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## Class Actions

### **Meet the Mediators Who Brokered \$1B in 401(k), Bias Settlements**

BY CARMEN CASTRO-PAGAN

Thousands of employment-related class actions are filed each year in federal courts across the nation, and both sides tend to turn to a small group of high-profile attorneys known for their track records in reaching big-ticket settlements.

Mediators—usually neutral attorneys who help the parties to negotiate an agreement to end their dispute—play a key role in most if not all of the major federal court employment-related class actions that are settled. When settlement talks start, some lawyers look at the names of the mediators proposed by opposite counsel to judge how serious the party is about engaging in negotiations.

Mediators Hunter Hughes III and Robert Meyer are responsible for a chunk of the action. Between the two of them, they've helped negotiate over \$1 billion in employment-related class action settlements over the past 10 years. Hughes and Meyer, who haven't worked together and don't know each other, both started mediating cases after long careers practicing law. For this story, Bloomberg Law did an analysis of data over the past decade but both men have been mediating longer than that.

They've served as mediators in workers' class actions against some of the country's largest employers, including JPMorgan, Lockheed Martin, Tyson Foods, Citigroup, JC Penney, Honeywell, TD Bank, KMart, and Abercrombie & Fitch.

**401(k) Excessive Fee Litigation** Hughes has mediated at least 69 employment-related class actions over the decade, according to Bloomberg Law dockets. He is a frequent mediator of excessive fee cases under the Employee Retirement Income Security Act, having successfully mediated 12 of these cases since 2008. Hughes is also a frequent "neutral" in cases involving employment discrimination, and wage and hour disputes.

Hughes has been mediating cases for the past 20 years. He practiced employment law until 2015, specializing in bias class actions, he told Bloomberg Law. Now he serves only as a mediator, based in Atlanta but taking cases across the nation.

He started as a mediator in 1997 when the parties' attorneys in a sex discrimination dispute involving Publix Super Markets asked him if he could assist in mediating the case. It took him three months to settle the case

for a "pretty large amount of money," Hughes said. The case settled for \$81.5 million, according to court documents.

Hughes has mediated some of the most high-profile 401(k) fee class actions against major employers, including Lockheed Martin, Boeing, MassMutual, Cigna, and Caterpillar. Just four months ago, he assisted in the JPMorgan \$75 million settlement that, if approved, would end a class action accusing the banking giant of investing its stable value funds in risky, mortgage-related assets. Hughes has also mediated employment discrimination disputes involving Citigroup, H&R Block, and Willis Group, and wage and hour cases against Tyson Foods, Abercrombie & Fitch, and Dicks Sporting Goods.

**Wachovia, AOL, Lots of Hospital Pensions** Meyer usually serves in cases involving pension disputes, stock drops, consumer fraud claims, and complex business issues. He has been mediating cases for the past 12 years, Meyer told Bloomberg Law.

He has mediated workers' retirement benefits disputes, including cases where Wachovia, which was later acquired by Wells Fargo, and JC Penney were accused separately of investing their employees' retirement assets in the companies' own declining stock. In 2006, he mediated the AOL Time Warner \$100 million settlement that ended a lawsuit by workers accusing the company of violating ERISA by investing in AOL's stock fund during a period in which the company lost its traditional online advertising revenue base, Meyer said.

Since 2016, he's been busy mediating lawsuits brought by hospital workers who claimed that religiously affiliated institutions underfunded their pension plans by wrongly treating them as church plans exempted from ERISA requirements. More than two dozen such hospitals have been accused of underfunding their plans by hundreds of millions of dollars to their workers' detriment.

So far, Meyer has successfully mediated cases against eight hospitals, including Holy Cross, St. Joseph's, Bon Secours, Saint Francis, and Trinity Health. These mediations have resulted in commitments from hospitals to pay nearly \$400 million to their workers' pension plans.

Meyer has also served as mediator in cases filed by the Labor Department against companies that allegedly allow employee stock ownership plans to buy company stock at inflated prices, he said.

**How Do You Spell Success?** Attorneys representing both sides in these cases agree that the list of mediators for these complex employment cases is very short. In wage and hour cases, there are probably 25 mediators

who are suggested all the time, while in ERISA cases there are approximately 15, said Paul Lukas, a partner at Nichols Kaster PLLP, a law firm that usually represents plaintiffs.

There's a very large group of lawyers who do mediation, but there's a reasonably small group of mediators who are viewed by the parties--including plaintiffs, defendants, and insurers--as acceptable and successful, Craig Martin of Jenner & Block told Bloomberg Law.

In the big cases, which include ERISA and wage and hour disputes, the list of names generally includes the "usual suspects," Lukas added. "You usually know where the defendant is with respect to settling by the mediator they suggest," he added. If they select Hughes, "I know the defendant is serious about settling the case," Lukas added.

A good mediator never quits, he or she calls back, tracks cases, and always has a plan, Lukas said. Good mediators give a fair read of a case's facts and law, and make sure the settlement is reasonable, Craig said. A good mediator needs to have credibility, Lukas said. "I may disagree with some of what they say, but at the end of the day their opinion has to ring true to me," he added.

**Insurers Complicate ERISA Cases** Hughes and Meyer agreed that mediating has become more difficult in the past 10 years. It used to be you could mediate a complex class action in one day, but that's not common these days, Meyer said.

Both mediators also said that the increasing role of insurance companies has affected the process. Insurers now engage outside lawyers who are very active in the process, they said.

ERISA cases take time to mediate but no longer than discrimination disputes, Hughes said. But ERISA cases

are the most difficult to settle in terms of reaching a monetary remedy, he said. Also complicating things—there are a lot of parties, sometimes up to five insurers with their own respective attorneys. About 90 percent of cases eventually settle over time, not necessarily on one day. "I had one discrimination case that took two years to settle, and it had 23 separate defendants," Hughes said.

Wage and hour disputes are more straight-forward and easier to mediate, Hughes who has mediated hundreds of these cases in state court, said.

**Busy Times Ahead** If the number of employment-related class actions continues to rise, mediators' skills, experience, and services will be increasingly crucial.

Labor and employment class actions have become the most common type of class action, making up 37.7 percent of matters, and 38.9 percent of spending, according to the 2017 Carlton Fields Class Action Survey. Consumer fraud, which constituted the bulk of class actions in 2015, are now second, according to the survey.

Hughes and Meyer don't seem to slow down. Earlier this month, Hughes was appointed mediator in a case involving Duke University's retirement plan, according to court documents. If successful, this would be the first settlement in an ERISA case against a prestigious university. Meyer is currently mediating ERISA cases against Adventist Health System, Mercy Health, and Hospital Sisters, according to court documents.

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