

**DISPUTE RESOLUTION PROCESSES
PRMD 8209 AA**

**Fall Term 2008
Monday 4:05 – 5:55 p.m.**

Seton Hall University Law School

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Books: Roger Fisher & William Ury
“*Getting to Yes: Negotiating Without Giving In*” (Second Edition)
Penguin Books
 (“Yes”)

Riskin, Westbrook, Guthrie, Heinsz, Reuben, and Robbennolt
“*Dispute Resolution and Lawyers*” (Abridged Third Edition)
Thomson West Publishers
 (“Riskin”)

Class 1 (8/25): General Introduction to Dispute Resolution Processes

Riskin: pp. 1 – 31, 170 – 190

Yes: pp. 1 – 14

Attached article from *The New York Times*, August 8, 2008

August 8, 2008

Study Finds Settling Is Better Than Going to Trial

By [JONATHAN D. GLATER](#)

Note to victims of accidents, medical malpractice, broken contracts and the like: When you sue, make a deal.

That is the clear lesson of a soon-to-be-released study of civil lawsuits that has found that most of the plaintiffs who decided to pass up a settlement offer and went to trial ended up getting less money than if they had taken that offer.

“The lesson for plaintiffs is, in the vast majority of cases, they are perceiving the defendant’s offer to be half a loaf when in fact it is an entire loaf or more,” said Randall L. Kiser, a co-author of the study and principal analyst at DecisionSet, a consulting firm that advises clients on litigation decisions.

Defendants made the wrong decision by proceeding to trial far less often, in 24 percent of cases, according to the study; plaintiffs were wrong in 61 percent of cases. In just 15 percent of cases, both sides were right to go to trial — meaning that the defendant paid less than the plaintiff had wanted but the plaintiff got more than the defendant had offered.

The vast majority of cases do settle — from 80 to 92 percent by some estimates, Mr. Kiser said — and there is no way to know whether either side in those cases could have done better at trial. But the findings, based on a study of 2,054 cases that went to trial from 2002 to 2005, raise provocative questions about how lawyers and clients make decisions, the quality of legal advice and lawyers’ motives.

Critics of the profession have long argued that lawyers have an incentive to try to collect fees that are contingent on winning in court or simply to bill for all the hours required to prepare and go to trial.

“What I would want them to look at was whether or not the lawyers had a strong financial incentive to go to trial,” said Cristina C. Arguedas, a criminal defense lawyer in Berkeley, Calif., when told of the study. “I’m not suggesting the answer, because I don’t know, but that would be my question.”

The study, which is to be published in the September issue of the [Journal of Empirical Legal Studies](#), does not directly answer Ms. Arguedas, but it does find that the mistakes were made more often in cases in which lawyers are typically paid a share of whatever is won at trial.

On average, getting it wrong cost plaintiffs at about \$43,000; the total could be more because information on legal costs was not available in every case. For defendants, who were less often wrong about going to trial, the cost was much greater: \$1.1 million.

“Most of the time, one of the parties has made some kind of miscalculation or mistake,” said Jeffrey J. Rachlinski, a law professor at Cornell who has studied how lawyers and clients decide to go to trial and who is co-editor of the journal. “The interesting thing about it is the errors the defendants make are much more costly.”

The study’s authors have analyzed some data from New York and, after a review of 554 state court trials in 2005, have found parties to lawsuits making the wrong decision at comparable rates.

The findings suggest that lawyers may not be explaining the odds to their clients — or that clients are not listening to their lawyers.

“It’s entirely possible that the attorneys are not giving adequate advice,” said Mr. Kiser, who is also a lawyer but is not practicing. “An attorney could advise a client that they have a strong defense to enforcement of a contract, but that is not the same thing as forecasting what the likely outcome at trial would be.”

As part of the study, which is the biggest of its kind to date, the authors surveyed trial outcomes over 40 years until 2004. They found that over time, poor decisions to go to trial have actually become more frequent.

“It’s peculiar if any field is not improving its performance over a 40-year period,” Mr. Kiser said. “That’s a troubling finding.”

Law schools do not teach how to handicap trials, nor do they help develop the important skill of telling a client that a case is not a winner. Clients do not like to hear such news. “Most clients think they are completely right,” Michael Shepard, a lawyer at Heller Ehrman in San Francisco. A good lawyer has to be able to tell clients that a judge or jury might see them differently, he continued. “Part of it is judgment and part of it is diplomacy.”

Several lawyers were dismissive of the study, noting that the statistics mean nothing when contemplating a particular case, with its specific facts and legal issues, before a specific judge. They stressed the importance of a lawyer’s experience.

But the study tried to account for that possibility and found that factors like the years of experience, rank of a lawyer’s law school and the size of a law firm were less helpful in predicting the decision to go to trial. More significant was the type of case.

For example, poor decisions by plaintiffs to go to trial “are associated with cases in which contingency fee arrangements are common,” according to the report. “On the defense side, high error rates are noted in cases where insurance coverage is generally unavailable.”

The findings are consistent with research on human behavior and responses to risk, said Martin A. Asher, an economist at the [University of Pennsylvania](#) and a co-author. For example, psychologists have found that people are more averse to taking a risk when they are expecting to gain something, and more willing to take a risk when they have something to lose.

“If you approach a class of students and say, I’ll either write you a check for \$200, or we can flip a coin and I will pay you nothing or \$500,” most students will take the \$200 rather than risk getting nothing, Mr. Asher said.

But reverse the situation, so that students have to write the check, and they will choose to flip the coin, risking a bigger loss because they hope to pay nothing at all, he continued. “They’ll take the gamble.”

The third co-author of the study was Blakeley B. McShane, a graduate student at the Wharton School of the University of Pennsylvania.

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