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Show Me the Money! Damage Analysis is Key to Settling Complex Commercial Cases

BY JAMS

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It's common to see that lawyers can easily discuss the merits of the liability issues, but are not well prepared to discuss the complex damage issues. It seems they are unable to explain the model or math behind the damages, which is where many mediations bog down.

An understanding of the damage model and the facts and figures to back it up is crucial to a successful mediation. Most defendants are not going to roll over and pay substantial sums of money when they have not been presented with a cogent explanation of the damage model and seen the documents, facts and figures to back up the settlement demand. Likewise, most plaintiffs will not easily budge from their demand unless the defense is prepared to poke holes in the damage model and present facts and figures to rebut the plaintiff's claims. A thorough analysis of the damages prior to mediation is necessary for the plaintiff to honestly evaluate its potential recovery and for the defendant to honestly evaluate its potential exposure. To that end, what follows are a few suggestions to consider in preparing for mediation.

Retain a Damages Expert Early

You'll need a damages expert, so get a good one early. No matter whether you represent the plaintiff or defendant, the expert can guide you in gathering information and documents relevant to damages you will need to obtain from your client and the opposing party. If you represent the plaintiff and most of the relevant information is already in your client's possession, your expert may provide you with a detailed damage analysis that includes back-up documents

even before discovery has been done. This may enable you to mediate even before engaging in protracted and expensive discovery.

Send a Detailed Pre-Mediation Settlement Demand

Be sure to send a detailed settlement demand to opposing counsel as soon as the necessary information is available. The demand should include a detailed explanation of the damage model and calculations and provide the key documents that support the damages analysis. Providing this information well in advance of the mediation greatly enhances the chances of settling the case.

Consider Early Mediation

If both parties are motivated to settle, an experienced mediator can assist the parties in formulating a list of documents that both parties agree to exchange pre-discovery. After the documents are exchanged, plaintiff's counsel, with the assistance of the expert, should prepare and send the settlement demand if that has not already been done. Once defendant's counsel and expert have analyzed the demand, defense counsel should consider sending a response that responds to the damage analysis and provides any relevant rebuttal documents.

Educate Yourself, the Client and the Mediator

Counsel should meet with the expert in advance of mediation to make sure counsel has a thorough understanding of the damage model and calculations and is prepared to answer questions about it. The mediator should be given a copy of any settlement demands and responses,



expert reports and relevant underlying documents, as well as any confidential mediation statements.

Damages should not be an Afterthought

In complex commercial litigation, attorneys will greatly improve their chances of settling and saving their clients money if they involve a good damages expert early, provide opposing counsel with a settlement demand that includes a comprehensive explanation of damages as soon as possible, make efforts to mediate early and educate themselves, their clients, and the mediator well in advance of the mediation.

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