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Valuation of Businesses, Securities, and Intellectual Property for Bankruptcy Purposes

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Robert Reilly has been a managing director of Willamette Management Associates for about 25 years. Willamette Management Associates provides business valuation, forensic analysis, and financial opinion services for transaction, financing, taxation, bankruptcy, litigation, and planning purposes. Robert frequently provides valuation, fairness, solvency, and other financial advisory opinions related to companies within a bankruptcy context. Robert has testified in both federal and state courts on numerous occasions with regard to bankruptcy-related valuations.

Robert holds a BA in economics and an MBA in finance, both from Columbia University. He is a certified public accountant, accredited in business valuation, and certified in financial forensics. He is also a chartered financial analyst, chartered global management accountant, certified management accountant, certified business appraiser, and certified valuation analyst.

Robert has served as member of the AICPA forensic and valuation services executive committee (FVSEC), business valuation committee (BVC), and consulting services executive committee (CSEC). He is an inductee into the AICPA business valuation hall of fame.

Robert is the co-author of 12 books, including *Guide to Intangible Asset Valuation* (revised edition published by the AICPA in 2014) and *Practical Guide to Bankruptcy Valuation* (published by the American Bankruptcy Institute in 2013).

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Discussion Outline

- Introduction of discussion topics
- Description of common reasons to conduct a bankruptcy valuation (with specific references to the applicable Bankruptcy Code sections and Bankruptcy Rules)
- Explanation of current analytical issues that practitioners face in performing bankruptcy valuations
- Recommendation of caveats for valuation analysts performing bankruptcy valuations
- Summary and conclusion; questions and discussion

Common Bankruptcy Valuation Services

1. Preference actions solvency analysis (Section 547)
2. Fraudulent transfers solvency analysis (Section 548)
3. Asset sale price and creditor adequate protection analysis (Section 363)
4. Analysis of DIP inbound and outbound intellectual property license agreements (Section 363)
5. Assessment of adequate protection (decrease in value) of a creditor's interest (Section 361)

Common Bankruptcy Valuation Services (cont.)

6. Analysis of whether the value of a secured creditor's claim is fully secured (Rules 3012 and 3018) and determination of a secured creditor's status (Section 560)
7. Confirmation of the reorganization plan (Section 1129) opinions
8. Cram down of the reorganization plan (Section 1129) opinions
9. Secured creditor relief from the automatic stay (Section 362) opinions



Common Bankruptcy Valuation Services (cont.)

10. Estimating collateral value for DIP financing
11. Opining on debtor corporation director duties and the zone of insolvency
12. Assessing the rejection of the debtor's intellectual property licenses (Section 365)



Bankruptcy Code Section 547

Preference Claims and Debtor Solvency

- In a Chapter 11 matter, the trustee may seek to avoid any “preference payments” from the debtor company:

Section 547 excerpt

(b) Except as provided in subsections (c) and (i) of this section, the **trustee may avoid any transfer** of an interest of the debtor in property -

1. to order for the benefit of a creditor;
2. for or on account of an antecedent debt owed by the debtor before such transfer was made;
3. **made while the debtor was insolvent; . . .**

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and **during the 90 days immediately preceding** the date of the filing of the petition.

Bankruptcy Code Section 548

Fraudulent Transfers and Debtor Solvency

- In a Chapter 11 matter, the trustee may seek to avoid “fraudulent transfers” from the debtor company:

Section 548 excerpt

(a)(1)) The trustee **may avoid any transfer** (including any transfer to or for the benefit of an insider under an employment contract) of an interest of the debtor in property, or any obligation (including any obligation to or for the benefit of an insider under an employment contract) 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—

- (A) 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; **or**
- (B)(i) received less than a **reasonably equivalent value** in exchange for such transfer or obligation; **and**



Bankruptcy Code Section 548

Fraudulent Transfers and Debtor Solvency (cont.)

(ii)(I) **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;

(II) 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**;

(III) 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**; or

(IV) made such transfer to or for the **benefit of an insider**, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

Bankruptcy Code Section 101

Definition of “Insolvent”

- Unlike the three-part test for fraudulent transfers, insolvency is a one-part test:

Section 101 excerpt

(32) The term “insolvent” means—

(A) **with reference to 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—

(i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and

(ii) property that may be exempted from property of the estate under section 522 of this title;

Bankruptcy Code Section 101

Definition of “Insolvent” (cont.)

(B) **with reference to a partnership**, financial condition such that the **sum of such partnership's debts is greater than the aggregate of, at a fair valuation—**

- (i) **all of such partnership's property**, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and
- (ii) 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; and

(C) **with reference to a municipality**, financial condition such that the municipality is—

- (i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or
- (ii) **unable to pay its debts** as they become due.

Bankruptcy Code Section 363

Asset Sales and Adequate Protection

- The trustee must ensure that any sales of DIP assets are fair to the bankruptcy stakeholders:

Section 363 excerpt

(b)(1) **The trustee**, after notice and a hearing, **may use, sell, or lease**, other than in the ordinary course of business, **property of the estate**

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, **the trustee may enter into transactions, including the sale or lease of property of the estate**, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(p) In any hearing under this section—

- (1) **the trustee has the burden of proof on the issue of adequate protection;**
and
- (2) **the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.**

Bankruptcy Code Section 363

DIP Entering into Inbound or Outbound Intellectual Property License Agreements

- Section 363 covers the “**use, sale, or lease of property**” within a bankruptcy estate.
- Therefore, Section 363 covers both inbound and outbound intellectual property licenses entered into by the DIP.
- The trustee (or the DIP) may wish to enter into such agreements for operating purposes or cash flow generation purposes, but only if such agreements are **fair to the bankruptcy stakeholders**.
- The trustee is responsible to ensure that the estate receives no less than a fair price for outbound licenses and pays no more than a fair price for inbound licenses—and does not decrease the security of the secured creditors.
- The valuation analyst may be asked to analyze and **opine** (at a hearing) **on the fairness** of the proposed intellectual property license agreement.



Bankruptcy Code Section 361

Decrease in Value of Creditor's Interest

- If an event (e.g., a Section 363 sale) causes a **decrease in a creditor's interest in debtor property**, the creditor will receive cash or an additional lien on debtor property:

Section 361 excerpt

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, **such adequate protection may be provided by—**

- (1) requiring **the trustee to make a cash payment** or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;



Bankruptcy Code Section 361

Decrease in Value of Creditor's Interest (cont.)

- (2) providing to such entity an **additional or replacement lien** to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or
- (3) **granting such other relief**, other than entitling such entity to compensation allowable under section 503 (b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

Bankruptcy Rules Regarding a Secured Creditor's Interest

- The court may hold a valuation hearing when there is a question about the **value of a creditor's security interest** in the debtor company:

Rule 3012 Valuation of Security excerpt

The court may determine the **value of a claim secured by a lien on property** in which the estate has an interest on motion of any party in interest and **after a hearing** on notice to the holder of the secured claim and any other entity as the court may direct.

Bankruptcy Rules Regarding a Secured Creditor's Interest (cont.)

- The value of a secured creditor's interest is important with regard to the approval (or rejection) of the proposed **plan of reorganization**:

Rule 3018 Acceptance or Rejection of Plan in a Chapter 9 (Municipality) or a Chapter 11 (Reorganization) Case excerpt

(a) Entities Entitled To Accept or Reject Plan; Time for Acceptance or Rejection. A plan may be accepted or rejected in accordance with §1126 of the Code within the time fixed by the court pursuant to Rule 3017.

(d) Acceptance or Rejection by Partially Secured Creditor. A creditor whose claim has been allowed in part **as a secured claim** and in part **as an unsecured claim** shall be entitled to accept or reject a plan in both capacities.

Bankruptcy Code Section 560

Determination of Secured Creditor Status

- Secured creditors want to prove that the value of their security interest is **fully secured**—i.e., greater than the debtor's liability to them:

Section 560 excerpt

(a) (1) **An allowed claim** of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, **is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property**, or to the extent of the amount subject to setoff, as the case may be, and **is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property**, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.



Bankruptcy Code Section 560

Determination of Secured Creditor Status (cont.)

(b) To the extent that **an allowed secured claim is secured by property the value of which**, after any recovery under subsection (c) of this section, **is greater than the amount of such claim**, there **shall be allowed** to the holder of such claim, **interest on such claim, and any reasonable fees, costs, or charges** provided for under the agreement or State statute under which such claim arose.



Bankruptcy Code Section 1129

Reorganization Plan Confirmation

- Valuation analysts are often asked to opine on the proposed **plan of reorganization**:

Section 1129 excerpt

- (a) The **court shall confirm a plan only if all of the following requirements are met: . . .**

(7) With respect to **each impaired class of claims** or interests—

(A) **each holder of a claim** or interest of such class—

(i) has accepted the plan; or

(ii) **will receive** or retain under the plan on account of such claim or interest **property of a value**, as of the effective date of the plan, that is **not less than the amount that such holder would so receive** or retain **if the debtor were liquidated** under chapter 7 of this title on such date; . . .

(11) Confirmation of the plan is **not likely to be followed by the liquidation**, or the need for **further financial reorganization**, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. . .



Bankruptcy Code Section 1129

Reorganization Plan Confirmation (cont.)

(16) All transfers of property of the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, **the court**, on request of the proponent of the plan, **shall confirm the plan** notwithstanding the requirements of such paragraph **if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired** under, and has not accepted, the plan.



Bankruptcy Code Section 1129

Reorganization Plan Confirmation (cont.)

(2) For the purpose of this subsection, the condition that a **plan be fair and equitable** with respect to a class **includes the following requirements:**

(A) With respect to a class of secured claims, **the plan provides—**

(i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that **each holder of a claim** of such class **receive** on account of such claim **deferred cash payments totaling** at least the allowed amount of such claim, of a value, as of the effective date of the plan, of **at least the value of such holder's interest in the estate's interest in such property;**

Bankruptcy Code Section 1129

Cram Down of the Reorganization Plan

- Valuation analysts are often asked to opine on whether the proposed reorganization plan is “**fair and equitable**”:

Section 1129 excerpt

Another requirement for reorganization plan confirmation is that, **with respect to each class of claims, (1) such class has accepted the plan, or (2) such class is not impaired** under the plan. If all the requirements for plan confirmation are met except for this one, **the plan can still be confirmed *if the plan* does not discriminate unfairly, and is *fair and equitable with respect to each class of claims* or interests that is impaired under, and has not accepted the plan.**

This is known as a *cram down*.



Bankruptcy Code Section 362 Secured Creditor Relief from Automatic Stay

- After the bankruptcy filing, there is an “**automatic stay**” of the creditors’ ability to collection prepetition debts:

Section 362(d)(1) and (2) excerpts

On request of a party in interest and after notice and a hearing, **the court shall grant relief from the [automatic] stay . . .**, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) **with respect to a stay of an act against property . . .**, if—

(A) **the debtor does not have an equity in such property; and**

(B) **such property is not necessary to an effective reorganization**

. . .

DIP Financing

- A debtor's ability to borrow is limited in Chapter 11. Without court authorization, a debtor company can only incur ordinary course of business trade debt that will be allowed as an administrative expense in the bankruptcy case.
- The **court can authorize the obtaining of credit** secured by a senior or equal lien on encumbered property of the estate **only if** (1) the debtor is unable to obtain credit otherwise and (2) **there is adequate protection of the interest of the holder of the lien on the property** on which such senior or equal lien is proposed to be granted.
- This debt is usually referred to as DIP financing.

Bankruptcy Code Section 101

Definition of “Intellectual Property”

- In DIP financing, the only unencumbered debtor company assets available to pledge as collateral may be the debtor’s IP assets:

Section 101 excerpt

(35A) The term "**intellectual property**" means—

- (A) trade secret;
- (B) invention, process, design, or plant protected under title 35;
- (C) patent application;
- (D) plant variety;
- (E) work of authorship protected under title 17; or
- (F) mask work protected under chapter 9 of title 17;

to the extent protected by applicable nonbankruptcy law.



The Zone of Insolvency and Debtor Corporation Director Duties

- Directors of a debtor corporation owe a duty of loyalty, care, and good faith to the corporation and its shareholders.
- But when a corporation approaches the **zone of insolvency**, under the laws of most states, the directors owe those **duties to the creditors**, too.
- In such a case, the creditors (and not just the shareholders) have standing to assert breach of fiduciary duty claims on the company's behalf.



Bankruptcy Code Section 365(n) – Rejection of Debtor’s Intellectual Property Licenses

- Section 365(n) allows the **trustee to reject** an executory contract in which the **debtor is a licensor** to a right to intellectual property.
- If such a contract rejection is made, the licensee has certain rights specified in Section 365(n).
- The analyst may assist the trustee in the decision of whether or not to reject the **debtor’s outbound intellectual property licenses**.
- The analyst may assist the licensee(s) in the assessment of the licensee rights in the case of the trustee's rejection of this debtor intellectual property license.
- Recall that, under Section 101 (35A), **intellectual property** is defined as patents, copyrights, and trade secrets—but not trademarks.

Current Issues Analysts Face in the Bankruptcy Valuation

1. There is no Bankruptcy Code definition (or standard) of the term “value”
 - Analysts sometimes use fair value, fair market value, market value, other standards of value
 - Bankruptcy Code Section 506 provides that “**value shall be determined in light of the purpose of the valuation** and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor’s interest.”
2. The use of hindsight in the valuation is discouraged
 - The courts seem to adopt the so-called **known or knowable rule**
 - There is usually a controversy over when actual events (favorable or unfavorable) would have been known or knowable

Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

3. The analyst reliance on management-prepared financial projections is often questioned
 - How **contemporaneous** are the projections to the valuation date?
 - Were projections prepared after the valuation date but the variables were still **known or knowable**?
 - Were there various versions of management projections?
 - What was the purpose for which the management projections were prepared?
 - **How skilled was management** in preparing projections?
 - How reliable is the selected set of management projections?
 - Should the analyst use various projection scenarios?

Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

4. The analyst selection of valuation variables is often questioned
 - Should variables reflect the **current** state of the debtor?
 - Should variables reflect the **reorganized** state of the debtor?
 - Should variables reflect a willing buyer or the industry average assumptions?
 - How does the assumed **condition of the debtor** affect the k_d , k_e , debt/equity ratio, or WACC?
 - How does the assumed **condition of the debtor** affects the expected LT growth rate?
 - Should the selected discount rate relate to the **business risk** of the debtor company or to the **performance risk** of the specific projections?



Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

5. Current interest rates may be considered unreasonably low
 - Low risk-free rate affects the k_e
 - Low corporate bond interest rates affect the k_d
 - Can the **debtor actually realize** such low capital costs?
 - Does an understated WACC overstate the debtor value?

6. The reasonableness of the analyst due diligence is often questioned
 - Contemporaneous valuation versus retrospective valuation
 - Was there **access to debtor management** and other parties?
 - Parties' memories and perceptions often change over time
 - **Limited** debtor company **documents** may be available
 - Industry research may be subject to various interpretations
 - "Hindsight is always 20/20"



Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

7. Consider all of the income tax effects on the debtor value
 - Debtor's effective income tax rate
 - Debtor's income tax expense
 - Value of deferred income tax assets or liabilities
 - Use of NOLs and other debtor income tax attributes
 - Change of ownership may affect the debtor's tax attributes
 - Change of ownership may affect the debtor's asset tax basis



Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

8. Use of industry valuation rules of thumb is often questioned
 - Rule of thumb financial pricing multiples
 - Rule of thumb operational pricing multiples
 - Rule of thumb values of intangible assets/contingent liabilities (e.g., capitalization of debtor operating leases)
 - Rules of thumb for individual financial projection variables
 - Rules of thumb assume the **average company** in the industry
 - If valid, rules of thumb should be **supported by empirical data**



Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

9. Performing the cash flow test within a solvency analysis
 - Inclusion of any **new debt** or **new equity** capital during the cash flow projection period
 - Consideration of debtor's current **credit availability** during projection period
 - Consideration of any **asset sales** during the projection period
 - Consider **longest term** debt outstanding in projection period
 - Consider debt **balloon payments** later in the projection period



Current Issues Analysts Face in the Bankruptcy Valuation (cont.)

10. Use of the market approach in an inactive market is often questioned
 - There are no **sufficiently comparable** public companies
 - There are no **sufficiently comparable** M&A transactions
 - There is no **current market** for the sale of the debtor company (assets or securities)
 - How reliable are “backsolve method” **actual sale transactions** in the debtor company securities



Recommended Analyst Caveats when Preparing Bankruptcy Valuations

1. Request and accept legal counsel advice and instructions
 - Document all legal instructions
 - Document all legal definitions
 - Don't practice law without a license
 - Let **legal counsel** take responsibility for **legal issues**
2. Counsel is not always fully forthcoming to the valuation analyst
 - Be aware of any **creeping commitments** regarding the scope of the engagement
 - Be aware of any limitations regarding **access to all of the documents** in the case



Recommended Analyst Caveats when Preparing Bankruptcy Valuations (cont.)

3. Document, document, document
 - Document all of the management and other party interviews
 - Document all of the **due diligence procedures** performed
 - Document why you selected/rejected **valuation methods**
 - Document why you selected/rejected **valuation variables**
 - Document why you selected/rejected **financial projections**
 - Use contemporaneously prepared financial projections relied on by others, if possible

4. Use generally accepted valuation approaches, methods, and procedures
 - Don't use de novo **valuation methods** (or naming conventions)
 - Don't rely on **rules of thumb** as value indications



Recommended Analyst Caveats when Preparing Bankruptcy Valuations (cont.)

5. Use confirmatory valuation approaches and methods
 - Explain your **valuation synthesis** and conclusion process
6. Use confirmatory documents, if possible
 - Look for confirmatory documents
 - Look for contradictory documents
 - Explain your **selection of the documents** you relied on
 - Look at all the documents that were available to you
 - Don't wear "hindsight blinders" in reviewing documents

Recommended Analyst Caveats when Preparing Bankruptcy Valuations (cont.)

7. Consider all debtor company intangible assets in the valuation
Consider all debtor company contingent liabilities in the valuation
8. Consider the expected income tax affects in all valuation (and other solvency) analyses
 - Consult an income tax expert, if needed



Recommended Analyst Caveats when Preparing Bankruptcy Valuations (cont.)

9. In bankruptcy litigation, your expert report is your best friend
 - The report should be **clear, convincing, and cogent**
 - The report should be **replicable and transparent**
 - The report should be **supported** with source documents
 - “If it’s not in the report, you didn’t do it”



Recommended Analyst Caveats when Preparing Bankruptcy Valuations (cont.)

10. Know the limitations of your expertise, rely on specialists when needed
 - Industry experts
 - Tax accounting experts
 - Financing accounting experts
 - Real estate appraisal experts
 - Personal property appraisal experts
 - Other experts



Summary and Conclusion

- Common bankruptcy business, security, and intellectual property valuation services
- Current bankruptcy valuation analytical issues
- Recommended bankruptcy valuation analyst caveats
- Questions and discussion