
NORTON JOURNAL OF BANKRUPTCY LAW AND PRACTICE

Vol. 18, No. 1 (2009)

The Impact of Credit Default Swaps on the Chapter 11 Process Gregory Gennady Plotko	1
Gimme Shelter: The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims in Bankruptcy Mark L. Desgrosseilliers	19
Present Value Discounting and 11 U.S.C.A. § 502(b) Kenneth J. Schweiker, Jr.	55
The Elusive Notion of “Income from Discharge of Indebtedness” Robert Willens	89
Fixing the Broken Machine: Means Testing and Secured Debt Payments Under BAPCPA Adam D. Herring	101
The Bankruptcy Court’s Jurisdiction Does Not End Upon Entry of the Confirmation Order Richard J. Corbi	137
“Nonstatutory” Insiders Under Bankruptcy Code § 101(31): An “Arm’s-Length” Test Is Not a Proper Test Grant L. Cartwright	157
Section 363(f) “Free and Clear” Sales May Not Survive Appeal Richard J. Corbi	163

Norton Journal of Bankruptcy Law & Practice (USPS 012-091), (ISSN 1059-048X) is published bimonthly, six times per year, by West, 610 Opperman Drive, Eagan, MN 55123-1396. Subscription Price: \$441.48 annually. Periodicals postage paid at St. Paul, MN, and additional mailing offices. Postmaster: send address changes to Journal of Bankruptcy Law & Practice, PO Box 64526, St. Paul, MN 55164-0526.

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Mat # 40722127

Gimme Shelter: The Use of Alternative Dispute Resolution Procedures to Resolve Tort Claims in Bankruptcy

MARK L. DESGROSSEILLIERS

The floods is threatening
My very life today
Gimme, gimme shelter
Or I'm gonna fade away¹

I. INTRODUCTION

One of the primary advantages of bankruptcy for corporations struggling under the weight of massive debt loads and an overwhelming number of lawsuits is that a bankruptcy court provides the corporation with a centralized forum for the resolution of its disputes.² Thus rather than engage hundreds of expensive lawyers in multiple jurisdictions to engage in endless litigation, bankrupt corporations can turn to merely dozens of expensive lawyers in one jurisdiction to engage in litigation that must, by the nature of the bankruptcy process, end on a shorter and therefore (presumably) less costly timeframe. In addition, the filing of the bankruptcy petition imposes an injunction, the “automatic stay,” against all efforts to collect on any claim arising prior to the date of the bankruptcy filing.³ In order to proceed with or initiate litigation in which a party seeks a money judgment against a debtor for a “claim” arising prior to the bankruptcy filing, a litigant must first seek relief from the automatic stay from the bankruptcy court in which the bankruptcy case is pending.⁴

However, bankruptcy courts are courts of limited jurisdiction.⁵ Accordingly, a bankrupt corporation might find that the jurisdiction in which it filed its case is not ultimately the jurisdiction that will deter-

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mine the validity or amount of certain claims against the corporation, particularly if such claims arise from litigation involving personal injury or wrongful death claims.⁶ If a debtor files for bankruptcy because of an overwhelming amount of litigation or as a result of an adverse decision in “bet the company” litigation, such a debtor will almost certainly be on the receiving end of one or more motions seeking relief from the automatic stay rather promptly after the filing of the bankruptcy case.⁷ Alternatively, or in conjunction with a motion seeking relief from the automatic stay, a tort claimant faced with a bankruptcy filing might move for the bankruptcy court to abstain from hearing such matter,⁸ or to withdraw the reference from the bankruptcy court to the federal district court.⁹ Although bankruptcy courts have generally favored maintaining the centrality of all litigation involving a debtor, particularly debtors facing an overwhelming amount of litigation prior to the petition date, a debtor in bankruptcy could face the prospect of litigating claims against it in multiple jurisdictions, notwithstanding the filing of the bankruptcy case. This result, of course, is not generally ideal for the debtor on the receiving end of numerous prepetition lawsuits.

In addition to the jurisdictional issues that bankruptcy creates for the resolution of certain tort claims, large bankruptcy cases also create practical problems for the bankruptcy court fortunate enough to be on the receiving end of such filings. Among other things, the Federal Rules of Bankruptcy Procedure¹⁰ require the institution of separate adversary proceedings for a debtor to pursue certain causes of action, including the recovery of preferential and fraudulent transfers, available to debtors under the Bankruptcy Code.¹¹ Moreover, when a debtor objects to a claim, that objection is a contested matter.¹² Where the objection to the claim raises substantive issues with respect to the validity of the claim, such objection results in separate litigation with respect to such claim. Thus bankruptcy courts in which multiple “mega-cases”¹³ have been filed can and have become overwhelmed by the sheer number of resulting adversary proceedings. In response to such onslaughts of bankruptcy litigation, bankruptcy courts across the nation have increasingly mandated alternative dispute resolution (ADR) procedures for the resolution of adversary proceedings and certain contested matters.¹⁴

Similarly, in the face of numerous motions for relief from the stay, motions to abstain, and motions to withdraw the reference from tort claimants intent on pursuing their claims to judgment generally in a forum other than the bankruptcy court in which the debtor’s case is pending, and with limited financial resources and time to address such issues, creative debtors’ counsel have increasingly turned to ADR mechanisms to resolve what may very well be thousands of prepetition claims. Such

debtors have generally sought the approval of such claims resolution procedures either by motion during the bankruptcy cases or through the confirmation of a plan containing such ADR procedures.

This article explores the legal bases for and challenges posed by the adoption of alternative dispute resolution procedures, particularly for tort, including personal injury and wrongful death, claims. After setting forth some of the general principles that motivate the principal players involved in pursuing or defending tort claims in bankruptcy, the article examines procedures that have been developed, primarily by debtor's counsel, to address such claims promptly and efficiently. The procedures discussed herein have been approved by bankruptcy courts facing such waves of bankruptcy claim litigation and have generally permitted troubled debtors to resolve the bulk of their pending tort claims without adversely impacting such debtors' efforts to consummate their plans of reorganization. Accordingly, such procedures may serve as convenient models¹⁵ for bankruptcy professionals who appear to be heading once more into the breach.¹⁶

II. IMPACT OF BANKRUPTCY FILING ON PREPETITION LITIGATION AND CORRESPONDING CLAIMS

In order to fully examine the strategies employed by bankruptcy courts and debtors to address tort claims, including personal injury tort claims in a debtor's bankruptcy case, it is critical to understand the bases for objections to such procedures. Towards that end, a very brief discussion of some basic bankruptcy principles provides a framework for the examination of the ADR procedures employed by debtors that will follow.

A. The Bankruptcy Court's Jurisdiction

1. Generally

Initially, a bankruptcy court is a court of limited jurisdiction.¹⁷ Thus in approving any alternative dispute resolution procedures, debtors and courts must be mindful of the jurisdictional constraints placed on such efforts.

Although this article will not attempt a full examination of the boundaries of a bankruptcy court's jurisdiction,¹⁸ such jurisdiction (i) is determined by the district court's original and exclusive jurisdiction over bankruptcy cases¹⁹ and (ii) is further delimited by the constraints on federal district courts to refer their bankruptcy case jurisdiction to the bankruptcy courts, which are arms of their respective district courts.²⁰

Under section 1334(a) of Title 28, U.S. Code, the federal district courts have original and exclusive jurisdiction of all bankruptcy cases.²¹ In contrast, pursuant to section 1334(b) of Title 28, federal courts have original but not exclusive jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.”²² Thus while federal courts have exclusive jurisdiction over cases filed under Title 11 of the U.S. Code, such courts may, and indeed must (in certain instances on request of a party, as discussed herein²³), abstain from hearing certain matters, including those primarily state law tort claims that may be the subject of litigation pending at the time of the bankruptcy filing or that may be the result of actions taken (or not taken) prior to the filing of the bankruptcy case by the debtor.

Section 157(a) of Title 28 permits all federal district courts to refer “all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11” to the bankruptcy judges for that district.²⁴ Moreover, section 157(b) of Title 28 permits “all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11” to be heard and determined by bankruptcy judges.²⁵ Although a bankruptcy court may have a matter referred to it by the district court that is “noncore,” and indeed, as a result of the automatic reference, the bankruptcy court will almost certainly have “non-core” matters referred to it by the district court,²⁶ absent the consent of the parties to such matter, the bankruptcy court cannot issue a final order with respect to such matter.²⁷ Instead, in such instances, the district can either withdraw the reference and determine the matter (unless such court abstains)²⁸ or the bankruptcy court can submit proposed findings of fact and conclusions of law with respect to such matter to the district court.²⁹ Accordingly, in determining whether and how to resolve disputed claims in a bankruptcy case, the court must first determine whether the disputes underlying such claims are core or noncore matters. If the matters are core, then the bankruptcy court has jurisdiction to enter a final order. If the matters are non-core, e.g., state law tort claims, however, the jurisdiction of the bankruptcy court becomes more problematic.

2. Core vs. noncore matters

As noted above, if a matter is “core,” a bankruptcy court can issue a final order with respect to such matter.³⁰ However, in the absence of consent of the parties, if the matter is not core, the bankruptcy court can, at best, issue proposed findings of fact and conclusions of law with respect to such matter.³¹

Generally, a core proceeding has been described as one that “invokes a substantive right provided by” the Bankruptcy Code or one that “could arise only in the context of a bankruptcy case.”³² The broad categories of core matters are set forth in section 157(b)(2).³³ One of these categories is “other proceedings affecting the liquidation of the estate.”³⁴ This sweeping category specifically excepts from its apparently broad reach “personal injury tort or wrongful death claims.”³⁵ Thus the liquidation of such claims for purposes of determining a claimant’s entitlement to distribution under a plan is not a core matter. Moreover, in light of the Supreme Court’s decision in *Marathon*, it is likely that the sweeping, catch-all provision (O) in section 157(b)(2) does not bring within the bankruptcy court’s core jurisdiction claims arising primarily from state law.³⁶ Thus the resolution of prepetition tort claims arising against a debtor will not generally be considered a “core” matter.

3. Special provisions for personal injury tort and wrongful death claims

The liquidation of personal injury tort and wrongful death claims is specifically excluded from the bankruptcy court’s core jurisdiction, irrespective of the very material impact such claims can and often do have on a debtor’s case. However, section 157(b)(4) also provides that such claims “shall not be subject to the mandatory abstention provisions of section 1334(c)(2).”³⁷ Moreover, the statute is clear that proceedings to estimate personal injury tort and wrongful death claims for purposes of plan confirmation are core matters.³⁸ Thus, as discussed below, while a tort claimant may be able to have the reference withdrawn with respect to the resolution of its noncore matter, unless the district court agrees to abstain from hearing the matter or determines that venue should properly lie where the claim arose, the district court for the district in which the bankruptcy case is pending may ultimately hear the matter for purposes of liquidation of the claim.³⁹ Importantly, the bankruptcy court may also retain jurisdiction to estimate such claims for purposes of plan confirmation and, with the consent of the tort claimant, may even liquidate such claims.

B. The Automatic Stay

Pursuant to Bankruptcy Code section 362, the filing of a petition in bankruptcy operates as a stay (the automatic stay) of all pending litigation.⁴⁰ The automatic stay generally prevents creditors, including litigants and claimants whose claims arose prior to the date of the filing of the bankruptcy petition from taking actions to collect on such claims, including through the pursuit of the underlying litigation. The central

policy behind the automatic stay is to provide the debtors with a breathing spell in order to reorganize successfully.⁴¹ This breathing spell, in turn, helps to ensure that all similarly situated unsecured creditors are treated equally.⁴²

Thus a corporation facing hundreds of lawsuits will receive a temporary reprieve from the onslaught of litigation. Indeed, numerous courts have recognized that the automatic stay is one of the fundamental protections afforded debtors.⁴³ Such courts will generally go to great lengths to preserve the automatic stay, particularly in the early stages of the debtor's bankruptcy case.

However, the mere stay of such litigation does nothing to address the claims underlying such litigation. Such claims remain and, if scheduled by the debtor, are presumably addressed through the bankruptcy claims process.

Indeed, in many instances, large judgments, numerous personal injury or product liability lawsuits, or precipitous creditor collection actions may have triggered the filing of bankruptcy by the debtor. In these cases, it will be critical for debtors to address such claims in the course of their bankruptcy cases if such debtors are to emerge with the fresh start that bankruptcy promises. In addition, payment of "common variety tort claims," although often overlooked by overworked debtor's counsel, could have a material impact on the outcome of the debtor's case and the recovery for such debtor's creditors and other parties in interest in the debtor's case depending on the type of insurance available to cover such claims and the security (if any) held by a debtor's insurer. Where the debtor's insurance company holds such security, the development of procedures for addressing such claims in a cost-effective manner might benefit both the debtor and its purportedly secured insurer.

C. Relief from the Automatic Stay, Withdrawal of the Reference, and Abstention

Debtors that are facing numerous lawsuits prior to their bankruptcy filings will almost certainly, upon filing for bankruptcy protection, receive numerous requests for relief from the automatic stay to allow the pending litigation to proceed. In addition to such "lift stay" motions, or coupled with such motions, debtors will also have to respond to requests from litigants that the bankruptcy court either abstain from hearing the disputes underlying the litigation or that the district court withdraw the reference with respect to such litigation. The ADR procedures that have been developed by debtors to resolve the tort claims facing their estates will also generally seek to stay any further efforts by litigants to obtain relief from the stay or otherwise seek authority from the bankruptcy

court to proceed with their litigation, generally by seeking (i) to have the bankruptcy court abstain from further proceedings with respect to the underlying dispute or (ii) to have the automatic reference with respect to the pending litigation withdrawn from the bankruptcy court.

1. Relief from the automatic stay

A creditor, including a party to pending litigation, may seek relief from the automatic stay imposed by Bankruptcy Code section 362.⁴⁴ Specifically, Bankruptcy Code section 362(d)(1) provides:

- (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
 - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.⁴⁵

The party moving for relief from the automatic stay bears the initial burden of demonstrating that “cause” exists to warrant terminating the automatic stay.⁴⁶ In determining whether sufficient cause exists to lift the automatic stay, bankruptcy courts generally consider: (i) the policies underlying the automatic stay; (ii) the competing interests of the debtors and the party seeking relief from the stay; and (iii) the probability of success on the merits of the underlying action if the stay were lifted.⁴⁷

Where a debtor faces numerous claims, including disputed tort claims that are either the subject of litigation ongoing at the time of the bankruptcy filing or that have arisen or will arise as a result of actions taken by the debtor prior to the filing of the debtor’s bankruptcy case, such debtor should expect multiple lift stay motions. Often these lift stay motions will be filed in the early stages of the debtor’s bankruptcy case and, if not addressed systematically by the debtor could seriously impede the debtor’s efforts to: (i) stabilize its business and (ii) develop and implement a plan for restructuring its business operations. In addition, such lift stay motions will often be accompanied by requests from current or prospective tort claimants that the bankruptcy court abstain from hearing the tort claim or that the district court withdraw the automatic reference, at least with respect to such claimants’ pending or proposed litigation.

2. Withdrawal of the reference

An additional recourse for tort claimants whose litigation has been placed on an apparently permanent hold by the debtor’s bankruptcy fil-

ing is to seek to have the reference withdrawn with respect to their claim or proceeding. Specifically, section 157(d) provides:

The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.⁴⁸

Pursuant to section 157(d), as discussed more fully below, withdrawal of the reference may be either mandatory or permissive.⁴⁹ However, pursuant to Rule 5011 of the Federal Rules of Bankruptcy Procedure, all motions seeking an order for withdrawal of the reference of a case or a proceeding “shall be heard by a district judge.”⁵⁰ Thus the district court determines whether the reference with respect to an entire bankruptcy case or a specific proceeding within a bankruptcy case will be withdrawn.

a. Mandatory withdrawal of the reference

Courts have held generally that the withdrawal of the reference is required where the resolution of claims will require “substantial and material” consideration of non-bankruptcy statutory law regulating activities affecting interstate commerce.⁵¹ Certain courts, however, have interpreted section 157(d) to mandate such withdrawal only where a proceeding will demand that the bankruptcy judge engage in intensive interpretation of nonbankruptcy federal law.⁵² Indeed, one court has noted that a narrow interpretation of section 157(d) is essential “so that it is not utilized as an escape hatch through which most bankruptcy matters could be removed to a district court.”⁵³

Thus while section 157(d) would appear to mandate the withdrawal of all proceedings other than those unique to bankruptcy, e.g., objections to discharge under Bankruptcy Code section 523⁵⁴ or recovery of preferential transfers under Bankruptcy Code section 547,⁵⁵ numerous courts have determined that mandatory withdrawal is only justified if resolution of the issues raised will require the bankruptcy court to delve deeply into nonbankruptcy federal law.⁵⁶ Moreover, the “bare contention” that a determination of an issue of federal, nonbankruptcy law would dispose of the matter has been held not to justify mandatory withdrawal.⁵⁷ Finally, courts have also been sensitive to the potential that litigants might use a motion for withdrawal of the reference in an effort to defeat the forum chosen by the debtor for its bankruptcy case and in such cases have been reluctant to grant such requests.⁵⁸

b. Permissive withdrawal of the reference

Section 157(d) also permits, but does not require, a district court to withdraw the reference “for cause shown.”⁵⁹ The statute does not define “cause,” but numerous courts have set forth the principal factors that will be analyzed in determining whether cause has been established to justify withdrawal of the reference.⁶⁰

The following factors, among others, have been identified by courts determining whether or not to withdraw the reference: (1) whether the proceeding is core or noncore; (2) the interests of judicial economy; (3) the need for uniformity in bankruptcy administration; (4) whether such withdrawal would further the more efficient use of debtors’ and creditors’ resources; (5) the potential that such withdrawal would encourage forum shopping; (6) whether the withdrawal would delay the bankruptcy process; and (7) whether any party made a jury demand.⁶¹

Initially, if a particular proceeding involves only noncore matters, some district courts are inclined to withdraw the reference with respect to such proceeding.⁶² In addition, where a tort claimant has demanded a jury trial in a prepetition action, “cause” to withdraw the reference would exist.⁶³ Moreover, if the parties to the litigation have not consented to a jury trial by the bankruptcy court, the bankruptcy court’s inability to conduct such a jury trial may also constitute sufficient cause for withdrawal of the reference with respect to such proceeding.⁶⁴ However, the fact that a bankruptcy case, and the numerous adversary proceedings spawned by such bankruptcy filing, may be more uniformly administered if the reference is not withdrawn, may weigh heavily against withdrawing the reference.⁶⁵

3. Abstention

The third arrow in the tort claimant’s quiver is a motion requesting that the bankruptcy court abstain from hearing the existing prepetition litigation and any claims resulting from such litigation. Section 1334(c) of Title 28 governs abstention in bankruptcy cases and provides:

- (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.
- (2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been

commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.⁶⁶

Thus as with the withdrawal of the reference, abstention may be either mandatory or permissive. Unlike decisions with respect to the withdrawal of the reference, however, the bankruptcy court has jurisdiction to consider a motion to abstain.⁶⁷

In order for mandatory abstention to apply, pursuant to section 1334(c)(2) of Title 28, a tort claimant must first timely move for abstention.⁶⁸ Generally, a motion to abstain will be considered to have been made timely if the motion is brought as soon as possible after the facts giving rise to such motion are known to the movant.⁶⁹ Importantly, abstention will only be mandatory in those instances where there is not complete diversity of citizenship.⁷⁰ Thus for most tort claims of any significance, the mandatory abstention provisions may not apply. Moreover, in order for the bankruptcy court to be required to abstain from a proceeding, the litigation must not only be pending as of the bankruptcy filing, but also must be capable of being “timely adjudicated.”⁷¹ Finally, for all practical purposes because most entities with a claim against a debtor will file a proof of claim as a matter of course, and because the allowance or disallowance of such claim is a “core” matter, there will be few occasions where a bankruptcy court will be compelled to determine whether such court is required to abstain under section 1334(c)(2) of Title 28.⁷²

In contrast, bankruptcy courts frequently must determine whether to abstain from hearing a proceeding under the discretionary standard set forth in section 1334(c)(1) of Title 28.⁷³ Factors considered for discretionary abstention include: (1) the effect on the efficient administration of the bankruptcy estate; (2) the extent to which issues of state law predominate; (3) the difficulty or unsettled nature of the applicable state law; (4) comity with state courts; (5) the degree of relatedness or remoteness of the proceeding with the main bankruptcy case; (6) the existence of a right to trial by jury; (7) prejudice to the involuntarily removed parties; and (8) the potential for duplicative and uneconomical use of judicial resources.⁷⁴ Generally, however, in order to abstain from hearing a particular matter, particularly a “core” matter, a bankruptcy court must overcome a strong presumption against such abstention.⁷⁵

D. Claims Estimation

Although many “people think of bankruptcy as a means of avoiding paying claims as opposed to resolving them,”⁷⁶ bankruptcy practitioners, by necessity, are often compelled to resolve relatively expeditiously a

large number of substantial claims.⁷⁷ Among other things, such resolution may be necessary in order to permit a debtor to confirm its plan in the bankruptcy cases.⁷⁸

If, due to jurisdictional issues or timing constraints, the debtor is unable to conduct a mini-trial with respect to all of its contingent or unliquidated claims prior to confirmation of the debtor's plan, as is almost always the case, Bankruptcy Code section 502(c) requires a debtor to estimate unliquidated or contingent claims.⁷⁹ In addition, section 157(b)(2)(B) of Title 28, as noted above, specifically provides that the estimation of claims and interests for the purpose of confirming a plan, even personal injury tort and wrongful death claims, are "core" matters.⁸⁰

Neither the Bankruptcy Code nor the Bankruptcy Rules proscribe precisely how a bankruptcy court may estimate claims.⁸¹ Accordingly, bankruptcy courts have generally shaped estimation procedures to the needs of specific bankruptcy cases.⁸²

E. Effect of Filing of Proof of Claim on Liquidation of Claims

A bankruptcy court may also be inclined to deem consent to the liquidation of a proof of claim by the bankruptcy court, even if such claim arises from an alleged tort resulting in personal injury or wrongful death, if the tort claimant, has, among other things, filed a proof of claim or an adversary proceeding to determine the dischargeability of the debt owed to her by the debtor.⁸³ As the bankruptcy court noted in *Smith*:

Section 157(b) generally, and section 157(b)(5) in particular, do not create or destroy jurisdiction. They simply allocate the jurisdiction already conferred upon federal courts in an effort to answer the question as to whether a bankruptcy court may enter a binding judgment, or whether it must make proposed findings of fact and conclusions of law for the district court's use.⁸⁴

In that case, the bankruptcy court determined that the tort claimant had, in fact, consented to the determination of its unliquidated prepetition personal injury tort claim (arising from a prepetition libel action), where the creditor: (i) filed a proof of claim and (ii) filed a complaint with the bankruptcy court to determine the dischargeability of the debtor's liability in the libel action (which the tort claimant admitted was a "core proceeding").⁸⁵ Interestingly (for creditors' lawyers), the court gave little credence to the tort claimant's attempt to reserve his right to a jury trial in his filed proof of claim:

Adelson's proof of claim purports to reserve his right to jury trial, but he can no more stave of a waiver in that manner than he could accede to this court's jurisdiction only on the condition that he

win... [F]iling a proof of claim carries with it undeniable waivers and risks, and Adelson and his lawyers should have known of these when they filed Adelson's complaint and his proof of claim.⁸⁶

As set forth above, a debtor will generally face an uphill battle in any attempt to liquidate tort claims in a bankruptcy case without the consent of the tort claimant.⁸⁷ For the debtor's purposes, it may be enough to simply have the claim or numerous tort claims (in a mass tort bankruptcy case) estimated for purposes of plan confirmation. However, in light of (i) the delay that tort claimants may face after a debtor files for bankruptcy before being permitted to proceed with the prosecution of their tort claims in the original jurisdictions in which the claims were brought prior to the bankruptcy filing (if such prosecution is permitted at all);⁸⁸ and (ii) the potentially small recovery available in the bankruptcy case to individual, unsecured creditors like the tort claimant, it might be in the tort claimant's best interest to resolve her claim against the debtor through more streamlined procedures in the bankruptcy court. Thus, notwithstanding that the bankruptcy court will generally not hear matters relating to the liquidation of personal injury tort and wrongful death claims over the objection of the tort claimant, such claimant can (and perhaps should) consent to the liquidation of her claim.

IV. ALTERNATIVE DISPUTE RESOLUTION AND BANKRUPTCY

As noted above, rather than linger in what often appears to be a land in which claims are filed and never paid, tort claimants faced with the bankruptcy of the alleged tortfeasor generally would prefer to litigate their claims in the forum in which any prepetition litigation was or could have been filed with respect to such claims. Thus, early in a debtor's bankruptcy case, particularly if the filing of a particular bankruptcy case was precipitated by prepetition litigation, a debtor may find itself on the receiving end of numerous stay relief requests, motions to abstain, or motions to withdraw the reference. Moreover, such a debtor will likely need to resolve unliquidated tort claims on a relatively expedited basis if the debtor is to develop, solicit, and ultimately confirm a plan within the very tight time frame currently provided by the Bankruptcy Code.⁸⁹ Accordingly, a debtor may decide relatively early in the bankruptcy cases to seek approval of ADR procedures for resolving such claims.

Bankruptcy itself has been referred to as a form of alternative dispute resolution, allowing a summary adjudication of disputes in a centralized forum.⁹⁰ Moreover, Bankruptcy Rule 9019(c) specifically permits a bankruptcy court to submit a matter to "final and binding arbitration" on stipulation of the parties.⁹¹ Accordingly, it is not surprising that com-

mentators have generally noted that bankruptcy cases seem ideal for implementing ADR procedures. Indeed, as discussed below, bankruptcy courts have “embraced” alternative dispute resolution procedures both to manage their often overwhelming dockets and, in response in part to the Alternative Dispute Resolution Act of 1998,⁹² to resolve efficiently certain disputes arising within bankruptcy cases.⁹³ However, the use of ADR procedures to resolve tort claims in bankruptcy has not been nearly as widespread. It has been suggested that such procedures are not routinely implemented because of a lack of awareness of the processes that have been approved by bankruptcy courts.⁹⁴ In addition, the changing nature of insurance coverage has, no doubt encouraged debtors who previously had little or no interest in disputing tort claims that were covered by insurance to focus increasingly on minimizing the total amount of such claims.⁹⁵

A. Alternative Dispute Resolution Act of 1998

In October 1998, Congress passed and then President Clinton signed the Alternative Dispute Resolution Act of 1998 (ADR Act).⁹⁶ The purpose of the ADR Act was to encourage the use of ADR procedures in all federal courts, including bankruptcy courts.⁹⁷ Among other things, the ADR Act required that federal district courts “authorize, by local rule... the use of alternative dispute resolution procedures in all civil actions, including adversary proceedings in bankruptcy.”⁹⁸ The ADR Act further authorized the Federal Judicial Center to assist the federal courts in devising and implementing such procedures.⁹⁹ In addition, federal courts were directed to make ADR procedures available to litigants.¹⁰⁰ Those federal courts that chose to require participation by litigants in ADR procedures were expressly limited to requiring participation in early neutral evaluation and mediation.¹⁰¹ Only with the consent of the parties could the federal court compel arbitration.¹⁰²

Spurred on by the ADR Act and overwhelmed by thousands of adversary proceedings and massive bankruptcy filings with hundreds of contested matters and thousands of claims per large bankruptcy case, bankruptcy courts have: (i) implemented through their local rules voluntary ADR procedures and (ii) approved voluntary and mandatory mediation procedures in bankruptcy cases.

B. ADR Procedures in General

1. ADR in bankruptcy

Following the boom in business bankruptcy case filings beginning in 1999 and continuing through 2001 in Delaware, the Delaware bankrupt-

cy court found itself awash in adversary proceedings, including complaints for the recovery of preferential transfers pursuant to Bankruptcy Code section 547.¹⁰³ In order to address the 15,000 adversary proceedings that were pending and the additional 10,000 that were expected to be filed in 2004, then-Chief Judge Mary F. Walrath instituted certain pretrial procedures in all adversary proceedings filed in the U.S. Bankruptcy Court for the District of Delaware (the Delaware Bankruptcy Court) on or after May 1, 2004. Among other things, these procedures mandated that the parties appoint a mediator within 90 days after an answer or other responsive pleading to the complaint was filed.¹⁰⁴ In the event that the parties failed to appoint a mediator, the bankruptcy court would select a mediator from a panel of approved mediators.¹⁰⁵ Thus in response to an almost overwhelming number of adversary proceedings, as permitted (and, indeed, encouraged) by the ADR Act, the Delaware Bankruptcy Court mandated that prior to proceeding with certain adversary proceedings, the parties first had to attempt to mediate their disputes. This was not, however, the first instance in which bankruptcy courts have turned to alternative dispute resolution procedures.

As early as 1986, then-Chief Bankruptcy Judge Louise Adler introduced a voluntary ADR procedure in the U.S. Bankruptcy Court for the Southern District of California in San Diego.¹⁰⁶ By all accounts, the ADR program reduced the court time required for adversary proceedings and promoted settlement.¹⁰⁷

Bankruptcy practitioners have also been employing ADR procedures for well over a decade.¹⁰⁸ Such practices began to be regularly employed at least as early as 1990. In June of that year, Greyhound Lines, facing a violent strike by the company's bus drivers, hundreds of millions in debt, and millions of losses per quarter, filed for bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of Texas.¹⁰⁹ In addition to the serious labor issues, massive losses, and large amount of debt that Greyhound faced, it also needed to address about 3,000 tort claims arising from accidents that occurred prior to the petition date.¹¹⁰ The ADR plan implemented in the Greyhound bankruptcy cases consisted of three separate stages.¹¹¹ Initially, claimants were required to complete a claim form and set forth thereon information concerning their lost wages, medical bills, and other damages.¹¹² The claimant then had the option of entering into an "offer and exchange process" with counsel for the debtors.¹¹³ If the claimant chose not to participate in this stage, or if the offer and exchange process did not result in a settlement, however, the claimant and the debtor then engaged in mediation for 60 days.¹¹⁴ In the final stage, the parties could arbitrate their disputes.¹¹⁵ In the event that the parties chose not to arbitrate and no settlement was

otherwise reached, the litigation remained stayed unless and until the bankruptcy court granted the claimant relief from the stay to proceed with any litigation.¹¹⁶ In the end, the debtors were able to address approximately 1,500 of the 3,000 tort claims through the ADR procedures and all settled, 90% in the first stage (the offer and exchange stage).¹¹⁷

Similarly in 1996, Best Products filed for bankruptcy in the U.S. Bankruptcy Court for the Eastern District of Virginia and subsequently sought and obtained approval of certain mediation procedures for disputed claims.¹¹⁸ Specifically, Best Products initiated a mediation process in which after filing an objection to a claim, the debtor could schedule a nonbinding, but mandatory, mediation session with respect to such claim.¹¹⁹ Because the mediation and claims objection process proceeded simultaneously, the mediation occasioned no additional delay for claimants with disputed claims. Moreover, the bankruptcy court required all claimants to participate in the mediation process. If a claimant failed to participate, the claimant's claim would be disallowed. The result in the Best Products bankruptcy cases was that most disputes settled prior to mediation and the settlement percentage for those claims actually subject to mediation exceeded 85%.¹²⁰ The debtor was even able to resolve certain personal injury claims, for which, as discussed above, the bankruptcy court lacked jurisdiction to issue a final order liquidating the amount of such claims. The ADR procedures, in short, permitted the debtor to minimize unnecessary litigation expenses and thereby provide a greater return to the debtor's unsecured creditors. By allowing the debtor a convenient means of bringing tort claimants to the table for settlement, the procedures also decreased the time before the debtor could begin to make distributions to such unsecured creditors.¹²¹

2. ADR options available

The procedures employed in the Greyhound and Best Products bankruptcy cases provide an outline of the range of options available in ADR procedures. Generally, the term ADR encompasses a broad range of nonjudicial resolution procedures.¹²² At one end of the spectrum is "early neutral evaluation," in which a third party (usually an attorney) selected by the parties evaluates each side's case and presents each side with her view of the "strengths and weaknesses of the parties' positions, identifies areas of agreement and dispute, estimates the cost and time for litigation, [and] attempts to reach agreement as to discovery and open issues."¹²³

Mediation is a more formal process in which both sides, in essence, present their cases to an independent third party, who attempts to resolve the disputes between the parties.¹²⁴ Generally, the parties will be

required to submit a mediation brief to the mediator.¹²⁵ Such brief and all communications with the mediator are usually confidential.¹²⁶ The mediation may involve more than one formal or informal session and may or may not be mandated by the court.¹²⁷

The next degree in the ADR spectrum is arbitration. The arbitration can be either binding or nonbinding, but in the end it is the arbitrator, or panel of arbitrators, much like a judge, who will decide the matter.¹²⁸ All of the arbitrators are neutral and generally each side in the dispute will pick an arbitrator and each of those party-selected arbitrators (all of whom are charged with being neutral) will select the remaining arbitrator (although the selection process can, and usually is, established by the applicable arbitration clause in a contract or the terms of the order approving ADR procedures).¹²⁹

Although some courts have been reluctant to enforce arbitration clauses and other contractual requirements for resolution of disputes through ADR procedures, primarily when there is a significant imbalance in the respective power of the parties to a contract with such clauses,¹³⁰ courts have generally honored such contractual provisions where there are no legal or equitable grounds available to revoke a contract generally. Indeed, in *Shearson/American Exp. Inc. v. McMahon*,¹³¹ the U.S. Supreme Court made it abundantly clear that, in accordance with the Federal Arbitration Act,¹³² arbitration clauses are, except in limited circumstances, to be enforced by federal courts.¹³³

Thus, the general rule is that bankruptcy courts have no discretion and must enforce arbitration clauses in the context of noncore proceedings.¹³⁴ Moreover, even where core matters are implicated, bankruptcy courts will only exercise their discretion to invalidate arbitration clauses (other than for unconscionability or other available state law defenses to such enforcement) where the debtor: (i) establishes a conflict between the Bankruptcy Code and the Federal Arbitration Act and (ii) enforcement of the arbitration clause would undermine the purposes of the Bankruptcy Code.¹³⁵ In an indication of the lengths to which courts will go to enforce otherwise valid arbitration clauses, federal courts have even determined that arbitration clauses survive the rejection of a contract by a debtor.¹³⁶

The procedure in an arbitration is similar to the procedure in a litigation, although such procedure can be modified by agreement. Specifically, the arbitration is generally commenced with the filing of a demand, setting forth the dispute and the basis for arbitrating the dispute. The other party will then generally respond, unless there is a challenge to the enforceability of the arbitration clause.¹³⁷ The matter then proceeds through discovery (which discovery may be eliminated or limited by

contract or the rules that the parties to the contract may have adopted) to a hearing and eventual decision by the panel of arbitrators.¹³⁸

Certain courts have also adopted summary trial proceedings in which the case is tried to a judge or a jury.¹³⁹ The mock trial proceeding is condensed and generally tried before a judge other than the judge assigned to the case.¹⁴⁰ Following the rendering of a verdict, the judge for the proceeding and the parties attempt for a final time to reach a settlement.¹⁴¹

C. Legal Bases for and Obstacles to ADR in Bankruptcy

Outside of bankruptcy, ADR procedures, in one form or another, are common contractual provisions. Following the passage of the ADR Act, and in light of the deference federal courts, including bankruptcy courts, must give to contractual arbitration provisions, such procedures have become increasingly common in bankruptcy cases, as well. Among other things, such procedures allow debtors a certain flexibility to resolve quickly claims that might otherwise consume months or years of attorney time and diminish significantly the recovery available for parties in interest in the debtors' bankruptcy cases. Moreover, such procedures provide litigants with a more efficient and, in most cases, more expedited means of liquidating their claims against the debtor and, ultimately, obtaining some payment for such claims. Nonetheless, such procedures continue to meet with resistance, primarily from tort claimants insisting on their often hollow "right" to litigate their tort claims before: (i) at a minimum a federal district court and (ii) a jury of their peers.

Specifically, tort claimants, particularly personal injury and wrongful death tort claimants, are not suing debtors in connection with contracts with a debtor. Thus, such claimants have not contractually consented to such ADR procedures. Notwithstanding the general deference that bankruptcy courts give to arbitration clauses and agreements to employ ADR procedures to resolve disputes, in general, and notwithstanding the directive from the U.S. Supreme Court that the Federal Arbitration Act generally requires federal courts to enforce such clauses, therefore, debtors cannot simply rely on the Federal Arbitration Act in structuring ADR procedures for addressing tort claims. Instead, debtors that have sought the approval of such procedures rely primarily on: (i) the inherent ability of the bankruptcy courts to control their own docket and the broad powers granted to the bankruptcy court under Bankruptcy Code section 105 to, among other things, implement pretrial procedures and (ii) the ability of a debtor to settle certain matters under Bankruptcy Rule 9019. Moreover, as discussed below, most such procedures rest on either: (i) the implied or expressed consent of tort claimants to have

their disputes resolved (or estimated) through such procedures or (ii) the ability of tort claimants to opt out of such procedures.¹⁴²

1. Legal bases for approval of ADR procedures for resolving personal injury and wrongful death tort claims

In their motions seeking approval of ADR procedures for the resolution of personal injury and wrongful death tort claims, debtors routinely rely on Bankruptcy Code section 105, Bankruptcy Rule 9019, and Rule 16 of the Federal Rules of Civil Procedure. Bankruptcy Code section 105(d) provides:

The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically.¹⁴³

Moreover, Bankruptcy Code section 105(a) authorizes the bankruptcy court to “issue any order... necessary or appropriate to carry out the provisions of this title.”¹⁴⁴

Although bankruptcy courts may only use their broad powers under section 105(a) to further other provisions of the Bankruptcy Code, the approval of ADR procedures to resolve prepetition litigation claims and the stay that debtors seek in connection with the approval of such procedures pending the conclusion of the ADR process furthers the automatic stay under Bankruptcy Code section 362 and the debtor’s “fresh start.”¹⁴⁵ In addition, in light of the passage of the ADR Act and the specific grant in Bankruptcy Code section 105(d) of authority to the bankruptcy court to issue any order necessary “to ensure that the case is handled expeditiously and economically, Bankruptcy Code section 105 would seem to provide ample authority for the bankruptcy court to approve ADR procedures, even if such procedures were mandatory and applicable to personal injury tort and wrongful death claims.¹⁴⁶

Debtors have also looked to Rule 16 of the Federal Rules of Civil Procedure to support the implementation of ADR procedures to resolve certain prepetition tort claims.¹⁴⁷ Specifically, Civil Rule 16(c)(9) permits a bankruptcy judge¹⁴⁸ to “take appropriate action... with respect

to... settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.”¹⁴⁹ Moreover, where the parties consent to arbitration, Bankruptcy Rule 9019(c) expressly permits a bankruptcy court to “authorize the matter to be submitted to final and binding arbitration.”¹⁵⁰ Finally, to the extent that a debtor seeks expedited procedures for the resolution of formerly disputed claims, including tort claims, Bankruptcy Rule 9019(b) permits the bankruptcy court to “fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.”¹⁵¹

2. Objections to ADR procedures

Notwithstanding what some consider the “ample statutory and rule-based authority for courts to refer all types of disputes to ADR, usually mediation,”¹⁵² motions filed by debtors to establish such procedures are often met with objections, primarily from those litigants that would prefer to have their claims liquidated in the forum in which such litigants originally filed suit. Accordingly, such litigants generally object to any mandatory ADR procedures and to any stay proposed for the prepetition litigation.

Objectors have specifically taken issue with provisions in ADR procedures that purport to disallow or expunge claimants’ claims if they do not respond to notices mandated by the ADR process.¹⁵³ In addition, a debtor’s request that the bankruptcy court abrogate, or at least temporarily suspend, any right of claimants to seek the withdrawal of the reference or abstention may similarly raise an objection. Provided, however, that the ADR procedures proposed by the debtor only require a stay of such rights, it is unlikely that such objections will derail approval of the proposed ADR procedures.¹⁵⁴

V. IMPLEMENTATION OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES BY BANKRUPTCY COURTS: REPRESENTATIVE CASE STUDIES

Numerous bankruptcy courts have approved ADR procedures for the resolution of disputed claims, including claims for personal injury and wrongful death. Set forth below are some representative ADR procedures approved by bankruptcy courts prior to confirmation of a plan.¹⁵⁵

Although the procedures contain certain variations that will be discussed below, the procedures generally allow for a negotiation stage, a mediation stage, an arbitration stage, and a process for the expedited approval of any settlement ultimately reached. Moreover, the procedures uniformly provide for a stay of all ongoing litigation, and attempts by

litigants to seek relief from the automatic stay, abstention, or withdrawal of the reference. Thus each of the procedures discussed below provides a debtor with: (i) at least temporary relief from attempts by litigants to by-pass the bankruptcy court, thereby preserving for the debtor the benefits of the automatic stay and (ii) an efficient and expedited means for resolving claims that might otherwise: (a) consume an inordinate amount of the debtor's limited time and resources and (b) unnecessarily delay or otherwise impede the debtor's efforts to reorganize.

A. Wickes (Northern District of Illinois)—ADR Settlement Procedures

Prior to filing its bankruptcy case, Wickes was a manufacturer and supplier of roof and floor trusses, wood panels, and pre-hung door units.¹⁵⁶ As a result of the increased price of certain commodity lumber products, Wickes experienced a decrease in its margin on sales and a corresponding decline in gross profits.¹⁵⁷ In addition, notwithstanding an exchange offering and the sale of a significant portion of its business operations, Wickes was unable to retire certain prepetition subordinated notes.¹⁵⁸ Accordingly, on January 20, 2004, Wickes filed for protection under Chapter 11 of the Bankruptcy Code.¹⁵⁹

In the course of its bankruptcy cases, the debtor determined that it was in the estate's best interest to sell substantially all of its assets on a going-concern basis.¹⁶⁰ On July 26, 2004, the debtor closed on the sales of substantially all of its assets.¹⁶¹ Prior to the closing of the sale, however, and in an effort to minimize costs while fixing certain of its liabilities, Wickes sought approval of certain ADR procedures to resolve certain non-asbestos personal injury and property damage claims.¹⁶²

Specifically, in the Wickes ADR Motion, Wickes stated that it had undertaken an initial review of the proofs of claim filed prior to the claims bar date and had determined that approximately 60 non-asbestos personal injury or property damage claims had been filed out of the thousands of claims filed against Wickes.¹⁶³ While acknowledging that certain personal injury claimants might seek to have their claims liquidated outside of the bankruptcy court, the debtor argued that given that the ultimate distribution to any of the tort claimants was at the time of the filing of the Wickes ADR Motion unknown, it would be prohibitively expensive for the debtor and the claimants to proceed with litigation outside of the bankruptcy court.¹⁶⁴ Moreover, Wickes was insured for such claims, but the insurance was subject to a self-insured retention in the amount of \$250,000 per occurrence. To the extent that any third parties might be obligated to indemnify the debtor, Wickes requested authority from the court to invite such parties to take part in the proposed ADR procedures and further requested

that any mediator be authorized to compel such parties to attend any mediation.¹⁶⁵ Through the Wickes ADR Motion, Wickes sought approval of: (i) a multi-step ADR process, (ii) a stay of any lift stay proceedings until the claimant had exhausted the ADR procedure, and (iii) claims settlement procedures designed to eliminate the requirement for a notice and a hearing of settlements under \$100,000 and to limit the notice required for settlements above this amount.¹⁶⁶

On July 8, 2004, the bankruptcy court approved modified ADR procedures and the settlement procedures proposed by the debtor.¹⁶⁷ The ADR procedures approved by the bankruptcy court provided, among other things, that the debtors would serve the claims resolution procedures on affected claimants by July 30, 2004 and that such claimants would then have a fixed time thereafter to return the questionnaire to the debtors. The questionnaire, executed under penalty of perjury, required detailed information from the claimant designed to allow the debtor to identify and analyze the claim. In addition, the claimant was required to disclose an amount for which such claimant would be willing to settle her claim against the debtor. To the extent that any claimant failed to return the questionnaire, such claimant would not be permitted to vote on any plan of reorganization (essentially the claim of such claimant would be estimated at \$0 for plan voting purposes). Approximately 30 days after the deadline for returning the questionnaire, the debtor was required to reply to the claimant and indicate if the claim was accepted or, if disputed, what amount the debtor would accept in settlement of the claim.

The claimant was then given an additional approximately 45 days to respond to the debtor. If no reply was received, then the offer from the debtor would be presumed rejected and the parties would be free to pursue mediation or arbitration, or the claimant could seek relief from the stay. The only objection that the debtor could raise to any such stay relief motion was that the claimant did not comply in good faith with the first offer-exchange stage of the proposed ADR procedures. To the extent that litigation was permitted to proceed, the claimant could only go to judgment in the nonbankruptcy action. The claimant could not take any steps to enforce on any such judgment.

The procedures also provided for voluntary mediation before an impartial and neutral person trained in mediation. Costs of such mediation were to be split between the debtor and the claimant. Finally, the debtor and the claimant could agree to binding arbitration. As of the date of the Wickes Disclosure Statement, 25 claims remained outstanding with a face value in excess of \$132 million.¹⁶⁸ Pursuant to the terms of the liquidating plan confirmed in the Wickes bankruptcy cases on December

12, 2007, such remaining claimants were entitled to available proceeds of insurance and their pro rata share of \$100,000.¹⁶⁹

B. Delphi (Southern District of New York)—Lift Stay Procedures

In the *Delphi* bankruptcy cases, the debtors requested authority to modify the automatic stay to permit the debtors to liquidate and settle or to mediate certain of the debtors' prepetition litigation claims.¹⁷⁰ The Delphi debtors estimated that there were approximately 100 claimants with unliquidated prepetition litigation claims that were covered by their insurance program and that just over 50 such claimants had commenced litigation prior to the bankruptcy filings.¹⁷¹ The debtors further estimated that the total amount of the claims could exceed \$6.3 million.¹⁷²

Because the debtors anticipated objecting to most if not all of these filed claims and because most of the claimants, in the debtors' view, would have allowed claims in amounts less than \$100,000, the debtors sought approval of an efficient and inexpensive means for settling such claims if possible, including through mediation.¹⁷³ In addition, because the debtors had already assumed the insurance programs under which such claims would be paid to the extent that payments were made on such claims by the debtors' insurance companies, the debtors asserted that the insurers would simply pursue administrative expense claims against the debtors.¹⁷⁴

On June 27, 2006, the U.S. Bankruptcy Court for the Southern District of New York entered an order approving the Delphi ADR Procedures Motion.¹⁷⁵ Specifically, the bankruptcy court lifted the automatic stay to the extent necessary to allow the debtors to attempt to resolve the unliquidated litigation claims.¹⁷⁶ The debtors were permitted to engage in informal settlement negotiations and could request additional information from claimants to further such settlement.¹⁷⁷ If the debtors and the claimant could not reach a resolution as a result of such procedures, then the debtors and such claimant could agree to mediate their disputes with respect to the claim.¹⁷⁸ Any such mediation would be consensual and the cost of such mediation would be divided as agreed by the parties.¹⁷⁹ In light of the debtors' assumption of the insurance agreement and the potential administrative expense claims that such insurers could, therefore, assert against the debtors for any claims paid under such programs, the debtors would insist in any settlement that the insurers receive a release.¹⁸⁰ Perhaps most critically for the debtors, the Delphi ADR Procedures permitted the debtors to settle claims if the settlement called for the allowance of a general unsecured claim in an amount equal to \$500,000 or less without further notice and a hearing.¹⁸¹ Settlement of claims in excess of \$500,000 but less than the

applicable deductible would only be effective after the expiration of a 10-business-day negative notice period.¹⁸²

C. W.R. Grace (District of Delaware)—ADR Settlement Procedures

W.R. Grace & Co. and 62 of its affiliated entities, filed for bankruptcy on April 2, 2001.¹⁸³ Although Grace's descent into bankruptcy was precipitated by a dramatic increase in the amount of asbestos claims asserted against Grace beginning in 2000,¹⁸⁴ after the bar date for non-asbestos claims was set in the bankruptcy cases, Grace also had received in excess of 200 non-asbestos litigation claims and was aware of at least 20 additional non-asbestos litigation actions for which no claims were filed. In order to address these unliquidated claims, Grace (like Wickes) requested the approval of certain ADR procedures. Unlike the procedures sought in Wickes, however, once the claimants consented to the proposed ADR procedures, such claimants could be compelled to mediate.¹⁸⁵ Moreover, the procedures in Grace offered multiple opportunities for a claimant to miss a response deadline.¹⁸⁶ The consequence in each case was the same—disallowance of the claimants' claim.

On November 9, 2004, almost five months after the debtors filed the Grace ADR Procedures Motion and only after at least two hearings, the bankruptcy court entered an order approving certain ADR procedures.¹⁸⁷ The procedures actually approved by the bankruptcy court differed from those proposed by the debtors. Among other things, before the debtors could subject a claimant to the ADR procedures, the debtors were required to object to such claim.¹⁸⁸ In addition, while the bankruptcy court required a claimant to pay half of the fees for a mediator, the claims of such claimant would not be disallowed for failure to pay such fees unless the bankruptcy court ordered such disallowance.¹⁸⁹ Moreover, although the bankruptcy court did approve a stay of all litigation, upon service of the ADR package upon a particular claimant, the court amended the ADR procedures to make such stay subject to any prior stipulation that may have been negotiated between the debtor and the claimant with respect to the application of the automatic stay.¹⁹⁰

The revised ADR procedures required the debtor to provide two separate notices of the ADR procedures to claimants. Only if the claimant failed to respond to the second notice would the claimant's claim be deemed disallowed.¹⁹¹ Where the debtor had previously proposed that claims be automatically disallowed, without further order of the bankruptcy court, if the claimant failed to respond to any of a multitude of deadlines, the revised procedures actually approved by the bankruptcy

court required that any such disallowance only occur upon motion by the debtor.¹⁹²

The Grace ADR Procedures, as approved by the bankruptcy court, provided generally that a claimant could elect not to participate in the ADR program.¹⁹³ In that case, the claimant's claims would be resolved pursuant to the debtor's claims resolution process in the bankruptcy court.¹⁹⁴ Moreover, nothing in such ADR procedures prevented a claimant who had opted out of the procedures from seeking relief from the automatic stay to liquidate her claim outside of the bankruptcy court.¹⁹⁵

Overall, the court approved essentially a three-tiered system. Initially, the debtors would engage in a settlement offer stage in which the debtor and the claimant would exchange acceptable settlement figures for the claimant's claim.¹⁹⁶ Upon exhaustion of the settlement period, which period could be extended by mutual agreement of the debtor and the claimant,¹⁹⁷ the debtor could refer the matter to mandatory but nonbinding mediation.¹⁹⁸ After the conclusion of the initial mediation, the debtor had the option of declaring that no settlement was likely to be reached, in which case the claimant could no longer participate in the ADR procedures.¹⁹⁹ If, however, both the claimant and the debtor agreed that further mediation might lead to a settlement, then the parties could agree to further mediation.²⁰⁰ Only after mediation efforts were exhausted without a settlement being reached would the claimant be permitted to continue litigating her claim.²⁰¹

Importantly, the bankruptcy court made significant changes to the debtor's proposed procedures if litigation was necessary. The debtor had proposed in the Grace ADR Procedures Motion that claimants would have to notify the debtor of an intent to litigate within 15 days of the conclusion of mediation efforts. If the claimant failed to so notify the debtor, then its claim would be disallowed. In contrast in the Grace ADR Procedures actually approved by the bankruptcy court, the bankruptcy court allowed for the automatic litigation of such disputes.²⁰² Moreover, the Grace ADR Procedures distinguish between immature and mature litigation (i.e., litigation that had not substantially progressed prior to the filing of the bankruptcy case and litigation that had either progressed through discovery and was essentially ready for trial or litigation that had concluded and was on appeal).²⁰³ Immature litigation would be tried in the bankruptcy court (unless the bankruptcy court lacked jurisdiction to resolve such matter) and mature litigation would be permitted to proceed in the forum in which such litigation was pending prior to the filing of the bankruptcy case.²⁰⁴

CONCLUSION

As bankruptcy and restructuring attorneys are all too well aware, the boom days for the bankruptcy practice have returned with a vengeance. Indeed, in the first half of 2008, business bankruptcy filings under both Chapters 7 and 11 of the Bankruptcy Code rose 42.1% over the same time period in 2007.²⁰⁵

As noted herein, the increase in bankruptcy filings and the corresponding increase in adversary proceedings and litigation that such filings both create and transfer into the federal court system, will necessarily increase the administrative burden initially for bankruptcy courts, but also increasingly for federal district and appellate courts. Faced with such an avalanche of bankruptcy litigation, bankruptcy courts, appeals courts, and bankruptcy practitioners will need to explore creative and increasingly nonjudicial means of resolving disputes. Provided that proper procedural safeguards are maintained, ADR procedures, whether imposed by a court or proposed by a debtor, supply a viable means of managing the impending “tsunami”²⁰⁶ of bankruptcy cases and accompanying litigation that otherwise could very quickly overwhelm the system.

In addition, as discussed herein and in other recent publications, the liquidation of tort claims may have a dramatic impact on the ability of a debtor to reorganize or confirm a plan of liquidation under Chapter 11 of the Bankruptcy Code. Even where such claims are paid in the first instance from proceeds of insurance, payment of such claims by the debtor’s insurance company may: (i) transform a potential unsecured claim by a tort claimant into a secured claim of the insurer or (ii) increase the amount of unpaid administrative expense claims that may be asserted against a debtor by such debtor’s insurance carrier. Among other things, the insurer of a bankrupt debtor will almost certainly assert that any security it holds covers first prepetition claims and then, only after all such prepetition claims have been paid in full or (more likely) reserved with sufficient security to ensure the payment of any and all possible prepetition claims, postpetition claims entitled to administrative priority under section 503 of the Bankruptcy Code. Accordingly, where a debtor is faced with a significant number of such prepetition tort claims, the debtor should seek to implement procedures that ideally will permit the debtor to liquidate such claims in the bankruptcy court, but that will, at a minimum, allow for the estimation of such claims prior to confirmation of a plan. The procedures discussed above (or some variation thereon) should provide a mechanism for addressing such claims expeditiously. Moreover, if the debtor has the foresight to involve the debtor’s insurer, it is possible that such procedures will also serve to minimize any claims by the debtor’s insurer.

Notes

1. The Rolling Stones, Gimme Shelter, on Let It Bleed (Abkco 1969).
2. See, e.g., Francis Flaherty, To Streamline a Bankruptcy Try Using ADR, 10 Alternatives to High Cost Litig. 113, 120 (Aug. 1992) (noting advantages of centralized forum for resolution of commercial disputes).
3. See 11 U.S.C.A. § 362(a)(1).
4. See Lawrence P. King 3 Collier on Bankruptcy ¶ 362.08 at 362-107-362-108 (2006) (citing cases).
5. See, e.g., Celotex Corp. v. Edwards, 514 U.S. 300, 307 (1995) (“The jurisdiction of the bankruptcy courts, like that of other federal courts, is grounded in, and limited by, statute.”).
6. See *infra* § II.A.3.
7. See, e.g., In re Plastech Engineered Products, Inc., 382 B.R. 90, 49 Bankr. Ct. Dec. (CRR) 151 (Bankr. E.D. Mich. 2008) (customer obtained state court injunction permitting customer to repossess certain tooling immediately prior to the debtor’s bankruptcy case filing and filed a motion for relief from the automatic stay and a corresponding adversary proceeding on the very day of the debtor’s bankruptcy filing); see also *infra* § II.B. Indeed, in *Plastech*, the party adverse to the debtor filed its stay relief motion before the debtors had filed all of their motions seeking “first day” relief. See *Plastech*, 382 B.R. at 103. The hearing with respect to such motion extended for several days in the first three weeks of the bankruptcy case. See *Plastech*, 382 B.R. at 103.
8. See *infra* § II.C.3.
9. See *infra* § II.C.2.
10. These rules shall be referred to herein as the Bankruptcy Rules.
11. See generally Fed. R. Bankr. P. 7001, 7004.
12. See Fed. R. Bankr. P. 3007, 9014. Joining the objection with a request for relief specified in Bankruptcy Rule 7001 converts the claim objection into an adversary proceeding. See Fed. R. Bankr. P. 3007.
13. Generally mega-cases are those cases with over 1,000 creditors and \$100 million or more in assets. See Laura B. Bartell, A Guide to the Judicial Management of Bankruptcy Mega-Cases at 4 (Federal Judicial Center 2d ed. 2007) (setting forth these and certain additional factors considered in the definition of mega-cases established by the Administrative Office of the U.S. Courts).
14. See *infra* § IV.B.1.
15. See Jacob Aaron Esher, Alternative Dispute Resolution Subcommittee: Model Claim Resolution Procedure, 113000 ABI-CLE 589 (2000) (providing a form of order and ADR procedures for use in resolving unliquidated tort claims in bankruptcy cases).
16. William Shakespeare, Henry V, act 3, sc. 1, 38-44 (“Once more unto the breach, dear friends, once more, Or close the wall up with our English dead!”).
17. The Supreme Court thoroughly addressed the limited jurisdiction that could be afforded to non-Article III bankruptcy courts in Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S. Ct. 2858, 73 L. Ed. 2d 598, 6 Collier Bankr. Cas. 2d (MB) 785, Bankr. L. Rep. (CCH) P 68698 (1982).
18. For a comprehensive overview of the development of the current jurisdictional limits in bankruptcy cases and the issues that commonly arise in bankruptcy cases in connection with such jurisdiction see generally Collier on Bankruptcy Ch. 3 (15th ed. rev. 2008).
19. 28 U.S.C.A. § 1334(a), (b), (e).
20. See 28 U.S.C.A. §§ 151, 157.
21. See 28 U.S.C.A. § 1334(a).
22. 28 U.S.C.A. § 1334(b).
23. See *infra* § II.C.3.

24. 28 U.S.C.A. § 157(a).
25. 28 U.S.C.A. § 157(b)(1).
26. As permitted by 28 U.S.C.A. § 157(a), every district court has instituted an automatic referral of bankruptcy cases and proceedings to their respective bankruptcy courts.
27. 28 U.S.C.A. § 157(c)(1).
28. See 28 U.S.C.A. § 157(d).
29. See 28 U.S.C.A. § 157(c)(1).
30. See *supra* § II.A.1.
31. See 28 U.S.C.A. § 157(c)(2); see also, e.g., *In re Smith*, 389 B.R. 902, 907, 50 Bankr. Ct. Dec. (CRR) 88 (Bankr. D. Nev. 2008) (28 U.S.C.A. § 157(c)(2) “empowers the bankruptcy court to hear... [noncore] matters, but on the condition that they be submitted to the district court for a final determination unless the parties otherwise consent”).
32. *In re Guild and Gallery Plus, Inc.*, 72 F.3d 1171, 1178, 28 Bankr. Ct. Dec. (CRR) 502, 35 Collier Bankr. Cas. 2d (MB) 70, Bankr. L. Rep. (CCH) P 76738 (3d Cir. 1996); see also *Halper v. Halper*, 164 F.3d 830, 836, 33 Bankr. Ct. Dec. (CRR) 906, Bankr. L. Rep. (CCH) P 77909 (3d Cir. 1999).
33. See 28 U.S.C.A. § 157(b)(2).
34. See 28 U.S.C.A. § 157(b)(2)(O).
35. See 28 U.S.C.A. § 157(b)(2)(O).
36. See *Collier on Bankruptcy* ¶ 3.02[3][d] at 3-42 (15th ed. rev. 2007) (citing *Barnett v. Stern*, 909 F.2d 973, 979, Bankr. L. Rep. (CCH) P 73584, R.I.C.O. Bus. Disp. Guide (CCH) P 7595 (7th Cir. 1990)).
37. 28 U.S.C.A. § 157(b)(4).
38. See 28 U.S.C.A. § 157(b)(2)(B).
39. See 28 U.S.C.A. § 157(b)(4).
40. See 11 U.S.C.A. § 362(a)(1).
41. See *Midlantic Nat. Bank v. New Jersey Dept. of Environmental Protection*, 474 U.S. 494, 503, 106 S. Ct. 755, 88 L. Ed. 2d 859, 13 Bankr. Ct. Dec. (CRR) 1262, 13 Bankr. Ct. Dec. (CRR) 1269, 13 Collier Bankr. Cas. 2d (MB) 1355, 23 Env’t. Rep. Cas. (BNA) 1913, Bankr. L. Rep. (CCH) P 70923, 16 Env’t. L. Rep. 20278 (1986); see also *Matter of Holly’s, Inc.*, 140 B.R. 643, 685 (Bankr. W.D. Mich. 1992) (“The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors” (quoting H.R. Rep. No. 95-595, reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97)).
42. See, e.g., *Holly’s*, 140 B.R. at 685 (“Without [the automatic stay], certain creditors would be able to pursue their own remedies against the debtor’s property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors” (quoting H.R. Rep. No. 95-595, reprinted in 1978 U.S.C.C.A.N. 5963, 6296-97)).
43. See *Lawrence P. King*, 3 *Collier on Bankruptcy* ¶ 362.03 at 362-13 n.5 (15th ed. rev. 2006) (citing numerous cases).
44. See 11 U.S.C.A. § 362(d).
45. 11 U.S.C.A. § 362(d)(1).
46. See *In re Stranahan Gear Co., Inc.*, 67 B.R. 834, 835, 837 (Bankr. E.D. Pa. 1986).
47. See *In re Caves*, 309 B.R. 76, 80 (Bankr. M.D. Ga. 2004); see also *Holly’s*, 140 B.R. at 687 n.70 (in denying request for stay relief, court considered a “balance [of] the inherent hardships on all parties” and “the overall goals of the Bankruptcy Code”); *In re Cardinal Industries, Inc.*, 116 B.R. 964, 983, 20 Bankr. Ct. Dec. (CRR) 1264, Bankr. L. Rep. (CCH) P 73586 (Bankr. S.D. Ohio 1990) (same). Some courts (adhering to the Sonnax/Curtis factors) examine as many as 12 factors to determine if stay relief is appropriate to permit prepetition litigation to proceed. See, e.g., *In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1285, 23 Collier Bankr. Cas. 2d (MB) 132 (2d Cir. 1990); *In re Smith*, 389 B.R. 902, 918, 50 Bankr. Ct. Dec.

(CRR) 88 (Bankr. D. Nev. 2008); *In re Curtis*, 40 B.R. 795, 799-800, 11 Bankr. Ct. Dec. (CRR) 1256 (Bankr. D. Utah 1984).

48. 28 U.S.C.A. § 157(d).

49. See 28 U.S.C.A. § 157(d); see also *In re Apponline.Com., Inc.*, 303 B.R. 723, 726 (E.D. N.Y. 2004).

50. Fed. R. Bankr. P. 5011.

51. See, e.g., *In re G I Holdings, Inc.*, 295 B.R. 222, 224, 2003-2 U.S. Tax Cas. (CCH) P 50535, 91 A.F.T.R.2d 2003-2596 (D.N.J. 2003); *In re Schlein*, 188 B.R. 13, 14, R.I.C.O. Bus. Disp. Guide (CCH) P 8921 (E.D. Pa. 1995).

52. See, e.g., *Oneida Ltd. v. Pension Ben. Guar. Corp.*, 372 B.R. 107, 110, 41 Employee Benefits Cas. (BNA) 2914 (S.D. N.Y. 2007) (citing *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026, 21 Bankr. Ct. Dec. (CRR) 1073, 24 Collier Bankr. Cas. 2d (MB) 1737, 33 Env't. Rep. Cas. (BNA) 1035, Bankr. L. Rep. (CCH) P 73931, 21 Env'tl. L. Rep. 21051 (2d Cir. 1991)).

53. *Deep v. Recording Industry of America*, 2005 U.S. Dist. LEXIS 43724, at *5 (N.D.N.Y. Feb. 10, 2005).

54. See 11 U.S.C.A. § 523.

55. See 11 U.S.C.A. § 547.

56. See, e.g., *In re Dana Corp.*, 379 B.R. 449, 453-54 (S.D. N.Y. 2007).

57. See *Dana*, 379 B.R. at 453-54.

58. See, e.g., *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101, 24 Bankr. Ct. Dec. (CRR) 1139, 29 Collier Bankr. Cas. 2d (MB) 1341, Bankr. L. Rep. (CCH) P 75459, 123 A.L.R. Fed. 681 (2d Cir. 1993) (noting that a district court should consider “the prevention of forum shopping” in deciding a motion to withdraw the reference); see also 1 Collier on Bankruptcy ¶ 3.04[1][b] at 3-53 (“Believing that a motion to withdraw smacks of forum shopping, the district courts have generally not been receptive to motions to withdraw the reference.”).

59. See 28 U.S.C.A. § 157(d).

60. See, e.g., *Orion Pictures*, 4 F.3d at 1095; see also *Enron North America Corp. v. Media General Inc.*, 2004 U.S. Dist. LEXIS 9814, at *5 (S.D.N.Y. May 27, 2004).

61. See *In re Enron Corp.*, 295 B.R. 21, 25 (S.D. N.Y. 2003) (citing *Orion Pictures*, 4 F.3d at 1101); see also 1 Collier on Bankruptcy ¶ 3.04[1][b] at 3-53 (citing numerous cases); *Solutia, Inc. v. FMC Corp.*, 2004 WL 1661115, *3 (S.D. N.Y. 2004) (“In a non-core proceeding, the bankruptcy court’s findings are subject to de novo review, which could lead to duplication of effort. This factor strongly favors withdrawal of the reference.”); *In re Chemetco, Inc.*, 308 B.R. 339, 341 n.2, 42 Bankr. Ct. Dec. (CRR) 274 (Bankr. S.D. Ill. 2004) (“‘Cause’ for permissive withdrawal is held to include a right to a jury trial when the parties do not consent to jury trial before a bankruptcy judge.”); *In re Just for Feet, Inc.*, 2002 WL 550035, *2 (Bankr. D. Del. 2002) (“most courts have held that the right to a jury trial constitutes sufficient cause for withdrawal of the reference”).

62. See, e.g., *Solutia*, 2004 WL 1661115 at *3 (“In a non-core proceeding, the bankruptcy court’s findings are subject to de novo review, which could lead to duplication of effort. This factor strongly favors withdrawal of the reference”) (quoting *Petition of McMahon*, 222 B.R. 205, 208 (S.D. N.Y. 1998)). As the court stated in *In re Pellulo*:

Having determined that [plaintiff’s] complaint presents non-core, related claims to his bankruptcy case, the Court concludes that cause exists to withdraw the reference for this adversary action. Proceeding in the district court will reduce forum shopping and confusion, foster the economical use of the debtors’ and creditors’ resources, and expedite the bankruptcy process. In contrast, permitting this case to proceed in the bankruptcy court, even for pre-trial matters, would require duplication of the bankruptcy court’s efforts, since defendants have not consented to entry of final judgment by the bankruptcy court. Under such circumstances, this Court would have to review the bankruptcy court’s orders de novo and conduct a jury trial without the benefit of having overseen pre-trial matters. Moreover, [plaintiff’s] state claims are not the type of claims typically heard in

the bankruptcy court and could require extensive discovery and instructions to the jury on the law of Pennsylvania or possibly another state.

In re Pelullo, 1997 WL 535155, at *2 (E.D. Pa. 1997) (citations omitted).

63. See *Beard v. Braunstein*, 914 F.2d 434, 443, 23 Collier Bankr. Cas. 2d (MB) 1247, Bankr. L. Rep. (CCH) P 73625 (3d Cir. 1990) (rejected by, *Weiss v. Avenir Acquisition Corp. II*, 139 B.R. 761 (D. Mass. 1991)); In re Pelullo, 1997 WL 535155, at *2 (E.D. Pa. 1997); In re 641 Associates, Ltd., 1992 WL 392625, at *2 (E.D. Pa. 1992).

64. See, e.g., *Chemetco*, 308 B.R. at 341 n.2 (“‘Cause’ for permissive withdrawal is held to include a right to a jury trial when the parties do not consent to jury trial before a bankruptcy judge.”); *Just for Feet*, 2002 WL 550035 at * 2 (“most courts have held that the right to a jury trial constitutes sufficient cause for withdrawal of the reference”).

65. See, e.g., In re *Conseco Finance Corp.*, 324 B.R. 50, 54-55 (N.D. Ill. 2005) (denying request for withdrawal of the reference where bankruptcy court had instituted optional mediation procedures and defendant in preference action had not opted out of such procedures).

66. 28 U.S.C.A. § 1334(c)(1).

67. See 28 U.S.C.A. § 157(b)(1); Fed. R. Bankr. P. 5011(b); see also In re *Hearthside Baking Co., Inc.*, 391 B.R. 807, 811, 50 Bankr. Ct. Dec. (CRR) 107 (Bankr. N.D. Ill. 2008); In re *Haverhill Technology Group*, 310 B.R. 478, 483, 43 Bankr. Ct. Dec. (CRR) 53, 52 Collier Bankr. Cas. 2d (MB) 365 (Bankr. D. Mass. 2004).

68. See 28 U.S.C.A. § 1334(c)(1); see also In re *Smith*, 389 B.R. 902, 916, 50 Bankr. Ct. Dec. (CRR) 88 (Bankr. D. Nev. 2008) (noting that tort claimant had failed to seek abstention, but even if the request had been made, such request would have been denied because tort claimant: (i) delayed in bringing any such request and (ii) failed to establish that state court could adjudicate matter more promptly than bankruptcy court could).

69. See 1 Collier on Bankruptcy ¶ 3.05[2] at 3-62 (discussing requirement of “timeliness” and citing numerous cases addressing the issue).

70. See 28 U.S.C.A. §§ 1332, 1334(c)(2).

71. See 28 U.S.C.A. § 1334(c)(2); see also 1 Collier on Bankruptcy ¶ 3.05[4] at 3-62, 3-64.

72. See 1 Collier on Bankruptcy ¶ 3.05[3] at 3-62.

73. See 28 U.S.C.A. § 1334(c)(1).

74. See In re *Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, 341 F. Supp. 2d 386, 412, 59 Env’t. Rep. Cas. (BNA) 1520, Prod. Liab. Rep. (CCH) P 17129, 164 O.G.R. 1143 (S.D. N.Y. 2004), decision disapproved in part, 488 F.3d 112, 48 Bankr. Ct. Dec. (CRR) 78, 64 Env’t. Rep. Cas. (BNA) 1616, Fed. Sec. L. Rep. (CCH) P 17761, 164 O.G.R. 1205 (2d Cir. 2007); see also In re *Calpine Corp.*, 361 B.R. 665, 669, 47 Bankr. Ct. Dec. (CRR) 216 (Bankr. S.D. N.Y. 2007). Some courts have looked to as many as 12 factors to determine if abstention is appropriate. See, e.g., In re *Tucson Estates, Inc.*, 912 F.2d 1162, 1167, Bankr. L. Rep. (CCH) P 73613 (9th Cir. 1990); In re *Smith*, 389 B.R. 902, 921, 50 Bankr. Ct. Dec. (CRR) 88 (Bankr. D. Nev. 2008).

75. See, e.g., *Calpine*, 361 B.R. at 670 (quoting In re *Joint Eastern and Southern Dist. Asbestos Litigation*, 78 F.3d 764, 775, 34 Fed. R. Serv. 3d 357 (2d Cir. 1996) (“Abstention is an extraordinary and narrow exception to a federal court’s duty to exercise its jurisdiction.”)); In re *Chateaugay Corp.*, 1990 WL 692236 at *3 (Bankr. S.D. N.Y. 1990) (declining to abstain where “[t]he issues presented in this Adversary Proceeding are not redolent with unsettled questions of state law. The state law issues involved require only the application of settled principles of contract law.”); see also *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478, 483, 60 S. Ct. 628, 84 L. Ed. 876 (1940) (abstention proper where state law issues predominate or the bankruptcy case raises areas of state law that have not been decided by respective state court); *Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 817-18, 96 S. Ct. 1236, 47 L. Ed. 2d 483, 9 Env’t. Rep. Cas. (BNA) 1016 (1976) (abstention designed to avoid duplicative litigation and is only appropriate in certain narrowly-tailored, exceptional circumstances).

76. Jacob Aaron Esher, *ADR Comes to Bankruptcy*, 9 No. 4 *Disp. Resol. Mag.* 29 at 29, Summer 2003.

77. See Hon. Erwin I. Katz, *ADR in the New Millennium—Some Random Thoughts*, 112901 *ABI-CLE* 141 (noting that “[t]he bankruptcy practitioner has always maintained a pragmatic approach to bankruptcy practice” and that limited funds combined with a decrease in court time available for court-supervised settlement conferences favor the resolution of certain disputes if possible through ADR).

78. Bankruptcy Rule 3018(a) specifically provides that a bankruptcy court “may temporarily allow... [a] claim or interest in an amount which [sic] the court deems proper for the purpose of accepting or rejecting a plan.” Fed. R. Bankr. P. 3018(a). Such allowance or disallowance may be necessary, among other things, to determine if the appropriate amount and number of creditors within a particular class of creditors has voted to accept a plan and if such plan is feasible. See 11 U.S.C.A. §§ 1126(d), 1129(a)(11).

79. 11 U.S.C.A. § 502(c); but see Smith, 389 B.R. at 912 (noting that the issue for personal injury tort and wrongful death claims is not whether the federal courts have jurisdiction (they do), but whether the bankruptcy court can enter a final order with respect to such claims or merely enter proposed findings of fact and conclusions of law for review by the district court).

80. 28 U.S.C.A. § 157(b)(2)(B).

81. See Laura B. Bartell, *A Guide to the Judicial Management of Bankruptcy Mega-Cases* at 60-61. (Federal Judicial Center 2d ed. 2007).

82. See Bartell, *A Guide to the Judicial Management of Bankruptcy Mega-Cases* at 60-61 (citing *Bittner v. Borne Chemical Co., Inc.*, 691 F.2d 134, 135, 9 Bankr. Ct. Dec. (CRR) 1065, 7 *Collier Bankr. Cas.* 2d (MB) 376 (3d Cir. 1982)).

83. See, e.g., Smith, 389 B.R. at 910.

84. See Smith, 389 B.R. at 912 (citing *In re UAL Corp.*, 310 B.R. 373, 383, 43 Bankr. Ct. Dec. (CRR) 31 (Bankr. N.D. Ill. 2004); *In re Leslie Fay Companies, Inc.*, 212 B.R. 747, 25 A.D.D. 203 (Bankr. S.D. N.Y. 1997), *aff'd*, 222 B.R. 718 (S.D. N.Y. 1998), judgment *aff'd*, 182 F.3d 899 (2d Cir. 1999) to support the proposition that bankruptcy courts have noncore jurisdiction over allowance of personal injury tort claims).

85. See Smith, 389 B.R. at 913-914, 924.

86. Smith, 389 B.R. at 916 n.10. The court noted:

When a creditor submits to bankruptcy court jurisdiction by filing a proof of claim in order to collect all or a portion of a debt, it assumes certain risks. For example, the creditor loses the right to a jury trial on any counter-claims filed by the debtor or the trustee. In addition, the creditor loses previously-held rights to assert “legal claims” against the debtor and his estate; bankruptcy “converts the creditor’s legal claim into an equitable claim to a pro rata share of the res.”

Smith, 389 B.R. at 916 (quoting *In re Simon*, 153 F.3d 991, 997, 33 Bankr. Ct. Dec. (CRR) 141, *Bankr. L. Rep.* (CCH) P 77783 (9th Cir. 1998)).

87. But see Smith, 389 B.R. at 916 (allowing liquidation of personal injury tort claim by bankruptcy court).

88. See *Mass Tort Litigation and Bankruptcy*, 2003 Third Circuit Judicial Conference materials (Nov. 10, 2003) (on file with the author) (noting that Dalkon Shield claimants who did not elect a flat sum payment in the A. H. Robins bankruptcy cases had to wait 13 years to receive compensation); see also Deborah R. Hensler, *A Glass Half Full, A Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 *Tex. L. Rev.* 1587, 1616-17 (1995) (discussing certain problems with the ADR procedures implemented through the confirmed plan in the A.H. Robins bankruptcy cases).

89. See 11 U.S.C.A. § 1121(b), (d)(2) (setting an initial 120-day exclusive period during which only the debtor may file a plan and limiting any extension of such “exclusive period” to the date that is 18 months after the date on which the bankruptcy case was filed).

90. See, e.g., Robert J. Niemic, et al., *Guide to Judicial Management of Cases in ADR*, at 36 (Federal Judicial Center 2001); Francis Flaherty, *To Streamline a Bankruptcy Try Using ADR*, 10 *Alternatives to High Cost Litig.* 113, 119-120 (Aug. 1992).

91. Fed. R. Bankr. P. 9019(c).

92. 28 U.S.C.A. §§ 651 to 658.

93. But see Colin W. Wied, *Mediation in Bankruptcy—Why Just in the Mini Chapter 7 and Mega Chapter 11 Cases?*, 112901 *ABI-CLE* 199 (2001) (noting that although bankruptcy courts have theoretically embraced ADR, it is less apparent in practice). Mr. Wied notes that ADR procedures have not become part of the culture of bankruptcy practice. Although commenting on the “feeding frenzy” that a large Chapter 11 bankruptcy case filing almost always engenders, Mr. Wied states that he is “not so cynical to believe that most practitioners, at least the busy ones, want to avoid mediation to keep their fees high.” Instead, Mr. Wied proposes that the American Bankruptcy Institute undertake certain initiatives, including the certification of mediators, the promotion of mediation, and the maintenance of statistics with respect to mediation efforts, that would encourage more mediation. Mr. Wied concludes:

There is no need to make the case for mediation. Mediation is inexorably becoming part of the fabric of dispute resolution in trial courts in all jurisdictions. It is time the bankruptcy professionals likewise stop litigating and start mediating; and it is time the bankruptcy courts encourage them to do that.

94. See Hon. Lisa Hill Fenning, *Using ADR Tools to Resolve Litigation-Driven Chapter 11 Cases*, 2001 No.2 *Norton Bankr. L. Adviser* 6 (2001). This article provides an excellent and summary of ADR procedures approved by bankruptcy courts through the date of its publication.

95. See Margaret Anderson, *Postbankruptcy Treatment of Insured Claims*, 17 *J. Bankr. L. & Prac.* 839 (Section II); see also Fenning, 2001 No.2 *Norton Bankr. L. Adviser* 6 (noting that change in insurance coverage from prior, relatively simple coverage for tort claims (with low deductible) to more complex forms of insurance coverage may also be contributing to reluctance of debtors to agree to stay relief and allow claimants to pursue insurance).

96. 28 U.S.C.A. §§ 651-658.

97. See Fenning, 2001 No.2 *Norton Bankr. L. Adviser* 6; see also Jacob Aaron Esher, *ADR Comes to Bankruptcy*, 9 *No. 4 Disp. Resol. Mag.* 29, 29 (2003).

98. 28 U.S.C.A. § 651(b).

99. See 28 U.S.C.A. § 651(f). Following the passage of the ADR Act, the Federal Judicial Center published its *Guide to Judicial Management of Cases in ADR*.

100. See 28 U.S.C.A. § 652(a).

101. See 28 U.S.C.A. § 652(a).

102. See 28 U.S.C.A. § 652(a).

103. See General Order re: Procedures in Adversary Proceedings (Bankr. D. Del. Apr. 7, 2004).

104. See General Order re: Procedures in Adversary Proceedings (Bankr. D. Del. Apr. 7, 2004) ¶ 3.(a). The procedures were subsequently amended on April 7, 2004, to give the parties an additional 30 days (for a total of 120 days after the filing of an answer or other pleading responsive to an adversary complaint). See Amendment to General Order re: Procedures in Adversary Proceedings (Bankr. D. Del. Apr. 7, 2004).

105. See General Order re: Procedures in Adversary Proceedings (Bankr. D. Del. Apr. 7, 2004) ¶ 3.(a).

106. The bankruptcy court’s voluntary mediation procedures are codified in the Local Rules of the U.S. Bankruptcy Court for the Southern District of California. See S.D. Cal. Bankr. L.R. 7016-2, 7016-4, 7016-6.

107. See, e.g., Flaherty, 10 *Alternatives to High Cost Litig.* 113, 127 (citing report by the Federal Judicial Center).

108. For a thorough discussion of the development of ADR procedures in the federal court system see Hensler, 73 Tex. L. Rev. at 1589-1592.

109. See Thomas C. Hayes, Bankruptcy, Like the Strike May Be Rough at Greyhound, The New York Times, June 6, 1990.

110. See Flaherty, 10 Alternatives to High Cost Litig. 113, 118, 128.

111. See Flaherty, 10 Alternatives to High Cost Litig. at 128.

112. See Flaherty, 10 Alternatives to High Cost Litig. at 128.

113. See Flaherty, 10 Alternatives to High Cost Litig. at 128.

114. See Flaherty, 10 Alternatives to High Cost Litig. at 128.

115. See Flaherty, 10 Alternatives to High Cost Litig. at 128.

116. See Flaherty, 10 Alternatives to High Cost Litig. at 128.

117. See Flaherty, 10 Alternatives to High Cost Litig. at 128. The article also presents an interesting discussion about the successful use of ADR procedures to resolve thousands of malpractice claims in the bankruptcy case filed by accounting firm Laventhol & Horwath. See Flaherty, 10 Alternatives to High Cost Litig. at 120.

118. See H. Slayton Dabney, Jr. & Dion W. Hayes, Bankruptcy Lawyers Better Tun[sic] up Their ADR Skills: Best Products is One Case Where Mediation Really Worked, 18-Jun Am. Bankr. Inst. J. 16 (1999).

119. See Dabney & Hayes, 18-Jun Am. Bankr. Inst. J. 16.

120. See Dabney & Hayes, 18-Jun Am. Bankr. Inst. J. 16.

121. See Dabney & Hayes, 18-Jun Am. Bankr. Inst. J. 16.

122. See Michael H. Diamant, et al., Strategies for Mediation, Arbitration, and Other Forms of Alternative Dispute Resolution, SM017 ALI-ABA 235 (2006). Included in the article is a comprehensive discussion of the advantages and disadvantages of employing ADR. See Diamant, et al., SM017 ALI-ABA at 238-40.

123. See Diamant, et al., SM017 ALI-ABA at 241. The progression of ADR methods has been described as moving from meditative processes in which the parties retain more control to adjudicative processes (like binding arbitration) in which the parties cede control to a third party in exchange for an increased likelihood of reaching a resolution without court involvement. See Judy D. Thompson, et al., Mediation and ADR: Making the Most of the Process, Mediation Checklist, 072705 ABI-CLE 258 (2005).

124. Diamant, et al., SM017 ALI-ABA at 241-42.

125. See, e.g. Del Bankr. L.R. 9019-5(c)(ii).

126. See Del Bankr. L.R. 9019-5(d); see also Diamant, et al., SM017 ALI-ABA at 244.

127. See, e.g., Del Bankr. L.R. 9019-5(c)(iii).

128. See Diamant, et al., SM017 ALI-ABA at 248.

129. See Diamant, et al., SM017 ALI-ABA at 263. The parties in dispute may also contractually provide for the sequence of any ADR procedures leading to arbitration. See Diamant, et al., SM017 ALI-ABA at 254.

130. See, e.g., Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1170, 1172-80, 91 Fair Empl. Prac. Cas. (BNA) 1426, 84 Empl. Prac. Dec. (CCH) P 41386, 148 Lab. Cas. (CCH) P 59764 (9th Cir. 2003).

131. Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185, Fed. Sec. L. Rep. (CCH) P 93265, R.I.C.O. Bus. Disp. Guide (CCH) P 6642 (1987).

132. 9 U.S.C.A. §§ 1 to 9 (2006).

133. Shearson/American Exp., 482 U.S. at 237, 242; see also Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 20-23, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

134. See, e.g., In re Electric Machinery Enterprises, Inc., 479 F.3d 791, 796, 47 Bankr. Ct. Dec. (CRR) 234 (11th Cir. 2007); MBNA America Bank, N.A. v. Hill, 436 F.3d 104, 108, Bankr. L. Rep. (CCH) P 80445 (2d Cir. 2006); In re Gandy, 299 F.3d 489, 496, 48 Collier Bankr.

Cas. 2d (MB) 895, Bankr. L. Rep. (CCH) P 78709 (5th Cir. 2002); *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 893-94, 87 Fair Empl. Prac. Cas. (BNA) 1509, 18 I.E.R. Cas. (BNA) 773, 82 Empl. Prac. Dec. (CCH) P 40936 (9th Cir. 2002); see also *In re Olympus Healthcare Group, Inc.*, 352 B.R. 603, 612-13, 47 Bankr. Ct. Dec. (CRR) 64 (Bankr. D. Del. 2006) (refusing to deny arbitration of turnover action filed by trustee against debtor's insurer where arbitration clause was not "unconscionable" and turnover action also involved dispute a dispute regarding the amount subject to turnover).

135. See, e.g., *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104, 108-109, Bankr. L. Rep. (CCH) P 80445 (2d Cir. 2006); *In re Mintze*, 434 F.3d 222, 229-31 (3d Cir. 2006); see also *In re Merrill*, 343 B.R. 1, 7 (Bankr. D. Me. 2006) (allowing arbitration of alleged state and federal consumer protection law violations, but ordering alleged violations of the automatic stay be heard before the bankruptcy court); but see *In re Brown*, 354 B.R. 591, 603 (D.R.I. 2006) (holding that resolution of core dispute must occur in bankruptcy court not through arbitration).

136. See *In re Fleming Companies, Inc.*, 2007 WL 788921, *4 (D. Del. 2007).

137. The subtleties of the procedures for challenging an arbitration are well beyond the scope of this paper, but generally, a court can only review "whether the arbitration agreement is valid, and whether the arbitration agreement applies to the underlying dispute." See *Diamant, et al.*, SM017 ALI-ABA at 255 (citing numerous cases).

138. See *Diamant, et al.*, SM017 ALI-ABA at 263.

139. See *Diamant, et al.*, SM017 ALI-ABA at 266.

140. See *Diamant, et al.*, SM017 ALI-ABA at 266.

141. See *Diamant, et al.*, SM017 ALI-ABA at 266.

142. See, e.g., *Diamant, et al.*, SM017 ALI-ABA at 260. As discussed below, although the procedures allow tort claimants to opt out, the procedures also generally provide for a prohibition on the filing of motions for relief from the stay, abstention, or withdrawal of the reference while such procedures are ongoing (or for a fixed period of time). See *infra* § V. Thus notwithstanding the ultimate inability of a debtor to resolve all of its unliquidated, prepetition tort claims through the proposed ADR procedures, the debtor will at least gain the full benefit of the breathing spell that bankruptcy purports to afford.

143. 11 U.S.C.A. § 105(d).

144. 11 U.S.C.A. § 105(a).

145. But see *David B. Young, Alternative Dispute Resolution in Bankruptcy*, 876 PLI/Comm 999, 1029, 1031-32 (2005) (noting that section 105(a) might prove a slender reed on which to rest a bankruptcy court's authority to order ADR procedures and to stay pending litigation while such procedures are in effect and suggesting that Bankruptcy Code section 105(d) and other bases in the Federal Rules and the Bankruptcy Rules would provide more solid support).

146. See *In re Federated Dept. Stores, Inc.*, 328 F.3d 829, 834-36, 41 Bankr. Ct. Dec. (CRR) 120, 50 Collier Bankr. Cas. 2d (MB) 190, Bankr. L. Rep. (CCH) P 78849, 2003 FED App. 0139P (6th Cir. 2003) (affirming bankruptcy court's decision to mandate ADR for tort claimant and to stay litigation during such ADR process).

147. See *Fed. R. Civ. P. 16*; see also *Young*, 876 PLI/Comm at 1032.

148. Although Federal Rule 16 does not generally apply to contested matters in bankruptcy cases, pursuant to Bankruptcy Rule 9014, a bankruptcy judge is permitted to order that Federal Rule 16 apply to specific contested matters. See *Fed. R. Bankr. P. 9014*.

149. *Fed. R. Civ. P. 16(c)(9)*.

150. *Fed. R. Bankr. P. 9019(c)*.

151. *Fed. R. Bankr. P. 9019(b)*.

152. *Young*, 876 PLI/Comm at 1032, 1033.

153. Objectors may argue that such procedures must contain certain carve-outs for claimants who can establish "excusable neglect" or some other adequate basis for not responding to the notices sent by the debtor with respect to the ADR process. See *Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 397-99, 113 S. Ct. 1489, 123 L. Ed. 2d

74, 24 Bankr. Ct. Dec. (CRR) 63, 28 Collier Bankr. Cas. 2d (MB) 267, Bankr. L. Rep. (CCH) P 75157A, 25 Fed. R. Serv. 3d 401 (1993).

154. See *In re Federated Dept. Stores, Inc.*, 328 F.3d 829, 836, 41 Bankr. Ct. Dec. (CRR) 120, 50 Collier Bankr. Cas. 2d (MB) 190, Bankr. L. Rep. (CCH) P 78849, 2003 FED App. 0139P (6th Cir. 2003) (holding that bankruptcy court's stay of state court litigation did not result in an ultimate decision of the issues raised in the state court action by the bankruptcy court and, therefore, was a constitutional exercise of the bankruptcy court's power).

155. See *Federated*, 328 F.3d at 831-32 (discussing ADR procedures for resolution of litigation claims implemented following confirmation of a plan and ultimately affirming bankruptcy court's approval of such procedures). As one commentator on the case has noted:

The Federated decision is good news for debtors seeking to establish ADR procedures for the resolution of hundreds, if not potentially thousands, of disputed claims in a timely and efficient manner. At a minimum, mandatory non-binding ADR can provide an opportunity for a streamlined and economical resolution of complex claims, like tort injuries. But without the stay of state court litigation pending ADR, debtors could find themselves in a morass of legal and factual disputes in a variety of different forums. The Sixth Circuit's decision has confirmed the bankruptcy court's constitutional authority to require claimants to participate in mandatory ADR as a predicate to litigating their claims, thereby providing a real alternative for claims resolution.

Adam C. Rogoff, *Releasing the Albatross: The Use of Mandatory ADR as a Constitutional Alternative for Claims Resolution*, 20 No. 12 Bankr. Strategist 1 (2003).

156. See Affidavit of James A. Hopwood in Support of Chapter 11 Petition and First Day Orders ¶ 8, *In re Wickes, Inc.*, No. 04-02221 (Bankr. N. D. Ill. Jan. 20, 2004).

157. See Affidavit of James A. Hopwood in Support of Chapter 11 Petition and First Day Orders ¶¶ 14-15.

158. See Affidavit of James A. Hopwood in Support of Chapter 11 Petition and First Day Orders ¶¶ 10, 21.

159. See Affidavit of James A. Hopwood in Support of Chapter 11 Petition and First Day Orders ¶ 22.

160. See Disclosure Statement with Respect to the First Amended Joint Plan of Liquidation of Wickes, Inc. and Official Committee of Unsecured Creditors Dated September 5, 2007 (Wickes Disclosure Statement) § C.1., *In re Wickes, Inc.*, No. 04-02221 (Bankr. N. D. Ill. Sept. 5, 2007).

161. See Wickes Disclosure Statement § C.2.

162. See Motion for Order Approving Procedures for (A) Liquidating and Settling Certain Personal Injury and Property Damage Claims through Direct Negotiation and/or Alternative Dispute Resolution and/or (B) Modifying the Automatic Stay to Permit Certain Litigation with Respect to Such Claims to Proceed on Certain Conditions (the Wickes ADR Motion), *In re Wickes, Inc.*, No. 04-02221 (Bankr. N. D. Ill. June 2, 2004).

163. See Wickes ADR Motion ¶¶ 7-8.

164. See Wickes ADR Motion ¶¶ 10-11.

165. See Wickes ADR Motion ¶¶ 12-13.

166. See Wickes ADR Motion ¶¶ 14, 22.

167. See Order Approving Procedures for (A) Liquidating and Settling Certain Personal Injury and Property Damage Claims through Direct Negotiation and/or Alternative Dispute Resolution and/or (B) Modifying the Automatic Stay to Permit Certain Litigation with Respect to Such Claims to Proceed on Certain Conditions (the Wickes ADR Order), *In re Wickes, Inc.*, No. 04-02221 (Bankr. N. D. Ill. July 8, 2004).

168. See Wickes Disclosure Statement § IV.C.6. at 13.

169. See Modified First Amended Joint Plan of Liquidation of Wickes, Inc. and Official Committee of Unsecured Creditors Dated December, 2007 Art. 2.3 (d) at 14-15, a copy of

which is attached as Exhibit A to the Order Confirming Debtors' [sic] Modified First Amended Joint Plan of Liquidation, In re Wickes, Inc., No. 04-02221 (Bankr. N. D. Ill. Dec. 12, 2007).

170. See Motion for Order Pursuant to 11 U.S.C. § 362 and Fed. R. Bankr. P. 7016 and 9019 Approving Procedures for Modifying the Automatic Stay to Allow for (I) Liquidating and Settling and/or (II) Mediating Certain Prepetition Litigation Claims (the Delphi ADR Procedures Motion), In re Delphi Corporation, No. 05-44481 (Bankr. S.D.N.Y. June 6, 2008).

171. See Delphi ADR Procedures Motion ¶ 20.

172. See Delphi ADR Procedures Motion ¶ 20.

173. See Delphi ADR Procedures Motion ¶ 21.

174. See Delphi ADR Procedures Motion ¶¶ 22-23.

175. See Order Approving Procedures for Modifying the Automatic Stay under 11 U.S.C. § 362 to Allow for (I) Liquidating and Settling and/or (II) Mediating Certain Prepetition Litigation Claims (the Delphi ADR Procedures Order), In re Delphi Corporation, No. 05-44481 (Bankr. S.D.N.Y. June 6, 2008).

176. See Delphi ADR Procedures Order ¶ 3.

177. See Delphi ADR Procedures Motion ¶ 28(b).

178. See Delphi ADR Procedures Motion ¶ 28(c).

179. See Delphi ADR Procedures Motion ¶ 28(c).

180. See Delphi ADR Procedures Motion ¶ 28(d).

181. See Delphi ADR Procedures Order ¶ 4(a).

182. See Delphi ADR Procedures Motion ¶¶ 4(b), (c).

183. See Debtors' Motion Pursuant to Sections 105(a), 362, 363, 502 and 503 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019 to Establish an Alternative Dispute Resolution Program to Liquidate Certain Prepetition Claims (the Grace ADR Procedures Motion) ¶ 2, In re W. R. Grace & Co., No. 01-01139 (Bankr. D. Del. June 14, 2004).

184. See Debtors' Disclosure Statement for the Joint Plan of Reorganization under Chapter 11 of the Bankruptcy Code of W. R. Grace & Co., et al., the Official Committee of Asbestos Personal Injury Claimants, the Asbestos PI Future Claimants' Representative, and the Official Committee of Equity Security Holders Dated as of September 19, 2008 (the Grace Disclosure Statement) at § 2.7, In re W. R. Grace & Co., No. 01-01139 (Bankr. D. Del. Sept. 19, 2008). The debtors state in the Grace Disclosure Statement that asbestos lawsuits increased by 81% in 2000 and the first quarter of 2001. See id. By the date of the bankruptcy filing, Grace was named in 65,656 separate lawsuits. See id.

185. See Grace ADR Procedures Motion ¶ 25 (such mediation was, however, nonbinding).

186. See Grace ADR Procedures Motion ¶¶ 14, 30, 33. The procedures proposed by the debtors would even have provided for the disallowance of a claimant's claim where such claimant failed to pay all fees in the mandatory mediation. See Grace ADR Procedures Motion ¶ 27.

187. See Order Pursuant to Sections 105(a), 362, 363, 502 and 503 of the Bankruptcy Code and Federal Rule of Bankruptcy Procedure 9019 Establishing an Alternative Dispute Resolution Program and to Permit the Debtors to Liquidate Certain Prepetition Claims (the Grace ADR Procedures Order), In re W. R. Grace & Co., No. 01-01139 (Bankr. D. Del. Nov. 9, 2004).

188. See Grace ADR Procedures Order ¶ 4.

189. See Grace ADR Procedures Order ¶ 9.

190. See Grace ADR Procedures Order ¶ 13; see also W.R. Grace & Co., et al., Alternative Dispute Resolution Procedures (the Grace ADR Procedures), attached to the Grace ADR Procedures Order § 18.0.

191. See Grace ADR Procedures Order § 6.3.1.

192. See, e.g., Grace ADR Procedures Order § 7.0.

193. See Grace ADR Procedures Order § 3.0.

194. See Grace ADR Procedures Order § 3.0.

195. See Grace ADR Procedures Order § 12.0 (permitting liquidation of claim outside of claims resolution process and/or ADR Program “upon leave of Court from the Automatic Stay or Preliminary Injunction”).

196. See Grace ADR Procedures Order § 8.0.

197. See Grace ADR Procedures Order § 8.3.

198. See Grace ADR Procedures Order § 9.0.

199. See Grace ADR Procedures Order § 9.4.0.

200. See Grace ADR Procedures Order § 9.4.0.

201. See Grace ADR Procedures Order § 10.0.

202. Compare proposed ADR procedures attached to Grace ADR Procedures Motion § 10.0 with Grace ADR Procedures § 10.0.

203. See Grace ADR Procedures § 10.0.

204. See Grace ADR Procedures § 10.0.

205. See Press Release, American Bankruptcy Institute, Total U.S. Bankruptcies in First Half of 2008 up 29 Percent from a Year Ago (Aug. 27, 2008), available at www.abiworld.org (follow “Newsroom: Press Releases” hyperlink, then follow “Total U.S. Bankruptcies in First Half of 2008 up 29 Percent from a Year Ago” hyperlink).

206. See, e.g., Big Law Firm Embracing Bankruptcy Practice (Aug. 3, 2007), available at www.nytimes.com/2007/08/03/business/03bankrupt.html.