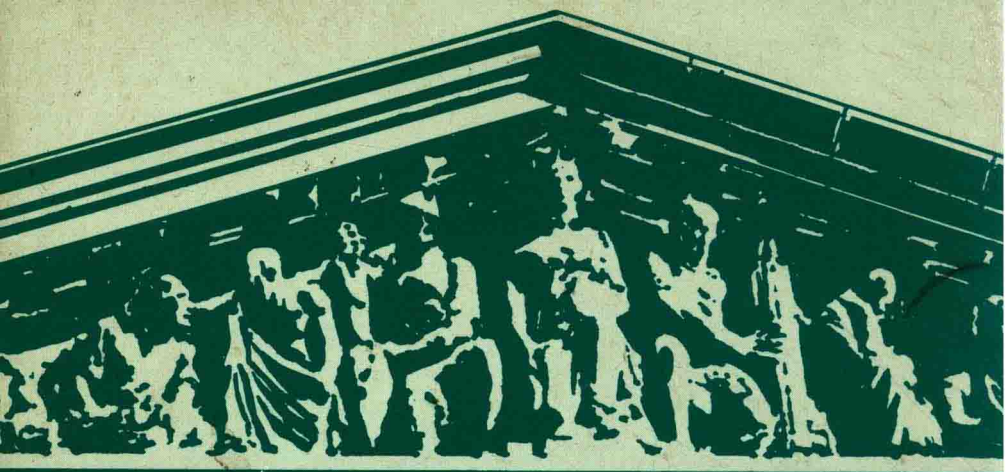

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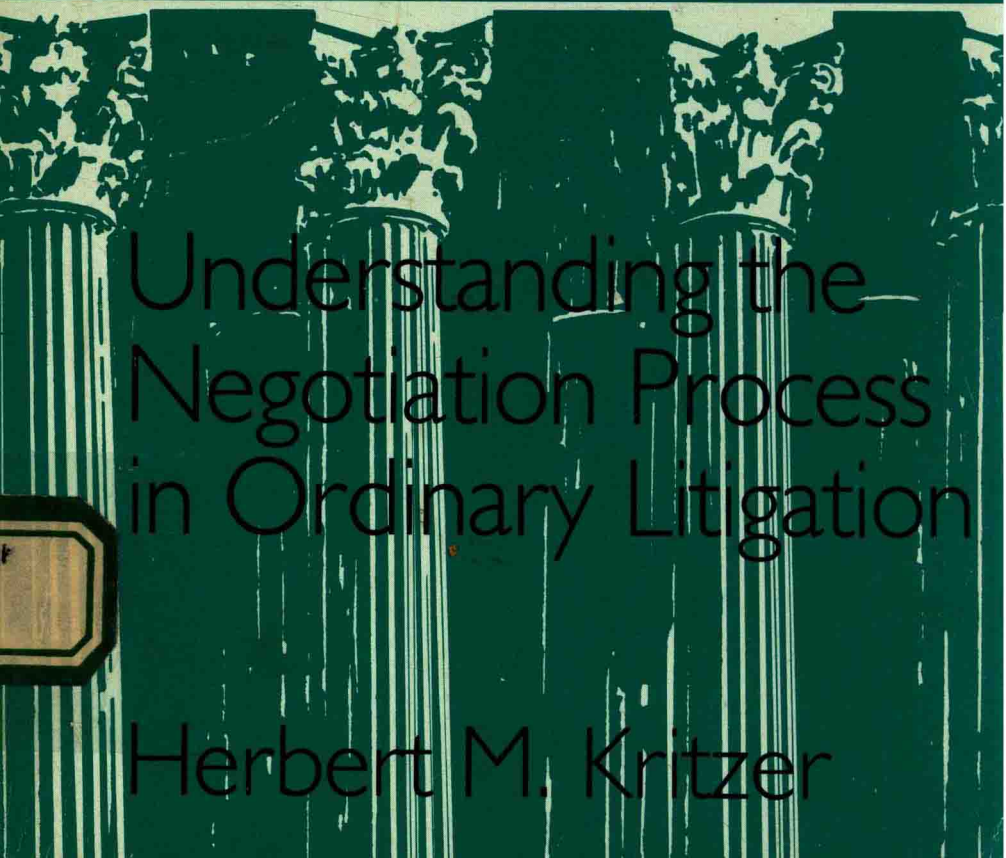

Understanding the Negotiation Process in Ordinary Litigation

Herbert M. Kritzer

Let's Make a Deal

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The University of Wisconsin Press

The University of Wisconsin Press
114 North Murray Street
Madison, Wisconsin 53715

3 Henrietta Street
London WC2E 8LU, England

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5 4 3 2 1

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data
Kritzer, Herbert M., 1947–
Let's make a deal: understanding the negotiation process in ordinary litigation / Herbert M. Kritzer.
220 pp. cm.
Includes bibliographical references (p. 181) and index.
1. Dispute resolution (Law)—United States. 2. Negotiation.
I. Title.
KF9084.K75 1991
347.73'9—dc20
[347.3079]
ISBN 0-299-12820-2 90-50648
ISBN 0-299-12824-5 CIP

To my parents,
Jean Freisleben Kritzer
and Emanuel Kritzer

Acknowledgments

The data that form the basis of the analysis in this book were collected by the Civil Litigation Research Project during 1979–80. CLRP, as it was known, was a unique undertaking, both in purpose and in scale. The funding for the project came initially from the Office for Improvements in the Administration of Justice in the United States Department of Justice (Contract No. JAOIA-79-C-0040); after the political winds shifted in 1981, responsibility for the project was transferred to the National Institute of Justice (Contract No. J-LEAA-003-82). Over the years, substantial supplemental support has been forthcoming from the University of Wisconsin Graduate School and the University of Wisconsin Law School. In the time since funding from the Department of Justice came to an end, support for specific pieces of work and analysis was provided by the National Institute for Dispute Resolution (NIDR) and the National Science Foundation (Grant No. SES-8320129), which funded the negotiations analysis which I report in the pages that follow. With additional support from the National Science Foundation (Grant No. SES-8511622) the data collected by the project have been archived for use by other researchers; data and accompanying documentation are available from the Interuniversity Consortium for Political and Social Research (ICPSR), University of Michigan, P.O. Box 1248, Ann Arbor, Michigan, 48106.

The work that I describe in the following pages reflects substantial contributions by a number of people. David M. Trubek (professor of law, University of Wisconsin–Madison, and former director of the Institute for Legal Studies) served as project director, taking on the burden of day-to-day administration of the project during the years when large numbers of people were involved. Along with David Trubek, William L. F. Felstiner (distinguished research fellow and former director of the American Bar Foundation), Joel Grossman (professor of political science and law, University of Wisconsin–Madison), and Austin Sarat (professor of political science, Amherst College) were collaborators in the tasks of thinking through the design of the research and planning the data collection and the early analyses.

Most of the survey data were collected on our behalf by Mathematica Policy Research in Princeton, New Jersey. Lois Blanchard and Joey Cerf

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worked on a day-to-day basis insuring that the data collected would meet our requirements; the work at Mathematica was under the general supervision of Paul Planchon. The court records data were coded by law students working under the direct supervision of Stephen McDougal and Judith Hansen; collection of data from alternative dispute-processing institutions was handled in the field by Jill Anderson. In Madison, Laura Guy, Richard Miller, Jeannette Holz, Kristin Bumiller, Elizabeth McNichol, Dan Krymkowski, George Brown, and Mary Pfister carried out much of the day-to-day work of the project. I was assisted by Karen Holst, Thomas Schmeling, and Jung Il Gill in the preparation of the open-ended data used in the negotiations analysis. Many other persons, both students and nonstudents, worked on the project over the years. To all of them I owe a debt of appreciation for their hard work.

Much of chapter 5 appeared previously, and I would like to thank the journals where the material originally appeared for their permission to include it in this book:

"Fee Arrangements and Negotiation: A Research Note," *Law & Society Review* 21, 2 (1987): 341–348; reprinted by permission of the Law and Society Association.

"A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases" (a review essay of *Hard Bargaining: Out of Court Settlement in Personal Injury Actions,* by Hazel Genn), *Law & Social Inquiry* 14 (1989): 167–185.

Additionally, a version of Table 1.1 appeared in:

"Studying Disputes: Learning from the CLRP Experience," *Law & Society Review* 15, 3–4 (1980–81): 514; reprinted by permission of the Law and Society Association.

Several persons read and commented on portions of the manuscript at various stages of its development: Tim Swanson, Malcolm Feeley, Carrie Menkel-Meadow, and Craig McEwen. Their comments have led to a much more interesting book, and I greatly appreciate their time and effort. The manuscript benefited tremendously from Robin Whitaker's excellent editing. In a less specific way, this work has benefited from my opportunity to interact with the large Law and Society community at the University of Wisconsin–Madison, including Marc Galanter, Stewart Macaulay, Jack Ladinsky, Howard Erlanger, Laurie Edelman, Malcolm Feeley, Martha Fineman, Dirk Hartog, Donald Downs, Steve Penrod, and the many graduate students who "did time" at Wisconsin during the 1980s. The initial draft of the manuscript was prepared while I was a visiting fellow at the Faculty of Law, University College London, and a guest of the Institute for Advanced

Legal Studies in London; the opportunity to escape the phone calls and committees of Madison allowed me the relaxed context needed to conceptualize and draft the manuscript. Of course, the final responsibility for the analyses and conclusions rests with me.

Finally, to my wife, Amelia Howe Kritzer, who has put up with this research project for too long: Amy, the publication of this book means it's over!

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CHAPTER 1

Adjudication, Bargaining, and Settlement

Introduction

Americans have a long-standing reputation for relying upon the legal system to deal with all manner of problems and issues.[1] In recent years we have been described as having reached new heights of litigiousness (Lieberman, 1981; Rosenberg, 1972); we suffer from the disorder of "hyperlexis" (Manning, 1977). The correctness of this diagnosis is vigorously debated, with prominent judges (Burger, 1982; Posner, 1985: 59–93), policy-makers and researchers (Marvell, 1987, 1985), and academics (Barton, 1975; Tribe, 1979; Galanter, 1983, 1986a) marshaling personal experiences, anecdotes, and statistics to buttress one side or the other of the argument.

Although the resolution of this debate is not in sight, all observers agree that very few of the cases on the dockets of America's courts will be resolved by the full, formal adjudication of the issues presented. Of the vast majority of the cases started in the courts, perhaps 90 percent will be settled by the parties, many without ever seeing the inside of the court*room*.[2] If one were to include the cases that never get through the door of the court*house*—cases that are settled between the parties before a formal court action is even started—the settlement figure approaches 99 percent![3] Does this mean it is time to consider replacing the phrases chiseled in stone above America's courthouse doors, phrases like that appearing on the United States Supreme Court Building in Washington, D.C.:

Equal Justice under Law

with something that more accurately reflects the realities of what happens in the civil justice system? A cynic might suggest the following as a more apt epigram:

Let's Make a Deal!

But is there an inconsistency between "justice" for an aggrieved party achieved through adjudication and "deals" arrived at by parties in a dispute through negotiation? What is the significance of the dominance of settlement over adjudication for the civil justice system's goal of providing justice for aggrieved parties?[4]

Although settlement and adjudication can be cast as contrasting methods of resolving disputes, they are by no means unrelated within the context of actual or potential civil litigation: there is always the option to forego settlement and allow the dispute to be adjudicated.[5] Marc Galanter goes one step further, arguing that the combination of *liti*gation leading to formal adjudication and ne*gotiation* to achieve an out-of-court settlement should be thought of as "a single process of disputing in the vicinity of official tribunals that might [be] call[ed] *litigotiation,* that is, the strategic pursuit of a settlement through mobilizing the court process" (Galanter, 1984: 268).[6] What is interesting about this characterization is that it recognizes the interrelationship between litigation and negotiation while preserving the analytic distinction between adjudication and settlement. From the recent work of the Civil Litigation Research Project (Trubek, Grossman, et al., 1983; Trubek, Sarat, et al., 1983; Kritzer, Sarat, et al., 1984; Kritzer et al., 1985, 1987; Kritzer, 1990) we now know a great deal about the litigation and adjudication side of this process in ordinary cases. Much less is known about the nature of the negotiation and settlement side; the purpose of this book is to fill in this gap.

In the pages that follow, I will draw upon data collected through interviews with lawyers involved in a sample of federal and state court cases from five federal judicial districts to present a portrait of the negotiation and settlement process in *ordinary* litigation. Because of the data source, the discussion is oriented toward the lawyer's perspective rather than the litigant's. The first goal of this book is to describe the day-to-day negotiation and settlement of cases in America's civil justice system. With the portrait in place, I will examine several ways to explain the patterns I describe. To do this, I will turn to the large theoretical literature on negotiation and settlement. I argue that much of that literature is of little help in accounting for the realities of what happens in ordinary civil cases. This is not to say that theories of settlement and negotiation are of no value; rather, there is a narrow element among those theories that can account for much of what is observed. From this discussion of existing theories, I will posit a typology that I believe is helpful in understanding what types of theoretical approaches can be usefully pursued in advancing our knowledge of negotia-

tion and settlement in ordinary litigation. Lastly, in the concluding chapter, I will examine the implications of the analysis, both theoretically and practically:

—Given an empirically based portrait of settlement and negotiation, what are the implications for court reform, both now and in the future (and what does this tell us about the impacts of past efforts to reform the civil litigation process)?

—With a better understanding of the realities of the settlement process, how can the litigotiation image be refined and extended?

What We Know About Negotiation in Court—Four Stories

The perception of a justice system frustrated by deals made in the corridors of the courthouse[7] certainly arises in part from a popular dissatisfaction with the criminal side of the justice system, which is commonly seen as being subverted by rampant so-called plea bargaining. Plea bargaining is attacked both by those who see it as a process by which defendants become the victims of injustice because of a natural fear of the consequences of insisting upon their right to a full trial (e.g., Alschuler, 1968, 1975, 1976, 1981, 1983) and by those who see it as symptomatic of the failure of the criminal justice system to mete out the harsh penalties that criminals justly deserve (e.g., van den Haag, 1975: 171–173; Fine, 1986). The criticisms of settlement in the civil justice system neatly parallel those of the criminal side. Some people attack the deals that are made by way of settlement as evidence that victims of legally compensable injuries are forced (by delay, uncertainty, and the like) to accept resolutions far short of what the law entitles them to (Fiss, 1984; Alschuler, 1986). Others see the civil justice process as a vehicle by which undeserving persons (and their contingent-fee lawyers) extort payments by filing frivolous lawsuits which defendants choose to settle because the cost of defending the case in court exceeds the amount that the plaintiff is willing to accept in settlement.

In fact, as suggested by Galanter's notion of litigotiation, there is a growing realization that both the criminal and civil justice processes involve a complex mix of adversary advocacy, threatened and actual adjudication, and cooperative and competitive bargaining. On the criminal justice side, analyses show that the large numbers of dispositions through guilty pleas may reflect a combination of bargaining with strong cooperative overtones and client advocacy; this combination produces an adversarylike process through which the prosecutor and defender arrive at a common perception of what the case represents and what constitutes an appropriate sanction

(see Utz, 1978; Feeley, 1979a). This revisionist view of the "guilty-plea process" is supported by the fact that there is little systematic evidence to support the proposition that guilty pleas reflect wholesale reductions in charges and/or sanctions (see Maynard, 1984a; Nardulli, Flemming, and Eisenstein, 1985; Nardulli, Eisenstein, and Flemming, 1988; Eisenstein, Flemming, and Nardulli, 1988). Furthermore, the fact that at least one very large urban court disposes of most of its cases through trials rather than guilty pleas (Schulhofer, 1984, 1985) confirms previous research questioning the argument that plea bargaining is an inevitable result of heavy case loads (Heumann, 1977; Feeley, 1979b).

Our understanding of civil settlement is about where our knowledge of the guilty-plea system in criminal cases was 20 years ago. We know that settlement negotiations take place, and we know that they more often than not succeed (at least in the sense that some settlement is agreed to[8]); however, we know little about how or why they succeed. What we do know is dominated by an image of cases that are much bigger than those that make up the bulk of the work of state and federal trial courts (see, for example, Raiffa, 1982: 66–77; Wallach, 1979), particularly those kinds of cases that capture substantial media attention.

THE PENNZOIL VERSUS TEXACO CASE

In a 1980's multibillion-dollar case, Pennzoil sued Texaco in a Texas state court, claiming that Texaco had illegally interfered with a deal Pennzoil had negotiated to buy Getty Oil. In November 1985 a jury found in Pennzoil's favor, awarding approximately $10.5 billion in damages.[9] Texaco went to federal court to seek relief from the Texas law requiring it to post a bond in the full amount of the judgment in order to appeal the jury's verdict; in February 1986, a federal judge in White Plains, New York, issued an order allowing Texaco to post an appeals bond of $1 billion (in stock) rather than the required $12 billion (the higher amount reflecting accrued interest). A year later, Texaco obtained a $2 billion reduction in punitive damages from a Texas appeals court, but was shocked by a United States Supreme Court ruling two months later (April 6, 1987) that the New York federal judge had erred in reducing the appeal bond amount. Six days later, April 12, 1987, Texaco filed for protection under the federal bankruptcy statutes (*National Law Journal,* December 28, 1987, p. 18).

Although the public reports of the settlement negotiations are sketchy, it is clear that a complex dance between Texaco and Pennzoil started soon after the initial jury verdict. This dance included executives of Texaco and Pennzoil, attorneys representing Texaco shareholders (some of whom had

filed suit against the Texaco board of directors), plus outside players such as Carl Icahn (who purchased a large block of Texaco shares and exerted substantial pressures to try to bring about a settlement) and Texaco's general creditors who had been put on hold through the bankruptcy filing (and who were owed approximately $2.5 billion by Texaco). Reported potential settlement figures ranged from $1 billion to $5 billion, and were discussed in the shadow of three different courts: the Texas Supreme Court, the United States Supreme Court, and the federal bankruptcy court in New York. Negotiations were accelerated in November 1987, after the Texas Supreme Court refused to review the Texas appeals court decisions, leaving the United States Supreme Court as Texaco's only hope.

Particular plans included both outright settlement as well as a possible agreement that Texaco would pay a fixed, nonrefundable amount prior to Supreme Court review to purchase what in effect would be a fixed maximum payment; i.e., Texaco would pay Pennzoil $1 billion before filing with the Supreme Court, and Pennzoil would agree that if it (Pennzoil) prevailed at the Supreme Court, Texaco would not have to pay more than $3 billion to satisfy its liability to Pennzoil (*National Law Journal,* December 21, 1987, p. 10). On December 19, 1987, Texaco announced a settlement in which it would pay Pennzoil $3 billion to settle the case, as well as paying other creditors $2.5 billion in order to emerge from the Bankruptcy Court (*Chicago Tribune,* December 20, 1987, p. 6).

This very general chronology suggests a complex, behind-the-scenes process where the costs, risks, and likely outcomes of continuing the fight through the courts were constantly weighed against the results that could be achieved by settlement. The negotiations clearly involved many parties with both conflicting and complementary interests that had to be balanced. Since we do not have a detailed account of actions and responses for individual players, we cannot do more than speculate on how those actors and actions led to the ultimate result.

THE AGENT ORANGE CASE

Peter Schuck (1986) does provide that kind of detailed look at the complexities involved in settling the Agent Orange class action case. This case involved claims by a large number of Vietnam veterans (and their families) against a group of chemical manufacturers and the United States government for a variety of health problems alleged to be associated with exposure to dioxin-based defoliants used in Vietnam. Three key groups were involved in the negotiations: a group of attorneys representing claimants (known as the Plaintiffs' Management Committee, or PMC), attorneys representing

companies that had manufactured the chemicals, and Federal Judge Jack B. Weinstein, plus three attorneys working with Judge Weinstein as special masters.

Soon after Judge Weinstein assumed responsibility for the case, he asked the first special master, Kenneth Feinberg, to draft a plan to guide the settlement discussions. This 80-page document, which avoided any references to specific settlement amounts, laid out the three primary areas where resolution was needed:

—in determining the aggregate amount of the settlement;
—in setting the amounts to be paid by each defendant;
—in dividing the settlement among the claimants.

Each of these areas raised many thorny issues. For example, concerning the amount of the settlement, there was no information available on the total number of claims that might be made, nor was there any information on the distribution of the various types of injuries that had been alleged.

The second special master, David Shapiro, had responsibility for working directly with the two sides to try to reach agreement on the specific issues. These negotiations dealt with questions such as:

—Should the proportion of the settlement to be paid by each defendant be proportional to market shares, dioxin content of their chemicals, litigation cost, or some combination of these?
—Should potential claimants be permitted to "opt out" of any settlement that was reached, or should all claimants be required to accept the settlement under provisions of the federal rules governing class actions; if opt-outs were to be permitted, to what degree should their claims be paid out of the settlement fund?
—How should claims of children and the unborn be handled?
—Should American and Vietnamese civilians plus soldiers (and their families) from American allies (Australia and New Zealand) be included?
—When should interest on the settlement fund begin to accrue?
—What role, if any, should the federal government be required to play in funding the settlement?[10]
—What kinds of fee awards should be made to attorneys representing claimants?
—What kinds of information should claimants be required to provide to obtain compensation?

The negotiations started with the two sides far apart on settlement issues, particularly the amount of the settlement. The defendants were willing to settle, but the amount they typically mentioned was $25 million. The PMC was thinking in terms of $700 million. A week before jury selection

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