Mediation Use Grows in Bankruptcy Cases

By Christopher Candon

As an effective tool to combat the associated costs and delay in litigation, mediation has gained momentum and popularity as an efficient method to resolve disputes in state and federal courts. This trend has been emerging in bankruptcy matters as well, where limited resources and time make mediation an attractive alternative dispute resolution mechanism.

The collaborative approach of mediation frequently strikes the right balance in bankruptcy, because the likelihood of success in achieving a "fresh start," whether in a consumer (Chapters 7 and 13) or a business bankruptcy case (Chapter 11), often depends on savings in litigation and bankruptcy costs.

As a result of the growing acceptance of mediation in bankruptcy proceedings, many bankruptcy courts have incorporated mediation rules as part of their local rules and, in some instances, require mediation before advancing the matter to a litigation calendar.

At the United States Bankruptcy Court for the District of New Hampshire, *Local Rule 7016-1(c) – Alternative Dispute Resolution*, encourages parties to engage in alternative dispute resolution. The encouragement stems from the Alternative Dispute Resolution Act of 1998, but the act makes each district responsible for adopting its own rules. Although the New Hampshire bankruptcy court has not adopted local rules to govern bankruptcy mediations, other bankruptcy courts have, and a patchwork of rules exists across jurisdictions.

Over the past several years, published articles by the American Bankruptcy Institute (ABI) have noted the increased use of mediation in the bankruptcy process. Recurrently, the articles remark that when people or businesses are in financial crisis, an efficient and inexpensive resolution becomes an even greater priority.

Responding to the growing use of mediation and the different mediation practices employed by the bankruptcy courts, the ABI introduced model bankruptcy mediation rules earlier this year. These model rules may provide some uniformity to the adoption of new rules or the revision of existing mediation rules, but generally could be viewed as a template to assist the various bankruptcy courts in crafting their own rules and adapting to the growing trend of mediation.

Some of the highlights of the ABI model rules include: allowing a bankruptcy judge to send a case to mediation, maintaining discovery or trial schedules during mediation, guidelines for the conduct of the mediation process, attendance by the parties, and strict standards of protection upon all participants to the mediation for all information disclosed at the mediation.

In general, mediation rules are intended to promote a collaborative process. If the timing is right and the appropriate forum exists, mediation provides an opportunity to negotiate a resolution to a dispute that has become an obstacle or impasse for the parties. Both timing and forum, key self-determination factors, are essential to a successful mediation.

The dispute has to be ripe for negotiation – meaning the parties have to be prepared to thoughtfully consider significant elements of the case and evaluating those elements. This is important as the mediation allows for direct communication between a neutral third party (the mediator) and the client, which may assist a client in seeing another perspective of what may happen in litigation.

The forum is equally important. The parties usually select the mediator, as well as where and when the mediation session or sessions will be held.

Mediation is a facilitative process. The mediator has no stake in the outcome of mediation, but is a participant in the parties' attempt to reach their own resolution. If an agreement is reached, it is non-binding and subject to approval by the bankruptcy court.

Perhaps most importantly, mediation is a confidential process. This confidentiality is necessary to create a forum for a negotiated resolution.

In these regards, mediation differs significantly from arbitration. Arbitration is conducted by one or more arbitrators, who take on a role similar to that of a judge, making decisions about evidence and typically issuing binding opinions.

Examples of the use of mediation in bankruptcy proceedings are widespread. Whether the dispute arises in a Chapter 7, 11 or 13 cases, mediation has proven successful in resolving preference, avoidance, non-discharge-ability, fraudulent conveyance and claims allowance actions, and for the resolution of complex plan negotiations in Chapter 11 cases.

The benefits of mediation are readily apparent – a voluntary, confidential, efficient and cost-effective resource for achieving a mutually desirable resolution. To prepare for successful bankruptcy mediation, the parties should consider:

- **The mediator.** Select a mutually acceptable mediator. A mediator with substantive knowledge of bankruptcy law will likely increase the efficiency of the mediation. Pre-mediation meetings with the mediator will also focus the dispute.
- **Preparation.** Be prepared. Analyze all relevant arguments in preparation for the mediation to compose possible options for a settlement. Allow for creative solutions that may not otherwise be available in litigation, considering economic and non-economic factors.
- **Understand the process.** Both counsel and client should understand the mediation process and the role of the mediator so there are no surprises. The mediation is confidential, and the mediator is acting as a facilitator for the parties. The structure of the mediation should be agreed upon, and the mediation conducted according to that structure.
- **Participation.** Participation is voluntary, but the parties that are required for authorization of any settlement should attend and be prepared to evaluate proposals and make counter-proposals if the mediation progresses.

Because of the associated costs of bankruptcy and litigation, parties that find themselves entangled in a bankruptcy dispute should consider mediation as an alternative to litigation.

Depending on the status of the dispute, mediation may simply supply the needed forum and encouragement for a resolution. In other instances, mediation may assist the parties to overcome difficult impasses by focusing settlement discussions and allowing all sides to present their own interests while hearing the opposing position as well. Moreover, mediation provides an opportunity for more creative resolutions to the difficult circumstances that frequently exist in bankruptcy matters.

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