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A Deeper Look at Deepening Insolvency*

Neil S. Abbott, Robert Radasevich, & Keith J. Shapiro

MR. SHAPIRO: This is going to be an interesting discussion, I think you will find. It will be for me. But before we get going, in fairness to Rudy, who is really smarting up here about the “O” in the middle his name — you heard them say the “J” correctly in mine. Rudy doesn’t have an “O” in the middle of his name, actually.

MR. RADASEVICH: I don’t have a middle name.

MR. SHAPIRO: I thought that before the end of the session, if you all want to hand up papers trying to figure out what the O stands for, we can pick a middle name for Rudy. I have already taken Oz, so that one is taken.

MR. RADASEVICH: One other point. Particularly with a topic like this, which is kind of in its infancy and it hasn’t gelled into anything cohesive yet, it works better if we get a lot of audience participation. So rather than wait until the end, when you all have questions, or you want to say something, just raise your hand and interrupt us. We would much rather hear your thoughts than have you just listen to us lecture.

MR. SHAPIRO: We do encourage that. Raise your hand. We will take the questions.

This is really a funky topic. And you will see what I am saying in the coming minutes. I am not asked very often to lecture about tort law. I am a bankruptcy lawyer. But today what we are really doing is talking about tort law. We are not going to be discussing a statute. It would be, frankly, as a lecturer much easier for us to take Section 547¹ and preferences and discuss all the interesting case developments about those because you have got a statute. Everything goes back to the statute; does it fit? How are you construing the statute? This isn’t that.

We are talking about something — I think that the professor called it the developing tort of deepening insolvency. And I don’t know if

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1. 11 U.S.C. § 547.

it's a developing tort. I don't know if it's a developing damages theory. I don't know if it's a rework of pre-existing tort and damages theories that are just being captured by another name, another count in a complaint. And so you tell me and tell us after the session what you think. But it has us scratching our heads over the last couple of years.

But a lot of lawyers and financial advisors are making an enormous amount of money litigating these issues today. What better than a common law doctrine, where you could come up with theories until the end of the day and allege them, and you are not bound by a statute? And now that some courts have given some credibility to these theories, you know, Katy, bar the door. People are going to be raising them, and they are, as you will see — I think I counted some 50 plus filed litigation matters citing deepening insolvency as a theory over the last two years in significant cases, typically. So something is going on out there.

This is interesting to financial advisors and the lawyers for two reasons. One, it becomes an issue of solvency, and changes in solvency, and changes in financial performance. So this is a right to work bill for them. And more interesting in some ways is the fact that for the lawyers, the financial advisers, and the bankers, they are being named as defendants in these lawsuits. You are going to see why and how in a few moments. But it's become a hot topic because it raises all kinds of interesting possible theories of liability against the professionals and against the lenders and key creditors.

So let's take a run at it. And what we are going to do is I am going to give you a little overview on what this area is as it's developed so far. And then we are going to take a quick detour and talk about Canada, where Neil is going to give us some context beyond the United States as to whether this is a theory that's been adopted elsewhere, how these kinds of activities are dealt with elsewhere, and we will cover that. Then we are going to come back, and Rudy and I are going to talk about the cases that have come down so far, some of the trial issues, litigation issues that have been raised in these cases. And, again, we will take your questions.

So first of all, when a company is insolvent, the directors and officers are supposed to take actions that are in the best interest of whom? The shareholders. And that's just black letter. They exist to service and benefit the shareholders. The insolvency incidence changes everything under pretty well-established case law. And that's the case law not dealing with deepening insolvency, but what we call

today the zone of insolvency. And make sure that you distinguish as we go along today between these two concepts.

The zone of insolvency, arguably, is that time at which the corporation is either balance sheet insolvent — it doesn't have adequate capital — it doesn't have adequate capital or assets to conduct business to weather storm, things like that. Again, this is a common law doctrine, too, but it's been around for a long time. It comes and goes, depending on the economy.

Under the zone of insolvency, the directors and officers, arguably, now have a duty, not to the shareholders any longer, but to the creditors. The duty shifts, arguably. Now you are insolvent? Wait a minute. Forget about the shareholders. They were interesting to us when there was value for shareholders. But now that there's no value on a piece of paper for shareholders, your duties have shifted to the creditors.

So we see a lot of litigation alleging a tort, effectively, for acts of D's & O's as a means of getting, typically, to the insurance policies, the D&O insurance policies, alleging that they behaved improperly during the zone of insolvency by looking after the shareholders and not the creditors.

Now, the issue we are going to talk about today takes it another step lower. It's sort of a trust fund kind of a theory that says, "Okay. Now you are in the zone of insolvency. How are you going to behave in this zone?" And we have tried to identify a new tort, if you will, that says that if you are in the zone of insolvency and you take actions to prolong the life of the company — I have never seen the word prolongation in a case before, and it's in every case in this area. It's a hot word, prolongation. A prolongation of the life of the company during this insolvent period can give rise to either this tort, if you buy that it's a tort, or if your court buys it, or this damage theory.

So what does this mean? Okay. We are running the company and we are trying to fix it. We are trying to get out of trouble. I mean, we see that every day as Chapter 11 lawyers. That's what we do, is deal with troubled businesses, frequently before they get into bankruptcy court. And, you know, our whole Bankruptcy Code is about trying to save debtors, keep people employed, et cetera. It's the whole philosophy underlying the Code. But now you have thrown in this theory that, wait a minute, you can try too hard, first of all. You know, what kind of behavior constitutes this bad act during the insolvency period? Is it just the efforts to try to turn the company around? But instead of working, the company has gotten worse, which is many of our clients, if not most. You know, they fight and they fight, which our laws en-

courage, and they end up in bankruptcy at the end of the day, now with way more debt than they had before.

Is that the bad act? Is that the act that's now actionable against directors, officers, and, perhaps, others who participated; maybe the accountants who wrote the financials during that period or certified the financials during that period? Or is the act something more? Is the act based on what you said in order to keep operating during that period?

Just take the garden variety situation. If you are the credit manager and an officer of the company, and you are telling all the creditors, "Things are getting better, everything is going great, we are really working our way out of this, we need an extra 60 days, you have to extend us some more credit so we can get through." Have you now become personally liable later on for the new tort of deepening insolvency, not because you tried to get out of trouble and help the company out of trouble, but because you misled people about your finances while you were trying to get out of trouble? And that, as you will see when we talk about the cases today, seems to really be where the cases are going.

There are a lot of cases. There aren't a lot of decisions saying people have violated the law and are liable for this tort. It's a very murky area right now because it's in heavy litigation, typically. And you have got decisions — and this is case law at its finest — you have got decisions, and the authority in every decision is the last three courts that got it at least two months before you did, and they all get cited as the authority in the next case. And now you have a nice string cite in your decision, but does that really make it a tort, and does that really make this a compensable act?

So what's happening is it's evolving into, I think, into a theory that says if you misled people financially during this zone of insolvency period, during which the company got deeper into insolvency — and we will talk in a moment about what that means; deeper insolvency, how do you calculate that — if you did that through misleading acts, fraudulent acts, now you are potentially, depending on the state, you are potentially into the tort. And if you are not into the tort, then in some states you are into the damages.

Maybe the tort is the good old-fashioned torts. And, by the way, I will opine that to a great extent this is a repeat of torts that already exist; breach of loyalty, breach of fiduciary duties by directors and officers to the company, and that this is that by another name, a new count in the complaint. And so in the cases where the courts buy that that's the tort, this is being used as the damages calculation. You

caused the company to go from this level of value — maybe it was insolvent, but we could have liquidated it for a certain value — to a worse state of affairs. And, in fact, maybe you are liable for all the costs of the bankruptcy as part of the damages claim, because the bankruptcy might not have ensued if you had liquidated out of court and allowed people to get a higher recovery.

So you can see already, I think, from my comments how dark the waters are here, how murky this is and how evolutionary this is right now. We are still in the early stages. So the things we are going to be talking about are, what have the courts been doing? What did this court say? Is it a tort? Is it a damages theory? If it's a tort, what are the elements of the tort? If it's a tort, what are the defenses to the tort? What's a good defense? Are there exceptions to those defenses? And that's really where the case law is going. That's how it really breaks down, as you will see when we get into the cases.

Now, let's talk about, for a second, what this means. I said we don't even know how to quantify this deepening insolvency damage that's been incurred. Is it a balance sheet damage where the company — we bring in the experts, the financial advisors. And the damage is that the company was this insolvent, this far under water, and could have liquidated for 40 cents on the dollar if you just pulled the plug with no bankruptcy, or even filed bankruptcy then and pulled the plug and liquidated, and comparing that against the fact that creditors are now getting a dime on the dollar, and they have lost that 30 percent increment, plus all the costs now of cleaning up the mess that, maybe, wouldn't have been incurred.

Is that the way that you calculate it, or do we look at the going concern value of the company; not a balance sheet assets versus liability? Do we look at the idea that the company might have been able to be sold still at a multiple, as a going concern? And by the way, companies that are losing money do get sold in multiples all the time. In the biotech sector, for example, or the computer sector, you have got publicly-traded companies that still haven't made money in ten years, in 15 years, and everybody is betting on the technology or on the new science. And so that's not uncommon.

Could you have sold the company? Are we now calculating the damages here as the ability to sell the company for a going concern value versus no longer being able to do so, in which case the damages could be astronomical at that point in time?

Really, really tricky stuff, and stuff that courts are grappling with. Lawyers are having fun with it. The place where you will see it, and now you know why the bankruptcy lawyers are telling the other bank-

ruptcy professionals about this today, is that it's coming up most frequently as an action brought by trustees and an action brought by creditors' committees in bankruptcy cases. And they are bringing these actions not on behalf of the creditors, okay.

You know, keep in mind, this is not a direct action of the creditors, and you are going to see this discussed in the cases. This is an action that the corporation owns, the debtor owns. So now the company is in the toilet. We are in bankruptcy court. We are scrappy trustees' and creditors' committee professionals, and we are good at it. And what we do well is — and I spend a lot of my time doing that — is scratching and clawing and trying to get leverage, to find a way to get recovery from those who have money for the creditors.

What you have to do here is step in the shoes of the corporation to try to bring this action, not in your individual capacity. And so the question is, if the bad guys, as they typically are, are the leaders of the corporation, the Ken Lays and the Fastows, and the Skillings, that did this, if it's the leaders, is the company ever going to have clean hands, if you will, in order to be able to bring the lawsuit?

You will see, as we discuss the case law and some of the litigation strategies, that that becomes a huge issue in these cases and, frankly, leads me, and perhaps the other panelists, to wonder if this really has teeth in it in the long run or if this is going to be a passing fad.

MR. RADASEVICH: One of the fun things about this topic is that, as Keith said, all of this is developing in bankruptcy court. These are the report decisions that have come down in about the last 20 years. Out of about 65 decisions, there's only about five that are state court decisions. Most of those say there's no such thing as a tort of deepening insolvency.

So what you have is a bunch of bankruptcy trial lawyers, who are clawing and scratching and trying to find assets, trying to convince a bankruptcy court that a state court would recognize a new cause of action.

And what state court? Is it the state court where the bankruptcy court is situated? Is it the state selected in the choice of venue provision under the loan documents with the bank? Is it the state selected in the choice of venue under the engagement agreement with the accounting firm?

What state law is going to apply? Whatever state law applies, are bankruptcy courts going to recognize this new tort when there's not a single decision anywhere in that state saying anything about the tort of deepening insolvency. They are just trying to guesstimate what state court would do.

In fact, there's a decision out of a state trial court in New Jersey that says, "Wait a minute it's not my job as a trial court judge, to create causes of action out of whole cloth, because that's what I would be doing here. That's a job for the legislature or that's a job for the Supreme Court. Until they do, we don't have that tort in New Jersey." So that's a whole other issue, and it's something that bankruptcy judges are not very used to doing — construing whether causes of action exist under a state's tort law.

MR. SHAPIRO: That's really what they are doing. It's painful to watch and read in the opinions these bankruptcy court judges scouring 150-year-old state law cases in various states, not necessarily their own, trying to figure out if this is a tort recognized in that state, so as to be able to be brought by the trustee or the creditor's committee as a lawsuit or a count in the lawsuit.

AUDIENCE MEMBER: Has deepening insolvency ever been used or tried to be used as grounds for replacing a debtor in possession with a trustee?

MR. SHAPIRO: I haven't seen, Lou, a case where that's been discussed. And like Rudy said, this is pretty much it, okay. And so I think I have pretty much seen them, but I haven't seen it used. And it's an interesting question since under the Code, when the Code talks about cause for the appointment of a trustee in a bankruptcy case² — and I should repeat the question so everyone heard it.

Lou has asked whether this theory or claim has been used as a basis for replacing the debtor in possession from being able to continue operating their business in Chapter 11, replace them with a trustee. And I think the answer is that it's an interesting argument because cause is not exclusively defined in the statute. Cause for appointing a trustee is not defined in the statute³. They give examples, but it's not an exclusive list.⁴

So, you know, query whether you could, and say, "These guys really screwed it up from taking" — maybe, Lou, it's consumed in a confidence and gross mismanagement in the statute that's already stated. But the query whether it is taking the company from this value at an insolvent level to a terrible value today is an act that should cause them to be kicked out as management during the bankruptcy. Very interesting idea. Yes.

2. 11 U.S.C. § 1104.

3. *See id.*

4. *See id.*

AUDIENCE MEMBER: Trustees are going to look to follow the diverting of corporate assets by an officer. Perhaps the deepening insolvency issue could be part of a diversion of corporate assets which the courts now rely on in state law and in the bankruptcy cases, since trustees all have honest, clean hands. We have no problems.

MR. SHAPIRO: It's a problem, actually. It is a problem, I think. I will repeat that question, too, as best I can.

Isn't this possibly a theory that could be articulated differently than deepening insolvency; that there were breaches directly by the individuals, and you are suing them, effectively, for mismanagement of funds, absconding with the funds, et cetera, for their own benefit?

You know, those are conventional claims that we see every day. And first of all, let me say that I agree, and it's something that really bothers me about this doctrine. Look, I am all for getting the bad guys, and I don't care what theory you have to use at the end of the day. All these cases, almost every one, is about bad guys; Ponzi schemes, things like that. That's where this doctrine comes out. And so I am all for getting at them, but I think we already, largely, have the theories we need in order to get to them.

I think the torts largely already exist. You know, we will see how this ultimately gets articulated and whether the courts eventually converge at the appellate level on a description of this so-called tort that is really new and different from what's out there. But I happen to believe that it's probably well cared for under existing tort law.

Now, part of your question, though, Gene, is a big issue you are going to see in the cases, and that is that in the bankruptcy context, you don't necessarily walk in as a good guy trustee when it comes to deepening insolvency. And where the cases are going on this is that 541 of the Bankruptcy Code talks about property of the estate as it existed on the date of filing, not how it looks today with this nice trustee who is a good guy or woman with very clean hands, looking out for the benefit of creditors.⁵

When the courts look at the company, the plaintiff bringing the case, they are looking at the plaintiff on the day it filed, not the moment after it filed. And that plaintiff, depending — you will see they have some very interesting definitions they have come up with — if the corporation had dirty hands as opposed to the individuals running it — and you will see how they break this down — then these cases are being thrown out. And "*in pari delicto*" is the Latin for this. And, to me, it's unclean hands by the corporation, in simpler terms.

5. 11 U.S.C. § 541.

And cases are very regularly being thrown out. A lot of these cases in Rudy's stack here are losers, and they are losers because of *in pari delicto*. If you had brought the suit, Gene, as a receiver, not as a trustee, you would be fine, it looks like, under the case law because you don't have Section 541 of the Code defining this, and that's what the courts are telling us.

And so if you brought it as an assignee for the benefit of creditors you might be fine. But as a bankruptcy trustee or a creditor's committee bringing this suit for the estate, you may have lost because you don't get the benefit of this old doctrine. And there is a doctrine of a successor — I forget the name off the top of my head. There is a clean-handed successor doctrine, if you will, that is out there, and it's followed in the case law under a number of torts, which I think, probably, you could argue fits here, but for the bankruptcy.

AUDIENCE MEMBER: There is a whole body of law under common law. This is a tort regarding fraud. And the bankruptcy court has recognized this when the fraud had to do with the consumer being defrauded.

Has any of these courts looked at the body of law? If the credit manager was deceiving the creditors, that's a misrepresentation. They were damaged. There is a whole body of law that goes back 100 years that talks about misrepresentations that caused damage.

MR. RADASEVICH: Courts do look at that with respect to claims by the individual creditors. The difficulty with this cause of action is when it's brought by a trustee or a creditor's committee, they can only recover harm to the debtor, to the corporation.

So the fact that the corporation's creditors all were lighter than water, as my kids would say, and took less than they would have received had this company remained not quite as underwater as it was, doesn't give the debtor a cause of action to pursue. The debtor has to pursue damages that are different than the losses to its customers. That's not a recovery that a trustee can obtain or a creditor's committee can obtain. They have to try to get separate and individual damages to the debtor.

And there's not a lot of case law on damages because this is still in the primordial soup of litigation. And none of these cases have gone to trial, there's one called *Bookland*⁶ out of Maine that's close. But other than that, all of these cases are being decided at the motion to dismiss stage, where courts are trying to come to grips with what

6. *Bookland of Me. v. Baker, Newman & Noyes, L.L.C.*, 271 F. Supp. 2d 324 (D. Me. 2003).

pleading requirements are, and you don't really have to plead damages as much as seek damages.

So to answer your question, defrauding a customer will give the customer claims. It doesn't give the debtor claims. And the trustee and a creditor's committee are only pursuing claims the Debtor has.

AUDIENCE MEMBER: That's not my question. Substitute the word "consumer" in the consumer law cases for the word "Creditor" misrepresentation. The creditor is being deceived here.

MR. SHAPIRO: First of all, I think the answer begins with what Rudy said. In the first instance, the creditors may have individual claims against the people who defrauded them as well as the company. That's number one. And you would lose at that point, as far as bringing it for the company.

But a clever counsel, trying to put together a cause of action here, would articulate it differently, I think. They would say in the trade vendor context, which is now what you have clarified your question is about — for trade vendor, "I extended additional credit to this company by virtue of misrepresentations being made to me by people at the company." Now the company has been hurt by being forced into deepening insolvency because it took on more debt through those misrepresentations and put the company in worse shape, and now the corporation has been hurt, arguably, if you buy this as a tort. The company has been hurt by going deeper into insolvency, and now I have articulated, whether you buy it or not, the deepening insolvency theory on those facts. And that's how you would do it, I think.

And, you know, look, some of the cases go back to, you know, stuff the law students here probably remember better than we do because this is what we all learned in law school; that where there is an injury, the law provides a remedy. And we all start with that in tort class. That's what the courts are talking about in these cases. Is there an injury where there's no remedy already? As Gene put it, isn't there already a way to collect here? But they are trying to reconstruct this as not an individual claim by a bunch of disbursed creditors against people or the company. But now the company has been injured.

And why are they doing this? Anybody in the audience want to guess why they are trying to do this and push this theory?

MR. RADASEVICH: They want to get the lenders.

MR. SHAPIRO: They want to get to the lenders and the D&O policies; the directors' and officers' insurance policies. If the corporation was harmed by its directors and officers, now you have implicated the insurance policies.

You know, Worldcom, the D&Os paid \$18 million in. How much debt was there in Worldcom? How many billions and billions of dollars? And everyone boasts, "Hey, we got to the directors and officers." You know, 18 million is still good money on the southwest side of Chicago where I grew up.

MR. RADASEVICH: What if you have exculpation clauses in your corporate organizational documents exculpating directors and officers for acts of their own malfeasance if they agree to be directors? Do you then waive your right to go after these guys on a deepening insolvency basis?

MR. SHAPIRO: Let's go to Canada for awhile.

MR. ABBOTT: Thank you. First of all, thank you again for the opportunity to come and speak with you. I do have a paper which is in your material, so I don't have to go on as much as my friends have. And I am sure that their discussion may be a little bit more interesting than what I am about to say. But the title of the paper is "Another Canadian Compromise."⁷

And Canada, I think, is a compromise in and of itself between the United States and Great Britain. We like compromise. We don't like torts. We don't, generally, have civil jury trials. And if we do, the judges tend to say, you know, "You really don't want a civil jury trial." The maximum punitive damages award, according to our Supreme Court of Canada, is \$100,000. That's Canadian, by the way, which isn't too bad now. We are about 85 cents on the dollar.

So we look at this with great fascination because we have already come up with a solution to the problem. We have created by statute a corporation act in each province and federally. And the Business Corporations Act⁸ — and I append them to the back of my paper — they, essentially, provide for creditors and shareholders and any other interested party. You don't even have to have a necessary financial interest in the company, although it would be a very hard case to make if you didn't.

You can go to the Court if you feel that an officer, a director, an advisor, a principal, an employee has been oppressive of your rights.⁹ It's been characterized as one of the broadest, most liberal — liberal in the small L sense of the word — statutes providing for these types of remedies in the world. And I have prosecuted or litigated a number of oppression remedy cases.

7. Prepared for presentation at the Symposium.

8. R.S.C., ch. C-44, §§ 1-268 (1985) (Can.).

9. *Id.* § 241.

It allows us to pierce the corporate veil. It allows us to move as a creditor not just, as I say, a shareholder, to challenge an act or an omission by a director or an officer, et cetera, of a company.

Now, has it succeeded in the case of an insolvency? The short answer is, not yet. I do cite in my paper — and I should say a word about citing. I did not bring with me the various cases that I referred to. And for those of you who have a dying fascination to read about Canadian law and Canadian cases, I am going to give you a web site that you can go to that has it all: www.canlii.com. And you can go there and you can type in a word, and you can find every statute from all ten provinces, three territories, and the federal government as well as case law that evolves from there.

And the courts in Canada, and certainly in Ontario — and, again, I am not sure if there are any Canadians in the audience. I know a lot of you come up to fish and buy Cuban cigars, and all those other wonderful things that you can do up in our fair country. But Ontario has close to 40 percent of the population, and it has at least 60 percent of the business in Canada. So we are fortunate that we don't, as I was saying to my colleagues up here, we don't have the dichotomy that you have between a federal and a state court.

We have one bankruptcy court. We have one bankruptcy act for the country, and we can actually use an acronym for ours. It's called the BIA, the Bankruptcy And Insolvency Act¹⁰, as opposed to your Debt — Fairness Debt — blah, blah. Whatever you call it.

Anyway, the judges that opine about Canadian bankruptcy law, for the most part, are resident in Ontario. So we do have a consistency. And our supreme court is not very much interested in commercial law disputes. They like criminal law and they like charter arguments, which is equivalent to your bill of rights.

So the Court of Appeal in Ontario is generally the court of last resort for commercial disputes. And very recently, in a case that I cite on page 12 of my paper — it's an Ontario Court of Appeal decision where the Court re-affirmed what we call the Business Judgment Rule in Canada.¹¹ And this is the closest case that I could find to someone taking a shot on the basis of deepening insolvency.

This was a leather goods company that was, essentially, on the verge of insolvency, and the directors of the company failed to disclose fourth quarter reports because the reports, actually, said that the company isn't going to do so well. But the directors felt, "You know, we

10. R.S.C., c. B-3, §§ 1-275 (1985) (Can.).

11. *Kerr v. Danier Leather Inc.*, [2005] O.A.C.

think we are going to do well.” And there’s a certification of a class action by one of the creditors in the case. And I cite both the trial level and the Court of Appeal level decision.

At the trial level, the judge, who is one of our more senior bankruptcy judges, he did find that the officers and directors were liable in misleading the creditors in, essentially, causing the company to go further into insolvency and cause damages, et cetera.¹² The Court of Appeal reversed that.¹³ They said, essentially, that businesses are entitled to be run by their officers or directors, and even if they are wrong, so long as they acted in good faith, et cetera. “Even if they didn’t act in good faith but, you know, at the end of the day they made the right business decision, we are not going to interfere with that.” And if you do want to interfere with that, creditors, et cetera, you have other remedies to do that. You can go under the oppression remedy cases, et cetera. The problem here was oppression wasn’t really something that could be established.

So in Ontario, we have said no deepening insolvency. We have said we already have a statute in place that addresses these issues. If you want to go there and seek your redress, give it a shot. I can tell you that the likelihood of success of a deepening insolvency case in Canada is very slim, again, on the basis that we like to uphold the Business Judgment Rule, and also that we don’t have, as I said at the outset, a real interest in torts and an interest in litigating disputes. We try to find a compromise and a resolution.

And our Bankruptcy Code, our Federal Code, also provides for protection from liability for trustees and some other professionals who give advice to businesses when they are entering the insolvency zone.¹⁴

And the last word I will mention is with respect to the insolvency zone, because one of my colleagues asked me about that. There is a book I referred to as well, and it’s on page 9 of my material, and I will just read from it. “To date Canadian law has not yet recognized that merely continuing to carry on business, knowing that the corporation is insolvent and will be unable to pay its liabilities as they become due, constitutes unfair or oppressive conduct.”¹⁵

So we don’t even have the insolvency zone problem in our country. If you can carry on your business, you don’t have to disclose the financial state to creditors. If creditors want to take a shot at you, use the

12. *Kerr v. Danier Leather Inc.*, [2004] O.R.3d

13. *Kerr v. Danier Leather Inc.*, [2005] O.A.C.

14. R.S.C., c. B-3, §§ 15-41 (1985) (Can.).

15. *DIRECTORS’ LIABILITIES IN CASE OF INSOLVENCY* 401 (Anker Sorensen ed., 1999).

oppression remedy section. But I can tell you, most courts will shut that down.

MR. SHAPIRO: Let's take a vote on who likes the Canadian laws better than the United States.

MR. ABBOTT: Did I mention our tax laws? We can get into that.

MR. SHAPIRO: Thanks, Neil. Okay. Let's turn for a little bit to some of the cases, just so you can get a feel for what the courts are doing and saying in these cases and how — where some of the variances are.

One of the leading cases — maybe the leading case on this so far is a case — and it's in the materials, so you don't have to write it all down. It's *Lafferty*¹⁶, L-a-f-f-e-r-t-y. It's a Third Circuit Court of Appeals decision from 2001. And *Lafferty* is interesting because it's a good old-fashioned Ponzi scheme.

For the students in the room, a Ponzi scheme is very simple. Money is coming in, being promised a return on investment and, typically, it's going to pay others who have already invested and been promised a return on investment rather than going into the operations of the business, and it just gets bigger and bigger and bigger until it bursts. And these are the kind of bad actors I was talking about earlier that tend to find themselves in these deepening insolvency reported decisions.

So this was a leasing company, or a series of them, that — no relation — the Shapiro family ran to operate their scheme. What these guys did — and it was a family. They all had senior offices, apparently, in the corporation. They were issuing fraudulent debt certificates and selling them to individual debtors to raise money.

And what they did, as I recall, is they actually set up a subsidiary. They were so insolvent at one point, and they were stuck. And it's a Ponzi scheme, and it dies if you don't have more cash coming in from third parties. They created a subsidiary that looked like it had a cleaner balance sheet; in some ways reminiscent of the allegations you see in some of the Enron litigation. It's off balance sheet stuff that you read about.

So now they started selling certificates at this cleaner looking subsidiary and, eventually, of course, it busted. The creditor's committee comes in and sues a variety of third parties, including most of the principals, alleging that they fraudulently — remember that word “fraudulently” — induced the corporations to issue securities, thereby deepening their insolvency. They were in trouble. They were in debt,

16. Official Comm. Of Unsecured Creditors v. R.F. Lafferty & Co., 267 F.3d 340 (3d Cir. 2001).

if you will. And they should have taken an action at that point, but instead, they created the scam, brought in more debt, using misrepresentation and fraud to gain that additional debt, and now the company is in even worse shape and is in bankruptcy.

So the creditor's committee brings that theory. They get in front of the Third Circuit ultimately, and the Third Circuit said, first of all, about state law, that they had to look at whether the right of action belongs to the debtor or the creditors under state law. So it's the first part of the process for the Court. Is it a theory? And if it is, who does it belong to?

They talk about the mismanagement, and they say — again, you will see them trying to define the tort in the tests here — “[W]here fraud, mismanagement, or other wrong damages a corporation's assets, a shareholder does not have a direct cause of action. Rather, it is the corporate body that suffers the primary wrong.”¹⁷

Now, in this case they — you see they are all straining. They are citing from one another and thinking about this out loud. They cite the old jurisprudential proposition I mentioned earlier. They are looking to see if there is an injury that needs a remedy here. And they say, “The damages that could have occurred here are the following.” This raises all kinds of new issues, in my mind. “[T]he incurrence of debt can force an insolvent corporation into bankruptcy, thus inflicting legal and administrative costs on the corporation.”¹⁸

Number two, “When brought on by unwieldy debt, bankruptcy also creates operational limitations which hurt the corporation's ability to run its business in a profitable manner.”¹⁹ Number three, “[D]eepening insolvency can undermine a corporation's relationship with its customers, suppliers, and employees.”²⁰ And I would just digress; so can high prices. Four, “[P]rolonging a corporation's life through bad debt may simply cause the dissipation of corporate assets.”²¹

So you have got these courts at the circuit level. And with all due respect to them, you know, I am living every day in the operating side of these troubled companies. It's not that simple, I would suggest. It's not that simple. There are a lot of things that can cause a disruption in the relationships that are very good faith efforts to keep the company alive. You realize you no longer can pay on 60 days, but you still have

17. *Id.* at 348.

18. *Id.* at 349.

19. *Id.* at 350.

20. *Id.*

21. *Id.*

a viable restructuring plan. Is the fact that you took on more credit and went to 90 days or 100 days with creditors, is that a bad act? Well, the answer may be, if you fraudulently convinced them to do it, perhaps.

But it worries me when a doctrine like this potentially could go into all kinds of ordinary behaviors, good faith behavior; not only that, but behavior we would want to encourage. We wrote a whole bankruptcy code in the late '70s to encourage this kind of restructuring behavior. And if the courts aren't careful and very judicious in how they allow this doctrine to exist, you run the risk of really chilling the willingness of operators of businesses, equity holders of businesses, lenders, financial advisers, lawyers to participate in the process. And so you have got to really be careful how you define it.

MR. RADASEVICH: You don't even need in that *Lafferty* case — really, in any of these cases, you don't need the theory of deepening insolvency to go after the insiders. The insiders all owe fiduciary duties to the company; period. Sue them for their fiduciary duties. If you think there may be a measure of damages, yada, yada, fine. Sue them for breach of their fiduciary duties. Get that in front of a jury. Get that claim out there. They need to go to deepening insolvency, like in the *Lafferty* case, because they wanted to get the auditors.

Now, most every state recognizes liability for aiding and abetting a breach of fiduciary duty. So they could have sued the auditors, and did, for aiding and abetting the breach of fiduciary duty. But to prove aiding and abetting, there is a scienter requirement. You have to prove that the third party, the auditors, knew that the insiders were breaching their fiduciary duties and provided substantial assistance to allow them to do that. That's a difficult thing to prove. Plaintiffs don't want to have to prove that.

They would rather sweep third parties in, and that's what this deepening insolvency theory tries to do. It tries to sweep third parties into the case without trying to prove complicity. Because if you had to prove complicity, why have the theory at all? Just get them for aiding and abetting a breach of fiduciary duty; you already have them in the case.

AUDIENCE MEMBER: Neil mentions that in Canada there is a pretty strong business judgment rule. Isn't that the case in the States as well? Isn't that the initial line of defense?

MR. RADASEVICH: There is a relatively recent decision that came out called *Global Services Group*.²² It's at 316 Bankruptcy Re-

22. In re Global Serv. Group L.L.C., 316 B.R. 451 (Bankr. S.D.N.Y. 2004).

porter 451. And in that case, they sued the insiders, like they always do, and they also sued the outside accountants, auditors, and everybody they could. And they went after the lender, saying, “You knew this company was insolvent. You lent it money. You should have known it couldn’t pay you back. Other people, based upon the strength of your credit facility with this debtor, continue to do business with it, continue to extend it credit. You drove it into the ground, and you helped the officers and directors do that.”

What the bankruptcy court in that case said was, “Wait a minute. Wait a minute. This is simple business judgment rule stuff. You haven’t alleged in your complaint that the officers and directors did anything wrong, that they acted fraudulently. All you have alleged is that they operated an insolvent company and it didn’t work out, and they used the lender’s money to do it.” It may have been a bad loan, but it’s not a tort. The insiders were shielded by the business judgment rule, and the court threw out the case.

The cases where you find this argument having any legs at all are cases where there’s rampant fraud; the Ponzi scheme in *Lafferty* or there’s another case — another series of cases called *Parmalat Securities Litigation* where they created offshore companies and stocked them up with half a billion dollars worth of assets in order to defraud creditors and had family insiders fleece money out of the company.²³

You see the theory getting a little more legs in those types of cases. But in a pure business judgment rule case, what *Global Services* said is, “You are out. You have no cause of action.”

MR. SHAPIRO: Again, one thing, I think, we learned from looking at a survey of these cases is that you better be able to argue and prove misrepresentation — intentional misrepresentation or fraud if you want to really have a case that sticks under this theory. And you will see in this stack of cases, most of them are thrown out if you can’t show misrepresentation or fraud.

Now, Rudy mentioned the aiding and abetting concept. And there’s actually a recent case on that, too, and that’s the *Adelphia Communications Corporation* case²⁴— a pretty high profile case in the Southern District of New York in ‘05. And they try to articulate what the elements are to show an aiding and abetting claim. And they say the Plaintiff must allege: number one, the existence of the primary violation, this deepening insolvency tort, the knowledge of the viola-

23. See *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005) (listing the entire series of cases).

24. *In re Adelphia Commc’ns Corp. Sec. and Derivative Litig.*, No. 03-MDL-1529LMM, 2005 WL 1404798 (S.D.N.Y. June 14, 2005).

tion on the part of the aider and abetter, and, number three, substantial assistance by the aider and abetter in achieving the primary violation.

Now, you could take Enron, because everyone seems to know the facts of Enron, and start to see where these kinds of theories for aiding and abetting could be very interesting. You have all kinds of indicted staffers in the accounting departments of these companies that helped create the financial statements or didn't say anything and saw the creation of the statements. Have they committed the crime or the tort of deepening insolvency? Real interesting questions.

AUDIENCE MEMBER: This aiding — I am not an attorney; I am an appraiser.

MR. SHAPIRO: Your opinion matters more, for sure.

AUDIENCE MEMBER: I can see where there could be some problems with this. And we put a lot of disclaimers on our appraisal reports that we turn in, and somehow some of us get in trouble. Are we going to go any further in discussing this later today, or what?

MR. SHAPIRO: We only have so much time, but I will tell you that you should be seeing red flags which, I guess, you are, that this is a risk for accounting firms. I hadn't thought of appraisers, but you are absolutely right. You create the appraisals upon which the creditors rely in extending more debt. And if it's alleged that you did a lousy job and, kind of, took the debtor's word for it in putting — MAI, if you will, made as instructed appraisal, you could be named in one of these.

And when you look through the cases — when you get into one of these and start looking at the cases, you will see that KPMG is named as a defendant in one of them. Bank of America is named in the *Parmalat* cases that Rudy referred to.²⁵ You know, they are looking for deep pockets. And guess where that tends to be; the insurance companies and all the professionals. And that's where this theory seems to be slipping to, is a way of bringing in more than just the directors and officers.

You had a follow-up?

AUDIENCE MEMBER: Yes. We are seeing, as you mentioned, a lot of this coming on. And I know in several of mine that I put some of these disclosures in. And maybe it's setting off a flag with banks. I don't know. But in those appraisal reports, I want them to know that what I can see or what they are being presented with is all that's been given to me.

25. *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005).

And I know they have been after several of them. I think somebody just said or it's in the newspaper that ten percent is attributable to a fraud. And I know in Indiana, where I'm from, the FBI has been very active in that area. And so my suspicion is that we are going to have to be very careful as to how we present those reports. It may well be that several banks don't want to do business with us.

MR. RADASEVICH: Putting things on like disclaimers, it's like when you go and look at a corporation's financial statements, and they always have that big disclaimer written by lawyers at the end saying, "These are forward-looking statements." Don't rely on them. We may be lying through our teeth. Don't rely on these. Those types of disclaimers mean almost nothing. It's like when you take your kid to Disneyland. On the back of the ticket, you waive all your kid's rights. You can't waive any of your kid's rights. So don't think disclaimers will shield you. They will only get you sued.

What will help you is if you are a lender, act like a lender. Don't act like a business manager. Don't put on a lot of restrictions as to how the debtor is supposed to operate its business. Be extremely careful on restrictions you put in as to how the debtor is supposed to use its money.

Be extremely careful about toggling the situation in such a way that the debtor is forced to stay out of bankruptcy for long enough to avoid the avoidance periods on the liens you received, which caused the lender to get sued in one of these deepening insolvency cases. So you have to be careful. But disclaimers will do practically nothing.

AUDIENCE MEMBER: What I have done is transferred all my assets to my wife.

MR. RADASEVICH: That's good. I will give you account numbers for the 529 accounts for my kids, if you have anything left over.

MR. SHAPIRO: Give us her name. We will do the same thing.

AUDIENCE MEMBER: What about SEC law? Are any of the courts considering — there's a lot of regulations of this kind if it's a publicly held company, and all of the regulations and administrative cases involving the Securities and Exchange Commission. Does that have any effect on this at all?

MR. RADASEVICH: There's the whole Sarbanes-Oxley thing.²⁶ I could put a different hat on and we could talk about that for awhile. But that hasn't really found its way into these cases yet because, remember, the cases are coming from the bankruptcy litigators. They really have this mindset.

26. Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201-7266 (2006).

There's not a case here where a creditor has tried the deepening insolvency theory because, remember, by definition, the deepening insolvency theory is a cause of action to be pursued by the debtor, not its creditors. I will read the definition that most courts use: It's the fraudulent prolongation of a corporation's life beyond solvency, resulting in damages to the corporation caused by increased debt.

SEC regulations often have little to do with appraisers. They may have little to do with other outside professionals, workout groups that a troubled debtor may go to. We were speaking to one counsel earlier who does a lot of out-of-court workouts and composition agreements so a company can avoid bankruptcy. When they work, they are great. When they don't, you are really subjecting yourself to the risk of suit.

If you as an outside professional guiding a debtor, a putative debtor, through a composition arrangement that blows up, and during the time period the debtor goes from here under water (Demonstrating) to under water here, you are going to find yourself getting sued. You will have defenses of the business judgment rule, *in pari delicto*, all these other things, but all this means is that the debtor's lawyers will bill bankruptcy estates, where nobody is really paying the bill, to litigate these claims against you.

MR. SHAPIRO: Let's take a minute now. And here is a great example of what we have been telling you about how hot this idea of deepening insolvency has become. Here is a news release dated the 25th of April, so Tuesday of this week.²⁷ Having heard us for over an hour now talk about this theory, now you are experts like we are. You tell me if there isn't a deepening insolvency theory contained in the Complaint I am going to tell you about.

And this Complaint is under seal, apparently, in the Refco case. Everyone has heard the Refco name in the last year due to the huge scandal there. You tell me if they are not talking about a deepening insolvency theory. When we see this Complaint some day, if we do, I promise you it's in there somewhere.

"Seeking more than \$1.3 billion, unsecured creditors for Refco, Inc. are suing Austrian bank Bawag PSK Group, accusing the financier of helping propel the futures broker into bankruptcy through a series of fraudulent loans to Refco's embattled former chief. Central to the allegations is the \$420 million loan from Bawag to former Refco CEO Phil Bennett in October of '05, just days before Refco stunned Wall Street with its massive insolvency."²⁸

27. Peter A. McKay, *Refco's Creditors Sue Austrian Bank*, WALL ST. J., April 25, 2006, at C5.

28. *Id.*

Now, the article goes on to say that Bennett used the Bawag loan to repay \$430 million in bad debt to Refco's Bennett-controlled subsidiary, Refco Group Holdings, the last place Plaintiffs say Bennett floated the debt in an effort to hide it.²⁹ So he moved some debt. He took some money from these guys to cover certain debts, moved it into other entities to try to prop up Refco and make it look good, I think, is the allegation there.

So now this is a third party helping him, arguably, create more debt for the company, keep it going, keep incurring more debt and losses, and deceiving the public at a time when they were already, probably, insolvent.

The allegations outlined in court documents suggest that such transactions took place with regularity, arranged specifically to help Bennett's Refco unit and Bawag hide their mutual debt. So you are seeing — this is not an accident, the way this release reads, I think. These guys are telling you the elements. They read these cases, too. They are telling you the elements of a deepening insolvency theory here, and they are going to be suing Bawag, and they are probably going to sue others who may have participated.

I suspect you may see lawyers and accountants and others sued, potentially. In the *Parmalat* cases that Rudy referred to, there's more than one reported decision, by the way. *Parmalat* comes out of New York.³⁰ It's the Italian company where there's similar massive fraud creating fake assets, moving debts off the balance sheet into other entities, things like that.

In *Parmalat*, it's wild when you read the decisions, because they are rambling through — one case is all about Illinois law.³¹ They brought one under Illinois law, which they said this tort doesn't exist in Illinois. Another case, they brought it under another state's law.

And the interesting thing, and something I am beginning to observe anecdotally in talking to lawyers in some of the states where these cases are being filed, is Delaware, for instance, has some cases already that are very positive on the existence of this tort; that they endorse the existence of this tort. New York has almost exclusively said no way, and found *in pari delicto* very frequently as a valid defense.

MR. RADASEVICH: What that means for you non-lawyers is that an entity cannot sue another wrong-doer for a wrong that the entity participated in. Since the officers and directors of the company con-

29. *Id.*

30. *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005).

31. *See In re Parmalat Sec. Litig.*, 421 F. Supp. 2d 703 (S.D.N.Y. 2006).

trol the company — and, again, it's the company suing — the company won't be able to sue another wrong-doer for something that it facilitated or participated in through its own officers and directors. That's what it means.

MR. SHAPIRO: This is the thing we were talking about earlier. And there is an exception in some states for that, for the innocent successor that we were being asked about earlier.

So now let's take my little theory for a minute. I think from anecdotal conversations, for instance, that the lawyers in Delaware are very concerned that this means to be taking root in Delaware because it's not protective, if you will, of directors and officers. And let's remember where the whole Delaware corporation thing originally came from. People find that to be a very corporate friendly jurisdiction, and maybe these rulings are not so corporate friendly against directors and officers.

So there's some talk about proposing legislation in Delaware that would define what the deepening insolvency theory is so that it might stay a more friendly director and officer and corporation jurisdiction. So be on the lookout for something like that in Delaware and, perhaps, other states. Frankly, as a lawyer, just tell me what the law is and don't leave me with a stack of cases as the law. It would make life a lot easier and, frankly, would save a lot of money for a lot of participants in these cases.

MR. RADASEVICH: He is a bankruptcy lawyer. Litigators — we love controversy because we never know what side of the equation we are going to be on.

MR. SHAPIRO: Rudy carries this around when he is not lecturing.

MR. RADASEVICH: I love this. In Illinois we don't know what the law of deepening insolvency is. You have a Southern District of New York Bankruptcy Court saying there is no such theory under Illinois law. You have the Seventh Circuit in the *Schacht v. Brown* case³² a few years ago saying, "We are not going to tell you it's not an element of damages." And then you have a judge in the Central District of Illinois in the *Fleming Packaging* cases — there is a decision at 336 Bankruptcy Reporter 398³³ — saying, "I am not going to say there isn't one yet. We are in the pleadings stage. I am not going to say there isn't one yet. I am going to take it down the road a little farther before I decide."

32. *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983).

33. *See In re Fleming Packaging Corp.*, 336 B.R. 398 (Bankr. C.D. Ill. 2006).

What the judges may not appreciate is that litigants are spending hundreds and hundreds of thousands of dollars during motion practice and discovery, and it's egregiously expensive to do that.

MR. SHAPIRO: Let's take another twist on this for a minute and consider this: Now you are in the insolvency phase, okay. The zone of insolvency has occurred. Lights are flashing, and you are in the zone now as a director and officer. And now what do you do when you are in the zone, as frequently happens? You bring in crisis managers, right? You bring in insolvency attorneys to help counsel you.

And now you go another year, sometimes two years in this troubled state where you are trying to fix the problems. You know, some people suggest GM may be in that stage. I don't know. But you are in trouble and you are trying to work through it. As a crisis manager, have you walked into a potential liability situation? You don't always know what representations have been made or are being made by people within the company. You are not always aware until you get well into it what's really happening, and that's very frequent in these cases.

MR. RADASEVICH: Almost by a definition, a crisis manager always walks into a potential deepening insolvency problem; always, or he wouldn't be there. They are not brought in to help healthy companies too often.

So it's really interesting to think that we have Title 11 so that we can save companies, and we just don't have straight liquidations. But if you try to save a floundering company outside a bankruptcy court, god forbid, you might get sued.

MR. SHAPIRO: And we will take the last questions in a moment. You know, I think that if this is going to be a tort that's going to stick and that's going to have legs and be an established doctrine in the years to come, it's got to be tightly defined by the courts, ultimately by the circuit courts, so that people are clear what it is. It's got to be focused on fraud and misrepresentation or it's going to cause a lot of harm in the everyday cases where there wasn't wrongdoing. It's got to be very carefully construed.

Now, I will say I may and Rudy may re-think that when we are being paid by a client to analyze these issues. Professor Countryman, the great Harvard bankruptcy professor, famously once said, when asked, I think, in Congress about a position he was taking relative to something he had once written, that he thinks better when he is being paid. So whatever. You know, this is a developing doctrine, but that's what I think has got to happen.

Rudy, maybe you want to comment before we take the question on where you think this is going.

MR. RADASEVICH: I don't think it's a job for the circuit courts. I think it's a job for the state courts; state courts and state legislatures. There's no such thing as federal common law. You can't let a bunch of bankruptcy lawyers make the stuff up out of whole cloth, even if they are really good at doing just that.

I have also had the privilege of litigating bankruptcy issues in state court. Try that sometime. Most state court judges have no idea what you are talking about. Bankruptcy judges may be very astute at dealing with bankruptcy-related issues and the type of commercial issues they face every day, and by and large they basically are. But you throw "Let's develop a new tort" in front of them, and this is what you get. This is what you get.

MR. SHAPIRO: That's the litigator in Rudy speaking. Of course, he is wrong in what he says, because out of a practical consideration, the cases aren't being filed, as he said, in the state courts. They are just not getting filed there. They are coming up in the bankruptcy form, so they are ending up in the circuit courts. And whether that – I will say, Rudy, it's probably the place it should be decided.

MR. RADASEVICH: The court of appeals has the ability all the time to refer a state court question to a state supreme court to get an adjudication. That's what they should do. They have no business creating state law out of whole cloth. They just don't. If this came before the Seventh Circuit, they will either say, "No, it's up to the state court," or, depending on who the panel is, they might refer it over to the Illinois Supreme Court.

MR. SHAPIRO: Let's take that question.

AUDIENCE MEMBER: What role are the insurance companies, the malpractice insurance or the director — insurance companies taking on this? Are they worried that this is going to affect them? Because they are going to be the ultimate payers on this.

MR. RADASEVICH: Well, two problems: One, they have a duty to defend and a duty to pay, which are two different things. Duty to defend is if it's potentially coverable. Duty to pay is if they proved it. So plaintiff's lawyers may throw in a negligence claim, which would be covered under your policy. If the suit is only an intentional tort, and it's big enough dollars, I think the insurance company would file a declaratory action in a minute so they don't have an obligation even to continue to defend.

But that defense, as you can tell, would be a massive, expensive undertaking. They haven't been sued yet. I haven't seen a case

against insurance companies. But there are cases out there against — I will give you a list — auditors, underwriters, merger and acquisition professionals, workout professionals, attorneys, customers, potential buyers, lenders and, of course, officers and directors are low hanging fruit.

MR. SHAPIRO: You have a question.

AUDIENCE MEMBER: I may have missed it. I apologize. But that stack of cases over there, how many decisions were found that there was liability under that theory?

MR. RADASEVICH: Again, these are only the pleading stage. So you have courts in Pennsylvania saying that the theory exists. You have courts in Delaware saying the theory exists. You have courts interpreting Illinois law saying maybe it exists, maybe it doesn't exist. But the Seventh Circuit is saying, "We think it's an element of damages." But to be an element of damages, you have to have your underlying tort claim, and then we will try to define what that element of damages is.

The only case out there that really speaks of damages so far is a case called *Southwest Supermarkets*,³⁴ 325 Bankruptcy Reporter 417. Remember, it's difficult for the debtor to say how the debtor was injured in a deepening insolvency case, because usually when you keep something alive, it's a good thing. What they argued in that *Southwest Supermarkets* case was that the damage was the diminution of the enterprise value of the business. Even though GM may have lost \$3 Billion last quarter, and maybe, on a balance sheet, is technically insolvent, it's got a real nice value on the New York Stock Exchange. So they look at the decline in the enterprise value of a company — that's where they were going in that case. None of this stuff has gone to trial yet, but that's one element — I think, one aspect of damages plaintiffs will try and prove.

AUDIENCE MEMBER: This may just be a vehicle for them to find liability under some other theory; start out talking about this and then say, "Well, this doesn't really exist, but you do have liability here."

MR. RADASEVICH: The *Parmalat* cases are classic for that.³⁵ What they say is that, "No, you have breach of fiduciary duty, you have aiding and abetting, you have fraud. That's enough. You are trying to recast something. We are not going to let you do it.

34. *In re Sw. Supermarkets, LLC*, 325 B.R. 417 (Bankr. D. Ariz. 2005).

35. See *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005) (listing the entire series of cases).

MR. SHAPIRO: This is really early stage litigation right now. Most of these cases are either being dismissed in the motion to dismiss or summary judgment stage and haven't been litigated or are in the early stages or mid stages of discovery. As I have said, we found over 50 filed cases over the last two years, and pretty good size cases, around the country where these cases are being filed.

And, frankly, you know, if you have observed the way case law develops over the years — and I am doing this 24 years now. If you look at the way the case law develops, it takes one vein to really stick, you know, where some courts get it identified down to a well-defined tort and other courts start following it. All the other cases, I suspect, will fall from the wayside, and you really may have a tort that takes root and goes forward that's, maybe, better defined than this morass of case law that we have today.

I think we are years from that right now, and I think we will be discussing this on seminars for years to come as a result, as we try to figure it all out.

Yes, sir.

AUDIENCE MEMBER: We have a real problem as appraisers. We are required to comply with USPAP.³⁶ We are compelled to comply with the bankruptcy laws, and we are compelled to respond to the state law, and they are not all together. And so the effect of it has been, in my town where I live, is that we have virtually no appraisers that are wanting to do bankruptcy appraisals. We have two attorneys left out of a very, very large group in our town that are even trying to file bankruptcies. So it's a real mess right now. Nobody knows what to do.

MR. SHAPIRO: Part of the problem is that when you are being called on to do this kind of work, they are not in bankruptcy for the deepening insolvency tort. These things tend to occur when they are in trouble, not when they are in bankruptcy. Once they are in bankruptcy, you have either committed the tort or you haven't.

So if you are worried, then I think you got a lot out of today's presentation, because I think that's really what you should take from this, is that you ought to be worried and watching for this. Thank you all very much.

36. Uniform Standards of Professional Appraisal Practice.