

Mandatory Mediation Expanded

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In a major expansion of the use of mandatory mediation, the Michigan Bankruptcy Court ordered mediation of nearly 1170 preference actions filed in conjunction with Collin& Aikman's^[1] Chapter 11 reorganization plan.^[2] In re Collins & Aikman Corp., 376 B.R. 815 (Bankr. E.D. Mich. 2007. The court concluded that mediation "will promote the just, speedy and inexpensive resolution of these adversary proceedings."^[3] The court went further and both required defendants to share the costs of mediation and provided for default judgment to be entered against parties failing to engage in the mediation process.^[4]

This decision reflects the growing use of mediation in bankruptcy. Prior to the adoption of the Alternative Dispute Resolution Act of 1998, bankruptcy court's found authority to use mediation by fusing together various provisions of the bankruptcy rules, local rules, the Bankruptcy Code and other federal legislation.^[5] Section 105 of the Bankruptcy Code^[6] and the provisions relating to the appointment of examiners under Sections 1104^[7] and 1106^[8] of the Code gave the bankruptcy court's authority to mediate in reorganization plan cases, and in other cases to resolve litigation. In conjunction with the authorizations granted in the Code, local rules giving bankruptcy courts authority to order mediation emerged as a way to promoting the efficiency in the courts by limiting excessive costs and delays.^[9] Using these principles, the Southern District of California established the first mediation program for bankruptcy, which soon was followed by the Middle District of Florida.^[10] In 1990, Congress enacted the Civil Justice Reform Act^[11] with the purpose of implementing alternatives to reduce expense and delay in civil litigation and this was seen as supporting use of alternative dispute programs as a tool in effectuating congressional intent.^[12] Finally, in 1998, Congress passed the Alternative Dispute Resolution Act of 1998, which gave bankruptcy courts express authority to utilize mediation in adversary proceedings.^[13]

While Congress gave broad authority to the bankruptcy courts to implement mediation procedures, the procedural requirements are left to the local rules of the bankruptcy court.^[14] Based upon that delegation of power, the Eastern District of Michigan has taken a hard-line approach to parties who fail to mediate. Under Rule 7016-1(c), failure to mediate can be the grounds for a default judgment.^[15] The imposition of mediation cost on defendants who may believe they have no liability and who do not voluntarily chose the alternative dispute resolution mechanism raises questions whether mandatory mediation will lead to a fairer and more efficient resolution, or add to the pressure to settle the claims?

^[1] Collins & Aikman makes instrument panels, doors and trim used in 90% of cars sold in the United States. Erik Larson, Bankrupt Parts Maker Gets Contract Extensions, Wash. Post, July 6, 2007, at D3. Prior to filing its Chapter 11 bankruptcy petition in May 2005, Collins & Aikman employed 23,000 workers at 80 plants and had annual revenue of \$4 billion. Id.

[2] *In re Collins & Aikman Corp.*, 376 B.R. 815 (Bankr. E.D. Mich. 2007).

[3] *Id.* at 816.

[4] *Id.* at 818.

[5] See generally, Randall J. Newsome, *Vanishing Trials—What’s All the Fuss About?*, 79 *Am. Bankr. L.J.* 973, 797–78 (Fall, 2005).

[6] 11 U.S.C. § 105(d)(2) (1994) (“The court, on its own motion or on the request of a party in interest... issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically....”).

[7] 11 U.S.C. § 1104 (1994).

[8] 11 U.S.C. § 1106 (1994).

[9] Ralph R. Mabey, et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation*, 46 *S.C L. Rev.* 1261, 1296 (1994–1995).

[10] Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 *Am. Bankr. L.J.* 55, 70 (Winter, 1994).

[11] 28 U.S.C. § 473 (1994)

[12] J. Thomas Corbett, *Mediation, Bankruptcy and the Bankruptcy Administrator*, 65 *Ala. Lawyer* 400, 400 (Nov. 2004).

[13] 28 U.S.C. § 651 (1998). The relevant portion, § 651(b) reads:

“Each United States district court shall authorize, by local rule adopted under section 2071(a), the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with this chapter, except that the use of arbitration may be authorized only as provided in section 654. Each United States district court shall devise and implement its own alternative dispute resolution program, by local rule adopted under section 2071(a), to encourage and promote the use of alternative dispute resolution in its district.” (emphasis added)

[14] Newsome, *supra* note 5, at 978.

[15] U.S. Bankr. Court E.D. Mich. Local Rules § 7016-1(c).