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MEDIATOR & ARBITRATOR

Mediation News and Updates

January-February 2005

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CASES & RESOLUTIONS:

$87 Million Settlement in Mediation Aided by Summary Jury Trial

Fulton County Daily Report, January 25, 2005

PricewaterhouseCoopers and an international syndicate of 90 lenders successfully used mediation to avoid an estimated three-month long trial. PricewaterhouseCoopers paid $87 million last October in a settlement that came to light in a subsequent dispute between two of the plaintiffs. The parties stated that the initial mediation settlement was guided by a non-binding "summary jury trial" that was conducted in the presiding judge's courtroom.

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Symphony Finds Harmony in Mediation

TIME Online Edition, February 24, 2005

An FMCS mediator helped end the St. Louis Symphony's first strike since 1979. The symphony had to cancel 18 concerts due to a contract conflict between the musicians and management. In late February, following a National Labor Relations Board ruling that the strike was illegal, the parties agreed to resolve the dispute rather than take the case to court.

View Article

Unexpected Income: *Commissioner of Internal Revenue v. Banks*, 125 S. Ct. 825 (2005)

Reversing decisions of the Sixth and Ninth Circuits, the U.S. Supreme Court unanimously held on January 24 that generally when a litigant's recovery (by judgment or settlement) constitutes income, the portion of the recovery paid to the attorney as a contingent fee is also taxed as income pursuant to the Internal Revenue Code, 26 U.S.C. § 61(a). The Court reasoned that a contingency-fee agreement should be viewed as an anticipatory assignment of a portion of the client's income from any litigation recovery. Further, in keeping with the rule that income should be taxed to the party who earns it, in the case of a litigation recovery, the income-generating asset is the cause of action derived from the plaintiff's legal injury. However, the Court notes that this issue may be less critical in cases that arise after enactment of the American Jobs Creation Act of 2004, which permits attorneys fees such as these to be deducted.

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- *Three Little Pigs Go to Mediation*

Mediator Cannot Be Decision-maker: *Travelers Casualty and Surety Co. v. Superior Court*, B176030 (Cal. App. 2d Dist. 2005)

The California Court of Appeals held that a settlement judge, acting as a mediator, cannot be the decision-maker, and that a mediation is not an "actual trial" as the settlement judge stated in a written order. Judge Peter D. Lichtman was appointed as settlement judge to help seek resolution between the Roman Catholic Diocese of Orange's liability insurers and the victims of alleged childhood sexual abuse by various priests. After contention with the parties, Judge Lichtman released a lengthy written "order," stating his determination of the reasonable settlement value of plaintiffs' claims based upon his view that the insurers had stymied attempts to settle the case. The appellate court did expressly state that a mediator may be evaluative and provide views to the parties, but may not issue "findings" or attempt to coerce the participants and thus vacated and sealed the mediation "order." Subsequent news accounts reported that Judge Lichtman has been replaced as the mediator in the case.

View Opinion

Listen to the Mediator?: *Massachusetts Port Authority v. Employers Insurance of Wausau*, No. 95-3079-A (Mass. Super. Ct. 2004)

A Massachusetts trial court denied motions for summary judgment, holding that the defendant insurance company's failure to heed the advice of mediators could constitute evidence of bad faith refusal to settle. Surprisingly, even though Massachusetts law provides confidentiality for communications made during mediation, the court relied on the substantive views of three different mediators during various mediations over a four year period as evidence of the defendant's bad faith settlement practices.

View Opinion

Mediation Quote

"Peacemaking offers an opportunity to explore and discover that which is as yet unimagined."

– Douglas Noll, *Peace*making

NEWS & INITIATIVES:

Federal Legislation Mandates More Mediation in Special Ed

Continuing the federal government's trend toward mediation, federal legislation was enacted in December to expand use of mediation to resolve special education disputes. P.L. 108-446 reauthorizes and enhances the *Individuals with Disabilities Act*, requiring states to provide voluntary, confidential mediation services to help parents resolve disputes arising under the Act. The act also permits agencies to adopt procedures to encourage parents who chose not to use mediation to meet with disinterested parties who can explain and encourage mediation.

View P.L. 108-446

Maryland Requires Mandatory ADR for Malpractice Claims

ADRWorld.com, January 14, 2005

Maryland adopted mandatory alternative dispute resolution for medical

Contact Information

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

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malpractice cases on January 12, joining a number of other states. Under Maryland's new law, all malpractice cases will be referred to ADR, including mediation, neutral fact-finding, or neutral case evaluation, within 30 days after a defendant files an answer to a complaint, unless the court finds that it would not be useful in resolving the case or all parties agree to forego the process. Parties will be responsible for choosing an ADR neutral or provider, and covering their fees and costs. Mediators are required to adhere to the state's ADR standards of practice and the law permits rules requiring experience with medical malpractice claims.

View Article (subscription required)

Ohio Is Fourth State to Adopt Uniform Mediation Act

ADRWorld.com, February 8, 2005

Ohio enacted the Uniform Mediation Act on January 28, which will go into effect in six months, after training on the law. Ohio is the fourth state to adopt the act (following Illinois, New Jersey and Nebraska). Ohio's version closely tracks the model statute, but deviates from the model by authorizing withdrawal if a mediator becomes uncomfortable with a legal representative's participation, and by permitting a non-party to pierce the confidentiality of mediation if a judge or arbitrator determines after a hearing that the confidential information is not otherwise available and disclosure is necessary to prevent a "manifest injustice."

View Article (subscription required)

Tennessee Using Mediation to Settle Homebuilding Disputes

ADRWorld.com, January 28, 2005

Tennessee launched a new mediation program in February in response to growing dissatisfaction among homeowners about the state agency's slow pace of resolving contracting disputes. The agency does not have authority to compel mediation, so has established a "Problem Contractor List" to publicly identify contractors who fail to respond to mediation.

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Ethiopia Launching Court-Annexed Mediation Program

Africa News, February 6, 2005

Recognizing that mediation is a "world-wide trend," the Ethiopian Supreme Court is launching a pilot mediation system next month to help settle commercial disputes. The program aims to resolve cases using experts drawn from various professions, but without legal expertise. Trainers from Nigeria, Gambia, Malawi, Canada and the United States will train 120 new mediators; 30 have already received training. Mediation guidelines outlining pay, relationship with the courts, and a code of conduct is being prepared. Following the pilot project, the Ethiopian high court hopes to expand the mediation program to all regional courts.

ABA Section Approves Revised Mediator *Model Standards*

ADRWorld.com, February 17, 2005

The ABA's Dispute Resolution Section endorsed revisions to the *Model Standards of Conduct for Mediators* in February and is reaching out to other ABA sections to build support for adoption by the ABA House of Delegates in August. The first update to the *Model Standards* in ten years, the

revisions expand on the areas of impartiality, disclosure, and confidentiality, and provide additional guidance for mediators on advertising and process quality. Notably, the revisions permit incidental gifts to be accepted by mediators in certain circumstances, but do not allow the parties to waive conflicts of interest. The final draft *Model Standards* were released in December by the ABA, the American Arbitration Association and the Association for Conflict Resolution.

View Model Standards*; View Article (subscription required)*

Maurits Barendrecht and Berend R. de Vries, "*Fitting the Forum to the Fuss with Sticky Defaults: Failure on the Market for Dispute Resolution Services?*," Tilburg Law and Economics Center, Tilburg University (The Netherlands, June 2004)

In *Fitting the Forum to the Fuss with Sticky Defaults*, the authors neutrally examine the significant issue of why empirical evidence (mostly based on U.S. data) shows high satisfaction with mediation, and ADR generally, but underutilization unless parties are compelled by courts or pre-dispute contractual provisions. The article explains that it is very difficult for disputants to opt out of the default method of dispute resolution, which is litigation or, more precisely, "lawyer-assisted negotiations in the shadow of the possibility of litigation." In short, the default is "sticky," which occurs for many reasons. First, moving away from the default generally requires both (or all) parties to agree on the alternative at a point when they don't want to agree with each other on anything. Second, there are a large number of psychological/cognitive, strategic/tactical, and institutional/structural factors that make it hard to move from the default position. These include reactive devaluation (of the idea of mediation or anything else suggested by the other side), ambiguity about types of mediation and whether there will be any resolution in mediation, and uncertainty over the extent parties are "disarming" by entering into mediation.

The article emphasizes the importance of not concluding that parties are achieving their preferences by the mere fact that they are not easily able to move away from the sticky default and the underutilization of mediation. Nor is additional information about mediation sufficient by itself to address this market failure; mediation will not be able to prove itself in the marketplace due to the unusual nature of the dispute resolution market. It is important for courts to encourage mediation and for public policy to be determined in a way that furthers the true preferences of informed users of dispute resolution services.

View Abstract (link to article)

Party While You Work: Neutral Raises Questions by Inviting Counsel to Out of Town Party

New York Law Journal, January 19, 2005

The special master seeking to settle asbestos litigation in New York City has stirred controversy with her plans for an April party at her Arizona home to which she has invited all counsel in the asbestos cases. The special master, Laraine Pacheco (who is paid $368,000 per year by the parties), is a well-regarded mediator who often encourages parties to get to know each other as people, which has helped her settle hundreds of asbestos claims

over the past few years. However, ethical concerns are being raised about the April party, especially when she mentioned the availability of discounts at a family-owned jewelry store.

Three Little Pigs Go to Mediation

Finally, just for fun: In an effort to explain and demystify mediation, the Department of Veteran's Affairs has produced a short cartoon starring Wise Owl as the mediator in *The Three Little Pigs Go to Mediation*.

View Cartoon