TRIAL ADVOCACY

Chapter 5

LAWSUIT NEGOTIATION

INTRODUCTION

The materials in this chapter have a more direct relevance to the work of most law students than will the materials in any of the other chapters in the book. Not only trial lawyers but also lawyers who try only an occasional case are frequently involved in lawsuit settlement negotiations. The statistics, both in the settlement of civil cases and in plea bargaining of criminal cases, make it plain that dozens of suits are settled for each that is tried; indeed, if each case that is now settled were tried, our legal system would be hopelessly swamped. Thus, lawsuit settlement is uniquely a lawyer function and, perhaps, the lawyer's most important function.

The writings in this chapter by Ross, Hermann, Conard and Pierson all deal with the negotiation of personal injury claims. To some extent the experience in personal injury litigation will not be useful for the negotiation of other kinds of cases, but most of these authors' observations will have relevance to criminal and other civil suit negotiations. In Hermann and Pierson, both practitioners, one should look for the explicit and pragmatic articulation of things that are touched upon in a more general way in other parts of the book. For example, although Pierson never refers explicitly to nonverbal and verbal communication, his instructions about the kind of response one should give to an offer, about the timing of offers and counteroffers and about the appropriate behavior in a settlement negotiation are keen pragmatic insights into the verbal and nonverbal communication process involved in a lawsuit settlement. One should compare his advice in that with the materials on nonverbal communication and should test Pierson's hypotheses against the learning set out in Chapter 4. Likewise one should test Hermann's hypotheses concerning the "leverage of uncertainty" against the psychological materials in Chapters 2 and 4. Surely Hermann is proceeding on an inarticulate hypothesis about an opposing lawyer's psychological makeup and psychological response in setting forth his the-sis concerning the creation of uncertainty and the favorable consequences that he predicts.

Finally, the empirical studies that form the basis of Ross' and Conard's material merit consideration in their own right. Ross' clever analysis of the adjuster, his environment and his motivation should challenge one to generalize and to speculate about the corresponding motivations and forces that might affect others in the lawsuit negotiation process. For example, how is the prosecutor in a criminal case influenced by the circumstances in which he finds himself? To what extent is his relationship with the police on the one hand and with the electorate on the other different from the adjuster's relationship with his boss and with the insurance company? How is the probation officer who controls the sentencing similar to or different from the adjuster, and to what extent can one's learning concerning the adjuster give insight about the possible motivation of a probation officer. In short, Ross' study of the insurance company and the adjuster, serves as a model of institutional analysis that each lawyer should emulate.

That is so whether the institution in question is the Justice Department, the local prosecutor's office, the in-house counsel of a large corporation or a large law firm. Doubtless, each of these institutions has a mode of selection, a mode of promotion and elimination, and a system of rewards that significantly influence the negotiation that its members undertake.

Before one turns to the readings below, he should examine the lawsuit on a somewhat theoretical plane to identify some of the factors that make the negotiation of lawsuit settlements unique in some respects and commonplace in other respects. Of course, the fact that there will be a public trial if settlement cannot be reached is the single critical fact from which a variety of consequences about lawsuit negotiation flow.

First, the trial is not catastrophic; failure to settle a lawsuit does not lead to war, to the murder of hostages or even to a strike. Rather it produces a form of well-known and genteel combat. Nevertheless the costs of trial are significant. The lawyer's fees can be large, the cost of investigation and collection of evidence can be significant; and miscellaneous expenses in the form of absorption of the client's time and psychic energy will sometimes be enormous. Thus the expense of this alternative lies somewhere in the middle of the spectrum that is bounded on the one end by war-the consequence of unsuccessful diplomatic negotiations, and of a walkaway-the consequence of the failure of the parties to agree upon a proposed commercial venture.

Second, the trial differs from many other kinds of negotiation alternatives in that it is public. Consequently not only the lawyer's performance but also the client's award and all of the facts put in evidence about his affairs are public knowledge in most cases. A trial lawyer who depends upon a success record to attract clients may hate to lose a lawsuit. A company that is negotiating simultaneously with many litigants may hate to have a precedent established by the loss of a case to one of those litigants. Even a lawyer who does not depend upon his won-lost record for attracting new clients may be embarrassed by a public loss especially in circumstances in which he advised his client to turn down the settlement that would have been more favorable than the trial outcome proved to be.

Because the alternative to settlement is a trial and because the trial lawyer will almost invariably be the negotiator, his skill as a trial lawyer will be highly significant in determining the level of settlement. One who is known to be afraid to go to trial will have to settle for less than one who is willing and able to try cases.

Lawsuit settlement is like labor negotiation in the sense that a third-party mediator is often involved. Many judges are active in promoting settlement; some are arm twisters. One of the purposes of the pretrial conference is to give the parties an opportunity to reach a settlement and the scheduling of such a conference together with the presence of a third party doubtless performs many of the functions performed by mediators in the labor field. On the other hand the lawsuit is radically different from the typical labor negotiation in the sense that the typical labor settlement is prospective and contemplates the need for the parties to work amicably together over

the life of a contract. Some lawsuit settlements are prospective, but in the typical case the court's obligation is simply to decide whether one party gets some money from the other. The parties may never do business with one another again. Thus, in a lawsuit settlement, unlike a labor negotiation, one usually need not worry that he will be unable to get along with the other party a week or a month after the settlement has been concluded.

Finally, the lawsuit is unusual in that it can often be orchestrated by one party or another for his own interest. The insurance lawyer may welcome the fact that the case will not come to trial for four years on a crowded docket. By taking additional depositions, asking for a jury trial, or making various motions, one party may be able to postpone the trial date and thus put pressure on his opponent. This ability to orchestrate the alternative is not normally available in other forms of negotiation.

What should one conclude from the foregoing observations about lawsuit negotiation? Perhaps they are interesting but ultimately irrelevant to the tactics one employs in a lawsuit negotiation. However, we suspect that one can learn something by careful consideration of these factors. Surely he can acquire a few tactics from Pierson; we hope he can achieve a deeper insight by extrapolating from Ross to other areas.

HERMANN, BETTER SETTLEMENTS
THROUGH LEVERAGE

(Rochester, New York: The Lawyer's Cooperative Publishing Co., 1965),pp. 9-10, 122-123, 130-131, 250-251.

Uncertainty is by far the most effective lever that one can use to increase or decrease the settlement value of a personal injury case. However, few lawyers or insurance company claims representatives take full advantage of its enormous power.

Most lawyers and insurer's representatives are keenly aware of the elements of uncertainty in their own personal injury cases. They allow uncertainty to affect adversely their own positions as respects settlement, but many do not adequately consider the powerful effect that uncertainty has on the opposing party. For example, an attorney for the plaintiff may so seriously concern himself with the prospects of a small or defense verdict that he may settle the claim for a small fraction of its value. He may fail to realize that the insurance company and, or defense counsel may be equally worried that the verdict may be extremely large, and, because of this uncertainty, may, if properly maneuvered, be willing to pay a sizable amount to effect a settlement rather than submit the case to a jury.

THE DANGER OF PROTECTING THE OPPOSITION
FROM UNCERTAINTY

Perhaps the most serious mistake of all, and one that is made daily by many attorneys and insurer's representatives, is to insulate the opposing side from the effect of uncertainty. As ridiculous as it may sound, many attorneys and insurance companies, instead of enlisting

uncertainty's enormous power, unwittingly make certain that the other side does not have to concern itself with the problems and depreciating influences of uncertainty.

To illustrate: assume that both the plaintiff's counsel and defense counsel privately evaluate a personal injury case as having a value of $5,000. In addition, both sides are of the opinion that, if the case is submitted to a jury, the verdict may range from zero to $15,000. The plaintiff's attorney, to allow ample spread for negotiation, makes a demand of $15,000. This effectively insulates the insurance company from uncertainty. The insurer calculates that if it is very unlucky, the jury will bring in a verdict of $15,000. Yet, the verdict is likely to be much less, and even zero. Accordingly, so long as the plaintiff's attorney adheres to his original demand, the insurance company has little to worry about in refusing to accede.

What is a typical response to such a demand? The insurance company may (and frequently does) take the position that a ridiculous demand merits a ridiculous offer. It may decide to offer $500, or perhaps nothing. The effect of this is to insulate the plaintiff and his attorney from the depreciating effects of uncertainty. If the offer is zero, the plaintiff (and his attorney) has nothing to worry about in not accepting it; if the jury brings in zero, he is not much worse off; even if the insurer's offer is $500, the possible loss involved in rejection is relatively nominal.

Thus, we see that each side has insulated the opposing side from the effects of uncertainty. The end result may be that although each made a similar evaluation, the case, because of the insulation, may have to be resolved by the expensive trial process.

EMPLOYING UNCERTAINTY PROPERLY

Now, let us consider what could have happened if, in the case assumed above, uncertainty had been taken advantage of. The plaintiff makes a firm demand of $7,500. The insurance company, concerned with the prospect that the verdict might be $15,000, must seriously consider a demand of this amount. In many instances, the insurance company may, as a prudent move, pay the $2,500 more than its own evaluation of the case to eliminate the possibility of a verdict far in excess of #7,500.

But what would happen if the insurance company decided to make a firm offer of $2,500? Again, many a plaintiff or his attorney, although believing the case to be worth $5,000, may be sufficiently concerned with the prospect of a defense verdict to accept the offer as a prudent means of eliminating the uncertainty of outcome at the hands of a jury.

The proper bargaining method for today's attorney for the personal injury claimant is to appraise the claim on the basis of verdict expectancy statistics, allowing for adjustments upward or downward to reflect whatever negotiation leverage may be brought into operation. He should then demand an amount closely approximating this appraisal. It is permissible to make a demand slightly higher than the appraisal in order to allow some room for adjustment, but, as a general rule, the asking price should either be adhered to or, at worst, not

materially departed from, unless unforeseen events indicate serious error.

Barring change in valuation as a result of new information, the demand figure should be "Price As Marked."

It may be conceded that the principle of standing on "Price As Marked" may seem a revolutionary one. And it should be recognized that many insurer's representatives may refuse to honor a demand notwithstanding their belief that it is in line with the true value of the claim, basing their refusal on the thought that they themselves may be wrong in valuing the claim, or on the hope that somehow they may be able to obtain a bargain settlement.

But it will pay the plaintiff's counsel to stand firm; from his firmness his adversary will learn the costliness of an unjustified refusal to honor a sound demand. The recalcitrant adversary will be faced with investigation expenses, attorneys' fees, and out-of-pocket expenses, and, perhaps, the cost of trial. Of course, plaintiff's counsel whose sound demand has been refused will also be faced with increased expenses, but, in the long, as insurers and defense lawyers understand that his practice is to make an initial demand that is a firm and fair one, their tendency will be to accept it, and at an early date. The ultimate result will be a method of negotiation far superior to haggling.

A firm, fair demand has obvious persuasive value that haggling lacks. The plaintiff's counsel who names a fair but firm figure and sticks to it is likely to exude confidence which the opposition will be quick to sense.

A word of caution: to the extent that there is a difference between a claimant's demand and the defense's offer, the difference may be explainable on the basis of information available to one side but not the other. To avoid this situation, the negotiations between the parties should be characterized by frank and open discussion, and clear communication from each side of the basis of its valuation of the claim. It is one thing-and a desirable thing-to change one's demand on the basis of newly discovered, relevant information; it is something else-an undesirable something else-to change one's demand purely as a result of haggling.

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THE BENEFITS OF A YEAR-END LAWSUIT

Insurance companies typically operate on a calendar year basis, and their claim managers are ordinarily required to report lawsuits initiated against the insurer at the end of the year. In the insurance business, this year-end report is a very important document. It is this report that is compared with the reports for previous years, and it is on the basis of this report that the work of the insurer's claims personnel is judged. An insurance company may prefer a lawsuit to substantial overpayment in settlement negotiations, but most insurers are very sensitive to year-end increases in the number of lawsuits in which they are named as defendants.

Cognizant of their employers' lawsuit sensitivity, many insurance company claims managers begin, as each year draws to a close, to consider critically the number of lawsuits pending and if there are more than there were the previous year, these claims managers are likely to make every effort to settle as many of the pending suits as possible, and to settle pending claims short of the lawsuit stage.

* * *

The close of the year brings a good settlement climate not only to the claimant but also to the defense, whether a defense attorney or an insurer. The good feeling that accompanies the holiday season may be reflected in a more charitable attitude on the part of both claimant's and defendant's counsel. Similarly, the claimant who cursed the insurance company for offering so little may look at the situation with a more kindly eye. Not to be overlooked is a need for money for the Christmas season: the needy claimant or claimant's counsel is the kind of adversary in settlement negotiations that every defense counsel and insurer dreams of.

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We have already seen how much settlement leverage one can gain if he can make it clear to his adversary that, unless a favorable settlement is agreed upon, the case will be tried. But this kind of leverage cannot possibly be exerted unless the attorney seeking to employ it impresses his adversary with his complete willingness to try the case in order to achieve a result compatible with his position during settlement negotiations. Regardless of how great a lawyer's trial skills may be, once his opponent discovers that, in this case, he is reluctant to enter the courtroom, his chances of exerting leverage disappear.

It follows that if, for any reason (whether ill health, a recent unfavorable verdict or series of unfavorable verdicts, personal problems, or whatever), you wish to avoid trial of a case, don't let your adversary at the settlement table know about it. Do your best to make whatever effort is necessary to give the appearance of eagerness to do battle before judge and jury.

But act with some caution, and some common sense. Development of maximum settlement leverage requires demonstration of eagerness to go to trial, not obstinate determination not to settle without a trial. If it seems that you will insist upon going to trial no matter how fair a settlement offer is made, the obvious result will be to make all of the settlement efforts futile, and to make you look foolish.

How can one determine whether his adversary is really willing to try the case rather than substantially alter the position he has taken in settlement negotiations? Probably the easiest way is to find out whether the adversary has, in fact, tried a great many cases. If, over a period of years, the adversary tried cases to verdict only rarely or not at all, it is reasonable to conclude that whatever trial eagerness he displays is feigned.

* * *

NOTE

In touting the leverage of uncertainty, Mr. Hermann makes the following point at page 8:

> Uncertainty is one of man's great natural enemies. People often worry more about what may happen than they do when it does happen. The young child fears darkness because he doesn't know what is beyond his ability to see. It might be good; it might be bad. But the fact that he doesn't know instinctively creates fear.

Hermann's thesis seems to be that the probability of a favorable settlement varies directly with the amount of anxiety (fear) inspired in one's opponent, and that this anxiety in turn varies directly with the amount of uncertainty generated; thus, uncertainty leads to anxiety leads to settlement.

One familiar with the psychiatrist's hypothesis that persons faced with threat flee or fight should question Hermann's thesis. It is possible, even plausible, that some who are faced with the considerable anxiety produced by uncertainty will choose not to flee (i.e., settle) but to fight (i.e., refuse to settle and strike, go to court or whatever). Indeed, our experience with students in the seminars at Michigan and Harvard, and some of the field research that students of the seminar have done, suggest that some negotiators, perhaps a significant number, respond to anxiety not with concessions but with heightened and perhaps irrational resolutions to fight and not give in.

Lawyer respondents in the Baumgart and Compagnone study (reported in Chapter 6), and in another student study of practicing lawyers, place high value on the ability to reduce anxiety. If heightened anxiety is productive, why do lawyers identify ability to reduce anxiety as a significant attribute of a good negotiator?

At minimum one should take Hermann's thesis with a grain of salt. He should at least consider the possibility that a magnification of the opponent's anxiety will cause strong negative reaction, namely the refusal to settle, rather than the desired reactions reasonable agreement.

How does one tell when an anxiety will be productive and when not productive? That is a question we cannot answer. Surely the able negotiator has some sense of his opponent's reaction to heavy pressure, and will get some feedback about the likely response of his opponent. It is equally certain that even an able negotiator will sometimes err. We would suggest only that Hermann's leverage of uncertainty is a good working hypothesis, and that those who use it should be alert to the signals that it is backfiring. One who makes extensive use of such leverage should be prepared to reduce the leverage of anxiety where it appears that uncertainty and anxiety is only going to cause the opposing party to refuse to settle.

ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT

(Chicago: Aldine Publishing Co., 1970), pp. 136-166
[footnotes omitted]

The investigation and evaluation of bodily injury liability claims proceeds with the expectation that these claims will terminate not in court but in a negotiated settlement. In fact, better than 19 in 20 claims are disposed of informally through negotiation. The spirit of negotiation thus pervades the entire claims-handling process, and its tactics are empirically intertwined with the tasks of investigation and evaluation. However, negotiation can be distinguished analytically for the purpose of exploring its rules and tactics, and for delineating its relationship to the rest of the claims-settlement process. This chapter describes the negotiation of bodily injury claims. It offers generalizations that may be applicable as well to many other areas, such as business relations, labor-management relations, and international relations, where negotiation is an important mechanism for resolving differences among men.

NEGOTIATION VS. ADJUDICATION

"Negotiation is a process in which explicit proposals are put forward ostensibly for the purpose of reaching agreement on an exchange or on the realization of a common interest where conflicting interests are present." The exchange of proposals is, of course, supplemented by arguments designed to rationalize and to strengthen or weaken the proposals, but the fundamental move in the game of negotiation remains the offer. The recipient of offer is then faced with a continual threefold choice: to accept the offer, to accept no agreement, or to continue negotiation. The final outcome of negotiation is thus either an agreement based on an offer and an acceptance, or no agreement, based on the inability of either side to make an offer that is acceptable to the other. Negotiation situations may be divided roughly into three major types depending on the consequences of no agreement.

One type of negotiation occurs in situations where no agreement simply implies a new and different negotiation. Here, opportunities to negotiate an agreement are relatively numerous and competitive. The purchase and sale of a house or a car exemplify this type of negotiation, where each side can assume the availability of many alternative bargaining partners should a given negotiation fail. The parties will reach an agreement if they are persuaded that a particular offer is likely to be at least as attractive as what they might expect from other opportunities to negotiate. The limiting case here is the totally free market where every negotiation may be expected to have the same outcome. It is likely that negotiations in this category are fragile-that they frequently come to no agreement-but the adverse consequences of no agreement are minor. The main determinants of who bargains with whom are the accidents of time and place: the person who happens to need a five-year-old sedan bargains with a resident of the same city who happens to have one for sale at the time. As the item in question becomes more differentiated and specialized, the negotiation comes to resemble that of the second or third categories.

In the second class of negotiations, the consequence of no agreement may be disorderly. In the extreme, the issue concerns a

unique matter that must be disposed of either by agreement or by a fight-the disorderly alternative. Many kinds of international relations exemplify this case: Poland is to be partitioned, either at the bargaining table or on the battlefield. Industrial relations can be similar when the alternative to a contract is a disruptive and disorderly strike. In this case, the negotiated agreement enjoys considerable advantages over the disorderly alternative. Relative benefits include not only costs in time and money, but such matters as mutual regard, trust, and even mutual survival.

In the third class, the result of no agreement may be the determination of the issue by a formal and orderly procedure. This case is exemplified by legal claims of all varieties, because the parties can take an unresolved case to court for a formal adjudication. The negotiated settlement may be preferred for a variety of reasons, chief of which is the cost in time and money of resort to the formal alternative. In addition, the relative informality of negotiation may appear as an advantage for the parties. Negotiation not only costs less than adjudication, it uses different techniques and allows the application of different talents. Negotiation may thus be preferred by one or even both parties because they believe that they can gain something through informality. For example, they may have "false counters" maneuvers that they believe likely to be ineffective or deficient in formal procedure but possibly effective in negotiation. The informal process may also permit outcomes that are unavailable in the formal process-e.g., compromise, as against an all-or-none determination of rights-yet which are preferred by both parties over the outcomes possible using the formal procedure.

The negotiation of bodily injury claims falls into this last category. The negotiators are in the position of bilateral monopoly-the claimant cannot find another insurance company to be interested in his claim should he not like the offer, and the company must deal with the particular claimant, no matter how much they would prefer someone else. However, the failure to reach a negotiated settlement offers either side the opportunity to put the case into litigation. Economy in time and money is clearly a major reason for both sides to prefer the negotiated settlement. A full-scale common-law jury trial is never trivial, and it can be enormously expensive. A routine case is apt to cost each party several hundred dollars more than a negotiated settlement. The costs involved are only in part those of the courtroom-court costs, jury fees, document fees, and the fee of a trial attorney. Also important are the costs of preparation, including depositions, special investigations, exhibits, and the time of legal and paralegal personnel who must oversee and coordinate these efforts. Since these expenses are not recoverable from the opponent even if one wins the case there is a strong incentive to avoid litigation and to prefer a negotiated settlement. The analysis of the Acme files showed the average cost of defense legal fees in tried cases to be $740, compared with an average fee of $221 in all other cases where the plaintiff was represented, and only $3 where the plaintiff was unrepresented. The fees of defense physicians and other direct processing costs totaled $105 in tried cases, $72 in other represented cases, and $4 in unrepresented cases. Also involved in trial are large unmeasured internal costs, including the salaries of adjusters and other staff for extended periods of time.

There is in addition to monetary cost considerable delay involved in adjudication. The amount of delay involved in a civil suit for bodily injuries can run from a few months in some fortunate jurisdictions to several years in most major metropolitan areas. Delay is transparently uneconomical to the ordinary plaintiff, who must do without any compensation until the end of the trial, and whose living expenses may be increased while earning power is decreased as a result of injuries sustained. It has been argued that, to the contrary, the average insurance company profits from delay. These arguments are repeatedly and consistently denied by insurance management, and the preoccupation of adjusters with disposing of cases quickly indicates that, whatever the economic effect of delay on the company as a whole, the men who control the cases ordinarily regard it as a nuisance and strive to eliminate it. On the other hand, delay is certainly more costly to the usual claimant than it is to the company, and it tends to make a negotiated disposition comparatively more attractive to the claimant.

The informality of negotiation may be regarded as an advantage to both sides over trial, considerations of cost aside. From the viewpoint of the claimant, the formal law may appear very favorable to the insurance company, particularly in light of the contributory negligence rule which denies all payment to a plaintiff who has contributed in any significant way to the accident. In fact, it would seem that very few multi-car accidents occur without some "error" on the part of all parties, and in theory it would seem that trial ought to yield very few plaintiffs' awards. Though that is not actually what happens, the claimant anticipating trial has in mind the definite possibility that his jury will take judge's instructions regarding contributory negligence at face value and therefore render a verdict for the defendant.

From the viewpoint of the insurance company, the presence of a jury as a matter of right in most bodily injury claims makes the formal law seem a claimant's law. In most cases, contributory negligence is a jury question, and defendants rightly feel that juries hesitate to leave an injured person with no compensation whatever. Moreover, along with the fact that juries' sympathies tend to be with injured people is the fact that their discretion in making awards is very large, indeed. Pain and suffering constitute legitimate damages, and these can be and have been evaluated in the hundreds of thou-sands of dollars (all tax-free to the plaintiff, on the theory that these are reparations for what has been taken from him). To be sure, awards that are "excessive" can be reviewed, at additional cost for appeal, but few defendants probably agree with the courts' ideas concerning the reasonableness of general damages.

In this situation, where the formal law threatens the plaintiff with the possibility of no award, and the jury system threatens the defendant with a judgment even in the absence of formal liability, negotiation offers the advantage of permitting compromise. The claimant can eliminate the chance of no award and the defendant can eliminate the possibility of a "runaway" jury verdict by a compromise that violates the letter of the formal law but accords with the spirit of negotiation.

The advantages of negotiation over adjudication in terms of lower cost and the possibility of compromise are apparent in the fact that more than 95 per cent of all bodily injury claims made against insured automobile drivers are settled by negotiation. Even among those claims represented by an attorney and accompanied by formal suit papers, the majority result in negotiated settlements. The outcomes of these claims are affected by the special features of negotiation-its rules and tactics-which are the subject of this chapter.

SOME DIMENSIONS OF NEGOTIATION

The form of a negotiation may well be affected by the peculiarities of the situation in which it is carried out. In this section bodily injury negotiation is placed on several dimensions that are likely to shape its form, as compared with other kinds of negotiation. Some differences are noted between negotiation with an unrepresented claimant and negotiation with a plaintiff's attorney.

A first consideration is the number of parties involved. Regard-less of representation, bodily injury negotiation is generally (though not always) a simple, two-party affair, even though more than two cars may have been involved in a given accident. In the latter case there is much less coordination than one might expect in the handling of related claims by different insurance companies, and each claim tends to be negotiated independently. An adjuster will usually request and obtain a contribution in a settlement involving a joint tortfeasor, but his negotiations generally involve only minimal consultation with the latter.

A second concern is the balance of power between the negotiating parties. This is substantially different in represented and unrepresented claims. Dealings between two parties, one of whom is completely powerless, could not meaningfully be called negotiation, and even an unrepresented claimant possesses power through his ability to secure an attorney and file suit in the event that he is dissatisfied with his experience with the adjuster. However, as noted in Chapter 3, many unrepresented claimants are naive; they have only vague knowledge concerning their rights to recover, and they are unfamiliar with the rules and tactics of negotiation. The balance of power is more equal when the adjuster deals with a plaintiff's attorney or with the rare plaintiff who is personally knowledgeable and skilled concerning the nature of his rights and the techniques of negotiation. Overall, I would guess that the combination of represented claimants and sophisticated claimants adds up to less than half of the total number of claimants, and that the power balance generally favors the insurance company.

Third, the number and clarity of issues may affect the nature of negotiation. A multiplicity of complex issues may permit or favor integrative bargaining, whereas a single clear issue usually permits only distributive bargaining in which the gain of one party is the loss of the other. Negotiating a labor contract with a multiplicity of is-sues may permit the exchange of union recognition-perhaps crucial to the union-for a lesser increase in the hourly wage-which may be crucial to the company. Each side then feels that it has lost relatively little and gained relatively much. Bodily injury negotiation generally allows no such tradeoffs. The only matter at issue is the amount to be

paid for the release, and what the claimant gains the company must lose.

A fourth factor is time-orientation. Some negotiations, like those over a labor contract, adjust conditions for the future. Bodily injury negotiation is almost entirely concerned with the past, thus ruling out many types of threats and promises as effective negotiating tools. For example, although employees can threaten to change their work patterns, it is difficult to threaten the opponent in bodily negotiation with a possible change in the manner of occurrence of the accident amount to be paid for the release, and what the company must lose.

A fifth and related factor is the continuity of negotiations. Relations between countries, for instance, continue over time, and mutual attitudes and bargaining reputations have effects on future installments in the relationships. Bodily injury negotiation is generally a one-time affair, particularly in urban areas where reputations of individuals and even of companies are slow to spread. There is relatively little to be gained or lost in the way of a reputation through the use and display of integrity or determination in this situation. The firmness of a commitment, for example to go to trial, does not return as great rewards in bodily injury claims negotiation as where bargaining continues over time.

Finally, there is the previously mentioned factor of available alternatives in the event of failure of negotiation. In some negotiations, the outcome of failure is merely another negotiation. In others, there is a costly and disorderly alternative, such as war. In others, including the bargaining over criminal charges as well as bodily injury negotiation, there is the costly and formal alternative of litigation and adjudication by a court.

Comparison of bodily injury claims negotiation with other types of negotiation on these dimensions indicates that the former may be a particularly simple and rudimentary form of bargaining. The number of parties and issues is minimal, and there is relatively little inter-relationship between one negotiated agreement and another. The balance of power is often one-sided, and agreements are retrospective rather than prospective in orientation. The bargaining is entirely distributive. Finally, the consequences of failure, although not trivial, are not catastrophic, so the achievement of a bargain is un-heroic. The simplicity of the personal injury negotiation suggests that the rules and tactics observed here may be very basic. There is little material here that is specialized and applicable only to specific situations. Therefore, though bodily injury negotiation may strike the ob-server as simple, inelegant, and unimaginative, it may afford an opportunity to examine some very elementary and universal aspects of negotiation.

THE ROLE OF EXPECTED VALUE IN LITIGATION

A necessary but not sufficient condition for a negotiated agreement is that there be a range of values that all parties prefer over no agreement. This range may be defined by the overlap of the parties' resistance points, which are the points of indifference of each party between a settlement and no agreement. Taking for example a

buyer and a seller, the buyer's resistance point is the maximum he would be willing to pay to acquire the commodity. The seller's resistance point is the least he would accept. Where these points overlap-where the buyer would be willing to pay at least as much as or more than the seller would minimally accept-there exists a settlement range or contract zone, and a negotiated agreement is possible.

A party's resistance point is strongly dependent on his perception of the costs to him of the no-agreement alternative. In negotiating settlements of serious injury claims, this alternative is the courtroom trial, which is, as mentioned before, costly to both sides. The resistance point for each party is thus a function of his expectations of value in litigation-the amount that a jury might give, modified by the chance of recovery and of his expectations concerning direct and in-direct processing costs. If each party's assessment of the likely jury award and chance of recovery is the same, a settlement range equal to the combined processing costs of both sides is logically implied. Expected value in litigation is based on understandings concerning the facts of liability and damages. Where the parties' perceptions of these facts are significantly different, there may not be a settlement range. Where there is a convergence of expectations concerning value in litigation, the settlement range will be centered on the point of convergence, and will have an extent corresponding to the combined processing costs. Figure 4.1 diagrams a hypothetical settlement range where the parties' expectations of value in litigation are reasonably close.

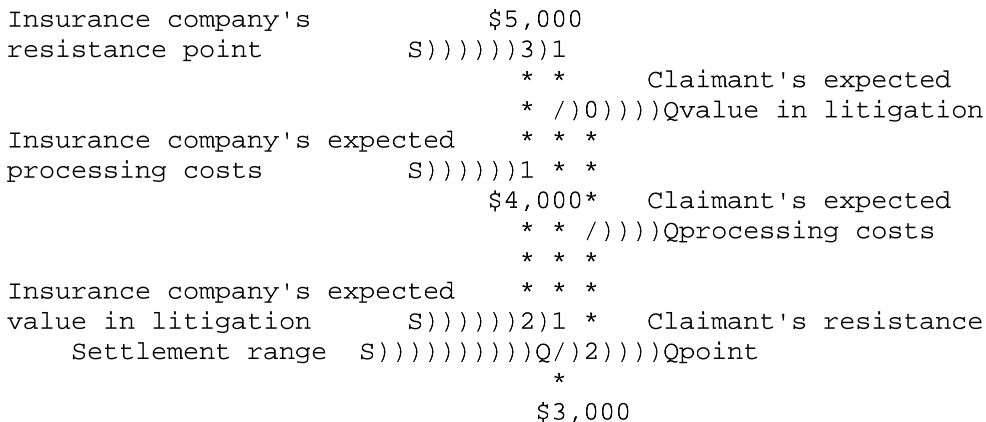

Figure 4.1 Hypothetical illustration of the settlement range or contract zone.

The expected value in litigation is thus the most important factor influencing the general level of settlement for a serious bodily injury claim. Particularly in the early stages of negotiation, the goals of each party center on manipulating the expectations of the other concerning this matter.

The most effective strategy for the claimant is to manage the appearance of both liability and injury. First, information is

generally withheld, and is released only when it can support but not limit the strength of the case. An adjuster advises:

If you want to get the last dime * * * you begin by not cooperating with the insurance company, so they have no in-formation to use against you. You don't give them a statement; you don't sign consent forms so that medical information can be obtained early in the picture; you don't con-sent to a medical examination, etc.; general non-cooperation.

The commonly accepted paper indications of damage should be maximized. Special damages can be accumulated in the following manner:

I have a doctor that will, at your request, X-ray every bone in your body, and he always renders a bill that's about $200 for all these X-rays, and his report is always the same-I could dictate it myself. It goes along and everything is negative, and then he puts a long page of explanation after that as to why the X-rays being negative doesn't prove anything and doesn't rule out soft-tissue damage, etc. And then the doctor that works with this X-ray may charge $100 for the first examination, which is a thorough examination to deter-mine what is wrong with you, and then $15 to $25 for a treatment and the treatments average three to five per week. You can see that with a very simple whiplash injury you suddenly have a thousand or two thousand dollars' worth of bills.

Another adjuster adds:

If I was a claimant-I mean if I was injured in an automobile accident-I'm sure I wouldn't go to work the next day, not because I would want to cheat anybody, but if I didn't feel like working and I'm going to be paid for it anyhow, why should I work?

Liability must also be managed, and damaging admissions must be avoided:

There are certain key words of negligence in every state. "I didn't see the other fellow," in Pennsylvania that's the magic words. * * * When you have ice, a fall on the sidewalk, you have got to say there were hills and ridges, in Pennsylvania. You've just got to! * * * "I didn't see the other person," is really the biggest thing of all. I think a lot of claims adjusters sometimes cheat people by being a psychologist and asking a question in a correct way to elicit a different answer. In Pennsylvania you are supposed to be looking around to see where you are going, and having your car under control at all times, and therefore an admission that you never saw the other vehicle shows that you are not paying attention, and are therefore negligent. * * * and mostly it's not true. They did, but they don't want to admit it because to the average person seeing the other car seems to equate itself with, "I could have done something to avoid it." That's not true. * * * Most of-ten this is true: you are at an intersection and you do look around a bit and there's the car right on top of you, and what can you do? But for some reason people, if you ask that question right, nine times out of ten you will elicit this response.

In response to these manipulations by the claimant, the insurance company can obtain a defendant's medical examination that will convert the issue of damages into a battle between the experts, thus spoiling the claimant's game. The company can further cite testimony of possible witnesses-real or imaginary-who may counter the claimant's version of liability.

Each party's approach to negotiation is conditioned not only by his resistance point, but also by his target-a point more favorable to him, which he believes to be a possible point of agreement, the best that can be hoped for. A party's target corresponds with his estimate of the opponent's resistance point. The strategies used to affect the opponent's expectations of value in litigation are relevant to both target and resistance point. If the case is redefined as potentially more costly in litigation, this redefinition should affect the resistance points of both parties directly, moving them upward. The adjuster could be willing to pay more in settlement than previously and should also expect the claimant to insist on more. Thus, his target is raised. If, on the other hand, a claimant happens to disclose a weakness in his case the adjuster will probably lower both his target and resistance point. However, the two points do not always vary together. An adjuster may have estimated the value of a claim in court at $1,000, and set his resistance point at $1,500, with a target at $500. Should the claimant indicate that he is thinking in terms of a $400 settlement, the adjuster may lower his target to $300 without changing his resistance point.

SOME GENERAL RULES OF NEGOTIATION

The following rules are derived from reading the bargaining literature and observing adjusters negotiating with attorneys. They are proposed as descriptions of the understandings that guide skilled negotiators when dealing with other skilled negotiators. Failure of either party to follow these rules may result in a breakdown of the negotiations, even though there may be a settlement range within which the parties could have reached agreement.

1. Yield from an initial demand. Stated conversely, the rule is to make an initial demand that is well in excess of one's resistance point. Yielding was noted in virtually all negotiations that my students and I observed between adjusters and attorneys. This rule makes understandable the fact reported by the Michigan Study that 63 per cent of all first offers by adjusters were for three quarters or less of the economic loss, and that two thirds of first offers were for less than half what the lawyer demanded.

The general bargaining literature cites an apparent exception to this rule: the Boulwareism technique (named after an officer of the General Electric Company), whereby a single offer is made and rigidly adhered to. This was practically never attempted between the "professionals" we observed, but it occurred on occasions when adjusters negotiated with unrepresented claimants. Boulwareism does not seem to fit the definition of negotiation, since no exchange of proposals is involved, and it may well be considered a different "game"-called "take-it-or-leave-it." It could conceivably work among "professionals" only where the side employing it could build a

reputation for deviant bargaining with the other side. Otherwise, the technique would fail and the negotiation would break down because of the opponent's disbelief. Because automobile claims negotiation infrequently involves the same combination of adjusters and attorneys, a bargaining reputation is difficult to obtain. The general rule of yielding is followed invariably among negotiators of automobile bodily injury claims.

2. Balance concessions. Concessions by one party generally require concessions by the other, although the amount need not be similar. Indeed, the amount of a concession will communicate to the other party how readily future concessions will be given. For this reason, concessions are carefully measured. A negotiator planning for a possible retreat from an initial demand of $10,000 to a final demand of $2,500 will not make a first concession of, say, $7,000, because that would leave him virtually no room for balancing concessions in the event the negotiation should be protracted.

My observations showed that negotiation moves were quite generally balanced, and that claimants wielded larger sums than did the insurance companies. Thus, the claimant's initial demand was often considerably farther from the final outcome than was the company's offer. A failure to reciprocate a concession was treated as an invitation to trial, and the granting of an unreciprocated concession (i.e., making two concessions in a row) was interpreted as a sign of extreme weakness.

3. Retractions may not be made. It is very difficult to make a conditional proposal in negotiation. Even a carefully guarded and qualified offer-for example, one with a time limit on it-is hard to retract. The offer exposes the fact that the party's resistance point is not thereby exceeded, and in practice the opponent will regard any offer as binding. This rule may be tested in some more complex types of negotiation, but I never saw a successful retraction in the course of my observations.

4. Bargain in good faith. This is a most general rule, though the concept of good faith is difficult to define. The term has somewhat the same place in negotiation that "due process" has in litigation. To lack good faith is to subvert negotiation, and to perpetrate a fraud. The good faith negotiator must want to reach an agreement, and must be willing to follow the rules in obtaining the agreement. The bad faith negotiator uses the exchange of proposals to gain time, to obtain information to destroy his opponent's case in litigation, or for other reasons apart from the ostensible one of reaching an agreed settlement.

These rules create the familiar pattern of high demands and low offers, the distance between them diminishing with the passage of time in a reciprocated fashion. At some point it may become manifest to the negotiators that a settlement range exists, and thus that an agreement is possible, in which case the problem shifts from that of determining or creating a settlement range to that of determining a specific point of agreement within this range. This problem will be discussed below. On the other hand, a considerable separation of positions coupled with trivial concessions may make manifest the fact that a settlement range does not exist, and the claim will have to be litigated.

SOME TACTICS OF NEGOTIATION

Within the context of these four general rules, the "game" of negotiation proceeds with a variety of tactics. The tactics of negotiation have been variously labeled in the literature. I propose their division into the categories of proposals, rationalizations, threats, and commitments, to be illustrated by quotations from interviews and re-corded negotiations.

Proposals are offers of settlement, but they are more as well. They are intended as clues to the expectations of the proposer, and as indications of what further proposals may be expected. They must be interpreted in the light of the stage of negotiations and in the light of what proposals are already on the table:

The initial bargaining proposal is an information-seeking device. During the early stages of negotiation, each party, in addition to giving information about (and concealing) his preferences, is attempting to discover the true preferences of his opponent. In part, the negotiator will infer these preferences from his opponent's bargaining position. He will also infer these from his opponent's reaction to his own bargaining position.

Thus, the initial offer and demand in a bodily injury negotiation are seldom meant to be accepted by the other party. They are rather made almost entirely for their communicative value. The initial demand of $25,000, for example, is a way of saying, "I think this is a serious case, which deserves a settlement in the thousands and not in the hundreds of dollars." A following offer of $2,000 would be a way of communicating agreement on the more general principle, whereas an offer of $400 would most likely be meant and construed as a disagreement. The communicative function of proposals is also evident in the meanings attached to changes in them through the course of negotiation. An attorney reducing his demand from $25,000 to $15,000 and then to $14,500 is saying something different from one whose third proposal is $10,000.

The communicative function of proposals is amusingly illustrated in the following exchange, in which the lawyer was tacitly informed that his demand had been too low. His embarrassment was evident, yet he was prevented by Rule 3 above from retracting his offer, once made.

Lawyer: Well, I talked with Mrs. Jones, and she felt that around $600 would be all right. That would take into consideration some future minor doctor bills, etc. Since I'm not taking a fee and am being honest, that's the actual figure.

Adjuster: Golly, you don't think I can bring you down some? You know, that's what I'm supposed to do.

Lawyer: Well, I had considered starting at $700, but after talking with my friend at lunch I decided to be direct. I figured if you were at $310, that $600 would be the figure so why should we waste our time?

Adjuster: Well, I think that's a reasonable figure. That's why I'm not trying to bring you down. Since I can't bring you down I guess I can make out the check.

Lawyer: Well, isn't the settlement usually figured at three times the specials? [Specials are $310.]

Adjuster: No! That's a folk tale. Each case has to be fig-ured differently.

Lawyer: I see. Well, let me check with my client as to the $600 before you make out the check.

Rationalizations are tactics intended to legitimize proposals in the eyes of the opponents. The discussions that my students and I observed were most frequently focused around rationalizations. Each party was attempting to convince the other that general, mutually shared principles justified the contentions indicated by his proposals. Perhaps the principal issue in the majority of negotiations was whether the case ought to be considered routine or serious. The following example is excerpted from one such discussion:

Adjuster: We are looking at a hell of a lot of damages here for what may be a bruised hip as opposed, say, to a broken hip. * * *

Lawyer: She of course did not have a broken bone, but yet did complain quite bitterly, and she did everything short of surgery-that she would not go through. * * * Although you seem to feel that this $1000 in specials is a bit too high for what you are calling a bruise, as far as I'm concerned, my knowledge of this woman which is extensive-I've known her for many, many, many years, goes way, way, way back-from my own personal knowledge, this woman is not a complainer-just exactly the contrary. * * * As a comparison I've got an accident case where there is a broken hip and a rather severely broken hip in three or four places, if I remember rightly. That woman has healed up completely and she had no residuals, nothing, with the breaks. And here we have one where there are no breaks and yet she still has residuals and I believe her sincerely when she says, "It hurts; it bothers me." I don't call it a mere bruise.

Adjuster: I think about the only thing we have is a demonstration of tenderness and pain upon palpitation which seems to be compatible with the type of injury she has described.

The import of this distinction is that cases defined as routine are acknowledged by both sides to warrant a relatively small settlement, the amount arrived at implicitly through the use of a formula multiplier of the medical bills. Having obtained the concession that a case was routine, an adjuster would then argue, as in the case just cited, "How do the majority of people do this? In a rear-end accident they take the specials and multiply by four."

On the other hand, a case defined as serious would be further discussed in terms of previous settlements or of jury awards in similar cases, as well as the specific injuries and impairments, the peculiar characteristics of the parties, and other particulars relevant to the expected value in litigation.

The simplicity and clarity of the payoffs in the claims studied curtailed potential discussion of the value of various outcomes to the parties-a dollar given to the claimant was a dollar taken from the insurance company. However, there was considerable discussion of the potential costs involved in failure to agree, each side stressing the costs of the other. For instance:

We're only a thousand dollars apart. [To litigate you would have to] bring in four doctors and pay an arbitrator.

It is at this point that the issue of delay becomes a bargaining tool. Delay can be a threat when it is under the control of a party who proposes to use it deliberately, but some degree of delay is inevitable in the event of no agreement, and it will be cited to rationalize a proposal. It is more effective as an argument by the company, which is less harmed by delay, than as an argument by the claimant:

Lawyer: My client is greedy.

Adjuster: He'll be cured when he finds he has to wait five years. We have thousands of cases in suit. This is just one case additional. We have no aggravation. This is all part of our premium.

The threat is an attempt to change the opponent's expectations concerning the party's reactions to his choices. The party conveys the information that if the opponent chooses a particular course of action, the party will react in a way prejudicial to him. Variations upon this are the promise, a negative threat, and the warning, in which the undesirable consequences of the opponent's choice will come not from the party, but from a third person or an impersonal source, such as nature.

The principal threat used in bodily injury claims negotiations is to go to trial, thus forcing processing costs upon the threatened party. The threatener must obviously bear these costs as well, raising the problem of making the threat believable. This can be accomplished by the insurance company through rationalizations of the type appearing in the quotation just cited. The claimant's threat generally has to be supported by commitment tactics, which are explained below.

As mentioned previously, delay can also be threatened. Again, the consequences of this threat are clearly more harmful to the claimant than to the insurance company, and the latter can use the threat more effectively:

Now right here you can do one of two things. You can settle with me right now, and I'm going to consider this as three times your medical, or if you don't want to accept this you have a right to go further: seek what you may, wait a lot longer, have a lot of harassment, a lot of wonderment, a lot of complications, witnesses will die, people will move, and eventually you might get more.

If the above-mentioned threats are more useful to the insurance company than to the claimant, the claimant has unique access to the threat to manipulate the apparent loss by "building" the claim. The company's threat to take the case to trial may be met with:

> You know what the specials will be by that time! * * * You must understand that I cannot let a case like this lie fallow for five years. Then I would look stupid before the judge.

One adjuster's advice to a hypothetical claimant would be:

> I think I'd tell the fellow that I plan to want to see a neurological associate in here, and get some tests done, and you're going to get yourself X-rayed from head to foot, and so forth. There are a couple of doctors in town–you hate to throw in their names–and of course, if you knew them you'd be going to one of them.

The threat to "build" specials is effective to the extent that the claimant is not tied to a definitive version of costs. It is most useful to the claimant who has refused a statement to the adjuster, or whose statement recites, "I was injured but I have unknown injuries at this time."

An unusual example of a powerful threat by an adjuster capitalized on the special circumstances of the claimant. This is an unusual case, but it seems to be a good example of a tactic that could be very powerful in negotiation, yet useless in litigation:

> I tried to talk to a woman who was a colored gal on Public Assistance. * * * She had about 19 kids and no husband, and there I had something else to talk about because I threatened the attorney, threatened her, with the fact that: "You know where your recovery is going? Right to the Commonwealth! To offset my taxes. * * * I am serious. Let's not talk about the City and State, etc. Let's just get these things wrapped up here. Look at the specials. * * * And this is the way we closed that claim because I had a good file and * * * they would just as soon the State not know about the thing.

The commitment for negotiation purposes is a backing of a proposal, rationalization or threat by making a pledge to it of resources, reputation, or principle. In brief, commitment establishes credibility by making it more difficult to abandon a negotiation position. It works because both the committing party and his opponent know that the former has more to lose by a concession because of the commitment, and thus both know that he will not yield as easily.

Commitment to a proposal tends to turn the negotiation "game" into take-it-or-leave-it. The party seeks to limit the opponent's choice to agreement on the terms proposed or no agreement rather than the three-fold choice permitting further negotiation. This commitment will be used, for instance, when the party believes that his offer is regarded by the opponent as acceptable but not optimum. The commitment, if successful, constrains the opponent to accept a proposal that may barely exceed his resistance point. The commit-ting party may thus obtain agreement at his target.

Commitment to a rationalization converts the latter into a principle. This was observed with respect to the formula multiplier in certain cases. The "going rate" might be resisted by the claimant on the grounds that the case was not a routine one; this would be en-countered by a commitment to the formula, with an explanation such as,

"this case is not flesh and blood. It's paper! Its value is based on a market value to a bureaucracy."

Commitment to a threat makes it more credible, insuring that the threatener will fulfill his threat even though it would otherwise be patently to his disadvantage, as in the case of the threat to "blow us both up." The threat to go to trial often requires a commitment, particularly for the claimant: filing suit papers, taking depositions, and other more or less costly pre-trial procedures are assumed not only for their manifest purposes, but because they demonstrate commitment.

The commitment is potentially a very powerful negotiation technique, but it possesses very powerful disadvantages. Among these is the fact that at times it will be necessary to withdraw from a commitment, particularly when the commitment is to a threat that is detrimental to the interests of the threatener, when the threat has failed to secure the action it was intended to elicit. To withdraw involves a loss, not only to the principle that was committed, but to the total bargaining reputation of the negotiator. Moreover, a strong commitment exacerbates this problem, but a weak commitment is less effective in obtaining the desired action from the opponent. Another problem in the liberal use of commitment is that it poisons the atmosphere of negotiation through suggesting hostility and bad faith. Moreover, commitment tactics involve the risk of simultaneous commitment of the parties to incompatible positions, which is likely not only to ruin the chances of agreement, but to force the parties to incur the additional costs of fulfilling threats that cause mutual harm or to suffer the weakening of bargaining reputations consequent on abandoning commitments.

The commitments observed in bodily injury claims negotiation tended to be weak and therefore easily abandoned, but of only marginal effectiveness in negotiation. The commitments most frequently observed consisted of invoking dependence on clients or supervisors who were alleged to be uncooperative or irrational. The following recitals are typical:

Oh, very many times you call an attorney to offer $l,000 and he wants you to wait until he calls his client. He calls the client and he can't accept it because the client wants him to get $1,200. Normally, an attorney who has the case under control knows how much he can settle the case for when the case is ready for settlement. He doesn't have to call his client because if you have the case under control you can tell your client, "That is the best I can do; I recommend you to settle it," and normally the client will go along with you.

I had a case that he started at $7,500 on, and I was sticking at $1,500, and [Home Office] was screaming to settle it. I met him on a Friday afternoon and said, "Let's settle this case." He said, "I'm going on vacation and I need some money." I said, "Well, I offered you 1,500. I discussed it with our attorney and he said, 'If you pay a nickel over $2,000 I'll kill you.'" He said, "And what will you settle it for?" I said $2,000 and the next 13 minutes he said, "I'll take it," on the street by the parking meter.

PURE BARGAINING IN BODILY INJURY CLAIMS NEGOTIATION

It was mentioned above that the formation of a settlement range is a necessary condition for a negotiated agreement, but that it is not sufficient. A settlement must be not for a range of amounts, but for a specific sum. This presents the problem of pure bargaining. In Schelling's words:

> There is some range of alternative outcomes in which any point is better for both sides than no agreement at all. To insist on any such point is pure bargaining, since one would take less rather than reach no agreement at all, and since one always can recede if retreat proves necessary to agreement. Yet if both parties are aware of the limits to this range, any outcome is a point from which at least one party.