What Does "Shall" Mean?

Words of Authority

by Raymond P. Ward

Words of authority are those that set forth duties, rights, prohibitions, and entitlements. Most lawyers have only one word of authority in their vocabularies: "shall." The problem with this workhorse word is that it has too many meanings and purposes to be precise. The uses of "shall" include:

- To show that something is mandatory. It can express an obligation: "The lessee shall pay the rent on the first of each month." Or it can express an order: "You shall leave."
- To show entitlement. "The employee shall be reimbursed reasonable expenses."
- To indicate future tense. "The lease shall terminate on December 31, 2003."
- To express a promise, or the speaker's determination. "They shall not pass." "My firm nerves shall never tremble." "I was born an American; I will live an American; I shall die an American." (Note Daniel Webster's distinction between "will" and "shall.")
- To show the speaker's intent to do something. "I shall try to correct errors when shown to be errors."
- To show inevitability. "When the Coliseum falls, Rome shall fall."
- To make a suggestion. "Shall we dance?"
- To convey high moral seriousness. "We shall overcome."
- To state a non-mandatory directive. Black's Law Dictionary lists "should" as one of the definitions of "shall," according to many courts' interpretations.

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It's not always easy to tell what "shall" means in a given context. Consider the Gospel sentence, "The truth shall make you free." Is Jesus predicting a future event? Making a promise? Declaring that something is inevitable? Saying that truth should produce freedom?

Multi-layered meanings can add depth to Scripture or poetry, but can be disastrous in legal writing. Ambiguity plants the seed of litigation. Legal-language guru Bryan Garner points out that some 76 pages of *Words and Phrases* are full of small-type blurbs from cases interpreting "shall." So much litigation over the meaning of a word is a sure sign that the word is not precise.

Garner and Richard Wydick advocate doing away with "shall," and substituting a word with a narrower, more precise meaning. Their approach has two advantages. First, when the writer uses unambiguous words, the reader is more likely to grasp the writer's meaning. Second, by getting rid of a fuzzy, imprecise word like "shall," the writer is forced to think more clearly about what he or she is trying to communicate. Words don't just express thought; they shape thought too. Clarify your language, and you will clarify your thinking.

You don't have to invent your own glossary of words of authority; Garner has already done that. Here is his list, slightly modified:

"Must" means "is required to." Use "must" show that the subject of the sentence is obligated to do something. "The employee must send notice within 30 days."

"Will" means future tense. "The lease will expire on December 31, 2003."

"Will" is also useful to express obligations when tact is required. For instance, imagine that you are on your state bar association's court-rules committee, and are drafting rules that impose obligations on judges. And imagine that the political support of the district judges affected by the rules is necessary for the rules to become reality. In that situation, you probably don't want to flat-out tell the district judges that they "must" do something. Use "will" instead. "In bench trials, the court will render judgment within 30 days after the case is submitted." The judges will find such a rule more palatable than a demand that they "must" render their decisions within 30 days.

Garner suggests using "will" to express both parties' contractual obligations when the relationship is delicate, and when expressing your own client's obligations in an adhesion contract. The reason is the same as in the preceding paragraph; "will" sounds more tactful than "must."

"May" means "has discretion to" or "is allowed to." "An obligee may put the obligor in default by a written request of performance."

"Must not" or **"may not"** are nearly synonymous. "Must not" means "is required not to." "May not" means "is not permitted to." But be careful with "may not," because sometimes it is ambiguous. An example: "The clerk may not accept papers for filing after 5:00 p.m." Does that mean the clerk *might not* accept anything after 5:00 p.m., or that the clerk *is not allowed to* accept anything after 5:00 p.m.? If the former, write, "The clerk is not required to accept…." If the latter, try "The clerk will not accept…."

"Is entitled to" means "has a right to." "The employee is entitled to be reimbursed for reasonable expenses."

"Should" means "ought to." "A judge should avoid even the appearance of impropriety." "Lawyers should conduct themselves civilly when dealing with one another."

For a more complete essay on words of authority, read Garner's *A Dictionary of Modern Legal Usage* pp. 939-42 (2nd ed. 1995). Other references include Garner's "Guidelines for Drafting and Editing Court Rules," 169 F.R.D. 176, 212 (1997), and Wydick's "Plain English for Lawyers," pp. 66-71 (4th ed. 1998).

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owner and beneficiary of a nonexempt insurance policy. *Matter of Edgeworth*, 993 F.2d 51, 56 (5th Cir. 1993). However, if the debtor has exempted insured property from the estate, the insurance proceeds belong to the debtor and not the bankruptcy estate. *In re Snow*, 21 B.R. 598, 601 (E.D.Cal. 1982). In *Snow*, the debtor filed a Chapter 7 petition and listed home furnishings as exempt property. The bankruptcy trustee did not object to the exemption. The debtor's furnishings were subsequently destroyed by a fire, and the debtor's insurance policy covered the furnishings. The court found that the debtor, not the estate, was entitled to the insurance proceeds.

Resolution Opportunities

Settlements with a debtor in bankruptcy are subject to approval of the bankruptcy court. Creditors must be given notice of the settlement and of the hearing on approval of the settlement. Federal Rules of Bankruptcy Procedure, Rule 9019 ("on motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement."). The bankruptcy court must conclude that the settlement is "fair and equitable and in the best interest of the creditors of th[e] estate." *In re: H.K. Porter, Inc.*, No. 91-468 (PHG) (Bankr. W.D.Pa. 2000), citing *Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414 (1968). The court must also "canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." *In re Dow Corning Corp.*, 192 B.R. 415 (Bankr.E.D.Mich. 1996).

Various settlements can be created to provide peace of mind to the insurers: policy buy-back (as if the policies never existed); claim buy-back (a complete release of all defined claims); coverage-in-place (resolving defense obligations and coverage defenses and exclusions in exchange for a payment cap or discounted coverage); or a known claims release. Any settlement effectuated should be incorporated in the debtor's Chapter 11 plan of reorganization and become final when the plan has been approved by the mass tort claimants and confirmed by the bankruptcy court.

In deciding whether to settle, primary and lower level excess insurers must consider the impact their policies' deductibles and retentions will have when the debtor insured lacks funds to pay. The debtor's failure to pay such amounts potentially affects the settling insurer's rights and duties to its reinsurers and excess insurers. Reinsurers could claim that their obligations are not ripe because mature claim payments have not been made. Excess insurers may assert contractual claims against the settling insurers. A bankruptcy court's good faith finding will eliminate these problems, especially if the excess insurers have notice of the settlement. Bankruptcy courts have held that a debtor's failure to pay its self-insured retention did not excuse the insurer from payment of amounts over the retention. *In re Ames Department Stores, Inc.*, 1995 Westlaw 311764 (S.D.N.Y.); *In re Federal Press Co.*, 104 B.R. 56 (Bankr.N.D.Ind. 1989).

In asbestos cases, the insured debtor seeks settlement of coverage to obtain funds to pay not just existing accrued claims, but also future claims. Payment of proceeds in settlement of future coverage obligations may present the same problems for settling insurers as presented by unpaid deductibles and retentions. Again, reinsurers may claim their obligations have not been triggered, and excess insurers may assert contractual claims against the settling insurer. Co-insureds will object to the exhaustion of limits based on future claims that have not yet been tendered for coverage.

The failure to reach settlement will result in litigation of coverage issues. The automatic stay will need to be lifted before any suit filed by the insurer may proceed. The debtor's use of any monies recovered in a coverage suit should be restricted to payment of covered claims. The debtor insured may assert breach of contract or bad faith claims against the insurer based on the insurer's failure to pay claims or defend. Under most circumstances, confirmation of a plan of reorganization or liquidation discharges the debtor from liability for debts arising before confirmation. 11 U.S.C. §1141. The discharge is effectuated by a permanent statutory injunction protecting the debtor. 11 U.S.C. §524. Section 524(e) of the Code provides that the discharge of the debtor does not affect the liability of a nondebtor for the discharged debts of the debtor.

A channeling injunction under section 524(g) will enjoin claimants and other nondebtors to seek payment of their claims relating to the debtor only from the trust established by the plan, even though they may have rights of recovery against someone else. *In re A.H. Robins Co.*, *supra*. The channeling injunction will always apply to the mass tort claimants. It will also apply to entities co-liable with the debtor, coinsureds, and nonsettling insurers. *MacArthur Co. v. Johns-Manville Corp.*, *supra*. The Bankruptcy Code contains a provision that expressly sanctions the use of channeling injunctions in cases involving mass tort liability for asbestos when certain conditions have been

met. 11 U.S.C. §524(g); see *In re Eagle-Picher Industries, Inc.*, 203 B.R. 256 (S.D.Ohio 1996).

Section 524(g) provides that the channeling injunction may protect the following nondebtors: 1) an owner of a financial interest in the debtor; 2) a nondebtor involved in the management of the debtor; 3) an officer, director, or employee of the debtor; 4) insurers of the debtor; and 5) certain providers of past financing to the debtor, and advisors to those involved in the financing transaction. Section 524(g) establishes "a procedure for dealing in a chapter 11 reorganization proceeding with future personal injury claims against the debtor based on exposure to asbestos-containing products. The procedure involves the establishment of a trust to pay the future claims, coupled with an injunction to prevent future claimants from suing the debtor." Notes of Committee on the Judiciary, Senate Report No. 95-989 (1994).

Underwriting Issues

If an insured has filed for bankruptcy, the insurance company should not unilaterally cancel the policy without obtaining legal guidance and possibly bankruptcy court approval. If the debtor insured does not meet its post-petition premium obligations for a policy still in effect, an insurer can seek to lift the automatic stay to cancel the policy for nonpayment of premiums. See *In re WMR Enterprises, Inc.*, 163 B.R. 884 (Bankr.N.D.Fla. 1994). If, however, the policy at issue is retrospectively rated, the coverage term expired, and the debtor insured still owes premiums or has paid premiums during the 90-day preference period (the 90 days before the filing of the bankruptcy), the insurer should seek the advice of counsel on how best to proceed and to determine if any right of setoff or recoupment exists or whether a proof of claim must be filed. Generally, the carrier cannot seek to have the coverage cancelled solely because of the nonpayment of retro premiums.

Conclusion

Bankruptcy proceedings will tremendously complicate a carrier's management of the debtor insured's account and any pending claims. From the underwriter's perspective, notification of an account's bankruptcy may result in nonrenewal and cancellation issues, preference claims, return premium issues, loss-sensitive premium calculation complications, and general disgust at the likely loss of an account and premium revenue. From a claims perspective, at a very minimum, the insured's bankruptcy will significantly prolong the ultimate resolution of the claim. Every aspect of the debtor's account is affected from the point in time a debtor's claim is tendered up until the last reinsurance issue or retrospective premium accounting is resolved. If a claims professional is presented with her insured's coverage litigation in a bankruptcy context, she will need to address unusual issues and uncertainties associated with a bankruptcy court's treatment of the claim dispute.

This article provides a general road map to guide an insurance professional and counsel in correctly assessing the claim, and seeking the necessary relief from the bankruptcy court or appropriately monitoring the court's proceedings' effect on the claim. With this guidance and diligent and patient work, the insurance professional will increase the likelihood of ensuring successful management of the debtor insured's account and resolution of the debtor insured's claims. FD

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Hancock Mutual Life Insurance Co., 2001 Westlaw 1159852, at *1 (E.D.Pa.). The court went on, however, to note alternatives that the parties to the arbitration might consider to obtain the evidence sought:

> Given the nature of the disputes being arbitrated, the nature of the documents sought by the subpoena, and all of the surrounding circumstances, the arbitrators may well be able to persuade one of the parties that its best interests would be served by obtaining the documents and presenting them to the opposing side (failing which, adverse inferences might be justified). Or, if the deposition of [the witness] and the documents sought by the subpoena are of sufficient importance, and if all else fails, attendance could presumably be compelled at an arbitration hearing in Florida.

This recent decision, and the court's suggested alternatives quoted above, illustrate some of the compromises and limitations on discovery that are inherent in the arbitration process. They also shed light on ways around those limitations, and ways to utilize the court's enforcement powers under 9 U.S.C. §7, to ensure (in most cases) a full and fair arbitration hearing.

Enforcing, Challenging and Correcting the Arbitration Award

Section 9 of the FAA provides that the court "shall" confirm an arbitration award unless the award is vacated pursuant to section 10, or modified or corrected pursuant to section 11. The effect of an order under section 9 confirming an arbitration award is to make the award a judgment of the court issuing the order. That judgment can then be executed, if necessary, in the same manner as any other judgment.

The court's function in confirming or vacating an arbitration award is severely limited in order to avoid frustration of the very purpose of arbitration: the avoidance of litigation. Therefore, a confirmation proceeding is intended to be summary. Confirmation can only be denied if an award has been corrected, vacated, or modified in accordance with the Federal Arbitration Act. See, *e.g.*, *Taylor v. Nelson*, 788 F.2d 220, 225 (4th Cir. 1986). If a party wishes to bring a motion to vacate an arbitration award, he must move that the entire award be vacated. There is no precedent for vacating parts of an award and, indeed, doing so will be viewed by the reviewing court as taking contradictory positions. *Ketchum v. Prudential-Bache Securities, Inc.*, 710 F.Supp. 300 (D.Kan. 1989). The failure of the arbitrators to include findings or an explanation of their reasoning to support the award is not grounds for vacation of the award. *Robbins v. Day*, 954 F.2d 679 (11th Cir. 1992), *overruled on other grounds*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 948 (1995). Under 9 U.S.C. §10, an arbitration award may be vacated if: (a) the award was procured by fraud, corruption, or undue means; (b) there was evident partiality or corruption in the arbitrators; (c) misconduct of the arbitrators prejudiced any party's rights; or (d) the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award was not made.

Conclusion

The value, complexity, and globalized nature of many of today's business transactions and relationships render the prospect of resolving commercial disputes in traditional court systems unappealing. Courts remain inaccessible and have become ill-suited in many respects to efficiently and satisfactorily resolve complicated commercial disputes. These shortcomings likely will not be corrected in the foreseeable future, especially considering the

ever-accelerating pace of change in the business world. Therefore, arbitration will continue to be an essential tool for dispute resolution. Indeed, its prevalence as the dispute resolution mechanism of choice in the commercial arena almost assuredly will continue to increase. These circumstances necessitate that commercial practitioners become familiar with arbitration's advantages, features, and limitations—and be prepared to arbitrate.

The key feature of arbitration—that it is implemented by the parties' affirmative agreement, either before or after a dispute arises—gives the parties power and control over who resolves their dispute and how it gets resolved. Arbitration thus has great potential value as a dispute resolution mechanism that should be more widely embraced by defense lawyers. This value is most fully realized when the parties use the power and control that arbitration provides them to tailor their arbitration agreement, and the rules and procedures pursuant to which their arbitration is to be conducted, to meet their goals and requirements. FD

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consent. In *Dingle v. Belin,* 358 Md. 354, 749 A.2d 157 (2000), the Maryland Court of Appeals held that if a physician agrees to a patient's requests concerning the roles to be played by various members of the surgical team as part of the informed consent discussion, and then fails to comply with that agreement, the physician can be held liable for breach of contract.

In July 1993, Deborah Belin, a surgical technician at Mercy Medical Center, was referred to Dr. Dingle by her primary care physician because she needed to have her gallbladder removed. Ms. Belin contended that because she knew Mercy was a teaching hospital and because she did not want residents too involved in her surgery, she told Dr. Dingle that she wanted him to be the one that was going to make the incision, find her gallbladder, and take it out. During the surgery, however, a resident did the cutting and the clipping required to remove the gallbladder and Dr. Dingle did only the retraction. Ms. Belin contended that the cutting and clipping done by the resident was a breach of the agreement she had with Dr. Dingle that he would do those portions of the operation.

Ms. Belin included in her complaint allegations of lack of informed consent and breach of contract with her claim for medical negligence. The trial court granted judgment in favor of Dr. Dingle on the breach of contract claim and the jury found in favor of Dr. Dingle on both the negligence and lack of informed consent claims. Ms. Belin appealed the trial court's decision to the Maryland Court of Special Appeals, which reversed the trial court's granting of judgment on the breach of contract claim, finding the facts of the case to support a claim for "ghost surgery." The Court of Appeals (Maryland's highest court) granted certiorari and affirmed the verdict entered by the trial court.

Although the Maryland Court of Appeals ultimately affirmed the trial court decision, it noted that it did so in Dr. Dingle's case because the breach of contract claim and lack of informed consent claim were based upon the same factual allegations. The court recognized, however, that a breach of contract claim may be asserted if the physician agrees to perform as requested by the patient and then fails to do so.

The expansion of breach of contact claims against physicians permits a patient to recover even in the absence of proof of a breach of the standard of care or proof that insufficient information was provided to obtain the patient's consent. The Maryland Court of Appeals did not, however, specify the damages recoverable against a physician in a breach of contract action.

In *Dingle v. Belin*, the court also reaffirmed the basic tenet of the informed consent doctrine that, in order to obtain a patient's consent a physician must disclose to the patient the risks, benefits, and alternatives to the proposed therapy. *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014 (1977). The *Dingle* court further commented that other considerations, if raised by the patient, must also be discussed and resolved for the patient's consent to be informed. Those other considerations may include who, in the case of surgical therapy, will be per-

forming the procedure and information similar to that discussed in *Duttry v. Patterson*.

The Supreme Court of Connecticut, in *Alswanger v. Smego*, 257 Conn. 58, 68, 776 A.2d 444, 449 (2001), was asked to consider whether the defendants were on notice that a lack of consent to a resident's involvement in a procedure was an issue that plaintiff could raise. The court found that the defendants were not on notice that such a claim could be raised because of the absence of any prior decisions stating that the identity and qualifications of participants in a surgical procedure and the policies of teaching hospitals constituted a lack of informed consent claim. However, the court specifically stated that its holding was not to suggest that informed consent did not involve disclosure to the patient of the identity and qualifications of members of a surgical team. *Id.*

Conclusion

The law discussed in this article highlights the patient's potential need for information about the roles of health care providers in a surgical procedure and the claims that may arise. In order for his or her consent to be "informed," the patient needs to know about the relative risks associated with different health care providers performing the same procedure. This area of information, comparing physicians to each other, has been referred to as "the second revolution in informed consent."

In Twerski & Cohen, "The Second Revolution in Informed Consent: Comparing Physicians to Each Other," 94 Nw.U. L.Rev. 1 (1999), the authors discuss what is presumably going to be the next wave in the development of the law of informed consent. Lawyers defending health care providers must be aware of the material risks of the surgical procedures performed by their clients as well as which medical personnel participated in the procedures at issue. They must also know how those personnel performed compared to others in their field. FD

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Get every shred of information available

Don't rely on others to do your job for you. While it may be helpful to get information from the plaintiff's attorney, this should never be your only source. You can count on the information coming from the other side to be both biased and limited. They will never expose the weaknesses in their case. Do the necessary investigation.

Engage in critical evaluation

Consider the sources of your information, including bias and unreliability. Listen carefully to everyone, including the plaintiff's attorneys, but insist that they give you their facts. No one has a crystal ball, but you should know what the evidence will ultimately be. Tie everything together and reach your own conclusions.

Evaluate and price your own claims

Reach your own conclusions in partnership with defense counsel. "Price the case" (*i.e.*, determine an appropriate settlement value) yourself, before you can be influenced by other people. Don't be intimidated by any of the attorneys. Always remember that if the case isn't settled, it will ultimately be decided by a jury. Chances are that you have a whole lot more in common with the jurors who will decide the case than do either of the attorneys. Think in terms of what your neighbor or your grandmother would be likely to do, and then put yourself in that position.

Negotiate from a position of strength

If you aren't comfortable with the position that you have taken, then either you've taken a bad position, or you are the wrong person to negotiate the case. Be reasonable. Listen to the other side. Note and consider any arguments or facts that are revealed. Be careful about what you, yourself, reveal. Be prepared to address each and every issue that you considered in formulating your position, but justify yourself with only those things known by both sides. Stick to your guns on every point that is discussed during negotiations.

Know when to negotiate

You control the timing of when, if ever, you offer something to settle a contested claim. Whether you make an offer, depends upon the facts of the individual claim, and whether you consider an offer appropriate at a given time and place. This means taking the initiative of making a reasonable offer on the right claim as early as possible. It also means refraining from offers on the questionable claim, until the time is right, and you have reason to expect a positive reception. In the right case, you can engage in creative approaches or solutions, including mediation or arbitration, or issue settlement.

Know when to say "When"

Although you control the process, and how much you are willing to pay for a settlement, you can't make the other side take your money (*i.e.*, you can lead a horse to water…). That means that the claim you are handling may eventually go to trial, and be decided by the court or jury. Always remember that a settlement "at any price" is not a settlement. By definition, a settlement is something that both sides can live with, or "settle for." Don't be afraid to leave the unresolved issues to a jury. That is the right of every American, including your insured.

Don't dwell over "mistakes"—learn from them

You know that there are risks associated with every claim. You take those risks into consideration in reaching your conclusions about settlement value. Even if a case goes against you, it doesn't mean that you were wrong in your evaluation, it simply means that the probabilities worked against you. If you aren't taking a bad verdict from time to time, it simply means that you aren't trying enough of your cases. You would better serve your files if, after taking a good verdict, you consider whether you are overpaying the claims which you are settling. After all, you can always appeal.

The Three-Tiered Evaluation of a Claim

Good lawyers will always settle their cases when they have a fair offer. This is because a settlement is something that proves to be acceptable to both sides. There are not many plaintiffs that can afford to turn down a reasonable offer against a real loss or injury. Most people simply can't afford to leave the money on the table and gamble on an inherently unpredictable outcome. An insurance company is generally in a better position to take chances with a verdict; it has adequate coverage, there should be adequate reserves, and there is often reinsurance.

Settlement values in general are set by the insurance industry that settles most of the claims, and to a lesser extent, the civil juries that decide a small percentage of cases. Far too much attention is paid to jury verdicts. The outrageous verdicts always find their way into newspapers. The good verdicts are seldom reported and quickly forgotten. The settlement

value of any given case is determined more by the value for similar cases in that locality (or venue). Most experienced trial lawyers in the area will be able to give reliable estimates.

When the liability of the insured is clear, and there is no comparative or contributory negligence factor, arriving at a settlement value is a simple matter of assigning a value to the injuries sustained. But liability is seldom clear. Settlement values must always be discounted when liability questions are presented. Even when the liability of the insured is established, other factors may call for a reduction in the total award and a discounted settlement offer.

Here is a summary of the evaluation process used by many experienced claims handlers in the insurance industry. They call it a "three-tier evaluation." The experienced handlers believe that application of the three tiers described below will lead to the most realistic settlement value.

Determine the full value of the damages

Compensatory damages for injured persons are of two types: economic and non-economic. Economic loss is objective, and subject to simple calculations. Non-economic loss is subjective. It is the amount determined as appropriate to compensate the injured plaintiff for his or her "pain and suffering" sustained in the past and to be experienced in the future (permanency).

Refer to the plaintiff's bill of particulars or other discovery responses to tell you what is being claimed in terms of economic loss. In some cases, such damages are not even recoverable (*i.e.*, New York no-fault law precludes any claim for economic loss which does not exceed "basic economic loss" as defined by the law). Look carefully at what is being claimed and verify that it is supported by the medical records and witnesses. Consider reports from economists where applicable. Perform any necessary calculations. Inflation may be a factor, but all calculations must be converted to present value. Arrive at the figure that you believe will be supported by the evidence.

Estimating non-economic loss is more difficult, but you can rely on experienced attorneys and claim professionals. In addition, Colossus provides a large database accumulated from settlements in similar cases. This should be used as an invaluable guide. Some aspects of the evaluation are even more subjective. Placing a value on scars, for example, requires interpretation of photographs, and an understanding of the plaintiff. Using the available tools, you must arrive at a reasonable *full value* for the plaintiff's injury. Do so with the realization that an actual verdict may vary significantly from this value (in either direction).

Discount the full value because of liability issues

There are liability issues presented in almost every case. The plaintiff only makes out a claim when those issues are resolved against your insured. Your determination of a reasonable settlement value must first consider the likelihood that your insured will prevail on liability issues. For example, if there is a 50 percent likelihood of prevailing on the liability issues, you should cut the full value of the claim in half.

Estimating the likelihood of prevailing on liability issues requires knowledge of the questions to be answered by the jury. In negligence cases, those questions can include whether the premises where the accident occurred were reasonably safe. They *will* include whether your insured was negligent, and whether any negligence was "a proximate cause" of the accident. If *any* of these questions are resolved in favor of your insured, there will not be any liability. All you can do is come up with a simple estimate. Think in terms of a survey, and the percentages of people likely to answer one way or the other.

Looking at this question another way, you may simply multiply the full value by the likelihood that you will lose on the liability questions. There is almost always a chance of prevailing. The plaintiff may not be able to put in the case, or may not satisfy the burden of proof. With the product of this calculation, you are two-thirds the way toward arriving at the reasonable settlement of the case.

Discount the value because of comparative negligence or other issues

Even in a liability situation, there may be a potential for reducing the total exposure because of comparative/contributory negligence or other factors. Such an outcome can be reached by a jury as a compromise between jurors who disagree about liability. There may also be other responsible parties in or out of the case. Whatever the rationale, this will serve to reduce the plaintiff's potential recovery. It should likewise be part of your calculations in determining settlement value.

The actual calculations should be applied to the full value that has already been discounted for liability. It is just like an additional markdown on a sale item in a store. Looking at it another way, you can simply multiply the discounted full value of the case by your insured's likely share of liability (assuming there is any).

Give yourself some room to move. A reasonable settlement range can fluctuate +/– 10 percent. Before you begin negotiations, go back and look at your best arguments. Start negotiations from the lowest figure that can be justified by a reasonable interpretation of the facts. Don't attempt to negotiate against a demand that can't be supported by any reasonable interpretation of the facts.

Conclusion

The handler employed by the insurance company occupies a position of central importance in the claims resolution process. The ultimate objective of any claims handler is the fair and fast disposition of claims brought against the insureds. In carrying out this responsibility, they work closely with defense attorneys. The latter group must recognize that claims handlers are a vital cog in the gears that operate the insurance industry. FD