



# ADR

## NEWSLETTER

ALTERNATIVE DISPUTE RESOLUTION in the NINTH CIRCUIT COURTS



SUMMER 2015

# Northern District Bankruptcy Court Mediates Mortgage Loan Modifications

One of the troubling discoveries of the Great Recession was the complex relationship among rising home values, the extension of easy credit to homebuyers, and the economic crisis arising from the unsustainable housing bubble. Mortgage lenders were accused of using the bubble to take advantage of unsophisticated homebuyers, and the attorneys general in several states sued the banks for these practices. A large settlement with the banks resulted in changes to their lending practices and made it possible to modify existing home loans.



*Committee member Roger L. Efremsky is the chief bankruptcy judge of the Northern District of California.*

In California, Attorney General Kamala Harris obtained settlements from three major banks, Bank of America, Citibank, and JP Morgan Chase, related to their marketing and sale of residential mortgage backed securities. After the settlement, California homeowners could obtain relief through reductions in principal balances and interest rates.

Bankruptcy courts often stand at the intersection between the lenders and debtors seeking loan modifications as part of Chapter 13 petitions. The United States Bankruptcy Court for the Northern District of California has implemented an innovative mediation program to address the loan modification

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## Judge Edward Leavy: A Master Mediator for the Highest Profile Cases

On January 7, 2015, Senior Circuit Judge Edward Leavy of the United States Court of Appeals for the Ninth Circuit celebrated his 58th year on the bench. In addition to 31 years as an appellate jurist, Judge Leavy has served as a state court judge and as a federal magistrate judge and district judge. He also spent six years as a judge of the U.S. Foreign Intelligence Surveillance Court of Review.



*Committee member N. Randy Smith is a Ninth Circuit judge, and Lisa Jaye is a Ninth Circuit mediator.*

In addition to deciding cases, Judge Leavy has further assisted the judiciary by mediating and settling hundreds of cases nationally. Judge Leavy is considered a master at quickly seeing the big picture then simplifying the many legal variables. His intelligence, patience, humor, common sense, and integrity are noted and respected by all mediation participants.

Case management as a magistrate judge in civil cases led Judge Leavy to experiment

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## LOAN MODIFICATIONS *continued from page 1*

issues for debtors and lenders. The Mortgage Modification Mediation Program was created pursuant to General Order 29 and is designed to function as a forum for individual debtors to explore mortgage modification options with their lenders for real property in which they have an interest or are obligated on the promissory note or mortgage.

The goal of the MMM Program is to facilitate communication and exchange of information in a confidential setting and encourage the parties to finalize a feasible and beneficial agreement under the supervision of the bankruptcy court. Options available under the MMM Program include modification of a mortgage or surrender of real property owned by an individual debtor.

The mediation program allows either the debtor or the lender to seek an order of referral to mediation. The debtor, the debtor's attorney, the lender, the lender's California legal counsel, and any co-borrower or third-party obligor is required to participate in the mediation process. To expedite the exchange of relevant information between the debtor and lender, the MMM Program mandates the use of a secure online portal and an online document preparation program that facilitates the preparation of debtor's loan modification package. Default Mitigation Management, LLC, developed the document preparation software and is the approved vendor for the mediation program. The court may approve the use of other vendors in the future.

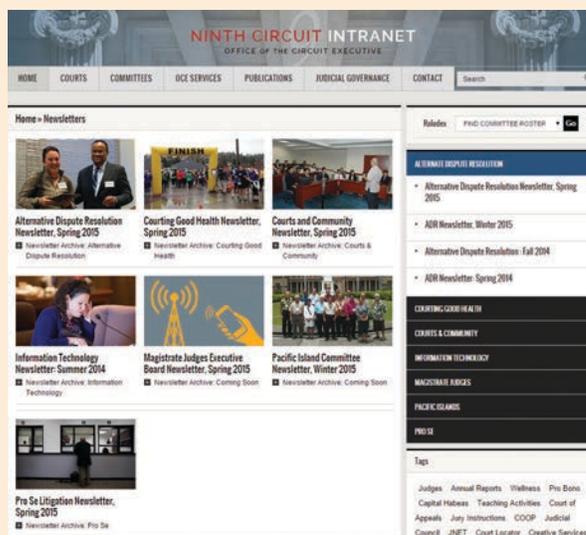
Seven days after the entry of a mediation referral order, the debtor must submit documents to the online portal and select a mediator from the court's approved list. Fourteen days after the referral order, the lender must submit its documents and agree to the mediator selection or request a different one. When the parties disagree on the mediator, the court clerk randomly selects a mediator from the approved list. At the time of their document submission, the debtor and lender are responsible for a \$40 portal submission fee and a \$300 mediator fee. The use of the portal and the document preparation software eliminates the

need for multiple submissions of documents and unnecessary delay in the mediation process. The mediation sessions must be completed within 150 days of the order of referral to mediation. The court will confirm a debtor's plan only after the mediator has filed a final report and approve the terms of the loan modification agreement when one is reached.

Unless the court agrees, all written communication between the parties regarding the mediation is sent exclusively through the MMM Portal. The Chapter 13 trustee has access to the portal but cannot read the contents of documentation, correspondence or other confidential information. Free training on the use of the MMM Portal is available to all attorneys and lenders. The bankruptcy court's webpage also includes MMM Portal training materials on mortgage modification, including contact information for the MMM Portal vendor and information on the document preparation software.

Please feel free to contact me if you have questions. ●

## Looking for Past Issues of the ADR newsletter?



The screenshot shows the Ninth Circuit Intranet website. The main navigation bar includes links for HOME, COURTS, COMMITTEES, OCE SERVICES, PUBLICATIONS, JUDICIAL GOVERNANCE, and CONTACT. A search bar is located on the right. The page title is "Home - Newsletters". The main content area displays a grid of newsletter thumbnails with titles and dates, such as "Alternative Dispute Resolution Newsletter, Spring 2015", "Courting Good Health Newsletter, Spring 2015", "Courts and Community Newsletter, Spring 2015", "Information Technology Newsletter, Summer 2014", "Magistrate Judges Executive Board Newsletter, Spring 2015", "Pacific Island Committee Newsletter, Winter 2015", and "Pre Se Litigation Newsletter, Spring 2015". A sidebar on the right contains a "Relate" section with a "PDF COMMITTEE ROSTER" link and a "NEWSLETTER ARCHIVE" section with a list of newsletter issues: "Alternative Dispute Resolution Newsletter, Spring 2015", "ADR Newsletter, Winter 2015", "Alternative Dispute Resolution - Fall 2014", and "ADR Newsletter, Spring 2014". Below the sidebar are sections for "COURTING GOOD HEALTH", "COURTS & COMMUNITY", "INFORMATION TECHNOLOGY", "MAGISTRATE JUDGES", "PACIFIC ISLANDS", and "PRE SE".

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with mediation, and he has developed and honed his mediation skills over the past 35 years. Today, he continues to help resolve complex cases of national significance as well as many other civil matters that are referred to him. Listed below are a few of the significant settlements he has negotiated in national high profile cases.

**2004 - Present: Mediation Continues Between California Parties and FERC**

The Federal Energy Regulatory Commission, or FERC, Refund Proceedings stem from the energy crisis in California and the Pacific Northwest involving billion dollar claims that Enron and other sellers manipulated the energy markets and charged unjust rates in 2000 and 2001. By 2003, the Ninth Circuit had 244 petitions challenging FERC's decisions in connection with the energy crisis.

The Ninth Circuit assigned Judge Leavy to oversee the many pending matters and to explore mediation. Initially, there were over 80 parties and 125 lead attorneys involved. Given the extraordinary magnitude of the cases, FERC offered its staff to assist in settlement discussions, and Judge Leavy has led the mediation team of FERC and Ninth Circuit mediators since 2004.

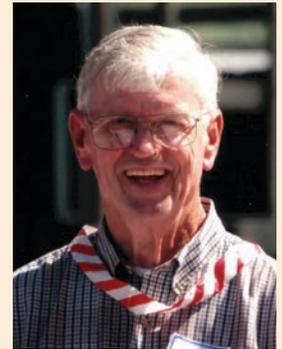
As of March 2015, petitioners have settled with 80 percent of the seller respondents and have negotiated FERC-approved settlements totaling several billion dollars in refunds to ratepayers, including a single settlement of \$750 million in 2014. The parties credit Judge Leavy's leadership, patience, wisdom and guidance in bringing about many of those settlements. Settlement negotiations with the remaining sellers are ongoing.

**2004 - 2009: Benchmark Settlement Reached in Tribes' Suit**

In 2002, The Confederated Tribes of Warm Springs Reservation of Oregon filed a trust mismanagement case against the federal government. The case consisted of two separate lawsuits—one filed in the U.S. Court of Federal Claims and the other filed in the U.S. District Court for



*A ceremony marking the settlement of lawsuits brought against the federal government by The Confederated Tribes of Warm Springs Reservation of Oregon was held in 2009 during the U.S. District Court of Oregon Historical Society's annual picnic held at Judge Leavy's farm.*



the District of Columbia. The scope of the tribes' case included alleged mismanagement of the tribes' trust funds and trust resources spanning many decades. In 2004, the parties looked beyond the D.C. Circuit and selected Judge Leavy as the settlement judge.

Between 2006 and 2009, with Judge Leavy's assistance, the parties settled the tribes' claims. In August 2009, the tribes and the U.S. celebrated these historic settlements during the U.S. District

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## LEAVY *continued from page 3*

Court of Oregon Historical Society's annual picnic held at Judge Leavy's farm. The event was capped by a ceremony in which the parties signed a Commemorative Memorandum.

At the time, the settlements Judge Leavy successfully mediated were among the first and the more significant ones that emerged from the hundred or so Indian tribal "breach of trust" cases against the U.S. The paradigm Judge Leavy created helped guide subsequent settlement efforts between the federal government and the other litigating tribes and served as a benchmark.

### **2001 - 2002: Plaintiffs, Capital Consultants LLC Find Resolution to Pension Suit**

In 2001, Judge Leavy was asked to mediate the civil litigation surrounding one of the biggest pension fraud cases in the country. Capital Consultants LLC of Oregon once managed nearly \$1 billion in investments. When the firm lost more than \$350 million of client funds, it was taken over by federal regulators. Former clients, including union benefit plan trustees and union members, filed over 30 separate lawsuits against the investment firm, their advisors, attorneys, and accountants, and against each other. Also involved in the protracted litigation were the U.S. Department of Labor and the U.S. Securities and Exchange Commission.

The civil cases were consolidated before three different Oregon district court judges. Senior District Judge Garr M. King suggested the plaintiffs go into mediation to reduce the staggering legal costs of multiple cases with over 100 attorneys. Judge Leavy was selected as the mediator, and over a period of six months, quietly and effectively reached settlements with 75 percent of the defendants. Within a year, all final settlements were accomplished and court-approved.

The initial settlements totaled over \$142 million, and together with the proceeds from the sale of assets and additional monies obtained through further

mediations Judge Leavy handled, the total payout to pensioners and other investors over the next two years was over 70 cents on the dollar. This exceptional result was possible because of Judge Leavy's determination to effect fair settlements in complex, interrelated lawsuits, without having attorneys' fees consume a disproportionate portion of the recovery.

### **1999 - 2000: Judge Expedites Settlement in Wen Ho Lee Case**

In one of the highest profile federal criminal cases ever settled, Judge Leavy assisted judges in the District of New Mexico regarding the indictment of Dr. Wen Ho Lee for mishandling the nation's nuclear secrets. After he was indicted, Dr. Lee was denied bail and placed in solitary confinement for nine months. This complex criminal case, involving surveillance and national security issues, received national attention and was a political quagmire for the Clinton administration. The U.S. Department of Justice and Dr. Lee's attorneys selected Judge Leavy to mediate a plea agreement. Judge Leavy expeditiously and successfully negotiated a plea agreement in which Dr. Lee pled guilty to one felony count, and the government received the information it sought. Judge Leavy oversaw the sensitive wrap-up procedures of Dr. Lee's plea agreement over the following year. ●

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## Committee Website and Newsletter Archive

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