrials	19,590
Frontier Communications Corporation	Communications	17,513
Intelsat S.A.	Communications	14,717
Chesapeake Energy Corporation	Energy	9,095
McDermott International, Inc.	Energy	7,105
Valaris plc	Energy	7,094
Mallinckrodt plc	Healthcare	5,283
Neiman Marcus Group Ltd LLC	Retail and consumer	5,154
California Resources Corporation	Energy	5,085
J.C. Penney Company Inc.	Retail and consumer	4,917
		95,553

Source: Reorg Research, Debtwire, CapitalIQ

OUTLOOK AND SECTORS TO WATCH IN 2021

Exhibit 4 on the next page presents total bankruptcies by sector for 2020. Our outlook for the first half of 2021 is largely more of the same, as fresh stimulus should allow companies to continue to tread water through the vaccine rollout and hopefully bridge to a reopening of the economy. However, in the second half of 2021 and in 2022, it will become clearer whether companies are tracking toward the performance projected in their V-shaped recovery scenarios—enabling balance sheet deleveraging from operations—or whether those projections were overly optimistic, and debt service and balance sheets must be addressed through debt restructurings.

We think that the additional financial and operational leverage companies have had to take on to navigate the operational burdens of COVID-19 in 2020-2021 likely won't be sustainable for some businesses. Companies that act now to recover will have more options available to achieve sustainable solutions, avoid friction costs and minimize process disruption. We are closely monitoring several sectors, highlighted below, in which we think these themes may drive increased restructuring activity.

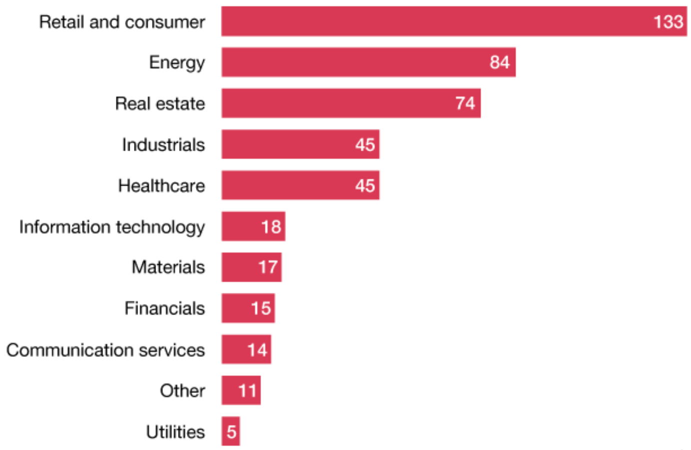
Oil and Gas

Access to capital markets will likely remain constrained for most oil and natural gas producers in the near term, and borrowing base redeterminations in the spring will determine the size of the next wave of bankruptcies. Any price softening from rollbacks in OPEC+ production cuts or additional economic shutdowns could trigger borrowing base shortfalls and additional bankruptcy filings.

Continued from p.45

Exhibit 4: 2020 Bankruptcies by Sector

Retail and consumer, energy and real estate companies accounted for 63% of all 2020 bankruptcy activity during the year.



Source: Reorg Research

This will trickle down to the oilfield services sector, which is expected to remain under pressure for the foreseeable future. Operators have cut costs substantially and hope to ride out the storm, but interest costs of highly leveraged players will continue to challenge liquidity. Consolidation in the sector is needed to remove capacity, cut overhead costs and improve pricing power.

Midstream and downstream companies have largely been spared from the bankruptcy wave, but they're starting to face their own headwinds. Overcapacity due to reduced volumes — along with recent court decisions allowing the rejection of gathering and transportation agreements, previously thought to be safe — have reduced midstream pricing power and resulting cash flows. This also gives upstream customers more leverage to renegotiate above market rates or minimum delivery commitments.

Political and macroeconomic trends add another layer of headwinds across the sector, as a renewed focus on the transition from fossil fuels to renewables is expected from the Biden administration.

Retail

The pandemic has dramatically accelerated ongoing retail industry trends, including growth in digital commerce platforms and a dramatic shift in consumer habits away from apparel and toward essentials and the home. Mandated lockdowns and prolonged store closures have further pushed liquidity-constrained retailers to consider large-scale permanent store closures, financial restructurings and even outright liquidation. There were more than 8,000 permanent brick-and-mortar store closures in 2019, and when taking into account temporary store closures, total estimated store closures could eventually approach 25,000.[1]

The restaurant subsector has arguably been forever changed, with impacts felt hardest by those that continue to rely heavily on indoor dining. While mobile ordering and grab-and-go business models have fared better, the restaurant sector continues to be a matter of survival of the fittest in the face of continued pandemic fallout.

Looking ahead, we expect consumer spending and dining habits to hinge on the pace of new COVID-19 cases, the continued rollout of the vaccine and additional government assistance programs. The ability of troubled retailers to continue to lean on landlords for various forms of rent waivers or abatement will likely reach its tipping point by mid-2021 as exhausted landlords increasingly deal with their own financial challenges. While the winners and losers of the 2020 holiday season have yet to be declared, we expect most retailers to face a rocky road ahead, especially during the first half of 2021.

Hospitality and Leisure

The US travel industry faced its worst year in decades, as the concurrent health and economic crises caused by COVID-19 pressured hotel owners, lenders, brands and operators. The collapse in demand for leisure and business travel is expected to cause a 44% drop in US hotel occupancy and a 21% drop in average daily room rates for 2020. While the fallout has impacted the entire sector, destinations that rely on business, group and international demand have suffered the most.

The CARES Act and Paycheck Protection Program, combined with loan modifications and forbearance agreements, have provided hotel owners much needed breathing room. If vaccine distribution proceeds as planned, the industry may see a much-needed surge from pent-up leisure demand in the second half of 2021, but it could be years before business travel returns to 2019 levels, if at all.

So far, investor commitment to the sector has remained strong, and lenders have hesitated to pursue foreclosures and take ownership of these assets outright. But that trend is contingent on achieving sustainable control of the virus. If the vaccine rollout stumbles or demand doesn't materialize in the second half of 2021 as hoped, the industry could face a liquidity crisis and a surge in foreclosures, especially among noninstitutional hotel owners.

[1] Doug Whiteman, "These Chains Are Permanently Closing the Most Stores in 2020," MoneyWise, April 5, 2021. Available at https://moneywise.com/news/top-stories/chains-closing-the-most-stores-in-2020.

Healthcare

The global health crisis stemming from COVID-19 has disproportionately challenged healthcare providers. The cancellation of profitable elective procedures at hospitals has pressured margins and cash flows, particularly at smaller rural systems where patient volumes were already declining. Providers benefited from substantial government support in the CARES Act, including the acceleration of Medicare and Medicaid reimbursements, but that will end beginning in Q1 2021. Once that happens, we expect more hospitals to face liquidity challenges that will drive restructuring activity.

Senior living operators are also at risk given the impact COVID-19 has had on demand from new residents in a sector that was already dealing with excess capacity. While the longer-term demographics are favorable for the sector, near-term supply-and-demand imbalances may drive increases in restructuring activity in 2021.

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RECENT DEVELOPMENTS IN THE TRANSITION FROM LIBOR

JOSEPH AAKER and CYNTHIA WEISS
Polsinelli

While the end of widespread use of the U.S. Dollar London Inter-Bank Offered Rate ("LIBOR")[1] has been looming for several years, there have been a number of key developments recently in the transition away from LIBOR that have brought the process and timeline into greater focus.

This article provides an overview of important developments related to the LIBOR transition that have occurred in the spring and summer of 2021, including (i) confirmation of the timing of the cessation of the publication of LIBOR, (ii) the effect of recent events on contracts using ARRC Fallback Language (defined below), (iii) the enactment of legislation in New York to address the problem of existing contracts that reference LIBOR but do not include LIBOR replacement provisions, (iv) the endorsement by the ARRC (defined below) of the CME Group's publication of Term SOFR, and (v) additional considerations for market participants based on current developments.

TIMING OF TRANSITION FROM LIBOR

Following an initial announcement by the UK Financial Conduct Authority (the "FCA") in 2017 indicating that LIBOR might not continue to be published beyond year-end 2021, market participants have worked to identify and implement successor rates for new contracts and to create fallback provisions to address the replacement of LIBOR with a successor rate in existing contracts. The timing of the cessation of LIBOR was confirmed on March 5, 2021, when the ICE Benchmark Administration Limited (the "IBA"), the administrator of LIBOR, and the FCA issued separate statements confirming the dates on which LIBOR will no longer be published by the IBA or will be deemed no longer "representative" by the FCA.[2] These announcements stated that one week and two month LIBOR will no longer be published (or deemed representative) after December 31, 2021 and all other LIBOR tenors (including the frequently-used 1-month and 3-month tenors) will no longer be published (or will be deemed not "representative") after June 30, 2023.

Impact on new floating rate loans and other financial instruments: Market regulators are already urging market participants to issue contracts and instruments that do not use LIBOR as a reference rate, and the pressure to do so is expected to increase over the course of 2021. LIBOR remains the floating rate of choice for much of the U.S. debt market, despite prior statements from U.S. bank regulators indicating that any new contracts referencing LIBOR after December 31, 2021 may present safety and soundness concerns.[3] Federal Reserve Governor Randal Quarles reiterated this warning to the financial markets in a speech on March 22, 2021, saying that examiners "should consider issuing supervisory findings or taking other supervisory actions" against regulated entities that "are not making adequate progress in transitioning away from LIBOR."[4] The adoption of alternative reference rates is likely to necessitate operational and administrative changes for many market participants, and the deadline by which to adopt such measures is rapidly approaching.

Impact on existing contracts referencing LIBOR: Statements by regulators starting in 2017 had specified that LIBOR might not continue to be published beyond the end of 2021. However, given the large volume of existing financial contracts and instruments that use LIBOR and that have not been amended to include language providing for a fallback reference rate, the IBA decided to extend the publication of the most widely used LIBOR maturities to June 30, 2023, as confirmed in the IBA's March 5th announcement. The extension will allow a significant number of existing contracts to expire without the need to add language providing for replacement rates, which is an important consideration for certain contracts where it is difficult to obtain amendments. However, it is important to note that this extension does not mean that all existing contracts referencing affected LIBOR tenors will delay transition

[1] The transition from interbank offered rate usage has been a global issue, with separate processes and successor rates occurring around the globe and for rates in different currencies. This discussion focuses on the replacement of U.S. Dollar LIBOR in the United States, and all references herein to "LIBOR" refer to USD LIBOR.

[2] ICE LIBOR® Feedback Statement on Consultation on Potential Cessation. March 5, 2021. Available at https://www.theice. com/publicdocs/ICE_LIBOR_feedback_statement_on_consultation_on_potential_cessation.pdf. Financial Conduct Authority. FCA Announcement on Future Cessation and Loss of Representativeness of the LIBOR Benchmarks. March 5, 2021. Available at https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf. The less commonly used one week and two month LIBOR maturities will cease to be published after December 31, 2021.

[3] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation and Office of the Comptroller of the Currency. Statement on LIBOR Transition. November 30, 2020. Available at https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20201130a1.pdf

[4] See Board of Governors of the Federal Reserve System. Keynote Remarks by Vice Chair for Supervision Randal K. Quarles at "The DOFR Symposium: The Final Year," an event hosted by the Alternative Reference Rate Committee, New York, New York (via webcast). March 22, 2021. Available at https://www.federalreserve.gov/newsevents/speech/quarles20210322a.htm

to a replacement rate until June 30, 2023. "Early Opt-In" provisions under the ARRC Fallback Language, as well as contract provisions allowing replacement at one party's discretion or other trigger events, may result in some contracts or markets transitioning ahead of that date.

EFFECT OF THE MARCH 5TH ANNOUNCEMENTS UNDER ARRC FALLBACK LANGUAGE

The Alternative Reference Rates Committee (the "ARRC"), a working group convened by the Federal Reserve Board of Governors and the Federal Reserve Bank of New York to suggest solutions to guide the LIBOR transition process, has published multiple versions of recommended contract language to implement LIBOR replacement in existing contracts (the "ARRC Fallback Language"). Key terms used in the ARRC Fallback Language are described as follows:

ARRC Fallback Language Key Terminology

- **"Benchmark Replacement"** – the successor rate determined based on a specified hierarchy of rate selections—starting with Term SOFR and Daily Simple SOFR (discussed in more detail below)—along with a Benchmark Replacement Adjustment.
- **"Benchmark Replacement Adjustment"** – the spread adjustment calculated for the Benchmark Replacement to reflect the difference between the Benchmark Replacement and the original benchmark.
- **"Benchmark Transition Event"** – defined objective events, including statements from the benchmark administrator or applicable governmental body, that trigger the start of a transition to a Benchmark Replacement.
- **"Benchmark Replacement Date"** – the date the Benchmark Replacement becomes effective, following the occurrence of a Benchmark Transition Event. This term appears in legacy ARRC Fallback Language but is collapsed into the Benchmark Transition Event concept in the latest version.
- **"Benchmark Replacement Conforming Changes"** – "technical, administrative or operational changes" needed to reflect a Benchmark Replacement in an existing contract, including business days, interest calculation periods, index reference dates/times, etc.

BENCHMARK TRANSITION EVENT

On March 8, 2021, the ARRC released a statement providing its opinion that the March 5th announcements by the IBA and the FCA constituted the occurrence of a Benchmark Transition Event under the ARRC Fallback

Continued from p.49

Language.[5] However, the occurrence of a Benchmark Transition Event does not mean that replacement rates would become effective as of the date of such Benchmark Transition Event. Under the versions of the ARRC Fallback Language in use at the time of the ARRC statement, a "Benchmark Replacement" would not be effective until a "Benchmark Replacement Date"—which would be expected to occur immediately after June 30, 2023, for the most widely used LIBOR tenors, as discussed above.

While the March 5th announcements would not generally trigger an immediate replacement of LIBOR with a successor rate, under the ARRC Fallback Language in use at the time of the announcements, the occurrence of a Benchmark Transition Event typically would trigger a notice obligation of the lender or similar party of the occurrence of a Benchmark Transition Event, or, under certain earlier iterations of the ARRC Fallback Language, the beginning of an amendment process to select a replacement rate. Market participants should consider whether the March 5th announcements trigger any notice obligations or amendment processes under the LIBOR replacement language in their existing contracts.

Spread Adjustment:

LIBOR replacement language, including the ARRC Fallback Language, typically includes the concept of a spread adjustment to reflect the different economic characteristics of a replacement rate versus LIBOR. The ARRC has previously recommended following the spread adjustment methodology published by the International Swaps and Derivatives Association ("ISDA"), which is based on historical average differences during a five-year lookback window set by the occurrence of a Benchmark Transition Event. As a result of this framework, the occurrence of a Benchmark Transition Event on March 5, 2021 fixed the lookback window for this calculation and allowed Bloomberg Index Services Limited, as ISDA's vendor for calculating spread adjustments, to publish a list of adjustments based on the specified calculation methodology.[6] Consequently, market participants can now refer to definitive numerical spread adjustments in their replacement rate language as opposed to general concepts such as the "Benchmark Replacement Adjustment" as set forth in earlier iterations of the ARRC Fallback Language.

NEW YORK LEGISLATION

On April 6, 2021, the State of New York enacted legislation to provide, by operation of law, a fallback reference rate based on SOFR for contracts that do not include replacement rate language in the event that LIBOR is no longer published or deemed unrepresentative ("Legacy LIBOR Contracts"). For contracts governed by New York law that use LIBOR as a reference rate, but either (i) do not include a procedure for determining the interest rate once such tenor of LIBOR ceases to be published or is deemed to no longer be representative or (ii) include such a procedure, but use an alternative that is also based on LIBOR, the New York statute provides that, on the date that LIBOR permanently ceases to be published, or is announced by a relevant regulatory or supervisory body to no longer be representative, LIBOR will be deemed by operation of law to be replaced by the "recommended benchmark replacement" (as defined in the statute). That replacement rate will be based on SOFR as selected or recommended by the Federal Reserve Board, the Federal Reserve Bank of New York or the ARRC for the applicable type of contract, security or instrument, and will include any applicable spread adjustment between LIBOR and the SOFR-based rate. The statute provides that any conforming changes selected or recommended by those bodies will also be deemed by operation of law to have been integrated into the relevant contract. The statute explicitly states that it does not alter or impair any contract where the parties have agreed to use a replacement rate that is not based on SOFR (as long as such alternative rate is not based on LIBOR or otherwise based on a poll,

5 Alternative Reference Rates Committee. ARRC Confirms a "Benchmark Transition Event" has occurred under ARRC Fallback Language. March 8, 2021. Available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Benchmark_Transition_Event_Statement.pdf. See also Alternative Reference Rates Committee. ARRC FAQs Regarding the Occurrence of a Benchmark Transition Event. March 8, 2021. Available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Benchmark_Transition_Event_FAQs.pdf. Note that the ARRC's opinion is not binding on contract parties, but the consensus view is that the March 5th announcements constituted a Benchmark Transition Event under standard ARRC Fallback Language.

6 See Bloomberg Index Services Limited. Technical Notice – Spread Fixing Event for LIBOR. March 5, 2021. Available at https://assets.bbhub.io/professional/sites/10/IBOR-Fallbacks-LIBOR-Cessation_Announcement_20210305.pdf. The notice includes calculated spread adjustments for various LIBOR currencies and maturities, including a spread adjustment for 1-month USD LIBOR of 0.11448% or 11.448 basis points.

survey or inquiries for quotes or information concerning interbank lending rates).[7]

The New York statute also provides contract parties with a safe harbor from liability in connection with transitioning from LIBOR, stating that neither the selection of a recommended benchmark replacement nor the determination, implementation or performance of benchmark replacement conforming changes as permitted by the statute will give rise to liability for damages or a claim for equitable relief. In addition, the law prohibits contract parties from refusing to perform their obligations under the applicable contract due to the selection of a recommended benchmark replacement or the determination, implementation or performance of benchmark replacement conforming changes as permitted by the statute. By its terms, the New York statute only applies to contracts governed by New York law, but may provide a model for similar legislation in other states. Certain industry groups and market participants are encouraging similar legislation at a federal level, so that there would be a unified approach to existing LIBOR contracts nationwide.

ADDITIONAL CONSIDERATIONS AND CURRENT DEVELOPMENTS

New Contract Language to Reflect the Occurrence of a Benchmark Transition Event

For instruments executed after March 5, 2021, parties need to decide how to reflect the effect of the March 5th announcements in their fallback language. On March 25, 2021, the ARRC published Supplemental Recommendations of Hardwired Fallback Language for Syndicated and Bilateral Business Loans.[8] The new language explicitly references the March 5th announcements as an event that will result in the occurrence of a Benchmark Replacement upon the earlier of cessation/loss of representativeness, or the occurrence of an Early Opt-in. While some market participants have begun using this latest language in new contracts, another approach being used in the market is to retain the prior ARRC Fallback Language but include contract language stipulating that the March 5th announcements constitute the occurrence of a Benchmark Transition Event.

Remediation of Legacy LIBOR Contracts

As the year 2021 approached, market participants expressed growing concern with the logistical issues in obtaining amendments to modify existing contracts that did not yet have LIBOR replacement language. The extension to June 30, 2023 of the most widely-used tenors of LIBOR, along with the New York legislation adding fallback language by operation of law, has likely greatly reduced the number of outstanding contracts that will ultimately need to be remediated. However, we encourage lenders to take every opportunity to reduce the number of outstanding Legacy LIBOR Contracts on their books and to include LIBOR replacement language as part of any contemplated amendment of an outstanding Legacy LIBOR Contract. It is also likely that market participants will need to implement operational and administrative changes to adjust to non-LIBOR reference rates. These changes should be implemented as soon as possible, as the market is under continuing pressure by regulators to stop issuing new contracts referencing LIBOR by the end of 2021.

Credit Sensitive Rates

Some market participants have continued to express dissatisfaction with the selection of SOFR as a successor rate since, unlike LIBOR, it is a secured rate and would not reflect a similar credit risk premium over a risk free rate. On April 13, 2021, the Loan Syndication Trading Association (the "LSTA") published model language for the inclusion of credit sensitive rate options in LIBOR fallback language for syndicated and bilateral loans.[9] It is not yet clear whether significant portions of the market will coalesce around an alternative successor rate that is credit sensitive.

SOFR Terminology

- **"SOFR"** – an index published daily by the Federal Reserve Bank of New York based on overnight repurchase agreement transactions on U.S. Treasury securities.
- **"Term SOFR"** – the calculation of an implied forward-looking term SOFR based on observed transactions in derivatives referencing SOFR. As described below, the ARRC recently endorsed the CME Group's formulation of Term SOFR as a sufficiently robust replacement for LIBOR.
- **"Daily Simple SOFR"** – an interest convention of applying daily SOFR to an outstanding loan balance for each day during an observation period without any compounding.
- **"Daily Compounded SOFR"** – an interest convention of applying daily SOFR to an outstanding balance on a daily compounded basis.

[7] See Section 18-401 of the New York General Obligations Law. Available at https://www.nysenate.gov/legislation/laws/GOB/18-401.

[8] Alternative Reference Rates Committee. ARRC Releases Supplemental Recommendation of Hardwired Fallback Language for Business Loans. March 25, 2021. Available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210325-arrc-press-release-updated-hardwired-language.

[9] LSTA. Credit Sensitive Hardwired Fallbacks. April 13, 2021. Available to LSTA members at https://www.lsta.org/news-resources/credit-sensitive-hardwired-fallbacks/.

Continued from p.51

- **"SOFR Average"** – the calculated compounded average of observed SOFR during a specified observation period. The Federal Reserve Bank of New York publishes 30, 90 and 180-day compounded average SOFR calculations.

ARRC Endorsement of Term SOFR

On July 29, 2021, the ARRC officially endorsed the CME Group's publication of Term SOFR, which is now available for one-, three- and six-month tenors. The ARRC noted that the recent change in derivative trading conventions replacing LIBOR with SOFR in linear swap trades in the interdealer market has created a sufficiently robust market in SOFR-linked derivatives for the ARRC to recommend Term SOFR. While the bilateral loan market has been anxious for the publication of a widely accepted formulation of Term SOFR, note that the ARRC has cautioned that Term SOFR should not be relied upon without careful consideration. The ARRC has noted that "use of the SOFR Term Rate should be in proportion to the depth of transactions in the underlying derivatives market and should not materially detract from volumes in the underlying SOFR-linked derivatives transactions that are relied upon to construct the SOFR Term Rate itself over time and as the market evolves." [10]

For existing contracts that have already integrated the hardwired version of the ARRC Fallback Language, the ARRC's formal recommendation of Term SOFR should not necessitate any changes to the existing ARRC Fallback Language. Such provisions already contemplate Term SOFR as a Benchmark Replacement, and so Term SOFR should become effective once the relevant Benchmark Replacement Date occurs. For new contracts, the ARRC still recommends that market participants use daily and average SOFR rates, and opt for Term SOFR only in contexts where using daily or average rates would prove difficult, such as for bilateral or syndicated loans. [11]

[10] Alternative Reference Rates Committee. ARRC Best Practice Recommendations Related to Scope of Use of the Term Rate. July 29, 2021. Available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Scope_of_Use.pdf.

[11] Ibid.

SOFR Variants and Operational Complexity

This article has generally discussed the leading successor rate to LIBOR as "SOFR," but it is important to recognize that there are multiple ways to calculate SOFR and to choose the method of calculating SOFR that works best operationally. LIBOR is an estimate of what a bank would be charged to borrow funds over a prospective period, so it is a forward-looking rate. SOFR, in contrast, is an index of overnight borrowing rates based on observed transactions. While Term SOFR will allow market participants to set their reference rate interest period in advance for a prospective interest rate calculation period, other variants of SOFR will be calculated in arrears or based on observed rates from a prior period. Seeking to use current period SOFR observations and calculate in arrears leads to various practical problems regarding the timing of calculation and notice of payment amounts, which may require shifts in the observation period. Additionally, while Daily Compounded SOFR was originally identified as a means to replicate the term structure of LIBOR, it has generally been abandoned in replacement rate language due to the complexity of calculation and the fact that the market to date has shown there to be little difference between the calculated values of Daily Compounded SOFR and Daily Simple SOFR.[12] As noted above, Term SOFR itself may have its own complications when it comes to calculating the appropriate rate. Since the formulation of Term SOFR is based on trades in certain derivative products linked to SOFR (such as futures and overnight indexed swaps), if there is not enough activity in SOFR products for the relevant derivatives markets to be sufficiently robust, the usefulness of Term SOFR will be significantly impaired. A full discussion of the calculation differences and options available is beyond the scope of this discussion, but we wish to emphasize that calculation complexity and systems limitations will be an important factor in how and when lenders and other service providers are able to implement LIBOR replacement.[13]

Multiple Versions of Fallback Language in Existing Contracts

The continued changing circumstances have resulted in several iterations of ARRC Fallback Language being published, including the latest March 25, 2021 version

[12] Note that Daily Compounded SOFR (rather than Term SOFR) occupies the first place in the replacement hierarchy under standard language in the derivatives market. Therefore, in loans where a derivatives hedge may be in place, the parties may choose to specify Daily Compounded SOFR as a replacement to eliminate or reduce basis risk between the loan and the derivatives hedge.

[13] For a more in-depth discussion of the SOFR variants available and practical implementation issues, see the ARRC's Updated User's Guide to SOFR (February 2021), available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/users-guide-to-sofr2021-update.pdf, and the ARRC Guide to Published SOFR Averages – available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/20210511-guide-to-published-sofr-averages.polsinelli.com.

discussed above. Additionally, the LIBOR replacement language used by most lenders has evolved over time. Furthermore, individual contracts may contain language variations due to negotiations in the course of a transaction. Due to these factors, lenders may have a large volume of contracts outstanding with slightly (or not so slightly) different versions of replacement rate language. Lenders with large portfolios of outstanding contracts with a wide degree of variation in replacement rate language will face a difficult task in developing operational solutions that can accommodate the language in all such contracts, and/or determining that certain contracts won't fit the lender's preferred solution and trying to amend such contracts or use multiple operational solutions for contracts with different replacement rate language.

While the spring and summer of 2021 have produced important developments and more insight as to what is to come in the LIBOR replacement process, we expect changes will continue to occur at a rapid pace through 2021. Market participants will need to follow developments closely and plan for flexible solutions that will remain functional in the face of continued uncertainty.

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ECONOMIC PROSPECTS IMPROVING AMID COST PRESSURES[1]

JOSEPH BRUSUELAS
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Middle market business conditions improved in April as the prospect of an economic boom, rising revenues and surging net earnings this year more than offset evidence of increasing prices paid and record expectations of further cost increases.

The increase in the proprietary RSM US Middle Market Business Index (insert at right) to 132.1 in April from 128 in March is statistically significant at a 0.05% level with seven of the 10 questions in the survey about business conditions improving over the past month. The three other questions were either unchanged or declined.

Roughly half of respondents reported an increase in revenues and net earnings in the recent quarter, which is a touch below the pre-pandemic 2019 average and is another sign of the underlying resilience inside the American middle market. The survey was taken from April 7 to April 28, before the Colonial Pipeline shutdown disrupted gasoline distribution on the East Coast.

The undeniable strength in middle market business conditions is best illustrated by the strong jump in current economic prospects over the past two months from 34% of survey respondents indicating an improvement in overall economic conditions in February to 49% in April. This is matched by the increase to 47% of respondents noting an improvement in gross revenues and 48% in net earnings in the most recent quarter.

When looking to the next six months, 74% of respondents expect an improved economy, 72% anticipate better revenues and 71% expect rising net earnings. These responses underscore the noticeably improved condition of the American real economy through the first quarter of the year, which had a 6.4% increase in gross domestic product.[2]

Perhaps most encouraging is that 62% of survey respondents said that they intended to engage in productivity-enhancing capital expenditures over the next six months in contrast with the 35% who in April said they did so over the recent quarter. We do anticipate a hypercompetitive post-pandemic economy that will feature the pulling forward of a decade's worth of technology into the next few years, so this is a positive development in both the long run and in the near term.

Why the near term? Because it is clear that pricing pressures associated with the reopening of the economy are at the forefront of middle market business concerns. Roughly 82% of respondents said they expect to pay more for the inputs used in their operations over the next six months, breaking the record set in last month's survey.

Surging demand will continue to constrain supply chains, which remain impaired because of the chaos of the past year. It was clearly easier to shut down the economy than it is to reopen one. Restoring those supply chains will not be a linear process. It will be profoundly nonlinear, causing production and delivery headaches and placing additional upward pressure on prices.

ABOUT THE MMBI SURVEY AND INDEX

RSM US LLP and The Harris Poll have collected data on middle market firms from a quarterly survey that began in the first quarter of 2015. The survey is conducted four times a year in the first month of each quarter: January, April, July and October. The survey panel, the Middle Market Leadership Council, consists of 700 middle market executives, and is designed to accurately reflect conditions in the middle market. The data is weighted to ensure that they correspond to the U.S. Census Bureau data on the basis of industry representation.

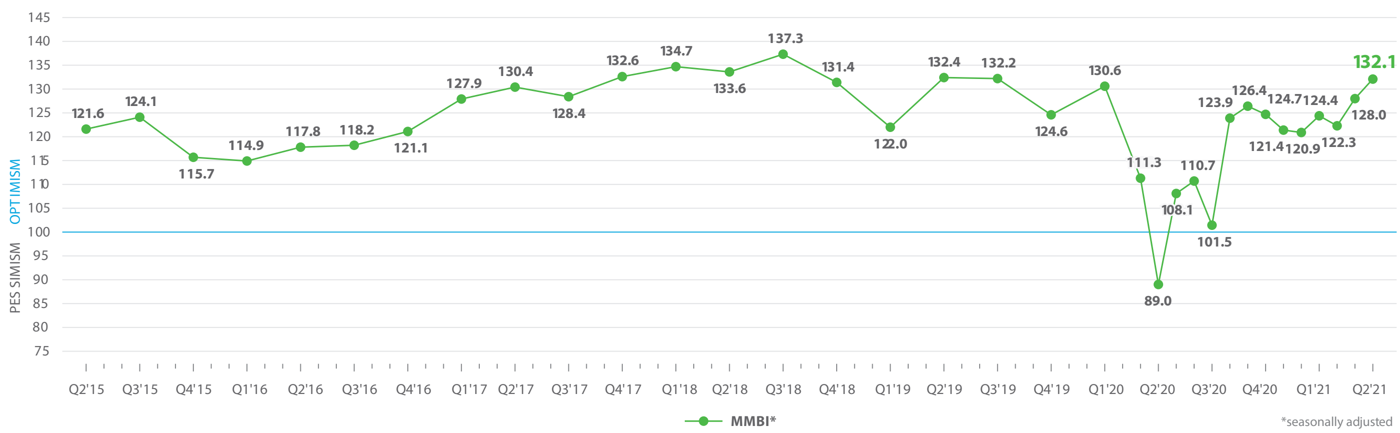
A reading above 100 for the MMBI indicates that the middle market is generally expanding; below 100 indicates that it is generally contracting. The distance from 100 is indicative of the strength of the expansion or contraction.

In March 2020, RSM began conducting the economic portion of the MMBI survey on a monthly basis to capture the effects of the COVID-19 crisis on the middle market. The report was fielded between April 7 to April 28, 2021, and based on the responses of 404 participants.

1 This article was originally published in *RSM US Middle Market Business Index in Partnership with U.S. Chamber of Commerce*, Q2 – 2021. Reprinted with permission.

2 Joseph Brusuelas, "First-quarter GDP: Growth improves as the recovery accelerates," April 21, 2021. Available at https://realeconomy.rsmus.com/first-quarter-gdp-growth-improves-as-the-recovery-accelerates/.

RSM US MIDDLE MARKET BUSINESS INDEX



Source: RSM US LLP

That being said, despite 69% of respondents stating in April that they paid higher prices for goods this quarter compared to the previous quarter, only 43% noted in April that they received prices downstream this quarter, which is broadly in line with the long-term average in the history of the time series.

While there is little argument that prices are on the rise following steep declines into the depths of the pandemic last year, they are moving back toward pre-pandemic levels, and for now, the majority of survey participants are not facing significant problems linked to inflation. Otherwise, we would be observing a much greater rate of pass-through in inflation to downstream clients.

Traditionally, early in economic recoveries, goods prices tend to increase first, followed by service costs, which compromise the overwhelming majority of the modern economy. But it is important to note that there are some ways to go before service-sector prices move back toward their pre-pandemic levels.

For example, airfares rose 10% in April and are up more than 16% compared to May 2020. Yet they are down 17% from where they were before the pandemic. This is a perfect example of price variation and volatility and not inflation. Despite an increase in prices paid at earlier stages of production and what are clear constraints in the supply of available services, whether they be commercial aircraft or hotel rooms, we are not yet ready to label this price recovery a precursor of 1970s-style inflation.

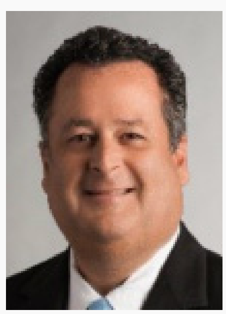
Service sector inflation, which the economy has not materially experienced since the 1980s, is driven by wage gains. The April middle market business survey tends to suggest that wage gains are restrained, but could pick up later this year.

Employment remains muted with only 39% of respondents indicating in April that they stepped up hiring in the recent quarter compared to the previous one, with 60% indicating they intend to do so over the next six months. Compensation increases also remained restrained, with 39% in April noting they paid more for labor, and 64% implying they will pay more to recruit and retain labor. This denotes that service- sector inflation, which is up 2.4% on a year-ago basis, will most likely rise as it traditionally does emerging from economic downturns.

Middle market survey participants continue to carefully manage inventories with only 33% of respondents in April noting an increase in the level of existing stock during the recent quarter compared to the previous one. As one would expect given middle market anticipation of growth as the economy fully reopens later this year, 54% of respondents expect to increase inventory purchases over the next six months.

This publication represents the views of the author(s), and does not necessarily represent the views of RSM. This publication does not constitute professional advice.

ABOUT THE AUTHOR



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SEEING RESTRUCTURING THROUGH A WIDER LENS—AND EMBRACING THE OPPORTUNITIES

KUTTAYAN ANNAMALAI, KIRK BLAIR, and ELIAS TZAVELIS
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Restructuring is commonly employed to turn around troubled enterprises, but this narrow lens misses a broader opportunity to improve business performance. A holistic restructuring approach deploys levers and tools that have been effectively applied across a spectrum of circumstances to help companies achieve greater profitability and competitive advantage. An organization that's been ***disrupted*** *may still want to refresh, rethink, or redesign itself. A company that finds itself* ***disadvantaged*** *in the marketplace might reset, rebalance, or reconfigure its operating model or capital structure. A business that's significantly* ***distressed*** *may need to reconnect, reconstruct, or restore its strategy or structure.*

INTRODUCTION

Businesses now operate in a set of circumstances that has been reshaped by a pandemic. The longest economic expansion in US history ended abruptly in February 2020. Gross domestic product plunged in first part of the year and then rebounded, but the economy remains about 3.5% smaller than it was in 2019. Large US companies are filing for bankruptcy protection at the fastest pace since the end of the Great Recession, and some 60,000 local, small businesses had shuttered permanently as of late July, according to Yelp data.[1] Amid all this economic turmoil, organizations should be prepared to embrace change. Doing nothing is not an option when the business environment, customer behaviors, regulatory factors, and capital markets have all shifted abruptly and dramatically.

For some businesses, the need for change may be painfully obvious. A company's operating model may be deeply damaged, or its finances strained—think of an international airline or a small operator of local gyms or any number of businesses in between. Such companies may be facing balance sheet concerns or new liquidity management requirements, or they may be waiting to see how long government pandemic relief measures might last. They may be divesting assets to cut losses from a crippled business line, or they may be raising funds to invest in a new strategy. Some may be in bad enough shape that they must work with creditors or seek court protection to reorganize and shed liabilities. These enterprises are restructuring in the more narrow, traditional sense.

For companies experiencing a milder impact from the pandemic, there still may be a benefit in seeing their future through a restructuring lens. The enterprises most likely to thrive in the next normal that will eventually supplant the coronavirus disruption are those that take deliberate steps to reposition themselves based on their new or shifting circumstances.

Studies of how companies came out of the last recession support this idea. Businesses that acted to foster brand loyalty, for example, or develop new methods to keep customers engaged as the financial recession ran its course were successful in the next cycle.[2] Key attributes of the most resilient companies were that they moved quickly to cut expenses and boost cash flow, and they built flexibility into their investment planning and operations.

Restructuring, in the broadest sense of the term, should be on the table for every business to help them pursue the actions that have been shown to be effective in previous cycles. The underlying purpose of restructuring is to ensure that the assets and resources a company deploys are performing to their highest potential—and fully meet return expectations. That's the goal when a company seeks bankruptcy protection, which can be a valuable tool for making changes that can't happen otherwise. But it can also be the objective in less distressed situations. Enhancing the performance of assets and resources can be addressed across a spectrum of circumstances.

When business leaders bring an expanded focus to the restructuring process, they have a way to organize their thoughts to envision and execute the turnaround or transformation that can most benefit their organization.

RESTRUCTURING RECONSIDERED

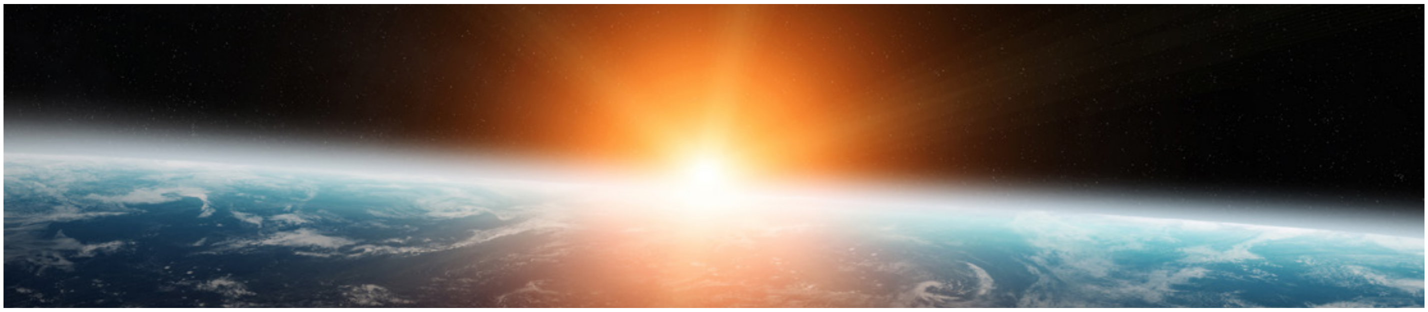
We see restructuring activities grouped into three segments along a continuum. At one end are simpler measures that may be entertained by a company that has been **disrupted**, as indeed most companies are today due to the pandemic. In the middle are more aggressive steps appropriate for a business that has been more deeply **disadvantaged** by its current circumstances. At the far end of the spectrum are measures for a company that's clearly **distressed**, including those in need of the reorganization tools that fit within any narrow definition of restructuring.

1. Disrupted

The dramatic changes the pandemic has brought to the business environment should prompt most companies

[1] Yelp: Local Economic Impact Report, September 2020. Available at https://www.yelpeconomicaverage.com/business-closures-update-sep-2020.

[2] Kevin Laczkowski, Mihir Mysore, "What Companies Should Do to Prepare for a Recession," *Harvard Business Review* (May 2019).



to explore ways to improve their customer strategy and their operational and tax models to get the most effective returns from their resources, assets, and capital in a new environment.

For an organization that's been **disrupted**, whether it's due to the pandemic or some other business trend, the impact may be relatively fleeting and revenue might be starting to recover. In such a situation, a company may want to ***refresh*** its go-to-market model, brand positioning, or other parts of its strategy. By being willing to ***rethink*** the business, leadership may find new ways to thrive amid shifts in customer behaviors, supply chain interruptions, or changes in capital requirements or availability. Where impacts are lasting, there may be reasons to ***redesign*** specific business processes.

The potential changes a company looks at when facing a disruption may be around optimization of its business mix. Consider, for example, a retailer that has primarily been identified as a bricks-and-mortar operator but has now seen a shift in the willingness of its customers to order online for delivery or curbside pickup. Embracing the possibility that this shift might be lasting, the retailer may need to ***rethink*** its supply chain practices, its real estate footprint, or its staffing. It may need to ***refresh*** its marketing around delivery options or its contracts with delivery services. Those changes, in turn, may create the need for a ***redesign*** of its organizational structure.

The disruption of the economy has also had a significant effect on working capital requirements for many businesses. If your sales are down, it may be time to ***rethink*** the variety of merchandise that you stock to avoid having too much cash locked up in inventory that is turning over more slowly. There may also be questions that need to be asked about whether your receivables financing is optimal, for example.

Many businesses have seen changes in how or where their employees do their work, and these changes may require a ***rethink***. Here, the example might be a medical practice that has finally seen significant adoption of telemedicine appointments in place of in-office visits. Now it's time to ***rethink*** what the right mix will be for doctors, nurses and support staff to allocate their time between working in the office and working from home. It may be time to ***redesign*** workplace rules and ***refresh*** recruiting efforts or HR practices.

A number of trends affecting the future of work have clearly been accelerated in the pandemic, and resilient companies should consider using the current disruption to ***rethink*** and ***refresh*** their workforce strategies.[3] An organization ***redesign*** may help to seize the opportunity to ensure that there are clear connections across individual jobs, team objectives, and the organization's mission, for example, to strengthen links between belonging and organizational performance.

2. Disadvantaged

Where the disruption of a business or an industry has been more lasting or severe, a company may need to embark on more ambitious initiatives or a deeper transformation. The enterprise may not be responding yet to a distress situation, but it may be taking steps to avoid one.

Some businesses may find themselves **disadvantaged** by changes in the operating environment, with their ability to bring products or services to market threatened or interrupted by the pandemic. There may be a need to ***reset*** relationships, making big changes in the supply chain, for example, or developing new customer marketing efforts. There may be a need to ***rebalance*** the company's financial and tax condition, strengthening the balance sheet or making better use of available capital. A company may need to ***reconfigure*** its workforce, reducing the number of employees or dramatically changing the mix of job titles.

In our disadvantaged grouping, the actions a company might consider include those meant to put the enterprise on a more solid financial footing. If the balance sheet carries debt that could ultimately be difficult to service, the sooner the business takes steps to ***reset*** or ***reconfigure*** those obligations, the better. For a hotel operator that is trying to weather the dramatic downturn in travel, for example, It may be time for an equity offering to ***reconfigure*** the balance sheet. This may be particularly attractive given the strength that's been seen in the stock market relative to the economy overall. The effort to ***reset*** or ***rebalance*** the business

[3] Deloitte, "Returning to Work in the Future of Work" (May 2020) Available at https://www2.deloitte.com/ca/en/pages/consulting/articles/returning-to-work-2020.html.

Continued from p.57

may even involve the necessity of opening negotiations with creditors.

Another option for a company that needs to shore up its finances is to ***reconfigure*** the business through a divestiture or, in some cases, a managed exit. By identifying and shedding non-core assets, including units that have been made less competitive or profitable by the pandemic, a company can raise capital to support the heart of its business—or at least to stem the drain on its resources. To return to the retailer example, the effort to ***rebalance*** and ***reconfigure*** might involve selling or even winding down a severely impacted unit that has little prospect of returning to profitability to help strengthen other operations.

There may also be opportunities for a company to monetize tax assets that have been languishing as part of a reset. When the change buffeting a company is significant enough to prompt divestitures or similar steps, it may also serve as a catalyst that boosts efforts to optimize tax assets or ***reconfigure*** for greater tax efficiency.

Sometimes, there may be M&A solutions to address supply chain issues that have been created by the pandemic, such as an acquisition of a supplier or a partnership to create better vertical integration. There may also be scenarios in which the effort to ***reconfigure*** the company involves acquisitions meant to support a ***reset*** in strategy or an initiative to ***rebalance*** operations.

The workforce challenges a disadvantaged company may face are bigger than the adjustments highlighted under our first category. If you're an airline or a hotel operator, the size of your workforce may need to be ***reset*** or ***reconfigured*** to a sustainable level for a future in which fewer people travel. Here, the organization that ***rebalances*** quickly and decisively, communicating its actions transparently to all stakeholders, is likely to come out of the current circumstances with improved employee morale and perhaps greater flexibility to thrive in the new business environment.

3. Distressed

Some companies may reach a level of strain that requires difficult issues to be addressed urgently, using the tools and proceedings that fit the narrow, textbook definition of restructuring. Even at this point, though, the focus should remain consistent: This is about finding, preserving and enhancing the value of the resources and assets of the organization.

Should a company find itself significantly **distressed**, in need of a turnaround, it becomes vital to ***reconnect*** with shareholders and debt holders, along with other stakeholders such as employees and certainly customers. A company placed in distress due to the pandemic, or because of longer-term trends or missteps, may now have to ***reconstruct*** itself, and that includes making changes in capital structure. If successful, these steps should lead directly to a longer-term mandate to ***restore*** faith in the company and its purpose, with customers first and foremost but ultimately with all stakeholders.

The level of distress that creates an imperative for a company to embrace a full reorganization will likely involve a pressing need to ***reconstruct*** the capital structure by renegotiating terms with existing debt holders and other creditors. To do this requires a viable plan to ***restore*** the company to health or viability. The plan has to take into account changes in the current business environment and the capital markets, along with the increased uncertainty the pandemic has created. Any such plan or strategy needs to ***reconnect*** with the business's customers or it will not appear to be credible to anyone else, including potential new investors. Selling assets may well be part of the effort to raise capital and ***restore*** the parts of the business that have the greatest value as a going concern.

In any comprehensive restructuring, there has to be considerable attention given to the identification and preservation of certain valuable tax assets, including net operating losses. Typically, the transaction structure for an entity emerging from bankruptcy is guided, in part, by the potential tax consequences to the entity and the various stakeholders. In a court proceeding, there are complex tax rules that need to be considered by the entity to ensure it is restructured to maximize the value of tax assets.

Court protection can help a company to shed obligations that it would be unable to get out of through other methods. A retailer, for example, may be able to ***reconstruct*** itself by breaking leases that suddenly are underwater because the pandemic is keeping shoppers out of stores, for example. Bankruptcy proceedings may also help companies to ***restore*** themselves to health by getting out of other untenable contracts.

For all of these reasons, bankruptcy protection should not be seen as the endpoint in a bad story, but rather as an available tool that makes possible to ***restore*** things in ways that wouldn't be possible any other way. It comes about when a company hasn't been able to achieve what it thought it could and when its options have deteriorated, demanding it ***reconstruct*** itself and ***reconnect*** to its purpose.

CONCLUSION

The tools in the restructuring toolkit can be relevant to an organization that finds itself anywhere along a broad spectrum of circumstances. Common concerns arise: Addressing portfolio imbalances may be key to position a company for the current environment; making certain that the capital structure is fit for the present circumstances can be vital; a careful profitability analysis may be more urgent than ever; taking tax efficiency into account may be necessary; and designing for workforce flexibility may benefit any number of companies, especially given the uncertainty that persists today.

The three categories of restructuring activities presented in this paper are designed to highlight the available tools—and the potential benefits a restructuring mindset can bring. They are intended to show how a disrupted organization may need to ***rethink*** or ***redesign*** the business model or processes, for example. They are meant to help a company that's disadvantaged in the current environment understand when it might benefit by ***resetting*** supply chain or customer relationships.

Understanding the levers that can be applied across the spectrum of situations that may be faced today can help organizations embrace change and find opportunities, whether the disruption is mild or the distress is severe. Seeing circumstances clearly and weighing the available restructuring tools may even help a company to better understand where it lies on this spectrum—and anticipate what comes next.

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SOVEREIGN DEBT CHALLENGES AHEAD[1]

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Sovereign debt levels around the world were at record-high levels before the Covid-19 crisis, and the trend is continuing upward. A 2020 International Monetary Fund (IMF) paper on public debt vulnerabilities showed that half of the countries covered in the report were assessed to be at high risk of or already in debt distress.

With countries globally increasing spending to alleviate the pandemic's adverse health and economic effects, at times when revenues are plummeting due to decreased income and trade, a growing number of governments are at risk of sovereign debt default. As of September 2020, the IMF reported that at least seven countries had announced defaults, including Gambia, Lebanon, Mozambique, the Republic of Congo, Suriname, Venezuela, and Zambia.

Just as debt quanta have risen, the types of creditors have also increased, opening up a new set of issues for restructurings. This change in structure gave rise to many challenges for sovereign debt restructurings, especially with bonds more easily ending up in the hands of distressed debt funds, whose opportunistic approach to restructuring may differ from the approach of the older school of investors.

Regrettably, despite the severe costs of default and litigation, the international community has failed to produce an effective sovereign restructuring mechanism, making sovereign debt crisis resolution a very complex and costly process. How nations learn to live with heightened debt levels or find orderly—or less orderly—ways to reduce them will have a crucial impact on people's lives around the globe.

THE CHALLENGE IN RESTRUCTURING SOVEREIGN DEBT

Unlike when corporations are in financial distress, governments cannot be liquidated. In addition, there are no standardized reorganization processes such as those that bankruptcy laws provide, and there is no supranational legal authority to enforce repayment. So, when a government cannot pay its debts, the only recourse is to enter voluntary negotiations with its creditors, which are a mixture of private and public entities with different agendas. In contrast to the bankruptcy process for private borrowers, participation in a sovereign debt workout is optional, and creditors may choose to opt out by bringing lawsuits on the face value of defaulted debt.

One of the key challenges in restructuring claims against sovereign borrowers is creating a balance between the interests of the majority of the creditors and those of minority creditors. Holdout creditors serve as a check on "opportunistic" defaults—where a sovereign debtor is unwilling, but not unable, to pay—and unreasonable restructuring terms, yet their presence can interfere with the restructuring process.

Political factors may also influence the restructuring process. For example, by influencing banking regulations, the governments of the countries in which creditor banks are chartered may pressure those banks to provide supplementary financing to strategically important sovereign debtors. At the same time, international development organizations, including the IMF and the World Bank, can influence the restructuring process by enforcing requirements on the financing that they provide to settle temporary liquidity crises. These conditions typically include mandated changes in macroeconomic policies and may include the privatization of state-owned enterprises.

The challenge in restructuring sovereign debt is managing these complexities to engineer a voluntary process by which a sovereign borrower and its creditors can negotiate a feasible debt payment schedule without irreparably harming market confidence. Many factors—such as protracted restructuring processes during which payments on existing debt are suspended, repayment terms that appear to be unreasonably low, and unequal treatment of creditors—can threaten the success of individual restructurings and the long-term strength of the international capital markets.

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LITIGATION & RESTRUCTURING DYNAMICS

Historically, litigation against sovereign borrowers has been relatively limited. Defaulting governments were shielded by the principle of sovereign immunity, and there was no universal legal authority to enforce repayment.[2] To the extent that sovereign debt litigation has arisen, it tends to be brought after a restructuring, and there has been little evidence that the likelihood of litigation has significantly held up restructurings.

Over the last decade, however, there has been a significant rise in litigation. Sovereign immunity has gradually eroded, either because governments had waived such immunity in the debt contracts or due to the application of the "commercial activity" exception, which foreclosed the sovereign-immunity defense for countries that had accessed the U.S. debt markets and agreed to repayment in the U.S. As a result, banks and specialized hedge funds have successfully sued defaulting countries in courts in the U.S. and the UK.

The Argentine debt crisis of 2001 and its aftermath demonstrate a major change in the legal framework of global sovereign debt markets. In the wake of the default, multiple hedge funds filed suit against Argentina in New York and litigated for full repayment. Fifteen years later, these holdout creditors prevailed, and a favorable court ruling forced the Government of Argentina into a more than $10 billion settlement—a multiple of the debt's face value. This decision was one of the first cases of a court awarding specific performance based on a pari passu, or equal footing, clause.

Argentina's case is not an exception but part of a general trend. In recent years, almost half of debt crises involved litigation, compared to less than 10% in the 1980s and early 1990s. One study's case archive, based on direct coding from court documents, identifies158 litigation cases against 34 defaulting sovereigns filed in the U.S. or UK between 1976 and 2010. This is a lower bound, since we focus on lawsuits by institutional investors and avoid double-counting. The claims under dispute have grown notably, from nearly zero in the 1980s to an average of 3% of restructured debt, or 1.5% of debtor country GDP, in the 2000s.[3] Compared to corporate debt markets, these are very large numbers.

Today, the question arises as to whether the record surge in sovereign debt levels is likely to bring on additional litigation, with effects on sovereign ratings, bond pricing, and debt restructuring processes. Three key changes in the sovereign bond market over the past two decades have prompted a modification in the rules for debt restructuring.

The first is the advancement of credit default swaps (CDS), an over-the-counter market instrument that allows investors to more easily and cost-effectively obtain insurance against default and without disclosure. With insurance against default, these investors have less of an incentive to agree to a timely restructuring.

The second factor is a U.S. Second Circuit ruling, which was upheld by the Supreme Court in 2014, which required Argentina to pay certain holdout investors in full before proceeding with the sovereign debt restructuring with the consenting investors. Given the voluntary nature of the restructuring process, creditors may refuse to participate in a restructuring and instead "hold out" in the hope of receiving better repayment terms or even the full value of their claims.

The third factor is the rise in heterogeneity and number of creditors. Compared to the 1980s, where lending to sovereign borrowers was dominated by commercial banks, today the sovereign debt market has become open to a more diverse population of creditors, including institutional investors, distressed debt funds, and retail investors.

Each of these changes has increased the complexities of successful restructuring and thereby increased the chances of litigation against sovereign debtors.

RISE OF VULTURE FUNDS

Distressed debt funds (sometimes called "vulture funds") specialize in buying debt in the secondary market at a discount and turning a profit on this investment. Typically, these funds buy struggling companies' debt at a steep discount, hold the debt for several years until the financials of the company improves, and then sell the bonds at a price closer to fair value or perhaps exchange it for equity.

Vultures take a markedly different approach in the sovereign context than they do in corporate restructurings. As in the corporate context, vultures buy up the debt of distressed sovereigns on the secondary market at bargain prices. However, rather than working with the sovereign to guide it back to profitability, vultures seek repayment of full principal through litigation.

Today, hedge funds account for most of the new cases, and they pursue more aggressive legal strategies than other types of creditors. Consequently, the lawsuits filed have become larger, are less likely to settle early, and involve more attempts to attach sovereign assets abroad - i.e., undergo legal proceedings that enable creditors to potentially seize assets or disrupt international debt payments. In one example, Elliott Capital, which bought Argentinian bonds in 2001, not only succeeded in pocketing profits of over 900%, but was even able to convince a court in Ghana to seize an Argentinian warship used to train their naval corps.

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2 Ugo Panizza, et al., "The Economics and Law of Sovereign Debt and Default," *Journal of Economic Literature,* 2009.

3 Julian Schumaker, et al., "Sovereign Defaults in Court," last revised March 10, 2018. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2189997.

Continued from p.61

PRACTICAL SOLUTIONS

Debt restructurings are messy. With the U.S. Supreme Court ruling on the Argentina case, sovereign debt restructurings are likely to become even more complicated, and vulture fund litigation could be on the rise. Looking ahead, the evolution of modern sovereign debt litigation will be driven by the successes and failures of the legal strategies employed by vulture funds in obtaining judgments against governments.

There have been many ongoing discussions on the need to create an orderly sovereign debt workout process, including proposals to tighten up debt contract language and introduce firmer debt contract clauses. The key focus has been on contractual reform—such as newly designed collective action clauses (CACs). These innovations are likely to lessen the holdout problem by establishing each creditor's agreement at the time of entry into the contract that minorities can be bound by supermajorities.

However, CACs will not remedy all of the problems. This is especially true in circumstances where a holdout creditor secures a sufficient percentage of a particular issuance, allowing it to offset the operation of the collective action clause in that issue. Given these obstacles and the prospect of a Covid-related systemic sovereign debt crisis, additional innovations in this space will be necessary to effectively address the crisis, including technical support to help governments restructure their debt on time and bolster their debt management capacity ex ante.

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BUSINESS INTERRUPTION – CHALLENGES AND SOLUTIONS

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INTRODUCTION

Business interruption insurance coverage and claims are considered one of the most complex challenges for risk managers with large, multifaceted, and/or global programs as well as for smaller organizations. Large natural disasters, increased cyber-attacks and COVID-19 losses over the past few years, and their impact on businesses worldwide presented the insurance industry with an unprecedented volume of claims under various coverage endorsements that had previously seldom been contemplated or tested. As history shows, disaster can strike at any time and corporate America needs to be ready with appropriate insurance coverage to protect its assets and bottom line, as well as a comprehensive plan for recovery and management of the claims process. Further, as the recent economic conditions have forced companies to downsize or restructure, risk management must reevaluate limits and coverage to match the company's current, adjusted risk profile.

Although business interruption (BI) is a specialized insurance product intended to provide protection for the earnings of a business in the event of a loss, many policies aren't well defined to address all of the issues that arise out of large scale loss, leading to inconsistent interpretation of policy terms. In addition, there is limited guidance in many policies for calculating the proper amount of business interruption losses. This has led to recurring issues which have largely remained unaddressed in litigated cases and policy refinements, leaving policyholders, insurers, and claims professionals clamoring for legal precedents, clarification of policy intent, and guidance on how to properly address such issues when they arise.

The following text outlines some practical guidance to help risk managers establish a solid business interruption insurance program, including policy design, determining exposed and ratable values, and pre-loss business continuity and leadership planning.

In addition, we explore the post-event claims adjustment and settlement process, along with loss determination and measurement issues commonly confronted by risk management. Ultimately, appropriate accounting and claim presentation determine whether or not losses are measured accurately.

Accordingly, we offer some technical and practical advice to help risk managers proactively address these challenges as the claims unfold.

BEFORE THE LOSS

A number of topics address the measures that should be employed by the risk manager to prepare his or her organization's BI program in advance of a loss event. Some of these are as follows:

Review Business Interruption Policy

The purpose for business interruption coverage is to protect the earnings stream of a company after a loss. In other words, the income statement should, effectively, be returned to a state where it reflects the same results that would have been reported had no loss occurred.

Volumes can be written about the intricacies of business interruption coverage, but the essential elements which should be in place are as follows:

- Obtain proper coverage – This includes using the right type of form (manufacturing, mercantile, etc.), and assuring the underlying property form contains the essential coverage, such as flood, earthquake, BI and extra expense applicable to the risk;
- Establish adequate limits – Assure the limit (blanket preferable) is adequate for exposure;
- Obtain special endorsements – Extended period of interruption coverage, contingent business interruption, service interruption, civil authority and claim preparation expense coverage are extensions of coverage that may not otherwise exist in the core policy;
- Deductibles – Understand how the deductible works for all of the above coverage provisions and modify to match company needs; and
- Understand Exclusions – Standard exclusions should be tailored to the insured risk and understood prior to any loss.

Ultimately, the BI policy should match the type of risk and levels of exposure represented by the company, in order to enhance the probability of a full claim recovery.

DETERMINE EXPOSED/ REPORTED VALUES

In designing the BI program, the risk manager must assess the amount of value at risk and how best to report it to underwriters. Most policyholders are asked to submit their business interruption values as part of the initial underwriting or program renewal, via completing a brief worksheet, usually supplied by the underwriter. Generally, there is limited guidance provided to support completion of these worksheets and the implications

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of the values included in that worksheet are often misunderstood, creating issues when the values are relied upon, as explained below.

"Business interruption values" is a catch-all phrase describing a variety of measures related to the business interruption amount at risk for the policyholder. The perceived meaning ranges from annual business income to "MFL" (Maximum Foreseeable Loss) and "PMLs" (Probable Maximum Loss). These values can reflect overall, consolidated measures or measures by location or business unit. Values are utilized in a number of ways, such as:

- Basis for annual premiums
- Basis for percentage-of-value deductibles and average daily value ("ADV") deductibles
- Basis for establishing policy limits (aggregate and by location)
- Basis for determination of MFLs and PMLs
- Basis for allocation of premium to business units
- Basis for allocating program risk across market capacity

Conflict can arise when the methods of determining values are inconsistent with their intent. For example, if a company evaluates its exposure and determines its MFL to be less than one year's earnings and reports this amount on the business interruption (BI) worksheet, this amount may be appropriate for establishing policy limits, but it may not be the proper basis for determination of percent-of-value deductibles or ADV deductibles. This example is better illustrated in Exhibit 1, which shows various "BI value" formulations and how they could be applied to a % of value deductible.

There are a wide variety of scenarios that show how the earnings results can be used. In Exhibit 1, the 3% deductible could range from $750,000 to $1.8 million, depending on which interpretation of values or deductible is applied. It should be noted in many policies "Gross Earnings" is both a defined term, as well as a business interruption coverage, which can lead to confusion. It is important that the policyholder

Exhibit 1: Effect of Reported Values on Deductibles

	Trailing Actual 12 Month Amount	Maximum 7 Months (MFL)	Projected Future 12 Month Amount
Gross Sales	$109,500,000	$63,875,000	$125,925,000
Selling Expenses	($10,950,000)	($6,387,500)	($12,592,500)
Net Sales	**$98,550,000**	**$57,487,500**	**$113,332,500**
Materials	($32,850,000)	($19,162,500)	($37,777,500)
Supplies	($5,475,000)	($3,193,750)	($6,296,250)
Ordinary Payroll	($6,570,000)	($3,832,500)	($7,555,500)
Variable Utilities	($2,500,000)	($1,458,333)	($2,500,000)
Gross Earnings	**$51,155,000**	**$29,840,417**	**$59,203,250**
Non-Continuing Expenses	($24,637,500)	($8,623,125)	($28,333,125)
Business Interruption Value	**$26,517,500**	**$21,217,292**	**$30,870,125**
Ordinary Payroll (add back)	$6,570,000	$3,832,500	$7,555,500
BI Value Including OP	**$33,087,500**	**$38,425,625**	**$25,049,792**
Monthly BI Value	**$2,757,292**	**$3,202,135**	**$3,578,542**
Percent of Value Deductible (Based on Net BI Value):			
3% of Latest 12 Months	$992,625		
3% of Projected 12 Months			$1,152,769
3% of MFL		$751,494	
Percent of Value Deductible (Based on Gross Earnings Value):			
3% of Latest 12 Months	$1,534,650		
3% of Projected 12 Months			$1,776,098
3% of MFL		$895,213	

understand how the values being reported will be used by the underwriter, both in the placement of the insurance program in the marketplace with an appropriate limit and premium and in the design of the policy and application of value-based deductibles.

Questions to ask include the following.

- Will the amounts reported in the BI worksheet be used to establish policy limits? Annual premium?
- Should the amounts included in the BI worksheet represent the MFL or PML?
- Should the amounts included in the BI worksheet represent the annual earnings insured under business interruption?
- How should non-continuing or saved expenses be considered when reporting business interruption values?
- How will the amounts reported in the BI worksheet affect the determination of coverage for a specific loss event?
- How will the amounts reported in the BI worksheet be used in the formulation of value-based deductibles?

Once the questions above are answered and the intended uses of reported values are understood, a policyholder should be proactive in properly preparing the values to be reported. In doing so, consideration should be given to the coverage afforded in the policy, consistency in the accounting across business units or locations, mitigation capabilities, and likely loss scenarios (MFL or PMLs). Also, current business trends should be considered, particularly in the current economic environment. Claims consultants who are also familiar with assisting policyholders with business interruption values can be helpful in completing this project. As noted above, it is also imperative that the policyholder gain an understanding of the purpose and intended use of the reported values and how they relate to the insurance policy before the loss event occurs. Ultimately, the submission of accurate and properly understood business interruption values at the outset of the insurance program will help ensure a smooth transaction in the event of a claim. Thus, a discussion with the underwriter to establish the ground rules is advised.

Establish a Business Continuity Plan (BCP)

BCP is essential for reacting to the events of a loss. As organizations become more global, reduce inventories, rely more heavily on sophisticated supply chains, and are at risk of a cyber-attacks, it is imperative that a comprehensive plan be in place should one link in the chain fail. Companies that have a BCP in place are more likely to recover faster from the loss event and minimize the operational impact and business interruption claim. Since standard BI policies require the policyholder to make efforts to mitigate their loss, some level of formal, advanced business continuity planning will help expedite insurer approval and facilitate the claim process. BCP is also an effective tool when marketing a property insurance program.

Claim Decision Team

Business interruption and property claims are generally long, burdensome and time-consuming efforts which demand the attention of high-level management. At the same time, these same individuals must continue to manage the business and return operations to normal. To ensure both interests are met, the risk manager should establish who will be assigned to address the needs of the organization and the insurer in the event of a claim to ensure a successful outcome. This would include individuals in the following roles:

- Risk Management – Central point of contact for the organization's claim;
- Finance/Accounting – To provide the necessary records and information upon which the claim is based;
- Sales/Operations – To determine the impact to operations and ensuing production and sales losses;
- Insurance Broker – To advise on policy concerns and interface with the insurer;
- Claims Accountant – Accountants with specialized experience to prepare and submit the claim measurement; and
- Named Adjuster – There are several benefits of naming an independent adjuster in the policy prior to the loss.

AFTER/DURING THE LOSS – CLAIM CHALLENGES

Adjustment Process

Often times, risk managers are surprised at the level of activity, personnel and documentation required to process their business interruption claim. Following a loss event, the adjuster will normally engage a host of experts. Many of these experts will focus on the underlying property damage, such as construction, engineering, and equipment consultants. But often overlooked are the ramifications these individuals may have on the BI claim, such as establishing causation and the length of interruption. Virtually every BI claim will involve the adjuster engaging an accountant representing the insurer to audit the claim. This process will include the need to provide a well-designed claim package along with supporting documentation. The adjuster typically relies on the opinion of the accounting consultant as a basis for adjusting the BI claim. Therefore, the risk manager should ensure that the company interests are addressed, and internal expectations are

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properly aligned. A proactive claim compilation will aid in this effort.

During the adjustment process, the policyholder should include the adjuster in recovery decisions and obtain advance approval to the extent it is practical. This includes providing requested information in a complete and timely manner.

Nevertheless, the policyholder should not let indecision on the part of the adjuster or his/her experts hamper neither the recovery efforts nor a complete return to normal operations.

Common Measurement Issues

As mentioned above, the calculation of business interruption losses are essentially rooted in the application of accounting concepts, analyses, and insurance policy valuation clauses, which is not based on an exact science, but rather subjective opinions.

Below, we explore common measurement issues confronted in the measurement of business interruption losses and the presentation of BI claims:

Deductibles

One element of change in BI policies is the use of increasingly higher and more complex deductibles. Determining appropriate deductibles is an important decision the risk manager can make in policy design. These are the most common types of deductibles available in the marketplace for business interruption insurance:

- Fixed/Stated Policy Amount;
- Percentage of Value;
- Average Daily Value; and
- Waiting Period

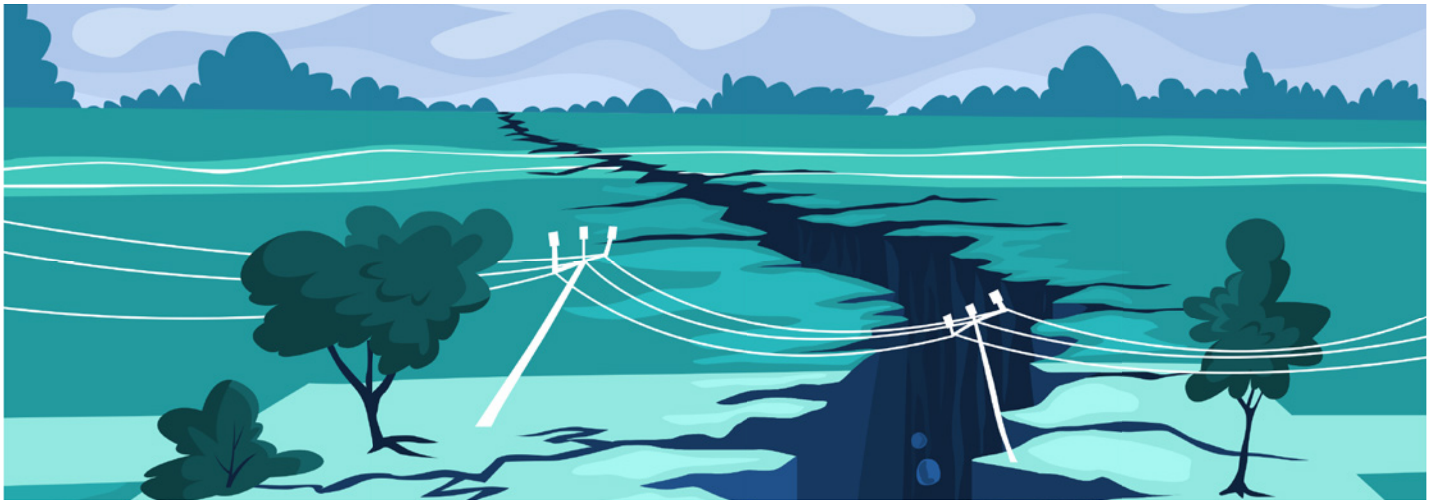
It is not uncommon for deductibles to be disputed or unclear to the adjuster on a claim, due to uncertainty about loss causation (wind vs. flood) or ambiguity in the policy. This gives the risk manager pause when reporting to management or investors about the potential recovery of a business interruption claim. Service interruption, earthquake, wind, flood, and software endorsements (among others) may contain more restrictive limits as well as deductibles larger than the deductible in the main policy form. In many cases, it is necessary to review multiple sections of the policy, followed by certain calculations, in order to determine the deductible (with the exception of a flat dollar amount). Some policies contain terms within the deductible clause that are defined in another section of the policy. A property policy can contain various methods of calculating the deductible based on the type of peril. Consider the following loss scenario:

XYZ Manufacturing Company suffers damage during a named windstorm that completely shuts down operations at its only location for 3 months, resulting in a BI loss of $25MM and property damage of $75MM. XYZ reported annual BI values at $100MM and property values of $200MM 14 months prior during its latest renewal of its 2 year insurance policy. The policy has a deductible of $1MM, except for windstorm, which is based on 3% of values (undefined). For the 12 months preceding the loss, XYZ had generated $125MM in BI value.

Percentage of a Defined Value

Generally, this type deductible applies to windstorm and flood losses. The stated percentage is applied to the basis value in the event of a loss to determine the applicable deductible. Some considerations are:

- **Applicability to locations** – Some percentage deductibles only apply in certain windstorm or earthquake zones, or may vary depending on zone or distance from coastal areas. If XYZ's policy only applied to "Tier 1" locations, then only those locations would be subject to the 3% deductible.
- **Unit applicability** – The basis value may only



include certain lines of insurance (BI, Property or Total Insured Value), or may apply separately to each physical location "unit", such that locations or line losses falling below their deductible can be excluded from the claim. This is very useful policy language and allows the policyholder the greatest flexibility.

- **Value definition** – The basis value may be based on a defined timeframe (12 months pre/post-loss) or defined calculation (gross earnings, etc). It also may refer to reported values, as opposed to actual values.

In our example, if the policy stated that the 3% applied to all locations and the basis value was to be the BI values anticipated for the 12 months preceding the loss, then the BI deductible would be $125MM x 3%, or $3,750,000. Change the policy to state the deductible to be based on reported values, and it becomes $100MM x 3%, or $3,000,000. The other considerations mentioned above create a multitude of scenarios which would alter the deductible.

Average Daily Value ("ADV")

This deductible simply uses a number of days times an average daily rate, which should be defined by the policy. As with the percentage deductible, there are several variables that should be considered when determining the average daily rate:

- Basis period for determining the daily rate: Pre-loss, post- event projected, other
- Basis assumption – Formulate based on amounts projected or amounts lost

In our example, if the loss were not windstorm, and the policy stated the average daily value deductible applied, based on 5 days times the ADV for the 12 months preceding the loss, the deductible would be $125MM/365 days times 5 = $1,712,329. If we change the facts, and XYZ was only partially shut down, loosing $12.5MM over 3 months and the deductible is based on the amounts lost during the indemnity period, the deductible would be $12.5MM/90 days times 5 = $694,444.

Waiting Period Deductibles

Many large commercial policyholders retain part of their business interruption risk through the use of a waiting period for certain types of covered perils, such as service interruption or software coverage. A waiting period is a deductible that starts when the loss begins and continues through the period of time as set out in the policy. During this period of time when losses are incurred, the insured assumes all business interruption loss, as compared to a stated dollar or percentage deductible that is deducted from the total business interruption amount of loss.

Some policies first require a stated waiting period before a payable loss begins, and after the waiting period is passed, a dollar value deductible may be applied (type depending on the policy). In these cases, a waiting period is generally listed separately from the deductible in the declarations section of the policy. Some policies have a waiting period following which all losses from day one are insured. Other policies have a stated period of time during which no coverage exists, and coverage then starts after the stated period of time. In a loss event, consideration must be given to losses incurred during the period, and whether those losses should be excluded, paid, or allocated across the entire period of indemnity.

Other Deductible Scenarios

Sub-limits and Deductibles – Policyholders sometimes face losses with certain components exceeding sub-limits (e.g. debris removal). If the policy allows the loss amounts exceeding sub-limits to count towards the deductible, this increases the amount payable to the policyholder.

"Occurrence" Versus "Per Loss" or "Per Location" – Most policies apply one deductible to a single occurrence, but some apply a deductible on a per location per occurrence basis. In such an instance, the same hurricane damaging multiple locations could result in a separate deductible for each location.

Contingent Exposures – Recent catastrophic events have involved a large number of contingent claims, without clear guidance as to which deductible should apply.

As indicated above, the policyholder should carefully consider their risk exposures when determining deductibles. Certain endorsements may alter the deductible language, so the policy should be reviewed prior to a loss event.

PROJECTIONS

One of the most common areas of dispute in business interruption claims is projecting the profitability a business would have had "but for" a loss occurring. There are several ways one could select to project a business' profitability (in terms of revenues and expenses), including, but not limited to:

- Budgets;
- Adjusted Budgets;
- Forecasts;
- Run Rates or Pre-Loss Averages, including prior year;
- Percent of market share;

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- Independent variables; and
- Comparable businesses not impacted by the loss.

In addition, there are several internal factors as well as external factors to consider when projecting profitability. Internal considerations include capacity, labor force availability, maximum production volumes, labor cost, material cost, sales force and working capital. External considerations can include, but are not limited to, the industry, competition, and the economy.

Given the numerous variables involved in projecting profitability, differences of opinion on the method and/or projected value will occur, but generally with the appropriate data and proper analysis, these differences can be eliminated or at least narrowed greatly. However, there are a few situations where projecting the profitability of a business could be significantly impacted by the event itself. Here are a couple examples:

- A major hurricane, such as Harvey occurs, dramatically changing the conditions of the market locally and regionally, for an extended period of time; and
- A loss at a single facility that impacts the entire supply of a product causing price increases for the product through entire industry.

An illustration of the first example is that many restaurant, hospitality, and retail businesses have a sales increase after a wide spread natural disaster. Local residents that lost their homes move to hotels for lodging and dine at restaurants for meals. In addition, there is in influx of construction workers and insurance personnel (adjusters, accountants, engineers, etc.) into the area, which causes increased demand and sales for hotels and restaurants. To complicate things further, many times hotels are damaged or destroyed in the event, making them uninhabitable, which prevents the hotel from participating in the current market conditions, as well as reduces the supply of rooms. Generally, retail businesses enjoy increased sales as residents who lost their personal property in the event flock to stores to replace belongings. Home improvement retail stores have huge increases in sales as people and businesses in the area begin the rebuilding process.

So should such market increases be factored into the sales projections of restaurants, hotels and retail businesses that were damaged and could not operate during this period? Had they not been damaged, they too would have also enjoyed an increase in sales during the post-event period. This has been an issue that has been disputed and litigated many times over. As usual, it depends on the specific insurance policy in force at the time of the loss and the facts of the matter. There have been some changes in policy language to address this issue, but unfortunately it has not been a balanced approach. Several policies now have language that excludes the effect of any "favorable business conditions caused by the impact." Excluding the effect of any favorable business condition without excluding the effects of any unfavorable business conditions is flawed. An equitable solution to this issue would be to have language that would both exclude the unfavorable as well as favorable business conditions.

Should your company have these types of exposures noted in the examples above, we encourage you to work with your brokers and attorneys to develop language that best fits your company's risk profile.

Continuing vs. Non-Continuing Expenses

In addition to the primary drivers of business interruption losses, such as lost production and lost revenue, continuing expenses are a major component of loss calculations. The impact on expenses during a shutdown of operations is often the source of confusion and conflict in the loss adjustment process. Because policies generally fall into two categories – the gross profits (U.K. and non-U.S.) form and the gross earnings form – there are two mirroring approaches to evaluating expenses. Under a gross profits form, the claim must reflect the fixed charges that necessarily continue during the interruption of business. These expenses are added to lost net income to determine the total BI loss. Under a gross earnings form, the claim must reflect the expenses that do not continue during the interruption of business. These expenses are deducted from lost net revenue to determine the total BI loss.

One source of confusion for many policyholders, especially under the Gross Profits form, is the perception that any expense incurred during a loss is wholly covered by the policy. There are two common issues. The first occurs when operations are only partially, not completely, interrupted. In that event, some revenue is still being generated; thus, part of the expenses are covered by those revenues. It would not be proper to include 100 percent of the continuing expense in the claim, as part of the compensation would be duplicated.

The second issue relates to expenses that are reported, or recognized, during the period(s) affected by the interruption but do not directly relate to that accounting period. For example, a company paid back rent for a location that was previously missed for six months as a result of an accounting error. Should the entire six months of back rent be claimed and covered by business interruption? The same problem can occur with annual bonuses and other expense categories. For these reasons, the Gross Profits form tends to be confusing when dealing with the expense impact.

Under the Gross Earnings form, non-continuing expenses are calculated by projecting expenses that would have been incurred but for the loss and comparing them to actual expenses incurred during (and related to) the loss period. The evaluation of expenses during an actual loss determines how much was truly saved.

When formulating saved expenses, since actual results should be an undisputed matter of fact, the primary driver is the projection. The exception is in the event of a claim for extra expenses, which is discussed below. Projections can be formulated in a variety of ways, including:

- Monthly, weekly, or daily historical average amount
- Percentage of sales
- Dollar amount per unit of production
- Dollar amount per unit of sales

Sometimes, the impact of an event results in excess, rather than saved expenses. It is important that the policyholder be prepared to explain and document reasons for extra expenses associated with operating inefficiently and whether the measurement reflects expenses that are, in fact, related to the covered loss. As with many of the contentious elements of a business interruption claim, the answers regarding how expenses are affected and properly claimed lie somewhere in the details. One must examine whether the necessary information exists to properly present the measurement and how much time and expense would be involved in gathering the information as compared to the potential amount of recovery.

Finished Goods Insured at Selling Price

Most property policies today provide coverage for finished goods ("FG") based on selling price valuation. This is most common in the retail industry or businesses with substantial investment in inventory stockpiles. This valuation is generally the likely selling price of the lost inventory during the period over which the inventory would have been sold, based on actual sales, market statistics, or other measures, less deductions for "un-incurred selling expenses," such as discounts or spoilage, among others.

The relationship between FG inventory insured at selling price and business interruption is that, in the case of an inventory loss, the FG inventory is effectively sold to the insurer. In theory, the margin earned by selling this inventory to the insurer replaces at least part of the BI loss suffered by not selling to third parties. In fact, some policies specifically provide for the deduction of FG inventory proceeds from the business interruption claim.

Some issues to avoid include duplicating claims for finished goods at selling price with the BI claim and properly matching the valuation between those claims (revenue/selling price vs. margin or net BI value). Another is determining whether, due to the fundamental basis for the BI claim, any duplication even exists. This may be the case where the BI claim is based solely on lost production, depending on the resultant impact to sales. Thus, it is possible to have inventory covered at selling price and still have a valid claim for business interruption, for a variety of reasons.

In summary, a careful evaluation should be made to ensure the proper treatment of finished goods insured at selling price in the business interruption calculation. This will prevent overstating the potential business interruption recovery in an event where inventory is involved. It will also ensure the proper recovery under both the inventory and business interruption claims.

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LOSS MITIGATION

Most policies require that the policyholder practice due diligence in mitigating or reducing the effects of a loss event. This mitigation can be achieved through several means, including:

- utilizing extra capacity at the insured location;
- utilizing extra capacity at other owned or operated locations;
- outsourcing partial or entire operations to a third party purchasing same or similar substitute product to fill orders;
- working extra shifts to make up lost production; and
- consuming inventory stockpiles to fulfill orders.

Policyholders have a vested interest in restoring their business and resuming operations in order to reduce the impact on their business in both the short and long-term. A loss of a large customer or market share could impact their business and profitability well beyond the period that is covered by insurance. Despite their best efforts, policyholders often find themselves challenged by their insurer about whether all efforts were made to mitigate or make up losses. The mitigation question is usually asked early in the interruption, so that the recovery process can be commenced efficiently and effectively. However, often, it does not become clear that mitigation was possible until after detailed analysis of statistics and documentation is completed. This occurs sometimes months after any action can be taken. In those instances, sometimes the policyholder finds the post loss recovery efforts challenged or second-guessed by the insurer. Loss mitigation (or failure) can cause ramifications both on the measure of loss magnitude throughout the loss period and on the length of the loss period or period of interruption itself.

CLOSING

The complexity of business interruption issues in recent years has made resolving insurance claims more challenging. The nature of business interruption and the adjustment process creates challenges in avoiding differences of opinion when determining the amount of claimable loss. The insurance industry is slowly modifying policy language to address some problematic matters. In the meantime, by properly planning and executing a disaster recovery plan, being proactive in documenting losses as well as business decisions, submitting detailed claims in a timely matter, and including the adjuster in recovery decisions process, the insured can avoid or reduce claim conflicts. Policyholders can benefit from engaging claims professionals who are experts in business interruption and who have backgrounds representing both insurers and policyholders in compiling properly formulated and documented claim measurements. This will minimize disagreements with the insurer and expedite the adjustment, settlement, and payment of the claim.

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IRS GUIDANCE FOR DEDUCTING EXPENSES COVERED BY PPP LOANS – REVENUE PROCEDURE 2021-20

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On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[1] The CARES Act was designed to stabilize the economy and provide businesses with cash to keep operating during the period of uncertainty. To accomplish that goal, one of the central provisions of the CARES Act, the Paycheck Protection Program (PPP), uses loans disbursed by the Small Business Administration (SBA) to help taxpayers cover various operating expenses. The program's structure left one particularly important question – if a taxpayer is being reimbursed for expenses via forgivable loans, how can the taxpayer deduct its costs? Tax law principles would generally hold these expenses as technically "zeroed out" by the reimbursement; and perhaps the eventual loan forgiveness would create cancelation-of-debt (COD) income. Fortunately the Consolidated Appropriations Act of 2020 addressed many of the issues, but it did not cover all taxpayers. The IRS and Treasury subsequently released Revenue Procedure 2021-20 to provide answers not provided by statute. This article discusses issues with deductions covered by PPP loans as well as more recent guidance regarding the proper treatment of such deductions.

BACKGROUND

Congress established the PPP in March 2020 as the vehicle for economic assistance to small businesses.[2] The PPP is structured as a loan program which is administered by the SBA through the "7(a) Loan Program"[3] to provide economic assistance to businesses impacted by the COVID–19 emergency. The CARES Act empowered the SBA to guarantee the full amount of covered PPP loans.[4] Practitioners widely understood Congressional intent to provide loan forgiveness without any penalty to the taxpayer. To that effect, the CARES Act instructed taxpayers to exclude forgiven PPP amounts from gross income.[5] Ordinarily, section 61(a)(11) requires taxpayers to include discharged debt in gross income, subject to limited exceptions.

While the CARES Act clearly addressed debt forgiveness, it left open the question of whether expenses paid with PPP funds could be deductible. The IRS issued a notice[6] and a revenue ruling[7] stating its position that while the loan forgiveness was exempt from gross income, the amounts paid with such funds were not deductible expenses. Specifically, taxpayers may not deduct expenses if, at the end of the taxpayer's 2020 taxable year, the taxpayer had a reasonable expectation of reimbursement of the expenses in the form of covered loan forgiveness. In essence, PPP became a taxable item.

This was not a popular conclusion for taxpayers and many PPP borrowers petitioned Congress to provide a 'fix' for this unintended consequence. On Dec. 27, 2020, the Consolidated Appropriations Act of 2021 passed into law and allowed the deduction of expenses related to loans forgiven or expected to be forgiven.[8] A flurry of guidance followed to address the legislative changes. Revenue Ruling 2021-2[9] obsoleted Notice 2020-32 and Rev. Rul. 2020-27 due to the enactment of section 276(a) of the COVID-related Tax Relief Act.

Much has been written about general deductibility, and the Consolidated Appropriations Act fixed many of the problems, but one class of taxpayers was left behind. The delay in the legislative fix created issues for fiscal year taxpayers. Due to the prior IRS position that expenses paid with PPP loans were nondeductible, fiscal year taxpayers may have already filed 2020 tax returns before Congress passed the PPP deductibility fix. Revenue Procedure 2021-20 soon followed to guide such taxpayers.

[1] Public Law 116-136, 134 Stat. 281 (2020).

[2] Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281, 286-93 (Mar. 27, 2020).

[3] 15 U.S.C. 636(a).

[4] CARES Act at § 1102(a)(2) (defining "covered loans" as loans made under the PPP between Feb. 15, 2020 and Dec. 31, 2020); *see also* Paycheck Protection Program Flexibility Act of 2020, Public Law 116-142, 134 Stat. 641 (June 5, 2020) (clarifying deductibility provisions).

[5] CARES Act at 1106(b) ("any amount which [but for PPP provisions] would be includible in gross income of the eligible recipient by reason of forgiveness [through the PPP] … shall be excluded from gross income").

[6] Notice 2020-32, 2020-21 IRB 837 (May 18, 2020) (concluding that expenses covered by PPP loans represent expenses paid with tax-exempt income, prohibited from deduction under section 265).

[7] Rev. Rul. 2020-27, 2020-50 IRB 1552 (December 7, 2020). Some tax practitioners argued that without certainty that SBA would approve loan forgiveness, taxpayers should be able to deduct the expenses paid with PPP loans. Rev. Rul. 2020-27 refuted that argument as the IRS argued the taxpayer must present evidence of significant uncertainty at year-end to qualify for a deduction.

[8] COVID-related Tax Relief Act of 2020 (COVID Tax Relief Act), enacted as Subtitle B of Title II of Division N of the Consolidated Appropriations Act, 2021 (Appropriations Act), Public Law 116-260, 134 Stat. 1182 (Dec. 27, 2020).

[9] Rev. Rul. 2021-2, 2021-4 IRB 495 (Jan. 25, 2021) (providing that, as of December 27, 2020, the conclusion stated in Notice 2020-32 and the holding stated in Rev. Rul. 2020-27 are no longer accurate statements of the law).

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THE REV. PROC. 2021-20 SAFE HARBOR

In April 2021, the IRS released Rev. Proc. 2021-20 with a safe harbor allowing impacted taxpayers a choice in how to claim their now allowed PPP expenses. Under Rev. Proc. 2021-20, a taxpayer may elect to deduct expenses related to forgiven PPP loans on a timely filed, including extensions, original Federal income tax return or information return in the immediate subsequent year. The taxpayer does not need to amend its return or make an administrative adjustment request. To qualify the taxpayer must be a 'Covered Taxpayer' and the election must fulfill certain requirements contained within the revenue procedure.

A taxpayer is considered a "Covered Taxpayer" if it satisfies each of the follows conditions: (1) the taxpayer received an original PPP covered loan; (2) the taxpayer paid or incurred original eligible expense during its 2020 taxable year; (3) on or before Dec. 27, 2020, the taxpayer timely filed, including extensions, a Federal income tax return or information return, as applicable, for its 2020 taxable year; and (4) on its Federal income tax return or information return, as applicable, the taxpayer did not deduct the original eligible expenses because either the expenses resulted in forgiveness of the original PPP covered loan; or the taxpayer reasonably expected at the end of the 2020 taxable year that the expenses would result in such forgiveness.[10]

The revenue procedure does not apply to all expenses paid with PPP loans – section 3.03(2) clarifies that Paycheck Protection Program Second Draw Loans are not covered, despite being nearly identical. New expenses not included as part of the original eligible expenses do not qualify. Both categories, however, would likely be deductible following the Consolidated Appropriations Act.

To use the safe harbor, covered taxpayers must make the election on their timely filed, including extensions, Federal income tax return or information return for the first taxable year following their 2020 taxable year. Taxpayers must also attach a statement to the return titled "Revenue Procedure 2021-20 Statement" including (a) the Covered Taxpayer's name, address, and social security number or taxpayer identification number; (b) A statement that the Covered Taxpayer is applying the safe harbor provided by section 3.01 of Rev. Proc. 2021-20; (c) the amount and date of disbursement of the taxpayer's original PPP covered loan; and (d) a list, including descriptions and amounts, of the original eligible expenses paid or incurred by the Covered Taxpayer during the Covered Taxpayer's 2020 taxable year that are reported on the Federal income tax return or information return, as applicable, for the Covered Taxpayer's first taxable year following that 2020 taxable year.[11] This election requires considerable detail, and section 3.05 of Rev. Proc. 2021-20 reserves the IRS's right to examine any issues relating to the claimed deductions for original eligible expenses, and request additional information to substantiate the amounts claimed for deduction.

CONCLUSION

The PPP was a source of relief for most taxpayers, and provided much needed cash, but was not without hiccups. By structuring relief through forgivable loans, Congress transformed expenses that would ordinarily be deductible into nondeductible items. While most taxpayers were spared negative tax effects by the Consolidated Appropriations Act, fiscal year filers who already filed 2020 tax returns needed additional guidance. With the Rev. Proc. 2021-20 safe harbor, Covered Taxpayers now have procedures to deduct qualified expenses on their 2021 tax returns. This provision applies for a limited time, however, so affected taxpayers should consult their tax advisors and move quickly to capture their deductions.

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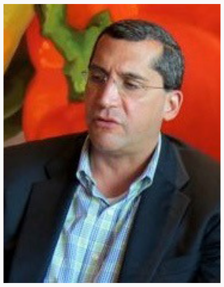

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10 Rev. Proc. 2021-20, section 3.02.

11 Rev. Proc. 2021-20, section 3.04(2).

AIRA DIRECTOR ON THE MOVE

Jennifer Meyerowitz Joins Stretto as Executive VP – Business Development

IRVINE, CA, April 2021: Stretto is pleased to announce **Jennifer Meyerowitz** has joined the company as Executive Vice President, Business Development. With more than 20 years of experience in the bankruptcy and fiduciary industries, Jennifer brings a unique skill set and expertise to her role at Stretto, where she leads the organization's business-development efforts for its Trustee Suite and Best Case by Stretto business units.

Leveraging keen bankruptcy-industry acumen and exceptional leadership skills, Jennifer is focused on the strategic expansion of Stretto's market share in the consumer-bankruptcy space. Through her experience as a corporate-restructuring attorney and her tenure in various leadership roles around the bankruptcy industry over the last two decades, Jennifer understands the importance of serving as a trusted partner to clients, and she appreciates the necessity of delivering tailored solutions to meet fiduciaries' case-management and operational needs.

Jennifer actively participates in the bankruptcy community and currently serves as a board member for the AIRA, ABI, TMA, and IWIRC.

PRESS RELEASE

Huron Expands Its Commercial Disputes Advisory Team: Welcome, John Kim and Eric Jenkins, CIRA!

Managing Director **John Kim**, specializing in investigations, disputes and helping organizations navigate complex accounting and financial challenges. John has 25 years of experience providing forensic accounting, regulatory, auditing and consulting services across various industries. Prior to joining Huron, John served as a managing director with Alvarez & Marsal's Disputes and Investigations practice, where he provided expert services in accounting investigations, compliance, and bankruptcy matters. He also served audit and advisory leadership roles as a managing director with Deloitte.

Managing Director **Eric Jenkins, CIRA**, has a proven track record as a trusted advisor and in providing expert services to his clients, using his more than two decades of experience to advise and testify on complex disputes and investigations involving forensic accounting, breaches of contract, debt and equity capital markets, post-M&A disputes, and insolvency, restructuring and bankruptcy matters. Prior to joining Huron, Eric served as a managing director at Duff & Phelps, where he provided expert services in valuations, corporate finance, disputes and investigations, compliance and regulatory sectors. Eric previously served as a senior executive at Bank of America Securities and Deloitte.

PRESS RELEASE

Dennis O'Donnell and Ben Winger Join DLA Piper's Restructuring Practice

June 14, 2021 – DLA Piper announced today that **Dennis O'Donnell** (top) and **Ben Winger** (bottom) have joined the firm's Restructuring practice. O'Donnell joins as a partner based in New York, and Winger joins as a partner in Chicago.

O'Donnell focuses on corporate reorganization and bankruptcy-related litigation matters and has represented debtors, lenders, official and unofficial committees, significant creditors, equity holders, examiners and acquirors in chapter 11 cases, chapter 15 cases, loan restructurings and out-of-court workouts. He has played significant roles in some of the largest and most complex chapter 11 cases of the past 30 years, many of which have involved multi-billion-dollar restructurings and precedent-setting decisions.

Winger handles all aspects of corporate restructuring, bankruptcy, and insolvency proceedings. He brings particular experience representing privately and publicly held companies across all industries, with recent focus on the energy, retail and transportation sectors. He has advised boards of directors, management teams, equity sponsors, ad hoc groups and buyers of distressed assets, among others, on in-court and out-of-court transactions. Having worked with a number of multinational companies, Winger also has strong cross-border, international insolvency experience.

PRESS RELEASE

CohnReznick Hires Aronoff and Campbell to Bolster Restructuring and Dispute Resolution Practice

New York, NY – July 7, 2021 – CohnReznick LLP announced that James H. Aronoff and Charles Campbell have joined the firm as Managing Director and Director in its Restructuring and Dispute Resolution (RDR) practice. The new team significantly strengthens CohnReznick's structured finance consulting expertise while bringing additional capabilities to clients involved in capital markets transactions.

Aronoff has more than 35 years of experience in the financial services and capital markets arena providing advisory, litigation support, and expert witness services to law firms and financial institutions. His experience includes helping clients maximize value from structured finance arrangements secured by distressed, sub-performing, and nonperforming assets and securities. He has performed valuations, investigations, and forensic reviews for capital markets transactions, public and private securities, and portfolios of secured and unsecured commercial, residential, and consumer assets. Aronoff earned a BA in Economics and Political Science from Yale and a Juris Doctor from Cornell Law School.

Campbell has extensive consulting expertise in the areas of forensic investigations, litigation support, and loss mitigation. He is a credit and structured finance professional with significant experience in transaction management and credit underwriting. This experience includes loan file due diligence, cash flow modeling, legal structures, and corporate financial analysis within the structured finance and the lending industries. Campbell earned a BA in Finance and an MBA in Accounting from St. John's University, College of Business Administration.

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The Association of Insolvency and Restructuring Advisors is governed by a board composed of up to 40 directors (several former directors continue to serve as directors emeritus). Directors are elected by majority vote at a meeting of the Board, serve for a term of three years (or such less term as the Board may determine or until their successors are duly elected and qualified) and may serve an unlimited number of terms, whether or not consecutive. The majority of the directors on the Board must have a CIRA Certificate; although most are financial advisors, a number of directors are attorneys. New officers assumed their duties at the end of the June AC20 Virtual Series and will serve for one year.

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