What can $787.5 million buy you? The case of *Dominion v. Fox* and the function of justice in commercial mediation

By Gary Birnberg, Esq., JAMS

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In an absolute blockbuster defamation case, brought by Dominion Voting Systems against Fox News Network, the much-anticipated judicial day of reckoning for a media empire fizzled out like a dud. *US Dominion, Inc. v. Fox News Network, LLC*, 2021 WL 5984265, at *1 (Del. Super. Ct. Dec. 16, 2021), cert. denied, 2022 WL 100820 (Del. Super. Ct. Jan. 10, 2022), and appeal refused, 270 A.3d 273 (Del. 2022).

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Through its complaint Dominion contended that: (i) Fox intentionally provided a platform for guests that Fox's hosts knew would make false and defamatory statements of fact on the air; (ii) Fox, through Fox's hosts, affirmed, endorsed, repeated, and agreed with those guests' statements; and (iii) Fox republished those defamatory and false statements of fact on the air, Fox's websites, Fox's social media accounts, and Fox's other digital platforms and subscription services. Dominion sought punitive and economic damages for defamation *per se*.

A settlement of gargantuan proportions was achieved with neither a damning public judgment (or vindication) nor a ground-shaking *mea culpa* to accompany the big check: merely a milquetoast statement in which the defendant *kind of, sort of* acknowledged wrongdoing, while agreeing to pay out $787.5 million on a claim for $1.6 billion. A statement released by Fox after settlement includes the following language. "We acknowledge the Court's rulings finding certain claims about Dominion to be false." ("Fox was resigned to a tough trial. Then, a secret mediator stepped in," The Washington Post, April 19, 2023) https://wapo.st/3R2DGqQ

As a result of the parties' having utilized this consensual offramp, we, the public, were deprived of the opportunity to observe the solemn process of justice work. We missed our chance to see artist renderings of and listen to reporting on the testimony of Rupert Murdoch, the powerful media mogul who controls Fox News, and fire-stoking TV celebrities, including Tucker Carlson.

Should we, the public, be enraged that we were left with only a hollow sense of satisfaction? Fox ultimately dug well into its deep pockets to pay to Dominion what perhaps was a transformative sum for the latter. Yet, defendant was proven to be no more liable than vindicated as we, the public, are forced to come to our own conclusions as to whether this was justice served or merely a smart business deal.

Yet, what we witnessed here was not a lack of justice within the courts: It was the parties' monetization of the respective risks and rewards of permitting justice in the courts to be done. It is exactly the calculation that parties to commercial disputes, together with counsel, perform routinely when they engage in mediation.

The public following the news of the court proceedings was largely shocked by the drama of this last-minute settlement. Conversely, the outcome was not a surprise for those of us who work regularly with commercial mediation.

Fox, clearly, was looking down the barrel of a menacing weapon, knowing that a public trial would be ugly: Independent of potential monetary damages for which it might be held liable, it faced the specter of a public airing of its dirty laundry, which, by the tone of the constant drip of information that was finding its way to the public, would have been particularly embarrassing.

Dominion, on the other hand, was pursuing a court judgment of impressive proportions. Although it surely had a chance of winning the entire amount of the judgment that it sought, some US$1.6 billion, it could not bank on winning that amount and, even if it were to win 100% of what it claimed (or more), it surely *could* bank on Fox's contesting the damages assessment, as well as liability, on appeal. This, consequently, would delay the payout date, if any, for years to come. Settling for roughly half of what it was seeking, Dominion put into perfectly proportional practice the saying "A bird in the hand is worth two in the bush."

On the one hand, this was a perfect storm. A rather clearly aggrieved plaintiff with nothing to lose and everything to gain in trial facing off against a cash-laden defendant with everything to lose and nothing to gain were the trial to proceed. Yet, prior to the entry of the mediator, nobody would jump off the precipice. See "Report: Judge "Implored" Fox and Dominion to Settle, With a Vacationing Mediator Stepping in to Close the Deal," Vanity Fair, April 20, 2023.

On the other hand, this was a typical commercial mediation: after months of reinforced confirmation bias, there comes a tipping point at which the parties take a long, hard look at the risks and rewards of the alternative to settlement (in this case, trial by jury) and agree that there is an alternative that better suits their interests.

One can imagine two factors that conspired to tip the scales in favor of settlement here.

First, as opposed to the parties' situation a week earlier, this truly was the final opportunity to avoid the public airing of Fox's alleged abundant dirty laundry. Theretofore, Fox had every incentive to dangle lower numbers under Dominion's nose in hopes that the fragrance of a meal certain would prompt Dominion to pounce on a lesser sum. Dominion, in turn, knew that Fox's incentive to settle would progressively deteriorate as the trial began, with Dominion assaulting Fox's claims of "fair and balanced reporting," suffering if not death, then serious annoyance by a thousand cuts.

Second, the highly capable and respected mediator Jerry Roscoe, was expertly situated to reconfigure the puzzle pieces, surely by contrasting, in convergent monetary terms, the costs of litigation with the benefits of settlement. (Roscoe works with the same mediation provider as the author, JAMS.)

And Roscoe surely utilized tested mediation practice, as mediators normally remind parties that costs-benefit calculation goes beyond financial measures to include issues of reputation and the very heavy toll that litigation can take on the psyche, work rhythm, and reputation of the parties. Parties must consider whether it is a good business decision to divert resources to litigation that might be allocated to core business development.

There is a classic paradigm that I often break out in detail in trainings that I give to prospective mediators and counsel in mediation. It contrasts the core divergence between externally adjudicated processes, litigation and arbitration, and mediation: a consensual process. Litigation and arbitration depend on application of the objective, factual record as seen by the judge, jury, or arbitrator(s) to a set of laws, often subject to substantial interpretation, that rarely are tailored precisely to the relevant relationship or dispute. These processes are, by definition, backward-looking and remedial.

Additionally, courts and arbitral bodies can err in their analysis. Litigation offers appeals processes to redress error at trial. Yet, appeals do not guarantee that justice be done: only that more than one court will get a crack at applying the already-determined facts to the law as they see it.

It is revelatory to consider that the attenuated nature of a seemingly endless series of court appeals is one of the best selling points for arbitration, a process that, in principle, offers no opportunity for appeal.

Mediation, on the other hand, acknowledges the facts of the dispute and damages suffered, yet redirects the process focus from backward-looking, rights-based to future-looking, interest-based. The mediator reminds the parties that victory in justice frequently is pyrrhic and the cost of achieving the same may be disproportionate to potential benefits.

Commercial mediation all too frequently gets a bad rap. Many litigators blithely declare that mediation does not work, stating that it is appropriate for divorce proceedings, where emotions are at the forefront, rather than in the business-focused realm of facts, figures, and objective adherence to the rules of the game, be they contract terms or legal standards.

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To these and other doubters, I proclaim that they are half right: mediation *is* suitable for divorce proceedings and *can* address emotions. Yet, that does not make mediation unsuitable for commercial disputes. In fact, the very malleability that renders mediation appropriate for divorce proceedings presages its effective applicability to business disputes; it liberates the parties from the constraint of an externally referenced, determinative system prone to mistake, redirecting them to an internally driven process that elevates their business interests above all.

This allows mediation to be an exercise in resolving disputes by practical, party-driven means rather than by often inadequate, externally imposed rules.

Voluminous testimonies indicate not merely that commercial mediation works, but that it works extraordinarily well. Anecdotal evidence reveals, consistently, that upwards of 70% of commercial disputes that go to mediation settle fully, either during the mediation session or shortly thereafter. Furthermore, for those cases that do not settle, significant progress can be made in narrowing the scope of contention and assisting counsel in clarifying pivotal issues for hearing.

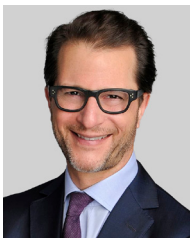
So, we return to where we started: What do the parties to a dispute favor? Commercial mediators keep at the top of their agenda precisely the same principles that surely were front and center in the parties' minds in the *Dominion v. Fox* suit: righteous battle versus monetary resolution, uncertainty versus certainty, and the value of time versus the time value of money.

At the end of the day, Dominion and Fox chose the practical solution. Fox assessed the monetary value of avoiding the potential

of forever sporting the dreaded scarlet letter ("D" for Defamation), while Dominion took a handsome bird in the hand.

This outcome was to have been expected between a mogul-controlled media empire and a private equity–owned operating company. Each responded to what it knew best: risk management, the value of money, and the time value of money. They, to the chagrin of much of the public, sacrificed a moment of justice for a good business decision, something which happens every day in hundreds, if not thousands, of commercial mediations throughout the world.

About the author



Gary Birnberg serves as a **JAMS** mediator, arbitrator and settlement negotiator. He marries his background in law and management consulting throughout the spectrum of dispute resolution as a thought leader and veteran of almost 1,000 alternative dispute resolution cases, both international and domestic. He is based in Miami, Fla., and he can be reached at GBirnberg@jamsadr.com.

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