Thinking Outside the Jury Box:

Why Expeditious Resolution May be Preferable to a Verdict

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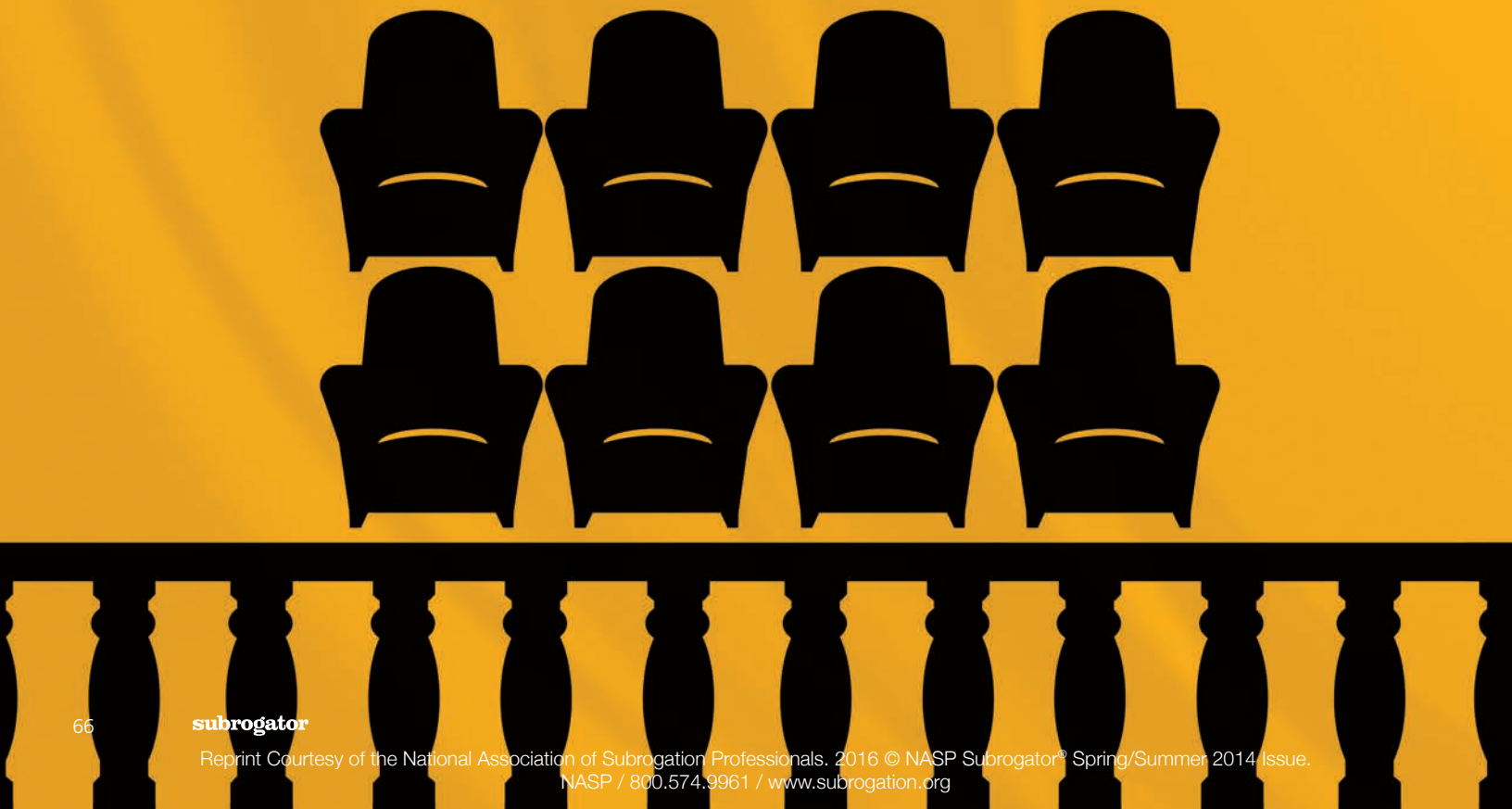
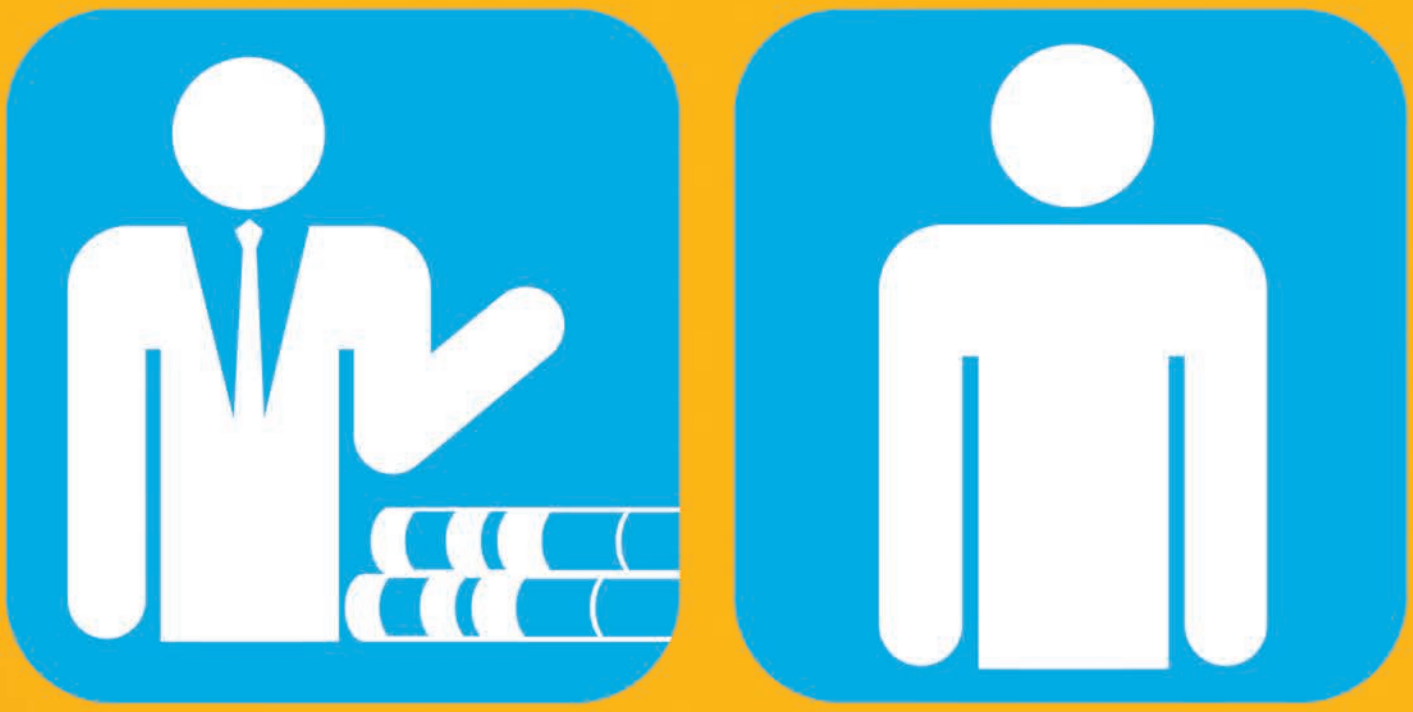
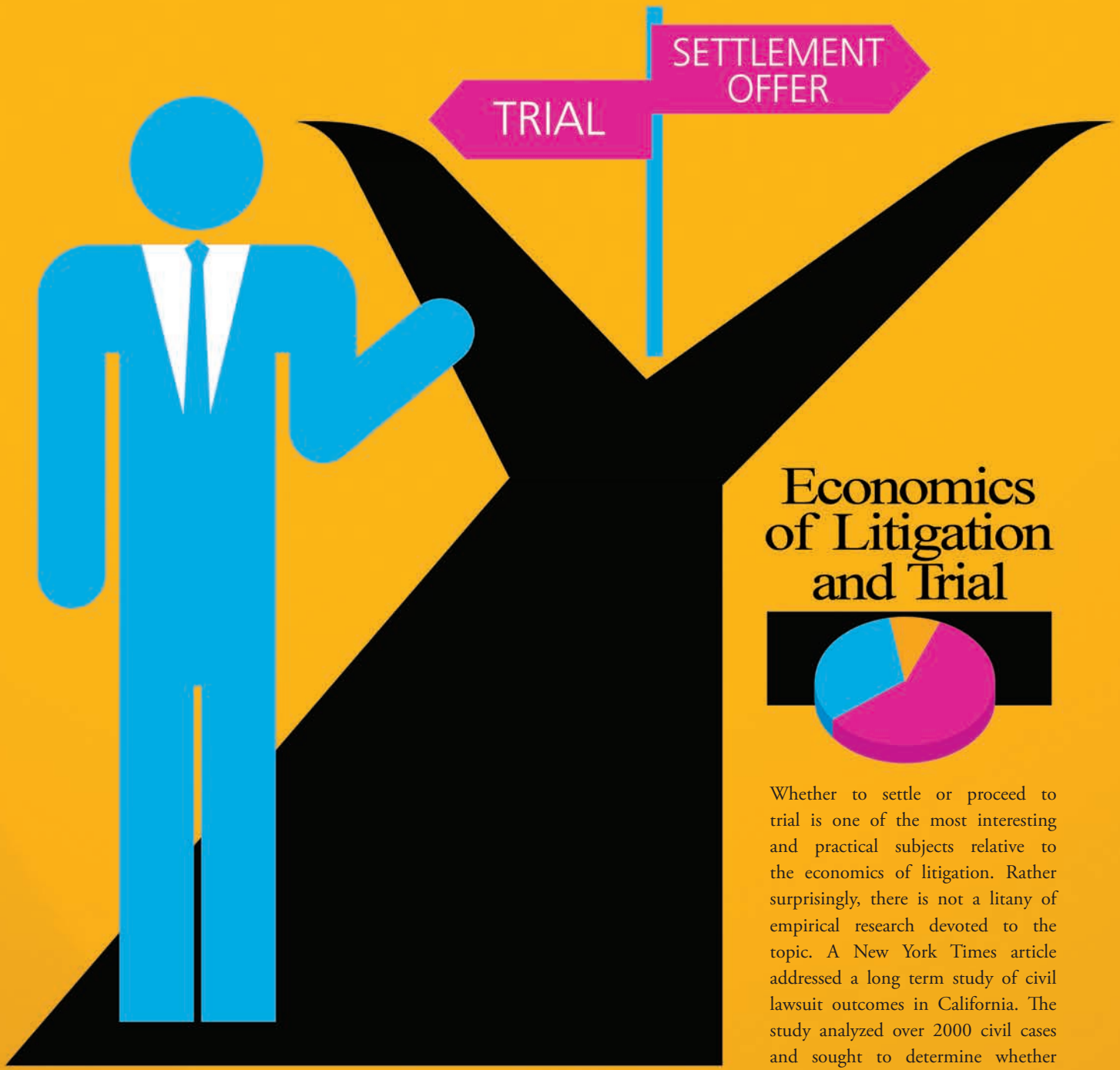




Throughout the course of a large civil action, lawyers and their clients will be faced with many decisions. Perhaps most important and challenging is the decision regarding settlement.

At some point during the litigation, a lawyer and her client will reach the fork in the road leading to settlement or trial. This becomes particularly challenging when both the lawyer and client are passionate about their cause and are faced with a settlement offer that is reasonable yet significantly undermines expectations.

This scenario is presented to most practitioners many times during their careers. A skilled attorney will pragmatically balance the pros and cons of accepting a settlement offer and advise their client appropriately. However, it is easy for both lawyers and, particularly, clients to become so enamored with their cause that they lose site of the fact the ultimate goal is to obtain the highest possible value for the case after accounting for costs and expenses associated with litigation. This article will discuss the economics associated with trial, the potential disadvantages of proceeding to trial in lieu of accepting a good faith settlement and further address the implications of the oft-ignored offer of judgment.



Economics of Litigation and Trial

Whether to settle or proceed to trial is one of the most interesting and practical subjects relative to the economics of litigation. Rather surprisingly, there is not a litany of empirical research devoted to the topic. A New York Times article addressed a long term study of civil lawsuit outcomes in California. The study analyzed over 2000 civil cases and sought to determine whether

parties who chose not to settle actually fared better at trial. [1]

While interesting, the results of this study were not entirely surprising. The complied data revealed that plaintiffs who rejected the defendant's final settlement offer were ultimately awarded less money at trial. Moreover, the study found that these plaintiffs proceeded to trial at a staggering rate of 61% of the time. On the contrary, defendants who would have fared better had they settled chose to proceed to trial only 24% of the time. In only 15% of the cases did trial provide a more favorable outcome for both plaintiffs and defendants. However, even in those instances, the verdicts awarded accounted for less than plaintiff's demand although plaintiff nevertheless received more than the defendant's last settlement offer.

An interesting aspect of the study found that in the case of plaintiffs who would have received a more favorable outcome settling prior to trial, on average, the difference between the highest settlement offer and subsequent verdict was $43,000. Conversely, the cost of trial for defendants in this situation was a whopping $1.1 million, on average.[2] While the study did not account for significant trial costs such as expert witness testimony, the increase in contingent fees, the cost of court reporters and trial transcripts in addition to potential appeals, it ultimately concluded that settlement was typically more economically beneficial for both plaintiffs and defendants.

Risks Commonly Associated with Trial

During a memorable settlement conference before a well-known Federal Magistrate, the judge directly addressed the parties prior to the session to discuss the advantages of settling a legal dispute. Specifically, the judge emphasized that through settlement, the client controls the outcome of the case as they are given the opportunity to openly discuss resolution with their adversaries. On the contrary, during litigation, many key decisions are often out of the control of the parties with the most at stake and placed in the hands of the lawyers, judge and jury.

The magistrate further emphasized the risks and costs associated with trial that are avoided by settlement. Settlement further fosters creativity amongst the parties in an effort to achieve the desired result. Perhaps most importantly, the magistrate warned the parties to further consider the unavoidable emotional rollercoaster that inevitably accompanies a trial as parties will be required to relive unpleasant experiences before a roomful of strangers. On the other contrary, settlement allows the parties to look towards the future instead of dwelling on the past.

It is often difficult for a lawyer to adequately explain the settlement value of a case to her client. This is particularly true in high dollar cases where the facts weigh heavily in the client's favor. However, it is important for both lawyers and their clients to evaluate the numerous obstacles that may hinder a favorable verdict, even in the most ideal cases.

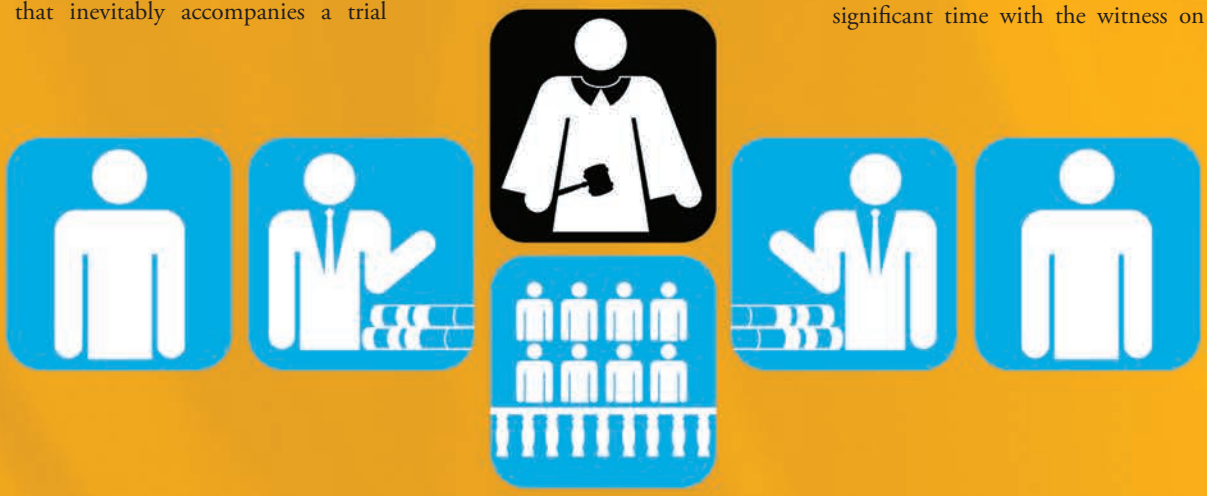
Most often, subrogation carriers and their attorneys attempt to obtain a recovery prior to the initiation of litigation. However, once a lawsuit is filed, the length of time to arrive at a trial date varies greatly depending on numerous factors such as the nature of the claim, jurisdiction, the number of defendants, time to obtain service on the defendant(s), the complexity of pre-trial motions filed by each party and the number of fact and expert witnesses to be deposed.

The average length of time from the day the complaint is filed to the start of a civil trial is over two years.[3] Attorneys should be mindful to advise their clients of the potential negative implications time has on the value of a case. For one, during the passage of time, memories fade and witnesses disappear. Witnesses may move outside the jurisdiction, making it difficult and time consuming to compel them to testify at trial. Worse yet, fact and expert witnesses may pass away prior to trial. The unavailability of an important fact or expert witness has the potential to turn a strong case into one that may be susceptible to a directed verdict.

The most exhaustive and calculated trial preparations will not prevent the unexpected from occurring during trial. Unfortunately, attorneys and their clients often learn this the hard way. Despite countless hours spent preparing star witnesses, it is not uncommon for these witnesses to either falter under pressure due to the intimidation of a courtroom setting or unexpectedly change the substance of their testimony on the stand.

Take the instance of a fairly basic subrogation case wherein it is alleged a house fire resulted from negligent smoking by workers replacing a roof. Such a case is extremely fact specific and requires the testimony of an individual who witnessed the workers smoking on the roof just prior to the fire. Imagine your star witness is such a person who emphatically and persuasively claimed during deposition that she witnessed the workers constantly smoking on the roof. For any subrogation attorney, this testimony is the smoking gun that should lead to a favorable verdict.

Imagine the attorney spending significant time with the witness on



TRIAL

- LONG TIME
- EXPENSIVE
- EMOTIONAL
- LOSS OF EVIDENCE
- LOSS OF WITNESSES
- FICKLE JURY
- APPEALS

SETTLEMENT OFFER

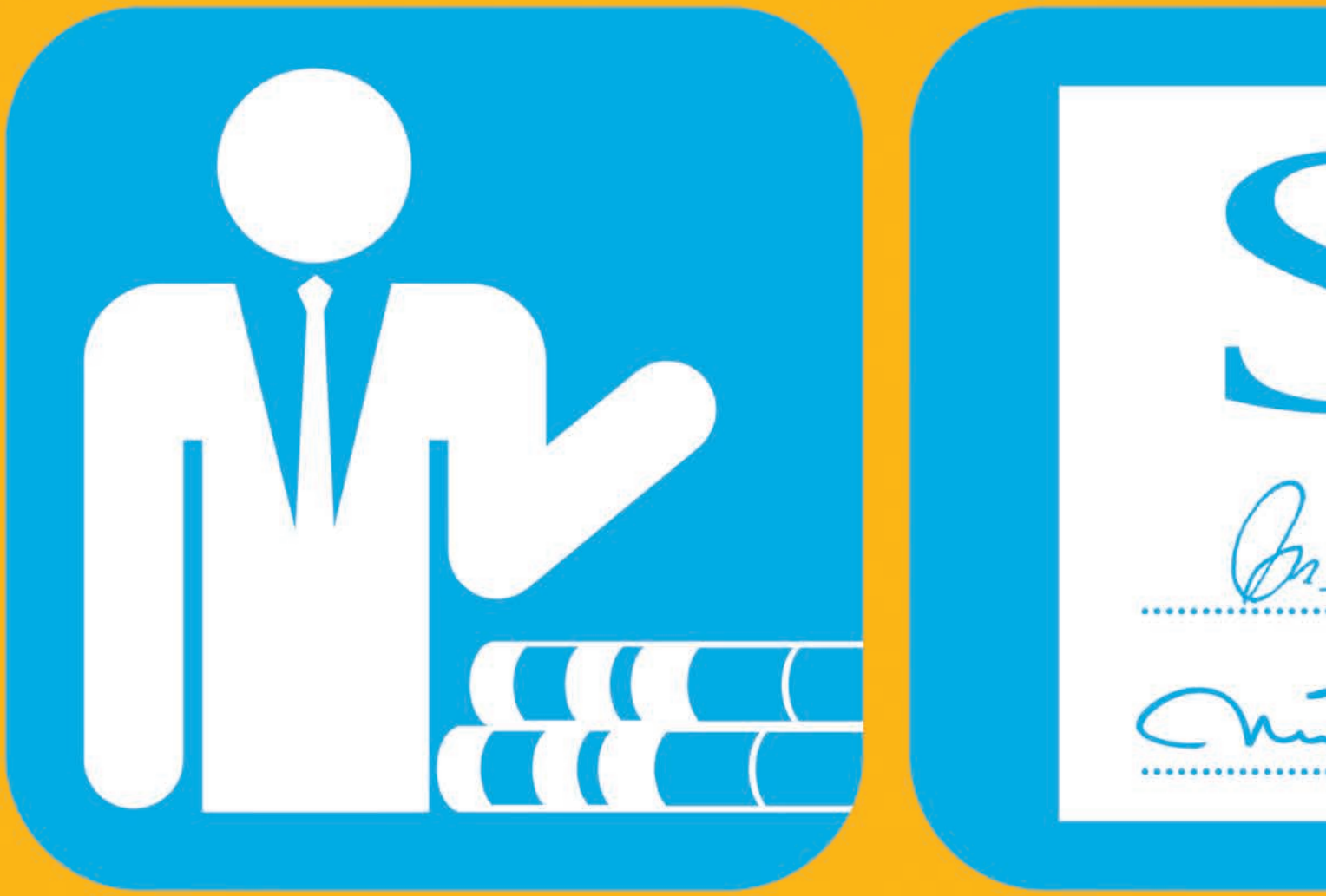
MOVE ON TO A BRIGHTER FUTURE

the days leading to trial to review her deposition testimony. Imagine the witness repeating that nothing in terms of her recollection of events has changed since the deposition occurred more than one year ago. Imagine the attorney confidently asking this witness at trial whether she observed the workers smoking on the roof prior to the fire. Imagine the attorney's horror when the witness responds with a resounding "no" and it becomes necessary to impeach her own witness on the stand. Further imagine the authors of this article wincing at such an unfortunate memory.

In short, the most promising of cases can be undercut by the erratic and inconsistent testimony of a single witness. It is important to consider the fact that no one is more invested or passionate about a case than a client and his attorney. Therefore, reliance on witnesses who do not have a stake in the outcome may have devastating consequences at trial.

Trials may be particularly difficult when an insurance company plaintiff is pursuing a small, locally owned business. Despite favorable facts, some juries may be reluctant to award money damages to an insurance company, particularly when a motion in limine prevents reference to the defendant's insurance coverage. This is especially relevant in cases where the subrogating carrier is seeking large six and seven figure awards. This factor must not be ignored when attorneys and their clients evaluate the pre-trial settlement value of a case.

An additional factor to be considered before trying a case is the unpredictability of a jury. Despite strong evidence in support of a case, a verdict is never guaranteed. In civil tort actions tried in federal court, plaintiffs' verdicts are awarded 65% of the time in bench trials versus 51% of the time in jury trials.[4] This difference demonstrates the fickle nature of juries and the difficulty in predicting a favorable verdict.



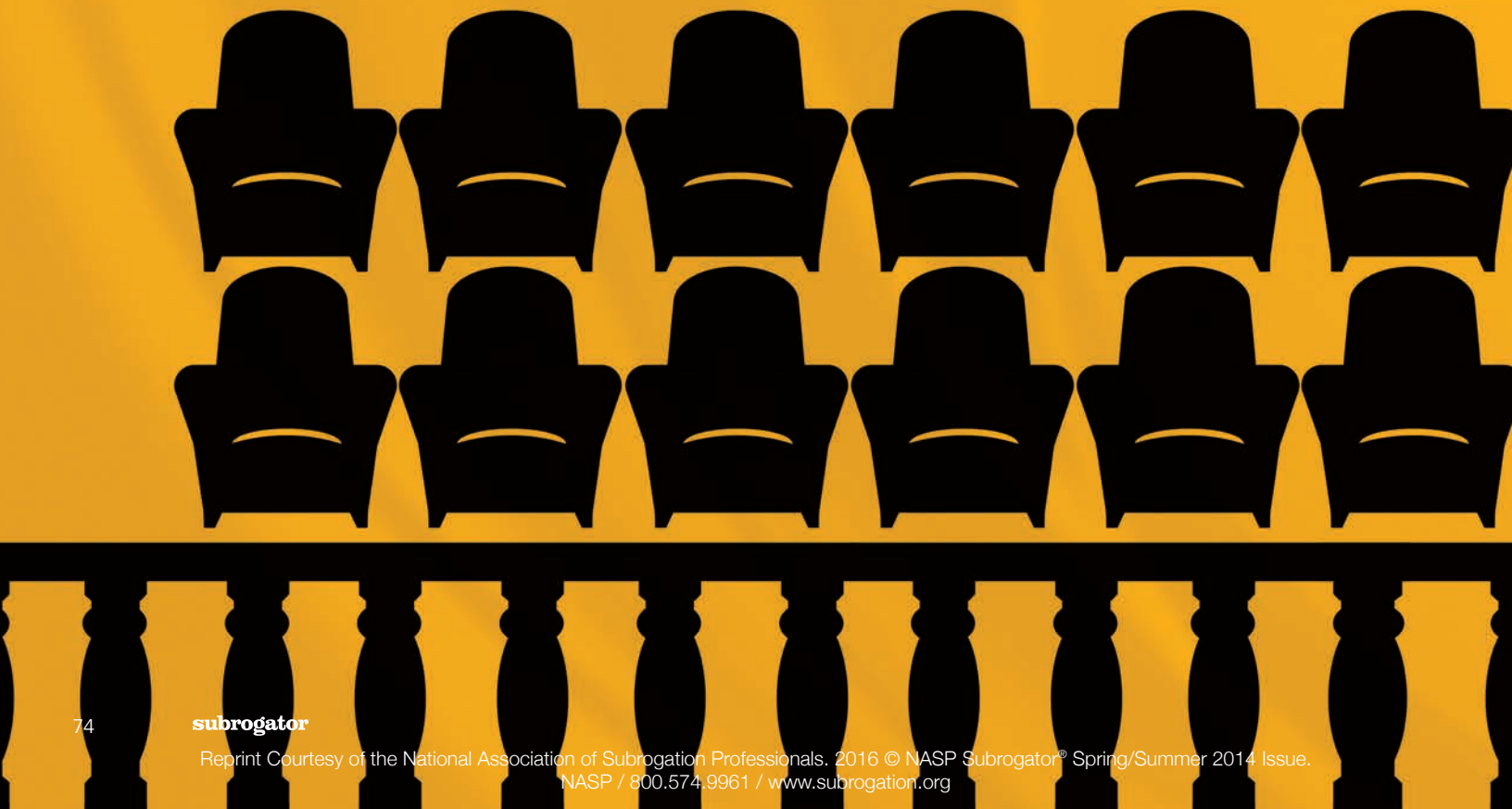
The Offer of Judgment

It is obvious that the cost of pursuing even the most straightforward case will add up surprisingly quickly. In many instances, offers of judgment are overlooked by both zealous plaintiffs and defendants largely because the consequences of failing to accept these offers, even if the offeror ultimately prevails at trial, are usually nominal compared to the cost of litigating a case to verdict. Pursuant to Fed.R.Civ.P. 68, if a judgment obtained by the offeree is not more favorable than the rejected offer of judgment, the offeree must pay the costs incurred after the offer was made. While the term "costs" is open to interpretation, it is often incorrectly assumed that costs merely include court reporter fees, copying costs and certain filing fees.

However, certain states have adopted rather detrimental consequences for parties that draw the proverbial line in the sand and insist on proceeding to trial in lieu of accepting reasonable settlement offers. In fact, certain jurisdictions have held that offer of judgment "costs" include attorneys' fees. In particular, under Florida's offer of judgment rule, a prevailing defendant is entitled to an award of costs and attorney fees incurred from the date of service of the rejected offer of judgment if the defense verdict is either of no liability or at least 25% less than the offer.[5] Similarly, a prevailing plaintiff will be awarded attorneys' fees incurred from the date of service of the offer of judgment if the defendant rejects the offer of judgment and the verdict is at least 25% greater than the offer.[6] Florida courts also strictly construe the offer of judgment statute and further consider the award of attorney's fees as a sanction against parties who unreasonably reject a good faith settlement offer.[7] Alaska, Idaho, New Jersey and Texas have similar statutes wherein a party who fails to accept an offer of judgment and ultimately receives a judgment less than the offer may also be responsible for attorneys' fees. [8]

Other jurisdictions have imposed harsh penalties on litigants who fail to accept reasonable settlement offers. Recently, the Arizona Supreme Court held that a personal injury plaintiff was entitled to prejudgment interest on a $1.5 million dollar award calculated at 10 percent per annum which accrued while defendant appealed the court's denial of a new trial on damages until final judgment. The court further held that prejudgment interest pursuant to Rule 68 is considered an indebtedness or obligation as it is imposed as a sanction and should be calculated at 10 percent per annum rather than the one percent plus the prime rate utilized to calculate interest on a judgment.[9]

Connecticut law further encourages plaintiffs to expeditiously evaluate the potential settlement value of their case and submit an



offer of compromise to a defendant.[10] Pursuant to C.G.S.A. §52-192a, a plaintiff may submit an offer of compromise 180 days after service is made on the defendant and at least 30 days before trial. If the plaintiff recovers an amount less than or equal to the amount set forth in the offer of compromise, the court shall add to the amount so recovered eight percent annual interest on this amount, calculated from the date the complaint was filed if the offer of compromise was not filed later than 18 months after the filing of the complaint.[11]

Relevant case and statutory law shed light on the importance of considering the potential implications of rejecting an offer of judgment. Alternatively, offers of judgment may be used as a sword by attorneys and their clients to effectuate a more expeditious and cost effective settlement. Attorneys should specifically discuss the viability of making an offer of judgment with their clients at the onset of a case presenting favorable legal and factual evidence.

Conclusion

Openly and candidly discussing the potential risks associated with trial at the commencement of litigation will allow an attorney to effectively negotiate a realistic settlement on behalf of his client and further minimize unrealistic expectations. A practitioner should prepare detailed litigation and trial budgets to assist clients in making the decision to accept a settlement that may, at first glance, appear to undervalue their case. While trial is certainly appropriate for cases wherein an adversary has been unwilling to participate in settlement discussions in good faith or where the settlement values are worlds apart, a thorough and early evaluation of the costs and risks associated with trial will greatly assist in achieving a favorable outcome.

Endnotes:

1 Randall L. Kiser, Martin A. Asher and Blakeley B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations,* 5 J. Empirical Legal Stud 551, 551-591 (Sept. 2008).

2 Jonathan B. Glatner, *Study Finds Settling Is Better Than Going to Trial,* N.Y. Times, August 8, 2008.

3 http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/appendices/C05Sep11.pdf

4 *Examining the Work of State Courts,* Court Statistics Project, Vol. 14, No.1, March 2007, available at http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/Vol14Num1CivilTrialsonAppeal1.ashx.

5 See F.S.A. §768.79

6 Id.

7 See *Cano v. Hyundai Motor America, Inc.* 8 So.3d 408, 410 (Fla.App. 4 Dist.,2009) (reversed on other grounds)

8 See AS 09.30.065; I.R.C.P. 68; N.J.Ct. R. 4:58 -2 and 4:58-3; TRCP 167.4(c)(4)

9 *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles,* 233 Ariz. 133 (Aug. 28, 2013) (citing A.R.S. § 44 -1201(A) and A.R.S. § 44 -1201(B)).

10 See C.G.S.A. §52-192a

11 Id.