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

Mediation News and Updates

Fall/Winter 2004

In This Issue

CASES & RESOLUTIONS:

Court Upholds Mandatory Mediation Clause Denying Attorneys Fees

Frei v. Davey, No. G033682 (Cal. App. 4th Dist. 12/17/04)

Mandatory mediation clauses gained strong support from a California appellate court ruling that a contract provision barring recovery of attorneys' fees by a prevailing party that refuses to mediate prior to litigation is enforceable. The seller of a house refused to mediate a $20,000 dispute, which ultimately resulted in attorneys' fees exceeding $500,000 for the parties. The trial court awarded the seller attorneys' fees of $130,000, but the appellate court reversed based on a new mandatory mediation provision in the California standard form residential purchase agreement, which prohibits recovery of attorneys' fees by a party refusing a mediation request. This is the first published decision in which the provision has been applied; the court discusses the benefits of mediation and systematically rejected numerous arguments ranging from timing (seller agreed to a later mediation) to futility.

View Decision

Short Mediation Settlement Agreement Enforceable

Fair v. Bakhitairi, 18 Cal.Rptr.3d, 208 (Cal App. 1st Dist. 2004)

A California appellate court reversed the lower court and enforced a nine-word arbitration clause in an abbreviated settlement agreement that had been signed by the parties at the end of two days of mediation pending preparation of a detailed formal agreement. When disputes arose over the language of the longer agreement, the parties did not return to mediation, and litigation over the enforceability of the arbitration provision ensued. The appellate court concluded that the inclusion of the arbitration clause demonstrated that the parties intended the document to be binding, so it fell within the state's exception to mediation confidentiality. The court further found that the short settlement agreement set forth all the material terms of a contract and the parties reported to the court that the case had been settled in mediation, even though they intended to flesh out a more comprehensive agreement.

View Decision

Mediation Resolves Freedom Tower Dispute

Wall Street Journal, October 6, 2004

Assisted by a court-appointed mediator, World Trade Center leaseholder

Larry Silverstein agreed to pay architect Daniel Libeskind's firm $370,000 for work on the Freedom Tower. Under the settlement, Libeskind, designer of the master plan for redevelopment of the trade center site, will withdraw his lawsuit claiming Silverstein owed him more than $843,000 for creative services.

View Article (Subscription Required)

NEWS & INITIATIVES:

General Counsels Favor Mediation

Fulbright & Jaworski, 2004

An independent survey of hundreds of general counsels of large corporations on litigation trends reported that mediation is viewed favorably by 60% of corporate counsels, while 15% disfavor it. Seventy percent consider that mediation provides savings, with 6% reporting increase in costs from use of mediation. By contrast, domestic arbitration was viewed favorably by only 43% of respondents, and disfavored by 36%. Forty-seven percent noted savings from use of arbitration, and 9% reported increases in costs from arbitration. In ranking litigation exposure, respondents' top concerns were labor and employment, contract issues, intellectual property, product liability and class actions. The survey purports to be one of the largest of its kind ever conducted.

View Report

Aggressive Settlement Strategy Reaps Benefits

Corporate Counsel, September 24, 2004

The $1.5 billion outdoor equipment business Toro Co. uses mediation whenever informal settlement efforts fail, in order to avoid litigation. Toro states it has saved nearly $100 million in litigation costs since implementing its aggressive settlement strategy in 1991. Toro's systematic approach begins with sympathetic paralegals (who resolve about 70% of claims), and when needed moves to in-house settlement counsel and mediators experienced with Toro's approach. Toro has cut the total cost of each claim from $115,000 to $35,000, and hasn't defended a product liability claim in court since 1994.

View Article

Tyson to Mediate Future EEOC Claims

Wall Street Journal, September 15, 2004

Tyson Foods, Inc. became the 62nd U.S. company to sign the U.S. Equal Employment Opportunity Commission's National Universal Agreement to Mediate, agreeing to rely on mediation to resolve future workplace disputes prior to EEOC investigation or litigation. Either the company or the EEOC may opt out of mediation if it believes a matter is inappropriate.

View Article (Subscription Required)

Use of Dispute Boards Increasing; ICC Issues New Rules

Contact Information

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

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

Tel: 301-681-7450
Fax: 301-681-9243
Cell: 301-523-5535
kseat@keithseat.com
www.keithseat.com

Jones Day, December 2, 2004

Use of "dispute boards" has been increasing well beyond the major civil engineering projects where they originated. Dispute boards comprised of one or three neutrals are typically used by parties to an ongoing project who want a dispute resolution process in place to quickly address conflicts that may arise during the project. The process often involves periodic meetings to keep neutrals up to speed on the project so that any disputes can be more quickly resolved. The mere existence of a dispute board encourages cooperation between the parties and often keeps the relationship from becoming adversarial. The World Bank has relied on dispute boards for a decade and includes revised provisions for them in its model contracts. More recently, the International Chamber of Commerce ("ICC") in Paris issued new Dispute Board Rules, which took effect September 1. The essence of dispute boards is often articulated as making decisions, whether binding or advisory, but dispute boards are intended to be quicker and less formal than arbitration. The process may in fact be closer to mediation in many circumstances. The ICC Rules state that a dispute board may informally assist the parties in resolving disagreements by meeting separately with a party and by giving its informal views to the parties.

View Article

Interior Department Testing ADR Option for Administrative Appeals

ADRWorld, December 22, 2004

As part of its effort to expand use of alternative dispute resolution, the Interior Department's Board of Land Appeals is beginning an 18-month pilot project to use ADR in suitable cases appealed from Bureau of Land Management decisions. Use of mediation and other forms of ADR would be voluntary. Any neutral could be used, although government-provided neutrals would be free, while the parties would be responsible for payment of private-sector neutrals. The agency suggests that this project could be a model for other federal entities and notes that the U.S. Forest Service has already made inquiries.

View Article (Subscription Required)

HHS Touts New ADR Program

ADRWorld.com, September 29, 2004

In late September, the U.S. Department of Health and Human Services began an alternative dispute resolution pilot program for medical negligence claims against the federal government, which it hopes might become a model for other agencies. However, the so-called Early Offers ADR program merely provides a mechanical administrative process for parties to confidentially submit settlement offers and see whether the claimant's offer is less than or equal to an HHS offer.

View Article (Subscription Required)

ICANN Ombudsman to Use ADR System for Complaints

ADRWorld.com, December 14, 2004

A newly established ombuds office within the Internet Corporation for Assigned Names and Numbers will use alternative dispute resolution to

handle claims brought as a result of ICANN's actions. The ombudsman will use mediation, neutral fact-finding and conciliation, as appropriate, to help the parties better understand ICANN and resolve concerns before they become formal complaints.

View Article (Subscription Required)

NMB, UMass Developing New ODR Processes

ADRWorld.com, December 17, 2004

The National Mediation Board ("NMB") and the University of Massachusetts are developing new online dispute resolution ("ODR") processes and techniques for use by federal agencies and the private sector. The University of Massachusetts received a $700,000 grant from the National Science Foundation at the end of October. The project is scheduled to last three years, with the first year devoted to developing ODR software and then two years using the new tools in a test-bed of the NMB's voluntary grievance mediation program for labor unions and the railroad and airline industries. Software development will focus on visual communication tools and mapping software, with an emphasis on keeping the ODR processes simple and easy to use.

View Article (Subscription Required)

U.S. Delegation Meeting with UK, French Officials on ADR

ADRWorld.com, December 7, 2004

A U.S. delegation including Supreme Court Justice Stephen G. Breyer and top jurists and legal experts will meet January 23-28 with high-level officials from the United Kingdom and France to discuss emerging issues in international commercial dispute resolution. The meetings will cover mediation as well as arbitration. The U.S. has more experience mediating large commercial cases than does Europe, where companies and courts are just beginning to move in that direction. The delegation plans to release papers after the sessions and there may be future exchange of ideas.

View Article (Subscription Required)

U.S. Encouraging Japan to Use ADR

ADRWorld.com, October 22, 2004

The U.S. Office of the Trade Representative is encouraging Japan to establish an overall framework for using ADR in cross-border commerce as part of an ongoing U.S.-Japan competition initiative to promote economic growth and competition in the private sector. In particular, the USTR suggests that foreign lawyers and legal advisors should be able to represent clients in ADR processes in Japan; that ADR provider organizations should be able to administer cases in Japan without government license; that parties can chose what ADR processes and standards to use; and that neutrals are not practicing law and need not be supervised by Japanese lawyers. In addition, the U.S. recommends than e-commerce include processes for online dispute resolution. These recommendations will be discussed over the next year pending issuance of an annual report to heads of state.

View Article (Subscription Required)

Survey Shows Strong Support for Mediation Growth in Europe

ADRWorld.com, December 1, 2004

A survey by the CPR Institute of top European business and legal leaders indicates strong support for more use of mediation in both international and domestic commercial disputes and more training of lawyers and managers in mediation skills and uses. According to the head of CPR, there has been much greater use of mediation in the United Kingdom in the last five years, and use is increasing on the continent as well; courts have instituted pilot mediation programs in Italy, Belgium and the Netherlands. The European Commission issued a policy directive in November to promote greater use of mediation in civil and commercial disputes.

View Article (Subscription Required)

Eleventh Circuit Project Allows Private-Sector Mediators

ADRWorld.com, November 4, 2004

The U.S. Court of Appeals for the Eleventh Circuit has launched a two-year pilot project to permit parties to hire outside neutrals in cases the court refers to mediation, which the court states is a first for any federal circuit court. This will allow the parties to have more live mediations and avoid the telephone mediations caused by the court having only three offices across the circuit (which covers Florida, Alabama, Georgia).

View Article (Subscription Required)

New Jersey Is Third State to Adopt Uniform Mediation Act

ADRWorld.com, November 29, 2004

New Jersey became the third state (with Illinois and Nebraska) to enact the Uniform Mediation Act on November 22, providing mediation participants with the privilege to prevent disclosure of mediation communications. The New Jersey legislation is very similar to the model act.

View Article (Subscription Required)

Michigan Encouraging Mediation in Larger Cases

ADRWorld.com, September 23, 2004

Michigan dispute resolution officials are urging state courts to expand their use of mediation in complex and high-dollar civil cases in light of a new study of small claims that shows better collection rates when mediation is used.

View Article (Subscription Required)

Florida to Mediate Hurricane Claims

ADRWorld.com, October 15, 2004

With two million insurance claims expected as a result of the four recent large hurricanes, Florida's Department of Financial Services has adopted a new mediation program. It is modeled after the one used to resolve claims from Hurricane Andrew, which successfully resolved 80% of all claims disputes and partially resolved another 10%. Four mediation centers are being established in the state for the new claims by the Collins Center for

Public Policy, in order to resolve as many as 30,000 claims within a year.

View Article (Subscription Required)

California Expands Insurance Mediation Program

ADRWorld.com, September 8, 2004

California legislation has created a new program that allows homeowners to pursue mediation for insurance claims stemming from the state's widespread wildfires in 2003 and extends existing programs for car insurance disputes and earthquake claims for another four years. The legislation gives mediators some discovery powers and requires the costs of mediation to be "reasonable," which may be limited by the state agency to $1500 for fire claims and $700 for earthquake and car claims.

View Article (Subscription Required)

Philadelphia Court Task Force Exploring ADR Expansion

ADRWorld.com, November 24, 2004

The Philadelphia Court of Common Pleas has convened a task force to explore opportunities for broadening alternative dispute resolution options available to litigants in its civil case docket. The court currently uses arbitration, but based on consumer demand is looking to add mediation and early neutral evaluation, with special attention being given to medical malpractice cases.

View Article (Subscription Required)

Wyoming Voters OK ADR for Medical Malpractice Claims

ADRWorld.com, November 8, 2004

Wyoming voters on November 2 narrowly approved a constitutional amendment authorizing state lawmakers to adopt legislation mandating the use of alternative dispute resolution to settle medical malpractice claims before they are filed in court. The amendment was passed in response to a decision overturning as unconstitutional a previous Wyoming law authorizing ADR in medical malpractice cases.

View Article (Subscription Required)

Doctors Advised that an Apology a Day Keeps the Lawyer Away

Associated Press, November 12, 2004

According to some malpractice-reform advocates, an apology can soothe patients and help doctors avoid malpractice lawsuits, especially when combined with upfront settlement offers. The hospitals in the University of Michigan Health System have been encouraging doctors since 2002 to apologize for mistakes, and have seen annual attorneys' fees drop from $3 million to $1 million, and malpractice lawsuits and notices of intent to sue fall from 262 before beginning the program to about 130 per year. The Veterans Affairs hospital in Lexington, Ky., adopted a program called "Sorry Works" in 1987 after two expensive malpractice cases.

View Article