At a Negotiating Impasse? Mediation Can Be A Solution

by Dan Brecher on December 5, 2012

Watching our elected representatives negotiate our financial future, their in-artful and dangerous dance toward the "cliff" makes business managers cringe. The posturing and clearly unworkable proposals from both sides are made out of fear that their constituencies will perceive them as weak or unfaithful to principles they do not wish to compromise.

As a federal court and FINRA mediator, I know that a participant in settlement negotiations who stands on principle will make it difficult to find an acceptable compromise, especially with a person on the other side of the negotiations with an opposing, and similarly strong stand on principle.

So, how do parties with conflicting principle positions resolve those conflicts? Almost all of us hope and expect to see our representatives compromise before we reach the "fiscal cliff." Certain reassuring experiences I have had in mediating disputes over the years lead me to believe that, unless hell-bent on creating another recession based on adherence to principle, our political representatives will find some areas of compromise shortly before "midnight." It is analogous to pre-trial negotiations I have seen time and again.

Rather than leave a determination to a jury, or, in this case, to fate, the belief is that the negotiating parties will compromise. It is simply too dangerous to do otherwise. In the commercial setting, the danger is usually that the parties do not know what the trier of fact (the jury, judge or arbitrators) will do. The danger at trial is that one side will prevail entirely, or, having expended significant resources, that neither side will achieve a result that might be achievable in a negotiated settlement in which the parties determine their own fate by signing on to a solution they themselves craft. That is why I recommend that parties that appear to have the potential for negotiated resolution utilize mediation at the earliest phase of the dispute, before spending time and money on litigation, even where hard and firm positions have set in. However, my experience has been that where positions are based more on principle than on simple economics, or where one of the parties (or both) cannot or will not face the true facts, settlement is more readily achieved as the reality of a trial date nears; not unlike the "fiscal cliff."

When serving as mediator, I try to determine if the parties have looked at the relevant facts and law realistically. If not, that should be the initial focus. Try to agree on the relevant facts. If that is not feasible, agree on what each party's version of the facts is, on what is disputed, and what each party believes to be the evidence that supports its position. I ask the parties to consider accepting a settlement recommendation that they can live with six months down the road, because they may find that a jury is

unsympathetic to their position and they could wind up with a far worse result, having spent significant time and money preparing for and conducting a full trial, with its attendant emotional stress and potential negative result.

As the trial date nears, the fear of leaving one's fate to disinterested third parties can bring into favor consideration of a compromise proposal and a pragmatic resolution. Statistics show that about 80 percent of claims mediated in the federal courts and at FINRA settle. My experience is that the morning session of a one-day mediation rarely results in resolution, and that after lunch, usually closer to the end of the day, is when compromises are made. It seems likely that our political representatives recognize this dynamic and will act to avoid our "fiscal cliff,' as 80 percent of parties in mediated matters in the commercial world are able to do.

If you have any questions about the benefits of mediation, please contact me, Dan Brecher, or the Scarinci Hollenbeck attorney with whom you work.