



## **When to Litigate and When to Settle: 5 Tips for Determining Your Legal Strategy**

**Litigation and Dispute Resolution**

**Corporate, Securities, and Governance**



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If only we had a crystal ball to predict that a seemingly defensible case would, alas, result in a seven-figure verdict, or whether a troubling liability lawsuit would end with a verdict less than what was offered to settle the case before trial.

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## 1. Unreasonable demand

An exaggerated amount in a lawsuit can make the decision easy. When plaintiff's counsel refuses to drop into a reasonable realm for settlement, the company really has no option but to litigate. [The increase in nuclear verdicts](#) across the nation has emboldened plaintiffs' attorneys, and some are simply unreasonable about settlement. The company must decide whether to allocate available resources to trial preparation rather than paying the current asking price.

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## 2. Defensible product

In a product liability case, special consideration should be given to defending the product and what that means to the company. Cases involving product misuse or assumed risk are usually good candidates for trial. If there are other cases involving the same product, showing those plaintiffs that the company is not afraid to defend its product can impact the resolution of similar litigation.

## 3. Early investigation

Assessing early the strength of your case is key to determining the path forward. Interviewing witnesses, getting experts involved early and preserving relevant evidence are all crucial steps. This is particularly crucial in cases where there is video or some other evidence of the company's conduct that is devastating to your case. Use that information to make an early evaluation and attempt to resolve the case pre-suit or as early as possible. Early investigation also may reveal damaging evidence to the plaintiff's case which could impact your litigation strategy.

## 4. Available insurance

The amount of coverage and applicable [self-insured retention](#) (loss not covered by the insurance policy) should be part of internal discussions when evaluating whether to settle or go to trial. Insurance market payouts have gotten progressively higher in recent years, so their [run rates](#) factor in at renewal time and can cause payout resistance and higher premiums. A company should consider the financial impact of litigation, and/or settlement and the related interplay with insurance.

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## 5. Disputed facts

Most cases present disputed facts, but when there is a fundamental disagreement over essential facts in the case, the chance of resolution through settlement is usually lower. The parties may have to litigate to develop evidence that weighs more heavily in favor of one side or the other. If the evidence is relatively balanced, the best path forward may be to let a jury decide.

Giving due consideration to these five factors will hopefully help in-house counsel make an informed decision about which path is right for each case. That path may change as litigation progresses, but these tips can be used to guide the company's ongoing evaluation and assessment.

[For more information about the Commercial Courts resolution and how chapters can use this resolution, please contact ACC's AGC and Director of Advocacy Initiatives, Amy Chai.](#)

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