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Post - Settlement Settlements: Agreeing to Make Resolutions Efficient

Robert W. Mendenhalt*

I. INTRODUCTION

Post-settlement settlements¹ is a dispute resolution method designed to increase the efficiency and profitability of settlement agreements.¹ Simply put, the idea is for parties in conflict² to negotiate a settlement as best they can.³ Then, the parties ask an expert third party to use analytical methods to improve on the quality of the agreement for both sides.⁴ In dispute resolution literature, this joint improvement of the agreement is termed "expanding the pie" or discovering opportunities for joint gains.⁵ While the third party's improvements may be substantial, the conflicting parties do not accept any new proposal by the intervenor unless *both* prefer it to their initial agreement.⁶

The purpose of this article is to more fully describe the concept of post-settlement settlements, to discuss the assumptions upon which it is based, to critique the concept, and to make proposals that will assist third-party intervenors in achieving advantageous post-settlement settlements. Since the goal of post-

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1. Howard Raiffa developed the concept of post-settlement settlements in his article *Post-Settlement Settlements*. The concept finds an earlier genesis in Raiffa's book, *THE ART AND SCIENCE OF NEGOTIATION* where, in the context of mediation, Raiffa speaks of using a strong mediator, called a "contract embellisher," to use analytical methods to maximize the joint gains for both sides. See Howard Raiffa, *THE ART AND SCIENCE OF NEGOTIATION* 221 (1982) [hereinafter *ART AND SCIENCE*]; Howard Raiffa, *Post-Settlement Settlements*, 11 *NEGOTIATION JOURNAL - ON THE PROCESS OF DISPUTE SETTLEMENT* 9 (1985) [hereinafter *Post-Settlement Settlements*].

2. Raiffa, *Post-Settlement Settlements*, *supra* note 2, at 9-10.

3. I will use "conflict" throughout this paper in its wider meaning of an opposition of interests, and not in its more limited meaning of an open fight or struggle. See "conflict" in *WEBSTER'S NEW WORLD DICTIONARY* 298 (2d ed. 1980).

4. Raiffa, *Post-Settlement Settlements*, *supra* note 2, at 9.

5. *Id.* at 9-10.

6. *Id.* at 9; RAIFFA, *ART AND SCIENCE*, *supra* note 2, at 131-32; DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR* 32 (1986).

7. Raiffa, *Post-Settlement Settlements*, *supra* note 2, at 9-10.

settlement settlements is to increase conflicting parties' joint gains,⁷ the concept of joint gains must first be addressed.

II. UNDERSTANDING JOINT GAINS

This article undertakes two efforts in an attempt to explain the idea of joint gains clearly and concisely. First, it will divide joint gains into two sections: one dealing with the objectives of joint gains and the other dealing with the process of joint gains.⁸ This division facilitates a rational organization of the idea's underlying notions. Second, the article will use a simple, precise working vocabulary to explain joint gains. In particular, the use of multiple terms to express the same idea or notion⁹ will be avoided, a definite obstacle to the uninitiated in this area.

A. Objectives of Joint Gains

Value is the most basic notion to joint gains¹⁰ and, in this context, has its broadest possible meaning. Typically, value is understood to mean the monetary worth of an object.¹¹ Thus, if persons were to value a certain object, their natural inclination would be to state that the object is worth a certain dollar amount. Commonly, this type of value is called market value.¹² Now, if persons were asked to value a certain object, but limited to non-monetary descriptions of value, they would likely describe the object's desirability, usefulness, or

7. RAIFFA, ART AND SCIENCE, *supra* note 2, at 219; Raiffa, *Post-Settlement Settlements*, *supra* note 2, at 9; NEGOTIATION: STRATEGIES FOR MUTUAL GAIN: THE BASIC SEMINAR OF THE PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL 14 (Lavina Hall ed., 1993) [hereinafter NEGOTIATION STRATEGIES].

8. The author is unaware of any negotiation literature that draws a distinction between the objectives and the process of joint gains as he has done. However, the author has personally found the distinction helpful in understanding joint gains.

9. Alternative terms, phrases and expressions for the ideas and notions presented will be set out in the footnotes. This will assist readers who use this explanation of joint gains as a beginning point for further research.

10. Some authors use the idea of a party's interests as the fundamental notion in achieving joint gains. However, interests arise from the values persons place on items or situations. See LAX & SEBENIUS, *supra* note 7 at 63 (1986), there the authors speak of assessing the relative importance of interests and assessing trade-offs.

11. See "value," WEBSTER'S NEW WORLD DICTIONARY 1568 (2d ed. 1980)(note the strong emphasis on monetary references and market valuation).

12. This type of value is also termed quantitative value because the person making the value judgment sets an amount, or quantifies the value of an item in terms of what it can be exchanged for. This broad definition is inclusive of both the bartering situation and the more familiar retail setting where money is exchanged for an item. In an effort to simplify, the author has chosen to use the more familiar "market value."

importance.¹³ This type of value is termed "intrinsic value," and it is the esteem held for an item as opposed to its monetary worth.¹⁴

In the language of joint gains, value includes both market value and intrinsic value.¹⁵ Beyond attaching value to objects, people can also ascribe value to situations - the life circumstances in which they find themselves.¹⁶ Generally, they use expressions of intrinsic value to communicate the value of certain situations, but ascribing market value to situations is not entirely uncommon.¹⁷ Remembering the broad scope of value is critical to fully grasping the objective of joint gains.

The objective of joint gains is to increase the total shared value that parties to a conflict realize in the settlement of their conflict.¹⁸ This is the gain we refer to in joint gains. Also, as the term infers, all parties must realize this increase in value simultaneously, and one party cannot have their value in the settlement increased at the expense of any other party.¹⁹ The ultimate culmination of this objective is to have the parties realize all possible joint gains; that is, to reach a settlement that has no other alternative settlement producing greater joint improvement for the parties.²⁰ At this point, the settlement has become efficient.²¹

13. See "value," BLACK'S LAW DICTIONARY 1551 (1990).

14. A good example is the statement, "There is value in my home!" Some might interpret this statement to mean that one's house has considerable market value. The same statement, when understood to mean intrinsic value, can be interpreted to mean one's family relationships are good and they contribute to one's well-being.

15. Market value can actually be seen as a subset of intrinsic value. That is, even market value is merely the quantification of the intrinsic value of an item. The distinction is made in this paper to ensure that the broadest meaning possible is given to value. Market value and intrinsic value are equivalent to what Raiffa describes as quantitative trade-offs and qualitative trade-offs. See the discussion of AMPO Versus City in RAIFFA, ART AND SCIENCE, *supra* note 2, at 133-47, but especially noting 145-47.

16. RAIFFA, ART AND SCIENCE, *supra* note 2, at 131-31, 145-47; LAX & SEBENIUS, *supra* note 7 at 75, 77.

17. Seeking compensation for personal injuries is a common form of ascribing a market value or money to a changed life situation.

18. RAIFFA, ART AND SCIENCE, *supra* note 2, at 131-31; LAX & SEBENIUS, *supra* note 7, at 88-89.

19. RAIFFA, ART AND SCIENCE, *supra* note 2, at 131-32.

20. *Id.* at 139.

21. *Id.* Several terms and phrases are used synonymously with "efficient" when referring to such settlements. An Italian economist, Vilfredo Pareto, applied the concept of efficiency to economic theory. Thus, efficient settlements are often referred to as Pareto optimal settlements. *Id.*; LAX & SEBENIUS, *supra* note 6, at 44. As well, since value is the "pie" to be divided in the settlement of a conflict, an efficient agreement is said to leave no pie on the negotiating table. RAIFFA, ART AND SCIENCE, *supra* note 1, at 139. Lastly, the settlement of a conflict is often referred to as an agreement, referring to the end legal product of a settlement. Thus, an efficient settlement may be referred to as an efficient agreement or a Pareto optimal agreement. *Id.* The phraseology and terms used to denote an efficient settlement can be interchanged and combined in several different ways so that even further hybrids are possible. This increases the importance of having the concept of efficient settlements firmly in mind.

A common error is to assume that only one efficient settlement exists in any given conflict.²² This is not so. Several efficient agreements generally exist in any conflict.²³ If the parties realize and apportion all possible value to one or the other of the parties, the crux of the idea of efficiency, they can apportion the value unequally should they choose to do so.²⁴ Remember that efficiency means that the parties have realized and apportioned all possible joint gains despite whether they apportion the joint gains equally.²⁵

Fairness in the apportionment of joint gains exhibits all the complications normally seen in determining fairness. What is fair depends on the criteria used.²⁶ If the parties bring the same amount of value to the negotiation, the parties or intervenors may equally apportion the value created by settlement on the basis that equality is also equitable in this situation. However, achieving an equitable solution often requires an unequal apportionment of the value created by the settlement. Like the assessment of value itself, fairness is highly subjective and often difficult to quantify.

In this section, the article has set out the definition of value and its broad meaning in joint gains, inclusive of both market value and intrinsic value. The article also has addressed that joint gain is a simultaneous increase in value by the parties to the conflict. A realization of all potential joint gains results in an efficient settlement, though the parties may not apportion the value created by the settlement equally between themselves.

B. The Process of Joint Gains

As with any ideal goal or objective, parties to a conflict will often not accomplish the objective of achieving efficient settlements. Yet, in employing the process of joint gains and striving for the ideal objective, parties in conflict can attain as efficient agreements as possible, given the parties' resources and skills as negotiators. The process of joint gains must now be explored.

The process of joint gains is most succinctly described as the matching of complementary values.²⁷ This process is not so much the matching of similar types of values²⁸ as it is the matching of any values that produce a tradeoff value, as perceived by the parties to the conflict.²⁹ Tradeoff value is a conclusion

22. Generally, we equate an "efficient" settlement to the "best" settlement. Once we do this we import notions of fairness and equity. Efficiency, as described here is not concerned with fairness or equity in the distribution of value. Rather, the only concern of efficiency is that all possible value is created and allocated to one or other of the parties to the conflict.

23. RAIFFA, ART AND SCIENCE, *supra* note 1, at 139, 160-64; LAX & SEBENIUS, *supra* note 1, at 44.

24. *Id.*

25. *Id.*

26. LAX & SEBENIUS, *supra* note 6, at 150-52.

27. *Id.* at 42, 92-93, 105. This process is also referred to as the linking of issues. *Id.* at 236-37.

28. The matching of a market value to a market value or an intrinsic value to an intrinsic value.

29. *Id.*

reached when making a comparison for the purpose of exchanging items or situations, or a combination of the two.³⁰ The decision facing each party is whether the exchange of the items or situations gives them value compared to another possible trade, or no trade at all.³¹ If the party concludes that the exchange realizes value for them, the exchange creates tradeoff value for that party.³² The usual way of expressing this tradeoff value is to state the value they receive for the item or situation exchanged. When all parties see tradeoff value in a particular exchange, the exchange, of course, is likely to occur.³³

Matching complementary values is an accomplishable, yet difficult, task.³⁴ The process becomes even more difficult when accurate information is not available concerning the parties' values.³⁵ Generally, this difficulty arises from the decision of one party or both parties to engage in competitive behavior.³⁶ Strategic misrepresentation and partial disclosure characterize competitive behavior as each party attempts to "bring their opponent to their senses" and have their opponent see tradeoff value on their terms.³⁷ The parties also feel that if they truly set out their values other parties to the conflict will exploit the information and take advantage of them.³⁸ That is, the other parties will also act competitively and use the information of the other's values to make greater gains at the expense of the disclosing party.

Truth-telling and full disclosure, on the other hand, characterize cooperative negotiation behavior.³⁹ This type of behavior is most conducive to realizing joint gains since the parties expose and explore all issues in the conflict.⁴⁰ In particular, conflicting parties reveal their true values to each other.⁴¹ By matching one or more issues on which the parties' values differ, the parties can

30. *Id.* at 74-77.

31. *See* LAX & SEBENIUS, *supra* note 6, at 89 (where joint gains are expressed in terms of three joint actions, each a progression of joint gains from the no agreement situation to the efficient agreement).

32. *Id.* at 74-77.

33. *Id.*

34. *Id.* at 90-112.

35. *Id.* at 34-35, 121-22, 139-41.

36. RAIFFA, ART AND SCIENCE, *supra* note 1, at 33. Competitive negotiation behavior is also termed "distributional bargaining." Competitive behavior is often exhibited in single issue, distributive situations where one party's gain necessarily comes at the expense of another party. *Id.* Another reference to competitive behavior is "value-claiming" behavior since the object of the parties' conduct is to acquire as much value as possible. LAX & SEBENIUS, *supra* note 6, at 32-33.

37. *Id.* at 34-35, 121-23.

38. *Id.*

39. RAIFFA, ART AND SCIENCE, *supra* note 1, at 131. Cooperative negotiation behavior is also referred to as integrative bargaining. Like distributional bargaining, the appellation is derived from bargaining situations where the behavior occurs most frequently. An integrative bargaining situation is a multi-issue conflict where the parties are not strictly competitors, that is, all parties can gain value rather than one party only gains at the expense of another. *Id.* Cooperative behavior also is "value-creating" behavior since it is more explorative of values. *See* LAX & SEBENIUS, *supra* note 6, at 30-32.

40. *Id.* at 30-32.

41. *Id.*

engineer an exchange where each party gains value on an issue or issues to which it ascribes great value, and the other parties do not, in exchange for the other parties gaining value on other issues.⁴² Obviously, the parties must trust each other not to act competitively and exploit the information for their own singular gain, but to act cooperatively.⁴³

The choice that the parties make to act competitively or cooperatively is not as stark as represented. The choice of negotiating behavior by the parties is more on a behavioral continuum with competitive and cooperative behavior being at opposite ends of the spectrum.⁴⁴ The process of joint gains requires that the parties choose behavior that encourages the greatest degree of truth-telling and disclosure possible.⁴⁵ In other words, the parties must choose cooperative negotiating behavior to realistically hope to realize all possible joint gains.⁴⁶

The ironic twist to this choice of negotiating behavior, as discussed, is that eventually the negotiating behavior must turn to apportioning the value that the cooperative behavior has succeeded in creating.⁴⁷ Claiming value often results in competitive behavior.⁴⁸ Thus, in the process of joint gains, a healthy tension exists between postponing competitive behavior to realize all possible joint gains and knowing when to claim the value that they have created.⁴⁹ This tension is often termed the "negotiators' dilemma."⁵⁰

This section reveals the process of joint gains as primarily the matching of complementary values. The ability of the parties to discover complementary values is highly dependent on the negotiating behavior of the parties. More cooperative behavior, as opposed to competitive behavior, enhances the joint gains process by revealing the parties' true values as to the items or situations that are at issue. The joint gains process must eventually end in the apportioning of value, a step that often encourages competitive behavior by the parties. Thus, an ongoing tension in the joint gains process is the postponing of competitive behavior and the eventual need to apportion the value which cooperative behavior has created.

42. *Id.* at 88-90.

43. *Id.* at 33-35, 154-155.

44. This is another way of viewing the linked parts of negotiation-value creating and value claiming. In a negotiation, the negotiators have the opportunity to, and in fact must, move through the spectrum. They do, however, also have the opportunity to choose the specific tactics they employ. See *id.* and discussion below.

45. *Id.* at 30-32.

46. *Id.*

47. *Id.* at 33-35.

48. *Id.*

49. A fatal response to the absolute requirement that value eventually be claimed is to heighten commitment to cooperative behavior. This permits another party to claim value, without restraint, to his unfair advantage and at the expense of parties that do not engage in claiming value.

50. *Id.* at 33-34, 38-42.

III. EXAMPLE

A case example is helpful in clarifying the ideas central to joint gains. The example in this article draws on the negotiation problem of *Orin Parker v. Dynamic Electronics, Inc.*⁵¹ The full negotiation problem will not be replicated here, only facts sufficient to exemplify joint gains.

A. *The Facts of the Case*

Orin Parker is an electronics whiz.⁵² Since high school, Parker has teamed up with Charles Decker, a boyhood friend, in business ventures in the electronics industry.⁵³ Initially, the two carried on business as an informal partnership and, during this period of informal partnership, Parker designed and patented a power diode.⁵⁴ When they combined the power diode with a power generator, also of Parker's own design, the two partners manufactured a power generator superior to any other generator on the market.⁵⁵

The business flourished with this new product and Parker and Decker decided to incorporate as Dynamic Electronics, Inc. ("Dynamic").⁵⁶ Parker and Decker were allocated equal shares in the company, some 50,000 participating and voting shares.⁵⁷ Both sat on the board of directors, rotating the position of chairman.⁵⁸ Both were employed as officers of the corporation taking their respective turns in the offices of president and vice-president.⁵⁹ At incorporation, Parker signed an agreement stating that all designs, developments, and inventions created by him in the future belonged to Dynamic.⁶⁰ The agreement did not mention the power diode patent or the design of the power generator developed by Parker before the date of incorporation.⁶¹

After some years of successful business, Dynamic experienced a downturn for the following reasons: (1) rising costs, (2) major spending cutbacks by customers, (3) erosion of the domestic market, and (4) introduction of newer, more advanced products by competitors.⁶² A serious disagreement arose between

51. Gerald R. Williams, *Parker v. Dynamic Electronic, Inc.* (Nov. 14, 1994) (unpublished negotiation exercise on file with the author, J. Reuben Clark Law School, Brigham Young University, Provo Utah) [hereinafter *Parker v. Dynamic*]. Used with the permission of Gerald R. Williams.

52. *Id.*; General Information for plaintiff and defendant's attorneys 1 [hereinafter General Information].

53. General Information, *supra* note 53, at 1.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

Parker and Decker about how to handle the problem.⁶³ Parker felt that the company should move into the growing export market where their products would still be in demand.⁶⁴ Decker viewed new technological advances as the key to recovery, provided Parker could produce the desired results.⁶⁵ Further, Decker argued that Dynamic should delay entry into the export markets until the domestic market firmed up.⁶⁶

At this time, Parker also had been developing an improved capacitance meter and had patented the crucial first stage of development.⁶⁷ However, the next stage of development had been eluding him for some time and he was frustrated by the whole problem.⁶⁸

Amid this tension, Parker and Decker held a directors' meeting.⁶⁹ An acrimonious fight broke out and the meeting ended with Parker walking out.⁷⁰ The next day Parker resigned as a director and Decker fired Parker as vice-president of Dynamic.⁷¹ A few days later, Parker appeared at a scheduled shareholders' meeting, but Decker failed to appear, most likely to prevent Parker from taking his turn as chair of the board.⁷²

A frustrated Parker decided to sell his shares in Dynamic and, according to the terms of the corporate bylaws, the company exercised its right of first refusal to purchase the shares.⁷³ Parker offered to accept forty dollars per share; Dynamic countered with an offer of twenty dollars per share.⁷⁴ Parker filed suit seeking various kinds of relief, all of which would allow him to disentangle himself from Dynamic and receive a payout on his shares.⁷⁵

B. Case Issues

Obviously, the conflict is very complex with many issues in contention. Each of these issues is examined in greater detail below.

63. *Id.*

64. *Id.*; see also *id.* at 2, (confidential Instructions for attorney representing defendants Dynamic Electronics and Decker 7)[hereinafter Defendant's Instructions].

65. Defendant's Instructions, *supra* note 65, at 7.

66. *Id.*

67. *Id.*; Confidential Instructions for attorney representing the plaintiff Parker 6 [hereinafter Plaintiff's Instructions].

68. *Id.*

69. *Id.*; General Information, *supra* note 53, at 2.

70. General Information, *supra* note 53, at 2.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*; see also *id.* at 2; Plaintiff's Instructions, *supra* note 68, at 3; Defendant's Instructions, *supra* note 65, at 3.

1. Valuation of Parker's Shares

Taken alone, the valuation of Parker's shares is highly distributive and competitive. Parker desired to receive a price as great as possible, while Dynamic, now under Decker's sole direction, wanted to pay as little as possible.⁷⁶ Dynamic, having exercised its right of first refusal, was under a legal obligation to purchase Parker's shares.⁷⁷ Though it offered twenty dollars per share, it realizes it would need to pay between twenty-four dollars and thirty-four per share.⁷⁸ Any lesser amount paid for shares would represent money well invested, while a larger amount would be a poor investment.⁷⁹

Parker, on the other hand, had three experts value the shares at thirty-four, twenty-eight, and twenty-four per share.⁸⁰ Realistically, Parker felt that the outcome at a trial would be between the two higher figures.⁸¹ He also knew that another Dynamic employee dismissed at the same time received twenty-four per share for his shares, which were participating, but not voting, shares.⁸² In addition, a venture capitalist verbally offered forty per share to Parker for his shares.⁸³ However, the offer was conditional on Parker transferring the shares free and clear, something Parker was unable to do as Dynamic exercised its right to purchase the shares.⁸⁴ In total, Parker just wanted the best price he could get for the shares and any amounts received pursuant to a settlement would have its own face value.⁸⁵

2. Claim for Lost Salary

Another complex issue in the negotiation between Parker and Dynamic involves Parker's claim for lost salary. Parker lost six months of wages following

76. General Information, *supra* note 53, at 2; Plaintiff's Instructions, *supra* note 68, at 3; Defendant's Instructions, *supra* note 65, at 3.

77. *Id.*

78. Defendant's Instructions, *supra* note 65, at 3.

79. See *Parker v. Dynamic*; Defendant's Instructions, *supra* note 65, at 4. Below are the evaluations done by the parties as expressed in their cost/benefit calculations. This gives some flavor of the intense evaluation that should be performed by each party to the conflict. Thus, Dynamic's cost of settlement on the share issue is as follows:

<u>Payment per share</u>	<u>Cost to Dynamic</u>
< \$24 per share	0.75 x total payment
\$24 to \$34 per share	1.0 x total payment
> \$34 per share	1.5 x total payment

80. Plaintiff's Instructions, *supra* note 68, at 4.

81. *Id.*

82. General Information, *supra* note 53, at 1; Plaintiff's Instructions, *supra* note 68, at 4; Defendant's Instructions, *supra* note 68, at 4.

83. Plaintiff's Instructions, *supra* note 68, at 4; Defendant's Instructions, *supra* note 65, at 4.

84. *Id.*

85. Plaintiff's Instructions, *supra* note 68, at 4.

his dismissal, despite his best efforts to obtain alternate employment.⁸⁶ As vice-president, Parker had earned \$70,000 per year plus benefits and bonuses.⁸⁷ The office of president, which he was to assume shortly, earned a salary of \$80,000 per year plus benefits and bonuses. Parker felt he was entitled to a claim for \$40,000 plus bonuses.⁸⁸

Dynamic's position was that Parker was dismissed for just cause and was not entitled to a claim for lost salary.⁸⁹ However, if he were entitled to such a claim, Parker's inability to find work for six months was surprising given the current demand for electrical engineers.⁹⁰ As well, Dynamic paid no bonuses to officers of Dynamic and, therefore, Dynamic felt that Parker was not entitled to any bonuses.⁹¹

Dynamic felt it could make some gain on this issue, as Dynamic was entitled to a tax deduction of twenty-eight percent for amounts paid for salary.⁹² This type of deduction was not available on other amounts paid to Parker, such as for purchase of shares.⁹³ If the company did not have to admit liability, Dynamic was willing to channel some funds from share purchases to Parker's claim for lost wages.⁹⁴ One critical factor to remember is that Dynamic could only make the deduction for salary paid as reasonable compensation.⁹⁵ If the amount deducted was unreasonable, Dynamic would lose the deduction and be subject to penalties.⁹⁶ The company considered anything more than \$100,000 unreasonable, as it would be subject to an increased risk of an audit.⁹⁷

3. Covenant Not to Compete

During the negotiation, the issue of whether Parker should agree to a covenant not to compete was also discussed in detail. Within the industry, Parker enjoyed an excellent reputation as an experienced electrical engineer and innovator.⁹⁸ His reputation, and the fact that he had not already signed a covenant not to compete with Dynamic, made Parker very hesitant to make such

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*; Defendant's Instructions, *supra* note 65, at 4.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*; Defendant's Instructions, *supra* note 65, at 5.

96. *Id.*

97. *Id.* The costs of settlement to Dynamic in this area are assessed as follows:

<u>Payment by Dynamic</u>	<u>Cost to Dynamic</u>
< \$100,00	.72 x payment
\$100,001 to \$200,000	.75 x payment
> \$200,000	.80 x payment

98. *Id.*; Plaintiff's Instructions, *supra* note 68, at 4.

an agreement.⁹⁹ However, Dynamic asserted that Parker had a duty not to compete because of his former positions with Dynamic as an officer and director.¹⁰⁰ Dynamic believed it had somewhere between a thirty and a fifty percent chance of establishing this duty at trial.¹⁰¹

Parker did not compete with Dynamic in his employment at the time of the negotiation, but this would have changed had he accepted a pending offer for employment from one of Dynamic's competitors.¹⁰² Employment with a competitor would raise Parker's present wage of \$80,000 to \$90,000, plus additional stock benefits.¹⁰³ Since the competitor was willing to leave the offer of employment open for a year or two, the possibility existed that Parker could wait out a covenant to compete and still move to the competitor.¹⁰⁴

Dynamic felt that it must obtain a covenant not to compete because the financial consequences of not doing so are enormous.¹⁰⁵ It was estimated that Dynamic would lose a net present value of \$200,000 if Parker competed against them.¹⁰⁶ Moreover, Dynamic realized that any legal position it chose to argue could not guarantee the creation of a valid covenant not to compete. The company could only argue that Parker had an implied duty not to compete against his former employer.¹⁰⁷

4. Rights to Power Diode and Generator

Since the power diode and generator had been good money-makers for Dynamic, the division of the rights to these products was also discussed during the negotiation.¹⁰⁸ Both Parker and Dynamic expected sales to drop significantly

99. Plaintiff's Instructions, *supra* note 68, at 5; Defendant's Instructions, *supra* note 65, at 5.

100. *Id.*; Plaintiff's Instructions, *supra* note 68, at 4.

101. Plaintiff's Instructions, *supra* note 68, at 4; Defendant's Instructions, *supra* note 65, at 3.

102. Plaintiff's Instructions, *supra* note 68, at 5; Defendant's Instructions, *supra* note 65, at 5.

103. Plaintiff's Instructions, *supra* note 68, at 5.

104. *Parker v. Dynamic*. Parker assesses the covenant not to compete as follows:

<u>Covenant by Parker</u>	<u>Benefit to Parker</u>
No covenant	\$50,000
1 year covenant	\$30,000 plus payment
2 year covenant	\$20,000 plus payment
3 year covenant	\$10,000 plus payment
> 3 year covenant	Payment

105. Defendant's Instructions, *supra* note 65, at 5.

106. *Id.*

107. *Id.* at 3. Dynamic's gains and losses would be:

<u>Covenant by Parker</u>	<u>Cost to Dynamic</u>
No covenant	\$200,000
1 year covenant	\$150,000 plus payment
2 year covenant	\$100,000 plus payment
3 year covenant	\$50,000 plus payment
> 3 year covenant	Payment

108. Plaintiff's Instructions, *supra* note 68, at 5; Defendant's Instructions, *supra* note 65, at 6.

within the next year as technological advances made the products obsolete.¹⁰⁹ At the time of negotiation, the net present value of profits arising from sales of the product for the next three years, the life expectancy of the product, was \$105,000.¹¹⁰ To settle the dispute over the rights to the product, Dynamic or Parker would need to pay the other for the rights to the product.¹¹¹

Parker realized the limited life of the product, but was quite confident of his chances at trial of obtaining a favorable outcome.¹¹² He wanted Dynamic to pay handsomely for his rights in the products and estimated the net present value of the products to be \$35,000.¹¹³

5. Rights to Work in Progress

Beyond the rights to the power diode and generator, Parker and Dynamics also addressed their rights to the capacitance meter. This issue concerned an improved capacitance meter that Parker was developing just before leaving Dynamic.¹¹⁴ Parker completed the first phase of the project before his departure, and Dynamic patented the technology.¹¹⁵ Parker, after his dismissal, made a breakthrough and applied for a patent for this second phase of technology.¹¹⁶ Unfortunately, the total package for the capacitance meter still relied on the first phase, for which Dynamic still held the patent.¹¹⁷ Parker had the new meter evaluated and all indications were that it presented an unusually attractive opportunity.¹¹⁸

Gaining rights to the capacitance meter was particularly important for Parker. To market the product, he must obtain rights from Dynamic to the first phase patent.¹¹⁹ As well, he must not have any constraints on his ability to market the meter outside the United States (i.e., no covenant not to compete that is effective beyond United States borders), and he would have to give up his job offer from

109. *Id.*

110. Defendant's Instructions, *supra* note 65, at 6.

111. Plaintiff's Instructions, *supra* note 68, at 6; Defendant's Instructions, *supra* note 65, at 6.

Dynamic's alternatives and costs are:

<u>Agreement</u>	<u>Cost to Dynamic</u>
Sell rights to Parker	\$105,000 - payment
Buy rights from Parker	Payment

112. Plaintiff's Instructions, *supra* note 68, at 6.

113. *Parker v. Dynamic*, *supra* note 52. Parker's evaluation results in the following:

<u>Agreement</u>	<u>Benefit to Parker</u>
Sell rights to Dynamic	Payment
Buy rights from Dynamic	\$35,000 - Payment

114. Plaintiff's Instructions, *supra* note 68, at 6; Defendant's Instructions, *supra* note 65, at 7.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

Dynamic's competitor.¹²⁰ Parker saw three alternatives: (1) sell the rights to the second phase to Dynamic, (2) buy the phase one rights from Dynamic, or (3) enter into a licensing agreement with Dynamic.¹²¹ The net present value of the breakthrough technology was \$240,000.¹²²

Dynamic realized that Parker's new capacitance meter was directed at export markets, a direction the company was not enthusiastic about taking.¹²³ However, the company was suspicious that the new product also required the underlying technology of phase one, to which it held the rights.¹²⁴ Dynamic saw four alternatives: (1) refuse to license the phase one technology and gain a profit from cutting off this competition in the export market, (2) sell its phase one technology and use the money for research and development of more profitable products, (3) obtain a license from Parker and market the new meter, or (4) grant a license to Parker and take a royalty.¹²⁵

6. Litigation Expenses

At the time of the negotiation, Parker and Dynamic spent \$120,000 in attorney fees, expert witness costs, and other litigation expenses.¹²⁶ Both Dynamic and Parker knew they would spend a similar amount if the conflict went to trial.¹²⁷

120. *Id.*

121. Plaintiff's Instructions, *supra* note 65, at 6,7.

122. Plaintiff's Instructions, *supra* note 68, at 7. In summary, Parker's alternatives have the following benefits or costs:

<u>Agreement</u>	<u>Benefit to Parker</u>
Dynamic keeps phase one rights	None
Parker buys phase one rights and competes outside the U.S.	\$240,000- payment.
Dynamic licenses second phase technology and Parker gets ½ profit.	\$100,000 + payment
Parker licenses phase one technology and markets meter.	\$120,000 - payment

123. Defendant's Instructions, *supra* note 65, at 7.

124. *Id.*

125. Defendant's Instructions, *supra* note 65, at 7-8. Dynamic's evaluation:

<u>Agreement</u>	<u>Benefit to Dynamic</u>
(1)Keep phase one rights	\$30,000
(2)Sell rights; allow Parker to compete and obtain R&D money.	Up to \$100,000, payment x 1.5; plus amount > \$100,000, but < \$130,000 x 1.3; plus any amount > \$130,000.
(3)Dynamic licenses breakthrough	\$72,000 - payment
(4)Parker licenses phase one	\$60,000 + payment

126. General Information, *supra* note 53, at 3.

127. Plaintiff's Instructions, *supra* note 68, at 3; Defendant's Instructions, *supra* note 68, at 3.

C. Illustration of Joint Gains

The purpose of this section is not to construct an efficient agreement, but to illustrate the concept of joint gains through a discussion of the negotiation case example. The notion of value is apparently quite straightforward in the case example because most of the issues are reduced to monetary terms. Parker and Dynamic have closely evaluated their positions and determined the monetary consequences of each potential resolution, whether it be share purchase price, patent rights to the power diode and power generator, covenants not to compete, or other issues.

The case example, however, also illustrates the importance of intrinsic value. For example, though Dynamic had an opportunity to cooperate with Parker in the marketing of his new capacitance meter and make some profit, the anticipated market for the product was the export market.¹²⁸ Whether Dynamic should further enter the export market was the crux of the original dispute between Decker and Parker.¹²⁹ For Dynamic to now enter the export market under Decker's direction was quite incongruous. Putting monetary considerations aside, Decker's attempt to cause Dynamic to make a further entrance into the export market was a huge psychological barrier for dynamic to overcome.

This negotiation case example also illustrates the potential for joint gain, the increase in value that both parties can realize from settlement of conflicts. Again, the increases in value can occur both in a market value context and in an intrinsic value context. As to joint gain in monetary value, the most apparent joint gain is suggested by the facts. Dynamic could funnel part of the purchase price for Parker's shares into his lost wages claim.¹³⁰ By doing so, Dynamic received a tax deduction in its favor and Parker could settle his total claims in an amount that was favorable to him as well.¹³¹ Regarding intrinsic value, the author previously pointed out the incongruity of Dynamic making a further entry into the export market. This could have led Dynamic to sell its phase one rights or adopt a more detached role in the development and marketing of the capacitance meter despite its being less monetarily rewarding. As well, funds received from Parker in the sale of phase one rights can be profitably used in research and development in the domestic market area, an area Dynamic anticipated being more profitable.

Anytime issues are quantified, in the monetary sense or by use of a scoring system where non-monetary issues are involved, the mathematical calculation of all possible settlements and, particularly, the efficient frontier is possible.¹³² Even if actual mathematical calculation is not possible, experimentation with differing resolutions and calculating the benefit to each party helps in perceiving greater opportunities for joint gain. In essence, the suggestion here is that parties

128. Defendant's Instructions, *supra* note 68, at 7-8.

129. General Information, *supra* note 53, at 3; Plaintiff's Instructions, *supra* note 68.

130. Defendant's Instructions, *supra* note 65, at 4-5.

131. *Id.*

132. RAIFFA, ART AND SCIENCE, *supra* note 1, at 133-38, 148-54, 160-64.

do not always need to calculate the efficient frontier.¹³³ Rather, parties can experiment with various potential settlements until they comprehend the greatest joint gains possible.

Again, conflicting parties must remember that several efficient settlements are available to solve their disputes. How they apportion the value created goes to the issue of fairness. Once Parker and Dynamic create value, they will need to negotiate the issue of fairness.

The issue of fairness creates a bridge between the objectives and the process of joint gains. Whether parties will engage in the process of joint gains largely depends on their perception of being treated fairly.¹³⁴ If they feel other parties will treat them fairly, they will more likely postpone their competitive, value-claiming behavior and engage in creating value.¹³⁵

Of course, the process of joint gains involves the matching of complementary values.¹³⁶ The matching of the complementary values in the purchase of shares and the wage loss claim is a good example.¹³⁷ Essentially by jointly solving the two issues, both parties gain an advantage over the separate negotiation of the issues. Another example of matching complementary values is found in the negotiation between Parker and Dynamic over the covenant not to compete and the opportunity for a joint venture marketing the capacitance meter. If Dynamic wanted to obtain funds through the sale of the company's phase one rights to enable it to conduct further research and development, the company might also have permitted Parker to compete against it. Again, a natural linking occurs in the discussion between these two issues.

The matching of complementary values can become much more complex than suggested by the illustrations set out above. Parker can trade off a gain in one or more matched sets against Dynamic's gain in one or more other areas. Thus, the potential for creating value can continue along increasingly complex lines and create greater opportunities for joint gains among the parties.

The necessity for truth-telling and full disclosure is paramount. In the negotiation case example, imagining that the parties or their negotiators might act strategically and misrepresent the truth or fail to give full disclosure is not difficult.¹³⁸ This strategic behavior results from the fear of being exploited by the other party.¹³⁹ For instance, Dynamic may be hesitant to fully reveal its

133. *Id.* at 139-42; LAX & SEBENIUS, *supra* note 6, at 4.

134. LAX & SEBENIUS, *supra* note 6, at 150-52.

135. *Id.*

136. *Id.* at 42, 92-93, 105.

137. *Parker v. Dynamic*, *supra* note 52; Defendant's Instructions, *supra* note 65, at 4-5.

138. RAIFFA, ART AND SCIENCE, *supra* note 1, at 142-45; LAX & SEBENIUS, *supra* note 6, at 139-41.

139. *Id.* My perception is that both cooperative negotiators and aggressive negotiators make strategic decisions based on the fear of being taken advantage of, though their point of reference differs. An aggressive negotiator fears he or she is being taken advantage of if they do not claim as much as they can; cooperative negotiators generally fear that their good natures will be exploited and they will get tied up in creating value and neglect claiming it.

available tax deduction on reasonable compensation paid to Parker. Parker may take the information and use it to justify heightening his demands or simply holding firm to his position. After all, if the settlement is going to cost Dynamic less than anticipated, why shouldn't Parker claim some of that value?

Likewise, Parker may be reluctant to inform Dynamic about his offer of employment from one of Dynamic's competitors. This fact may only make Dynamic more insistent that they obtain a covenant not to compete as part of any settlement. Parker's present employment does not directly compete with it, but if he has an immediate opportunity to compete against Dynamic, the company may feel inclined to entrench its position.

The purpose of this section is to illustrate some ideas about joint gains. The problem of Dynamic and Parker allows readers to explore the many facets of joint gains. One of the best ways to comprehend the facets of joint gains is to observe a negotiation of the problem where the parties or negotiators only know their own relevant facts. Observing the behavior of the negotiators and assessing the differing settlements that occur would be interesting and instructive.

IV. POST - SETTLEMENT SETTLEMENTS

As stated earlier, post-settlement settlements is an idea or process developed to enhance the realization of joint gains and, where possible, achieve efficient agreements.¹⁴⁰ As Howard Raiffa, the originator of post-settlement settlements, has observed:

[W]e must recognize that a lot of disputes are settled by hard-nosed, positional bargaining. Settled, yes. But efficiently settled? Often not. Both sides are often so intent on justifying their individual claims that not much time is spent on creating gains to be shared. They quibble about sharing a small pie and often fail to realize that perhaps the pie can be jointly enlarged. Even where there is a modicum of civility and some cooperative behavior on the part of the negotiators, it is not easy to squeeze out joint gains.¹⁴¹

Consequently, the preceding discussion of joint gains needs to be kept firmly in mind and used to evaluate whether post-settlement settlements can further the joint gains process.

140. Raiffa, *Post-Settlement Settlements*, *supra* note 1, at 9.

141. *Id.*

A. Contract Embellisher

To fully appreciate the concept of post-settlement settlements, one must understand what appears as its genesis. In *The Art and Science of Negotiation*,¹⁴² Howard Raiffa devotes an entire section to the discussion of efficient settlements. In discussing the role of third party intervenors in furthering joint gains and achieving efficient settlements, Raiffa suggests a type of intervenor he calls a "contract embellisher," as follows:

I once invented a role for a rather unorthodox type of intervenor, whom I called a "contract embellisher." Suppose that two parties are involved in a complex negotiating deal. At some early stage in the negotiations, when both sides fully understand the issues they are negotiating, the contract embellisher interviews each side separately, confidentially, and in depth about its needs, perceptions, value tradeoffs, and so on. He then seals this information and retires from the scene until normal contract negotiations are terminated. Knowing a great deal about each side's beliefs, values, aspirations, and constraints, he is in a position to ascertain whether they have arrived at an efficient contract -- a contract that will not permit further joint gains. If they have not, the contract embellisher attempts to devise an alternate contract, which according to his calculations they would both prefer. But there may be slippage and it is possible that he could be wrong. So next he asks each side privately if it would prefer his suggested contract to the one already negotiated. If both sides separately indicate that they would prefer his proposal, then the change is consummated. There is no haggling about the proposal: the parties can either take it or leave it.¹⁴³

Essentially, the suggestion requires a third party intervenor to use a confidential relationship with each party to a conflict to obtain each party's true values as to the items or situations in dispute.¹⁴⁴ After the parties have negotiated the best possible contract they can, the intervenor, at the request of the parties, reviews the contract and further matches complementary values.¹⁴⁵ Due to the intervenor's intimate knowledge of each party's true values, the presumption is that the intervenor can find further joint gains and, possibly, craft an efficient contract.¹⁴⁶

Since the parties do not intend the intervenor's review of the contract to be a re-opening of the negotiations, the embellished contract is presented in a take-it-

142. RAIFFA, *ART AND SCIENCE*, *supra* note 1.

143. *Id.* at 221.

144. *Id.*

145. *Id.*

146. *Id.*

or-leave-it approach.¹⁴⁷ The rationale for this approach may also include some protection for the intervenor. Finding more joint gains or crafting an efficient agreement is not an exact science, and slippage, as Raiffa calls it, may occur.¹⁴⁸ Thus, the intervenor is not guaranteeing a more efficient agreement, but rather is using analytical methods to enhance the agreement. Also, the parties may possibly have already negotiated an efficient contract.

Here, then, is the beginnings of a new dispute resolution process that is specifically designed to assist parties in conflict to realize all possible joint gains. This concept finds further development, and perhaps its fullest development, in a subsequent article by Raiffa.

B. Analytical Intervenor

In *Post-Settlement Settlements*,¹⁴⁹ Raiffa further develops the role of a contract embellisher, now termed an "analytical intervenor,":

Here's one suggestion for how such intransigent negotiators might be helped. Let them negotiate as they will. Let them arrive at a settlement, or let a judge or jury impose a settlement on them [O]ne protagonist might feel happy about the outcome - he got more than he expected - but . . . the other protagonist is unhappy - she did not realize her just aspirations. But even in this case the negotiators might not have squeezed out the full potential gains. There may be another carefully crafted settlement that both . . . might prefer to the settlement they actually achieved.

Now let's imagine that along comes an intervenor . . . and he asks [the protagonists] after they have achieved their settlement if they would be willing to let him try to sweeten the contract for each. The intervenor carefully explains to [the protagonists] that [they] will have the security of the outcome level . . . already achieved but that [they] may have the opportunity to do still better. The intervenor proposes that after some analysis he will suggest an alternate settlement- a post-settlement settlement, if you will- that would replace the original settlement only on the condition that both parties agree to the change; and of course they would only do this if each prefers the new settlement proposal to the old one. . . .

Let's suppose that [one protagonist] is eager to cooperate with the intervenor and that [the other protagonist] also reluctantly agrees, but each side is not too happy about resuming face-to-face negotiations. The intervenor proceeds by meeting separately with each side and doing a careful, deep analysis of its interests and values, probing in particular

147. *Id.*

148. *Id.*

149. Raiffa, *Post-Settlement Settlements*, *supra* note 1.

values that may be quite sensitive. The intervenor promises each side not to reveal these confidentialities to the other (nor to anyone else), and his promise is credible because of his existing reputation and his desire to do business of a similar kind with others. . . .

By the end of these deep-mapping exercises, the intervenor would be privy to information that neither side had about the other. Now the analytical task is clear There may be more than one new settlement that would be better for each than the old one, and then the intervenor would have a choice. Of course, he would then want to select a settlement that would squeeze out all potential joint gains. Several choices might still then remain, but that possibility should not detract from the scheme. How to find appropriate candidate settlements becomes a mathematical optimization problem, and a host of techniques can be employed to help the intervenor identify candidates and make his selection.

Let's push on and assume that, on the basis of the information the intervenor has elicited privately and confidentially from each of the parties, he designs a new settlement that he believes each party will prefer to the old negotiated (or imposed) settlement. He then proposes, in a take-it-or-leave-it way, the new post-settlement settlement. Either side has veto power. There's no bargaining. If both say yes, so be it. If one says no, the old settlement prevails. That's the scheme. . . .¹⁵⁰

Raiffa's idea for post-settlement settlements is obviously an extension of his contract embellisher. Perceptively, Raiffa has recognized that parties negotiating a contract are in conflict. As parties in conflict, they will eventually need to claim the value they can create. The contract embellisher, an intervenor having the confidences of the conflicting parties, controls both the creation and allocation of value.¹⁵¹ The concept invites itself to other types of conflict, including family disputes, business disputes, and estate disputes.¹⁵² Thus, the enlarged concept of post-settlement settlements emerges.

Post-settlement settlements also recognize that some parties probably cannot negotiate a settlement. However, this should not impede the use of an intervenor.¹⁵³ The parties can use the intervenor following any resolution of a

150. *Id.* at 9-10.

151. A marked difference is noticeable between Raiffa's contract embellisher and analytical intervenor. Even as the change in name of the third party suggests, Raiffa puts his ideas in the broader context of conflicts and settlements rather than deals and contracts. Other language used notes the extension of his ideas to a broader, much more inclusive concept of conflicts. RAIFFA, *ART AND SCIENCE*, *supra* note 1, at 221; Raiffa, *Post-Settlement Settlements*, *supra* note 1, at 9-12.

152. These are specific examples of situations that might utilize post-settlement settlements, as envisioned by the broader, conflict-based context of the intervention proposed by Raiffa. *See supra* note 153.

153. Raiffa, *Post-Settlement Settlements*, *supra* note 1, at 9.

conflict, whether such a resolution is voluntary or imposed.¹⁵⁴ Perhaps, then, a better term for the process might be "post-resolution settlement," since settlement usually implies voluntary agreement and consensual resolution of a problem.¹⁵⁵

Interestingly, Raiffa does not repeat the requirement that the intervenor gather information from the parties before they have reached a resolution.¹⁵⁶ Instead, the intervenor gathers the information following the settlement.¹⁵⁷

C. Comments on Post-settlement Settlements

Following Raiffa's article, two specific responses were made to *Post-Settlement Settlements*. The approaches taken by the authors of these comments are quite different, one is prescriptive and the other is descriptive,¹⁵⁸ but both provide significant insight into the area.

1. Suitability to Multi-Party Conflicts

The first article, *Some Additional Thoughts on Post-Settlement Settlements*,¹⁵⁹ proceeds on the basis that the "use of mathematical models in the study of negotiation . . . [can] make certain kinds of insights precise, permitting a systematic exploration of their implications."¹⁶⁰ Specifically, the author, Alvin E. Roth, uses mathematical models to buttress Raiffa's contention that two-party negotiations in complex situations frequently fail to realize a significant amount of joint gains, and that an analytical intervenor can expect many opportunities to achieve a more efficient post-settlement settlement.¹⁶¹

Support for Raiffa's contention springs from three conclusions reached by using mathematical models.¹⁶² First, mathematical calculations show that as the number of issues in a conflict increase, the total number of possible settlements

154. *Id.*

155. See "settlement" in WEBSTER'S NEW WORLD DICTIONARY 1304 (2d ed. 1980). Settlement is defined as an agreement, arrangement, or adjustment. Such language implies the consensual nature of a settlement, though a stricter, technical definition may not imply the same meaning. Raiffa himself uses settlement in the more common usage suggested, since his post-settlement settlement requires both parties to accept the alternate settlement presented; a consensual, voluntary resolution. RAIFFA, ART AND SCIENCE, *supra* note 1, at 221; Raiffa, *Post-Settlement Settlements*, *supra* note 1, at 9-10.

156. RAIFFA, ART AND SCIENCE, *supra* note 1, at 221.

157. Raiffa, *Post-Settlement Settlements*, *supra* note 1, at 9.

158. Gerald R. Williams has said, "A prescriptive approach says, 'This is how it ought to be done.' A descriptive approach says, 'I have examined large numbers of experienced dispute resolvers and this is how they do it; here are the characteristics and patterns of highly effective negotiators.'" NEGOTIATION STRATEGIES, *supra* note 8, at 151.

159. Alvin E. Roth, *Some Additional Thoughts on Post-Settlement Settlements*, 1 NEGOTIATION JOURNAL - ON THE PROCESS OF DISPUTE SETTLEMENT 245 (1985).

160. *Id.* at 245.

161. *Id.* at 245, 247.

162. *Id.*

increases dramatically.¹⁶³ This is due to the myriad of new potential settlements created by the matching of complementary values. Second, the calculations also show that as the number of issues increases, the increase in non-efficient settlements is disproportionately greater than the increase in efficient settlements.¹⁶⁴ So, the probability that the parties will choose non-efficient settlement from the total set of potential settlements also increases.

By combining these two conclusions, one can predict that even though multiple issues increase the number of possible settlements to a conflict.¹⁶⁵ The chances that conflicting parties will reach an efficient resolution decreases.¹⁶⁶ Hence, the analytical intervenor's opportunity to create a more efficient, or Pareto "optimal",¹⁶⁷ post-settlement settlement increases.¹⁶⁸

An excerpt from the article helps to solidify the idea:

[W]hen there are only two parties to the negotiations . . . , the percentage of possible Pareto optimal settlements on average will be less than 30 percent when there are 10 possible settlements (i.e., the expected number of Pareto optimal settlements will be 2.93. This percentage will drop to less than 1 percent when there are 1000 possible settlements. If it is costly to evaluate possible settlements, and if strategic considerations prevent the negotiators from frankly revealing their preferences, then the possibility that the final outcome of negotiations will not be Pareto optimal can be expected to increase as the percentage of Pareto optimal settlements declines. Thus the probability that mutually profitable post-settlement settlements can be found is potentially very large when there are many possible settlements.¹⁶⁹

The third conclusion is that opportunities for more efficient post-settlement settlements decrease as the dispute expands from a two-party dispute to a multi-party dispute.¹⁷⁰ Continuing in the article, Roth states:

The situation is quite different as the number of negotiators grows. This can be understood by noting that, the larger the number of negotiators with independent interests, the harder it is to propose a change from one settlement to another that all regard as an improvement . . . [T]he case of three negotiators . . . is already significantly different

163. *Id.* at 245-46.

164. *Id.* at 246.

165. *Id.*

166. *Id.*

167. *See supra* note 23.

168. *Id.*

169. *Id.*

170. *Id.* at 247.

from the case . . . [of two negotiators]. And by the time we reach the case . . . [of fifteen negotiators], the expected percentage of Pareto optimal settlements is over 98 percent even when there are as many as 1000 possible settlements. Even if the negotiators choose a final outcome entirely at random, the likelihood of selecting one that could not be mutually improved upon by a post-settlement settlement would be overwhelming. This is of course in stark contrast to the situation that exists when there are only two negotiators.¹⁷¹

The obvious conclusion from the mathematical model, and the prescription for post-settlement settlements, is that this type of intervention is most successful in multi-issue disputes with a small number of parties, generally two or three.¹⁷²

2. Effective Working Relationships and Post-Settlement Settlements

The stated purpose of the article *Post-Settlement Settlements in Two-Party Negotiations*¹⁷³ is to extend the concept of post-settlement settlements "by arguing that, in complex two-party relationships, the creation of . . . [post-settlement settlements] (without the help of a third party) should be viewed as part of an effective working relationship."¹⁷⁴ Some negotiations, it is argued, cannot achieve an efficient agreement, at least initially.¹⁷⁵ These types of situations are familiar to lawyers and other service providers. A client consults the service provider concerning a complex problem, but has only limited information and insists, in order to save costs, on negotiating the fee up front.¹⁷⁶ As the article puts it:

[T]he full nature of an agreement will often be unspecifiable until the work begins. The consultant, for example, can often be trapped by a Catch-22 since he or she cannot know the true problem without providing a great deal of service. In effect, a consultant cannot begin the project without knowing what the project is, and cannot know what

171. *Id.*

172. *Id.*

173. Max H. Bazerman et al., *Post-Settlement Settlements in Two-Party Negotiations*, 3 NEGOTIATION JOURNAL - ON THE PROCESS OF DISPUTE SETTLEMENT, 283 (1987).

174. *Id.*

175. *Id.*

176. This problem is entirely understandable in the attorney-client relationship. Cost is an important factor at the outset of the project, yet the lawyer, like a consultant, cannot assess the entirety of the project or the impact that outside individuals may have on the process without beginning the project. For an abbreviated, but effective discussion of the fee dilemma and a good illustration of the attorney-client discussion, see DAVID A. BINDER ET AL., LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 23, 227-28 (1991).

the project is without beginning the project. [Post-settlement settlements] provide an approach of resolving this Catch-22.

Many negotiations will lead the parties into the trap . . . [of] escalating their commitment to a flawed initial agreement. . . .¹⁷⁷

The article describes three complex negotiations that occurred in three separate offices of a national accounting firm.¹⁷⁸ In each study, a client approached the firm to solicit the services of the firm's consulting division.¹⁷⁹ After an initial consultation, the firm developed and implemented a plan in each circumstance.¹⁸⁰ But as problems developed within the plan or as the plan was completed and the projects took on greater dimensions, the firm and the clients were forced to look at their relationship.¹⁸¹ They had to determine if the "consultant-client" relationship extended to the new problems or if a new relationship of "extended service provider-client" needed to be formed.¹⁸² This reevaluation of the relationship is viewed as a post-settlement settlement process.

After examination of the three cases, the authors of *Post-Settlement Settlements in Two-Party Negotiations* come to several conclusions. First, complexity of the tasks undertaken and limited information as to the entirety of the project were the two main reasons a less than efficient agreement was initially reached.¹⁸³ Second, when the opportunity arose for a post-settlement settlement process, the successful parties initiated the negotiating process and the structures in place encouraged them to seek one another out to resolve the problem.¹⁸⁴ Third, complexity is a critical aspect of all three cases.¹⁸⁵ Generally, the needs of the client were complex and difficult to put in terms of finite services, thus making it difficult for the client exactly to enunciate the problem and for the firm to comprehend the problem and understand what services were required. In a word, the full nature of the agreement was not definitive until the work progressed and the firm could evaluate the full needs of the client.¹⁸⁶ This extreme complexity, which is typical of, though not exclusive to, service contracts, creates a real dilemma for both the client and the firm.¹⁸⁷ The client generally does not understand the problem. If he did, he probably would not seek out consulting services. Further, the consultant does not know the problem as the client cannot explain it to him fully and the consultant cannot know the problem without

177. Bazerman et al., *supra* note 174, at 291.

178. *Id.* at 284.

179. *Id.* at 285, 287-288.

180. *Id.* at 285, 287-89.

181. *Id.* at 285-87.

182. *Id.* at 286-90.

183. *Id.* at 290.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

beginning the project.¹⁸⁸ The post-settlement settlements process is ideal to resolve this dilemma or conflict.¹⁸⁹

In each study, the ability or inability of the firm and the client to "manage and/or facilitate the dyadic [post-settlement settlement] process"¹⁹⁰ was critical to the success or failure of the ongoing relationship. The authors make several suggestions as to the best methods for handling opportunities for a post-settlement settlements process.¹⁹¹ First, train individuals¹⁹² who often negotiate these types of agreements to consider a post-settlement settlements process.¹⁹³ In other words, our business culture needs to understand that reopening matters is appropriate, despite a propensity not to reopen settled matters. Part of this training should include instruction in creating joint gains and a caution against escalating commitment to an agreement that is not working.¹⁹⁴

The second suggestion is to create structures to monitor the feasibility of the agreement. The parties need to ask whether the agreement is still working for them.¹⁹⁵

The last suggestion is specifically directed at lawyers and negotiators who are responsible for drafting such agreements.¹⁹⁶ Simply stated, the suggestion is: Write in the post-settlement settlement process!¹⁹⁷ Contracts can be firm, but they also need the flexibility to deal with the ever-widening scope of an ongoing relationship.¹⁹⁸ If the contract has an explicit provision directing the parties toward a post-settlement settlement process,¹⁹⁹ then hopefully, they can use the process to solve the problem instead of heightening their commitment to a now-flawed agreement.²⁰⁰

188. See discussion *supra* note 40.

189. Bazerman et al., *supra* note 174, at 291.

190. *Id.* at 284.

191. *Id.* at 291.

192. Some examples would be lawyers and their clients, managers, consultants and other professionals.

193. Bazerman et al., *supra* note 174, at 291.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. Some may argue that the parties can simply replace the old agreement with a totally new agreement. In fact, the authors recognize this argument, but do not offer arguments in defense of having post-settlement settlement processes included in the initial agreement. My responses are that first, a new contract, at least symbolically, begins the relationship anew. Thus, many matters already settled are up again for renegotiation and there is no default position as both have agreed to rescind the old agreement. To use a trite phrase, it is taking a step backward to take two steps forward. The old agreement is not entirely flawed and a simple step forward is all that is needed.

Second, commitment to the initial agreement is lessened during the period that a new agreement is being negotiated. This may result in harm to the relationship and may create a loss of time in moving ahead with the fundamental aspect of the relationship.

200. Bazerman et al., *supra* note 173, at 291.

3. Neutral Intervenor

Raiffa's latest comment on post-settlement settlements is found in the book *NEGOTIATION: STRATEGIES FOR MUTUAL GAIN: THE BASIC SEMINAR OF THE PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL*.²⁰¹ In his chapter entitled *The Neutral Analyst: Helping Parties to Reach Better Solutions*, Raiffa takes a different approach to post-settlement settlements than he has taken in his previous writings. His latest work is much more focused on the process of post-settlement settlements than on the role of the intervenor. That is, the discussion of post-settlement settlements is much less an attempt to carve out a new role for a specialist intervenor than it is an attempt to introduce a new tool of intervention.

An interesting aspect of Raiffa's discussion in this chapter is the example he uses to illustrate the post-settlement settlements process.²⁰² The negotiation case example is drawn from Raiffa's own experience as an intervenor. Two brothers who received, as a bequest from their mother, a large and valuable art collection²⁰³ were to share the art collection equally.²⁰⁴ Though the brothers were socially friendly, they were intensively competitive in matters of business and the like.²⁰⁵ Dividing the art collection took on an air of competitive bargaining and, despite the brothers' desires to be fair, their personal motivations made them unable to negotiate the division.²⁰⁶ The brothers approached Raiffa to generate an efficient resolution to the conflict.²⁰⁷

An interesting aspect of this case is the analytical process that Raiffa used to achieve an efficient agreement. He says:

Up to this point, we never discussed preference for particular items. When we finally came to the point of dividing up the paintings, I communicated with each of them confidentially in order to get lots of information. I asked each of them to do whatever they found natural; to write long letters telling me how they felt about the pieces and the rationale behind these feelings. I asked that they use any system they wanted to measure the strength of their preferences, including rankings or numbers.

I collected this information to determine whether compatible deals could be arranged that could balance the need for equity across artists and equity in fair market values. Occasionally, I had to get more information from them. I put all this information into a spreadsheet on a computer. After analyzing all the information they had given me, I

201. *NEGOTIATION STRATEGIES*, *supra* note 8, at 14.

202. *Id.* at 19-21.

203. *Id.* at 19.

204. *Id.*

205. *Id.* at 19-20.

206. *Id.* at 20.

207. *Id.*

made suggestions to them. This is the role of an analytic intervenor. I would show them two allocations and ask them which one they preferred and why. I then used this information to come up with a third allocation to which they both agreed on. After it was all over, they invited me to dinner to show me that they were still brothers. They also agreed that in a couple of years they would go through another round of trading. They also awarded me a bonus because their relationship did not deteriorate during the process.²⁰⁸

The post-settlement settlements process used by Raiffa departs significantly from the process described in his previous writings. The boundaries for post-settlement settlements have expanded and, though Raiffa still relies on analysis to reach an efficient settlement, no preexisting, negotiated settlement between the brothers is available to use as a default position.²⁰⁹ Or, if there is, it is a very minimal agreement by the brothers that they want a settlement process that eliminates competitive bargaining and results in an equitable, efficient agreement.²¹⁰ Such a minimal agreement is more an agreement in principle, an agreement as to the character of the settlement, and not its substantive provisions. Obviously, Raiffa felt that there was enough of an agreement to go on with a post-settlement settlements process.

Another interesting twist is Raiffa's seeming departure from the strict "take-it-or leave-it" approach.²¹¹ Raiffa suggests two possible settlements to the brothers and obtains their reaction. This information is then used to "fine tune," in a sense, the analytical information that Raiffa has already received from his deep-mapping exercises.²¹² Finally, the third alternative is proposed and accepted as the post-settlement settlement.²¹³ Certainly, the basics of analytical intervention are present in this process, but it is not a strict adherence to the plan for post-settlement settlements.

208. *Id.* at 21.

209. *Id.* at 20.

210. *Id.*

211. *Id.* at 21.

212. *Id.*

213. *Id.*

V. COMMENTARY AND SUGGESTIONS

Having now canvassed the concept of post-settlement settlements as set out by Raiffa and other writers in the area of negotiations, this section will comment on the concept of post-settlement settlements, both to challenge and build upon the concepts that have been put forward. Of course, any critical comment is not complete without an attempt to suggest improvement or development. Consequently, the article will make recommendations to assist third party intervenors in carrying out post-settlement settlements.

A. Concept or Procedure?

From a review of literature discussing post-settlement settlements, this settlement techniques has evidently evolved from a procedure to more of a concept.²¹⁴ For instance, the contract embellisher and the analytical intervenor have specific roles and procedures laid out for them. However, as Bazerman so forcefully points out, post-settlement settlements is a natural part of an ongoing, working relationship.²¹⁵ Thus, there is a shift in the discussion of Raiffa's neutral intervenor from role and procedure to a greater concern for the concept of a third-party intervenor using analytical methods to further the realization of joint gains.²¹⁶

This is a healthy development that will lead to the innovative use of post-settlement settlements in other procedures. For instance, the concept could be used in a procedure termed mediation-intervention (med-intervention). Originally, the author developed this procedure in response to the concern for the extra expense that an analytical intervenor would add to the process, thus making it a procedure for wealthy disputants only. Med-intervention is a spin-off of classic mediation-arbitration (med-arb). Following mediation, whether it results in a settlement or not, the mediator undertakes a post-settlement settlements procedure. Since the mediator already has intimate knowledge of the conflict and the parties' values, no expense is incurred by a new third-party intervenor gathering information. The mediator, come intervenor, would propose a more efficient agreement with the same take-it-or-leave-it approach. Undoubtedly, some would argue that it is difficult to have an intervenor shift from the role of a mediator to that of a neutral intervenor. However, the shift would not be any more difficult than the shift required in the med-arb situation.

214. Note the progression from a tight procedural role in a specified conflict, the contract embellisher, to the procedurally looser and broader-based conflict resolution role of an analytical intervenor. See previous discussion on this point, *supra* note 153. In *THE NEUTRAL ANALYST: HELPING PARTIES REACH BETTER SOLUTIONS*, Raiffa's language noticeably shifts from labelling the intervenor to speaking of the process, i.e., the term "neutral analysis," is the focus. *NEGOTIATION STRATEGIES*, *supra* note 8, at 18-19.

215. Bazerman et al., *supra* note 174, at 281, 283.

216. See previous discussion, *supra* note 215.

B. Confidentiality: A Pitfall for the Unwary

Confidentiality is perhaps the most critical presumption of post-settlement settlements. Without confidentiality, no realistic expectation exists that the parties will disclose sufficient truthful values that will enable the intervenor to craft a more efficient settlement. But, the process itself eventually breaches this confidentiality.

The scenario where an actual or perceived breach of confidentiality occurs is not hard to imagine. Suppose that the parties have negotiated an initial agreement in a very competitive manner - they strategically misrepresent facts and they make only partial disclosure. Next, the intervenor enters the scene and carries out his deep-mapping exercises, and the parties, in contrast to their own negotiations, give the intervenor full and truthful disclosure of all information. Of course, the parties have given the information to the intervenor in confidence and, in this scenario, confidence is critical as neither party wants the other to discover its deception. How, then, does the intervenor craft a more efficient agreement that does not disclose to all parties the deception they have played on each other? Does the new settlement itself belie their true positions and reveal their true values? Possibly, the relationships of the parties will worsen as each accuses the other of having engaged in dishonesty. Eventually, the whole relationship, including the initial agreement, could disintegrate due to the intervenor's inadvertent disclosure of confidential information through the crafting of a more efficient agreement.

The above scenario, which is not an unlikely one, presents some real difficulties which arise in the confidentiality of negotiations. An acceptance of the possibility that a breach of confidentiality is somewhat inevitable means that persons actually only anticipate post-settlement settlements to work where cooperative negotiations have taken place, but, due to the parties' lack of negotiating skills, an efficient agreement was not reached. Left out of the process are those settlements that could most benefit from the process - settlements resulting from hard, positional bargaining. This observation is the most disturbing of all, since it strikes at the very heart of the process.

C. Truth-Telling and Disclosure

An outgrowth of the discussion on confidentiality is the assumption that confidentiality will foster truth-telling and full disclosure - two activities essential to achieving joint gains.²¹⁷ The question remains whether the confidential aspect of post-settlement settlements will actually foster these types of activities. This issue has not gone unnoticed by Raiffa.²¹⁸ His response is as follows:

217. LAX & SEBENIUS, *supra* note 6, at 30-32.

218. Raiffa, *Post-Settlement Settlements*, *supra* note 1, at 11.

Again in laboratory settings, I have asked many pairs of contending players (after each pair has negotiated a settlement) whether they would be willing to let a third party try to find a new settlement that would jointly be preferred to the old settlement. Practically all subjects say something to the effect of, "Why not, I have nothing to lose." A lot of them consider how they might distort their values and interests to the intervenor, but they then realize that it is not so clear how they should falsify information to their advantage, and they end up by saying that they would disclose their value tradeoffs as truthfully as possible. Let's suppose that Mr. A discloses his interests to the intervenor in a distorted fashion and that the intervenor then succeeds in finding a post-settlement settlement he believes A should prefer to the old settlement according to the values A has stated. If this post-settlement is in reality worse for A than the old settlement, then A will reject the offer. On the other hand, A might get a better final settlement by providing the intervenor with false information, but as I said, how to distort information to one's advantage is far from clear. It is simply prudent to tell the truth.²¹⁹

Raiffa's thoughts on the parties' views seem too optimistic. The rationale for assuming non-strategic behavior in the post-settlement settlements process is rooted in the complexity of the process - or the stupidity of the clients, that they will not understand how to work the process to their advantage. However, practical experience has shown that assuming the stupidity of a client is unwise. Further, it might be especially unwise in the context of post-settlement settlements. Like any other advisor, an intervenor will need to simplify the process to help parties formulate realistic expectations. But, must they also assure the process is complicated enough that they should not attempt to act strategically as it may backfire on them?

To add more fuel to the fire of criticism, the rationale also ignores other reasons that may influence parties to engage in the process. As in mediation, a party may engage in post-settlement settlements to appease another party or to keep up the appearance of cooperativeness. Any of these reasons may militate against the party acting cooperatively since they have no real concern for the success of the process.

D. Impact upon the Parties

1. Expectations of the Parties

Whether the third-party intervenor is called a contract embellisher, analytical intervenor, or neutral intervenor, there is no doubt that the intervenor who embarks

219. *Id.*

on a post-settlement settlement process is not the usual type of intervenor.²²⁰ In some respects the intervenor is a mediator who facilitates a more efficient settlement, but in other ways the intervenor is much more like an advisory arbitrator who uses more directive methods to achieve greater joint gains.²²¹ Consequently, the intervenor that uses post-settlement settlements cannot be easily classified as either a mediator or an arbitrator.

Inability to classify the intervenor has two consequences. First, the expectations of the parties must be considered.²²² If the expectation is that the intervenor will simply facilitate a settlement in the classic mediation style, the analytical methods used by the intervenor and the take-it-or-leave-it approach will be perceived as too directive. On the other hand, another party may expect the intervenor to act in an adjudicatory role and reach an agreement based on fairness or legal principles. Since the intervenor is limited to a certain subset of efficient agreements by the initial settlement of the parties, the intervenor may not be able to select a settlement which is fairer to the parties.²²³ Thus, a party expecting adjudication on legal or fairness principles may not be able to have this expectation fulfilled, being cut-off by the initial agreement.

This consequence of the parties' expectations can be overcome to some extent by education. The intervenor would need to explain the post-settlement settlements process in some detail to the parties and, particularly, explain the realistic and attainable objectives of the process. False expectations of pure facilitation or of adjudication on legal or fairness principles should be dispelled. Most importantly, any explanation should emphasize that the objective is to craft a more efficient agreement than they already have and this necessarily entails no loss of the gains made in the initial settlement.

The second consequence is that the parties may possibly want an intervenor who is neither a mediator nor an adjudicator. Rather, they may want an intervenor that overarches all the roles and employs all the methods that are available to an intervenor, regardless of categorization.²²⁴ Categorizing intervenors may

220. RAIFFA, ART AND SCIENCE, *supra* note 1, at 221.

221. *Id.* (where quite directive measures are taken by the contract embellisher.). However, *see* NEGOTIATION STRATEGIES, *supra* note 8, at 19-21. (where Raiffa, in his example, acts more as a mediator).

222. In any client-centered counselling, the client's expectations as to the dispute resolution process, including the expected role of an intervenor, are important. Such expectations can either assist or inhibit the dispute resolution process. If the expectations inhibit resolution, we may need to examine the structure of the resolution process and determine if it creates the inhibiting expectation. For a good discussion of client-centered counselling in the resolution process, *see* BINDER ET AL., *supra* note 177, at 19-22.

223. Recall that in Raiffa's post-settlement settlements, the initial settlement is the default position. Therefore, any efficient settlement cannot allocate value to one party at the expense of another. This may mean that the intervenor is limited in selecting a fairer settlement; as such a selection is cut-off by the parties gain under the initial agreement.

224. To a large extent, this observation comes from my experience as a lawyer. Even though a lawyer is trained and experienced in litigation, the adversarial process, the client expects the lawyer to use all available methods to resolve the dispute. This lead, quite naturally, to the lawyer attempting

inadvertently suggest that their roles and methods are confined to the terms that are used to categorize them. However, disputes do not occur within neat categories; rather, they occur across a continuum of the dispute resolution processes. The parties may begin to resolve a dispute initially with avoidance and afterwards move within the continuum of the primary dispute resolution processes of negotiation, mediation, and arbitration. My perception is that parties to a dispute are not constricted by the categorizations of dispute resolution processes and see a dispute as it is, that is, needing resolution throughout the continuum of dispute resolution processes.²²⁵

2. Parties' Commitment to the Settlement

Lastly, a concern needs to be raised as to the parties' commitment to the new efficient agreement following a post-settlement settlements process. Parties who resolve conflicts through consensual processes have a higher degree of commitment to the terms of the settlement. In post-settlement settlements, the parties likely have attained this higher degree of commitment to the initial settlement,²²⁶ especially if the settlement is of a consensual nature.²²⁷ The question, then, is: Does a post-settlement settlements process diminish the parties' commitment to a settlement?

The argument that the commitment of the parties is diminished is quite simple. The intervenor assumes some degree of decision-making responsibility in a post-settlement settlements process. Thus, the consensual nature of the process is lessened as is the parties' commitment to the outcome.

The argument against this position is that the parties still retain full authority to reject or accept the new, efficient agreement. Thus, the process remains fully consensual.

Both arguments have merit. The first argument is especially valid where the parties' initial settlement is quite inefficient or the intervenor seeks to construct

to negotiate a resolution to the dispute, and, depending on the lawyer's inclination and experience, to perhaps employ other resolution techniques.

This observation is confirmed in resolution literature. For instance, negotiation, mediation, and adjudication are seen as the primary processes of dispute resolution. STEPHEN B GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 1 (2nd ed. 1992). However, several methods may be borrowed from the primary processes to accommodate client desires or situations. Thus, hybrid dispute resolution processes develop. *Id.* at 1, 223-39.

225. My observation is that the expectation of the client that a lawyer employ all dispute resolution processes is a source of client discontent with a lawyer. The lawyer, as a specialized dispute facilitator/intervenor, often is not familiar enough with other dispute resolution processes to employ them or to advise the client on their use. Thus, the lawyer adheres to the processes best understood by him or her, and frustrates the client's expectations of efficient resolution of the dispute.

226. *Supra* note 1, at 8, 154-55.

227. *Post-Settlement Settlements*, *supra* note 1, at 9-10.

a settlement that is not only more efficient, but also fairer.²²⁸ In the first case, that of a very inefficient agreement, the leap, so to speak, that needs to be made to an efficient or near-efficient agreement may be so large that the parties feel that it is not really an improvement upon their initial agreement, but a whole new agreement. Thus, the new settlement is really perceived as a new, imposed agreement. If so, the parties' commitment to the post-settlement settlement may actually decline from its level in the initial settlement.

In the second situation, the intervenor may move to an efficient agreement that clearly favors one of the parties. The intervenor has determined that a greater apportionment of the value created by the process must go to one party in accordance with equitable concepts (or the intervenor's sense of fairness).²²⁹ This is not a suggestion that the gain or apportionment of value is made at another's expense, but that additional value created by the process is allocated unequally in the discretion of the intervenor. Such an unequal allocation is likely to be apparent and, again, the parties may view the settlement as imposed and experience a decreased commitment to the settlement.

In conclusion to the arguments regarding the commitment of the parties to the solution, neither argument is wholly correct. Rather, they both point out potential pitfalls for the intervenor and the intervenor needs to be aware of the effect of his selection of an efficient settlement on the parties.

VI. CONCLUSION

This article examined the concept of post-settlement settlements in some considerable length. Initially, it reviewed the idea of creating joint gains and set out that post-settlement settlements emphasize the use of a confidential third party intervenor to enhance the true and full disclosure of information vital to joint gains. Post-settlement settlements do not overly concern themselves with the fairness of settlements, leaving this aspect largely to the negotiation of the parties.

As well, the article reviewed the development of post-settlement settlements from the roles of contract embellishers to neutral intervenors. This development, by Raiffa and other writers, shows hope for the possibility of achieving more efficient settlements through post-settlement settlements. As well, we have observed the unfettering of post-settlement settlements from a set of procedures

228. If the parties have reached a rather inefficient agreement, the scope of the efficient frontier from which an intervenor may choose a post-settlement settlement is significant. Thus, does the intervenor move to an efficient frontier that is directly "northeast" of the default position? Or does the intervenor move more northerly than easterly, or vice versa? This is the issue of fairness. *Id.* at 160-163. See also ARTS AND SCIENCE, *supra* note 1, where Raiffa devotes an entire section to the issue of fairness.

229. Note that the two situations presented are not mutually exclusive since a very inefficient agreement opens up a much greater subset of more efficient settlements to the intervenor; consequently, the intervenor has greater discretion within which to choose a "fairer" settlement.

to a concept that can be applied with appropriate modifications to many circumstances.

Lastly, some critique has been made of the assumptions underlying the post-settlement settlement process. Hopefully, the critiques do not dampen the enthusiasm that dispute resolvers ought to have for using more analytical methods. Rather, the suggestions for implementation of post-settlement settlements are intended to make advocates of dispute resolution wiser and more innovative in their implementation of this promising concept.

