

# Trial Simulations at Work

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**T**he room momentarily becomes silent among the group of insurance executives and claims professionals engaged in a "roundtable" discussion regarding a high-exposure claim. The basic facts of the case look favorable...but what about sympathy and emotional facts...how is a jury likely to react to this case?

In major insurance litigation, settlement offers are rarely increased, or decisions to proceed to trial are made without contemplating the hazards of allowing a jury to decide the case. As a result, claims executives are progressively utilizing trial simulations and "mock" trials to evaluate exposure. Why? Jurors often award damages based on perceptual and psychological factors. Consequently, pretrial damage estimates based solely on precedence, experience or actuarial/economic analysis may misrepresent what the actual jury will award. Nearly every experienced claims

manager or defense attorney has been shocked more than once by an adverse jury award. More commonly, however, settlement offers are increased to disproportionate amounts in order to relieve the risk of going to trial. In either event, the effects from a monetary standpoint can be staggering.

## "Catch 22"

The two scenarios described above represent the difficult "Catch 22" claims executives often face. For example, in a recent case, a pre-trial mediation panel of three lawyers who had reviewed the case recommended settlement for \$700,000. The plaintiff was willing to accept this sum. However, the defense elected to proceed to trial. The jury returned a verdict against the defendant, levying damages in the shocking amount of \$10 million! Conversely, in another case, final-hour settlement was achieved following the trial's closing arguments. However, the judge asked the jury to deliberate and assess damages. The result: the settlement cost the company \$2 million.

Simply put, trial simulations place before surrogate jurors the

facts and issues of the case, as well as available evidence and testimony of key witnesses. Often, the defense attorneys themselves present their opening and closing arguments, while another member of the team simulates plaintiff counsel. Through analysis of surrogate juror deliberations and damage awards, claims managers and defense attorneys are able to judge the strengths and weaknesses of the case, areas of confusion and the monetary risk of proceeding to trial.

Proponents of the service report a high accuracy rate among pre-trial surrogate jury awards and actual awards in cases that have proceeded to trial. What this means is that claims managers, who often opt for last-minute settlements during the course of the trial, can augment their decisions with reliable behavioral data from a similar jury that has already "pre-tried" the case.

## Advantages

Jury research offers the advantage of pre-testing the range of exposure, developing strategies based on what works with actual

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juries, and evaluating and selecting the right jurors for the case. Negotiation posture and settlement decisions are thereby supplemented by this scientific behavioral data obtained through carefully controlled jury research studies.

Interestingly, in our contacts with claims professionals, we have found three attitudinal types among companies:

## **Type I**

Type I is the "Settle them all" approach, in which claims managers (usually out of fear) try very few cases, and proudly report a high success rate at settling cases. What this means, of course, is while avoiding a catastrophic verdict, the plaintiffs demands have nearly always been met (even when excessive), thus costing the company unnecessary expenditures.

## **Type II**

Conversely, Type II claims managers boast "an aggressive litigation stance," preferring to let the jury decide appropriate damages. This is probably more cost-effective in the long run than the "settle them all" approach, keeping in mind that plaintiffs do not like to go to trial either, and would much prefer a fat settlement. However, this approach opens the door to a catastrophic adverse verdict that can quickly erode savings accrued from a tougher bargaining position.

## **Type III**

Typically, however, the majority of claims managers will pursue a "middle of the road" approach. Settlements are pursued aggressively, but going to trial is a viable option when demands are excessive. Logically, this is the preferred approach, however, it may fare no better than the other approaches if inaccurate decisions are made regarding which cases to try and which to settle. In other words, if

some cases are settled excessively high, combined with a catastrophic verdict, the result is a greater overall expenditure.

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enced in the use of this valuable tool. A recent survey by Litigation Research Technologies, a Phoenix based jury-research firm, indicates approximately one-half of regional/district claims managers have never even heard of utilizing trial simulations, while approximately one-quarter use this type of analysis regularly. A small percentage have even hired in-house personnel to routinely conduct the studies.

## **Benefits**

The reported benefits of trial simulations go beyond prediction and evaluation purposes. Mock simulations are seen as an excellent means of pre-testing strategy, assessing differing methods of dealing with damaging evidence

and evaluating juror's perceptions of issues, witnesses, attorneys, evidence and exhibits. In some cases, successive trial simulations will be conducted until the most effective and persuasive case has been determined. Lastly, when sufficient numbers of surrogate jurors are used, valuable information regarding favorable vs. unfavorable juror types can be obtained.

Trial simulations are typically conducted by jury research firms experienced in behavioral research methods. A danger exists for firms conducting their own jury studies unless they are experienced in behavioral research methods. Following the recommendations of results flawed by failure to control for validity, threats inherent in the sample or procedure can produce disastrous results. For example, utilizing employees of the insurance company as surrogate jurors, or even conducting the study on the premises may skew the results by subtly biasing the jurors.

## **Expense**

Fees for trial simulations run from \$5,000 to \$6,000 up to \$50,000 or \$60,000 for complex cases. The study may be worth its weight in gold, however, when it prevents unnecessary increases in settlement offers, or conversely, leads to settlement in a case that would have produced disastrous results at trial.

In Las Vegas, oddsmakers don't just evaluate the win-loss record of opposing teams. They look specifically at how those two teams match up. Trial simulations offer the opportunity to see just how the specific facts of your case "play" with this jury prior to the big game.

The next time your litigator starts giving you the odds for success in the case, "I think we have a 50/50 chance," you may want to consider improving the odds with a jury trial simulation. ■