



JULY 2009

## CASES & RESOLUTIONS:

### Court Refuses to Allow Plaintiff to Cure Failure to Mediate

A Kansas appellate court affirmed dismissal of a homebuyer's lawsuit against the seller and realtor for failure to first proceed with mediation as required by the purchase contract. When confronted with the defense of failure to mediate, the homebuyer sought to mediate and moved to compel mediation. But the court concluded it was too late and dismissed the litigation, even though the contract provision did not expressly state that the mediation must occur prior to filing suit. The court ruled that when parties contractually agree to mediate they should not be able to continue with their litigation by late compliance with their obligation, as delayed mediation cannot fully achieve its goals.

[Santana v. Olguin](#), 2009 WL 1491383 (Kan. App., May 29, 2009)

### Court Holds that Litigation Damages Cannot be Based on Amount Set in Mediation

A Georgia appellate court reversed a trial court's judgment which relied on the amount agreed upon in mediation with a third party as the measure of consequential damages. The mediation agreement was not performed after discovering the product was defective, but the appellate court concluded that the failure to carry out the mediation agreement was not directly attributable to the breach of warranty, and that the amount agreed to in mediation was not causally connected to the defective product.

[Sunstate Indus., Inc. v. VP Group, Inc.](#), No. A09A0635 (Ga. App., June 26, 2009) (Subscription Required)

### Early Resolution of Multi-Party Mining Disaster Achieved in Mediation

The 2007 Crandall Canyon mine disaster wrongful death and personal injury lawsuits were resolved in mediation for more than \$22 million. The complex cases involved more than 100 participants, including sixteen groups of family plaintiffs, seven defendants, six primary insurance companies, additional secondary insurers, plus four employers. Participants considered the

## Mediation Quote:

"When controversy breaks out, there is no single truth, only different stories about reality. The most dangerous combatants are those who cannot acknowledge multiple realities. Conflicts are kaleidoscopic with many different truths. So the first order of business is to cease antagonizing each other long enough to explore the view planes people are operating on. The second is to understand the different and varied meanings the conflict is imbued with. Only then can you start the journey towards solutions."

Peter S. Adler, *Eye of the Storm Leadership* (Mediate.com Publications 2008) at 43

## Check These Out:

### Directed Body Movements Can Assist Problem Solving

Recent study of "embodied cognition," the link between mind and body, indicates that how people move their bodies may influence how they solve problems. This occurs even when a third party directs the movements of the problem solver, which in the research involved arm swinging.

mediation to be challenging, with a weeklong mediation session, followed by negotiations among counsel, and a final marathon day of mediation. However, settlement was reached prior to any depositions in the case and saved an estimated five years of litigation and a huge emotional and financial toll.

[Salt Lake Tribune](#) (May 30, 2009)

## **Pennsylvania County Mediation Program Criticized for Resolving Property Reassessment Challenges**

All 400 cases mediated with property owners who challenged their property assessments have settled since Luzerne County's mandatory mediation program began in December 2008. To settle the challenges, reductions in assessed value amounting to \$31.6 million have been made. The Pennsylvania county's reassessment company is arguing in court that the county is contractually required to pay the company to defend assessment appeals and to participate in the mediations, which it opposed. The company, which has been paid \$8 million for its reassessment work, alleges that the modifications have been made without adequate basis, reducing tax and school revenues by hundreds of thousands of dollars, but the county stands behind the mediation process. The county has about another 1,600 mediations to go.

[Standard Speaker](#) (May 26, 2009); [The Times Leader](#) (May 28, 2009) (Subscription Required); [The Times Leader](#) (June 30, 2009) (Subscription Required)

## **Ohio Supreme Court Sends Judges' Lawsuit to Mediation**

The three municipal judges of Youngstown filed suit against the city in Ohio's highest court to try to compel suitable accommodations for the court, but the Ohio Supreme Court responded by requiring the parties to mediate. The municipal judges claim that they need larger and better space, but the city states it cannot afford the \$8 million needed for a new facility and that money should be saved by reducing the number of municipal judges. Both sides say they are pleased with the opportunity to mediate.

[Youngstown Vindicator](#) (June 27, 2009)

## **Federal Prosecutors to Mediate with Divorcing Couple**

With a restitution order of over \$3 billion pending against Walter Forbes, the former chairman of Cendant Corp., the U.S. attorney is seeking to intervene in the Forbes' divorce case, asserting an improper effort to transfer assets to his wife, Caren. Caren Forbes filed for divorce in March, after her husband was sentenced to 151 months in federal prison, asserting that the marriage is irretrievably broken and seeking an equitable division of property. Two days of mediation are scheduled to try to resolve the issues, with all divorce proceedings postponed until the mediation is concluded.

[Connecticut Post](#) (June 20, 2009)

[Science Daily](#) (May 13, 2009)

### **Hazardous Mediation Duty**

A court-appointed mediator was bitten and shoved by a woman who was yelling and screaming at the other party in a family dispute, as the mediator tried to separate the parties. The woman was arrested and charged with assaulting the mediator, as well as threatening to kill the other party.

[Foster's Daily Democrat](#) (NH) (May 23, 2009)

## **Other Cases & Resolutions:**

### **DuPont and CSX Settle Complex Rate Complaint Using Surface**

**Transportation Board's Mediation Process,** [Progressive Rail Roadng](#) (May 12, 2009)

**L'Oreal Appealing French Court's Ruling that Ebay Was Not Responsible for Counterfeit Products, But Agreed to Mediate with Ebay at Court's Direction,** [Financial Times](#) (June 25, 2009)

**Mediation Resolves Dispute Between Break-Away Vestry and the Episcopal Diocese of Colorado over Ownership of Grace Church Property,** [Colorado Springs Gazette](#) (June 3, 2009)

**Vodafone Refuses Offers of Mediation to Address Interference from New Telecom 3G Network, So Parties Head to Court,** [New Zealand Herald](#) (May 5, 2009)

**Minnesota Judge Who Benefited by Referring Mediator to Be Removed**

## **Court Requires Mediation in Auto-Parts Maker's Bankruptcy**

Delphi Corp., General Motors Corp., the Treasury Department's auto task force and other lenders were ordered into mediation by the federal bankruptcy court handling Delphi's bankruptcy. The role of General Motors in funding its auto-parts supplier is a central issue. While acknowledging that good faith negotiations were occurring, the court concluded that mediation may be helpful to find a consensual resolution of the bankruptcy cases.

[Bloomberg](#) (May 22, 2009)

## **Australian Court Awards Mediation Expenses as Costs of Proceedings**

The New South Wales Court of Appeals in [Newcastle City Council v. Wieland](#), NSWCA 113 (NSW, Australia 2009), concluded that court-ordered mediation expenses generally should be treated as legitimate costs of the proceedings, since the mediation is a required step. If the parties wish to ensure that each pays its own mediation costs, they must make that clear by agreement.

[Mondaq](#) (May 27, 2009) (Subscription Required)

## **NEWS & INITIATIVES:**

## **Wisconsin Smart Growth Requirements May Spur Mediation**

Wisconsin counties, cities and towns are required to complete comprehensive smart growth plans covering utilities, economic development, housing, transportation, intergovernmental relations and more under the Wisconsin Comprehensive Planning Law, enacted in 1999, which contains a deadline of January 1, 2010. The state has been offering \$2 million a year in grants to help local governments develop their complex plans, which can be aided by mediation, especially in furthering cooperation among communities. Completed smart growth plans range from 100 to 500 pages in length. Once the January 1 deadline arrives, local governments may only take action consistent with their comprehensive plans. The Department of Administration maintains a roster of dispute resolution providers who can assist in intergovernmental and related issues.

[Wisconsin Law Journal](#) (May 25, 2009)

## **Georgia Regulations Require Mediation or Facilitation of Conflicts over Smart Growth Plans**

Final regulations of the Georgia Department of Community Affairs require that mediation or facilitation by a third party neutral be used when conflicts arise from efforts to plan for smart growth in the state. Details of the alternative dispute resolution processes are set forth, including a 90-day

from Bench If State Supreme Court Agrees with Board on Judicial Standards, [ABA Journal](#) (May 12, 2009)

**Woman Injured by Running into Curb Receives \$740,000 in Mediation,** [Pennsylvania Law Weekly](#) (June 22, 2009) (Subscription Required)

**Man Struck by Runaway Electric Cart Reaches Mediation Settlement of \$2 Million,** [Pennsylvania Law Weekly](#) (June 1, 2009) (Subscription Required)

**\$3 Billion Lawsuit Against Montana Power Company Sent to Mediation,** [Montana's News Station](#) (May 20, 2009)

**Mediation Set for October in Canadian Breast Cancer Class Action over Faulty Hormone Receptor Tests,** [The Telegram](#) (May 26, 2009)

**Bankruptcy Judge Orders Fontainebleau Las Vegas Resort and Banks into Mediation after Potential Unnamed Lender Appears,** [Las Vegas Sun](#) (June 19, 2009)

**Federal Judge Appoints Mediator in Lawsuit Claiming that Utah Mismanaged Navajo Trust Fund Containing Royalties on Reservation Oil Wells,** [Salt Lake Tribune](#) (June 25, 2009)

**Dozens of Elected Officials from 16 Governments Continue to Mediate over Service Delivery Issues, Including Police and Transportation,** [Gwinnett \(GA\) Daily Post](#) (May 14, 2009)

**Court Order Requiring Mediation Sought to Address Ohio City's Budget**

deadline which may be extended. The goal is to improve regional and state communication about planning and growth management issues.

[RegAlert](#) (June 10, 2009) (Subscription Required)

## Washington County Requires Mediation of Land Use Disputes

The commissioners of Kitsap County, Washington now require mediation of land use disputes prior to seeking a hearing examiner decision, which may result in an appeal to the county commissioners. The effort to require mediation began after a controversial case involving three appeals was settled late in the process; the commissioners decided to encourage parties to get straight to the compromise and avoid the appeals.

[Kitsap Sun](#) (June 24, 2009)

## Legislation Introduced to Extend Federal Agricultural Mediation Program

The Certified State Agricultural Mediation Program, administered by the Farm Service Agency of the U.S. Department of Agriculture, helps farmers resolve disputes with lenders and others in order to avoid litigation, appeals, bankruptcy and foreclosure. Legislation has been introduced to extend by five years the Mediation Program, which provides matching federal grants to 35 states.

[WIBW](#) (June 26, 2009); [USDA Agricultural Mediation Program](#)

## Early Mediation Becoming More Common in Midwest

Mediators and counsel in the Chicago area report seeing many more commercial disputes being mediated prior to litigation being filed. Some attribute it to the economic climate, while others believe it may be the natural result of court programs encouraging parties to mediate. The Cook County Circuit Court's Law Division began a mediation program five years ago, while the Court's Chancery Division began its mediation program in early 2007, both of which result in hundreds of mediated cases each year. While counsel are more willing to work out disputes earlier, some also observe that lawyers are increasingly reluctant to pay a mediator until after they first try to settle the matter through direct negotiations.

[Chicago Daily Law Bulletin](#) (June 25, 2009) (Subscription Required)

## Update on Home Foreclosure Mediation Efforts

- A detailed 66-page report analyzes the home foreclosure crisis in the U.S., surveys the status of state mediation programs addressing home foreclosures, suggests best practices, and urges a significant federal government role in mandatory mediation.

[Center for American Progress](#) (June 22, 2009); [Report](#)

**Problems,** [Mansfield News Journal](#) (June 18, 2009)

**Illinois Township Turning to Mediator to Address Heated Dispute over Supervisor Hiring Friend,** [Homer Horizon](#) (June 17, 2009)

**National Hockey League and Owner of Bankrupt Phoenix Coyotes Sent to Mediation by Bankruptcy Judge to Determine Control of Team,** [Reuters](#) (May 19, 2009)

**Judge Orders Mediation over Hiring of Goshen, Alabama High School Football Coach,** [Dothan Eagle](#) (June 18, 2009)

**Judge Calls for Second Round of Mediation over Placement of 77-Foot Cross near Highway,** [Kerrville](#) (June 3, 2009) (Subscription Required)

**Two Years of Mediation over Tupper Lake Resort Development Pleases Some, But Leaves Unresolved Issues,** [Plattsburgh Press Republican](#) (June 24, 2009)

**Auckland War Memorial Museum to Mediate with Family of Sir Ed Hillary over Plans for Memorabilia,** [New Zealand Herald](#) (May 25, 2009)

**City Officials and Insurance Carrier Heading to Mediation over Tornado Damage to Civic Center,** [The Enterprised Ledger](#) (AL) (June 3, 2009)

**Lionsgate Films and Weinstein Co. Agree to Mediate Distribution Dispute over Movie "Push,"** [Contra Costa Times](#) (June 8, 2009)

**Court Orders Five Women Accused of Paddling Sorority Pledges to Go to Mediation,** [Cincinnati.com](#)

- **Nevada** has enacted legislation requiring lenders to meet with homeowners who may request mediation if they receive a foreclosure notice. The program takes effect on July 1 and may generate up to 1,500 mediation requests a month, as Nevada has the worst foreclosure rate in the country. The first mediations will be conducted by senior judges and settlement judges; more than 350 lawyers who have expressed interest in acting as mediators, but must both be experienced and receive training. The costs of mediation are to be shared, with homeowners and lenders paying \$200 each. The Nevada Supreme Court issued rules for the mediation program after holding public hearings.

[Mercury News](#) (June 17, 2009); [Mediation Rules](#) (June 30, 2009); [Foreclosure Mediation Website](#)

- **Connecticut** has passed legislation that as of July 1 makes mandatory the foreclosure mediation program that was previously voluntary. About 60% of homeowners in the voluntary program have been able to stay in their homes, but only about one-third of those eligible for the mediation program have used it. The program has been funded through a \$5 million grant, but additional funds may be needed. The mediation program's 30-person staff (including 12 mediators) is expected to more than double along with its caseload.

[Connecticut Law Tribune](#) (June 8, 2009)

- Emergency legislation was enacted in **Maine** to create an optional home foreclosure mediation program and provide additional counseling for homeowners. Maine's bill, modeled on similar legislation in Connecticut, takes effect on July 1.

[LD 1418 Status](#); [Bangor Daily News](#) (June 12, 2009)

- A **Florida** Supreme Court task force is exploring the possibility of a statewide mandatory foreclosure mediation program in light of worsening conditions in Florida, which has the second highest rate of foreclosures in the nation (after Nevada).

[Miami Herald](#) (May 14, 2009)

- The governor of **Minnesota** vetoed a home foreclosure mediation bill that would have required lenders to participate in mediation at the request of homeowners facing foreclosure. The legislation was opposed by the Minnesota Bankers Association. By contrast, a foreclosure mediation program continues to move forward in **Wisconsin** with money from a settlement with Countrywide Financial Corp.

[Bizjournals.com](#) (May 20, 2009); [Arbitration Forum Blogspot.com](#) (May 28, 2009)

(May 14, 2009)

**City's Restrictions on Nude Dancing Sent to Mediation,** [Destin \(FL\) Log](#) (May 29, 2009)

## Other News & Initiatives:

**National Archives Appoints FOIA Ombuds to Mediate Disputes over Access to Information,** [New York Times](#) (June 11, 2009)

**Orange County, Florida Requires All Small Claims Cases to Be Mediated; 75% of Those Mediated Are Resolved,** [TMCnet](#) (June 22, 2009)

**New Hampshire Legislation Sent to Governor to Raise Small Claim Limit to \$7,500 and to Require Mediation of Any Small Claim Exceeding \$5,000,** [Fox 44 News](#) (May 13, 2009)

**Texas Moving Forward with Legislation for Mediation System for Patients Surprised by Out-of-Network Medical Charges,** [Fort Worth Star Telegram](#) (May 30, 2009)

## Elder Mediation Service Launched to Address Dementia Issues

The Alzheimer Society of Ireland launched a pilot elder mediation program to assist families coping with dementia. Family members are often involved and deeply affected by a relative with dementia; the new model of elder mediation services may help address the resulting stress and family conflict.

[Irish Medical Times](#) (June 22, 2009)

## New Chinese Law Provides for Mediation of Rural Land Disputes

China's top legislature enacted legislation on mediation and arbitration of rural land contract disputes. The law is to ensure rural stability by addressing the growing number of disputes resulting from allocating publicly-owned farmland to individual households using long term contracts. Over 50,000 land dispute cases arose from 2003 to 2008. Arbitration has been used in land disputes since the late 1990s, with patchwork arbitration regulations in 23 provinces. Under the new national law, when a land dispute arises the parties can negotiate directly or obtain mediation assistance from a village committee or local government. The law recommends that local officials encourage use of mediation. If mediation is not successful, the parties can apply for arbitration or go to court. The law takes effect January 1, 2010.

[Xinhua Economic News](#) (June 29, 2009) (Subscription Required)

## Other International Mediation Developments

- Latest survey of **U.K.** construction litigation by the Technology and Construction Court and King's College, London finds evidence of increasing use of mediation with significant costs savings. [Building](#) (June 5, 2009) (Subscription Required); [Mondaq News Alerts](#) (May 19, 2009)
- Benefits of mediation are particularly significant when dealing with intellectual property in an international context. [Lawyer \(U.K.\)](#) (May 25, 2009) (Subscription Required)
- **Nigerian** High Court Justice encourages Nigerian Bar Association to focus attention on mediation and other forms of ADR in commercial cases. [AllAfrica.com](#) (May 25, 2009) (Subscription Required)
- **Pakistan's** Ministry of Law is considering amendments to mandate mediation in all cases prior to arbitration or litigation. [Business Recorder](#) (June 24, 2009) (Subscription Required)
- World Bank's International Finance Corporation encourages development of banking mediation in **Pakistan**. [Daily Times](#) (May 5, 2009)
- **Nepal's** six mediation centers are making progress, and may expand by another 20, but face challenges. [eKantipur.com](#) (May 24, 2009)
- Four-day judicial mediation exchange program between **China** and U.S. held in Jilin Province with 60 judges and experts. [Xinhua](#) (June 17, 2009)
- Victoria, **Australia** turns to international expert on judge-led mediation to educate judiciary prior to pilot mediation program. [The New Lawyer](#) (May 12, 2009)
- **Fiji's** employment mediation service exceeding goals with 84% success rate since inception. [Fiji Daily Post](#) (May 14, 2009)

- First **Asian Mediation Association** conference to be held in Singapore. [Business Times \(Singapore\)](#) (May 22, 2009)  
(Subscription Required)

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