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Negotiating the reverse auction in class-action cases

How can the "prisoner's dilemma" work in mediation?


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Settling class-action cases is typically a distributive negotiation where there is a fixed pie that gets divided up. While there is some room for creativity, for the most part, it is a zero-sum game in which a litigant's gain (or loss) is balanced by the losses (or gains) of the other litigants. If the total gains of the parties are added up, and the total losses are subtracted, they will equal zero. This sets the stage for a very competitive negotiation.

Usually when there are only two parties to the negotiation, we engage in a series of moves and concessions and things tend to find a range of value that is resolved through a mediator's recommendation or some similar technique. The challenge comes when plaintiffs "back file" on each other, seeking identical claims against the same defendant. If the defendant is motivated to settle, this sets the stage for either: a) settling with one and hoping the other doesn't object; or b) the reverse auction. A competitive defendant will often try to create a reverse auction when there are multiple cases filed in order to get a better deal.

A reverse auction is a type of auction in which the roles of buyer and seller are reversed. In a class-action case, the buyer is the defendant and the seller is the plaintiff. The defendant wants to pay money to eliminate an exposure. The plaintiff wants to "sell" the exposure back to the defendant. In a customary auction, buyers/defendants negotiate to obtain a settlement by offering increasingly higher prices. In a reverse auction, the sellers/plaintiffs compete to obtain settlement funds from the buyer/defendant and negotiate a price that will usually decrease as the sellers/plaintiffs undercut each other.

This situation is not a pleasant experience for multiple plaintiffs because of our instinctive nature to compete with each other. By that I mean that when each plaintiff tries to get more of the pie, the response will be to pit them against each other in the reverse-auction setting. If the plaintiffs don't cooperate with each other, clearly the settlement will be reduced and one side will be left out in the cold. What is created in this situation is a classic prisoner's dilemma. Understanding how to deal with this dynamic will lead to more productive negotiations and better settlements.

Prisoner's dilemma

One way to think about this conundrum is through a theory known as "the prisoner's dilemma." This theory pits two parties against each other when they have a choice as to whether to cooperate or compete, similar to the choice the plaintiffs have when faced with a back-filing situation. The prisoner's dilemma demonstrates why two parties might not cooperate, even if it appears that it is in their best interest to do so. A classic example of the prisoner's dilemma has been presented in numerous books and treatises as follows:

> Two men are arrested, but the police do not possess enough information for a conviction. Following the separation of the two men, the police offer both a similar deal – if one betrays his partner by testifying adversely, and the other cooperates by remaining silent, the betrayer goes free and the one that remains silent receives the full one-year sentence. If both remain silent, both are sentenced to only one month in jail for a minor charge. If each 'rats out' the other, each receives a three-month sentence. Each prisoner must choose either to betray or remain silent; the decision of each is kept quiet. The prisoner's dilemma raises the simple question: What should the partners do to get the best possible outcome? If each player is only concerned with lessening his time in jail, the game moves away from a classic zero sum exchange and is transformed into a situation where the two players may either assist or betray the other. In the game, the sole worry of the prisoners seems to be increasing his own reward. The interesting symmetry of this problem is that the logical decision leads each to betray the other, even though their individual 'prize' would be greater if they cooperated.

In the typical approach to this game, collaboration is dominated by betrayal, and as a result, the only possible outcome of the game is for both prisoners to betray the other and spend a lot of time in jail. Regardless of what the other prisoner chooses, one will always gain a greater payoff by betraying the other. Because it is believed that betrayal will always trump cooperation, all self-interested prisoners seemingly betray the other if they are hoping to obtain an advantage.

In applying the prisoner's dilemma to a reverse-auction situation, the buyer/defendant will rely on the expectation that the prisoners (competing plaintiffs) will betray each other, (i.e. not cooperate with each other.) The end result of non-cooperation between plaintiffs is that one of the parties will likely get nothing

and the other will negotiate a poor deal for the class. Cooperation between sellers/plaintiffs will result in the opposite effect, a stronger negotiating position and the ability to share in a fair outcome. The only challenge will be in reaching an understanding about division of fees.

One modest suggestion to lawyers who are faced with this situation: select a lead negotiator between the firms and give that person the authority to make a deal on behalf of all members of the class. This cooperative approach between plaintiffs will shift the dynamic back to a more traditional negotiation, with usual and customary concessions by each side, and a fair market settlement of the case.

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