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JUNE 2011

Dispute Resolution Update

IN THIS ISSUE

- Recent Mediation Cases
- Dispute Resolution News & Initiatives
- Foreclosure Mediation Update
- Other Mediation News
- Fall CME/CLE In-House Training, Topeka, Kansas

Mediation Quote

"When, as mediators, we accept stories that lie at the periphery of the conflict, we can only work at the periphery. Superficial stories yield superficial results. When we discover the stories at the core, however, we can work at the core to discover what created the conflict in the first place and what the parties need to do to resolve it."

- Kenneth Cloke and Joan Goldsmith, *Resolving Personal and Organizational Conflict: Stories of Transformation and Forgiveness* (Jossey-Bass 2000) at 114

Dear Friends and Colleagues,

This edition of Dispute Resolution Update features recent court decisions that have affirmed oral or summary mediation settlements or have upheld settlement agreements following a determination of bad faith. The *Facebook* and *Bulk Petroleum* cases (below) have been summarized by Keith L. Seat, a respected Mediator and Editor of the International Academy of Mediators' Newsletter. Keith has also summarized international mediation developments as well as providing an update on home foreclosure mediation.

In *Facebook, Inc., v. Pacific NW Software, Inc.*, a Panel of the 9th Circuit Court of Appeals upheld a short, handwritten settlement agreement that had been developed at the conclusion of the mediation session. The Panel found that the handwritten agreement stated on its face that it was "binding" and further provided a mechanism for supplying additional terms. The Respondents, the "Winklevoss Brothers," have since filed a Petition for Rehearing *En Banc*.

In *Bulk Petroleum Corp., v. United Central Bank*, a U.S. Bankruptcy Court found bad faith on the part of a bank by holding out a bank official as having authority to approve, on behalf of the bank, the terms of a global settlement agreement reached in mediation. While the bank repeatedly noted that it would have to obtain the consent of the FDIC to the settlement terms, it only revealed, after four months, that it had never sent the settlement terms to the FDIC because an internal loan committee of the bank had rejected the terms. The Court determined that the failure of the bank's representative to mention the need for an internal loan committee to approve the settlement was bad faith. As a result of bad faith, the Court refused to prevent the enforcement of the settlement terms, despite the lack of approval by the internal bank committee or the FDIC.

In *Stephenson v. Young and Southeast Kansas Educational Service Center, Inter Local No. 609* (D. Kan.), the Court (Hon. Catherine H. Vratil) found, on May 26, 2011, that both parties had orally accepted a written mediator's proposal. Later, one of the parties to the oral agreement withdrew its acceptance of the settlement agreement before formal approval of the Respondent's Board of Directors. The Court found that settlement agreements need not be in writing to be enforceable under Kansas law. Further, absent fraud or bad faith, neither party to an agreement is

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permitted to repudiate it. For a copy of the Court's Memorandum and Order, For a copy of the Court's Memorandum and Order, [click here](#).

It has been our custom for the last nine years to host a one-day continuing legal education event each fall to discuss dispute resolution settlement strategies. This year's event will be held on Friday, September 30, 2011, at the Topeka office of Associates in Dispute Resolution (lower level conference room). Prospective presenters include: Bill Ebert, Tori Mroz, Dr. Kathy Nichols, Patrick Nichols, Kathy Perkins, John Phillips, Larry Rute and Art Thompson. Seating is limited to 50 attendees. If you would like to receive additional information or to reserve a training slot, [click here](#).

Patrick Nichols will be a featured presenter at the 2011 Annual Conference of the Center for ADR in Washington D.C., on June 17, 2011. The presentation, entitled "Managing Conflict and Removing Barriers to Collaborative Decision Making," will be presented with Patrick's wife, Kathie Nichols, Ph.D., ABPP. This program, a reprise of a similar topic presented to the ABA Annual Family Law Conference in 2009, explores five well-documented biases which cause non-rational decision making in the context of settlement and mediation. Additional information can be obtained by contacting our Lawrence office at 785-865-3700.

Larry Rute recently presented at the May 25, 2011, KC MBA 2011 Employment Law Update. Those interested in receiving a copy of Larry's PowerPoint presentation, *Successful Settlements that Last: How Mediation Best Practices & Techniques Can Improve your Settlement Strategy*, [click here](#).

Readers are welcome to submit news or summaries regarding local, regional, or national substantive developments in the field of dispute resolution. Our next newsletter will be published in early August.

Larry Rute*

Patrick Nichols





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2008-2011 **Super Lawyers**

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RECENT MEDIATION CASES & UPDATES

Facebook Mediated Settlement Agreement Upheld

A short, handwritten settlement agreement prepared and signed in mediation between Facebook and the Winklevosses (who claimed that the idea for Facebook was stolen from them) has been upheld by the U.S. Court of Appeals for the Ninth Circuit against claims that it was missing material terms, was procured by fraud and violated federal securities laws. Although extensive additional documentation of the settlement was anticipated, the handwritten agreement stated that it was "binding" and provided a mechanism for supplying additional terms. The court also concluded that the mediation confidentiality agreement signed by the parties prevented reliance on any evidence from the mediation itself, which eliminated the securities claims. Refusing to give up, the Winklevosses quickly filed a petition for rehearing en banc.

[Facebook, Inc. v. Pacific NW Software, Inc.](#), Nos. 08-16745, 08-16873, 09-15021 (U.S.C.A. 9th Cir., April 11, 2011); [Forbes](#) (April 18, 2011); [Petition for Rehearing En Banc](#)

Mediated Settlement Agreement Enforced Despite Lack of Required Approvals by Bank Committee and FDIC

A U.S. bankruptcy court found a bank's bad faith in holding out a bank official as having authority a sufficient basis on which to enforce the terms of a global settlement agreement reached in mediation, even in the absence of required approval from the

FDIC. While the bank repeatedly noted that it would have to obtain the consent of the FDIC to the settlement terms, it only revealed after four months that it had never sent the settlement terms to the FDIC because an internal loan committee of the bank had rejected the terms. No mention of the internal committee had been made previously, which the court concluded was bad faith and relied on the doctrine of prevention to enforce the settlement terms despite the lack of approval by the bank committee or FDIC.

[Bulk Petroleum Corp. v. United Central Bank](#), No. 09-21782-svk, No. 10-2194 (Bankr. E.D. Wis., March 18, 2011)

Court Considers Preliminary Injunction Despite Contract's Mandatory Mediation Provision

While recognizing that the parties' franchise agreement provided that disputes must go through mediation prior to litigation, the federal court entertained plaintiff's effort to maintain the status quo during mediation by seeking a preliminary injunction. However, the court denied plaintiff's request after analyzing the factors required for a preliminary injunction.

[Edelman v. Certified Restoration Dry Cleaning Network](#), No. 11-10781 (U.S.D.C. E.D. Mich., March 11, 2011)

Other Notable or High Profile Proceedings

- Federal court refuses to allow additional discovery to pursue contentions made by opposing counsel during mediation, as it

would undermine the settlement process. [Chenevert v. GC Constructors](#), No. 4:10CV00113-WAP-DAS (U.S.D.C. N.D. Miss., April 8, 2011)

- Federal litigant has no right to mediation in Utah where alternative dispute resolution is not mandatory in federal court. [Lopez v. Administrative Office of Courts](#), No. 10-4137 (U.S.C.A. 10th Cir., March 22, 2011).

- Trial court dismisses foreclosure complaint with prejudice and orders fine plus \$15,000 payment to defendant for attorneys' fees and costs after bank failed to appear for mediation a second time because counsel "inadvertently overlooked" notice. [Bank of New York v. Richardson](#), No. Yor-10-498 (Maine, March 22, 2011)

- Court rejects an injured party's motion to appear for mediation by telephone-video conference because he would not have been able to actively participate, but extends time for mediation. [Hernandez v. Wilsonart Int'l, Inc.](#), No. 2:09-cv-747-FtM-36SPC (U.S.D.C. M.D. Fla., March 15, 2011)

- Court sanctions party for seeking to file mediation brief as "an egregious violation of mediation confidentiality." [Cosolo v. Verizon California, Inc.](#), No. E049017 (Cal. App., 4th Dist., March 15, 2011)

- Rejecting assertions that mediation confidentiality provides a shield from prosecution, Toronto lawyer is found guilty of professional misconduct for uncivil behavior during mediation, among other incidents. [Law Times](#) (March 21, 2011) 18, 2011).

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RECENT MEDIATION CASES & UPDATES (cont.)

(Continued)

- Court considers details of mediation between parties, including counsel and party affidavits, without discussion or reference to confidentiality in mediation. [Vanderford Company, Inc. v. Knudson](#), No. 37061 (Idaho, March 21, 2011)
- Bar is high for any party represented by counsel who seeks to overturn settlement agreement based on duress or incapacity, even if duress is by the party's own counsel. [Shepard v. Florida Power Corp.](#), No. 8:09-CV-2398-T-27TGW (U.S.D.C. M.D. Fla., April 18, 2011).
- Mediation of the NFL dispute with its players is scheduled to resume on May 16. [Businessweek](#) (April 28, 2011)

Check These Out:

"Jury Mediation" May Be Helpful in Some Disputes In a twist on mini-trials, "jury mediation" brings together typical jurors to receive a short presentation from the parties, including key documents and even witness testimony, after which the "jury" deliberates and provides its conclusions and reactions in conversation with a mediator and trial consultant. The goal is to de-

crease uncertainty and increase the information on which parties can make informed settlement decisions in mediation. [New Orleans City Business](#) (March 25, 2011)

Mediation May Resolve Electronic Discovery Disputes

Electronically stored information (ESI) is making litigation more challenging, especially with ever increasing use of social media. Some parties are turning to mediation to work out ESI discovery disputes and streamline the process. [The American College of e-Neutrals](#) was created earlier this year to focus on resolving ESI disputes. [E-Commerce Times](#) (March 9, 2011)

CPR Promoting Tool for Evaluating Mediators and Arbitrators

The International Institute for Conflict Prevention and Resolution offers forms on its website for use by those seeking mediators or arbitrators and conducting due diligence. CPR's evaluation tools come in both short and long versions. [CPR](#) (March 2011)

IMI Prepares Inter-Cultural Competency Certification

The International Mediation Institute has published draft criteria for

its planned Inter-Cultural Competency Certification of mediators, following a year of meetings and preparation. A pilot program is planned prior to launch of the initiative in late 2011. [International Mediation Institute](#) (March 2011)

Los Angeles Court Trying Settlement Program for Difficult Employment Cases

A pilot settlement program is being launched in the Los Angeles Superior Court for difficult employment cases that have not settled through mediation or negotiation. The program will use a settlement team comprised of an experienced plaintiff's lawyer, an experienced defendant's lawyer and a judicial officer to evaluate cases and encourage parties to settle. A pilot of 150 cases is set for a week in September in the Mosk courthouse. The court is asking lawyers to volunteer as settlement officers. [LA Superior Court](#) (April 2011)

Oprah Network Featuring Victim-Offender Mediation

Oprah Winfrey's cable network has announced six new shows, including *Confronting*, which documents victim-offender mediations, showing the effort to achieve closure. [EW.com](#) (April 14, 2011); [Preview](#)

DISPUTE RESOLUTION NEWS & INITIATIVES

International Mediation Developments

- The Council of Ministers in **Spain** has approved and will send to Parliament legislation to introduce mediation in civil and mercantile matters. [La Moncloa](#) (April 8, 2011)
- Adopting workplace mediation in the **U.K.** significantly reduces costs, as well as improves employee relations. [People Management Magazine Online](#) (March 11, 2011)
- Lawyers in **Italy** went on a week-long national strike to protest the implementation of mandatory mediation in the country, seeking to make mediation optional and to require technical (lawyer) assistance in mediation. [Law Forward](#) (March 17, 2011)
- The northernmost states in **India**, Jammu and Kashmir, broke ground on its second mediation center, with the Chief Justice promoting mediation as an important means to avoid judicial backlogs. [IBN Live News](#) (March 25, 2011)
- **India** has created seven Indirect Tax Ombudsmen to mediate and use other mechanisms to resolve grievances over customs, excise and service taxes with government departments. [The Hindu](#) (April 1, 2011)
- The **Bangladesh** International Arbitration Centre has been established to resolve disputes through both arbitration and mediation, which may help attract foreign investment. [The Financial Express](#) (April 10, 2011)
- The People's Mediation Law, enacted last year in **China**, is intended to enhance democracy at the grassroots level, according to a Chinese lawmaker; Chi-

na has over 4.9 million mediators and handled over 7 million disputes in 2010, with a resolution rate of 97%. [CriEnglish.com](#) (March 10, 2011)

- More than 20 years after it was first proposed, **Korea** enacts legislation to resolve medical malpractice disputes through alternative dispute resolution; law takes effect in April 2012. [The Korea Times](#) (April 6, 2011); [Donga.com](#) (March 12, 2011)

Mandatory Mediation of Disputes Urged as Best Practice for Commercial Real Estate Financing

The CRE Finance Council has released new "best practices" initiatives to enhance safeguards for the commercial real estate finance market, which include mandatory third-party mediation prior to bringing any legal action.

[National Mortgage Professional Magazine](#) (March 24, 2011)

WIPO Developments Include Creative Barcodes

The World Intellectual Property Organization's (WIPO) Arbitration and Mediation Center will provide mediation services for Creative Barcode members; Creative Barcode is a new mechanism for facilitating safe disclosure of creative concepts and ideas in business deals and proposals by using barcoded files. In more traditional endeavors, some 2,700 cybersquatting cases were filed with the WIPO Center in 2010, setting a new record. The cases were handled by over 300 panelists in 49 countries in 13 languages. The WIPO Center also continues to handle

significant numbers of intellectual property disputes.

[Dexigner](#) (March 22, 2011); [Ag-Ip-News.com](#) (March 31, 2011)

North Dakota Expands Agricultural Mediation Program to Energy Disputes

North Dakota enacted legislation in late April to broaden the mission of the state's Agricultural Mediation Service beyond helping farmers, ranchers and their creditors to addressing disputes between landowners, producers and energy companies. While the mediation program is voluntary, the leading oil and gas industry organization in the state, the North Dakota Petroleum Council, is encouraging its members to use the state mediation services to resolve disputes. The legislation also dropped "Agricultural" from the name of the North Dakota Mediation Service.

[H.B. 1462](#); [Status](#); [The Republic](#) (April 8, 2011)

Other Notable

- Florida's court system is facing a large deficit due to a shortfall in expected filing fees from mortgage foreclosure cases, so it has transferred \$12 million from the Mediation Arbitration Trust Fund. [Crestview News Bulletin](#) (March 26, 2011)
- Huge increases in credit card collection cases have resulted from the recession, with most cases going to mediation prior to litigation. [Credit Cards.com](#) (April 18, 2011)

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DISPUTE RESOLUTION NEWS & INITIATIVES (cont.)

Update on Home Foreclosure Mediation

- The **U.S.** Senate Judiciary Committee passed S. 222, which would give bankruptcy courts nationwide the authority to set up foreclosure mediation programs. Mediation programs have already been set up in several bankruptcy courts in New York, Florida, Iowa, and Connecticut. Banks contested the program in Rhode Island, however, leading to the legislation. On the House side, H.R. 1131 has been introduced to provide grants to states to provide mediation for homeowners facing foreclosure. [Housing Wire](#) (March 31, 2011); [Housing Wire](#) (March 18, 2011)
- **Washington** state enacted H.B. 1362 to provide more time and counseling for indebted homeowners, and mediation with lenders prior to foreclosure. A housing counselor or lawyer can refer a homeowner to mediation, in which a mediator is to ensure that both parties are acting in good faith. Washington is the third non-judicial foreclosure state to enact a mediation process, following Nevada and Maryland. H.B. 1362 takes effect in July. [The News Tribune](#) (April 15, 2011)
- New home foreclosure mediation programs are beginning in the **Illinois** counties of Peoria and Madison. While homeowners in Madison County must submit a mediation request and meet certain financial pre-conditions, in Peoria County the mediation period is mandatory for residential foreclosures. The mediation program in Peoria begins June 1 and is financed with increased filing fees. [The Madison/St. Claire Record](#) (April 19, 2011); [PJ Star.com](#) (April 19, 2011)
- **Washington, D.C.** adopted foreclosure mediation legislation in November and then barred residential foreclosures until promulgation of mediation-related rules, which were published in April. Lenders must give borrowers notice of default which includes a mediation election form. If borrowers decide to mediate they must pay a \$50 fee and mediation must be completed within 90 days. [Washington Business Journal](#) (April 8, 2011)
- Three alternative foreclosure reform bills are near enactment in **Hawaii**, although settling on one bill could be challenging. Two of the three bills include mediation. Mortgage industry representatives have raised strong objections to the bills, and especially to the dispute resolution provision. [Star Advertiser.com](#) (April 15, 2011)
- Legislation was introduced in **Delaware** that would provide for automatic mediation for homeowners facing foreclosure, instead of the voluntary mediation program that is currently in place. [Delaware Online.com](#) (March 16, 2011)
- Legislation in **Connecticut** would extend the state's foreclosure mediation program through 2014 and require mediation to be completed before foreclosure litigation can proceed. [Courant.com](#) (March 21, 2011)
- The **Indiana** Supreme Court is launching a secure online network for exchanging necessary financial documents and information in order to make foreclosure mediation more effective. A pilot project using the system is beginning in two counties. [Inside Indiana Business](#) (April 11, 2011)

OTHER NEWS & INFORMATION

Unprecedented agreement reached by 34 participants under which Denver Water would pay \$25 million and divert no further water across the Continental Divide. All parties must approve the agreement, which is expected to take months. [Denver Business Journal \(April 28, 2011\)](#)

Litigation over secret meetings by board of commissioners has been resolved with a detailed settlement co-mediated by a federal judge and a local judge; along with payment of attorneys' fees and other provisions, the commissioners involved are prohibited from violating the law for a year. [The Register-Guard \(April 2, 2011\)](#)

Lawsuit over competing hospitals in Berkeley County, South Carolina delayed to give hospitals time to mediate. [Charleston Regional Business Journal \(April 28, 2011\)](#)

Mediation results in full settlement between hospital district and Health Access Washoe County. [RGJ.com \(March 16, 2011\)](#)

Having already spent \$15 million in legal fees in dispute against construction giant with no end in sight, state senator urges DeKalb County Schools to turn to mediation. [AJC.com \(March 7, 2011\)](#)

Court delays trial to permit time for mediation in litigation over a major contract dispute which court expanded to include fraud allegations. [Chelsea Standard \(April 25, 2011\)](#)

Sir Edmund Hillary's family is mediating an internal squabble over his watches. [Stuff.co.nz \(March 23, 2011\)](#)

Mediation is scheduled the day before trial between Guns N' Roses' Axl Rose and his former manager over allegations of broken promises and mismanagement. [Beverly Hills Courier \(April 11, 2011\)](#)

Roseanne Barr seeks mediation of legal dispute with neighbors in Hawaii over construction and privacy issues, with claims of dead goats, restraining orders and much upset. [KHON2.com \(March 10, 2011\)](#)

Transgender golfer Lana Lawless to mediate with Long Drivers Association over regulation excluding transgender women. Pro Golf Talk (March 15, 2011) Mediation results in \$6 million settlement for woman hit by school bus in crosswalk. [PR Web \(April 3, 2011\)](#)

Mediation in southwest China provides compensation of \$3,800 for discrimination against a carrier of hepatitis. [English.Eastday.com \(March 19, 2011\)](#)

Public meeting of residents held prior to "public mediation" between board of supervisors and gas driller over town ordinance that prohibits temporary housing at work sites. [Post-Gazette.com \(April 13, 2011\)](#)

Iowa legislative resolution encourages use of professional mediation in dispute between homeowners and drainage district board of trustees over dis-

posal of material dredged from drainage canal. [Muscatine Journal \(March 17, 2011\)](#)

Cyclists and shooting club mediate and resolve claims to city land in Mission, Texas for recreational uses. [The Monitor \(March 18, 2011\)](#)

A national non-profit, the Patient Advocate Foundation, relies on mediation to ensure that patients with life threatening or debilitating diseases have adequate access to care or receive other needed assistance. The Foundation served 83,000 patients in 2010, an increase of 50% over the previous year. [PR Newswire \(April 13, 2011\)](#)

Bankruptcy judge orders Fulton Homes and primary creditors into mediation over repayment terms for \$160 million. [AZ Central.com \(April 28, 2011\)](#)

Millions of dollars of casino money remains in escrow pending mediation seeking to settle six years of litigation. [Chicago Tribune \(March 18, 2011\)](#)

The City of Ottawa is willing to enter mediation over extending the Urban Boundary. [580 CFRA News Talk Radio \(March 18, 2011\)](#)

Last ditch mediation efforts make progress in attempt to rescue Edinburgh's tram project. [Scotsman.com \(March 16, 2011\)](#)

SAVE THIS DATE

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