



David G. Clarke, ASA

Calculating Economic Damages for Mediation Can Save Time and Money

The Griffing Group (“TGG”) was retained jointly by two parties in a breach of contract dispute. Seeking to avoid the high cost of a trial, the parties agreed to enter into mediation. TGG was asked to aid in the mediation process by providing analysis of the economic damages caused by the breach of contract.

The Dispute – A insurance agency (the plaintiff) entered into a multi-year contract with a national insurer (the defendant). The contract required the defendant to provide the plaintiff with requests for proposal (“RFPs”) for the sale of group health insurance policies. The defendant was required to provide a certain minimum number of RFPs (essentially sales leads) to the plaintiff each year for several years. One year into the contract, the defendant acquired one of the plaintiff’s competitors (a similar insurance agency). Having made this vertical integration, the defendant relied upon its new subsidiary for the services it had previously contracted out to the plaintiff. Thus the defendant stopped sending requests for proposal to the plaintiff and the contract was breached. The insurance agency (plaintiff) sued the national insurer, intending to recoup economic damages.

Faced with the prospect of costly litigation, the two sides elected to retain a single damages expert, The Griffing Group, and enter mediation. TGG was given access to both parties’ management staff and confidential documents. TGG met separately with each party and considered their respective stances in analyzing economic damages.

Our Analysis – Despite the two sides’ very divergent opinions of the damages, TGG cut through the emotion and noise in the dispute and created a logical framework for analysis. We began by estimating the number of RFPs that the defendant would have provided to the plaintiff during the remaining years of the contract. This estimate was made by applying a statistical sampling method to the RFP data from the first (completed) contract year. We discussed with each party the external economic conditions, the outlook for the insurance industry, and both companies’ internal projections to ensure that the one-year data set could serve as a fair and accurate basis for extrapolation. The analysis produced a median expected number of RFPs which would have changed hands during the remaining contract years, and a confidence range above and below that median. Using guideline data provided to us for the number of RFPs which actually resulted in new accounts and the expected profits from each new account, we determined the plaintiff’s lost profits over the life of the contract. Finally, we calculated a discount rate to convert the projected lost profits to present value. A draft report which detailed our methods and conclusion was sent to both parties.

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TGG calculated a present value of economic damages that was significantly higher than the defendant's calculation and several times lower than the plaintiff's calculation. Both sides had the opportunity to review our analysis and provide comments on our report. We considered these comments, made changes where appropriate and issued our final report.

Valuable Insight – While the two sides were not able to settle the dispute in mediation, the benefits of the process were numerous for both parties. Both the plaintiff and defendant were able to test their damage estimation theories and calculations through review by an independent, experienced damages expert. Both sides gained a better understanding of the strengths and weaknesses of their calculations and learned that further work was required to support their respective opinions.

The Griffing Group: Experienced, Thoughtful and Respected –

The Griffing Group is regularly chosen as an expert for litigation matters involving determination of economic damages because of our experience and ingenuity. Our well-supported written reports and experience in testimony add tremendous value to complex cases. Our areas of expertise include determination of fair value and fair market value, economic damages, intellectual property damages, and contractual issues such as material adverse effect clauses. If we can be helpful to you, please contact David Clarke at (708) 383-9050.

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