Who Wins in Settlement Negotiations?

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When lawsuits are resolved out of court, what determines the settlement price? This article uses a laboratory simulation and path analysis to estimate the relative importance of measurable variables in determining who wins the battle for the cooperative surplus. In the simulated negotiation conditions, seven variables explained more than half of the variation in settlement outcomes achieved by participants, with negotiators’ predictions of their opponent’s reservation prices the most important, followed by negotiator gender and amount of first offer. Although the specific context of this article is settlement, the insights generated are applicable to any two-party, distributive negotiation. (JEL C78, C92, D03, D74, D86, K12, K41)

When lawsuits are resolved out of court, what determines the settlement amount?

As a first approximation, the legal merits of the lawsuit matter, of course. Settlements are negotiated in the shadow of the law (Mnookin and Kornhauser, 1979). Plaintiffs with a strong liability case and large damages...
clearly will tend to recover more at the settlement table than plaintiffs with a weak case for liability and low damages.

But there is much more to settlement negotiations than the facts of the dispute and the relevant legal rules. Within certain boundaries determined by the nature and strength of the plaintiff’s claim, the plaintiff’s lawyer attempts to obtain every dollar that the defendant will pay, and the defendant’s lawyer attempts to avoid paying all but the most minimal amount. This article attempts to identify the factors that can be assessed prior to the beginning of bargaining that determines who wins and who loses this battle.

It is difficult, if not impossible, to judge a negotiator’s success in litigation bargaining by reference to actual settlement outcomes because the legal merits of a case cannot be measured precisely. In any given dispute, a plaintiff may owe her ability to negotiate a large settlement to the strength of her case rather than the bargaining ability of her lawyer. Comparing settlement outcomes across cases fails to solve this problem, because no two cases have precisely the same legal value.

In light of this difficulty, this article approaches the problem by performing and analyzing the results of a controlled simulation, with law-student subjects participating in a settlement negotiation. Our analysis reveals that, in the conditions of this simulated negotiation, the negotiators’ estimate of the opposing negotiator’s reservation price is the best predictor of outcomes, follow by the gender of the negotiator and the size of the first offer made. The negotiator’s “target” or aspiration, the negotiator’s relative enthusiasm for litigating the case if need be, and the negotiator’s relative confidence in his negotiating ability were also predictive of a successful outcome, although less important. The negotiators’ pre-negotiation perception of what would constitute a fair outcome had a very small indirect effect on outcomes. Together these seven variables explain more than half of the variation in settlement outcomes achieved by the subjects who participated in the simulation.

The article proceeds as follows: Section 1 describes the basic background assumptions of the article. Section 2 explains the simulation methodology in detail. Section 3 presents a series of hypotheses as to what variables might affect negotiation success. Sections 4 and 5 test the hypotheses generated in Section 3 using the tool of bivariate correlation and then a more sophisticated path analysis that can identify both direct and indirect effects of the variables measured on outcomes. Section 6 identifies some of the limitations of the approach and the findings presented.
1. Background Assumptions

1.1. Fixed Reservation Prices and Bargaining Zone

Our methodology assumes that, prior to bargaining, each litigant develops a “reservation price,” or “bottom line.” The defendant’s reservation price is defined as the maximum amount that she would be willing to pay to reach a negotiated agreement. The plaintiff’s reservation price is defined as the minimum amount that he will accept to reach a negotiated agreement.

If the defendant’s reservation price exceeds the plaintiff’s, the distance between these two points constitutes the “bargaining zone.” If the parties reach an out-of-court settlement, they are jointly better off than they would have been had they litigated the case to judgment by the amount of money within the bargaining zone, referred to as the “cooperative surplus” or “surplus.” In the simulation, the defendant’s reservation price is fixed at $60,000, while the plaintiff’s reservation price is $10,000, meaning that the parties generate $50,000 of “cooperative surplus” by reaching a settlement agreement but the negotiation will determine how that amount of surplus is divided between them.

The conclusions drawn do not depend on how negotiators actually determine their reservation prices. Negotiators might use a normative approach consistent with “rational choice theory,” or they might rely on cognitive heuristics and be affected by judgment biases; they might rely on cold calculation or hot emotion. Understanding precisely how negotiators determine their reservation prices is necessary to a complete understanding of settlement dynamics, of course, but it is beyond the scope of this study.

1.2. Purely Distributive Negotiation

The simulation limits subjects to one issue for negotiation: the amount of money the defendant will pay the plaintiff, if any, to settle a lawsuit. This limitation means that the negotiation is purely “distributive” (in the language of negotiation theory), or “zero-sum” (in the language of game theory). That is, every incremental benefit negotiated by one party in the negotiation will represent an equivalent cost to the other party.

Not all settlement negotiations are purely distributive. In many cases, there is some opportunity to bargain in a way that increases size of the joint cooperative surplus available to the parties. Using so-called “integrative
bargaining” techniques, such as adding additional issues to the negotiation and logrolling (trading concessions on issues of relatively less value to one party for concessions by their counterpart on issues of relatively more value), it is often possible for both parties to be left better off under an agreement than they would have been had they exclusively haggled over dollars and cents.

In spite of the role integrative bargaining can play in settlement negotiations, however, it is useful to study outcomes in a strictly distributive setting for two reasons. First, in many, and perhaps most, settlement negotiations—especially those involving disputes between strangers or parties that otherwise want no future interaction with their counterpart—both parties care exclusively, or nearly so, about the size of the monetary settlement. In this large number of cases, the outcomes will be driven entirely by the distributive aspect of negotiation.

More importantly, even when integrative bargaining can increase the value of an agreement, settlement negotiations always have an important distributive aspect. In fact, success at integrative bargaining makes the distributive aspect of the negotiation more, not less, important, because the amount of cooperative surplus that must be distributed increases (Korobkin, 2009). In other words, even though the methodology used in this study artificially excludes the possibility of integrative bargaining by permitting subjects to negotiating only price, the conclusions reached are relevant to real-world settlement negotiations that are not strictly limited in this way.

2. Methodology

2.1. Subject Pool

Subjects were 136 first-year law students at the University of California at Los Angeles (UCLA) and the University of Southern California (USC) law schools recruited in law school classes. Each subject was paid a flat fee of $10 for participating in the simulation, which took approximately 1 hour, and all were told that they would have a chance to earn “hundreds of dollars, not to exceed $1000,” based on the actual results of a negotiation, if they were randomly chosen at the end of the time period to be the “real money negotiation.”
The simulation was conducted on three occasions, once at USC and twice at UCLA. Subjects were randomly assigned to act as the lawyer representing either the plaintiff or the defendant in a negotiation to attempt to settle an employment discrimination lawsuit brought by the plaintiff and randomly assigned one of the students with the opposite role as a negotiation counterpart.

2.2. Stimulus Materials

The stimulus materials attempted to describe an easy-to-understand yet realistic litigation bargaining situation with the following characteristics: the negotiation was entirely zero sum; the bargaining zone was large (although subjects did not know this); all subjects playing a given role had an identical reservation price; there was significant uncertainty about which party would prevail in litigation in the event of a bargaining impasse.

Depending on role assignment, subjects were provided with “confidential instructions” for either the “plaintiff’s lawyer” or the “defendant’s lawyer,” and given 15 minutes to read the instructions and contemplate their negotiation strategy. Both sets of confidential instructions described an employment discrimination lawsuit brought by Henry Smith against Electec Corporation alleging that his firing by the firm after 18 years of employment constituted illegal age discrimination. Smith alleged damages of $100,000, based on losing his $75,000 salary for the one year of time he was unemployed subsequent to being fired, and $25,000 for emotional distress.

The same set of potentially relevant facts was also provided to both groups of subjects, along with the instruction that discovery was complete and there was no likelihood that any material facts remained hidden from either side. Smith’s claim was based on the following facts: he was 60 years of age when he was fired; all of his performance evaluations at the firm rated him as at least “very good;” employees promoted to his level over the past several years had been under 40 years of age but many employees eligible for such a promotion had been older; Electec had been criticized in the business press for having high pension plan liabilities compared to its competitors. Electec’s defense was based on the following facts: a reduction in business had caused it to lay off 10% of its workforce; both younger and older workers (including Smith) had been part of this group; Smith’s performance evaluations had been “excellent” for 14 years but then declined to “very good” for the past four years; five other employees at Smith’s
level were over 60 years old at the time Smith was fired and all remain at Electec.

All subjects were also told that the relevant legal standard, should the dispute be litigated, is described in the U.S. Supreme Court case of *Hazen v. Biggins* (507 US 604 (1993)). The subjects were provided a short excerpt from that decision that explains that liability in an age-discrimination lawsuit turns on whether the employer was motivated to fire the employee based on his age rather than on his merits, and that indirect evidence may “support liability if the plaintiff also shows that the employer’s explanation for its decision is ‘unworthy of credence.’” (*Hazen v. Biggins*, 507 US 604, 613 (1993)). This legal standard, along with the facts provided that point in both directions, were intended to suggest to subjects that, should the parties decide to litigate the case, both parties had a possibility of prevailing and victory would be a “sure thing” for neither.

Both groups of subjects were told that their client had asked them to meet with the other side’s attorney to try to negotiate an out-of-court settlement. The only issue for negotiation was the size of a cash settlement, if any, because Smith had found new employment and was not interested in reinstatement. Because Smith’s complaint claimed $100,000 in damages, that was the theoretical maximum settlement amount.

Additional instructions varied depending on role assignment. Plaintiff lawyer subjects were told that their client wanted the highest cash settlement possible, but due to the costs and emotional stress of litigation and the uncertainty of the outcome, he had established a “bottom line” of $10,000. The significance of this reservation price was reinforced with the following instruction:

[I]n other words, you should not leave settlement negotiation without an agreement if it is possible to get at least $10,000. If you cannot convince Electec to pay Smith at least $10,000, you should decline to settle the case. If there is no settlement, Smith will retain a specialist in employment law litigation to represent him in court in this matter, notwithstanding the costs and risks of trial.

Defendant lawyer subjects were told that their client, Electec, wanted to settle the case for as little money as possible, but due to the cost of litigation, the negative publicity that it would bring, and the uncertainty of the result, it had established a bottom line of $60,000. That is:
In other words, Electec has instructed you that you should not leave the settlement negotiation without an agreement if it is possible for you to secure a settlement by agreeing that Electec will pay Smith $60,000 or less. If you cannot convince Smith’s lawyer to accept $60,000 or less, then you should decline to settle the case. If this occurs, Electec will hire a litigator and take its chances in court.

2.3. Incentives for Subjects

Experimental psychologists typically do not pay subjects based on the quality of their performance in laboratory tasks. In contrast, it is an article of faith in the experimental economics community that pay-for-performance is critical to obtaining externally valid results—especially when market behavior is the subject of study—because incentives are necessary to ensure subjects will put forth the same level of concentration and effort in the laboratory context that they would exert in the real world.

The question of whether and to what extent performance-based financial incentive affect results has generated substantial debate but no answer that is clearly applicable to all experimental conditions (Hertwig and Ortmann, 2001; Camerer and Hogarth, 1999). A thoughtful meta-analysis by Camerer and Hogarth of studies that compare outcomes when some subjects are given performance-based financial incentives and others are not reached the intuitively reasonable conclusion that incentives can affect results when effort is critical to task performance but they have little bearing when outcomes are relatively insensitive to effort, either because the task is very easy or very hard. So, for example, performance-based payments appear to affect results when subjects are asked to recall information to which they were previously exposed, but not when they are asked to recognize such information when it is presented to them, because recall requires significant mental effort but recognition does not. In addition, financial incentives are less likely to affect performance if performing well at the task is inherently pleasurable (and money is not needed to incentivize effort) and consistent with the way subjects would like to present themselves (so that there is not a social incentive to perform poorly).

Results of an unstructured distributive negotiation, like the one studied here, conceivably can depend a great deal on the amount of effort put forth by subjects. For example, a plaintiff subject with a given level of skill and
perception of the negotiation circumstances would almost certainly fair much better against any given defendant if she were to make arguments justifying a high settlement price and make concessions slowly and deliberately over the full amount of time given for bargaining than if she said nothing and immediately accepted the first offer made by the defendant subject. The intrinsic enjoyment of the task, which could promote effort in the absence of financial incentives, is likely to be highly variable across subjects. Without adequate financial incentives, it is reasonable to fear that at least some subjects will shirk (Murnighan et al., 1999; Smith and Walker, 1993). This could reduce the study’s external validity by causing subjects that enjoy bargaining to perform relatively better in the experimental context than they would in the type of “real world” negotiations that the experiment attempts to model.\(^1\) Finally, at least some subjects are likely to find outstanding performance at the bargaining task inconsistent with personal traits that they would like to display to their counterparts (who are their law school classmates), such as generosity and altruism. Without financial incentives, these subjects are likely to value the self-presentational and social advantages of concessionary behavior more heavily than they would in a real-world settlement negotiation.

Rather than receiving compensation without regard to performance or based on performance but in small dollar amounts, subjects in the present study were given a chance of earning a significant amount of money based on performance. The last element of the simulation instructions described how subjects would be compensated by their hypothetical client for their services. Plaintiff subjects were told that Smith would pay them 1% of whatever settlement they could negotiate, up to $1000, provided they did not accept an amount lower than their bottom line of $10,000 (in which case they would be paid $0). If negotiations ended in impasse, they would be paid a flat fee of $100. Defendant subjects were told that Electec would pay them a flat fee of $100 plus a commission of 1% of every dollar less than $60,000 that they had to pay to Smith to settle the case.

At the end of the simulation materials, all subjects were provided the following instruction:

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1. This assumes, of course, that shirking is not a serious problem in real-world settlement negotiations in which the lawyer–negotiator’s professional reputation and her client’s welfare are at stake.
At the end of the negotiation session, a random process will select one negotiation as the “real money” negotiation. If your negotiation is selected, the researchers will pay you—in addition to $10 for simply participating in this study—your fee (as described above) in cash, based on the outcome of your negotiation. If your negotiation is not selected as the “real money” negotiation, you will still receive your $10 payment for participating in the experiment.

Based on the reservation prices specified in the instructions, plaintiff and defendant subjects had the potential to earn up to $600 each in practice. Given the number of students participating in the study and the fact that it was run three times, each subject had roughly a one in 22 chance of being selected as part of a “real money” negotiation. At the conclusion of each of the three simulation sessions, a random drawing took place in the presence of the subjects, and both the plaintiff’s lawyer subject and the defendant’s lawyer subject in that dyad were paid based on the settlement amount that they had negotiated.

Some research suggests that paying randomly selected large rewards based on outcomes can induce greater effort in laboratory interactions than paying all subjects small awards based on outcomes, and this incentive method has occasionally been employed in bargaining experiments (Murnighan et al., 1999). There is no way to determine whether this compensation arrangement optimized subject effort (given the typical resource constraints) in this particular study. However, two measures that we took of subjects’ enjoyment of bargaining interactions relative to that of their dyadic counterparts were not significant predictors of success in the simulation: success was correlated neither with the difference between the amount plaintiff and defendant said that they “look forward” to negotiating situations ($r = -0.166, P = 0.23$) nor the difference between the amount plaintiff and defendant said that “conflict” made them “uncomfortable” ($r = -0.129, P = 0.35$). These results suggest there was not disproportionate shirking by the subjects who find negotiating the most unpleasant or uncomfortable, which was the primary concern.

2.4. Manipulation Checks

Because the primary goal of the study is to explain the division of cooperative surplus holding the bargaining zone constant, it was critical to the validity of the results that the subjects approached the negotiation governed by the reservation prices assigned to them, rather than setting their own
reservation prices. In an attempt to ensure this, after reading the stimulus materials, each subject was asked to state his or her “bottom line” in the settlement negotiation, defined for plaintiff subjects as the “minimum amount of money that you will agree to accept on your client’s behalf to settle the lawsuit out of court” and defined for defendant subjects as the “maximum amount of money that you will agree to pay on your client’s behalf to settle the lawsuit out of court.” Plaintiff subjects who understood and internalized the simulation materials should have responded “$10,000,” and defendant subjects should have responded “$60,000.”

It is, of course, impossible to guarantee that each subject exerted an amount of effort in the simulation comparable to the amount they would exert in a real-world litigation settlement negotiation. In order to come as close as possible to achieving this goal, however, it was important that the subjects clearly understood how compensation for the randomly selected “real money” negotiation dyad would be calculated. To test their understanding of the mechanism, plaintiff subjects were asked how much money they would earn if they were selected to be the “real money” negotiation and they had convinced the defendant’s lawyer to pay $100,000 to settle the case. Defendant subjects were asked how much money they would earn if they were selected to be the “real money” negotiation and they had convinced the plaintiff’s lawyer to settle the case for $0. The correct answer was $1000 for plaintiffs and $600 for defendants.2

All dyads in which either subject failed either manipulation check (12 total) were deleted from the dataset.

2.5. Data Collected

After reviewing their confidential instructions but before attempting to negotiate a settlement agreement, subjects completed a questionnaire that elicited information concerning variables that might correlate with success in capturing cooperative surplus. Some of the information depended on subjects’ specific analysis of the Smith v. Electec negotiation (i.e., the subject’s “target” settlement amount, the subject’s estimate of the other party’s “bottom line,” the subject’s view of what settlement amount would be “fair”)

2. Answers of $1010 for plaintiffs and $610 for defendants were also accepted (the $10 presumably representing the show-up fee that all subjects, including those selected for the real money negotiation, would earn).
and was usually elicited in the form of a dollar amount. Some concerned the subjects’ views about negotiation generally (i.e., how much they enjoyed negotiating, how confident they were in their negotiating ability) and were usually elicited in the form of ratings on a 9-point scale. Some was basic demographic data that might have predictive value (i.e., sex, age, undergraduate major).

Following the completion of the negotiation, each plaintiff–defendant dyad completed a questionnaire in which the subjects jointly reported whether they were able to reach a settlement, the dollar amount of the settlement (if applicable), the identity of the subject who made the first offer, the amount of that offer, and the total number of offers and counteroffers made during the negotiation.

Finally, each subject individually completed a brief post-negotiation questionnaire that asked questions concerning the subject’s enjoyment of the negotiation, satisfaction with the outcome, and perceptions of the opposing negotiator.

Although it would have been desirable to compare the characteristics of subjects who reached a negotiated agreement with subjects who failed to do so, only one dyad in the sample was unable to reach agreement in the time allotted. Consequently, that dyad was removed from the dataset. Along with the removal of dyads in which either subject failed either manipulation check, the revised dataset, analyzed below, consisted of 55 plaintiff–defendant dyads.

3. Hypotheses

This Part derives a range of hypotheses of the determinants of negotiation success in settlement negotiation from game theory (which assumes strictly “rational” behavior by both negotiators) and existing experimental evidence. These hypotheses are then evaluated, in light of the simulation results, in the following two Parts of the article.

3.1. Estimates of the Counterpart’s Bottom Line

When reservation prices are private information (i.e., each negotiator knows his reservation price but not his opponent’s), a plaintiff must decide what settlement amount he should demand without knowing how much the defendant rationally should be willing to pay rather than go to trial. The
higher a plaintiff’s estimate of the defendant’s reservation price, the higher the demands a rational plaintiff should make and be willing to maintain in the event of opposition. The lower the plaintiff’s estimate of the defendant’s reservation price, the more willing the plaintiff should be to abandon a stated demand for a settlement price higher than his reservation price, because he should evaluate the risk of impasse inherent in such a strategy to be relatively high. Thus:

Hypothesis 1: Plaintiff’s surplus will be positively correlated with his estimation of the defendant’s reservation price, or “bottom line.”

The same reasoning applies to defendants. That is, the lower the defendant believes the plaintiff’s reservation price will be, the lower the settlement amount the defendant will be willing to make and maintain. Thus:

Hypothesis 1B: Plaintiff’s surplus will be positively correlated with the defendant’s estimation of the plaintiff’s reservation price.

3.2. Proxies for Patience

Game theoretic models of bargaining predict that the negotiator for whom a continued stalemate is the least costly (i.e., the more “patient” negotiator) will capture a majority of the cooperative surplus (Young, 1991; Baird et al., 1994). The intuition is that the patient negotiator knows that his impatient counterpart will suffer more from delay, so the former will be emboldened to hold out for more of the surplus. The impatient party knows that she stands to lose more from lengthy negotiations, and that the patient party knows this as well, so rather than hold out and suffer the lion’s share of the costs, she will make immediate concessions.

This prediction depends on the assumptions that the parties’ reservation prices are public information (each negotiator knows not only his reservation price but also his counterpart’s as well) and that the parties’ costs of stalemate are also public information. In most negotiation contexts, including settlement negotiations, neither of these assumptions is likely to be true. A plaintiff is unlikely to know with any degree of certainty the defendant’s reservation price or how costly it is for the defendant to engage in a stalemate. When negotiators are not sure about which party is more patient, agreement is likely to take some time, as each party attempts to gauge who can least afford to hold out for more of the surplus. Ultimately, however, this
line of reasoning predicts that the more impatient party will finally become convinced that he is more impatient, and then make appropriate concessions.

There are several sources of costs, and thus of impatience, in litigation bargaining. Delay in reaching a settlement agreement will often require parties to expend resources on preparing for adjudication, such as preparing motions and preparing for trial. When this is true, the party with high preparation costs or the party with fewer financial resources might be more impatient to settle than his counterpart. However, when the cost of preparing for trial have largely been expended, as for example when the parties attempt to negotiate on the proverbial courthouse steps, the dollar costs of a marginal extension in negotiating time is likely to be relatively low for both parties and approximately equivalent.

Even when financial costs of ongoing bargaining do not diverge, however, negotiators suffer less obvious costs as a result of ongoing bargaining, and these costs are likely to vary across negotiators. Some negotiators simply find negotiating to be less pleasant or more stressful than do others, which could cause them to concede surplus in order to end the interaction. The flip side of this conjecture is that some negotiators will find the prospect of going to trial relatively less pleasant or desirable than will others, even holding their reservation price constant, potentially causing them to concede surplus in order to minimize the risk of impasse. Finally, regardless of their feelings about litigating the case itself, some negotiators will be generally more risk averse than others, and thus might be more willing to make concessions rather than engage in brinksmanship or other “hard bargaining” tactics that could lead to impasse even when there is a potential to reach a settlement for an amount greater than their reservation price (Korobkin, 2002a). Consequently:

*Hypothesis 2: Plaintiff’s surplus will be positively correlated with his enjoyment of the negotiation process relative to the defendant’s enjoyment of the negotiation process.*

*Hypothesis 2B: Plaintiff’s surplus will be positively correlated with how positively he views the prospect of adjudication relative to how positively the defendant views litigation.*

*Hypothesis 2C: Plaintiff’s surplus will be negatively correlated with his general level of risk aversion relative to the defendant’s general level of risk aversion.*
3.3. Aspiration Levels as Reflected by “Targets”

Many negotiation scholars claim that negotiators with aggressive aspirations—as distinguished from their reservation points—will capture more cooperative surplus than parties with lesser aspirations (Mnookin et al., 2000; Shell, 1999). There is some empirical evidence to support this contention. In one demonstration of the effect, for example, experimenters found that when subjects were assigned a reservation price and subgroups were assigned either low aspirations (slightly more aggressive than the reservation price) or high aspirations (significantly more aggressive than their reservation price), the high-aspiration subjects negotiated more favorable agreements (White and Neale, 1994). A recent meta-analysis of experimental data found that experimental subjects assigned specific and difficult goals achieved better negotiation outcomes that subjects assigned easy goals or no goals at all (Zetik and Stulmacher, 2002).

Aspirations are implicitly ignored by game theorists, at least as a factor independently affecting bargaining outcomes, because there is no clearly “rational” way to determine one’s aspiration level other than by direct reference to one’s own reservation price or estimation of the adversary’s reservation price (Korobkin, 2002b). However, if aspirations cause negotiators to set mental reference points from which they evaluate agreements as either “gains” or “losses,” the postulate of prospect theory that “losses loom larger than gains” (Kahneman and Tversky, 1979) suggests that a negotiator with higher aspirations will work harder and take greater risks in bargaining (to avoid a potential loss) than a negotiator with lower aspirations (who would stand only to increase gains), all other things being equal. This theory might explain the findings of two studies that negotiators given a reservation price and a more aggressive target achieved better results if they either were told to focus their attention on their target rather than on their reservation price or if they reported after a negotiation that they did focus more on their aspiration than on their reservation price (Galinsky et al., 2002; Galinsky et al., 2005).

Thus:

Hypothesis 3: Plaintiff’s surplus will be positively correlated with his aspiration level or “target.”

By the same reasoning, defendants who set aggressive (low dollar) targets should capture more surplus, cutting into the plaintiff’s surplus. Thus:
Hypothesis 3B: Plaintiff’s surplus will be positively correlated with the defendant’s aspiration level or “target.”

3.4. Perceptions of a “Fair” Settlement

Other theorists believe that negotiators’ perceptions of what constitutes a “fair” distribution of the cooperative surplus affects the division of the cooperative surplus. The well-known empirical evidence from the “ultimatum game” provides indirect support for this conjecture (see Buelens & Van Poucke, 2004).

In the ultimatum game, one subject (the “proposer”) is asked to divide a fixed amount of money (the “stakes”) between himself and a second subject (the “responder”). The responder must then choose whether to accept the proposed division, in which case the stakes are divided as proposed, or to reject the proposal, in which case both subjects get $0 and the stakes escheat back to the experimenter. Because the game is zero sum and the responder has the last opportunity to avoid an impasse, game theoretic analysis predicts that the proposer will offer the smallest possible increment to the responder and the responder will accept that amount, because “something” dominates “nothing.”

In fact, proposers routinely offer substantially more than game theory predicts—often up to half of the stakes. Responders, for their part, routinely reject offers of less than half of the stakes, even though doing so is costly, with the likelihood of rejection increasing as the percentage offered by the proposer decreases (Pillutla & Murnighan, 2003). This evidence suggests that negotiators might resist agreeing to a division of cooperative surplus that they find unfair to them under the circumstances (perhaps out of spite (Straub and Murnighan, 1995)), and that their counterparts intuitively know this and moderate their bargaining behavior accordingly. Thus:

Hypothesis 4: Plaintiff’s surplus will be positively correlated with the settlement amount he believes—while attempting to adopt a neutral perspective—would be “fair.”

Hypothesis 4B: Plaintiff’s surplus will be positively correlated with settlement amount that the defendant believes—while attempting to adopt a neutral perspective—would be “fair.”
3.5. Gender of Subjects

For decades, scholars have investigated whether gender is correlated with bargaining outcomes, with inconsistent results. Some research has found that men tend to be more competitive and concerned with “winning” in negotiation as well as other contexts, while women tend to be more concerned with preserving and strengthening relationships (Babcock and Laschever, 2003). Studies have found, for example, that women asked to divide resources are more likely to propose equal rather than self-serving divisions (Guth et al., 2007), and that women give more than men in “dictator” games, in which the subject unilaterally divides an amount of money between herself and another individual (Eckel and Grossman, 1998) especially when generosity is costly (Andreoni and Vesterland, 2001). These findings suggest that men might fare better in terms of tangible results at the bargaining table.

The current scholarly consensus, supported by a meta-analysis of bargaining experiments that study gender as a variable, is that, on average across studies, men achieve slightly better outcomes than women in distributive negotiations (Stuhlmacher and Walters, 1999). Thus:

Hypothesis 5: Plaintiff’s surplus will be larger if the plaintiff’s negotiator is male.

Hypothesis 5B. Plaintiff’s surplus will be larger if the defendant’s negotiator is female.

3.6. First Offers

Traditionally, conventional wisdom among negotiators was that it is a tactical blunder to make the first offer, because if the offer is below the other party’s reservation price, surplus that may have been captured is immediately conceded (Lax and Sebenius, 2006). In recent years, however, negotiation theorists have more frequently suggested that making the first offer can be advantageous in distributive bargaining, especially if the first offer is aggressive, by anchoring the opposing negotiator’s expectations and thus altering his subsequent concessionary behavior (Galinsky and Mussweiler, 2001; Bazerman and Neale, 1992; Kristensen and Garling, 2000).

The content of the first offer can render information consistent with transacting at that price more mentally accessible than other relevant but inconsistent information. For example, a buyer exposed to a high initial demand by a seller might be more likely to focus on attributes of the seller’s wares that are consistent with a high price than attributes that would be more
consistent with a low price (Mussweiler and Stack, 1999). The first offer can also act as a reference point by which the offeree evaluates the subsequent proposals, such that an aggressive first offer can make later concessions appear to be more beneficial in comparison (relative to concessions made from a baseline of more modest first offer) and thus desirable. In addition, an aggressive first offer also can imply that the offeror has a higher reservation price than his counterpart originally estimated, causing the counterpart to believe more concessionary behavior might be necessary to prevent impasse than he originally assumed. (Although a negotiator can make an aggressive offer regardless of whether his reservation price is high or low, the offeree is likely to assume a relationship between the offeror’s reservation price and his offer.) A recent meta-analysis of bargaining experiments that compare first offers to negotiated outcomes found that aggressive first offers predict favorable outcomes, with a correlation between these two variables across studies of nearly a 0.5 (Orr and Guthrie, 2006).

The literature on first offers suggests the following hypotheses:

**H6A:** Plaintiffs who make the first offer will capture a larger surplus than those who do not.

**H6B:** Assuming that the plaintiff makes the first offer, plaintiff’s surplus will be positively correlated with the amount of that offer.

**H6C:** Assuming that the defendant makes the first offer, plaintiff’s surplus will be positively correlated with the amount of that offer.

### 3.7. Self-Reported Assessments of Ability

It is highly likely that bargaining success depends in part on the differential ability of negotiators to select specific tactics at the bargaining table that convince their opponents to make concessions. For example, consistent with the previous hypotheses, we would expect negotiators to capture more of the surplus if they are able to convince their counterparts to change their reservation price, change their estimate of the negotiator’s reservation price, change their perception of what would constitute a fair settlement, fear the prospect of trial, dread the prospect of further negotiations, etc.

Unfortunately, there is no metric that directly measures such tactical ability such that it could be used to predict relative success in a negotiation ex ante. It is possible, however, to measure negotiators’ self-evaluations of their bargaining skill. If self-evaluations are accurate, a correlation between
relative skill and negotiating success is likely. Even if self-evaluations are not accurate reflections of actual tactical skill, they likely reflect confidence, which itself might correlate with the ability to convince opponents to make concessions. Some studies have documented a correlation between self-assessments of general ability of the use of specific bargaining tactics and negotiating outcomes (Sullivan et al., 2005; Stolte, 1983). Thus:

\[ H7: \text{A plaintiff's surplus will be positively correlated with his relative confidence in his negotiating skill and ability.} \]

4. Hypothesis Testing Using Correlation Analysis

The 55 dyads that negotiated an agreement in the allotted time settled the case of *Smith v. Electec* for an average of $44,980, meaning that the average plaintiff received $34,980 of the $50,000 in cooperative surplus, and the average defendant received $15,020 of the surplus (see Table 1). The

### Table 1. Descriptive Statistics

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<tr>
<th>Variable</th>
<th>Mean</th>
<th>Std. Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlement Amount: Negotiated outcome agreed upon by both parties</td>
<td>$44,980</td>
<td>10,789</td>
</tr>
<tr>
<td>Plaintiff’s Surplus: Settlement Amount expressed as the plaintiff’s share of the negotiating space ($10,000–$50,000)</td>
<td>$34,980</td>
<td>10,789</td>
</tr>
<tr>
<td>Time to Settle: Length of negotiation, in minutes</td>
<td>17.95</td>
<td>6.687</td>
</tr>
<tr>
<td>Plaintiff Makes First Offer: Proportion of negotiations in which the Plaintiff made the first offer</td>
<td>0.49</td>
<td>0.505</td>
</tr>
<tr>
<td>Plaintiff’s OtherBL: Plaintiff’s pre-negotiation estimate of the Defendant’s bottom line</td>
<td>$46,182</td>
<td>23,412</td>
</tr>
<tr>
<td>Plaintiff’s Target: Plaintiff’s pre-negotiation target settlement amount</td>
<td>$54,355</td>
<td>16,447</td>
</tr>
<tr>
<td>Plaintiff’s Fair: Plaintiff’s pre-negotiation perception of a settlement amount that would be fair to both parties</td>
<td>$37,791</td>
<td>20,027</td>
</tr>
<tr>
<td>Plaintiff Female: Proportion of negotiations in which the Plaintiff is female</td>
<td>0.47</td>
<td>0.504</td>
</tr>
<tr>
<td>Defendant’s OtherBL: Defendant’s pre-negotiation estimate of the Plaintiff’s bottom line</td>
<td>$46,818</td>
<td>20,803</td>
</tr>
<tr>
<td>Defendant’s Target: Defendant’s pre-negotiation target settlement amount</td>
<td>$31,764</td>
<td>13,370</td>
</tr>
<tr>
<td>Defendant’s Fair: Defendant’s pre-negotiation perception of a settlement amount that would be fair to both parties</td>
<td>$36,882</td>
<td>20,741</td>
</tr>
<tr>
<td>Defendant Female: Proportion of negotiations in which the Defendant is female</td>
<td>0.51</td>
<td>0.504</td>
</tr>
</tbody>
</table>
results are probably skewed in favor of plaintiffs because of an artifact of the study design. Although the actual bargaining zone was between $10,000 and $60,000 dollars, because the plaintiff’s complaint sought $100,000 in damages, the theoretically possible bargaining zone was from $0 to $100,000. The mid-point between these two figures, $50,000, might have worked as an anchor for subjects’ expectations, in addition to other information endogenous to the stimulus materials. In any event, the pro-plaintiff skew does not affect the primary analysis, because the analytical question of interest is what causes variance in the plaintiff’s share of the cooperative surplus (“Plaintiff’s Surplus”) across dyads.

The first step in the analysis was to identify independent variables that were significantly correlated with the dependent variable, Plaintiff’s Surplus. Since the amounts of surplus captured by the plaintiff and by the defendant are interdependent, each negotiating dyad is treated as one observation that includes a plaintiff and a linked defendant. The results are described in this section and compiled in Table 2.

4.1. Estimate of Adversary’s Bottom Line

To elicit subjects’ estimates of their opponent’s reservation price, plaintiff subjects were asked the following question (defendant subjects were posed a slight variation):

Given what you know about the case, what is your best guess as to what the defendant’s lawyer’s “bottom line” is in the upcoming settlement negotiations. That is, what amount of money do you think is the maximum the defendant’s lawyer will be willing to pay to settle the case rather than go to court?

In bivariate correlation tests, the amount of surplus captured by plaintiff subjects was significantly correlated with the subjects’ predictions of their opponent’s reservation price or “bottom line” (Plaintiff’s OtherBL) ($r = 0.344, P = 0.00$) and their opponent’s prediction of their “bottom line” (Defendant’s OtherBL) ($r = 0.437, P = 0.00$).3

In theory, the two effects should be symmetrical; that is, if an increase in the plaintiff’s prediction of the defendant’s bottom line leads to greater surplus for the plaintiff because he is more willing to demand and hold out for a larger settlement amount, an increase in the defendant’s prediction

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3. These are Pearson’s $r$ correlation coefficients, with $N = 55$ and df = 1.
Table 2. Bivariate Correlations with “Plaintiff’s Surplus” (significant variables in bold)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Correlation coefficient ($r$)</th>
<th>Significance ($P$-value)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff's OtherBL:</td>
<td>0.344</td>
<td>0.00</td>
</tr>
<tr>
<td>Defendant's OtherBL:</td>
<td>0.437</td>
<td>0.00</td>
</tr>
<tr>
<td>JointOtherBL:</td>
<td>0.599</td>
<td>0.00</td>
</tr>
<tr>
<td>Relative Enjoyment:</td>
<td>−0.166</td>
<td>0.23</td>
</tr>
<tr>
<td>Relative LitEnthusiasm:</td>
<td>0.375</td>
<td>0.01</td>
</tr>
<tr>
<td>Relative Risk Aversion:</td>
<td>0.035</td>
<td>0.80</td>
</tr>
<tr>
<td>Plaintiff’s Target:</td>
<td>0.344</td>
<td>0.01</td>
</tr>
<tr>
<td>Defendant’s Target:</td>
<td>0.141</td>
<td>0.30</td>
</tr>
<tr>
<td>JointTarget:</td>
<td>0.382</td>
<td>0.00</td>
</tr>
<tr>
<td>Plaintiff's Fair:</td>
<td>0.292</td>
<td>0.02</td>
</tr>
<tr>
<td>Defendant’s Fair:</td>
<td>0.400</td>
<td>0.00</td>
</tr>
<tr>
<td>JointFair:</td>
<td>0.474</td>
<td>0.00</td>
</tr>
<tr>
<td>Plaintiff Female:</td>
<td>−0.404</td>
<td>0.00</td>
</tr>
<tr>
<td>First Offeror:</td>
<td>−0.051</td>
<td>0.71</td>
</tr>
<tr>
<td>FOamount:</td>
<td>0.440</td>
<td>0.00</td>
</tr>
<tr>
<td>Relative Confidence:</td>
<td>0.266</td>
<td>0.05</td>
</tr>
<tr>
<td>Relative Success:</td>
<td>0.259</td>
<td>0.06</td>
</tr>
</tbody>
</table>

of the plaintiff’s bottom line should have the same effect, holding other variables constant, because this will cause the defendant not to hold out for as large a settlement amount. Consequently, in addition to testing the significance of both variables individually, we also created a JointOtherBL variable by adding the plaintiff’s prediction of the defendant’s bottom line with the linked defendant’s prediction of the plaintiff’s bottom line. This joint variable was even more significant that the two individual variables ($r = 0.599, P = 0.00$). Thus, the data clearly support H1 and H1B.
4.2. Proxies for Patience

Subjects’ enjoyment of the bargaining process was measured as a proxy for the relative patience they would be likely to demonstrate during negotiations by asking subjects to rate their agreement with the statement, “I look forward to opportunities to negotiate with others,” on a nine-point scale ranging from “disagree completely” to “agree completely.” From these responses we constructed a “Relative Enjoyment” variable for each dyad defined by the plaintiff’s rating minus the linked-defendant’s rating. Plaintiff’s Surplus was not significantly correlated with this variable ($r = -0.166, P = 0.23$). Thus, the data do not support H2.

Two questions were used in an attempt to identify a proxy for subjects’ willingness to adopt hard bargaining tactics in the settlement negotiation that could increase the risk of an inefficient impasse and result in the dispute proceeding to adjudication. First, subjects were asked to rate their perception of how promising their client’s nonagreement alternative of litigating the matter in court was on a nine-point scale ranging from “extremely bad” to “extremely good.” A relative litigation enthusiasm (“Relative LitEnthusiasm”) variable was constructed by subtracting from each plaintiff’s rating the rating provided by the linked defendant. Plaintiff’s success was highly significantly correlated with this variable ($r = 0.375, P = 0.01$), supporting H2B.

Second, an attempt was made to gauge subjects’ general tendency to be risk averse by asking them to make a series of hypothetical choices between receiving a certain $1000 and a risky prospect with increasing expected values (i.e., a 50% chance of receiving $2000 and coupled with a 50% chance of receiving $0, a 50% chance of receiving $2500 coupled with a 50% chance of receiving $0, etc.). Subjects were assigned a risk aversion score based on the point in the series of questions at which they switched their preference from the certain option to the risky option, and a “Relative Risk Aversion” variable was constructed by subtracting from the plaintiff’s score the score of the linked defendant. There was no significant correlation between Plaintiff’s Surplus and this variable, however ($r = 0.035, P = 0.80$), meaning that our data fail to support H2C.

4.3. Targets

To gauge subjects’ aspirations, plaintiff subjects were posed the following question (a slight variation was given to defendant subjects):
Like all negotiators, most lawyers who are preparing to participate in settlement negotiations find it is useful to set a goal in advance—that is, to establish a “target” settlement amount that they hope to achieve in the negotiation. This target is not necessarily the same amount as their “bottom line” (the point beyond which they will go to court rather than settle the case out of court), although it could be. Now that you have had a chance to consider the circumstances of the case of Smith v. Electec, please determine and record below what your settlement target will be going into the negotiation session. (Logically, the amount should be somewhere between $0 and $100,000.)

Plaintiff’s Surplus was significantly correlated with the plaintiff’s aspiration or “target” value (“Plaintiff’s Target”) \( (r = 0.344, P = 0.01) \), supporting H3. The correlation between Plaintiff’s Surplus and the target of the linked defendant (“Defendant’s Target”) was positive but not significant \( (r = 0.141, P = 0.30) \), failing to support H3B. This result seems anomalous because, in theory, if targets affect negotiation outcomes, a dollar increase in Defendant’s Target should have the same impact on the plaintiff’s outcome as a dollar increase in Plaintiff’s Target. Thus, if Plaintiff’s Target is correlated with Plaintiff’s Surplus, Defendant’s Target should likewise be correlated with Plaintiff’s Surplus. When the Plaintiff’s Target and the linked Defendant’s Target are added together to create a single “JointTarget variable,” that measure is significantly correlated with plaintiff success \( (r = 0.382, P = 0.00) \). This result provides support for both H3 and H3B.

4.4. Perceptions of a Fair Settlement

To elicit subjects’ perceptions of what settlement amount would be fair, plaintiff subjects were asked the following (a slight variation was posed to defendant subjects):

Assume for a minute that you were not representing either the plaintiff or defendant in this settlement negotiation, but that instead you were a neutral observer of the situation. Given what you know about the case, what dollar amount do you think would be a fair amount for the defendant to pay the plaintiff to settle the case out of court?

The amount of surplus captured by plaintiffs was significantly correlated with the plaintiff’s view of the dollar amount that would constitute, from a neutral perspective, a fair settlement amount (“Plaintiff’s Fair”) \( (r = 0.292, P = 0.02) \), and with the linked defendant’s view of the fair settlement amount (“Defendant’s Fair”) \( (r = 0.400, P = 0.00) \). When these two variables...
are combined into a “JointFair” variable, the correlation between it and Plaintiff’s Surplus is highly significant ($r = 0.474, P = 0.00$). These results support H4 and H4B.

4.5. Gender of Subjects

While there was no significant correlation between the plaintiff subjects’ age, undergraduate major, or legal practice interest and plaintiff’s surplus, there was a highly significant correlation between the gender of the plaintiff subject and amount of surplus captured by plaintiffs. Being “Female” was negatively correlated with Plaintiff’s Surplus ($r = -0.404, P = 0.00$), supporting H5. Plaintiff’s Surplus was not significantly correlated with the gender of the opposing negotiator ($r = 0.090, P = 0.51$). Thus, H5B is not supported. Admittedly, this result is anomalous: given that female plaintiffs underperformed male plaintiffs, we would have expected that plaintiffs of either gender paired with female defendants to outperform plaintiffs paired with male defendants. Our data are insufficient to resolve this anomaly, suggesting that further research is indicated.

4.6. First Offers

In 27 of the 55 dyadic negotiations, the plaintiff subject made the first settlement offer in the negotiation, while the defendant subject made the first offer in 28 of the negotiations. When plaintiff subjects made the first offer, they eventually settled for $34,426 of the cooperative surplus. When defendant subjects made the first offer, plaintiffs eventually captured a virtually identical $35,514 of surplus ($F (1,53) = 0.138, P = 0.71$), thus failing to support H8. When plaintiffs did make the first offer, however, the amount of that first offer was significantly correlated with surplus ($r = 0.412, P = 0.03$), supporting H8b; moreover, when defendants make the first offer, the amount of that first offer is also significantly correlated with plaintiff’s surplus (that is, the higher the defendant’s first offer, the better the plaintiff’s results).

When first offers are made by plaintiffs, they tend to be quite high relative to first offers made by defendants, so it would be inappropriate to combine the raw data. To address this problem, the two sets of data were normalized by adding the difference between the mean first offer when made by a plaintiff and the mean first offer when made by a defendant to all defendant
first offers to create a “FOAmount” variable. This variable is also highly correlated with Plaintiff’s Surplus ($r = 0.440, P = 0.00$).

Taken as a whole, these results suggest that subjects who made the first offer were either advantaged or disadvantaged depending on aggressiveness of that offer. Aggressive offers correlated with greater surplus, and modest offers correlated with less surplus.

4.7. Self-Reported Assessment of Ability

Two questions were used in an effort to identify a proxy for the subjects’ relative confidence in their bargaining ability. Subjects were asked to rate their “overall skill level as a negotiator relative to your peers” on a nine-point scale from “worse than nearly all” to “better than nearly all,” and to rate “how successful you were in achieving your goals” in the most recent negotiation encounter they could recollect. Variables for “Relative Confidence” and “Relative Success” were then constructed by subtracting the linked-defendant’s rating on each question from the plaintiff’s rating. There was a significant correlation between plaintiff’s surplus and the Relative Confidence ($r = 0.266, P = 0.05$), and a marginally significant correlation between plaintiff’s surplus and Relative Success ($r = 0.259, P = 0.06$).

5. Path Analysis

Analyzing the data with one hypothesis at a time, the following variables were significantly correlated with a plaintiff subject’s success in capturing cooperative surplus:

- The subject’s predictions of his or her counterpart’s reservation price, or “bottom line”
- The subject’s aspiration level, or “target”
- The subject’s perception of what settlement amount would be “fair”
- The subject’s relative enthusiasm about the possibility of litigating
- The subject’s relative confidence in his or her bargaining skill
- The subject’s gender
- The dollar amount of the first offer made in the negotiation

Although this analysis is useful in better understanding the predictors of bargaining success, it can be misleading in several ways. One potential problem is that a variable can be statistically significant (i.e., have a
A high degree of correlation between two independent variables can lead to inferences that overstate the significance of one or both relative to the dependent variable; one might have little or no predictive value beyond what the other provides. On the other hand, a weak bivariate correlation can mask an independent variable’s important indirect effects on the dependent variable through its effect on other independent variables.

For all of these reasons, in an effort to better understand the actual predictive value of the individually significant variables, we employed the technique of path analysis (a type of structural equation modeling, and in the same class of techniques as multiple regression analysis). Like multiple regression, path analysis accounts for the direct relationship between the independent variables and the dependent variable (that is, Plaintiff’s Surplus), but path analysis also allows us to specify additional relationships amongst the independent variables. This Part provides the results of the path analysis and delves further into the findings concerning the variables Female, Target, and Fair.

5.1. Model Specifications

Our model of the determinants of Plaintiff’s Surplus is depicted graphically in Figure 1, and it uses the variables JointOtherBL, JointTarget, JointFair, FOamount, Relative Skill, Relative LitEnthusiasm, and Female. Statistical analysis of these data can only estimate the strength and sign of the relationships between the variables, not the direction of the arrows connecting them. For some of the relationships, the direction is obvious. For example, Female cannot be caused by any other variable. We specify the direction of the other arrows by hypothesizing causal relationships among the variables based upon the order in which the data were collected. In

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4. For example, if negotiators’ targets are perfectly correlated with their estimates of the counterparts’ reservation prices, Target could appear to be a highly significant predictor of surplus in a bivariate correlation but, in reality, that measure would provide no useful information for predicting outcome beyond the information provided by the negotiators’ predictions of their counterparts’ reservation prices.
other words, the model assumes that if A is decided before B, any causal connection must run from A to B rather than B to A. More specifically:

(1) JointOtherBL, JointFair, JointTarget and FOamount could affect Plaintiff’s Surplus but Plaintiff’s Surplus cannot affect the other variables because we collected data on the independent variables before subjects knew the results of their negotiation (and thus the value of Surplus).

(2) JointOtherBL, JointFair, and JointTarget could affect FOamount rather than the reverse, because subjects are presumed to determine the size of their first offers at the beginning of the negotiation simulation, after the pre-negotiation questionnaire elicited their judgments concerning the other variables.

(3) JointOtherBL could affect JointFair and JointTarget (but not the reverse) because subjects were asked to estimate their counterpart’s
Table 3. Path Analysis: Standardized and Unstandardized Effects

<table>
<thead>
<tr>
<th></th>
<th>Unstandardized Effects</th>
<th>Standardized Effects</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Direct</td>
<td>Indirect</td>
</tr>
<tr>
<td>JointOther BL</td>
<td>0.09</td>
<td>0.04</td>
</tr>
<tr>
<td>Female</td>
<td>−4661</td>
<td>−2985</td>
</tr>
<tr>
<td>FOamount</td>
<td>0.15</td>
<td>0</td>
</tr>
<tr>
<td>JointTarget</td>
<td>0.08</td>
<td>0.05</td>
</tr>
<tr>
<td>Relative LitEnthusiasm</td>
<td>611</td>
<td>0</td>
</tr>
<tr>
<td>Relative Confidence</td>
<td>975</td>
<td>0</td>
</tr>
<tr>
<td>JointFair</td>
<td>0.03</td>
<td>0</td>
</tr>
</tbody>
</table>

bottom line before they were asked to set a target or determine what settlement value would be fair.

(4) JointTarget could affect JointFair rather than the reverse because subjects were asked to set a target before they were asked to determine what settlement value would be fair.

In the absence of a controlled experiment, we cannot be certain of the causal directions that we model in the path analysis, or whether the relationships are causal rather than correlative. We rely upon the logic of the temporal order of the questionnaire and of the steps of the simulation to guide us, but we realize that this is no warranty against misspecification. The directions of arrows between JointOtherBL, JointFair, and JointTarget, for example, could plausibly be reversed. The paths themselves, however, cannot be eliminated without destroying the analysis; the substantive and statistical significance of these three variables is not in question.

The model was estimated using the AMOS software package. A chi-squared value of 17.838 (df = 16, P = 0.333) and the fit statistics (CFI = 0.980, TLI = 0.964) indicate that this model is a good fit for the data (Hu and Bentler, 1995). Its $R^2$ of 0.52 indicates that the independent variables included in the analysis explain just over half of the variance in Plaintiff’s Surplus across dyads.

The results of the analysis are described below and displayed in different formats in Figure 1 and Table 3. The numbers in Figure 1 adjacent to the arrows linking the independent variables to Plaintiff’s Surplus are

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6. See also Appendix 5 for the complete path analysis output.
standardized coefficients that represent each variable’s relative direct effect in predicting a plaintiff subject’s success in the negotiation—higher numbers mean that the variable is relatively more predictive of Surplus.\footnote{We re-estimated the model by adding covariances for Female, Relative LitEnthusiasm, and Relative Confidence. The new parameters were not individually significant and did not improve the model fit, and so they were not included.}

5.2. Results

5.2.1. Direct effects. The model shows that JointOtherBL and FOamount have the largest direct effects (both positive) on Plaintiff’s Surplus, followed by Female (negative). Relative LitEnthusiasm also has a highly significant direct effect on Plaintiff’s Surplus ($P < 0.05$), although the magnitude of the effect is less than the three leading explanatory variables. Relative Confidence has a marginally significant direct effect on Plaintiff’s Surplus ($P < 0.10$). JointTarget probably has an effect, but it fails to reach statistical significance under conventional standards ($P = 0.12$). JointFair does not have a significant effect on Plaintiff’s Surplus in the multivariate model.

5.2.2. Indirect effects. The direct effects of the independent variables on Plaintiff’s Surplus do not tell the entire story, however, because some of those variables affect others, and thus have an indirect effect on Plaintiff’s Surplus.

Female has a negative effect on JointOtherBL, meaning that female subjects estimated their counterparts’ bottom lines to be significantly lower than did male subjects and, as we know, lower predictions of the opponent’s bottom line are themselves correlated with less Plaintiff’s Surplus. JointOtherBL has a significant effect on JointTarget, and both of these variables have a significant effect on JointFair. JointTarget also has a significant effect on FOamount.

5.2.3. Combined effects. To fully understand the total effects that an independent variable has on Plaintiff’s Surplus, we need to take into account its indirect effects (that is, the effect it has on other variables that themselves affect Plaintiff’s Surplus) as well as its direct effects. When the two types of effects are combined, JointOtherBL is revealed to be the most influential single variable, with Female second, and FOamount third. The importance
of JointTarget rises above Relative LitEnthusiasm and Relative Confidence, because the parties’ Targets have a significant effect on the size of the first offer made, which in turn has a significant effect on Plaintiff’s Surplus. The standardized coefficients reported in Table 3 describe the relative importance of each of the independent variables in predicting Plaintiff’s Surplus, with higher numbers indicating greater importance.

The unstandardized coefficients reported in Table 3 can help provide a better intuitive understanding of the magnitude of each variable’s predictive effect on Plaintiff’s surplus, and how that effect is divided between direct and indirect effects. These coefficients describe the amount of change in the Plaintiff’s Surplus that the model would predict as a result of a one-unit increase in any variable.

To understand the size of the effects, assume, as a baseline case, the mean settlement amount negotiated by our dyads of $44,980. For every $1 increase in either party’s estimate of the other’s bottom line, as reflected in JointOtherBL, the model predicts a 13 cent increase in the settlement amount. So if the plaintiff’s estimate of the defendant’s bottom line (OtherBL) were to increase by $10,000 while all other variables were held constant, we would expect the settlement amount would be approximately $46,280. Increasing the amount of the first offer (FOamount), whether made by plaintiff or defendant, by $1 yields the prediction that the Plaintiff’s Surplus will increase by 15 cents. This means that if a plaintiff who makes the first offer were to increase it by $10,000, the model would predict a settlement amount of $46,480.

The effect of a change in either party’s Target is similar. An increase in either party’s target value by $1 yields the prediction of a 13 cent increase in Plaintiff’s Surplus. So a $10,000 increase in plaintiff’s Target, holding all other variables constant, would predict a settlement value of $46,280.

Because gender is not a continuous variable—it can only be “male” or “female”—its affect on predictive negotiating success appears starker. Positing a change in the gender of the plaintiff’s negotiator from male to female causes the model to predict a decrease of $7646 in surplus. That is, by substituting a female subject for a male subject in our baseline case, the predicted settlement amount drops to $37,334.

For every increase of one point in the differential between the plaintiff’s and the defendant’s LitEnthusiasm score, the model predicts a $611 increase in the plaintiff’s share of the cooperative surplus. For every increase of
one point in the differential between the plaintiff’s and the defendant’s Confidence score predicts an increase of $975 in the plaintiff’s share of the surplus.

5.3. Explaining the Gender Gap

The gender gap in the simulation results is extremely large. Male subjects in the role of plaintiff captured $39,066 of the surplus on average, while female subjects in the role of plaintiff captured only $30,423 on average ($F(1, 53) = 10.315, P = 0.00)$, and the path analysis predicts that substituting a female subject for a male subject will result in a decrease of $7646 in Plaintiff’s Surplus. Although a substantial literature suggests that men generally outperform women (slightly) in distributive negotiating situations (Stuhlmacher and Walters, 1999), it would be reasonable to predict gender differences would be mitigated when subjects are members of self-selected pre-professional group (law students (Craver and Barnes, 1999) with strong implicit bargaining norms (i.e., the duty of “zealous representation”) (Model R. of Prof’l Conduct 1.3) and negotiating as an agent rather than as a principal (Bowles et al., 2005). Under these conditions, why might plaintiff subjects who are female capture so much less surplus than plaintiff subjects who are male?

In their recent book, *Women Don’t Ask*, Linda Babcock and Sarah Laschever argue that one reason women often underperform in bargaining situations is that they do not demand as much as men (2003; see also Bowles et al., 2005). This claim suggests that women plaintiffs in this study might have captured less surplus as a consequence of making lower first offers than did men, but the data provide no support for this hypothesis. Of the 27 plaintiffs who made the first settlement offer, 12 were males and 15 were females. The average first offer proposed by the males was $84,250, a very small difference from the $82,767 average for females and not close to being statistically significant ($F(1, 25) = 0.022, P = 0.88$). If extreme outliers are removed, the average first offer made by female plaintiffs was actually slightly higher than the average first offer made by male plaintiffs.

A related hypothesis suggested by the work of Babcock and Laschever (2003) is that perhaps female negotiators set lower targets than male negotiators—that is, that they have lower aspirations than men and consequently accept less. One recent experiment, for example, found that male student subjects set more aggressive negotiation targets in a distributive
negotiation without clear information concerning what would constitute a
good agreement than did their female counterparts (Bowles et al., 2005).
This theory too fails to find support in our study, however. The mean target
for male plaintiffs was $54,569, while the mean target for female plaintiffs
was $54,115 ($F(1,53) = 0.010, P = 0.92).

There was a significant difference based on sex, however, of negotiators’
estimates of their opponent’s bottom line. Females estimated on average
that the defendant’s bottom line would be $36,923, while males, on average,
estimated that figure to be $54,483 ($F(1,53) = 8.830, P = 0.00). This data
hint that some of the gender gap might be explained by the fact that women
made lower OtherBL estimates, which, in turn, caused them to capture
less surplus. The path analysis allows us to examine this relationship more
formally.

There is no significant correlation between Female and JointTarget or
FOAmount, but there is a significant negative correlation between Female
and JointOtherBL (see Appendix). This model estimates that, in addition to
the direct effect of $-4661 Female has on Plaintiff Surplus, it also has an
indirect effect of $-2985 on Surplus by virtue of significantly decreasing
JointOtherBL. In other words, more than 40% of the gender gap is explained
by the fact that females reported lower OtherBL scores.

The cause of the remainder of the gender gap cannot be inferred from
the data, but one reasonable hypothesis is that men and women—even
professionals—are differentially likely to employ certain bargaining tactics
that are useful in distributive contexts and not specifically examined in this
study, such as refusing to make concessions, misrepresenting their actual
bottom lines, or dragging out the negotiation (Korobkin, 2006). Such a
differential might result from men and women having different personal
preferences (on average) for using competitive bargaining tactics, or it might
be caused by the fact that women faced higher social costs of employing
such tactics and are thus less likely to favor them.

A substantial body of research has found that women are more risk averse
than men in a variety of contexts. For example, women are less likely to
take risky gambles in experimental settings and they are more likely to
choose conservative investments for their retirement accounts (Holt and
Laury, 2002; Croson and Gneezy, 2004). This risk-aversion gap seems to
persist across cultures and ethnic groups (Croson and Gneezy, 2004). One
consequence of this might be that women are more likely than men to
accept offers made to them as the bargaining process progresses (the safe alternative) rather than rejecting them and seeking a more favorable division of the surplus (a riskier strategy).

Another body of research finds that men choose to participate in competitive social interactions at higher rates than women and that males often perform tasks better in competitive environments than in noncompetitive ones, whereas competition does not tend to enhance the performance of females (Croson and Gneezy, 2004; Babcock and Laschever, 2003). This effect might be because women tend to be more uncomfortable than men in conflictual situations (Kolb and Coolidge, 1991), or it might be attributable, at least in part, to a norm that women are expected to be “nice” and are punished socially if they fail to conform to this expectation (Babcock and Laschever, 2003; Babcock, 2007). Either way, women—even women law students—might calculate that employing competitive negotiating tactics that can help capture cooperative surplus will produce a lower overall expected benefit than would men facing the same set of circumstances (Guinier et al., 1994; Craver and Barnes, 1999).

Other studies have found that female negotiators can be penalized at the bargaining table for “aggressive” behavior that goes uncriticized when exhibited by men (Bowles et al., 2007). If this is true, female subjects might have rationally calculated that the social costs of employing competitive tactics were relatively high (compared to what men would rationally calculate). Since the potential benefits of competitive behavior—that is, a sense of achievement in the simulation and the increase in their expected earnings—were the same for males and females, a cost–benefit analysis that takes into account social costs would cause women to choose less aggressive tactics. The extent that such differential calculations would be made by male and female lawyers negotiating an actual settlement agreement with other lawyers rather than by male and female students participating in a simulation with other students attending the same law school is uncertain and requires further study.

In addition, for any of these reasons, male subjects in mixed-gender negotiating dyads might have adopted more competitive bargaining tactics when negotiating against women than they would have used against other men, a conjecture supported by literature that has found men adopt more aggressive tactics when negotiating with women than when negotiating with men at least in some contexts because they perceive the chances of
success to be greater in the former case (Ayres, 1991; Ayres and Siegleman, 1995).

5.4. The Puzzling Role of “Targets” in Negotiation

Other studies have shown that subjects with more aggressive goals achieve more advantageous bargaining outcomes than others, at least in some situations. It remains an open question, however, whether goals have a causal effect on outcomes, rather than being correlated with other variables that have a causal effect, and, if so, via what mechanism.

In the analysis presented here, the correlation between JointTarget and Plaintiff’s Surplus is highly significant when examined individually ($r = 0.38, P = 0.00$), but the statistical significance drops to a marginal status ($P = 0.12$) in the context of an equation that includes other individually significant variables. The path analysis shows that JointTarget has a significant effect on FOamount, which itself has a significant effect on Plaintiff’s Surplus, as well as a direct effect on surplus. From this, two conclusions can be drawn about the affect of Target in our study: (1) The negotiators’ targets are correlated with Plaintiff’s Surplus at least in part because negotiators with higher targets are likely to make more aggressive first offers. (2) Because the positive direct correlation between JointTarget and Plaintiff’s Surplus arguably approaches conventional levels of statistical significance ($P = 0.12$), it is quite possible that Target levels trigger other behaviors that positively affect Plaintiff’s Surplus, although the data do fall short of statistical significance at the usual confidence level.

How do negotiators determine their targets? Logically, selection of a target must be based in part on the negotiator’s reservation price, because it would make little sense to set one’s target below one’s reservation price. But because all of our plaintiff subjects had the same reservation price, this factor cannot explain the variance across subjects. It would also be sensible for a subject to select a target based on his estimate of the opponent’s reservation price, since the opponent’s reservation price marks the end of the bargaining zone and, therefore, what is possible to achieve (Buelens and Van Poucke, 2004). The significant relationship between JointOtherBL and JointTarget confirms this hypothesis, although the correlation is not precise: our subjects apparently took other factors into account as well when setting their pre-bargaining aspiration levels.
It is possible that negotiators also choose targets, at least in part, on what settlement amount they think would be fair to both sides. Our principal model does not account for this possibility because of our assumption, stated above, that subjects’ would set their target before determining what would be fair, rather than the opposite. If we reverse that assumption—that is, we assume that subjects decide what would be fair before they set their targets, even though we did not elicit their responses in this order on the pre-negotiation questionnaire—we find JointFair has a significant effect on JointTarget. Interestingly, however, in this alternative model, JointOtherBL has no significant impact on JointTarget. Because it seems implausible that negotiators’ estimates of their adversaries bottom lines would not significantly affect their targets, especially when such an estimate is explicitly elicited, we think that preferred model better fits the data than this alternative model. The reality is probably that many negotiators’ targets and perceptions of fairness are not determined in a strictly sequential manner, and that these two variables influence each other, but our model cannot accommodate this subtlety.

5.5. Does Fairness Matter?

The bivariate correlation between JointFair and Plaintiff’s Surplus indicates that, standing alone, subject’s estimates of what settlement amount would be fair to both parties has significant value in predicting negotiation outcomes. This significance disappears in the multivariate analysis, however. The reason is that JointFair is highly correlated with both JointOtherBL and JointTarget. Put differently, it appears that the bivariate correlation exists because the negotiators’ estimates of their adversary’s bottom line and their aspiration levels drove both their perception of fairness and their bargaining results, as reflected by Plaintiff’s Surplus, but that the fairness perceptions themselves did not drive the outcome.

This result remains the same if we assume that fairness perceptions precede and affect aspiration levels rather than the reverse. Under that assumption, fairness perceptions have a statistically significant impact on Target, and thus some indirect influence on Plaintiff’s Surplus, but still no significant direct influence on Plaintiff’s Surplus.

8. Respecifying the model in this fashion does not alter the overall fit of the analysis, and it also does not change the size or significance of the coefficient associated with JointFair. It remains.09.
6. Limitations and Cautions

As noted in the introduction, although the context of this study is a settlement negotiation, the results are relevant beyond the boundaries of the litigation system, and indeed beyond the boundaries of the legal profession more generally. However, the results might be dependent on other characteristics of the simulation, suggesting the importance of exercising caution in drawing prescriptive implications for settings in which these characteristics are not present.

6.1. Size of the Bargaining Zone

First, the bargaining zone in the simulation was quite large, which might tend to magnify the potential benefits of (for plaintiffs) high first offers, high estimates of the defendant’s reservation price, high targets, and relative enthusiasm for litigating the case, while obscuring the related risks. Many, if not all, of the factors that led to better outcomes for our subjects, could have increased the risk of impasse if the bargaining zone had been smaller and more difficult to locate (Oesch and Galinsky, 2003). A negotiator might interpret the findings of this study to suggest more surplus can be captured by making aggressive first offers, setting aggressive targets, assuming that your opponent would be willing to make large concessions rather than except an impasse, hiring an agent who enjoys litigating, and, perhaps, hiring a male agent. But all of these tactics might be contraindicated and lead to disaster if the bargaining zone is small, because the risk of impasse is greater and the amount of cooperative surplus available in the case of an agreement is smaller in such conditions.

6.2. Size of Bargaining Zone Relative to Subject Estimates

Second, the bargaining zone was not only large in an absolute sense, but it was also larger than most of the subjects estimated it to be. On average, plaintiff subjects estimated that the defendant’s reservation price was just over $46,000 when the defendant’s actual reservation price was $60,000; defendant subjects estimated the plaintiff’s reservation price to be just under $47,000 on average, when, in fact, it was $10,000. The value of estimating the opponent’s reservation price to be relatively high (or, for defendant subjects, relatively low) is likely to be magnified under these conditions. If, for example, the average plaintiff subject estimated the defendant’s reservation
price to be substantially higher than the defendant’s actual reservation price, this would suggest that the marginal value to be gained from an even higher estimate would be lower than it was in the simulation, making increases in OtherBL less predictive of an increase in surplus. The same analysis applies for FOamount and Target. Because 40% of the gender gap can be explained by the lower OtherBL estimates of female plaintiffs, the gender gap also might be substantially reduced in a bargaining situation in which the parties tend to overestimate rather than underestimate the weakness of their counterpart’s reservation price.

Intuitively, it seems likely that, at some point, increasing OtherBL, FOamount, and Target values would not only yield declining marginal benefits, but also their marginal value might even turn negative, reducing Plaintiff’s Surplus, because they will lead to behaviors that the opposing counterpart might view as offensive and/or indicative of unreasonable expectations and provoke retaliation or disengagement. Thus, some negotiation scholars give advice like “make high first offers, but not too high.” (Bazerman and Neale, 1992; Shell, 1999).

With the caveat more research needs to be done on this issue, it does bear noting that the dataset presented here provides no support for the conjecture that the value of increasing OtherBL, FOamount, or Target peaks. As the OtherBL, FOamount, and Target of plaintiff subjects increased, there was no point at which the plaintiffs’ share of the surplus leveled off or began to decline, at least to a statistically significant degree. That is, the benefit to plaintiff subjects of higher OtherBL, FOamount, and Target seemed to continue relatively steadily, even at very high levels.

6.3. Absence of Information about Similar Transactions

Third, although subjects had a clear reservation price and sufficient information to understand the nature of the legal risks their client would face if settlement negotiations failed and the dispute continued to adjudication, they lacked any information about settlement agreements that had been reached in similar cases. This is a realistic representation of some types of disputes (those in which the factual evidence varies substantially from case to case) but not of others (those in which many lawsuits share similar facts). For example, lawyers handling lawsuits arising from automobile accidents are not only able to estimate the risks of litigation, but they also are likely to have some information available from personal experience, colleagues, or
databases about settlement prices paid in similar cases. This information can provide an “objective criteria” (Fisher et al., 1991); or a “reference transaction” (Korobkin, 2000) that can serve as focal point in negotiations.

It is a reasonable hypothesis that as available information concerning reference transactions increases, a focal point in the negotiation will emerge decreasing the impact on outcomes of the variables OtherBL, Foamount, and Target. Further, this effect could be greater for women than men, which would suggest, in turn, the availability of information about reference transactions could decrease the gender gap. One recent experiment found that male MBA students negotiated higher starting salaries with their employers than similarly situated female students, but that the gender gap did not exist in industries in which data concerning typical starting salaries were readily available (Bowles, et al., 2005).

7. Conclusion

Using the methodology of a controlled simulation, we found that bargaining success, defined as maximizing the amount of cooperative surplus captured by a party in a settlement negotiation, is best predicted by the following factors, in order of importance, taking into consideration the direct effects of these variables and the indirect effect of the variables as mediated by other variables:

1. The negotiators’ estimates of the counterpart’s reservation price;
2. The gender of the focal negotiator (with males capturing more surplus than females);
3. The amount of the first offer made (with higher first offers predicting higher settlements, regardless of which party makes the first offer);
4. The negotiators’ aspirations (with more aggressive aspirations predicting greater success);
5. The negotiators’ relative enthusiasm for litigating the case;
6. The negotiators’ relative confidence in their negotiating ability; and
7. The negotiators’ opinions concerning what would constitute a fair outcome.

The generalizability of these results depends on the universality of the parameters built into the simulation. Of specific concern are the fact that the simulation involved a large bargaining zone, that the bargaining
zone was substantially larger than most subjects apparently expected it to be, and the negotiators had no information about how similar lawsuits were resolved, either through settlement or adjudication. Future research should manipulate these variables to see whether the factors that predict negotiation success in the present context also predict success in different settlement contexts, or whether determinants of success differ with the structure of the bargaining problem.

Our study attempts to minimize external validity concerns by using a highly contextual and realistic (but not overly complex) simulation context, employing law students (i.e., future lawyers) as negotiators, and providing a level and type of compensation designed to encourage the subjects to exert an amount of effort in the simulation that one would expect actual lawyers to demonstrate in real-world settlement negotiations. Despite these steps, external validity remains a valid concern, and especially so concerning the gender gap, given that there are reasons to hypothesize that (a) the consequence of negotiating with classmates and (b) the lack of comparative information concerning similar disputes might have differentially affected the results achieved by female subjects. External validity concerns might be addressed further in future studies by employing practicing litigators rather than law students as subjects, providing different amounts or types of compensation in order to regulate effort, or by making the personal and social consequence of negotiating behavior more realistic by having subjects bargain against negotiators with whom they are not likely to interact on a routine basis in the way that law students are likely to interact with their classmates.

Appendix A

Table A1. Pearson R Correlations among the Variables in the Analysis

<table>
<thead>
<tr>
<th></th>
<th>Surplus</th>
<th>Female</th>
<th>JointOtherBL</th>
<th>JointFair</th>
<th>JointTar</th>
<th>FOAmt</th>
<th>JointLitAlt</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>-0.404**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JointOtherBL</td>
<td>0.599***</td>
<td>-0.353**</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JointFair</td>
<td>0.474***</td>
<td>-0.156</td>
<td>0.675***</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>JointTar</td>
<td>0.382**</td>
<td>-0.025</td>
<td>0.281*</td>
<td>0.409**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>foamt2</td>
<td>0.440**</td>
<td>-0.171</td>
<td>0.232</td>
<td>0.083</td>
<td>0.223</td>
<td></td>
<td></td>
</tr>
<tr>
<td>JointLitAlt</td>
<td>0.375**</td>
<td>-0.053</td>
<td>0.252</td>
<td>0.378**</td>
<td>0.268*</td>
<td>0.098</td>
<td></td>
</tr>
<tr>
<td>JointConf</td>
<td>0.266*</td>
<td>-0.085</td>
<td>0.216</td>
<td>0.082</td>
<td>0.007</td>
<td>-0.002</td>
<td>0.100</td>
</tr>
</tbody>
</table>

*P < .05, **P < .01, ***P < .001.
Appendix B

Table B1. Path Analysis Results

<table>
<thead>
<tr>
<th></th>
<th>JointOtherBL</th>
<th>JointFair</th>
<th>JointTarget</th>
<th>FOamount</th>
<th>Plaintiff’s Surplus</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
<td>-23561**</td>
<td></td>
<td></td>
<td></td>
<td>-4660*</td>
</tr>
<tr>
<td></td>
<td>(8510)</td>
<td></td>
<td></td>
<td></td>
<td>(2003)</td>
</tr>
<tr>
<td>JointOtherBL</td>
<td>0.545***</td>
<td>0.165*</td>
<td></td>
<td>0.088*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.089)</td>
<td>(0.077)</td>
<td></td>
<td>(0.039)</td>
<td></td>
</tr>
<tr>
<td>JointFair</td>
<td></td>
<td>0.031</td>
<td></td>
<td>0.045</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>(0.165)</td>
<td></td>
<td>(0.165)</td>
<td></td>
</tr>
<tr>
<td>JointTarget</td>
<td>0.363*</td>
<td>0.232*</td>
<td></td>
<td>0.083</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.152)</td>
<td>(0.138)</td>
<td></td>
<td>(0.053)</td>
<td></td>
</tr>
<tr>
<td>Relative LitEnthusiasm</td>
<td>0.611*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.303)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foamount</td>
<td>0.147***</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.047)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Relative Confidence</td>
<td>0.974*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.524)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Chi-square = 17.838 (df = 16, n = 55, P = 0.333), CFI = 0.980, TLI = 0.964, R-squared = 0.52.

* P < 0.10, ** P < 0.05, *** P < 0.01, **** P < 0.001.

Stimulus Materials

Plaintiff’s Lawyer’s Confidential Instructions

You are an attorney in a small law firm with a general practice. Currently, you are representing Henry Smith in an employment discrimination lawsuit against his former employer, Elected Corporation. Two years ago, Smith was fired by his Electec after 18 years of employment in a middle management position. Smith is now happily employed in a similar position in another company at the same salary level, but it took him a full year to find his new job. Smith recently filed a complaint against Electec claiming age discrimination and seeking damages of $100,000—his $75,000 annual salary for the year he was unemployed, plus $25,000 for emotional distress. (Smith has no interest in getting his old job back, and he has told this to Electec.) Electec filed an answer to the complaint denying the charge and claiming that it has no legal liability to Smith.
Smith bases his charge of age discrimination on the following facts, which are known by both parties: He was fired almost immediately after he turned 60 years old. All of his performance evaluations have rated his performance as at least “very good.” All other Electec employees promoted to his level over the past few years have been under 40 years of age, despite the fact that many other employees eligible for such promotions have been older. Shortly before he was fired, Electec had been criticized by Wall Street investment analysts for having high pension liabilities compared to its competitors.

The company denies Smith’s charge of discrimination, and has pointed to the following facts, also known to both parties: A reduction in business last year forced it to lay off 10% of its workforce. The 10% was made up of younger and older employees. Smith’s performance evaluations consistently rated him as “excellent” for his first 14 years with the company, but his rating has slipped to “very good” for the last 4 years in a row. Five other employees at Smith’s management level were over 60 years old at the time Smith was fired and are all still employed by Electec.

The relevant legal standard, should the case be litigated, is described by the Supreme Court in the attached excerpt of Hazen v. Biggins, 507 U.S. 604 (1993). Both sides have conducted substantial discovery in the case, and there is no likelihood that Electec knows facts relevant to legal merits of the case that you do not know. Of course, Electec and its lawyers might have different opinions than you and Smith have about the likelihood that Smith would prevail if the case were to go to trial.

Smith has asked you to meet with Electec’s lawyer to try to negotiate an out-of-court settlement on his behalf, and he has given you the following instructions (which are not known by Electec): Smith, not surprisingly, wants you to negotiate the largest settlement possible. However, Smith understands that his chances of prevailing in court should settlement negotiations fail are uncertain, that staging a jury trial would be costly (and that Smith would have to dip into his limited funds set aside for retirement to finance the litigation), and that a trial would cause him emotional distress (he does not want to be cross-examined by Electec’s lawyers, who will no doubt try to depict him as an incompetent employee). Taking all of these factors into account, you and Smith have decided that your “bottom line” in the negotiation will be $10,000—in other words, you should not leave settlement negotiation without an agreement if it is possible to get at least $10,000. If you cannot convince Electec to pay Smith at least $10,000, you should decline to settle.
the case. If there is no settlement, Smith will retain a specialist in employment law litigation to represent him in court in this matter, notwithstanding the costs and risks of trial.

Smith has agreed to pay you 1% of whatever settlement amount you are able to negotiate, up to $1000 (provided that you do not agree to any settlement of less than his bottom line of $10,000). So, for example, if you were to agree to settle the case for $11,000, you would earn $110; if you were to agree to settle the case for $99,000, you would earn $990. If you are unable to reach a settlement, Smith will pay you a flat fee of $100 for your effort.

You may say anything you like to the opposing negotiator during the negotiation, but you may not show him or her these confidential instructions.

∗∗∗

At the end of the negotiation session, a random process will select one negotiation as the “real money” negotiation. If your negotiation is selected, the researchers will pay you—in addition to $10 for simply participating in this study—your fee (as described above) in cash, based on the outcome of your negotiation. If your negotiation is not selected as the “real money” negotiation, you will still receive your $10 payment for participating in the experiment.

Defendant’s Lawyer’s Confidential Instructions

You are a lawyer in a small firm with a general “business law” practice. One of your clients is Electec Corporation. Two years ago, Electec fired Henry Smith from a middle management position. Just recently, Smith filed a lawsuit against your client alleging employment discrimination. According to Smith’s complaint, he is now employed in a similar position in another company at the same salary level, but it took him a year to find his new job. The complaint seeks damages of $100,000—Smith’s $75,000 annual salary for the year he was unemployed, plus $25,000 for emotional distress. The complaint does not ask that Electec reinstate Smith in his old job, and Smith has told Electec he has no interest in getting his job back. You filed a brief answer to Smith’s complaint on behalf of Electec, denying the charge and denying any legal liability to Smith.
Smith bases his charge of age discrimination on the following facts, which are known to both parties: He was fired almost immediately after he turned 60 years old. All of his performance evaluations have rated his performance as at least “very good.” All other Electec employees promoted to his level over the past few years have been under 40 years of age, despite the fact that many other employees eligible for such promotions have been older. Shortly before he was fired, Electec had been criticized by Wall Street investment analysts for having high pension liabilities compared to its competitors.

Electec bases its defense to Smith’s charge of discrimination on the following facts, which are also known to both parties: A reduction in business last year forced it to lay off 10% of its workforce. The 10% was made up of younger and older employees. Smith’s performance evaluations consistently rated him as “excellent” for his first 14 years with the company, but his rating has slipped substantially to “very good” for the last 4 years in a row. Five other employees at Smith’s management level were over 60 years old at the time Smith was fired and are all still employed by Electec.

The relevant legal standard, should the case be litigated, is described by the Supreme Court in the attached excerpt of *Hazen v. Biggins*, 507 U.S. 604 (1993). Both sides have conducted substantial discovery in the case, and there is no likelihood that Electec knows facts relevant to legal merits of the case that you do not know. Of course, Electec and its lawyers might have different opinions than you and Smith have about the likelihood that Smith would prevail if the case were to go to trial.

Although you are not a litigator, Electec has asked you to meet with Smith’s lawyer to try to negotiate an out-of-court settlement, and the company has given you the following instructions, which are not known to Smith:

Not surprisingly, Electec hopes that you can convince Smith to settle the case for a very low amount of money, and wants you to try to achieve a settlement for as little money as possible. However, Electec realizes that its chances of prevailing in court should settlement negotiations fail are uncertain, that staging a jury trial would be costly (it would probably cost the company at least $10,000–$20,000) and that a trial is likely to create a great deal of negative publicity for Electec that the company wants to avoid. In light of these considerations, Electec has decided that your “bottom line” in the negotiation will be to pay $60,000 to settle the case. In other words, Electec has instructed you that you should not leave the settlement negotiation...
without an agreement if it is possible for you to secure a settlement by agreeing that Electec will pay Smith $60,000 or less. If you cannot convince Smith’s lawyer to accept $60,000 or less, then you should decline to settle the case. If this occurs, Electec will hire a litigator and take its chances in court.

Presumably, Electec could call Smith’s lawyer, simply offer to pay $60,000 to settle the case (its “bottom line”), and then pay that amount if Smith were to accept the offer and go to court if Smith were to reject the offer. Consequently, Electec figures that if you can negotiate a settlement for any amount less than $60,000 you will have saved it money. Elected thus has agreed to pay you a flat fee of $100 for handling the negotiation plus commission of 1% of every dollar you save them by settling the case for less than $60,000. So, for example, if you settle the case for $1,000, you would save Electec $59,000 and your fee would be $590 + $100; conversely, if you were to settle the case for $59,000, you would save Electec $1,000 and your fee would be $10 + $100. If no settlement is reached, you will receive the $100 fixed payment but no commission. If you were to ignore Electec’s instructions and agree to a settlement of more than $60,000, you will receive no payment at all.

You may say anything you like to the opposing negotiator during the negotiation, but you may not show him or her these confidential instructions.

***

At the end of the negotiation session, a random process will select one negotiation as the “real money” negotiation. If your negotiation is selected, the researchers will pay you—in addition to $10 for simply participating in this study—your fee (as described above) in cash, based on the outcome of your negotiation. If your negotiation is not selected as the “real money” negotiation, you will still receive your $10 payment for participating in the experiment.

Supreme Court of the United States
HAZEN PAPER COMPANY, et al., Petitioners,

v.
Walter F. BIGGINS.

No. 91-1600.
Decided April 20, 1993.
Justice O’CONNOR delivered the opinion of the Court.

...In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer’s decision. ...The employer may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait. ...Or the employer may have been motivated by the protected trait on an ad hoc, informal basis. ...Whatever the employer’s decision-making process, a disparate treatment claim cannot succeed unless the employee’s protected trait actually played a role in that process and had a determinative influence on the outcome.

Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age. As we explained in EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983), Congress’ promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes. ...Thus, the ADEA commands that “employers are to evaluate [older] employees . . . on their merits and not their age.” ...The employer cannot rely on age as a proxy for an employee’s remaining characteristics, such as productivity, but must instead focus on those factors directly. ...

...In the ordinary ADEA case, indirect evidence ... may well suffice to support liability if the plaintiff also shows that the employer’s explanation for its decision ... is “unworthy of credence.” ...

So ordered.

References


