



**ASSESSING THE RISK OF TRIAL VERSUS SETTLEMENT:
NEW U.S. STUDY FINDS FREQUENT
DECISION-MAKING ERRORS MADE BY LITIGANTS**

Prepared by
Donald J. McGarvey
Partner, McLennan Ross LLP

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Assessing The Risk of Trial Versus Settlement: New U.S. Study Finds Frequent Decision-Making Errors Made by Litigants

A recent study of 2,054 cases that went to trial in the United States between 2002 and 2005 is raising serious questions about how lawyers and their clients made decisions about whether to accept a pre-trial settlement as an alternative to proceeding to trial.

The study, which was published in the September issue of the *Journal of Empirical Legal Studies*, found that in most cases, one of the two parties made some kind of miscalculation or mistake in rejecting a pre-trial settlement. The study reinforces previous studies which found similar results. Perhaps most surprisingly is that over time, the incidence of making a wrong decision by proceeding to trial has actually become more frequent (when the current study is compared with previous similar studies over the past four years).

Inherent in all litigation is the need to quantify risk and assess the likely outcome of trial. That assessment necessarily must be measured against the prudence of a pre-trial settlement. In those cases studied where a pre-trial settlement was offered but rejected and the parties proceeded to a trial judgment, the study found that Plaintiffs would have achieved a better result by settling as opposed to proceeding to trial in 61% of the cases. Defendants were wrong in 24% of the cases. In only 15% of the cases were both sides correct in avoiding pre-trial settlement and proceeding to trial, meaning that the Defendant paid less than the Plaintiff had demanded but the Plaintiff got more at trial than the Defendant had offered.

Further, while Defendants were less likely to be wrong in their assessment, the study found that where Defendants were wrong and rejected a pre-trial settlement in favour of trial, the errors made by Defendants were much more costly in dollar terms. On average, where Plaintiffs wrongly rejected a pre-trial settlement, it cost them \$43,000.00 (although this study was not uniform on whether this amount included legal costs in every case). For Defendants, however, who were wrong less often, the cost of their mistake in rejecting a pre-trial settlement offer was much greater, an average of \$1.1 million per wrong decision, per case.

The study speculates several reasons for this phenomenon: bad legal advice, misplaced motives, clients rejecting otherwise prudent legal advice or a miscalculation of the likelihood of success at trial. While it is difficult to derive much from a study of this nature and apply it to a single case, one thing is clear: solid legal advice and a realistic risk assessment, coupled with decision-making that divorces emotion from the business at hand, will result in better outcomes for litigants.

As Roger Fisher and William Ury state in "Getting to Yes", a litigant's best alternative to a negotiated settlement "...is the standard against which any proposed agreement should be measured". That is the only standard which can protect a litigant from both accepting terms that are too unfavorable and from rejecting terms it would be in their interest to accept.

Litigation is necessarily fraught with risk and unknowns. While the process of oral and document discovery in advance of trial are designed to reduce the number of unknowns and thereby narrow the focus of what is truly in dispute, there remain many elements of any case that cannot be accounted for with precision. Whether it is the positive or negative presentation of certain witnesses, the effectiveness of counsel, the accurate assessment of the state of the law or even the life experiences of the trier of fact (judge, jury or arbitrator), all cases have their unknowns which will affect the outcome. These unknowns ought to cause all litigants and their counsel to carefully and objectively consider their case, and the case of their opponent, before considering settlement as opposed to the prospect of proceeding to trial.

Further, the amount that a plaintiff is willing to discount their claim ought to take into account the risk of litigation, the cost of litigating not only through the course of a trial but also a potential appeal, as well as various other factors such as the soft costs of the time that the plaintiff could be engaging in other revenue-generating activities. A defendant needs to similarly consider these issues as well as the potential for a harmful precedent being set that could have deleterious effects on the defendant in future cases.

Many litigants properly see trial or arbitration as last resorts to a negotiated settlement. Others appear to want their “day in court”, perhaps believing too strongly in the strength of their case and being unwilling to fully consider a compromise solution. Based on the results of this study, such a mindset can clearly be costly when compared to a negotiated resolution. This tends to lend credence to the old maxim “a bird in the hand is worth two in the bush”.