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Adam C. Pritchard

University of Michigan Law School, acplaw@umich.edu

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Toward a Theory of Motion Practice and Settlement

Comment

by

A. C. Pritchard*

1 Introduction

Scott Baker (2017) has provided a thought-provoking contribution to this symposium volume, helping us to better understand the strategic game of litigation. In terms of both resources and actual disputes resolved, pretrial practice is vastly more important than actual trials. Trials are a rarity in the American civil justice system, as the overwhelming majority of disputes are resolved via settlement. Indeed, rational-choice scholars have struggled to explain why *all* disputes are not resolved via settlement, as settlement avoids the expense of a trial, which is a dead-weight loss to both sides of the dispute. The parties' mutual incentive toward settlement is only reinforced by the influence of judges, who – faced with overburdened dockets – also strongly favor settlement. Consequently, understanding the dynamics of the pretrial process and how it affects settlement is critical to understanding how disputes are actually resolved.

Baker's contribution to that understanding is to clarify the connections between motion practice and settlement, in particular, the motion for summary judgment. One motivation for this model is to explain the phenomenon of settlement offers increasing as legal proceedings pass successive hurdles. The key takeaway from Baker's model is that settlement offers are a strategic means that allow defendants to sort plaintiffs by degree of optimism. In developing his model, Baker relies on a number of critical assumptions. Specifically, he assumes, uncontroversially, that: (1) liability is uncertain; and (2) discovery reduces that uncertainty. More contestable is Baker's assumption that plaintiffs are optimistic about recovery (and that their degree of optimism is private information).

Based on these assumptions, Baker's model shows that making settlement offers subsequent to dismissal motions helps defendants sort plaintiffs by degree of optimism. This process facilitates dispute resolution, because plaintiffs cannot otherwise credibly share their degree of optimism with their adversary, and defendants will be reluctant to overpay when making settlement offers. Baker's model also

* Frances and George Skestos Professor of Law, University of Michigan, Ann Arbor (MI), U.S.A.

confirms the intuition that defendants are always better off with more opportunities to dispose of cases, despite the costs of bringing the motion, because it allows them to make investments in litigation sequentially.

In this comment, I will make some observations about Baker's model and what I perceive as some of its limitations, primarily its assumption of asymmetric optimism. Exploring those limitations suggests possible extensions to the model based on other forms of information asymmetry between the plaintiff and the defendant that may be important in certain litigation contexts and have potential policy relevance.

2 Observations and Extensions

2.1 Observations

One aspect of Baker's model that raises questions for a scholar whose work focuses on litigation is the assumption that plaintiffs are optimistic – and know it – but defendants are not.¹ To begin, the plaintiff may be ignorant of her degree of optimism. Optimism is likely the result of psychological biases, and it is very difficult for individuals to recognize their own biases. This suggests that degree of optimism may not be *asymmetric* private information, because it may be unknown to both parties.

Economic incentives, however, give reason to believe that asymmetric optimism may not be the rule, or even the norm, in private litigation. In particular, the livelihood of plaintiffs' lawyers depends upon making accurate assessments of the likelihood of recovery. In the United States, most litigation on behalf of plaintiffs is financed by the plaintiffs' bar. Of course, these lawyers will maintain a diversified portfolio of claimants to represent, but diversification is only a partial solution to the financing risks created by working on a contingency fee. A plaintiffs' lawyer who does not do an efficient job of screening will quickly find himself driven from the market by lawyers who screen more carefully. This is true not only because the careful screener will waste fewer resources on weak claims, but also because the careful screener will be able to develop a reputation with defense lawyers. A reputation for only taking on strong cases affords a plaintiff's lawyer greater credibility in settlement negotiations.

Indeed, settlements rarely happen unless the plaintiff can make a plausible threat to sue and to pursue the case to judgment. Unless the plaintiff makes the threshold investment of filing a complaint, few defendants will settle a claim, regardless of the merits, because they are screening plaintiffs to verify that they have the resources to actually litigate a claim. If the plaintiff cannot secure a lawyer willing to make the minimal investment required file a complaint, they are essentially admitting that they do not have the resources to litigate to judgment. But filing a

¹ Baker notes in footnote 6 that these assumptions can be reversed with similar results for his model.

complaint will not be enough in most situations. A lawyer filing a complaint on behalf of a plaintiff has to be able to make a plausible threat of winning the claim at trial to extract any settlement whatsoever. Thus, plaintiffs' lawyers working on a contingency fee will have strong incentives to screen claims, and a similarly strong incentive to provide their clients with unbiased predictions of the likelihood of success. Clients are less likely to be disappointed if expectations are managed properly.

On the other side of the dispute, optimism may go unchecked because the constraints are more relaxed. It is quite common for defendants to feel victimized by a lawsuit, willing to defend "on principle." Self-serving bias likely plays a strong role in fueling this feeling. The defendants, despite having better access to information shedding light on the likelihood that a jury would find them to be at fault, may view the known facts through a lens that minimizes their own culpability.

Agency costs may also play a role in encouraging self-serving assessment. Institutional defendants, such as corporations or the government, may not have a good sense of probability of liability. This will be particularly true if one element of liability is state of mind, because the institutional decision-maker(s) may not have ready access to all of the relevant facts. The relevant minds for determining the institution's culpability may be lower-level officers or bureaucrats, who will have their own incentives to minimize the impact of their actions. Even if the responsible parties are higher-ups in the organization, their ability to defend their personal reputations with other people's money is unlikely to promote clarity in assessing the prospect of liability. And the lawyers representing the entity will not share the demanding screening incentives of their adversaries on the plaintiff's side, as they are typically paid by the hour, rather than on a contingent basis. The defense-side lawyers will be reluctant to push the dispute all the way to trial, for fear of incurring an embarrassing loss, but a lengthy tour through extended pretrial proceedings is definitely in their interest. Only after a summary-judgment motion has been resolved will the defense lawyer be forced to make an assessment of his client's prospects at trial with any degree of accountability.² For all of these reasons, discovery may shed light for defendants on the true probability of prevailing that they do not have at the onset of litigation, although the marginal illumination may be less for defendants than it is for plaintiffs. Optimism at the outset of litigation may be a two-way street.

If optimism is probable on both sides of the dispute, the role of the judge looks somewhat different. The judge, rather than signaling her own predilections toward the case, may be focused on persuading both sides to the dispute to come to a more realistic assessment of their probability of prevailing. Convergence is the goal, but the judge's formal role in promoting convergence is a limited one in a system that ultimately relies on trial by jury. If the facts in the case are ultimately to be decided by a jury, the judge's capacity for intervention is limited to a gatekeeping role,

² Of course, a discerning general counsel will be able to assess litigation counsel's earlier evaluations, but those predictions are typically so hedged by qualifiers as to be close to unfalsifiable.

screening out claims (or defenses) that are completely out of bounds for the jury to accept. Both long-established doctrine and norms constrain the judge from signaling her personal views of the merits of the claim in any reliable way. The judge is supposed to: (1) keep an open mind; and (2) give substantial deference to the jury's role in fact-finding. Even after discovery has closed, the judge may not signal a definite view on the case even at summary judgment if she is being faithful to legal standards applied in the United States. Moreover, many judges distrust "trial by affidavit" and may want to see actual testimony rather than excerpts of deposition transcripts. The judge is not signaling her view of the merits of the case; instead, the judge is signaling what range she will apply in deciding to take the case away from the jury and award judgment to either the plaintiff or the defendant. The question to be resolved is what conclusion a "reasonable" jury could reach based on the evidence currently before the court. All of this means that the sorting done by the judge at the summary-judgment stage will be a very constrained imitation of what could potentially happen at trial. Given the constrained signal that is being sent by the judge, for optimistic plaintiffs, intermediate rulings short of dismissal may not dissuade them. For optimistic defendants, nothing short of a grant of summary judgment for the plaintiff may be sufficient to debunk their optimism.

Consequently, the pretrial process of discovery may be more important in driving both plaintiffs and defendants to a more realistic assessment of their prospects at trial than the resolution of pretrial motions. Both sides may be ignorant of the true facts relating to liability at the inception of the litigation, which may fuel joint – but conflicting – optimism about their prospects. The implication for settlement offers is that the defendant may be revealing information about his own optimism in making the offer, while at the same time screening plaintiffs on the basis of their optimism as they choose to accept or reject the offer.

2.2 *Extensions*

The possibility that optimism may be joint, rather than asymmetric, gives rise to an interesting potential extension of Baker's model. Baker uses the simplifying assumption that there is a single fact – culpability – that the jury will ultimately be called upon to decide. Simplifying assumptions are necessary in any theoretical model for tractability, but this one obscures an important point: plaintiffs generally must satisfy multiple elements in order to prevail, while defendants need to negate only one to defeat the claim.³ For example, even a garden-variety tort claim requires the plaintiff to prove duty, breach, causation, and damages. Baker assumes that the existence of the breach is known to the defendant, which I have questioned above, but the other elements may be equally or more accessible to the plaintiff. All of these elements give rise to the possibility of optimism. Duty seems closest to a pure question of law, which is presumably equally accessible to the plaintiff and defendant. Other elements may be better known to the plaintiff at earlier points in the proceedings than they are to the defendant. For example, damages are clearly better

³ As Baker notes in footnote 6.

known to the plaintiff at the inception of the litigation, but they may be difficult to credibly convey to the defendant at the outset of the litigation. Even causation may have important aspects that are specific to the individual's circumstances. Was the plaintiff's cancer caused by the chemical manufactured by the defendant, or the lifestyle choices (smoking, etc.) that he has made? Plaintiffs may know aspects of their personal history that are relevant to causation, but may be entirely unavailable to the defendant until discovery has been completed. Even in the situation in which the plaintiff has better access to the facts, the plaintiff (and his lawyer) may lack the scientific understanding to know which facts of the plaintiff's history are relevant to the question of causation. Discovery, including expert reports, may flesh out this understanding.

The possibility that the plaintiff may have an equal or better understanding of some elements of his claim prior to discovery has important implications for the timing of judicial intervention. If we treat judicial interventions as a form of *de-biasing* of optimistic litigants (plaintiffs and defendants alike), then the motion to dismiss is not simply another opportunity for the defendant to get a signal from the judge on the likelihood that the jury will uphold the plaintiff's claim. Instead, we can consider it an opportunity to get an assessment of the strength of the plaintiff's claim in situations where the information is equally or more accessible to the plaintiff (and the potential for bluffing may be high). On the question of duty, that question of law is to be decided by the judge sooner or later in the proceedings, so there is no point in putting off the resolution of that uncertainty. On the questions of causation and damages, the plaintiff's lawyer's obligation to make a reasonable investigation before filing a complaint imposes some screening obligation on the lawyer. Moreover, failing in that obligation will, at least under some circumstances, lead to sanctions being imposed by the court, thus deterring some amount of bluffing. The combination means that uncertainty over some elements of potential claims will be limited even before the claims are filed, which necessarily limits the range of optimism by plaintiffs.

From a policy perspective, the question is: How stringent do we want that initial screen to be? This goes to the debate over *notice pleading* in complaints. If a central purpose of pretrial proceedings is to debias litigants' assessment of their prospects in order to facilitate settlement, it may make sense to impose more than a perfunctory obligation on plaintiffs to share the facts at their disposal. *Fact pleading*, allowing those facts to be assessed by a neutral decision-maker in the form of the judge, offers attractive efficiency advantages if we think that plaintiff optimism is likely to be a pervasive problem. Its utility, however, is limited to those elements likely to be most accessible to the plaintiff. If the facts are exclusively in the hands of the defendant, requiring the plaintiff to make detailed allegations is arbitrary.

3 Conclusion

Baker's contribution to this symposium adds a useful component to our understanding of dispute resolution. Understanding the relation between optimism and settlement offers is an important first step in understanding the strategic interaction between plaintiff and defendant. The next step is to understand the role that mutual optimism plays in impeding the resolution of the disputes because of the complexities it adds to that strategic interaction. A better theoretical understanding of that game would help both scholars of the litigation process and policymakers pursuing the goal of encouraging the efficient resolution of disputes.

References

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A. C. Pritchard
University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109-1215
U.S.A.
acplaw@umich.edu