

# Kluwer Mediation Blog

## A Convoluted but Efficient Settlement

Jeffrey Krivis (First Mediation Corporation) · Saturday, February 16th, 2013

In a complex business dispute involving substantial and potentially unlimited exposure, a sophisticated defendant was not willing to pay the amount it determined it would actually take to settle, so they became primarily concerned about how to ‘cap’ their exposure on the case. Based on an excellent working relationship that developed between general counsel for the defendant and trial counsel for the plaintiffs, the parties negotiated a convoluted but efficient agreement. The terms of the agreement allowed for finality yet further mediation before submission to a binding award. Here are the skeleton terms:

1. Defendant agreed to advance \$1.5 million to plaintiffs immediately upon execution of a memorandum of settlement. This money would be paid unconditionally and would not be used toward credit in the future of the case;
2. The parties agreed to enter binding Arbitration that involved a strict timeline beginning with the selection of a neutral. If the parties were unable to select a neutral, the mediator will select one for them;
3. Within a specified date the parties would exchange written resolution plans based on their forensic expert studies. A meeting will be held between the parties and the mediator within 30 days to either accept one of the plans or negotiate a compromise. If neither of the above was satisfactory, the binding Arbitration would go forward;
4. Within 90 days the parties will exchange expert reports and make the experts available for an abbreviated deposition. No further written discovery will be served in the case;
5. Thirty (30) days prior to the Arbitration date, the parties will submit to the neutral arbitrator their briefs and positions of law limited to 20 pages, and their original Last, Best and Final Offer of Settlement. The Last, Best and Final Offer will not be submitted to the Arbitrator at this time;
6. Fifteen (15) days prior to the Arbitration date, the parties have the right to withdraw and submit a second Last, Best and Final Offer of Settlement;
7. Fifteen (15) days prior to the Arbitration date the parties can submit under seal either their original or, if submitted, second Last, Best and Final Offer of settlement to the neutral arbitrator;
8. Fifteen (15) days prior to the Arbitration date the parties can submit rebuttal briefs limited to ten pages;
9. The mediator shall attempt to negotiate between the parties based on the Last, Best and Final offers submitted;
10. If the negotiation does not succeed, the parties will each have up to 30 hours to present their cases to the Arbitrator. Upon conclusion of the evidence and argument, the Arbitrator shall unseal the Last, Best and Final Offers of Settlement of the parties and begin deliberations. The Arbitrator shall be limited to awarding only one or the other of the two Last, Best offers of

settlement submitted by the parties, which shall be the final decision of the Arbitrator and binding on the parties.

11. All findings and award of the Arbitrator shall be confidential except as may be required by law after consultation with the other party.

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The graphic features a black background with white text and a circular icon. The icon depicts a group of five stylized human figures, with a magnifying glass positioned over the central figure. The background is accented with horizontal lines in blue and green.

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