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MEDIATION IN BANKRUPTCY — AN IMPORTANT, ALBEIT UNWIELDY TOOL

In this article the author acknowledges that mediation is now a staple of large chapter 11 bankruptcy cases, but she notes issues that make mediation an unwieldy tool in the bankruptcy context.

By Julia Winters *

Mediation is now a staple of large chapter 11 bankruptcy cases, particularly those cases involving mass tort litigation. Despite the increased use of mediation, there remain aspects of the practice that simply do not work as well in bankruptcy as in other fora. This article discusses recent trends in bankruptcy mediation, in particular, in the mass tort case context, and highlights some of the square-hole-round-peg issues with mediation that arise in bankruptcy cases.

MEDIATION HAS BECOME UBIQUITOUS IN CHAPTER 11 CASES

The Alternative Disputes Resolution Act of 1998 required each district court to authorize “the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy.”¹ Since its passage, mediation has become ubiquitous in large, chapter 11 bankruptcy cases in the United States.² With its rise, bankruptcy courts have established local rules and/or standing orders to address how mediation can, and should be, employed.

¹ 28 U.S.C. § 651.

² Prior to its passage, bankruptcy courts used the general, Power of Court, provision of the Bankruptcy Code to order mediation. 11 U.S.C. § 105.

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According to one survey, at least 80 percent of bankruptcy court districts had adopted local rules regarding mediation as of August 30, 2018.³

The districts where most large, chapter 11 cases are filed — Delaware, Southern District of New York, and the Southern District of Texas — all have standing orders, local rules, or procedures governing the practice.⁴ The District of Delaware also *mandates* mediation in all

³ A List of Bankruptcy Districts That Have and Have Not Adopted Local Mediation Rules, August 30, 2018, *available at* <https://mediatbankry.com/2016/12/06/a-list-of-bankruptcy-districts-that-have-and-have-not-adopted-local-mediation-rules/>.

⁴ *In re*: Procedures Governing Mediation of Matters and the use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings, United States Bankruptcy Court, Southern District of New York, June 28, 2013, *available at* <https://www.nysb.uscourts.gov/content/mediation-procedures>; Local Rule 9015-5 of the Local Rules for the United States Bankruptcy Court, District of Delaware, February 1, 2022, *available at* <http://www.deb.uscourts.gov/content/rule-9019-5-mediation>; Procedures for Complex Cases in the Southern District of Texas, Section S, August 1, 2021, *available at* <https://www.txs.uscourts.gov/page/complex-chapter-11-cases>.