Friedman Mediation
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TIPS FOR MEDIATING A SECURITIES CLASS ACTION

As every litigator and experienced mediator can attest, no two mediations are the same. In fact, the mediation process can vary greatly from practice area to practice area. I have mediated class actions, insurance disputes, real estate disputes, legal malpractice claims, and countless others (to view a brief summary of my mediation experience, please click here).

Here are some tips gleaned from years of mediating securities class actions as both a litigator and mediator:

1. Timing of Mediation—the time line ranges from post filing to after class certification. The best time for plaintiff is post denial of the motion dismiss or after a class is certified. After the denial of a motion to dismiss, the defendants know that they have to deal with the case and are exposed to discovery which is precluded until after the motion to dismiss under the Securities Reform Act. The best time for defendants is after filing a motion to dismiss but before it is heard. The plaintiff risks dismissal and has no opportunity to do discovery to bolster the complaint.

2. Preparing for Mediation—an evaluative mediation is necessary to settle a securities class action, but the mediator cannot conduct one unless the parties submit briefs which analyze the legal and factual issues in the case. The briefs need to address materiality, scienter, primary liability, control person liability, reliance presumptions, class certification and damages issues.

3. Analysis of Damages—both sides need to prepare a damage analysis and should consult experts prior to the mediation. Use of damage experts at the mediation should also be considered.

4. Insurance—plaintiffs need to know the extent of D&O insurance and defendants need to include the D&O insurer(s) in the mediation process. The insurance representative is likely to be an excellent resource of information regarding choice of mediator and the defense and valuation of the case. The question of how many levels of insurance, primary and excess, should be represented at the

mediation is a strategic one. Too many may signal a concern about the level of exposure that the defendant may not wish to divulge. Coordination with the D&O insurer(s) is a must as the policies require it.

5. Presentation of your case—a presentation of the case through the use of Power Point will help the mediator understand the issues. Whether the presentation is done in joint session or not depends on the case and the parties. I have found that a joint presentation fostering a discussion between counsel regarding the factual and legal issues, rather than an argument of the case, is a useful tool in settling securities cases.

Securities cases more than any other type of case that I have mediated often involve multiple mediation sessions. It takes time to digest the issues and for the insurers to obtain the authority to settle the cases. Patience is always the key to getting the best settlement.

--Bruce A. Friedman

Bruce A. Friedman is a mediator and arbitrator with an international practice. With years of litigation experience behind him, he understands the goals of the mediation process and will do his best to ensure that the needs of both parties are met, justly and efficiently. For more information on the mediation services that Bruce A. Friedman provides, check out his website at http://www.FriedmanMediation.com, his profile at ADRServices.org, or call him at (310) 201-0010.