

# Dispute Resolution of **BANKRUPTCY CASES**

**T**he United States Bankruptcy Court for the District of Maryland has been administratively challenged for many years as a result of having one of the highest case loads per judge in the bankruptcy court system.

Although recommendations for additional judgeships for this District were regularly made over the years by the Administrative Office of the U.S. Courts, no authorizations for new judgeships were approved by Congress until 3 additional “temporary” judgeships were recently approved for the District of Maryland in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S. 256), signed April 20, 2005.

To assist in dealing with its heavy docket, the Bankruptcy Court adopted an alternative dispute resolution (ADR) program through an amendment to its local rules and fashioned the program after a successful program implemented by the Bankruptcy

Court for the Eastern District of California. This article will outline the ADR program in the District of Maryland in the hope that litigants in the Bankruptcy Court will consider and possibly elect to utilize ADR as a means of attempting to resolve pending disputes and litigation.

## Alternative Dispute Resolution Rules

ADR of contested bankruptcy matters is essentially voluntary on the part of litigants. If elected by the parties, those proceedings are governed by Local Bankruptcy Rule (“LR”) 9019-2, titled “Alternative Dispute Resolution.” LR 9019-2 establishes the Bankruptcy Dispute Resolution Program of the Court.

The goals and types of ADR processes which can be employed in bankruptcy disputes are described in the preamble to the Rule:

“A Bankruptcy Dispute Resolution Program (“BDRP”) will be maintained and available to facilitate the resolution of disputes. The BDRP is to operate in such a way as to allow the participants to use a variety of alternative dispute resolution methods. These methods may include but are not limited to: mediation, negotiation, early neutral evaluation and settlement facilitation. The specific method or methods employed will be those that are appropriate, as determined by the Resolution Advocate and the parties.”

To date, the most prevalent use of ADR has been non-binding mediation before an impartial mediator (a “Resolution Advocate” under the LR).

## Types of Disputes That May Be Referred to the BDRP

Any controversy arising in an adversary proceeding, a contested matter or

any other dispute in or related to a bankruptcy case is eligible for referral to the BDRP, except for the following:

Issues relating to the employment and compensation of professionals in the case;

Issues relating to compensation of trustees and examiners in the case; Objections to the discharge of a debtor under § 727 of the Bankruptcy Code, unless the objection is joined with a dispute over the dischargeability of debts under § 523 of the Bankruptcy Code; and

All matters involving contempt or other forms of sanctions sought in the case. LR 9019-1(a).

Effective November 12, 2002, Chief Judge James F. Schneider adopted procedures in cases assigned to his docket and referred certain specific kinds of disputes to mediation. Those matters are disputes relating to (i) alimony and child support issues arising in a bankruptcy case; (ii) preference and fraudulent conveyance cases involving claims in excess of \$10,000; (iii) dischargeability complaints involving claims in excess of \$10,000; and (iv) turnover complaints involving assets in excess of \$10,000.

## Commencing ADR

Assignment to the BDRP must be requested in writing by the parties to a disputed proceeding and if requested, the proceeding will be referred to the BDRP by order of the bankruptcy court. However, any bankruptcy judge is authorized, sua sponte, or at the request of only one party, to designate specific matters for referral. If the matter is assigned to the BDRP, the parties are to select the Resolution Advocate from the current roster of approved Resolution Advocates maintained by the court. With the

consent of the court, the parties may select a Resolution Advocate who is not a member of the panel so long as the Resolution Advocate agrees to be subject to the BDRP Rules. Only (i) if the parties cannot agree on the selection of a Resolution Advocate, or (ii) if a judge deems selection by the court to be appropriate under the facts and circumstances of any particular contested matter, can a judge select a Resolution Advocate. LR 9019-2(d).

Significantly, assignment to the BDRP does not alter or affect any time limits, deadlines, scheduling matters, or any orders in any adversary proceeding, contested matter or other proceeding unless specifically ordered by the Court. LR 9019-2(d)(6).

## The Resolution Advocates

Upon appointment, the Resolution Advocate is required to promptly determine if any conflicts or potential conflicts exist under the applicable rules pertaining to the Resolution Advocate’s profession. If a Resolution Advocate’s firm has represented one or more parties to the dispute, the Resolution Advocate is required to promptly disclose those circumstances to all parties in writing. If a party believes that the Resolution Advocate has a conflict of interest, the party is required to bring that matter to the attention of the Resolution Advocate. If the Resolution Advocate does not decline or withdraw from the assignment, the issue of conflict may be brought to the attention of the court by either the Resolution Advocate or the party claiming a conflict. LR 9019-2(d)(7). Since a Resolution Advocate makes no decisions, and his or her sole role in mediation is to attempt to assist the parties in resolving their dispute, it would seem that disputes over conflicts would be quite unusual.

Resolution Advocates are to be compensated by the parties according

to the rates disclosed in the court's website, which identifies the current roster of Resolution Advocates. The order referring the matter to BDRP will set forth the allocation of the Resolution Advocate's fees among the parties. However, each Resolution Advocate has agreed (i) that he or she will serve as a member of the panel for a minimum of one (1) year, and (ii) to evaluate or mediate pro bono matters not more often than once in every six (6) months. The roster of Resolution Advocates is presently set by the court at fifty (50), which is intended to ensure that the panel is comprised of individuals with "broad based experience, superior skills and qualifications." LR 9019-2(b)(4).

### The BDRP Conference

Within seven days of appointment, the Resolution Advocate is required to schedule the BDRP conference, which is to commence not later than sixty days after the date of the appointment, unless the Order of Appointment provides a different time period. The conference is to be held at a suitable "neutral" setting (the Resolution Advocate's office is specifically identified as such a neutral setting). The proceedings are confidential and the parties are required to execute a confidentiality agreement in accordance with Local Bankruptcy Form ("LBF") J3. LR 9019-2(e)(1).

At least eight days prior to the BDRP conference (unless modified by the Resolution Advocate), each party is required to submit a written BDRP Statement to the Resolution Advocate. In addition, the plaintiff or moving party is required to include copies of the complaint or motion and the answer or opposition with respect to the disputed matter. The Resolution Advocate is required to treat the BDRP Statements as confidential and

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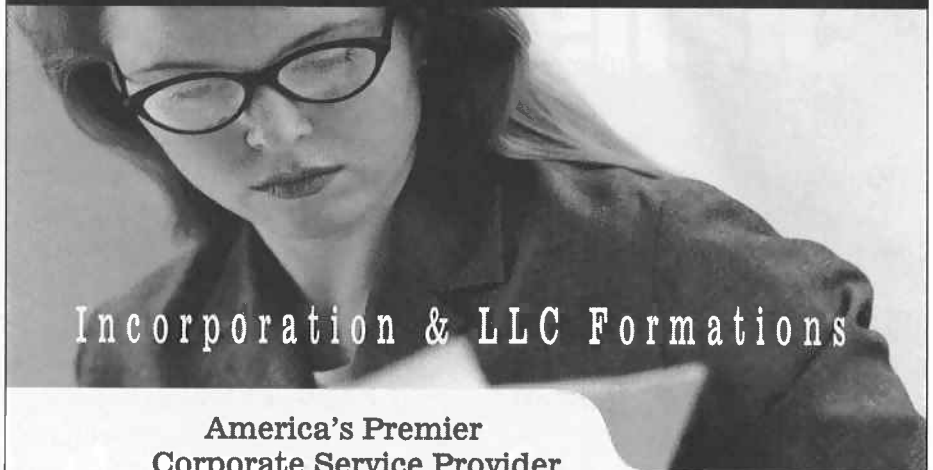


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may not disclose their contents to anyone without the consent of the party submitting it. The BDRP Statements are Not filed with the court. They are only for the Resolution Advocate's use. LR 9019-2(e)(2) and (6).

The BDRP Statements may not exceed ten pages (not counting exhibits and attachments). They are required (i) to identify the client's representative who will be attending the BDRP conference, and (ii) to confirm that that person will have decision making authority on behalf of such party. In addition, the BDRP Statements must include the following:

A brief description of the substance of the dispute.

A statement as to whether or not there are legal or factual issues whose early resolution might appreciably reduce the scope of the dispute or contribute significantly to settlement.

The identification of discovery that could best contribute to allowing the parties to participate in more meaningful discussions.

A history of past settlement discussions, including disclosure of past and pending settlement offers.

An estimate of the cost and time for discovery, pretrial motions, expert witnesses and trial.

The present scheduled dates in the adversary proceeding or contested matter.

LR 9019-2(e)(3). The parties are also required to attach to their BDRP Statements copies of documents out of which the dispute has arisen. LR 9019-2(e)(5).

Counsel for a party who is "primarily responsible" for the matter must attend the BDRP conference. Counsel is required to come "prepared to dis-

cuss resolution of the Matter in detail and in good faith." LR 9019-1(e)(7). Individual parties to the disputed matter and representatives with authority to negotiate and settle the dispute on behalf of non-individual parties, are required to attend the BDRP conference in person, unless excused by the Resolution Advocate for cause. A party or a lawyer who is excused from appearing in person can be required to participate by telephone. LR 9019-2(b)(8).

The BDRP conference is informal in nature. The Resolution Advocate has broad latitude as to how the conference is to proceed and may, as a matter of discretion, provide the attorneys and parties with a written settlement recommendation memorandum or an assessment of the relative strengths and weaknesses of the parties' contentions and evidence. The Resolution Advocate is also authorized to help the parties devise a plan for sharing important information and/or conducting discovery that will allow the parties to participate in expeditious and meaningful settlement discussions or to posture the case for disposition by other means. If, in the judgment of the Resolution Advocate, a subsequent mediation session would promote resolution of the dispute, the Resolution Advocate is authorized to adjourn the BDRP conference and to direct the parties to attend a second BDRP conference. LR 9019-2(b)(14).

If a party willfully fails to attend a BDRP conference, or violates an obligation of the BDRP, the Resolution Advocate is directed to report such failure or violation to the bankruptcy court which can impose sanctions. LR 9019-2(b)(10).

## Post-BDRP Conference Procedure

If the parties reach an agreement regarding the disposition of the mat-

ter during the BDRP conference, the parties are to determine, with the advice of the Resolution Advocate, who will prepare the writing to dispose of the matter. If bankruptcy court approval is required, the parties are directed to promptly submit the appropriate motion or stipulation for court approval. Where a settlement does not require court approval, a written agreement disposing of the matter will be enforceable pursuant to applicable law. LR 9019-2(f).

The Resolution Advocate is required to file (i) a certification as to whether the parties have complied with the BDRP conference requirements (LBF J-4), and (ii) a statistical report to allow the BDRP Administrator to evaluate the BDRP and the efforts of the Resolution Advocate (LBF J-5).

## Impact of The BDRP to Date

To date, the greatest impact of the BDRP has been in the larger bankruptcy cases where numerous preference or fraudulent conveyance actions are filed at one time by a debtor or the litigation representative of a debtor. In one case in the Greenbelt Division, a debtor filed more than sixty separate, adversary proceedings at the same time and sought to recover preferential payments under Section 547 of the Bankruptcy Code. The debtor was in a liquidation mode and the costs of this litigation would significantly affect the ultimate distribution to creditors.

The debtor's attorney recognized this early in the litigation process and sought approval from the bankruptcy court to refer all preference cases to early mediation, even prior to discovery. The bankruptcy court agreed, the entry of a scheduling order in each case was deferred and a stay of discovery was imposed in each case.

The results were extremely beneficial for all. Of the more than sixty

separate, adversary proceedings, approximately one-half settled before the BDRP conference. Of the more than thirty cases in which BDRP conferences were held, all but one settled. The one case that did not settle during the BDRP settled prior to trial.

The savings in discovery and litigation costs inured to the benefit of all creditors of the debtor since the cost of pursuing the preference litigation was greatly reduced. On the other side of the table, the professional fees of each defendant were reduced because there was a voluntary exchange of information by the parties prior to and during the BDRP conferences, and an early evaluation of the strengths or weaknesses of their defenses to the preference claims. With the primary benefit of mediation being the involvement of a neutral party dealing directly with

the litigant or litigant's representative, the entire caseload of more than sixty adversary proceedings were resolved with minimal court involvement and with substantial savings of litigation costs to all parties.

BDRP has been a win-win situation for litigants and the bankruptcy court. However, because of its voluntary nature, litigants have not yet fully embraced the program. Other bankruptcy courts have adopted mandatory mediation for certain kinds of disputes and the number of case referrals in those courts is obviously higher than in Maryland. Some of the mandatory provisions in other bankruptcy courts were necessary to deal with the heavy burden of pending adversary proceedings.

For example, in the District of Delaware, all preference cases filed after May 1, 2004 which are not

resolved within one hundred twenty days after the commencement of the lawsuit, are automatically referred to mediation. When mandatory mediation of preference cases was adopted by the District of Delaware, that court had over 15,000 adversary proceedings pending, and expected another 10,000 adversary proceedings to be filed that year.

Even though referral to BDRP is voluntary, litigants may well benefit from such a referral. The worst possible result is that the matter cannot be resolved. However, the alternative of promptly resolving litigation and thereby saving significant costs and avoiding the risks and uncertainty of an adverse result, clearly outweigh the burden.

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