

**Entering the Sixth Dimension:
An Area Called “The Insolvency Zone”**

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The Zone of Insolvency is an elusive concept that, although not precisely defined, has substantial ramifications. As a company confronts its financially distressed state, the nature and extent of a director’s obligations to shareholder and creditor constituencies shift. Corporate management may confront complex questions regarding the prolongation of a corporation’s existence through the infusion of capital and the attendant risk of deepening insolvency and escalating debt. Once a company enters bankruptcy, tactical venue decisions by both the debtor and defendant can have a significant impact on the outcome of a suit.

The insolvency zone has profound implications for mining firms, executives, creditors, vendors, and counsel. By exploring the Five Ws of the Insolvency Zone, this paper will introduce the major legal hurdles that interested parties could face as a mining company spins into insolvency: What exactly is the elusive Insolvency Zone? Who can benefit from it? When does “deepening insolvency” justify a claim or lawsuit? Where can and will an insolvent company pursue the claim or suit? Why does any of this matter to mining constituencies? An understanding of these topics allows companies, businessmen, and lawyers to better navigate the legal intricacies of a dynamic marketplace in these times of serial financial crises.

I. What is the Insolvency Zone?

A threshold question critical to corporate governance is whether a company is insolvent or in the insolvency zone. Courts have not yet set forth a precise definition of what constitutes a “zone of insolvency.” The fact that determining whether a corporation is even insolvent is itself a challenge makes the assessment whether a corporation has entered the zone of insolvency even more difficult. Courts have generally resolved the question on a case-by-case basis.

A. Tests for Measuring Insolvency

The two predominant tests for insolvency are the balance sheet test and the cash flow or equity test. The balance sheet test, which is the settled test under fraudulent conveyance law, evaluates whether the fair market value of a corporation’s liabilities

exceeds the fair market value of its assets.¹ This test is consistent with the Bankruptcy Code, which defines insolvency as the financial state in which the sum of the corporation's liabilities is larger than the fair market value of all its assets, excluding exempted property and property concealed from the corporation's creditors in order to defraud them.²

The balance sheet test invites considerable ambiguity, as the valuation methods of a corporation's assets vary. The term "debts" is broadly defined under the Bankruptcy Code to include contingent, unliquidated, and disputed debts that may not be reflected on a balance sheet prepared in accordance with generally accepted accounting principles.³ A company's value as a going concern may be substantially different than its valuation on a liquidation basis, and methods of discounting or adjusting income may alter the analysis. Large investments, relative to asset value, could deem a company insolvent under the balance sheet test. Alternatively, a company "could be solvent in balance-sheet terms yet be in danger of imminent failure."⁴

The cash flow, or equity, test considers whether a corporation can pay its debts as they come due in the ordinary course of its business.⁵ The test is often relevant in fiduciary situations and is consistent with the Uniform Commercial Code's definition of insolvency and the Uniform Fraudulent Transfer Act's presumption of insolvency.⁶ A corporation could be deemed insolvent according to this test even if it had substantial assets but poor cash flow. Zealous application of this test could lead to unwarranted results since many corporations fail to timely pay some debts for a variety of reasons.

¹ *Brandt v. Hicks, Muse & Co. (In re Healthco Int'l, Inc.)*, 208 B.R. 288, 301 (Bankr. D. Mass. 1997).

² 11 U.S.C. § 101(32).

³ *See* 11 U.S.C. § 101(5), (12).

⁴ *In re Taxman Clothing Co., Inc.*, 905 F.2d 166, 170 (7th Cir. 1990).

⁵ *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 789 (Del. Ch. 1992).

⁶ *In re Healthco*, 208 B.R. at 300.

B. Distinguishing the Insolvency Zone

The “zone” or “vicinity” of insolvency is “a poorly defined state.”⁷ Courts recognize that its characterization “is an admittedly confusing one.”⁸

Some courts have attempted to distinguish the insolvency zone based upon prevailing insolvency standards, employing either the balance-sheet test or the cash-flow test. Another test is whether a transaction leaves an unreasonably small amount of capital and results in an unreasonable risk of insolvency.⁹ Courts may apply a presumption of insolvency immediately before a bankruptcy filing.¹⁰

The concept of a “zone” raises complicated questions regarding how close to insolvency a corporation must be and the duration of a time a corporation can be in such a state. A company with close operating margins might perpetually be in the zone. As obligations shift and potential liability increases, crafty lawyers may push for an expansive view.

II. Who Can Benefit from the Insolvency Zone?

The nature of a director’s duties and the constituencies to whom they are owed shift as a corporation’s solvency changes. Although directors of a solvent corporation owe fiduciary duties to shareholders, creditors may attain fiduciary status as a corporation’s ability to repay debt diminishes. Over the past two decades, Delaware courts have examined the fiduciary rights of creditors as a corporation nears insolvency.

⁷ *Official Comm. of Bond Holders of Metricom, Inc. v. Derrickson*, 2004 WL 2151336, at *3 (N.D. Cal. 2004).

⁸ *Prod. Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 789 n.56 (Del. Ch. 2004); *see also N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 98 n. 20 (Del. 2007) (noting that Delaware courts have not yet defined “zone of insolvency” precisely).

⁹ *See, e.g., Pereira v. Cogan*, 294 B.R. 449, 520 (S.D.N.Y. 2003) (a corporation is in the “zone of insolvency” if it will not “generate and/or obtain enough cash to pay for its projected obligations and fund its business requirements for working capital and capital expenditures with a reasonable cushion to cover the variability of its business needs over time”), *vacated sub nom. Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), *cert. denied*, 547 U.S. 1147 (2006).

¹⁰ *See, e.g., In re Mortgage & Realty Trust*, 195 B.R. 740, 751 (Bankr. C.D. Cal. 1996) (presuming insolvency given the filing of bankruptcy four days after the board’s ratification of the sale of a major asset in an insider transaction, despite the absence of actual evidence of insolvency).

But the ability to pursue claims for fiduciary breach is generally limited to derivative claims, reinforcing a director's ultimate obligation to the corporate enterprise.

These issues are particularly relevant to mining companies during the current period of economic challenge. With the deepening of the global financial crisis and the precipitous drop in energy prices, companies have been forced to decrease spending and delay projects. The troubled state of the economy, coupled with the uncertain definitional contours of the insolvency zone, could result in the classification of many companies as near insolvency. Companies therefore should understand the scope of their fiduciary duties and responsibility to the corporate constituencies.

A. Protection under the Business Judgment Rule

The business judgment rule requires judicial deference to a director's good-faith corporate decisions. It is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."¹¹ Under the rule, a court will not disturb a board of directors' judgments if they can be attributed to any rational business purpose.¹² The business judgment rule applies in the absence of active wrongdoing or malfeasance by directors.¹³

B. Derivative Standing

Under the law of most jurisdictions, the directors of a clearly solvent corporation owe a fiduciary duty to the shareholders but not to the creditors.¹⁴ The assets of a solvent corporation will be sufficient to satisfy creditors, who are protected by contract law, and the beneficiaries or victims of corporate actions will be shareholders. The shareholders must enforce fiduciary duties derivatively on behalf of the corporation, unless they are directly injured by the breach.¹⁵ By contrast, directors of a clearly

¹¹ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).

¹² *Matter of Reading Co.*, 711 F.2d 509, 517 (3d Cir. 1983).

¹³ *See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986).

¹⁴ *See, e.g., U.S. v. Byrum*, 408 U.S. 125, 138 (1972).

¹⁵ *In re Touch America Holdings, Inc.*, 401 B.R. 107, 123 n.29 (Bankr. D.Del. 2009).

insolvent corporation generally owe a fiduciary duty to creditors.¹⁶ When a corporation is clearly insolvent, corporate actions taken to benefit shareholders can adversely affect the creditors because the remaining assets may be insufficient to compensate them. As residual claimants, creditors are the primary beneficiaries of attempts to maximize value during bankruptcy.

C. Evolving Delaware Law on Creditor Rights

The assessment of a director's fiduciary obligations when a corporation is in the vicinity of insolvency may be unclear as decisions affect creditors and shareholders unequally. Over the past two decades, Delaware courts have assessed creditors' standing to bring actions against directors for breaches of fiduciary duty when a corporation is insolvent or near insolvent. "Courts across the nation have looked to Delaware for further developments and clarification regarding the cause of action."¹⁷ The Delaware courts' analysis provides guidance to litigants in federal bankruptcy proceedings as well as federal diversity suits where courts apply the substantive law of the state whose law governs the matter.

1. *Credit Lyonnais Bank*

A seminal case on a director's fiduciary obligations in the zone of insolvency is *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corporation*.¹⁸ In that case, Credit Lyonnais entered into a Corporate Governance Agreement with MGM Corporation's controlling shareholder, Pathe Communications, to arrange a leveraged buyout of MGM. The leveraged buyout, however, failed and MGM became insolvent. Pathe Communications' owners then asserted control over MGM, in breach of the Corporate Governance Agreement. When the bank sued to enforce the contract, the Pathe Communications owners responded that the CEO appointed under the contract breached its duty of good faith to them.

The court held that the business judgment rule protected the decisions of the CEO, who had been "appropriately mindful of the potential differing interests

¹⁶ See, e.g., *In re McCook Metals, L.L.C.*, 319 B.R. 570, 594 (Bankr. N.D. Ill. 2005).

¹⁷ *I.G. Services v. Wells Fargo Bank*, 2007 WL 2229650, at*2 (Bankr. W.D. Tex. 2007).

¹⁸ 1991 WL 277613 (Del. Ch. 1991).

between the corporation and its 98% shareholder.”¹⁹ The court explained that “[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers [i.e., shareholders], but owes its duty to the corporate enterprise.”²⁰ It emphasized the board’s responsibility to “the community of interests,” rather than to a particular constituency, asserting that a board “has an obligation to the community of interest that sustained the corporation, to exercise judgment in an informed, good faith effort to maximize the corporation’s long-term wealth creating capacity.”²¹ In a famous footnote, the court explained that “in managing the business affairs of a solvent corporation in the vicinity of insolvency, circumstances may arise when the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholders (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act.”²²

Courts subsequently diverged on the assessment of duties owed to creditors of a company in the zone of insolvency. Some courts did not accord differential fiduciary status to creditors.²³ Others, however, concluded that creditors attain fiduciary status when a corporation is in the zone of insolvency.²⁴

2. Production Resources Group

The Delaware court in *Production Resources Group, L.L.C. v. NCT Group, Inc.*,²⁵ helped to clarify some of the confusion that had resulted from conflicting interpretations of *Credit Lyonnais*. In that case, a creditor of NCT Group asserted direct

¹⁹ *Id.* at *34.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *34 n.55.

²³ *See, e.g., Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040, 1042 n.2 (Del. Ch. 1997) (“While the board in [insolvency] could have made a different business judgment . . . it violated no duty owed to the preferred in not doing so.”).

²⁴ *See, e.g., In re Global Crossing Ltd.*, 295 B.R. 726, 745 (Bankr. S.D.N.Y. 2003) (“It is well established that when a corporation gets into the zone of insolvency, the fiduciary duties of its board expand from the corporation’s stockholders to its creditors.”).

²⁵ 863 A.2d 772 (Del.Ch. 2004).

claims of fiduciary breach against the allegedly insolvent company. The court held that such claims were “classically derivative” and that the corporation’s insolvency “does not turn such claims into direct creditor claims.”²⁶ Although the company’s insolvency conferred standing to the creditors to assert the claim derivatively, any recovery would inure to the company.²⁷ The court rejected the premise that *Credit Lyonnais* “creat[ed] a new body of creditors’ rights.”²⁸ It explained that there is no “magic dividing line that should signal the end to some, most, or all risk-taking on behalf of stockholders or even on behalf of creditors, who are not homogenous and whose interests may not be served by a board that refuses to undertake any further business activities that involve risk.”²⁹ The court noted the enforcement means that directors can utilize to protect their interests, including strong covenants, liens on assets, negotiated contractual provisions, the implied covenant of good faith and fair dealing, and fraudulent conveyance law.³⁰

3. *Gheewalla*

The Delaware Supreme Court “finally helped to clear what have been for many years very muddy legal waters,”³¹ in *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*.³² In that case, the North America Catholic Education Programming Foundation entered into a licensing agreement with a wireless Internet company, Clearwire, which subsequently went out of business without paying. The Foundation sued Clearwire’s directors for breach of fiduciary duty, based upon their alleged failure to preserve the company’s assets for the benefit of creditors when the company was insolvent or near insolvency.

The *Gheewalla* court held the creditors of a corporation “in the ‘zone of insolvency’ may not assert direct claims for breach of fiduciary duty against its

²⁶ *Id.* at 776.

²⁷ *Id.*

²⁸ *Id.* at 788.

²⁹ *Id.*

³⁰ *Id.* at 790.

³¹ *I.G. Services*, 2007 WL 2229650, at *2.

³² 930 A.2d 92 (Del. 2007).

directors.”³³ Allowing creditors to bring direct claims for breach of fiduciary duty “would create a conflict between those directors’ duty to maximize the value of the insolvent corporation for the benefit of all those having an interest in it, and the newly recognized direct fiduciary duty to individual creditors.”³⁴ Rather, directors of insolvent corporations “must retain the freedom to engage in vigorous, good faith negotiations with individual creditors for the benefit of the corporation.”³⁵

The court emphasized that corporate governance should be geared to the benefit of the corporate collective, notwithstanding the degree of solvency. “When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.”³⁶ Likewise, when a company is insolvent, creditors may pursue derivative claims because they become “the principal constituency injured by any fiduciary breaches that diminish the firm’s value.”³⁷ The court did not address whether creditors of a company in the zone of insolvency have standing to pursue derivative claims.

Despite the inability to pursue direct fiduciary actions, creditors have numerous other means to protect their interests, including negotiated agreements, security instruments, fraud, fraudulent conveyance law, the implied covenant of good faith and fair dealing, and bankruptcy law.³⁸ Courts have relied on *Gheewalla*, in at least one case even recognizing a creditor’s ability to pursue a derivative claim for breach of fiduciary duty when a corporation is in the zone of insolvency, notwithstanding the absence of such a direct analysis by the Delaware court.³⁹

³³ *Id.* at 94.

³⁴ *Id.* at 103.

³⁵ *Id.*

³⁶ *Id.* at 101.

³⁷ *Id.* at 102.

³⁸ *Id.* at 99.

³⁹ *See In re VarTec Telecom, Inc.*, 2007 WL 2872283, at *4 (Bankr. N.D. Tex. 2007) (“Both Texas and Delaware law recognize a [derivative] cause of action for breach of fiduciary duty against the directors or officers of a corporation may be brought by the

D. Balancing Creditor Rights and Corporate Welfare

Permitting creditors to bring derivative rather than direct claims when a company is insolvent or near insolvency strikes an appropriate balance between creditor rights and corporate interests. Restricting the scope of the duty facilitates corporate endeavors to restore financial security without compromising decisions with undue concern for any particular subgroup.

As a result of the dichotomy in rights, officers and directors of insolvent corporations need not “liquidate corporations for the benefit of unsecured creditors, but, can pursue risky restructuring plans in good faith attempts to regain solvency.”⁴⁰ Requiring directors to act for the benefit of specific groups or classes could “result in performance paralysis, even if limited to unsecured creditors.”⁴¹ The interests of priority claims, unsecured bondholders, trade creditors, and general unsecured creditors often conflict, and even creditors of a specific class or group may disagree on their own optimal course of action.⁴² Recognizing a director’s duties to the entire “community of interests”⁴³ reinforces the obligation to the corporate enterprise as a whole.

III. When Does Deepening Insolvency Justify a Claim or Lawsuit?

Corporate management faces challenging strategic decisions when a company confronts financial distress. As the company’s performance deteriorates, trade debt may become increasingly delinquent and interest on outstanding debt may accrue.

creditors of a corporation when the corporation is either insolvent or in the ‘zone’ or ‘vicinity’ of insolvency.”); *see also, e.g., Seidel v. Byron*, 2009 WL 1334490, at *6 (N.D. Ill. 2009) (permitting a derivative claim brought by creditors of an insolvent corporation to proceed); *In Re MS55, Inc.*, 2008 WL 2358699, at *3 (D. Colo. 2008) (holding that bankruptcy trustee could “stand in the creditor’s shoes” and bring derivative action for aiding and abetting breach of fiduciary duties).

⁴⁰ *In re Sec. Asset Cap. Corp.*, 396 B.R. 35, 40 (Bankr. D. Minn. 2008); *see also In re RSL COM PRIMECALL, Inc.*, 2003 WL 22989669, at *8 (Bankr. S.D.N.Y. 2003) (“when managing a corporation ‘in the vicinity of insolvency,’ directors must consider the best interests of the corporation, and not just the interests of either creditors or shareholders alone”).

⁴¹ *In re Sec. Asset Cap. Corp.*, 396 B.R. at 40, n.8.

⁴² *Id.*

⁴³ *Credit Lyonnais*, 1991 WL 277613, at *34 n.55.

Executives may seek bridge financing to facilitate an opportunity to develop strategic alternatives. Nevertheless, the recovery attempts may fail, leaving the company more insolvent and creditors with decreased prospects for recovery.

Plaintiffs have utilized the theory of deepening insolvency to recover damages from third parties, such as directors and officers, whose management or decisions allegedly led to a company's enhanced insolvency. "Deepening insolvency" refers to the prolongation of an insolvent corporation's life through bad debt, causing the dissipation of corporate assets. As a theory of damages, deepening insolvency enables a plaintiff to claim an injury beyond lost equity. As an independent cause of action, it confers liability on a defendant for causing an insolvent company to incur additional debt in an attempt to sustain its life.

A. Rise of the Deepening Insolvency Theory

The deepening insolvency theory originated in part in *Bloor v. Danskere (In re Investors Funding Corporation of N.Y. Securities Litigation)*.⁴⁴ The defendant accounting firm in that case certified financial statements that allegedly overstated income and assets, thereby inducing third parties to continue funding a company actually teetering on the brink of insolvency. The court rejected the contention that the corporation benefited by the prolongation of its existence, explaining that the defendants allegedly "created the false appearance of fiscal salubrity to conceal their past acts of mismanagement, and to raise capital for their further plundering," driving the company "further into deficit and toward its ultimate financial ruin."⁴⁵

The Seventh Circuit in *Schacht v. Brown*⁴⁶ examined deepening insolvency as a theory of damages. In that case, the State Director of Insurance sued the officers and directors of an insurance company for allegedly fraudulently extending the insolvent company's life and causing it to accrue substantially more debt. The court rejected the notion that a corporation cannot "sue to recover damages alleged to have

⁴⁴ 523 F. Supp. 533 (S.D.N.Y. 1980).

⁴⁵ *Id.* at 541.

⁴⁶ 711 F.2d 1343 (7th Cir. 1983).

resulted from the artificial prolongation of an insolvent corporation's life."⁴⁷ It found the premise that extension of corporate existence is always beneficial to "collide[] with common sense," explaining that "the corporate body is ineluctably damaged by the deepening of its insolvency, through increased exposure to creditor liability."⁴⁸ The court reasoned that "acceptance of a rule which would bar a corporation from recovering damages due to the hiding of information concerning its insolvency would create perverse incentives for wrong-doing officers and directors to conceal the true financial condition of the corporation from the corporate body as long as possible."⁴⁹

The theory was accepted as a distinct and viable cause of action under Pennsylvania law in *Official Committee of Unsecured Creditors v. R.F. Lafferty & Company*.⁵⁰ Courts in numerous jurisdictions subsequently recognized the theory.⁵¹ Most courts have required a showing of wrongful conduct, such as fraud, to sustain a claim of deepening insolvency.⁵²

B. Decline of the Deepening Insolvency Theory

The deepening insolvency theory lost considerable force in *Trenwick American Litigation Trust v. Ernst & Young, L.L.P.*⁵³ In that case, a trust created as part

⁴⁷ *Id.* at 1350.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 267 F.3d 340, 351 (3d Cir. 2001).

⁵¹ *See, e.g., Limor v. Buerger (In re Del-Met Corp.)*, 322 B.R. 781, 815 (Bankr. M.D. Tenn. 2005) (stating that a deepening insolvency claim may be valid under Tennessee law); *Tug Liquidation, LLC v. Atwood (In re BuildNet, Inc.)*, 2004 WL 1534296, at *7 (Bankr. M.D.N.C. 2004) (recognizing cause of action under North Carolina law); *Ranalli v. Ferrari (In re Unifi Commc'ns, Inc.)*, 317 B.R. 13, 17 (D. Mass. 2004) (recognizing breach of fiduciary duty claim based on deepening insolvency under Massachusetts law).

⁵² *See, e.g., Seitz v. Detweiler, Hershey & Assocs., P.C. (In re CitX Corp.)*, 448 F.3d 672, 677 (3d Cir. 2006) (holding that negligence cannot sustain a claim of deepening insolvency); *Nisselson v. Ford Motor Co. (In re Monahan Ford Corp. of Flushing)*, 340 B.R. 1, 39 (Bankr. E.D.N.Y. 2006) (recognizing that deepening insolvency claim is premised on breach of a separate duty or an actionable tort). *But see Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1004 (9th Cir. 2005) (suggesting that deepening insolvency does not require intentional conduct).

⁵³ 906 A.2d 168 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Trust v. Billett*, 931 A.2d 438 (Del. 2007)

of a reorganization plan for a wholly owned subsidiary of a parent company sued the directors of the parent and its subsidiary for alleged breach of fiduciary duty through a strategy that rendered both companies insolvent. The court rejected the doctrine as an independent cause of action or as a theory of damages, holding that even when “a firm is insolvent, its directors may, in the appropriate exercise of their business judgment, take action that might, if it does not pan out, result in the firm being painted in a deeper hue of red.”⁵⁴ It explained that the fact that a company’s residual claimants are creditors “does not mean that the directors cannot choose to continue the firm’s operations in the hope that they can expand the inadequate pie such that the firm’s creditors get a greater recovery.”⁵⁵ The court emphasized that “Delaware law imposes no absolute obligation on the board of a company that is unable to pay its bills to cease operations and to liquidate.”⁵⁶

The *Trenwick* court noted that plaintiffs can assert existing equitable causes of action for fraud and breach of fiduciary duty to hold accountable directors of insolvent corporations. It reasoned that a plaintiff unable to state such claims “may not cure that deficiency simply by alleging that the corporation became more insolvent as a result of the failed strategy.”⁵⁷

Several courts recently have rejected deepening insolvency as a theory of damages. The Third Circuit in *In re CitX* held that deepening insolvency as a measure of harm improperly assesses actions “through hindsight bias.”⁵⁸ Likewise, in *In re SI Restructuring, Inc.*,⁵⁹ the Fifth Circuit held that deepening insolvency is not a valid theory of damages and rejected the proposition that the directors’ loan to the company

⁵⁴ *Id.* at 174.

⁵⁵ *Id.*

⁵⁶ *Id.* at 204.

⁵⁷ *Id.* at 205; *see also Bondi v. Bank of America Corp. (In re Parmalat Secs. Litig.)*, 383 F.Supp.2d 587, 601-02 (S.D.N.Y. 2005) (“If officers and directors can be shown to have breached their fiduciary duties by deepening a corporation’s insolvency . . . that injury is compensable on a claim for breach of fiduciary duty.”); *Alberts v. Tuft (In re Greater S.E. Cmty. Hosp. Corp.)*, 333 B.R. 506, 517 (Bankr. D.D.C. 2005) (declining to recognize new cause of action because “established ones cover the same ground”).

⁵⁸ 448 F.3d at 678.

⁵⁹ 532 F.3d 355 (5th Cir. 2008).

caused harm by spiraling the company into further debt.⁶⁰ Nevertheless, the doctrine's force as a theory of damages still maintains traction.⁶¹

C. Disadvantages of the Deepening Insolvency Theory

The rejection of the deepening insolvency theory would protect companies as well as their officers and directors. The doctrine's amorphous and expansive reach may produce a chilling effect that prevents bona fide efforts to sustain a company. The prospect of liability could discourage corporate management from pursuing restructuring efforts that ultimately could rescue an economically distressed company. The upshot could become an artificial preference for liquidations over restructuring, notwithstanding the best interests of a company. Plaintiffs have numerous alternative legal means to assert claims for wrongful or fraudulent conduct and need not add deepening insolvency to the litigation arsenal.

Deepening insolvency as a theory of damages produces inconsistent results, erecting arbitrary distinctions between the damage calculation for a company that is insolvent and then rendered more insolvent by wrongful conduct and a company that begins solvent but is rendered insolvent by the same conduct. It imports hindsight into the damages calculation, recalibrating the risks of a transaction through 20/20 vision, and requires decision-makers to become the guarantors of success. The prospect of damages, measured by conduct's impact on the solvency of a company teetering on bankruptcy, could thwart bona fide means to protect a company in financial straits.

IV. Where Can and Will an Insolvent Company Pursue the Claim or Suit?

The determination of the venue for a lawsuit is a tactical decision that can greatly impact the results of a case. The issue can become particularly significant in

⁶⁰ *Id.* at 363-64. The speaker's firm represented the defendants-appellants on appeal.

⁶¹ *See, e.g., In re Greater S.E. Cmty. Hosp. I*, 353 B.R. 324, 338 (Bankr. D.D.C. 2006) ("Unless and until this court is told differently by a higher court in its own circuit, deepening insolvency will remain a viable theory of damages in this jurisdiction regardless of whether the injury occurred as a result of negligence or fraud."); *In re The Brown Schools*, 386 B.R. 37, 48 (Bankr. D. Del. 2008) (recognizing deepening insolvency as a valid form of damages). *But see Joseph v. Frank, et al. (In re Troll Comm., LLC)*, 385 B.R. 110, 122 (Bankr. D. Del. 2008) (rejecting deepening insolvency as a valid cause of action or theory of damages under Delaware law).

bankruptcy where a defendant may be haled into a distant forum for an adversary proceeding that has no relationship to the venue other than the location of the main bankruptcy case itself. Defendants traditionally have been hamstrung by the “home court presumption” accorded to cases brought in the district where the bankruptcy is pending. However, a recent watershed case from the Fifth Circuit could provide ammunition to defendants attempting to evade a remote venue that houses the underlying bankruptcy case.

A. Statutory Guidance

A chapter 11 bankruptcy case commences with the filing of a petition in the district court. The venue statute permits a chapter 11 case, other than a case ancillary to foreign proceedings, to be initiated in the district court in which the domicile, residence, principal place of business, or principal assets of the debtor have been located for the 180 days immediately preceding the commencement of the case, or for a longer portion of that period during which the same were located in another district; or where a chapter 11 case concerning the debtor’s affiliate, general partner, or partnership is pending.⁶² A debtor is authorized to bring an adversary proceeding in the district court in which the bankruptcy is pending.⁶³ Under Federal Rule of Bankruptcy Procedure 7087, upon motion, “the court may transfer an adversary proceeding or any part thereof to another district pursuant to 28 U.S.C. § 1412.” Under section 1412, a court is authorized to “transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties.”⁶⁴ The statute is phrased in the disjunctive, providing independent authority to each prong of the “interest of justice” and “convenience of parties” analysis.⁶⁵ “[T]ransferability pursuant to section 1412 is an either-or test, not a two-fold one.”⁶⁶

⁶² 28 U.S.C. § 1408.

⁶³ 28 U.S.C. § 1409(a).

⁶⁴ 28 U.S.C. § 1412.

⁶⁵ Courts traditionally have considered the following “interest of justice” factors: (1) the location of the debtor’s bankruptcy case; (2) whether the transfer would promote the economic and efficient administration of the bankruptcy estate; (3) whether the interests of judicial economy would be served by the transfer; (4) whether the parties would receive a fair trial in each of the possible venues; (5) whether either forum has an interest in having the controversy decided within its

B. The Home Court Presumption

Despite the permissive language of the venue statutes, the primacy of a bankruptcy venue has generally controlled. Under the “home court presumption,” a court in which the underlying bankruptcy case is pending “is presumed to be the appropriate district for hearing and determination of a proceeding in bankruptcy.”⁶⁷ There is a “strong presumption in favor of maintaining venue where the bankruptcy case is pending.”⁶⁸ Courts also recognize a “strong presumption in favor of the plaintiff’s choice of forum.”⁶⁹ Most chapter 5 adversary proceedings accordingly have been litigated in the home bankruptcy court.⁷⁰

C. Changing Landscape under *Volkswagen*

The Fifth Circuit in its landmark *en banc* ruling in *In re Volkswagen of America, Inc.*⁷¹ held that a plaintiff’s choice of venue does not control. The case could

borders; (6) whether the enforceability of any judgment obtained would be affected by the transfer; and (7) whether the plaintiff’s original choice of forum should be disturbed. *In re Enron Corp.*, 317 B.R. 629, 638-39 (Bankr. S.D.N.Y. 2004); *Norton v. Encompass Servs. Corp.*, 301 B.R. 836, 839 (S.D. Tex. 2003). Courts also have considered the following “convenience of parties” factors: (1) the location of the parties; (2) the ease of access to necessary proof; (3) the convenience of the witnesses; (4) the convenience of the parties as indicated by their relative physical and financial condition; (5) the availability of subpoena power for unwilling witnesses; and (6) the expense of obtaining willing witnesses. *Id.*

⁶⁶ *In re Enron Corp.*, 317 B.R. at 637.

⁶⁷ *In re Manville Forest Prods. Corp.*, 896 F.2d 1384, 1391 (2d Cir. 1990).

⁶⁸ *In re Terry Mfg. Co. Inc.*, 323 B.R. 507, 509 (Bankr. M.D. Ala. 2005).

⁶⁹ *Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman*, 306 B.R. 746, 750 (S.D.N.Y. 2004).

⁷⁰ A survey of cases from January 2000 to December 2007 found that motions to transfer venue of proceedings related to the bankruptcy case from the home court to another venue were denied at a ratio of nearly two-to-one, whereas motions to transfer venue of proceedings related to the bankruptcy case from an outside venue to the home court were granted at a two-to-one ratio. J. Gardina, “The Bankruptcy of Due Process: Nationwide Service of Process, Personal Jurisdiction and the Bankruptcy Code,” 16 *Am. Bankr. Inst. L. Rev.* 37, 59 (2008). A proceeding is related to a bankruptcy case “if the outcome could alter the debtor’s rights, liabilities, options, or freedom of action in any way, thereby impacting on the handling and administration of the bankruptcy estate.” *Gardner v. United States*, 913 F.2d 1515, 1518 (10th Cir. 1990).

⁷¹ 545 F.3d 304 (5th Cir. 2008).

have substantial implications for defendants attempting to transfer venue in a bankruptcy case.

Although the case involved a car accident in Dallas, where the plaintiffs lived, witnesses to the accident resided, the car was bought, and the wreckage and other evidence were located, the plaintiffs chose to sue in Marshall, Texas. The Court of Appeals reversed the district court's denial of Volkswagen's motion to transfer venue to Dallas, finding that the district court "clearly abused its discretion" by "misconstruing the weight of the plaintiffs' choice of venue" and "glossing over the fact" that the allegations concerned a different venue.⁷² Giving "inordinate weight" to the plaintiff's venue selection, the district court had required the movant to show that the balance of convenience and justice "substantially" weighed in favor of transfer, importing a standard from the *forum non conveniens* analysis, when the proper standard is that the party seeking transfer merely show "good cause."⁷³

Noting that lower courts have applied venue transfer tests "with too little regard for consistency of outcomes,"⁷⁴ the Fifth Circuit set out four controlling "private interest" and "public interest" factors. The private interest factors are the relative ease of access to sources of proof; the availability of compulsory process to secure the attendance of witnesses; the cost of attendance for willing witnesses; and all other practical problems that make trial of a case easy, expeditious, and inexpensive.⁷⁵ The public interest factors are the administrative difficulties flowing from court congestion; the local interest in having localized interests decided at home; the familiarity of the forum with the law that will govern the case; and the avoidance of unnecessary problems of conflict of laws or in the application of foreign law.⁷⁶ Where the documents and physical evidence about the accident were 150 miles away, relative access to sources of proof was a "meaningful factor" that weighed in favor of transfer.⁷⁷ Criticizing the district court's assumption that

⁷² *Id.* at 309, 318.

⁷³ *Id.* at 314-15.

⁷⁴ *Id.* at 319.

⁷⁵ *Id.* at 315.

⁷⁶ *Id.*

⁷⁷ *Id.* at 316.

advances in copying technology and information storage rendered the factor neutral, the Fifth Circuit counseled that the fact that “access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous.”⁷⁸

The location of witnesses was a core element of the *Volkswagen* analysis. Two plaintiffs and a defendant lived in Dallas (155 miles from the Marshall venue), and a third plaintiff lived in Kansas. All third-party witnesses resided more than 100 miles away. The Fifth Circuit rejected the district court’s rationale that it could simply deny a motion to quash and compel the attendance of unwilling witnesses who resided outside its subpoena power.⁷⁹ The court imposed a 100-mile rule for witnesses outside the district, stating that when the distance to the existing venue exceeds 100 miles, “the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.”⁸⁰ The additional distance and travel time dictate that witnesses “not only suffer monetary costs, but also the personal costs associated with being away from work, family, and community.”⁸¹

The *Volkswagen* court also emphasized consideration of “those actually affected -- directly and indirectly -- by the controversies and events giving rise to a case.”⁸² The residents of an existing venue may “not in any relevant way [be] connected to the events that gave rise to [a] suit,” whereas the residents of a proposed venue may “have extensive connections with the events that gave rise to [a] suit.”⁸³ The Fifth Circuit criticized the district court’s assumption that the citizens of Marshall would have an interest in the product liability case since the product was available in Marshall,

⁷⁸ *Id.*

⁷⁹ *Id.* A court has no authority to compel the attendance of third-party witnesses who live “more than 100 miles from where that person resides, is employed, or regularly transacts business.” Fed. R. Civ. P. 45(c)(3)(A)(ii). This 100-mile rule applies to bankruptcy cases to limit the power of a subpoena. Fed. R. Bankr. P. 9016.

⁸⁰ 545 F.3d at 317.

⁸¹ *Id.*

⁸² *Id.* at 318.

⁸³ *Id.*

finding that such a lenient analysis “stretches logic in a manner that eviscerates the public interest that this factor attempts to capture.”⁸⁴

D. Volkswagen’s Applicability to Adversary Proceedings

Volkswagen’s rationale should apply fully to adversary proceedings brought in bankruptcy. The statutory analysis is nearly identical, and the same practical considerations regarding the interest of justice and convenience of parties apply. Although bankruptcy cases involve additional consideration of administration of the estate, adversary proceedings often have a minimal impact on the underlying bankruptcy case. In bankruptcy, where the venue statute accords no consideration to defendants, forum shopping may be rampant, forcing defendants to faraway venues that have no connection to the dispute.

1. Statutory Parallels

The factors cited in *Volkswagen*, which was decided under 28 U.S.C. § 1404, also apply under § 1412. “The statutory language of sections 1404 and 1412 are similar and courts apply the same basic factors when considering motions to transfer under either section.”⁸⁵

The pronounced difference is in the venue provisions that dictate a plaintiff’s choice of forum. The federal venue provisions generally predicate venue on the location of the defendant or the site of the actions giving rise to the claim.⁸⁶ However, the Bankruptcy Code omits any consideration of the defendant from the venue analysis.⁸⁷ Given the lack of any statutory accommodation to defendants, the ability to

⁸⁴ *Id.*

⁸⁵ *In re Holmes*, 306 B.R. 11, 14 (Bankr. M.D. Ga. 2004); *accord In re Harwell*, 381 B.R. 885, 891 n.4 (Bankr. D. Colo. 2008) (“in reality, the language of the statutes and the factors to be considered in analyzing whether transfer is warranted are nearly identical”). Section 1404 provides that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C. § 1404(a).

⁸⁶ *See* 28 U.S.C. § 1391(a) & (b).

⁸⁷ *See* 28 U.S.C. § 1409(a) (“[A] proceeding arising under title 11 or arising in or related to a case under title 11 may be commenced in the district court in which such case is pending.”).

transfer venue may be even more important in the bankruptcy context than in federal question or diversity cases.

2. *Commonwealth Oil*

In rebutting the significance of *Volkswagen*, debtors might raise *In re Commonwealth Oil Refining Company, Inc.*⁸⁸ to argue that the most important consideration is whether the requested transfer would promote the economic and efficient administration of the bankruptcy estate. However, the case's relevance is questionable at best. In *Commonwealth*, the court considered whether to transfer venue of a Chapter 11 case, not a single adversary suit.

Commonwealth also involved the interpretation of former Bankruptcy Rule 116, which has since been replaced. Former Rule 116(b)(1) stated that “the court may after hearing on notice to the petitioner or petitioners and such other persons as it may direct in the interest of justice and for the convenience of the parties, transfer the case to another district.”⁸⁹ Section 1412 provides that a court “may transfer a case or proceeding” to another district “in the interest of justice or for the convenience of the parties.”⁹⁰ This change expanded the transfer powers of the bankruptcy court.

Cases decided before the enactment of section 1412 in 1984 have limited value. The prior rule “employed the conjunctive language and, therefore, a heightened standard.”⁹¹ For that reason, the “change in language” under section 1412 “should result in a greater willingness to transfer cases,”⁹² and the “helpfulness [of *Commonwealth*]” -- and other like cases -- “is limited.”⁹³

3. *Forum Shopping*

Given the ability to file a suit in a preferred district notwithstanding the complete absence of connection between the transactions or assets and the jurisdiction,

⁸⁸ 596 F.2d 1239 (5th Cir. 1979).

⁸⁹ Fed. R. Bankr. P. 116(b)(1) (repealed) (emphases added).

⁹⁰ 28 U.S.C. § 1412 (emphasis added).

⁹¹ *In re Shorts Auto Parts of Warren, Inc.*, 136 B.R. 30, 35 (Bankr. N.D.N.Y. 1991).

⁹² 3 W. Norton, *Norton Bankr. Law & Prac.* § 140:2 at 140-8.

⁹³ *Shorts Auto Parts*, 136 B.R. at 35.

forum shopping becomes a real concern (and inescapable conclusion). The “wide options” of venue available to a debtor “seed potentiality for abuse in the nature of forum shopping.”⁹⁴ A leading bankruptcy treatise has noted that “Section 1408(1) has been used to permit the most blatant form of forum shopping.”⁹⁵ However, “forum shopping is permitted by the literal language of the statute.”⁹⁶ Thus forum shopping by debtors has been “rampant for decades.”⁹⁷

When a debtor sues an out-of-state defendant regarding out-of-state conduct and out-of-state assets and the case’s only connection to the home bankruptcy venue is the main bankruptcy itself, the defendant has a strong argument for transfer under *Volkswagen*. A debtor may emphasize the ability to efficiently administer the estate, the time and effort already expended by the bankruptcy court, and the multiplicity of adversary cases, but retaining a case on such bases alone could preclude the transfer of any proceeding and effectively negate the venue transfer statute. Moreover, an adversary proceeding often has little impact on the administration of the bankruptcy estate. Particularly since venue transfer motions are typically filed near the commencement of a case, a bankruptcy judge usually will have expended few resources on consideration of the case. That a debtor is pursuing suits against several defendants does not shield it from traditional venue requirements; a litigious debtor simply merits no sympathy for the costs of litigation.

Several courts have recognized the propriety of transferring venue to districts outside the home bankruptcy court. One explained that the need “to centralize litigation involving a debtor in a single forum is at its minimum where claims by, rather than against, the debtor are involved.”⁹⁸ Similarly, another found that “[w]hen the

⁹⁴ *In re Pinehaven Assocs.*, 132 B.R. 982, 987 (Bankr. E.D.N.Y. 1991).

⁹⁵ 1 COLLIER ON BANKRUPTCY ¶ 4.01[2][b] (Lawrence P. King ed., 15th ed. revised 2008).

⁹⁶ *Id.* at ¶ 4.01[3]. As one court noted, in bankruptcy, the tactic of forum shopping too often “is masked by pious pronouncements about the debtor’s ‘right’ to select the most advantageous of several possible forums, in order to advance the prospects for reorganization. That rationale, however, should in the usual instance, be taken with several grains of salt.” *In re Abacus Broad. Corp.*, 154 B.R. 682, 686-87 (W.D. Tex. 1993).

⁹⁷ Lynn LoPucki, “Bankruptcy Forum Shopping,” 30 *Nat’l L. J.* 26 (Feb. 11, 2008).

⁹⁸ *In re N.Y. Trap Rock Corp.*, 158 B.R. 574, 576 (S.D.N.Y. 1993).

conduct and events giving rise to the cause of action did not take place in the plaintiff's selected forum, the plaintiff's preference has minimal value, even if it is its home forum."⁹⁹ And "where the plaintiff chooses a forum which is neither his home nor the situs where any of the operative facts of the underlying action is based, his forum selection is entitled to less weight."¹⁰⁰ While it may be "economically efficient for those in control of a bankruptcy case to administer it in a location that handicaps parties in interest, the integrity of the bankruptcy process requires that the natural enemies have reasonable access to the court."¹⁰¹

A meaningful consideration of the multi-factor analysis in *Volkswagen*, coupled by recognition that the plaintiff's selection of venue does not control, could thwart the debtor-choice stronghold. Assessment of the location of the assets that are the subject of the dispute as well as the convenience to and subpoena power over witnesses, among the other private and public interest factors, could compel the conclusion that a defendant's ability to mount an effective defense warrants transfer. A case and defendant's connection to the plaintiff's chosen venue may be even more attenuated in bankruptcy than in traditional civil suits, providing even greater ammunition to the proposition that a plaintiff's choice of venue should not dominate.

4. *Extension of Volkswagen*

Although no court has yet applied *Volkswagen* to transfer a bankruptcy case, courts have construed the opinion expansively. In a patent case, the Federal Circuit emphasized that the *Volkswagen* "precedent clearly forbids treating the plaintiff's choice of venue as a distinct factor" in the venue transfer analysis.¹⁰² Undermining the Eastern District of Texas as the "IP Rocket Docket," the court concluded that the denial of a motion to transfer venue to transfer the case to the Southern District of Ohio was a

⁹⁹ *Kalamazoo Realty Ven. Ltd. P'ship v. Blockbuster Enter. Corp.*, 249 B.R. 879, 889 (N.D. Ill. 2000) (cites and quotes omitted).

¹⁰⁰ *Krystal Cadillac-Oldsmobile-GMC Truck, Inc. v. Gen. Motors Corp.*, 232 B.R. 622, 628-29 (E.D. Pa. 1999).

¹⁰¹ *In re Donald*, 328 B.R. 192, 204 (9th Cir. 2005).

¹⁰² *In re TS Tech USA Corp.*, 551 F.3d 1315, 1320 (Fed. Cir. 2008).

“patently erroneous result.”¹⁰³ Nevertheless, parties have managed to reignite the Eastern District of Texas as the hub of patent cases by creating exceptions to *Volkswagen* for cases where evidence and witnesses are dispersed throughout the country.¹⁰⁴ Courts in other jurisdictions have not uniformly followed *Volkswagen*.¹⁰⁵

Volkswagen provides promising new ground for defendants attempting to transfer adversary proceedings to a different district. The prevailing presumption that the debtor’s choice controls rewards litigation tactics that lessen or foreclose the ability of an adversary to defend itself, its major asset, and its stakeholders and employees.

V. Why Does the Insolvency Zone Matter to Mining Companies?

The recent financial crisis has had a marked impact on the metals and commodities market. During the 12 months that ended in February 2009, U.S. industrial output fell 11.2%, the largest annual decline since 1975.¹⁰⁶ The financial meltdown and credit crisis have precipitated a plunge in sales of cars, houses, airplanes, and computers.¹⁰⁷ Economic projections vary, spawning continued uncertainty. J.P. Morgan Securities commodity strategists in London predicted a \$2.09 world copper price average in 2010, based on a forecast that global gross domestic product will increase at 2.6% next year, which exceeds the recent 1.9% growth projection by the International Monetary Fund.¹⁰⁸

The vicissitudes in commodities prices could cast companies into bankruptcy and draw unwitting business partners into lawsuits. As an example, the

¹⁰³ *Id.* at 1321-22.

¹⁰⁴ *See, e.g., Novartis Vaccines and Diagnostics, Inc. v. Hoffman-La Roche Inc.*, 597 F.Supp.2d 706, 711, 713 (E.D.Tex. 2009) (refusing to transfer venue, noting that physical evidence was not “confined to a limited region” and that “the witnesses are decentralized”).

¹⁰⁵ *See, e.g., Ward v. Cisco Sys., Inc.*, 2008 WL 5101996, at *2 (W.D. Ark. 2008) (denying a motion for reconsideration of an order denying transfer, finding that Volkswagen does not overrule Eighth Circuit precedent according considerable deference to a plaintiff’s choice of venue).

¹⁰⁶ B. Willis, “U.S. Indus. Prod. Fell 1.4% in February,” *Bloomberg.com* (Mar. 16, 2009).

¹⁰⁷ *Id.*

¹⁰⁸ T. Stundza, “J.P. Morgan Says Copper Prices Heading Up in 2010,” *Purchasing* (May 21, 2009).

recent ASARCO litigation, prompted by the company's August 9, 2005 bankruptcy petition, involved the filing of more than 200 adversary proceedings and billions of dollars in settlement and judgments, many pertaining to alleged fraudulent transfers.¹⁰⁹

Companies that are not themselves experiencing financial difficulties must still be wary of fraudulent transfer laws, which enable debtors to recover property, or the value thereof, for transfers that occurred prior to a bankruptcy filing. Under federal bankruptcy law, a trustee can bring a fraudulent transfer action for sales that occurred up to two years before the bankruptcy petition filing.¹¹⁰ Under state fraudulent transfer laws, which are incorporated into the federal recovery scheme, the applicable time period can be even longer.¹¹¹ A trustee can bring an actual fraud action for any transfers that were made with intent to hinder, delay, or defraud creditors.¹¹² Even in the absence of any actual fraud, a trustee can recover for the estate from an unwitting buyer property, or the value thereof, that a debtor sold for less than its reasonably equivalent value at a time it was insolvent or about to become insolvent.¹¹³ Transferees should be therefore cautious when purchasing assets from a company whose financial status is suspect. To protect themselves from potential liability, transferees should refrain from purchasing under circumstances indicative of a fire sale. They should also create a record of the

¹⁰⁹ The speaker's firm represented several defendants in this case.

¹¹⁰ See 11 U.S.C. § 548 (allowing federal actions for transfers made up to two years prior to a bankruptcy filing).

¹¹¹ See 11 U.S.C. ¶ 544(b)(1) (incorporating state fraudulent conveyance law into bankruptcy proceedings); 11 U.S.C. § 550(a) (permitting the recovery of property avoided under section 544); see also, e.g., A.R.S. § 44-1009 (permitting constructive fraudulent transfer claims under Arizona law to be brought within four years of the transfer).

¹¹² 11 U.S.C. § 548(a)(1)(A).

¹¹³ 11 U.S.C. § 548(a)(1)(B). Specifically, a trustee may avoid any transfer if the debtor voluntarily or involuntarily "received less than a reasonably equivalent value in exchange for such transfer or obligation; and (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; (II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business."

parties' arm's-length negotiations and the use of any third-party brokers or advisers that attest to the fairness of the transaction.¹¹⁴

During these periods of economic turmoil, mining companies may face considerable hurdles in litigation. Issues regarding creditors' rights, directors' breaches of fiduciary duties, venue, and solvency have had profound impacts on litigants and asset recovery and will continue to predominate in bankruptcy proceedings.

VI. Conclusion

Firms may hover near insolvency for protracted periods of time and should understand the legal implications in order to best protect their rights and interests. Although the creditor may not be in a fiduciary position in all cases, a company experiencing deepening liquidity could insulate itself from potential liability and bolster application of the business judgment rule by creating a record of corporate decisionmaking that demonstrates that it considered creditor interests in the process.

The prospect of litigation may create reluctance to pursue risky strategies in financially precarious conditions, but courts have reduced potential liability through a clarification of the duties owed to the corporate enterprise and a gradual rejection of the deepening insolvency theory. When a company does enter bankruptcy and initiate adversary proceedings in a strategically advantageous forum, defendants can utilize the landmark *Volkswagen* decision to facilitate a transfer to a more convenient venue. An understanding of the core legal issues will help a company to best navigate the minefields of the insolvency zone.

¹¹⁴ Courts look “to see if what the debtor received was ‘in the range of a reasonable measure of the value’ of what the debtor transferred.” *In re Viscount Air Servs., Inc.*, 232 B.R. 416, 435 (Bankr. D. Ariz. 1998) (cite omitted). Also probative of reasonably equivalent value is “that the transaction had been a voluntary one between two parties of mental competency trading at arm’s length without any fraud or improper action by either party.” *In re Morris Commc’ns NC, Inc.*, 914 F.2d 458, 465 (4th Cir. 1990). *See also, e.g., In re WCC Holding Corp.*, 171 B.R. 972, 982 (Bankr. N.D. Tex. 1994) (finding reasonably equivalent value in an arm’s-length sale between a willing buyer and a willing seller).