AIRA Journal

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WHAT'S INSIDE

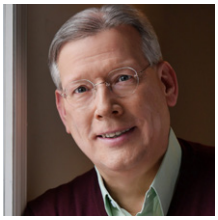
Mount McLoughlin in the Cascade Range of Southern Oregon, near Medford, OR, AIRA's headquarters

SAVE THE DATE FOR THE 24TH ANNUAL ADVANCED RESTRUCTURING & PLAN OF REORGANIZATION (POR) CONFERENCE | NOVEMBER 17, 2025 NEW YORK & ONLINE

Visit www.aira.org/conference for more information and registration

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

From the Executive Director's Desk



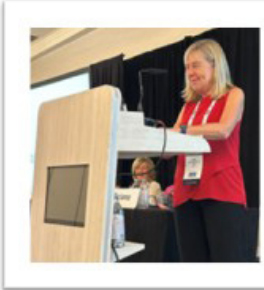
James M. Lukenda, CIRA

BRC25 - A Successful Conference

June in Orange County, CA, tends to be a very pleasant time to visit the West Coast. This year was no exception. On June 4th, AIRA returned to Newport Beach for its 41st annual meeting and Bankruptcy Restructuring Conference 2025 (BRC25).

A successful conference is the culmination of hours upon hours of devoted effort by the conference planning committee, the individual session leaders and panelists, and importantly, the leadership provided by the conference co-chairs and AIRA staff.

This year, the main conference Co-Chairs were **Cia H. Mackle,** Pachulski Stang Ziehl & Jones LLP, **Thora Thoroddsen,** CIRA, AlixPartners, LLP, and **Nick R. Troszak,** CIRA, Development Specialists, Inc. with The Honorable **Martin R. Barash,** U.S. Bankruptcy Court, C.D. Cal., as Judicial Co-Chair. Co-chairing the Pre-conference Bankruptcy Taxation session were **Andrew R. Barg,** CIRA, Barg & Henson CPAs, PLLC, and **Patricia Bailey,** Alvarez & Marsal Tax, LLC. Co-chairing the Financial Advisors' Toolbox sessions were **Karl Knechtel,** CIRA, RK Consultants, LLC, and **Matthew R. Bentley,** ArentFox Schiff LLP. On behalf of the Association, our membership, and the board of directors, I extend thanks and appreciation for these individuals' efforts and those of the planning committee participants with whom they worked. Once again, my thanks to the AIRA staff, Cheryl, Michele, and Mike, with assistance from Dom and Alexa, in addressing the logistical details which are so important for accomplishing a well-received event.



Thora Thoroddsen

This issue of the Journal recaps the conference, the annual AlixPartners CIRA award winners, and the recognition of the 2025 class of AIRA Distinguished Fellows. Since 2000, we have granted the Emmanuel M. Katten Award. This year, AIRA recognized an individual who has contributed to AIRA for many years behind the scenes. **Keith Shapiro** has counseled the Association and its board going back for more years than I can count. Even when he left the practice of law to pursue his own investment fund, he remained always available and ready to connect the Association with counsel as needed. Steve Darr's remarks on Keith's contributions are included later in this issue, but I wish to extend my thanks personally for Keith's involvement with AIRA. Congratulations!

2025 AIRA Distinguished Fellow David Payne with AIRA Founder Grant Newton (in absentia)

Board Member David Bart

BRC26 - Nashville Planning

Cheryl is currently organizing the planning committee for BRC26 which will be held in Nashville beginning on June 3, 2026. If you are interested in participating or perhaps have a staff member in your firm looking to expand their participation in the area of thought leadership, please reach out to Cheryl (ccampbell@aira.org).

AIRA NCBJ Luncheon - Other Roles in the Bankruptcy Process - Trustees, Examiners, Why not Special Masters?

By the time this Journal is in your inbox or mailbox, we will likely be upon NCBJ in Chicago (September 17-20). Sponsored by **Huron Consulting,** the topic for AIRA's September 18th luncheon session concerns efforts by the Honorable **Michael B. Kaplan**, U.S. Bankruptcy Court, NJ, and others to revise Bankruptcy Rule 9031 to allow the appointment of special masters where such an appointment would be helpful to a bankruptcy

Board Member Angela Shortall

case. Speaking with Judge Kaplan are **Judge Craig Goldblatt**, DE, and **Judge Frank Bailey**, MA (ret.). **Katie Catanese,** Foley & Lardner LLP, and **Angela Shortall,** 3Cubed Advisory Services, LLC, are moderating. If you have already registered for NCBJ and overlooked attending the luncheon, please contact Cheryl. She'll provide the details for adding the luncheon to your registration. This is a panel well worth hearing – don't miss it.

Two Other Upcoming Events of Note

AIRA and TMA Dallas are in the final stages of organizing our annual afternoon summit on October 23rd. After focusing on healthcare in 2024, the summit topic is returning to energy with a focus on the state of renewable energy markets. More to come – registration will open in mid-September.

AIRA's annual Advanced Restructuring and POR Conference will again be held at the CohnReznick's conference center in New York City on November 17th. Registration will open in early September. Following the Monday conference, AIRA will conduct an in-person CIRA 2 session at the CohnReznick conference center on Tuesday and Wednesday, November 18th and 19th. Registration for this CIRA 2 session qualifies participants for a discount to attend the Monday conference.

Previous years Distinguished Fellows Mike Deeba, Jack Williams, and Susan Seabury

Significant Legislative Changes to the Bankruptcy Code

In June I was asking bankruptcy attorneys what, if anything, was simmering on Capitol Hill related to the Bankruptcy Code. Not much, I was informed. Increasing the Subchapter V threshold was still a topic of discussion,

AIRA President Eric Danner

but there wasn't much movement with all that was going on in other legislative areas. So, I was surprised when I saw the news that Public Law 119-27, the so called "Genius Act," contained provisions that some are describing as the most significant amendments to the Bankruptcy Code since BAPCPA in 2005. While this is very new legislation, a summary follows here in the Journal with more to come, I am sure.

Few Final Thoughts on Careers, Involvement, and Transitions

Board Member Ira Herman

We are all busy. The best way to utilize time effectively and expand participation in association matters and thought leadership is to leverage your leadership in your firm by providing your staff with the introduction tto a planning committee or conference participation role. As I've written in past letters, I am grateful for the then-leaders in the firms where I was an associate who encouraged my participation in AIRA and other thought leadership organizations.

Once again, a collection of informative and well-edited articles follows. Please read, enjoy, and learn.

Jim

Judges Roundtable (left to right): Judge Lafferty, Judge Barnes, Judge Barash, Judge Clarkson, Judge Heston

AlixPartners CIRA Awards

Congratulations CIRA Award Winners

Each year, AIRA recognizes the CIRA candidates who attained the highest cumulative scores on the CIRA exams. Since 2018, the CIRA Awards have been sponsored by AlixPartners. This year's winners were honored at the Awards Presentation.
(Left to right) Winners Freda Yuan, CIRA, AlixPartners, Zach Brant, Ankura Consulting, Warren Su, CIRA, Alvarez & Marsal, and Presenter Steven Spitzer.

Certificates of Distinguished Performance were awarded to:

Matthew Altman, CIRA, M3 Partners, LP
Matthew Flahive, CIRA, Stapleton Group, part of JS Held
Eric Greenhaus, M3 Partners, LP
Jason Miller, M3 Partners, LP
Justin Mitchell, Alvarez & Marsal
Harrison Zuk, CIRA, Palm Tree LLC

2025 Class of Distinguished Fellows

(Left to Right) Executive Director Jim Lukenda, Distinguished Fellows Payne, Meyerowitz, Herman, Shapiro, and Barg, and Chair of the Fellows Committee David Bart.

AIRA's Distinguished Fellows Program annually recognizes those AIRA members who have made significant contributions to AIRA and to the art and science of corporate restructuring. The program is intended as an academic and professional honor for those AIRA members who exemplify the highest level of excellence in professional practice and whose contributions have left a significant positive legacy to our profession and to AIRA. At BRC25, we recognized the fifth class of Distinguished Fellows, as presented by AIRA Board Member and Chair of the Fellows Committee David Bart:

Andrew Barg, CIRA, Barg & Henson CPAs, PLLC
Ira Herman, Blank Rome LLP
Karl Knechtel, **CIRA,** RK Consultants, LLC
Kimberly Lam, CIRA, Bachecki Crom & Company LLP
Jennifer Meyerowitz, SAK Healthcare
David R. Payne, CIRA, CDBV, D. R. Payne & Associates
Keith Shapiro, Karlov Street Capital

The Emanuel M. Katten Award

Emanuel M. Katten was a restructuring accountant in the Chicago area and a founder of AIRA almost fifty years ago. Manny was one of the original board members, and was the 23rd person to complete the requirements for the CIRA designation. He was also the Chairman of the first Annual Conference.

Emanuel "Manny" Katten

The Manny Katten award was approved by the board of directors in 1999 following Manny's passing from cancer. The award is bestowed annually to an individual selected by the Board who has demonstrated exceptional leadership, dedication, and service to the bankruptcy, restructuring, and turnaround field.

Steven Darr, AIRA Board Member, presented the award to this year's honoree, Keith Shapiro of Karlov Street Capital, introducing him as a "Man for All Seasons." Keith is a lawyer, investment advisor, restaurateur, and philanthropist.

Keith Shapiro and Board Member Steve Darr

As an attorney, Keith was a founder of the Chicago office of Greenberg Traurig and held many leadership positions there. He was President and Chairman of the American Bankruptcy Institute, a Director of the Turnaround Management Association and the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL International), and an American College of Bankruptcy Fellow. He served on the Emory Law School Law Advisory Board. Most importantly, he has been Special Counsel to AIRA since 1993.

A leading investment advisor, he founded Karlov Street Capital, LLC in 2015, where he is now the Chairman and CEO. Karlov is an innovative private investment firm designed to find and invest in opportunistic private equity and real estate investments. To date, Karlov has deployed over $300 million across more than 30 transactions.

He is an entrepreneur and restauranteur through his activities at award-winning sister restaurants Smyth and The Loyalist in Chicago. Smyth earned a legendary three stars from the Michelin Guide in 2023, 2024, and 2025. He gives back by his volunteer work with many charities, including leading the 2024 $100 million campaign for the Jewish United Fund of Chicago.

Keith was inducted this year as an AIRA Distinguished Fellow. He is leading by example in his service to the bankruptcy, restructuring, and turnaround field, and beyond.

To learn more about the program and nominations, visit the AIRA Distinguished Fellows Program page at www.aira.org/aira/fellows.

THANK YOU TO OUR CONFERENCE SPONSORS

CHEERS TO OUR CO-CHAIRS & PLANNING COMMITTEE

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Cia H. Mackle, *Pachulski Stang Ziehl & Jones LLP*
Thora Thoroddsen, CIRA, *AlixPartners, LLP*
Nick R. Troszak, CIRA, *Development Specialists, Inc.*

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Andrew Barg, CIRA, *Barg & Henson CPAs, PLLC*

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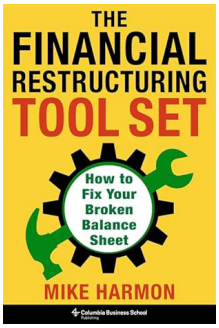
42nd ANNUAL BRC
Bankruptcy & Restructuring Conference

UNITED STATES INSOLVENCY PRACTICES: CAN THEY BE BETTER?

Mike Harmon, *Gaviota Advisors LLC and Lecturer, Stanford Graduate School of Business*



In my opinion, the US insolvency system strikes a fairly attractive balance between the societal objectives of debtor rehabilitation and the protection of creditor rights. Achieving this balance increases the likelihood that the right firms survive – those that are viable as measured by their going concern valuation exceeding their liquidation value. By protecting creditor rights, and particularly, secured creditor rights, the US system keeps the cost of debt capital low for firms, which is beneficial for their growth and thus for the economy as a whole. That said, as with anything, this system has room for improvement.

There has been a lot of thoughtful academic and practitioner research and recommendations on how to improve bankruptcy in the US. I will address a few areas in which I see the Chapter 11 process and insolvency practices sometimes leading to suboptimal outcomes, and what might be done to improve these.

Small Firm Filings

Small firms liquidate far too frequently. Many of the costs of Chapter 11 bankruptcy are relatively and prohibitively high for smaller firms, which forces many of them to liquidate rather than reorganize. In many cases, these might be inefficient liquidations, in that viable firms whose going concern value exceeds their liquidation value are forced to liquidate due only to the high costs of bankruptcy. Subchapter V has introduced a useful path for these firms to pursue a reorganization in a low cost way. However, that path has been underutilized, as many smaller companies do not know how it works and what its benefits are. I am hoping that private industry will rise to this challenge by (1) providing better education, resources, advisory services, and capital to smaller firms so that they can access this path more effectively, and (2) bringing technology, including artificial intelligence, to better application within the insolvency process so as to streamline the preparation of legal documents and lower costs even further.

DIP Loans

DIP lenders are often able to extract excessive pricing and terms, to the detriment of debtors and other creditors. A majority of DIP loans, by necessity, are made on a priming basis, given the amount of secured debt in most capital structures. Capital providers are rarely willing to provide a loan to a bankrupt firm at a priority tier that is junior to that of the secured lenders. Unless the secured lenders (typically a majority) approve of a priming loan, there will be a priming fight that could result in a liquidation of the firm's assets if the debtor loses. Most debtors are not willing to take this risk. This sets up a dynamic in which the only viable option in many bankruptcies is for the secured lenders to put up the DIP loan. This effectively provides them with monopolistic power that they are often able to leverage into negotiating (1) a roll up of their other secured claims into the DIP loan, (2) excessive pricing, (3) control rights over the bankruptcy process, and sometimes (4) a linking between their DIP loan and the reorganization plan's outcome (by, for example, requiring that the DIP loan be converted into the post-reorganization equity as part of the plan). Empirically, DIP loans have enjoyed very low charge-off rates, so such pricing and features are often disproportionately beneficial relative to the investment risk to which these lenders are underwriting.

Why is this a problem? The Bankruptcy Code was designed to treat creditors fairly in accordance with their priority. If DIP loans routinely enable certain creditors to circumvent this fair treatment to the detriment of others, this could result in other creditors suffering higher than expected losses. Such creditors will likely price these losses into future credit spreads, which will raise the cost of capital for firms operating in an economy.

One way to resolve this might be to amend the Bankruptcy Code to allow judges more leeway to satisfy the adequate protection requirement for priming DIP loans in instances in which the secured lenders have previously made a proposal to prime themselves. In essence, the proposal of a priming DIP loan by a majority of the secured creditors in a given situation could serve as evidence that the secured lenders are indeed adequately protected, and this could open the door for a more competitive process. Such a process could include (1)

minority secured creditors, (2) junior creditors, (3) equity holders, and (4) independent third parties. If this were to occur, I predict that secured creditors would still end up providing the DIP loan in the vast majority of cases, as they would be highly motivated to maintain control over their collateral. However, this process would force them to do so on more competitive terms. Alternatively, some guardrails could be introduced, including a prohibition on DIP lenders' ability to connect a DIP financing to a reorganization plan's outcome.

Tort Claims

Tort claimants often get a bad deal. As unjust as it seems when those wronged by a bankrupt corporation fail to receive a full recovery, a debtor can only provide such claimants with 100 percent of its value (after satisfying the claims of secured creditors). However, in many historical cases, tort claimants have fallen well short of achieving even this outcome. In some cases, they have often suffered large impairments to their claims, while equity holders with junior claims have been allowed to keep some or all of their equity. In other cases, tort claimants received lower recoveries than other unsecured creditors of the same rank in the priority waterfall. Poor outcomes have sometimes occurred because (1) many tort claimants have had a negative emotional reaction to receiving an ownership stake in the company that wronged them, (2) such claimants have had real expenses associated with their claims and have preferred to receive cash from the estate at a lower recovery rate than what might be fair to allow them to pay those expenses, as opposed to receiving the equity that they would have otherwise received, and (3) most tort claimants are not sophisticated creditors in the same way that institutional investors were, and thus lacked the ability to properly value the equity they could have received, or to negotiate their recoveries as aggressively.

One way to resolve this would be to require that the absolute priority rule automatically be invoked in situations in which tort claims reach a certain threshold in amount relative to the value of the estate. In essence, if a debtor is going to use Chapter 11 to resolve large tort claims, it should have to settle the estimated value of the claims in full or provide claimants with all of the equity of the company. Tort claimants who wish to receive cash can achieve this through secondary public equity offerings, if the debtor is of sufficient size, or through private equity placements.

A second solution would be for courts to undertake more rigorous enforcement of the Bankruptcy Code provisions that prevent unfair discrimination among unsecured creditors. The idea is that proper care would be taken to ensure that tort claimants are receiving at least as large a recovery against their claims as other equally ranked unsecured creditors, even if the tort claimants have approved the settlement as a class.

Governance

Boards of directors have too much leeway to harm companies and creditors. Corporate governance laws and legal precedent in the US only require directors and officers of companies to consider the welfare of creditors as residual claimants once a company is insolvent. The definition of the word insolvent is ambiguous, and through the "business judgment rule," boards of directors have been mostly immune to liability.[1] Boards can gain cover by retaining paid financial advisors to perform valuation analyses to support their assertion of solvency. Such analyses are based on a number of subjective assumptions over which an advocate has a lot of discretion. In some of these instances, the companies arguing the case for solvency had debt trading at deep discounts to par value, a glaring market indicator of insolvency. Under the cover of third-party validation, many boards have acted on behalf of shareholders by pursuing liability management transactions which preserve such holders' "hope certificate" for a recovery, while failing to address the company's overwhelming debt burden adequately. Empirically, most of these companies have ended up in bankruptcy anyway. Thus, these earlier transactions have only served to prolong the companies' zombie personae and often caused harm to the associated enterprises and their stakeholders. Accordingly, recovery rates to debtholders have been declining over time, and this could eventually impact risk spreads and costs of capital for firms operating in the economy more broadly.[2]

Potential solutions could include (1) courts placing more emphasis on debt trading at a discount as evidence of insolvency, and (2) courts holding boards more accountable for the damage which occurs to an insolvent business enterprise and residual stakeholders when it maintains too much debt, and when a bankruptcy filing might have been more appropriate.

Chapter 22

There are too many Chapter 22s. From 1984 until 2017, 20 percent of all firms emerging from the bankruptcy process have subsequently refiled at least one additional time—and one has filed five times.[3] The high relapse rate associated with bankrupt companies occurs because (1)

[1] Under the business judgment rule, directors are not held liable in courts if they acted in good faith, with care, and in a way that would be reasonable to assume was in the best interests of the company. In practice, this has shielded directors from liability, except in instances of material misconduct.
[2] Edward I. Altman and Mike Harmon, "Risky Corporate Bonds in 2021: A Bubble, or Rational Underwriting in a Low-Rate Environment?," The Journal of Portfolio Management, November 2021.
[3] Trump Casinos and Resorts. Edward I. Altman, Edith Hotchkiss, and Wei Wang, *Corporate Financial Distress, Restructuring and Bankruptcy,* Fourth edition (Wiley, 2019), 17.

many types of creditors prefer to receive debt, rather than equity, in restructuring transactions, and (2) many debtor management teams are too optimistic in the forecasts that they use to determine feasibility for their proposed reorganization plans. That said, the optimal and realistically achievable amount of Chapter 22s is not zero, but rather a rate which is closer to that of businesses that have not previously filed for Chapter 11 bankruptcy.

One possible solution is to encourage bankruptcy judges to hire their own financial advisor for larger cases, with the cost being charged to the estate. This advisor would have a narrow mandate of assessing the feasibility of the reorganization plan. Judges would have the power to use the advisor's analysis to block the confirmation of a plan that proposed too much debt and force creditors to either (1) discharge more debt, (2) convert more debt into equity, or (3) raise cash through an equity offering where the use of proceeds would further deleverage the emerging debtor's balance sheet. Such a resource could be used more sparingly with regard to expedited plans, in recognition that the benefits of an expedited process possibly outweigh the Chapter 22 bankruptcy risk.

Skeptics will correctly point out that this will increase the costs of an already costly process. However, if this cost reduces the relapse rate of Chapter 11 bankruptcy cases by a meaningful amount, the average costs for bankruptcies, and thus costs for individual debtors, will decrease over time.

Conclusion

Any system design involves making tradeoffs and difficult choices, and there are no policies that will achieve perfect outcomes in every situation. The US insolvency system has become what many consider to be the "gold standard" in terms of minimizing the potential adverse consequences from such tradeoffs. However, as actors' practices have evolved over time, this has led to more unintended outcomes than were the case when the bulk of the current system was established in the Bankruptcy Reform Act of 1978. While thoughtful adjustments to the current framework may introduce other tradeoffs, they may also represent opportunities to improve fairness, efficiency, and long-term economic value.

ABOUT THE AUTHOR

Mike Harmon
Gaviota Advisors

Mike has focused on distressed companies and restructuring situations for more than thirty years, largely as a senior investment professional at Oaktree Capital Management, a leading private investment firm. He is a lecturer at Stanford University's Graduate School of Business and the managing partner of Gaviota Advisors, where he advises and invests in small to medium-sized companies.

FROM REACTION TO READINESS: UNDERSTANDING MODERN CROs

Mychal Harrison and Brian Buebel, CIRA, *KPMG LLP*

Companies and stakeholders can find themselves navigating rough waters for any number of reasons and may decide they need the specialized help of a chief restructuring officer (CRO) to guide the path forward. A CRO can offer a different perspective and skill set, bring discipline to an organization, and effect needed cultural change.

But often, organizations wait too long to bring in a CRO, according to a recent KPMG LLP survey. What's more, survey respondents consistently shared that earlier intervention would likely have led to better outcomes.

Key Survey Statistics

- **Persistent financial distress was cited as the top reason to hire a CRO, cited by 66% of overall respondents.**
- **63% of all respondents acknowledge the high importance of CROs in future restructuring scenarios.**
- **60% of respondents expect global economic volatility to significantly affect the need for CRO services, with PE firms (65%) especially concerned.**

Today's rapidly evolving business landscape demands that companies reevaluate their thinking when it comes to resolving the issues they face. Companies are experiencing market challenges that include sustained high interest rates, political uncertainty, increasing global economic volatility, accelerated digital transformation, and a rise in cross-border restructuring. Hiring a CRO can no longer wait until a company is in crisis. Delay can too often result in significant value erosion.

CROs are expanding their skill sets to include digital transformation, technology, and workforce management

For companies in distress, early, sophisticated intervention through a modern CRO approach offers enhanced options and improved outcomes. To determine the challenges – and leading practices – related to hiring a CRO, KPMG conducted a survey of private equity (PE) firms, law firms, and lenders to glean insights into how they use CROs to assist the companies with which they are involved.

This article delves into the multifaceted realm of CRO engagements, shedding light on why and when companies see the unique skill set of a CRO, the criteria that inform their selection, and the outcomes they anticipate from such pivotal appointments. Drawing on insights from a diverse array of hiring organizations, it provides an in-depth analysis of the current state of CRO engagements and offers insights into the evolving expectations and challenges that shape these missions.

The expected increase in reliance on CROs speaks volumes about their expanding scope and the growing recognition of their strategic value. With the right approach and expertise, CROs can help companies chart a course toward revitalization and growth.

Storm Clouds Gathering: Why Today's Business Landscape Demands a New Approach

Businesses are facing numerous pressures and complexities, creating new risks that can presage the need for restructuring and hiring a CRO. The severity of these pressures can vary based on stakeholder, from C-suite financial concerns to PE firms' volatility worries to lenders' capital recovery priorities. And ongoing global economic instability points to the increasing importance of CROs and the need for a nimble, proactive approach when hiring one.

What follows are some of the more pressing issues influencing the need for a CRO:

Economic Indicators

Current economic conditions are contributing to financial stress. Companies can find themselves navigating rough waters for any number of reasons and may decide they need the specialized assistance of a CRO to move forward. In fact, 60% of respondents expect economic volatility to significantly impact the need for CRO services in the next three years. Contributing factors include slowing consumer spending, a decline in business investments, sustained high inflation, and weakening profits. Moreover, interest rates are now projected to decrease more slowly than previously anticipated, constraining access to capital.

Stakeholder-specific Market Pressures

Persistent financial distress—the most prevalent reason historically for needing restructuring help, along with

acute operating losses—was cited as the top reason to hire a CRO, cited by 66% of overall respondents. That was followed by the need for strategic redirection or restructuring (53% of respondents), and the inability to meet debt obligations (49% of respondents).

Digital Disruption

Our survey also found that accelerated digital transformation was another driver for organizations to consider the services of a CRO, cited by 45% of all respondents. This was of particular concern for PE firms (59%) and lenders (45%), suggesting a rising demand for CROs adept in managing digital shifts.

Converging Pressures Creating Risk

The world remains volatile, with regional armed conflicts creating geopolitical uncertainty. Extreme weather events can eliminate sourcing, disrupt supply chains, and cause other organizational challenges—all leading to higher business costs.

Variations Among Hiring Organizations

Outside of general trends, lenders, PE firms, and law firms each had their own top reasons for seeking a CRO.

PE firms (65%) were especially concerned about economic viability. Both PE firms (50%) and law firms (45%) recognized the rise in cross-border restructuring complexities, indicating a trend toward focusing on global operational challenges. Law firms also placed a higher emphasis on the expanding role of technology and AI in operations (41%), indicating an awareness of the technological risks and opportunities facing businesses. Lenders (45%) saw accelerated digital transformation in industries as a significant trend.

Outlook

While CROs are already playing a vital role in restructuring and turnaround efforts, these economic, technological, and geopolitical trends suggest that their significance will increase in the years ahead, with 63% of all respondents acknowledging the high importance of CROs in future restructuring scenarios.

The Timing Paradox: Why Companies Wait Too Long, and What that Can Cost Them

Ideal Timing and the Golden Window of Opportunity

For companies in distress, the most important question may not be whether to hire a CRO but when. However, our data uncovers a critical disconnect. Organizations acknowledge that early engagement is ideal, but

paradoxically, most organizations wait until too long, limiting their options.

The earlier a CRO gets involved, the more possibilities—including contract renegotiations, special concessions, cost cutting measures, selling underutilized assets, extending liquidity runway, managing creditor constituencies, restructuring, a sale, etc.—are available. As financial distress intensifies, available paths forward diminish. Delaying action until insolvency threatens may leave only the most drastic solutions. Companies often achieve optimal outcomes when CROs are engaged at the first signs of financial strain, before covenant breaches or missed obligations narrow the scope for strategic intervention.

It may be human nature to try to postpone the inevitable, and our survey reflects that apprehension. Among overall respondents, early signs of financial underperformance were identified as the ideal stage for CRO engagement, cited by 34% of respondents, followed by when exploring restructuring options (26%), and when facing liquidity constraints (15%).

Reality Check: What Really Happens

However, when asked when respondents hire a CRO, the results paint a different picture. A significant portion ofrespondents among PE firms (36%) said they usually hire a CRO when facing liquidity constraints. For lenders (38%) and law firms (20%), the most likely stage for hiring a was when exploring restructuring options.

The Hindsight Moment: "We should have called sooner"

Our survey results suggest that hiring organizations typically take a reactive approach to engaging CROs, waiting until financial issues are near crisis level before acting. That fact was not lost on survey participants. Overall, respondents said that sometimes (33%) or occasionally (32%) they realized that bringing in a CRO earlier would have been more beneficial. On the other hand, those hiring organizations that look to bring aboard a CRO to explore restructuring options show a more proactive and strategic attitude, looking to avoid and correct problems before they become insurmountable.

Understanding Reluctance to Seek Help

There are several reasons why organizations bring in a CRO later than they know they should. For instance, leadership may feel overconfident in their abilities and put up psychological barriers to seeking help. The organization may lack clear early warning systems or metrics that would reveal financial or other stress. Or the company

may be hesitant to incur extra cost or publicly admit difficulties, instead opting to try internal solutions before seeking external help.

All Hands on Deck: Putting Modern CRO Strategies into Action

Evolution of Role Requirements

The role of the CRO is evolving with the changing economic and business landscape. Highly effective CROs or next-generation CROs will need a broad skill set, including digital transformation expertise, technology fluency, sophisticated management skills, and a focus on both financial goals and workforce stability. The traditional aggressive approach of disrupting everything is no longer effective; instead, more sophisticated management is needed.

CROs are moving from traditional restructuring—that is, short-term alleviation of immediate distress—to a more transformational approach that provides a roadmap to help shift the way the organization operates long-term.

The modern CRO can drive more digital fluency in the organization, enabling it to take advantage of innovative technologies to streamline capabilities and operations to sustain improved performance. They can help navigate a complex workforce, ensuring that the culture maintains productivity while undergoing notable change. For example, CROs today recognize that talent has different expectations at various levels and generations. Rather than raising concerns among employees, CROs can help companies show support for their workers and balance

financial needs while continuing to motivate employees to execute strategic plans.

Hiring organizations will want next-generation CROs to possess a broad skill set. Overall, 55% of respondents said global market and regulatory knowledge would be the most valuable skill for CROs, with lenders especially valuing this expertise (58%). Digital and technological fluency followed closely, considered valuable by 49% of all respondents, showing a trend toward more technology-driven decision-making during restructuring. Advanced data analytics and interpretation were also highlighted (48% overall), with PE firms particularly emphasizing its importance (51%). Additionally, lenders (31%) demonstrated a higher focus on sustainability and environmental, social, and governance integration than PE (12%) and law firms (18%).

Beyond Crisis Management: The Rise of the Modern Restructuring Leader

CROs are usually hired by a company in need, but that decision is influenced by PE, lenders, or law firms. They play a crucial role in managing the impact of disruptive technologies and economic volatility.

Hiring a CRO can bring or restore credibility in management through improved stakeholder reporting, communications, and negotiations. This role can establish performance improvement and restructuring plans and related metrics, while supporting the finance and accounting team, including stabilizing and managing liquidity. It can also strive to bring stability to the restructuring process through organization redesign, proposing strategic alternatives, and adding a new voice or perspective to the situation. By relieving the management team of much of the burden of a turnaround and restructuring, CROs free them up to run the company and focus on value creation.

As we have seen, early signs of financial underperformance were identified as the ideal stage for CRO engagement, and bringing in a CRO sooner than later is ideal. Here are some specific actions stakeholders can take when considering a CRO.

C-Suite

Focus on implementing robust early warning systems, fostering a culture of proactive risk management, and understanding the evolving role of the CRO to better gauge when to call for help. This includes leveraging data analytics to monitor key performance indicators, analyze market trends, and identify operational inefficiencies that could signal emerging risks. Management should a clear understanding of the CRO's role, a clear scope of work, codified in the engagement letter, and effective

communication with all stakeholders to ensure a successful restructuring process.

PE Firms

PE firms are less likely to enlist a CRO to avoid negative publicity. Sponsors are loath to put a company into Chapter 11 because of its public nature. But delaying the decision can further deteriorate enterprise value, limit refinancing options, lead to breach of covenants, and accelerate creditor actions. To engage earlier, PE firms should establish clear financial performance thresholds that trigger CRO consideration, conduct routine portfolio risk assessments, implement standardized early warning KPIs across investments, and maintain relationships with restructuring professionals before crises emerge. Emphasize digital transformation understanding, prioritize data analytics in portfolio companies, and engage earlier in underperforming assets.

Lenders

Lenders deal with borrowers facing imminent financial distress or near insolvency, complex debt restructuring, and short-term restructuring projects to prevent collapse. They may also need operational turnarounds to rebuild stakeholder trust. Prioritize regulatory expertise in restructuring plans, engage earlier in restructuring exploration, and understand the impact of digital transformation on borrowers.

Charting a Course Forward: The Future of Business Resilience

In this rapidly changing business environment marked by economic volatility, political uncertainty, and accelerated

digital transformation, the traditional reactive approach to hiring a CRO has evolved into a proactive and strategic necessity. The modern CRO must possess a broad skill set, including digital fluency, sophisticated management capabilities, and a keen understanding of global market dynamics. Based on the KPMG survey, it is evident that early engagement of CROs can significantly enhance restructuring outcomes, yet many organizations still delay this critical intervention until financial distress becomes acute.

With CROs increasingly being asked to navigate ever-more-complex restructuring scenarios, early and sophisticated intervention to mitigate risks and enhance organizational resilience is more vital than ever. As businesses continue to face multifaceted pressures and complexities, the demand for CROs capable of guiding companies through transformational change is projected to increase, emphasizing the importance of timely and informed decision-making in restructuring efforts.

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JOIN, OR DIE: THE CO-OP REVOLUTION

Brett Seaton

Cooperation agreements (Co-Ops) grew rapidly over the past two years as an innovation in the landscape of corporate restructuring, shaped by the rise of covenant-lite loans and lender-on-lender violence. Co-Ops bind together lenders by preventing them from individually engaging with the debtor on a transaction. The number of Co-Ops signed rose dramatically over the past year to safeguard debt value against novel restructuring tactics, such as dropdowns and uptiers (Figure 1).

Figure 1: Co-Ops Signed by Public Companies 2022-2025 YTD[1]

2022
Carvana
2023
Rackspace
2024
DISH
CommScope
Cumulus
Sinclair
Altice
Weight Watchers
Bausch
iHeart
Intrum
GrafTech
Claritev
Ardagh
2025 YTD
Leslie's
Bally's Corporation
Saks Global

Although it has grown rapidly over the past two years, the Co-Op was first created in the late 1990s by lenders to SpectraSite, a telecommunications infrastructure provider. It was one of the largest cell tower operators and construction services providers to the broadcast industry in the United States. SpectraSite's early success and eventual restructuring were a result of the dot-com boom and bust that occurred in the late 1990s and early 2000s. Management, supported by private equity owners Madison Dearborn Partners, started looking into a tender

offer and exchange transaction in 2001 and formally launched the offer on May 16, 2002.[2] Restructuring attorney Bruce Bennett, then at Hennigan, Bennett, and Dorman, was contacted by two bondholders around the time that the exchange offer was launched.[3] The exchange offer was similar to today's uptier transactions. The offer would have provided $425 million in new money which the company would use to increase liquidity and tender for existing notes (Figure 2).

Current bondholders came prepared. The voting majority of each security subject to the exchange transaction had been discussing strategies to fend off management aggression on debt reduction prior to the exchange offer being officially launched.[4] Bennett began work on an agreement that could keep bondholders from participating in the exchange through binding them closer together while an injunction request was being prepared. Bennett, who now leads the restructuring practice at Jones Day, wrote a document from scratch which was less than three pages long and kept signees from selling their bonds to entities who had not agreed to the terms of the agreement. The agreement prevented any exchange offer not approved by a specified amount of the group's aggregate holdings (not just the first exchange presented by the company) and allowed sales to buyers who signed on to the agreement. It required purchases by current group-members of non-governed bonds to add their holdings to the agreement as well—ensuring a permanent majority.

The agreement, which the group did not want to call a lock-up agreement, was called a Co-Op and signed by

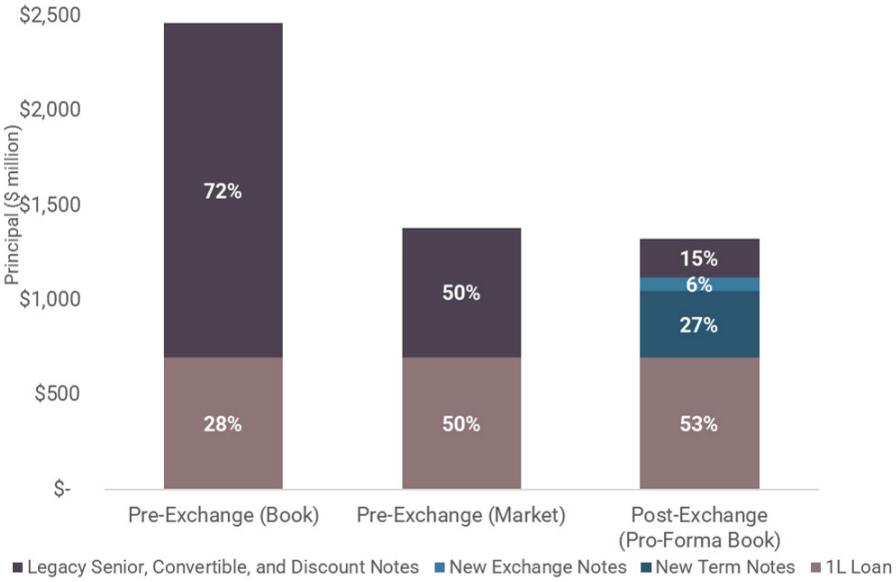
[1] Source: 9fin, Bloomberg.

[2] Proposed Plan of Reorganization of SpectraSite Holdings, Inc. Under Chapter 11 of the Bankruptcy Code, Case No. 02-03631-5-(ATS) (Bankr. E.D.N.C. Nov. 18, 2002).

[3] Bruce Bennett Interview, March 14, 2025.

[4] Ibid.

Figure 2: Exchange Transaction Impact on Capital Structure[6]



a majority of each security that the coercive exchange targeted before the lender group filed their injunction request with the Delaware court.[5] The memorandum opinion on the transaction from Delaware Judge Farnan strengthened bondholders' bargaining position and catalyzed Chapter 11 proceedings, but Bennett maintains that the Co-Op could have successfully held off the exchange offer on its own. Since the headlines in this case focused on the exchange offer and the influence of the memorandum opinion and failed injunction request, the Co-Op did not immediately rise to prominence as a go-to defensive tool for creditors. The agreement was not widely publicized and the economy recovered following the dot-com crash, causing the Co-Op to go unutilized. The Co-Op would reappear in the Caesars' 2015 bankruptcy and become widely adopted in response to aggressive LMEs over the past 5 years.

[5] Max Frumes, Special Situations Insight: The subtle art of the cooperation agreement, LevFinInsights (Oct. 3, 2023).
[6] Oaktree Capital Mgmt., LLC v. SpectraSite Holdings, Inc., Civil Action No. 02-548 JJF (D. Del. June 25, 2002).

Scott Greenberg, partner at law firm Gibson Dunn and global head of its business restructuring unit, is one of the leading experts on the formation of Co-Ops for lenders. Greenberg's experience is that modern Co-Ops address more potential transactions and provide language governing an "approved transaction" which is endorsed by the majority of holders and requires all signed onto the agreement to participate.[7] New agreements are usually longer than 20 pages, in some cases because lenders want securities governed by the agreement to trade at a premium. To accomplish this, some agreements include carveout premiums and incentive fees for lenders who help form the agreement and are the earliest to join: creating the Carveout Co-Op.

Co-Op Species

Greenberg breaks modern Co-Ops into three distinct types: the 50.1% Offensive Co-Op, the Carveout Co-Op, and the Open Co-Op. To illustrate trading and functional differences between the high-participation and low-

[7] Scott Greenberg Interview, March 25, 2025.

Figure 3: Characteristics of Common Co-Ops

	Offensive		*Open w/ Carveout*		*Open, Low Participation*		*Open, High Participation*	
	Majority	**Minority**	**Majority**	**Minority**	**Majority**	**Minority**	**Majority**	**Minority**
% of Total Debt	50.1%	49.9%	>50%	<49%	55%-65%	45%-35%	>90%	<10%
Liquidity	Decline		Decline		Decline		Improve	Decline
Market Price	Improve	Decline	Improve	Decline	Decline	Improve	Improve	Decline
Treatment in Transaction	Improve	Decline	Improve	Decline	Variable	Variable	Improve	Variable
Formation Time	Late		Early		Early		Earliest	
Initiated By	Ownership		Lenders		Lenders		Lenders	

participation Co-Op, the Open Co-Op has been separated into Low and High participation versions by the author.

Offensive

The Offensive agreement is formed oftentimes to effectuate liability management exercises (LME), not to prevent them. They were more prevalent from 2020 through 2022 than they are today as LMEs have become less binary in terms of outcome.[8] Usually, these agreements are initiated relatively closer to a necessary restructuring or transaction by the private equity fund or management team of the company. They approach their preferred lenders and build a bare-majority group to complete a non-pro rata uptier transaction. When the market finds out about this group, the instruments that are included will often trade much higher while the securities left out will decline precipitously. Liquidity will be low as many in the majority will sign agreements forbidding sales when they receive material non-public information to participate in an upcoming transaction.

Open, High Participation

This is the oldest type of Co-Op and its function is described best in the SpectraSite overview. All lenders may participate in these agreements and their greatest advantage is the lender leverage created in a restructuring negotiation. They have a record of successfully preventing prisoner's dilemma debt exchanges,[9] providing equitable treatment of signees, and maximizing the leverage of lenders to the detriment of equity holders. They are usually signed relatively early and formed by the largest lenders in the capital structure, who can quickly garner high participation. Open, non-carveout, high participation agreements are slightly outdated as they have in many cases been replaced by carveout agreements. The reason these agreements have become exceedingly rare is that they are formed by the same large lenders as carveout agreements, and large lenders have incentives to form carveout agreements rather than open agreements.

Open, Low Participation

This is the least common type of agreement. Low participation in a fully open agreement does not differ in structure from a high participation agreement but differs greatly in terms of implications for future transactions and market perception. If an agreement is open to anyone to join but there are large players who do not sign on, securities that are governed by the agreement often decrease in value in part due to the perceived decline in flexibility, liquidity, and the failure of that group to fully unite the capital structure.

The timing of the formation of the agreement can affect participation rates in an open Co-Op. Lenders may view joining at an early juncture to be premature and prefer to retain flexibility in the short run. If the debtor ends up performing poorly, lenders may still see it in their interest to join the group. Not signing on to the agreement is seen as most advantageous when a restructuring is uncertain and still years away. Lenders who do not sign onto the agreement retain flexibility, for example, to participate in a dropdown transaction which would otherwise be forbidden by a Co-Op.[10]

Carveout Co-Op

The Carveout Co-Op is growing in popularity. It is similar to an Open, High Participation Co-Op which allows any lender who chooses to join, except that it provides "carveouts" in the contract for signees before an agreed upon date to earn outsized economic benefits in a future transaction.

Ross Rosenfelt, managing director at Oaktree Capital Management, is an attorney and Oaktree's in-house expert on cooperation agreements. He explains that Carveout Co-Ops have become popular to decrease free-riding and compensate large lenders for the expenses they incur structuring the agreement and negotiating with the borrower should it choose to engage.[11] Free-riding incentives are large in capital structures where an open Co-Op is forming as lenders benefit from the group's efforts without contributing to legal expenses.[12] Large lenders defend their improved position by citing the legal fees they accrue structuring the deal and the loss in liquidity they incur.

Lenders who help structure these agreements also provide new money in the impending transaction, which is advantageous because it is usually the most senior debt in the capital structure and has higher interest rates than would normally be provided for such senior debt. The carveouts that the advantaged lenders who enter the Co-Op receive are structured either as a "backstop fee" or as an improved exchange rate with newly issued instruments. The backstop fee is a fee that the advantaged lenders receive in exchange for security that the advantaged lenders on the steering committee will provide the financing in full should

[8] Komsky, Jane, and Max Frumes. 2024. "Co-op Challenges Are Coming — Will They Work?" 9fin. https://9fin.com/insights/co-op-challenges-coming-will-they-work.

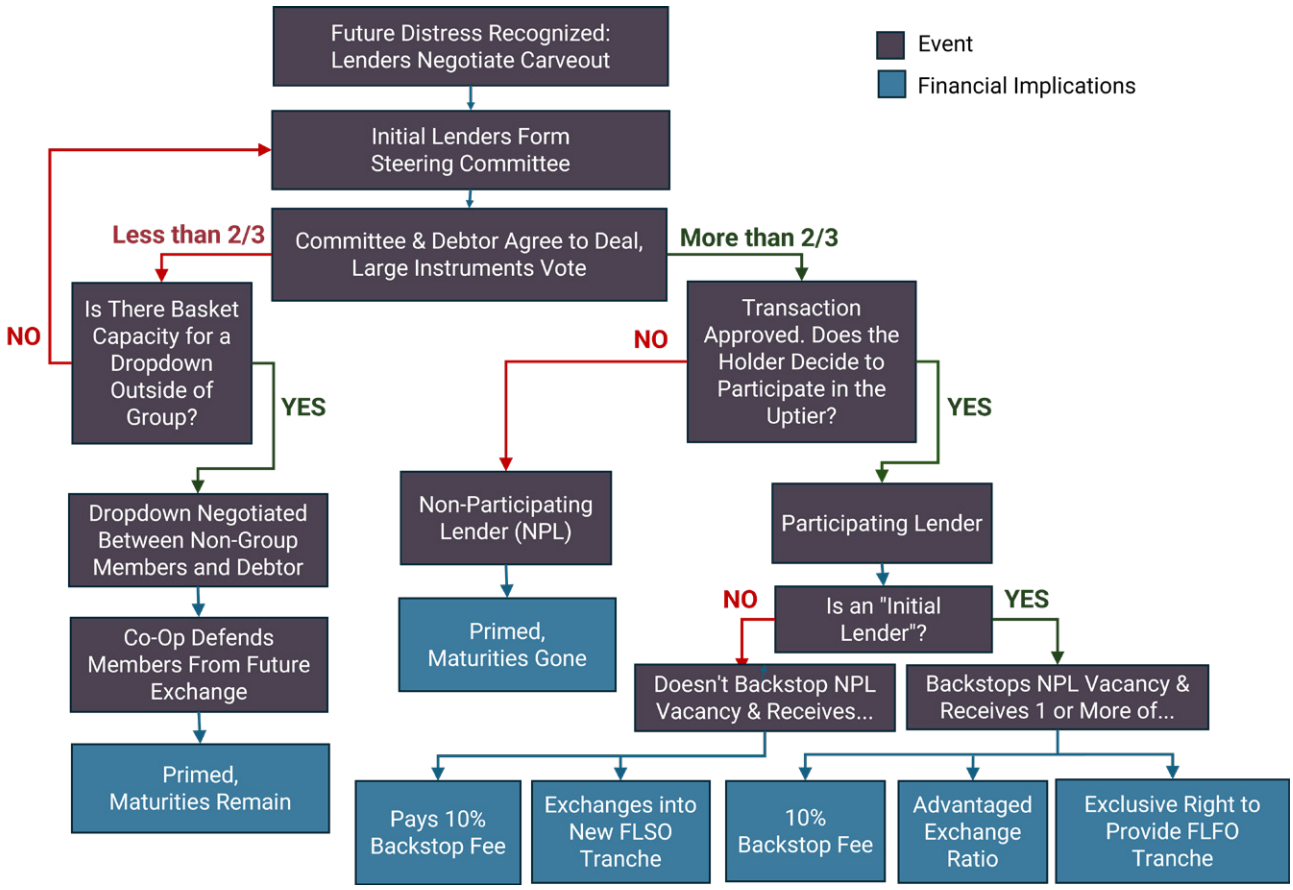
[9] The Prisoner's Dilemma is a classic concept in game theory that illustrates why two individuals might not cooperate even when it is in their best interest to do so. It highlights the conflict between individual rationality and collective well-being, where each individual acting in their own self-interest leads to a worse outcome for both than if they had cooperated. A prisoner's dilemma debt exchange is one in which bondholders are coerced through damaging their holdings should they choose not to participate. Participating bondholders would derive participation benefits from the losses of non-participators.

[10] Scott Greenberg Interview, March 25, 2025.

[11] Ross Rosenfelt Interview, April 15, 2025.

[12] Samir D. Parikh, Creditors Strike Back: The Return of the Cooperation Agreement, 73 Duke L.J. Online 1 (2023).

Figure 4: The Process for a Carveout Co-Op



the members of the Co-Op decide not to participate. While lenders almost always participate in the new money considering how attractive the interest rate and protections are, some collateralized loan obligation funds (CLOs) are contractually unable to participate, requiring the advantaged lenders to provide the backstop. The backstop fee is a method of creating differential treatment within a Co-Op to recognize the difference in expenses incurred and time spent by the largest lenders in support of all holders. These fees effectively create a compromise between the binary Offensive agreement and the egalitarian Open agreement but their coupling with the functionality of backstopping the cash infusion is questionable due to increasing flexibility from CLOs and the attractiveness of the security created by the new money. The advantaged economics that these lenders receive in fees can be upwards of 10-15%. Eligibility for receiving the backstop fee depends on signing before a set date, guaranteeing that the lenders who helped put the agreement together will qualify. They can then wait for that date to pass to begin offering access to other lenders who will have to instead pay that fee if they choose to participate.

Terms

The governance structure of Carveout Co-Ops requires a two-thirds majority of each instrument to vote for a transaction for it to be effectuated. If a security is trading particularly poorly and is still a member of the Co-Op, sometimes those holders' two-thirds approval is not encoded as a prerequisite to an approved transaction. In the case where two-thirds of each required security vote for a transaction, 100% of the parties to the agreement must then vote in favor of the transaction when it is proposed by the company even if they voted against it within the confines of the Co-Op's governing system. In the rare case where a transaction passes the two-thirds threshold across securities that are party to the agreement, but a large minority of holders do not want to participate in their pro-rata share of the transaction, initial lenders backstop the agreed amount of new money.

Ensuring a permanent majority is the goal of most terms in a Carveout Co-Op. Cooperating creditors cannot sell their holdings unless the buyer signs a joinder to the original agreement. In addition, all of the buyer's holdings prior to purchasing debt restricted by the joinder are now restricted by the Co-Op. Creditors party to the agreement cannot communicate with the debtor or any of its agents. Most importantly, a creditor who signs onto the agreement and then violates its covenant forbidding unapproved transactions cannot have its actions remedied through monetary damages. This covenant allows parties to the creditor agreement to unwind defecting transactions through an injunction.

Cross-Security Complications

The Co-Op among SpectraSite holders was cross-security while the agreement in the Caesars case was only among second lien holders. According to Rosenfelt, single-security Co-Ops were more popular in its earliest uses. Holders of a security with a strong bargaining position used the agreement to shore up its defenses and avoid coercion from the debtor. Today, cross-security Co-Ops are becoming more popular, which bring with it complications for holders across securities.

Imagine you are a first lien holder in a cross-security Co-Op and the debtor has approached you to exchange your debt into First Lien First Out (FLFO) debt at a 95% exchange rate. The first lien loan trades at 90 cents on the dollar and participates in a new-money transaction. First lien holders value this exchange at five cents on the dollar plus 12 cents on the dollar for an improved covenant package. While this is a great deal for you and other first lien holders, second lien holders now sit behind additional FLFO debt, the unexchanged legacy first lien debt, and an amended covenant package that allows for incurring additional debt that has priority over their claims. Second lien holders estimate that this transaction will push the value of their holdings from its current trading price of 50 cents down to 30 cents. Second lien holders would reliably vote 'No' when the steering committee approaches them with this transaction proposal while first lien holders would presumably vote 'Yes.' However, consider a cross-holder whose holdings are 80% concentrated in the first lien and 20% concentrated in the second lien. They would earn (80%)($0.17) - (20%)($0.2) or 9.6 cents on the dollar in this transaction. In this example, for every cross-holder whose portfolio is made up of greater than 54% first lien, they will be financially incentivized to support the transaction. This can create situations where cross-holders vote against their own interests at the security level but for their interests at the portfolio level.

Violations

To date, there have not been any publicly reported violations of a Co-Op's core stipulations regarding participating in an unapproved transaction. Market participants indicate that it is quite unlikely that these agreements would be violated because of the reputational damage this would cause to the lender who broke the agreement. Additionally, due to the "no monetary damages" clause, a lender who breaks the agreement and executes an uptier transaction could have the transaction unwound or stopped altogether through court-ordered injunctive relief. Critics of the Co-Op note the difficulty in proving monetary damages done to bondholders if there are many offers of new money for a dropdown and a signee participates. If a dropdown is going to be consummated anyway, does it matter if a Co-Op signee participates? While this is true for the first step of a dropdown, it is not true for any subsequent amendment or exchange offer. If any signee were to violate a majority Co-Op to vote for an amendment that strips litigation rights (e.g., PetSmart), Co-Op members can easily measure damages and allocate them to the offending party.

Credit Agreements

There have been two companies who attempted to issue loans with language in their credit agreements that discourages and effectively bans Co-Ops among its lenders. Avalara and WHP are both owned by private equity funds (Vista and Oaktree, respectively) and both were issuing a Term Loan B in 2025. Both ended up dropping the language banning the Co-Op due to push back from lenders. Credit agreements banned cooperation among its lenders by including language that automatically classifies participating creditors as "disqualified lenders." Disqualified lender lists were originally intended to prevent competitors from controlling a firm by buying its debt.[13] Today they are often used by private equity sponsors to keep aggressive lenders from acquiring their bonds or loans on the open market.[14] While these lists are often created at issuance, lenders can also be added to the list once secondary trading has begun, as Serta did to Apollo following its uptier transaction in 2020.[15] While Apollo was able to keep half of their loans outstanding in the eventual settlement, if lenders opt in to this language by buying debt with conditional disqualification contingent on cooperation, cooperation among lenders would be powerfully discouraged and unlikely to be in the best interest of creditors.

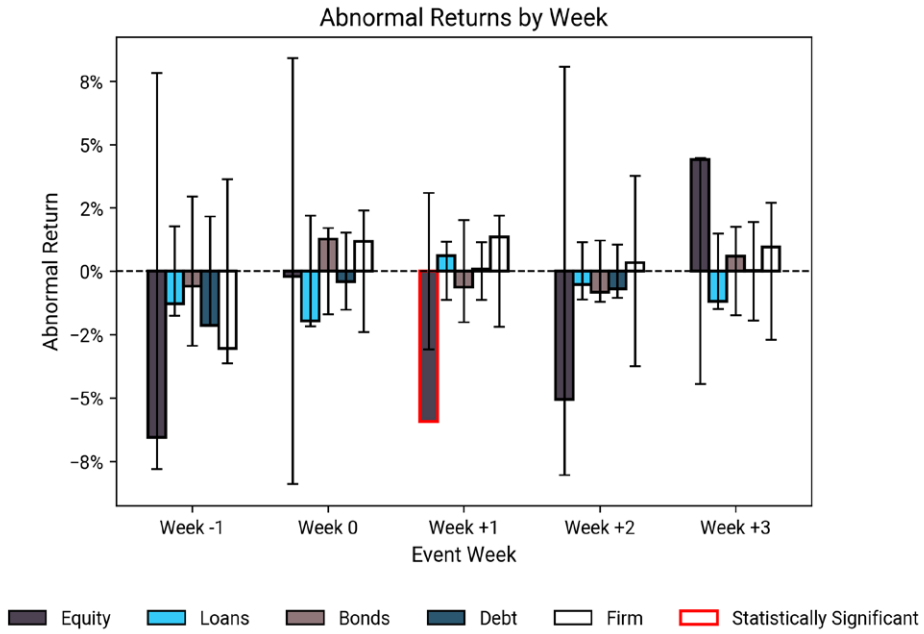
Event Study

To determine the impact of Co-Ops on market prices, an event study methodology was used on 12 publicly traded firms with announced Co-Ops. While there were no cumulative abnormal returns that reached statistical significance, one week of abnormal returns did: equity returns in Week +1 (Figure 5 on the next page).

Week +1 had mean abnormal returns equal to -5.9%, indicating a negative first week market reaction to the signing of a Co-Op. Firm value on the other hand had consistently positive abnormal returns across all event periods following a Co-Op being signed. These results are

[13] Ellen Hefferan & Bridget Marsh, Disqualified Lender Lists Revisited, LSTA (Sep. 5, 2024).
[14] Sydney P. Levinson & Mitchell Carlson, The evolving scope and application of 'Disqualified Lender' lists, Debevoise & Plimpton (Nov. 18, 2024).
[15] Justin Forlenza, Sidney Levinson, James Millar & Paul Silverstein, Special Feature: Disqualified Lender Provisions in the Spotlight, Creditor Rights Coal. (Dec. 20, 2023).

Figure 5: Single-Week Abnormal Returns[16]



mixed with respect to the ongoing question of whether Co-Ops violate the Sherman Antitrust Act. Lenders would argue that buoying firm value is enough of a pro-competitive effect to balance equity value declines while ownership would argue the opposite. Co-Ops did not effectuate a massive value transfer from equity holders to debt holders and did coincide with positive firm value returns, perhaps vitiating the debtor's case that Co-Ops' anti-competitive effects substantiate an unreasonable restraint of trade under the Sherman Antitrust Act's Rule of Reason framework.

Conclusion

Since its roots in the SpectraSite restructuring, the Co-Op has evolved from a three-page lock-up alternative into a robust defensive tool for lenders. Today's carveout variants preserve the egalitarian spirit of the original while layering in economic incentives to offset free-rider problems and compensate the largest lenders for expenses incurred and liquidity lost. The Carveout Co-Op has become the middle ground in the ongoing lender war—tight enough to block coercive LMEs, yet flexible enough to reward the lenders who underwrite the heavy lifting and could have otherwise launched an Offensive Co-Op with non-pro rata recoveries. Carveout Co-Ops provide large lenders with an incentive, small lenders with near-equal treatment, and a truce to the credit market in a time of war.

While academic and regulatory interest has grown around creditor coordination, there remains no clear legal challenge to the Co-Op's fundamental structure. Meanwhile, attempts by borrowers to suppress Co-Op formation have met significant market resistance, indicating that creditors still value their right to organize and negotiate as a group. Evidence from market returns following a Co-Op announcement reinforces this view. The equity market reacts negatively in the immediate aftermath, firm value tends to rise modestly, and debt securities show mixed performance.

These findings suggest that Co-Ops do not simply reallocate value from one class of stakeholders to another but may instead preserve value in the face of a restructuring that might otherwise destroy it. The Co-Op is evolving to facilitate a truce in the lender wars, presenting a united front to debtors in restructuring negotiations and creating a more even playing field in the brave new world of LME.

[16] "Debt" in this graph refers to abnormal returns across all debt instruments including bonds and bank loans. "Firm" represents abnormal returns across all instruments in the company's capital structure.

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Brett is a 2025 graduate of the University of Pennsylvania's Wharton School of Business. He is a 2025 Stevens Center for Innovation and Finance Fellow, a Wharton Honors Research Scholar, and a former teaching and research assistant for debt modeling in the Finance Department. Brett's senior thesis *The Value and Legality of Lender Cooperation Agreements* addresses the history, value, and legal theory of cooperation agreements between debt holders (this article is a synopsis thereof). He is working in investment banking in New York City.

KEY OPERATIONAL CONSIDERATIONS TO ENSURE BUSINESS CONTINUITY IN A CHANGE OF CONTROL TRANSACTION

Craig Cheng and Krishna Pattabhiraman, *FTI Consulting, Inc.*

In the current business environment, we are witnessing a growing trend of lenders actively acquiring companies in distressed situations, which can lead to a Change of Control Transaction ("CCT"). Just like any disruption in normal business activity, it is critical to take certain steps to maintain business continuity through a CCT. There are several key areas that need to be evaluated and managed to ensure a smooth transition.

CCT generally refers to an occurrence that materially alters the equity ownership of a legal entity and may result in a change in management and board composition. The market commonly views a change of control as a situation where a single equity holder, or consortium of equity holders, transfers an equity stake greater than 50% to another party or parties. However, contracts or legal instruments may contain explicit definitions with thresholds that can be higher or lower than 50%.

Corporate transactions that can give rise to a change of control include mergers and acquisitions ("M&A"), the sale of equity securities, or a debt for equity conversion. While asset sales technically do not result in a change of shareholder ownership of a business entity, many contracts will define the sale of substantially all assets as a change of control.

As we have experienced, more lenders are acquiring companies in distress. Using senior debt holdings as leverage, lenders would either convert their debt to equity in an out-of-court restructuring or use the US Chapter 11 Bankruptcy proceeding either to credit bid in a Section 363 sale process or convert their debt to equity in a Plan of Reorganization. Two recent transactions are an example of a change of control: Spirit Airline's 2025 financial restructuring where a debt-for-equity swap gave bondholders majority control over the business and WeWork's 2024 Chapter 11 plan which transferred the company's equity to a group of lenders.[1]

[1] Knauth, Dietrich, "Spirit Airlines gets court approval for $795 million debt deal," Reuters (February 20, 2025), https://www.reuters.com/business/aerospace-defense/spirit-airlines-gets-court-approval-795-million-debt-deal-2025-02-20/. Knauth, Dietrich, "WeWork cleared to exit bankruptcy and slash $4 billion in debt," Reuters (May 30, 2024), https://www.reuters.com/legal/wework-cleared-exit-bankruptcy-slash-4-billion-debt-court-says-2024-05-30/.

Change of Control Provisions

Many successful bankruptcy cases have involved transactions that resulted in a change of control through a Section 363 sale process or through a Plan of Reorganization. These types of transactions require a careful assessment of existing contracts and agreements that may contain change of control provisions. In addition, the new owners and/or management team may have a different vision that will impact the strategy for potentially renegotiating, transitioning, or terminating contracts as needed. A successful transfer to new ownership will require an effective process for evaluating contractual obligations, adapting to new business needs, and developing a plan that will facilitate a smooth transition while considering the business's strategic and financial goals.

A change of control provision generally provides the party and/or counterparty with certain rights or remedies to terminate the contract in the event of a change in ownership, allowing the party to avoid being forced into a contractual obligation with a different counterparty. For example, a supplier may not wish to continue honoring the contractual requirements under a vendor agreement if the counterparty was acquired by a competitor or an adverse party in a lawsuit. Similarly, a lender may have a change of control covenant that allows for the termination of the loan document if the borrower has a new owner with a different credit profile.

Contracts will define specific events and parameters that would violate a change of control provision. To the extent a potential transaction may breach a change of control provision in critical agreements, the parties to the contract may proactively negotiate and seek a consent or amendment to avoid termination of the agreement.

Under a Chapter 11 Bankruptcy, contracts with change of control provisions are generally enforceable pursuant to Section 1124(2) in the Bankruptcy Code. Irrespective of an in-court or out-of-court transaction, contracts with change of control provisions will need to be managed carefully.

Potential Risks and Pitfalls

CCT can be in the form of an asset sale or an equity sale. An asset sale allows for a purchaser to pick and choose contracts to be part of the acquisition. Generally, most

contracts can be assigned to the purchaser; however, there may be contracts with clauses that restrict assignments or will need to be novated in the case of government contracts.

In an equity sale, the purchaser is buying the ownership stake of the business entity. Any contractual obligation associated with the entity will be part of the equity sale. The purchaser essentially assumes all the rights and obligations of unexpired contracts where the business entity is a party to the contract.

A transaction that takes place within a Chapter 11 Bankruptcy process will often provide more optionality to a purchaser. Under Section 365, US Chapter 11 bankruptcy provides an ability for debtors to assume or reject pre-petition executory contracts and unexpired leases. Contracts with favorable terms can be assumed by the debtors as long as monetary and non-monetary defaults are cured. In addition, debtors have an opportunity to renegotiate and modify contracts or exit contracts that are viewed to be above-market or onerous.

Contract assignments are generally not necessary in an equity sale within a Chapter 11 bankruptcy process as the purchaser will own the shares of the business entity that is a party to the contract. However, in a section 363 asset sale, contracts that will be transferred as part of the asset sale will need to be cured and assumed by the debtors before being assigned to the purchaser. Anti-assignment clauses are generally unenforceable in bankruptcy; however, section 365(c) does provide an exception that prohibits assignment when (1) the counterparty does not consent to the assignment and (2) where applicable non-bankruptcy law bars assignment of certain types of contracts (e.g., personal service contracts under state law, Anti-Assignment Act, Patent Act, Copyright Act, Lanham Act).

Under a Chapter 11 bankruptcy, a party who is purchasing the equity, or will become the majority owner from a debt-for-equity conversion, may be able to negotiate with debtors to reject or modify certain pre-petition contracts before consummating a transaction.

Any contract that contains a change of control provision will provide certain rights or remedies for the counterparty to terminate the contract. As part of the legal due diligence process, the purchaser should examine whether critical contracts have change of control provisions that could be exercised by the counterparty. When examining these provisions, it is essential to consider the related operational aspects in more detail.

High Level Operational Considerations

Legal Entity

A CCT may or may not include a change in the legal entity owning the business:

No change in the legal entity owning the business: a change in ownership of the existing legal entity which owns the business providing the underlying security.

Lenders take over ownership of the existing legal entity from the current equity owners.

New legal entity is created to own the business: a new legal entity is set up which acquires all impacted assets from the existing (old) legal entity.

Perimeter Definition

In a CCT, the basic Perimeter must be confirmed before further evaluation can proceed. Key questions to consider include:

- Has the Lender or Company or Debtor defined what will change from a Perimeter perspective. i.e., what will be left in or out as part of the CCT?
- What are the non-core assets, if any, and what are the related disposal strategies, e.g., sale, spin off, joint venture, etc.?

Strategy Changes

Considerations include:

- Has the Lender or Company or Debtor confirmed the Day 1 strategy for each market, location, country, and legal entity which is part of the Perimeter?
- Is the Lender or Company or Debtor implementing a new strategic vision?
- Is a strong management team in place or does there need to be a new management team?
- Is there a new business plan to track performance?
- Have cost rationalization initiatives or optimization goals been identified and evaluated?
- Have plans been developed to retain talent that are critical for leadership and support to ensure business continuity post-transaction close?

Other Considerations

As the Lender or Company or Debtor evaluates the components of the perimeter and what strategy changes might result from the CCT, some items to consider include the following:

Legal Entities

- Examine legal entities by country, and local sponsors (in countries where a regional partner who is also a shareholder is required)
- Confirm whether a new legal entity needs to be set up and whether there is a need to transfer any assets between legal entities
- Examine corporate governance documents, including company registrations, Bylaws, and Articles of Incorporation

Regulatory and Tax Implications

- Examine new compliance and filing requirements at various markets, locations, states, countries where the business operates
- Make changes with various state/local governments, customs registrations, etc., as a result of changes in ITIN/EIN, VAT, and other registrations
- Review transfer pricing policies and processes which in turn might impact the supply chain for procurement and sales
- Review tax strategy and structure, ensuring tax efficiency (e.g., impact to pre-existing Net Operating Loss ("NOL"s) from change of control)

Banking and Payments

- Secure new credit facilities
- Replace or pay guarantees of the prior ownership, including counter guarantees, financial guarantees, surety bonds, regulatory guarantees, etc.
- Update bank account signatories
- Execute new Know Your Customer ("KYC") documentation, as needed
- Exit from shared cash pooling arrangements, e.g., Zero Balance Accounts ("ZBA")
- Set up new credit cards and P-cards
- Consider changes in interest rates and bank charges
- Implement new treasury solutions, as needed

Contracts

- Review all contracts, including vendor, customer, and employee agreements, to determine any impact of change of control
- Identify any changes to Terms and Conditions ("T&C")
- Identify areas affected by loss of scale or leverage
- Identify comingled vendor contracts which are used across the equity owners' portfolio which the business relies on for Day 1 business continuity
- Look for any increases in procurement or sale tariffs due to changes in legal or tax structure

Insurance

- Make required changes to insurance policies
- If required, procure new insurance, and update it for new Directors & Officers ("D&O") and business liability requirements

Real Estate

- Make required changes to lease agreements and real estate strategy
- If required, replace any guarantees, and update for any other requirements arising from the change of control
- Ensure transfer of contracts from/to the business to support Day 1 business continuity

Shared services and TSAs

- Confirm any shared services that the business gets as part of the previous equity owners' network for Human Resources (payroll, benefits, etc.), Information Technology, operational services, audit (internal and statutory), Accounts Receivable, Accounts Payable, Travel and Expenses, treasury processing, reporting, tax, etc.
- Evaluate the need for Transition Services Agreements ("TSAs") or other commercial agreements between the business and/or other previous equity owner entities to support Day 1 business continuity

Data and IP

- Access to IP, systems, data, websites, etc. including new or transfer of relevant contracts and licenses

Communication Plan

- Design Day 1 (and +/- 45 days) communication plan
- Identify all stakeholders including customers, regulatory and other government agencies, employees, lenders, previous equity owners, and vendors
- Create communication content, ownership and timeline

Organization design

- Confirm Day 1 organization design changes:
  - In board of directors and any impact to the business's ongoing operations
  - In management (e.g., equity owner oversight roles, Chief Financial Officer, Chief Operating Officer, strategy, Project Management Office)
  - In local sponsor (as required)
  - In organization structure, reporting lines, by country, by operational requirements, by location, by function (e.g., within finance and global finance, etc. across all functions)
  - In Delegation of Authority ("DOA") matrix to support approvals and payments on Day 1 and beyond.
- Additionally, any changes in DOA will need to be updated and tested in the Enterprise Resource Planning/IT systems for the relevant functions
- Develop new statutory reporting as necessary

Onboarding

- Identify whether any employees need to be onboarded to existing or new legal entities and accompanying impact to benefits and systems (e.g., transfer of pension, health care benefits, payroll)

Other

- Develop retention plans
- Be clear about distribution network, e.g., will distribution channels remain or are new distributors needed? Local licenses to sell?
- Identify anything being left out of transferring assets/systems/employees due to the CCT and the impact on Day 1 business continuity for the business

Next Steps

Current and Day 1 operating models: What is changing between now and Day 1?

- Functional leaders should evaluate their global end-to-end processes as part of the operating model review (e.g., Procure to Pay, Order to Cash, Record to Report, Hire to Retire, etc.)
- Every function should conduct an operating model evaluation across its people, processes, systems, contracts that it uses currently and evaluate "what changes" on Day 1 as a result of the above questions (and associated change of control).
- This evaluation will be across all functions, global or not, e.g. Finance and Accounting, IT, HR, real estate, operations, regulatory and compliance, legal, etc.
- Every function should create a Day 1 checklist and mitigation plan to address those items that could change on Day 1

Centralized Transaction Team

- Create a list of key tasks expected due to the change of control using the above list focusing on a detailed operating model comparison as explained above
- Bucket the list of key tasks into “one time” and “run rate” activities
- Identify mitigation plans needing to be put in place to ensure Day 1 business continuity, for example:
  - Updating DOA matrix will need some IT resources, internal communication to employees, etc.
  - Changes in signatories would have to be coordinated across previous equity owners and lender representatives and relevant banks
  - New facilities might need additional collateral from lenders
- Quantify the cost/dollar impact from the key tasks, issues, and mitigation plans being put in place

Conclusion

CCT requires careful consideration of contractual terms and potential operational challenges that could impact business strategy under new ownership. Proactively identifying and managing these issues is crucial to prevent disruptions after the transaction closes. While not exhaustive, these areas provide a solid starting point.

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TARIFFS, A TRADE WAR, AND TUMULT IN THE GLOBAL TRADING SYSTEM: YET ANOTHER POTENTIAL ECONOMIC SHOCK TO EMERGING ECONOMIES

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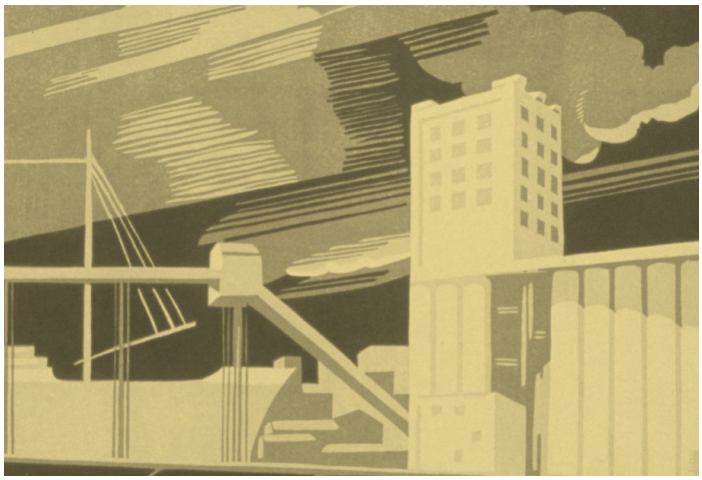
The Trump administration's recent imposition of high tariffs on goods from countries large and small has upended decades-long expectations about how the post-World War II 'rules-based' global trading system, largely designed by the US, was supposed to operate. Unless these new tariffs announced by the Trump Administration are significantly reversed on a permanent basis, it is widely believed that they could potentially have a major disruptive impact on global trade and the global economy.

As of the beginning of May 2025, it appears that an incipient full-blown trade war between the US and China, as well as serious trade tensions between the US and its other large trading partners Canada, Mexico, and the European Union (EU), might ultimately have significant spillover effects for economies across the globe, including emerging economies and developing countries.

Introduction

Upheaval in the global trading system does not bode well for the growth prospects for the global economy. In fact, the International Monetary Fund (IMF) has recently downgraded its earlier forecasts for the level of global economic growth for 2025 and 2026 based on its assessment of the likely effects of tariffs and trade frictions. In its new "World Economic Outlook" released on April 22, 2025, the IMF is now projecting in its base case global economic growth of 2.8% in 2025 and 3% in 2026, down from 3.3% growth in 2024. Just a few months ago, in January 2025, the IMF had projected global economic growth of 3.3% for both 2025 and 2026 (i.e., the April 2025 projections when compared to the January 2025 projections represent a 0.5% reduction for 2025 and a 0.3% reduction for 2026). [*Update*: In June, both the World Bank and OECD also revised downward their earlier forecasts for global economic growth in 2025 and 2026 in



view of the anticipated impact of the new US tariffs and the related policy uncertainty.][1]

Since the US and China are the two largest economies in the world, it is perhaps not surprising that considerable attention has been focused on how the US and Chinese economies will be affected by the tit-for-tat escalation of tariffs that is now unfolding between the two countries. Yet, apart from the US and China, the economies of a broad array of emerging markets and developing countries globally could also potentially be affected in an environment of higher tariffs and global trade frictions (including any marked disruptions of global supply chains that are such a vital part of the global trading system).[2]

Indeed, just as the growth prospects of the global economy as a whole have been downgraded in the IMF's report released on April 22, the IMF has also downgraded its growth forecasts for emerging economies and developing countries. The IMF is now projecting in its base case economic growth for these countries of 3.7% in 2025 and 3.9% in 2026 compared with its earlier forecasts in January 2025 of 4.2% growth in 2025 and 4.3% growth in 2026 (i.e., a 0.5% reduction for 2025 and a 0.4% reduction

[1] See World Bank, Global Economic Prospects, June 2025, Chapter 1, p. 4; and OECD, OECD Economic Outlook, Vol. 2025 Issue 1, June 2025 (https://www.oecd.org/en/publications/oecd-economic-outlook-volume-2025-issue-1_83363382-en.html). For example, in its Global Economic Outlook released in June, the World Bank projected global economic growth of 2.3% in 2025 and 2.4% in 2026, representing a reduction in projected growth of 0.4% in 2025 and 0.3% in 2026 from the forecasts it made earlier in the year in January 2025. World Bank, Global Economic Prospects, supra.

[2] Reuters, "Emerging Economies Brace for Trump Tariff 'Turning Point,'" April 4, 2025 ("[e]merging economies worldwide are bracing for sliding currencies and a possible deterioration of their sovereign credit after U.S. President Donald Trump's tariffs brought levies on U.S. imports to their highest levels in 100 years").

for 2026, when comparing the April 2025 projections against the January 2025 projections). To put this in context, in 2024, these countries as a group achieved a growth rate of 4.3%, according to an IMF estimate. (The April 2025 IMF base case takes into account the high 'reciprocal' tariffs announced by the Trump administration on April 2, 2025.) [Update: In their latest projections released in June, the World Bank and OECD have also lowered their projections for economic growth in emerging markets and developing countries.[3] Separately, on July 29, 2025, the IMF released new projections for growth in emerging markets and developing economies, and these latest projections represent a not insignificant upward revision from the IMF's April projections, jumping from 3.7% to 4.1%.]

If the economies of emerging markets and developing countries are in fact ultimately dealt a serious blow by the fallout from the new US tariffs and escalating global trade tensions, this could place a new strain on the balance sheets of the affected sovereigns. The impact of any new trade-related shock to their economic systems might well be exacerbated by the fact that a number of these countries are already currently facing high sovereign debt burdens, limited fiscal space (and thus a constrained ability to respond to new financial and economic pressures),[4] possibly weakened currencies vis-à-vis the US dollar and/ or in some cases wide current account and fiscal deficits.

Sovereign debt levels and the related debt servicing costs for many emerging economies and developing countries are significantly higher than they were in the pre-COVID-19 period. Many of these countries increased their sovereign debt levels during the pandemic and in the wake of the start of the Ukraine war in order to address the economic and social fallout from these developments.[5]

As a result, the debt-to-GDP ratio (a key metric of sovereign debt sustainability) for emerging economies

[3] See World Bank, Global Economic Prospects, June 2025, Chapter 1, p. 4; and OECD, OECD Economic Outlook, Vol. 2025 Issue 1, June 2025. The World Bank, for instance, is now projecting economic growth for emerging markets and developing countries of 3.8% in both 2025 and 2026 (compared with its earlier forecasts in January 2025 of 4.1% growth in 2025 and 4.0% growth in 2026). World Bank, Global Economic Prospects, supra.

[4] International Monetary Fund (IMF), World Economic Outlook, Chapter 1 (Global Prospects and Policies) (April 2025), p. 7 ("Crucially, much of the available policy space has already been exhausted in many countries… limiting how much support policymakers can give economies in case of new negative shocks or a pronounced downturn. Many countries passed large fiscal support packages, first during the pandemic and then as energy and food prices spiked at the onset of Russia's invasion of Ukraine.").

[5] World Bank, World Development Report 2022, Chapter 5 ("Managing Sovereign Debt") ("The COVID-19 crisis forced emerging and developing economies to exceed their already record-high sovereign debt levels to mitigate the economic impacts of the crisis on families and their domestic economies").

and developing countries as a whole has increased markedly from prior to the pandemic. As the IMF has recently indicated, the debt-to-GDP ratios for these countries rose from 54.5% in 2019 to 69.5% in 2024 and are projected to reach levels of 73.6% in 2025 and 76.7% in 2026.[6] In other words, these countries have gone from what is generally considered a relatively safe debt-to-GDP ratio in the pre-pandemic period to what is generally considered a risky ratio in the post-pandemic period and into the coming years.

Furthermore, sovereign debt distress – i.e., a state where a sovereign's ability to service its outstanding sovereign debt is seriously impaired – is currently an ever-present reality for myriad emerging economies and developing countries. As the IMF noted in its April 2025 "Fiscal Monitor" report, "53% of low-income developing countries and 23% of emerging markets were at high risk of debt distress or in debt distress."[7]

As of the date that this article is being submitted for publication in early May 2025, the overall tariff and trade conflict situation is very much in a state of flux. It may therefore be premature to make any definitive predictions as to whether the new global economic and trade landscape will lead to widespread sovereign debt defaults, sovereign debt restructurings, and/or new or revised arrangements between the IMF and affected sovereigns. Nonetheless, it is not too early to flag the very real possibility that a range of emerging market and developing country sovereigns across Asia, Latin America, Africa and elsewhere might at some point in the coming period begin to experience new or heightened sovereign debt distress as a result of the fallout from the tariffs and trade tensions.

Yet Another Unwelcome External Economic Shock to Emerging Economies

In the last five years, the economies of emerging markets and developing countries have already suffered two external shocks that arose from events that had not occurred in a century or the better part of a century: namely, the COVID-19 pandemic (2020 and beyond), and a major land war in Europe (i.e., the ongoing war in Ukraine that started in 2022). Prior to the COVID-19 pandemic, the last major pandemic had occurred in the late 1910s, and prior to the Ukraine war, there had not been a major land war in Europe since the end of World War II in 1945.

To be sure, the Ukraine war led to ill effects such as higher inflation and shortages of basic commodities (e.g., grains, oil, etc.) among a number of emerging economies and developing countries, such as Egypt and a number of countries in Sub-Sahara Africa. However, the deleterious economic impact of the COVID-19 pandemic was far more profound and pervasive as the COVID-19 pandemic led to the widespread shutdown of economies around the globe.

Now, with higher tariffs, escalating trade tensions, a developing trade war between the US and China, and the resulting possibility of major disruptions of the global trading system, emerging economies and developing countries are now potentially at risk of being hit by a third major external shock in just the five-year period that began with the onset of the COVID-19 pandemic in 2020. In the same way that the COVID-19 pandemic and the Ukraine war were once in a century (or once in three-quarters of) a century events, the tariffs recently imposed by the Trump administration stand at levels that have not been seen in almost a century.

Specifically, compared to an 'average effective tariff rate'[8] of 2.3% in 2024,[9] the so-called 'average effective tariff rate' for the US has increased to an estimated 22% or higher based on the 'reciprocal' tariffs announced on April 2, 2025, with estimates varying depending on who is making the estimate.[10] This is apparently the highest average effective tariff rate for the US since the early twentieth century when, for example, in 1909 the average effective tariff rate was estimated to be approximately 21.1%, according to Fitch Ratings.[11]

Indeed, the current average effective tariff rate in the US is estimated to be higher than it was at the time of the (in)famous and widely derided Smoot-Hawley tariffs of 1930 for which the average effective tariff rate was estimated to be approximately 19%-20%.[12] Of course, the Smoot-Hawley tariffs, which took effect in 1930 in the early days of the Great Depression, have widely been seen by economic historians and other commentators as having contributed to the depth and duration of the Great Depression and as having led to the last great global trade war in the 1930s.

[*Update*: The Yale Budget Lab now estimates that, taking into account tariff developments as of July 27, 2025, the

[6] Id. at p. 3 (Table 1.2, "General Government Debt, 2019–30).
[7] IMF, Fiscal Monitor, April 2025, Chapter 1 ("Fiscal Policy Under Uncertainty"), p. 2.
[8] The concept of 'average effective tariff rate' reflects "the average tariff paid across all imports." Federal Reserve Bank of Richmond, "Tariffs Update: Potential Effects of the April 2 Announcements," Economic Brief (No. 25-13), April 2025 (https://www. richmondfed.org/publications/research/ economic brief/2025/eb_25-13).
[9] Id.
[10] Id. (indicating an 'average effective tariff rate' of 20.2% after giving effect to the April 2, 2025, tariffs). See also Fitch Ratings, "'Liberation Day' Takes US Tariff Rate Back to Level Last Seen in 1909," April 23, 2025 (https://www.fitchratings.com/ research/sovereigns/liberation-day-takes- us-tariff-rate-back-to-level-last-seen-in-1909-03-04-2025) (indicating an 'average effective tariff rate' of 25%).
[11] Id.
[12] Kate Nalepinski, "How the Smoot-Hawley Tariff Act Compares to Trump's Reciprocal Tariffs," Newsweek, April 4, 2025.

'average effective tariff rate' for the US has increased to a level of 18.2%,[13] which it indicates is the highest average effective tariff rate since 1934.[14]]

So far, while the current round of tariffs has led to an incipient trade war between the US and China as well as to fairly pronounced trade tensions between the US and Canada, Mexico, and the European Union (EU), the recently imposed tariffs have not yet led to the outbreak of a full- scale global trade war.

As of early May 2025, there are many unknowns and substantial uncertainty about where the current escalation of tariffs and the trade tensions between the US and China will end up. In the first place, the proposed level of country-level tariffs put forward by the Trump Administration has been an almost constantly moving target, to put it mildly. First there were country-specific tariffs (the so-called 'reciprocal' tariffs) announced on April 2, 2025 (what the Trump administration billed as 'Liberation Day'). These 'reciprocal' tariffs targeted approximately 60 countries with tariffs reaching as high as nearly 50% in some cases effective April 9 (while all countries would be subject to a baseline 10% tariff effective April 5). Such high tariffs were imposed even on some smaller developing countries that do not carry on much trade at all with the US and which therefore do not contribute meaningfully to the US trade deficit.[15]

Then on April 9, after a near-immediate and resoundingly negative reaction in the financial markets –including in the US stock market, the government bond market for US Treasuries, and the foreign exchange market for the US dollar – to the Trump administration's 'reciprocal' tariffs announced on April 2, a 90-day 'pause' was announced with respect to the 'reciprocal' tariffs. Yet, the 10% baseline tariff remained in effect for the countries on which the 'reciprocal' tariffs had originally been imposed. (China has been treated differently throughout the process, with the Trump administration continuing to raise the tariffs on China until a tariff of 145% on goods imported from China came into effect on April 9, 2025.)

Second, it is also unknown whether the Trump administration, during the 90-day 'pause' on 'reciprocal tariffs,' will be able to finalize any trade deals with those specific countries that were initially subject to those 'reciprocal' tariffs; if not, the Trump administration has said the original 'reciprocal' tariffs will snap back

[13] Yale Budget Lab, "State of US Tariffs: July 28, 2025," July 28, 2025 (https://budgetlab.yale.edu/research/state-us-tariffs-july-28-2025).
[14] Id. The Yale Budget Lab stated that "[a]fter consumption shifts, the average tariff rate will be 17.3%, the highest since 1935."

[15] For example, the tariffs for Cambodia, Laos, and Vietnam were set at rates of 49%, 48%, and 46%, respectively. The tariffs for the tiny African republic of Lesotho, which is surrounded on all sides by South Africa, were set at 50%, even though Lesotho's total exports to the US are miniscule.

into effect. [*Update*: During the 90-day pause, the Trump administration has announced only a handful of trade deals with countries such as the UK, Vietnam, Indonesia, the Philippines, and Japan (although at least a few of these deals appear to be more in the nature of agreements-in-principle as opposed to detailed final trade agreements). Further, the 90-day pause that was supposed to expire on July 9, 2025, has now been extended by the Trump administration until early August 2025, but it remains to be seen whether that timeline will be extended as well.]

Third, the targeting of specific industries for special industry-wide tariffs (e.g., tariffs for industries such as steel, aluminum, automobiles, and auto parts) and the exempting of certain products from the tariffs imposed on goods imported from China (e.g., smartphones, computers, electronics, etc.) has also been subject to change on seemingly a moment's notice.

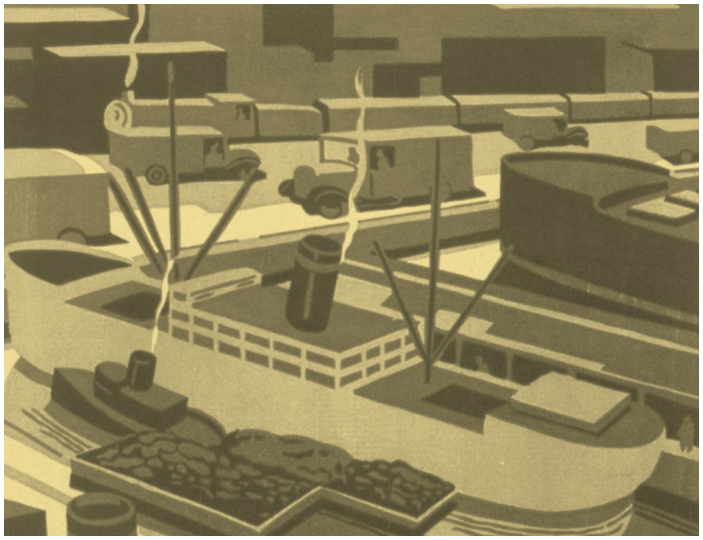
Finally, it is unclear how the unfolding US-China trade war will develop in the coming period. Tariffs imposed by the two countries on goods from the other country are now at fairly stratospheric levels: as noted above, the US has imposed tariffs of 145% on Chinese goods, and China has imposed tariffs of 125% on US goods.

The question is: Will the tariffs on the US and Chinese sides continue to escalate to even higher levels in a continuous cycle of tit-for-tat retaliation, or in the end will the US and China be able to reach some type of trade deal? As of early May 2025, it is not clear whether the US and China are even having discussions to discuss such a deal.[16] [*Update*: As a result of high-level meetings between representatives of the US and Chinese governments held in Geneva on May 10-11, 2025, the bilateral tariffs imposed by the US and China have been rolled back to lower levels—specifically US tariffs of 30% on Chinese goods and Chinese tariffs of 10% on US goods[17]—for ninety days until an August 12, 2025 expiration date (which now looks likely to be extended).[18]]

Pathways from Tariffs and Trade Conflicts to Potential Sovereign Debt Distress

There are multiple potential pathways by which high tariffs and escalating trade tensions (including the possibility of an expanding trade war) might ultimately cause adverse economic and financial developments

[16] Joe Leahy, Wenjie Ding, and Demetri Sevastopulo, Financial Times, "China Tells US to 'Cancel All Unilateral Tariffs' If It Wants Talks," April 24, 2025 ("Beijing also said there were 'no economic and trade negotiations between China and the United States', despite repeated comments from President Donald Trump that the two sides were talking."). But see also Reuters, "China 'Evaluating' US Offer to Negotiate Tariffs; Beijing's Door Is Open," May 2, 2025.
[17] Financial Times, "China and US Agree to Slash Tariffs," May 12, 2025.
[18] Reuters, "US, China to Discuss Tariff Deadline Extension as Trump Reaches Philippines Deal," July 22, 2025. The temporary ninety-day truce between the US and China expiring on August 12 now looks likely to be extended by the US and China when the two governments plan to meet for discussions in Stockholm during the week of July 28, 2025.



which might then lead to potential sovereign debt distress for the affected countries. Some countries might feel the effects of one or more of these pathways at the same time, such as where a country is both a direct exporter to the US as well as an indirect exporter to the US by virtue of its participation in global supply chains.

Further, financial channels – such as flows of capital out of a country, a depreciation or a devaluation of the local currency, increased borrowing costs, and/or investor sentiment – could amplify the effects of tariffs and trade frictions, and possibly vice versa. Moreover, the impact of tariffs and trade tensions is not necessarily a simple cause-and-effect dynamic but can involve ripple effects and feedback loops within and across economies.

Direct Impact of Reduced Exports to the US

The most direct pathway would be high US tariffs causing harm to economies which have significant exports directly to the US. If the tariffs for a particular country are high enough and the exports to the US of the country in question represent a meaningful enough share of the country's GDP, its overall exports, and/or its foreign exchange earnings, then the country could experience serious detrimental effects from the tariffs. There are a number of emerging and developing economies that rely heavily on exports to the US as a percentage of their total overall exports, including, among others, Mexico, various countries in Central America, Vietnam, Bangladesh, the, Thailand, Malaysia, the Philippines, and Colombia.

However, as discussed in further detail below, the mere fact that these specific economies are heavily dependent on US exports does not mean that such economies will necessarily experience sovereign debt distress as a result of the fallout from the tariffs and trade tensions. If the US tariffs become prohibitive enough that there is a reduction in such exports from these countries, the country in question (unless it can find alternative export markets for its goods) may face a major economic slowdown with contracting GDP, higher unemployment, and/or lower tax revenues. If the country attempts to cushion the blow by pumping money into its economy or otherwise providing a safety net for its citizens, it could put undue pressure on its fiscal balance.

Moreover, if the country raises debt in order to be able to undertake such measures, it could be adding debt to what may already be a very high existing debt burden or perhaps even an unsustainable debt burden. Further, where such a country loses access to the US market and is unable to reroute its exports to other countries, it may lose an important source of foreign exchange. If a country's outstanding sovereign debt is denominated in a hard currency such as the US dollar, this loss of export- generated foreign exchange could make it more difficult for the country to repay its outstanding dollar-denominated sovereign debt. This problem would be compounded if the value of the local currency depreciates vis-à-vis the US dollar.

Thus, where a country's exports to the US market are cut off or reduced significantly, the affected country, depending on its pre-tariff position and subject to its economy's ability to withstand economic shocks, may start to experience some degree of sovereign debt distress or any existing sovereign debt distress may be exacerbated. As noted above, this may be due to factors such as growing fiscal imbalances, a higher debt burden and therefore potentially higher debt servicing costs, and/or lower foreign exchange earnings.

However, the situation can get even worse if, as a result of these developments, foreign investors begin to lose confidence in the affected country and start to pull back their investments in the country, resulting in capital outflows. This, in turn, could lead to a weakening of the local currency, inflationary pressures, higher interest rates, and higher borrowing costs for the country in question, and possibly sovereign rating downgrades. To be sure, though, there can be multiple chains of causation for these various adverse economic effects.

In other words, these subsequent developments could exacerbate the more immediate and direct adverse effects resulting from a cutoff or reduction in exports and a slowing of the country's economy. And this downward spiral can feed on itself and lead to further negative effects for the economy in question.

Disruption of Global Supply Chains

The economies of many emerging markets and developing countries are connected to and/or highly dependent on global supply chains, and these supply chains represent a critical feature of the global trading system. Overall, while

Continued on p.60

THE REASONABLY EQUIVALENT VALUE CONUNDRUM

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

Introduction

The overarching objective of a solvency analysis is to provide assurance that the transfer of an asset, or incurrence of a financial obligation, is not likely to harm non-participating creditors and shareholders.[1] Simply stated, the analyses performed seek to determine whether the subject firm was left with positive equity, the ability to repay its debts on maturity, and sufficient capital to operate its business. The three tests used in practice to evaluate these questions are known as the solvency tests. Each must be passed for the firm to be deemed solvent. If not, the firm, its selling shareholders, lenders, and directors may be liable for a claim for fraudulent transfer in the event of bankruptcy.

Where the firm is found to be insolvent, and the claim is for constructive rather than actual fraudulent transfer, an additional question arises in that it is necessary to determine whether the firm received reasonably equivalent ("REV") value in exchange for the asset transferred or obligation incurred. REV is not defined in the Bankruptcy Code, however. Consequently, how reasonably equivalent value should be interpreted and measured under the fraudulent conveyance laws, and how the courts will adjudicate it, remains an enigma.

Background

Theory

A fraudulent conveyance or fraudulent transfer is a pre-petition transfer made or obligation incurred by a debtor, that is deemed improper by law and therefore not legally recognizable.[2] The transaction is consequently "voidable," conveyance of the title is not recognized, and the assets are in general returned to the estate. There are two types of fraudulent transfers: intentional and constructive. The intent of the debtor to hinder, delay, or defraud its creditors is determinative in an intentional fraudulent transfer. Intent does not play a role in a constructive fraudulent transfer ("CFT"), however. Rather, the essence of the claim is that the counterparty to the transferor received more than its fair share of value.

Framework

The legal framework for pursuing a fraudulent transfer claim is specified in Bankruptcy Code sections 548 and 544(b)(1), the Uniform Voidable Transactions Act ("UVTA"), the Uniform Fraudulent Transfer Act ("UFTA"), and the Uniform Fraudulent Conveyance Act ("UFCA").[3] Section 548 of the Bankruptcy Code gives unsecured creditors direct power to avoid fraudulent transfers, while Section 544(b)(1) vests in the debtor rights to avoid fraudulent transfers typically reserved for unsecured creditors. The debtor must, however, identify at least one unsecured creditor with standing to pursue the claim. The debtor may then "step into the shoes" of the unsecured creditor to assert the claim, with recoveries shared with all unsecured creditors.

Section 544(b)(1) is used mainly to facilitate a bankruptcy estate's prosecution of fraudulent transfer claims under state law. In addition, most states have legislated one of two model fraudulent conveyance statutes to decide such disputes. The UVTA has been adopted by 25 states, including New York and the UFTA has been implemented by 23 states, including Delaware. The UFCA is still in effect only in Maryland and Louisiana has effected its own version.[4] Though there are differences between the UVTA and the UFTA, both have in common the principle that title to assets transferred to a third party to place the assets outside the reach of creditors is fraudulent.

What constitutes a transfer is described in section 101(54) of the Bankruptcy Code.[5] In particular, a transfer is defined as every mode, direct or indirect, absolute of conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of debtor's equity of redemption. In *Segal v. Rochelle,* the Supreme Court defined property to include anything that has debt-paying or debt-securing power. Transfers may include a pledge of assets to secure a letter of credit, execution on a lien judgement, renewal of a loan and payments thereon, termination of a lease, recission of a profitable contract, payment of a dividend, purchase of treasury stock, and incurrence of a financial obligation.

In analyzing REV, courts compare the amount of the transfer to the value the debtor received, not the value that the transferee gave.[6] For example, when a firm transfers cash to its stockholders to redeem its own shares, courts have found the company does not receive

[1] David Light, Bryce May, Richard May, John Miscione, and John O'Brien, Solvency Opinions, In Robert F. Riley & Robert P. Schweihs (Ed.), Handbook of Advanced Business Valuation, (New York: McGraw-Hill), pp. 267-284.
[2] Contested Valuation in Corporate Bankruptcy: A Collier Monograph, ¶ [2.02]) Robert J. Stark et al., eds., 2011).
[3] Ibid.
[4] https://content.next.westlaw.com/Glossary/PracticalLaw/I1c633754ef2811e28578f7ccc38dcbee?transitionType=Default&contextData=(sc.Default).
[5] Grant W. Newton, Bankruptcy and Insolvency Accounting, Vol. 1, 7th Ed. (Hoboken: John Wiley & Sons, Inc.) p. 252.
[6] Edward S. Weisfelner, Advanced Fraudulent Transfers: A Litigation Guide, (Alexandria: American Bankruptcy Institute), pp. 70-71.

anything of value by virtue of its shareholder's tender. Conceptually, this is because analyzing value from the debtor perspective "reflects that the purpose of the [fraudulent transfer] laws is estate preservation [and] thus the question [of] whether the debtor received reasonable value must be determined from the standpoint of the creditors."[7] Since "the proper focus is on the net effect of the transfer on the debtor's estate, [and] the funds available to the unsecured creditors,"[8] a transferee "cannot hide behind the position, although sympathetic, that it has parted with reasonable value."[9]

Relationship between REV and CFT Claims

Under Bankruptcy Code section 548 and state laws, a prepetition transfer or obligation incurred by a debtor may be avoided if (i) the debtor did not receive REV in exchange for the transfer made or obligation incurred, and (ii) the debtor (a) was insolvent on the date of the transfer or became insolvent as a result, (b) engaged in a business or transaction for which the remaining capital was unreasonably small after the transfer, and (c) intended to or believed that it would incur debts greater than its ability to pay as they matured.[10]

Despite its importance in bringing avoidance actions, the Bankruptcy Code does not define REV, however.[11] Notwithstanding, section 548(a)(2) of the Bankruptcy Code requires the trustee to prove that the debtor received less than REV in exchange for the challenged transfer.[12] The same is true of the UFTA, while Section 3 of the UFCA uses the term "fair consideration" to mean a "fair equivalent" exchange in "good faith"[13] in which the debtor received value not "disproportionally small" compared to what it gave, or obligation obtained.[14,15]The terminology of section 548(a)(2) of the Bankruptcy Code also differs from former section 67d(2) of the Bankruptcy Act in that it does not contain a good-faith element.[16] Rather, former section 67d(2) of the Bankruptcy Act provided that a transfer was voidable "if made or incurred without fair consideration," and that "consideration [other that consideration received as security]…is fair …when in good faith, and as a fair equivalent therefore, property is transferred or an antecedent debt is satisfied.[17]

Factors Weighed by the Courts

The ambiguity in the terms used to describe REV in the Bankruptcy Code and related state statutes historically caused courts to struggle in developing a uniform standard of analysis. Consequently, courts looked to fair market value alone to measure whether the debtor received REV. Since then, however, courts have approached the analysis using a "totality of circumstances" approach. Using this methodology, courts take into account the fair market value of the benefit received from the transfer, the existence of an arm's length relationship between the debtor and transferee, and the good faith of the transferee.[18]

Fair Market Value

In 1998, Campbell Soup Co. incorporated a wholly owned subsidiary, Vlasic Foods International, Inc., ("VFI") and sold it several food companies in exchange for borrowed cash. Campbell subsequently issued the subsidiary's stock to its shareholders as an in-kind dividend, making VFI an independent company. Within three years, VFI filed for bankruptcy and sold the food companies for less than it paid for them. VFI subsequently reorganized into VFB, LLC. Acting on behalf of VFI's creditors, VFB, LLC filed suit arguing that the transaction was a constructive fraudulent transfer and that Campbell aided a breach of fiduciary duty by VFI's directors.[19] Affirming the dismissal by the District Court of the constructive fraudulent transfer action, the Court of Appeals for the Third Circuit held that the value the stock market had given VFI was dispositive for determining whether it had received REV in the spin-off.[20]

Arm's Length Relationship

An arm's length transaction is one between unrelated parties, not involved in a confidential relationship, and who have roughly equal bargaining power. More specifically, "An arm's length transaction is characterized by three elements: [(1)] it is voluntary, i.e., without compulsion or duress; [(2)] it generally takes place in an open market; and [3)] the parties act in their own self-interest."[21]

Good Faith

Like REV, good faith is not defined in the Bankruptcy Code. However, Section 548(c) of the Bankruptcy Code provides

[7] Metro Commc'ns, 945 F.2d at 646.
[8] Stanley, 597 F.3d at 306 (citing In re Hinsley, 201, F.3d 638, 644 (5th Cir. 2000)).
[9] Metro Commc'ns, 945 F.2d at 646.
[10] Grant W. Newton, Bankruptcy and Insolvency Accounting, Vol. 1, 7th Ed. (Hoboken: John Wiley & Sons, Inc.) p. 251.
[11] Scott F. Norberg, Avoidability of Intercorporate Guarantees under Sections 548(a)(2) and 544(b) of the Bankruptcy Code, 64 N.C. L. Rev., p. 1104.
[12] Ibid. 1099 (1986).
[13] James F. Queenan Jr., The Collapsed Leverage Buyout and the Trustee in Bankruptcy, Cardozo Law Review 11, no.1 (October 1989): p. 6.
[14] Contested Valuation in Corporate Bankruptcy: A Collier Monograph, ¶ 2.02[2][a] (Robert J. Stark et al. eds., 2011).
[15] James F. Queenan Jr., The Collapsed Leverage Buyout and the Trustee in Bankruptcy, Cardozo Law Review 11, no.1 (October 1989): p. 9.
[16] Edward S. Weisfelner, Advanced Fraudulent Transfers: A Litigation Guide, (Alexandria: American Bankruptcy Institute), p. 63.
[17] Scott F. Norberg, Avoidability of Intercorporate Guarantees under Sections 548(a)(2) and 544(b) of the Bankruptcy Code, 64 N.C. L. Rev., pp. 1104-5.
[18] Edward S. Weisfelner, Advanced Fraudulent Transfers: A Litigation Guide, (Alexandria: American Bankruptcy Institute), p. 65.
[19] 2007 Decisions, Opinions of the United States Court of Appeals for the Third Circuit.
[20] Michael W. Schwartz, David C. Bryan, Campbell, Iridium, and the Future of Valuation Litigation, The Business Lawyer, Vol. 67, August 2012, p. 940.
[21] https://www.law.cornell.edu/wex/arm%27s_length.

an affirmative defense to an action to avoid a transfer as fraudulent if the transferee receives property for value and in good faith.[22] A transferee may establish good faith by showing (i) an honest belief in the propriety of the questioned actions, (ii) no intent to take unconscionable advantage of others, and (iii) no intent or knowledge that the questioned actions would hinder, delay, or defraud others.

Time of Transfer

It is generally well established among courts that the analysis of REV should concentrate on the time the transfer was made. Accordingly, "neither subsequent depreciation in nor appreciation in value of the consideration affects the value question whether reasonably equivalent value was given."[23]

Direct and Indirect Benefits

Transferees often argue that REV should include the synergies and other indirect benefits from a transaction.[24] Courts have differed with respect to their findings regarding such benefits, however, with some refusing to consider benefits that are not "fairly concrete." Examples of concrete benefits generally include the proceeds from loans, relief from debt, acquisition of inventory, and tax benefits, refunds, and offsets.

The basis for this treatment is that value as defined under Bankruptcy Code section 548 does not include indirect benefits, including synergies. Specifically, section 548(d)(2)(A) defines value as "property, or satisfaction or securing of a present or antecedent debt of the debtor." "Property" in this context is defined as including "all legal or equitable interests of the debtor in property as of the commencement of the case."

In opposite, courts that do consider synergies and other indirect benefits as value frequently rely on section 67(d) of the former Bankruptcy Act, in which "fair consideration" was interpreted to include indirect benefits from "transfer[ring] property or incur[ing] an obligation as security for the debt of a third person."[25] The court also indicated that to qualify as "value," the indirect benefit received by the debtor must preserve the debtor's economic net worth.[26] The defendant must prove that the indirect benefit is sufficiently "concrete and quantifiable," however.[27] Further, the defendant must quantify the economic value of the debtor,[28] and only if the economic

[22] Barclay Damon LLP, Bankruptcy Avoidance Actions, Par 2 – Fraudulent Transfers, May 21, 2025.
[23] Collier on Bankruptcy, Section 548.09, p. 116 (15th Ed. 1984).
[24] Edward S. Weisfelner, Advanced Fraudulent Transfers: A Litigation Guide, (Alexandria: American Bankruptcy Institute), p. 71.
[25] Rubin v. Manufacturers Hanover Trust Co., 661 F.2d, 991 (2d Cir.1981) (explaining the "indirect benefit rule").
[26] Rubin, 661 F.2d at 991 - 92.
[27] Lisle, 196 F. App'x at 342 (placing the burden on defendant to quantify the indirect, intangible benefit)
[28] Id.

value of the benefit to the debtor is equivalent to the value of the transfer given will the defendant be able to circumvent the trustee's effort to avoid the transfer.[29]

With respect to synergies in particular, the current standard outlined in *Metro Communications* requires expected synergies to be "legitimate and reasonable"[30] and that "the value of …synergy obtained in the corporation's affiliation …[is] difficult to quantify without the aid of expert witnesses."[31] Courts therefore look to expert witnesses for quantification of expected synergies and other indirect benefits and on that basis decide whether the expected value is "legitimate and reasonable." Factors that go into this analysis include market value, the price paid, and the likelihood that the benefit of the projected synergies will be realized, discounted by the associated risk.

Conclusion

In a constructive fraudulent transfer claim, the trustee must show that the debtor did not receive REV in exchange for the asset transferred or obligation incurred.

As if this analysis were not complicated enough, REV is not defined in the Bankruptcy Code or in the related state statutes with particularity, whether past or present. Fortunately, the analysis of REV is in general a question of fact, with courts employing a case-by-case approach, careful study of which is required to unravel the puzzle posed by REV and its constituent parts.

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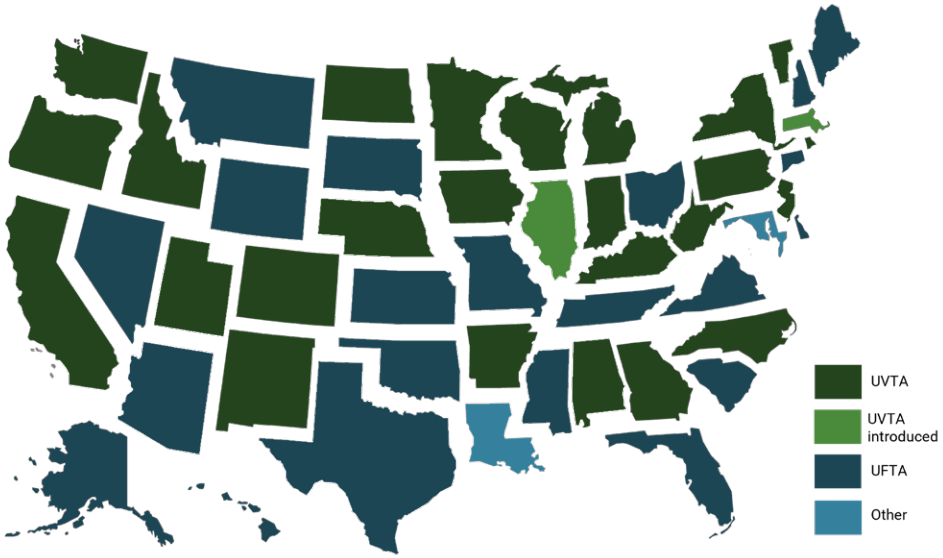
[29] Rubin, 661 F.2d at 991 - 92.
[30] Edward S. Weisfelner, Advanced Fraudulent Transfers: A Litigation Guide, (Alexandria: American Bankruptcy Institute), p. 72.
[31] See Boris J. Steffen, Measuring Cognizable Merger Efficiencies in the Ordinary Course, The Credit and Financial Management Review, Volume 28, Number 4, 4th Quarter 2022 · Dec 15, 2022, for reference.

THE UNIFORM VOIDABLE TRANSACTIONS ACT – UPDATE

In 2014, the Uniform Law Commission drafted the Uniform Voidable Transactions Act ("UVTA") as an amendment to the 1984 Uniform Fraudulent Transfer Act ("UFTA").



As of August 2025, 25 states have enacted a version of the UVTA. Twenty-three states follow the UFTA, although two have recently introduced legislation to adopt the UVTA (Illinois and Massachusetts). Maryland still follows the older Uniform Fraudulent Conveyance Act ("UFCA"), and Louisiana follows its own version.

The UVTA, by its name and in concept, replaced "Fraudulent" with "Voidable," and "Transactions" with "Transfers." The change to "Voidable" better conveys that a transaction need not to have been accomplished through actual fraud, and "transactions" better conveys that a range of transactions can fall under this law.

DIRECTOR PROTECTIONS IN OUT-OF-COURT RESTRUCTURINGS: AVOIDING FIDUCIARY PITFALLS

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In the high-stakes environment of corporate distress, directors often find themselves navigating a minefield of fiduciary risk with diminishing support. The tools that typically shield directors from personal liability may erode or become unavailable as the legal exposure intensifies.

This article explores how the insolvency of a Delaware corporation alters the effectiveness of traditional director protections and examines the nuanced risks associated with third-party indemnification — particularly from parties with a stake in the outcome of an out-of-court restructuring. As illustrated by the Delaware Court of Chancery's recent decision in GB-SP Holdings, LLC v. Walker,[1] improperly structured indemnification arrangements can transform a well-intentioned board decision into a fiduciary breach, subject to heightened judicial scrutiny and personal liability.

By understanding the fiduciary pitfalls associated with distressed companies and carefully structuring indemnification, directors and counterparties alike can avoid inadvertently tainting a transaction.

Director Protections in the Insolvent Corporation

When a corporation becomes insolvent, the legal and strategic risks for all parties involved, including the corporation's directors, become more complex. A director of a Delaware corporation owes fiduciary duties to the corporation and its stockholders. Directors frequently face litigation alleging breaches of these duties. Under normal operating conditions, directors rely on various tools to manage the risk of fiduciary breach claims, including contractual rights to indemnification and advancement of expenses from the corporation, insurance coverage under directors' and officers' (D&O) insurance policies carried by the corporation, and provisions in the corporation's charter eliminating monetary liability for breaches of certain fiduciary duties. However, when a corporation becomes insolvent, some of these tools may become unavailable.

In the insolvency context, the corporation may not have sufficient funds to satisfy its obligations in full, including its obligations to indemnify and advance expenses to its directors. A director's right to indemnification from the corporation is a general unsecured obligation of the corporation that is subordinate to claims of the corporation's secured creditors and *pari passu* with claims of its unsecured creditors. If the corporation provides indemnification and advancement of expenses to a director while it is insolvent, and the corporation subsequently enters bankruptcy, the directors who received such payments may be subject to preference claims from the bankruptcy estate for recovery of those payments.[2]

A director's ability to rely on the corporation's D&O policies may also become impaired when the corporation becomes insolvent. D&O policies are generally "claims made" policies – meaning that the policy must be active at the time a claim is asserted against the policy. A director that is relying on a "claims made" D&O policy must have confidence that the policy will be active for the foreseeable future when claims could be asserted against the director. For example, claims for breaches of fiduciary duties in Delaware may be asserted for up to three years following the breach.[3] When a corporation becomes insolvent, a corporation might not have the ability to continue paying premiums on its D&O policy and a director may have little confidence that policy coverage will be available when claims are eventually asserted.

Section 102(b)(7) of the Delaware General Corporation Law ("DGCL") permits a corporation to include in its certificate of incorporation a provision eliminating or limiting the personal liability of a director for breach of fiduciary duty, provided, that such provision cannot eliminate liability in respect of a breach of the duty of loyalty or any transaction in which the director derives an improper personal benefit.[4] A charter provision of this kind essentially insulates the board from monetary liability for breaches of the fiduciary duty of care – which

[1] GB-SP Holdings, LLC v. Walker, No. 9413-VCF, 2024 Del. Ch. LEXIS 363 (Del. Ch. Nov. 15, 2024).

[2] Pursuant to 11 U.S.C. § 547.

[3] See Largo Legacy Grp., Ltd. Liab. Co. v. Charles, No. 2020-0105-MTZ, 2021 Del. Ch. LEXIS 140, at *21 (Del. Ch. June 30, 2021) ("For cases in equity alleging breach of fiduciary duty … Delaware courts have looked to the analogous three-year statute of limitations period established by 10 Del. C. § 8106.").

[4] See 8 Del. C. §102(b)(7). Sixteen states have substantially adopted the Delaware director exculpation statute. See Itai Fiegenbaum, Caremark's Fractured State, Vol. 80, the Business Lawyer, 59 (2024). Similarly, the Model Business Corporation Act permits a corporation's articles of incorporation to include a provision eliminating or limiting the liability of a director for money damages for any action taken, or any failure to take any action, as a director, except liability for, among other things, the amount of a financial benefit received by a director to which the director is not entitled. The Model Business Corporation Act's director exculpation provisions have been substantially adopted by 17 states. Id.

is the duty to act on an informed basis, in good faith, and with due care. The insolvency of a corporation does not alter this limitation.

Fiduciary Pitfalls

Directors of an insolvent corporation often must take significant action quickly to preserve value. Unfortunately, they are often required to do this while their fiduciary duties are extended to a broader group of beneficiaries and without a meaningful source of indemnification. In many states, including Delaware, a corporation's insolvency results in an extension of the board's fiduciary duties beyond stockholders to all residual claimants of the corporation.[5] The residual claimants of an insolvent corporation include those creditors that would not be fully paid if the corporation's assets were sold for fair value.[6] This extension of fiduciary duties reflects the reality when dealing with an insolvent corporation: the value of the corporation's liabilities exceeds the value of its assets, and it is creditors who bear the downside risk of corporate decisions. A practical reality of this extension of duties is that more people (rather than just stockholders) can bring fiduciary breach claims against the corporation's directors.

While in bankruptcy, decisions made by the board of directors outside of the ordinary course of business are generally subject to court approval, which reduces the risk of fiduciary breach claims against directors for their post-petition conduct.[7] However, in an out-of-court restructuring, there is no court oversight of board decisions, leaving directors exposed to fiduciary breach claims for actions taken during the restructuring process.

In such situations, a director will need to decide whether to resign from the board, and therefore potentially mitigate their personal liability, or continue their board service to work for the best outcome for the corporation's stakeholders, including employees, customers, vendors, and residual claimants. A third party, such as a secured creditor or a prospective acquirer of the corporation's business, may also have a strong interest in ensuring that there are no disruptions to the composition of the board until the restructuring is completed. In this context, the board, though infrequently, may be able to secure a commitment from a third party to directly indemnify the directors against third-party claims or to obtain a D&O tail policy for the corporation.[8] However, both the directors and the third party should be mindful that this arrangement could taint the board's approval of any restructuring transaction if not properly structured.

Ordinarily, decisions made by directors are presumed by Delaware courts to be made in good faith, on an informed basis, and in the best interests of the corporation and its stockholders.[9] This presumption, widely referred to as the "business judgment rule," is intended to provide directors with comfort that their decisions will not be second guessed by others. However, if a majority of the board is conflicted with respect to a transaction, such as by having a personal interest in the transaction that is not shared by stockholders, then the business judgment rule will not apply and a court will evaluate the board's decision making under a more stringent standard referred to as the "entire fairness standard." Under the entire fairness standard, the defendants (*i.e.*, the directors) must establish to the court's satisfaction that the transaction was the result of **both** fair dealing and fair price.[10]

In addition, a board that is found to have engaged in a conflicted transaction that does not meet the entire fairness standard is not afforded protection from monetary liability under Section 102(b)(7) of the DGCL. Additionally, anyone that is found to have knowingly aided

[5] See Quadrant Structured Prods. Co., Ltd. v. Vertin, 115 A.3d 535, 546-47 (Del. Ch. 2015) (Upon the insolvency of a corporation, directors "continue to owe fiduciary duties to the corporation for the benefit of all of its residual claimants, a category which now includes creditors.").

[6] See GB-SP Holdings, LLC v. Walker, No. 9413-VCF, 2024 Del. Ch. LEXIS 363, at *66 (Del. Ch. Nov. 15, 2024), ("When a corporation is insolvent, the value of the corporation is insufficient to pay all of its fixed claimants and leave a residuum. The residual distribution—in the sense of the last money the corporation has—goes at least partially to pay a class of creditors. Those not-fully-paid creditors therefore enter the class of residual claimants." Internal quotations omitted).

[7] See, e.g., 11 U.S.C. § 363(b) (Authorizing the debtor in possession, after notice and a hearing, to sell assets outside of the ordinary course of business).

[8] A tail policy offers insurance coverage for a specified time period following the end of the policy, commonly six years.

[9] See Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014). (The presumption is that the presumption that the directors "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Internal quotations omitted).

[10] In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation, 2024 Del. Ch. LEXIS 12, at *77 (Del. Ch. Jan. 24, 2024).

the board in such breach may be subject to liability as well.

The recent case of *GB-SP Holdings* highlights how a director can run into trouble with indemnification agreements. In *GB-SP Holdings*, BridgeStreet Worldwide, Inc. ("BSW") failed to make interest and principal payments on its secured debt. Domus BWW Funding, LLC ("Domus"), an affiliate of a private equity firm, decided to acquire BSW's business through a "loan to own" strategy. Domus acquired BSW's secured debt and began negotiating a forbearance agreement with BSW. Under the forbearance agreement, Domus agreed to advance additional funds to BSW and to forbear from exercising certain of its rights for a period of five months. In exchange, Domus received additional collateral from BSW to secure its debt.

At the same time as the BSW board was negotiating the forbearance agreement, it was receiving demands from GB-SP Holdings, LLC ("GB-SP"), BSW's then-largest shareholder, to enforce its rights under a shareholders' agreement to have its designee seated on the BSW board. Despite threats of litigation from the shareholder, the BSW board ignored these demands for several reasons, including a desire to finalize the forbearance agreement before GB-SP's representative was appointed to the board. In anticipation of litigation from GB-SP, the BSW board asked Domus to indemnify the board from claims arising out of the forbearance agreement **and** claims from GB-SP. Domus agreed and signed the forbearance agreement and the director indemnification agreements on the same day. BSW thereafter defaulted under the forbearance agreement and agreed to Domus's foreclosure on BSW's assets.

GB-SP subsequently filed suit for a myriad of claims, including breach of fiduciary duties by the BSW board and a claim for aiding and abetting breach of fiduciary duties against Domus. In its breach of duty claims, GB-SP alleged that the deferential business judgment standard should not apply to the board's decision to approve the forbearance agreement because the board had a self-interest in obtaining the related indemnification agreements from Domus, and by tying those agreements together, the board was unable to properly discharge its fiduciary duties in approving the forbearance agreement.

The Delaware Chancery Court noted that ordinarily, a director's entry into an indemnification agreement does not create a presumption of self-interest on the part of the director because the receipt of indemnification is commonplace in corporate affairs and does not materially

increase the director's wealth.[11] However, where indemnification has been significant to a director, courts have found that the personal benefit conferred on the director may make it improbable that the director can perform his fiduciary duties without being influenced by his personal interests.[12] In this case, the Court found that due to the looming risk of litigation by GB-SP against the directors, the indemnification arrangement bestowed a significant personal benefit to the board and that tying the indemnification arrangements to the forbearance agreement discussions made it improbable that the board could discharge its fiduciary duties when approving the forbearance agreement. Due to the board's self-interest in the forbearance agreement, the court applied an entire fairness standard of review to the transaction and concluded that the board's approval of the forbearance agreement was not entirely fair as to process or price. Because the transaction was not entirely fair to BSW, the court found that the board breached its fiduciary duty of loyalty –a breach that is not subject to exculpation under Section 102(b)(7) of the DGCL.[13] Having found that the board breached its duties, the court next found that Domus knowingly participated in the board's breach and was therefore liable for aiding and abetting the board's breach of those duties.[14]

To avoid the fiduciary pitfalls exemplified in *GB-SP Holdings v. Walker*, boards overseeing distressed corporations should take proactive steps to insulate their decision-making from conflicts of interest. If some (but not all) of the directors may personally benefit from an arrangement, the board should consider forming a special committee of disinterested directors to evaluate and approve any potentially conflicted transaction. If this is not an option, the board can take other steps to mitigate its risk. First, directors should seek independent legal counsel early in any out-of-court restructuring process to assess the risks associated with a third party providing indemnification or facilitating the corporation's acquisition of a D&O tail policy. Second, any arrangement involving directors entered into during a time of heightened litigation risk should be carefully reviewed to determine whether it may be viewed as a material personal benefit that compromises the board's independence. Third, boards should ensure that any arrangement with a third party that bestows a benefit to the board that is not shared with the corporation's residual claimants is clearly separated from the negotiation and approval of any other material transaction. For example, in *Edgewater Growth Capital v. H.I.G.*, the Delaware Chancery Court determined that a secured creditor's agreement to indemnify certain directors of Pendum, a private equity portfolio company, did not compromise the directors' independence when they approved the sale of Pendum's business to an affiliate of the secured creditor.[15] A critical factor in the Court's determination was that the directors negotiated an indemnification agreement that required the secured creditor to indemnify them even if the secured creditor's affiliate was not the ultimate buyer of Pendum's business.[16]

In the challenging landscape of corporate distress, directors face significantly increased personal liability as traditional protections erode and fiduciary duties extend to residual claimants. The *GB-SP Holdings v. Walker* case serves as a warning, starkly illustrating how improperly structured indemnification arrangements – particularly those designed to induce board approval – can lead to a breach of the duty of loyalty by directors and aiding and abetting liability for the third-party providing indemnification. To successfully navigate complex out-of-court restructurings and avoid severe fiduciary pitfalls, boards must proactively seek experienced, independent counsel, rigorously scrutinize any arrangements that confer personal benefits not equally shared by the corporation's residual claimants, and ensure that all decisions are made with disciplined focus on the best interests of the corporation and its residual claimants.

[11] GB-SP Holdings, LLC v. Walker, No. 9413-VCF, 2024 Del. Ch. LEXIS 363, at *72-73 (Del. Ch. Nov. 15, 2024) ("Normally, the receipt of indemnification is not deemed to taint related director actions with a presumption of self-interest. That is because indemnification has become commonplace in corporate affairs, and because indemnification does not increase a director's wealth.") citing Grover v. Simmons (In re Sea-Land Corp. Shareholders Litig.), 642 A.2d 792, 804 (Del. Ch. 1993) (citations omitted).

[12] See Pfeffer v. Redstone, 965 A.2d 676, 690 (Del. 2009) ("The personal benefit must be so significant that it is improbable that the director could perform her fiduciary duties . . . without being influenced by her overriding personal interest.") (alternations in original).

[13] *GB-SP Holdings, LLC v. Walker*, No. 9413-VCF, 2024 Del. Ch. LEXIS 363, at *96 (Del. Ch. Nov. 15, 2024)

[14] In order to establish a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must prove: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in that breach by the defendants, and (iv) damages proximately caused by the breach." See RBC Cap. Mkts., LLC v. Jervis, 129 A.3d 816, 861 (Del. 2015).

[15] Edgewater Growth Capital Partners LP v. H.I.G. Capital, Inc., 68 A.3d 197, 232 (Del. Ch. 2013).

[16] Id. at *232.

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HOW DO YIELDS VARY BY SIZE OF BORROWER?

Cindy Ma, PhD, and Chris Cessna, *Houlihan Lokey*

Houlihan Lokey has been producing the Private Performing Credit Index ("PPCI")[1] for several quarters using a dataset of instruments we have valued since Q3 2017. Clients have asked us for a variety of data insights, and the question of whether different size loans persistently yield more has been common. To answer this, we turned to the same dataset we use to compute the quarterly index but created quartile subindices for comparison purposes.

The answer to that question is yes: There are trends and conclusions, but it is not a simple response. We stratified the data into quartiles based on adjusted EBITDA—breakpoints of $10 million, $20 million, and $100 million. The periods prior to and since COVID-19 display marked differences, but the loans to the smallest borrowers do persistently have the highest yields. The loans to the largest borrowers have the lowest yields, although that is most pronounced since Q2 2019. It is important to note that these yields represent the weighted average yield of loans we value each quarter and are not a measure of total return or historical performance. Rather, the yield is a snapshot at each point in time. Furthermore, all the loans in the PPCI are performing loans, so these yields do not reflect the impact of underperforming or defaulted loans.

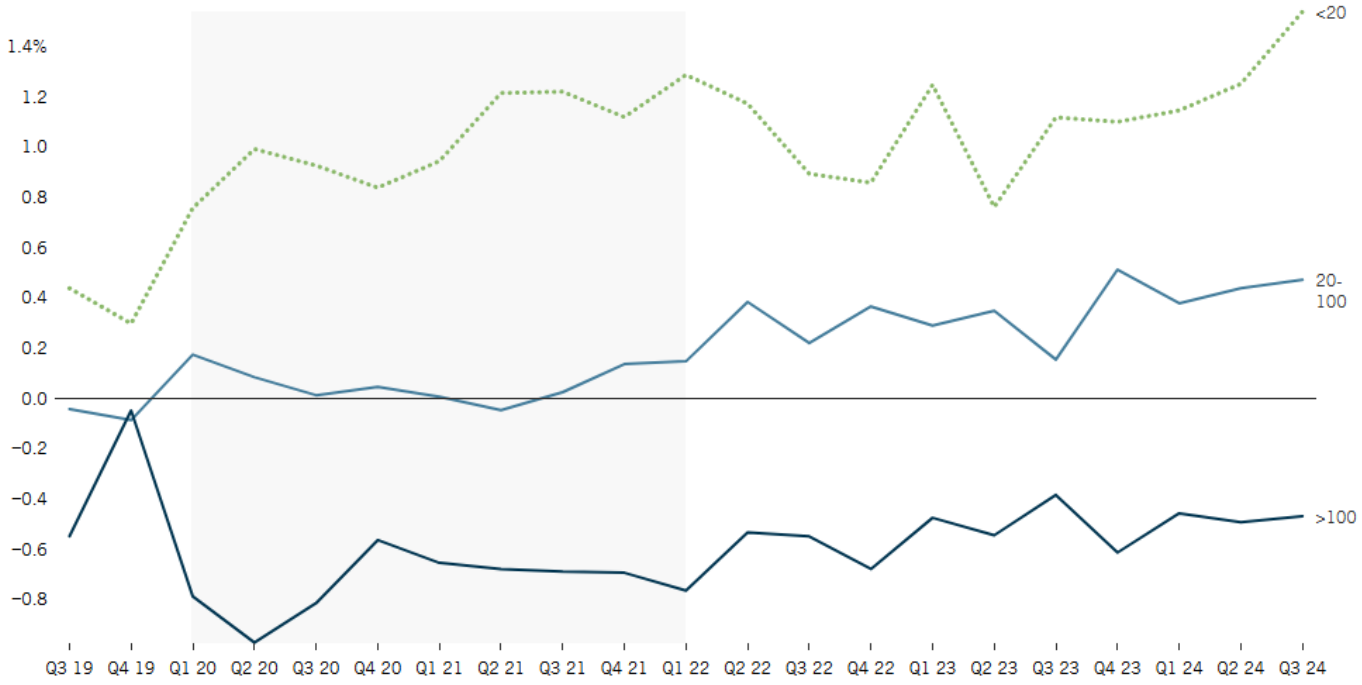
The average of the entire dataset is presented as subindex average. For computational reasons, that average is not exactly the same as the PPCI, but the comparison between quartiles is accurate.

By examining the quartiles relative to the subindex average, that same observation is easier to see. However, there is a marked convergence of yields by quartile in Q4 2019, prior to COVID-19 lockdowns and market reaction. While the largest borrowers are routinely +/- 20bps from the average, the smallest borrowers have been more than 110 bps above average in the past several quarters.

[1] The Private Performing Credit Index (PPCI) is intended primarily to provide a window to the universe of performing private credit loans, which is generally inaccessible, and to act as a basis for comparison to specific assets or other indices to inform discussions of market dynamics.

Difference From Index by Size Quartile

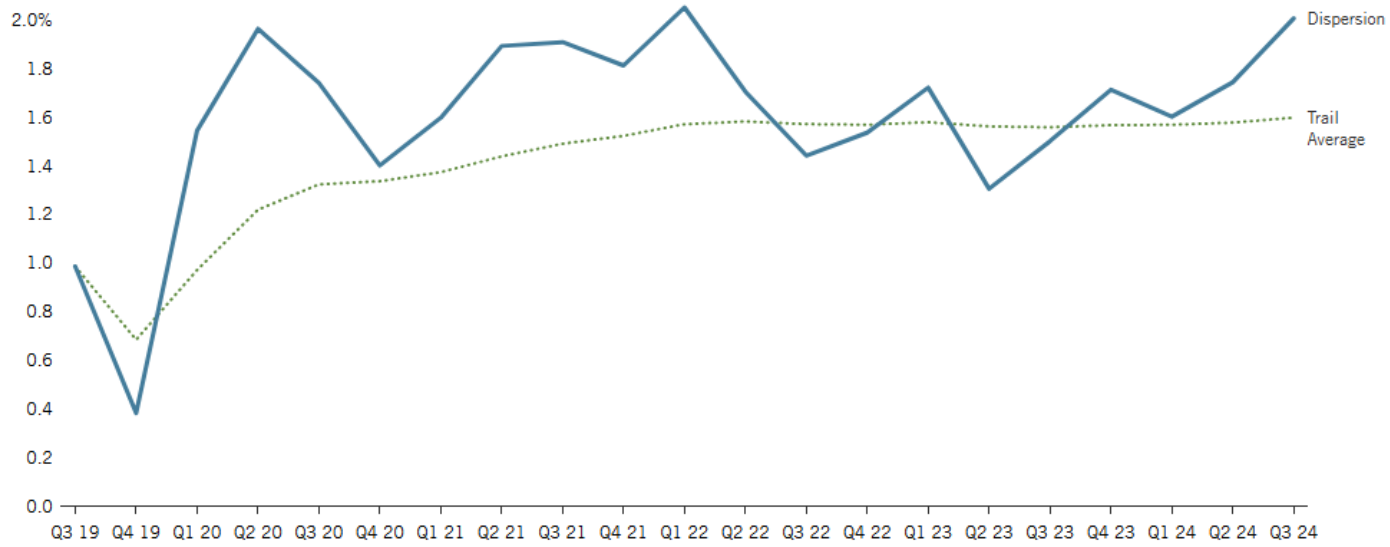
Yield of each quartile relative to the average (not absolute); COVID-19 period is highlighted



Source: Houlihan Lokey • Embed

Yield Dispersion is Increasing

Difference between highest and lowest quartile yield



Source: Houlihan Lokey • Embed

The overall divergence between quartiles is also dynamic and has moved wider and tighter over time. This graphic shows the dispersion as the highest quartile yield minus the lowest quartile yield. The trailing average of dispersion also shows an increase, as yields continuously reflect size premiums or discounts.

Conclusions and Observations

This is the simple answer to the question, "How do yields vary by size of borrower?" There is a wide variation in the dispersion of yields relative to size, but loans to the smallest borrowers consistently have the higher yields. These higher yields may be required to compensate lenders for the increase in execution costs for a larger number of transactions. Additionally, smaller borrowers may be perceived to have more credit risk than larger borrowers, thus justifying a higher required yield for loans to small borrowers.

It seems clear that competing strategies of lending to small borrowers and lending to large borrowers can both be successful if managed appropriately.

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TAX ACCOUNTING FOR BANKRUPTCY ESTATES AND DEBTORS: A PRACTICAL GUIDE

Michael Barton, CIRA, Nate Myers, and Omar Mutlak, *RSM US LLP*

This article is the second of a series reviewing and expanding upon fundamental tax issues relating to bankruptcy and insolvency, based on the Certified Insolvency and Recovery Advisor curriculum. This article is drawn from CIRA Part 3, Chapter 7, Administrative Aspects of Taxes

Introduction

When an individual debtor ("Debtor") commences a Chapter 7 or 11[1] bankruptcy case, federal tax law treats the resulting estate as a separate taxable entity. This "bankruptcy estate" steps into the Debtor's shoes for federal income- tax purposes, taking over assets, liabilities, and reporting obligations previously held by the individual that filed for bankruptcy protection.[2] Managing the estate's inherited tax attributes, elections, and ongoing obligations is essential to minimize tax liabilities and preserve value for creditors and stakeholders. No such separate taxable entity is created in filings under Chapters 12 or 13.

This article discusses the formation of the taxable bankruptcy estate in certain individual person's bankruptcies, the carryover and application of pre-/post-petition federal tax attributes, strategic planning opportunities, permissible deductions, and special year-end federal tax elections.

Separate Estate Creation

Upon the filing of a voluntary or involuntary bankruptcy petition, section 541 of the Bankruptcy Code and section 1398 of the Internal Revenue Code ("IRC") automatically create a distinct taxable entity—the bankruptcy estate—generally comprised of all of the assets the individual owns on the date the bankruptcy petition was filed.[3] The segregation of the Debtor's pre- and post- petition operations prevents duplication of liabilities, streamlines both the bankruptcy estate and Debtor filings, and limits the ability of the Debtor to control the assets held in the estate.

An individual Debtor is authorized to retain certain exempt assets, regardless of chapter under which they have filed. The exemptions may be allowed under state law, though the Bankruptcy

Code contains specific exemptions if elected, or if state law does not provide specific exemptions. For example, for certain states, an individual may exclude the equity in their primary residence.[4] However, for federal purposes only the first $214,000 of value in such residence would be exempt.[5]

Bankruptcy Trustee

In a Chapter 7 case, a bankruptcy trustee is appointed. As a neutral third party, the trustee is a fiduciary to the Debtor's creditors to ensure that bankruptcy estate property is properly managed and maintained for the benefit of the creditors.[6]

In the "liquidating" Chapter 7 filing, the trustee takes control of non-exempt assets and then distributes the assets to the creditors.[7]

In a Chapter 11 case, the Debtor typically remains "in-possession," and thus no separate trustee is appointed.[8] However, the debtor-in-possession is generally constrained by oversight from the United States Trustee Program as well as the unsecured creditors committee (if one is appointed).

Carrying Over Federal Tax Attributes

A key benefit of the separate bankruptcy estate is its ability to inherit certain pre-petition federal tax attributes from the Debtor. These carryovers can shelter the bankruptcy estate's post-petition income and optimize distributions to creditors.[9]

[1] The chapters refer to the Bankruptcy Code, i,e., Title 11 of the United States Code.
[2] 26 U.S.C. § 1398; 11 U.S.C. §§ 541–550.
[3] Id.; See also IRS, Publication 908 (2024), Bankruptcy Tax Guide. Note for Chapter 7 and 13 cases, certain assets, may be exempted under state law.
[4] For example, under Florida state law, if certain requirements are met, an individual or couple can exempt an unlimited amount of equity in their primary residence. Fla. Stat. Ann. § 222.01-02.
[5] 11 U.S.C. §522(p)(1).
[6] See 11 U.S.C. §704 for an enumeration of the duties of the trustee.
[7] 11 U.S.C. §§ 701, 704.
[8] 11 U.S.C. § 1107(a).
[9] 26 U.S.C. § 1398.

Pre-Confirmation Tax Benefits

Before confirmation or discharge, the estate succeeds to these attribute of the Debtor:

- Net operating loss carryovers
- Capital loss carryovers
- Unused tax credits
- Bad debt deductions and prior tax liabilities
- Charitable contribution carryovers.

[10]Post-Petition Accounting

Once the trustee or Debtor-in-possession elects to continue the Debtor's accounting methods, the estate applies those methods to:

- Passive activity loss and at-risk limitations
- Principal residence gain exclusions.[11]

Income and Expenses

A bankruptcy estate reports all post-petition income and may deduct qualifying expenses, subject to certain limitations and ordering rules.

Income

All income generated by estate property after the petition date, such as rents, royalties, and business receipts, must be included in gross income.[12]

Deductions and Credits

The estate may deduct:

- Ordinary and necessary expenses of the Debtor's pre-petition trade or business.
- Interest, taxes, and certain state and local levies
- Passive activity losses.[13]

Administrative Expenses

Costs incurred in administering the bankruptcy estate, such as trustee and professional fees, court costs,

and related commissions, are generally deductible as administrative expenses under IRC § 1398. In contrast, expenditures to improve estate property, such as renovations, equipment purchases, or structural upgrades, are typically capitalized and depreciated over time, rather than immediately deducted.[14]

This distinction follows standard federal tax rules: bankruptcy does not alter how capital investments are treated. While administrative costs are expensed in the year incurred, property improvements must be recovered through depreciation, consistent with non-bankruptcy tax treatment. The key is whether the expense maintains the estate or enhances its value.

Managing the Tax Year and Attributes

A strategic "short-year" election allows the bankruptcy estate to bifurcate pre- from post-petition attributes, simplifying both tax compliance and the application

of attribute-reduction rules.[15] Under § 1398(d)(2), the bankruptcy estate may elect a tax year ending on the petition date. This short-year election:

- Isolates pre-bankruptcy net operating losses and credits for immediate use.
- Triggers § 108(b) attribute-reduction ordering rules, preserving residual attributes for future tax years.[16]

Post-Confirmation Tax Treatment

Once a Chapter 11 case is confirmed, the tax treatment of the bankruptcy estate depends on the disposition of assets and the tax reporting during the bankruptcy. Upon emergence from bankruptcy, any remaining tax attributes, such as net operating losses or credits, revert to the individual taxpayer.[17]

Similarly, if a Chapter 13 case is successfully completed, any remaining tangible property still held by the bankruptcy estate, such as cash, personal property, or real estate, is generally returned to the Debtor. This does not typically include tax attributes, which may be extinguished or used within the estate before case closure.[18]

For Chapter 7 cases where assets are liquidated, the bankruptcy estate generally ceases to exist after all distributions are made. Remaining liabilities may be discharged, with any tax reporting obligations ending, unless unresolved claims require additional filings.[19]

COD Income

One of the most significant tax consequences of bankruptcy is the potential recognition of cancellation of debt (COD) income, which generally arises when a Debtor is relieved of repayment obligations for indebtedness.

Under normal circumstances, discharged debt is treated as taxable income under IRC § 61(a)(12). However, taxpayers in Title 11 bankruptcy proceedings benefit from a crucial exclusion: IRC § 108(a)(1)(A) permits bankruptcy

[10] 26 U.S.C. §§ 172, 1212, 108, 6402, 170(d).
[11] 26 U.S.C. §§ 465, 469; § 121.
[12] 26 U.S.C. § 61.
[13] 26 U.S.C. §§ 162, 163, 263; §§ 465, 469.
[14] 26 U.S.C. §§ 1398(h), 162; 11 U.S.C. § 503(b). Note: Debt costs have separate capitalization and deductibility rules for US federal tax purposes.
[15] 26 U.S.C. § 1398(d).
[16] 26 U.S.C. § 108(b); § 1398(d)(2).
[17] 26 U.S.C. § 108(b)
[18] The discharge releases the Debtor from all debts provided for by the plan or disallowed, with limited exceptions. See 11 U.S.C. § 1328 for requirements for discharge.
[19] 26 U.S.C. § 1398(f); 11 U.S.C. § 727. Note: Trustees and Debtors must ensure that final tax returns and elections properly account for attribute reductions and disposition of the bankruptcy estate property.

estates to exclude COD income from gross income. In lieu of current taxation, the estate must reduce certain tax attributes, such as net operating losses, general business credits, and basis in property, under the ordering rules of § 108(b). These reductions preserve liquidity and support creditor recovery while deferring the tax impact to future periods. Strategic use of short-year elections and attribute planning allows trustees and debtors-in-possession to maximize the value of this exclusion during the pendency of the case.

Summary

When a Debtor files for Chapter 7, or 11 bankruptcy, a separate taxable estate is created, inheriting the Debtor's pre-petition assets, liabilities, and tax attributes. Proper management of these attributes, including net operating losses, capital loss carryovers, and tax credits, can optimize distributions to creditors and minimize tax liabilities. Strategic planning, such as electing a short tax year or utilizing cancellation of debt exclusions, helps trustees and debtors-in-possession preserve deductions and defer income recognition.

Understanding the tax consequences of bankruptcy estates requires careful navigation of federal tax rules. Maintaining compliance and structuring elections effectively ensures tax efficiency while preserving value for stakeholders. Engaging experienced tax professionals is essential in addressing the complexities of bankruptcy taxation.

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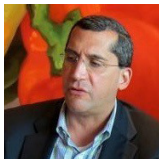

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estimates vary, some estimates indicate that over half of total global trade involves 'global value chains' (a close cousin of global supply chains).[19]

Global supply chains remain important notwithstanding the efforts of various large economies in recent years to bring supply chains closer to their home economies (such as through 'nearshoring' or even 'onshoring' of important imports), which was a business and policy response to the significant supply chain disruptions that occurred during the COVID-19 pandemic.

A number of emerging economies and developing countries may not export directly to the US market, but rather they may contribute inputs that are then ultimately incorporated into the final product which is then exported to the US or elsewhere. Moreover, these global supply chains can be very long with many countries contributing inputs into the final product.

In a global supply chain for any particular product (whether it is, for example, a smartphone, computer, automobile, or countless other items), raw materials such as various types of minerals may be sourced in one set of countries and components for the product may be manufactured in another set of countries. The final assembly of the product may take place in a third set of countries, and sales and distribution of the final product may be handled from yet a fourth set of countries.

Even though a particular country may not export directly to the US, the intermediate products that are produced in that country may be in less demand overall if, due to US tariffs, the US market is effectively shut off to the country from where the final product is being exported. Thus, in such a scenario, countries up and down the supply chain might see diminished demand for their output of intermediate products.

This could result in a wide range of adverse effects for the countries that are part of a particular supply chain. These effects might include reduced GDP, lower foreign exchange earnings, higher levels of unemployment, and further strain on its fiscal accounts to the extent the

[19] See, e.g., OECD, "Global Value and Supply Chains" ("[a]bout 70% of international trade involves global value chains (GVCs), as services, raw materials, parts, and components cross borders – often numerous times") (https://www.oecd.org/ en/topics/global-value-and-supply-chains. html). 'Global supply chains' are defined as "a network of suppliers, manufacturers, distributors and retailers who are involved in sourcing raw materials, creating a product and selling it to the consumer," whereas 'global value chains' are defined as "a series of activities by a business to offer valuable products or services to its customers." GEP, "Supply Chain versus Value Chain: Why the Difference Matters" (https://www.gep.com/blog/technology/supply-chain-vs-value-chain).

governments try to cushion the impact of the dislocation caused by a slowdown in their economies.

As discussed above with respect to direct exports to the US and the follow-on effects, there could be further negative effects for countries plugged into global supply chains if and when investors start to lose confidence in a particular country. For instance, borrowing costs for the countries in question could rise if and when there are credit downgrades by ratings agencies (in response to capital outflows and other negative economic developments for the countries), and that could set off its own negative feedback loop.

It should be noted that the effect of tariff-induced disruptions to global supply chains might be magnified if there are other causes for supply chain disruption, such as port closures, natural disasters, pandemics, extreme weather events, and so forth.

Countries Affected by Global Economic Slowdown

Even countries that are not heavily dependent on global trade via exports to the US or integration into global supply chains could find themselves facing financial and economic challenges from an overall slowdown of the global economy that may result from the new tariffs and trade tensions. For example, commodity-exporting economies may be hurt by a slowdown in the global economy if such a slowdown leads to a lower level of demand for the particular commodities the country exports, and this in turn could lead to a drop in the price of these commodities. With falling commodity prices, these economies may generate lower export revenues and thus lower foreign exchange earnings. To the extent that these economies are heavily dependent on commodity exports, this loss of export revenues and foreign exchange earnings could create unwelcome financial and economic pressures on these commodity-exporting countries.

A number of emerging economies and developing countries depend on commodity exports to help sustain their economies, whether the commodities in question are agricultural products (e.g., soybeans, grains, coffee, cocoa, tea, rice, palm oil, etc.), minerals or natural resources (e.g., oil, copper, coal, cobalt, lithium, etc.), or otherwise. But if, as many observers expect, the tariffs and trade tensions lead to a global slowdown and thus lower demand for key commodities that in normal times keep economies humming, the prices of such commodities might drop sharply.

This is certainly the expectation of international institutions such as the World Bank which has stated that "[c]ommodity prices are set to fall sharply [in 2025], by about 12% overall, as weakening global economic growth weighs on demand. [In 2026], commodity prices are projected to decline by another 5%, reaching a six-year low."[20]

For instance, among other commodities, a global slowdown could lead to a significant drop in the price of oil. Thus, whereas baseline projections for the 2025 price of oil might have been roughly in the range of the mid-$70s per barrel[21] absent the recent tariff/trade disruptions, projections taking into the effect of those disruptions would lower the price per barrel to the lower to mid-$60s range per barrel.[22] Obviously, if such a steep price drop were to occur, that could potentially translate into a large loss of export revenues and foreign exchange earnings for an oil-exporting country, with the associated deleterious consequences for the economy in question. (Of course, on the other hand, oil-importing countries might benefit from such a drop in the price of oil, although such countries might suffer from other ill effects of tariffs and trade tensions such as where the prices of commodities exported by these countries also decline.)

Oil-producing countries have a benchmark oil price that will enable their governments to achieve budget balance which is known as the 'fiscal breakeven oil price.' However, if the current global trade and economic conditions lead to a sharp drop in the price of oil, some of these countries may find that the market price of oil is less – even possibly considerably less – than the fiscal breakeven oil price. If that were to occur, that could mean that their fiscal balance might be thrown out of whack.

Potential Impact on Sovereign Debt Distress in Individual Countries

As a result of the tariffs and trade tensions, countries around the world may suffer a wide range of adverse financial and economic effects as discussed above. But whether those adverse effects will translate into sovereign debt distress for the country in question will depend on various factors. For instance, what will be the final rate of US tariffs for a particular country, and specifically will the 'reciprocal' tariff rates come down significantly from the levels announced on April 2, 2025 as a result of any trade deal that is ultimately reached between the US and the country in question? Nonetheless, wherever the tariff rates end up, the issue is how serious will the adverse

[20] World Bank, Commodities Market Outlook, Executive Summary, p. 1, April 2025.

[21] EIA Short-Term Energy Outlook (April 10, 2025) (www.eia.gov/outlooks/steo/) and World Bank Commodity Markets Outlook (April 2025), Table I (World Bank Commodity Price Forecasts), p. 11. Prior to the latest tariff announcements, the Energy Information Administration of the US Department of Energy (EIA) in its March 2025 Short-Term Energy Outlook projected Brent crude oil prices to average $74.22 per barrel in 2025, and the World Bank forecast a price of $73 per barrel. EIA Short-Term Energy Outlook (April 10, 2025) (www.eia.gov/outlooks/steo/)..

[22] Id. After the announcement of tariffs, the EIA forecast a 2025 price of $67.87 per barrel, and the World Bank forecast a 2025 price of $64.

effects from the tariffs and the trade tensions be for the country's economy.

Fundamentally, whether a country experiences sovereign debt distress as a result of the tariffs and trade war may depend on the extent of the country's fiscal and other buffers that would help cushion any impact that any adverse effects from the tariffs and trade war might have on the country's economy and overall fiscal and financial situation. There are many forms those buffers could take, including the country having adequate 'fiscal space' and a degree of fiscal balance, sufficient foreign exchange reserves, manageable public debt levels, and so forth.

If a country is lacking those types of buffers, it could be leaving itself more exposed to the possibility that, as a result of the fallout from the tariffs and trade tensions, it will experience sovereign debt distress or at least will be at the risk of such distress (assuming that its financial and economic situation will suffer serious harm from the fallout of the tariffs and trade war). Thus, for each individual country, one needs to consider whether the country enters this new period of tariffs and trade tensions with adequate buffers or, rather, whether it has a number of fiscal and financial/economic vulnerabilities that make it more likely to experience sovereign debt distress.

For example, is the country's debt-to-GDP ratio and/or its debt servicing costs-to-government revenues ratio too high? Does it have foreign exchange reserves that will cover more than merely a couple of months of imports? Is an inordinately high percentage of its government debt in the form of external, foreign-currency denominated debt, or does it have mostly domestic debt denominated in the local currency?

Finally, it should be noted that not all countries that experience adverse effects from the tariffs and trade tensions will automatically experience sovereign debt distress. Some of the countries may have sound underlying economic and financial fundamentals and will thus be able to withstand the adverse impact on their economies from the tariffs and trade tensions. Thus, as noted above, one cannot simply assume that since a country is heavily dependent on exports to the US and those exports are subject to high tariffs that the country will necessarily end up in a situation where it has difficulty servicing its sovereign debt.

In short, whether or not a particular country will experience sovereign debt distress will require an individualized assessment of the particular characteristics of the country's fiscal and economic/ financial profile. Again, the issue is whether the country's fiscal, economic, and financial fundamentals are basically sound. In other words, does the country have adequate buffers to cushion

the impact of the adverse effects that might flow from the tariffs and trade tensions?

Wild Cards

Uncertainties regarding both the recovery of the Chinese economy and the future US relationship with the IMF and World Bank could be wild cards. The extent to which the economies of emerging markets and developing countries may be adversely affected by high tariffs and intensified trade conflicts (as well as the extent to which these economies begin to experience or otherwise address existing sovereign debt distress that is made worse by such conditions) may be influenced by two important factors. First, will the Chinese economy continue to stagnate as it seems to be doing at the present or will it stage a recovery anytime soon? Second, will the US government continue to provide its usual level of support to the IMF and the World Bank, or will it drastically reduce the US financial support for and/or involvement with these institutions as a result of the Trump administration's policies?

Short-term Recovery of the Chinese Economy?

In the past few years, the Chinese economy has been beset by serious deep-seated problems. Its property market essentially collapsed a few years ago, and property prices remain relatively subdued or depressed even today.[23] The Chinese government has also been grappling with a massive overhang of trillions of dollars of debt incurred by its so-called local government financing vehicles (LGFVs), as was discussed in my article in last year's edition of International Insolvency & Restructuring Report.[24]

So far at least, however, the Chinese government seems to have made fairly limited headway in addressing or resolving this issue. Growth in the Chinese economy has been sluggish, and China has struggled to meet annual growth targets of 5% GDP growth. The IMF recently reported that China had achieved 5% growth in 2024, although there has been some skepticism as to whether China actually achieved 5% growth that was reported by the Chinese government.[25] Yet, in any event, the IMF is now projecting lower growth of 4% for China in both 2025 and 2026.[26] [*Update*: China recently reported growth of 5.2% growth in the second quarter of 2025 and 5.3% for the entire first half of 2025,[27] but many analysts believe that it will be difficult for China to sustain that level of growth for full-year 2025.[28]]

Many analysts have expressed the view that the Chinese economy is experiencing a period of stagnation. Further, unlike much of the rest of the world where inflation has been a major concern, China has been facing just the opposite problem: what many consider to be a deflationary environment with a broad-based decline in prices across the Chinese economy.[29]

Some observers have even wondered whether China is falling or may fall into a deflationary trap such as Japan experienced in the 1990s (Japan's 'lost decade') and even beyond.[30] Others, however, have pointed out that the Chinese government, with its state-directed economy and its control of state-owned enterprises and state-owned banks, has many more policy levers at its disposal to reverse deflationary pressures in the Chinese economy than were available to the Japanese government at the time that it was experiencing its long-running bout of deflation.

The Chinese government has sought to provide important stimulus to the Chinese economy by, for example, providing significant additional resources to its large state-owned banks with the expectation that the banks will then in turn sharply increase their overall lending to companies in China. Nonetheless, it is unclear when China will truly turn the corner in overcoming deflationary pressures in its economy and also when China will resume having the type of relatively healthy economic growth that it had experienced in the pre-COVID period.

To be sure, though, the Chinese government continues to make huge and important investments in advanced science and technology in cutting-edge areas (e.g., AI,

[23] Reuters, "China's Home Prices to Drop Further, Recovery Not Expected Until 2026: Reuters Poll," February 25, 2025 ("Home prices were expected to drop at a faster pace this year than previously estimated, with growth resuming in 2026….").

[24] Steven T. Kargman, "A Tale of Two Debt Burdens: A Day of Reckoning for China's Debt-Fueled Infrastructure Development at Home and Abroad," International Insolvency & Restructuring Report 2024/25, May 2024, pp. 11-24.

[25] Gerard DiPippo, "Focus on the New Economy, Not the Old: Why China's Economic Slowdown Understates Gains," Rand Corporation, February 18, 2025 ("In 2024, China achieved its politically mandated real (inflation- adjusted) GDP growth target of 5% with implausible precision. More plausibly, China reported nominal (not adjusted for inflation) growth of 4.2%.").

[26] IMF, World Economic Outlook (April 2025), Projections Table ("World Economic Outlook Growth Projections") (https://www.imf.org/en/Publications/WEO/Issues/2025/04/22/world-economic-outlook- april-2025).

[27] Wall Street Journal, "China's Solid Economic First Half Will Be a Tough Act to Follow," July 17, 2025.

[28] Reuters, "China's Economy Slows as Consumers Tighten Belts, US Tariff Risks Mount," July 15, 2023. Many analysts believe that, among other reasons, China's stronger-than-expected first half results are due to the fact that China seems to have been 'front-loading' exports to the US during the first half of 2025 while the US-China tariff truce announced in mid-May 2025 remained in effect.

[29] Alexandra Stevenson, "Can China Fight Deflation and Trump's Tariffs at the Same Time?," New York Times, April 17, 2025 ("The Chinese government has for several years been dealing with deflation, the pernicious side effect of a property crisis crawling through the economy and putting a freeze on much economic activity.").

[30] See, e.g., Reuters, "China's Deflationary Pressures Persist as Trade Gloom Worsens," April, 9, 2025 ("China's consumer prices fell for the second straight month in March while factory-gate deflation worsened"); Patrick Bolton and Haizhou Huang, "Is China Facing a Deflationary Trap?," Project Syndicate, October 18, 2024 ("Now, China is teetering on the edge of a deflationary trap: the consumer price index has been hovering near zero for 16 months, and the producer price index has been in negative territory for 24 months.")

electric vehicles (EVs), biotechnology, semiconductors). These investments may yield substantial and possibly transformative benefits for the Chinese economy over the longer term.[31]

In past periods of global economic slowdown such as at the time of the 'global financial crisis' of 2008-2009, China 'primed the pump' with a massive fiscal stimulus plan of nearly US$600bn and the Chinese economy grew at a very healthy rate during this period, with growth reported to be over 9% in both 2008 and 2009.[32] This growth in China occurred notwithstanding the gloomy global economic environment and the global economic slowdown that was then affecting many other countries around the world. Indeed, growth of the Chinese economy in the period of the global financial crisis helped fuel overall growth in the global economy (or at least provided a ballast for the global economy so that it did not contract further) as evidenced by the fact that growth in the Chinese economy constituted approximately a quarter of total global growth during this period.[33]

However, if the Chinese economy remains in the doldrums relatively speaking, then a crucial engine for economic growth in the global economy might be missing from the global economic equation. Thus, to the extent that emerging economies and developing countries experience major economic slowdowns as a result of the new tariffs and trade conflict, the Chinese economy may not necessarily be in a position to pull these economies out of their economic troughs. This, in turn, will make it even more difficult for these economies to address any sovereign debt challenges, including any sovereign debt distress that they may then be experiencing.

Separately, if Chinese companies remain locked out of the US market for an extended period of time or even if they are exporting at a much lower level than they have in the past, such Chinese companies may end up looking for new export markets for their products that would otherwise have gone to the US market. The Chinese government may be supportive of the Chinese companies undertaking such a strategy since presumably it will not want to see Chinese factories operating at significantly reduced capacities with the result that such Chinese companies might potentially have to lay off large numbers of their employees. The Chinese government has long wanted to avoid widespread Chinese unemployment which it views as a potential threat to one of its overriding policy objectives, namely maintaining social stability in China.

Yet, some observers have speculated that if Chinese companies shift products from the US market to other markets, this may result in Chinese companies effectively 'dumping' their products in these other markets at artificially low prices, i.e., flooding these markets with relatively inexpensive products. That could potentially hurt the economies of these alternative markets, especially if they produce the same goods that the Chinese companies are shipping into these other markets.

It remains to be seen, though, whether Chinese companies, with (or without) the possible support or encouragement of the Chinese government, will in fact pursue such an export diversification/'dumping' strategy as a way of addressing the loss of exports to the US market due to high US tariffs on Chinese goods. But if the Chinese companies do send such excess goods to economies that may already be suffering in one way or another generally from the new tariffs and trade conflicts, this may simply be adding insult to injury. Moreover, if those alternative markets involve vulnerable emerging economies or developing countries, that could put additional stress on their economies and potentially on their sovereign balance sheets.

Finally, it has to be remembered that China has its own agency in the trade war with the US. It can decide if and when it wants to enter into trade negotiations with the US and what terms it is willing to accept in a trade deal, if any, that might ultimately be negotiated by the US and China.

Continued US Support for the IMF and World Bank?

Countries look to the IMF as a crucial source of financial support when they are facing balance-of-payments crises or financial/economic crises generally. When countries cannot access financing from other sources (such as when they are cut off from the international capital markets), they will often turn to the IMF to provide the necessary financing. In that sense, the IMF has played the role of a 'lender of last resort.'

To be sure, IMF loans come with strings attached, namely a series of conditions, such as macroeconomic targets and 'structural' reform benchmarks, which borrower countries must satisfy in order to receive disbursements under the relevant IMF loans and the associated IMF programs. These conditions can be controversial, especially if they lead to severe austerity measures and if any such austerity measures have a contractionary effect on the economy.

Further, complementing the role played by the IMF, the World Bank also often provides important financial support to countries undergoing financial or economic

[31] Gerard DiPippo, "Focus on the New Economy, Not the Old: Why China's Economic Slowdown Understates Gains," Rand Corporation, February 18, 2025.
[32] World Bank DataBank (indicating that the Chinese economy grew 9.7% in 2008 and 9.4 percent in 2009, albeit at a reduced level from 2007 when it grew 14.2%) (https:// data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?locations=CN).
[33] See, e.g., IMF, World Economic Outlook April 2010, Chapter 1 ("[i]n 2009, China and India together accounted for almost half of global GDP growth, with China alone contributing more than 27%"). See also World Bank, Global Economic Prospects 2010 ("[w]ithout the contribution of China and a few other large developing countries, global output would have fallen more sharply in 2009").

crises (in addition to its broader, more customary role of providing loans and grants in order to promote development in developing countries).

Nonetheless, in early February 2025, the Trump administration announced pursuant to an executive order that it would undertake a 180-day review of the US roles in international institutions.[34] It should be noted that the highly controversial Project 2025 report, which was designed to serve as a blueprint for policy in a second Trump Administration, called for the US to withdraw from both the IMF and the World Bank and to cut off financial contributions to both institutions.[35]

Yet, on April 23, 2025, in connection with the spring 2025 annual meetings of the IMF and the World Bank, US Treasury Secretary Scott Bessent delivered an address in which he indicated that the US was not planning to withdraw from either the IMF or the World Bank but instead wanted to see major changes in the direction of these institutions, such as de-emphasizing areas such as climate change in the work of these institutions.[36] Of course, until President Trump himself weighs in on this matter, it is very difficult to predict where the Trump administration will end up on this issue. Thus, a more drastic change in the nature of the US relationship with the IMF and World Bank cannot be completely ruled out.

Even then, though, the Trump administration's position could be subject to further change in response to market reaction (as reflected for example in stock market movements, the price of US Treasuries, or the value of the dollar) or otherwise as has become evident recently with the topsy-turvy way in which the Administration has handled its announcement of tariffs in early April. [Update: Since Treasury Secretary Scott Bessent's statements on this issue in late April, there have not been any major pronouncements from the Trump administration regarding this issue. Thus, it still remains to be seen what actions the Trump administration will ultimately end up taking vis-à-vis the IMF and the World Bank and, in particular, whether it will limit itself to what Treasury Secretary Bessent stated in late April or whether it will take more sweeping actions. (It should be noted, though, that in early May as part of its fiscal year 2026 budget, the Trump administration asked Congress to provide $3.2 billion of funding for the International Development Association, the arm of the World Bank that provides concessional lending to the world's poorest countries.[37])]

If, however, the Trump administration was ultimately to decide to cut off all US financial support for these institutions or even to significantly reduce such support, that could potentially seriously affect ability of these institutions to carry out their missions. For example, since the US provides a large part of the IMF's overall funding, any diminution of US support and funding for the US could make it potentially more difficult for the IMF to provide rescue packages for countries in need of emergency financing.[38]

(Separately, if the US were to withdraw from the IMF and the World Bank or substantially reduce its contributions to these institutions, various observers believe that the US would be giving up its enormous influence at these institutions, possibly to the benefit of China[39] and certain other countries. Some observers have even suggested that such moves might even undermine the role of the US dollar as the world's reserve currency.[40] The US is the largest shareholder of these institutions, and, for example, with approximately 16.5% of the total voting power of the IMF, the US government has an effective veto power over certain specified major decisions by the IMF Board which require a supermajority vote of 85%. Thus, with this de facto veto power and the significant influence that comes with being the IMF's largest shareholder, the US is seen as having an important voice in influencing the policy direction of the IMF.)

With diminished support from the US (if that comes to pass), the IMF might not be in a position to step in and provide financing packages to countries experiencing

[34] DW, "Trump Probe Raises Doubts Over US role in IMF, World Bank," April 23, 2025 (https://www.dw.com/en/trump- probe-raises-doubts-over-us-role-in-imf- world-bank/a-72271143); Fitch Ratings, "US Review of Participation in International Organizations Highlights Risk to MDBs," February 11, 2025.
[35] Heritage Foundation, Project 2025, Chapter 22 ("Department of the Treasury"), pp. 701-702.
[36] Claire Jones and James Politi, Financial Times, "Scott Bessent Accuses IMF and World Bank of 'Mission Creep,'" April 23, 2025.
[37] Reuters, "Trump's Budget Includes $3.2 Billion for World Bank's Fund for Poorest Countries," May 2, 2025. This funding request came as a welcome surprise to development experts in light of prior statements from the Trump administration that have been generally critical of international institutions.
[38] DW, "Trump Probe Raises Doubts Over US role in IMF, World Bank," April 23, 2025 (https://www.dw.com/en/ trump-probe-raises-doubts-over-us-role- in-imf-world-bank/a-72271143) ("[a]ny US withdrawal may create an immediate liquidity crisis for the IMF and World Bank, whose combined $1.5 trillion in resources depend heavily on US contributions").
[39] Alan Rappeport, "Global Economic Leaders Gathering in the US Confront Trump's New World Order," New York Times, April 22, 2025 (withdrawal of the US from the IMF and World Bank would "most likely cede more global influence to China by giving it more sway in how the institutions are operated").
[40] Edwin Truman, "Imagine What Would Happen If America Left the IMF," Financial Times, April 20, 2025 (arguing that a US withdrawal from the IMF could undermine the role of the US dollar as the world's reserve currency).

financial distress of the same size and scope as it has in past sovereign debt episodes (unless, for instance, other IMF members step up and fill the financial gap created by any potential US reduction of financial support). As discussed above, emerging economies and developing countries may face increased incidence of sovereign debt distress as a result of the new tariffs and increased trade tensions so a lack of adequate resources for the IMF could hinder the IMF's ability to respond to sovereign debt crises.

Similarly, assuming that the Trump administration also reduces financial support for the World Bank, it too may also be constrained in its ability to provide assistance to countries undergoing financial and economic difficulties.[41] However, unlike the IMF, the World Bank can and does access the capital markets to support its operations, but query whether a US withdrawal from the World Bank would harm the Bank's triple-A credit rating and thereby raise borrowing costs for the Bank.

[41] Alan Rappeport, "Global Economic Leaders Gathering in the US Confront Trump's New World Order," New York Times, April 22, 2025 ("The United States is the Bank's largest shareholder. If America tried to withdraw, it would substantially reduce the bank's lending power and influence.")

Consequently, if the IMF in particular (but the World Bank as well) were to have reduced financial resources and thus less overall firepower available to address financial and/or economic challenges facing distressed sovereigns, such countries may have greater difficulty in addressing and resolving their financial and/or economic travails. In short, a crucial part of the existing overall sovereign debt restructuring/resolution machinery would no longer be available to help sovereigns address their financial and/or economic travails and any related sovereign debt distress.

ABOUT THE AUTHOR

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Steven is the Founder and President of Kargman Associates, a New York City-based strategic advisory firm specializing in providing strategic advice to clients involved in complex and challenging international restructuring situations, with a special focus on emerging markets around the globe. He is a leading expert on international debt restructurings and cross-border insolvency. Steven and formerly served as General Counsel of the New York State Financial Control Board and as Lead Attorney with the Export-Import Bank of the United States. He has worked on numerous high-profile and complex debt restructuring and infrastructure project transactions in emerging markets.

Sheryl P. Giugliano to Serve as Bankruptcy Judge in the Eastern District of New York

New York, July 17, 2025—Chief Judge Debra Ann Livingston of the United States Court of Appeals for the Second Circuit announced today that the Court of Appeals will appoint Sheryl P. Giugliano as a United States Bankruptcy Judge for the Eastern District of New York in Central Islip. Chief Judge Livingston stated, "We are thrilled to welcome Ms. Giugliano to the Eastern District bankruptcy bench. Ms. Giugliano has extensive and varied bankruptcy experience and has already demonstrated her commitment to the Eastern District bankruptcy community—she is an excellent addition to an excellent bench. We look forward to working with Ms. Giugliano for many years to come."

Ms. Giugliano is a partner at Ruskin Moscou Faltischek P.C. She has extensive practice experience in the areas of bankruptcy, restructuring, and litigation, representing clients in Chapter 11 and Chapter 7 proceedings, preference and fraudulent conveyance actions, bankruptcy auctions, mergers and acquisitions, financings, and other complex business transactions and agreements.

Ms. Giugliano has served as the co-chair of the EDNY Bankruptcy Local Rules Committee and a member of the SDNY Bankruptcy Local Rules Committee. She has also served as the chair of the EDNY Bankruptcy Chapter 11 Lawyers' Advisory Committee, and the co-chair of the Bankruptcy and Creditors' Rights Committee of the Federal and Commercial Litigation Section of the New York State Bar Association. Ms. Giugliano also teaches as an adjunct professor at St. John's University School of Law. Ms. Giugliano holds an LLM in Bankruptcy from St. John's University School of Law. She graduated from St. John's University School of Law and the University of Michigan.

Province Welcomes Tom Buck, CIRA

Province is excited to welcome Tom Buck, Partner, to its growing team of professionals. Mr. Buck is a crisis management professional with over 25 years of experience advising distressed businesses in a wide variety of industries. His restructuring acumen includes operational turnarounds, financial restructurings, divestiture transactions, merger integration, enterprise improvement and orderly liquidations.

Mr. Buck's case experience includes Transit Group, Inc., Parmalat USA Corp., Best Manufacturing Group LLC, North Oakland Medical Centers, Autobacs Strauss, Consolidated Horticulture Group, Qualteq, Inc., KidsPeace Corp., Saint Michaels Medical Center, Inc., Lombard Public Facilities Corporation, Great Eastern Energy, Agera Energy, and Buckingham Senior Living. He performs financial advisory, interim management and CRO roles for distressed companies. His experience managing complex dynamics across the stakeholder spectrum has resulted in many innovative and consensual solutions.

Prior to joining Province, Mr. Buck was a restructuring advisor at Glass & Associates/Huron Consulting, a Principal at EisnerAmper, and a Senior Managing Director at B. Riley Advisory Services (formerly GlassRatner). Before his restructuring career, he spent nine years in industry, in a variety of roles including manufacturing operations, marketing, and executive management. His experience includes chemicals/plastics, textiles, automotive, heavy and light industrial manufacturing, tax-free bonds (range of industries), healthcare, credit cards, transportation and logistics, engineering and construction, food processing, metals/mining, fertilizer processing, personal care products, dairy, steel, retail, industrial rental equipment, hotel & hospitality, vending and retail energy.

Mr. Buck has a BS in Economics from Lehigh University and an MBA from Wake Forest University and holds CTP and CIRA designations.

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