Resolving Disputes Using Principle-Based Mediation

Foundation Performance Association

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Executive Summary

- Benefits of Mediation

- Mediation Method (Principle-Based)

- Mediation Settlement Analysis

Dispute

P's Prospective		D's Prospective
Maximize Recovery	▶	Minimize Exposure
Fast Resolution	▶	Slow Resolution
Public	▶	Confidential
Minimize Resolution Costs	▶	Minimize Resolution Costs

Dispute Resolution

1 Method 1: Litigation

2 Method 2: Arbitration

3 Method 3: Mediation

Method 1: Litigation

- US Constitution – Amendment VII

- Texas Constitution – Article 1 Section 15

Method 1: Litigation

Advantages

- Reviewable
- Fair
- Established Rules

Disadvantages

- Expensive
- Slow
- Jury/Judge Decides Destiny
- Not Final

Method 2: Arbitration

- Federal Law - 9 U.S.C.A. § 1-15 (West 1970 and Supp. 1990)

- Texas Law – Tex. Civ. Prac. & Rem. Code Ann. §154.023

- Texas Residential Construction Commission (TRCC)

Method 2: Arbitration

Advantages

- Final
- Faster

Disadvantages

- Expensive
- Perceived Bias
- Can be non-reviewable
- Arbitrator Decides Destiny

Method 3: Mediation

- Mediation is a forum in which an impartial person, the mediator, facilitates communication between the parties to promote reconciliation, settlement, or understanding among them. See Civ. Prac. Rem. & Code Ann. §154.023.

Method 3: Mediation

Advantages

- Inexpensive
- Fast
- Final
- Parties Decide Destiny
- Narrow the issues

Disadvantages

- Can be wasteful
- Bad faith participation
- Ineffective

Benefits of Mediation

	Litigation	Arbitration	Mediation
Cost	$$$$$	$$$$	$$
Time	Slow	Faster	Fast
Review	Yes	No	-
Confidential	No	Maybe	Yes
Destiny	Jury	Arbitrator	Parties

Principle-Based Mediation Model

Steps

1. Opening Statements
2. Discussion
3. Problem Statement
4. Brainstorming
5. Resolution
6. Writing

Purpose

Purpose: Mediator is a "facilitator" that attempts to have each Party express their case in a manner that the other can comprehend

Step 1: Opening Statements

Opening

Opening statements provide each side with an opportunity to identify purpose

- Nature of claim
- Types of damages
- What they hope to accomplish

Key Terms

- Prepared
- Short Statement
- Concise
- Desire to Resolve

Step 2: Discussion – Identify the "Principles"

Position		Principle
$1000	➤	Compensation
Not me	➤	Responsibility
Quality	➤	Fairness

Purpose:
- Party explains their case to opposing party
- Mediator "translates" the case to neutral language
- Mediator identifies principles

Step 3: Problem Statement

Purpose

After discussing the issues, the <u>Mediator</u>, states the <u>principles</u> in the form of a question, with the answer being the resolution

Key Terms

- Written on blackboard
- Identifies <u>principles</u>
- Addresses both sides
- Concise
- Solution is resolution

Example:

How can A be <u>compensated</u> at a price that is <u>fair</u> to B?

Step 4: Brainstorm

Purpose

The <u>Parties</u> indicate possible solutions to the Problem Statement

Key Terms

- Mediator writes options below PS
- No discussion
- Positions

Continue until all possible solutions are exhausted

Step 5: Resolution

Purpose

After brainstorming, the Parties discussion the possible resolutions

Key Terms

- Mediator refrain from talking
- Use silence

Step 6: Writing

Agreement

The "settlement agreement" is reduced to a written contract. Upon execution, the contract is enforceable in Court (with exceptions)

Key Terms

- Payment Terms
- Release
- Litigation Issues
- Confidentiality

Few Words on "Caucus"

"Caucus"

Caucus is a private discussion with a Party and the Mediator outside the presence of the other Party

When to Caucus

- Embarrassing Issues
- Unperceived weakness in case
- Rude/Obnoxious Party
- Significant Power Differential

General Guidelines for Caucus:

- No information is confidential unless the Party specifically states that the information is confidential
- Principle-Based Mediation avoids Caucus
- Continue group discussion (if possible)

Pre-Suit Mediation Clauses

"In the event that any dispute arise between the Parties relating to or concerning this Agreement, the Parties hereby agree to first mediate their dispute prior to filing any legal action."

"In the event that any dispute arise between the Parties relating to or concerning this Agreement, the Parties hereby agree to first mediate their dispute prior to filing any legal action. The mediator shall be **David T. Dorr**."

"In the event that any dispute arise between the Parties relating to or concerning this Agreement, the Parties hereby agree to first mediate their dispute prior to filing any legal action. The Parties shall first submit their dispute for resolution by the **Dispute Resolution Center of Harris County**."

Dispute Resolution Center of Harris County

49 San Jacinto, Suite 220

Houston, Texas 77002-1233

(713) 755-8274

- Free to Citizens of Harris County, nominal fee otherwise

- Three or less Parties

- Total claim less than $100,000

Mediation Settlement Theory

How much should I settle for?

Mediation Settlement Analysis

1. Identify Possible Outcomes

   - High-Low

   - Win-Lose

   - Look at the pleadings/discovery

   - Strengths/weaknesses in case

   - Experience

2. Assign Probabilities to Possible Outcomes

   - Experience

3. Calculate Expected Value, Standard Deviation, and Ranges

Example 1: Breach of Contract

Claim

- $10,000 Expectation Damages
- $5,000 Attorney Fees

Counter Claim

- Attorney Fees only ($5,000)

Total: All or nothing recovery, no partial recovery = $15,000

Example 1: Assumptions

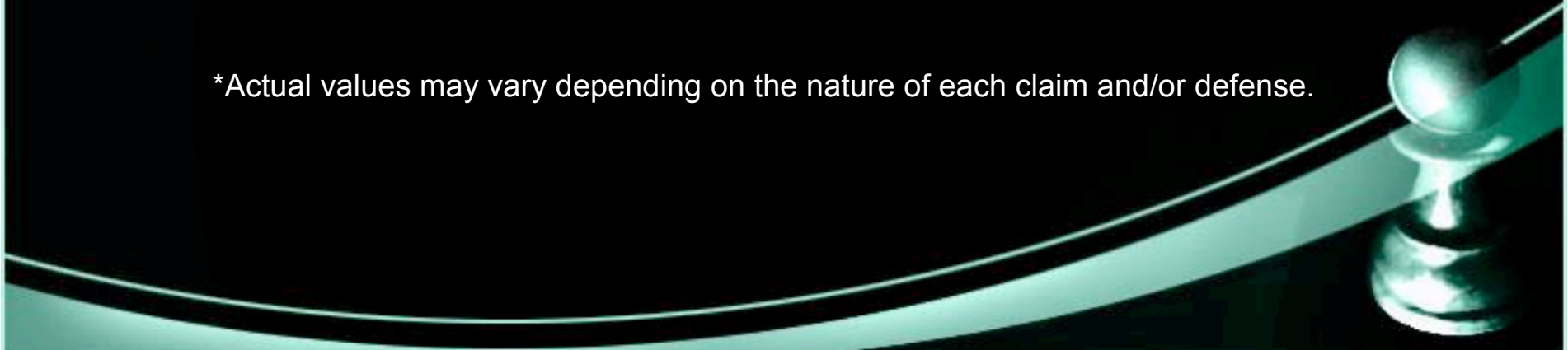Nothing in litigation is 100% certain. Make the following assumptions for this example*:

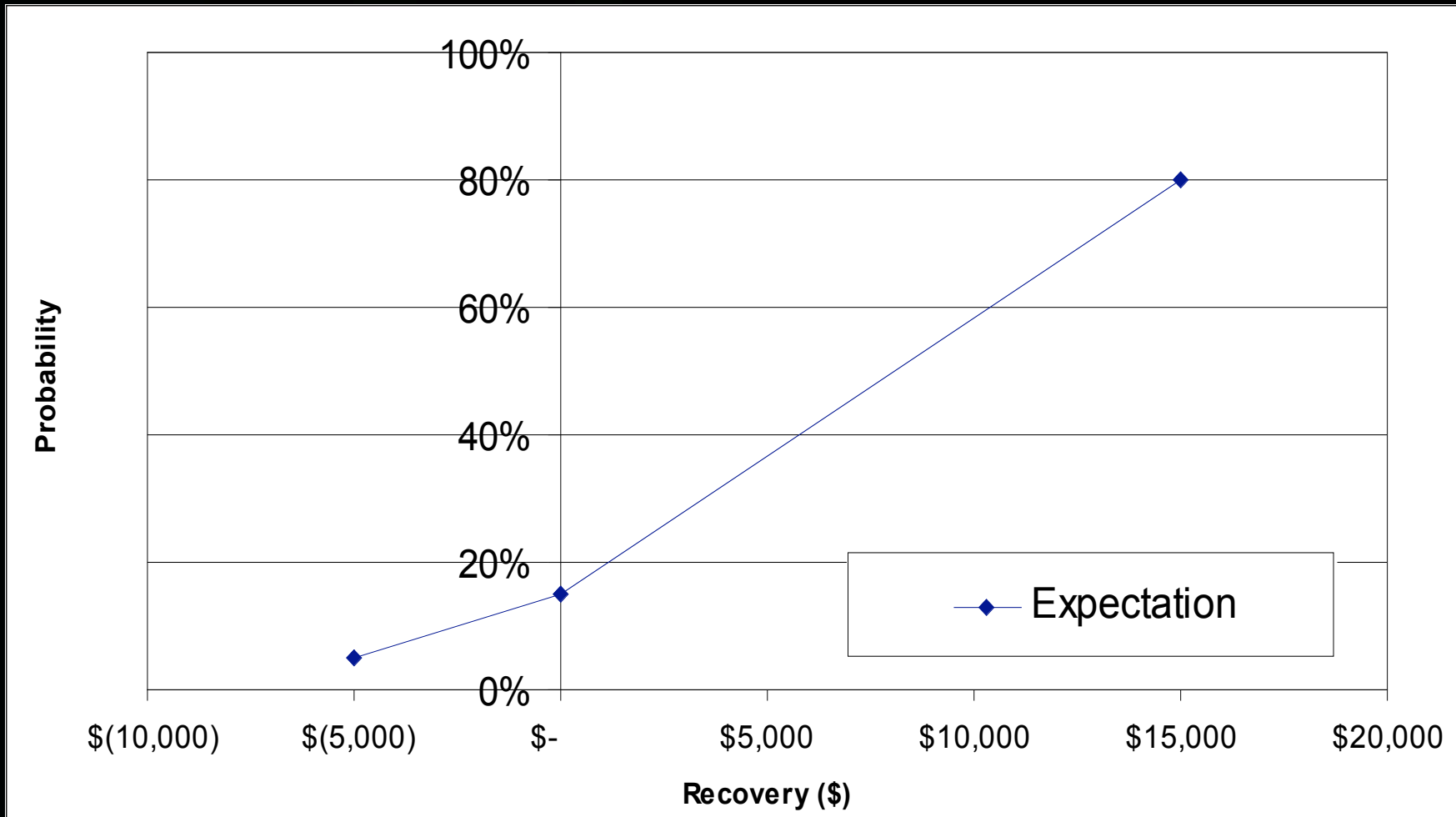80% chance of total recovery: $15,000

15% chance of no recovery: $0

5% chance of payment: ($5,000)

_____

*Actual values may vary depending on the nature of each claim and/or defense.

Example 1: Probability Distribution

Example 1: Expected Value

$$E(X) = \mu_x = \sum_{x \in D} x \cdot p(x)$$

E(X)

= (0.05)*(-$5000) + (0.15)* ($0) + (0.80)*($15,000)

= -$250 + $0 + $12,000

= $11,750

Delta

= Claim – Expected Value

= $15,000 – $11,750

= $3,250

Example 1: Variance and Standard Deviation

$$V(X) = \sum_{D} (x - \mu)^2 \cdot p(x)$$

= (0.05)*(-$5,000-$11,750)^2 + (0.15) *(0-$11,750)^2 + (0.80)*($15,000-$11,750) ^{2}

V(X)

= (14,028,125+ 20,709,375 + 8,450,000)

= 43,187,500

$$V(x) = \sigma^2$$

SD

= $6,571.72

Example 1: Settlement Value

Claim

- Total Claim: $15,000
- Expected Value: $11,750
- Delta: $3,250
- Standard Deviation: $6,571
- Range: $5,178 (low) to $15,000 (high)

$V(x) = \sigma^2$

Settlement Value

- Economic cost
- Emotional cost
- Time-value of money
- Payment Assurance
- Finality
- Confidentiality

Example 2: Personal Injury

Claim

- $10,000 Medicals
- $ <u>Unknown</u> Pain and Suffering (capped at 3x)
- $40,000 total claim +/-
- No attorney fees
- No Punitive D

Counter Claim

- No counter claim

Partial Recovery Possible

Example 2: Assumptions
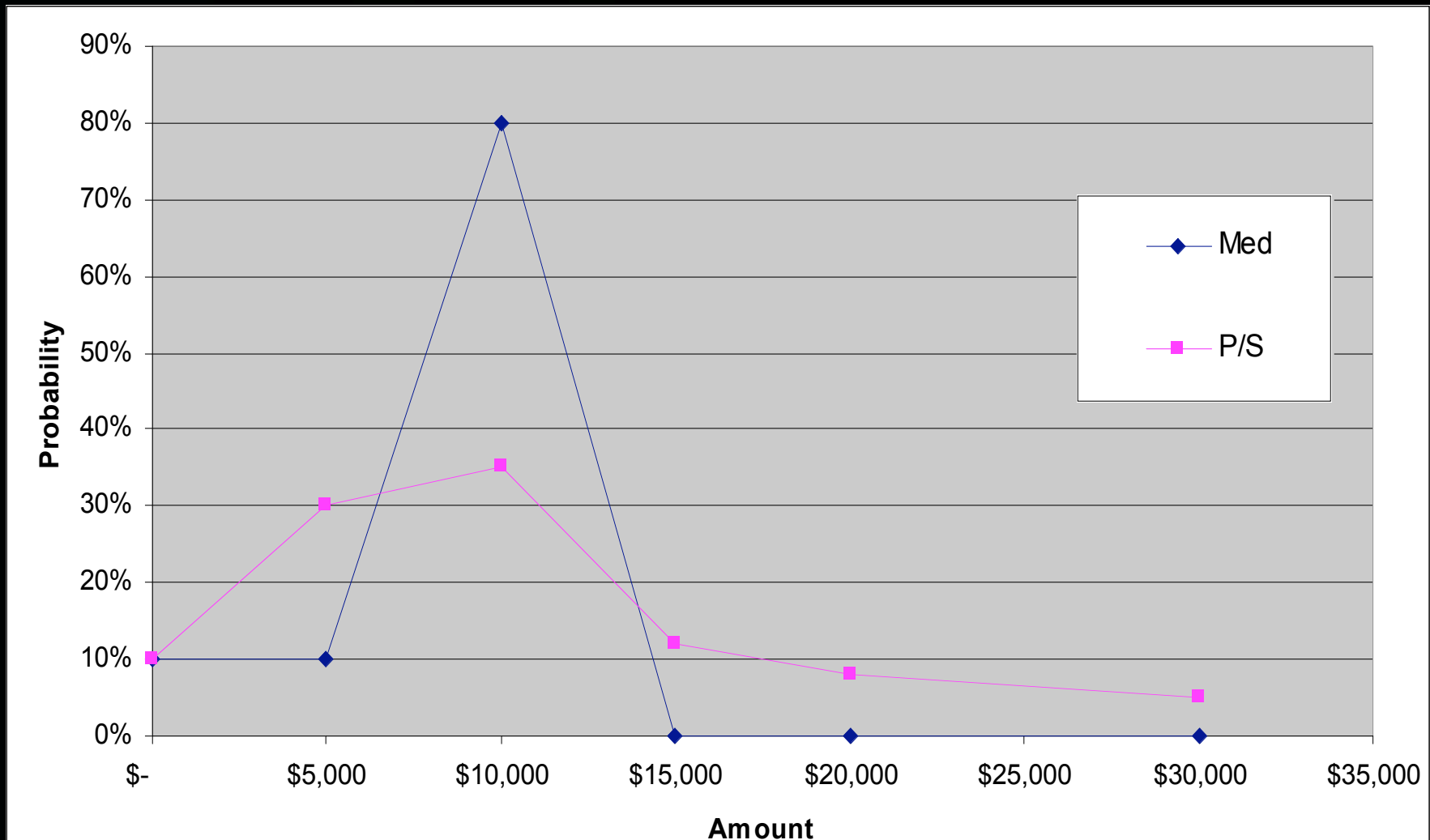
Nothing in litigation is 100% certain. Make the following assumptions*:

Amount	Med	P/S
$ -	10%	10%
$ 5,000.00	10%	30%
$ 10,000.00	80%	35%
$ 15,000.00	0%	12%
$ 20,000.00	0%	8%
$ 30,000.00	0%	5%
	100%	100%

*Actual values may vary depending on the nature of each claim and/or defense.

Example 2: Probability Distribution

Example 2: Expected Value

$$E(X) = \mu_x = \sum_{x \in D} x \cdot p(x)$$

Meds

E(X)

= (0.10)*(0) + (.10)*(5,000) + (.80)*(10,000) + …

= $8,500

P/S

E(X)

= (0.10)*(0) + (.30)*(5,000) + (.35)*(10,000) + …

= $9,900

Expected Value: $18,400

Example 2: Variance and Standard Deviation

$$V(X) = \sum_{D} (x - \mu)^2 \cdot p(x)$$

$$V(x) = \sigma^2$$

SD   = $7,965

Example 2: Settlement Value

Claim

- Total Claim: $40,000
- Expected Value: $18,400
- Delta: $21,600
- Standard Deviation: $7,965
- Range: $10,434 (low) to $26,365 (high)

Settlement Value

- Economic cost
- Emotional cost
- Time-value of money
- Payment Assurance
- Finality
- Confidentiality

Recap

- Benefits of Mediation

- Mediation Method (Principle-Based)

- Mediation Settlement Analysis

Suggested Reading Materials

- *Report to Texas Residential Construction Commission and the 79th Legislature*, Arbitration Task Force, January 2005

- *The Consumer Pitfalls of Binding Arbitration*, a report by the Texas Watch Foundation

- *Report* by Carole Keeton Strayhorn, Texas Comptroller of Public Accounts, to Honorable Todd Smith, Texas House of Representatives, January 23, 2006.

Your Questions & Comments

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