NYSBA SUMMER 2011 | VOL. 4 | NO. 2

New York Dispute Resolution Lawyer

A publication of the Dispute Resolution Section
of the New York State Bar Association

Reflections on Mediation in Bankruptcy Matters

By Leslie A. Berkoff

One of the primary goals of Title 11 of the United States Code, commonly referred to as the Bankruptcy Code, is to afford debtors the necessary breathing space from creditors in order to enable debtors to effectively reorganize their assets. Arguably by doing so, debtors maximize the value of these assets and provide creditors with payment on account of their claims. The protection of these competing, often contrary, interests is one of the hardest balancing acts created by the Bankruptcy Code. Throughout the process the debtor must either secure consent from the creditors or establish that creditors are not otherwise harmed by the debtor's actions. Thus, while in some respects the debtor has the ability to control the process and establish the means for the reorganization to take effect, the need to secure the consent of the creditors at various points lends balance to the process. To facilitate the goal of reorganization, the practice of bankruptcy law has evolved into a collaborative process with adverse parties working to harmonize their competing needs. However, this is simply not always possible or viable in all cases.

Bankruptcy is clearly a motion-driven process with the constant need to secure Court approval, even if matters are not contested, and Court intervention if they are contested. 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 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.

The goal of mediation is, of course, resolution of the issues that have been presented. Mediation can be a useful tool in bankruptcy to encourage warring parties, blinded by emotion, to consider the economic reality of both their position and the impact on the overall reorganization process. While the bankruptcy process is governed by the Bankruptcy Code, the Bankruptcy Code serves merely as the outline for the process and the underlying framework allows room to structure resolution of claims and divergent positions. Mediation can allow an individualized solution, which meets the party's needs and perhaps might not otherwise be in line with that which the Court can facilitate or achieve as a result of the bench ruling or published decision. In this regard, mediation can be a useful tool to allow the parties to customize the settlements of their dispute within the overall process.

Moreover, given the fact that there are oftentimes limited dollars at play, mediation can be a useful way for parties to effectuate a resolution with limited costs involved. Unlike more traditional contract disputes or commercial litigation, in the bankruptcy process even if the underlying dispute is resolved and a claim fixed, or a value ascribed, the overall payment and satisfaction of that debt or obligation is governed by the Bankruptcy Code and it may be that the payment is pennies on the dollar and over time. All of these are considerations that can be taken into account in bankruptcy mediation to determine whether the dispute over the dollar is really a dollar for dollar value or a percentage thereof. The mediator can provide a useful perspective on evaluating such claims and resolutions, especially when not all of the parties are perhaps bankruptcy practitioners by trade.

Furthermore, bankruptcy cases usually involve various other areas of law, and can require the interpretation of underlying documents or agreements between the parties over points of law that have nothing to do with the Bankruptcy Code. The interpretation, resolution and/or determination of these disputes must be in line with the bankruptcy process but can be assisted by a party having knowledge in that specific area. There exist many bankruptcy practitioners who in addition to having knowledge of bankruptcy have an additional specialized knowledge base which they can draw upon, for example health care law, labor law, and the automotive industry, to name a few. The ability to appoint a mediator with relevant experience and/or expertise would greatly decrease the costs and time associated with a discrete issue and can be truly useful to both the parties and the Court in facilitating a resolution of a matter. All of these factors taken together allow for mediation and a mediator to serve as an asset in meeting the goal of the Bankruptcy Code to reorganize the parties in a consensual manner.

Leslie A. Berkoff, lberkoff@moritthock.com, is a partner at Moritt Hock & Hamroff LLP and the Co-Chair of the Bankruptcy and Litigation Department.