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THE RISING USE OF MEDIATORS: IS THIS THE WAVE OF THE FUTURE?

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Select Cases

I. **Discoverability of Mediation Documents**

a. In re Teligent, Inc., 640 F.3d 53 (2d Cir. 2011)

i. The debtor and its CEO had engaged in court-ordered mediation and agreed to be bound by the standard protective orders employed by the S.D.N.Y. The parties reached a settlement, one aspect of which required the CEO to sue his former lawyers for malpractice. During discovery, the defendant law firm sought all mediation and settlement communications.

ii. The court of appeals for the Second Circuit affirmed the district court's order denying the law firm's motion to lift two protective orders prohibiting disclosure of communications made during mediation.

iii. The court explained that there is a presumption against modifying confidentiality provisions contained in protective orders entered in the mediation context, and emphasized the importance of confidentiality in mediation to promote the free flow of information that may result in the settlement of a dispute.

iv. ***Teligent Test***: The court established a three-prong test that the party seeking discovery must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence out-weighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents."

b. *Dandong v. Pinnacle Performance Ltd.,* 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012)

i. The confidential materials in dispute were from a private, confidential mediation among plaintiffs, who claimed that they had been the victims of a fraud relating to their purchase of certain notes created by the defendants. The defendants sought to use the prior mediation statements of the plaintiffs to impeach them and the plaintiffs sought a protective order to prevent access to the materials.

ii. The District Court for the S.D.N.Y. first held that the *Teligent* test protects the confidentiality of mediations in which the confidentiality order is purely private, stating the test applies to "all situations in which a party seeks disclosure of confidential mediation communications."

iii. The court went on to clarify that the third party seeking discovery must show extraordinary need, and one that outweighs the strong public interest in preserving a mediation's presumed confidentiality, in order to obtain disclosure of mediation materials.

iv. The court ultimately reversed the magistrate's decision that a "special need" for the material had been demonstrated and held that impeachment was not a "special need" or "compelling need" warranting lifting the protective order and, therefore, the *Teligent* test was not satisfied.

II. Material Non-Public Information (MNPI)

a. *In re Washington Mut., Inc.*, 461 B.R. 200, 259 (Bankr. D. Del. 2011) vacated in part, No. 08-12229 MFW, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012)

i. There were several disputes between creditors of Washington Mutual Bank's parent company and JPMorgan over the ownership of certain assets following the sale of Washington Mutual Bank to JPMorgan.

ii. Investors holding substantial positions in Washington Mutual participated in various confidential settlement negotiations with JPMorgan. In an effort to minimize their risk of trading with MNPI obtained during the confidential negotiations, the investors typically agreed not to trade until Washington Mutual disclosed the MNPI at the end of predetermined lock-up periods.

iii. Notwithstanding the precautions the investors took to avoid trading improprieties, Judge Walrath found that there were "colorable claims" that the investors may have traded while in possession of MNPI and that they could be subject to equitable remedies imposed by the bankruptcy court.

b. Mediation Orders in the Wake of Washington Mutual

i. In an effort to encourage parties to participate in mediations and provide parties with an up-front understanding of the potential risks of participating, recent mediation orders have addressed the MNPI issue directly. Compare *General Motors* with *Cengage* and *Lightsquared*.

ii. ***General Motors***: The mediation order included a warning to potential parties that they may come into possession of MNPI by participating in the mediation. Notably, the order did not provide any comfort to potential parties with respect to the risk that their claims could be subject to equitable treatment.

1. "In connection with the Mediation, such Mediation Party may come into possession of information (including but not limited to information concerning the ranges of values and other circumstances in which the Mediation Parties might be willing to settle the Claims Objection, the Adversary Proceeding, the Rule 60(b) Motion and the New GM Claim) that may constitute material, non-public information under the Securities Laws."

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