Settlement Tactics in US Litigation

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A Note explaining the principal factors that can help counsel decide whether, when and how to settle litigation proceedings.

This Note discusses some of the factors that can help counsel decide whether, when and how to settle litigation proceedings. In particular, it details the factors counsel should consider when contemplating and advising on the benefits and disadvantages of settling a dispute. It also offers ways to successfully present and correctly time a settlement offer. For a detailed list of issues to consider when drafting a settlement agreement, see *Settlement Agreement Drafting Issues Checklist (http://us.practicallaw.com/2-501-1790)*.

DECIDING WHETHER YOUR CLIENT SHOULD SETTLE

Determining whether to pursue litigation or consider settling involves many complex issues, not all of which are known at the outset of a dispute. The main concerns counsel must deal with when considering whether to settle are described below.

YOUR OPPONENT'S RESOURCES

If you are representing the plaintiff and the opposing party has limited financial resources, it may be better to settle soon after the dispute arises instead of later, especially if you anticipate incurring significant costs litigating the dispute (for example, with discovery expenses). Pursuing a lawsuit may result in a Pyrrhic victory, where your client wins but at considerable cost. For example, a long, drawn out litigation may result in your adversary being unable to pay a money judgment awarded to your client, including your client's legal costs (assuming fee shifting is even possible).

Similarly, it may not be worthwhile litigating a case against an opponent with extensive resources who can afford the high costs of litigation if your client cannot. In this case, you may want to create an incentive for speedy resolution by offering to settle for less than the full value of the claim (if the settlement value is reasonable).

If, however, you represent a defendant with substantial resources and the plaintiff has limited resources, you may want to litigate and not settle.

YOUR CLIENT'S RESOURCES

Considering your client's financial resources, examine whether it may be better to settle up front, with little litigation expense. Think about which is the better (and cost-justified) strategy:

- Pursue or defend your client's rights with the goal of achieving a more favorable result on the merits.
- Put your client in a more favorable negotiating position with the opposing side.

AMOUNT AT STAKE

At the outset of the dispute you should conduct a cost/benefit analysis that takes into account the:

- Potential litigation results.
- Potential settlement outcome.
- Near-term and long-term costs.

Review and update this analysis periodically and when any relevant changes emerge concerning your client's or the

opponent's bargaining position. It may be worth settling a case if the cost of litigation far exceeds the sum at stake.

CURRENT AND FUTURE LITIGATION EXPENSE

Consider and compare the cost and likelihood of obtaining a return for your client now against the risks and anticipated return of a future settlement or verdict (taking into account the additional litigation expenses involved and the ones your client has already incurred). In light of how quickly litigation expenses escalate, your client may be saving money in the long run by settling early, even if it has to pay a large amount to end the dispute.

MANAGEMENT TIME

Consider the burden, expense and opportunity costs to your client's management and employees if they must devote substantial time and other resources to support the litigation. Corporate employees involved in litigation can typically lose a significant amount of work time to locating, collecting, reviewing and producing records requested for discovery, as well as the additional time spent preparing for depositions and/or trial. All these factors can have a negative impact on the company's overall productivity.

MERITS OF THE CASE

You should periodically assess and report to your client the factual and legal strengths and weaknesses of the case. These analyses typically evolve over the life of a lawsuit and should include, for example:

- Findings made through discovery requests.
- Projected expenses for additional necessary investigations and document review.
- Deposition results.
- Witness credibility assessments.
- Rulings on any pre-trial motions.
- New court decisions related to the case's subject matter.

EVIDENTIARY PROBLEMS

Determine whether the client's case has evidentiary problems, the extent to which the case suffers from them and whether they can be overcome. Consider whether the client's case is dependent on information possessed by others and, if it is, whether you can obtain it. Estimate how expensive it may be to access and obtain it. Examine any admissibility issues and whether they can be resolved. Keep in mind that your opponent may try to bog you down with expensive and time-consuming motions practice over discovery and your ability to use certain evidence.

DISCOVERY ISSUES

You may not want to disclose certain potentially damaging documents that are otherwise discoverable if your client pursues the litigation. This factor alone may be reason enough to settle.

PUBLICITY AND PRECEDENTS

Your client may be highly motivated to settle if it is concerned about the publicity associated with a public trial or if there is substantial risk that an unfavorable decision may lead to additional claims (see *Practice Note, Managing Litigation PR (http://us.practicallaw.com/0-101-7801)*). This concern may also impact your client's negotiating leverage. Likewise, if your client is concerned that a settlement may attract more litigation, it may be less inclined to settle. If your adversary faces these issues, your client may have substantial negotiating leverage.

RELATIONSHIP OF THE PARTIES

Consider the ongoing relationship of the parties and the relationship your client wants them to maintain in the future. Determine whether there are commercial benefits to an amicable settlement. Try to devise a way for there to be a strategic component to the settlement considering, and perhaps even advancing, the current business relationship (see *Maximize Collateral Benefits*). This requires creativity and considerable discussion with your client.

OTHER COMMERCIAL CONSIDERATIONS

Examine other commercial reasons for settling the case. For example, the dispute may have a negative impact on your client's business in ways beyond the pending lawsuit, such as:

- A drop in stock price.
- Disruption of on-going business relationships.
- Inability to secure funding or investors.
- Negative impact on insurability.
- Reduction in key employees' productivity.
- Loss of any potential business advantage achievable through settlement.

DECIDING WHEN YOUR CLIENT SHOULD SETTLE

If there is a high probability that your client may settle, it is generally better to finalize the terms quickly, before additional legal costs are committed and the parties' positions become too entrenched. While the prospect of settlement should be evaluated throughout the life of a dispute, there are several factors to consider in connection with the timing of a settlement.

BEFORE PROCEEDINGS BEGIN

Settling the dispute as soon as it arises can be advantageous to both sides, mostly because of the cost savings involved in avoiding discovery and related attorney costs. This is particularly appropriate where maintaining the relationship between commercial parties is a priority, before the situation becomes irreversibly adversarial. To initiate settlement talks at this stage of a dispute, address the parties' long-standing

business relationship if they have one, and your client's interest in continuing it. Stress the ongoing alignment of the two parties' business interests and how the right settlement agreement can preserve the benefits they have obtained by working together and understanding each other's needs.

AFTER PROCEEDINGS BEGIN

When representing a plaintiff, you can give your client negotiating leverage by beginning formal court proceedings. You accomplish this by demonstrating through the filing of your claim that your client is serious about pursuing its rights and by articulating in clear terms:

- How it intends to advance any claims.
- What the strength of any claims may be.

From a defendant's perspective, waiting to engage in a settlement dialogue until after court proceedings are begun forces the plaintiff to commit to the process and incur the expense of preparing, filing and serving the complaint. Waiting also can clarify whether the plaintiff was bluffing about its intentions and provides the defendant the opportunity to assess the scope, nature and strength of the plaintiff's claim(s).

DISCOVERY

Discovery is often the most expensive part of litigation. Each party's relative discovery burdens should be compared and factored into the settlement analysis. There may be no strategic or financial advantage to incurring the expense of discovery only to engage in a settlement dialogue immediately after completing this stage of the litigation. Consider whether the discovery process may strengthen or weaken your respective positions and whether it is likely to provide your client additional settlement leverage. In addition, you may want to consider proposing to your adversary an agreement to limit discovery and design it to aid the settlement process.

DEPOSITIONS

Preparing for, taking and defending depositions are time-consuming for the deponents and for the legal team. In addition, this process can drain human and financial resources. While engaging in initial written discovery and document exchanges may be necessary to develop your settlement strategy, consider whether it is more beneficial to your client to have a settlement dialogue before deposition discovery. However, if deposition discovery may strengthen your client's factual and/or legal positions, the cost of deposition discovery may be justified.

ON THE EVE OF TRIAL

Costs escalate rapidly in the period leading up to trial. Consider whether there is a strategic opportunity to advance a settlement dialogue before these costs are incurred, when both sides may feel some amount of uncertainty (for example, before preparing dispositive motions or while they are pending before the court). Once the opposing party has incurred the cost of trial preparation, the opportunity to engage in a productive settlement dialogue may be lost.

ON THE COURTHOUSE STEPS

Occasionally parties agree on a settlement immediately before the start of trial, when many of the trial-related costs have already been incurred. However, last-minute pretrial rulings (for example, motions *in limine*) often affect a party's negotiating position significantly. Evaluate whether your client's position was strengthened or weakened by pretrial rulings and reevaluate your settlement position accordingly. Substantial trial expense can still be avoided when settling "on the courthouse steps." In addition, the risk of negative publicity and precedent may be eliminated by settling at this time.

DURING TRIAL

The prospect of settlement does not necessarily end once trial begins. You must evaluate the strength of your client's position objectively now that a judge or jury is involved. The strength of your client's case may be affected by:

- How well the opening statements went.
- The temperament of the judge.
- How effective opposing counsel is.
- How the evidence is entered into the record.
- The reactions you perceive from the judge and/or jury to the witnesses' testimony and evidence.

You should consider all of these issues, and others, when deciding whether to engage in further settlement discussions during the course of trial, including:

- Any new information that has come to light during the trial.
- The length of the trial.
- The makeup of the jury.
- The substance and form of the anticipated points for charge (jury instructions).
- Verdict form.

AFTER TRIAL, PRE-JUDGMENT

The parties may choose to reach settlement after the evidentiary portion of trial but before the judge has made his decision. This kind of outcome may be desirable where both parties are concerned that the case is not going to be properly decided. For example, a party may want to settle if it appears the judge may misapply the law or the jury appears to be confused about the facts or how to apply the law. These circumstances may make an appeal (and the associated costs) appear inevitable and unattractive. A settlement at this point may be especially desirable if trial went poorly for one party who wants to avoid an unfavorable judgment and the publicity associated with it.

POST-JUDGMENT, PRE-APPEAL

Parties may also reach settlement after the trial court has entered judgment, but before an appeal or ruling by an appellate court. If the trial court judgment is plainly vulnerable on appeal, a party may want to settle for a compromised amount. Often, the quality of the trial

judge's opinion or consistency of the jury's findings on the evidence, both of which are beyond the parties' control, play a significant role in settlement discussions during this stage of litigation.

ACHIEVING A FAVORABLE SETTLEMENT

Regardless of when parties have settlement talks, the primary objective is usually to end the dispute. To achieve this in the most favorable way for your client, you should assess the strengths and weaknesses of all of the parties' positions accurately. In addition to your analysis of the material facts and controlling law, there are many other factors to consider. A few examples are discussed below.

PEOPLE AND PERSONALITIES

Consider who is driving the decision-making process. You must understand and assess the individuals involved in the settlement decision-making process. To determine whether they are the right people to be involved in the settlement negotiation, you need to know what their primary objectives are and whether they have:

- The necessary authority to reach a settlement.
- Sufficient knowledge of the facts and legal issues.

Find out whether any individuals are fact witnesses to the underlying dispute and, if so, whether they are too close to the issues to be effective in the settlement process. In domestic and international disputes, sensitivity to the cultural, ethnic and local expectations of the individuals involved can be beneficial. Consider whether a principal of the client or counsel should be the principal representative in the settlement process.

INSTALLMENT PAYMENTS

Where a settlement most likely will result in financial payments to the plaintiff, installment payments may achieve an overall greater recovery if the defendant cannot pay the entire judgment up-front.

MAXIMIZE COLLATERAL BENEFITS

Occasionally, new business relationships can be tied into a settlement so that the agreement can be viewed (and publicized) as a win-win situation. Examples of this type of arrangement include:

- Having one of the parties become the distributor or supplier for certain products that were in dispute.
- Having one of the parties become a licensee/licensor of intellectual property that was in dispute.
- Creating a joint venture relative to the matter in dispute.
- Creating a new employment arrangement for a former or prospective employee.

CONSIDER NON-CASH ALTERNATIVES

If the parties cannot agree on a cash payment to settle the dispute, consider non-cash alternatives to provide value to the opposing party. This type of arrangement can be done by offering non-cash assets (for example, free or discounted goods that the opposing party needs) and/or by agreeing to engage, or refrain from engaging, in certain conduct.

RELEVANT INSURANCE

The availability of insurance coverage for a liability can help or impede a settlement. The party that pays to settle a dispute must fully understand the extent to which insurance will provide coverage for the payment. That party must also ensure that its insurance carrier is fully informed about the imminent demand for coverage.

If insurance information has not already been discovered in the underlying litigation, consider whether it benefits your client's position to disclose this in the settlement discussions. A party must be very careful about disclosing the existence or amount of insurance coverage for a claim because these types of disclosure can imply that it is prepared to settle up to a certain amount (and may put the party at risk of breaching its insurance policy terms).

In addition, you must have the guidance of a lawyer experienced in dealing with insurance carriers if and when settlement is discussed with insurers. No matter how well the underlying settlement is handled, all of that effort and work can be undone if the insurance carrier funding the litigation is allowed to slip away. For more information on insurance companies' coverage of litigation costs, see *Article, Minimizing Litigation Costs by Maximizing the Value of Insurance Coverage (http://us.practicallaw.com/8-502-7415)*.

TAXATION

You must discuss with your client the tax implications of a financial payment to settle a claim, regardless of whether your client is paying or receiving the settlement proceeds. Consult a tax specialist if necessary, such as any time you do not fully understand the tax implications of a potential settlement. The timing of a settlement payout, as well as the jurisdiction in which the payment is made, may impact the way tax authorities treat it. Keeping these issues and local laws in mind, you may want to delay, accelerate or split up the settlement payment, or arrange for a specific country or state for payment transmittal, to avoid any unwanted tax consequences.

LEGAL COSTS

Commercial contracts occasionally provide the prevailing party with the right to recover its legal costs. If your client must pay the opposing party's legal costs, request detailed breakdowns of the fees so that your client can assess their reasonableness and possibly negotiate a lower amount to be reimbursed. If paying the opposing party's legal costs becomes sticking point for your client, restructure the settlement terms in a way that reduces or eliminates their impact. The attorneys involved in settlement negotiations are often the only participants in the settlement process who can diffuse the parties' emotions tied to these issues.

SETTLEMENT AGREEMENT

Consider whether you want to have primary control of the structure and format of the settlement agreement. If it is important to your client, seize the opportunity to prepare the initial draft from which the parties will further negotiate the terms (see *Standard Document, Settlement Agreement and Release: A US Example (http://us.practicallaw.com/2-503-1929)*).

FORM OF THE OFFER

In addition to engaging in traditional confidential settlement discussions, there are several ways for parties to present a settlement offer in a way that exerts more pressure on the opposing party. Some of these ways are described below.

FEDERAL RULE OF CIVIL PROCEDURE 68

Tendering a settlement offer according to Rule 68 of the Federal Rules of Civil Procedure places the offeree at risk of incurring the offeror's litigation expenses (such as attorneys fees and discovery costs) if the offeree does not accept the offer and the judgment ultimately is not more favorable than the unaccepted offer. Several states have similar procedural rules, including New York, Pennsylvania and Tennessee (*C.P.L.R. §§ 3219-21, Pa. R. Civ. P. 238* and *Tenn. R. Civ. P. 68*). Pennsylvania's rule precludes the plaintiff from obtaining delay damages for the time the offer was pending.

OPEN OFFER BEFORE THE COURT

To the extent settlement discussions are overseen by the judge or other judicial officer, making a formal offer in a court setting can have a positive impact for a party in two ways:

- It can demonstrate to the court the reasonableness of its position.
- It forces the opposing party to engage in the dialogue or risk appearing unreasonable.

However, you must balance these potential positives against the risk of the court construing a party's offer as a sign of weakness.

FEDERAL RULE OF EVIDENCE 408

Regardless of where or how a settlement offer is made, keep in mind that in federal actions, Rule 408 of the Federal Rules of Evidence, which prohibits the use of settlement negotiations at trial to prove liability, applies regardless of whether it is expressly referenced in a settlement-related communication (an offer or counteroffer).

MULTIPLE PARTIES

All of the above considerations apply whether there are only two parties to a dispute or more than two parties. However, several additional considerations are worth noting in multi-party disputes.

RELATED PARTIES

Consider whether any of the parties to the dispute are connected and, if so, whether their relationship is significant to the dispute. Determine each party's potential liability exposures and obtain details on their financial resources. Find out whether their interests are aligned so that they are likely to coordinate their strategies and pool their ideas, information and resources.

DIVISIONS OF LIABILITY

There is often a tension between focusing on the total amount your client may want to recover and negotiating individually with opposing parties to establish their individual share of liability. Picking off and settling with individual defendants (commonly known as the "divide and conquer" strategy) can be effective. It can put additional pressure on defendants who are unwilling to engage in a meaningful settlement dialogue. Occasionally, it can result in a more favorable outcome overall than trying to achieve a single net result by negotiating collectively with all of the parties simultaneously. And if the case involves personal injuries, you should consider whether a joint tortfeasor release is appropriate or necessary.

SIMILAR CLAIMS AGAINST ADDITIONAL PARTIES

When representing a plaintiff who may have similar future claims against other parties, ensure that the settlement agreement is not drafted so broadly that these potential future claims are also released. It may be appropriate to include an express reservation of rights against all non-parties to the agreement. For an example of this type of provision, see *Standard Document, Settlement Agreement and Release: A US Example (http://us.practicallaw.com/2-503-1929)*.

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