ARTICLES

Delaware Bankruptcy Court: Mandatory Mediation Update

As our well-informed readers know, the Delaware Bankruptcy Court considers amendments to its local rules on an annual basis and also adopts its local rules on an annual basis. *See* Del. Bankr. L.R. 1001-1.

Recently, the Delaware Bankruptcy Court published its amendments to the local rules effective as of February 1, 2013. Two particular rules will be highlighted in this article: (i) the Delaware Bankruptcy Court's new rule regarding mediation in adversary proceedings in Chapter 11 cases and preference cases; and (ii) the Delaware Bankruptcy Court's adoption of new mediation and procedural rules for avoidance actions in which the plaintiff seeks to avoid and recover $75,000 or less from the defendant.

Let's begin with the more general rule. Those familiar with procedure in the Delaware Bankruptcy Court will not be surprised to learn that the court has incorporated the requirement of mandatory mediation into the local rules for proceedings that involve a claim to avoid a preferential transfer pursuant to 11 U.S.C. § 547. Indeed, the Delaware Bankruptcy Court has required mediation in such proceedings since April 7, 2004, under a general order of that date.

But mandatory mediation is not just for preference cases anymore. Instead, mandatory mediation will be required in *every* adversary proceeding in a Chapter 11 case in addition to any proceeding to avoid a preferential transfer. The Local Rule provides as follows:

> Except as otherwise ordered by the Court, all adversary proceedings filed in a chapter 11 case and, in all other cases, all adversaries that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) shall be referred to mandatory mediation. Parties to an adversary proceeding or contested matter may also stipulate to mediation, subject to Court approval.

Local Rule 9019-5(a).

The role of mediation in bankruptcy cases and adversary proceedings steadily has grown over the last several years. The court's adoption of this rule, however, represents a new chapter in the Delaware Bankruptcy Court's use of mediation within bankruptcy cases and related proceedings. While the scope of the mandatory mediation requirement is all-encompassing, it is worth noting that the rule contemplates that the Court will entertain exceptions to the mediation requirement in particular cases. Indeed, it is not difficult to imagine a number of different proceedings in which mediation might not be an appropriate tool (for example, proceedings for injunctive relief).

Moreover, the rule does not address other issues, such as the timing of any mediation or whether one or both parties are required to bear the costs of any mediator.

The second mediation-related rule is new Local Rule 9019-5(j). (The author chaired the subcommittee with principal responsibility to draft (for consideration by the Delaware Bankruptcy Court) this new rule.) This rule applies to proceedings in which the plaintiff includes a claim to avoid a preferential transfer in the amount of $75,000 or less. By its terms, it grants to the defendant in any such proceeding the right to elect a front-loaded mediation process under which mediation will be conducted prior to any formal discovery in the underlying proceeding. Again, the rule vests this decision with the defendant, not the plaintiff, and if the defendant elects early mediation pursuant to this rule, the plaintiff must participate in that mediation process. The rule also continues the pre-existing requirement (under the previously discussed general order) for the plaintiff to bear the costs of the mediator in any such proceeding. To activate early mediation, the defendant only need file with the court a certificate demanding mediation under the rule (a local form will be available on the court's website) and serve that certificate on the plaintiff.

It is worth noting that the rule does not relieve a defendant from any requirement to respond to the complaint. Nor does it prevent the entry of a scheduling order at any initial status conference otherwise scheduled pursuant to the summons issued with the complaint. It does, however, relieve the parties to a mediation conducted under its provisions from any requirement to propound or respond to discovery pending conclusion of mediation. It also provides that any deadlines under any applicable scheduling order will be recalculated to run from the date of completion of mediation in the subject proceeding, thus effectively providing for a stay of any deadlines under a scheduling order until after the conclusion of mediation pursuant to this rule.

While the rule gives the defendant the right to choose early mediation, it also requires the defendant electing early mediation to provide defense-related analysis to the plaintiff. Accordingly, the rule contemplates that as part of the mediation process, the defendant will discuss the merits of the plaintiff's preference claim in writing and provide evidence to support its defense analysis. In return, the plaintiff likewise will be required to respond to the merits of the defendant's defenses, including in light of the facts then known to the plaintiff.

While any mediation is to be conducted in Delaware, the rule provides relaxed procedures under which the defendant may participate by telephonic or other means. Finally, by consent of the plaintiff and defendant, the rule also may be invoked with regard to claims in excess of $75,000.

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Marcos A. Ramos is a director with Richards, Layton & Finger, P.A., in Wilmington, Delaware.