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Understanding Settlement in Damages (and Beyond)

Chris Guthrie

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I. INTRODUCTION

For all of the ways in which the *Sabia* case[1] is extraordinary, its outcome—settlement—is decidedly ordinary. In most civil litigation, as in the Sabias' litigation against Dr. Maryellen Humes and Norwalk Hospital, "[s]ettlement is where the action is."[2] Roughly two-thirds of all cases settle[3] (and most of the rest are resolved through motions[4]). Why do most cases settle? Given the costs, delay, and unpleasantness of the litigation process, why do *any* cases go to trial?

To address these questions—that is, to explain why most cases settle as well as why some cases "fail"[5] to settle and result in trial—legal academics have developed several theoretical accounts of litigation behavior in "ordinary"[6] civil cases. These accounts fall into two basic categories: (1) rational actor accounts (which assume that litigants are outcome-maximizers), and (2) non-rational actor

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1. BARRY WERTH, DAMAGES: ONE FAMILY'S LEGAL STRUGGLES IN THE WORLD OF MEDICINE (1998).

2. Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1212 (1992).

3. *See, e.g.*, Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1339-40 (1994) (relying, in part, on the Kritzer study, stating that the often cited eighty-five to ninety-five percent settlement rates are misleading because they represent all civil cases that do not go to trial as opposed to limiting the definition of settle to those resolved solely by agreement between the parties without any decision by an authoritative decision maker).

4. *See, e.g.*, Chris Guthrie, *Procedural Justice Research and the Paucity of Trials*, 2002 J. DISP. RESOL. 127 (using databases maintained by Professors Theodore Eisenberg and Kevin Clermont to show that one to four percent of federal and state cases result in trial); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511-12 (1986) (citing an estimate by an employee of the Administrative Office of the United States Courts that "some thirty-five percent of all federal cases are disposed of by rulings on motions for dismissal or for summary judgment").

5. Most legal scholars treat trial as a failure. *See, e.g.*, Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991).

> A trial is a failure. Although we celebrate it as the centerpiece of our system of justice, we know that trial is not only an uncommon method of resolving disputes, but a disfavored one. With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.

Id. For contrasting views, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (celebrating the virtues of public trials versus private settlements) and Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

6. *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 168 (2000) (describing "ordinary" litigation as that in which plaintiffs have at least a moderate probability of recovering money damages at trial) [hereinafter Guthrie, *Frivolous Framing*].

accounts (which assume that litigants want to maximize their outcomes but have difficulty doing so).

The purpose of this article is to introduce these academic accounts of settlement and to consider whether they provide insight into the settlement of the Sabias' litigation against Humes and Norwalk. I believe these accounts are largely complementary rather than competing, so my own view is that each sheds some light on litigation and settlement behavior in most civil cases (including the *Sabia* case).

II. RATIONAL ACTOR ACCOUNTS

The prevailing accounts of litigation behavior assume that litigants are "rational actors." The basic idea with respect to these rational actor accounts is that litigants will make decisions in accordance with various logical axioms in an effort to maximize their outcomes in the litigation process. The two rational actor accounts of litigation behavior are the Economic Theory of Suit and Settlement and the Strategic Bargaining Theory.

A. The Economic Theory of Suit and Settlement

The Economic Theory of Suit and Settlement, developed most fully by Professors George Priest and Benjamin Klein,[7] assumes that litigants make risk-neutral or risk-averse choices to maximize their outcomes in litigation. When deciding whether to settle a case or go forward to trial, the Economic Theory predicts that litigants compare the value of settlement to the expected value of trial and select whichever of the options promises more value. Because the costs of trying a case almost invariably exceed the costs of settlement, the Economic Theory predicts that litigants will settle most cases as a way of saving costs. Trials result only where litigants develop divergent expectations about likely trial outcomes so that the parties cannot agree on a settlement range. Professors Samuel Gross and Kent Syverud explain the Priest and Klein model as follows:

> Priest and Klein assume that the parties will settle whenever the defendant's maximum offer is greater than the plaintiff's minimum demand. Because litigation costs are added to the defendant's maximum offer and subtracted from the plaintiff's minimum demand, settlement will normally occur. Indeed, if plaintiffs and defendants always agreed in their predictions of trial outcomes, there would be no trials at all. But the parties do not always agree, and their disagreements can lead to very different assessments of the expected judgment. As a result, the plaintiff's minimum demand will sometimes exceed the defendant's maximum offer. In that situation, Priest and Klein tacitly assume that the parties neither bargain nor litigate strategically. The litigants make demands and offers, they settle or try cases, solely because of what they expect the

7. *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

court will do, and not at all because of how they expect opposing parties to respond.[8]

* * * *Notes & Questions* * * *

(1) Does this theory explain why cases settle and why cases go to trial? Does it explain the outcome in the Sabias' litigation with Humes or Norwalk?

(2) Following the *Sabia* case, Michael Koskoff stopped trying medical malpractice cases. Barry Werth's explanation of Koskoff's decision suggests that Koskoff would endorse the Economic Theory's account of medical malpractice litigation:

> Mike Koskoff stopped trying medical malpractice cases, not because his office wasn't handling them but because virtually all of the large cases in which he was personally involved now settled through negotiation. Part of this was due to Koskoff himself. Insurance companies doing business in Connecticut recognized that his careful screening of cases, his ability to hire and prepare top medical experts, and his courtroom skills made it risky to go to trial against the firm in cases with high exposure. Other factors also militated against claimants holding out for trial: plaintiffs' frustrations with ever-lengthening delays, the availability of alternative methods of dispute resolution, the rising costs of litigation, and *the fact that there was no longer much guesswork about what big-ticket medical malpractice cases were worth.* Jury verdicts in excess of $20 million were routinely knocked down on appeal to between $7 and $8 million. Even without malpractice reform or health-care reform, both of which collapsed with the failed Clinton health-care proposal, *the medical liability system had become more rational because it had become more market-driven, at least at the top. Lawyers still needed to prepare as if trials were inevitable, but trials were no longer necessary to determine what cases were worth. Disputes like the one over Little Tony's life expectancy started to disappear from the bargaining table.*[9]

B. Strategic Bargaining Theory

Strategic bargaining theorists, most notably Professors Robert Mnookin and Lewis Kornhauser,[10] elaborated on the Economic Theory of Suit and Settlement by positing that rational litigants will seek to bargain with one another in order to obtain more favorable settlements. Thus, for strategic bargaining theorists, negotiated outcomes are determined not only by the litigants' expectations about likely trial outcomes[11] but also by the litigants' strategic bargaining behavior. Professors

8. Gross & Syverud, *supra* note 5, at 324.

9. WERTH, *supra* note 1, at 373-74 (emphasis added).

10. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). *See also* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

11. *See supra* Part II.A.

Gross and Syverud describe the Mnookin and Kornhauser strategic bargaining theory as follows:

> Pretrial bargaining is strategic. The predicted trial outcome may inform a litigant's strategy, but it cannot determine it, since even a perfect prediction leaves crucial questions unanswered: What fraction or multiple of the expected judgment should the litigant offer, and when? How quickly and in what fashion should she respond to an offer by the other side? Under what circumstances should a party make a sincere offer? An outrageous demand? An insincere threat to go to trial? Despite extensive research, no general theory even claims to describe the optimal settlement strategy. Bargaining remains an art rather than a science.
>
> Bargaining theory has provided an interesting and complex view of the process that leads cases to be tried. The first major statement of that view was presented in Robert Mnookin and Lewis Kornhauser's 1979 article, "Bargaining in the Shadow of the Law: The Case of Divorce." The central point of this article is consistent with Priest and Klein's framework: litigants order their private, out-of-court negotiations around the substantive law and procedure that will be applied if the negotiations break down and the court steps out of the shadows to adjudicate the dispute. But Mnookin and Kornhauser also argue that an array of other factors affect negotiating behavior . . . [including] strategic behavior . . . .[12]

* * * *Notes & Questions* * * *

(1) Did the lawyers representing the parties in the *Sabia* case engage in any strategic bargaining tactics? Consider the following:

(a) Offers of judgment: Rule 68 of the Federal Rules of Civil Procedure and many state codes authorize litigants to make "offers of judgment" to one another. An offer of judgment is designed "to significantly increase the incentives for settlement by attaching financial penalties (through a cost-shifting mechanism) to the rejection of a settlement offer that was eventually proved (by the verdict) to have been reasonable."[13] If a litigant rejects an offer and then fails to recover more at trial, the litigant must pay post-offer costs incurred by her adversary.[14] On behalf of the Sabias, Chris Bernard filed offers of judgment against both Humes and Norwalk:

> Bernard filed two separate "offers of judgment" in Bridgeport Superior Court. Aimed at Norwalk Hospital and Humes, these were largely set-

12. Gross & Syverud, *supra* note 5, at 327-28. It is worth noting that though Mnookin and Kornhauser built their theory on the Economic Theory, they did acknowledge "non-rational" factors that might influence bargaining, including, for example, the litigants' feelings toward one another. *See* Mnookin & Kornhauser, *supra* note 10.

13. Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 380 (1997).

14. *Id.*

tlement devices, legal notification of what the Sabias would accept to drop their case . . . .

An offer of judgment started the clock on settlement negotiations whether both sides were interested or not, and it was one of the few tools available to plaintiffs to begin such discussions, in effect by announcing their willingness to settle for, and only for, a stated price, then forcing the other side to respond. Such offers were notoriously unrealistic, but defendants had to treat them seriously. If they refused, and a verdict ultimately matched or exceeded the plaintiffs' offer, they would have to pay for any added losses due to the delay. Explains Koskoff, "What we wanted to say to the defendants and their insurance companies was, 'We think if we go to trial, we're going to get more than this. If you don't accept, you could end up on the hook not only for the verdict, but twelve percent a year for the difference.'" The offers of judgment against the hospital and Humes were $15 million and $2 million, respectively, the top limits of their insurance coverage.[15]

(b) Settlement presentation: The plaintiffs' offer of judgment appeared to backfire after Koskoff made his settlement presentation to the Norwalk Hospital executives. Koskoff began by making the case for liability and then addressed damages. He told the executives that the plaintiffs valued the case at $22,227,463 (seven million dollars more than the offer of judgment). Here is how the Norwalk executives reacted to the presentation:

Koskoff remained standing. No one spoke.

Finally, Osborne [the hospital president and CEO] broke the silence. "I thought the case was for $15 million. That was the offer of judgment. Where did you get $22 million?"

Koskoff thought for a second. He might have said that he was trying to grab their attention. Or that, as they could see, he was well prepared and they had better be ready to talk serious money because Koskoff thought he could try the case and get a verdict of $22 million. Or that although his professed goal was to go to trial, it was an open secret that ninety percent of cases settled, and he was purposely putting up a big number in order to leave room to negotiate. He might even have said that pain and suffering, those damages promoted so successfully by his father and uncle, had lately become the chief inflator of jury awards and thus the main area where price ultimately was negotiated, so he was now asking for $10 million for those damages rather than the $2.5 million he'd estimated earlier. Instead, he simply told them he had revalued the case.

An uncomfortable silence followed. At last Osborne stood up and thanked Koskoff and Bernard for coming. Koskoff was baffled by this

15. WERTH, *supra* note 1, at 178.

> brusque dismissal. The hospital had invited him up to hear his case, yet when he finished, no one responded. He didn't expect them to accept his terms, but he expected something, some discussion. He had never seen anything like it.[16]

(c) Pre-trial motions as "bargaining chips"[17]: As the litigation progressed, Koskoff filed two "last-minute" motions as a way of posturing for settlement:

> Typically, Koskoff thought he couldn't lose. He believed that Doyle—though he would never admit it—knew it too, and he wanted Doyle to reconsider whether going to court was in his client's best interest. As part of the housekeeping of setting the issues for trial, Koskoff now entered two last-minute pleadings. Both were meant to remind Doyle what he would be up against, all too soon, if Travelers still refused to discuss resolving the case.[18]

III. NON-RATIONAL ACTOR ACCOUNTS

Legal scholars have also developed non-rational actor accounts of litigation behavior. These psychology-based theories challenge the rational-actor assumption underlying the economic and strategic bargaining theories. Relying on empirical evidence of predictable patterns of mental processing, these theories purport to describe the way litigants will actually behave when making settlement decisions. The virtue of these psychological theories is that they rest on empirical observations about human behavior; precisely for that reason, however, they are much less elegant than the rational actor theories (which make questionable assumptions about human behavior but generate straightforward predictions about case outcomes).

A. The Framing Theory

Psychologists have discovered that when people face risk or uncertainty, they make decisions by comparing the available options to the status quo position. When the options appear to be gains, people tend to make risk-averse decisions and select the safe option; when options appear to be losses, however, people tend to make risk-seeking decisions and select the gamble. Legal scholars have used this insight, formalized by Professors Daniel Kahneman and Amos Tversky in "prospect theory,"[19] to explain suit and settlement behavior. In an article on frivolous litigation,[20] I explain the "framing theory"[21] as follows:

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16. *Id.* at 251.
17. *Id.* at 268.
18. *Id.* at 266.
19. *See* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979).
20. Guthrie, *Frivolous Framing*, *supra* note 6.
21. Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113 (1996). *See also* ROBIN M. HOGARTH, JUDGEMENT AND CHOICE 105 (2d ed. 1987) ("Prospect theory therefore predicts that whereas the plaintiff would settle out of court (i.e. take the safe option), the

> The Framing Theory of Litigation posits that litigants, like decision-makers generally, evaluate decision options relative to the current state of affairs and make risk-averse decisions when choosing between gains and risk-seeking decisions when choosing between losses. When deciding whether to settle a case or go forward to trial, the Framing Theory thus predicts that *plaintiffs* are likely to prefer the risk-averse option—settlement—because they view both settlement and trial as gains, while *defendants* are more likely to prefer the risk-seeking option—trial—because they view both settlement and trial as losses.[22]

Scholars have collected experimental evidence supporting the Framing Theory. In one simple illustration, Professor Jeffrey Rachlinski gave a copyright litigation problem to law students, some of whom played the role of plaintiff and some the role of defendant.[23] Rachlinski gave the plaintiff-subjects a choice between a certain $200,000 settlement and a fifty percent chance of winning $400,000 at trial (along with a fifty percent chance of winning $0) and the defendant-subjects a choice between paying a $200,000 settlement to the plaintiff and a fifty percent chance of losing $400,000 at trial (along with a fifty percent chance of losing $0).[24] Rachlinski found that seventy-seven percent of plaintiff-subjects preferred to settle while sixty-nine percent of defendant-subjects preferred *trial*.[25] Rachlinski concluded that:

> Litigation appears to supply a natural frame. When deciding whether to settle a case, plaintiffs consistently choose between a sure gain by settling and the prospect of winning more at trial. This closely resembles a gains frame . . . . Conversely, defendants choose between a sure loss by settling and the prospect of losing more at trial. This is a choice made in a loss frame. Hence, cross-claims aside, litigation presents a fairly consistent frame.[26]

* * * *Notes & Questions* * * *

(1) Do you find the Framing Theory persuasive? Assuming for the moment that you do, who is likely to do "better" in settlement talks? Plaintiffs (who are risk averse) or defendants (who are risk seeking)? Why?

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defendant would prefer to go to court (i.e. the risky alternative)."); Linda Babcock et al., *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289 (1995) (examining framing in a hypothetical products liability case); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 129-42 (1994) (positing that the framing of an offer will affect settlement rates); Peter J. van Koppen, *Risk Taking in Civil Law Negotiations*, 14 LAW & HUM. BEHAV. 151 (1990) (providing evidence consistent with framing).

22. Guthrie, *Frivolous Framing*, *supra* note 6, at 167-68.

23. Rachlinski, *supra* note 21, at 128-29.

24. *Id.*

25. *Id.*

26. *Id.* at 129.

(2) Do you think this account applies to frivolous or low-probability litigation the same way that it applies to regular cases? In other words, do you think plaintiffs in frivolous cases are likely to be risk averse and defendants risk seeking?[27]

(3) The Framing Theory's central insight is that litigation involves risky or uncertain decision-making and that people confronted with decisions of this type seem to decide in predictable, non-maximizing ways. Is there any evidence to suggest that the Framing Theory influenced the decisions of the litigants or lawyers in the *Sabia* case?

Koskoff accepts the Framing Theory's central insight about litigation decision-making—"settlements were almost always a last-ditch means of avoiding the uncertainty of putting a case to a jury."[28] Do you think he accepts the Framing Theory's predictions about how plaintiffs and defendants will respond to that uncertainty?

B. The Regret Aversion Theory

Litigation decision-making creates a palpable possibility of regret. Because regret is an unpleasant emotion, litigants are motivated to make decisions during the process that decrease the likelihood they will experience post-litigation regret. Given the structure of the civil justice system, this means that most litigants will be motivated to settle:

> When confronted with difficult litigation decisions, like whether to settle a case or go forward with trial, litigants will likely number-crunch, calculate, and value-maximize, as the Economic and Framing Theories predict, but they will also feel a range of actual and prospective emotion that they will incorporate into their decision-making. Legal scholars seeking to understand, describe, and perhaps even modify litigation behavior need not abandon their elegant, "calculating" theories, but they need to couple them with richer theories that take the reality—not just the rationality—of human beings into account.[29]

> Building on modern regret theory, I propose in this article the Regret Aversion Theory of Litigation Behavior. This theory posits that litigants seek to make litigation decisions that minimize the likelihood they will experience post-litigation regret. In our litigation system, litigants generally must choose between settling and trying their cases. Litigants who settle never learn what they would have recovered at trial, but litigants who reject settlement offers in favor of trial learn the outcomes of both options. Settlement, thus, offers litigants an opportunity to avoid, or at least minimize, regret, while trial increases the likelihood litigants will experience regret. Given the structure of our litigation system, the Regret

27. *See* Guthrie, *Frivolous Framing*, *supra* note 6 (demonstrating experimentally that plaintiff and defendant risk preferences are reversed in frivolous or low-probability cases and exploring the implications of this finding for settlement behavior).

28. WERTH, *supra* note 1, at 296.

29. Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV. 43, 61-62.

> Aversion Theory posits that litigants will choose settlement over trial to avoid feelings of regret associated with learning after trial that they should have settled.[30]

To test the Regret Aversion Theory, I provided law student-subjects with a hypothetical scenario called "Overtime":

> I administered the first scenario—"Overtime"—to twenty-seven students. In this scenario, the students read about two identical disputes, one between Lisa and her employer and the other between Martha and her employer. Lisa and Martha believe their respective employers, Company ABC and Company XYZ, have failed to pay them overtime compensation. To recover the overtime compensation they believe they are owed, Lisa and Martha have filed suit against their respective employers, seeking payment of $5,000.
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> Each learns from her lawyer that due to "the vagueness of the law and the particular characteristics of her job" she has a "fifty percent chance of recovering $5,000 and a fifty percent chance of recovering $0, depending upon whether the judge finds her to be a 'non-exempt' or an 'exempt' employee." Thus, both Lisa and Martha face an expected trial verdict valued at $2,500—i.e., fifty percent chance x $5,000 + fifty percent chance x $0 = $2,500 expected value. Immediately prior to the hearing, Company ABC offers to settle Lisa's claim for $2,500, and Company XYZ offers to settle Martha's claim for $2,500. Thus, each faces a choice between a certain $2,500 settlement on the one hand and an expected trial value of $2,500 on the other hand.
>
> Lisa, the subjects learn, "is litigating in a jurisdiction where the judge will cease to participate in the case upon learning that the parties have reached an out-of-court settlement." Because Lisa is litigating in a "traditional" jurisdiction, she will not learn what the judge would have decided at the hearing if she accepts the settlement offer. Martha, by contrast, is litigating in a "regret" jurisdiction. She, the subjects learn, "is litigating in a jurisdiction where the judge is required, upon learning that the parties have reached an out-of-court settlement, to inform the parties of what he would have awarded at the hearing." Because Martha is litigating in a regret jurisdiction, she *will* learn what the judge would have decided at the hearing if she accepts the $2,500 settlement offer. The subjects are then asked to indicate which of the plaintiffs—Lisa or Martha—is "most likely to *accept* the settlement offer."[31]

Although Lisa and Martha faced identical substantive decisions, the emotional consequences of settling were quite different because Lisa could minimize regret by settling but Martha could not. Consistent with regret theory, I found that

30. *Id.* at 72-73.
31. *Id.* at 74-75.

subjects overwhelmingly indicated that Lisa was more likely to settle (81.5% of subjects).[32] I asked the subjects to indicate why:

> Most students provided answers consistent with the proposed Regret Aversion Theory. "If Martha takes the $2,500 [and] settles," one respondent explained, "there is a chance that she will have to hear from the judge that she could have got [sic] the full $5,000. Knowing that the judge could say she is entitled to the full $5,000 when she already accepted the $2,500 is something she will not want to hear." Another respondent explained that Lisa "can be confident that she did what was best for her, whereas Martha may learn later that the judge would have ruled for her. That knowledge could be an emotional blow to Martha." And still another explained, "I think that the plaintiff in the jurisdiction where the judge ceases to participate upon settlement is most likely to [settle] because never knowing what the judge would have decided, whether she would have been better or worse off, will leave the least amount of regret."[33]

* * * *Notes & Questions* * * *

(1) The "Overtime" vignette reported above suggests that plaintiffs are likely to settle due to regret aversion, but what about defendants? In another vignette, I found evidence suggesting that defendants are also likely to settle due to regret aversion.[34] This latter finding arguably contrasts with the Framing Theory, which predicts that defendants are risk-*seeking* rather than regret-*averse*.

(2) Does regret aversion influence the litigants and lawyers in the *Sabia* case to settle?

(a) Consider Bernard's ruminations on recommending to the Sabias that they reject Travelers' settlement proposal:

> Approaching trial was one thing; going to court after turning down a multimillion dollar offer was another. Protective of Tony and Donna, Bernard was nagged by doubt. He worried that by encouraging the Sabias to reject Travelers' proposal, however inadequate, he and Koskoff may have doomed them to a far worse fate: "How would you like to be the one to say to Big Tony Sabia, 'I'm sorry, we lost. You're going to have to go back to living the way you've been living.'" Mediations, he knew, are more difficult for trial lawyers than trials are. In court everything is black and white—you argue your case, give it all you've got, and if you lose, as Ted Koskoff used to say, the judge and jury were against you from the start. But failing to reach a settlement once negotiations

32. *Id.* at 75.
33. *Id.* at 76.
34. *Id.* at 77-79.

began left only yourself to blame and carried the legal and moral weight of having rejected a suboptimal deal for possibly none at all.[35]

(b) Or consider Bill Doyle's use of a motion to strike as a way of inducing the Sabias to settle due to anticipated regret:

Doyle as promised filed his last-minute motion to strike Donna's claim for emotional stress. With a trial imminent, he wanted the Sabias to know that one of the costs of refusing to settle was that Donna might well end up with no money of her own. Whether or not he knew the intimate details of the Sabias' domestic history, he, like Koskoff, knew exactly which buttons to push to make his opponents squirm.[36]

(3) Trial creates a salient possibility of regret because it is almost invariably preceded by the rejection of some certain settlement amount, but it is worth observing that litigants and lawyers can also feel regret following settlement. In the following excerpt, Tony Sabia expresses regret following the Sabias' acceptance of the Norwalk settlement:

"You mean I'm going to walk out of here with a check and that's going to be it? Is that all it means?" Tony asked, his voice steeped in remorse. Already he was "kicking myself in the ass, because I watched that guy [Doyle] agree with everything Michael said." They had gotten it over with, Donna would say, but for what purpose, and at what price, she and Tony still didn't know.[37]

Koskoff's reaction to Tony's initial expression of regret is instructive:

After they left, Koskoff chatted with Bernard and Lichtenstein, and then sat alone at his desk, decompressing from the past week. He understood the Sabias' regrets but thought he had saved them from something much worse: yet another crushing disappointment followed by the wait for a trial that still might not happen. "That," he says, "would have really destroyed them." By ending their case now, he had done probably as well for them as any lawyer could have. A trial might have satisfied their craving for justice and revenge, but not their need to get on with their lives, which Koskoff considered ultimately more important. Tony had once asked: "Who the hell could ever dream that a fucking nightmare like this would ever happen? Not us." Yet Koskoff saw nightmares like theirs every day; most not as bad, a few worse. As a trial lawyer and public performer, he preferred to go to court, but he had learned that it

35. WERTH, *supra* note 1, at 327.
36. *Id.* at 331.
37. *Id.* at 369.

was far better for everyone not to, provided the defendant's insurer could be forced to pay.[38]

C. Settlement Factors

Legal scholars devised the Framing Theory and the Regret Aversion Theory to provide fully developed, non-rational actor accounts of litigation and settlement. Legal scholars have also identified other psychological phenomena that may systematically influence litigation behavior. Although these phenomena do not lend themselves to comprehensive litigation theories, they can play a significant role in suit and settlement nonetheless. Below, I consider four of these phenomena: anchoring, reciprocity, scarcity, and vindication seeking.

1. Anchoring

When people make numerical estimates, they tend to rely heavily on the initial value available to them. This initial value serves as an "anchor" that often exerts undue influence on their final estimates. As Professors Tversky and Kahneman explain it, "different starting points yield different estimates, which are biased toward initial values."[39] Anchors can have a significant impact on litigation behavior:

> Litigation frequently produces anchors. In settlement talks, for instance, litigants can be influenced by the opening offers that their adversaries make. Professors Russell Korobkin and Chris Guthrie found that people evaluating hypothetical settlement offers were more likely to accept a $12,000 final settlement offer when it followed a $2,000 opening offer than when it followed a $10,000 opening offer. Korobkin and Guthrie hypothesized that those who received the $2,000 opening offer expected to settle for a relatively small amount, so the $12,000 final offer seemed generous by comparison. On the other hand, those who received the $10,000 opening offer expected to settle for relatively more, so the $12,000 final offer seemed relatively stingy. The opening offers effectively "anchored subjects' expectations" and influenced their settlement preferences.[40]

*** *Notes & Questions* ***

(1) Do you think that anchoring really influences decision-making? Is there any evidence that anchoring influenced the outcome in the Sabias' litigation? How about the policy limits on Humes' and Norwalk's insurance policies? Did those figures irrationally influence the way the lawyers valued the *Sabia* case?

38. *Id.*

39. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases, reprinted in* JUDGMENT UNDER UNCERTAINTY 13 (Daneil Kahneman et al. eds., 1982).

40. Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 789 (2001).

(2) If the case had gone to trial, do you think anchoring might have influenced the jurors' decisions? In several studies, researchers have found that plaintiffs' lawyers' damage requests influenced mock jurors' assessments of the appropriate damages to award in civil cases.[41]

2. Reciprocity

Settlement behavior is also influenced by the so-called "reciprocity rule."[42] According to this rule—which appears to operate in all cultures[43]—people tend to feel obligated "to repay, in kind, what another person has provided us."[44] As Professor Robert Cialdini explains, the reciprocity rule sheds light on concession making:

> It is in the interest of any human group to have its members working together toward the achievement of common goals. However, in many social interactions the participants begin with requirements and demands that are unacceptable to one another. Thus, the society must arrange to have these initial, incompatible desires set aside for the sake of socially beneficial cooperation. This is accomplished through procedures that promote compromise. Mutual concession is one important such procedure.
>
> The reciprocation rule brings about mutual concession in two ways. The first is obvious; it pressures the recipient of an already-made concession to respond in kind. The second, while not so obvious, is pivotally important. Because of a recipient's obligation to reciprocate, people are freed to make the *initial* concession and, thereby, to begin the beneficial process of exchange. After all, if there were no social obligation to reciprocate a concession, who would want to make the first sacrifice? To do so would be to risk giving up something and getting nothing back. However, with the rule in effect, we can feel safe making the first sacrifice to our partner, who is obligated to offer a return sacrifice.[45]

* * * *Notes & Questions* * * *

(1) In what ways do you think the reciprocity rule may have influenced behavior in the *Sabia* case?

(a) Did the reciprocity rule influence the lawyers' expectations regarding discovery? Consider the following:

> Karen's job was to amass all the relevant facts in *Sabia*, a grinding process known optimistically as "discovery." She knew what to expect—

41. For a summary, see *id.* at 789-90.
42. ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE 20 (4th ed. 2001).
43. *Id.* at 20-21.
44. *Id.* at 20.
45. *Id.* at 37-38.

> very little. The goal once a lawsuit has been filed is for both sides to come to a common understanding of events. Without this there can be little hope of a focused trial or fair result. But lawyers have far more interest in gaining information than in yielding it and are disinclined to make things easier for their opponents than they have to. Now that *Sabia* was in litigation, it was up to the lawyers to submit each other written questions, called interrogatories, which they were supposed to review with their clients and return. Ostensibly, they sought this information to flesh out their knowledge and prepare for the next state of discovery—depositions—in which they interviewed each other's witnesses under oath. But Karen knew that wasn't how it worked. With most written discovery, she notes, "everybody objects to everybody else's questions." The case bogs down; then, after a period of meaningful delay the lawyers come back and horse-trade, saying, "We'll withdraw this question if you answer that one."[46]

(b) Did the reciprocity rule influence Koskoff to agree to an extension when Doyle joined the litigation? Consider the following:

> "I'm going to put this case on trial unless you both decide not to," [Judge] Ballen warned them. Koskoff smiled ambiguously, realizing he had gotten what he wanted—and might do better not to take it. All he had to do was say no to an extension and he and Doyle would be picking a jury in six weeks. That was exactly what he and Bernard had been trying to engineer for almost two years, since they'd filed the offers of judgment. A trial sooner rather than later would benefit him and hobble Doyle.
>
> And yet he held back. The case was now between him and Doyle, and the two of them had too much other business together, particularly the Yale case, for Koskoff to want Doyle to feel that he had taken unfair advantage. On the other hand, if he accepted a delay, Doyle would owe him. Whatever he decided, Koskoff knew Doyle would have numerous occasions to repay him, and would, aggressively, when it suited him.[47]

(c) Did the reciprocity rule influence the concession-making behavior in the second mediation?[48]

3. Scarcity

Scarcity also influences litigation behavior. The scarcity principle refers to the observation that "opportunities seem more valuable to us when they are less available."[49] Consider the following explanation:

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46. WERTH, *supra* note 1, at 79-80.
47. *Id.* at 262.
48. *See id.* at 363-64.
49. CIALDINI, *supra* note 42, at 205 (emphasis omitted).

> Collectors of everything from baseball cards to antiques are keenly aware of the scarcity principle's influence in determining the worth of an item. As a rule, if an item is rare or becoming rare, it is more valuable. Especially enlightening on the importance of scarcity in the collectibles market is the phenomenon of the "precious mistake." Flawed items—a blurred stamp or a double-struck coin—are sometimes the most valued of all. Thus, a stamp carrying a three-eyed likeness of George Washington is anatomically incorrect, aesthetically unappealing, and yet highly sought after. There is instructive irony here: Imperfections that would otherwise make for rubbish make for prized possessions when they bring along an abiding scarcity.[50]

* * * *Notes & Questions* * * *

(1) Can you think of any instances where the scarcity principle may have influenced litigation and settlement behavior in the *Sabia* case? How about the threat of Little Tony's death as an inducement to resolve the case more quickly?[51] The threat of trial?[52] Other deadlines? Do you think that deadlines and the scarcity principle explain the prevalence of apparent "courthouse-steps" settlements? For more on deadlines as scarcity, consider the following excerpt from Cialdini:

> [P]eople frequently find themselves doing what they wouldn't much care to do simply because the time to do so is running out. The adept merchandiser makes this tendency pay off by arranging and publicizing customer deadlines that generate interest where none may have existed before. Concentrated instances of this approach often occur in movie advertising. In fact, I recently noticed that one theater owner, with remarkable singleness of purpose, had managed to invoke the scarcity principle three separate times in just five words of copy, "Exclusive, limited engagement ends soon!"[53]

4. Vindication-Seeking

Litigants may also seek to vindicate their rights or to restore equity to inequitable relationships through the litigation process. Consider the following excerpt, in which Russell Korobkin and I tested for this in a hypothetical litigation problem:

> We provided subjects with a simple landlord-tenant dispute. Subjects were told that they signed a six-month lease to live in an off-campus apartment beginning September 1. After two months the heater broke down. Although they immediately notified the landlord and requested repair, the landlord failed to fix the heater. As a result, according to the

50. *Id.* at 205.
51. WERTH, *supra* note 1, at 261.
52. *Id.* at 296.
53. CIALDINI, *supra* note 42, at 207.

scenario, the subjects spent four winter months in a cold apartment attempting to keep warm with a space heater before moving out at the end of the lease period. Throughout this time period, the subjects had continued to pay $1,000 per month in rent. After moving out, they learned from a student legal service lawyer that "there was a good chance" of recovering a portion of the $4,000 in rent paid over that four-month period of time. The lawyer gave neither a specific prediction of the likelihood of success nor any estimate of the exact magnitude of a judgment. Subjects learned that, with the assistance of their attorney, they had filed an action in small claims court against the landlord. Prior to the court date, the landlord offered to settle the case out of court for $900.

The variable tested in this scenario was the landlord's reason for failing to repair the heater in spite of the tenant's prompt request that he do so. Group *A* subjects learned that they had made a number of calls to the landlord, to no avail. "The landlord promised to fix your heater, but he never did. A week later, you called him again. Again, he promised to fix it, but he never did. Over the next several weeks, you called him a half-dozen times, but he did not return your calls." Group *B* participants received a different explanation: After the second call to the landlord, "[y]ou learned that he had left the country unexpectedly due to a family emergency and that he was expected to be gone for several months . . . ."

The given explanation had a significant impact on how likely subjects were to accept the settlement offer and forgo their day in court. Knowing that the landlord did not fix the heater because he was out of the country due to a family emergency, most Group *B* (Family Emergency) subjects were willing to accept the landlord's offer and let the matter rest. Their mean response was 3.41 [on a 5-point scale where 1 = "definitely reject" and 5 = "definitely accept"]. Group *A* subjects (Broken Promise), in contrast, were more likely to reject the $900 offer and risk a less favorable decision in small claims court than to accept the offer. Their average score was 2.60. The difference between the two groups is highly significant. Fifty-nine percent of the Family Emergency subjects said they would "definitely" or "probably" accept the settlement offer, while only thirty-five percent of the Broken Promise subjects provided those same responses. Thirty percent of the Broken Promise subjects said they would "definitely reject" the $900 settlement offer in favor of small claims court, while only nine percent of the Family Emergency subjects would "definitely reject" the offer . . . .

The very different responses of the Family Emergency and Broken Promise subjects provide empirical support for the hypothesis that litigant victims seek more than just monetary damages from the legal system. They seek to restore equity to inequitable relationships. When litigants feel they have been treated badly by the other side, the chances of settlement

decrease because litigants are more likely to seek retaliation or vindication of their moral position in addition to monetary damages.[54]

* * * *Notes & Questions* * * *

(1) Were any of the litigants involved in the *Sabia* case motivated by a need for vindication?

(a) Consider Dr. Humes:

> Humes heard about the negotiations from Arnold Bai. She was hardly cheered by them. She knew now that unless St. Paul withdrew its offer and elected to stand by her as staunchly as it had Sherrington, there would be no trial. The realization pained her. It destroyed any chance of public vindication, although in truth few people outside Norwalk's medical community knew about the cloud she was under. Still, seeing how the experience of the trial had almost ruined Sherrington may have caused her to reconsider. As Haskell often pointed out, once a case settled, it sank forever from public view. Humes had to agree that there was release in burying the past. Doctors settled claims all the time simply to avoid being stigmatized. Even without publicity, Humes had been tarnished enough.[55]

(b) Consider Bernard's ruminations on the Sabias and on Tony in particular:

> Bernard was enraged when he considered what they'd [the Sabias] been through because of Little Tony. He admired them, Tony especially, and knew their hardships wouldn't lift until the case was at an end. He and Tony had talked frequently since Donna moved out, and Bernard knew that Tony wanted more than anything else the *vindication* of a trial. He had done all he could to keep his family from coming apart. What he craved now was recognition, not for his efforts but for his injury. Tony wanted the world to acknowledge his family's suffering and concede that they had been wronged.[56]

(c) And consider Tony's reaction to Doyle's remarks at the second mediation:

> Here was Tony's final, consuming plaint: The world had no idea how he and Donna and Little Tony had suffered, and that ignorance itself was the larger crime, even more than whatever had been done to them in the first place. He wanted Doyle to acknowledge that the hospital was at fault for killing Michael and devastating Little Tony and making him and Donna

54. Korobkin & Guthrie, *supra* note 21, at 144-47.
55. WERTH, *supra* note 1, at 207.
56. *Id.* at 298.

> wrecks. He wanted Travelers to pay, dearly. But what he seemed to want even more was a formal recognition of what his family had been put through, how violated and alone they were, and what it had taken for them to survive. He wanted Doyle and Casey to concede that he, Tony, had withstood all the mental abuse the world could throw at him and was still standing.[57]

(2) Is there anything other than a victory at trial that might meet a litigant's need for vindication? What about an apology?[58]

IV. CONCLUSION

It is conventional wisdom that litigants and lawyers settle cases in "the shadow of the law."[59] Law certainly informs settlement,[60] but settlement is also a process influenced mightily by economic, strategic, and psychological factors. Given the prevalence of settlement in the civil justice system, law students and lawyers must appreciate not only the potentially applicable legal rules but also these non-legal factors, the very factors that appear to have driven much litigation behavior in the *Sabia* case.

57. *Id.* at 359.

58. *See* Korobkin & Guthrie, *supra* note 21, at 147-50 (demonstrating experimentally that an apology increases the likelihood that a litigant motivated by a need for vindication will settle for a fair value). For a general introduction to apologies in civil litigation, see Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009 (1999).

59. *See* Mnookin & Kornhauser, *supra* note 10.

60. *See* Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161 (2002).