REPRINT FINANCIER WORLDWIDE

APRIL 2014

FINANCIER WORLDWIDE corporatefinanceintelligence

BANKRUPTCY & RESTRUCTURING

The prevalence and utility of 'roadmap' decisions in bankruptcy mega-cases

MARSHALL S. HUEBNER AND ELLIOT MOSKOWITZ

DAVIS POLK & WARDWELL LLP

As the pace of Chapter 11 filings jumped in the aftermath of the 2008 financial crisis, bankruptcy courts found their resources increasingly stretched. The number of Chapter 11 'mega-cases' – that is, cases that involve $100m or more in assets, over 1000 entities and/or a high degree of public interest – placed significant strain on the nation's bankruptcy courts. Many of these cases involve numerous creditors and, given the stakes, litigation that has the potential to drag on for years. Against this backdrop, bankruptcy judges have developed a variety of strategies to foster the efficient resolution of such cases. Mediation is becoming a regular feature of contentious mega-cases, and judges are frequently urging parties to resolve their disputes. Where a compromise is not possible and litigation is unavoidable, judges have increasingly issued 'roadmap' decisions that deny relief but provide a specific list of steps that need to be taken or changes to be made that will yield judicial approval. These decisions encourage parties to recalibrate their positions based on the court's views on the matter, engage in productive negotiations, and quickly come to an agreement on a proposal that the court

Davis Polk

Marshall S. Huebner and Elliot Moskowitz are partners at Davis Polk & Wardwell LLP. Mr Huebner can be contacted on +1 (212) 450 4099 or by email: marshall.huebner@davispolk.com. Mr Moskowitz can be contacted on +1 (212) 450 4241 or by email: elliot.moskowitz@davispolk.com.

Davis Polk

has already indicated it will approve.

Examples of such 'roadmap' decisions can be seen in at least four recent mega-cases. In the Chapter 11 cases of *Washington Mutual*, Judge Mary F. Walrath of the District of Delaware at first denied the debtor's motion to confirm a plan of reorganisation that contained a global settlement of disputes among the debtors, JPMorgan Chase and the Federal Deposit Insurance Corporation. In this opinion, however, Judge Walrath laid out the specific steps the debtors needed to take to garner approval of a revised plan. The court concluded by stating that the plan was "not confirmable unless the deficiencies explained herein [were] corrected". *In re Washington Mutual, Inc*., 442 B.R. 314, 322 (Bankr. D. Del. 2011). Although Judge Walrath denied confirmation of a subsequent iteration of the plan because of certain deficiencies and allegations that certain hedge funds had engaged in insider trading, the parties were able to correct the specific items noted in the bankruptcy court's initial opinion and, once further modifications were made and the insider trading allegations were resolved, present a confirmable plan of reorganisation to the court based on the roadmap that had been provided.

A similar approach was taken by Judge Kevin J. Carey of the District of Delaware in the *Tribune* Chapter 11 cases. In *Tribune*, the debtors and several groups of creditors filed competing plans of reorganisation, and ultimately two plans were presented to the court for approval. Following a June 2011 confirmation hearing, Judge Carey concluded that neither plan was confirmable in its current form, laid out a number of flaws in each of the plans and threatened to appoint a trustee if Tribune and its creditors could not soon agree on a viable solution. Nevertheless, Judge Carey noted that he favoured the plan proposed by the debtors, the Official Committee of Unsecured Creditors and a group of senior creditors, (the 'DCL Plan') over the competing plan proposed by bondholders led by Aurelius Capital Management – in part because the DCL Plan was more feasible and enjoyed broader support among Tribune's creditors. Judge Carey then advised the parties that even if "both sets of plan proponents addressed only flaws in their respective plans and both returned confirmable plans containing terms otherwise similar to those presently proposed, with similar voting results, *the DCL Plan would survive the crucible of §1129(c)". In re Tribune Company*, 464 B.R. 126, 208 (Bankr. D. Del. 2011) (footnote omitted) (emphasis added). Based on this roadmap, the debtors promptly filed an amended DCL Plan, addressing each of the concerns identified in the 31 October 2011 opinion. After certain other disputes were resolved, the plan was confirmed on 23 July 2012 based on Judge Carey's roadmap.

Judges have also used 'roadmap' decisions in the context of resolving labour disputes under Section 1113 of the Bankruptcy Code, which governs the rejection of collective bargaining agreements. In both the *AMR* and *Pinnacle Airlines* Chapter 11 cases, the bankruptcy courts denied the debtors' motion to reject collective bargaining agreements but at the same time provided a specific roadmap for the debtors to follow to achieve approval of a renewed motion.

In the *AMR* case, Judge Sean H. Lane of the Southern District of New York denied the debtors' motion to reject a collective bargaining agreement with the Allied Pilots Association (APA) but simultaneously held that if two changes were made, a subsequent motion would be approved: "American's proposed

Davis Polk

changes to furlough and codesharing have not been justified by either reference to the Business Plan or the practices of American's competitors. Given the significance of these two provisions collectively to American's proposal, the Court finds that American has not shown that the proposal is necessary as required by Section 1113. For the reasons set forth above, therefore, American's Motion to reject the collective bargaining agreements of the APA is denied. This denial is without prejudice to remedying the two defects identified in this Opinion and submitting a new application under Section 1113." In *re AMR Corp*., 477 B.R. 384, 454 (Bankr. S.D.N.Y. 2012) (emphasis added). Based on this roadmap, the debtors reinstated contractual restrictions on pilot furloughs, modified their codesharing requests and – within two days – filed a renewed motion to reject the collective bargaining agreement. Less than one month later, on 4 September 2012, the court granted the renewed motion.

Likewise, in the *Pinnacle Airlines* matter, Judge Robert E. Gerber denied the debtors' motion to reject a collective bargaining agreement with the Air Line Pilots Association (ALPA) on narrow grounds but simultaneously provided a clear path for the debtors to follow in filing a renewed motion: "Pinnacle has come very close to making the showing it must make to reject its collective bargaining agreement with the Pilots... The only remaining issues are (1) the full extent of the necessary cuts in Pilot labor expense... (2) whether the Pilots' pain should have been ameliorated, at least to some greater extent, by a better proposal to allow them to share, through equity or profit sharing, in fruits of concessions they were asked to make; and (3) whether Pinnacle properly could have shown no movement whatever in its overall cost savings demand. With respect to each of these matters (but these matters alone), the Court finds Pinnacle's proposal insufficient to pass muster under sections 1113(b) and 1113(c)... Pinnacle may well be served to present a new proposal that cures the deficiencies just noted. If Pinnacle does so, and if that does not by itself result in consensual agreement after negotiation with the Pilots, a subsequent motion for 1113 relief will almost certainly be granted." In *re Pinnacle Airlines Corp*., 483 B.R. 381, 423-24 (Bankr. S.D.N.Y. 2012) (footnote omitted) (emphasis added). Taking into account the court's view on the matter, both sides recalibrated their positions for further negotiations, and quickly reached a consensual agreement on modifications to the collective bargaining agreement. Shortly thereafter, the debtors filed a motion to approve the settlement, which the court granted.

Taken together, these cases demonstrate the increasing trend towards, and potential benefits of, the use of 'roadmap' decisions by bankruptcy judges presiding over mega-cases. Such decisions can foster a consensual resolution by allowing the parties to negotiate with the knowledge of the judge's views of the matter and likely outcome if litigation were to continue. At the same time, even where compromise is not possible, 'roadmap' decisions provide for the speedy conclusion of contested matters because the movants can simply file a renewed motion which will almost certainly be promptly approved by the court. Given this recent history, the use of such decisions will likely continue. ■