29th Edition December 2012

# Bankruptcy Mediation News

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## *A Word From The Administrator . . .*

We recently co-hosted the 14th Annual ADR Luncheon with the U.S. District Court on November 9, 2012 to recognize your truly invaluable service to the Court. Your time and efforts are the reason why our ADR program is the largest and most robust bankruptcy court program in the country. (Please see details and photos on pages 7 & 8).

I would like to recognize the many judicial appointments that have occurred in the past few years which I have not previously had a chance to mention in this column: bankruptcy judges **Wayne E. Johnson** and **Mark D. Houle** (Riverside Division), **Mark S. Wallace** and **Scott C. Clarkson** (Santa Ana Division), and **Neil W. Bason**, **Julia W. Brand** and **Sandra R. Klein** (Los Angeles Division). They join Judges **Catherine E. Bauer** (Santa Ana Division) and **Deborah J. Saltzman** (Riverside Division).

I am pleased to include in this edition an article entitled "*Meltdown Mediation,"* authored by Benjamin S. Seigel, Esq., a member of our panel since the Program's inception in 1995. The article is reprinted with permission of the American Bar Association's Dispute Resolution Magazine, which previously published it in its Winter 2010 edition. I invite all interested mediators to submit articles that may be of interest to your ADR colleagues.

The Court continues to implement technical improvements which benefit our Program, including the new website launched on October 25, 2012. Its many new features make the website easier to navigate and search for content. The link to the ADR program is now prominently located on the home page.

We have also recently launched a drive to recruit new members to our panel by way of a Public Notice, letters to current mediators requesting recommendation of their colleagues, etc. We have received applications from many excellent individuals whose applications are presently being processed. I invite all panel members to continue to submit recommendations of your qualified colleagues.

Finally, many of our judges have relocated recently among the various divisions. An updated list of the judges' initials and locations can be found on page 9 of this newsletter.

*As always, I look forward to receiving your feedback on our Program. Please send any comments and suggestions to me in writing c/o the United States Bankruptcy Court, 255 East Temple Street, Room 1660, Los Angeles, CA 90012.*

# MEDIATOR SPOTLIGHT

"[LEONARD GUMPORT] did a great job! He is an excellent mediator. He really made a good effort toward the mediation of the case. He took the time necessary to analyze the parties' interests and assisted in crafting a mediated resolution to what had been an intractable dispute."

"[HENRY S. DAVID] was exceptionally prepared and thorough. He demonstrated an excellent grasp of the law and of the key issues. We did not settle at mediation, but later prevailed on a motion for summary judgment. If plaintiff had been more reasonable, a settlement might have been possible."

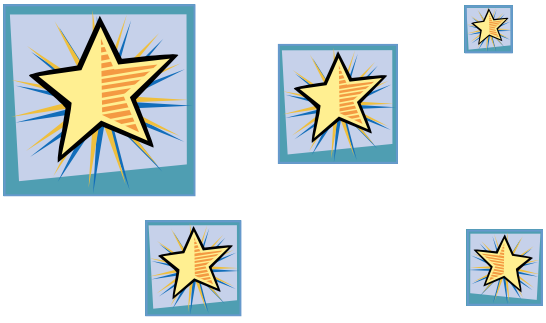
"[RICHARD W. ESTERKIN] was a professional, skilled and persuasive mediator. Without the creative input from him the case would not have settled. He was exceptionally effective in getting the parties and counsel to agree to a settlement. Definitely would use him again."

"[ROBBIN L. ITKIN] is an excellent mediator. She was well informed and prepared for the mediation. The program needs more mediators like Ms. Itkin."

"[RICHARD A. MARSHACK] was well informed and prepared for the mediation. He was fair and attempted to have the matter settled. However, due to the plaintiff's counsel's unpreparedness at mediation, a resolution was not obtained. We very much appreciated his persistent endeavor to bring this matter to a sensible resolution."

"[ALAN I. NAHMIAS] is a talented mediator. The matter would not have settled without his efforts. He was well prepared, well informed, had a pleasant and persuasive manner and was creative in his approach towards a successful resolution."

"[LAUREL ZAESKE] is the best! Her mediation style is conducive to reasonable negotiations. She was responsible for bringing the parties together and affecting a just, fair and equitable compromise of a complex and disputed matter. I highly recommend her!"



***Bankruptcy costs too much, takes too long, and involves too many expensive attorneys, accountants and financial advisors. The bankruptcy laws are complicated, difficult to understand, and often make no sense. Times are tough, and bankruptcy courts need to recognize that it's time to find some new solutions to the problems we are facing.***

## *MELTDOWN MEDIATION*

By: Benjamin S. Seigel, Esq.[1]

The above statement is the cry we frequently hear today from debtors, creditors, and others affected by the bankruptcy process. The economic conditions facing us have resulted in dramatic increases in bankruptcy cases throughout the country. Consumers are worried about how they will pay for their mortgage, car, credit card, gasoline, and other purchases or debts. Business owners faced with decreasing sales and profits are cutting back on benefits, furloughing employees, and trying to renegotiate their lease payments. Lenders are faced with slower collections, defaulting borrowers, and repayment of TARP funds to the federal government.

Mediated resolutions are more attractive than ever because they can include terms or components that deliver real value that no bankruptcy court would have the authority to order. Mediated resolutions can deliver an almost limitless range of types of value and can provide for the delivery of value indirectly, over time, or in forms that would not be accessible in conventional financial arrangements or through a judgment entered by a court. An apology printed in the local newspaper, a donation to the other side's favorite charity, or an agreement to adjust the price or terms of future purchases are examples of mediated solutions that can be achieved. The economy has created a new box for us to think outside of.

Benjamin S. Seigel

1. Benjamin S. Seigel is a shareholder in Buchalter Nemer, a professional law corporation, headquartered in Los Angeles, California, with offices in Scottsdale, Arizona, and Irvine and San Francisco, California. He is a former chair of the firm's Insolvency and Financial Solutions Practice Group and has been a mediator for the Central District of California Bankruptcy Court since the inception of the program in 1995. He can be reached at bseigel@buchalter.com .

## NEW APPROACHES

Hard economic times require a new and different approach to the problems we see in both consumer and business bankruptcy cases. Courts and creditors are finding that new approaches to bankruptcy issues are needed to bring some sanity to the bankruptcy process and to resolve the conflicts that the melting economy has presented. The role of the mediator in bankruptcy cases has become more important than ever in finding practical and plausible solutions to these challenging problems.

Mediation of bankruptcy controversies has required mediators to be more sensitive to the needs and pressures of both sides to the disputes presented to them. The parties to bankruptcy disputes also must be more sensitive to the concerns of their adversaries if a mediated resolution is to take place. Flexible thinking is required if realistic solutions are to be achieved.

What is just as significant, when parties to bankruptcy mediations have not been able to identify or fashion acceptable terms of an agreement, they are more inclined in these stressful times to look to the mediator to suggest additional ideas, perhaps even unconventional approaches, to help them find some way to move forward. In other words, the deep economic downturn encourages lawyers and their clients to turn more sharply to their mediators for help. Parties in severe economic distress often want their mediators to play more expansive and activist roles. These circumstances intensify the risk that bankruptcy mediators will, in unconscious collusion with the people they are trying to serve, permit parties to relocate their sense of responsibility and compromise their self-determination.

The most appropriate response by mediators in these cases, however, is not to refuse to help, not to refuse to offer ideas (learned elsewhere or thought up on the spot), but, instead, to help the parties understand the process and responsibility risks as they surface and then, if the parties knowingly choose to assume those risks, to accept the challenge of trying to work with them in the role of ally and idea-source.

The need to find practical mediated solutions can be illustrated by two cases: one involving consumer issues; the other, a business Chapter 11 bankruptcy. Both illustrations represent a melding of facts from several cases that were mediated in the ADR program of the Bankruptcy Court for the Central District of California.

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**MELTDOWN MEDIATION**

By: Benjamin S. Seigel, Esq.

## NEW APPROACHES (cont'd)

The United States Bankruptcy Court for the Central District of California initiated its mediation program in 1995. The vast majority of the cases referred to mediation panel members have been settled at the mediation conference. Mediation is used to deal with both bankruptcy matters and nonbankruptcy issues that come before the bankruptcy court. Bankruptcy issues include preference and fraudulent transfer matters, objections to claims, objections to discharge, dischargeability matters, and objections to bankruptcy court orders. Nonbankruptcy issues include tort actions, ownership of property, perfection and enforceability of security interests, probate-related matters, breach of contract matters, and even family law property settlements.

Because all mediations are confidential, the actual cases have been disguised.

## THE CONSUMER BANKRUPTCY CASE

Some of the new challenges facing mediators dealing with consumer bankruptcies are:

1. Major lifestyle changes created by the general economic conditions,
2. Dried-up sources of repayment of credit card debt and installment purchases,
3. Loss of a home due to foreclosure,
4. Issues created by loss of jobs,
5. Problems created by paycheck-to-paycheck living — or no more paycheck,
6. Mental and physical health issues from worries about how to care for the family,
7. No foreseeable prospect of employment,
8. Loss of savings due to investments becoming worthless, and
9. Loss of health insurance due to termination of employment.

The consumer cases that we are currently called upon to mediate in bankruptcy court typically involve a demand that the consumer debtor pay money to the bankruptcy estate, or that a particular debt be deemed nondischargeable, or that the entirety of the debtor's indebtedness to all creditors be deemed nondischargeable. After undergoing

## THE CONSUMER BANKRUPTCY CASE (cont'd)

the usual mediation process of persuasive negotiations, an agreement may be reached that something must be paid to the estate or that a nondischargeable judgment will be entered. Further negotiations often are needed to establish a payment schedule (how much must be paid at what intervals). Designing such a schedule can require sensitive exploration of all the factors that could affect the debtor's ability to pay — and can provide an opportunity for a mediator to help the parties fashion plans whose terms could vary, in predefined ways, with specified changes in certain variables.

An example may help to illustrate the new thinking required in mediation of consumer bankruptcy cases. The following facts are based on a combination of actual cases.

### Big Corporation vs. Sam Brown

Sam Brown is the debtor in a Chapter 7 bankruptcy. He filed a bankruptcy petition because a judgment had been entered against him in a suit that Big Corporation, Inc., had filed against him for conversion of company property. Big Corporation had suffered a substantial loss of business due to economic conditions that affected its industry. Sam and 40 other employees were terminated. He packed up his belongings and left the offices of the company with the laptop computer he had been using. Sam swore that it was given to him by his supervisor as part of his termination package. Big Corporation claimed the computer was company property that Sam had stolen. Sam had no money to hire a lawyer. A default judgment was entered against Sam for $2,000 in compensatory damages and $10,000 punitive damages. Sam sold the computer to pay a lawyer to file bankruptcy. Big Corporation brought an action in the bankruptcy court to have its $12,000 judgment deemed nondischargeable. The matter was referred to mediation.

In better economic times, the matter would likely be settled by Sam agreeing to pay some amount less than the judgment in a lump sum or by making monthly payments with a stipulated judgment for the full amount if he should miss a payment. However, Sam had no job, no money, had lost his home in a foreclosure sale, and was living in a car borrowed from a friend. Big Corporation's representative was unbending in her demand for a nondischargeable $12,000 judgment.

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**MELTDOWN MEDIATION**

By: Benjamin S. Seigel, Esq.

## Persuasive Mediation

The mediator spoke to Big Corporation's representative in private and convinced her that, in view of Sam's economic circumstances, agreeing to some more reasonable, lesser amount might be better than chasing him for the next 20 years. With Sam's permission, he explained the economic realities that imposed severe limits on what Sam could do. She reluctantly agreed to consider the specifics of Sam's economic conditions.

## Resolution Achieved

The parties settled by agreeing to a $4,000 stipulated, nondischargeable judgment that would be discharged if Sam paid $2,000. The judgment would be held by Big Corporation's lawyer and not entered unless there was an uncured default. Sam agreed to pay $50 or more per month starting in six months or as soon as he found a job. Probably not a great settlement for either party!

But the mediator managed to get the parties to assess the downsides of their alternative courses of action—downsides that were particularly pronounced because of the way the economic downturn has affected both Sam and Big Corporation. If the corporation did not agree to a settlement and simply obtained a nondischargeable judgment, it would be forced to pursue collection, probably without much payoff, for up to 20 years. The expense of doing so would not make economic sense. There was at least some chance that Sam would pay the $2,000. If not, a $4,000 nondischargeable judgment would be entered against him—far preferable to the $12,000 nondischargeable judgment that could be imposed by the bankruptcy court.

This case demonstrates the challenges facing mediators and the parties in times of great economic stress. Practical solutions to difficult problems are required.

## THE BUSINESS BANKRUPTCY CASE

Some of the challenges in Chapter 11 business bankruptcy cases that are especially pronounced in these difficult economic times are:

1. The lack of credit available for debtor-in-possession financing,

## THE BUSINESS BANKRUPTCY CASE (cont'd)

2. Reluctance of landlords to modify commercial and industrial leases and the time restrictions placed on debtors to assume or reject leases,
3. Utilities demanding cash deposits or letters of credit as adequate assurance of future performance,
4. Reclamation claims creating expensive and prolonged litigation,
5. Lack of interested buyers in asset sales, and
6. Increased administrative expenses for committee counsel and financial advisors.

The following example from the retail apparel industry highlights some of the kinds of problems that bankruptcy mediators must help parties address in these stressful economic times.

### Big Time Stores, Chapter 11 Debtor vs. PQR Corporation

Consider the case of PQR Corporation, a supplier of women's clothing to Big Time Stores, Inc., a 600-store boutique chain with locations in upscale retail malls throughout the country. Big Time filed a Chapter 11 reorganization bankruptcy case but was having considerable difficulty obtaining postpetition financing from its current secured lender. The available financing was barely enough to keep the stores open. Big Time rejected the leases of 20 of its less profitable stores. Negotiations with landlords for rent reductions were unavailing in all but five locations. The utilities demanded cash deposits to keep supplying electricity, gas, and water to 30 of the locations.

Badly strapped for cash, Big Time commenced actions in the bankruptcy court to set aside and recover preferential payments made to its suppliers within the ninety days preceding the commencement of the bankruptcy case. Big Time hoped to recover enough cash to keep the remaining stores open until it could find a buyer.

One of Big Time's preference actions was against PQR stores, seeking to recapture $450,000 that Big Time had paid for goods shipped to it by PQR. The alleged preferential payments were made within the 90 days before the bankruptcy case commenced. PQR answered the complaint and raised every conceivable defense to the action. The case was referred to mediation.

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**MELTDOWN MEDIATION**

By: Benjamin S. Seigel, Esq.

## Pity the Preference Defendant

PQR was having bad times itself. Sales were down 40 percent, directly attributable to slowing economic conditions. Its secured lender had reduced the availability of funds. Its accounts payable were aging out, and collection actions threatened. Its withholding tax payments to the state and federal government were delinquent, and its landlord was threatening to sue for the last two months' unpaid rent.

The evidence that Big Time presented in support of its preference action seemed convincing. PQR's defenses to the preference claim did not. However, PQR insisted that if the matter went to trial and if Big Time should obtain a $450,000 judgment, PQR would be forced to file its own bankruptcy case. PQR acknowledged (solely for purposes of the mediation) that its defenses to the preference claims of Big Time were minimal at best, but insisted that the only fact that really mattered was its inability to pay $450,000 or anything close to it. It was that reality, not the evidence and law, that any solution that would deliver value to either party would need to address.

PQR presented a recently prepared financial statement showing a negative net worth. Its financial projections showed further losses for the next two months, then break-even for another two months, then a small profit projected for the following six months. It became clear to all present at the mediation that PQR simply did not have the wherewithal to repay the preference payments in a lump sum or even in a few installments. At that point the mediation seemed dead in the water. No one could identify an acceptable solution.

## Resolution Achieved

After several hours of negotiations the mediator suggested that PQR consider an agreement to supply merchandise to Big Time for a defined period at a break-even cost rather than at its normal markup and to extend longer payment terms. That would provide Big Time with goods to keep its shelves stocked without having to be concerned about immediate payment. PQR would have a priority expense claim in Big Time's bankruptcy. After mulling it over for a period of time, the parties liked the idea as the way to break the impasse. They worked out a formula so that the difference between the regular markup and the lowered markup would be equal to the repayment of the preference claim. An agreement was drafted and signed by the parties and their attorneys.

This case demonstrates the new premium on business creativity that mediators need to bring to business disputes in our troubled times. It also illustrates that even sophisticated commercial parties realize that they need to be open to ideas from all sources -- and that they are quite comfortable with a mediator who jumps into the brainstorming process with them and who actively suggests terms or ways to structure deals that have not occurred to the parties.

After encouraging the parties themselves to identify all possible paths forward, a good mediator in a bankruptcy case should not be reluctant to ask the parties if they can make substantive suggestions. More often than not, the parties will welcome help they can get from any quarter. An experienced bankruptcy mediator can draw on lessons learned or ideas developed in other cases to suggest ways of structuring continuing relationships that might never occur to the parties. Thus, in times like these, the best bankruptcy mediators will add both process value and substantive value.

## Finding Solutions

Hard times and tough problems created by the economic meltdown require new levels of sensitivity, flexibility, and ingenuity by judges, debtors, creditors, and mediators so that creative and workable solutions can be found. Mediation presents a viable vehicle to accomplish results that cannot be obtained through trials, prolonged adversary hearings, endless motions, and appellate procedures. Mediators need to be innovative and proactive in assisting disputing parties to achieve resolutions that can save all concerned the time, effort, acrimony, and money that would otherwise be required to proceed to the end of the judicial process.

# 14th Annual Luncheon Honors Mediators


J. Scott Bovitz


Carol J. Medof


Michael D. Evnin


Lana Borsook


Jason Wallach


Kimberly S. Winick


Michael H. White


Linda M. Blank

The Bankruptcy and District Courts hosted the 14th annual ADR luncheon honoring our mediators and the District Court's settlement officers at the DoubleTree Hotel (formerly the New Otani Hotel) on November 9, 2012.

District Court Chief Judge George King, District Court Judge Philip Gutierrez , Chair of the District Court's ADR Committee, and I all praised your hard work and specifically recognized the enormous contribution that your efforts make towards lightening our courts' enormous case loads.

*We thank you all for your generous service and wish you very Happy Holidays!*


Sara L. Chenetz


Barry S. Glaser


Judge Julia W. Brand


Judge Alan M. Ahart


Judge Catherine E. Bauer


Judge Neil W. Bason

Cont'd on page 8

Continued from page 7— **14th Annual Luncheon Honors Mediators**

***Longest mediation conference***
Robbin L. Itkin - 10 hours (settled)

***Settled case involving largest amount of money (2 way tie)***
Robbin L. Itkin/Benjamin S. Seigel

***Conference with the most attendees ( 5 way tie)***
Leon J. Alexander, M. Jonathan Hayes, Robbin L. Itkin, Michael B. Lubic & Joseph C. Markowitz 7 attendees

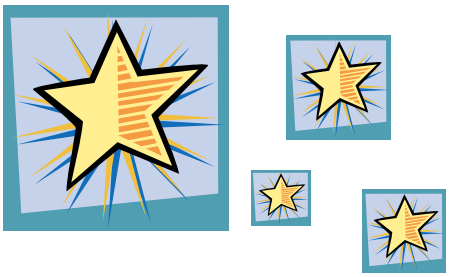
***Shortest mediation conference (2 way tie)***
Christoher L. Blank & Benjamin S. Seigel 50 mins.

***Most frequently chosen mediator:***

| | | |
|---|---|---|
| **Entire Central District:** | **Franklin C. Adams** | **11** |
| San Fernando Vallley Division: | David Gould & Alan I. Nahmias | 5 each |
| Los Angeles Division: | Joel B. Weinberg | 8 |
| Riverside Division: | Franklin C. Adams | 11 |
| Santa Ana Division: | Richard W. Esterkin | 5 |
| Northern Division: | William C. Beall | 2 |

***Most conferences settled in mediation:***

| | | |
|---|---|---|
| **Entire Central District:** | **Christopher L. Blank** | **11** |
| San Fernando Valley Division: | Alan I. Nahmias | 4 |
| Los Angeles Division: | Benjamin S. Seigel | 5 |
| Riverside Division: | Franklin C. Adams | 5 |
| Santa Ana Division: | Christopher L. Blank | 11 |
| Northern Division: | Keith S. Dobbins | 2 |



David Gould

Robbin I. Itkin

Franklin C. Adams

Joel B. Weinberg

Benjamin S. Seigel

Christopher L. Blank

M. Jonathan Hayes

Alan I. Nahmias

Joseph C. Markowitz

Michael B. Lubic

## MAILING COURTESY COPIES OF MEDIATION PLEADINGS TO JUDGES

A courtesy copy of the Mediator's Certificate Regarding Conclusion of Mediation Assignment (Form 706) must be mailed to the judge to whom the bankruptcy case and/or adversary proceeding is assigned.

The last two letters of the case number specify the judge's name. Their names and division locations are:

**LOS ANGELES DIVISION**

NB = Judge Neil W. Bason
BB= Judge Sheri Bluebond
WB = Judge Julia W. Brand
PC= Judge Peter H. Carroll (Chief Judge)
TD= Judge Thomas B. Donovan
SK= Judge Sandra R. Klein
RK = Judge Robert Kwan
RN= Judge Richard M. Neiter
ER= Judge Ernest M. Robles
BR= Judge Barry Russell
VZ= Judge Vincent P. Zurzolo

**RIVERSIDE DIVISION**

MH = Judge Mark D. Houle
WJ= Judge Wayne E. Johnson
MJ= Judge Meredith A. Jury
DS= Judge Deborah J. Saltzman

**SAN FERNANDO VALLEY DIVISION**

AA = Judge Alan M. Ahart
VK = Judge Victoria S. Kaufman
MT= Judge Maureen A. Tighe

**SANTA ANA DIVISION**

TA= Judge Theodor C. Albert
CB= Judge Catherine E. Bauer
SC= Judge Scott C. Clarkson
ES= Judge Erithe A. Smith
MW = Judge Mark S. Wallace

**NORTHERN DIVISION**

RR= Judge Robin L. Riblet

## CONTACT INFORMATION FOR MEDIATION TRAINING PROGRAMS

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www.law.pepperdine.edu/straus

The Loyola Law School
Center for Conflict Resolution
Los Angeles, CA 90015
(213) 736-1145 (tel)
www.lls.edu

Center for Civic Mediation
Los Angeles County Bar Association
Los Angeles, CA 90055
(213) 896-6533 (tel)
(213) 896-6500 (fax)
www.centerforcivicmediation.org

## PROGRAM STATISTICS

As of December 18, 2012

Number of Matters Assigned
4809
Number of Matters Concluded
4318
Number of Matters Settled
2714
Number of Matters Not Settled
1605
Overall Settlement Rate
63%

**Bankruptcy Mediation News**

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**TO:**