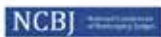


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Oct. 14, 2020, 5:00-6:15 p.m.

American Institute of Certified Public Accountants: Solvency Considerations for Financial Advisors

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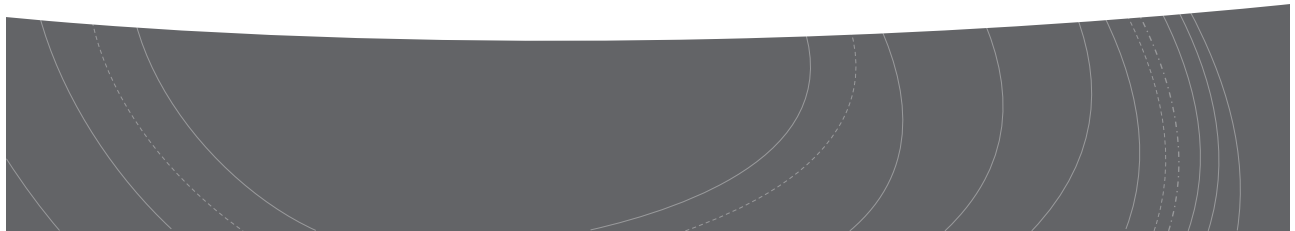
Josh Shilts; Shilts CPA, PLLC

Educational Materials

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Solvency



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Agenda

- Introductions
- Background & Opportunity
- Capital Adequacy
- Inability to pay debts as they come due
- Balance sheet test
- Variables & Challenges

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The Panel

American Institute of Certified Public Accountants
Forensic and Valuation Services Section - Bankruptcy Task Force

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The Panel

Ken DeGraw, CPA, CFP, CFE

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AICPA FVS Executive Committee, Bankruptcy
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The Panel

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Task Force, CARES Act Task Force Chair



Clara Chin, CPA, CFE

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Background & Opportunity

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What is Solvency?

- Statutory Definition 11USC §101(32)
- An entity other than a partnership and a municipality, financial condition such that the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of—
 - property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
 - property that may be exempted from property of the estate under section 522 of this title.
- A partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—
 - all of such partnership's property, exclusive of property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors and
 - the sum of the excess of the value of each general partner's nonpartnership property, exclusive of property of the kind specified in subparagraph (A) of this paragraph, over such partner's nonpartnership debts.

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What is Solvency?

- Other definition-commonly used, Solvency in practice
 - Under the Uniform Commercial Code, a person is considered to be insolvent when the party has ceased to pay its debts in the ordinary course of business, or cannot pay its debts as they become due, or is insolvent within the meaning of the Bankruptcy Code. Certain rights under the code may be invoked against an insolvent party which are otherwise unavailable
- State have similar but in some cases divergent definitions
 - UFTA / UVTA
 - UFCA – fading but still out there

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Why it Matters

- 11USC §548 Fraudulent Transfers
 - Comparable State Statutes (UFTA)
- 11 USC §547 Preference Actions
- Valuation

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Approach to the Analysis

- Get Guidance from counsel on decisions in your district
- Understand the operation & actions of the debtor
 - Historical performance
 - Third party analysts
 - Industry
 - Management competency
- Information or lack thereof
 - Financial Statements
 - Tax returns
 - Non-financial data
 - Petition
 - Management projections

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Actual v Constructive Fraud

- Actual Fraud
 - Intent §548
 - A transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—
 - made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

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Intent

- Badges of Fraud
 - The transfer or obligation was to an insider
 - The debtor retained possession or control of the property transferred after the transfer
 - Collusion between parties
 - Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit
 - The transfer was substantially all the debtor's assets
 - The debtor removed or concealed assets
 - The transfer occurred shortly before or shortly after a substantial debt was incurred
 - The debtor transferred the essential assets of the business to a lienor that transferred the assets to an insider of the debtor

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Reasonably Equivalent Value

- Received less than a reasonably equivalent value in exchange for such transfer or obligation
- Considerations
 - Consider whether FMV of benefit received, whether transfer was arm's length, good faith (In re Fruehauf Trailer Corp., 444 F. 3d 203 - Court of Appeals, 3rd Circuit 2006)
 - Look to the totality of the circumstances (In re RML, Inc., 92 F. 3d 139 - Court of Appeals, 3rd Circuit 1996)
 - Mere opportunity to benefit in the future constitutes value (In re RML, Inc., 92 F. 3d 139 - Court of Appeals, 3rd Circuit 1996)
 - Consider both direct and indirect benefits - (In re RML, Inc., 92 F. 3d 139 - Court of Appeals, 3rd Circuit 1996; Mellon Bank, NA v. Metro Communications, Inc., 945 F. 2d 635 - Court of Appeals, 3rd Circuit 1991)
 - If minimal benefit to debtor, need to not proceed to value (In re Fruehauf Trailer Corp., 444 F. 3d 203 - Court of Appeals, 3rd Circuit 2006)

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Constructive Fraud

- Was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;
- Was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;
- Intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

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The 548 Tests

- Capital Adequacy - Unreasonably small capital
- Cash Flow - Ability to pay debts
- Balance Sheet - Technical Insolvency
- Tested on the date of the transfer in question
- Known and knowable

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Capital Adequacy

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11 U.S. Code Section 548 – Fraudulent Transfers and Obligations

- Trustee may avoid transfers within two years of petition date if debtor made transfer —
 - With actual intent to hinder, delay, or defraud (actual fraud) OR
 - Received less than reasonably equivalent value (constructive fraud) AND
 - Was insolvent OR
 - Property remaining was unreasonably small capital OR
 - Beyond debtor's ability to repay OR
 - Transfer to an insider
 - For actual fraud, Courts require proof of intent and often consider circumstantial evidence such as 'badges of fraud' analysis
 - Reasonably equivalent value is not defined by the Code but is determined by the Courts on a case by case basis. The primary focus of the Courts is whether there was harm to the creditors of the estate.

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What is unreasonably small capital?

- Like reasonably equivalent value, not defined by the Code
- Generally left to the discretion of the Courts
- Case law focuses on two primary issues
 - Debtor may be solvent AND have insufficient capital.
 - The reasonable foreseeability standard should be applied in assessing capital adequacy.

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Relevant Case Law

- **Moody v. Security Pacific Business Credit, Inc.** 971 F.2d 1056 (3rd Cir. 1992)
 - Trustee sued participants in LBO of Jeannette Corporation alleging fraudulent transfer.
 - The concept of unreasonably small capital denotes a financial condition short of equitable insolvency (when debtor cannot pay debts as they become due).
 - Considered available credit to determine available capital.
 - Conclusion – Court found that Jeannette’s decline was not foreseeable at time of LBO. Affirmed district court’s judgment for defendants.

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Relevant Case Law

- **MFS/Sun Life Trust v. Van Dusen Airport Services**, 910 F. Supp. 913 – Dist. Court, SD New York 1995
 - Bondholders sued company, former partners, and purchasers claiming LBO rendered company insolvent and constituted fraudulent transfer – case dismissed
 - Test (insufficient capital) is aimed at transfers that leave the transferor technically solvent but doomed to fail.
 - ... court must consider the reasonableness of the projections, not with hindsight, but with respect to whether they were prudent when made.
 - While a company must be adequately capitalized, it does not need resources sufficient to withstand any and all setbacks.
 - Conclusion – Company did retain sufficient capital to sustain its operation for a substantial period after the LBO.

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Relevant Case Law

- **Boyer v. Crown Stock Distributions, Inc.**, 587 F.3d 787, 794 (7th Cir. 2009)
 - Trustee sued seeking recovery of fraudulently transferred 'dividend' paid at time of sale.
 - Concept of "unreasonably small" is fuzzy and in danger of being interpreted under the influence of hindsight bias. One is tempted to suppose that because a firm failed it must have been inadequately capitalized. The temptation must be resisted.
 - An inadequately capitalized company may be able to stagger along for quite some time, concealing its parlous state or persuading creditors to avoid forcing it into a bankruptcy proceeding in which perhaps only the lawyers will do well.
 - Conclusion – company last 3 + years before bankruptcy. Reversed to the district court related to the dividend payment.

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Relevant Case Law

- **In re Autobacs Strauss, Inc.**, 473 B.R. 525, 552 (Bankr. D. Del. 2012)
 - Debtor and former owner sued company and directors seeking recovery on fraudulent transfer and other theories.
 - Debtor has unreasonably small capital if it cannot generate enough cash flow to sustain operations at the time of the transfer or obligation.
 - Reasonable foreseeability is the standard.

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Relevant Case Law

- In re SemCrude, L.P., (3rd Cir. Apr. 28, 2016)
 - Litigation trust created by reorganization plan sued seeking to avoid equity distributions as fraudulent transfers
 - Trustee argued that certain option trading strategies would have violated the revolver agreement and ultimately led to insufficient capital.
 - The test for unreasonably small capital is reasonable foreseeability.
 - Conclusion – Third circuit affirmed the District Court’s ruling affirming the Bankruptcy Court which found that it was not foreseeable that the company would lose its revolver if evidence of its trading strategy came to light.

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Capital Adequacy Test

- Used to determine whether debtor has adequate capital to meet:
 - Operating expenses
 - Capital expenditure requirements
 - Debt repayment obligations
- Goal is to evaluate likelihood that debtor will survive potential business fluctuations over periods following transfer.
- Analysts generally focus on short-term sources and used of funds for periods following transfer.

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Capital Adequacy Test

- Analyst may also consider
 - Debtor's "most likely" estimate scenario of future financial and operational performance.
 - "No change" scenario from recent historical performance.
 - Reasonable variation scenarios in the debtor revenue growth rate and profit margins.
 - Survival is not the standard.

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Capital Adequacy Test

- Z Score
- Other considerations
 - Case law focused on credit lines and revolvers
 - Refinance
 - Debt financing
 - Debt conversion
 - Equity infusion
 - Asset sales outside of ordinary course

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Inability to Pay Debts as They Come Due

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“This one is a reminder to firms that debt, while making good times better for equity investors, makes bad times worse. For some of these firms, that debt will threaten their continued existence and result in liquidations, fire sales and distress. For others, it will create constraints for the near future on growth and investment and change business plans. For firms that are lightly burdened, it may create opportunities, as they use their liquidity as a strategic weapon to fund acquisitions and to increase market share.”

- Aswath Damadoran

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- The [United States](#) has established insolvency regimes which aim to protect the insolvent individual or company from the creditors and balance their respective interests. However, some state courts have begun to find individual corporate officers and directors liable for driving a company deeper into bankruptcy, under the legal theory of "deepening insolvency."
- In determining whether a gift or a payment to a creditor is an unlawful preference, the date of the insolvency, rather than the date of the legally declared bankruptcy, will usually be the primary consideration.
- Thompson, David. "A Critique of 'Deepening Insolvency,' a New Bankruptcy Tort Theory". Stanford Journal of Law, Business & Finance. 12 (2): 536. [SSRN 1377375](#)

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- Insolvency is the state of being unable to pay the money owed, by a person or company, on time; those in a state of insolvency are said to be insolvent. There are two forms: cash-flow insolvency and balance-sheet insolvency.
- A business may be 'cash flow insolvent' but 'balance sheet solvent' if it holds illiquid assets, particularly against short term debt that it cannot immediately realize if called upon to do so. Conversely, a business can have negative net assets showing on its balance sheet but still be cash flow solvent if ongoing revenue is able to meet debt obligations, and thus avoid default – for instance, if it holds long term debt. Many large companies operate permanently in this state (Distressed v Impaired).

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Distress and Impairment

- Distressed or impaired businesses have unique characteristics impacting asset value; whereas, valuation uncertainty is **concerned only with uncertainties that arise as part of the process of estimating value on a specific date**. Distress may be a temporary operating characteristic of the subject company whereas impairment normally coincides with permanent adjustment.
- The current pandemic and its impacts are an example of the “negative” while an example of “positive” impacts can be observed by analyzing the valuation of “dot com” companies prior to their market adjustments in the early 2000s. Valuation analysts should consider these phenomena in arriving at their conclusion of value as well as **consider the temporary and permanent characteristics** that impact their overall valuation conclusion.

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Characteristics of a Distressed Business

1. Periods of stagnant or declining revenues
 - Peer Group Comparison to determine if company or industry specific
2. Eroding margins
 - Price wars
3. Asset Liquidation / Cash Crunch
 - Sell company car to meet debt/expense obligations or owner contributions increase
 - Current assets, specifically cash, are depleted more quickly than in preceding periods

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Characteristics of an Impaired Business

1. Book value of asset exceeds expected future cash flows
2. Negative changes in technology, markets, economy, or laws
3. Obsolescence or physical damage
4. Idle Asset

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Business Lifecycle

- Valuation analysts may discuss the premises of value with management and communicate the differences in value produced from a going concern versus a liquidated value. Management also needs to understand where the business is within its lifecycle and comprehend the value of their company at points along this continuum. Helping clients or other professionals identify and understand common traits that may indicate distress or impairment may be incredibly important and helpful in times of uncertainty.
- A couple of common examples include:
 - Companies in decline have underperforming assets which may be evidenced by market values falling below liquidation values; and
 - Companies in distress or that have an impairment may also have lower return on equity (for example, existing assets may be worth more by liquidating than continuing operations).

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- Insolvency is not a synonym for bankruptcy, which is a determination of insolvency made by a court of law with resulting legal orders intended to resolve the insolvency.
- Definition of inability to pay debts:
 - A company is deemed unable to pay its debts:
 - if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due. This is known as cash flow insolvency.
 - a company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities. This is known as balance sheet insolvency.

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- Cash Flow Insolvency: a person or company has enough [assets](#) to pay what is owed, but does not have the appropriate form of payment (i.e. not liquid, distressed)
- Balance-sheet Insolvency: a person or company does not have enough assets to pay all of their debts (i.e. underwater, impaired). It has been suggested that the speaker or writer should either say technical insolvency or actual insolvency in order to always be clear - where technical insolvency is a [synonym](#) for balance sheet insolvency, which means that its liabilities are greater than its assets, and actual insolvency is a synonym for the first definition of insolvency ("Insolvency is the inability of a debtor to pay their debt.").
- Graeme Pietersz. ["Moneyterms Investment Definitions"](#)

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Calculation Mechanics

- Cash Flow Test: Able to Pay debts as they mature
 - Cash Flow Projections
 - Working Capital
 - Methods
 - Sources of Revenue (POS vs. Credit) and Sources of Liquidity
 - Refinance
 - Debt financing
 - Conversion of short term obligations to long term debt
 - Equity infusion
 - Sales of assets outside the ordinary course
 - Credit lines
 - Capital Commitments and Types of Debt
- Cash Flow Availability
 - Sensitivity/Scenario Tests (Increase Confidence)
 - Will debt covenants be maintained and, if not, whether adequate capital will be available should an event of default trigger the lender's right to accelerate maturity.
 - Projections include Income Statement and Balance Sheet

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Case Law

- Case Law
 - Footnote 55 Credit Lyonnais
 - Gheewalla 2007 Decision
 - EBC I, Inc v Am. Online, Inc. (In re EBC I, Inc.) 380 B.R. 348, 359 (Bankr. D. Del. 2008)
 - Quadrant Structured Products Co. v. Vertin, 2015 WL 2062115 (Del. Ch. May 4, 2015)

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Balance Sheet Test

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"Whether a company is insolvent under the Bankruptcy Code is considered a mixed question of law and fact."

- In re Trans World Airlines, Inc., 134 F.3d 188, 193 (3d Cir.1998)

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What is the Balance Sheet Test?

- Appraisal-based exercise premised on the definitions of “insolvent” set forth in the U.S. Bankruptcy Code and state law. Definitions vary depending on type of entity. For corporations:
 - “...financial condition such that the sum of such entity’s debts is greater than all of such entity’s property, at a fair valuation...” 11 USC§101(32)
 - “A debtor is insolvent if the sum of the debtor’s debts is greater than all of the debtor’s assets, at a fair valuation.” Section 2(a), Uniform Fraudulent Transfer Act
 - “A debtor is insolvent if, at a fair valuation, the sum of the debtor’s debts is greater than the sum of the debtor’s assets.” Section 2(a), Uniform Voidable Transactions Act
- Exclude property transferred, concealed, or removed with intent to hinder, delay, defraud creditors
- Exclude exempted property under 11 USC§522.

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Amazon.com, Inc. - Consolidated Balance Sheet - in millions of USD

	Dec. 31, 2019	Dec. 31, 2018
Current assets:		
Cash and cash equivalents	\$ 36,092	\$ 31,750
Marketable securities	18,929	9,500
Inventories	20,497	17,174
Accounts receivable, net and other	20,816	16,677
Total current assets	96,334	75,101
Property and equipment, net	72,705	61,797
Operating leases	25,141	0
Goodwill	14,754	14,548
Other assets	16,314	11,202
Total assets	\$ 225,248	\$ 162,648
Current liabilities:		
Accounts payable	\$ 47,183	\$ 38,192
Accrued expenses and other	32,439	23,663
Unearned revenue	8,190	6,536
Total current liabilities	87,812	68,391
Long-term lease liabilities	39,791	9,650
Long-term debt	23,414	23,495
Other long-term liabilities	12,171	17,563
Commitments and contingencies		
Total liabilities	\$ 163,188	\$ 119,099
Stockholders' equity:		
Preferred stock	\$ 0	\$ 0
Common stock	5	5
Treasury stock, at cost	(1,837)	(1,837)
Additional paid-in capital	33,658	26,791
Accumulated other comprehensive income (loss)	(986)	(1,035)
Retained earnings	31,220	19,625
Total stockholders' equity	\$ 62,060	\$ 43,549
Total liabilities and stockholders' equity	\$ 225,248	\$ 162,648

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Amazon.com, Inc. - Consolidated Balance Sheet - in millions of USD
Dec. 31, 2019 Dec. 31, 2018

"Asset values carried on a balance sheet, even if derived in accordance with generally accepted accounting principles, do not necessarily reflect fair value." *In re F&S Central Mfg. Corp.*, 53 BR 842 – 1985

"[T]he market value of particular property may of course differ substantially from its book value, and the market value of certain ... assets may [be] greater or less than their book value." *Rubin v. Manufacturers Hanover Trust Co.*, 661 F. 2d 979 - Court of Appeals, 2nd Circuit 1981

"While the inquiry is labeled a "balance sheet" test, the court's insolvency analysis is not literally limited to or constrained by the debtor's balance sheet. Instead, it is appropriate to adjust items on the balance sheet that are shown at a higher or lower value than their going concern value and to examine whether assets of a company that are not found on its balance sheet should be included in its fair value." *Peltz v. Hatten*, 279 B.R. 710, 743 (Bankr. D. Del. 2002)

"Nevertheless, while book values alone may be inappropriate as a direct measure of the fair value of property...such figures are, in some circumstances, competent evidence from which inferences about a debtor's insolvency may be drawn." *In re Roblin Industries, Inc.*, 78 F. 3d 30 - Court of Appeals, 2nd Circuit 1996

Total stockholders' equity	\$ 225,248	\$ 162,648
Total liabilities and stockholders' equity	\$ 225,248	\$ 162,648

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How is the Balance Sheet Test Performed?

- Determine the "fair valuation" of the entity's property or assets....
- ...Then compare with the debtor's debts.
- Important considerations:
 - What is meant by a "at a fair valuation"?
 - What premise of value should be used?
 - What methodologies are commonly used in the appraisal?
 - How does "at a fair valuation" apply to the debtor's debts?

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What is Meant by “At a Fair Valuation”?

- U.S. Bankruptcy Code provides no definition of “fair valuation”; thus, what appraisers refer to as “the standard of value” is not explicitly stated.
- Counsel should guide valuation expert on relevant common law interpretations of “at fair valuation” where solvency is being assessed when commissioning a solvency analysis.
- In practice, analysts frequently apply the fair market value standard of value.
 - “Fair Market Value—the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.” International Glossary of Business Valuation Terms
- The above definition of fair market value assumes that the property or assets to be sold will be exposed to the market for a reasonable period of time from the perspective of creditors.

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What is Meant by “At a Fair Valuation”?

Notable case law:

- “Fair value of a debtor's assets is determined by estimating what the debtor's assets would realize if sold in a prudent manner in current market conditions.” In re F & S Cent. Mfg. Corp., 53 BR 842 - Bankr. Court, ED New York 1985
- “Our analysis of TWA's insolvency depends on how TWA's assets and liabilities should be valued. We conclude that TWA's assets must be valued at fair market value in the context of a “going concern” and that its liabilities should be measured at face value.” In re Trans World Airlines, Inc., 134 F. 3d 188 - Court of Appeals, 3rd Circuit 1998
- “Fair valuation is generally interpreted as fair market value, that is the amount a hypothetical willing buyer would pay to a willing seller, rather than a distressed or liquidation value.” In re Winstar Communications, Inc., 348 B.R. 234 (Bankr. D. Del. 2005).

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What premise of value should be used?

- What is the “premise of value” and why is it important?
- Going Concern v. Liquidation Value
- Selecting the appropriate premise of value requires analysis of the facts and circumstances surrounding the debtor at the date of the analysis.
- Generally, courts have found that a going concern premise of value should be selected unless the debtor is on its “deathbed.”

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What premise of value should be used?

Notable case law:

- “‘Fair valuation’ for purposes of § 101(32) is generally defined as the going concern or fair market price ‘[u]nless a business is on its deathbed.’ When a business is in a precarious financial condition or on its financial deathbed, a liquidation value should be used to value the assets.” *In re Schwinn Bicycle Co.*, 192 B.R. at 486
- “If liquidation in bankruptcy was not ‘clearly imminent’ on the transfer date, then the entity should be valued as a going concern. ‘[A] business does not have to be thriving in order to receive a going concern valuation. Before the going concern valuation is to be abandoned, the business must be ‘wholly inoperative, defunct, or dead on its feet.’” *In re American Classic Voyages Co.*, 2007 WL 1237828, at *6
- “Because liquidation in bankruptcy was not clearly imminent on the date of the challenged transfer, we concern ourselves with how to achieve a fair valuation of TWA’s assets on a ‘going concern’ basis.” *In re Trans World Airlines, Inc.*, 134 F.3d at 193

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What premise of value should be used?

Notable case law:

- “Caution should be taken not to consider the property as ‘dead’ merely because hindsight teaches that the debtor was traveling on the road to financial ruin.” In re Taxman Clothing Co., 905 F.2d 166, 170 (7th Cir. 1990)
- “As long as liquidation in bankruptcy is not clearly imminent on the Valuation Date, the company must be valued as a going concern....As of the Valuation Date, Lids planned to continue operations as usual. Therefore, it must be valued as a going concern on that date.” In re Lids Corp., 281 B.R. at 541
- “Generally, in conducting asset valuation for insolvency determinations, the fair market value of assets is to be used, rather than a forced sale value. Forced sale or liquidation values apply where the debtor is ‘wholly inoperative, defunct, or dead on its feet.’” In re Trans World Airlines, Inc., 203 B.R. at 895
- “This court has defined the condition of a debtor on its deathbed as one where the debtor is ‘in a precarious financial condition’ so that ‘liquidation was imminent when the petition was filed,’ and the debtor ‘could continue in business postpetition for only a brief period.’ Other courts described a deathbed debtor as one only ‘nominally in existence’ or ‘wholly inoperative, defunct or dead on its feet.’” In re Heilig-Meyers Co., 319 B.R. at 457

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What methodologies are commonly used in the appraisal?

- **Income Approach**
 - Value is estimated based on the present value of future cash flows from the subject company’s assets.
 - Methods include the discounted cash flow (“DCF”) method and the capitalized cash flow (“CCF”) method.
- **Market Approach**
 - Value is estimated based on observable transactions involving similar or “guideline” companies.
 - Premised on the theory of substitution (i.e., a willing buyer will pay no more than what it would cost to acquire a substitute asset/company).
 - Methods include the guideline public company method and the guideline transaction method.

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What methodologies are commonly used in the appraisal?

- Asset Approach
 - Value is estimated by restating the value of each category of assets on the balance sheet; may require specialists to value, depending on the assets.
 - More commonly used for businesses holding significant tangible assets (e.g., holding companies, finance companies, investment companies, manufacturing companies) and few intangible assets or for companies with no history of earnings.
 - Common for valuations under liquidation premise.
 - Methods include NAV method (used in liquidation analyses) and the excess earnings method.

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Comparison of the Value of Assets with Liabilities

- Liabilities: Fair Valuation v. Face Amount
 - U.S. Bankruptcy Code – debts at face amount
 - State law (UFTA/UVTA) – debts at fair value
 - Generally accepted practice:
 - Interest-bearing debt should be included at face amount, as discounting for distress would render solvency analysis nonmeaningful.
 - Contingent liabilities (i.e., liabilities for which the occurrence and/or the amount of the liability in the future is uncertain) should be included at their fair value giving consideration to the uncertainty.
 - The face amount of short-term non-interest bearing debts often approximates its fair value from the perspective of creditors and ignoring effects of distress, rendering the question moot for this class of debts.
 - Potentially inconsistent practice
 - Long-term, non-interest bearing debts and debts with below market terms.

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Variables & Challenges

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Variables & Challenges

- Potential for Equity Injection
- Credit Terms Available
- Valuation Variables:
 - Current vs. Reorganized
 - Willing vs Industry Avg
 - Cost of Capital
 - Growth Rate
- Value is not defined
- Known or knowable events
 - Players
 - Industry
 - Entity
- Calculation/Valuation Date (i.e. test date)
- Zone of insolvency

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Variables & Challenges

- Projections
 - History, Current state, projected state
 - Management
- Growth rates
 - Capacity constraints
 - Deferred CapX
- Comparability of entities in valuation
 - Non-distressed businesses
- Premise of value
 - Death bed v GC
- Ability to Refinance
 - Terms

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Faculty

Clara Chin, CPA, CFE is a managing director in the Forensic & Litigation Consulting segment at FTI Consulting, Inc. in New York. She has more than 14 years of experience in providing consulting services related to solvency, fraudulent conveyances, breach of contract, due diligence review of fund managers, accountant malpractice, ability-to-pay analyses, audit assistance, fraudulent financial reporting, regulatory investigations and other litigation matters. Ms. Chin is a national instructor for FTI Consulting and teaches a two-day course on economic damages. She also is a co-instructor for the AICPA Expert Witness Skills Workshop and AICPA Business Damages Concepts and Calculations course. Ms. Chin's litigation consulting assignments have included solvency analysis, piercing the corporate veil, recalculation of management fees, operational due diligence of fund managers, audit malpractice, bankruptcy litigation, post-acquisition disputes and breach-of-contract claims. Her financial investigative assignments have included fraudulent accounting investigations, embezzlement of corporate funds and government subsidy payments, fraudulent trade allocations, and Foreign Corrupt Practices Act violations. Ms. Chin has experience in a range of industries, including financial services, banking, investment management, financial derivatives, consumer products, retail, aerospace, health care and energy. Prior to joining FTI, she was a senior associate in PwC's Assurance practice in New York, during which time she supported audit engagements of investment-management companies with securities pricing and portfolio valuations. She also worked as an associate in PwC's International Tax practice in New York. A member of the Association of Certified Fraud Examiners, Ms. Chin received her B.A. in economics from Barnard College and her M.S. in accounting from Queens College.

Kenneth J. DeGraw, CPA, CFP, CFE, CFF is a partner with Withum Smith+Brown, PC in Whippany, N.J., and has more than 35 years of public accounting experience. His expertise extends to the professional practice areas of distressed business services, forensic accounting, litigation support, tax compliance and controversy, as well as the traditional accounting areas of attest and taxation. Mr. DeGraw has represented clients in various industries, including alternative investment funds, professional services and high-net-worth individuals. He is a member of the American Institute of Certified Public Accountants, New Jersey Society of Certified Public Accountants and the Forensic and Valuation Services Executive Committee, a past chair of the Bankruptcy Task Force and the NJCPA Insolvency Committee, and a member of the New York State Society of Certified Public Accountants's Bankruptcy and Financial Reorganizations and Litigation Services Committees. He also is past chair of the Somerset County Bar Foundation, and a member of the Turnaround Management Association, ABI, Association of Insolvency and Restructuring Advisors, Wall Street Block Chain Alliance, National Association of Federal Equity Receivers and the American Bar Association. In addition, he is a board member of the New Jersey Bankruptcy Lawyer Foundation. Mr. DeGraw received his B.A. in accounting from Lycoming College.

Dean Driskell, CPA, CFE, CFF, ABV is a managing director with Willamette Management Associates in Atlanta and has more than 25 years of experience in financial analysis, accounting, reporting and financial management. He specializes in performing financial-consulting services for clients involved in various types of accounting, economic and commercial disputes, as well as fraud and forensic accounting matters. Mr. Driskell serves clients and their counsel in both the private and public

sectors, and has provided technical analyses, accounting/restatement assistance and litigation support across a variety of industries, including banking, oil and gas, health care, real estate, utilities, pulp and paper, construction, insurance, farming, chemicals, entertainment, consumer products, manufacturing and various service entities. He is responsible for engagement management and the preparation of financial models, economic projections, financial statements, and sensitivity analyses used in the determination of financial damages or dispute resolution. Such matters may include breach of contract, reporting/restatement, fraud investigation, white-collar crimes, construction claims, lost profits, forensic accounting, mergers/acquisitions, and arbitrated disputes. Mr. Driskell has been employed by financial service firms for the past 19 years, devoting himself exclusively to forensic consulting, and he has experience as an expert witness, having provided expert testimony in the U.S. district courts, bankruptcy courts and various state superior courts. Prior to joining Willamette, he performed expert witness, accounting, litigation support and forensic engagements for FTI Consulting, KPMG, Andersen and Ernst & Young, and he worked as an analyst for the Yarmouth Group, Inc., where he managed the financial analysis and accounting functions for \$140 million in assets. He also monitored and analyzed the financial performance for \$5 billion in assets under management. Prior to that, he was a special project accountant with Compass Retail Inc., a wholly owned subsidiary of Equitable Real Estate Investment Management, where he was primarily responsible for SEC, tax and investor reporting for various private and publicly held portfolios. Mr. Driskell is a member of the American Institute of Certified Public Accountants, Association of Certified Fraud Examiners, Georgia Chapter of Certified Fraud Examiners, American Society of Appraisers and the American Bar Association. He also is an adjunct professor of accounting at Georgia State University, where he primarily teaches principles of accounting, forensic accounting, and graduate-level financial analysis classes. Mr. Driskell received his B.S. in finance from Auburn University and his M.B.A. from Georgia State University.

Josh Shilts CPA, ABV, CFF, CGMA, CFE is the president and owner of Shilts CPA, PLLC in Jacksonville, Fla. He developed its Forensic & Valuation division, leading a team of professionals in providing an array of forensic and valuation services, and he leads the firm's tax and accounting division (Shilts TAX), as well as developed quality control processes. Previously, he was director of Forensic Audit with Citizens Property Insurance Corporation, where he developed and led the company's forensic audit team, which was responsible for internal investigations and forensic audits, and identified a multi-millionaire fraud scheme and assisted management in recovery. He also was with Deloitte LLP in its Senior Forensic & Dispute Services department and managed Protiviti's Litigation Support & Advisory Services. Mr. Shilts was an adjunct professor at Florida Atlantic University's School of Accounting from 2013-15, teaching principles of fraud examination. He is a member of the American Institute of Certified Public Accountants, Florida Institute of Certified Public Accountants, Association of Certified Fraud Examiners, American Society of Appraisers, National Association of Certified Valuation Analysts, Florida Academy of Collaborative Professionals, Association of Family and Conciliation Courts and Association of Corporate Growth, and was named to NACVA's "40 Under 40" list in 2018. Mr. Shilts received his B.S. in accounting from the University of South Florida's Muma School of Business in 2005 and his M.Acc. with a concentration in forensic accounting from Florida Atlantic University's College of Business in 2007.

