ROUNDTABLE

Bankruptcy litigation

REPRINTED FROM
JULY 2013 ISSUE

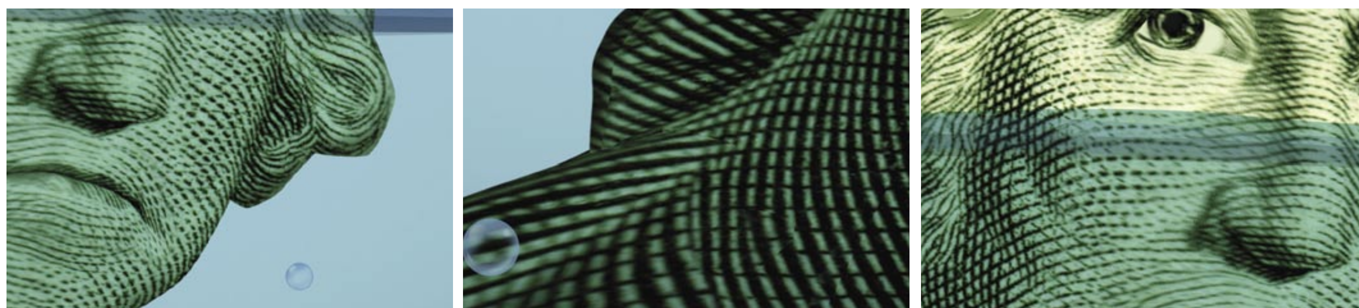
© 2013 Financier Worldwide Limited.
Permission to use this reprint has been granted by the publisher.

FINANCIER WORLDWIDE corporatefinanceintelligence

ROUNDTABLE

BANKRUPTCY LITIGATION

Bankruptcy matters now come loaded with complex litigation and investigatory issues, and recent court rulings have had a profound impact on the process – particularly *Stern V. Marshall* in the US. In addition, creditors are forever looking for ways to exert control over process, and statutory and ad hoc committees regularly work together using litigation as a bargaining tool. With full-scale litigation now an enormously expensive process, firms must take a more creative approach to finding workable solutions.



THE PANELLISTS

Rafael X. Zahralddin
Shareholder, Elliott Greenleaf
T: +1 (302) 545 2888
E: rxza@elliottgreenleaf.com
www.elliottgreenleaf.com

Rafael X. Zahralddin-Aravena is the chair of Elliott Greenleaf's Commercial Bankruptcy and Restructuring practice and a founding shareholder of the Delaware office. He concentrates his practice in the areas of reorganisation, creditors' rights, commercial litigation, entity formation, and international and comparative law. Mr Zahralddin has represented multiple official creditors' committees in some of the largest reorganisations in the US. He has significant experience in representing individual creditors and his debtor representations have ranged from small businesses to publicly traded companies.

James H.M. Sprayregen
Partner, Kirkland & Ellis LLP
T: +1 (312) 862 2481
E: james.sprayregen@kirkland.com
www.kirkland.com

James H.M. Sprayregen is recognised as one of the outstanding restructuring lawyers in the US and around the world, and has led some of the most complex Chapter 11 filings in recent history. He has extensive experience representing major US and international companies in and out of court as well as buyers and sellers of assets in distressed situations. He has experience advising boards of directors, and representing domestic and international debtors and creditors in workout, insolvency, restructuring and bankruptcy matters.

Paul Hessler
Partner, Linklaters LLP
T: +1 (212) 903 9132
E: paul.hessler@linklaters.com
www.linklaters.com

Paul Hessler is a partner in the Litigation and Restructuring & Insolvency practices at Linklaters LLP. He has extensive experience in bankruptcy and other financial distress litigation, and has represented debtors, creditors, and acquirers in domestic and cross-border bankruptcy cases. He recently advised Lehman Brothers International (Europe) (in administration) in the SIPA liquidation of Lehman Brothers, Inc. and DISH Network and its subsidiary Blockbuster L.L.C. in the acquisition of the assets of Blockbuster Inc.

Christopher Ward
Shareholder, Polsinelli PC
T: +1 (302) 252 0922
E: cward@polsinelli.com
www.polsinelli.com

Christopher A. Ward is co-chair of the Bankruptcy and Financial Restructuring practice group, as well as managing shareholder of Polsinelli's Wilmington, Delaware office. Mr Ward focuses his practice on corporate bankruptcy, financial restructuring, bankruptcy litigation, out-of-court workouts and debtor in possession financing. He has represented a vast array of clients, including numerous Chapter 11 debtors, creditors' committees, liquidating and litigation trusts, asset purchasers, institutional lenders, private equity firms, and both plaintiffs and defendants in adversary proceedings.

Daniel Hayek
Partner, Prager Dreifuss
T: +41 44 254 5555
E: daniel.hayek@prager-dreifuss.com
www.prager-dreifuss.com

Daniel Hayek, LL.M. is a member of the management committee and head of Prager Dreifuss' Corporate and M&A team. He specialises in mergers and acquisitions (mainly strategic buyers), corporate finance, banking, restructuring and bankruptcy as well as corporate matters. He advises business clients in all types of domestic and cross-border transactions. He also represents creditors (some of which are banks, hedge funds or other financial institutions) in insolvency and restructuring proceedings.

Anthony W. Clark
Partner, Skadden, Arps, Slate, Meagher & Flom LLP
T: +1 (302) 651 3080
E: anthony.clark@skadden.com
www.skadden.com

Anthony W. Clark heads Skadden's corporate restructuring and bankruptcy litigation practice in Wilmington, Del., and represents debtors, creditors and acquirers. He also handles corporate, securities and general litigation matters. Mr Clark has been selected for inclusion in 'Chambers USA: America's Leading Lawyers for Business' since 2003 and 'The Best Lawyers in America' since 2001. He also was named Best Lawyers' 2012 Wilmington-DE Litigation – Bankruptcy Lawyer of the Year.

FW: In your experience, what types of bankruptcy litigation have been prevalent in the past year? Have any notable cases attracted your attention?

Zahralddin: Fraudulent conveyances have figured prominently in terms of complexity and because they have been important litigation tools in large law firm bankruptcies, Ponzi and other related fraud cases, and as a means of recovery in many high stakes unsecured debt recoveries. Fraudulent conveyances and the treatment of fraudulent transfers under the Supreme Court's *Stern v. Marshall* Decision has had a wide ranging impact on bankruptcy litigation. While the *Marshall* case had some very interesting aspects at the time, there was little indication the case would, over a decade later, have the impact that it has had on bankruptcy litigation. *Stern* continues to define and refine the powers of the Bankruptcy Court. The Ninth Circuit decision in *Executive Benefits Insurance Agency v. Arkison (In re Bellingham Insurance Agency, Inc.)* is probably the most significant case in recent memory addressing *Stern* issues. The Ninth Circuit is the first circuit court of appeals to address whether a bankruptcy court has the constitutional authority to enter a final order in fraudulent conveyance litigation in the absence of the defendant filing a proof of claim.

Sprayregen: Parties litigated over several interesting issues during the past year. Moreover, many litigated cases involved active participation by the US trustee. Litigation regarding make-whole premiums arose in both *School Specialty* and *AMR*, but only the *School Specialty* court allowed the premium. The long-term impact of that decision remains to be seen. On the venue front, in *Houghton-Mifflin* the UST successfully transferred venue from New York to Massachusetts for post-confirmation issues, while in *Patriot Coal* the UST and unions successfully transferred venue from New York to Missouri. The companies in *Patriot Coal, Residential Capital, Kodak, LightSquared,* and *Hawker Beechcraft* either had their motion denied, withdrew certain insider bonus initiatives, or substantially revised such bonus initiatives after the UST objected that such initiatives were disguised retention plans. In each of these cases, the court approved the companies' non-insider, rank-and-file bonus plans over the UST's objections.

Hessler: There have been a number of key areas of bankruptcy litigation in the past year or so, but of particular importance, especially in light of the current economic situation in Europe and elsewhere, are recent decisions in the Chapter 15 sphere. Among the key recent decisions have been the Second Circuit's recent COMI decision in *In re Fairfield Sentry Ltd.*, which is the first Second Circuit decision to address recognition issues under Chapter 15 and which held that a Chapter 15 debtor's COMI should be determined as of the time of filing the Chapter 15 petition, not where it might have been throughout the debtor's operational history; the Fifth Circuit's recent decision in *In re Vitro, S.A.B. de C.V.*, in which the court refused to recognise a non-consensual foreign reorganisation that contained third party releases because such relief was not available under section 1521 of the Bankruptcy Code and the foreign representative had not shown extraordinary circumstances to justify recognition under section 1507 of the Bankruptcy Code; and the Delaware Bankruptcy Court decision in *In re Elpida Memory, Inc.*, which clarified the standard that should be applied in assessing asset sales under Chapter 15 by holding that the sound business judgment standard of Section 363 of the Bankruptcy Code applied to the sale of assets in the US under Chapter 15. We expect continued cross-border bankruptcy activity and related litigation and thus further developments in this area. We have also seen recent significant decisions in the areas of make-whole premiums, and bankruptcy and IP litigation.

Ward: Over the past year the trend of 'bet the company' litigation has continued, if not increased. As more high profile bankruptcy cases are filed with creditors, both secured and unsecured, being out of the money, the only means to recovery is through litigation proceeds. As a result, you see more big ticket director and officer litigation related to breach of fiduciary duties (D&O litigation), as well as the continuance of mass preference runs to recover funds for the bankruptcy estate. MF Global is the perfect example of high profile, risky litigation. In MF Global, the trustee has brought D&O litigation related to breach of the duty of care and other claims under corporate law. These are difficult claims to prove and are typically tied to a catastrophic event at the company. While the risk is high, so is the reward as many large, high profile companies have more than adequate insurance to cover claims against the officers and directors.

Hayek: Recently, bankruptcy litigation in Switzerland has been fairly finance-based. Switzerland was shaken by the insolvency of its national airline Swissair in 2003, which led to the largest insolvency proceedings in Swiss history. Additionally, due to the financial crisis after the collapse of Lehman Brothers, banks and financial institutions find themselves in the public eye. Consequently, litigation concerning aircraft lease agreements as well as failed syndicated loans and over-the-counter derivatives contracts – ISDA Master Agreements – are increasingly in the spotlight. Another notable change is the increased use of avoidance claims – fraudulent conveyance claims – by bankruptcy administrators. Bankruptcy administrators have successfully claimed back considerable amounts paid by debtors shortly before bankruptcy by means of clawback actions and have also instituted directors' liabilities claims, though to a lesser degree of success.

Clark: Especially in situations where distressed debt traders have bought up substantial positions in the unsecured debt, we see a fair amount of intercreditor litigation concerning priority and recharacterisation of secured debt, validity of liens, valuation issues, and so on. Also, as has been true for some time now, where a debtor's bankruptcy filing was preceded, sometimes by many years, by a significant recapitalisation or refinancing transaction, fraudulent transfer litigation continues to be popular with unsecured creditors' committees and post-confirmation litigation trusts. With respect to fraudulent transfer litigation, the recent Florida bankruptcy case of homebuilder TOUSA, Inc. is worth noting. In a much criticised decision, the bankruptcy court ruled for the creditors, ordered the old lenders to disgorge the settlement payment they had received, and voided the new lenders' liens on the subsidiaries' assets. The banks appealed to the district court, which reversed and held for the lenders, and the creditors' committee then appealed to the United States Court of Appeals for the Eleventh Circuit, which reversed the district court and reinstated the bankruptcy court's decision in favour of the unsecured creditors.

FW: What legal developments have emerged in the past 12-18 months? What impact have these had on the bankruptcy litigation process?

Sprayregen: An important continued development remains the evolution among lower courts' application of the Supreme Court's 2011 *Stern v. Marshall* opinion. As courts and commentators have

both recognised, *Stern v. Marshall* potentially calls into question a bankruptcy court's ability to adjudicate matters that were previously thought to fall squarely within both their core competency and core jurisdiction – fraudulent conveyance suits, preference actions, tort claims – or counterclaims – and the like. The case has also caused jurisdictional confusion. Parties may have to address, brief and argue jurisdictional issues that were considered routine in earlier cases. Of course, the bankruptcy system has not broken down, as some commentators feared when *Stern* was first handed down – the case has received thoughtful consideration and implementation from the courts in the overall bankruptcy context. That said, the long-term effects of *Stern* are still developing. A circuit split has already emerged between the sixth and ninth circuits on *Stern*'s scope, or its limits, and at least one petition for certiori on a *Stern*-related issue is still pending.

Hessler: A number of recent decisions both in the US and abroad suggest that universalism – that is, the notion that there should be one main insolvency process of a debtor with universal effect – is going to be difficult to achieve. For example, in a recent decision of the Supreme Court of England and Wales, the court declined to recognise a clawback judgment obtained in a Chapter 11 case because the creditor had not submitted to the jurisdiction of the US bankruptcy court. The English court held that the principles of universalism did not permit divergence from the general common law rules related to the recognition and enforcement of foreign judgments. Similarly, in *Vitro*, the Fifth Circuit affirmed the District Court's decision affirming the Bankruptcy Court's refusal to recognise a plan of reorganisation approved by a Mexican court that released claims against subsidiaries of the Mexican debtor because such relief would not have been available in a US case in the Fifth Circuit. These cases demonstrate that despite advances in cross-border cooperation in bankruptcy cases and related litigation, it remains crucial to be alert to the local law where litigation will be conducted or bankruptcy judgments may be sought to be enforced. The enforcement concern is significantly ameliorated in many cases where the key parties are large financial or other institutions that have a direct or indirect US presence, and thus are highly unlikely to violate the Bankruptcy Code's automatic stay and any injunctions issued by the court, but the point bears consideration in any case.

Ward: The biggest legal development affecting bankruptcy litigation continues to be the *Stern v. Marshall* decision, which limits a Bankruptcy Court's jurisdiction over certain types of claims. It is now common in bankruptcy litigation that involves issues of both state law and bankruptcy law for defendants to move to dismiss or transfer venue based on the *Stern* decision. The ultimate issue is typically that plaintiffs prefer to be in Bankruptcy Court as they view it as a more favourable jurisdiction with a fast docket. While defendants typically prefer to be in District Court, or even state court, where they can delay the litigation and have a more extensive discovery schedule. Personally, I question the motive behind some of the challenges to jurisdiction being raised under the guise of *Stern* because in some instances it appears to be nothing more than a litigation tactic to delay the proceedings rather than a substantive issue that truly affects the defendants.

Hayek: The new unified Swiss Code of Civil Procedure (CCP), which came into effect on 1 January 2011, has had a significant impact on bankruptcy litigation proceedings. Actions to contest the schedule of claims are now no longer brought in the special accelerated proceedings. Under the new CCP, ordinary proceedings for commercial litigation apply. While under the previous Cantonal procedural laws the plaintiff was allowed to file a first summary brief within a deadline of 20 days to institute litigation – which could be amended later – under the new procedural law the plaintiff must now file a full statement of claim within the statutory 20 day deadline. Since the CCP does not assign finance and commercial law bankruptcy litigation proceedings to the competence of the Commercial Court (*Handelsgericht*), bankruptcy litigation cases are handled by a single judge at the District Court (*Bezirksgericht*) in the first instance. Only few court decisions regarding bankruptcy litigation cases have been rendered under the new CCP. In the absence of pertinent case law, there remains uncertainty on the interpretation of various new provisions.

Clark: The impact of the 2011 decision of the United States Supreme Court in *Stern v. Marshall* continues to be debated by federal courts and bankruptcy practitioners. In *Stern*, the Supreme Court ruled that bankruptcy courts do not have constitutional power to hear and decide state law counterclaims brought by debtors, even though Congress expressly granted such authority under 28 U.S.C. § 157(b). Ever since that ruling, the lower federal courts have struggled to understand the limits on bankruptcy court jurisdiction, notwithstanding the expansive grant of authority under section 157(b), and to deal with the practical ramifications of those limits on litigations brought under the auspices of Chapter 11 bankruptcy cases. For example, many bankruptcy and district courts have since adopted local rules, or entered *ad hoc* orders, to deal with the issue, and are now making parties expressly state at the outset of such litigations whether they consent to bankruptcy court jurisdiction; if not, the litigation then can be referred to the district court for trial proceedings.

Zahralddin: Valuation disputes continue to be a central aspect of bankruptcy litigation and the practice and caselaw surrounding valuation methodologies continues to evolve. Valuation drives creditor recoveries and valuation disputes are not limited to enterprise valuation as solvency valuation determines fraudulent transfer and other bankruptcy related litigation. Courts have been presented with a growing number of cases of hard-to-value assets that go outside of the traditional disputes over real estate and going concern value. One area of note is the valuation issues that have come up in the context of energy cases, the result of market pressures on coal, power generation and renewables. Coal has been impacted by natural gas taking its market share, increases in environmental compliance costs, and legacy costs. The pressures on coal are also tied to the segments of the power generation sector which bet on coal in the early 2000s and are now at a sharp disadvantage to power generation which relies on much cheaper natural gas. The same higher compliance costs plague coal fired power generation that plagues mining. An area that has received a lot of attention has been in renewables, solar, wind and geothermal, due to the involvement of government incentives, guarantees and funding, and the early stage of development for the sector. Oil and gas valuation requires petroleum engineering experts to evaluate geologic data and project future production. Oil and gas are subject to the same valuation issues as other commodities with the added complexity of assessing reserves against a changing market and against changing information on the reserve information from producing wells.

FW: A high number and wide variety of creditors are often involved in today's bankruptcy processes. To what extent are these creditors seeking ways to exert more influence on the ▸▸

process?

Hessler: Statutory and *ad hoc* committees are working together in today's bankruptcies and using litigation, or the threat of litigation, as a bargaining tool to increase their leverage with the debtor and senior secured creditors to enhance the recoveries that undersecured or unsecured constituencies would otherwise receive. Many large companies today are overlevered and have pledged their assets to secure their senior debt. In many cases, value breaks with the senior debt, which gives the senior secured lenders a lot of leverage in determining the course of a restructuring. Without the threat of litigation, junior or unsecured creditors stand to receive very little, if anything, in today's quick balance sheet restructurings. To the extent that creditor groups are successful in getting statutory committees appointed, they have nothing to lose from litigating because their fees are covered by the debtors' estate.

Ward: In cases like *In re Open Range Communications*, there have been extensive multi-party litigation that included not only the bankruptcy estate and the defendants, but also several creditors who determined to take an active role in the litigation. The involvement of the creditors provided added pressure on the defendants as they had to not only respond to discovery issued by the plaintiff, but also to discovery issued by other parties-in-interest. Another great example of this strategy is typically used in cases involving several layers of debt. You will find that an *ad hoc* committee representing certain tranches of debt will take the lead on a particular piece of litigation, but in reality there are other tranches of debt not included in the *ad hoc* group that are also involved in the litigation. This multi-party approach of attacking a target can lead to running up legal fees for the defendant, which in turn can assist in reaching an amicable settlement.

Hayek: Some major creditors are large corporations – mostly investment banks and hedge funds – who have the know-how and the resources to dedicate ample attention to the bankruptcy process. These creditors tend to seek to accelerate the bankruptcy process by appointing representatives to the creditors committee and nominating administrators and liquidators who can rely on the infrastructure of a larger law firm. Creditors also increase their influence on the bankruptcy process by acquiring additional claims. Further, creditors often seek the dialogue with administrators by meeting them on a regular basis and inspecting the files of the bankrupt estate and suggesting transactions to maximise and accelerate distributions for the benefit of all creditors.

Clark: The traditional repeat players in bankruptcy cases – distressed debt traders and institutional bondholders – continue to be very active in Chapter 11 cases. These creditors tend to be sophisticated, well organised and represented by top shelf counsel and financial advisers who are themselves repeat players in the big reorganisation cases, regardless of where they happen to get filed. And these types of creditors do their diligence and push to get involved early, usually well in advance of the actual bankruptcy filing, in order to maximise their influence on the process and the return on their investment. In cases where the debtor is to be reorganised on a standalone basis or sold as a going concern, the trade creditors tend to be less of a factor because either their claims get paid off or are dwarfed by the debt for borrowed money, or both; but in other situations, the trade can have significant influence on the creditors' committee or in connection with material contracts and related litigations.

These types of creditors do their diligence and push to get involved early, usually well in advance of the actual bankruptcy filing, in order to maximise their influence on the process and the return on their investment.

ANTHONY W. CLARK

Zahralddin: There is an interesting contrast between what the private equity funds and hedge funds have done in two cases, which shows funds should not be lionised or demonised as they are simply playing their part in the market. Creditors, mostly equity funds, in the Tribune and Lyondell bankruptcies have been seeking to recover amounts paid to investors in leveraged buyouts (LBOs) they allege drove both corporations into bankruptcy. The plaintiffs in both cases are pursuing the company and its principals under a theory of intentional fraudulent transfer and pursuing passive investors under a constructive fraudulent transfer theory. Mutual funds, public and private pension funds, almost any type of investor, have been sued for fraudulent conveyances based upon their receipt of LBO proceeds, even though they had nothing to do with the transaction, including rank-and-file employees who sold stock or collected deferred compensation in the LBO and small investors, and many retirees who bought stock. These are costly suits to bring and often settle before trial. Parties to the transaction should expect consequences if the transaction renders a company insolvent, but for passive investors the litigation is questionable. The lawsuits might incentivise directors to be more careful and aware of the risks of a buyout rendering a target company insolvent, but they will only serve to further disenchant individual investors and larger institutional investors alike. On the other hand, creditors in the *School Specialty* case were instrumental in finding a better exit vehicle or DIP financing than that presented by the debtor. The case began as a typical loan to own scenario with an accelerated sale process. Creditors often complain that the 'loan-to-own' Chapter 11 is a well-orchestrated 'theft' of the estate assets perpetrated by the DIP lender or buyer, but litigation is an ineffective tool often because there is often no alternative to the quick sale. However, School Specialty's unsecured bondholders agreed to back up their arguments that an expedited auction would undervalue School Specialty by funding an alternative DIP financing of $155m that paid off the existing loan of the DIP and provided the debtor with an additional $50m of new funding and combined this with a successful litigation strategy. The case has been recently confirmed and the company reorganised with a modest but acceptable return for unsecured creditors.

Sprayregen: Creditors are always looking for ways to exert control over the bankruptcy process. One way creditors are seeking to control companies' Chapter 11 cases is through contesting ex-

tensions of debtors' exclusive periods under section 1121 of the Bankruptcy Code. In the *MS Resorts* case, parties fought vigorously over an initial exclusivity extension but eventually agreed on a settlement under which a prepetition equity holder agreed to fund some post-petition interest to secured creditors to preserve the debtors' exclusive periods for the duration of the case. Over a year later, the equity holder stopped paying interest, giving the secured creditors the right to file a notice terminating exclusivity. The creditors declined to terminate because, by then, they'd reached a deal with the company on the overall restructuring. It is an interesting case of both secured creditors and equity holders trying to leverage the exclusivity deadline to exert control over a bankruptcy case.

FW: Full-scale litigation tends to be an enormously expensive process. With this in mind, are you seeing parties take a more creative and consensual approach to finding workable solutions? What benefits do alternative dispute resolution methods have over litigation?

Ward: More often than not these days, the only reason a piece of litigation can be brought in a bankruptcy case is because the estate has found a contingency fee lawyer to represent its interests. In the case where you are evaluating complex and expensive causes of action, it will routinely be a case where creditors are out of the money. As such, there are no funds in the estate to fund counsel to investigate and prosecute such causes of action. In these instances, creditors are willing to enter into very aggressive contingency fee arrangements in order to incentivise counsel to vigorously pursue their interests. Contingency fee counsel can be a tremendous benefit to an estate with little or no assets.

Hayek: Our jurisdiction does not provide for a formal pre-litigation dispute resolution process. Parties try to settle disputes by way of informal settlement negotiations. The success of such negotiations often depends on the degree of preparation and knowledge about the case by the parties. Recently, we have also seen liquidators approach creditors informally with an indication of the range in which they intend to allow a claim thereby trying to reach an agreement with the creditor before issuing the schedule of claims. This may help to reduce unnecessary litigation.

Clark: Individual creditors who are funding their own litigations can be more pragmatic about finding resolutions that minimise or avoid further litigation expense. By contrast, organised creditor groups whose litigation costs are shared or, in the case of official committees, covered by the debtor's estate, can have less incentive to settle, and their willingness to do so, short of extensive and expensive litigation, frequently depends on how much faith creditors further down the food chain have in the debtor's business plan and the debtor's and senior creditors' valuation position – here, transparency in the process is critical. As for ADR, I have found that, depending on the neutral, mediation can help to expedite the settlement process and should at least be considered at the earliest practicable time in just about any litigation.

In these instances, creditors are willing to enter into very aggressive contingency fee arrangements in order to incentivise counsel to vigorously pursue their interests. Contingency fee counsel can be a tremendous benefit to an estate with little or no assets.

CHRISTOPHER WARD

Zahralddin: Some people think that bankruptcy litigation is more inclined to end up in a deal than other types of litigation because there is a disincentive to spend resources in a distressed situation, but I don't believe that's entirely true. What dispute doesn't involve some degree of distress? My experience in commercial litigation outside of bankruptcy is consistent with that in bankruptcy litigation. Whether you reach a deal during the trial stage or during the first appeal or second appeal, the endgame is to resolve the parties' dispute and get a quick and efficient resolution. Alternative dispute resolution, mediation for example, works when lawyers are effective advocates for the 'deal' with their own clients. ADR, especially where confidentiality of settlement negotiations is ensured, through agreement or court order, should facilitate openness that allows the lawyer to provide the right counsel to her or his client. It ought to allow the parties to identify the interests that lead to a deal and provide a better understanding of the litigation risk involved. However, negotiating styles differ from lawyer to lawyer and if a lawyer takes too conservative a position in ADR or, worse, uses ADR as another litigation tool, as opposed to an alternative to litigation, ADR is just a delay in the litigation.

Sprayregen: Full-scale litigation can be expensive and time-consuming, even in fast-moving bankruptcy matters. Many parties are pursuing creative approaches to finding consensual solutions. For instance, in *Hawker Beechcraft*, the company achieved a global settlement with the PBGC and its unions regarding the termination of significantly underfunded pension plans and an amendment to its collective bargaining agreement. Absent the settlement, the parties could have engaged in lengthy and costly litigation seeking distressed termination of the pension plans and the rejection of its collective bargaining agreement. With the settlement, the company was able to secure substantial cost savings that facilitated its restructuring.

Hessler: The costs of litigation are a particularly relevant consideration in the context of bankruptcy litigation. The financial costs alone are significant, particularly where the debtor may be saddled not only with its own litigation costs, but also in some circumstances those of certain committees and other constituencies. In addition to the financial cost, in some cases the potential delay inherent in resolving significant litigations itself can be very harmful to a debtor's reorganisation efforts. With that in mind, it is becoming increasingly common for bankruptcy litigations, particularly where the litigations involve parties other than the debtor, to be referred to mediation by the judges or otherwise. In Delaware, for example, the US District Court has mandated that mediation be considered in all appeals of bankruptcy decisions. Not only are judges requiring mediation, but sophisticated financial creditors often see the value of mediation. For example, hedge funds managed by Paulson & Co. are seeking continued ▸▸

mediation before a bankruptcy judge in the GM case to avoid the high costs and time associated with full scale litigation.

FW: Bankruptcy litigation often captures so much information that it is impossible to manage without sophisticated search and sort capabilities. What advice can you give to parties to help them expedite the discovery process? What role is e-discovery playing in today's disputes?

Hayek: Our jurisdiction does not provide for any e-discovery proceeding as applied in US civil litigation. Prior to bankruptcy litigation, the creditor has usually already deposited with the administrator a filing of claim including numerous annexes and the administrator has made available to the creditor certain information by way of inspection of the files. Consequently, each party has access to more comprehensive data and information from the opposing party before litigation starts than in ordinary commercial litigation. In order to efficiently analyse huge amounts of data, in particular emails, in a short time it is, however, essential that law firms make use of sophisticated data search tools. It is advisable to collect data and run it through electronic data search tools well before the decision to institute litigation is made.

Clark: The best way to 'expedite' the discovery process is to avoid it altogether by settling business disputes before they become litigations. But once they do, it is often most helpful to negotiate a shorter, rather than longer, discovery schedule and approach the process with an open kimono – ask only for what you need from the other side, and if what they request is relevant, even arguably, just produce it, and avoid unnecessary and costly discovery disputes. As for e-discovery, that is the entire ballgame these days; everyone has so much electronically stored information (ESI), and that's where the evidence, good or bad, is going to be. Reputable and competent forensic ESI experts who are retained early in the process are worth their weight in gold and will help you to quickly get to the evidence you need to know about to effectively prosecute or defend your case.

Zahralddin: Most documents produced since 2000 have been created in digital form. Two hundred and ninety-four billion emails are sent per day. Electronic discovery of electronic communications and digital files plays a key role in all types of bankruptcy litigation. Most e-discovery experts agree that it is a best practice to preserve ESI in anticipation of a bankruptcy or other insolvency proceeding in addition to the requirement in adversary proceedings, but indicate that a debtor shouldn't be expected to preserve every bit of ESI in its possession. The problem that arises when ESI isn't preserved is that at crucial points in a bankruptcy a debtor can be challenged in the relief it seeks and needs evidence to support the request for relief under exigent circumstances. A debtor shouldn't be complacent that it doesn't have an absolute duty to preserve all ESI.

Sprayregen: As noted, bankruptcy litigation often moves more quickly than ordinary civil litigation. When discovery is completed in a matter of weeks or days rather than months, discovery of ESI can be overwhelming if not properly handled. In fact, dissenting parties may use the threat of massive e-discovery as a weapon. Parties should understand discoverable data – its location, its format, and so on – up front, before the matter begins to immediately and intelligently address discovery demands. Taking time early on to think about how to narrow the universe of documents saves time and money. Limit searches to specific custodians and date ranges. Use targeted keywords. Engage a vendor to assist with search terms to process the available data. In the end, there is no substitute for an eyes-on review by experienced lawyers, but the e-discovery tools available today permit attorneys to focus time on the documents that are most likely to matter.

Whenever litigation may arise, there is no substitute for early planning in order to minimise the time and expense of discovery and production. That is particularly true in cross-border insolvencies.

PAUL HESSLER

Hessler: E-discovery is here to stay and will only become more important as technology continues to advance and more and more electronic data is created, transmitted and stored. Whenever litigation may arise, there is no substitute for early planning in order to minimise the time and expense of discovery and production. That is particularly true in cross-border insolvencies, where the bankruptcy of a group of companies can lead to some of them being cut off from access to systems that they had accessed and used prior to the group's collapse. Even before litigation arises, a key first step is to mobilise a team of lawyers, business people and IT personnel to understand, in the context of a given case or dispute, what types of relevant data may exist and the different systems on which the litigants and relevant third parties transmitted and stored that data. That first step is crucial to everything that follows; in addition to enabling the party to institute appropriate internal document preservation measures and to notify other parties of their document preservation obligations, it provides a roadmap to assist a party in pre-litigation assessment of claims and defences and is an essential precursor to appropriately planning for and managing discovery. And once litigation commences, communication with one's adversary or adversaries is crucial. In many litigations today, discovery cannot be managed appropriately unless the parties craft a process to agree search terms and then to test and refine those terms as necessary so that discovery can be conducted responsibly and efficiently.

Ward: In my opinion e-discovery is making all big ticket litigation that much easier. Emails and documents can be compiled in a database and made searchable. This in turn makes the discovery process that much more manageable. In the past, looking for a particular document, even if you had its bates label, could have taken a considerable amount of time. Given technology, you can type in a number or search time and typically easily find the document. Accordingly, understanding e-discovery, and the ramifications thereof, is a must for all bankruptcy litigators.

FW: What challenges exist in bankruptcy litigation that are generally not seen in general commercial litigation? What ▸▸

can parties do to control such challenges and the associated costs?

Clark: Material litigation in bankruptcy is often just as complex as, but far more expedited than, comparable high stakes cases outside of bankruptcy. So while extensive discovery and pre-trial motion practice are frequently required in both, the associated costs can be incurred much more quickly in the bankruptcy context. Once again, the best way to control those costs is to avoid them, if possible, by resolving the dispute in pre-litigation negotiation or, if that doesn't work, as early as possible on the shortest litigation schedule that reasonably can be achieved.

Zahralddin: The bankruptcy process continues to be driven by sophisticated financial actors such as hedge funds and private equity funds. Understanding their investment perspective and the tools they use is a vital part of being a successful advocate in bankruptcy litigation. Fiduciary duty conflicts and intercreditor conflicts between senior and junior debt persist. The good news is that fiduciary duties between these types of creditors can be contractually modified by sophisticated parties through arms-length negotiation up front. That makes the valuation and conflict issues manageable so that the parties, and not the courts, are resolving fiduciary conflicts and class conflicts between secured creditors. The uncertainty caused by intercreditor and fiduciary duty conflicts has caused unnecessary delay and cost not just for the secured parties, but for the debtor and the unsecured creditors, complicating work outs and in some instances forcing a bankruptcy filing where none was necessary.

Sprayregen: Bankruptcy litigation presents challenges related to its accelerated pace, the larger number of different parties and multilateral matters, and the dynamic between the litigated matter and other aspects of a company's bankruptcy case. These challenges can be controlled by advance preparation, dealmaking acumen – specifically a keen understanding of the motivations of other parties and parties in interest – and creativity. Often, focusing on these three items can minimise litigation and other costs by producing favourable consensual resolutions in short timeframes. In cases where litigation is unavoidable or desirable, these items can also help guide a bankruptcy dispute to a favourable outcome. Having experienced lawyers with knowledge of the facts and issues can be critical to success.

Parties can limit their risks by starting to prepare litigation in good time before the availability of the schedule of claims is expected and by seeking the dialogue with the administrators in order to understand what position they tend to take regarding the admittance of the claim.

DANIEL HAYEK

Hessler: Bankruptcy litigation presents a number of challenges that are not always present in general commercial litigation, especially in tandem. Given the nature of bankruptcy and the overarching concern to preserve the value of the bankruptcy estate, bankruptcy litigation often occurs on a highly compressed timeframe. Compounding that pressure, it almost always involves multiple parties and constituencies that all have divergent interests. In addition, some of those parties may have no disincentive to litigate their claims, because they are facing minimal or zero recovery and, the costs of litigation aside, believe they have nothing to lose. And if such a constituency happens to be a statutory committee whose fees and expenses will be borne by the debtor, the incentives are still further skewed in favour of litigation. Settling early with statutory or other committees and other key stakeholders is one way to manage the multi-party risk and to begin to build consensus. Although that will not end every party's incentive to litigate, it can focus the issues that remain in dispute and build momentum toward a consensual resolution.

Ward: The biggest challenges in bankruptcy litigation are standing and jurisdiction. Putting the *Stern* jurisdictional arguments aside for the moment, standing becomes the biggest impediment for a plaintiff in bankruptcy. There are certain causes of action that are only available to the bankruptcy estate. Therefore, other creditors, including the Creditors' Committee, have to obtain standing to bring these claims. The criteria to obtain standing differs by jurisdictions. Assuming you can get standing, you then have issues like *in pari delicato* – for example, unclean hands – that may affect your ability to assert some causes of action. There are pitfalls that one must be aware of before determining to commence bankruptcy litigation.

Hayek: The biggest challenge in Swiss bankruptcy litigation which does not exist in general commercial litigation is the brief not-extendable deadline of 20 days after the availability of a schedule of claims to institute litigation – to file an action to contest the schedule of claims. While this short deadline might seem appropriate in small bankruptcy litigation cases, it poses serious challenges when it comes to complex cross-border claims. Parties can limit their risks by starting to prepare litigation in good time before the availability of the schedule of claims is expected and by seeking the dialogue with the administrators in order to understand what position they tend to take regarding the admittance of the claim. Further, unsecured third class creditors are confronted with uncertainties concerning the amounts of distribution – in percentages of their claim – they can expect. Estimates from bankruptcy administrators on expected third class dividends frequently include wide ranges where the maximum estimate can easily be the quadruplicate of the lowest estimate. This complicates the litigation risk assessment of the parties, in particular since the amount in dispute forms the basis for the levying of security for court and party fees.

FW: Cross-border bankruptcy litigation is traditionally very complex and uncertain. Has the process become any easier in recent years? What advice can you give to parties entering into cross-border bankruptcy litigation?

Zahralddin: Insolvency professionals involved in cross-border insolvencies were limited to comity as one of the only tools available to them. Some jurisdictions recognised foreign proceedings, but the procedure differed dramatically across different countries. The UNICITRAL Model Law on Cross-Border Insolvency was ▸▸

developed to provide guidelines for countries wishing to adopt other mechanisms. The Model Law has allowed judges to acknowledge the impact that proceedings in one jurisdiction could have on parties in the other; it has untied their hands. There is a need for an early application for recognition of a foreign proceeding and a foreign representative actively assisting the courts in coordinating their responses. Failure to apply for recognition can lead to inconsistent rulings that further delay or diminish recovery for all stakeholders. Even when recognition has been obtained, however, there is still a potential for litigation over jurisdiction and choice of law. Despite the broader tools available to insolvency professionals, courts can reach opposite conclusions on the validity of substantive law issues, as was the case in *Lehman* and the recent *Vitro* cases, but I can't imagine what those cases would have looked like if comity and the prior *ad hoc* recognition regime were the only available options.

Sprayregen: Thanks to new European insolvency laws and increased adoption of the UNCITRAL Model Law on Cross-Border Insolvency, in some ways, traditionally challenging cross-border bankruptcy litigation has become a bit easier to navigate in recent years. The UNCITRAL Model Law was designed to effectively address cross-border insolvencies – including related litigation – by increasing cooperation between courts in different countries when a company's assets or creditors are located across jurisdictions. Under the model, a debtor company can obtain recognition of a foreign proceeding without separately seeking the relief – or an injunction – in that jurisdiction. Nonetheless, cross-border litigation in bankruptcy remains complex. Many countries have not adopted the Model Law and are not party to a recognition mechanism, and even the UNCITRAL model is no panacea. For instance, recent decisions from the Supreme Court of England and Wales in the *Rubin* and *New Cap* matters limit the enforceability of foreign judgments in the UK when the UK defendant is not present in the foreign proceeding.

Thanks to new European insolvency laws and increased adoption of the UNCITRAL Model Law on Cross-Border Insolvency, in some ways, traditionally challenging cross-border bankruptcy litigation has become a bit easier to navigate in recent years.

JAMES H.M. SPRAYREGEN

Hessler: Cross-border bankruptcy litigation presents a number of unique issues that used to deter parties from instituting US bankruptcy cases. A significant body of case law in the cross-border sphere has begun developing over the past few years. As case law continues to develop and parties become more sophisticated and accustomed to US bankruptcy, we will see more parties turning to the US as a forum to implement a restructuring. A key issue, particularly in light of the *Rubin* and *Vitro* decisions, is going to be whether US Bankruptcy Court orders will be enforced in foreign courts and vice versa. Parties cannot simply decide which forum in which to pursue a restructuring, but must also consider and plan in advance how to get that proceeding enforced in other key jurisdictions, whether through parallel proceedings or otherwise. As noted, this concern can be ameliorated where the key parties are large financial or other institutions that have a direct or indirect US presence, and thus are highly unlikely to violate the Bankruptcy Code's automatic stay and any injunctions issued by the court, but parties should consider this issue in any case.

Ward: I do not think the trend of difficulty in cross-border litigation has changed. It is still very complex to attempt to tie causes of action in one jurisdiction and then bind another jurisdiction by those actions. Chapter 15 of the Bankruptcy Code can assist this endeavour in the United States, but until recently not all countries have a corollary provision in their insolvency laws.

Hayek: Cross-border bankruptcy litigation continues to be complex and challenging. Claims in these types of proceedings are frequently based on agreements which are subject to foreign law. One must take into account that, pursuant to the Swiss International Private Law, in the case of monetary claims, the burden of proof regarding the application of the foreign law can be imposed on the parties. Parties should consult a foreign law expert in due time not least in order to understand the merits of the case before the decision to litigate the case is taken. Additional challenges arise if parties institute – before or after the declaration of bankruptcy – parallel proceedings in other jurisdictions, even though according to the legal practice of the Swiss Federal Supreme Court, court decisions rendered in other jurisdictions are generally not binding on the Swiss bankruptcy litigation judge. Litigation parties must also be made aware that under the new CCP the court may order the plaintiff to post security for the expected court costs. Further, the foreign based plaintiffs may be required to post security for the counterparty's potential legal fees.

Clark: There are recent examples of cross-border cases where complex litigation matters have been handled more expeditiously and cost-effectively through direct coordination of the 'competing' courts than otherwise might be the case. The US and Canadian Nortel cases pending in Delaware and Ontario are a good example of such coordination. But in most cases, this kind of coordination is more aspirational than real; and in those cases, one may expect the parties to exploit differences and nuances in local law and practice to their tactical advantage, which, in turn, can result in much less predictability and much greater litigation costs.

FW: Are you seeing any particular trends with regard to bankruptcy litigation financing? What role is external or third-party funding playing in today's bankruptcy court battles?

Sprayregen: There is a robust industry built around debtor-in-possession (DIP) financing for companies in bankruptcy. Often, a DIP loan, or a portion of that loan, is used to fund litigation costs and other professional fees associated with administering a Chapter 11 case. That said, there is not always a great deal of litigation-specific financing in bankruptcy. One reason may be that litigation financing is not always available to a company in bankruptcy. To incur new indebtedness, a debtor company must make a showing to the bankruptcy court that the financing is necessary. A company in bankruptcy also faces heightened disclosure requirements and scrutiny regarding compensation and sharing of

any proceeds – as do its lawyers and other professionals. Other, non-debtor stakeholders, of course, do not face the same restrictions and may in some cases obtain external litigation financing. Many parties in bankruptcy litigation, though, are sophisticated and well-funded and so do not often use third-party financing to support their litigation efforts.

Hessler: Although we are not seeing much pure litigation funding by outside investors, parties involved in a bankruptcy case have several ways in which to obtain financing to fund litigation. Perhaps most obviously, funding can often be sought, either through entitlement or by application to the court, from the bankruptcy estate itself. In addition to paying the fees of official committees, a debtor's estate may ultimately pay all or part of the costs of litigants who are found to have made a substantial contribution to the progress of the case. Certain creditors may persuade their counsel to foot all or part of the bill through contingent fee arrangements. Finally, the claims trading market may permit acquirers of claims to amass a stake at a fraction of face value and to aggressively pursue litigation to leverage a recovery on that stake.

Ward: I have seen more third party companies willing to finance bankruptcy litigation in recent times than I have before. Entities have seen the trend of more 'bet the company' litigation being done on a contingency fee basis. With that in mind, rather than having the law firm absorb all of the risk, companies will now finance the law firm's expenses or even a portion, if not all, of the litigation in order to assist the law firm with its risk. The financing entity then plays an integral role in the litigation as it may allow a firm to hire an expert it previously could not afford or image thousands of documents that it was not practical to do beforehand. This strategy can give plaintiffs an upper hand in bankruptcy litigation they previously did not have.

Hayek: Bankruptcy litigation financing or other third party financing is generally not seen in the Swiss market.

Clark: I have not seen any real change in bankruptcy litigation financing to date, but I'm aware of the recent rise in third-party funding arrangements in significant non-bankruptcy litigation. I see no reason why those kinds of arrangements could not be used in bankruptcy litigation, and I expect we will begin to see them in the not too distant future – for example, in connection with post-confirmation litigation trust situations, where the reorganisation plan does not provide sufficient funding for the creditors to pursue major claims vested in the trust under the plan.

The main third-party financing that I have seen is from the law firms themselves. The bankruptcy bar is slowly moving towards the changes that have marked the legal services market in terms of alternative fee arrangements.

RAFAEL X. ZAHRALDDIN

Zahralddin: The main third-party financing that I have seen is from the law firms themselves. The bankruptcy bar is slowly moving towards the changes that have marked the legal services market in terms of alternative fee arrangements. The United States Trustee has released the first revisions to its fee guidelines for estate professionals in many years. To their credit, the US Trustee's office worked with the various groups over nearly a year and listened to and incorporated several suggestions before releasing the new guidelines. One of the more significant guidelines suggests that while larger national law firms have advantages in terms of capacity and skills necessary to handle many of the reorganisation tasks in large Chapter 11 cases, they are not suited for many of the litigation tasks that are better handled by specialised litigation firms whose rate structure and expertise allow for better results at better value to the estate.

FW: What are some of the main benefits parties derive from using bankruptcy litigation as a positive tactic?

Hessler: Bankruptcy litigation is one of the main tools, and often may be the only tool, that junior or unsecured creditors have to enhance their leverage in a bankruptcy case to maximise their recovery. This is particularly true where the debtor's assets are fully encumbered by liens pledged in favour of the secured creditors, and junior creditors face little or no recovery absent litigation.

Ward: Bankruptcy litigation can be used in a positive manner given the open nature of a bankruptcy case. Unlike state or other federal court litigation, bankruptcy is a fairly open venue. A company will file for bankruptcy and as part of the bankruptcy process put a party on notice that they are the potential target of future litigation. In fact, in a disclosure statement it is required that litigation targets be identified. As a result, there are instances when you can use this as an opportunity to negotiate an amicable resolution with the target, rather than merely commence litigation. As Judge Shannon recently opined in Delaware, bankruptcy is an invitation to negotiate.

Hayek: A creditor whose claim has been partially or fully rejected in the schedule of claims or has not been accepted in the requested class of creditors can bring an action against the bankrupt estate in order to increase the amount of distributions received from the estate – if the action is successful. One distinct feature in our jurisdiction is that a creditor is not limited to litigating the admittance of his own claim but he can also contest the admission to the schedule of claims of another creditor by bringing an action against such creditor. If such action is upheld, the amount by which the participation of the defendant in the schedule of claims is reduced is used for the satisfaction of the plaintiff up to the full amount of his claim including the costs of the action.

Clark: The main differences I see between bankruptcy and non-bankruptcy litigation processes are, first, there are no juries, and second, the expedited nature of the former as compared with the latter. Taken together, these differences allow for quicker and, therefore, theoretically less expensive judicial resolution of major disputes that the parties cannot resolve between themselves. And while the Bankruptcy Code has its own debtor oriented bias, where the rule of decision is supplied by state law or non-bankruptcy federal law, I have found that bankruptcy courts largely

get to the same substantive result as might be expected in their non-bankruptcy counterparts, but more quickly.

Zahralddin: Bankruptcy litigation is practical by its nature. The local rules or a well written case management order combined with the Federal Rules of Bankruptcy Procedure provide for a much quicker timeline than most other commercial litigation. The fact that the Bankruptcy Court is a specialised court and that many of the busier jurisdictions are used for emergencies and the necessary expediency required to keep a case alive and moving make it an effective forum to litigate. Bankruptcy judges are some of the most dedicated professionals involved in our practice and it is not uncommon for cases to go late into the evening and for the judges to allow for the appropriate recess to allow the parties to reach a consensual resolution on issues. While consensus is encouraged, if you can't reach it and the question has to go to the judge, you have a very good chance of a fast, efficient and less costly resolution to your dispute through the Bankruptcy Courts.

Sprayregen: Parties can use bankruptcy litigation – or even the threat of litigation – to exact leverage. As noted above, a party may use the timing, potential costs, and delay of litigation to force a judgment or resolution of a matter on an expedited basis – if litigation could disrupt a company's restructuring timeline or important case milestones, it could be swiftly resolved, as a company and its stakeholders are often focused on moving the company, or its assets, through the bankruptcy process as quickly as possible. In addition, there are tools available in bankruptcy that may not be available in other fora that can be used to expedite litigation processes. These include, among others, claim estimation – a form of mini-trial used to fix a contingent or unliquidated claim, such as a complex litigation claim, that otherwise could take months or years to resolve outside bankruptcy – and discovery under Bankruptcy Rule 2004, which has been likened to a 'fishing expedition' and may be broader than typical civil discovery.

FW: What are the pitfalls and benefits with respect to available insurance coverage as a means of recovery in bankruptcy litigation?

Ward: The benefit of insurance coverage is obviously that the plaintiff arguably has a pot of money to go after to fund the proceeds of any litigation. The existence of such insurance may incentivise parties to pursue otherwise spurious causes of action. However, there are several pitfalls to chasing the money that may make it impossible to recover. There are exclusions to every insurance policy. If plaintiffs are solely relying on available insurance proceeds to fund any recovery, they need to be sure that none of these exclusions apply. A great example is a fraud exclusion, which appears in most insurance policies. However, if plaintiffs are aware of the fraud exclusion they can craft their causes of action to be direct harm rather than fraudulent, but the knowledge of the policy and its limitations is a must as part of any bankruptcy litigation.

Hayek: We are not aware that insurance coverage is an important means of recovery in bankruptcy litigation in our market. Legal protection insurance for bankruptcy litigation is offered by insurance brokers. However, there does not seem to be high demand for such insurance coverage, in particular since premiums tend to be too elevated to be attractive for claims with high amounts in dispute.

Clark: If we're talking about litigation that implicates the debtor's insurance policies, the pitfalls regarding insurance are pretty much the same in bankruptcy as outside of it – insurers are most adept at collecting premiums and denying or delaying payment on claims. The big benefit when these issues arise in a bankruptcy proceeding is that the insurer knows that any disputes will be decided – and decided quickly – by the bankruptcy judge under a statutory regimen that generally favours the insured, so the debtor has greater leverage, and the insurer has more incentive, to negotiate a practical, prompt and fair resolution of any coverage issues.

Zahralddin: Insurance proceeds are not property of the estate so they offer the potential for a liquid and full recovery on an adjudicated claim where there is coverage. Claims against directors and officers (D&O) are a significant source of recovery for a bankruptcy estate and D&O litigation is often related to alleged violations of securities laws or ERISA. D&O insurance is generally used to advance defence costs, indemnify judgments, and pay for settlements with respect to claims against the directors and officers after the policy's self-insured retention is satisfied. D&O insurance also protects a director or officer personally against her or his personal assets. The biggest drawback is that bankruptcy litigators are used to hearing these cases in Bankruptcy Court and a recent Washington Mutual ruling could change that significantly.

Sprayregen: Insurance coverage can provide recoveries that otherwise may be unavailable in bankruptcy – almost always a benefit to a company's creditors whose claims are covered by insurance and often a tool that can be utilised by a debtor company to implement creative dispute resolutions. In other cases that may involve large numbers of personal-injury lawsuits, a debtor company and its stakeholders may need to implement creative solutions to minimise the distraction caused by many claimants' pursuing the company's insurance. Bankruptcy can offer the means to do so: for example, in *The Great Atlantic & Pacific Tea Company* bankruptcy, the company obtained court approval of a dedicated personal-injury claims process to funnel parties into mediation and avoid a constant stream of stay-relief motions seeking insurance recoveries in the primary restructuring proceedings.

Hessler: In some cases insurance may provide a particular claimant with a means to recover the full amount of its claim, since as a general matter only certain types of claims will be covered by an insurance policy and the proceeds typically will not be available to the debtor's estate generally. However, where the proceeds of an insurance policy are less than the claims against it, in some ways, insurance coverage as a means of recovery in bankruptcy litigation is not unlike recovery from a bankruptcy estate generally: there is a finite fund from which multiple parties with divergent interests may seek to recover, so a distribution to one claimant will reduce the amount available to satisfy later claims. The resulting dynamics are familiar: parties with a potential right to share in insurance proceeds will need to understand the nature and terms of the available insurance policies, the amount of coverage and the potential claims against that amount, and then to press their claim early, to monitor other claims to the same proceeds, and to appear and object if necessary to settlements – for example, between the debtor and the insurer – or other means by which insurance proceeds may be distributed and the claimant's rights affected. ■