

1981

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Recommended Citation

Randal R. Craft Jr., *Factors Influencing Settlement of Personal Injury and Death Claims in Aircraft Accident Litigation (Including Occasionally Disputatious Views of Excessive Fees, Unnecessary Delays, Unreliable Advice to Clients, and Other Regrettable Improprieties)*, 46 J. AIR L. & COM. 895 (1981)
<https://scholar.smu.edu/jalc/vol46/iss4/3>

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FACTORS INFLUENCING SETTLEMENT OF PERSONAL INJURY AND DEATH CLAIMS IN AIRCRAFT ACCIDENT LITIGATION

(Including occasionally disputatious views of excessive fees,
unnecessary delays, unreliable advice to clients, and
other regrettable improprieties)

RANDAL R. CRAFT, JR.*

[On the bulletin board in Drew's first-grade classroom, the] teacher had written "I wish I could be a grownup so I could" The children had drawn fanciful pictures illustrating such adult pleasures as "so I could eat all the ice cream I want before supper" or "so I could watch Saturday Night Live." It took me a minute to find Drew's picture. He had drawn a drab stick-figure man dressed in a black suit with a large brown square hooked onto his left hand. The caption: "so I could settle cases."¹

UNLESS YOU were a lawyer's child you probably had no idea how much of a lawyer's time is spent dealing with settlement issues. In imagining what it would be like once we achieved our goal of becoming lawyers, few of us spent time thinking about the settlement of cases. Many different things may have inspired us to study law, but it is doubtful that any of our sources of inspiration, certainly not the popular television programs, ever had anything to say about compromising claims.

Our law schools were no help, either. We spent our time talking about the evolution of the law, virtually all of which was reflected in statutes and, predominantly, final court decisions that naturally contained no references to settlement. Our professors never discussed, and we never considered, how the claims in those cases

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¹ Mackintosh, *True Confessions of Fathers and Sons*, TEXAS MONTHLY, Dec. 1980, 190, 192 (italics added).

might have been compromised or how thousands of similar cases might have been settled amicably. Only a few of us were taught how to litigate, and no one ever received any guidance on when or how to negotiate settlements. Even in the unlikely event that our professors would have known what they were talking about in this regard, we probably still would not have been very receptive to such instruction; we did not see ourselves as going to law school in order to learn how to settle cases.

The fact of the matter is that settlement issues command a substantial portion of an aviation lawyer's time. Nevertheless, not too differently from law school, there is still relatively little discussion, either in law journals or seminars, about settlement procedures, settlement strategies, and so forth. The problem is that there is not much that a writer or speaker can say on this subject that will be particularly meaningful to experienced attorneys. There are, however, some things that need to be said about a few of the factors influencing settlements in air crash and other mass-disaster cases.

No one can describe all the factors because settlements are contingent upon peculiar preferences, circumstances, and necessities, and they reflect the everyday experiences of markets, politics, statecraft, and personal relations.² Furthermore, even the factors chosen for discussion must be treated in a truncated fashion, so what are presented here are some very limited personal observations, many of which will be painfully prosaic and a few of which will be at least a bit controversial.

I. THE TENERIFE EXPERIENCE

Whether it is reflected in their own direct involvement or in the activities of their attorneys, in recent years aviation underwriters have been taking a different approach to settling claims, and that approach is perhaps best exemplified by the handling of the claims arising out of the collision between a KLM Boeing 747 and a Pan American Boeing 747 on the runway at Tenerife, in the Canary

² Coons, *Compromise as Precise Justice*, 68 CAL. L. REV. 250, 251 (1980). For an esoteric analysis of the societal norms that play a role in "bargained" settlements, see Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 638-39 (1976), which sees the outcome of negotiations as being "heavily determined by the principles, rules, and precedents that the parties invoke" rather than by mere "power, horse-trading, threat, and bluff."

Islands on March 27, 1977. This was not the legendary hypothetical collision of 747's over third base at Yankee Stadium on Bat Day (which would produce many more injuries than a similar collision on Helmet Day, when helmets, not bats, are distributed to younger fans), but the casualties were almost twice those of the next largest accident, the Turkish Airlines DC-10 crash in Paris on March 3, 1974. The airline underwriters and lawyers (this writer was one of the lead counsel for Pan American) were quite pleased with the outcome of that litigation, and in subsequent major crash cases defendants' underwriters and lawyers have frequently looked to the Tenerife case as a guide to how those cases should be handled. The Tenerife outcome has also had a significant effect on the way plaintiffs' attorneys handle their cases. Some have suggested that the facts of the Tenerife case were unique and that it is unlikely that defendants' approach in Tenerife can be successfully used in other major air crash cases. For the most part, this suggestion is probably wishful thinking; at any rate, the fact remains that this approach has definitely altered the face of aviation litigation in this country.

In general, what has come to be known as the Tenerife approach involves efforts by defendants to settle cases at the earliest possible moment,³ with full-dollar offers not constrained by most potential defenses such as limitations on liability. Claimants need not wait for reasonable compensation, and that compensation need not be diminished significantly by contingent fees paid to their attorneys. The Tenerife approach is designed so that, even if claimants might later get higher awards or offers, the claimants will probably net more by settling early. The Tenerife approach may also involve a reduction in the work done by high-priced defense lawyers, at least until it is obvious that litigation is inevitable.⁴ However, because underwriters cannot accurately predict the roles of potential co-defendants and third-party defendants, it is very dangerous to

³ The perception of the benefits of early settlement is, of course, not new. See, e.g., Snow, *Discussion by Home Office Counsel [of Evaluation of a Personal Injury Case for Settlement Purposes]*, 23 INS. COUNSEL J. 281, 282-83 (1956).

⁴ As of October 1978, the defense costs for the Turkish Airlines' McDonnell Douglas DC-10 accident litigation came to \$17,000 per person, about 500% more than the Tenerife defense costs, which had averaged \$3,500 per claim at that point. Brevetti, *Defendants Will Save Money by Cooperating to Pay Claims*, J. COMM., Oct. 6, 1978, at 2, col. 1 (quoting John Hewitt).

postpone the intensive efforts of defense counsel to prepare for litigation; those efforts should begin immediately following any major accident, rather than after the fat is in the fire.

II. GATHERING INFORMATION; CONTACTING THE CLAIMANTS

Early settlement offers must be based upon early information, and underwriters begin gathering this information immediately after the accident. The airlines' underwriters arrive at the accident site as soon as possible in order to assist the airline and the passengers or their families. While they are helping with the more obvious problems involved in a mass disaster, underwriters usually learn some basic personal information about the passengers and their families. In the weeks that follow, this information is supplemented during other contacts with the passengers or their families.

Also beginning immediately after the accident is an effort by underwriters' attorneys to determine what laws will be applicable to the potential claims and how claimant's damages will be measured under those laws. There may also be research into liability issues of particular interest. Another inquiry affecting both damages and liability is the question of whether international conventions are applicable to the accident or to the potential claims. Ultimately, underwriters in the Tenerife case decided that their settlement offers would be based on the law of the domiciles of the passengers. In addition, even though willful misconduct claims were not a serious threat, the involvement of two different airlines in this accident⁵ helped the airline underwriters to decide that their settlement offers would not be constrained by the limitations of liability of the Warsaw Convention⁶ as modified by the Montreal Agreement.⁷ In cases where these limits of liability stand less chance of being skirted, airline underwriters may not necessarily follow the Tenerife approach. However, in recognition of the controversy

⁵ In a collision between airplanes of different airlines, there is some doubt whether either airline's liability limitations are applicable to claims made by passengers who were on the other airline's airplane. See *Scarf v. Trans World Airlines, Inc.*, 4 Av. Cas. 17,795, 17,796 (CCH) (S.D.N.Y. 1955) (dicta).

⁶ Convention for the Unification of Certain Rules Relating to International Transportation by Air [the "Warsaw Convention"], opened for signature October 12, 1929, 49 Stat. 3000; T.S. No. 876 (1934).

⁷ Agreement Relating to Liability Limitations of the Warsaw Convention And The Hague Protocol, CAB Order No. E-23680, 31 Fed. Reg. 7,302 (1966), approving Agreement CAB 18,900.

over the conversion rate for the Warsaw limitation, from "gold" francs into United States currency,⁸ settlement offers may still exceed \$75,000.

Full-dollar settlement offers are based on assessments of what the claimants would likely be awarded at trials of damage issues alone. There is to be no discounting based on the earliness of the offers. Of course, neither the trial awards nor the settlement offers make any provision for fees charged by plaintiffs' attorneys. Accordingly, in the Tenerife case, Robert L. Alpert, Esq., Senior Vice President of United States Aviation Underwriters, Inc., wrote directly to the surviving passengers and other potential claimants to suggest that underwriters be given the opportunity to evaluate information supporting the claimants' damage claims and make appropriate settlement offers. He suggested further that the claimants should turn initially to their family lawyers or other lawyers paid by the hour, rather than contingency fee lawyers, for advice concerning the appropriateness of these settlement offers. Coming as it did during what one aviation plaintiffs' attorney has (jokingly?) called "the all-important solicitation phase of the case," the Alpert letter caused a great uproar. A number of aviation plaintiffs' attorneys feel strongly that this letter, which has also been used in subsequent cases, is improper.⁹ Nevertheless, the use of such letters in aviation and other cases will probably increase.¹⁰ Despite the attacks on the letter, it seems to have survived relatively intact. No court or bar association has censured the letter or directed that it not be sent.¹¹

One plaintiff's attorney's complaint about underwriters' early communications with claimants is that the claimants who do not

⁸ See generally Martin, *After 50 Years of the Warsaw Convention—What Next?*, AEROSPACE, March 1980, 14, at 18. For recent contributions to this controversy, see *Kinney Shoe Corp. v. Alitalia Airlines*, 15 Av. Cas. 18,509, 18,513, n.9 (S.D.N.Y. 1980), and the recently released CAB staff internal memorandum reprinted in *LAWYER—PILOTS B. ASSOC. J.*, Sept.—Oct. 1980, at 31.

⁹ For one dialogue on this letter, see *THE FUTURE OF AVIATION TORT LAW*, transcript of Proceedings of the Association of Trial Lawyers of America, Monaco (Feb. 8, 1978).

¹⁰ *Id.*

¹¹ See generally *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 476 F. Supp. 445, 450 n.7 (J.P.M.D.L. 1979). See also *Erhardt v. Prudential Group, Inc.*, 629 F.2d 843 (2d Cir. 1980) (Defendant's president sent letter to plaintiff class members informing them of their potential liability for attorneys' fees).

accept early offers right away are ultimately harder to deal with. These communications have led such claimants to conclude that they will have no problem recovering damages from the defendants and that the amount will naturally be substantially higher than the underwriters were willing to offer initially. Having reached this conclusion on the basis of their own personal contact with defendants' underwriters, the claimants are not easily persuaded by their attorneys to modify their expectations.

III. THE INITIAL ROLE OF PLAINTIFFS' ATTORNEYS

Needless to say, underwriters are not the only people in contact with potential claimants following an airplane crash. Without engaging in any supposition about the manner and extent to which attorneys might directly approach potential plaintiffs about being retained, it is clear that there are ways of indirectly informing passengers and their families that other claimants have already retained attorneys to prosecute their claims. While advertising is now a possible avenue, claimants are more often informed through newspaper reports about newly filed actions arising out of the accident. The reports describe the plaintiffs and may even have a comment or two from their attorney, but the emphasis of almost every such report is on the *ad damnum*. Reading such an article, unsophisticated claimants, who assume that the amount claimed has something to do with the amounts that may be recovered, are likely to be disappointed by the settlement offers being proffered by underwriters. These claimants may even contact the attorney mentioned in the article about representing them. Another reason why some plaintiffs' attorneys file their actions so soon is the potential effect that the venue of the actions may have on the venue selected for multidistrict litigation by the Judicial Panel on Multidistrict Litigation.¹³ In any event, a plaintiffs' attorney with more than a few cases will seldom contact the defendants' attorney or underwriters prior to filing these cases in court, or even prior to the selection of the plaintiffs' committee in the multidistrict litigation.

¹³ As noted later, actions instituted in various federal district courts may be consolidated by the Judicial Panel on Multidistrict Litigation and transferred to a single district for discovery and other pretrial proceedings pursuant to 28 U.S.C. § 1407 (1976).

Taking these ideas a step further, a few plaintiffs' attorneys file class actions for enormous sums as soon as they can get to the courthouse. It is clear that such actions will not be permitted in air crash disasters,¹³ but that does not prevent a plaintiffs' attorney from raising the issue again and, more important, publicizing to the world that he claims to be representing all of the potential claimants. Reading about this, some of these claimants may then contact the attorney, who will no doubt take steps to solidify the relationship. The other potential claimants may not contact the attorney, but this can also work to the attorney's advantage, for he can subsequently argue, when the class action is dismissed, as it will almost certainly be, that all potential claimants should be notified of the dismissal so that the claimants can then make individual arrangements to prosecute their claims. The full effect of this kind of situation is unclear, but the resulting confusion certainly does not help the passengers and their families.

Whether they be family attorneys or aviation specialists, once attorneys have been retained by the plaintiffs, the underwriters and defense counsel necessarily deal with them in seeking to obtain the information required to formulate settlement offers. Frequently, the plaintiffs' attorneys will submit attractive settlement brochures describing in some detail the claimed damages and providing descriptions and photographs of the passengers and their families. These often overblown brochures may give a more complete view of the claimants' situation, but at least some underwriters would prefer a short letter supporting the plaintiffs' demands with documented facts about the income, health, marital history, dependents, etc. Tax returns are particularly helpful; if they are temporarily unavailable, letters from employers may suffice. Any lawyer worth his salt (or at least worth his fee) should be able in almost every case to provide such information to the underwriters within sixty to ninety days after being retained. If too much of that time is spent preparing a shiny settlement brochure, then submission of the significant information is delayed. It should be noted, though, that preparation of these brochures is

¹³ See e.g., *McDonnell Douglas Corp. v. United States District Court for Central District of California*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *McClintock v. Pan American World Airways, Inc.*, No. 77 Civ. 4092 (S.D.N.Y., filed Jan. 16, 1978); *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500 (E.D.N.Y. 1975).

helpful to the plaintiffs' attorneys in that it gets them started in gathering information, photographs, and documents that will be needed later if the cases are not settled. Perhaps more important, the brochure itself makes a nice product to show to the claimants as some evidence of what is being done on their behalf. Although it is not necessarily relevant, in death cases these brochures tell what wonderful persons the decedents were, and decedents' representatives are naturally very appreciative and approving.

IV. SETTING UP FUNDS AND MAKING OFFERS

In some cases offers cannot be made until after depositions or medical examinations of the claimants, but in most uncomplicated cases once the basic information is received the underwriters and their counsel are in a position to respond fairly quickly with full-dollar offers. Again, these offers do not take into account fees to be paid to claimants' attorneys. Concomitantly, offers to claimants who are not represented by attorneys should not be lower than offers made to claimants in similar cases who are represented by attorneys.

These early settlement efforts have to be backed up by the money to pay the agreed settlement figures, and the defendants' underwriters try to set up funds for settling the passenger cases. The underwriters contribute to the settlement funds in accordance with their early and very rough assessment of who has the most to lose if the cases are not settled. Agreements as to funding settlement "pots" and, later, as to ultimate responsibility among defendants, are in some cases made much easier by overlapping insurance coverage. It is not unusual in multi-defendant air crash cases to find that two or more defendants have some of the same underwriters. The percentages of coverage may vary in such cases, but underwriters are obviously not anxious to have their insureds involved in expensive fights when the same underwriters are on both sides of the fence or, switching metaphors, when the outcome would simply move money from one pocket to another in the same pair of pants.

Of course, the percentage allocations of contributions to a settlement fund are not set in concrete, and the defendants reserve their rights as against each other. However, such allocations may in fact not be changed, and some insureds who are concerned about

the potential effect on their future premiums have asked to be more involved in the decision-making process that establishes the initial allocations. These insureds have asked that their underwriters not enter into funding agreements without consulting them, and they have further inquired about formalizing the decision-making process by means of a policy clause providing machinery for arbitration of any dispute between underwriters and their insureds over the proposed agreements. Underwriters recognize the need to consult with their insureds on such matters, but they are reluctant to make these matters dependent upon procedures that could delay the agreements and thereby destroy their utility. Moreover, underwriters consider this entire approach to be in its formative stage, so they also believe that formalizing the process at this time would be premature.

In any event, there is widespread recognition that fights among defendants about responsibility for settlements would cost a great deal and would involve great delay before issues of responsibility are resolved. The delay alone would probably increase the difficulty of reaching settlements, and defendants' attacks on each other would probably add fuel to litigation fires.

(This paper does not include any discussion of the especially relevant topic of individual agreements and settlements between a plaintiff and less than all of the defendants in the action. Whether these are secret "Mary Carter"¹⁴ agreements or open, fully consummated settlements, their ramifications (not to mention their legitimacy) are complex and are dependent upon state law, so this broad topic is beyond the scope of this paper.)

Successfully pursuing the Tenerife approach to early settlements requires, in those cases where the underwriters are not handling these efforts directly, that the underwriters' legal counsel be ready, willing, and able to do what is necessary. This is particularly important in multi-defendant cases and in cases where a single defendant is represented by more than one firm, for one recalcitrant

¹⁴ A Mary Carter Agreement is a secret agreement entered into by the plaintiff and less than all of the defendants that guarantees the plaintiff a minimum recovery regardless of the trial's outcome, fixes each agreeing defendants' liability in an inverse proportion to the liability of the non-agreeing defendant, and requires the continued participation at trial of the agreeing defendants. Note, *Gallagher Covenants, Mary Carter Agreements, and Loan Receipt Agreements: Unsettling Contributions to Conflict Resolution*, 1977 ABIZ. ST. L.J. 117, 120-22.

or reluctant defendants' counsel can undermine the entire approach if he does not understand it, does not have the authority to take the appropriate steps, or does not take those steps with due diligence and promptness.

On this point, it is interesting to consider how the Federal Government will respond to a request that it join in a Tenerife approach to a case in which the Federal Government will be a primary defendant. The Federal Government does not hurry to accept its share of the responsibility, even when the facts are relatively clear. Government attorneys have traditionally wanted to wait, if not for dispositive depositions, at least for the National Transportation Safety Board report, even though such reports are concerned more with safety than with fault or legal responsibility. Those reports and depositions give Government attorneys and their superiors something official and tangible to hang their hats on, and thereby they avoid having to take the responsibility and the risk of making an early decision themselves. In addition, the Justice Department requires many levels of approval, and at each level there may be problems caused by political concerns, inexperience (resulting from rapid turnover of personnel), or simple uneasiness in dealing with the staggering amounts of money being paid out while nothing is being received in return. In cases involving Air Traffic Control (ATC) responsibility, the Federal Aviation Administration, which does not have control of the litigation, may also have a deleterious influence on the Justice Department's appraisal of the situation. The FAA often seems to ignore the concept of joint proximate cause, and it is quick to conclude that the accident was caused solely by the pilot and not at all by ATC.

In the cases arising out of the San Diego mid-air collision on September 25, 1978,¹⁵ the Government initially declined to participate in a settlement fund. When it finally agreed to contribute an acceptable percentage to the settlements, it adopted the inefficient procedure of issuing, as each settlement occurred, a separate check for its percentage contribution. It remains to be seen whether the Federal Government will be sufficiently enlightened or will have a sufficiently responsive mechanism to participate fully in a Tenerife approach, especially when it comes to the early establish-

¹⁵ NATIONAL TRANS. SAFETY BOARD, Report NTSB-AAR-79-5 (April 20, 1979).

ment of allocations for a settlement fund among various potential defendants.

V. MULTIDISTRICT LITIGATION; NARROWING THE ISSUES

In Tenerife the early settlement efforts by underwriters worked quite well, and there were only 160 actions filed by or on behalf of Pan American passengers and crew. In addition, about thirty actions were filed in the United States by KLM passengers and crew. The vast majority of the plaintiffs sued in federal courts, mostly in California, and the Judicial Panel on Multidistrict Litigation consolidated these federal actions for discovery and other pre-trial proceedings before the Honorable Robert J. Ward, in the Southern District of New York.¹⁶ California plaintiffs' attorneys objected strenuously to the New York location, and even moved for reargument, which motion was denied. Most of these attorneys appeared at the first pre-trial conference, but thereafter fewer and fewer attorneys appeared for the conferences before Judge Ward. These attorneys were represented by a plaintiffs' committee, which in turn was generally represented by the Chairman of the Committee, Chuck Krause. (One has to wonder if the distant location of these proceedings discouraged unnecessary controversy and unnecessary expenses and thereby helped eliminate some potential obstacles to amicable settlements.)

Of course, settlement efforts continued, and their progress was advanced by the defendants' proposal of a stipulation under which, *inter alia*, they would agree not to contest liability for compensatory damages and the plaintiffs would agree to withdraw all claims of punitive damages. The stipulation was signed by the plaintiffs' attorneys in virtually all of the unsettled cases, and it did not thereafter prove to be a source of any great controversy except for the question of whether defendants had, by means of the stipulation, waived their defenses that certain plaintiffs were improper parties and that certain claims (*e.g.*, employers' claims) were improper. Since he was present at the genesis and evolution of this stipulation, Judge Ward was able to dispose of these controversies rather easily, holding that such defenses had not been

¹⁶ In re Air Crash Disaster at Tenerife, Canary Islands, on March 27, 1977, 435 F. Supp. 927 (J.P.M.D.L. 1977).

waived in the stipulation.¹⁷ In order to avoid such controversies, the so-called no-contest stipulations used in subsequent crash litigation have been clarified. The plaintiffs' attorneys have also revised their approach to such stipulations, as indicated below.

In responding to the summons and complaints that initiated the litigation, defense counsel served and filed (in addition to answers) requests for production of documents, notices of depositions, and two sets of interrogatories. One set of interrogatories was a typical long-form set designed to obtain detailed information that would be necessary if a settlement was not forthcoming. The second set of interrogatories was a short-form set designed to elicit certain minimal information to be relied upon in making or revising settlement offers. Nevertheless, there was a great deal of difficulty in getting responses from some plaintiffs' attorneys even to the short-form interrogatories. It also frequently was difficult to arrange depositions of the plaintiffs. And when depositions were taken, many times the plaintiffs (especially the widows) did not have a sufficient background to be able to testify about certain basic matters, such as income history. Examinations of the surviving passengers by defendants' physicians were also requested; although in that arena delays were sometimes the result of the physician's own scheduling problems, there often was difficulty getting the passengers' medical records at an early date. It is plain that, if they are to be fair to their clients, attorneys have to do a much better job of responding in a timely fashion to early discovery requests. If there is going to be a settlement, the earlier the plaintiffs get their money, the better. Furthermore, early settlement may avoid unnecessary subsequent fees and expenses that might adversely influence settlement decisions.

Since some attorneys do not quite see it this way, one of the first items of business for the judge to whom multidistrict litigation is assigned is to be sure that the damage discovery is completed as soon as possible, particularly where liability is unlikely to be an issue. Usually this plaintiff's damage discovery allows the defendants and their underwriters to understand better the basis of the plaintiffs' claims. Moreover, sometimes such damage discovery

¹⁷ *Bowen v. Pan American World Airways, Inc.*, 474 F. Supp. 563, 566-67 (S.D.N.Y. 1979); *Vogel v. Pan American World Airways, Inc.*, 450 F. Supp. 224, 227 (S.D.N.Y. 1978).

is beneficial to the defendants also because it may bring to the attention of the plaintiffs' attorneys for the first time the weaknesses in the plaintiffs' claims.

Discovery controversies in the Tenerife litigation were dealt with quite promptly. Controversies about substantive issues were treated equally promptly. Pending motions did not linger, much less fester, and Judge Ward did not make it easy on himself by applying some preconceived philosophy as a shortcut to decisions on the merits. Less critical issues that could be clearly delineated were frequently decided without the need for a motion. On more important issues, the motions were fully briefed and were almost always accompanied by meaningful oral argument. Choice of law issues were treated this way, and with respect to plaintiffs' damage claims Judge Ward concluded that the law of the State where each passenger was domiciled would be applied.¹⁸ Then, using that law, Judge Ward dealt with questions concerning pre-death pain and suffering, plaintiffs' standing, and related matters.¹⁹

As you might imagine, after an airplane accident, potential claimants seem to come out of the woodwork. In some cases there are competing plaintiffs, and the legitimacy of their claims cannot be determined without a trial. Settlements are much more difficult to complete in such situations. The first step is to consolidate the claims into a single action and then to try to arrange a kind of informal interpleader whereby all of the competing plaintiffs in that action agree to the total settlement figure, which they will then fight over among themselves without the defendants' remaining in the case.

In situations where it is obvious that one or more of the competing plaintiffs do not have standing under the applicable law, it may be simpler to move to dismiss those actions. This was

¹⁸ See, e.g., *Bouvy-Loggers v. Pan American World Airways, Inc.*, 15 Av. Cas. 17,153, 17,156, n.3 (CCH) (S.D.N.Y. 1978); *Vogel v. Pan American World Airways, Inc.*, 450 F. Supp. 224, 225 (S.D.N.Y. 1978); Transcript of Hearing, January 13, 1978, at 93, *In re Multidistrict Litigation v. KLM Royal Dutch Airlines, et. al.* (M-11-306).

¹⁹ See, e.g., *Bowen v. Pan American World Airways, Inc.*, 474 F. Supp. 563 (S.D.N.Y. 1979) (standing); *Hohner v. KLM Airlines, Inc.*, No. 78 Civ. 2027 (S.D.N.Y. Dec. 13, 1978) (standing); *Weller v. Pan American World Airways, Inc.*, No. 78 Civ. 256 (S.D.N.Y. Nov. 17, 1978) (pre-death pain and suffering); *Vogel v. Pan American World Airways, Inc.*, 450 F. Supp. 224 (S.D.N.Y. 1978) (standing).

done in a number of cases in Tenerife.²⁰ Once again, Judge Ward did not hesitate to apply the law as he understood it, and resolution of these questions cleared the air and made it possible to focus on the legitimate claims of the proper plaintiffs. (Perhaps the most interesting of all of the Tenerife allegations was that a deceased passenger's twin sister in California had, through the process of extra-sensory empathy, suffered severe pain at the very moment her sister was involved in the accident in the Canary Islands. This was one of the claims that was dismissed.²¹)

When claims are baseless or when the parties are improper, there is naturally a temptation to settle them for small amounts and get rid of them. Defendants should do this only when the claims themselves *sound* legitimate. Defendants should not consider settling a case, even for its nuisance value, when it will be obvious for all to see that the defendants are paying when they are not liable. An extreme example is the case where a major airline was sued by a plaintiff for allegedly putting an invisible powder on the food it served her, that caused her hemorrhoids. It took two trials and an appeal, all of which the airline won, not to mention numerous court appearances, before the case was over. The fees and expenses were inordinately expensive, but settlement could not be considered as an option. A report in the newspaper that such a case had been settled would cause readers to assume either that the claims were well-founded or, worse still, that the claims were groundless but that the airline paid nevertheless. Every nut in town would soon be suing.

VI. FORUM NON CONVENIENS

Getting back to the discussion of Tenerife, the motion that created the most interest and, even to this date, the most controversy was Pan American's motion to dismiss an action by a Dutch plaintiff.²² This and other Dutch plaintiffs, who were on the KLM air-

²⁰ See, e.g., *Bowen v. Pan American World Airways, Inc.*, 474 F. Supp. 563 (S.D.N.Y. 1979); *Vogel v. Pan American World Airways, Inc.*, 450 F. Supp. 224 (S.D.N.Y. 1978).

²¹ *Burke v. Pan American World Airways, Inc.*, 484 F. Supp. 850 (S.D.N.Y. 1980).

²² *Bouvy-Loggers v. Pan American World Airways, Inc.*, 15 Av. Cas. 17,153 (CCH) (S.D.N.Y. 1978).

craft but who were unable to sue KLM in the United States (primarily because of the constraints of Article 28 of the Warsaw Convention), sued Pan American in New York and California. There were some American attorneys who had yet-unfiled cases on behalf of other Dutch plaintiffs. When liability was no longer at issue, the only remaining issues related to the measure of damages, and all of these issues were going to be decided according to Dutch law, based upon the testimony of Dutch witnesses and on Dutch records. Accordingly, Pan American moved to dismiss the lead Dutch action by plaintiff Bouvy-Loggers on the ground of *forum non conveniens*, which motion was granted.²³ The success of that motion had an enormous effect on the settlement of the KLM passenger cases. Interestingly, some plaintiffs' attorneys have recently suggested that the decision was somehow of no importance and should not be given any particular recognition because it was not published as a final decision in the Federal Supplement.²⁴ But the decision was not published in the Federal Supplement because of a maneuver by Bouvy-Loggers' own attorneys, who, after the decision was rendered, moved for reargument, evidently in the hope that they could undermine the value of the decision as a precedent. The chief assertion was that plaintiff's attorneys had signed the no-contest stipulation only as a result of having been led down the garden path by defendants' attorneys. In accordance with his usual inclination to allow the attorneys to present their arguments as fully as they desired, Judge Ward entertained the motion for reargument, but after completion of the oral presentations, the plaintiff's attorney accepted the settlement offer made prior to the motion for reargument. Moreover, all of the other Dutch cases in the United States also settled quickly on the basis of the then-pending offers (or very close thereto), and none of the Dutch claimants' attorneys sought to raise the issue again before Judge Ward. Judge Ward has never indicated any doubt about the correctness of the consideration of the *forum non conveniens* factors in his decision, which Lee Kreindler called the "Tenerife Bombshell,"²⁵ and the correctness of that decision was sufficiently obvious that all plaintiffs' attorneys decided

²³ *Id.*

²⁴ See, e. g., Kreindler, *Foreign Plaintiffs*, N.Y.L.J., Aug. 15, 1980, at 1, col. 1.

²⁵ Kreindler, *Tenerife Bombshell*, N.Y.L.J., April 21, 1978, at 1, col. 1.

to settle their Dutch cases rather than pursue the issue further.

The issue has been pursued in other cases, with varying results subject to differences of interpretation,²⁶ but it is certainly clear that, absent special circumstances, foreign plaintiffs cannot count on being able to maintain their claims in the United States. Obviously, this will be a major, if not overriding, factor in negotiating settlements of such claims, for it is doubtful that the courts or the legislatures, much less the Reagan Administration, will agree with Stu Speiser's belief: "that we should use American justice as a good will generator and provide enough judges and courtrooms so that anyone who needs our courts in order to achieve justice can have access to them. I cannot think of any better way to spend the taxpayer's money."²⁷

The United States' treatment of this issue will probably not depend upon the views expressed overseas.²⁸ Nor will it depend upon the levels or elements of damages allowed overseas, though these factors may have another effect. For example, most European airlines have increased their liability limits, and the United Kingdom's airlines, by special contract effective April 1, 1981, have increased their limit to approximately \$125,000 per passenger.²⁹ These and subsequent increases, as well as more intense use of the Tenerife approach in Europe, may for some claimants make it less attractive to sue in the United States, where their recovery will be diminished by the expenses and sizeable contingency fees of American attorneys.

VII. PUNITIVE DAMAGES

Another major issue to be dealt with as early as possible is the law to be applied to any claims for punitive damages. Very early on, Judge Ward expressed the tentative position that the

²⁶ Two recent decisions to be compared are *Pain v. United Technologies Corp.*, 637 F.2d 775 (D.C. Cir. 1980), and *Aboujdid v. Gulf Aviation Co.*, 108 Misc. 2d 175, 437 N.Y.S.2d 219 (N.Y. Co. 1980).

²⁷ S. SPEISER, *LAWUIT* 490 (1980).

²⁸ See generally Martin, *Recent Trends in International Aviation Accident Litigation—A Practical View*, 5 *ANNALS OF AIR LAW & SPACE LAW* 189 (1980).

²⁹ See Passenger Rules Tariff No. PR-3, CAB No. 55: Rule 25(D)(1)(a)(ii), 34th revision, p. 54, March 23, 1981, applicable to British Caledonian Airways, Ltd.; Rule 25(D)(1)(a)(ii), 35th revision, p. 54, March 31, 1981, applicable to British Airways.

issue of punitive damages would be determined with reference to the law of New York regarding Pan American, and with reference to the law of the Netherlands regarding KLM.³⁰ Since neither of these laws permitted punitive damages, and since the circumstances of the accident did not seem to reflect the kind of outrageous conduct necessary to support punitive damages, plaintiffs' attorneys generally felt that there was little hope of obtaining punitive damages in that litigation. Therefore, they were quite willing to give up punitive damage claims in exchange for the defendants' agreement not to contest liability for compensatory damages.³¹ Somewhat later, however, questions arose concerning claims for the deaths of passengers from states that permitted punitive damages as part of a compensatory-type wrongful death statute.³² In these cases, the no-contest stipulation was not executed. With respect to a Massachusetts case, Judge Ward concluded that the wrongful death statute did not apply with regard to the punitive damage issue and that the applicable law would be that of the Netherlands, the domicile of KLM.³³ Later, in a California case, Judge Ward concluded that a California court would apply the law of Spain (the place of the accident) or the law of the Netherlands (the domicile of KLM) to the issue of punitive damages.³⁴

In the Chicago DC-10 litigation, the District Court determined the sufficiency of punitive damage claims against the defendants by referring to each respective defendant's principal place of business at the time of the accident.³⁵ On an expedited appeal, the Seventh Circuit Court of Appeals analyzed, in addition, the laws of the states where the alleged wrongdoing occurred and the laws of the state where the disaster took place. The ultimate conclusion

³⁰ Transcript of Hearing, January 13, 1978, at 77-79, *In re Multidistrict Litigation v. KLM Royal Dutch Airlines, et al.* (M-11-306).

³¹ Of course, now it is clear that in wrongful death cases California does not permit recovery of punitive damages. *In re Paris Air Crash*, 622 F.2d 1315, 1317 (9th Cir.), *cert. denied*, 449 U.S. 976 (1980).

³² *Sibley v. KLM-Royal Dutch Airlines*, 454 F. Supp. 425, 428-29 (S.D.N.Y. 1978).

³³ *Id.*

³⁴ *Jackson v. KLM-Royal Dutch Airlines*, 459 F. Supp. 953, 956 (S.D.N.Y. 1978).

³⁵ *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 500 F. Supp. 1044 (N.D. Ill. 1980), *rev'd in part and aff'd in part*, 644 F.2d 594 (7th Cir. 1981).

was that the applicable state law did not permit punitive damages against either the manufacturer or the airline. The point is that, until that appeal was decided, it was difficult to proceed with settlement negotiations because of the hope of many plaintiffs' attorneys that they and their clients would be able to benefit from the award of such damages. There is always such hope with respect to any potential element of damages, but nothing destabilizes settlement discussions more than the hope of recovering punitive damages. Although defendants' offers will probably be higher if such damages are likely to be awarded, there is little or no way for a defendant to make any realistic assessment of the total liability it may be facing.

There was one aviation case where the wrongdoer had no difficulty understanding the precise relationship of the punishment to the wrongdoing. A number of years ago, it was reported that a passenger had been killed in Yemen in an airplane crash caused by the pilot, who survived the crash. Once he was sufficiently recovered, the pilot was required pursuant to court order, to become the passenger on a similar flight, during which he was forced out of the airplane to his death.³⁶

VIII. PREJUDGMENT INTEREST

Prejudgment interest is another major substantive issue that affects settlement. In the Chicago DC-10 litigation, the United States District Court for the Northern District of Illinois decided that the juries would be instructed to include prejudgment interest as an element of damages in those wrongful death cases.³⁷ This is not the place to examine the arguments for and against prejudgment interest, but it is curious that the district court's decision was based, at least in part, on its perception that not allowing prejudgment interest would be "a real incentive for the defendants to postpone paying the plaintiffs."³⁸ Maybe so, but, as indicated above, where the Tenerife approach is used, the plaintiffs' attorneys (and sometimes their clients) bear at least an equal, if not a greater,

³⁶ Sindel, *Settlement Techniques—As Viewed by a Plaintiff's Attorney*, PRAC. LAW., Feb. 1969, 82, at 82-83.

³⁷ In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 480 F. Supp. 1280, 1282 (N.D. Ill. 1979).

³⁸ *Id.* at 1287.

responsibility for the delays in reaching settlement and in going to trial.

This district court decision was appealed to the United States Court of Appeals for the Seventh Circuit, which rendered its decision on February 17, 1981.³⁹ Because of the idiosyncrasies of the case, the judgment below was affirmed, but the court of appeals concluded that, under the applicable Illinois law, the pre-judgment interest was not allowable as a separate element of damages in wrongful death actions.⁴⁰ Accordingly, the court of appeals emphasized "that the instructions by the trial court in this case cannot be the model for the future wrongful death actions."⁴¹ Instead, the court concluded that future losses should be discounted to the date of trial, and the jury should be instructed to calculate the present value of the amount that plaintiff would have received from the decedent between death and trial. The calculation could well involve the consideration of interest on that specific amount, but this formulation would not permit prejudgment interest on the total amount of the verdict.⁴²

IX. FURTHER NEGOTIATIONS AND OFFERS

Once the substantive issues have been decided, the parties can conduct settlement negotiations on more common ground. If the parties are going to rely on some kind of formula to arrive at a settlement figure, this would be the time to do it. But the typical simplistic formulas are seldom useful except as "makeweights," and, at least in recent times, attorneys have properly shied away from them, realizing each case has to be treated distinctively; that is the way it will be treated at trial by the jury.⁴³

At some point after they have sufficient information about each

³⁹ *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 644 F.2d 633 (7th Cir. 1981).

⁴⁰ *Id.* at 638.

⁴¹ *Id.*

⁴² *Id.* at 644.

⁴³ See Galiher, *The Defendant's Lawyer Looks at Settlement*, 31 INS. COUNSEL J. 65, 68 (1964); Kelner, *Settlement of Personal Injury Cases*, 53 N.Y. ST. B. J. 116, 117 (1981). There have been attempts to construct complicated formulas that would better reflect complex variables, see, e.g., Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67 (1969), but I am not aware that there have been any practical applications of these formulas.

plaintiff's claim (which may require additional depositions, etc.) and after they have engaged in some negotiations with the plaintiff's attorneys, the underwriters or their attorneys may reach a conclusion that it is unlikely that they will decide to increase the pending settlement offer. At that time, underwriters usually instruct their attorneys to serve offers of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure or pursuant to some similar state statute. Offers of judgment have frequently been used in aviation cases, and apparently no problems have developed. Nevertheless, these offers have not been the subject of much litigation, and there are some questions about possible adverse effects of such offers.⁴⁴ For example, the potential *res judicata* effect on negligence counterclaims in a comparative negligence jurisdiction must be considered.⁴⁵

Offers of judgment must be accepted within 10 days if they are to have formal effect,⁴⁶ but, like other offers and demands, once made they seem to take on a life of their own. Barring some drastic change in the state of the case, prior offers and demands are the foundations on which all subsequent negotiations are based. Unfortunately, trying to get a judge to recognize that a previous settlement offer has been withdrawn because of the plaintiff's failure to respond in a timely fashion is virtually impossible, even when plaintiff's failure caused the underwriters to incur much greater expenses for litigation and trial preparation.

X. THE ROLE OF THE JUDGE

Because public policy favors settlements, judges (including magistrates and masters) get involved in settlement negotiations when the parties reach an impasse, and they can be a great help or a great disappointment.⁴⁷ Though little can be said here to re-

⁴⁴ Armato, *Offers of Judgment and Compromise: Turning the Tables on Your Opponent*, 55 CALIF. ST. B. J. 286 (1980); Blecke, *Make the Settlement Offer an Offer of Judgment*, FOR THE DEFENSE, Dec. 1980, at 21; Stieglitz & White, *The Offer of Judgment Rule: A Sword and a Shield*, FOR THE DEFENSE, Feb. 1980, at 29 [hereinafter cited as Stieglitz & White].

⁴⁵ See Stieglitz & White, *supra* note 44.

⁴⁶ FED. R. CIV. P. 68.

⁴⁷ See Fox, *Settlement: Helping the Lawyers to Fulfill Their Responsibility*, 53 F.R.D. 129 (1971), in which Judge Fox provides an excellent examination of judges' roles in settlement negotiations.

flect the overall importance of this particular topic to the entire subject, the judges' role in bringing the parties together cannot be overemphasized. This is certainly not meant to be a suggestion that the judges get out their hammers and pound on the parties. The judges who will have the most effect will be those who can best exercise powers of persuasion, usually by virtue of having done their homework and by virtue of being eminently fair to both sides in the controversy. Being eminently fair does not mean simply splitting the difference. All too often a settlement conference is nothing more than an announcement of the offer and the demand by the parties, followed by the judge coming down squarely in the middle. The only answer to this type of judicial approach to settlements is to have the judge assess the case prior to hearing the offer and the demand.

Judges who do not follow the knee-jerk, split-the-difference approach must have a good appreciation of verdict ranges for the general type of case, and they must be astute enough to recognize the importance of the differences between the case before them and the general types of cases that the verdict ranges represent. A judge's suggestion that an outstanding offer is low or that a demand is high will be of little effect unless it appears that the judge's conclusion was arrived at intelligently and knowledgeably, with a full appreciation of the likely result of the trial.

If he has been receiving closing statements in settlements of the cases before him, the judge can develop a feel for the appropriateness of the offers and demands in the remaining cases. Plaintiffs' attorneys have tried to gain access to the information on individual settlements, but such unnecessary disclosure would violate the confidentiality of the settlement. It might also be unfair to the parties by allowing their settlements to be parlayed into a higher recovery for someone else,⁴⁸ resulting in a round of second-guessing that would discourage early settlements in similar litigation in the future.

The judge may well be involved in the trial, even if this is a

⁴⁸ Consider the following statement from Kriendler, *DC-10: Stipulation and Settlements*, N.Y.L.J., Nov. 16, 1979, at 1, col. 1 (emphasis supplied): "Plaintiff's lawyers would like to have settlement information on the individual cases, of course, so that they can make sure that their clients are as well compensated, or better compensated, than others similarly situated."

transferred multidistrict case.⁴⁹ Accordingly, the judge has an opportunity to exert additional force in settlement negotiations, but blatant threats of retribution are of little use. What is of use is a judge's identification of a party's or an attorney's Achilles' Heel and its use as the focus of suggestions as to how the case might proceed. In other words (giving the judge the benefit of the doubt), no one is going to believe that the judge will ultimately risk his own reputation by going out of bounds to get back at a party or attorney who has ignored his recommendations. It is, however, reasonable to expect that, in an area where a party already recognizes his position to be weak, the judge may well handle the issue to the disadvantage of that party or attorney if the offer or demand is not altered to take account of that weakness.

Similarly, with respect to discretionary matters, a judge can exercise an immense amount of influence, but here again the influence is most effective when the discretionary authority is being exercised in support of a recognizably reasonable position. If the parties and the attorneys do not, either on their own or as a result of discussions with the judge, recognize and understand the weaknesses in their cases, even forceful attempts to resolve a controversy will probably be relatively ineffective.

If one or more of the parties is being completely unreasonable, then the judge may conclude that the only solution is to bring the case to trial immediately. In the Tenerife cases, the defendants, as part of the overall Tenerife approach, pushed for early trials, and a number of cases were not settled until the plaintiffs' attorneys saw that there were going to be no further negotiations and that the trials were going to be held at once.

Of course, settlements during trial are also possible, and the parties obviously should listen to the observations of an astute judge as the trial progresses. Assuming that the plaintiff's position appears strongest immediately after completion of the plaintiff's case, defense counsel should generally avoid settlement overtures

⁴⁹ Cases transferred to district judges for multidistrict litigation pre-trial proceedings pursuant to 28 U.S.C. § 1407 have frequently been tried by those transferee judges as a result of those judges' having transferred the cases to themselves for all purposes pursuant to 28 U.S.C. § 1404. See Speiser, *Dynamics of Airline Crash Litigation: What Makes the Cases Move?*, 43 J. AIR. L. & COM. 565, 571 (1977). Although it is unusual, the transferee judge may also try multidistrict cases after they are remanded to the transferor courts. For example, Judge Ward went to California to try some Tenerife cases after they had been remanded.

at that point. However, there are many trials in which the defendants' best shots will be during the cross examination of the plaintiffs' witnesses, and in those trials defense counsel may find the close of plaintiff's case the optimum time to broach settlement, probably through the judge.

Early damage trials are also important in another respect. To the extent that they may be similar to or somehow representative of other unsettled cases, the cases tried may be treated as precedents, and the outcomes of the trials may weigh heavily on the negotiations in those other cases.

XI. THE ROLE OF THE ATTORNEY

In view of the procedures and pressures described thus far, one may well ask why more air crash cases are not settled as a matter of course. The answer lies in other factors affecting settlement including attorneys' attitudes, inertia, insufficient communications with the client, inexperience, ego, and, not surprisingly, money. These factors may cause some defense attorneys to be less than committed to the Tenerife approach and some plaintiffs' attorneys to be unresponsive or outright antagonistic.

Many delays in providing damage information that could be the basis of an early settlement are simply the result of less-than-intense efforts to deal with matters as they ought to be dealt with. And on some occasions, such delays are apparently intentional or very close to it. There recently was one instance in which a plaintiff's attorney, who had been retained fairly soon after a major accident, refused to respond to underwriters' requests for information and, by waiting until the last minute to file his action, prevented underwriters from extricating that information by means of formal discovery proceedings. There is no question that this is an effective way to keep a client from receiving a reasonable settlement offer at an early time.

XII. PLAINTIFF'S ATTORNEY'S FEES

Contingency fees also have an effect on settlements. American underwriters and their attorneys do not oppose the contingent fee system,⁵⁰ for such fees, even though they take a large share of the

⁵⁰ See, e.g., *THE FUTURE OF AVIATION TORT LAW* 239-45, transcript of Proceed-

ultimate recovery, can be justified by the risk and the work.⁵¹ The question is whether contingent fees are appropriate when liability is not at issue or when the claimants' recoveries are otherwise not really contingent. Entrepreneur tort lawyers may have to set their fees high enough so that fees from winning cases will offset the lack of fees from losing cases,⁵² but this equation concerns cases with contingencies; cases in which there is little or nothing contingent should not have to bear this burden. Claimants may feel the same way, so early settlement offers can obviously put pressure on plaintiffs' attorneys' fee arrangements when the offers do not appear to relate to the presence or efforts of the attorneys in the case. Of course, it is not easy for a plaintiff's attorney to recommend acceptance of an offer that is made early enough and at a high enough figure that it will prevent him from conscientiously taking the percentage fee he had contracted to receive. Even if such attorneys are unwilling to attempt to justify their fees by doing needless work or creating unnecessary delays, there may still be a reluctance to recommend acceptance.

Not infrequently, this reluctance to settle early is based on the attorneys' experiences in previous settlement negotiations in ordinary cases. Typically, after receiving the initial settlement offer in such a case, the attorney was in contact with defense counsel or underwriters on five or so separate occasions, and on almost every occasion the offer was increased incrementally. The attorney expects that it will work the same way in major air crash litigation, and he is frustrated when he discovers that the Tenerife approach is not supposed to work that way. Accordingly, after rejecting the original offer some time earlier, the plaintiffs' attorney may find himself trapped if he cannot persuade defendants' underwriters to increase the offer. For their part, the underwriters are generally unwilling to increase the offer unless the attorney can demonstrate something that was not sufficiently considered by underwriters beforehand.

Of course, if the case is tried some years later the verdict may

ings of the Association of Trial Lawyers of America, Monaco (Feb. 8, 1978) (Remarks of John V. Brennan).

⁵¹See generally Kreindler, *Cost and Compensation*, N.Y.L.J., Feb. 20, 1981, at 1, col. 1.

⁵²See generally S. SPEISER, *LAWSUIT* 593 (1980), reviewed in Hughes, *A Mixed Bane*, N.Y. REV. OF BOOKS, March 19, 1981, 16, 17.

well be substantially in excess of the original offer, and, if it is, the plaintiff's attorney will congratulate himself and his client for rejecting the offer. But such self-congratulations are often unfounded, because, by accepting and investing the amount originally offered, the client could have netted as much as or more than he did by waiting for a higher verdict and having to pay substantial attorneys' expenses and fees out of that verdict.

The difficulty of dealing with sensitive fee problems in individual cases is aggravated by the variation in the contingency fees contracted for by different plaintiffs' attorneys. While a 33 1/3% contingency fee is fairly common for a typical case, many plaintiffs' attorneys believe that a 20% fee is more reasonable where liability is not at issue. However, some plaintiffs' attorneys still insist on a 40% contingency fee. Interestingly, there may even be variations among the fees charged by the same attorney for similar cases, which variation may have resulted from the posture of the cases when the attorney was retained. Though it cannot be said so with certainty, this variation may also reflect pressures of competition that may have arisen in a particular situation. A related factor is the number of cases that an attorney has, for the lawyers who have more cases are less likely to charge as high a percentage contingency fee as lawyers who have only a few cases. And more often than not, in multidistrict litigation the attorneys with the larger number of cases are actually doing more work to justify their fees than are the attorneys with one or two cases.

In the DC-10 litigation, the multidistrict judges criticized the "fairly wide disparity" in the fee arrangements for the various cases that had been settled.⁵³ Recognizing that there was nothing that the defendants could do about this disparity, Judge Will said that it was the responsibility of plaintiffs' counsel and the judges. He suggested that plaintiffs' counsel police themselves in order to reduce the disparity and get some kind of reasonable consensus. What Judge Will said from there on is too sensitive to paraphrase even for the sake of brevity:

I recognize that if a lawyer says, "I have a contract, and I don't care what the rest of you fellows think, and I don't even care what the judges think," that he probably is immune from direct action,

⁵³ Transcript of Hearing, Nov. 6, 1980, In Re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979.

although I don't think he's immune from the possibility that somebody will report to an appropriate committee of a Bar Association or an integrated Bar that his conduct is seriously out of line.

I see lawyers back there shaking their heads on the theory that, to hell with you, whatever agreement I make is what I make, and if I want to give my client a good shafting, it's okay with them, and there's nothing you can do about it. I'll tell you right now that if we see anybody giving a client a good shafting, we'll figure out something to do about it, and you can shake your head all you like, but you do not have a license to steal because you are admitted to the practice of law, nor do you have a license to gouge because you are admitted to the practice of law. And a judge cannot sit up here and see somebody gouged and do nothing about it, and neither Judge Robson nor I intend to be in that position.

So you can just make up your mind—you can shake your heads all you like, but the fact of the matter is that we are not going to stand by and see closing statements or settlement agreements or settlement reports which indicate that there was gouging and do nothing about it.⁵⁴

Following some colloquy with plaintiffs' committee representatives, who joined in his concern, Judge Will restated his position:

[Y]ou have to get a little worried when you see some of these percentage fees in relatively early settlements in cases in which there is no contested liability, and the amounts involved are substantial. You know, you cannot just sit idly by and say, "Well, that's all right. These were arm's length bargains between knowing people, and, sure, this lawyer is getting a tremendous windfall, but, what the hell, this is his lucky day," or something of that sort. I don't think you can just stand by and do nothing about that.

I'm not sure what we can do. I know some of the things we can do, and we have discussed it, and at some point we are going to do it, because I do not think that judges can stand by and watch lawyers gouge clients and do nothing about it.⁵⁵

Clearly, Judge Will's brush was not intended to tar all plaintiffs' attorneys, and his major concern was with fairness to the clients. He is quoted here primarily because the unreasonably high fees referred to can have adverse effects on the chances of settlement.

This situation is complicated even further when the local con-

⁵⁴ *Id.* at 8-10.

⁵⁵ *Id.* at 14.

tingency fee attorney refers his case to an aviation or other tort specialist, who typically contracts to receive a large part of the contingency fee of the original attorney. (The original attorney may shop around for the best deal, so there is at this level a good bit of competition among the specialists.) Since so-called referral fees are frowned upon, the referring attorney may justify his fee by playing a role in the handling of the case, but the referring attorney's role may well not be commensurate with his share of the fee. Accordingly, in its settlement efforts a defendant should consider the possibility that the plaintiffs' two firms may have different interests and, therefore, different approaches to a potential settlement.

The aviation or tort specialists to whom cases are referred are usually the attorneys who carry the multidistrict litigation burden. As lead counsel, liaison counsel, or members of plaintiffs' coordinating or discovery committees, these specialists represent all of the plaintiffs in the battles over major legal issues and in any discovery proceedings relating to liability or punitive damages. Insofar as they are receiving part of the fees for the cases that have been referred to them, the attorneys on these plaintiffs' committees will be paid for their work. However, there are always a number of the plaintiffs' attorneys whose cases benefit from the services of the plaintiffs' committees but who are not, in the absence of court orders, obliged to pay for those services. If these cases are part of the multidistrict litigation, then the multidistrict court will usually require that the plaintiffs' committee members be compensated with pro rata contributions from each case to cover expenses and with a small share of the settlement proceeds to cover services rendered. (If there are state court cases pending, then the multidistrict plaintiffs' committee will also attempt to obtain a similar order from the state court judges, for the multidistrict discovery is usually made applicable to the state court cases.)

This potential fee-sharing results in another divergence of interest among plaintiffs' attorneys, a divergence that is of particular importance to settlement efforts. The plaintiffs' attorneys in these various cases are not anxious to share their fees with the plaintiffs' committee, and, if they believe that the plaintiffs' committee's share will be too large, then in cases where liability is not contested they may prefer to settle their cases before the court requires such a

sharing of the settlement proceeds. In order to counter this fairly wide-spread attitude, the attorneys on the plaintiffs' discovery committee in the Chicago DC-10 litigation initially requested only a small pro rata contribution from each case to cover the plaintiffs' committee's expenses and nothing to pay for their services. This removed one incentive for individual plaintiff's attorneys to settle early, but it is questionable whether such a tactic would have the same effect where there was no hope for a punitive damage award that would significantly increase the total recovery. At any rate, similar tactics will certainly be less than persuasive in the future because, even though punitive damages were eliminated in the Chicago DC-10 litigation, the plaintiffs' committee later made a fee request to cover its services in connection with the proceedings through the date of the Seventh Circuit decision⁵⁶ on punitive damages. At the February 26th pretrial conference, the plaintiffs' committee suggested that 5% of each settlement or judgment be deducted from the attorneys' fees in the respective cases and held for use in paying the committee for its services to date.⁵⁷ In this connection, it should be mentioned that such applications are not necessarily granted as a matter of course. For example, in the Eastern Airlines Everglades accident litigation, the plaintiffs' committee's requested fee share was reduced,⁵⁸ and in some individual cases the committee received even less.

There is a dilemma here. Where liability or punitive damages are *not* at issue, the committee's workload is relatively small, and its role may not justify the members' usual fees. On the other hand, if they are at least temporarily able to keep liability or punitive damages at issue, the attorneys comprising the plaintiffs' committee may have too much work to do in connection with those issues, and the fees they receive may not provide enough profit to justify the workload and the investment of time and talent. Plaintiffs'

⁵⁶ In *Re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 500 F. Supp. 1004 (N.D. Ill. 1980), *rev'd in part and aff'd in part*, 644 F.2d 594 (7th Cir. 1981).

⁵⁷ Transcript of Hearing, February 26, 1981, at 85-86, In *Re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979.

⁵⁸ In *Re Air Crash Disaster at Florida Everglades* on December 29, 1972, 549 F.2d 1006 (5th Cir. 1977). See generally *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977).

attorneys have to be aware of the time investment that would be justified by the fees expected. If an attorney has only a few cases of his own, or if his cases are not likely to produce large settlements or verdicts, then this will directly influence the amount of time that he and his firm can spend on this litigation.

Some plaintiffs' attorneys have tried to find a middle ground. They take cases directly and by referral at competitive rates, keep liability at issue in those cases, and participate on the plaintiffs' discovery committee, but, when it comes to the actual handling of depositions and document discovery, they send the younger attorneys in the office because their time is less valuable. Utilizing the younger attorneys will reduce the rate at which potential profits are eaten up by the workload. Furthermore, the various firms represented on the plaintiffs' discovery committee will take turns sending representatives to depositions, document productions, and other time-consuming activities. By being personally represented, however occasionally, the attorneys' firms have something tangible to point to when it comes to explaining their fees in their own cases and in the other multidistrict cases that benefit from their discovery activities. Unfortunately for the rest of the plaintiffs, this approach dilutes the time and talent invested; it sometimes results in the plaintiffs being intermittently represented by inexperienced, less knowledgeable attorneys, in which case those attorneys may have to rely on other parties to carry the discovery burden. Thereafter, if these cases do proceed to trial on liability or punitive damages,⁵⁹ it may then be discovered that all of the potential evidence was not developed during discovery proceedings or that it was not developed in a manner suitable for use by the plaintiffs. All this has to be kept in mind by the plaintiffs' attorney who is considering settlement of his cases.

As indicated earlier, even if the Tenerife approach does not result in early settlement of a case, it may affect the trial of that case by eliminating the issue of liability through the "no-contest" stipulation. It has been observed on a number of occasions that trials on compensatory damages alone are "sterile" and less likely

⁵⁹ Ultimately, where liability is a genuine issue, the decision to gamble on a trial rather than accept substantial settlement offers cannot be made without consideration of each client's particular situation. Cf. Phillips, *Discussion by Defense Counsel [of Evaluation of a Personal Injury Case for Settlement Purposes]*, 23 INS. COUNSEL J. 275, 275-76 (1956).

to result in substantial verdicts than are trials where fault is proved in front of a jury.⁶⁰ This is another reason why plaintiffs' attorneys would prefer to keep liability at issue. In line with this concern, the proposed no-contest stipulation may be reworded to water down the exculpatory aspect of the defendants' agreement not to contest liability. However, assuming that plaintiffs' attorneys would not stoop to spurious allegations of punitive damages in order to keep liability at issue, there seems to be very little that plaintiffs' attorneys can do to overcome defendants' intention not to contest liability. It is inconceivable that a judge would allow plaintiffs to tie up, for one trial, much less 200 trials, the court system and everyone else involved in the litigation just so one or more plaintiffs could get some doubtful additional amount of damages by trying an uncontested issue. For one thing, there is just not enough evidence to show that damage verdicts would be significantly affected by concurrent consideration of liability issues. Furthermore, even if there were a trial of liability, in multidistrict litigation it is likely that there would be only a single such trial.

The foregoing should demonstrate that plaintiffs' attorneys' fee arrangements can significantly affect the entire settlement process, and it is probably not uncommon for these arrangements to be the source, sometimes less than obviously, of an impasse in settlement negotiations. Such an impasse, if it is to be resolved, will probably have to be resolved by a judge. Again, the judge has to be particularly astute. He must know when to push and when not to push. He must be willing to set cases down for prompt trials, and he must be determined to set aside the time and do the required work to follow through on such trial schedules. But at this point it should be emphasized that the judge must also be willing to review fee arrangements to insure that they are reasonable under the circumstances and are not the source of the settlement impasse. This can be done in connection with approvals of settlements, but the judge can also indicate his views on the matter during settlement negotiations.

Reliance on a probate court for fee approval is no answer, for probate courts usually have little or no information concerning the litigation, except for the potentially self-serving information

⁶⁰ See, e.g., Kreindler, *DC-10: Stipulation and Settlement*, N.Y.L.J., Nov. 16, 1979, at 1, col. 1.

presented to them by the attorney who is seeking approval of his fee. Furthermore, in some states the probate court only approves those portions of the settlement that relate to minors, and there is at least one situation where it appears the settlement was restructured so that the attorney's fee would not be reflected in the minor's portion of the settlement.

Determining the reasonableness of contingency fee agreements is not easy. There are not very many decisions on point, but particular attention should be given to the 1979 decision of the Third Circuit Court of Appeals in *Dunn v. H. K. Porter Co.*,⁶¹ which held that a district court has the authority, *sua sponte*, to review contingency fee agreements in class actions and to set aside agreements yielding unreasonable fees.⁶² Under this decision, plaintiffs' counsel has the burden of proving by a preponderance of the evidence that its contingency fee agreement is not the result of overreaching by counsel and that the fee is reasonable. Subsequent decisions in the Fourth Circuit (involving a class action) and in the Eighth Circuit (involving a statutory fee award) concluded that the district courts have an obligation and responsibility to monitor contingent fee agreements for reasonableness and to limit fees accordingly.⁶³ It will be interesting to see how these decisions are applied in individual negligence and product liability actions in federal courts, and how these courts will treat state laws and rules concerning contingent fees.

The subject of fees cannot be discussed without mentioning structured settlements. Since they have been the subject of widespread analysis and controversy,⁶⁴ and since they would be too complex and unwieldy to deal with properly in this paper, it should simply be noted that the handling of the attorneys' fees can be

⁶¹ 602 F.2d 1105 (3rd Cir. 1979).

⁶² *Id.* at 1108-09, 1114.

⁶³ *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1277-78 (8th Cir. 1980); *Allen v. United States*, 606 F.2d 432, 435-36 (4th Cir. 1979).

⁶⁴ See, e.g., Broder, *Structured Settlements*, N.Y.L.J., Aug. 8, 1980, at 1, col. 1; Broder, *Structured Settlements*, N.Y.L.J., July 11, 1980, at 1, col. 1; Broder, *Structured Settlements*, N.Y.L.J., June 13, 1980, at 1, col. 1; Cayea, *Letter to the Editor*, N.Y.L.J., Aug. 20, 1980, at 2, col. 5; Hindert, *Periodic Payment of Personal Injury Damages*, 31 FED'N INS. COUNSEL Q. 3 (1980); Kelner & Kelner, *Structured Settlements*, N.Y.L.J., Aug. 13, 1980, at 1, col. 1; Mangano, *Letter to the Editor*, N.Y.L.J., June 27, 1980, at 2, col. 5.

the critical factor affecting the acceptance or rejection of the structured settlement.

XIII. THE ROLE OF THE DEFENSE COUNSEL

The plaintiffs' attorneys are not the only high-priced lawyers who are affected by the Tenerife approach. Turning our attention to defense counsel, the first point to be made is that the affect which their fees have on settlement efforts is very different from the way those efforts are affected by the fees of plaintiffs' attorneys. Seldom does the amount owed by a defendant to its attorneys affect the actual determination of whether or not the case should be settled. As suggested previously, however, defense counsel can unconsciously interfere with the Tenerife approach by failing to take the appropriate steps with understanding, diligence, and promptness. Where a single defendant's settlement efforts are handled or approved by more than one firm, there is a particularly high likelihood that someone will drop the ball in the process.

A more typical complaint about defense counsel is that they are frequently guilty of "running their meters". Since they are paid by the hour, it is supposedly in their interest to run up as many hours as possible, even if it means making unnecessary motions and performing other tasks of remote utility. Be that as it may, where the client sees this happening it becomes an incentive toward, not against, early settlement.⁶⁵ The key phrase here is "where the client sees this happening;" in fact, the client may not realize what is happening. This might not be so bad if extra work was the only thing of which the client was ignorant. Unfortunately, the client may also be insufficiently aware of legal and factual aspects of the case that would affect the client's thinking about his settlement posture. Because of promising reports from their defense counsel, underwriters frequently find themselves paying substantial fees to their counsel over a period of years, in a case in which counsel ultimately advises them to settle for an amount not very different (in constant dollars) from the amount for which the case could have been settled early on. Therefore, clients should be much less troubled about defense counsel going overboard in

⁶⁵ Cf. Weston, *Discussion by Plaintiff's Counsel [of Evaluation of a Personal Injury Case for Settlement Purposes]*, 23 INS. COUNSEL J. 269, 273 (1956).

working on a case than about their counsel's provision of incomplete or inappropriate assessments and advice concerning the status and future of the issues being litigated, not to mention the status of settlement possibilities.

It must be remembered that attorneys have to play two different roles.⁶⁶ One role is as an advocate who firmly presents to the opposition the arguments that favor his client's point of view. With respect to his presentation to the client, however, the attorney plays a different role, the role of counselor. The role of advocate and the role of counselor should be kept separate, and the attorney ought to know the difference and know when to be one or the other. All too often attorneys let the two roles overlap, and the result is that the clients are misled. For example, in assessing settlement possibilities and recommending settlement figures, attorneys have to be markedly more objective than they are in their dealings with the opposition,⁶⁷ but, unfortunately, some attorneys seem constitutionally unable to do this. Whether they are dealing with the opposition or with their clients, they have only two speeds—go and stop—and, while their words are perhaps different, the substance of their remarks to the opposition and to the clients is the same. This is frequently the approach of those defense counsel who believe that settlements are a coward's way out of litigation. Such counsel are disinclined towards settlements, and, in some instances, even fail to relay the opposition's most recent indications of interest in settlement. These counsel believe that they have been mandated to fight the case as hard as possible and without quarter, and they believe that, as part of that fight, their role is to bolster the client's moral and confidence in the ultimate ability to win.⁶⁸ Not dissimilar is the situation where attorneys handle their cases too personally and treat them either as their own causes or as their own vehicles for gaining fame and adulation. Perhaps clients should pay heed to Sir Francis Bacon's suggestion that, in choosing nego-

⁶⁶ See Loevinger, *The Lawyer's Role Before Litigation*, 11 VAND. L. REV. 155 (1957) [hereinafter cited as Loevinger].

⁶⁷ *Id.* at 156, 165.

⁶⁸ Some unsophisticated clients expect this role as a matter of course, and an attorney who tries to be a devil's advocate or just a dispassionate appraiser of the client's best interests in terms of settlement will find these clients concluding that he is not fully their champion or that he is a turncoat. Dispassionate assessments in auditors' letters can also be upsetting to clients; the timing of such letters may be the source of some additional problems.

tiators to represent them, "it is better to choose men of the plainer sort," for they are more likely to do what is assigned to them, and to report back accurately, than those representatives who would seek somehow to grace themselves in the process.⁶⁹

When the attorneys get their roles confused, there is little hope of a client getting the kind of objective counseling the client has a right to expect in settlement negotiations. "[T]he lawyer who counsels a client on the basis of resolving numerous doubtful points in favor of a desired result will usually mislead the client into a much less favorable position than was anticipated."⁷⁰ In this same vein, it should be hurriedly pointed out that an attorney's analysis of the case cannot take his client's story at face value. Information coming from clients should not be given any extra credit because of the source; if anything, such information should be treated with extra caution when it is generated in a non-adversary context by people who are interested in protecting themselves or their points of view, who have a pecuniary motivation, or who have only a limited or partial understanding of all of the information that is available. Attorneys cannot go wrong by considering client-generated information as unreliable until they are able to verify it themselves through extensive interviews and document reviews. And once an attorney has differentiated between the client's story and the actual facts, he must then differentiate the actual facts from the admissible evidence.

Role confusion is less of a problem on the defense side when the case is being managed by primary underwriters who take very active roles in the settlement process, for the claims staffs of such underwriters handle the negotiations with claimants and claimants' attorneys. Defense lawyers regret losing control of this aspect of the case, but on the whole they recognize that well-staffed and highly qualified claims organizations can, in mass disaster cases, usually provide more efficient handling of the intensive and extensive settlement efforts that, under the Tenerife approach, must take place over a relatively short period of time. Defense counsel, on the other hand, should be used in those negotiations where the outcome may turn on issues as to which underwriters have relied on the counsel's factual or legal analysis. In those situations, the

⁶⁹ SIR FRANCIS BACON, *Of Negotiating*, ESSAYS OF SIR FRANCIS BACON.

⁷⁰ Loevinger, *supra* note 66, at 156.

defense counsel are probably better able to handle the give-and-take with plaintiffs' attorneys about the correctness of that analysis.

The Tenerife approach is less likely to be followed successfully where it is not the underwriters but, rather, the insured who is managing the litigation. The insured's own inexperience may cause economic realities to be overlooked, and the insured's attorneys may be inexperienced in or uncomfortable with the requisite early efforts towards settlement. A special problem may develop where the attorneys representing the insured (or "partially insured") in litigation are also the attorneys who are corporate counsel for the insured. The insured's attorneys are the primary source of information for the insured and, significantly, the underwriters. Such attorneys' reports to underwriters may well be influenced, consciously or unconsciously, by interests of the insured that may undermine settlement efforts. For example, in the view of most underwriters, putting off the inevitable is poor settlement strategy, for the ultimate settlement will probably be more expensive. A partially insured corporation may, however, want to delay settlement for reasons having to do with the timing of financial reports, pending product sales, contemporaneous public relations problems, etc. This factor, along with the natural inclination of corporate counsel to reassure corporate personnel that their responsibility for the accident is not as great as others might think, creates a situation where it may be difficult to give underwriters the kind of objective analysis upon which the settlement process depends. Moreover, in extreme situations, such attorneys may utilize the discovery process to persuade underwriters of the righteousness of the insured's cause. Out to prove a point rather than prepare for trial, the attorneys are able, because of the liberality of the federal discovery rules, to generate (in addition to excessive fees) favorable testimony and documents that are neither reliable nor ultimately admissible at trial, but that nevertheless are considered as dispositive in the attorneys' reports. When underwriters base their settlement positions on such reports, reasonable settlements are unlikely. Unfortunately, perhaps the only people capable of picking apart such a report are the opposing attorneys, but there is no method for them to do this. Someday perhaps there will be. Until then, we will probably have to rely upon the wariness and realism

of underwriters and upon the unwillingness of judges to permit the discovery process to be used simply as an unrestrained play to the grandstand.

Of course, most defense attorneys do not find themselves in the unusual situation just described. At least in litigation of fully covered passengers' claims in which there is no conflict, the defense attorneys are essentially serving a single master, the underwriters. Where the underwriters are knowledgeable and involved directly in the settlement efforts, they come to their own conclusions about the worth of a case. This circumstance leads to a discussion of a different kind of pressure, the pressure to support the underwriters' view of the worth of the claim.

Where underwriters have independently evaluated a case, attorneys are not anxious to suggest to them that the resulting offer is very far off target. On the other hand, the attorneys have a duty to be honest, and they also do not want to agree wholeheartedly with the appropriateness of the offer if they believe that the ultimate verdict may well be substantially in excess of the offer so that their reputations may suffer as a result. Where an attorney believes that the case may be tried to a favorable result, but that the chances are slim, he is in an even greater bind if he, like other trial attorneys, wants the opportunity to demonstrate his ability to win when the odds are against him. There are different ways of handling this kind of situation, and they depend upon the particular case and the individuals involved. The attorneys must satisfy themselves that the underwriters understand all of the relevant factors. Needless to say, there is a distinct difference between the reasonableness of an offer and the range of reasonably expected verdicts. The offer may be toward the bottom of the verdict range because of other considerations, such as the possibility of avoiding liability altogether. The prediction of the range of verdicts need not include every possible verdict, however wild, but there had better be some clearly communicated objective recognition of the risks involved in going to trial. Of this and other matters, underwriters complain that they too often hear what their counsel believe they want to hear, while they would prefer that more defense counsel were willing to make forthright recommendations and accept the responsibility for those recommendations.

These factors are even more important when the underwriters involved are not personally handling settlement negotiations and when they are, as in the case of some foreign underwriters, naturally inclined to view settlements and litigation in the light of their own countries' system. For example, in some countries defendants may be reluctant to litigate because litigation is not accomplished by extensive discovery that would permit a better understanding of the other side's ability to prove its case. Under such circumstances there is an effort to learn as much as possible about the claims prior to the institution of litigation, for, once litigation is begun, the opportunities for learning about the other side's position are greatly diminished. Accordingly, the outcome of any such litigation is particularly unpredictable; it is a gamble that defendants prefer to avoid.

This understandable attitude, when projected into the United States context, may result in an appearance of oversensitivity to litigation. As the more sophisticated foreign underwriters recognize, litigation in the United States is not the ultimate adversarial act, much less the ultimate insult. Furthermore, it is the best means to assure that there is full disclosure by all sides of the facts and opinions upon which their positions are based. Litigation in the United States is not necessarily a reflection of a failure of settlement efforts.

In foreign jurisdictions, where significant discovery is not available after litigation has begun, settlements must be reached on the basis of the information gathered prior to the commencement of litigation, as indicated above. What this means is that underwriters in those jurisdictions may settle their cases on the basis of what would here be considered insufficient information about the case. Accordingly, with respect to cases in the United States, foreign brokers, attorneys, and underwriters have been heard to say that some underwriters are therefore not accustomed to putting sufficient pressure on their American attorneys in order to obtain, through litigation or otherwise, full, accurate, and objective information and analyses upon which the evaluations of a case must be based.

Of course, when attorneys representing underwriters are by themselves handling the settlement negotiations and related mat-

ters, they all too often are able to camouflage unreliable reports and advice to underwriters by simply recommending a more-than-sufficient reserve figure. Reserves are particularly important, for they can involve certain tax benefits, a description of which is beyond the scope of this paper. Suffice it to say that under-reserving costs more money than one might think. In addition, many claims staffs are faced with an enormous work load and are, in the normal case, often unable to spend a great deal of time assessing the information and analyses upon which their attorneys base their recommendations. Therefore, those recommendations, at least with respect to reserves, are generally taken at face value, and the attorneys' performance in settling their cases is measured against that standard. (The attorneys do not get any credit unless the reserve figure is set high enough to begin with. Very little infuriates underwriters more than an attorney who later raises his reserve figure and then settles the case within that figure in order to claim victory.)

For this and other reasons mentioned above, it is not surprising to find that some underwriters feel overly vulnerable to the attorneys on whom they depend. As one might expect, the relationship between the attorneys and the underwriters, as well as the tensions that can result, may have significant ramifications and may account for otherwise inexplicable settlement strategies. It must be added that in many cases the defendants' attorneys do not fully understand the reasons for the settlement strategy they are pursuing. This fact is especially true where underwriters make a settlement offer seemingly at odds with their attorneys' views of the case. When it happens, it is more than likely the result of the attorneys seeing only a part of the overall claims picture. Sometimes, however, personalities and attitudes are involved, and the settlement position is the product of an undisclosed bitterness or rivalry, or perhaps even an ill-conceived early prediction concerning the outcome of the case. Nevertheless, it is an unfair burden on defense counsel if they are saddled with attempting settlement, or even defending the settlement offer before a judge, when such unseen factors are not revealed.

Whatever their source, outrage and indignation will often cause a client to ignore the difficulties and risks of litigation and announce his willingness to do everything it takes to sustain his posi-

tion. Experienced attorneys will recognize that the client's outrage and indignation may not last throughout the entire litigation. The attorneys will have to monitor the evolution of the client's position and conduct themselves accordingly. In no event should the attorneys burn their bridges to the other side, for those bridges may ultimately be useful in reaching a settlement after the furor has subsided.⁷¹

This is not to say that defense counsel should adopt a "buddy-buddy" approach to plaintiffs' attorneys. Such an approach can easily be overdone, particularly where the plaintiffs' attorneys are personal friends, and the result is that the defense counsel goes along with the plaintiffs' attorneys in order to keep their good will. In these situations it frequently develops that there is no pressure at all for the case to proceed. For example, there may be excessive extensions of time to respond to discovery requests, and in some situations these may be exchanged for extensions in completely unrelated litigation. Consequently, all activity ceases—nothing is learned from discovery, nothing substantive is resolved, and settlement is delayed. Such situations are viewed very unfavorably by underwriters, who are intently pursuing early settlements through the Tenerife approach.

A similar problem develops when counsel would rather be nice to the local judges than take unpopular stands requested by the underwriters. Even when underwriters are themselves active in the litigation and are present to take the brunt of the judicial displeasure, their counsel may still be reluctant to apply pressure and raise an issue that would cause the judges and the other parties to generate the necessary damage information, to resolve controversies that obstruct settlements, and to move the litigation along.

These are a few of the ways in which defense counsel may prove to be unsatisfactory in the efforts toward early settlements. Some firms may offset these detrimental features with cheap rates or with special expertise in aviation matters, but, as to the latter, some underwriters feel that such expertise is frequently overrated and that they are not getting much more than what a number of other firms could provide.

⁷¹ Cf. Loevinger, *The Lawyer's Role Before Litigation*, 11 VAND. L. REV. 155, 161-62 (1957).

XIV. SETTLEMENT NEGOTIATIONS

As to negotiations themselves, very little can be said. Attorneys do what comes naturally and logically, and it is difficult and perhaps even pointless to try to conceptualize the way in which they deal with other attorneys in negotiations. Nevertheless, without attempting to present a primer of settlement techniques, there are a few general points to be made here about attitudes and approaches.

Trial attorneys frequently find the entire settlement process frustrating and unfulfilling. Yet, they have to recognize that settlement is probably the most important tool available to the trial lawyer to reach a reasonably satisfactory result for a client. They also have to keep remembering that, in many instances, effecting a settlement involves the highest degree of advocacy by trial lawyers.⁷³

It should be quickly emphasized that being an advocate does not necessarily mean being as adversarial as one would normally be in trials or other litigation proceedings. The obvious idea is not to antagonize the person with whom negotiations are taking place, for the negotiations are unlikely to be successful unless there is cooperation and recognition of each sides' needs.⁷³ Bickering and haggling should be avoided. It is also inappropriate to make derogatory remarks or to pick on the opponent, even in jest.⁷⁴ Condescension is equally disadvantageous, for it, too, can cause opposition attorneys to bristle and "get their backs up." An attorney must exhibit a positive attitude toward the other side, an attitude that suggests that he has found them to be fair and honorable opponents, who sincerely believe in their position.⁷⁵

In turn, he is being judged concerning the sincerity and confidence with which he presents his position, for no one wants to negotiate with an attorney who cannot be believed. The perceived trustworthiness and credibility of opposing counsel can greatly influence the course of negotiations, and the attorney who has a

⁷³ Elam, *Settlement Procedures*, 28 INS. COUNSEL J. 602, 603 (1961).

⁷³ Cf. Hurowitz, *How to Settle a Support Case*, PRAC. LAW., July 15, 1980, 27.

⁷⁴ Gubin, *Settling Government Contract Claims*, PRAC. LAW., Dec. 1959, 71, at 72.

⁷⁵ Schneider & Mone, *A Positive Approach to Tort Settlements*, PRAC. LAW., March 1971, 27. [hereinafter cited as Schneider & Mone]

reputation for presenting claims and defenses fairly, and for openly and truthfully discussing their nature and effect, has a definite advantage over attorneys who are unknown or who have a poor reputation in this regard.⁷⁶

This perception is particularly important in somewhat smaller cases in which both sides believe that the case should be settled rather than tried, and that the best way of reaching settlement is by full disclosure of each side's view of the law and the facts. An attorney who discloses to the other side his approach and his supporting evidence feels exposed and uneasy. It will never be done where there is a distinct distrust of the opposition attorney's ability or willingness to give proper credit to the matters disclosed and to be equally candid about the opposition's own approaches and evidence. Of course, if the decision to shoot for settlement is a genuine one on both sides, then it is useless to make the disclosure less than complete, for secret evidence does not encourage settlements. This writer has been involved in such an unrestrained exchange on only one occasion, but that was a significant wrongful death case arising out of a hot-air balloon accident. Lengthy letters were exchanged describing each side's position and the evidence on which they relied, and the settlement that was reached seemed to satisfy everyone involved. In addition, it eliminated future fees and expenses, which were expected to be very high. This approach can probably be used in only a few situations, but attorneys may not be sufficiently alert to such opportunities when they do arise.

Aside from its favorable impact on settlement negotiations, the truthfulness of a defendant or his attorney when dealing with an unrepresented claimant may head off claims that false information or improper legal advice was given to the claimant. For example, one plaintiff sought to bring a class action against an airline for alleged misstatements concerning its limited liability under baggage tariffs and the Warsaw Convention. This class action was dismissed,⁷⁷ but defendants and their attorneys should keep such potential litigation in mind when they are dealing with unrepresented claimants.

⁷⁶ See Hurowitz, *supra* note 73, at 29, 34; Schneider & Mone, *supra* note 75, at 28.

⁷⁷ *Greeley v. KLM-Royal Dutch Airlines*, 85 F.R.D. 697 (S.D.N.Y. 1980).

One way for an attorney to undermine his reputation for credibility and expose his clients to added settlement difficulties in future cases is for him to assure his opponent, without qualification, that the latest offer or demand is the *final* one. Such assurances are usually taken as bluffs, and, even if they are given some initial respect, they turn out to be incorrect so often that similar assurances, and maybe the other things the attorney says, will never be believed again.

Of course, in a related vein, many lawyers let conceit and self-delusion destroy their reasonableness and, along with it, their effectiveness in settlement negotiations. Such attorneys make offers and demands that are, respectively, ridiculously low or ridiculously high. To the extent that defendants are faithfully following the Tenerife approach, this is a problem primarily found in some plaintiffs' attorneys. Perhaps they hope that exorbitant demands will attract attention to their claims or to themselves, but for the most part the design is to put pressure on the defendants to increase their offers. If the demands are beyond the realm of reason, however, the predictable result is the defendants' conclusion that the plaintiffs' attorneys are just not interested in settling their cases. Less, not more, attention is given to those cases, and any negotiations will probably come to a standstill. The pressure on the defendants is also less; exorbitant demands are easy to reject. Lee Kreindler has described this situation quite well:

I do not believe that you get responsible, professional, experienced people interested in settling cases, unless you give them an opportunity to make a good business deal for themselves. The defendant's lawyer who receives a ridiculous demand figure has nothing to worry about. Even if the eventual jury comes back with a large verdict it will probably be less than the plaintiff wanted, in settlement. The claims adjuster who receives an inflated demand, similarly, has nothing to worry about. He is not tempted to negotiate, and his offer to the plaintiff is likely to be equally deflated. The insurance company, or the excess or reinsurance company that sees a high demand figure has no incentive to talk turkey. What does it have to lose by trial? There is no point in trying to settle *this* case.⁷⁸

It is also generally unproductive for plaintiffs' attorneys to write

⁷⁸ L. KREINDLER, AVIATION ACCIDENT LAW § 43.03 (1978).

defendants' underwriters *pro forma* letters suggesting the possibility of bad faith in making settlement offers. Like the boy who cried "wolf," the plaintiffs' attorneys who use such letters indiscriminately are unlikely to attract much extra attention to their cases or to put any extra pressure on underwriters.⁷⁹

All things considered, negotiations have to be thought of as a cooperative effort, not just a game. An attorney has to understand the needs of his client and those of the opposition, for settlement is unlikely unless each side wins something.⁸⁰ It is frequently difficult to be objective about one's own attempts at cooperation, and the best example of this involves a plaintiff seen in small claims court some years ago. She was suing a man for \$500, and during her testimony the judge asked her if she had attempted to settle her claim. She replied, "Yes, but he won't give me the \$500."

Now this and much of everything else discussed above is rather obvious, but it is equally obvious that many otherwise good attorneys fail to live up to their potential in dealing with others, and their settlement negotiations suffer as a result. Where such an attorney, rather than exhibiting a proper firmness, is simply obnoxious to the opposition, another attorney in the firm should handle the settlement negotiations. The resulting situation is a little bit like the "good cop—bad cop" routine for obtaining confessions. Sometimes this happens at the insistence of the opposition, who would rather not get into a hassle with the obnoxious attorney, that might result in a complete halt to the settlement negotiations. They may prefer to make an extra effort to settle the matter with the other attorney.

XV. ASSESSING THE VALUE OF THE CASE

Ultimately, the most important influence on settlement negotiations is each party's assessment (which, as has already been stressed, should be a hard-headed and detached assessment) of a number of factors that have been outlined in many articles:⁸¹

⁷⁹ The threat of well-founded bad faith claims might, indeed, be an important factor in settlement negotiations, but this is a subject that has received substantial attention elsewhere, so I have confined this presentation to more typical situations.

⁸⁰ Hurowitz, *supra* note 73, at 29.

⁸¹ See, e.g., Elam, *Settlement Procedures*, 28 INS. COUNSEL J. 602, 603-06 (1961); Galiher, *The Defendant's Lawyer Looks at Settlement*, 31 INS. COUNSEL

—The extent of insurance coverage.

—The clearness of the facts supporting liability and injury claims.

—The nature of the accident and fault; the dramatic or emotional aspects of the events and circumstances to be described to the jury.

—The nature and effect of the injuries; their visibility, their permanence, their connection to pre-existing conditions, etc.

—The extent of special damages.

—The place of the trial; the attitudes of the panel from whom the jury will be chosen.

—The impressions that the plaintiff and defendant will make on the jury.

—The impressions that the parties' witnesses will make on the jury.

—The probable disposition of legal issues, particularly evidentiary issues, by the court.

—The readiness and ability of the parties' attorneys to try the case; their talent; and the impressions they will make on the jury.

The last factor relates especially closely to the rest of this paper. Specifically, if an attorney's presence in the case is to have a maximum positive effect during settlement negotiations, he not only needs to be able to explain his position convincingly, but he also must have a reputation for competence in trials, based upon his willingness and ability to obtain full discovery, to deal carefully with the discovery against his client, to master the facts and the applicable law, to determine which evidence is important to use at trial and which evidence is not, and so forth. In other words, the other side must expect the attorney to prepare the case for trial thoroughly and competently. Moreover, the earlier he is prepared to go to trial, the better off he will be in settlement negotiations. An attorney cannot evaluate the facts without knowing the applicable law, and, until he evaluates the full facts, he will not know the odds of prevailing and, thereby, the case's real worth. "In many, many cases failure to reach a common area of agreement is in direct proportion to an attorney's failure in prepa-

ration for the pretrial or trial, and the resulting failure of comprehension, understanding and evaluation of the case at issue."⁸² An attorney and his client cannot depend upon selling his analysis to the other side until he has analyzed the case thoroughly. In summary, preparation is "all important."⁸³

An attorney's preparation for trial can significantly affect settlement negotiations only if the other side considers him able to make the most of that preparation at trial. For example, does he have the talent to get witnesses to say what he wants them to say when he wants them to say it? Perhaps more important, at least in close cases, is a defense attorney's ability to offset the natural sympathy for the other side by getting the jury to like him or by getting the jury's empathy, if not sympathy, for himself. If he has that ability, it is certainly something the other side should consider in determining the settlement value of the case.

Where the other attorney is unknown and his abilities cannot be personally assessed, reliance will have to be placed on his general reputation, and one may agree with the wag who said that the best way for a defense attorney to get a respected reputation is to lose big. If a defense attorney wins a favorable verdict, it is usually assumed that the verdict reflects the weakness of the plaintiff's case; there is just no way to measure the attorney's accomplishment objectively. On the other hand, if he is "hit" with a large verdict, everyone will respectfully observe that the attorney must really be good if he is trying big cases of such proven worth.

Bringing this paper to a close is difficult because of the many matters that have been left untouched or that have been discussed only superficially; much remains to be said. The hope is that this paper's brief description of certain factors influencing settlement will deepen the dialogue among judges, lawyers, and clients about maximizing settlement possibilities. As indicated, particular attention should be given to curtailing excessive fees, unnecessary delays, and unreliable advice to clients.

In concluding, it must be admitted that a good bit of what has

⁸² Fox, *Settlement: Helping the Lawyers to Fulfill their Responsibility*, 53 F.R.D. 129, 136 (1972).

⁸³ Elam, *supra* note 62, at 603. *Accord*, Schneider & Mone, *A Positive Approach to Tort Settlement*, PRAC. LAW., March 1971, 27, at 29, where it is properly stated: "Preparation is the most important part of trial practice, regardless of whether the case is settled or tried."

been said in this paper is about as obvious as what the high-powered computer told the stockbroker who had fed it with every known bit of information on the stock market. Everyone will recall that the computer's advice was simply, "Buy low; sell high." Similarly, in response to the lawyer's ultimate question of when to settle and when to litigate, this writer's profound response is: Settle the case whenever it is to your *client's* advantage.