

To Settle Or Not To Settle — That Is The Question

Parties involved in business litigation are often motivated to consider settlement for a variety of reasons. They might want to eliminate the costs of litigation or the risks associated with a bad result or they might conclude that they can achieve better relief through settlement

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than they can expect in court. The mistake many litigants make is that they begin discussions without first determining the result they want to achieve in settlement or a strategy to accomplish that result.

Analyzing The Potential For Settlement

You never want to leave any of the other side's potential concessions on the table during settlement discussions, but it is generally a mistake to begin your consideration of settlement by attempting to predict the concessions that the opposing party might be prepared to make. Instead, the starting point in your analysis should be what you want to achieve in settlement. Many participants in business litigation approach settlement as they would approach any other business decision. In other words, they attempt to quantify the risks and benefits of settlement and weigh them against the risks and benefits of continued litigation. In order to conduct this type of settlement analysis, you will need several critical types of information from your attorney.

First and foremost, you will need your attorney's best estimate of your current chances of prevailing on the merits. Do not be frustrated if your attorney's estimate of success falls somewhere in a range between 30-70%. Many clear cut disputes get resolved prior to litigation, and most litigated matters are not so clear cut. In many instances, they are being litigated precisely because both sides feel they have the better position. Moreover, there are inherent risks associated with even the best cases. A jury might do something crazy; you

might draw a bad judge or a good judge on a bad day; or your star witness might have a family medical emergency or might die on the eve of trial. In any event, you should fully discuss with your attorney the basis for his or her estimate.

Next, you will need to quantify the potential damages at issue. A quantification of damages often requires expert analysis and might be based upon information in the other side's exclusive possession. Thus, it might be difficult to accurately quantify damages at early stages of the litigation.

Finally, you will need a budget representing the attorneys' fees and costs that will be incurred through each of the remaining stages of litigation, including appeals. You simply cannot perform a proper settlement analysis without this information. For example, if your claims have a value of \$3 million (a 60% chance of recovering \$5 million in damages at trial) and you are considering a \$2.5 million settlement offer, it is very important to know whether the remaining portions of the litigation will cost \$300,000, \$500,000 or \$700,000. You should critique your attorneys' budget for reasonableness. You also need to consider whether contractual or statutory attorneys' fee shifting provisions are applicable and whether there is a basis for recovering your fees from the opposing party or a basis for the other side to recover its fees from you.

With the above information, you should be in a position to determine what you want to achieve in settlement or at least a range of acceptable outcomes.

The Timing Of Settlement

There are several stages in litigation particularly conducive to settlement, including 1) prior to the filing of suit, 2) prior to the commencement of discovery, 3) prior to the filing of dispositive motions, and 4) prior to the commencement of trial. Whether it makes sense to explore settlement at any of these stages of litigation

depends primarily upon whether you are in a position to fully analyze the case.

If the merits of a dispute are relatively straightforward and damages are readily quantifiable, settlement before the filing of suit is often appropriate, particularly when the anticipated costs of litigation threaten to subsume the damages at issue. A defendant might forego attempts to settle before suit, however, if a statute of limitations is about to expire or if there is a question whether the plaintiff is actually committed to filing suit.

After the filing of a lawsuit, the primary consideration regarding potential settlement is whether the parties are in a position to evaluate the merits and quantify the potential damages. Discovery is often necessary before you can fully analyze the potential for settlement. Moreover, you might believe that you can improve your chances of ultimate success and, thus, your settlement leverage through discovery. You will need to consider whether the costs of discovery are justified by the potential incremental improvement in your position resulting from that discovery.

Once discovery has been completed, a party (more often the defendant) might determine that it has grounds for a dispositive motion. You should not completely ignore the potential for settlement even if you believe you have a strong motion for summary judgment. The mere potential for summary judgment might provide you with the leverage to settle the case on attractive grounds. Further, it will cost additional attorneys' fees and costs to present a motion for summary judgment, and you will likely lose much of your settlement leverage, particularly in a jury case, if your motion is denied.

Conducting Settlement Discussions

You will need to select a point person for settlement discussions. In doing so, you should consider whether any of the players could be an impediment to settlement or, alternatively, might bring particular value to the process. For example, if there are hard feelings among the business people, you should consider whether having the business people involved will impede settlement or advance the cause by giving them an opportunity to clear the air.

The use of a mediator is often, but not always, useful in the context of settlement. Mediation can be an expen-

sive and time consuming process. If the parties have a reasonable chance of settling the case on their own, it might make little sense to invest resources in mediation. On the other hand, mediation can in some cases be a real benefit. Mediators often (but not always) give an independent assessment of the case which can be valuable when the parties differ dramatically in their analysis of the merits. Further, some mediators can help break through the animosity often associated with litigation and facilitate a business resolution of the disputes. Mediators vary in their personal skills and approaches. It is important to determine whether mediation makes sense in your case and to select a mediator that can bring something of value to the settlement process.

Develop A Settlement Strategy

The final step is to develop a strategy for achieving the result you want to accomplish in settlement. There are many settlement strategies you might utilize depending on the nature of your position. For example, if you have settlement leverage, you might commence negotiations with modest concessions while holding potential concessions back for use at the end if necessary to close the deal. Alternatively, if you have less leverage, you might start with larger concessions in order to close the gap and make it more difficult for the other side to walk away from the table.

The important thing to remember about settlement is that, before commencing discussions, you should have considered the result you want to achieve and chosen a settlement strategy calculated to obtain that result.

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