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Dispute Resolution Update

October, 2009

Dear Friends and Colleagues:

This edition of *Dispute Resolution Update* features recent mediation cases and initiatives gathered from around the country and around the world. This information has been summarized by Keith L. Seat, a respected mediator and editor of the International Academy of Mediators newsletter.

The August 2009 newsletter noted a May 29, 2009, decision by the Kansas Court of Appeals in *Santana v. Olguin*, in which a home-buyer's lawsuit against the seller and realtor was dismissed because the parties failed to first proceed with mediation as required by the purchase contract. To review the *Santana* decision, [click here](#).

A recent California appellate decision, *Adams v. Newport Crest Homeowners Association* is closely analogous to the *Santana* decision. Homeowner, Kristine Adams and Newport Crest Homeowners Association entered into a settlement agreement, which contained a provision requiring the parties to submit disputes to mediation prior to seeking judicial relief. Later, the parties disagreed on the settlement agreement's obligations, and Adams sued in state court to enforce the agreement. The court ordered the parties to participate in mediation as required by the agreement. Adams refused to participate and her lawsuit was dismissed. Adams appealed to the Court of Appeal, Fourth District, Division 3, California. The Court affirmed the lower court's judgment. It held that the plain language of the settlement agreement manifested its intent to be binding on the parties and therefore was enforceable. The Court ruled that the mediation clause allowed the mediator to use his discretion in determining whether to issue a final and binding ruling, and the court only has jurisdiction after the parties have submitted their dispute to mediation. To review the *Adams* decision, please [click here](#).

Our readers are encouraged to notify us if you become aware of trial court or appellate decisions that impact or discuss mediation or other dispute resolution processes.

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Mediated Settlements of Sex Abuse Cases Involve Large Payments and Disclosure of Files

While many mediations focus on maintaining confidentiality, recent mediation settlements of six sex abuse cases involving the Archdiocese of Chicago require the disclosure of information and files as a term of the settlements. In the six cases, the Archdiocese also agreed to pay \$3.9 million for sexual abuse by four priests in the 1970s and 1980s. Counsel for the victims noted that they took comfort in exposing past crimes, while the Archdiocese stated that negotiation and mediation was the most compassionate way to proceed in order to spare victims and their families the stress of extended legal proceedings. [Chicago Tribune](#) (July 22, 2009)

"Baseline" Mediation Agreement Reached over Development of Big Tupper Ski Area

The Franklin County (NY) legislature ratified a legislator's signing of a "baseline" agreement that resulted from lengthy mediation over a proposed Big Tupper Ski Area development. The mediation came out of New York's Adirondack Park Agency permitting process, and the agreement lists changes to be made to project plans. Permits are still required from the New York Department of Health and the Tupper Lake Planning Board. While the one legislator participated in the mediation and did disclose the agreement (which other participants held confidential), another legislator refused to engage in the process due to the confidentiality required. The latter legislator even suggested that the county might want to bar its legislators from agreeing to confidentiality provisions in the future, while recognizing the downside of not participating in important negotiations. [Adirondack Daily Enterprise](#) (July 17, 2009)

California Attorney General Offers to Mediate Environmental Dispute

Litigation brought by three environmental groups against Chevron over an upgrade of its refinery in Richmond, California resulted in an order to stop work, which led to layoffs of 1,000 construction workers. State Attorney General Jerry Brown offered to mediate and suggested the issues could be resolved quickly. The Richmond City Council unanimously passed a supporting resolution and the environmental groups stated they are willing to participate. Chevron is not interested, as private mediation is still under way making other mediation proposals premature, according to a spokesperson. [CBS5](#) (July 22, 2009)

Parties in Dispute Have Difficulty Agreeing to Voluntary Mediation

The Maricopa County (AZ) Attorney, the Sheriff, the County Treasurer and the Board of Supervisors have been embroiled in six lawsuits against each other in the past year, costing more than \$1.1 million in attorneys' fees. In the apparent absence of court ordered mediation, the parties have proposed voluntary mediation and agreed to mediation at various times, and even proposed specific mediators. However, no mediation has occurred, for which the parties blame each other. [Arizona Republic](#) (July 21, 2009)

Mediation of Staff Concerns with College President to Be Webcast

The president of Florida Keys Community College has brought in a professional mediator to address staff concerns in several days of mediation sessions, culminating in a public session which will be webcast. Concerns range from complaints of staff intimidation and retaliation by the president to over-reporting the number of students for purposes of state funding. [KeysNet](#) (August 29, 2009)

U.K. Court Requires Mediator to Testify with Consent of Parties

Six years after mediation resulted in a settlement, the parties sought testimony from the mediator about whether the settlement had been achieved through economic duress. The mediator objected, but the U.K.'s Technology and Construction Court ruled that the mediator must testify in [Farm Assist Limited v. Secretary of State for Environment, Food and Rural Affairs \(No. 2\)](#), [2009] EWHC 1102 (TCC). The court concluded that mediation confidentiality can be waived by the court in the interests of justice. The court analyzed various possible privileges and concluded that even if there is a mediation privilege, it may be waived by the parties without the consent of the mediator. The court sidestepped the mediation agreement, which provided that the mediator could not be called as a witness in any litigation relating to the dispute, reasoning that the issue of economic duress was distinct from the underlying dispute. [Farm Assist Limited v. Secretary of State for Environment, Food and Rural Affairs \(No. 2\)](#), [2009] EWHC 1102 (TCC); [Mondaq](#) (July 8, 2009) (Subscription Required)

U.K. Court Imposes Mediation Costs when Party Refuses to Participate

In the absence of prior agreement by the parties on how mediation costs were to be handled, U.K.'s Technology and Construction Court concluded that a party who refused to appear at a mandatory mediation should bear the costs from late cancellation. The court found insufficient the party's explanation about the futility of mediation in the absence of another entity. [Commercial Litigation Wire](#) (July 2009)

Update on Home Foreclosure Mediation Efforts

- Implementing legislation that went into effect July 1, the **Nevada** Supreme Court has appointed 97 mediators in the state's new home foreclosure mediation program, and expects to increase the number to about 400 mediators over the next year. The current group included 37 Supreme Court settlement judges, along with other retired judges, attorneys and existing mediators. Mediation sessions are expected to last between one and six hours, with mediators paid a flat rate of \$400 split between the parties. The first mediations are scheduled for mid-September. [Las Vegas Sun](#) (August 28, 2009); [News 3](#) (July 24, 2009)
- **Nevada's** new foreclosure mediation program began modestly, with only ten requests for mediation in the first weeks, although by mid-August 450 requests had been filed. Nevada officials still expect 1,000 or more requests per month once the program is under way. Nevada has the highest rate of home foreclosures in the country, followed by California and Arizona. Nevada set a record for foreclosures in July, with a 94% increase over July 2008. A former casino executive has been hired as Nevada's program administrator. [Review-Journal](#) (Aug 10, 2009); [Las Vegas Sun](#) (August 14, 2009); [13 Action News](#) (July 26, 2009); [Las Vegas Sun](#) (August 21, 2009)
- The governor of **Connecticut** signed legislation making mandatory the state's home foreclosure mediation program for all foreclosures after July 1. The state's mediation program has helped over 2,000 borrowers stay in their homes – a 60% success rate – since it began in July 2008 as a voluntary program. In Connecticut, 10.8 percent of all residential loans are late or in foreclosure, compared to 13.1 percent nationally. The Connecticut Bankers Association had initial concerns about the mediation program, but now considers it a success. [Hartford Courant](#) (August 21, 2009); [Los Angeles Times](#) (August 21, 2009)
- A **Florida** task force on residential foreclosures issued a report proposing mandatory mediation unless the borrower and lender agree to opt out. Mediation would be free to borrowers. Vacant and abandoned properties would be exempt from the mediation program, while properties occupied by tenants or other non-borrowers which could involve several parties in mediation would be considered on a case by case basis. [The Move Channel](#) (August 25, 2009)
- **New York** state is considering expanding its foreclosure mediation program for subprime borrowers to include all homeowners, but faces challenges due to its legislature's leadership crisis. [New York Times](#) (July 10, 2009)
- A backlog of 46,000 foreclosure cases in **Cook County, Illinois** has caused the presiding judge to order a two-month suspension on initial court appearances by lenders in default cases. While Cook County judges grant individual mediation requests from the parties, an advisory committee is being formed to determine how to increase court-backed mediation. [Progress Illinois](#) (July 1, 2009)
- On the first anniversary of **Philadelphia's** foreclosure mediation program, court officials say that the program has helped 1,400 people keep their homes and another 700 to postpone sheriff's sales. [Mercury](#) (July 1, 2009)
- The mayor of **Providence, Rhode Island** signed a city ordinance requiring lenders to mediate with borrowers prior to foreclosure. [Boston Herald](#) (August 6, 2009)

Farm Mediation Spikes in Minnesota

A University of Minnesota study shows that mediation over farm debt has dramatically increased in the last year, with a jump from 133 open cases in July 2008 to 488 cases in July 2009. In total, 2,000 mediation matters were opened in 2008, with negotiation of over \$150 million in debt, and 2009 has seen significant increases. Creditors with secured debts over \$5,000 against agricultural property in Minnesota are required to offer mediation prior to judgment collection, repossession or foreclosure. Farmers choosing mediation have 90 days to work with lenders to renegotiate their debts.

[Business Journal](#) (August 21, 2009); [Hutchinson Leader](#) (August 15, 2009)

West Virginia Grievance Board Adds Mediation to Streamline Process

The West Virginia Public Employees Grievance Board was created two years ago by the state legislature to improve a slow and expensive system. The new Board reduced the existing four-step system to only three steps, but added mediation as the second step prior to an administrative law judge hearing. A mediator from the Board or a private mediator chosen by the worker is used for the sessions. Although some 2,500 grievances are filed each year, the Board has eliminated the backlog through the mediation process, which resolves about thirty percent of the cases that get to that step. [Daily Mail](#) (July 29, 2009)

Rutgers Law School Adds Mediation Center

Due to growth in the field of dispute resolution, Rutgers School of Law-Camden is adding a Mediation Center to provide classes for both the law school and Rutgers School of Business-Camden, as well as provide training to practitioners, with an emphasis on family mediation. The Center will also provide mediation services to the public and businesses. [Rutgers](#) (July 13, 2009)

Kentucky Mediating Criminal Cases

Mediation of criminal cases is expanding in western Kentucky, with a retired judge mediating one day a month to resolve cases in which prosecutors and defense attorneys have not been able to reach a plea bargain, such as an assault charge that resulted in a deadlocked jury at trial and then settled in mediation. The program was first begun in 2005 by a judge who prefers to include the crime victims in the mediations so they feel they are being heard, which can promote their healing. The American Bar Association is issuing grants elsewhere for new criminal mediation programs based on the Kentucky model. [Cincinnati.com](#) (August 8, 2009)

Parliamentary Inquiry Proposes Mediation to Resolve Disputes Between Police and Protesters

Following one death and hundreds of complaints about police conduct in controlling demonstrators at the April G20 summit in London, a parliamentary inquiry by the Joint Committee on Human Rights proposed that independent mediators be used. The Committee report blamed both police and demonstrators for failing to communicate prior to the protests, leading to excessive violence, and noted that improved communication and resolution of disputes may be achieved through mediation between the police and protestors in the future. [Reuters](#) (July 28, 2009); [Guardian](#) (July 28, 2009)

WIPO Opening Arbitration and Mediation Center in Singapore

The World Intellectual Property Organization is opening its first arbitration and mediation center outside its Geneva headquarters, with a new Singapore office opening in January to serve the Asia-Pacific region. WIPO administers mediations relating to patent, trademark and copyright issues, as well as telecommunications, engineering and domain name disputes. The Singapore WIPO office will also collaborate with Singapore's Media Development Authority to address film related disputes, along with providing training and advice on mediation and arbitration.

[Bernama.com](#) (July 28, 2009)

New Zealand Court Mediation Turning to Private Mediators

The High Court in Auckland, New Zealand is introducing a pilot program using private mediators for court-ordered mediations in certain civil disputes. Judges had previously conducted all mediations and settlement conferences, which were quite successful but took a great deal of judicial time. The Chief High Court Judge is creating a roster of 12 to 15 mediators, who will be paid NZ\$1,500 (US\$1,000) for half-day and NZ\$3,000 for full-day mediations. The pilot begins on November 1 and will be reviewed in June 2010. [Law Fuel](#) (August 10, 2009)

Other International Mediation Developments

Mediator appointed to Parades Commission in **Northern Ireland** after upsurge in parade violence, [Ireland On-Line](#) (July 23, 2009)

Nigeria celebrates tenth anniversary of Citizens' Mediation Center with evaluation of past and strategic planning for future, [AllAfrica.com](#) (July 27, 2009)

Mauritius seeking to become mediation hub to serve African and Indian companies, [Le Defi Media Group](#) (July 16, 2009)

Two doctors' groups in **Pakistan** have formed a committee to mediate between the government and the Provincial Doctors Association to address ongoing doctors' strike, [News](#) (August 2, 2009)

Indian Police in Dehli turn to mediation in family matters, with mediations conducted six days a week, [Express India](#) (August 24, 2009)

Chief Justice of Allahabad High Court encourages judiciary in **India** to see benefits of mediation beyond reducing court dockets, [Times India](#) (July 20, 2009)

China's Supreme People's Court issues regulation giving mediation settlements the weight of legal judgments; mediation encouraged to deal with 13% increase in lawsuits, [China View](#) (August 4, 2009)

Mexican resort opening English-language mediation center to amicably resolve expat and tourist disagreements with local businesses, [Wichita Eagle](#) (August 31, 2009)

High Court judge in **St. Kitts and Nevis** emphasizes success of court-connected mediation, which is still unknown by many, [ZIZ](#) (August 29, 2009)



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