
Post-Settlement Settlements

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"It's all very well to talk about collegial, joint problem-solving negotiation processes, but my opponent has unreasonable aspirations and I'm not going to weaken my just claim by trying to be a nice guy. I'm going to bargain tough, for myself, by myself." No matter how much we might bemoan this state of affairs, we must recognize that a lot of disputes are settled by hard-nosed, positional bargaining. Settled, yes. But efficiently settled? Often not. Both sides are often so intent on justifying their individual claims that not much time is spent on creating gains to be shared. They quibble about sharing a small pie and often fail to realize that perhaps the pie can be jointly enlarged. Even where there is a modicum of civility and some cooperative behavior on the part of the negotiators, it is not easy to squeeze out joint gains.

Here's one suggestion for how such intransigent negotiators might be helped. Let them negotiate as they will. Let them arrive at a settlement, or let a judge or jury impose a settlement on them. Mr. Jones, one protagonist, might feel happy about the outcome — he got more than he expected — but Ms. Spencer, the other protagonist, is unhappy — she did not realize her just aspirations. But even in this case the negotiators might not have squeezed out the full potential gains. There may be another carefully crafted settlement that both Jones and Spencer might prefer to the settlement they actually achieved.

Now let's imagine that along comes an intervenor from the Contract Embellishment Service, and he asks Jones and Spencer after they have achieved their settlement if they would be willing to let him try to sweeten the contract for each. The intervenor carefully explains to Jones that he will have the security of the outcome level he has already achieved but that he (Jones) may have the opportunity to do still better. The intervenor proposes that after some analysis he will suggest an alternate settlement — a *post-settlement settlement*, if you will — that would replace the original settlement only on the condition that both parties agree to the change; and of course they would only do this if each prefers the new settlement proposal to the old one.

Is this pie in the sky? Can the intervenor deliver the goods? Not always, but then Spencer and Jones would not have lost anything in trying, except perhaps their time. But it is my contention that in really complex negotiations where a lot of issues are at stake, where uncertainties are involved, or where settlements could involve transaction and payments over time, jointly desir-

able post-settlement settlements more often than not could be achieved by an analytical intervenor. If successful, the intervenor would add a surplus value to each side, and he might be recompensed for his effort by getting a small proportional slice of this surplus (if there is such a surplus) from each of the protagonists. So everybody would be happy.

Let's suppose that Spencer is eager to cooperate with the intervenor and that Jones also reluctantly agrees, but each side is not too happy about resuming face-to-face negotiations. The intervenor proceeds by meeting separately with each side and doing a careful, deep analysis of its interests and values, probing in particular values that may be quite sensitive. The intervenor promises each side not to reveal these confidentialities to the other (nor to anyone else), and his promise is credible because of his existing reputation and his desire to do business of a similar kind with others.

In the course of these separate meetings, Jones and Spencer might each give the intervenor information that was deliberately distorted or only partially revealed during the original negotiations. Also, the intervenor might help crystallize values that each protagonist might not have clearly articulated to himself or herself. It might be self-evident that Jones wants more of attribute X and less of Y, and vice versa for Spencer, but the critical ingredient might involve intricate quantitative tradeoffs between different incommensurable qualities.

By the end of these deep-mapping exercises, the intervenor would be privy to information that neither side had about the other. Now the analytical task is clear. Can the intervenor craft a new settlement that each party would prefer to the old one? Can he sweeten the old contract for Jones and Spencer simultaneously? There may be more than one new settlement that would be better for each than the old one, and then the intervenor would have a choice. Of course, he would then want to select a settlement that would squeeze out all potential joint gains. Several choices might still then remain, but that possibility should not detract from the scheme. How to find appropriate candidate settlements becomes a mathematical optimization problem, and a host of techniques can be employed to help the intervenor identify candidates and make his selection.

Let's push on and assume that, on the basis of the information the intervenor has elicited privately and confidentially from each of the parties, he designs a new settlement that he believes each party will prefer to the old negotiated (or imposed) settlement. He then proposes, in a take-it-or-leave-it way, the new post-settlement settlement. Each side has veto power. There's no bargaining. If both say yes, so be it. If one says no, the old settlement prevails. That's the scheme.

If you were a party to a dispute and had already negotiated a settlement or had a settlement imposed on you, would you, on a contingent fee basis, employ the services of the intervenor from the Contract Embellishment Service? Would you tell him the truth about your value tradeoffs and judgments about critical uncertainties?

I have never put this embellishment scheme into practice, but I do have some promising laboratory evidence. I and a host of others have shown that in two-party negotiations with several interacting issues to resolve, negotiated settlements in laboratory settings usually leave room for potential additional

joint gains. Again in laboratory settings, I have asked many pairs of contending players (after each pair has negotiated a settlement) whether they would be willing to let a third party try to find a new settlement that would jointly be preferred to the old settlement. Practically all subjects say something to the effect of, "Why not? I have nothing to lose." A lot of them consider how they might distort their values and interests to the intervenor, but they then realize that it is not so clear how they should falsify information to their advantage, and they end up by saying that they would disclose their value tradeoffs as truthfully as possible. Let's suppose that Mr. A discloses his interests to the intervenor in a distorted fashion and that the intervenor then succeeds in finding a post-settlement settlement he believes A should prefer to the old settlement according to the values A has stated. If this post-settlement settlement is in reality worse for A than the old settlement, then A will reject the offer. On the other hand, A might get a better final settlement by providing the intervenor with false information, but, as I said, how to distort information to one's advantage is far from clear. It is simply prudent to tell the truth.

Thus far I have talked about suggesting this post-settlement embellishment scheme to the negotiating protagonists after they have already reached a settlement. What would happen to the first-stage negotiations if the parties were to know initially that their settlement yet-to-be-decided would be, or might be, subject to this post-settlement scrutiny? I suspect that it would not have much impact on the negotiators in really complicated negotiations. In the tension that exists in negotiations between creating joint value and claiming individual value, this post-settlement scheme might distort the initial negotiations unfortunately in favor of the claiming-value side. Certainly, we can concede that two very analytical protagonists in clearly structured games with clear payoffs would in a laboratory setting modify their initial negotiating behavior if they were certain that there would be post-settlement embellishments. But even in this extreme case, an astute game theorist would be in a quandary about how to behave if information about the preferences of the other protagonist was ambiguous, if it was not certain that post-settlement analysis would be forthcoming, and if it was not clear how the intervenor would in fact choose a post-settlement settlement from a myriad of possibilities. Indeed, I myself as a game theorist would be tempted to forget about this potential second-stage embellishment feature.

If it makes such good sense to engage in post-settlement embellishments, why not call in this analytical intervenor right from the start? Why not do pre-settlement embellishments? Of course this could be done, and is done, in the arbitration of disputes. But let's go back to Jones and Spencer. Jones feels that he has the real power, whatever that means, and he is not going to take chances with this outside intervenor. He might intuitively calculate that he could do better against Spencer in a rough-and-tumble bargaining joust than he could in a so-called fair settlement suggested by the intervenor. Stated alternatively, his certainty equivalent for the uncertain outcome of the negotiation alternative is higher than his certainty equivalent of the uncertain outcome he would achieve through the intervenor.

Furthermore, if he initially requests a suggested resolution by the intervenor and then does not like the suggestion and rejects the offer in favor of conventional negotiation, it will be hard to budge his adversary, Spencer, from

the suggested agreement. She can be resolute in her demand for her just share because an astute and fair analytical intervenor has deemed her demand most reasonable. But this argument against intervention does not cut in a proposed post-settlement settlement!

A shift of attitude, from belligerent positional bargaining to constructive collaboration with an intervenor, might very well take place *after* each side has gained the security of some negotiated settlement.