

PUTTING RIGHT VALUES ON CLAIMS

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Putting a value on a claim, like investing in the stock market, is both an art and a science. The science is getting the right information to consider. The art is deciding how much weight to give each of the pieces of information in light of the whole. That comes from experience, yours in particular and the historical experience of similar claims in general.

Ultimately, putting a value on a claim is a form of odds-making. For example, in a negligence case it is a combination of the likelihood of the ranges of fault for the parties and non-parties, and the likelihood of the ranges of damages for the plaintiff. However, you can never be *sure* what the outcome will be because of all the uncertainties of a trial. Anyone who has tried a lot of cases will tell you that they have won cases they should have lost and that they have lost cases they should have won. The best the person putting the value on the claim can know are the odds of an outcome.

Compare it to a hand of five-card, draw poker. If you have been dealt four hearts, you can figure the mathematical odds of discarding one card and drawing a heart to complete a flush. You may even know the odds of a flush winning any one hand when the game has five players. However, there is no way to know if you *will* draw a heart, and there is no way to know if a flush *will* win over every other player's hand that particular time. All you can know are the odds of it happening. Uncertainty of an outcome is one of the reasons claims get settled.

Anyone can get lucky and pick one good stock, play one good poker hand, or correctly predict the verdict range of one particular claim. But it takes more than luck to consistently

evaluate claims well. The best may have been doing it for so long that they seem to come up with their value almost by “intuition.” This is because there are so many ways to consider and combine all the variables that ultimately it is based, not on a mathematical formula, but on professional judgment. That is why teaching and learning the art of consistently evaluating claims well is very difficult, takes time, and involves experience with hundreds and hundreds of claims.

This judgment of the claim’s value may be the most fundamental part of what the person setting the value gets paid to do. The accuracy of these judgments over time by a plaintiff’s lawyer may be important in determining how much money they make and whether they continue to attract clients with serious claims. The accuracy of these judgments over time by a defense lawyer may also be important in determining how much money they make and whether they are repeatedly assigned serious claims to defend. The accuracy of these judgments over time by a claims adjuster may determine if they advance in the company, or maybe even whether they keep their job.

Like the poker player and the stockbroker, the claim evaluator’s accuracy on the odds of outcomes can be improved over time by applying good judgment to the right information. In no particular order, some of the information to consider improving the accuracy of the value put on a negligence claim alleging personal injury could include the following:

- experience and skill of the plaintiff’s lawyer
- experience and skill of the defense lawyer
- willingness of the plaintiff’s lawyer to go to trial
- willingness of the defense lawyer to go to trial
- willingness of the plaintiff to go to trial
- willingness of the defendant or defendant’s insurer to go to trial
- cost to prosecute

- availability of funds to prosecute
- availability of funds to defend
- cost to defend
- whether the insurer is more sensitive to costs of defense or indemnity
- experience and skill of the trial judge
- verdict experience in that venue
- experience of plaintiff's lawyer with that venue
- experience of plaintiff's lawyer with that judge
- experience of defense lawyer with that venue
- experience of defense lawyer with that judge
- how soon plaintiff can get a trial in that venue
- insurance coverage limits
- risk of an excess verdict
- strength of any denial of coverage or reservation of rights
- validity of any punitive damages claim
- defendant's personal assets
- extent plaintiff or defendant seeks to avoid publicity
- whether criminal charges are possible or pending
- whether defendant must consent to any settlement
- plaintiff's age
- any unrelated condition that would shorten plaintiff's ordinary life expectancy
- how badly plaintiff needs the money
- the experience of the claim adjuster
- past successes or not with claims that were tried by this evaluator
- the kinds and types of pressures the claim evaluator is getting from above
- assessment of plaintiff as a witness
- effect of the injury on plaintiff's family
- assessment of defendant as a witness
- assessment of independent witnesses
- assessment of treaters as witnesses
- assessment of any needed expert witnesses
- objectiveness of injury
- objective basis to dispute injuries
- any permanency and its type
- prognosis for future pain
- prognosis for future effect on activities of daily living
- medical bills
- expected future medical bills
- risk and probability for success of future medical treatment
- lost wages
- impairment of future earning capacity
- property damages
- lien types & amounts

- whether there is any scarring or deformity
- nature and extent of the injury claimed
- reasonableness & necessity of medical expenses
- extent of any pre-existing problem
- ranges and likelihood of each party and non-party's percentage of fault
- objective basis to dispute fault
- any aggravating factors regarding liability
- whether mediation will be required and the probable mediator

The above information is commonly considered by people who regularly put values on claims. In addition, for any particular claim there may be additional twists that either increase or reduce its value. Finding the additional twist, recognizing its usefulness, and knowing how to use it comes most from experience.

Knowing what information to gather is the least difficult part of the art and science of claim evaluation. The next most difficult part is knowing how to get the information you want, especially in a way that does not use any more time or money than is necessary. Now assume you have all of the needed information. The most difficult part is still to come as you perform the art of deciding how much weight to give to each piece of information.

Getting the claim settled within the value you have given it can be as difficult as putting an accurate value on it. An argument can be made that the skill of the probable negotiators is additional information that goes into the mix when determining the claim's value. Regardless, negotiation itself contains both art and science (although the more experienced may lament that it is a dwindling art because of the increased dependence on mediation). There is also an art and science to mediation.

The trial lawyer must know and be able to seamlessly apply the law, facts, science, and art when evaluating, negotiating, or trying the claim. It is difficult to consistently do it well. But

be glad that it is difficult, because, as they say, if it was easy then anyone could do it and no one would pay much for it to be done.

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