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Why Civil Cases Go to Trial: Strategic Bargaining and the Desire for Vindication

By Samuel R. Gross and Kent D. Syverud

When negotiations break down and a dispute cannot be settled, attorneys commonly blame their adversaries, often questioning their ethics or their judgment.

After interviewing many attorneys, we have come to believe much of the criticism is directed at *strategic* moves in negotiation. But strategic ploys are not the only reason dispute resolution fails. Rather, our research also suggests that a genuine desire for vindication through trial or other formal process may be very significant in some types of cases where bargaining breaks down.

Strategic Ploys

In litigation, as in other adversarial contexts, many of the moves in negotiation are "strategic" – ploys that are used to mislead and manipulate. Thus, litigants will conceal or distort information to impress their opponents, demand things that they don't want in order to get other concessions that they do, and play "chicken" with the opposition in order to get paid to avoid trials that nobody wants.

When strategic bargaining works, it improves the terms of settlement. You may get an additional $20,000 out of a defendant by convincing him that otherwise you will go to trial even if it costs you $100,000. But if he calls your bluff the result may be no settlement at all.

We have studied data from two sets of civil jury trials for money damages in California – 523 cases from 1985-86, and 359 from 1990-91 – including information on pre-trial bargaining as well as the outcomes of the trials themselves. For the second set of cases we also have data from interviews with attorneys on both sides in over 90 percent of the cases.[1] Our data show clear signs of this sort of strategic bargaining.

For example, most defendants in the commercial trials in our samples made puny settlement offers and then got hammered in court. In 1985-86, the offers in commercial trials averaged $574,000 less than the verdicts that were ultimately awarded, and the defendants lost 67 percent of the trials. In 1990-91, they averaged $1.71 million less and the defendants lost 55 percent of the time.

Wouldn't it have made simple economic sense for many of these defendants to offer more and settle instead of losing? In some individual cases, of course, that must be true, but overall we think not.

The tip-off is that, for the most part, the plaintiffs in these *commercial* cases played along with the defense and made puny demands – on average $322,000 less than the verdicts in 1985-86 and $710,000 less in 1990-91. *Personal injury* plaintiffs, by contrast, demanded on average a great deal more than the juries gave them. If the commercial plaintiffs who ultimately went to trial were willing to settle for that little, those who actually did settle may have agreed to take an even smaller fraction of the jury value of their claims.

Why? The great majority of these commercial plaintiffs are individuals, and most of them must pay some or all of the costs of trial. More than a third pay their lawyers at least partly by the hour, and two thirds advance at least a portion of the trial expenses. Personal injury plaintiffs, on the other hand, are

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almost always represented by contingent-fee lawyers who advance all trial costs.

It is very likely that most of the commercial plaintiffs were reluctant or unable to invest money in litigation, even in winning cases – and the defendants took advantage of their timidity by sticking to low-ball offers. That strategy, however, requires the defendant to maintain a posture of intransigence: Take $20,000 or go to trial. This may be the best approach, and it may work 95 percent of the time – but when it fails, the result probably won't be a settlement for $100,000 but an expensive trial followed by an even larger verdict.

Repeat Players and Conflicts

When a party to a dispute is a repeat player – a person or an institution that participates in a steady stream of litigated cases – it has an additional incentive to behave strategically: to influence the outcomes of other cases.

The most common repeat players in civil litigation for monetary damages are not the parties themselves but agents of the parties – plaintiffs' attorneys on one side and insurance companies on the other. This creates the possibility of conflicts of interest.

On the plaintiff's side, the attorney may want to go to trial to make a name for herself as a big winner, or at least as someone who will fight to the expensive end. Such a reputation might bring in business, it might even help future clients, but it has no value to the current one-shot plaintiff.[2]

On the defense side, the most common potential conflict occurs in cases with doubtful liability and damages in excess of the liability limit of the defendant's insurance policy. If the plaintiff makes a demand at or near the policy limit, the defendant will probably want to take the settlement, which is free to him, rather than risk a trial after which he might be stuck with personal liability for damages above that limit. Most liability insurance contracts, however, give the insurance company the power to accept or reject settlements,[3] and the insurance company may prefer a trial. It can't lose more than the policy limit one way or the other, and, for the price of trying the case, it might save itself a settlement of about that amount.[4]

We don't doubt that plaintiffs' attorneys and defendants' insurers sometimes act in conflict with the best interests of the parties. But we don't believe that such conflicts (strategic or otherwise) are a common cause of trials. Taking a case to trial against the interests of the client violates professional norms, and may subject the attorney or the insurance company to formal or informal sanctions. Norms and sanctions don't eliminate abuses, but they do suggest that the disfavored behavior is the exception rather than the rule.

While both plaintiffs' and defense attorneys may sometimes act in conflict with the best interests of their clients, research suggests these conflicts are not a common reason that cases go to trial rather than settle.

Disfavored Behavior Exceptional

In this context, our survey data are consistent with that expectation. The attorneys we interviewed frequently said that the trial was caused by the opposition's stupidity or stubbornness, but no defense attorney said that there was no settlement because the plaintiff's attorney wanted a shot at a major verdict, and no plaintiff's lawyer said that it happened because the insurance company had little to risk at trial and was unconcerned about its insured.

If we ignore occasionally serious conflicts and assume that attorneys and insurance companies handle these cases in the best interests of the parties, then the repeat players in ordinary civil litigation are all on the defense. Plaintiffs are almost always individuals and therefore necessarily one-shot players, while defendants, if they are not large businesses or government entities – and therefore likely to be repeat players in their own right – are almost always insured, usually completely. In other contexts, repeat players may just as easily be plaintiffs. This is true of some private litigants – e.g., environmental groups – it is the rule for public litigants, such as the Internal Revenue Service, regulatory agencies, and most important, criminal prosecutors.

If a repeat party is a plaintiff it can set its agenda and influence law and practice by its *filing strategy*. Indeed, that is likely to be its main tool, since nothing that happens later is as influential as the decision to file in the first place – especially since most repeat players plaintiffs see many more possible cases than they can ever handle.

A repeat player defendant can hope to exercise some control over the general pattern of litigation, but only through its *settlement* strategy. Unlike a repeat player plaintiff, it has no other way to send signals or channel cases. The only ultimate threat it can make is the threat of trial, and it must take some cases to trial to keep that threat credible. Therefore, we would expect the defendants in these ordinary civil cases to be more likely than the plaintiffs to engage in strategic bargaining, and more prone to take cases to trial for strategic reasons.

Our survey data support this prediction. Although each side was apt to say the other caused the trial, overall the attorneys were more likely to say the defendants rather than the plaintiffs did it, 52 percent to 42 percent.

Since trials are more visible than

settlements, an effective way to influence future litigation cases is to win most trials. Repeat players on both sides can do just that, since their non-repeat player opponents are more risk averse. Thus, a repeat player plaintiff (e.g., prosecutor) can win most trials by taking strong cases to court and offering defendants in weak cases deals that they are afraid to refuse. A repeat player defendant, such as an insurance company, can do the same.

Plaintiffs win most *cases* in both situations, usually by plea bargain or by settlement; repeat players or not, they rarely file unless they expect to win. But the repeat player plaintiffs (prosecutors) also win 75 percent or more of criminal *trials*,[5] while insured civil defendants (who settle and pay up on most *claims*) win approximately 70 percent of personal injury *trials*.

Zero-Offer Cases

Our settlement data show clear signs that some of these defense victories were due to strategic bargaining by defendants that was aimed at goals beyond the outcomes of the trials at hand. In many cases that went to trial the defendants made no settlement offers whatever. These zero-offer cases make up over a quarter of all trials, and about 60 percent of medical malpractice trials.

A zero offer is never a reasonable assessment of the expected cost of a case to a defendant. The trial itself is never free and usually expensive, and there is always a chance, however low, that a jury will side with the plaintiff.

Moreover, unlike the low-ball strategy that defendants seem to use in commercial cases, making a zero offer is not a promising way to avoid trials altogether. If no face-saving settlement whatever is offered, a plaintiff who has already filed and pursued a case may well plow ahead to the end, at high cost to everyone. This is particularly true in personal injury cases, where the costs of trial are usually born by the plaintiff's attorney – a repeat player who has the money to spend, and who can afford to lose most trials as long as she wins some big ones.

Still, a defendant (or his insurer) might well make such an offer to affect *other litigation*. Refusing to settle increases the risk to future litigants and may discourage future claims, and taking likely winners to trial may be worth the cost if it helps you bluff successfully in negotiations with plaintiffs in future cases.

While strategic bargaining therefore seems important, settlement may also break down because the parties have non-economic interests in obtaining more formal judgments. In particular, several scholars claim that many litigants want a type of non-economic satisfaction that settlement rarely provides – public vindication – and they argue that vindication is a goal that our legal system should promote.[6]

Strategic bargaining often may be aimed at goals beyond trial outcomes, which may help explain why about 60% of all medical malpractice cases studied were 'zero-offer' cases.

Our findings on this point are mostly negative. In 735 interviews, only three attorneys mentioned a desire for vindication as an explanation for why their case went to trial. Two attorneys said their case was tried because a party demanded her day in court; they were on the opposing sides of the same case, and each pointed their finger at the other's client. Only a few attributed trials even in part to the desire of a client for a hearing or a public judgment.

Less direct data, however, suggests that a desire for vindication was indeed at the root of many trials – at least in one type of case. Twenty-seven percent of the cases we examined failed to settle because the defendants offered nothing to the plaintiff, at any point in the pretrial proceeding. This "zero-offer" rate varied across types of claims, from a low of 11 percent to 15 percent in vehicular negligence trials, to a high of 59 percent to 60 percent in medical malpractice trials.

Medical Malpractice Illustrative

We believe the high rate of zero-offers in medical malpractice cases is best explained by the desire of physicians for vindication at trial. Most physician malpractice insurance policies in effect in California at the time contained a "consent to settle" clause, which requires the agreement of the doctor to any non-zero settlement negotiated by the insurer.[7]

Lack of consent was mentioned by an attorney as a cause of trial in 19 of the 32 1990-91 zero-offer medical malpractice trials, and we suspect that it was a factor in at least several other medical malpractice trials in which no attorney specifically mentioned it. We also know that the trial rate in medical malpractice cases is considerably higher across the nation than for any other category of personal injury litigation, and that doctors win defense verdicts in more than 90 percent of the cases in which there is no settlement offer at any point in the litigation.

What explains these patterns?

What seems to be happening is that doctors are insisting on trial in some medical malpractice cases in which they expect to obtain public vindication. This is most likely to happen when the doctor is convinced that she acted in a professionally responsible manner, but had nonetheless been wounded in her self-esteem and damaged in her reputation by a patient's claim that she committed malpractice. Cases where the defendant feels like that all the way up to trial are very likely to be winners for the defense.

In other contexts, insurance companies settle most odds-on winners for comparatively small amounts, in order to save trial costs and to minimize risks – not in medical malpractice.

Unlike other litigants, doctors have negotiated insurance contracts that give them the power to make that choice themselves. Moreover, since the insurance companies remain responsible for the defense costs and for damage awards at trial, the defendant doctor can usually reject a low settlement without undertaking personal liability for legal costs or for any judgment within policy limits. The usual result is a trial that the insurance company pays for, and the doctor wins.

In other words, in at least one type of litigation where reputation and vindication are particularly significant for a coherent and influential constituency of defendants, those defendants have been able to order their private relationships with their insurance companies in a way that protects that interest.[8]

Implications for ADR

These findings have implications for mediators, arbitrators and judges, who are trying to resolve disputes short of trial on the merits. In particular, low-ball offers and zero offers from defendants may be less a matter of ethics than of a rational strategy that looks to stakes outside the economic value of a particular dispute. A dispute resolver who confronts a low offer, or no offer at all, would do well to clarify the economic strategy and the non-economic stakes that may underlie it, before ascribing the conduct to bad faith in negotiation.

Endnotes

[1] The cases that we studied were reported in *Jury Verdicts Weekly*, a statewide California jury-verdict reporter. We used only civil jury trials that went to verdict in the California State Superior Courts, the courts of general jurisdiction. Our findings are reported in 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 (1991), and Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. Rev. 1 (1996). Unless otherwise indicated, any empirical findings reported here are drawn from these two articles.

[2] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 712-13 1987; Geoffrey Miller, *Some Agency Problems in Settlement*, 16 J. Legal Studies 189, 198-202 (1987).

[3]. On the other hand, many medical malpractice insurance policies also give the defendant veto power over settlements. *See* Gross & Syverud, *supra* note 1 at 361-362.

[4] *See* Kent Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113, 1129-1130; Charles Silver and Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 Duke L. J. 255, 264-268 (1995).

[5]. For example, in fiscal year, 1994, 78 percent of defendants in all federal criminal trials, and 85 percent of defendants in federal criminal jury trials, were convicted. *Bureau of Justice Statistics*, U. S. Department of Justice, *Sourcebook of Criminal Justice Statistics 1994*, 462, Table 5.28.

[6]. *See* Owen Fiss, *Against Settlement*, 93 Yale L. J. 1073 (1984); Richard Delgado et. al., *Fairness and Formality; Reducing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 Wis.. L. Rev. 1359; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494 (1986); Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754 (1984).

[7]. In most civil litigation, the insurance company controls the decision to settle, and insurance contracts do not require the consent of the insured before a settlement can be reached. Syverud, *supra* note 4, 76 Va. L. Rev. at 1172-1185.

[8]. Since 1991 (and the trials from which our second sample is drawn), increasing numbers of doctors have become employed by health maintenance organizations and other forms of managed care plans. The liability insurance arrangements for these plans usually divest the doctor's right to veto settlements, and instead assign that power to the corporate care provider. Telephone conversation with Gail Agrawal, Associate General Counsel, Aetna Life & Casualty Co., March 15, 1996.