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Mediation Allowed a Complex Dispute to Be Resolved Without Protracted Litigation

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Commercial debtors, creditors, bankruptcy practitioners and bankruptcy courts all experience the demands, stresses and uncertain outcomes of multi-party bankruptcy disputes. In complex cases involving multiple creditors sporting high-value claims, the parties and the court can reasonably expect that some of these disputes may already have had, or will have, protracted motion practice costing significant expenditures of time and resources for all parties involved (including the court).

In fact, many parties come to bankruptcy court having already having spent years and prohibitive amounts of money on pre-petition litigation just to find themselves potentially facing the need to engage in further expensive discovery and motion practice. While bankruptcy courts are well suited, as are bankruptcy practitioners, for dealing with fast-moving cases involving complex issues, the parties in these cases usually consider that the efficient, effective and economical resolution of disputes might be critical to the process of a successful reorganization or an orderly winding down of an estate.

Bankruptcy courts and practitioners have long recognized the economic benefit and utility of using mediation to resolve cases (both simple and complex) quickly and efficiently. Prior to the COVID-19 pandemic, most multi-party complex mediations were in person given the number of parties involved, along with the voluminous documents that parties might wish to refer to during mediation, as well as the perceived benefits of being in person to see, hear and negotiate disputes. The pandemic impeded that option as in-person meetings and travel were prohibited. While many practitioners acclimated to Zoom[2] or other online platforms for meetings involving a few parties, skillfully navigating a multi-party dispute with multiple caucus rooms, joint sessions and exhibits "online" were not things that every participant was adept at handling or keen to attempt. As commercial bankruptcy filings have increased over the past year as a result of government-mandated business shutdowns, parties are expanding the use of mediation for even the more complex cases simply out of necessity.[3]

Highland Capital Management LP is an effective example of a massively contested matter involving longstanding conflicts over substantial sums, and it demonstrates just how effective, versatile and valuable of a tool mediation can be when the parties commit to the process. In *Highland Capital*, out of the U.S. Bankruptcy Court for the Northern District of Texas and presided over by Hon. **Stacey G. C. Jernigan**, the court directed — and the parties consented to — the use of mediation to resolve discrete issues between the debtor and various significant creditors within the web of a very complicated case. The end result paved the way for a successful reorganization.

The disputes involved parties from multiple states during a time when the COVID-19 pandemic made travel, if not impossible, certainly a significant concern for a variety of reasons. In order to ensure that the process worked smoothly, the parties utilized the services of the American Arbitration Association (AAA), which not only has a roster of bankruptcy mediators, but also has the ability to facilitate an online platform for mediations while incorporating multiple platforms at the same time.[4] As a result, the parties were presented with a virtual format that enabled each of them to utilize the programs that they were most comfortable or familiar with, so that they could focus instead on addressing the legal and factual complexities of the case.

In *Highland Capital*, the debtor was an investment manager that filed a voluntary chapter 11 petition after various creditors obtained sub-

1 **Michael C. Troiano**, an associate with Moritt Hock & Hamroff LLP in the firm's Creditors' Rights and Restructuring Department, contributed to this article.

2 For a discussion of the unique benefits of alternative dispute resolution (ADR) processes, particularly in a virtual setting, *see* Leslie A. Berkoff & Hon. Louis H. Kornreich, "Taking Mediation Online: The Practicalities and the Pitfalls," XXXIX *ABI Journal* 6, 32, 56-57, June 2020, *available at* abi.org/abi-journal (unless otherwise specified, all links in this article were last visited on May 28, 2021).

3 According to statistics provided to ABI by the Administrative Office of the U.S. Courts, there was an onslaught of new chapter 11 cases, as commercial bankruptcy case filings rose by 29 percent nationally in 2020. "December 2020 Bankruptcy Statistics," ABI, Dec. 30, 2020, *available at* abi.org/newsroom/epiq-stats/december-2020-bankruptcy-statistics-commercial-filings.

4 For example, the AAA has the ability to accommodate each party's own videoconferencing software on its virtual ADR platform, thereby allowing each party to appear via whatever videoconferencing software it uses (Zoom, Skype, etc.) without mandating that all parties use a single software.

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stantial judgments against it following the completion of a series of highly contentious litigations. (The debtor, along with the Crusader Fund Creditors, UBS and Acis, are collectively referred to herein as the "parties.") The Crusader Fund Creditors and UBS were judgment creditors that had filed proofs of claim in the debtor's case that were predicated on long-running, highly charged disputes and involved in some manner alleged wrongful acts by the debtor and/or its agents.

In addition, there were other creditors, including Acis, that held significant causes of action against the debtor and had filed proofs of claim that needed to also be resolved in order to effectuate plan confirmation. The debtor objected to the claims asserted by the foregoing creditors on multiple grounds, and the creditors contested these objections.[5]

One set of fund-related creditors (the "Crusader Fund Creditors") had filed a series of claims totaling more than $200 million stemming from a pre-petition arbitration award, which the debtor had been challenging in the chancery court at the time that the bankruptcy petition was filed. There were disputes over the scope of the Crusader Fund Creditors' claims, including (but not limited to) the inclusion by the Crusader Fund Creditors of claims to recover funds that they claimed the debtor had allegedly prematurely taken from the Crusader Fund Creditors' accounts. The debtor contended that it would ultimately be entitled to those funds, or at least part of the same, upon liquidation of the accounts. There were also claims concerning the debtor's improper handling of certain shares of stock in which the Crusader Fund Creditors possessed an interest.

Another set of creditors, Acis Capital Management LP and Acis Capital Management GP LLC (together, "Acis"), which operated a portfolio-management company previously owned in part by the debtor's principal and managed by the debtor, also asserted a series of claims. At the time of the debtor's filing, Acis had just concluded its own heavily litigated chapter 11 case in front of Judge Jernigan, which had been commenced as an involuntary filing as a result of alleged bad acts committed by the principal of the debtor (Highland). The involuntary filing led to the appointment of a chapter 11 trustee and a web of adversary proceedings, including (but not limited to) a fraudulent conveyance suit by the chapter 11 trustee against the debtor (Highland), and objections to proofs of claim filed by the debtor (Highland) in the Acis case.

Acis had emerged from its involuntary chapter 11 case with a confirmed plan, which included the retention of the Acis estate's causes of action against the debtor (Highland) in its yet-to-be-concluded adversary proceeding in the Acis bankruptcy case (the "Acis adversary proceeding"). Based on the causes of action asserted in the adversary proceeding, Acis filed a proof of claim in the debtor's case containing "34 separate counts, all of which were extremely complex both factually and legally,"[6] to which the debtor objected and to which Acis filed a lengthy response.

Finally, UBS Securities LLC and UBS AG London Branch (together, "UBS") had also filed a factually and legally complicated claim stemming from a $1 billion state court judgment following an acrimonious 10-year litigation with the debtor. The debtor also objected to this claim. While the court had initially disallowed the UBS claim, it was subsequently allowed on a limited basis solely for the purposes of plan voting after another round of contested motion practice. Adding to the complexity of the UBS claim was the implication and involvement of several affiliates of the debtor that were defendants in a separate state court action and had been the recipients of assets transferred by the debtor, and UBS had asserted an interest.

All of the foregoing claim disputes involved parties involved in long-term highly adversarial relationships that were now battling to determine the scope and substance of claims to be allowed in the debtor's case in anticipation of a plan-confirmation process. Further litigation regarding the various issues surrounding these claims would have consumed significant chunks of the debtor's assets (which would otherwise have been available for distribution under the plan) and it would have monopolized time and resources of the court and the parties' practitioners for an extended period of time. As a result, this case was ripe for a cost-effective and potentially issue-dispositive mediation.

In August 2020 (almost a year after the case was commenced in October 2019), Judge Jernigan ordered the parties to mediate to see whether the various disputes could be resolved, as opposed to allowing them to continue to drain time and resources.[7] Given the pugilistic history and deeply entrenched mistrust among the parties, the situation required a mediator of significant acumen to resolve it. Consequently, the parties selected retired Judge **Allan L. Gropper** (U.S. Bankruptcy Court (S.D.N.Y.); New York) and **Sylvia A. Mayer** (S. Mayer Law PLLC; Houston) as co-mediators (the "mediators") to conduct the mediation. Through the mediation process, the parties settled each of their claims with the debtor within approximately eight months of the court's order directing mediation, clearly defining the amounts and sources of each of the agreed-upon claims and tying off the possibility of any further disputes among the parties regarding those particular claims.

For example, as a result of the mediation, the debtor's resolution with Acis resulted in the mutual release of a number of the factually and legally interconnected, and previously contested, claims stemming from Acis's prior involuntary bankruptcy, as well as the claims necessary to move forward with the debtor's plan confirmation.[8]

5 For an example of such a response, *see Highland Capital Mgmt. LP*, No. 19-34054-sgj11 (Bankr. N.D. Tex.), Docket No. 908 (*see* creditor Acis's response to debtor's claim objection to understand breadth of objections at play).

6 *Id.* at Docket No. 1087, p. 8.
7 *Id.* at Docket No. 912.
8 *Id.* at Docket No. 1087, pp. 9-10.

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The settlement between the debtor and the Crusader Fund Creditors resolved similarly longstanding intricate issues, as the debtor agreed to surrender certain wrongfully acquired interests and to market and sell certain securities for the Crusader Fund Creditors' benefit in exchange for mutual releases and significantly reduced claim amounts.[9]

The results of the mediation are even more impressive given some of the legal and factual issues that arose during the mediation process. For example, after the parties to the UBS dispute had participated in multiple mediation sessions and had agreed on a claim amount, they learned from an independent investigatory panel that the debtor had illegally transferred hundreds of millions of dollars' worth of assets to offshore accounts presumably to escape collection by UBS, thereby possibly exposing the estate to further claims and litigation. Through the mediation, the parties were able to renegotiate the claims of UBS at a substantial-yet-fair increase, thereby obviating the need for what would surely have been costly litigation regarding the improperly transferred assets.[10]

As these examples demonstrate, the retention of skilled mediators who were familiar with the complex issues presented by this bankruptcy case and the ability to manage the parties, as well as the parties' agreement and active participation in the process, led to the parties reaching consensus. As with most settlements in bankruptcy cases, the settlement agreements were then presented to the court for approval, and although there were objections, the court approved the resulting agreements.[11]

It is possible that absent the utilization of mediation, the multiple motions would have taken months to be heard and determined, leading to extensive discovery, hearings and trials, and potentially even appeals. By allowing the parties the opportunity to explore the validity of the various positions within the confines of the mediation process, and understand the risks associated with each of their respective positions, the parties were able to have a hand in the eventual resolution of their claims. With the claims of some of the debtor's most substantial claims' creditors settled in a timely fashion, the mediators helped pave the way for confirmation of a reorganization plan. In the end, the debtor was able to propose a confirmable plan shortly after the settlements were reached. abi

9 *Id.* at Docket No. 1089, pp. 7-8.

10 For a complete factual recitation of the UBS debtor-mediation process, including the discovery of and response to the unapproved transfers, *see Highland Capital Mgmt. LP* at Docket No. 2199 (debtor's motion for order approving settlement with UBS pursuant to Bankruptcy Rule 9019).

11 None of these objections were filed by the U.S. Trustee's Office. The most significant creditor objection to settlement was UBS's objection to the dollar amount of the debtor's agreement with the Crusader Fund Creditors; for objection, *see Highland Capital Mgmt. LP* at Docket No. 1190. The remaining objectors included the debtor's former principal and certain other fund creditors, all of whose objections were overruled by the court.