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The Economic Downturn: Has Settling Cases Become an Exercise in Rearranging Deck Chairs on the Titanic

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We have always been told that parties are in a settlement mode at the end of the year, around the holidays. The plaintiffs are looking for cash for the holiday and are ready to settle their case, even though that may mean they will take less money to settle. The buzz is defendants are more likely to settle because insurance adjusters want to close out their files at year end or corporations do not want to carry the liability over to the next year. However, now the economic downturn has replaced this yearend rush. Mediators have seen a shift which is motivated by economic concerns which is fueling the settlement of cases.

Economic concerns emanate from all the participants in mediation. A mediator now has to deal with this emotion and help the parties come to a mutually acceptable agreement. Mediators must confront these concerns and emotions with all the participants, including attorneys. Mediators who speak to what's real for all the parties and the attorneys —the stock market, bank failures, tight cash and the cost of getting through the day—will advance settlement of the case. Those who insist on sticking to the issues of liability and damages and hammer away to try to reach a settlement, without dealing with the effects of the economy on each of the participants, may look back and see their efforts as an exercise in rearranging deck chairs on the Titanic. Discovering how the participants are affected and coping with the economic downturn will cause the parties to focus more on settling the case.

Mediators have discovered that Plaintiffs' dreams on how to spend their settlement funds have done a 180 degree turn. Plaintiffs are no longer looking to use the settlement monies to spend on the purchase of goods. Plaintiffs now are looking to use the settlement to pay off their debt, save their home from foreclosure, to live on while looking for a job and to make ends meet.

Defendants have become a target of more frivolous lawsuits, suffered a decrease in business revenue, tight cash, and increased cost of production of goods and services, inability to obtain a bank loan, failed investments, and imminent insolvency. Defendants do not have available cash for a settlement and are responding by offering a schedule of payments over time.

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Some plaintiff's are very wary of payout schedules because it signals to them that defendant may not be liquid and they may face being listed as a creditor in a bankruptcy petition. Settlements being paid over time are troublesome if the defendant defaults on the payments. Even though California Code of Civil Procedure section 664.6 requires the court to retain jurisdiction over the case in order to enforce the settlement agreement, some courts insist that once a settlement is reached that the parties dismiss the case so the case is removed from the court's docket. Dismissing the case may help the court's docket, but it divests the court of jurisdiction and leaves the plaintiff with no other alternative but to file a separate action for breach of the settlement agreement. Filing a new action, increases the delay of receiving the settlement funds and increases the costs for the plaintiff. To alleviate the problem posed by the court's requirement of a dismissal, mediators are seeing settlements agreements where monies are paid over time accompanied by a conditional stipulated judgment. If defendant defaults on a payment under the settlement agreement, the stipulated judgment will be entered expeditiously, usually ex parte.

Defendant's attorneys are feeling the pressure when the client reiterates the same concerns of tight cash and threat of bankruptcy. For the defense attorney, if the client turns into a non paying client the pressure mounts to cut the client lose. A large amount of account receivables is not healthy for any law practice and threatens its existence, for example, the dissolution of Heller Ehrman was recently caused in part by an estimated \$118 million in accounts receivable. This untold pressure can cause the defendant's attorney to have the 'reasonable settlement offer discussion' with his or her client and may prompt the defendant to engage in settlement talks earlier than expected.

Plaintiff's attorneys are also feeling the pressure. Lending institutions are not so quick to provide a line of credit against the plaintiff's attorneys anticipated account receivables. To float a business with any line of credit from a bank is nonexistent, even if you have a good credit score. This pressure is causing the plaintiff's attorney to have not only the 'reasonable demand' talk but 'the lifelong chasing to satisfy a judgment' talk with their client.

This economic downturn is driving reasonable settlements that are paid out now, not in the future. A mediator must confront the economic concerns of all participants and manage their economic fears. Mediations have not turned into fire sales, but it has caused the mediator, as well as all the participants to become more realistic and to settle what is attainable today, not chase a possibility of recovery sometime in the future.