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9-18-2016

BAD DECISIONS TO GO TO TRIAL

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BAD DECISIONS TO GO TO TRIAL

SEPTEMBER 18, 2016 | JOHN LANDE | 2 COMMENTS

You may be familiar with the Randall Kiser et al. study, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*, 5 Journal of Empirical Legal Studies 551 (2008), which replicated amazing findings in other studies, cited in Randy's book, *Professional Judgment for Lawyers*.

The top line finding in the large-scale Kiser study was that an astounding 85% of litigants made "decision errors" by rejecting settlement offers and then getting worse results at trial.

Plaintiffs were more likely to make such errors – 61% of plaintiffs made such errors in this study compared with 24% of defendants.

When defendants erred, however, the average cost of the error was $1.14 million, compared with $43,100 for the plaintiffs.

Last week the *Independent Mail* newspaper reported (as linked by the *ABA Journal*) a story right in line with Randy's and others' studies. Target Corporation was hit with a $4.6 million verdict after rejecting a $12,000 demand on behalf of a child who was stuck with a hypodermic needle in a Target parking lot. Target had offered only $750.

Of course, the verdict may be overturned or reduced on appeal. And we will never hear about all the cases in which Target made good "bets" to go to trial and got better results than the plaintiffs' last demands. Some defendants calculate that sometimes it is better to take a hard line in negotiation to create a reputation as tough negotiators, even if they get bad results in some cases.

Even so, the verdict in this case probably caused some serious heartburn by the Target general counsel and top executives.

And it's a cautionary tale illustrating why so many litigants and lawyers are wary about going to trial and the vast majority of lawsuits are resolved without trial.

EMPIRICAL RESEARCH LITIGATION NEGOTIATION

2 THOUGHTS ON "BAD DECISIONS TO GO TO TRIAL"

Stephanie Bell Blondell

SEPTEMBER 19, 2016 AT 1:30 PM

Great example, John!

Jill Handley

SEPTEMBER 19, 2016 AT 10:08 AM

Having read this blog and John's blog of September 16th, it seems that the heart of the problem is lack of meaningful evaluation of one's case at the outset.

Implicit in John's earlier blog is rigorous review of the merits through ADR at the beginning of a matter. If a settlement occurs, that makes all the "process" elements of a law firm's offerings irrelevant.

The study underlying this blog's comments notes finds that the presence of an Offer of Judgment can reduce error in the decision to go to trial. Again, this is a tactic that is most effective if used early in the case, before much of the "process" has taken place.

Companies could gain insight by comparing all of their early critical analyses with actual results. Companies can then develop a sense of the specific factors they under– or over–estimate. They could also track the results predicted by various law firms against actual outcomes, resulting in data that may indicate a firm's accuracy in its hypotheses. This exercise might also help a company develop a measure of the value of discovery in altering the initial analyses. The need for discovery often appears to be an excuse for exacting analysis up front.

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