

Sizing Up Settlement: How Much Do The Merits of a Dispute Really Matter?

Tim A. Baker*

Legal disputes routinely settle. But to what extent do the merits of the parties' legal positions determine the terms of settlement? In theory, the party with the more favorable legal position will achieve the more favorable settlement. In actuality, the merits of the legal dispute often play a largely diminished role in achieving settlement. Economic factors, such as whether a party can afford costly litigation or whether a defendant can afford to pay a settlement or judgment, play a crucial role in settlement outcomes. Numerous other factors unrelated to the merits of the litigation similarly drive settlement outcomes.

This Article explores the economic and many other factors unrelated to the merits of a dispute that play a significant role in determining whether and on what terms a dispute will be resolved. Lawyers who are cognizant of these factors and fully capitalize on them during settlement will achieve better litigation outcomes. Mediators who do the same can more effectively move a hard-fought dispute toward settlement.

CONTENTS

I.	Introduction	254
II.	Discussion.....	255
	A. Economic considerations	255
	B. Non-economic considerations.....	259
	C. Process-Based Factors	268
III.	Conclusion	270

* Tim A. Baker is a U.S. Magistrate Judge in the Southern District of Indiana. He was appointed to this position in 2001, and since then has conducted thousands of court-supervised settlement conferences. The views expressed in this Article are based largely on the author's observations and experiences in working to resolve these cases, and these views are solely those of the author.

I. INTRODUCTION

How much do the merits of a dispute really matter in resolving that dispute?¹

Many litigants might assume that the merits, or lack thereof, are perhaps the most significant factor in resolving a dispute. Indeed, the typical mediation or settlement conference begins with parties in a joint caucus hashing out their factual and legal differences. Their discussion about merits may even result in an emotional exchange.² The parties then retire to separate rooms, expecting that the stronger legal claims will guide the back-and-forth of the resulting offers and counteroffers, hopefully producing a settlement. A closer examination of the process suggests otherwise.

The merits of a dispute should not be disregarded. However, they can be largely irrelevant in achieving settlement. An obvious example is a situation in which there is significant disparity in the parties' relative financial resources. A poorly funded party with looming financial issues often has no ability to go the distance against a well-funded foe.

There are countless other examples. Some are rooted in economics, such as the cost of litigation, a defendant's ability to pay a settlement or judgment, or whether any liability insurance exists. Other factors have no economic component, but are equally significant, such as a party's willingness to offer an apology, a party's appetite for risk, or the perceived credibility of parties and their witnesses. Drawing on the author's observations and experiences in settling thousands of cases, this Article examines a variety of these examples, and demonstrates how the merits of a case may play a diminished or even an insignificant role in settlement. Mediators who understand and utilize these factors will be more successful in achieving settlement.

1. This Article uses the terms "mediation" and "settlement conference" interchangeably, even though they are admittedly different processes. A mediation is typically conducted by a private mediator and may be largely facilitative, whereas a settlement conference is typically conducted by a judge involved in the litigation and may be more evaluative in nature. For purposes of this Article, however, this distinction is largely, if not completely, irrelevant.

2. As U.S. Magistrate Judge Jeffrey Cole noted while discussing some of the challenges of settlement conferences, "[e]ach side often thinks they're absolutely right and the other side is absolutely wrong and is evil incarnate." Patricia Manson, *Magistrate Judge Embraces Law's Adversarial Process*, CHI. DAILY L. BULL. (Feb. 27, 2019), <https://www.chicagolawbulletin.com/magistrate-judge-embraces-law%E2%80%99s-adversarial-process-20190227>.

Lawyers and parties who appreciate and capitalize upon this dynamic will increase the likelihood of achieving a more favorable settlement.

II. DISCUSSION

A. *Economic considerations*

Consider more closely the poorly-funded party noted above. Assume that party is the plaintiff, that plaintiff's employer unlawfully terminated him from what was a low-paying job, and that plaintiff has remained unemployed for a year since. The plaintiff is strapped for cash, behind on his mortgage, and facing foreclosure. Such a plaintiff might accept an unreasonably low settlement offer to avoid foreclosure, even if the plaintiff's case is strong on the merits. A better-funded plaintiff could hold out, pay for depositions needed to prove the case, or retain a crucial expert that might secure a favorable verdict and sizable award for the plaintiff. Instead, given the plaintiff's financial difficulties, the case settles for reasons largely, if not completely, unrelated to the merits.

The indigent plaintiff is hardly the only example of situations where economic factors can drive settlement more than the merits. Another common example stems from the sheer cost of litigation. Litigation is expensive and legal fees can be a major burden for clients.³ Thus, even well-funded defendants often pay significant sums to avoid litigation or to bring costly litigation to an end, all while still maintaining that the plaintiff's case has no merit.⁴

Litigation costs stretch beyond financial impact. Litigation also requires parties "to devote their time and attention to gathering documents, responding to interrogatories, attending depositions, consulting with counsel, and participating at trial."⁵ Settlement allows parties to "eliminate these expenses and devote their time, money, and energy to their current business or occupation."⁶ Hence, a company may be eager to settle what it contends is a bogus case if, as a result, the time-consuming and exhaustive discovery process can be avoided. The company's president and other high-ranking officers may pursue an early settlement for similar reasons—that is, not because they fear an adverse judgment, but rather to avoid preparing

3. See Morton Denlow, *Settlement Conference Techniques: A Judge's Opening Statement*, 45 JUDGES' J. 22, 25 (2006).

4. In some cases, plaintiffs have required that the settlement agreement expressly include a disclaimer of any wrongdoing or liability by the defendant.

5. Denlow, *supra* note 3, at 25.

6. *Id.*

for and giving depositions. They may also pursue an early settlement because litigation is a distraction from the daily requirements of their current business or occupation.

A plaintiff's concern about the financial resources of a defendant may also play a major role in settlement. A plaintiff with a strong case will often be forced to accept a lower-value settlement if the defendant is financially incapable of paying the likely judgment. Similarly, a plaintiff might quickly settle for pennies on the dollar if the defendant is headed toward bankruptcy. This is because when an entity goes bankrupt, secured creditors are paid before plaintiffs, who are considered unsecured creditors. In such a case, a plaintiff may forego pursuing an otherwise lucrative lawsuit if it is obvious that a nearly insolvent defendant lacks sufficient funds to pay even secured creditors.

The existence or lack of adequate insurance is another economic factor that drives settlement in ways unrelated to the merits.⁷ The Federal Rules of Civil Procedure recognize the importance of insurance available to fund liabilities and judgments early in the litigation process. Indeed, Rule 26(a)(1)(A) provides that a:

[P]arty must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.⁸

The Federal Rules of Evidence similarly demonstrate how insurance may affect a case's value. Rule 411 generally excludes from the jury's consideration the existence of liability insurance.⁹ As the advisory committee notes explain, this prohibition undoubtedly stems in part from "the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds."¹⁰

7. The total lack of insurance may cause a case to settle below market value for a variety of reasons. For example, as described above, a defendant's inability to pay a likely judgment impacts settlement value. The lack of insurance proceeds to fund a settlement for a cash-strapped defendant will result, out of necessity, in a lower settlement.

8. FED. R. CIV. P. 26(a)(1)(A).

9. See FED. R. EVID. 411 (stating that "[e]vidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully . . . [b]ut the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control").

10. *Id.*

The value of the insurance policy at issue may drive settlement more than the merits.¹¹ This is a byproduct of settling litigation funded with other people's money. Monitoring counsel in securities litigation aptly and humorously described this dynamic as follows:

[T]he meeting of the board of directors to decide how to resolve these securities class actions goes something like this: Defense counsel comes in, makes a presentation that's very erudite about the nature of the case and the defenses that are available. At the end of the presentation he says that "we believe [that] . . . it is appropriate and highly recommended that the board approve a resolution that allows us to pay \$60 million to resolve this case." [The board responds] "Gasp, gasp, that's \$60 million? We just had a presentation with the finance committee, and they said we need this, this, and this." The general counsel says, "OK. Fine. We have \$70 million in D&O insurance, and every dollar is coming out of D&O." The next question is "What time is lunch?"¹²

Plaintiffs' settlement demands regarding insurance policy limits further illustrate this point. An insurance policy limits demand is an offer by a plaintiff to settle the litigation in exchange for payment of the full amount of the value of the defendant's available insurance coverage.¹³ Consider, for example, a hypothetical case involving a car rear-ended by a semi-tractor trailer that seriously injures plaintiff. Assume liability is not at issue, medical expenses are \$350,000, lost wages exceed \$100,000, future medical expenses are estimated to be \$300,000, and plaintiff experiences significant pain daily. Were this case to go to trial, a verdict of three to five times these special damages (\$2,250,000 to \$3,750,000) might be well within plaintiff's reach. Nevertheless, plaintiff would be tempted to accept a policy limits offer of \$1 million. While the facts of the case suggest that the case is worth much more than \$1 million, a guaranteed, prompt recovery of a

11. See Symposium, *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 331, 339 (2000) (quoting Professor David Ruder: "Inevitably the insurance coverage will influence movement toward settlement without close analysis of the merits of the litigation."). See also Barry Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 223-24 (2004) (noting that "[i]ndeed, there are some circumstances in which the existence of insurance coverage, while generally disclosable in litigation, can be considered a secret or confidence of the client such that its disclosure could affect the settlement of other cases or encourage additional suits").

12. Tom Baker & Sean J. Griffith, *How the Merits Matter: Directors' and Officers' Insurance and Securities Settlements*, 157 U. PA. L. REV. 755, 798 (2009).

13. See Constance A. Anastopoulo, *Bad Faith: Building a House of Straw, Sticks, or Bricks*, 42 U. MEM. L. REV. 687, 791, 844 (2012).

sizable sum secured by insurance coverage makes the policy limits offer compelling.¹⁴

Another economic factor unrelated to the merits is whether the parties desire to preserve a business relationship. Consider the case of a supplier who sues a customer for breach of contract after the customer fails to pay for materials that the customer previously agreed to purchase. The customer claims the materials were defective and countersues. Both the supplier and customer believe their cases are meritorious, so attempting to resolve such a dispute by focusing on the competing merits would prove particularly challenging and damaging to the business relationship.

A better settlement approach would be to shift the emphasis from the merits of the case and instead to focus on the parties' common interests and the mutual value to be gained from a continuing relationship. In this example, both supplier and customer have a shared interest in having a profitable and long-term business relationship. A settlement that mends and preserves this relationship offers mutual benefit. The future economic benefit an ongoing business relationship presents will strongly encourage both sides to downplay the merits and settle their dispute at a discount. Practically speaking, litigation has a way of souring relationships. A business solution such as a long-term business relationship is not always viable. However, it is one of many economic considerations, unrelated to the merits, that should be explored in attempting to reach settlement.¹⁵

Finally, attorneys' fees are another economic factor impacting settlement but not necessarily tied to the merits of a case. For example, in the case of a well-funded defendant embroiled in costly litigation, defendant's counsel unquestionably has an obligation to advise the client how best to proceed. Unfortunately, it is possible that defense counsel in this situation may eschew an early settlement opportunity and instead recommend a hard-nosed and comprehensive litigation strategy that increases billable hours and thus benefits the

14. A plaintiff's ability to take a large settlement figure and utilize a structured settlement, which will pay plaintiff money over a certain period of time, further encourages settlement for sums less than what the case might be worth if a structured settlement were not an option. See Denise Johnson, *The Beginnings of Structured Settlements*, CLAIMS J. (Aug. 5, 2013), <https://www.claimsjournal.com/news/national/2013/08/05/234176.htm>.

15. In contrast, the previous hypothetical example involving a car rear-ended by a semi-tractor trailer that seriously injures plaintiff would typically involve a one-time interaction between parties. Therefore, they would not place a premium on preserving any ongoing relationship.

defense counsel's coffers. In this way, defendant's counsel may be incentivized to continue litigating even when plaintiff has a formidable case and the merits suggest that the case should be settled early. Likewise, plaintiff's counsel handling a case with a fee-shifting provision might be tempted to "churn the file" and be less willing to recommend an early settlement to plaintiff if it appears likely that a hefty fee award awaits at the end of the case.¹⁶ Similarly, when a plaintiff's case is strong, a defendant may choose to settle for an amount less than the projected attorney fees necessary to win summary judgment.

B. *Non-economic considerations*

In addition to economic-based considerations, a host of non-economic considerations can greatly impact settlement even when these considerations are not linked to the likelihood of one side prevailing based on the law and the facts. Of particular note is the apology, which has become an increasingly common negotiating tool in settlement. As one article noted, "many have begun to argue that advising legal clients to apologize may reap important benefits—including increasing the possibility of reaching an out-of-court settlement."¹⁷

One may argue that apologies cannot be wholly severed from the merits. Indeed, a willingness to offer an apology may indicate some sense of guilt or fault by the apologizer. Nevertheless, regardless of whether the apologizer believes they have actually done anything wrong, an apology can spur settlement:

[R]esearch has generally found that apologies influence claimants' perceptions, judgments, and decisions in ways that are likely to make settlement more likely—for example, altering perceptions of the dispute and the disputants, decreasing negative emotion, improving expectations about the future conduct and relationship of the parties, changing negotiation aspirations and fairness judgments, and increasing willingness to accept an offer of settlement.¹⁸

16. See, e.g., *Goss v. Killian Oaks House of Learning*, 248 F. Supp. 2d 1162, 1168–69 (S.D. Fla. 2003).

17. Jennifer K. Robbennolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 350 (2008) (citations omitted). See Susan Daicoff, *Apology, Forgiveness, Reconciliation & Therapeutic Jurisprudence*, 13 PEPP. DISP. RESOL. L.J. 131, 131–34 (2013) (describing societal trends and policies increasingly facilitating apologies).

18. Robbennolt, *supra* note 17, at 350 (citations omitted).

Thus, a party who is willing to include an apology as part of a settlement has a better chance to resolve a litigated matter on mutually beneficial terms than a counterpart who refuses to do so.¹⁹

Apologies have become more commonplace in many high-profile cases.²⁰ One such case involves the tragic death of University of Maryland football player Jordan McNair. McNair, a nineteen-year-old offensive lineman, died of heatstroke on June 13, 2018, two weeks after collapsing following a football workout. In the wake of McNair's death, Maryland President Wallace Loh met with McNair's parents "to express, on behalf of the university, our apology for the loss of their son."²¹ President Loh went on to say that "the university accepts legal and moral responsibility for the mistakes that our training staff made on that fateful workout day Based upon what we know at this time, even though the final report is not completed, I said to the family, "The university owes you an apology."²² Such apologies, particularly those not conditioned on settlement of a legal claim, were once almost unheard of. Yet President Loh, as well as Maryland Athletic Director Damon Evans, took responsibility for McNair's death. Doing so helps the healing process that will be needed to reach a resolution of any litigation that might arise from McNair's death.²³

The sexual abuse scandal in the Roman Catholic church further illustrates this point. An editorial in the *Wall Street Journal* recounts the story of Rachel Mastrogiacomo, who claims she was twice victimized by the church.²⁴ Father Jacob Bertrand allegedly first abused Mastrogiacomo in 2010 by sexually assaulting her during a private

19. *Id.* at 359–63. Strategic mediators often use their own opening statements to express an apology for what has happened to one or both parties that led to the dispute. By doing so, the mediator often creates a more inviting environment for settlement and one that may include an apology being expressed by one or both parties.

20. See, e.g., Daicoff, *supra* note 17, at 131–32.

21. Ben Kercheval, *Maryland Accepts Responsibility for Player Death*, CBS SPORTS (Aug. 14, 2018), <https://www.cbssports.com/college-football/news/maryland-accepts-responsibility-for-player-death-keeps-dj-durkin-on-leave-during-new-investigation/>.

22. *Id.*

23. As of the time of publication, McNair's parents have not filed a lawsuit. However, McNair's parents provided notice to the state that they may file a lawsuit. See Talia Richman, *Parents of Late University of Maryland Football Player Jordan McNair File Notice of Possible Lawsuit*, BALTIMORE SUN (Sept. 12, 2018), <http://www.baltimore.sun.com/news/maryland/education/bs-md-jordan-mcnair-lawsuit-notice-20180912-story.html>.

24. See Matthew Schmitz, *Stopping the Priests Who Prey on Adults*, WALL ST. J. (Sept. 14, 2018), <https://www.wsj.com/articles/stopping-the-priests-who-prey-on-adults-1536879580>.

mass in her Minnesota basement.²⁵ Mastrogiacomo was twenty-four years old.²⁶ She reported the assault four years later to church officials.²⁷ Father Bertrand “substantially admitted [to] misconduct” and took a leave of absence.²⁸ However, the editorial reported that Mastrogiacomo felt victimized again by the fact that the priest was not removed from the ministry.²⁹ In 2016, Mastrogiacomo discovered Father Bertrand was again serving as a parish priest, this time in San Diego.³⁰ Bertrand subsequently pleaded guilty to criminal sexual conduct and was sentenced to ten years of probation.³¹ According to the editorial, Mastrogiacomo remains unsatisfied, and the lack of any apology seems to have played a role.³² As Mastrogiacomo described it, “The Diocese of San Diego has never reached out to me.”³³ Mastrogiacomo went on to say, “though I am an orthodox Catholic who remains faithful to the Church, they’ve never extended a hand.”³⁴ This victim’s story painfully demonstrates the value of apologies. That is, traumatized parties often seek apologies, and parties willing to offer such an apology are more likely to settle their disputes. Conversely, a steadfast refusal to apologize may prolong litigation and thwart settlement efforts.

Apologies are not the only non-economic factors that impact settlement values. Employment discrimination cases are particularly rife with other examples.³⁵ A plaintiff suing for wrongful termination who has been unable to secure new employment may highly value their former employer’s willingness to provide a favorable letter of reference.³⁶ The same is true regarding a defendant willing to change personnel records to reflect that plaintiff resigned instead of being

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* (quoting Kevin Eckery, Spokesperson, Diocese of San Diego).

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. See Sheila M. Bias, *Considerations in Drafting Settlement Agreements and Releases in Employment Cases*, AM. BAR ASS’N (Jan. 18, 2019), https://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/considerations-in-drafting-settlement-agreements-and-releases-in/ (discussing non-economic terms such as reference, no-rehire, and discharge-reclassification provisions).

36. See Richard Harroch, *16 Key Issues in Negotiating an Employment Severance Package*, FORBES (Apr. 14, 2018), <https://www.forbes.com/sites/allbusiness/2018/04/14/16-key-issues-in-negotiating-an-employment-severance-package/#2fb76bf76b2>.

terminated.³⁷ A former employer's willingness to change a termination to a resignation as part of a settlement likely will be giving plaintiff a favorable boost in future job searches, since job applications routinely ask whether an applicant was ever terminated from prior employment. As a result, a defendant who offers these types of non-economic settlement terms might benefit by having to pay less to resolve the litigation, even though such terms are unrelated to the merits of a case.

Conversely, an employer may agree to pay more to resolve a case based on a plaintiff's agreement to certain non-merit terms. A common settlement term in this category is the "no re-employment" clause.³⁸ Under the terms of a "no re-employment" clause, the terminated employee agrees never to seek re-employment with the defendant employer.³⁹ Including such a term in the settlement agreement may impact both plaintiff and defendant, regardless of their respective views of the merits of the case. A defendant may pay more toward settlement in exchange for this term, which guarantees that the defendant will not have to deal with the plaintiff in the future and can avoid any chance of a retaliation claim if plaintiff were to re-apply for a job and not be selected.⁴⁰ Additionally, the plaintiff may agree to this term in exchange for a larger settlement figure, even though the plaintiff believes the termination was unlawful and would otherwise pursue reinstatement by defendant as relief in the litigation.

Another non-merit term that is often included in an employer's termination or separation package is the offer to provide outsourced job placement services to the departing employee.⁴¹ The willingness of an employer to look beyond the merits of the employment issues and assist its former employee with such services in seeking a new

37. *Id.*

38. *See, e.g.,* Salerno v. City Univ. of N.Y., No. 99 Civ. 11151, 2005 WL 578944, at *3 (S.D.N.Y. Mar. 10, 2005) (imposing a settlement judgment that included a no-re-employment provision and noting that "a bar on future employment is not unusual").

39. *See* Wendi S. Lazar, *Settling the Case and Wrapping Up Employment: Negotiating Strategies, Drafting Realities*, 46 PAC. COAST LAB. & EMP. L. CONF. 1, 9 (2013) (explaining "no re-employment" provisions).

40. *See* Jeffrey D. Polsky, *Should Your Settlement Agreements Have a No-Rehire Clause?*, MONDAQ BUS. BRIEFING (Apr. 17, 2015), <http://www.mondaq.com/united-states/x/389878/employee+rights+labour+relations/Should+Your+Settlement+Agreements+Have+a+NoRehire+Clause> (discussing merits of and possible liability concerns associated with clauses barring re-employment).

41. *See* Harroch, *supra* note 36.

job is typically greatly appreciated by the employee and often expedites the resolution of such disputes.⁴²

The precise value of these terms in any settlement may be fairly debated. However, two propositions are undeniably true. First, at a minimum, such terms can help close a remaining gap between the parties' monetary settlement positions. Second, these terms are unrelated to the merits of a case.

Other non-economic settlement terms fall into this category. One such term is a confidentiality clause, whereby one or both sides agree not to disclose the terms of the settlement. Such terms can help motivate parties to settle.⁴³ Likewise, parties often request "non-disparagement" clauses in settlement agreements, whereby one or both sides agree not to say or do anything negative about the other.⁴⁴ In today's high-profile social media world, the extent to which certain companies, and even individuals, may seek to avoid bad publicity on social media platforms cannot be overstated.⁴⁵

Another example that sometimes arises involves a party's desire to avoid establishing an unfavorable legal precedent.⁴⁶ Consider, for example, an insurance company that denies insurance coverage to a seriously injured insured. Assume that the insured then sues for breach of contract and bad faith, and that the policy language at issue in the litigation is commonplace in the insurance company's policies. In this hypothetical, given that the injuries are significant, the company's potential exposure is, too. As a result, the insurance company might pay more to settle this case than it would if it were a one-off case, or if the policy language at least were not commonplace. By settling for a heightened sum in this instance, the insurance company

42. *Id.* (suggesting that employees may value such services at between \$10,000 and \$25,000).

43. *See* Denlow, *supra* note 3, at 25. Many claims have been resolved in mediation prior to litigation because of the importance of a party wanting to avoid publicity. Additionally, the risk of an unfavorable judgment and the related adverse publicity can often serve as a prime motivator for parties to resolve their differences.

44. *See* Harroch, *supra* note 36.

45. *See* Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 635, 677–78 (2017); Michael Elliott, *Trial by Social-Media: The Rise of Litigation Crowdfunding*, 84 U. CIN. L. REV. 529, 550 (2016).

46. *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 231 (1999).

avoids (or at least delays) the possibility of establishing adverse precedent, or can wait to fight it out in a case that the insurance company deems more factually preferable or in a court the company believes might view its position more favorably.

A party's appetite for risk is another factor unrelated to the merits that impacts a party's willingness to settle.⁴⁷ Litigation offers few guarantees, and many clients are risk averse. This may be particularly so when a party finds themselves unexpectedly in litigation through no fault of their own, such as from a car accident wholly caused by someone else. Settlement provides certainty as to the outcome—a compelling factor for most parties.⁴⁸ Thus, it follows that a risk-averse party will settle the exact same case on less favorable terms than a non-risk averse party.

The strength (or weakness) of the opposing party also looms large in affixing a value to a case. A “good plaintiff,” i.e., one who is sympathetic and testifies well in a deposition will likely recover more than a “bad plaintiff”—for example, one is not sympathetic or who rambles incoherently in a deposition.⁴⁹ More specifically, consider a personal injury case involving an ongoing claim for lost wages. If there is a question about whether a plaintiff is malingering in not returning to work, a plaintiff with a solid and impressive work history likely will fare better than a plaintiff who has never held a steady job. Even though the injuries for these two plaintiffs are identical, the cases have different settlement values.

Similarly, consider a case involving a factual dispute between a plaintiff and a defendant. Picture an elderly employee terminated for allegedly stealing from her employer. The employee denies stealing and alleges her employer unlawfully terminated her based on her age. The case boils down to a factual dispute between plaintiff's testimony and that of her supervisor as to whether she stole company property. The value of this case would likely diminish dramatically if plaintiff had a prior forgery conviction, which could be used to undermine plaintiff's credibility.⁵⁰ Likewise, the case value would swing in plaintiff's direction if, instead, plaintiff had no criminal record and

47. *Id.* at 230–31 n.60.

48. *See* Denlow, *supra* note 3, at 25.

49. *See* Michael Palmer, *Insights into Case Valuation: A Review of How Leading Lawyers Think*, 26 ALTERNATIVE RESOL. 24, 25 (2017) (noting that client credibility and likeability are primary considerations in evaluating settlement offers).

50. *Id.* at 27.

her supervisor was subsequently terminated for dishonesty on the job.⁵¹

While the discussion above focuses on the parties, the characteristics of *counsel* also affect settlement terms. “Nothing encourages a ‘panic’ settlement more than catching plaintiff’s attorney ill-prepared; indeed, defense counsel often assess the strengths and abilities of plaintiff’s attorney as much as they do the merits of the case, and settle accordingly.”⁵² Some lawyers build a reputation for a willingness (if not an eagerness) to settle, whereas others are known to reject even reasonable settlements in favor of building reputational capital. One examination of the lawyer’s role in settlement observed that “a contingency fee lawyer might favor trial over settlement, rather than the reverse, if he wants to enhance his reputation as a gladiator in order to attract future clients.”⁵³ On the other hand, “[a]n hourly fee lawyer who calculates that his reputation would be harmed more by losing a trial than it would be enhanced by winning a trial might favor settlement after all, despite his immediate financial incentive to favor trial.”⁵⁴

Counsel’s relative experience may also drive the value of a settlement. For example, a lawyer with a reputation as a skilled trial lawyer who has won big settlements and verdicts for clients presumably would negotiate a better settlement than a new lawyer with no reputation or, even worse, a lawyer known to be a poor litigator.⁵⁵ Sometimes lawyers are too inexperienced in the mediation process or simply too inexperienced in general to represent their client’s best interests, which can materially reduce the value of a case.

Yet another non-monetary factor that plays a critical role in the mediation process is lawyers managing their clients’ expectations. Too often, parties show up at mediation with unrealistic expectations about the process and the expected outcome. It is quite common for a lawyer to “oversell” the case to a client, resulting in artificially inflated expectations by the client. In those situations, the claimant often tunes out the opposing counsel and the client and simply awaits

51. *Id.*

52. Stephen L. Tober, *The Settlement Conference: Making It Work for the Plaintiff*, 27 N.H. B.J. 9, 10 (1985–86).

53. Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 Tex. L. Rev. 77, 123 (1997) (citations omitted).

54. *Id.*

55. On a related note, a *pro se* party might not fare as well in resolving a case as a party with skilled counsel. The represented party is undeniably at a litigation advantage, and this advantage can translate into a less favorable result for the *pro se* party, regardless of the merits of the case.

an expected result. In such cases, it is critical that a mediator understands the unrealistic expectations early in the mediation process and explains the importance of the give-and-take that needs to occur if the parties are to make settlement progress. Rather than focusing on the merits and directly challenging the inflated expectations of counsel and clients, the mediator should stress the importance of each side listening to the other side's view of the case, and focusing on the events that have changed since the inception of the claim or litigation (such as deposition testimonies, court rulings, etc.). These changed circumstances should provide a platform to begin reducing the artificially inflated expectations. As the foregoing discussion demonstrates, both lawyers and parties help shape case values in ways unrelated to the case's merits.

Lawyers and parties are not the only players in the legal arena that impact settlement values. Judges matter, too.⁵⁶ Judges, like lawyers, have reputations. Some judges are known for being more likely than their colleagues to grant summary judgments. Thus, a defendant who anticipates the presiding judge to grant its summary judgment motion would put less settlement value on the case than if the same case were pending before a judge who routinely denies such motions. Judges also have reputations for other characteristics, such as how long it takes them to get a case to trial, how carefully they apply the rules of procedure and evidence at trial, and how often they are reversed on appeal.⁵⁷ None of these factors arises from the merits of the case, but each of these factors can impact a case's settlement value.

Mediators also can be difference makers. It is vital that the mediator possesses the appropriate skill set. Typically, the right mediator is someone who possesses the necessary substantive expertise as well as the procedural expertise. A mediator lacking such expertise may bring about a settlement vastly different than might an experienced mediator or may even fail to resolve the case.

56. See Gerald L. Sbarboro, *Guide for a Successful Settlement Conference*, 2 CBA REC. 12, 13 (1988) ("A trial judge's personality and experience will also lend to the effectiveness and success of the settlement conference.")

57. See *Litigation Intelligence Center*, BLOOMBERG LAW, <https://www.bloomberglaw.com/product/blic/litigation/analytics/new> (last visited May 22, 2019) (rating judges' motion outcomes, appeal outcomes, and length of cases); *The Robing Room: Where Judges Are Judged*, ROBING ROOM, <http://www.therobingroom.com/> (last visited May 22, 2019) (rating judges based on 14 criteria, including industriousness, ability to handle complex litigation, punctuality, evenhandedness, flexibility in scheduling, and involvement in settlement negotiations).

The potential jury pool also matters. Consider a plaintiff of color bringing a race discrimination case to trial in a district where the demographics of the jury pool suggest there will be few, if any, persons of color on the venire. Such a plaintiff might be inclined to settle for less than the case might otherwise be worth, given concerns that a predominately white and conservative jury pool may be less willing to return a verdict in favor of the plaintiff.⁵⁸

Other “wild card” factors unrelated to the facts of a case and the laws governing them can further impact settlement values. For example, consideration must be given to possible obstacles such as “unavailability or reluctance of witnesses.”⁵⁹ One adage of litigation is that the value of a case is not rooted in what happened between the parties, but rather what the parties can prove happened.⁶⁰ These can be very different propositions. Witnesses do not just say the unexpected; sometimes they say nothing at all. Some witnesses stop responding to texts or phone calls; others move far away. Witnesses also unexpectedly become incapacitated or even die during the course of litigation before their testimony can be preserved. Such events can dramatically impact the value of the case, even though the merits remain unchanged.

The foregoing list of non-economic factors impacting the value of a case is far from exhaustive. However, it demonstrates that, as with economic factors, a host of non-economic factors can significantly impact a case’s settlement values.

58. See *Selecting the Forum—Defendant’s Position*, 3 AM. JUR. TRIALS 611 § 8 (noting that “[t]he type of juror available varies from one forum to another. In the highly industrialized areas, the majority of the jurors are working people who, as a general rule, favor a plaintiff in a personal injury case and bring in larger verdicts against the defendant than do jurors who are farmers, ranchers, and small businessmen.”); see also Robert T. Carter & Silvia L. Mazzula, *Race and Racial Identity Status Attitudes: Mock Jury Decision Making in Race Discrimination Cases*, 11 J. ETHNICITY CRIM. JUST. 196, 209–10 (2013) (finding that white mock jurors were significantly less likely to find that the plaintiff suffered emotional distress due to employment discrimination, even though white mock jurors are equally likely to find a hostile work environment); Eric Helland & Alexander Tabarrok, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. LEG. STUD. 27, 43 (2003) (finding that the “average tort award increases as black and Hispanic county population rates increase and especially as black and Hispanic county poverty rates increase”).

59. Sbarboro, *supra* note 56, at 14.

60. Denzel Washington dramatically delivered a version of this adage in TRAINING DAY (Warner Bros. 2001) (“It’s not what you know, it’s what you can prove.”). See LAW ABIDING CITIZEN (The Film Department 2009) (involving Gerard Butler’s character saying the phrase to Jamie Foxx, who played a prosecutor attempting to extract a confession from Butler’s character).

C. *Process-Based Factors*

Other factors impacting the value of a case are rooted in the settlement process more than they are linked to the merits of a case. A few of the most common examples are discussed below.

Perhaps the most common example of a process-based factor is what is often referred to as a “mediator’s proposal.” A mediator’s proposal typically is a device employed when the parties are seemingly at an impasse and unwilling to deviate from their respective settlement numbers.⁶¹ In this situation, the judge or mediator overseeing the negotiation may be asked, or may volunteer, to provide a settlement number to both sides. This is typically done as a “yes or no” proposal only, so this proposal is either accepted by both sides or no settlement is reached at that time.⁶² This has proven to be a highly effective way to get the parties over a final hurdle and resolve their dispute. However, in proposing a settlement figure, the mediator typically is not trying to select the number that is most closely tied to the merits. Rather, the mediator is attempting to select a number that is most likely to achieve settlement *irrespective of the merits*. These two numbers are often different.

For example, suppose a plaintiff has an exceedingly strong breach of contract case, which, if the plaintiff prevails, would result in a \$200,000 verdict for the plaintiff. The plaintiff has told the defendant that it will not accept less than \$150,000, but has admitted to the mediator that it very much wants to end this litigation and is willing to be flexible. In this example, the defendant has offered only \$70,000 and has confidentially shared with the mediator several compelling reasons, unrelated to the merits, why it cannot pay \$100,000 to settle. In this situation, the mediator may suggest to the parties a settlement figure of \$95,000, to which they would likely agree. The mediator would not suggest \$95,000 based upon the merits. Indeed, the measure of settlement from a purely merits-based analysis suggests that the plaintiff’s last proposal of \$150,000 is much closer to the mark. But \$95,000 is the number the mediator would likely select

61. See Stephen A. Hochman, *The Mediator’s Proposal: Whether, When and How It Should Be Used*, 30 ALTERNATIVES TO HIGH COST LITIG. 121, 125 (2012) (“A mediator’s proposal should be used only as an endgame—that is, only after all other attempts to avoid an impasse have failed.”); Hunter R. Hughes, III, *Sitting at the Head of the Table: How to Be an Effective Labor and Employment Mediator and Arbitrator*, 51 PRAC. LAW. 35 (Dec. 2005) (arguing that a mediator’s proposal is “best used where the parties[] are at a complete impasse . . .”).

62. See Hochman, *supra* note 61, at 125.

because it is the number most likely to achieve settlement irrespective of the merits.

A related example involves cases that settle when the parties agree to meet in the middle. Assume that the parties bargained to impasse and the plaintiff's last proposal was \$300,000, whereas the defendant's last counteroffer was \$200,000. The parties may agree to settle their dispute "in the middle" for \$250,000. Presumably by bargaining to impasse, the plaintiff believed the proper settlement value of the case was \$300,000, whereas the defendant valued the case at \$200,000. But faced with the prospect that the case would not settle, both sides agreed to move another \$50,000. This final movement had very little to do with the merits of the case and, instead, was linked to a number that would resolve the dispute. Moreover, the final settlement figure also contained a "fairness" component in that it required both sides to move the same dollar figure off their impasse numbers.

The point is that, for most litigation cases, there simply is a number that will bring closure. Typically, this is a round number, even though damages are not necessarily so cleanly articulated. A telling example of this can also be seen in the litigation against Michigan State University for the horrific acts of sexual abuse toward athletes by disgraced physician Larry Nassar. That litigation ultimately settled for \$500 million.⁶³ Why was \$500 million the number that got this case resolved, rather than \$492 million or \$516,257,962.26? The answer, it seems, is that \$500 million is not just a big number, but also a round number. So, the litigation settled at that figure, even though the other figures noted above may well have been appropriate settlement figures. In the end, this was the number that got the case settled, even though arguments could be made that the merits of the case justified a different settlement figure.

Finally, the sheer timing of the settlement often greatly impacts the amount of the settlement. The settlement value for a case varies over the course of the life cycle of a dispute or a lawsuit, and there are many pertinent factors and risks that must be regularly updated and re-evaluated by counsel and parties. This could include factors such as: (a) favorable witness testimony in a deposition, (b) obtaining helpful admissions found in the opposing party's document production, (c) defeating a *Daubert* motion where one side sought to exclude the

63. See Mitch Smith & Anemona Hartocollis, *Michigan State's \$500 Million for Nassar Victims Dwarfs Other Settlements*, N.Y. TIMES (May 16, 2018), <https://www.nytimes.com/2018/05/16/us/larry-nassar-michigan-state-settlement.html>.

other's expert witness, (d) the court's ruling on discovery and dispositive motions, and (e) the court's ruling on motions in limine governing the introduction or exclusion of witnesses and/or documents as exhibits. None of these factors, however, change the facts of the case.

By way of further explanation, suppose a discovery ruling goes against a plaintiff, such that the plaintiff must appear for a supplemental deposition. This does not change the facts of the case. But plaintiff's angst about sitting through a second deposition, or about what the defendant might discover during this second deposition, may impact the plaintiff's willingness to settle to avoid this second deposition. Or suppose a disputed material fact results in the court denying defendant's summary judgment motion. This does not change the facts of the case, but it does change the dynamics of the case in two important ways. First, plaintiff will have an opportunity to get the case before a jury. Second, defendant will be faced with the certainty of a potentially expensive trial and the risk of an adverse verdict, however unlikely defendant may believe that to be. As a result, the defendant would be more willing to engage in a meaningful settlement dialogue. Despite the discovery ruling and the summary judgment ruling, the facts underlying the dispute remain the same. However, as these factors illustrate, the settlement value of a case necessarily increases or decreases over its life cycle.

It has been said that many cases settle on the courthouse steps.⁶⁴ The value of a settlement, however, most certainly varies depending on whether the parties are stepping into the courthouse for trial, or instead, stepping into the courthouse for an initial pretrial conference at the beginning of the case.

III. CONCLUSION

The merits of a case cannot and should not be completely removed from the settlement process. Ignoring the merits would be to ignore a potentially useful factor in helping the parties reach a settlement. However, emphasizing the merits too much or too often can be misguided. As discussed above, countless other factors that are wholly detached from the merits often play crucial roles in achieving an agreed upon resolution.

All participants in the settlement process should be on the lookout for non-merits-based factors that might be particularly important to resolving the litigation at hand. As discussed in this Article, the

64. See Andrew J. Wistrich & Jeffrey J. Rachlinski, *How Lawyers' Institutions Prolong Litigation*, 86 S. CAL. L. REV. 571, 571 (2013).

following questions are among those ripe for exploration during the settlement process:

- (1) Can the parties afford to litigate?
- (2) Can the defendant afford to pay a settlement or judgment?
- (3) What are the parties' appetites for risk?
- (4) Are the parties willing to devote the time and energy needed to effectively litigate?
- (5) Is there insurance coverage for the underlying claim, and are there gaps or disputes in coverage?
- (6) Do the parties have a business relationship that could be preserved and might help resolve the litigation?
- (7) Is there an attorney fee-shifting provision at play?
- (8) Would an apology help settlement prospects?
- (9) Are there non-monetary terms that might be important to the parties, such as a no re-employment provision in an employment discrimination case or a confidentiality or non-disparagement clause?
- (10) Is either party concerned that the case might establish unfavorable precedent?
- (11) Which party is likely to be found more sympathetic or more credible by a jury?
- (12) Is a key witness likely to be unavailable?
- (13) Is there a disparity of experience or skill among the attorneys?
- (14) What is the presiding judge's reputation for fairness and efficiency?
- (15) Does the mediator possess the skill and experience to be effective?
- (16) What is the composition of the jury pool?

These are just some of the questions that will help elucidate the non-merits-based factors that often play a significant role in achieving settlement. Lawyers must fully explore these factors with their clients and should carefully consider which non-merits factors might be of significance to their opponents. Mediators also should be careful to avoid reflexively dwelling too extensively on the merits. Instead, they should move beyond the merits and engage counsel and parties in discussions aimed at unearthing the multitude of other factors that often play crucial roles in the dispute resolution. Doing so will significantly enhance the likelihood of settlement.

