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"To Tell the Truth..."



NorVergence Reverberations: Mass Mediation?

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As reported four weeks ago in *Leasing News*, judges of the Ninth Circuit Court of Appeals are scheduled to hold a telephonic hearing today (May 31) to determine whether certain cases involving the infamous NorVergence leasing transactions will be ordered to mediation. *Leasing News* has also reported that a state judge in Cook County, Illinois, has asked that some 500 NorVergence cases, all naming IFC Credit Corporation as a party, be ordered to mediation as a consolidated group.

What an amazing turn of events. After (in some cases) years of litigation on these cases, with the parties digging in their heels and holding fast to their positions, the courts are now considering using mediation – essentially structured negotiation – as a way to reach out-of-court settlements of these lawsuits. And apparently considering doing so on a massive scale.

Although it is often misunderstood (and too little used), mediation can be a very powerful and effective tool for resolving leasing disputes. It allows the parties to meet together in a completely confidential and non-binding setting where, with the help of a skillful mediator, they

can review the background of the dispute, talk about the issues involved, work out a mutually acceptable settlement, and avoid the cost and hassle of further litigation. Neither side gives up any rights or benefits by entering into the mediation process, and no one is compelled to settle on terms that are not acceptable. (For a more detailed discussion of mediation in leasing, see "Just What is ADR, Anyway?" in *Leasing News* for March 30, 2007. <http://www.leasingnews.org/archives/March%202007/03-30-07.htm#truth>).

But what does all that mean in the context of hundreds of lawsuits involving hundreds of different parties? And can it really work?

There is growing interest in the legal community regarding the use of mediation in class action lawsuits. In general, a class action suit is one in which multiple parties bring an action against a single defendant (or a very small number of defendants) for damages resulting from something done (or not done) by the defendants that affects all the plaintiffs in essentially the same way. Well known examples include the Phen-Fen cases, in which more than 50,000 plaintiffs sued the makers of an anti-obesity drug, claiming that it caused them to suffer various heart and pulmonary injuries. Or the more recent Wal-Mart employment cases, in which a very large group of Wal-Mart employees brought a class action suit against the company based on alleged sex discrimination in employment practices.

These cases, like most class action cases, are based upon a specific injury alleged to result from a specific act or failure to act on the part of the defendant. The trial of such cases almost invariably turns on questions of fact. Was there a product defect? Did the defendant know about it? Did the defendant take or fail to take certain specific actions? Was there actual loss suffered by the defendants as a class? Through mediation, these kinds of factual questions can be discussed in open ended and confidential meetings, and the background and specific facts of the case can be reviewed and questioned by the parties. The parties can then arrive at a settlement based on their own assessment of the actual facts of the matter and on their own determination of the likelihood of prevailing if they go to trial. In most class action cases, the factual grounds are essentially the same for all the parties; indeed, that's generally the basis for certifying a class action in the first place. There is seldom a question of law in such cases, or of the interpretation of underlying legal principles; it's almost always a matter of ferreting out and ruling on the facts.

But what about leasing disputes? Are the cases arising from the NorVergence deals essentially fact-based disputes? It would appear they're not. Indeed, the facts in these cases are pretty straightforward – the lessees failed to pay rent and were found in default by the lessors. The real issues in the lawsuits seem to revolve around why the lessees failed to pay, and the cases tend to be much more concerned with interpretation of law than with simple facts. The NorVergence cases being considered for mass mediation have typically been brought by lessees, claiming fraud on the part of lessors or arguing that the lease agreements are not enforceable for various legal reasons. These are not cases in which a finder of fact can hear expert witnesses, review detailed evidence, and decide whether or not a certain action was taken or a certain event occurred. (Note: As of now, none of the NorVergence cases have been certified as class actions; but the concepts discussed in this article would apply to any mass case, whether certified or not.)

Should such cases be mediated *en masse*? Well, perhaps in the hands of an experienced mediator who is also an expert in leasing law and practice these cases could be settled on a mass basis. There may be common ground in the way most courts or the industry as a whole interprets choice of law or forum selection provisions (the issues that arise regularly in the NorVergence litigation), and there may be willingness on the part of both lessees and lessors to put these matters to rest without further substantial cost and hardship. (To get some perspective on the costs of trying versus settling a relatively small leasing dispute, see [http://www.leasingnews.org/Conscious-Top%20Stories/Settlement Vs litigation.htm](http://www.leasingnews.org/Conscious-Top%20Stories/Settlement%20Vs%20litigation.htm).)

The measure of costs that can be avoided by settling such a large number of cases through mediation is most likely not just a multiple of the cost of trying such cases one by one; there are no doubt economies of scale in trying hundreds of similar cases. But these cases are not by any measure all identical; each raises a somewhat different point of law, and each involves a different party's (or attorney's) interpretation of the lease agreement. It is reasonable to assume that the costs of individually trying hundreds of such cases would run into tens of millions of dollars, not to mention lost opportunity cost, management time, and uncertainty of outcome.

Then does it make sense at least to try mass mediation in this situation? Absolutely. Mediation is always worth a try, because the downside exposure of failing to reach a settlement in mediation is

miniscule; if they don't settle, the parties can always go to trial. But if the court is willing to support such an approach, if the parties are willing to go into mediation with an open mind, and if a mediator with strong leasing experience and mediation expertise can be found, then the parties in these cases (both lessees and lessors) would be well advised to give it their best shot. They have nothing to lose but their continued agony and costs of dealing with the reverberations of NorVergence.

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Global Experience Provides Direction

As a principal of the Alta Group, he serves as an industry expert in legal matters involving leasing, complex corporate financings, transaction structuring, and contract interpretation; and he provides services as a neutral mediator and arbitrator in difficult disputes over leasing and corporate finance, with emphasis on maintaining relationships and avoiding litigation.

In addition to serving as a principal of The Alta Group, he is the founder, president and general counsel of GoodSmith & Co., Incorporated, a corporate financial services firm specializing in large-ticket leasing and asset-based corporate financing.

Paul Bent is an active musician;- now a singer, formerly a violinist and bass player. He is a professional, on the payroll of the Los Angeles Master Chorale, singing at 8 concerts a year at Walt Disney Concert Hall. He also is active in singing in the Los Angeles, California area, jazz and classical, mostly.