

# *Fordham Urban Law Journal*

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*Volume 37, Number 1*

2009

*Article 12*

SYMPOSIUM - ACCESS TO JUSTICE

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## Access to Justice in a World Without Lawyers: Evidence from Texas Bodily Injury Claims

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# Access to Justice in a World Without Lawyers: Evidence from Texas Bodily Injury Claims

Charles Silver and David A. Hyman

## **Abstract**

Will tort reform capping contingency fees limit plaintiffs' ability to recover for their injuries? If self-representation is a viable option, contingency fees may have less of an impact on access than one might otherwise expect. Conversely, if tort recoveries flow only or mostly to plaintiffs who either actually hire lawyers or can credibly threaten to do so, caps on contingency fees may make it difficult or impossible for many victims to obtain justice. This article explores the issue by looking at patterns of representation among claimants who received payments for bodily injury in Texas during 1988-2005. Over an extended period and across multiple lines of coverage, an overwhelming majority of successful bodily injury claimants in Texas decided they needed a lawyer. When claims can be resolved without the initiation of formal litigation, a small percentage of claimants decide to represent themselves, because these claimants have "lawyer-worthy" claims and can credibly threaten to "lawyer up" unless paid amounts they consider satisfactory. Only claimants who can credibly threaten to litigate successfully can extract settlement payments, and claimants who cannot find lawyers cannot make this threat.

# ACCESS TO JUSTICE IN A WORLD WITHOUT LAWYERS: EVIDENCE FROM TEXAS BODILY INJURY CLAIMS

*Charles Silver and David A. Hyman\**

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## INTRODUCTION

Price controls are unpopular, except when they are imposed on plaintiffs' lawyers. Sixteen states have caps on contingency fees;<sup>1</sup> none cap defense-side fees.<sup>2</sup> The federal government limits the fees plaintiffs can pay in Federal Tort Claims Act ("FTCA") cases,<sup>3</sup> Social Security disability cases,<sup>4</sup> and claims for veterans' benefits.<sup>5</sup> In 2003, 2004, and 2005, the House of Representatives passed a bill capping contingency fees in medical malpractice cases—only to see it die in the Senate each time.<sup>6</sup> Judges have followed suit; in recent aggregate products liability proceedings, three federal judges capped the plaintiffs' lawyers' fees after noting a "trend in the states to limit contingent fees to 33-1/3% or less of net recovery."<sup>7</sup>

Claimants are the supposed beneficiaries of these restrictions, which are said to protect them from excessive legal fees.<sup>8</sup> The assertion is facially plausible: lawyers' fees are the biggest component of litigation costs, so policies that reduce fees may help claimants. Yet, the pressure to cap contingent fees comes from tort reform groups, representing drug manufacturers, medical providers, liability insurers, and other repeat players on the defense side in litigation. Like all interest groups, tort reform groups advocate policies that help their supporters.<sup>9</sup> Because tort reform groups have defendants' interests at heart, it is safe to assume that these groups

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1. See generally David A. Hyman, Bernard Black, Charles Silver & William Sage, *Estimating the Effect of Damages Caps in Medical Malpractice Cases: Evidence from Texas*, 1 J. LEGAL ANALYSIS 355 (2009) [hereinafter *Damage Caps*].

2. *Id.*

3. 28 U.S.C.A. § 2678 (West 2006) (FTCA cap of 20-25%).

4. See 42 U.S.C.A. § 406 (West 2006) (Social Security cap of 25%).

5. Act of July 14, 1862, ch. 166, §§ 6-7, 12 Stat. 566, 568.

6. See Help Efficient, Accessible, Low-cost, Timely Healthcare ("HEALTH") Act of 2005, H.R. 5, 109th Cong. (2005); H.R. 4280, 108th Cong. § 5 (2004).

7. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 495 (E.D.N.Y. 2006); see also *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 617 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, No. 05-1708, 2008 WL 682174, at \*17 (D. Minn. Mar. 7, 2008). For an analysis of judicial practices regarding fees in MDLs, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1352646>.

8. See *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 360 (1985) (Stevens, J., dissenting) (observing that fee caps were originally implemented "to protect the veteran from extortion or improvident bargains with unscrupulous lawyers").

9. These policies include such reforms as caps on compensatory and punitive damages, abolition of the collateral source rule, heightened standards of pleading and proof, mandatory non-binding alternative dispute resolution, and limits on advertising by attorneys. The object of these policies is to reduce claim values by lowering recoveries and making litigation more expensive.

expect caps on contingency fees to help defendants—most likely because price controls tend to cause the supply and quality of services to decline.<sup>10</sup> When lawsuits become less profitable for lawyers, plaintiffs' attorneys will predictably become more selective and may even move into other uncapped lines of work, or retire. Because expected marginal earnings also decline, lawyers will predictably invest less in the cases they do accept—that is, they will litigate less intensively.

Will plaintiffs' ability to recover for their injuries also decline? Although most academics believe "meaningful access" to the tort system requires legal counsel,<sup>11</sup> claimants can always represent themselves.<sup>12</sup> Many tort claims settle without formal litigation, and nearly all settle without trials.<sup>13</sup> Some studies contend that claimants who represent themselves don't do that much worse than claimants represented by attorneys once attorneys' fees are subtracted.<sup>14</sup> If self-representation is a viable option, caps on con-

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10. See generally ROBERT L. SCHUETTINGER & EAMONN F. BUTLER, FORTY CENTURIES OF WAGE AND PRICE CONTROLS (1979).

11. See Stephen Daniels & Joanne Martin, *Texas Plaintiffs' Practice in the Age of Tort Reform: Survival of the Fittest—It's Even More True Now*, 51 N.Y.L. SCH. L. REV. 285, 287 (2006/2007) [hereinafter *Survival of the Fittest*]; see also HERBERT JACOB, LAW AND POLITICS IN THE UNITED STATES 123 (1986); Stephen Daniels & Joanne Martin, *Access Denied: 'Tort Reform' Rhetoric is Closing the Courthouse Door*, 33 TRIAL 26 (1997). See generally Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635 (2006) [hereinafter *The Texas Two-Step*] (discussing generally the possible link between damage caps in medical malpractice cases and access); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeeper in the Civil Justice System*, 81 JUDICATURE 22 (1997).

12. See Kuo-Chang Huang, *How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan*, 5 J. EMPIRICAL LEGAL STUD. 197, 201-08 (2008) (reporting that both parties were represented in only 21% of over 100,000 cases formally litigated in Taiwan from 2000 to 2006); Bruce D. Sales, Connie J. Beck & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 594 (1993) (studying divorce cases in Maricopa County, Arizona in 1990 and finding that "approximately 90% of the cases involved at least one litigant who self-represented, while in 52% of the cases both parties self-represented"). The frequency of self-representation appears to be growing, as the number of persons unable to afford attorneys rises. See, e.g., Margery A. Gibbs, *More Americans Serving as Their Own Lawyers*, YAHOO NEWS, Nov. 24, 2008, [http://news.yahoo.com/s/ap/20081124/ap\\_on\\_re\\_us/representing\\_yourself](http://news.yahoo.com/s/ap/20081124/ap_on_re_us/representing_yourself).

13. The conventional wisdom is that only 2-3% of lawsuits are tried, and that in recent decades the trial rate has declined. For statistics and possible explanations, see the articles collected in 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

14. See JAMES K. HAMMITT, AUTOMOBILE ACCIDENT COMPENSATION, VOL. II: PAYMENTS BY AUTO INSURERS 37 (1985) (finding that represented claimants fared much better than unrepresented claimants in tort fault states after attorneys' fees were deducted but that the difference was much smaller in no-fault states); Terry Thomason, *Are Attorneys Paid What They're Worth? Contingent Fees and the Settlement Process*, 20 J. LEGAL STUD. 187, 221 (1991) (finding that "by retaining legal counsel, the average New York workers' compensa-

tingency fees may have less of an impact on access than one might otherwise expect.<sup>15</sup> Conversely, if tort recoveries flow only or mostly to plaintiffs who either actually hire lawyers or can credibly threaten to do so, caps on contingency fees may make it difficult or impossible for many victims to obtain justice.

We explore this issue by looking at patterns of representation among claimants who received payments for bodily injuries (“BI”) in Texas during 1988-2005. Our database includes every closed claim with a payout greater than or equal to \$10,000 (nominal) from five commercial lines of insurance. Approximately 7% of successful BI claimants represented themselves. Paid claims brought by persons who represented themselves had smaller payouts and were almost always resolved without litigation. Self-representation was roughly four times as common (12% versus 3.3%) in small claims (less than \$10,000) as compared to large claims (greater than \$25,000) (both amounts in 2008 dollars). The filing of a lawsuit marked a fundamental divide: almost 16% of claims resolved without filing a lawsuit involved self-represented claimants, compared with a mere 0.2% of claims resolved after a lawsuit was filed.

This Article proceeds as follows: Part II describes our data, Part III presents our results, Part IV discusses the implications of our findings, and Part V concludes.<sup>16</sup>

## I. DATA DESCRIPTION

We have published a series of articles on tort litigation<sup>17</sup> using the Texas Closed Claim Database (“TCCD”), which is maintained by the Texas De-

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tion claimant with a nonscheduled [permanent partial disability] may expect to receive almost \$6,000 less in benefits than will the claimant who does not retain counsel”).

15. We use the label “self-represented claimants” rather than “pro se claimants” to avoid the association with lawsuits the phrase “pro se” entails. As shown below, the overwhelming majority of payments recovered by self-represented claimants were obtained without filing a lawsuit.

16. Closed claim data collected by the Texas Department of Insurance can be downloaded free of charge. TEX. DEP’T OF INS. REPORTS LISTING, <http://www.tdi.state.tx.us/reports/report4.html> (last visited Dec. 15, 2009).

17. The articles include Bernard Black, David A. Hyman, Charles Silver & William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L. & ECON. REV. 185 (2008); Bernard Black, Charles Silver, David A. Hyman & William M. Sage, *Stability, Not Crisis: Medical Malpractice Claim Outcomes In Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005) [hereinafter *Stability, Not Crisis*]; Frank Cross & Charles Silver, *In Texas, Life is Cheap*, 59 VAND. L. REV. 1875 (2006); David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver & William M. Sage, *Do Defendants Pay What Juries Award?: Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003*, 4 J. EMPIRICAL LEGAL STUD. 3 (2007) [hereinafter *Jury Verdicts*]; Charles Silver, David A. Hyman & Bernard S. Black, *The Impact of*

partment of Insurance (“TDI”). The TCCD, which we describe more fully in other works, contains individual reports of all Texas BI claims covered by five lines of commercial insurance (auto, general commercial, multi-peril, medical professional liability, and other professional liability) that closed with payments exceeding \$10,000 (nominal) from 1988 to 2005.<sup>18</sup>

Because the TCCD uses a fixed nominal dollar reporting threshold, the dataset is subject to bracket creep. Over time, the lower end of the bracket creeps downward, encompassing smaller and smaller claims. Thus, a claim worth \$10,000 (nominal) in 2005 would have been worth only \$6,057 in 1988. More generally, a claim worth \$10,000 in 2005 would have been worth less than \$10,000 in any year prior to 2005, and thus would not have been reported to TDI. Bracket creep has the potential to make time trends in the TCCD misleading.

In other publications, we address the problem of bracket creep by adjusting payments to 1988 dollars and excluding claims with real payments below \$10,000.<sup>19</sup> This approach has an important drawback here. Claims with real payments below \$10,000 are common, and the frequency of self-representation is higher in claims with smaller payouts. Indeed, the highest rate of self-representation occurs in the bracket creep claims. To preserve information about self-representation, we therefore include bracket creep claims in our summary tables. When studying time trends, however, we adjust for bracket creep to avoid inflation-generated distortions.

When submitting closed claim information to the TDI, insurers use “short forms” for claims with nominal payouts greater than \$10,000 but less than \$25,000, and “long forms” for claims with nominal payouts of \$25,000 or more.<sup>20</sup> Although both forms indicate whether the claimant

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*the 2003 Texas Medical Malpractice Damages Cap on Physician Supply and Insurer Payouts: Separating Facts from Rhetoric*, 44 TEXAS ADVOCATE 25 (2008) [hereinafter *Separating Facts from Rhetoric*], available at <http://ssrn.com/abstract=1139190>; Charles Silver, Kathryn Zeiler, Bernard S. Black, David A. Hyman & William M. Sage, *Malpractice Payouts and Malpractice Insurance: Evidence from Texas Closed Claims, 1990-2003*, 33 GENEVA PAPERS ON RISK & INS.: ISSUES & PRACTICE 177 (2008); Kathryn Zeiler, Charles Silver, Bernard S. Black, David A. Hyman & William M. Sage, *Physicians' Insurance Limits and Malpractice Payments: Evidence from Texas Closed Claims, 1990-2003*, 36 J. LEGAL STUD. s9 (2007) [hereinafter *Physicians' Insurance Limits*]; *Damage Caps*, *supra* note 1.

18. Unless otherwise indicated, all dollar amounts in this paper are in 1988 dollars, computed using the Consumer Price Index for All Urban Consumers (annual average) as a price index. Bureau of Labor Statistics, [www.bls.gov/cpi/](http://www.bls.gov/cpi/) (last visited Dec. 30, 2009). To convert to 2008 dollars, multiply by 1.82. In regressions we define year as (year - 1988).

19. See *supra* note 17.

20. TEX. DEP'T OF INS., THE 2007 TEXAS LIABILITY INSURANCE CLOSED CLAIM ANNUAL REPORT 1 (2009), available at <http://www.tdi.state.tx.us/reports/pc/documents/taccar2007.pdf>.

hired an attorney, long forms contain much more information than short forms.<sup>21</sup> Many fields of potential interest—age, employment status, injury type, and injury cause—appear only on the long form,<sup>22</sup> and neither form has all the information needed to fully study the choice between self-representation and representation by counsel.<sup>23</sup>

The TCCD contains only insured claims.<sup>24</sup> Rates of self-representation may differ in uninsured cases, which lawyers are likely to find less appealing. The TCCD also contains only claims covered by commercial or professional lines of insurance.<sup>25</sup> Cases involving personal lines of insurance, for example, personal auto, homeowners, or watercraft policies, may have a different pattern of self-representation as well. Unfortunately, we lack a source of data with which to explore these issues.

## II. RESULTS

### A. Descriptive Statistics

Table 1 presents descriptive statistics on all claims in the database. Commercial auto claims are the most common, the least likely to involve death as the injury alleged, and have the smallest mean and median payouts. Medical malpractice claims are much less numerous than commercial auto claims, but have the highest frequency of death, as well as the highest mean and median payouts.

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21. Compare TEX. DEP'T OF INS., SHORT FORM, <http://www.tdi.state.tx.us/forms/pdataservices/pc134ccrptshort.doc> (last visited Dec. 20, 2009), with TEX. DEP'T OF INS., LONG FORM, <http://www.tdi.state.tx.us/forms/pdataservices/pc133ccrptlong.doc> (last visited Dec. 20, 2009).

22. Compare TEX. DEP'T OF INS., SHORT FORM, <http://www.tdi.state.tx.us/forms/pdataservices/pc134ccrptshort.doc> (last visited Dec. 20, 2009), with TEX. DEP'T OF INS., LONG FORM, <http://www.tdi.state.tx.us/forms/pdataservices/pc133ccrptlong.doc> (last visited Dec. 20, 2009).

23. A partial list of potentially relevant factors would include a variety of claim-related characteristics, such as injury severity, uninsured medical costs, lost wages, the potential for claim value to vary, and the obviousness of liability. Claimants' personal characteristics, such as their sex, education, nature of employment, claiming history, and experience with lawyers may also matter. The cost of legal services seems highly likely to influence the decision to retain counsel as well. The TCCD contains none of this information. See *supra* note 21.

24. See TEX. DEP'T OF INS., *supra* note 20.

25. The Texas Department of Insurance produces annual reports that describe the TCCD and provide a yearly snapshot of findings. The annual reports can be downloaded free of charge. See TEXAS DEP'T OF INSURANCE, *supra* note 20.



Table 1. Summary Statistics on Claim Characteristics

	Number of Claims	% of All Claims	% Death	Mean Payout	Median Payout
Commercial Auto	99,047	56.5%	3.5%	\$61,595	\$16,304
General Commercial	33,322	19.0%	8.1%	\$146,409	\$30,000
Medical Professional	17,965	10.2%	29.1%	\$261,941	\$96,154
Multi-Peril	23,655	13.5%	6.5%	\$108,587	\$26,125
Other Professional	1,437	0.8%	23.4%	\$172,988	\$38,820
Total	175,426	100.0%	7.5%	\$105,471	\$21,696

Closed claims in the “All Lines Full Variables” dataset for 1988-2005, excluding duplicate reports and one claim resolved at summary judgment, by line of coverage, nature of injury alleged (death versus non-death), and mean and median payout (2008\$).<sup>26</sup> Includes “bracket creep” claims with payments below \$10,000 (1988\$).

Table 2 provides further descriptive statistics on whether the plaintiff was represented by a lawyer and the resolution stage (pre-suit versus post-suit) of each claim. Table 2 indicates that across all lines of coverage 6.9% of claimants represented themselves, ranging from 2.5% (medical professional) to 7.9% (commercial auto). In cases where no suit was filed, the rate of self-representation was far higher, ranging from 13.4% (commercial auto) to 24% (multi-peril). In claims where a lawsuit was filed, however, the rate of self-representation was essentially zero across all lines of coverage. For unrepresented claimants, there is an unbridgeable chasm between pre-suit and post-suit resolution. The probability of suit varied widely, however, with commercial auto accounting for the lowest rate (42%) and medical professional having the highest (89.5%).<sup>27</sup>

26. *See supra* note 16.

27. The tendency of formal litigation to occur more often in medical malpractice cases than automobile cases has been observed before. *See* PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY* 56 (1985) (reporting that “[l]awsuits [were] filed in only 20 percent of automobile claims . . . whereas suits [were] filed in 58 percent of malpractice cases . . .”).

Table 2. Summary Statistics on Self-Representation

	% of Claimants Self-Represented			% of Claims Resolved Post-Suit
	All Claims	Claims Resolved Pre-Suit	Claims Resolved Post-Suit	
Commercial Auto	7.9%	13.4%	0.3%	42.0%
General Commercial	6.1%	23.6%	0.2%	74.8%
Medical Professional	2.5%	21.6%	0.3%	89.5%
Multi-Peril	7.7%	24.0%	0.3%	68.7%
Other Professional	4.0%	18.6%	0.3%	79.4%
Total	6.9%	15.8%	0.2%	57.0%

Closed claims in the “All Lines Full Variables” dataset for 1988-2005, excluding duplicate reports and one claim resolved at summary judgment, by line of coverage, resolution litigation, and nature of representation (self vs. counsel).<sup>28</sup> Includes “bracket creep” claims with payments below \$10,000 (1988\$).

Table 3 provides descriptive statistics on the relationship between self-representation and payout. As it shows, across all lines of coverage the frequency of self-representation declines steadily as the payout increases. Coverage line still matters, however. Medical malpractice claimants retained lawyers more often than auto claimants at all payment levels except the very smallest.

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28. *See supra* note 16.

Table 3. Self-Representation by Coverage Type and Payout Level

	Comm. Auto	Gen. Comm.	Multi- Peril	Medical Prof.	Other Prof.	All Lines
Payout (2008\$)	% of Claimants Self-Represented					
<\$10,000	11.4%	14.4%	15.2%	14.3%	8.8%	12.1%
\$10,000-\$15,000	9.5%	10.7%	12.2%	8.6%	7.1%	10.0%
\$15,001-\$20,000	8.7%	8.1%	10.4%	5.5%	8.5%	8.7%
\$20,001-\$25,000	7.9%	7.6%	9.2%	5.8%	7.3%	7.9%
\$25,001-\$50,000	5.7%	5.3%	6.6%	3.4%	2.4%	5.5%
\$50,001-\$100,000	4.2%	2.6%	3.9%	1.9%	3.1%	3.4%
>\$100,000	2.4%	0.8%	0.8%	0.5%	0.7%	1.2%
All Paid Claims	7.9%	6.1%	7.7%	2.5%	4.0%	6.9%

Percent of paid claims in which claimants represented themselves by line of coverage and payout (2008\$), using the “All Lines Full Variables” dataset for 1988-2005, excluding duplicate reports and one claim resolved at summary judgment.<sup>29</sup> The first row is composed of “bracket creep” claims with payments below \$10,000 (1988\$).

## B. Multivariate Analysis

### 1. Changes in the Rate of Self-Representation over Time

We used multivariate analysis to study the factors that influence self-representation and to determine whether the frequency of self-representation changed over time. Because the dependent variable, “lawyer/no lawyer,” has only two possible values (1 when a claimant had counsel; 0 otherwise), we used logit regressions.<sup>30</sup> To avoid reporting time trends influenced by inflation, we excluded all “bracket creep” claims with real payments below \$10,000 (1988\$). For independent variables, we used (year-1988) and a dummy for whether the claim was filed after Texas adopted tort reform in 1995.<sup>31</sup> We report the results for each line of coverage and for the entire dataset. The results are shown in Table 4.

29. See *supra* note 16.

30. We ran identical probit regressions as robustness checks. In terms of the direction of effects and statistical significance, the results were identical.

31. For a description of the 1995 reforms, see *Physicians’ Insurance Limits*, *supra* note 17, at s19-s20 and Martin Grace, *Tort Reform: Are There Real Benefits?* 8-11 (Aug. 2004) (unpublished paper, on file with Georgia State University Center for Risk Management and Insurance Research). A more extensive package of lawsuit restrictions applies to cases filed

Table 4. Logit Regression Analysis of Self-Representation

	Comm. Auto	Gen. Comm.	Multi- Peril	Medical Prof.	Other Prof.	All Lines
Dependent Variable—Representation by Counsel						
	[1]	[2]	[3]	[4]	[5]	[6]
	<b>.0397</b>	<b>.0755</b>	<b>.0669</b>	<b>.1952</b>	<b>.0121</b>	<b>.0695</b>
Year	<b>.0610</b>	<b>.1151</b>	<b>.1065</b>	<b>.2849</b>	<b>.1937</b>	<b>.0857</b>
P> z	0.000	0.000	0.000	0.000	0.026	0.000
Post- Reform Dummy	<b>-.5205</b>	<b>-1.1060</b>	<b>-1.0072</b>	<b>-3.1996</b>	-1.7635	<b>-.7846</b>
P> z	0.000	0.000	0.000	0.000	0.063	0.000
No. of claims	79,272	30,460	21,549	17,558	1,323	150,162

Logistic regressions with robust standard errors of representation by counsel against year-1988 and a tort reform dummy variable by line of insurance coverage for all claims with payouts greater than \$10,000 (1988\$) in the “All Lines Full Variables” dataset for 1988-2005, excluding duplicate reports and one claim resolved at summary judgment.<sup>32</sup> Coefficients are reported as 95% confidence intervals. Year = year-1988. Significant results are bolded.

In Table 4, a confidence interval with only positive (negative) values indicates a statistically significant higher (lower) probability of representation by counsel as the value of an independent variable increases. Conversely, a confidence interval that spans zero indicates that there is no statistically significant relationship between the probability of representation and the independent variable in question. Thus, the 95% confidence interval of [.0397: .0610] shown in Table 4 for “Commercial Auto” claims implies a statistically significant increase in the rate of representation by counsel over time. The positive spreads for all lines of coverage also mean the null hypothesis of no change over time can be rejected.

after September 1, 2003. When this paper was originally presented, the TCCD contained claims that had closed by 2005. The vast majority of these claims were initiated before the effective date of the 2003 statute. Accordingly, we do not attempt to study the impact of the 2003 reforms in this paper.

32. See *supra* note 16.

Table 4 also indicates that the 1995 tort reform package slowed the trend toward increasing use of counsel. The confidence intervals associated with the post-reform dummy are negative and significant for all lines except “Other Professional Liability.”

## 2. *Claim-level Factors*

We now turn to claim-level factors that might affect the rate of self-representation. Intuitively, the likelihood of self-representation should decline as legal services become more valuable. Three factors (claim size, claim complexity, and the cost/availability of legal services) are likely predictors of such circumstances. We separately describe the logic for including each factor, and then analyze their combined impact.

### a. *Claim Size*

Claim size matters for two reasons. First, insurers should become more reluctant to pay as the amount demanded from them grows. As repeat players with appropriate knowledge and incentives, plaintiffs’ lawyers are well situated to provide the needed “encouragement.” Second, plaintiffs’ risk aversion may increase with claim size. If so, plaintiffs with larger claims should be more willing to spend money on legal services in order to reduce their risks.<sup>33</sup>

The most obvious way to measure claim size is to use the payment a claimant received, as we do in Table 3.<sup>34</sup> Unfortunately, the possibility of simultaneous (or reverse) causation makes payment a problematic independent variable. If attorneys in fact add value, their involvement increases the payments their clients receive. Therefore, it may be true that more valuable claims are more likely to make their way to attorneys and that attorneys make claims more valuable than they otherwise would be.

Accordingly, we use policy limits as a proxy for claim size. The amount of the policy limit is set before a claim occurs. Higher limits mean that higher damages are collectible, since there is limited ability to collect

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33. Huang, *supra* note 12, at 205, also finds that the likelihood of retaining counsel rises with the amount in controversy. Unfortunately, he does not explain how this amount was determined for the cases in his dataset. Sales et al., *supra* note 12, at 561, found that parties with higher incomes retained lawyers more often in divorce cases, but they attributed this to greater ability to afford counsel rather than to higher stakes.

34. Death is a measure of injury severity, but we cannot use death as an independent variable because counsel appeared in all paid death claims.

above limits.<sup>35</sup> Policy size thus affects claim value without being tainted by reverse causation.<sup>36</sup>

Because the TCCD contains policy limits only for the primary insurer, we must exclude all multi-payer cases from regressions in which policy limits are employed as an independent variable. Multi-payer cases are those in which excess carriers or other sources contribute to settlements. Excluding these cases reduces the size of the dataset by 20,356 claims. As in Table 4, we also exclude cases with real payments below \$10,000 (1988\$) from all regressions to avoid bracket creep.

*b. Claim Complexity*

As claims become more complex, specialized legal and factual knowledge becomes more important for plaintiffs.<sup>37</sup> For example, when liability, causation, and damages are obvious (such as in most rear-end automobile collisions), self-representation is more practicable than when one or more elements are difficult to gauge and likely to be disputed (as is usually the case in medical malpractice cases). When claims are complex, simply knowing how to develop and package them for consideration by insurance carriers is valuable. Thus, it is easier for legal services to “add value” to complex cases than to simple ones.

We use line of coverage as a (highly imperfect) proxy for claim complexity.<sup>38</sup> Although the TCCD contains other indirect measures of claim

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35. See *Jury Verdicts*, *supra* note 17, at 35; *Separating Facts from Rhetoric*, *supra* note 17, at 180-84; *Physicians' Insurance Limits*, *supra* note 17, at s8. Medical malpractice claimants recovered more than the policy limits only about 2% of the time. Defendants pay only about 44% of the total amount awarded by juries—and they pay only about 10% of the amount awarded above-limits, most of which is paid by insurers. DANZON, *supra* note 27, at 56, also found “that awards tend to rise with the limits of the defendant’s insurance coverage.” Danzon studied settlements separately from jury verdicts.

36. Higher limits may also indicate practice areas with special potential to inflict serious injuries, such as surgery, obstetrics, or anesthesiology. Providers more likely to generate high-dollar claims may purchase larger policies than others, both to protect their personal assets and to satisfy minimum coverage requirements set by hospitals. Whether this is true, however, is uncertain. Our studies of malpractice claims found that doctors with paid perinatal claims carried smaller policies than others, even though payments on perinatal claims were above average. The correlation between policy size and exposure is therefore imperfect, at best.

37. See Sales et al., *supra* note 12, at 567 (finding that 39% of parties who hired lawyers identified complexity as a reason for their doing so). On the basis of telephone interviews with 273 parties to divorce lawsuits in Maricopa County, Arizona in 1991, Sales et al. also concluded that case complexity, measured by the presence or absence of children in a marriage and the ownership of real estate, affected the decision to hire counsel. *Id.* at 564-65.

38. Huang, *supra* note 12, at 206-07, also finds variation in self-representation rates by subject matter of litigation.

complexity, such as the duration from injury to payment, the number of defendants, and the commencement of formal litigation,<sup>39</sup> the possibility of simultaneous (or reverse) causation complicates the use of these variables in regressions. For example, although we expect more complex claims to take longer than simpler ones, attorney involvement may increase (or decrease) claim duration. Even when claims are of similar complexity, attorneys may make fuller investigations or drag out negotiations longer than self-represented claimants. Similarly, the number of defendants may motivate the plaintiff to hire a lawyer—but it is also possible that the lawyer identified additional potential responsible parties—making claims handled by lawyers seem more complex than would otherwise be the case. The filing of a formal complaint may also be more likely in relatively complex cases, but the involvement of an attorney is effectively a precondition to the filing of a lawsuit, as shown in Table 2. Accordingly, we rely on line of coverage as a proxy for complexity, with the expectation that commercial auto claims will be simpler than other types of lawsuits.

*c. Cost of Legal Services*

Finally, the cost and availability of legal services should matter as well. Other things being equal, more availability and lower cost should imply higher utilization—particularly if more availability and lower costs encourage the development of a “culture of claiming.”<sup>40</sup> In Texas, as in other states, lawyers concentrate in urban areas. Claimants residing in urban counties may therefore be more likely to use lawyers than rural Texans.<sup>41</sup> To test this hypothesis, we created an urban/rural county dummy variable using the membership list of the Texas Conference of Urban Counties. The

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39. *See supra* note 21.

40. Claiming rates vary considerably both across states and within them. *See, e.g.*, INS. RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, PART ONE: ANALYSIS OF CLAIM FREQUENCY 11 (2d ed. 1995) (reporting a national average of twenty-nine bodily injury (“BI”) claims per 100 property damage (“PD”) claims for tort (i.e., fault) states in 1993, ranging from a high of sixty-one BI claims per 100 PD claims in California to a low of eighteen in Wyoming); *id.* at 3 (“Central city territories usually have more bodily injury claims per 100 property damage claims than territories composed of suburbs, medium-sized cities, small towns, or rural areas.”). Even across urban areas, however, substantial variation can occur. *See id.* (reporting ninety-nine BI claims per 100 PD claims in Los Angeles but only forty in San Diego). *See also* Kevin D. Hart & Philip G. Peters, *Cultures of Claiming: Local Variation in Malpractice Claim Frequency*, 5 J. EMPIRICAL LEGAL STUD. 77 (2008).

41. Stated differently, rural residents may be more likely to “lump it.” *See, e.g.*, VASANTHAKUMAR N. BHAT, MEDICAL MALPRACTICE: A COMPREHENSIVE ANALYSIS 118-19 (2001) (finding that patients in urban areas are more likely to sue dentists, but finding a negative association between trial lawyers per capita and the frequency of dental malpractice claims).

variable takes a value of one for the thirty-five counties that are members and a value of zero for the 219 counties that are not.<sup>42</sup>

*d. Regression Analysis*

Table 5 presents logit regressions by coverage line using these independent variables. It also presents an aggregate regression on the entire dataset in which “Commercial Auto” is the omitted line of coverage.

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42. See Texas Conference of Urban Counties—FAQ, <http://www.cuc.org/faq.aspx#members> (last visited Dec. 17, 2009) (listing the thirty-five counties that are members of the Texas Conference of Urban Counties).



Table 5. Multivariate Logistic Regression of Likelihood of Representation by Counsel by Coverage Line and for All Lines

	Comm. Auto	Gen. Comm.	Multi- Peril	Medical Prof.	Other Prof.	All Lines
	[1]	[2]	[3]	[4]	[5]	[6]
Year	<b>.0401:</b> <b>.0617</b>	<b>.0692:</b> <b>.1097</b>	<b>.0639:</b> <b>.1044</b>	<b>.1772:</b> <b>.2681</b>	<b>.0293:</b> <b>.2209</b>	<b>.0637:</b> <b>.0805</b>
P> z	0.000	0.000	0.000	0.000	0.010	0.000
Post-Reform Dummy	<b>-.5128:</b> <b>-.3066</b>	<b>-.9726:</b> <b>-.5638</b>	<b>-.9714:</b> <b>-.5869</b>	<b>-2.8125:</b> <b>-1.8247</b>	<b>-1.978:</b> <b>-.1473</b>	<b>-.7095:</b> <b>-.5467</b>
P> z	0.000	0.000	0.000	0.000	0.023	.000
Ln(Policy Limit (1988\$))	<b>.1065:</b> <b>.1557</b>	<b>.0583:</b> <b>.1814</b>	-.1831: .0174	<b>-.645:</b> <b>-.4569</b>	-.323: .426	<b>.0558:</b> <b>.1018</b>
P> z	0.000	0.000	0.105	0.000	0.787	0.000
Urban	<b>.2314:</b> <b>.3557</b>	<b>.0505:</b> <b>.2854</b>	<b>.1343:</b> <b>.3872</b>	<b>-.4728:</b> .0883	<b>-.9429:</b> .4081	<b>.1928:</b> <b>.2912</b>
P> z	0.000	0.005	0.000	0.179	0.438	0.000
Gen. Comm.						<b>.0064:</b> <b>.1261</b>
P> z						.030
Multi-Peril						<b>-.25:</b> <b>-.1282</b>
P> z						.000
Medical Prof.						<b>.7969:</b> <b>1.013</b>
P> z						.000
Other Prof.						<b>.1803:</b> <b>.7751</b>
P> z						.002
Constant	.0708: .7263	-.2948: 1.3767	1.6297: 4.3143	9.0604: 11.7076	-3.355: 7.3869	.739: 1.3503
P> z	.017	.205	.000	.000	.462	.000
No. of claims	75,112	23,837	17,454	12,349	1,048	129,800

Logistic regressions with robust standard errors of representation by counsel by line of insurance coverage for all single-payer claims with payouts greater than \$10,000 (1988\$) in the "All Lines Full Variables" dataset for 1988-2005, excluding duplicate reports and one

claim resolved at summary judgment.<sup>43</sup> Coefficients are reported as 95% confidence intervals. Year = Year-1988. Statistically significant results are bolded. Commercial Auto is the omitted coverage line in the All Lines regression.

As in Table 4, across all lines of coverage we find a consistent time-trend toward increased use of counsel and a negative impact from the 1995 tort reforms. Larger exposure (proxied by ln(policy limits)) is associated with an increased use of counsel in two coverage lines (commercial auto and general commercial), but with decreased use of counsel in medical malpractice. Claimants in urban areas are more likely to use counsel in three coverage lines—commercial auto, general commercial, and multi-peril. Regression [6] indicates that, relative to commercial auto, the probability of employing counsel was higher in general liability, medical professional, and other professional coverage, but lower in multi-peril.

The results in regression [4] for medical professional liability are counterintuitive, since the Urban dummy is insignificant and larger policy limits predict a lower likelihood of representation by counsel. The unimportance of location has a plausible explanation. Medical malpractice injuries tend to be unusually severe. These cases have by far the highest mean and median payments, and in almost 30% of the cases the patients died. The size of malpractice claims may justify the cost of searching for a lawyer, regardless of where one resides.

The negative impact of policy limits in regression [4] is harder to understand. Why might higher policy limits make it less attractive to retain counsel? Insurers' settlement behavior may explain this result. Insurers know how much coverage providers carry. Insurance policies also require providers to give insurers prompt notice of mishaps likely to cause liability claims. Taking advantage of this information, insurers may identify claims with significant potential to generate large losses and seek to settle them before plaintiffs' counsel becomes involved. The presence of counsel on the claimant's side drives up insurers' costs by increasing both payouts and litigation expenses.<sup>44</sup> It therefore makes sense for insurers to intervene aggressively in cases with clear liability and large policy limits, where the potential savings are the greatest.

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43. See *supra* note 16.

44. This has been known for years. See HAMMITT, *supra* note 14, at 34-36 (studying closed automobile claims collected in 1977 and finding that "[r]epresented claimants not only recover[ed] larger payments on average, they [were] also significantly more likely to recover some payment for general damages than [were] unrepresented claimants with comparable injuries"); see also *id.* at 64 (finding that the "average time to settlement [of BI claims] more than double[d] when claimants hired attorneys").

Table 6 provides some suggestive evidence supporting this hypothesis. It shows that mean and median real policy limits for self-representing medical malpractice claimants are nearly double those of claimants armed with attorneys. By contrast, the median real policy limit post-suit is nearly the same for both types of claimants.

Table 6. Policy Limits for Medical Professional Liability Claims Resolved Pre- and Post-Suit

	Claims Settled Pre-Suit		Claims Settled Post-Suit	
	Self-Representing Claimants	Claimants with Counsel	Self-Representing Claimants	Claimants with Counsel
Mean Policy Limit (1988\$)	\$2,016,074	\$1,179,335	\$2,151,065	\$906,811
Median Policy Limit (1988\$)	\$1,211,387	\$657,462	\$672,138	\$605,693
No. of claims	387	1283	36	11,043

Mean and median policy limits (1988\$) for self-representing claimants and claims with counsel by resolution stage, using claims covered by Medical Professional Liability policies in the "All Lines Full Variables" dataset for 1988-2005, excluding duplicate reports and one claim resolved at summary judgment.<sup>45</sup> Includes "bracket creep" claims with payments below \$10,000 (1988\$).

### III. DISCUSSION

#### A. Implications of Our Findings

Although 7% of paid BI claimants were self-represented, virtually every paid claimant who filed suit had legal counsel.<sup>46</sup> The conventional view is that settlement occurs in the shadow of the expected outcome at trial.<sup>47</sup> Assuming that is correct, it follows that only BI claimants with lawyer-worthy claims can obtain settlement payments. Stated differently, self-

45. See *supra* note 16.

46. See *supra* note 16. Because the TCCD includes only paid claims, we do not capture the representation patterns of those who engaged in litigation but did not receive a payout.

47. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 969-70 (1979).

representation only works for claimants who could hire attorneys if they wanted to—since only these claimants can threaten insurers with the risk of losing at trial. Claimants with non-lawyer-worthy claims will not receive anything, because they cannot credibly threaten to extract a forced payment in an amount set by a court.<sup>48</sup> Unless insurers willingly throw money at claims on which they face no exposure at trial—a doubtful proposition—the only plausible inference is that they thought the unrepresented claimants they paid would have been able to hire lawyers, had they tried. As Alfred F. Conard observed in the 1950s, a claimant’s ability to hire a lawyer and sue “is the threat that makes defendants settle.”<sup>49</sup>

The obvious conclusion is that a cap on contingency fees, if set below the market-clearing price for legal services, will result in many claimants being left without any recourse against those who caused their injuries. This conclusion provides a simple incentive-based explanation for the support for caps shown by tort-reform advocates: capping attorneys’ fees helps defendants, not plaintiffs.

One additional note: quality of lawyering matters as well. We have focused on a binary set of options: lawyer or no-lawyer. But, if price caps reduce the quality of lawyering, both sides are likely to take the case less seriously (and its value is likely to be reduced) relative to what would happen in a world without such caps. For example, in cases involving social security benefits, the government initially takes a position that is not “substantially justified” (which results in a fee award under the Equal Access to Justice Act) 42% of the time; in veterans’ benefits cases, the government’s position is not substantially justified 70% of the time.<sup>50</sup> Does anyone believe it is a coincidence that error rates are high when fees are capped?

## B. Time Trends

After controlling for the tort reforms enacted in 1995, we find a consistent decline in self-representation across all five lines of coverage. Similar results have been reported in earlier research.<sup>51</sup> What might explain these

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48. *Cf. Farmer v. Haas*, 990 F.2d 319, 321 (1993) (“Her suit sought damages, and if it had merit she might be able to retain a tort lawyer to handle it on a contingent basis. . . . If the plaintiff were unable to secure a lawyer in the private market, this might mean the suit had no merit, although alternatively it might mean that the plaintiff lacked the necessary information to obtain a suitable lawyer.”).

49. Alfred F. Conard, *The Impact of Expense on Injury Claims*, 287 ANNALS AM. ACAD. POL. & SOC. SCI. 110, 114 (May 1953).

50. Posting of Marcia Coyle to The BLT: The Blog of Legal Times, <http://legaltimes.typepad.com/blt/2010/02/roberts-startled-by-government-errors-in-vet-cases.html> (Feb. 23, 2010, 12:13 EST).

51. *See* INS. RESEARCH COUNCIL, *supra* note 40, at 1.

patterns? The cost of self-representation may have increased or the cost of legal services may have declined. Rising real wages could account for the former. The latter could be explained by growth in the supply of lawyers or the rise of law firms that specialize in small claims, often referred to derisively as “settlement mills.”<sup>52</sup> Alternatively, insurers in Texas may have grown increasingly reluctant to pay unrepresented claimants—and claimants responded by hiring lawyers. Unfortunately, we are unable to distinguish between these possible explanations with the information available in the TCCD.

### C. Effect of 1995 Tort Reforms

The probability of self-representation increased following the tort reforms adopted by Texas in 1995. The most obvious explanation for this is that more claimants had to represent themselves because the supply of legal services contracted. In other words, tort reforms made legal services less available, making self-representation more attractive.

The problem with this argument is that claimants who cannot secure representation cannot extract settlement payments from insurers because they cannot credibly threaten to sue. Self-representation is a viable option only for claimants who could “lawyer up” if it became necessary.<sup>53</sup> If tort reforms make legal services more expensive/less available, claimants who could pay the higher prices but do not wish to may find self-representation attractive, but claimants who are priced out of the market must simply give up. Claimants who lost access to lawyers as a result of 1995 legislation should not turn up as successful self-representing claimants in the TCCD; they should become unsuccessful claimants and drop out of the dataset entirely.

Another possibility is that the 1995 tort reforms reduced the need for legal services by making it easier to evaluate the merits of claims. Some claimants presumably start out by representing themselves and consult a lawyer only after a malpractice insurer rejects their demands or offers them less than they want. In some of these instances, plaintiffs’ attorneys decide that the insurer wrongly failed to pay or offered too little, and sign up the clients. In a fraction of these cases, the insurer pays the claim after counsel is retained and the claim appears in the TCCD as one with a represented claimant.

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52. For a description of plaintiffs’ law firms that specialize in processing small claims cheaply, see generally Nora Freeman Engstrom, *Run-of-the-Mill Justice*, 22 *GEO. J. LEGAL ETHICS* 1485, 1487 (2009).

53. See *supra* notes 38-39 and accompanying text.

If tort reforms make claim values easier to detect and harder to manipulate, insurers should generate false negatives less often and plaintiffs' attorneys should agree with insurers more often. In other words, plaintiffs' attorneys should more often reject claimants who were dissatisfied with the treatment they received from insurers. The rejected claimants should then either take whatever non-zero offer they received (and be identified as self-represented in the TCCD) or drop their claims (and fall out of the TCCD). In either event, the frequency of successful self-represented claimants should rise relative to that of represented claimants.

This explanation is consistent with a study by Professor Martin Grace, who found that post-1995 claimants received a higher fraction of the compensation they demanded in settlement of their claims (44% pre-reform versus 49% post-reform).<sup>54</sup> Grace hypothesized that higher percentage recoveries occurred because the 1995 reforms made it more difficult for claimants to manipulate their damages.<sup>55</sup> In other words, the reforms enabled insurance carriers to have greater confidence in claimants' assertions because fraudulent and inflated demands were easier to spot.

#### **D. The Proof is in the Pudding**

Apart from the claims reported to the TCCD, is there any other evidence that tort reform can interrupt a trend toward greater use of private counsel? In a series of articles, Stephen Daniels and Joanne Martin explored the impact of the 1995 and 2003 Texas tort reforms on plaintiffs' lawyers' willingness to take cases.<sup>56</sup> They report that many plaintiffs' attorneys cut back, especially in the area of medical malpractice.<sup>57</sup> Their finding suggests that the cost of private counsel increased, causing the balance to shift in favor of self-representation for some claimants.

#### **E. Experience in Other States**

Studies conducted in other states also find that unrepresented claimants generally cannot sue successfully. A 1993 American Bar Foundation ("ABF") study used a Wisconsin dataset of closed medical malpractice claims. It found that self-representation was no substitute for representation by an attorney. Of the 2,896 closed claims in the study, 59 involved

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54. See Grace, *supra* note 31, at 22.

55. *Id.* at 25.

56. See *The Texas Two-Step*, *supra* note 11.

57. *Survival of the Fittest*, *supra* note 11, at 317-19.

pro se plaintiffs and another 102 involved unrepresented plaintiffs.<sup>58</sup> “Claimants were able to secure a monetary settlement in only 1 of the 59 pro se claims [a success rate of 1.7%], and 8 of the other 102 claims [a success rate of 7.8%].”<sup>59</sup> In contrast, the success rate for all claimants represented by counsel was 33.4%<sup>60</sup> and the success rate for claimants represented by the two most experienced plaintiffs’ firms in the study was 50.2%.<sup>61</sup> Older studies also found that unrepresented claimants obtained payments less often than claimants armed with attorneys.<sup>62</sup> Thus, representation makes a difference and the best representation can make a substantial difference.

Unlike the TCCD, the Wisconsin dataset included claims that closed without payments.<sup>63</sup> Lumping pro se litigants and unrepresented litigants together, the ABF report indicates that claimants without attorneys went home empty-handed 94.4% of the time (152/161 = 94.4%).<sup>64</sup>

The Wisconsin data came from a single state-backed medical malpractice insurer, the Wisconsin Health Care Liability Insurance Plan (“WHCLIP”).<sup>65</sup> The dataset also contained only 6,727 closed claims, more than half of which were incident reports in which “no legal claim was filed and . . . the patient did not assert a claim for money.”<sup>66</sup> The analysis focused on 2,896 claims in which formal legal proceedings were commenced.

By contrast, the TCCD contains over 182,000 reports of paid claims filed by all admitted carriers operating in the Texas market. It therefore provides a more comprehensive picture of claiming behavior than the Wisconsin dataset. The TCCD reports also cover all commercial coverage lines, not just medical malpractice. Finally, the reports in the TCCD cover

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58. Stephen Daniels et al., *Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims* 6 (Am. B. Found. Working Paper No. 9210, 1993) (Pro se claimants were formally listed as such in the claim file. For unrepresented claimants, the claim file simply did not identify the claimants’ attorney.).

59. *Id.*

60. *Id.* at 7.

61. *See id.* at 20.

62. Marc A. Franklin, Robert H. Chanin & Irving Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 13 (1961) (study of personal injury cases finding success rates of 90% and 65% for represented and unrepresented claimants, respectively). *See* Clarence Morris & James C. N. Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913, 924 (1962) (reporting that 95% (111 of 117) of represented claimants with non-fatal injuries stemming from automobile accidents obtained some recovery, and that only 66% (129 of 194) of unrepresented claimants did).

63. Daniels et al., *supra* note 58, at 16.

64. *Id.* at 6.

65. *Id.* at 13.

66. *Id.* at 16.

all claims on which insurers paid more than \$10,000 (nominal), including claims insurers settled without formal litigation. The TCCD thus enables one to examine an area of claiming behavior—pre-suit resolution—in which self-representation may be especially common.

Comparing Wisconsin and Texas, one difference jumps out. The ABF study does not analyze or present results for the pre-lawsuit period, which, in Texas, was the most common way for unrepresented BI claimants to obtain recoveries. Across all lines of insurance, about 7% of the reports in the TCCD concerned unrepresented BI claimants who recovered payments without filing lawsuits. The percentage for the medical malpractice coverage line was relatively low, but still positive. Judging from the ABF report, the analogous recovery rate for medical malpractice claimants in Wisconsin appears to be zero.

We originally suspected that the manner of reporting data accounted for the difference between the ABF report's findings and our own. In fact, the findings appear to reflect a real difference in the way claims were handled. According to Stephen Daniels, "WHCLIP didn't really pay much attention to something in terms [of] setting aside reserves or entertaining any settlement discussions until the other side went through the trouble of filing a formal legal complaint."<sup>67</sup> Texas insurers, including those that sell medical malpractice coverage, do not require such a show of force. Were they to do so, the data strongly suggest that for claims of all types the rate of successful self-representation would drop to near zero—that is, to the Wisconsin rate. It is all but impossible for medical malpractice claimants to sue successfully without help from attorneys.

As a claims handling strategy, there is something to be said for the policy of waiting for claimants to sue.<sup>68</sup> Some claims are meritorious; some are not. It can be hard to distinguish the former from the latter, especially when claims are complex. Rather than bear the cost of sorting all claims, including those that gave rise only to incident reports or were brought to their attention by unrepresented claimants, WHCLIP used plaintiffs' attorneys to do some initial sorting for it. It used a contingent fee lawyer's wil-

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67. E-mail from Stephen Daniels to Charles Silver (Nov. 11, 2008, 14:10:00 CST) (on file with author).

68. See David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1122 (2006) ("Nothing prevents providers or liability carriers from offering payments before patients sue or from paying valid claims expeditiously. Yet, they rarely compensate patients until threatened with litigation . . . [B]y and large, compensation flows only to patients who sue and only after litigation becomes protracted. On economic grounds this is easy to explain. Given the high degree of under-claiming and the high drop rates for malpractice cases, the strategy of paying claims only after protracted litigation minimizes expected liability costs.").



lingness to handle a claim as a signal that the claim was worth a closer look. WHCLIP ignored other claims because unrepresented claimants could not credibly threaten to sue.

Texas insurers relied on plaintiffs' attorneys less heavily than WHCLIP, but the difference should not be exaggerated. In Texas, only 450 of 17,515 paid medical malpractice claims (2.5%) involved self-represented claimants. Texas medical malpractice insurers therefore had the benefit of plaintiffs' attorneys' sorting efforts in the vast majority of paid claims. We find a similar pattern across all lines of coverage and payout. As Table 3 reflects, the highest rate of self-representation is found in multi-peril cases with a payout of less than \$10,000—but even here, only 15% of plaintiffs proceed without a lawyer. Lawyers' willingness to handle small claims supports the inference that unrepresented claimants succeed only because they could “lawyer up” if necessary.

#### F. Wealth and Income and the Decision to Hire Counsel

Disagreement exists over whether or how greatly parties' wealth and income affect the decision to employ counsel to address legal problems.<sup>69</sup> Because the TCCD contains no measure of claimants' wealth or income, we cannot assess this factor's importance. Based on other research and discussions with plaintiffs' lawyers in Texas, however, we believe that essentially all claimants who hire lawyers in BI suits in Texas use contingent percentage fee arrangements. Because these arrangements free claimants from the obligation of paying for legal services except from their recoveries, we would not expect wealth or income to directly influence the decision to hire lawyers.

To be sure, income might indirectly affect lawyers' willingness to take cases. All other things equal, claimants with higher incomes will have higher lost earnings. If the lawyer's fee is a fixed percentage of the recovery, higher lost earnings will translate into a higher fee. In addition, many plaintiffs' lawyers will only accept a case if there is a minimum amount of damages—and claimants with higher incomes will more easily satisfy this

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69. Compare AM. BAR ASS'N, LEGAL NEEDS AMONG LOW-INCOME AND MODERATE-INCOME HOUSEHOLDS: SUMMARY OF FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY (1994) (finding that wealth matters) and Bruce D. Sales, Connie J. Beck & Richard K. Haan, *Is Self-Representation a Reasonable Alternative to Attorney Representation in Divorce Cases?*, 37 ST. LOUIS U. L.J. 553, 594-98 (1993) (also finding that wealth matters) with Herbert M. Kritzer, *To Lawyer or Not to Lawyer, Is that the Question?*, 5 J. EMPIRICAL LEGAL STUD. 875 (2008) (finding similar lawyer retention patterns across wealth levels).

requirement.<sup>70</sup> In combination, these factors make high-income claimants more appealing than low-income claimants.

### G. Limitations of Our Study

We do not offer a formal model of the decision to hire or not hire a lawyer. Without a model, considerable caution is required in interpreting the patterns we document. For example, the time trends we observe are only meaningful if, *inter alia*, the claiming environment is otherwise stable. If the environment changed in ways affecting the cost and value of legal services, claimants' propensity to hire lawyers may have changed as well. Although we have controlled for the factors we were able to identify, our findings are tentative. Further research will be necessary to fully understand the dynamics at stake.

### CONCLUSION

Over an extended period, and across multiple lines of coverage, an overwhelming majority of successful bodily injury claimants in Texas decided they needed a lawyer. When claims can be resolved without the initiation of formal litigation, a small percentage of claimants decide to represent themselves. The option of self-representation exists for these claimants because they have lawyer-worthy claims. In other words, these claimants can credibly threaten to "lawyer up" unless paid amounts they consider satisfactory.

Tort reforms can cause the supply of legal services to contract by capping fees, reducing claim values, or making litigation riskier or more expensive for claimants. All these changes alter the costs and benefits of legal representation, and thus affect the decision to hire counsel or do without. When the scarcity of legal services increases, some claimants who could hire lawyers find it economically better to represent themselves, but many others are priced out of the market entirely. For these claimants, the only option is to abandon their claims. Only claimants who can credibly threaten to litigate successfully can extract settlement payments, and claimants who cannot find lawyers cannot make this threat.

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70. Hyman & Silver, *supra* note 68, at 1117-20 (describing efforts by plaintiffs' lawyers to screen cases with routine rejection of cases with insufficient damages).