

Settling Out of Court

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“I would rather lose my vineyard,” wrote Montaigne, “than go to court for it.” Many Americans apparently feel otherwise. Whether or not we are, as many have charged, the most litigious nation in human history, our civil litigation rate is certainly among the highest in the world.

Most law suits — upwards of 90 percent — settle out of court before a formal jury verdict or judicial decision is rendered. This is a matter of sheer necessity. “It is a given,” according to U.S. District Court Judge H. Lee Sarokin, “that if cases did not continue to settle in roughly the same percentages, our system of justice would come to a standstill.” For reasons of cost and speed, “in rare exceptions, it must be conceded that the preponderance of settlements in the judicial system is a worthy goal.”

The imperative toward settlement rather than trial is defended on other, less purely expedient, grounds as well. Settlement is claimed to leave participants more satisfied with the resolution of their case. It is lauded as representing a voluntary agreement between the parties rather than a coercive court order, a give-a-little, get-a-little compromise rather than a lopsided black-and-white judgment in which the winner takes all. And what Harvard’s president Derek Bok has called the “gentler arts of reconciliation and accommodation” involved in negotiating a settlement are, well, kinder and gentler than the aggressive rough-and-tumble of hard-ball litigation in the adversary system. Insofar as the so-called litigiousness of the American public is