

ARTICLE

Run-of-the-Mill Justice

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[I]t's a cookie-cutter. It's routine. You call and they offer you \$500 and you ask for \$2,000 a month, and then you go to \$1,000. If you get \$1,200, you do it, but it's just boom, boom, boom like that.¹

INTRODUCTION

Over the past three decades, no development in the legal services industry has been more widely observed and less carefully scrutinized than the emergence of firms I call “settlement mills”—high-volume personal injury law practices that aggressively advertise and mass produce the resolution of claims, typically with little client interaction and without initiating lawsuits, much less taking claims to trial.² Settlement mills process³ tens of thousands of claims each year. Their ads are fixtures on late-night television and big-city billboards. But their operations have been largely ignored by the academic literature, leaving a sizable gap in what is known about the delivery of contemporary legal services in the United States.

1. Tr. of Louisiana Disciplinary Bd. Hr'g, In re Lawrence D. Sledge, No. 00-DB-135 (Feb. 16, 2001), at 335 [hereinafter Sledge Disciplinary Hr'g Tr.] (Test. of Lawrence D. Sledge).

2. Settlement mills have not to date been the subject of serious study, or even significant comment. An April 6, 2009 search of the term “settlement mill” in the Westlaw “JLR” database yielded only one relevant result, Jeffrey W. Stemple, *Assessing the Coverage Carnage: Asbestos Liability and Insurance After Three Decades of Dispute*, 12 CONN. INS. L.J. 349, 422 (2005), which itself used the term only in passing. In comparison, and reflective of the term's currency among practitioners, a Google search of the term called up dozens of hits—primarily personal injury law firms reassuring prospective clients that *their* firm is not a “settlement mill.” To the extent the term “settlement mill” has a derogatory connotation, that is not intended. The term “mill” is employed here because of its repeated use by my interviewees. *See, e.g.*, Telephone Interview with K.R. (May 1, 2008); Telephone Interview with S.R. (Mar. 27, 2008); Telephone Interview with K.N. (Nov. 8, 2007); Telephone Interview with A.E. (Aug. 16, 2007). Unless otherwise indicated, all interviews cited in this article are on file with the author.

3. The use of the term “process” is deliberate. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS 98 (2004) (distinguishing the “processing” of claims from the “litigation” of cases).

This lack of attention is somewhat surprising, for scholars have long sought to understand how and why cases settle in the civil context. Research to date, however, has focused on a very small subset of disputes. On-the-ground studies of settlement have traditionally focused on the resolution of *filed* cases⁴—even though it is well understood that a very small percentage of injuries or disputes ever culminates in a lawsuit.⁵ Likewise, Robert Mnookin, Lewis Kornhauser, George Priest, and Benjamin Klein, among others,⁶ have crafted well-developed and widely-accepted theoretical models of civil settlements. But these models assume that bargaining takes place “in the shadow” of trial—and, as we will see, many negotiations do not. The settlement of routine personal injury claims, especially when no lawsuit is initiated and trial is not a realistic alternative, remains poorly understood.

In the same vein, though the plaintiffs’ personal injury lawyer plays a pivotal role in the civil justice system, there have been few detailed studies of such lawyers’ day-to-day activities.⁷ Moreover, the few recent studies that *have* been conducted⁸ have generally focused on “conventional” law practices, *i.e.*, the

4. See, e.g., *infra* notes 195 & 196 and accompanying text. A notable exception is H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970).

5. KRITZER, *supra* note 3, at 12. See generally William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631 (1980); see, e.g., DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 121-22 (1991); Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525, 527, 536-43 (1981).

6. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1978); see also Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61, 101-02 (1971); Alan E. Friedman, Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67, 68 (1969).

7. See KRITZER, *supra* note 3, at 98 (observing that “little” is known “about how lawyers handle contingency fee cases”); Sara Parikh, *Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff’s Personal Injury Bar*, Unpublished Ph.D. Thesis, at 33 (2001) (on file with the author) (“Until very recently, almost no research focused on the plaintiff’s personal injury lawyer.”); Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs’ Personal Injury Lawyers*, 6 INT’L J. OF THE LEGAL PROF. Vol. 3, at 347 (1999) (“To date there has been little inquiry into the practices of plaintiffs’ personal injury attorneys.”); Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 473 (1998) (observing that plaintiffs’ lawyering is a topic that has suffered from little investment in research). To the extent scholars have examined the day-to-day practices of personal injury lawyers, those studies are now decades old. See, e.g., DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE* (1974); JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY* (1967); JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 87-91 (1962). Given that attorney advertising has fundamentally reoriented the work of personal injury lawyers, these studies, which predate *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), shed little light on contemporary practice.

8. See Parikh, *supra* note 7; HERBERT M. KRITZER, *LET’S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* (1991) [hereinafter KRITZER, *DEAL*]; HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990) [hereinafter KRITZER, *BROKER*].

subset of personal injury lawyers who litigate cases and appear in court.⁹ Comparatively little is known about the cadre of attorneys who make a living settling large numbers of claims almost entirely outside of the court system.

This Article begins the process of filling these gaps. Drawing on extensive documentary evidence and fifty in-depth, semi-structured interviews with forty-nine past and current settlement mill attorneys and non-attorney employees,¹⁰ I introduce what I contend is a relatively new,¹¹ largely overlooked, and surprisingly prevalent form of law firm organization. This law firm form deviates substantially from the conventional model. As compared to their conventional counterparts, settlement mill attorneys have more clients, advertise more aggressively, sign a higher percentage of callers to contract, delegate more duties to non-lawyers, file fewer lawsuits, and take far fewer cases to trial. They also settle claims differently—in a manner that implicates and challenges prevailing theories of settlement as well as our basic notions of compensation through tort.

Part I begins by offering ten characteristics which enable us to define certain personal injury firms as “settlement mills” as opposed to more conventional law practices. The question of whether a firm is or is not a settlement mill is not dichotomous. Personal injury firms exist on a continuum, and many firms will exhibit certain settlement mill characteristics. Nevertheless, the ten factors help to chart where on the “conventional firm—settlement mill” continuum a particular firm lies.¹²

Part I then introduces eight settlement mills from seven states.¹³ Three of the

9. Exceptions include: KRITZER, *supra* note 3; Stephen Daniels & Joanne Martin, *The Strange Success of Tort Reform*, 53 EMORY L.J. 1225 (2004) [hereinafter Daniels & Martin, *Strange Success*]; Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781 (2002) [hereinafter Daniels & Martin, *Best*]; Stephen Daniels & Joanne Martin, “It’s Darwinism—Survival of the Fittest:” *How Markets and Reputations Shape the Ways in Which Plaintiffs’ Lawyers Obtain Clients*, 21 LAW & POL’Y 377 (1999) [hereinafter Daniels & Martin, *Darwinism*]; Van Hoy, *supra* note 7.

10. The interviews averaged approximately fifty minutes in length, and approximately half were tape recorded and transcribed. Of the fifty telephone interviews I have conducted, thirty-two were with employees or former employees of the eight firms profiled herein. I have so far compiled preliminary information on three additional settlement mills (in California, Alabama, and Texas). The insights of the additional sources have informed this Article and will be discussed in greater detail in future work.

11. In asserting that settlement mills are “relatively new” (*i.e.*, that they have sprung up within the past three decades), I do not contend that they are unrelated to previously-studied types of law practice. Settlement mills are related to, and arguably descendants of, both franchise law firms, *see infra* note 19 and old-style ambulance chasers, *see infra* note 234.

12. As noted, all firms exist on a continuum. Settlement mills are no exception. Indeed, even firms fairly called settlement mills vary a great deal from one another. Some profiled firms exhibit both more settlement mill traits—and also more exaggerated versions of those traits—than others.

13. Data on three of the eight firms (Sledge, Zang & Whitmer, and Guirard) come primarily from state bar disciplinary records. One (Azar) is based on the summary judgment exhibits of a case recently settled in Colorado federal district court. The final four (Dupayne, Garnett, Jones, and Jeffers) are based on semi-structured telephone interviews with current and past law firm attorneys and non-attorney employees, supplemented and corroborated in some respects with information from public sources. Because detailed information on the latter four firms (Dupayne, Garnett, Jones, and Jeffers) are not matters of public record and

firms are discussed in case studies; five others are introduced briefly in Part I.A. Together, these eight firms account (or in their prime, accounted)¹⁴ for the settlement of more than 7,000 claims in the United States each year. To put that number in perspective, those eight firms alone disposed of more than triple the number of claims resolved annually by juries in all of the nation's federal district courts.¹⁵

Of course, if the firms studied in Part I simply represent a smattering of aberrational law practices, the settlement mill phenomenon would be scarcely more than a curiosity. Part II confronts this prevalence question and considers why, if settlement mills indeed represent a major player in the legal services marketplace, they have so far largely escaped academic notice. I explore the practical, demographic, and legal mechanisms which have shielded settlement mills from scrutiny and then consider initial evidence that settlement mills represent a significant proportion of personal injury claimants in the United States.

Part III explores three conditions that have led to the evolution of such firms: the advent of aggressive attorney advertising; the widespread acceptance of the contingency fee, and in particular the tiered contingency fee (*i.e.*, a contingency fee that escalates if the case proceeds to various stages); and the increasingly inhospitable legal and political environment for the conventional litigation of low-dollar torts. Because these conditions have fostered the development of settlement mills, it follows that, if there is no change to these conditions (by, for example, limiting attorney advertising or the charging of tiered fees), and the environment for the litigation of low-dollar torts continues to deteriorate, settlement mills will predictably multiply.

Part IV analyzes how settlement mills resolve claims in practice and to what effect. This Part demonstrates that settlement mills operate in a manner that bears little resemblance to—and thus implicitly challenges—conventional notions of bargaining. At their core, conventional accounts, as developed by Mnookin-Kornhauser, Priest-Klein, and others, posit that cases settle because settlement is preferable to trial.¹⁶ When cases settle, the settlement value reached “in the

the firms continue to operate, these firms' names are pseudonyms. Initials are also used in lieu of names in order to preserve the confidentiality of my sources. Sources' real initials are used only with permission. Since the information on these four firms comes primarily from individual recollections, the descriptions below should be viewed with appropriate skepticism, as they may be outdated, colored by incomplete recall, or tainted by any number of additional biases. In addition, different sources sometimes painted markedly different portraits of law firm operations. In a few instances, I made credibility determinations (while noting the disagreement); more often, I simply pointed out the contested nature of the assertion. A final note is that the data presented herein comes from a limited number of sources and firms, which means that its generalizability is, by definition, uncertain.

14. As will be explained below, certain firms are no longer in existence or are no longer operating in the manner described.

15. Annual Report of the Director James C. Duff, 2006 Judicial Business of the United States Courts, at 29, available at <http://www.uscourts.gov/judbus2006/completejudicialbusiness.pdf> (reporting that 2,097 civil jury trials were completed in 2006).

16. See *supra* note 6.

shadow of the law” approximates the parties’ overlapping estimate of the expected trial outcome discounted for risk and foreseeable transaction costs.¹⁷ Critically, these models take for granted that, in reaching settlements, both parties at the negotiating table will be armed with particular information—a forecast of how the claim would fare at trial—and a particular and potent weapon—the ability to head to trial, should negotiations break down. Settlement mill bargains are remarkable because they are typically struck by a negotiator without (1) first-hand information about verdicts obtained in comparable cases, (2) detailed information about the intricacies of the particular claim, and (3) the proven willingness and ability to take the claim to court.

Part IV shows that when the conventional models’ prerequisites are not satisfied, the bargain reached bears little resemblance to any hypothetical trial outcome. Rather than the trial-centered portrait painted by conventional theorists, it is *past settlements* that provide the touchstone of appropriate claim value. Negotiated by repeat players, claims are settled for formulaic going rates tied to the gravity of the injury the claimant has sustained. As such, instead of resembling the conventional model, settlement mill bargains more closely resemble two other areas of law from opposite sides of the spectrum where the chance of trial is also absent or much reduced: workers’ compensation and, in Janet Cooper Alexander’s conceptualization, high-stakes securities class actions.

Part IV goes on to probe the distributional consequences of going rates, asking who wins and loses when settlement values are lumped together, largely decoupled from the substantive merit of the underlying claim. This question, of course, deserves rigorous quantitative study.¹⁸ Preliminary qualitative evidence, however, suggests that both those with unmeritorious claims as well as those with meritorious but very small claims, fare reasonably well. On the other hand, those with particularly meritorious claims (those injured by a reckless defendant, for example) and those with meritorious claims who are seriously injured likely fare relatively poorly.

Finally, Part V confronts a puzzle: If settlement mills do not hold the proverbial stick (fear of trial) to nudge the opposing party toward settlement, why do defendants (through their insurers) settle with settlement mills at all? Why don’t

17. Mnookin-Kornhauser also emphasize the parties’ individual preferences. Mnookin & Kornhauser, *supra* note 6, at 966-68. Of course, the above description collapses two separate bargaining models, oversimplifying each. For greater parsing, see Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1600-02 (2004); Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 501-04 (1991). This general model has indisputably taken hold. See, e.g., *Evans v. Jeff D.*, 475 U.S. 717, 734 (1986) (“Most defendants are unlikely to settle unless the cost of the predicted judgment, discounted by its probability, plus the transaction costs of further litigation, are greater than the cost of the settlement package.”).

18. The question also has profound normative implications beyond the scope of this Article. In a future publication, provisionally entitled “Settlement Mills Under the Microscope: A Normative and Prescriptive Analysis” (working paper), I will evaluate settlement mills’ social utility and also propose a policy solution that seeks to curb settlement mills’ worst abuses.

insurers essentially call settlement mills' bluff, refusing to offer any acceptable award, especially in marginal cases? The answer to this question reveals that insurance companies might be *choosing* to cooperate with settlement mills, in part because settlement mills appear willing to settle the largest claims—which present the highest chance of a catastrophic verdict—at an attractive discount. In addition, settlement mills and insurance companies share two sets of overlapping interests: speed and certainty. Insurers, it appears, cooperate with settlement mills, in even marginal cases, because *cooperation is profitable*.

This Article examines the law in action—the unorthodox and little-understood claims resolution practices employed in a largely invisible but increasingly important segment of the legal services industry. What I find challenges our basic understanding of bargaining behavior and has broad implications for our understanding of the tort system's delivery of compensation to accident victims in the United States.

I. CHARACTERISTICS OF SETTLEMENT MILLS

Ten characteristics help to distinguish settlement mills from more conventional personal injury law firms.¹⁹ Four of these factors are necessary (meaning a law firm that does not exhibit each characteristic cannot be considered a settlement mill), and six represent traits that are probative. Settlement mills necessarily (1) are high-volume personal injury practices that (2) engage in aggressive advertising from which they obtain a high proportion of their clients, (3) epitomize “entrepreneurial legal practices,”²⁰ and (4) take few—if any—cases to trial. In addition, settlement mills generally (5) charge tiered contingency fees; (6) do not

19. Even many “conventional” law firms will likely exhibit several of these traits. Many of the characteristics are also shared by franchise law firms, which arguably helped to set the stage for settlement mills' formation. Like settlement mills, franchise law firms (which did some personal injury work in addition to handling matters such as wills, uncontested divorces, name changes, real estate closings, and bankruptcies) operated in high volumes, advertised on television, delegated important duties to para-professionals, streamlined legal tasks, limited meaningful attorney-client interaction, tied compensation to profit generation, and served a client base that has been historically under-served by the legal profession. See generally JERRY VAN HOY, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* (1997), and particularly 136. Underscoring the connection between settlement mills and franchise law firms, Lawrence D. Sledge, an attorney profiled in Part I.B.1., actually visited Jacoby & Myers, perhaps the most famous franchise law firm, as he prepared to launch his own advertising campaign in the late 1970s. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007). He made the trip, he said, because “I wanted to see how they did it and see what was coming. I wanted to see the future.” Sledge Disciplinary Hr'g Tr., *supra* note 1, at 412 (Test. of Lawrence D. Sledge). There are also parallels between settlement mills and mass tort personal injury law firms, as those firms are described by Deborah R. Hensler and Mark A. Peterson. Like settlement mills, mass tort law firms interact frequently with the same pool of defendants, juggle a high volume of claims, and assert claims involving a fairly common set of injuries “incurred in the same or similar circumstances.” Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOKLYN L. REV. 961, 966 (1993).

20. See CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS* 107-09, 141, 147 (1996) (describing “entrepreneurial legal practices”).

engage in rigorous case screening and thus primarily represent victims with low-dollar claims; (7) do not prioritize meaningful attorney-client interaction; (8) incentivize settlements via mandatory quotas or by offering negotiators awards or fee-based compensation; (9) resolve cases quickly, usually within two-to-eight months of the accident; and (10) rarely file lawsuits. Each of these factors is considered below.

A. THE TEN CHARACTERISTICS

First, settlement mills are high-volume personal injury law practices. While plaintiffs' personal injury lawyers are known to have sizable caseloads as compared to others within the profession,²¹ the number of claims per attorney at settlement mills is extreme. Studies suggest that conventional personal injury attorneys have somewhere around seventy open files at any one time²² and serve on the order of 110 clients per year.²³ Settlement mill attorneys (or non-attorney negotiators) often triple that—juggling 200 to 300 open files on any given day and serving 300 to 400 clients annually. Indeed, one Georgia settlement mill attorney reports that she personally settled approximately 600 to 700 claims in a thirteen-month span,²⁴ while an Arizona attorney “process[ed]” 500 to 600 cases per year, “far more,” he recognized, “than a conventional attorney could handle.”²⁵

Second, settlement mills aggressively advertise, and the majority of their clients come from those advertising efforts. This reliance on advertising is, as discussed in Part III, at the heart of the settlement mill business model. It is also distinctive. Despite the seeming ubiquity of attorney ads, relatively few personal injury lawyers advertise on television,²⁶ and even heavy advertisers still typically

21. See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 435-36 & Tbl. B.1 (1982).

22. Stephen Daniels & Joanne Martin, *Plaintiffs' Lawyers, Specialization, and Medical Malpractice*, 59 VAND. L. REV. 1051, 1062-63 (2006) [hereinafter Daniels & Martin, *Malpractice*] (reporting on data from a 2000 survey of Texas plaintiffs' lawyers); see also Daniels & Martin, *Best*, *supra* note 9, at 1789, Tbl. 4 (reporting that lower-echelon attorneys in Texas had a median of forty-five cases at any one time, while higher-echelon attorneys had significantly fewer).

23. Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 247 (2006) (citing JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005) (unpublished data)) (reporting that Chicago plaintiffs' personal injury lawyers surveyed in 1995 served an average of 142 clients per year); Parikh, *supra* note 7, at 73 (reporting that low-end personal injury practitioners in Chicago served an average of seventy-nine clients per year).

24. Sworn Statement of S.S. at 6 (Aug. 19, 1998). Near the end of her employment, S.S. sought the advice of counsel because she feared that her employer was engaged in certain unethical conduct. The attorney she consulted had S.S. make a sworn statement concerning her employer's operations. S.S. has consented to the statement's use and quotation herein. Telephone Interview with S.S. (July 16, 2007).

25. Bruce Tomaso, *Ads for Attorneys: A Question of Ethics: 'Old School' Lawyers Rally to Battle 'Misleading' Valley Sales Pitches*, THE ARIZONA REP., June 12, 1983, at A12.

26. A recent study found that, even among those Texas lawyers with the highest volume of relatively low-dollar claims (BB1 lawyers), only 13% advertised on television. Daniels & Martin, *Best*, *supra* note 9, at 1788-89 & n.19.

obtain most of their clients from traditional sources: practitioner referrals and client word-of-mouth.²⁷ In comparison, all settlement mills considered here air television ads and all obtain the majority of new clients from advertising efforts. Likewise, in contrast with the still-prevailing norm of obtaining a sizable percentage of one's business from one's fellow practitioners,²⁸ for settlement mills, obtaining a client via an attorney referral is said to be somewhere between rare and unheard of.²⁹

Third, settlement mills epitomize "entrepreneurial legal practices" in Carroll Seron's conceptualization of the term.³⁰ At settlement mills, it is assumed that claims will be straightforward. Standardized and routinized procedures are then designed and employed in keeping with that assumption. Efficiency trumps process and quality. Important tasks (such as client screening and, sometimes, actual settlement negotiations) are delegated to non-lawyers.³¹ Factual investigations are short-circuited or skipped altogether.³² And negotiating with insurance adjusters and brokering deals is prioritized over work that draws on a specialized legal education.³³

It is not unusual for conventional personal injury attorneys to spend comparatively little time engaged in legal research, investigating claims, and preparing pleadings.³⁴ Nor is it unusual for conventional attorneys to delegate tasks

27. *See id.*; *see also* KRITZER, *supra* note 3, at 47-49, 55; HEINZ & LAUMANN, *supra* note 21, at 436 Tbl. B.1; Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L. Q. 738, 751-53 (2002); Parikh, *supra* note 7, at 88; Daniels & Martin, *Darwinism*, *supra* note 9, at 383; Herbert M. Kritzer & Jayanth K. Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and their Implications for Case Handling*, 21 LAW & POL'Y 347, 350-52 & Tbls. 1 & 3 (1999). In line with the above scholars' findings, a 1988 survey of auto accident victims found that, of those who retained counsel, a meager 5.8% of clients selected their attorneys on the basis of Yellow Pages, radio, television, or newspaper advertising. ELIZABETH SPRINKEL, ATTORNEY INVOLVEMENT IN AUTO INJURY CLAIMS 25, Tbl. 33 (1988).

28. Daniels & Martin, *Strange Success*, *supra* note 9, at 1237, 1245 n.44 (reporting on a survey of Texas plaintiffs' lawyers that found, for all respondents, "referrals from lawyers are the most important source of business").

29. *See, e.g.*, Telephone Interview with J.K. (May 15, 2008) (stating that the firm received no cases from lawyer referrals); Telephone Interview with V.O. (Nov. 1, 2007) (estimating that 5% of the firm's cases came from attorney referrals); Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007) (recalling that, as soon as he started advertising, he stopped being referred cases from fellow attorneys).

30. *See supra* note 20.

31. As is clear below, this delegation often shades into the unauthorized practice of law, prohibited by Model Rule of Professional Conduct 5.5(a). Of the settlement mill attorneys considered herein who have been subject to state bar disciplinary proceedings, all but Stephen Zang and Peter Whitmer were charged with assisting non-attorneys in the unauthorized practice of law.

32. *See, e.g., infra* notes 296-97 and accompanying text.

33. In this regard, settlement mills are situated on the far end of Herbert Kritzer's continuum between "legal professionals" and "legal brokers." *See generally* KRITZER, BROKER, *supra* note 8. Kritzer was not the first to observe that many lawyers engage in "brokering." H. Laurence Ross observed long ago that "[n]egligence work may be easily regarded as brokerage, rather than the profession of law." Ross, *supra* note 4, at 77. This reality is not lost on settlement mill attorneys. *See* Telephone Interview with D.W. (May 8, 2008) ("Lawyers over there on the pre-litigation side are just brokers. That's all you are.").

34. *See* KRITZER, *supra* note 3, at 99, 136; David M. Trubek et al., *The Costs of Ordinary Litigation*, 31 UCLAL. REV. 72, 91 & Tbl. 3 (1983).

to underlings and keep a watchful eye on the bottom line.³⁵ What sets settlement mills apart is the extreme emphasis they place on efficiency, the extent to which procedures are mechanized, and the lopsided balance struck between the conceptualization of the practice of law as a business versus a profession.

As for the business/profession dichotomy, the founder of one settlement mill profiled herein is on record declaring that he “always . . . approached this as a business first and a law firm second.”³⁶ And, as for the balance struck between traditional legal work versus brokering, one former settlement mill attorney from the Jones firm of Texas recalled, “We did *nothing* legal,”³⁷ while another stated: “They do not want you to practice conventional law.”³⁸

At a Louisiana firm, meanwhile, delegation was taken to such lengths that it was a “regular practice” for clients to have “their cases settled without any attorney involvement whatsoever.”³⁹ In fact, even the initial client interview was mechanized: clients were shown a video of their attorney explaining the case settlement process, rather than having a real-live attorney provide that information.⁴⁰ At two additional law firms, group settlement meetings with claims

35. See VAN HOY, *supra* note 19, at 14.

36. Brett Barrouquere, *Attorneys Hit Local Airwaves—Many Say Business Savvy As Important As Legal Skills*, *ADVOC. (BATON ROUGE)*, Nov. 30, 2003.

37. Telephone Interview with C.P. (May 20, 2008).

38. Telephone Interview with D.W. (May 8, 2008). Based on interviews with nine former attorney and non-attorney employees who worked at the firm between 1996 and 2007, I conclude that, during those years, the Jones firm of Texas resembled a settlement mill in important respects. The firm, first, had a high volume of personal injury claims. Some attorneys reported settling as many as 300 cases per year, and the firm reportedly settled 720-900 claims annually. One attorney lamented: “[T]he volume is so big you lose count.” *Id.* Second, the firm engaged in aggressive television and print advertising and obtained the majority of clients (estimates ranged from 65-100%) from advertising efforts. Third, as noted above, the firm did not emphasize traditional legal work. There was also great mechanization, and claims were frequently settled by non-attorney claims handlers. Fourth, as noted in the text *infra*, the firm rarely tried cases or initiated referrals. Fifth, according to most sources, the firm charged a tiered fee: 40% in the absence of suit and 45% if the claim required litigation. *But see* Telephone Interview with D.W. (May 8, 2008) (recalling a non-tiered fee of 40%). As to the sixth factor, attorneys sometimes screened cases (typically valued around \$6,000) themselves, but there was substantial disagreement as to what percentage of prospective clients were accepted: One source reported that the firm accepted nearly 90% of potential clients, while another put that number as low as 15%. Seventh, there was little meaningful attorney-client interaction. Somewhere between 20% and 90% of clients never met face-to-face with an attorney, and clients were not typically informed of the sum demanded of the insurer on their behalf. Eighth, the firm incentivized settlements by offering negotiators (attorneys and non-attorneys alike) fee-based compensation. Ninth, the firm resolved cases quickly. The typical soft tissue injury case (which made up the bulk of the firm’s caseload), was generally resolved within six months. Finally, the firm rarely filed lawsuits, as noted in the text *infra*. See generally Telephone Interview with B.B. (May 28, 2008); Telephone Interview with D.D. (May 20, 2008); Telephone Interview with C.P. (May 20, 2008); Telephone Interview with J.K. (May 15, 2008); Telephone Interview with A.Z. (May 14, 2008); Telephone Interview with J.D. (May 13, 2008); Telephone Interview with B.D. (May 12, 2008); Telephone Interview with B.M. (May 8, 2008); Telephone Interview with D.W. (May 8, 2008).

39. Sledge Disciplinary Hr’g Tr., *supra* note 1, at 67-68 (Test. of Wendy LeBleau); see *id.* at 425 (Test. of Lawrence D. Sledge).

40. *Id.* at 336-38, 395 (Test. of Lawrence D. Sledge); *id.* at 105-06 (Test. of Lillian Lalumandier); Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007).

adjusters were conducted, and numerous clients' claims were resolved at one sitting.⁴¹

Fourth, settlement mills very rarely take cases to trial themselves, and they also only rarely refer cases to higher-echelon law firms for litigation. These attributes distinguish settlement mills both from conventional firms and from "referral mills," which evaluate claims and then do little but farm out those claims to an appropriate specialist, in return for a portion of the eventual recovery.⁴²

True, even when handled by conventional counsel, trials are anomalous. According to a 1988 study, only 2.8% of represented auto accident victims have their claims tried to a verdict.⁴³ But settlement mills fall short of even this fairly low benchmark. Two of the eight firms considered herein (Zang & Whitmer of Arizona and Jasper Dupayne of Georgia) never completed a trial in-house during the period under discussion.⁴⁴ At Garnett & Associates of

41. Pl.'s Resp. to Def.'s Mot. For Partial Summ. J., Pappas v. Frank Azar & Associates, P.C., 06-cv-01024 (D. Colo. Apr. 16, 2007) [hereinafter Pl.'s Azar Resp.], at Ex. 8 (Dep. of Amy Gainnie, at 34); Telephone Interview of D.W. (May 8, 2008); see also Telephone Interview with C.P. (May 20, 2008); Telephone Interview with D.D. (May 20, 2008). For a critical discussion of this practice, see ROSENTHAL, *supra* note 7, at 103.

42. See John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 286-87 (2007) (discussing referral mills); Hensler & Peterson, *supra* note 19, at 1026 ("Many law firms that advertise serve only as referring lawyers who sign up and then refer claims to experienced law firms that specialize in representing mass tort claimants . . ."). Model Rule of Professional Conduct 1.5(e) condones attorney referral fees, with some restrictions. Much has been said about the plaintiff bar's increasingly rationalized referral networks, see, e.g., Parikh, *supra* note 23, at 243; Daniels & Martin, *Best*, *supra* note 9; Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 DEPAUL L. REV. 363, 368 (1998); Stephen J. Spurr, *Referral Practices Among Lawyers: A Theoretical and Empirical Analysis*, 13 LAW & SOC. INQUIRY 87, 108 (1988).

43. SPRINKEL, *supra* note 27, at 26, Tbl. 35. An additional 1.7% of represented claimants went to trial but settled before a verdict was rendered. *Id.* Because settlement mill sources were typically asked how often trials were "conducted," rather than how often cases were tried to judgment, the proper benchmark to use when judging whether settlement mills deviate from the norm might be closer to 4.5% (2.8% plus 1.7%). That number might exaggerate the frequency of trials, however. As noted, it comes from a 1988 study, and trial rates have declined substantially over the past two decades. See, e.g., Patricia Lee Refo, Symposium, *The Vanishing Trial*, 30 ABA SEC. LIT. 1 (Winter 2004). On the other hand, a more recent (1999-2000) study by Stephen Daniels and Joanne Martin offers another (and higher) comparator. In Daniels and Martin's survey of Texas plaintiffs' lawyers, the lawyers with the highest claim volume of relatively low-dollar claims (the BB1s) reported that a full 6.7% of their claims were "Disposed by Verdict/Trial." Daniels & Martin, *Best*, *supra* note 9, at 1789, Tbl. 4. Meanwhile, a Georgia study found that, from 1994-1997, "[j]ury trials disposed of 5.2% of the automobile accident cases filed in superior court and 4.3% of the state court automobile accident cases." Thomas A. Eaton et al., *Another Brick in the Wall: An Empirical Look at Georgia Tort Litigation in the 1990s*, 34 GA. L. REV. 1049, 1077 (2000). Since plaintiffs' lawyers typically file lawsuits to resolve between 30% and 50% of auto accident claims, see *infra* note 77, the Georgia study brings us full circle to an estimate approaching 2.8%. See also Bernard Black et al., *Defense Costs and Insider Reserves in Med Mal and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L. & ECON. REV. 185, 202 (2008) (reporting that 2.7% of auto accident claims in Texas with payment equal to or greater than \$10,000 involved a "full trial").

44. In re Zang, 741 P.2d 267, 275 (Ariz. 1987). For a discussion of the Dupayne firm, see Part I.B.2. Based on evidence adduced at Zang and Whitmer's disciplinary proceeding, it appears that Zang & Whitmer largely fits the settlement mill mold. First, the firm was a "high-volume" personal injury practice. Commission Report, Zang v. Members of the State Bar of Arizona (Jan. 21, 1986), at 10 [hereinafter Zang Commission Report]. Zang personally processed 500-600 cases per year. Tomaso, *supra* note 25, at A12. Second, the firm advertised

Florida, meanwhile, on the order of 0.5% of claims were tried.⁴⁵ At Frank Azar & Associates, described in the press as “Denver’s best-known personal injury law

aggressively. Zang Commission Report, *supra*, at 19. Third, the firm “utilize[ed] many computer-generated forms and operat[ed] with a staff of paralegals.” Br. for Respondents Before the Disciplinary Commission of the Supreme Court of Arizona, *Zang v. Members of the State Bar of Arizona*, at 2 (Jul. 10, 1986). Indeed, it was alleged (but not proved) that paralegals negotiated settlements. Tomaso, *supra* note 25, at 12A. Fourth, as noted above, during the relevant period, no trials were completed in-house. Fifth, the firm charged a tiered contingency fee: 33% up to 40% if suit was filed and the ultimate recovery did not exceed \$10,000. Tr. of Arizona Disciplinary Bd. Hr’g of Stephen Zang and Peter Whitmer, SB-86-0014-D (Mar. 23, 1984), at 230-33 (Test. of Stephen Zang) [hereinafter Zang Disciplinary Hr’g Tr.]. Sixth, the firm’s portfolio was comprised of “small-dollar” cases, typically involving soft tissue injuries sustained in automobile accidents. *Id.* at 129, Mar. 21, 1984 (Test. of Peter Whitmer); Zang Commission Report, *supra*, at 9-10. As to the seventh and eighth factors, there is some deviation. Attorneys did have face-to-face meetings with clients, including at the initial screening interview. Zang Disciplinary Hr’g Tr., *supra*, at 46, 107, Mar. 22, 1984 (Test. of Stephen Zang), and there is no evidence that the firm employed incentives or quotas. Ninth, the firm resolved most cases quickly, often within six months of the firm’s retention. *Id.* at 119, Mar. 21, 1984 (Test. of Peter Whitmer); *id.* at 117 (“generally they’re in and out relatively fast”). As for the tenth factor, as noted in the text *infra*, Zang & Whitmer initiated lawsuits only about 5% of the time. *In re Zang*, 741 P.2d at 276.

45. Telephone Interview with D.R. (Apr. 3, 2008) (recalling that the firm tried ten or fifteen cases each year, out of approximately 3,000 claims); *see also* Telephone Interview with R.J. (Apr. 8, 2008) (“I could probably count on one hand the number of trials that took place while I was there.”); Telephone Interview with K.E. (Apr. 3, 2008) (“Several thousand cases went through the office per year. And then one or two trials.”). Based on interviews with six former attorneys, two current attorneys, and the firm’s founder, I conclude that, from 1986 through 1992, Garnett & Associates resembled a settlement mill in important respects. (The firm still operates in Florida, but my sources worked at the firm primarily from 1986 through 1992. I do not suggest that the Garnett firm still operates in the manner described. In fact, it is my understanding that the firm’s operations have substantially changed in recent years.) First, the firm had a high volume. The firm settled several thousand cases per year, and each attorney handled 150-420 cases at any one time. Typical of settlement mills, the majority of the firm’s cases involved soft tissue injuries sustained in auto accidents. Second, the firm advertised on television, with an annual advertising budget of approximately \$2.5 million. The majority of clients (estimates ranged from 70% to 99%) came from these advertising efforts. Third, the firm epitomized an entrepreneurial legal practice. Processes were routinized; important tasks such as client screening were delegated to non-lawyers; and one former attorney likened the job to pushing “widgets through the assembly line.” Telephone Interview with R.J. (Apr. 8, 2008). Fourth, as noted in the text, trials were extremely rare. Fifth, the firm charged a tiered contingency fee: 33% up to 40% if suit was filed. Sixth, non-attorney investigators typically screened clients, and the majority of callers were accepted although some were then “kicked or terminated” after retention. Seventh, as noted in the text, *infra*, according to most sources, most clients did not ever meet with an attorney, although clients were typically informed of the sum demanded of the insurance company on their behalf. *But see* Telephone Interview with H.G. (Apr. 29, 2008). Eighth, the firm incentivized settlements by offering negotiators fee-based compensation. Attorneys had a relatively small base salary and then earned 5% of the first \$300,000 in fees generated annually and 10% thereafter. Some attorneys also reported quotas, requiring them either to settle ten cases a month or generate \$300,000 in fees per year. As to the ninth factor, cases were reportedly resolved within six-to-twelve months. Settlements were slowed somewhat by Florida’s “permanency” requirement for the award of non-economic damages. Despite that constraint, according to one attorney: “We cranked ‘em out pretty damn quick.” Telephone Interview with D.R. (Apr. 3, 2008). Finally, as to the tenth and final factor, most attorneys agreed that lawsuits were filed in fewer than 10% of cases. *But see* Telephone Interview with R.J. (Apr. 8, 2008) (noting there was significant variation by lawyer, and some lawyers filed suit quite frequently); Telephone Interview with T.T. (July 14, 2008) (estimating that lawsuits were filed to resolve 10% to 30% of claims). *See generally* Telephone Interview with D.X. (July 18, 2008); Telephone Interview with T.T. (July 14, 2008); Telephone Interview with H.G. (Apr. 29, 2008); Telephone Interview with R.J. (Apr. 8, 2008); Telephone Interview with G.V. (Apr. 7, 2008); Telephone Interview with H.L. (Apr. 7, 2008); Telephone Interview with D.R. (Apr. 3, 2008); Telephone Interview with K.E. (Apr. 3, 2008); Telephone Interview with C.R. (Apr. 1, 2008).

practice,”⁴⁶ it appears that trials were conducted to resolve only about 0.3% of claims.⁴⁷ At Jones & Associates of Texas, most lawyers agreed that the in-house trial rate was less than 0.2%.⁴⁸

46. John Accola, *Frank Azar Keeps Profile High With TV Commercials*, ROCKY Mtn. NEWS, Jan. 4, 2003, at 4C.

47. Compare Pl.’s Azar Resp., *supra* note 41, at Ex. 13, with Jane M. Von Bergen, *Lawyer Who’s Taken on World’s Largest Retailer*, PHILADELPHIA INQUIRER, Oct. 15, 2006, at E1. Press reports and evidence adduced in a malpractice action in Colorado federal district court suggest that, at least prior to 2006, Frank Azar & Associates fulfilled most settlement mill factors. First, the firm operated in extremely high volumes, handling about 3,000 claims a year. Bergen, *supra*, at E1. Second, the firm engaged in aggressive “in your face” television advertising. On some ads, Azar referred to himself as the “Strong Arm” and boasted “I can get you more money!” John Accola, *A Twist For ‘Strong Arm’: Suit Reinstated*, ROCKY MOUNTAIN NEWS, Jan. 10, 2006, at 1B. Like other settlement mills, the firm only “[v]ery, very rarely” got referrals from other law firms or lawyers. Def. Frank Azar & Associates, P.C.’s Motion for Partial Summ. J., 06-cv-01024 (D. Colo. Feb. 5, 2007) [hereinafter Def.’s Azar Motion], at Ex. A (Dep. of Frank Azar, at 117), although Azar contended that the firm did get substantial business from client word-of-mouth, Accola, *supra* note 46, at 4C. Third, in typical cases, Azar had a routinized claim settlement process characterized by a number of discrete steps or “phases.” Def.’s Azar Motion, *supra*, at Ex. C (Dep. of Darwin Burke, at 53-54). And, though attorneys negotiated with claims adjusters, there was significant delegation. Non-attorneys, referred to as “demand coordinators,” for example, compiled draft demands. *Id.* at 54. Fourth, as explained above, very few cases were tried.

As to the non-necessary factors, the firm charged clients a tiered contingency fee—from 35% up to 40% “if it becomes necessary to file suit or demand arbitration to cover damages.” Pl.’s Motion for Partial Summ. J. as to Liability for Breach of Fiduciary Duty, Pappas v. Frank Azar & Associates, 06-cv-01024 (D. Colo. Mar. 30, 2007) [hereinafter Pl.’s Azar Motion], at Ex. A (fee agreement). Sixth, the bulk of the firm’s caseload consisted of auto accident cases, Bergen, *supra* at E1, which “often” settled for as little as \$2,000, Stuart Steers, *The Wal-Mart Crusade: Denver’s Best Known Ambulance Chaser Rolls Over Rollback Smiley*, WESTWORD, Dec. 12, 2002, available at <http://www.westword.com/2002-12-12/news/the-wal-mart-crusade/> (last visited Aug. 5, 2009). Attorneys did screen clients over the telephone, however, asking about the type and factual circumstances of the accident. Def.’s Azar Motion, *supra*, at Ex. C (Dep. of Darwin Burke, at 37, 47-48). Azar & Associates appears to differ from typical settlement mills on the seventh factor: attorney-client interaction. Though investigators would sometimes “sign [clients] up,” after a client retained the firm, she usually met with her attorney. *Id.* at 37; Pl.’s Azar Resp., *supra* note 41, at Ex. 8 (Dep. of Amy Gaiennie, at 19). One attorney, for instance, testified that she always met with clients before transmitting the settlement demand package. *Id.* at Ex. 5 (Dep. of Rosalia Fazzone, at 33). Eighth, fee-based compensation incentivized settlements, as discussed in the text, *infra*. Inadequate information is available on the ninth factor, the average length of time between accident and payment, although some firm commercials promised that the firm will “obtain as much as we can, as fast as we can.” Crowe v. Tull, 126 P.3d 196, 200 (Colo. 2006). As to the tenth factor, as explained in the text, at least during 2002-03, lawsuits were filed to resolve only about 8% of claims. A final distinctive characteristic is that Azar & Associates has been front-and-center in a number of successful big-ticket class actions, most notably representing current and former Wal-Mart employees asserting labor and contract law claims against the discount retailer, suggesting that the law firm has the expertise and resources to try cases when so inclined. *Denver Firms Involved in Wal-Mart Case*, DENVER BUS. J. Oct. 5, 2007, available at <http://denver.bizjournals.com/denver/stories/2007/10/01/daily55.html> (last visited Aug. 12, 2009); Bergen, *supra*, at E1; Accola, *supra* note 46, at 4C.

48. See Telephone Interview with D.D. (May 20, 2008) (recalling that, in his near-decade with the firm, one out of roughly 900 claims went to trial each year); Telephone Interview with C.P. (May 20, 2008) (asserting that the firm has conducted one trial in the past seventeen years); Telephone Interview with D.W. (May 8, 2008) (“The law firm never tried a case while I was there. They haven’t tried one since.”); Telephone Interview with A.Z. (May 14, 2008) (“In the three years I was there, I never saw a trial. They would settle.”); Telephone Interview with J.K. (May 15, 2008) (recalling no trials during his three years of employment); *cf.* Telephone Interview with J.D. (May 13, 2008) (recalling “some” trials during her three years of employment). *But see* Telephone Interview with B.B. (May 28, 2008) (stating that he personally conducted ten trials per year).

Referrals of mature cases are similarly infrequent.⁴⁹ Again, consider Arizona's Zang & Whitmer. From that firm's 1979 formation until disciplinary hearings in 1983,⁵⁰ Zang & Whitmer settled approximately 1,500 personal injury claims without *ever* completing a trial, while referring only 1.3% of claims to outside counsel.⁵¹ Likewise, at the Dupayne firm of Georgia, which reportedly completed no trials, a former attorney reports that only around 1% of claims were referred out.⁵² As that attorney explained, her job was neither to litigate nor to refer but rather to "get [claims] to close, if at all possible, unless the offer was just ridiculous."⁵³

Fifth, settlement mills typically charge tiered (*i.e.*, graduated), rather than fixed, contingency fees for their services, increasing the fee if a lawsuit is initiated. While tiered fees are charged by only the minority of plaintiffs' lawyers nationwide,⁵⁴ such fees are charged by *all* of the settlement mills considered herein. Settlement mills' advertising and fee-charging practices are explored in greater detail in Part III, which considers the factors that have contributed to the evolution of such firms.

Sixth, settlement mills do not function as traditional gatekeepers.⁵⁵ Unlike

49. One reason referrals are infrequent is that many settlement mill claims are too small to be accepted by high-echelon counsel. *See infra* note 238 and accompanying text. Next, even assuming the claim would be accepted, referrals are not necessarily profitable for settlement mills given that the referral firm keeps a significant portion of the eventual fee: 100% of one-third of a small settlement is often greater than 50% (or less) of one-third of a larger settlement or judgment. *See, e.g.*, Telephone Interview with R.J. (Apr. 4, 2008) (stating that the Garnett firm rarely, if ever, referred personal injury cases to other lawyers because "[t]hat's an opportunity for a fee to go out the door. You're trying to get fees to come in, not go out."); Telephone Interview with G.V. (Apr. 7, 2008) (stating that the Garnett firm did not generally refer personal injury cases to other lawyers because a referral would entail "giving [away] at least 25% of the fee, if not half"). Moreover, even if a referral would be profitable from the firm's perspective, quotas or incentives might spark an intra-firm principal-agent problem by motivating line-level negotiators to keep files in-house. *See* Telephone Interview with D.D. (May 20, 2008) (Q: "If a case that had been initially assigned to you was referred to another law firm, did you forego a fee on that case?" A: "Our firm didn't forego a fee, but I would forego part of my bonus." Q: "How do you think that affected attorney or claims manager behavior?" A: "In really one of the ugliest ways, people would settle a case for less than the value or be inclined to rather than refer it somewhere else. . . ."). Finally, it is theoretically possible (albeit purely speculative) that settlement mills *intentionally* keep some significant claims in-house, for reasons discussed in Part V. For a discussion of why higher-echelon firms might obtain higher awards, see *infra* Part IV.C.2.

50. At the conclusion of this disciplinary proceeding, Stephen Zang and Peter Whitmer were adjudged, *inter alia*, to have erroneously advertised the firm's willingness and ability to try personal injury cases. Whitmer was suspended for thirty days; Zang was suspended for one year. *In re Zang*, 741 P.2d 267, 288 (Ariz. 1987).

51. *Id.* at 277. Of those sixteen claims referred out, nine (or 0.6%) were actually tried. *Id.*

52. Telephone Interview with S.S. (May 30, 2007).

53. Sworn Statement of S.S. at 38 (Aug. 19, 1998).

54. KRITZER, *supra* note 3, at 39 & Tbl. 2.4 (estimating that 31% of Wisconsin contingency-fee practitioners use variable fee schedules); HENSLER ET AL., *supra* note 5, at 135-36 (putting the number at 23%). It also appears that, as compared to conventional counsel, settlement mills trigger the escalator earlier in the litigation process. That is, settlement mills trigger the escalator when a lawsuit is filed, while conventional counsel appear to trigger the escalator only if the case involves substantial trial preparation. *See* KRITZER, *supra* note 3, at 40.

55. *See generally* Herbert M. Kritzer, *Contingency Fee Lawyers As Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (July-Aug. 1997).

conventional attorneys, they take most would-be litigants their ads attract. There is usually substantial risk associated with accepting a contingency fee case, and so conventional law firms take screening seriously. They expend significant resources vetting clients and, almost universally, decline far more cases than they accept.⁵⁶ For example, in a 1995-96 survey of Wisconsin contingent fee lawyers, Herbert Kritzer found that respondents accepted approximately 28% of the potential clients who contacted their offices,⁵⁷ and lawyers with the highest call volume from potential clients (1,000 or more calls per year) accepted an even lower percentage—a meager 10% to 15%.⁵⁸ Kritzer also found that conventional attorneys generally screen cases themselves; in his Wisconsin study, only 8% of contingent fee lawyers reported that a non-lawyer typically handled the initial telephone contact from a potential client.⁵⁹

At settlement mills, in contrast, non-attorneys usually screen clients with a heavy thumb on the scale in favor of acceptance.⁶⁰ Indeed, at the Dupayne firm of Georgia, an attorney reports that the “overwhelming” number of prospective clients were accepted.⁶¹ At Garnett of Florida, meanwhile, a former attorney said the “*modus operandi* was to sign everything up.”⁶² Because they are not

56. For a discussion of attorney screening, see KRITZER, *supra* note 3, at 67, 71-76; Mary Nell Trautner, *How Social Hierarchies Within the Personal Injury Bar Affect Case Screening Decisions*, 51 N.Y.L. SCH. L. REV. 215 (2007); Daniels & Martin, *Malpractice*, *supra* note 22, at 1064-66; Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1190-96 (1992); Mark Crane, *Lawyer's Don't Take Every Case*, NAT'L L. J., at 1 (Jan. 25, 1988).

57. See Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, 70 WIS. LAW. 10, 13 (Mar. 1997).

58. *Id.* at 13. See also KRITZER, *supra* note 3, at 72 (lawyers with more than twenty contacts from potential clients per week agree to represent only 8% of those clients). Kritzer's results roughly comport with others' findings. In Daniels and Martin's Texas study, the BB1 attorneys signed a mean of 35.1% of callers to contract, while high-end “heavy hitters” accepted only 17.9%. Daniels & Martin, *Best*, *supra* note 9, at 1789, Tbl. 4. Likewise, in Parikh's study of Chicago plaintiffs' lawyers, the mean acceptance rate for low-end practitioners was 49%. Parikh, *supra* note 7, at 78, Tbl. V. Finally, in its 1995 study of lawyer advertising, the ABA found: “Lawyers who advertise on television . . . reported accepting between two and 15 percent of the potential clients who contacted them.” ABA COMMISSION ON ADVERTISING, *LAWYER ADVERTISING AT THE CROSSROADS* 128 (1995).

59. See Kritzer, *supra* note 57, at 13. In another 26% of offices, either a lawyer or non-lawyer handled the initial screening depending upon availability. *Id.*

60. One might attempt to explain this high rate of acceptance by noting that settlement mills primarily represent auto accident claimants and theorizing that rules governing auto accident liability are so well understood by the general public that counsel is called only if third-party liability is or can be established—in essence, settlement mills need not screen auto cases because auto claimants effectively screen themselves. Such a theory is belied by data, however. A study by RAND researchers found that “the overwhelming tendency of Americans involved in motor vehicle accidents is to blame someone else, no matter what the particular circumstances were.” Indeed, “even among driver-respondents who hit another vehicle only 16 percent name themselves as the cause.” HENSLER ET AL., *supra* note 5, at 23; accord Daniels & Martin, *Strange Success*, *supra* note 9, at 1259 (reporting that plaintiffs' lawyers in Texas that specialize in automobile actions sign only 33.4% of callers to contract).

61. Telephone Interview with S.S. (July 16, 2007).

62. Telephone Interview with D.R. (Apr. 3, 2008); see also Telephone Interview with R.J. (Apr. 8, 2008) (“Did they turn away any cases? Not many.”); Telephone Interview with G.V. (Apr. 7, 2008) (Q: “What

especially selective in the cases they accept, settlement mills' portfolios consist primarily of routine personal injury claims—specifically, automobile accident claims with relatively minor soft tissue injuries.⁶³

A seventh characteristic of settlement mills is that attorney-client interaction is minimal and, when it does occur, tends to be paternalistic rather than participative. Except for agreeing to accept the ultimate offer, clients play little role in the dispute resolution process.⁶⁴ This lack of meaningful personal interaction is unusual. In his study of Wisconsin contingent fee lawyers, for example, Kritzer found that face-to-face meetings were relatively rare, but they did bookend a typical case: clients met with their lawyers when the retainer was signed at the beginning of the representation and when the settlement check was delivered at the end.⁶⁵

Settlement mills typically cut this interaction in half or eliminate it entirely. Clients usually meet with attorneys when the settlement check is disbursed—or not at all. As one attorney from the South Carolina firm Jeffers & Associates explained: “Very often, the first time I saw the client was when they came in to sign their settlement check.”⁶⁶ At Garnett, meanwhile, attorneys recalled that the

percentage of callers seeking legal representation were accepted as clients?” A: “Pretty much everyone.”); Telephone Interview with C.R. (Apr. 1, 2008) (estimating that 90% of callers were initially accepted as clients); *but cf.* Telephone Interview with H.G. (Apr. 29, 2008) (suggesting that the firm turned away a non-trivial number of prospective clients).

63. Common soft tissue injuries are sprains, strains, contusions, whiplash, and herniated discs. Soft tissue injuries do not show up on x-rays and so can be difficult to verify.

64. For an extended discussion of the “participatory model” of legal practice, *see* ROSENTHAL, *supra* note 7. At settlement mills, some clients become mere spectators, creating parallels to clients’ marginalized role (and the ramifications thereof) in the class action context. *See generally* John C. Coffee, Jr., *Understanding The Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

65. KRITZER, *supra* note 3, at 113; *cf.* ROBERT HUNTING & GLORIA NEUWIRTH, WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS 107 (1962) (“In most cases, there was little or no contact between the client and his attorney except at the time of hiring (which was in some cases accomplished by a telephone call) and at the time of final settlement.”).

66. Telephone Interview with K.N. (Nov. 8, 2007); *see also* Telephone Interview with L.T. (Mar. 6, 2008) (“The majority of clients, we don’t meet until they come in and sign the release and get their check.”); Telephone Interview with J.B. (Nov. 12, 2007). According to three current and three former law firm attorneys, as of 2007, Jeffers & Associates of South Carolina fulfilled most of the ten factors enumerated above. First, the firm was a high-volume operation, settling on the order of 1,400 claims annually. Attorneys juggled approximately 100 to 400 cases at any one time and settled 120 to 500 cases per year. Second, the firm engaged in aggressive television advertising, spending more than \$1 million on ads annually. The majority of clients (estimates ranged from 60% to 90%) came from these advertising efforts, while very few came from practitioner referrals. Third, the “entrepreneurial model” was epitomized. Important tasks were delegated to para-professionals, and, although serious cases might require substantial inputs, run-of-the mill cases received only three-to-five hours of attorney time. Fourth, a conservative estimate is that the firm had a trial rate approximating 1.8%. Fifth, the firm charged a tiered contingency fee, one-third up to 40% if a lawsuit was filed, although in practice, lawyers sometimes declined to trigger the escalator if the case was resolved with little effort. Sixth, non-attorneys typically conducted screening interviews, although a lawyer reviewed each file prior to the case’s acceptance. There was disagreement as to what percentage of callers seeking legal representation were accepted as clients. Estimates ranged from 30% to 85%. All agreed, however, that the majority of clients

majority of clients *never* met a lawyer face-to-face.⁶⁷ Further evidence of clients' paternalistic treatment is that, at many settlement mills, clients are not routinely informed of the sum demanded of the insurance company on their behalf. This information is not shared, attorneys report, because of a fear the knowledge will create lofty and unrealistic expectations.⁶⁸

Eighth, settlement mills incentivize settlements via mandatory quotas or by offering their negotiators awards or fee-based compensation. These requirements and rewards put the focus on the *number* of files closed or *aggregate* returns, as opposed to obtaining a fair value for each individual client. At Azar & Associates of Colorado, for example, there is evidence that attorneys were expected to generate \$30,000 to \$40,000 in fees per month.⁶⁹ The attorney who generated the most fees was recognized with a monthly "shark" award.⁷⁰ And attorneys were compensated via straight commissions, rather than salaries.⁷¹ Likewise, at the Jones firm of Texas, where all negotiators (attorneys and non-attorneys alike)⁷² were paid bonuses based on the fees they generated, a former attorney recalled: "There was a constant pressure for more numbers, rather than the quality of the work."⁷³

had been in car accidents and had sustained soft tissue injuries. Seventh, as noted in the text, in typical cases, face-to-face attorney-client interaction was exceptional, and five of the six attorneys interviewed did not routinely notify clients of the sum demanded of the insurance company on the client's behalf. Eighth, until recently, compensation was based on the fees each attorney generated, and one former attorney recalled a quota, requiring her to generate \$40,000 in fees per month. *See* Telephone Interview with K.N. (Nov. 8, 2007) ("It was actually called a quota . . . I was supposed to generate \$40,000 in fees per month."). Ninth, typical claims were resolved quickly, usually within three-to-eight months of the accident, although claims could take substantially longer to resolve. Finally, lawsuits were rarely filed—in approximately 10% to 15% of cases. *See generally* Telephone Interview with T.F. (Mar. 6, 2008); Telephone Interview with L.T. (Mar. 6, 2008); Telephone Interview with J.B. (Nov. 12, 2007); Telephone Interview with K.N. (Nov. 8, 2007); Telephone Interview of J.P. (Nov. 1, 2007); Telephone Interview of V.O. (Nov. 1, 2007).

67. *See* Telephone Interview with R.J. (Apr. 8, 2008) (estimating that 80% or 90% of clients never met with a lawyer face-to-face); Telephone Interview with G.V. (Apr. 7, 2008) ("[T]here was probably at least half of clients, if not more, that I never actually set eyes on."); Telephone Interview with H.L. (Apr. 7, 2008) ("Very rarely did we ever meet our clients."); Telephone Interview with K.E. (Apr. 3, 2008) (estimating that one-half to two-thirds of clients never saw a lawyer face-to-face); Telephone Interview with D.R. (Apr. 3, 2008) ("Most of the time you never even met 'em."). *But see* Telephone Interview with H.G. (Apr. 29, 2008) (stating that, at some point, the negotiating attorney had typically met with the client); Telephone Interview with C.R. (Apr. 1, 2008) (stating that he met with clients but does not believe that all followed this approach).

68. *See, e.g.*, Telephone Interview with L.T. (Mar. 6, 2008); Telephone Interview with K.N. (Nov. 8, 2007). This reticence raises issues under Model Rules of Professional Conduct 1.2(a) and 1.4. Of course, lawyers of all stripes have to contend with clients' unrealistic expectations. There is evidence, however, that rather than simply withholding information, conventional lawyers make an effort to educate clients as to what result reasonably can be attained. *See* KRITZER, *supra* note 3, at 170-72.

69. Pl.'s Azar Resp., *supra* note 41, at Ex. 9 (Dep. of Timmerman, at 37). *But see* Def.'s Azar Motion, *supra*, at Ex. A (Dep. of Frank Azar, at 138) (denying this); *id.* at Ex. C (Dep. of Darwin Burke, at 33) (same).

70. *Id.* at Ex. A (Dep. of Frank Azar, at 80); *id.* at Ex. B (Dep. of Benjamin Johnson, at 20-21).

71. *See, e.g., id.* at Ex. A (Dep. of Frank Azar, at 74-75).

72. *See* Telephone Interview with D.D. (May 20, 2008). Sharing fees with non-lawyers is proscribed. *See* MODEL RULES OF PROF'L CONDUCT R. 5.4(a) [hereinafter MODEL RULES].

73. Telephone Interview with B.M. (May 8, 2008).

The ninth and related factor is the speed at which settlement mills close files. As a rule, claims are resolved much faster in the absence of suit.⁷⁴ But settlement mills resolve claims quickly even accounting for the fact lawsuits are seldom initiated. Studies suggest that, even if no lawsuit is filed, around one year elapses between the accident and the settlement if a claimant is represented by counsel.⁷⁵ At settlement mills, in comparison, cases are sometimes resolved in as little as two months and usually within eight.⁷⁶

The above discussion hints at the tenth and final characteristic: Settlement mills rarely file lawsuits. This fact further distinguishes settlement mills from their conventional counterparts. Studies indicate that even low-status plaintiffs' attorneys file suit in a significant percentage of cases—approximately 50% of the time.⁷⁷ At settlement mills, in contrast, lawsuits are the strong exception. Jeffers & Associates of South Carolina instituted suit to resolve only about 10% to 15% of its claims.⁷⁸ Azar & Associates of Colorado filed suit even less frequently. Between July 2002 and May 2003, the firm opened a total of 1,574 new files and filed suit or commenced arbitration in 127 instances, or a meager 8% of the time.⁷⁹ The now-defunct Arizona personal injury firm of Zang & Whitmer

74. See, e.g., Ross, *supra* note 4, at 229, Tbl. 5.15; Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 31 (1961); Maurice Rosenberg & Michael I. Sovern, *Delay and the Dynamics of Personal Injury Litigation*, 59 COLUM. L. REV. 1115, 1128 n.47 (1959).

75. See, e.g., Ross, *supra* note 4, at 229 (claims settled in an average of 360 days when a claimant was represented by an attorney but suit was not filed).

76. Part of the explanation for this quick closure is exogenous to settlement mills' claim settlement behavior. It is that settlement mills typically represent clients with minor injuries, and, as a rule, the more serious the injury, the longer the claim takes to resolve. See, e.g., *id.* at 226, Tbl. 5.11; Rosenberg & Sovern, *supra* note 74, at 1122-23. In addition, settlement mill negotiators and claims adjusters interact with one another frequently, see *infra* note 286, and frequent interaction is correlated with faster claims resolution, see generally Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence From Federal Civil Litigation*, 31 J. LEGAL STUD. 39 (2002).

77. Daniels & Martin, *Best*, *supra* note 9, at 1789, Tbl. 4 (BB1 attorneys settled prior to filing suit 51.2% of the time); Parikh, *supra* note 7, at 85, Tbl. VI (low-end attorneys settled without suit 52% of the time); see also Franklin et al., *supra* note 74, at 10 (about 50% of New York accident victims who retained counsel initiated suit). One might surmise that settlement mills' low rate of filing is attributable to the fact that settlement mills overwhelmingly represent auto accident victims, and auto accident victims settle pre-suit at abnormally high rates. That explanation is imperfect, however. The BB1 attorneys studied by Daniels and Martin also predominantly represented auto accident victims, Daniels & Martin, *Best*, *supra* note 9, at 1790, and as noted, BB1 attorneys filed lawsuits prior to settling nearly half of the time, *id.* at 1789, Tbl. 4. Likewise, a number of studies have also found that represented auto accident victims still file suit at least one-third of the time. See SPRINKEL, *supra* note 27, at 26, Tbl. 35; DEPARTMENT OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS, Vol. 1, 121 (1970); ALFRED F. CONARD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION 154 (1964).

78. See Telephone Interview with J.B. (Nov. 12, 2007) (firm filed suit about 10% of the time); Telephone Interview with K.N. (Nov. 8, 2007) (firm filed suit to resolve 10% to 15% of claims); Telephone Interview with V.O. (Nov. 1, 2007) (firm filed suit 10% of the time or less); Telephone Interview with L.T. (Mar. 6, 2008) (firm filed suit to resolve about 10% to 15% of claims); *but cf.* Telephone Interview with J.P. (Nov. 1, 2007) (firm filed suit to resolve at least 10% of claims).

79. Compare Pl.'s. Azar Resp., *supra* note 41, at Ex. 6 (letter from Thomas B. Quinn to Patric J. LeHouillier dated Mar. 16, 2007), with *id.* Ex. 14 (chart showing when suit was filed or arbitration commenced). Of course,

provides another data point. In a four-year period, the firm settled roughly 1,500 personal injury claims, with a lawsuit filing rate of only 5%.⁸⁰ And at the Jones firm of Texas, where there was reportedly “pressure” to “conclude [claims] without the necessity of a lawsuit,”⁸¹ some former attorneys recalled initiating lawsuits less frequently still.⁸²

B. THREE CASE STUDIES

We now consider the operations of three settlement mills in some detail. One of these firms is currently in existence; two operated in the recent past.

1. THE LOUISIANA LAW FIRM OF LAWRENCE D. SLEDGE

Lawrence D. Sledge was a solo practitioner in Louisiana. Until he was disbarred in 2003,⁸³ Sledge had, for fifteen years, run a high-volume personal injury practice.⁸⁴ During those years, Sledge and his non-attorney office staff juggled approximately 300 open files at any one time,⁸⁵ the vast majority of which were settled within three-to-six months.⁸⁶ Most of these files involved minor automobile accidents, predominantly “itty bitty”⁸⁷ rear-enders.⁸⁸

Sledge advertised widely and had been advertising in one form or another

some of the files that were opened in 2002-03 could have resulted in a lawsuit instituted after June 2003. Conversely, some of the lawsuits filed in the June 2002-03 window likely reflect files opened prior to June 2002.

80. *In re Zang*, 741 P.2d 267, 277 (Ariz. 1987) (“[N]inety-five percent of respondents’ cases were not filed.”).

81. Telephone Interview with D.W. (May 8, 2008).

82. *See* Telephone Interview with C.P. (May 20, 2008) (lawsuits were filed to resolve “less than 1%” of claims); Telephone Interview with D.D. (May 20, 2008) (lawsuits were filed less than 3% of the time); Telephone Interview with J.K. (May 15, 2008) (lawsuits were filed in “maybe 1%” of claims). *But see* Telephone Interview with D.W. (May 8, 2008) (estimating that lawsuits were filed 20% of the time); Telephone Interview with B.B. (May 28, 2008) (estimating that lawsuits were filed about 8% of the time). In rare instances, when a case could not settle, rather than filing a lawsuit in-house, claims were referred to outside counsel. *See, e.g.*, Telephone Interview with D.D. (May 20, 2008) (“less than 5%” of claims were referred to other law firms); Telephone Interview with D.W. (May 8, 2008) (“maybe 2% of cases” were referred to outside counsel); Telephone Interview with J.K. (same). *But see* Telephone Interview with C.P. (May 20, 2008) (15% to 20% of claims would be referred to outside counsel).

83. *In re Sledge*, 859 So.2d 671, 686-87 (La. 2003). The Louisiana Supreme Court disbarred Sledge after concluding that he solicited prospective clients, in violation of Louisiana Rule of Professional Conduct 7.2(a) and (d); failed to act with reasonable diligence, in violation of Rule 1.3; failed to supervise non-lawyer assistants, in violation of Rule 5.3; and facilitated the unauthorized practice of law, in violation of Rule 5.5(b).

84. Sledge Disciplinary Hr’g Tr., *supra* note 1, at 16 (Test. of Wendy LeBleau); *id.* at 311 (Test. of Lawrence D. Sledge). While Sledge operated a personal injury practice for only fifteen years, he had been practicing law since 1960. *Id.*

85. *Id.* at 76 (Test. of Lillian Lalumandier) (“We had approximately 300 files in the office.”); *id.* at 114 (“[W]e signed up the average of five files a week.”).

86. Offer of Proof, transmitted by letter from Leslie J. Schiff, attorney for Lawrence D. Sledge, to Donna L. Roberts, Board Administrator, Louisiana Attorney Disciplinary Board (Apr. 16, 2001), at LDS-0058 [hereinafter Sledge Supp. Submission].

87. Sledge Disciplinary Hr’g Tr., *supra* note 1, at 369 (Test. of Lawrence D. Sledge).

88. Telephone Interview with Lillian Lalumandier (Aug. 13, 2007).

since 1979.⁸⁹ According to the firm's office manager, the bulk of the firm's clients came from these advertising efforts.⁹⁰ Sledge's ads reflected his colorful personality, and in his firm's heyday, in a play off his surname, Sledge was known throughout Louisiana as "the hammer."⁹¹

When a potential client called the Sledge firm ("invariably" after seeing his advertisement in the Yellow Pages⁹²), the prospective client came to the office where he was typically screened by a paralegal.⁹³ In deciding whether to accept the representation, paralegals were trained to look for the "three legs of the stool": an at-fault defendant, an injury, and insurance.⁹⁴

Once a case was accepted, the client executed the firm's contract for legal services, which specified that the fee would be contingent and tiered: one-third of the total recovery in the absence of suit, 40% if a suit was filed, and 50% of the settlement, verdict, or judgment in the event of an appeal.⁹⁵ At the same time, the claim was also broadly characterized as a litigation or non-litigation matter, which meant that it could be settled without a lawsuit. Matters were heavily skewed in the latter direction: Only about 10% of claims resulted in lawsuits being filed.⁹⁶ Even when suit was initiated, settlements were usually obtained without further court proceedings.⁹⁷

As to the few real "litigation matters" the firm pursued, while Sledge did attend

89. At various times, Sledge advertised on television, in the Yellow Pages, and on billboards. Sledge Disciplinary Hr'g Tr., *supra* note 1, at 413 (Test. of Lawrence D. Sledge).

90. Telephone Interview with Lillian Lalumandier (Aug. 13, 2007). Sledge's recollection differs. He recalls that two-thirds of clients came from referrals and one-third from advertising. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007). That recollection, however, is in some tension with Sledge's sworn testimony that he "built a practice from [advertising]." Sledge Disciplinary Hr'g Tr., *supra* note 1, at 413 (Test. of Lawrence D. Sledge). Sledge undoubtedly did obtain a sizable number of clients from client referrals; he expressed his gratitude to those who sent him business by providing modest cash payments or sending a ham at Christmas. *In re Sledge*, 859 So.2d at 673-74.

91. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007); *see also* Mark Ballard, *Coming to Terms with the \$20,000 Ad: A Realization About Lawyer Advertising*, NAT'L L. J., Oct. 7, 2002, at A1 (describing Sledge's advertisement).

92. Telephone Interview with Lillian Lalumandier (Aug. 13, 2007).

93. Early on, Sledge conducted the initial screening interview himself. In time, the task was delegated to the office staff. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007).

94. Sledge Supp. Submission, *supra* note 86, at LDS-0007-0009 (office protocol). *See also* Sledge Disciplinary Hr'g Tr., *supra* note 1, at 337 (Test. of Lawrence D. Sledge).

95. Sledge Supp. Submission, *supra* note 86, at LDS-0152 (contract for legal services).

96. According to Sledge's long-time bookkeeper, 90% of files were "non-litigation files." Sledge Disciplinary Hr'g Tr., *supra* note 1, at 145 (Test. of Jennifer Cangelosi). Sledge's office manager likewise testified that between 1995 and 1998, "very few" cases resulted in lawsuits being filed. *Id.* at 121 (Test. of Lillian Lalumandier). Sledge, however, testified that the office had approximately 150 nonlitigation files and 100 litigation files at any one time. *Id.* at 348-49 (Test. of Lawrence D. Sledge). *But see* Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007) (stating that the firm had thirty to forty court files at any given time).

97. Sledge Disciplinary Hr'g Tr., *supra* note 1, at 130 (Test. of Lillian Lalumandier). Sledge's office manager explained: "Most of the time the litigation files—most of the time they didn't go to litigation." *Id.* Instead, even after suit was filed, as long as the insurer was not denying liability, the file would return to the non-litigation side of the firm and negotiations with the adjuster would continue unabated.

depositions and make rare court appearances, petitions and other pleadings were usually drafted by various non-attorney employees utilizing general pleading forms.⁹⁸ Sledge did occasionally take cases to trial, however. The firm tried (and lost) four cases in 1993.⁹⁹ Perhaps chastened, the firm tried no more than ten cases from 1995 to 1998, more often referring the rare non-settlers to other personal injury attorneys.¹⁰⁰

“Non-litigation” matters, meanwhile, were the office’s “bread and butter.”¹⁰¹ These matters ordinarily went to Sledge’s legal assistant, who would oversee the clients’ medical treatment, verify insurance, correspond with insurance adjusters, and prepare demand letters and packages using a damage formula of \$2,000 for each month of active medical treatment plus medical bills, drug bills, and lost income during the period of medically-verified disability.¹⁰² Following her preparation of a demand package, the matter would be transferred to Sledge’s office manager, who would negotiate and settle the matter directly with the insurance adjuster.¹⁰³ Sledge was not involved in this effort,¹⁰⁴ because, he explained, these claims were “cookie-cutter,” “programmed,”¹⁰⁵ “on automatic,” and “so very cut and dry.”¹⁰⁶

Unlike some other settlement mill negotiators, Sledge’s office manager did not settle cases pursuant to a quota, but Sledge did stay apprised of her numbers nonetheless. She explained: “[M]y whole future employment depended upon my ability to settle these files That’s the statistic that he’d look at: the number of files I settled and how much money I brought in.”¹⁰⁷

Though Sledge was the firm’s only attorney, he rarely met with clients to discuss substantive matters. Often, the only time the client actually “saw” her attorney was via videotape during the initial intake interview.¹⁰⁸ When feasible,

98. *In re Sledge*, 859 So.2d at 674; see also Sledge Disciplinary Hr’g Tr., *supra* note 1, at 74-78, 119 (Test. of Lillian Lalumandier).

99. *Id.* at 76, 95, 98-99, 120. The firm did not eschew litigation for lack of trial experience. Sledge was an experienced trial lawyer. In the course of his long legal career, he estimates that he had eighty-seven jury trials and more than 200 bench trials. In his recollection, at least, he won “probably 90% of them.” The firm’s move from litigation to standardized settlements coincided with its use of advertising. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007).

100. Sledge Disciplinary Hr’g Tr., *supra* note 1, at 120 (Test. of Lillian Lalumandier) (“In 1995, ’96, ’97 and ’98 . . . we settled a very large percentage of our files. We didn’t go to trial on any.”); *id.* at 205-07 (Test. of Randall Shipp) (stating that, beginning in the mid 1990’s, Sledge started to refer out complicated cases). *But see In re Sledge*, 859 So.2d at 679 (suggesting that Sledge conducted ten trials between 1995 and 1998).

101. Sledge Disciplinary Hr’g Tr., *supra* note 1, at 133 (Test. of Lillian Lalumandier).

102. *In re Sledge*, 859 So.2d at 671, n.6; see also Sledge Disciplinary Hearing Tr., *supra* note 1, at 69-70 (testimony of Wendy LeBleau).

103. *Id.* at 114 (Test. of Lillian Lalumandier).

104. *Id.* at 79, 95.

105. *Id.* at 335 (Test. of Lawrence D. Sledge).

106. *Id.* at 427.

107. *Id.* at 132 (Test. of Lillian Lalumandier); see also *id.* at 363 (Test. of Lawrence D. Sledge) (“That’s her statistic.”).

108. *In re Sledge*, 859 So.2d at 674 n.7.

however, Sledge did make an effort to introduce himself to clients—and “do my thing”¹⁰⁹—at the conclusion of the representation when a settlement check was disbursed. Sledge explained: “I would shake their hand and they’d tell me what a great job I did. I know [my legal assistant] and them had done that, but you know, they thought I was doing it, you know, and they thanked me so much for doing a great job, and that’s the way we did it.”¹¹⁰

2. THE GEORGIA LAW FIRM OF JASPER DUPAYNE

A second exemplar is the Jasper Dupayne Law Firm of Georgia. During the years under consideration,¹¹¹ the Dupayne firm was a high-volume personal injury practice. Indeed, its case volume was, to quote a former Dupayne attorney, “astronomical.”¹¹² That attorney reports that she had 300 to 400 open files on her desk at any one time,¹¹³ and “I was supposed to settle at least 100 a month.”¹¹⁴ A non-attorney employee who worked at the Dupayne firm a few years earlier also negotiated settlements. She recalls that she and another non-attorney were given a quota of negotiating a combined \$100,000 in settlements per week.¹¹⁵

The Dupayne firm advertised aggressively and got the vast majority (estimates ranged from 80% to 98%) of its clients from its extensive advertising efforts.¹¹⁶ The firm started advertising in 1996 and in the late 1990s, the firm’s annual advertising budget was estimated to exceed \$1 million.¹¹⁷ As is true for other settlement mills, most of the firm’s clientele had been in automobile accidents and had sustained minor soft tissue injuries.¹¹⁸

When a prospective client first called the office (usually after seeing an advertisement on television), a non-attorney conducted the initial intake interview via telephone, which principally involved determining whether either the prospective client *or* the putative defendant had insurance and whether the

109. Sledge Disciplinary Hr’g Tr., *supra* note 1, at 369 (Test. of Lawrence D. Sledge).

110. *Id.* at 365.

111. The information below comes primarily from a sworn statement executed by a former attorney and interviews with that attorney, another attorney, and three non-attorney employees who worked at the Dupayne firm for a combined twenty-one years. The interview subjects on whom I most heavily rely worked at the firm between 1994 and 1999. Accordingly, although the firm still exists, no claim is made as to the firm’s recent or current operations.

112. Sworn Statement of S.S. at 31 (Aug. 19, 1998). Another employee input new cases into the firm’s electronic case tracking system. She recalls inputting four or five new cases each hour, eight hours per day. This translates, conservatively, into 160 new cases per week or 640 new cases per month. Telephone Interview of J.G. (Aug. 27, 2007).

113. Sworn Statement of S.S. at 23-24 (Aug. 19, 1998).

114. *Id.* at 41.

115. Telephone Interview with A.E. (Aug. 16, 2007); *see also* Telephone Interview with J.G. (Aug. 27, 2007) (confirming that two non-attorneys negotiated settlements pursuant to a weekly quota).

116. Telephone Interview with A.E. (Aug. 16, 2007); Telephone Interview with S.S. (July 16, 2007).

117. Telephone Interview with A.E. (Aug. 16, 2007); Telephone Interview with S.S. (July 16, 2007).

118. Telephone Interview with S.L. (Apr. 7, 2008); Telephone Interview with A.E. (Aug. 16, 2007).

putative client had sought prompt medical care for her injuries. If these criteria were met, the Dupayne firm would reportedly agree to the representation. Thus, the screening process only weeded out a small minority of claims.¹¹⁹ Once it was determined that the caller would be represented, the client either came into the office to sign the retention agreements or, if the client lived far away, a courier would take the agreements to the client's home or business.¹²⁰ Dupayne reportedly met with a new client during the intake process only if the client had what appeared to be a "high dollar" case.¹²¹

Like other settlement mills, the firm reportedly charged a tiered contingency fee—but Dupayne's had an unusual twist. The standard agreement set the fee at 40% of the gross recovery attained. The office's practice, however, was to add a handwritten note stating that the fee would be "reduced" to 33% if a settlement could be negotiated without suit being filed.¹²² The notation was added in handwriting, one former employee surmised, to give clients the impression that they were getting a discount.¹²³

According to former employees, once the retention agreement was executed, the vast majority of claims were processed in the following manner.¹²⁴ After a client completed his medical treatment and his medical bills had been assembled, a non-lawyer employee of the firm would send a time-limited demand to an insurance company using a formula of 5.2-times medical bills for soft tissue injuries and insurance policy limits for DUIs.¹²⁵ Clients were not usually consulted concerning the demand. Indeed, at some point the firm reportedly stopped cc'ing clients on the demand letter sent to insurance adjusters because of client complaints that the demands were too low.¹²⁶ This demand would be drafted prior to a detailed investigation of the client's claim. According to a

119. As a former employee recalled: "[H]e would take about all cases." Telephone Interview with A.E. (Aug. 16, 2007); *see* Telephone Interview with S.L. (Apr. 7, 2008) (estimating that 75% of callers seeking legal representation were accepted as clients); Telephone Interview with J.G. (Aug. 27, 2007) (recalling that, if a prospective client had waited too long before seeing a doctor, the caller would be rejected, but that was "pretty much it"); Telephone Interview with S.S. (July 16, 2007) (recalling that a client would be accepted as long as there was some insurance coverage).

120. *See* Sworn Statement of S.S. at 44-46, 71-74 (Aug. 19, 1998); *see also* Telephone Interview with S.L. (Apr. 7, 2008) (estimating that 50% to 60% of clients were signed up by couriers).

121. Telephone Interview with A.E. (Aug. 16, 2007); Telephone Interview with J.G. (Aug. 27, 2007).

122. Telephone Interview with A.E. (Aug. 16, 2007).

123. Telephone Interview with J.G. (Aug. 27, 2007). To the extent clients were misled as to whether they were getting a "discount," the firm's practice arguably ran afoul of Model Rules of Professional Conduct 1.4, 7.1, and 8.4(e).

124. Dupayne had personal responsibility over the small proportion of higher-value claims involving broken bones, permanent scarring, or the like. Because Dupayne handled these claims himself, the former employees with whom I spoke lacked first-hand information as to how such claims were processed. They might have been handled quite differently than the description above.

125. Telephone Interview with A.E. (Aug. 16, 2007); Sworn Statement of S.S. at 17, 19, 35 (Aug. 19, 1998).

126. Sworn Statement of S.S. at 18-19, 22-23 (Aug. 19, 1998). As noted, this failure to notify clients of the sum demanded raises ethical issues. *See supra* note 68.

former attorney: “[T]here was never any investigation done of the claim The only investigation that was ever done was whether or not someone had insurance.”¹²⁷ When I asked two other former Dupayne employees how much investigation was conducted, each responded with the same one-word answer: “None.”¹²⁸

After receiving this demand, the insurance adjuster would provide a counter-offer and negotiation with the insurance adjuster would ensue. According to a former employee, the goal of this negotiation was to settle for three or four times the amount of the medical bills.¹²⁹ These discussions were not protracted, taking around ten minutes,¹³⁰ and legal issues such as comparative negligence were seldom discussed.¹³¹

After this negotiation, the client would be notified of the insurance company’s offer and would be given the opportunity to accept or reject the negotiated sum. Clients were encouraged to take settlement offers. In fact, “a good offer,” an attorney reports, “would be one that met the client’s idea of a good offer or whatever we could talk them into.”¹³² The entire process, from the time the client completed medical treatment to the time he or she was handed a settlement check, took between one and four months,¹³³ and the average gross recovery was somewhere between \$3,500 and \$5,000.¹³⁴

As is typical of settlement mills, during the course of a representation, attorney-client interaction was minimal. “It’s very possible that they could go all the way through to settlement having had only one phone call with an attorney.”¹³⁵ Indeed, by one estimate, fewer than 10% of clients ever met with a lawyer face-to-face.¹³⁶

127. Sworn Statement of S.S. at 59 (Aug. 19, 1998)

128. Telephone Interview with A.E. (Aug. 16, 2007); Telephone Interview with J.G. (Aug. 27, 2007).

129. Telephone Interview with A.E. (Aug. 16, 2007).

130. Telephone Interview with S.S. (May 30, 2007).

131. Telephone Interview with A.E. (Aug. 16, 2007).

132. Sworn Statement of S.S. at 38 (Aug. 19, 1998); *see also* Telephone Interview with J.G. (Aug. 27, 2007).

133. Telephone Interview with S.S. (May 30, 2007) (cases were resolved within four months “at the most”); *see also* Telephone Interview with J.G. (Aug. 27, 2007) (the process was usually a few months long); Telephone Interview with A.E. (Aug. 16, 2007) (settlements were usually negotiated within thirty days after the conclusion of medical treatment).

134. *Compare* Sworn Statement of S.S. at 31 (Aug. 19, 1998) (estimating the average gross recovery to be \$3,500), *with* Telephone Interview with A.E. (Aug. 16, 2007) (estimating the average gross recovery to be \$5,000). This estimate does not include the small number of higher-value claims Dupayne handled personally. *See supra* note 124.

135. Sworn Statement of S.S. at 141-42 (Aug. 19, 1998). This observation is bolstered by an April 6, 2009, Westlaw search of Georgia state and federal court opinions. Dupayne’s name appears only twice, in two opinions involving the same bankruptcy case from 2000. (Case citation not printed to preserve confidentiality.) The court opinion indicates that Dupayne represented a client, now a debtor in bankruptcy, in a personal injury action. Because of his debtor status, that client filed a motion with the bankruptcy court to approve his tort settlement. In its opinion, the court noted that the client’s retention had taken place outside the presence of a lawyer, at the client’s job site. After the retention, the client had no contact with any lawyer at the firm. He also did not know whether suit had been filed on his behalf.

136. Sworn Statement of S.S. at 93 (Aug. 19, 1998); *see also* Telephone Interview with J.G. (Aug. 27, 2007) (stating that, other than handing out settlement checks, Dupayne had personal interaction with soft tissue clients only “once in a blue moon”). *But see* Telephone Interview with A.E. (Aug. 16, 2007) (Dupayne “usually” met with clients at the beginning and end of the representation).

In the late 1990s, the Dupayne firm *very* rarely filed lawsuits and did not take a single case to trial.¹³⁷ A former attorney recalls: “I never touched a case that was filed in court. *Ever*.”¹³⁸ Another former employee opined that “[Dupayne] has some morbid fear of litigating.”¹³⁹ Instead, in the rare instance that a claim would not settle, the client would either be dropped outright or, if the client had sustained significant injuries, he would be referred to a network of more sophisticated trial attorneys, in return for a portion of the ultimate fee.¹⁴⁰ These referrals reportedly took place less than 1% of the time.¹⁴¹

3. THE LOUISIANA LAW FIRM OF E. ERIC GUIRARD & ASSOCIATES

A third firm with settlement mill features is the “hugely successful advertising law firm”¹⁴² of E. Eric Guirard & Associates. This Louisiana law firm, in business until May of 2009, differs from the two firms profiled above because, in many respects (at least in 2000), it housed a settlement mill inside a conventional high-volume personal injury law practice. As explained below, during the time at issue, the firm did try cases. After a case was screened, if the claim was slated for litigation, it went to a team of lawyers who, by all accounts, litigated the case.¹⁴³ If, however, a file was deemed a “non-litigation” file, it initially went to a wing of the firm with distinct settlement mill features.

The Guirard firm was founded on July 4, 1994. Until very recently, it employed fifty-seven individuals, including sixteen attorneys,¹⁴⁴ and was one of the most recognized plaintiffs’ firms in the Southeast.¹⁴⁵ The firm had two offices in Louisiana, with a flagship office in Baton Rouge. That Baton Rouge office was itself a sparkling 10,000-square-foot building constructed in the Italian Renais-

137. Sworn Statement of S.S. at 28 (Aug. 19, 1998); *see* Telephone Interview with A.E. (Aug. 16, 2007); Telephone Interview with J.G. (Aug. 27, 2007).

138. Telephone Interview with S.S. (May 30, 2007).

139. Telephone Interview with J.G. (Aug. 27, 2007).

140. *Id.*; Telephone Interview with A.E. (Aug. 16, 2007).

141. Telephone Interview with S.S. (May 30, 2007).

142. Tr. of Louisiana Disciplinary Bd. Hr’g, In re E. Eric Guirard & Thomas R. Pittenger, No. 04-DB-005 (Sept. 23, 2004), at 145 [hereinafter Guirard Disciplinary Hr’g Tr.] (Test. of Eric Guirard).

143. The law firm litigated a non-trivial number of cases, as confirmed by an August 2, 2009 search in Westlaw’s “ALLCASES” database. That search brought up seventeen opinions in which an attorney from Guirard & Associates served as counsel. *See also* Guirard Disciplinary Hr’g Ex. ODC-22 (Dep. of Steven Debosier, at 4) (testifying that, as an attorney at the firm, he goes to court and tries cases).

144. E. Eric Guirard Firm Profile—Our Staff, <http://www.eguarantee.com/staff.php> (last visited Aug. 13, 2008); Firm Profile—Our attorneys <http://www.eguarantee.com/attorneys.php> (last visited Aug. 13, 2008); Firm Profile—Our Partners <http://www.eguarantee.com/partners.php> (last visited Aug. 13, 2008).

Eds. Note: After Eric Guirard’s disbarment in May 2009 (*see infra* note 152) and shortly before this article went to press, the name of Guirard’s former firm was changed to “Dudley DeBosier Injury Lawyers” and their website was relocated to <http://www.dudleydebosier.com/>.

145. Mark Ballard, *The Ad-Made Man and the Old-Line Firm: Changes in Law Practice are Played out in Baton Rouge*, NAT’L L. J., Sept. 30, 2002, at A1.

sance style, covering an entire city block.¹⁴⁶

The Guirard firm advertised throughout the state of Louisiana, spending more than \$1 million on advertising each year.¹⁴⁷ According to Guirard, a self-proclaimed “e-trepreneur,”¹⁴⁸ “[a]dvertising works”; it gets the necessary volume of clients (some 30,000 during the firm’s fifteen-year existence) in the door.¹⁴⁹ The firm’s ads usually featured the firm’s slogan: “Get The ‘E’ Guarantee,” a motto repeated in the firm’s merchandise, including T-shirts and sports equipment, for sale through its website.¹⁵⁰ The firm, it is reported, even had its own brand of bottled water.¹⁵¹

In 2004, the firm’s founding partners, E. Eric Guirard and Tommy Pittenger, were subject to a bar disciplinary proceeding, which culminated in their 2009 disbarment by the Louisiana Supreme Court.¹⁵² In charging Guirard and Pittenger with wrongdoing, bar counsel focused on the firm’s operations in 2000.¹⁵³ The description below is thus a snapshot of the firm as it then existed, as reflected by the disciplinary hearing record.¹⁵⁴

When a prospective personal injury client called E. Eric Guirard & Associates, the client was screened in two parts. First, a non-attorney “case manager” would question the caller about the facts of the accident.¹⁵⁵ If the brief conversation

146. Timothy Boone, *Entrepreneur: E. Eric Guirard*, GREATER BATON ROUGE BUS. REP. 54, May 22, 2007, available at http://findarticles.com/p/articles/mi_qa5281/is_200705/ai_n21245138/ (last visited Aug. 6, 2009).

147. Joe Mandak, *Money for You: Lawyer Ads Most Prevalent on “Local TV,”* PITTSBURGH POST-GAZETTE, June 29, 2004, at C-9.

148. Boone, *supra* note 146.

149. *Id.*; see also Guirard Disciplinary Hr’g Tr., *supra* note 142, at 84, Sept. 23, 2004 (Test. of Eric Guirard); Penny Font, *Disbarred But Not Disbranded*, BusinessReport.com (May 18, 2009), available at <http://www.businessreport.com/news/2009/may/18/disbarred-not-disbranded-1gl1/?print> (last visited Aug. 12, 2009) (reporting that, during the firm’s existence, it served 30,000 clients).

150. See <http://www.eguarantee.com/e-store.php> (last visited Apr. 6, 2009).

Eds. Note: The “e-store” link was removed after Guirard was disbarred.

151. Boone, *supra* note 146.

152. See Ruling of Hearing Committee # 15, Louisiana Attorney Disciplinary Board, In re E. Eric Guirard & Thomas Pittenger, Docket # 04-DB-005, Feb. 19, 2008 [hereinafter Guirard I]. Guirard and Pittenger were charged with, *inter alia*, sharing fees with non-lawyers, in violation of Louisiana Rule of Professional Conduct 5.4 and assisting in the unauthorized practice of law, in violation of Rule 5.5. *Id.* at 3-4. The Hearing Committee issued a ruling on February 19, 2008, finding violations and determining that suspensions of one year and one day were appropriate. *Id.* at 15. On November 6, 2008, the Louisiana Disciplinary Board accepted the Hearing Committee’s conclusions (with modifications), found that Guirard and Pittenger additionally violated Rule 7.2 (concerning solicitation), and recommended that both be permanently disbarred from the practice of law. Louisiana Disciplinary Board Recommendation to the Louisiana Supreme Court, In re E. Eric Guirard & Thomas Pittenger, Docket # 04-DB-005, Nov. 6, 2008. On May 5, 2009, the Louisiana Supreme Court disbarred both Guirard and Pittenger. In re Guirard (*Guirard II*), No. 2008-B-2621, 2009 WL 1384981 (La. May 5, 2009).

153. Guirard I, *supra* note 152, at 1.

154. The firm utilized some version of the case manager system from 1997 through 2004. *Guirard II*, 2009 WL 1384981, at *6.

155. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 98-100, 142-44, Sept. 23, 2004 (Test. of Eric Guirard). If the case was complex, case managers were “under strict instructions to always put the phone call on hold and go find a lawyer and ask more questions.” *Id.* at 99; see also Guirard Disciplinary Hr’g Ex. ODC 4, at 000029-30 (Manual). This particular version of the Case Manager Manual was in effect in 2000 but was

revealed that another individual was at fault and there was “probable insurance coverage” of any type,¹⁵⁶ the client would be asked to execute various retention agreements, a task that could be accomplished at the firm or at the client’s home, in the presence of a non-attorney investigator.¹⁵⁷ Investigators were paid based on whether they succeeded in getting clients signed up: \$25 for unsuccessful house calls; \$50 if they secured the client’s signature.¹⁵⁸ Bonuses were also available: an extra \$15 if the investigator signed up other accident victims living in the same house; \$50 if the investigator completed additional out-of-home sign-ups.¹⁵⁹

At the time of retention, clients would execute the firm’s fee agreement, which—typical of settlement mills—was tiered, specifying that the fee would be 36% if the claim was settled without suit and 40% if suit was filed.¹⁶⁰ In keeping with the “E Guarantee,” however, the firm reduced its legal fees when necessary to ensure that its take never exceeded the client’s recovery, after the client paid his out-of-pocket expenses.¹⁶¹

While this initial screen did weed out some clients, it did not weed out many of those complaining of injuries sustained in auto accidents. In 2000, for example, the firm fielded a total of 4,836 calls from potential clients and signed 2,294 callers to contract, meaning there was an acceptance rate of 47%.¹⁶² The acceptance rate for clients who had been injured in auto accidents, however, was much higher. Of 2,204 such callers, the firm signed 2,107, or 95%.¹⁶³

After these retention agreements were executed, the case file underwent a second review, this time by an attorney.¹⁶⁴ During this review, the attorney decided whether or not the firm would retain the file. If the attorney decided to let the claim go, it would either be referred to another firm or dropped altogether, in which case the client would be sent a “dump letter” ending the nascent attorney-client relationship.¹⁶⁵

After the second screen, there were two other choices: whether to track the

subsequently revised. At the disciplinary hearing, Guirard disputed that the Manual accurately portrayed the office’s operations or procedures, insisting that it “wasn’t meant to be followed.” Guirard Disciplinary Hr’g Tr., *supra* note 142, at 158-62, 192, Sept. 23, 2004 (Test. of Eric Guirard); *cf. id.* at 337-38 (Test. of Thomas Pittenger). In addition to having case managers answer calls from prospective clients, according to a news account, the firm also had a backup intake system, located in Nashville, Tennessee, to insure that no calls from prospective clients would be missed. Ballard, *supra* note 145, at A1.

156. Guirard Disciplinary Hr’g Ex. ODC 4, at 000030 (Manual).

157. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 99-100, Sept. 23, 2004 (Test. of Eric Guirard).

158. *Id.* at 101-02.

159. *Id.* at 102-04.

160. Guirard Disciplinary Board Hr’g Ex. ODC 3 (Contract of Employment).

161. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 110, Sept. 23, 2004 (Test. of Eric Guirard); Guirard Disciplinary Hr’g Ex. ODC-22 (Dep. of Steven Debosier, at 45).

162. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 113-14, Sept. 23, 2004 (Test. of Eric Guirard).

163. *Id.* at 138-39.

164. *Id.* at 114.

165. Guirard Disciplinary Hr’g Ex. R-4 (Dep. of Verna Schwartz, at 51).

claim as a litigation matter to be handled by an attorney,¹⁶⁶ or—particularly if the claim involved a soft tissue injury sustained in an automobile accident¹⁶⁷—as a non-litigation matter. If a case was deemed a non-litigation matter (as approximately three-quarters of claims were), it was directed to one of several non-attorney case managers for “an early settlement.”¹⁶⁸ Each case manager juggled 100 to 175 files at any one time¹⁶⁹ and settled roughly 250 claims per year.¹⁷⁰

Once a case manager received a claim, she was, to quote the firm’s Case Manager Manual, “assigned the case, the client and all assignable tasks.”¹⁷¹ This delegation, which was “vastly different from the traditional method,”¹⁷² took place because efficiencies that can be achieved by paralegal assistance “are not fully realized when Paralegals are used in the ‘traditional’ sense.”¹⁷³ Case managers gathered medical records and lost wage data, oversaw the client’s medical treatment, communicated with the client, prepared a settlement demand package for an attorney’s review and signature,¹⁷⁴ and then turned to their most critical task: negotiation with insurance claims adjusters. Before the negotiation, an attorney would review the client’s file and determine the claim’s high and low settlement value.¹⁷⁵ After those numbers were recorded, the case manager had the firm’s authorization to settle for any amount within that range.¹⁷⁶ If an offer within the parameters materialized, the manager presented the settlement offer to

166. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 91, 275-76, Sept. 23, 2004 (Test. of Eric Guirard).

167. *Id.* at 127.

168. Guirard Disciplinary Hr’g Ex. ODC-22 (Dep. of Steven Debosier, at 38). In year 2000, the firm sent 429 files to attorneys and 1,865 files directly to case managers. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 116, 130, Sept. 23, 2004 (Test. of Eric Guirard).

169. *Id.* at 91, 122-24.

170. *Id.* at 328-29 (Test. of Thomas Pittenger). In 2000, 1,865 files were sent to case managers, and 963 claims were settled by case managers. *Compare id.* at 116 (Test. of Eric Guirard), with Stipulations of Fact at ¶¶ 8-12, In re E. Eric Guirard & Thomas R. Pittenger, No. 04-DB-005 (undated). There is little evidence of what happened to the remaining claims, although it is clear that some claims sent to case managers in 2000 were settled in 2001; some were dropped by the firm; some were referred to other law firms; and in some instances, clients fired the Guirard firm and sought alternate representation. *See* Guirard Disciplinary Hr’g Tr., *supra* note 142, at 53-54, 118, 131-32 Sept. 23, 2004 (Test. of Eric Guirard) (offering possibilities); *id.* at 117 (explaining that some cases would be dropped by the firm even after being assigned to a case manager). Some claims, of course, were also transferred to the firm’s litigation department for litigation. *Id.* As to whether an appreciable number of claims that started in the hands of case managers were transferred to attorneys and litigated, it is theoretically possible, although doubtful. Critically, the Hearing Committee found that the financial incentives imposed on case managers (described *infra*) created an “overwhelming motive to settle a claim at any price before the claims manager loses control over the file.” Guirard I, *supra* note 152, at 10; *see also* Guirard Disciplinary Hr’g Ex. R-5 (Dep. of Adrean Joseph, at 27, 29) (testifying that, in her years as an insurance adjuster negotiating with the Guirard firm, she cannot recall any claim that she could not settle with a case manager); Guirard Disciplinary Hr’g Ex. ODC 4, at 000049 (Manual) (stating that a case manager could not transfer a file to the litigation department without obtaining personal approval from Guirard or Pittenger).

171. Guirard Disciplinary Hr’g Ex. ODC 4, at 000025 (Manual).

172. *Id.*

173. *Id.* at 000023.

174. *Id.* at 000041, 000044.

175. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 109, 202, 299, Sept. 23, 2004 (Test. of Eric Guirard).

176. *Id.* at 365-67 (Test. of Thomas Pittenger); *id.* at 201-02 (Test. of Eric Guirard).

the client for the client's approval.¹⁷⁷ The Case Manager Manual explained: "The goal of the case manager at this time is to get the client to follow our advice."¹⁷⁸ After obtaining the client's assent, the case manager would again contact the insurance adjuster and try to increase the offer. If those efforts failed, then the case would be settled for the offer previously obtained.¹⁷⁹ The average turn-around, according to Guirard, was around six months.¹⁸⁰

Like other settlement mills, the firm used a number of carrots and sticks to encourage case managers to settle claims. One case manager was compensated pursuant to a quota, with an 8% commission paid only after \$10,000 in legal fees had been collected from the cases she settled.¹⁸¹ Other case managers, meanwhile, received 15% to 17% of the attorney fee generated by the settlements they negotiated.¹⁸² If the claim had to be transferred to the litigation department because it could not be settled without the initiation of suit, however, the case manager would typically forego her fee.¹⁸³ Other incentives were also used. Each month, the firm gave out a lion ("king of the jungle") and monkey ("monkey on their back") award to the negotiator who generated the most and least fees for the firm during the period.¹⁸⁴ The firm also held office-wide contests, setting firm-wide fee goals, which, if met, would be rewarded with group trips to exotic locales.¹⁸⁵

The Guirard firm prided itself on frequent client-case manager contact,¹⁸⁶ but like other settlement mills, much of this contact was paternalistic. For example, clients were notified when the firm issued a demand but were not routinely notified of the demand amount since it would create "some false expectations."¹⁸⁷ Likewise, the Case Manager Manual advised that clients should be encouraged to take a negotiated settlement offer because: "We know the value of the case, and the client does not."¹⁸⁸ As at other mills, the firm's founders, Guirard or Pittenger, did try to be on hand when clients came in to sign the release

177. *Id.* at 207.

178. Guirard Disciplinary Hr'g Ex. ODC 4, at 000046 (Manual).

179. Guirard Disciplinary Hr'g Tr., *supra* note 142, at 210-12, Sept. 23, 2004 (Test. of Eric Guirard).

180. *Id.* at 117, 119, 302; *see also* Guirard Disciplinary Hr'g Ex. R-5 (Dep. of Adrean Joseph, at 38) ("Once the initial offer is made . . . it's usually a quick turnaround.").

181. Guirard Disciplinary Hr'g, Stipulations of Fact ¶ 12.

182. Guirard Disciplinary Hr'g Tr., *supra* note 142, at 216-217, 222-23 (Test. of Eric Guirard). The practice was discontinued sometime before January 31, 2001. Guirard Disciplinary Hr'g, Stipulations of Fact ¶ 3.

183. *Guirard II*, 2009 WL 1384981, at *7; *see also* Guirard Disciplinary Hr'g Tr., *supra* note 142, at 221-22, Sept. 23, 2004 (Test. of Eric Guirard). Occasionally, even after transfer, a discretionary bonus would be approved and paid. *Id.* at 127-28.

184. *Id.* at 224-25.

185. *Id.* at 227-28.

186. Guirard Disciplinary Hr'g Ex. ODC 4, at 000027-28 (Manual) (requiring that case managers contact each client every fourteen days and promptly return client phone calls).

187. Guirard Disciplinary Hr'g Tr., *supra* note 142, at 202-03 (Test. of Eric Guirard).

188. *Id.* at 207; Guirard Disciplinary Hr'g Ex. ODC 4, at 000046 (Manual)

and take their settlement check,¹⁸⁹ but at this late stage in the process, the time for meaningful attorney-client discussion had largely passed; the meeting was largely self-promotional. As Guirard explained: “We want people, when they leave here, to talk good about us.”¹⁹⁰

II. THE PREVALENCE OF SETTLEMENT MILL REPRESENTATION

Are the eight firms considered above outliers or rather exemplars of a distinct and pervasive form of personal injury practice? This is not a simple question to answer. Evidence on settlement mills is extremely difficult to unearth, for reasons discussed below. As a consequence, there is no easy way to chart how many settlement mills are in existence, to gauge whether they are increasing in number, or to estimate the percentage of personal injury clients they represent. Given this scarcity of hard data, it is theoretically possible that the firms introduced in Part I are so anomalous as to be almost irrelevant—the work of a few lawyers operating far outside the legal mainstream who were sometimes disciplined and, in two cases, disbarred, for their behavior. But the anecdotal and empirical evidence discussed below suggests otherwise, and as we will see in Part III, conditions are ripe for settlement mills’ continued growth.

A. THE INVISIBILITY PROBLEM: “IT’S ALL OUT OF THE LIGHT OF DAY”¹⁹¹

It is not easy to obtain data on civil settlements, even of filed cases.¹⁹² Obtaining data on the settlement of unfiled claims—and on the settlement mills that profit therefrom—is much harder. For a host of reasons, settlement mills operate in a sphere almost completely shielded from scrutiny.

For starters, claims handled by settlement mills are typically modest—usually soft tissue injuries sustained in car accidents with damages under \$8,000. They are therefore unlikely to attract the attention of the press. Furthermore, because settlement mills only rarely file lawsuits, few, if any, public documents reflect their work. The fact that they do not routinely litigate also means that settlement mill attorneys will seldom come to the attention of judges, who might otherwise

189. Guirard Disciplinary Hr’g Tr., *supra* note 142, at 248 (Test. of Eric Guirard); *id.* at 82, May 9, 2007 (Test. of Dane Ciolino).

190. Boone, *supra* note 146.

191. Telephone Interview with E.G. (Apr. 22, 2008) (“Let me tell you, so much goes on in a law firm that settles cases, and it’s all out of the light of day. If you don’t have a moral center, and you’re willing to slide and slip around, you can do all sorts of things because you’re never going to be caught.”).

192. See JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 277 (2007) (discussing the American tort settlement system’s invisibility); Issacharoff & Witt, *supra* note 17, at 1596 (observing that the “occasional glimpse into the real world of mature tort settlement practices” is “extremely valuable” because the phenomenon is so often shielded from view); Saks, *supra* note 56, at 1212-13 (describing the difficulty of getting reliable information about the workings of the private settlement system).

monitor the competence of attorneys who practice within their jurisdiction.¹⁹³

Settlement mills will also slip through almost any research screen that uses as its initial data source lawsuits filed in a given jurisdiction. For example, in her recent study of Chicago personal injury lawyers, Sara Parikh identified interview subjects based on a “random sample of case filings in the Cook County Circuit Court.”¹⁹⁴ Similarly, Herbert M. Kritzer’s monographs, *Let’s Make a Deal: Understanding the Negotiation Process in Ordinary Litigation*, and *The Justice Broker: Lawyers and Ordinary Litigation* shed great light on the day-to-day practices of plaintiffs’ attorneys, but they too are based only on interviews with “lawyers involved in . . . federal and state court cases.”¹⁹⁵ All three important studies thus exclude or under-represent plaintiffs’ attorneys who regularly settle cases before filing lawsuits.¹⁹⁶

Compounding this invisibility, attorneys who work for settlement mills (or have worked for such firms in the past) are sometimes reluctant to discuss their practices. This reticence might stem from a worry that particular conduct violated professional standards, or it might come from a proprietary concern that rival law firms or insurance companies could profit from inside information about the firm’s compensation scheme or negotiating strategies. Indeed, perhaps due to competitive concerns, Azar & Associates of Colorado reportedly required its associates to sign a confidentiality agreement barring the discussion of certain firm practices as a condition of employment.¹⁹⁷

Meanwhile, fellow attorneys who are, in certain circumstances, obliged to bring observed ethical lapses to light,¹⁹⁸ are poorly positioned to observe settlement mill practice. Plaintiffs’ lawyers rarely refer cases to settlement mills.¹⁹⁹ Hence, unlike those to whom they do refer cases in return for a portion of the ultimate recovery, fellow plaintiffs’ attorneys lack a financial incentive to monitor settlement mill activity. On the defense side, because insurance companies usually assign legal professionals to a claim only in the event of suit, and settlement mills rarely file suit, settlement mill negotiators typically interact

193. Cf. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 807-08, 835-36 (1992) (discussing the significant role judges typically play in “uncovering and sanctioning lawyer misconduct”).

194. Parikh, *supra* note 7, at 48.

195. KRITZER, *DEAL*, *supra* note 8, at 4, 14; see KRITZER, *BROKER*, *supra* note 8, at 20-24.

196. Parikh recognized but downplayed the importance of that omission, saying that “many respondents discussed recent changes in insurance company strategies which have made it increasingly difficult to settle without having to file suit.” Parikh, *supra* note 7, at 49 n.2. In support of that contention, Parikh cited a magazine article concerning Allstate. *Id.* at 86. While it is true that Allstate did enact changes in the mid-1990s making it more difficult to settle without suit, Allstate is distinctive, see *infra* note 350. My research shows that, at the time of Parikh’s study (December 1998 through February 2000), numerous settlement mills flourished. Likewise, Parikh’s own interviews with personal injury attorneys suggested the existence of settlement mill attorneys in Chicago. See *infra* note 230.

197. Pl.’s Azar Resp., *supra* note 41, at Ex. 9 (Dep. of Timmerman, at 32).

198. See MODEL RULES R. 8.3(a).

199. See *supra* note 29 and accompanying text.

with insurance claims adjusters rather than defense counsel.²⁰⁰ Unlike lawyers, adjusters are not subject to rules of professional responsibility and are not duty-bound to blow the whistle on perceived unethical conduct.

Next, clients, especially clients who seek the services of such firms, seldom make their experiences known by filing grievances or malpractice lawsuits.²⁰¹ This is true partly because legal services are “credence goods”: a service provided by an expert who strongly influences the buyer’s need for that service.²⁰² Consumers of credence goods cannot easily gauge the quantity of the service they should purchase or judge its quality. Individual clients are therefore unlikely to detect if they have received less-than-stellar counsel.²⁰³

This general inability to assess the quality of legal services is then exacerbated by two factors unique to settlement mills. First, clients served by settlement mills are comparatively uneducated and underprivileged and disproportionately belong to historically disadvantaged ethnic and racial minority groups.²⁰⁴ As a result, settlement mill clients are unlikely to be personally acquainted with lawyers with whom they can consult²⁰⁵ or have a sophisticated sense of what the lawyer-client

200. See, e.g., Telephone Interview with S.S. (May 30, 2007) (explaining that all of her negotiations were with adjusters).

201. For example, no client of the Sledge law firm ever filed a grievance or complaint. Initial Br. of Resp., Lawrence D. Sledge, Docket No. 00-DB-135, at 11 (June 12, 2002); see also Statement of Eric Guirard and Thomas Pittenger Regarding the Disciplinary Inquiry in Which They are Named As Respondents, 11-11-08, available at <http://media.businessreport.com/media/ads/STATEMENT.pdf> (last visited Mar. 31, 2009) (stating that the then-pending disciplinary action was “marked by no client complaints”).

202. Witt, *supra* note 42, at 278-79; Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 968-69 (1999).

203. See Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 90-91 (1979); see also HUNTING & NEUWIRTH, *supra* note 65, at 107-08; Wilkins, *supra* note 193, at 829-31.

204. See, e.g., Telephone Interview with C.P. (May 20, 2008) (stating of her clients “they were all poor; they were all uneducated”); Telephone Interview with A.E. (Aug. 16, 2007) (describing her typical client as poor and African-American). One insurance company investigator with whom I spoke noted that settlement mill clients do not typically complain about the services they receive because they are “non-sophisticated, non-English speaking, or non-injured.” Telephone Interview with insurance investigator (June 14, 2007). The third descriptor (“non-injured”) references the fact that personal injury firms exist upon a continuum, from the upstanding to the lawless. Some settlement mills at the far end of this spectrum go so far as to exaggerate injuries, send clients to sham doctors and chiropractors in order to manufacture or inflate medical bills, or even stage accidents. While the darkest underbelly of the personal injury system is worthy of academic consideration, and while it is also possible that one or more of the firms studied herein has grossly exaggerated injuries, this Article attempts to focus on the legal representation afforded legitimate accident victims. For accounts of decidedly corrupt personal injury practices, see KEN DORNSTEIN, *ACCIDENTALLY, ON PURPOSE: THE MAKING OF A PERSONAL INJURY UNDERWORLD IN AMERICA* (1998); JEFFREY O’CONNELL & C. BRIAN KELLY, *THE BLAME GAME: INJURIES, INSURANCE, AND INJUSTICE* 57-61 (1987); JEFFREY O’CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* 10-19 (1979); cf. Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers’ Compensation: The Recent California Experience*, 52 MD. L. REV. 983, 988-91 (1993) (discussing workers’ compensation mills that manufacture and/or exaggerate claims).

205. As E. Eric Guirard once explained: “[T]here are no lawyers in [my clients’] personal social circles.” Ballard, *supra* note 145, at A1; see also Jerome E. Carlin & Jan Howard, *Legal Representation & Class Justice*, 12 UCLAL. REV. 381, 427 (1964).

relationship is “supposed” to entail.²⁰⁶ Second, settlement mills almost always obtain *something* for their clients,²⁰⁷ and, as compared to those who walk away empty-handed, clients who receive some money in settlement are relatively unlikely to harbor ill will toward their attorney or recognize that they failed to obtain top-dollar.

Finally, even if a judge, fellow attorney, or dissatisfied client does file a grievance with a state bar, only rarely will that grievance become a matter of public record. Complaints leveled against attorneys are usually shrouded in secrecy. In most states, a grievance is sealed unless bar counsel concludes that the complaint is supported by probable cause and chooses to file formal charges²⁰⁸—an unusual event.²⁰⁹ Adding to the secrecy, all but a few states impose private discipline, and in many states, it predominates.²¹⁰ When private (as opposed to public) discipline is ultimately imposed, the proceeding which precipitated that discipline—including the testimony concerning an attorney’s law practice, which is most valuable to researchers—is sometimes deemed confidential and thus off limits.²¹¹ A final wrinkle is that, even when proceedings are formally public, only a few states’ disciplinary board opinions are available in a searchable format.²¹² When disciplinary opinions are not searchable, locating particular lawyers who have engaged in a particular conduct takes on a distinct needle-in-a-haystack feel.

B. JUST HOW PREVALENT IS SETTLEMENT MILL REPRESENTATION?

The above analysis explains how it would be theoretically possible for settlement mills to represent a significant number of claimants throughout the United States but largely escape notice. Yet the question remains: Are the firms profiled above mere deviants? The evidence, while preliminary, suggests not.

The first category of evidence pointing to the prevalence of settlement mills

206. See Telephone Interview with S.S. (May 30, 2007) (“People didn’t know what a real law firm was.”).

207. Although some clients with dubious claims are “dumped” by settlement mills after retention, very few cases that proceed to negotiation result in no offer from the insurance company. See, e.g., Telephone Interview with C.R. (Apr. 1, 2008) (recalling that less than 1% of his cases generated no offer); Telephone Interview with J.P. (Nov. 1, 2007) (same); Telephone Interview with L.T. (Mar. 6, 2008) (same); Pl.’s Azar Resp., *supra* note 41, at Ex. 5 (Dep. of Rosalia Fazzone, at 25, 30) (recalling that, during her six-month tenure at Azar & Associates, she never had a no-offer case). *But see* Sworn Statement of S.S. at 123-24, 37 (Aug. 19, 1998); Telephone Interview with T.F. (Mar. 6, 2008) (estimating that, of his claims—all valued in excess of \$25,000—perhaps 20% generated no offer).

208. Complaints are matters of public record in only Florida, New Hampshire, Oregon, and West Virginia. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 19 & n.122 (2007).

209. Only about 3% of grievances result in formal charges. See ABA CENTER FOR PROFESSIONAL RESPONSIBILITY STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, SURVEY ON LAWYER DISCIPLINE SYSTEMS, Chart I (2003).

210. See, e.g., *id.* at Chart II.

211. Levin, *supra* note 208, at 19-21 & nn.123-127.

212. As of August 2008, only the bar disciplinary opinions of Colorado, Illinois, Massachusetts, and Virginia were available on Westlaw. Additional states make lawyers’ public disciplinary opinions available online, but this information is often incomplete and difficult to search.

comes from insurance adjusters—settlement mills’ negotiating partners.²¹³ In the Guirard disciplinary proceeding, Guirard’s counsel sought to show that the firm’s practice of having non-attorney case managers negotiate settlements was unremarkable. Toward that end, five Louisiana-based insurance adjusters were subpoenaed and asked to estimate, in their experience, what percentage of personal injury law firms employ non-lawyers to negotiate claims. That question is important because it partly cuts through the ten-factor framework set forth above. While a firm can be a settlement mill and exclusively employ *attorney* negotiators (*see, e.g.*, the Jeffers, Zang, Garnett, and Azar firms), the opposite (i.e., employing non-lawyers to negotiate claims while not being a settlement mill) is likely rare. Delegating personal injury settlement negotiations to non-lawyers is not sufficient to deem a firm a settlement mill, but it is suggestive—in part because it is likely to be correlated with other important factors, such as high claim volumes, modest damages, and an entrepreneurial bent.

The five Louisiana insurance adjusters agreed with Guirard’s defense counsel that, in employing non-attorney negotiators, the Guirard firm was hardly alone. The adjusters identified a total of ten Louisiana law firms (not counting the law firms of Sledge or Guirard) that delegate the settlement of claims to para-professionals.²¹⁴ One adjuster even testified that, in her years in the “rep unit” (the unit that handles the claims of represented claimants), the *majority* of her negotiations were with non-lawyer personnel.²¹⁵

Settlement mill employees themselves, immersed in the world of low-dollar torts, also indicate that the firms profiled herein are far from exceptional and that their unique style of representation is increasingly on-offer. One former Garnett & Associates attorney, for example, suggested that there has been tremendous consolidation of claims into settlement mills’ hands. He explained: “I think the analogy would be to Wal-Mart. Twenty to thirty years ago, you could go to any town and there were little mom and pop retailers. Same has happened with personal injury. If you go to any city, there will be three or four firms getting 90% of the cases.”²¹⁶ That attorney, who now operates an advertising firm in Nevada, also reviewed an early draft of his Article. He then wrote to me that, in his experience, the characteristics set forth in Part I would generally apply to any

213. *See supra* note 200 and accompanying text.

214. Guirard Disciplinary Hr’g Ex. R-5 (Dep. of Adrean Joseph, at 42-43); *id.* Ex. R-6 (Dep. of Michelle Keys, at 62-66); *id.* Ex. R-7 (Dep. of Alva Duronslet, at 49-51); *id.* Ex. R-8 (Dep. of Corey Whitworth, at 28-30); *id.* Ex. R-9 (Dep. of Charles LaFleur, at 33-39).

215. *Id.* Ex. R-6 (Dep. of Michelle Keys, at 67); *accord* Font, *supra* note 149 (quoting Louisiana Chief Disciplinary Counsel Charles Plattsmier as stating: “Unfortunately, the practices that we discovered and investigated and prosecuted in the case of Mr. Guirard and Mr. Pittenger appear in other matters under investigation . . . I don’t want to leave you with the suggestion that we are satisfied this was the only instance where this sort of behavior occurred . . .”).

216. Telephone Interview with D.R. (Apr. 3, 2008).

firm that spends over \$500,000 per year on television advertising.²¹⁷

Sledge had a similar view. He said that the system he pioneered has been replicated by plaintiffs' lawyers throughout the state of Louisiana.²¹⁸ Another attorney, who worked at Garnett and still practices personal injury law in Florida, likewise cautioned:

I don't want to convey that this is just [Garnett & Associates]. The [Garnett] method is widely adopted by many of the firms here in town, usually the biggest advertisers. It's the same kind of *modus operandi*. They don't talk to their clients. They don't meet their clients People have no idea how PI has changed in the last twenty, twenty-five years.²¹⁹

A final settlement mill employee from Texas explained: "Most of these prestigious trial lawyer firms now that used to handle all these great multi-million dollar cases are emulating [Jones] and going on his basic model I'm beginning to hear more and more about it, about people going into this high volume-type thing."²²⁰

The next category of evidence is empirical. Two sets of automobile accident statistics point to the prevalence of settlement mills. First, from 1977 to 1997, lawyer participation in the settlement of third-party auto accident personal injury claims increased substantially.²²¹ Yet, during those two decades, the chance that any particular claim would produce a lawsuit decreased dramatically; the number of third-party claims that culminated in filed lawsuits was 154% greater in 1977 than in 1997.²²² During another time slice, from 1992 to 2001, the National Center for State Courts reports that automobile tort filings declined 14% in the seventeen states (representing 53% of the U.S. population) for which data were available.²²³ This decline occurred during years in which the number of

217. E-mail Message from D.R. to author (Apr. 4, 2008) ("[Y]our draft is very accurate in describing this phenomenon of settlement mill[s]. Another area to investigate is the amount of money spent on tv advertising by law firms in major media markets If you look at the top 50 media markets in the country and then break down the number of firms in those markets spending a half million or more per year on TV, you will have found your settlement mills.").

218. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007).

219. Telephone Interview with C.R. (Apr. 1, 2008); *see also* Telephone Interview with T.T. (July 14, 2008) (stating that the majority of Garnett's competitors in Florida have adopted the "case manager model" where non-attorneys negotiate settlements).

220. Telephone Interview with B.D. (May 12, 2008).

221. Mark J. Browne & Joan T. Schmit, *Patterns in Personal Automobile Third-Party Bodily Injury Litigation: 1977-1997*, at 16 (Sept. 7, 2004) (unpublished manuscript), available at <http://ssrn.com/abstract=588481> (last visited Mar. 18, 2009); *cf.* INSURANCE RESEARCH COUNCIL, *INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS* 7, Fig. 1-5 (June 1999) [hereinafter *IRC, ANALYSIS*] (estimating that attorney representation increased for bodily injury claims from 47% in 1977 to 52% in 1997).

222. Browne & Schmit, *supra* note 221, at 16; *see also* Witt, *supra* note 42, at 270-71 (discussing this study in a similar context).

223. National Center for State Courts, *Tort and Contract Caseloads in State Courts*, at 26 (2002). This period saw an increase in the number of lawsuits involving contract claims, indicating that there was not a reduction of

traffic accidents with injuries marginally increased (from 1.99 million to 2 million), as did the number of traffic accidents overall (from 6 million to 6.32 million).²²⁴

There likely are a number of explanations for these counter-intuitive trends. One plausible explanation, however, is that more claims are being handled by firms which resolve car accident claims without ever filing a lawsuit.²²⁵ Or, as RAND opined when trying to make sense of the fact that, between 1975 and 1985, “[i]n every category, auto cases are a declining percentage of case filings:” “[I]t appears they are being settled elsewhere, in forums that produce stable, predictable outcomes.”²²⁶ Consistent with that, of course, is resolution by settlement mills.

The final bit of evidence suggesting that settlement mills exist far beyond the eight firms discussed above is that, in recent years, other researchers have published descriptions of firms with distinct settlement mill features.²²⁷ In Herbert Kritzer’s interviews with Wisconsin attorneys, for example, one attorney noted: “There are what we call the factory attorneys. Those are the people who are taking claims no matter what they are, and they are going to turn them over quickly”²²⁸ Another observed: “There are some [firms] that are volume dealers, and all they are looking for is the quick, easy-buck settlement. They generally get the lower run-of-the-mill types of claims that don’t have a great deal of value, and they don’t do a lot of work in preparing their cases.”²²⁹

Likewise, Sara Parikh quotes a “low-end” Chicago personal injury practitioner as stating:

overall litigiousness. National Center for State Courts, *Tort Filings in General Jurisdiction Courts in 16 States*, at 23 (2003).

224. National Center for Statistics & Analysis, 2005 Traffic Safety Facts, Vehicle Traffic Crashes by Crash Severity FARS/GES 1988-2005, at 1.

225. The statistics are in some measure consistent with greater representation by repeat player plaintiffs’ attorneys generally (not necessarily settlement mills), since it is well understood that repeat play fosters cooperation. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509 (1994); Cooter et al., *supra* note 6, at 241. Still, conventional lawyers often file lawsuits on the path to settlement, *see supra* note 77 and accompanying text, and we are seeing far fewer court filings—not just fewer trials. The explanation is not that more accident victims are failing to seek compensation for their injuries altogether (“lumping it”). When adjusted for the auto accident rate, those involved in car crashes were about 32% more likely to file a bodily injury (“BI”) claim in 1992 than they were in 1987. INSURANCE RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS 1 (Sept. 1994) [hereinafter IRC, CLAIMING BEHAVIOR]; *see also* INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, 2002 4 (Oct. 2002) (“[A]uto injury claimants in 1995 were 65 percent more likely to file BI claims as a result of their auto accident than claimants in 1980.”).

226. DEBORAH R. HENSLER ET AL., TRENDS IN TORT LITIGATION 8-9, 32 (1987).

227. Granted, it is unclear to what extent the firms referenced would fit the settlement mill paradigm set forth herein.

228. KRITZER, *supra* note 3, at 243.

229. *Id.* at 244. Another Wisconsin lawyer discussed his own law practice, which, he said, involved a “fairly sophisticated assembly line.” *Id.*

There are a lot of attorneys who don't go into the courtroom. If you watch a lot of the advertising on television, quite a few of them do not These particular attorneys I get cases from will attempt to settle them if they have an adequate case. They have the secretarial and paralegal staff more than they have attorneys. That's where the bulk of their work is done, getting together medical bills, getting together the pictures if necessary . . . submitting them and hoping to work out a deal²³⁰

In the same vein, while studying attorneys in Indiana, Jerry Van Hoy recorded an interview with a lawyer who described a “mass advertising, mass production personal injury practice” bearing a close resemblance to the law practices profiled above.²³¹

III. THE EVOLUTION OF SETTLEMENT MILLS

This Part explores three of the conditions that have contributed to settlement mills' rise.²³² My aim in this Part is two-fold. First, understanding the origins of these firms helps to complete the picture drawn above and leads to a more sophisticated understanding of settlement mill business practices and financial incentives. Second, this analysis suggests that settlement mills will continue to flourish, absent a change in the underlying conditions that have led to their rise.

A. ADVERTISING

The first and most important factor contributing to the evolution of settlement mills is the advent of attorney advertising. In 1977, in *Bates v. State Bar of Arizona*,²³³ the Supreme Court held that attorney advertising is entitled to protection under the First Amendment and indirectly facilitated the rise of

230. Parikh, *supra* note 23, at 264-65 (quoting low-end attorney #9).

231. Van Hoy, *supra* note 7, at 358-59; *see also id.* at 360, 362. For others' recognition of settlement mill practices, *see* Daniels & Martin, *Darwinism*, *supra* note 9, at 386 (noting the existence of heavy-advertising “high-volume/low-case-value practices (‘mills’)”); Stephen D. Sugarman, *A Century of Change in Personal Injury Law*, 88 CAL. L. REV. 2403, 2410 (2000) (“[S]ome lawyers continue to make their living by running ‘mills’ that process vast numbers of small (mostly auto accident or slip and fall) cases by negotiating settlements with insurance company adjusters.”).

232. These three factors are not exhaustive. Other phenomena have also contributed to settlement mills' development, including: (1) explosive growth in the number of law school graduates (and especially an increase in the number of graduates from non-elite law schools), which has made competition for clients more fierce; (2) the increased stratification of the legal profession; and (3) the development of computer technology, which has facilitated delegation to para-professionals and made it easier to serve an ever-greater number of clients. *See* HEINZ ET AL., *supra* note 23, at 317-19 (discussing stratification), 325 (discussing the profession's growth); VAN HOY, *supra* note 19, at 5 (discussing stratification), 20-21 (discussing computer technology). In addition, although legal historians might be hard-pressed to identify a golden age of attorney professionalism in the United States, many agree that all segments of the profession have become more rationalized and market-oriented in the past three decades. *See, e.g.*, MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 2-3 (1991).

233. 433 U.S. 350 (1977).

highly-rationalized, small-case, high-volume personal injury practices.²³⁴ Much of what makes settlement mills distinctive is traceable to the unique way they obtain clients and thus, to the *Bates* decision.

Advertising is first responsible for the fact that settlement mills represent primarily those who have sustained minor injuries—and for the cascade of effects that follow. It is relatively well known that, as Sledge advised his staff: “*Advertising gets small cases only*”²³⁵—or at least principally.²³⁶ This fact explains why so many conventional personal injury attorneys who specialize in big claims eschew aggressive advertising²³⁷ and also why, for settlement mills, advertising works so well.

Advertising works well for settlement mills *precisely because* these firms do not make a significant investment into each matter. Given that little time or effort will be expended, settlement mills can afford to represent clients with small or borderline claims that other firms might reject as unprofitable.²³⁸ This, in turn, means that settlement mills’ screening processes can be cursory: they need not and typically do not expend significant effort reviewing cases prior to reten-

234. “*Bates* made it possible for the more business-minded, more aggressive, more competitive-minded lawyers to change the profession into a business.” Ballard, *supra* note 145, at A1 (quotation omitted). Before *Bates*, there were certainly plaintiffs’ attorneys who operated in high volumes and settled small claims in a mechanized fashion. See WITT, *supra* note 192, at 267-71. Indeed, settlement mills are arguably descendants of mid-century ambulance chasers, which, in their day, were quite prevalent—by one estimate, representing up to half of the accident victims in Chicago. Comments, *Settlement of Personal Injury Cases in the Chicago Area*, 47 NW. U. L. REV. 895, 895-99 (1953). Like settlement mills, ambulance chasers of old, some of which “organized the business on a vast scale,” *Morris v. Pennsylvania R.R. Co.*, 134 N.E. 2d 21, 25 (Ill. App. 1st Dist. 1956), handled primarily small claims, performed work that required little technical knowledge or skill, focused on negotiation with claims adjusters, and rarely (if ever) tried cases, see CARLIN, *supra* note 7, at 87-91; Comments, *supra* at 904. An important distinction between settlement mills and old-style chasers is that settlement mills (which rely largely on legal advertisements to obtain new clients) do not necessarily violate rules of professional responsibility and so need not operate under cover. In addition, the literature suggests that ambulance chasers were chiefly (and perhaps exclusively) confined to metropolitan areas; settlement mills, in contrast, have a broad geographic reach. Cf. HANDLER, *supra* note 7, at 16.

235. Sledge Supp. Submission, *supra* note 86, at LDS-0123 (emphasis in original).

236. See KRITZER, *supra* note 3, at 55.

237. See *id.* at 47-58; Daniels & Martin, *Best*, *supra* note 9, at 1793-95.

238. While settlement mills primarily represent claimants who have been in auto accidents and sustained soft tissue injuries, the majority of plaintiffs’ lawyers (59.2%) reject such cases outright. See Daniels & Martin, *Strange Success*, *supra* note 9, at 1256 & Tbl. 8. Indeed, one hears a refrain from settlement mill attorneys that settlement mills routinely accept cases other firms reject as unprofitable. For instance, Peter Whitmer of Zang & Whitmer explained:

[W]e frequently have clients come in who have been turned down by other attorneys because their case is too small; they can’t find an attorney easily to take their case. It may only be worth a few thousand dollars, but we can still afford to take the case and, because of automation, generally make a profit on it.

Zang Disciplinary Hr’g Tr., *supra* note 44, at 112, Mar. 21, 1984 (Test. of Peter Whitmer); see also Telephone Interview with Lillian Lalumandier (Aug. 13, 2007) (stating that a significant proportion of Sledge’s clients could not have gotten representation at other law firms); Telephone Interview with L.T. (Mar. 6, 2008) (“[A] lot of attorneys won’t handle the cases that we’re willing to handle”); Telephone Interview with D.R. (Mar. 4, 2008) (“[T]hese firms will accept cases that other folks might not handle.”).

tion.²³⁹ Settlement mills put a premium on claim quantity rather than quality, and advertising delivers that quantity of claims.²⁴⁰

There is another dynamic at work: expense. Aggressive advertising delivers loads of clients but at great cost. Settlement mills afford six- and seven-figure ad campaigns by maintaining high volumes (volumes which ads, in turn, supply) and then harnessing the resulting economies of scale by mechanizing case processing and cutting corners wherever feasible.²⁴¹

A third interplay is that advertising harms an attorney's reputation and stigmatizes a lawyer within the legal profession,²⁴² while simultaneously relaxing the "reputational imperative" (*i.e.*, the need to maintain a good reputation among past clients and fellow practitioners in order to obtain referrals and thus generate future business) and reducing the long-term cost of economic self-dealing. For most lawyers, a good reputation is the cornerstone of financial success.²⁴³ The reputational imperative thus serves to constrain attorney incentives in individual cases. For reasons discussed below, it might be in the contingency fee lawyer's short-term financial interest to settle cases quickly and cheaply. Due to the reputational imperative, however, many lawyers will maximize profits over the long haul if they take their time, do quality work, and obtain full value for their clients.²⁴⁴

Quite critically, advertising *relaxes* the reputational imperative. If an attorney obtains the vast majority of his business by paid advertising rather than referrals or word-of-mouth, he need not have a sterling reputation among fellow practitioners or past clients. He requires only a big advertising budget and a steady supply of unsophisticated consumers from which to draw.²⁴⁵

This principle also explains how settlement mills get away with having so little face-to-face attorney-client interaction.²⁴⁶ Conventional legal practice places a

239. See *supra* notes 60-62, 93-94, 119 & 155-157 and accompanying text.

240. See Telephone Interview with G.V. (Apr. 7, 2008) ("They had sort of a theory of get whatever you can because there's such a volume . . . even if you're getting \$1,000 on 500 cases, that's half a million dollars.").

241. An attorney at the Garnett firm explained: "When I came into practice [in the late 1970s], I didn't know of any firm that utilized case managers. As advertising costs got higher, it made more sense to use a case manager rather than an attorney. Take the money you save from utilizing case managers and plow it into advertising." Telephone Interview with T.T. (July 14, 2008); see Jerry Van Hoy, *The Practice Dynamics of Solo and Small Firm Lawyers*, 31 *LAW & SOC'Y REV.* 377, 385 (1997) (recognizing that advertising "may necessitate . . . organizational changes").

242. See Daniels & Martin, *Darwinism*, *supra* note 9, at 389 ("Aggressive advertisers are often called 'scum,' 'bottom feeders,' 'incompetents,' or worse."); see also Telephone Interview with R.J. (Apr. 8, 2008) ("Other lawyers kind of looked at you like you were a McLawyer."); Telephone Interview with K.N. (Nov. 8, 2007) ("There's a real hostility.").

243. See KRITZER, *supra* note 3, at 222-23; see also SERON, *supra* note 20, at 48-65; Witt, *supra* note 42, at 274; Parikh, *supra* note 7, at 41.

244. See KRITZER, *supra* note 3, at 221-22, 233-34; see also Witt, *supra* note 42, at 275; Spurr, *supra* note 42, at 88.

245. See VAN HOY, *supra* note 19, at 21 (discussing a similar dynamic at franchise law firms).

246. See *supra* notes 66-67 and accompanying text.

high value on cultivating relationships on the theory that, even if the individual client is a “one-shooter” who will never again require a personal injury attorney’s services (as most, but certainly not all, personal injury plaintiffs are²⁴⁷), a client who feels an affinity with her attorney will likely recommend that attorney to friends and relatives down the road.²⁴⁸ Settlement mill attorneys can afford to spend comparatively little time cultivating such relationships, presumably because they recognize that they need not rely on repeat clients or word-of-mouth in order to obtain a steady stream of new business.

Finally, advertising is intimately bound with the type of clients settlement mills represent. Television advertising for legal services disproportionately attracts the unsophisticated and the uneducated.²⁴⁹ On top of this general reality, some settlement mills specifically target their commercials to appeal to particular—often vulnerable—groups. Guirard, for example, crafted his ads to appeal to “working class” clients;²⁵⁰ Jeffers & Associates’ ads reportedly targeted the “lowest common denominator,”²⁵¹ and, according to a past employee, Dupayne geared his ads to resonate with Georgia’s historically disadvantaged African-American community.²⁵² Among other attributes, such clients are more likely to lack comprehensive health and disability insurance and are less likely to benefit from generous paid sick leave policies, putting a premium on the speedy and certain resolution of claims.

B. CONTINGENCY FEES

The widespread acceptance of contingency fees—and particularly tiered fees—has also contributed to settlement mills’ rise. Contingency fees, which are far-and-away the most prevalent attorney compensation arrangement for tort plaintiffs,²⁵³ have long been a feature of the American legal landscape.²⁵⁴ By allowing clients to shift some litigation risk to the lawyer and also borrow the

247. While one-shooters predominate, repeat personal injury clients are surprisingly common. SPRINKEL, *supra* note 27, at 25, Tbl. 33 (28% of personal injury clients spoke to or selected an attorney because they had interacted with the attorney or law firm previously); JAMES A. SWEET, UNIVERSITY OF WISCONSIN SURVEY CENTER, REPORT ON SURVEY OF ACCIDENT VICTIMS 18 (Apr. 16, 1997) (on file with the author) (27.6% of Wisconsin residents injured in motor vehicle accidents chose a lawyer they had previously used).

248. See VAN HOY, *supra* note 19, at 83.

249. See ABA COMMISSION ON ADVERTISING, *supra* note 58, at 97.

250. Barrouquere, *supra* note 36.

251. Telephone Interview with K.N. (Nov. 8, 2007); see also Telephone Interview with L.T. (Mar. 6, 2008) (“They are geared to the lower socio-economic class.”); Telephone Interview with J.B. (Nov. 12, 2007) (stating that ads targeted “[b]lue collar folks”).

252. Telephone Interview with A.E. (Aug. 16, 2007).

253. Approximately 96% of individual personal injury plaintiffs pay their lawyers on a contingent-fee basis. Samuel R. Gross & Kent D. Syverud, *Don’t Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15 (1996).

254. See Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DEPAUL L. REV. 231, 231-32 (1998).

lawyer's services in advance of a favorable settlement or judgment, contingency fees give individuals meaningful access to the rights and remedies the law provides. Contingency fees also have an advantage over other legal payment schemes because, unlike a flat or hourly fee, contingency agreements align the client and attorney's financial interests. The alignment is imperfect, however, and thus generates significant agency costs. Settlement mills exploit this misalignment and also turn a solution some have offered to remedy it on its head.

The problem is as follows. Clients who have agreed to pay a flat (non-tiered) contingency fee are indifferent to incremental additional expenditures of attorney time and effort. While clients do bear some additional direct costs as a case progresses (such as court costs, travel costs, expert witness fees, and the like),²⁵⁵ from the client's perspective, attorney time is costless: The more of it the better. It is in the attorney's short-term economic interest, meanwhile, to secure the maximum fee with the minimum expenditure of time and effort. To accomplish this goal, attorneys have an incentive to invest in a claim only up to the point at which further investment is not profitable for the firm—a level that may be far below the investment needed to produce the optimal award for the client. Particularly when the plaintiff's injury is modest and the potential upside is limited, rather than squeezing every dollar out of every case, it is in an attorney's short-term financial interest to seek a high volume of cases and quickly process each, expending minimal time and resources on case development.²⁵⁶ This, of course, precisely describes settlement mills' business model.

By trading in small claims with limited potential recoveries, settlement mills exploit the contingency fee's well-documented structural flaw. The underlying theory is best summed up in Sledge's policy manual: "The quicker we can get a

255. These costs usually account for 10% or less of the plaintiff's total legal expenses—or around 3% of the ultimate recovery. JAMES S. KAKALIK & NICHOLAS M. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION 39 (1986). Under a typical contingent-fee contract, the lawyer advances these out-of-pocket costs, which the client agrees to reimburse at the case's conclusion, regardless of its outcome. In practice, out-of-pocket costs are customarily paid from the recovery or not at all; if a client loses, she need not reimburse her attorney for out-of-pocket expenses. Samuel R. Gross, *We Could Pass A Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 321-22 (1998).

256. For discussion of this inherent financial conflict, see KRITZER, BROKER *supra* note 8, at 138, 157; CORYDON T. JOHNS, AN INTRODUCTION TO LIABILITY CLAIMS ADJUSTING 375-76 (1982); ROSENTHAL, *supra* note 7, at 98-99; F. B. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 198 (1964); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 88-92 (1997); Galanter, *supra* note 7, at 471; Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189 (1987); David Rosenberg, *The Causal Connection In Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 HARV. L. REV. 849, 890 (1984); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970). Many contingency-fee attorneys will be able to resist the temptation to rush through a representation because of the reputational imperative, described *supra* at Part III.A., the recognition that sometimes huge inputs will spell huge outputs (as the lawyers who brought the asbestos and tobacco cases well learned), the personal satisfaction that comes from a job well done, and formal ethical obligations. As to the latter point, an attorney may breach her professional obligations if she allows her own financial interest to interfere unduly with the advice she offers her clients. See MODEL RULES R. 1.7 cmt. 10 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

settlement for a client, the happier he will be . . . and the less time spent on the case the more profit for the office. We have to balance a happy client/well client with our need to move the case to maximize our return.”²⁵⁷ While Herbert Kritzer’s research reveals that even the highest volume contingency fee lawyers spend an average of twenty-five hours per case,²⁵⁸ at the Sledge firm—guided by the admonition to “[m]ake sure that we economize on money in developing cases”²⁵⁹—claims usually settled after only four-to-six hours of *employee* (not necessarily attorney) effort.²⁶⁰ Nor is this unique to Sledge. An attorney from Jeffers & Associates said though some cases required substantial inputs, “regular run-of-the-mill cases” required only two-to-three hours of attorney time.²⁶¹ An attorney from the Garnett firm likewise recalled that the “usual case” required “[n]ot more than eight hours” of attorney effort.²⁶² And two attorneys at the Jones firm recalled that typical soft tissue injury cases settled after four hours of attorney time “max.”²⁶³

Some have theorized that tiered fees might counteract this structural misalignment. More money for more effort, the thinking goes, will deter attorneys from settling cases hastily for less than top-dollar.²⁶⁴ Tiered fees, however, are another area where litigation theory and litigation reality collide. Rather than spurring additional attorney effort, tiered fees can be used to dissuade a client from insisting on her day in court.

Nationally, only a minority of contingent-fee contracts charge tiered fees,²⁶⁵ while such fees are utilized by *all* of the settlement mills introduced above. This is no coincidence. Despite their tremendous promise, in the hands of settlement mill practitioners, tiered fees are a “good leverage tool”²⁶⁶ used to obtain client

257. Sledge Supp. Submission, *supra* note 86, at LDS-0042 (staff memo).

258. Herbert M. Kritzer, *Investing In Cases: Can You Profit From Contingency Fee Work?*, 70 WIS. L. REV. 10, 44 (Aug. 1997).

259. Sledge Supp. Submission, *supra* note 86, at LDS-0042 (staff memo).

260. *Id.*

261. Telephone Interview with J.P. (Nov. 1, 2007). Another Jeffers attorney estimated that typical claims were resolved after “anywhere from twenty minutes to three hours,” Telephone Interview with K.N. (Nov. 8, 2007), while a third said he typically spent four-to-five hours per claim, Telephone Interview with J.B. (Nov. 12, 2007).

262. Telephone Interview with K.E. (Apr. 3, 2008); *see* Telephone Interview with R.J. (Apr. 8, 2008) (stating that he spent “a couple, few hours” per settlement).

263. Telephone Interview with J.K. (May 15, 2008); *see* Telephone Interview with C.P. (May 20, 2008) (“[T]wo hours would cover everything.”).

264. *See, e.g.*, Witt, *supra* note 42, at 273 (“Upwardly sliding fee scales are relatively imprecise ways of aligning interests with respect to the duration of litigation, but they are better than straight contingencies.”); Molot, *supra* note 256, at 92 (“[S]liding scale fee arrangements help alleviate conflicts of interest between attorney and client.”); Geoffrey P. Miller, *supra* note 256, at 201-02 (a tiered fee “partially mitigates the attorney-client conflicts”).

265. *See supra* note 54 and accompanying text.

266. Telephone Interview with C.S. (Aug. 22, 2007) (stating that tiered contingency fees are a “good leverage tool” when attempting to obtain a client’s consent to a particular settlement).

consent to the quick pre-complaint settlement of claims.²⁶⁷ As Stephen Zang, a founder of Zang & Whitmer, explained: “[I]f the client insists on suit where we have recommended settlement, we then invoke that clause as an added incentive It’s there as a deterrent to convince people with very small suits not suited for trial to settle it.”²⁶⁸ Though tiered fees theoretically align the interests of attorney and client, when the claims are small and the margins (from the fee that would be earned, for instance, 33% versus 40%) are inconsequential from the attorney’s perspective,²⁶⁹ tiered fees can actually vest the attorney with additional power to persuade reluctant clients to accept an already negotiated sum.²⁷⁰

C. RECOURSE TO THE CIVIL COURT SYSTEM HAS BECOME LESS ATTRACTIVE

The third condition to create a fertile environment for settlement mills is the inhospitable environment for civil litigation in general and low-dollar torts in particular—and, just as important—the perception that litigation is slow, expensive, uncertain, and getting worse all the time. As litigation is and is perceived to be a less attractive alternative, lawyers and would-be litigants²⁷¹ are increasingly rational in opting for an alternate approach.

High litigation costs—which present the biggest barrier in the smallest cases—are the first factor militating in favor of settlement mills. The average gross recovery in the Dupayne firm hovered between \$3,500 and \$5,000.²⁷² At Azar & Associates, cases “often” settled for as little as \$2,000.²⁷³ And at Jones, “pre-lit” cases typically settled for about \$6,000.²⁷⁴ Now, consider an estimate by RAND researchers that, in 1985, tort defendants paid an average of \$4,900 to defend each auto tort lawsuit.²⁷⁵ Adjusted for inflation, that \$4,900 is roughly

267. See, e.g., Telephone Interview with K.N. (Nov. 8, 2007) (stating that tiered fees were given as a reason for a client to accept an already negotiated settlement offer). It must be noted that some former settlement mill attorneys deny using the tiered fee to discourage litigation. See, e.g., Telephone Interview with J.P. (Nov. 1, 2007).

268. Zang Disciplinary Hr’g Tr., *supra* note 44, at 232-33, Mar. 23, 1984 (Test. of Stephen Zang).

269. Telephone Interview with Lawrence D. Sledge (Aug. 21, 2007) (stating that the potential financial gain generated from the escalated fee was, from his perspective, *de minimis*).

270. Tiered fees, of course, are not attorneys’ only leverage—or even necessarily the most powerful one. The risk of losing at trial, delays and entanglements that attend litigation, expert witness fees, and court costs also loom large.

271. The rationality of “would-be litigants” should not be exaggerated. Many settlement mill clients, it is fair to assume, neither recognize that their lawyer supplies a unique brand of legal services, nor intentionally select the settlement mill over conventional counsel. Indeed, it is unlikely that a client who retains an attorney who refers to himself as the “Strong Arm” (as does Azar), *supra* note 47, or “the Hammer” (as did Sledge), *supra* note 91, has deliberately chosen a less-adversarial mode of dispute resolution. *Accord supra* note 206.

272. See *supra* note 134 and accompanying text.

273. See *supra* note 47.

274. See *supra* note 38.

275. KAKALIK & PACE, *supra* note 255, at 51. This figure relies on University of Wisconsin survey data adjusted for inflation from 1978 dollars. *Id.*

\$8,193—a sum that exceeds settlement mills' average gross recovery.²⁷⁶ When foreseeable transaction costs will swamp any realistic judgment, the preferred strategy, on behalf of both plaintiffs and defendants, is to settle rather than litigate clients' disputes.²⁷⁷ As a former attorney at the Garnett firm put it: “[L]et’s face it, I don’t care if you’re working for the greatest law firm in the world or for legal aid, the smaller cases are better off settled.”²⁷⁸

The slow pace of litigation further weighs in favor of settlement. Though it varies by jurisdiction, torts take an average of 25.6 months to litigate.²⁷⁹ A two-year delay (from the filing of the complaint) versus a wait of only two-to-eight months (from the time of the accident) makes settlements appear all the more attractive.²⁸⁰

Finally, the grim outlook for those plaintiffs who make it to trial further counsels in favor of settlement. Roughly 48% of plaintiffs who withstand lengthy delays, survive dispositive motions, shoulder the burdens of discovery, and actually succeed in getting their day in court lose outright.²⁸¹ Moreover, in recent years, plaintiffs' fortunes have only declined. The reasons for this decline are debatable,²⁸² but the trend is unmistakable. The Bureau of Justice Statistics recently compared trial success rates from 1992 and 2001. While the rate of

276. See <http://www.measuringworth.com/calculators/uscompare/result.php> (online tool that can convert 1985 dollars to 2006 dollars) (last visited Aug. 6, 2009). That RAND finding is consistent with an assessment by Trubek and his co-authors that, “for cases involving recoveries of under \$10,000 the total legal fees paid by both sides will equal or even exceed the net amounts recovered by the plaintiff.” Trubek et al., *supra* note 34, at 120.

277. See generally Trubek et al., *supra* note 34, at 120. This analysis suggests that bigger cases are more apt to go to trial, and indeed, evidence supports that supposition. See, e.g., Rosenberg & Sovern, *supra* note 74, at 1133-36, 1152.

278. Telephone Interview with D.R. (Apr. 3, 2008); see also Telephone Interview with Lillian Lalumandier (Aug. 13, 2007) (“Why in the world would a case go to trial if someone was injured for three months? That, to me, would be a travesty.”).

279. See Bureau of Justice Statistics, *Civil Trial Cases and Verdicts in Large Counties, 2001*, at 8 (Apr. 2004) (average tort case processing time from complaint to verdict or judgment was 25.6 months). This roughly two-year period has remained relatively stable over the past few decades, see Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 129-30 & Fig. 2 (2002), although waits vary by jurisdiction, and there are pockets of extreme delay, see Michael Heise, *Justice Delayed? An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 836-38 (1999); John Burritt McArthur, *The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits*, 24 HOFSTRA L. REV. 865, 869 (1996).

280. George Priest has offered a congestion equilibrium hypothesis, arguing that court congestion relief efforts have not shortened delays because court congestion and lawsuit volume are linked: The shorter the delay between filing and adjudication, the higher the incentive to litigate, and vice versa. See George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527 (1989). Delays thus encourage settlement. This insight sheds light on why long delays favor settlement mills.

281. Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 2001* (Nov. 2004).

282. Potential culprits include structural changes enacted pursuant to state court “tort reform” efforts, see Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653, 726 (2003), tort reform-related public relations campaigns' influence on juror decision-making, see Daniels & Martin, *Strange Success*, *supra* note 9, at 1242-44, and (somewhat ironically) the negative impact of in-your-face television ads aired by aggressive advertisers, including settlement mills, accord Stephanie M. Myers et al., *A Survey of Jurors' Attitudes Toward Attorney Advertising*, INTER ALIA,

plaintiff victories remained relatively constant over that period,²⁸³ victorious plaintiffs in 2001 were awarded far less. When adjusted for inflation, between 1992 and 2001, the median jury trial tort award decreased a dramatic 56.3%, from \$64,000 to \$28,000, while awards for automobile accidents—settlement mills' stock-in-trade—fell a full 56.8%, from \$37,000 in 1992 to \$16,000 in 2001.²⁸⁴

These statistics would matter little if their underlying message were not reflected in attorney's perception of the civil justice system. But in a recent survey conducted by Stephen Daniels and Joanne Martin, 87.8% of Texas personal injury attorneys said that from 1995 to 1999 the cost of bringing the typical case to conclusion had increased; 60.2% said the time it took to bring the typical case to conclusion had increased; and 90.5% agreed that juries were awarding less in cases with comparable injuries.²⁸⁵ As litigation becomes and is perceived to be more expensive, more time consuming, and less lucrative, the settlement mill model, which features speedy, inexpensive, and relatively certain settlements, looks comparatively more attractive.

IV. BARGAINING IN THE FAINT SHADOW OF THE LAW

The foregoing Parts have demonstrated that settlement mills exist, suggested they exist in significant number, and considered the factors contributing to their evolution. We now turn to the question of how settlement mills actually resolve claims and to what effect. In Part IV we see that settlement mill bargaining behavior challenges conventional models, yet settlement mill cases still settle, and their cases still settle rationally. With similarities both to the workers' compensation scheme and, in Janet Alexander's conceptualization, securities class actions, settlement mill claims are valued not based on an individualized assessment of how the claim would fare at *trial*, but instead based on formulaic going rates worked out by repeat players²⁸⁶ over the course of recurring *negotiations*. In the dim shadow of the law in which settlement mills operate, where small claim size and agency costs combine to virtually rule out recourse to

July 1991, at 14 (reporting results of a Nevada survey which found "jurors favored the defendant in a large majority of the trials in which the plaintiff's attorney was a television advertiser").

283. For a theory of why plaintiff victories have consistently hovered around 50%, see Priest & Klein, *supra* note 6.

284. Bureau of Justice Statistics, *supra* note 279, at 9.

285. Daniels & Martin, *Strange Success*, *supra* note 9, at 1244, 1249; see *id.* at 1243 ("The whole process of resolving claims has become, plaintiffs' lawyers say, more risky, more time consuming, and more expensive."); see also Daniels & Martin, *Best*, *supra* note 9, at 1806-08 (stating that BB1 attorneys have the darkest outlook and believe that the cost of the typical case has increased, as has the time it takes to bring a typical case to resolution).

286. Settlement mill negotiators frequently negotiate with the same pool of insurance adjusters. See, e.g., Telephone Interview with D.W. (May 8, 2008); Telephone Interview with H.L. (Apr. 7, 2008); Telephone Interview with J.B. (Nov. 12, 2007); Telephone Interview with V.O. (Nov. 1, 2007). This repeated interaction represents a change from the time of Ross's study. Compare Ross, *supra* note 4, at 150.

litigation, past settlements eclipse hypothetical trial verdicts as the touchstone of appropriate claim value.

Going rates worked out by insurance adjusters and settlement mill negotiators largely disassociate a claim's substantive merit from its worth and cluster claim values within established parameters. This decoupling and clustering has significant distributional consequences. Part IV's final subpart begins the important task of analyzing who wins and who loses under settlement mills' going rate scheme.

A. SETTLEMENT MILLS CHALLENGE CONVENTIONAL NOTIONS OF BARGAINING

At their most basic, prevailing theories of settlement, as developed by Mnookin-Kornhauser and Priest-Klein, among others, hold that cases settle because settlement is preferable to trial. Moreover, *when* cases settle, the settlement value reached "in the shadow of the law" approximates the parties' overlapping estimate of the expected outcome at trial, discounted for risks and foreseeable transaction costs.²⁸⁷ Settlements, the models posit, thus internalize and mirror hypothetical trial outcomes.²⁸⁸ These theories, however, rest on a few core assumptions: namely, that each party at the negotiating table will be able to forecast likely trial outcomes, which in turn requires that each party has (1) an understanding of the verdicts obtained in comparable cases and (2) a developed enough understanding of the strengths and weaknesses of the *particular* claim to situate it within the constellation of comparable claims resolved at trial. The models additionally and crucially assume (3) that each party will be willing and able to proceed to trial, if settlement negotiations stall or fail.²⁸⁹ Settlement mills challenge each of these assumptions.

First, dominant theories assume that a negotiated settlement is determined, at least in part, by the parties' predictions of how the claim would fare at trial. To predict how the claim would fare, the parties need information about comparable trial verdicts. On this point, however, settlement mill negotiators often lack necessary knowledge. A law firm that never or very rarely takes a case to trial will

287. See *supra* note 17 and accompanying text.

288. See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2548 (2004).

289. Additional assumptions are that the parties are rational actors, that their goal is to maximize wealth, and that they are equally able to bear risk. Some are starting to question these assumptions, asking how structural influences, such as attorney competence, workloads, and resources, as well as cognitive variables, such as anchoring and framing effects, biases, and risk tolerance, skew bargained-for outcomes. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (in the criminal context); Stuntz, *supra* note 288 (same); Chris Guthrie & Jeffrey J. Rachlinski, *Insurers, Illusions of Judgment & Litigation*, 59 VAND. L. REV. 2017 (2006) (in the civil context); Molot, *supra* note 256, at 70-74 (same). This Article aims to advance this literature by showing how both claim size and attorney behavior influence civil settlement negotiations.

have a far more difficult time assessing the probability of a particular verdict.²⁹⁰ As one settlement mill attorney recalled: “A lot of times my biggest problem with it is I had no idea what the cases were really worth because I had no court experience at all and he [Dupayne] didn’t either, so I didn’t know how, you know, where to get the information from.”²⁹¹ Although resources are available to guide negotiators in their appraisal of particular claims, at least some settlement mill negotiators (and especially non-attorney negotiators) do not routinely consult such material.²⁹² One settlement mill attorney explained that, although she sometimes glanced at the county bar circular which compiled various jury awards, “[t]here wasn’t a whole lot of researching going on.”²⁹³ Another non-attorney negotiator who settled thousands of claims laughed when I asked her if she had ever consulted such reports.²⁹⁴

Second, in order to bargain effectively in the shadow of the law, parties must know enough about the strengths and weaknesses of the *particular* claim in order to discount a potential verdict for a probable verdict.²⁹⁵ In litigated cases, this fine-tuning is often accomplished by motions testing a claim’s legal adequacy, followed by broad pretrial discovery wherein interrogatories, the exchange of documents, requests for admission, and depositions all frame and narrow the issues, refine the parties’ estimates, and bring the case’s strengths and weaknesses into sharp relief. But settlement mills rarely file lawsuits and almost never engage in formal discovery. Rarely do they even informally investigate a client’s

290. There is, not surprisingly, evidence of substantial disagreement of claim values, even among experienced practitioners. See, e.g., GERALD R. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); ROSENTHAL, *supra* note 7, at 202-05. One reason attorneys have trouble valuing tort cases *ex ante* is that pain and suffering damages are often awarded, and these damages are highly idiosyncratic, subjective, and variable. For a discussion of the difficulty of assessing pain and suffering damages, see, e.g., Mark Geistfeld, *Placing A Price on Pain and Suffering: A Method For Helping Juries Determine Tort Damages For Nonmonetary Injuries*, 83 CAL. L. REV. 773 (1995). For further discussion of the challenges in determining a case’s “accurate” settlement value, see Issacharoff & Witt, *supra* note 17, at 1602; Saks, *supra* note 56, at 1221-24. Nevertheless, it seems clear that lawyers immersed in trial work will be better able to predict adjudicated outcomes, as compared to strangers to the courthouse. See Bibas, *supra* note 289, at 2481-83 (discussing the importance of institutional knowledge of adjudicated outcomes for effective plea bargaining in the criminal law context); Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 UCLA L. REV. 833, 857-58 (1990) (noting that a lawyer lacking trial experience will have a difficult time “assessing the prospects at trial in terms of both liability and damages”).

291. Sworn statement of S.S. at 39 (Aug. 19, 1998).

292. Academic literature likely overestimates negotiators’ reliance on these materials. Compare Daniels & Martin, *Best*, *supra* note 9, at 1806 (“All the participants in the civil litigation process—plaintiffs’ lawyers, defense lawyers, and insurance companies—look to jury verdicts to set the going rates used to value the vast majority of matters that do not go all the way to a trial.”), with Telephone Interview with C.P. (May 20, 2008) (recalling that when he was employed at the Jones law firm, he settled cases without consulting jury verdict reports); Telephone Interview with J.K. (May 15, 2008) (stating that the majority of negotiators in his office did not consult such materials).

293. Telephone Interview of K.N. (Nov. 8, 2007).

294. Telephone Interview with A.E. (Aug. 16, 2007).

295. See Bibas, *supra* note 289, at 2492.

claim.²⁹⁶ As an attorney who settled hundreds of cases while working at the Dupayne law firm explained, “there was never any investigation done of the claim The only investigation that was ever done was whether or not someone had insurance.”²⁹⁷ And: “Most of the cases I handled, I didn’t even know the facts of the case.”²⁹⁸ Lacking an understanding of the claim’s unique attributes, settlement mill negotiators can only make a rough guess of where a particular claim might fit within the range of potential trial verdicts.

Third and most importantly, the prevalent models take for granted that both parties will be equipped to proceed to trial should settlement negotiations stall or fail. The threat of trial, and its attendant risks and costs, provides the proverbial stick to keep both parties moving toward a negotiated result. But settlement mill negotiators are virtually unarmed. Whether due to agency costs (*i.e.*, an inability or unwillingness on the part of settlement mills to try the case or forgo part of their fee by referring it to a firm that will) or outsized litigation costs in relation to the limited ultimate recovery, settlement mills almost “inevitably settle before going to trial.”²⁹⁹ The parties consequently bargain in only the dimmest shadow of the law.

B. GOING RATES

If settlement mill negotiations do not resemble the prevailing models of bargaining, then how are claims valued? The answer lies in “going rates.”³⁰⁰ Settlement mill negotiators and the cadre of insurance adjusters with whom they bargain come to a common understanding of certain injuries’ proper value. As a non-attorney who negotiated more than 500 settlements on behalf of the Sledge firm, explained:

296. Sources indicate that there was no investigation of typical claims at the Dupayne firm. *See supra* notes 127-128 and accompanying text. At Jeffers, an attorney recalled that witness interviews were “in no way standard procedure.” Telephone Interview with K.N. (Nov. 8, 2007). *But see* Telephone Interview with L.T. (Mar. 6, 2008) (stating that witnesses were interviewed “maybe 40 to 50% of the time”). At the Guirard firm, according to the Case Manager Manual, formal witness statements were only obtained for non-litigation files if “Eric or Tommy decides that such statements are necessary” after reviewing a memo outlining why they were needed. Guirard Disciplinary Hr’g Ex. ODC 4, at 000037 (Manual). At the Jones firm, meanwhile, most agreed that additional investigation was the exception. *See* Telephone Interview with C.P. (May 20, 2008) (accident scene photos were “[n]ever” taken and witnesses were “never” interviewed); Telephone Interview with D.D. (May 20, 2008) (accident scene photos were “rarely” taken, while witnesses were “[a]lmost never” interviewed). *But see* Telephone Interview with B.B. (May 28, 2008) (stating that the firm conducted additional investigation at least half of the time).

297. Sworn Statement of S.S. at 59 (Aug. 19, 1998).

298. *Id.* at 41.

299. Sledge Supp. Submission, *supra* note 86, at LDS-0015 (office protocol).

300. Others have commented upon going rates. *See, e.g.*, ROSS, *supra* note 4, at 86, 107-08; KRITZER, DEAL, *supra* note 8, at 39, 71, 128-29; ROSENTHAL, *supra* note 7, at 36 (referring to “going rates” as “going values”); Daniels & Martin, *Strange Success*, *supra* note 9, at 1228-29, 1249-50; Daniels & Martin, *Best*, *supra* note 9, at 1796, 1804.

[E]ver[y] case has a potential value. These little soft tissue injury cases, two- or three-month duration cases, there isn't a senior adjuster in town that doesn't have a very set number . . . you know going in and they know going in about the value of this case.³⁰¹

At the Sledge firm, “[adjusters] would pay medical bills, drug bills, lost income (if the doctor said you couldn't work), and a thousand dollars a month.”³⁰² At the Dupayne firm, claims typically settled for three-to-four times medical bills.³⁰³ At Jeffers, one attorney used a settlement metric of two-to-three times medical bills.³⁰⁴ And at Jones, one attorney recalled that, in most instances, he would ask for “three times the meds and hope to get two.”³⁰⁵

Of course, going rates reflect well-established legal rules and entitlements and bear *some* relation to past trial verdicts. What is distinctive is that the relationship between going rates and trial verdicts is muted,³⁰⁶ and going rates are relatively unaffected by the many merit- and non-merit-based factors that would serve to increase or decrease a claim's value in a court of law. In some ways, this comes as no surprise. A victim's unique personal attributes are less likely to affect settlement values when the negotiator (or the attorney fixing the settlement parameters) has never seen or spoken to the client. It is hard for witness credibility to play a prominent role when witnesses are seldom interviewed. And it would be unusual for the negotiation to focus on fine-grained legal considerations, since settlement mill negotiators are frequently non-lawyers.³⁰⁷ A former Garnett

301. Sledge Disciplinary Hr'g Tr., *supra* note 1, at 128 (Test. of Lillian Lalumandier); *see also id.* at 423 (Test. of Lawrence D. Sledge) (“[Y]ou know, somebody who gets whiplash, they're all the same, almost the same. I mean, if somebody has a two-month whiplash or a three-month whiplash and they get well, it has a certain value.”).

302. *Id.* at 313.

303. Telephone Interview with A.E. (Aug. 16, 2007).

304. Telephone Interview with K.N. (Nov. 8, 2007). A different and more trial-centered portrait was painted by other lawyers from the Jeffers firm. *See, e.g.*, Telephone Interview with L.T. (Mar. 6, 2008); Telephone Interview with T.F. (Mar. 6, 2008).

305. Telephone Interview with C.P. (May 20, 2008). Another recalled asking for six times the medical bills and settling for three. Telephone Interview with D.W. (May 8, 2008). *But see* Telephone Interview with J.K. (May 15, 2008) (“There wasn't a formula involved.”).

306. Sledge's explanation of how his firm's going rate was established is instructive. During his disciplinary hearing, he testified that, though the parameter could be traced to the damages once affirmed by the Fourth Circuit, it had been in place and relatively unchanged for two decades. Sledge Disciplinary Hr'g Tr., *supra* note 1, at 430 (Test. of Lawrence D. Sledge). I likewise asked an attorney at the Jeffers firm how she knew to settle cases for two or three times medical bills. She replied: “I was just told three times meds is what you were supposed to get.” Telephone Interview with K.N. (Nov. 8, 2007).

307. *See* Telephone Interview with A.E. (Aug. 16, 2007) (confirming that issues such as comparative fault did not arise); Sledge Disciplinary Hr'g Tr., *supra* note 1, at 123 (Test. of Lillian Lalumandier) (Q: “In your negotiation with the adjusters, did you have occasion to argue the law . . . ?” A: “We argued quantum.” Q: “I assume you got involved in arguments frequently about comparative fault percentages?” A: “No.”). In many cases, legal liability is obvious, and so it is hardly surprising it isn't discussed. A Department of Transportation study suggests, however, that traffic citations are issued following only the minority of accidents where compensation is later sought, leaving a sizable percentage of claims where fault might theoretically be

attorney perhaps said it best: “Adjusters don’t know the people. We don’t know them. So this kind of neck sprain would tend to go for \$5,000, \$7,500, like that. Generic kinds of injuries, generic kinds of price.”³⁰⁸ In practice, rather than resembling the dominant model of settlement, as Samuel Issacharoff and John Witt have observed, the system more closely resembles a private, under-the-table, ultra-flexible workers’ compensation scheme.³⁰⁹ Indeed, the system is, in the words of Sledge, “a grid.”³¹⁰ Instead of an individualized and fact-intensive analysis of each case’s strengths and weaknesses alongside a careful study of case law and comparable jury verdicts, settlement mill negotiators and insurance claims adjusters assign values to claims with little regard to fault³¹¹ based on agreed-upon formulas, keyed off lost work, type and length of treatment, property damage, and/or medical bills, which in turn relate to the severity of the injury. And, like the grand bargain which undergirds the workers’ compensation scheme, as we will see below, participants in the settlement mill system appear to trade the possibility of a significant verdict in favor of greater assurance of *some* recovery.³¹²

There is also a striking similarity to the very high-stakes world of securities class actions as those actions are conceptualized by Janet Cooper Alexander in her influential 1991 study.³¹³ In that study, Alexander found that securities class actions’ unique attributes combine to create a situation where trials are not viewed “as a practically available alternative.”³¹⁴ Like the small personal injury claims processed by settlement mills, securities class actions almost invariably

contested. DEPARTMENT OF TRANSPORTATION, *supra* note 77, at 37. And indeed, the founder of the Garnett firm stated that, at least at his firm, “most cases” were contested. Telephone Interview with H.G. (Apr. 29, 2008).

308. Telephone Interview with K.E. (Apr. 3, 2008).

309. Issacharoff & Witt, *supra* note 17, at 1595, 1616-1617; *see also* Witt, *supra* note 42, at 270. One irony, not lost on Issacharoff and Witt, is that a compensation system for automobile accidents, explicitly modeled on workers’ compensation, was long ago proposed, debated, and rejected. *See Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 786 (1932).

310. Telephone Interview of Lawrence D. Sledge (Aug. 21, 2007).

311. *See supra* note 207 (concerning the rarity of no-offer cases); *supra* note 307 (concerning the fact comparative fault was seldom discussed); *infra* note 322 (concerning the effect of a defendant’s “egregious” conduct); *infra* note 324 and accompanying text (concerning the settlement of non-meritorious claims).

312. *See generally* Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers’ Compensation in the United States 1900-1930*, 41 J.L. & ECON. 305 (1998); *see also* Issacharoff & Witt, *supra* note 17, at 1586-87.

313. Alexander, *supra* note 17. Alexander’s methodology and conclusions have been widely questioned and criticized. *See, e.g.*, James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 512 (1997); Leonard B. Simon & William S. Dato, *Legislating on a False Foundation: The Erroneous Academic Underpinnings of the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 959 (1996); Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2084 (1995).

314. Alexander, *supra* note 17, at 529-558. Just a few of these attributes include: the potential liability of extremely risk-averse individual defendants empowered to make decisions on behalf of the company defendant; staggering potential damages sufficient to swamp insurance coverage; and the defense attorney’s reputational interest in avoiding a devastating verdict.

settle. Alexander went on to explore how the virtual certainty of settlement impacts securities class actions' settlement value. She found that, stripped of a realistic threat of trial, a case's settlement value becomes less bound to a hypothetical trial outcome.³¹⁵ So untethered, securities class actions settle for a "going rate" divorced from the claim's underlying merit—specifically, one quarter of the potential damages specified in the plaintiffs' complaint.³¹⁶ Alexander concluded: "When the parties are virtually certain that the case will not be adjudicated on the merits whether at trial or by motion, the link between the settlement outcome and a hypothetical trial outcome may be weakened or broken."³¹⁷ So too here.

C. THE DISTRIBUTIONAL CONSEQUENCES OF GOING RATES

The going rate scheme largely disassociates the substantive merits of the claim from the claim's settlement value and clusters claim values within established parameters. This decoupling and clustering means two things: First, in practice, the much-criticized all-or-nothing fault system gives way to a scheme of near universal (albeit sometimes partial) compensation. Second, some claims are settled for more than they are objectively worth and some are settled for less. There are, it seems, predictable winners and losers, as set forth on the grid below.³¹⁸

TABLE I: HOW SETTLEMENT MILL CLAIMANTS FARE COMPARED TO OTHER SIMILARLY SITUATED CLAIMANTS

	Particularly Meritorious	Meritorious	Unmeritorious
Large Claim	Loser	Likely Loser	Likely Winner
Small Claim	Likely Loser	Likely Winner	Winner

Those with particularly meritorious claims (where the defendant's liability is pronounced) likely get less than they would if not for settlement mills, while those with unmeritorious claims likely get more. For the meritorious claims (the claims in the middle), conclusions become more complex and less sure. For meritorious/large claims, settlement mill bargains must be judged against results obtained by conventional counsel. Conventional attorneys supply the proper comparator because those with large claims have the *option* of conventional representation. These claimants likely fare poorly. The last class of claimants

315. *Id.* at 500-01.

316. *Id.* at 516-19.

317. *Id.* at 500-01.

318. The foregoing analysis looks only at clients' monetary recovery and does not attempt to quantify other costs or benefits. It should also be emphasized that rigorous quantitative studies are needed to test the preliminary, impressionistic conclusions set forth herein.

includes those with meritorious yet small claims, meaning minor injuries. Here, the proper baseline is not to conventional counsel, since many small claims are weeded out as unprofitable during conventional attorneys' initial case screening.³¹⁹ The relevant question is whether a settlement mill client fares better than she would fare were she to negotiate *pro se* with the insurance adjuster, after deducting attorneys' fees and costs. Using this baseline, clients with small claims (who comprise the bulk of settlement mills' caseload) appear to come out ahead.³²⁰ The foregoing analysis is unpacked below.

1. PARTICULARLY MERITORIOUS AND UNMERITORIOUS CLAIMS

We consider those on the left and right of the grid first. Those with particularly meritorious claims (and especially those with large/particularly meritorious claims, who could definitely obtain representation by conventional counsel) fare comparatively poorly, and those with non-meritorious claims (and especially those with small/non-meritorious claims, who would be least likely to obtain representation by conventional counsel) fare well because, in the settlement mill scheme, those two classes of clients are not fully distinguished.³²¹ At settlement mills, the specific facts underlying each claim—the facts that would make a claim appear especially strong or weak—are seldom discovered, or even if facially discovered, are never fully appreciated or exploited.³²² Legally strong and weak claims are lumped together. For dubious claims that would face obstacles under the substantive law, the lack of careful investigation likely re-dounds to the plaintiff's advantage. Not so for particularly deserving plaintiffs,

319. See *supra* notes 56-59 & 238 and accompanying text.

320. As a former settlement mill attorney explained:

[I]f you have small injuries that are not very permanent [and] that are well documented, he settles quick, he settles fast, and gets you full value. If you have very, very serious injuries that require long-term treatment, then you get the short end of the stick.

Telephone Interview with K.R. (May 1, 2008); see also Telephone Interview with D.R. (Mar. 4, 2008) (stating that when big cases are handled by settlement mills: “[C]orners are cut. You don’t get full value.” But “[r]un-of-the-mill cases are just as well served, maybe better.”). It is not just when represented by settlement mills that the seriously injured fare poorly and trivially injured fare well. Empirical studies have *consistently* found that the least hurt tend to get the most (in relation to their expenses), while the most hurt get the least. See, e.g., DEPARTMENT OF TRANSPORTATION, *supra* note 77, at 59-61; Clarence Morris & James C.N. Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962) (Pennsylvania study); CONARD ET AL., *supra* note 77, at 179, 197, 251 (Michigan study).

321. We cannot be certain as to how particularly meritorious/small claims or unmeritorious/large claims fare because these claimants' relative success is tied to whether conventional counsel could be retained—an open question. Conventional counsel might—but would not necessarily—represent each category of claimant. Accord ROSS, *supra* note 4, at 196 (finding that “unfavorable liability exerts but a small influence on the proportion of cases represented”). Further complicating the analysis, it is possible, as explained *infra* at notes 323-324, that settlement mills actually fare *better* than their conventional counterparts when representing those with unmeritorious claims.

322. See Telephone Interview with D.H. (Aug. 20, 2007) (a defendant's egregious conduct might “slightly” affect a claim's settlement value).

where a thorough investigation might turn up evidence of the defendant's egregious conduct, which might expose the defendant to punitive damages, thus theoretically increasing the plaintiffs' potential recovery.

Often, of course, the questionable nature of the claim will be obvious—at least to the insurance adjuster. Yet, even then (or perhaps, especially then), those represented by settlement mills are advantaged. Settlement mill clients with non-meritorious claims fare well because, even if an insurance adjuster recognizes that a particular claim lacks merit, if he is negotiating with a plaintiffs' attorney (or non-attorney) with whom he *frequently bargains*, he nevertheless has an incentive to tender an acceptable offer, both in order to close the claim expeditiously and to engender good will to pave the way for future bargaining.³²³ The former incentive (often referred to as tendering a “nuisance value settlement”) exists regardless of whether the client is represented or by whom, but the latter incentive is only present if the claimant is represented by an attorney whom the adjuster knows he will encounter again. Settlement mills' high claim volume, meanwhile, practically guarantees future interaction.³²⁴

2. MERITORIOUS/LARGE CLAIMS

We now turn to the meritorious claims at the center of the grid, specifically meritorious/large claims. This category encompasses relatively few claimants, since settlement mills primarily represent those with minor injuries. Some severely injured clients are represented by settlement mills, however,³²⁵ and they

323. See *supra* note 225 (concerning repeat-play dynamics); *supra* note 286 (concerning insurance adjusters and settlement mill negotiators' repeated interaction); see also Ross, *supra* note 4, at 19 (“The attorney . . . since he might have repeated dealings with the same adjuster . . . may be in a position to demand consideration over and above what the claim might merit on the basis of formal law.”); Franklin et al., *supra* note 74, at 14 & n.70 (“Attorneys who do any significant amount of plaintiffs' personal injury work become acquainted with the representatives and attorneys who handle the other side of these cases. In order to maintain a good working relationship, defendants may make small payments in some weak cases to give the plaintiff's attorney a fee.”); Telephone Interview with K.E. (Apr. 3, 2008) (observing that “there are some real benefits of the wholesale business,” partly because of the repeat “relationships with the insurance claims adjusters”).

324. According to Sledge's claims negotiator, adjusters would indeed settle claims even if there was “a real legal dispute” over the claim's validity, saying: “Well, look, just to make this thing go away, I'm still willing to give you \$5,000, \$6,000.” Sledge Disciplinary Hr'g Tr., *supra* note 1, at 128 (Test. of Lillian Lalumandier). A negotiator from a California firm, meanwhile, offered a revealing anecdote. He recalled getting a file from a colleague where the statute of limitations had already lapsed. He explained: “I knew the adjuster very, very well. Had dealt with him on several other cases. I asked him to do me—it wasn't my case—to do me a big favor: Let's settle this as three days earlier before the statute ran, and he did.” Telephone Interview with S.R. (Mar. 27, 2008).

325. Sledge's office manager, for example, settled “several” cases for more than \$100,000. Sledge Disciplinary Hr'g Tr., *supra* note 1, at 121 (Test. of Lillian Lalumandier). Similarly, a non-attorney at the Dupayne firm recalled settling a claim for \$75,000. Telephone Interview with A.E. (Aug. 16, 2007). A former attorney at the Garnett firm, meanwhile, recalled settling a claim for \$1 million. See Telephone Interview with C.R. (Apr. 1, 2008).

are likely represented by settlement mills to their detriment.³²⁶ The reason is simple: Clients who are badly injured have options. They *can* obtain the services of a conventional personal injury attorney. And, four of the traits that distinguish settlement mills from conventional law firms artificially depress claim value.

First, settlement mills settle cases quickly. Although speed has important salutary benefits, fast settlements likely depress the value of claims, since it is fairly well understood “that the longer the client holds out, the larger the settlement he will be able to bargain out of the insurer.”³²⁷ Second, settlement mills rarely file lawsuits, and the act of not filing is correlated with lower settlements.³²⁸ Third, settlement mills commonly impose quotas or incentives on negotiators, which put the emphasis on turning claims over, rather than maximizing their value. And finally, attorney reputation for going to trial affects bargaining.³²⁹ Because settlement mills have a reputation for avoiding trial, they have less leverage in their dealings with insurers and are less likely to obtain top-dollar.³³⁰

Anecdotal evidence indeed suggests that settlement mills get less than their conventional counterparts. First, a defense attorney who went up against Zang & Whitmer testified that, in his experience, the firm “left a lot of money on the table.”³³¹ Second and more powerfully, the point is supported by former settlement mill attorneys themselves. One attorney stated: “I am personally aware of cases I think [were] settled for \$10,000, \$15,000, \$20,000 less” because insurance adjusters knew the attorney handling the case “wasn’t going to actually

326. As noted previously, some firms at least sometimes segregate serious claims from non-serious claims during intake, sending larger claims to a special unit for processing. This sorting might ameliorate some of the problems described herein.

327. ROSENTHAL, *supra* note 7, at 36; *see also* DEPARTMENT OF TRANSPORTATION, *supra* note 77, at 88 (noting that data suggests “the earlier one settles, the smaller will be his recovery in relationship to economic loss”); Kenneth J. Reichstein, *Ambulance Chasing: A Case Study of Deviation and Control Within the Legal Profession*, 13 SOC. PROBS. 3, 9 (1965) (“Generally, the amount of compensation insurance companies are willing to pay increases as the date of trial approaches.”); John R. Foutty, *The Evaluation and Settlement of Personal Injury Claims*, INS. L. J., No. 492, at 7 (1964) (“[T]he value of a personal injury claim often increases in proportion to the time elapsed since the date of the injury.”).

328. *See* CONARD ET AL., *supra* note 77, at 157, 270 & Fig. 4-5; Rosenberg & Sovern, *supra* note 74, at 1128-29; Franklin et al., *supra* note 74, at 17 & n.86. Note, the relationship is merely correlative; no causal relationship has been proved.

329. Insurance adjusters are attuned to the past litigation behavior of attorneys with whom they repeatedly negotiate. According to Allstate Insurance Company’s former regional casualty manager, for example, during her employment, Allstate kept a log of plaintiffs’ attorneys, delineating which ones were aggressive and which ones were likely to cave. Brandon Ortiz, *Former Casualty Manager Testifies Against Allstate*, Oct. 5, 2007, LEXINGTON HERALD LEADER A1 (quoting Test. of Debbie Niemer).

330. *See* KRITZER, BROKER, *supra* note 8, at 173; Catherine T. Harris et al., *Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs’ Attorneys*, 58 SMU L. REV. 225, 246-47 (2005) (suggesting, with some empirical support, that insurers’ settlement decisions are influenced by an attorney’s reputation for taking cases to trial); Marc Galanter & Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1389 (1994) (“Power to achieve an attractive settlement may be dependent on having adjudication as a viable alternative.”).

331. Zang Disciplinary Hr’g Tr., *supra* note 44, at 59, Apr. 2, 1986 (Test. of Harold Swenson).

try the case and tee it up.”³³² Another confessed that he and his colleagues sometimes yielded to the financial incentives to get cases settled quickly, rather than at full value.³³³ And a third attributed his short tenure at a settlement mill to the following fact: “I had a hard time turning everyone around really quick and taking very little money.”³³⁴

Still more powerful evidence comes from those attorneys who are able to make an express comparison between settlement mills and conventional law firms. Of those former settlement mill attorneys able to make a comparison, a majority (ten out of fifteen) reported that the offers they received for comparable cases improved upon departing the settlement mill and joining a more conventional law firm.³³⁵ When asked to explain this disparity, attorneys offered rationales echoing those advanced above. One attorney said he thought he got better settlements upon leaving the Jones firm because, at his subsequent employer, financial incentives no longer rewarded the quick turnover of claims. At Jones, he said, it was too tempting to “[g]et the first offer from the insurance company and move on.”³³⁶ Another attorney, meanwhile, attributed the more generous offers he received to the fact that, freed from the settlement mill, insurers knew he would actually litigate the case.³³⁷

3. MERITORIOUS/SMALL CLAIMS

The final category of claimants—those with a legal entitlement to compensation but only minor (typically, soft tissue) injuries—is the largest, in terms of raw numbers. These claimants, initial evidence suggests, might do quite well. As noted, to gauge how this class fares, we must compare settlement mill settlements to sums obtained by clients proceeding *pro se*, since, for this universe of clients, the choice is often not between a settlement mill and a conventional attorney but rather between a settlement mill and no lawyer at all. The question thus becomes: Do clients net more when represented by settlement mills or by working it out with the insurance company on their own?

332. Telephone Interview with C.R. (Apr. 1, 2008).

333. Telephone Interview with G.V. (Apr. 7, 2008).

334. Telephone Interview with C.P. (May 20, 2008).

335. An additional attorney reported that his wife was a personal injury lawyer while he was at the Jones firm, and during the same period of time, from the same pool of insurance adjusters, she was “getting much better offers . . . [f]or similar cases.” *Id.*

336. Telephone Interview of J.K. (May 15, 2008). *Accord* Telephone Interview with G.V. (Apr. 7, 2008) (“[I]t was very very difficult as a young attorney to want to take a case all the way through a jury trial if you were going to be out of the office five, six, and seven days, plus the preparation—preparing—spending weeks preparing for a jury trial, if your compensation was coming from getting cases settled on a percentage basis. That probably did not serve clients well.”); *Guirard II*, 2009 WL 1384981, at *11 (“Respondents . . . motivated the nonlawyers to settle the clients’ claims as quickly as possible in order to collect a paycheck.”).

337. Telephone Interview with D.W. (May 8, 2008); *see also* Telephone Interview with C.P. (May 20, 2008) (stating that his wife, who was a personal injury lawyer at a conventional law firm, got better offers than he did while he worked at the Jones firm because “they knew she would litigate”).

Two studies conducted by the Insurance Research Council (“IRC”) offer guidance. These studies, based primarily on the review of 147,127 private passenger auto injury insurance claims from years 1992 and 1997,³³⁸ compared the recoveries of represented bodily injury (“BI”) claimants incurring minor injuries to their unrepresented counterparts. Findings for three typical settlement mill injuries (neck sprains and strains, back sprains and strains, and minor lacerations) are presented below.

TABLE II: HOW COMPENSATED BI CLAIMANTS WITH MINOR INJURIES FARED WITH AND WITHOUT REPRESENTATION, 1992 AND 1997

Most Serious Injury Claimed	Mean Claimed Economic Loss	Mean Gross BI Payment	Mean Net Payment After Deducting Attorneys’ Fee and Claimed Expenses
Neck Sprain/Strain			
1992			
Attorney	\$4,098	\$7,918	\$1,207
No Attorney	\$1,237	\$2,480	\$1,243
1997			
Attorney	\$4,299	\$6,927	\$411
No Attorney	\$1,260	\$2,307	\$1,047
Back Sprain/Strain			
1992			
Attorney	\$5,208	\$9,342	\$1,051
No Attorney	\$1,541	\$3,074	\$1,533
1997			
Attorney	\$5,160	\$8,118	\$360
No Attorney	\$1,626	\$2,888	\$1,262
Minor Lacerations			
1992			
Attorney	\$2,021	\$4,771	\$1,175
No Attorney	\$688	\$1,166	\$478
1997			
Attorney	\$2,698	\$5,172	\$819
No Attorney	\$793	\$1,531	\$738

Sources: IRC, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS 61, Fig. 6-6 (Sept. 1994) (1992 data); IRC, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS 7, Fig. 1-5 (June 1999) (1997 data).

Note: Attorneys’ fees are estimated to consume 33% of the gross recovery in 1992 and 32% in 1997.

338. See IRC, CLAIMING BEHAVIOR, *supra* note 225, at 9, and IRC, ANALYSIS, *supra* note 221, at 2.

IRC's evidence permits two clear conclusions. First, represented claimants report much higher economic losses (out-of-pocket expenses), as compared to those who are unrepresented³³⁹ in part because represented claimants seek medical care at substantially higher rates.³⁴⁰ Next, represented clients do get significantly more money on average than those who negotiate without the assistance of counsel, although—as the insurance industry is quick to point out—attorneys' fees and higher out-of-pocket expenses consume a sizable portion (and for some, *more* than the entirety) of these gains.³⁴¹

Beyond this point, however, conclusions become less sure. One important wrinkle is that IRC's database includes only claims closed *with payment*.³⁴² One could reasonably hypothesize that individuals seeking compensation are far more likely to be denied altogether when proceeding *pro se* as compared to when they are represented—and indeed, settlement mills' reported infrequency of no-offer cases would tend to support that hypothesis,³⁴³ as do past studies.³⁴⁴

A second important wrinkle is that it might be that *real* out-of-pocket expenses are roughly equivalent for represented and unrepresented claimants. This would be true if: (1) the economic loss differential is covered in large measure by a claimant's sick leave or first-party health or disability insurance;³⁴⁵ (2) the observed economic loss differential is the result of represented claimants' more comprehensive claiming, on the theory that represented claimants are better equipped to identify, document, and seek payment for the full range of

339. For all types of injuries combined, the IRC has found that “attorney-represented claimants reported economic losses (mainly medical expenses) more than 3.6 times higher than the economic losses reported by non-represented claimants (\$6,391 vs. \$1,755).” IRC, CLAIMING BEHAVIOR, *supra* note 225, at 58-59.

340. *See id.* at 65-67. In some cases, this medical treatment no-doubt facilitates more complete and rapid recoveries. In other cases, however, additional medical care is sought for a more troubling purpose. That is, clients have a financial incentive to “build up” medical bills because, as explained *supra* at Part IV.B., these bills are often multiplied to generate a final award. Adding to the incentive, a number of states have adopted dollar-threshold no-fault systems pursuant to which a claimant can seek general damages only if her medical costs exceed a particular sum. For a discussion of medical “build up,” see Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L. Q. 653, 673 (2003); Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303, 1307-08 (1994).

341. Across all injury categories, represented clients in 1992 collected an average of \$11,939 for their BI claims, as compared to \$3,262 collected by non-represented claimants. IRC, CLAIMING BEHAVIOR, *supra* note 225, at 59, Fig. 6-5; *see also* IRC, ANALYSIS, *supra* note 221, at 78 (reporting similar figures).

342. E-mail Message from David Corum, Vice President, Insurance Research Council, to the author (Apr. 1, 2009).

343. *See supra* note 207 (concerning the infrequency of no-offer cases); *see also* Telephone Interview with Lillian Lalumandier (Aug. 13, 2007) (“Nine out of ten people who walked into Mr. Sledge's office had first tried to work it out with the insurance company, and it didn't work. They were denied.”).

344. *See, e.g.,* Morris & Paul, *supra* note 320, at 924 (“[R]etention of a lawyer greatly increases the prospect . . . of an award”); Franklin et al., *supra* note 74, at 13 (“In those cases in which the claimant is represented by an attorney the frequency of recovery is 90 per cent, while in those cases in which the claimant acts for himself the rate of recovery is only 65 per cent.”).

345. Medical insurers often, but not always, recoup expenses from tort awards, while those supplying sick leave or disability insurance rarely do, permitting double recoveries. *See* Sugarman, *supra* note 231, at 2423.

compensable expenses;³⁴⁶ or (3) represented claimants' reported medical bills are not *really* paid to medical providers in full but are rather reduced after the insurer's reimbursement.³⁴⁷ If real out-of-pocket expenses are comparable, then the only significant cost represented claimants bear, as opposed to non-represented claimants, is attorneys' fees. Assuming those fees consume one-third of the claimant's recovery, then represented claimants in all categories may net more than their unrepresented compatriots, while also (theoretically) benefiting from greater medical intervention, offering the distinct possibility that settlement mill clients with minor but meritorious claims fare better than they would proceeding *pro se*.³⁴⁸

V. WHY DO INSURERS COME TO THE TABLE AT ALL?

We finally confront a puzzle that looms over the settlement mill scheme: Given that the threat of trial generally prods the parties toward settlement, why do insurance companies bargain with settlement mills at all? Why shouldn't insurance companies simply call their bluff, refusing to offer anything (or only the most nominal of sums) when settlement mills come calling?³⁴⁹

The first explanation for why insurers tender settlement offers to settlement mills is that insurance companies are constrained in numerous ways—unrelated to the

346. Others have remarked on attorneys' ability to assist clients in this regard. *See, e.g.*, ROSS, *supra* note 4, at 117; KRITZER, *supra* note 27, at 778. It does not appear that the economic loss differential is attributable to the fact that only the most severely injured within each injury category seek legal representation. IRC studies confront, analyze, and largely dismiss this possibility. *See* IRC, CLAIMING BEHAVIOR, *supra* note 225, at 62-63, 65; IRC, ANALYSIS, *supra* note 221, at 91 & Figs. 7-14, 7-15, 7-16 & 7-17.

347. Settlement mill sources indicate that clients' medical bills *are* routinely reduced, in part because settlement mills, which routinely refer clients to specific medical providers, have great leverage over those providers when it comes time to pay the tab. One settlement mill attorney reported that, in his experience at the Jones firm, doctors or chiropractors would agree to reduce their bills a full "90% of the time." Telephone Interview with D.W. (May 8, 2008); *see also, e.g.*, Telephone Interview with J.K. (May 15, 2008) (estimating that medical providers' bills were reduced 70% to 80% of the time). Likewise, at the Garnett firm, chiropractors and doctors were "frequently" asked to reduce their bills, Telephone Interview with H.G. (Apr. 29, 2008), and at the Guirard firm, the Case Manager Manual advised case managers to "[a]sk doctors to reduce their bills in appropriate cases," Guirard Disciplinary Hr'g Ex. ODC 4, at 000046 (Manual).

348. One may also question whether the advantage exists for settlement mill clients specifically—since some claimants in the above survey were no-doubt represented by conventional attorneys who might achieve better results than settlement mill negotiators, for reasons explained in Part IV.C.2.

349. At least one insurance company—Allstate—appears to be doing just that. According to a number of sources, as compared to other prominent insurers, Allstate is far more likely to offer only a trivial sum, thus forcing small claims into litigation. *See, e.g.*, Telephone Interview with C.R. (Apr. 1, 2008); Telephone Interview with L.T. (Mar. 6, 2008); Telephone Interview with J.B. (Nov. 12, 2007); Telephone Interview with K.N. (Nov. 8, 2007); Sledge Disciplinary Hr'g Tr., *supra* note 1, at 129-30 (Test. of Lillian Lalumandier); *id.* at 327, 398 (Test. of Lawrence D. Sledge). According to published reports, Allstate's hardball strategy is the result of a mid-1990s McKinsey & Co.-directed overhaul of soft tissue claims compensation. *See* Michael Maiello, *So Sue Us*, FORBES, Feb. 7, 2000, at 60; *see also* Brandon Ortiz, *Former Casualty Manager Testifies Against Allstate*, Oct. 5, 2007, LEXINGTON HERALD LEADER, A1; Brandon Ortiz, *Local Claim Could Lead to \$800 Million Class Action*, July 9, 2006, LEXINGTON HERALD LEADER, A1.

instant threat of litigation. Insurers owe their insureds certain express and implied contractual obligations, have a reputational and public relations interest in quickly and fairly compensating accident victims,³⁵⁰ are licensed and regulated by state insurance commissions, and are subject to specific state statutory provisions,³⁵¹ including, sometimes, state Consumer Protection Acts.³⁵² An additional factor militating strongly in favor of settlement is that, in a majority of states, insurers have a common law duty to settle, which can make an insurer liable for a judgment exceeding the insured's policy limits if a reasonable insurer would have settled the claim within those limits.³⁵³ Refusing to bargain with accident victims in good faith and settle when appropriate can therefore entail substantial risk.³⁵⁴

There is, however, another and less obvious explanation for insurer's consistent cooperation: Insurers *like* settlement mills. A 1950s-era law review article, based on interviews with claim department heads of four insurance companies, hints at this phenomenon:

[I]nsurers . . . admit to some private advantages when a chaser handles a case. He is generally an easier man to deal with than a general practitioner. Insurers and chasers deal with each other frequently in settlement negotiations. There is an awareness of each party that both are aiming at settlement, and that a figure can usually be agreed upon. The general practitioner, aggrandizing the interests of his client at every turn, cannot be so easily disposed of, especially with the more prevalent threat of a lawsuit in the offing.³⁵⁵

350. Ross, *supra* note 4, at 52 ("insurance is public relations conscious"); Comments, *supra* note 234, at 899 n.27 ("Most insurance companies consider it good public relations to settle small claims speedily.").

351. At least forty-eight states have Unfair Claims Settlement Practices Acts. Most states' statutes copy the model statute, which makes the following an unfair claims practice:

(D) Not attempting in good faith to effectuate prompt, fair and equitable settlement of claims submitted in which liability has become reasonably clear;

(E) Compelling insureds or beneficiaries to institute suits to recover amounts due under its policies by offering substantially less than the amounts ultimately recovered in suits brought by them

See JOHN N. ELLISON ET AL., *BAD FAITH AND PUNITIVE DAMAGES: THE POLICYHOLDER'S GUIDE TO BAD FAITH INSURANCE COVERAGE LITIGATION—UNDERSTANDING THE AVAILABLE RECOVERY TOOLS* (2005); Francis J. Mootz, III, *Holding Liability Insurers Accountable for Bad Faith Litigation Tactics With the Tort Abuse of Process*, 9 CONN. INS. L. J. 467, 480-82 (2002).

352. See, e.g., *Stevens v. Motorists Mut. Ins. Co.*, 759 S.W.2d 819 (Ky. 1988) (permitting such an action); *United Techs. Corp. v. Am. Home Assurance Co.*, 118 F. Supp. 2d 174, 176 (D. Conn. 2000) (same). *But see*, e.g., *Wilder v. Aetna Life & Cas. Ins. Co.*, 433 A.2d 309, 310 (Vt. 1981) (disallowing such an action).

353. See, e.g., *State Fire & Cas. Co. v. Haley*, 916 A.2d 952, 956 (Me. 2007); *Johnson v. Tennessee Farmers Mut. Ins. Co.*, 205 S.W. 3d 365, 370-71 (Tenn. 2006); see also Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1116-21 (1990).

354. This is a lesson that Allstate might now be learning. As noted at *supra* note 349, starting in the mid 1990s, Allstate started taking a hard line on the settlement of soft tissue injury claims. This stance has resulted in numerous court proceedings, alleging *inter alia*, violations of state Unfair Claims Practices Acts. See, e.g., Brandon Ortiz, *Fayette Case Puts Allstate Tactics to Test \$1.42 Billion Suit Targets Claims-Handling Procedures*, LEXINGTON HERALD LEADER, Sept. 30, 2007, A1.

355. Comments, *supra* note 234, at 905 & n.51.

Similarly, an insurance adjuster has been quoted as saying: “From an insurance company standpoint, it is advantageous to have [Garnett] as the opponent.”³⁵⁶ An attorney who worked for Dupayne, meanwhile, describes the firm/insurer relationship as follows: “The insurance companies would send cases to the firm.”³⁵⁷

Insurers benefit from the presence of settlement mills partly because serious claims, which present the highest chance of a catastrophic verdict,³⁵⁸ are apt to be resolved at a discount, as explained in Part IV.C.2. It is, after all, profitable for an insurer to overpay on a lot of debatable \$2,000 claims if, every once in a while, it will only have to pay \$50,000 to discharge what could be—in the hands of a conventional attorney—a \$500,000 or \$1 million judgment.³⁵⁹

Insurers also like settlement mills because the interests of settlement mills and insurers overlap along two dimensions: speed and certainty.³⁶⁰ As to speed, settlement mills, insurance adjusters, and, to a lesser extent, insurance companies desire a prompt resolution of the claim. Settlement mills chiefly value speed for the reason explained in Sledge’s office materials: “The longer we have the case, the more work we do = the less return to the office.”³⁶¹ Settlement mills instill this interest in their line-level negotiators through quotas and other incentives (office-wide trips or the lion or shark award, for example), which reward the efficient turnover of claims or (like the Guirard firm’s monkey award), punish their slow resolution. Insurance adjusters’ interest in quick claim resolution is no less immediate. In his classic 1968 study of insurance company claims resolution behavior, H. Laurence Ross found that the “principal pressure” on line-level adjusters is to close files expeditiously.³⁶² Adjusters are more concerned with the speed of claim closure than the sum expended, Ross found, because the rate at which an adjuster closes files can be objectively measured. By contrast, whether the adjuster overpaid can only be subjectively judged by looking at the facts of the claim “presented in the file over which the claims man has control.”³⁶³ To a lesser extent, speed also benefits the insurance company by freeing insurance

356. Florida newspaper article (citation omitted to preserve confidentiality).

357. Telephone Interview with S.S. (May 30, 2007); *see also* Guirard Disciplinary Hr’g Ex. R-9 (Sworn Statement Charles LaFleur, at 19, 21) (agreeing that, in his experience as a claims adjuster, non-litigation claims at the Guirard firm were “[g]enerally settled within a range that’s acceptable pretty easily”).

358. “Catastrophic” verdicts are admittedly rare, and it is rarer still that an insurer would be liable for the whole of a catastrophic verdict, given that most Americans have only limited automobile insurance coverage.

359. This analysis implicitly suggests that compensation on the most serious and meritorious claims is being swapped for compensation on the smallest and least meritorious claims. I have uncovered little evidence of explicit horse trading. *But see* Telephone Interview with D.W. (May 8, 2008) (recalling that negotiators would sometimes agree to take less on one claim in return for more on another claim “[n]o question about it”). Even if the trading is not explicit, however, it may still exert an influence over bargaining.

360. This thesis echoes one of Ross’s conclusions. He found: “As with all negotiation patterns, the interaction between the attorney and the adjuster has a large component of common interest. Both parties desire a quick disposal of the claim, and both wish to avoid the costs of litigation.” Ross, *supra* note 4, at 86.

361. Sledge Supp. Submission, *supra* note 86, at LDS-0042 (staff memo).

362. Ross, *supra* note 4, at 19, 60, 127.

363. *Id.* at 60; *see id.* at 127.

reserves and releasing the insurer from slow-to-develop injuries, the gravity of which is not fully recognized until long after the accident.³⁶⁴

Settlement mills and insurers also value certainty—that the claim will be resolved for a predictable sum and without formal litigation. Settlement mills' entire business model hinges on predictability. If every claim's worth were variable and a sizable portion of claims required litigation or were lost at trial (thus producing no fee), settlement mills could not delegate as many tasks to non-lawyers, profitably accept low-dollar claims, maintain high case volumes, or ensure enough surplus in their budgets to finance seven-figure ad campaigns. Certainty is also prized by adjusters who "hope[] to settle every claim"³⁶⁵ and insurance companies, which know that if a claim is in the hands of a settlement mill, they will be spared exposure to the litigation lottery³⁶⁶ and—oftentimes more importantly—no court costs or attorneys fees will accrue.³⁶⁷

Thus, though settlement mills lack the proverbial stick of trial, they do have appetizing carrots: Pay up, and you will likely pay less on the largest and theoretically costliest claims, close files without delay, settle for predictable sums, and save on attorney's fees and costs. Though some settlement mills cannot credibly threaten to take a claim to court, they do have another threat to levy: If you refuse to tender a reasonable offer, a conventional attorney might take the case.³⁶⁸ In the aggregate, insurers' willingness to do business with settlement mills quietly, repetitively, and in a mutually beneficial way, allows these firms to flourish. When settlement mills succeed, they can increase their advertising budgets, hire more staff, and open branch offices, thus increasing their market share.

CONCLUSION

Lawyer advertising is settlement mills' lifeblood. Thus, it is no exaggeration to say that settlement mills owe their existence to the United States Supreme Court's ruling in *Bates v. State Bar of Arizona*³⁶⁹ just over thirty years ago. In that opinion, the Court wrote: "The only services that lend themselves to advertising

364. See Morris & Paul, *supra* note 320, at 928-29; see also ROSENTHAL, *supra* note 7, at 79 (noting that, especially when claims are small, quick settlements often inure to the insurer's advantage); ROSS, *supra* note 4, at 60 (quoting an insurance supervisor as saying: "The sooner we dispose of the file, the better off we are"). On the other hand, delayed payments allow insurers to earn interest on the sum.

365. JOHNS, *supra* note 256, at 5.

366. As compared to plaintiffs, insurers are relatively indifferent to the uncertainty of litigation. For an explanation of why this is so see ROSS, *supra* note 4, at 214; Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

367. These costs are significant and, as explained previously, often exceed clients' gross recoveries. See *supra* Part III.C.

368. Insurers' motivation, one attorney believed, was "[g]ive a little bit or else another lawyer might take the case." Telephone Interview of S.S. (May 5, 2007).

369. 33 U.S. 350 (1977).

are the routine ones: the uncontested divorce, the simple adoption, the uncontested personal bankruptcy, [and] the change of name”³⁷⁰ With that observation, the Supreme Court reassured itself and the legal community that advertising would not be employed by those engaged in the traditional, individualized, adversarial practice of law.

In a way, the Court was right. What the Court and influential commentators wholly underestimated, however, was the force of advertising’s gravitational pull.³⁷¹ Because advertising is indeed ill-suited to “individualized”³⁷² law practice, some entrepreneurial personal injury lawyers, rather than foregoing advertising’s benefit, have turned what was once a prototypical individualized service into a routine or “standardizable”³⁷³ one, characterized by high volumes and cookie-cutter assembly-line procedures.³⁷⁴ Put simply: Because advertising provides little benefit to conventional personal injury practices, some personal injury practices have become unconventional. Tracing their lineage back to the landmark *Bates* decision, settlement mills stand as a monument to the law of unintended consequences.

It is peculiar that settlement mills—some of which, by virtue of their relentless advertising, are household names—have for so long flown under the academic radar. Yet, many factors—practical, demographic, psychological, and legal—have shielded settlement mills from careful scrutiny, allowing them to flourish and process each year tens of thousands of personal injury claims. Researchers have from time to time noted the existence of a cadre of high-volume, low-value, business-oriented contingent fee lawyers that advertise aggressively and eschew litigation.³⁷⁵ But this Article represents the first careful study of settlement mills—a distinct segment of the legal services industry responsible for the delivery of legal services to a significant, albeit disadvantaged, portion of the population.

Drawing on voluminous documents extracted from federal court and state bar disciplinary files, as well as dozens of interviews with current and past settlement

370. 33 U.S. at 372.

371. Not long after the Court’s ruling, Geoffrey Hazard published an influential and reassuring defense of attorney advertising. Geoffrey C. Hazard, Jr. et al., *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084 (1983). Hazard and his co-authors predicted that lawyer advertising would be used only by attorneys providing “standardizable” services, those “matters such as uncontested divorces, simple wills, and routine collection litigation, each of which is best delivered through a routinized system of production.” *Id.* at 1101. “Individualized” legal services (such as “a trial involving a serious tort or crime”) were ill-suited to advertising, the authors opined, and consequently would be relatively unaffected. *Id.* at 1107, 1113.

372. *Id.* at 1090, 1101-09 (contrasting “standardizable” and “individualized” practices).

373. *Id.*

374. Compare *id.* at 1102 (“[Standardizable law practices] assume a high volume of client matters and focus their labor on systematizing their response to similar legal issues.”), with Telephone Interview with R.J. (Apr. 8, 2008) (“I might as well have been working on an assembly line.”), and Sledge Disciplinary Hr’g Tr., *supra* note 1, at 365 (Test. of Lawrence D. Sledge) (“I put them on the conveyor belt . . .”).

375. See *supra* notes 227-231 and accompanying text.

mill employees, we have seen that settlement mills have proliferated across the United States. Although rigorous empirical studies are needed to gauge the precise impact settlement mills are having on the American judicial system, RAND's assessment of why, from 1975 to 1985, there was a significant decline in automobile-related case filings³⁷⁶ bears repeating. "[I]t appears," RAND found, "they are being settled elsewhere, in forums that produce stable, predictable outcomes."³⁷⁷ The evidence adduced here suggests that the "forums" are America's settlement mills.

Settlement mills differ from conventional personal injury law firms in many obvious respects: They have higher claim volumes, advertise more aggressively, tout a different fee structure, settle claims more quickly and with less effort, file fewer lawsuits, and delegate more duties to para-professionals. We have seen, in fact, that they even settle claims in a different way, implicitly challenging conventional accounts of claims resolution behavior. Rather than negotiating in the shadow of trial, as prevailing accounts of bargaining behavior presume, settlement mills bargain in the shadow of *past settlements*. A current South Carolina settlement mill attorney perhaps said it best. When I asked him: "How are cases valued for settlement?" He answered: "What I've settled 'em for before."³⁷⁸ Shorn of a realistic likelihood of litigation, settlement mill claims are simply and systematically settled for formulaic going rates worked out over time by repeat players (the settlement mill negotiator and insurance claims adjuster), relatively independent of the merit-based assessments and individualized considerations that would loom large if the case were headed to trial. Much like workers' compensation tables, these going rates are predictable, generally applicable, and tied less to fault than to the gravity of the injury the claimant has sustained.

In the world of settlement mill dispute resolution, the much-maligned adversarial all-or-nothing fault system yields to an almost cooperative scheme of near-universal (though sometimes partial) compensation. In this system, going rates are clustered within established parameters. Some claims are consequently settled for more than they are objectively worth and some for less. For many clients, and particularly those with minor injuries or a dubious legal entitlement to relief, this new system seems to function well. Settlement mills eliminate potentially time-consuming and frustrating legal entanglements, while providing in return prompt, relatively certain, and comparatively generous payouts. Unfortunately, as we have seen, those who have meritorious claims and have been seriously injured are least apt to benefit from this unique brand of legal service, raising profound ethical and public policy issues deserving detailed scrutiny by academics, bar organizations, and the judiciary.

376. HENSLER ET AL., *supra* note 226, at 8-9.

377. *Id.* at 32.

378. Telephone Interview with J.B. (Nov. 12, 2007).