

Insurance by Number - Metrics in Litigation

Article By:

Insurance Recovery at Gilbert LLP

Jurist and law professor **Richard Posner** recently commented on a common problem among lawyers, namely, that they believe they have a “math block.” ***Jackson v. Pollion***, 733 F.3d 786, 788 (7th Cir. 2013). More recently, Judge and Mediator Wayne D. Brazil noted that even sophisticated risk analysts “cannot reliably determine the ‘discounted settlement value’ of a case” because of their misunderstanding of how to apply mathematical principles to real-world decision making.^[1] In fact, if you are a lawyer, you have likely heard other lawyers make jokes about how if they could do math, they would not have gone to law school, but rather business or medical school. You may have even made these jokes yourself.

Posner, however, believes that **lawyers’ basic discomfort around math** is a serious matter, and one that disadvantages clients. He points to the need for lawyers in litigation related to emerging science or technology to understand the evidence and underlying facts. We posit that the need for comfort with math applies much more broadly. In fact, if a lawyer is uncomfortable with “math,” “numbers,” or “metrics,” there are an ever-vanishing number of circumstances where the lawyer can do his or her job effectively. Our expertise is insurance recovery. The underlying fact patterns in our field more frequently deal with decades-old contracts than cutting-edge technology. Nevertheless, we quantify, organize data, make calculations, and wrestle with financial concepts in virtually every matter we encounter.

Here are just a few of the particular circumstances where a comfort with numbers and math come into play in insurance coverage, and many other types of litigation:

- When we communicate with the CFO or other finance experts within our client organizations, or assist our client contacts in doing so, we must be able to communicate in the language of numbers, balance sheets and quantifiable results. Speaking this language is similarly necessary to understand fully our clients’ business goals and constraints and the part our legal strategies may play within those goals.
- Budgeting complicated long-term matters with various contingencies and uncertainties requires that you approach numbers without fear.
- Evaluating the settlement value of a case with multiple potential issues requires, in the

simplest terms, a probability analysis; but as Judge Brazil's article points out, that may be more complex than many practitioners appreciate.

- In large, multiparty matters where resolutions may require structures other than a single payment for dismissal, creating and evaluating settlement proposals (often in real time during a negotiation) requires a detailed understanding of how those proposals will translate to a client's bottom line.
- The various creative settlement solutions that are proposed may have tax or accounting impacts that must be considered.
- Simple calculation of damages may become a complex mathematical exercise when lost profits or other complicated losses are involved. Answering the question of "what did my client lose," may require examination of balance sheets, income statements, cash flow statements, sales histories, cost histories, and other mathematic and economic evidence.

As insurance recovery lawyers, we deal with these and many more issues that require us to dig deep into data analysis, spreadsheets, numbers and accounting. Understanding the complicated interaction between multiple dependent and variable outcomes on various insurers and policies necessitates a comfort with math and numbers. Some lawyers may point out that where the "math part" becomes particularly complicated, experts are typically employed to handle those issues. But the involvement of an expert does not excuse a lawyer from understanding the expert's work. It is ultimately the responsibility of the lawyer to understand and convey the meaning of those calculations to his or her client, opposing counsel, or trier of fact. Indeed, an understanding of mathematical concepts helps a lawyer know what to ask his or her expert for in the first place. Knowing how to direct consultants effectively reduces costs, and ultimately creates a greater value to the client.

[1] Judge Wayne D. Brazil, *Don't Apply Risk Analysis To Discounted Settlement Value*(February 03, 2014, 9:49 AM), http://www.law360.com/insurance/articles/500858?nl_pk=e5cccee0-d0cb-4d28-aa35-79dab830e7f8&utm_source=newsletter&utm_medium=email&utm_campaign=insurance.