KEITH L. SEAT, J.D.
MEDIATOR & ARBITRATOR

Mediation News and Updates

Keith's Perspective: *"Mediation is a powerful, yet underutilized tool for resolving serious conflicts, and often saves important business and personal relationships as well. Although mediation is not magic, and requires hard work by the parties, as an experienced mediator I have time and again directed its power to turn difficult situations around and end bitter drawn-out litigation. I invite you to consult with me, as I am committed to the mediation process and fostering understanding of how mediation can help you and your business or clients."*

March 1, 2006

In This Issue

CASES & RESOLUTIONS:

Court-Ordered Mediation Leads to Nearly Half-Billion Dollar HealthSouth Settlement

Chicago Tribune, February 24, 2006

After lengthy court-ordered mediation, HealthSouth Corp. and its insurers agreed to pay $445 million to settle investor lawsuits filed following a $2.7 billion accounting fraud at the company. If the court approves the resolution, the company will pay $215 million in stock, with no admission of wrongdoing, and its insurers will pay the rest in cash. In June, HealthSouth agreed to pay $100 million to settle Securities and Exchange Commission litigation. Fifteen executives have pleaded guilty, while another was convicted at trial. Other litigation continues against HealthSouth's former auditor, its former banker and Richard Scrushy, the company's former chief executive officer, who was acquitted in June of orchestrating the fraud.

View Article (Registration Required)

Mediation Saves Teraforce Bankruptcy Plan

Daily Deal, February 27, 2006

A February 24 mediation between Teraforce Technology Corp., its lender and a group of dissenting creditors surmounted a great deal of drama in the case and may permit a bankruptcy plan to proceed so that Teraforce can emerge from bankruptcy rather than be liquidated. Facing the prospect of very contentious litigation, participants were pleased with mediation, with counsel for the unsecured creditors' committee concluding "it's the closest we're going to get to happiness."

View Article (Subscription Required)

Dispute Can't Be "A Little-Bit-Settled": *Lehr v. Afflitto*, 2006 N.J. Super. LEXIS 8 (N.J. App. 2006)

A New Jersey appellate court reversed the trial court's determination that a dispute was settled where all issues were admittedly not resolved and there

Check This Out:

New Zealand mediator Geoff Sharp writes a blog which can be read here. Geoff describes it as an "offbeat online confessional in pursuit of reflective mediation" – which pretty much sums it up.

was no signed settlement agreement. The appellate court expressed dismay that the trial court had taken testimony from the mediator and noted that "confidentiality of the mediation process is a matter of great public and systemic importance." The court enumerated multiple bases for confidentiality in mediation: terms in the order sending the case to mediation; the mediator's oral statements to the parties; the applicable court rules; and the principles of the Uniform Mediation Act which the court stated was an "appropriate analytical framework" even though the UMA was not in force during the time in question.

View Opinion

Insured Can't Unilaterally Settle and Expect Insurer to Pick up Tab: *Motiva Enterprises v. St. Paul Fire and Marine Ins.*, 2006 WL 270191 (5th Cir. 2006)

An insured party may not mediate and settle a case without the consent of its insurance company and then expect the insurer to reimburse it for the settlement, according to the U.S. Court of Appeals for the Fifth Circuit in Motiva Enterprises v. St. Paul Fire and Marine Ins. However, applying Texas law to standard insurance policy provisions that the insurer's consent must be obtained for settlements and that the insured must cooperate in any defense, the Fifth Circuit reversed summary judgment against the insured, Motiva, because there were questions of fact about its cooperation. The court also concluded that to avoid covering the loss the insurer must have suffered actual prejudice by the failure of Motiva to cooperate or obtain the insurer's consent. The appellate court sent the case back to the trial court to determine whether it was lack of cooperation for Motiva to abruptly exclude the insurer's representative from the mediation and whether the settlement was unreasonable.

View Opinion

Court Cannot Require Mediation Prior to Enforcing Arbitration Provision: *In re Heritage Building Systems, Inc.*, 2006 WL 300813 (Tex. App. 2006)

When a party to a dispute seeks to enforce a valid arbitration agreement under the Federal Arbitration Act, the court may not first order the parties to try mediation, but must send the case directly to arbitration, according to a Texas appellate court in In re Heritage Building Systems, Inc. Despite the policy of encouraging settlements, the intent of the parties in contracting for arbitration must be respected, the court emphasized, for the parties can always agree to mediate prior to arbitration if they wish. Interestingly, the court noted that once the matter is referred to arbitration, the "arbitrator may, or may not, choose to require mediation."

View Opinion

Mediation Quote:

"In myth and legend, the trickster plays the role of reconciler of immovable objects and the manager of conflict. To play this role requires [the mediator] to be able to work in a world of confusion and ambiguity and to be willing to help the parties transform their perspectives so that they can reach a turning point in their decision-making process. . . . Tricksters are shape-shifters, playing whatever role is necessary at the moment to create a dissonance that ultimately leads to a fruitful discussion on common ground. As trickster [the mediator] may simply appear as humorist, judge, and listener, or you may even assume the guise of heckler, fool, or deceiver.
Use the techniques of the trickster sparingly."

– Jeffrey Krivis, *Improvisational Negotiation: A Mediator's Stories of Conflict About Love, Money, Anger – and the Strategies that Resolved Them* (Jossey-Bass 2006) at 223-24.

NEWS & INITIATIVES:

Federal Court Launches Broad Mediation Program

U.S. District Court (W.D.N.Y.) ADR Program, January 31, 2006

Finding mediation to be the best alternative dispute resolution process, the U.S. District Court for the Western District of New York launched a pilot mediation program on January 1. While currently limited to the docket of the judge overseeing the program, the program broadly refers all new and pending civil cases to mediation (with certain exceptions, such as habeas corpus writs and Social Security and bankruptcy appeals). Other judges may choose to refer cases to mediation. Parties may agree to use a form of alternative dispute resolution other than mediation, but may seek to opt out of the program only for good cause. The court has established a roster of mediators (who need not be lawyers) and will make a selection if the parties are unable to agree on a mediator. The court set a rate of $150/hour for the first two hours of mediation, and allows mediators to charge a higher rate after two hours and to charge for preparation.

View Court ADR Program

FCC Relies on Mediation for Modifying Use of Spectrum

U.S. Federal News, January 31, 2006

The Federal Communications Commission's plan to rely on mandatory mediation to help relocate users of spectrum was implemented with mediations conducted between December 27 and February 8 in the first wave of the 800 MHz band reconfiguration process. Parties that were unable to resolve all issues during mediation will receive an FCC decision following a de novo review. Unlike the usual case, the mediator prepares and submits a report on the mediation to the FCC, so the proceedings are not expected to be confidential. Along with its report, the mediator or the Transition Administrator is expected to propose a recommended decision or provide advice to the decision-maker about unresolved matters.

View Article (Subscription Required)

Mandatory ADR Clauses Endorsed for Banks Contracting with Auditors

ADRWorld.com, Feb. 22, 2006

After initially stirring controversy with a May 2005 draft advisory warning banks against agreeing to mandatory alternative dispute resolution provisions in auditing contracts, the Federal Financial Institutions Examination Council issued its final advisory on February 8. The Council's final advisory endorses the use of ADR, and simply warns banks to ensure that they do not limit the liability of auditors.

View Article (Subscription Required)

Contact Information

Please contact Keith with dispute resolution questions and to discuss any matters or issues that might be suitable for mediation or facilitation:

KEITH L. SEAT, J.D.
MEDIATOR & ARBITRATOR

Keith L. Seat, J.D.
Mediator & Arbitrator
Six Whitehall Court
Silver Spring, MD
20901

Tel: 301-681-7450
Fax: 301-681-9243
Cell: 301-523-5535
Keith@KeithSeat.com
www.KeithSeat.com

Subscribe

Feel free to share this mediation newsletter with others who may be interested. Current and past issues of the newsletter may be accessed at this link.

If you did not receive this newsletter directly from Keith's mediation newsletter list (mediation_news@keithseat.com), you may subscribe by clicking here.

However, if you received this newsletter directly and would prefer not to, you may unsubscribe by clicking here or by sending an e-mail stating "unsubscribe" to Admin@KeithSeat.com.

DC Enacts Uniform Mediation Act with International Provisions

ADR World, January 23, 2006

Washington, DC became the seventh jurisdiction to enact the Uniform Mediation Act (UMA) on January 26, and the first to include the international supplement which incorporates the United Nations Model Law on International Commercial Conciliation. The UMA is intended to encourage greater use of mediation by ensuring clear confidentiality protections. The DC legislation is very similar to the uniform act drafted by the National Conference of Commissioners on Uniform State Laws, except for the exclusion of consumer mediations conducted by the DC attorney general. The international supplement provides that, unless the parties agree otherwise, mediations of international disputes are to be governed by the UN model law. The UMA has been adopted in Iowa, Illinois, Nebraska, Ohio, New Jersey, and Washington state. Legislation to adopt the Act is near enactment in Utah, and is pending in Massachusetts, New York, and Vermont. The DC legislation should take effect around April 3, following the required waiting period of 30 legislative days for Congressional review.

View ADRWorld Article (Subscription Required); View United Nation's Model Law on International Commercial Conciliation

Growing Legislative Interest in Med Mal Mediation

The legislative trend toward mediation of medical malpractice disputes continues with the introduction of legislation in Hawaii on January 25. The bill (S.B. 2658) states that it is intended to "encourage open, frank communications between patients and physicians, apologies, and quick resolution of claims through mediation to avoid bitter and protracted lawsuits." By requiring medical facilities to implement mediation processes, the legislation seeks to encourage early "exchange of information" in addition to early settlement. By contrast, two bills introduced in New Jersey in the 2006 session (A.B. 945 and A.B. 1088) purport to require mediation, but in fact call for panels of five "mediators" to provide early neutral evaluation. The evaluation may be the basis for cost shifting if the case does not settle and may trigger a requirement to post bonds prior to trial in cases the "mediators" find frivolous.

Hawaii Legislation; New Jersey Legislation (A.B. 945); New Jersey Legislation (A.B. 1088)

Tennessee Proposing More Mediation by State Government

Legalert, February 22, 2006

Legislation introduced in Tennessee would require all departments of the state to submit disputes to mediation if the claimant agrees, and provides for lists of qualified mediators to be developed. Significantly, however, the legislation (HB 3496) would only apply to "valid and meritorious claims" against the state, which may significantly limit its application. Mediation is needed, the bill notes, because there are over 14,000 pending administrative claims or lawsuits in the state at any given time.

View Legislation

Florida May Prohibit Mediation If Party Has History of Violence

ADRWorld, February 2, 2006

Expanding beyond domestic violence cases, proposed legislation in Florida would prevent a court from ordering mediation in any case in which the judge finds that a history of violence would compromise the mediation process or endanger anyone. A party's motion or request would trigger the court's inquiry. The legislation (HB 7019) is considered uncontroversial.

View Article (Subscription Required); View Legislation

Florida Opens New Mediation Center for Hurricane Claims

Miami Herald, January 31, 2006

Florida insurance regulators opened a fifth mediation center in February to help resolve disputes among the 500,000 insurance claims resulting from the four hurricanes that hit Florida last year. Insurance companies must provide notice that homeowners have the option to mediate disputed claims. Last year, 93 percent of the 12,000 claims brought to mediation in the Florida hurricane program were resolved.

View Article (Subscription Required)

Auto Dealers Turning to Mediation as Dissatisfaction with Arbitration Grows

Automotive News, February 6, 2006

Many automobile dealers are finding the benefits of arbitration to be outweighed by its costs, uncertainties and lack of procedural protections. Some dealers are pleased with mediation and are beginning to rely on mandatory mediation clauses, requiring an attempt at mediation prior to initiating litigation.

View Article

Mediation Developing in Nigeria

This Day (Nigeria), February 13, 2006

A Nigerian chapter of the Centre for Effective Dispute Resolution (CEDR) has been established by local mediators accredited by CEDR (UK). The Nigerian group is emphasizing the value of mediation in Lagos, in part to encourage foreign investors, and asserts that the association members' international training gives them an edge over other local mediators.

View Article (Subscription Required)

Mediation Follows Outsourcing to India

Hindu (India), February 3, 2006

Mediation is being used in place of arbitration to resolve disputes involving outsourcing contracts, due to its promptness and capacity for preserving relationships between the parties. Incorporating mandatory mediation clauses in outsourcing contracts was advocated at an international

Computer Law Association in Bangalore, India in February.

View Article(Subscription Required)

Mediation of Sports Disputes in Malaysia

Malay Mail, February 15, 2006

The Olympic Council of Malaysia is turning to mediation and arbitration to resolve disputes involving sports in the country, with a mediation workshop on March 4. National sporting associations are sending representatives in an effort to channel more disputes into mediation for amicable resolution, rather than going to court.

View Article (Subscription Required)