

DOUBLE-BLIND SETTLEMENT TECHNIQUES: MEDIATOR MAKES A SPECIFIC SETTLEMENT PROPOSAL

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ERISA CLASS ACTION ALLEGING DEFENDANTS BREACHED THEIR FIDUCIARY DUTY IN MANAGING TWO EMPLOYEE RETIREMENT PLANS

PLAINTIFFS' INITIAL SETTLEMENT DEMAND IN THEIR MEDIATION STATEMENT WAS \$20,000,000 AND DEFENDANTS' INITIAL OFFER IN THEIR MEDIATION STATEMENT WAS \$1,000,000.

PARTY NEGOTIATING MOVES AT THE MEDIATION:

PLAINTIFF: \$18,000,000 DEFENDANTS: \$1,100,000

PLAINTIFF: \$17,900,000 DEFENDANTS: NO NEW OFFER

POSSIBLE ALTERNATIVES:

- 1. DOUBLE-BLIND CONFIDENTIAL BRACKETS GIVEN ONLY TO ME WITH A SPREAD I WILL SELECT, WITH THE MIDPOINT BEING THEIR SETTLEMENT NUMBER. I WILL NOT SHARE ACTUAL NUMBERS. I WILL TELL THEM ONE OF THREE THINGS: A) THEY ARE ON DIFFERENT PLANETS; OR 2) THEY HAVE MADE GOOD PROGRESS, AND I HAVE HOPE; OR 3) THEIR BRACKETS ARE TOUCHING OR OVERLAPPING.**
- 2. I CAN ASK THEM TO EXCHANGE BRACKETS OF THEIR CHOOSING WITH THE MIDPOINT BEING THEIR SETTLEMENT NUMBER, AND I EXPLAIN THE THREE POSSIBLE RESPONSES THEY MAY RECEIVE IF THEY CHOOSE TO EXCHANGE BRACKETS.**

I RECOMMEND TO THE PARTIES THAT WE PROCEED WITH OPTION 1 AND THEY BOTH AGREE:

CONFIDENTIAL BRACKETS GIVEN ONLY TO ME:

PLAINTIFF: \$4,000,000 - \$6,000,000	DEFENDANTS: \$1,250,000 - \$3,250,000
MIDPOINT \$5,000,000	\$2,250,000

PLAINTIFF HAS MADE A SIGNIFICANT MOVE. THIS IS NOT UNCOMMON.

I TELL THEM THEY HAVE MADE GOOD PROGRESS AND I HAVE HOPE. [WHAT IF THEY WERE STILL ON DIFFERENT PLANETS?]

I ASK THEM IF THEY WOULD EACH MOVE THEIR BRACKETS ON A DOUBLE-BLIND BASIS. I DO NOT SPECIFY THE SIZE OF THE MOVE. THEY AGREE.

PLAINTIFF: \$3,500,000 - \$5,500,000	DEFENDANTS: \$1,500,000-\$3,500,000
MIDPOINT \$4,500,000	\$2,500,000

THEY ARE TOUCHING BECAUSE THE BOTTOM END OF PLAINTIFF'S BRACKET AND THE TOP END OF DEFENDANTS' BRACKET ARE BOTH \$3,500,000. THIS MEANS THEY ARE \$2,000,0000 APART AT THE MIDPOINT.

I TELL THEM THEY ARE TOUCHING SO BOTH SIDES KNOW THEY ARE NOW \$2,000,000 APART.

I ASK THEM, ON A DOUBLE-BLIND BASIS, IF THEY WOULD SPLIT THE DIFFERENCE AT \$3,500,000. THIS IS NOT A MEDIATOR'S PROPOSAL BUT A WAY TO SEE IF WE CAN QUICKLY CUT TO THE CHASE AND SETTLE THE CASE. I EXPLAIN IF I RECEIVE ONE "NO", I WILL CONTINUE TO WORK WITH THEM.

PLAINTIFF'S RESPONSE: "NO" DEFENDANT'S RESPONSE: "NO"

I THEN CONTINUE NEGOTIATIONS WITH AN EXCHANGE OF NUMBERS:

PLAINTIFF: \$4,400,000	DEFENDANTS: \$2,700,000
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PLAINTIFF: \$4,300,000	DEFENDANTS: \$2,900,000
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PARTIES LEARN THAT A MOTION TO DISMISS IN A SIMILAR CASE WAS GRANTED WHILE WE ARE IN THE MEDIATION.

PLAINTIFF: \$4,000,000	DEFENDANTS: \$3,000,000
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DEFENDANTS ADVISE ME THEY HAVE NO FURTHER AUTHORITY ABOVE \$3,000,000. I ASK THEM HOW MUCH TIME THEY WILL NEED TO OBTAIN ADDITIONAL AUTHORITY. THEY SAY 5 BUSINESS DAYS. I ADVISE PLAINTIFFS OF THIS FACT AND ASK BOTH PARTIES IF THEY WOULD LIKE FOR ME TO MAKE A MEDIATOR'S RECOMMENDATION. THEY BOTH SAY "YES".

POSSIBLE ALTERNATIVES:

- 1. TELL THEM MY RECOMMENDATION AT THE MEDIATION AND FOLLOW UP WITH A WRITTEN RECOMMENDATION TO BOTH PARTIES TO WHICH THEY WILL RESPOND WITHIN 5 BUSINESS DAYS ON A DOUBLE-BLIND BASIS.**
- 2. THINK ABOUT IT AND SEND A WRITTEN RECOMMENDATION THE NEXT DAY TO WHICH BOTH PARTIES WILL RESPOND WITHIN 5 BUSINESS DAYS ON A DOUBLE-BLIND BASIS.**

I CHOOSE OPTION 1 AND TELL THEM MY RECOMMENDATION IS \$3,500,000 SUBJECT TO THE PREPARATION AND EXECUTION OF A MUTUALLY-ACCEPTABLE SETTLEMENT AGREEMENT AND RELEASE AND COURT APPROVAL. IN THE COURSE OF THE MEDIATION, THE PARTIES HAVE MADE GOOD PROGRESS ON THE STRUCTURE OF THE SETTLEMENT THROUGH COMPLETION OF MY CLASS ACTION CHECKLIST.

WHAT ARE POSSIBLE CLOSING MESSAGES I USE AT THE MEDIATION TO ENCOURAGE ACCEPTANCE OF MY RECOMMENDATION?

MY CASE MANAGER SENDS OUT MY RECOMMENDATION THE NEXT DAY. (SEE MY FORM OF CLASS ACTION MEDIATOR'S RECOMMENDATION).

BOTH PARTIES RESPOND "YES" TO MY RECOMMENDATION.