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April 2003

Editor's Note: *In this interview, Mr. Levy explains how alternative dispute resolution processes such as mediation are being used successfully to resolve multiple claims and preferences in large bankruptcy filings.*

Introduction
The systematic use of mediation in complex bankruptcies can significantly shorten the amount of time that the estate must stay open and substantially reduce the transactional costs incurred in prosecuting preference actions and defending claims against the estate. With the continued rise in large bankruptcy filings, courts and the financial community are well served by these processes that have proven useful in other multiple-claims proceedings such as class actions and mass torts.

Can you give our readers an overview of how mediation is used in a large bankruptcy proceeding?

The use of mediation generally occurs in two ways. First, any single claim or preference can be mediated on an ad hoc basis -- much like any other legal dispute. The parties merely need to agree to try to resolve the dispute in this manner and obtain the court's approval where necessary. This is not difficult to do. Bankruptcy courts around the country welcome the voluntary use of alternative dispute resolution to resolve cases outside of the courtroom. Judges are delighted when the parties find ways to settle without tying up their courtrooms in trial.

A second, more innovative way of using alternative dispute resolution procedures has been to take large groups of claims and preferences from a single bankruptcy and put them into an orderly process that allows for their early resolution through mediation.

How is a comprehensive ADR process initiated?

A motion is made before the bankruptcy court for an order establishing procedures for the submission and resolution of cases through mediation. The order specifies which claims, preference actions or both are subject to ADR. The order further provides the procedures for noticing each mediation including the date, time and location of the proceeding. Documentation accompanying the notice explains the process in detail and ordinarily provides for the exchange of briefing and/or important documents in advance of the hearing date.

Can you give an example of a current bankruptcy ADR program?

I am currently managing a mediation process, as approved by the bankruptcy court in Delaware, in which 250-300 preference actions are being mediated on a regular basis. In that case, the estate filed approximately 600 preference complaints in the bankruptcy court in Delaware. As usually happens, the mere filing of the complaints caused approximately one-half of the cases to settle through direct negotiations between counsel for the parties. The other 50 percent did not. I was asked to design and implement a process, subject to approval of the bankruptcy court, that would allow for the orderly mediation of the remaining cases on a rolling basis. After a hearing on the proposed mediation procedures, the court authorized the following process:

We notice the mediations between 35 and 40 days before the hearing date. The notice contains a description of the mediation process, the identity and qualifications of the mediator and the location of the mediation. In addition, the notice provides dates for the exchange of mediation-related documents and allows either side to contact the mediator in advance to request additional information or other assistance in preparing the case for mediation.

We have found that it makes sense to notice more mediations per day than we expect to hear because many cases settle in advance of the hearing. We are then left with four to six cases, on average, that can be mediated comfortably in a single day. The occasional preference matter with a very high dollar value or an unusually complex set of facts might need to be noticed independently for a full or half-day mediation.

In another matter, we are implementing a bankruptcy mediation program in Texas. In that case, we assisted the debtor in developing a program in which each personal injury claim against the debtor must be mediated before the court will consider lifting the automatic stay. As in the preference-related mediations, we handle all the administrative details, provide the mediators and ensure that the parties are fully prepared to mediate the case to settlement.

How successful are these ADR programs?

The multiple preference and claims mediation programs have been very successful. Statistically, in the program I summarized above, more than 95 percent of the cases that have been noticed for mediation have settled. While most cases settle on their hearing dates, we have found that the mere noticing of a case for hearing can cause parties to settle in advance in order to avoid the time and expense of attending the hearing.

What are the advantages of ADR in large bankruptcies?

In most bankruptcies, there are many claims and preferences that the parties have been unable to settle themselves but do not require traditional full-scale litigation to reach resolution. Alternative dispute resolution procedures, such as mediation, can avoid the unnecessary costs of discovery, motion practice and trial preparation. In relative terms, the time and expenses of preparing for and appearing at a mediation pale by comparison to the costs of trial -- even a short cause. Also, as I mentioned, the systematic use of ADR in this fashion can significantly shorten the length of the overall bankruptcy proceeding.

Are there any limitations on the use or effectiveness of this process?

As with any changes to existing practice, some lawyers and clients who have not used mediation or arbitration before are initially resistant to using them in their cases. But as they become more experienced in ADR, most practitioners find these processes to be useful tools in resolving cases fairly and efficiently for their clients. This is true not only in bankruptcy practice, but throughout the spectrum of legal disputes.

What about the larger or more complex cases where counsel believes that discovery will be necessary to evaluate the case for settlement?

The amount of allowable discovery can be adjusted based on need in the individual case. For example, the processes I have used generally require both sides to exchange key documents in advance of the mediation session. Where more discovery is truly necessary, the parties' specific needs are identified and addressed before the parties sit down to negotiate. The key is to ensure that the discovery is designed to yield important information that will assist the parties in making informed decisions regarding settlement -- while avoiding irrelevant, unnecessary and costly discovery. All of this can be accomplished in a short period of time under the supervision of the mediator or arbitrator.

Where are the hearings held?

Hearings can be held in any location around the country. Hearing locations are usually determined by court order depending on the location of the debtor, the creditors, other parties, and the court in which the action is pending. However, there are no limitations on the location of the hearing where the parties agree. The selection of a location convenient to the parties can also significantly reduce the parties' costs.

How many mediations can be handled in a single day?

It depends on the size of the case. For example, it is not unusual to handle as many as six small to medium-sized preference cases in a single day. Because claims against the estate that we see in mediation or arbitration tend to be larger on average, and may involve more complex questions of liability, they tend to require a full or half-day hearing. In addition, setting multiple cases with the same lawyers on the same day can further increase the efficiencies of these processes.

How have bankruptcy judges reacted to the proposed use of ADR in the cases pending before them?

In my experience, the judges are very pleased with the results. They are also very careful to ensure that any proposed ADR process fully safeguards the parties' rights to fairness and due process. Arbitrations, for example, must provide for the right to trial *de novo.* That said, courts are very receptive to using mediation and arbitration to significantly reduce the number of matters on their dockets. Overall, the judges find that a professionally structured ADR program provides increased economy, efficiency and utility, which benefit not only the judges but all participants in the process.

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