AIRA Journal

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WHAT'S INSIDE

SPECIAL FRAUD SECTION

35TH ANNUAL BANKRUPTCY & RESTRUCTURING CONFERENCE

See what's in store for AC19 | AIRA's 35th Annual Conference on p. 35 or visit www.aira.org for more information

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From the Executive Director's Desk

THOMAS MORROW, CIRA
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The Importance of Training

One of the most important roles of AIRA is training and this really sets AIRA apart in the restructuring community. As your competitors hire new financial advisors, many of them are sending their new recruits to AIRA for CIRA training. If you are not also actively investing in your people by sending them to the CIRA program, you risk falling behind. The AIRA has several vehicles for delivering outstanding training to financial advisors in the field of restructuring, including the following:

CIRA

Our primary certification is the Certified Insolvency and Restructuring Advisor. We have been offering the CIRA program since 1992 to recognize those professionals that demonstrate a high level of competency through not only the completion of a course of study and examination but by providing evidence of comprehensive experience. Since its inception approximately 2,000 professionals have completed the program and call themselves CIRA. It is by far the largest program of its kind for financial advisors in the restructuring world. We have just kicked off our schedule for 2019, including these courses at this time:

- CIRA 1, offered once, in Boston in conjunction with our annual conference June 6/3-6/5
- CIRA 2, offered 3 times – online in Spring (April 24 through May 9); in New York City July 16-18; online in Fall (November 5-15)
- CIRA 3, offered 2 times online – in June (6/11-6/21) and December (12/10-12/20)

Please check our web site www.aira.org for exact schedule information. If you have not yet started or completed your CIRA certificate, I strongly urge you to consider it as soon as you are able.

CDBV

In 2004 the AIRA introduced the Certification in Distressed Business Valuation program to address the need for a professional designation to distinguish those who are skilled and experienced in distressed business valuation work or expert valuation testimony in bankruptcy litigation. The CDBV program is designed to provide specialized training and certification that is uniquely and specifically formulated for the performance of services encompassing valuation of underperforming assets including distressed entities and especially those in bankruptcy. The CDBV program is in three-parts: Part 1, a two-day class followed by a half-day test, and Parts 2 and 3, which are three-day classes followed by half-day exams.

CDBV courses are offered less frequently than CIRA; however, there are opportunities to be exempted from some requirements. CDBV Part 1 is waived if you have your CIRA or the CTP offered by the Turnaround Management Association. CDBV Part 2 is waived for valuation professionals with any of the following certifications: ASA-business valuation, CBA, CFA, CPA/ABV or CVA/AVA.

This year, CDBV 1 is offered online in April (4/24-5/9), in New York in July (7/16-7/18), and again online in November (11/5-11/15). CDBV 3 is offered online in September (9/3-9/19). Exact schedule information is available on our website www.aira.org.

For more information and suggestions about these and other offerings, see www.aira.org or feel free to contact me and the AIRA staff members.

A Letter from AIRA's President

KEVIN CLANCY, CIRA
CohnReznick LLP

Dear fellow AIRA members and friends:

I hope 2019 is off to a great start for all of you. It certainly seems there has been an uptick in activity in our space – fingers crossed that all of us will be busy for the foreseeable future. The year is flying by and it is hard to believe I am more than halfway through my tenure as your AIRA President. I have really benefited from the tremendous support of Tom Morrow, the AIRA Board and the fantastic AIRA staff throughout the year. Kudos to all of you and my sincere appreciation for all that you do for our wonderful organization.

I am very excited about our upcoming 35th Annual Bankruptcy & Restructuring Conference scheduled for June 5-8 at Fairmont Copley Plaza in Boston. We are just putting the finishing touches on the agenda. Traditionally, Boston has been a very popular venue for our conference. We are planning a tremendous program, which includes 4 days of in–depth educational sessions encompassing two all–day seminars on the latest issues and trends in Bankruptcy and Restructuring. Just to give you an idea, here are some of the panel topics: "The Fate of Higher Education"; "Healthcare Disruptors & The Future of Community Hospitals"; "Retention Issues - The Perfect Storm"; "Privacy, Data Protection, Cybersecurity in the Restructuring Context - Tips to Ensure You Don't Create More Distress"; "Litigating Confirmation in Multi-Debtor Cases"; "The Impact of Trade Tariffs on Distressed Companies"; "Solvency & Capitalization: Challenging Issues Relating To Proving Solvency and Capitalization"; "Avoidance Actions" and "Hot Topics in Valuation," to name a few.

In addition to the panels and educational sessions, we have lined up some exceptional speakers. Our Wednesday Preconference lunch speaker is Mike Jenkins from Bloomberg Professional Service, who will demonstrate the results of his automation efforts that focus on predictive factors of distress, not only in the market, but for specific sectors and corporations.

Our Friday lunch speaker is Juliette Kayyem who, among other things, is a national security, intelligence and terrorism analyst for CNN.

Outside of the classroom, Bean Town has so much to offer conference attendees. Boston is one of the oldest cities in the United States, rich in history and brimming with exciting and educational things to do. We have lined up excursions for almost every interest. On Thursday afternoon, you will have your choice of a group tour of the John F. Kennedy Library, an all-hands-on deck tour aboard the USS Constitution, enjoying an afternoon at the Isabella Stewart Gardner Museum, or a sightseeing trip of Boston aboard a Duck Boat. Friday evening, we are off to Fenway Park to watch the reigning World Series Champion Boston Red Sox take on the Tampa Bay Rays. Always a very popular excursion!

Please mark your calendar for AIRA's 18th Annual Advanced Restructuring and Plan of Reorganization Conference in New York at the Union League Club on Monday, November 18th. We will begin the planning process in a few months and welcome your thoughts and input. Please send an email to me, Brian Ryniker (AIRA President Elect) or Tom Morrow with any suggested topics.

For those of us in the northern climates, spring cannot come soon enough. I'm really looking forward to seeing all of you in Boston in June!

WHO DECIDES HOW BANKRUPTCY LAWS ARE APPLIED?

JAY ALIX
AlixPartners LLP

For much of history, the premise of most bankruptcy laws has been to provide a mechanism whereby creditors could force debtors to pay their obligations. America's Founding Fathers shifted the emphasis a bit, envisioning a system that might also help release honest debtors from the perpetual bondage of their creditors. That innovation aside, the Constitution nevertheless failed to spell out the rules with precision. It simply mandated in Article I, Section 8 – the first permanent federal bankruptcy law – there shall exist "uniform Laws on the subject of Bankruptcies throughout the United States."

The lack of constitutional precision has led to widespread disagreement about how the laws should be applied, and has resulted in repeated attempts to modernize our country's system for reorganizing companies by restructuring and eliminating debt. Industry associations and groups like the American Bankruptcy Institute, the American College of Bankruptcy, the National Conference of Bankruptcy Judges, the Turnaround Management Association, the National Bankruptcy Conference, and the Association of Insolvency and Restructuring Advisors convene and compile current informed opinions on bankruptcy laws and rules to define and ensure uniformity across the bankruptcy system. The courts and the Congress establish precedent through rulings and the introduction of new laws, and those laws have addressed every aspect of the bankruptcy process, from disclosure of conflicts to venue to liquidation and compensation of participants in the system itself.

> **"When a turnaround firm or law firm refuses to disclose, or worse, conceals relationships with clients and other investments, they are delivering a resounding blow to the integrity of the bankruptcy system."**

One of the more recent attempts to do so focused on Bankruptcy Rule 2014(a), which requires all professional services firms retained on behalf of a debtor company in bankruptcy proceedings to disclose all their connections with the debtor, creditors, other professional firms and parties of interest. The goal: To demonstrate to the court, under penalty of perjury, that the professionals retained are "disinterested" – that they have no conflicts or adverse interests. The case law is both significant and uniform on the matter, providing that even minor technical violations of Rule 2014(a)'s disclosure requirements are subject to sanction, including disgorgement of fees and disqualification. Intentional violations have even led to imprisonment.

There are powerful reasons for transparency when debtors and creditors are locked in a battle for the reorganization of an insolvent business or the division of assets. Banks, employees, unions, vendors, investors, government agencies, environmental claimants, pensioners, tort claimants, and others are all facing the hard fact that they will not get full reimbursement of monies owed them. Proper disclosure helps all be confident they will be treated fairly and legally.

Bankruptcy Rule 2014(a) and all related case law require a law firm or turnaround firm employed by a debtor company to disclose all of its connections with the debtor, creditor, and all other parties-in-interest so as to demonstrate disinterestedness.

Why?

Because in bankruptcy, there is – by definition – not enough money to pay everyone back. Someone – and in many cases, *everyone* – is going to come up short. If advisors are conflicted – that is, if they have a commercial relationship with one or more of the interested parties – it raises the risk of their polluting or corrupting the entire process. This is why concealment of advisor conflicts or adverse interests to gain employment in a bankruptcy case is illegal. And until the U.S. Supreme Court or an Act of Congress amends it, all participants in the bankruptcy system must abide by this rule.

Our nation's bankruptcy system, which is resolving hundreds of billions in creditor claims annually, can only provide fairness to all creditors and claimants if all professionals adhere to those parts of the bankruptcy code requiring disinterestedness, transparency, and the prohibition of adverse interests and improper favoritism to anyone. When a turnaround firm or law firm refuses to disclose, or worse, conceals relationships with clients and other investments, they are delivering a resounding blow to the integrity of the bankruptcy system.

Concealment of conflicts and adverse interests to gain employment in a bankruptcy case is illegal, a violation of federal law; yet, some are able to avoid punishment by concealing connections to senior creditors and investors until after a plan is approved.

At the same time, a large volume of less egregious instances of non-disclosure with relatively minor violations shows just the opposite – dozens of much smaller firms, most with the intention to comply, have been penalized with stiff financial, professional, and legal consequences, including at least one case involving criminal prosecution, conviction, and federal prison.

Intentional violations of Rule 2014(a) and concealment of connections and relationships should be met with consequences. A regime of non-disclosure would destroy the root fairness of the country's system and instill fear in global markets, as well as in creditors, and other parties-in-interest who must rely on the system, which oversees hundreds of billions of dollars in company-saving reorganizations, financings, asset sales, creditor recoveries, and litigation.

In a typical large bankruptcy restructuring, with thousands of creditors and employees working alongside dozens of outside professionals, it's imperative everyone have comfort they are standing on a level playing field with transparent and conflict-free fiduciary professionals who have no self-interest in the outcome. The alternative — a rigged system — simply cannot be tolerated. Players – large or small – should not be allowed to skirt federal laws for their own competitive and financial advantages. But it is happening, and to this point, those rogue players have yet to be sanctioned and continue to engage in blatant and repeated disclosure violations. Deliberate and continued flouting of federal bankruptcy laws directly hurts competitors, taints the entire reorganization process, and subverts the bankruptcy courts' legislated authority over the hiring of all professionals. It also jeopardizes the smooth functioning and integrity of the world's biggest and best sovereign bankruptcy system.

To restore the integrity of the bankruptcy process, all turnaround and law firms should be required to immediately and fully comply with all U.S. Bankruptcy Laws, including the disclosure laws, as well as be held legally accountable for any sworn false statements, concealments, material misrepresentations, intentional omissions, and other improper activities. Anything else is contrary to how we do things in this country. We are better than that.

ABOUT THE AUTHOR

Jay Alix
AlixPartners LLP

Jay Alix has served as CEO, COO, and CFO and has introduced, developed, and served in the roles of chief turnaround officer (CTO) and chief restructuring officer (CRO) for a variety of companies undergoing significant change. In addition, he has served as an advisor to major lenders, bondholders, trade creditors, and shareholders as well as to city and federal government agencies—and has assisted these various entities in maximizing the value and recoveries from distressed companies. Jay has led some of the largest and most complex out-of-court restructurings, turnarounds, and performance improvement programs, focusing on the speed of completion by minimizing litigation and achieving results and success through building consensus. Jay's experience includes designations as a Certified Public Accountant (CPA), a Certified Turnaround Professional (CTP), a Certified Fraud Examiner (CFE), and a Certified Insolvency & Reorganization Accountant (CIRA). In addition, he is a Fellow in the American College of Bankruptcy. Jay completed the YPO/Advanced Management Program at the Harvard Business School, and holds an MBA in Accounting from Rutgers University and a Bachelor's Degree in Finance from the Wharton School at the University of Pennsylvania. He began his career as a CPA with Price Waterhouse in New York.

PROMESA: AN EXPERIMENT DOOMED TO FAIL

ROLANDO EMMANUELLI JIMÉNEZ and YASMÍN COLÓN COLÓN
Bufete Emmanuelli

On June 30, 2016, President Obama signed the Puerto Rico Oversight, Management, and Economic Stability Act or ''PROMESA". This Act created a mechanism for the United States to face the crisis caused by the non-payment of municipal bonds issued by the Commonwealth of Puerto Rico and its instrumentalities. PROMESA was designed based on the Control Board, created in Washington in the 1990s, but with much broader powers.

The Financial Oversight and Management Board or "FOMB" is composed of 7 members not elected by Puerto Ricans. These members were not submitted by the President to the advice and consent of the federal Senate and the First Circuit recently decided in a case filed by a labor union that their appointments were unconstitutional. All the parties have announced they will petition for certiorari to the Supreme Court. Still, at this moment the members of the FOMB exercise all the powers of public policy through the certification of fiscal plans and budgets. Neither the governor nor the legislature can supervise the FOMB. All legislation and governmental regulatory actions must also be submitted to the Board to determine whether they comply with the corresponding certified fiscal plan and related budgets.

The complexity of the implementation of PROMESA responds to a hybrid of provisions from Chapter 9 and 11 of the Bankruptcy Code with other provisions that connect them, enacted by Congress under the Territories Clause. PROMESA, contrary to Chapter 9, allows the central government to initiate a debt adjustment procedure based on fiscal plans and budgets approved by the sole discretion of the FOMB. This type of legislation had not been previously implemented in the United States. U.S. District Judge Laura Taylor Swain is in the process of giving it substantive meaning to determine the extent of the provisions of the Act. This has generated more than 100 lawsuits within the Title III cases. The cost of the proceedings under PROMESA is estimated at more than 1.5 billion dollars over a five-year period.

On paper, PROMESA seems to have all the elements necessary to achieve the adjustment of Puerto Rico's debts. However, the colonial situation in Puerto Rico in which there is no reliable basis to predict economic growth, an outlook dramatically impaired by the passage of two hurricanes in September 2017, augurs that it is not possible to obtain the objectives of the Act.

The objective in PROMESA's text is that the FOMB shall continue controlling Puerto Rico until achieving four consecutive balanced budgets and access to bond markets at reasonable costs. However, for these four consecutive budgets to be balanced, it is essential that the projections of expenditures and income of the fiscal plans be reliable. This is the main problem that the FOMB currently faces. The fiscal plans have undergone numerous amendments and will continue to suffer changes because the economy of Puerto Rico has not yet recovered to the levels before September 2017. If there is no recovery, it will aggravate the situation forcing many people to leave the country in alarming numbers to relocate to the mainland United States. This constant outflow of population undermines the government's tax base and affects the projections of income and expenditure.

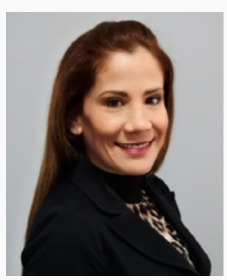
If the projections of income and expenses are not met, any agreement carried out with the bondholders will be destined to fail. So far, the FOMB has filed five cases of debt adjustment (Title III). These cases have a very close relationship. For example, in the case of the Puerto Rico Urgent Interest Fund Corporation ("COFINA"), which is fed by the sales and use tax, the agreement that is carried out with the bondholders of that entity will undermine the capacity of the central government to collect revenues. Therefore, if the agreement with COFINA is unreasonable, the Commonwealth could fail in its plans to restructure its debt, because it would not have sufficient income to meet the other creditors.

To date, the FOMB appears to be handling this issue in separate compartments. That is, it has reached n agreement with the bondholders of COFINA, and the Government Development Bank, overcommitting these entities to payments of obligations that could make the process of debt adjustment not feasible for the central government.

On the other hand, the FOMB has started to impose austerity measures that will increase the harm to the economy. If the economy does not grow, there is no way to achieve the four balanced budgets and access the bond markets at reasonable costs. In conclusion, the FOMB could be operating indefinitely, which would dramatically affect investor confidence in Puerto Rico, thus compromising the future of the island due to a permanent economic downturn.

PROMESA is not the Act that Puerto Rico needs to tackle its problems. PROMESA, under the current political and economic circumstances, is not feasible and is doomed for failure.

ABOUT THE AUTHORS



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The authors are Partners of Bufete Emmanuelli, C.S.P. (www.bufete-emmanuelli.com), a bankruptcy law firm located in Ponce, Puerto Rico. They co-authored "PROMESA" a legal essay that was awarded as the best legal opus of 2017 by the Puerto Rico Bar Association. They actively participate in PROMESA's Title III proceedings representing social creditors, like workers unions and associations. For questions and comments, you can contact the authors at their email addresses: rolando@bufete-emmanuelli.com, yasmin@bufete-emmanuelli.com.

THE ROLE OF ALTER EGO IN RESTRUCTURING

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This past May 2018, the Court of Appeal in Ontario, Canada ruled that Ecuadorean citizens could not enforce a $9.5 billion Ecuadorean court's judgment against Chevron Corp. through its Canadian subsidiary, finding that the subsidiary was a separate corporate entity, and that its assets could therefore not be seized to satisfy a judgment against the parent for contamination from the production of crude oil.[1] Following in August 2018, a federal judge in Delaware ruled that Canadian mining company Crystallex International Corporation ("Chrystallex") could seize shares in Citgo Petroleum Corp. ("CITGO"), which is owned by Venezuelan state-owned oil company Petróleos de Venezuela, S.A. ("PDVSA"), to satisfy a $1.2 billion judgment against Venezuela to compensate for the expropriation of a mining project.[2] The decision in *Chrystallex* in particular is expected to set off a fire storm of litigation as holders of arbitral awards, sovereign bonds, PDVSA bonds and promissory notes jockey for position to be paid. Outcomes, creditors, strategies and geographic differences aside, both claims have in common that they are actions to pierce the corporate veil premised on the theory of alter ego.

General Constructs

The legal distinction between a corporation and its shareholders acts as a "veil" to limit the liability of shareholders to the value of their investment.[3] Notwithstanding, "In certain circumstances, the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation."[4] "Under Delaware Law, in order to pierce the corporate veil on an alter ego theory, traditionally a plaintiff must prove: (1) the parent and subsidiary operated as a single economic entity; and (2) an overall element of injustice or unfairness

1 Keith Goldberg, *Chevron Escapes $9.5B Ecuadorean Award Bid In Canada*, Law360, May 24, 2018, https://www.law360.com/articles/1047007/chevron-escapes-9-5b-ecuadorean-award-bid-in-canada; Gideon Long and John Paul Rathbone, *Venezuela Creditors Eye Oil Assets In Battle Over Unpaid Debt*, Financial Times, August 16, 2018, https://www.ft.com/content/df04f4ea-a034-11e8-85da-eeb7a9ce36e4

2 Caroline Simson, *Citgo Ruling Has Queued Up Brawl Over Venezuelan Assets,* Law360, August 23, 2018, https://www.law360.com/articles/1076307/citgo-ruling-has-queued-up-brawl-over-venezuelan-assets

3 Stephen M. Bainbridge, Corporate Law, 3rd ed. (St. Paul, MN: Foundation Press, 2015), 53.

4 *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1115 (N.D. Cal. 2003) (citing *Mesler v. Bragg Mgmt. Co.*, 39 Cal.3d 290, 300 (1985)).

is present."[5] To do so, "First, there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist. Second, there must be an inequitable result if the acts in question are treated as those of the corporation alone."[6]

Indicia

An action to pierce the corporate veil based on alter ego is an equitable remedy in which the court must find that it would be unfair to *not* disregard the corporation's standing as a separate and distinct legal entity, and allow claimants to obtain a judgment and recovery from its shareholders.[7] To arrive this conclusion, the court requires evidence of the facts and circumstances underlying the claim.

Notwithstanding, the courts have not defined a bright-line test for when alter ego will apply, or reached a consensus as to the identity and relevance of the factors that should be considered. As case law has evolved, however, financial dependence, confusion as to corporate identity, a lack of separateness and domination and control have emerged as the primary indicia of alter ego.[8]

Factors underlying the indicia of financial dependence, lack of separateness and domination and control may include that the corporation lacks adequate capital, is insolvent, or unable to operate as a standalone enterprise, the use of cash management accounts for which the corporation does not pay or receive interest, and related party transactions that benefit the owners or corporation. Confusion as to corporate identity and lack of separateness may be marked by signs including the failure to observe corporate formalities, the use of a common name, trademark, location, IT system and management team, and affirmative misrepresentations regarding the corporation's financial position, expected operating results and entity standing behind its obligations. Domination and control and a lack of separateness may alsobe indicated by a defacto merger or an unfair preference over other creditors.

The *defacto merger doctrine* is an exception to the generality that an acquirer of assets does not assume the liabilities of the seller unless contractually agreed or through a merger. The four elements that must be shown are (1) a continuation of the seller's enterprise resulting in the continuity of its management, employees, assets and operations, (2) a continuity of shareholders resulting from the buyer paying for the assets acquired with its own shares, with the seller's shareholders subsequently becoming shareholders of the buyer; (3) the seller ceases ordinary operations, liquidates and dissolves as soon as legally and practically possible; and (4) the buyer assumes those liabilities of the seller ordinarily required to maintain the uninterrupted continuation of the seller's business operations. Where all four determinants are present, courts have viewed the successor corporation as nothing more than a continuation of the seller corporation.

Whether a shareholder or parent company has used its controlling position to unfairly favor itself over other holders of interests and claims might also be examined by means of the factors identified in § 547(b) of the Bankruptcy Code. Under § 547(b), a preference may be proven[9] by showing that the debtor transferred an interest in property (1) to or for the benefit of a creditor, (2) for or on account of an antecedent debt, (3) while the debtor was insolvent, (4) on or within 90 days before the debtor filed the petition, or between 90 days and one year prior to the filing of the petition if the creditor was an insider, and (5) the creditor received more than it would have received in a Chapter 7 liquidation, if the transfer had not been made, and if it received payment to the extent provided under the provisions of § 547(b). As applied to the analysis of alter ego, the timing provision of the fourth test may not be relevant in most cases. And while the first, second and third tests may be, they have not been shown necessary for a court to determine alter ego. The fifth condition, however, is dispositive in assessing whether the shareholder or corporation received more than it would have but for the transfer and the corporation were liquidated.

By extension, § 548 of the Bankruptcy Code is similarly useful in analyzing whether a transfer is unfair. As a general matter, fraudulent transfer actions allow creditors to recover pre-petition transfers motivated by actual or constructive fraud by the debtor. In particular, § 548 allows for the avoidance of any transfer of an interest in property, or any obligation incurred, on or within 2 years before the filing of the petition, if the debtor voluntarily or involuntarily (1) made the transfer or incurred the obligation with actual intent[10] to hinder, delay or defraud any entity to which the debtor was or became indebted on or after the date the transfer was made or obligation incurred; or (2) received less than reasonably equivalent value[11] in exchange for the transfer or obligation; and (a) was or became insolvent on the date the transfer was made or obligation incurred, (b) had been or was going to be engaged in a business or transaction for which it had unreasonably small capital; (c) incurred or intended to incur debts exceeding its ability to pay at maturity; or (d) made the transfer to, or incurred the obligation for, the benefit of an insider under an employment contract rather than in the ordinary course of business. As pertains to the analysis of alter ego with a focus on the conduct of a shareholder or parent corporation, the tests concerning

5 *ASARCO LLC, v. Americas Mining Corp.,* 396 B.R. 278, 317 (S.D. Tex. 2008) (citing *In re Foxmeyer Corp.*, 290 B.R. 229, 235 (Bankr. D. Del. 2003)).

6 *Neilson v. Union Bank of Cal.*, N.A., 290 F. Supp. 2d at 1115 (Quoting *Sonora Diamond Corp. v. Superior Court*, 99 Cal. Rptr. 2d 824 (2000)).

7 Daniel G. Lentz, Lynda H. Schwartz, *"Alter Ego" in Litigation Services Handbook, The Role of the Financial Expert,* ed. Roman L. Weil, Daniel G. Lentz and David P. Hoffman. 23.2 – 5th ed. (Hoboken: John Wiley & Sons, Inc., 2012)

8 *Ibid.,* 23.3.

9 Kathy Bazoian Phelps and Steven Rhodes, *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes,* 1st ed., §[5.02] (LexisNexis, 2012).

10 *Ibid.,* § [2.01].

11 Daniel G. Lentz, Grant W. Newton, Lynda H. Schwartz, *"The Troubled Business And Bankruptcy" in Litigation Services Handbook, The Role of the Financial Expert*, ed. Roman L. Weil, Daniel G. Lentz and David P. Hoffman. 22.2 – 5th ed. (Hoboken: John Wiley & Sons, Inc., 2012).

Continued from p.11

actual intent, the receipt of less than reasonably equivalent value, and making a transfer to or incurring an obligation for the benefit of an insider may be especially relevant.

Fact Patterns

Circumstances that give rise to piercing the corporate veil based on alter ego include (1) the parent or subsidiary are judgment-proof, (2) the corporation is judgment-proof but its shareholders are not, (3) confusion over the corporations identity due to misrepresentation or failure to observe corporate formalities, and (4) the corporation sold assets to avoid a liability, leaving it undercapitalized.[12] The situation where the corporation is judgment-proof but its shareholders are not can arise from a fraudulent transfer, allowing the claimant to seek recovery under the Bankruptcy Code in addition to pursuing equitable relief by establishing that the corporation acted as the alter ego of its owners. The same is true for where a corporation has sold assets to avoid a liability leaving it with inadequate capital, which depending on the transaction structure, may also be deemed a defacto merger.

The Case of Crystallex

In the United States, PDVSA's main asset is CITGO, which it owns through its wholly owned subsidiaries PDV Holding and CITGO Holding, both of which are incorporated in Delaware. In seeking to enforce its judgment against Venezuela ("Republic") from the assets of PDVSA, Crystallex commenced three different causes of action in Delaware.[13] Two of the claims alleged fraudulent transfer, and one, alter ego.

The Fraudulent Transfer Litigation

Perhaps predicated on the awareness of several possible billion-dollar arbitral awards against the Republic, and expecting that the holders could attempt to enforce them against CITGO, in late 2014 and early 2015, CITGO Holding issued roughly $2.8 billion in non-investment grade debt and paid a dividend of approximately the same amount to PDV Holding. PDV Holding then paid PDVSA, in Venezuela, a dividend of $2.2 billion. Following in November 2015, Crystallex filed suit under the Delaware Uniform Fraudulent Transfer Act ("DUFTA") against PDVSA, PDV Holding and CITGO Holding, seeking among other relief the return to the United States of the $2.2 billion that was paid to PDVSA in Venezuela and allegedly to the Republic.

With Crystallex' first lawsuit pending, in October 2016, PDVSA issued bonds as part of an exchange offer secured by 50.1% of PDV Holding's interest in CITGO Holding. This was followed by Crystallex filing a second lawsuit against PDV Holding in the District of Delaware on October 31, 2016. Shortly thereafter, PDV Holding, in a separate financing with Rosneft, pledged the remaining 49.9% of its interest in CITGO Holding, resulting in 100% of the equity interests in CITGO being fully pledged.

From the perspective of Crystallex, the bond issuances and dividends constituted an integrated plan by the Republic to transfer in excess of $2 billion dollars from the United States to Venezuela where the funds could not be available to satisfy a judgment. Defendants' view, however, was that Delaware law imposes liability under the DUFTA only on debtors and not on parties alleged to have participated in an aiding and abetting conspiracy. In this regard, though PDV Holding and CITGO Holding were participants, they were not debtors of Crystallex, or alleged to have been alter egos of PDVSA or the Republic.

The Alter Ego Litigation

In June 2017, Crystallex filed an alter ego proceeding in the District of Delaware seeking to execute its judgment on PDVSA's 100% interest in PDV Holdings arguing that PDVSA was the alter ego of the Republic. The applicable case law[14] required Crystallex to establish that (1) the "corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created," (the "Extensive Control Prong") or (2) treating the corporation as a separate legal entity "would work fraud or injustice" (the "Fraud or Injustice Prong"). Of note, Crystallex filed its argument in a motion for writ of attachment to PDVSA's shares in PDV Holdings rather than seeking a universal declaration, thereby potentially limiting the court's ruling to the facts of its own case and not benefitting other creditors. However, Crystallex also asserted it could establish alter ego based on the evidence it had submitted, all of which was publicly available. So if Crystallex were to prevail, its record might provide the basis for others to establish alter ego and recover from PDVSA.

Crystallex' arguments that Venezuela exercised extensive control over PDVSA included that the Republic ignored PDVSA's separate form, exercised day-to-day control over its operations, used PDVSA property as its own and used PDVSA to implement government programs and policies. On the fraud and injustice front, Crystallex contended that Venezuela gave PDVSA the mineral rights it expropriated by official decree and for no consideration, that PDVSA subsequently sold a 40% interest in the associated land to the government for approximately US $2.4 billion, and that the government designated PDVSA as the "expropriating entity" for the state, conflating numerous other expropriations with PDVSA's involvement.

Responding to Crystallex, PDVSA argued that the court did not have jurisdiction under the Foreign Sovereign Immunities Act of 1976, and even if it did, the shares Crystallex sought to attach were immune as they were not used for a commercial activity. PDVSA also denied

12 Daniel G. Lentz, Lynda H. Schwartz, *"Alter Ego" in Litigation Services Handbook, The Role of the Financial Expert*, ed. Roman L. Weil, Daniel G. Lentz and David P. Hoffman. 23.2 – 5th ed. (Hoboken: John Wiley & Sons, Inc., 2012)

13 Cooper, Richard and Morag, Boaz S., *"Venezuela's Imminent Restructuring and the Role Alter Ego Claims May Play in this Chavismo Saga"* (November 9, 2017). Available at SSRN: https://ssrn.com/abstract=3068455 or http://dx.doi.org/10.2139/ssrn.3068455

14 *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 627, 629 (1983) ("Bancec")

it was the alter ego of Venezuela based on the Bancec presumption that state-owned firms' separateness should be respected, and argued that Crystallex' extensive control allegations indicated PDVSA was no different from a typical government instrumentality. Further, PDVSA argued that the expropriation should not be considered a fraud or injustice with respect to Crystallex, explaining that by the time it was given the mineral rights, years after the expropriation underlying Crystallex' judgement, any harm to Crystallex had been completed.

Summary

The legal distinction between a corporation and its shareholders acts as a "veil" to limit the liability of shareholders to the value of their investment. In circumstances such as those that characterize alter ego, however, the court will pierce the corporate veil to hold the shareholders liable. To establish alter ego, a plaintiff must prove the parent and subsidiary operated as a single economic entity, and that an overall element of injustice or unfairness is present. Doing so requires showing a unity of interest and ownership between the corporation and its owner, and that the outcome would be inequitable if the conduct in question were treated as that of the corporation alone. Financial dependence, confusion as to corporate identity, a lack of separateness and domination and control have emerged in case law as the primary indicia of alter ego. Situations that commonly give rise to piercing based on alter ego include that the parent or subsidiary are judgment-proof, the corporation is judgment-proof but its shareholders are not, confusion over corporate identity due to misrepresentation or failure to observe corporate formalities, or the corporation sold assets to avoid a liability, leaving it undercapitalized. The guidance outlined in § 547 and § 548 of the Bankruptcy Code has proven useful in analyzing these scenarios and seeking recoveries.

ABOUT THE AUTHOR

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Boris Steffen, CDBV, is a Senior Managing Director with GlassRatner Advisory and Capital Group. An expert in accounting, finance, valuation, solvency and damages analyses, Boris has advised or testified on behalf of numerous privately owned and publicly traded enterprises as well as governmental agencies in the U.S. and abroad. The matters in which he has consulted have involved antitrust and competition policy, appraisal arbitrage, bankruptcy and restructuring, breach of contract, fraud, intellectual property, international trade and arbitration, mergers and acquisitions, securities and utility regulation. Prior to entering the consulting field, Boris worked in finance with Inland Steel Industries, Inc., antitrust with the U.S. Federal Trade Commission, Bureau of Competition and in corporate development with U.S. Generating, Inc

CPA ETHICS

The road to fraud is a slippery slope,
One we would never walk, we hope.
But we should be leery, lest others may say
Our compass appears to be pointed that way.

Our decisions and actions made silently each day
Determine our fate as we stride on our way.
Impressive signs that we post along life's path
Mean nothing to those trampled down in our wrath.

Oh, not me you say, I am a CPA.
I would never handle things that way!
But be careful of the choices you make.
Do they invisibly move your compass each step you take?
And over the course, degree by degree,
Point your ethics in a direction you'd never foresee?

Perhaps it starts out with helping a friend
Who owes lots of taxes, so a small rule you bend.
Or what if your client, a loan covenant has breached?
Minor inventory adjustments shouldn't get one impeached!
Or maybe you're above it all, so you say,
I do fraud accounting, putting bad guys away!

But ethics applies to everyone
With perhaps a higher standard for some.
When determining which job we'll take,
A check for conflicts we always should make,
Using discretion when seeking a case,
Lest it appear we've inappropriately laced.

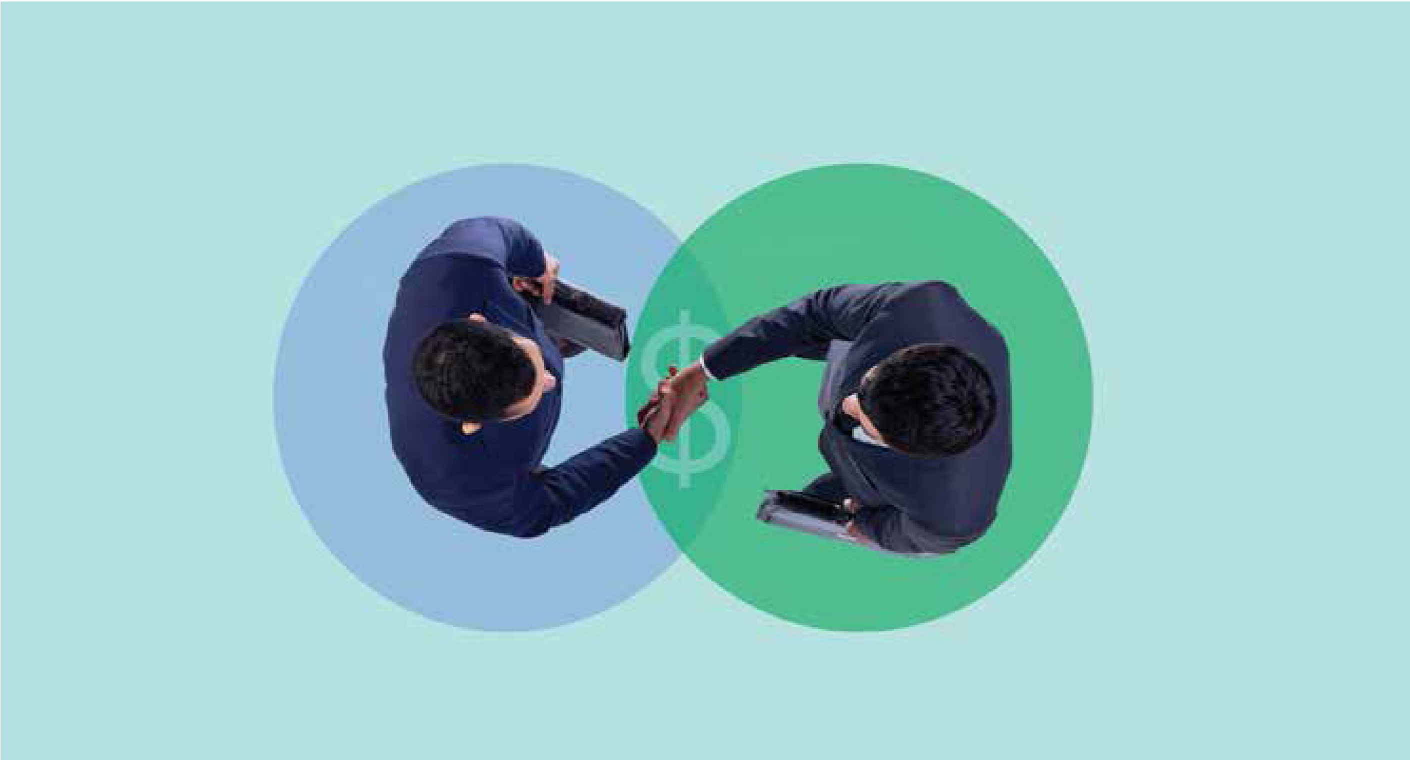
As you tread down life's road,
Your actions declare your moral code.
Who you are is disclosed by your deeds,
Things you do plant your ethical seeds.
You can claim you have ethics, loud and bold,
Yet, ethics are determined by the kernels you've sown.

Did you say you are honest, but cheat to save on tax?
Did you alter balance sheets to keep covenants intact?
Or did you merely forget to disclose to the clerk
That prior to suing that entity, your office provided work?

Yes, the road to fraud is a slippery slope.
Be wary, lest you slide downward without hope.
Be mindful to check your compass each day,
And never, no never, head down that way!

Barbara M. Smith, CPA, CIRA, CDBV

DON'T DEPEND ON A HANDSHAKE



STEPHEN PEDNEAULT
Forensic Accounting Services, LLC

"Once someone is entrusted in a fiduciary relationship, an opportunity is created for that person to become less trustworthy, or worse, a thief."

An attorney representing a local condominium association called our firm to set up a meeting. Her client, a residential homeowners' association consisting of 32 unit owners, learned that the property manager, we'll call her Jane, had been using its funds for personal purposes. The board of directors, comprised of unit owners with varying degrees of financial knowledge, relied solely on the monthly financial reports provided by Jane.

The board had established a reserve fund and budgeted contributions to it for many years, and the association needed to use the reserve to fund a roofing project. Financial issues surfaced when Jane reported that the reserves were deficient and that they'd need to borrow outside money to undertake the project.

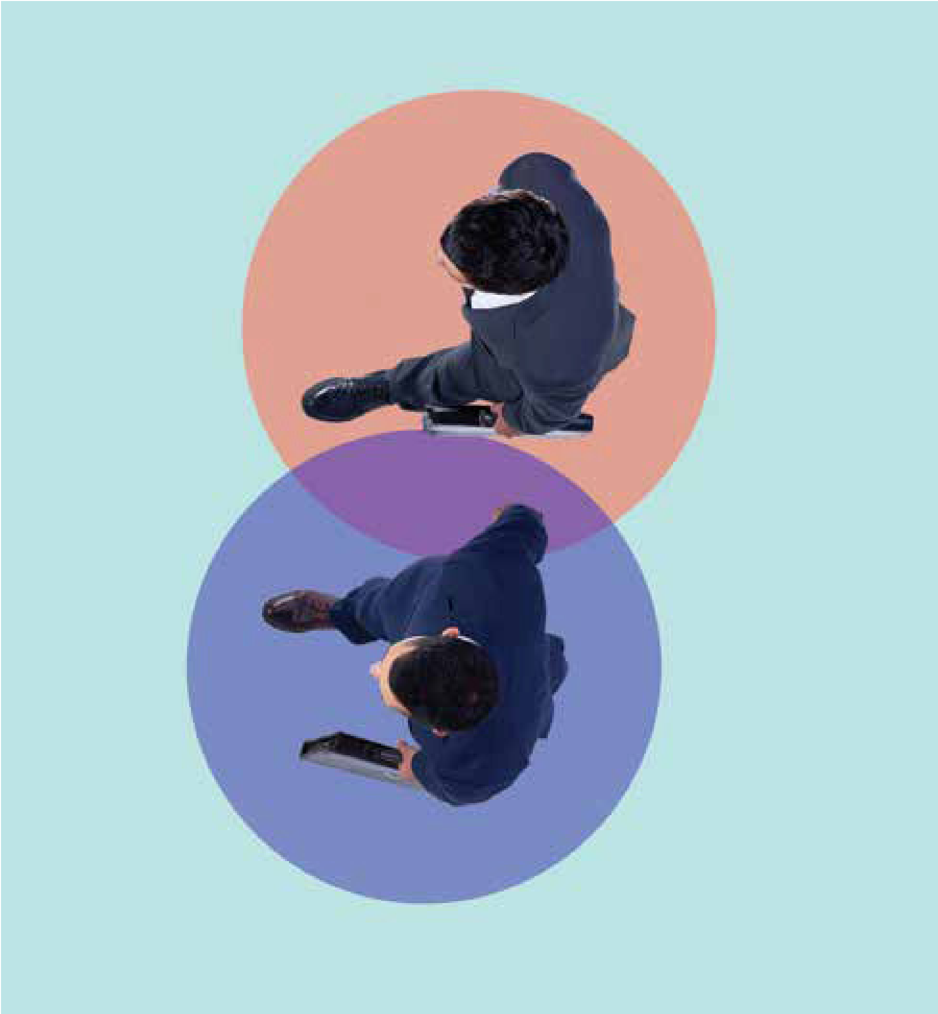
The board members, surprised to learn of the insufficient funds, demanded to see the monthly bank statements controlled by Jane, which she hadn't shared. After several meetings and many emails, she still hadn't provided the bank statements. The board grew more frustrated, so it held one final meeting and told Jane that the president was going to the bank to obtain replacement statements and check images for the association's accounts. At that meeting Jane told the board that she'd been using the association's funds to fuel a gambling addiction at a local casino, and she'd depleted the association's reserves. The board members quickly realized that the reports they'd been relying on were fictitious.

Jane abruptly left the meeting and subsequently stopped communicating with the board, which left the association high and dry. The board members had no records, no bank accounts, no listing of delinquencies, no contracts — nothing. Even worse, because of personal responsibilities, they couldn't manage the property themselves. They needed to find a new property manager — and quickly.

The president contacted the association's counsel, who called our firm.

The board retained a new property manager who worked with the bank to remove Jane from the accounts and establish new bank accounts. The bank requested replacement statements and check images for each association account, and the cleanup process began.

We reconstructed the bank activity for the past several years and easily identified when Jane had withdrawn funds and transferred amounts from the association's reserve account into the checking account. We identified frequent ATM withdrawals — often at multiple times a day at the same location (the casino) — and we watched as the account balances dwindled to nearly zero. In the end, Jane had abused her position of trust — it was her duty to safe-guard the association's funds and use them solely for the association's benefit with prior authorization from the board. The association lost more than $150,000 and recovered only $10,000 through its insurance policy. Clearly, Jane had violated her fiduciary duty to the association. She was charged for her crime, but because there were no means for recovery, the association elected not to pursue her civilly because the cost of litigation outweighed any potential recovery on a judgment.



Fiduciary responsibilities beyond property management

Were the association's board members responsible in this case for their actions or lack of actions about Jane's theft? The answer is yes. Board members can be and often are held responsible for their fiduciary duties to organizations for which they serve. Compensated or uncompensated, board members have responsibilities to their stakeholders, who can sue them. That's why most prudent boards require insurance coverage and other protection policies for their directors and officers.

To understand how someone in a position of control can exploit their responsibilities for personal benefit, we need to first identify some common, easily recognized contexts for fiduciary fraud.

The first is the world of investing. Individuals and organizations place their funds "in trust" with other individuals or an organization, like investment managers or hedge funds, with the expectation that their funds will be safeguarded and invested in accordance with their directions. Of course, investment managers, both individuals and institutional, sometimes divert investor

"Some large fiduciary frauds... have gained notoriety. But countless cases have attracted little-to-no media attention when investment managers steal lesser amounts from clients"

funds. But countless cases have attracted little-to-no media attention when investment managers steal lesser amounts from clients. However, the results are often the same: Individuals and organizations are deprived of funds with few means of recovery.

Other common fiduciary contexts, to name only a few, involve:

- Property managers entrusted to collect fees from tenants and owners.
- Insurance agents charged with collecting and remitting clients' insurance premium payments.

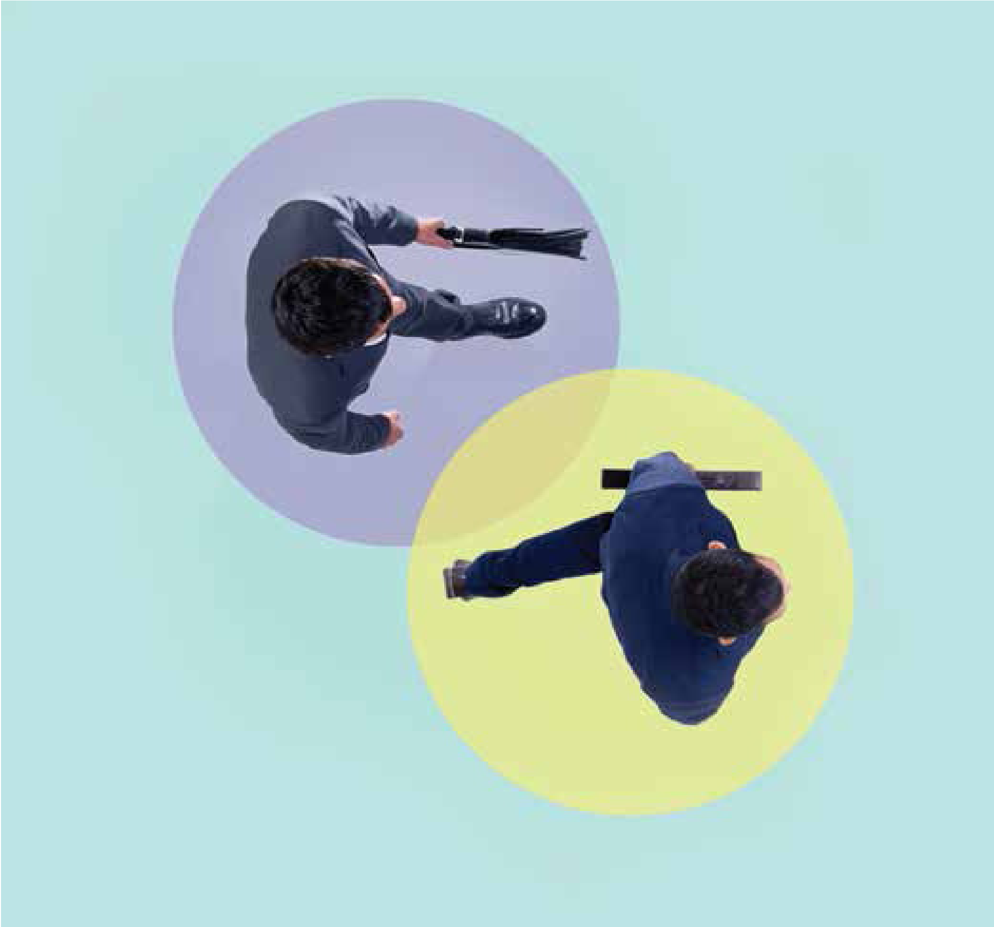
Continued from p.15

- Attorneys performing residential refinancing transactions.
- Payroll companies withholding federal and state-required payroll taxes.
- Treasurers of clubs, leagues, associations and organizations protecting funds.

The names and dates change, but the stories, motives and frauds remain the same. Someone placed in charge of funds crosses the line and uses the funds for personal purposes — to the detriment of the beneficiary of the funds.

When people are placed in positions of trust and violate those positions for personal gain, their actions are described as a breach of fiduciary duty (breach). In the opening case, Jane was a fiduciary of the association and specifically of the association's funds. She and the association had signed a written property management agreement.

Although board members run the risk of breaching their own fiduciary duties, an association commonly designates a property manager to perform services without a written contract. The written contract helps define the scope of the relationship and provided services, but a property manager acting with or without a written contract can be held responsible for breach of fiduciary duty if that manager uses the funds for personal purchases. The property manager also can be charged with larceny.



Steward of the funds

Fiduciaries can make bad business decisions that result in losses, but if the fiduciary acts in the best manner with the best information known (also called acting in good faith), then the fiduciary can use that as a defense if complaints are lodged. There's a world of difference between acting in good faith — but suffering a loss — and stealing.

During engagements, I'm often asked to describe fiduciary duty in layman's terms. My response is always the same: If an individual or organization acting in fiduciary capacity has the mindset that they or it is a steward of the funds, and the funds will be used only for the sole benefit of the beneficiary, then that individual or organization has fulfilled the fiduciary duty to the best of their abilities.

If, under subsequent review, all transactions result in an easily identifiable benefit to the beneficiary, there shouldn't be an issue. However, if two piles of transactions exist — one set that benefited the beneficiary and one set that benefited someone else — then the fiduciary has questions to answer. Simply put, there shouldn't be transactions in the second pile.

Issues arise when the distinction between the two piles gets blurred, or worse, when transactions are commingled with the fiduciary's personal funds and assets. Commonly, a fiduciary has commingled managed funds with funds in a personal bank account. In these cases, fraud investigators or examiners must remain objective, and every case is different. Seasoned examiners know that a fiduciary commingling assets and funds doesn't automatically indicate that fraud has occurred. The intent and actions of the fiduciary play a major role in resolving the matter along with the reconciliation of the commingled funds and activities. The examiner's findings will influence the beneficiary's decision to pursue criminal and/or civil remedies.

The living and the dead: probate matters

Probate is the court-supervised process of authenticating a last will and testament of the deceased, according to "Learn What Happens During Probate," by Julie Garber, (the balance, March 25, tinyurl.com/y8xn-bbyt). It requires fiduciary duty and can be at risk for potential breaches, abuses and frauds. Probate jurisdiction in most states in the U.S. (and in many global jurisdictions) might also include:

- Statutory durable power of attorney/attorney in fact.
- Guardianships
- Conservatorships
- Estates
- Trusts (of virtually every kind)

Each of these areas warrant a brief explanation to highlight the fiduciary duty and the potential engagements for qualified fraud investigators, such as Certified Fraud Examiners (CFE). All have four common elements:

- An individual or organization is specifically identified to act as the fiduciary.
- The fiduciary must act in the best interest of the beneficiary.
- The potential for fiduciary fraud and abuse exists.
- The fiduciary always risks accusations of not acting in the best interest of the beneficiaries.

In some instances, the fiduciary has broad powers and authority to conduct transactions, and in others, court approval is required. In every matter, the fiduciary is required to act as a steward of the funds, which involves any asset including money, and the fiduciary has a duty to act in the beneficiary's best interest to the best of his or her abilities.

Statutory durable power of attorney/attorney in fact

When one individual wants another person to conduct transactions, manage affairs or act on their behalf, the individual must complete a power-of-attorney form that names the designated person and identifies the level of authority granted to that person. Most states in the U.S. require this form to be witnessed and notarized to ensure that it was properly executed and the individual providing the power of attorney understands the form.

Selecting someone to be your power of attorney, in many cases, involves handing over all your assets to someone else to manage on your behalf. Commonly, aging parents give power of attorney to their child, so as they get older and are less able to manage their affairs, the child can take charge and manage them on their behalf. Whenever someone gives another person access and control over assets, there's always a risk that the fiduciary will take advantage of the situation and divert assets for the fiduciary's personal use. When the suspicion or actual knowledge of such activity comes to light, the individual — if still competent — can revoke the power of attorney and identify a new fiduciary. The beneficiary (the potential victim) typically begins the case in probate court and requests that the court remove the authority of the person holding the power of attorney. The fiduciary is required to prepare and file a financial accounting report that identifies the assets with which they were entrusted and what they did with those assets. The fiduciary, in most cases, must produce a detailed accounting for each transaction, along with the underlying records though a summary accounting might sometimes suffice.

Fraud examiners could assist in resolving a matter in two contexts. First, beneficiaries could retain an examiner to assist the fiduciary in preparing the accounting and defending the fiduciary's decisions. Disgruntled family members, motivated by jealousy or bitterness, who might or (more likely) might not be heirs to the individual's estate, often bring these cases. However, even if the fiduciary did use assets for personal purposes, the fiduciary might still require assistance in preparing the accounting and defending their actions.

Second, beneficiaries could retain an examiner to review the fiduciary's accounting and trace the reported amounts to the underlying documentation. The examiner could assist counsel for the beneficiaries who are seeking explanations and possibly ultimately testify in civil and criminal actions against the fiduciary.

In some cases, the probate judge might appoint an examiner to investigate the accounting and underlying records and report back on the findings. Counsel for the fiduciary and the beneficiaries might sometimes mutually engage an examiner to report back to both counsels.

In the end, the challenge in these cases lies in gaining access to all the accounting records to determine what happened under the fiduciary's watch. The author has found that the more the fiduciary or the fiduciary's representative hinders the beneficiaries' access to necessary statements, records and documents, the more likely it is that the fiduciary has crossed the line and breached fiduciary duty (i.e., stolen assets for personal use).

Guardianships

For those who are unable to manage their affairs because of incompetence, disability or age (those under the age of 18), the court will appoint a guardian to manage funds on their behalf. The role of the guardian as a fiduciary, which is similar to a power of attorney, must be as a steward of the entrusted funds and to act in the individual's best interests. However, a guardian — unlike a fiduciary who acts under a power of attorney — is answerable to the court. A beneficiary could accuse a guardian of mishandling or misusing funds. A victim's counsel could retain an examiner to determine whether a guardian used funds for purposes other than the victim's benefit. Alternately, fiduciary's counsel could retain an examiner to defend the guardian against accusations and ensure that no malfeasance occurred. Or both parties (or a court) also could mutually engage an examiner.

Conservatorships

A conservator is similar to a guardian: A court appoints them to manage a person's financial affairs and/or daily life when that person becomes physically or mentally unable to do so — commonly because of age or health.

In some jurisdictions, guardians handle personal and health-related decisions, whereas conservators handle financial affairs.

Estates

When people die, they leave behind estates comprised of the assets held at the time of their deaths. Sometimes, no assets exist, but significant assets often remain in other cases. If an individual planned in advance, they might have formalized instructions, often in a will, for handling these assets. (The person who memorializes wishes in a will is called a testator.) However, the person could also die

Continued from p.17

intestate, meaning that they never executed a will. Either way, someone needs to manage and settle the estate, marshal any assets, pay any outstanding obligations and debts, file required forms and tax returns, and distribute residual assets to beneficiaries. If named within a will, the person in charge of an estate is called an executor; if court-appointed, this person is called an administrator

Trusts

An individual can create a separate legal entity, called a trust, and transfer personal assets into the trust. The person who establishes the trust is called the grantor. A trust can be established during the person's lifetime ("inter vivos"), and the trust can be revocable or irrevocable. A trust created through a will after a person's death is called a testamentary trust.

Regardless of the type of trust, the fiduciary role is, generally speaking, the same — to be fiscally responsible and act in the best interest of the beneficiaries. A fraud examiner or investigator might be retained in all types of trust matters.

Don't underestimate a fiduciary

Fiduciary fraud, like employee embezzlement, financial statement fraud and corruption, provides potential engagement opportunities for fraud examiners. In these cases, examiners can get involved and help resolve financial issues. I highlight only a few of the contexts where an individual or organization operates in a fiduciary capacity and can be investigated for breach of fiduciary duty. Those who maintain finances on behalf of others or are responsible for overseeing the use of funds likely have fiduciary duties to the beneficiaries of the funds. In many cases, the beneficiaries of the funds are those who report new matters to investigate.

Even if a fiduciary has done nothing wrong and acted with utmost care, we could still investigate potential matters. Because of frequent fiduciary thefts, courts must investigate allegations to ensure no wrongdoing has occurred even if the motivation for the allegations obviously stems from beneficiaries' sense of entitlement.

"In the end the challenge in these cases lies in gaining access to all the accounting records to determine what happened under the fiduciary's watch."

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HEALTH CARE FRAUD INVESTIGATIONS AND LITIGATION OFFER UNEXPECTED LESSONS FOR BANKRUPTCY COUNSEL

SAMANTHA KINGSBURY[1]
Mintz, Levin, Cohn, Ferris, Glovsky, and Popeo, P.C.

As many readers are likely aware, health care fraud investigations and related litigation pose substantial risks for health care and life sciences companies for a variety of reasons. Total annual settlements and judgments reached with the federal government in these cases over the last several years have consistently exceeded the $2 billion mark (which in turn incentivizes governmental agencies and private whistleblowers to continue filing these cases).[2] Such substantial judgments and settlements often cause financial strain for the companies paying these amounts. In addition, investigations and litigation can (and often do) last for several years and the costs of these prolonged proceedings can also lead to financial distress and potential bankruptcy for companies at issue.[3] However, beyond the bankruptcy-related risks posed by these cases, many readers may not have considered the important lessons that health care fraud cases may offer for bankruptcy counsel. For example, substantive issues decided in these cases, such as whether an exception exists to the requirement that allegations of fraud be pled with particularity, could prove to be important tools in the bankruptcy context.

Many of the investigations that have resulted in such enormous government recoveries against health care and life sciences companies were originally filed by private individuals (referred to as "whistleblowers" or "relators") under the *qui tam* provisions of the False Claims Act ("FCA").[4] These provisions award relators up to 30 percent of the proceeds of any action or settlement of the claims at issue (depending on whether the government decides to "intervene" in the matter and take over the litigation or "decline" the case and permit the relator(s) to proceed with the case on behalf of the government).[5] Because of

1 The author wishes to thank Brian Dunphy (https://www.mintz.com/our-people/brian-p-dunphy) and Adrienne Walker (https://www.mintz.com/our-people/adrienne-k-walker) for their guidance regarding and contributions to this article.

2 *See* Dep't of Justice, *Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018), https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018 (reporting that in the fiscal year ending September 30, 2018, the U.S. Department of Justice "obtained more than $2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government," $2.5 billion of which involved the health care industry and that 2018 was the ninth consecutive year in which DOJ's health care fraud settlements and judgments surpassed the $2 billion mark). *See* also Dep't of Justice and U.S. Dep't of Health and Human Services, *Annual Report of the Departments of Health and Human Services and Justice, Health Care Fraud and Abuse Control Program FY 2014*, available at https://oig.hhs.gov/publications/docs/hcfac/FY2014-hcfac.pdf (reporting that in 2014, the federal government recovered, on average, $7.70 for every dollar it spent on health care fraud enforcement activities).

3 For example, Health Diagnostic Laboratory, Inc. made headlines over the past few years after its initial financial success was followed by a DOJ investigation (sparked by a *qui tam* False Claims Act suit) and settlement that eventually led the company to file for chapter 11 bankruptcy. *See, e.g.*, Larry Husten, Embattled Laboratory Files for Bankruptcy, Forbes (June 8, 2015), *available at* https://www.forbes.com/sites/larryhusten/2015/06/08/embattled-laboratory-files-for-bankruptcy/#313012281378. Other health care companies have shared a similar fate.

4 *See* 31 U.S.C. § 3730(b).

5 *See* 31 U.S.C. § 3730(d).

Continued from p.19

the potentially huge financial rewards, over the last few decades, the number of FCA cases filed by whistleblowers has skyrocketed.[6] Moreover, relators are increasingly pressing ahead and litigating FCA cases, even when the government declines to intervene.

Over the past few years, numerous FCA *qui tam* cases have made headlines in the health care industry as the parties have engaged in prolonged litigation. One such case, *United States ex rel. Polukoff v. St. Mark's Hospital*, has been particularly interesting to follow, both because of the legal issues it raises in the health care enforcement defense arena and the potential lessons it has to offer. We are not aware of any current bankruptcy issues or financial distress at issue in this case, but the procedural history serves as a good example of extended investigations and litigation in FCA cases, and the substantive issues raised also offer potential strategic lessons about the use of Federal Rule of Civil Procedure 9(b) ("Rule 9(b)") in the FCA context to defeat or bolster claims in the bankruptcy context.

The *Polukoff* case has been pending for over six years, and shows no signs of reaching resolution in the near future, as one of the defendants recently filed a Petition for a Writ of Certiorari before the U.S. Supreme Court.[7] This case began in December 2012 when Dr. Gerald Polukoff filed an FCA *qui tam* suit alleging that another cardiologist, Dr. Polukoff's colleague, performed medically unnecessary cardiac procedures, which were then fraudulently billed to federal health care programs.[8] Allegations that certain procedures are not medically necessary are fairly common FCA claims. In addition to naming the other cardiologist as a defendant in the case, Dr. Polukoff also named two hospitals as defendants.

In June 2015, nearly two and one-half years after the case was filed, DOJ filed a Notice of Election to Decline Intervention in the case and the relator decided to proceed with litigation.[9] Since that time the case has proceeded through extensive motions practice:

- Between October 2015 and January 2017, the defendants filed motions to dismiss and the parties engaged in extensive motions practice addressing whether the relator's complaint met federal pleading standards for an FCA case. One issue was the question of whether Dr. Polukoff, as the relator, had satisfied the requirement of Rule 9(b), which mandates that allegations of fraud, including FCA violations, be pled with particularity.
- In January 2017, the U.S. District Court for the District of Utah found, in part, that while the relator had satisfied Rule 9(b)'s requirements as to certain claims, his FCA claims failed as a matter of law because he had not shown that the defendants "knowingly made an objectively false representation to the government

6 *See* Jordan T. Cohen & Kevin M. McGinty, Health Care Enforcement Year in Review & 2019 Outlook: Analysis of Health Care FCA Litigation Trends (Jan. 8, 2019), https://www.mintz.com/insights-center/viewpoints/2019-01-health-care-enforcement-year-review-2019-outlook-analysis-health.

7 *See* Petition for a Writ of Certiorari, *Intermountain Health Care Inc. v. United States ex rel. Gerald Polukoff, M.D.*, No. 18-911 (Jan. 14, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-911/80446/20190114152041921_Intermountain%20Cert%20Petition.pdf.

8 Complaint, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (M.D. Tenn. Dec. 6, 2012) (transferred to the United States District Court for the District of Utah on April 14, 2016).

9 United States' Notice of Election to Decline Intervention, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (M.D. Tenn. June 15, 2015).

that caused the government to remit payment."[10] The district court granted the defendants' Motion to Dismiss.[11]

- In February 2017, the relator appealed the district court's decision to the U.S. Court of Appeals for the Tenth Circuit.[12]In July 2018, 17 months after the relator filed his appeal, the Tenth Circuit reversed the district court's decision.[13]

One of the most recent developments in this case took place in November 2018, when defendants filed a Motion to Stay Proceedings Pending Certiorari Petition, indicating that they planned to file a Petition for Certiorari to the U.S. Supreme Court in January 2019.[14] As of the date of publication, it remains to be seen whether the Supreme Court will agree to hear this case and, what, if any, impact the Supreme Court's determination will have on the duration of the remainder of the case.

Polukoff defendants filed their Petition for a Writ of Certiorari on January 14, 2019 and raised two issues, one of which is potentially instructive in the bankruptcy and restructuring context.[15] Namely, the defendants raised the question of whether a court may create an exception to Rule 9(b)'s particularity requirement (i.e., that fraud suits include particular allegations of fraud) when the plaintiff claims that only the defendant possesses the information needed to satisfy that requirement.[16] They also asked the Supreme Court to resolve a circuit split over Rule 9(b) and allege that the Tenth Circuit joined many other circuits in erroneously excusing a lack of detail when such detail is exclusively in the control of the defendant accused of FCA violations.[17]

The Supreme Court's decision on this issue, if it decides to take the case, could raise important strategic considerations in the bankruptcy context. For example, if the Supreme Court were to decide that no exception should be granted to Rule 9(b)'s particularity requirement, trustees of a defendant in a *qui tam* case could potentially use this decision to preclude relators from recovering from the debtor's estate. For example, if a health care fraud case has not been determined (either by a judgment or settlement with the government or, in declined cases, a *qui tam* relator with the government's approval), and the company files for bankruptcy, the relator generally does not have access to sufficient evidence to allege fraud with particularity. In such a situation, the bankruptcy trustee, standing in the shoes of the defendant debtor, could file a motion to dismiss the relator's claim under Rule 9(b), arguing that the relator has failed to allege fraud with sufficient specificity and thus should be precluded from recovering from the company.

Given the many substantive and strategic lessons to be learned from this and other FCA investigations and litigations, bankruptcy counsel advising the various constituents impacted by an FCA case should be mindful of these potential lessons, as they may raise issues relevant to the bankruptcy estate.

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10 Memorandum Decision and Order Granting Motions to Dismiss, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (D. Utah Jan. 19, 2017).

11 *Id*. In reaching this decision, the court noted that the crux of the relator's case was that the "defendants represented to the government that the [procedures] performed… were medically reasonable and necessary and that this representation was objectively false," but that such representations could not be proven to be "objectively false" because "opinions, medical judgments, and 'conclusions about which reasonable minds may differ cannot be false'" for purposes of an FCA claim. This decision was a welcome development to the defense bar handling FCA cases premised on allegations related to lack of medical necessity.

12 *See* Plaintiff/Relator Gerald Polukoff's Notice of Appeal, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (D. Utah Feb. 2, 2017).

13 *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 17-4014 (10th Cir. July 9, 2018) (order reversing district court's decision to grant motion to dismiss). In reaching this decision, the Tenth Circuit Court of Appeals found that it is possible "for a medical judgment to be 'false or fraudulent' as proscribed" by the FCA.

14 Motion to Stay Proceedings Pending Certiorari Petition, *United States ex rel. Polukoff v. St. Mark's Hospital*, No. 16-cv-00304 (D. Utah Nov. 15, 2018).

15 Petition for a Writ of Certiorari, *Intermountain Health Care Inc. v. United States ex rel. Gerald Polukoff, M.D.*, No. 18-911 (Jan. 14, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-911/80446/20190114152041921_Intermountain%20Cert%20Petition.pdf.

16 The other question raised in the Petition for a Writ of Certiorari was whether the False Claims Act's *qui tam* provisions violate the Appointments Clause of Article II of the Constitution. *See id.*

17 *Id.*

CRITICAL ISSUES IN FRAUD INVESTIGATIONS

PART I - KEY RISK AREAS FOR FRAUDULENT ACTIVITIES

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RSM US LLP

Introduction

All organizations face the risk of fraud. Companies dealing with situations involving financial distress face increased motive and opportunity for individuals to perpetrate frauds. The motives can be either for direct personal gain, or for indirect personal gain if companies they own face the potential for losses that could affect their incomes or wealth. Understanding the sources of risk from fraud and the methods used for its detection can help lay a foundation for effectively identifying and managing each unique investigation into fraudulent activity. Those investigations may be part of a general bankruptcy inquiry into losses of cash or assets, or they may be part of an investigation into theft(s) perpetrated by insiders, or an investigation into the effectiveness of internal controls. The findings may result in individual criminal prosecution, commercial claims, or revised management procedures and redesign of internal controls. All of these potential issues and outcomes necessitate an appreciation of:

- Forensic investigation versus general accounting methods
- Incidence rates of fraudulent activity
- Characteristics of the perpetrators of fraud
- Methods of fraud detection
- Methods used to investigate the allegation(s)
- Understanding some key lessons gleaned from experience.

This two-part article series will introduce some basic concepts regarding the potential risk from fraudulent activities and common methods of investigating allegations. Part I identifies the major types of fraud, their frequency of occurrence, and median sizes of loss. This discussion highlights key areas for insolvency professionals to consider as they investigate the causes and locations of financial distress and identify strategies and solutions. Part II focuses on fraud detection, methods used to investigate allegations of fraud, and summarizes key lessons and observations from past experience.

Forensic Accounting is Different Than Auditing

Auditing services typically include an examination of the financial accounts used to develop and report financial results, along with specified testing and analyses of transactions and tests of internal controls. These methods focus on questions of materiality, i.e. performing tests of the reported balances and financial results in order to provide meaningful interpretation and confidence in the reported amounts.

Forensic accounting services are different. The Association of Certified Fraud Examiners (ACFE) states that forensic accounting is the application of professional accounting skills in matters involving potential or actual civil or criminal litigation. The American Institute of Certified Public Accountants' (AICPA) Code of Professional Conduct, Section 1.295.140 states that forensic accounting services consist of investigative services and litigation services involving the application of: (a) special skills in accounting, auditing, finance, quantitative methods or certain areas of the law, and research, and (b) investigative skills to collect, analyze, and evaluate evidential matter and to interpret and communicate findings.

Forensic approaches target the allegations of fraud or focus on specific risk concerns. Forensic accounting usually entails taking a deeper dive into investigating individual or specific categories of financial transactions. Typically, forensic accounting seeks to understand the nature of transactions involved in an allegation and employs a targeted test approach to identify, verify, and evaluate fact patterns. This contrasts with an auditor's selective sampling approach, which is intended to reach conclusions about the reliability of a reported financial result or an accounting balance and whether there is a material risk that the result is not correctly reported within a reasonable degree of certainty.

Fraud examinations apply methodologies designed to resolve allegations of fraud through obtaining evidence, taking statements, writing reports, testifying to findings, or otherwise assisting in the detection and prevention of fraud. Examinations and investigations are generally custom designed to address each unique situation or issue. Most fraud examinations include forensic accounting, but not all forensic accounting involves fraud examination. Methodologies and approaches are selected based on their relevance to the questions raised. Each examination or investigation will be unique; no two are alike. Proactive management of an investigation should respond to new findings in order to help ensure that the investigation accounts for new facts that are uncovered and new theories that may emerge.

Forensic Accounting Applications

Forensics are performed in a wide variety of contexts. Each of these situations will require different approaches, although some common techniques may be applied. Some typical contexts include:

- Allegations of actual and constructive fraud
- Arbitration and mediation
- Post-closing acquisition disputes
- Breach of fiduciary duty claims
- Calculation of commercial damages and lost profits
- Bankruptcy litigation
- Breach of contract disputes
- Shareholder disputes
- Intellectual property disputes and valuations of trade names and trademarks, patents, contractual and franchise rights, customer lists, and non-compete agreements.

Some specific examples include:

- Evaluation of ineffective internal controls
- Fraud related to the unauthorized use of loan proceeds
- Misappropriation of bank deposit account funds
- Fraud in connection with contractual obligations under an asset purchase agreement
- Falsification of financial statements
- Misappropriation of corporate assets
- Corruption
- Fictitious vendors and employees
- Occurrence of unexpected operating losses triggering loan covenant defaults
- Purchasing manager collusion with vendors
- Inventory shortages and other irregularities
- Filing of fraudulent warranty claims to manufacturers
- Employee benefits transactions
- Asset transaction post-closing disputes, i.e. working capital disputes
- Fraudulent billings
- Control failures.

Annual Losses From Fraud

The incidence rates of fraudulent activity are constantly evolving. The annual losses from fraud are staggering. ACFE's *Report to the Nations: 2018 Global Study on Occupational Fraud and Abuse* analyzed 2,690 cases of occupational fraud in 125 countries occurring between January 2016 and October 2017. ACFE concluded that organizations lose an estimated 5% of revenues to fraud in any given year, representing an estimated global fraud loss of nearly $4 trillion. The median loss per fraud in 2017 was $130,000 worldwide, and the median loss per fraud in the U.S. was $108,000. Overall, 22% of cases involving $7 billion in total losses had individual losses greater than $1 million each.

One important reason that losses from individual occurrences can be substantial involves the time to detection. The median duration of fraud until it is detected typically spans 16 months after the fraud commenced. Employee theft is alleged to have caused more businesses to go into bankruptcy than any other crime.

Classifications of Fraud

Legal professionals, the ACFE, and others have classified frauds into three primary categories: corruption, asset misappropriation, and financial statement fraud.

- **Corruption** involves conflicts of interests (purchasing schemes, sales schemes), bribery (invoice kickbacks, bid rigging), illegal gratuities and economic extortion.
- **Financial statement fraud** encompasses net worth/ net income overstatements (timing differences, fictitious revenues, concealed liabilities and expenses,

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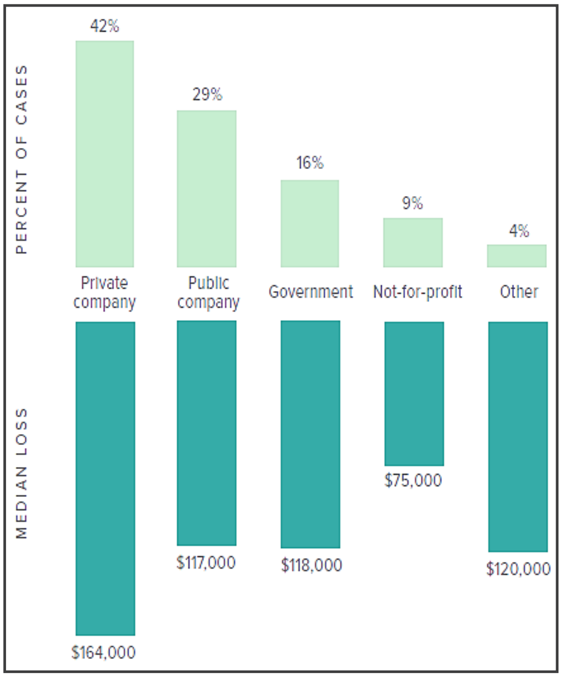
Exhibit 1: Victims of Occupational Fraud



Source: ACFE 2018 Report to the Nations, Fig. 12.

improper asset valuations, and improper disclosures) and net worth/net income understatements (timing differences, understated revenues, overstated liabilities and expenses, improper asset valuations, and improper disclosures).

- **Asset misappropriation** is a broad category involving cash (theft of cash on hand and theft of cash receipts, fraudulent disbursements), inventory, and all other asset (misuse, larceny). Fraudulent disbursements can range from billing schemes to payroll and expense schemes to check tampering and register disbursements. Theft of cash receipts includes skimming of sales, receivables, or issuing false refunds, and includes cash larceny.

Frequency and Loss

The frequency of occupational frauds varies. The ACFE reported that more than 70% of the frauds in 2017 occurred at for-profit organizations, with 42% of victim organizations comprising private companies and 29% comprising public companies. Private companies suffer the greatest median losses and have the greatest share of frauds. But, although not-for-profit companies have lower share and lower median losses, their abilities to withstand those losses may be more limited since many are smaller organizations. *(See Exhibit 1.)*

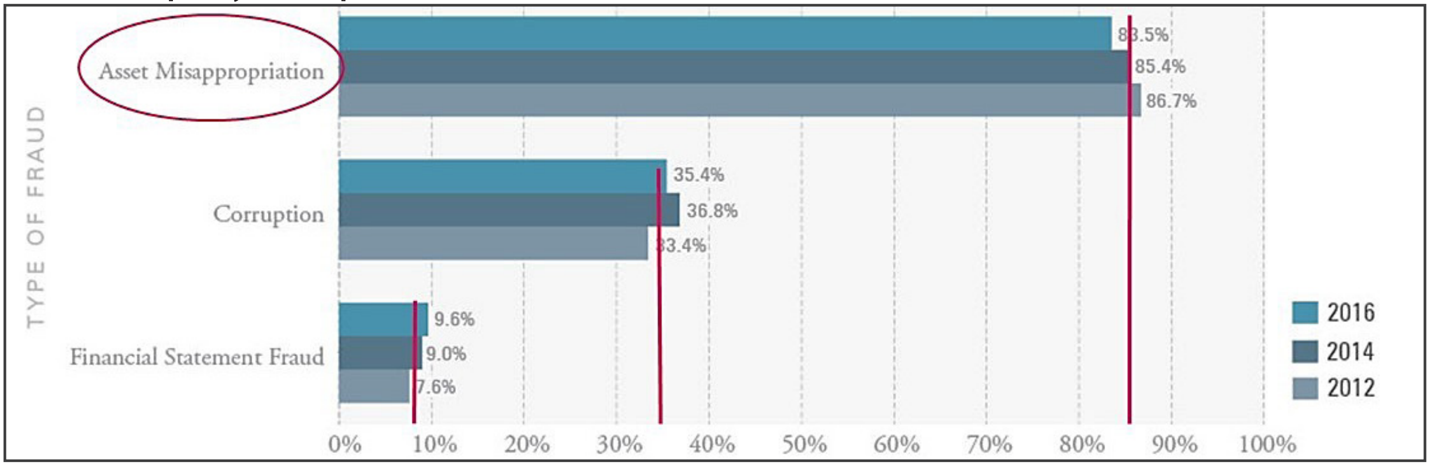
The 2016 and 2018 ACFE *Report to the Nations* compared the frequency and median losses from the three categories of fraud. The 2016 results showed that while asset misappropriation represents approximately 85-90% of the overall frequency of fraud the median losses are approximately $120 thousand. In contrast, the median loss is much larger at $0.8-1.0 million for the lower occurring rates of 9-10% for financial statement fraud, representing a different type and severity of risk. Thus, risk evaluation should consider both occurrence rates and severity of loss to form a balanced assessment. The results in 2017 follow similar trends. *(See Exhibits 2 & 3.)*

A balanced assessment of risk reflects the combined exposure to frequency and median loss. For example, when suspecting asset misappropriation frauds, focusing on billing or check and payment tampering schemes may provide an approach that recognizes both the heightened frequency and the heightened losses per occurrence, meaning these schemes may represent the greatest categories of risk. *(See Exhibit 4.)*

Complexity is Rising Across Different Environments

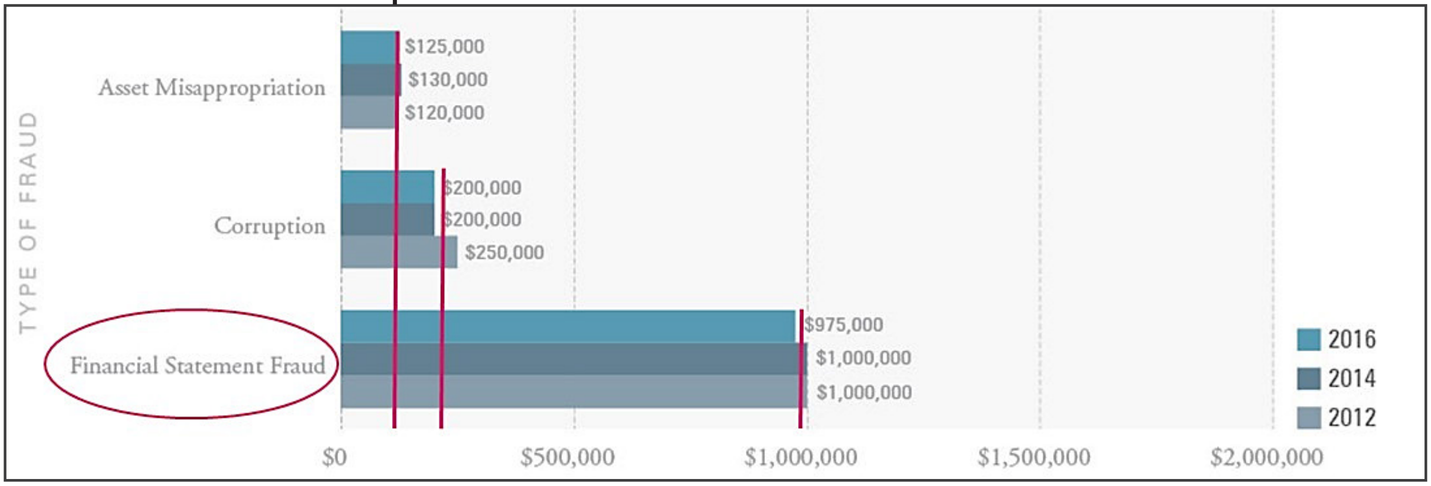
Frauds are becoming increasingly complex. The 2016 ACFE *Report to the Nations* stated that perpetrators engaged in at least one other form of fraud in 35% of asset misappropriations, 80% of financial statement frauds, and 76% of corruption schemes. In 2018, the ACFE reported

Exhibit 2: Frequency of Occupational Frauds



Source: ACFE 2016 Report to the Nations, Fig. 4.

Exhibit 3: Medial Loss From Occupational Frauds



Source: ACFE 2016 Report to the Nations, Fig. 5.

that incidences of asset misappropriation combined with corruption schemes during 2017 accounted for 23% of frauds involving more than one type of occupational fraud. *(See Exhibit 5 on p. 26.)*

Different size organizations face different risks for fraud. As of 2017, smaller organizations with less than 100 employees experienced 32% of fraud cases involving corruption, while larger organizations with more than 100 employees experienced more than 43% of fraud cases involving corruption. Billing, check tampering, expense reimbursements, skimming, and financial statement fraud all occur with far greater frequency in smaller firms compared to larger firms.

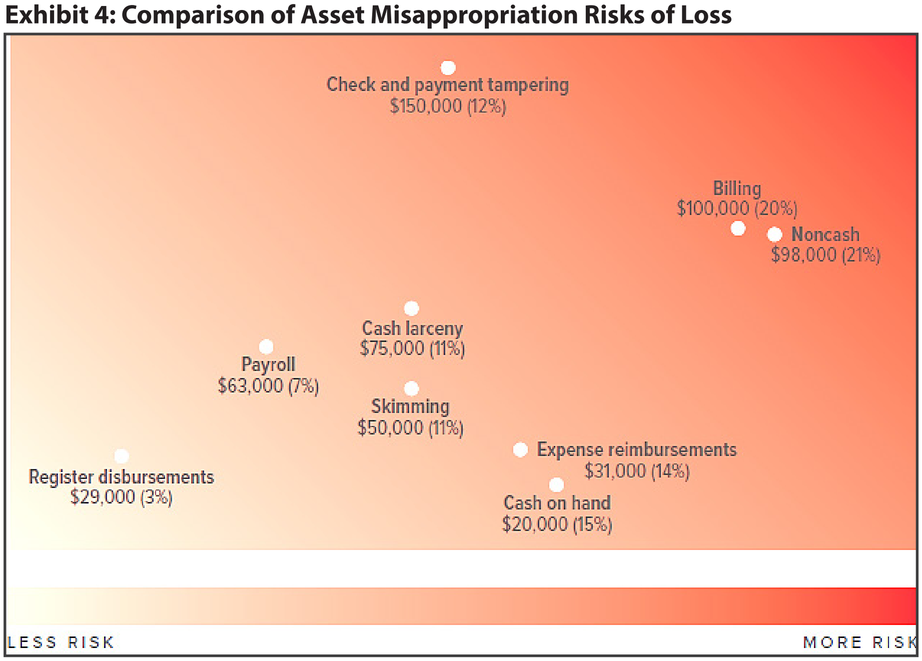
Frequencies of fraud also vary widely by industry. The 2018 ACFE *Report to the Nations* provided a heat map of the relative risks by types of occupational fraud and industry. *(See Exhibit 6 on p. 26.)* Developing an understanding of the frequency of specific fraud schemes within different industries can help target the risks of fraud and target the scope of investigatory work. Organizations can also assess and design controls to safeguard against the schemes that pose the most significant threats. The heat map shows the relevant risk for each category of occupational fraud in every industry that had at least 50 reported cases in ACFE's study. Boxes are shaded from light to dark red based on the respective level of occurrence, with darker boxes indicating higher-frequency schemes.

Perpetrators of Fraud

The classic "fraud triangle" states that individuals are motivated to commit fraud when three elements come together: (1) some kind of perceived pressure, (2) some perceived opportunity, and (3) some way to rationalize the fraud as not being inconsistent with one's values.[1] Some of the common reasons for employees to commit fraud include: the employee has a financial need, the employee is able to rationalize the act of fraud, the employee has opportunity, there is a lack of internal controls, authority/power is concentrated and unchecked, and there is a lack of consequences.

Personal perspectives drive perceptions of whether a crime occurred or is underway. Corporate crime involves personal context; i.e., whether the accused knew their actions were illegal and whether the fraudulent behavior is considered business as usual in that industry. Many things that appear greedy or selfish in hindsight are not illegal, and many actual crimes occur when valid business practices edge beyond what the law allows. White-collar criminals rarely pause to think about the outcomes or potential victims of their decisions.[2]

Exhibit 4: Comparison of Asset Misappropriation Risks of Loss



Source: ACFE 2018 Report to the Nations, Fig. 6.

1 Albrecht, W. Steve, Iconic Fraud Triangle Endures, *Fraud Magazine*, July/August 2014.

2 The Psychology of White-Collar Criminals, *The Atlantic*, Dec. 16, 2016. Eugene Soltes, Why They Do It, *Public Affairs*, 2016. J.M. Olejarz, Understanding White-Collar Crime, *Harvard Business Review*, Nov. 2016.

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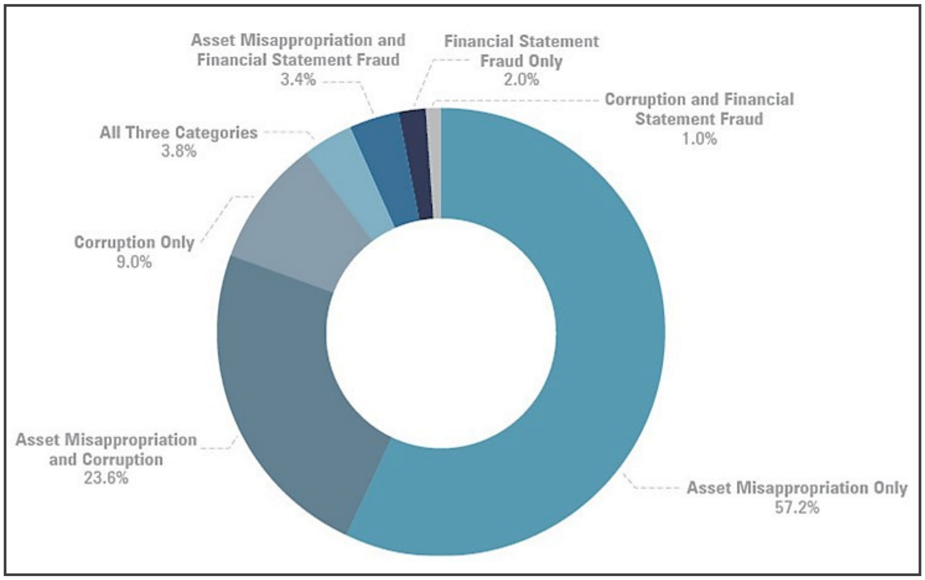
Exhibit 5: Median Losses From Occupational Frauds



Source: ACFE 2016 Report to the Nations, Fig. 6.

Exhibit 6: Common Occupational Fraud Schemes By Industry

INDUSTRY	Cases	Billing	Cash larceny	Cash on hand	Check and payment tampering	Corruption	Expense reimbursements	Financial statement fraud	Noncash	Payroll	Register disbursements	Skimming
Banking and financial services	338	11%	14%	23%	12%	36%	7%	8%	11%	2%	3%	9%
Manufacturing	201	27%	8%	15%	12%	51%	18%	10%	28%	5%	3%	7%
Government and public administration	184	15%	11%	11%	9%	50%	11%	5%	22%	7%	2%	11%
Health care	149	26%	7%	13%	13%	36%	16%	11%	19%	17%	1%	12%
Retail	104	20%	10%	19%	9%	28%	8%	12%	34%	5%	13%	13%
Education	96	23%	19%	19%	6%	38%	18%	6%	19%	6%	0%	14%
Insurance	87	20%	9%	3%	18%	45%	8%	7%	11%	3%	1%	11%
Energy	86	20%	2%	10%	12%	53%	10%	3%	27%	7%	2%	10%
Construction	83	37%	12%	8%	19%	42%	23%	16%	23%	14%	1%	13%
Transportation and warehousing	79	25%	8%	8%	9%	46%	15%	8%	28%	3%	3%	13%
Food service and hospitality	75	17%	16%	20%	11%	29%	12%	12%	24%	7%	0%	23%
Technology	62	26%	5%	10%	8%	42%	21%	16%	32%	8%	0%	6%
Religious, charitable, or social services	58	40%	9%	22%	19%	34%	29%	10%	19%	22%	3%	17%
Services (professional)	54	26%	17%	15%	26%	17%	30%	13%	13%	15%	0%	15%
Arts, entertainment, and recreation	50	14%	20%	36%	6%	32%	12%	8%	18%	4%	8%	28%

LESS RISK — MORE RISK

Source: ACFE 2016 Report to the Nations, Fig. 16.

Criminal perspectives are also personal. Most lack remorse regarding either their actions or the harm those actions had caused. Questions of morality are rendered irrelevant when the pressure is on. The ends can justify the means: such as whether the fraud was seen as helping people and an attempt to ultimately do the right thing. Criminals generally do not think they will be caught. Often, many smaller instances accumulate and compound, creating added pressure to now "fix" or "cover" the crime. Criminals may also distance themselves from their crimes and victims, making the acts more impersonal.[3]

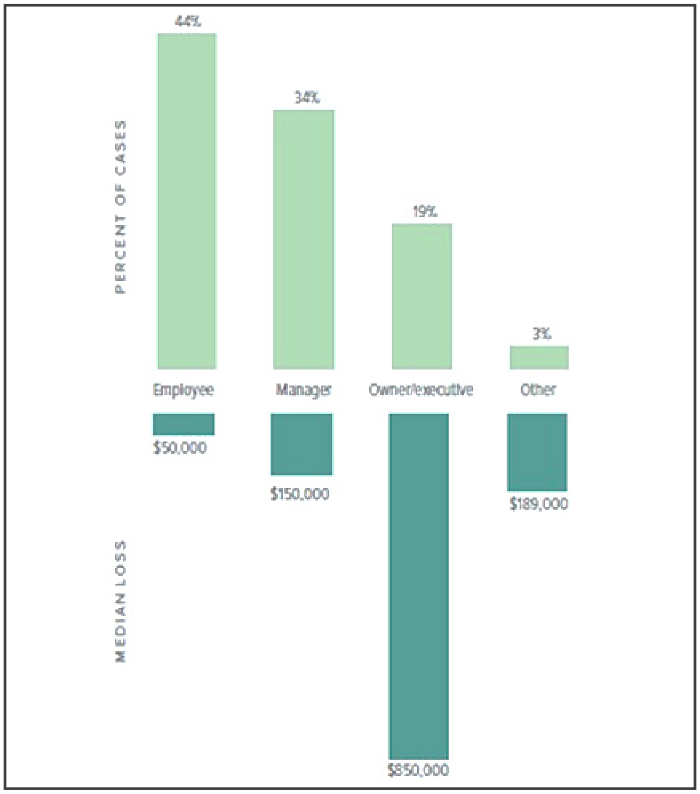
There is a notable correlation between: (1) level of fraudster and size of fraud/ duration of fraud, and (2) tenure of fraudster and size of fraud. The ACFE reported that while owners/executives committed only 19% of the frauds in the study, those schemes resulted in a median loss of $850,000 each in 2017. The ACFE found that 65% of owner/executive frauds involved corruption schemes and 27% of owner/ executive frauds involved financial statement frauds. Third party detection of these schemes is difficult. Only 1 in 8 owner/executive frauds are detected by outside auditors or law enforcement, and non-owner/executive fraud detection is even rarer at 1 in 25. Frauds that go undetected for longer periods tend to be more costly.

A significant correlation between authority and fraud loss has been found in every edition of the ACFE's *Report to the Nations* since 1996. In 2017, ACFE found that 70% of corruption cases were perpetrated by someone in a position of authority: 38% by a manager and 32% by an owner/executive. The median time to detection also increases with authority. The median months to detection for employees of 12 months, grows to 18 months for managers, and 24 months for owner/executives. Fraud losses also tend to increase based on the length of time the perpetrator worked for the victim organization. Perpetrators with less than one year of tenure caused a median loss of $40,000, while those with more than ten years' experience at the victim organization caused a median loss of $241,000, more than six times as high. *(See Exhibit 7.)*

Risks vary by department and opportunity. Overall, 77% of the occupational frauds in

3 *Ibid.*

Exhibit 7: Frequency of Occupational Frauds



Source: ACFE 2018 Report to the Nations, Fig. 24.

ACFE's study came from eight departments: accounting, operations, sales, executive/upper management, customer service, administrative support, finance, and purchasing. The 2018 ACFE *Report to the Nations* provided a heat map of the relative risks by types of fraud and department based on the relevant frequency for each category. *(See Exhibit 8.)* Boxes are shaded from light to dark red based on the respective level of occurrence, with darker boxes indicating higher-frequency schemes. Developing an understanding of the frequency of specific fraud schemes within different departments can help target the risks of fraud, allowing the organization and the investigator to focus the scope of any inquiries on key hotspots. Organizations can also assess and design anti-fraud internal controls to safeguard against the schemes that pose the most significant threats to specific departments.

Part I of this two-part article focused on identifying types of fraud, its frequency of occurrence, and sizes of loss. Part II will focus on fraud detection, methods used to investigate allegations of fraud, and summarize key lessons and observations from this article series.

ABOUT THE AUTHORS

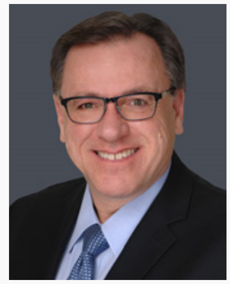


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Exhibit 8: Common Occupational Fraud Schemes By Department

INDUSTRY	Cases	Billing	Cash larceny	Cash on hand	Check and payment tampering	Corruption	Expense reimbursements	Financial statement fraud	Noncash	Payroll	Register disbursements	Skimming
Accounting	290	29%	14%	17%	30%	23%	12%	13%	7%	14%	2%	19%
Operations	266	15%	8%	15%	8%	36%	11%	4%	20%	5%	2%	11%
Executive/upper management	223	35%	14%	16%	15%	62%	29%	30%	20%	12%	3%	9%
Sales	216	10%	12%	12%	6%	34%	13%	6%	25%	2%	5%	14%
Customer service	155	5%	16%	31%	8%	19%	4%	1%	15%	3%	5%	14%
Administrative support	147	33%	7%	21%	14%	26%	22%	8%	19%	13%	3%	14%
Finance	110	17%	15%	21%	16%	37%	13%	16%	15%	6%	2%	10%
Purchasing	94	18%	5%	6%	5%	77%	10%	3%	31%	3%	2%	4%

LESS RISK — MORE RISK

Source: ACFE 2018 Report to the Nations, Fig. 29.

ANALYZING CRITICAL CYBERATTACK VECTORS WITHIN FINANCIAL INSTITUTIONS

Understanding Potential Cyberthreats While Minimizing Risks

SEAN RENSHAW
RSM US LLP

Financial institutions are heavily regulated due to the sensitive information used by the industry in addition to the financial impact of banking on the economy. The various regulators utilize the Federal Financial Institutions Examination Council (FFIEC) and other security best practices as the basis of their IT audit program and other security advisories, and to baseline institutions' overall security posture.

Despite these safeguards, however, attackers continue to develop new techniques to compromise systems and gain access to critical applications that may contain sensitive information. No organization is completely safe against cyberattacks, regardless of the efforts taken to be proactive in preventing an incident. These attacks may come in the form of skilled cybercriminals, rogue employees, social engineering or malicious software. The key is to stop an attack when it is merely a security incident and not yet a full-blown data breach.

Even with significant regulatory attention and protections, financial institutions are vulnerable, and the monetary impact of a breach can be significant. A recent NetDiligence cyber insurance claims study sponsored by RSM[1] identified several points that are relevant to this discussion (see graphic below.)

These figures highlight the importance of cybersecurity to financial institutions and their leadership. Not only are

1 "The real cost of a data breach: Insights on the latest cyber risks and associated damages," RSM US LLP, accessed Nov. 12, 2018, https://rsmus.com/what-we-do/services/risk-advisory/security-and-privacy/the-real-cost-of-a-data-breach.html.

The financial institutions sector accounted for **13 percent** of cyber insurance claims, and **14 percent** of records exposed

The industry has the **third-highest** average breach cost, at **$588,000** per breach

The study observed that **88 percent** of cyber claims were from organizations under **$2 billion** in revenue

The average total **breach costs** for institutions under $2 billion is **$194,000** these organizations at a significant risk of an incident, but the financial impact to the organization could be extensive.

While financial institutions encounter a number of different cyberattack types, we have identified three attack vectors that are consistently seen in this industry:

- Business email compromise and wire transfer fraud
- Insider threats or malicious users
- Malware

The following is a brief overview of the impact each of these cyber incident types can have on a financial institution.

Threat impact

Business email compromise and wire transfer fraud

In the last two years, we have seen a significant increase in the number of business email compromise cases. These threats are not limited to a specific industry or organization size, so every company should be mindful of this threat. Ultimately, the bad actors are trying to exploit compromised email accounts to perpetuate wire transfer frauds. The same NetDiligence study also indicated that wire transfer fraud costs an average of $179,000 in breach costs for each incident.[2]

Insider threats

Unintentional or malicious insider threats account for only 6 percent of reported cyber incidents.[3] However, the potential impact is especially apparent when you consider that the average claim expense for a malicious insider is four times that of an unintentional insider. When the average expense is compared to noninsider threats, the cost of a malicious insider is still 1.3 times higher. Intellectual property and trademark infringement cyber incidents are a particular concern, with an average breach cost reaching $865,000 per incident.

Malware

Our financial institutions clients have encountered a growing number of malware incidents over the years. Not surprisingly, malware incidents accounted for 16 percent of reported cyber events, which is a close third behind lost or stolen devices and rogue employees and outside hackers.[4]

Case studies

The following case studies provide an overview of these emerging risks and specific details about situations that institutions have faced along with guidance about how to help prevent similar attacks.

2 *Ibid.*
3 *Ibid.*
4 *Ibid.*

Issue 1: Business email compromises and wire transfer fraud

Business email compromises are not a new threat; however, we are seeing exponential growth in these attacks. Several factors contribute to this increase including the trend toward utilizing cloud-based systems for email and the growing sophistication of email phishing attacks. Phishing emails typically include very legitimate-looking links or attachments that are used by attackers to collect email, application, network and system passwords, or are designed to exploit other vulnerabilities.

The attackers are also researching contact information for employees at all levels, which is readily available from a variety of sources, including institution websites and social media profiles. Perusing such sites can give attackers insight into employee emotional status, physical location (e.g., on vacation or out of the office) and other factors that can be leveraged to mount a credible phishing attack. This information is then embedded within carefully targeted emails that look completely legitimate.

Example: The persistent phishing threat

RSM recently worked with three financial institutions that suffered business email compromises via similar phishing attacks. Many business email compromises follow a similar pattern. In all of these cases, the affected users received phishing emails which sent them to a website that mirrored an email logon screen and collected user names and passwords. All of that information was then sent back to the attackers, providing all of the information necessary to compromise the user's email.

Our experience has been that the attackers are, first and foremost, trying to monetize a compromised email account. These cases followed the same approach where they searched the compromised account for information related to financial transactions (e.g., the hackers searched using terms like "invoice," "wire transfer," "accounting," etc.). In these particular matters, the intruders did not find any financial information. At this point, the intruder will use the compromised email account to send out phishing emails to everyone in the employee's contact list, whether internal or external to the organization.

It did not occur in any of these cases, but if the unauthorized user does find financial transaction information in a compromised account, they will then try to perpetrate a fraudulent wire transfer. This can take the form of posing as a senior company employee who asks someone to wire transfer money to a fraudulent account. Alternatively, the attacker may contact a vendor or other third party, posing as a legitimate company employee, and provide them with new wire transfer information, which would send the funds to a fraudulent bank account.

Continued from p.29

Lessons learned

In order to properly protect against business email compromises and the subsequent effects of information falling into the wrong hands, institutions must first implement a comprehensive user education and awareness program. In addition, organizations should integrate multifactor authentication processes to provide an extra level of protection and discourage any unauthorized access to email accounts.

An active phishing email testing program within the organization is also a best practice to reinforce training and help employees fully understand threats. Employees must know that they can't blindly trust emails from other internal employees.

Issue 2: Insider threats

While the threat of an attack from within an institution accounts for only a small portion of the total reported cyber incidents, the damage an insider can create is often far more significant than many other attack types. The following case examples highlight how significant these cases can be to an organization.

Example 1: Theft of intellectual property

A state bank with over $10 billion in assets and over 100 locations experienced an insider threat incident. The bank was in the midst of acquiring another financial institution, when several employees of the new institution all went to work for a competitor at the same time, without any prior notice. The bank wanted to know if the former employees may have colluded with each other or their new employer to take any proprietary information as they were departing.

RSM was engaged to perform an analysis of the former employees' computer systems to determine what activity occurred leading up to their departure. Based on our investigation, we determined that one employee in particular was leading the effort to convince the group to depart together. Prior to their departure, the leader was communicating with the new employer, using a Gmail email account, to coordinate the effort.

Our analysis further disclosed that the mass departure was being planned for an extended period of time. In addition, we discovered evidence that the employees took proprietary documents and information when they departed.

Example 2: Revealing fraudulent behavior

A multinational financial institution with several billion dollars in assets and over a dozen locations detected that multiple employees may have been involved in a potential financial fraud. The bank's compliance department identified irregularities in certain accounts, specifically related to transaction activity and credit cards issued by the bank. The bank believed that the branch manager at one of its locations had colluded with a related-party customer to allow for illicit activity.

RSM was asked to perform an investigation to determine if the employees were perpetrating financial fraud. We compiled a diverse team of financial and digital investigators to perform this analysis. The digital forensic team arrived on location and preserved 10 computers from a branch office while the business was operating. Any references to RSM were obscured, as we were portrayed as an IT vendor performing inventory upgrades to computers. The employees' email files were also collected by the bank's IT team and provided to RSM for further investigation.

We performed an analysis of the employees' computers and email to identify information that was relevant to the fraud investigation. At the same time, our financial investigative team was analyzing the relevant financial documents, as well as the digital evidence that had been recovered.

At the conclusion of this effort, RSM provided the bank with the key documents and information needed to fully evaluate the actions of the branch manager. Our work included a detailed analysis of all transactions of select bank accounts and credit card accounts, and a tracing of transactions between and among the accounts. Our services allowed the bank, along with counsel representing the bank, to evaluate the significance of the transactions, report necessary transactions to regulatory bodies and make corrective actions as appropriate.

Example 3: Employee theft of customer data

A credit union with over a half-billion dollars in assets and several locations had a former employee who was suspected of stealing customer financial data in an attempt to extort money from those customers. The issue was extremely high-profile, as the suspect was arrested during a failed home invasion attempt while posing as law enforcement officer.

RSM was asked to assist the financial institution with conducting an analysis of the former employee's computer systems to determine what actions might have been taken. We located emails and files containing the customer financial data in question on the suspected employee's computer. We also identified internal database queries where the employee had accessed customer information.

Our analysis of the employee's computer disclosed several internet searches for the customers in question, visits to the victims' social media pages and searches for information related to law enforcement officers, including how to acquire fake badges. At the conclusion of our investigation, we prepared a detailed report, which was provided to the client, as well as to local law enforcement, to assist in their investigation.

Lessons learned

While the overall number of insider-created cyber events may be limited, the financial and reputational cost can be significant, especially for small and midsize entities. These threats can be manifested by someone stealing trade secrets as they depart an institution, or they can also consist of malicious activity to harm an organization.

To help combat this, leadership should ensure that adequate internal controls are implemented and being followed. In addition, performing a preliminary analysis of computer activity performed by suspected employees as they depart from the organization can help to minimize the impact of trade secret data being stolen.

Issue 3: Malware attacks

Malware attacks, especially ransomware events, are a significant threat to any organization. Several of our financial institution clients have experienced malware incidents, but fortunately none of them have encountered a ransomware attack yet. The following examples illustrate how severely some of our clients were affected by malware events.

Example 1: Identifying potential malicious network activity

Our client is a state bank with under $500 million in assets and less than 10 locations. During a routine bank examination, the FDIC conducted a review of the bank's intrusion prevention system (IPS) logs and failed login attempts in the logs.

There were several failed login attempts by the administrator account and the IPS logs indicated a potential attempt to login from a suspicious foreign IP address. The FDIC expressed concern that the network had been compromised and that the login attempts were related to the attempt from the suspicious foreign IP address.

The bank's IT team installed a new internal intrusion detection system (IDS), which identified one computer that had been affected with potential malware. This system was subsequently remediated by the IT team. Due to the concerns of the FDIC, the bank thought it was important to undergo a network threat detection assessment and digital forensic and incident response audit. These processes would also help ensure that the bank and its customer information was secure.

RSM deployed an advanced threat detection network appliance to identify potential malicious network traffic, determine capabilities and confirm the risk of harm to the computer system and corporate network from said malicious traffic. During the monitoring period, RSM found no evidence of suspicious activity on the bank's network and no evidence of any successful remote connections or unauthorized access from known malicious IP addresses to the bank's network.

Example 2: Phishing attachments

Our client is a national bank with under $100 million in assets and less than five locations. In this case, a bank employee received a phishing email with the subject line "Unpaid invoice," which also contained a PDF attachment. When the user opened the email, the bank's malware protection system alerted that the attached PDF was a network-based malware.

Once the attachment was identified as malicious by the malware protection system, it was blocked from being opened by the user. The bank was notified about this alert and launched an internal investigation into the incident.

The bank contacted RSM to perform an analysis of the email and attachment in order to determine the nature and extent of the incident. We determined that the email contained a PDF attachment with a link to a known fraudulent phishing internet site. The phishing site was designed to trick users into giving up their email user credentials. Because the attachment was blocked when the user attempted to access it, no information was provided by the user based on this phishing effort and no information was compromised.

Lessons learned

Preventing a malware incident is often challenging; however, an organization can implement several approaches to help minimize the potential for an event to occur. Installing hardware or software to proactively monitor network activity and look for suspicious files can reduce the likelihood of a malware infection.

While these devices or programs can help, their alerts and notifications must be actively reviewed and investigations should be undertaken to identify and remediate any potentially infected system. Given the ever- changing nature of malware, if a potentially harmful file or program is located it must be appropriately analyzed in secure environment. This analysis often requires specialized knowledge and tools to perform a proper examination of the suspect data.

Conclusion

As noted throughout, no industry or business size is immune to a cyberattack, although small and midsize businesses are at a higher risk of suffering an incident. Due to the value of information that they routinely possess, certain business sectors, including financial institutions, are inherently more susceptible to these events. Understanding the potential threats and lessons learned can help your institution respond to and mitigate potential cyber threats.

In addition, leadership must be ever vigilant in trying to protect their organization from potential cyberthreats. The following are some high-level recommendations that your financial institution can take advantage of to help minimize the risk of a cyberincident:

- Install malware detection and IDS platforms
- Actively monitor logs and IDS to identify potential problems as early as possible
- Develop comprehensive security awareness campaigns
- Perform a regular cyber threat intelligence (CTI) assessment to determine if confidential information has been disclosed on the deep or dark web

Continued from p.31

- Develop, evaluate and test your incident response program
- When (not if) something bad happens, consult someone who handles incidents regularly to help ensure your response is proper and comprehensive

While there is no perfect solution to prevent a cyber event, having an effective tone at the top and implementing common sense controls will greatly reduce the risk.

For further information

In addition to the information in this document, your institution can leverage the following resources to learn more about mitigating cyber-risks at your institution:

Federal Reserve Watchdog Probes Banks' Cybersecurity: https://www.bankinfosecurity.com/fed-reserve-watchdog-probes-banks-cybersecurity-a-9215

Common Cybersecurity Findings and How to Avoid Them: https://minneapolisfed.org/publications/banking-in-the-ninth/common-cybersecurity-findings-and-how-to-avoid-them

Federal Regulatory Agencies Advise on Cyber Insurance for Information Security Programs: https://www.paymentlawadvisor.com/2018/04/13/banking-agencies-advise-on-cyber-insurance-for-information-security-programs/

Cybersecurity and Resilience Against Cyber Attacks: https://www.ffiec.gov/press/pdf/ffieccybersecuritybrochure.pdf

ABOUT THE AUTHOR

Sean Renshaw, CFE, EnCE, CCE, DFCP

Sean Renshaw is the national leader of RSM's digital forensics and incident response (DFIR) practice. His team conducts investigations relating to digital forensics, cybercrime, data breach and also assists with litigation support and e-discovery matters for a broad range of clients within a variety different industries. Sean has over 30 years of experience leading and conducting investigations throughout the U.S. and globally in civil and criminal matters in both federal and state courts. He has provided testimony in reports, depositions and before triers of fact extensively in his career. Sean has also served as an expert witness in federal court surrounding various topics related to electronic evidence and digital forensic investigations. Sean is a former senior special agent and national program manager with the U.S. government, and was a consultant with a Big Four accounting firm prior to joining RSM. He has served as an instructor on topics relating to digital investigations for the U.S. Department of the Treasury, and the U.S. Department of Justice. Sean is a frequent speaker on digital forensics and cybersecurity.

ASSOCIATION NEWS

AIRA WELCOMES NEW BOARD MEMBERS

The AIRA is fortunate to have an enthusiastic, knowledgeable and active board whose members actively participate in the governance of the organization at three board meetings each year. Our board members and their firms have also been, and continue to be, some of the strongest supporters of the CIRA and CDBV programs and AIRA's educational programs, and generous sponsors of AIRA events. Without their support and involvement, the AIRA would not be the strong organization we know today.

AIRA is pleased to announce the addition of two new Board members: Leah Eisenberg from Foley and Lardner LLP and Boris Steffen from GlassRatner Advisory & Capital Group (pictured above, left to right).

- Leah is Of Counsel and a bankruptcy and restructuring attorney with Foley & Lardner LLP in New York City, where she focuses on counseling clients in default, restructuring, bankruptcy, and corporate trust matters, with an emphasis on indenture trustee, creditors' committee, and other creditor representations.
- Boris Steffen, CDBV, is a Senior Managing Director in the Washington and New York City offices of GlassRatner Advisory & Capital Group, where he serves as a financial advisor and expert witness in transactions and related disputes that arise in mergers, acquisitions and restructurings.

Both Leah and Boris have long been active supporters and contributors to the AIRA. Leah has participated in the annual Toolbox pre-conference seminar preceding the AIRA's annual conference and has served on the New York Plan of Restructuring Conference planning committee. Boris has participated at AIRA conferences, in AIRA's webinars, and authored articles for the *AIRA Journal.*

We look forward to working closely with both of them in the future.

AIRA ANNOUNCES NEW EDITORIAL BOARD

Editorial Board members, left to right: Michael Lastowski (Publications Chairman), David Bart (Co-Editor), Boris Steffen (Co-Editor).

The AIRA is pleased to announce formation of a new editorial board that will work toward enhancing the AIRA's signature publication, *AIRA Journal*. Michael Lastowski from Duane Morris LLP in Philadelphia, will be joined by David Bart from RSM US LLP and Boris Steffen from GlassRatner Advisory & Capital Group. Going forward, Michael will serve as Publications Chairman, and Boris and David will serve as Co-Editors of *AIRA Journal*. Plans are underway to increase content, expand advertising, emphasize recognition of AIRA activities and events, and to bring added value to *AIRA Journal's* readership.

Michael Lastowski, managing partner of Duane Morris' Wilmington office, has served as *AIRA Journal* editor since June 2014. He is admitted to practice in Delaware, Pennsylvania and New York. He is a member of the board of directors of the American Board of Certification, an organization that certifies bankruptcy specialists. For a number of years, he has been recognized as a "Super Lawyer" in *Delaware* magazine. He also has been listed in multiple editions of *Chambers USA: America's Leading Business Lawyers*. He is a graduate of Brown University and the University of Pennsylvania Law School. In 2014, he was appointed to the AIRA board of directors.

David Bart is the Senior Director of Forensic Investigation and Dispute Services for the Great Lakes Region of RSM US LLP in the Chicago office. He was Chairman of the ABI Litigation Trust Task Force and the primary author of the *Practitioner's Guide to Liquidation and Litigation Trusts*. He is Vice President of the AIRA and Chairman of the Technical Issues and Standards Committee. He was the primary author of the AIRA's *Standards for Distressed Business Valuation*. He has an MBA in Finance and Accounting from the University of Chicago and holds the CIRA, CDBV, ASA, and CFE professional designations. He was appointed to the AIRA board of directors in 2010.

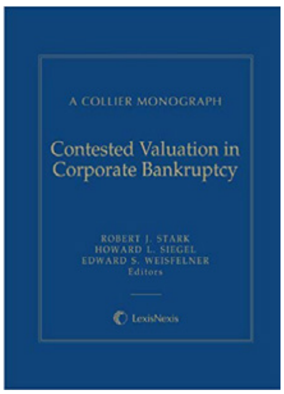
Boris Steffen is the Senior Managing Director of GlassRatner's Washington, DC office. Boris has been active with the American Bankruptcy Institute, American Bar Association, and the AIRA for many years as a conference panelist and contributing author. He has an MM with specializations in Accounting and Finance from the Kellogg School of Management of Northwestern University and holds the CDBV, ASA, CGMA, and CPA professional designations. He was appointed to the AIRA board of directors in 2019.

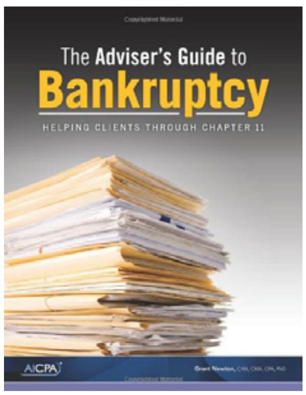
AIRA Journal is focused on wide ranging topics of interest to AIRA's broad-based membership and others in the bankruptcy and restructuring field. Although it emphasizes financial and accounting subjects, topical coverage encompasses the many subjects that impact on the restructuring profession, including legal, strategic, governmental regulation, news, conference activities, and other items. Back issues beginning in 2009 are available on the AIRA website.

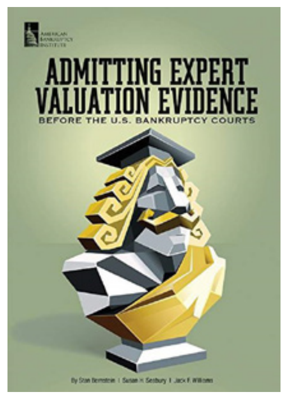
AIRA members, program participants and others are invited to contribute material for publication. To submit materials and suggestions, please contact: Michael Lastowski (mlastowski@duanemorris.com), David Bart (david.bart@rsmus.com), Boris Steffen (bsteffen@glassratner.com), and Valda Newton (vnewton@aira.org).

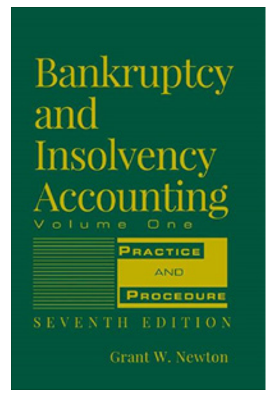
SALUTE TO AIRA AUTHORS

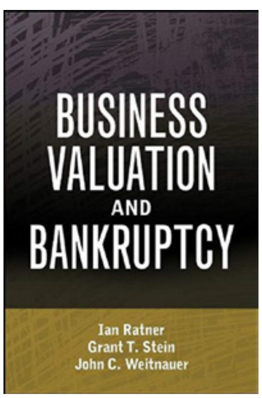
The AIRA congratulates and appreciates its members and conference participants whose publications have contributed to the body of knowledge in the restructuring field. If there are other authors and publications we may acknowledge, please email aira@aira.org. (Note: This recognition does not imply an endorsement or review of these publications.)

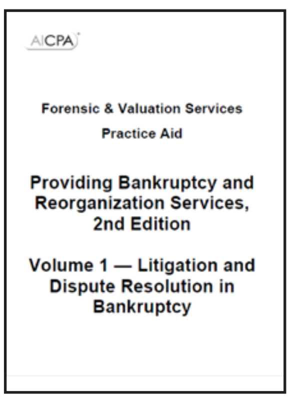


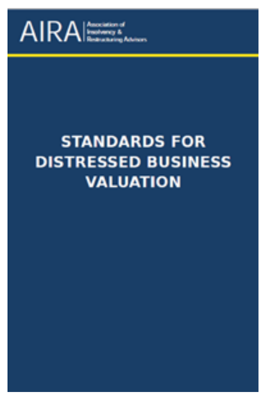


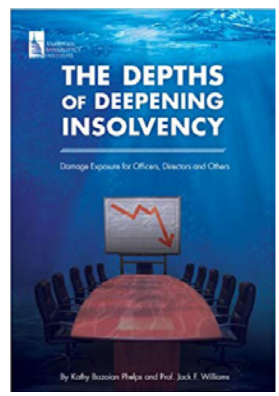


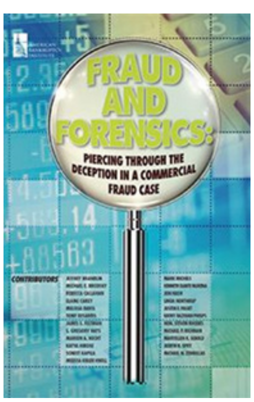


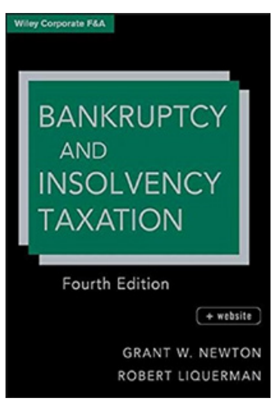


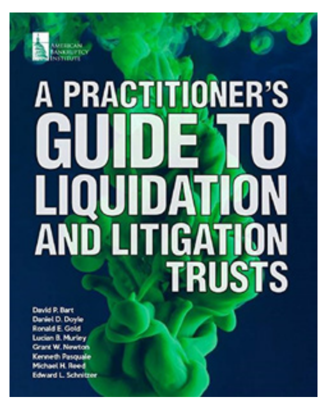










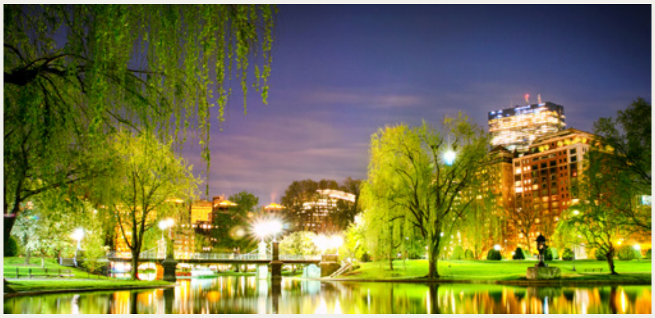


WELCOME TO BOSTON

Join AIRA at AC19 for 4 days of in–depth education that includes two all–day seminars and 18 presentations on the latest developments and trends in Bankruptcy and Restructuring.

In addition to its outstanding educational program, AC19 offers a dynamic context to enjoy other benefits of the conference and its setting. Participants can connect with peers and make new contacts during the many networking opportunities and 5 optional excursions that will showcase the best of Boston.

Boston is a quintessential blend of colonial history and cutting-edge innovation. From the charming cobblestones of Beacon Hill, to the civic landmarks along the Black Heritage Trail and Freedom Trail, to the iconic grounds of Harvard University and Fenway Park, Boston is a treasure trove of Americana.



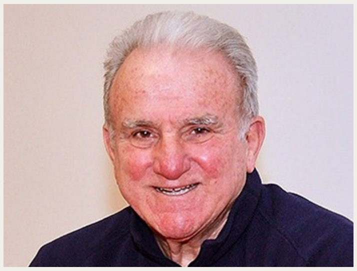
MORE INFORMATION ON NEXT PAGE

3 DISTINGUISHED KEYNOTES

WEDNESDAY

Michael Jenkins
Bloomberg LLP, Product Manager, Core Applications and Insights

THURSDAY



Stephen Kurkjian
Pulitzer Prize-Winning Journalist

FRIDAY

Juliette Kayyem
Lecturer in International Security at Harvard's Kennedy School of Government

EARN UP TO 20 CPE/16.75 CLE, INCLUDING 1.5/1.25 OF ETHICS CREDIT*

*(*Includes Preconference and Annual Conference. CLE based on a 60–minute hour)*

PRECONFERENCE - 2 ALL-DAY SESSIONS

WEDNESDAY

Bankruptcy Taxation
It's a Boston Tea Party! Tax Reform Under Bankruptcy – Insolvency tax experts will assess how the Tax Cuts and Jobs Act including continuing IRS guidance impacts insolvent taxable corporations, pass-through entities, and bankruptcy estates of individuals. They will examine Officer tax liability defense; State tax issues including the impact of Wayfair and sales tax exposure; tax planning and compliance including paperless filing; bankruptcy income tax return preparation; recovery of payments made to tax authorities; issues relating to cryptocurrencies, marijuana and other unconventional assets.

Financial Advisors' Toolbox
The Financial Advisors' Toolbox program will educate an intermediate practitioner about the fundamental tenents of bankruptcy law. Discussions will include providing information on when a company should consider restructuring, various in court and out of court options, pre-bankruptcy planning, first and second day matters, issues impacting unsecured creditors and exit strategies

CONFERENCE - 16 SESSIONS

THURSDAY

The Fate of Higher Education

Developments in Arbitration or Mediation as an Alternative to Litigation

FRIDAY

Litigating Confirmation in Multi-Debtor Cases

Food for Thought: A Look Back and Ahead at Grocery Retail Disruption

Moving Beyond the Waterfall: Post-Confirmation Liquidation Trusts (SBMM)*

Privacy, Data Protection, and Cybersecurity in the Restructuring Context – Don't Create More Distress

Is That Company Solvent? You Are the Judge!

Healthcare Consolidation and Collaboration - Who Will Be the Winners and Who Will Be the Losers? Managing Constituents in the Face of Industry Disruption and Change

The Closely Held Company in Distress: Prepetition Steps for Preserving Going Concern Value (SBMM)*

Negotiating & Drafting Lessons and Tips That Could Help Protect or Eliminate Avoidance Claims - What You Agree to Today Can Affect Tomorrow!

Wind Down of Private Funds and Other Assets: Process and Strategies in Various Jurisdictions and Tales from the Road

Hot Topics in Valuation

The Impact of Trade Tariffs – How Are They Impacting Companies and Creating Distressed Situations? (SBMM)*

Bitter Pill? Pharma Restructuring Challenges...and Upside

SATURDAY

2019 Retail Restructuring Trends and What You Need to Know

Avoiding Disaster - Navigating Ethical Issues Relating to Retention and Compensation

EXCURSIONS NEXT PAGE

*SBMM denotes sessions directed towards small business/middle-market.

5 FUN-FILLED EXCURSIONS

THURSDAY

Boston Duck Tour

Sponsored by Development Specialists, Inc.

Take the ride of your life and hop on a Boston Duck Tour!

The fun begins as soon as you board your "DUCK", a W.W.II style amphibious landing vehicle. First, you'll be greeted by one of our legendary tour ConDUCKtors®, who'll be narrating your sightseeing tour of Boston. Then you're off on a journey like you've never had before. You'll cruise by all the places that make Boston the birthplace of freedom and a city of firsts, from the golden-domed State House to Beacon Hill and the TD Garden, Boston Common and Copley Square to the Big Dig, Government Center to fashionable Newbury Street, Quincy Market to the Prudential Tower, and more. And just when you think you've seen it all, there's more. It's time for "Splashdown" as your captain splashes your DUCK right into the Charles River for a breathtaking view of the Boston and Cambridge skylines, the kind of view you just won't get anywhere else!

Cost: $40

JFK Presidential Library Self-Guided Tour

The John F. Kennedy Presidential Library and Museum is dedicated to preserving and providing access to the legacy of the 35th President of the United States. The Museum utilizes high definition, large-screen projections, interactive displays, re-mastered films and original artifacts from the life and times of JFK to bring to life President Kennedy's 1000 days in office. Visitors have described the Museum as "an unforgettable journey through American history and the life of a truly remarkable man." We invite you to embark on a journey through the early 1960s to experience anew the words, ideals and actions of President John F. Kennedy which inspired Americans to ask what they could do for their country.

Enjoy lunch on your own before the transportation departs the hotel at 2:00.

Cost: $30

USS Constitution Museum & Ship Tours

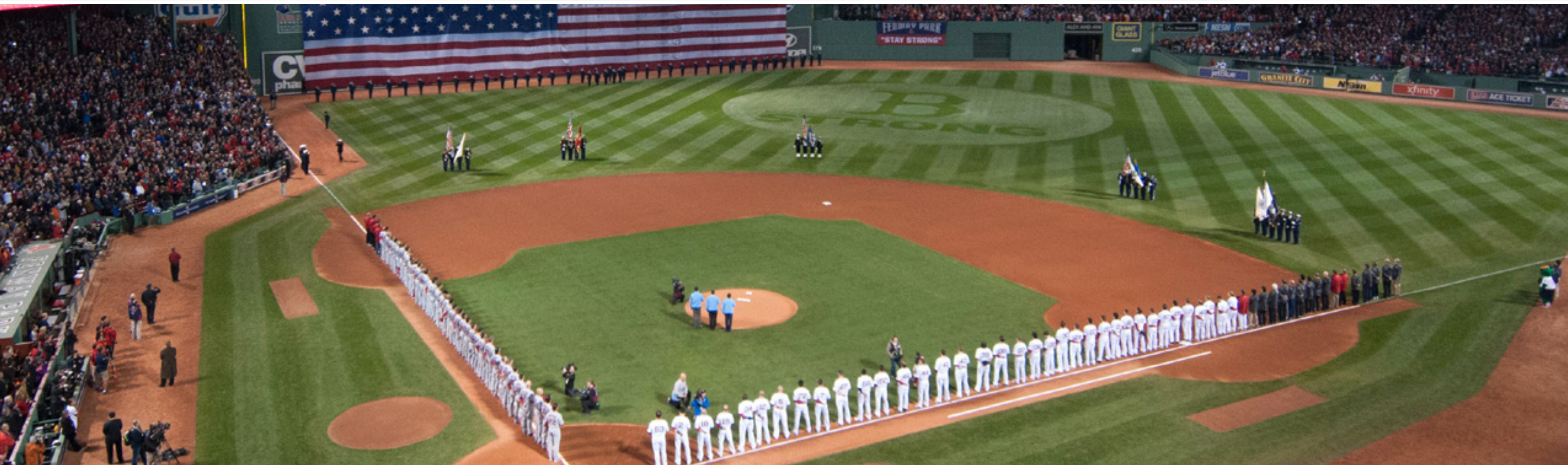
The USS Constitution's past comes to life through objects, stories, award-winning exhibits and hands-on experiences at the USS Constitution Museum. We begin here for a 45 minute guided tour. For the complete experience, we will also explore the USS Constitution, the world's oldest commissioned warship afloat and America's Ship of State, which promotes the United States Navy and America's naval heritage. Located inside Boston National Historical Park as part of the Charlestown Navy Yard, it is also part of Boston's Freedom Trail. Visitors are able to ask questions and speak with active duty U.S. Navy Sailors assigned as members of USS Constitution's crew, who are stationed at the ship as interpretative historians to help bring its storied past to life.

Cost: $20

Isabella Stewart Gardner Museum - Guided Tour

Discover the Isabella Stewart Gardner museum's magic through a private guided tour. Our knowledgeable Museum Teacher docents will engage you through conversation and close looking, while sharing insights and stories about the museum's history, collections and installations. You will explore masterpieces of the Gardner Museum and discover why this is one of the greatest private art collections in America. Tours are typically one hour long and focus on approximately five works of art. Following the guided tour, you'll have some time to explore the museum and gardens at your leisure.

Cost: $20



FRIDAY

An Evening at Fenway Park - Red Sox Game

Sponsored by CohnReznick LLP and EY LLP

Start the summer off right with an evening at beautiful Fenway Park to witness a battle between the World Champion Red Sox and the Tampa Bay Rays! A pre-party with food and drinks will be held at a local restaurant prior to the game. A box in the right field is reserved for AIRA guests, and game time is 7:10 pm.

Cost: $90

CONFERENCE HOTEL - FAIRMONT COPLEY PLAZA

Centrally located in Boston's historic Back Bay, Fairmont Copley Plaza is steps away from the Boston Public Library, historic Beacon Hill, and the Freedom Trail. The historic landmark Back Bay hotel is a luxury four diamond property and has been a symbol of the city's rich history and elegance since its gala opening in 1912.

AIRA's room block consists of an assortment of Fairmont Rooms (1 queen bed) and Deluxe Rooms (1 King bed or 2 double beds). To qualify for the group nightly rate of $355 Fairmont / $375 Deluxe, your reservation must be made by April 30, 2019.

Hotel Address: 138 St. James Avenue
Boston, Massachusetts 02116
Phone: (617) 267-5300
For Online Registration visit www.aira.org

REGISTER ONLINE FOR AC19 AT WWW.AIRA.ORG

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CPAs, Forensic and Insolvency Advisors

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MALEK REMIAN LLC

Kevin Cofsky of Perella Weinberg Partners gave the Keynote Presentation. Dennis Ulak of Huron moderated an M&A Panel that included Austin Elam of Haynes and Boone, Jeremy Griggs of Guggenheim Partners, Marcel Hewamudalige of Evercore, and Scott Smetko of EnCap. Larry Manning of FTI Consulting moderated a Restructuring Panel that included Eli Columbus of Haynes and Boone, David Hindman of AlixPartners, the Honorable Marvin Isgur from the U.S. Bankruptcy Court, Southern District of Texas, and Brett Lowrey of Houlihan Lokey.

CLUB 10

Organizations with 10+ professionals who are active CIRAs or have passed all three parts of the exam

AlixPartners, LLP	61
FTI Consulting, Inc.	48
Alvarez & Marsal	41
Ernst & Young LLP	30
Berkeley Research Group, LLC	23
Deloitte	23
Huron Consulting Group	21
Conway MacKenzie, Inc.	18
Ankura Consulting Group, LLC	16
KPMG LLP	15
Office of the United States Trustee	13
BDO USA, LLP	12
PwC	12
EisnerAmper LLP	11
GlassRatner Advisory & Capital Group LLC	11
SOLIC Capital Advisors, LLC	11
Pension Benefit Guaranty Corporation	11
Protiviti Inc.	10

FALL 2018 EVENT HIGHLIGHTS

In September 2018 AIRA together with the Commercial Finance Association hosted the 7th Annual Dallas Energy Summit. Approximately 125 people comprising the top minds and key players in the energy industry met at the Haynes and Boone Conference Center. Bankruptcy and restructuring advisors, attorneys and others gained valuable insights into current issues, trends and developments, and had an opportunity to network and make new contacts at the cocktail reception. Thank you to our sponsors FTI Consulting, Huron, AlixPartners, Haynes Boone, and TMA/Dallas-Fort Worth Chapter!

In November 2018, AIRA held its annual Advanced Restructuring and Plan of Reorganization Conference (NYPOR) at the Union League Club of New York City. Approximately 135 bankruptcy and restructuring advisors, attorneys and others addressed current issues, trends and developments, and had an opportunity to network and make new contacts at the cocktail reception. Thank you to our many sponsors: AlixPartners, Ankura, Arent Fox, Cohn Reznick, Duane Morris, Deloitte, Goodwin, Huron, Norton Rose Fulbright, and Young Conaway Stargatt & Taylor! Conference co-chairs Mike Lastowski of Duane Morris and Brian Ryniker of CBIZ MHM pulled together a full day of programs with six panels and a lunch program speaker, the Hon. Steven W. Rhodes of the U.S. Bankruptcy Court, Eastern District of Michigan. A closing cocktail party honored Judge Michael B. Kaplan of the U.S. Bankruptcy Court, District of New Jersey. Each year NYPOR honors a judge for his or her service to the profession. This full-day event featured a total of 30 speakers who presented to a packed room!

Save These Dates for Fall 2019

Dallas Energy Summit - September 17

NYPOR - November 18

NEW MEMBERS

Carlos Abadi
Abadi & Co.
New York, NY

Muath Alrobie
Superior, CO

Alex Arriaga
Kensington Fund
San Juan, PR

Jody Bacque
M&E Partners
Spanish Fort, AL

Debra Bailey
Pension Benefit Guaranty Corporation
Washington, DC

Alissia Bell
AlixPartners, LLP
New York, NY

Emma Berardino
Huron Consulting Group
Boston, MA

Evan Bookstaff
FTI Consulting
Dallas, TX

Tom Braegelmann
Kensington Fund
San Juan, PR

Russell Brooks
Protiviti
Richmond, VA

Eric Brown
FTI Consulting
Los Angeles, CA

Jon Bryant
AlixPartners, LLP
Dallas, TX

Jeremy Burnstein
Globalview Advisors LLC
Irvine, CA

Alexander Canale
Alvarez & Marsal
New York, NY

Connor Casas
SOLIC Capital
Evanston, IL

Kevin Cassidy
Alvarez & Marsal
New York, NY

Carl Charlotin
Pension Benefit Guaranty Corporation
Washington, DC

Nicholas Cherry
Alvarez & Marsal
Santa Monica, CA

Andrew Ciriello
Alvarez & Marsal
Washington, DC

Austin Cornwell
Larx Advisors
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Robert Crockett
Ernst & Young
Camana Bay, Grand Cayman

Matthew Delmonte
AlixPartners, LLP
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Megan Donahue
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James Dullinger
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