



MEDIATION NEWS

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CASES & RESOLUTIONS:

Mediation Confidentiality No Excuse for Court Not to Analyze Reasonableness of Class Action Settlement

A California appellate court concluded in [Kullar v. Foot Locker Retail, Inc.](#) that – without breaching mediation confidentiality – the trial court must look at underlying information about the claims and defenses to determine the reasonableness of a class action settlement reached in mediation. A \$2 million settlement of claims brought by employees against Foot Locker was challenged based on the lack of discovery about the magnitude of the issues being settled. The trial court believed that circumstantial evidence of reasonableness was adequate, in part due to the involvement of an experienced mediator. But the appellate court concluded that the lower court abused its discretion, explaining that the court needed to analyze the amounts in controversy and range of litigation outcomes, and could not rely on general statements that information on these issues was exchanged between competent counsel during mediation with the involvement of a neutral mediator. The appellate court noted that the underlying data should not be immune from discovery even if it was used in mediation, review of which may help the court determine if the class settlement was in the ballpark of reasonableness.

[Kullar v. Foot Locker Retail, Inc.](#), A119697 (Cal. App. 1st Dist., Nov. 7, 2008)

Colorado Supreme Court Clarifies State Mediation Statute

The Colorado Supreme Court considered a pair of appeals in [Yaekle v. Andrews](#) to clarify that the Colorado mediation statute sets forth the way settlement agreements reached in mediation may be enforced as court orders, but does not affect the common law of contract which determines whether a settlement agreement exists at all. Since the Colorado statute makes “mediation communications” confidential, any agreement must be demonstrated without impinging on the confidentiality of the mediation process. In one case the unsigned term sheet prepared by the mediator was not admissible to show an agreement, and partial performance of the purported agreement by one party did not help. In the other case, the parties conducted direct negotiations over the terms of the settlement agreement and were still exchanging drafts months after the mediation session. The court

Mediation Quote:

“The use of stories and metaphors in the mediation process often serves to shape and shift the context of a dispute just enough to allow admission of a variant construction of reality. Although disputing parties cannot even envision themselves on the same stage together, the mediator, as master storyteller, must be able to edit the script of each disputant’s story of the conflict and concoct another scenario in which all participants can play a part in the drama. Thus, . . . the understanding and manipulation of the story is the primary technique by which a mediator dislodges disputing parties from their entrenched positions.”

- Robert D. Benjamin, “Managing the Natural Energy of Conflict,” in David Bowling and David A. Hoffman, Eds., *Bringing Peace Into the Room: How the Personal Qualities of the Mediator Impact the Process of Conflict Resolution* (Jossey-Bass 2003) at 120.

Other Cases &

concluded that these exchanges were no longer mediation communications and could be used, along with statements made by counsel in open court, to determine that an agreement had been reached even though it had never been signed.

[Yaekle v. Andrews](#), Nos. 07SC420, 07SC874 (Colo., Oct. 20, 2008)

Court-Style Transcript Setting Forth Agreement Not Sufficient for Mediated Settlement

A split Colorado appellate court concluded in [GLN Compliance Group, Inc. v. Aviation Manual Solutions](#) that it could not enforce a mediated settlement agreement in the absence of a signed writing, even though the retired judge who acted as mediator called in a stenographer and set forth the settlement terms and obtained each party's agreement "on the record," even though defendants sent a settlement check to plaintiff who cashed it, and even though plaintiff's counsel withdrew and testified that an agreement existed. The court further concluded that Colorado's mediation confidentiality provisions may not be waived by implication. A vigorous dissent agreed with the trial court that the settlement agreement was clearly enforceable since it was "read in the presence of the senior judge [acting as mediator] and transcribed by a court reporter...in open court."

[GLN Compliance Group, Inc. v. Aviation Manual Solutions](#), No. 07CA1563 (October 16, 2008)

Court Considers Parties' Mediation Positions in Determining No Harm from Missing Insurer

A federal magistrate determined there was no harm to plaintiff and imposed no sanctions when defendant's insurer failed to send a representative to mediation in violation of explicit court rules. In denying sanctions, the magistrate noted that other representatives attended the mediation for defendant and it made no difference that the insurer failed to attend because the parties were "light years" apart due to "plaintiff's settlement position." Summary judgment for defendant had been granted days before the mediation, but the magistrate required that the scheduled mediation proceed despite the parties' desire to cancel.

[Hinkle Oil & Gas, Inc. v. Bowles Rice McDavid Graff & Love](#), No. 7:07cv487 (W.D. Va., Oct. 17, 2008)

Enforcement of Mediation Clause Doesn't Bar Future Litigation

The Utah Court of Appeals interpreted the mediation clause in the real estate purchase contract in [Miller Family Real Estate v. Hajizadeh](#) and concluded that it precludes litigation until mediation has been attempted, but that an initial failure to mediate would not prevent eventual litigation if mediation is tried unsuccessfully. Thus, the court affirmed the trial court's dismissal of litigation without prejudice. The appellate court did note that parties could agree to contractual terms that would create a condition precedent and

Resolutions:

City of Detroit Rejects \$1 Million Mediation Offer for Brain-Damaged Teen, Hit with \$15 Million Jury Verdict, [DetNews.com](#) (December 17, 2008)

Mediation Results in Ernst & Young Paying for Continuing Education Courses in Pennsylvania, [PR Newswire](#) (December 23, 2008)

Bus Companies Agree in Mediation to Pay Jaywalker \$2.6 Million, [Pennsylvania Law Weekly](#) (December 22, 2008) (Subscription Required)

Three Cities Mediate and Settle Condemnation Litigation with Former Brewery for \$5.3 Million, Obtaining Water Rights, [The Olympian](#) (November 15, 2008)

NASCAR Settles \$225 Million Sexual Harassment and Discrimination Case in Mediation, [Autoweek](#) (December 19, 2008)

Professional Hockey Player Bertuzzi Maintains Confidentiality after Mediation Involving Steve Moore over 2004 "Sucker Punch" that Broke Moore's Neck, Ending Career and Leading to \$38 Million Lawsuit, [Canoe.ca](#) (December 17, 2008)

Multi-Party Litigation over Country Club Policy Changes Resolved in 12-Hour Mediation, [The Free Lance-Star](#) (November 14, 2008)

Mediator's Proposal Tentatively Resolves Dispute over Demutualization of Prudential Insurance

prevent any litigation if dispute resolution processes were not carried out, but found that the real estate purchase contract in this case did not contain such terms.

[Miller Family Real Estate v. Hajizadeh](#), 2008 UT App 475 (Utah App., Dec. 26, 2008)

Unambiguous Confidentiality Agreement Merits Summary Judgment on Oral Settlement Claim

The Utah appellate court concluded in [Moss v. Parr Waddoups Brown Gee & Loveless](#) that the terms of a mediation confidentiality agreement were unambiguous and so required summary judgment in litigation seeking to enforce an alleged oral settlement agreement. While the confidentiality agreement was signed for mediation in one case, the parties also negotiated a second case during the mediation session, which plaintiffs argued was not covered by the confidentiality agreement. The appellate court found the broad language of the confidentiality clause to be unambiguous and reversed the district court's denial of summary judgment, without reaching the provisions for mediation confidentiality offered by state statutes. Negotiations in the second case involved an additional plaintiff contacted by telephone who did not sign the confidentiality agreement, but the appellate court concluded that her testimony about the defendants' alleged agreement to settle could not avoid the hearsay rule because the mediator was not an agent conveying a party-opponent's admission.

[Moss v. Parr Waddoups Brown Gee & Loveless](#), 2008 UT App 405 (Utah App., Nov. 6, 2008)

Watershed Mediation Still Succeeding After Ten Years

The successful resolution of an eight-month long mediation in 1998 has permitted ongoing constructive engagement between Minnesota land owners, watershed managers, and county, state and federal conservation agencies in dealing with continuing issues of flood protection, water quality and conservation. Ten years later, the Red River Watershed Management Board continues to use mediation processes. The initial mediation also created a working group which relies on an advisory committee that develops technical consensus to undergird the decision-making of the working group and the Board.

[Crocketon Daily Times](#) (December 31, 2008)

Class Action Discrimination Claims Against Dating Service Sent to Mediation

A California case alleging discrimination by the dating service eHarmony for refusing to extend its services to gay and lesbian customers was certified as a class action and sent to mediation. A similar case in New Jersey was just settled, with eHarmony agreeing to open a new website for gay customers, which the company asserts should resolve the California case as well.

Company with Final Distribution Contingent on Outcome of Summary Judgment Appeal, [Marketwatch.com](#) (December 15, 2008)

U.S. Third Circuit Requires Mediation of Antitrust Appeal Involving ATP World Tour, [Sports Business Journal](#) (December 15, 2008)

Judge Orders Mediation of Alabama's Lawsuit Against Drug Companies Alleging Medicaid Overcharges, [Wlox.com](#) (December 11, 2008)

Court Orders Township and Quarry to Mediate, with Quarry to Pay Mediation Costs as Long as Township Cooperates, [Scarlet Scuttlebutt](#) (December 1, 2008)

Trial of Home Fraud Claims Against JP Morgan Chase Bank Delayed for Mediation after Denial of Motion to Dismiss, [Pocono Record](#) (December 26, 2008); [Fort Mills Times](#) (December 26, 2008)

Courthouse Mold Dispute Goes to Mediation, [Monitor](#) (December 25, 2008)

\$14,500/Day Mediator to Assist Santa Clara County and Contractors in Dispute over Unfinished Courthouse, [San Jose Mercury News](#) (November 29, 2008)

Wal-Mart Entering Mediation over Plans to Build Store after Suing the Zionsville (Ind.) Plan Commission, [Indianapolis Star](#) (December 26, 2008)

Horse-Rescue Operation Enters Mediation with City

[PC Magazine](#) (November 21, 2008)

NEWS & INITIATIVES:

International Trade Commission Begins Pilot Mediation Program

The U.S. International Trade Commission has launched a pilot mediation program for section 337 investigations, as an initial step towards a permanent mediation program. Participation by parties in the pilot program is voluntary. The program relies on pro bono mediators, most of whom also mediate in the U.S. Court of Appeals for the Federal Circuit. While mediation is confidential and the Commission investigative attorney will not participate or have knowledge of the mediation, the investigative attorney may review any settlement agreement that results from mediation in order to make a recommendation on whether the settlement is in the public interest.

[U.S. International Trade Commission Notice](#) 73 Fed. Reg. 65,615 (November 4, 2008); [Pilot Mediation Program Information](#)

IRS Expands Mediation Options with Post-Appeals Pilot Program

The Internal Revenue Service has begun a two-year test of a post-Appeals mediation program, along with an arbitration program. The programs are available in specified Appeals offices for Offer in Compromise and Trust Fund Recovery Penalty cases. Either the taxpayer or Appeals may request mediation. While the taxpayer may decline Appeals' request for mediation, Appeals must evaluate taxpayer requests according to established regulations.

[IRS.gov](#) (December 1, 2008)

EEOC Reports Jump in Filings, Slight Increase in Mediation

The U.S. Equal Employment Opportunity Commission reported a 15 percent increase in job bias charges last year, for a total of over 95,000 private sector filings in fiscal year 2008. Its National Mediation Program obtained nearly 9,000 resolutions in FY 2008, a 2% increase for the year. In addition to non-monetary relief, the EEOC recovered \$124 million for complainants through mediation. The mediation program maintains its very high user satisfaction rate of 96.5 percent. Employers continue to enter into Universal Agreements to Mediate with the EEOC, with the total rising by 14 percent during 2008, to 1,450. In its Federal Sector Mediation Program, the EEOC noted that parties in over 18,000 EEO cases participated in alternative dispute resolution, which was nearly half of all EEO cases in federal agencies.

[National Underwriter Property & Casualty](#) (December 8, 2008) (Subscription Required); [EEOC FY2008 Performance Report](#)

over Impact on Neighbors, Bonner Springs Chieftain
[Bonner Springs Chieftain](#)
(December 18, 2008)

Tulsa County Commissioner Upset with Mayor for Talking to Press after Unsuccessful Mediation over Jail Payments, Ktul.com
[Ktul.com](#)
(December 3, 2008)

Vote to Cut Off Water Supply May Lead to Mediation of Dispute Between Towns over Repairs to Aging Water Pipes, Gazette.net (December 4, 2008)

Bay County and Panama City in Mediation over Multi-Million Dollar Trash Fees, The News Herald (FL)
[The News Herald \(FL\)](#)
(December 8, 2008)

Parents of Murdered Informant File Lawsuit Against Tallahassee Police Department Despite Ongoing Mediation, Tallahassee Democrat (December 31, 2008)

UCSC and Campus Tree-Sitter Supporters End Mediation Without Resolution, San Jose Mercury News (December 12, 2008)

Litigation over Pollution of Water Supplies Between San Diego and Water Districts Postponed for Mediation, Union Tribune (December 5, 2008) (Subscription Required)

Australian Federal Court Orders Class Actions Against Centro Properties Group to Go Directly to Mediation, The Age
[The Age](#)
(December 17, 2008)

Multi-Million-Dollar Defamation Suit Against Australian Police for Naming "Prime" Suspect Going to Mediation, WA today

Delaware Joins EEOC's Universal Agreement to Mediate

Delaware is the second state to enter into a Universal Agreement to Mediate with the U.S. Equal Employment Opportunity Commission, following New Mexico in October. Based on Delaware's formal agreement to resolve disputes through mediation, all eligible discrimination charges filed with the EEOC naming Delaware as respondent will be sent to the EEOC's mediation unit.

[US State News](#) (November 19, 2008) (Subscription Required)

Update on State Programs for Mediation of Home Foreclosure Disputes

- **Connecticut's** foreclosure mediations have saved the homes of about 360 homeowners in the past five months, but the mediation program is reaching less than 30 percent of those eligible. The governor has proposed making the mediation program mandatory for all homeowners facing foreclosure. Mediators in the program report that lenders were initially skeptical, but are now willing to participate and actively negotiate solutions. [Hartford Business](#) (December 8, 2008)
- **New Jersey** has enacted foreclosure prevention legislation which allocates \$12 million for additional mediation and counseling through the Housing and Mortgage Finance Agency, and \$500,000 for state courts to provide mediation services to homeowners facing foreclosure. [Bizjournals.com](#) (December 1, 2008)
- In order to implement the **New Jersey** Residential Foreclosure Mediation Program, the state Supreme Court has relaxed several court rules, including minimum requirements for mediators in the program. [New Jersey Law Journal](#) (November 24, 2008) (Subscription Required); [New Jersey Foreclosure Mediation Information and Forms](#)
- **Wisconsin** is considering legislation that would require lenders to offer mediation to homeowners before proceeding with foreclosure. [Milwaukee Journal Sentinel](#) (December 12, 2008)
- Legislation modeled on the 1986 Farmer-Lender Mediation Act is proposed in **Minnesota** to curb home foreclosures by giving homeowners the right to request mediation in an effort to renegotiate their mortgage terms with lenders. [Bizjournals.com](#) (November 21, 2008)

Texas Considering New Mediation Program for Hurricane Claims

The Texas Department of Insurance is considering a mediation program to help resolve claims resulting from Hurricane Ike last September, which resulted in about \$10 billion in damages and more than 750,000 insurance claims. While about 60-80 percent of the claims have been settled, the Department of Insurance has received some 2,000 complaints and expects more. The Department is looking to hurricane mediation programs in other states as models and hopes to have a proposal ready for the state legislature in January.

(November 19, 2008)

Grupo Mexico, Its Bankrupt U.S. Unit Asarco, and India's Sterlite Industries in Mediation over Revised Deal Due to Falling Copper Prices, [Reuters](#) (November 25, 2008)

Hong Kong International Arbitration Centre Announces First Mediation of Dispute Relating to Lehman Brothers, with Settlement in Five Hours, [CNNmoney.com](#) (December 22, 2008)

Other News & Initiatives:

Maryland Circuit Court Begins Requiring Mediation in All Motor Tort Cases where Claimed Damages Exceed \$20,000, [Maryland Daily Record](#) (December 13, 2008)

Cracker Barrel Signs Universal Agreement to Mediate with EEOC for Workplace Disputes in Florida, [HR.BLR.com](#) (December 30, 2008)

ACLU Distinguishes Mediation in Criticism of Rhode Island's Rent-a-Judge Proposal, [Woonsocket Call](#) (December 29, 2008)

District Attorney's Office for Yolo County, California Will Hold Mediations Involving Truant High School Students to Provide Final Chance Before Cases Go to Court, [Daily Democrat](#) (CA) (November 22, 2008)

Ninth Intercollegiate Mediation Tournament Held by American Mock Trial Association, [US Federal](#)

[AM Best Newswire](#) (December 30, 2008) (Subscription Required)

[News](#) (November 14, 2008)
(Subscription Required)

Pennsylvania County Using Newly-Established Mediation Program for Property Reassessment Challenges

Luzerne County, Pennsylvania has implemented a mandatory mediation program for property owners who wish to challenge their property assessments following a formal appeal. The county is reassessing all property in the county for first time since 1965, so expects a large number of challenges, but is relying on the specialty courts director as the sole mediator. Over 850 mediations have already been filed, which may take the single mediator until June, and nearly 8,000 additional appeal board rulings have not yet been received by property owners. The first four settlements in the mediation program have been reached, with assessment reductions ranging from ten to twenty percent. If mediation is not successful, the challenge proceeds to a three-person arbitration panel, then to a special master, and finally to the county court.

[Times Leader](#) (November 7, 2008); [The Citizens' Voice](#) (November 14, 2008) (Subscription Required); [The Times Leader](#) (November 20, 2008) (Subscription Required); [The Times Leader](#) (December 11, 2008) (Subscription Required)

Mediation Successful in Providing Consumer Restitution

Missouri's attorney general recovered \$9.5 million for consumers through mediation in 2008, exceeding the previous mediation record, plus an additional \$6 million through civil and criminal litigation. The attorney general's office handled about 120,000 contacts from consumers during 2008, including over 40,000 formal complaints.

[US State News](#) (December 30, 2008) (Subscription Required)

“Street” Mediation Works to Curb Homicides

CeaseFire, an anti-violence program in Chicago, has been successfully using mediation to reduce homicides since 2000. When shootings occur, trained mediators reach out to try to break the cycle of violence and prevent retaliation. Many of the paid mediators were former gang members who have access to and credibility with current gang members. The CeaseFire program has expanded to 15 Chicago neighborhoods and five other Illinois cities, and has been replicated in Baltimore, Cincinnati and Newark, New Jersey. Kansas City, Missouri has been working to develop a similar anti-violence program with a mediation component to address increasing homicide rates, but daunting organizational and funding challenges have thus far hampered the pilot project.

[Pitch Weekly](#) (November 20, 2008); [CeaseFire Website](#)

China Continues to Ramp Up Mediation

Mediation of litigated cases continues to increase in China; last year, one-third of five million civil cases were resolved using non-mandatory mediation, often with assistant judges acting as mediators. The Supreme People's Court is pleased with the effectiveness of mediation and hopes to further increase the use of mediation in civil and family cases to deal with ever larger caseloads. Pilot projects using mandatory mediation began in June 2008 in seven Chinese provinces and large cities.

[China Daily](#) (November 21, 2008)

Other International Mediation Developments

- Use of “planning mediators” is urged in **Malta** under the Development Planning Act, [Times of Malta](#) (December 7, 2008)
- **India** launches 17 mediation centers for the courts of Punjab and Haryana, [Express India](#) (November 9, 2008); [The Hindu](#) (November 8, 2008)
- Chief Justice of **India** announces that mediation training camps will be conducted in all high courts in India, [Express Buzz](#) (December 21, 2008)
- **Indian** government turns to UK mediators, who are training Indian lawyers to Western standards, [The Lawyer](#) (November 3, 2008)
- **Indian** television launches mediation/arbitration show in which actual civil disputes are resolved without actors or scripts, [OneIndia](#) (November 30, 2008)
- The third of four mediation centers planned for **Nepal** was launched with support from the U.S. Agency for International Development, [US Federal News](#) (December 19, 2008) (Subscription Required)
- Mediation of large medical disputes will be provided without charge by a mediation committee supported by the Tainjin city government in **China**, [China Business Newswire](#) (December 22, 2008) (Subscription Required)
- Implementation of civil justice reforms by **Hong Kong** is likely to greatly increase demand for mediation, [South China Morning Post](#) (November 15, 2008) (Subscription Required)
- **Malaysia** has trained 200 mediators and expects to train more in concerted effort to defuse racial conflict and tension, [The New Straits Time](#) (December 21, 2008)

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