



AMERICAN  
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INSTITUTE

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## Valuing Litigation Claims

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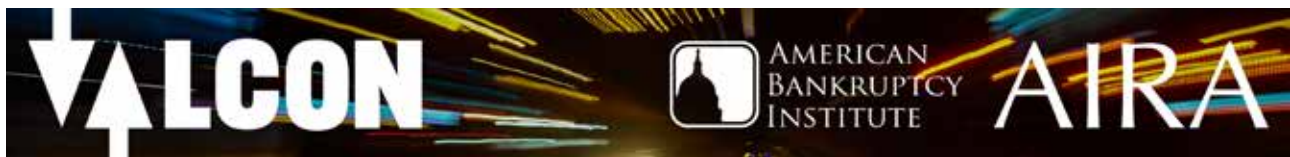
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## Reasons for Valuing Litigation

### Solvency

- Balance sheet recalculation based on accrual of claims owned by or asserted against debtor.
- Primarily used in avoidance litigation.

### Estimation

- Voting
- Distribution (personal injury/non-personal injury)
- Mass tort plan confirmation (feasibility/other)

### Liquidation Analysis

- Estimating distributions to creditors under plan versus liquidation
- Estimating outcome of claims against limited fund

### Settlement

- Lowest range of reasonableness
- Subject to higher and better offer under section 363?



## Methodology

### Valuing litigation claims requires significant collaboration between Counsel and Financial Expert

- While Counsel will ultimately instruct the Financial Expert regarding key inputs (e.g. monetary awards, probability of outcomes, timing, etc.), a Financial Expert can assist in quantifying the claims and their ultimate value.

### Each case is unique and requires an understanding of the specifics at hand

- This can be achieved through a review of documents, interviews with relevant parties, a review of publicly available information, among other sources of support for the claim.

### Benchmarking can provide helpful insight

- Research on similar claims and their respective outcomes can serve as a starting point when assessing key inputs.

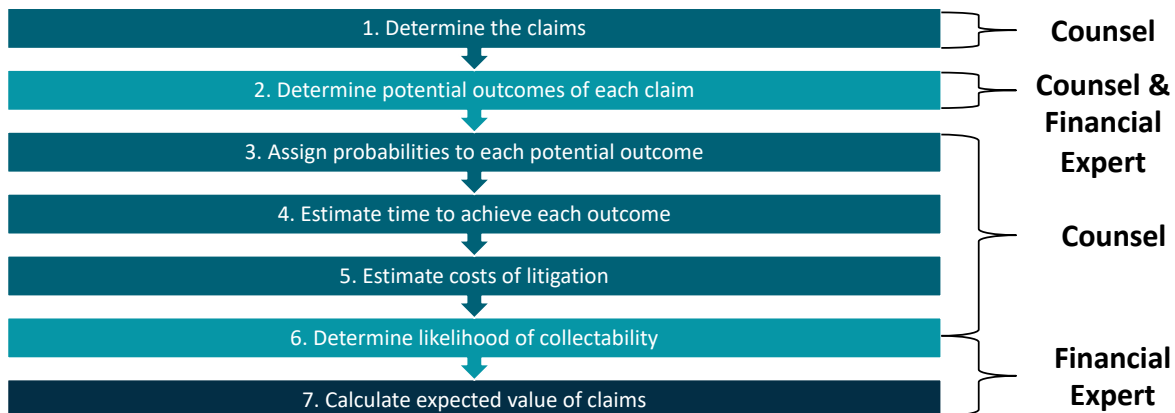
### The value of litigation claims inherently involves a degree of uncertainty

- Even after a ruling, potential appeals and questions of ultimate collectability add uncertainty.

The following slides provide a general framework to determine the value of litigation claims



## Steps for the Valuation of Litigation Claims





## Steps for the Valuation of Litigation Claims (cont.)

### Determine the claims

- Counsel to assess the legal filings (e.g. Complaint) and identify claims.

### Determine potential outcomes of each claim

- While the different possible outcomes, along with the estimated monetary award, is ultimately the responsibility of Counsel, a Financial Expert can assist in certain areas such as assessments of solvency / fraudulent transfer.

### Assign probabilities to each potential outcome

- Counsel should provide the Financial Expert with the probability of each potential outcome expressed as percentage (totaling 100%).

### Estimate time to achieve each outcome

- Counsel should estimate the time to achieve each outcome.



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## Steps for the Valuation of Litigation Claims (cont.)

### Estimate costs of litigation

- Counsel should estimate the cost of litigation for each outcome, including legal fees, trustee fees, or other professionals.
- This should also account for possible offsets, such as success fees.

### Determine likelihood of collectability

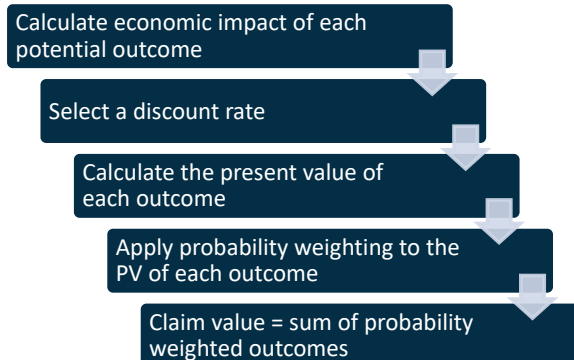
- This can be determined by both Counsel and the Financial Expert.
- Counsel will need to weigh in on the legal merits of collectability, while a Financial Expert can determine whether or not a counterparty has the ability to pay an award (e.g., credit risk).

### Calculate expected value of outcomes

- A Financial Expert will review all information obtained in the preceding steps to calculate the value of all outcomes.
- The Financial Expert should determine an appropriate discount rate and calculate the net present value of each outcome.
- If pre-judgement interest is contemplated, the Financial Expert should include this as well.



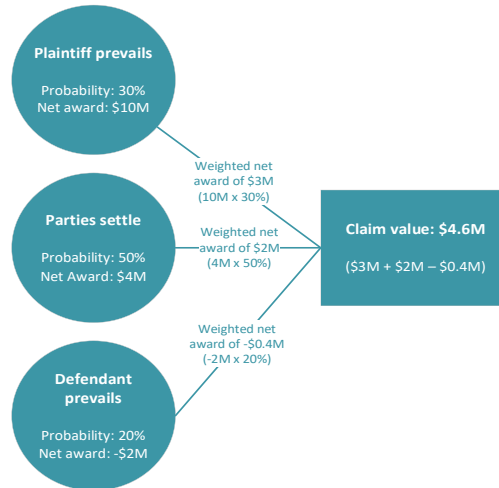
## Analysis Performed by the Financial Expert



The collectability of a claim can be accounted for in the discount rate or by applying a reduction to the total claim value.



### Illustrative Plaintiff Claim Value



## Claims Estimation

### General Framework

Claims estimation is conducted pursuant to section 502 of the Bankruptcy Code, subject to certain parameters:

- The bankruptcy court may estimate **personal injury** claims for confirmation purposes, but a district court must estimate such claims for purposes of distribution;
- There is no estimation for claims that have already been settled or reduced to judgment ("Closed Claims"); and
- The bankruptcy court can estimate the aggregate value of claims that are either currently asserted against the debtors ("Open Claims") or may be asserted in the future ("Future Claims").





## Claims Estimation

### *General Framework (cont.)*

Bankruptcy courts have significant discretion in choosing an appropriate methodology for estimating claims.

- When estimating mass tort claims, bankruptcy courts typically apply one of two approaches (with various deviations between cases):
  - **Traditional approach**—aggregate liability is estimated based on the type of alleged injuries and the expected amount, timing, and likelihood of any recovery, all as informed by prior resolutions of Closed Claims.
  - **Legal liability approach**—aggregate liability is estimated based on the court’s view of the debtor’s legal liability for alleged injuries, irrespective of previous settlement or judgment amounts.



## Claims Estimation

### *General Framework (cont.)*

Certain courts modify their approaches when estimating Future Claims.

- Unlike Open Claims, Future Claims require courts to consider how many plaintiffs will discover and subsequently allege future injuries.
- As such, forecasts of the frequency and timing of Future Claims play a key role, and the value of such Future Claims will be discounted back to present values.



## Claims Estimation

### *Interaction Between Courts*

Bankruptcy courts have core jurisdiction over estimation of personal injury tort claims *for purposes plan confirmation, but not for purposes of distribution*. 28 U.S.C. § 157(b)(2)(b); 4 Collier on Bankruptcy P 502.04 (16th ed. 2021).

- The United States Code plainly provides that “core” bankruptcy proceedings include “estimation of claims or interests for purposes of confirming a plan,” but not “estimation of [personal injury claims] for purposes of distribution.” 28 U.S.C. § 157(b)(2)(b).



## Claims Estimation

### *Interaction Between Courts (cont.)*

- Thus, bankruptcy courts have the authority to estimate personal injury tort claims for purposes of confirming a chapter 11 plan (e.g., to determine feasibility), in which case they conduct “‘estimation in bulk,’ so to speak, because no single [personal injury] claim is being estimated.” 1 Collier on Bankruptcy P 3.06 (16th ed. 2021).
- On the other hand, “when it comes time to determine the [individual] claims for purposes of distribution, section 157(b)(2)(B)” makes clear that such “determination for purposes of distribution must be undertaken by the district court.” *Id.*





## Claims Estimation

### *Interaction Between Courts (cont.)*

Despite the foregoing framework, the district court can withdraw any issues from bankruptcy court “for cause,” either of its own accord or upon another party’s motion. *Id.*, § 157(d).

- District courts tend to avoid exercising this power, however, and even in mass tort cases they typically avoid taking control of claims estimation; this is particularly true in non-asbestos cases. *See, e.g., In re Garlock Sealing Technologies, LLC*, 504 B.R. 71, (Bankr. W.D.N.C. 2014); *In re Eagle-Picher Indus., Inc.*, 189 B.R. 681, 686 (Bankr. S.D. Ohio 1995); *but see In re A.H. Robins Co.*, Bankr. No. 85–01307–R (Bankr. E.D. Va. Aug. 21, 1985).



## Claims Estimation

### *Estimation Process*

In advance of filing a claims estimation motion, the debtors would engage in a number of meet-and-confer sessions with counsel to the official tort claimants committee and the future claims representative to discuss settlement and, in the alternative, estimation.

- Any agreements or stipulations reached during negotiations, such as the frequency and nature of certain types of alleged injuries constituting the majority of outstanding claims, will be set forth in the motion.



## Claims Estimation

### *Estimation Process (cont.)*

The estimation motion would ask the bankruptcy court to set a preliminary hearing date at which a discovery and trial preparation schedule can be set.

- Following the preliminary hearing, a debtor, the official tort claimants committee, the future claims representative, and any key parent/affiliate entities would conduct discovery, finalize expert testimony, and prepare for and prosecute a claims estimation trial.
- Settlement negotiations often occur throughout the chapter 11 and could take many months or years.
- Following the conclusion of the trial, the bankruptcy court would issue a ruling on the estimated aggregate liability.

# Faculty

**Marc J. Brown, CFA** is a managing director and Global Valuation Practice coordinator in the Chicago office of AlixPartners, LLP and has more than 25 years of corporate finance engagements with a focus on valuation, restructuring and litigation consulting. He has valued hundreds of companies for diverse purposes, advised companies and creditors operating in chapter 11 and workout environments, assessed corporate solvency and analyzed issues related to fraudulent conveyance, led inter-company claims analyses, conducted liquidation analyses, analyzed damages for litigation purposes, and provided expert testimony. He has also been an investment banker and hedge fund analyst. Mr. Brown received his B.S. with high honors from the University of Illinois and his M.B.A. with honors from the University of Chicago Graduate School of Business with concentrations in accounting, finance and strategy.

**Chad J. Husnick** is a partner in Kirkland & Ellis LLP's Restructuring Practice Group in Chicago and represents debtors, creditors, equity-holders and other stakeholders in all aspects of corporate restructuring, bankruptcy and insolvency proceedings. He has represented clients in a variety of industries, including energy, retail, real estate, infrastructure, manufacturing, transportation and distribution, hospitality and gaming, automotive and printing. Mr. Husnick regularly advises clients on corporate governance issues facing financially distressed companies, including liability management strategies, fiduciary duties and executive compensation. He has been recognized in the 2017–22 editions of *Chambers USA*, *America's Leading Lawyers for Business* and in the 2022 edition of *The Legal 500 U.S.* In addition, he was recognized as an "Outstanding Restructuring Lawyer – 2022" and an "Outstanding Young Restructuring Lawyer – 2017" by *Turnarounds & Workouts*. Mr. Husnick is a member of ABI's 2018 class of "40 Under 40," and he was named a "Dealmaker of the Year – 2016" by *The American Lawyer* for his role in the \$40+ billion restructuring of Energy Future Holdings Corp. He is a Conferee in the National Bankruptcy Conference, a Fellow in the American College of Bankruptcy, and a member of ABI and the Turnaround Management Association. In addition, he is a lecturer in the law at the University of Chicago Law School and a contributing author for *Collier on Bankruptcy*. Mr. Husnick received his B.S. in 2001 in political science and behavioral science and law, with distinction, from the University of Wisconsin-Madison and his J.D. with honors in 2004 from the University of Chicago Law School.

**Hon. David R. Jones** is Chief U.S. Bankruptcy Judge for the Southern District of Texas in Houston, initially sworn in on Sept. 30, 2011, and named Chief Judge in 2015. Prior to becoming a judge, he was a partner in the bankruptcy group at Porter Hedges, LLP in Houston, specializing in bankruptcy and bankruptcy-related litigation. Judge Jones received his B.S. in electrical engineering from Duke University in 1983, his M.B.A. from Southern Methodist University in 1986, and his J.D. from the University of Houston in 1992, where he served as editor-in-chief of the *Houston Law Review*.

**Patricia B. Tomasco** is a partner in Quinn Emanuel Urquhart & Sullivan LLP's Houston office and has more than 30 years of experience solving corporate insolvency problems. She represents debtors and creditors in some of the largest bankruptcy cases filed in the U.S. and in cross-border insolvency matters. Ms. Tomasco frequently represents clients in the energy, telecommunications and high-tech

industries in both reorganizations and litigation. Her current and recent representations include counsel to Moby S.p.A in chapter 15 proceedings and litigation, Ad Hoc Tort Claimants Committee in Alto Maipo SpA; counsel to plaintiffs in *Northlight European Fundamental Credit Fund v. Intralot Capital Luxembourg, S.A.*, Certain Shareholders in *Grupo Aeromexico, S.A. de C.V.*, *Cinemex USA Holdings, Inc.* (lead counsel for chapter 11 debtors), Kingfisher Midstream, LLC in the chapter 11 cases of Alta Mesa Resources, Inc.; Ad Hoc Committee of Unsecured Bondholders in Sanchez Energy, Inc., Official Unsecured Creditors Committee of Halcon Resources, Inc.; Official Committee of Unsecured Creditors in EXCO Resources, Inc.; counsel to the Ad Hoc Committee of First Lien Lenders in Vanguard Natural Resources, Inc.; and debtors' counsel in SH-130 Concession Co., LLC., Westmoreland Coal Co., iHeartMedia, Inc., Linn Energy LLC, Berry Petroleum, Midstates Petroleum Co., Inc., El Paso Children's Hospital, AF Global and Ameriforge Group, Inc., Light Tower Rentals, and equity sponsor in Francis' Drilling Fluids, Inc. Ms. Tomasco recently completed a three-year term as chair of the Complex Case Committee for the Southern District of Texas, a function created by Judges Jones and Isgur to review and improve complex case procedures and to provide a liaison between complex case practitioners and the courts. She has been listed in *The Best Lawyers of America* and is listed in *Super Lawyers*. Ms. Tomasco was named Best Business Bankruptcy Lawyer by the *Austin Business Journal*. She is admitted to the New York and Texas Bars, as well as the U.S. Court of Appeals for the District of Columbia, Federal, Fifth and Sixth Circuits, the U.S. District Courts for the District of Columbia, the Eastern District of Michigan, the Southern District of New York, the District of Arizona, and the Eastern, Western, Southern and Northern Districts of Texas, and the U.S. Supreme Court. Ms. Tomasco received her B.A. from Rice University and her J.D. from South Texas College of Law.