WHERE HAVE SETTLEMENTS GONE?

The Settlement Scene as Viewed
From the 19TH Floor Above Manhattan

Vincent M. DeOrchis
DeOrchis & Partners, LLP
New York, N.Y.

My father, who has practiced maritime law for more than 57 years, told me early in my career that a lawyer who has to take a case to trial has already "failed" because he did not achieve a settlement. While the statement is perhaps an overly broad generalization, it does sum up the attitude of many lawyers in respect to handling cases for their clients: Settlement is a far better solution to resolving a case than is a trial. Even the most aggressive and cocky young litigator coming out of law school learns quickly that the judges, the juries, the witnesses, the evidence, the trial proceedings - and even the interpretation of the law - are never fully predictable, sometimes errant, and rarely under anyone's complete control. For all the learned decisions by judges, the availability of modern research techniques, the unending details of statutes and regulations, and the discipline of training to be a lawyer, a legal trial remains riddled with vagaries and inconsistencies. Therefore, trial is, and should be, a route of last recourse justified only by the most necessary of circumstances.

Perhaps this last statement has even greater weight in the maritime practice where most of the claims are commercial in nature and are governed by contracts, and ultimately covered by insurance for each side in one form or another. At the end of the day, most legal claims in the maritime practice have a monetary "ceiling," sometimes dictated by statutory or contractual limitations. By the same token, most maritime claims also have a "floor," or minimum monetary value, often dependent on the rule of damages and the terms of the contract.

As a result, maritime lawyers have founded their careers on their ability to calculate the risk of winning – or – losing a trial against the range of recoverable

damages, and they use that rough mathematical equation to recommend a settlement figure to the client. Indeed, the equation has often led to accepted formulas for settlement of certain claims, especially in the field of cargo law.

At least in New York, we have used the so-called “Helsinki formula” to settle paper roll cases based on the depth of cuts or gouges on the side or end wall, and “steel roll” formulas to settle salt water, fresh water and galvanized steel coil claims. Ranges of settlement figures are used for confirmed non-delivery claims, heavy weather on-deck cargo claims, and reefer box claims. Certainly similar formulas (or ranges) can be found in demurrage and speed claims under charterparties, and in collision and general average claims. In theory, all of these formulas are a product of earlier trials in which parties refused to settle, and the results became markers for future claims.

But something has changed in the maritime law practice when it comes to settlement. Indeed, the subject of this seminar today is in part the product of comments made by P & I Clubs concerned as to whether maritime lawyers are making the same effort to settle cases today as they did in the past. There appears to be a lingering suspicion that lawyers may be holding off on settling cases so as to generate more legal fees. In short, in these difficult economic times, are lawyers “milking their cases” to the detriment of the client?

From my perch on the 19th floor of an office building in Downtown Manhattan, I would have to answer that question as follows: Settlements are not happening as quickly and easily as they used to, and settlements are now coming late in the game, often near the start of trial, after a lot of pre-trial motion practice and discovery has taken place, and has been paid for. But I do not believe the motivation for tardy settlements is due to lawyers seeking additional fees. I believe the cause of delayed settlements is due to an evolving era in which a global decline in litigation has fostered a culture that believes cases must be handled more aggressively and more formally than in the past so as to satisfy and indeed impress clients.

Cases are not handed to law firms with the abandon that they were in the early 70's when I started practicing. Perhaps in those days, because of the continuing presence of the break bulk trade and the traffic generated by the Vietnam war, cargo, personal injury and charter claims flowed in the door every day, sometimes in box loads. By the time I was a third year associate, I was assigned to more than 350 cases a year. The sheer volume of the workload made it necessary to talk settlement with one's opponent.

It was common back in the 70's and 80's for opposing lawyers to meet for lunch in one the many luncheon clubs in lower Manhattan, such as the India House or the Whitehall Club, and bring several files with them. By the end of lunch, figures had been scribbled on the file covers, and there was a shaking of hands to do ones best to get the clients to agree to a settlement. It was a bit of rough justice, and compromises were made on one file to help a settlement in another, but it kept the stream of cases moving and avoided trial costs.

Today, it is my impression that when a claim is sent out to a law firm, in many instances it represents a "special situation" in which the in house counsel for the cargo underwriters, or the Clubs, could not reach an agreement. The lawyers on both sides understand that the case requires some form of special attention and that the clients are not interested in rough justice settlements, because they could have done that themselves. This is all the more true when one realizes that the claim handlers today often have legal training or may have been practicing lawyers.

The irony is that in an effort to impress the client that the file is receiving that special attention and care, the client expects that lawyers today are doing a more professional and detailed job than they might have been done a few decades ago. More analysis by higher levels of staff, more research on primary and secondary legal issues, more memos to file summarizing conversations and information from inside and outside the firm; and more consideration of all the available procedural and discovery options under the rules. No stone is left unturned. And that translates into higher legal expenses. But does it create better settlements? Probably not, because the other side

is just as motivated to impress their client and willing to “ratchet up” the game. In the end, the litigation is more competitive, because the feeling is that the stakes are higher: If one does not demonstrate that they are doing an outstanding job for the client, the client has many other options as to where it will send the next case. The allegiance to law firms is not what it was twenty five years ago.

The increased popularity in alternative dispute resolution, especially mediation and court sponsored settlement discussions, should have created a huge dam for runaway litigation. But from where I sit, it has only had modest success. I truly believe that the biggest advantage provided by mediation and court settlement conferences is that it forces the clients, and the lawyers, to actually talk. More than ever, I am continually reminded by clients that one should never open settlement talks with the opponent because it will suggest a weakness in their case. Because the opposing counsel is being told the same thing, no one likes to initiate settlement discussions.

The result of this dilemma is that many lawyers will, at the outset of a case, “test the waters” with the other side about the idea of settlement in an effort to see if there is at least a willingness to open talks. After the first court hearing in many federal court cases, usually within the first 60 to 90 days of the filing of the complaint, both lawyers can be heard on the courthouse steps as they leave a hearing bantering about what each lawyer thinks the case is worth. Many lawyers, including myself, do this to protect themselves. They can report the banter to the client, and it begins to define the ceiling (from the defense side) of the potential exposure in the lawsuit and the possibility of settlement. However, the clients often don’t bite when told of the conversations. Whatever motivated the case to be sent out to counsel in the first place is still a “sore wound,” which makes settlement an unwanted achievement. There is often some undefined principle that is controlling the case. The result is that lawyers make the mistake of allowing the case to go forward rather than pressing the opponent into more concrete discussions.

The judges are often not much help when it comes to settlement in spite of their good intention to promote settlement. This is because they are burdened with too heavy

a case load, and are under scrutiny as to how fast they dispose of cases. Since maritime cases are generally non-jury, it means the judge will have to write a written opinion at the end of the case, which is subject to appeal. That translates into more work which they would prefer to avoid. Moreover, maritime cases do not need to meet the $75,000 threshold required of other civil cases. The judges are often irritated when confronted with smaller maritime claims, even if the legal issues are significant. Since the claims often involve a dispute between insurance companies, the judges often do not see the maritime cases as being as critical as other matters they must handle, especially their criminal docket. The consequence is that many of the judges in the U.S. will try to press lawyers to settle as quickly as possible, often listening to settlement figures, or unsupported legal arguments in an effort to expedite a quick resolution of the claim. By the time the judge becomes frustrated with his own efforts to pressure a settlement, and instructs the parties to go to mediation or a court ordered settlement conference, the parties are well into discovery. Often the party who is in the weaker position will insist on further discovery before settlement talks in an effort to see if the fishing expedition, or the irritation caused by further discovery, will provide more leverage.

Once the settlement conference starts, the Magistrate (a junior judge) will usually allot only a few hours from one day to the project. If it fails, so be it. On to trial. And Magistrates often fail to understand that the object of settlement talks is to foster an atmosphere of settlement, and to cajole the parties into a proposal. There is a knee jerk reaction by many Magistrate judges to pontificate on the legal issues and how they will affect the trial. That only strengthens the resolve of one side not to settle.

Mediators are in my experience better trained to cope with the subtleties of settlement negotiations; especially the private mediators whom parties can always agree to engage, with or without the court's permission. Still mediation requires the right mediator with the right attitude and perhaps background or knowledge for the given facts in a case. If the mediator has the wrong personality, the mediation will be a disappointment.

Perhaps one of the biggest hurdles one faces in both mediation and court sponsored settlement talks is the need to have the client present at the session. Clients often balk at the cost and inconvenience. Many judges have given in on this rule, and now permit the clients to attend by telephone if they work a long distance from the courthouse, or even forgo the attendance of the clients. It seems to be a developing practice that the Magistrates will permit the clients to remain in their office, on “standby” near their telephone during the settlement conference, in case the judge wants to talk to them. While the arrangement avoids the cost and nuisance of having the client to attend the settlement hearing, it often reduces the likelihood of a settlement, because the client feels he has turned the case over to his lawyer.

Most mediators are not as accommodating. They want the clients present. But I have seen many clients on both sides get around this by sending a local agent or someone with little authority or knowledge of the case to provide “attendance.” This leaves the lawyer in an uncomfortable position, as he usually has been given a target settlement figure by the client, and no matter what happens during the mediation, the low- level individual sitting next to the lawyer can’t change that figure. Consequently, there is no real negotiation. There is only posturing.

More and more I find clients seeking an estimate of costs in litigation from the outset of the case. That project is about as accurate as estimating when the war in Afghanistan will end. I think the clients understand that, but they need to have something in their file that shows they made an effort to “cap” their cost of the litigation. What I don’t see is a request for an estimate to first talk settlement with the opposition and determine if the case can be settled. Indeed, I am impressed that many of the modern day charterparties, and even a few bills of lading and service contracts, require the parties to mediate their disputes before they initiate any litigation. One clause simply requires the senior representative of each company to meet with one another so as to make a bona fide effort at settlement. Unfortunately, my own experience is that the mediation clause is often not paid any attention. My own feeling is that the clients should explore mediation at the outset of the lawsuit, or while it is still in the claim stage,

and not after the case is full litigation mode. Too often the attitude is that we need to find out more about the case, and by the time and expense that the additional information is ferreted out, one of the parties has dug in its heels and refuses to talk settlement. If the mediation is done at the outset of the lawsuit, the ambiguities of the case make an even playing field for both sides. Even if a settlement is not achieved by early mediation, at least everyone will have a good idea as to whether there are serious issues in the case, whether any party appears entrenched in their position, and if the matter is going to be a tough battle over a long haul.

If mediation takes place only when the litigation is halfway over, the mediation often becomes more of a “trial run” to see if the arguments to be used later at trial will be accepted or given merit by the mediator. By the same token, key arguments or facts are often left out of the mediation so as not to reveal a secret weapon in the trial armory. In short, it is difficult to make settlement the true motivation of a mediation when the case has advanced towards a trial, for fear that if settlement fails, the parties had best be prepared to go forward with the trial.

When settlement talks do go forward, I often find that today there is more of an effort to “chisel” the other side down on the details of the settlement. Parties will reject offers or demands, and counter offers are made that are intended to “refine” the settlement. Back and forth the parties chip away at a figure, all the time paying for legal fees to make these relatively small changes. Even the wording of the release or settlement agreement gets highly scrutinized and modified, although the odds of a problem occurring should be no greater than it was in the past.

I should also take a moment to discuss settlement in the context of arbitration. Based on my own experience, the odds of settlement discussions successfully taking place after a demand for arbitration has been served are not very good. This is because, at least in New York where arbitration hearings are staggered, there is always an attitude of, “let’s wait for the next hearing to see what the other side says.” The result is that the settlement talks rarely get off the ground because the parties race themselves right up to the final hearing waiting to see the proof by the other side, at

which point one party or the other says “why settle”? While legal fees are now awarded in almost every arbitration proceeding by the Society of Maritime Arbitrators in New York, when settlement talks have been postponed to the last minute, the party who is in the winning position has no motive to settle because he stands to also recover his legal fees. The good news is that the SMA in New York is trying hard to promote back-to-back hearings so that the proceedings are concentrated and shorter.

Having said all of the above, I do not have a magic answer to improving the settlement process. The difficulties encountered during this economy have impacted on all of us, including the insureds, the underwriters and the law firms. Everyone is concerned about cutting the overhead and costs. That translates into exercising more diligence. This in turn, if not controlled, can actually lead to greater expense and cost, and in the end there will be continuing frustration with lawyers and the cost of litigation.

I do think that lawyers need to get clearer instructions from the clients at the outset about what is to be accomplished. If a firm is going to estimate costs, it needs to know what the client wants to achieve. Is there a real underlying principle that must be litigated at all costs? Or is the other side just being obstinate about settling the claim, and the lawyer needs to achieve the best outcome for the least amount of legal expense? My experience is that most cases often fall into the latter category. But if the goal of the client - which can be different for the Member as compared to the Club- is not identified, then the litigation game is afoot and there will be no end to complaints about lawyer’s fees.

Thank you.