



# MEDIATION NEWS

BROUGHT TO YOU BY

Keith L. Seat

SEPTEMBER 2007

## CASES & RESOLUTIONS:

### **Ninth Circuit Concludes Party Put on Notice by Information Despite Mediation Confidentiality**

Defendant was put on notice of the amount in controversy for purposes of the deadline for removing the case to federal court, even if plaintiffs' letter providing the information was covered by California's strict mediation confidentiality statute, according to the U.S. Court of Appeals for the Ninth Circuit in [Babasa v. LensCrafters, Inc.](#) The court held that the California mediation privilege did not apply because removal is an issue of federal law and that defendant neglected to assert a federal evidentiary privilege.

[Babasa v. LensCrafters, Inc.](#), 2007 WL 2331949 (9<sup>th</sup> Cir. August 16, 2007) (Subscription Required)

### **Federal Court Rejects Assertion of "Interest of Justice" Exception to Mediation Confidentiality**

Denying a motion seeking materials prepared for mediation, a federal magistrate in Connecticut ruled that defendant failed to show that the requested materials fell within the "interest of justice" exception in Connecticut's short mediation statute. Plaintiffs provided defendant with all releases and settlement agreements reached in an earlier mediation with third party defendants and their insurer, and disclosed that there were no other written or oral agreements or understandings. Defendant argued that production of communications before and after settlement was necessary to evaluate third party claims and uncover any potential prejudice of witnesses. The court reviewed the requested materials *in camera*, listed them in the opinion, and held that mediation confidentiality outweighed any interests served by disclosure.

[Bradley v. Fontaine Trailer Co.](#), Civ. 3:06CV62, 2007 WL 2028115 (D.Conn., July 10, 2007) (Subscription Required)

## Mediation Quote:

"During the proposal-swapping stage of traditional bargaining, reactive parties hurl epithets, engage in name-calling, and blame the other side for not getting the case settled. Out of a reactive state, they engage in behavior (make outrageous counterproposals) that drives the other side away and makes the result they give lip service to (settlement) harder to achieve. It is important for us to remember that, when negotiators react reflexively by slowing their movement or stopping movement altogether, they have lost control of their own creative processes.... [T]he mediator can help parties regain control over their own destiny."

- J. Anderson Little, *Making Money Talk: How to Mediate Insured Claims and Other Monetary Disputes* (ABA Section of Dispute Resolution 2007) at 92, 93.

## Other Cases & Resolutions:

**Johnson & Johnson Seeks Mediation in Trademark Suit Against American Red Cross Over Use of Red Cross Emblem,** [Reuters.com](#) (August 16, 2007)

**Parties in Cattle Fraud Lawsuits Begin Mediation; Criminal Charges Also Pending,**

## Texas Court Enforces Strict Terms of Agreement

A Texas appellate court reversed the lower court and held that a mediated settlement agreement was breached and liquidated damages appropriate when a tenant's check bounced, even though the landlord had held the check for weeks, the tenant offered a cashier's check in replacement and had had no other problems with the payment schedule. The appellate court also reversed on the issue of the completeness of the agreement, concluding that the mediated agreement did not lack essential terms by failing to address the refund of a security deposit and timing for vacating the premises.

[E.P. Towne Center Partners, v. Chopsticks, Inc.](#), 2007 WL 2405212 (Tex.App. August 23, 2007) (Subscription Required)

## Short Settlement Agreement Unambiguous and Enforceable

Despite one party's assertions that the short document signed at the end of the mediation was not intended to be a final settlement agreement, a North Carolina Court of Appeals upheld the agreement in [Capps v. Mecklenburg County](#), noting that signed agreements need not be thorough to be enforceable. The objecting party also asserted that the mediator, who filed an affidavit in the litigation, had said that strong confidentiality provisions would be negotiated and included in a subsequent settlement agreement.

[Capps v. Mecklenburg County](#), No. 03 CVS 10822 (N.C. App. August 21, 2007) (Subscription Required)

## Copyright Royalty Terms Go to Mediation

Sirius Satellite Radio and XM Satellite Radio Service are attempting to negotiate royalty deals with the Copyright Royalty Board, as their current arrangements have expired, but the parties are so far apart that they have turned to mediation. The radio service providers are proposing a new approach, with royalties tied to performance rather than overall revenues, and the rate per performance increasing as subscriber targets are met. The process is generating great interest within the broader industry and is being closely followed.

[SeekingAlpha](#) (August 13, 2007)

## Abuse Case Against Mormon Church Enters Mediation

The Church of Latter-day Saints has agreed to mediate a \$45,000,000 sex abuse case in which the church has already been ordered by the Oregon Supreme Court to produce detailed financial information for the first time since 1959. Larger battles over the rights of the church may be litigated in the absence of settlement. In addition to monetary damages, the alleged victim is seeking changes to the church's sex abuse policies in the

[Booneville Daily News](#) (July 11, 2007)

**Mediation Brings Some Success in Second Phase of Canadian Windmill Farm Dispute; Expected Length of Hearings Reduced Significantly,** [Orangeville Citizen](#) (July 26, 2007)

**Dispute Over Allocation of Water for Kayak Park Opposed by Colorado Water Conservation Board Continues in Mediation, Set for Trial,** [The Durango Herald](#) (July 26, 2007)

**Rapper Kanye West and Daredevil Stuntman Evel Knievel to Mediate Multimillion Dollar Trademark Infringement Suit,** [Rap Basement](#) (July 11, 2007)

**Court Hearings in Dispute Between New Orleans School Districts Delayed Indefinitely for Mediation,** [The Advocate](#) (August 7, 2007)

**Court Order for Mediation Seen as Victory for Local Florida Housing Agency Resisting Federal Takeover by HUD,** [Miami Herald](#) (August 24, 2007) (Subscription Required)

**Missouri Judge Orders Mediation of Open-Meeting Dispute Among County Legislators,** [The Examiner](#) (July 19, 2007)

**Panel Investigating Toronto School District Recommends Mediation Between School Board Superintendent and Trustee to Heal Relationship; Parties Concur,** [The Star Toronto](#) (August 30, 2007)

**\$50 Million Real Estate Project in Australia, Delayed 18 Months by Opponents, Goes to Mediation a Second Time,** [The Southland Times](#) (July 16, 2007)

**Civil Fraud Suit Against Former**

mediation.

OregonLive.com (July 26, 2007)

## City Council Turns to Mediation for Quick Resolution of Tax Dispute

After ten months of litigation that cost the city of Ashtabula, Ohio over \$120,000, the City Council has decided to seek to mediate its tax dispute with the Ashtabula Area Board of Education, rejecting the alternative of binding arbitration as too time consuming and costly. The dispute involves \$1.3 million in property tax revenues lost by the School Board due to tax abatements granted to residents by the city.

[Star Beacon](#) (August 3, 2007)

## Court Requires Fire Department, City to Mediate Merger Dispute

In a dispute over the proposed consolidation of four local fire departments by the City of Stamford, Connecticut, a state court has ordered the dissenting fire department and the city to mediate, as set forth in a management contract between the parties. The court also required the fire department to post a \$5,000 bond to cover the city's legal costs depending on the outcome of the mediation.

[The Advocate](#) (July 10, 2007) (Subscription Required); [The Advocate](#) (August 23, 2007) (Subscription Required)

## New Zealand Authority Finds Dismissal Unjustified for Post-Mediation Disclosures

After a successful workplace mediation, the employee mentioned to a co-worker that the manager had attended with her son and had been in tears during the mediation. The employer learned of the conversation, alleged a breach of the mediation confidentiality agreement and terminated the employee. The New Zealand Employment Relations Authority concluded in [Plimmer v. Hawksbury Community Living Trust, CA 31/07](#) (Christchurch, March 28, 2007), that the employee's disclosure was inadvisable but did not breach confidentiality since there was no disclosure of the settlement discussions or the details of what had been agreed.

[Independent \(NZ\)](#) (July 18, 2007) (Subscription Required)

## NEWS & INITIATIVES:

### Evaluating Mediation and Arbitration Clauses in Real Estate Contracts

**Indonesian President Suharto Ordered to Mediation by Indonesian Court, [Radio Australia](#)** (August 9, 2007)

Other News & Initiatives:

**OECD Adopts Policy Recommendations to Ensure Better Consumer Access to Cost-Effective Dispute Resolution for E-Commerce, Including Cross-Border Transactions, [OECD Recommendation](#)** (July 12, 2007)

**United Nations Security Council Reaffirms Commitment to 2005 Resolution Regarding Peaceful Resolution and Prevention of Disputes, Including Use of Mediation, [U.S. Federal News](#)** (August 28, 2007) (Subscription Required)

**Croatia's Ministry of Finance Requests Proposals to Enhance Mediation Processes, Including Case Management, Recommendations on Mediation Law, and Development of Code of Ethics, [Tenders Electronic Daily](#)** (July 25, 2007)(Subscription Required)

Many residential real estate contracts include mediation or arbitration clauses in order to avoid drawn out, expensive litigation between buyers and sellers if a dispute arises, which may raise concerns about giving up future legal rights. Mediation clauses do not impact legal rights, and if the parties do not settle they continue to have rights to a jury trial, courtroom rules of evidence, and appeal. With binding arbitration these rights are waived and even a mistaken decision by the arbitrator is generally final and non-appealable. While mediators don't have the power to compel settlement, even when the parties don't reach agreement they at least may know better the position of their opponent. Real estate agents are not a party to the sales contract and so are generally not bound by mediation or arbitration clauses.

[Boston.com](#) (August 31, 2007)

## **North Carolina Encouraging Mediation of Criminal Cases**

North Carolina is fostering mediation of all types of criminal cases through new legislation to establish a mediator certification process and permit district attorneys to delay prosecution pending mediation. Enacted on August 19, the legislation applies to mediations conducted after the North Carolina Supreme Court adopts rules and regulations for training and certifying mediators, which the act requires by January 1, 2008. Community mediation centers are to assist in administering the criminal mediation program using volunteer or staff mediators. The act expressly provides confidentiality for work product and case files, as well as protecting conduct and statements made in mediation with listed exceptions that include threats, juvenile abuse, and evidence needed in felony cases that is not otherwise available. The act also provides that mediators in criminal cases are granted judicial immunity.

[North Carolina Session Law 2007-387](#)

## **New York City Expands Online Dispute Resolution**

New York City has agreed to use the online dispute resolution systems of Cybersettle, Inc. for the next three to five years, and expand the types of claims covered, following a three-year pilot project with Cybersettle which resolved two-thirds of the claims submitted, dramatically reduced claim cycle times, and reportedly saved the city many millions in administrative costs and legal expenses. Initially limited to sidewalk, roadway, traffic device, public school and some personal injury claims, the extended agreement will also cover property damage claims by individuals and businesses, subrogation claims and medical malpractice. Cybersettle's double-blind system permits each party to submit offers and demands confidentially; cases settle when the offer exceeds the demand or by automatically splitting the difference when the offer and demand are within a specified range of each other. If the mechanized process does not succeed, optional telephone facilitation is also available.

[Cybersettle.com](#) (July 30, 2007); [GCN](#) (August 7, 2007)

## **Baltimore Increasing Mediation of**

## **Condemnation Disputes**

The Baltimore Development Corp. is increasingly turning to mediation to settle disputes in condemnation proceedings in order to avoid the costs and burdens of trials. Caseloads are up, especially due to Baltimore's "quick take" policy, which has sparked public controversy and judicial criticism. The City Solicitor has stated that Baltimore will cautiously continue the "quick take" program in appropriate circumstances, and is focusing more on negotiations if disputes arise.

[Baltimore Business Journal](#) (July 11, 2007)

## **Mediation Effective in Katrina Insurance Claims in Mississippi**

Two years after Hurricane Katrina, Mississippi mediation programs with different approaches are successfully resolving thousands of insurance claims. The U.S. District Court in Mississippi has reduced its Katrina caseload from over 1,000 to about 500 cases this year by encouraging prompt and fair resolutions, leading many parties to successfully pursue mediation without court order. In the 174 cases in which mediation was actually ordered by the court, the settlement rate was 49 percent. In a second program, the Mississippi Department of Insurance sponsored mediations in nearly 3,700 cases that were voluntarily mediated by the parties, resulting in an 83 percent resolution rate.

[Sun Herald \(Biloxi, MS\)](#) (July 31, 2007) (Subscription Required)

## **Mediation Better Option for Religious Groups**

A Huntsville, Alabama church and its presbytery opted for mediation in a dispute over church property that had gone from state to federal court and back. Potentially facing years of legal wrangling and damage to its public image, the presbytery suggested mediation and the parties successfully resolved the dispute, which involved underlying theological issues that caused the church to leave the presbytery with the disputed property. Religious groups are increasingly turning to mediation out of concern for public perception and to maintain consistency with their principles, as well as to avoid the costs and hassles of litigation.

[The Decatur Daily](#) (July 21, 2007)

## **Mediation Critical When Litigation Unaffordable**

Mediation is crucial for those unable to afford the risks and costs of litigation, according to a strongly worded editorial by British High Court Justice Gavin Lightman. However, mediation was set back by the appellate decision in [Halsey v. Milton Keynes General NHS Trust](#), EWCA (Civ) 576 (2004), which refused to order parties to mediate over their objections and required a litigant seeking costs for an opponent's refusal to mediate to carry the burden of proving the refusal was unreasonable. The importance of these issues is heightened by the government's limitation on

civil legal aid.

[TimesOnline](#) (July 31, 2007)

## **UK Using Mediation to Curb Gang Wars**

In its efforts to reduce gang violence and murders, the police force in Manchester, England is looking to Northern Ireland's use of mediation in the late 1980s which helped Catholics and Protestants break the cycle of retaliatory violence and ultimately settle their issues. The process under consideration involves using community members as mediators between rival gangs in a police-sponsored program, which is already under way in Birmingham.

[Manchester Evening News](#) (August 7, 2007)

## **Asian Mediation Association Forming to Address Commercial Disputes**

Mediation centers in Singapore, Hong Kong, Indonesia, Malaysia and the Philippines are joining together to form the Asian Mediation Association (AMA) in response to increasing trade and cross border activity among countries and businesses in the region. The AMA will pool resources and provide a regional infrastructure for conflict management and resolution. An AMA secretariat will be located at the Singapore Mediation Centre, where a memorandum of understanding forming the AMA was signed on August 17 at the 10<sup>th</sup> anniversary celebration of the Singapore Centre. The AMA hopes to expand to include China and India, as well as other Asian members.

[Channel NewsAsia](#) (August 17, 2007); [Business Times \(Singapore\)](#) (August 18, 2007) (Subscription Required)

## **Japan Upgrading Consumer Mediation Services**

Japan's Cabinet Office plans to improve mediation services for consumers harmed by illegal business practices and defective products by creating a new Alternative Dispute Resolution system at the National Consumer Affairs Center. After submission of a final report in September, legislation will likely be introduced to give the Center greater authority to conduct mediations and resolve matters, including authority to request companies to participate, present materials and execute agreements with consumers. Sufficient resources are also needed to ensure success, as the Center's workload is already heavy. This proposal reflects the gradual change in Japan's approach to consumer protection, which is moving from reliance on extensive regulation to greater enforcement by consumers through the legal system.

[Daily Yomiuri](#) (August 8, 2007) (Subscription Required)

## **China's General Secretary Affirms Civil**

## **Mediation System**

The importance of China's "people's mediation work," a civil reconciliation system in which publicly-elected local mediation committees mediate social contradictions and disputes out of court, was emphasized by General Secretary Hu Jintao in a recent speech at the Central Party School. Referring to that speech at a national conference on the people's mediation work, politburo member Luo Gan affirmed the great success achieved through mediation while stressing the need for institutionalization and standardization of mediation in China, including additional legislation. Luo Gan called on party officials at all levels to overcome any impediments and commit to the success of the people's mediation work.

[BBC International Reports \(Asia\)](#) (July 11, 2007) (Subscription Required)

## **Botswana Begins Court-Annexed Mediation**

Botswana's chief justice announced a new judicial case management system, which includes court-annexed mediation, in order to reduce attorney control over cases and shift the focus to the interests of parties and the delivery of justice. To reduce the huge backlog, judges will intervene earlier to control civil cases, and direct cases to mediation when appropriate. The initiative, co-sponsored by the United Nations Development Programme, the U.S. Embassy in Botswana and the Botswana government, is bringing experienced American judges to work with local judges.

[AllAfrica](#) (July 24, 2007)

Newsletter service provided by [Mediate.com](#) Feedback and news for potential inclusion in future newsletters may be sent to Mediation News Editor Keith L. Seat at [kseat@keithseat.com](mailto:kseat@keithseat.com). Copyright 2007 Resourceful Internet Solutions, Inc. and Keith L. Seat