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Trial Practice
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A Defendant's Perspective on Settling Cases During Trial

BY JOHN W. BELL

In my experience, most defendants and defense attorneys who are going to settle a case will do so before going through the expense of beginning a trial; by some estimates, 90–95 percent of cases settle before trial. Preparing for litigation is expensive, so settling a losing case early in the process is much more cost-effective in the long run. The cost of defending even an ultimately successful case may be more than it would have cost to settle early on. If a case does go to trial, it is because the client and his attorney feel they have a good chance at winning (obviously).

However, depending on the circumstances, it is not unusual to settle a case in the middle of trial, or even at the end of a trial while the jury is deliberating. Whether a case settles during trial depends on several factors, such as: the presentation of evidence at trial and how the jury reacts to it; the quality of the jury; the quality of your witnesses or of the plaintiff's witnesses, including whether your witnesses show up for trial; whether the settlement demand decreases; and whether the opposing attorney has a reputation for settling at the last minute. Most of these are unknown entities at the beginning of the trial. Not surprisingly, the amount of the settlement is keyed to these same factors. A few of these factors are examined here, followed by a look at how the parties arrive at the settlement figure.

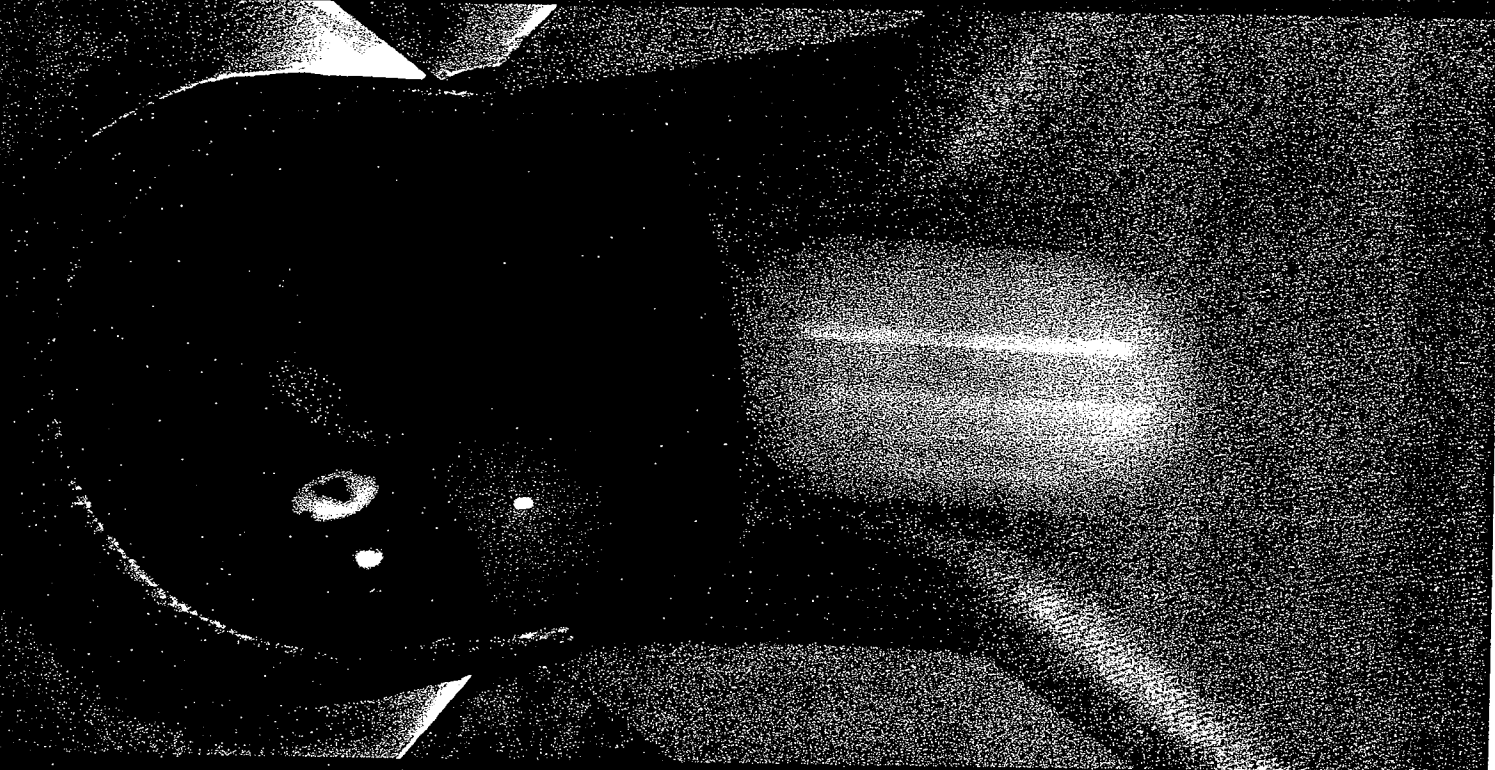
PRESENTATION OF EVIDENCE AT TRIAL

This factor encompasses both *what* evidence is presented and *how* it is presented. How the trial judge rules on the various motions in limine presented at the beginning of trial has a great effect on the strength of your case. Defense attorneys will put forth motions in limine that go to the heart of the plaintiff's theories on liability or damages, hoping to introduce or exclude damaging evidence, and thereby hoping to diminish the value of the case.

For example, one product liability case that I tried involved an injury caused by a nail gun. Plaintiff was alleging both design and manufacturing defects. Immediately after the injury occurred, the plaintiff's friend had placed the nail gun in a box with eight or nine other nail guns. As a result, the plaintiff was unable to identify *which* gun was allegedly defective and caused his injury. The defendant won a motion in limine to exclude the gun, forcing the plaintiff to proceed on a design defect theory alone. The case settled soon after for a lesser amount.

Another lawyer in my firm recently tried a case in which the plaintiff was alleging, as part of his damages, permanent brain injuries resulting from the car accident at issue. The defendant fought to introduce evidence of the plaintiff's past history of heroin use, to demonstrate that the plaintiff's brain injuries were more probably caused by drug use rather than the car accident. The judge allowed this evidence in, and combined with several other evidentiary rulings favorable to the defendant, the plaintiff was forced to settle the case, not only for less than his original demand but also for less than the defendant's original offer.

Thus, evidentiary rulings as to liability or damages can greatly affect the case, causing it to settle during the beginning phases of the trial.



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THE JURY

The jury is one of the most important factors at trial. However, it is also one of the unknown factors, something you will have to wait to learn about until the trial process begins. How a jury interprets and reacts to your case, and whether you pick up on the jury's reactions, can determine whether you settle the case or wait it out until the end. Points that the defense attorney may think are vital may be assigned less importance by the jury. For example, I tried a case involving a minor plaintiff whose foot had been amputated by a riding lawn mower driven by his father. My position on liability was strong. However, the jury deliberated for several days, giving the impression that they might deadlock, which indicated to me that they gave less credence to my arguments on liability than those of my opponent. Out of concern over a possible compromise verdict, while the jury was still deliberating I settled the case for slightly more than I had previously offered.

A jury's sympathy for the plaintiff may affect their consideration of the case, as well as a lawyer's consideration whether to settle. For example, another lawyer in my firm tried a case where the injured plaintiff was a minor. His position was strong on liability, and he thought he had picked the best possible jury. However, during deliberations, the judge informed both lawyers that the jury was deadlocked. This forced the defense attorney to reevaluate the case, realizing that he might not get as good a jury on retrial, that any new jury would be similarly affected by sympathy, and that a retrial would be almost prohibitively expensive. Thus, he agreed to settle the case.

THE WITNESSES

The impression left by your witnesses can also be a factor in deciding whether to settle a case during trial. A defendant may testify very well in his deposition, but then, in the words of one lawyer, turn into Jon Lovitz' "Pathological Liar" character on the stand. Similarly, an expert witness may testify well at a deposition, but then may be badly, and unexpectedly, impeached on the stand by the plaintiff. Some witnesses, although they agreed to testify, may not even appear at trial, leaving the attorney scrambling. Because the jury determines the credibility of the witnesses it sees, and can disregard the testimony of one expert in favor of another, how your witnesses appear on the stand can turn the tide of the trial against you. Thus, an important witness who testifies badly can influence your decision to settle the case during the trial.

The same holds true for the plaintiff's witnesses. Often the plaintiff's deposition is the defense attorney's first chance to observe the plaintiff, and to determine how he or she will react while giving testimony in a trial setting. A plaintiff who falters during her deposition, but then transforms herself at trial into a calm, competent witness, can have an influence on the decision to settle as well.

THE AMOUNT OF SETTLEMENT AND ATTORNEY'S REPUTATION

Often, plaintiff's attorneys will dramatically decrease their demand just before trial starts, in a last ditch attempt to avoid trying the case. Some attorneys even have a reputation for settling every time before a trial gets underway. Knowing whether the opposing attorney has a tendency to do this can affect the settlement decision as well.

As has often been said, the best settlement is the one where the defendant walks away saying he paid too much and the plaintiff walks away saying he could have gotten more.

NEGOTIATION OF THE SETTLEMENT

Should the defense attorney decide to settle the case during trial, there are a few ways to broach the subject. First, as one lawyer recommends, *never* approach the plaintiff's attorney immediately after something has gone wrong for your side. Watching your expert crumple under cross-examination, and immediately asking the plaintiff's attorney for a settlement figure, makes an already weak position even weaker. Wait a while for the dust to settle, *then*, if you have a good rapport with the plaintiff's attorney, approach him or her and begin to negotiate an amount. Of course, if the trial is going well for you, and the plaintiff feels the need to settle, then wait for the plaintiff's attorney to make the first move.

If you do not have a good relationship with the plaintiff's attorney, then you can request that the judge raise the subject. Many judges are willing to promote settlements to clear up part of a congested docket. Set out for the judge both your strong and weak points of the case, and how much you think the case might be worth. Listen to any suggestions or opinions he might have as well. The judge may be able to bring the parties to a settlement negotiation and deal.

In deciding on an amount for which to settle, you should account for the past and future medical expenses, past and future lost earnings, loss of consortium claims (if any), and the extent of the physical injuries. Next, look at the jury verdict reporters to determine the range of a potential verdict. This gives you a "gross verdict potential." Then, you should estimate the likelihood of a defense verdict and the percentage of the plaintiff's comparative negligence. By reducing the amount of the gross verdict potential by the percentage of a defense verdict and the percentage of the

plaintiff's comparative negligence, you arrive at a "net verdict potential." This net verdict potential will give the initial settlement value of the case. Presumably, if the case has gotten as far as trial, there have already been several demands made and offers rejected. Thus, all previous demands and offers should be considered along with the initial settlement value to arrive at a final settlement value.

CONCLUSION

There are many reasons to settle a case during trial, such as adverse or beneficial evidentiary rulings, how witnesses are presented and perceived, and how the jury reacts to your case. Through all these, the basic consideration is what happens at trial that drastically changes your position, either for better or for worse, forcing a settlement. If it is necessary, I try to settle for an amount that I consider acceptable to avoid the uncertainty of a retrial, a hung jury, a sympathy verdict, or other factors. However, as has often been said, the best settlement is the one where the defendant walks away saying he paid too much and the plaintiff walks away saying he could have gotten more. ■

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