Some Reasons Why Big Cases Do Not Settle Sooner

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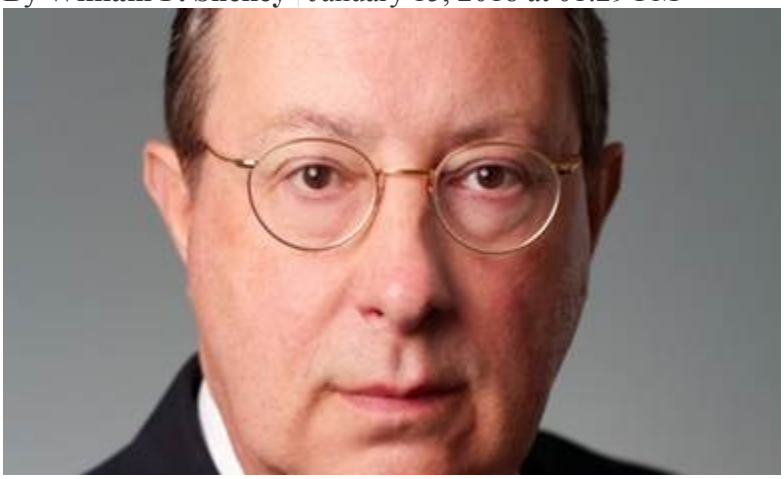
By **William P. Shelley** | January 15, 2018 at 01:29 PM



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So the question is why can't big cases be settled sooner since they are almost certain to settle eventually, as reflected in the oft-cited court statistics that "95 percent of cases never make it to trial." See, e.g. Paula Hannaford-Agor, et al., Nat'l Ctr. for State Courts & State Justice Inst., **"Civil Justice Initiative: The Landscape of Civil Litigation in State Courts,"** at 25-26 (2015), (less than 4 percent of civil cases were disposed of by bench or jury trial); Megan M.

LaBelle, “Against Settlement of (Some) Patent Cases,” 67 Vand. L. Rev. 375 (2014), (opining that the primary cause of the “vanishing trial” is settlement).

While the literature is replete with articles about settling cases, it is worthwhile to further explore some of the reasons big cases do not settle sooner that seem to have become more and more powerful in their effect on the case settlement process. We also address some of the strategies available to push the process forward notwithstanding these challenges.

Plaintiffs Are Often Concerned That Putting Their Settlement Toe in the Water Early Leads to the Loss of Toes, Not Settlement

Many defendants fail to recognize that in a large case plaintiffs are often reluctant to settle early because although they may have done some pre-discovery investigation and filed a complaint, they may not have a clear picture of what their real potential recovery is early in a case. Related to that fear about what they do not yet know is the fear that a low demand close to what their final strike number would be for settlement will only set a ceiling against which a defendant will bargain, perhaps with a very low counter.

To address the information gap concern, a defendant should consider speeding up the process of filling information gaps through prompt disclosure of documents, or even early depositions, that will help plaintiffs clarify how big and how viable their claim really is. (Such early, frank discussions are often best conducted under the cloak of a mediation privilege). If this process is taken seriously, as opposed to merely being used tactically, a case can be narrowed and perhaps resolved early on at great savings to both parties.

The concern over making a realistic demand too soon plays itself out regularly in big cases, particularly products and catastrophe cases but also in pure business cases. The simple fact is that sky-high, unrealistic demands kill settlement negotiations. They make it easy for defense counsel and corporate clients to simply plow ahead with litigation. The best plaintiffs’ counsel at settlement recognize that what puts pressure on defendants is not an outrageously high demand that is easily dismissed, but a demand that is “in the ballpark,” that is in the neighborhood at least of what might be doable. In-house counsel do not typically want to be

accused internally of having failed to respond to realistic settlement demands, particularly in a big case. Correspondingly, a smart corporate defendant recognizes that “throwing bait in the water” is what makes fish jump. A reasonable early settlement offer is often what gets the plaintiff to make a serious move. Before you know it, you have a serious settlement dialogue.

The fundamental point is that a party, plaintiff or defendant, should hate to say that they did not find out if a case was settleable early on because neither side really came to the table in a serious way. Realistic “in the ballpark” demands and offers are what lead to settlements.

Lack of Authority/The Absent Decision-Maker

While this point seems simple, it is critical to getting big cases settled early. When those attending mediation are no more than note-takers with only limited authority, the process suffers, and usually fails. It is not just lack of physical presence, it is what it signifies, i.e., a client who is not yet ready to deal, either because the key decision-maker has not become involved or she has not yet fully processed the case in terms of the financial exposure the case poses.

In our current corporate environment, final decision-making authority has been increasingly centralized with remote decision-makers. If you do not have that remote decision-maker’s attention, real progress becomes difficult. This dynamic of corporate decision-making is exacerbated in large cases where it often takes appreciable time for a case to wind its way through the corporate organizational chart until it hits the right person to make a decision. Stated another way, it takes time for a company to digest a major case where the money at stake is substantial. Thus, to accelerate the settlement process, it is critical to get the real decision-maker’s time and attention, whether in person or not, in order to get a big case settled. And until that digestion process happens, you are likely to have a settlement process, but no settlement.

Ironically, an expensive mediator may prove helpful. Nobody wants to pay $800 per hour until they are ready for hard bargaining so discussions about mediation can be a good way to measure your adversary’s seriousness about the process.

‘Externalities’ to the Substantive Merits Impacting Case Resolution

A corporate party or its counsel should always carefully look at what might impact a settlement discussion beyond the inherent merits of a claim. Classic examples of such external factors include financial issues facing a party which may make moving faster or slower to resolution more beneficial for that party. Thus, a defendant may wish to finalize and report a matter this quarter as opposed to next year. Similar issues may lead a corporate plaintiff to discount a demand if a case can be finalized quickly. Such financial issues should lead to creative thinking about how and when a settlement is funded, e.g., payments over time versus lump sum.

Another key externality is outside counsel. They may be under pressure to get the case done quickly to improve how they are viewed by a new client. On the other hand a lawyer whose plate is only half full may be in no hurry to push a case to conclusion. The phenomenon of the last ship in the shipyard taking the longest to build applies to the law and is particularly a concern in an era of flat litigation demand.

What is amazing is how little attention is paid to these critical issues despite the powerful impact they have on how quickly a case resolves. But if these “externalities” are carefully evaluated, there are often work-arounds to help the settlement process. For example, if your counsel lacks the “charm” to get a settlement discussion going, or is so enamored with “their case” that he or she cannot imagine settling, perhaps consider financial incentives for achieving a settlement within a given time frame.

Difficulties in lawyer dynamics have also led some companies to retain separate settlement counsel. This idea seems to have generated a lot of interest and articles beginning in the late 1990s and early 2000s, with articles continuing to appear to the present. But the prevalence of the use of settlement counsel is not well documented nor is it clear whether the use of such counsel has proven to be beneficial.

The premise underlying the use of separate settlement counsel is the idea that what the litigator/trial lawyer brings to the table may not be what is needed to get a big case settled. Factors cited as supporting the use of separate settlement counsel include concerns about

lawyer personality clashes in a hotly contested case and the fact that lawyers tend to overvalue their own cases and undervalue the positions of their opponents. See, e.g., Christopher Nolland, **"What the Heck is Settlement Counsel and Why Do You Care?"**, American Bar Association Corporate Counsel CLE Seminar (February 11-14, 2016), Dan Churay, Frank M. Bedell, Eric O. English and J. Patrick O'Malley, "Case Studies in Settlement Counsel: Best Practices for Litigation Exit Strategies," ACC Docket, October 2015, at 52; Keith E. Whitson, "E**arly Resolution of Claims Using Settlement Counsel, Presentation to the Western Pennsylvania Chapter of the Association of Corporate Counsel"** (May 6, 2014), Kathy A. Bryan, "Why Should Businesses Hire Settlement Counsel?", 2008 J. DISP. RESOL. 195 (2009); David Hoffman & Pauline Tesler, Collaborative Law and the Use of Settlement Counsel, *in* The Alternative Dispute Resolution Practice Guide, Chapter 41 (B. Roth, ed.; West Publishing, 2002); William F. Coyne, Jr., "The Case for Settlement Counsel," 14 Ohio St. J. on Disp. Resol. 367 (1999).

The takeaway from this article is straightforward. Outside and in-house counsel need to look more carefully and invest more time and effort at thinking their way toward early settlement. Settlement evaluation should be an early step, not an afterthought.

A pretty fine country lawyer once said "as a peacemaker the lawyer has a superior opportunity of being a good man. There will be business enough." The Collected Works of Abraham Lincoln edited by Roy P. Basler, Vol II, "Notes for a Law Lecture" (July 1, 1850), p. 81. Settlement, particularly early settlement, is hard work, just as much as preparing for trial, and should be treated as such by lawyers and clients alike.

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