For a Mandatory Mediation in Mass Tort Chapter 11 cases

Written by:
Isaac Stevens (LL.M. Candidate – Class of 2020)
University of Pennsylvania Law School; Philadelphia, Pennsylvania
istevens@pennlaw.upenn.edu

I. Introduction

One of the many strengths of chapter 11 of the U.S. Bankruptcy Code is its success in resolving complex mass tort litigation cases.[1] Chapter 11 has long been considered an ideal forum for providing refuge to both the defendant and the multiple victims, providing "a fair and effective vehicle for dealing with mass tort liability."[2] The ability to halt pending litigation,[3] centralize massive claims in a single procedure,[4] and resolve pending and future litigation[5] are some of the features that have caused both practitioners[6] and academics[7] to consider it an effective mechanism to deal with mass tort liabilities.[8]

While traditionally, mass tort bankruptcies have been related to asbestos[9] and product-liability cases,[10] the range of issues has grown consistently in the last decade to include proceedings related to the opioid crisis,[11] wildfires,[12] and sexual abuse.[13] 2019 was

[1] Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. Pa. L. Rev. 2045, 2048 (2000).
[2] *Id.*
[3] Barbara J. Houser, *Chapter 11 as a Mass Tort Solution*, 31 Loy. L. A. L. Rev. 451 (1998).
[4] *Id.* at 452.
[5] *Id.* at 456.
[6] *See generally Id.* (arguing that chapter 11 is a powerful tool to assist a company burdened by mass tort litigation).
[7] *See generally* Alan N. Resnick, *supra* note 1 (arguing that bankruptcy provides an appropriate framework to deal with mass tort litigation).
[8] Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613, 1615 (2008).
[9] Stephen J. Carroll et al., *Asbestos Litigation* 109 (2005).
[10] Leslie A. Berkoff et al., *Bankruptcy Mediation* 45 (2016).
[11] *E.g.*, *Insys Therapeutics Inc.*, No. 19-11219, (Bankr. D. Del. June 6, 2019); *Purdue Pharma L.P.*, No. 19-23649, (Bankr. S.D.N.Y. Sept. 15, 2019).
[12] *E.g. PG&E Corp.*, No. 19-30088, (Bankr. N.D. Cal. Jan. 29, 2019).
[13] *E.g. Archdiocese of Agana,* No. 19-00010, (Bankr. D. Guam. Jan. 16, 2019); *Diocese of Rochester*, No. 19-20905, (Bankr. W.D.N.Y. Sept. 12, 2019).

a particularly prolific year in mass tort bankruptcies, showing that the trend remains on the rise with no signs of future decline.[14]

Since the debtor's insolvency is not a requirement of the Bankruptcy Code, there has been massive application of reorganization in these scenarios, allowing perfectly solvent companies to use chapter 11 as a defense mechanism against the initiation of large-scale litigation. Hence, for many defendants (debtors), chapter 11 is seen more as a procedural mechanism for handling massive litigation, than as a process for the rescue or restructuring of a distressed debtor.[15]

From the victim's perspective, chapter 11 also provides significant relief. Instead of worrying about starting a race to get hold of the debtor's assets quickly in a context where the debtor receives an avalanche of lawsuits,[16] the victim can be confident that the system will provide her - ideally - with an equitable distribution, without incurring the "extraordinarily expensive" costs of one-to-one litigation in the tort system,[17] and without having to assume the risk of what will happen to the debtor's assets during a lengthy judicial process.[18]

However, despite the widespread application of chapter 11 to resolve mass tort litigation, existing regulation and practice have been sharply, and in some cases justly, criticized.[19] In this paper, I will suggest that the criticisms of the treatment of mass tort in

[14] *See supra* notes 11, 12, and 13.
[15] Thomas A. Smith, *A Capital Markets Approach to Mass Tort Bankruptcy*, 104 Yale L.J. 367, 373 (1994).
[16] Stacy L. Rahl, *Modification of a Chapter 11 Plan in the Mass Tort Context*, 92 Colum. L. Rev. 192, 211 (1992).
[17] Georgene Vairo, *Mass Tort Bankruptcies: The Who, The Why and The How* 2 (Loy. L.A. Research Paper No. 21, 2003).
[18] *See Id.* ("the one-on-one model of litigation threatens to overly reward some plaintiffs, but leave others with nothing as corporate defendants' assets are depleted through the litigation process.").
[19] Joseph F. Rice & Nancy Worth Davis, *Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S. C. L. Rev. 405, 409 (1999).

chapter 11, which are mainly high costs and delays, are concerns that can be overcome through mediation, which has become an increasingly important feature of this new wave of mass tort bankruptcies. Given the benefits that mediation brings to all parties in these complex disputes, I argue that mediation should be made mandatory in mass tort chapter 11 cases. Mandatory mediation (which refers to the way the process is initiated and has nothing to do with ensuring a particular outcome) would give the interveners the power to mediate their disputes through this cooperative and cost-saving alternative dispute resolution mechanism, even if the particular bankruptcy judge or the participants do not typically favor it.

II. Criticism of the Treatment of Mass Tort Claims in Chapter 11

Exacerbated costs and excessive delays in the compensation of massive victims, which include undesired inefficiencies,[20] are some of the criticisms that are often reiterated when examining the treatment of mass tort claims in chapter 11.[21] I will briefly review these criticisms.

A. High costs in mass tort chapter 11 cases.

According to Professor Mackenzie, "[c]omplaints about the cost of bankruptcy are pervasive. Those complaints reach beyond the context of mass tort cases, but they are particularly pointed in mass tort cases."[22] The traditional criticisms of chapter 11 being

[20] S. Elizabeth Gibson, Fed. Judicial Ctr., *Judicial Management of Mass Tort Bankruptcy Cases*, 2 (2005).
[21] Rice & Worth, *supra* note 19 at 409. ("[C]hapter 11 structure results in delay and high transaction costs (…) [t]he interminable delays and high costs become coercive devices, placing tort victims at a disadvantage in the bankruptcy process.").
[22] Troy A. McKenzie, *The Mass Tort Bankruptcy: A Pre-History*, 5 J. Tort L. 59, 73 (2012).

"expensive" are repeated, emphasizing that the costs of mass tort bankruptcies are even higher than the costs of a conventional restructuring process.[23]

Most of these complaints are related to the overcharge of professionals' fees (both legal and financial) and transaction costs that are directly related to the level of litigation of the specific case. Aggressive litigation implies more working hours for the participants and the Court, more overwork, and consequently, more costs. In the restructuring arena, an undesirable effect of aggressive litigation is that the positions of the parties (which are already worn out from the phase before the bankruptcy proceeding) begin to harden and polarize. Such polarization harms a process in which the arrival at an agreement (the Reorganization plan) is - or rather, should be - the desired objective.

B. Excessive delays in plan confirmation and payments to creditors.

A second complaint against the treatment of mass torts in Chapter 11 is simply that "it takes too much time."[24] Too much time for the confirmation of the plan, and too much time for the victims (non-consensual creditors) to receive their payments.

Some of the delays in procedure, from filing to confirmation, can be explained by the complexity of this type of process,[25] but others are caused by the manifest animosity among the participants hindering any kind of agreement.[26] Cases often adopt a process of constant action and reaction,[27] and it is precisely this excessive litigation that leads to delay in their final resolution.

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[23] *Id.*
[24] *Id.*
[25] *See* Rice & Worth, *supra* note 19 at 459 (arguing that complexity usually generate an extension of both of the automatic stay and the exclusive periods to propose a plan).
[26] James M. Peck, *Mediation meditations: Understanding the mediation culture of Chapter 11*, Int. Ins. & Res. Rep. 2018/19 8 (2018).
[27] *Id*.

Delays in a restructuring setting are a much greater concern than costs alone, especially when we consider the reputational factor (related to the rational debtor's desire to exit chapter 11 as soon as possible) and the potential frustration of the bankruptcy goals.[28]

The Johns-Manville case is representative of this idea. This case is not only the most commented mass tort case in the Bankruptcy Code era, but also is recognized as the "first case"[29] that finds a solution to massive litigation in bankruptcy. "Johns-Manville filed its petition in 1982, which was finally approved six years later, in 1988. Payments began then but were suspended in 1990 (Smith, 1990) and did not resume again until 1995, 13 years after Manville's initial filing".[30]

III. The Benefits of Mediation in Complex Bankruptcy Cases.

In the last decades, mediation has played a crucial role in complex bankruptcy cases,[31] providing the parties a nonbinding resolution procedure in which they can be guided by a neutral expert during their negotiations to reach a fair settlement.[32] Good reasons justify this trend:

[28] On this point, it has been said that "The twin policy objectives of bankruptcy law are to rehabilitate the debtor and provide them with a "fresh start," while maximizing recovery to the creditors. These goals are frustrated when bankruptcy proceedings linger unresolved". Steven R. Wirth & Joseph P. Mitchell, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation*, 6 Am. Bankr. Inst. L. Rev. 213, 234 (1998).

[29] The label of "first case" is not accurate. Recent research about the history of mass tort bankruptcies has shown that the *Ringling Brothers Circus* was the first case, even before the enactment of the U.S. Bankruptcy Code, and that at the time that Johns Manville sought relief under Chapter 11 case, there was at least one other asbestos company that had requested the same relief under the Code. *See* Troy A. McKenzie, *supra* note 21, at 59,60 (explaining the development of a pre-Code arrangement for the resolution of enterprise-threatening mass tort claims against a firm); *See also* Robert Jones, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 Harv. L. Rev. 1121,1122 (1983) (commenting multiple features of the Johns Manville's case).

[30] Carroll et al., *supra* note 9, at 119.

[31] Jacob A. Esher, *Alternative Dispute Resolution in U.S. Bankruptcy Practice*, 4 S. New Eng. Roundtable Symp. L.J. 76, 78 (2009).

[32] Gibson, *supra* note 20, at 108.

- Mediation fits perfectly within bankruptcy settings. In fact, both are considered a form of alternative dispute resolution,[33] and in the specific case of chapter 11, reaching a voluntary agreement is also a primary goal. So much more can be accomplished, then, if in the process of seeking an agreement, the interveners are assisted by an expert and neutral third party. In this way, chapter 11 is a fertile ground for mediation.

- Flexibility, allowing for adaptation of the mediation to the particularities of each case.[34] This is particularly important in mega chapter 11 cases, given the existence of a plurality of creditors with antagonistic and diverse needs and interests. Flexibility has allowed for both informal processes and formal processes to try to reach the broadest possible settlement, the former as happened in the *Tribune* case, and the latter (including the submission of briefing and arguments before the appointed mediator) as occurred in the *Cengage Learning* case.[35]

- Non-adversarial atmosphere. Mediation also creates a safe environment to express underlying interests[36] that usually cannot be expressed in a brief or even communicated to the bankruptcy judge. It also encourages the parties to put their cards on the table, facilitating negotiation. The fact that the parties are being guided by a neutral third party (i.e., a former bankruptcy judge, as has been the rule in most of the cases) allows them to calm down and "to manage outbreaks of hostility that distract from the collective goals of reorganization."[37] The role of the mediator, at this point, is fundamental. It is not the same for a lawyer to acknowledge a weakness in the case or give the opposing party a concession

[33] Ralph Peeples, *The Uses of Mediation in Chapter 11 Cases*, 17 Am. Bankr. Inst. L. Rev. 401, 402 (2009)
[34] Wirth & Mitchell, *supra* note 28 at 216.
[35] *See* more details about these cases in Damian S. Schaibke & Eli. J. Vonnegut, *The rise of Plan Mediation: Benefits and Pitfalls*, 33 Am. Bankr. Inst. J. 8, 28-29, 84-85 (2014).
[36] Leif M. Clark, *Mediation as an Effective Alternative in Bankruptcy Litigation, Part I*, 18 Bankr. & Insolvency Litig. 12, 14 (2013).
[37] Peck, *supra* note 26, at 8.

before the judge, as it is for the mediator, especially when any concession may be detrimental to the defense of their client if the agreement is not closed.[38]

- Focus on the issues. The presence of a neutral mediator facilitating an eventual settlement allows the parties to focus concretely on what they expect to obtain during the process.[39] On many occasions, the multiple aspects that are generated in mega chapter 11 cases make it easy for the participants to lose focus, taking flags that do not belong to them or engaging in battles that will not necessarily guide them to satisfying their interests. Efficient and properly targeted mediation allows the parties to focus on the relevant issues.[40]

- Confidentiality.[41] The confidentiality of negotiations has traditionally been recognized as one of the advantages of mediation. It is one of the core pillars of mediation[42], making it appropriate for bankruptcy scenarios, since privacy in these cases has been vigorously defended by various courts.

IV. Mediation in Bankruptcy as an Alternative to Address the Critics of the Treatment of Mass Tort in Chapter 11

If mediation appears to be a suitable tool for a traditional chapter 11 case, in the event of a mass tort bankruptcy case, it is indispensable. This is also the reason why mediation has been widely accepted in these complex processes, playing a predominant

[38] Civil Litigation Management Manual (Second), 78 (2010).
[39] Peck, *supra* note 26, at 9.
[40] *Id.*, at 12.
[41] "Mediation sessions are confidential and are structured to help parties clarify their understanding of underlying interests and concerns, probe the strengths and weaknesses of legal positions, explore the consequences of not settling, and generate settlement options". Civ. Lit. Man. Manual, *supra* note 38, at 78.
[42] "Courts recognize that this precept of confidentiality is a hallmark of the mediation process, because it permits the parties to seek a mutually beneficial, interests-based outcome without fear of compromising a litigation position if the mediation is unsuccessful". *In re Brizinova*, 565 B.R. 488, 498 (Bankr. E.D.N.Y. 2017).

role[43] as an efficient mechanism to avoid additional costs and to reduce unwanted delays.[44] The benefits of mediation are precisely calibrated to address the principal criticisms of a traditional mass tort bankruptcy.

An excellent example of this understanding is the strategy applied in the recent filing for chapter 11 relief by The Boy Scouts of America, in which this non-profit corporation has requested the appointment of a mediator, exemplifying the virtues of mediation in these scenarios. "[T]he appointment of a Mediator at the outset of these cases is a cornerstone of the Debtor's restructuring strategy. The complexity and sheer number of issues that must be resolved in connection with a global resolution of abuse claims under a plan of reorganization cannot be understated (….) Litigating all (or even some) of these issues would entail extensive discovery costs and professional fees and expenses and extend the timeline of the Debtors' chapter 11 cases, thereby compounding such costs".[45]

In this regard, it has been argued that given the complexity of the restructuring process involving mass tort claims, having a mediator would be especially beneficial given mediation's inherent dedication to the consensual resolution of the multiple issues of the case and reducing the times of judgment and the costs involved.[46] Donald L. Swanson has exemplified the virtue of mediation in mass tort bankruptcy settings in the dioceses bankruptcies, noting that while some dioceses "fight hard to avoid liability," spending large

[43] Gibson, *supra* note 20, at 108.
[44] Peck, *supra* note 26, at 10.
[45] Debtors' Motion for the appointment of a judicial mediator at 10, 11, *The Boy Scouts of America,* No. 20-10343-LSS (Bankr. Del., Feb. 18, 2020).
[46] *See* Steven R. Wirth & Joseph P. Mitchell, *A Uniform Structural Basis for Nationwide Authorization of Bankruptcy Court-Annexed Mediation,* 6 Am. Bankr. Inst. L. Rev. 213, 230 (1998) (explaining how quickly disposing of chapter 11 will benefit the bankruptcy court).

sums on professional fees, others prefer to avoid paying these fees and have a more significant budget to settle the cases in the context of mediation.[47]

V. The Need to Establish a Mandatory Mediation in Mass Tort Chapter 11

The traditional view of mediation puts the focus on voluntariness. This is reflected in most local regulations on mediation in bankruptcy.[48] Professor Peeples argued that "[a]n order for mediation was even less likely, when at least one party objected; courts ordered referrals to mediation when a party objected occurred less than 7% of the time"[49]. Mediation "apparently"[50] is "treated as voluntary on both ends: the decision to participate, and the decision whether to reach an agreement."[51] We consider that such conclusions are not ideal when dealing with mass tort chapter 11 cases. Years ago, Kenneth R. Feinberg posited that "What should be emphasized is the importance placed by the mediator on the cooperation of the court and, even more importantly, the parties. Once negotiations begin, once the parties come to the negotiation table with the understanding that an attempt will be made to resolve the controversy, I find that it is more than likely that resolution will be achieved. The problem is getting the parties to the table!"[52] This is a logical problem even for those who defend the role of mediation in bankruptcy scenarios. How does one convince a hostile litigant that mediation is an option? The premise of many local regulations, which assume that any mediation will be initiated by the mutual agreement of the parties, does not help.

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[47] Donald L. Swanson, *How Mandatory Mediation Succeeds: Seven Illustrations*, Mediatbankry Blog (Apr. 9, 2020, 5:30 PM), https://mediatbankry.com/2017/10/03/how-mandatory-mediation-succeeds-six-illustrations/.
[48] Peeples, *supra* note 33, at 406.
[49] *Id.*
[50] *Id.*
[51] *Id*.
[52] Kenneth R. Feinberg, *Reporting from the Front Line – One mediator's experience with Mass Torts,* 31 Loy. L.A. L. Rev. 359, 371 (1998).

Mediation is seen by some bankruptcy litigators as a mechanism that does not generate added value, since usually such litigants rely on their own negotiation skills. Under the premise that they are good negotiators, they consider that the intervention of a neutral third party is not propitious among sophisticated practitioners. This paradigm must be changed, and the best way to change this it would be to incorporate a requirement in the bankruptcy local rules that mass tort chapter 11 cases must go through a mandatory mediation.[53]

On the subject of mandatory mediation, it has been pointed out in comparative law that "research indicates that once at the mediation table, skilled mediators can guide even the most reluctant of parties to recognize opportunities for resolution."[54] This reasoning can be extrapolated to the American situation as well.

Another virtue of compulsory mediation relates to timing. Knowing in advance that the procedure will involve a mediation, which will be initiated at the outset of the case, is far more efficient than initiating one after the parties have disputed various aspects of the case, invested enormous resources, and fractured their relations. As was pointed out by the Judicial Conference of the United States, "early settlement is one objective of effective litigation management."[55] Once parties start spending money on the discovery, they often believe that the only way to justify the expense (to themselves or their client) is to have their claim heard by the court.

Mandatory mediation, while a novel proposal in terms of its applicability to mass tort cases, is not entirely novel in bankruptcy. In the Delaware bankruptcy court, a

[53] I support the idea of using local rules (rather than a change to the Bankruptcy Code) to implement mandatory mediation, to avoid breaking into the legislation process. However, debtors might file in districts that do not have the mandatory mediation rule to bypass this alternative resolution mechanism. Works like this, the experience of successful mediations, and the effort of the bankruptcy community overall, should be oriented to ensure that many districts adopt the mandatory mediation rule.
[54] Nadja Alexander, *International and comparative mediation: Legal perspectives*, 172 (2009).
[55] Civ. Lit. Man. Manual, *supra* note 38, at 69.

mandatory mediation program has been in place since 2004. Due to its results, the program has been somewhat expanded.[56] Other jurisdictions have also incorporated mandatory mediation for different chapters of the U.S. Bankruptcy Code, such as the State of California, about municipal bankruptcy cases derived from chapter 9.[57]

The advantages associated with mediation are many, and include the pooling of positions and reduction of costs and time frames so that creditors can increase their recovery and eventually the debtor can effectively reorganize its business unit. These benefits are enough to justify that in all mass tort cases, in the context of chapter 11, a flexible, confidential, transparent, and expertly conducted process be required to be initiated. It should be noted that even if no agreement is reached, the mere fact of having activated the procedure generates positive externalities for the case in question;[58] hence it should not be a cause for concern that cases that enter into mediation do not necessarily end in an agreement.

A final argument for making mediation mandatory is based on the need for bankruptcy to provide special protection for torts victims. The position of a tort victim is different from that of a creditor who has a contractual non-bankruptcy right. High costs and delays affect victims more than traditional corporate creditors, and therefore victims benefit

[56] *See* Bankr. D. Del. R. 9019-5(a) "(...) 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").

[57] *See* Michael Galen, *Chapter 9 Bankruptcy in California: The Efficacy of Mandating Alternative Dispute Resolution in Municipal Bankruptcy Filings*, 15 Cardozo J. Conflict Resol. 547 (2014), (explaining recent legislation passed in California that mandates mediation in municipal bankruptcies).

[58] It has been said that "Even if the parties' dispute is not settled during the mediation process, mediation often forces the parties to reevaluate their claims and positions and serves to narrow and clarify issues". *Smith Wholesale Co. v. Philip Morris USA Inc*., No. 2:03-CV-221, (E.D. Tenn. Aug. 23, 2005).

more from mediation than any other group of creditors, so to safeguard their position,[59] it becomes necessary to establish a mandatory rule to assure their right to access to mediation.

VI. Conclusion

The advantages of mediation have been widely recognized, and mass tort chapter 11 cases are a fertile terrain for this alternative dispute resolution mechanism. The fact that the advantages provided by mediation coincide with the criticisms that are often made of the treatment of mass tort in chapter 11 invites the conclusion that mediation should be available to the various participants, given the advantages it provides for the parties, the court, and the system in general. To avoid these benefits being granted only upon reaching an agreement, or to avoid potential bias of a judge against mediation, local rules should consider some form of mandatory mediation for mass tort bankruptcy cases. As experience from mediation in chapter 11 cases supports, one of the most challenging aspects of the mediation process is bringing the parties to the table. This shift from the courthouse to the negotiating table is necessary to change the mindset and disposition of litigants who look down on this means of alternative dispute resolution. Moreover, those who have had experience with court-ordered mediation have recognized that even without an agreement, mediation in itself is fruitful. Therefore, the establishment of mandatory mediation programs would, without doubt, contribute to a more efficient resolution to mass tort claims in restructuring scenarios.

[59] The consideration that tort victims (as nonconsensual creditors) require special protection in bankruptcy scenarios has been especially highlighted in the United States. "In the USG Corporation bankruptcy, Judge Alfred Wolin ordered that claimants with cancer would have their claims processed before claimants with non-cancer injuries, essentially establishing an expedited docket. Judge Wolin also appointed special masters and mediators to work with bankruptcy parties to achieve consensual reorganization plans". Carroll et al., *supra* note 9, at 67.