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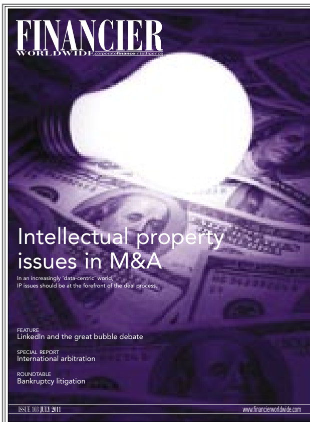
BANKRUPTCY LITIGATION



REPRINTED FROM:

JULY 2011 ISSUE

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FW MAGAZINE

FINANCIER WORLDWIDE corporatefinanceintelligence

BANKRUPTCY LITIGATION

In the past few years the nature of business bankruptcies has changed radically. Previously, litigation arising from a bankruptcy was usually peripheral to the bankruptcy itself. Today, however, almost every bankruptcy matter brings complex litigation and investigatory issues. A turbulent economic climate and precedent-setting rulings have increased the potential for claim subordination, fraudulent transfer and litigation claims by disgruntled stakeholders. Legal expertise and efficiency is paramount to resolving disputes and allowing companies to successfully emerge from bankruptcy protection.

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Sprayregen: What has been the biggest difference in litigation trends this year compared to last year?

Galatopoulos: In the Cayman Islands, this year has seen far more emphasis on the external funding of litigation claims. Bankruptcy litigation is seen as a fertile ground for external funding because it is one of the main exceptions to the ancient laws prohibiting trafficking in litigation. Feeder funds in an investment fund structure are an obvious example of a company in distress whose asset base may include litigation claims but no liquid assets. External funding may be a liquidator's option for recovering assets. Professional litigation funders are showing a great interest in Cayman Islands litigation and have established good contacts with the bankruptcy professionals here. The funding structures vary and create interesting challenges and opportunities for everybody involved, including the potential defendants to the litigation claims. Another major trend in Cayman and the British Virgin Islands (BVI) is the focus on the position of the investor, in particular the surge in claw-back claims.

Cohen: Although new corporate Chapter 11 filings have decreased somewhat from their peak in the past few years, new adversary proceedings within these bankruptcies continue to be commenced as statutes of limitations begin to run and tolling agreements expire. The ultimate resolution of claims, however, is increasingly becoming more creative and consensual. This is largely due to the growing expense and inherent uncertainty involved in litigation. I expect to see this trend continue in the near future.

Durrer: Last year saw an increase in bankruptcy litigation spurred by parties who were arguably 'out of the money' seeking to use the litigation as a means to leverage a recovery. More recently, we have seen this trend worsen. Such litigation can persist even where the amount in controversy does not justify the legal fees incurred. Insolvent estates are also increasingly negotiating contingent fee arrangements for the pursuit of avoidance litigation.

Strochak: There has not been any significant shift in bankruptcy litigation trends compared to last year. There are cases where major litigation is avoided through successful negotiation – *General Growth Properties* is a good example – and cases that become mired in litigation despite efforts to avoid it, such as *Tribune Companies* and *Washington Mutual*. We have seen more litigation over the treatment of specialised securities in bankruptcy: litigation tracking warrants, trust preferred securities, residential and commercial mortgage-backed securities, and others. There also seems to be an increase in aggressive use of involuntary bankruptcies and receivership proceedings by bank lenders.

Ratner: As the bankruptcy and restructuring area slows, the litigation asset is becoming more and more important to all stakeholders in the process. That said, attorneys are spending more time working through the litigation assets. This will result in more post bankruptcy litigation. This is not unique to this cycle: in every cycle the litigation cases tend to follow the bankruptcy cycle. The only difference this time is that the world is so much more leveraged than in the past, that there are lower and lower recoveries for unsecured creditors from the core case, and the litigation recovery is more important in this cycle.

Given the economic realities many debtors and creditors have faced in the wake of the global recession, increasingly, creditors will leave no stone unturned in seeking viable causes of action to augment a debtors' estate and, ultimately, creditors' recoveries.

DAVID S. COHEN

Leonard: I do not think there has been any significant difference in litigation trends this year. Probably there is more litigation this year than last because of the state of the industry. The mega-cases that were filed a couple of years ago are now reaching the stage where claims and distributions become important, and those issues always attract more litigation. We are seeing more claims and allocation-of-asset litigation, but nothing dramatically different compared to last year.

Sprayregen: What types of bankruptcy disputes seem to be prevalent in the current market, and what are their underlying causes?

Cohen: Bankruptcy litigation tends to lag Chapter 11 filings, sometimes significantly. This is due to a variety of factors, including the need to prioritise a debtor's initial actions in a bankruptcy case and the time it takes to investigate and commence adversary proceedings. Because Section 108 of the Bankruptcy Code extends the time within which a debtor may bring claims, there is usually no urgency to commence adversary proceedings early in a Chapter 11 case. Given the economic realities many debtors and creditors have faced in the wake of the global recession, increasingly, creditors will leave no stone unturned in seeking viable causes of action to augment a debtors' estate and, ultimately, creditors' recoveries.

Durrer: So-called 'lender liability' claims have become more prevalent. This is where a borrower alleges that some bad faith mistreatment on the part of the lender has caused the borrower and its business harm. With so many lenders themselves in distress, a borrower sometimes perceives that a lender's refusal to negotiate may have more to do with the lender's own financial condition, and less to do with the enforcement of the lender's contractual rights. However, this litigation can also be nothing more than a borrower's last-gasp attempt to force the lender to restructure the underlying debt obligation. Depending on the nature of ⏩

the allegations of bad faith, the litigation can take a long time to resolve and, as a consequence, be very expensive. When a creditor becomes troubled, lenders are well advised to have the borrower sign a pre-negotiation agreement which can be a valuable tool in resolving such litigation.

Strochak: We have seen many disputes over the treatment of specialised securities, often at the bottom of the capital structure. Much of this litigation seems to be driven by aggressive distressed debt investors buying into these instruments at very low prices after a bankruptcy filing and then trying to use the litigation process to drive the value higher. There also appears to be more fraudulent transfer litigation, which is likely driven by the rapid collapse of values during the financial crisis and the many years of easy credit leading up to the crash that encouraged so many mergers and acquisitions.

Ratner: We have seen a large number of directors and officers (D&O) cases in this cycle. D&O recoveries or potential recoveries are turning into a great source of funds for bankruptcy estates. These cases are really forensic and investigative in nature and are a natural outcome of a failed business or failed deal. Did the directors or officers do something wrong? Did they take prudent steps to protect the creditors? Did they benefit from insider transactions? We have seen many cases in this area. The rash of failed financial institutions has left a trail of D&O litigation.

Leonard: In international cases, we are seeing a lot of friction which usually leads to litigation that spans several countries. Lehman is quintessentially fractious because there is no single central court or authority that can resolve disputes. Each dispute seems to be raised in each jurisdiction, which multiplies litigation in bankruptcy cases, particularly in the case of intercompany claims. We have not encountered bankruptcies on the scale of Lehman before, and financial intermediary entities are among the most complicated situations to resolve. There is no obvious solution: everybody has their own point of view, their own interests, and their own theories as to why they should be getting whatever money is available. That is a recipe for continuous full-time litigation.

The key to resolving disputes among parties in the bankruptcy context is first to understand a party's motivation and second to remain cognizant of the fact that, in an insolvency situation, all parties must be prepared to surrender something for a global resolution.

VAN DURRER

Galatopoulos: In the Cayman Islands and the BVI we are still seeing lots of litigation involving investment funds. Many of these cases concern the question of whether a fund should be put into a formal bankruptcy process and placed under the control of an independent liquidator rather than wound down by its manager. That type of litigation is often caused by the investment manager losing the confidence of at least one significant investor and a perceived lack of transparency. We are also seeing a good diet of priority and avoidance disputes caused by basic instincts such as investors wanting to become creditors – such as the *Westford* case in the BVI – and not wanting their fellow investors to be paid before they are paid. Investors seem to have more appetite and resources to pursue this type of litigation compared with a couple of years ago.

Sprayregen: Are you seeing more disputes arising between creditors and debtors in the bankruptcy context? How difficult is it to resolve these issues for the benefit of all parties?

Durrer: The key to resolving disputes among parties in the bankruptcy context is first to understand a party's motivation and second to remain cognizant of the fact that, in an insolvency situation, all parties must be prepared to surrender something for a global resolution. It is when parties fail to understand the perspective of others and respect that fundamental truth in an insolvency situation that settlements are most challenging.

Strochak: There are always disputes between creditors, or creditor constituencies, and debtors, so there has not been much change there. What has changed is that it has gotten harder to settle some of these disputes. Case law limiting the ability of creditors to 'gift' part of their returns to other groups has made it a challenge to settle disputes where the settlement would have value moving across constituencies that are entitled to different bankruptcy priorities.

Ratner: We have certainly seen a lot of debtors threaten lender liability type claims against their secured lenders. This is often the reaction when a company ultimately has to file bankruptcy or liquidate, and management feels that their lender did not cooperate with them. Banks are very careful these days trying to give a consistent message to the borrower, but that does not always happen.

Leonard: Disputes often arise as a result of the intercompany nature of claims within multinational organisations. One entity may have a claim against another entity, and that entity may have a claim against the parent and so on. It can be almost insoluble as there are separate sets of constituents, in separate countries, vying for a limited amount of assets. Litigation to decide what share of a global company's assets should go to each of the countries involved presents huge obstacles. Lehman is a prime example, but a Canadian example is Nortel, which sold its major operating divisions for around $4bn. Under the deal, the money was escrowed at a bank in New York and cannot be released without the consent of

all of the estates involved. The sales were successful, the money came in, the sales closed, and there is around $4.3bn held at JPMorgan Chase in New York. However, because there are estates in Canada, the UK and the US, there is no single court in control of the situation, and the parties are unable to agree on anything – which means the funds remain 'locked' in the bank account.

Galatopoulos: I agree that resolving these disputes is often very difficult simply because of the number of parties with a financial interest and a voice. The 2006 *SphinX/Refco* collapse in Cayman continues to be a classic example of this. Also, there are not always clear lines between winning and losing. For example, who wins if the court decides to take a company away from its management and give control of it to an independent liquidator? Whether or not that was the 'right' decision economically may be impossible to tell – what matters is the creation of a transparent, accountable process, if what was previously in place was inappropriate or had come to the end of its useful life.

Cohen: Creditors continue to be very vigilant in their efforts to maximise recoveries from a debtor's estate. This includes attempting to exert more pressure and influence over reorganisation efforts at all stages of a Chapter 11 proceeding. For example, in the Lehman Brothers bankruptcy, we have seen two competing plans of reorganisation, in addition to the plan of the debtors, filed by creditor groups. The Tribune bankruptcy has also been particularly interesting, as there are four competing plans of reorganisation pending before the court. Which competing plan is ultimately adopted will impact the course of litigation in that case for years to come. How difficult it is to resolve disputes between debtors and creditors in the bankruptcy context varies dramatically from case-to-case based on the specific facts at issue, the interests of the parties, and the personality of counsel. Generally speaking, however, there appears to be an increased willingness to resolve disputes through mediation and multilateral negotiation.

Sprayregen: Can you outline some of the legacy issues stemming from Lehman's collapse and the subprime crash?

Strochak: The most closely-watched issue will be whether the reforms enacted under the Dodd-Frank law solve the 'too-big-to-fail' problem. Financial institutions are going to spend much time and money preparing living wills and fulfilling other regulatory requirements intended to prevent future collapses and provide an orderly resolution mechanism when they inevitably do occur. It remains to be seen if this advance planning will avoid protracted litigation in future failures.

Ratner: One of the legacies from the subprime era is that the amount of general litigation and government scrutiny that is being placed on financial institutions, and others that participated in that market, is extraordinary. Almost every major financial institution has been involved in some form of expensive litigation stemming from that era. One consequence of the backlash in this part of the economy is that there is a whole swath of the population that cannot get a mortgage or a line of credit. We are going through a period of tight consumer credit which will inevitably be followed again by loosening credit.

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IAN RATNER

Leonard: When a financial intermediary collapses, it leads to the most complicated of administrations. All the bank loans and credit facilities have been split, and it is almost impossible to identify exactly who the creditors are because the original creditors may have taken on the initial loan then subdivided it out to another set of creditors, and so on. That is a key issue in Lehman but it's true of all of the major filings these days. Previously, if you had a major insolvency, there would be a number of banks around a table and everybody would accept some of the pain. The banks would usually agree a workable solution rather than see the situation hang in limbo forever. But with the 'democratisation of claims', to coin a phrase, no one knows where all the creditors are, as each bank has packaged and sold its claims against the debtor. What may have begun as one bank with a $100m loan to the debtor becomes a $100m loan potentially broken into pieces held by thousands of claimants.

Galatopoulos: An important legacy issue affecting Cayman companies is the extent to which bankruptcy can be used to unwind a structured finance deal. Many deals in the CDO market are in default and the noteholders' recourse is limited to the amount of available assets. The notes will be held pursuant to the terms of a US law governed indenture in a structure deliberately designed to make the note issuer 'bankruptcy remote' and to allow the underlying pool of assets to be managed for many years. Some investors want to restructure or terminate those deals for their own commercial reasons; others want to sit back and wait for an upturn. There is no 'one size fits all' answer to this problem – everyone's rights and remedies are governed by the indenture. The Cayman Courts will respect and enforce the terms of the contract agreed to by the stakeholders, including any covenants not to file for the issuer's bankruptcy. The scope of those covenants, and whether the US Bankruptcy Court will override them, is one for the US lawyers.

Cohen: One of the significant collateral effects of Lehman's collapse is the uncertainty that arose in the derivatives and structured finance markets. Because the Lehman bankruptcy petition was hastily filed without the benefit of a planned unwind of the ▸▸

numerous derivatives positions, the Lehman estates and swap counterparties must now adjudicate novel issues in connection with the termination of swap transactions, which can be governed by US or foreign law. These issues are further complicated by the application of the US Bankruptcy Code, even in instances where the underlying transaction may be governed by foreign law.

Durrer: Lehman's collapse and the death of subprime continue to reverberate in the real estate and retail markets. Lehman was a huge force in commercial real estate, and many real estate investors across the US had projects stalled, abandoned or lost due to a failure or inability by Lehman and its partners to follow through with commitments in those projects. The demise of subprime contributed to decreased consumer confidence, hurting retailers' performance. Poor performance by retailers caused the closure of stores and even entire malls, contributing to a downtown in commercial real estate. We have not yet witnessed all of the fallout in the commercial real estate market from these two game-changing market events.

Sprayregen: To what extent are litigation issues linked to failed investment funds still playing out in the courts? What are the main challenges in these cases?

Ratner: One of the interesting challenges in these cases is access to the people that were present at the time, and collection of the records. In one current case related to a failed deal in 2001, there is a wealth of documents and financial information around but finding someone to walk you through the data and what exactly it all means is difficult. All the people associated with this deal have moved on – some permanently.

Leonard: Canada has escaped the worst of the investment funds kinds of failures. It did not suffer a subprime crisis, and its banks were not making loans in the same way as the US banks. One major conduit did collapse, but the major players rallied around and supported a reorganisation and that worked out successfully, although it was not what you would call a reorganisation or a liquidation. Since we have had only one large case of this kind, it is difficult to generalise about the Canadian experience.

Galatopoulos: Cayman and the BVI remain at the cutting edge in this area. Hot topics include the question of when the court will exercise its discretion to put a solvent fund into liquidation at the behest of an aggrieved investor. The BVI Court considers an orderly wind down by management to be part of the natural life of the fund and not in itself a reason for the appointment of an independent liquidator. The Cayman Court has taken a more interventionist approach, especially in circumstances where there has been a lack of proper disclosure to investors about the possibility of a management led wind down of indefinite length. The question of service provider risk remains topical. The challenge facing plaintiffs continues to be navigating around the broadly drafted exculpations and indemnities given to professional service providers. Under Cayman Islands and BVI law, those indemnities work unless they purport to exculpate or indemnify wilful default. They can create serious difficulty for plaintiffs trying to assess the economics of a claim, and personal risks for liquidators and external funders.

Durrer: We have all heard the expression 'what goes around, comes around'. In the context of litigation, the notion is that if a party, like an investment fund, is overly aggressive or litigious, other market participants may be less willing to do business with such a party in the future. However, when an investment fund has failed, is winding down, and trying to achieve the best recoveries for its creditors, there is no longer any incentive to foster goodwill and forge relationships for the future, for there is no future. In this regard, we have seen failed funds take more aggressive positions since they no longer have a reputation to preserve for the future.

Strochak: The Madoff case continues to generate litigation. We are awaiting a decision from the US Court of Appeals for the Second Circuit on the proper method for calculating the value of each investor's claim. The trustee there advocated for an approach that simply totalled the amount of cash invested and subtracted all distributions, and the bankruptcy court agreed. That decision, however, has riled many investors and they seek a ruling that the value of their claim should be the balance on their last statement before the Ponzi scheme was revealed. The trustee also has taken some aggressive positions in litigation against parties alleged to be complicit in the fraud; sustaining these theories will be a challenge for the trustee.

Sprayregen: What developments have you seen in the area of fraudulent conveyance and avoidance litigation in the last year?

Galatopoulos: As in the US, Cayman and BVI have seen a recent spike in clawback claims. The latest wave has of course been linked to the Madoff scandal. A key challenge is identification of the claim's governing law. If a redemption payment was made by a Cayman Islands company to the Irish bank account of a US incorporated investor, which law will govern the clawback claim? You may get a different answer depending on whether the claim

Cayman and BVI have seen a recent spike in clawback claims. If a redemption payment was made by a Cayman Islands company to the Irish bank account of a US incorporated investor, which law will govern the clawback claim?

ARISTOS GALATOPOULOS

arises from the payer's bankruptcy statute, or is based on common law principles such as mistake or 'knowing receipt'. Choice of law issues can really shape the strategy and ultimately the outcome of a case. A related hot topic is the extent to which the net asset value (NAV) of a fund can be restated if a payment was made based on that NAV. This is a question currently before the BVI Court in the Fairfield Sentry liquidation.

Cohen: The biggest development in fraudulent conveyance law in the last year was the decision by the US District Court for the Southern District of Florida in the TOUSA bankruptcy that quashed a $480m fraudulent transfer judgment by the US Bankruptcy Court for the Southern District of Florida – *3V Capital Master Fund Ltd. v Official Committee of Unsecured Creditors of TOUSA, Inc. (In re TOUSA, Inc.), 444 B.R. 613 (S.D. Fla. 2011).* There were three particularly significant aspects of the District Court ruling. First, entering into refinancing in order to avoid bankruptcy or default can provide a valuable, indirect benefit to parties who become obligated to repay the refinancing. Second, the District Court reaffirmed the narrow interpretation of who can be a party 'for whose benefit' a transfer was made under section 550 of the Bankruptcy Code. Third, the District Court reversed the Bankruptcy Court's conclusion that lenders who get repaid in a refinancing transaction have an obligation to investigate how the borrower raised funds to repay them.

Durrer: Of course, the reversal of the *TOUSA* decision by the District Court was probably the most significant development in the law in the last year. The impact of the decision and the cost of the appeal will continue to be felt for some time. Lenders would be wise to be mindful of their borrowers' businesses and to understand the intended use of loan proceeds. Although not relevant in *TOUSA*, this latter point is particularly significant where loan proceeds are financing a dividend to equity, transactions of which continue to be the subject of ongoing litigation in bankruptcy courts.

Strochak: There have been several significant developments in fraudulent conveyance litigation. In the TOUSA case, decided in February 2011, the district court took the unusual step of 'quashing' the decision of the bankruptcy court below, which had sustained fraudulent transfer claims against lenders based on a finding that the financing in question did not provide 'reasonably equivalent value' to TOUSA subsidiaries. The case raises critical issues under fraudulent transfer law in situations where the proceeds of a financing are utilised by only one member of an integrated corporate family that jointly obligates itself to repay the loans. Decisions from the 7th and 11th Circuits provided guidance on who is an 'initial transferee' and explored the contours of the 'mere conduit' defence; applicable in situations where the actual recipient of a transfer does not itself benefit from the transaction. An important decision in the Chrysler bankruptcy rejected constructive fraudulent transfer allegations against Daimler AG, finding them implausible in light of the facts established in the main bankruptcy case.

Ratner: The solvency and valuation fight in these cases is getting more and more complex. In some cases business multiples were so high during the prior 10 years that, during the solvency investigation, the appraiser is challenged by comparable data from the time that may seem unreasonable based on today's environment, but was believable and consistent with the market at the time of the payment or transfer in question.

In the TOUSA case the district court took the unusual step of 'quashing' the decision of the bankruptcy court below, which had sustained fraudulent transfer claims against lenders based on a finding that the financing in question did not provide 'reasonably equivalent value' to TOUSA subsidiaries.

ADAM STROCHAK

Sprayregen: With the amendment to Rule 2019 coming into effect in the US later this year, do you expect this to affect the formation of ad hoc committees and the ability to pursue litigation in bankruptcy cases?

Cohen: I do expect the changes to Rule 2019 to affect the formation of *ad hoc* committees, because, as a result of the changes, typical '*ad hoc* committees', 'steering groups' and 'informal groups', to use a few of the common appellations, will be subject to Rule 2019. The revised rule may cause creditors to more frequently operate through their contractual agents – for instance, administrative agents and indenture trustees – to take advantage of the specific exclusion granted to such agents. The revised rule may also spawn its share of litigation. For instance, the revised rule requires disclosure with respect to a group or committee that represents multiple creditors or equity holders when such entity "act[s] in concert to advance common interests". Because this concept is undefined, parties seeking to avoid disclosure may argue that they are not "acting in concert to advance common interests".

Durrer: I do not expect the changes to Rule 2019 to affect the formation of *ad hoc* committees. At this point, given the evolution in the case-law under the rule to date, I think the parties that typically band together in these groups are well aware of the risks associated with joining forces. One of the key reasons behind these combinations remains unchanged – pooling resources to have a more effective voice in a bankruptcy case. The new rule does not change that, it just makes disclosure of positions and timing more transparent. I do think that this transparency will assist distressed companies in their reorganisation efforts, because they will be better able to understand the motivation and goals of their constituencies.

Strochak: If the proposed changes to Bankruptcy Rule 2019 become final, groups of creditors working together will have to provide greater public disclosure in Chapter 11 cases. The additional disclosure requirements are not likely to deter many parties from acquiring claims or participating actively in Chapter 11 cases. Although the amended rule will require more disclosure than typically has been provided under current practice, proposals to require disclosure of date of acquisition and purchase price were watered down in the final version approved by the Advisory Committee on Bankruptcy Rules. The new requirements likely will not be a significant disincentive to the formation of *ad hoc* committees or other informal groups.

Sprayregen: What role have you seen mediators and arbitrators play in the bankruptcy process?

Durrer: In my experience, bankruptcy judges quite regularly take advantage of mediators for all sorts of disputes – from simple claim reconciliation matters, to more complex assumption and rejection of contract disputes, to the entirety of plan of reorganisation negotiation. The mediators themselves, pulled from the ranks of sitting and retired bankruptcy judges or active restructuring professionals, tend to be expert in turnaround matters which adds to the likelihood of success of mediations.

Strochak: Mediation is very common in bankruptcy litigation matters. Courts like it because it reduces their workload and can expedite the resolution of complex matters. We have seen mediators in a variety of roles, sometimes mediating multi-party matters that are core to the reorganisation effort, such as negotiation of a plan of reorganisation, and sometimes mediating more traditional bilateral disputes on claims. Arbitration is much less common, and is rarely used to adjudicate disputes that are critical to the reorganisation.

Ratner: In many cases arbitration can be just as expensive as litigation and the process is not always as fluid as one would hope. On the other hand, mediation in bankruptcy can be wonderful. A good mediator can assess the issues quickly and get parties focused on 'what will happen' if they run their case to the logical conclusion. A good mediator can save parties significant amounts of money. Mediation is not successful when parties to a dispute 'love' their case too much. In other words when a party to a dispute cannot be even slightly objective and see the problems with their case, or 'hear' someone else's thoughts, mediation just does not work.

The Nortel case has seen a huge mediation effort. One process involved representatives from 18 to 20 countries and more than 150 participants. It ended in an agreement to disagree, which can be endemic to mediation in bankruptcy.

BRUCE LEONARD

Leonard: The *Nortel* case has seen a huge mediation effort. One process involved representatives from 18 to 20 countries and more than 150 participants. It ended in an agreement to disagree, which can be endemic to mediation in bankruptcy. As the parties prepared for the second round of the mediation, they drilled down to concentrate on the points they thought would bring them more success than other claimants. As it turned out, everybody outlined their best case and, in the course of drilling down to improve the statements of their positions and their entitlement to the proceeds, they came up with new evidence. Consequently, the mediation ended up with the parties further apart than when it had started. That is not the way it is supposed to work, but it is a risk in mediation.

Galatopoulos: Cayman and the BVI have seen little emphasis on mediation and arbitration in bankruptcy proceedings, compared to general commercial litigation. The multi-party nature of the proceedings does not always lend itself to mediation. Also, it must be said that the emphasis of the BVI Commercial Court and Cayman Financial Services Division on proactive case management and speedy resolution of disputes means that the parties are less likely to consider mediation to be a quicker or cheaper alternative to litigation.

Cohen: Mediators have played a significant role in the bankruptcy process recently. For example, in the Lehman bankruptcy, the debtors have established multiple alternative dispute resolution procedures to resolve both claims against the estates and payables owed to the estates. These procedures have avoided burdening the bankruptcy court with an overwhelming number of matters. They have also created an environment that fosters settlements by capitalising on the desires of the debtors and their counterparties to avoid the time and expense of litigation.

Sprayregen: Have you seen judges in multiple jurisdictions in cross-border cases working more or less closely together this year?

Strochak: As courts, both in the US and in other jurisdictions, get more familiar with the requirements of Chapter 15, we anticipate the level of inter-court communications will increase. There do not appear to be any widely applicable trends in this area. In some cases, inter-court communications are frequent; in others, they rarely or never occur. The US courts are steadily developing a body of law interpreting Chapter 15 and the procedural aspects of cross-border cases will become more settled as time goes on.

Leonard: Judges are cooperating and coordinating more than

ever before. At a recent conference the Canadian judge on the Nortel case mentioned that he had held about 20-25 joint court hearings with his US colleague. That is almost unprecedented. Five to 10 years ago it was unusual for one judge to even talk to another on the same case, let alone hold a joint hearing. But a number of organisations have promulgated the idea of a cross-border insolvency protocol, which have been adopted in around 35-40 cases. This offers a road map for the courts to speak to each other and coordinate their administrations, and this has been a very positive development in the last few years.

Galatopoulos: There seems to be more willingness to work closely together and to take a flexible and cooperative approach. In common law jurisdictions like Cayman and the BVI, this may be partly down to the recent landmark decisions – *Cambridge Gas* in the Privy Council and *Rubin v Eurofinance* in the English Court of Appeal – encouraging a universal approach to bankruptcy related problems. It is also good to see how the interpretation of Chapter 15 has evolved recently – the *Condor* decision was a welcome reminder of the cooperation afforded to 'foreigners' and their laws by Chapter 15's predecessor. It is noteworthy that judges are willing to participate in industry conferences and debate issues of general importance. In the last six months alone, bankruptcy conferences in the Caribbean have benefited from the participation of judges from the US, England and the BVI. Practitioners really appreciate the efforts that the judges make to interact with each other and with the communities of bankruptcy professionals in other jurisdictions. This can only be a benefit to everybody involved in international bankruptcy cases.

Cohen: We have seen some examples of close collaboration in the last year between US bankruptcy courts and insolvency courts in Canada and England. For example, the Nortel bankruptcy has seen the US and Canadian bankruptcy courts generally evidencing a high degree of mutual respect. The courts have even held joint hearings via video link. In the Lehman bankruptcy, the US and English courts have exchanged multiple letters and are attempting not to usurp each other's authority.

Durrer: I would say collaboration continues to vary. All of the model laws encourage and foster communication and cooperation, but cultural divides can still raise barriers to that sort of interaction. The good news is that restructuring professionals – including judges – are becoming more and more aware of the critical need for coordination among multiple-jurisdiction insolvency proceedings. This has translated into a better environment for judges to work together across borders, but it still remains to be seen what will happen on a case by case basis.

Sprayregen: What general advice would you give to parties involved in bankruptcy litigation in today's climate? What basic considerations and preparations should they make before proceeding?

Leonard: It is tough to prepare for litigation in the general sense because you do not know where it's going to come from. That said, key areas to consider include claims processes, sales processes, jurisdiction, and stays. Most people are aware of these areas and remain vigilant, but that is about all you can do.

Ratner: I advocate 'case assessment'. Identify as many of the pros or cons and strengths or weaknesses of your case before proceeding. The case assessment team could include a lawyer, a forensic accountant, a financial adviser and a business person. Try to get as many of the issues on the table before diving into the deep water of litigation.

Galatopoulos: Generalising is very difficult. In rare cases, liquidator plaintiffs have needed reminding that they are expected to litigate like officers of the court and that un-particularised allegations will not be tolerated. Economically, a plaintiff litigating in Cayman and BVI will need to ensure that he has the means to carry out his threats and to pay his opponent's costs if he does not succeed. The advice for defendants continues to be to check the small print carefully – if you have an indemnity, let the indemnifier know quickly. If the indemnifier is in liquidation, you will become a creditor and will acquire the leverage that goes with that creditor status.

Cohen: Bankruptcy litigation carries with it all of the costs and complexities of general commercial litigation, in addition to complexities inherent to the bankruptcy process. It also typically proceeds at a far quicker pace than non-bankruptcy commercial litigation. It behoves parties to put structures in place to streamline the litigation process for the benefit of the debtor's estate, creditors and potential defendants. All parties should give serious consideration to mandatory mediation protocols, streamlined discovery and aggressive coordination to control costs and the process.

Durrer: We continue to give the same advice to all of our clients – before you send an email or a text or post something on a social media platform, ask yourself the following question: 'Would I be embarrassed to have someone read this email, text or post back to me in a courtroom situation?' The proliferation of seemingly endless modes of real time communication with hundreds or even thousands of people has made many of us too casual in our approach to communicating in business. Often, it makes sense simply to pick up a telephone and have a live conversation with someone rather than firing off an email. Following this advice will not always avoid litigation, but it can make it less costly to resolve.

Strochak: The cost of litigation will continue to increase due in large part to changes in records management. Virtually all document production now is in electronic format and as records have migrated from file cabinets to hard drives to servers, and now to the 'cloud', and as storage costs have decreased, the volume of information retained and potentially subject to discovery, and the cost of retrieving and reviewing it, has grown exponentially. Document production is probably the most labour-intensive aspect of litigation. Any party contemplating a significant bankruptcy litigation is well served by collecting pertinent documents from its own files before commencing the litigation, both to expedite the matter and to gain an appreciation for what its own records will show. ■