Mediation of Class Actions Since the "Financial Meltdown"

Hon. William Cahill (Ret.)

On August 28, 2008, the Dow Jones Industrial Average closed at 11,715. By November 21, 2008, it had fallen to 8,046, and on March 9, 2009, it had sunk to a low of 6,547 (as of this writing, it has risen to over 9,400). This "financial meltdown" or "Great Recession" has effected all litigation, including mediations of class actions.

"No Money to Settle" Rings True More Often

The most obvious change in all mediations that has occurred since last fall is that defense statements that the defendant company has no money or "is too broke" to pay a reasonable settlement have become statements that plaintiff's counsel must treat with less skepticism than they have in the past. It is now less likely that the statements are a "bluff" made in an effort to create leverage in negotiations, but in fact may reflect a serious reality. For example, in a class action against a large bank, plaintiffs during a mediation last fall rejected a $25,000,000 offer. Months later that bank began appearing in the national news for reasons completely unrelated to the litigation, and the $25,000,000 settlement offer simply disappeared following the "financial meltdown."

As in all mediations, where the defense raises the possibility that there is insufficient money to pay a reasonable settlement, the plaintiff's counsel, whether she believes the cry of poverty or not, still needs actual evidence of that fact before advising the client. A lawyer simply cannot advise his or her clients to take a small settlement based on a hearsay statement by defense counsel that is made in a confidential mediation setting. In the past, when this issue came up, defendants were often reluctant to make audited financial statements available or make declarations under oath as to their personal financial situation. There was often the statement, "I am telling you the truth, go ahead and take me to trial and see."

After the "financial meltdown" some defendants have become almost anxious to provide private financial information to plaintiffs (often under a protective order and often "for attorneys' eyes only"). It appears that today more and more defendants are facing actual and serious financial difficulties and want to do what they can to end expensive litigation earlier. To

(continued on page 4)

Author Spotlight

Judge William Cahill (Ret.) of JAMS is a nationally renowned mediator who has successfully assisted parties in resolving numerous complex and highly contentious matters.

Originally published, Class Action Litigation Newsletter, Vol. 1, issue 2. Copyright American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®). Reprinted with permission (September 2009).

© (2009) American Association for Justice's Class Action Litigation Group

Mediation of Class Actions Since the "Financial Meltdown"

(continued from page 3)

accomplish this they are taking the position of offering what they can afford and justifying that position by providing financial information where they would not have done so before. If that fails, they feel they have no choice but to save their company by "rolling the dice" and going to trial. It is their hope that they can convince the plaintiff that a judgment will be hard if not impossible to collect and therefore they hope to settle in a range they can actually afford under the circumstances.

Beginning in Late 2008 There Were Changes in Mediation Negotiations

Beginning in November 2008 and continuing through January 2009, the number of class action and commercial mediations (at least for many of the persons I know) dropped by 10%-20% or more. Since then, while there has been an increase, the number of mediations has not reached "Pre-Meltdown" days. One of the explanations given is that individual companies and corporations during the "meltdown" were in "shock" and were doing nothing except trying to remain solvent. Almost no one had seen these major financial problems coming. Resolving litigation became a low priority compared to keeping the company from going out of business. And, in my experience, when the mediation did take place, the statements that an offer was a "bottom line" or a "take it or leave it" became much more firm than in any other time. For the 10 years I was a judge and 9 years as a mediator, I never literally believed such statements and neither did sophisticated and professional counsel. That changed last fall.

"Almost no one had seen these major financial problems coming. Resolving litigation became a low priority compared to keeping the company from going out of business. And, in my experience, when the mediation did take place, the statements that an offer was a "bottom line" or a "take it or leave it" became much more firm than in any other time."

Starting last fall such statements started becoming more and more true. Defense counsel and in-house counsel appeared to start analyzing settlement differently. Companies in real financial trouble were deciding that they could only pay a certain amount of money on the matter, regardless of the strength of the claims. If the amount they could pay was insufficient, many defendants would not increase their offer. Instead, they made the decision simply to use that same money to pay their defense lawyers over time. The expenditure would then not be used for settlement, but would be gradually stretched over months and maybe years. That way either the economy would improve and they would be in no worse a position vis a vis settlement, and if the economy did not improve, they believed that there was a good chance the company would no longer exist. The merits of the case faded in comparison to the focus on a company's short-term survival.

Insurance Coverage Disputes Show a New Strain

Since the "financial meltdown" I have seen cases where the relationship between an insurance carrier and its insureds has become even more strained than they sometimes were before. Mediation often involves not only the plaintiff/

Originally published, Class Action Litigation Newsletter, Vol. 1, issue 2. Copyright American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®). Reprinted with permission (September 2009).

© (2009) American Association for Justice's Class Action Litigation Group

defendant negotiations, but also the defendant/carrier coverage negotiations. Although they take different forms, these coverage disputes often have to do with which claims are covered (and thus paid by insurance) and which claims are not covered. Such defendant/carrier disputes typically concern how much a defendant company will contribute to a settlement as compared to the carrier based on coverage arguments. Such disputes are quite common, presenting themselves in numerous forms and contexts.

> ***" Companies, even those with a lot of cash on hand or a fairly consistent revenue stream, became more and more reluctant to contribute to a settlement, not because they were being advised by coverage counsel that the carrier's position was unreasonable, but because corporate officers honestly believed that to pay a substantial settlement out of their liquid corporate funds now created problems that were worse than continued litigation with plaintiff or the carrier."***

After the "financial meltdown," such insurance coverage disputes often became more intense. The carriers now would ask and demand contributions to settlement and companies would simply refuse. The refusal differed from past situations because the dispute would take a form that was unrelated to the coverage positions or litigation. Companies, even those with a lot of cash on hand or a fairly consistent revenue stream, became more and more reluctant to contribute to a settlement, not because they were being advised by coverage counsel that the carrier's position was unreasonable, but because corporate officers honestly believed that to pay a substantial settlement out of their liquid corporate funds now created problems that were worse than continued litigation with plaintiff or the carrier. Often the defendant had made recent layoffs and there was a real possibility that there would be a need to further reduce their workforce. In some cases revenues were down substantially even from a few months before and there were concerns that cash would be needed to cover expenses, not resolving cases. Although this argument had not been made much in the past, the changed circumstances caused by the "meltdown" made the corporations very firm in their positions. As a result it has become more common for the carriers to simply pay more money than they would have a year ago to resolve the matter, or sometimes the litigation that could have settled a year ago simply does not resolve. Of course, if a plaintiff or his or her counsel becomes convinced that a defendant is indeed in a financial emergency, they agree to settle, often below what they believed to be an appropriate "pre-meltdown" value.

The Usual Class Action Settlement Issues Arise, but With More Intensity

Of course the merits of a normal class action lawsuit continue just as they did "pre-meltdown," but for the reasons stated above, the issues sometimes are negotiated more intensely than before. The class definition, the size of the class, the source of funds to pay for publication and notice, the amount of the settlement and possible reversion and *cy pres* continue to be the subject of intense negotiation. It may be the case now that defendants are willing to settle on behalf of a smaller class than they would have otherwise, thus taking the

(continued on page 6)

Originally published, Class Action Litigation Newsletter, Vol. 1, issue 2. Copyright American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®). Reprinted with permission (September 2009).

© (2009) American Association for Justice's Class Action Litigation Group

Mediation of Class Actions Since the "Financial Meltdown"

(continued from page 5)

chance that they do not get *res judicata* for the largest possible number of class members. This has been explained as simply a cost control measure. In these economic times, Defendants are balancing the risk of a future lawsuit for another class with the cost of paying a larger settlement.

or arbitrator decide the fees (defendants needed to know the entire cost of a settlement), but that also is becoming more common with defendants choosing to litigate fee issues.

There also appears to be more of an effort by defendants to resolve class actions

"I have been told that in-house counsel in these economic times have a difficult time convincing management that there are good reasons to spend corporate money on settlements, and a Mediator's Proposal gives them an extra level of credibility. The same is true for public entities, and perhaps even more so. Whatever its genesis, the phenomenon is recent and it would not be too far from the truth to say that more than 50% of my mediations include some type of Mediator's Proposal."

Always the subject of intense negotiations, the resolution of the issue of the defendant paying class counsel's attorneys' fees also has, if possible, become even more intense, but there have also been changes. If the fees cannot be resolved at the mediation, defendants, who would refuse in the past, are more likely to take the fee dispute to binding arbitration or baseball arbitration. It used to be that defendants rarely agreed to have the court

very early. If this trend proves successful it will benefit everyone: the Court, the class, the defendant, and counsel. For an early settlement approach to succeed, however, the defendant has to be willing to provide all reasonable discovery promptly so that the plaintiffs can properly evaluate their case; the plaintiff has to do the same. Once that procedure is complete the class action can be settled if everyone believes that the facts are being represented by the other side truthfully. Early settlement negotiations fail most often when one side simply does not trust what it is being told. Parties who understand this can accomplish early settlement. Since the "meltdown" there are more parties who are taking these steps and getting early settlements.

Counsel on both sides of the litigation have begun to live with these new realities of mediation. Defense counsel obviously realized it sooner. The cost of litigation has had clients even more conscious of containing costs. Fewer lawyers appear to be coming to mediations in an apparent effort to reduce fees, and we are told by defense counsel that there is new pressure on counsel to reduce their fees. It also appears that corporate counsel have become more and more active in the actual mediation negotiations. In some early mediations, outside counsel does not attend at all.

For quite a while the plaintiffs' bar did not appear to recognize how the "financial meltdown" affected their practice. I mentioned earlier about the $25,000,000 offer that disappeared when the defendant company ran into serious financial problems. On the plaintiffs'

Originally published, Class Action Litigation Newsletter, Vol. 1, issue 2. Copyright American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®). Reprinted with permission (September 2009).

© (2009) American Association for Justice's Class Action Litigation Group

side, while it was always the case when examining defendants' financial statements, there is now even more insistence on seeing actual proof of a poor financial situation, with some lawyers hiring forensic accountants to verify the financial situation of defendants. And, not surprisingly, plaintiffs are sometimes settling cases for less than they have been in the past. In fact, within the last week a class action plaintiff's counsel actually accepted a "take it or leave it and do not give me a counter" defense offer, forgoing the option of walking out in the hopes of increasing the value of the settlement later in the litigation. That just did not happen a year ago.

The "meltdown" also may have lead to an increased desire for "Mediator's Proposals" and it may be that those Proposals are more and more often accepted (I continue to find that when counsel ask for a Mediator's Proposal it is too early to give one that is effective). I have been told that in-house counsel in these economic times have a difficult time convincing management that there are good reasons to spend corporate money on settlements, and a Mediator's Proposal gives them an extra level of credibility. The same is true for public entities, and perhaps even more so. Whatever its genesis, the phenomenon is recent and it would not be too far from the truth to say that more than 50% of my mediations include some type of Mediator's Proposal.

Mediators have not only been affected by the current economic climate; they have been affected by the fact that mediation as a whole is becoming more and more sophisticated and pro-active. Parties' heightened cost-consciousness has made it more important for mediators to quickly get to the issues. Every effort must be made to have cases resolved in one day. This need for results has led me to more frequently require pre-mediation telephone calls that might even include clients and carriers. Follow-up, especially right after the mediation session, has become even more important. Preparation has always been essential, but it is even more so now. It costs a lot to prepare a case so that it is ready for mediation (tens of thousands of dollars often), and while using every tool available to be an effective mediator has always been the rule, it is more so now given the economic realities that everyone is living under since the "financial meltdown."

Finally, I want to note one other noteworthy new thing that is happening in mediation,

(continued on page 8)

PRACTICE POINTER

*Whatever class definition you proposed for certification, a defendant will usually be able to come up with some scenario—real or theoretical—in which uninjured class members would be included. The next time a defendant argues that class certification is inappropriate because it would impermissibly bestow judicial standing on those who have suffered no injury, look to a recent trend in class action case law, which recognizes that requiring a class representative to demonstrate individual injury for each and every class member would defeat the purpose of class-wide representation. See, e.g., Rodriguez v. Hayes, --- F.3d ----, 2009 WL 2526622, *13 (9th Cir. Aug. 20, 2009) ("The fact that some class members may have suffered no injury or different injuries from the challenged practice does not prevent the class from meeting the requirements of Rule 23(b)(2)."); Kohen v. Pacific Inv. Management Co. LLC , 571 F.3d 672, 677 (7th Cir. July 7, 2009) ("[A] class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification..."); In re Tobacco II Cases, 46 Cal.4th 298, 318-319, (2009) (concluding that only the class representative must demonstrate standing to sue under California's Unfair Competition Law; "the question of standing in class actions involves the standing of the class representative and not the class members").*

Originally published, Class Action Litigation Newsletter, Vol. 1, issue 2. Copyright American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®). Reprinted with permission (September 2009).

© (2009) American Association for Justice's Class Action Litigation Group

Mediation of Class Actions Since the "Financial Meltdown"

(continued from page 7)

even though it probably does not relate to the "financial meltdown." There have always been great trial lawyers — rarer in corporate litigation than before, but still with us. Similarly, many litigators are great law and motion or discovery lawyers. What is new, however, is the emergence of more and more very good "mediation lawyers." These lawyers start with demands or offers that show that their client is serious about settlement. They do not start with a demand that is so high and unreasonable that it causes an equally low and unreasonable offer. If the other side is being unreasonable, these lawyers ignore the other side's position and remain reasonable. They are well-prepared and they have carefully prepared their client for the mediation process. They even manipulate the mediator to their advantage. In one instance, looking back on it, I am sure that one lawyer started working on manipulating my Mediator's Proposal hours before I made it. And throughout the day she never took a position she could not justify and she did not change her mind when she outlined how she got to where she was (but she was open to better arguments). As more and more lawyers learn to be expert mediation lawyers the process will work better for everyone (and maybe even conclude successfully before 4 pm everyday). ■

PRACTICE POINTER

With CAFA steering more and more class actions into the federal system, district court judges are increasingly looking for ways to isolate those cases most deserving of the substantial time and effort that class litigation entails. The class certification stage has long served such a filtering process, and now courts are frequently engaging a similar "rigorous analysis" at the pleading stage as well. The impact of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (May 18, 2009), has been felt most in complex litigation, where courts have the greatest incentive to exercise their discretion to dismiss cases that, based on the courts' own "experience and common sense," strike them as implausible. Similarly, district courts are frequently relying on FRCP 9(b) to separate class cases with detailed factual allegations, and thus a greater likelihood of reaping substantial benefits for the proposed class, from those that are more speculative in nature. Even when the underlying substantive law would not require detailed factual allegations, the Ninth Circuit Court of Appeals recently safeguarded the district courts' rights to insist on particularized pleading as a procedural matter. See Kearns v. Ford Motor Co., 567 F.3d 1120 (9th Cir. June 8, 2009). Some lessons from these shifts in the law: Treat your class pleadings as an appeal for a scarce resource. Work to convince the judge that your case, out of the many class actions that have and will be filed before him or her, is likely to benefit a large group of people and is thus worthy of serious judicial resources. In other words, remember that when Congress enacted CAFA, it didn't simultaneously increase the size of or the resources available to the federal court system, which all of a sudden found itself adjudicating many complex matters that had long been the province of the state court system. That reality may have an impact on your case.

Originally published, Class Action Litigation Newsletter, Vol. 1, issue 2. Copyright American Association for Justice, formerly Association of Trial Lawyers of America (ATLA®). Reprinted with permission (September 2009).

© (2009) American Association for Justice's Class Action Litigation Group