Tracing The Path To Health Care Investigation Settlements

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Leo Tolstoy famously wrote in Anna Karenina that all happy families are alike, but every unhappy family is unhappy in its own way.

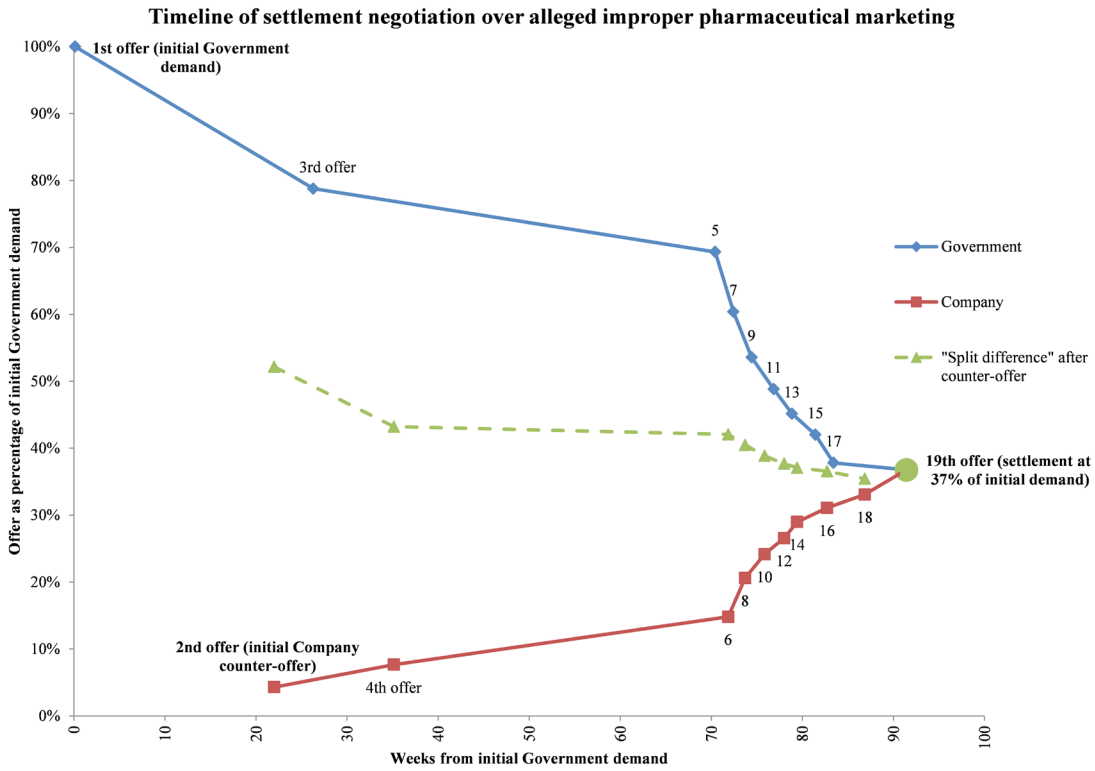
In our experience with settlement agreements reached by the government and pharmaceutical manufacturers on investigations under the False Claims Act and federal Anti-Kickback Statute, we have observed that although every investigation begins with its own unique underlying story and facts, the eventual paths to settlement are alike on certain key dimensions.[1]

This article discusses common features that tend to characterize a negotiation once an initial demand or settlement offer has been made.

To support our observations, the accompanying chart provides a representative path based on our experience performing modeling and analysis to support numerous settlement negotiations.

Given the negotiations' confidential nature the chart presents percentages of the initial demand or offer based on blended data from multiple settlements, rather than actual dollar values.

In economics, negotiations are often analyzed in terms of game theory. This is a common setting that focuses on making the best possible move while anticipating that the opposing party will respond with its best possible move. Indeed, although the alleged acts being investigated are often quite serious and the monetary stakes are often quite high,



the idea of a negotiation as a "game" is a helpful metaphor. We have observed that negotiations tend to be "played" in five general stages:

1. Defining the "field of play": Prior to an initial government demand (or initial company offer), the two sides present a mix of qualitative and quantitative arguments to one another. These tend to characterize the scope and severity of the alleged acts at issue as well as the potential factors underlying the likely causation arguments. At this stage the approaches may be wildly different; with key facts still in dispute, the two sides may be playing on different fields, by different rules. Even before either side puts forth a damages number, they may begin to converge on certain areas of agreement or rule out irrelevant approaches. At this stage, it is often helpful to begin developing a flexible, quantitative model that can gather up all the available data and apply selected causation factors to determine damages under different potential approaches. Such a model can also serve as a "scouting report" on potential approaches being contemplated by the other side.

2. The "first pitch": An initial government demand (as shown on the chart) or initial company offer is made, and along with it a methodology is put forward. Both sides can draw an advantage from making the first move to quantify damages, but also face potential drawbacks in so doing:

- The first move can act as an "anchor" for the ensuing negotiation, with both parties making subsequent offers as modifications to the initial value and method, rather than starting from a clean slate. There is substantial literature showing that the anchoring effect can be a powerful one, even if the initial value is arbitrary.[2]

- On the other hand, the first party to move faces a strategic challenge. Too aggressive an offer may be dismissed by the other party and may thus diminish the anchoring effect. But an initial offer that includes too many concessions leaves little room for movement if the other side is aggressive in its counter-offer.
- The first party also faces methodological challenges. At this stage, the government may have access to total sales or prescription figures but only limited visibility into the details underlying the conduct at issue. In contrast, the company may lack quantitative information on reimbursements by some relevant government programs. Moving second gives an opportunity to draw on whatever supporting information was provided along with the initial offer, and can avoid the risk of blind spots.

3. The "counter": The first counter-offer often follows a very different methodology, reflecting the remaining factual disagreements and resulting differences in approach. In effect, the two sides may still be playing parallel games on different fields.

4. The "time-out": With initial numbers and methods on the table, there may be relatively long delays between counter-offers, though the length of the delays depends on the magnitude of the disagreement. Note that the negotiation process in the chart shows one lengthy time-out, but some negotiations may have a series of shorter delays before the pace of negotiations picked up. By the end of this phase, the two sides will have reached agreement on some arguments over the merits of the allegations, and acknowledged that some other arguments will not likely be resolved. As a result of doing so, they are able to adopt a single damages methodology moving forward, typically one that includes flexible parameters that allow for various damages scenarios to be calculated based on the various causation factors still in play. This methodology, as built into a flexible model, is the culmination of the "scouting report" model developed in the first stage of the negotiation. The granular nature of the health care data involved often allows these factors to be precisely quantified and fine-tuned in the model. Though disagreements may still remain, the two sides are now playing the same game, on the same field of play.

5. The "end-game": The negotiation pace picks up as the two sides continue to dispute "balls and strikes" but are unlikely to return to the more fundamental disagreements from earlier phases. The flexible model developed in the earlier stages is often the engine for closing the negotiation, as it can be quickly updated to reflect new compromises and generate additional scenarios for counter-offers without starting the analysis from scratch each time. As this phase progresses, offers tend to become less focused on the data themselves and gradually move toward horse-trading over the remaining points of disagreement. The two sides often become more willing to capitulate on one factor in return for a concession on another, and eventually may split the remaining difference.

It is noteworthy that most of the changes embedded in the offers and counter-offers occur within the first few rounds. This is shown in the dotted green lines depicting what would have happened had the two sides split the difference at any point along the way. In the "end-game" there may be a flurry of counter-offers as the two sides converge toward an agreement. A flexible model that computes alternate scenarios within the agreed-upon

damages methodology is essential to make this phase efficient, and can be used to anticipate how the end-game will play out.

That the outcome has, in our experience, generally been less than an even split of the initial offers has a few potential explanations: companies may be more tenacious and expend more on legal and analytical support; the government may take an aggressive initial stance in setting their opening demand; or, to the extent other factors enter into the negotiation, companies may be willing to trade more stringent ongoing compliance agreements in return for a lower upfront settlement figure. Exclusive focus on changes in the settlement offers cannot capture important underlying dynamics of this type that may also be at play.

Though settlement negotiations in such cases are unlikely to become simpler or less protracted anytime soon, we hope these observations help to make them somewhat less opaque. The more we know what patterns to expect, the better we can forecast potential outcomes, and the more efficiently we can help reach agreements amenable to both sides.

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Endnotes

1 As in the Bureau of National Affairs checklist "Calculating Damages Under the False Claims Act": " ... there is no single rule for calculating damages under the [False Claims] Act. The damages must be determined based on the facts of the particular case at issue and identifying and valuing damages can be a murky task. While there is no hard and fast rule, the fundamental guiding principle in calculating damages is to make the government whole for any damages incurred 'because of' a violation of the Act."

2 See, for example, Adam Galinsky, "Should You Make the First Offer?" Negotiation, July 2004.The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.