

# MEDIATION NEWS

brought to you by:  
**Keith L. Seat**

**Keith is focused on conflict resolution and policy consensus building through his work in Certus Strategies.** Certus assists industry groups in finding consensus on divisive public policy issues and government agencies in conducting critical assessment and public participation efforts. In addition, Certus helps project developers in areas such as energy, telecommunications and other critical infrastructure address the public upset which is often sparked by such efforts. Originally founded in Calgary, Certus has a 20-year record of success in helping parties get ahead and stay ahead of conflict. Certus emphasizes public engagement, stakeholder participation and information architecture processes, which Keith and his partner Steve Shapiro apply to projects in the Washington, D.C. region and elsewhere in North America. See [www.Certus-Strategies.us](http://www.Certus-Strategies.us). Keith continues his mediation practice in his Certus offices and conference space at 6101 Executive Boulevard, Suite 390, in Rockville, Maryland.



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## CASES & RESOLUTIONS:

### **Federal Circuit Concludes that Non-Binding Arbitration Is Not Mediation, So No Decision Reached on Mediation Privilege**

The U.S. Court of Appeals for the Federal Circuit readily concluded that arbitration is not mediation simply because it is non-binding and intended to facilitate settlement. A key confirming element was that ex parte contact with the arbitrators was prohibited, so the parties could not speak openly and freely about their case with a neutral. Because mediation was not involved, the appellate court declined to determine whether there is a federal mediation privilege as found by the district court.

[Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC](#), No. 2011-1157 (U.S.C.A. Fed. Cir., November 15, 2011).

### **West Virginia Supreme Court Reverses Sanctions, But Confirms that Failure to**

## Appear at Mediation with Full Settlement Authority Is Sanctionable

While affirming the principle that sanctions can be imposed for violation of local rules requiring attendance at mediation by an insurance representative with full settlement authority, the West Virginia Supreme Court reversed sanctions exceeding \$270,000. The Court concluded that the sanctioned insurer (which acquired the first insurer) did not receive adequate notice of the first court-ordered mediation; did not act in bad faith by reducing an offer from \$700,000 to \$350,000 because a second representative did not know of the first mediation; and did not deserve sanctions after receiving only three days' notice of a mediation session, when the insurance representative failed to appear in person because of missing a flight, did participate by telephone, and showed up in person for the final mediation session the next day. On the other hand, the Court expressed surprise that no sanctions were imposed for the "egregiously deceptive" conduct of the insurance representative at the first mediation who did not have authority to agree to the \$900,000 she thought was appropriate and went back to the insurer to seek authorization.

[Casaccio v. Curtiss](#), No. 101527 (W. Va., November 9, 2011)

## Attorney's Signature Not Sufficient for Binding Settlement Agreement When Party Is Present

A Georgia appellate court reversed summary judgment which enforced a mediated settlement agreement based only on the signature of a party's attorney when the party himself had refused to sign the agreement and stormed out of the mediation. The appellate court concluded that with the party present and signature lines for both the party and attorney, there was no issue of apparent authority on which the lower court relied in enforcing the agreement.

[Omni Builders Risk, Inc. v. Bennett](#), A11A1025 (Ga. Ct. App., November 29, 2011)

## Massive Federal Drug Litigations Turn to Mediation

GlaxoSmithKline has reached a \$3 billion settlement of federal civil and criminal charges over the diabetes drug Avandia, and a federal judge has ordered mediation of the thousands of remaining patient claims. The judge appointed a mediator and set a 75-day deadline to resolve 85% of the remaining cases. Earlier this year, GlaxoSmithKline agreed to resolve over 10,000 patient cases for more than \$700 million. In a separate matter involving multidistrict litigation against Merck over its Vioxx painkiller, a federal judge delayed litigation by state attorneys general a year ago to give time for global mediation. Merck has now agreed on payments to the states of Florida, New York and South Carolina, although the size of the settlements is confidential. Merck has paid \$4.85 billion to settle patient lawsuits involving Vioxx.

[MedCity News](#) (November 9, 2011); [Businessweek](#) (November 15, 2011)

*commercial disputes. With twenty-five years of legal experience as a mediator, arbitrator, litigator, advocate before executive branch agencies, and key staffer in the legislative and judicial branches, Keith brings a wealth of experience to his work as a mediator and arbitrator to help parties reach successful resolutions of complex disputes.*

## Mediation Quote:

"[E]veryone in conflict has a different perception of what happened, who caused it, and why. Each side tells stories that are accurate and honest – for themselves, as requests for communication, empathy, and authenticity. Both sides also tell stories that are inaccurate and dishonest – for each other, as literal facts, and as requests for surrender or acceptance of blame.... [E]veryone in conflict views the world from the inside out, and finds empathy and honesty difficult with those they detest or by whom they feel detested. Their willingness to accept responsibility is distorted by their need for sympathy and support, or their desire to make themselves appear right by making others appear wrong."

Kenneth Cloke, *Mediating Dangerously: The Frontiers of Conflict Resolution* (Jossey-Bass 2001) at 28

## NEWS & INITIATIVES:

### EEOC Increases Monetary Recoveries in Mediation to \$170 Million

The U.S. Equal Employment Opportunity Commission reports that in fiscal 2011 it again set a record for the amount of monetary relief obtained for victims of discrimination, at \$365 million, of which over \$170 million was obtained in mediations. About 100,000 discrimination charges were filed with the EEOC in 2011, but the agency reduced its backlog so that fewer than 80,000 matters were pending late in the year.

[JDSupra](#) (December 16, 2011)

### Florida Supreme Court Strengthens Rules on Who Must Attend Mediation

The Florida Supreme Court adopted amendments to the state's mediation procedures relating to who must appear at mediations, which take effect on January 1. The amendments require that final decision-makers on all issues in the case appear in person at the mediation and have the legal capacity to enter a binding settlement agreement. The rule continues to require insurance representatives to appear in person with full authority to settle the case for plaintiff's last demand (or policy limits, if lower) "without further consultation." The identities of those who will be attending a mediation and confirmation of their authority must be submitted to the court and all parties ten days before the mediation session, unless the parties stipulate otherwise. Failure to comply with the rules can result in imposition of sanctions, including mediation fees, attorneys' fees and costs. Some are concerned about the impact on insurers located out of state and the difficulty of providing a person with sole authority to settle for policy limits.

[In re Amendments to Florida Rule of Civil Procedure 1.720](#), No. SC10-2329 (Fla., November 3, 2011); [Claims Journal](#) (November 21, 2011)

### Update on Home Foreclosure Mediation

- **Federal** legislation was introduced by Congresswoman Frederica Wilson (D-FL) on December 8 which would provide for mediation between borrowers and lenders prior to foreclosure. H.R. 3595, the Mandatory Foreclosure Mediation Act, was referred to the Committee on Financial Services. [South Florida Caribbean News](#) (December 8, 2011); [H.R. 3595](#)
- The **Florida** Supreme Court terminated its statewide mandatory foreclosure mediation program due to lack of success. Only 4% of cases eligible for mediation concluded with a settlement. Borrowers often were not contacted; when they were, mediation settlements increased to 27%. In ending the statewide program, the Court noted that the

## Check These Out:

### New Technology for Mediation

After three years of work, a free smartphone application has been launched for iPhones/iPads and Android devices to help negotiators and mediators calculate monetary offers and graph trajectories, tracking both dollars and the timing of offers and counter-offers. In addition, enterprise software under development can provide input from data accumulated from past cases; it is expected to be available for beta testing early in 2012. [San Antonio Business Journal](#) (December 1, 2011); [Picture It Settled](#)  
Decision tree software from [Resolution Tree](#) can help guide the process of building decision trees and quickly calculate the dollar implications of various assumptions. The software is currently in beta testing and free, but will be offered for a monthly charge when launched. [Mediate.com](#) (December 2011); [Resolution Tree](#)

### Another Mediation Show

MTV Networks is casting a new reality show in which professional mediators will help high school students resolve their disputes and personal dramas. The casting call seeks disputants with great personalities and genuine, real life issues who are in high school and appear to be between 16 and 19 years old. [RealityWanted.com](#)

state's Circuit Courts have the responsibility to manage residential foreclosure cases and may refer cases to mediation. [In re Managed Mediation Program for Residential Mortgage Foreclosure Cases](#), No. AOSC11-44 (Fla., December 19, 2011); [Miami Herald.com](#) (December 21, 2011); [JDSupra](#) (December 22, 2011)

- A new **Florida** mediation program may help homeowners going through Chapter 13 bankruptcy obtain mortgage modifications to prevent foreclosure of their homes. Thus far, 90% of homeowners who have entered the Bankruptcy Mortgage Modification Mediation Program have obtained mortgage modifications. The program was launched in Orlando, is expanding into Manatee and Sarasota counties and could be statewide by the end of 2012. [Digital Journal](#) (December 16, 2011)
- The **Nevada** Supreme Court concluded that even though a lender had failed twice to mediate as required, it did not lose its security interest and could bring another foreclosure action. The Court rejected the homeowners' assertions of issue and claim preclusion and affirmed the lower court's order that the matter be sent to mediation as part of the subsequent foreclosure process. [Holt v. Regional Trustee Services Corp.](#), 127 Nev. Adv. Op. No. 80 (Nev., December 15, 2011)
- The **Nevada** foreclosure mediation program, run by the Nevada Supreme Court, has conducted over 12,000 homeowner mediations, of which some 11,000 did not result in foreclosures, and in about 3,700 the homeowners were allowed to remain in their homes, according to the program. A California nonprofit group is seeking to verify those claims of success, but has been told it would cost them \$940,000 to review the records. The state asserts that it would cost that much to redact the 600,000 requested documents in order to preserve mediation confidentiality. [Las Vegas Sun](#) (November 19, 2011)
- **Las Vegas, Nevada** has launched an advertising campaign to increase awareness of free assistance by approved counselors relating to foreclosure mediation and related topics. The three-month campaign is funded by a grant from Fannie Mae and HUD. [FOX5 Las Vegas](#) (November 9, 2011)
- **Hawaii's** May 2011 legislation requiring mediation of non-judicial foreclosures continues to significantly constrain the number of foreclosures in the state, with only one-third the number of foreclosure filings compared to a year earlier. The necessary mediation process for non-judicial foreclosures was not available until October 3, but lenders have not used the non-judicial process during the first month and say it will not be used because of punitive penalties for even minor infractions. A legislative push to make the law more palatable to lenders – while still protecting homeowners – is likely in 2012. [Honolulu Star-Advertiser](#) (November 10, 2011)
- Recent legislation in **Delaware** created a Foreclosure Prevention Office that assists homeowners facing foreclosure with mediation and other issues. Delaware's mandatory foreclosure mediation program begins in January. [WGMD.com](#) (November 17, 2011)
- Although two bills addressing foreclosure died in the **Oregon** legislature when the 2011 session ended on June 30, Oregon legislators intend to renew the effort, which may include pre-foreclosure mediation, in the new session beginning in February. [Statesman Journal.com](#) (November 26, 2011)

(December 12, 2011)

### **Mediation Competitions**

The Twelfth Annual National Intercollegiate Mediation Tournament was held November 11-12 at Drake University Law School. Results from the INADR Tenth Annual International Law School Mediation Tournament have also been posted. [International Academy of Dispute Resolution](#) (November 12, 2011)

The Fourth U.K. National Mediation Competition for Law Schools was held November 24-26, with 16 teams participating, including two from the U.S. and one from Germany. [University of Strathclyde](#) (November 29, 2011)

### **Other Cases & Resolutions:**

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's dismissal of law students' antitrust claims against West Publishing Company relating to bar review courses, but ordered the parties to mediate rather than remanding the case to the district court. [Market Watch](#) (November 17, 2011)

Parties praised the mediator for assisting in the settlement between Washington Mutual shareholders and four hedge funds, permitting the \$7 billion bankruptcy-exit plan to move forward. [Businessweek](#) (December 14, 2011)

Consolidated litigation against Netflix was sent to

## UK Press Commission Proposed for Mediation of Libel and Privacy Cases

With the phonehacking scandal continuing to unfold, a top UK newspaper editor-in-chief is proposing a new Press, Standards and Mediation Commission that would act as an independent regulator of the press and provide mediation services for libel and privacy cases to reduce the high cost of litigation.

[BBC News](#) (November 13, 2011)

## Ontario Insurance Regulator's Mediation Backlog Continues to Grow

A significant mediation backlog has arisen for claimants in disputes with insurers before Ontario's insurance regulator, the Financial Services Commission of Ontario (FSCO). Mediations are taking 10-12 months to complete, rather than the 60 days required by law. Applications for mediation have arisen by 135% over the last five years, with half of all injury claims ending up in mediation (when the insured is not satisfied with the amounts offered by the insurer). Although FSCO is completing 50% more cases with no increase in staff in the last five years, FSCO expects the mediation backlog to continue to increase; 36,000 new mediation applications are expected in the current fiscal year, up 18% from last year. FSCO is seeking approval to hire external mediation providers to address the backlog because government hiring restrictions prevent bringing on more internal staff.

[2011 Annual Report \(Ch. 3\). Office of the Auditor General of Ontario; Canadian Underwriter.ca](#) (December 5, 2011)

## Other International Mediation Developments

- **Swiss** mediators succeeded in working out a deal between **Russia** and **Georgia** on monitoring mutual trade, permitting Russia to join the World Trade Organization after 18 years. [Reuters](#) (November 3, 2011)
- Mediation is expanding in the **Ukraine** with the opening of a mediation center in Kyiv by the International Chamber of Commerce; Ukrainian courts are widely viewed as corrupt and Ukrainian arbitration cannot be used in disputes involving a foreign party or real estate located outside the country. [Kyiv Post](#) (November 17, 2011)
- The World Bank Group's International Finance Corporation established the first-of-its-kind Business Mediation Centre at the Lahore Chamber of Commerce and Industry in **Pakistan** to improve the investment climate. [The Nation](#) (December 21, 2011)
- **South Korean** opposition to ratification of the Korea-U.S. Free Trade Agreement has focused on the investor-state disputes (ISD) clause, which permits third party mediation, while proponents note that the ISD settlement system is a global standard which is included in over

private mediation based on an agreement between the parties. The dispute concerns allegations that Netflix maintained customer movie rental history even after their subscriptions were cancelled. [Lexology](#) (December 15, 2011)

Mediation is to resume between Fox and the Dodgers, even as Fox appeals a ruling by the U.S. Bankruptcy Judge that TV rights may be sold along with the team. [Lasorda's Lair](#) (December 10, 2011)

Analysis of financial records resulted in mediated settlements totaling \$1.39 million in a bankruptcy case. [Tulsa World](#) (December 29, 2011)

Five of six lawsuits have settled through mediation with families of workers killed in the Kleen Energy power plant explosion in February 2010. Mediation continues on other lawsuits by injured workers. [Courant.com](#) (November 13, 2011)

The first settlements have been reached in mediation with an Iowa egg producer for injuries from an outbreak of salmonella in July 2010 that sickened 1,900 people. [Businessweek](#) (November 16, 2011)

A \$1.9 million settlement was reached in a private mediation on the eve of trial with a young father who fell on an untreated patch of ice in a restaurant parking lot resulting in permanent disabilities. [The Township Journal](#) (November 4, 2011)

Three pedestrians hit by a tow truck which was struck by a train settled in

2,500 international agreements. [The Korea Herald](#) (November 1, 2011)

- Mediation efforts by the government of **South Korea** were successful in getting cable television operators to resume high definition TV retransmission pending further negotiations in a dispute over retransmission fees. [The Korea Herald](#) (December 5, 2011)
- **Taiwan** is considering amendments to regulations on consumer debt to permit mediation of debt relief between banks and consumers with the assistance of community mediation committees. [The China Post](#) (November 29, 2011)
- Legislation to enhance the confidentiality of mediation was introduced in **Hong Kong** on November 30, based on a 2010 recommendation of the Working Group on Mediation and consultation with stakeholders. [Lexology](#) (December 13, 2011); [7th Space Interactive](#) (November 18, 2011)
- **Victoria, Australia's** Farm Debt Mediation Act 2011 went into effect on December 1, and permits either a farmer or a creditor to initiate mediation relating to enforcement actions involving farm mortgages. [Office of the Victorian Small Business Commissioner](#) (December 2011).
- In **Queensland, Australia**, the Queensland Farm Finance Strategy, a public agreement between rural groups and nine banks, requires mediation relating to farm loan defaults. The Rural Financial Counseling Service of Queensland predicts an ongoing increase in debt mediation talks by Queensland graziers in 2012. [Queensland Country Life](#) (December 5, 2011); [ABC.net.au](#) (December 6, 2011)
- The Consumer Council of **Fiji** resolved \$2 million worth of complaints through mediation in 2011, with the largest number of complaints involving landlord/tenant issues and faulty electronic products. [Fiji Broadcasting Corporation](#) (November 24, 2011)
- The Mediation Board of **Trinidad and Tobago** presented Mediation Week in November to help further a culture of mediating all types of conflicts. [Breaking News Trinidad and Tobago](#) (November 3, 2011)
- **Lagos, Nigeria** intended to clear a backlog of 300 cases across a range of subject matters during settlement week in December, using mediation and other forms of alternative dispute resolution. [234Next.com](#) (November 16, 2011)
- The National Debt Mediation Association in **South Africa**, a nonprofit organization established by the credit industry, has addressed 1900 valid complaints against credit providers since it was established 19 months ago. [Fin 24](#) (November 8, 2011); [NDMA Website](#)

mediation for \$1 million. [Press of Atlantic City](#) (December 29, 2011)

Mediation resulted in a \$500,000 settlement for a widower from a truck accident that injured his wife, who died from infection contracted in the hospital. [Delmarvanow.com](#) (December 28, 2011)

A New Zealand land use decision reached through mediation will permit retail development to begin, likely in 2012. [Stuff.co.nz](#) (December 30, 2011)

A city's reconstruction of a main street to prevent flooding is beginning after a settlement with Amtrak in a court-ordered mediation. [Indystar.com](#) (December 24, 2011)

Mediation has been ordered in a nearly ten-year-old dispute over a home entertainment system in which there have already been two jury trials, trips to the Kentucky Court of Appeals and the Kentucky Supreme Court, as well as battles in a U.S. Bankruptcy Court. [Kentucky.com](#) (December 16, 2011)