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### **Anchoring – When Holding Firm Sinks a Case**

#### **I. What is an Anchor and how does it impede results?**

##### **a. Anchoring is popular to send a shot across the bow.**

Anchoring is a cognitive bias that describes the common human tendency to rely disproportionately on the first piece of information offered (the “anchor”) when making decisions. In negotiations, the anchor via an initial offer, especially when presented as intransigent, can result in adverse decisions.

This initial piece of information, the first offer, is the basis of the subsequent decision whether to continue negotiations. When an offer is deemed too low, or to be an indicator of lack of good faith negotiations, plaintiff(s) can have an immediate, visceral, negative reaction and cease negotiations based on that first impression.

A shot across the bow to relay a defense position should be strategic and not a show that sinks the case. Driving a case to trial that could have been resolved at a mutually agreeable number is often a less than optimal use of defense costs, increases risk for a carrier, and may result in a judgment in excess of policy limits, creating other exposures. Appropriate use of an anchor, in managing risk, is key.

##### **b. The cognitive bias that results can impede progress and the goal.**

Once an anchor is set, other judgments are made by adjusting away from that anchor, and there is a bias toward interpreting other information around the anchor. An initial offer that is deemed too low by plaintiff can result in a judgment that defense has undervalued the case and cause the plaintiff to walk away from negotiations.

Also, an initial demand that is too high is a technique to set the standard for the rest of the negotiations, so that subsequent demands seem lower than the initial thus more reasonable even if they are still higher than the actual range of the case. The attempt to move the ceiling to the floor. Thus, negotiating with awareness of plaintiff’s use of the anchoring technique is key

to avoid sinking a case by moving outside of the authority range or deeming a case as unable to resolve due to a high initial settlement demand.

## II. **The right mindset and agile approach can allow anchoring without sinking a case.**

- a. **Mindset**- understanding that negotiations are a process and may involve several rounds of discussions, a pause at times, and awareness of cognitive bias potential can assist in reducing the anchoring effect. Communications with plaintiff should also convey that discussions will continue but an anchor is to establish a value based on information assessed to date, while still inviting rebuttal to those assessments or new information that is additive to the evaluation.
- b. **Agility**- creative movement can also reduce the cognitive bias of an anchor. Presenting an odd number that indicates a lengthy value assessment or decision tree is useful. Also, a subsequent offer that is not a reaction to a frustrated counter demand but shows an interest in progress can show an agile approach. Introducing non-monetary aspects to the offer can also show an agile approach, while retaining an anchor number.
- c. **Latent evidence**- often in negotiations, plaintiff counsel will now wait until mid-discussions to present impactful evidence. There is a diminution of responsiveness to requests for information, discovery, etc. early in a case now thus less of an ability to comprehensively evaluate a matter before dispute resolution attempts begin. "Sandbagging" or "hiding the ball" are often mentioned concerns for defense. Accordingly, anticipating these latent items in advance is helpful to continue resolution progress while still utilizing an anchor.

For instance, if medical records for an injury case reference ongoing treatment or the need for future treatment, but those later records are missing, an expert can assist in assessing the most probable cost of same, impact on recovery, etc. Also, identifying the payor of those medical bills can assist in assessing the probable offset of a regular billed amount (paid v. incurred).

## III. **Techniques to continue sending the position message without stalling**

- a. **The magic word "because"**- attached to initial offer the word "because" provides a basis and context for the offer to reduce cognitive bias and the appearance it is arbitrary. It should attach to each subsequent offer as well to convey why it has increased; what new factors were taken into consideration to change the offer and what impact they had on same (e.g. updated odds of a liability or damage assessment based on new evidence, a new expert retained by opposing counsel, a new witness, recently assigned judge, pending motion, etc.)
- b. **Resolution oriented language**- use language that confirms the initial offer or subsequent small increased offers are not dispositive. Words such as "at this time, we are prepared to offer x," or "based on what we have received and assessed, we are comfortable offering y at this time," can show willingness to continue discussing

resolution (values, injunctive terms, etc.) despite being far apart at that point in negotiations.

- c. **Preparation-** Consider the case nuances, personalities involved, procedural posturing at time of negotiations, specifics as to judicial rulings, venue nuances, etc. Decision trees are a good tool to factor in these considerations to an evaluation in an empirical manner and create a road map for a negotiation plan.
- d. **Leverage-** ensure all leverage that supports the anchoring number is asserted at the time the anchor is utilized (e.g. motions, offers of judgment, targeted discovery, etc.). When presenting the anchor, point to the leverage as a basis for the offer. It is support for the number and shifts to plaintiff to overcome the assertion.
- e. **Realistic values-** (consider all elements of damages, joint and several liability or reallocation exposure, derivative claims, venue or nullification exposure, etc.)
- f. **Ask for any new information not yet presented.** Continuing to request additional or new information to substantiate a demand that is outside an assessed range, conveys a willingness to consider additional factors that the other side has not fully developed or perhaps presented in a compelling manner. The openness reduces cognitive bias. The new information can be related to coverage, liability, or damages.
- g. **Consider expert support.** An anchoring number may be determined pursuant to an expert's assessment. If the assessment can strategically used at the time of negotiations as opposed to conveying defense strategy too early in a case, support via that assessment (report, in person expert mediation, etc.) can be presented with the anchor.
- h. **Avoid compressed time frames.** As anchoring can result in cognitive bias that works against immediate resolution, it is best utilized in negotiation situations that allow sufficient time for an explanatory presentation, receipt and review of contravening information, and time for both discussion of point and counter point and time to identify and overcome a cognitive bias.
- i. **Negotiate to a target.** Inherently, when negotiating to an anchor or to full authority, messaging and inferences will lean towards that number. By establishing a target resolution, and negotiating to that number, signals will allow movement from the anchor to continue discussions but will not signal a full authority number for a case. Choose a target and move towards it.

#### **IV. Ethical considerations when anchoring**

Seeking to resolve an insured or client's case within policy limits, for covered matters, remains a primary obligation. Ensuring an anchoring position does not implode resolution potential is key to the negotiation process. If a plaintiff becomes upset with an offer, the demand may increase. With the reality of social inflation increasing verdicts at this time, and effective plaintiff

techniques such as the reptile theory, case law allowing blackboarding of billed amounts rather than offsets that are allowed, inflated verdicts have a greater likelihood of occurring and can exceed policy limits. In cases where limits are at issue, including the insured in the negotiation steps and arguments and keeping the insured apprised all along is imperative.

Also, for self-insured retention matters, an insured has an ethical obligation to a carrier to avoid improper exhaustion by over-reliance on an anchor that then sinks negotiations within the SIR threshold, sending it into the carrier's layer.

A final factor to consider is that while there is active litigation against a client or insured, it may affect their ability to secure loans, employment, etc. Accordingly, prudent use of anchoring to resolve a matter for the appropriate amount is a broad-based ethical obligation.

## **V. Overall strategy is key, including when anchoring**

The human mind is biased by first impressions. Accordingly, the initial offer in negotiations can create a strong position message but also run the risk of sinking the case by plaintiff's judgement that there is an insurmountable gap to overcome to reach a resolution.

Accordingly, how the anchor is presented, attaching it to an empirical, evaluative reasoning and facilitating a follow-up discussion is critical to a successful outcome. Using the anchor to present a defense position must be accompanied by sound reasoning. It also needs to be presented in a manner that invites further discussion, especially presentation and consideration of new information.

Inherent in the process of effective anchoring, is the need for additional time for negotiations. Avoid compressed negotiation timeframes when anchoring, use resolution language, and continually request a response and any new information. Be agile, creative, and maintain a positive, resolution-oriented mindset.