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A UNIFORM STRUCTURAL BASIS FOR NATIONWIDE AUTHORIZATION OF BANKRUPTCY COURT−ANNEXED MEDIATION

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I. INTRODUCTION

Since the enactment of the Bankruptcy Reform Act of 1978, [1] there has been an explosion in the number of bankruptcy filings. [2] Driven by the high costs and inefficiencies of litigation, [3] increasing pressure to reduce dockets, [4] and dramatic increase in bankruptcy petitions, an increasing number of bankruptcy courts have implemented Alternative Dispute Resolution ("ADR") [5] methods. [6] The use of ADR in bankruptcy courts offers parties a useful option for settling their differences with less trauma. [7] In addition, ADR helps courts reduce the sheer volume of cases, and eliminates or reduces the cost and delay of litigation. [8]

Mediation has been the most commonly used form of ADR in bankruptcy cases. [9] This distinct type [10] of ADR can aid in reducing court congestion and delay [11] through the use of a neutral mediator who informally guides the parties through the negotiations. [12] Typically, the mediator allows the parties to tell their side of the story through a series of private and joint sessions. [13] Mediation is not the determination of the strengths and weaknesses of a parties' case, but rather is a mechanism by which to reach a solution consistent with the goals of the participants. [14]

As a court of equity, the bankruptcy tribunal constantly seeks to improve efficiency without sacrificing fairness. [15] However, bankruptcy courts have little guidance when it comes to court−annexed ADR and, therefore, a vast majority of courts have failed to adopt ADR programs. [16] Furthermore, many bankruptcy judges have refused to take an active role in the administration of chapter 11's by failing to implement case management tools that are crucial to the effective resolution of these cases. A case management approach to chapter 11 mediation is particularly useful because it allows judges to assure that the process for addressing the debtor's legal and business problems will produce a prompt and effective result. [17]

This note analyzes the emerging use of bankruptcy mediation programs and discusses the legal and practical bases for such use. Part I considers the basic characteristics of mediation and bankruptcy mediation programs. Part II reviews how some bankruptcy courts interpret today's statutory language to glean authority for the use of the mediation process. In addition, Part II reviews the National Bankruptcy Review Commission's ("Commission") proposal to create a uniform structural basis for mediation in bankruptcy courts. Part III discusses the goals and purposes of chapter 11, in an effort to illustrate how mediation techniques would be particularly useful in business reorganizations. Part IV suggests additional changes to the proposed system that will facilitate bankruptcy mediation programs, emphasizing the current use of judicial case management techniques, in an effort to illustrate how these revisions can improve chapter 11's effectiveness by markedly reducing the typical duration of its cases. [18]

II. THE MEDIATION PROCESS

A. Characteristics

The mediation process is much less formal than a court proceeding, and takes place in a neutral setting mutually agreed upon by the parties and the mediator. [19] Mediation is intended to take place swiftly. [20] Resolution is arrived at more quickly than bankruptcy litigation and results in substantial savings because attorneys typically spend less time with trial preparation. [21] Also, mediation is more flexible than litigation because it is not bound by evidentiary and procedural rules. [22]

The mediator usually begins the conference by making introductions and explaining the entire process to the parties. The parties are then given equal opportunities to present their viewpoints. [23] Typically, the mediator summarizes the parties' assertions and highlights the key issues in controversy that will be addressed during the conference. The mediator also tries to elicit proposed solutions from the parties. [24]

The mediator may, if necessary, decide to caucus [25] separately with each of the parties so that they may have forthright and nonrestrictive discussions. After the caucuses are held, the mediator brings the parties together and directs any additional discussions. [26] If no understanding can be reached, the mediator ends the meeting and urges the parties to work toward a resolution. [27] However, if the parties do reach a settlement, the parties must submit the executed stipulation agreement to the court for approval, usually within a short period of time. [28] Furthermore, Bankruptcy Rule 2002(a)(3) requires that not less than 20 days advance notice be given to all creditors of the date of the hearing for approval of the compromise, unless the court, for cause, directs otherwise. [29]

Settlements are typically evaluated under a "fair and equitable" standard, [30] with the overriding concern of the bankruptcy court to protect the best interests of the estate. [31] Therefore, courts must develop ways to resolve contested matters without the use of extra judicial resources. [32]

B. Bankruptcy Court−Annexed Mediation Programs

Authority for mediation programs in bankruptcy courts is thought to be derived from a combination of statute, rules of procedure, and the court's inherent power. [33] The first bankruptcy mediation program was established in 1986 in the Bankruptcy Court for the Southern District of California. [34] Several other districts have since adopted mediation pilot programs, [35] which have generally been favorably received. [36]

There are several different views on which classes of bankruptcy disputes are most amenable to successful mediation. [37] Some commentators have found that the "most notable impact of ADR in bankruptcy programs is in the resolution of many smaller adversary proceedings through the use of unpaid or nominally paid mediators." [38] However, bankruptcy courts have successfully used mediation to resolve single creditor claims, [39] to liquidate or determine multiple creditor claims, [40] and to confirm consensual plans of reorganization. [41]

Bankruptcy proceedings encompassing matters suitable for mediation are often assigned to mediation by the court or upon motion by either party. For example, in the Eastern District of Virginia, a case can be assigned to mediation by joint request of the parties or by court order. [42] In the Southern District of California, cases are referred to mediation by the court. [43] While in the Middle District of Florida, a proceeding may be sent to mediation by a motion from either party or by the court. [44] Typically, the parties are free to choose a mediator from a court−annexed list. If they wish to choose someone else they must get court approval. [45]

It seems inevitable that these ADR programs are here to stay, therefore, it is imperative to examine them and to address the concerns that anyone involved in bankruptcy may have regarding the mediation process.

III. DEBATE OVER THE USE OF MEDIATION IN BANKRUPTCY

Recently, there has been an increased amount of discussion and debate regarding the use of mediation in bankruptcy. [46] Much of this discussion and debate arises from the ill−defined statutory language regarding a bankruptcy court's authority for the use of mediation. [47] For a bankruptcy court to institute a mediation program in its district, it must operate within the rules and laws promulgated by the Judicial Code, the Bankruptcy Code, and the Federal Rules of Bankruptcy Procedure. [48] However, neither the Bankruptcy Code

nor the Federal Rules of Bankruptcy Procedure clearly authorize or give specific guidelines for the use of mediation in bankruptcy courts. [49]

There may be concerns about whether courts are authorized to mandate mediation without the consent of the parties. However, since mediation is not binding, it should be no problem for a court to refer a matter to mediation when the court determines that no prejudice will likely occur. [50] Further, withholding consent by a party to the dispute could be used as a delay tactic or leverage tool. [51] Also, since several districts already have established some mediation programs, [52] many commentators have questioned whether it is necessary to enact specific statutory authority. [53] Despite this, however, the limited number of bankruptcy courts that have mediation programs usually rest their authority on shaky and ill−defined foundations. [54]

A. Present Day Authority for Court−Annexed Mediation

On October 26, 1990, Congress enacted the Judicial Improvements Act of 1990 [55] ("JIA") which requires each federal district to develop a civil justice expense and delay reduction plan. [56] Title I of the JIA, known as Civil Justice Reform Act [57] ("CJRA"), was enacted to reduce delays associated with the civil litigation process. [58] Section 103 of the CJRA requires district courts to "formulate plans which may include . . . authorization to refer appropriate cases to alternative dispute resolution programs . . . including mediation . . ." [59] Also enacted in 1990, the Judicial Improvements and Access to Justice Act [60] ("JIAJ"), provides for the use of arbitration in the District Courts, but speaks only generally of bankruptcy. [61] Additionally, 28 U.S.C. § 157 "authorizes the bankruptcy courts to determine cases referred to by the District Court." [62] And as bankruptcy courts are units of the district court, the references to "district court" in the JIA, CJRA, and the JIAJ may be read to grant the same authority to use mediation programs in bankruptcy courts. [63] Consequently, many bankruptcy courts have based their use of mediation programs on this statutory language. [64]

Moreover, Rule 16 (c) of the Federal Rules of Civil Procedure has historically been the legal predicate upon which courts have found the authority for court−annexed mediation [65] based on the court's inherent power to control its docket. [66] Furthermore, section 105 of the Bankruptcy Code, [67] added by the Bankruptcy Reform Act of 1994, [68] provides important statutory authority for use of mediation procedures in bankruptcy cases. [69] The basic premise behind section 105, as indicated by its legislative history, is that the amendment "authorizes bankruptcy judges to . . . manage their dockets in a more efficient and expeditious manner." [70] Therefore, the rationale in each instance is that bankruptcy judges are given considerable latitude to compel parties to submit their dispute to ADR prior to trial, because mediation promotes just, speedy and inexpensive determinations of a dispute. [71] What is lacking, however, is a unifying procedural framework authorizing mediation in bankruptcy courts. [72] This will help establish a body of case law interpreting mediation so bankruptcy court litigants can become more knowledgeable with the extent and limitations of the mediation process. Therefore, it is these authors' contention that the adoption of the Bankruptcy Review Commission's Proposal will enhance the use of mediation, thus limiting its unpredictability. This will help bridge the gap between what has become a veritable "morass of uncertainty and statutory vagueness." [73]

B. Bankruptcy Review Commission Proposal

2.4.7 *Authorization for Local Mediation Programs*

> Congress should authorize judicial districts to enact local rules establishing mediation programs in which the court may order non−binding, confidential mediation upon its own motion or upon the motion of any party in interest. The court should be able to order mediation in an adversary proceeding, contested matter, or otherwise in a bankruptcy case, except that the court may not order mediation of a dispute arising in connection with the retention or payment of professionals or in connection with a motion for contempt, sanctions, or other judicial disciplinary matter. The court should have explicit statutory authority to approve the payment of persons performing mediation functions pursuant to the local rules of that district's mediation program who satisfy the training requirements or standards set by the local rules of that district. The statute should provide further that the details of such mediation

programs that are not provided herein may be determined by local rule. [74]

Much of the debate over whether bankruptcy courts have the authority to use mediation pursuant to district court and bankruptcy court rules, regulations, and guidelines will be settled if the Commission's proposal is enacted. The Commission's proposal is a first step in moving many bankruptcy courts into the mainstream trend of using mediation as a method of dispute resolution and will cure them of their "administration phobia" regarding these programs. [75]

The Commission contends using mediation is a low cost, high yield alternative to litigation. [76] However, many bankruptcy courts have been reluctant to implement mediation programs because of the lack of clear and concise mediation guidelines within the Bankruptcy Code or Federal Rules of Bankruptcy Procedure. [77] Additionally, some bankruptcy judges have argued that the use of mediation in bankruptcy cases is not authorized at all in the Bankruptcy Code. [78] In accordance with these concerns, the Commission has recommended that the Judicial Code and the Federal Rules of Bankruptcy Procedure expressly authorize the use of mediation programs. [79] More specifically, they recommend that bankruptcy judges should be authorized to order parties to attempt mediation. [80]

The Commission is not trying to implement a rigid national mediation rule that will be binding on all bankruptcy courts. [81] Instead, the Commission seeks to establish a nationwide authorization of mediation providing a uniform structural basis for bankruptcy courts to formulate their own mediation programs. [82] The theory is that by establishing this uniform structural basis, bankruptcy courts will be able to implement local rules specifically tailored to better serve the disputes that dominate their particular docket. [83] Also, the use of ADR methods as a case management tool is gaining more acceptance each year. [84] ADR programs offer the parties the ability to settle legal disputes efficiently, promptly, and to their mutual satisfaction, which in turn reduces costs, delays, and the burden that long protracted litigation places on courts. [85]

IV. A NEED FOR GUIDELINES: BUT WHO SHOULD GUIDE? [86]

Although many proponents seek a national [87] bankruptcy mediation rule, [88] such a rigid design would run the risk of paralyzing ADR programs which were enacted for the very purpose of making the judicial system more responsive and flexible to the needs of its citizens. [89] Therefore, the Commission's proposal to enact national authorization for mediation will allow for the continued flexibility of court−annexed mediation programs, which are best accomplished by implementing local bankruptcy rules. [90] There are numerous differing variables present in each district that may effect how a local rule [91] would be promulgated; [92] thus, implementing local rules would allow a district to revise these ADR programs to continuously meet their changing needs. [93]

A local rule should allow the court to assign a matter to mediation sua sponte or upon motion of any party in interest, or by motion of the United States Trustee. [94] This clause would not pose any serious constitutional challenges because mediation proceedings are not binding. [95] Furthermore, the local rule should not relieve the debtor, any party in interest, attorneys, or the United Trustee from complying with the United States Code, bankruptcy rules, or the local rules. [96] Also, in order to discourage parties from seeking mediation as a delaying tactic, it is important that the local rules contain a provision that will not allow for a stay of a proceeding, upon assignment to mediation, absent court order. [97]

Additionally, the local rules would need to establish a register of active mediators and a means by which these mediators are to be chosen and trained. [98] Once the qualifications and establishment of the register for mediators is completed, the local rule must provide authority to assess the costs of mediation to the parties. [99] The local rule must also include the procedure and standard for participation in mediation and provide a means to insure the confidentiality of the mediation. [100] Therefore, the establishment of court−annexed mediation through the use of local rules provides courts a template from which to mold a more complex mediation process when needed. [101]

Although the federal unification of the use of mediation is needed, local rule−making and informal innovation are important sources of procedural alterations. [102] From the wide array of cases which have utilized mediation, it is clear that mediation is not only a feature of the pretrial process, but is also used as a remedial provision in large scale cases. [103] Although not all judges are proponents, [104] many have stressed the need for expanding authority over the pretrial process [105] and increasing opportunities for the use of mediation. [106] Moreover, a number of judges, as well as the authors, are eager to expand the role of the judge as a mediator, particularly in chapter 11 reorganizations. [107] Therefore, in addition to federal authorization for mediation and the implementation of local rules, it is the authors' contention that because of the inherent problems present in chapter 11 as illustrated in Part III, bankruptcy judges need to use case management techniques to reduce the delays associated with business reorganizations. [108]

V. CHAPTER 11: GOALS OF THE CODE, PARTIES IN INTEREST AND THE COURTS

A. Chapter 11's basic premise

One goal of chapter 11 is to enable a bankrupt business to reorganize and to restructure its finances so that it may continue to operate as a going concern. [109] Chapter 11 also seeks to provide jobs for employees of the business, preserve the assets of the equity holders, insure the payment of secured creditors, and protect the interests of junior or subordinated creditors and stockholders. [110] Chapter 11 aspires to promote efficiency by serving as a model for out−of−court restructuring. [111] There are, however, larger purposes of chapter 11 found in the legislative history of the Bankruptcy Code. [112] The real success of reorganization is measured by what the business continues to add to the economy once the case is over. [113] Therefore, arguably, the broad goal of chapter 11 bankruptcy is to maximize the value of the debtors business to society by preserving the private and social components of its going concern when there is a good probability for success of reorganization. [114] Of course, chapter 11 also attracts some "dead−on−arrival" businesses. Therefore, another of its principle functions is to recognize and funnel hopeless cases into speedier, more effective liquidation than could be obtained under non−bankruptcy law. [115]

After twenty years of operating under chapter 11, growing dissatisfaction has resulted in the emergence of renewed analysis and criticism. [116] A number of academics [117] and others have scrutinized the chapter 11 process. [118] This scrutiny has identified the costs associated with the reorganization process as an area requiring reform. [119] These costs can be attributed to specific areas within (or without) the process, including the lack of adequate mediation programs and the high costs of unnecessary litigation. [120]

b. Parties in Interest

Reducing delays in chapter 11 cases is undoubtedly a goal of creditors. [121] Particularly, secured creditors would benefit the most if a debtor's chapter 11 case is dismissed. [122] This allows the creditor to pursue a state law remedy to seek their collateral, as the dismissal results in a termination of the automatic stay. [123] A conversion of the case to chapter 7 is the next best alternative for the secured creditor. [124] This allows the creditor to foreclose on the collateral if the trustee abandons it, or realize the profits if the property is liquidated. [125] The least favored outcome for the secured creditor is a confirmation of the plan because it only assures that they will be paid some time in the future. [126] Unsecured and undersecured creditors [127] similarly benefit by an early resolution of a chapter 11 case because the earlier the plan is confirmed, the earlier the assets are distributed to creditors. [128] Furthermore, the earlier a chapter 11 case can be converted to one of chapter 7 or be dismissed outright, the more likely there will be excess assets in the estate to distribute to the unsecured creditors. [129]

The debtor, however, usually favors delaying the proceeding as long as possible in an effort to wait for the business to increase in value and succeed. [130] This is especially true as debtors−in−possession usually face little risk as they often do not share in corresponding losses suffered by their business. [131] The debtor may also benefit from delaying chapter 11 proceedings so they can continue to collect salaries and other ownership interests. [132] Chapter 11 debtors in possession will, therefore, attempt to delay proceedings whenever they can, and for as long as possible.

C. The Courts

Bankruptcy courts will benefit greatly by quickly disposing of chapter 11 cases. [133] Bankruptcy judges spend approximately one−third [134] of their case time resolving chapter 11 cases and utilize about 30% [135] more of their time on related adversary proceedings. [136] Much of this delay is caused by the difficulty of negotiations itself, and is primarily caused by bankruptcy procedure. [137] In a predominantly large number of chapter 11 cases, the debtor has the cooperation of the bankruptcy judge in the granting of extensions of time of exclusivity. [138] This exclusive right of the debtor, coupled with bankruptcy judges' willingness to grant extensions to them, is a major cause of delay in chapter 11. [139] It is for these reasons that these authors propose that bankruptcy judges use case management strategies and mediation as a means for shortening the time companies spend in chapter 11 reorganizations.

VI. A CASE MANAGEMENT APPROACH

Currently it appears that the implementation of the Commission's recommendation will help promote the use of case management by bankruptcy judges. This part will highlight some of the characteristics of the more documented and established existing case management programs regarding chapter 11 cases, which have been adopted by bankruptcy courts pursuant to local bankruptcy rule, general order or informal programs.

In 1987, Judge A. Thomas Small, of the Eastern District of North Carolina, was the first to implement a "fast track" [140] case management procedure in attempt to shorten the time chapter 11 cases remained pending in his court. [141] Judge Small identified cases that were appropriate for expedited process and required those selected to file a plan and disclosure statement 60 to 90 days from the petition date. [142] Judge Small would then conditionally approve the disclosure statement, [143] with final approval coming only after notice and hearing, usually at the same time as the confirmation hearing. By conditionally approving a debtor's disclosure statement, Judge Small has eliminated what most had thought was a mandatory delay necessary to give notice and a hearing on approval of a disclosure statement. [144] This system has allowed Judge Small to significantly reduce the delays associated with chapter 11 within his district. [145]

Following Judge Small's fast track model of case management, Judge Geraldine Mund, of the Central District of California, [146] set up a similar system in her courtroom that has met with similar success. [147] Under Judge Mund's fast track system, she would look at the initial petition and schedules and make a determination as to which cases would likely be ready for a hearing on a plan and disclosure statement within 120 days after the date the petition was filed. [148] If Judge Mund determined that the case would be ready within the allotted time, she would issue an order that required the debtor to submit and file a plan and disclosure statement on a date approximately four months after the petition was filed. About one week after the filing of these documents, Judge Mund would hold a hearing for conditional approval of the disclosure statement. [149] Prior to this hearing, the debtor would be informed that if they filed an insufficient statement, or did not appear at the hearing, the case would be dismissed or converted to a case under another provision of the code. However, if the plan was conditionally approved, Judge Mund would then combine the hearings [150] for plan confirmation and the disclosure statement to be held at least 36 days later, thus continuing on a fast track system.

By setting early deadlines, Judge Mund and Judge Small have forced the debtor to take a serious look at whether or not a feasible reorganization is possible. [151] If there is a chance for reorganization, the debtor is forced to immediately begin plan negotiations with creditors. [152] By taking an active role in the case management and mediation process of business reorganizations, and holding all chapter 11 hearings at once, [153] debtors can no longer delay the reorganization process by saying they had a viable plan, but it was simply not ready to be presented.

The fast track method of case management has proved successful, but since it primarily focuses on setting deadlines, it fails to recognize several crucial needs that should be addressed in the chapter 11 process. Bankruptcy judges not only need to set deadlines, but must also hold status conferences as early as possible after the petition is filed. [154] The early status conference is essential because it will not only allow judges to jump−start [155] the mediation process in cases where the debtor has a reasonable prospect of an effective

reorganization, [156] but will also allow them to terminate or convert hopeless cases that have little or no prospect of success. [157]

The chapter 11 process itself has been appropriately described as "binding mediation," with its fruition defined as a consensual plan of reorganization. [158] Chapter 11 is explicitly designed to achieve its goals by having all interested parties represented during negotiations under the direction of the bankruptcy judge. [159] Therefore, the procedure of chapter 11 operates as a structured settlement process. [160] Since chapter 11 acts as a settlement process by statutory design, it follows that it is a bankruptcy judge's job to act as a neutral mediator to facilitate settlement, with the authority to decide the case if the litigants fail to agree on a plan. [161] For plans that have a reasonable likelihood of success, the early status conference needs to be utilized in order to bring the debtor and all parties in interest together to start the mediation process. This will also allow the judge to inform the litigants how the chapter 11 process functions, what problems it can solve, and what outcome the parties can reasonably expect. [162] The status conference will also allow the judge to inquire about the debtor's financial situation, reasons for filing for bankruptcy, and potential plan. [163]

Case management techniques are a means to assure the chapter 11 process will address all parties' business [164] and legal problems so that it produces a timely, effective result, whether it be by dismissal, conversion, or plan confirmation. [165] Although deadlines need to be set, bankruptcy judges must also take an active role as mediators to not only insure that the chapter 11 process starts out on the right foot, but that it continues to function correctly and according to its goals.

VII. CONCLUSION

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. Therefore, in bankruptcy, where legal fees surge while creditor's recoveries dwindle, there is enormous promise in quicker, more efficient dispute resolution. The current docket logjam, amplified by the substantial increase in trial costs, makes court−annexed mediation an appetizing alternative to litigation.

Parties in a bankruptcy proceeding, who usually continue to communicate on a regular basis in the future, will benefit greatly from consensual conflict resolution. Mediation is the most likely ADR method to foster ongoing relationships and is the least costly in terms of time and money.

There may be adequate case, statutory, and inherent authority existing to support the imposition by the bankruptcy courts of mandatory, court−annexed mediation. However, most courts have failed to implement such programs. One reason for this shortfall may be the remaining suspicion and unfamiliarity with court−annexed mediation. Another may be the lack of a clear path in the law and rules which give bankruptcy courts the power to implement ADR programs. Further, the current rules fail to address individual districts' bankruptcy concerns.

Accordingly, the Commission's recommendation should be enacted to provide clear statutory authority for bankruptcy courts to implement local rules allowing a wide array of court−annexed ADR programs. In addition to these local rules, it is these authors contention that bankruptcy judges must take a more active role in case management. Until this is done, the financial plight of the debtor will worsen, recovery by the creditor will diminish, and the bankruptcy court docket will remain overburdened. ADR is the wave of the future in the bankruptcy court, whether it be a million dollar reorganization or small adversary proceedings, court−annexed mediation and case management are processes whose time has come.

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FOOTNOTES:

[1] Bankruptcy Reform Act of 1978, Pub. L. No. 95−598, 92 Stat. 2549.Back To Text

[2] *See* Jagdeep S. Bhandari & Lawrence A. Weiss, *The Increasing Bankruptcy Filing Rate: An Historical Analysis*, 67 Am. Bankr. L.J. 1, 2 (1993) (reporting 185% increase in number of bankruptcy filings from 1980 to 1991). In the fiscal year of 1992, bankruptcy filings peaked at 971,516. *See U.S. Bankruptcy Filings 1980−1997* (*Business, Non−Business, Total*), (visited April 6, 1998) <http://www.abiworld.org/stats/1980annual.html/>. Since 1992 bankruptcy filings have declined. *See id.* For example, in the fiscal year 1993 there were 875,202 filings, and in 1994 there were 832,829 filings. *See id.* However, since 1995 bankruptcy filings have been on the upswing. For example in 1995 there were 926,601 filings, in 1996 there were 1,178,555 and in 1997 there were 1,404,145. *See id.**Back To Text*

[3] *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure From the Field Code to the Federal Rules*, 89 Colum. L. Rev. 1, 3 (1989) (noting that most critics blame overburdened court systems and overzealous advocacy as cause of excessive costs and delays of litigation); *see also* Lynn M. LoPucki, *The Trouble with Chapter 11*, 1993 Wis. L. Rev. 729, 730−31, (noting direct costs of bankruptcy proceedings combined with other factors "[s]trangle chapter 11"); *cf.* Robert A. Baruch Bush, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. Fla. L. Rev. 253, 259−60 (1989) (noting main value of mediation is not to remove litigation from courts to lower expense, but instead to safeguard rights of disputing parties by imposing various checks). Back To Text

[4] An important goal of the Bankruptcy Code is to expeditiously resolve the financial affairs of the estate. *See* Lisa A. Lomax, *Alternative Dispute Resolution in Bankruptcy: Rule 9019 and Bankruptcy Mediation Programs*, 68 Am. Bankr. L.J. 55 (1994) (discussing Rule 9019 of Federal Rules of Bankruptcy Procedure regarding mediation and arbitration). Unnecessary delay, expense, and duplication of effort are abhorred in the bankruptcy context because of the limited resources available to spend on judicial proceedings. *See id.* at 56. Furthermore, policy considerations of debtor rehabilitation and maximum return to creditors are frustrated when bankruptcy proceedings linger unresolved. *See id. See also* Zimmerman v. Continental Airlines, 712 F.2d 55, 59−60 (3d Cir. 1983) (concluding granting stay of proceeding pending arbitration is contrary to policy of bankruptcy code which encourages expeditious resolution of disputes). Back To Text

[5] *See generally* Lomax, *supra* note 4 (discussing arbitration and mediation as forms of ADR). ADR is a catch−all term used to describe various problem solving methods and techniques. *See id.**Back To Text*

[6] *See* James R. Holbrook & Laura M. Gray, *Court−Annexed Alternative Dispute Resolution*, 21 J. Contemp. L., 1, 1 (1995) (noting that ADR techniques have recently become institutionalized in response to growing need for more efficient and cost−effective dispute settlement). Alternative Dispute Resolution has been defined as:

> a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts.

Jethro K. Lieberman & James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U. Chi. L. Rev. 424, 425−26 (1986); *see also* Blacks Law Dictionary 78 (6th ed. 1990) (defining alternative dispute resolution as procedures "settling disputes by means other than litigation;" for example; arbitration, mediation and mini−trials). *But cf.* Owen M. Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1670 (opposing ADR in general). Back To Text

[7] *See* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 110 (1976). Back To Text

[8] *See* Mary S. Bedikian, *Using ADR to Resolve Bankruptcy Claims*, 48 Disp. Resol. J. 25 (Dec. 1993) (noting that because emotions run high and money is at core of every decision, desire to impose blame is rampant, and anything done to refocus hostility and expedite proceedings is beneficial). One of the biggest areas of application of ADR in bankruptcy proceedings is in resolving claims. *Focus of the Future: ADR in the New*

Century, 51 Disp. Resol. J. 10, 13 (Sept. 1997). A large amount of time is spent in a bankruptcy court determining whether or not someone has a pre−petition or post−petition claim. *See id.* Because there are limited resources in our federal courts, these claims should be handled out of court by people who understand the issues and can resolve them quickly and fairly. *See id.* Back To Text

[9] *See generally* Jay Folberg & Alison Taylor, Mediation: A Comprehensive Guide to Resolution, Conflicts without Litigation 130 (1984) (noting that mediation in Bankruptcy Court for Eastern District of Pennsylvania is required for all adversary proceedings seeking money damages of less than $100,000). Back To Text

[10] *See* Lomax, *supra* note 4. Back To Text

[11] *See* Lomax, *supra* note 4 (citing Nancy H. Rogers & Craig A. McEwen, Mediation 34 (1989) (quoting former Chief Justice Warren E. Burger)). Back To Text

[12] *See also* Baruch Bush, *supra* note 3, at 266 (stating generally mediator's role is to fulfill powers that are unique to mediation that other processes cannot); s*ee generally* Christopher W. Moore, The Mediation Process, 155−62 (1986) (giving comprehensive view of mediator's role). The role of the mediator is to facilitate negotiations between the parties, not to act as a decision maker. *See id.* at 156. Back To Text

[13] *See* Bedikian, *supra* note 8, at 25. Mediation is conducted like a court settlement conference, but includes separate confidential discussions of issues and case evaluation. *See id.* Back To Text

[14] *See id.* Significantly, mediation allows the parties to veto a proposed resolution which does not satisfy their interests or their needs. *See id.* Back To Text

[15] *Cf.* Bhandari, *supra* note 2, at 131−32 (arguing reasons for inefficiency in post−Code filings are due to changing economic environment).Back To Text

[16] *See* Anne M. Burr, *Building Reform From the Bottom Up: Formulating Local Rules for Bankruptcy Court−Annexed Mediation*, 12 Ohio St. J. on Disp. Resol. 311, 313 (1997) (noting natural guidelines are nonexistent and fail to address bankruptcy concerns).Back To Text

[17] *See generally* Hon. Lisa Hill Fenning, *Business Management: The Heart of Chapter 11*, 15 Am. Bankr. Inst. J., No. 8, p. 38 (Oct. 1996) [hereinafter *Heart of Chapter 11*] (noting judges should enforce time and cost constraints to ensure prompt resolution); Hon. Lisa Hill Fenning, *Judicial Case Management is No Hostile Takeover*, 15 Am. Bankr. Inst. J., No. 7, p. 35 (Sept. 1996) [hereinafter *No Hostile Takeover*] (defining case management as assuring process to address creditor concerns, and debtor's legal and business problems to produce prompt results); Hon. Lisa Hill Fenning, *Mediation, Not Litigation*, 15 Am. Bankr. Inst. J., No. 6 (July/Aug. 1996) [hereinafter *Mediation*] (describing external design flaw of bankruptcy system); Hon. Lisa Hill Fenning, *Batter Up: Argument for Case Management*, 35 Am. Bankr. Inst. J. 34 (April 1997) [hereinafter *Batter Up*]. Back To Text

[18] A discussion of the full gamut of ADR programs implemented in bankruptcy courts throughout the country is beyond the purview of this note. However, the ADR processes include, but are not limited to, mediation, early neutral evaluation, "advisory" arbitration, full−fledged arbitration, early case status conferences, and dispute coverage. For a discussion of these processes, see generally Frank E. A. Sander & Stephen S. Goldberg, *Fitting the Forum to the Fuss: A User−Friendly Guide to Selecting an ADR Procedure*, 10 Negotiation J. 49 (1994); Stephen S. Goldberg, et al., Dispute Resolution: Negotiation, Mediation and Other Processes 199−200 (2d ed. 1992). Back To Text

[19] Often times this takes place at the mediator's office or conference room. *See* Nancy H. Rogers & Craig A. McEwen, Mediation: Law, Policy & Practice, § 3:02, at 2 (2d ed. 1994) (discussing typical mediation setting, format and techniques). Back To Text

[20] *See id.* The mediator is usually required to schedule the first conference as early as practicable and as far in advance of the scheduled court hearing or trial as possible. *See id.* Some rules specify the number of days within which the mediation conference must be held. *See id.* Also, the mediator must give advance written notice of the time and place of the session to the parties. *See id.**Back To Text*

[21] *See id.* This is particularly true when mediation is conducted before the parties invest heavily in discovery. *See id.**Back To Text*

[22] *See* Bedikian, *supra* note 8, at 25. Therefore, parties are free to discuss marginal aspects of the case that may lead to a more expansive and effective settlement. *See id.* Back To Text

[23] *See* Ralph R. Mabey, et al., *Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and Other Forms of ADR*, 46 S.C. L. Rev. 1259, 1281 (1995). Some rules require the parties to complete written information submissions describing their side of the case, and then serve them on the other parties and the mediator prior to the conference. *See id.* Usually, the mediator is permitted to offer a written settlement recommendation to the parties. *See id.* *Back To Text*

[24] *See* Rogers & McEwen, *supra* note 19, § 3:01, at 1 n.2 (listing articles that provide information on various mediation techniques). A primary technique of mediators is to translate parties' statements of positions into statements of interests. *See id.* *Back To Text*

[25] *See* Lomax, *supra* note 4, at 69. A caucus is a safe environment in which all discussions between the mediator and the party will be kept in strict confidence unless the party explicitly authorizes the mediator to convey specified information to the opposing party. *See id.* The mediator may also use this time to test each parties' position on various proposals. *See id.* Often times more than one caucus is needed, but they will become progressively shorter. *See id.* Mediators cannot bind parties, so caucus does not raise same ethical problems as ex parte conference with judge. *See* Rogers & McEwen, *supra* note 19, at 3:02 at 4−5.Back To Text

[26] *See* Lomax, *supra* note 4, at 69. Mediation is voluntary and flexible, thus the proposed solutions can usually be very flexible and specifically tailored to the individual parties' needs. *See id.*at 70. Back To Text

[27] *See* Rogers & McEwen, *supra* note 19, § 3:02, at 3 (noting that mediator acts as facilitator guiding negotiations and offering proposals that parties may not have otherwise conceptualized). Because parties of mediation decide whether to accept such proposals, they may be more supportive of a settlement because they had a role in negotiating, rather than simply having a decision forced upon them. *See* Lomax, *supra* note 4, at 70. *Back To Text*

[28] *See* Mabey, *supra* note 23, at 1282. Such settlements affect the amount of funds available for distribution to creditors and must be approved by the court after notice is given to creditors. *See id.* Bankruptcy Rule 9019(a) requires that a compromise or settlement be approved by the bankruptcy court after notice and a hearing. *See* Fed. R. Bank. P. 9019(a) (1994). Rule 9019(a) also provides the procedure for court approval of settlements: (a) Compromise. On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct. *See id.* Back To Text

[29] Rule 2002(a)(3) provides:

> (a) *Twenty−Day Notices to Parties in Interest.* Except as provided in subdivisions (h)(i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days notice by mail of . . . the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not

be sent.

Fed. R. Bank. P. 2002(a)(3) (1994). Back To Text

[30] *See* Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (stating general proposition that reorganization proceedings must be administered in "fair and equitable" manner); *see also* Martin v. Kane (*In re* A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986) (suggesting there must be more than mere good faith negotiation of settlement; court must find compromise was fair and equitable). The bankruptcy court must consider four factors in determining whether to approve a settlement: (1) the probability of success of the litigation; (2) the difficulties to be encountered when attempting to collect a judgment; (3) the complexity of the litigation, and the expense and delay attendant to it; and (4) the paramount interests of the creditors with proper deference to their reasonable views. *Id.* (citations omitted). Back To Text

[31] *See, e.g.*, *Anderson*, 390 U.S. at 414, 424; American Can Co. v. Herpel *(In re* Jackson Brewing Co.), 624 F.2d 605, 607 (5th Cir. 1980) (citing *Anderson*); Blond v. Balaber−Strauss *(In re* Tampa Chain Co.), 70 B.R. 25, 26 (Bankr. S.D.N.Y. 1987) (same); *In re* Neshaminy Office Bldg. Assocs., 62 B.R. 798, 803 (Bankr. E.D. Pa. 1986) (stating court must determine if settlement proposal is in best interest of estate).Back To Text

[32] *See infra* notes 37, 39 (discussing proceedings suitable for mediation).Back To Text

[33] *See infra* Part II; s*ee also* Lomax, *supra* note 4, at 69 and accompanying text; Mabey, *supra* note 23, at 1283−1302 (discussing authority for use of ADR in bankruptcy). Back To Text

[34] Steven Hartwell & Gordon Bermant, Alternative Dispute Resolution in the Bankruptcy Court: The Mediation Program in the Southern District of California 71 (1988). Back To Text

[35] These districts include: Northern District of Alabama, Northern District of California, Central District of California, Middle District of Florida, Southern District of Florida, Northern District of Indiana, Southern District of New York, Western District of Oklahoma, District of Oregon, Eastern District of Pennsylvania, Eastern District of Virginia, and Eastern District of Michigan. See *Mediation: Boon or Bane?*, 23 Weekly (25 Bankr. Ct. Dec.) at a−1 Feb. 11, 1993 for a detailed account of the types of mediation programs adopted by each bankruptcy district. Back To Text

[36] *See id.* On May 25, 1990 the bankruptcy judges of the Middle District of Florida voted unanimously to adopt the mediation project throughout the district. Two years later, the Florida mediation project was expanded to include large chapter 11 cases. *See id. Back To Text*

[37] *See* Lomax, *supra* note 4, at 73; *see also* Hartwell & Bermant, *supra* note 34, at 71 (discussing study of California mediation programs). The Hartwell and Bermant study concluded that several indicia of proceedings were suitable for mediation: (1) enough discovery has been completed so that factual positions of parties are mutually understood; (2) the bankruptcy rules do not place extraordinary calendaring demands on the disposition of the case; (3) the disposition of the case turns on the facts rather than on an interpretation of the law; (4) the dispute is over an amount of money owed (the attorneys perceive that mediation will save their clients money and their clients are more likely to consider a settlement if they hear their position evaluated by an objective third party); (5) and one or both parties are reluctant to go to trial. *See id.* at 22. A "weak" proceeding is also one that is viewed as appropriate for mediation. *See id.* at 21. A "weak" proceeding is one in which a party has just enough evidence to avoid a summary judgment motion against it. *See id.* at 21−22. Back To Text

[38] Hartwell & Bermant, *supra* note 34, at 21−22; s*ee also* Pate v. Hunt (*In re* Hunt), 136 B.R. 437, 448−49, (Bankr. N.D. Tex. 1991) (using mediator to facilitate settlement of adversary proceeding).Back To Text

[39] *See* Mabey, *supra* note 23, at 1273 n.41; *see also* Michael Sirota & Ilana Volkov, *ADR Can Help a Chapter 11 Debtor*, N.J. L.J., Jan. 17, 1994, at 27 (examining applicability and usefulness of ADR in preserving cash for chapter 11 debtor); s*ee, e.g., In re* Herman's Sporting Goods, Inc., 166 B.R. 581, 583−84 (Bankr. D.N.J. 1994) (approving ADR procedure for resolution of personal injury and product liability claims); *In re* M Corp. Fin., Inc., 160 B.R. 941, 947 (Bankr. S.D. Tex. 1993) (facilitating use of mediator to resolve $50 million real estate claim); *In re* Child World, Inc., 147 B.R. 847, 850−51 (Bankr. S.D.N.Y. 1992) (authorizing standing ADR procedure for resolving certain tort and insurance claims, including use of mediator). *Back To Text*

[40] *See In re* A.H. Robins Co., 88 B.R. 742, 744−45 (Bankr. E.D. Va. 1988) (using mediator to liquidate multiple claims after confirmation of plan of reorganization). Also, in *Robins* the mediator helped the parties agree on a claims resolution procedure in which it provided claimants various options for seeking compensation for their injuries. *See id.* at 746.Back To Text

[41] *See In re* R.H. Macy & Co., 173 B.R. 470, 471−72 (Bankr. S.D.N.Y. 1994) (using mediator to effect consensual plans of reorganization and to expedite debtor's emergence from chapter 11). In *Macy*, the judge *sua sponte* appointed a mediator to quickly devise a joint plan of reorganization. *See id. See also* Hartwell & Bermant, *supra* note 34, at 7 (noting numerous types of proceedings referred to mediation in Middle District of Florida and its expanded view since initial ADR trial period)*;* Mabey, *supra* note 23, at 1273 n.41.Back To Text

[42] *See* Hartwell & Bermant, *supra* note 34, at 67 (discussing General Order No. 92−1−2, United States Bankruptcy Court, Eastern District of Virginia, Alexandria Division).Back To Text

[43] *See* Hartwell & Bermant, *supra* note 34, at 67 (discussing General Order No. 145, United States Bankruptcy Court, Southern District of California).Back To Text

[44] *See* Local Rules (Bankr. M.D. Fla.) 2.23(b)(1). Back To Text

[45] *See* General Order No. 92−1−2 *supra* note 42; *see also* General Order No. 145, *supra* note 43. Back To Text

[46] Compare generally *Heart of Chapter 11, No Hostile Takeover*, and *Mediation*, *supra* note 17, with Hon. Robert Martin, *Mediation−Schmediation—Let's Play Ball*, 16 Am. Bankr. Inst. J. No. 1, p.34 (Feb. 1997), for a debate on the use of mediation techniques by bankruptcy judges in chapter 11 cases.Back To Text

[47] *See infra* Part II, A.Back To Text

[48] *See* Lomax, *supra* note 4, at 82 (discussing possible limitations to bankruptcy mediation programs).Back To Text

[49] *See* Mabey, *supra* note 23, at 1263−64; *see also* 11 U.S.C. § 105(d) (1994) (authorizing bankruptcy courts "such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically[,]" but does not specify use of mediation); Fed. R. Bankr. P. 9019 (stating that consent is required before arbitration can be final and binding, however, Rule 9019 does not discuss the use of mediation).Back To Text

[50] *See* Mabey, *supra* note 23, and accompanying text. "Absent the parties' agreement, a bankruptcy court should only refer a proceeding to mediation when the court has determined that 'the mediation will not abridge substantive rights of the parties' and is reasonably likely to advance 'the just, speedy and inexpensive resolution of the matter.'" *Id.* at 1302.Back To Text

[51] *See* Link v. Wabash R.R. Co., 370 U.S. 626, 629−31 (1962) (discussing delays that occur in using mediation process); Kothe v. Smith, 771 F.2d 667, 669 (2d Cir. 1985) (rejecting district court's use of sanctions to force parties into settlement); *In re* LaMarre, 494 F.2d 753, 756 (6th Cir. 1974) (indicating due

process considerations may bar judge from compelling settlement); Abney v. Patten, 696 F. Supp. 567, 568 (W.D. Okla. 1987) (stating Federal Rules of Civil Procedure § 16 does not permit courts to impose settlements on unwilling litigants); s*ee generally* Fed. R. Civ. P. 16 (requiring good faith participation at various stages of trial).Back To Text

[52] *See supra* notes 32−34, 40−44 and accompanying text.Back To Text

[53] *See* Mabey, *supra* note 23, at 1261−65 (discussing reasons why "not many organized ADR programs exist in bankruptcy courts," despite advantages).Back To Text

[54] *See id.* (commenting on few reported decisions dealing with ADR role and authority in bankruptcy cases); s*ee also infra* Part II, A.Back To Text

[55] *See* Pub. L. No. 101−650, 104 Stat. 5090 (1990) (codified at 28 U.S.C. §§ 471−482 (1994)).Back To Text

[56] *See* 28 U.S.C. § 471 (1994).Back To Text

[57] *See* Pub. L. No. 101−650, 104 Stat. 5090 (1990) (codified at 28 U.S.C. § 473 (1994)). For a discussion on the CJRA, see Joseph R. Biden, Jr., *Equal Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 Cornell J.L. & Pub. Pol'y 1, 4−8 (1992).Back To Text

[58] *See supra* note 57 and accompanying text. Section 102 of the CJRA provides that "an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including . . . utilization of [ADR] programs in appropriate cases." *See* 28 U.S.C. § 473 (1994)Back To Text

[59] *See* 28 U.S.C. §§ 473(b)(4), 473(a)(6)(B). Back To Text

[60] *See* Pub. L. No. 100−702, (102 Stat.) 4642.Back To Text

[61] *See* 28 U.S.C. § 651 (stating that "each United States District Court described in Section 658 may authorize by local rule the use of arbitration in any civil action, including an adversary proceeding in bankruptcy") 28 U.S.C. § 651 speaks only of arbitration, possibly because that was the primary mechanism used by District Courts prior to its enactment. *See* William L. Norton, Jr., Norton Bankruptcy Law and Practice 2d, § 146:3. The term "arbitrator," however, is not defined. *See id. Back To Text*

[62] *See* Norton, *supra* note 61. From that referral power of the District Court, one might argue that because the District Court has implicit power to use court−annexed mediation, they also have the power to authorize Bankruptcy Courts to employ such techniques. *See id. Back To Text*

[63] *See* 28 U.S.C. § 151 (1994) ("In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district."). However, the rules divide all disputes into "adversary proceedings" (as defined in Rule 7001) and "contested matters" (as defined in Rule 9014). The analysis with respect to adversary proceedings is straightforward, in that Rule 7016 explicitly incorporates Rule 16 of the Federal Rules of Civil Procedure in adversary proceedings. *See* Fed. R. Bankr. P. 7016. But, Rule 9014 provides that "[t]he court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply." Fed. R. Bankr. P. 9014. Therefore, the court may exercise its discretion and direct that Rule 7016 apply to a contested matter so as to authorize the use of mediation in the matter. *See* Norton, *supra* note 43. Further, Rule 1001 requires that the "rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." Fed. R. Bankr. P. 1001. Back To Text

[64] *See* Memorandum from Richard S. Toder & Scott D. Talmadge to Professor Elizabeth Warren, Reporter, 2 (June 5, 1997) (stating, as of May 9, 1997, twenty six bankruptcy courts were using form of mediation citing district court or bankruptcy rules as its authority). Additionally, the Southern District of California established

its mediation program in 1986, while the Northern District of Illinois recently adopted local rules establishing voluntary mediation programs. *See* Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years, Final Report 489, 490 (1997) [hereinafter Commission Report].Back To Text

[65] Fed. R. Civ. P. 16 (c) ("The participants at any conference under this rule may consider and take action with respect to . . . the possibility of settlement or the use of extra−judicial procedures to resolve the dispute."). Bankruptcy Rule 7016 has adopted the language in full. *See generally* Federal Reserve Bank of Minneapolis v. Carey−Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988); Arabian Am. Oil Co. v. Scarfone, 119 F.R.D. 448 (M.D. Fla. 1988); McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988).Back To Text

[66] *See* Link v. Wabash R.R., 370 U.S. 626, 629−31 (1962) (holding district court had inherent power to dismiss without affording notice or pending adversary opinion).Back To Text

[67] 11 U.S.C. § 105 (1994).Back To Text

[68] Pub. L. No. 103−394, 1994 U.S.C.C.A.N. (108 Stat.) 4106.Back To Text

[69] Section 105 provides that:

> The court, on its own motion or on the request of a party in interest, may—
>
> (1) hold a status conference regarding any case or proceeding under this title after notice to the parties in interest; and
>
> (2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically . . .

11 U.S.C. § 105.Back To Text

[70] 140 Cong. Rec. H10, 710−764 (Oct. 4, 1994) (describing Bankruptcy Reform Act of 1994). Back To Text

[71] *See supra* notes 48−52 and accompanying text. Back To Text

[72] *See* Scott A. Miller, Note, *Expanding the Federal Courts' Power to Encourage Settlement Under Rule 16: G. Heileman Brewing v. Joseph Oat*, 1990 Wis. L. Rev. 1399, 1427 (noting that ad hoc usage of ADR does not provide sufficient guidance to litigants to permit proper balance between protecting litigants from judicial coercion and allowing courts legitimate docket management authority). Further, a national rule will help promote uniform formality and enforceability. *See id.* at 1428. Back To Text

[73] Joseph D. Vaccaro & Marc R. Milano, Note, *Section 327(A): A Statute in Conflict: A Proposed Solution to Conflicts of Interest in Bankruptcy*, 5 Am. Bankr. Inst. L. Rev. 237, 250 (1997) (discussing current state of bankruptcy law concerning conflicts of interest).Back To Text

[74] Commission Report, *supra* note 64, at 489. This note will not analyze the latter portion of the proposal concerning the retention and payment of professionals, judicial disciplinary matters, or standards and requirements for individuals performing mediation functions. It is focusing primarily on the promulgation of legislation to specifically and clearly authorize bankruptcy courts to use mediation. For further discussion on the areas not covered in this note, see Frederick Tung, *Confirmation and Claims Trading*, 90 Nw. U. L. Rev. 1684, 1717 (1996); Herbert P. Minkel, Jr., *Oversight of the Case–Responsibility, Employment, and Payment of Professionals*, C430 ALI−ABA 425, 471−74 (1989) (noting courts role in payment of professionals).Back To Text

[75] *See Mediation, supra* note 17, at 35 (noting state courts and federal district courts are becoming more like "managerial judges"); s*ee also* Harvey R. Miller, *The Changing Face of Chapter 11: A Reemergence of the Bankruptcy Judge as Producer, Director, and Sometimes Star of the Reorganization Passion Play*, 69 Am. Bankr. L.J. 431, 436−37 (1995) (noting increased frequency of judges using section 105 to establish alternative dispute resolution programs).Back To Text

[76] *See* Commission Report, *supra* note 64; *see also* Barbara Franklin, *ADR Meets Bankruptcy Experts Explore Ways to Abbreviate the Process*, N.Y. L.J., April 22, 1993, at 5 (quoting Professor F. Stephen Knippenberg "[i]t's a long time from the filing of a petition to plan confirmation. Given the cost to creditors and everybody else, virtually anything you can do to expedite these proceedings is worthwhile").Back To Text

[77] *See* 11 U.S.C. § 105 (1994) (authorizing bankruptcy courts to impose "such limitations and conditions as the court deems appropriate to insure that the case is handled expeditiously and economically" but does not provide any specific mediation guidelines); s*ee also* Mabey, *supra* note 23, at 1281 (discussing lack of clear guidelines for implementation of mediation programs pursuant to Bankruptcy Reform Act of 1994).Back To Text

[78] *See* Martin, *supra* note 46, at 34 (stating "otherwise sensible bankruptcy lawyers and judges are suggesting that bankruptcy judges should . . . [assume] the garb of a grand inquisitor . . . some commentators suggest it is appropriate for the meddlesome judge to make up rules not found in the Bankruptcy Code"); *In re* Chou−Chen Chem., Inc., 31 B.R. 842, 851 (W.D. Ky. 1983) (noting there is much good to be learned from mediation system). Back To Text

[79] *See, e.g.*, Commission Report, *supra* note 64, at 491. Back To Text

[80] *See id*. (authorizing judges to order parties to attempt mediation will not prejudice any one litigant because mediation is not binding and only requires good faith effort).Back To Text

[81] *See id.Back To Text*

[82] *See id; supra* notes 49−52 and accompanying text (discussing lack of clear statutory language directing bankruptcy courts to establish mediation programs).Back To Text

[83] *See supra* notes 49−52 and accompanying text (finding it best to leave details to local bankruptcy courts to determine what local rules it wants to implement to serve its needs more efficiently). Back To Text

[84] *See* Burr, *supra* note 16, at 348 (discussing benefits and guidelines of ADR programs); *see also infra* Part IV.*Back To Text*

[85] *See id.* at 348−49 (discussing benefits of ADR programs); *see also* Commission Report, *supra* note 64, at 490; *Batter Up*, *supra* note 17, at 34−35 (same).Back To Text

[86] This note does not touch upon the extensive requirements that should be analyzed when drafting local rules with respect to mediators, procedures of mediation, and confidentiality concerns. For a full discussion of these areas of concern see Mabey, *supra* note 23, at 1279. The author discusses qualifications of mediators and noting several local rules' policies on selecting them. See also 28 U.S.C. § 455(b)(1) (1993) which provides that a judge must excuse himself "where he has a personal bias or prejudice concerning a party, or a personal knowledge of disputed evidentiary facts concerning the proceeding". Incorporating this provision in a local bankruptcy rule should lessen concerns over conflicts of interest. See also Lomax, *supra* note 4, at 77−78, where conflicts of interest is discussed.Back To Text

[87] It is these authors' contention that the only change in the national rules would be to enact the Commission's recommendation to authorize bankruptcy judges to order mediation and the assessment of costs where the courts deem appropriate. *See supra* notes 77−78 and accompanying text (discussing need for reformed

guidelines). The present language of the rule only specifically refers to the use of binding arbitration upon consent of the parties. *See* Fed. R. Bankr. P. 9019(c). Despite the authority cited by many courts to refer proceedings to mediation as noted *supra* Part II, this language may lead to a negative inference opposing the use of other forms of ADR. Accordingly, implementing the Commission's recommendation would provide a bankruptcy court with unambiguous procedural guidelines to order mediation without compromising any other provision of the Bankruptcy Code. *See id.*Back To Text

[88] *See* Mabey, *supra* note 23, at 1310 n.190. Commentators propose that such a rule will promote formality, enforceability, and uniformity. *See id.* Back To Text

[89] *See* Burr, *supra* note 16, at 349 (noting risks associated with standardizing rules).Back To Text

[90] *See* Lomax, *supra* note 4, at 82, 89−90 (discussing "bottom up" theory of district by district programs). This is so because each district has distinct concerns. Therefore, establishing court−annexed mediation by local rule allows programs to be developed for the existing concerns of the individual districts. Back To Text

[91] S*ee* Mabey, *supra* note 23, at 1294−1302 (noting case law has interpreted 28 U.S.C. § 2075 to grant Supreme Court "broad rule−making power" to prescribe rules aimed at promoting efficiency which govern procedure and practice in bankruptcy courts). Thus, bankruptcy court−annexed mediation, as opposed to a time−consuming and costly summary jury trial or mini−trial, ordinarily do not offend these goals. *See id.*Back To Text

[92] For example, the numerous variables may include, but are not limited to, the size and skill of the bankruptcy bench, docket, local bar and existing case law in the district, and the complexity of the bankruptcy cases. *See* Burr, *supra* note 16, at 349.Back To Text

[93] *See id.* (noting benefits of local rules).Back To Text

[94] *See id*. at 351. Several local bankruptcy rules include this or similar provisions. *See supra* notes 35−38 and accompanying local rules. Also, local rules should provide for submission to mediation upon the stipulation of the parties. *See supra* notes 35−8. Mediation by consent should survive all constitutional challenges. *See* Fed. R. Bankr. P. 9019(c) (providing for submission to binding arbitration on stipulation of the parties); *see, e.g.*, General Order No. 145, *supra* note 43, at 67. Back To Text

[95] *See* Mabey, *supra* note 23, at 1294−1302 (discussing constitutional concerns associated with bankruptcy court−annexed mediation).Back To Text

[96] *See id.* (noting several local rules that include similar provisions, and further analyzing their constitutionality).Back To Text

[97] At minimum, the rule should provide that assignment to mediation will not alter any deadlines, orders, or time limits in any proceeding. *See* Norton, *supra* note 61, at § 146:3 (implementing mediation programs will still satisfy due process requirements).Back To Text

[98] *See, e.g.*, Burr, *supra* note 16, at 352 (discussing in greater detail the qualifications of mediators). Back To Text

[99] *See id.* at 353−54 (discussing factors of compensating mediators); Lomax, *supra* note 4, at 72−73 (same)Mabey, *supra* note 23, at 1304−05. *Back To Text*

[100] *See* Burr, *supra* note 16, at 357 (discussing ways to ensure confidentiality of mediator); Lomax, *supra* note 4, at 76−77 (same); Mabey, *supra* note 23, at 1306−07.Back To Text

[101] *See* Mabey, *supra* note 23, at 1283−99 (discussing inherent and statutory authority of courts and their authority to promulgate bankruptcy and local rules).Back To Text

[102] *See id.* at 1293−99 (implementing local rules will gain courts favor if they promote efficiency).Back To Text

[103] *See, e.g., In re* Public Serv. Co., 99 B.R. 177, 182 (Bankr. D.N.H. 1989) (using examiner to mediate deadlock in plan of reorganization).Back To Text

[104] *See, e.g.*, Hon. G. Thomas Eisele, *Differing Visions, Differing Values: A Comment on Judge Parker's Reformation Model for Federal District Court*s, 46 SMU L. Rev. 1935 (1993).Back To Text

[105] *See* Hon. Richard A. Enslen, *ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences*, 18 N.M. L. Rev. 1, 2−6 (1988) (discussing whether courts should use central assignment/master calendar); *see also* Hon. Robert M. Parker & Leslie J. Hagin, *"ADR" Techniques in the Reformation Model of Civil Dispute Resolution*, 46 SMU L. Rev. 1905, 1913 (1993) (noting judge must be more active in pretrial process).Back To Text

[106] *See Heart of Chapter 11*, *supra* note 17, at 36 (noting increased need for availability of mediation). Some judges are proponents of other forms of ADR. Judges such as the Honorable Raymond Broderick of the Eastern District of Pennsylvania, Hon. Thomas Lambros of the Northern District of Ohio, Hon. Arthur Spiegel of the Southern District of Ohio, and Hon. Richard Enslen of the Western District of Michigan, have expressed their approval of processes such as summary jury trials and court−annexed arbitration, both of which rely on the use of third−party intermediaries, to respond to the development of factual and legal information. *See also* Hon. Raymond J. Broderick, *Court−Annexed Compulsory Arbitration: It Works*, 72 Judicature 217, 217 (1989) (inserting "Chapter 44 Arbitration" into Title 28 of United States Code provides for court−annexed arbitration in 20 United States district courts); Hon. Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. Pitt. L. Rev. 789, 789−90 (1989) (discussing stability of Federal Rules of Civil Procedure); Hon. S. Arthur Spiegel, *Summary Jury Trials*, 54 U. Cin. L. Rev. 829, 829 (1986) (explaining the summary jury trial, how it works, today; "its evolution, philosophy, and effectiveness"). *But see* Hon. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366, 370−71 (1986) (questioning use of jurors and further noting high cost of summary jury trials). Back To Text

[107] *See Batter Up*, *supra* note 17, at 38 (discussing training of judges in mediation)*; see also* Hon. Samuel L. Bufford, *Chapter 11 Case Management and Delay Reduction: An Empirical Study*, 4 Am. Bankr. Inst. L. Rev. 85, 86 (1996) (noting use of "fast track" judicial case management is good for bankruptcy system, creditors, and debtors by reducing time in disposing of chapter 11 cases). Back To Text

[108] *See infra* Part IV (discussing implementation of case management approach).*Back To Text*

[109] *See* Cross Elec. Co. v. United States, 512 F. Supp. 511, 513 (W.D. Va. 1980) (stating "[t]here is a strong public policy which favors rehabilitation of failing concerns to make them viable contributors to society once again, rather than liquidating the companies quickly to turn over a reduced sum to all creditors."); *In re* Aurora Cord & Cable Co., 2 B.R. 342, 346 (Bankr. N.D. Ill. 1980) (noting chapter 11 was tailored to provide maximum distribution to creditors who would likely receive nothing in event of liquidation while preventing destruction of viable corporations); H.R. Rep. No. 95−595, at 220 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return to its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. *See id.**Back To Text*

[110] *See* H.R. Rep. No. 95−595, at 220 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179; *see also* S. Rep. No. 95−989, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5796.

> The Committee believes that it should be emphasized that investor protection is most critical when the company in which the public invested is in financial difficulties and is forced to seek relief under the bankruptcy laws. A fair and equitable reorganization, as provided in the bill, is literally the last clear chance to conserve for them values that corporate financial stress or insolvency have placed in jeopardy. As public investors are likely to be junior or subordinated creditors or stockholders, it is essential for them to have legislative assurance that their interests will be protected.

Id. However, most chapter 11 debtors are small businesses without public investors, and managed by their owners. *See* Lynn M. LoPucki, *The Debtor in Full Control−Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 Am. Bankr. L.J. 247, 264 (1983) (noting in limited study of companies filing under chapter 11, only approximately 14% had more than three shareholders and were not family owned). Back To Text

[111] *See* Commission Report, *supra* note 64, at 309. ("Parties negotiate in the shadow of chapter 11, restructuring companies without taking them through a formal bankruptcy proceeding. This 'non−bankruptcy−bankruptcy' and a related mechanism, the 'pre−packaged' bankruptcy, demonstrate the advantages of a clear legal structure to identify the rules of business reorganization.").Back To Text

[112] *See* H.R. Rep. No. 95−595, at 220, *reprinted in* 1978 U.S.C.C.A.N. at 6179 (stating that "[i]t is more *economically efficient* to reorganize than to liquidate, because it preserves jobs and assets") (emphasis added). Back To Text

[113] *See, e.g.,* Robert K. Rasmussen, *The Efficiency of Chapter 11*, 8 Bankr. Dev. J. 319, 322−25 (1991) (discussing academic debate over what are bankruptcy code's primary goals). Back To Text

[114] *See* Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 Yale L.J. 1043, 1047−49, 1076 (1992) (arguing that natural order of liquidation would better serve society than reorganizing failing corporation); *see generally* Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 Mich. L. Rev. 336, 344 (1993) (indicating society is better off reorganizing business when firm's assets are more valuable as going concern). Back To Text

[115] *See* Commission Report, *supra* note 64, at 308 (discussing benefits of ADR for hopeless cases). Back To Text

[116] *See* Bradley & Rosenzweig, *supra* note 114, at 1076−78 (noting empirical evidence supports conclusion that chapter 11 should be repealed); *see also* Kathleen M. Berry, *Executive Update; Taxe*s, Investor's Bus. Daily, Aug. 17, 1993, at 4 (stating chapter 11 has come under increased scrutiny and criticism); *Mediation*, *supra* note 17, at 35 (noting that leading judges and practitioners recognize obvious symptoms of dysfunction of chapter 11); *see generally* Hon. Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 Am. Bankr. L.J. 287 (1993) (discussing statutory causes of delay in chapter 11 cases and suggesting various solutions).Back To Text

[117] Criticism of chapter 11 has not been isolated to that of academics. The Honorable Edith Jones, a very well respected federal judge, has called chapter 11 "[a] death penalty for debtor and creditor interests." Hon. Edith H. Jones, *Chapter 11: A Death Penalty for Debtor and Creditor Interests*, 77 Cornell L. Rev. 1088, 1092 (1992). Back To Text

[118] As noted above, some authors have even gone so far as to suggest repealing chapter 11. *See supra* note 115 and accompanying text. Back To Text

[119] *See* Commission Report, *supra* note 64, at 311−15 (suggesting several changes to plan confirmation process that are designed to settle disputes or uncertainties in law that have led to expensive, time−consuming delays). Back To Text

[120] *See generally* Hon. Alexander L. Paskay & Frances Pilaro Wolstenholme, *Chapter 11: A Growing Cash Cow: Some Thoughts on How to Rein in the System*, 1 Am. Bankr. Inst. L. Rev. 331, 336−37 (1993) (recommending use of out−of−court workouts and limitations on professional fees as potential remedies for chapter 11 inefficiencies).Back To Text

[121] *See* LoPucki, *supra* note 3, at 738 (noting that suppliers are less willing to do business with debtor in chapter 11, and may require advance deposits or insist upon cash on delivery). Further, customers may be weary when buying a chapter 11 debtor's products as they may be fearful they will not receive service in the future. *See id.Back To Text*

[122] *See* Bufford, *supra* note 107, at 90 (noting earlier secured creditors receive collateral in which they have security interest in, the better off they are). Secured creditors also have to pay attorney fees and other expenses, therefore an earlier disposition of the chapter 11 case results in a reduction of these expenses. *See id. Back To Text*

[123] *See* 11 U.S.C. § 362(c)(2)(B) (1994) (noting stay is lifted on dismissal of claim).Back To Text

[124] *See* Bufford, *supra* note 107, at 90 (noting trustee will likely liquidate property in conversion to chapter 7).Back To Text

[125] *See id.* (noting confirmation will result in delayed payment).Back To Text

[126] *See generally* Mark E. MacDonald et al., *Confirmation by Cramdown Through the New Value Exception in Single Asset Cases*, 1 Am. Bank. Inst. L. Rev. 65, 67 (1993) (noting that cramdown provision, 11 U.S.C. § 1129(b), may allow plan to be confirmed despite objection of class of impaired interests or claims). Back To Text

[127] Secured creditors' claims are essentially treated the same as unsecured claims to the extent that they are undersecured. *See* 11 U.S.C. § 506(a). Section 506 of the Bankruptcy Code splits an undersecured claim into two parts, a secured claim and "a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to set−off, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set−off is less than the amount of such allowed claim." *Id.* Back To Text

[128] *See* 11 U.S.C. § 503 (1994) (allowing administrative expenses); 11 U.S.C. § 507 (listing claims and expenses that have priority and their order of priority). The foregoing are all paid before unsecured creditors. Back To Text

[129] *See* Bufford, *supra* note 107, at 91 (noting that waiting for marketplace of debtor's business to change, or waiting for highest bidder for business if it needs to be sold, may also be in best interests of an unsecured creditor, and therefore a valid reason for them to delay chapter 11 proceeding). Judge Bufford also notes that unsecured creditors, if there are few or no unencumbered assets, will risk little to delay a chapter 11 proceeding because their only chance to receive assets may be if the debtor's business prospers. *See id.* Back To Text

[130] This is especially true if the debtor wants to make long−term business changes that take time to implement. *See id.* at 92.Back To Text

[131] *See* LoPucki, *supra* note 3, at 733 (noting that debtors−in−possession often face little down−side risk in making risky business decisions); *see also In re* Kendavis Indus. Int'l, Inc., 91 B.R. 742, 765 (Bankr. N.D.

Tex. 1988) (noting that shareholders often have little or no equity so they have nothing to risk in making careless business decisions).Back To Text

[132] *See* Bufford, *supra* note 107, at 92 (noting how chapter 11 debtor's often act based on their own self interest) (citing Lynn LoPucki, Strategies for Creditors in Bankruptcy Proceedings § 11.7, at 622 (2d ed. 1991)).Back To Text

[133] *See id*. at 93 (noting that reducing time bankruptcy judge spends on chapter 11 cases will reduce their caseload and leave them more time for other matters). Back To Text

[134] *See* Gordon Bermant et al., *A Day in the Life: The Federal Judicial Center's 1988−1989 Bankruptcy Court Time Study*, 65 Am. Bankr. L.J. 491, 503−08 (1991). This study concluded that 37% of judicial case−related work time is spent on chapter 11 cases. *See id.* at 517. For the calendar year statistics of chapter 11 filings throughout the country for the years 1980−1994 see Admin. Off. of the U.S. Cts. Fed. Jud. Workload Stat. (December 31 reports, for years 1980−1994). *See* Consumer Bankr. News, Dec. 21, 1995. at 2 (1995 fiscal year statistics); *see also supra* note 2 and accompanying statistics. Back To Text

[135] *See* Bermant, *supra* note 134, at 503−08 (concluding that approximately 27.4% of case−related work time was spent on adversary proceedings). However, this study did not separate time spent on adversary proceedings by chapter and therefore, the better approximation is that taken by Judge Bufford. *See* Bufford, *supra* note 107, at 93 (noting "approximately 50% of a bankruptcy judge's case related work time is spent resolving [chapter 11] cases and related adversary proceedings").Back To Text

[136] These numbers are especially significant as the number of chapter 11 filings only constitute approximately 2 1/2 % of all bankruptcy filings. *See* Bufford, *supra* note 107, at 93 (summarizing percentage of chapter 11 filings in bankruptcy courts for years 1988−1993). Back To Text

[137] Section 1121 of the bankruptcy code gives chapter 11 debtors the exclusive right to file a plan during the first 120 days of the case, with such extensions as the court may authorize. *See* 11 U.S.C. § 1121 (1994).Back To Text

[138] *See generally* Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 Wis. L. Rev. 11, 31 n.67 (noting that as long as debtor retains right of exclusivity, case can go forward only on terms of debtor). In thirty−four of the forty−three cases LoPucki and Whitford studied, exclusivity was continued throughout the case. *Id. See generally* LoPucki, *supra* note 3, at 754−56 (showing thorough analysis on why many bankruptcy judges are willing to grant chapter 11 debtors extensions of time of exclusivity).*Back To Text*

[139] *See supra* note 138 and accompanying text.Back To Text

[140] These authors do not contend that a fast track system of case management is the best type for all districts. This article only discussed the fast track model of case management because it is the only type, to date, that there is sufficient data available for analysis. *See* Hon. A. Thomas Small, *Small Business Bankruptcy Cases*, 1 Am. Bankr. Inst. L. Rev. 305, 321 (1993) (explaining fast track method of case management); *see also* Bufford, *supra* note 107, at 99−102 (explaining Judge Mund's fast track method of case management and giving statistics revealing significant time reduction in chapter 11 cases).Back To Text

[141] *See* John Greenwald, *The Bankruptcy Game*, Time, May 18, 1992, at 60 (noting that under fast track system installed by Judge Small in his bankruptcy court, law firms have filed reorganization plans within 90 days and average just 6 months in court); Mary Graham, *Bankrupt and Bullish*, The Atlantic, Mar. 1992, at 24, 40 (noting that fast track system reduces paperwork, allows plans to be filed quickly, and thus cases only average seven months).Back To Text

[142] *See* LoPucki, *supra* note 3, at 751−52 (noting that procedure utilized by Judge Small's fast track system is similar to former chapter 11). Back To Text

[143] If Judge Small does not conditionally approve the disclosure statement, he typically would inform the debtor of his reasons thereof and allow them time to cure its defects. *See* Small, *supra* note 140, at 309. Conditional approval, however, lets the debtor solicit votes on the plan for reorganization. *See id.* Back To Text

[144] *See* LoPucki, *supra* note 3, at 751.Back To Text

[145] Judge Small's case management mediation approach has been generally excepted by both judges and the bankruptcy community. *See* LoPucki, *supra*, note 3, at 751; *see, e.g.*, Bufford, *supra* note 107, at 114 (noting Congress considered adopting Judge Small's fast track method); Hon. Lisa Hill Fenning, *The Future of Chapter 11: One View From the Bench*, 65 PLI/Comm. 317 (1993). Back To Text

[146] The Central District of California is the largest bankruptcy court in the nation. Approximately 9% of the entire nations cases are filed in this district annually. *See* Workload Stat., *supra* note 134 (compiling statistics of bankruptcy filings from Administrative Office of United States Reports).Back To Text

[147] The life span of a chapter 11 case was found to have been reduced by 45.4%, while the median time to confirm fell by 24.1%. *See* Bufford, *supra* note 107, at 102. There were also dramatic decreases in time that cases remained in chapter 11 in which they were ultimately dismissed (53.5% decrease) or converted to another chapter (44.1% decrease). *See id.* at 102−05. Back To Text

[148] *See id.* at 99 (noting that this determination was made by Judge Mund based on her experience as bankruptcy attorney and Judge). Typically, the more complex cases, such as companies with a particularly large number of assets, or publicly traded businesses, did not fit under Judge Mund's fast track system. *See id.* *Back To Text*

[149] *See id.* Judge Mund conditionally approved disclosure statements if they contained adequate information and could meet the requirements with only minor changes, or if there was a feasible possibility of reorganization and the statement only needed minor alterations. *See id.* at 100. Back To Text

[150] *See* Bufford, *supra* note 107, at 100 n.74 (noting differences between Judge Mund's and Judge Small's fast track system of case management). Also, if there were objections from creditors, based on the nonfeasibility of the plan, Judge Mund would typically hold these objections on the fast track hearing date. *See id.* at 100.Back To Text

[151] *See id.* at 100.Back To Text

[152] *See id.**Back To Text*

[153] Bufford has noted that coincidentally, Judge Mund's fast track hearing dates often coincide with the end of the exclusivity period, and the 120 day test espoused by the Supreme Court as the appropriate time frame for testing the viability of a chapter 11 reorganization. *See id.*; 11 U.S.C. § 1121(b) (1994); *see also* United Sav. Ass'n v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 376 (1988) (noting debtor has four months to put together plan). Back To Text

[154] *See Mediation*, *supra* note 17, at 35.Back To Text

[155] *See Heart of Chapter 11*, *supra* note 17, at 38 (giving reasons bankruptcy judges are particularly effective at prodding parties toward consensual plan). Back To Text

[156] *See Timbers*, 484 U.S. at 376 (noting that debtors are entitled to delay secured creditor enforcement only when they prove reasonable prospect of effective reorganization in reasonable period of time). Back To Text

[157] *See generally Heart of Chapter 11*; *No Hostile Takeover*; *Mediation*, *supra* note 17.Back To Text

[158] *See Mediation*, *supra* note 17, at 36.Back To Text

[159] *See id.* (noting that bankruptcy judges must run chapter 11 reorganizations in business, not litigation terms).Back To Text

[160] *See id.Back To Text*

[161] *See id.Back To Text*

[162] *See generally Heart of Chapter 11; No Hostile Takeover; Mediation, supra* note 17.Back To Text

[163] *See id.Back To Text*

[164] *See Heart of Chapter 11*, *supra* note 17, at 38 (advocating that Code needs to adopt business−based confirmation standards for use in business reorganizations; and further recommending business and mediation training for bankruptcy judges).Back To Text

[165] *See id.Back To Text*