

**Child Sexual Abuse Claims,
Survivor Rights, and Bankruptcy
March 30, 2023**



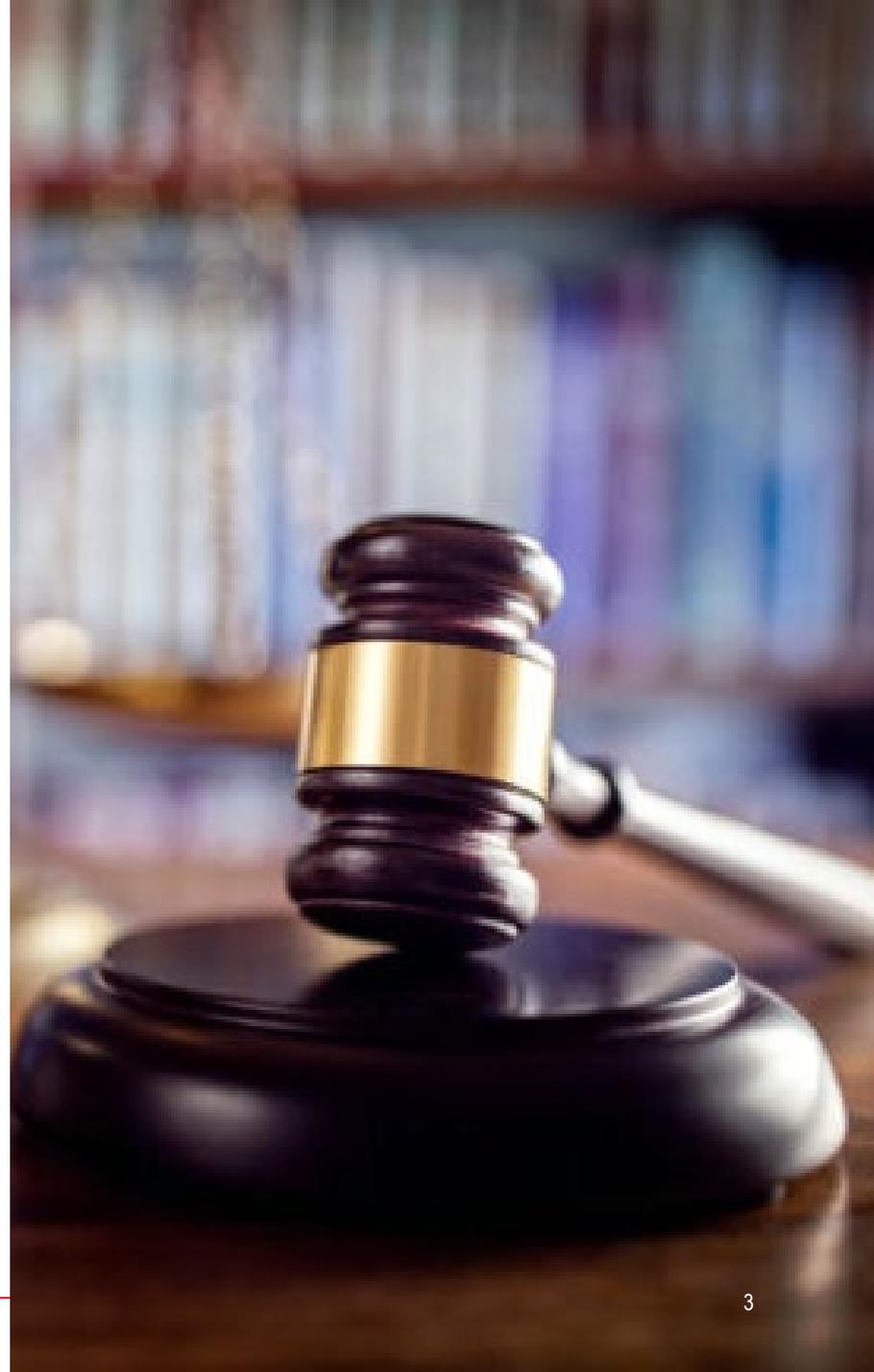
VIEWS FROM THE BENCH WITH THE HON. CHRISTOPHER SONTCHI (RET.)

MATERIALS AND DISCUSSION DISCLAIMER

The presenters involved in this panel may be involved in ongoing cases in different roles. The topics discussed in this outline, and the issues raised in this presentation, are presented for academic purposes only and do not reflect the views of the attorneys involved, their law firms, or clients they may represent in ongoing pending matters.

| DISCUSSION TOPICS

- The use of Chapter 11 to resolve mass sexual abuse claims
- Committee standing to prosecute substantive consolidation, alter ego and coverage claims
- Mediating mass sexual abuse claims in bankruptcy



THE USE OF CHAPTER 11 TO RESOLVE MASS SEXUAL ABUSE CLAIMS



TORT SYSTEM V. BANKRUPTCY SYSTEM

Tort System	Bankruptcy System
Survivors file their Complaints in State Court. Each Survivor files an individual Complaint, which will likely be assigned to different judges and have differing outcomes.	Diocese files for bankruptcy. Automatic stay immediately enjoins any pending actions against the Diocese in State Court. Bankruptcy estate is created establishing the maximum amount that can be distributed to all creditors.
Each individual State Court Action undergoes discovery, motion practice, possibly mediation, and a trial if necessary. The State Court Actions each proceed on an individual timeline, and it is somewhat of a race to obtain a judgment and payment.	The Court sets a deadline by which all claims must be filed, so that claims can share collectively in the assets of the estate according to the statutory priority scheme.
If a Survivor succeeds in litigation, the State Court enters a judgment for an amount certain regardless of the amount of assets held by the defendants, which will include the Diocese and an individual Parish, Mission, or School.	The Committee conducts an investigation into what assets are property of the estate, and determines all possible avenues to enlarge the estate. There may be mediation or bankruptcy litigation, which, in part, will try to expand the assets that make up the estate.
The Survivor attempts to collect the amount of the judgment. This may require waiting in line behind other Survivors (and other creditors) who obtained a judgment first.	The Debtor proposes a plan of reorganization which classifies claims and interests, and sets forth how the assets of the estate can be divided amongst all creditors.
The Defendants may collectively pay the judgment amount, appeal the judgment, refuse to pay and force the Survivor to commence an enforcement action, or file for bankruptcy.	Under no circumstances can the Bankruptcy Court order assets greater than the estate to be distributed to creditors. A creditors' recovery is capped by the assets of the estate (along with other potential recoveries which we will discuss).

MASS TORTS AND BANKRUPTCY

- Chapter 11 is often thought of as a means by which a financially distressed entity can restructure its debt and reduce its financial obligations.
- Prior to the diocesan bankruptcy filings, the Chapter 11 process had become an increasingly popular mechanism to address mass tort litigation, such as in the case of asbestos company bankruptcy filings. *See, e.g., In re Johns-Manville Corporation*, Case No. 82-11656 (S.D.N.Y. August 26, 1982).
 - But see *In re LTL Management, LLC* (3rd Cir. January 30, 2023) —“We start, and stay, with good faith. Good intentions— such as to protect the J&J brand or comprehensively resolve litigation—do not suffice alone. What counts to access the Bankruptcy Code’s safe harbor is to meet its intended purposes. Only a putative debtor in financial distress can do so. LTL was not. Thus we dismiss its petition.”
- The majority of diocesan bankruptcies have been filed primarily to address mass sex abuse tort claims filed against these dioceses. “But for” the potential liability for sex abuse claims, many of such diocese debtors would otherwise be financially sound. *See, e.g., David A. Skeel, Jr., Avoiding Moral Bankruptcy*, 44 B.C. L. REV. 1181, 1181-86 (2003).

SEXUAL ABUSE BANKRUPTCY CASES

- Although there are distinctions between Chapter 11 cases filed to address mass sex abuse tort claims and typical commercial cases, there can be financial and procedural reasons for Chapter 11 filings under these circumstances, including:
 - Avoiding a race to the courthouse.
 - More equitable treatment of claims and avoidance of early claims being paid more than late filed claims.
 - Pooling of resources to address claims and insurance litigation.
 - Permitting the organization to carry on its charitable mission.

DIOCESAN BANKRUPTCY PROCEEDINGS

- Diocesan bankruptcy proceedings are unique and distinct from other mass tort bankruptcy cases, and other Chapter 11 bankruptcy cases in general, in a number of ways.
- *Emotional and sensitive nature of the claims*: The majority of creditors are sexual abuse survivors, which results in highly sensitive and emotionally charged proceedings.
 - The typical Chapter 11 creditor seeks the repayment of money owed to it by the debtor, whereas sexual abuse survivors seek justice and compensation for deeply personal crimes committed against them. Bankruptcy, however, is not necessarily designed to provide justice but is instead designed to provide relief based on financial wrongs.
 - Due to the religious and moral issues involved in the diocesan cases, diocesan debtors face higher scrutiny from creditors and the media, who may be more likely to view the debtor as shirking its moral responsibilities through Chapter 11.
- Allowing a diocese to carry on its charitable religious purpose is a long-term goal of these cases.

THE BENEFITS OF CHAPTER 11 TO A DIOCESE

- Chapter 11 enables organizations to remain operational through debt restructuring and repayment plans administered through a trust.
- The automatic stay halts pending litigations, including tort-related claims, and prohibits (1) new actions from being initiated; and (2) judgments from being recovered without bankruptcy court relief.
- The Bankruptcy Code provides the debtor with the ability to request a deadline for proofs of claim, including survivor proofs of claim, that can in some instances conflict with the deadline established by the applicable statute of limitations.
- Third-party releases can relieve certain non-debtor affiliates (i.e., parishes or insurers) and/or individuals from liability with current and future survivor claimants.
- The plan injunction can similarly relieve non-debtor affiliates from defending survivor claims by channeling those claims to the trust for adjudication.

**COMMITTEE STANDING TO
PROSECUTE SUBSTANTIVE
CONSOLIDATION, ALTER EGO,
AND COVERAGE CLAIMS**



COMMITTEE'S ABILITY TO OBTAIN STANDING

- The Committee first files a motion in the bankruptcy court requesting authorization to assert causes of action on behalf of debtor's estate.
- The Committee must meet the jurisdictional requirements for derivative standing.
- The Committee is entitled to derivative standing if its claim is colorable and if the Debtor unjustifiably refused to pursue it.
- To pursue derivative standing, the Committee must demonstrate that its claims are colorable, i.e., could survive a motion to dismiss.

SUBSTANTIVE CONSOLIDATION

Legal Elements to Satisfy

The party requesting substantive consolidation must show:

- 1) A substantial identity between the entities to be consolidated;
 - 2) That consolidation is necessary to avoid harm or to achieve some benefit; and
 - 3) In the event that the creditor shows harm, that the benefits of consolidation “heavily” outweigh the harm.
- However, some jurisdictions, including the Eighth Circuit, hold that Section 303(a) of the Bankruptcy Code prohibits involuntary bankruptcy proceedings against religious and charitable organizations.

I ALTER EGO

- Under New Jersey law, where one corporation is the “alter ego” of another, both are treated as a single corporation with respect to the rights of third parties as against either corporation.
- Two-Part Analysis: The controlled corporation is so dominated by the controlling entity that the corporation is rendered the controlling entity’s “alter ego”; and
- The controlled corporation is being used to “defeat the ends of justice, to perpetuate fraud, to accomplish a crime, or otherwise to evade the law.”
- Factors considered by the Third Circuit in this analysis:
 - Gross undercapitalization
 - Failure to observe corporate formalities
 - Non-payment of dividends
 - Insolvency of the debtor corporation
 - Siphoning funds from the debtor corporation by the dominate stockholder
 - Non-functioning of officers and directors
 - Absence of corporate records
 - Whether the corporation is merely a façade for the operations of the dominant stockholder or shareholders
- The Committee must seek standing from the Bankruptcy Court to bring alter ego claims under New Jersey law.

I COVERAGE CLAIMS



- Typically, a Diocese debtor will commence an adversary proceeding in the early days of its Chapter 11 case seeking a declaratory judgment regarding the scope and extent of its insurance coverage.
- If a debtor fails to do so, may a Committee gain standing to step into the debtor's shoes and commence a similar action? *See, e.g., In re The Roman Catholic Diocese of Norwich* (Bankr. D. Conn. 21-20687) (*Motion by Official Committee of Unsecured Creditors for Order Granting it Standing and Authorizing it to Prosecute and Settle Certain Insurance Coverage Claims Against the Catholic Mutual Relief Society of America*).

MEDIATING MASS SEXUAL ABUSE CLAIMS IN BANKRUPTCY



BANKRUPTCY MEDIATION, GENERALLY

- Mediation allows parties to avoid the unpredictability and expense of litigation, especially where litigation would be drawn-out, expensive and highly fact-driven.
- Mediation is not specifically addressed in the Bankruptcy Code or Bankruptcy Rules, but courts often rely on local rules providing for mediation.
- Prior to local rules addressing mediation, courts relied on provisions concerning the appointment of an examiner pursuant to section 1104 of the Bankruptcy Code or section 105(a) of the Bankruptcy Code.



LOCAL RULES OFTEN ADDRESS MEDIATION

- Judicial authority to order parties to participate in mandatory, non-binding mediation derives from:
 - a) An applicable statute;
 - b) The court's local rules;
 - c) The Federal Rules of Civil Procedure; and
 - d) The court's inherent powers.
- As statutory authority, courts cite the Alternative Dispute Resolution Act ("ADR Act"), 28 U.S.C. §§ 651-658, enacted by Congress to promote the use of alternative dispute resolution ("ADR") by federal courts. The ADR Act lists mandatory mediation as an appropriate ADR process but does not authorize its use. 28 U.S.C. § 651(a).
- Instead, the ADR Act directs each district court to "devise and implement its own alternative dispute resolution program, by local rule adopted under [28 U.S.C.] section 2071(a), to encourage and promote the use of alternative dispute resolution in its district." 28 U.S.C. § 651(b). Most federal district courts and some bankruptcy courts responded to the ADR Act by adopting local rules authorizing mandatory mediation. These local rules provide a source of authority for ordering parties to participate in mediation.
- **78 of 94 districts (83%) HAVE adopted some type of local bankruptcy mediation rules, and 16 of 94 districts (17%) HAVE NOT adopted bankruptcy mediation rules.**

BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
First Circuit			
District of Maine	LBR 9019-2	Link	
District of Massachusetts	LBR 16.4, and F.R.B.P. 9019-2	Link	
District of New Hampshire	LBR 7016-1	Link	
District of Puerto Rico	LBR 7026-1(c)		Implementing mediation via discovery plan
District of Rhode Island	Implements District Court's ADR Plan	Link	
Second Circuit			
District of Connecticut	LBR 9019-2	Link	
Eastern District of New York	LBR 9019-1	Link	
Northern District of New York	LBR 9019-1	Link	Implementing Local Appendix IV mediation program for the U.S. Bankruptcy Court Northern District of New York
Southern District of New York	LBR 9019-1	Link	
Western District of New York	--	--	None
District of Vermont	VT. L.B.R. 9019-1	Link	
Third Circuit			
District of Delaware	LBR 9019 (1-7)	Link	
District of New Jersey	D.N.J. LBR 9019-1; D.N.J. LBR 9019-2	Link	
Eastern District of Pennsylvania	LBR 9019-2	Link	One of the most comprehensive rules
Middle District of Pennsylvania	LBR 9019-02 & LBR 9019-3 (Mortgage Modification Mediation Program)	Link	LBR 9019-3 = Mortgage Modification Mediation Program
Western District of Pennsylvania	LBR 9019 (1-7)	Link	
District of Virgin Islands	LBR 9019-02	Link	

BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Fourth Circuit			
District of Maryland	LBR 9019-2	Link	
Eastern District of North Carolina	LBR 9019-2(1-7)	Link	
Middle District of North Carolina	LBR 9019-2	Link	Continues to use Mediated Settlement Conference
Western District of North Carolina	LBR 9019-2	Link	Continues to use Mediated Settlement Conference
District of South Carolina	LBR 9019-2	Link	
Eastern District of Virginia	LBR 9019-1	Link	
Western District of Virginia	--	--	None
Northern District of West Virginia	LBR 9019-1 and LBR 9019-2	Link	
Southern District of West Virginia	LBR 9019-2	Link	
Fifth Circuit			
Eastern District of Louisiana	--	--	None
Middle District of Louisiana	--	--	None
Western District of Louisiana	LBR 9019-2	Link	
Northern District of Mississippi	LBR 9019-1	Link	
Southern District of Mississippi	LBR 9019-1	Link	
Eastern District of Texas	LBR 9019-1	Link	
Northern District of Texas	LBR 9019-1 and LBR 9019-2	Link	
Southern District of Texas	District Court LR 16.4	Link	Not in local rules
Western District of Texas	LBR 1001(h) adopting Appendix L-1001-h	Link	Comprehensive rule

BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Sixth Circuit			
Eastern District of Kentucky	LBR 9019-1	Link	
Western District of Kentucky	--	--	None
Eastern District of Michigan	LBR 7016-2	Link	
Western District of Michigan	LBR 9019-(1-20)	Link	Includes LBR 9019-5: Pro Bono Mediations
Northern District of Ohio	LBR 9019-2	Link	(Governed by L. Civil R. 16.4 – 16.7)
Southern District of Ohio	LBR 9019-2	Link	
Eastern District of Tennessee	LBR 9019-2	Link	
Middle District of Tennessee	LBR 9019-2	Link	
Western District of Tennessee	LBR 9019-1	Link	
Seventh Circuit			
Central District of Illinois	District Court Rule 16.4	Link	
Northern District of Illinois	LBR 9060-1	Link	
Southern District of Illinois	--	--	None
Northern District of Indiana	LBR 9019-2	Link	
Southern District of Indiana	LBR 9019-2	Link	
Eastern District of Wisconsin	--	Link	Per website "A committee of judges and attorneys is exploring the creation of a formal mediation program for adversary proceedings and contested matters."
Western District of Wisconsin	--	--	None. Conducts Mortgage Modification Mediation

BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Eighth Circuit			
Eastern District of Arkansas	--	--	None
Western District of Arkansas	--	--	None
Northern District of Iowa	District Court LR 72B	Link	Not discussed in Br. Local Rules; Mentions B. Ct. in Dist. Ct. Local Rules
Southern District of Iowa	District Court LR 72B	Link	Not discussed in Br. Local Rules; Mentions B. Ct. in Dist. Ct. Local Rules
District of Minnesota	LBR 9019-2	Link	
Eastern District of Missouri	LBR 9019	Link	
Western District of Missouri	District Court LR 16.4	Link	Implemented Mediation and Assessment Program (MAP) in 2019 – includes Bankruptcy
District of Nebraska	LBR 7016-1	Link	
District of North Dakota	LBR 7016-2	Link	Adopts District Court Local Rule 16.2
District of South Dakota	--	--	None
Ninth Circuit			
District of Alaska	LBR 1001	Link	Adopts District Court Local Rule 16.2
District of Arizona	LBR 9072 (1-9)	Link	
Central District of California	LBR Appendix III	Link	General B. Website includes guidance on Bankruptcy Mediation Program
Eastern District of California	General Order 95-01 - Adoption of Mediation Program for Bankruptcy Cases and Adversary Proceedings	Link	
Northern District of California	LBR 9040 through LBR 9050	Link	
Southern District of California	LBR 7016-3; 7016-11	Link	
District of Guam	--	--	None
District of Hawaii	LBR 9019-2	Link	
District of Idaho	District Court Rule 16.4	Link	

BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
District of Montana	LBR 9019-1	Link	See Mont. LBR 9014-1 for ADR application
District of Nevada	LBR 9019	Link	
District of Northern Mariana Islands	LBR 9019-2	Link	Adopts District Court Local Rule 16.4
District of Oregon	LBR 9019-1	Link	
Eastern District of Washington	LBR 9019-2	Link	
Western District of Washington	LBR 9040 through LBR 9050	Link	Honorable Thomas T. Glover Mediation Program
Tenth Circuit			
District of Colorado	LBR 9019-2	Link	
District of Kansas	LBR 9019-2	Link	
District of New Mexico	Mediation Order	Link	Implements Mediation Order in certain cases
Eastern District of Oklahoma	LBR 9019-2	Link	
Northern District of Oklahoma	LBR 9019-2	Link	
Western District of Oklahoma	LBR 7016(f)	Link	
District of Utah	LBR 9019-2	Link	
District of Wyoming	LBR 9019-2	Link	

BANKRUPTCY MEDIATION RULES AND POLICIES (AS OF 10/26/22)

Bankruptcy Court	Local Rule	Rule	Notes
Eleventh Circuit			
Middle District of Alabama	--	--	None
Northern District of Alabama	--	--	None
Southern District of Alabama	--	--	None
Middle District of Florida	LBR 9019-2	Link	
Northern District of Florida	LBR 7016-1	Link	
Southern District of Florida	LBR 9019-2	Link	
Middle District of Georgia	Mediation Procedures	Link	
Northern District of Georgia	Mediation Procedures	Link	
Southern District of Georgia	--	--	None
D.C. Circuit			
District of Columbia	LBR 9019-2	Link	

BENEFITS OF MEDIATION IN COMPLEX CASES

- Mediation in bankruptcy will ideally create a pool of assets to satisfy claims, and provides a clear alternative to a “race to the courthouse” scenario that bankruptcy seeks to avoid.
- Mediation can help resolve complex insurance coverage disputes such as late notice, number of occurrences, and “expected or intended” issues.
- Mediation can be especially relevant in bankruptcy cases with significant tort claims, which can’t be addressed directly by bankruptcy courts. 28 U.S.C. 157(b)(5) provides:
 - “The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.”

HISTORICAL RESOLUTION OF CLAIMS IN MASS TORT CASES

- Resolution of far-ranging, numerous tort claims through the bankruptcy process began with asbestos litigation. Over 700,000 asbestos personal injury and wrongful death claims were filed against over 80 asbestos firms from the mid-1980s through the early 2000s (See RAND INSTITUTE, ASBESTOS LITIGATION, at xxiv (2005)).]
- Since that time, non-asbestos mass tort cases have charted similar paths toward a global resolution for claim resolution.
- Some form of mediation or active judicial participation in the settlement of issues between the various constituents has been used to resolve a diverse collection of mass tort issues:
 - Pharmaceuticals (*Mallinckrodt PLC, Purdue Pharma*)
 - Silicon implant cases (*Dow Corning*)
 - Dalkon Shield (*A.H. Robins, Inc.*)

PROS AND CONS OF BANKRUPTCY MEDIATION IN ABUSE CASES

PROS

- The automatic stay creates a pause in litigation that may allow for a global resolution.
- Claims have common threshold liability issues and differences in claims can be addressed through a claims administration process.
- Avoid expensive insurance coverage litigation involving numerous insurers across many coverage years.

CONS

- Abuse claimants seeking jury trials and individual court actions – due process concerns.
- Aggregating claims may create a pressure to settle for more meritorious claims while creating a low bar to asserting claims and create a danger of false or unsupportable claims.

WHO SHOULD BE AT THE NEGOTIATING TABLE?

- The concept of mediation between all of the parties at the same time, or several subsets of the groups below (sometimes referred to as “co-mediation”) should be carefully considered.
- Mediation should include:
 - Debtor/Diocese
 - Official Committee of Unsecured Creditors
 - The abuse claimant committee, if separately organized
 - Insurers
 - Parishes or other non-debtor entities named in abuse claims
- Should mediation be overseen by more than one mediator? If so, how will each mediator’s duties be defined?
- Should the mediation take place in phases such that the mediator initially meets with the Diocese and the Committee and if progress is made, only then invite the insurers?

| TIMING OF MEDIATION

- Prior to bankruptcy – as part of a pre-arranged or prepack plan.
- During the initial stages of the case, to facilitate a stay of actions against related parties and additional insureds.
- After the claims bar date when the universe of claims is known.
- At the plan stage, to address releases, the treatment of non-debtor entities and to determine procedures for claims administration.



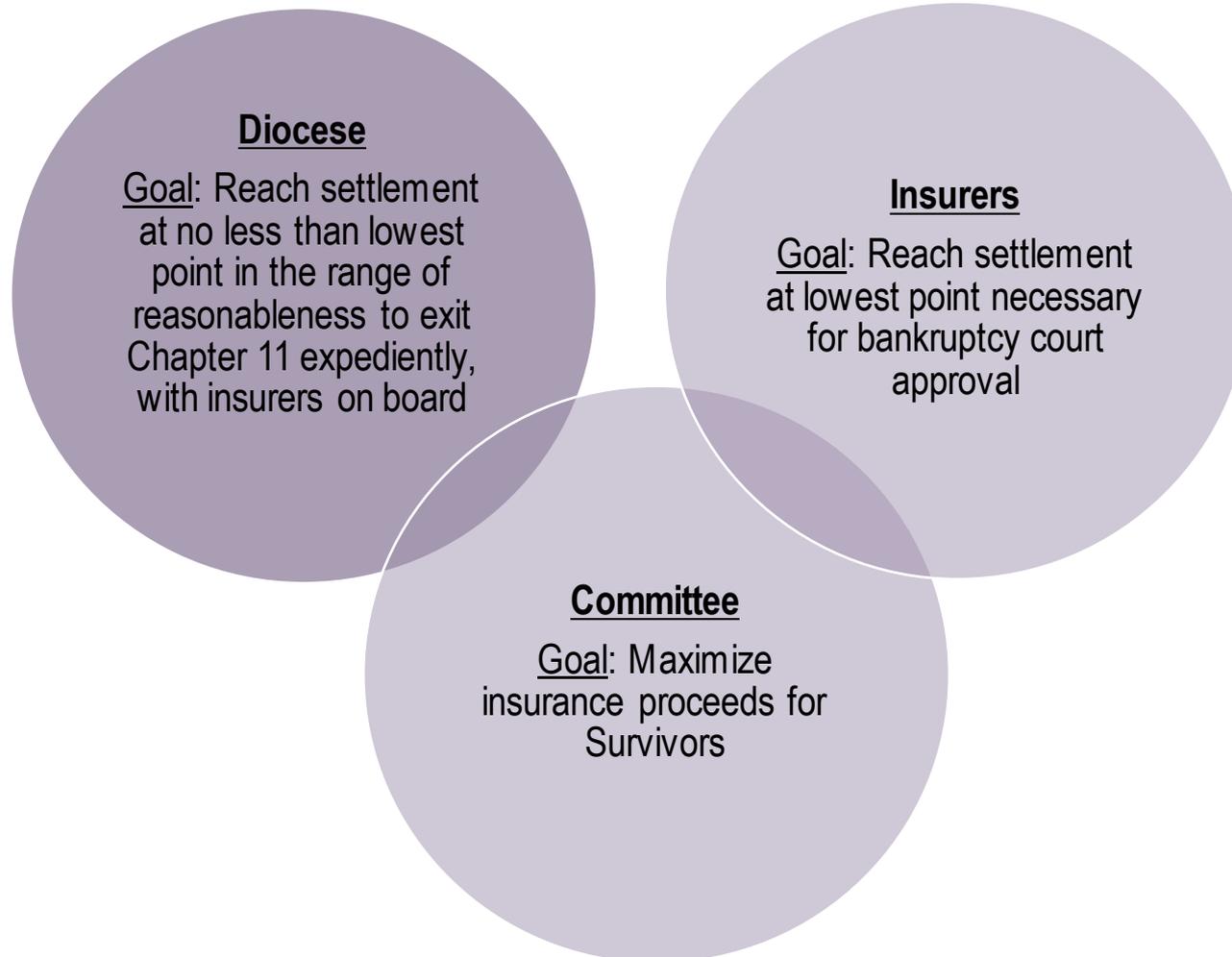
WHICH ISSUES CAN BE SETTLED THROUGH MEDIATION?

- Availability of insurance proceeds.
- Total amount available for distribution to claimants.
- Clawback actions.
- Property of the estate issues.
- Abuse claim administration procedure.
- Parish and other entity contribution.
- Non-debtor releases.
- Insurance neutrality.
- Non-monetary provisions such as policies and procedures to prevent future tort claims.

MEDIATION STRATEGIES

- Is there a way that Bankruptcy Courts can be involved either at the outset of mediation or later in the process to motivate parties to settle?
- How do you facilitate productive conversation rather than arguing?
- In some instances, having more than one mediator through the process (either to deal with separate issues or settlement between different constituents) may facilitate the process.
- How to best staff the mediation and structure the discussions to make progress instead of restating entrenched positions?
- How to build some sense of urgency to get things done?

THE CHALLENGES OF A GLOBAL SOLUTION





**THANK
YOU**

[lowenstein.com](https://www.lowenstein.com)

© 2023 Lowenstein Sandler LLP