To Mediate or Not, That Is the Quest?

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AMERICAN BANKRUPTCY INSTITUTE
11th ANNUAL MID-ATLANTIC BANKRUPTCY WORKSHOP

"To Mediate or Not, That Is the Question?"
Concurrent Sessions

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I. Court Approval and Compensation of Mediators

A. Local Bankruptcy Rules and Related Authority

Bankruptcy courts within the Second, Third, and Fourth Circuits have adopted local rules and/or related procedures governing the process for referring matters to mediation.[2] On the basis of these local rules and procedures, bankruptcy courts in these jurisdictions have referred disputes between debtors, their constituencies, and stakeholders to mediation in numerous large and complex chapter 11 cases.[3] Below is an overview of applicable local rules and procedures governing referral and compensation of mediators in select jurisdictions.

1. U.S. Bankruptcy Court for the Southern District of New York

a. Referral Procedure. Rule 1.0 of the Bankr. S.D.N.Y. Mediation Procedures provides that any "matter" (which includes "any adversary proceeding, contested

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[2] See, e.g., Bankr. S.D.N.Y. R. 9019-1; Bankr. S.D.N.Y. General Order M-452 (adopting *Procedures Governing the Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings* (the "Bankr. S.D.N.Y. Mediation Procedures")); Bankr. D. Del. R. 9019-5; Bankr. D. Md. R. 9019-2; Bankr. E.D. Va. (Alexandria Division) General Order No. 91-1-2 (adopting *Procedures for Mediation of Adversary Proceedings and Contested Matters* (the "Bankr. E.D. Va. (Alexandria Division) Mediation Procedures").

[3] See, e.g., In re Residential Capital, LLC, Case No. 12-12020 (MG) (Bankr. S.D.N.Y. Dec. 26, 2012) [Docket No. 2519] (appointing Judge James M. Peck "to assist the parties in resolving certain issues relating to formulation and confirmation of a Plan"); In re NewPage Corp., Case No. 11-12804 (KG) (Bankr. D. Del. Aug. 14, 2012) [Docket No. 2155] (appointing Judge Robert D. Drain as mediator to resolve "certain issues and impediments relating to the formulation of a chapter 11 plan . . . ."); In re Washington Mutual Inc., Case No. 08-12229 (MFW) (Bankr. D. Del. Sept. 13, 2011) [Docket No. 8612] (denying confirmation of *Modified Sixth Amended Joint Plan of Affiliated Debtors* and referring parties to mediation); In re Tribune Co., Case No. 08-13141 (KJC) (Bankr. D. Del. Sept. 1, 2010) [Docket No. 5591] (appointing Judge Kevin Gross as mediator concerning causes of action associated with previous leveraged buyout).

matter or other dispute") may be assigned to mediation (1) by Court order "upon a motion by any party in interest or the U.S. Trustee[,]" or (2) "upon stipulated order submitted by counsel of record or by a party appearing *pro se*[.]"[4]

b. Compensation. Rule 4.0 of the Bankr. S.D.N.Y. Mediation Procedures provides "[t]he mediator's compensation shall be on such terms as are satisfactory to the mediator and the parties, and subject to Court approval if the estate is to be charged with such expense."[5]

2. U.S. Bankruptcy Court for the District of Delaware

a. Referral Procedure. Rule 9019-5(a) of the Local Rules of the U.S. Bankruptcy Court for the District of Delaware ("Bankr. D. Del. LBR") provides "[t]he Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case."[6] Additionally, Bankr. D. Del. LBR 9019-5(a) provides "[p]arties to an adversary proceeding or contested matter may also stipulate to mediation, subject to Court approval."[7]

b. Compensation. Bankr. Del. D. LBR 9019-2(f) states "[o]nce eligible to serve as a mediator or arbitrator for compensation, which shall be at reasonable rates and subject to judicial review, the mediator or arbitrator may require compensation or reimbursement of expenses as agreed by the parties."[8]

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[4] Bankr. S.D.N.Y. Mediation Procedures, Rules 1.1 – 1.3.

[5] Bankr. S.D.N.Y. Mediation Procedures, Rule 4.0.

[6] Bankr. D. Del. R. 9019-5(a).

[7] Bankr. D. Del. R. 9019-5(a).

[8] Bankr. D. Del. R. 9019-2(f).

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3. U.S. Bankruptcy Court for the District of Maryland

a. Referral Procedure. Rule 9019-2(d)(1) of the Local Rules of the U.S. Bankruptcy Court for the District of Maryland ("Bankr. D. Md. LBR") provides "[i]f requested in writing by the parties, a contested matter, adversary proceeding, or other dispute . . . may be assigned to the [Bankruptcy Dispute Resolution Program ("BDRP")] by order of the court."[9] Additionally, Bankr. D. Md. LBR 9019-2(d)(2) provides that "[w]hile as a general rule participation in the BDRP is voluntary, any judge, acting *sua sponte* or on the request of a party, may designate specific Matters for inclusion in the program."[10]

b. Compensation. Pursuant to Bankr. D. Md. LBR 9019-2(g), a mediator may serve either on a compensated or pro bono basis.[11] If the mediator is to receive compensation from the bankruptcy estate exceeding $3,000.00, the mediator must file with the bankruptcy court a notice that provides, *inter alia*, "the terms and conditions of compensation (including hourly rate)[.]"[12] "[I]f the proposed compensation . . . is $3,000.00 or less, there is no need for further court order to authorize payment to the [mediator]."[13]

4. U.S. Bankruptcy Court for the Eastern District of Virginia

[9] Bankr. D. Md. R. 9019-2(d)(1).

[10] Bankr. D. Md. R. 9019-2(d)(2).

[11] Bankr. D. Md. R. 9019-2(g)(1)-(3).

[12] Bankr. D. Md. R. 9019-2(g)(2)(A).

[13] Bankr. D. Md. R. 9019-2(g)(2)(B).

a. Referral Procedure. Rule 3.1 of the Bankr. E.D. Va. (Alexandria Division) Mediation Procedures states "[a] case may be assigned to mediation by joint request of the parties or by the Court at a status conference or other hearing."[14]

b. Compensation. Pursuant to Rule 1.1 of the Bankr. E.D. Va. (Alexandria Division) Mediation Procedures, "[t]he Court shall establish and maintain a register of qualified attorneys who have volunteered to serve, without compensation, as mediators in contested matters and adversary proceedings in cases pending in this division."[15]

B. Court-Approval of Mediators under 11 U.S.C. § 327(a)

An issue that has recently emerged is whether a mediator is a "professional" for purposes of section 327(a) of the Bankruptcy Code and Rule 2014(a) of the Federal Rules of Bankruptcy Procedure.[16] The U.S. Bankruptcy Court for the Southern District of Texas addressed this issue earlier this year in In re Smith, 524 B.R. 689, 695 (Bankr. S.D. Tex. 2015).[17]

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[14] Bankr. E.D. Va. (Alexandria Division) Mediation Procedures, Rule 3.1.
[15] Bankr. E.D. Va. (Alexandria Division) Mediation Procedures, Rule 1.1.

[16] Pursuant to section 327(a), the trustee (including debtor-in-possession), subject to bankruptcy court approval:

> [M]ay employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the [debtor] in carrying out the [debtor]'s duties under this title.

11 U.S.C. § 327(a). In conjunction with section 327(a), Bankruptcy Rule 2014(a) provides, in pertinent part, that a bankruptcy court must approve the employment of professional persons:

> An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327 . . . of the Code shall be made only on application of the trustee or committee.

Fed. R. Bankr. P. 2014(a). To the extent mediators in bankruptcy proceedings are "other professional persons" under section 327(a), prospective mediators must file with the bankruptcy court a declaration of disinterestedness. Among other requirements, a declaration of disinterestedness must contain a statement, made under penalty of perjury, that the prospective professional (a) is a "disinterested person" within the meaning of section 101(14) of the Bankruptcy Code, and does not hold or represent an interest adverse to the debtors' estates, and (b) has no connection to the debtors, their creditors, or their related parties except as otherwise disclosed in the declaration of disinterestedness. *See* 11 U.S.C. §§ 101(14), 327(a).

[17] In re Smith, 524 B.R. 689, 695 (Bankr. S.D. Tex. 2015).

In Smith, the underlying dispute centered on a motion by the chapter 7 trustee seeking turnover of cash distributions from a limited partnership in which the debtor and certain of his family members shared an ownership interest.[18] While the dispute over the turnover motion was ongoing, the parties to the dispute filed a joint motion seeking entry of an order tolling the deadline to file pleadings for post-judgment remedies.[19] In the tolling motion, the parties disclosed to the court (for the first time) that the parties had scheduled mediation (without prior court-approval) with retired Bankruptcy Judge Leif Clark.[20] Additionally, at a hearing on the tolling motion, the parties advised the court (for the first time) that the parties intended to pay the prospective mediator from bankruptcy estate funds.[21]

Denying the tolling motion, the court in Smith held that "the parties could not go forward with the scheduled mediation because they had failed to obtain th[e] [c]ourt's prior approval."[22] Ultimately, the Court held that "under the Bankruptcy Code and Rules mediators are 'professional persons' whose terms of employment, including their level of compensation, must be approved before mediation services are provided."[23] The court began its analysis by noting that, although "it found no case law directly on point" and while the Bankruptcy Code does not define the term "professional persons," "boundaries have developed in case law" on whether a person qualifies as a "professional person" for purposes of section 327(a).[24] First, a

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[18] See id. at 692.

[19] See id. at 693.

[20] See id.

[21] See id.

[22] See id. at 694.

[23] Id.

[24] Id. at 692, 695.

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"professional person" must be a professional "in the ordinary sense of the word – that is, a person must perform high-level, specialized services requiring 'discretion or autonomy.'"[25] Second, his or her employment "must specifically relate to the administration of the bankruptcy case, as opposed to the ordinary course operation of the debtor's business."[26] Third, "a professional must utilize his professional skills to impact the administration of the estate."[27]

Ultimately, the court held that mediators satisfy each of these three factors: (i) "[m]ediators dealing with disputes in bankruptcy are professionals in the ordinary sense of the word, as they are usually attorneys with a highly specialized skill set[;]" (ii) mediators "who are engaged to resolve bankruptcy disputes are by definition playing a central role in those disputes[;]" and, (iii) "the substantial discretion a mediator has in helping to resolve a bankruptcy dispute is sufficiently significant to the overall administration of the estate to require court approval under section 327(a) and Rule 2014(a)."[28]

II. Appointment of Examiners as Mediators

An additional issue that has recently emerged is whether an individual appointed as court-examiner pursuant to section 1104 of the Bankruptcy Code may also serve as

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[25] Id. at 694 (citing In re Semenza, 121 B.R. 56, 57 (Bankr. D. Mont. 1990)).

[26] Id. at 695 (citing Matter of Seatrain Lines, Inc., 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981)).

[27] Id. (citing In re Fretheim, 102 B.R. 298, 299 (Bankr. D. Conn. 1989)).

[28] See id. The court in Smith went on to hold that, even if mediators are not "'professional persons' whose terms of employment are subject to approval under section 327(a) and Rule 2014(a)," prior court approval is still required pursuant to section 105(a) to "prevent any abuse of the process of selection of ex-bankruptcy judges as mediators – including the appearance of an abuse of this selection process." Id. at 697.

court-appointed mediator in the same bankruptcy proceeding.[29] Section 1104(c) of the Bankruptcy Code, provides, in pertinent part:

> (c) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if –
>
> > (1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or
> >
> > (2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

11 U.S.C. § 1104(c). Section 1106 of the Bankruptcy Code identifies the duties of an examiner appointed pursuant to section 1104. Section 1106(b), in particular, states:

> (b) An examiner appointed under section 1104(d) of this title shall perform the duties specified in paragraphs (3) and (4) of subsection (a) of this section, *and, except to the extent that the court orders otherwise, any other duties of the trustee that the court orders the debtor in possession not to perform*.

11 U.S.C. § 1104(b) (emphasis added).

Citing the "other duties" clause of section 1106(b), bankruptcy courts have held that "[s]ection 1106(b) provides that an examiner appointed under section 1104[] may have its powers expanded by the [c]ourt" beyond the examiner's "investigatory function."[30]

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[29] See, e.g., NORTON BANKR. L. & PRAC. 3d § 168:4 (West 2015) ("The mediator is not a professional in the sense provided for under Code § 327, nor is he or she an examiner or trustee. The mediator's authority generally should not be expanded into these roles.").

[30] In re JNL Funding Corp., No. 10-73724-AST, 2011 Bankr. LEXIS 622, at *31 (Bankr. E.D.N.Y. Feb. 10, 2011) (citing In re Texasoil Enters., Inc., 296 B.R. 431, 435-36 (Bankr. N.D. Tex. 2003)); see also 5 COLLIER ON BANKRUPTCY ¶ 1106.05[2], at 1106-34 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014) (noting that "there are additional roles to be played by an examiner in addition to the investigatory function that represents the

At least one bankruptcy court has specifically expanded the powers of a court-appointed examiner to include service as a mediator. Notably, in Dynegy Holdings, LLC, Chief Judge Cecelia G. Morris of the U.S. Bankruptcy Court for the Southern District of New York entered an *Order Granting the Motion of U.S. Bank National Association, as Indenture Trustee, for Appointment of an Examiner Pursuant to Section 1104(c) of the Bankruptcy Code* (the "Dynegy Examiner Order").[31] The Dynegy Examiner Order provides, in pertinent part:

> **ORDERED** that the examiner may make reasonable efforts to facilitate discussions among parties in interest regarding issues of contention in the Debtors' cases (including with respect to plan negotiations), and may act as mediator between or among parties in interest to the extent the examiner determines mediation may be beneficial to the progress of these cases; provided, that all discussions and correspondence relating to mediation shall be confidential and not admissible (or discoverable) in any proceeding and no party may disclose any document, information, offer, or counteroffer provided by another party in connection with mediation without the consent of the parties in mediation; . . . .[32]

On January 11, 2012, the U.S. Trustee for Region 2 appointed Susheel Kirpalani as examiner (the "Examiner") in the bankruptcy cases of Dynegy Holdings, LLC and its debtor affiliates pursuant to section 1104 of the Bankruptcy Code.[33] On January 12, 2012, the court entered an order approving the appointment.[34] "The Examiner was . . . charged to serve as court-appointed mediator to attempt to force a consensual Chapter 11 plan among the Debtors' various constituents."[35]

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primary role for an examiner" including "authoriz[ation] to mediat[e] deadlocked plan negotiations" (citing In re Pub. Serv. Co. of N.H., 99 B.R. 177 (Bankr. D.N.H. 1989)).

[31] In re Dynegy Holdings, LLC, Case No. 11-38111 (CGM) (Bankr. S.D.N.Y. Dec. 29, 2011) [Docket No. 276].

[32] Id. [Docket No. 276, at 7].

[33] See In re Dynegy Holdings, LLC, Case No. 11-38111 (CGM) (Bankr. S.D.N.Y. Jan. 11, 2012) [Docket No. 308].

[34] See In re Dynegy Holdings, LLC, Case No. 11-38111 (CGM) (Bankr. S.D.N.Y. Jan. 12, 2012) [Docket No. 318].

[35] In re Dynegy Holdings, LLC, Case No. 11-38111 (CGM) (Bankr. S.D.N.Y. March 9, 2012) [Docket No. 490].

ABI Mid-Atlantic Workshop Panel: Mediation; Selected Issues

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1. **Are paid mediators better prepared and more successful in resolving disputes?**

As the saying goes, you often get what you pay for. While this is not always true with regard to mediations, it is true that paid mediators are often better prepared when going into a mediation simply because they have been paid to prepare. Further, when parties are paying for the mediation, they are generally more invested in its outcome. In complex cases where the stakes are high, paying for a seasoned mediator is often money well spent. They will usually read everything you ask them to read prior to engaging in discussions with the parties. This avoids the parties having to take the time to explain the entire background of the dispute and the rationale for their position. The mediator can then initiate the mediation by asking relevant and intelligent questions of each side which often expedites the parties getting to the heart of the matter. Further, it is likely that a paid mediator will treat the mediation as a job, and will want to do that job as best as possible in the hopes of building his or her mediation practice. While it is unclear statistically whether paid mediators are more successful settling disputes than are mediators who are not paid for their services, it seems logical that a paid mediator would ordinarily invest more time preparing for the mediation and encouraging parties to come to an agreement. Likewise, in an article pertaining to mediations in the labor and employment area, the authors who collected empirical data regarding the success of mediations reported that "Pro-Bono cases were also much less likely to settle. Parties to such mediations may not take them very seriously. In contrast, parties who invest several thousand dollars to mediate are likely to do so only if they are ready to make significant concessions in order to settle." See, *Inside the Caucus: An Empirical Analysis of Mediation from Within*, by Daniel Klerman and Lisa Kleman, p. 7.

On the other hand, sitting judges often are extremely effective mediators. While their time may be more limited than that of paid mediators, their judicial status carries a lot of weight with many litigants. Their ability to persuade parties to be more realistic about their chances at trial often results in parties' reducing their demands or increasing their offers, as the case may be.

Examples of Mediations Involving Paid Mediators

In re Semcrude, L.P. (Bankr. D. Del 08-11525)
Arrow Oil and Gas, Inc., et al. v. Calcasieu Refining Co., et al, (Bankr. D. Del 10-51828)
Anstine & Musgrove, Inc., et al. v. Calcasieu Refining Co., et al. (Bankr. D. Del 11-1619)

Mediation involving the claims of approximately 80 plus oil producers against parties who bought oil and gas from a debtor entity prior to the inception of the bankruptcy case. Case involved whether liens on oil and gas under statutes in oil producing states are not released under certain circumstances even if the seller of such oil and gas has been paid for the product. Following mediation, settlements reached with all but 3 defendants on the eve of summary judgment hearing.

In re Tousa (Bankr. S.D. Fla. 08-10928)

Mediation of Chapter 11 plan issues (including major fraudulent conveyance and preference claims) – following mediation, settlement reached which was incorporated into plan.

Mediation of (i) claims by three groups of plaintiffs against directors and officers and (ii) coverage issues relating to two tranches of D&O insurance involving multiple policy periods and twelve insurers (including AIG, ACE, Allied World, Arch, AXIS, Beazley, Chubb, Travelers, XL (US and Bermuda), and Zurich)

Mediation of more than fifty preference actions (100% of which were settled through mediation).

In re St. Vincents Catholic Medical Centers (Bankr. S.D.N.Y. 10-11963)

Mediation regarding claims of major creditor s including Sun Life Financial and PBGC.

Examples of Mediations Involving Unpaid (Usually Sitting Judge) Mediators

In re Cengage Learning, Inc. (Bankr. E.D.N.Y. 13-44105)

Following mediation conducted by Judge Drain, a global settlement between the debtor, the Official Committee of Unsecured Creditors, the holders of a super-majority of the company's first lien, second lien and unsecured debt, and its existing primary equity holder reached a settlement concerning plan issues, which resulted in an amended plan, with key creditor support being filed.

In re Residential Capital, LLC, No. 12-12020 (MG) (Bankr. S.D.N.Y.)

A Five (5) month long mediation conducted by then sitting Judge James Peck resulted in the settlement of various complex disputes between the Debtor, the Creditor's Committee, AFI and other key creditors, and pave the way to a largely consensual plan

confirmation process, reducing the expenses associated with a long chapter 11 plan fight and ultimately produced an increased recovery to creditors.

Examples of Mediations Involving Paid and Unpaid Professionals

City of Detroit, Michigan

Complex mediation lasting a year in chapter 9 case involving multiple issues and mediators. Mediators earned $1 MM in fees, but the lead mediator did not receive any compensation. Mediators included:

- Chief Judge Gerald Rosen the U.S. District Court for the Eastern District of Michigan-- appointed as the lead mediator for Detroit
- Judge Victoria Roberts of the U.S. District Court for the Eastern District of Michigan,
- Judge Elizabeth Perris of the U.S. Bankruptcy Court for the District of Oregon
- Senior Judge Wiley Daniel U.S. District Court in Colorado,
- Judge David Coar - former bankruptcy and district judge
- Eugene Driker, co-founder of Detroit law firm Barris, Sott, Denn & Driker PLLC

Many of the issues that were mediated involved legal issues of first impression and the treatment of different creditor groups under the Plan.

2. **Should a sitting judge serve as mediator in a case pending in his/her district?**

Pros: Sitting judge in the district where the legal dispute is to be tried will likely be familiar with the trial judge and thus may be more influential with litigants regarding the way their case will be perceived by trial judge and his or her views on certain relevant matters; he or she will also be knowledgeable in law of that jurisdiction; relationship between sitting judge and lawyers may be such that he or she is more influential in driving a settlement. Experienced current or prior bankruptcy judges can be especially persuasive in setting realistic expectations and encouraging parties to reconsider unreasonable positions. Limits costs to the estate because sitting judges are not paid fees (only expenses reimbursed).

Cons: Sitting judge may discuss matter with trial judge which would be inappropriate but probably does occur from time to time; sitting judge may have certain biases as to counsel for either side and that may impair his or her impartiality. There may also be concerns regarding counsel's ability to be forthright with a sitting judge as mediator because counsel likely appears before sitting judge in other cases (i.e., counsel wants to avoid such biases). Lastly a sitting judge may already have full work load and not have the time to fully undertake/prepare for mediation involving multiple complex issues.

Important to review local rules governing mediations to determine who can and cannot serve as a Court appointed mediator.

3. **Should parties select the mediator or should he/she be court appointed?**

Pros to Parties' Selection of Mediator: Parties may be more conciliatory if they are able to choose the mediator because they may have greater respect for the mediator's views and advice; parties are more apt to state their views frankly if they have chosen mediator; process may be more efficient if parties select mediator that has mediated similar cases and is knowledgeable about applicable law; each party has an ability to eliminate anyone with whom such party is not comfortable.

Pros to Court selection of Mediator: Presumably Court will appoint a mediator who has Court's confidence making it likely that Court will approve any settlement that is derived from mediation. The selection process could be less time consuming, if the parties have a history of being unable to reach agreement on even relatively minor issues.

4. **How to maximize the prospects for success in mediation through pre-session submissions and communication?**

Pre Session submissions assist the mediator in framing the issues and obtaining each party's best arguments and "hot buttons". In many of the larger, more complicated matters, by the time the mediation occurs, reams of paper regarding each side's position have already been produced. A well written and relatively brief Mediation Statement by each side helps the mediator familiarize him or herself with the issues at hand and points him or her to the main evidence or law that is under consideration. Oftentimes, this makes the process more efficient and helps to focus the mediator on the most important areas of contention. Furthermore, because a Mediation Statement may be your earliest opportunity to present the strength of your case and merits of your position to a neutral third party, your approach should not be "informal" but instead should be to try to (politely) convince the mediator that your case is strong and thereby "test" your position. If the mediator finds the argument put forth in your Mediation Statement to be persuasive, he or she is more likely to urge your opponent to accept your settlement terms or encourage your opponent to make an offer that the mediator believes you might accept.

5. **What are some of the techniques employed to break a perceived impasse?**

Mediator may challenge the parties' (i) perceived best and worst alternatives to a negotiated agreement, (ii) emotional connections to the case, (iii) strength of held positions; or (iv) "game playing." Mediator may make a suggested settlement, perhaps a bracketed proposal. A seasoned mediator will know how and when to make an offer to each side.

If a "global" settlement appears unreachable, Mediator may isolate discrete claims or issues, e.g., discovery matters, and propose resolutions for such claims or issues, thereby narrowing the "gap" for the "global" settlement.

Bankruptcy Courts can facilitate by crafting procedures to encourage and aid the process. See the *In re Residential Capital , LLC* case in which the mediation involved the exchanged of material non-public information. Parties worried that by participating in the mediation, they could be exposed to liability for insider trading violations given that the debt was being actively traded. In ResCap the Court entered a protective comfort order which was a condition to plan negotiations providing that participants will be protected from specified future claims by virtue of participating in a mediation over plan terms. See ResCap Order re Plan Mediation.

Mediation: An Arrow In the Bankruptcy Court's Quiver

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Sanctions Awarded in Connection with Mediation

Spradlin v. Richard, 572 Fed. Appx. 420, 427-428 (6th Cir. 2014): Bankruptcy Court awarded sanctions against a defendant in an adversary proceeding, predicated upon bad faith and lack of preparedness in mediation, and on appeal the sanctions award was sustained by both the district and appeals court. The sanctioned party had unsuccessfully argued that the bankruptcy court lacked jurisdiction to award, notwithstanding its dismissal of the complaint in the adversary proceeding. According to the Sixth Circuit, "The federal courts maintain jurisdiction over certain collateral issues even after the underlying action is dismissed for lack of jurisdiction. 'Just because a federal court is later found to lack subject matter jurisdiction in a particular matter does not give litigants a free pass with respect to any and all prior indiscretions they may have committed before the court.'"

Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762 (9th Cir. 2001): On appeal, the Ninth Circuit affirmed the imposition of sanctions where plaintiff's president failed to attend a mediation session, claiming that "he was suffering from an incapacitating headache, and that his failure to appear was not intentional." The Court of Appeals rejected that argument because plaintiff's president failed to "notify the parties beforehand of his nonappearance."

In re Bambi, 492 B.R. 183 (S.D.N.Y. 2013): Bankruptcy Court imposed sanctions in Chapter 7 personal bankruptcy upon the debtors' mortgage holder where the debtors had participated in a court-supervised loss mitigation program, but where the mortgage holding bank failed to participate in the mitigation process. Specifically, the bank failed to timely advise the court that it would not participate in loss mitigation. Instead, the bank, through its agent and servicer, solicited documents from the debtors, filed status letters, and appeared at status hearings for almost eight months before finally informing the debtors and the court that it did not modify loans. In awarding sanctions against the bank, the court expressly analogized mitigation to mediation.

Sanctions Denied in Connection with Mediation

Procaps S.A. v. Patheon Inc., 2015 U.S. Dist. LEXIS 72464 (S.D. Fla., June 4, 2015): District Court declined to award sanctions against party which met criteria for objective good faith participation in mediation, but otherwise failed to accept or propose a settlement. The District Court provided the following guidance with regard to conduct in mediation:

1. Courts have not developed any clear standards for evaluating good faith in court-ordered mediations.

2. Nevertheless, courts typically interpret good faith requirements narrowly, and limit them to compliance with orders to attend mediation, to provide pre-mediation memoranda and produce representatives with sufficient settlement authority.

3. A good faith standard imposes several problems: (a) good faith is an intangible and abstract quality with no technical meaning or statutory definition; (b) inquiring into good faith is inconsistent with the confidential nature of mediation -- but a court must investigate and endanger the mediation's confidentiality if a bad faith allegation arises; and (c) inquiring into a party's mediation conduct, backed by a sanctions threat, may exact a coercive influence on the parties to settle.

4. It is well-settled that a court cannot force a party to settle, nor may it use pressure tactics designed to coerce a settlement.

5. Although a court may certainly require parties to appear for mediation or a settlement conference, it may not coerce a party into making a settlement offer at that mediation.

6. There is no meaningful difference between coercion of an offer and coercion of a settlement; if a party is forced to make a settlement offer in order to avoid sanctions for failing to act in good faith and the offer is accepted, then a settlement has been achieved through coercion.

7. A party is within its rights to adopt a "no-pay" position.

8. "Mediation will only succeed if the parties themselves want it to," and a court's requirement that they mediate in good faith "will not change the mind of a party who believes that settlement is not in their best interest."

9. Certain disputes are simply not amenable to mediation, and it should be no surprise when efforts to settle them at mediation quickly deteriorate.

10. The standard for determining adequate participation in mediation is not risk analysis.

> 11. A party does not forego risk analysis merely because it determines that it is not liable and adheres to that position at mediation.

In re A.T. Reynolds & Sons, Inc., 452 B.R. 374, 381-382 (S.D.N.Y. 2011): The District Court reversed a Bankruptcy Cour's order which had sanctioned the debtor's financier and its counsel for failing to participate in mediation in good faith. There, the debtor's financier had taken the position that it would not make a settlement offer. The District Court observed that: "Most courts that have addressed allegations of insufficient 'participation' during mediation proceedings (i.e., the degree to which a party discusses the issues, listens to opposing viewpoints, analyzes its risk of liability, and generally participates in the 'process' of mediation) have declined to find a lack of good faith."

ABA Section of Dispute Resolution

RESOLUTION ON GOOD FAITH REQUIREMENTS FOR MEDIATORS AND MEDIATION ADVOCATES IN COURT-MANDATED MEDIATION PROGRAMS

Approved by Section Council, August 7, 2004

> 3. There are numerous statutes and rules that establish good-faith requirements in mediation. Professor Lande, in his article, *Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs,* 50 UCLA L. Rev. 69 (2002), notes that at least 22 states and the territory of Guam have such statutory requirements. Only one of those, he reports, includes a definition of "good faith." At least 21 federal district courts and 17 state courts have local rules requiring good-faith participation. Also, several federal district courts have relied on Rule 16 of the Federal Rules of Civil Procedure as the basis for a good-faith requirement in mediation. Professor Lande further points out that, at the time his article was written, there were 27 reported cases dealing with bad faith in mediation, and most of them arose out court-connected mediation programs . . . .

Mediation, Bankruptcy and Plan of Reorganization

Court Directs Mediation

Class Five Nev. Claimants v. Dow Corning Corp. (In re Dow Corning Corp.), 280 F.3d 648 (6th Cir. 2002): The Dow Corning bankruptcy pitted the Debtor against the Tort Claimants' Committee. As the result of a dispute between the two, the parties entered into mediation, which succeeded. Thereafter, Dow and the Tort Claimants' Committee submitted an Amended Joint Plan of Reorganization, which was approved by the Bankruptcy Court, and affirmed on appeal by both the District Court (*In re Dow Corning Corp.*, 255 B.R. 445 (E.D. Mich. 2000)) and the Sixth Circuit.

Unofficial Committee of Co-Defendants v. In re Eagle Picher Industries, Inc. (In re Eagle Picher Industries, Inc.), 1998 U.S. App. LEXIS 31946 (6th Cir. December 21, 1998): The Bankruptcy Court appointed a mediator to assist in the negotiation of a consensual plan of reorganization for Debtors. The mediator limited the mediation participants to Debtors, the ICC, and the legal representative for future personal injury and property damage claimants because they held the largest claims. The parties to the mediation then formalized the Third Amended Consolidated Plan of Reorganization of Debtors and a Disclosure Statement, which both won Bankruptcy Court approval, and were sustained on appeal.

Topwater Exclusive Fund III, LLC, v. In re Sagecrest II, LLC (In re Sagecrest II, LLC), 2011 U.S. Dist. LEXIS 3517 (D. Conn. Jan. 14, 2011): Debtors filed a voluntary Chapter 11 petitions, which were thereafter consolidated. Three of the debtors filed a joint plan of reorganization, while a fourth filed its plan. On consent, the Court directed mediation with the aim of reaching a proposed joint consensual plan for liquidating the funds' respective assets, and appointed Melanie L. Cyganowski as mediator. The Bankruptcy Court approved the reorganization and related agreements.

Marlow Manor Downtown, LLC v. Wells Fargo Bank (In re Marlow Manor Downtown, LLC), 2015 Bankr. LEXIS 391 (B.A.P. 9th, Feb. 6, 2015): Parties participated in mediation, and as the result reached a number of agreements, including that a receiver would remain in place. Subsequently, plans for reorganization were filed with the Bankruptcy Court.

In re Residential Capital, LLC, 497 B.R. 720 (S.D.N.Y. 2013): In May 2012, the Debtors filed voluntary Chapter 11 petitions. In July 2012, the Court approved Arthur J. Gonzalez as the examiner. Later, in November 2012, the Court approved the Section 363 sale of the Debtors' mortgage servicing businesses, and most of the bankruptcy estate's whole loan portfolios. After these asset sales, the Debtors turned their attention to reaching a consensual Chapter 11. After months of negotiation and impasse, the Debtors sought the appointment of a mediator and a chief restructuring officer. The Court selected James M. Peck, U.S.B.J., as a Plan Mediator. Ultimately, the mediator and the constituencies reached a Plan Support Agreement, a Plan Term Sheet, and a Supplemental Term Sheet.

In re Tribune Co., 464 B.R. 126 (Bankr. D. Del. 2011): In September 2010, the Bankruptcy Court appointed Bankruptcy Judge to mediate concerning the terms of a plan of reorganization. The parties included the Debtors, the Creditors' Committee, and various creditors constituencies. The mediator reached agreements with various constituencies

Court Declines Mediation

Triad Guar. Inc. v. Triad Guar. Ins. Corp. ((In re Triad Guar. Inc.), 2015 U.S. Dist. LEXIS 12944 D. Del. 2015) , there Bankruptcy Court declined to direct court-ordered mediation because the prior private mediate had also failed, and the resulting delay from mediation could be potentially injurious to negotiations involving a third party. The Magistrate observed: "I find that the issues involved in this case are not amenable to mediation and mediation at this stage would not be a productive exercise, a worthwhile use of judicial resources nor warrant the expense of the process."

Mediation as a Vehicle for Dispensing with Objections

Rev Op Group v. ML Manager, LLC, 2011 U.S. Dist. LEXIS 9635 (D. Ariz. Jan. 31, 2011): Certain creditors initially objected to a plan of reorganization. Their objections, however, were resolved by an agreement that that the parties would mediate, and if necessary resort to arbitration.

Desirability of Mediation

In re City of Detroit, 519 B.R. 673 (Bankr. E.D. Mich. 2014): Court granted motion to disband the Official Creditors Committee in the Detroit's Chapter 9 bankruptcy. Central to the City's motion was the Committee's refusal to participate in the mediation process. In granting the City's motion, the Court placed great weight on the Committee's recalcitrance in attempting to reach a settlement, and ultimately concluded that the Committee's conduct evidenced that it would not "contribute" to the disposition of the bankruptcy:

> The Committee's stated disavowal of the mediation process is extraordinary in its manifest disrespect for the importance of mediation in this chapter 9 case, as well as for the orders of this Court and the mediator requiring all parties to participate in mediation. Four Committee members have already participated in mediation and presumably have heard and appreciated this Court's repeated admonitions regarding the value of mediation. Yet, inexplicably, the Committee chose to announce, in its first substantive pleading in the case, its intent to disobey the Court's mediation order.

In re Wash. Mut., Inc., 461 B.R. 200 (Bankr. D. Del. 2011), *overruled, vacated and modified in part*, *In re Wash. Mut., Inc.*, 2012 Bankr. LEXIS 895 (Bankr. D. Del. Feb. 23, 2012): Court directed the parties to proceed to mediation as vehicle for reaching agreement between warring

bankruptcy constituencies, for conserving assets, and increasing the likelihood of a recovery at the end of the day. The Court observed:

> Judging from the vigor with which the Settlement Noteholders have opposed the Equity Committee's standing motion, the Court is concerned that the case will devolve into a litigation morass. In addition, the Court notes that as the case continues, the potential recoveries for all parties in the case dwindles. Regardless of which parties prevail, they may be disappointed to find their recovery significantly less than expected.
>
> Therefore, before the Equity Committee proceeds with its claim any further, the Court will direct that the parties go to mediation on this issue, as well as the issues that remain an impediment to confirmation of any plan of reorganization in this case.

As for the effectiveness of the *Washington Mutual* mediation, in confirming the joint plan of reorganization, the Bankruptcy Court noted the direct nexus between mediation and reaching a satisfactory plan of reorganization:

> 2. Compromise of Controversies. For the reasons stated herein and in the January Opinion and September Opinion, the provisions of the Plan and the Global Settlement Agreement constitute a good faith, reasonable, fair, and equitable compromise and settlement of all Claims and controversies resolved pursuant to the Plan, including, without limitation, the Global Settlement Agreement and *the compromise and settlement incorporated into the Plan after the Mediation* . . . .
>
> ***
>
> 4. Plan Settlement Approved. The Court hereby approves the compromises and settlements embodied in the Plan *after and as a result of the Mediation* as fair, reasonable, and in the estates' best interests and, upon the effectiveness of the Plan, authorizes and directs the consummation thereof.

Wash. Mut., Inc., 2012 Bankr. LEXIS 895.

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Confidentiality in Mediation

Raymond T. Lyons
Fox Rothschild, LLP; Princeton, New Jersey

1. SOURCES OF CONFIDENTIALITY IN MEDIATION

The Alternate Dispute Resolution Act of 1998, 28 U.S.C. §§651-658

> §652(d). Each district court shall adopt local rules to provide for the confidentiality of the alternative dispute resolution process and to prohibit disclosure of confidential dispute resolution communications.

Court Mediation Programs.

ABI Model Local Rules for Bankruptcy Mediation

> Model Rule 1(d). The mediator and all Mediation Participants are prohibited from divulging any Mediation Communication and same are not admissible in evidence or discoverable. The mediator shall not be compelled to testify.

U.S. Bankruptcy Court Local Bankruptcy Rules

U.S. District Court Local Civil Rules

U.S. Circuit Court Local Appellate Rule

State Court Local Rules

Rules of Evidence.

Fed. R. Evid. 408. Not admissible to prove or disprove the validity of a claim.

Uniform Mediation Act.

National Conference of Commissioners on Uniform State Laws.
http://www.uniformlaws.org/shared/docs/mediation/uma_final_03.pdf

> Section 4. Privilege. A mediation communication is privileged and is not discoverable or admissible in evidence.

Section 5. Waiver.

Section 6. Exceptions: written settlement agreement, crime.

Model Standards of Conduct for Mediators.

American Arbitration Assocition, American Bar Association, Association for Conflict Resolution
http://www.americanbar.org/content/dam/aba/migrated/dispute/documents/model_standards_conduct_april2007.authcheckdam.pdf

Standard 5. A mediator shall maintain the confidentiality of all information obtained in the mediation. Exceptions: parties consent or parties make different rule for confidentiality.

American Arbitration Association (AAA)

Commercial Mediation Procedures
https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103

M-10. Confidential information shall not be disclosed by the mediator. The parties shall maintain the confidentiality of the mediation.

Federal Arbitration, Inc. (FedArb)

Rules for Arbitration and Mediation
http://www.fedarb.com/rules/fedarb-rules/#_Toe178331754

Rule 10.04. Unless all the parties otherwise agree, all papers, exchanges, hearings,and decisions in any FedArb proceeding shall be and shall remain confidential, except to the extent that the information has been previously disclosed, or disclosure is necessary in connection with a judicial challenge to or enforcement of an Award, or disclosure is required by law.

Judicial Arbitration and Mediation Services (JAMS)

JAMS International Mediation Rules
http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-International-Mediation-Rules.pdf

Rule 11. All information, etc. received by a mediator will be confidential. The mediator will not be compelled to divulge such information or to give evidence. The parties will maintain confidentiality.

Mediation Agreement

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Parties may establish particular rules for confidentiality.

2. CASE LAW ON CONFIDENTIALITY IN MEDIATION

Willingboro Mall, LTD. v. 240/242 Franklin Avenue, L.L.C., 215 N.J. 242 (2013)

Commercial foreclosure action referred to mediation by the court. Defendant informed court that matter had settled after mediation. Plaintiff refused to sign documents to implement settlement. Defendant moved to compel settled and attached a certification of the mediator attesting to the settlement. Plaintiff did not object to mediator's certification by requested an evidentiary hearing. Plaintiff disclosed mediation communications. Both parties consented to a court order compelling the mediator to testify. Held: Plaintiff waived the mediation privilege by failing to object to mediator's certification, revealing mediation communications itself, and consenting to the order compelling mediator's testimony. In the future following mediation, New jersey courts will require a signed, written settlement agreement to be enforceable.

Savage & Associates, P.C. v. K&L Gates LLP (In re Teligent, Inc.), 640 F.3d 53 (2d Cir. 2011).

Law firm moved to lift protective orders for mediation communications. A party seeking disclosure of confidential mediation communications must demonstrate: (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality. Held: Extraordinary circumstances did not exist to warrant disclosure of confidential mediation communications. Law firm did not prove compelling need for confidential information.

Dandong v. Pinnacle Performance Limited, 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012)

Investors and security distributors entered into private mediation before the Financial Industry Dispute Resolution Center ("FEDReC"). Defendants in securities litigation sought discovery of information presented by the investors in the mediation and plaintiffs sought a protection over. The Magistrate Judge granted the protective order in part but ordered disclosure of plaintiffs' own statements during mediation about the basis for their investments and materials on which they relied. Plaintiffs objected to the magistrate judge's ruling and the matter came before the district judge. First, the district judge agreed with the magistrate judge that the Second Circuit's *Teligent* test for disclosure of confidential mediation statements applied to private mediation as well as mediation pursuant to a court order. The district judge reversed the magistrate judge's decision because use of statements in mediation for impeachment is not a special need.

In re A.T. Reynolds & Sons, Inc., 3011 WL 1044566 (S.D.N.Y. 2011).

Bankruptcy Court ordered debtor and lender to mediation. Mediator reported that lender did not participate in mediation in good faith and provided details of mediation session. Bankruptcy Court held lender in contempt and issued sanctions. District Court reversed. "Confidentiality concerns preclude a court from inquiring into the level of a party's participation in mandatory court-ordered mediation…. This does not mean that all conduct in a mandatory mediation is outside the scope of a court's inquiry into good faith. Where, for example, a party demonstrates

dishonesty, intent to defraud, or some other improper purpose, the befits of inquiry into such conduct may outweigh considerations of coercion and confidentiality."

Rutigliano v. Rutigliano, 2012 WL 4855864 (N.J. Super. App. Div. 2012)

Will contest between brothers ordered to mediation. Parties authorized the mediator to report to the court that the matter had settled, although no document was signed. One brother contended that no final agreement had been reached. Held: Mediation privilege did not prohibit one party from testifying to the terms of the settlement where both parties authorized the mediator to report to the court that the matter had been settled.

Beazer East, Inc. v. The Mead Corporation, 412 F.2d 429 (3d Cir. 2005).

Appellant sought to enforce alleged settlement agreement reached during appellate mediation. l Court denied request because to do so would violate Local Appellate Rule that prohibits disclosure of any statement made during mediation. "Both Local Appellate Rule (LAR) 33.4 and sound judicial policy compel the conclusions that parties to an appellate mediation session are not bound by anything short of a written settlement. Any other rule would seriously undermine the efficacy of the Appellate Mediation Program by compromising the confidentiality of settlement negotiations."

In re Washington Mutual, Inc., 461 B.R. 200 (Bankr. D. Del. 2011) vacated in party 2012 WL 1563880 (Bankr. De. Del. Feb. 24, 2012)

Creditors holding debt security participated in confidential settlement negotiations regarding disputed ownership of assets among the debtor/bank holding company, purchaser of bank and the FDIC. Equity Committee state colorable claim that creditors may have traded on material non-public information (MNPI) learned during settlement negotiations. Bankruptcy Court granted standing to Equity Committee to pursue equitable disallowance of creditor's claims. That part of the opinion was later vacated to facilitate a consensual plan of reorganization supported by the Equity Committee.

Model Rule 1 Mediation.

(a) Types of Matters Subject to Mediation. The court may assign to mediation any dispute arising in a bankruptcy case, whether or not any adversary proceedings or contested matters is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter and a dispute not yet pending before the court, may also stipulate to mediation, subject to court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that mater from complying with any other court orders or applicable provisions of the U.S. Code, the Bankruptcy Rules or these Local Rules. Unless otherwise ordered by the court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules. Any party may seek such delay or stay, and the court, after notice and hearing, may enter appropriate orders.

(c) The Mediation Conference

(i) Informal Mediation Discussions. The mediator shall be entitled to confer with any or all a) counsel, b) pro se parties, c) parties represented by counsel, with the permission of counsel to such party and d) other representatives and professionals of the parties, with the permission of a pro se party or counsel to a party, prior to, during or after the commencement of the mediation conference (the "Mediation Process"). The mediator shall notify all Mediation Participants of the occurrence of all such communications, but no advance notice or permission from the other Mediation Participants shall be required. The topic of such discussions may include all matters which the mediator believes will be beneficial at the mediation conference or the conduct of the Mediation Process, including without limitation, those matters which will ordinarily be included in a Submission under Local Rule 1(c)(iii). All such discussions held shall be subject to the confidentiality requirements of subsection(d) of this Local Rule 1.

(ii) Time and Place of Mediation Conference. After consulting with the parties and their counsel, as appropriate, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty one (21) days' written notice to all counsel and pro se parties. The mediation conference may be concluded after any number of sessions, all of which shall be considered part of the mediation conference for purposes of this Local Rule.

(iii) Submission Materials. Each Mediation Participant (as defined below) shall submit directly to the mediator such materials (the "Submission") as are directed by the mediator after consultation with the Mediation Participants. The mediator may confer with the Mediation Participants, or such of them as the mediator

determines appropriate, to discuss what materials would be beneficial to include in the Submission, the time of the Submissions and what portion of such materials, if any, should be provided to the mediator but not to the other parties. No Mediation Participant shall be required to provide its Submission, or any part thereof, to another party without the consent of the submitting Mediation Participant. The Submission shall not be filed with the court and the court shall not have access to the Submission. A Submission shall ordinarily include an overview of the facts and law, a narrative of the strengths and weaknesses of a party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

(iv) Attendance at Mediation Conference

(A) Persons Required to Attend. Unless excused by the mediator upon a showing of hardship, or if the mediator determines that it is consistent with the goals of the mediation to excuse such party, the following persons (the "Mediation Participants") must attend the mediation conference personally:

1) Each party that is a natural person;

2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has authority to negotiate and settle the matter on behalf of the party, and prompt access to any board, officer, government body or official necessary to approve any settlement that is not within the authority previously provided to such representative;

3) The attorney who has primary responsibility for each party's case;

4) Other interested parties, such as insurers or indemnitors, whose presence is necessary, or beneficial to, reaching a full resolution of the matter assigned to mediation, and such attendance shall be governed in all respects by the provisions of this subparagraph (c)(iv) of this Local Rule 1.

(B) Persons Allowed to Attend. Other interested parties in the bankruptcy case who are not direct parties to the dispute, i.e., representatives of a creditors committees, may be allowed to attend the mediation conference, but only with the prior consent of the mediator and the Mediation Participants, who will establish the terms, scope and conditions of such participation. Any such interested party that does participate in the mediation conference will be subject to the confidentiality provisions of Local Rule 1(d) and shall be a Mediation Participation.

(C) Failure to Attend. Willful failure of a Mediation Participant to attend any mediation conference, and any other material violation of this Local Rule, may be reported to the court by any party, and may result in the imposition of sanctions by the court. Any such report shall comply with the confidentiality requirement of Local Rule 1(d).

(v) Mediation Conference Procedures. After consultation with the Mediation Participants or their counsel, as appropriate, the mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach an agreement in principle after the matter has been assigned to mediation, but prior to the mediation conference, the parties shall promptly advise the mediator in writing. If the parties agree that a settlement in principle has been reached, the mediation conference shall be continued (to a date certain or generally as the mediator determines) to provide the parties sufficient time to take all steps necessary to finalize the settlement. As soon as practicable, but in no event later than thirty (30) days after the parties report of an agreement in principle, the parties shall confirm to the mediator that the settlement has been finalized. If the agreement in principle has not been finalized, the mediation conference shall go forward, unless further extended by the mediator, or by the court.

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. The mediator and the Mediation Participants are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the Mediation Participants or by witnesses in the course of the mediation (the "Mediation Communications"). No person, including without limitation, the Mediation Participants and any person who is not a party to the dispute being mediated or to the Mediation Process (a "Person"), may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the Mediation Communications, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (b) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (c) proposals made or views expressed by the mediator; (d) statements or admissions made by a party in the course of the mediation; and (e) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation. However, except as set forth in the previous sentence, no

Person shall seek discovery from any of the Mediation Participants with respect to the Mediation Communications.

(ii) Discovery from Mediator. The mediator shall not be compelled to disclose to the court or to any Person outside the mediation conference any of the records, reports, summaries, notes. Mediation Communications or other documents received or made by the mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediator or the Mediation Communications in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation. Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the court in wiring, from filing a final report as required herein, or from otherwise complying with the obligations set forth in this Local Rule 1.

(iii) Protection of Proprietary Information. The Mediation Participants and the mediator shall protect proprietary information. Proprietary information should be designated as such by the Mediation Participant seeking such protection, in writing, to all Mediation Participants, prior to any disclosure of such proprietary information. Such designation shall not require the disclosure of the proprietary information, but shall include a description of the type of information for which protection is sought. Any dispute as to the protection of proprietary information bay be decided by the court.

(iv) Preservation of Privileges. The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to parties, or any of them, but not to the court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If an agreement in principle for settlement is reached (event if the agreement in principle is subject to the execution of a definitive settlement agreement or court approval, and is not binding before that date) during the mediation conference, one or more of the Mediation Participant shall file a notice of settlement or, where required, a motion and proposed order seeking court approval of the settlement.

(ii) Mediator's Certificate of Completion. After the conclusion of the mediation conference (as determined by the mediator), the mediator shall file with the court a certificate in the form provided by the court ("Certificate of Completion") notifying the court about whether or not a settlement has been reach. Regardless

of the outcome of the Mediation Process, the mediator shall not provide the court with any details of the substance of the conference or the settlement, if any.

(iii) If the Agreement in Principle is Not Completed. If the parties are not able to willing to consummate the agreement in principle that was reached during the mediation conference, and the agreement in principal never becomes a binding contract, the substance of the proposed settlement shall remain confidential and shall not be disclosed to the court by the mediator or any of the Mediation Participants.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the court at any time. Any Mediation Participant may file a motion with the court seeking authority to withdraw from the mediation or seeking to withdraw any matter assigned to mediation by court order from such mediation.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 1(f)(ii) or the entry of an order withdrawing a matter from mediation under Local Rule 1(g) the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the court. If the Mediation Process does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the court's scheduling orders. However, the court shall always have the discretion to reinstitute the Mediation Process if the court determines that such action is the most appropriate course under the circumstances. In such event, Local Rule 1 and Local Rule 2 shall apply in the same manner as if the mediation were first beginning pursuant to Local Rule 1(a).

(i) Applicability of Rules to a Particular Mediation. The court may, upon request of one or more parties to the mediation, or on the court's own motion, declare that one or more of the provisions of this Local Rule may be suspended or rendered inapplicable with respect to a particular mediation except Local Rule 1(d) and Local Rule 1(j). Otherwise these Local Rules shall control any mediation related to a case under the Bankruptcy Code.

(j) Immunity. Aside from proof of actual fraud or other willful misconduct, mediators shall be immune from claims arising out of acts or omissions incident or related to their service as mediators appointed by the bankruptcy court. See, *Wagshal v. Foster*, 28 F.3d 1249 (D.C. Cir. 1994) Appointed mediators are judicial officers clothed with the same immunities as judges and to the same extent set forth in Title 28 of the United States Code.

Model Rule 2 Mediator Qualifications and Compensation.

(a) Register of Mediator. The Clerk shall establish and maintain a register of person (the "Register of Mediators") qualified under this Local Rule and designated by the Court to serve as mediators in the Mediation Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court, the Clerk or a person qualified under this Local Rule who is a member in good standing the Bar of the State of _____ to serve as the Mediation Program Administrator. Aided by a staff member of the Court, the Mediation Administrator shall receive applications for designation to the Register, maintain the Register, track and compile reports on the Mediation Program and otherwise administer the program.

(b) Application and Qualifications. Each applicant shall submit to the Mediation Program Administrator a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be designated to the Register. The application shall submit the statement substantially in compliance with Local Form ___. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the Mediation Program. Each applicant shall certify that the applicant has completed appropriate mediation training or has sufficient experience in the mediation process. To have satisfied the requirement of "appropriate mediation training" the applicant should have successfully completed at least 40 hours of mediation training sponsored by a nationally recognized bankruptcy organization. To have satisfied the requirement of "sufficient experience in the mediation process" the applicant must have at least ten (10) years of professional experience in the insolvency field.

(c) Court Certification. The Court in its sole and absolute discretion, on any feasible basis shall grant or deny any application submitted under this Local Rule. If the Court grants the application, the applicant's name shall be added to the Register, subject to removal under these Local Rules.

(i) Reaffirmation of Qualifications. The Mediation Program Administrator may request from each applicant accepted for designation to the Register to reaffirm annually the continued existence and accuracy of the qualification, statement and representations made in the application. If such a request is made and not complied with within one month of such request, the applicant shall be removed from the Register under compliance is complete (the "Suspension of Eligibility"). After the passage of six months from the Suspension of Eligibility, if compliance is not complete, the applicant shall be permanently removed from the Register and may only be placed on the Registry by reapplying in the manner set forth pursuant to the provisions of subsection (b) of the is Local Rule 2.

(d) Removal from Register. A person shall be removed from the Register either at the person's request or by Court order entered on the sole and absolute determination of the Court. If removed by Court order, the person shall be eligible to file an application for reinstatement after one year.

(e) Appointment.

(i) Selection. Upon assignment of a mater to mediation in accordance with these Local Rules and unless special circumstances exist, as determined by the Court, the parties shall select a mediator. If the parties fail to make such selection within the time frame as set by the Court, then the Court shall appoint a mediator. A mediator shall be selected from the Register of Mediators, unless the parties stipulate and agree to a mediator not on the Register of Mediator.

(ii) Inability Serve. If the mediator is unable to or elects not to serve, he or she shall file and serve on all parties, and on the Mediation Program Administrator, within seven (7) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event an alternative mediator shall be selected in accordance with the procedures pursuant to Subsection(e)(1) of this Local Rule 2.

(iii) Disqualification.

(A) Disqualifying Events. Any person selected as a mediator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. §44. Any person selected as a mediator shall be disqualified in any matter where 28 U.S.C. §455 would require disqualification if that person were a Judge.

(B) Disclosure. Promptly after receiving notice of appointment, the mediator shall make an inquiry sufficient to determine whether there is a basis for disqualification under this Local Rule. The inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed by the applicable rules of professional conduct for attorneys and by the applicable rules pertaining to the profession of the mediator. Within ten (10) days after receiving notice of appointment, the mediator shall file with the Court and serve on the parties either (1) a statement disclosing to the best of the applicant's knowledge all of the applicant's connections with the parties and their professionals, together with a statement that the mediator believes that there is no basis for disqualification and that the mediator has no actual or potential conflict of interest or (2) a notice of withdrawal.

(C) Objection Based on Conflict of Interest. A party to the mediation who believes that the assigned mediator has a conflict of interest

promptly shall bring the issue to the attention of the mediator and to the other parties. If after discussion among the mediator, the party raising the issue and the other parties the issues is not resolved and any of the parties requests the withdrawal of the mediator, the mediator shall file a notice of withdrawal.

(f) Compensation. A mediator shall be entitled to serve as a paid mediator and shall be compensated at reasonable rates, and, subject to any judicial review of the reasonableness of fees and expenses required by this subsection f Local Rule 2, the mediator may require compensation and reimbursement of expenses ("Compensation") as agreed by the parties. Court approval of the reasonableness of such fees and reimbursement of expenses shall be required if the estate is to be charged for all or part of the mediator's Compensation and the Compensation to be paid by the estate for such mediation exceeds $25,000. If the Compensation to be paid by the estate for the particular mediation does not exceed $25,000, then court approval shall only be necessary if the estate representative objects to the fees sought from the estate. If the mediator consents to serve without compensation and at the conclusion of the first full day of the mediation conference it is determined by the mediator and the parties that additional time will be both necessary and productive in order to complete the mediation or arbitration, then:

(i) If the mediator consents to continue to serve without compensation, the parties may agree to continue the mediation conference.

(ii) If the mediator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator and the parties, subject to Court approval, if required by subsection (f) of this Local Rule 2. Where the parties have agreed to pay such fees and expenses, the parties shall share equally all such fees and expenses unless the parties agree to some other allocation The Court may determine a different allocation.

(iii) Subject to Court approval, if the estate is to be charged with such expense, the mediator may be reimbursed for expenses necessarily incurred in the performance of duties.

(g) Party Unable to Afford. If the Court determines that a party to a matter assigned to mediation cannot afford to pay the fees and costs of the mediator, the Court may appoint a mediator to serve pro bono as to that party.

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American Bankruptcy Institute Journal
August, 2014

Feature

*28 THE RISE OF PLAN MEDIATION: BENEFITS AND PITFALLS

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Interested parties in the largest and most complex bankruptcy cases are increasingly turning to mediation as a means of reaching consensual plan terms, in addition to more targeted mediation of specific disputes. Plan mediation offers potentially significant cost savings and efficiency benefits, but it also entails risks. In addition to the potential for increased cost and delay from a premature, failed or mismanaged mediation, parties should be mindful of the risks relating to exposure to nonpublic information in the context of a mediation, particularly in the wake of Hon. **Mary F. Walrath**'s 2011 ruling in the *WaMu* bankruptcy regarding potential violations of the federal securities laws by participants in confidential settlement talks. [2] Judges and practitioners have begun developing certain creative means of seeking to address the risks highlighted by the *WaMu* ruling; however, no method is a panacea, and participants are well advised to be mindful of the drawbacks of each.

The Benefits of Plan Mediation

Chief among the benefits of plan mediation is flexibility. Mediation is not a ""one-size-fits-all" plan and can be tailored to address the needs of a specific case. In recent cases, the scope of plan mediation has ranged from narrowly tailored individual issues to broader efforts to achieve global settlement, while the processes themselves have ranged from highly formalized minitrials to more loosely supervised settlement talks.

In the *Tribune* case, for instance, an informal process unfolded over several months with the goal of reaching the broadest possible settlement of claims stemming from Tribune's 2007 leveraged buyout and plan terms reflecting any agreed deals. Rather than fully briefing the issues, parties submitted streamlined, five-page term sheets to the mediator, along with ownership statements reflecting their respective economic stakes in the debtors' capital structure. [3] This minimalist structure was effective, given that the mediation occurred several years into the case after the parties' positions were well known. An informal approach also served to expedite and simplify the process, but still provided the parties with a forum to negotiate a settlement and a concise means of setting forth their positions for the mediator's benefit. The plan that emerged from these negotiations, while not fully consensual, had broad support and ultimately allowed the company to successfully emerge. [4]

Toward the more formal end of the spectrum, the plan mediation in the recent *Cengage Learning* case occurred much earlier in the case and began with a heavily negotiated list of topics to be mediated, continued for three rounds of formal mediation, and included formal briefing and argument on each topic in the dispute. [5] Although each issue was hotly disputed, the mediation ultimately helped the parties assign risk-weighted values to the issues in dispute, which laid the groundwork for a global settlement.

Although negotiations in *Tribune* and *Cengage* encompassed a range of issues relevant to ultimate plan terms, mediation can also be useful for narrower, single-issue disputes. In the *Lehman Brothers* case, for instance, a detailed mediation process was instrumental in helping to resolve disputes over the potential termination of many of Lehman's derivatives contracts. The mediation order for that process created a rotating panel of mediators and set forth expedited procedures for the resolution of claims arising from the closeout of the portfolio.[6] Progress in the main case was able to continue during mediation, and by May 2012, more than 200 disputes referred to mediation had been settled without litigation, with total estate recoveries in excess of $1 billion.

More recently, in the chapter 9 proceeding of the *City of Detroit*, Hon. **Steven W. Rhodes** appointed District Judge Gerald Rosen early in the case as chief mediator to oversee a panel of mediators drawn from around the country, each focusing on a subset of the issues in the case.[7] The program, which was overseen by Judge Rosen, covered a wide range of disputes, including labor, debt and swap treatment, pension issues, other post-employment benefits and municipal finance issues, among others. Throughout the case, a variety of disputes have been referred to and successfully resolved through mediation that was overseen by Judge Rosen.

Downside Risks: Delay and Expense

Recent experience with plan mediation reveals both benefits and significant risks. Structured mediation ***29** ensures a robust forum for dispute resolution--but it can also create an opening for delay, strategic or otherwise. Although the highly structured mediation in *Cengage* ultimately produced a workable settlement, extensive briefing over numerous rounds inevitably hindered progress in the broader case, and it would have left the company significantly behind schedule had it failed. While a dual-track process is sometimes attempted, as a practical matter, continuing to push forward on a plan or litigation process simultaneously is difficult and progress on other fronts once mediation begins is less likely. While an effective mediation can limit costs by avoiding full litigation or a contested plan process, unsuccessful mediation can leave parties effectively paying for two cases instead of one.

Avoiding these pitfalls requires attention to several key considerations, including the timing of mediation, its scope and the selection of the mediator. To ensure an effective process, timing of mediation in the case must balance the twin goals of commencing early enough to still offer the benefit of short-cutting full litigation, while not commencing so early that issues have not yet been clarified enough to allow for an efficient negotiation. Put another way, mediation should ideally commence after the parties' positions have become clear but before they have calcified.

In determining the scope of a mediation, there is also a balance to be struck: between the risk of too broad a mediation making progress impossible, and the risk of too narrow a mediation, which would not effectively facilitate meaningful progress in the broader case. Putting all issues in play at the same time, as was the case in *Tribune*, may facilitate a wideranging settlement, but lengthy lists of issues can also slow down the process and distract from the key determinants of settlement value, while leaving key issues out of a mediation can render a narrow settlement of limited value.

Finally, parties should choose a mediator with care. Increasingly, cases have made use of sitting or retired judges, who bring the significant benefit of being able to credibly opine on the strength of the parties' positions and are more cost-efficient than sitting judges. Professional mediators have been successful in a number of high-profile mediations; however, credibility with the parties and standing in the restructuring community are crucial to a mediator's success.

MNPI in Bankruptcy and *WaMu*

In the wake of the *WaMu* ruling on insider-trading allegations related to confidential settlement talks, participants in all forms of confidential discussions in bankruptcy have been particularly focused on the risk that exposure to material nonpublic information

(MNPI) might leave them unable to trade or vulnerable to allegations of improper trading. The basics of the *WaMu* case are instructive in understanding the decision's impact on market practice.

After the sale of Washington Mutual Bank to JPMorgan, the primary driver of value for the parent company's creditors was a dispute with JPMorgan over the ownership of certain disputed assets. Throughout the case, investors holding large positions in the WaMu capital structure participated in confidential ***84** settlement negotiations with JPMorgan, both through counsel and directly. To manage their exposure to MNPI, the investors established formal lock-up periods during which the investors participated in settlement talks directly and were exposed to nonpublic information, with WaMu agreeing to disclose any MNPI received by participants in the negotiations at the end of each lock-up period so that the investors could resume open trading.

In spite of these procedures, Judge Walrath found that there were "colorable claims" that the investors had traded improperly while in possession of MNPI.[8] Central to this holding were findings that even tentative settlement proposals that were rejected could be viewed as material, and investors were not entitled to rely on the debtor's conclusion that they were immaterial. In order to find potential liability, the court held that the investors may have assumed special duties and risks as temporary or nonstatutory insiders through their participation in negotiations.[9]

Importantly, the *WaMu* decision was not about traditional securities law liability. Instead, the decision focused on exposure to MNPI potentially leading to the imposition of equitable remedies based on potentially improper trading activity.

Creditor Strategies for Managing MNPI

While the *WaMu* decision did not address the merits of any insider-trading claims and was subsequently vacated, it nonetheless highlights certain risks for creditors that may want, or be required, to participate in mediations in which they will be exposed to MNPI. Several tools can help ensure that nonpublic information is treated appropriately. Information walls between traders and those involved in mediation can allow both unfettered trading and active participation in negotiations, but they may be impractical for many holders. Although cleansing disclosures theoretically address concerns about possession of MNPI, judgments as to materiality carry the risk of being second-guessed by a court, and broad disclosure may be problematic for companies that are understandably hesitant to publicly disclose sensitive business information.

Restricting trading is an effective solution, but it has numerous drawbacks. Discrete restricted periods, such as were employed in *WaMu*, are ineffective without burdensome cleansing disclosure at the end of each period. Indefinite restriction, while apparently the *WaMu* court's favored solution, constrains liquidity and may deter stakeholders from participating in mediation in the first place.

Recent Strategies for Managing MNPI

Issues raised by the *WaMu* decision and the inherent problems in available solutions to the MNPI dilemma have prompted parties and judges to reach for up-front fixes to encourage participation in mediation and limit its risks. Mediation orders in numerous cases since *WaMu* have addressed MNPI risk head-on, advancing a number of approaches to the problem.

The mediation order in the *General Motors* bankruptcy case embodies one extreme among the range of potential approaches.[10] The court's order explicitly spelled out the risks of participation and afforded no protection to the parties from the effects of exposure to MNPI. Parties to the mediation were required to ***85** acknowledge that they might receive MNPI during the mediation, and it warned that they would trade at their own risk.[11]

The court's order in *Cengage*, on the other hand, offered mediation participants comfort in order to encourage participation by addressing several elements of the *WaMu* decision, providing that "[n] o Party shall (a) be or become an insider ..., (b) be deemed

to owe any duty to any Debtor Parties ..., (c) undertake any duty to any party in interest, or (d) be deemed to misappropriate any information" by taking part in the mediation. [12] The order also included a finding that settlement proposals would not be considered MNPI and squarely addressed the risk of equitable subordination: "No party in interest ... shall have ... any other basis to withhold, subordinate, disallow or relay payment ... on account of a claim based on such Party's trading in Debtor Party Securities by reason of a Party's participation in the Mediation as a result of receiving ... (b) a Settlement Proposal." [13] These provisions appear to be gaining some traction, as they were recently included in Hon. **Shelley C. Chapman**'s order appointing a mediator in the *LightSquared* case. [14] While it is not clear what weight these findings would have in a traditional insider-trading prosecution, they do offer participants in bankruptcy mediations the comfort that the presiding bankruptcy judge will not use their participation in the mediation as grounds for the imposition of equitable bankruptcy remedies, such as claim-subordination or disallowance.

Relatedly, a recent order in the *Momentive* bankruptcy case offers an example of another approach for creditors' committee members, who face regular exposure to MNPI in their roles as such. Based on a declaration from the committee member regarding the safeguards it intended to implement, Hon. **Robert D. Drain** entered an order holding that a committee member "will not subject its claims to possible disallowance, subordination, or other adverse treatment, by trading in [claims against the debtors] ... provided that [it] establishes and effectively implements and strictly adheres to the information blocking procedures detailed in the ... Declaration." [15] While not directly tied to a mediation, this order could provide a model for creditors that are willing to establish trading walls and want comfort that the presiding court is satisfied with those walls.

Conclusion

The significant current market trend toward mediation, both with respect to plan terms and narrower disputes, is sure to continue. Mediation's flexibility allows parties to develop tailored processes to meet the particular needs and traits of each case. However, in negotiating these processes, parties should be attentive to the risks and benefits of decisions concerning formality, scope and timing. Parties must also be aware of the risk of exposure to MNPI during mediation, and the strengths, weaknesses and tradeoffs involved in each approach to managing MNPI. Careful design of a mediation process and order can both increase the odds of success and help effectively address the risks to participants.

Editor's Note: *ABI's Mediation Committee focuses on mediation and other ADR methods applied in the bankruptcy process, including conflict-resolution skills development, overcoming impasses, multiparty mediations, confidentiality and more. The committee is also considering Model Rules for courts on the use of mediation, mediator qualifications and compensation. Visit*

Footnotes

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1 The authors thank Nick Axelrod for his extensive assistance in the preparation of this article.

2 *In re Washington Mutual Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011).

3 Order Appointing Mediator, *In re Tribune Co.*, No. 08-13141 (KJC) (Bankr. D. Del. Sept. 1, 2010), at ¶ 4.

4 *See In re Tribune Co.*, 464 B.R. 126, 207-08 (Bankr. D. Del. Oct. 31, 2011); *In re Tribune Co.*, 476 B.R. 843, 849-51 (Bankr. D. Del. 2012).

5 Order Selecting Mediator and Governing Mediation Procedure, *In re Cengage Learning Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Sept. 25, 2013), at ¶ 2 (hereinafter, "*Cengage* Order").

6 Alternative Dispute Resolution Procedures Order for Affirmative Claims of Debtors under Derivatives Contracts, *In re Lehman Bros. Holdings Inc.*, No. 08-13555 (JMP) (Bankr. S.D.N.Y. Sept. 17, 2009), at ¶ 10.

7 Mediation Order, *In re City of Detroit, Michigan*, No. 13-53846 (Bank. E.D. Mich. Aug. 13, 2013).

8 *Washington Mutual Inc.*, 461 B.R. at 266.

9 *Id.*

10 Stipulation and Agreed Order Appointing Mediator, *Motors Liquidation Co. v. Appaloosa Investment Ltd. P'ship I (In re Motors Liquidation Co.)*, Bankruptcy Case No. 09-50026 (REG), Adv. Proceeding Case No. 12-09802 (Bankr. S.D.N.Y. June 27, 2013).

11 *Id.* at ¶¶ 11.A and 13. *committees.abi.org/mediation to join this committee.*

12 *Cengage* Order, *supra* n.5, at ¶ 12.

13 *Id.* at ¶ 13.

14 Order Selecting Mediator and Governing Mediation Procedure, *LightSquared LP, et al., v. SP Special Opportunities LLC, et al.)*, Bankruptcy Case No. 121280 (SCC), Adv. Proceeding Case No. 13-1930 (Bankr. S.D.N.Y. May 28, 2014).

15 Order Granting Motion of Aurelius Capital Partners LP for Entry of an Order Approving Specified Information Blocking Procedures and Permitting Trading of Claims Against the Debtors Upon Establishment of a Screening Wall, *In re MPM Silicones LLC*, No. 14-22503 (RDD) (Bankr. S.D.N.Y. May 12, 2014), at 2.

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