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MEDIATION IN DEBTOR/ CREDITOR RELATIONSHIPS

The recent crisis in agriculture has resulted in a record number of farm and bank failures in agricultural states.¹ The attendant social and economic turmoil, which sometimes has included violence,² in communities dependent upon agriculture has focused attention on the relationship between debtor and creditor and their respective rights in collateral.

Where the debtor is in default and the secured lender pursues its legal remedies, whether through judicial action³ or self-help repossession without the consent of the debtor,⁴ a permanent breakdown in the debtor/creditor relationship occurs. From the debtor's perspective, the opportunity to repay debt is often cut off because the property necessary to operate a business is no longer available.⁵ The creditor is similarly deprived of any op-

1. See Nash, *A Line of Defense Under Stress*, N.Y. Times, Mar. 10, 1986, at A16, col. 4 (reporting the FDIC's struggle with a huge workload as a result of the largest number of bank failures since the Depression); Schneider, *As More Family Farms Fail, Hired Managers Take Charge*, N.Y. Times, Mar. 17, 1986, at A1, col. 5 (reporting a wave of farm failures that is swamping lenders with property, contributing to the rapid growth of professional farm management services); Schneider, *Farm Loan System's Huge Loss*, N.Y. Times, Feb. 19, 1986, at D1, col. 6 (reporting that the Farm Credit System, the nation's largest agricultural lender, posted the biggest loss in its 70-year history).

2. Malcolm, *Troubled Farmers: Debts and Guns*, N.Y. Times, Dec. 12, 1985, at A20, col. 4.

3. Court-enforced repossession of personal property generally consists of actions under replevin or claim and delivery statutes. See J. WHITE & R. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 1102-03 (2d ed. 1980). Where real property subject to mortgage is involved, foreclosure is the judicial remedy. 36A C.J.S. *Foreclosure* (1960).

4. U.C.C. § 9-503 states: "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."

5. See *Penney v. First Nat'l Bank*, 385 Mass. 715, 433 N.E. 2d 901 (1982). Penney, a commercial fisherman, borrowed \$32,802.39 from the bank and executed a security agreement involving his lobster boat on March 28, 1975. After making several payments and incurring additional debt from the bank, Penney defaulted on the note, and on July 29, October 11, November 4, and December 30, 1977, the bank wrote to Penney demanding all of the sums due. Penney made further payments after every letter except the last, although he remained in default throughout the period. The bank seized the lobster boat without notice on January 19, 1978. As a consequence of the repossession, Penney lost

portunity for future repayment and he incurs collection costs that potentially increase the amount of any deficiency and limit any excess that would be available for the debtor.

Economic and social costs follow from terminating the debtor/creditor relationship. A negotiated agreement, which either restructures the terms of repayment, or, if repayment is infeasible, provides for voluntary surrender of the collateral, may effectively reduce these costs.

Two states that have substantial interests in agricultural debtor/creditor relationships have attempted to limit the social and economic costs of prematurely terminating the debtor/creditor relationship. Iowa and Minnesota have adopted a statutory requirement that the creditor offer to submit to mediation prior to taking any debt collection action against an agricultural borrower.⁶ This Note argues that requiring creditors to offer mediation as a statutory prerequisite to debt collection is an effective means of reducing the social and economic costs of the premature termination of a debtor/creditor relationship in business contexts. Part I examines the conceptual foundations of the mediation process and analyzes the viability of extending mediation to debtor/creditor relationships, concluding that mediation can provide effective assistance in negotiating an alternative solution to repossession of collateral. Part II examines the mediation statutes of two agricultural states. An evaluation of empirical data from the Iowa Farmer/Creditor Mediation Service demonstrates that mediation has proved successful in resolving agricultural debtor/creditor disputes. Part III explores the feasibility of requiring mediation in debtor/creditor relationships outside of agriculture, including business and consumer loan contexts. Although mediation is probably more appropriate and cost-effective in the case of business loans, possibilities also exist for application to consumer loans above a threshold amount.

\$34,000 worth of fishing equipment at sea. At the time of the repossession, Penney owed the bank \$19,000. The debt was secured by the boat and by real estate, valued at \$18,500, pledged by a guarantor. The bank sold the boat for \$13,500, but did not exercise its rights against the guarantor. As a result of the repossession, both Penney and the bank sustained unnecessary losses.

6. Act effective May 23, 1986, H.F. 2473, 1986 Iowa Legis. Serv. 21 (West) (No. 7) [hereinafter Iowa H.F. 2473]; MINN. STAT. ANN. §§ 583.20-.32 (West Supp. 1987). The Illinois legislature has considered similar legislation. H.B. 3357, 84th Gen. Assembly, Reg. Sess. (Ill. 1986).

I. CONCEPTUAL FOUNDATION OF MEDIATION

The distinction between mediation and other dispute resolution methods has been the source of considerable confusion among legal professionals.⁷ On a spectrum, with negotiation at one end and formal adversary proceedings at the other, mediation is properly considered a step beyond negotiation.⁸ Unlike an arbitrator, a mediator is not the ultimate decisionmaker who imposes a result upon the disputants. The mediator's goal is to resolve the dispute by helping the parties negotiate an agreement appropriate to their needs and circumstances,⁹ which often involves going beyond the formal legal prescriptions that define the rights of the parties in the relationship.¹⁰ Mediation is a radical departure from the judicial process and from arbitration because it is committed to resolving disputes voluntarily through communication and compromise: a third party does not force a solution upon the disputants.¹¹

Although mediation is designed to be adapted to the particular needs of the parties, it is not totally unstructured and generally proceeds through common phases. An analysis of these phases is helpful in understanding the mediator's role in dispute resolution.

A. *The Mediation Process*

The mediation process typically begins with a period of preparation in which the disputants obtain background information on their potential claims, defenses, and remedies.¹² The mediator may request information from the disputants or engage in other background research to familiarize himself with the dis-

7. Cooley, *Arbitration v. Mediation—Explaining the Differences*, 69 JUDICATURE 263 (1986); see also Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 29-30 (1982).

8. J. MARKS, E. JOHNSON & P. SZANTON, *DISPUTE RESOLUTION IN AMERICA* 39 (1984).

9. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971). "[T]he central quality of mediation . . . [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another." *Id.*

10. *Id.* at 308. "[M]ediation is commonly directed, not toward achieving conformity to norms, but toward the creation of the relevant norms themselves." *Id.* Professor Fuller notes that this is particularly true in a contract negotiation, with no pre-existing structure that can guide mediation. *Id.*

11. R. COULSON, *PROFESSIONAL MEDIATION OF CIVIL DISPUTES* 17-18 (1984).

12. Cooley, *supra* note 7, at 269.

pute.¹³ Although the mediator need not be an expert in the subject matter of the dispute, the mediator should appreciate the constraints and pressures acting upon each of the parties in the environment of the dispute.¹⁴

After the preparation phase, the parties typically proceed to the initial phase of negotiation. The approach in this phase may vary substantially, depending upon the experience and background of the disputants as well as the orientation of the mediator,¹⁵ but generally the mediator introduces the disputants to one another and to the negotiation process.¹⁶ The next phase is the statement of the problem, where each party separately identifies and discusses the issues in the dispute.¹⁷ A problem clarification phase follows, where the mediator may ask questions or summarize areas of agreement and disagreement in order to define and focus the interests of the parties.¹⁸ The mediator may choose to hold separate confidential meetings with each of the parties where each party can give a candid account of the internal posture of his interests.¹⁹ The disclosure of confidential information mandates that the mediator be neutral both in appearance and fact so that a bond of trust may develop.²⁰

After the problem is stated and clarified, the parties and the mediator begin to suggest possible solutions to the dispute.²¹ From these suggestions, the mediator assists the parties in evaluating the alternatives, eliminating unworkable options, and selecting a solution that will produce the optimum result for both parties.²² If successful, an agreement that functions as a contract

13. *Id.*

14. Stuhlberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 95-96 (1981). Professor Stuhlberg notes that the content knowledge of a mediator may depend upon the specific type of dispute. Although at least a basic knowledge is desirable, expert knowledge presents the potential difficulty of having the parties look toward the mediator for the correct answers, which is contrary to the goal of the parties devising their own solutions.

15. J. FOLBERG & A. TAYLOR, *MEDIATION*, reprinted in S. GOLDBERG, E. GREEN & F. SANDER, *DISPUTE RESOLUTION* 97, 99 (1985); see also J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 8, at 41 (stating that mediation can involve both facilitative and persuasive components, depending upon the approach of the mediator and the substance of the dispute).

16. Cooley, *supra* note 7, at 269.

17. *Id.*

18. *Id.*

19. Fuller, *supra* note 9, at 318.

20. Stuhlberg, *supra* note 14, at 96.

21. Cooley, *supra* note 7, at 269.

22. *Id.*

between the disputing parties concludes the formal mediation process.²³

B. Functions of the Mediator

The mediator serves several important functions in the mediation process.²⁴ One of the more pervasive and general functions is that of a catalyst: the mediator reacts to each party's concerns and acts to reduce unnecessary friction between the parties and to provide a constructive environment for communication.²⁵ As a neutral third party, the mediator brings a distinct and new perspective to the problem that can affect the way that the parties view proposed solutions. Although the mediator has no formal authority, his position in the process commands the attention of the parties, giving him power to make dramatic suggestions,²⁶ as well as to assist the parties to communicate freely and effectively.²⁷

As an educator,²⁸ the mediator informs and guides the parties in applying the concepts of principled negotiation and problem solving.²⁹ The mediator's participation discourages distortions in the bargaining process caused by gamesmanship and allows the parties to examine their actual interests and achieve the reciprocal advantages of a properly negotiated exchange.³⁰ The mediator also helps the parties to focus on the implications of not reaching an agreement, thus articulating and clarifying the incentives for continued participation.³¹

23. *Id.*

24. Within the mediation model, the continuum of roles that the mediator may fulfill ranges from the rather passive role of a discussion facilitator or convenor of meetings to comparatively active roles involving participation in the discussions and providing additional counseling services to the disputants. See H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 218-19 (1982). The functions described *infra* in text accompanying notes 25-38 contemplate performance on the more active portion of the continuum.

25. Stuhlberg, *supra* note 14, at 91-92.

26. Fuller, *supra* note 9, at 315; see also Cooley, *supra* note 7, at 268-69 (discussing the comparative power of mediators and arbitrators).

27. Cooley, *supra* note 7, at 269.

28. Stuhlberg, *supra* note 14, at 92.

29. R. FISHER & W. URY, *PRINCIPLED NEGOTIATION* (Draft Ed. 1980), quoted in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 15, at 93.

30. Fuller, *supra* note 9, at 316-22. Professor Fuller uses the example of the "wicked partner" ploy as a helpful illustration of the distortion in the bargaining process that occurs in the context of mediation between agents. *Id.* at 321-22.

31. H. RAIFFA, *supra* note 24, at 108. The mediator helps the parties clarify their values and derive responsible proposals by analyzing the implications of failing to reach agreement with each disputant. *Id.*

Expanding the resources available to the parties is closely related to the mediator's educating function.³² Although serving as a source of substantive legal knowledge may threaten to destroy the mediator's neutrality,³³ the mediator's relationship to the parties makes him a logical source of referrals for assistance or information to clarify interests and possible remedies in the dispute.

A function that is particularly important where the parties meet independently with the mediator is that of the bearer of bad news.³⁴ The mediator can present the position of the other party in private conversation, thus allowing emotional response without inflaming personal conflicts.³⁵ As a translator, the mediator can provide similar assistance in face-to-face negotiation by restating and conveying each party's proposal in language that accurately projects the interests of the proposing party without unnecessarily alienating the listener.³⁶

As an agent of reality, the mediator's independence and neutrality allow him to confront candidly a party about the possibility of realizing its desired objective.³⁷ Having access to confidential information provided by both of the parties, the mediator is able to deflate unreasonable claims, thereby minimizing excessive posturing by the parties.³⁸

C. *Limitations on the Use of Mediation*

Although these functions of mediators certainly do not constitute an exhaustive list,³⁹ they do provide a basis for understanding the advantages of mediation. In addition to the immediate benefits of resolving the dispute more efficaciously, mediation allows the parties to come to a more complete understanding of one another, their problems, and the constraints on their action.

32. Stuhlberg, *supra* note 14, at 93.

33. *See supra* note 14. When one of the parties looks to the mediator for legal advice regarding how to act against the other, the role of a neutral facilitator is certainly compromised.

34. Stuhlberg, *supra* note 14, at 93.

35. *Id.*

36. *Id.* at 92-93.

37. *Id.*

38. H. RAIFFA, *supra* note 24, at 108-09.

39. *See* Stuhlberg, *supra* note 14, at 94. Professor Stuhlberg also lists the function of scapegoat, which is particularly applicable in situations where agents are negotiating for principals. When constituents of the agent are disappointed with the settlement, they blame the mediator. Thus, a party may proceed with a settlement and save face as well.

This understanding provides continuing benefits for parties in resolving future disputes, perhaps allowing them to bypass formal dispute resolution procedures.⁴⁰

Mediation is not the answer for all disputes, however, and is subject to some conceptual limitations. Professor Fuller has proposed two intrinsic limitations: (1) mediation is generally inappropriate when more than two parties are involved,⁴¹ and (2) mediation presupposes mutual interests of sufficient intensity to make the parties willing to collaborate in the mediational effort.⁴²

According to Professor Fuller, the multiparty environment makes neutrality increasingly difficult for the mediator, creating a tendency for him to become a participant in the internal games of the dispute.⁴³ As the number of relationships increases, the complexity of the dispute and the opportunity for misunderstanding multiply, thus erecting greater barriers for the mediator to help the parties overcome.⁴⁴

The requirement of strong mutual interests stems from the fact that mediation is generally voluntary. The parties can break off negotiations at any time and resort to other means of resolving the dispute, including arbitration or the formal judicial process. Commitment to a good faith effort to reach agreement is thus an important element in successful mediation, and lack of

40. Fuller, *supra* note 9, at 327. Professor Fuller refers to the example of collective bargaining in which the parties, with the help of a mediator, work out a labor contract. The communication and understanding developed in negotiating the contract allows the parties to make appropriate adjustments without reference to the contract because each understands the other's positions. *Id.*

41. *Id.* at 330. Professor Fuller refers to the sociological observations of George Simmel, who concluded that the group of two, the dyad, is at a disadvantage compared to larger groups in resolving internal disputes because it lacks opportunity to resolve disputes by the majority principle. *Id.* at 312. The dyad is at a further disadvantage because, unlike the group of three, it has no member who is able to assume neutrality on a temporary basis and serve as a mediator. *Id.* at 312-13.

42. *Id.* at 330. "Mediation by its very nature presupposes relationships normally affected by some strong internal pull toward cohesion; this is true whether the mediative efforts in question be directed toward the formation, modification or dissolution of such relationships." *Id.* at 314.

43. *Id.* at 313-14.

44. The multiparty dispute presents no conceptual problem where the mediator is able to assist rival factions to resolve their differences and to clarify common interests so that they may become a collective group for purposes of negotiating the primary dispute. For example, there may be rival factions within a union during contract negotiations with management. If the mediator can assist the union factions to clarify common interests and negotiate as a collective group, a dyad of labor and management is created in which the mediator can function with optimal results. Thus, the mediator has worked with two dyads, not a three-way dispute. *Id.* at 314 n.2.

commitment presents a substantial limitation on its effectiveness in a given dispute.

D. Conceptual Difficulties in the Debtor/Creditor Context

Disputants have used mediation extensively in resolving conflicts on a personal or community level involving family relationships⁴⁵ and neighborhood quarrels.⁴⁶ In the commercial context, mediation is often part of the dispute resolution process in labor relations.⁴⁷ Mediation is desirable in these situations because the parties are dependent upon consensual agreement, rather than third party imposition of a rule-based decision, to resolve the dispute.⁴⁸

Mediation is particularly appropriate in disputes involving community relationships because the adversary system and the winner-take-all approach of adjudication is inadequate for resolving many disputes.⁴⁹ Families often seek mediation of problems such as child custody, because a solution ordered by a court may not meet the needs of the family members as readily as would a negotiated agreement.⁵⁰ Declaring an absolute winner and loser becomes unnecessary, as the focus is on achieving harmony through a resolution that will satisfy the disputants.⁵¹

In the commercial context, the employer and labor union face similar problems in collective bargaining because they depend primarily on consensual resolution of the contract dispute rather

45. Clark & Orbeton, *Mandatory Mediation of Divorce: Maine's Experience*, 69 JUDICATURE 310 (1986).

46. Davis, *Community Mediation in Massachusetts*, 69 JUDICATURE 307 (1986). Landlord/tenant and merchant/consumer disputes are also mediated with some regularity. *Id.* For a list of dispute resolution programs and services that includes general descriptions of categories of cases handled and resolved, see SPECIAL COMM. ON ALTERNATIVE DISPUTE RESOLUTION, PUBLIC SERV. ACTIVITIES DIV., AMERICAN BAR ASS'N, DISPUTE RESOLUTION PROGRAM DIRECTORY (1983) [hereinafter ABA DISPUTE RESOLUTION DIRECTORY].

47. J. DUNLOP, DISPUTE RESOLUTION 140 (1984).

48.

In most mediations, the emphasis is not on determining rights or interests, or who is right and who is wrong, or who wins and who loses because of which rule; these would control the typical adjudicatory proceeding. The focus, instead, is upon establishing a degree of harmony through a resolution that will work for these disputants.

Riskin, *supra* note 7, at 34.

49. Davis, *supra* note 46, at 307.

50. Clark & Orbeton, *supra* note 45, at 310.

51. Riskin, *supra* note 7, at 34.

than legal rules that define their rights.⁵² Even if a court or arbitration panel were available to impose a solution to a contract dispute, the parties have a mutual interest in reaching an agreement by themselves: subjecting one's interests to the risk of complete frustration by a neutral decisionmaker creates a significant disincentive to resort immediately to arbitration or adjudication.⁵³

Although similar in many respects to such relationships, the debtor/creditor relationship has distinct characteristics that may conflict with the mediation model's characteristic mutuality of interests, dyadic relationships, and neutral mediator.

1. *Limited mutuality because of rights-consciousness*—Once the creditor establishes that the debtor has defaulted,⁵⁴ the law defines the balance of the debtor's and creditor's rights in the collateral.⁵⁵ The parties' consciousness of their rights affects the way in which they approach mediation because the dispute is usually not about whether the creditor has a legal right to the collateral, but about when and how those legal rights will be exercised.

The fact that the creditor is assured of getting the value of the collateral bargained for in the original loan agreement may reduce the creditor's commitment to resolving the dispute through mediation. Putting aside intangible concerns about business relationships and reputation in the community,⁵⁶ the creditor's

52. See generally Fuller, *supra* note 9, at 314-20 (emphasizing the interdependence of the parties and the complexity of calculations pursued in determining the terms of a contract).

53. Robert Coulson, President of the American Arbitration Association, makes this observation in the context of arbitration. R. COULSON, *supra* note 11, at 11. It is equally applicable in any situation where parties can lose control of the decision to a third party.

54. "Default" is not defined in the U.C.C. See J. WHITE & R. SUMMERS, *supra* note 3, at 1085. The authors of the Uniform Consumer Credit Code (UCCC) suggest that: "By its nature [default] is not a term that is agreed to by the parties but rather one that is dictated by the creditor." UCCC § 5.109 comment 1 (1974); see also O'Connor & Baron, *Consumer Defaults and the Commercial Code—Some Old Ideas and New Relief*, 10 U.C.C. L.J. 222, 226 (1978).

55. A possible exception is a dispute between a purchaser/debtor and seller/creditor where the purchaser may have claims against the seller/creditor that could be set off against the debt. See Mentschikoff, *Peaceful Repossession Under the Uniform Commercial Code: A Constitutional and Economic Analysis*, 14 WM. & MARY L. REV. 767, 775-78 (1973); White, *The Abolition of Self-Help Repossession: The Poor Pay Even More*, 1973 WIS. L. REV. 503, 527-28.

56. See Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). Professor Macaulay found that concerns about reputation in the business community are an important nonlegal consideration affecting behavior in relationships among business persons in contractual situations. *Id.* at 64. The effect of community expectations is difficult to quantify but should not be ignored in the debtor/creditor relationship.

primary interest in negotiating a settlement is securing economic gains greater than or equal to those from repossession and sale of the collateral. The undersecured creditor will arguably have a greater incentive to pursue a restructured agreement, because he is more likely to incur loss than a fully secured creditor.

2. *Problem of reconciling multiparty interests*— Another potential difficulty is present when a default situation involves the interests of more than one creditor. Considering multiple interests may reduce the advantages of Professor Fuller's dyad model.⁵⁷ Including the creditors as a class with common interests may eliminate conceptual difficulties.⁵⁸ Commonality may not always be possible, however, due to the potential frustration of creditors' independent rights against the debtor by an agreement with one creditor that affects the security of payments to others. A legislature should consider the constraint of the multiplicity of relationships and their interdependence on the mediation model in deciding whether to make mediation a statutory requirement. Experience has shown, however, that the problems of multiparty mediation are not insurmountable.⁵⁹

3. *Risk of dominance by creditor*— In addition to limiting the creditor's commitment to extrajudicial resolution of the dispute, the ultimate right to repossess collateral may also give the creditor an advantage in exacting concessions from the debtor.⁶⁰ Where the creditor possesses superior bargaining power, mediation presents a potential means of circumventing the legal constraints intended to protect the debtor.⁶¹

Where one party is more cognizant of his legal rights than the other, the mediator faces the further difficulty of maintaining neutrality. If the creditor exacts a settlement from the debtor that would leave him in a worse position than if he filed for bankruptcy or allowed the collateral to be repossessed, the mediator may have a limited responsibility to ensure that the agree-

57. See *supra* note 41.

58. See *supra* note 44.

59. See *infra* text accompanying notes 115-16.

60. See Riskin, *supra* note 7, at 35. Professor Riskin advocates that society carefully adjust the role of lawyers in the mediation process to reduce the risk of dominance by the stronger or more knowledgeable party. *Id.* "To reduce the danger that less powerful persons unwittingly will give up legal rights that would be important to them, they must be afforded a way of knowing about the nature of the adversary process and the result it would likely produce." *Id.*

61. See J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 8, at 53-54.

ment is fair by informing the parties of rights that may be violated.⁶²

The merits of imposing responsibility upon the mediator for the result achieved in negotiations have been debated in the context of environmental mediation.⁶³ Imposing this responsibility, however, presents a danger of reducing the institutional credibility and perceived neutrality of the mediator. Allowing the mediator to direct the parties to resources that would assist in evaluating proposals mitigates the problem of unfairness, while maintaining the mediator's neutral posture toward both parties.

The mediator should exercise his role of expander of resources with care. From the creditor's perspective, the danger is that the mediator will turn into an advocate for the debtor, representing another means for the system to hinder the debt collection process. From the debtor's perspective, not having the proper pro-

62. See R. COULSON, *supra* note 11, at 18. Coulson raises this issue and presents his analysis:

Agreements between equally knowledgeable disputants usually come close to what an objective person would deem fair. That may not be the case when agreements are entered into between parties of flagrantly different bargaining strengths or ability. . . . A mediator should avoid such situations by persuading the parties not to rush into a premature agreement and by encouraging a weaker party to obtain legal advice.

Id. at 18. Coulson concedes that "some bad bargains are inevitable." *Id.* The Commercial Mediation Rules of the American Arbitration Association make no specific provisions for this ethical problem. *Id.* at 42-45.

At least one professional code of conduct has addressed this issue. See CENTER FOR DISPUTE RESOLUTION, DENVER, COLO., CODE OF PROFESSIONAL CONDUCT FOR MEDIATORS, reprinted in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 15, at 116-22. Although noting that the mediator's satisfaction with the settlement is secondary to that of the parties, it gives the mediator the option to inform the parties of his reservations, to withdraw without notification of the reason, or to withdraw and privately or publicly disclose the reasons for his actions. *Id.* at 120.

Reconciling the alternative of allowing public disclosure with the duty of confidentiality is difficult, but may be akin to the proposed Michigan version of the MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983). This rule allows a lawyer to disclose confidential information "to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another" (emphasis added).

63. See Susskind, *Environmental Mediation and the Accountability Problem*, 6 Vt. L. REV. 1 (1981). Professor Susskind contends that a special problem is presented in the environmental mediation context because the solution reached by the parties may have adverse effects on others, such as surrounding communities, who are not parties to the mediation. He concludes that environmental mediators should be held accountable for the results achieved. *Id.* at 6-8. However, Stuhlberg, *supra* note 14, states: "Susskind's demand for a non-neutral intervenor is conceptually and pragmatically incompatible with the goals and purposes of mediation. . . . It is precisely a mediator's commitment to neutrality which ensures responsible actions on the part of the mediator and permits mediation to be an effective, principled dispute settlement procedure." *Id.* at 86.

tection may create the impression that the mediation system is merely a means of cheap and expedient justice for the creditor.⁶⁴ Neither of these risks should become reality in a mediation system because they will weaken the mutual commitment essential to negotiating an alternative to repossession.

E. Practical Difficulties: Problems of Forum and Funding

Added to the theoretical limitations on the use of mediation in debtor/creditor disputes are practical limitations. These include problems of forum—who serves as mediator and where the mediation takes place,⁶⁵ and the problems of funding—who bears the cost of mediation and how costs are assessed.⁶⁶ The approach of two agricultural states in implementing mediation programs for debtor/creditor disputes reveals practical solutions to these problems.⁶⁷

II. APPROACH TO THE PROBLEM IN AGRICULTURAL STATES: MEDIATION AS A STATUTORY PREREQUISITE TO DEBT COLLECTION

In response to the agricultural credit crisis,⁶⁸ Iowa and Minnesota adopted legislation that requires creditors to submit to me-

64. J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 8, at 51-52.

65. Properly choosing who serves as mediator is essential to the success of a mediation program because it affects the parties' perceptions of the legitimacy of the process. A mediator who is neutral, in appearance and in fact, facilitates mutual commitment to a negotiated settlement.

66. Funding may also affect the mutual commitment to the process of negotiated settlement. For example, total funding by creditors threatens the appearance of neutrality although proper controls may preserve actual neutrality. See Milstein & Ratner, *Consumer Credit Counseling Service: A Consumer-Oriented View*, 56 N.Y.U. L. REV. 978 (1981), where the authors examined a Consumer Credit Counseling Service in New York. Although the service was formed for the purpose of helping debtors in trouble, the authors stated that the close ties to creditors made it "virtually impossible . . . to represent debtors." *Id.* at 986. Marks, Johnson, and Szanton also express this concern, stating that associating a dispute resolution service with an institution that is affiliated with the more powerful party reinforces perceived imbalances. J. MARKS, E. JOHNSON & P. SZANTON, *supra* note 8, at 53.

67. See *infra* text accompanying notes 91-102.

68.

The general assembly finds that the agricultural sector of the economy of this state is under severe financial stress due to low farm commodity prices, continuing high interest rates, and reduced net farm income. The suffering agricultural economy also adversely affects economic conditions for all other businesses in rural communities. Thousands of this state's farmers are unable to meet current payments of interest and principal on mortgages and other loan and land con-

diation as a statutory prerequisite to collecting debts secured by agricultural property.⁶⁹ The Illinois legislature has considered similar legislation.⁷⁰

A. Basic Provisions

The legislation in each of the states provides for the creation of an entity or designation of a state official who is responsible for providing mediation services.⁷¹ Before initiating any proceeding to enforce a debt that exceeds a threshold amount⁷² against agricultural property,⁷³ or taking any self-help action to repos-

tracts and are threatened by the loss of their farmland, equipment, crops, and livestock through mortgage and lien foreclosures, forfeiture of real estate contracts, and other collection actions. The agricultural economic emergency requires an orderly process with state assistance to adjust agricultural indebtedness to preserve the general welfare and fiscal integrity of the state.

Iowa H.F. 2473, *supra* note 6, § 1, at 21-22. Minnesota's law contains an almost identical provision. MINN. STAT. ANN. § 583.21 (West Supp. 1987).

69. Iowa H.F. 2473, *supra* note 6; Farmer-Lender Mediation Act, ch. 398, art. I, §§ 5-17, 1986 Minn. Laws 405 (codified as amended at MINN. STAT. ANN. §§ 583.20-.32 (West Supp. 1987)) [hereinafter Minn. Farmer-Lender Mediation Act]. Both of these laws include repealer provisions. Iowa H.F. 2473, *supra* note 6, § 29, at 32 (to be repealed July 1, 1989); Minn. Farmer-Lender Mediation Act, *supra*, art. 1, § 18, at 411 (to be repealed July 1, 1988).

70. H.B. 3357, 84th Gen. Assembly, Reg. Sess. (Ill. 1986).

71. The Iowa statute empowers an official designated by the attorney general's office to contract with a nonprofit corporation to provide the mediation services. Iowa H.F. 2473, *supra* note 6, §§ 15-16, at 28-29 (to be codified at IOWA CODE §§ 654A.2-.3). The statute explicitly provides that this corporation is not a state agency. *Id.* § 16, at 28-29 (to be codified at IOWA CODE § 654A.3). The Minnesota statute, MINN. STAT. ANN. § 583.22(5) (West Supp. 1987), designates a state official, the director of the agricultural extension service or his designee, to be responsible for the mediation service, but does not explicitly provide for reliance upon a private organization. *Id.* § 583.23.

72. The secured debt must be more than \$5000 in Minnesota, and \$20,000 in Iowa. MINN. STAT. ANN. § 550.365(1) (West Supp. 1987); Iowa H.F. 2473, *supra* note 6, § 17, at 29 (to be codified at IOWA CODE § 654A.4).

73. Agricultural property is defined as "[a]gricultural land that is principally used for farming . . . and personal property that is used as security to finance a farm operation or used as part of a farm operation including equipment, crops, livestock, and proceeds of the security." Iowa H.F. 2473, *supra* note 6, § 14(1), at 28 (to be codified at IOWA CODE § 654A.1). The Minnesota statute initially included "agriculturally related businesses as defined by the commission," thus bringing the economic effects on nonfarmers within the purposes of the act. Minn. Farmer-Lender Mediation Act, *supra* note 69, § 7(2), at 405. An amendment in the First Special Session of the Legislature subsequently deleted this provision. Act of Apr. 11, 1986, ch. 2, art. 2, § 1(2), 1986 Minn. Laws 1278; see MINN. STAT. ANN. § 583.22(2) (West Supp. 1987) (reflecting the amended definition of agricultural property).

sess such property,⁷⁴ a creditor must file a request for mediation with the mediation service.⁷⁵

After receiving the request for mediation, the mediation service sends notice to the debtor,⁷⁶ including information about the services of financial analysts and lawyers for which the debtor may be eligible.⁷⁷ The debtor must respond to the request for mediation within a prescribed period.⁷⁸ Failure to respond constitutes a waiver of the right to mediation.⁷⁹ The debtor may also voluntarily waive the right to mediation.⁸⁰ The mediation service notifies all known creditors of the debtor and

74. The statutes prohibit actions to "seize" agricultural property. Iowa H.F. 2473, *supra* note 6, § 19(1), at 29-30 (to be codified at IOWA CODE § 654A.6(1)); MINN. STAT. ANN. § 583.26(1) (West Supp. 1987).

75. Iowa H.F. 2473, *supra* note 6, § 19(1), at 29-30 (to be codified at IOWA CODE § 654A.6(1)); MINN. STAT. ANN. § 583.26(1) (West Supp. 1987).

76. In Minnesota, the creditor is responsible for serving notice on the debtor. For a notice containing the requisite information, see MINN. STAT. ANN. § 581.015(2) (West Supp. 1987).

77. Iowa H.F. 2473, *supra* note 6, § 20, at 30 (to be codified at IOWA CODE § 654A.7); MINN. STAT. ANN. § 583.26(3) (West Supp. 1987). The laws of both states have made the services of lawyers and financial analysts available free of charge to qualifying debtors.

78. Iowa H.F. 2473, *supra* note 6, § 20, at 30 (to be codified at IOWA CODE § 654A.7) (21 days); MINN. STAT. ANN. § 583.26(2) (West Supp. 1987) (14 days).

79. Minnesota's statute expressly provides for waiver by nonresponse. MINN. STAT. ANN. § 583.26(2)(b) (West Supp. 1987). Waiver by nonresponse is implied in the Iowa statute because the mediator has the power to sign a statement that mediation was waived if one of the parties fails to sign. The statement constitutes a mediation release. Iowa H.F. 2473, *supra* note 6, § 24, at 31 (to be codified at IOWA CODE § 654A.11(3)). The Iowa Farmer/Creditor Mediation Service sends notice to the debtor after it receives a request for mediation from a creditor. The notice clearly warns the debtor that failure to reply constitutes a waiver and empowers the creditor to proceed with foreclosure action.

80. Express voluntary waiver is not explicitly provided in either statute. In Minnesota, failure to request mediation within the prescribed 14 day period may result in voluntary waiver. MINN. STAT. ANN. § 583.26(2)(b) (West Supp. 1987). In Iowa, Iowa H.F. 2473, *supra* note 6, § 24, at 31 (to be codified at IOWA CODE § 654A.11) states that "the borrower and the creditors may sign a statement prepared by the mediator that mediation was waived." This language, along with the provision in Iowa H.F. 2473 § 19 (to be codified at IOWA CODE 654A.6(2)) that states "[t]he borrower may waive mediation after the initial consultation [with the mediation service]," is subject to the possible construction that waiver is not possible without first going through the formality of meeting with the mediation service. In actual practice, the debtor may return a waiver form provided in the information packet that he receives from the mediation service that is sent with the notice of a mediation request from a creditor. The packet thus appears to be the initial consultation for the purposes of the statute, although the notice to the debtor provides for a telephone consultation free of charge if the debtor has questions about the process or how to begin preparing for mediation.

The issue of whether an alternative method of waiver is appropriate is not resolved. A source in the Iowa Attorney General's office has indicated that waiver on a form provided by the creditor *may* be effective. Telephone interview with Chuck Rutenbeck, Iowa Attorney General's Office, Farm Div. (July 25, 1986). The apparent concern here is to prevent the creditor from depriving the debtor who is not informed of his rights under the statute of the opportunity for mediation.

gives them the opportunity to attend the initial mediation meeting. Creditors may also have some input in deciding who will serve as mediator.⁸¹

The statute defines the mediator's role in a manner that is consistent with the conceptual role of the mediator.⁸² Basically, the mediator listens to the parties, advises them of programs that may be able to assist them,⁸³ and helps them in arriving at an agreement to adjust, refinance, or provide for payment of the debts.⁸⁴

The Minnesota statute requires the parties to meet in good faith; the mediator is empowered to determine if this standard is met.⁸⁵ Iowa has no good faith requirement within the statute, but the Farmer-Creditor Mediation Rules, promulgated by the Attorney General, include promoting good faith participation

81. In Iowa, the mediation service provides the mediator without preselection by either of the parties. The parties may remove the mediator, however, if one of the disputants can demonstrate that the mediator has close personal or professional relationships with one of the parties that would jeopardize neutrality. Iowa Admin. Bull. ch. 17, § 61-17.11(3), 17.14(1) (1986).

In Minnesota, the debtor and creditors have the right to strike one mediator from a list of three names presented to the parties prior to the initial meeting. In the event that the requests of the creditors would remove all three, the director appoints the mediator not excluded by the creditor owed the largest debt. If the debtor and creditor choose the same mediator, that mediator is appointed. MINN. STAT. ANN. § 583.26(4) (West Supp. 1987).

82. See *supra* text accompanying notes 25-38.

83. In Iowa, the mediation service informs the debtor about programs for legal and financial planning assistance through an information packet or through telephone consultation. The mediator does not make it a practice to direct the debtor toward such assistance during the mediation meeting. Interview with Liz Binger, Assistant Director of the Iowa Farmer/Creditor Mediation Service, in Des Moines, Iowa (Nov. 21, 1986) [hereinafter Binger Interview].

84. Iowa H.F. 2473, *supra* note 6, § 22, at 31 (to be codified at IOWA CODE § 654A.9); MINN. STAT. ANN. § 583.26(6) (West Supp. 1987).

85. The Minnesota statute explicitly provides for good faith participation, and includes examples of conduct not evidencing good faith, including: failure to attend and participate in meetings, failure of the debtor to make full disclosure of his financial obligations, failure of the creditor to designate a representative having adequate authority to participate in the mediation, failure to provide a written statement of alternatives for restructuring debt and/or failure to provide reasons why alternatives presented are unacceptable, and failure of a creditor to release necessary living and operating expenses to the debtor. MINN. STAT. ANN. § 583.27(1) (West Supp. 1987).

The mediator is responsible for determining compliance with standards of good faith. *Id.* § 583.27(2). Should the creditor fail to participate in good faith, the mediator may invoke court-supervised mediation. *Id.* § 583.27(3). If the creditor is still recalcitrant, the statute suspends his remedies for an additional 180 days and requires him to pay the debtor's attorney's fees and costs. *Id.*

If the debtor does not participate in good faith, the mediator's affidavit so stating allows the creditor to proceed with its usual remedies. *Id.* § 583.27(4).

among the parties as one of the duties of the mediator.⁸⁶ Meetings may continue until the parties either reach agreement or the mediation period defined by statute has expired.⁸⁷ An agreement becomes a binding contract between them upon the signature of the parties.⁸⁸ If the parties fail to reach agreement, yet have fulfilled the requirement to meet in good faith,⁸⁹ the creditor may proceed with traditional legal remedies.⁹⁰

B. Iowa Approach to Problems of Forum and Funding

The Iowa Farmer Creditor Mediation Service, Inc., is the organization that is responsible for providing mediation services in Iowa.⁹¹ A director and support staff at a central office and eight regional coordinators, who are dispersed throughout the state, train, supervise, and provide support services for mediators.⁹² These mediators provide mediation services at neutral places acceptable to both the creditors and the debtor, which often may be the regional offices of the mediation service, but may include space provided by a local Farm Bureau office or church.⁹³

The mediators in the Iowa program come from all walks of life, including homemakers, farmers, business people, retirees,

86. Iowa Admin. Bull. ch. 17, § 61-17.12(2)(d)(3) (1986). Although a legislative history is not available, it is possible that one of the reasons for leaving out a good faith requirement was to prevent lawsuits by debtors alleging that creditors failed to mediate in good faith.

87. Iowa H.F. 2473, *supra* note 6, § 23, at 31 (to be codified at IOWA CODE § 654A.10), limits the total mediation period to 42 days following the initial request for mediation, subject to extension of up to 30 days upon petition by the borrower and all known creditors. *Id.* § 25, at 32 (to be codified at IOWA CODE § 654A.12). Minnesota's statute limits the mediation period to 60 days. MINN. STAT. ANN. § 583.26(8) (West Supp. 1987). Presumably, if all parties agree to continue meetings, nothing would prevent them from doing so. The significance of the extension of the mediation period is that the statute of limitations affecting rights in collateral stops running during this period. Iowa H.F. 2473, *supra* note 6, § 21(2), at 30-31 (to be codified at IOWA CODE § 654A.8(2)); MINN. STAT. ANN. § 583.26(5) (West Supp. 1987).

88. The statute is not clear whether a creditor who has participated in mediation and agreed to restructure the debt is required to submit to mediation a second time should the debtor again default. The Iowa Farmer/Creditor Mediation Service's position is that the creditor need only offer to mediate once, and may proceed with a debt collection action should the debtor again be in default. Binger Interview, *supra* note 83.

89. See *supra* notes 85-86 and accompanying text.

90. Iowa H.F. 2473, *supra* note 6, § 19, at 29-30 (to be codified at IOWA CODE § 654A.6); MINN. STAT. ANN. § 583.26(1) (West Supp. 1987).

91. Iowa Admin. Bull. ch. 17, § 61-17.1 (1986).

92. Binger Interview, *supra* note 83; see also Iowa Admin. Bull. ch. 17, § 61-17.4(1)-(6) (1986).

93. Binger Interview, *supra* note 83.

and lawyers.⁹⁴ Candidates are selected from applicants who can demonstrate the necessary qualifications, including good written and verbal communication skills, the ability to relate to other people, and flexible thinking.⁹⁵ An agriculture background is not necessary to participate in the program.⁹⁶

Candidates participate in a formal training program consisting of approximately forty hours of group exercises, role playing, and discussion designed to familiarize the participants with the mediation process.⁹⁷ An additional function of the training program is to allow participants to determine if they possess the personal characteristics necessary to perform as a mediator.⁹⁸ Training focuses minimally on the substantive issues of debtor/creditor relationships, as the major emphasis is on the process of mediation.⁹⁹ Regional coordinators provide continuing training as the mediators develop skills while resolving actual disputes.¹⁰⁰

The budget for the mediation service's first year of operation is \$790,100.¹⁰¹ The State of Iowa provides \$100,000 (12.66%), and fees assessed against disputants are to generate the remainder of the funding.¹⁰² Thus, the creditors and debtors involved in the disputes theoretically bear the majority of the cost of the mediation service, with only a small portion of the cost directly borne by the general public through government financing.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Iowa Farmer/Creditor Mediation Service 1986-1987 Budget, provided in Binger Interview, *supra* note 83 (copy on file with U. MICH. J.L. REF.).

102. The budgeted expenditure of \$790,100 is based on an estimate of 7200 cases for the year. Binger Interview, *supra* note 83. Based on this estimate, the average cost per case would be approximately \$109.74 (\$790,100/7200 cases). Of this amount, state funds provide approximately \$13.89 per case (\$100,000/7200 cases).

Each party participating in the mediation is charged \$25 per hour. (For example, if the debtor and three creditors are present, the total fee is \$100 per hour.) The mediator is paid \$23.50 per hour, plus expenses. Multiple creditors are not often present, however, as indicated in the income statement of October 31, 1986 showing approximately 50% of mediation income was paid to mediators. Iowa Farmer/Creditor Mediation Service, Income Statement of October 31, 1986, provided in Binger Interview, *supra* note 83. For further observations regarding multiple-creditor mediation, see *infra* note 115.

C. Preliminary Results of the Iowa Farmer/Creditor Mediation Service

The Iowa Farmer/Creditor Mediation Service's operations commenced in early July 1986.¹⁰³ Iowa law requires all creditors seeking to foreclose upon or repossess agricultural property securing debt greater than \$20,000 to offer to mediate with the debtor.¹⁰⁴ The mandatory offer by creditors provides an opportunity to evaluate the overall effectiveness of mediation in resolving disputes concerning debtor default, as the empirical data reflects all debtor/creditor cases within the threshold criteria, not merely those in which the creditor is particularly amenable to alternatives to repossession.¹⁰⁵

1. *Debtor and creditor response*— Through the first four months of operation, ending October 31, 1986, the mediation service received a total of 3607 requests for mediation.¹⁰⁶ The

103. Binger Interview, *supra* note 83.

104. Iowa H.F. 2473, *supra* note 6, § 17, at 29 (to be codified at IOWA CODE § 654A.4).

105. Goldberg, Green & Sander, *ADR Problems and Prospects: Looking to the Future*, 69 JUDICATURE 291, 294 (1986).

106. The following represents the total caseload statistics of the Iowa Farmer Creditor Mediation Service through the first four months of operation ending October 31, 1986:

		Percentage of Cases Closed	Percentage of Cases Mediated
Total Requests	3607		
Open	649		
Closed	2958	100.00%	
Staff Release	1292	43.68%	
Waiver	189	6.39%	
Conciliated	206	6.96%	
Transferred	13	0.44%	
Mediated*	1278	43.20%	100.00%
Agreement	700	23.66%	54.77%
No Agreement	568	19.20%	44.44%

Relevant Definitions:

Open: Case is still pending. Either the debtor has not yet waived mediation through return of a waiver form or through lapse of the 21-day statutory period, or if mediation was selected, mediation proceedings are not yet complete.

Closed: Case resolved for purposes of the mediation service through completion of mediation or through waiver.

Staff Release: Involuntary waiver signed by mediation service staff because debtor failed to respond to the request for mediation within the 21 day period.

Waiver: Express voluntary waiver by the debtor.

Conciliated: Parties had selected mediation, but either reached an agreement or the debtor cured the default prior to participating in a mediation meeting.

Mediated: Parties participated in at least one mediation meeting as required by Iowa law.

service closed 2958 cases¹⁰⁷ during this period, leaving 649 cases still pending.¹⁰⁸ Of the 2958 cases closed during this period, approximately one-half of the debtors responded favorably to participating in mediation: the parties actually participated in mediation in 43% of the cases,¹⁰⁹ and the parties conciliated prior to mediation in 6% of the cases.¹¹⁰

In the mediated cases, the debtor and creditor reached an agreement approximately 55% of the time,¹¹¹ representing 24% of the total cases closed during the period.¹¹² Thus, when conciliations are included, agreements were reached or defaults were cured in approximately 30% of all of the potential debt collection actions filed during the period.¹¹³ Considering the fact that approximately 50% of the debtors waived the opportunity to mediate,¹¹⁴ thereby reducing the number of cases in which the parties were able to attempt to reach an agreement, this data presents a strong case for the efficacy of statutory mediation.

Although no hard data were available indicating the actual number of creditors participating, multiple creditors did participate in mediation.¹¹⁵ Thus, the conceptual constraint of the dyad model¹¹⁶ is not insurmountable.

2. *Mediation program costs not prohibitive*— An analysis of the operating expenses of the mediation service for the first four months of operation indicates an average cost of approximately \$263 per mediated case in which an agreement is reached¹¹⁷ or

Agreement: Parties reached a mutually acceptable solution, which could include restructuring debt repayment or surrendering collateral.

* There is a minor discrepancy in the report concerning the number of cases mediated. The "Agreement" and "No Agreement" categories total only 1268 cases, which is 10 cases short of the total cases mediated. For purposes of this study, these cases will be considered in the "No Agreement" category. This discrepancy has no effect on the conclusions drawn below.

107. See *supra* note 106.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Binger Interview, *supra* note 83. Binger observed that although multiple creditor mediation occurred infrequently, mediation with multiple creditors often went better than two-party mediation. The parties seemed better prepared for mediation and better able to discuss relevant facts. Telephone Interview with Liz Binger, Assistant Director of the Iowa Farmer/Creditor Mediation Service (Feb. 27, 1987).

116. See *supra* note 42.

117. The Iowa Farmer/Creditor Mediation Service incurred actual expenses of \$183,884.31 (unaudited) during the first four months of operation, ending October 31, 1986. Mediators' hourly wages and mileage (approximately 30%) and salaries of adminis-

approximately \$144 per mediated case.¹¹⁸ Given the requirement that the amount of debt involved must be at least \$20,000,¹¹⁹ these costs are not prohibitive.¹²⁰

III. EVALUATION: EXTENDING MEDIATION BEYOND THE AGRICULTURAL CONTEXT INTO OTHER BUSINESS AND CONSUMER DEBT

Mediation effects a balancing of the interests of both debtors and creditors in achieving a fair resolution of the problems of the agricultural credit crisis. Debtors receive every possible opportunity to work out an alternative structure of repayment, and creditors are spared from such draconian measures as mortgage foreclosure moratoria¹²¹ or more permissive bankruptcy laws¹²² that may severely restrict creditors' rights in collateral. Borrowers who are current with debt repayments but are dependent upon further extensions of credit to operate avoid the credit-restricting effects of more radical measures.

trators and staff (approximately 30%) constitute the greatest percentage of the total expenditures. The remainder is overhead expenses, some of which would represent non-recurring start-up costs (approximately 5% of total costs).

The estimated cost of \$263 is based on the total expenses of the period (\$183,884.31) divided by the total number of cases mediated in which agreement was reached (700).

118. This estimated cost is based on the total expenses of the period (\$183,884.31) divided by total number of cases mediated (1278). The mediation service incurs costs for preparing and mailing notices to all debtors whether or not they choose to mediate. Such costs are included in this estimate; thus, actual costs may be less.

119. Iowa H.F. 2473, *supra* note 6, § 17, at 29 (to be codified at IOWA CODE § 654A.4). The minimum debt is \$20,000, and in many cases the amount in controversy may be substantially higher than \$20,000.

120. For example, should the farmer decide to file Chapter 11 bankruptcy, one source estimates the legal costs alone to be \$10,000 to \$15,000. Taylor, *New Hope for Hard-Pressed Farmers*, FARM J., Dec. 1986, at 22, 23. With attorney fees at \$100 per hour, even less complex legal action could quickly equal or surpass these mediation cost estimates.

121. A mortgage foreclosure moratorium restricts a creditor's rights in collateral for a prescribed time period by preventing foreclosure actions against a debtor in default, thus giving the debtor a legal right to delay meeting an obligation. Historically, statutes providing for moratoria have been passed in response to an economic crisis. Minnesota has a mortgage moratorium statute in effect. MINN. STAT. ANN. §§ 583.01-.12 (West Supp. 1987). See generally Annotation, *Financial Depression as Justification of Moratorium or Other Relief to Mortgagor (Including Decisions Under Statutes in That Regard)*, 104 A.L.R. 375, 377-82 (1936).

122. See Taylor, *supra* note 120, at 22-23. The new Chapter 12 bankruptcy provisions have debt forgiveness features that, according to a spokesman for the American Bankers Association, will "pressure banks to get out of agricultural lending." *Id.* at 23.

A. *Extension of Statutory Mediation to Other Business Debt*

Given the similar problems faced in business debt relationships involving agricultural and nonagricultural property, a persuasive argument can be made for extending mediation to debtor/creditor relationships in other business contexts. Although states passed mediation statutes in response to a crisis in the agricultural economy, the positive effects of preventing premature termination of the debtor/creditor relationship, while placing only a minimal burden on the creditor's interests in collateral, merit consideration even though there is currently no corresponding crisis in the nonagricultural business credit environment.

One may argue, however, that if communication to achieve consensual resolution is the primary goal of mediation, governmental intrusion in the form of required mediation is an unnecessary burden upon debtors and creditors if negotiation to restructure debt is already a common practice.¹²³ A conclusion that statutory mediation is unnecessary does not necessarily follow from this argument.

1. *Advantages of mediation over negotiation*— The fact that some creditors may negotiate with debtors to restructure the repayment of debt is not dispositive of the issue of whether mediation is necessary in the business debtor/creditor context. There are certainly situations in which the parties fail to negotiate,¹²⁴ or in which the parties fail to reach an agreement through negotiation. The mediator's functions in facilitating communication, proposing alternatives, and expanding the parties' knowledge of resources for assistance present a potentially superior opportunity to achieve a solution that is not available through pure negotiation;¹²⁵ negotiation is not a substitute for mediation.

Data from the Iowa mediation program support the efficacy of mediation. Although the creditor had to offer to mediate, media-

123. Although there are no specific data available concerning the practices of commercial lenders, some authorities have shown that negotiation of alternative repayment plans is common in other loan contexts, particularly automobile loans. See White, *supra* note 55, at 515 n.43; see also Note, *Caveat Venditor: Greater Restriction of Remedial Self-Help in Consumer Transactions*, 9 SUFFOLK U.L. REV. 756 (1975). In a survey of the consumer practices of Boston area banks, all respondents "claimed to be conscientious" in resorting to repossession only after phone calls, letters, notices of maturity, and attempts to work out alternative payment arrangements. *Id.* at 789. The author cautioned, however, that the small number of respondents precluded any fair conclusions about creditor practices. *Id.*

124. See, e.g., *supra* note 5.

125. H. RAIFFA, *supra* note 24, at 130.

tion was not mandatory, and debtors could waive it if they desired.¹²⁶ Despite the option of waiver, nearly fifty percent of the debtors chose to participate in mediation.¹²⁷ These results indicate that the debtors believed that mediation would be helpful. The fact that nearly fifty-five percent of the debtors who elected to mediate reached an agreement confirms that mediation was in fact helpful.¹²⁸

2. *Minimal economic burdens of mediation*— The data from the Iowa mediation program show that the economic burdens placed on the debtor and creditor by a mediation statute are minimal. Total direct costs of providing mediation services as a percentage of the debt involved were well below one percent.¹²⁹ Furthermore, requiring mediation does not increase indirect costs that may include the time spent by each of the parties and the delay in repossessing property.

Creditors who practice negotiation in good faith already commit the time they might spend in mediation to negotiation. The only additional burdens the statute places upon them are the creditor's share of the mediator's cost. Because debtors have the right to waive mediation,¹³⁰ the requirement to mediate imposes only a minimal inconvenience on those who do not wish to participate in mediation because they are mutually satisfied with their business relationship and ability to resolve disputes. The mediation statute thus limits many of the abusive situations where the debtor is unnecessarily put out of business by creditors acting in bad faith, while placing very little burden on the creditor who practices good faith negotiation with regard to debt collection practices.

Proper drafting can alleviate creditors' concerns that the debtor could use the mediation statute to drag out the collection process. Some states require waiting periods that provide the debtor with the right to cure default before a creditor may seek legal remedies to collect the debt.¹³¹ Rather than tolling during mediation, those time periods may run concurrently with the

126. See *supra* notes 79-80 and accompanying text.

127. See *supra* note 106.

128. *Id.*

129. See *supra* notes 117-19 and accompanying text.

130. Iowa H.F. 2473, *supra* note 6, § 19(2), at 30 (to be codified at IOWA CODE § 654A.6(2)); see also notes 79-80 and accompanying text.

131. See, e.g., Iowa H.F. 2473, *supra* note 6, § 15, at 28 (to be codified at IOWA CODE § 654A.2).

mediation period.¹³² The mediation request provides notice for the debtor, who can then prepare to take action to protect his rights. If the statutory waiting period between notice of default and the right to repossess is not tolled, delay is eliminated. Statutory requirements of good faith in negotiation can limit the debtor's ability to use the mediation period as a delay tactic where the waiting period establishing a right to cure is greater than the mediation period.¹³³

Proper drafting can also alleviate creditors' legitimate concerns with delay when the value of the collateral is rapidly declining. A provision allowing waiver of mediation through a court determination that delay would cause the creditor to suffer irreparable harm can prevent loss.¹³⁴ Thus, the costs imposed by delay need not be a problem.

3. *Mediation clauses in security agreements: A nonstatutory option*— Even if one rejects statutory mediation as a prerequisite to debt collection, mediation clauses within the security agreement present a viable alternative that may provide numerous benefits for both debtor and creditor. The offer to mediate is a good business practice for the creditor because it enhances the opportunity to reach an agreement in which both parties are economic winners. The Iowa program data indicated that nearly one-fourth of the debtors in default worked out agreements of some type with creditors through mediation,¹³⁵ thus indicating that both parties preferred the consensual result achieved. Research in the area of small claims mediation indicates that disputants are more likely to be responsible about fulfilling their obligations when they have participated in making an agreement with the other party.¹³⁶ An analogous result is probable when each party considers the needs of the other in agreeing to restructure payments, rather than presenting ultimatums.¹³⁷

132. Iowa H.F. 2473, *supra* note 6, § 19(1), at 29 (to be codified at IOWA CODE § 654A.6(1)). *But see id.* § 21(2), at 30-31 (to be codified at IOWA CODE § 654A.8(2)); MINN. STAT. ANN. § 583.26(5) (West Supp. 1987).

133. The Minnesota statute allows the mediator to determine whether the parties are participating in good faith according to specified criteria, thus allowing the creditor to take immediate action if the debtor breaches the duty of good faith. MINN. STAT. ANN. § 583.27(2) (West Supp. 1987); *see supra* note 85.

134. Iowa H.F. 2473, *supra* note 6, § 19(1) at 29, 30 (to be codified at IOWA CODE § 654A.6(1)).

135. *See supra* note 106.

136. McEwen & Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 261 (1981). Goldberg, Green and Sander have criticized this research. Goldberg, Green & Sander, *supra* note 105, at 294.

137. The Iowa Farmer/Creditor Mediation Service reaches this same conclusion and states in informational material: "The benefits of mediation are numerous. Perhaps the

A further benefit of mediation for the creditor, who would otherwise seek to satisfy a debt through self-help repossession, is that he may avoid tort claims for bad faith or wrongful repossession. Recent cases have demonstrated that a debtor may hold a creditor liable for conversion where he failed to give advance notice of intent to repossess collateral.¹³⁸ The creditor may avoid liability if he offers to mediate with the debtor and notifies the debtor of his willingness to pursue the option of repossession if an alternative payment agreement cannot be reached.

4. *Implementing the program: alternative solutions to the problems of funding and forum*— The institutional mechanism designed in Iowa to provide services and allocate the costs of those services is potentially applicable and easily adaptable to other business debt. Alternatives to the institutional approach adopted in Iowa are available, however, and merit consideration.

Although one can argue that the parties to the mediation should bear the costs of a mediation program because they are the immediate beneficiaries of the service, public funding of a portion of the service is an option. At least one state has funded an alternative dispute resolution program by taxing fees to litigants in state courts and allocating them for use in dispute resolution programs.¹³⁹ This method would expose litigants to the availability of mediation, and may provide an additional incentive to use mediation services rather than the courts. The use of public funds to underwrite the settlement of private disputes is defensible, because an attendant consequence of extrajudicial resolution of disputes is the alleviation of caseload pressures on the courts.¹⁴⁰ The benefits of preventing premature termination of a business also inure to the public, thus justifying public expenditures.

most important is its effectiveness in resolving emotional and factual issues in a dispute. Other benefits include . . . its participatory nature, which results in a strong commitment by the parties to adhere to the agreements reached." Iowa Farmer/Creditor Mediation Service Informational Sheet, provided in Binger Interview, *supra* note 83 (copy on file with U. MICH. J.L. REF.).

Due to the relatively short period that the service has been operating, sufficient data is not available to test the accuracy of this assertion in the debtor/creditor context.

138. See National Consumer Law Center, Inc., *Is Advance Notice Required Before a Self-Help Repossession?*, 19 CLEARINGHOUSE REV. 1304 (1986); White, *Representing the Low-Income Consumer in Repossessions, Resales and Deficiency Judgments Cases*, 3 U.C.C. L.J. 199, 217 (1971).

139. TEX. REV. CIV. STAT. ANN. § 2372aa (Vernon Supp. 1987) (providing financing for an adjunct system to the courts).

140. R. COULSON, *supra* note 11, at 28-29.

One alternative to an institutional approach is the use of private mediators, who are already used in labor disputes.¹⁴¹ Private mediators may be most appropriate where both parties are reasonably sophisticated and already have resources available to appraise adequately their rights.

One problem with using private mediators is lack of certainty about the mediator's qualifications. The person to whom disputants usually turn for help in dispute resolution, the attorney, is not necessarily qualified to be a mediator.¹⁴² Mediation services are available for commercial disputes, but are not always conveniently available in all geographic regions in which they may be required,¹⁴³ and they are considerably more expensive than those provided in the Iowa program.¹⁴⁴

Advocates of professionalizing mediation support the creation of a class of certified public mediators who have satisfied certain training requirements.¹⁴⁵ Professionalization may significantly increase the availability of qualified private mediators and improve the feasibility of a noninstitutional approach to providing mediation services for debtor/creditor disputes.

141. J. DUNLOP, *supra* note 47, at 140. The Federal Mediation and Conciliation Service, an independent executive agency of the federal government created in 1947 to facilitate the resolution of labor-management conflicts, has also provided labor mediators. Susskind, *supra* note 63, at 4 n.9. Thus, an institutional alternative is available.

142. Riskin, *supra* note 7, at 39-47.

Most lawyers neither understand nor perform mediation nor have a strong interest in doing either. At least three interrelated reasons account for this: the way most lawyers, as lawyers, look at the world; the economics and structure of contemporary law practice; and the lack of training in mediation for lawyers.

Id. at 43. Particularly troublesome are the lawyer's assumptions of the adversarial nature of the parties and the lawyer's penchant for the application of rules as a means of dispute resolution. *Id.* at 43-44; see also Watson, *Mediation and Negotiation: Learning to Deal with Psychological Responses*, 18 U. MICH. J.L. REF. 293, 293-96 (1985) (emphasizing the need for lawyers to be educated about the psychological aspects of mediation in order to be effective).

143. A directory for mediation services is available, but many of these services are geared specifically toward family or community disputes and thus may not be appropriate in commercial contexts; see ABA DISPUTE RESOLUTION DIRECTORY *supra* note 46.

144. American Arbitration Ass'n, Fee Schedule, *reprinted in* R. COULSON, *supra* note 11, at 46 (showing claims ranging from \$1 to \$1.5 million and corresponding fees from \$250 to \$850 per party).

145. See R. COULSON, *supra* note 11, at 20-26; see also Note, *The Dilemma of Regulating Mediation*, 22 HOUS. L. REV. 841 (1985).

B. Consumer Debt

Although mediation is conceptually applicable in the context of consumer debt,¹⁴⁶ practical difficulties in the consumer context make required mediation infeasible in many circumstances. The costs of mediation applied to the relatively small value of many consumer loans limit the application of mediation to those cases that can economically justify the expenditure of resources to mediate an agreement. Without funding mediation services so that the parties to the disputes do not have to bear the entire cost,¹⁴⁷ the scope of practical implementation is limited to big-ticket items, such as automobiles.

"In extending consumer credit, the creditor is chiefly concerned that legal remedies provide inexpensive and effective means for investment recovery if the consumer fails to fulfill agreement terms."¹⁴⁸ The fact that mediation takes time does not necessarily jeopardize the effectiveness of the creditor's remedies. Data on current lending practices indicate that consumer lenders already delay acts of repossession or judicial action to enforce security interests for a substantial period after the debtor is in default.¹⁴⁹ In addition, research indicates that a substantial amount of contact occurs between the debtor and creditor before repossession.¹⁵⁰ If the creditor is willing to make an effort to negotiate with the debtor, an offer to negotiate with the assistance of a mediator would place only a minimal burden on

146. A neutral third party could help the debtor to appraise realistically the possibility of repayment or to commit himself to a repayment agreement. See McEwen & Maiman, *supra* note 136, at 250, 267.

147. One possibility is funding a mediation service by assessing part of the finance charge paid by each credit customer. Although an effective means of spreading the costs, the assessment presents a fairness issue—consumers who pay debts faithfully would fund part of the costs of services for those who are financially irresponsible.

148. National Comm'n on Consumer Finance, Report—Consumer Credit in the United States 27 (1972), reprinted in L. FULLER & M. EISENBERG, BASIC CONTRACT LAW 733 (4th ed. 1981).

149. Mentschikoff, *supra* note 55, at 779 n.35 (discussing that one bank officer reported a policy of a 90-day waiting period after default before pursuing repossession).

150. White, *supra* note 55, at 515 n.43. A survey in 1971 by the Consumers Bankers Association in Washington, D.C., revealed the following activity, on average, preceding each repossession:

Written extensions or rewrites	3.6
Delinquency notices sent	10.3
Telephone calls	12.2
Personal contacts	7.9

The source of the study cautioned that because a group of small banks was the subject of the survey, the average number of personal contacts may be higher than the national average. *Id.*

the honest creditor acting in good faith. The only professional help that the parties require is the mediator, and he need not have elaborate training.¹⁵¹ The parties need no special personnel to perform the negotiating tasks.

Creditors pursue negotiation and contact with consumer debtors out of self-interest.¹⁵² Pursuing the benefits of mediation by providing a neutral forum in which the debtor may be assured of being heard and receiving assistance in evaluating the realistic possibilities of repaying the debt is consistent with the self-interest of the creditor.¹⁵³ Persons who have had a part in constructing an agreement are more likely to assume responsibility for their part of the agreement.¹⁵⁴ A mediated solution, giving the creditor a better opportunity for repayment, may thus be superior to a solution that is merely imposed on the debtor.

Self-interest may support a voluntary mediation program, or the inclusion of a mediation clause in the security agreement. Statutorily mandated mediation, however, depends upon other social values that are implicated when creditor's rights in collateral are affected. Even if the actual effect of requiring consumer mediation for large consumer debts is minimal, those skeptical of the benefits of mediation may view an additional barrier in the credit process as a costly additional protection for the debtor with little reciprocal benefit to society. Repossession of consumer items does not present the magnitude of adverse social effects—loss of employment, tax revenue, and economic influence in the community—that result from terminating a business. The owners, employees, and the community lose when repossession of collateral terminates a business prematurely. Some authorities consider the benefits of preventing wrongful repossession where the consumer is not really in default or the consumer has a legitimate defense to be minimal.¹⁵⁵ Although these authorities do not measure the human costs involved, they show that the social commitment to placing further restrictions on the debtor/creditor relationship in the consumer context may not support a statutory solution.

151. See *supra* text accompanying notes 94-100.

152. See *supra* text accompanying note 148.

153. Mediation is not a form of a consumer credit counseling service, as discussed in note 66, *supra*, although the mediator may refer the debtor to assistance.

154. See *supra* notes 135-36 and accompanying text.

155. Mentschikoff, *supra* note 55, at 778 (concluding that a prior judicial hearing as a safeguard to prevent wrongful repossession for reasons of fraud, unconscionability, or breach of warranty might help keep one in ten thousand debtors from losing the use of his automobile for 10-60 days); see also White, *supra* note 55, at 528-29.

Mediation as a statutory prerequisite to a debt collection action potentially has limited application in the context of large consumer debts, and its benefits merit examination by business persons and consumer advocates. Any conclusion about the efficacy of mediation in the consumer context requires more research concerning the actual costs of mediation with consumers, the consumer response to the opportunity for mediation, and the economic benefits in the context of consumer debt.

CONCLUSION

Mediation offers a viable method of helping debtors and creditors develop alternatives to terminating the debtor/creditor relationship through repossession of security. The mediator's position as a neutral third party facilitates the negotiating process and brings a fresh perspective to potential solutions. As an agent of reality, the mediator exposes unrealistic expectations of both parties and helps each of them to understand the possibility of settlement. As an expander of resources, the mediator directs the parties to agencies or persons who can assist them in protecting their legal rights or in meeting their obligations under the contract.

Despite the potential conceptual difficulties of mediation involving more than one creditor, mediation has proved successful in the context of agricultural loans. Similarities in agricultural and other business contexts make statutory mediation both practical and desirable as long as the threshold amount of debt involved makes incurring the costs of mediation economically feasible.

The practical difficulties of implementing mediation as a statutory requirement present the greatest problem in the context of consumer debt. Limited economic feasibility would make mediation inapplicable in a substantial number of consumer purchases involving lower-priced items. Because termination of a consumer debtor/creditor relationship has less of an impact on the society than in the business context, the social commitment to providing restrictions upon the enforcement of credit in the consumer context may be insufficient to support a statutory requirement to mediate. If more research in the consumer context reveals economic benefits of mediation with consumers, greater emphasis on contractual agreements to mediate may result as creditors

pursue self-interest in restructuring payment of the debt, rather than repossessing and selling the collateral.

—*Edward A. Morse*

