"Reverse engineering" the settlement of a punch press case

The defense will do a risk analysis of their exposure to a jury verdict. Use it to get into a settlement zone

This story is for you if:
- You handle product liability cases
- Your initial demand has resulted in the defense declining to negotiate
- You want to move a difficult case quickly into the fair settlement zone


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Settlement of product liability cases tends to get stalled early on with monetary demands that far exceed the reasonable value of the case. This happens because defendants often do comprehensive risk analysis using actual numbers that would be given to the jury, as well as handicapping the case for likelihood of success. When negotiators make demands that don't take those factors into consideration, defendants get frustrated and find reason to allow the mediation to fail.

Consider an example of someone who loses their arm in a punch press machine. No doubt this catastrophic event can lead to a significant jury verdict. At the same time, the issues of employer negligence, comparative fault and joint and several liability blend together to create the potential for a huge financial investment in a case with no commensurate returns. In order to avoid the downside of such cases and realize a fair settlement, you need an approach that avoids the usual posturing and places the parties in a reasonable zone of settlement quickly.

There are several components that go into a risk analysis of this type of case, including but not limited to: (1) the economic and medical specials; (2) the general damages;

Smith v. Manufacturer, et al (plaintiff's version)

Computing Judgment			
$2,500,000.00	non-economic	$670,000.00	workers comp
$850,000.00	economic		
$3,350,000.00	total		

Apportionment of Liability			
		non-economic	economic
20.00%	Plaintiff	$500,000.00	$170,000.00
30.00%	Employer	$750,000.00	$255,000.00
50.00%	Manufacturer	$1,250,000.00	$425,000.00
$510,000.00	economic damage against Manufacturer		
$1,760,000.00	total award against Manufacturer		

Figure 1

Smith v. Manufacturer, et al (defense version)

Computing Judgment			
$2,000,000.00	non-economic	$670,000.00	workers comp
$750,000.00	economic		
$2,750,000.00	total		

Apportionment of Liability			
		non-economic	economic
45.00%	Plaintiff	$900,000.00	$337,500.00
30.00%	Employer	$600,000.00	$225,000.00
25.00%	Manufacturer	$500,000.00	$187,500.00
$229,772.73	economic damage against Manufacturer		
$729,772.73	total award against Manufacturer		

Figure 2

Smith v. Manufacturer, et al (mediator's version)			
Computing Judgment			
$2,250,000.00	non-economic	$670,000.00	workers comp
$800,000.00	economic		
$3,050,000.00	total		
Apportionment of Liability			
		non-economic	economic
35.00%	Plaintiff	$787,500.00	$280,000.00
30.00%	Employer	$675,000.00	$240,000.00
35.00%	Manufacturer	$787,500.00	$280,000.00
$344,262.30	economic damage against Manufacturer		
$1,131,762.30	total award against Manufacturer		

Figure 3

(3) the comparative negligence of the plaintiff; (4) the employer's negligence; (5) the workers compensation lien; and (6) and the likelihood of winning or losing in court. Inevitably there will be a huge disparity in the last component, but some of the others can be evaluated quickly and within reason. One approach I use is to hand out an Excel spread sheet to the parties and have them give me their confidential analysis based on their assessment of the above factors, leaving out the sixth factor as everyone has huge disagreements on likelihood of winning and losing. Since the medical and economic information is usually within the same ball park, we are often able to get a clear picture of how far apart the parties really are before any demands are even made.

Consider the following examples. The first (see previous page) represents plaintiff's assessment of the numbers in the case and the second (see previous page) represents defendant's assessment.

This information is very revealing to the mediator and helpful in allowing the mediator to make settlement ecommendations that avoid a huge demand that goes nowhere and a lowball offer that is insulting. Recognizing that the parties have slightly different non-economic and economic numbers, the mediator can probe the parties to determine the basis for their respective assumptions, and then make his own recommendations.

At the same time, if the mediator simply allowed the parties to negotiate at their own will, it is highly likely that plaintiff would start at a number exceeding $3.3 million, causing the defense to push back to the point where it disengages from the mediation process. Instead, the mediator has identified that the respective evaluations are only one million dollars apart, without taking into consideration the possibility of winning or losing the case.

To move things along, the mediator can then do his own risk analysis on a separate sheet and show it to the parties as a way of anchoring the negotiation at a level that allows for initiation of offers and demands in a reasonable zone. Take a look at Figure 3 for the mediator's analysis.

While the mediator doesn't expect the parties to accept his analysis, it offers a method to begin a more principled discussion of risk, and to probe assumptions in an impartial manner. If the parties show some degree of positive response to the mediator's approach, a demand could be made in the area of $1.5 million which would no doubt get the attention of the defense. The mediator would then encourage the defense to offer something in the area of $500,000 and the dance will begin.

While this is an oversimplification, it demonstrates an approach that recognizes how, at any given point in mediation the process can fall apart and the object must be to keep the parties engaged. This approach can jumpstart a negotiation without putting the trial lawyers in a position of having to battle with each other every nuance in the case, and it gets the parties thinking about a realistic zone of fairness early on in the mediation.

Jeffrey Krivis has mediated complex dispute issues in Northern and Southern California for 20 years. He teaches at Pepperdine Law School/Straus Institute for Dispute Resolution and has been named one of the Top Neutrals in the state by the Daily Journal. *Visit his web site:www.firstmediation.com*