Mediating With the New Kid in Town

By Leslie A Berkoff

Bankruptcy Mediation – A Different Construct than Other Forums

Mediation in the bankruptcy forum is a unique process different than other types of mediation. In almost all bankruptcy courts, mediation is used in both business and consumer cases. Mediation is used to resolve multi-party disputes, discrete issues in larger litigations, and oftentimes to resolve traditional clawback claims brought under 11 U.S.C. §§ 544, 546, 547, 548 and 550. However, there is often a key difference to mediation in other forums. In bankruptcy, the party acting as the plaintiff in the bankruptcy mediation process is oftentimes not the original business owner but rather a litigation committee or liquidation trustee who is running a court ordered process long after the debtor has failed or has sold off these claims to a litigation trust. Oftentimes, the premise for the action being sent to mediation is the trustee's duty to pursue "clawback actions" (preferences or fraudulent conveyances which are creatures of bankruptcy law), although the underlying business facts governing the transfers are key. As a result, the dynamic is very different than other types of cases where both parties involved in the mediation were also involved in the original underlying "dispute" and have history and first-hand knowledge of the key facts. In fact, in bankruptcy mediation the plaintiff may have no historical knowledge of the underpinning business transactions which relate to the dispute at hand. Moreover, it is entirely possible that the key employees or other parties with knowledge of the history of the dispute and the related facts are long since gone from the company – having lost their jobs months or years prior during the failed restructuring of the corporate operations or having left for greener pastures when things turned rocky or uncertain. This means that the plaintiff has to learn all of the key facts at a time when there may be no one with first-hand knowledge to educate them and must rely on books and records interpreted by unfamiliar parties.

Despite the New Plaintiff – Does the Process Still Work?

Can you successfully mediate with a new and unfamiliar party at the table? The answer, this author believes, is yes and, by experience, quite well. Mediation is still an incredibly useful and productive tool and its use is on the rise in bankruptcy cases as a way to minimize costs and streamline the litigation process. In fact, in bankruptcy cases where there can be hundreds of "clawback" actions brought at one time, it can be an essential means to implement a successful collection process. Moreover, mediation can be singularly effective in these cases because the party negotiating for the estate is actually charged to act as a fiduciary and must maintain his or her focus, the concern to maximize assets, minimize and justify expenses, and strive to provide a return for creditors. This is not necessarily the same in non-bankruptcy mediations where plaintiffs are involved in the history of the dispute and tied to the company in a different fashion by their ongoing responsibilities in management and operations. In my experience, this new plaintiff can oftentimes survey the facts with more benign objectivity. True, they don't know the history, but these plaintiffs can be educated on the specific business facts, unique to the debtor's business currently at play and incorporate that into knowledge gleaned from other businesses where they might have served in a similar capacity in the past. Moreover, they lack the emotional or historical baggage that can impede a mediation in a more traditional setting. These are not the people who caused the problem at hand or are responsible for the facts that led to the dispute.

They are simply able to analyze the pros and cons of the litigation risks that are before them and decide how to proceed.

Bankruptcy in Mediation is a Cost Saving Tool

The filing of a bankruptcy case is usually commenced with a flurry of motion practice, which can mount quickly into significant fees. The multitude of motions that need to be filed to set the stage for the reorganization or liquidation process and the breadth of creditors that these motions can reach and affect, oftentimes leads to voluminous responsive filings and multiple hearings. Additional contested matters are created by the ancillary obligation for debtors and trustees to commence separate "spin off" litigations during the reorganization process to determine the value of collateral, the validity of liens, facilitate the recovery of assets, and/or determine various property rights. In order to reduce mounting legal fees (which will reduce recoveries to creditors or impact the ability of a debtor to successfully reorganize) many bankruptcy courts have turned to mediation as a means to address these issues.

Recognizing the usefulness of the mediation process in balancing costs and resolving disputes has led bankruptcy courts to encourage the development and implementation of local rules providing for mediation and for administering the process. Most courts have now established mediation panels comprised of a pre-approved (and, at times, pre-vetted) panel mediators who can be called upon to serve in a case at times by the participants; at times these mediators are simply selected by the Judge. Although the Federal Rules of Bankruptcy Procedure are silent about the ability to use mediation in the bankruptcy forum, a significant number of bankruptcy courts have opted to create formal court rules that authorize the use of mediation; other courts have used mediation on an ad hoc basis. This is predicated in part on the fact that, in 1998, Congress passed the Authorization of Alternative Dispute Resolution in 1998 (Public Law 105-315-Oct. 30, 1998), which provides for the use of alternative dispute resolution in bankruptcy. Moreover, well recognized organizations, like the American Bankruptcy Institute, have enacted formal training programs for bankruptcy dedicated mediators.

General Use in Mega Case*s*

In recent years, mediation has been especially effective in the context of "mega-bankruptcy" cases such as *Enron Corporation* and the *Adelphia Communications Corporation* bankruptcy cases. So too, have a many other bankruptcy cases utilized this entering orders providing for proposed procedures in cases where a debtor, creditors' committee or trustee anticipates filing a large number of avoidance actions. *See, e.g., In re Eastman Kodak Company,* Case No. 12-10202 (ALG) (Bankr. S.D.N.Y.) (Docket No. 6380); *In re Oldco M. Corporation (f/k/a Metaldyne Corporation)*, Case No. 09-13412 (MG) (Bankr. S.D.N.Y.) (Docket No. 1726); *In re Lehman Brothers, Inc.*, Case No. 08-01420 (JMP) (Bankr. S.D.N.Y.) (Docket No. 2894); *In re Creative Group, Inc.*, Case No. 08-10975 (RDD) (Bankr.S.D.N.Y.) (Docket No. 421); *In re Bernard L. Madoff*, Adversary Case No. 08-01789 (BRL) (Bankr. S.D.N.Y.) (Docket No. 3141).
Mediation has also proven to be a significant tool in the Detroit bankruptcy case. In fact, it has been recognized that, absent the use of mediation, in this case the funds and resources were simply not there to efficiently resolve the issues. "What has transpired is a delicate balancing act in bankruptcy court, where the public's right to know how public money is being handled is

being weighed against the rights of creditors and debtors to resolved their disputes in private." *See* Tresa Baldas, Matt Helms & Alisa Priddle, *How Mediation has Put Detroit Bankruptcy on the Road to Resolution,* Detroit Free Press, Feb. 20, 2014, http://www.freep.com/article/20140202/NEWS01/302020063/Orr-Snyder-Rosen-Detroi-bankruptcy. As lead mediator, Chief Judge Rosen oversaw several contentious restructuring talks between the city and its creditors, brokered the rescue fund to boost pensions and shielded artwork from being sold.

Bankruptcy courts are courts of dispute resolution independent of mediation. An effective bankruptcy lawyer knows that productive negotiations with creditors to develop a consensual plan, if possible, are the keystone of a successful reorganization process. Part of the impetus in all of these cases to using mediation is the benefit of reducing costs in the bankruptcy case as litigation costs for the debtor (or estate representative) or litigation committee are paid from property of the estate; funds that are paid for litigation diminish and deplete creditor recoveries.

Defendants Benefit as Well

While many defendants often express concern over the use of a "litigation appointed plaintiff," in the process, more often than not the clinical and dispassionate approach applied by this new party when balanced by need to justify fees more than tempers any lack of historical knowledge or personal history. As noted earlier, plaintiffs feel constrained to justify any actions they take more keenly than other traditional plaintiffs do. So too, a creditor's committee has a fiduciary obligation to represent the interests of all unsecured creditors.

Mediation is a delicate process that works best when parties are committed to the resolution and keep their eye on the end goal of achieving a reasonable result that balances litigation risks and concerns. The insertion of a new party into the factual dispute between business entities that have a history as to which this new party may have no first hand familiarity does not adversely affect that dynamic.

Given the considerations that one must draw upon as guidelines in resolving matters in mediation i.e. costs, risks and closure, are the same kinds of concerns that underpin the fiduciary obligations owed by the plaintiff in these matters the consistency of these concerns only serves to facilitate a reasonable and expeditious result. Overall, defendants should appreciate that an increased level of objectivity is brought to bear on the process and recognize that the need to unemotionally balance these concerns may allow for a more expeditious and efficient result which benefits them in the end.

Leslie A. Berkoff *is the Chair of Moritt Hock & Hamroff LLP's Bankruptcy and Corporate Restructuring Practice where she represents lenders, landlords, debtors, and trade creditors in cases pending nationwide. A mediator with over 15 years of experience, Ms. Berkoff has served as a mediator in a multitude of bankruptcy cases as well as general commercial litigation cases. Ms. Berkoff is a graduate of the American Bankruptcy Institute's ("ABI") inaugural class in Bankruptcy Mediation and currently serves as Co-Chair of Special Projects for the ABI Mediation Committee. She can be reached at lberkoff@moritthock.com.*