



MAY 2008

CASES & RESOLUTIONS:

Eleventh Circuit Holds Federal Arbitration Act Cannot Compel Mediation

A contract requiring either mediation or nonbinding arbitration prior to litigation cannot be enforced using the Federal Arbitration Act, because the FAA only applies when the parties have agreed to arbitrate, the U.S. Court of Appeals for the Eleventh Circuit concluded in [Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.](#) The court carefully examined the attributes of arbitration, since processes are sometimes mislabeled. In dicta, the court emphasized the desirability of mediation, including courts requiring mediation and staying litigation pending mediation, noting that its holding was merely that the FAA cannot be used to compel mediation.

[Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.](#), No. 07-12309 (11th Cir. April 21, 2008)

North Carolina Court Requires Disclosure of Insurance Coverage Remaining Prior to Mediation

The North Carolina Business Court in [Harco National Ins. Co. v. Grant Thornton LLP](#) required the defendant to disclose the amount of insurance remaining under its liability policy immediately prior to mediation, even though the court did not require disclosure of all insurance information sought. The court relied on the requirement to mediate in “good faith” and held that refusing information about available insurance coverage was not good faith. The court noted that the North Carolina Supreme Court’s governing interpretation of the discovery rule, which requires disclosure of the “true facts” of insurance coverage, is broader than the analogous federal rule.

[Harco National Ins. Co. v. Grant Thornton LLP](#), 2008 NCBC 5 (N.C. Bus. Ct. March 4, 2008)

Mediation Resolves Pet Food Multi-District Litigation in Principle

A comprehensive, cross-border settlement in principle addressing all major

Mediation Quote:

“What we believe about ourselves can hold us hostage....[A] belief is more than just an idea – it seems to shift the way in which we actually experience ourselves and our lives. According to Talmudic teaching, ‘We do not see things the way they are. We see them as we are.’ A belief is like a pair of sunglasses. When we wear a belief and look at life through it, it is difficult to convince ourselves that what we see is not what is real.... Knowing what is real requires that we remember that we are wearing glasses, and take them off. One of the great moments in life is the moment we recognize we have them on in the first place. Freedom is very close to us then. It is a moment of great power.”

- Rachel Naomi Remen,
Kitchen Table Wisdom
(Berkeley Publishing 1996) at 77.

Other Cases & Resolutions:

Restoration Project Back on Track After Mediation Resolves Litigation Against City over Permitting,
[Marshall News Messenger](#)

terms has been reached through mediation in the Pet Food Multi-District Litigation. While approval of a definitive settlement agreement is required, along with approval of both the U.S. federal court and Canadian courts, the parties reported to the New Jersey court that they are confident of final resolution. Once finalized, the administrator of a settlement fund will provide details to pet owners on how to submit individual claims.

[Marketwire](#) (April 1, 2008)

Mediation During Trial Yields \$7.5 Million Settlement for Injuries from Stepping into Hole

Five defendants ultimately agreed to pay \$7.5 million after mediation to resolve claims by a man with severe injuries from stepping into a hole left by the removal of an electrical pole on a construction site. Defendants blamed each other, and asserted that plaintiff was trespassing when he was injured. Trial was initially delayed to permit mediation, but settlement efforts continued during the trial proceedings. When the trial began, plaintiff's counsel stated that his demand would increase by a quarter million each day, and the case ultimately settled at the end of the week a million dollars higher, just before plaintiff's mother was to testify. Plaintiff's counsel agreed to use a mediator from a law firm that had represented another defendant in the case who had settled prior to the last minute mediation.

[The Legal Intelligencer](#) (April 30, 2008) (Subscription Required)

Lawsuit Filed to Spur More Insurance Mediation

Litigation has begun asserting that property insurers deliberately failed to inform Florida policyholders that they can seek mediation for hurricane claims, allegedly saving the insurance industry \$400 million in mediation and extra claims settlement costs. The case was brought on behalf of a homeowner against the Florida Office of Insurance Regulation and the Department of Financial Services, alleging that the agencies allowed insurers to ignore their obligations to offer mediation. While class action certification is not being sought, plaintiff's counsel hopes the state agencies will become more diligent in enforcing the mediation notification requirement. The state disputes the claims, stating that it does focus on getting homeowners with insurance disputes into mediation. Over 13,000 requests for mediation of hurricane claims have been submitted in the last 27 months, and about 140 are still arriving monthly. The mediation program, which has been extended to July 31, 2008, has resolved 80-90 percent of the claims.

[Orlando Sentinel](#) (April 3, 2008); [Business Wire](#) (April 2, 2008)

Movie and TV Stars Pursue Mediation

"Desperate Housewife" star Nicollette Sheridan has avoided a June 30 trial date by reaching a confidential settlement through mediation with her ex-manager over his claim for ten percent of her earnings, after a Los Angeles judge ordered the parties into mediation last October. In separate litigation against Keanu Reeves by a paparazzo photographer who claims severe injuries from the actor backing into him with a Porsche, Reeves' lawyer has sought mediation of the claims and requested that legal proceedings be suspended in

(Texas) (April 19, 2008)

Mediation Continues in Defective Design and Construction Claims by County Against Eleven Contractors in Four Cases, [Beaufort Gazette](#) (South Carolina) (April 4, 2008)

County Authorizes Mediation over Land Deal with School Where Intentions Not Included in Contract Language, [The News-Press](#) (Florida) (April 6, 2008)

Efforts to Obtain State Approval to Build Hospitals Four Miles Apart Headed to Mediation, [The Business Journal](#) (North Carolina) (March 13, 2008); [Winston-Salem Journal](#) (March 15, 2008)

Mediation Set over Sonoma County Wheelchair-Accessible Trail Plan Pitting Hikers Against Cows, [Santa Rosa Press Democrat](#) (California) (March 16, 2008)

Dispute over Scope of Archdiocese Documents to Be Disclosed in \$72 Million Sex Abuse Settlement Goes to Mediation, [Catholic Sentinel](#) (Portland, Oregon) (March 21, 2008)

Dispute Among Owner, Neighbors and City over Three-Story "Garage Mahal" Being Mediated, [New Bern Sun Journal](#) (North Carolina) (March 14, 2008)

Bankruptcy Judge Orders Mediation Between Owner Seeking to Develop Property and Holdout Tenant, [Business Review](#) (Albany, NY) (March 14, 2008)

Appearance of Mediator Conflict of Interest in Eye of

the meantime.

[E! Online](#) (March 25, 2008); [E! Online](#) (March 25, 2008)

NEWS & INITIATIVES:

European Parliament Approves Mediation Directive for Cross-Border Civil Disputes

After many years of effort, a Mediation Directive for cross-border civil and commercial disputes was approved by the European Parliament on April 23, 2008. The new Directive (i) requires member states to encourage training of mediators and development of codes of conduct and other quality control measures for mediation services, (ii) gives all judges the right to invite parties to mediate, (iii) requires member states to provide judgment-like status for mediated agreements, (iv) requires mediation confidentiality and protects mediators from compulsion to give evidence, and (v) ensures that statutes of limitations and prescription periods will be suspended during mediation. Member states have three years to implement the Directive for most issues, and may choose to apply the Directive to internal as well as cross-border disputes.

[European Parliament](#) (Brussels) (April 23, 2008)

Idaho Enacts Uniform Mediation Act

Idaho has enacted the Uniform Mediation Act (UMA), effective July 1, 2008, in order to establish confidentiality for mediation communications, with specified exceptions. The legislation is intended to encourage greater use of non-judicial mediation by providing confidentiality protections that are uniform with the recent rules adopted by the Idaho Supreme Court for court-annexed mediation. The Idaho legislation also incorporates the United Nations Model Law on International Commercial Conciliation, which is a supplement to the UMA for international commercial mediations, unless the parties agree otherwise. The UMA has now been adopted in the District of Columbia and ten states: Idaho, Illinois, Iowa, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont and Washington state.

[Idaho S.B. 1261](#)

Minnesota Adds Mediation to Fight Against Home Foreclosures

The governor of Minnesota is emphasizing voluntary mediation in response to high levels of home foreclosures and as a further step after foreclosure counseling programs. Under his program, Minnesota agencies are to offer grants to pay for mediation if counseling has not resolved the issues, but a home-saving deal may still be possible.

[Post-Bulletin](#) (April 16, 2008)

California Legislation Would Require

Mediation Party, [South Florida Sun-Sentinel](#) (April 10, 2008)

Court Sends Complex Dispute over Grand Bahama Port Authority to Mediation, [The Bahama Journal](#) (March 8, 2008)

Mediation Set over Development of Motorsport Park that Neighbors Oppose as Excessively Noisy, [Drivesouth](#) (New Zealand) (March 27, 2008)

Other News & Initiatives:

Mediation Voluntary in Large Civil Cases in Madison County, Illinois, But Nonbinding Arbitration Required, [Edwardsville Intelligencer](#) (March 10, 2008)

Marin County Courts Embrace Mediation for All Civil, Probate and Family Law Disputes, [Marin Independent-Journal](#) (California) (March 21, 2008)

Legal Culture Shifting Towards Mediation in Michigan, [MLive.com](#) (April 4, 2008)

Ohio's Foreclosure Mediation Programs Continue, [Mansfield News Journal](#) (March 26, 2008); [Kentucky Post](#) (April 1, 2008); [U.S. News & World Report](#) (April 21, 2008)

Publicity Grows for Hospital Mediation Plan, [Pennsylvania Law Weekly](#) (March 17, 2008) (Subscription Required); [The Intelligencer](#) (Philadelphia) (March 28, 2008); [6abc.com](#) (Philadelphia) (March 28, 2008)

Mediation of Public Works Disputes

Pending California legislation would require mediation at the option of the claimant for disputes of \$50,000 or more arising from public works contracts involving local agencies, cities and counties, followed by binding arbitration if mediation is not fully successful, unless another dispute resolution process was provided in the contract. If the parties are unable to agree on the mediator or arbitrator, the legislation mandates selection through the American Arbitration Association. If litigation is required to enforce the provisions, the legislation provides attorneys' fees and costs to the prevailing party.

[California S.B. 1642](#) (April 3, 2008)

Resignations Undercut Florida's Open Government Mediation Program

Florida's Open Government Mediation Program began in the early 1990s with the Attorney General's office acting as an intermediary to assist requesters in getting access to documents or meetings of government agencies, rather than agencies spending substantial resources fighting public access. The process was so successful that it was enacted by the state in 1996 and grew to over 120 cases per year. Recently, Florida's Attorney General McCollum has not made the program a priority and top-level turnover has resulted in a one-third reduction in the cases being handled, raising concern among media groups. However, Attorney General McCollum stated that the mediation process has been very successful and promised it will continue.

[Orlando Sentinel](#) (March 16, 2008)

Missouri Bar Begins Mediation Program for Attorneys in Office Conflicts

Attorneys in disputes due to economic changes at their firm or communication problems will be offered free mediation by the Missouri Bar in a program beginning June 1, 2008. The process requires the consent of both parties and will be confidential unless serious ethical violations are uncovered. The Bar will only pay out of pocket costs for mediators, but more than 100 attorneys have volunteered.

[Missouri Lawyers Weekly](#) (April 28, 2008) (Subscription Required)

Maryland County Mediating Misdemeanors

Maryland's Worcester County has been sending misdemeanor criminal complaints to mediation and discovered that the results are excellent. Since the mediation program began three years ago, over 360 cases have been referred to the one-person mediation office after review by prosecutors. About two-thirds of the cases were mediated and all but one were successfully resolved. The mediation program, which is free to the parties, has been supported by a modest grant from the Maryland Judiciary's Mediation and Conflict Resolution Office, and hopes to become a permanent county program.

[The Daily Times](#) (March 21, 2008)

Mediation Policy of Large Bulk Chemical Transporter's Risk Management Team Minimizes Costs with 75% Settlement Rate, [Business Insurance](#) (March 24, 2008)

Need for Clarity in Mediation on Existence and Scope of Insurance, [New Jersey Law Journal](#) (March 31, 2008)
(Subscription Required)

CPR Initiative Promotes Mediation for Policyholder-Insurer Disputes, [Business Insurance](#) (March 24, 2008)

Technology Contracts Should Include Mediation and Arbitration Provisions, [ITBusiness.ca](#) (Ontario, Canada) (March 24, 2008)

Ten Years After Controversial Beginning, Judicial Mediation Celebrated in Quebec, [The Gazette](#) (Canada) (April 11, 2008)

Mediation Needs to Become Mainstream in U.K. Planning Disputes, [Planning \(U.K.\)](#) (March 20, 2008) (Subscription Required)

U.K. Family Farm Disputes Are Focus in Mediation, [Farmers Guardian](#) (U.K.) (April 21, 2008)

American Named as U.N. Ombuds, Will Mediate Issues Involving U.N. Staff Around World, [China View](#) (March 14, 2008)

Tennessee Judges Training in Mediation

Reflecting the growing importance of mediation and the pressure on court dockets, 29 Tennessee judges, including four Supreme Court justices, are attending a five-day mediation training. State court figures indicate that 1,500 cases were mediated in the first quarter of the year.

[The Tennessean](#) (April 15, 2008)

Online Mediation Moves to “Second Life”

Law students in a dispute resolution class at the University of Dayton Law School are honing their skills in mediations held in the online world of Second Life, where each participant is shown as an avatar or animated character who communicates through its user’s voice or by text messages. In addition to the general communication among the group, separate private Instant Messages can occur simultaneously. Compared to communicating through conference calls, personality can come through in how the avatars are dressed and move. Biases based on appearance or voice can be eliminated, but gestures and facial expressions that are important to communication are also lost.

[Dayton Daily News](#) (March 16, 2008)

Timing Flexibility for Mandatory Mediation Increases Settlements in Toronto

Evaluation of Toronto Superior Court’s mandatory mediation requirements shows greater success by allowing more flexible timing, rather than requiring mediation to occur too quickly, although some practitioners think the delay sometimes results in parties incurring excessive legal fees which can impede settlement. Counsel have shifted perspective and appear to now be mediating to get cases settled rather than merely as a necessary step to get to trial. The Chief Justice behind the program has concluded that “mediation is the cornerstone of the justice system” in the province.

[Law Times](#) (Canada) (April 21, 2008)

Victoria, Australia Expanding Court-Connected Mediation

Australian Supreme and County Courts will be able to send cases to mediation for the first time in a pilot project being started in Victoria, which will include large commercial disputes. Based on a Canadian model, senior judges will be involved to give the mediation process their imprimatur. The project is allocated A\$3.7 million in the current budget package for the judicial system. In addition, the budget includes a A\$5.8 million expansion of the mediation program in Magistrate Court and A\$6.2 million to expand alternative dispute resolution regionally in Victoria.

[The Age](#) (May 4, 2008)

U.K. Group Urges Mediation to Remedy Design Theft

The leading U.K. trade organization opposing design theft has launched a national campaign to encourage mediation of intellectual property disputes. The organization, known as ACID (Anti Copying in Design), launched its pro-mediation campaign with the slogan "Mediate to Resolve" on the group's tenth anniversary in April. However, ACID has long been involved in resolving disputes, with a mediation panel chaired by a former High Court Judge and a countrywide network of mediators. ACID has handled 2,000 mediations and states that only a handful have gone on to court, as most result in royalty or licensing agreements. ACID's mediation campaign is supported by the Minister for Intellectual Property.

[ITNews](#) (Rome) (April 7, 2008)

Other International Mediation Developments

- **U.K.** market becoming saturated with retired judges seeking to become mediators and arbitrators, [The Lawyer](#) (March 24, 2008) (Subscription Required)
- **Czech** dispute resolution program begins for consumer complaints, [Prague Post](#) (March 19, 2008)
- Mediation spreading to state of Andhra Pradesh, **India**, with mediation centers being set up in 11 of 23 districts, [Hindu](#) (March 23, 2008) (Subscription Required)
- Bar association opposes judicial involvement in mediation in Delhi, **India**, [Hindustan Times](#) (March 16, 2008) (Subscription Required)
- Chief Justice of **India** encourages mediation at conference on Alternative Dispute Resolution to bolster public confidence in judicial system, [Howrah News Service](#) (March 29, 2008)
- Commercial mediators being trained in **South Africa** to respond to new Companies Bill and provide better alternative to arbitration, [AllAfrica.com](#) (March 25, 2008)
- Victoria's Office of the Small Business Commissioner is unique in **Australia**, using mediation to resolve over 4,000 disputes in five years, including many franchisee-franchisor conflicts, [Herald Sun](#) (May 1, 2008) (Subscription Required)
- Australia funding pilot community mediation programs in **Fiji, Kiribati, Samoa, Solomon Islands, Tonga, Tuvalu** and **Vanuatu**, [Radio New Zealand International](#) (March 19, 2008)
- Trial lawyers are becoming scarcer in the **Philippines** due to high demand for tax and corporate lawyers, resulting in the judiciary putting greater emphasis on court mediation programs, [Inquirer.net](#) (May 6, 2008)

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