

Negotiating Against Yourself: From Congress to the Courtroom

by Dan Brecher on October 1, 2013

For many years, I have been a federal court mediator, a FINRA mediator and arbitrator and, as an attorney, a negotiator in many hundreds of successful matters. The improper use of the "I am not going to negotiate against myself" tactic I have seen employed in too many of these proceedings is now front and center in the current national debt debate.

There is nothing objectionable about that statement of position after having made a demand (seller) or offer (buyer) that is within reason, usually based upon a determinable range for market value. "Fair Market Value" has been described in law as "the price that a seller is willing to accept and a buyer is willing to pay in an arm's-length transaction."

I recently represented a lender in a court-ordered mediation with the borrower who acknowledged owing more than \$200,000, but communicated an initial offer of only \$30,000 through the mediator. The mediator (in my view correctly) confirmed that communicating that offer showed that the defendant debtor was refusing to indicate the actual range in which it was willing to negotiate settlement and that these negotiations were doomed to fail because of posturing by the debtor. Despite the patent bad faith of the debtor's initial offer, the debtor stated it was unwilling to bid against itself by increasing its initial, clearly bad faith, offer.

I refused to make a demand until the debtor made a more indicative offer. Our client was willing to walk away from the mediation, and the mediator did not find unreasonable my refusal to make a counter demand to anything less than an offer indicating a willingness to negotiate in the six figure range. I was unwilling to have our client bid against itself. I was willing to show our demand in the \$170,000 range with reasonable secured time payment terms (defendant threatened bankruptcy and drawn out litigation, and our client was cash poor and willing to discount the debt in favor of immediate cash). The mediator encouraged the debtor to up its initial offer, which the debtor, feigning reluctance, made another unworkable, albeit better, offer of \$50,000.

Although the mediation did not succeed, by the end of the day, we were able to get an offer in the low six figures, which we rejected. The bad faith in the debtor's approach to the mediation was in not signaling, even to or through the mediator, the offer it was actually willing to pay. This became evident several days later, when the debtor "blinked" and debtor's counsel communicated a significantly higher offer.

The sad fact as to what is going on in Washington is the Democrats' refusal to bid against themselves in the face of what even Senate Republicans publicly acknowledge to be offers by the House Republicans that are unreasonable. House Republicans are using a ploy analogous to the bad faith offers and threat of bankruptcy of my client's debtor; this tactic is what our mediator saw as bad faith negotiating. While it is the House Republicans who claim that it is now up to the

Democrats to make a counter-offer, the Senate majority voted to not engage in negotiations with what was described as this "holding the country hostage" tactic of the House Republicans.

The Democrat position, that they are unwilling to bid against themselves, seems reasonable to those, including many Republicans, who view the House Republican threat to shut down the Government as wrongheaded. Yet, it is the House Republicans who are complaining, to a mostly incredulous public, that the Democrats are not willing to negotiate.

A lesson here is that the tactic of stating a refusal to bid against oneself should only be used when one has taken a good faith position in the negotiations, or, when one is in a power position to dictate terms and there is no need for a future relationship between the parties (or, in this situation, the Parties).

If you have any questions about negotiation tactics during mediation or arbitration or would like to discuss the legal issues involved, please contact me, Dan Brecher, or the Scarinci Hollenbeck attorney with whom you work.