SUMMARY OF DECISIONSET® RESEARCH ON ADVERSE LITIGATION OUTCOMES

The possibility that attorneys and their clients are obtaining suboptimal results at trial, after walking away from settlement negotiations, has been studied extensively by Randall Kiser of DecisionSet®. In a 2008 study, Kiser and his co-authors at The Wharton School, Martin Asher and Blakeley McShane, conducted the largest multivariate analysis of adjudicated outcomes following unsuccessful settlement negotiations. An estimated 17%-21% of all currently practicing California litigation attorneys represented the parties in the study datasets. The research results were published in the *Journal of Empirical Legal Studies* article, "Let's Not Make A Deal: An Empirical Study Of Decision-Making In Unsuccessful Settlement Negotiations."[1]

Overall Results

The study, which examined more than 4,500 cases and 9,000 settlement decisions made by plaintiffs and defendants during the last 44 years, analyzed California civil cases in which the parties exchanged settlement offers, rejected the other party's offer, and proceeded to trial. Comparing the actual trial results with the rejected pre-trial settlement offers, the study found that 61% of plaintiffs and 24% of defendants obtained an award at trial that was the same as or worse than the result that could have been achieved by accepting their opponent's pre-trial settlement proposal. In only 15% of cases did both the plaintiff and the defendant obtain a trial result that was better than their opponent's settlement proposal. [2]

Although plaintiffs experienced adverse trial outcomes more frequently than defendants, the financial costs incurred by defendants when they lost their litigation wagers were significantly higher than plaintiffs' costs. The average cost of "decision error," as the authors term these adverse trial outcomes, was $43,100 for plaintiffs and $1,140,000 for defendants during the 2002-2005 period.[3]

Historical Perspective

The study also found that the incidence of decision errors increased and the cost of these errors soared between 1964 and 2004. Plaintiffs obtained worse results at trial than could have been obtained through settlement in 54% of the cases in 1964, and this

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[1] Randall L. Kiser, et. al, *Let's Not Make A Deal: An Empirical Study Of Decision-Making In Unsuccessful Settlement Negotiations*, 5 J, EMPIRICAL LEGAL STUDIES 551-91 (Sept. 2008), http://www3.interscience.wiley.com/cgi-bin/fulltext/121400491/HTMLSTART

[2] *Id.* at 566-67.

[3] *Id.* at 566.

decision error rate rose to 66% in 2004. During that period, the incidence of defendants' adverse outcomes ranged from a low of 19% in 1964 to a high of 26% in 1984, declining to 20% in 2004. The proportion of cases in which neither party committed a decision error decreased from 27% in 1964 to 14% in 2004. Adjusted for inflation, the cost of plaintiffs' decision errors increased three-fold, a relatively moderate amount compared to defendants' 14-fold increase.[4]

Effect of Case Variables

Analyzing case variables like the type of case, insurance coverage, and the gender of the parties and their attorneys, the study further found that "Context" variables are more predictive of adverse trial outcomes than "Actor" variables.[5] The Context variables include systemic factors like the type of case, damages, forum, and statutory settlement procedures, while the Actor variables include personal factors like the experience level of the attorneys, the size of firm in which the attorneys work, and the parties and attorneys' gender. The law school from which the attorney graduated, for instance, was not as predictive of decision error as the forum (jury trial, judge trial, or arbitration).

An optional California statutory cost-shifting procedure, intended to encourage settlement by financially penalizing parties whose trial result is worse than the settlement offer made by an adversary, could be counter-productive, the study shows. Parties who received settlement offers under the optional statutory procedure (Code of Civil Procedure Section 998) were more likely to take aggressive settlement positions, resulting in financially adverse outcomes, than the other parties in the study. The decision error rate for plaintiffs who risked the imposition of statutory financial penalties for taking unreasonable settlement positions was 83%, compared with a 61% rate for plaintiffs who were not subject to the statutory penalties. Similarly, defendants faced with statutory penalties for unreasonable settlement positions exhibited a decision error rate of 46%, compared to an error rate of 22% for defendants who did not negotiate under the threat of statutory penalties.[6] These findings complement other empirical and experimental studies indicating that legislation intended to increase settlement rates or curb risk-taking settlement negotiation behavior may be ineffective.

Mediator Results

To assess whether an attorney's experience and training in conflict resolution may affect decision error, the authors also examined trial outcomes for attorneys who served as mediators on their local court panels. These mediators are required to complete 30 hours of classroom and experiential training in conflict resolution. The study found that parties who are represented by attorneys with mediation training

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[4] *Id.* at 568.

[5] *Id.* at 571.

[6] *Id.* at 573.

experienced a lower incidence of decision error and that the presence of these attorney-mediators decreased total decision error for both parties. The lower decision error rates correlated with cases in which a party is represented by an attorney who also mediates unrelated cases. This finding suggests that dispute resolution training could reduce the incidence of adverse trial outcomes.

Corroborative Studies

The decision-making anomalies in the study – high plaintiff decision error rates and high defendant decision error costs – are evident in prior, smaller scale studies of attorney/litigant decision making. Jeffrey Rachlinski, a law professor at Cornell Law School who completed a related study about ten years ago, concluded that "framing biases may affect parties decisions, particularly defendants, who, he observed, "were unable to distinguish those cases in which they would win from those in which they would lose."[7] Similar results were obtained in two studies by law professors Samuel Gross (University of Michigan) and Kent Syverud (now Dean of the Washington University School of Law).[8] In these three independent studies, plaintiff decision error rates ranged between 56% and 65%, and defendant decision error rates ranged between 23% and 26%. "Most of the time, one of the parties has made some kind of miscalculation or mistake," Professsor Rachlinski notes. "The interesting thing about it is the errors the defendants make are much more costly."[9]

Updated and Expanded Findings

In his 2010 book, *Beyond Right and Wrong: The Power of Effective Decision Making for Attorneys and Clients*, Kiser updates his earlier findings regarding the incidence and magnitude of settlement decision errors. Although the California dataset was expanded from 2,054 cases to 2,754 cases in *Beyond Right and Wrong*, the patterns of decision error remained constant. The incidence of plaintiff decision error was 60%, contrasted with defendants' decision error rate of 25%. In only 15% of the cases did both the plaintiff and the defendant obtain a better result at trial than could have been achieved by accepting an adversary's settlement proposal. The average cost of a decision error was $73,400 for plaintiffs and $1,403,654 for defendants.

"High-End Cases"

The distribution of decision error remained similar in the "high-end" cases, although one may have expected decreased error and costs in major cases where the

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[7] Jeffrey Rachlinski, *Gains, Losses and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 158 n. 156 (1996).

[8] Samuel Gross & Kent Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Samuel Gross & Kent Syverud, *Don't Try: Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1 (1996).

[9] Jonathan Glater, *The Cost of Not Settling a Lawsuit*, N.Y. TIMES, Aug. 8, 2008.

parties and their attorneys presumably are more sophisticated and experienced. When the California dataset is limited to cases in which a plaintiff's demand is between $1,000,000 and $50,000,000, the incidence of plaintiff error is 58%, compared with 28% for defendants. The "no error" cases constitute 14% of all cases in the high-end dataset. The average cost of plaintiff error in the high-end cases is $327,158, compared with defendant average cost of error of $5,325,785. The folks in the high rent district seem to exhibit the same patterns of decision-making errors and costs as all other litigants.

New York Results

To preliminarily determine whether the research results previously reported by Rachlinski, Gross and Syverud, and Kiser, Asher and McShane were unique to California cases, *Beyond Right and Wrong* analyzes 524 New York cases adjudicated in 2004. The New York cases reveal patterns similar to the California cases. Plaintiffs' decision error rate in New York was slightly lower than in California (56% vs. 60%), but the New York defendants' error rate was slightly higher than the California defendants' error rate (29% vs. 25%). Due to these offsetting decreases and increases in error rates, the incidence of "no decision error" is 15%, exactly the same percentage in both the New York and California databases. Plaintiffs' mean cost of error in New York is $52,183, compared to defendants' mean cost of error of $920,874, roughly 18 times the cost of plaintiffs' error. (In California, defendants' mean cost of error was 19 times the mean amount of plaintiffs' decision error.)