

THE ECONOMICS OF PLAINTIFF-SIDE PERSONAL INJURY PRACTICE

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Little is known about the economics of plaintiff-side law firms, which typically work on a contingency fee basis. We begin here to fill that gap. We report on the fees received by 124 plaintiff-side personal injury firms located in four states (Illinois, Texas, and two additional undisclosed states). At all of the firms, cases with modest fees may help to keep the lights on, but occasional “blockbuster” cases account for an overwhelming percentage of earned fees. A one-third contingency fee is the most common arrangement but is not always collected ex post; when recoveries are low, firms often reduce or waive their fee. We also estimate the impact of various statutory contingency fee caps on these firms; the effect varies, depending on cap design and case-mix. But, many contingency fee caps dramatically affect the economics of plaintiff-side personal injury practice.

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I. INTRODUCTION

Contingency fee litigation is a matter of intense public concern, but there is little empirical data on the economics of plaintiff-side personal injury (“PI”) practice. The limited data has not kept sixteen states from concluding that plaintiffs’ lawyers are paid too much, and adopting statutory caps on contingency fees in PI cases, worker’s compensation cases, or both.¹ Federal caps on contingency fees apply to Social Security, disability, and veteran benefits claims, and to claims brought under the Federal Tort Claims Act (“FTCA”).² Similarly, the U.S. House of Representatives has passed a bill three times (in 2003, 2004, and 2005)

1. For a list of states with caps on PI fee percentages, see Table 1, *infra*.

2. 28 U.S.C. § 2678 (2012) (FTCA); 38 U.S.C. § 5904 (2012) (veteran benefits); 42 U.S.C. § 406 (2012) (Social Security disability).

capping contingency fees in medical malpractice (“med mal”) cases.³ There was also a campaign in thirteen states in 2003 to have state bars impose fee caps.⁴ Judges have taken note of these dynamics: in several recent proceedings, federal judges have capped the plaintiffs’ lawyers’ fees after noting a “trend in the states . . . to limit contingent fees . . . to 33-1/3% or less of net recovery.”⁵

We begin to fill this gap in knowledge. We study the economics of plaintiff-side PI litigation, primarily (if not exclusively) in state courts. We study 124 plaintiff-side PI firms located in four states (Illinois, Texas, and two undisclosed states). We report four main results. First, we find consistent evidence that cases with modest fees help to keep the lights on, but occasional “blockbuster” cases account for an overwhelming percentage of earned fees.

Second, for three large firms, we have sufficient data to compute the contingency fee actually received. Contingency fees vary from zero percent to thirty-four percent, but a clear majority of cases have a contingency fee of one-third of the recovery. Even when a one-third contingency fee is explicitly contracted for ex ante, it is not always collected ex post. Instead, when recoveries are low, firms often reduce their fees.

Third, we find evidence of intensive multi-level screening of cases by the only firm in our dataset for which we have sufficient data to assess the issue. Screening begins at the time of an initial call by a potential plaintiff, and continues over time.

Fourth, we study how caps on contingency fees would affect each firm’s economics. The estimated effect of statutory caps depends on the mix of cases handled by each firm and the details of cap design. However, our estimates indicate that many fee caps will dramatically affect the economics of plaintiff-side PI practice.

3. Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2005, H.R. 5, 109th Cong. § 5 (2005); Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2004, H.R. 4280, 108th Cong. § 5 (2004); Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong. § 5 (2003).

4. Adam Liptak, *In 13 States, A United Push to Limit Fees of Lawyers*, N.Y. TIMES, May 26, 2003, <http://www.nytimes.com/2003/05/26/us/in-13-states-a-united-push-to-limit-fees-of-lawyers.html?pagewanted=1> (“The new proposal would limit contingency fees in many cases to 10 percent of the first \$100,000 of a settlement, and 5 percent of anything more. Common Good, an advocacy group pushing for the change, has enlisted the help of some lawyers in filing petitions for the change with state supreme courts, bar associations or ethics commissions in Alabama, Arizona, California, Colorado, Maryland, Mississippi, New Jersey, New York, Ohio, Oklahoma, Texas, Utah and Virginia.”).

5. *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 495 (E.D.N.Y. 2006); *see also* Order and Reasons, *In re Vioxx Products Liab. Litig.*, 574 F. Supp. 2d 606, 607 (E.D. La. 2008); Order Setting Caps on Individual Attorneys’ Fees, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on April 20, 2010, MDL No. 2179, 2012 WL 2236737, at *1 (E.D. La. June 15, 2012); Memorandum Opinion and Amended Order Regarding Determination of the Common Benefit Fee Amount and Reasonable Assessment of Attorney Fees, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at *17 (D. Minn. 2008). For an analysis of judicial practices regarding fees in multi-district litigation, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

Part II reviews past research on plaintiff-side fees, describes our data, and details the ways in which state and federal statutes have restricted the range of allowable contingency fees. Part III analyzes the economics of plaintiff-side PI practice. Part IV estimates the impact of fee caps on the economics of plaintiff-side PI practice, and on the amounts recovered by plaintiffs. Part V discusses our findings. Part VI concludes.

II. LITERATURE REVIEW, OUR DATA, AND STATUTORY RESTRICTIONS ON CONTINGENCY FEES

A. *Literature Review*

The conventional wisdom is that plaintiff's lawyers are paid one-third of what they recover, plus expenses—except when they are paid more.⁶ The reality is more complex. There is a modest literature on the contingency fees charged by plaintiff's lawyers. We focus on studies published in the 1980s or later.⁷ The Rand Institute for Civil Justice published several studies in the 1980s, finding that plaintiffs' attorneys' fees ranged from twenty percent in airline crash cases to thirty-three percent in automobile cases to forty percent in asbestos cases.⁸ The Federal Trade Commission conducted a survey of plaintiff-side legal fees in ten cities in 1981–1982 and found that contingency fees for personal injury cases settled before trial ranged from thirty-one percent to thirty-seven percent, with a mean of thirty-three percent.⁹ Using data obtained from insurers, the Government Accountability Office (“GAO”) studied medical cases closed in 1984, and found that roughly half (fifty-two percent) had contingency fees ranging from thirty-one to forty percent of indemnity payments.¹⁰ One of the Rand studies referenced above found that

6. See, e.g., Letter to the ABA Standing Comm. on Ethics and Professional Responsibility (Feb. 10, 1994), in Lester Brickman *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 *FORDHAM L. REV.* 247, 268 (1996) (“Standard contingency fees are typically at least one-third, forty and even fifty percent in cases settled before trial and often more than fifty percent [of the net recovery] in cases which go to trial.”); Winand Emons, *Conditional Versus Contingent Fees*, 59 *OXFORD ECON. PAPERS* 89, 89 (2007) (“A common practice is to use a sliding scale: the attorney gets one-third if the case is settled without trial, 40% if the plaintiff wins at trial, and 50% if a judgment for the plaintiff is affirmed on appeal.”).

7. For older studies, see DEP'T. OF TRANSP., *AUTOMOBILE ACCIDENT LITIGATION: A REPORT OF THE FEDERAL JUDICIAL CENTER TO THE DEPARTMENT OF TRANSPORTATION* (1970); Marc A. Franklin et al., *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation*, 61 *COLUM. L. REV.* 1 (1961); Int'l Assoc. of Ins. Counsel, *A Study of Contingent Fees in the Prosecution of Personal Injury Claims*, 33 *INSURANCE COUNSEL J.* 197 (1966).

8. JAMES S. KAKALIK & NICHOLAS M. PACE, *COSTS AND COMPENSATION PAID IN TORT LITIGATION* 38 (1986); DEBORAH R. HENSLER ET AL., *RAND INST. FOR CIV. JUST., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 131–38 (1991), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3999.pdf>.

9. FED. TRADE COMM'N STAFF, *IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING* 100 (1984); see also *id.* at 113 (noting “range of percent contingent fees of 10 to 50 percent” for case settled before trial).

10. U.S. GOV'T ACCOUNTABILITY OFFICE, *GAO/HRD-87-55, CHARACTERISTICS OF CLAIMS CLOSED IN 1984*, 49 *tbl.3.10* (1987). Only four percent of claims had contingency fees greater than forty percent; fully thirty-two percent had no fee whatsoever. *Id.* It is not obvious how (or why) the defense-

eighty-seven percent of personal injury claimants with attorneys had entered into a contingency fee agreement, with a median fee of one-third.¹¹ In 2004, the Insurance Research Council published the results of a survey of auto accident victims that found that the mean (median) contingency fee among those who retained an attorney was thirty-one (thirty-three) percent.¹²

Professor Herbert Kritzer has conducted several studies of personal injury lawyers.¹³ Kritzer found that about two-thirds of the lawyers he surveyed used a fixed contingency rate, of which almost ninety percent had a contingency fee of thirty-three percent.¹⁴ The contingency rate for the remaining one-third ranged from twenty-five percent if the case settled before trial, to thirty-three percent if trial was required, to forty to fifty percent if there was an appeal.¹⁵ Garber et al. surveyed plaintiffs' lawyers on their willingness to accept cases, based on three vignettes.¹⁶ As part of their analysis, they asked respondents what contingency fee rate they used most often.¹⁷ Thirty-three percent used variable rates depending on the level of effort and stage of case resolution; fifty percent charged a flat forty percent; fourteen percent charged a flat one-third; and the remaining three percent charged a flat rate other than forty percent or one-third.¹⁸

Professor Lester Brickman has argued that the prevalence and stability of a one-third contingency fee is the result of collusion and/or coordinated efforts of plaintiffs' lawyers.¹⁹ Although Brickman's argument

side insurer would have access to the actual contingency fee charged by the plaintiff's lawyer, and the GAO report casts no light on this issue.

11. HENSLER ET AL., *supra* note 8, at 136. The contingent fee was at a fixed level for sixty-seven percent of claimants, and would vary depending on the amount of work required (e.g., on whether a trial was necessary), for twenty percent of claimants. *Id.* at 135–36. The mean fixed rate was twenty-nine percent. *Id.* at 136.

12. INS. RESEARCH COUNCIL, *PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS* (2004), available at <http://www.insurance-research.org/research-publications/paying-auto-injuries-consumer-panel-survey-auto-accident-victims-2004-edition>.

13. See, e.g., HERBERT M. KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* (2004) [hereinafter KRITZER, *RISKS*]; Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943 (2002) [hereinafter Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation*]; Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739 (2002); Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998) [hereinafter Kritzer, *Wages of Risk*].

14. KRITZER, *RISKS*, *supra* note 13, at 39.

15. *Id.* at 40.

16. Steven Garber et al., *Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?* 6 J. EMPIRICAL LEGAL STUD. 637, 643 (2009).

17. *Id.* at 648.

18. *Id.* at 652 n.29.

19. See, e.g., LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 57–66 (2011); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653 (2003); Lester Brickman, *The Market for Contingent Fee Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003); Lester Brickman, *Making Lawyers Compete*, REG., Summer 2004, at 30.

has been widely criticized, his claim of collusive behavior has figured prominently in debates over tort reform.²⁰

Several scholars have studied the extent to which plaintiffs' lawyers screen cases and the impact of tort reform on their willingness to accept a case. Kritzer found that plaintiffs' lawyers routinely turn away more than half of those seeking representation, but some lawyers are far more selective, but some lawyers are fare more selective.²¹ Huycke and Huycke surveyed individuals who contacted plaintiffs' attorneys seeking representation in med mal cases, and found that only 3.3 percent resulted in the filing of a lawsuit.²²

Daniels and Martin used surveys and in-depth interviews of plaintiffs' lawyers to examine the impact of Texas' 2003 cap on non-economic damages.²³ They found that many lawyers either no longer accepted med mal cases or had become far more selective in accepting such cases.²⁴ Garber et al. surveyed plaintiffs' lawyers in forty-two states and the District of Columbia—sixteen of which had caps on attorney's fees and/or on non-economic damages.²⁵ They found that plaintiffs' lawyers are less willing to accept cases when these caps affect the financial attractiveness of the case (which depends on both case-specific and attorney-specific characteristics).²⁶ Shepherd conducted an online survey of lawyers who do med mal litigation, and found that a majority of respondents turn away ninety-five to ninety-nine percent of those seeking their assistance, often based on a minimum damages threshold.²⁷ Over eighty percent of respondents indicated that tort reform had reduced their willingness to undertake representation, with non-economic damage caps named by the most respondents.²⁸

Unfortunately, this research does not provide much insight into the overall economics of plaintiff-side personal injury practice. To the extent

20. See, e.g., ALEXANDER TABARROK & ERIC HELLAND, TWO CHEERS FOR CONTINGENT FEES (2005); Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U. L.Q. 477 (2004); Alex Tabarrok, *The Problem of Contingent Fees for Waiters*, 8 GREEN BAG 377 (2005), available at <http://mason.gmu.edu/~atabarro/ContingentFeesforWaiters.pdf>.

21. See Kritzer, *Wages of Risk*, *supra* note 13, at 304; see also Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, WIS. LAWYER, Mar. 1997 [hereinafter Kritzer, *Holding Back the Floodtide*], available at <http://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=70&Issue=3&ArticleID=19852>.

22. LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS INTERNAL MED. 792, 796 (1994).

23. Stephanie Daniels & Joanne Martin, "It is No Longer Viable from a Practical and Business Standpoint": *Damage Caps, "Hidden Victims," and the Declining Interest in Medical Malpractice Cases*, 17 INT'L J. LEGAL PROF. 59 (2010).

24. *Id.* at 60. On the general strategies lawyers use to get clients, see 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).

25. Garber et al., *supra* note 16, at 639.

26. *Id.* at 637.

27. Joanna Shepherd, *Uncovering the Silent Victims of the American Medical Liability System*, 67 VAND. L. REV. 151, 154 (2014).

28. *Id.* at 188.

there is any information on the subject, it is of the following sort, again from Kritzer:

For most lawyers handling contingency fee work, the real profits come from a very small segment of cases One lawyer who turned over as many as 200 cases a year told me that two-thirds of his gross fees (and hence his profits) came from perhaps a dozen cases each year; the other cases essentially covered his overhead. This lawyer took large numbers of cases primarily to keep his name out in the community.²⁹

In this Article, we confirm this qualitative picture and provide some actual numbers.

B. *Our Data*

There is no publicly available data on plaintiff-side fees in personal injury litigation. There is some data on fees in particular class actions, but only for individual cases—not for the firms that bring these cases. We constructed our own dataset by contacting individual firms and requesting that they share information on a confidential basis. We were able to obtain detailed case-level information on recoveries, fees, and expenses from three plaintiff-side firms—one in Illinois, one in Texas, and one in an undisclosed state (“Third Firm”). As we detail below, the Third Firm advertises extensively, handles some cases internally, but refers most of its cases to 115 other firms (“Referral Firms”).³⁰ We have data on the fees charged by the Referral Firms in the referred cases. We were able to obtain less comprehensive data on all cases handled by two additional firms (“Fourth Firm” and “Fifth Firm”). We also have publicly available information from Texas on four additional firms (“Yellow Pages Firms”).

In total, we have significant information for over 42,000 paid claims handled by 124 firms, with total fees of \$1.1 billion (all amounts in this paper are in 2010 dollars unless otherwise specified), over periods of up to twenty-three years (depending on the firm).³¹ By “paid” we mean cases in which the firm obtained a recovery for its client.³² We have the universe of claims handled by the Illinois, Texas, Third Firm-Internal, Fourth, and Fifth firms, and part of the portfolio of claims for the other 119 firms. Because we promised confidentiality to each firm, we provide only limited information about the firms.

29. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation*, *supra* note 13, at 1977; see also Kritzer, *Wages of Risk*, *supra* note 13, at 293 (noting one lawyer with a very high volume practice “stated that sixty to seventy percent of his gross fees came from perhaps a dozen of the cases he closed each year. In most of his cases, he was lucky if he met the costs of running his practice”).

30. The Third Firm’s records indicate the lawyer to which each case was referred. It referred cases to only one lawyer at each firm. A few were identified only as “other lawyer.” We treat “other lawyer” as a single firm. Excluding these cases has no effect on our findings.

31. For five firms, with fees totaling \$305 million, we do not know the year of closing. We treat these cases as closed in 2010.

32. As noted below, for the Referral Firms we only observe whether there was a fee charged. Thus, for the Referral Firms we lack data on any cases where the firm may have obtained a small recovery but waived its fee.

We note at the outset an important limitation of our analysis. At the firm-level, our sample size is modest. We only have data from firms that were willing to share data with us, plus the Referral Firms. These firms may not be representative of the larger universe of plaintiff-side PI firms. That said, our findings on the range of contingency fees are consistent with previous work. Our findings on the economics of plaintiff-side PI practice are consistent with prior anecdotal evidence. Our findings on plaintiff firm economics are also consistent with a separate study, using data on every Illinois med mal case closed during an eleven-year period (2000–2010).³³ Thus, there is good reason to believe that our findings are likely to be reasonably representative of plaintiff-side personal injury practice at reasonably successful firms.

C. *Specific Firms in Our Study*

1. *Illinois Firm*

This firm is located in Chicago, but it has a state-wide practice. It has been in existence for less than three decades. It had fewer than fifteen attorneys over the period we studied, with a handful there continuously. The firm has a substantial med mal portfolio (over fifty percent of its cases), but it also handles a significant number of other personal injury claims. The firm receives most of its cases through referrals from other attorneys. It does not advertise beyond a small listing in the yellow pages and a web presence. The firm does not track the hours that its lawyers spend on individual cases. We coded information on every case that closed with a positive payout, including total recovery, legal fees, expenses, and plaintiff's net recovery. We do not have information on case type.

2. *Texas Firm*

This firm is located in a major city in Texas, but has a national practice. It has been in existence for more than three decades. Fewer than twenty attorneys worked there over the period we studied, with only a few there continuously. The firm's practice is concentrated in three areas: personal injury, including med mal; aviation accidents; and business litigation. The firm often receives referrals from other attorneys, but a significant percentage of its cases come from referrals from previous clients. The firm does not advertise beyond a small listing in the yellow pages and a web presence. The firm does not track the hours that its lawyers spend on individual cases. We coded information on every case that closed with a positive payout, including total recovery, legal fees, ex-

33. David A. Hyman, Mohammad Rahmati, Bernard Black, & Charles Silver, *Plaintiff-Side Representation in Medical Malpractice, Part 1: Market Structure and the Wages of Risk* (unpublished article) (on file with authors) [hereinafter Hyman et al., *Market Structure and the Wages of Risk*].

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penses, and plaintiff's net recovery. We do not have information on plaintiff demographics or case type.

3. *Third Firm*

The Third Firm is located in an undisclosed state and has been in existence for more than five decades. The firm handles general personal injury litigation. The firm advertises heavily on TV and radio, and it has a sophisticated computerized system for tracking inquiries and cases it accepts. The Third Firm conducts initial screening of incoming phone calls, and it rejects many cases in the initial call. It refers out a majority of the cases that it does not initially reject, but also handles a substantial number of cases internally. The firm does not track the hours that its lawyers spend on individual cases. The overwhelming majority of cases that the Third Firm accepts are in its home state. The Third Firm has computerized records. For cases it handles internally, we have information on total recovery, case type, fees, expenses, plaintiff's net recovery, and case type; for referred cases we know only the total fee and case type.

The Third Firm has standing agreements with the firms to which it refers cases on how any fee should be divided. However, the Third Firm does not know the specific contingency fee agreement between plaintiffs and these other firms. Instead, the Third Firm only observes the fee received from the Referral Firms. We estimate total recovery in these cases by assuming a contingency fee of one-third of total recovery, unless the case involves social security disability or workers' compensation, in which case the fee is capped by statute at twenty-five percent.³⁴ We "roll up" 258,715 referred cases into 115 separate Referral Firms.³⁵

4. *Fourth Firm*

The Fourth Firm is in an undisclosed state. It employs more than twenty attorneys and does some plaintiff-side PI litigation, but it primarily handles other plaintiff-side claims. The Fourth Firm advertises heavily. We studied only the forty-five cases that involved personal injury claims, for which we know the amount recovered and the fee received, but not expenses.

34. So, if the Third Firm receives a fee of \$5000 from a firm with which it has a standing agreement that requires fees to be shared on a 50:50 basis, the total fee is \$10,000, and we impute a case settlement value of \$30,000, unless the case involves social security disability or workers' compensation, in which case we impute a case settlement value of \$40,000.

35. The Third Firm also referred 999 cases to seventy-seven additional lawyers/law firms, but none of these were paid.

5. *Fifth Firm*

The Fifth Firm is located in an undisclosed state and concentrates on class actions. Because the firm is small and relatively new, they had only sixteen cases that generated a fee—of which half involved damages, while the other half were resolved with an injunction. For each case, we know the amount recovered and the fee received, but not expenses.

6. *Yellow Pages Firms*

We also collected publicly available information on larger recoveries for four Texas firms. Beginning in 2005, the Texas State Bar has required attorneys that advertise gross verdicts or settlements to also disclose the net recovery to the plaintiff, and the amounts of legal fees, and expenses. We searched online yellow pages for eleven cities and regions in Texas and found four law firms that disclosed sufficient information to be included in our analysis: Krebs; Miller Weisbrod; Onstad; and Miller, Lewis & Davenport. We refer to these firms as “Yellow Pages Firms.”³⁶ These firms advertise only their larger recoveries. Almost all involve gross recoveries greater than \$1 million. Below, we exclude these firms in analyses that would be affected by their partial disclosure.

D. *Statutory Restrictions on Contingency Fees*

At present, sixteen states have contingency fee caps on med mal litigation or on PI litigation more generally.³⁷ Some states (e.g., Florida) allow clients to waive these fee caps. Federal law also caps contingency fees for claims pursuant to the Federal Tort Claims Act (“FTCA”), social security disability, and veterans’ benefits. Table 1 provides detail on these caps.

Brickman, Horowitz, and O’Connell proposed still lower caps in 1994. They proposed that if defendants offered to settle—and the plaintiff did not do materially better than that at trial—attorneys’ fees should be capped at ten percent of the first \$100,000, and five percent of all ad-

36. The ads for these firms do not specify the year in which the case was closed, so figures are in nominal dollars. We searched the Yellow Pages for Amarillo; Austin; Corpus Christi Bay Area; Greater Dallas; El Paso; Greater Fort Worth; Greater Houston; Lubbock; Rio Grande Valley; Greater San Antonio; and South Central Texas. Two firms (Krebs and Onstad) still operate under the same name, while the other two have reorganized since we began this research. Data is available from RYAN KREBS, M.D., J.D., <http://www.krebslaw.com/verdicts-settlements/> (last visited February 3, 2014); MILLER WEISBROD LLP, <http://www.millerweisbrod.com/proven-results> (last visited Mar. 8, 2015); THE ONSTAD LAW FIRM, <http://onstadlaw.com> (last visited Mar. 8, 2015); LEWIS & HILDEBRAND P.C., (reorganized, and no longer available online); and DAVENPORT LAW FIRM P.C., <http://davenport-law.com/index.php?results> (last visited Mar. 8, 2015). Lewis & Hildebrand and Davenport previously operated as Miller, Lewis & Davenport (“MLD”). We combined their cases into a single firm (below, “MLD”).

37. New Hampshire had a cap on contingency fees in med mal cases that was held unconstitutional in *Carson v. Maurer*, 424 A.2d 825, 839 (N.H. 1980).

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ditional amounts.³⁸ No state has adopted this or a similar proposal. Instead, the adopted caps involve either a fixed or declining percentage, depending on the amount recovered. The states also use percentages that are substantially higher than those proposed by Brickman, Horowitz, and O'Connell.

38. LESTER BRICKMAN, MICHAEL HOROWITZ & JEFFREY O'CONNELL, *RETHINKING CONTINGENCY FEES* 27 (1994).

TABLE 1: STATUTORY CAPS ON CONTINGENCY FEES

Table 1 summarizes state and federal caps on contingency fees. Amounts in nominal dollars. Applies To? = Case Type to which the cap applies. FTCA = Federal Tort Claims Act. SSDI = Social Security Disability Insurance.

State	Applies To?	Cap Type	Maximum Authorized Fee
California	Med Mal	Sliding	40% of first \$50k, 1/3 rd of next \$50k, 25% of next \$500k, and 15% of amounts > \$600k
Connecticut	PI	Sliding	1/3 rd of first \$300k; 25% of next \$300k; 20% of next \$300k; 15% of next \$300k; and 10% of amounts > \$1.2M
Delaware	Med Mal	Sliding	35% of first \$100k, 25% of next \$100k, and 10% of amounts > \$200k
Florida	PI	Sliding	1/3 rd of first \$1M, 30% of second million and 20 percent thereafter (varies depending on resolution stage)
	Med Mal	Sliding	30% of first \$250k; 10% of amounts > \$250k
Illinois	Med Mal (post-2013)	Flat	1/3 rd
	Med Mal (pre-2013)	Sliding	1/3 rd of first \$150k; 25% of next \$850k; 20% of amounts > \$1M
Indiana	Med Mal	Sliding	No limit on first \$250k; 15% for amounts > \$250k.
Maine	Med Mal	Sliding	1/3 rd of first \$100k; 25% of next \$100k; and 20% of amounts > \$200k
Massachusetts	Med Mal	Sliding	40% of first \$150k; 1/3 rd of next \$150k; 30% of next \$200k and 25% of amounts > \$500k
Michigan	PI	Flat	1/3 rd
Nevada	Med Mal	Sliding	40% of first \$50k; 1/3 rd of next \$50k; 25% of next \$500k; 15% of amounts > \$600k
New Jersey	PI	Sliding	1/3 rd of first \$500k; 30% of next \$500k; 25% of third \$500k; and 20% of fourth \$500k, and court approved fee for amounts above \$2M.
New York	Med Mal	Sliding	30% of first \$250k; 25% of second \$250k; 20% of next \$500k; 15% of next \$250k; 10% over \$1.25M
Oklahoma	PI	Flat	50% of net amount
Tennessee	Med Mal	Flat	1/3 rd of amount recovered
Utah	Med Mal	Flat	1/3 rd of amount recovered
Wisconsin	Med Mal	Sliding	1/3 rd of first \$1M; 20% of amounts > \$1M
Federal			
FTCA	--	Sliding	20% of administrative settlements; 25% of amount after suit is filed
SSDI	--	Flat	25% of amount
Veterans' Benefits	--	Sliding	\$0 pre-notice of disagreement; 20% of past due benefits thereafter, up to \$6k in fees.

III. RESULTS

A. Overview

Table 2 provides summary information on the distribution of cases and fees among the 124 firms that make up our dataset. Table 3 provides additional details for the 25 firms with at least 250 paid cases in our sam-

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ple; an Appendix provides similar information for the remaining firms. As Table 2 indicates, the firms in our dataset generated \$1.1 billion in fees—but a small number of firms account for a disproportionate share of cases and fees. For example, the ten firms with more than 1,000 paid cases account for seventy percent of cases and forty-eight percent of fees.

TABLE 2: BASIC FIRM-LEVEL STATISTICS

Summary statistics for number of paid cases and fees earned for 43 022 paid cases handled by 124 firms, including Illinois Firm, Texas Firm, Third Firm-Internal, Fourth and Fifth Firms, Referral Firms, and Yellow Pages Firms.

Paid Cases Per Firm	No. of		Fees (2010 \$ millions)	Share of		
	Firms	Paid Cases		Firms	Cases	Fees
< 10	54	134	\$22	43.5%	0.3%	2.0%
11-50	15	380	\$84	12.1%	0.9%	7.6%
51-100	13	916	\$15	10.5%	2.2%	1.3%
101-150	10	1,254	\$77	8.1%	3.0%	7.0%
151-250	7	1,340	\$228	5.6%	3.2%	20.7%
251-500	7	2,387	\$52	5.6%	5.7%	4.7%
501-1,000	8	6,176	\$98	6.5%	14.6%	8.9%
1,001-2,000	5	7,172	\$149	4.0%	17.0%	13.6%
>2,000	5	23,263	\$378	4.0%	55.1%	34.4%
All	124	43,022	\$1,102	100.0%	100%	100%

Table 3 presents summary statistics on paid cases for the twenty-five firms in our dataset with more than 250 paid cases.

TABLE 3: SUMMARY STATISTICS FOR MAJOR FIRMS

Summary information on paid cases and fees for firms with > 250 paid cases. Mean and median are per firm, not per case.

No.	Firm	Years w/ data	No. of paid cases	Fees (\$'000)	
				Mean	Median
1	Third Firm-Internal	23	10,715	\$23	\$11
2	Referral Firm-A	17	5,156	\$13	\$7
3	Texas Firm	23	2,751	\$19	\$3
4	Referral Firm-B	12	2,662	\$3	\$3
5	Referral Firm-C	22	2,125	\$3	\$2
6	Referral Firm-D	14	1,745	\$13	\$7
7	Referral Firm-E	22	1,548	\$37	\$12
8	Referral Firm-F	20	1,528	\$13	\$6
9	Referral Firm-G	20	1,218	\$36	\$9
10	Referral Firm-H	21	1,133	\$6	\$3
11	Referral Firm-I	19	967	\$3	\$1
12	Referral Firm-J	15	938	\$5	\$4
13	Referral Firm-K	21	922	\$7	\$4
14	Referral Firm-L	20	820	\$6	\$3
15	Illinois Firm	12	737	\$81	\$14
16	Referral Firm-M	21	733	\$8	\$5
17	Referral Firm-N	20	603	\$5	\$2
18	Referral Firm-O	19	503	\$20	\$10
19	Referral Firm-P	11	446	\$6	\$3
20	Referral Firm-Q	9	386	\$11	\$5
21	Referral Firm-R	20	353	\$90	\$51
22	Referral Firm-S	7	353	\$4	\$3
23	Referral Firm-T	7	303	\$20	\$14
24	Referral Firm-U	12	286	\$17	\$9
25	Referral Firm-V	20	260	\$4	\$2
Referral Firms listed above		N/A	24,988	\$15	\$5
All Referral Firms combined		N/A	28,675	\$32	\$23
Third Firm-Internal + all Referral Firms		N/A	38,551	\$28	\$18

As Table 3 reflects, we find considerable variation in mean and median fees. None of the twenty-five firms has a mean fee of greater than \$100,000. The mean fee among all twenty-five firms in Table 3 is \$15,000, and the median fee is \$5,000.

What is the distribution of fees across cases within these firms? Stated differently, what role do larger recoveries play in overall firm economics? Table 4 provides a first cut at the issue. It provides fee concentration ratios, in the form of the share of total fees accounted for by the top ten percent and top one percent of cases (sorted by fees) for each of the firms in Table 3. Table 4 also lists the Gini coefficients (for paid cases and for all cases) for fees earned by these firms. A Gini coefficient is a common measure of income inequality—meaning it effectively cap-

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tures the degree of fee (and recovery) dispersion at each firm, and across our entire dataset.³⁹ The Appendix provides similar detail on the remaining firms in our dataset.

TABLE 4: FEE CONCENTRATION

Fraction of total fees earned in 10% and 1% of cases with largest fees, and Gini coefficients for fees in all cases and paid cases, for firms with > 250 paid cases. For the Texas Firm and Illinois Firm, we have partial information on unpaid cases, so we only report the Gini coefficient for paid cases.

No.	Firm	Fees Earned in		Gini Coefficient	
		Top 10% of Cases	Top 1% of Cases	Paid Cases	All Cases
1	Third Firm-Internal	46%	15%	0.60	0.83
2	Referral Firm-A	49%	19%	0.63	0.93
3	Texas Firm	82%	54%	0.85	n.a.
4	Referral Firm-B	19%	4%	0.32	0.91
5	Referral Firm-C	45%	16%	0.55	0.92
6	Referral Firm-D	46%	14%	0.63	0.95
7	Referral Firm-E	55%	15%	0.68	0.94
8	Referral Firm-F	53%	28%	0.64	0.95
9	Referral Firm-G	69%	31%	0.76	0.97
10	Referral Firm-H	41%	13%	0.55	0.95
11	Referral Firm-I	46%	13%	0.63	0.93
12	Referral Firm-J	30%	6%	0.48	0.94
13	Referral Firm-K	41%	12%	0.52	0.83
14	Referral Firm-L	49%	23%	0.61	0.91
15	Illinois Firm	66%	22%	0.78	n.a.
16	Referral Firm-M	44%	17%	0.56	0.88
17	Referral Firm-N	45%	14%	0.62	0.96
18	Referral Firm-O	49%	19%	0.62	0.85
19	Referral Firm-P	46%	11%	0.58	0.93
20	Referral Firm-Q	45%	11%	0.62	0.91
21	Referral Firm-R	36%	7%	0.54	0.97
22	Referral Firm-S	49%	14%	0.60	0.99
23	Referral Firm-T	35%	12%	0.49	0.95
24	Referral Firm-U	43%	17%	0.58	0.89
25	Referral Firm-V	37%	7%	0.56	0.94
Referral Firms listed above		44%	15%	0.58	0.93
All Referral Firms combined		53%	35%	0.43	0.83
Third Firm-Internal + all Referral Firms		49%	25%	0.52	0.83

The first two columns in Table 4 provide one way of seeing the extent to which fees are skewed, with a small number of cases leading to

39. Jill Lepore, *Richer and Poorer: Accounting for Inequality*, NEW YORKER, Mar. 16, 2015, <http://www.newyorker.com/magazine/2015/03/16/richer-and-poorer>.

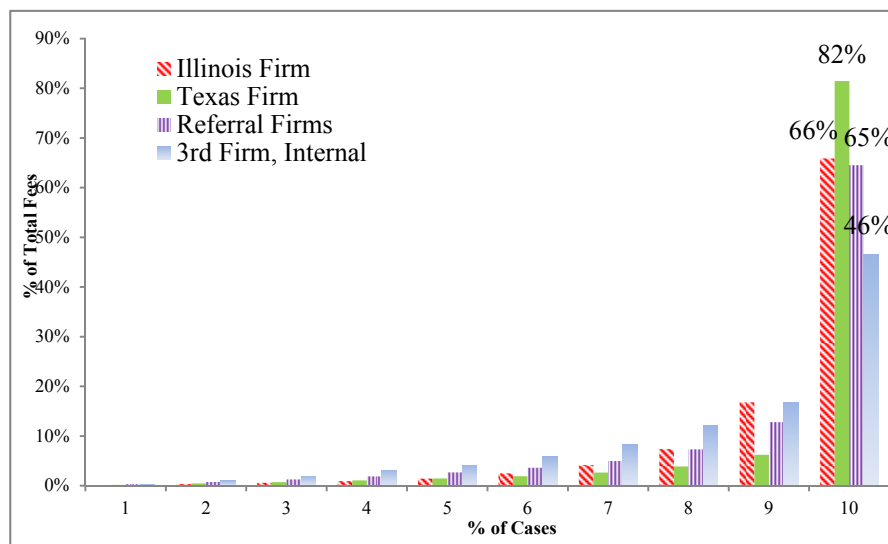
most of the fees. The top ten percent of paid cases account for nineteen percent to eighty-one percent of the fees received by these twenty-five firms, and for over forty percent of recoveries at all but two firms. The top one percent of paid cases account for four percent to fifty-four percent of fees received by these firms.

The Gini coefficients confirm that fees at all of these firms are heavily skewed. By way of comparison, the Gini coefficient for the United States in 2007 was 0.45; the country with the highest Gini coefficient was Honduras, at 0.58.⁴⁰

We present graphical information on fee concentration in Figure 1 for the Texas Firm, Illinois Firm, Third Firm-Internal, and all Referral Firms combined.⁴¹ At all four firms (treating the combined Referral Firms as a single firm), a small percentage of cases are responsible for a heavily disproportionate share of fees. The top ten percent of paid cases are responsible for sixty-six percent of total earned fees for the Illinois Firm, eighty-two percent for the Texas Firm, sixty-five percent for the Referral Firms, and forty-six percent for the Third Firm-Internal.

FIGURE 1: FEE DISTRIBUTION IN PAID CASES BY PERCENT OF CASES

Distribution of fees in paid cases for Illinois Firm, Texas Firm, Third Firm-Internal, and all Referral Firms combined. Cases are sorted by fee received.



40. *The World Factbook: Country Comparison: Distribution of Family Income - GINI Index*, CENTRAL INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2172rank.html> (last visited Mar. 8, 2015).

41. To prepare Figure 3, we sorted each firm's cases from lowest to highest fee (excluding cases in which the fee is zero or missing). We then divided the data into deciles and computed the percentage of total fees that fall within each decile.

This pattern (a small number of cases generating a disproportionate share of fees) continues within the top ten percent of paid cases handled by each firm. Figure 2 presents the same analysis as Figure 1 for the top ten percent of cases handled by each firm. The top one percent of cases accounts for twenty-two percent of the fees at the Illinois Firm, fifty-four percent at the Texas Firm, twenty-nine percent at the Referral Firms, and fifteen percent at the Third Firm-Internal.

FIGURE 2: FEE DISTRIBUTION FOR TOP 10% OF PAID CASES
Distribution of fees in top ten percent of paid cases (by firm) for Illinois Firm, Texas Firm, Third Firm-Internal, and all Referral Firms combined. Cases are sorted by fee received.

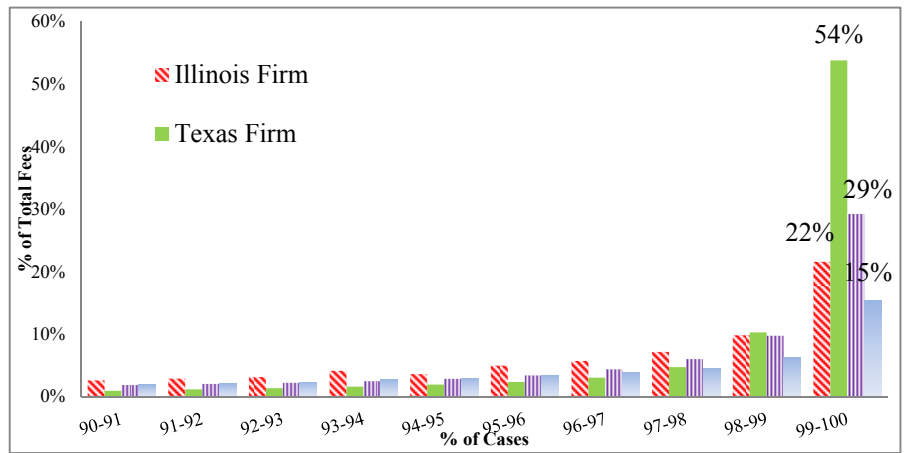
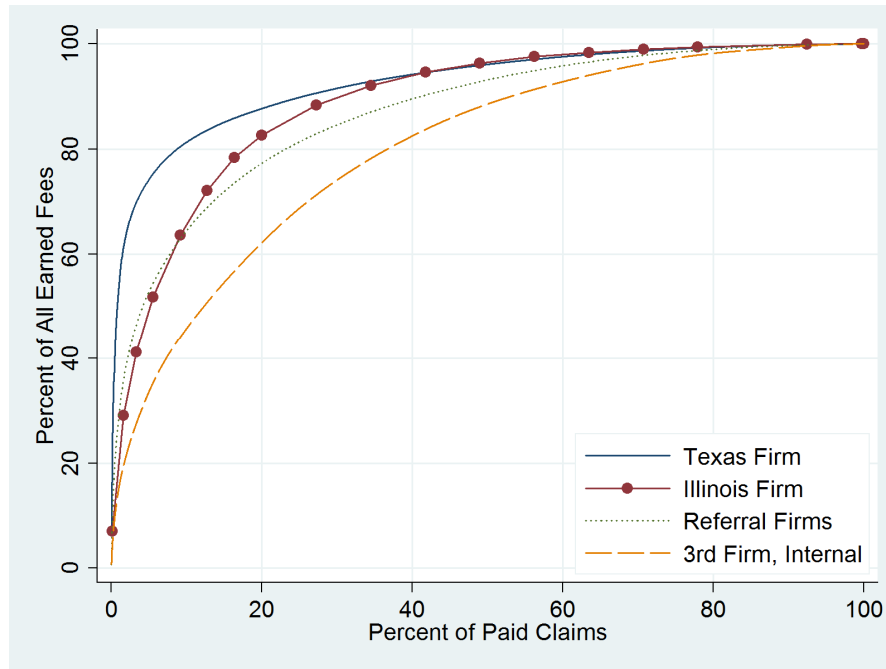


Figure 3 presents the same information in a different way. The y-axis shows the cumulative percentage of fees earned in all cases; the x-axis shows paid claims, ranked in decreasing order of fee earned. We again show results for the Illinois Firm, Texas Firm, all Referral Firms combined, and the Third Firm-Internal. At all four firms, a modest percentage of paid cases accounts for a heavily disproportionate share of total earned fees. At the same time, the shape of the curve varies across firms—indicating that each firm has its own (slightly different) business model.

FIGURE 3: CUMULATIVE FREQUENCY FOR % OF FEES V. % OF CASES



We find a similar pattern when we analyze particular types of cases. We have this information only for cases handled by the Third Firm (internally or sent to Referral Firms). In Table 5, we compute fee concentration ratios and Gini coefficients for each case type handled by the Third Firm. There is substantial skewing of fees for all case types, apart from social security—where awards (and therefore fees) are much more homogeneous. The Gini coefficient confirms this finding. The Gini coefficient for paid social security cases is only 0.34, well below the figure for all other case types in Table 5, but it is 0.89 if we include unpaid cases.

TABLE 5: THIRD FIRM FEE CONCENTRATION BY CASE TYPE

For different case types, fraction of total fees earned in 10% and 1% of cases with largest fees, and Gini coefficients for fees in all cases and paid cases received by Third Firm, and handled either internally or by Referral Firms.

Type of Case	No. of Paid Cases	Mean Fee	Fee Concentration		Gini Coefficient	
			Top 10%	Top 1%	Paid	All
Auto	14,668	\$12,247	53%	18%	0.69	0.94
Dog Bite	2,097	\$4,607	45%	11%	0.69	0.94
Med mal	1,202	\$31,168	61%	18%	0.72	0.99
Other	6,170	\$22,482	49%	16%	0.64	0.88
Premises	995	\$3,683	71%	45%	0.78	0.98
Product Liability	775	\$6,524	63%	19%	0.75	0.98
Slip & Fall	5,573	\$4,652	51%	20%	0.72	0.95
Social Security	3,593	\$1,442	17%	3%	0.34	0.89
Workers' Comp.	4,317	\$1,638	50%	24%	0.65	0.97
All Internal	10,715	\$22,892	46%	15%	0.60	0.83
All Referral	28,675	\$5,827	67%	30%	0.76	0.97
All	39,390	\$10,469	62%	23%	0.74	0.96

B. Contingency Fee Percentages and Expenses

We turn next to the contingency fee percentages that these firms charged. We focus on the Illinois Firm, Texas Firm, and Third Firm-Internal; we lack data on fee percentages for the Referral Firms and have a limited number of cases for the Fourth and Fifth firms. With limited exceptions, the Illinois, Texas, and Third Firm contracted ex ante for a fee of one-third of the gross recovery before expenses (unless a fee cap required a lower percentage). This percentage did not depend on the type of case or whether the case settled or went to trial. We know from Kritzer's work, discussed above, that many (but not all) firms adopt this "fixed contingency rate" approach.

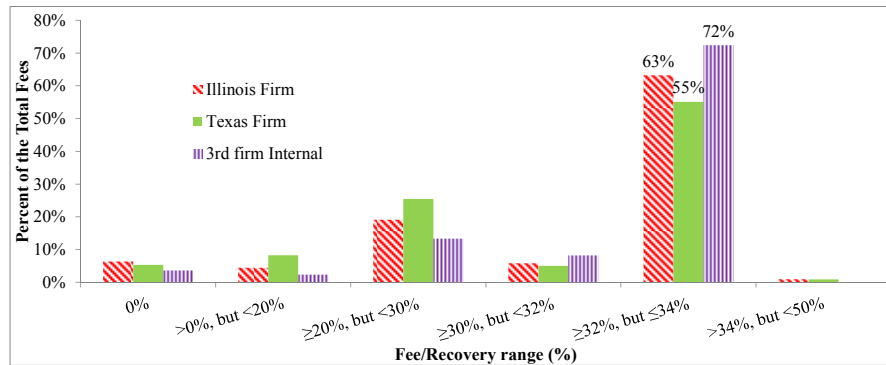
What fee percentages do these firms actually realize? Figure 4 shows the distribution of fee percentages actually collected.

As Figure 4 shows, a one-third fee was the most common fee collected; a vanishingly small number of cases involved fees greater than one-third. In contrast, fees below one-third were reasonably common. Across the three firms, from twenty-eight percent (for the Third Firm-Internal) to forty-five percent (for the Texas Firm) of cases were resolved with fees below thirty-two percent. A modest number were handled with either no fee or a fee below twenty percent. The mean contingency fees (weighting each case equally) were twenty-nine percent at the Illinois Firm, twenty-eight percent at the Texas Firm, and thirty-one percent at the Third Firm-Internal. Because these discounts are usually in smaller cases, they have less effect on the dollar-weighted realized fee

percentage contingency fee, which was 30.6 percent for the Illinois Firm, 30.8 percent for the Texas Firm, and 31.9 percent for the Third Firm-Internal.

FIGURE 4: REALIZED CONTINGENCY FEE PERCENTAGES FOR ILLINOIS FIRM, TEXAS FIRM, AND 3RD FIRM-INTERNAL

Fee percentages collected by Illinois Firm, Texas Firm, and Third Firm-Internal in paid cases. Fee percentage for paid social security cases handled by Third Firm-Internal assumed to be 25%.



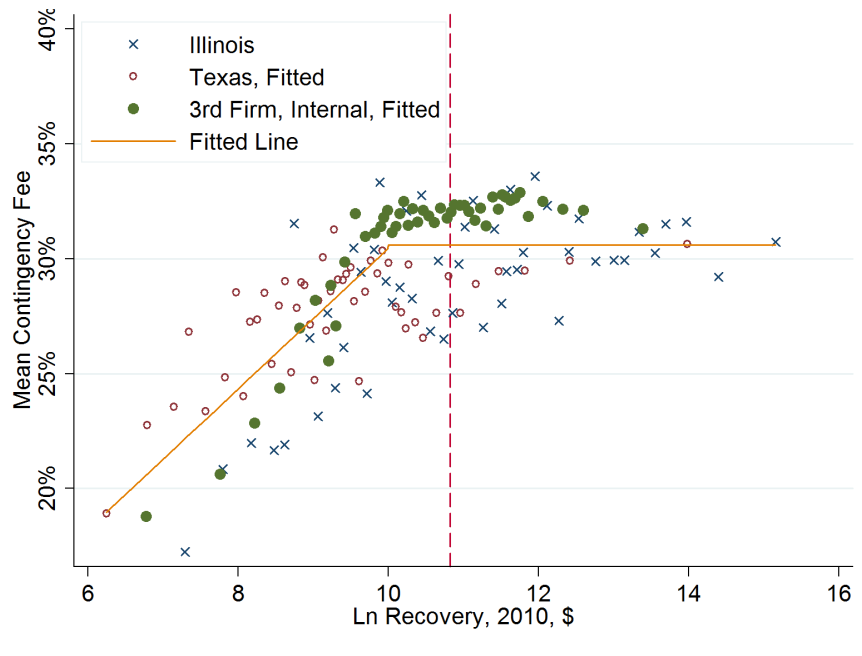
The four Yellow Pages Firms report higher contingency fees, with mean fees from thirty-five to thirty-nine percent and median fees of thirty-six to forty percent. Because our data for these firms is limited to cases with larger recoveries, we cannot compute their mean or median recovery across all cases.

Figure 4 does not indicate how realized fee percentages vary with the amount recovered. We address that question in Figure 5. We divided all paid cases handled by the Texas Firm, Illinois Firm, and Third Firm-Internal into fifty equal-sized bins for each firm, sorted by the amount recovered. We then computed the mean fee percentage in each bin. Figure 5 reports those percentages for each firm.

The realized fee percentage rises with recovery, and then flattens out. We model this as a two-part spline—a regression line with a positive slope up to a threshold amount, then a flat line above that threshold. We jointly choose the threshold, the below-threshold slope and the above-threshold level, to maximize R^2 for a regression of fee percentage on the $\ln(\text{recovery})$ spline. Figure 5 shows the fitted spline. Averaged across all three firms, the threshold at which the slope changes is \$18,000. In firm-specific analyses, the threshold ranged from a low of \$9,900 (Third Firm-Internal) to a high of \$22,000 (Texas Firm). Stated differently, all three firms generally charge a one-third contingency fee (one-third of recovery) for recoveries greater than their firm-specific threshold, but often charge a lower percentage when they recover less than this threshold amount.

FIGURE 5: REALIZED FEE PERCENTAGE V. RECOVERY

Figure shows realized fee percentage versus $\ln(\text{recovery})$ for Illinois Firm, Texas Firm, and Third Firm-Internal. We divide each firm's paid cases into 50 equal-sized bins and show the mean fee percentage for each bin. Fitted line: we regress mean percentage on two-part spline for $\ln(\text{recovery})$ (upper part has zero slope), and choose the threshold to maximize R^2 . Dotted vertical line is at recovery of \$50,000. Threshold is at \$18,000 ($\ln(9.8)$).



C. Litigation Expenses

We turn next to litigation-related, out-of-pocket expenses incurred by plaintiffs' firms. We again focus on the Illinois Firm, Texas Firm, and Third Firm-Internal; we lack data on expenses for the Referral Firms, and have only a limited number of cases for the Fourth and Fifth firms. Table 6 summarizes the expenses incurred by these three firms in paid cases.

TABLE 6: SUMMARY STATISTICS FOR LITIGATION EXPENSES
(IN 2010 DOLLARS)

Summary data for litigation expenses for Illinois Firm, Texas Firm, and Third Firm-Internal in paid cases. Percentage per-case Expenses/Recovery is computed on a per-case basis, and then averaged across all cases. Aggregate Expenses/Recovery = Cumulative Expenses/Cumulative Recovery.

Firm		Illinois	Texas	Third Firm (Internal)
Per-case Expenses (\$)	Mean	\$6.1	\$2.4	\$2.0
	Median	\$1.3	\$0.2	\$1.0
Per-case Expenses/Recovery (%)	Mean	5.1%	5.6%	5.4%
	Median	2.3%	2.1%	2.6%
Aggregate Expenses/Recovery (%)		2.3%	3.8%	2.6%

Across all three firms, we find mean per-case expenses are 5.1–5.6 percent of the recovery. However, the ratio of expenses/recovery is lower in larger cases, so aggregate expenses are only 2.3–3.8 percent of recovery.⁴² The aggregate figure would be higher if we included expenses that the firms incur, but do not recover, in cases with no payout.

D. Time Trends

What about time trends? In other work, we find dramatic *increases* in defense-side fees and defense-side expenses in med mal cases over time, controlling for payout.⁴³ To what extent do we find a similar rise in either fee percentage or out-of-pocket expenses on the plaintiff side, across a broader class of PI cases? Table 7 presents a simple regression for each firm of realized fee percentages and expenses on a year trend, controlling for recovery.

42. In unreported results, we replicated the analysis in Figure 5 using expenses/recovery instead of realized fee percentage. For all three firms, we find that expenses/recovery declines as recoveries increase, although the pattern varies somewhat among the three firms, and the coefficient on this variable was significantly different from zero only for the Third Firm-Internal.

43. Bernard Black, David A. Hyman, Charles Silver, & William M. Sage, *Defense Costs and Insurer Reserves in Medical Malpractice and Other Personal Injury Cases: Evidence from Texas, 1988-2004*, 10 AM. L. & ECON. REV. 185, 185–86 (2008) [hereinafter Black et al., *Defense Costs and Insurer Reserves*].

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TABLE 7: TRENDS IN FEE AND EXPENSE PERCENTAGES
(PAID CASES)

Dependent variable is fee percentage of total recovery, or litigation-related expenses/recovery ratio in paid cases with positive fees for Illinois Firm, Texas Firm, and Third Firm-Internal. t-statistics use heteroskedasticity-consistent standard errors. "Year trend" = (year of recovery – first year in which data is available for each firm). First year = 1997 (Illinois Firm), 1985 (Texas Firm), and 1988 (Third Firm).

Dep. variable	Fee percentage			Expenses/Recovery		
	Illinois	Texas	Third Firm-Internal	Illinois	Texas	Third Firm-Internal
Year Trend	-0.11 (-0.79)	-0.12*** (-3.33)	-0.02* (-1.86)	0.59*** (6.91)	0.32*** (5.61)	-0.18*** (-12.81)
<i>ln</i> (Recovery)	1.25*** (6.12)	1.14*** (8.56)	2.11*** (23.95)	-1.07*** (-6.61)	-1.29*** (-3.52)	-3.09*** (-16.74)
Constant	15.86 (6.28)	18.27 (13.57)	8.47 (10.41)	12.1 (6.91)	14.24 (4.27)	40.37 (19.60)
Observations	737	2,751	11,077	737	2,751	10,122
R ²	0.059	0.035	0.142	0.085	0.016	0.139

We find a modest time trend toward *lower* fee percentages, which is statistically significant for the Texas Firm. Consistent with Figure 5, higher recoveries predict higher realized fee percentages at all three firms. Thus, we find no evidence that plaintiff-side fee trends parallel those on the defense side.

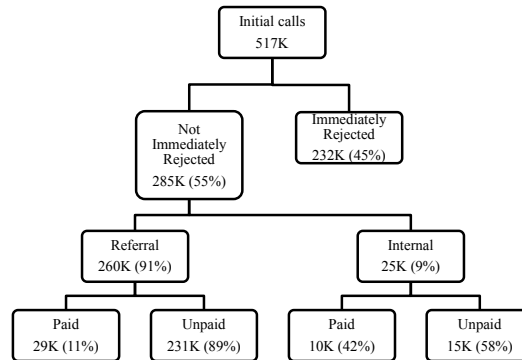
For out-of-pocket expenses, we find that expenses are rising at the Illinois Firm and Texas Firm, but falling at the Third Firm-Internal, in each case controlling for payout. For the Third Firm, we obtain similar results if we control for case type. Thus, we find mixed evidence with regard to expenses, with two of the three firms showing increases, and one showing a decrease.

E. Case Screening and Specialization

As noted above, the Third Firm has a complex system for screening the large number of cases that it handles. Figure 6 presents a flow chart of how cases flow through the Third Firm. The initial call in Figure 6 is when potential clients first contact the Third Firm. "Not Immediately Rejected" means only that the case has passed a quick telephone screening, and does not necessarily indicate an agreement by either the Third Firm or a Referral Firm to undertake representation.

FIGURE 6: FLOW CHART OF CLAIM RESOLUTION IN THE THIRD FIRM

Percentages in flow chart are based on the row above the reported percentage. For periods prior to 2005, we do not know how many cases were rejected by the Third Firm at the initial call. We estimate the number of rejected and total calls based on percentages for 2005–2010.



As Figure 6 indicates, forty-five percent of those who contact the Third Firm are rejected during the initial phone call. Of the remaining fifty-five percent of cases, the Third Firm handles nine percent internally, and refers the other ninety-one percent to Referral Firms, either immediately after the initial phone contact, or after some further screening.⁴⁴

Each of the Referral Firms conducts their own screening and decides whether or not to accept each referred case. Unfortunately, the Third Firm does not track whether or not cases have been accepted by Referral Firms; instead, it tracks whether or not it receives a referral fee, which it does only if the Referral Firm takes the case and later obtains a recovery.⁴⁵ Thus, we cannot determine the percentage of referred cases in which Referral Firms actually agree to undertake representation, so we cannot compute success rates for cases handled by the Referral Firms. However, additional screening by the Referral Firms is an important part of the Referral Firms' own business models. The managing partner of the Third Firm told us that only about twenty percent of the cases they refer are accepted by a Referral Firm, and that the plaintiff receives a recovery in roughly half of these (accepted) cases.⁴⁶

44. Representatives of the Third Firm indicated that they use several simple decision rules (e.g., type of case, stakes) to identify a large number of cases that are automatically sent to Referral Firms. After additional screening, they send a more limited number of additional cases to Referral Firms.

45. Because of the way the Third Firm records its data, we cannot determine how often the receiving attorney earns a recovery but does not charge a fee (presumably where the recovery is small). Instead, we only observe when a fee is charged.

46. Telephone Interview with Managing Partner of the Third Firm (Aug. 8, 2014). Of course, this is an overall average, which varies among Referral Firms and by case type.

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In Table 8, we provide summary statistics comparing case type for cases that the Third Firm handles internally versus those sent to the Referral Firms.

TABLE 8: SUMMARY STATISTICS BY CASE TYPE FOR THE THIRD FIRM

Summary information on number of cases, number and percent handled internally by the Third Firm, and success rates for cases handled internally. "Accepted cases" means that the case passed an initial phone screening, and does not indicate an agreement to undertake representation. "% of cases handled internally" = (cases handled internally)/(accepted cases). "Success rate" = (number of internal cases that result in a fee)/accepted cases of that type.

Case Type	Accepted Cases	No. Handled Internally	% Handled Internally	Success Rate (Internal)
Auto	80,313	10,453	13%	37%
Dog Bite	10,226	1,587	16%	42%
Med mal	57,313	379	1%	7%
Other/not classified	27,410	9,374	34%	52%
Premises	14,017	0	0%	--
Product Liability	8,100	33	0%	--
Slip and Fall	31,185	2,567	8%	16%
Social Security	21,403	851	4%	99%
Workers' Comp	35,033	42	0%	--
Total	285,000	25,286	9%	42%

As Table 8 shows, the Third Firm refers out *all* cases involving premises liability; virtually all cases involving med mal, product liability, and workers' comp; and a very high percentage of slip and fall and social security cases. The only case types that the Third Firm handles internally in significant numbers are auto, dog bite, and the residual "other/not classified" category. For the cases that the Third Firm handles internally, success rates vary dramatically by case type.⁴⁷

F. Fees by Case Type

To what extent do fees vary by case type? Table 9 compares mean and median fee by case type, for the Third Firm-Internal and the Referral Firms. As Table 8 reflects, the Third-Firm Internal referred out all Premises cases, and had no recoveries in Product Liability and Workers' Comp cases handled internally. Table 9 does not report mean and median fees for these three categories of cases.

47. When we asked the managing partner of the Third Firm how they achieved a near-one-hundred percent success rate with social security cases handled internally, he responded "we only took the cases we were absolutely sure we could win. We let the Referral Firms handle everything else." *Id.*

TABLE 9: FEES IN PAID CASES, BY CASE TYPE THIRD FIRM

Mean and median fees in paid cases for 39,000 paid cases handled by Third Firm, either internally or through referral. Amounts in 2010 \$ thousands.

Case Type	Fee (2010 \$ '000)			
	Mean		Median	
	Internal	Referral	Internal	Referral
Auto	\$23	\$21	\$14	\$8
Dog Bite	\$10	\$6	\$6	\$3
Med mal	\$65	\$81	\$31	\$25
Other/not classified	\$27	\$13	\$14	\$4
Premises	--	\$10	--	\$3
Product Liability	--	\$18	--	\$5
Slip and Fall	\$25	\$8	\$20	\$4
Social Security	\$3	\$3	\$3	\$3
Workers' Comp	--	\$5	--	\$2
Total	\$25	\$15	\$13	\$5

As Table 9 reflects, with the exception of med mal and social security, the Third Firm handles cases with larger fees internally, and refers out cases with smaller fees.

IV. ESTIMATING THE IMPACT OF CONTINGENCY FEE CAPS

So far, we have focused on describing the results actually obtained by the 124 firms in our dataset. But, we can also use our data to estimate the effect of fee caps on the economics of plaintiff-side practice and on plaintiff recoveries. Throughout our discussion of fee caps, we: (1) treat all caps as if they apply to all cases, even though some state caps apply only to med mal cases; (2) assume that the cap is never waived, although there are circumstances in some states, including Florida and Illinois, where waiver is possible, and even likely; and (3) assume that the same cases would have been brought, and the same recoveries secured, with a fee cap in place. For these reasons, our analysis should be seen as providing an upper bound on the impact of the actual caps for cases that would still be brought with the cap in place. If fee caps, like damage caps, also affect the volume of cases that are brought, the effect on firm economics will be magnified.

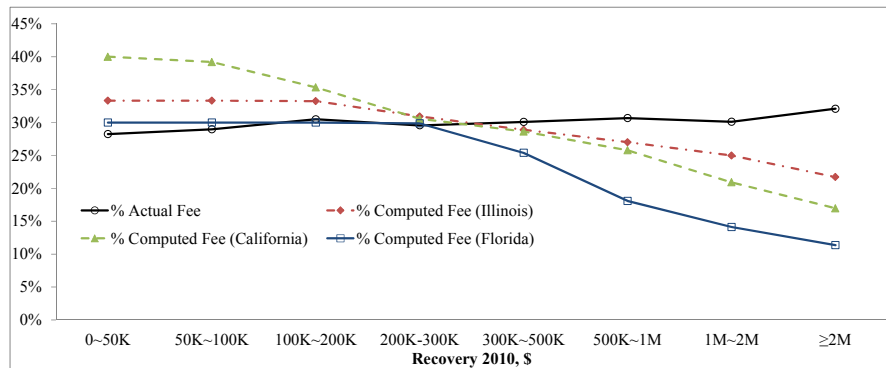
A. Impact on Firm Economics

We begin in Figure 7 by illustrating the impact of fee caps, using three different caps (California cap, Florida med mal cap, pre-2013 Illinois med mal cap) on the cases handled by the Illinois and Texas firms.

Figure 7 shows the effect of these three caps on the fee percentage that a firm could collect for various slices of the amount recovered.⁴⁸

FIGURE 7: IMPACT OF FEE CAPS ON AUTHORIZED FEE

Percentage contingency fee for indicated recovery ranges, both actual and assuming the fee caps adopted by California, Florida, and Illinois. Actual fees are for combined cases for Illinois and Texas firms, and use 2010 dollars.



As Figure 7 reflects, for recoveries of \$300,000 or less, California and Illinois authorize fees *higher* than those actually charged by the Illinois and Texas firms on average (though not necessarily in each individual case). For Florida, the fee cap authorizes fees *higher* than those actually charged for recoveries of \$100,000 or less. Above these thresholds, the fee caps impose haircuts, which increase as recoveries increase.

The fee caps apply to only a small fraction of the cases handled by each firm, but they have a significant effect on overall firm economics. Table 10 analyzes the impact of the fee caps in Table 1 on the overall fees earned by the Illinois Firm, Texas Firm, Referral Firms, and the Third Firm-Internal. Table 10 shows the overall percentage “haircut” each firm would take on its fees. The caps are sorted from highest to lowest haircut (for the Illinois Firm’s portfolio of cases).

The state caps vary widely in their impact on plaintiff firms. At the more stringent end of the spectrum, the Florida med mal cap would reduce the Illinois Firm’s fees by forty-five percent and the Texas Firm’s fees by forty percent. It would have smaller but still important effects on the Referral Firms (twenty-six percent) and the Third Firm-Internal (seventeen percent). At the other end of the spectrum, the caps in

48. For the “actual” line in Figure 7, we include only the Illinois Firm and Texas Firm. We exclude the Third Firm-Internal because it handles a very different mix of cases, on which fee caps have only a modest impact. We exclude the Referral Firms because we do not have information on the actual contingency fee percentages they charged. We exclude the Fourth Firm because we have data for a limited number of cases. We exclude the Fifth Firm because contingency fee caps do not apply to class actions.

Michigan, Oklahoma, Tennessee, and Utah would have almost no effect. However, the flat one-third caps in Michigan, Tennessee, and Utah would affect the recoveries reported by the Yellow Pages Firms. The last row of Table 10 shows the extreme effect of the Brickman et al. proposal referenced *supra*, which (subject to the exception for settlement offers that the plaintiff later beats at trial) would reduce recoveries by seventy-four to eighty percent.⁴⁹

TABLE 10: IMPACT OF FEE CAPS ON FIRMS (% HAIRCUT)

Aggregate percent reduction in fees attributable to specified fee caps, for Illinois Firm, Texas Firm, Third Firm-Internal, and all Referral Firms together, each of the listed firms, for all of their cases. We assume that firms will collect the lesser of the actual fee charged or the capped amount. We treat the FTCA cap as a flat 20% cap.

	Cap type	Illinois Firm	Texas Firm	Referral Firms	Third Firm-Internal
State Caps					
Florida (med mal cap)	Sliding	45%	40%	26%	17%
Florida (PI cap)	Sliding	7%	10%	2%	0%
Delaware	Sliding	42%	37%	20%	11%
Indiana	Sliding	32%	29%	15%	7%
New York	Sliding	30%	32%	19%	12%
California	Sliding	27%	26%	13%	7%
Connecticut	Sliding	27%	28%	11%	4%
Illinois (pre-2013)	Sliding	18%	19%	10%	5%
New Jersey	Sliding	10%	13%	4%	1%
Nevada	Sliding	10%	11%	5%	2%
Wisconsin	Sliding	10%	13%	3%	1%
Massachusetts	Sliding	9%	10%	4%	1%
Michigan, Tennessee, Utah & Illinois (post-2013)	Flat 1/3 rd	0%	1%	0%	0%
Oklahoma	Flat 50%	0%	0%	0%	0%
Mean for State Caps		17%	17%	8%	4%
Federal Caps					
FTCA (administrative resolution)	Flat 20%	35%	37%	40%	39%
Social Security	Flat 25%	20%	21%	25%	24%
Brickman et al. proposal	Sliding	80%	78%	76%	73%

Interestingly, the Referral Firms incur a larger haircut than the Third Firm-Internal, even though the Third Firm-Internal has a larger mean recovery. This is because a few of the Referral Firms have cases

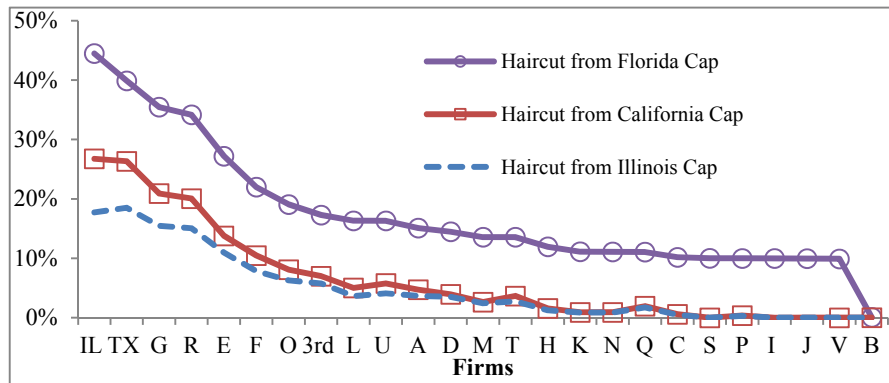
49. See *supra* note 38.

with very large recoveries, and hence a large reduction in fees, relative to the Third Firm-Internal.

Table 10 trades off limited breadth (four firms) for greater depth (seventeen caps). In Figure 8 we flip perspectives and show the impact of three fee caps (California, the Florida med mal cap, and the cap that applies in Michigan, Tennessee, and Ohio (plus pre-2013 Illinois)) on all twenty-five firms listed in Table 3. Figure 8 shows that the impact of a fee cap is affected by *both* cap design and the portfolio of cases to which it is applied. Firms that concentrate on larger cases will suffer a much larger impact than firms that mostly handle smaller cases. For the twenty-two Referral Firms that appear in Figure 8, we are only measuring the impact of the fee caps on the cases they received from the Third Firm, but they would not take those cases unless they were at least as remunerative as the alternatives available to them.⁵⁰

FIGURE 8: IMPACT OF FEE CAPS ON INDIVIDUAL FIRMS (% HAIRCUT)

Aggregate percent reduction in fees attributable to California, Florida, and Illinois (pre-2013) med mal fee caps, for the 25 firms listed in Table 3, for all of their cases. We assume that caps apply to all cases and that firms will collect the lesser of the actual fee charged or the capped amount. Firms are sorted based on haircut imposed by Florida med mal fee cap. Initials on x axis (e.g., A, B, C) refer to Referral Firms listed in Table 3. "IL" is Illinois firm; "TX" is Texas firm; "3rd" is Third Firm-Internal.



50. We expect Referral Firms to decline representation unless the referred cases are, on average and net of the referral fees they pay the Third Firm, at least as financially remunerative as the cases these firms can secure on their own.

B. Impact of Fee Cap on Plaintiff Recovery

What are the implications of fee caps for the share of the recovery received by the plaintiff, net of legal fees, and litigation expenses, assuming the same cases were brought? Table 11 illustrates how the med mal fee caps in California, Florida, and Illinois will affect the recovery that plaintiffs takes home, for the fifteen firms in our sample with the largest number of paid cases. Table 11 is expressed as the percentage increase in the dollar amount received by the plaintiff; the percentage increase in the plaintiff's share of the recovery is smaller.⁵¹

TABLE 11: INCREASE IN PLAINTIFF'S RECOVERY FROM FEE CAP

Percentage increase in amount received by plaintiff as a result of med mal fee caps in California, Florida, and Illinois (pre-2013) for indicated firms. We assume that caps apply to all cases and that firms will collect the lesser of the actual fee charged or the capped amount.

Firm	Fee Cap		
	Florida	California	Illinois
Illinois Firm	19.7%	7.8%	14.3%
Texas Firm	17.6%	8.2%	12.6%
Third Firm-Internal	8.0%	2.7%	3.4%
Referral Firm-A	7.5%	1.8%	2.4%
Referral Firm-B	0.0%	0.0%	0.0%
Referral Firm-C	5.1%	0.2%	0.1%
Referral Firm-D	7.2%	1.8%	2.0%
Referral Firm-E	13.6%	5.5%	7.8%
Referral Firm-F	11.0%	3.9%	5.5%
Referral Firm-G	17.7%	7.7%	11.7%
Referral Firm-H	6.0%	0.6%	0.9%
Referral Firm-I	5.0%	0.0%	0.0%
Referral Firm-J	5.0%	0.0%	0.0%
Referral Firm-K	5.5%	0.4%	0.5%
Referral Firm-L	8.2%	1.8%	2.9%
All Listed Firms	9.2%	2.8%	4.3%

The increase in plaintiffs' recovery is, of course, the flip side of lower fees earned by plaintiffs' lawyers; every dollar less for plaintiffs' lawyers is a dollar more for plaintiffs. Yet, as Table 11 illustrates, the impact (in percentage terms) on plaintiffs' recovery is muted, because plaintiffs already receive a large fraction of the recovery. The strict Florida med mal cap has the most impact, increasing plaintiffs' recoveries across these

51. For example, if the contingent fee falls by three percent from thirty-three percent to thirty percent, and expenses were five percent, the plaintiff's share of the recovery rises from sixty-two to sixty-five percent (i.e., by the same three percent), but the increase in her dollar amount rises by 4.8% (i.e., by $(65-62)/62$).

fifteen firms by an average of 9.2 percent, compared to California (2.8 percent) and pre-2013 Illinois (4.3 percent).

These figures are averages. Most recoveries are small, and all of the state caps allow a thirty percent or higher fee for smaller cases; all but two allow a fee of thirty-three percent or higher in smaller cases. This level exceeds the average fee charged by the Texas Firm, Illinois Firm, and Third Firm-Internal in smaller cases. Thus, at first glance, fee caps will not affect most plaintiffs.

However, indirect effects are likely. The strong skew in fees shown above suggests that firms are engaging in cross-subsidization from large cases to small ones.⁵² If fees drop in large cases, the firm will likely take fewer *small* cases, because it can no longer afford them. In other work we find evidence that caps on damages in med mal cases lead to fewer cases being brought, including fewer small cases that are not directly affected by these caps.⁵³ And, as noted previously, Daniels and Martin found that Texas's 2003 adoption of a strict cap on non-economic damages in med mal cases sharply reduced the willingness of plaintiff firms to accept all med mal cases.⁵⁴

V. DISCUSSION

A. *Business Model(s) of Plaintiff-Side Personal Injury Practice*

At all 124 firms in our data set, a small percentage of cases accounts for a disproportionate share of fee income. Although we are the first to quantify this pattern, we are not the first to observe it. As one plaintiff's lawyer observed:

[A]s contingent fee lawyers, we are in the business of managing portfolio risk. By this I mean, there are a certain number of cases on your docket, only a portion of which will have any significant value. The remainder will either break even or be complete flops. In organizing your time and dedicating resources, you need to be able to separate the stars from the duds and deal with them accordingly. In my experience, the 80-20 rule applies pretty well to a normal plaintiff's practice, meaning roughly 20% of your cases will account for 80% of your revenues. What does that mean? Well, for one thing, it means that if you have forty cases on your docket, on average you may expect that eight should come in strong, while the

52. By cross-subsidization, we do not mean that plaintiffs' firms intentionally accept cases on which they expect to lose money, intending to make up the shortfall with more remunerative cases. Instead, as we discuss below, we mean that plaintiffs' firms have developed a business model in which all accepted cases must exceed a threshold expected value—but they then accept an array of cases, expecting that a few large winners (only some of which they can identify *ex ante*) will account for a lion's share of their fees. Other factors will also influence the decision whether to accept any given case. *See infra* Part V.A.

53. Myunggho Paik, Bernard Black, & David Hyman, *The Receding Tide of Medical Malpractice Litigation: Part 2—Effect of Damage Caps*, 10 J. EMPIRICAL LEGAL STUD. 639, 668 (2013).

54. Daniels & Martin, *supra* note 23, at 78; *see also* Shepherd, *supra* note 27, at 173.

balance will either be non-productive losers or repay your time and investment, but just barely.⁵⁵

This 80/20 pattern, which was named “Pareto’s Principle” after the Italian economist who first observed the phenomenon, has been observed in numerous other settings, including land ownership; movie, book and CD sales; global income; customer complaints; sales force productivity; and software coding errors.⁵⁶

Why do plaintiffs’ lawyers take so many cases with modest fees? One possibility is that the plaintiffs’ lawyers do not know *ex ante* which cases are likely to result in a modest payday, so they just vacuum up everything and let the chips fall where they may. We do not believe that is an accurate description of how plaintiffs’ lawyers operate. At the Third Firm, almost half of the initial inquiries are turned down flat. Subsequent screening by both the Third Firm and the Referral Firms eliminates a substantial majority of those cases that make it through the initial screen.⁵⁷ We estimate that at most fifteen percent of those who contact the Third Firm ultimately receive representation from either the Third Firm or one of the Referral Firms.⁵⁸ As we noted above, research by others shows that in med mal cases, plaintiffs’ lawyers reject well over ninety percent of initial inquiries.⁵⁹

So, there must be something about the specific low-recovery cases that the plaintiffs’ lawyers in our dataset do accept that makes them worth taking. Once a case clears a minimum threshold of value, we think a plausible explanation is that most plaintiffs’ lawyers believe they can simultaneously:

1. help those who have been negligently injured;
2. earn sufficient fees to cover their (opportunity) costs;
3. increase their experience and skill; and
4. build their visibility and reputation in the community.

55. Bill Daniels, *Ten Tips for Making Partner in a Plaintiff’s Firm*, THE PRACTICAL PRACTITIONER (July 2007), <http://billdanielslaw.com/docs/Ten-Tips-for-Making-Partner-in-a-Plaintiffs-Firm.htm>.

56. See RICHARD KOCH, *THE 80/20 PRINCIPLE* (2008); see also M.E.J. Newman, *Power Laws, Pareto Distributions and Zipf’s Law*, 46 CONTEMP. PHYSICS 323 (2005); Mark Maremont & Alexandra Berzon, *How Often Do Gamblers Really Win?: New Data Provide Answers on the Real Odds for Gambling*, WALL ST. J. (Oct. 11, 2013, 1:56 PM), <http://www.wsj.com/articles/SB10001424052702304626104579123383535635644> (analyzing two years of data from an online casino, and finding that “of the 4,222 casino customers, just 2.8%—or 119 big losers—provided half of the casino’s take, and 10.7% provided 80% of the take”).

57. As noted above, the Managing Partner of the Third Firm estimated that Referral Firms only accept twenty percent of the cases they receive. See *supra* note 46 and accompanying text.

58. As Figure 6 indicates, a total of 517,000 individuals contacted the Third Firm, and 232,000 were rejected immediately. Of the remaining 285,000, the Third Firm handled 25,000 internally, and 260,000 were sent to Referral Firms. If the Referral Firms accepted twenty percent of the referred cases, then 77,000 cases were accepted (52,000 by the Referral Firms and 25,000 by the Third Firm-Internal). $77,000/517,000 = 15$ percent. All amounts in this footnote are rounded to the nearest thousandth.

59. See *supra* notes 21–28 and accompanying text.

This approach also likely increases the firm's chances of securing the occasional blockbuster case, and maximizing its value when it does appear.⁶⁰

The lawyers at the Third Firm are pursuing a more complex strategy. For cases within their geographic reach and case type expertise, they unbundle cases with lower expected recoveries (which they refer elsewhere) from cases with higher expected recoveries (which they handle themselves). The success of this strategy is shown by the fact that of the twenty-eight Referral Firms with at least 150 paid cases, only six had mean fees (and only four had median fees) higher than those the Third Firm earned on the cases it handled internally.

Med mal and social security cases are partial exceptions to this pattern. For med mal cases, the Third Firm's mean recovery is lower for retained cases, while the median is higher—perhaps because the Third Firm refers out high-recovery cases that require specialized expertise. For social security cases, the mean and median fee/recovery are comparable whether the case is handled internally or referred out—most likely because of the limited variance of recoveries in such cases. However, as Table 8 reflects, the Third Firm achieves a stratospheric (ninety-nine percent) success rate on the cases it handles internally. And as noted *supra*, the managing partner of the Third Firm explained they only handle social security cases internally if they are a “sure thing.”⁶¹

Thus, selection effects explain why the Third Firm has higher mean and median recoveries on the cases it handles internally versus those it refers elsewhere. Indeed, a lawyer at the Third Firm made the point with a striking metaphor: “Our business model is ‘shucking oysters and looking for pearls.’ The Referral Firms only see oysters that we have already shucked. If we happen to miss a pearl, the Referral Firms provide a second set of eyes—and if they happen to find a pearl, we get a share of its value.”

The Third Firm's practice of advertising heavily and then referring out smaller cases requires a different explanation. To our knowledge, this is the first time that a practice of referring out small cases has been documented with quantitative evidence.⁶² A likely explanation is that the Third Firm refers out cases it cannot handle profitably to lawyers whose business model lets them operate at lower cost. By establishing regular referral arrangements with other lawyers, the Third Firm “buys” the ability to handle smaller cases profitably instead of “making” that ability it-

60. Kritzer, *Wages of Risk*, *supra* note 13, at 299 (“Some lawyers are able to ‘cherry pick’ the good cases; others handle large volumes of cases in order to find the occasional very profitable case. Relatively few lawyers ever see ‘the really big one.’ One of the lawyers observed as part of the study had been doing plaintiffs’ contingent fee work for twenty years, had a very successful practice, and had never collected a fee of over \$100,000 on a case.”).

61. See *supra* note 47.

62. For a qualitative account of this practice, see Sarah Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs’ Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 278–79 (2007).

self.⁶³ The Referral Firms simultaneously “buy” the marketing and case intake skills of the Third Firm, which likely involve significant economies of scale.

B. *Fee Levels, Collusion, and Time Trends*

We have data on fees—not on the hours spent by each firm in obtaining those fees. Thus, we are unable to determine which cases are more profitable than others, let alone the per-hour fees received by the firm. We asked one firm why they did not track hours, and were told “it would be too depressing if we did.”

In the three firms for which we have good data, the modal fee is one-third, but there is a fair degree of dispersion. There are very few cases with fees greater than thirty-four percent, but all three firms often charge less than one-third for cases with smaller recoveries. Our convenience sample of Yellow Pages Firms is more heavily weighted toward contingency fees of forty percent, but even here there is a fair degree of dispersion. Also, several firms advertise the availability of “discount fees.”⁶⁴ These patterns provide no evidence of the collusion feared by Professor Brickman, even were there not structural reasons for doubting the feasibility of collusive arrangements given the large number of plaintiffs’ firms in the market.

In other work, we found that defense side fees and expenses in medical cases in Texas and Illinois have increased substantially in recent decades, controlling for inflation and payouts.⁶⁵ In contrast, on the plaintiff-side, fee percentages declined at the Texas Firm and were stable at the Illinois Firm and Third Firm-Internal. Litigation-related out-of-pocket expenses increased substantially at the Texas and Illinois firms and declined at the Third Firm-Internal. Further research will be necessary to understand why we observe such different patterns on two sides of the same market, and why there is variance among plaintiffs’ firms.

C. *Fee Caps*

Our findings make it clear that the impact of a fee cap depends greatly on how it is designed, and on the portfolio of cases to which it is applied. A flat cap of one-third of the recovery, adopted by a number of

63. For example, the Third Firm receives phone calls from potential clients who live within the same state, but are quite far away. The time and travel costs associated with handling such cases internally are likely to be significant. By referring these cases out, the Third Firm is able to capture some of the value of these cases, and the Referral Firms are willing to pay a referral fee in order to obtain the benefit of the Third Firm’s marketing.

64. See, e.g., HASTINGS & HASTINGS: THE DISCOUNT ACCIDENT LAWYERS, <http://www.hastingsandhastings.com> (last visited Mar. 8, 2015); see also Deborah L. Cohen, *Half Off: Nevada Lawyer Bets on Discount Model*, ABA J. (July 1, 2011, 6:59 AM), http://www.abajournal.com/magazine/article/half_off_nevada_lawyer_bets_on_discount_model/.

65. Black et al., *Defense Costs and Insurer Reserves*, *supra* note 43; Mohammad Rahmati, David A. Hyman, Bernard Black, & Charles Silver, *Defense Costs in Medical Malpractice Litigation: Evidence from Illinois* (unpublished article) (on file with author).

states, would have almost no impact on the fees charged by the Illinois Firm, Texas Firm, and Third Firm-Internal. But the sliding scale caps adopted by other states would have a substantial impact. All else being equal, this would increase the amount of recovery kept by the plaintiff. But the “all else equal” assumption is not tenable.

Tort reform advocates promote fee caps as a simple “fix” for high attorney fees. The policy instinct behind sliding scale fee caps is that a plaintiffs’ firm’s efforts likely increase less than proportionately with recovery. Even if this is true, a flat contingency fee could reflect efficient adaptation to a market in which it makes business sense to take both large and small cases, and use larger cases to subsidize smaller cases. A sliding scale cap will disrupt that business model. In an occasional big case, plaintiffs will receive somewhat larger net recoveries, but plaintiffs in small cases may no longer be able to find lawyers at all. It is widely understood that contingency fees allow ex-post winners to subsidize ex-post losers, but our findings suggest that large winners are also subsidizing small winners.

Our data does not allow us to determine whether the contingency fees we observe exceed competitive market prices. But, in other work, we find Illinois’ med mal plaintiffs’ lawyer market is not concentrated.⁶⁶ And, when we compare the amounts received by plaintiff’s attorneys and defense attorneys, we find modest “wages of risk”—plaintiffs’ lawyers do not appear to earn substantially more than their defense-side counterparts.⁶⁷ Taken together, these findings indicate that plaintiffs’ attorneys in PI litigation are unlikely to be charging supra-competitive prices, even in large cases.

D. Case Screening by Plaintiffs’ Lawyers

Kritzer argues that plaintiffs’ lawyers are “holding back the flood tide” of PI litigation by rejecting many small and weak claims.⁶⁸ The extensive screening protocol employed by the Third Firm supports Kritzer’s view. Figure 6 shows that the Third Firm turns away almost half of those seeking representation after an initial phone screening.⁶⁹ The Third Firm and Referral Firms continue to evaluate cases that pass this initial screening and decline representation in many of the remaining cases. As noted above, we estimate that only about fifteen percent of those who contact the Third Firm ultimately receive representation.⁷⁰ This figure is lower than was previously reported for personal injury liti-

66. Hyman et al., *The Market for Plaintiff-Side Representation*, *supra* note 33.

67. *Id.*

68. Kritzer, *Holding Back the Floodtide*, *supra* note 21; see also Mary Nell Trautner, *Tort Reform and Access to Justice: How Legal Environments Shape Lawyers’ Case Selection*, 34 *QUALITATIVE SOC.* 523, 524 (2011).

69. The Third Firm presumably sets the threshold for which cases pass the initial phone screening to ensure it has a low false negative rate, at the cost of many false positives. The Third Firm then relies heavily on the Referral Firms to sort out which cases are worth pursuing.

70. See *supra* note 56 and accompanying text.

gation, but differences in the pool of those who contacted the firms in question could explain the difference.⁷¹

This multilevel screening leads to overall success rates of 50.6 percent for the cases actually accepted by the Third Firm and the Referral Firms.⁷² As Figure 6 makes clear, many unhappy people seek legal representation but are unable to obtain it. The fact that lawyers at the Third Firm and the Referral Firms are paid on contingency induces them to sort the wheat from the chaff.

E. Contingency Fees: Gross or Net?

If expenses are large relative to the recovery, a contingency fee based on gross recovery (rather than net recovery) can leave the plaintiff with little or nothing to show for their trouble. Indeed, the plaintiff might even owe money to the lawyer! Legal ethics scholars have criticized gross recovery contingency fees, but it is unclear how often plaintiffs' lawyers use such arrangements, or make other adjustments when there is a risk of the plaintiff walking away with nothing.⁷³

We asked each of the firms that provided us with data whether they computed contingency fees based on gross or net recovery. Although there was some diversity in the responses, the most common approach was based on gross recovery. Figure 4 confirms this finding; we observe a large peak at one third of the gross recovery for the three firms for which we have comprehensive data.

However, the lawyers we interviewed noted that they routinely lowered their fees when expenses were high relative to recoveries, to ensure the lawyer did not receive more than the client. This practice reduces the risks associated with gross fee arrangements. More data is necessary to determine how prevalent gross fee arrangements actually are, how widespread discounts are in small-recovery cases, and to quantify the actual effects of gross fee arrangements, taking discounts into account.

71. See Kritzer, *Wages of Risk*, *supra* note 13. The Third Firm advertises heavily, and potential clients need only "pick up the phone." The lawyers studied by Kritzer conducted their own initial screening, either by phone or in person, and with one exception did not advertise heavily. As such, we should not assume that those contacting the Third Firm are similar to those contacting the lawyers studied by Kritzer.

72. If the twenty percent estimate by the Third Firm for the fraction of referred cases that are accepted by Referral Firms is correct, then there was a recovery in fifty-six percent of the cases handled by the Referral Firms (29,000/52,000). This compares to forty percent for the cases that the Third Firm initially keeps (10,000/25,000). In combination, the result is an overall success rate of 50.6 percent (39,000/77,000). However, the Third Firm conducts its own additional screening on the cases it handles internally. Thus, forty percent is a lower bound on the success rate for the Third Firm-Internal.

73. See, e.g., W. William Hodes, *Cheating Clients with the Percentage-of-the-Gross Contingent Fee Scam*, 30 HOFSTRA L. REV. 767 (2002).

F. Advertising and Time Trends in Contingency Fees

In 1977, in *Bates v. State Bar of Arizona*, the Supreme Court struck down state bans on lawyer advertising.⁷⁴ Most economists and legal commentators believed that striking down these bans would result in higher quality services at a lower price. In the intervening years, as any viewer of late-night television can attest, advertising by plaintiff-side PI lawyers has become pervasive.⁷⁵ In a recent article, Professor Nora Engstrom notes that “there is scant evidence that [advertising] reduces contingency fees. To the contrary, though data are partial and fragmentary, it appears that PI advertisers might charge higher contingency fees, on a percentage basis, than their nonadvertising counterparts.”⁷⁶ Engstrom calls this absence of evidence “the contingency fee price paradox.”⁷⁷

Is there a paradox to be explained? Much more information would be needed to establish the existence of a paradox. First, advertised and contracted-for fees are not the same thing as collected fees. We find that lawyers routinely collect fees that are lower than those provided for in their retainer agreements.

Second, advertising will affect the mix of cases, particularly if cases attracted through advertising are riskier.⁷⁸ Third, not all lawyers are the same. Lawyers who advertise might be better (or worse) on average than those who do not. Fourth, advertising provides a service. The match between clients and lawyers could well be better than under a system without advertising. Finally, the better comparison is between fee levels that prevail in markets with and without advertising, and not the fee levels that prevail among those who advertise versus those who do not in a market where advertising is permissible.

It is hard to imagine how to design an empirical study that could control for these multiple confounders. We have good data on collected fees, but not on risk, expected recovery, or lawyer quality. For us, it is premature to draw conclusions about the social value of lawyer advertis-

74. 433 U.S. 350, 379 (1977).

75. Readers can submit their own favorites, but we are fans of lawyers who describe themselves as the “Hammer.” See, e.g., Jeffin Rush, *Jim Adler Doesn't Bark, HE BITES!*, YOUTUBE (May 22, 2011), <http://www.youtube.com/watch?v=MnImcw3xhCI>; LegalAdFan, *Terribly Hurt? - Lowell “The Hammer” Stanley Ad*, YOUTUBE (Feb. 22, 2008), <http://www.youtube.com/watch?v=jCSY0whNaNs>; Ripplin, *Jim “The Hammer” Shapiro Video #5*, YOUTUBE (June 4, 2006), <http://www.youtube.com/watch?v=zToHQ8oQvgA>.

For those interested in a lighter touch, there are the ads created for Trolman, Glaser & Lichtman. See, e.g., BrandFreakTwo, *Trolman, Glaser & Lichtman | “Machete”*, YOUTUBE (Jan. 11, 2010), <http://www.youtube.com/watch?v=-Eck-dlk0n4>; Joel Tractenberg, *Trolman, Glaser & Lichtman | “Power”* <http://www.tgllaw.com>, YOUTUBE (Jan. 14, 2010), <http://www.youtube.com/watch?v=KoDNdTXx-7U>.

76. Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 640 (2013).

77. *Id.*

78. Engstrom notes this problem in a footnote. *Id.* at 667 n.188.

ing (let alone the existence of a contingency fee price paradox) on the flimsy foundation formed by the available data.⁷⁹

G. *What Is a Fair Contingency Fee?*

Interestingly enough, plaintiffs' lawyers and state legislators appear to disagree on the structure of a "fair" contingency fee. Plaintiffs' lawyers charge lower contingency fees for cases with modest recoveries, and higher contingency fees for cases with recoveries above a firm-specific threshold. But, as Table 1 makes clear, many state legislators believe that plaintiffs' lawyers should charge higher contingency fees for cases with lower recoveries, and lower contingency fees for cases with higher recoveries. Although both sides believe in a sliding-scale contingency fee, they disagree on which way it should slope. We do not propose to settle the dispute; both sides can point to principles of economics and morality justifying their respective positions. We simply highlight the mismatch in what each side perceives to be a fair approach to contingency fee design.

H. *Representativeness of Our Findings?*

We have comprehensive information from three well-established plaintiffs' PI firms, extensive but less complete information on referred cases handled by 115 Referral Firms (but not the entire portfolio of cases handled by those firms), and more limited information on cases handled by six additional firms. This is far more data than in prior studies, yet it is still limited. Most of our data comes from three firms. The firms (and cases) for which we have data are not random samples of plaintiff-side law firms, or the cases they accept.

Are our findings likely to be reasonably representative of the broader universe of plaintiff-side practice, at least among "successful" firms? There are several reasons to believe the answer is yes. As noted previously, our findings on the range of contingency fees charged by plaintiffs' lawyers is consistent with previous work, and our findings on fee concentration are consistent with previous qualitative studies.

But, the best evidence that our findings are representative comes from comparing the results of this study to another study we recently completed.⁸⁰ In that study, we analyze fee concentration ratios in med mal cases in Illinois.⁸¹ That study is limited to one state, and one type of claim (med mal).⁸² But we have complete data on every med mal claim

79. Engstrom agrees that more data is needed. *Id.* at 691–92. But she greatly underestimates the difficulty of constructing a plausible counterfactual. We are not even sure what the research question would be. Would fees have been lower in the same case, brought by the same lawyer, if no one could advertise? That study cannot be conducted. Would fees have been lower in the same case, brought by the same lawyer, if *this lawyer* did not advertise? But this lawyer would then operate in a market in which other lawyers did advertise. And so on.

80. Hyman et al., *The Market for Plaintiff-Side Representation*, *supra* note 33.

81. *Id.*

82. *Id.*

brought in Illinois during an eleven-year period (2000–2010) covering more than 450 firms.⁸³ There too, a small percentage of cases account for a large share of recoveries (and, presumably, of fees).⁸⁴ For example, for the twenty-two firms that recovered at least \$25 million (in 2010 dollars), the top ten percent of cases account for an average of forty-four percent (range twenty-eight to seventy-nine percent) of the total amount recovered in all cases handled by these firms.⁸⁵ Our findings in this paper are effectively identical: the top ten percent of cases averaged forty-four percent (range nineteen to eighty-two percent) of the total amount recovered in all cases handled by the twenty-five firms in Table 4.

VI. CONCLUSION

At all 124 firms we study, a small percentage of cases accounts for a heavily disproportionate share of fees. This “blockbuster” business model has obvious implications for our understanding of the expected returns from plaintiff-side litigation practice, the risks associated with that practice, and the impact of fee caps (especially sliding scale caps) on the economics of contingency fee practice.

We find considerable variation in the contingency fee percentages that are charged by the firms in our study. At the firms for which we have comprehensive data, the standard contracted-for fee is one-third of the gross recovery, but there is a fair degree of dispersion in actual fees, with these firms often charging a lower fee percentage in cases with smaller recoveries. In a small sample of larger recoveries, advertised by the Yellow Pages Firms, many of the reported cases have fees of forty percent or more. We find no evidence that law firms collude to charge a standard contingency fee.

When we simulate the effect of a fee cap, we find that cap design and the portfolio of cases to which the cap is applied both make a difference in the impact. However, because plaintiff-side contingency fees account for roughly one-third of the recovery, even sizeable haircuts of those fees have only a modest impact on the percentage of the recovery received by the plaintiff.

83. *Id.*

84. *Id.*

85. *Id.*

APPENDIX

TABLE A1: FIRMS WITH <250 PAID CASES

ID	Firm	No. of Years	No. of paid cases	Fee in paid cases		Gini Coefficient	Fee Concentration
				Mean	Median	All	Top 10%
1	Referral Firm-W	16	213	\$3	\$2	0.96	33%
2	Referral Firm-X	14	205	\$24	\$7	0.99	61%
3	Referral Firm-Y	15	202	\$28	\$10	0.46	54%
4	Referral Firm-Z	6	188	\$14	\$6	0.62	47%
5	Referral Firm-AA	8	167	\$6	\$4	0.63	37%
6	Referral Firm-AB	7	157	\$20	\$11	0.58	48%
7	Referral Firm-AC	18	148	\$219	\$92	0.93	43%
8	Referral Firm-AD	1	140	\$3	\$1	0.96	56%
9	Referral Firm-AE	9	138	\$18	\$8	0.70	38%
10	Referral Firm-AF	9	130	\$68	\$19	0.93	63%
11	Referral Firm-AG	N/A	126	\$5	\$2	0.89	43%
12	Referral Firm-AH	7	126	\$163	\$131	0.51	32%
13	Referral Firm-AI	17	123	\$2	\$1	0.97	45%
14	Referral Firm-AJ	21	112	\$16	\$3	0.99	79%
15	Referral Firm-AK	9	110	\$80	\$16	0.85	71%
16	Referral Firm-AL	14	101	\$9	\$6	0.67	43%
17	Referral Firm-AM	20	93	\$47	\$30	0.97	37%
18	Referral Firm-AN	4	89	\$7	\$6	0.39	29%
19	Referral Firm-AO	6	87	\$18	\$12	0.67	36%
20	Referral Firm-AP	11	78	\$3	\$2	0.91	37%
21	Referral Firm-AQ	6	71	\$19	\$13	0.99	47%
22	Referral Firm-AR	20	70	\$20	\$12	0.59	42%
23	Referral Firm-AS	4	70	\$8	\$5	0.91	48%
24	Referral Firm-AT	16	69	\$2	\$1	0.92	32%
25	Referral Firm-AU	15	62	\$28	\$20	0.79	42%
26	Referral Firm-AV	20	61	\$24	\$12	0.90	46%
27	Referral Firm-AW	9	58	\$4	\$3	0.93	21%
28	Referral Firm-AX	3	55	\$9	\$7	0.50	38%
29	Referral Firm-AY	4	53	\$9	\$5	0.48	35%
30	4th Firm	N/A	45	\$5	\$3	0.93	47%
31	Referral Firm-AZ	5	42	\$6	\$5	0.29	28%
32	Referral Firm-BA	6	36	\$9	\$8	0.45	31%
33	Referral Firm-BB	6	33	\$12	\$9	0.47	34%
34	Referral Firm-BC	10	28	\$2	\$1	0.96	30%
35	Referral Firm-BD	4	23	\$6	\$5	0.68	30%
36	Referral Firm-BE	N/A	18	\$8	\$4	0.97	44%
37	Referral Firm-BF	10	18	\$79	\$31	0.97	59%
38	Referral Firm-BG	4	18	\$7	\$2	0.88	53%
39	Referral Firm-BH	2	15	\$4	\$4	0.43	32%
40	Referral Firm-BI	4	12	\$8	\$6	0.77	42%
41	Referral Firm-BJ	2	11	\$9	\$7	0.42	35%
42	Referral Firm-BK	5	10	\$8	\$4	0.58	48%
43	Referral Firm-BL	4	8	\$56	\$56	0.32	22%
44	Referral Firm-BM	2	7	\$6	\$5	0.21	24%

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45	Referral Firm-BN	3	7	\$226	\$40	0.73	76%
46	Class Action Firm	N/A	7	\$2,121	\$1,050	0.52	44%
47	Referral Firm-BO	2	6	\$5	\$6	0.88	24%
48	Referral Firm-BP	4	5	\$156	\$191	0.40	52%
49	Referral Firm-BQ	2	5	\$2	\$3	0.96	36%
50	Referral Firm-BR	2	5	\$243	\$114	0.96	36%
51	Referral Firm-BS	2	5	\$3	\$2	0.88	42%
44 referral firms with < 5 paid cases each		N/A	73	\$37	\$34	0.99	57%

TABLE A2: YELLOW PAGES FIRMS

ID	Firm	No. of Years	No. of paid cases	Fee in paid cases		Gini Coefficient	Fee Concentration
				Mean	Median	All	Top 10%
1	Miller Weisbrod	N/A	204	\$1,030	\$626	.46	39%
2	Onstad	N/A	43	\$923	\$667	0.40	36%
3	MLD	N/A	26	\$1,275	\$769	0.52	45%
4	Krebs	N/A	12	\$613	\$550	0.27	35%

The Gini coefficient and fee concentration for the Yellow Pages firms are not directly comparable to those for the other firms we analyze in this paper, because we believe we have only large paid cases for the Yellow Pages firms.

