



AMERICAN  
BANKRUPTCY  
INSTITUTE

# New York City Bankruptcy Conference

## Mediation in Large Cases

**Hon. Cecelia G. Morris, Moderator**  
U.S. Bankruptcy Court (S.D.N.Y.)

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NEW YORK HILTON MIDTOWN  
NEW YORK CITY

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### ABI PANEL ON MEDIATION

The Honorable Cecelia Morris  
SDNY Bankruptcy Court

Daniel Serviansky  
Adjunct Lecturer in Law,  
Columbia School of Law

Panel I  
Julia Winters  
Katten Muchin Rosenman LLP

Sarah Link Schultz  
Akin Gump Strauss Hauer & Feld LLP

Panel II  
Kenneth Eckstein  
Kramer Levin

John D. Penn  
Perkins Coie

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## I. Mediation Necessities

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### Mediation Necessities

- Buy-In From All Parties
  - Principals
  - Advisors
- Interest-Based Analysis
- Perspective-Taking
- Agreement on Scope

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## II. Mediation Variables

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### Mediation Variables – Our Scenario

#### A. Background on Snel Travel<sup>1</sup>

- Snel Travel (“ST” or “Snel”) is a Dutch transportation company providing chartered helicopters, custom luxury cars, and security to executives of most Fortune 500 companies.
- Faced with pandemic-induced challenges, Snel found itself unable to pay its debts in the near term and decided to file for bankruptcy.
- Snel and its subsidiaries filed a Chapter 11 petition in SDNY on March 15, 2021.

<sup>1</sup>“Snel” means “fast” or “rapid” in Dutch.

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## B. Capital Structure as of Petition Date

- Secured Debt
  - RCF: \$500mm fully drawn, secured by all aircraft and specialty vehicles owned by Snel.
- Unsecured Debt
  - Long-term aircraft leases: All private jets are leased by Snel from third parties. The leases are very costly to Snel based on current market prices, which remain depressed as corporate travel remains slow. Snel is therefore rejecting many of the leases, but the lease rejections give rise to substantial unsecured lease rejection claims.

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## B. Capital Structure as of Petition Date, cont'd

- Snel Finance Bonds: Snel Finance (a separate debtor subsidiary) issued \$600 million of debt in the U.S. markets and transferred the proceeds to other Snel entities through a series of intercompany transactions. Snel Finance's only assets are intercompany claims against Snel Leasing, whose only asset is obligations owed from subsidiary, Snel Executive Travel.
- Local Dutch Bonds: Snel Finance issued \$400 million of unsecured bonds governed by Dutch law. The local bonds are owned almost entirely by Dutch investors.

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## B. Capital Structure as of Petition Date, cont'd

- Equity
  - Three shareholders, all Dutch entities, own 60% of the Class A shares:
    - Hemel Winsten, B.V. (aircraft leasing company)
    - Zware Wagen N.V. (specialty luxury armored car manufacturer)
    - Edele B.V. (family office)
  - The other 40% of Class A shares are held widely across Dutch and non-Dutch investors.

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## C. Case Issues

- Insider Transaction
  - Snel contends that it paid fair value for the helicopters and specialty vehicles, and even if it was simultaneously planning to file for bankruptcy, it believed that it would need to expand its Executive Travel business to make itself a more attractive company.
  - The Creditors' Committee contends that Snel paid above-market prices during a period of global uncertainty mere weeks before filing for bankruptcy as a gift to major shareholders. The Committee and the Dutch bond indenture trustee are both contemplating filing a standing motion and/or seeking to have these claims put in a post-reorganization trust.

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- Plan Issues
  - Since it is conceded that the Snel parent company is insolvent, a U.S. bankruptcy practitioner would expect that any successful restructuring would involve converting the company's existing unsecured debt into equity in the reorganized company.
  - Snel will also need to raise new debt and equity capital in order to fund a reorganization. The terms of the new debt and equity will be a significant element of the plan process.
- Snel Finance Bonds
  - If the Snel Finance bond structure is upheld, those bondholders would recover par due to asserting claims at multiple entities, while general unsecured creditors and holders of the Dutch bonds will receive pennies on the dollar.

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- The UCC argues that holders of the Snel Finance Bonds should only be entitled to a single claim against Snel Parent and that the intercompany claims should be disregarded. If holders of the Snel Finance Bonds are limited to a single claim against Snel Parent, general unsecured creditors will get a recovery of approximately 30 cents.

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## D. Setting the Stage for Mediation

- The Debtors' exclusive period to file a plan expires in 90 days. In the face of a hotly contested plan process involving multiple creditor groups and shareholders, the Court announces that the Debtors and the major case parties should engage in mediation around a plan of reorganization and the key disputed case issues. The Court has asked the parties to propose the terms of mediation and submit a proposed mediation order to the Court.

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- The Court instructed the parties that the Mediation Order should address the following issues:
  - **Identity of the mediator** – a sitting judge, a former judge or a private mediator. Given the complexities of the case, would two or even three mediators be warranted?
  - **Who are the proper mediation parties?** What is the procedure to add mediation parties during the pendency of the mediation?
  - **How will parties who trade in securities participate in mediation?** Should the mediation order address this topic or provide for a cleansing mechanism?



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- How should the issues to be mediated be sequenced?
- What is the proper duration of the mediation?
- Should the mediator make reports to the court?
- Other issues to be addressed in the mediation order.

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## Mediation Variables

### A. Who Should the Mediator Be?

- Sitting Judge
- Subject Matter Expert
- Process Expert
- A Team: Lead Mediator, With Conflict Coaches

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## Mediation Variables

### B. Who Should Decide Who is Invited?

- Mediator
- Judge
- Participants

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## Mediation Variables

### D. Ground Rules

- “Who decides the shape of the table?”
  - The Debtors
  - All Parties to the Disputes
  - The Mediator
  - Fulcrum Creditors
  - Equityholders

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## Mediation Variables

- What Should the Mediator Order Say?
  - Confidentiality
  - Prescribe the Scope, Participants, Timing, etc.
  - What pre-mediation disclosures to mediator should include
  - How MNPI will be handled

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## III. The Mediation Process

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### The Mediation Process

#### A. What Sequence Should the Mediation Take When the Disputes are Complex and Involve Multiple Parties

- Sequential bilateral mediation
- Multi-Party Mediation
- Insights from negotiation theory

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### The Mediation Process

#### B. When Should the Mediation Occur

- At the Inception of Litigation
- On the Eve of Trial or Dispositive Ruling

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## IV. Success in Mediation

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### Success in Mediation

- A. Views from the Bench
- B. Skills for Practitioners

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## V. Q&A

# Faculty

**Kenneth H. Eckstein** is a partner with Kramer Levin Naftalis & Frankel LLP in New York and co-chairs its Bankruptcy and Restructuring department. He has played a prominent role in many of the largest and most complex chapter 11 reorganizations over the past 35 years, including most recently two large, complex restructurings of the pharmaceutical companies at the heart of the opioid crisis, as well as the bankruptcies of household names in the consumer products, automotive, media and entertainment, financial services, telecommunications, energy and airline industries. Mr. Eckstein represents creditors' committees, bondholders and other stakeholders in both in- and out-of-court restructurings, as well as trustees, examiners and third parties seeking to acquire the assets or businesses of financially troubled companies. He also counsels and represents debtors in the complex legal, financial and operational issues arising in reorganizations, including obtaining debtor-in-possession financing; negotiating forbearance agreements; negotiating plans of reorganization with secured lenders, creditors' committees and other stakeholders; and conducting sales of businesses. A Fellow of the American College of Bankruptcy, Mr. Eckstein has been repeatedly recognized by *Chambers USA* and *Legal 500* as one of the pre-eminent bankruptcy practitioners both in New York and in the United States. In 2014, Mr. Eckstein was named to *Global M&A Network's* list of Global Top 100 Turnaround Professionals and to *Law360's* MVP List, one of only eight lawyers named in the area of Bankruptcy and Corporate Restructuring, and he was listed as one of the Outstanding Restructuring Lawyers by *Turnarounds & Workouts* in 2011 and Restructuring Lawyer of the Year by Global M&A Network in 2010. He is admitted to practice before the U.S. District Courts for the Southern and Eastern Districts of New York. Mr. Eckstein received his B.A. *cum laude* from the University of Pennsylvania in 1978 and his J.D. from New York University School of Law in 1979, where he was research editor of the *Journal of International Law and Politics*.

**Hon. Cecelia G. Morris** is Chief U.S. Bankruptcy Judge for the Southern District of New York in Poughkeepsie, initially appointed on July 1, 2000, and named Chief Judge on March 1, 2012. Prior to her appointment to the bench, she clerked for the U.S. Bankruptcy Court for the Southern District of New York starting in December 1988. Prior to that, she clerked for the U.S. Bankruptcy Court for the Middle District of Georgia from February 1986 until she moved to New York. Before her career with the court, Chief Judge Morris had a private law practice in Macon, Ga., from May 1981 until February 1986. She served as an Assistant District Attorney and as the administrator of the Civil Division Child Support Recovery Unit, Griffin Judicial Circuit in Griffin, Ga., from September 1979 until May 1981. Chief Judge Morris also had a private law practice in Griffin from October 1977 until January 1978 and clerked at Seay Sims & Park (now Bolton & Park) in Griffin in 1976. Chief Judge Morris has participated as a trainer in many mediation/arbitration programs sponsored by the Federal Judicial Center, the Association of the Bar of the City of New York, the National Association of Security Dealer Regulation and Bankruptcy Court, Endispute Inc. and the Center for Public Resources, Inc. She has successfully mediated many disputes in some of the most prominent cases pending before the U.S. Bankruptcy Court for the Southern District of New York. Chief Judge Morris is an active participant in many bar outreach programs and has been honored to be the keynote speaker at several events, including the Federal Judicial Center's Clerk of Court and Chief Deputies Conference and Weil Gotshal and Manges' Women@Weil program. She has served as an editor of a treatise on bankruptcy being developed by Bloomberg Law, and she published an article describing

the history and legal basis of the court's loss-mitigation program in the Spring 2011 edition of the *ABI Law Review*. She has also authored several articles on electronic filing, including a chapter on electronic case filing in *Collier on Bankruptcy*, and has published articles on loss-mitigation, mediation, the consumer credit counseling requirement in bankruptcy and cross-border insolvency cases under chapter 15 of the Bankruptcy Code. Chief Judge Morris has testified before Congress and served on the Bankruptcy Judges Advisory Board to the Administrative Office of the U.S. Courts. She also has taught bankruptcy ethics at St. John's University's LL.M. in Bankruptcy program and served as a member of the Barry Zaretsky Roundtable Steering Committee at Brooklyn Law School, on the advisory board of the *ABI Law Review*, and as a member of the International Insolvency Institute, American College of Bankruptcy, National Conference of Bankruptcy Judges and the Global Restructuring Organization's Scientific Committee, headquartered in Modena, Italy. Chief Judge Morris received the Annual Conrad B. Duberstein Memorial Award for Excellence and Compassion in the Bankruptcy Judiciary and the *New York Law Journal* Impact Award for pioneering the use of e-filing in federal court. She received her B.S. from West Texas State University and her J.D. from the John Marshall Law School.

**John D. Penn** is a partner and the firmwide chair of Perkins Coie LLP's Bankruptcy & Restructuring Practice in New York and Dallas. He was licensed by the Supreme Court of Texas in 1982 and the Supreme Court, Appellate Division of New York in 2010, and has been an active bankruptcy and insolvency practitioner for almost 40 years. Mr. Penn has represented secured and unsecured creditors, debtors, trustees and unsecured creditor committees in major and high-profile reorganizations and insolvency proceedings. He is a former ABI president and chairman, and he served as chairman and past president of the American Board of Certification. He has been Board Certified in Business Bankruptcy Law by both the American Board of Certification and the Texas Board of Legal Specialization for nearly 30 years. Mr. Penn has written extensively on bankruptcy and reorganization topics. His work has been published in the *ABI Law Review*, the *ABI Journal* and a number of other publications. A frequent speaker at educational programs, Mr. Penn received both his B.B.A. and J.D. from Baylor University.

**Sarah L. Schultz** is a partner in Akin Gump Strauss Hauer & Feld LLP's Financial Restructuring group in Dallas and handles large, complex restructuring cases and out-of-court corporate reorganizations for public and private companies, as well as for alternative investment funds. She routinely handles representations for both debtors and creditors. Ms. Schultz advises in large, complex cases and out-of-court restructurings across a broad range of industries, including oil and gas, shipping, retail and health care. She is a member of the State Bar of Texas, was recognized as an "Outstanding Young Bankruptcy Lawyer" in 2015 in *Turnarounds & Workouts*, and has been listed in *Chambers USA: America's Leading Lawyers for Business* (2013-21), as one of *Lawdragon's* 500 Leading U.S. Bankruptcy & Restructuring Lawyers in 2020, in *The Best Lawyers in America* for Bankruptcy and Creditor Debtor Rights/Insolvency and Reorganization Law for 2021-22, and as one of "The Best Lawyers in Dallas" by *D Magazine* (2018-19). Ms. Schultz received her B.A. *summa cum laude* in 1998 from the University of North Dakota and her J.D. *cum laude* in 2001 from the University of Minnesota Law School, where she was a member of the *Minnesota Law Review* in 2000 and 2001.

**Daniel S. Serviansky** is a mediator and conflict coach specializing in private real estate business disputes and in divorce mediation, and a lecturer in law at Columbia Law School in New York. He



has served as a principal of various real estate deals, playing the roles of developer, syndicator and asset manager. Earlier in his career, Mr. Serviansky worked as a real estate finance attorney and as a zoning attorney. He is a licensed real estate instructor and broker in New York and is admitted to practice law in Florida and in New York. Mr. Serviansky has served as an adjunct assistant professor at the Columbia Graduate School of Architecture, Planning and Preservation. He received his B.A. from Yale University, his M.S. in real estate from the Columbia Graduate School of Architecture, Planning and Preservation, and his J.D. from Columbia Law School.

**Julia M. Winters** is a partner at Katten Muchin Rosenman LLP in New York, where she helps clients through the entire lifecycle of the bankruptcy litigation process — from negotiations and mediation through trial and prosecuting appeals. For more than 15 years, she has built a reputation for providing sound counsel to a wide array of creditors and debtors. Focusing her practice on bankruptcy and commercial litigation, Ms. Winters has represented creditors and debtors in several high-profile chapter 11 bankruptcy cases and provided counsel on commercial litigation matters in both federal and state court. She also covers bankruptcy litigation as an analyst for *Bloomberg Intelligence* and *Reorg Research*. Ms. Winters previously clerked for Hon. Elizabeth S. Stong of the U.S. Bankruptcy Court for the Eastern District of New York. She also was the executive articles editor for the *Brooklyn Journal of International Law* and taught legal writing at Brooklyn Law School as an adjunct professor for several years. Ms. Winters received her B.A. from the University of Michigan, her Master's in urban planning from Hunter College and her J.D. *cum laude* from Brooklyn Law School.