CARLTON FIELDS

Resolving the Judicial Manager/Judicial Judge Debate: Axioms and Elements of a Settlement

September 10, 2014

Part 1 of a 4-part series

"Well, God, Mother and Apple Pie, Mr. K! I know the lofty language of the committee report. What I asked was what you thought the practical effect of the changes to the rules might be." Prof. Joel P. Handler. Socratic method exchange, Civil Procedure, Vanderbilt Law School, 1961. [1] **"And the Lord said to Moses, 'Strike the water with your staff and the waters will be divided and piled up to the right and to the left, and you will have safe passage from your enemies on dry land. But first, you must prepare an environmental impact study.'" Exodus, Unintended Consequences Edition (Personal copy of the author).** There is a scholarly dispute about whether the courts should decide cases or dispose of them. Whether judges should see their roles as managers whose job it is to get the cases settled or disposed of, or whether they should instead focus on deciding legal issues and either deciding fact issues or presiding over the jury with that function. Nobody told me about this conundrum until I was presented with a problem that seemed to involve a judge who figuratively came off the bench to involve herself with the lawyer part of the process before climbing back on the bench to rule on it. I found that Fordham Law Review devoted a symposium issue on this a few years ago, and that it had been going on for some time, while the problem was getting worse. Symposium, *Against Settlement: Twenty-Five Years Later*, 78 *Fordham L. Rev.* 1117 (2009). That symposium presented an interesting scholarly examination, although the debate seemed to be whether Professor Fiss had really meant it 25 years earlier when he (famously in some circles) said the courts ought to stick to adjudicating, and concluding with an article by Professor Fiss saying, yes, he did.[2] Backing away from the philosophical, the courts' emphasis on case management and settlement can in many instances increase the cost of litigation, impede settlement opportunities, and decrease the parties' satisfaction with the process. Alternative Dispute Resolution grew up, I guess, because of dissatisfaction with Primary Dispute Resolution. Adapting the Primary System to mimic the Alternative through case management at the very least reduces the options and in many

instances makes things worse, while de-emphasizing the value of creating precedent, the one thing only a court can do. Mediation is often beneficial, but borrowing pieces of it and calling it judicial management has its drawbacks, the main one being that it impedes the lawyers from playing the most effective role they can play in the process, and shying away from the opportunity to make a precedential ruling may be a disservice to the greater community who can use the help. **I. AXIOMS.** To set up the discussion, let's accept the common law system and the adversary system as axiomatic. If we don't, we will be unlikely to get beyond the first page.

- Common Law: The resolution of one dispute can provide guidance for the resolution of similar disputes. Once they started writing down the decisions, lawyers could look at them and craft arguments why the new case was like or not like the various cases where a problem was already decided. Judges ruled on those arguments, creating new precedents. Lawyers advised their clients on the basis of those decisions. The common law approach is not the only way to do things, but it is a pretty good way and has a lot to say for it, including that it originates from real problems with common themes, and that it makes decisions that serve as guidance for the next similar problem.

- Adversary System. The truth is best uncovered when each side of the dispute tries to tell the arbiter everything favorable to him, while preventing as much as possible the opponent from doing the same. Although it sounds kind of silly, it is at least (a) consistent with human nature in every culture with more than 100 people in it, (b) nobody would hire a lawyer if the system were otherwise, and (c) it beats bending over backward to be fair to the other side.

II. ELEMENTS OF SETTLEMENT/CASE EVALUATION. This piece is not about settlement, but 90% of cases settle, and it is important to talk about settlement basics as background. Settlement dynamics is a very complicated subject where emotions are involved, but basically cases settle because of a combination of the likelihood of winning or losing, and the cost of winning or losing. Cost may mean dollars, and it may mean cost in terms of time and precedent and reputation and the economic benefit or burden they carry. A claim that if won will result in winning $1000 but which will cost $10,000 to each party to try is unlikely to go to trial, absent other factors, such as the claim is well publicized and is likely to be repeated 100 times. In essence, though, settlements occur as with any transaction involving risk – when the chances of losing or winning an estimated prize justify the investment required to see who wins. A simple analogy is a coin flip. Each flip of the coin has a 50% likelihood of showing tails. The likelihood of flipping tails twice in a row is the multiple of the odds flipping tails once, or .5 x .5 = 25%. Thus a $1 bet against a $10 prize if I get tails twice in a row is a great bet. 4 times in a row is a lousy bet since the odds are .5 x .5 x .5 x .5 = 6.25% - the opportunity to break even is worth 62 cents but it costs a dollar. But if the prize were instead $1000, the bet would be a great one – my $1 bet opportunity is worth $62.50, and I can probably sell it for something close to $50. And of course the value goes up each time I flip tails. If I only have 3 to go instead of 4, the odds double. A lawsuit is more complicated of course, but subject to at least roughly the same kind of analysis if not the same precision. A claim may consist of 4 elements. The facts may

be such that the plaintiff's ability to establish each of the 4 elements is less than certain, but if he can assign approximate odds to his chances of each he has at least an idea of the value of his case. If plaintiff puts his chances of establishing element A at 70%, B 60%, C 60%, D 50%, then his chances of winning are the multiple of those odds: .7x .6x .6x .5 =12.6%. If his damages are $200,000 and he estimates it will cost $100,000 to try , it is a lousy bet. If the damages might be $2 million, it is a different story. A different scenario may be more helpful to this discussion: Plaintiff has a good breach of contract action and an iffy tort theory that would involve damages very much larger than contract damages. Same cost to try. His odds on the contract case with 4 elements are .9 x .9 x .9 x .8= 58%. His odds on the tort are .9 x .8 x .5 x .3 = 9.6%. The contract damages are $200,000, the tort damages $5 million. In each scenario, the Defendant will have a similar analysis, undoubtedly assessing the odds slightly differently. He will assess the opponent's chances on the last element of the tort case at 10% and the 3d element at 30%, with the resulting evaluation of plaintiff's chances reduced to 2%. But once a DECISION is made on any of the elements, the odds change and settlement becomes more likely, not only because of the "math" but because it enables the lawyers to advise their clients and do their jobs. For that reason, any system that delays decisions on legal issues affecting the merits, even provisional or partial decisions, impedes settlements, increases costs, fails to take advantage of the lawyers' essential role in the process and decreases satisfaction with the system. I know not everyone goes through this kind of analysis in so many words. But most do something similar. Rather than "having a 90% chance of winning" issue 1, a lawyer will say that judges and juries are unpredictable, or that we have a better than even chance, or there are no guarantees, or that anything can happen, or they cannot tell the client that the likelihood of an unfavorable outcome is either probable or remote[3]. As another aside, if the opponent does not go through this kind of analysis, it can be very effective in mediation to explain it to him. "I know your lawyer may see the odds differently, but I also know that no experienced lawyer will tell you that your odds of winning each of these 5 issues is more than 90%, and that alone would put the overall odds at less than half. Our analysis is that your chances are much less than that, particularly on issues 3 and 4. I don't expect you will agree with our assessment on the issues, but this explains why we cannot get too worried about the case or your damage figure, which we also think is inflated." **Read the full series, *Resolving the Judicial Manager/Judicial Judge Debate*:**

- Axioms and Elements of a Settlement (Part 1)
- The Effect of Early Issue Resolution (Part 2)
- Theories and Fads of Civil Procedure (Part 3)
- What Would Help? (Part 4)

---

[1] Professor Handler does not advertise that he once taught civil procedure. If it was secret, I

apologize.

[2] See also, Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire,* Duke Law Journal Vol. 60:669 2010.

[3] Or 50/50, so that win or lose the lawyer can say, “See! I was right.”

Authored By

Peter J. Winders