Claims Management Settlement Negotiations And Strategy

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Experienced claims professionals and litigation counsel usually agree that most claims and litigation, better than ninety percent, will be resolved either by motion or by settlement and will never go to trial. Unfortunately, most training and knowledge in settlement practices comes from "on-the-job" experience and there are many misconceptions. Most seminars dealing with the subject are limited to gimmicky tactics. Understanding the settlement negotiations and strategy is obviously very useful knowledge, but because of the lack of knowledge, there are many bad settlements, either because the costs of the settlement were unnecessary, the legal costs were unnecessary or the settlement itself actually encourages future claims.

Psychology Of Settlement - Reputation

There is a common misconception that settlement negotiations are a sign of weakness. Bad settlements or poorly timed negotiations are a sign of weakness. Settlement is a normal and very important part of risk management. It is a business decision, nothing more.

"Is this claim negotiable?", is a common question posed to counsel. Every claim is negotiable, not just cases where liability is clear. You should always be open to the possibility of settlement. "Will settlement hurt my reputation"?, is another common question. Bad settlements will hurt your representation and unreasonably failing to settle

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will also hurt your representation, and in some cases, may lead to bad faith claims by the insured or by an excess insurer. Settling for too much without enough regard to the facts will encourage more claims against you. Failing to settle a case that should be settled will also hurt you: in the wallet and in your reputation.

Do not underestimate the impact of failure to settle on the court generally and on the case particularly. Judges have their own sense of what a case is worth. If the judge feels you are being unreasonable, it is likely that a lot of "discretionary" or borderline decisions will go against you to encourage you to reconsider. Judges remember companies that were previously difficult and it is likely that the judge will continue to give you a hard time because he/she thinks you are unreasonable.

Your company's reputation among the plaintiffs' bar is also something that should be considered. Just as a reputation for oversized or unjustified settlements will hurt you, a reputation for being unreasonable may also hurt you. If your reputation is that you are unreasonable, plaintiffs will likely become more unreasonable as the case proceeds. Plaintiffs may also add a premium to settlement demands on future cases.

A consideration for insurers is the possibility of a bad faith claim. Most States recognize direct action lawsuits against the insurer that can lead to liability in excess of indemnity limits by the insured or an excess insurer for unreasonably failing to settle a claim within indemnity limits. The elements of the claim are : (1) liability against the insured was reasonably clear; (2) Damages were reasonably ascertainable and were likely to exceed the indemnity limits of the contract; and, (3) the insurer had a reasonable opportunity to settle the case within indemnity limits.

There are notable exceptions to the general rules regarding reputation. Industries that suffer a high volume of nuisance claims may wish to make a strategic decision to refuse to settle claims regardless of the legal expense, but only for those types of nuisance claims. An example of this is retailers who suffer a large amount of nuisance slip and fall cases or companies in the auto business, who may suffer a high volume of minor "fender-bender" cases. In these types of cases, a conscious decision to spend money on legal fees well beyond the worth of the case has been successful in sending a message to the local plaintiff's bar that nuisance suits are not worth the cost. However, this company must be careful to make sure the suit really is a typical nuisance suit.

Honesty

If you do not approach settlement honestly, you will almost certainly fail. You may still fail if you are honest, but you will have made your best effort, and probably gained valuable insight and credibility. You are only fooling yourself if you do not honestly assess the risk of liability or the likely damages. Look to the usual result, not the exceptional cases. Usually the median recovery is more accurate statistically than the average, which can be hugely biased in a small sample by extreme cases.

Negotiate with your adversary honestly. Assume your adversary is at least as smart and committed as you are. You may be wrong, but you won't be hurt and will gain valuable credibility. Credibility, intelligence, commitment and credit worthiness is the currency of settlement negotiations. You can get by with deficiencies in the last three categories, but lack of credibility is a settlement killer and an invitation to litigation as retribution.

When Is The Time To Settle?

The best times to settle are at the very outset of a case and again at the close of discovery. The benefits to settling at the outset are: (1) minimal costs incurred on both sides; (2) you may be able to voluntarily elicit a lot of information about the other side's case; thus, if settlement is unsuccessful, you know where to focus discovery; (3) there is no history between the parties to overcome; nobody is "wedded" to the case or a position; and, (4) usually you will pay a smaller settlement than later on in the case. The problems with settling at the outset of the case are: (1) you know the least about the case and the facts; (2) early settlement may encourage future nuisance claims in certain types of cases (*i.e.* the retail experience); (3) it is difficult to calculate a reasonable settlement with so little information although a jury verdict search can be very helpful but be careful of search result manipulation; (4) defense counsel may discourage an early settlement (under the worst assumption, it is not in their self-interest); and, (5) eliminates the ability to make a motion for summary judgment.

The close of discovery is the other optimal time to settle a matter. It should take place before counsel prepares for trial, when experts are not yet retained but preferably after a summary judgment motion has been made. The benefits of making a motion at the close of discovery are: (1) you know all facts and are never going to know them any better; (2) it avoids the costs of trial and trial preparation, experts; (3) you can make motion for summary judgment which gives you leverage and requires the opponent to educate you about his best presentation of the facts; and (4) settlement avoids the possibility of a runaway jury windfall. The problems with settlement at the close of discovery are: (1) you already incurred most of cost of litigation in conducting discovery;

(2) witnesses may not show up at trial or may testify inconsistently; (3) expert opinions may be critical and depending on the jurisdiction there may be little discovery of experts; (4) evidentiary motions are not yet served and these could also be critical or supply valuable leverage; (5) the trial judge might be more favorable than the pre-trial judge in jurisdictions where different judges are assigned.

The worst time to settle, although it is unfortunately the most common time to settle is "on the court house steps". Almost all the litigation costs have been incurred, trial preparation done, experts retained. You might as well try the case, but there are exceptions; (1) a change in circumstance may make settlement appropriate at this stage: witness or evidence changes, plaintiff's demand changes drastically, unfavorable judge, jury; (2) a "high low" settlement. These are used extensively in cases where liability is clear but parties differ vastly on damages. The settlement protects both sides from runaway juries; and (3) In complex litigation where there are extended trials, many things may change making settlement appropriate.

The Mechanics Of Settlement Negotiations

Ask your counsel to obtain an early demand from plaintiff. Litigation etiquette dictates that plaintiff make the demand. How thoughtless or thoughtful the demand is will tell you a lot about the claim. Most lawyers will consider the demand the "ceiling" of settlement prior to trial. The common assumption is that most parties will usually accept half of their first demand. Whether or not you respond to the demand at this point, you will be expected to make the next offer. Most parties will generally refuse to bargain against themselves.

If the first demand is unreasonable you do not have to respond, but at least you can prudently proceed to spend money on the defense. Another response to an unreasonable demand is to ask plaintiff to justify the high demand and educate you about the claim from his point of view. You might learn that your initial assessment was wrong. Otherwise, you may spot weaknesses or gain helpful avenues for discovery. Still another response is to honestly tell plaintiff his demand is unreasonable, if you are able to justify your response. It's not an insult or "low-balling" if you can honestly justify your position with facts or law

If the first demand is reasonable it can lead to serious negotiations The early demand sets a tone for the case. Both sides now have an operating budgetary framework, which provides parameters for sensible legal expenses. This will tend to prevent runaway litigation. However, there may be a lingering effect if the early discussions are rancorous.

Valuation of The Case

The valuation of the case is a calculation for business purposes balancing the litigation budget (likely legal expense in defending) versus the risk of liability. Honesty is critical. If you use unrealistic budget projections or extreme risk assessments, you will doom the settlement or even worse, end up with a poor settlement. Don't be afraid to use your assessment in negotiations. If you are honest, there is no reason not to tell your adversary why his valuation is unreasonable, but avoid argument/reply cycles (see below).

An honest litigation budget is very important to an honest valuation. You cannot make an informed decision about settlement unless you have some idea how expensive the case is likely to be. Get budgets early and often and ask defense counsel to update it

every three months or as necessary. Keep in mind that most lawyers will tend to underestimate.

I have found in my jurisdiction, New York City, that the average legal expense in the average case is approximately $100,000 from start to finish including everything, assuming the going defense counsel, and expert rates in the New York City area. That's is not to say that some simple cases (*e.g.* a slip and fall) may cost less than half that, but plenty of cases cost considerably more. Accordingly, if your counsel is giving you a budget that is far less than $100,000, there may be a number of unrealistic assumptions in the budget.

In complex cases, (*e.g.*. multi jurisdiction cases), my general rule of thumb is that legal expenses escalate by order of magnitude and not linearly. That is, the costs do not double, but instead rise by a factor of ten.

It costs approximately $100-$175 to have a jury verdict search conducted for you by computer. Important factors are venue, injury, plaintiff's age and plaintiff's counsel. Be broader rather than more restrictive. Don't be afraid to update yearly or more often. This is much more reliable than counsel's "feel". The search will give you a likely estimate of the damages if the defendant is liable.

If your insurance indemnity limits are well below median damages awarded in the case, you must add this as a third factor. Are you litigating to save $10,000 off your limits? Often an annuity will accomplish the same thing. Certain venues (*e.g.* Brooklyn, Bronx) are notoriously bad for defendants, and others (Suffolk County, N.Y., Upstate New York) are plaintiff's nightmares. Your valuation must consider this factor in terms of both liability and damages.

Counsel Versus Claims Professional Settlement Negotiation

Should counsel or the insurer take the lead in settlement negotiations? The answer may differ from case to case but whatever the result, communication is the key to avoid working at cross purposes and permitting the plaintiff to use a divide and conquer approach.

The benefits to allowing defense counsel to take the lead are: (1) he should know the facts, the law, the venue and his adversary better than you do; (2) usually the attorney has a much smaller caseload than the claims professional; (3) not only is it the attorney's ethical obligation to settle cases that can and should be settled, but it also is part of the attorney's job; he knows that the client will take him to task if the case could have been settled for the same legal expense; moreover, the attorney, like the client, will be motivated to dispose of indefensible cases; and, (4) the standing and credibility of counsel may help negotiations.

The disadvantages to permitting defense counsel to take the lead in settlement negotiations are: (1) the three roles of counsel - attorneys are advocates (trial lawyer, lobbyist), counselors (advisors) and facilitators (problem solvers, negotiator, transactional attorney); some lawyers are better at one skill than another. where does your counsel fit in?; (2) personal injury litigators tend to be specialists and may even be on the "cutting edge"; however, they are often weak negotiators, because they are too confrontational, may lack credibility with their adversaries, and may be too wedded to their position; general litigators or practitioners are often a better choice for negotiation because it is more common in commercial litigation and these attorneys handle less "volume"; (3) attorneys make more money by litigating; thus negotiations may be half-hearted; (4)

some counsel believe they will be perceived as weak if they try too hard to settle a case; and, (5) most attorneys do not receive any training in law school in negotiating generally or in settlements particularly; this is especially true for litigators; the only training is on the job experience or CLE.

The advantages to having the claims professional take the lead in settlement negotiations are : (1) there is no legal expense; (2) it avoids monetary conflicts of interest with litigator; (3) the claims professional is usually more motivated to settle than the attorney; and (4) they are more familiar with actual costs of litigation. The disadvantages to claims professional lead are: (1) it creates a credibility problem for the attorney; (2) it may permit a divide and conquer strategy by the plaintiff's counsel because it undermines your relationship with defense counsel; (3) it may Inadvertently get you involved in acting as an attorney; (4) it is time-consuming; and, (5) you have the least knowledge of facts and law which could lead to unwarranted or ill-advised settlements and may also waste money.

Whether the claims professional or attorney should take the lead in settlement negotiations will vary from case to case. Keep your attorney involved and in the loop and you will have an effective negotiation. If you don't trust your attorney, why are you using him/her?

Negotiating "Style" and Tactics

Too much is made of psychological games and maneuvering. Most attorneys are too experienced, calculating, smart and disinterested to be significantly influenced by appearance, silence, "good cop/bad cop" and other tactical approaches. Settlement is a business decision and it is business considerations that will generally influence both sides

to reach a settlement. The best approach is an honest assessment of the strengths and weaknesses of the case. Skip the rhetoric on tactics and devote more effort to understanding your case and your adversary's case. Step into his/her shoes to understand what motivates him/her.

Should negotiations proceed by telephone versus or be done in person? As a practical matter, live negotiations may be impossible. If it is feasible, then live negotiations are usually much more effective if the parties are reasonably close. Judges have long known that forcing counsel to come to court and "dust off the file", particularly with the client present, is the most effective way to get a settlement.

"The difficult client" is over-used and is usually a "tactic". If the client really is difficult, a mediator or third party will help. The difficult client will also affect your litigation budget. If you think this is a posture, the typical response is that I have a difficult boss too.

Don't get sucked into an "argument reply cycle". Everyone wants to negotiate "from a position of strength", but in practice, this maxim is the same as saying every politician wants to cut taxes. Too often, parties use this maxim to try to convince the other side of the benefits of their position. This assumes that the other side is dumb. As previously stated, assume the other side is at least as smart as you are, and you will be well-served in negotiations. If you have a good case, the other side already knows it and everything else is just posturing. The argument reply cycle is just a waste of time that frequently causes parties to harden their position, especially if the client starts to believe his own attorney's rhetoric. Honesty is much more helpful.

The proper response to a posturing adversary is, "I Understand your position although I may disagree with your conclusion and I think you understand mine. Now do you want to settle this case or do want to posture?" In a minority of cases there may be some misunderstanding of the facts or the law. Some *honest* discussion may be helpful. Chances are, though, if you have to explain your position, it isn't a very good one.

In complex cases, insisting on a "global settlement" is usually the quickest way to kill any chance of settling the case. Settle your claims if the settlement is fair. It is not "bad cricket" to let other defendants fend for themselves. Be aware though that a "divide and conquer" strategy may work against you.

Other Factors Affecting Settlement Negotiations

Your proposed settlement has to take into account that plaintiff's personal injury counsel is working on a contingency. Accordingly, an annuity settlement has to have a cash portion. The settlement amount should take into account what the plaintiff and his counsel will actually walk away with, unless the case is patently meritless.

Liens from insurers will almost always be present in significant personal injury cases. It is too simplistic to say this is plaintiff's problem. It is your problem too if the plaintiff has no choice but to continue to litigate. Lien holders will almost always have to be involved in the negotiations in order to effectuate meaningful settlement discussions. The good news is that because they are almost always insurers, they will make significant concessions.

Don't overestimate the worth of subrogation and indemnity rights. Chances are that if the subrogation claim was an easy one, plaintiff would have brought it directly.

Cases involving children (less than twenty-one years in most jurisdictions) require the court's approval for settlement. If the judge thinks the client is getting ripped off by his lawyer it will reject the settlement.

Alternative Dispute Resolution

In practice, formal arbitration is neither cheaper nor quicker than formal litigation. There are no rules of evidence**.** Hearsay, evidence without foundation, reputation, all are admissible. Basically, anything goes. Judges can be biased. Beware of "industry" experts. Judges get paid by the hour. They do not have the pressure of a docket to manage so there is no incentive to act quickly and a strong incentive to permit the parties to go as long as possible. Judges do not have to follow the law. Often, the judges are not even lawyers. There is no realistic possibility of appeal for crazy rulings. The standard for appeal of an arbitration ruling is abuse of discretion. It is rare when an appellant meets this standard.

Non-binding mediation has become a very useful tool in settling cases. However, there are some things to keep in mind. You pay the mediator a fee. Traditionally, the courts performed this function for free and many still will if you are persistent. Mediators get paid by the hour. This encourages wasteful argument reply cycle. Beware of service providers that have ongoing contracts or relationships with your adversaries.

Structured Settlements and Other Settlement Tools

Annuities, confessions of judgment and other devices can be a very useful way to resolve a difficult case. Annuities are particularly useful in cases involving children because the ultimate reward becomes very large. Judges like them because it keeps parents' greedy hands off the child's money. An annuity settlement usually requires a cash portion to pay counsel, experts, and immediate expenses. The defendant should probably

pay a "lock-in" fee because an infant's compromise could take time and annuity rates may change.

Confessions of judgment are useful where money is not immediately available but the defendant is a good credit risk. Judgment can be implemented immediately for larger amount if a periodic payment is missed.

Cap cost insurance is very useful in environmental cases where ultimate cost may not be fixed. The insurance responds if the remediation contractor's estimate turns out incorrect. Another technique in environmental cases is to request that the contractors bid on cost where they guarantee the amount.

To end indemnity claims have plaintiff step into your shoes. This should not be limited by settlement amount. That’s a risk plaintiff should bear. In environmental cases or multiple toxic tort claims, insurers should try to obtain either a site release or better yet, a policy buy back**.** However, demanding a buy back in negotiations for less than face amount of policy could provide basis for unfair claims settlement practice.

Conclusion

I. The goal of any settlement is to "buy your peace". Effective settlement practices achieve the goal at average cost that is minimal over the long term of many claims or lawsuits. If you approach the settlement with honesty and avoid the common pitfalls outlined in this article, you should be successful in achieving this long term goal.