

Winning Advantage



Litigation Risk Analysis

Litigation and Risk

- **What is Litigation?**
 - A Time consuming, expensive, and clumsy method of resolving disputes.
- **Litigation is about Risk**
- **“That’s What Makes Horse Races and Supreme Court Cases.”**

*Givens v. United States R. Retirement Bd.,
720 F.2d 196, 200 (D.C. Cir. 1983).*

Turning Risk Into A Strategic Advantage

The Keys to Good Risk Assessment:

- Experience and Knowledge
- Front End Planning
- Systematic Risk Evaluation

The Result:

- Better Decisions
 - Strategically Based
 - Efficient Resource Allocation
 - Faster Action
 - Focused Implementation
- Lead to Better Results

The Copple & Associates Approach to Legal Risk Evaluation

Risk Evaluation Process

- **Facilitate Team Participation**
- **Focus Analysis On the Important Issues**
- **Apply Risk Analysis Tools**
- **Interpret Results**
- **Identify Management's Level of Risk Tolerance**
- **Develop Most Meaningful Strategies and Efficiencies**

The Copple & Associates Approach to Legal Risk Evaluation

The Process Applied – A Case Study

Step 1: Identify the Important Issues

- **Dispositive Issues**
 - Result In End of Matter or Particular Claims
- **Influence Issues**
 - Not Dispositive, But Can Have Significant Impact on Outcome
- **Combine Issues When Possible**
 - The Trier of Fact Perspective

Litigation Risk Evaluation Case Study

Step 1 – Issue Identification

■ Plf Sues Def for Breach of Contract

- Contract Created a Joint Enterprise for Development, Manufacture, and Marketing of Revolutionary New Microprocessor
- Def Refused to Manufacture and Market Microprocessor
- Plf Will Attempt to Prove Ambiguity / Admission of Parole Evidence
- Resulted in Damages
 - \$250,000 Direct Damages
 - \$10,000,000 Direct and Lost Profit Damages
- Plf Has Offered to Settle for \$3,000,000

■ Def Position

- If At All, Contract Was Development Only
- Plf Did Not Provide Adequate Specs – NonPerformance
- Will Move For SJ – Contract Not Ambiguous – No Parole Evidence
- At Most, Only Liable for Direct Damages

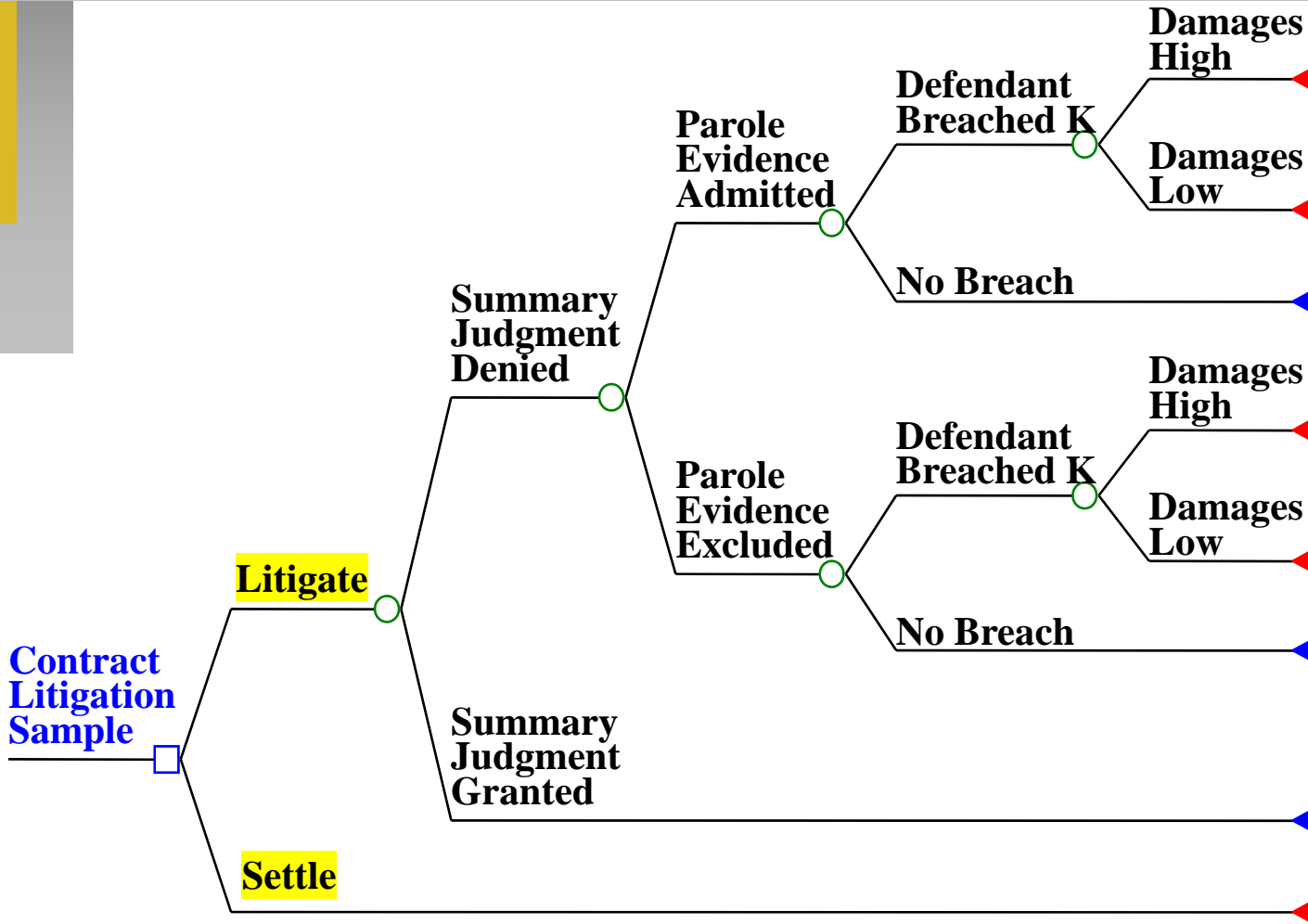
Litigation Risk Evaluation Case Study

Step 2 – Case Structure

- **Evaluate How The Issues Fit Together**
 - Each Issue May Impact One or More Other Issues
- **Build a Case Structure**
 - Basic Decision Tree is the Road Map
 - Shows How the Issues Interact

Litigation Risk Evaluation Case Study

Step 2 – Case Structure



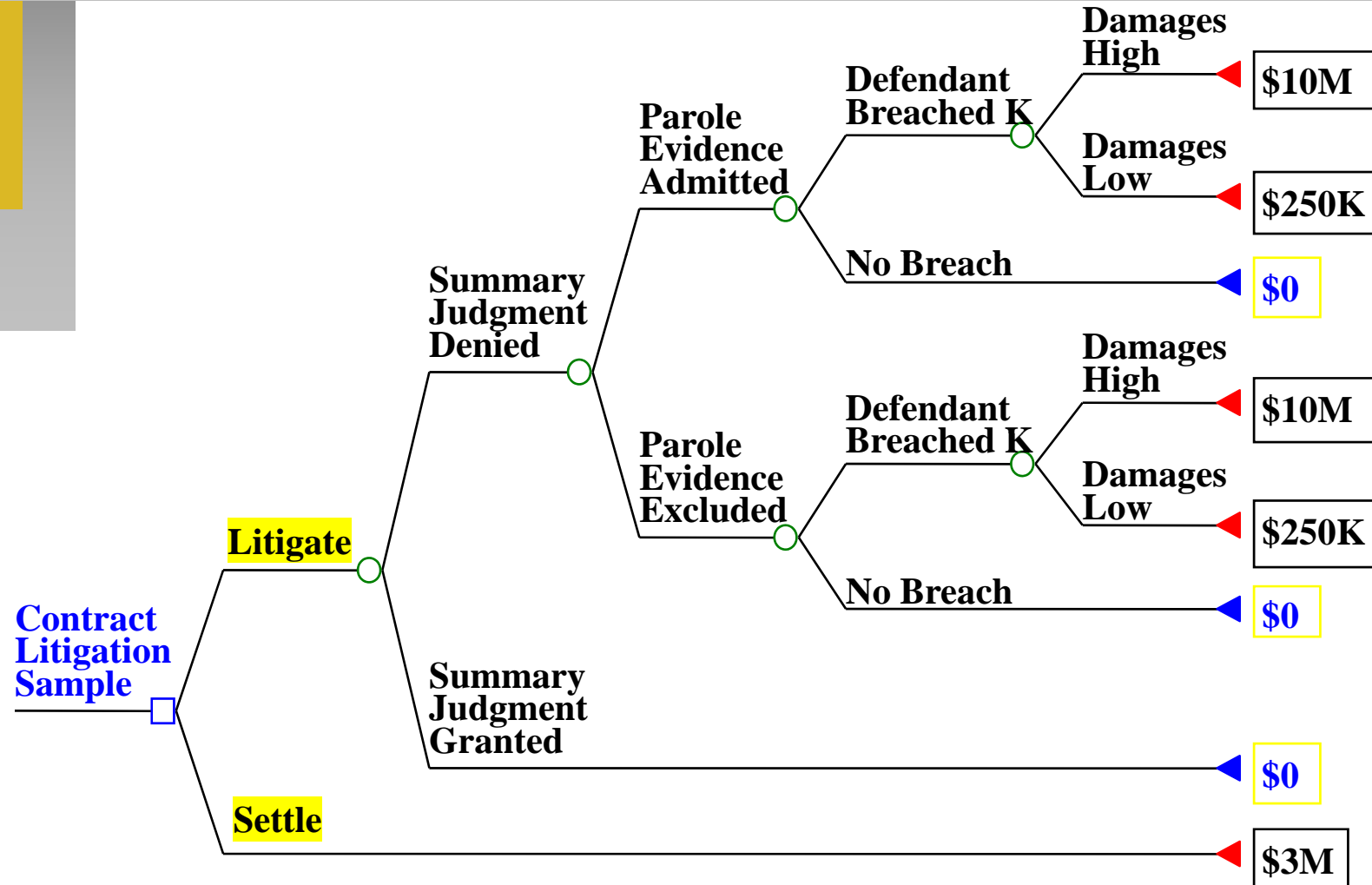
Litigation Risk Evaluation Case Study

Step 3 – Identify Damage Scenarios

- **Damages At Least As Important As Liability**
 - Often Ignored By Counsel
 - Potential Exposure May Dictate Resource Allocation
- **Identify Full Range of Damage Scenarios**
 - Beyond Tendency to Only Identify High and Low
 - Helps to Focus Future Work
 - Provides for More Accurate Valuation of the Entire Case

Litigation Risk Evaluation Case Study

Step 3 – Identify Damage Scenarios



Litigation Risk Evaluation Case Study

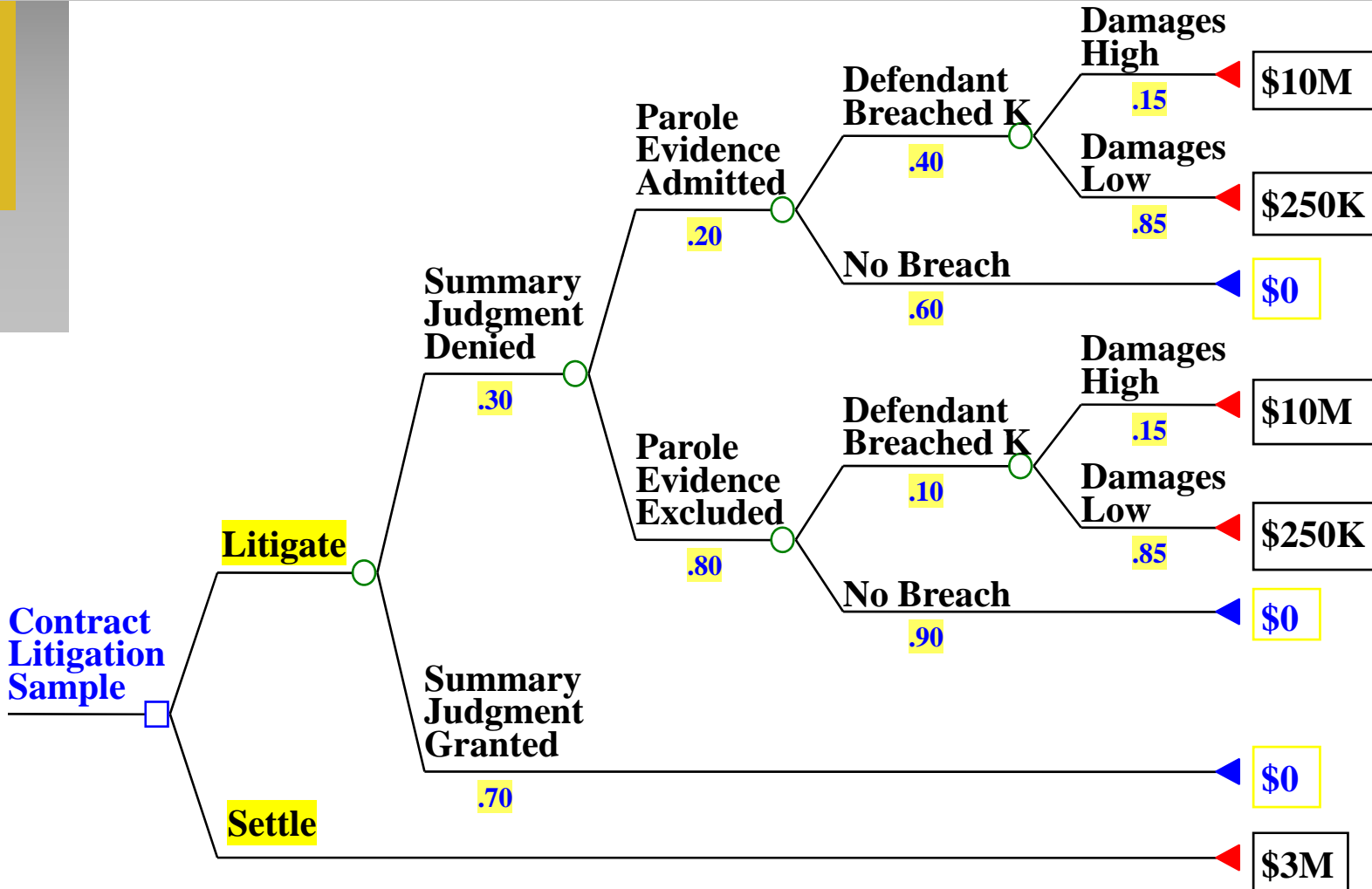
Step 4 – Probabilities

- **This is the Hard Part**
 - **Lawyers are Reluctant to Make Predictions**
 - 60/40 -- 40/60 Syndrome
 - **The Anchoring Problem**
 - **Difficult to Estimate Probabilities for Multivariable Problem**
 - **All Litigation is Multivariable**

- **But Can Be Done**
 - **With the Help of an Experienced Legal Modeler**
 - **By Breaking the Case Down Into Single Issues**
 - **By Understanding That We Are Not Seeking Perfect Knowledge, Only Better Knowledge**

Litigation Risk Evaluation Case Study

Step 4 – Probabilities



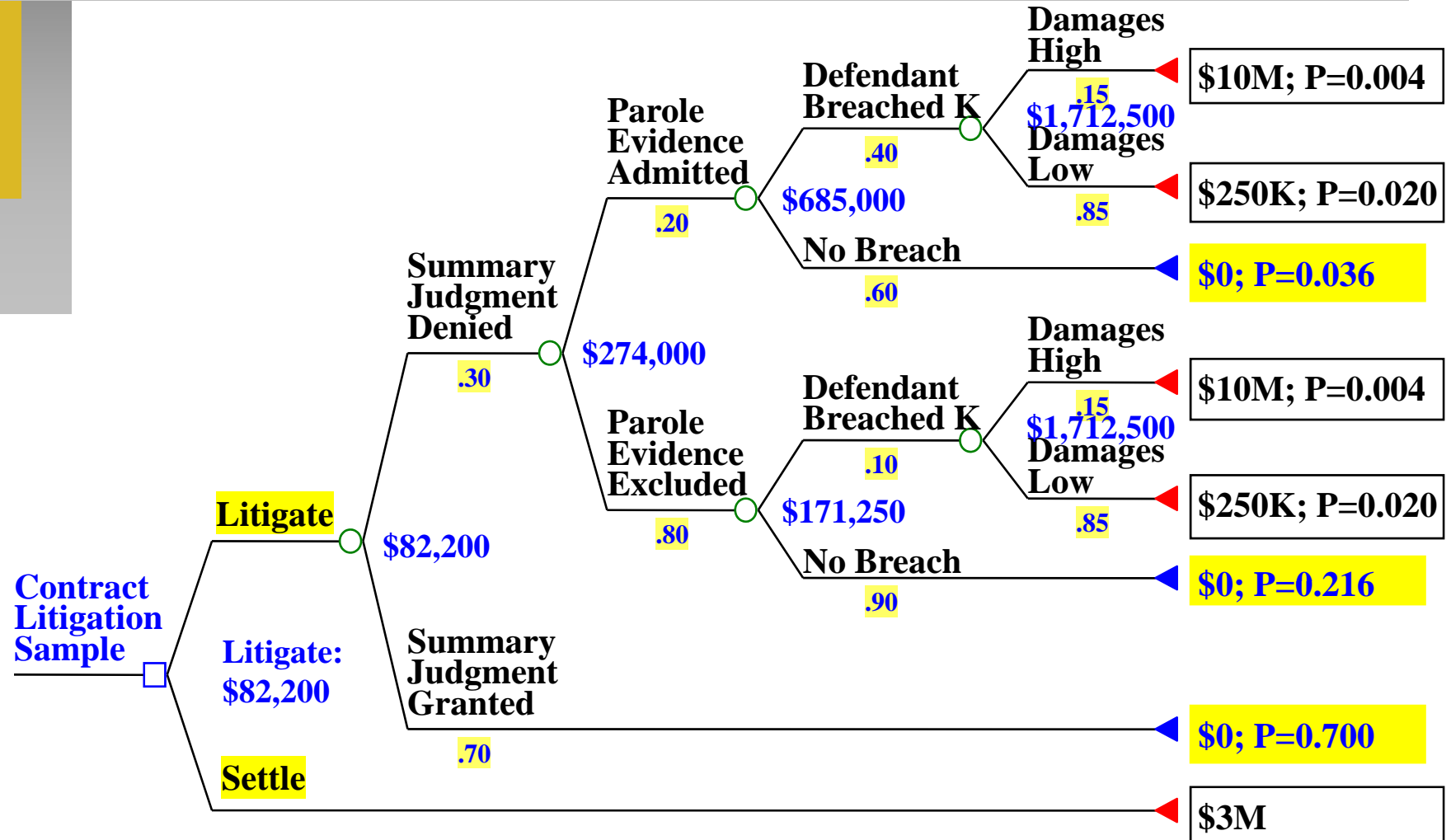
Litigation Risk Evaluation Case Study

Step 5 – Interpreting the Results

- **What Does the Statistical (“Expected Value”) Result Really Mean?**
 - **The Weighted Average Result Of 100 Trials**
 - **Should Not Be Viewed as Numerical Certainty**
 - **Instead, Helps to Identify Trends and to Put the Distribution of High and Low Results in Perspective**

Litigation Risk Evaluation Case Study

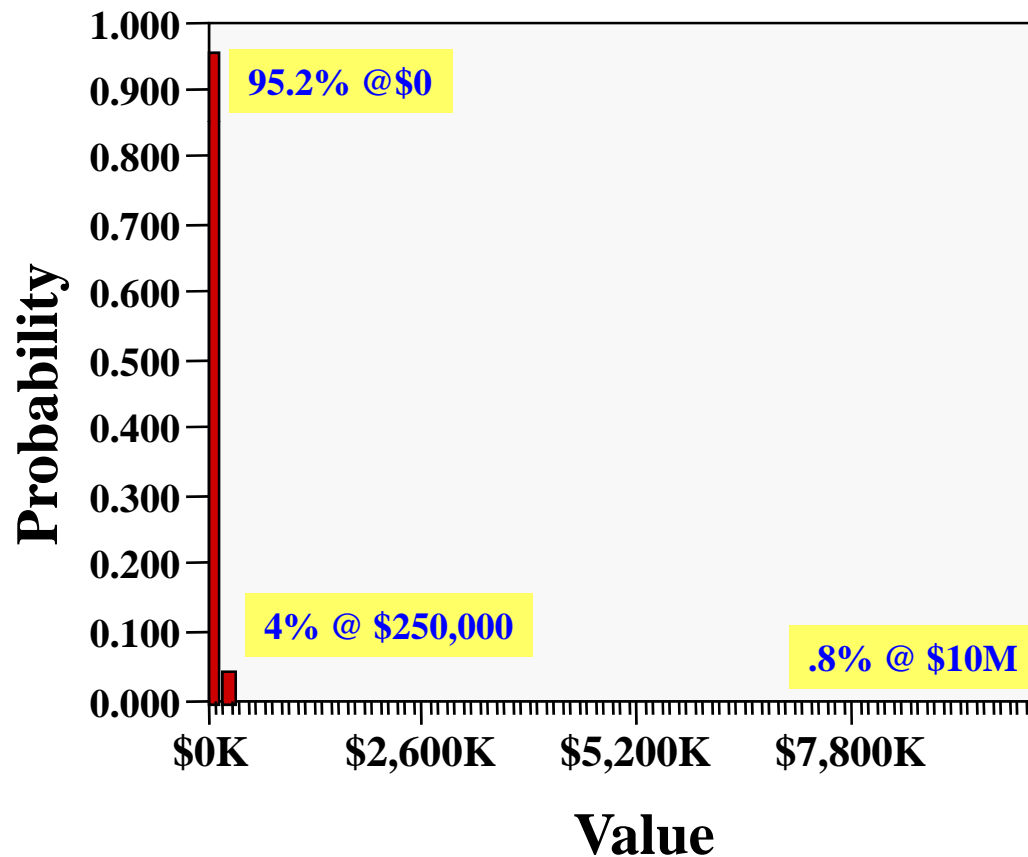
Step 5 – Interpreting the Results



Litigation Risk Evaluation Case Study

Step 5 – Interpreting the Results

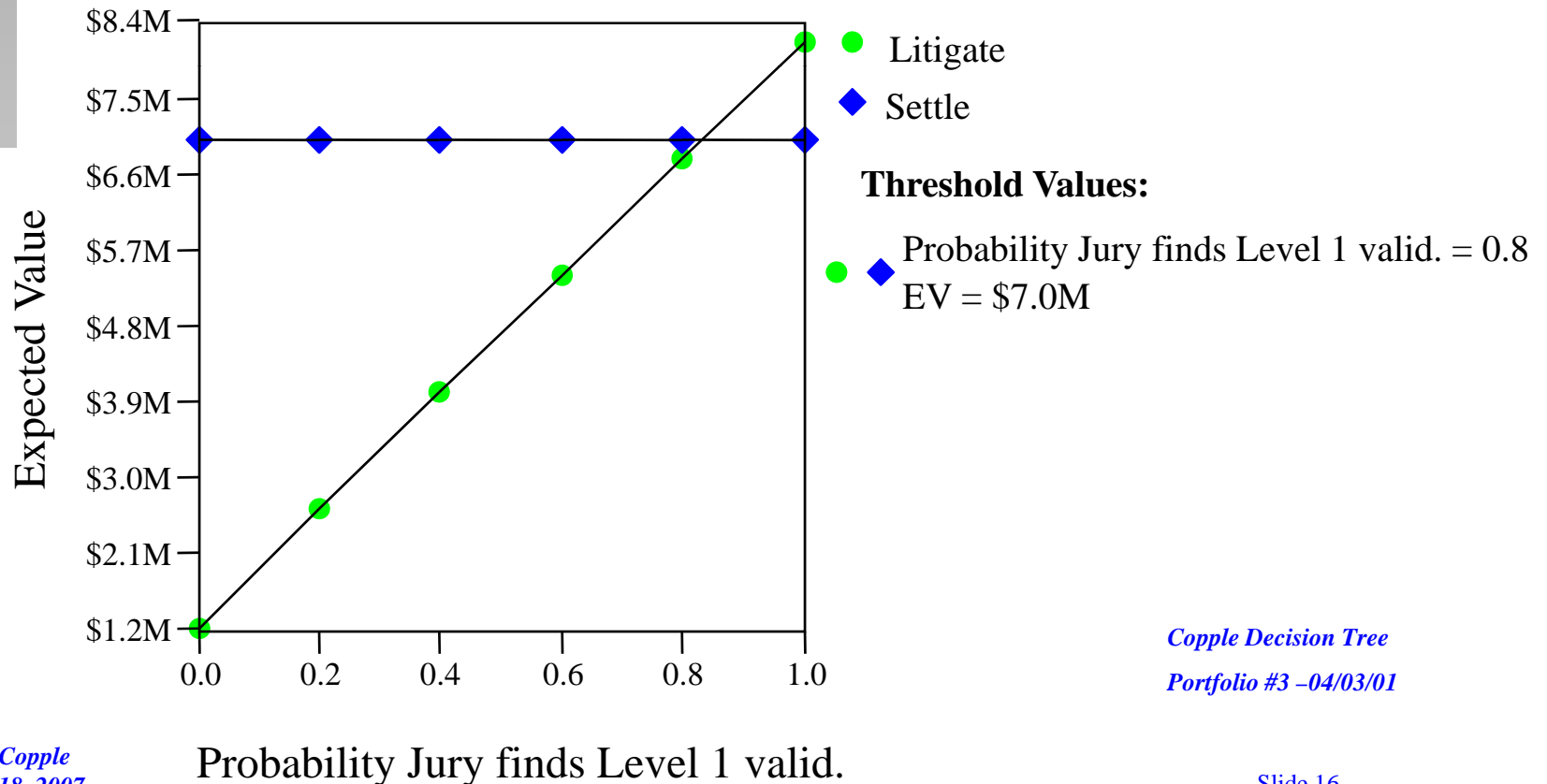
Probability Distribution at Contract Litigation Sample



Sensitivity Analysis – Single Issue

PATENT LITIGATION EXAMPLE

Sensitivity Analysis on Probability Jury finds Level 1 valid.



Copple Decision Tree
Portfolio #3 -04/03/01

The Rule of Reason

Calibration and Validation

- **Modifying the Tool for the Particular Matter**
 - **Make the Tool Work for You**
- **Validating the Result**
 - **Jury Research**
 - **“Marketplace” Data for Similar Matters**
 - **Lawyer Experience**

The Value of the Process

Our Experience

- **Bringing Reality to Risk Management**
 - High End Risks
 - Case Value

- **Management Briefing Tool**
 - Allows Visualization for Decision makers
 - You are Prepared, and Look It!

Applications

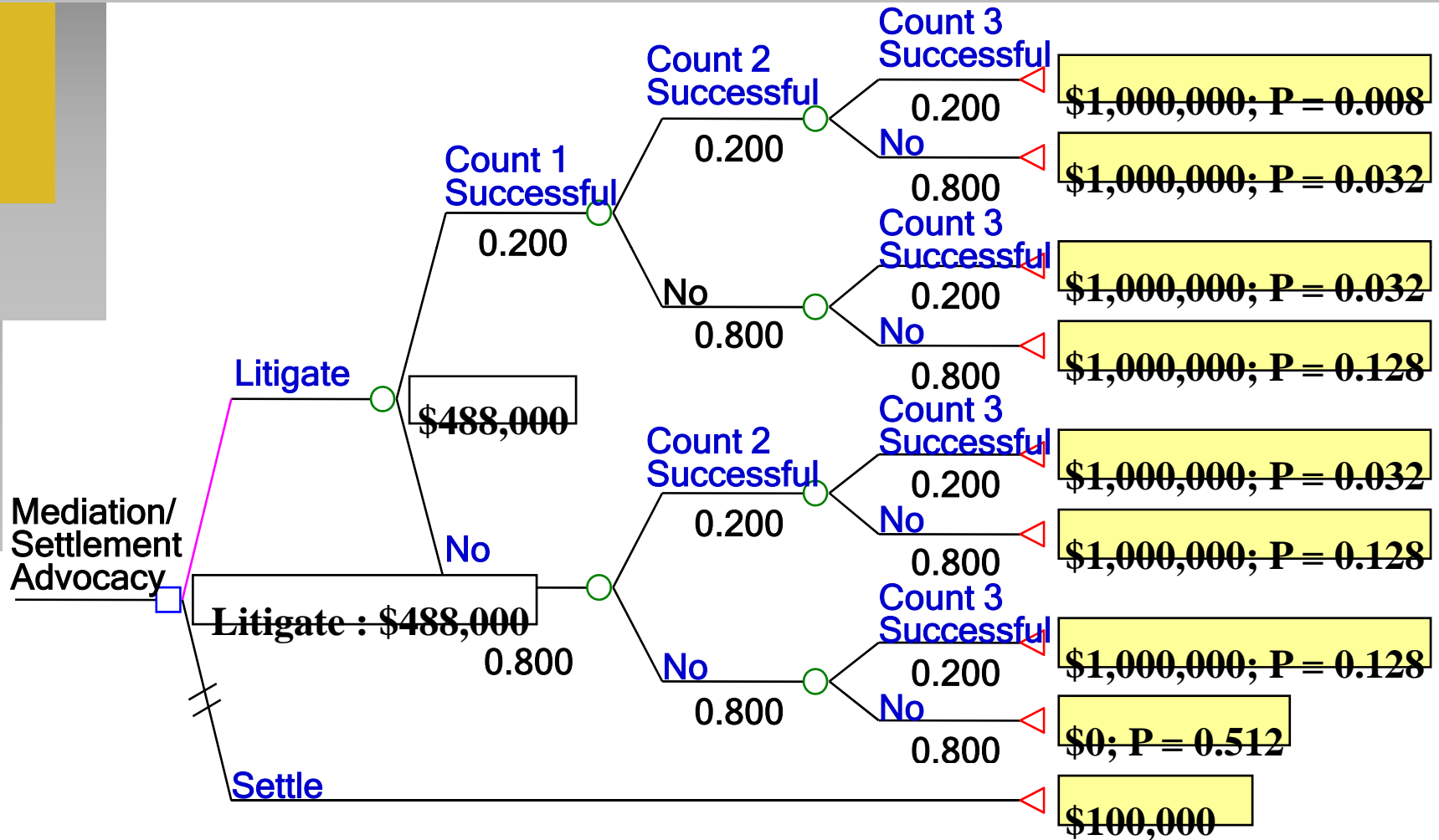
- **Litigation – Both Complex and Simple**
- **Negotiations and Mediations**
- **Regulatory Compliance Plans**
- **Management Briefing Tools**
- **Document Reasoning Behind Decisions**
- **Transactions**
- **Legal Process Maps**

The Winning Advantage

**“It’s Good to be Smart, It’s Better to be Right,
It’s Best to Win”**

- **The Advantage Comes From:**
 - **Rigorous and Superior Analysis**
 - **Strategic Decision making**
 - **Faster Actions**

Negotiation Tree Or How A Dog Case Becomes a Negotiation Risk



The Copple & Associates Approach to Legal Risk Evaluation

Risk Evaluation Practice

- **Lead Attorney on Hundreds of Cases**
- **Wide Range of Subject Matter**
 - **Complex Commercial and Securities**
 - **Multistate Tort**
 - **Corporate Employment**
 - **Government Enforcement**
 - **Insurance Coverage**
 - **Class Actions**
 - **Alternative Dispute Resolution**
 - **Environmental**
 - **International**
 - **Intellectual Property**

The Copple & Associates Approach to Legal Risk Evaluation

Risk Evaluation Services

■ Litigation Consulting

- Litigation Portfolio Management
- Planning for New Potential Liabilities
- Early Case Evaluation
- Strategic Coordination of Pattern or Interrelated Cases
- Red Team Review of Existing Representation
- Senior Management and Auditor Briefings

■ Crisis Management

- Response Planning, Coordination and Execution

Litigation Risk Analysis Presentations

- **CPR Institute for Dispute Resolution, Annual Fall Meeting, Chicago, October 9, 2003.** Decision Science Tools in ADR.
- **CPR Institute for Dispute Resolution, Annual Spring Meeting, Carlsbad, California, May 1-3, 2003.** Risk Analysis in Mediation, Training Program for ADR Neutrals
- **University of Houston Law Center, April 16, 2003.** Decision Sciences in Trial Advocacy.
- **ABA Litigation Section Annual Meeting, Houston, April 10-11, 2003.** Decision Sciences in Litigation Analysis.
- **University of Nebraska College of Law, Lincoln, Nebraska, October 11, 2002.** Trial Advocacy Classes -- Decision Sciences in the Litigation Process.