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PERSPECTIVE

Steps for a successful class action mediation

By Louis M. Marlin

Successfully settling a class action through mediation requires considerable expertise in class action litigation. While the first step is to find a mediator experienced in class litigation, the work does not end there.

Before discussing the various factors that counsel should consider, it is important to decide when these factors should be addressed. My practice has been to raise the “nuts and bolts” demands either shortly before the scheduled mediation or at the very onset of the process. The reason is that the items discussed below may have a significant impact on the parties’ willingness to settle. The best practice is to address these items in a letter to opposing counsel and their mediator far enough before a mediation to allow both sides to consider the same and prepare, at a minimum, to craft their position as to each so that a meaningful give and take can occur.

Ultimately, in addition to having the amount of a settlement agreed to, the following issues should also be resolved within the context of either a memorandum of understanding (MOU) or, in rare situations, a formal settlement agreement:

The Class Definition: If the class has not yet been certified, having a clear and well-defined class, and specifying any individuals or categories of persons who are excluded from the class, is critical. Even if the class has already been certified, it is not unusual for a party to want to expand or modify the class definition to obtain a more global release for the defendant. Doing this up front avoids future disagreements.

The Class Period: While the pleadings may have defined the class period as starting on a date prior to filing and ending “upon the entry of judgment,” the fact is that by settling, the parties are agreeing upon a sum certain to comprise the gross settle-

ment fund. If the actions allegedly forming the basis for a defendant’s liability are ongoing, the damages keep growing, perhaps on a daily basis. With our courts as busy as they are, and in light of the court funding crisis, both the preliminary and final approval of a class settlement can take up to six months. Thus, the parties need to agree on the cutoff date: the date the settlement is agreed to, the date a motion for preliminary approval is made, or some other definable date.

The Size of the Class: Class size is a critical factor. Reaching a settlement number only to find that the class is meaningfully larger or smaller than one side envisioned means there is simply no meeting of the minds. Particularly in wage and hour litigation, the full-time equivalent (FTE) number is also important. Thus, while there may be 500 people in a class, the turnover of defendant’s employees may be such that, on average, there are only 300 full-time employees at any given time. The FTE number is the one that an approving court will often use to determine if the settlement is fair and reasonable.

The Type of Settlement: There are two basic class action settlement types: (1) claims made, and (2) non-reversion. In the case of a claims made settlement, all or a portion of the gross settlement amount will be returned to the defendant if all class members do not make claims for their share of the settlement fund. This form of settlement, by definition, requires that class members affirmatively act to claim their share of the fund, despite the fact that their claims may be extinguished if the matter is granted final approval by the court. In a nonreversion settlement, the defendant commits to paying the gross amount with no chance of receiving any reversion of funds. Nonreversion settlements often do not require class members to make claims. The impact of the two types of class settlements will no doubt

have a direct impact on the agreed upon gross settlement amount.

The Extent of the Claim Form: In a claims made settlement (and some nonreversion settlements) the extent of information that a class member must provide can have a direct impact on the level of participation in the settlement. It should be decided what information must be required, as well as what declarations under oath a class member will have to make.

The Calculation of Settlement Shares: Determining the method by which the settlement fund will be divided among class members is crucial. While in some cases this is straightforward (e.g., a consumer matter with a payment for each product purchased), in others it can be complex (e.g., an employment case involving full-time and part-time workers). The issue should be resolved during the mediation negotiations.

The Scope of the Release: The release language in a class settlement agreement is often the most hotly contested issue. Is the class releasing all claims that were (or could have been) raised in the case? Or, is the release limited to specifically enumerated claims? There are, of course, several other variations. What is vital is that the scope of the release is an absolutely critical issue in negotiation.

The Cost of Administration: It is important to have a good understanding of the anticipated cost of class settlement administration when considering the funds that would be available to class members if a settlement number is reached. Factors like the type of settlement, the length of the notice, the complexity of the claim form, and the extent of the administrator’s involvement with calculation of settlement shares will directly impact the net settlement. It is always good to speak with an experienced claims administrator early in the settlement process.

The Drafting and Signing of a Settlement Agreement: Most successful class mediation sessions end with the signing of a MOU, leaving the drafting of a formal settlement agreement to the future. To avoid delays and unnecessary disagreements, the parties should agree (1) which side will take the laboring oar to prepare an initial draft of the agreement, and (2) a deadline for completion of the first draft. Once a first draft is out, there is usually little delay in finishing the process.

The Timing of Funding: While there is a two-step process for obtaining court approval of a class settlement, once that is accomplished disagreements may arise as to when funds are to be paid. Since there usually are no objections to most class settlements, and only objectors have the right to appeal, plaintiffs’ counsel want funding to take place within a few days of the final approval being granted by the trial court. On the other hand, defendants’ counsel are concerned that an appeal might be filed by someone who did not object, and that an appellate court might entertain the same. Both sides have legitimate positions, thus making this issue ripe for discussion during the mediation.

The proper and comprehensive mediation of a class action takes experience and careful thought. The key is understanding the nuances of your case, communicating your positions early in the process, and employing a mediator with substantial experience in this type of complex litigation, who understands the importance of including these issues in the discussion.



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