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# PSYCHOLOGICAL BARRIERS TO LITIGATION SETTLEMENT: AN EXPERIMENTAL APPROACH

Russell Korobkin\*  
and Chris Guthrie\*\*

## INTRODUCTION

Most civil lawsuits in the United States are settled out of court through negotiation rather than in court through adjudication.<sup>1</sup> Nevertheless, the disputes that do go to trial impose substantial costs on litigants<sup>2</sup> and the country.<sup>3</sup> The high costs of pursuing a

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\*\* Research Fellow, SCCN. B.A. 1989, Stanford; Ed.M. 1991, Harvard; J.D. 1994, Stanford. — Ed. Research support for this project was provided by a generous grant from the SCCN. The authors thank Robert Mnookin, Janet Cooper Alexander, Ian Ayres, and Tom Lyon for their advice and comments on earlier drafts, the participants in the Harvard Law School Negotiation and Conflict Resolution Interdisciplinary Research Seminar for their comprehensive and incisive written and oral critiques, and especially Lee Ross for his consultation on social science laboratory research methodology.

1. One seminal empirical study, now over 20 years old, found that only 4.2% of automobile liability claims filed against insurance companies ultimately reach trial. See H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 217 (1970). A more recent study found that approximately 8% of civil suits filed in state and federal courts went to trial, and another 22.5% of those cases were disposed of by judges, most through dismissal, summary judgment, or default judgment. See David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983). More than 50% of the claims settled out of court prior to adjudication. *Id.* Criminal suits also settle in overwhelming numbers through plea bargaining. See JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.2 (2d ed. 1983).

2. Litigants incur both psychic and financial costs. According to Marc Galanter, who cites a number of empirical studies to support his argument, trials impose substantial emotional costs on both plaintiffs and defendants. See Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 8-11 (1986). "For plaintiffs and defendants alike, litigation proves a miserable, disruptive, painful experience. Few litigants have a good time or bask in the esteem of their fellows — indeed, they may be stigmatized. Even those who prevail may find the process very costly." *Id.* at 9 (citations omitted). Plaintiffs and defendants also incur financial costs at trial. Trubek et al., *supra* note 1, at 90-93. Costs fall into two categories: out-of-pocket costs — including legal fees, expert witness fees, and so on — and the "monetary value of the time clients spend on cases." *Id.* at 91. Generally speaking, the more legal actions that take place, the higher the costs incurred — that is, increased legal fees, client time away from work, and trial fees, such as expert witness fees, stenographic costs, and travel expenses. *Id.* at 104 (finding that "duration does not have a substantial effect on hours. . . . [T]he more motions filed and discovery conducted, the more hours spent."); see also RAND: THE INSTITUTE FOR CIVIL JUSTICE, COMPENSATION FOR ACCIDENTAL INJURIES IN THE U.S. 135-36 (1991) (finding that about one-fifth of personal injury plaintiffs "were told that the fee would depend on the length of time required to resolve the claim, the ultimate amount received, or whether or not a trial was required").

3. J.S. Kakalik and R.L. Ross examined *public* spending on civil disputes during fiscal

claim to a trial verdict have led most commentators to hypothesize that trials represent mistakes — breakdowns in the bargaining process — that leave the litigants and society worse off than they would have been had settlement been reached.<sup>4</sup> The emphasis courts have placed on encouraging settlements and discouraging trials implies that the judicial system agrees.<sup>5</sup>

In attempting to create a general framework for explaining why settlement attempts fail and trials occur, commentators have developed two primary explanations, both of which assume that the disputants are rational actors. Proponents of the standard economic models of settlement hypothesize that because settlement is almost always less costly than trial, parties will reach agreement out of

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year 1982 in J.S. KAKALIK & R.L. ROSS, *COSTS OF THE CIVIL JUSTICE SYSTEM: COURT EXPENDITURES FOR VARIOUS TYPES OF CIVIL CASES* (1983). This was “the first book ever to estimate the amount spent on civil litigation in the United States.” Edward Brunet, *Measuring the Costs of Civil Justice*, 83 MICH. L. REV. 916, 917 (1985) (reviewing KAKALIK & ROSS, *supra*). Although a very small percentage of cases actually went to trial, KAKALIK & ROSS, *supra*, at xiii, half of the money spent by the government on civil litigation was for trials. *Id.* at 37. Indeed, the amount of public spending on litigation depended heavily upon whether cases were disposed of before or after trial. Cases disposed of early in the process imposed relatively minor costs on the public. A case that ended after the filing of the claim cost the government less than \$50, and “a case that ended after one hearing and one conference cost between \$207 and \$358 to process.” *Id.* at 41. In contrast, in a case involving “one hearing, two conferences (cases generally do not reach the trial stage without a second conference), and a jury trial, the average state government expenditure escalated to about \$3500 in Florida, \$2800 in Washington, and \$11,000 in Los Angeles.” *Id.* at 41-42.

4. See, e.g., Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225, 225 (1982) (concluding that a trial “represents a bargaining breakdown”); Samuel R. Gross & Kent D. Syverud, *Getting To No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (“A trial is a failure.”); Trubek et al., *supra* note 1, at 122 (“[B]argaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed.”).

Of course, a trial creates social benefits as well as costs. For a discussion of the relationships between these, see Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 11 J. LEGAL STUD. 333, 333-34 (1982). For cases with great precedential value, a trial might be more socially efficient than an out-of-court settlement. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that in some types of litigation — civil rights, for example — the positive externalities created by trial verdicts can make the social benefits of a trial greater than its social costs). Fiss fears that “[p]arties might settle while leaving justice undone.” *Id.* at 1085.

5. Courts have devised a number of procedures aimed at promoting settlement. One of the most commonly used is the judicial settlement conference. Robert J. MacCoun et al., *Alternative Dispute Resolution in Trial and Appellate Courts*, in *HANDBOOK OF PSYCHOLOGY AND LAW* 95, 107 (D.K. Kagehiro & W.S. Laufer eds., 1992) (“Perhaps the most common forum for attempts to increase settlement in civil cases is the judicial settlement conference, in which a judge or magistrate meets with the attorneys in a case to try to resolve the case short of trial.”). Federal Rule of Civil Procedure 16 makes the facilitation of settlement an explicit goal of the conference. See FED. R. CIV. P. 16. Other judicial procedures aimed at promoting settlement include mediation and summary jury trials. MacCoun et al., *supra*, at 105-06, 110-13. For a thorough discussion of how judges actively intervene in litigation to encourage settlement, see Herbert M. Kritzer, *The judge's role in pretrial case processing: assessing the need for change*, 66 JUDICATURE 28 (1982).

court as long as they agree on the expected value of a trial; the litigation costs they save represent joint gains of trade achieved through settlement, which the litigants can then distribute between themselves. Conversely, trials will occur when one or both parties miscalculate the likely outcome of the trial.<sup>6</sup> Other commentators — focusing on the distributive bargaining issues that arise when the parties recognize that they would create joint gains by reaching out-of-court agreement but must determine how to divide that savings — hypothesize that disputants fail to settle when one or both parties employ rational distributive bargaining strategies that lead to impasse, as they will on some occasions.<sup>7</sup>

We have no quarrel with either of these theories, but we believe that they fail to explain the full range of litigation negotiation failures. While they are elegant in their simplicity, their explanatory power is limited by the narrow assumptions about human behavior on which they rely. When individuals engaged in litigation must choose between settling a lawsuit out of court and seeking a trial verdict, we predict that they will not always act in the rational way that the economic and strategic bargaining models assume. We hypothesize that even in the absence of miscalculation and strategic bargaining, psychological processes create barriers that preclude out-of-court settlements in some cases. Specifically, we predict that psychological effects will impact how litigants perceive, understand, and respond to settlement offers in the following three ways:

*How the offer is framed will affect settlement rates ("framing").* People avoid risk when they choose between options they understand as gains, but they prefer risk when they select between choices viewed as losses.<sup>8</sup> Therefore, we predict that settlement rates will depend on whether the offeree understands a given settlement offer as a gain or loss. If an offeree views accepting an offer as a gain, he is likely to prefer settlement — the less risky alternative — to trial; if he sees the offer as a losing proposition, he is likely to prefer trial — the more risky option.

*The status of the relationship between the parties will affect settlement rates ("equity seeking").* People want what they are legally entitled to, but they also want recognition of their claim's validity.<sup>9</sup> Therefore, given the same legal rights, we predict that litigants will

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6. See *infra* notes 16-30 and accompanying text.

7. See *infra* notes 31-38 and accompanying text.

8. See *infra* Part III.

9. See *infra* Part IV.

be more likely to reject a settlement offer if they view the offeror as morally blameworthy or as disrespectful of their claim.

*Who makes the offer will affect settlement rates* (“reactive devaluation”). People do not like to do things their adversaries want them to do.<sup>10</sup> Therefore, a settlement offer that a litigant would evaluate favorably in the abstract or when suggested by an ally or neutral third party is more likely to meet with disfavor when proposed by the adversary.

In this article, we seek to substantiate “psychological barriers,”<sup>11</sup> as illustrated by the constructs described above, as a third explanation for the failure of legal disputants to settle out of court.<sup>12</sup> Although we are not the first to hypothesize that psychological processes can, in theory, affect legal dispute negotiations,<sup>13</sup> we attempt to give more definition to the otherwise vague contours of the psychological barriers hypothesis by bringing empirical data to bear on the question.<sup>14</sup> To achieve this end, we conducted a series of nine laboratory experiments — involving nearly 450 subjects<sup>15</sup> — designed to isolate the effects of the three psychological

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10. See *infra* Part V.

11. This term is used in the negotiation literature. See, e.g., Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 392 (1991).

12. Our secondary goal is to respond to the surprising scarcity of controlled laboratory experiments concerning legal issues in general, and the subject of litigation settlement in particular. What follows is a fairly exhaustive list of experimental work on the subject of litigation settlement: Don L. Coursey & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INTL. REV. L. & ECON. 161 (1988) (using bargaining games to test the effect different systems of allocating legal costs will have on settlement); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135 (1993) (studying the effects of self-serving biases and notions of fairness in settlement negotiations); Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, LAW & CONTEMP. PROBS., Autumn 1988, at 13 (studying the effects of the increased use of “offer of settlement devices” and the heightened visibility of Federal Rule of Civil Procedure 68); Linda R. Stanley & Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J. LEGAL STUD. 145 (1990) (testing the rational actor selection hypothesis). Linda Stanley and Don Coursey conclude the presentation of their findings with the observation that “as the quantity of experimental data on litigation bargaining increases, the procedural aspects of civil dispute will become less ambiguous.” *Id.* at 164.

13. Many commentators have provided theoretical or anecdotal accounts of how psychological barriers may affect the negotiation of legal disputes. See, e.g., Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235 (1993); Ross & Stillinger, *supra* note 11.

14. The notion that psychological barriers can impede successful negotiations may seem like no more than common sense to anyone who has participated in any type of negotiation. See, e.g., ROGER FISHER & WILLIAM URY, *GETTING TO YES* 19 (2d ed. 1991) (“[People] see the world from their own personal vantage point, and they frequently confuse their perceptions with reality. Routinely, they fail to interpret what you say in the way you intend and do not mean what you understand them to say.”). Our goal is to define more clearly some of these barriers and to lend empirical support to their existence and magnitude.

15. See *infra* Part II for a complete discussion of our research methodology.

processes outlined above on parties' decisions about whether to accept settlement offers or to opt for formal adjudication. Our results substantiate the basic hypothesis that non-value-maximizing considerations can affect decisions about whether to settle or try disputes, and our experimental findings cast light on the circumstances under which psychological barriers are more or less likely to affect settlement possibilities. The clearer understanding that stems from empirical research, we believe, will benefit future research on the impact of psychological barriers to litigation settlement.

Part I of this article describes the dominant rational actor paradigms of legal dispute resolution and suggests a theoretical role for the psychological barriers hypothesis. Part II describes the research methodology employed in our experiments. Parts III, IV, and V review the results of our experiments on how the psychological constructs of framing, equity seeking, and reactive devaluation can affect litigation settlement negotiations. Part VI discusses some of the implications of our findings for practitioners seeking to resolve litigation in the economic interests of their clients. Finally, the article concludes with a discussion of how an understanding of the effect of psychological processes on litigation settlement combines with the insights provided by existing economic models to create a richer understanding of how litigants perceive, think about, and respond to settlement offers.

## I. RATIONAL ACTOR SETTLEMENT THEORIES

### A. *The Standard Economic Account of Settlement*

According to standard economic explanations of the trial-versus-settlement decision, a defendant will be willing to settle for an amount equal to the cost of an adverse trial judgment multiplied by the percentage chance of losing the case, plus trial costs, minus out-of-court settlement costs. A plaintiff will be willing to accept a settlement offer in the amount of a favorable judgment multiplied by the likelihood of a favorable judgment, minus trial costs, plus out-of-court settlement costs.<sup>16</sup> Lawsuits will settle if the defendant's maximum offer is higher than the lowest offer the plaintiff will accept.<sup>17</sup>

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16. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-20 (1973).

17. *Id.* at 417. For a similar analysis of the criminal law process, see William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 66 (1971) ("[A] necessary condition for a settlement is that both the defendant and prosecutor simultaneously gain from a settlement compared to their expected trial outcomes.").

The clearest articulation of the assumptions behind the standard economic model is offered by George Priest and Benjamin Klein.<sup>18</sup> The Priest & Klein model assumes that litigants form rational estimates of the economic consequences of both trial and out-of-court settlement, compare the two, and act solely on the basis of that information. According to the simple version of the model, the plaintiff and defendant estimate their chances of success in court, the level of damages likely to be awarded, the costs of trial, and the costs of settlement before deciding whether to settle the dispute out of court.<sup>19</sup> As long as the costs of trial are higher than the costs of settlement,<sup>20</sup> and as long as both sides make an identical estimate of the likely outcome of the trial, the case should settle.<sup>21</sup> In effect, both parties in such a case agree on the risk-discounted value of a jury verdict, so they have no incentive to incur the high costs of trial.<sup>22</sup>

If the parties' predictions regarding the outcome of a trial differ, Priest and Klein predict that the dispute will settle out of court anyway, provided that the difference in expectations is smaller than the plaintiff's and the defendant's combined differential between the cost of trial and the cost of settlement.<sup>23</sup> A simple example makes the logic of this prediction clear: Consider an automobile accident that leads to a negligence lawsuit in which the plaintiff believes she has a 40% chance of winning a \$100,000 judgment at trial, while the defendant believes the plaintiff has only a 30% chance of winning a \$100,000 judgment. The plaintiff will then value a trial judgment at \$40,000, while the defendant will expect a trial judgment to cost him \$30,000. If plaintiff's and defendant's combined cost of litigating to a verdict, less their combined costs of settling the dispute out of

18. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 3-6 (1984).

19. *Id.* at 12-13.

20. Attorney's fees are usually the principal litigation cost in civil disputes. See Trubek et al., *supra* note 1, at 91-92. Generally the costs of trial are so much greater than the costs of settling out of court that some theorists simplify the equation by assuming the costs of settling to be zero. See, e.g., Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LITERATURE 1067, 1075 (1989).

21. Priest & Klein, *supra* note 18, at 16-17 ("In litigation, as in gambling, agreement over the outcome leads parties to drop out.").

22. This assumes both parties are either risk averse or risk neutral. If one party is risk-seeking, she might prefer to pay trial costs for the opportunity to take the gamble. See Landes, *supra* note 17, at 67.

23. Priest & Klein, *supra* note 18, at 13. A sufficient condition for trial is  $Pp - Pd > (C - S)J$ , where  $Pp$  = plaintiff's estimate of his percentage chance of winning at trial,  $Pd$  = defendant's estimate of plaintiff's percentage chance of winning at trial,  $C$  = the litigants' combined trial costs,  $S$  = the litigants' combined settlement costs, and  $J$  = the amount that will be awarded to plaintiff if he succeeds at trial. *Id.* at 12-13.



court, is greater than \$10,000, both sides will be better off settling the dispute out of court for an amount between \$30,000 and \$40,000. For example, if the plaintiff and the defendant expect that litigating the matter to a trial verdict will cost each of them \$20,000 more in attorney's fees than if they settle out of court, the plaintiff should accept a settlement of greater than \$20,000, and the defendant should favor any settlement of less than \$50,000. The \$10,000 difference between the plaintiff's and defendant's estimates of the value of a trial should not prevent a settlement that could produce \$40,000 of joint savings.

Conversely, the model predicts that if the costs of trial minus the costs of settlement are less than the difference between the two parties' estimates of the value of trial, the dispute will proceed to trial.<sup>24</sup> In the above example, if each party anticipates that a trial will cost it \$2,000 more in costs than a settlement, the defendant will offer no more than \$32,000 as a settlement and the plaintiff will accept no less than \$38,000. There will then exist no mutually advantageous bargaining range and, thus, no possibility of settlement.

One important assumption of the Priest & Klein model is that the parties are risk neutral — that is, they are equally attracted to a certain settlement amount and a fifty percent chance of receiving twice that amount. If the parties are risk averse, each would have an even stronger preference for settlement than the above examples would suggest.<sup>25</sup> The plaintiff in the above example might be willing to accept some amount less than \$40,000 — before figuring in costs of trial and settlement — and the defendant might be willing to pay something more than \$30,000. If risk aversion is strong enough, its effect alone might drive a settlement, even if the parties do not consider the high costs of trial relative to settlement.<sup>26</sup>

Another important assumption of the basic Priest & Klein model is that the parties have equivalent stakes in the dispute.<sup>27</sup> The purest example of this is a dispute between two "one-time players" who have nothing more to gain or lose from the dispute than

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24. *Id.*

25. See Cooter & Rubinfeld, *supra* note 20, at 1076 ("Risk aversion thus increases the surplus . . . which presumably increases the probability of a settlement."); Coursey & Stanley, *supra* note 12, at 164 ("Since trial is less attractive to risk averse parties than to risk neutral parties, *ceteris paribus*, the surplus from settlement is higher and trial is less likely."); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 280-81 (1973) ("[W]hen two risk-averse individuals become involved in a conflict that has an uncertain outcome for each, they can both gain by eliminating uncertainty and settling the conflict with a riskless transfer of wealth.").

26. Gould, *supra* note 25, at 286.

27. See Priest & Klein, *supra* note 18, at 24.

the damage award. If one party to the dispute is a repeat player with an interest in obtaining a verdict that will have precedential value in subsequent disputes, the predictions of the Priest & Klein model will not necessarily hold.<sup>28</sup> Assume, for example, that the defendant in the above automobile accident case is an insurance company involved in hundreds of similar disputes every year, while the plaintiff is an individual accident victim who foresees no further involvement in the litigation process. If the defendant insurance company anticipates that a trial will cost it \$20,000, it may choose not to offer the plaintiff a \$50,000 settlement — defendant's \$30,000 expected trial judgment plus \$20,000 costs — because a defense verdict at trial would establish precedent for future cases or because it desires to avoid developing a reputation as a carrier that succumbs to the threat of litigation.<sup>29</sup> If one litigant believes that a trial will have either a positive or a negative impact on her interests beyond the bounds of the particular litigation, the parties have asymmetrical stakes in the litigation — stakes that may either expand or reduce the bargaining range and, therefore, make settlement more or less likely.<sup>30</sup>

### B. *Strategic Bargaining*

The Priest & Klein model assumes that when there is a range of settlement outcomes that will leave both parties better off than they would expect to be after a trial, they will reach a settlement.<sup>31</sup> Strategic bargaining theorists focus on the parties' attempts to move from *identifying* a range of potential settlement options to *agreeing* on a single one. Robert Cooter, Stephen Marks, and Robert Mnookin suggest a model of litigation bargaining failure in which trials are caused by distribution problems; specifically, parties agree that settling out of court would create a joint surplus, but they can-

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28. *Id.* at 24-29. Depending on the nature of the asymmetrical stakes, settlement could require a smaller difference between the two parties' expectations of success or could be possible even in instances when the difference in expectations is greater than the parties' combined costs.

29. Priest and Klein make the converse point that if the loss of a case will severely damage a defendant's reputation, the defendant might overpay to settle the case out of court. *Id.* at 24-26.

30. See Cooter & Rubinfeld, *supra* note 20, at 1075 ("To illustrate, a defendant who wants to cultivate a reputation for tough bargaining will contest cases that he has little chance of winning. Conversely, a defendant who wants to avoid the publicity of a trial will settle cases that he has a high probability of winning.").

31. Richard Posner notes that this might be an unrealistic assumption in multiparty litigation in which there are incentives to hold out, but he assumes the assumption is valid in the more typical case of two-party negotiations. See Posner, *supra* note 16, at 417-18 & n.27.

not decide how to divide that surplus.<sup>32</sup> If one party demands more of the surplus at the negotiating table, he stands to receive more of the surplus if the dispute settles out of court, but he assumes a greater risk of bargaining breakdown and a resulting trial, which will destroy the surplus.<sup>33</sup>

Cooter, Marks, and Mnookin predict that one or both parties may use "hard" bargaining tactics, which might loosely be termed "brinksmanship,"<sup>34</sup> in an attempt to garner a larger portion of the surplus. The cost of such an approach is the risk that negotiations will fail and that a trial, with its attendant costs, will result.<sup>35</sup> Suppose, for example, that both the plaintiff and the defendant expect the plaintiff to win a \$35,000 damage award at trial. Suppose further that staging the trial would cost each party \$10,000. Because the parties would avoid this trial cost if they settled out of court, a settlement would create a surplus of \$20,000 to be divided between plaintiff and defendant. Assume that the defendant, in an attempt to appropriate all of the surplus, makes an initial \$25,000 settlement offer, which the plaintiff rejects. After extending this offer, the defendant might adopt a hard bargaining strategy and stand firm on the \$25,000 offer — rather than increasing the offer to \$30,000 or \$35,000 — hoping that the plaintiff will accept it on the proverbial courthouse steps.<sup>36</sup> If the plaintiff capitulates at the eleventh hour, the defendant is \$20,000 better off than he predicted he would have been after trial. If the plaintiff does not settle, the expected cost to

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32. Cooter et al., *supra* note 4, at 226 ("The fundamental cause [of trials] is the problem of distribution faced by the players."); see also David E. Bloom, *Is Arbitration Really Compatible with Bargaining?*, 20 *INDUS. REL.* 233 (1981) (examining the circumstances under which parties are likely to settle or resort to binding arbitration). Other economists have constructed more complicated accounts that consider how the presence of symmetric or asymmetric information will affect strategic bargaining. See, e.g., Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 *RAND J. ECON.* 404 (1984); I.P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 *BELL J. ECON.* 539 (1983).

33. Cooter et al., *supra* note 4, at 231. For another description of how strategic bargaining can frustrate settlement, see ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 487-92 (1988).

34. See THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 199-201 (1960).

35. See, e.g., Cooter et al., *supra* note 4, at 231 ("If a player adopts a hard strategy, then he receives a larger share of the stakes in the event of settlement. But a harder strategy is less likely to result in settlement. If the pair of strategies chosen by the players is too hard, then the dispute will be resolved by trial.")

36. The parties engaged in the strategic bargaining will continuously adjust their strategy based on the behavior of their adversary. But as the trial date draws near, the defendant will have to make a calculated decision about whether to make one final concession without knowing with certainty whether the plaintiff will accept the offer on the table. Similarly, the plaintiff will have to decide whether to accept the offer on the table without knowing with certainty whether the defendant will make one final offer.

the defendant is \$45,000 — a \$35,000 trial award plus \$10,000 in litigation costs.

The problem for the defendant is that he can never be sure whether the plaintiff will fold or call his bluff; he can only estimate the likelihood of each possibility.<sup>37</sup> If the defendant believes there is a 90% likelihood that the plaintiff will accept the offer and only a 10% chance that she will not, the defendant could quite rationally hold out until the end of the game: namely, when the jury returns a verdict. The expected value of the defendant's payout if he holds firm with his \$25,000 offer is  $(90\% \times \$25,000) + (10\% \times \$45,000) = \$27,000$ . If the 10% chance turns out to be the reality, the defendant loses the gamble.<sup>38</sup>

In the Cooter, Marks & Mnookin strategic bargaining model, like the Priest & Klein model, trials result from miscalculation. With limited information and a high degree of uncertainty, each disputant must estimate the likelihood of a variety of events. Sometimes, even the most savvy will be wrong. In the Priest & Klein model, the key estimate is the percentage chance of success at trial.<sup>39</sup> In the Cooter, Marks & Mnookin model, the key estimate is the percentage chance the adversary will accept an offer that divides the surplus. Under the assumptions of either model, inaccurate estimates, however rational, will frustrate settlement efforts and push the parties to trial.

### C. *Psychological Barriers as the Third Leg*

The Priest & Klein and Cooter, Marks & Mnookin models explain why rational, value-maximizing actors fail to reach a settlement even when it is in their best interest. We accept the premises of both models. We agree that an overlap of bargaining ranges is a necessary condition for settlement. So too are negotiating postures by both sides that are not so hard as to discourage the other party from settling. But these conditions, though necessary to produce an

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37. This problem exists because a litigant decides what negotiation strategy to pursue on the basis of her own "observable" and "unobservable" traits, but her opponents can only predict her likely strategy based on her observable traits. Cooter et al., *supra* note 4, at 231-32; see also Cooter & Rubinfeld, *supra* note 20, at 1079 ("A party may overestimate a particular opponent's willingness to make concessions, which can cause a breakdown in settlement negotiations and a trial.")

38. In this example, the defendant loses the gamble because his prediction that the plaintiff will accept the offer turns out to be wrong. This type of miscalculation is more likely to occur in disputes among strangers, due to less familiarity with the other litigant's personality traits. Cooter et al., *supra* note 4, at 237.

39. Priest & Klein, *supra* note 18, at 7-12.

out-of-court settlement, are insufficient to guarantee one.<sup>40</sup> Even in the presence of both conditions, trials can result if disputants and their attorneys do not overcome psychological barriers to settlement.

Psychological barriers, which are cognitive and perceptual in nature, prevent disputants from acting in a value-maximizing, utilitarian manner. Although the psychological phenomena tested in our study — the framing of settlement offers, personal animus and equity seeking, and the reactive devaluation of offers proposed by the adversary<sup>41</sup> — are well known in social science and negotiation circles, this article presents the first scientific evidence of their impact on decisionmaking in the litigation setting.<sup>42</sup> Our general conclusion is that these psychological constructs can cause legal disputes to go to trial even when there is a viable bargaining range and no strategic behavior by the disputants.<sup>43</sup>

While it seems logical to predict that psychological effects demonstrated in other arenas will be present in the litigation context, some unique features of litigation could mean conclusions drawn from other negotiation contexts would not be transferable. In many other bargaining contexts, the alternative to a negotiated agreement is the status quo — no agreement. This is not so in litigation bargaining, where the default result is a court-imposed solution. Litigation creates a unique bargaining context where the litigants negotiate in “the shadow of the law.”<sup>44</sup> This feature of liti-

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40. Economists modeling litigation settlement often admit that their models may be incomplete. See, e.g., Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 57 n.8 (1982).

41. See *infra* Parts III-V.

42. Commentators have noted the need for experimental research on how psychological barriers affect litigation settlement negotiations. In one set of experiments, Stanley and Coursey tested aspects of the Priest & Klein model using laboratory methods. See Stanley & Coursey, *supra* note 12. In their conclusion, they write:

The experiment above was not designed to study the psychological effects of the negotiation process. However, the results suggest that these effects may determine, in part, the outcome of negotiations. Carefully controlled laboratory experiments, like the one above, can play a key role in the process of sorting out these direct and psychological effects.

*Id.* at 164.

43. Our work to this point is insufficient to create a model that could predict whether individual disputes will settle out of court or result in trial, although such a model might be possible after considerably more research is conducted on the subject. For a more complete discussion of the modeling implications of our results, see *infra* text accompanying notes 237-44.

44. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing how in-court outcomes can affect out-of-court settlement negotiations); see also Gould, *supra* note 25, at 296 (“The concept of legal precedent is in effect a means to provide stationarity over time to the probabilities and hence to increase the opportunities for out of court agreement.” (footnote omitted)).

gation bargaining could, in some situations, provide additional incentives for disputants to reach agreement, resulting in more rational bargaining behavior than occurs in other contexts.<sup>45</sup>

## II. RESEARCH METHODOLOGY

### A. *Experimental Research v. Actual Dispute Data*

Empirical research conducted by legal scholars on why some disputes settle and others do not has been limited primarily to the analysis of actual disputes that have resulted in trial.<sup>46</sup> The study of actual trials has a major benefit: the disputes studied are *like* real-world disputes because they *are* real-world disputes. Provided that the sampling is not biased, whatever conclusions can be drawn from the sample are likely to be applicable to the general population of legal disputes.<sup>47</sup>

But the analysis of actual disputes has two important shortcomings, one practical and one methodological. The practical problem is that, while there is ample information about disputes that go to trial, there is very little about disputes that settle.<sup>48</sup> The methodological problem is that it is extremely difficult to isolate and examine the impact of any single independent variable when the data set is made up of actual disputes.<sup>49</sup> An example from the dispute resolution literature illustrates this difficulty:

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45. See Coursey & Stanley, *supra* note 12, at 161 ("The legal institution used in trial becomes, in effect, a third party to the negotiation process and to a great extent determines whether and at what level pretrial settlement will occur.").

46. See, e.g., MARK A. PETERSON & GEORGE L. PRIEST, *THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY ILLINOIS, 1960-1979*, at 2 (1982), (analyzing 9000 civil cases tried in Cook County, Illinois between 1960 and 1970); Gross & Syverud, *supra* note 4, at 321 (examining 529 civil jury trials in California state courts); Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185, 200 (1985) (analyzing 582 rear-end accident jury trials in California courts).

47. In social science terminology, such studies are externally valid — "the findings of the study can be generalized." JOHN MONAHAN & LAURENS WALKER, *SOCIAL SCIENCE IN LAW: CASES AND MATERIALS* 50 (1985).

48. Stanley & Coursey, *supra* note 12, at 146. Samuel Gross and Kent Syverud liken studying dispute resolution by analyzing cases that have gone to trial to "studying the operation of an assembly line by looking at the rejects." Gross & Syverud, *supra* note 4, at 321. There may be important subtleties about settlement that cannot be gleaned from examples of nonsettlement.

49. In social science terminology, such studies suffer from problems of internal validity. Internal validity "refers to the truth or accuracy of the inferences drawn from a study as applied to the circumstances of that particular study." MONAHAN & WALKER, *supra* note 47, at 50; see also Dan Coates & Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC. REV. 655, 667 (1981) ("More generalizable results come from surveys of actual or potential disputants[,] . . . but these studies measure rather than manipulate variables, with the consequence that clear causal inferences are impossible to make." (citation omitted)).

Priest and Klein hypothesize that trials occur only when the plaintiffs or defendants miscalculate their chances of success at trial; thus, they predict that plaintiffs will prevail at trial fifty percent of the time, because there is no reason to believe that either plaintiffs or defendants will miscalculate more often than the other group.<sup>50</sup> Attempts to validate the fifty-percent hypothesis by examining trial data have proven inconclusive. Donald Wittman attempted to test its validity by examining 582 rear-end auto accident cases in California.<sup>51</sup> He found that only seventeen percent of the trials resulted in verdicts for the defendant.<sup>52</sup> From that, he concluded that “[t]he 50 percent hypothesis is soundly rejected,” adding, for good measure, that “17 percent is 10 standard deviations from 50.”<sup>53</sup> Priest contended, in response, that there was too much noise in Wittman’s data set to test the fifty-percent hypothesis. The hypothesis predicts that plaintiffs will “win” fifty percent of cases that go to trial, but the “winner” is only clear when the parties agree on damages but disagree on liability. If the plaintiff and defendant disagree about the defendant’s liability but agree on the sum that will be awarded to the plaintiff if he prevails, it is easy to judge who wins the case and who loses: if the defendant is liable, the plaintiff wins; if there is no liability, the defendant wins. Priest asserted that in rear-end accident cases the defendant’s liability is often clear to both parties, but the amount of damages is disputed.<sup>54</sup> Because of this, Priest argued, it is not surprising that plaintiffs receive some award in most of these cases, but an award in this type of case does not necessarily constitute a victory for the plaintiff. Therefore, Priest claimed Wittman’s data did not disprove the fifty-percent hypothesis.<sup>55</sup> This exchange is, of course, only one illustration of why it is extremely difficult to use actual trial data to substantiate theories of bargaining.

The controlled laboratory setting substantially mitigates this problem because the experimenters can hold constant the variables they are not testing.<sup>56</sup> In a laboratory test of the fifty-percent hy-

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50. Priest & Klein, *supra* note 18, at 17-18.

51. Wittman, *supra* note 46, at 200.

52. *Id.* at 201.

53. *Id.*

54. George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman’s Mistakes*, 14 J. LEGAL STUD. 215, 233 (1985).

55. *Id.* at 233-37.

56. We adopted two methodological strategies to control for variables we did not seek to test. When possible, we designed our hypothetical litigation scenarios to eliminate possible variables completely. Because this approach was not always possible or practical, we opted for a “between-group” experimental methodology, in which we compared responses to litiga-

pothesis, for instance, experimenters could ask subjects to negotiate disputes in which both parties agree upon damages and liability is the only issue. The outcome of such an experiment would provide a much clearer sense of the validity of the hypothesis.<sup>57</sup>

## B. Data Collection Methodology

### 1. Subjects

Subjects for our experiments consisted of 445 undergraduate students at Stanford University recruited at a randomly selected sample of dormitories across campus. We asked all willing students to complete a written survey containing three different litigation scenarios followed by one or two questions. We made no attempt to control the number of students of a particular gender, ethnic group, major, or year in college. Participants were told that the survey was part of a law school experiment on how people involved in lawsuits respond to settlement offers and that it would require about ten minutes of their time. They received a popular "Mrs. Fields"-brand cookie as compensation for their participation after they completed the survey.

All subjects received the same written instructions on how to complete the survey.<sup>58</sup> The instructions told the students they would be asked to "play the role of a participant in three different lawsuits."<sup>59</sup> After reading each hypothetical scenario, they would respond to a settlement offer by checking an answer choice. The instructions asked the subjects to read the information "slowly and carefully" and not to discuss the survey with any other students prior to completing it.<sup>60</sup> All subjects completed the questionnaires in the presence of the experimenters.

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tion settlement offers made by one experimental group to responses made by another experimental group given a slightly different set of facts. For all variables we wished to control, we simply ensured that the fact patterns given each group presented the variable in the same way. This way, differences between the groups could not be attributed to variables that were the same across comparison groups. See, e.g., MONAHAN & WALKER, *supra* note 47, at 59; E. Allan Lind et al., *Methods for Empirical Evaluation of Innovations in the Justice System, in EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW* app. B at 82, 88-94 (1981); see also *supra* notes 41-55 and accompanying text.

57. Few controlled laboratory experiments concerning the litigation settlement process have been conducted. See *supra* note 12.

58. See *infra* Appendix A.

59. See *infra* Appendix A. Our experiments tested the responses of hypothetical litigants, as opposed to lawyers representing litigants. See *infra* Part VI for a discussion of the implications of our results in a world in which lawyers play an important role in the litigation bargaining process.

60. See *infra* Appendix A.



## 2. *Basis of Comparison*

In each hypothetical scenario, the subjects assumed the role of the plaintiff in a lawsuit. They read all the relevant facts of the case as well as an analysis of possible outcomes should the subjects decide to reject a settlement proposal and proceed to trial. At the end of each scenario, the subjects received a final settlement offer — usually a cash offer<sup>61</sup> — which, as the instructions informed them, they could either accept or reject and proceed to some form of formal adjudication. They then assessed the likelihood that they would accept the settlement offer on the following five-point scale, with the scores in brackets assigned to each answer choice:

- Definitely accept the offer [5]
- Probably accept the offer [4]
- Undecided [3]
- Probably reject the offer [2]
- Definitely reject the offer [1]<sup>62</sup>

We created slightly different versions of each basic scenario; each manipulated a single variable and held all other variables constant. In our analysis of the effect of equity seeking on individual disputants, for example, we constructed a landlord-tenant dispute. In one version, the landlord had a reasonable explanation for his failure to provide heat to the plaintiff's apartment;<sup>63</sup> in the other, he was simply acting in bad faith.<sup>64</sup> The version of a scenario any given subject received was determined randomly.<sup>65</sup> We draw conclusions as to the effect of each variable in encouraging or discouraging settlement by comparing the relative attractiveness of the same settlement offer<sup>66</sup> made to

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61. In the case of a scenario regarding a custody dispute in divorce litigation, the settlement offer made was in terms of days-per-month of visitation rights. See *infra* notes 114-24.

62. See generally *infra* Appendices B-Z.

63. See *infra* Appendix K.

64. See *infra* Appendix J.

65. Each subject received a packet containing three scenarios. Each of the three scenarios given to any one subject tested for a different psychological barrier to prevent a subject from "learning" from one scenario knowledge that could be applied to another of the scenarios. We systematically scrambled the combinations of scenarios in the packets to minimize interaction effects. For example, when we used six different versions of a scenario designed to test one psychological effect, six different versions of a scenario to test a second effect, and five different versions of a scenario to test a third effect, the first 180 subjects would receive different combinations of scenarios (6 x 6 x 5) before the combinations would begin to repeat.

66. For each scenario, we determined the value of the settlement offer in the following manner: Prior to our actual experiments, we presented one version of each scenario to a random sample of Stanford University undergraduate students. These scenarios were identical to the ones presented to subjects in our subsequent experiments — with one

subjects who had version *A* of a scenario with those who had version *B* of the same scenario.<sup>67</sup>

The validity of this type of between-group study depends on the essential similarity between the pool of subjects given version *A* of a scenario and the pool given version *B* of the same scenario.<sup>68</sup>

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exception. Instead of being offered a specific cash settlement, these students were asked the question "What is the minimum amount of money you would accept as a settlement in order for you to agree to drop your lawsuit?" We set the settlement offer in each scenario equal to the median response received from these pre-experimental subject groups. We reasoned that by using the median response we would present settlement offers likely to be accepted by approximately 50% of our subjects and rejected by roughly 50%, absent the variable manipulated in the experiment.

67. We conducted three statistical tests of the differences in responses given by subjects with different versions of the same basic scenario: *t* tests, Mann-Whitney tests, and proportional comparisons.

Our basic statistical comparison was a *t* test of the mean scores of the different pools of subjects. The *t* test measures the likelihood that any observed difference between the two mean scores is the result of an actual difference between the two groups' responses, as opposed to random error. As is the social science convention, we deemed differences in mean scores "statistically significant" if the chance that the difference was caused by random error was less than 5%. The *p* values provided in the footnotes throughout this article describe the likelihood that differences in means resulted from random error. See *infra* notes 107, 113, 122, 143, 163, 173, 177, 219, 231. For example, a value of  $p < .05$  means there is a less-than-5% chance that the difference was caused by random error;  $p < .1$  means less than a 10% likelihood of random error — in other words, the difference is probably real, but the certainty is not great enough to classify the difference as highly statistically significant. The *t* statistics themselves are also reported for statistically significant comparisons with degrees of freedom (total number of subjects involved in the comparisons adjusted based on the distribution of responses) noted in parentheses for readers interested in the raw statistical data.

Technically, a comparison of mean scores is only valid if the five-point scale is linear — that is, if the difference between a score of 3 and 4 is the same as a difference between a score of 4 and 5. It is possible that our subjects would perceive a greater difference between 3 and 4 ("undecided" and "probably accept the offer") than between 4 and 5 ("probably accept the offer" and "definitely accept the offer"). In other words, a subject giving a response of 4 might be much closer to a 5 than to a 3, but a comparison of means treats the score as equidistant from 3 and 5. To test whether the nonlinearity of our five-point scale could have affected our results, we also conducted a Mann-Whitney statistical test, which compares the median scores of the populations compared, making the nonlinearity of our five-point scale irrelevant. We have reported *p* values for statistically significant Mann-Whitney tests, which describe the likelihood that the difference between the median scores of two experimental groups is caused by random error. When the results of both *t* and Mann-Whitney tests are  $p < .05$ , the statistical validity of the results is very high. When one or both of the tests results in  $p > .05$  but  $p < .1$ , we still present our conclusions with the qualification that the data is highly suggestive but lacks the imprimatur of high statistical validity according to social science conventions.

We also compared the percentage of respondents giving each individual score (1, 2, 3, 4, or 5) from one subject group to the next, the percentage of respondents giving a score of either "definitely reject" or "probably reject" (Rejecters), and the percentage of respondents giving a score of either "probably accept" or "definitely accept" (Accepters). The significance of these comparisons tended to mirror the significance of the comparisons of means. For this reason, we do not report the results of these tests throughout, although we do present comparisons when the distribution of responses sheds additional light on the data.

We thank Bertram Malle, Lee Ross, Ian Ayres, Sanjaya Khare, Eric Talley, and the Stanford Statistics Department Consulting Service for their statistics advice and assistance. All errors in judgment are, of course, our own.

68. See Lind et al., *supra* note 56, at 91-94.

Any relevant difference between the members of the two pools creates the possibility that a difference in the results of Group A and Group B might be caused by differences in the subjects rather than differences in the versions of the scenario they evaluated. In our series of experiments, each group consisted of thirty to sixty-five Stanford University undergraduate students. Although there might be relevant differences between individual members of the pool, we assumed that in randomly assigned groups of this size, the law of large numbers would have a leveling effect and there would be no significant differences between the groups, on average.<sup>69</sup>

### 3. *Controlling the Variables*

In developing a theory of how parties negotiate agreements in divorce disputes, Robert Mnookin and Lewis Kornhauser identified five factors that influence the outcomes of bargaining in legal disputes: strategic behavior, transaction costs, bargaining endowments created by legal rules, the degree of uncertainty concerning the legal outcome if the parties go to court, and the preferences of the disputants.<sup>70</sup> In an effort to isolate and evaluate our psychological barriers, we attempted to the greatest degree possible to prevent any of these factors from affecting the results of our experiments. The experimental design eliminated the first two factors from consideration.<sup>71</sup> We allowed the latter three factors to affect responses to the questions, but we neutralized their impact on our conclusions by allowing those factors to influence subjects in all experimental groups that we compared to the same degree.<sup>72</sup>

*a. Strategic Bargaining.* To study the psychological variables manipulated in the hypothetical lawsuit scenarios, we wanted to ensure that the subjects focused on the substance of the fact patterns

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69. See, e.g., CLIFFORD J. DREW & MICHAEL L. HARDMAN, *DESIGNING AND CONDUCTING BEHAVIORAL RESEARCH* 168-69 (1985) (recommending a minimum of 12-14 subjects per experimental condition and, preferably, 20-25 or more). Another author elaborates:

Large samples are not advocated because large numbers are good in and of themselves.

They are advocated in order to give the principle of randomization, or simply randomness, a chance to "work," to speak somewhat anthropomorphically. With small samples, the probability of selecting deviant samples is . . . greater than with large samples. . . . With large groups, say 30 or more, there is less danger.

FRED N. KERLINGER, *FOUNDATIONS OF BEHAVIORAL RESEARCH* 119 (3d ed. 1986); see also Lind et al., *supra* note 56, at 91 ("If the groups are sufficiently large, the laws of probability assure us that it is very unlikely there will be any substantial difference between the group[s] . . .").

70. Mnookin & Kornhauser, *supra* note 44, at 966.

71. See *infra* sections II.B.3.a-b.

72. See *infra* section II.B.3.c.

presented to them and did not concern themselves with negotiation strategies. As a result, the experimental design artificially removed from the hypothetical situations any benefit subjects otherwise might have been tempted to think they could gain by behaving strategically.

So that the subjects would not engage in strategic behavior, we instructed them that the settlement offers made by the defendants were final offers. Subjects were required either to accept the offer or to reject it and go to trial. The surveys explicitly stated that there would be no time for further negotiations or conversations with the defendants before trial<sup>73</sup> and that they had no reason to disbelieve that these were the final and best offers the defendant would make.<sup>74</sup> We intended for this description to convince the subjects that settlement offers made by defendants were not the product of hard bargaining positions and that plaintiffs could not hope to achieve a greater distribution of the surplus by considering strategic bargaining tactics of their own.

*b. Transaction Costs.* In the real world, the high cost of pursuing a claim to trial can provide a strong incentive for out-of-court settlement.<sup>75</sup> To focus the maximum amount of the subjects' attention on the facts of the case and the psychological variables being manipulated, however, we eliminated all consideration of legal fees, the most significant transaction cost associated with trials,<sup>76</sup> from the experimental design.<sup>77</sup> We accomplished this in the easiest way

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73. Dispute resolution scholars have hypothesized that the imposition of a deadline can mitigate against psychological barriers to conflict resolution. Because the deadline provides the offeree with a causal explanation for why the offeror is extending the offer, the offeree is less likely to be skeptical of the offeror's motives and more likely to be receptive to the offer. See, e.g., Ross & Stillinger, *supra* note 11, at 398-400. Critics of our research design may challenge the validity of our results on the ground that we imposed a deadline on our subjects. We believe this criticism is misplaced. First, it is not at all clear that deadlines promote settlement. Even assuming that deadlines do promote settlement, this would make all our subjects slightly more likely to accept settlements than they would be absent the deadline. Because our results are based on between-group comparisons, the impact of the deadline, assuming it exists, would affect all our subjects equally and thus would not affect the comparative results.

74. See generally *infra* Appendices B-Z.

75. See, e.g., Ross, *supra* note 1, at 20.

76. In one study of litigation costs, individual clients reported that payments to lawyers represented 99% of their out-of-pocket costs, and organizational clients reported that lawyer's fees represented 98% of their out-of-pocket costs. See Trubek et al., *supra* note 1, at 91.

77. In the American litigation system, with few exceptions, each party must bear its own litigation costs, regardless of outcome. An extensive literature is available on the question of how alternative methods of assigning costs would affect the number and type of cases that settle out of court. See, e.g., Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, LAW & CONTEMP. PROBS., Winter 1984, at 173; John C. Hause, *Indemnity, Settlement, and Litigation, or I'll Be Suing You*, 18 J. LEGAL STUD. 157 (1989); Shavell, *supra* note 40.

possible: each scenario stated that the attorney had agreed to represent the subjects for free, so the subjects need not take legal fees into account when determining whether to accept the settlement offer on the table.<sup>78</sup>

We can predict that this contrivance would have the effect of causing some percentage of our subjects to reject an offer they would have accepted in a real-world situation in which legal fees were an issue. This does not affect the validity of our results, however. Because our results are based on between-group comparisons rather than the absolute responses of subjects, the fact that all subjects will be relatively more likely to risk trial than they might be in the real world does not affect the relevant comparisons.

A potential criticism of the no-legal-fees approach relates to external validity, a subject discussed at length below.<sup>79</sup> Because the no-legal-fees approach makes an already hypothetical study slightly less realistic, there is a concern that subjects may be less committed to playing the role of a litigant than they would otherwise be, making the applicability of our findings to real-world litigation more questionable. We made a conscious decision to endure these criticisms, however, based on our belief that making the hypothetical fact patterns as simple as possible, while still conveying the information important to our experiments, had immense value in focusing subject attention on the issues we were studying. To present a realistic description of attorney's fee structures that subjects should consider when deciding whether to accept the settlement offers would have required complicating the fact patterns with discussions of such issues as hourly rates, contingent fee arrangements, and fee retainers.

*c. Legal Endowments, Uncertainty, and Individual Preferences.* All subjects asked to consider a particular scenario were endowed with exactly the same legal rights, regardless of which *version* of that scenario they received. All legally relevant facts were identical across the variations, as were the attorney's analyses of the plaintiff's probability of prevailing at trial, if applicable.<sup>80</sup> Holding legal

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78. See generally *infra* Appendices B-I, M-Z.

79. See *infra* section II.C.

80. See generally *infra* Appendices B-Z. The attorneys in our scenarios provide very little information to their clients about likely recovery at trial. According to a recent study sponsored by RAND's Institute for Civil Justice, attorneys in the real world also provide few predictions about prospective trial outcomes to their clients. See RAND: THE INSTITUTE FOR CIVIL JUSTICE, *supra* note 2, at 112. In fact, only one-third of the plaintiffs in the RAND study ever discussed the "amount of compensation they might receive" with their attorneys. *Id.*

endowments constant across experimental groups was critical to the validity of the experimental method.

All the scenarios contained a large amount of uncertainty about whether the plaintiff would prevail at trial, consistent with the reality that trial results in close cases are difficult to predict. Although the level of uncertainty may make relatively risk-averse subjects more likely to accept settlement offers than other subjects, there is no reason to think that, given the random distribution of scenario variations, any variation group would be, on balance, more or less risk averse than any other variation group.<sup>81</sup>

Finally, the between-group experimental design also controls for differences in individual preferences. While cash or noncash settlement offers may have value that varies from one subject to the next, the random grouping of subjects gives us no reason to believe that, on average, preferences would vary between groups.

### C. *Potential Pitfalls of the Experimental Process: The Question of External Validity*

Although we consider the experimental method to be the best way to test our hypotheses, we recognize that our approach is not unproblematic. We are most concerned about the external validity of our results. Put simply, results demonstrated in the laboratory may not be replicable in real-world legal disputes.<sup>82</sup> Our methodology raises four specific external validity concerns.

First, the subjects used in the experiments were not actual litigants and, as a group, they may not be representative of the class of actual litigants. We speculate that Stanford undergraduates as a whole differ from the class of actual litigants in terms of age, life experience, education level, and socioeconomic class. For any of these reasons, Stanford undergraduates may not analyze settlement offers in the same way actual disputants do.<sup>83</sup> We could have em-

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81. See *supra* section II.B.2 (explaining the selection methodology, which we designed to promote uniformity among the groups).

82. *Id.*; see also Coates & Penrod, *supra* note 49, at 667 ("It is often difficult to generalize from results obtained under such conditions to more realistic injurious experiences and disputes.").

83. Recently, Margaret Neale and Gregory Northcraft addressed similar external validity concerns by conducting an experiment in which they compared the impact of framing effects on the decisionmaking of amateurs — that is, students — and experts — that is, professional negotiators. See Margaret A. Neale & Gregory B. Northcraft, *Experts, Amateurs, and Refrigerators: Comparing Expert and Amateur Negotiators in a Novel Task*, 38 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 305 (1986). They found that framing had similar effects on students and professional negotiators:

The data presented here support the generalizability of decisional biases to experts' decision behaviors in novel tasks. That is, it seems likely that when individuals — either

ployed participants from actual legal disputes as subjects in our experiments. This would, of course, have created its own problems. Although such a subject pool would have accurately represented the types of people who actually find themselves in lawsuits, such a group's personal experiences with the legal system would probably have influenced their responses. Alternatively, we could have studied the demographics of actual lawsuit participants and attempted to recruit subjects who met that group's characteristics. Even had we adopted such a time-consuming and expensive approach, it would only have begged the question of which personal characteristics are actually relevant to how people evaluate litigation settlement offers: race, gender, age, socioeconomic status, educational background, career, and so on.

Second, because the lawsuits we examine are hypothetical and crafted to isolate certain variables rather than to mirror actual legal disputes, subjects might not analyze these disputes in the same way that they would analyze real-world legal disputes. We designed each lawsuit scenario to be realistic enough to convey to subjects the feeling of an adversarial litigation setting and to make it clear that the stakes of the scenario were similar in scope and magnitude to the stakes of actual lawsuits. But we also consciously described the facts and the legal issues as simply as possible. All the scenarios deal with real lawsuit topics — that is, vehicular negligence, easements, visitation rights, employment contracts, and landlord-tenant disputes<sup>84</sup> — but for the sake of simplicity, the legal analyses made available to the participants did not, in all circumstances, correspond to the actual state of the law.<sup>85</sup> In other words, we decided to minimize confusion for our subjects so that the experiments would cleanly test the psychological barriers that interested us. The cost of this strategy was, at times, oversimplification of legal doctrine.

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amateurs or experts — are confronted with a unique decision setting, their judgments and choices will be systematically influenced by decision characteristics such as framing

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*Id.* at 316. Because they found that framing had a similar impact on the decisionmaking of students and experts, they reached the conclusion that results from negotiation research relying solely on student subjects can be generalized to the real world of negotiation. *Id.*

84. We attempted to select topics to which our undergraduate subjects could relate, even though most had not been in the positions described in the scenarios. Most of the subjects drive cars, have lived in a house with property boundaries, have some direct or indirect experience with divorce, and have either dealt with an employer or landlord or plan to do so in the near future. Other types of disputes for which they could make no personal reference — commercial litigation, for example — might have made it more difficult for them to play the roles we asked them to play.

85. In our discussion of each experiment, we note the extent to which the hypothetical scenarios both mirror and diverge from the actual state of the law. *See infra* notes 99, 109, 116, 118, 139, 159, 193, 205.

While we are comfortable that the level of realism in the experiments was sufficient to conclude that the experimental results apply to real-world situations, we recognize that we are not immune to the criticism that more complex legal disputes might have elicited different responses from subjects.

Third, our experiments do not replicate the time element present in most settlement negotiations. In our laboratory setting, subjects must learn the facts of the case, consider an offer, and respond to the offer in a compressed time frame. In the real world, significant time lags usually exist between the filing of a lawsuit, settlement offers, and the trial date. This extended time period may reduce the impact of psychological barriers by allowing plaintiffs time to reflect, to learn, and to be persuaded by attorneys, friends, and associates. Our experiments, however, closely replicate the proverbial last-minute, courthouse-steps settlement offer, which can allow little time for consideration or reflection before a reply is required. Many cases in the real world, in fact, do not settle until just before trial or even during trial.<sup>86</sup>

Finally, because the subjects are *playing* the role of litigants and are not *actual* litigants themselves, they may be less committed to expending the effort to make the best possible decision about whether to accept an offer based upon their preferences. To the extent that careful decisionmaking would make subjects in our experiments either more or less prone to accept the offered settlements, lack of commitment could affect the overall percentage of respondents accepting settlements. Again, however, because we are conducting between-group experiments and have no reason to believe any randomly selected group of subjects from our pool would be, on average, less committed to the experiment than any other, we doubt that this shortcoming affects our findings in any significant way.

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86. One explanation for this might be that it is not until then that litigants have a clear understanding of the strengths of each other's cases. As litigation progresses, the parties' expectations about the outcome of a trial will often change. See Robert H. Mnookin & Robert B. Wilson, *Rational Bargaining and Market Efficiency: Understanding Pennzoil v. Texaco*, 75 VA. L. REV. 295, 296 (1989) (making this point in the context of the *Pennzoil v. Texaco* litigation). The greater the understanding, the more likely that the two sides' estimates of the probabilities of prevailing in court will converge. See Gould, *supra* note 25, at 287. When estimates converge, settlements generally should occur so long as trial costs exceed settlement costs or the parties are risk averse. See *supra* sections I.A-B.



### III. THE EFFECTS OF FRAMING ON DECISIONS TO SETTLE

#### A. *Social Science Research on Decisionmaking Under Uncertainty*

According to the rational actor model of decisionmaking, people seek to maximize utility by selecting the decision option with the highest expected value. The rational actor model predicts that decisionmakers will make an identical selection between two options regardless of whether they perceive both choices as desirable or both as undesirable. This is because rational actors make decisions based on the absolute values of possible outcomes without regard to how those outcomes are described or classified.<sup>87</sup>

Research by cognitive psychologists, however, has demonstrated that people depart from the rational actor model in systematic ways when making decisions under conditions of uncertainty.<sup>88</sup> People routinely use a reference point heuristic when making such decisions.<sup>89</sup> Using this heuristic, people tend to evaluate options not only on the basis of their absolute values — as the rational actor theory postulates — but on the basis of the direction in which they deviate from some reference point. In essence, people code options as gains or losses from some referent; this coding, in turn, systematically affects preferences.<sup>90</sup>

One consequence of this coding process is “loss aversion.”<sup>91</sup> Loss aversion refers to the idea that people tend to disfavor a loss from a given reference point more than they favor an equivalent gain. Psychologists have shown, for instance, that people will demand a much greater amount of money to sell an item they own — a loss — than they will spend to buy the item if they do not already own it — a gain.<sup>92</sup>

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87. For a description of the model of decisionmaking under risk known as expected utility theory, see, for example, Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263, 263-64 (1979) [hereinafter Kahneman & Tversky, *Prospect Theory*]; Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 *J. BUS. S251, S251-54* (1986) [hereinafter Tversky & Kahneman, *Rational Choice and Framing*].

88. See Kahneman & Tversky, *Prospect Theory*, *supra* note 87.

89. See Daniel Kahneman, *Reference Points, Anchors, Norms, and Mixed Feelings*, 51 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 296 (1992); Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in *BARRIERS TO CONFLICT RESOLUTION* (Kenneth Arrow et al. eds., forthcoming 1995).

90. Kahneman, *supra* note 89, at 297; see also Kahneman & Tversky, *Prospect Theory*, *supra* note 87.

91. Kahneman, *supra* note 89, at 298 (“The general principle is straightforward: when an option is compared to the reference point, the comparison is coded in terms of the advantages and disadvantages of that option.”).

92. See Russell Korobkin, Note, *Policymaking and the Offer/Asking Price Gap: Toward a*

A second consequence of the reference point bias, which we consider in this section, is what the social science literature has referred to as the "framing" effect.<sup>93</sup> This label refers to the idea that people are risk averse in the face of what they perceive as a potential gain and risk seeking in the face of what they perceive as a potential loss. In other words, people will often take the same risks to avoid a loss that they will refuse to take to realize a gain of the same magnitude.

A simple numerical experiment illustrates this point. When subjects were asked to choose between a sure gain of \$240 and a 25% chance at a gain of \$1,000, 84% selected the sure payment, even though the expected value of the chance (25% x \$1,000) is \$10 higher. When the experimenters asked the same subjects whether they would prefer a certain loss of \$750 or a 75% chance of losing \$1,000, however, 87% selected the risky choice, although the expected value of the two is identical.<sup>94</sup> The experimenters drew the conclusion from this and similar experimental work that outcomes are coded as losses or gains from some neutral reference point and that "a person who has not made peace with his losses is likely to accept gambles that would be unacceptable to him otherwise."<sup>95</sup>

### B. *Framing and Risk Preferences in the Litigation Context*

Although researchers have studied the impact of framing on negotiation and bargaining in general,<sup>96</sup> no studies have examined the

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*Theory of Efficient Entitlement Allocation*, 46 STAN. L. REV. 663, 667-69 (1994) (describing the empirical evidence of the gap that exists between the price people are willing to pay for an item and the price they demand to sell the same item).

93. See Kahneman, *supra* note 89, at 297; see also Kahneman & Tversky, *Prospect Theory*, *supra* note 87, at 268.

94. Tversky & Kahneman, *Rational Choice and Framing*, *supra* note 87, at s255.

95. Kahneman & Tversky, *Prospect Theory*, *supra* note 87, at 287. In the experiment described in the text accompanying *supra* note 94, subjects in the "gain" group faced different end-state possibilities than subjects in the "loss" groups, although the different end states did not affect the comparative economic value of risky and riskless choices. Tversky and Kahneman have also demonstrated that even if options represent *identical* end states, people exhibit different propensities to accept risk depending upon whether they code the options as gains or losses. A simple numerical experiment illustrates this finding. Subjects in one group were told that they were given \$1,000 and then were asked to choose between a 50% chance of another \$1,000 and a certain \$500. Subjects in the second group were told they were given \$2,000 and then were asked to select between a 50% chance at losing \$1,000 and a certain loss of \$500. *Id.* at 273. Both problems offered exactly the same choice between two end states: the first option in both cases was a 50% chance at \$1,000 and a 50% chance at \$2,000; the second option in both cases was a certain net gain of \$1,500. Yet 84% of the subjects in the first group, which had the choice framed in terms of gain, selected the certain amount. In contrast, 69% of the second group, which had the choice framed in terms of a loss, selected the gamble. *Id.*

96. See, e.g., MARGARET A. NEALE & MAX H. BAZERMAN, *COGNITION AND RATIONALITY IN NEGOTIATION* 44-48 (1991).

framing effect in the litigation context. Yet litigation — which often requires parties to decide between a certain settlement offer and an uncertain trial verdict — presents an important, real-world example of decisionmaking under uncertainty. To begin to fill this void, we conducted a series of experiments in which we examined the impact of frames on parties to legal disputes. We hypothesized that the propensity to accept a settlement offer during a legal dispute would be dependent on whether the offeree viewed the settlement offer as a gain or a loss.

To test this hypothesis, we first asked two groups of subjects to consider a hypothetical lawsuit based on the most common of all torts: an automobile collision.<sup>97</sup> All the subjects received a nearly identical set of facts.<sup>98</sup> All had suffered \$28,000 worth of damages in an automobile accident that was not their fault. The other party was insolvent and could pay nothing, but he did have insurance coverage. The subjects learned that they had filed suit against the insurance carrier; the carrier, in turn, had conceded liability and agreed that the plaintiff incurred \$28,000 in damages but claimed that the policy covered a maximum of \$10,000 for accidents involving rental cars. Because the negligent driver was driving a rental car at the time of the accident, the insurance company contended that its liability was limited to \$10,000. The subjects' attorney advised them that the only legal issue was whether the policy language — which was unclear on the subject — limited the carrier's liability to \$10,000. The attorney also told the subjects that if the case went to trial, a judge would render a decision based on the language of the insurance policy. Based on his research, the attorney informed the subjects that the case could go either way. Depending upon the judge's interpretation of the insurance policy, the subjects would recover either \$28,000 or \$10,000.<sup>99</sup> Prior to trial, the insurance

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97. Gross and Syverud found that 21.7% of a representative sample of California trials were vehicular negligence trials. Gross & Syverud, *supra* note 4, at 330.

98. See *infra* Appendices B-C.

99. This scenario, though somewhat simplified, is generally consistent with the law. Judges do treat issues of insurance coverage in automobile collision claims as contract actions, not tort actions. As such, the language of the insurance policy, provided that it is unambiguous, should determine the measure of recovery, though judges sometimes rely on other factors. See, e.g., *United States Fidelity & Guar. Co. v. Corbett*, 134 S.E. 336 (Ga. Ct. App. 1926); *Haussler v. Indemnity Co. of Am.*, 227 Ill. App. 504 (1923). When the language of an insurance policy is ambiguous or contradictory, judges generally construe the policy so as to provide broad, but reasonable, coverage. See, e.g., *American Family Mut. Ins. Co. v. Turner*, 824 S.W.2d 19, 21 (Mo. Ct. App. 1991). In the real world, automobile insurance policies, especially with respect to temporary-use cars, are often ambiguous or contradictory. In *Coleman v. Valley Forge Insurance Co.*, 432 So. 2d 1368 (Fla. Ct. App. 1983), for example, an insured plaintiff sued for collision coverage under his policy after he wrecked a temporary substitute vehicle. The Florida Court of Appeals, which found provisions of the policy to be

company offered the subjects a settlement of \$21,000;<sup>100</sup> the subjects could either accept the offer or reject it and proceed to trial.<sup>101</sup>

In this scenario, all subjects found themselves in an identical legal situation. All faced a choice between a certain \$21,000 settlement and a trial in which they would receive either \$28,000 or \$10,000, depending on the outcome. Subjects were randomly assigned to either Group A or Group B of the automobile accident scenario. The subjects in the two groups received versions of the scenario that had only a single difference: the frames were altered.

Subjects in Group A were told they had been driving a \$14,000 Toyota Corolla, which was destroyed in the accident.<sup>102</sup> In addition, they suffered injuries that resulted in \$14,000 worth of medical bills. Their health insurance company had paid their medical bills, but they had no private insurance to cover the replacement cost of the car.<sup>103</sup> In contrast, Group B subjects had been driving a \$24,000 BMW.<sup>104</sup> Their BMW was totaled, and they suffered injuries resulting in \$4,000 worth of medical bills. This group's health insurance had also already paid the medical bills, but they had not been reimbursed for the car.<sup>105</sup> Both groups had losses from the accident totaling \$28,000, but Group A subjects had already been reimbursed for \$14,000 of that total, while Group B subjects had been reimbursed for only \$4,000 of their losses. This meant that accepting the \$21,000 offer would leave Group A subjects better off financially than they were prior to the accident ( $-\$28,000 + \$14,000 + \$21,000 = \$7,000$ ). The same offer would leave Group B subjects in a worse position than before the accident occurred ( $-\$28,000 + \$4,000 + \$21,000 = -\$3,000$ ).

The survey asked the subjects to indicate their willingness to accept the settlement offer by selecting one of the following options:

Definitely accept the offer [5]  
Probably accept the offer [4]  
Undecided [3]

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irreconcilable, held that the policy appeared to provide both liability and collision coverage for a primary vehicle but only liability coverage for a temporary substitute vehicle. Hence, the court ruled that the insurance company was under no obligation to provide coverage to the plaintiff. 432 So. 2d at 1371.

100. For a description of the methodology used to determine the value of the settlement offer, see *supra* note 66.

101. See *infra* Appendices B-C.

102. See *infra* Appendix B.

103. See *infra* Appendix B.

104. See *infra* Appendix C.

105. See *infra* Appendix C.

Probably reject the offer [2]  
Definitely reject the offer [1]<sup>106</sup>

Although the legal endowments of subjects in Groups *A* and *B* were identical, the framing of the settlement offer made a significant difference in the propensity of the subjects to accept the offer or to reject it and proceed to trial. Subjects in Group *A* (Toyota Drivers) responded very favorably to the offer, providing an average response of 4.43 ( $n = 42$ ). Subjects in Group *B* (BMW Drivers) also tended to favor the offer, but with much less fervor. Their average response was 3.64 ( $n = 44$ ). The difference between these two means is highly statistically significant.<sup>107</sup> Ninety percent of Toyota Drivers said they would “probably accept” or “definitely accept” the offer, while only 64% of BMW Drivers would “probably” or “definitely” accept. Only 2% of Toyota Drivers — one subject out of forty-two — would “probably” or “definitely” reject the offer, but 20% of BMW Drivers would “probably” or “definitely” reject the offer. The Toyota Drivers were inclined to choose the certain gain offered by the settlement over the risk that they might receive less at trial. The BMW Drivers apparently coded the decision options differently than did the Toyota Drivers. They perceived the settlement offer as a loss relative to the preaccident position and were, as a result, much less likely than the Toyota Drivers to accept the settlement. Many were prepared to accept the risk of a large loss in return for an uncertain chance at a payout that would leave them \$4,000 better off than they were prior to the accident.

We found similar results in a hypothetical scenario involving a property dispute between neighbors. Subjects assumed the role of homeowners in a densely populated section of Palo Alto, California.<sup>108</sup> When they began construction of a swimming pool in their backyard, they discovered that their neighbor’s wine cellar was built under their property. They discussed the matter with the neighbor and discovered that he had known for fifteen years that the cellar was built in the wrong location but had never mentioned it because it had never been in their way. The subjects were told that they agreed to allow their neighbor to keep the cellar where it was but they felt that he should compensate them for the past and future use of the land. The neighbor refused, so the subjects

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106. See *infra* Appendices B-C.

107.  $t(77) = 3.65, p < .01$  (Mann-Whitney,  $p < .01$ ).

108. See *infra* Appendices D-E.

responded by filing suit against the neighbor. The subjects' lawyer advised them that if they prevailed at trial, the property values and length of use suggested that an award of \$15,000 was in order. It was difficult to predict, however, whether the subjects would prevail. The neighbor's lawyer argued that fifteen years of uninterrupted use qualified the neighbor for free, perpetual use of the land, known as an easement by prescription.<sup>109</sup> The subjects were told that their attorney advised them the case could go either way, as there was no recorded case quite like this in California. The subjects could recover \$15,000 at trial, or nothing at all. In a final attempt to settle the case before trial, the neighbor offered a \$6,750 cash settlement.<sup>110</sup>

Again, we divided the subjects into two groups and, again, manipulated the frames. The instructions told the Group A subjects that, due to the location of the wine cellar, construction of the swimming pool cost \$2,000 more than it otherwise would have.<sup>111</sup> For members of this group, the \$6,750 settlement offer appeared to represent a gain ( $-\$2,000 + \$6,750 = \$4,750$ ). Members of Group B learned that the placement of the wine cellar caused construction to cost \$13,000 more than it otherwise would have.<sup>112</sup> To this group, a \$6,750 settlement offer appeared to be a loss ( $-\$13,000 + \$6,750 = -\$6,250$ ). Again, the scenario presented the case in a way that made it quite clear that the costs incurred by the subjects in no way affected their legal endowments.

As in the automobile collision scenario, subjects in the wine cellar scenario were more likely to settle out of court when the

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109. Generally speaking, an adverse claimant must show that his use of another's land is adverse, continuous, known, and open in order to establish an easement by prescription. *See, e.g.,* Pace v. Carter, 390 A.2d 505 (Me. 1978). Most prescriptive easements are for walkways, driveways, or surface roads, where the use is known and open. It is much more difficult for an adverse claimant to establish that his use of underground facilities — drains, pipes, sewers, or wine cellars, for example — qualifies him for a prescriptive easement. *Offenhardt v. Heinsohn*, 150 N.Y.S.2d 78 (Sup. Ct. 1956) (denying a prescriptive easement to claimants whose reservoir filled with spring water by means of a pipe line running underground through their neighbor's property); *Maricle v. Hines*, 247 S.W.2d 611 (Tex. Civ. App. 1952) (denying a prescriptive easement to a homeowner who inadvertently discovered that her sewer line ran under her neighbor's property and connected with her neighbor's sewer line). On occasion, however, such underground facilities have been found sufficient for prescriptive easement purposes. *See Strehlow v. Mothorn*, 280 P. 1021 (Cal. Dist. Ct. App. 1929) (granting an easement to a claimant whose water runoff flowed into a ditch on his neighbor's property); *Reading Co. v. Maguire*, 82 Pa. D. & C. 599 (Phila. County Ct. 1952) (granting a prescriptive easement to a public utility whose water main ran underground through defendant's property).

110. *See infra* Appendices D-E. For an explanation of how the proposed settlement amount was derived, see *supra* note 66.

111. *See infra* Appendix D.

112. *See infra* Appendix E.

frame of reference made the settlement offer look like a gain, rather than a loss. Group A subjects (Gainers) were more likely than not to accept the settlement, giving a mean score of 3.77 on the five-point scale ( $n = 44$ ). Group B subjects (Losers), on the other hand, were more likely to risk the uncertain outcome of a trial than to accept the settlement offer. They provided a mean score of 2.57 ( $n = 42$ ). Again, the difference between the two groups is highly statistically significant.<sup>113</sup> While 45% of Gainers said they would “definitely” accept the settlement offer, only 7% of Losers would “definitely” accept the offer. Fifty-seven percent of Losers “probably” or “definitely” preferred trial, as compared to 25% of Gainers.

We found the same phenomenon, in roughly the same degree, in a scenario involving a dispute over a nonmonetary good — postdivorce visitation rights.<sup>114</sup> In this scenario, the subjects, in the midst of a divorce, were told that their spouse had been the primary caretaker of their son during the marriage. As such, the subjects were told they had agreed to allow their spouse to have physical custody of their son. The subjects also learned that they enjoyed a close relationship with their son and that they were concerned about maintaining that relationship. Toward that end, the subjects sought liberal visitation privileges from the spouse.<sup>115</sup> If they failed to reach an out-of-court agreement with their spouse, both parties would be required to go to family court, where a judge would determine visitation rights under the “best interests of the child” standard.<sup>116</sup> The subjects’ attorney told them that judges tended “to favor the preservation of both maternal and paternal ties” in deciding this type of case,<sup>117</sup> but the attorney offered no predictions about the outcome in court.<sup>118</sup> Prior to the court date, the subjects

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113.  $t(84) = 4.06, p < .01$  (Mann-Whitney,  $p < .01$ ).

114. See *infra* Appendices F-G.

115. Some commentators have claimed that divorcing spouses use custody and visitation as bargaining chips in resolving such financial issues as property division, alimony, and child support. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 102 (1992). To preclude subjects in our study from considering this kind of strategic bargaining, we specified in our scenario that the divorcing spouses were in disagreement solely on the issue of visitation. See *infra* Appendices F-G.

116. This is the nearly universal legal standard used in custody cases. See, e.g., CAL. FAMILY CODE § 3100(a) (West 1994) (“[T]he court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child.”).

117. See *infra* Appendices F-G.

118. Technically, visitation decisions are governed by the “best interest of the child” standard. See, e.g., *supra* note 116. In the real world, however, it appears that courts typically serve the best interests of the child by awarding visitation to the noncustodial

received a final settlement offer from their spouse of ten visitation days per month.<sup>119</sup>

In this scenario, we again manipulated the frames between experimental Groups A and B. Group A subjects were told that during the separation period preceding the divorce their spouse had provided them with as many as five visitation days per month.<sup>120</sup> For Group B subjects, on the other hand, the temporary agreement had allowed them fifteen days per month with their son.<sup>121</sup> As in the automobile accident and wine cellar scenarios, subjects in the divorce scenario responded very differently to the settlement offer based on their respective frame of reference. Group A subjects (Gainers) were likely to accept the offer. Their mean response on the five-point scale was 3.78 ( $n = 45$ ). Group B subjects (Losers) were more likely *not* to accept the offer than they were to accept it. Their mean response was 2.95 ( $n = 38$ ). Once again, the difference between the groups is highly significant.<sup>122</sup> Losers were more likely to risk an uncertain trial verdict than to accept a settlement offer that appeared to leave them in a "worse" position than when they began. Only 47% of the members of that group indicated that they would "probably" or "definitely" accept the offer. Seventy-one percent of Gainers, in contrast, chose the risk-averse option. Moreover, more than twice as many Losers as Gainers said they would "probably" or "definitely" reject the offer. The results of this experiment are consistent with the previous two framing experiments,<sup>123</sup> but the context makes these results even more

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parents on alternate weekends. See, e.g., MACCOBY & MNOOKIN, *supra* note 115, at 172. Thus, a typical visitation arrangement might include four visitation days per month, plus four to six weeks of visitation during holidays, spring vacation, and summer vacation in a given year. The mathematics reveal an average of six to eight days of visitation per month, which is only slightly lower than the settlement offer made in our scenario.

Moreover, Eleanor Maccoby and Robert Mnookin, in their recently published longitudinal study, found that a sizable number of divorced parents did not adhere to the typical visitation arrangement. *Id.* According to Maccoby and Mnookin, "a substantial group (about 20 percent of those having some visitation) said that they did not have a definite schedule. Some of these parents said explicitly that they had an agreement permitting the non-residential parent to see the children whenever he or she wanted to." *Id.* For examples of liberal visitation rights granted to noncustodial parents, see Deininger v. Deininger, 835 P.2d 449 (Alaska 1992), and Halper v. Halper, 348 N.W.2d 360 (Minn. Ct. App. 1984). Despite our simplification of the facts and the law, then, this hypothetical scenario remains relatively representative of the real world.

119. See *infra* Appendices F-G. For an explanation of how the proposed settlement amount was derived, see *supra* note 66.

120. See *infra* Appendix F.

121. See *infra* Appendix G.

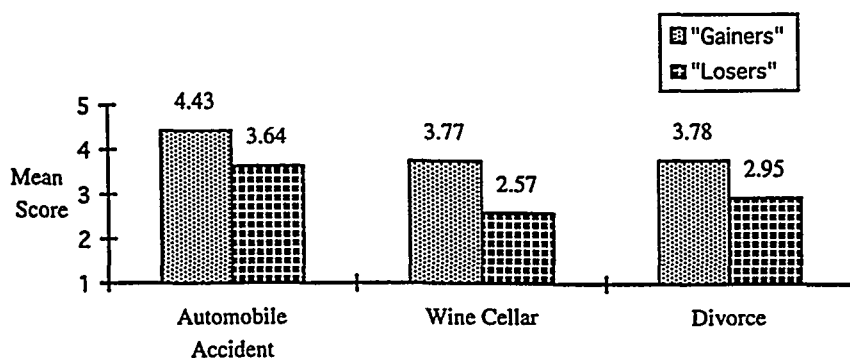
122.  $t(72) = 2.99$ ,  $p < .01$  (Mann-Whitney,  $p < .01$ ).

123. We believe the experimental methodology is somewhat less reliable in this scenario than in the automobile or wine cellar scenarios. In the other two scenarios, the subjects' legal



surprising. We would anticipate that people would act more cautiously when visitation with their children was at stake than when money was at stake,<sup>124</sup> but our results suggest that this is not the case.

Figure 1  
Effects of Framing on Acceptance Rates



Our results make it clear that frames matter in legal dispute resolution.<sup>125</sup> Disputants may reject a settlement offer economically sufficient to produce a negotiated settlement if they view it in relation to a reference point that suggests accepting the offer would mean accepting a net loss on the transaction. Conversely, an adverse party might perceive an offer framed in its best light as favorable, even if she would reject a frameless presentation of the same substance. To place the discussion in terms of negotiation theory, if an offer made by one party is either

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rights were clearly completely independent of the frame. In this scenario, however, it is possible that some subjects believed the frame might have an effect on the parties' legal rights. It would not be unreasonable for a subject to conclude that a judge employing the "best interests of the child" standard would take into account the visitation schedule in place prior to the divorce and would tend to favor continuity in parenting. If all subjects made this assumption, it would be rational for Losers to reject the 10-day offer, assuming the chances of winning 15 days through trial was extremely high.

Given this possibility, we would hesitate to push any conclusions drawn from this experiment alone too far. Because the results of this experiment mirror the preceding two experiments extremely closely, however, we are inclined to believe the results justify the conclusion that the frame alone had a significant effect on whether the subject accepted or rejected the settlement offer. The similarity of results across experiments suggests that subjects in this experiment responded to the frame itself as opposed to inferring that the frame might actually affect their legal rights.

124. *But see* Steven Shavell, *Suit versus Settlement When Parties Seek Nonmonetary Judgments*, 22 J. LEGAL STUD. 1 (1993) (arguing that when parties seek nonmonetary judgments, particularly if the judgment sought is indivisible — that is, the thing sought cannot be divided between the parties — parties may be more likely to go to trial).

125. *See supra* text accompanying notes 97-124.

marginally within the other party's range of acceptable settlements or marginally outside the other party's range, the frame could affect whether the dispute settles out of court or goes to trial.

It is, of course, little more than common sense to suggest that an attorney involved in settlement negotiations should try to convince her adversary that the adversary will gain, rather than lose, by accepting the deal — that is, to suggest to one of our BMW Driver subjects that he consider the settlement offer in relation to his *post-accident* position as opposed to his *preaccident* position. Our studies indicate one reason why this is sound advice: a positive frame creates a psychological state that favors risk-averse behavior — that is, settlement — and disfavors risk-seeking behavior — that is, trial.

### C. *The Anchor as Frame*

“Anchoring” is a cognitive psychological construct that can be categorized as a variant of framing. Cognitive psychologists have shown that people make estimates by starting at an initial “anchor” position, which they adjust to yield a final estimate. Different anchors create different expectations and yield different estimates, and these estimates tend to be biased toward the original anchor. Thus, anchors, like frames, serve to impede rational problem solving and decisionmaking.<sup>126</sup>

In one anchoring study, Edward Joyce and Gary Biddle divided professional auditors into two groups.<sup>127</sup> The experimenters anchored the groups as follows: The study asked members of Group A whether they thought significant executive-level management fraud occurred in more than ten of each 1000 companies audited by Big Eight accounting firms. The members of Group B were asked to indicate whether they thought significant executive-level management fraud occurred in more than 200 of each 1000 companies audited by Big Eight accounting firms.<sup>128</sup> The experimenters tested whether these anchors — 10 in Group A and 200 in Group B — would influence the answer to the second question they asked the members of both groups: “What is your estimate of the number of Big Eight clients per 1,000 that have significant exec-

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126. Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128-30 (1974).

127. See Edward E. Joyce & Gary C. Biddle, *Anchoring and Adjustment in Probabilistic Inference in Auditing*, 19 J. ACCT. RES. 120, 122-23 (1981).

128. *Id.* at 123.

utive-level management fraud?"<sup>129</sup> Consistent with anchoring and adjustment theory, Group A and B responses varied systematically. Group A subjects estimated an average of 16.52 incidents of fraud per 1000, while Group B subjects estimated an average of 43.11 incidents of fraud per 1000.<sup>130</sup> Thus, the rational judgments of these professional auditors were influenced by the initial anchors to which they were exposed.

In a similar study, Max Bazerman and Margaret Neale examined the impact of anchoring on real estate agents.<sup>131</sup> They gave four groups of agents different list prices for a piece of residential real estate and asked the agents to estimate the appraised value of the house, an appropriate listing price, a reasonable price to pay for the house, and the lowest offer they would accept for the house if they were the seller. They found that the list prices served to anchor the agents and affect their estimates.<sup>132</sup> In their words, "[t]he listing price had a major impact on their valuation process; they were more likely to have high estimates on all four prices when the listing price was high than when it was low."<sup>133</sup> Bazerman and Neale concluded that "the anchoring effect is not only present, it is pronounced."<sup>134</sup>

#### D. *Anchoring and Expectation Adjustment in the Litigation Settlement Context*

Dispute resolution scholars have noted that anchoring effects may impede rational decisionmaking in the negotiation context, particularly with respect to opening offers.<sup>135</sup> That is, opening offers may anchor the opposing side's expectations in negotiation and impede rational decisionmaking behavior.<sup>136</sup> We explored the effect of an opening offer anchor on subjects' expectations and willingness to accept a final settlement offer. Specifically, we hypothesized that different opening settlement offers would anchor

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129. *Id.*

130. *Id.* at 125.

131. See MAX H. BAZERMAN & MARGARET A. NEALE, *NEGOTIATING RATIONALLY* 26 (1992).

132. *Id.* at 27.

133. *Id.*

134. *Id.* at 28.

135. See, e.g., NEALE & BAZERMAN, *supra* note 96, at 49-50; Kahneman, *supra* note 89, at 309-10.

136. See, e.g., BAZERMAN & NEALE, *supra* note 131, at 25 ("[A]n anchor will inhibit individuals from negotiating rationally."); NEALE & BAZERMAN, *supra* note 96, at 49 ("Susceptibility to this bias can influence the negotiation process in a number of ways."); Kahneman, *supra* note 89, at 296, 309-10.

subjects' expectations regarding the value of the lawsuit in different ways and would affect the likelihood of out-of-court settlement.

To test this hypothesis, we asked two groups of subjects to assume the role of plaintiff in a hypothetical lawsuit involving a customer unhappy with a new car. All the plaintiffs had recently purchased a new BMW 318 automobile from a local car dealer for \$24,000. Shortly after purchasing the car, the subjects discovered that the car had a major problem they had not detected during the test drive: "[I]t occasionally stall[ed] at stop lights and stop signs and [was] extremely difficult to start in the morning."<sup>137</sup> Subjects took the car to the BMW mechanics twice. Both times the mechanics claimed the car was not defective and that they could not do anything to fix it. Their own mechanic agreed that the car's condition could not be improved.<sup>138</sup>

As a result, subjects approached the BMW dealer and asked for a refund of their money. The dealer refused. Accordingly, subjects retained a lawyer and filed a lawsuit against the dealer seeking a refund. The subjects' attorney advised them that the only legal issue in the case was whether the car was in fact "defective." If so, a court would require the dealer to refund the subjects' money. If not, the subjects would have to keep the car. The instructions informed the subjects, "Your lawyer thinks this is a very close case, and could easily go either way."<sup>139</sup> Prior to trial, the BMW dealer offered the subjects a final settlement offer of \$12,000 in cash to drop the lawsuit; the subjects could either accept the offer or reject it and proceed to trial.

We assigned subjects randomly to either Group A (Low-Ball Initial Offer) or Group B (Reasonable Initial Offer). The subjects in the two groups received identical versions of the scenario except for a single difference: the subjects were exposed to different anchors.

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137. See *infra* Appendices H-I.

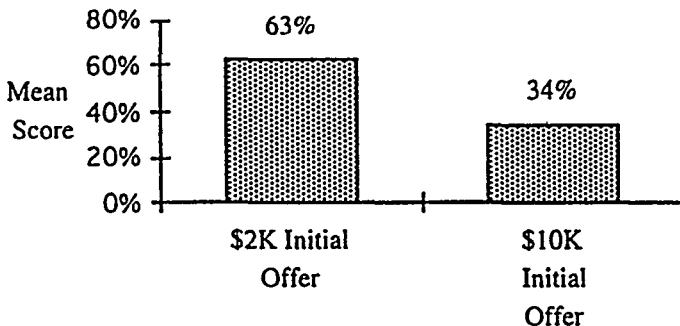
138. See *infra* Appendices H-I. This detail was added to clarify that subjects could not expect to accept a small settlement offer from the dealer and use the money to fix the car. If they own the car after the litigation, the problems will persist.

139. See *infra* Appendices H-I. This advice accurately reflects the legal situation under the "lemon laws" of a number of states. In California, for example, the Song-Beverly Consumer Warranty Act requires sellers of expressly or impliedly warranted goods either to replace them or to "reimburse the buyer in an amount equal to the purchase price paid by the buyer" when the seller is unable to service or repair the goods in a reasonable time. CAL. CIV. CODE § 1793.2(d)(1) (West Supp. 1994). The requirements of the Act apply when a good has a "nonconformity which substantially impairs the use, value, or safety of the new motor vehicle." CAL. CIV. CODE § 1793.2(e)(4)(a) (West Supp. 1994). Disappointed buyers of new cars routinely bring actions under this law. See, e.g., *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal. App. 3d 205 (1991); *Ibrahim v. Ford Motor Co.*, 214 Cal. App. 3d 878 (1989) (noting that, in lay terms, *defect* is the equivalent of *nonconformity*).

The BMW dealer had initially offered the Low-Ball Initial Offer subjects \$2,000 to settle the case — an offer subjects were told that they had rejected.<sup>140</sup> Reasonable Initial Offer subjects, on the other hand, received an offer of \$10,000, which they had rejected.<sup>141</sup> The instructions asked subjects in both groups to indicate their willingness to accept the dealer's final settlement offer of \$12,000 by selecting one of our five answer choices.<sup>142</sup>

Although the legal endowments of both subject groups were identical — both faced a choice between a certain cash settlement of \$12,000 or an uncertain trial in which they could receive a complete refund or no compensation — the opening offer anchor significantly affected the likelihood of the subjects to accept the offer or to reject it and proceed to trial. Low-Ball Initial Offer subjects responded favorably to the final offer: their mean response was 3.54. Reasonable Initial Offer subjects were slightly more likely, on average, to reject the offer than to accept it: their mean response was only 2.97. This difference is statistically significant.<sup>143</sup> Sixty-three percent of the Low-Ball Initial Offer subjects said they would “definitely accept” or “probably accept” the \$12,000 settlement offer, while only 34% of the Reasonable Initial Offer subjects would “definitely accept” or “probably accept” the final offer.

Figure 2  
The Weight of an Anchor: Percentage Definitely or Probably Accepting



140. See *infra* Appendix H.

141. See *infra* Appendix I.

142. See *infra* Appendices H-I.

143.  $t(68) = 1.96, p < .05$  (Mann-Whitney,  $p < .1$ ). Note that the Mann-Whitney result indicates only marginal statistical significance, making this finding slightly weaker than the results of our framing experiments.

These results support our basic anchor-as-frame hypothesis. The initial anchor influenced subjects' expectations — subjects in Group A, who received the low-ball initial offer of \$2,000, expected to settle for less, so the final offer of \$12,000 looked very good by comparison. Subjects in Group B, who received a reasonable initial offer of \$10,000, expected to settle for more, so the final offer of \$12,000 seemed less appealing by comparison. The objective information that subjects should have used to determine the expected value of going to trial was identical for subjects in both groups.<sup>144</sup> Thus, there appears to be no economically rational explanation for the differential in how the groups evaluated the \$12,000 settlement offer.

The anchoring and framing experiments both tend to demonstrate that rational actor models cannot account for the full range of settlement breakdown. When choosing between a concrete settlement offer and an uncertain trial result, our subjects faced cognitive biases that prevented at least some of them from acting in what decision theorists would consider a rational manner. The framing experiments illustrate that people use a reference point to code options as gains or losses and that this coding systematically influences settlement behavior. The anchoring experiment demonstrates that an opponent's opening offer may unduly influence people's expectations and, hence, their decisions about whether to settle. Together, the results suggest that litigants — who are not always rational actors — may fail to reach settlement on some occasions when settlement makes good economic sense.

#### IV. BLAMEWORTHINESS AND EQUITY SEEKING AS BARRIERS TO SETTLEMENT

##### A. *Social Science Research on Equity Seeking*

The rational actor models assume that litigants decide to settle or seek a trial based on a comparison of the expected monetary values of trial and settlement.<sup>145</sup> When litigants expect a trial award to be more lucrative than settlement, they litigate to a ver-

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144. We should note that a settlement offer can, at times, communicate information that could reasonably affect the offeree's estimate of the lawsuit's value. For example, a low offer can signal that an offeror has private information about the facts of the case that make him believe he has an excellent chance of prevailing at trial. In this scenario, however, we believe subjects could not have rationally concluded that the opening offers contained any useful information about the lawsuit's value. Any information signaled by the settlement offer would be embedded in the final offer. In this case, subjects in both experimental groups received final offers of the same amount.

145. See *supra* sections I.A-B.

dict. Conversely, when litigants expect to gain more money from a settlement than from a trial, they settle.<sup>146</sup> These rational actor models are incomplete because they fail to account for the impact that relational factors may have on a litigant's decision to settle a case or to seek vindication in court.

Social psychologists have long recognized that interpersonal comparisons affect individual behavior.<sup>147</sup> Most prominent among them are equity theorists,<sup>148</sup> who argue "that people attempt to maintain proportionality between inputs and outcomes to themselves [in] comparison [to] others."<sup>149</sup> According to Elaine Walster, Ellen Berscheid, and G. William Walster, equity theory "consists of four propositions designed to predict when individuals will perceive that they are justly treated and how they will react when they find themselves enmeshed in unjust relationships."<sup>150</sup> First, consistent with rational actor models, individuals attempt to maximize their own outcomes.<sup>151</sup> Second, individuals are members of *groups* that maximize collective equity by developing accepted systems for apportioning costs and benefits equitably. The only way groups can induce individuals "to behave equitably [is by making] it more profitable for members to behave equitably . . . ." Hence, groups tend to impose sanctions — for example, prison sentences — on those individuals who treat others inequitably.<sup>152</sup> Third, "when individuals find themselves participating in inequitable relationships" — relationships in which the participants receive unequal relative outcomes — "they become distressed."<sup>153</sup> Fourth, and finally, "[i]ndividuals who discover they are in an inequitable relationship attempt to eliminate their distress by restoring equity"<sup>154</sup> to the relationship.

Individuals seeking to restore equity may allow personal feelings to overcome economically rational calculations when resolving

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146. See *supra* sections I.A-B.

147. George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57 J. PERSONALITY & SOC. PSYCHOL. 426, 426 (1989).

148. In addition to equity theorists, others — including relative deprivation theorists, social comparison theorists, and social utility theorists — have studied the impact of interpersonal comparisons. *Id.* at 426-27.

149. *Id.* at 426.

150. Elaine Walster et al., *New Directions in Equity Research*, 25 J. PERSONALITY & SOC. PSYCHOL. 151, 151 (1973).

151. *Id.*

152. *Id.*

153. *Id.* at 153.

154. *Id.* at 153-54.

disputes. According to a team of social psychologists led by Constance Stillinger and Lee Ross:

Disputants, like other individuals involved in social exchange, both seek and feel entitled to receive equity. Proposals that are perceived to offer one a smaller share of available gains than that offered to one's adversary, or even proposals that offer an equal share but one not commensurate with the greater magnitude of one's needs or the greater legitimacy of one's claims, violate that sense of entitlement. Equity considerations, we argue, may lead one or even both parties to reject a proposal that would offer both parties a clear advantage over the status quo.<sup>155</sup>

### B. *Equity Seeking in the Litigation Context*

Many researchers assume, quite logically, that litigants seeking to restore equity may behave "irrationally" — that is, they may fail to select options with the highest expected monetary value. We attempted to bolster these assumptions with empirical data. Accordingly, we designed a hypothetical litigation scenario to study the extent to which a litigant's sense that she has been treated unjustly by an adversary, in and of itself, impedes the resolution of legal disputes. Such a study would be difficult to conduct using actual litigation data because in many legal disputes the relative blameworthiness of the disputants affects their legal rights and remedies.<sup>156</sup> Using our experimental method, however, we were able to test for the effects of perceived inequitable treatment while controlling for legal rights.<sup>157</sup>

We provided subjects with a simple landlord-tenant dispute.<sup>158</sup> Subjects were told that they signed a six-month lease to live in an off-campus apartment beginning September 1. After two months the heater broke down. Although they immediately notified the landlord and requested repair, the landlord failed to fix the heater. As a result, according to the scenario, the subjects spent four winter months in a cold apartment attempting to keep warm with a space heater before moving out at the end of the lease period. Throughout this time period, the subjects had continued to pay \$1,000 per

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155. CONSTANCE A. STILLINGER ET AL., THE "REACTIVE DEVALUATION" BARRIER TO CONFLICT RESOLUTION 4 (Stanford Ctr. on Conflict and Negotiation Working Paper No. 3, 1988) (citations omitted).

156. Under the Civil Rights Act of 1991, for instance, an employee who has been the victim of intentional discrimination by her employer may recover punitive damages only if she can show that the employer acted with "malice or with reckless indifference." 42 U.S.C. § 1981a(b)(1) (Supp. 1992).

157. See *infra* note 165 for a potential criticism of the experimental design along these lines.

158. See *infra* Appendices J-L.



month in rent. After moving out, they learned from a student legal service lawyer that "there was a good chance" of recovering a portion of the \$4,000 in rent paid over that four-month period of time. The lawyer gave neither a specific prediction of the likelihood of success nor any estimate of the exact magnitude of a judgment. Subjects learned that, with the assistance of their attorney, they had filed an action in small claims court against the landlord.<sup>159</sup> Prior to the court date, the landlord offered to settle the case out of court for \$900.<sup>160</sup>

The variable tested in this scenario was the landlord's reason for failing to repair the heater in spite of the tenant's prompt request that he do so. Group A subjects learned that they had made a number of calls to the landlord, to no avail. "The landlord promised to fix your heater, but he never did. A week later, you called him again. Again, he promised to fix it, but he never did. Over the next several weeks, you called him a half-dozen times, but he did not return your calls."<sup>161</sup> Group B participants received a different explanation: After the second call to the landlord, "[y]ou learned that he had left the country unexpectedly due to a family emergency and that he was expected to be gone for several months."<sup>162</sup> Both Group A and Group B subjects chose one of the five usual answer choices to indicate their likelihood of accepting the \$900 settlement offer.

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159. This scenario is quite representative of a real-world dispute and the prevailing common and statutory law. Under the implied warranty of habitability doctrine, a landlord is responsible for repairing conditions that impair the habitability of a rental unit. Both the RESTATEMENT (SECOND) OF PROPERTY §§ 5.1, 5.4, 5.5 (1976) and the UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 2.104, 7B U.L.A. 427 (1972), provide for the implied warranty of habitability. More importantly, at least 42 states and the District of Columbia recognize and enforce the warranty of habitability. Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 523-25 (1982). California, for instance, requires, that "[t]he lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof." CAL. CIV. CODE § 1941 (West 1985).

The failure to provide heat, as in this hypothetical, is a breach of the implied warranty of habitability. Again, according to California law, "[a] dwelling shall be deemed untenable for purposes of Section 1941 if it substantially lacks . . . (d) [h]eating facilities which conformed with applicable law at the time of installation, maintained in good working order." CAL. CIV. CODE § 1941.1 (West 1985). When a landlord breaches the warranty of habitability, it is common practice for a tenant to file suit for damages. Often, courts measure the damages "by the difference in the values of the apartment with and without the services in question." *Leris Realty Corp. v. Robbins*, 408 N.Y.S.2d 166, 167 (Civ. Ct. 1978); see also *Cazares v. Ortiz*, 168 Cal. Rptr. 108 (App. Dept. Super. Ct. 1980); *Parker 72nd Assocs. v. Isaacs*, 436 N.Y.S.2d 542 (Civ. Ct. 1980).

160. See *infra* Appendices J-L. For an explanation of how the proposed settlement amount was derived, see *supra* note 66.

161. See *infra* Appendix J.

162. See *infra* Appendix K.

The given explanation had a significant impact on how likely subjects were to accept the settlement offer and forgo their day in court. Knowing that the landlord did not fix the heater because he was out of the country due to a family emergency, most Group B (Family Emergency) subjects were willing to accept the landlord's offer and let the matter rest. Their mean response was 3.41 ( $n = 58$ ). Group A subjects (Broken Promise), in contrast, were more likely to reject the \$900 offer and risk a less favorable decision in small claims court than to accept the offer. Their average score was 2.60 ( $n = 60$ ). The difference between the two groups is highly significant.<sup>163</sup> Fifty-nine percent of the Family Emergency subjects said they would "definitely" or "probably" accept the settlement offer, while only 35% of the Broken Promise subjects provided those same responses. Thirty percent of the Broken Promise subjects said they would "definitely reject" the \$900 settlement offer in favor of small claims court, while only 9% of the Family Emergency subjects would "definitely reject" the offer.

Whether the equity-seeking barrier to settlement is purely psychological, or whether it suggests a refinement to economic models by demonstrating that litigants use the judicial process to maximize a combination of monetary and nonmonetary preferences, is a debatable point of theory.<sup>164</sup> Regardless of whether we label their responses psychological or economic, however, subjects in the two experimental groups were in the same legal position,<sup>165</sup> received the

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163.  $t(115) = 3.24, p < .01$  (Mann-Whitney,  $p < .01$ ).

164. Economic models sometimes explicitly state as an assumption that the parties seek only monetary goals. See Shavell, *supra* note 40, at 56 ("The parties are assumed to view suit and settlement or litigation solely as a financial matter . . ."). Priest and Klein note that their model of settlement assumes that neither litigant cares about the precedential value of a jury verdict. If one or both parties do care, the bargaining range that will result in a settlement is reduced. See *supra* notes 27-29 and accompanying text. Priest and Klein make this point in the context of a verdict's financial value to repeat players, such as insurance companies. But their point could be easily expanded to include one-time players who place noneconomic, psychic value on a verdict in their favor and therefore demand a more favorable monetary offer to settle. See generally Stephen M. Bundy, *Commentary on "Understanding Pennzoil v. Texaco": Rational Bargaining and Agency Problems*, 75 VA. L. REV. 335, 337-38 (1989) (describing the factors that will make settlement more or less likely according to the dominant economic model and concluding that "if either party affirmatively values judgment, settlement is less likely").

165. Some readers of earlier drafts of this article suggested that our experimental design may have failed to hold legal rights constant across groups in this scenario. Specifically, subjects might have believed that if the landlord had a good excuse for his behavior, victory in small claims court would have been less likely. If this were the case, the greater willingness to settle on the part of Family Emergency subjects may have been due to a different expected value calculation rather than nonmonetary factors. Although this hypothesis is plausible, a follow-up experiment we conducted appears to disprove it. In that experiment we gave a new group of subjects the Broken Promise group's scenario and explicitly informed them that the result in small claims court would not depend on the quality of the landlord's excuse for

same settlement offer, and faced the same uncertainty in court if they refused to settle. The very different responses of the Family Emergency and Broken Promise subjects provide empirical support for the hypothesis that litigant victims seek more than just monetary damages from the legal system.<sup>166</sup> They seek to restore equity to inequitable relationships. When litigants feel they have been treated badly by the other side, the chances of settlement decrease because litigants are more likely to seek retaliation or vindication of their moral position in addition to monetary damages. This finding, while intuitive, is somewhat at odds with the conventional wisdom that litigants find the litigation process so painful, inconvenient, and demeaning that they will pay almost any price to settle rather than prolong the experience by forcing a trial.<sup>167</sup> Conversely, when litigants can find a sympathetic explanation for the harm they have suffered — such as a family emergency incurred by the adversary — they appear better able to forgive the unjust treatment, making them more likely to accept a settlement offer.<sup>168</sup>

### C. *Will an Apology Make Any Difference?*

Fortunately for the practitioner with a blameworthy client, the discussion of equity seeking does not end at this point. The negotiation literature includes some discussion about the value of an apology.<sup>169</sup> Although it seems logical that an apology can improve the level of trust between parties in a negotiation situation, the case for

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failing to provide heat. This added information made subjects no more likely to accept the settlement offer. This experiment is presented in detail *infra* in section VI.B.

166. Researchers studying procedural justice have also found that disputants seek more than just monetary damages when they enter the legal system. MacCoun et al., *supra* note 5, at 105 (finding that litigants are “more concerned with issues of vindication and with obtaining an adequate hearing of their dispute than with the actual award that they obtain”).

167. See Galanter, *supra* note 2, at 8-9 (“Wary of risks, delays, and costs, litigants do not act as if propelled by an unappeasable appetite for contest or public vindication. For plaintiffs and defendants alike, litigation proves a miserable, disruptive, painful experience.”).

168. Given the results of our experiments, an experiment testing the hypothesis that the results would be the same in the commercial litigation setting would be illuminating. Such a study would shed light on the behavior of corporate litigants, rather than individuals. The results of such an experiment might add to the corporate law debate about whether corporate managers maximize value for their shareholders or pursue their personal interests. Compare Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1758 (1989) (explaining that in neoclassical economics, firms usually seek to maximize profits) with ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 114-15 (Harcourt, Brace & World, Inc. 1968) (1932) (contending that managers may pursue their own interests at shareholder expense).

169. See, e.g., WILLIAM URY, *GETTING PAST* No 42-43 (1991); Stephen B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221 (1987); John O. Haley, *Comment: The Implications of Apology*, 20 LAW & SOC. REV. 499 (1986); Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC. REV. 461 (1986); Walster et al., *supra* note 150, at 163.

its substantive success in resolving disputes out of court has, to date, been largely anecdotal.<sup>170</sup>

We tested the value of the apology, empirically and in the litigation context, by adding a third group to our landlord-tenant dispute experiment.<sup>171</sup> Group C (Apology) subjects received the same explanation for the landlord's failure to repair the heater as the Broken Promise subjects: the landlord repeatedly promised, but never followed through. But Apology subjects were given one additional piece of information prior to the landlord making the \$900 settlement offer: "Prior to the small claims court trial, you agreed to meet with the landlord. At the meeting, the landlord apologized to you for his behavior. 'I know this is not an acceptable excuse,' he told you, 'but I have been under a great deal of pressure lately.'" <sup>172</sup>

Apology subjects were more inclined to accept the settlement offer than Broken Promise subjects. Apology subjects gave a mean response of 2.93 ( $n = 59$ ) compared to the 2.60 score given by the Broken Promise group. Although the difference between these means falls short of statistical significance,<sup>173</sup> we find the distribution of the responses along the five-point scale enlightening nonetheless: whereas 30% of the Broken Promise subjects said they would "definitely reject" the settlement offer, only 12% of the Apology group similarly rejected the landlord's offer out of hand. Apparently, while the apology we tested did not mitigate all of the subjects' bad feelings, it provided enough vindication of the tenant's moral position and sense of equity to prevent subjects from definitively rejecting the offer. Whereas the modal response from the Broken Promise group was to "definitely reject" the offer, subjects in the Apology group were more likely to select any of the other choices than the "definitely reject" option.<sup>174</sup>

170. See, e.g., Goldberg et al., *supra* note 169.

171. See *infra* Appendix L.

172. See *infra* Appendix L.

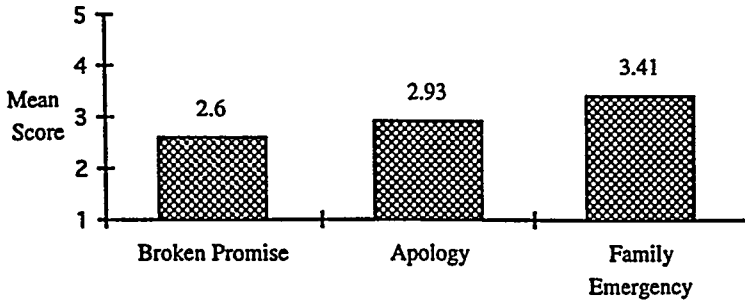
173.  $t(117) = 1.33, p < .1$ . Because the  $t$  test itself shows that this experiment's results were not statistically significant, we do not report the Mann-Whitney result.

174. The responses of the Apology and Broken Promise groups were as follows:

	Apology Group	Broken Promise Group
Definitely reject:	12%	30%
Probably reject:	34%	27%
Uncertain:	19%	8%
Probably accept:	20%	23%
Definitely accept:	15%	12%

Figure 3

## The Impact of Blameworthiness and Apology



Moreover, we believe our experiment understates the efficacy of apology for at least two reasons. First, the apology in the scenario, as written, was not particularly forceful. Although the narration referred to it as an apology, the landlord never used the phrase *I'm sorry*, or any similar expression.<sup>175</sup> Second, it is likely that the force of an apology resonates more when it is expressed face-to-face than when it is simply written down on paper. Given these limitations, it is surprising that our results are as strong as they are.<sup>176</sup>

It is worth reiterating that although the landlord's apology was useful in reducing the barriers to settlement caused by animus and equity seeking, it did not remove those barriers. The Family Emergency subjects (mean = 3.41) were far more likely to accept the settlement offer than the Apology subjects (mean = 2.93). The difference between these two groups is statistically significant.<sup>177</sup> Our findings suggest, then, that it may be difficult for litigants to overcome fully the barriers perceived blameworthiness creates with an apology. We hesitate, however, to push this conclusion too far. Perhaps a more sincere or more substantive apology<sup>178</sup> could re-

175. See *infra* Appendix L.

176. A critical analysis of the text of the apology as written may also lead to the conclusion that, while labeled an "apology," what the landlord actually said constituted an "excuse," and not a very good one at that. Such a reading might further support our prediction that a more straightforward and forcefully worded apology would increase litigants' propensity to accept a settlement offer. It also implies that an excuse, like an apology, might reduce the desire of litigants to seek a court verdict to establish the moral justification of their claims.

177.  $t(115) = 2.02, p < .05$  (Mann-Whitney,  $p = .05$ ).

178. According to equity theorists, an effective apology "is not a single strategy for restoring equity but comprises several quite different strategies." Walster et al., *supra* note 150,

store equity to the relationship to the point that decisions about whether to settle are determined solely by value-maximizing calculations.

The equity-seeking experiments demonstrate that relational factors can play a role in settlement breakdown. When deciding whether to settle or forge ahead with trial, people consider not only the economic value of each option but also the status of their relationship with the adversary. Our work on equity seeking illustrates that a disputant who feels she has put more into a relationship with an adversary than she has received in return is more likely to seek vindication in court than a disputant who has been treated equitably, even if settlement is economically rational.

## V. THE REACTIVE DEVALUATION BARRIER: ARE SETTLEMENT OFFERS DISCOUNTED?

### A. *The Reactive Devaluation Construct*

A team of social psychologists led by Stillinger and Ross has hypothesized that people tend to devalue proposals solely because they have been offered by an adversary. According to Ross and Stillinger, a party that views a change in the status quo as favorable may alter that evaluation upon learning that an adversary proposed the change.<sup>179</sup> Evidence for the existence of this “reactive devaluation” phenomenon comes from a number of experiments.<sup>180</sup>

In the first experiment to demonstrate the reactive devaluation phenomenon — an opinion survey conducted in the United States during the mid-1980s — researchers asked three groups of respondents to evaluate a nuclear disarmament proposal.<sup>181</sup> Each group received the same proposal, but the experimenters attributed the proposal to different parties. One group of subjects was told the disarmament proposal had been offered by Mikhail Gorbachev, the Soviet leader at the time. The second group was told that President Ronald Reagan had originated the proposal. The third group was told that the proposal came from a group of neutral “strategy ana-

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at 163. In particular, an apology should (i) convince the victim that the blameworthy party's justifications are plausible; (ii) convince the victim that the relationship between the two parties really is equitable; (iii) humble the blameworthy party and exalt the victim, thereby redistributing esteem; and (iv) acknowledge the inequity in the relationship but ask the victim to “forgive and forget.” *Id.* at 163. This description suggests that blameworthy litigants offering more sincere and substantive apologies than the one offered in our scenario are likely to have more success at restoring equity to the harmed relationship.

179. Ross & Stillinger, *supra* note 11, at 394-95.

180. See STILLINGER ET AL., *supra* note 155, at 3.

181. *Id.* at 6.

lysts.”<sup>182</sup> Consistent with reactive devaluation theory, respondents who attributed the proposal to Gorbachev rated it less favorably than respondents who attributed the proposal to Reagan. While a mere 16% of the Gorbachev-group respondents rated the proposal as favorable to the United States, 60% of Reagan-group respondents rated the proposal favorable to the United States. Subjects who attributed the proposal to neutral strategy analysts rated it more favorably than the Gorbachev group but less favorably than the Reagan group, just as the reactive devaluation theorists hypothesized.<sup>183</sup> The researchers drew the conclusion that “[t]erms that may appear evenhanded when advanced by a neutral third party (or even advantageous when proposed by one’s own side) somehow seem disadvantageous when it is the other side that has proposed them.”<sup>184</sup>

At least three different explanations could account for the fact that respondents devalued the disarmament plan when it was proposed by Gorbachev.<sup>185</sup> First, the phenomenon might be explained by what we refer to as “the fear of private information.” If Gorbachev, who had more information about the Soviet Union’s nuclear capabilities than the respondents, proposed a plan, respondents might have concluded that he probably knew something they did not and the bargain was probably good for the Soviet Union and bad for the United States. This explanation treats the respondents as rational actors who estimate the value of a specific deal in light of information they quite rationally believe the adversary may possess. We refer to the second possible explanation as “spite.” Even if the respondents did not value the actual proposal any less because it was offered by Gorbachev, they might have reacted less favorably to it because achieving the value of disarmament would bring with it the cost of allowing Gorbachev, or the Soviet people, to achieve something of value to them. This explanation is plausible whenever the offeree harbors negative feelings toward the offeror. Finally, the results might be explained, as Ross and Stillinger argue,<sup>186</sup> by a psychological reaction that causes people to devalue a proposal simply because it has been offered by an adversary, re-

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182. *Id.*

183. *Id.*

184. *Id.* at 7.

185. See also NEALE & BAZERMAN, *supra* note 96, at 75-77 (discussing possible explanations for reactive devaluation).

186. Ross & Stillinger, *supra* note 11, at 394-95.

ardless of personal feelings about the adversary. We will refer to this explanation as pure reactive devaluation.

To mitigate “the reaction that such a phenomenon [that is, reactive devaluation of the Gorbachev proposal] was obvious, or a result of purely logical reasoning, or simply ‘old hat,’”<sup>187</sup> Stillinger and her associates conducted another experiment in which they held the offeror constant but manipulated the offer proposed. They hypothesized that any proposal made by the other side would be viewed less favorably than proposals that could have been made but were not. In this second experiment — which was conducted during a period of heated debate over Stanford University’s divestment policy in South Africa — the researchers surveyed students’ reactions to two divestment proposals being considered by the university. Students in Group A were told that the university had proposed the “Deadline” plan, rather than the “Specific Divestment” plan it had considered.<sup>188</sup> Students in Group B were told that the university had proposed Specific Divestment, rather than the Deadline plan. Students in each group were asked to evaluate the attractiveness of the proposals. Consistent with the theory of reactive devaluation, when the university proposed the Deadline plan, 85% of students indicated a preference for Specific Divestment. Yet when the university proposed Specific Divestment, a majority of students (60%) preferred the Deadline plan.<sup>189</sup> In short, “students devalued the ‘proposed’ plan relative to the one that had not been proposed.”<sup>190</sup>

Although this experiment strengthens the argument that pure reactive devaluation caused disparities in responses, it does not completely rule out the competing explanations for the nuclear disarmament results. If respondents, who generally favored divestment,<sup>191</sup> felt that the university opposed divestment and sought to take the weakest steps politically possible, they might have feared private information and readjusted their valuation of the two di-

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187. STILLINGER ET AL., *supra* note 155, at 7.

188. The Deadline plan called for the creation of a committee of students and trustees charged with the task of monitoring investment responsibility with the promise of total divestment in two years if the committee was dissatisfied at that time with the pace of change in South Africa. The Specific Divestment plan called for the immediate divestment of all university investments in corporations doing business in South Africa. *Id.* at 8.

189. *Id.*

190. Ross & Stillinger, *supra* note 11, at 394. Moreover, in a follow-up experiment, students rated the divestment plan ultimately proposed by the university less favorably after it had been proposed than before it had been proposed, when it had been one of several hypothetical possibilities. STILLINGER ET AL., *supra* note 155, at 11-12.

191. STILLINGER ET AL., *supra* note 155, at 8.



vestment plans based on that fear. If respondents were hostile to the university because of a perceived lack of moral fortitude, spite might have caused respondents to look unfavorably on any plan proposed by the university.

B. *Pure Reactive Devaluation in the Litigation Context:  
Inconclusive Results*

To date, no one has studied reactive devaluation in the litigation context. Whether reactive devaluation can best be explained by the pure reactive devaluation, private information, or spite theories, its existence in the litigation context, if demonstrable, would have important implications for the settlement of legal disputes. But the specific policy prescriptions for litigants and attorneys would differ widely, depending on the causal factor. Consequently, in our initial effort to test reactive devaluation, we attempted to design our experiment to test for the existence of pure reactive devaluation, controlling for the fear of private information and for spite.

We asked three groups of subjects to imagine that they were plaintiffs involved in an employment dispute.<sup>192</sup> All subjects received an identical set of facts. During their senior year of college, an investment bank offered them a financial analyst position with a salary of \$40,000 per year. In reliance on that offer, the subjects turned down a number of similar offers. One week prior to graduation, the investment bank rescinded its offer. The subjects filed suit against the investment bank for breach of contract. Their attorney then advised them that the only issue for the judge to determine at trial was whether the agreement with the investment bank constituted a binding contract or a preliminary, nonbinding discussion. If the judge determined that there was a contract, the subjects would recover \$40,000, or one year's salary. If the judge determined otherwise, the subjects would recover nothing. The attorney, after researching the problem, advised the subjects that the outcome could go either way.<sup>193</sup> To minimize the fear that the investment

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192. See *infra* Appendices M-O.

193. To those who are somewhat familiar with contract and employment law, this scenario may seem rather farfetched. After all, the general rule is that an employment contract for an indefinite period of time is presumed to be terminable at will by either party at any time. Thus, if a company fires an employee ten minutes after he starts working for that company, courts will likely refuse to recognize a cause of action on behalf of that employee. See, e.g., *Crain v. Burroughs Corp.*, 560 F. Supp. 849 (C.D. Cal. 1983); *Daniel v. Magma Copper Co.*, 620 P.2d 699 (Ariz. Ct. App. 1980); see also CAL. LAB. CODE § 2922 (West 1989) ("An employment, having no specified term, may be terminated at the will of either party on notice to the other."). Recently, however, some courts have held that *prospective employees* who are terminated — like the subjects in our reactive devaluation hypothetical — have a cause of

bank had private information that would help it better evaluate the likelihood of success at trial, the instructions informed the subjects that “[t]he only ‘evidence’ that will bear on the judge’s interpretation in the case is your correspondence with the firm.” To minimize the possibility of spite affecting subjects’ evaluations of settlement offers, we provided subjects with a relatively sympathetic explanation of why the investment bank had revoked its offer: The Investment Bank wrote to inform you that, due to budgetary problems, “it will be able to employ fewer graduates than it previously anticipated and could not hire you after all. The firm apologized for the unfortunate situation but explained that there was really nothing else that it could do.”<sup>194</sup>

Prior to the trial, the investment bank offered the subjects \$25,000 to settle the case.<sup>195</sup> The independent variable we tested was analogous to the variable tested in the nuclear disarmament study: the identity of the offeror. Subjects in Group A (Adversary) were told that “the Investment Bank has offered to pay you \$25,000 if you will agree to drop the lawsuit.”<sup>196</sup> Subjects in Group B (Mediator) learned:

Your attorney and the Investment Bank jointly agreed on a neutral mediator to consider all the facts in the dispute and make a non-binding settlement recommendation; either side is free to reject it. The mediator has suggested that as a settlement the Investment Bank pay you \$25,000 and you agree to drop the lawsuit.<sup>197</sup>

Finally, the instructions for Group C (Attorney) read, “[Y]our attorney informs you that he thinks he might be able to convince the Bank to pay you \$25,000 to settle the case in return for your agreeing to drop the lawsuit. He would like to make the offer, and he is seeking your approval.”<sup>198</sup> Subjects indicated their willingness to accept the settlement offer by selecting one of the usual five options.

If pure reactive devaluation is at work in this situation, we

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action against the employer for breach of contract. In *Comeaux v. Brown & Williamson Tobacco Co.*, 915 F.2d 1264 (9th Cir. 1990), for example, the Ninth Circuit held that the promise to employ was separate from the employment contract itself. Accordingly, the court ruled that a prospective employee, whose job offer was rescinded by the employer prior to his start date, was entitled to damages in reliance. 915 F.2d at 1270-71. Thus, our scenario may actually reflect an emerging trend.

194. See *infra* Appendices M-O.

195. For an explanation of how the proposed settlement amount was derived, see *supra* note 66.

196. See *infra* Appendix M.

197. See *infra* Appendix N.

198. See *infra* Appendix O.

would predict that subjects in the Attorney group would be most likely to accept the offer, followed by subjects from the Mediator group, with subjects from the Adversary group the least likely to accept. In fact, subjects in all three groups were likely to accept the offer, with Mediator and Attorney subjects only slightly more likely to accept than Adversary subjects. Adversary subjects provided a mean response of 3.85 ( $n = 34$ ); Mediator subjects' response was 4.06 ( $n = 31$ ); Attorney subjects responded with an average of 4.10 ( $n = 35$ ). None of the differences between the three means is statistically significant. Accordingly, we fail to reject the null hypothesis that the slight difference in results is due to random error and conclude that, in this experiment, the identity of the offeror probably had no effect on the propensity of subjects to accept or reject the \$25,000 settlement offer.

We also tested whether pure reactive devaluation was more important in litigation scenarios involving nonmonetary settlement offers. Group *D* (Adversary 2) and Group *E* (Mediator 2) subjects faced the same scenario as the initial three groups, but with a different settlement offer. The Adversary 2 subjects were told that the investment bank "has offered to agree to hire you for the next available financial analyst position at the same salary (\$40,000) that it proposed before. However, you will have to wait 6 months before you begin working and drawing a salary."<sup>199</sup> Mediator 2 subjects received the same offer, but the offer was suggested by a neutral mediator rather than by the adversary.<sup>200</sup> The results of this experiment were similar to those of the preceding experiment. The Mediator 2 subjects were slightly more likely to accept the settlement offer (mean = 4.06,  $n = 35$ ) than the Adversary 2 subjects (mean = 3.88,  $n = 33$ ), but the difference was slight and failed to reach the level of statistical significance.

### C. *Reactive Devaluation in the Litigation Context Part II: Exploring Other Causes*

Our results suggest a number of plausible explanations, one of which is that the reactive devaluation phenomenon might result from either fear of the adversary possessing private information or ill feelings toward the adversary that make it unpalatable to embrace any options that she suggests.<sup>201</sup> To test these theories, we

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199. See *infra* Appendix P.

200. See *infra* Appendix Q.

201. Of course the lack of a statistical difference in the responses between groups in the employment dispute experiment could also reflect poor experimental design on our part, that

conducted another set of experiments with more variations to allow us to test for three possible causes of reactive devaluation simultaneously.

In "The Supermarket Accident," subjects slipped and fell on some pieces of fruit that had fallen to the floor at the local supermarket.<sup>202</sup> This fall resulted in a severe back injury, which might cause recurrent pain for several years. According to the subjects' attorney, the only legal issue in the case was whether the supermarket "negligently allowed a dangerous condition to exist . . . that the management should have been aware of and taken steps to remedy."<sup>203</sup> Subjects were told that this was a question for a jury to decide:

On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition.<sup>204</sup>

The instructions informed the subjects that if the jury decided at trial that the supermarket was negligent, they could expect a court to award them \$20,000; if not, they would recover nothing. As in the other cases, the subjects' attorney advised them that "this is a close case; cases like this can and do go both ways."<sup>205</sup> Alternatively, all subjects had the option to forgo trial and accept a settlement offer of \$10,000.<sup>206</sup> They were asked to assess the likelihood that they would accept the settlement offer on our five-point scale.

Subjects in Groups A and B (Pure Reactive Devaluation) were told that the supermarket management treated them well and "generously" paid for physical therapy. "While you feel somewhat bad about bringing the lawsuit, you believe that you deserve to be fairly compensated for your injuries."<sup>207</sup> They were also told that the

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reactive devaluation is too subtle a reaction to be triggered with only a written description of a dispute, that any effect present was swamped by the subjects' perception that the settlement offer was extremely generous, or that reactive devaluation is not present in litigation disputes.

202. See *infra* Appendices R-W.

203. See *infra* Appendices R-W.

204. See *infra* Appendices R-W.

205. See *infra* Appendices R-W. This scenario is representative of the real world of personal injury tort suits. In fact, a recent A.L.R. annotation on grocery store slips and falls contained a subcategory of cases dealing expressly with negligence suits arising from "[j]uice or pulp from produce." Sonja A. Soehnel, Annotation, *Liability of Operator of Grocery Store to Invitee Slipping on Spilled Liquid or Semiliquid Substance*, 24 A.L.R. 4TH 696, 726-28 (Supp. 1994).

206. See *infra* Appendices R-W.

207. See *infra* Appendices R-S.

only facts relevant to the jury's decision were the simple facts presented in the description they were reading: "[T]he only uncertainty is in how a jury will interpret these facts."<sup>208</sup> The only difference between Groups A and B was that Group A subjects received the settlement offer from the adversary,<sup>209</sup> while Group B subjects received the offer from a neutral mediator.<sup>210</sup> Consistent with our results in the job offer scenario, the willingness of subjects to accept the \$10,000 settlement was unaffected statistically by whether they received the offer from the adversary or from a neutral mediator.<sup>211</sup>

Groups C and D subjects (Private Information), like the subjects in Groups A and B, learned that the supermarket had treated them well during the litigation process. Unlike Groups A and B, however, C and D subjects were not told that all the relevant facts were known to both sides. Instead, the instructions stated:

A critical question is whether supermarket employees knew that there was fruit on the floor before your accident but failed to clean it up. If the answer is yes, your chances of winning at trial would increase substantially; if the answer is no, your chances would decrease substantially. This question will certainly be answered at trial, but you do not currently know the answer. Your lawyer is uncertain whether or not the supermarket chain knows the answer, but she assumes that the supermarket chain's attorneys have interviewed employees who worked on the day of your injury.<sup>212</sup>

The only difference between Groups C and D was that Group C subjects received the settlement offer from the adversary,<sup>213</sup> while Group D subjects received the offer from the neutral mediator.<sup>214</sup> If reactive devaluation in the litigation context is driven by litigants' fears that their adversary might possess private information relevant to the outcome of the case, we would expect to see significantly more Group D subjects accepting the mediator's settlement suggestions than Group C subjects accepting the adversary's potentially self-serving offer. The responses of the Private Information subjects, however, were nearly identical to those of the Pure Reactive Devaluation subjects; there was no statistical difference between Group C and Group D subjects.<sup>215</sup> Despite the clear

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208. See *infra* Appendices R-S.

209. See *infra* Appendix R.

210. See *infra* Appendix S.

211. Most subjects found the offer very generous. The mean score of Group A subjects was 4.36; the mean score of Group B subjects was 4.22.

212. See *infra* Appendices T-U.

213. See *infra* Appendix T.

214. See *infra* Appendix U.

215. Again, most subjects were inclined to accept the offer. The mean score of Group C

implication that the adversary might possess information unknown to the plaintiff that would be relevant to evaluating the likelihood of success at trial, subjects failed to devalue the settlement offer made by the adversary.

Members of Groups *E* and *F* (Spite), like the Pure Reactive Devaluation subjects, received versions of the scenario that controlled for the possibility of the defendant possessing relevant private information by stipulating that the only legally relevant facts were known to both parties. The supermarket, however, did not treat the Spite subjects well throughout the process. Instead, the subjects learned that “[t]he supermarket management has treated you rudely since the accident. While it grudgingly paid for the physical therapy that was not covered by your health insurance, the chain initially claimed that you had entirely staged the accident and now says that you were either careless, uncoordinated, or both.”<sup>216</sup> Group *E* subjects received the settlement offer from the supermarket,<sup>217</sup> Group *F* subjects from a neutral mediator.<sup>218</sup> Otherwise, the instructions given to Group *E* and *F* members were identical.

If the reactive devaluation of an adversary’s offer is a visceral reaction primarily motivated by dislike for the adversary and the desire to say “no” whenever the adversary says “yes,” we would expect to see a difference in the settlement rates of Groups *E* and *F*. In this case, the data supports the hypothesis. Again, the vast majority of subjects in both groups found the \$10,000 settlement offer generous and favored accepting it. The addition of rude behavior on the part of the supermarket, however, caused some subjects to disfavor the offer. While 96% (25 of 26) of the Group *F* subjects receiving the settlement suggestion from the mediator said they would “definitely accept” or “probably accept” the offer, only 81% (25 of 31) of the Group *E* subjects receiving the offer from the adversary would “definitely accept” or “probably accept.” Although the magnitude of the reactive devaluation phenomenon is not large, the difference between the accepters in Groups *E* and *F* is significant.<sup>219</sup> The results of this series of experiments suggest that

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was 4.40; the mean score of Group *D* was 4.38. There is no statistical difference between the two, nor is there any statistical difference between either Group *C* or *D* and the Pure Reactive Devaluation groups.

216. See *infra* Appendices V-W.

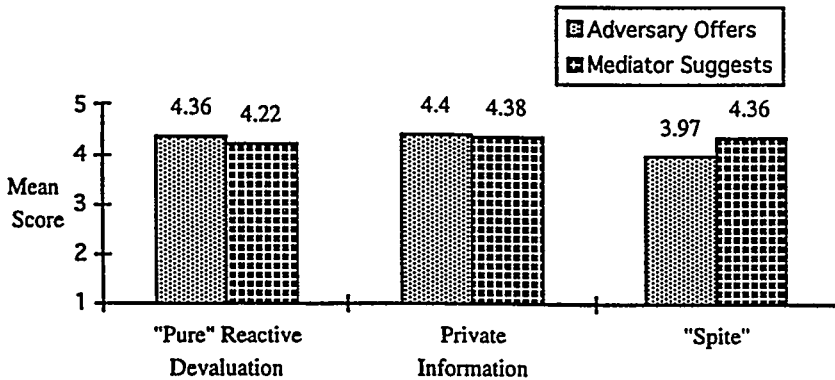
217. See *infra* Appendix V.

218. See *infra* Appendix W.

219. The mean score of Group *E* was 3.97; the mean of Group *F* was 4.36.  $t(47) = 1.73$ ,  $p < .05$ . The Mann-Whitney test results for this experiment, however, showed no statistical significance.

to the extent reactive devaluation occurs in the litigation negotiation context, it may be driven largely by spite, rather than by fear of private information or pure reactive devaluation. This in turn suggests a tentative hypothesis that the psychological factors that cause reactive devaluation might be similar to those that cause equity-seeking behavior.

Figure 4  
Effects of Identity of Settlement Offeror



These conclusions must be heavily qualified. First, in both series of reactive devaluation experiments we conducted, respondents perceived the settlement offers made by defendants as extremely generous. In each version of the job offer scenario, at least 78% of subjects said they would "definitely accept" or "probably accept" the settlement offer. In the supermarket accident scenarios, at least 86% of subjects in each experimental group gave one of those two answers.<sup>220</sup> Because all respondents were at or near the top of the five-point scale, it is possible that effects that otherwise would have presented themselves were swamped by the perceived generosity of the settlement offer. Second, it is also possible that the quality of our experimental design was sufficient to measure a small amount of devaluation in the spite context but not sufficiently sensitive to detect a pure reactive devaluation effect.<sup>221</sup>

220. For an explanation of the methodology used to select offer levels for the experiments, see *supra* note 66.

221. If our tentative findings about the factors driving reactive devaluation in the litigation scenario are correct, it may or may not be true that the same factors explain reactive devaluation in other contexts. Pure reactive devaluation, for example, may have less impact in the litigation context than in other contexts. In the litigation setting, an offer must be compared to another specific option — namely, a trial. A litigant who initially devalues an offer may be sobered by the realization that rejecting the offer means going to trial, with its attendant risks, and reconsider her impulse to devalue. In the nuclear disarmament and di-

While our work on framing, anchoring, and equity seeking provides compelling evidence for the existence of cognitive psychological barriers to lawsuit settlement, our work on reactive devaluation, though less conclusive, provides evidence of the existence of social psychological barriers to litigation settlement as well. Specifically, the reactive devaluation work suggests that when an offeror makes a settlement offer, there is a risk that the offeree will devalue that offer and opt for trial, particularly when she feels some ill will toward the offeror. This psychological phenomenon, like framing, anchoring, and equity seeking, may impede economically rational settlement behavior.

## VI. CONFRONTING THE PROBLEM OF PSYCHOLOGICAL BARRIERS

Our results demonstrate in an experimental setting that psychological barriers to the settlement of lawsuits exist. Provided that our results can be generalized to real-world disputes,<sup>222</sup> we predict that framing, equity seeking, and reactive devaluation will prevent some parties from settling where they would otherwise be able to reach agreement. Accordingly, parties who wish to ensure out-of-court settlement must prepare to confront these psychological barriers.<sup>223</sup>

Although the role of the individual parties in resolving disputes is critically important, "the legal system's central institutional characteristic" is that "litigation is carried out by *agents*,"<sup>224</sup> rather than by the disputants themselves. Thus, any discussion about confronting psychological barriers requires consideration of the role that attorneys should play. With respect to these barriers, attorneys can focus on two analytically distinct goals. First, they can attempt to negotiate in a manner that prevents the barriers from being con-

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vestment studies discussed above, the subjects did not face a risky alternative; rather, the only alternative was the status quo. This difference may have made devaluation of the adversary's offer *seem* less costly, although the status quo, of course, always has its own risks. For a brief discussion of how psychological constructs might affect litigants differently than actors in other contexts, see *supra* text accompanying notes 41-45.

222. See *supra* section II.C.

223. We acknowledge that our discussion in this section about minimizing psychological barriers is rooted in the normative assumption that when there is an economically rational settlement opportunity for both parties, it is preferable that the dispute is settled and trial, with its attendant costs, avoided. Readers who believe that the civil justice system should serve goals other than facilitating economically efficient settlement given the background of the substantive law might disagree with this assumption.

224. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 510 (1994) (emphasis added).



structed in the first place. Second, because it is highly unlikely that attorneys will successfully avoid all psychological barriers, attorneys can work to minimize the impact of already-erected barriers on settlement behavior. We conducted some follow-up research that sheds light on the extent to which they may be able to accomplish this. Our results, though preliminary, suggest that avoiding psychological barriers *ex post* is quite difficult.<sup>225</sup>

### A. *Reframing the Offer*

To test mitigation in the framing context, we recruited subjects from the same pool of Stanford University undergraduate students and gave them the same scenario we gave to the BMW Drivers in the automobile collision scenario.<sup>226</sup> We made one change in the scenario: the settlement option, which is framed first as a loss, is then reframed as a gain. In this second experiment, like the first, the subjects learned that they lost their \$24,000 BMW in the accident, that they could recover either \$10,000 or \$28,000 at trial, and that the defendant insurance company offered them a final settlement of \$21,000.<sup>227</sup> In this second experiment, however, subjects received the following additional information to consider before responding to the offer:

Keep in mind that this settlement would leave you substantially better off than you are now, and you would avoid the riskiness of a trial. Although the offer is \$7000 less than you hoped to recover, accepting the offer would make you \$21,000 better off than you are right now (remember, you currently have no car).<sup>228</sup>

In addition to testing the efficacy of attempting to reframe a perceived loss as a gain, we also tested the efficacy of reframing a perceived gain as a loss. Another experimental group received the same scenario as the Toyota Drivers in the automobile collision scenario.<sup>229</sup> In addition, this group of Toyota Drivers was told:

Keep in mind that if you accept the offer you will be left substan-

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225. The usefulness of strategies legal practitioners could employ to avoid or mitigate psychological barriers presumes lawyers' ability to recognize psychological barriers that their clients cannot recognize, a far-from-obvious ability. We are currently conducting further experimental research designed to measure the ability of lawyers, relative to our "litigant" subjects, to recognize and respond to psychological barriers to litigation settlement.

226. See *supra* text accompanying notes 97-105. Subjects in that scenario perceived the settlement as a loss and were accordingly less likely to accept it. See *supra* text accompanying note 107.

227. See *infra* Appendix X.

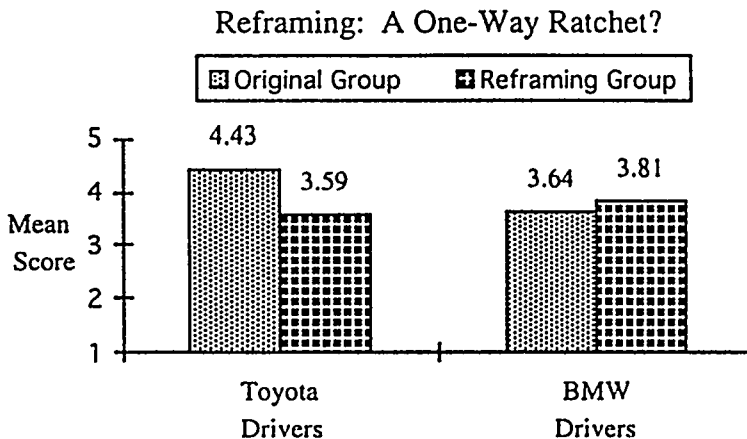
228. See *infra* Appendix X.

229. They tended to accept the defendant insurance company's offer, which was framed as a gain. See *supra* text accompanying note 107.

tially worse off than you were before the accident. The other driver did cause you \$28,000 worth of total damages, and accepting the offer would make it impossible for you to ever recover the full amount of damages. Rejecting the offer, though somewhat risky, would allow the possibility of recouping the full amount you believe National Mutual should pay you.<sup>230</sup>

Interestingly, the results of these two experiments were asymmetric. The BMW Drivers in the second group were only slightly more likely than those in the first to accept the \$21,000 settlement offer. The mean score of the second BMW group was 3.81 on our five-point scale, less than two-tenths of a point higher than the first BMW group, and not significantly different. The second group of Toyota Drivers, however, was far less likely to accept the settlement offer than the first group of Toyota Drivers. The mean score of the second group was 3.59, far lower than the first group's average score of 4.43. The difference between the means is highly significant,<sup>231</sup> as is the difference between the percentage of Toyota Drivers in the first group who said they would either "definitely accept" or "probably accept" the settlement offer (90%) and the Toyota Drivers in the second group who gave the same responses (64%).

Figure 5



The fact that the second group of BMW Drivers was unable to overcome the framing barrier does not prove that it is impossible to mitigate the barrier created by a negative frame. Although we were unable to mitigate the barrier with two sentences of written description, attorneys who can sit down, face-to-face, and explain the psy-

230. See *infra* Appendix Y.

231.  $t(63) = 3.41, p < .01$  (Mann-Whitney,  $p < .01$ ).

chological barrier to their clients are likely to be more successful. The asymmetry of results between the Toyota Drivers and BMW Drivers, however, leads us to a tentative conclusion. The fact that subjects learned to compensate for the psychological effects of a positive frame but not for the effects of a negative frame suggests that the barrier to settlement created by negative frames is not ephemeral and might prove quite stubborn and difficult to mitigate in real litigation situations.<sup>232</sup>

### B. *Mitigation in the Equity-Seeking Context*

We also attempted to measure mitigation in the equity-seeking context. To do this, we asked another sample of subjects to accept or reject the \$900 settlement offer made by the landlord in the broken heater scenario. This group, like the Broken Promise experimental group, learned that the landlord repeatedly failed to remedy the problem without a good excuse.<sup>233</sup> But the new group of subjects was advised — before responding to the settlement offer — to consider the following:

Keep in mind when making your decision that whether you win or lose in small claims court and how much the court might award you will be based on the fact that the landlord failed to provide heat for four months. The fact that the landlord behaved badly toward you by promising to fix the heater but never following through might have made you more upset, but whether the landlord had a sympathetic excuse for failing to provide the heat will not concern the court.<sup>234</sup>

This attempt to mitigate the psychological barrier, as with the second group of BMW Drivers, fell on deaf ears. The subjects responded to the settlement offer with a mean score of 2.69, statistically indistinguishable from the 2.60 response of the initial Broken Promise group.<sup>235</sup>

Although we hesitate to draw unqualified conclusions from experiments that produce nonresults, we feel confident in hypothesizing that once psychological barriers are constructed, attorneys are unlikely to eliminate the barriers entirely, although they may be able to reduce the impact of the barriers on the settlement decision.

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232. Our conclusions, based on experiments in the litigation context, are somewhat at odds with psychological research indicating that it is relatively easy to manipulate frames in either direction. In one study, for example, researchers found that respondents' decisions to have surgery or to seek radiation therapy could be manipulated just by describing the possible results in terms of survival rates or death rates. Barbara J. McNeil et al., *On the Elicitation of Preferences for Alternative Therapies*, 306 NEW ENG. J. MED. 1259 (1982).

233. See *supra* text accompanying notes 158-61.

234. See *infra* Appendix Z.

235. See *supra* text accompanying note 163.

Success in minimizing the impact of these barriers will depend on a combination of factors, including the strength of the barrier erected, the skill of the attorney at mitigating the barrier, and the bargaining range between the parties. Our complete inability to mitigate equity seeking in the broken heater scenario, compared with the mixed results of our reframing experiments, leads us to the further tentative conclusion that social-psychological barriers such as equity seeking might be harder for attorneys to overcome than more purely cognitive barriers such as framing effects.

Our tentative conclusion that psychological barriers are persistent and difficult to eliminate once they are erected raises normative and strategic questions for attorneys. In light of the evidence that litigants will not always make economically rational decisions about settlement, the legal profession needs to consider to what extent it is appropriate for lawyers to present settlement offers or to relay such offers to their clients in ways that minimize psychological barriers and thus encourage settlement.<sup>236</sup> The question of how lawyers might successfully go about accomplishing this also deserves further attention.

#### CONCLUSION: PSYCHOLOGICAL BARRIERS AND ECONOMIC MODELS

The traditional economic model of settlement breakdown — as developed by Priest and Klein — provides an important first step in understanding why some lawsuits settle and others go to trial. Rational miscalculation undoubtedly pushes some litigants into court who might otherwise reach out-of-court settlement. Absent miscalculation, however, some litigants still find themselves in court. We have presented experimental evidence suggesting that these litigants may proceed to trial because psychological barriers to value-maximizing behavior impede their settlement efforts. Indeed, our research empirically grounds the hypothesis that psychological barriers are powerful causal agents of trials.

The usefulness of this evidence does not require rejecting economic thinking on the settlement-versus-trial question. On the contrary, the psychological barriers hypothesis complements economic thinking. The predictions of strategic bargaining theory — as developed by Cooter, Marks, and Mnookin — can be viewed as a

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236. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.2(a), 1.4 (1993) (requiring attorneys to communicate all settlement offers to clients and mandating that clients, not attorneys, must decide whether or not to accept settlement offers).

refinement to the basis laid by economic models.<sup>237</sup> By layering the variable of litigants' bargaining strategies on top of the variable of litigants' assessments of likely trial outcomes, strategic bargaining theory contributes to a richer understanding of the causes of trials. Empirically demonstrated psychological barriers can be understood as another analytical overlay.

Priest and Klein hypothesize that trials result when one or both parties to litigation miscalculate either the probability of a victory at trial or the dollar value of a potential judgment.<sup>238</sup> They represent this insight with an equation, predicting that plaintiffs will accept a settlement offer equal to  $Pp(J) - Cp + Sp$ , where  $Pp$  represents the plaintiff's estimate of her percentage chance of prevailing at trial,  $J$  represents the expected trial judgment,  $Cp$  represents the plaintiff's cost of going to trial, and  $Sp$  represents the plaintiff's cost of settling out of court.<sup>239</sup> Strategic bargaining theory would predict that this equation will understate the plaintiff's minimum settlement demand. The plaintiff might demand some amount more than  $Pp(J) - Cp + Sp$  if she believes that the increased risk of the defendant's refusing to settle is small relative to the incremental increase in her demand — say  $VCp$ , to represent the amount of the “value” to the defendant of settling rather than going to trial, a value the plaintiff will attempt to “claim.”<sup>240</sup> Our evidence suggests that the Priest & Klein equation will also understate the plaintiff's minimum settlement demand by neglecting to take account of psychological barriers. This understatement can be described symbolically as  $Mp(B)$ , where  $B$  represents some psychological barrier constant and  $Mp$  represents a magnitude coefficient of the psychological barriers to the individual plaintiff in a particular case.

Our findings, when combined with economic and strategic bargaining theories of litigation settlement, provide a deeper understanding of how litigants think about and react to settlement offers. Plaintiff's minimum demand will equal  $Pp(J) - Cp + Sp + VCp + MpB$ . Because our findings offer no guidance as to how to approximate the value of  $B$  or to measure  $Mp$  in a particular case, they are less useful for predicting outcomes of litigation settlement negotiations. Subtle differences in negotiating situations could cause  $B$  to vary from case to case. Differences in the way individual litigants

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237. See *supra* text accompanying notes 16-39.

238. See *supra* text accompanying notes 16-30.

239. Priest & Klein, *supra* note 18, at 12. This assumes that the plaintiff is risk neutral.

240. See generally Cooter et al., *supra* note 4.

react to the same situation could cause  $Mp$  to vary from case to case. Both possibilities make the specific effect of psychological barriers difficult to model, though future research might overcome these difficulties. More empirical study of framing, equity seeking, and reactive devaluation in the litigation context could, in theory, lead to numerical estimates of  $B$  values under common lawsuit situations. Although these barriers may not be economically rational, they may very well be predictable from individual to individual,<sup>241</sup> which would mean that numerical estimates of  $Mp$  would be possible as well. Moreover, future research could identify and model the effects on settlement behavior of other well-established psychological constructs, such as optimistic overconfidence,<sup>242</sup> availability,<sup>243</sup> and confirmatory evidence bias.<sup>244</sup>

Although the evidence of psychological barriers is, at present, more useful for descriptive than for predictive purposes, even the currently available evidence has some predictive power. At the very least, our experimental findings can be used as tools to make directional predictions regarding whether a given lawsuit is more or less likely to go to trial, given the litigants' estimates of trial success and bargaining postures.

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241. Indeed, Tversky and Kahneman argue that the cognitive psychological barriers to rational decisionmaking that they study — including framing and anchoring — are predictable. Tversky & Kahneman, *supra* note 126, at 1131.

242. Optimistic overconfidence refers to the tendency of a decisionmaker to be overly optimistic and overly confident about his chances of success. Kahneman & Tversky, *supra* note 89 (manuscript at 2-8). Recently, Kahneman and Tversky have begun to examine the impact of optimistic overconfidence on the litigation process. *Id.* (manuscript at 2-4). This subject was also recently addressed by Loewenstein et al., *supra* note 12 (analyzing whether litigants can make objective estimations of the value of a lawsuit to which they are a party).

243. Availability refers to the tendency of a decisionmaker to overestimate the frequency of an event that is easily recalled relative to an event of equal frequency that is less easily recalled. NEALE & BAZERMAN, *supra* note 96, at 50-53.

244. Confirmatory evidence bias refers to the tendency of a decisionmaker to ignore evidence that disconfirms previously held beliefs. *Id.* at 57-58.

APPENDIX A<sup>245</sup>Survey Instructions

Thank you for participating in this survey designed to measure how people involved in lawsuits respond to settlement offers. You will be asked to play the role of a participant in three different lawsuits. In each lawsuit scenario, you will have suffered some type of loss or injury and will be in the process of suing another party. After reading the facts of each case, you will be asked either one or two questions. For each question, please check one of the five answer choices you are given. The lawsuit scenarios will provide you with all the information you need to evaluate the answer choices, and there are no right or wrong answers.

Please complete and return the survey now. It is very important for the success of the project that you read all the information slowly and carefully and do not discuss the scenarios or the questions with anyone before you have finished.

Thank you again, for your participation.

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245. The attached appendices appear in their original, unedited form. — Ed.

APPENDIX BDescription of the Facts of the Case:

Your new \$14,000 Toyota Corolla was recently totaled in an automobile accident that was clearly the other driver's fault. You sustained some injuries that required medical treatment, but fortunately none of them were permanent and you have completely recovered. Your \$14,000 in medical bills were paid by your health insurance company, but you have no automobile insurance coverage that will pay to replace your car.

The other driver has no money and is unemployed, so you will not be able to collect any money directly from him. However, he does have automobile insurance. You and your lawyer have filed a lawsuit against the insurance company, National Mutual, for \$28,000 — \$14,000 for the car, and \$14,000 for the medical bills. You are not asking for any pain and suffering damages. If you are able to recover the \$14,000 for the medical bills, that will be extra cash in your pocket since your health insurance company has already paid your doctors and the hospital — it will be a windfall of \$14,000.

National Mutual is not disputing that you suffered \$28,000 in damages, but it claims that the other driver's policy has a maximum coverage value of \$10,000 for accidents that occur while driving a rental car. Since the other driver was driving a rental car at the time of the accident, National Mutual has refused to pay more than \$10,000. Your lawyer has advised you that the only issue in the case is whether or not there is in fact a \$10,000 limit on the policy for this type of accident. If the case goes to trial, a judge will review the policy and interpret its language. If a judge decides that there is a limit, you will recover \$10,000 at trial. If the judge decides there is no such limit, you will recover the full \$28,000. Your lawyer has reviewed the policy carefully and advised you that the language is extremely unclear — not unusual for the fine print in insurance policies. He cannot predict whether you are more likely to win or lose if the case goes to trial.

Question:

Following some discussions with your attorney, National Mutual has made you a settlement offer of \$21,000, total — they will pay you that amount if you will drop the lawsuit and agree not to make any other claims against them. The company has told you this is its final offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and go to trial. Your attorney is a family friend who is representing you for free, so legal fees should not affect your decision.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |



APPENDIX CDescription of the Facts of the Case:

Your new \$24,000 BMW 318 was recently totaled in an automobile accident that was clearly the other driver's fault. You sustained some injuries that required medical treatment, but fortunately none of them were permanent and you have fully recovered. Your \$4000 in medical bills were paid by your health insurance company, but you have no automobile insurance coverage that will pay to replace your car.

The other driver has no money and is unemployed, so you will not be able to collect any money directly from him. However, he does have automobile insurance. You and your lawyer have filed a lawsuit against the insurance company, National Mutual, for \$28,000 — \$24,000 for the car, and \$4000 for the medical bills. You have not asked for any pain and suffering damages. If you are able to recover the \$4000 for the medical bills, that will be extra cash in your pocket since your health insurance company has already paid your doctors and the hospital — it will be a windfall of \$4000.

National Mutual is not disputing that you suffered \$28,000 in damages, but it claims that the other driver's policy has a maximum coverage value of \$10,000 for accidents that occur while driving a rental car. Since the other driver was driving a rental car at the time of the accident, National Mutual has refused to pay more than \$10,000. Your lawyer has advised you that the only issue in the case is whether or not there is in fact a \$10,000 limit on the policy for this type of accident. If the judge decides that there is, you will recover \$10,000 at trial. If the judge decides there is no such limit, you will recover the full \$28,000. Your lawyer has reviewed the policy carefully and advised you that the language is extremely unclear — not unusual for the fine print in insurance policies. He cannot predict whether you are more likely to win or lose if the case goes to trial.

Question:

Following some discussions with your attorney, National Mutual has made you a settlement offer of \$21,000, total — they will pay you that amount if you will drop the lawsuit and agree not to make any other claims against them. The company has told you this is its final offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and go to trial. Your attorney is a family friend who is representing you for free, so legal fees should not affect your decision.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX DDescription of the facts of the case

You own a home with a large yard in a densely populated area of Palo Alto. Last month you broke ground on a swimming pool that you are constructing near the property line that separates your lot from your neighbor's lot. When the builders began to dig into the ground they discovered, to your surprise, that your neighbor's wine cellar extends about 10 feet onto your property, approximately three feet below the surface of the ground. Construction of the pool ended up costing you an extra \$2000 since it had to be built around the wine cellar.

When you brought the matter to your neighbor's attention, he admitted that he knew the cellar was built partially on your property by mistake 15 years ago. He said he never told you because he didn't think it should matter to you. After all, it was never in your way. You told the neighbor that you did not object to the wine cellar remaining, but felt he should compensate you for the use of your land. He refused to pay you anything.

In the face of your neighbor's refusal to discuss the matter with you further, you have filed a lawsuit against him seeking past and future rents for his use of your property (known legally as an easement). Your lawyer has told you that based on the neighbor's use and the value of your land, if you win the case you will collect approximately \$15,000. However, the chances of you winning are very uncertain. Your neighbor's lawyer claims that the use of the land for 15 years without interruption may qualify him for free, perpetual use of that land (known as an easement by prescription). If your neighbor prevails in a trial, of course, he will not have to pay you any money at all. Your lawyer tells you that there has never been a reported case in California precisely like this one. It is impossible to predict who will win if the case goes to trial; it could easily go either way.

Your lawyer has agreed to represent you for free in this matter, so legal fees should not affect your decisions about whether to settle the case out of court or proceed to trial.

Question:

After meeting with you and your lawyer, the neighbor has offered to pay you \$6,750 to settle the case in return for you dropping your lawsuit. He told you that this is his final offer and, given the impracticalities of further meetings or discussions prior to trial, you have no reason to doubt this is the case. Therefore, you must either accept that offer or reject it and proceed to trial. Your lawyer has agreed to represent you for free, so considerations of legal fees should not affect your decision about accepting or rejecting the offer.

Will you:

- |  |   |
|--|---|
| definitely accept the settlement offer | — |
| probably accept the settlement offer   | — |
| undecided                              | — |
| probably reject the settlement offer   | — |
| definitely reject the settlement offer | — |

APPENDIX EDescription of the facts of the case

You own a home with a large yard in a densely populated area of Palo Alto. Last month you broke ground on a swimming pool that you are constructing near the property line that separates your lot from your neighbor's lot. When the builders began to dig into the ground they discovered, to your surprise, that your neighbor's wine cellar extends about 10 feet onto your property, approximately three feet below the surface of the ground. Construction of the pool ended up costing you an extra \$13,000 since it had to be built around the wine cellar.

When you brought the matter to your neighbor's attention, he admitted that he knew the cellar was built partially on your property by mistake 15 years ago. He said he never told you because he didn't think it should matter to you. After all, it was never in your way. You told the neighbor that you did not object to the wine cellar remaining, but felt he should compensate you for the use of your land. He refused to pay you anything.

In the face of your neighbor's refusal to discuss the matter with you further, you have filed a lawsuit against him seeking past and future rents for his use of your property (known legally as an easement). Your lawyer has told you that based on the neighbor's use and the value of your land, if you win the case you will collect approximately \$15,000. However, the chances of you winning are very uncertain. Your neighbor's lawyer claims that the use of the land for 15 years without interruption may qualify him for free, perpetual use of that land (known as an easement by prescription). If your neighbor prevails in a trial, of course, he will not have to pay you any money at all. Your lawyer tells you that there has never been a reported case in California precisely like this one. It is impossible to predict who will win if the case goes to trial; it could easily go either way.

Your lawyer has agreed to represent you for free in this matter, so legal fees should not affect your decisions about whether to settle the case out of court or proceed to trial.

Question:

After meeting with you and your lawyer, the neighbor has offered to pay you \$6,750 to settle the case in return for you dropping your lawsuit. He told you that this is his final offer and, given the impracticalities of further meetings or discussions prior to trial, you have no reason to doubt this is the case. Therefore, you must either accept that offer or reject it and proceed to trial. Your lawyer has agreed to represent you for free, so considerations of legal fees should not affect your decision about accepting or rejecting the offer.

Will you:

- definitely accept the settlement offer     —
- probably accept the settlement offer     —
- undecided     —
- probably reject the settlement offer     —
- definitely reject the settlement offer     —

APPENDIX FDescription of the Facts of the Case

For the past six months, you have been separated, but not legally divorced, from your spouse. During that period, you moved out of the marital home, and your spouse and your four-year-old son remained. You and your spouse agreed that during the separation period, you could have as many as five visitation days per month with your son.

You and your spouse have now filed for divorce. Throughout the marriage, your spouse has been the primary caretaker of your son, and the two of them have developed an especially close bond. Accordingly, you have agreed that your spouse should have physical custody of your son. You also have a good relationship with your son, and you wish to preserve the bond that has developed between the two of you. Unfortunately, you and your spouse have been unable to reach agreement on your visitation rights following the divorce.

If the two of you fail to reach an agreement, you will eventually have to appear before a judge who will decide what visitation arrangements are appropriate. Your attorney has informed you that the legal standard for determining visitation is "the best interests of the child" standard. This varies substantially from case-to-case, but your attorney has informed you that judges tend to favor the preservation of both maternal and paternal ties.

You and your attorney have agreed to meet with your spouse and your spouse's attorney on the day before your court hearing to discuss settlement.

Question:

At this meeting, your spouse offered you 10 visitation days per month. Your spouse has said that this is a final settlement offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and go to court. Your attorney is a friend who is representing you for free, so legal fees should not affect your decision.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX G

Description of the Facts of the Case

For the past six months, you have been separated, but not legally divorced, from your spouse. During that period, you moved out of the marital home, and your spouse and your four-year-old son remained. You and your spouse agreed that during the separation period, you could have as many as 15 visitation days per month with your son.

You and your spouse have now filed for divorce. Throughout the marriage, your spouse has been the primary caretaker of your son, and the two of them have developed an especially close bond. Accordingly, you have agreed that your spouse should have physical custody of your son. You also have a good relationship with your son, and you wish to preserve the bond that has developed between the two of you. Unfortunately, you and your spouse have been unable to reach agreement on your visitation rights following the divorce.

If the two of you fail to reach an agreement, you will eventually have to appear before a judge who will decide what visitation arrangements are appropriate. Your attorney has informed you that the legal standard for determining visitation is "the best interests of the child" standard. This varies substantially from case-to-case, but your attorney has informed you that judges tend to favor the preservation of both maternal and paternal ties.

You and your attorney have agreed to meet with your spouse and your spouse's attorney on the day before your court hearing to discuss settlement.

Question:

At this meeting, your spouse offered you 10 visitation days per month. Your spouse has said that this is a final settlement offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and go to court. Your attorney is a friend who is representing you for free, so legal fees should not affect your decision.

Will you:

- definitely accept the offer —
- probably accept the offer —
- undecided —
- probably reject the offer —
- definitely reject the offer —

APPENDIX HDescription of the Facts of the Case

Recently, you purchased a brand new BMW 318 automobile from your local dealer for \$24,000. Much to your disappointment, the car has one major problem that you were unable to detect when you test-drove it: it occasionally stalls at stop lights and stop signs and is extremely difficult to start in the morning. While these problems don't make it dangerous to drive, they have cut down on your enjoyment of the car. You have had BMW mechanics look at the car twice but BMW claims that the car is not defective and there is nothing that can be done to "fix" it. "Some cars just stall more often than others," they told you. You took the car to your own mechanic, and he agreed with the dealer that the problem could not be improved. Due to what you perceive as a defect, you have asked the dealer to take the car back and give you a refund. At this point, you would rather buy a different model of car. The dealer has refused to refund your money.

You have retained an attorney and filed a lawsuit against the dealer seeking a refund of your money. Your lawyer has informed you that the only legal issue is whether or not the car is, in fact, "defective," due to the problems you have recognized. If the case goes to trial, this will be a question for a jury to decide. If a jury decides the car's problems amount to a defect, the dealer will have to take the car back and give you a complete refund of your money. If the jury decides the problems do not amount to a "defect," you will have to keep the car and will not be entitled to any refund at all. Your lawyer thinks this is a very close case, and could easily go either way.

Initially, the BMW dealer offered to refund \$2000 of the purchase price if you would drop the lawsuit and keep the car. You rejected the offer. Now, with the trial date approaching, the dealer has asked for another meeting with you and your attorney to discuss the possibility of settling the case out of court.

Question:

At the meeting with you and your lawyer, the BMW dealer offered to settle the case by refunding \$12,000 of the purchase price if you agree to keep the car and drop your lawsuit. The dealer told you that this is his final offer, and given the impracticality of further meetings or discussions prior to trial, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and proceed to trial. Your lawyer has agreed to represent you for free in this case, so considerations of legal fees should not effect your decision about accepting or rejecting the offer.

Will you:

- Definitely accept the settlement offer      —
- Probably accept the settlement offer      —
- Undecided                                      —
- Probably reject the settlement offer      —
- Definitely reject the settlement offer     —

APPENDIX IDescription of the Facts of the Case

Recently, you purchased a brand new BMW 318 automobile from your local dealer for \$24,000. Much to your disappointment, the car has one major problem that you were unable to detect when you test-drove it: it occasionally stalls at stop lights and stop signs and is extremely difficult to start in the morning. While these problems don't make it dangerous to drive, they have cut down on your enjoyment of the car. You have had BMW mechanics look at the car twice but BMW claims that the car is not defective and there is nothing that can be done to "fix" it. "Some cars just stall more often than others," they told you. You took the car to your own mechanic, and he agreed with the dealer that the problem could not be improved. Due to what you perceive as a defect, you have asked the dealer to take the car back and give you a refund. At this point, you would rather buy a different model of car. The dealer refused to refund your money.

You retained an attorney and filed a lawsuit against the BMW dealer seeking a refund of your money. Your lawyer has informed you that the only legal issue is whether or not the car is, in fact, "defective," due to the problems you have recognized. If the case goes to trial, this will be a question for a jury to decide. If a jury decides the car's problems amount to a defect, the dealer will have to take the car back and give you a complete refund of your money. If the jury decides the problems do not amount to a "defect," you will have to keep the car and will not be entitled to any refund at all. Your lawyer thinks this is a very close case, and could easily go either way.

Initially, the BMW dealer offered to refund \$10,000 if you would drop the lawsuit and keep the car. You rejected the offer. Now, with the trial date approaching, the dealer has asked for another meeting with you and your attorney to discuss the possibility of settling the case out of court.

Question:

At the meeting with you and your lawyer, the BMW dealer offered to settle the case by refunding \$12,000 of the purchase price if you agree to keep the car and drop your lawsuit. The dealer told you that this is his final offer, and given the impracticality of further meetings or discussions prior to trial, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and proceed to trial. Your lawyer has agreed to represent you for free in this case, so considerations of legal fees should not effect your decision about accepting or rejecting the offer.

Will you:

- Definitely accept the settlement offer      —
- Probably accept the settlement offer      —
- Undecided      —
- Probably reject the settlement offer      —
- Definitely reject the settlement offer      —

APPENDIX JDescription of the Facts of the Case

Late last summer, you began looking off-campus for an apartment for the upcoming school year. You finally found a satisfactory apartment, but the landlord would agree only to a six-month lease. After careful deliberation, you signed a six-month lease and agreed to pay \$1,000 per month in rent. On September 1, you moved into your new apartment.

Everything was fine for two months. Around Halloween, through no fault of your own, the heater in your apartment broke down. You left a message with the landlord, requesting immediate repair due to the ensuing winter weather. You didn't hear anything from the landlord, so you called him again the next day. The landlord promised to fix your heater, but he never did. A week later, you called him again. Again, he promised to fix it, but he never did. Over the next several weeks, you called him a half-dozen times, but he did not return your calls. For four months (Nov, Dec, Jan, and Feb), you lived without heat but continued to pay your rent in full. Although you were able to borrow a small space heater from a friend, it failed to keep the apartment from feeling cold and drafty throughout the winter. When your lease expired, you moved out and found a new apartment.

After moving out, you told a friend what had happened to you, and she advised you to seek legal advice through the ASSU. You met with an ASSU attorney, who advised you that there was a good chance that you could recover a portion of the \$4,000 rent you paid during those four, cold months. Accordingly, with the attorney's assistance, you filed suit against the landlord in small claims court for failing to heat your apartment.

Prior to the small claims court trial, you agreed to meet with the landlord.

Question:

At the meeting, the landlord made you a settlement offer of \$900 if you would agree to drop the lawsuit. He told you that it was the highest offer he would make, and given the impracticality of any further meetings or discussions, there is no reason to doubt him. Therefore, you must either accept the offer or reject it and go to small claims court.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |



APPENDIX KDescription of the Facts of the Case

Late last summer, you began looking off-campus for an apartment for the upcoming school year. You finally found a satisfactory apartment, but the landlord would agree only to a six-month lease. After careful deliberation, you signed a six-month lease and agreed to pay \$1,000 per month in rent. On September 1, you moved into your new apartment.

Everything was fine for two months. Around Halloween, through no fault of your own, the heater in your apartment broke down. You left a message with the landlord, requesting immediate repair due to the ensuing winter weather. You didn't hear anything from the landlord, so you called him again the next day. You learned that he had left the country unexpectedly due to a family emergency and that he was expected to be gone for several months. For four months (Nov, Dec, Jan, and Feb), you lived without heat but continued to pay your rent in full. Although you were able to borrow a small space heater from a friend, it failed to keep the apartment from feeling cold and drafty throughout the winter. When your lease expired, you moved out and found a new apartment.

After moving out, you told a friend what had happened to you, and she advised you to seek legal advice through the ASSU. You met with an ASSU attorney, who advised you that there was a good chance that you could recover a portion of the \$4,000 rent you paid during those four, cold months. Accordingly, with the attorney's assistance, you filed suit against the landlord in small claims court for failing to heat your apartment.

Prior to the small claims court trial, you agreed to meet with the landlord.

Question:

At the meeting, the landlord made you a settlement offer of \$900 if you would agree to drop the lawsuit. He told you that it was the highest offer he would make, and given the impracticality of any further meetings or discussions, there is no reason to doubt him. Therefore, you must either accept the offer or reject it and go to small claims court.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX LDescription of the Facts of the Case

Late last summer, you began looking off-campus for an apartment for the upcoming school year. You finally found a satisfactory apartment, but the landlord would agree only to a six-month lease. After careful deliberation, you signed a six-month lease and agreed to pay \$1,000 per month in rent. On September 1, you moved into your new apartment.

Everything was fine for two months. Around Halloween, through no fault of your own, the heater in your apartment broke down. You left a message with the landlord, requesting immediate repair due to the ensuing winter weather. You didn't hear anything from the landlord, so you called him again the next day. The landlord promised to fix your heater, but he never did. A week later, you called him again. Again, he promised to fix it, but he never did. Over the next several weeks, you called him a half-dozen times, but he did not return your calls. For four months (Nov, Dec, Jan, and Feb), you lived without heat but continued to pay your rent in full. Although you were able to borrow a small space heater from a friend, it failed to keep the apartment from feeling cold and drafty throughout the winter. When your lease expired, you moved out and found a new apartment.

After moving out, you told a friend what had happened to you, and she advised you to seek legal advice through the ASSU. You met with an ASSU attorney, who advised you that there was a good chance that you could recover a portion of the \$4,000 rent you paid during those four, cold months. Accordingly, with the attorney's assistance, you filed suit against the landlord in small claims court for failing to heat your apartment.

Prior to the small claims court trial, you agreed to meet with the landlord. At the meeting, the landlord apologized to you for his behavior. "I know this is not an acceptable excuse," he told you, "but I have been under a great deal of pressure lately."

Question:

At the meeting, the landlord made you a settlement offer of \$900 if you would agree to drop the lawsuit. He told you that it was the highest offer he would make, and given the impracticality of any further meetings or discussions, there is no reason to doubt him. Therefore, you must either accept the offer or reject it and go to small claims court.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX MDescription of the facts of the case

In November of your senior year of college, you received and accepted an offer to work as a Financial Analyst for a prominent New York Investment Bank following graduation. As a result of accepting that offer, you turned down a number of similar offers from other firms. All the positions at the other firms have since been filled. The week before graduation, the Investment Bank wrote to inform you that a new personnel manager had been appointed, reviewed your file, and decided not to offer you the position after all. Due to budgetary problems, it will be able to employ fewer graduates than it previously anticipated and could not hire you after all. The firm apologized for the unfortunate situation but explained that there was really nothing else that it could do. You have retained a lawyer and filed suit against the firm for breach of contract.

Your lawyer informs you that, in this case, the only issue is whether your agreement with the firm was a binding contract or just a preliminary, "non-binding discussion." If the judge determines at trial that it was a binding contract, he will award you one full year's salary (\$40,000). If the judge determines it was a non-binding discussion, you will recover nothing. Your lawyer has researched the problem and tells you that it is unclear whether the correspondence between you and the Investment Bank was a binding contract. She says it is impossible to predict how the judge will interpret that correspondence — the outcome could go one way or the other. The only "evidence" that will bear on the judge's interpretation in the case is your correspondence with the firm.

Question 1:

Following some negotiations with your attorney, the Investment Bank has offered to pay you \$25,000 if you will agree to drop the lawsuit. The Investment Bank says this is its final offer and, given the impracticality of any further meetings or discussions, there is no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and proceed to trial. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX NDescription of the facts of the case

In November of your senior year of college, you received and accepted an offer to work as a Financial Analyst for a prominent New York Investment Bank following graduation. As a result of accepting that offer, you turned down a number of similar offers from other firms. All the positions at the other firms have since been filled. The week before graduation, the Investment Bank wrote to inform you that, due to budgetary problems, it will be able to employ fewer graduates than it previously anticipated and could not hire you after all. The firm apologized for the unfortunate situation but explained that there was really nothing else that it could do. You have retained a lawyer and filed suit against the firm for breach of contract.

Your lawyer informs you that, in this case, the only issue is whether your agreement with the firm was a binding contract or just a preliminary, "non-binding discussion." If the judge determines at trial that it was a binding contract, you will recover a full year's salary (\$40,000). If the judge determines it was a non-binding discussion, you will recover nothing. Your lawyer has researched the problem and tells you that it is unclear whether the correspondence between you and the Investment Bank was a binding contract. She says it is impossible to predict how the judge will interpret that correspondence — the outcome could go one way or the other. The only "evidence" that will bear on the judge's interpretation in the case is your correspondence with the firm.

Question 1:

Your attorney and the Investment Bank jointly agreed on a neutral mediator to consider all the facts in the dispute and make a non-binding settlement recommendation; either side is free to reject it. The mediator has suggested that as a settlement the Investment Bank pay you \$25,000 and you agree to drop the lawsuit. You must accept the mediator's suggestion (contingent upon the Investment Bank accepting it as well), or reject it and proceed to trial. There will be no time for counteroffers or further negotiations. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX ODescription of the facts of the case

In November of your senior year of college, you received and accepted an offer to work as a Financial Analyst for a prominent New York Investment Bank following graduation. As a result of accepting that offer, you turned down a number of similar offers from other firms. All the positions at the other firms have since been filled. The week before graduation, the Investment Bank wrote to inform you that, due to budgetary problems, it will be able to employ fewer graduates than it previously anticipated and could not hire you after all. The firm apologized for the unfortunate situation but explained that there was really nothing else that it could do. You have retained a lawyer and filed suit against the firm for breach of contract.

Your lawyer informs you that, in this case, the only issue is whether your agreement with the firm was a binding contract or just a preliminary, "non-binding discussion." If the judge determines at trial that it was a binding contract, you will recover a full year's salary (\$40,000). If the judge determines it was a non-binding discussion, you will recover nothing. Your lawyer has researched the problem and tells you that it is unclear whether the correspondence between you and the Investment Bank was a binding contract. She says it is impossible to predict how the judge will interpret that correspondence — the outcome could go one way or the other. The only "evidence" that will bear on the judge's interpretation in the case is your correspondence with the firm.

Question 1:

Following some discussions with the Investment Bank, your attorney informs you that he thinks he might be able to convince the Bank to pay you \$25,000 to settle the case in return for your agreeing to drop the lawsuit. He would like to make the offer, and he is seeking your approval. There is only time before the trial date for a single offer, so if you authorize this offer, it will be the only one. There will be no time for counteroffers or further negotiations. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                                |   |
|--------------------------------|---|
| definitely authorize the offer | — |
| probably authorize the offer   | — |
| undecided                      | — |
| probably not authorize         | — |
| definitely not authorize       | — |

APPENDIX PDescription of the facts of the case

In November of your senior year of college, you received and accepted an offer to work as a Financial Analyst for a prominent New York Investment Bank following graduation. As a result of accepting that offer, you turned down a number of similar offers from other firms. All the positions at the other firms have since been filled. The week before graduation, the Investment Bank wrote to inform you that, due to budgetary problems, it will be able to employ fewer graduates than it previously anticipated and could not hire you after all. The firm apologized for the unfortunate situation but explained that there was really nothing else that it could do. You have retained a lawyer and filed suit against the firm for breach of contract.

Your lawyer informs you that, in this case, the only issue is whether your agreement with the firm was a binding contract or just a preliminary, "non-binding discussion." If the judge determines at trial that it was a binding contract, you will recover a full year's salary (\$40,000). If the judge determines it was a non-binding discussion, you will recover nothing. Your lawyer has researched the problem and tells you that it is unclear whether the correspondence between you and the Investment Bank was a binding contract. She says it is impossible to predict how the judge will interpret that correspondence — the outcome could go one way or the other. The only "evidence" that will bear on the judge's interpretation in the case is your correspondence with the firm.

Question 1:

The Investment Bank has assured you that it would still very much like you to work for it; only budgetary problems due to the recession have made it impossible for it to hire you now. Following some discussions with your attorney, the Investment Bank has made you an offer to settle the case. It has offered to agree to hire you for the next available Financial Analyst position at the same salary (\$40,000) that it proposed before. However, you will have to wait 6 months before you begin working and drawing a salary. The Investment Bank says this is its final offer and, given the impracticality of any further meetings or discussion, there is no reason to doubt that this is the case. Therefore, you must either accept the firm's offer or reject it and proceed to trial. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX QDescription of the facts of the case

In November of your senior year of college, you received and accepted an offer to work as a Financial Analyst for a prominent New York Investment Bank following graduation. As a result of accepting that offer, you turned down a number of similar offers from other firms. All the positions at the other firms have since been filled. The week before graduation, the Investment Bank wrote to inform you that, due to budgetary problems, it will be able to employ fewer graduates than it previously anticipated and could not hire you after all. The firm apologized for the unfortunate situation but explained that there was really nothing else that it could do. You have retained a lawyer and filed suit against the firm for breach of contract.

Your lawyer informs you that, in this case, the only issue is whether your agreement with the firm was a binding contract or just a preliminary, "non-binding discussion." If the judge determines at trial that it was a binding contract, you will recover a full year's salary (\$40,000). If the judge determines it was a non-binding discussion, you will recover nothing. Your lawyer has researched the problem and tells you that it is unclear whether the correspondence between you and the Investment Bank was a binding contract. She says it is impossible to predict how the judge will interpret that correspondence — the outcome could go one way or the other. The only "evidence" that will bear on the judge's interpretation in the case is your correspondence with the firm.

Question 1:

The Investment Bank has assured you that it would still very much like you to work for it; only budgetary problems due to the recession have made it impossible for it to hire you now. Your attorney and the firm jointly agreed on a neutral mediator to consider all the facts in the dispute and make a non-binding settlement recommendation; either side is free to reject it. The mediator has suggested as a settlement that the firm agree to give you the Financial Analyst position at the same salary (\$40,000) that it proposed before and for you to agree not to begin working and drawing a salary for 6 months. You must accept the mediator's proposal (contingent upon the Investment Bank accepting it as well), or reject it and proceed to trial. There will be no time for counteroffers or further negotiations. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX RDescription of the facts of the case

Several months ago you slipped and fell on some pieces of loose fruit in the produce section of your local supermarket and severely injured your back. Although your doctor does not anticipate that the injury will prevent you from living an active life, there is a good chance you will feel occasional pain for many years. You have recently retained an attorney and filed a lawsuit against the supermarket chain. The supermarket management has treated you well (and generously paid for the physical therapy that was not covered by your health insurance). While you feel somewhat bad about bringing the lawsuit, you believe that you deserve to be fairly compensated for your injuries.

Your attorney has explained to you that the only legal issue in this case is whether the supermarket chain negligently allowed a dangerous condition to exist in the supermarket that the management should have been aware of and taken steps to remedy. If the case goes to trial, this question will be up to a jury to decide. Your attorney has told you this is a close case; cases like this can and do go both ways. On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition. These simple facts are the only facts that matter in the case; the only uncertainty is in how a jury will interpret these facts.

If the jury determines that the supermarket chain was negligent, your attorney has advised you that you can expect to win approximately \$20,000. If the jury finds the supermarket chain was not negligent, you will receive no money.

Question:

Following some negotiations with your attorney, the supermarket chain has offered to pay you \$10,000 if you will agree to drop the lawsuit. The chain says this is its final offer and, given the impracticality of any further meetings or discussions, there is no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and proceed to trial. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |



APPENDIX SDescription of the facts of the case

Several months ago you slipped and fell on some pieces of loose fruit in the produce section of your local supermarket and severely injured your back. Although your doctor does not anticipate that the injury will prevent you from living an active life, there is a good chance you will feel occasional pain for many years. You have recently retained an attorney and filed a lawsuit against the supermarket chain. The supermarket management has treated you well (and generously paid for the physical therapy that was not covered by your health insurance). While you feel somewhat bad about bringing the lawsuit, you believe that you deserve to be fairly compensated for your injuries.

Your attorney has explained to you that the only legal issue in this case is whether the supermarket chain negligently allowed a dangerous condition to exist in the supermarket that the management should have been aware of and taken steps to remedy. If the case goes to trial, this question will be up to a jury to decide. Your attorney has told you this is a close case; cases like this can and do go both ways. On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition. These simple facts are the only facts that matter in the case; the only uncertainty is in how a jury will interpret these facts.

If the jury determines that the supermarket chain was negligent, your attorney has advised you that you can expect to win approximately \$20,000. If the jury finds the supermarket chain was not negligent, you will receive no money.

Question:

Your attorney and the supermarket chain jointly agreed on a neutral mediator to consider the facts in the dispute and make a non-binding settlement recommendation; either side is free to reject it. The mediator, a respected retired judge, has examined the basic facts known to both sides and suggested that it would be a fair settlement for the supermarket to pay you \$10,000 and for you to drop the lawsuit in return. You must accept the mediator's suggestion (contingent upon the supermarket accepting it as well), or reject it and proceed to trial. There will be no time for counteroffers or further negotiations. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX TDescription of the facts of the case

Several months ago you slipped and fell on some pieces of loose fruit in the produce section of your local supermarket and severely injured your back. Although your doctor does not anticipate that the injury will prevent you from living an active life, there is a good chance you will feel occasional pain for many years. You have recently retained an attorney and filed a lawsuit against the supermarket chain. The supermarket management has treated you well (and generously paid for the physical therapy that was not covered by your health insurance). While you feel somewhat bad about bringing the lawsuit, you believe that you deserve to be fairly compensated for your injuries.

Your attorney has explained to you that the only legal issue in this case is whether the supermarket chain negligently allowed a dangerous condition to exist in the supermarket that the management should have been aware of and taken steps to remedy. If the case goes to trial, this question will be up to a jury to decide. Your attorney has told you this is a close case; cases like this can and do go both ways. On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition. A critical question is whether supermarket employees knew that there was fruit on the floor before your accident but failed to clean it up. If the answer is yes, your chances of winning at trial would increase substantially; if the answer is no, your chances would decrease substantially. This question will certainly be answered at a trial, but you do not currently know the answer. Your lawyer is uncertain whether or not the supermarket chain knows the answer, but she assumes that the supermarket chain's attorneys have interviewed employees who worked on the day of your injury.

If a jury determines that the supermarket chain was negligent, your attorney has advised you that you can expect to win approximately \$20,000. If the jury finds the supermarket chain was not negligent, you will receive no money.

Question:

Following some negotiations with your attorney, the supermarket chain has offered to pay you \$10,000 if you will agree to drop the lawsuit. The chain says this is its final offer and, given the impracticality of any further meetings or discussions, there is no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and proceed to trial. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX UDescription of the facts of the case

Several months ago you slipped and fell on some pieces of loose fruit in the produce section of your local supermarket and severely injured your back. Although your doctor does not anticipate that the injury will prevent you from living an active life, there is a good chance you will feel occasional pain for many years. You have recently retained an attorney and filed a lawsuit against the supermarket chain. The supermarket management has treated you well (and generously paid for the physical therapy that was not covered by your health insurance). While you feel somewhat bad about bringing the lawsuit, you believe that you deserve to be fairly compensated for your injuries.

Your attorney has explained to you that the only legal issue in this case is whether the supermarket chain negligently allowed a dangerous condition to exist in the supermarket that the management should have been aware of and taken steps to remedy. If the case goes to trial, this question will be up to a jury to decide. Your attorney has told you this is a close case; cases like this can and do go both ways. On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition. A critical question is whether supermarket employees knew that there was fruit on the floor before your accident but failed to clean it up. If the answer is yes, your chances of winning at trial would increase substantially; if the answer is no, your chances would decrease substantially. This question will certainly be answered at a trial, but you do not currently know the answer. Your lawyer is uncertain whether or not the supermarket chain knows the answer, but she assumes that the supermarket chain's attorneys have interviewed employees who worked on the day of your injury.

If a jury determines that the supermarket chain was negligent, your attorney has advised you that you can expect to win approximately \$20,000. If the jury finds the supermarket chain was not negligent, you will receive no money.

Question:

Your attorney and the supermarket chain jointly agreed on a neutral mediator to consider the facts in the dispute and make a non-binding settlement recommendation; either side is free to reject it. The mediator, a respected retired judge, has examined the basic facts known to both sides and suggested that it would be a fair settlement for the supermarket to pay you \$10,000 and for you to drop the lawsuit in return. You must accept the mediator's suggestion (contingent upon the supermarket accepting it as well), or reject it and proceed to trial. There will be no time for counteroffers or further negotiations. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX VDescription of the facts of the case

Several months ago you slipped and fell on some pieces of loose fruit in the produce section of your local supermarket and severely injured your back. Although your doctor does not anticipate that the injury will prevent you from living an active life, there is a good chance you will feel occasional pain for many years. You have recently retained an attorney and filed a lawsuit against the supermarket chain. The supermarket management has treated you rudely since the accident. While it grudgingly paid for the physical therapy that was not covered by your health insurance, the chain initially claimed that you had entirely staged the accident and now says that you were either careless, uncoordinated, or both. You believe that you deserve to be fairly compensated for your injuries.

Your attorney has explained to you that the only legal issue in this case is whether the supermarket chain negligently allowed a dangerous condition to exist in the supermarket that the management should have been aware of and taken steps to remedy. If the case goes to trial, this question will be up to a jury to determine. Your attorney has told you this is a close case; cases like this can and do go both ways. On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition. These simple facts are the only facts that matter in the case; the only uncertainty is in how a jury will interpret these facts.

If the jury determines that the supermarket chain was negligent, your attorney has advised you that you can expect to win approximately \$20,000. If the jury finds the supermarket chain was not negligent, you will receive no money.

Question:

Following some negotiations with your attorney, the supermarket chain has offered to pay you \$10,000 if you will agree to drop the lawsuit. The chain says this is its final offer and, given the impracticality of any further meetings or discussions, there is no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and proceed to trial. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX WDescription of the facts of the case

Several months ago you slipped and fell on some pieces of loose fruit in the produce section of your local supermarket and severely injured your back. Although your doctor does not anticipate that the injury will prevent you from living an active life, there is a good chance you will feel occasional pain for many years. You have recently retained an attorney and filed a lawsuit against the supermarket chain. The supermarket management has treated you rudely since the accident. While it grudgingly paid for the physical therapy that was not covered by your health insurance, the chain initially claimed that you had entirely staged the accident and now says that you were either careless, uncoordinated, or both. You believe that you deserve to be fairly compensated for your injuries.

Your attorney has explained to you that the only legal issue in this case is whether the supermarket chain negligently allowed a dangerous condition to exist in the supermarket that the management should have been aware of and taken steps to remedy. If the case goes to trial, this question will be up to a jury to determine. Your attorney has told you this is a close case; cases like this can and do go both ways. On one hand, the supermarket cannot reasonably be expected to prevent any fruit from ever falling on the floor or to clean up constantly. On the other hand, this supermarket displayed its fruit in very high stacks, which could be seen by a jury as unnecessarily creating a dangerous condition. These simple facts are the only facts that matter in the case; the only uncertainty is in how a jury will interpret these facts.

If the jury determines that the supermarket chain was negligent, your attorney has advised you that you can expect to win approximately \$20,000. If the jury finds the supermarket chain was not negligent, you will receive no money.

Question:

Your attorney and the supermarket chain jointly agreed on a neutral mediator to consider the facts in the dispute and make a non-binding settlement recommendation; either side is free to reject it. The mediator, a respected retired judge, has examined the basic facts known to both sides and suggested that it would be a fair settlement for the supermarket to pay you \$10,000 and for you to drop the lawsuit in return. You must accept the mediator's suggestion (contingent upon the supermarket accepting it as well), or reject it and proceed to trial. There will be no time for counteroffers or further negotiations. Your attorney has agreed to represent you for free, so legal fees should not affect your decision about whether to accept a settlement offer or reject it and proceed to trial.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX XDescription of the Facts of the Case:

Your new \$24,000 BMW 318 was recently totaled in an automobile accident that was clearly the other driver's fault. You sustained some injuries that required medical treatment, but fortunately none of them were permanent and you have fully recovered. Your \$4000 in medical bills were paid by your health insurance company, but you have no automobile insurance coverage that will pay to replace your car.

The other driver has no money and is unemployed, so you will not be able to collect any money directly from him. However, he does have automobile insurance. You and your lawyer have filed a lawsuit against the insurance company, National Mutual, for \$28,000 — \$24,000 for the car, and \$4000 for the medical bills. You have not asked for any pain and suffering damages. If you are able to recover the \$4000 for the medical bills, that will be extra cash in your pocket since your health insurance company has already paid your doctors and the hospital — it will be a windfall of \$4000.

National Mutual is not disputing that you suffered \$28,000 in damages, but it claims that the other driver's policy has a maximum coverage value of \$10,000 for accidents that occur while driving a rental car. Since the other driver was driving a rental car at the time of the accident, National Mutual has refused to pay more than \$10,000. Your lawyer has advised you that the only issue in the case is whether or not there is in fact a \$10,000 limit on the policy for this type of accident. If the judge decides that there is, you will recover \$10,000 at trial. If the judge decides there is no such limit, you will recover the full \$28,000. Your lawyer has reviewed the policy carefully and advised you that the language is extremely unclear — not unusual for the fine print in insurance policies. He cannot predict whether you are more likely to win or lose if the case goes to trial.

Question:

Following some discussions with your attorney, National Mutual has made you a settlement offer of \$21,000, total — they will pay you that amount if you will drop the lawsuit and agree not to make any other claims against them.

Keep in mind that this settlement would leave you substantially better off than you are now, and you would avoid the riskiness of a trial. Although the offer is \$7000 less than you hoped to recover, accepting the offer would make you \$21,000 better off than you are right now (remember, you currently have no car).

The company has told you this is its final offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and go to trial. Your attorney is a family friend who is representing you for free, so legal fees should not affect your decision.

Will you:

- |                             |   |
|-----------------------------|---|
| definitely accept the offer | — |
| probably accept the offer   | — |
| undecided                   | — |
| probably reject the offer   | — |
| definitely reject the offer | — |

APPENDIX Y

Description of the Facts of the Case:

Your new \$14,000 Toyota Corolla was recently totaled in an automobile accident that was clearly the other driver's fault. You sustained some injuries that required medical treatment, but fortunately none of them were permanent and you have completely recovered. Your \$14,000 in medical bills were paid by your health insurance company, but you have no automobile insurance coverage that will pay to replace your car.

The other driver has no money and is unemployed, so you will not be able to collect any money directly from him. However, he does have automobile insurance. You and your lawyer have filed a lawsuit against the insurance company, National Mutual, for \$28,000 — \$14,000 for the car, and \$14,000 for the medical bills. You are not asking for any pain and suffering damages. If you are able to recover the \$14,000 for the medical bills, that will be extra cash in your pocket since your health insurance company has already paid your doctors and the hospital — it will be a windfall of \$14,000.

National Mutual is not disputing that you suffered \$28,000 in damages, but it claims that the other driver's policy has a maximum coverage value of \$10,000 for accidents that occur while driving a rental car. Since the other driver was driving a rental car at the time of the accident, National Mutual has refused to pay more than \$10,000. Your lawyer has advised you that the only issue in the case is whether or not there is in fact a \$10,000 limit on the policy for this type of accident. If the case goes to trial, a judge will review the policy and interpret its language. If a judge decides that there is a limit, you will recover \$10,000 at trial. If the judge decides there is no such limit, you will recover the full \$28,000. Your lawyer has reviewed the policy carefully and advised you that the language is extremely unclear — not unusual for the fine print in insurance policies. He cannot predict whether you are more likely to win or lose if the case goes to trial.

Question:

Following some discussions with your attorney, National Mutual has made you a settlement offer of \$21,000, total — they will pay you that amount if you will drop the lawsuit and agree not to make any other claims against them.

Keep in mind that if you accept the offer you will be left substantially worse off than you were before the accident. The other driver did cause you \$28,000 worth of total damages, and accepting the offer would make it impossible for you to ever recover the full amount of damages. Rejecting the offer, though somewhat risky, would allow the possibility of recouping the full amount you believe National Mutual should pay you.

The company has told you this is its final offer and, given the impracticality of any further meetings or discussions, you have no reason to doubt that this is the case. Therefore, you must either accept the offer or reject it and go to trial. Your attorney is a family friend who is representing you for free, so legal fees should not affect your decision.

Will you:

- definitely accept the offer —
- probably accept the offer —
- undecided —
- probably reject the offer —
- definitely reject the offer —

APPENDIX ZDescription of the facts of the case

Late last summer, you began looking off-campus for an apartment for the upcoming school year. You finally found a satisfactory apartment, but the landlord would agree only to a six-month lease. After careful deliberation, you signed a six-month lease and agreed to pay \$1,000 per month in rent. On September 1, you moved into your new apartment.

Everything was fine for two months. Around Halloween, through no fault of your own, the heater in your apartment broke down. You left a message with the landlord, requesting immediate repair due to the ensuing winter weather. You didn't hear anything from the landlord, so you called him again the next day. The landlord promised to fix your heater, but he never did. A week later, you called him again. Again, he promised to fix it, but he never did. Over the next several weeks, you called him a half-dozen times, but he did not return your calls. For four months (Nov, Dec, Jan, and Feb), you lived without heat but continued to pay your rent in full. Although you were able to borrow a small space heater from a friend, it failed to keep the apartment from feeling cold and drafty throughout the winter. When your lease expired, you moved out and found a new apartment.

After moving out, you told a friend what had happened to you, and she advised you to seek free legal advice through the ASSU. You met with an ASSU attorney, who advised you that there was a good chance that you could recover a portion of the \$4,000 rent you paid during those four, cold months. Accordingly, with the attorney's assistance, you filed suit against the landlord in small claims court for failing to heat your apartment.

Prior to the small claims court trial, you agreed to meet with the landlord.

Question:

At the meeting, the landlord made you a settlement offer of \$900 if you would agree to drop the lawsuit. He told you that it was the highest offer he would make, and given the impracticality of any further meetings or discussions, there is no reason to doubt him. Therefore, you must either accept the offer or reject it and go to small claims court.

Keep in mind when making your decision that whether you win or lose in small claims court and how much the court might award you will be based on the fact that the landlord failed to provide heat for four months. The fact that the landlord behaved badly toward you by promising to fix the heater but never following through might have made you more upset, but whether the landlord had a sympathetic excuse for failing to provide the heat will not concern the court.

Will you:

- |                             |   |
|-----------------------------|---|
| Definitely accept the offer | — |
| Probably accept the offer   | — |
| Undecided                   | — |
| Probably reject the offer   | — |
| Definitely reject the offer | — |