



NOVEMBER/DECEMBER 2007

CASES & RESOLUTIONS:

Largest Antitrust Settlement Reached in Mediation

After five months of mediation, a settlement has been reached in which Visa will pay \$2.1 billion to credit card competitor American Express to resolve antitrust litigation. The U.S. Supreme Court held in 2004 that Visa and MasterCard rules preventing banks from issuing competing credit cards violate antitrust laws. The payments to American Express are to be made over time by Visa's member banks, with almost a billion dollars paid now and then \$70 million per quarter. This is understood to be the most ever paid in an antitrust matter, and resolves American Express's litigation against Visa's member banks. However, Discover Financial still has claims against Visa, and both American Express and Discover have ongoing claims against MasterCard.

[The New York Times](#) (November 8, 2007)

Mediation Resolves Land Dispute for Minnesota Twins Ballpark

Two weeks of intense mediation between Hennepin County, Minnesota and land owners finally resolved the price for ten acres of land needed for a new Minnesota Twins stadium. The settlement avoids a November jury trial on the landowner's appeal of the \$23.8 million set in condemnation proceedings.

[AP Alert Minnesota](#) (October 13, 2007) (Subscription Required)

Senator Feinstein Offers to Mediate Mining Dispute

U.S. Senator Dianne Feinstein (D-CA) offered to mediate between the City of Santa Clarita and Cemex over expansion of aggregate mining near the city, to see if a land trade or other solution could be found. The Senator, revealing options not available to regular mediators, suggested that if discussions are not successful she may introduce legislation in Congress.

Mediation Quote:

"Each of us is trapped in a place, a time, and a circumstance, and our attempts to use our minds to transcend those boundaries are, more often than not, ineffective....[W]e think we are thinking outside the box only because we can't see how big the box really is. Imagination cannot easily transcend the boundaries of the present, and one reason for this is that it must borrow machinery that is owned by perception. The fact that these two processes must run on the same platform means that we are sometimes confused about which one is running. We assume that what we feel as we imagine the future is what we'll feel when we get there, but in fact, what we feel as we imagine the future is often a response to what's happening in the present."

- Daniel Gilbert, *Stumbling on Happiness* (Alfred A. Knopf 2006) at 125.

Other Cases & Resolutions:

Assault Charge Against Local Politician Resolved in Mediation by Apology, [The Daily Tar Heel \(North Carolina\)](#)

[The Signal](#) (October 10, 2007); [LA Daily News](#) (October 10, 2007)

Punishment for Violating Mediation Order by Sending Counsel Alone Limited by U.S. Constitution

Despite sending a lawyer with “full settlement authority” to a mediation, a Texas trial court found both the individual party and his law firm in contempt because the individual failed to attend the mediation. When a \$500 fine was not paid, the court barred the entire law firm from practicing before the court, even in the absence of notice of the fine or any hearing on the more serious sanctions. Applying an abuse of discretion standard, the appellate court in [In re Magallon](#) upheld the contempt finding and fine against both the party and counsel, but concluded that barring the entire law firm from practicing before the court without prior notice and an opportunity to respond violated the due process clause of the U.S. Constitution.

[In re Magallon](#), No. 09-07-438 CV, 2007 WL 2962934 (Tex.App., October 11, 2007)

Judge Orders Mayor’s Arrest for Failure to Appear at Mediation

A county judge ordered the arrest of the mayor of a small town in Kentucky for failure to appear at a court-ordered mediation; the mayor also had failed to appear at an earlier hearing. The mayor is accused of assaulting a neighbor’s 15-year-old son in a dispute over fireworks, which could result in up to a year in jail. The boy and others waited over an hour for the mayor to appear at the mediation.

[The Cincinnati Post](#) (September 28, 2007)

Settlement Undone by Fraud Involving Prior Contradictory Statements

A settlement reached in mediation based on plaintiff’s certainty about the identity of the truck that caused his injuries was set aside by a divided Alabama Supreme Court in [Billy Barnes Enterprises, Inc. v. Williams](#) when it turned out that plaintiff had made earlier exculpatory statements, the existence of which plaintiff and his counsel repeatedly denied until the day after the settlement was reached. Applying basic principles of contract law, the court found the existence of fraud even if the denials were innocent mistakes, so reversed the trial court and set aside the settlement agreement.

[Billy Barnes Enterprises, Inc. v. Williams](#), No. 1050183, 2007 WL 2812768 (Ala., September 28, 2007)

Alleged Fraud Insufficient to Void Settlement Agreement

A federal court refused to set aside a settlement agreement reached in mediation based on alleged fraud in [Hughes v. Matchless Metal Polish Co.](#)

(October 26, 2007)

Bankruptcy Judge Orders Mediation over Ancient Redwood Groves of Pacific Lumber Co., [The Eureka Reporter](#) (October 24, 2007)

Class Action Against Ambulance Service for Excessive Charges Going to Mediation, [Spokesman-Review \(Spokane, Washington\)](#) (October 11, 2007) (Subscription Required)

Class Action Lawsuit Over Wages Ordered to Mediation, [Kansas City Business Journal](#) (October 12, 2007)

Federal Judge Gives City and Utility More Time for Mediation to Resolve Dispute and Rebuild Relationship, [Kalb.com \(Louisiana\)](#) (September 30, 2007)

After 14-Years of Litigation, Utility Agrees to Mediate with Residents It Flooded, [MyrtleBeachOnline \(South Carolina\)](#) (September 19, 2007)

Judge Returns to Mediation Three-Year Old Dispute with County over Reopening Tiki Bar after Fire, [Venicegondolier.com \(Florida\)](#) (September 14, 2007)

Two Towns Join Mediation with Hospital and State on Proposal to Relocate Hospital, [The News & Observer \(North Carolina\)](#) (September 27, 2007) (Subscription Required)

Oshkosh, Wisconsin and Developer Mediate Tax Dispute, [The Northwestern](#) (October 3, 2007)

Oracle Claims of Software Theft by SAP Headed to

Plaintiff, a self-employed jeweler, sued a manufacturer of metal polish containing silica and other defendants for his lung cancer, but did not accurately disclose his history as a smoker. Defendants settled prior to receiving requested medical records which contradicted plaintiff's statements about when he quit smoking. In refusing to void the settlement or impose other sanctions, the court concluded that plaintiff's actions did not amount to fraud, finding that defendants were on notice of potential evidence of plaintiff's continued smoking and of gaps in his medical records. The court noted that its deadline for mediation had not expired and might have been extended, but that the decision to settle in the absence of complete information was reasonable.

[Hughes v. Matchless Metal Polish Co.](#), No. 2:04-cv-485-FtM-29DNF, 2007 WL 2774214 (M.D.Fla., September 24, 2007) (Subscription Required)

Subpoena of Mediator Upheld in New York

A New York appellate court upheld the subpoena of a mediator in a one-paragraph opinion in [Hauzinger v. Hauzinger](#), despite the confidentiality agreement signed by the parties. Noting that that parties had not been represented by counsel in the mediation of a separation agreement, the opinion explained that the issue before the court was whether the separation agreement terms were "fair and reasonable," so it was not an abuse of discretion for the trial judge to refuse to quash the subpoena. Moreover, the appellate court was not swayed by the confidentiality provisions of the Uniform Mediation Act, since New York has not adopted the Act and the court did not find it a matter of public policy.

[Hauzinger v. Hauzinger](#), 43 A.D.3d 1289, 842 N.Y.S.2d 646 (NY App. 4th, Sept. 28, 2007)

NEWS & INITIATIVES:

Litigation Survey Reveals Extensive Use of Mediation

An annual survey of hundreds of senior corporate counsel on litigation trends states that half of the companies settled all or the majority of their cases prior to trial or arbitration hearing. Mediation was used in settled matters about half the time or more by 50% of U.S. companies and by 75% of U.K. companies. In the U.S., use of mediation is notably higher in the Midwest and New England than in other parts of the country. Among industries, mediation appears to be used much more frequently in Retail/Wholesale, Financial Services and Education, and less frequently in Real Estate, Tech/Communications and Manufacturing. Overall, the number of lawsuits filed was down from the previous year, although the number of cases involving \$20 million or more is increasing.

[Fourth Annual Litigation Trends Survey Findings](#) (Registration Required); [Survey Data](#)

Mediation Increasingly Used in Brokerage

Mediation, [Eweek.com](#) (September 26, 2007); [Bloomberg](#) (September 25, 2007)

Grain Shippers to Mediate with Canadian National Railway Over Use of Railcars, [Resource News International](#) (September 17, 2007) (Subscription Required)

Italian Banks Seek Mediation over Soured Partnership Due to Derivatives Exposure, [Forbes.com](#) (October 19, 2007)

Indonesian Toll Road Users and Government Ordered to Mediate Increase in Tolls, [Jakarta Post](#) (October 24, 2007) (Subscription Required)

Son of Former Indonesian President Suharto Denies Fraud Scheme and Seeks Mediation, [People's Daily Online](#) (September 17, 2007)

New Zealand Claims from Police Anti-Terrorism Raids Sent to Mediation by Human Rights Commission, [Stuff.co.nz](#) (October 30, 2007)

Other News & Initiatives:

Technology Disputes Benefit from Mediation Due to Choice of Mediators with Expertise and Speed of Resolution, [Australian IT](#) (October 9, 2007)

Mediation Provides Empowering Alternative to Litigation, [New Jersey Law Journal](#) (November 2, 2007) (Subscription Required)

Louisiana Insurance Commissioner Asks Insurers to Continue Paying for Hurricane Mediations even though Legal Requirement

Disputes

In the brokerage industry, where the norm of mandatory arbitration is being challenged by pending federal legislation and hearings, one alternative being used by more parties is mediation. The Financial Industry Regulatory Authority (FINRA) notes substantial growth in private mediation of brokerage disputes. Mediation is seen as a safer alternative to arbitration, since the parties retain control both in choosing the mediator and whether to settle at all. In addition, parties and attorneys agree that mediation can be used to test their cases and, in some instances, bring investor expectations back to earth. According to FINRA, about 80% of brokerage mediations do result in settlements, with mediations taking about four months compared to 13 months for arbitration. To promote mediation, FINRA offered discounted fees during October, in honor of Mediation Settlement Month.

[Wall Street Journal](#) (November 4, 2007); [AP DateStream](#) (September 28, 2007) (Subscription Required)

Mandatory Med Mal Mediation Approved for Illinois County

Mandatory mediation of all medical malpractice cases was approved for Madison County by the Illinois Supreme Court, establishing the first rule of its kind in Illinois. The new rule is also considered unique by allowing parties to choose between lawyers and judges to mediate the case, although a judge trained in mediation will be assigned at no cost to the parties unless all parties agree on an alternate mediator who they will compensate. All mediators are required by the rule to file a report with the court stating whether the parties mediated in "good faith." Mediations must be completed within 90 days after the depositions of all plaintiffs and defendants.

[The Madison-St. Clair Record](#) (September 26, 2007)

Federal Court in Pennsylvania Proposes Expanded ADR Program

After fourteen months experience with a pilot Alternative Dispute Resolution program, the U.S. District Court for the Western District of Pennsylvania is proposing to expand the program from cases assigned to four judges to nearly all cases before the court, beginning on January 1, 2008. Parties will continue to have a choice between mediation, arbitration, and early neutral evaluation. During the pilot program, the court found that 70% of the cases went to mediation, 20% to early neutral evaluation and only 3% to arbitration, even though the court pays the arbitrators' fees but the parties have to pay mediators and evaluators.

[Court Website](#); [The Legal Intelligencer](#) (October 30, 2007) (Subscription Required)

Minnesota's Farmer-Lender Mediation Program Building on Success

For twenty years, Minnesota farmers have had a statutory right to mediate claims brought by creditors, who are required to send notice of mediation

Has Ended, [New Orleans Times Picayune](#) (September 29, 2007)

Tax Court in Canada Willing to Mediate Income and Commodity Tax Disputes, [Financial Post](#) (October 13, 2007)

U.K. MPs Accuse Lawyers of Discouraging Mediation for Financial Gain, [Inthenews.co.uk](#) (October 16, 2007)

Successful Small Business Mediation Program in Victoria, Australia Has Handled 3,500 Disputes Since Founding in 2003, [Smh.com.au](#) (September 12, 2007)

rights to debtors. The Farmer-Lender Mediation program administrator then sends a packet of mediation information, and this last year added a follow-up telephone call to debtors to answer any questions. While notices were up 16%, mediation requests by debtors were up by a full one-third with the added phone call, to nearly 1,000.

[Agri News](#) (November 6, 2007)

AAA Updates Mediation Procedures

The American Arbitration Association has updated its mediation procedures, effective September 1. Among other changes are revisions of the duties and responsibilities of mediators, which emphasize party self-determination while permitting mediators to be evaluative. The revised procedures eliminate all filing fees by including AAA fees in the mediators' hourly rates, with a four-hour minimum. Mediator profiles and rates are provided online.

[LawFuel.com](#) (September 4, 2007); [AAA Rules Update](#)

Outside Mediators Best in Workplace Disputes

A mediator who is independent, rather than on staff, and not identified with either side is a key qualification in resolving difficult workplace disputes. An outside mediator may more effectively address problems on both rational and emotional levels, by assisting the parties in viewing issues more clearly and helping them address strong feelings in a safe environment, as well as providing other benefits of mediation.

[Gulfnews.com \(UAE\)](#) (October 2, 2007)

Korea Promotes Mediation of Private Antitrust Disputes

A Korean Fair Trade Mediation Board and a Fair Trade Dispute Mediation Council were established when amendments were made to the Korean Fair Trade Act in July and November. The Korean Fair Trade Commission's new procedures permit persons suffering damage from antitrust violations or unfair trade practices to file an application for mediation by the Council. If a settlement is reached in the mediation, the Fair Trade Commission will not impose additional penalties.

[Mondaq](#) (November 7, 2007)

Telephone Mediation Efficiently Resolves U.K. Personal Injury Claims

Seeking to mediate high volumes of personal injury claims by telephone, London's InterResolve Group has completed a six-month pilot project with AXA Insurance. With mediations typically lasting less than an hour for both liability and damages issues, InterResolve reports an 88% settlement rate. Matters were resolved in an average of seven weeks with mediation, at an average cost of £175 per party, compared to 18 months and much greater cost

using existing claims processes.

[Legal & Medical](#) (October 8, 2007); [InterResolve](#)

IFC Provides Mediation Assistance to Macedonian Chamber of Commerce

In order to provide better resolution of member disputes and improve the business environment through the use of mediation, the Macedonian Chamber of Commerce signed a memorandum of cooperation with the Alternative Dispute Resolution Program of the World Bank's International Finance Corporation. The agreement is part of an effort by Macedonia and neighboring countries to use mediation in the business sphere, with the greatest success thus far in Serbia, Bosnia and Herzegovina, where about 2,200 disputes involving 45 million euros have been resolved.

[World News Connection](#) (September 21, 2007) (Subscription Required); [IFC's ADR Program](#)

Mediation Continues to Expand Throughout World

From Africa to Asia to the Americas, mediation continues to develop around the globe:

- The **Moroccan** branch of the NGO (non-governmental organization) Search for Common Ground has been in partnership with the Moroccan Ministry of Justice to foster mediation, including commercial mediation, and has just launched a new project to mediate family disputes through a call center.
- A United Nations official encourages mediation in **Angola's** justice system, relying on both tribal chieftains and NGOs.
- Mediation of business disputes is being encouraged in **Kenya** to avoid harming the economy due to court delays which sometimes exceed ten years.
- **Hong Kong's** government is promoting mediation and considers it a global trend; a mediation conference being held in Hong Kong in November.
- In **Singapore**, the Ministry of State for Health has begun a Medical Mediation pilot program to help aggrieved patients obtain clear explanations and fair settlements.
- Mediation has been formally instituted in **Tonga** this year, and the country has two mediators who have resolved three-fourths of their eight cases.
- In **Barbados**, a former high court judge urges Barbadians to turn to mediation rather than courts.
- The **Chickasaw Nation** is following other **American Indian** tribes in adopting mediation programs as more in line with traditional tribal wisdom than formal court systems.

[Magharebia \(Morocco\)](#) (October 18, 2007); [Angola Press Agency](#) (October 23, 2007); [AllAfrica.com \(Kenya\)](#) (October 2, 2007); [World News Connection \(Hong Kong\)](#) (October 13, 2007) (Subscription Required); [Channel NewsAsia \(Singapore\)](#) (October 20, 2007); [Matangi Tonga](#) (September 24, 2007); [Cbc.cc \(Barbados\)](#) (October 18, 2007); [Tulsa World](#) (October 23, 2007) (Subscription

Required)

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