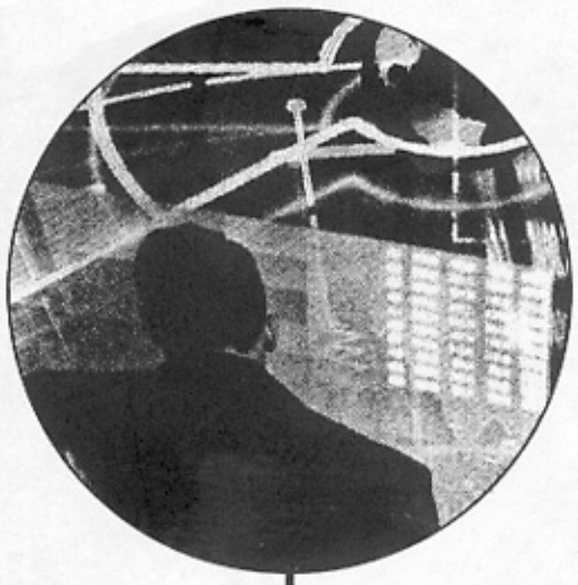


# Settlement Negotiations and Strategy

by Richard A. Fogel

Ask experienced claims professionals and litigation counsel and they will tell you: more than 90 percent of all claims and related litigation settle out of court. Unfortunately, many risk managers have no formal training in or knowledge of good settlement practices. As a result, organizations often agree to settlements that contain unnecessary costs, involve excessive legal expenses and are drafted to encourage future claims.

Settlement negotiations are not a sign of weakness, they are an important part of risk management. As such, risk managers must be able to identify the components of a solid settlement, know how to secure one and see that every claim is negotiable, not just cases where liability is clear.

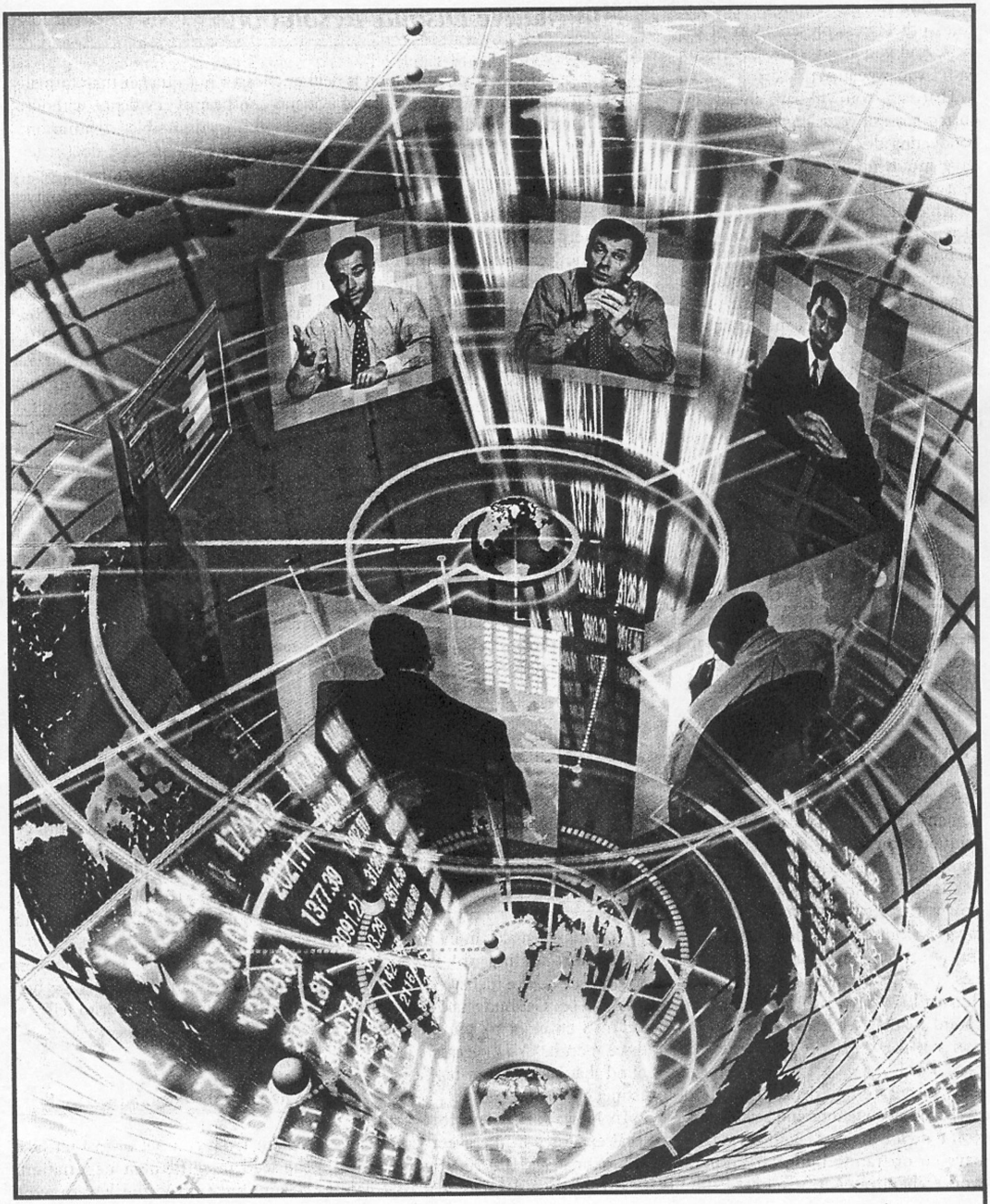
## When to Settle

The best times to settle are at the outset of a case or at the close of discovery.

At the outset of a case, the costs will be minimal. Neither side is wedded to a position and thus less likely to dig in. Settlements reached earlier also tend to be less expensive. And if settlement fails, you can elicit information about the other side's case in order to focus your discovery.

Settling at the outset of the case does mean, however, that you know the least about the case and its relevant facts, which makes it hard to calculate an appropriate settlement. Early settlements might also encourage additional claims and negate your ability to move for summary judgment.

By settling at the close of discovery—before counsel prepares for trial and experts are retained, but after a summary judgment motion has been made—you know all facts. You avoid the costs of trial and trial preparation. You can move for summary judgment,



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requiring the other side to educate you to their best presentation of the facts. And you avoid a possible run-in with a runaway jury.

That said, you will have already incurred most of your litigation costs by conducting discovery, so you will not save much money. No evidentiary motions will have been served yet, which could have given you additional negotiating leverage. And in jurisdictions where different phases of the case would have different judges, the trial judge might have been more sympathetic to your cause than the pretrial judge.

Settling on the courthouse steps is a common practice, but at this point you have incurred nearly all your litigation costs, prepared for trial and retained your experts. You might as well try the case unless a change in circumstance makes settling attractive. Examples include last-minute witness or evidence changes, drastic changes in the plaintiff's demands, or the presence of an unfavorable judge or jury. In cases where liability is clear but parties differ vastly on damages, a last-minute high-low settlement may protect both sides from unreasonable rulings.

## First Offers

Ask your counsel to obtain an early demand from the plaintiff. Litigation etiquette dictates that the plaintiff makes the demand. How thoughtless or thoughtful the demand is will tell you a lot about the claim. Most lawyers consider the demand a ceiling of settlement prior to trial; parties 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.

A reasonable first demand can lead to serious negotiations and sets a practical tone for the case. Both sides now have an operating budgetary framework, which provides parameters for sensible legal expenses. There may be lingering costs, however, if the early discussions are rancorous.

If the first demand is unreasonable, you do not have to respond; you can proceed with your defense. Or you can ask the plaintiff to justify the demand and educate you about its perspective on the claim. (This might show weaknesses in a position and helpful avenues for discovery.) If you can honestly justify your position with facts or law, you can simply tell the plaintiff the demand is unreasonable.

## Valuation of the Case

Assessing the value of the case balances your litigation budget (likely legal expenses for a defense) against the risk of liability. Honesty is critical here. If you use unrealistic budget projections or extreme risk assessments, you will doom the settlement. Or you could end up with a poor settlement.

You cannot make an informed decision about settling unless you have some idea how expensive the case is likely to be. Get budgets early and ask defense counsel to update it every three months or as necessary. Keep in mind that lawyers may tend to underestimate.

In New York City, for example, legal expenses in the average case are approximately $100,000. Simple cases (e.g., slip and fall) may cost less than half of that, but plenty of cases cost considerably more. Accordingly, if your counsel gives you a budget well under $100,000, it may be unrealistic.

In complex cases (e.g., multiple jurisdiction cases), legal expenses tend to escalate by a factor of ten, not merely double. Certain venues are notoriously bad for defendants and others are a plaintiff's nightmare. Your valuation must consider this in terms of both liability and damages. To estimate potential damages, a jury verdict search conducted by computer costs $100 to $175. Important factors are venue, injury, plaintiff's age and plaintiff's counsel. Conduct broad searches, updated at least yearly. This will provide a more reliable figure than the counsel's feel.

If your insurance indemnity limits are well below median damages awarded in like cases, add this as a third factor to consider. Are you litigating to save $10,000 off your limits? Often, an annuity will accomplish the same thing.

Do not be afraid to use your assessment in negotiations. If you are honest, there is no reason not to tell your adversary why his or her valuation is unreasonable.

## Who Does the Negotiating?

Whether the counsel or insurer takes the lead in settlement negotiations, communication is the key to avoid working at cross-purposes and permitting the plaintiff to use a divide-and-conquer approach.

The defense counsel will likely know the facts, the law, the venue and

## *Alternative Dispute Resolution*

In practice, formal arbitration is neither cheaper nor quicker than formal litigation. There are no rules of evidence, so hearsay, evidence without foundation and reputational evidence all are admissible. Arbitration judges get paid by the hour and 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. There is also no realistic possibility of appeal. The standard for appeal of an arbitration ruling is abuse of discretion, which appellants rarely meet.

Another option, nonbinding mediation, has become a useful tool in settling cases. Traditionally, the courts performed this function for free and many still will if you are persistent. Otherwise, mediators get paid by the hour, which can encourage a wasteful argument/reply cycle. Beware of service providers that have ongoing contracts or relationships with your adversaries.

his or her adversary. He or she may also have a smaller caseload than a claims professional and can devote more energy to the case. And, your counsel might lend additional standing and credibility during negotiations.

But your attorney may be a better litigator or advisor than a negotiator. Personal injury litigators in particular tend to be weak negotiators because they are too confrontational, lack credibility with their adversaries and become wedded to their position.

If you let your claims professional take the lead in settlement negotiations, there is no legal expense and it avoids monetary conflicts of interest with attorneys. Claims professionals are usually more motivated to settle because they are familiar with costs of litigation.

But letting your claims professional take the lead may undermine your relationship with the defense counsel. You may become more involved in the legal process than you wish.

The choice of who does the negotiation will vary from case to case, but keeping both parties involved is the best approach.

## Negotiating Styles and Tactics

Psychological games and maneuvering have no place in settlement negotiations. Most attorneys are too experienced to be influenced by appearance, silence or other tactical approaches. Simply present an honest assessment of the strengths and weaknesses of the case. Step into your adversary's shoes to understand what motivates him or her.

First, do not get sucked into an argument/reply cycle. This wastes time and causes parties to harden their position. Everyone wants to negotiate from a position of strength, but too often, parties use this maxim to convince the other side of the benefits of their position. If you have a good case, the other side already knows it. Everything else is just posturing. Chances are, if you have to explain your position, it is not 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. Let other defendants fend for themselves; settle your claims if the settlement is fair. RM

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