AIRA JOURNAL
ASSOCIATION OF INSOLVENCY & RESTRUCTURING ADVISORS
VOL. 39 · NO. 2 · 2026

DAWN OF A NEW DAY

NEW FREE AIRA MEMBERSHIP BENEFIT

Starting with this issue, the ***AIRA Journal*** becomes part of a new self-study CPE experience built to make membership more valuable year-round, with more member-focused updates ahead in 2027.

MID-YEAR INDUSTRY REVIEW | AI & PROFESSIONAL JUDGMENT | BRC26 REWIND

SPEND GOVERNANCE | VENDOR CONFIDENCE | ABILITY-TO-PAY

EARN CPE CREDIT FROM THIS ISSUE

AIRA is launching a **new CPE self-study initiative** built to make membership more valuable year-round. Reading the *AIRA Journal* for credit is just the first step. Starting with this issue, members can read the following applicable article content and earn CPE credit. With an estimated **8-10 self-study CPE credits per year**, this adds a free high-value benefit with meaningful savings for members.

2.4 SELF-STUDY CPE CREDITS

Read the Journal, complete the self-study assessment, and download your certificate after successful completion. At roughly $50 per CPE credit, the annual self-study opportunity represents an estimated $400-$500 in member value.

SCAN TO BEGIN

Use the QR code with your primary AIRA member email.

HOW IT WORKS

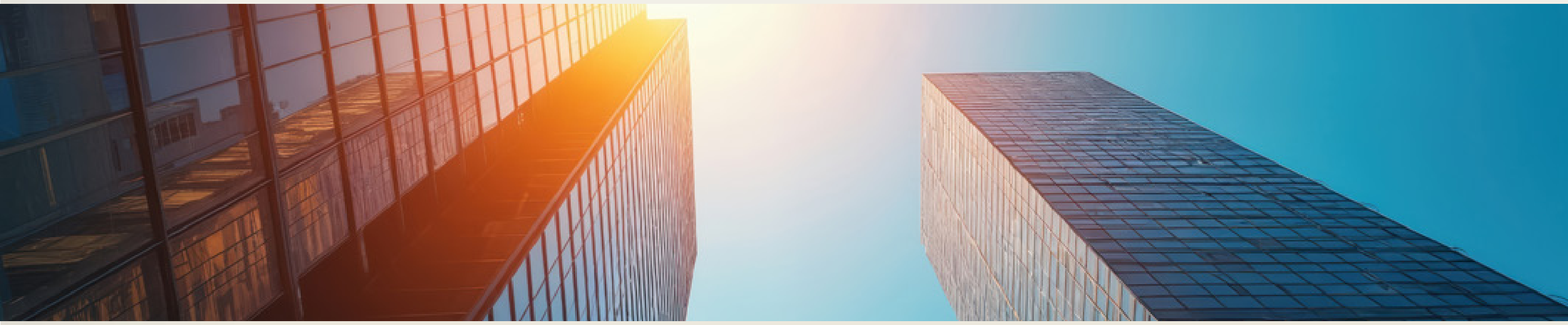
1. **SCAN THE CODE**
   The QR code takes you directly to the Journal self-study program.
2. **USE YOUR MEMBER EMAIL**
   Enter the primary email address connected to your AIRA member record.
3. **CREATE YOUR ACCOUNT**
   If you are not already signed in, AIRA will guide you through account setup and email verification.
4. **COMPLETE THE SELF-STUDY**
   Review the issue, take the practice quiz, submit the final exam, and receive your certificate.

Active AIRA membership is required for access. If your email address or membership status does not match AIRA's records, the system may not recognize your eligibility. **Questions?** Email us at aira@aira.org, or call 541-858-1665.

IN THIS ISSUE

BRC26 REWIND

ARTICLES & ASSOCIATION



AIRA Journal is published four times a year by the Association of Insolvency & Restructuring Advisors, 1314 Center Drive, Suite B-132, Medford, OR 97501.

FROM THE DESK OF THE EXECUTIVE DIRECTOR

JAMES M. LUKENDA, CIRA
AIRA EXECUTIVE DIRECTOR
JLUKENDA@AIRA.ORG

BRC26 – *SUCCESS!*

As I am drafting this letter, AIRA is back from Nashville with the conclusion of BRC26, AIRA's 42nd annual conference and meeting of the membership. Allowing for some construction disruption from lingering updating in the lobby of the Loews Vanderbilt Hotel, all in all it was a very successful program. On behalf of AIRA's board, thank you to all who participated in the planning and execution and particularly to the conference co-chairs, **K.P. Brockman**, CohnReznick Advisory LLC, **Jessica Scouten, CIRA**, PYA, P.C., **Scott Williams**, RumbergerKirk, and Judicial Co-Chair, **Hon. Charles M. Walker**, U.S. Bankruptcy Court, M.D. Tennessee, and pre-conference program co-chairs, Tax program: **Patricia Bailey**, Alvarez & Marsal Tax, LLC and **Andrew R. Barg, CIRA**, Barg & Henson CPAs, PLLC; Toolbox program: **Matthew R. Bentley**, ArentFox Schiff and **Karl Knechtel, CIRA**, RK Consultants, LLC. To date the feedback on the sessions has been very positive. You can find the educational materials at https://aira.org/brc/materials/2026.

SELF-STUDY CPE

In my letter in the *AIRA Journal* 39-1, I alerted you to the upcoming rollout of a continuing education program through which AIRA members will have the opportunity to **receive CPE credit for reading *AIRA Journal* articles**. By going online following a QR code, members access questions about the article(s) they've read and, having successfully answered those questions, receive CPE credit for the effort. Based on the length of the articles and other factors, **members will have the ability to earn 6 to 8 CPE credits over the course of four quarterly journals**. With this enhancement, AIRA members will be able to satisfy a significant part of their annual CPE requirements without additional cost. This **enhancement to membership essentially pays for the membership through the savings on CPE costs**. Please see the inside cover of this *AIRA Journal* for this volume's QR code and additional information.

BI-ANNUAL MEMBERSHIP SURVEY

The responses to the survey AIRA sent to members last month shows a prime value members receive from AIRA is education. The AIRA staff and I are focused on this issue and plan to roll out additional opportunities for members in this area.

In addition to the *AIRA Journal* self-study program, **AIRA will be adding new self-study materials** as we process recorded sessions from recent programs, such as the just-concluded BRC26, adding required review and testing questions to the excellent materials from selected recorded sessions. Adding these sessions in self-study mode will enable members who were not able to attend the in-person programs access to these educational sessions at reasonable cost and at the members' convenience.

We've received a good amount of feedback through the aforementioned survey request (see page 15). But it is not too late to add your thoughts. You can access the survey here:

MEMBERSHIP SURVEY

CERTIFICATION IN DISTRESSED BUSINESS VALUATION (CDBV)

AIRA's CDBV certification is an opportunity for turnaround and restructuring professionals to distinguish themselves from other valuation professionals who may only work in areas outside of the distressed business environment. For CIRAs, the first part of CDBV's three-part program is satisfied. Part 2 is waived for individuals with valuation certifications such as ASA-Business Valuation, CBA, CFA, CPA with ABV, or CVA/AVA. On August 11, there is an on-line CDBV 3 course of six sessions, held at 5 pm (EDT) on August 11, 12, 13, and 18, 19, and 20. If you are both a CIRA and have one of the additional valuation credentials, this may be a good time for you to enhance your credentials through completion of the CDBV certification. Please see https://aira.org/cdbv#part3 for additional details.

OTHER ASSOCIATION MATTERS

For nine years now AIRA, through the AIRA Fund for Education, has provided funding for a $2,500 scholarship to an accounting student at Pepperdine University in the name of Professor Grant W. Newton. At its June meeting, the AIRA board approved increasing the scholarship funding to an annual amount of $5,000. Needless to say, Pepperdine expressed their gratitude on behalf of its students for this action. The fund from which AIRA Fund for Education provides this scholarship currently has an invested value of approximately $200,000. Please consider making a contribution to the Grant Newton Endowment fund. Contributions may be mailed to AIRA at 1314 Center Drive, Unit B-132, Medford, OR 97501. For payment by credit card, please contact Michele at the AIRA office.

AIRA and AIRA Fund for Education filed the 2025 IRS Forms 990 with the approval of the board. Copies of these financial reports are posted at https://aira.org/aira/form990.

Finally, I wish to express my gratitude to **Denise Lorenzo** and **Eric Danner** for the time and effort they've devoted to AIRA during their tenures as the Association's chair and president, respectively. Thankfully, Denise remains a board member; Eric now serves as the Association's chair. I look forward to continuing to work closely with Boris Steffen, now the Association's president, and Scott Williams, as president-elect.

A collection of informative and well-edited articles follows. Please read, enjoy, and learn (and earn CPE credit).

PRESIDENT'S LETTER

BORIS STEFFEN, CIRA, CDBV
PROVINCE

DEAR MEMBERS,

I am honored to introduce myself to you as the newly elected President of the Association of Insolvency & Restructuring Advisors. I consider it a privilege to serve and feel quite fortunate to have the opportunity to do so.

Looking back to when I first joined AIRA in 2005, given my entry into the restructuring field after having worked as a professional musician until reaching an age when many practitioners are already well established and recognized for their achievements, never did I expect to be elected as the President of a professional association comprised of members as accomplished and distinguished as AIRA. But as luck would have it, I stumbled somewhat ingloriously into what became known as the Enron Mega Claims litigation.

I say ingloriously because at my first meeting with counsel for The Enron Creditors Recovery Corp., after introductions, the first question asked by counsel was "Okay, guys, tell me why you are ***not*** qualified to do this case." Needless to say, that was not what we expected. Notwithstanding, after a few moments of silence which seemed to last for an eternity, I recounted an engagement, my one and only bankruptcy case up to then, in which I testified as a solvency expert in a fraudulent transfer proceeding in defense of a private equity firm that had paid one dollar for the equity, and assumed $12 million of the debt, of a global specialty retailer that prior to filing for bankruptcy had a market cap of over $500 million, and to which an insurance syndicate (the plaintiffs) had loaned $130 million.

While that story got my colleagues and me to the next phase of the beauty contest, it was clear to me that I had a great deal to learn if we were to win the engagement and achieve a recovery for the Enron Creditors. Searching expeditiously for a solution to close my knowledge gap, my research led me to discover AIRA shortly thereafter. I quickly joined, in no small part, to study distressed valuation and solvency with one of the founders of AIRA, Professor Grant Newton, who literally wrote the book on insolvency and bankruptcy accounting, and became a great friend and mentor to me in my professional development. Consequently, I am deeply honored to take up this role and look forward to working alongside each of you to continue AIRA's legacy unabated and support the AIRA's mission of advancing the profession. There are plenty of opportunities to participate, whether submitting an article for publication in *AIRA Journal*, serving on a conference planning committee, or speaking on a conference panel.

I look forward to a productive and successful term.

Boris

We hope you like the new look of the *AIRA Journal*.

Please send your comments, suggestions, and ideas for articles to AIRA Journal Managing Editor, Alexandra Mahnken at: amahnken@aira.org.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Disruption Index
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of CEOs expect significant changes to business models over the next year.
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BRC26 Bankruptcy & Restructuring CONFERENCE

THE BRC26 MUSIC CITY REWIND

A look back at the conference, community, and recognition that shaped BRC26


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BRC26 REWIND

AlixPartners CIRA AWARDS

AIRA recognized outstanding achievement among CIRA candidates, honoring the highest examination performances and distinguished results across the 2025 awards cycle.

GOLD	SILVER	BRONZE
Alexander Woolley	**Robert Clark**	**Theresa Xu**
M3 Partners, LP New York, NY	Riveron Consulting, LLC Houston, TX	M3 Partners, LP New York, NY

Pictured: Former AIRA Chair and Award Presenter Denise Lorenzo, CIRA, with award winners Theresa Xu and Robert Clark, followed by Executive Director, James M. Lukenda, CIRA

Pictured: Newly Elected AIRA President, Boris Steffen, CIRA, CDBV, accepting his CIRA designation with Executive Director, James M. Lukenda, CIRA

CERTIFICATES OF DISTINGUISHED PERFORMANCE

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Christopher Sharp
Alvarez & Marsal
Atlanta, GA

Christopher Van Praag
FTI Consulting, Inc.
New York, NY

Ryan Goetz
Huron Consulting Group
Houston, TX

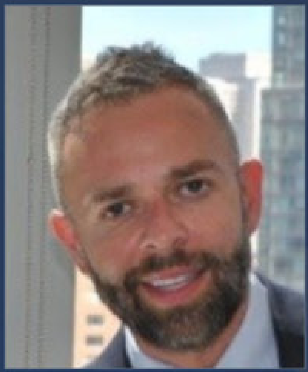
Daniel O'Connell, CIRA
M3 Partners, LP
New York, NY

Andrew Short, CIRA
JS Held LLC
Chicago, IL

2026 CLASS OF DISTINGUISHED FELLOWS

AIRA's Board of Directors conceived the Distinguished Fellows Program as a way to recognize the significant contributions AIRA's senior members have made to the art and science of corporate restructuring and to AIRA. The 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.

ERIC A.W. DANNER, CIRA
CohnReznick LLP



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MORE INFORMATION ON THE FELLOWS PROGRAM AT AIRA.ORG/FELLOWS

THE EMANUEL M. KATTEN AWARD

Emanuel M. Katten was a founding member of AIRA's predecessor organization. He was instrumental in the development of AIRA's CIRA certification program and other Association and professional initiatives. In recognition of Manny's legacy, annually, AIRA conveys its Emanuel M. Katten Founders Award to a member of the restructuring community with a history of outstanding service and a substantial contribution to the profession.

This year's honoree is **Dr. Jack F. Williams**, CIRA, CDBV, Professor of Law, Georgia State University and the Center for Middle East Studies and AIRA Resident Scholar.

David Bart, AIRA Board Member, and member of the *AIRA Journal* Editorial Board, introduced Jack. He described Jack's background, focusing on his diverse interests. Whether as an archeologist, law professor, economist, or teacher, Jack believes in the exploration of ideas. This is the meaning of the Latin word *forensis*. In the end, Jack is a forensic scientist. He searches for facts and brings those into the public forum for discussion. He loves that discussion, and it is that magic which he shares with us at AIRA and in the profession. He is a friend to all.

Michael Deeba, CIRA, introduced Jack's professional contributions, describing Jack's achievements in the largest cases in the country, his leadership of a practice, and his achievements for AIRA and the profession. He was named as an AIRA Distinguished Fellow in the class of 2023. Jack is, above all, humble. Whether consulting with the US Coast Guard, working with the CIA, or testifying in seminal bankruptcy cases, Jack quietly leads and teaches about life.

Susan Seabury stepped up to join Dave and Mike in presenting the award to Jack with Jim Lukenda.

Pictured: Jack Williams, CIRA, CDBV accepting his Manny Katten Award with AIRA Executive Director, James M. Lukenda, CIRA

PAST WINNERS

2025	Keith Shapiro	2012	Dan Armel
2024	David Berliner	2011	Jack Almquist
2023	William A. Brandt, Jr.	2010	Robert Remian
2022	Kenneth Malek	2009	Robert Medlin
2021	David S. Mork	2008	Michael Policano and Ron Sutter
2020	Thomas Morrow	2007	Dennis Bean
2019	Jay Alix	2006	Barry Monheit
2018	Robert Bingham	2005	Tracy Gopal
2017	Jay Crom	2004	Alexander Knopfler
2016	Grant Newton and Valda Newton	2003	Alan Gittelson
2015	Walter Greenhalgh	2002	Matt Schwartz
2014	Grant Stein	2001	Elmer Heupel
2013	Alan Holtz	2000	Steve Cooper

THE EMANUEL M. KATTEN AWARD

NONE OF US WALKS THIS LINE ALONE

REFLECTIONS ON AN EXEMPLARY PROFESSIONAL ASSOCIATION AND THE PEOPLE WITHIN IT

Jack F. Williams, PhD, JD, CIRA, CDBV, CTP
AIRA Resident Scholar
Georgia State University

Pictured: Jack F. Williams, CIRA, CDBV giving his acceptance speech at BRC26

When I accepted the Manny Katten Founders Award from the Association of Insolvency & Restructuring Advisors, I said something I meant more than I could fully explain in the moment: none of us walks this line alone. The response from colleagues afterward told me that the sentence resonated with them. So, I want to return to it, not to extend the acceptance remarks, but because the idea deserves more than a few moments at the podium can deliver.

Awards have a curious way of inviting reflection. They encourage us to look backward and consider what mattered. The older I get, the less interested I become in measuring success by accomplishments alone. Cases conclude. Articles are published. Classes end. Awards are presented. Important as those things are, they eventually become part of the past. What endures are the people who taught us, challenged us, trusted us, corrected us, and occasionally carried us when our own strength was not quite enough. That is the truth I keep returning to, and it is the one I want to explore here.

FORMATION

Like many young professionals, I entered practice believing that expertise was the primary goal. Learn the law. Master financial concepts. Develop sound judgment. Accept responsibility for outcomes. Work hard. There is nothing wrong with those aspirations. Clients deserve competence, courts deserve professionalism, and the work demands all of it. But expertise, I came to learn, is never the whole story.

The people who most influenced my professional life rarely taught their most important lessons through instruction. They taught through example. Some gave me opportunities I had not yet earned, seeing possibilities in me that I could not see in myself. Others invested time they could scarcely spare. What I thought they were teaching me was how to practice. What I eventually understood was that they were teaching me how to carry myself as a human being, with consistency, judgment, humility, accountability, and the quiet discipline of doing the right thing when no one is watching. They were building something in me so that when the hard moments came, I might not always know what to do, but I would always know who I am.

Looking back, the most important mentors in my professional life were not necessarily the most accomplished people I knew. They were the people whose character remained visible under pressure. They accepted responsibility when things went wrong. They gave credit generously and absorbed criticism without looking for someone else to blame. They treated support staff, young associates, opposing counsel, and clients with the same respect they extended to judges and senior partners. Those examples shaped me far more than I understood at the time.

That is why mentorship matters. At its best, it is not simply the transfer of information from one generation to another. It is the transfer of habits, values, judgment, and identity. It is one person helping another discover not only how to do the work, but how to live within it. Gratitude becomes more important with age for exactly this reason: we eventually recognize that much of what we call our own was first given to us by someone else.

COMMUNITY

If mentorship teaches us that we do not become ourselves alone, experience teaches us something equally important: we do not sustain ourselves alone either. One of the persistent myths of professional

life is the myth of individual accomplishment. Awards are given to individuals. Articles carry individual names. Professional biographies naturally organize around personal milestones. Individual effort matters. Discipline matters. Accountability matters. But the longer I have practiced and taught, the more convinced I have become that most meaningful accomplishments are profoundly communal.

Behind every visible success stands a largely invisible community. Some of its members are easy to identify: colleagues whose names appear beside ours, teammates who share the workload. Others are less visible. The people who stay late without seeking recognition. The ones who quietly solve problems before they become crises, who ask the difficult questions no one else wants to ask, whose wisdom often surfaces in meetings under someone else's voice. Every profession has such people. Every accomplished professional owes them more than is usually acknowledged.

There were just as many moments in my career when others carried me as when I carried the weight myself. Colleagues who caught mistakes before they became problems. Teammates whose judgment improved my own. Friends whose encouragement arrived precisely when it was needed. Students whose questions forced me to rethink ideas I thought I understood. Family members whose sacrifices created space I could never have created for myself. Many of the best decisions attributed to me were improved by conversations with others. Many successes associated with my name were collective achievements.

That realization changed how I think about leadership. Early in my career, I often thought leadership meant carrying the weight. Experience revealed something more complete. Leadership is not simply carrying weight. It is about creating conditions in which others can carry it together. It is about recognizing strengths that differ from your own, inviting contribution rather than demanding compliance, and remembering that the people around us are not supporting characters in your story. They are protagonists in their own stories, and the stories are, in fact, our collective stories.

TRUST AND STEWARDSHIP

Every profession has its language for the people it serves. Lawyers speak of clients. Academics speak of students. Consultants speak of engagements. Those terms are useful, but they can also obscure something important. Before anyone becomes a client or a student, they are first human beings. Professional life has a way of making us forget obvious things. Files accumulate. Deadlines multiply. Complexity grows. Before long, it becomes possible to focus so intently on the problem that we lose sight of the person experiencing it.

Working in restructuring and insolvency rarely permits that illusion to survive for long. Distress makes human realities visible. Behind every troubled company are employees wondering about their future. Behind every restructuring are families living with uncertainty. Behind every failed business plan is someone who once believed deeply in what they were building. The technical dimensions of these situations are important, but they are never the whole story. What I remember most from decades of this work is not the complexity of the transactions. It is the resilience of the people navigating them. People who kept showing up despite fear. People who kept honoring commitments despite disappointment. People who treated others with decency while carrying burdens that I hope never to face myself.

Those experiences changed how I think about professional service. Expertise remains essential, but expertise alone is insufficient. People rarely seek our help merely because they need information. They seek our help because they are navigating uncertainty, and

Pictured: James M. Lukenda, CIRA, Michael Deeba, CIRA, Susan Seabury, Jack F. Williams, CIRA, CDBV and David Bart, CIRA, CDBV

uncertainty is not simply an intellectual challenge. It is a human one. The goal is not to give people dignity. Dignity is not ours to bestow. Every person already possesses it. Our responsibility is to recognize it, honor it, and protect it when circumstances threaten to obscure it. When we do that, expertise becomes more meaningful, advice more effective, and service becomes something larger than a transaction.

Teaching reinforced that lesson in ways I did not anticipate. Like many young professors, I began with the assumption that my primary responsibility was to transfer knowledge. Experience revised that belief. The best classrooms are not places where information moves in one direction. They are places where curiosity is shared, assumptions are tested, and everyone remains unfinished, including the professor. Thousands of students have passed through my classrooms over the years. I am proud of what many of them have accomplished, but pride is not the primary emotion I feel when I think about them. Gratitude is. Because they taught me things I could not have learned on my own: that questions often matter more than answers, that intellectual humility is a strength rather than a weakness, and that growth does not stop simply because someone has accumulated experience.

Which brings me to stewardship. As the years have passed, I find myself returning to a simple question: what do we owe the people who helped make us who we are? Not repayment. Many such gifts cannot be repaid. What we owe is a continuation of the courtesy, care, and commitment, extending it to others some measure of what was extended to us. To teach. To mentor. To listen. To challenge when challenge is needed and encourage when encouragement is the harder thing to offer. To create opportunities where they might otherwise be absent. To help others discover possibilities they cannot yet see in themselves.

That, I believe, is the deepest form of professional stewardship, not merely preserving institutions or maintaining traditions, but helping people grow. As I look back on the course of my career, I find myself drawn to a different measure of what mattered. Not what I accumulated or achieved, but what I contributed to the lives of others.

NONE OF US WALKS THIS LINE ALONE

I accepted the Manny Katten Founders Award on behalf of every person who showed up for me, and I accepted it as a commitment: to become for others what others were for me.

Every life is, in some measure, a gift from people who showed up, stayed, taught, forgave, carried, listened, encouraged, corrected, or simply sat beside us for a while. Whatever success I have enjoyed belongs partly to them. Whatever recognition I have received reflects their influence as much as my own efforts.

We stand on the shoulders of others. We lean on each others' shoulders. If we do the work right, show up consistently, treat people as the protagonists they are, and remember that trust is a gift and not an entitlement, we become and provide the shoulders for someone else, at least sometimes.

One of the reasons the AIRA has remained so meaningful to me over the years is that it institutionalized many of these values. Technical excellence mattered, but so did generosity. Expertise mattered, but so did collegiality. Professional achievement mattered, but so did mentoring and helping others to succeed.

At its best, the AIRA has always reminded us that professions are sustained not merely by knowledge, but by communities willing to invest in one another.

To me, that is the line. And none of us walks it alone. Thank you for this honor.

"

AIRA Scholar in Residence Jack Williams is a professor at Georgia State University College of Law and the Middle East Studies Center. He has proudly served as a Board member and then Special Counsel to AIRA for more than 30 years.

CONFERENCE SPONSORS

AIRA gratefully recognizes the organizations whose support helped make the 2026 Bankruptcy & Restructuring Conference possible.

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AIRA recognizes the volunteer leaders and committee members who shaped the conference program, preconference sessions, and member experience.

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BANKRUPTCY & RESTRUCTURING CONFERENCE 2027: CHARLESTON, SC

AIRA's next Bankruptcy & Restructuring Conference will be held at The Emeline Hotel. Members interested in helping shape the 2027 program are encouraged to get involved with the BRC planning committee by contacting Cheryl Campbell at ccampbell@aira.org.

AIRA MEMBER SURVEY

HERE'S WHAT YOU ASKED FOR

Twice a year, AIRA will ask members what they need most and use that feedback to shape education, resources, communications, and programming. The first responses were clear: members want more ways to earn credit, stay current, and connect.

50%
CPE/CLE

35%
Bankruptcy law updates

35%
Networking

THE AIRA JOURNAL HELPS ANSWER THAT CALL

CPE was the strongest request. This issue gives members a direct way to earn free self-study CPE by completing the Journal self-study.

Use the QR code with your primary AIRA member email.

SCAN TO BEGIN

TOP REQUESTED CATEGORIES

CPE/CLE	50%
Bankruptcy law updates	35%
Networking	35%
Technology and AI	26%
Written resources or tools	21%
Career development	18%
Young / newer professionals	15%
Judicial or trustee perspectives	13%
Mentorship	11%
Senior practitioner support	11%

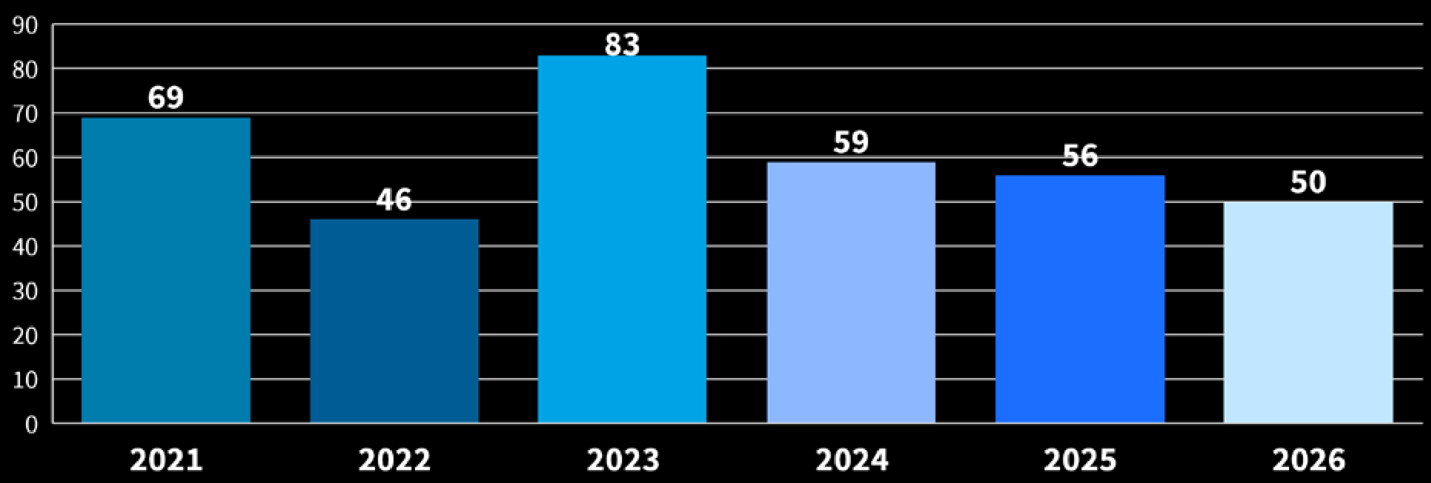
Source: AIRA Bi-Annual Membership Survey. Values shown are response percentages for requested programming, resources, and member-support topics.

RESTRUCTURING AND BANKRUPTCY MID-YEAR REVIEW

BY SARAH FOSS

This summary is adapted from the presentation given at the AIRA Annual Conference. For the full presentation, visit: https://aira.org/pdf/2026/brc26/609/Bankruptcy_Taxation_Financial_Advisors_Toolbox_-_Restructuring_Bankruptcy_Market_Outlook_Slide_Prese_1779138652.pdf *All data cited herein is from Debtwire's Restructuring Database. The database covers bankruptcy cases with funded debt of $10 million or more, however, exceptions to that threshold are made for a small number of select and otherwise notable cases.*

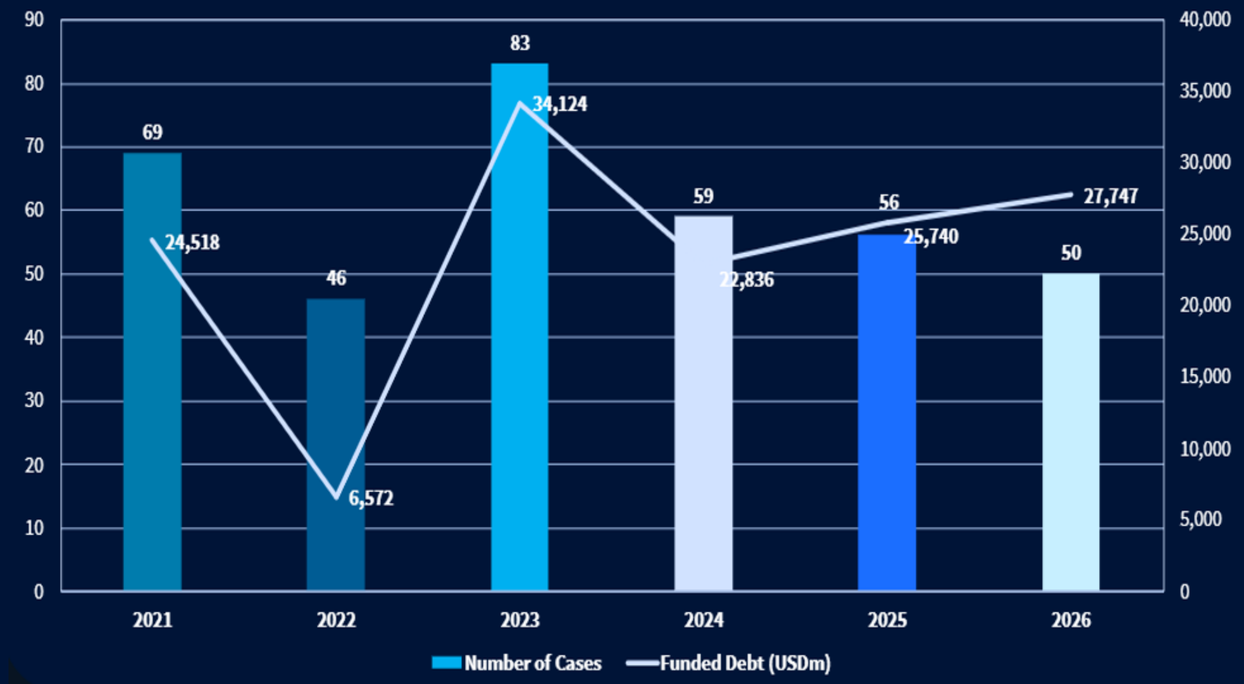
LARGE CHAPTER 11 CASES FILED BETWEEN JANUARY 1 AND APRIL 30 (2021-2026)



There has been a somewhat volatile cycle over the past six years, with activity falling from 69 large Chapter 11 cases in January – April 2021 to a low of 46 in 2022, before surging to a peak of 83 cases in 2023. In 2026 thus far, we have seen activity fall to 50 large Chapter 11 cases filed, marking the lowest level since 2022.

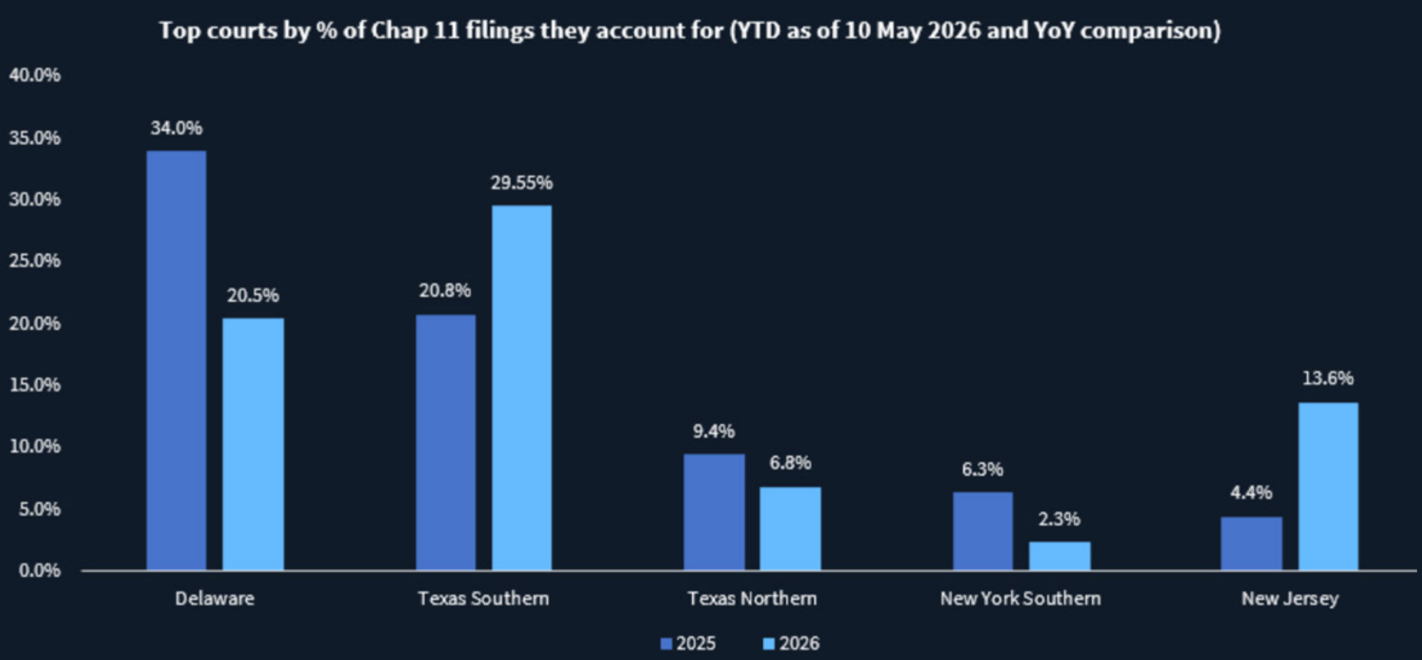
CHAPTER 11 CASES FILED BETWEEN JANUARY 1 AND APRIL 30, 2026 WITH FUNDED DEBT OVER $1 BILLION

Case	Funded debt (USD m)	Sector
QVC Group	$ 6,530	Retail
Multi-Color Corporation	5,938	Consumer Products
Saks Global Enterprises	3,411	Retail
Pretium Packaging	1,836	Chemicals & Materials
Eddie Bauer	1,742	Consumer Products
The LYCRA Company	1,534	Consumer Products
STG Logistics	1,160	Industrial Products & Serivces
FAT Brands Inc.	1,003	Food & Beverage



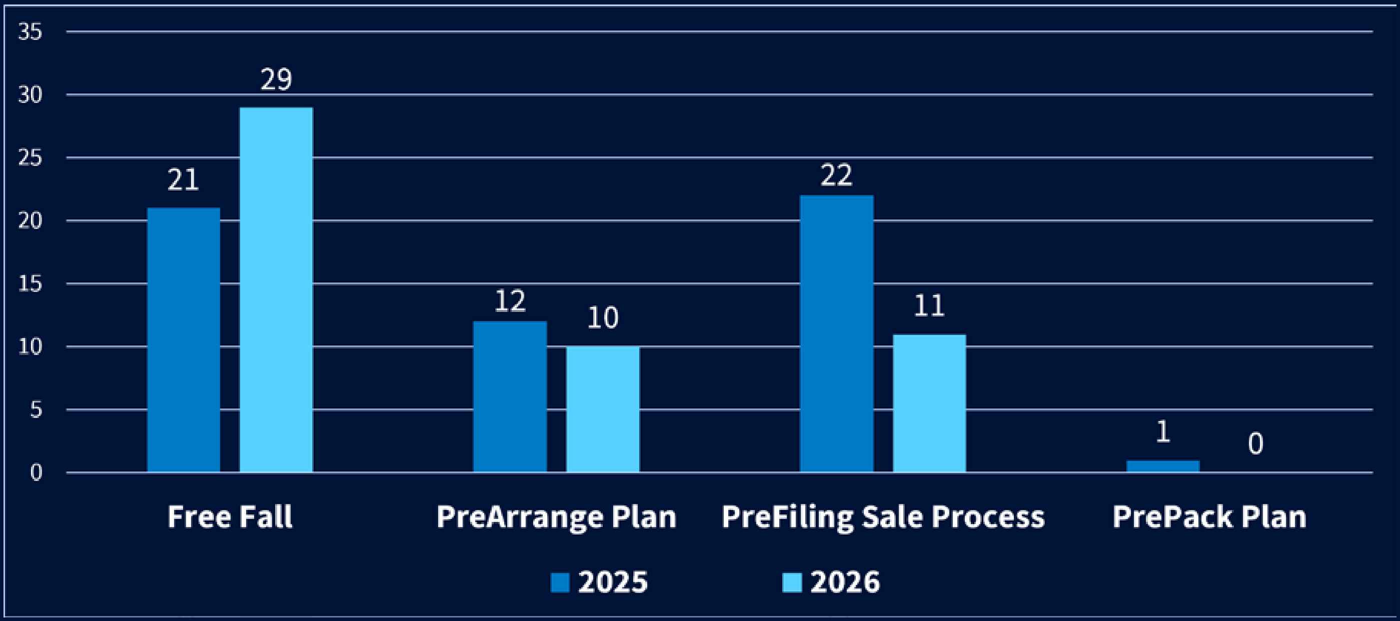
In 2026, large Chapter 11 filings are down 10.7% YTD through the end of April, but the aggregate funded debt of those companies has risen over the last two years to USD 27bn in 2026 YTD. There are fewer filings, but larger or more complex deals are driving activity with somewhat of a return of sizable transactions, even as overall case count trends down. This suggests a more targeted restructuring landscape, likely focused on larger issuers or more capital-intensive situations, rather than broad-based stress.

TOP COURTS BY PERCENTAGE OF CHAPTER 11 FILINGS: JANUARY 1 – MAY 10, 2026 AND YOY COMPARISON



In terms of Chapter 11 venues, Delaware and the Southern District of Texas remain the jurisdiction of choice for debtors. New Jersey is making a comeback. Also notable is the broad jurisdictional footprint of filings in many different courts.

YEAR OVER YEAR COMPARISON OF FILING STRATEGIES FOR CHAPTER 11 CASES (JANUARY 1 – APRIL 30)



Despite an overall decline in the number of cases of 11%, "free fall" cases increased over the comparable period disproportionally, by 38%, and pre-filing sale process cases fell by 50%.

TRENDS TO WATCH

SECTORS

- Healthcare: continues to lead all sectors YTD, representing 17% of Chapter 11 cases, driven by a structural margin squeeze: costs rising faster than reimbursement, compounded by labor shortages, policy cuts and higher debt burdens.
- Software and Technology-related Services: rising investor concern that rapid advances in AI including increasingly capable agentic and coding models, alongside platform consolidation and weakening pricing power are accelerating disruption across parts of the software ecosystem.
- Consumer Services/Retail: retail and consumer-facing services remain among the most exposed sectors.
- Energy and related services: exposed to commodity price volatility, geopolitical shocks, and higher operating costs.

COOPERATION-ERA LMES: CREDITOR-SIDE ORGANIZING REMAINS ACTIVE ACROSS SECTORS

- Co-op activity accelerates as AI disruption fears intensify
- YTD co-op formations already near 2025 levels
- Distressed activity likely to continue through LMEs and distressed exchanges
- Potential for additional Chapter 22s
- LMEs and Chapter 11 emergences fail to deliver long-lasting solutions

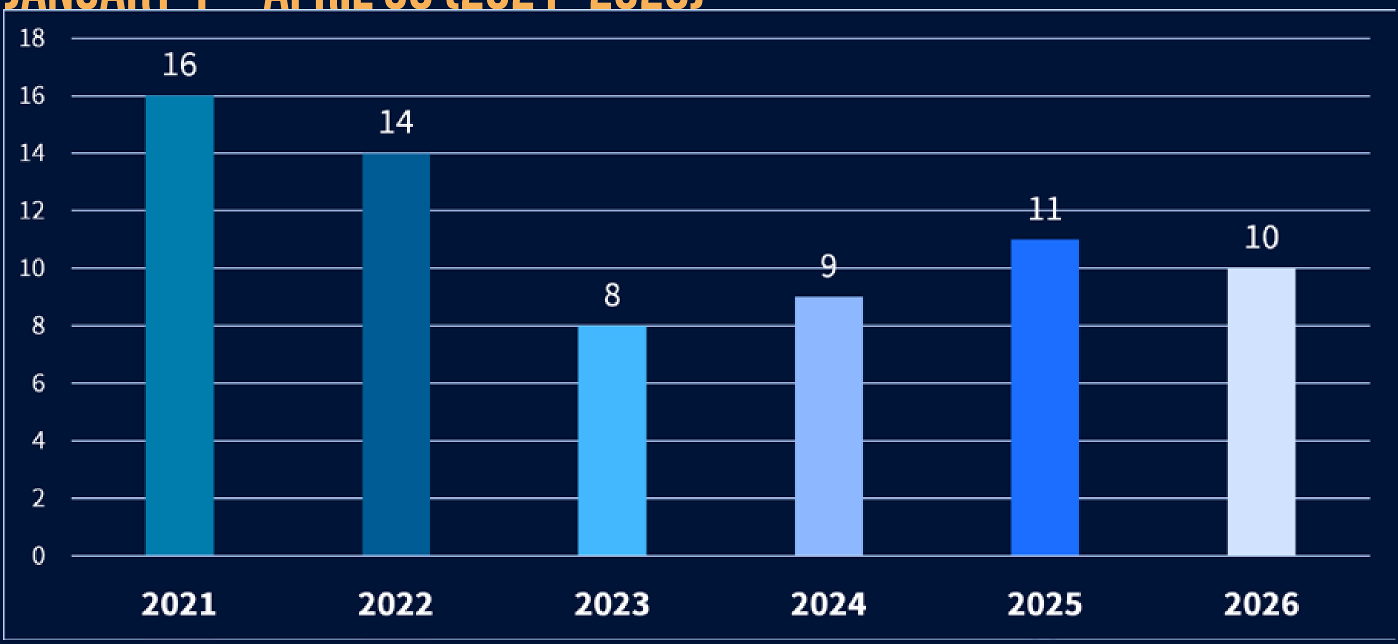
CAPITAL STRUCTURE MANAGEMENT IS A CORE BATTLEFIELD

- Private credit playing a central role – filling gaps left by traditional banks
- Refinancing constraints and maturity wall – large upcoming maturities driving restructuring activity
- LMEs still prevalent – avoid Chapter 11 and buy time for a recovery

GLOBAL FORUM SHOPPING

- Growth of alternative restructuring regimes like England and Wales
- Target specific parts of the capital structure
- More flexibility to preserve equity
- Aligns with LMEs
- Examples include Fossil Group, Argo Blockchain, New Fortress Energy

CHAPTER 15 CASES FILED JANUARY 1 – APRIL 30 (2021- 2026)



ABOUT THE AUTHOR

Sarah Foss
ION Analytics Editorial/Debtwire

Sarah is the Global Head of Legal for Debtwire and the General Counsel for parent organization, ION Analytics' Editorial Division. In her work for Debtwire, Sarah oversees a global team of legal analysts, court reporters and Debtwire's Restructuring Database, which provides comprehensive data and analytics on bankruptcy and restructuring proceedings. Sarah frequently contributes insights into distressed credit situations, legal developments, and market-moving events. She is the host of the "Women in Restructuring" podcast, a collaboration between Debtwire and the American Bankruptcy Institute, where she does in-depth interviews with prominent professionals—including attorneys, judges, and corporate restructuring leaders—highlighting the evolving landscape of insolvency, diversity in the profession, and the career paths of influential women in the field.

HUMAN JUDGMENT IN A DIGITAL AGE: ETHICS, PROFESSIONALISM, AND AI IN BANKRUPTCY PRACTICE – PART I

RESIDENT SCHOLAR COLUMN – BY JACK WILLIAMS, CIRA, CDBV

Artificial intelligence ("AI") has made significant and substantial inroads in how we practice as professionals in bankruptcy law, restructuring, finance, and accounting. The field is also challenging how we operate as professionals. This is the first in a series of articles that seeks to explore AI in our practice. I plan to consider ethical, practical, and theoretical aspects of AI in use, with the hope of understanding its strengths and weaknesses, its gifts and gaps. At all times, I will also consider AI through the lens of the touchstones of a professional – ethics, professionalism, and leadership.

Additionally, I plan to challenge AI as we weave its use through the Association of Insolvency & Restructuring Advisors ("AIRA") Code for Certified Insolvency & Restructuring Advisors ("CIRA"). The Code of Professional and Ethical Conduct (https://aira.org/aira/ethics) ("CIRA Code") mandates high standards of integrity, objectivity, and confidentiality. These standards are:

- Competence
- Confidentiality
- Integrity
- Objectivity
- Due Care.

BANKRUPTCY WORK AS HUMAN WORK

We often think our work is about numbers, restructuring plans, liquidity events, auctions, cramdowns, discharge, exemption rights, among other things. But behind every number is a life, a livelihood, a story. That's why compassion is central to our profession. A chapter 11 plan isn't just a reorganization. It's a future for the people working there. A § 363 sale is not just an auction; it's a lifeline to many of the employees of those businesses. A liquidation, when done responsibly, is an act of dignity. Giving clarity to a distressed debtor can preserve a future. And, a discharge, the opportunity for an honest individual to begin their economic life anew, is the grace we provide for those that temporarily fail in the rough and tumble of life in America. These outcomes are our objectives, goals, and professional legacy.

WORKING WITH AI

AI offers a panoply of temptations:

- Easy accessibility
- Speed
- Efficiency

- Organization
- Summarization
- Drafting
- Pattern recognition
- Words of welcome
- Encouragement
- An elegant and pleasing output.

The last three observations are important. You are going to think it likes you. You are going to thank it. Especially when you sign off. Especially when it calls you by your name.

What is AI? AI appears like the next fad to some, or a new buzzword. Not so; it has existed for a long time. AI is an umbrella term that encompasses technologies that enable machines to perform tasks that mimic "true intelligence." AI accesses many methods and tools to handle data (including words) like linear regression all the way to ChatGPT, Grok, and Claude. It can perform tasks like learning, reasoning, and decision-making.

The good news is that no one knows, not even the experts. The bad news is that nobody knows even when ethics guidance and court mandates presume a level of definition that simply does not exist. Before we get to that last point, an important one, let's unpack what we mean by AI.

The National Institute of Standards and Technology ("NIST") generally defines "artificial intelligence" in two ways:

> (1) A branch of computer science devoted to developing data processing systems that performs functions normally associated with human intelligence, such as reasoning, learning, and self-improvement; (2) The capability of a device to perform functions that are normally associated with human intelligence such as reasoning, learning, and self-improvement.[1]

A humbler attempt at a definition follows:

> AI is a catchall term for a set of technologies that make computers do things that are thought to require intelligence when done by people. Think of recognizing faces, understanding speech, driving cars, writing sentences, answering questions, creating pictures. But even that definition contains multitudes.

And that right there is the problem. What does it mean for machines to understand speech or write a sentence? What kinds of tasks could we ask such machines to do? And how much should we trust the machines to do them?[2]

But what to do, given that court mandates presume a level of knowledge that no one may possess? I would suggest this: AI is generally defined as a technical system that can perform tasks that typically require human knowledge and intelligence to do. I would group AI into three relevant types in our profession: Traditional, Predictive, and Generative.

Traditional AI uses pre-defined rules and logic to solve specific and often very structured problems. Think of rule-based systems that respond to a set of inputs. It is reactive, rule-based, rigid, and deterministic. Traditional AI is already an accepted part of our daily lives, such as recommendation systems, automated customer care, sales phone trees, etc.

Predictive AI uses machine learning algorithms on large amounts of data to learn to make predictions. It learns patterns from historical data to predict future outcomes or trends. Once the model is trained, it can make predictions on unseen data. For example, one can use predictive AI to predict the price of a house given certain parameters and historical data of comparable houses.

Generative AI uses machine learning algorithms to learn patterns from existing data to then generate new and original content based upon the training data. It learns the data's distribution and draws from that distribution to generate content. It is creative, emergent, imaginative, and innovative. Once a model is trained, it can generate new content like text, audio,

1 NIST, artificial intelligence AI, https://csrc.nist.rip/Topics/Technologies/artificial-intelligence#:~:text=artificial%20intelligence%20AI&text=%22(1)%20A%20branch%20of,learning%2C%20and%20self%2Dimprovement (last visited Dec. 1, 2025).

2 Will Douglas Heaven, What is AI?, MIT Technology Review (July 10, 2024), https://www.technologyreview.com/2024/07/10/1094475/what-is-artificial-intelligence-ai-definitive-guide/.

images, and code. Think of this category of AI like this:

> Generative artificial intelligence [is] [t]he class of AI models that emulate the structure and characteristic or input data in order to generate derived synthetic content. This can include images, videos, audio, text, and other digital content.[3]

Contrast that definition with that of "Agentic AI," a subset of Generative AI:

> Agentic systems, on the other hand, are given a set of capabilities and will then autonomously select which of those are best suited to achieve an objective - for example, fulfilling the order. This system may then look up the best price, consider competing prices, back order out-of-stock items, and offer different prices for different delivery schedules autonomously. This ability to use tools to solve problems is what makes agentic systems so powerful.[4]

In short, think of Generative AI as a form of AI that can imagine and create new things in response to prompts by a human for human judgment and consumption. Think of Agentic AI as a form of Generative AI that can decide or act to achieve predefined goals autonomously or even define those goals itself and achieve those goals, without human involvement.

A SIMPLE TEST

Let's try it on a simpler level. If you are using AI as a librarian or collector of information, that is likely not a Generative AI function, although such a platform may have Generative AI capabilities. If you are using AI as a storyteller or creator of content, that is Generative AI. If you are using AI through an agent that collects information and then creates content based on predefined rules with or without your involvement, that is Agentic AI.

In summary, Generative AI is a specific form of AI based on Large Language Models or LLMs. Familiar examples include ChatGPT (OpenAI), Copilot (Microsoft), Gemini (Google), Claude (Anthropic), Grok, and Perplexity AI.

AI is not simply a tool. It is a mirror that reflects the character of the practitioner using it. AI changes work at multiple levels. It sparks ideas, boosts performance, and automates drudgery. But what it really challenges is how we define work, skill, and value-add. No question: productivity is real, but uneven. AI improves outcomes, especially for novices and routine tasks. High performers benefit most when they know how to integrate and exercise deliberate judgment within their use of AI at all stages.

PROFESSIONAL EXCELLENCE AS ETHICAL PRACTICE

We earn our *professional brand* every single day. **Excellence isn't a goal; it's a discipline**. Excellence requires being on offense and never coasting; staying ahead of change; practicing continuous learning; and surrounding yourself with **professional companions**, people who challenge you, sharpen you, and make you better. A professional companion is not someone who agrees with you. It is someone who forces you to confront your fears and vulnerabilities. That is the essence of ethical growth.

Excellence is not perfection. Excellence is consistency, focus, humility, and effort. Excellence is also compliance with our ethical rules and principles of professionalism, especially now, when AI tempts people to cut corners.

COMPETENCE

The first ethical principle in the CIRA Code is styled "Competence." The American Bar Association ("ABA") has a corresponding requirement in its Model Rules of Professional Conduct ("ABA Model Rules") Rule 1.1. The CIRA Code further refines "Competence" to include:

- Maintaining an appropriate level of professional competence by ongoing development of their knowledge and skills.
- Performing their professional duties in accordance with relevant laws, regulations and technical standards; including, but not limited to, technical standards issued by authoritative bodies as designated in the bylaws.
- Accepting only those assignments for which they possess, or can reasonably acquire, the necessary competence to complete, applying their

3 NIST, Glossary, https://csrc.nist.gov/glossary/term/generative_artificial_intelligence (last visited Apr. 26, 2026)(citing NIST SP 800-218A).
4 AI Insights: Agentic AI (HTML), https://www.gov.uk/government/publications/ai-insights/ai-insights-agentic-ai-html (updated Apr. 26, 2026).

knowledge and skill with reasonable care and diligence, without assuming a responsibility for infallibility of knowledge or judgment.

The ABA Model Rule 1.1 (Competence) requires legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

The **duty of competence** does not appear to present anything controversial as it comes to the use of AI. AI allows us to work more efficiently; it may even reduce our workload, and that is a good thing. However, and this is where it becomes quite interesting, AI does not reduce our obligation of competence. It heightens it.

Recall that you (the "controller") control the "prompt" (that is, the input statement you present to AI) and the platform selection (that is, CoPilot, Gemini, ChatGPT, Claude, Grok, etc.); the platform, and the company that runs it, controls everything else. This process functions as a black box. So, for example, a large language model is not transparent and is subject to limits of its capabilities, accuracy, bias, and prejudices based on its training data and the company that controls it.

The duty of competence includes **technological competence**, recognized implicitly by the first bullet point in CIRA Code 1 and Code 5 (Due Care) and explicitly by the ABA's comment 8 to Rule 1.1. So, professional competence and excellence now include:

- knowing what AI can do,
- knowing what AI should not do, and
- always verifying the work.

DUTY OF SUPERVISION

AI challenges are amplified when you are responsible for supervising professionals and staff. CIRA Code 5, Bullet 2 (Due Care) and ABA Model Rules 5.1 – 5.3 speak to the "Duty to Supervise." Here are a few thoughts to keep in mind.

- We should supervise AI to a greater extent than we would a staff member or non-lawyer. AI has no conscience, no regret, no sympathy, no remorse.
- An AI system's mistakes are our mistakes. Conduct a thorough review to validate results reached by AI and ensure consistency (e.g., by reviewing a sample set of documents that we may have used AI to retrieve or to collect information from).
- We need to make the final decision, not AI.
- Professionals who supervise other professionals or staff need to know whether those others are using AI to perform professionally regulated or legal tasks.

CIRA Code 5, Bullet 2 (Due Care) and ABA Model Rules 5.1 – 5.3 are our bedrock on these points. Be a leader, lean forward, shine that light in the black box of AI, and lead. Under CIRA Code 5 and ABA Model Rules 5.1–5.3, supervisors must ensure that technology use, whether by CIRAs or lawyers or non-lawyers, is compatible with ethical obligations. If a junior financial advisor, bankruptcy accountant, or lawyer uses AI improperly, and you as the supervising CIRA or attorney did not provide or ensure compliance with guardrails, that is your responsibility. It is on us!

CLIENT DISCLOSURES

Then, of course, there are our clients. CIRA Code sections on Competence, Confidentiality, Integrity, Objectivity, and Due Care, as well as ABA Model Rule 1.4 speak to our relationship and communication with our clients. If we plan to use AI, we should explain to the client:

- The objective that AI involvement would achieve;
- Anticipated monetary costs; in many situations, the costs related to use of an AI system will be passed along to the client;
- Any benefits or drawbacks to using AI over professional (or support staff) labor;
- The potential benefits, including increased accuracy, speed, cost savings, and replicability;
- The level of data privacy and security.

Some clients may prefer not to pay for additional technology or assume additional privacy risks inherent in using AI products. It is their call and your duty to make that an informed decision and that you document that decision contemporaneously.

INTEGRITY

Integrity is the throughline of our reputation. CIRA Code 3 (Integrity) mandates:

- Be honest and candid within the constraints of client confidentiality.
- Avoid actual or apparent conflicts of interest and advise all appropriate parties of any potential conflicts.
- Not knowingly misrepresent facts.

- Refrain from any activity that would prejudice their ability to carry out their duties ethically.
- Recognize and communicate professional limitations or other constraints that would preclude responsible judgment or successful performance of an activity.
- Refrain from engaging in or supporting any activity that would discredit the profession.
- Observe the principles of objectivity and due care.

Consistent with CIRA Code 3, ABA Model Rule 3.3 (Candor to the Tribunal) and Rule 4.1 (Truthfulness) require that we never present false statements, intentionally or inadvertently. In our profession, integrity also means:

- Doing the right thing when no one is watching.
- Avoiding even the appearance of impropriety.
- Being accurate and honest in all representations.
- Doing right and being willing to suffer the consequences.

This is where AI becomes a profound ethical test. Professor Damien Charlotin has accomplished outstanding work on AI and LLMs in general, and hallucinations in particular. At the end of this article, I share with you a link to his exceptionally well-done website on the subject. He generously includes access to a series of PowerPoints related to a class he teaches on AI, LLM, and the law (https://www.damiencharlotin.com/llms-the-future-of-the-legal-profession/). He also writes a Substack column, Artificial Authority, that I read religiously and highly recommend (https://artificialauthority.ai/). He maintains a hallucination database that I consult frequently (https://www.damiencharlotin.com/hallucinations/). I also commend his scholarship (https://www.damiencharlotin.com/biblio/). I am a big fan!

Let's talk a little bit about hallucinations. Are they that big a problem or is this one of those examples where a few notorious cases have captured our attention? Well, the numbers suggest that it is not tailing off; rather it is a growing problem – over 1,350 cases to date across dozens of jurisdictions, both domestic and international (https://www.damiencharlotin.com/hallucinations/).

What are they? In response to a prompt, Generative AI will generate a response based on authority that simply does not exist. It makes it up. Out of whole cloth. Looks legit, very professional. Almost always it is on point, uncannily perfect for your situation. But, it is a ghost. And like a bottle of Jack Daniels when you find yourself on the dark side of midnight, AI will lie to you.

Hallucinations come in other forms. Say, the case is right; but do not put it past AI to generate a quote in that real case that can be found nowhere in that case. I mean nowhere.

Hallucinations can also take the form of mischaracterizing the meaning or role of language in a case. So, the case is real, you checked that. The quote is there in the case because you used CTRL-F and, sure enough, it is there. But Generative AI calls that quote a fundamental part of the holding. Sounds great until you learn that it was not at all part of the holding. It was dicta, undebatable dicta, and that was not what you called it in your motion, memo, or brief.

How do hallucinations come about? There are both simple and complex answers to that question. Professor Charlotin gives both types of responses. I am going to share the simple one. When you ask any Generative AI platform what guides its systems approach to its many algorithms, it answers primarily to keep you engaged and to use praise and follow-on questions to serve that end. To be sure, accuracy is not irrelevant. In fact, accuracy is very important, but not all-important. This is an important lesson to learn. AI is not your friend. In fact, I don't just question AI, I depose it.

Professor Charlotin convincingly argues that LLM hallucinations are a systemic issue, not a 'bug' that can be easily fixed. Here is a summary of Professor Charlotin's observations on the subject (I quote and paraphrase, in part).

- Not Random Errors: LLM hallucinations are systematic errors arising from the model's architecture and training.
- Plausible Fictions: Hallucinations are often plausible and grammatically correct, making them difficult to detect without external verification.
- Statistical Artifacts: Hallucinations reflect statistical patterns in the training data, not a connection to ground truth.
- Contrast with Human Error: Hallucinations strike us because no human would make such errors deliberately.
- The "Confidently Wrong" Problem: LLMs often present hallucinations with the same level of confidence as accurate statements. They don't necessarily "know" when they are wrong (though it may tell you when asked).

- The Sociological Aspect: AI fools us because we're wired to extend trust to things that sound smart. AI exploits that wiring.

Depose the machine! Follow up with human judgment, informed professional judgment, critical thinking. Be skeptical at all stages in the use of AI.

HUMILITY

Humility is listening deeply, learning from everyone, recognizing limits, asking for feedback, and being open to correction. Robert Greenleaf's "Servant Leadership" model says: "Leaders lead by example, not by authority." That form of leadership is predicated on humility.

In the AI age, humility means accepting that we cannot blindly trust the machine, recognizing that we control the choice of which AI platform to use and the prompt and that the machine controls most everything else; acknowledging what we don't know; and inviting your team to question results, even the results of a machine.

This attribute of leadership and professionalism may be the most challenging and important. It is also one of the hardest ethical obligations in AI practice. The machine sounds so authoritative that we may find confidence in a place where no such feeling should exist, failing to appreciate that humility has silently slipped away.

CONCLUSION

The machine is powerful, efficient, and remarkably persuasive. But it has no conscience, no license, no certification, and no skin in the game. You do. Behind every prompt you submit and every output you accept stands a professional obligation; to a client, to a court, to a colleague, and to the integrity of a practice built on human judgment. AI does not diminish that obligation. It intensifies it. Depose the machine. Verify the work. Lead with the values no algorithm can replicate. In the articles that follow, we will go deeper into how our peers are actually using AI, how courts and professional organizations are responding, and what guardrails look like in the field. The work ahead is challenging, the stakes are real, and the conversation has only just begun. Stay curious. Stay skeptical. Stay human. The finishing line, as always, is just the starting line.

RESIDENT SCHOLAR

Jack F. Williams, PhD, JD, CIRA, CDBV, CTP
Georgia State University

AIRA Scholar in Residence Jack Williams is a professor at Georgia State University College of Law and the Middle East Studies Center. His current teaching interests include accounting and finance for lawyers; admiralty and maritime commerce; American Indian law; archaeology; bankruptcy and business reorganization; board governance and business ethics; business valuations; corporate finance; counterterrorism, intelligence, and national security; forensic investigations; Islamic law and finance; mergers and acquisitions; remedies; and statistics and the law.

FURTHER READINGS:

https://www.damiencharlotin.com/

https://aira.org/aira/ethics

https://pub.aicpa.org/codeofconduct/Ethics.aspx

Guidelines for Responsible Use of Artificial Intelligence (AI) in Forensic and Valuation Services Engagements Issued by the AICPA Forensic & Valuation Services Executive Committee (2025)

ABA Formal Opinion 512

Florida Bar Ethics Opinion 24-1 (Jan. 19, 2024)

New York City Bar Association Committee on Professional Ethics, Formal Opinion 2024-5: Ethical Obligations of Lawyers and Law Firms Relating to the Use of Generative Artificial Intelligence in the Practice of Law

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility & Philadelphia Bar Association Professional Guidance Committee Joint Formal Opinion 2024-200, Ethical Issues Regarding the Use of Artificial Intelligence

Karl Ahlrichs, Ethics in an AI World, Ethics in an AI World: A Real-World Guide to Thinking Critically and Auditing AI Results, Business Learning Institute (2026)

Greenleaf, Robert K. Servant Leadership: A Journey into the Nature of Legitimate Power and Greatness, 25th anniversary ed., Paulist Press, 2002.

THE STRATEGIC POWER OF SPEND: A CFO'S GUIDE TO VALUE GOVERNANCE

PART I — BY STEFAN ZORN

THE QUESTION ISN'T WHETHER YOUR ORGANIZATION IS SPENDING — IT'S WHETHER IT IS SPENDING STRATEGICALLY

From our experience at FTI Consulting, for most enterprises, external spend – payments to suppliers, partners, and service providers – represents 40 to 70 percent of the total cost base. This encompasses everything from technology infrastructure and logistics to marketing programs and research and development partnerships. In absolute terms, we are often discussing hundreds of millions or even billions of dollars flowing through the organization annually.

Despite this magnitude, spend with external suppliers typically receives operational treatment rather than strategic scrutiny. It is delegated to functional teams, monitored through procurement dashboards, and escalated to leadership only during budget cycles or when variance thresholds are breached.

This represents a fundamental misallocation of executive attention.

EXTERNAL SPEND AS STRATEGIC INTELLIGENCE

Consider what spend data reveals about your organization. Every purchase order, every contract amendment, every vendor selection reveals something about strategic priorities, operational trade-offs, and organizational values. Spend patterns show what the business truly prioritizes — not what appears in strategy presentations, but what receives actual capital deployment.

One powerful illustration of this is the true story of a technology company whose executive team was adamant about its commitment to innovation and agility. Yet, the company's spend data told a different story: 78% of the external spend was locked into multi-year contracts with legacy providers, with minimal investment in emerging capabilities or flexible partnerships. The disconnect between stated strategy and actual capital allocation was costing the organization competitive positioning in fast-moving markets.

When external spend aligns with strategic intent, organizations achieve coherence. They become focused, resilient, and capable of extracting learning from their partner ecosystem. When alignment

Why External Spend Demands Executive Oversight: Every chief financial officer ("CFO") faces relentless pressure to drive growth, fund innovation, and optimize capital allocation. Yet, most CFOs have a tough time optimizing their largest lever for strategic impact: **external spend**

fails, the consequences are predictable: contract duplication across business units, misaligned incentives between internal teams and external partners, and capital trapped in low-value activities that made sense three years ago but no longer serves current objectives.

FROM COST CONTROL TO VALUE GOVERNANCE

Traditional spend management has centered on cost control: budget discipline, savings targets, and compliance monitoring. These remain necessary, but they represent only one dimension of financial stewardship.

The next evolution requires CFOs to think in terms of **value governance** — the systematic discipline of ensuring that every material spend decision serves an organizational purpose and advances strategic priorities. This applies whether you are evaluating a $50,000 consulting engagement or a $50 million systems integration partnership.

Value governance is not about creating additional approval layers or slowing down procurement cycles. It is about designing decision-making environments in which good choices happen naturally because incentives, information, and intent are properly aligned.

Let's share a cautionary example. A manufacturing client undertook aggressive cost reduction, including significant headcount cuts in its engineering division. Within 18 months, many of the same individuals had returned as independent contractors — now billing at rates that were three to four times their previous fully-loaded compensation costs. The organization had optimized for immediate cost reduction without considering total value or strategic capability retention. The CFO's short-term savings target became a multi-year exercise in value destruction.

This is not a procurement problem. It is a leadership capability gap. It demands the same analytical rigor, transparency, and cross-functional alignment that CFOs routinely apply to capital investment decisions, merger and acquisition due diligence, or enterprise risk management.

THE DISTRIBUTED DECISION-MAKING CHALLENGE

Spend decisions are highly distributed — made by hundreds or thousands of individuals across an enterprise, each optimizing for their own objectives, timelines, and success metrics. A project leader needs to hit a delivery milestone. A business unit head is protecting his profit and loss statement. A procurement team is measured on documented savings. These incentives frequently conflict, and in the absence of clear governance, local optimization prevails over enterprise value.

Technology systems can track and categorize spend, but they cannot improve decision quality. Only leadership can do that.

The CFO's role isn't to centralize every spending decision — that is neither scalable nor desirable. Rather, it is to architect governance frameworks that make strategic intent legible throughout the organization and ensure that decision-makers at every level define value consistently. This requires transparency that builds trust rather than creating fear, empowerment balanced with accountability, and incentive structures that reward total value creation rather than narrow functional metrics.

WHAT COMES NEXT

Across industries, CFOs are confronting a universal challenge: despite sophisticated systems, strong processes and skilled teams, organizations still struggle to translate external spend into strategic value consistently. The issue is rarely technical — it is cultural, behavioral, and rooted in how leaders make and manage decisions.

The Strategic Power of Spend is a two-part article that reframes external spend as a core strategic capability, not an operational necessity. The article explores the real reasons organizations mismanage spend and provides a leadership framework that blends governance design, behavioral economics and value creation. Part I, contained herein, includes:

- **The Strategic Blind Spot:** Why spend deserves board-level visibility
- **Why It's Harder Than It Looks:** The structural and behavioral traps that undermine good intentions.

Part II, to be published in the next issue of the *AIRA Journal*, will include:

- **The Human Side of Spend:** How leadership shapes decision quality at scale
- **Architecting Governance:** How systems can link spend decisions to strategic outcomes
- **The Executive Mindset Shift:** Why value creation, not cost control, is the true mark of maturity.

Together, these pieces build a new operating model for how CFOs can drive enterprise performance through smarter, more strategic deployment of external spend. The organizations that will lead the next decade will not be defined only by revenue growth or margin expansion, but also by how effectively they convert every dollar of external spend into capability, resilience and competitive advantage. For CFOs, the question is no longer *"How much are we spending?"* but *"How strategically are we spending — and what future are we building with each decision?"*

The Strategic Blind Spot in the Boardroom

WHY SPEND DESERVES EXECUTIVE ATTENTION

At FTI Consulting, we often hear executives describe their strategies in terms of growth, digital transformation, or talent. Far less frequently do we hear them talk about spend — even though spend is where most of a company's capital, and much of its strategic intent, ultimately manifests in practice.

Across the industries we serve, we see that 40 to 70 percent of enterprise costs typically flow to external suppliers. Every contract, sourcing decision, and supplier relationship therefore represents a deliberate choice about where and how the organization creates value. Yet in many boardrooms, spend is still treated as a financial detail rather than a leadership priority. In our experience, that is a costly oversight.

SPEND AS STRATEGY IN ACTION

Spend is not a support function, it is strategy in execution.

When a business commits significant capital to technology, logistics, marketing, or outsourced services, it is not simply purchasing inputs — it is expressing priorities. Spend reveals what a company truly values, not just what it communicates in presentations or town halls.

Too often, however, spend decisions are delegated deep into the organization under the assumption that procurement and finance can "handle the details." The result is fragmentation: disconnected purchasing, inconsistent supplier relationships, and misaligned investments that quietly erode value over time.

From our perspective, strategy is only as strong as the way resources are allocated. If spending patterns do not reinforce stated objectives, then strategy remains an aspiration rather than an operating system.

THE BLIND SPOT IN THE BOARDROOM

Why does spend so often escape sustained executive attention?

In our experience, it is because spend sits at the intersection of finance, operations, and governance. Everyone touches it, but few truly own it. CFOs focus on cost control. CPOs focus on sourcing efficiency. Business leaders focus on delivery. The result is a structural blind spot in which significant value leakage goes unnoticed.

We have worked with global organizations where supplier spend represented nearly 60 percent of operating costs, yet few members of the executive committee could clearly articulate how that supplier ecosystem supported strategic priorities. Contracts were negotiated function by function, with limited enterprise-wide visibility.

When we analyze spend in these environments, the findings are often stark. Tens of millions of dollars are routinely directed toward activities that no longer advance the company's agenda. The issue is not always waste in the traditional sense, but misalignment — the organization continues paying for capabilities that no longer fit its direction.

THE OPPORTUNITY HIDING IN PLAIN SIGHT

Many leaders assume that growth and efficiency are competing objectives. Strong spend governance demonstrates that they are not.

When executives intentionally align external spend with strategy, they can unlock trapped value and redirect capital from low-impact activities toward initiatives that drive measurable outcomes. This is not merely about reducing cost; it is about reshaping how capital is deployed to support ambition.

When leadership treats spend as a strategic lever, we consistently see three outcomes:

- Clear visibility into where value is being created — or quietly destroyed
- Shared expectations that every dollar must support strategic intent
- Stronger accountability for how external partners contribute to results.

Even modest shifts in framing can produce outsized results. We have seen organizations move supplier conversations from "How do we save five percent?" to "How can our suppliers help us achieve our growth objectives?" That shift alone often transforms relationships from transactional to strategic and delivers outcomes that negotiation tactics rarely achieve on their own.

WHY EXECUTIVES MUST LEAD

Effective spend management cannot be delegated.

Spend decisions reflect strategic trade-offs. They determine how flexible, resilient, and innovative an organization can be. Only executive leadership can define what "good spend" means — balancing control with empowerment, efficiency with impact.

Governance is what converts those principles into repeatable practice. It ensures that every budget owner, sourcing leader, and supplier operates within a shared definition of value. Without that alignment, even well-designed processes struggle to deliver consistency or trust.

Executives do not need to manage suppliers directly. But they must elevate spend to a leadership-level conversation — one that belongs alongside discussions of growth, risk and capital allocation.

A DIFFERENT KIND OF EXECUTIVE DISCIPLINE

When leaders begin to view spend as a strategic capability, the nature of the conversation changes.

They ask more precise questions:

- Are we buying capabilities or simply purchasing services?
- Do our suppliers strengthen competitive advantage or merely reduce workload?
- Are we investing in the relationships that create differentiation?

These questions drive a different executive discipline — one rooted in value governance rather than transactional control. It is not about auditing spend; it is about designing an ecosystem of partners that supports long-term direction.

In the strongest organizations we work with, procurement is not treated as a cost center. It is treated as a strategic mirror — one that reflects whether strategy is being lived out in day-to-day decisions.

THE EXECUTIVE TAKEAWAY

Spend deserves a seat at the executive table because it directly shapes an organization's ability to deliver on its commitments.

Every external dollar either reinforces strategy or quietly undermines it. When spend is treated as a secondary concern, organizations lose coherence — strategy drifts, accountability diffuses, and capital migrates toward inertia rather than impact. Over time, this erosion is not visible in any single decision, but it compounds across hundreds of contracts, suppliers and commitments.

We encourage leadership teams to treat spend as a strategic capability — one that demands intent, governance, and ownership at the highest levels.

The most important question is no longer "How much are we spending?" but "What future are we funding?"

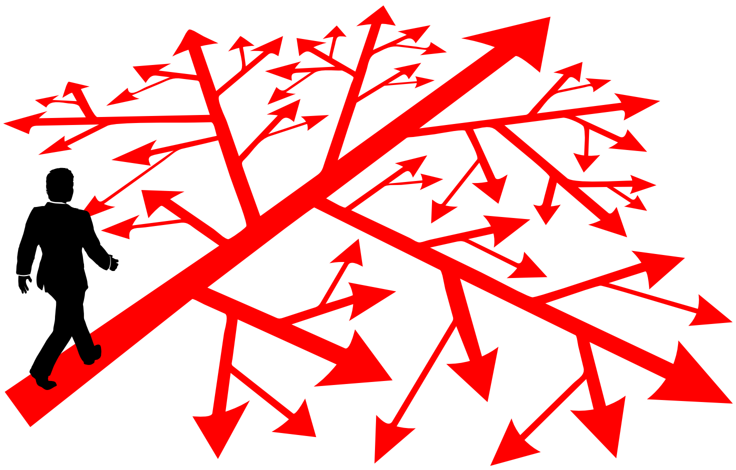
Why It Is So Hard To Manage External Spend Well

Every executive agrees that managing spend matters. Yet few believe their organization does it well.

Budgets are approved. Policies are in place and procurement teams work tirelessly, but results often fall short. Savings targets are met one quarter and eroded the next. Supplier relationships drift. Value slips quietly through the cracks.

We see this pattern across industries. The issue is rarely a lack of process or technology. More often, organizations underestimate that spend management is fundamentally human. People make decisions in ways that are messy, inconsistent, and influenced by incentives, habits, and emotion. The result is lost value across the enterprise.

THE INVISIBLE COMPLEXITY OF SPEND DECISIONS



External spend appears straightforward on paper: an organization buys goods or services to achieve its goals. In practice, it involves hundreds of daily decisions across functions, geographies, and reporting lines. Each decision carries context, trade-offs, and a different interpretation of value.

A marketing leader renews an agency because the team trusts them. An operations leader changes suppliers to improve lead times. A project manager expands scope to maintain momentum. None of these choices appear significant in isolation, but together they determine how effectively the organization converts spend into business value.

This complexity often remains invisible until it is mapped. Once organizations do so, a familiar pattern emerges: decisions are fragmented, ownership is unclear, and governance is uneven. In many organizations, the system produces exactly what it was designed to produce, which is to say it was never truly designed as an enterprise system.

WHY TRADITIONAL APPROACHES FALL SHORT

Many organizations respond to spend inefficiency by adding controls. They introduce new approval workflows, mandate preferred suppliers, or tighten procurement policies. These measures can improve compliance, but they do not necessarily improve outcomes or value creation.

We emphasize a simple distinction: controls manage behavior. Governance shapes intent.

Traditional spend frameworks assume that if people follow the right process, results will improve. In reality, purchasing decisions are rarely made on process logic alone. People respond to incentives, culture, and convenience. They optimize for local objectives, such as protecting timelines, satisfying stakeholders, and preserving flexibility, rather than maximizing enterprise value.

We often see this in decentralized environments where business units purchase similar services from different suppliers, often at different rates and with inconsistent terms. From the perspective of each leader, the decision is rational. From an enterprise perspective, the result is fragmented demand, duplicated effort, and reduced leverage.

When leaders say, “Central sourcing slows us down,” they are often revealing something more important than resistance to procurement. They are describing a system that rewards speed over stewardship. That is a governance issue, not simply a sourcing issue.

THE BEHAVIORAL SIDE OF SPEND

Spend management is often treated as an operational challenge, but in our experience, it is equally a behavioral one.

Several common biases shape spending behavior in ways policies alone cannot address:

- **Familiarity bias:** preferring known suppliers even when stronger options exist
- **Endowment effect:** overvaluing incumbent contracts because they feel earned
- **Loss aversion:** avoiding changes to spending decisions for fear of disrupting relationships or delivery.

These behaviors are not signs of poor leadership. They are normal human tendencies. They persist even in organizations with strong systems and capable teams. Technology can improve visibility and track spend, but it cannot by itself change how people evaluate trade-offs.

For that reason, influence matters as much as enforcement. Organizations that manage spend well do not rely solely on tighter rules. They design environments that make better decisions easier through transparency, clearer incentives, defined decision rights and trust.

THE GOVERNANCE GAP

Governance is often misunderstood as bureaucracy or a checklist of approvals and signoffs. We view it differently: governance is a leadership system that defines who decides what, how, and why.

The governance gap emerges when spend accountability is split across functions. Business units own budgets. Procurement owns process. Finance owns reporting. Yet no one consistently owns the central question: does this spend advance our strategic priorities and create value?

In well-governed organizations, that question is built into the decision process. Spend governance connects the how of procurement to the why of strategy. It gives leaders visibility into trade-offs before costs become commitments.

Without that connection, even high-performing teams can make rational local decisions that produce irrational enterprise outcomes. The whole becomes less than the sum of its parts.

WHY IT IS HARD AND WHY IT MATTERS

Managing external spend effectively is difficult because it requires alignment across three dimensions that rarely move in sync:

- Human judgment
- Organizational structure
- Strategic intent.

Most organizations can optimize two of these at once, but rarely all three. They may have strong strategy and efficient processes but weak ownership, or clear accountability but conflicting incentives. Sustainable spend performance requires integrating all three, which is why spend governance demands executive attention.

This is also where the opportunity lies.

When leaders treat spend as a behavioral and governance system, not simply a cost category, they unlock more than savings. They improve decision quality, strengthen accountability and create a clearer link between investment and enterprise value.

CASE STUDY

Spend governance should not be a list of rules that limits employees' ability to complete their work. Instead, it should help teams operate more efficiently while driving measurable value and savings. Recently, FTI Consulting helped an international technology manufacturer optimize its service technician automotive fleet. The objective was to enable technicians to work more efficiently while reducing costs.

The client managed more than 2,000 technicians across more than 200 different titles. Each technician had different needs from their vehicle. Some required space for large replacement parts while others needed smaller vehicles to navigate dense city environments.

As a result, the organization defaulted to the simplest solution: allowing technicians to select their own vehicles. Over time, this created a fleet that was excessive in both functionality and cost.

FTI Consulting approached the problem with a clear objective: deliver savings while ensuring technicians could still perform their service calls effectively.

Our team segmented the more than 200 job titles into five technician categories based on experience, service type, and operational needs.

We then reviewed more than 15 vehicle models historically used across the fleet, analyzing total cost of ownership including fuel economy, maintenance, repair, and lifespan alongside operational requirements such as storage capacity, workspace, and drivetrain.

Finally, we developed a governance framework that assigned vehicles based on role, required spare parts, mileage, and geography. Supervisors could easily match technicians with vehicles that met operational needs while remaining cost-effective.

However, assigning vehicles alone would not succeed. Technician buy-in was essential.

During a training session, FTI Consulting hosted a hands-on vehicle workshop with a representative group of technicians. The leasing company brought multiple vehicle types including trucks, vans, and crossovers, along with potential modifications. Technicians evaluated each option and provided feedback on what they needed to perform their jobs effectively.

The result was a solution that balanced operational performance with cost discipline. FTI Consulting delivered $3 million in savings on $30 million of annual fleet spend while enabling technicians to complete service calls effectively.

THE EXECUTIVE TAKEAWAY

The challenge of managing external spend is not a flaw in the organization. It is a signal. It reflects how decisions are made, how incentives are structured, and how strategy is translated into action.

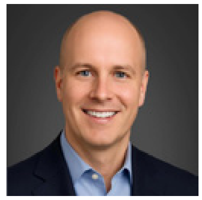
If spend is misaligned, strategy is likely misaligned. If governance is weak, accountability is often weak as well. The answer is not simply more control. It is stronger leadership and better system design.

The most effective executives stop asking, “Why is this so hard?” and instead ask, “What are we doing to make it easier for our teams to make better decisions?”

At FTI Consulting, we believe that is the core of effective spend governance: designing a governance system and operating model that consistently turns strategic intent into measurable value creation and growth.

Part II of this article will be published in the next issue of the AIRA Journal.

ABOUT THE AUTHOR



Stefan Zorn
FTI Consulting

Stefan is a Senior Managing Director at FTI Consulting, with more than 25 years of experience leading enterprise-wide external spend management transformations. He focuses on developing and optimizing sourcing and procurement cost reduction and optimization strategies across various industries. Stefan helps clients use their spend with external suppliers for competitive advantage, such as reducing their spend with suppliers, increasing their speed to market, innovation and supplier diversity, and becoming more agile.

PRESERVING VENDOR CONFIDENCE:
TRADE CREDIT MANAGEMENT IN STRESSED AND DISTRESSED SITUATIONS

BY JOHN HALLORAN, CIRA

In stressed and distressed situations, liquidity is typically framed in terms of cash balances, projected receipts and disbursements, borrowing base availability, and debt service obligations. Those measures are indispensable, but incomplete. For many businesses, especially those dependent on inventory turnover or continuous input supply, **liquidity also depends on whether vendors continue to extend ordinary-course trade credit**.

That support is essential to operations. It is a material source of financing embedded in the cash conversion cycle. When vendor confidence weakens, liquidity can deteriorate faster than a conventional cash flow forecast suggests. Vendors may tighten payment terms, slow shipment cadence, or require prepayment. Once that occurs, the effect is not confined to accounts payable balances. It can impair inventory flow, revenue generation, receivable formation, and ultimately, borrowing capacity.

Loss of vendor support is not inevitable. In many situations, a disciplined vendor management process can preserve trade support, protect the ordinary-course flow of goods and services, and create time for the business to stabilize or for stakeholders to pursue a broader value-maximizing solution. This article examines vendor management as a core liquidity discipline, explains why conventional liquidity tools often fail to capture vendor-driven risk, and proposes a practical framework for segmenting vendors, prioritizing payments, governing communications, and preserving enterprise value.

INTRODUCTION

Distressed situations often originate with a familiar set of questions.

- How much unrestricted cash is available?
- What does the thirteen-week liquidity forecast show?
- How much availability remains under the revolving facility?
- How quickly can working capital be converted into cash?

These are the right questions. They are simply not the only questions.

In practice, many businesses in distress do not fail because management missed a single forecast assumption or because a lender immediately shut off access to capital. They fail because the operating system loses credibility with the counterparties that finance it every day. At the center of that operating system sits the vendor base. Vendors provide more than product, raw materials, freight, contract labor, outsourced processing, and other business-critical inputs. They also provide credit. Expressed through ordinary payment terms, that credit finances a portion of the business continuously.

Vendor management therefore should not be treated as a narrow accounts payable function or a procurement issue delegated below the level of core restructuring work. It is a **liquidity discipline** focused on preserving the confidence necessary for vendors to continue supporting the business while management, owners, lenders, and advisors address a period of stress.

This issue also arises well before any bankruptcy filing. A distressed business may never file, and effective vendor management may be part of the reason it does not. Once liquidity tightens too far, vendors may begin to conclude that they are financing deterioration rather than recovery. At that point, management must do more than ask for patience. It must provide structure, credibility, and a believable path by which continued vendor support leaves vendors no worse off—and ideally incrementally better off—than withdrawing support immediately.

Trade credit, in other words, **is a confidence-based form of unsecured financing**. Once that confidence weakens, the company may have materially less liquidity than its internal forecast implies. Once confidence is lost broadly, the decline can be rapid.

TRADE CREDIT AS A STRUCTURAL COMPONENT OF LIQUIDITY

Trade payables are often presented as a liability on the balance sheet and then left there analytically, which understates their economic role. Trade credit functions as a revolving source of financing embedded in the ordinary course of business. Under standard commercial terms, vendors finance inventory purchases, production inputs, and the gap between shipment to customers and collection from those customers.

In many businesses, particularly those dependent on inventory turnover, trade credit supports the same operating cycle that lenders analyze through borrowing base formulas. Liquidity analysis therefore should not stop at cash and receipts/disbursements; it should also incorporate the movement of inventory, receivables, and payables through the cash conversion cycle. A business can show projected liquidity on paper while the underlying vendor-supported operating cycle is already destabilizing.

Vendor support affects liquidity twice. First, it affects the outflow side by determining how much cash must leave the business and when. Second, it affects the inflow side by determining whether the business can continue acquiring the goods and services necessary to generate revenue, receivables, and ultimately, collections. Once vendors retrench, the company does not merely lose time to pay; it may lose the ability to keep the business moving.

That distinction matters because apparent short-term liquidity can be illusory. A company may conserve cash by stretching payables, but if the price of that deferral is disruption to inventory flow, lower fill rates, missed customer orders, or impaired service performance, the benefit is often temporary. Cash conserved in weeks one and two may disappear in weeks three through six as the business loses its ability to convert working capital into collections.

Trade credit should therefore be analyzed not as a static payable balance but as a dynamic source of financing tied directly to value creation. Preserving that support is not just about avoiding disruption. It is about maintaining the conditions under which the business can continue converting cash into inventory, inventory into revenue, and revenue into collections.

WHY VENDOR CONFIDENCE MATTERS

Vendor behavior is often discussed as if it turns on hard default events: missed payments, public covenant breaches, or formal restructuring announcements. Vendor confidence usually shifts earlier and more gradually than that. Vendors are credit decision-makers. They do not need a bankruptcy filing to begin protecting themselves.

EARLY SIGNS OF WEAKENING VENDOR CONFIDENCE

What changes first is often not terms, but *tone*. Credit departments call more frequently. Shipment releases take longer. Sales personnel begin by asking whether checks are still coming on Friday. A vendor may seek greater visibility into payment timing, future order patterns, or the company's operating outlook. Those signals matter because they mark the point at which trade credit ceases to be passive.

At that stage, management often underestimates the risk. A common mistake is to interpret early vendor concern as merely a receivables-management annoyance rather than as a liquidity signal. Another is to assume that long-standing commercial relationships, by themselves, will preserve support. Relationships matter up to a point, but they do not replace a credible path forward.

WHY CONTINUED SUPPORT CAN STILL BE RATIONAL

A vendor deciding whether to continue shipping on credit is making a rational economic decision. That vendor wants to know whether continued support will leave it no worse off—and preferably better off—than pulling back. The path to that conclusion may differ by vendor, but it often includes some combination of:

- margin on new shipments and confidence that those shipments will be paid in the ordinary course;
- a visible process for reducing older balances over time;
- preservation of a valuable commercial relationship and future opportunity; and
- confidence that continued support increases the probability of an orderly, value-maximizing outcome rather than a collapse.

The role of a skilled professional is not simply to calm nerves. It is to organize those facts into a credible structure and communicate them consistently enough to preserve rational vendor support. In that sense, vendor management is not merely a communications exercise. It is a disciplined effort to make continued vendor support economically rational.

HOW VENDOR PRESSURE ACTUALLY BUILDS

Vendor stress does not typically arrive in a clean sequence. It is tempting to think of the process as linear: first some stretch, then a few uncomfortable phone calls, then a hold, and then a broader pullback. Real situations are messier. Vendors react at different speeds, with different levels of discipline, and based on different internal incentives.

Some vendors are operationally disciplined and financially conservative. They react early and with limited patience. Others are commercially aggressive and focused on revenue, allowing balances to build and reacting only once their exposure becomes acute. This creates a dangerous illusion. Management may interpret continued support from one group of vendors as overall stability when pressure is being redistributed to others.

In prolonged stress situations, this dynamic can evolve into a rotating pattern in which vendors escalate, receive partial payments, and temporarily stabilize. That pattern can inadvertently condition management to rely on the same approach repeatedly. The risk is that the vendor base eventually synchronizes in its response, at which point the strategy fails abruptly and with more severe consequences.

THE PRESSURE REDISTRIBUTION EFFECT

That redistribution of pressure is one of the reasons conventional forecasts fail. It creates a **pressure redistribution effect**. When one set of vendors tightens or is paid more aggressively, pressure moves elsewhere. A company may temporarily solve one supplier problem by not paying another. The second group then becomes more exposed, feels the pressure more acutely, and may react more sharply than the first. A forecast that measures only total payables or total disbursements will miss this effect because it does not track how pressure is migrating through the vendor base.

In practice, companies tend to attempt deferral of payments to professional services, marketing, and other non-core vendors while keeping core inventory suppliers current or periodically caught up. Reported payables may appear stable, but imbalances are often built beneath the surface. When that buffer is exhausted, pressure shifts to inventory vendors, a far more consequential step that directly threatens supply continuity and revenue generation.

Abrupt changes in payment patterns are often more damaging than the level of payments themselves. Vendors will tolerate aging balances when there is a consistent cadence of partial payments and clear communication. When that cadence breaks without explanation, confidence can deteriorate quickly even if total dollars paid over the period are similar. In distressed situations, signaling matters almost as much as cash. A steady flow of ordinary-course payments preserves confidence far better than intermittent crisis checks.

Table 1

Vendor Confidence Deterioration Sequence

Stage	Typical Signals	Principal Risk	Management Priority
Heightened concern	More calls, more aging questions, delayed release approvals	Confidence begins to weaken	Establish coordinated messaging and payment visibility
Informal tightening	Requests for commitments, pressure for current payments, selective holds	Uneven vendor reaction and hidden pressure migration	Segment vendors and track threshold risk
Formal tightening	Shortened terms, hard holds, reduced limits	Liquidity compression and supply disruption	Prioritize ordinary-course flow and stabilize key vendors
Disruption	Cash on delivery (COD), prepayment, shipment refusal	Revenue impairment and rapid liquidity decline	Preserve the operating core and evaluate broader alternatives

Table 1 summarizes observable vendor behavior and the corresponding management response required at each stage.

WHY CONVENTIONAL LIQUIDITY TOOLS OFTEN MISS THE PROBLEM

Conventional liquidity forecasts often fail to capture vendor risk for three reasons.

STATIC PAYMENT ASSUMPTIONS

First, they are typically built on static payment assumptions. The forecast may assume that payables age at a consistent rate or that disbursements can be slowed without altering vendor behavior. Vendor reactions are dynamic and uneven. Some vendors are highly disciplined and react early. Others absorb more pressure than they should, only to react later and more severely. This creates the illusion that the company still has flexibility when, in fact, risk is merely being redistributed.

HISTORICAL DPO IS NOT PREDICTIVE

Second, most liquidity forecasts rely too heavily on historical metrics such as average days payable outstanding (DPO). Those metrics describe how the company paid when vendors were comfortable, not how it will pay once counterparties become concerned. Historical DPO is *descriptive*; it is not *predictive* of vendor behavior in a distressed situation.

THE OPERATING-CYCLE FEEDBACK LOOP

Third, many forecasts do not model the full feedback loop between payables, supply continuity, revenue, and borrowing capacity. If vendors tighten, inventory receipts may decline. If inventory receipts decline, revenue and receivables may weaken. If receivables weaken, borrowing base availability may tighten as well. What appears at first to be only a payable problem can therefore impair both receipts and financing availability. That is why vendor-driven liquidity failures can accelerate faster than management expects.

A better liquidity analysis requires more than a thirteen-week direct cash flow forecast. It also requires current working capital rollforwards, vendor-specific exposure analysis, and a live view of how the ordinary-course operating cycle is functioning. If the business can no longer reliably convert payments to vendors into shipments, shipments into sales, and sales into collections, the liquidity model should show that impact explicitly.

ILLUSTRATIVE LIQUIDITY CASE

A simple illustrative case makes the point. Assume a business purchases approximately $20 million of product and services each month on average 45-day terms. In steady state, the vendor base is effectively financing roughly $30 million of working capital. Assume further that the company is operating with tight liquidity but still has:

- $3 million of unrestricted cash
- $5 million of borrowing base availability
- a thirteen-week forecast showing a thin but manageable cushion.

Now assume that vendors representing 35% of monthly purchases begin to tighten. Two key suppliers move from 45-day terms to 15-day terms, and one slows shipment releases on past-due balances. The immediate arithmetic effect is that the company must accelerate approximately one month of cash for that portion of spend: 35% of $20 million, or roughly $7 million. That acceleration alone exceeds the original liquidity cushion.

But the problem does not stop there. If slowed shipments reduce inventory availability enough to cut weekly sales by 10%–15%, collections also fall. If receivables are expected to decline by $3 million to $4 million over the next several weeks, borrowing base availability may contract as well. A vendor problem that began as a payable issue can therefore become:

- a direct cash need of approximately $7 million
- a receipts problem due to lower shipments and sales
- a borrowing base problem because the receivable base no longer develops as forecasted.

A forecast built only on historical payment timing will miss the operational and financing consequences of the tightening. The business may appear to have time when the operating system is already beginning to seize. The implication is that vendor tightening can eliminate apparent liquidity capacity faster than traditional forecasts suggest.

Experienced asset-based lenders generally recognize this dynamic, which is why the status of vendor relationships often influences their willingness to remain patient while a company works through its issues. In practice, this risk should be monitored through detailed roll forwards of balances, payments, and shipments for key vendors, supplemented by direct assessment of current vendor sentiment and recent communication activity.

THE INFORMATION ENVIRONMENT AROUND VENDORS

Vendors do not form views based solely on what accounts payable tells them. Their understanding of the company may be influenced by a much wider information environment. In practice, vendors may receive or infer information from various sources, including:

- payment aging and changes in payment patterns
- sales team conversations
- rumors in the market
- company-, owner-, or lender-led exploration of strategic alternatives
- changes in order cadence or shipment requests
- the tone, quality, and consistency of management communications.

This matters because management often assumes that it controls the narrative more tightly than it does. This is rarely the case. By the time a company decides it needs a coordinated vendor communication process, vendors may already be piecing together their own view of the situation.

The objective, therefore, is not to create a perfect narrative. It is to ensure that the messaging vendors do receive is factual, disciplined, and aligned with a credible path forward. Vendors will often tolerate difficult facts more readily than they will tolerate conflicting messages, missed commitments, or evasiveness.

A FRAMEWORK FOR MANAGING THE VENDOR BASE

SEGMENTING THE VENDOR BASE

An effective vendor strategy in distressed situations should begin with segmentation. At a minimum, vendors should be assessed across four dimensions:

1. operational criticality
2. substitutability
3. current and projected exposure
4. likely reaction threshold.

Table 2 shows a practical framework.Operational criticality identifies which vendors support the core cash-generating engine of the business. Substitutability asks how quickly, realistically, and at what cost alternatives could be found. Exposure measures both current balances and ongoing weekly

Table 2

Vendor Segmentation Framework

Dimension	Key Question	Typical Indicators
Operational criticality	If this vendor stops, what breaks?	Revenue impact, customer service impact, regulatory or operational dependency
Substitutability	Can the vendor be replaced in time?	Alternate suppliers, qualification lead time, switching cost
Current and projected exposure	How much risk is already concentrated here?	Current balance, weekly forward-flow requirement, order concentration
Likely reaction threshold	When is support likely to be impaired?	Aging tolerance, history of holds, internal credit posture, responsiveness to prior stress

ordinary-course requirements. Reaction threshold assesses the point at which support is likely to be impaired, whether due to aging, broken promises, shipment concentration, or internal credit policy.

With that segmentation in place, payment prioritization can be managed more intelligently. Equal treatment is rarely optimal from a liquidity or enterprise value perspective, but care must be taken to evaluate potential preference exposure and other avoidance risks in the event of a subsequent filing. The practical objective is to deploy cash in a way that preserves the operating system and maximizes value for stakeholders over time, while recognizing that legal and process considerations may later matter. In active situations, the segmentation should be refreshed regularly—often weekly—to ensure that assumptions remain accurate.

THE THREE-BUCKET PAYMENT ARCHITECTURE

A useful operating architecture is to separate payables into three conceptual buckets (See Table 3 below):

- **ordinary-course forward-flow obligations** required to preserve current shipments and ongoing cash generation;
- **legacy past-due balances** that must be managed deliberately but need not be paid down indiscriminately; and
- **strategic exception payments** where a specific payment, though not ordinary course, clearly protects value or prevents disproportionate disruption.

The forward-flow bucket should be refreshed weekly and modeled separately so management always has a live view of what the business requires to keep moving in the ordinary course. The legacy bucket can be managed deliberately, with payments minimized except where strategically necessary. Strategic exceptions should have clear approval discipline and an explicit value rationale.

This architecture permits a simple but powerful discipline: each disbursement should be evaluated against whether it protects or enhances the company's ongoing cash-generation capability. If it does not, it should face a materially higher bar.

One common implementation challenge is that many companies are accustomed to invoice matching and have strong preferences regarding the application of payments. Credit departments take greater notice of aged invoices than recent ones, and aged invoices naturally trigger alarm. As a practical matter, many companies in stressed or distressed situations will need to pay the oldest invoice first even if the amount paid was determined using a forward-looking framework. Once a formal restructuring path is clear, however, best practice typically shifts: the company no longer pays the oldest invoice and instead moves vendors that still require payment during the roll-up period to cash on delivery, to the extent necessary. Until then, the practical question is what value the business is receiving in exchange for the flow of payments.

> Each disbursement should be evaluated against whether it protects or enhances the company's ongoing cash-generation capability

COMMUNICATION AS A LIQUIDITY TOOL

In these situations, **message and messenger matter**. Skilled vendor management can prevent vendor retrenchment, but only if communication is treated as a technical discipline rather than an improvisational exercise. Vendors do not simply react to balances; they react to whether the company appears to

Table 3

Payment Architecture in Distress

Bucket	Objective	Typical Treatment	Approval Discipline
Ordinary-course forward flow	Preserve current shipments and cash generation	Refresh weekly; pay consistently where support is value-protective	Routine but controlled
Legacy past due	Contain historical burden while preserving liquidity	Freeze conceptually; minimize payments absent strategic need	Elevated review
Strategic exceptions	Prevent disproportionate disruption or unlock value	Pay selectively with explicit rationale	Senior approval and documented justification

understand its own position, whether commitments are being met, and whether the path forward sounds credible.

BEST PRACTICES

Best practices include:

- avoid promises for payment that cannot be kept
- designate a single point person or tightly coordinated communication team
- ensure messaging is factual, consistent, and tied to business objectives
- refrain from misleading vendors while avoiding unnecessary disclosure of confidential information
- insulate payment decisions from insider influence where conflicts exist
- use payment plans for past-due balances only where the forecast supports a credible path to repayment
- identify the thresholds at which vendor support is likely to break and prepare stage-based response plans
- ensure there is a path to new value for dollars going out the door.

WHEN THE MESSENGER MUST CHANGE

In more distressed situations, changing the face of the communication process is often necessary. Incumbent management may be technically knowledgeable and commercially valuable, but they are often in an uncomfortable and conflicted position with vendors. They may send inconsistent signals through tone, promises, or informal backchannels, and they may already have lost trust because of prior mistakes or results. In some cases, the professional's role is as much about keeping management on message as it is about keeping vendors rational. In others, it is about seeking a different answer from the vendor than management could obtain on its own or gaining some value from independence.

GOVERNANCE IN VENDOR COMMUNICATION

In distressed situations, incentives can become misaligned. Management teams may prioritize short-term relationship preservation, personal credibility, or operational continuity in ways that conflict with broader enterprise value objectives.

Uncoordinated communication is a common failure point. A CEO may reassure one vendor informally in ways that conflict with the formal process. A sales leader may overpromise to preserve product flow despite warnings to the contrary. A controller may adopt a tone that sounds defensive, evasive, or combative. A business unit may try to keep "its" vendors outside the structured process and, in doing so, overpromise or misstate facts. Once vendors sense that the company is speaking with multiple voices, credibility erodes quickly and counterparties begin competing for position.

Vendor communication therefore should be governed with the same discipline as liquidity management. Clear protocols, defined ownership, and consistency across all touchpoints are essential. The professional's task is twofold: preserve vendor confidence externally and impose communication discipline internally.

ETHICAL CONSIDERATIONS

Vendor management in distress is not a license for deception or manipulation. The process must be factual, ethically grounded, and consistent with legal obligations. That means not misleading vendors, not making promises that cannot be kept, and not allowing insiders with conflicts of interest to distort payment decisions. There is a clear difference between communications and decisions aligned with stakeholder interests and misrepresentation or improper conduct.

It also requires a disciplined distinction between what should be communicated and what should remain confidential. Vendors often want full visibility, but they are not entitled to every pertinent fact. The objective is not to volunteer every strategic detail; it is to provide enough truthful information to support rational credit behavior and preserve value. If pressed, it is appropriate to state that certain questions cannot be answered and, where permissible, explain why.

In this sense, vendor management is both an operational and fiduciary task. It is about keeping the business alive in a manner that can withstand scrutiny later. The most important conversations are high-stakes and high-trust; they should not be delegated to the most junior team members.

POTENTIAL OUTCOMES

A disciplined vendor management process does not guarantee a particular outcome. It does, however, improve the probability of a value-maximizing one. The range of possible outcomes generally includes:

- the business recovers and catches up on its past-due balances over time
- the business enters formal proceedings, and vendor communications and payments leading up to the filing become more fraught and potentially subject to subsequent dispute
- legacy balances are resolved through structured payment plans whether informal or formal, negotiated settlements, or other transactions contingent on financing, sale, or other strategic outcomes once there is process clarity.

In each case, the quality of vendor management affects the amount of value preserved before the ultimate outcome is reached and can meaningfully buy time to get there. Strong vendor management also puts the company in a better position to execute whichever path ultimately proves necessary. In one recent engagement, early work negotiating payment plans and maintaining regular communication with a broad vendor base created credibility that later proved critical. When the anticipated sales recovery did not materialize, that credibility supported negotiations that produced substantial savings through an out-of-court restructuring, avoided bankruptcy, and preserved significant going-concern value.

CONCLUSION

Vendor management in stressed and distressed situations should be viewed as a core liquidity discipline. Trade credit is not a passive liability. It is a dynamic financing source that supports the cash conversion cycle and therefore the ongoing operation of the business.

Once vendor confidence weakens, liquidity can deteriorate faster than conventional forecasts suggest because the problem spreads beyond disbursements and into inventory flow, revenue generation, receivables, and borrowing capacity. That risk is real, but it is not always unavoidable. A skilled professional, using disciplined communication, structured payment decision-making, and strong governance over both management behavior and vendor messaging, can often preserve confidence long enough for broader efforts to create value to succeed or fail.

In many situations, that is what keeping a company alive requires: preserving operating continuity while broader restructuring efforts are executed.

ABOUT THE AUTHOR

John Halloran, CIRA, CFA
J. Halloran Partners LLC

John serves as an interim CFO/COO for middle-market companies facing liquidity pressure, operational disruption, or leadership transitions. He works inside businesses to stabilize cash flow, rebuild forecasting and financial infrastructure, and align stakeholders around execution. Previously a senior director at SierraConstellation Partners, he has a background in private equity and strategy consulting. His experience includes interim executive roles, Chief Restructuring Officer support, and financial advisory work across restructurings, M&A, and performance improvement situations, both in and out of court.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THE ABILITY-TO-PAY TEST: PRINCIPLES, POLICIES AND PRACTICES

BY BORIS J. STEFFEN, CIRA, CDBV

INTRODUCTION

An objective of the Bankruptcy Code is to encourage a fair distribution of estate assets between similarly positioned creditors. To facilitate this goal and deter a debtor from favoring a particular creditor, the Bankruptcy Code provides that preferential and fraudulent transfers may be avoided for the benefit of the estate. As pertains to the Ability-to-Pay test within the constructive fraudulent transfer context, a debtor is unable to pay its debts when due if it "intended to or believed that it would incur debts beyond its ability to pay as they matured."[1] Also referred to as the cash flow or equitable solvency test,[2] the test considers if "the debtor was objectively unable to pay its debts or reasonably should have come to that conclusion."[3] In general, ability-to-pay is evidenced by a firm's paying its liabilities when due in the ordinary course of business. It is not enough for the firm to be able to meet its current obligations, however. The firm must be able to meet its future obligations as well.

GUIDING PRINCIPLES

There are two prongs to the Ability-to-Pay test: subjective and objective. The subjective prong posits that the debtor could not have reasonably believed it would be able to pay its debts at maturity based on available facts and circumstances.[4] That a debtor should have concluded it was unable to pay its debts may be inferred subjectively from where "the facts and circumstances surrounding the transaction show that the debtor could not have reasonably believed that it would be able to pay its debts as they matured." The objective prong examines the number of debts, amount of any delinquency, the materiality of non-payment and the debtor's management of its financial affairs.[5] The failure of either prong at the time of the transfer indicates an inability to pay.[6]

Factors analyzed may include contemporaneous liquidity and leverage measures, the debtor's payment history, check holds to vendors, timing of invoice payments, past due accounts, demand letters, and collection efforts.[7] With respect to the subject firm's cash flows, it is necessary as a precursor to the foregoing to assess whether the relevant cash flow projections were reasonable when prepared.[8] And while the analysis "should include . . . all reasonably anticipated sources of operating funds, which may include new equity infusions, cash from operations, or cash from secured or unsecured loans over the relevant time period,"[9] "only those cash flows that were reasonable for a company to have expected to receive…..are considered."[10]

EVIDENTIARY INPUTS

Though intended to provide direction for Criminal Division lawyers of the U.S. Department of Justice in their assessments of whether a business can afford to pay a criminal fine or monetary penalty, the requests for historical, contemporaneous and prospective operational, financial, and strategic data and information specified in the U.S. Department of Justice "Inability-to-Pay Questionnaire" are equally

1 11 U.S.C. §548(a) (1)(B)(i)(ii)(III).
2 Heaton, J.B., Solvency Tests, Business Lawyer, Vol. 62, No. 3, 988 (2007).
3 Tronox Inc. v. Kerr McGee Corp., 503 B.R. at 323-24 (Bankr. S.D.N.Y. 2013), citing ASARCO, 396 B.R. at 399; Doctors Hosp. of Hyde Park, Inc., 507 B.R. at 635-636.
4 WRT Creditors Liquidation Trust v. WRT Bankr. Litig. Master File (In re WRT Energy Corp.), 282 B.R. 415 (Bankr. W.D. La. 2001).
5 ASARCO LLC v. Ams. Mining Corp., 396 B.R. 401-02 (S.D. Tex. 2008).
6 ASARCO, 396 B.R. at 399; WRT Creditors Liquidation Trust v. WRT Bankruptcy Litig. Master File (In re WRT Energy Corp.), 282 B.R. 415 (Bankr. W.D. La. 2001).
7 Ibid., at 399-400.
8 Moody v. Security Pacific Business Credit, 971 F. 2d 1056, 1073 (3d Cir. 1992).
9 Moody, 971 F.2d at 1072 n.24.
10 In re Iridium Operating LLC, 273 B.R. 283, 345 (Bank. Ct. S.D.N.Y. 2007).

applicable to the analysis of whether a firm can pay its debts as they mature.[11]

Information categorically prioritized in the questionnaire includes, aside from supporting documentation, requests for (i) all cash flow projections created during the past year, (ii) all operating budgets and projections, including schedules of debt repayments and covenant calculations for the current year and prospectively, (iii) all capital budgets and/or projections of annual capital expenditures prepared within the last year, for the current year and prospectively, (iv) proposed changes in financing and capital structure, including debt restructuring, (v) acquisitions and/or divestitures of material assets or subsidiary companies, (vi) restructuring plans, including bankruptcy and/or liquidation, (vii) claims to insurers, including but not limited to directors and officers, (viii) related-party transactions, including intercompany loans, services agreements, and transfers of funds, within the past two years, (ix) encumbered assets, including documents sufficient to value each asset and establish its encumbrance, and (x) liens on any assets.

Information categorized in the aggregate as "additional," notwithstanding its import to the analysis, consists of (i) audited financial statements for the past five years and for the current fiscal year, (ii) federal corporate income tax returns for the past five years, (iii) copies of recent appraisals and/or valuation studies, including liquidation analyses, (iv) recent agings of accounts receivables and payables, including the break-out of receivables and payable by payer, (v) all current credit and loan agreements, (vi) compensation plans for the ten most-highly-compensated employees of the firm, and (vii) reports given to major lenders within the past three years, together with all correspondence with lenders to obtain additional credit and capital.

GENERAL CONSTRUCT OF THE TEST[12]

Assuming the analysis has confirmed the reasonableness of the projected cash flows, the payments of interest and principal on the company's debt subsequent to the date of the transaction in question are calculated and scheduled by date due. The liquidity available to the company for purposes of servicing its interest and principal payments on each due date over the projection period, typically three to five years, is then calculated, taking into account the projected financial performance of the company in scenarios reflecting the firm's historical financial performance, current economic conditions, and prospects. The company will pass the test if its unlevered free cash flow, cash on hand, new equity, and available borrowing (i.e., ability to tap unused credit from the company's revolving credit line without causing a default) are sufficient to make its required debt payments when due. Borrowing availability over the projection period may also consider the ability to relever the company to capitalize on the capacity made available by prior debt payments.

STEP 1: THE REASONABLENESS OF PROJECTIONS[13]

The reasonableness of projections "must be tested by an objective standard anchored in the company's actual performance."[14] The objective of the analysis is therefore to identify revenue and expense items that individually or as compared to each other differ from expectations. The analysis will generally focus on the key variables underlying the calculation of unlevered free cash flow, namely revenues; earnings before interest, taxes, depreciation, and amortization; earnings before interest and taxes; capital expenditures; working capital; depreciation; amortization; and taxes. Where management has specifically identified other elements as being critical to managing the firm's operations, consideration should be given to including those elements.

Once the key variables have been identified, the next step is to determine what method or combination of methods is most appropriate for the purposes of the analysis. In practice, it is typical to compare (1) management's projections with the firm's historical financial results, (2) the firm's historical results with contemporaneous budgets and forecasts, and (3) ratios derived from management's projections with ratios calculated for comparable companies. These comparisons might be made on a line-by-line basis and should include profitability margins and growth rates, with a view toward identifying patterns, trends, and variances that affirm or call into question the relevance and reliability of the projections. It is also important to be mindful of whether the projections are indicative of conditions at the peak or trough of the business cycle, and whether they are dependent on obtaining additional financing or other external developmental initiatives such as mergers and acquisitions (M&A), the cost for which should be subtracted in the calculation of free cash flow if

11 Brian A. Benczkowski, Assistant Attorney General, *Evaluating a Business Organization's Ability to Pay a Criminal Fine or Criminal Monetary Penalty*, U.S. Department of Justice, Criminal Division, October 8, 2019, pp. 5-6.

12 Robert F. Reilly, Robert P. Schweihs, *Handbook of Advanced Business Valuation* (New York: McGraw-Hill), 2000, pp. 341-2.

13 Boris J. Steffen, *Reasonableness of Projections from Outside Looking In*, ABI Journal, September 14, 2015.

14 Moody v. Sec. Pacific Bus. Credit Inc., 971 F2.d 1056,1073 (3d Cir. 1992).

the growth rates inherent to the projections are in fact dependent on M&A, and if it is determined to be appropriate given the nature of the subject firm's operations and the practices of its industry.

STEP 2: PROJECTION SCENARIOS

In determining whether a company is able to pay its debts as they fall due, the company's projections are analyzed under a range of performance scenarios reflective of its business strategies, operating environment, and industry trends.[15] While the character of the set of scenarios to be tested is not prescribed, as a general matter, management's "base case" is assumed to be the best estimate of the company's expected performance and should therefore always be tested. A second important scenario would reflect "no changes," with zero percent sales growth and no change to gross profit, EBITDA, and EBIT margins. Additional scenarios might be developed if warranted by adjusting sales growth rates, gross profit margins, selling, general and administrative expenses, depreciation, and capital expenditures, either individually or in tandem. The results of each scenario are then analyzed to determine the ability of the company to pay its debts when due, the amount of unused revolving credit lines, and compliance with debt covenants such as minimum EBITDA, interest coverage, and maximum leverage ratios.

THE BLACK-SHOLES OPTION PRICING ADJUNCT

While a detailed discussion of the model's specification is beyond the scope of this article, the Black-Scholes option pricing model may be used as an adjunct where the possibility of bias taints the selection of scenarios by providing a specific quantitative estimate of a company's expected probability of defaulting on its debt based on the nature of its business and capital structure.[16] Implicit to the use of the model is the firm's insolvency at two points in time. The first is the specific maturity date on which the fair value of the company's assets falls below the amount of its debt. The second is any time over the life of the debt that the fair value of the assets falls below the amount of the debt. Together, this range captures the complete spectrum of a company's future performance and allows for the use of the same assumptions used by Black and Scholes to derive the model.

The model considers that the assets of a company behave like stock, randomly increasing on average due to reinvestment and randomly decreasing with payments of dividends and debt. The expected growth in the value of the assets is considered equal to the unleveraged discount rate, while the amount of debt owned by the company is assumed to increase the cost of debt. Maturity is estimated as the average duration of the debt, with the random up and down changes in the asset's value measured using the standard deviation of their volatility accounting for "unexpected" movements.

The inputs to the Black-Scholes default analysis model consist of: (i) asset value; the fair value of the company's assets at the transaction date, (ii) expected growth rate in assets; the unleveraged cost of equity of the company, (iii) expiration date, or time for debt repayment, estimated as the duration of the debt, equal to the weighted average of the present value of interest and principal payments on all debt, (iv) value of debt, equal to the face value of debt post-transaction, and (v) volatility of assets, the expected annual standard deviation of the company's future returns on assets. With these assumptions, the model

15 Robert F. Reilly, Robert P. Schweihs, *Handbook of Advanced Business Valuation* (New York: McGraw-Hill), pp. 347-8.

16 Id., pp. 343; 345-7.

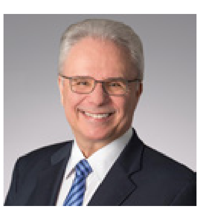
is used to estimate the bounds of the probability of default implied by the definitions of bankruptcy discussed above.

The calculation of the probability that the company's asset value will be less than the value of its debt at expiration considers only a single point in time. Whether the value of the asset fell below the value of the debt during the period in between is not contemplated. Consequently, this measure may understate the actual probability of default. The second calculation gives the probability that the company's asset value will fall below the value of debt at any time prior to expiration. In general, it should result in a higher probability of default as it reflects all cases where the asset value of the company is below the value of debt. Whenever either calculation results in a probability of default greater than 50 percent, the company arguably fails the test.

SUMMARY

As applied to the prosecution of constructive fraudulent transfer claims, the Ability-to-Pay test bolsters the Bankruptcy Code principle of promoting an equitable distribution of assets between comparably situated creditors. From review of judicial decisions and precedents, the policy adopted by courts is that a debtor will fail the test if it was objectively unable to pay its debts, or reasonably should have concluded that was the case. In practice, the test is conducted by analyzing the debtor's ability to make payments of interest and principal on each due date considering its historical financial performance, current economic conditions, and prospects. Also of import, if failing the test in a Chapter 11 case, the plan of reorganization may be deemed not feasible and converted to a Chapter 7 liquidation or dismissed in its entirety.

ABOUT THE AUTHOR



Boris J. Steffen, CIRA, CDBV, CPA, ABV, ASA, CGMA
Province, LLC

Boris is the President of AIRA, and a Managing Director in the Corporate Restructuring and Litigation practices of Province, LLC. With over 30 years' experience as a financial advisor and expert witness to holders of interests and claims exceeding $240 billion, he advised the Unsecured Creditors Committee in Global Clean Energy, Incora, Revlon, Purdue Pharma, Thrasio, Ascena Retail Group, Eagle Hospitality Trust, Committee of Opioid Related Creditors in Mallinckrodt PLC, Opioid Claimant Committee in Endo International plc, and the Special Committee of the Board of Managers in Intelsat Envision Holdings.

FROM DISTRESS TO DEAL:
HOW INCENTIVE DESIGN SHAPES RESTRUCTURING OUTCOMES

BY ALLISON HOEINGHAUS & RYAN WELLS

> In distressed environments, compensation design can influence whether management resists, delays, or actively pursues a value-maximizing transaction.

Financial distress often forces companies to redesign their compensation programs originally built for stable operating environments. As uncertainty increases, traditional incentive structures can lose their intended effect. This shift can create misalignment between company priorities and management decision making.

At the same time, distress can accelerate pathways to a transaction. Companies facing financial stress can quickly become attractive acquisition targets, whether due to depressed equity values or post-restructuring improved balance sheets and operational fundamentals. As a result, change in control ("CIC") potential may increase in the period leading up to, during, and shortly after restructuring. In this environment, incentive compensation design can play a critical role in influencing management teams' actions toward value creation.

With critical decisions on the line, this article explores incentive design, CIC market trends, and IRC Section 280G[1] considerations for distressed companies.

DESIGNING INCENTIVE PLANS AHEAD OF STRATEGIC ALTERNATIVES

Long-term incentive programs are central to aligning executive behavior with shareholder value, but their effectiveness depends on stable conditions. Volatility can significantly reduce both the economic and perceived value of such long-term incentives.

Stock options, in particular, are highly sensitive to share price fluctuations, resulting in unpredictable outcomes. When options go underwater, they often provide limited retentive or motivational value.

Performance-vesting awards may remain conceptually attractive from a governance and pay-for-performance perspective. However, as conditions deteriorate, establishing credible performance goals becomes increasingly difficult. Forecast accuracy declines and metrics that once reflected value creation may no longer align with strategic priorities.

In these circumstances, executives may view status quo metrics tied to the annual performance award as unattainable or disconnected from their ability to influence results. As a result, companies often recalibrate their long-term incentive mix toward time-vesting, full-value awards during periods of distress.

Time-vesting, full value awards provide a clearer line of sight to value realization and are less dependent on potentially volatile assumptions. Importantly, companies typically view this shift as a temporary

1 Note: Unless otherwise indicated, all section references in this article are to the Internal Revenue Code of 1986, as amended (the "Code") or to the Treasury Regulations ("Regulations" or "Treasury Regulations") promulgated thereunder.

response rather than a permanent retreat from performance-based compensation. By emphasizing service-based vesting during instability, organizations can preserve leadership continuity while maintaining strategic focus.

That said, performance vesting awards should not be disregarded entirely. When used appropriately, they can reinforce alignment with value creation, provided performance metrics are carefully selected. In some cases, milestone-based or relative performance measures may offer greater flexibility than absolute financial targets.

In a distressed environment, strategic alternatives — including an acquisition — can arise quickly. Therefore, when making adjustments to incentive programs ahead of potential strategic alternatives, it is crucial to consider how these design features will function if a CIC occurs – both from an economic perspective and through the lens of the "Golden Parachute" tax rules under Section 280G. Decisions made during distress can materially affect CIC outcomes, sometimes in ways which become evident later in the transaction process.

THE GOLDEN PARACHUTE RULES

The Section 280G Golden Parachute rules generally apply when a corporation undergoes a CIC. Section 280G provides that a CIC is deemed to occur in the following three scenarios:

- a change in the corporation's ownership
- a change in effective control of the corporation
- a change in the ownership of a substantial portion of the corporation's assets.

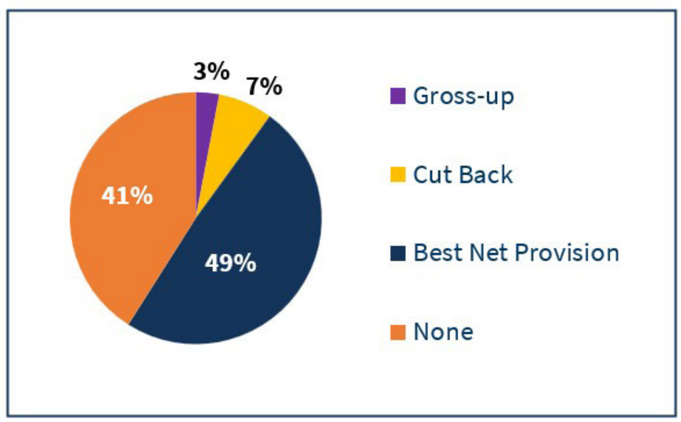
Sections 280G and 4999 impose a 20% excise tax on individuals who receive "excess parachute payments," while the company loses the corresponding tax deduction. Further, the employer is responsible for withholding the excise tax from individuals in the same manner as federal income taxes. The Golden Parachute rules apply to Disqualified Individuals ("DIs") – a DI is anyone who (a) is an employee or independent contractor who performs personal services for a corporation and (b) is an officer, 1% shareholder, or highly compensated individual.

An "excess parachute payment" is defined as the amount by which the "parachute payment" exceeds the "base amount" if the aggregate present value of the parachute payments exceeds three times the individual's base amount. The base amount is defined as the average of the individual's annualized includible compensation (generally Form W-2 box 1 compensation) for the previous five years. A parachute payment is generally defined as a payment in the nature of compensation that is contingent upon a CIC. Common examples of parachute payments include severance, prorated bonuses, and the accelerated vesting of equity awards.

Given the potentially large tax impacts of Section 280G, excise tax protections are important considerations. Companies often evaluate excise tax protection design features, commonly including the following:

Provision	Description
Gross-up	The company pays the executive the full amount of any excise tax imposed. The gross-up payment thereby makes the executive "whole" on an after-tax basis. The gross-up includes applicable federal, state, and local taxes resulting from the payment of the excise tax.
Cut Back	The company cuts back parachute payments to the "safe harbor" limit to avoid any excise tax.
Best-Net	The company cuts back parachute payments to the "safe harbor" limit if it is more financially advantageous to the executive. Otherwise the company does not adjust the payments and the executive is responsible for paying the excise tax.
None	Some companies do not address the excise tax; therefore executives are solely responsible for the excise tax.

Alvarez & Marsal's 2025/2026 Executive Change in Control Report ("CIC Report")[2] captured the following details with respect to such excise tax provisions:



Gross-ups to employees to cover tax obligations are very uncommon since they are viewed as an unfavorable compensation practice by shareholders. Accordingly, it places even greater importance on the initial design of compensation programs to be structured as favorably as possible under the Section 280G rules.

2 https://www.alvarezandmarsal.com/thought-leadership/2025-2026-executive-change-in-control-report.

IMPACTS ON INCENTIVE COMPENSATION

The type, timing, and vesting structure of equity awards can materially affect economic and tax outcomes; accordingly, the following design elements should be carefully considered.

1. Performance-vesting awards - While performance awards may provide less predictability, executives would be able to participate in upside opportunity. Performance awards can be powerful tools that incentivize executive teams to maximize stakeholder value. Compared to time-vesting awards, awards tied to specific performance metrics generally have a more significant impact on excise tax calculations since they are not eligible for a valuation discount. Although mitigation strategies may be available, these awards are inherently more variable and can introduce uncertainty in tax planning, particularly when targets shift during a restructuring.

2. Time-vesting awards - These awards generally offer more predictability and retentive value, which makes them easier to plan for in a restructuring or CIC scenario. Provided certain conditions are met, awards that vest solely based on continued service may qualify for a beneficial discounted valuation under Section 280G, which can ease the negative tax impact of such awards.

3. Cash Awards vs. Equity Awards

- **Cash-based awards** generally involve less variability in ultimate value, allowing more cash flow certainty for the executive and company. Such awards also allow for more precise Section 280G planning.
- **Cash-settled equity awards** are typically valued using an average closing stock price over a predetermined period, offering greater certainty as the CIC date approaches.
- **Stock-settled equity awards** are generally valued based on the closing price on the CIC date, resulting in higher variability and making sensitivity analyses an important planning tool.

THE PIVOT TO CASH

If financial distress becomes too severe, equity compensation programs will cease to function as desired. When share prices decline and remain depressed for long periods, employees will no longer value equity awards as a reliable component of their compensation package. Further, depressed share prices put pressure on equity share pools to the point where a company no longer has enough shares reserved to grant meaningful value to employees. Accordingly, there becomes a point where companies must shift to a predominantly cash-based compensation philosophy. The diminishing utility of equity awards typically happens over a period of time and often begins well in advance of the formal evaluation of strategic alternatives. It is critical that companies continually monitor the effectiveness of their equity compensation programs and proactively make the pivot to cash to achieve maximum retention and incentivization.

SECTION 280G CONSIDERATIONS INSIDE CHAPTER 11

During Chapter 11, a pivot to traditional restructuring compensation programs often becomes necessary since existing equity awards lose substantial value and effectiveness. In practice, that often includes a combination of pre-paid retention awards and court-approved Key Employee Incentive Plans ("KEIPs") and Key Employee Retention Plans ("KERPs").[3] When designing these programs, it is also important to consider potential impacts of a transaction and the application of Section 280G.

Oftentimes, a CIC will not be triggered under Section 280G while a corporation is in Chapter 11. However, there are certain Chapter 11 fact patterns where Section 280G can still apply. We most often see Section 280G apply during Chapter 11 in the following two scenarios: (1) when there is a substantial asset sale or (2) when a corporation has a major lender that converts its debt into new equity.

In contrast to public companies, private companies can often obtain shareholder approval to mitigate the impact of Section 280G. Similarly, in the context of an in-court restructuring — particularly Chapter 11 asset sales — bankruptcy court approval can serve a similar "cleansing" function for both public and private companies.

Leveraging bankruptcy court approval can provide relief from potential excise taxes and reduce uncertainty around critical executive compensation programs during a restructuring. Early in the restructuring process, it is important to understand the extent to which bankruptcy court approval can provide relief based on all facts and circumstances.

3 This article does not address specific Bankruptcy Code criteria for court approval of KEIPs and KERPs.

> In certain circumstances in Chapter 11 cases, bankruptcy court approval can effectively satisfy the shareholder approval exception under Section 280G.

INCENTIVE DESIGN FOLLOWING A RESTRUCTURING

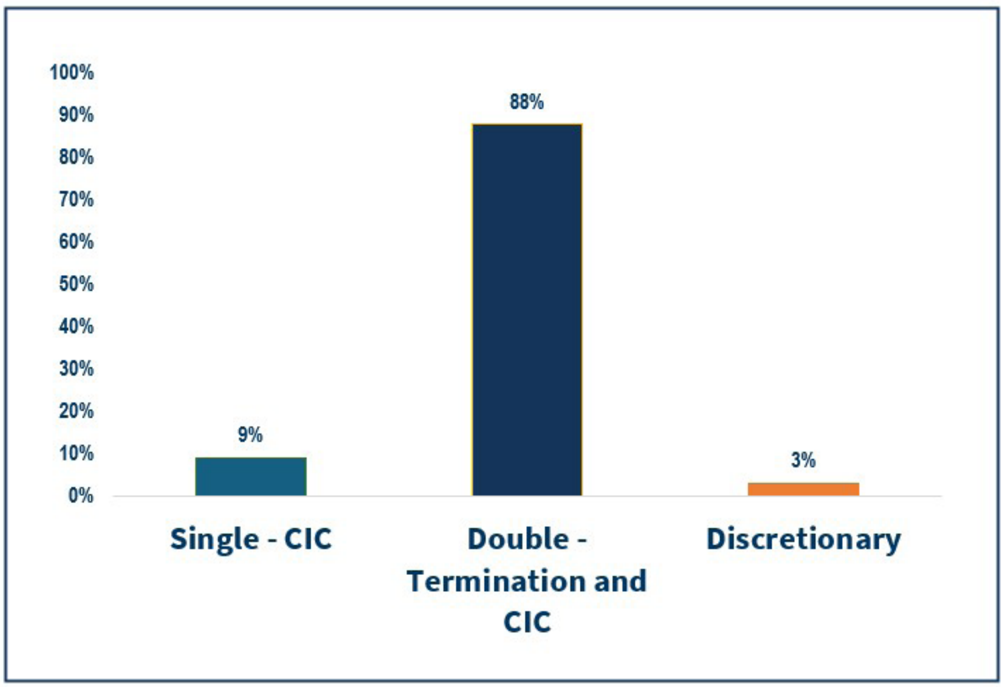
Following a restructuring, companies often implement management incentive plans ("MIPs") to quickly align key employees' results with shareholder value. MIPs are typically structured as large one-time grants of equity which vest over several years. When designing MIPs or other incentive programs upon emergence from a restructuring, it is crucial to consider how these new programs will function if a CIC occurs. In some cases, we find that MIP performance metrics are actually designed in a manner to encourage the pursuit of a transaction.

CIC protections for these incentive programs can serve an important function by allowing executives to evaluate potential transactions objectively. In many cases following a corporate restructuring, the best alternative for stakeholders may be to seek a buyer for the company. Properly designed CIC provisions reduce the risk that personal economic considerations will interfere with strategic decision making. This structure ensures that incentives align with thoughtful decision making rather than opportunistic departures.

Recent market data continues to show that equity acceleration is the largest component of Golden Parachute payments – comprising approximately 60% of the total value of CIC benefits for CEOs and CFOs. The average total CIC value for benefit payouts is detailed below.

Periodic evaluation of short-term and long-term incentive plans, employment agreements, and CIC severance arrangements helps maintain balance between retention goals, governance standards, and shareholder interests.

Following emergence from a restructuring, companies often reevaluate the vesting mechanics of equity awards in a CIC context. While double-trigger[4] vesting remains the prevailing market practice - observed at approximately 88% of companies according to



4 Double-trigger acceleration requires a CIC plus termination without cause or resignation for "good reason" within a certain period after the CIC.

KEY FINDINGS

Average total CIC value for benefit payouts

CEO

$26,840,000

CFO

$8,450,000

0.7%

Average total value of CIC benefits for CEOs and CFOs as a percentage of market cap

A&M's CIC Report - single-trigger[5] prevalence typically increases for companies emerging from bankruptcy to compensate for the elevated level of uncertainty.

KEY TAKEAWAYS

Compensation design throughout distress is most effective when it anticipates a transaction rather than reacting to one. Incentive programs that balance retention, motivation, and tax considerations can help management remain focused on maximizing enterprise value, even as timelines accelerate and outcomes shift.

Early, thoughtful attention to incentive design — particularly around long-term equity, CIC provisions, and Section 280G exposure — provides companies with greater flexibility when strategic alternatives converge. In restructuring environments, compensation can be a strategic tool that influences how — and how well — a company can navigate distress.

5 Single-trigger acceleration only requires a CIC to occur for vesting to be accelerated.

ABOUT THE AUTHORS

Allison Hoeinghaus
Alvarez & Marsal

Allison is a Managing Director with Alvarez & Marsal's Compensation and Benefits practice in Dallas. She brings more than 15 years of experience in compensation and benefits matters for both public and private companies. Allison helps companies tackle how to effectively and efficiently pay and incentivize their employees. She works with companies to design and benchmark annual bonus and long-term incentive compensation programs, all while considering the applicable tax, accounting, and other regulatory ramifications.

Ryan Wells
Alvarez & Marsal

Ryan is a Senior Director with Alvarez & Marsal. He advises clients on a variety of compensation and benefit issues with a specialty in executive compensation. Ryan designs compensation programs for each phase of a company's lifecycle, including initial public offerings, steady-state, restructuring, and mergers & acquisitions. Ryan assists with the review, design, benchmarking, and implementation of both non-equity and equity-based compensation programs, performing market analyses to align compensation with a company's business strategies, and evaluating the tax and accounting ramifications of compensation.

THE VALUE OF BEING REJECTED: DETERMINING THE APPROPRIATE DISCOUNT RATE FOR REJECTION DAMAGES

BY SAM ASHURAEY

When a debtor terminates a contract in bankruptcy, the counterparty should be compensated for the resulting damages. However, damages for the loss of future payments under the contract are discounted to present value because the counterparty (now creditor) is receiving a lump sum today, meaning it should not be compensated for the risk and time value of a stream of future payments. The few cases that have ruled on the appropriate discount rate have based that rate on either (a) the debtor's prepetition interest rates or (b) the creditor's weighted average cost of capital (WACC). This article discusses the cases and the two approaches, and argues that using the creditor's WACC is a more precise way for courts to capture risk in most cases.

BACKGROUND

Section 502(b) of the Bankruptcy Code provides that courts shall determine the amount of a claim "as of the date of the filing of the petition."[1] This includes claims for future payments a party did not receive and/or future losses it incurred due to a rejected (i.e., terminated) executory contract.[2] Courts interpret this provision to require a determination of the "present value" of the claim as of the petition date.[3]

As the name implies, calculating the present value of a claim is meant to convert the value of future payments a party was supposed to receive under, or losses it will incur due to, a rejected contract into an equivalent value as of the date of the calculation.[4] This is done by dividing each future payment by a discount rate that grows exponentially the further in the future the payment is made.[5] The discount rate is therefore the central component of the present value calculation. The higher the discount rate, the lower the resulting net present value. In payments that will be made far in the future, relatively small changes in the discount rate significantly impact their present value. For example, assuming a 5% discount rate, the net present value of a 30-year stream of $1,000,000 in annual payments is approximately $15.6 million. Assuming a 7% discount rate, it is approximately $12.5 million.[6]

Courts consider a variety of factors when determining the appropriate discount rate, but generally, the rate

1 11 U.S.C. § 502(b) (2021).
2 *See* id. § 502(g).
3 E.g., *In re* CSC Indus., Inc., 232 F.3d 505, 508 (6th Cir. 2000); *In re* CF & I Fabricators of Utah, Inc., 150 F.3d 1293, 1300 (10th Cir. 1998).

4 Robert M. Lloyd, *Discounting Lost Profits in Business Litigation: What Every Lawyer and Judge Needs to Know,* 9 Transactions: Tenn. J. of Bus. L. 9 (2007).
5 Id. at 12-13.
6 Id. at 12-16.

is meant to reflect two principles: (1) the time value of money (i.e., a smaller amount could be invested today and yield the same amount in the future); and (2) the risk associated with a particular investment (i.e., the higher the risk, the higher the return required to compensate for the risk, and generally, longer-term investments carry higher risk than shorter-term investments because more is unknown).[7]

CASE LAW

There is no mandated method of calculating the present value of rejection damages,[8] and courts have exercised considerable discretion in determining the appropriate discount rate. For instance, courts will often consider expert testimony advocating for the use of precise numbers but ultimately choose their own number.[9] Nevertheless, the handful of cases with substantive discussions on the issue generally agree on two principles of risk that should be reflected in the discount rate. First, the relevant time for determining the risk is the time at which the contract was entered into.[10] Second, the rate should reflect the risk associated with the particular debtor in question.[11] These principles reflect the idea that the creditor agreed to bear a certain amount of risk by entering into a contract with a particular debtor at a particular time.

Where the cases diverge is on the underlying basis for the discount rate. On the one hand, three cases (the "Interest Rate Cases") base the discount rate on the interest rates charged on the debtor's prepetition debt: *In re Mirant,*[12] along with subsequent cases that relied heavily on the reasoning therein, *In re USGen New England (USGen I)*[13] and *In re B456 Systems*.[14] On the other hand, two cases (the "WACC Cases") base the discount rate on the creditor's weighted average cost of capital:[15] *In re MSR Resort*[16] and *In re M Waikiki*.[17] As explained below, each of the two approaches reflects a different theory of how risk should be captured in the discount rate. The approach adopted by the court can lead to significantly different discount rates and therefore significantly different claim amounts.

THE INTEREST RATE CASES

In *In re Mirant*, the debtors rejected an agreement with the owner of a pipeline, Kern River Gas Transmission Company, to pay for transmission capacity for a period of 15 years.[18] Under the agreement, the debtors, who were merchant energy providers, were required to pay for the capacity regardless of whether it was used.[19]

Within a few months of the beginning of the term of the contract, the debtors filed for Chapter 11 bankruptcy.[20] Kern River filed a claim for rejection damages, which represented the total remaining payments due under the contract, less mitigation, discounted to present value.[21] The discount rates it proposed ranged from 1.07% to 5.14%, which were derived from the federal judgment rate, the FERC refund rate, and the interest rate on debt issued by Kern River.[22] The debtors objected, arguing that a rate

7 E.g., *In re* Mirant Corp., 332 B.R. 139, 156 (Bankr. N.D. Tex. 2005). *See also* Lloyd, *supra* note 4, at 19-23 (explaining the concept of "risk" as the term is used in financial theory, which can be thought of as volatility, i.e., "the likelihood that the actual outcome will be close to the expected value . . . .").

8 *In re* Fed.-Mogul Glob., Inc., 330 B.R. 133, 162 (Bankr. D. Del. 2005) (citing St. Louis Sw. Ry. Co. v. Dickerson, 470 U.S. 409, (1985)).

9 E.g., Bench Ruling at 22, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397) (rejecting rates proposed by debtors (13.6%-14.6%) and creditor (8%), and picking 11.69% based on creditor's weighted average cost of capital plus 1% for the risk associated with the debtor); *In re* Mirant, 332 B.R. at 159 (rejecting rates proposed by debtors (14.25%) and creditor (1.07% to 5.14%), and picking a rate of 8% after looking to debtors' prepetition unsecured interest rates of 7.4%-9.125%).

10 *In re* Mirant, 332 B.R. at 158-159 ("the risk to be taken into account is the risk of non-performance *at the time* Debtors contracted with [the creditor]") (emphasis added); *In re* B456 Systems, Inc., No. 12-12859, 2017 WL 6603817, at *25 (Bankr. U.S.D. Dec. 22, 2017); Bench Ruling at 17-18, *In re* MSR, No. 11-10372 (No. 1397). The author is aware of one exception to this general principle, where a court found the relevant time for determining risk to be when it was valuing the claim (i.e., after the petition date). *But see In re* USGen New England Inc., 429 B.R 437, 490 (Bank. D. Md. 2010) [hereinafter *USGen II*] *aff'd sub. nom.* Trans Canada Pipelines Ltd. v. USGen New England, Inc., 458 B.R. 195 (D. Md. 2011) (applying a risk-free rate to a claim against a solvent debtor for a claim arising out of the debtor's rejection of gas transportation contract with a pipeline operator and relying on Kucin v. Devan, 251 B.R. 269, 273 (D. Md. 2000) which found that the benefits in a non-executory retirement "are a legal certainty and need not be further discounted for the risk of nonpayment"); *see also* In re USGen, 429 B.R. at 490-91 (stating that the debtor "is a solvent bankruptcy estate and [the creditor's] claim, like all claims, will be paid in full with interest according to [debtor]'s confirmed plan"). *See In re* USGen New England, Inc., No. 03-30465, 2007 WL 1074055, at *4 (Bankr. D. Md. Jan. 23, 2007) [hereinafter *USGen I*] (demonstrating the discretion courts exercise when determining the appropriate discount rate) (following *In re* Mirant and using the interest rate under the debtor's prepetition credit facility as the discount rate).

11 *In re* Mirant, 332 B.R. at 157-58; *In re* B456 Systems, 2017 WL 6603817, at *24; *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *4 (Bankr. D. Haw. June 7, 2012) (incorporating risk associated with debtor into discount rate); Bench Ruling at 17-18, *In re* MSR, No. 11-10372 (No. 1397).

12 *In re* Mirant, 332 B.R. at 160.

13 *USGen I*, *supra* note 10, at *8.

14 *In re* B456 Systems, 2017 WL 6603817, at *25.

15 A firm's WACC is the weighted average cost of its combined equity and debt, and is calculated by adding the cost of the firm's equity (multiplied by the ratio of its equity to its total debt and equity) to the cost of its debt (multiplied by the ratio of its debt to its total debt and equity). *See generally* Lloyd, *supra* note 4, at 32-43 (discussing WACC, the financial theory, and the reasons it is used to discount damages in detail).

16 Bench Ruling at 18, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397).

17 *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *4 (Bankr. D. Haw. June 7, 2012).

18 *In re* Mirant Corp., 332 B.R. 139, 145 (Bankr. N.D. Tex. 2005).

19 Id.

20 Id. at 145-46.

21 Id. at 146.

22 Id. at 157.

of 15.92% should be used to properly reflect the risk of lending to an entity already in bankruptcy.[23]

The court rejected Kern River's proposed federal judgment rate and the FERC refund rate as risk-free rates that only provided compensation for the passage of time.[24] The court also rejected the interest rate on Kern River's debt, noting that "it would be apt for assessing the correct discount rate on an obligation *from* Kern River than one *to* Kern River" (but noting this rate was "closer to the mark").[25] The Court also rejected the discount rate proposed by the debtors, stating that the risk that should be taken into account in determining the interest rate should be the risk of non-performance at the time they entered into a contract with the debtors and not the non-performance by a bankrupt entity.[26]

In determining the appropriate rate, the court stated that the discount rate should reflect the "risk of non-performance faced by Kern River before bankruptcy."[27] However, the court did not have "extensive evidence" on what that rate should be.[28] Accordingly, the court looked generally to the interest rates on the debtors' prepetition debt, which ranged from 7.4% to 9.125%.[29] The court found these rates "provided some guidance" and settled on 8%, which it found "will fairly compensate Kern River but will not overcompensate it at the expense of all other similarly situated creditors."[30] In doing so, the court explained its view of the underlying goal of discounting:

> The purpose of application of the discount rate is to reduce the Claim to an amount consistent with the allowed amounts of other claims. Just as 11 U.S.C. § 502(b)(2) provides for disallowance of a claim to the extent of unmatured interest, including an original issue discount…to ensure that a creditor is not compensated for time passage (and the concomitant risk) that will never be faced, so, too, a discount rate must be applied to a claim for rejection damages to compensate for the absence of future risk of non-performance.[31]

In *USGen I*, a case that had similar facts but little additional reasoning, the court applied *In re Mirant* to discount the damages arising from the debtor's rejection of a transmission capacity contract on the claimant's pipeline.[32] The court used the interest rate on the debtor's credit facility in the same year the contract was entered into as the discount rate.[33]

In *In re B456 Systems*, the debtors rejected a contract with Daimler pursuant to which the debtors would manufacture and supply car batteries to Daimler.[34] Daimler filed a proof of claim alleging damages equal to the difference between the price of the batteries under the contract and the replacement batteries it will acquire as a result of the debtors' rejection.[35] The debtors filed an objection to the amount.[36] Daimler's expert argued the risk-free rate on the petition date should be used (2.51%).[37] The debtors' expert, however, argued that the discount rate should account for the risk of the debtors' non-performance and used the interest rate on the debtors' loans at the time the contract was entered into to arrive at a rate of 13.71%.[38] The court ultimately rejected both proposed rates to await further analysis.[39] However, citing *In re Mirant*, the court concluded that "an appropriate discount rate must be determined based upon the debtors' weighted average cost of debt as of the date of the [contract]."[40]

THE WACC CASES

In *In re MSR Resort*, Hilton filed a claim for damages based on the debtor's rejection of three management agreements with Hilton.[41] Under the management agreements, Hilton was entitled to, among other things, a fixed fee based on revenue and an incentive fee if the hotels exceeded certain performance thresholds.[42]

The court evaluated expert testimony on the rate that should be used to discount the future expected net profits to present value.[43] Both sets of experts applied a discount rate that was based on Hilton's WACC.[44] Hilton's expert argued for an 8% discount rate.[45] The expert argued this was appropriate because, among other things, it was the WACC Hilton used to value its own management contracts.[46] The expert pointed to several other sources, including Bloomberg, that arrived at a similar WACC for Hilton.[47] He argued that

23 Id.
24 Id.
25 Id.
26 Id. at 158.
27 Id.
28 Id. at 158-59.
29 Id.
30 Id. at 159.
31 Id. at 158 (citations omitted).
32 *USGen I*, *supra* note 10, at *23.
33 Id.
34 *In re* B456 Systems, Inc., No. 12-12859, 2017 WL 6603817, at *2 (Bankr. U.S.D. Dec. 22, 2017).
35 Id.
36 Id.
37 Id. at *24.
38 Id.
39 Id. at *25.
40 Id.
41 Bench Ruling at 3, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397).
42 Id. at 5.
43 Id. at 4.
44 Id. at 19-20.
45 Id. at 10.
46 Id. at 19.
47 Id.

the risk associated with the contracts was minimal and, therefore, his proposed WACC should be the discount rate.[48]

The debtors' expert argued that higher discount rates should be used: 14.6% for one hotel and 13.6% for the other two.[49] The expert argued these numbers should be used because: (a) they incorporated a higher beta[50] (than Bloomberg's WACC did, for example), which was appropriate because Hilton's portfolio was riskier than the market as a whole; and (b) they accounted for property-specific risks at each of the hotel locations.[51]

The court found that Hilton's WACC was a good "starting point" but should be adjusted for debtor-specific risk.[52] The court began by using a WACC on Hilton's form 10-K from the same year it entered into the contracts (10.69%), which was consistent with the 1.29 beta provided by the debtors' expert.[53] The court then adjusted the beta upward by one percent for two of the properties and by two percent for one of the properties to account for the specific risk associated with each property.[54]

In *In re M Waikiki*, the debtor rejected an up-to-50-year management agreement with Marriott and filed a motion to estimate Marriott's rejection damages claim for purposes of voting and feasibility.[55] The management agreement provided that Marriott would receive a management fee equal to a fixed percentage of revenue and an incentive fee equal to a fixed percentage of operating profits that exceeded a certain threshold.[56] After less than a year of opening, during which the hotel suffered an operating loss, the debtor removed Marriott's employees from the hotel, inserted a new management company, and filed for bankruptcy.[57]

In determining the present value of Marriott's claim, the court applied two discount rates for the management fee to different parts of the term of the contract.[58] For the first seven years of the contract, the court used a 7.5% discount rate.[59] The court arrived at the discount rate by adding 1% to Marriott's WACC (6.5%) to account for some risk to reflect that a portfolio carries less risk than one hotel contract, but also noting that the risk was minimal during this period because Marriott was guaranteed a percentage of revenue for the first seven years (i.e., irrespective of profitability).[60] For the remaining 43 years, the court used a 13.5% discount rate to account for the additional risk of the debtor terminating the contract due to failure to meet certain metrics (because the debtor had that right after the seventh year).[61] The court also applied a 13.5% discount rate for the incentive fees for the full 50 years of the contract, noting that the poor performance of the hotel in the months before it filed for bankruptcy demonstrated the high risk that Marriott would not earn the incentive fees.[62]

ANALYSIS OF CASE LAW

OVERVIEW

A debtor's interest rate and a creditor's WACC each reflect a different view of how much risk a counterparty agreed to assume by contracting with the debtor. On the one hand, the Interest Rate Cases "reduce the claim to an amount consistent with the allowed amounts of other prepetition unsecured claims."[63] These courts use the cost of borrowing based on the theory that the interest rate represents the "market's assessment of risk" of contracting with the debtor.[64] Implicit in this one-size-fits-all approach is that all creditors took on substantially the same level of risk regardless of whether they were providing financing to the debtor or entering into a contract with the debtor.[65]

On the other hand, the WACC Cases use a claimant's cost of capital as the basis for the discount rate.[66] This means courts determine the present value of the claim in the same way the creditor would have valued its initial investment, including the risk inherent in that investment. A creditor's WACC, in addition to serving as the discount rate for calculating a creditor's

48 Id.
49 Id. at 19-20.
50 Beta is central to determining the equity component of the WACC calculation. The capital asset pricing model (CAPM) is typically used to derive a firm's cost of equity, which in turn uses beta as a measure of how much a firm's equity fluctuates with the market. It is often referred to as the "risk premium." A beta of 1 implies that a stock has the same volatility as the market as a whole, and a beta of 2, for example, implies twice the amount of volatility as the market. *See generally* Lloyd, *supra* note 4, at 37-43. Here, Bloomberg's WACC calculation used a beta of 1, while the debtor's expert argued a beta of 1.29 should be used.
51 Id. at 20.
52 Id. at 18.
53 Id. at 21.
54 Id. at 22.
55 *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *1 (Bankr. D. Haw. June 7, 2012).
56 Id.
57 Id. at *2.
58 Id. at *4-5.
59 Id. at *4.
60 Id.
61 Id. at *5.
62 Id.
63 *In re* B456 Systems, Inc., No. 12-12859, 2017 WL 6603817, at *24 (Bankr. U.S.D. Dec. 22, 2017); *see also In re* O.P.M. Leasing Serus., Inc., 56 B.R. 678, 681 (Bankr. S.D.N.Y. 1986) (although discount rate was not disputed, Chapter 11 Trustee applied a uniform discount rate to all claims and court stated that discounting is "mandated by the Code and treats [creditor] on par with other similarly classified general unsecured creditors.").
64 *See In re* Mirant Corp., 332 B.R. 139, 159 n.54 (Bank. N.D. Tex. 2005).
65 Id.
66 Bench Ruling at 18, *In re* MSR Resort Golf Course, LLC, No. 11-10372 (Bankr. S.D.N.Y. Aug. 31, 2012) (No. 1397); *In re* M Waikiki LLC, No. 11-02371, 2012 WL 2062421, at *4-5 (Bankr. D. Haw. June 7, 2012).

own net present value, is the hurdle rate it uses "to evaluate investment opportunities, as it is considered to represent the [creditor's] opportunity cost."[67] The creditor would only enter into a contract (i.e., investment opportunity) if the present value of the contract, which is arrived at based on an assessment of risk, is greater than the hurdle rate. Therefore, these cases capture the risk a particular creditor anticipated it would assume by entering into a contract with the debtor, which may be a very different level of risk than another contract counterparty anticipated. At the same time, the WACC cases, like the Interest Rate Cases, take into account debtor-specific risk: the courts adjusted the WACC upward to account for the risk of contracting with the debtor because the risk in Hilton's or Marriott's WACC represents the risk of their entire diversified portfolios (i.e., having one contract with one counterparty is theoretically more risky than a diversified portfolio of contracts with multiple counterparties).[68]

THE BETTER VIEW

The WACC Cases' approach represents a more precise method of capturing risk that takes into account the particular context of the executory contract and the particular debtor. *In re M Waikiki* and *In re MSR* Resort demonstrate this point particularly well because the courts were valuing management contracts that debtors had with international hotel chains. Each hotel chain held a portfolio consisting of a large number of such contracts. Each contract within the portfolio can be thought of as an investment, and Marriott or Hilton would not have made these investments if the anticipated returns did not exceed their internal hurdle rate costs of capital. Similarly, the creditor WACC would also be appropriate for a pipeline owner that relies on future revenue from multiple capacity contracts (like those in *In re Mirant* and *USGen I*) and uses its WACC to calculate how much to charge on each capacity contract.

The WACC approach also still achieves the core bankruptcy policy objective of treating similarly situated creditors similarly.[69] Simply discounting future claims to present value is how this objective is achieved because it makes future unliquidated claims comparable to claims that are liquidated today. The Bankruptcy Code does not suggest that this policy should translate into discounting all claims by the same discount rate.[70] Indeed, using a uniform rate for all creditors may result in inequitable treatment because claims of creditors who agreed to assume a low amount of risk may be discounted to reflect far higher amount of risk, and vice versa.

Furthermore, comparing the interest rate charged on unsecured debt to the discount rate on a rejection damages claim for lost profits is an apples-to-oranges comparison of risk. The risk a typical lender accepts when lending to a company, which is central to calculating the resulting interest rate, is the risk of the debtor's non-repayment. The risk a contract counterparty accepts, however, also includes a variety of other risks specific to the contract. Prior to — and particularly in — bankruptcy, these risks may be greater (e.g., if it is a non-competitive contract or one associated with a poor-performing segment of the debtor's business) or smaller (e.g., when the contract is critical to a debtor's going concern and will almost certainly be assumed).

Moreover, as a practical matter, depending on the number and type of creditors and their treatment under a reorganization plan, using a uniform prepetition borrowing rate to discount all claims may do little to ensure equal treatment of unsecured creditors. One such scenario is where a large rejection damages claim dwarfs – and is separately classified from – other unsecured claims. In this scenario, trade creditors can be separately classified and be paid in full; unsecured bondholders can also be separately classified and receive equity in the reorganized company, while the rejection damages claimant will receive a small percentage recovery on the effective date that may very well prove to be less valuable than what other unsecured creditors are receiving.[71] Indeed, the WACC Cases exemplify this fact pattern. The damages claims from the hotel management contracts were far larger than the remaining combined unsecured claims, were separately classified, and were anticipated to receive different recoveries than other unsecured claimants.[72]

67 CFI Team, *WACC*, CFI, https://corporatefinanceinstitute.com/resources/valuation/what-is-wacc-formula/ (last updated Sept. 27, 2023).
68 While both these cases adjusted WACC upward to reflect that a diversified portfolio of contracts reduces risk, it is conceivable that a court could adjust the WACC downward. For example, a creditor may rely on only a few contracts for its entire revenue stream (i.e., not a sufficient number for diversification to meaningfully reduce overall risk) and the contract with the debtor may have carried the least amount of risk.
69 *In re Mirant*, 332 B.R. at 158-59.
70 *In re Mirant*, 332 B.R. 139, 158 n.52 (Bank. N.D. Tex. 2005) (relying on the overarching bankruptcy goal that similarly situated creditors should be treated equally).
71 *See* Jesse M. Fried, *Executory Contracts and Performance Decisions*, 46 Duke L.J. 517 (1996).
72 Marriott Int'l., Inc. and Marriott Hotel Serv., Inc.'s Proposed Disclosure Statement for the Chapter 11 Plan of Reorganization of M Waikiki LLC at 19-20, *In re* M Waikiki, No. 11-02371 (Bankr. D. Haw. Feb. 27, 2012) (No. 1577) 2012 WL 2062421; Disclosure Statement for the First Amended Joint Plan of Reorganization of MSR Resort Golf Course LLC, et al., Pursuant to Chapter 11 of the Bankr. Code at 49, *In re* MSR Resort Golf Course LLC, No. 11-10372 (Bankr. S.D.N.Y. Sept. 25, 2012).

THE BETTER VIEW: SOMETIMES JUST ANOTHER VIEW?

While using a creditor's WACC to discount future payments is the most appropriate approach in many cases, in some cases, it is arguably only a proxy that is not any more precise than the interest rate. To use *In re B456 Systems* as an example, WACC may not be particularly well-suited for discounting the additional cost a car manufacturer will incur under a battery supply agreement because its original contract was rejected. Because batteries are only one part that Daimler needed to achieve its ultimate source of revenue (i.e., manufacturing automobiles), it is unlikely Daimler relied heavily on its WACC in deciding whether to contract with the particular debtor. Rather, Daimler likely looked to other factors such as the market price of batteries and the manufacturer's reliability and quality control. While the cost of batteries ultimately affects Daimler's profitability and cash flows, Daimler will manufacture cars regardless of the price of batteries because manufacturing cars will still be a profitable business that overcomes Daimler's WACC "hurdle rate" (in part because it will probably pass some or all of any additional battery prices to its customers). Accordingly, in that case, and absent a more scientific measure, the interest rate on the manufacturer's debt is an acceptable approximation of risk.

CONCLUSION

Determining the appropriate discount rate for a rejection damages claim will likely continue to be a fact-specific question over which bankruptcy courts will, and should, exercise considerable discretion. Nevertheless, the WACC Cases illustrate how courts can more precisely achieve a central goal of discounting — to reduce damages to present value by the amount of risk a creditor agreed to assume but will no longer be assuming. Moreover, adjusting the WACC to account for debtor-specific risk achieves the policy goal of treating similarly situated creditors similarly by capturing the same risk that all creditors agreed to assume – the risk of contracting with the debtor.

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ABOUT THE AUTHOR

Sam Ashuraey
Ashuraey Law PLLC

Sam is a New York–based corporate restructuring lawyer and the founder of Ashuraey Law. His practice centers on representing creditors in large Chapter 11 cases, with significant experience in bankruptcy claims trading and matters involving digital assets and cryptocurrency. Prior to founding Ashuraey Law, Sam practiced at leading restructuring firms, where he advised official committees, ad hoc lender groups, and debtors in complex, high profile matters. He is a graduate of Columbia Law School and the University of Pennsylvania and has been recognized by *Best Lawyers: Ones to Watch* and *New York Super Lawyers: Rising Stars*.

MEMBERS ON THE MOVE

JENNIFER MEYEROWITZ JOINS KCP ADVISORY AS SENIOR MANAGING DIRECTOR AND GENERAL COUNSEL

BOSTON, May 12, 2026 – KCP Advisory Group, a leading restructuring and advisory firm, today announced that Jennifer Meyerowitz has joined the firm as Senior Managing Director and General Counsel. In this role, Meyerowitz will advise clients on complex restructurings, distressed transactions, and operational turnarounds, while also overseeing the firm's legal strategy and governance.

Meyerowitz brings two decades of experience across restructuring, healthcare operations, and legal advisory. She has built a reputation for driving results in high-stakes environments by combining legal expertise with hands-on operational leadership. Her work has spanned advising debtors, creditors, lenders, and investors in complex restructurings, as well as leading operational improvements in distressed healthcare settings.

"Meyerowitz will expand KCP Advisory's healthcare advisory and receivership capabilities, working closely with clients on provider-side operational challenges, regulatory compliance, and care-driven restructurings," said Paul Valentine, Senior Managing Director and Head of KCP's Healthcare Consulting Practice. "She will continue to take on court-appointed and lender-driven fiduciary roles, further strengthening KCP's ability to manage and stabilize distressed situations."

"Jennifer's unique ability to bridge legal strategy with operational execution makes her an exceptional addition to our team," said Jacen Dinoff, Founder and CEO of KCP Advisory. "She understands how to structure a deal and how to make businesses function more effectively in real time. That perspective is invaluable to our clients, especially in highly regulated sectors like healthcare."

Prior to joining KCP Advisory Group, Meyerowitz served as Chief Growth Officer and General Counsel at a national healthcare turnaround firm. Earlier in her career, she practiced restructuring law at Alston & Bird and held senior roles at other organizations in the restructuring business.

"I am thrilled to join KCP Advisory and work alongside this talented team," said Meyerowitz. "The firm has built a strong reputation for delivering thoughtful, strategic solutions in complex situations. I look forward to helping clients navigate challenges, particularly in healthcare and other regulated industries, and to expanding the firm's receivership and fiduciary capabilities."

Meyerowitz is a member of the Board of Directors of the AIRA.

KCP Advisory is a leading advisory firm providing restructuring, turnaround, and strategic consulting services to companies, lenders, and investors.

MARSH'S OLIVER WYMAN TO ACQUIRE MANAGEMENT CONSULTING FIRM CR3 PARTNERS

NEW YORK, May 4, 2026 – Oliver Wyman, a global leader in management consulting and a business of Marsh (NYSE:MRSH), today announced an agreement to acquire CR3 Partners, a consulting firm specializing in transition, turnaround, and distress. The terms of the transaction were not disclosed.

The acquisition will deepen Oliver Wyman's capabilities in restructuring, liquidity management, operational improvement, and crisis response. CR3 Partners has established itself as a trusted partner advising companies, boards, lenders, and other stakeholders in the turnaround and restructuring process. Their deep bench of senior practitioners has led transformations across industrials, retail, healthcare, energy and financial services. Oliver Wyman and CR3 Partners will deliver integrated solutions for financial lenders, private equity sponsors, and corporate clients across industries.

"This acquisition underscores our focus on supporting clients during pivotal moments of transformation," said Tim Hoyland, Partner and Head of Americas Restructuring at Oliver Wyman. "CR3 Partners' hands-on turnaround expertise complements our strategic capabilities and expands our ability to help organizations stabilize performance and build long-term resilience. I'm delighted to welcome our new colleagues to the firm."

William Snyder, Senior Managing Director and Partner, CR3 Partners, added, "We look forward to bringing our combined capabilities to a broader set of clients, at greater scale, and backed by Oliver Wyman's geographic footprint, deep industry expertise, and strong performance transformation capabilities."

"I am excited to welcome CR3 Partners to our firm. Their expertise in turnaround and restructuring builds naturally on Oliver Wyman's strong performance transformation capabilities and expands what we can deliver for clients around the world," said Michael

Zeltkevic, Managing Partner and Global Head of Capabilities.

As part of the transaction, 62 professionals from CR3 Partners will join Oliver Wyman in multiple cities.

About Oliver Wyman

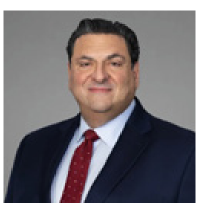
Oliver Wyman is a business of Marsh (NYSE: MRSH), a global leader in risk, reinsurance and capital, people and investments, and management consulting, advising clients in 130 countries, with annual revenue of $27 billion and more than 95,000 colleagues. For more information, visit oliverwyman.com.

About CR3 Partners

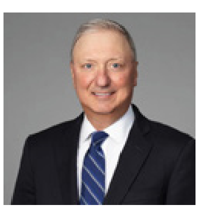
CR3 Partners is a leading turnaround and performance transformation advisory firm dedicated to helping companies navigate distress, restore operational performance and maximize enterprise value. The firm's professionals combine decades of operational, financial and restructuring experience with results-driven approach that has earned the trust of clients across a wide range of industries and тransaction types.

SMITH, GAMBRELL & RUSSELL, LLP EXPANDS BANKRUPTCY PRACTICE WITH ADDITION OF THREE PARTNERS

NEW YORK April 29, 2026 — Smith, Gambrell & Russell, LLP ("SGR") is pleased to announce the expansion of its Bankruptcy, Financial Restructuring, and Creditors' Rights practice with the addition of partners Allen G. Kadish, Gerard DiConza, and Harrison H.D. Breakstone, and associate Paris Gyparakis, in the firm's New York office.



Allen G. Kadish



Gerard DiConza

"Gerry, Allen, Harrison, and Paris each bring deep experience and strong market reputations in bankruptcy and restructuring," said Shelly DeRousse, head of the firm's Bankruptcy, Financial Restructuring and Creditors' Rights practice. "Together, they notably expand our capabilities in this area and give our clients access to a team that can handle the most complex, high-stakes insolvency matters in New York and throughout the country."

Kadish represents distressed businesses, creditors, lenders, fiduciaries, and investors navigating corporate crises, Chapter 11 restructurings, and out-of-court workouts across a broad range of industries, including real estate, healthcare, retail, energy, technology, and transportation. He serves on the Board of Directors of the American Bankruptcy Institute and has served on the Global Board of Directors of the Turnaround Management Association since 2015.

DiConza represents debtors, creditors, receivers, trustees, estate fiduciaries, distressed asset buyers, and other parties in interest in Chapter 11 cases and out-of-court restructurings. His practice includes the full spectrum of bankruptcy and restructuring work — from prosecuting avoidable transfer claims on behalf of estate fiduciaries, to navigating contested Section 363 sales, to advising debtors through restructurings. He has handled high-profile restructurings across industries, including high-end designer shoe retailers, national transportation and logistics companies, and commercial real estate owners.

Breakstone guides debtors, creditors, and stakeholders through complex corporate restructurings and bankruptcy proceedings with a strategic focus on preserving value and maximizing leverage. His practice spans debtors' and creditors' rights, bankruptcy litigation, and commercial disputes arising from financial distress.

Gyparakis represents financially distressed businesses, secured and unsecured creditors, and other stakeholders in corporate restructuring and bankruptcy cases. He counsels clients through Chapter 11 reorganizations, out-of-court workouts, and liquidations across multiple industries.

"SGR's national platform gives us the ability to serve clients in new ways," said Kadish. "When clients face complex restructuring challenges, they need more than bankruptcy counsel — they need a team that can engage on the litigation, real estate, corporate, and employment issues that inevitably arise alongside it. That's exactly what SGR offers, and it's what made this decision so compelling."

Smith, Gambrell & Russell, LLP's Bankruptcy, Financial Restructuring, and Creditors' Rights Practice represents creditors, lenders, debtors, and trustees in all aspects of bankruptcy and creditors' rights matters. The team emphasizes practical, business-oriented solutions while maintaining a readiness for litigation when necessary. Drawing on the firm's deep experience in commercial lending, financial services, and complementary areas such as real estate, litigation, and securities, the practice regularly delivers innovative strategies to resolve complex insolvency issues. To learn more, please visit: https://www.sgrlaw.com/practices/bankruptcy/.

AIRA GRANT NEWTON EDUCATIONAL ENDOWMENT FUND

CONGRATULATIONS TO ASHLEY BURTON

2026 SCHOLARSHIP / PEPPERDINE UNIVERSITY

Ashley Burton is a junior pursuing a bachelor's degree in accounting. She serves as Editor of the opinion section, Perspectives, for Pepperdine Graphic Media's newspaper, *The Graphic*, overseeing writers and editing in addition to writing articles. Ashley is President of the Gender and Sexuality Alliance club and plays flute for Pepperdine's Orchestra and Wind Ensemble.

Pepperdine's Accounting faculty selected Ashley for the scholarship because of her active campus involvement, excellent classroom performance, and interest in forensic work. In summer 2026, she will complete an internship at CBIZ in Forensic Accounting and Litigation Services.

THANK YOU TO ALL WHO HAVE CONTRIBUTED TO THE ENDOWMENT FUND.

SUPPORTING EDUCATION, RESEARCH, AND THE NEXT GENERATION

The AIRA Endowment Fund furthers educational programs and research in accounting, restructuring, and insolvency. Its work includes scholarships, research and educational forums, education for judges, court personnel, governmental and not-for-profit personnel, and other educational benefits for the bankruptcy and insolvency community.

Through the generosity of AIRA members, the Endowment Fund now supports a regular scholarship for an outstanding Pepperdine University accounting student.

CONTRIBUTE OR PLEDGE ONLINE AT HTTPS://AIRA.ORG/AIRA/ENDOWMENT_FUND

The Fund is a 501(c)(3) charitable organization; contributions may be tax-deductible as allowed by law.

For more information, contact AIRA Controller Sue Cicerone at scicerone@aira.org. Contributors of $200 or more will receive a limited-edition Grant W. Newton bobble head, designed to commemorate AIRA founder and former Executive Director Grant Newton's retirement after more than three decades of leadership and service to AIRA and its education program.

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1314 Center Drive, Suite B-132
Medford, OR 97501
Phone: 541-858-1665
aira@aira.org | www.aira.org

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