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Introduction

"Deepening Insolvency" is a rather new theory of either liability or damages in cases brought by a plaintiff (typically a bankruptcy trustee, litigation trust, or some other party "filling in" for an insolvent corporation, or debtor) against directors, officers, attorneys, or other professionals, based on their dealings with the debtor.[1] "Deepening insolvency" has been defined as "injury to the debtors' corporate property from the fraudulent expansion of corporate debt and prolongation of corporate life."[2] The theory of deepening insolvency has become a highly debated by attorneys, creditors, and the courts.

The courts, both state and federal, have continued to disagree on the appropriate view of deepening insolvency. Some courts have held that deepening insolvency should be viewed as an independent tort claim.[3] Other courts have held that deepening insolvency should be considered

[1] Emerging Issues in Deepening Insolvency
[2] Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340, 347 (3d Cir. 2001).
[3] *Id*.

as a means for measuring damages arising from another cause of action,[4] such as negligence or malpractice. Finally, other courts have refused to recognize deepening insolvency altogether.[5]

This Article discusses the three different approaches courts have taken when interpreting the theory of "deepening insolvency." Part I discusses the history of the doctrine of "deepening insolvency." Part II discusses the case law recognizing "deepening insolvency" as a separate cause of action. Part III discusses the case law recognizing "deepening insolvency" as a means of measuring damages. Part IV discusses the case law that refuses to recognize "deepening insolvency" altogether. Finally, Part V discusses the implications of each of the three views of "deepening insolvency."

I. The History of Deepening Insolvency

Deepening insolvency claims can be traced back to two cases from the early 1980s regarding the *in pari delicto* defense. In the first case, *In re Investors Funding Corp. of New York Securities Litigation*,[6] a bankruptcy trustee filed suit against the debtor's auditor, on behalf of the bankruptcy estate, for "issuing an unqualified audit opinion on allegedly false financial statements."[7] In its decision, the Investors Funding court opined that prolonging the existence of a corporate debtor is not always a benefit to the debtor.[8] Indeed, the Investors Funding court emphasized that "A corporation is not a biological entity for which it can be presumed that any act which extends its existence is beneficial to it."[9] Therefore since the prolonged existent insolvency of the debtor duly benefitted the "principal officers, controlling directors, controlling

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[4] Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 174 (Del. Ch. 2006) *aff'd sub nom*. Trenwick Am. Litig. Trust v. Billett, 931 A.2d 438 (Del. 2007).

[5] Fed. Nat. Mortgage Ass'n v. Olympia Mortgage Corp., No. 04-CV-4971 NG MDG, 2014 WL 2594340, at *7 (E.D.N.Y. June 10, 2014)

[6] *In re Investors Funding Corp. of New York Sec. Litig*., 523 F. Supp. 533, 541 (S.D.N.Y. 1980).

[7] *Id*.

[8] *Id*.

[9] *Id*.

stockholders" of the debtor and their confederates, the investors Funding court refused to impute such parties' knowledge and conduct to the debtor.[10] Shortly thereafter, in *Schact v. Brown*,[11] the Seventh Circuit held that under Illinois law, there was no restriction on prohibiting a corporation from suing to recover damages resulting from the fraudulent prolongation of its life past insolvency.[12] In so holding, the *Schact* court emphasized that because "the corporate body is ineluctably damaged by the deepening of its insolvency, through increased exposure to creditor liability."[13]

The theory of deepening insolvency, which is an outgrowth of these two cases, challenged the concept that a corporation always benefitted from prolonging its existence. While courts generally agree with this proposition, courts have split over the appropriate view of the doctrine of deepening the insolvency. As noted above, some court have held that there is a separate tort cause of action for deepening insolvency. Other courts have held that the doctrine of deepening insolvency provides a measure of damages arising from another cause of action, such as negligence or malpractice. Finally, other courts have refused to recognize deepening insolvency as either a separate cause of action or as a measure of damages.

II. Deepening Insolvency as a Separate Cause of Action

Some courts recognize the theory of deepening insolvency as a separate cause of action, sounding in tort.[14] This recognition presumes that, "in taking on additional unpayable debt, a corporation might be harmed by operational limitations, strained corporate relationships,

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[10] *Id.*
[11] *Schact v. Brown*, 711 F.2d 1343, 1350 (7th Cir. 1983), *cert. denied*, 464 U.S. 1002 (1983).
[12] *Id.*
[13] *Schact*, 711 F.2d 1343, 1350.
[14] *Lafferty*, 267 F.3d 340, 351.

diminution of corporate assets, and the legal and administrative costs of bankruptcy."[15] A cause of action for "deepening insolvency" generally contains 3 elements: (i) fraud, (ii) which further expands corporate debt, (iii) and also prolongs the life of the insolvent corporation.[16] While most courts require a finding of fraud, some courts have accepted negligence as being sufficient.[17] Furthermore, in addition to fraud or negligence, in order to create a valid cause of action for "deepening insolvency," a plaintiff must demonstrate that the defendant(s) proximately caused the plaintiff's damages.[18]

For example, the Third Circuit Court of Appeals, in *Official Committee of Unsecured Creditors v. R.F. & Lafferty Corporation, Inc.*,[19] held that the Pennsylvania Supreme Court would recognize "deepening insolvency" as a separate cause of action.[20] In so holding, the *Lafferty* court relied on decisions from other jurisdictions,[21] and the policy of Pennsylvania's tort law, to predict that the Pennsylvania Supreme Court would find "deepening insolvency" to give rise to a cognizable injury.[22]

William Shapiro owned the defendant corporation, Walnut Associates, Inc. ("Walnut"), which in turn owned Walnut Equipment Leasing Company, Inc.[23] In 1986, after experiencing financial difficulties, Walnut created Equipment Leasing Corporation of America ("ELCOA") as

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[15] Kirschner v. K & L Gates LLP, 2012 PA Super 102, 46 A.3d 737, 752 (2012).
[16] *Lafferty*, 267 F.3d 340, 351.
[17] *Id*.
[18] *Marion v. TDI Inc*., 591 F.3d 137, 150 (3rd Cir. 2010).
[19] *Lafferty,* 267 F.3d 340, 351.
[20] *Id*.
[21] *Lafferty*, 267 F.3d 340, 351; (citing Schacht v. Brown, 711 F.2d 1343, 1349 (7th Cir. 1983); *see also* Hannover Corp. of Am. v. Beckner, 211 B.R. 849, 853 (M.D. La. 1997); *see also* Allard v. Arthur Andersen & Co. (USA), 924 F. Supp. 488, 493 (S.D.N.Y. 1996)).
[22] *Lafferty,* 267 F.3d 340, 351.
[23] *Id at* 360

a financing subsidiary, in order to raise money.[24] ELCOA was wholly owned and operated by Shapiro, and was created for the sole purpose of providing as a platform to "sell debt securities though a new company with a clean financial picture."[25]

The Shapiro family allegedly lied about the financial positions of ELCOA and Walnut, persuading companies to register, offer, and sell additional debt certificates, leading many investors to purchase the ELCOA debt certificates. [26] The Shapiros, then, moved this newfound capital into Walnut.[27] Most importantly, the issuance of these debt securities further deepened the insolvency of Walnut and ELCOA, ultimately forcing them both into chapter 11 bankruptcy.[28] The Bankruptcy Court appointed a chapter 11 bankruptcy trustee, who in turn appointed the official creditors' committee to assert the claims on behalf of the debtor corporations.[29]

The appellant was the Official Committee of Unsecured Creditors, which was appointed by the bankruptcy trustee (which was authorized by stipulation) to assert claims on behalf of the debtor corporations.[30] On February 1, 1999, the creditors' committee, having most of the powers of the bankruptcy trustee, commenced a civil action in the District Court for the Eastern District of Pennsylvania, against the Shapiro family and their co-conspirators, including Lafferty, an outside professional. [31] The complaint accused the defendants of mismanagement of the debtors and operating Walnut and ELCOA as a Ponzi scheme.[32] Specifically, the creditors' committee

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[24] *Lafferty*, 267 F.3d 340, 344
[25] *Id*.
[26] *Id*.
[27] *Id at* 345.
[28] *Lafferty*, 267 F.3d 340, 345.
[29] *Id at* 344.
[30] *Id*.
[31] *Id at* 345.
[32] *Id*.

alleged that ELCOA was deceitfully marketed as an independent business entity, when in reality it was part of a network of businesses owned and operated by the Shapiro family, that were set up to acquire leases from Walnut and to sell debt certificates to raise money.[33] The creditors' committee further alleged that this ultimately increased debtors' debt load, thereby forcing them into bankruptcy.[34] The defendants moved to dismiss the complaint, arguing that the creditors' committee was barred from suing them under the doctrine of *in pari delicto*.[35]

The district court dismissed the claims against the Lafferty only, "reasoning that, '[s]ince it is pleaded that the [D]ebtors, acting through the Shapiros, perpetrated the Ponzi scheme the doctrine of *in pari delicto* bars [the creditors' committee] from suing these defendants for claims arising out of the fraud.'"[36] The district court never made a decision on whether it recognized deepening insolvency as a separate tort. The committee appealed the dismissal of its claims against Lafferty, thereby requiring the Third Circuit to analyze whether to recognize deepening insolvency as a separate cause of action under Pennsylvania law.[37]

Prior to *Lafferty*, no court in Pennsylvania had addressed the issue.[38] Thereafter, the Third Circuit had to predict how Pennsylvania courts would rule if confronted with the issue.[39] The Third Circuit mainly relied on the underlying policy of Pennsylvania tort law and decisions from other jurisdictions regarding deepening insolvency and concluded that the Pennsylvania Supreme Court would rule that "deepening insolvency" to give rise to a cognizable injury.[40] The Third

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33 *Id*.
34 *Id*.
35 *Lafferty*, 267 F.3d 340, 345.
36 *Lafferty*, 267 F.3d 340, 344 (quoting *Official Committee of Unsecured Creditors v. William Shapiro, et al.*, No. 99–526, slip op. at 11, 1999 WL 729267 (E.D.Pa. Sept. 8, 1999).
37 *Lafferty*, 267 F.3d 340, 346.
38 *Id*.
39 *Id at* 349.
40 *Id*.

Circuit came to this conclusion for several reasons. First, the court found the theory of deepening insolvency itself to be reasonable.[41] Under bankruptcy law, a corporation is considered insolvent when a corporation's debt exceeds the fair market value of its assets.[42] The Third Circuit reasoned that, even when a corporation is insolvent, however, corporate property still has value, and therefore the concealment and furtherance of debt can damage such value.[43] Second, the Third Circuit opined that simply prolonging the life of an insolvent corporation can further damage to such value because an increase in bad debt can cause the further dissipation of corporate assets.[44] Therefore the Third Circuit noted that further harm can be avoided, and the value of an insolvent corporation can be preserved, if the corporation is dissolved promptly, rather than being fraudulently prolonged.[45] Whereas contract law tries to put the non-breaching party back in the position he or she was in prior to the breach, here, the court concluded that the Pennsylvania Supreme Court would want to put the harmed parties in a "deepening insolvency" situation back into the position they were in prior to the fraudulent incurrence of more debt.[46]

The recognition of deepening insolvency as a cause of action, however, does not necessarily mean that a court will also recognize deepening insolvency as a valid theory of damages for an independent cause of action. For example, in *In re CitX Corporation.,*[47] *Inc.*, the Third Circuit emphasized that it never held "deepening insolvency" as a valid theory of damages for an independent cause of action.[48] Likewise, the Third Circuit stated that its conclusions in

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41 *Id*.
42 *Lafferty*, 267 F.3d 340, 349.
43 *Id*.
44 *Id*.
45 *Id*.
46 *Id*.
47 *Kirschner*, 46 A.3d 737, 752. (Citing Seitz v. Detweiler, Hershey and Assoc., P.C. (In re CitX Corp.), 448 F.3d 672, 676 (3d Cir.2006)).
48 *Id*.

Lafferty "should not be used to create a novel theory of damages for an independent cause of action like malpractice."[49]

III. Deepening Insolvency as a Means for Measuring Damages

Other courts, however, recognize deepening insolvency as a means of measuring damages arising from other torts.[50] Although these courts do not recognize deepening insolvency as an independent cause of action, they recognize that when a party commits an independent, legally cognizable tort, they can be liable to the extent that the transgression led to the deepening insolvency of the debtor.[51]

For example, in *Federal National Mortgage Association v. Olympia Mortgage Corporation*,[52] the plaintiff, "Olympia," brought claims against the defendant Avruham Donner, its former president and a principal shareholder, for breach of fiduciary duty, and for constructive and actual fraudulent conveyances under New York law.[53] Olympia undisputedly alleged that Donner (and his family) directly received or benefitted from over $7,000,000.00 in assets transferred and payments made from Olympia to the Donner family from 1998-2004, while the company was insolvent.[54] Although Donner's family claimed that all of the transfers were part of Donner's compensation as President, Olympia alleged that all of these transfers in question were unwarranted, and in excess of Donner's salary.[55]

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[49] *Id*.
[50] *Fed. Nat. Mortgage Ass'n v. Olympia Mortgage Corp.*, 04-CV-4971 (NG MDG), 2014 WL 2594340 1 (E.D.N.Y. June 10, 2014).
[51] *Id*.
[52] *Id*.
[53] *See Fed. Nat. Mortgage Ass'n v. Olympia Mortgage Corp.*, 04-CV-4971 (NG MDG), 2014 WL 2594340 1 (E.D.N.Y. June 10, 2014).
[54] See *Fed. Nat. Mortgage Ass'n v. Olympia Mortgage Corp.*, 792 F. Supp. 2d 645, 648 (E.D.N.Y. 2011).
[55] *Id*.; *See also* Fed. R. Civ. P. 55. ("Donner elected not to respond to Olympia's Proposed Pretrial Order; he then chose not to respond to the September 11, 2013 order to show cause; and he has now chosen not to oppose the present motion—even after requesting and receiving an

Due to Donner's failure to otherwise defend against Olympia's claims, the United States District Court for the Eastern District of New York held that Olympia was entitled to entry of default judgment against Donner under Rule 55 of the Federal Rules of Civil Procedure.[56] The *Olympia* court, therefore, accepted all of Olympia's allegations of fact as true, and drew all inferences in its favor.[57] The court concluded that Olympia's submission made it clear that Donner caused Olympia to transfer funds for less than fair consideration, while it was insolvent, in violation of section 273 of the New York Debtor Creditor Laws and also, that Donner caused Olympia to transfer funds to related persons and entities without fair consideration even though Donner knew that Olympia was insolvent, and that the transfers would cause Olympia to avoid making payments to creditors.[58] The Olympia court also determined that *Olympia* established that Donner owed a fiduciary duty to Olympia, that he breached this fiduciary duty by both causing the fraudulent conveyances to be made and engaging in various schemes to disguise Olympia's financial conditions and that as a result of Donner's breach, Olympia incurred damages in the form of increased indebtedness to Olympias's creditors.[59]

The court, however, was obligated, however, to inquire as to the amount of damages that were owed by Donner because when a default judgment is warranted, the allegations in the

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extension of time by which to do so. Such (in)action clearly demonstrates a failure to "otherwise defend" against the claims Olympia has been attempting to prosecute over these past many years, and Olympia's motion for the entry of default judgment is granted.")

[56] *Id.*

[57] *Fed. Nat. Mortgage Ass'n., WL 2594340* at 3.

[58] *Id.; See also United States v. Alfano, 34 F.Supp.2d 827, 844–45 (E.D.N.Y.1999)* (The court also concluded that such transfers caused Olympia to avoid making payments to its creditors, mainly Fannie Mae, violating Section 276 and that Donner owed a fiduciary duty to Olympia, which he breached by causing the fraudulent transfers to be made, as well as disguising Olympia's true financial condition).

[59] See *Fed. Nat. Mortgage Ass'n v. Olympia Mortgage Corp.*, 792 F. Supp. 2d 645, 648 (E.D.N.Y. 2011).

complaint, with respect to the amount of the damages are not automatically deemed true.[60] This inquiry involves two tasks: determining the proper rule for calculating damages on such a claim, and assessing plaintiff's evidence supporting the damages to be determined under this rule.[61]

In determining that deepening insolvency provided a basis for damages arising from Donner's breach of his fiduciary, the Olympia court stated that "deepening insolvency"

> is considered 'a basis for damages that may result from the commission of a separate tort.' Thus, one seeking to recover under this theory "must show that the defendant prolonged the company's life in breach of a separate duty, or committed an actionable tort that contributed to the continued operation of a corporation and its increased debt.[62]

Therefore the Olympia court went on to conclude that Donner's schemes amounted to a breach of fiduciary duty and were put in place to prolong the life of an already insolvent Olympia and increase its debts to its creditors, while simultaneously depleting the value of Olympia's assets available for repayment.[63] Therefore, because the Olympia court was satisfied that Olympia's liability to its creditors was caused by Donner's breach of his fiduciary duty, the Olympia court granted Olympia's motion for default judgment in the requested amount.[64]

IV. Not Recognizing Deepening Insolvency as Either a Separate Tort or a Basis for Measuring Damages

Some courts disagree with the previous two lines of cases and therefore, do not recognize the theory of "deepening insolvency" as a cause of action or as a means for measuring damages.[65] The most notable jurisdiction to refuse to recognize deepening insolvency is

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60 *Fed. Nat. Mortgage Ass'n., WL 2594340* at *4.
61 *Id*.
62 *Id at* *7.
63 *Fed. Nat. Mortgage Ass'n., WL 2594340* at *7.
64 *Id*.
65 *Id*.

Delaware.[66] For example, in *Trenwick America Litigation Trust v. Ernst & Young, L.L.P.*, the Trenwick Group Inc. ("Trenwick"), a publicly-traded holding company, with five direct subsidiaries, operated as a specialty insurance and reinsurance organization, which issued policies around the globe.[67]

In 1998, Trenwick began to grow via an acquisition strategy.[68] Within two years, Trenwick acquired three unaffiliated insurance companies.[69] As part of the last acquisition, Trenwick re-domiciled to Bermuda and reorganized its subsidiaries "by national line" to reduce its tax burdens.[70] In doing so, Trenwick America, Trenwick's top U.S. subsidiary, became the intermediary parent of all of the other subsidiaries operating in the U.S.[71] As a result, Trenwick America was valued at over $200 million.[72]

In 2003, Trenwick was forced to file for bankruptcy, mainly because "the claims made by the insureds against the holding company's operating subsidiaries (including the insureds of the companies it had acquired) exceeded estimates and outstripped the holding company's capacity to service the claims and its debt."[73] As a result, the Litigation Trust, which was assigned all of the causes of action that the U.S. subsidiary owned, brought the case to the Court of Chancery of Delaware.[74] The complaint alleged several causes of actions, all of which centered on the idea

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[66] Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 174 (Del. Ch. 2006) *aff'd sub nom*. Trenwick Am. Litig. Trust v. Billett, 931 A.2d 438 (Del. 2007). The Third Circuit had previously ruled that the Delaware courts would recognize a separate cause of action for deepening the insolvency. *In re Exide Technologies, Inc.*, 299 B.R. 732 (Bankr. D. Del. 2003). This was overruled by the Delaware Chancery Court in Trenwick.
[67] *Id at* 175.
[68] *Id at* 172.
[69] *Trenwick,* 906 A.2d 168, 172.
[70] *Id*.
[71] *Trenwick,* 906 A.2d 168, 172.
[72] *Id*.
[73] *Id*.
[74] *Id*.

that the debtor's growth strategy was "irrational" and amounted to "gross negligence." Included among these causes of actions was a claim for supposed tort of deepening insolvency.[75]

The main claim was that the majority independent board of Trenwick engaged in an irresponsible business strategy by "acquiring other insurers who had underestimated their potential claims exposure."[76] The claim further alleges that as a result the conduct by Trenwick caused Trenwick America to become insolvent.[77] In addition, Trenwick America also took on obligations to support Trenwick's debt, actually assuming some of that debt, leading to an even greater injury for itself and its creditors than was incurred by Trenwick and its creditors.[78]

The Delaware chancery court dismissed the litigation trust's complaint against the former Trenwick directors. [79] When considering the motion to dismiss, the chancery court noted that the litigation trust failed to plead facts supporting a conclusion that Trenwick America was insolvent prior to, or rendered insolvent by, the challenged transactions.[80] Yet, the court did not dismiss the deepening insolvency claim for that reason.[81] Instead the chancery court went on to hold that Delaware does not recognize deepening insolvency as an independent cause of action.[82] The chancery court also seems to indicate that it would not also recognize deepening insolvency as a measurement of damages arising from a separate tort.[83]

In so holding, the chancery court opined that the directors of an insolvent firm "may, in the appropriate exercise of their business judgment, take action that might, if it does not pan out,

[75] *Trenwick,* 906 A.2d 168, 172.
[76] *Id*.
[77] *Trenwick* 906 A.2d 168, 172.
[78] *Id*.
[79] *Trenwick,* 906 A.2d 168, 204.
[80] *Id at* 174
[81] *Id*.
[82] *Id*.
[83] *Id*.

result in the firm being painted in a deeper hue of red."[84] Accordingly, the chancery court found that the directors of an insolvent firm could cause the firm to incur more debt if they, after acting with due diligence and good faith, conclude that such a strategy will increase the firm's value.[85] The chancery court also stated that deepening insolvency is duplicative of existing causes of actions, such as fraud, fraudulent conveyance, and breach of contract that can be asserted to challenge the actions of an insolvent corporation's board.[86] Finally, the court supported its discussion by relying on the already existing Delaware law, which requires the directors of a corporation to pursue profit for a corporation in good faith, for the corporation's equity-holders.[87] The chancery court noted that this rule applies even when a firm is insolvent, provided that the directors recognize that the firm's creditors have become the firm's residual claimants, and therefore the firm's principle objective is the advancement of their investments.[88] The chancery court conclusion in *Trenwick*, was affirmed by the Delaware Supreme Court in 2007.[89]

V. Deepening Insolvency's Implications

The future of Deepening insolvency in the judicial system is uncertain. With all of the competing interpretations of this theory, one is unsure as to which view will ultimately prevail. Each interpretation has its own specific implications. (debtors, creditors, and debtors former directors).

If deepening insolvency is deemed a separate cause of action or as a means of measuring damages from a separate tort, many corporations may be terminated too fast. Corporate directors

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84 *Trenwick,* 906 A.2d 168, 174.
85 *Id*.
86 *Id*.
87 *Id*.
88 *Id*.
89 Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 174 (Del. Ch. 2006) *aff'd sub nom*. Trenwick Am. Litig. Trust v. Billett, 931 A.2d 438 (Del. 2007).

will have to worry about their potential liability. Corporate directors may lean towards ending an insolvent or failing corporation when they could have salvaged corporate value, and therefore some creditor debt, via prolonging it. Creditors will most likely be satisfied with such a ruling because they would have someone to sue when they have been fraudulently indebted. This will lead to creditors possibly making more deals with companies because they know that corporate directors will be more wary of their actions, and there will be less risk of fraudulent activity. The problem for creditors however would be that if a company was insolvent, and was indebted to such a creditor, the corporate directors, as stated above, may end an insolvent company quicker, without trying to salvage corporate value, and therefore salvaging some of the corporate debt. In general, the debtors will have more faith in their directors, because the directors be potentially liable for fraud, however, if the debtor is insolvent, and possibly could've been save via prolongation, the directors may choose to terminate too quickly.

If deepening insolvency is not recognized at all, corporate directors could continue the existence of a failing or insolvent corporation in bad faith in the hopes of making themselves as much money as possible before it falls, and not have to worry about any potential liability. This could lead to directors to seriously take advantage of their creditors. Creditors may be less inclined to give out loans, or assets altogether. The terms of the deals between creditors and the debtor corporations would most likely favor the creditors. Because the directors would have no direct liability in regards to "deepening insolvency," creditors may make the terms of the loans that they lend to debtors shorter, or with higher interest rates. There is some protection for creditors, and debtor corporations, however, because there are other causes of actions, such as negligence, or malpractice, that can hold the directors liable for fraudulent activities. All three theories lead to unique results, each having serious implications.

Conclusion

Although maybe considered a lost issue, “deepening insolvency” has recently been put back into the attention of courts. There are three approaches for applying the theory of “deepening insolvency:” (i) separate cause of action (ii) a means of measuring damages arising from another tort (iii) refusing to recognize “deepening insolvency” altogether. Each theory has its own merits. Although the future of “deepening insolvency” is unknown, its permanent place within the judicial system will most likely depend on changing corporate needs. If deepening insolvency is deemed a separate cause of action or deemed a measurement of damages arising from another tort, the creditors will have more protection and the corporate directors will be more wary of their actions because they will be potentially liable. If deepening insolvency is not recognized at all, creditors will not have a direct protection against directors who fraudulently deepen the insolvency of the debtor corporation, and the directors will not be as cautious because they will not have as much liability for fraudulently deepening the insolvency of the corporation.