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Binding Statutory Early Offers by Defendants, Not Plaintiffs, in Personal Injury Suits

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BINDING STATUTORY EARLY OFFERS BY DEFENDANTS, NOT PLAINTIFFS, IN PERSONAL INJURY SUITS

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INTRODUCTION

For some time now, the senior author has advanced an alternative to the current tort system in personal injury cases, including claims of medical malpractice.[1] The alternative is defined in the following way: A defendant would have statutory power to make a binding statutorily defined "Early Offer" to pay the plaintiff's net economic losses as they accrue.[2] If a defendant makes such an offer, the plaintiff can only proceed to trial by rejecting the offer, but to recover full common law damages the plaintiff must then prove the defendant's grossly negligent misconduct beyond a reasonable doubt.[3]

When promoting this early offers alternative, the senior author has been met with misgivings about the defendant's ability to bind the plaintiff-victim in this manner. Why, one might ask, should the alleged wrongdoer be given so much unilateral power over the plaintiff's claim? A fair question. We seek here to resolve this concern by

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1. *See generally* Jeffrey O'Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims Under a Variant of the Business Judgment Rule*, 77 NOTRE DAME L. REV. 373 (2002); Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, If Second Best, Alternative to Tort Law*, 78 NEB. L. REV. 858 (1999); Jeffrey O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability*, 27 WAKE FOREST L. REV. 871 (1992); Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589 (1982) [hereinafter O'Connell, *Offers That Can't Be Refused*].

2. *See* O'Connell, *Offers That Can't Be Refused*, *supra* note 1, at 601–04.

3. Early Offers for Medical Injury Act § 3 [hereinafter Early Offers Act] (unenacted model act, on file with the DePaul Law Review) (providing that a claimant may pursue a cause of action subsequent to a valid early offer "against the health provider for injury but only if it can be proven beyond a reasonable doubt" that the provider "was guilty of wanton or intentional misconduct in causing the injury"). For the terms of other bills incorporating the early offers idea, see S. 1861, 104th Cong. (1996) (introduced by Senator Mitch McConnell (R.-Ky.); Mass. House Bill no. 5700 (May 1986) (introduced by then-Governor Michael Dukakis (D.-Mass.); H.R. 3084, 99th Cong. (1985) (introduced by then-Congressman Richard Gephardt (D.-Mo.)).

explaining how an early offers statute is like judo: it turns the plaintiffs' strengths to the advantage of defendants and to the advantage of plaintiffs when there are arguably meritorious claims.[4] An early offers law greatly reduces the wide range of possible negative bargaining outcomes for such plaintiffs, along with some favorable possibilities, and replaces them with a desirable and sensible insurance result: an immediate and binding guarantee of payment for net economic losses as they accrue. The corporate defendant's risk aversion and its capacity for self-interested calculation encourage it to remove the dispute from the risky, costly, dilatory, and wasteful world of tort claims and to earn that exit by promptly compensating plaintiffs with arguably meritorious claims for their actual economic losses.

Part II of this Article briefly describes the early offers alternative. Part III explains why the current system has not led to the desirable results that an early offers law would encourage. Part IV demonstrates that under a "reverse" early offers system—in which *plaintiffs* have the power to bind defendants with early offers to pay the plaintiffs' net economic losses—the plaintiff has little or no incentive to differentiate between arguably meritorious and clearly non-meritorious claims. Part V advances evidence put forth elsewhere that supports the admittedly controversial proposition that, even if a system existed in which binding early offers by plaintiffs entailed their incentive to distinguish between meritorious and non-meritorious claims, individual plaintiffs (even with the assistance of sophisticated counsel) cannot be expected to make this distinction as well as corporate decisionmakers. In particular, the theory goes, because corporate decisionmakers face the discipline of accountability to markets within and without their companies, and because corporations diversify their decisionmaking processes, their choices are less likely to suffer as greatly from the cognitive biases which afflict individuals, especially injured ones. Part VI iterates that when defendants make early offers, they do so to the advantage of plaintiffs over the uncertain, costly, and protracted process of demanding compensation through litigation. An early offers statute seeks to enlist the strengths of defendant-corporations in the service of legitimate plaintiff-victims.

II. Early Offers: A Brief Description and Analysis

Under an early offers statute, all disputes remain at the outset in the current tort system. The plaintiff files a claim (very often with the

4. Broadly viewed, early offers are not as zero-sum as martial arts. But for purposes of addressing the charge of prodefendant one-sidedness, the analogy fits.

help of a lawyer), presumably for economic and non-economic damages, with the lawyer exacting a contingent fee. The early offers plan thereupon gives the defendant a fixed time period (e.g., 180 days) during which it may remove the claim from the current tort system by making an early offer. The early offer amount is statutorily defined and calculated. The defendant simply offers to pay *what the statute determines*—namely, the plaintiff's net economic loss as it accrues, plus reasonable plaintiff's attorney's fees (e.g., a pre-defined presumption by statute of ten percent of the current value of the payment due). Nothing is payable for non-economic damages such as pain and suffering.

Net economic loss generally includes medical and rehabilitation expenses necessitated by the disputed injury (not already compensated by the plaintiff's own insurance),[5] and, for example, eighty percent of lost wages that cannot be avoided through mitigation.[6] If the defendant makes such an early offer to pay uncompensated economic loss, the claim exits the current tort system in one of two ways: the plaintiff either (1) accepts the offer, receives the statutorily defined compensation as losses accrue,[7] and the tort claim is settled; or (2) the plaintiff rejects the offer, thereby retaining the right to seek both economic and non-economic damages, but in order to recover must prove the defendant's wanton or intentional misconduct beyond a reasonable doubt.[8] If the defendant makes no early offer, the current system remains in place in its entirety, including the possibility of seeking all non-economic damages such as pain and suffering as well as punitive damages. In the case of seriously injured claimants with minimal net economic losses, an early offer from a defendant must be a minimum of $250,000.

An early offers law might seem at first blush to empower defendants disproportionately over the claims of plaintiffs. To some, this will smack of injustice. The defendant can unilaterally eliminate the plaintiff's ability to obtain pain and suffering damages, except in extraordinarily egregious cases; such as, in clear cases of gross negligence.

5. *See* Early Offers Act, *supra* note 3, §§ 2(h), 2(i)(1)–(2) (including medical expenses, and placing limitations on the definition of medical expenses); (j) (including rehabilitation); (n) (excluding from early offers the plaintiff's own medical insurance coverage). Payment for more than net economic loss frequently amounts to a violation of the principle of indemnity, on which the proper functioning of insurance rests. *See* Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees*, 1981 U. ILL. L. REV. 333, 344–48, 366–67.

6. Early Offers Act, *supra* note 3, §§ 2(h)(i)–(ii).

7. *Id.* § 4(a).

8. *Id.* § 3.

Since defendants would only make such offers if they lessened the expected payout, plaintiffs with arguably valid claims would seem to be made worse off from the point of view of expected payoff, whereas if the plaintiff's claim is weak, the defendant need not make an offer. That looks like a win-win for the defense. Thus, an early offers law might seem to provide defendants with a one-sided option at the plaintiff's expense.

But this zero-sum view, we contend, is inaccurate. Early offers will indeed improve the position of defendants, but by no means necessarily to the detriment of plaintiffs. The early offers plan seeks to refute the preconception that anything good for defendants is bad for plaintiffs and vice versa. True, defendants' early offers can lower plaintiffs' probability of receiving greater awards so drastically that litigation is practically pointless. But plaintiffs gain too: plaintiffs' risks are cut short along with defendants'. True, plaintiffs lose their chance at compensation for pain and suffering, but they gain by the elimination of uncertainty, delay in payment, high transaction costs, and the inevitable frustration associated with litigation. One cannot overstate the value to injured victims of the peace of mind that accompanies a guarantee of essential payment, with no significant delay, and with no costly process of prolonged and often bitter lawsuits. As an extra advantage, in an early offers world plaintiffs receive all the compensation determined by the statute, since plaintiffs' attorneys' fees are paid by the defendant *in addition* to net economic loss. Nor would it be only cases with a high probability of plaintiff success where the early offer would be made. Given the high costs when an offer is not made—duplicating collateral sources, high transaction costs on both sides, and payment for pain and suffering—the incentives to make early offers will extend to many more than just the worst cases. One leading malpractice lawyer has opined that if an early offers bill were passed, he would advise making an early offer in 200 of the 250 cases that his large multi-city office was then defending.[9]

III. The Incapacity of the Current System to Replicate the Early Offers Result

If early offers can provide so many benefits to both plaintiffs and defendants, one might ask: Why don't adverse parties now reach the early offers result on their own? After all, under present law, either party can make an offer to settle for the claimant's net economic

9. Interview with William Ginsburg, Esq., in Durham, North Carolina (Apr. 15, 1986).

loss.[10] A pertinent question, then, is why a statute is needed to encourage such settlements.

Even though, as we contend, the optimal resolution of many personal injury claims is prompt payment of a claimant's net economic loss, today neither defendants nor plaintiffs are at all inclined to make such offers. In the first place, without a statute, neither plaintiffs nor defendants can negate the right of any collateral source to subrogation.

Much more importantly, the defendant may be confident of defeating or at least wearing down claimants, given the difficulties and delays in proving a tort claim. The long delay before trial often enables defendants to bargain down even claimants clearly entitled to tort damages because they need immediate money for medical bills and wage loss.[11] Delaying procedural tactics also are used to lessen the value of the contingent fee of plaintiffs' counsel.[12] Furthermore, defendants will fear that an early offer to settle for claimants' net economic loss will be seen as a signal of weakness and simply encourage claimants and their lawyers to seek an even larger settlement than originally sought. This mirrors the position of plaintiffs and their counsel who similarly fear that an early offer to settle only for economic loss would be deemed an admission of weakness resulting in either no payment or less than that otherwise sought.[13] Thus, even if defendants were to make such an offer, claimants could be expected to reject it. Defendants also must normally sweeten any settlement offer for actual losses by at least one-third to cover claimants' legal fees, lest they come out of claimants' own pockets.[14] In addition, defense attorneys, paid by the hour with additional payment for days in court, often seek to settle cases only after a jury is sworn in so they can collect an additional fee.[15] As a result, defendants may fail to offer a prompt settlement for a claimant's net economic loss even when it is seemingly advantageous to do so.

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10. *See* FRANK A. SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE 155 (discussing the twin concepts of the claimant's "minimum ask" and the defendant's "maximum offer").

11. *See id.* at 156 (stating that defense attorneys can take advantage of "plaintiffs with low income and the uninsured . . . by using various tactics to delay the date at which the case is resolved").

12. *See id.* at 78 (indicating that "the best return on the lawyer's investment occurs if the claim settles quickly").

13. *See generally* Barry Nalebuff, *Credible Pretrial Negotiation*, 18 RAND J. ECON. 198 (1987).

14. *See* JEFFREY O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 14, 45 (1971).

15. *Id.*

Workers' compensation and auto no-fault laws have avoided these troublesome dilemmas by forcing both parties to accept the disposition of claims for only claimants' economic losses regardless of either party's fault. However, a sweeping no-fault solution seems infeasible for medical malpractice (as well as products liability) claims in light of the difficulty of defining the insured events.[16] Thus, the only way to prevent a rejection of settlements for net economic loss is to allow one party the capacity to require the other party to accept such a settlement.

IV. Plaintiffs (and Their Counsel) Lack Incentives to Distinguish Between Meritorious and Non-Meritorious Claims

Even granting that plaintiffs and defendants both gain from an early offers system, why should the defendant be the one with power to bind the plaintiff? If the plaintiff and defendant gain so much, perhaps the plaintiff should have the power to make a binding early offer for payment of net economic loss by the defendant. In that connection, let us assume something like the mirror image of the proposed early offers law: A plaintiff may offer to accept net economic loss as it accrues; if the defendant rejects the offer, the *defendant* must prove that it was non-negligent beyond a reasonable doubt. One could label this a "reverse" early offers plan.

If claimants could force defendants to settle, many claimants could be expected to make almost random claims and realistically expect to extract at least some payment from a defendant (more on this in a moment). Furthermore, any screening device to separate arguably meritorious from non-meritorious tort claims would undoubtedly be almost as cumbersome as the present system. In fact, such screenings are already a large part of the present system, with motions to dismiss supposedly unmeritorious claims commonplace; nevertheless, the tide of tort litigation rolls along.[17]

To pursue why a "reverse" early offers plan would not work, note that plaintiffs and their counsel would simply lack sufficient incentives to weed out frivolous or non-meritorious claims under such a plan. Of course, potential plaintiffs and counsel want to maximize compensation (just as defendants want to minimize it). As the recipient of compensation, a plaintiff cannot be expected to act against self-interest by

16. O'Connell, *Offers That Can't Be Refused, supra* note 1, at 597 n.42.

17. For an example of a statutory screening device in medical malpractice cases, see Ind. Code Ann. § 34-18-1 *et seq.* (Michie 1973).

declaring the claim to be non-meritorious. In a system in which plaintiffs may unilaterally bind defendants, the predominant safeguard against frivolous claims would only be claimants' honor.[18] Defendants' treasuries would be largely left ajar.

Imagine a patient with an ear infection that has grown steadily worse. The patient has incurred considerable costs in treatment and has run short of funds. The patient knows that by making an early offer to the treating physician, a distinct likelihood of payment for net economic loss arises. What incentive do such patients have to ask themselves hard questions about such a claim? Did the treatment cause the condition to worsen? Was the treatment negligent? In other words, how much merit under substantive tort law does this claim have? The patient with the ear infection has little or no reason to probe any of these questions. Unlike defendants, individual plaintiffs have an incentive to be thoroughly satisfied when their own frivolous or meritless claims are paid. The power to bind a defendant unilaterally would create a perverse incentive to exploit the system with marginal claims or worse.

Even if defendants as the entity making payment normally want to pay the smallest amount feasible, the early offers law constrains defendants' ability to make unfair "low-ball" offers.[19] The defendant must make the minimum payment required (net economic loss) in order to forestall the plaintiff's further pursuit of a claim. When confronted with particularly meritless claims, defendants will desire to pay nothing and will make no offer—as they should. But when faced with arguably meritorious claims, they will minimize their risk by testing whether making the statutorily defined early offer involves less exposure than a full scale tort suit with all its uncertainty and transaction costs. The defendant alone must distinguish carefully between arguably meritorious and clearly non-meritorious claims as a way of reducing costs by prompt payment of the specified benefits.

As another rationale for placing the responsibility for the early offer in the hands of the defendant, note that the defendant has greater access to information regarding liability. Plaintiffs (and their attorneys) have an adverse outcome they can cite but they are often fishing for whatever fault existed, perhaps especially in medical malpractice cases. Defendants, however, have full and ready access to the records and to the individuals that allegedly engaged in the substandard prac-

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18. In my opinion, screening devices are limited in their effectiveness and largely preserve the current fault-based system.

19. *See* Early Offers Act, *supra* note 3, § 3.

tice. They are better positioned to make a relatively quick assessment of the value of the claim.

From another perspective, placing the early offer in defendants' hands also makes sense because the ball is after all in the defendants' "court." They are expected to "return serve" anyway, so an early offer by defendants seems a natural progression in the adjudication process.[20]

V. Are Corporate Defendants Less Affected by Cognitive Biases than Individual Claimants and Their Counsel?

Under an admittedly more controversial theory, consider the following: Arguably plaintiffs should not be granted unilateral power to bind because, even if they did have an incentive to ferret out non-meritorious claims, they cannot be expected to calculate the costs versus the benefits of paying claims nearly as well as defendant insurance companies. Claimants' *capacity* to calculate the costs and benefits of paying early offer claims is not anywhere equal to that of defendants.

Psychologists and behavioral economists claim that individuals fall prey to certain cognitive biases in their judgment.[21] These biases affect people non-uniformly.[22] They vary across cultures, educational groups, and gender, and from person to person.[23] But even so, a corporate entity probably suffers less from emotional cognitive biases than individual plaintiffs (and even their lawyers). Insurance companies as a group tend to be less quixotic in their reasoning than idiosyncratic tort victims. Their decisionmaking is diversified among many experienced hands. Overlapping decisionmaking in business tends to discipline every link in the chain of command for mistakes that diminish company value.[24] Companies are thereby institutionally better suited to overcoming biases in judgment than already anguished tort victims, with no recourse to others besides their own lawyers (more on the role of plaintiffs' lawyers in a moment).

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20. For these last two points in the text concerned with the appropriateness of putting the initiative on defendants, I am grateful to Tom Hafemesiter of the Institute of Law, Psychiatry and Public Policy at the University of Virginia (although he is not responsible for the thrust of this whole Article).

21. *See* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 Geo. L.J. 67, 82 (2002).

22. *See id.* at 86–87.

23. *Id.* at 87.

24. *See* Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. Pol. Econ. 288, 289, 292–96 (1980).

Gregory Mitchell, Assistant Professor of Law and Psychology at Florida State University, observes that "[r]esearch from psychology and behavioral economics studies reveals that human judgment and decisionmaking necessarily rely on imperfect psychological mechanisms that cause systematic departures from rationality."[25] Professor Mitchell concludes that "individuals differ greatly in their propensities to act rationally and that situations differ greatly in their propensities to elicit rational behavior from individuals."[26] From individuals, he argues, one can by no means expect stable and predictable rationality.[27] Variations in rationality are individual and situational: People differ from each other, and the same person reasons differently in alternative situations.[28] Mitchell focuses on the importance of both emotions and accountability.

Perhaps the most important individual variations for tort settlements are differences in emotions. Any given person's judgment diverges depending on one's emotional (read "affective") state:[29] "As one's affective state changes, so may the nature of one's cognitive processing and goals; conversely, the decisions one makes may have profound effects on one's own affective state."[30] Psychologists associate "negative mood states" with inducement of systematic and data-driven thinking.[31] Positive moods, on the other hand, induce heuristic[32] or theory-driven reasoning.[33] One would expect the bargaining posture of both positive and negative feelings on the part of plaintiffs in, say, medical malpractice situations to vary. An overly optimistic plaintiff[34] might rely on a heuristic in which injured people are more likely to win than they really are, and insist on proceeding to the jury rather than settling.[35] Others with claims of similar merit will not so decide, and the disparity will contribute to divergent results.

25. Mitchell, *supra* note 21, at 70–71 (2002).

26. *Id.* at 73.

27. *Id.* at 75–76.

28. *Id.*

29. *Id.* at 73, 98–101.

30. *Id.* at 99.

31. Mitchell, *supra* note 21, at 100.

32. "Heuristic" refers to a problem-solving technique ingrained by early experience that does not give rigorously accurate results. It entails matters resistant to proof, needing further empirical research. *See* Jeffrey O'Connell & Joseph R. Baldwin, *(In)Juries, (In)Justice, and (Il)Legal Blame: Tort Law as Melodrama—or Is It Farce?*, 50 UCLA L. REV. 425, 433 n.42 (2002) (citing NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 45–49 (2000)).

33. Mitchell, *supra* note 21, at 100.

34. *Id.* at 101 (noting that positive moods tend to increase an individual's optimism).

35. However, if tort claims can be likened to betting, they may make plaintiffs *more* risk averse. *Id.* at 101. Professor Mitchell states that "[t]he general effect of positive mood on peo-

Negative-feeling people naturally tend to be pessimistic.[36] A negatively disposed person might well settle early for less than is deserved. Particularly strong emotions—which could be expected in the highly charged atmosphere of malpractice claims—can overwhelm people and make them feel that they are prone to act against their interests.[37] It is not difficult to imagine an upset malpractice claimant "damning the torpedoes." Emotions play so prominent a role in settlement negotiations that Vanderbilt University Law School Professor Chris Guthrie argues that many plaintiffs negotiate partially to avoid feelings of regret, rather than solely to maximize expected value.[38] Important also is that the plaintiff will normally have only one serious tort claim in a lifetime, whereas defense personnel will deal with many.[39] Although insurance company decisionmakers are human too, their "skin is not in the game" the way a plaintiff's is, and they are highly likely to be less emotional about paying than victims are about being paid. Although Professor Mitchell limits the scope of his article to individuals, it stands to reason that aggregates of persons with different temperaments—as one would expect in the corporate decisionmaking context—would dilute the influence of any single person's idiosyncratic emotions. All in all, it seems reasonable to propose that a team of insurance company decisionmakers suffer less from emotional distortions in judgment than an individual injured tort victim.

Keep in mind in this connection that personal injury lawyers often practice without partners or with comparatively few of them.[40] Thus,

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ple's betting is to decrease their willingness to bet in situations where potential losses are great." *Id.* (citing Thomas E. Nygren et al., *The Influence of Positive Affect on the Decision Rule in Risk Situations: Focus on Outcome (and Especially Avoidance of Loss) Rather than Probability*, 66 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 59, 69 (1996)).

36. Mitchell, *supra* note 21, at 101 ("[Overall,] a person in a negative mood is more likely to evaluate ambiguous evidence negatively and draw more negative inferences than a person in a positive mood.").

37. *Id.* at 102 ("Intense emotions may even substantially disrupt ordinary cognitive processes to the point at which people feel as if they have lost control of themselves and are simply being driven by prevailing emotional states even against their own self-interest.").

38. *Id.* at 103–04 (citing Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation*, 1999 U. ILL. L. REV. 43, 44–45).

39. SLOAN ET AL., *supra* note 10, at 215 (analyzing the problems in "a market dominated by one-time claimants").

40. *See* Ted Schneyer, *Empirical Research with a Policy Payoff: Market Dynamics for Lawyers Who Represent Plaintiffs for a Contingent Fee*, 80 TEX. L. REV. 1829, 1833 (2002). Schneyer notes:

> For lawyers specializing in plaintiff's work, the financial risk is especially acute. As Daniels and Martin point out, plaintiff's lawyers represent clients who are unlikely to bring them other kinds of business in the event of a downturn in contingent-fee work. Moreover, most specialists in the field—eighty-one percent of the lawyers Daniels and Martin surveyed—are sole practitioners or practice in very small firms.

even if a lawyer representing a tort victim client was less emotionally involved than the client, the lawyer and the client are still only usually two people (or at least very few), far less than one would expect to work on significant claims in an insurance company claims department. The lawyer and client together, while better than just the client alone, are probably less emotionally diversified than corporate decisionmakers.

Further, it would be unwise to be sanguine about the plaintiff's lawyer's dispassion or to overestimate counsel's ability to influence an upset plaintiff. In his book recounting his career as a personal injury lawyer, for example, then-Senator from North Carolina, John Edwards went to great length to explain how he became highly emotionally invested in his clients' cases.[41]

It is hard to imagine the claims departments of Aetna, Allstate, or St. Paul's allowing themselves to become so personally involved with any particular claim. On balance, then, plaintiffs' lawyers are likely to be more emotional about medical malpractice and other personal injury cases they work on than insurance company personnel working on the same claims. This is not to deny that lawyers are often crucial

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Id. See also id. at 1833 n.29 ("Similarly, a 1995 survey of a random sample of the members of the Association of Trial Lawyers of America (ATLA) revealed that two-thirds of plaintiffs' lawyers practiced in firms comprised of five or fewer lawyers." (citing Mark Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 470–71 (1998))).

41. Throughout his book, John Edwards writes about his emotional involvement in his trials. For example, he describes how terrified and scared he felt when one client completely entrusted his case to Edwards's judgment. JOHN EDWARDS & JOHN AUCHARD, FOUR TRIALS 6–7, 21 (2004). Edwards describes one lawsuit as his "calling." *Id.* at 16. He notes that, at least for him, "these [personal injury legal] battles are never really abstract." *Id.* at 27. When defense lawyers attacked one of his clients in closing arguments, it was personally "*infuriating* to" Edwards. *Id.* at 47. A lawsuit between Edwards's client and a hospital is characterized as a struggle between David and Goliath. *Id.* at 83, 85. When a judge reduced a multi-million dollar medical malpractice verdict, Edwards was as angry as he had ever been "in [his] entire life." *Id.* at 112. Many other plaintiffs' lawyers exhibit similar passionate emotionalism. For example, Jacob Fuchsberg, a renowned plaintiffs' lawyer before becoming a judge, once said:

> When you say a [person] is objective, you are not describing a good lawyer. When a case is about to come to trial, I'm hard to settle with, because I've come to know the *people*, not just the file. There may have been an estimate of what the case was worth—which I concurred in superficially—but now I know the *people*.

JEFFREY O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN 147 (1979). Another one-time leading plaintiffs' lawyer, Alfred Julien, used to visit his clients' homes, eat dinner with them, and become their friends. Julien had done so, in the words of colleague Norman Sheresky, "simply so that he can feel closer to them and . . . more immersed in their causes. The deeper the relationship he develops the easier it seems for him, he believes, to communicate with the jury." *Id.*

in effectuating settlements (they are),[42] nor that lawyers are different than clients (they are); it is only to say that defendant insurance companies probably suffer less from emotional cognitive biases than highly emotionally invested personal injury attorneys. Ultimately, the buck stops with clients, anyway. The people making the final decisions are not the supposedly more cool-headed lawyers but the (often) upset claimants to whose decisions lawyers are ethically bound to defer.

Professor Mitchell also points out that accountability can greatly affect decisionmakers: "The situational variable with perhaps the most far-reaching effects on judgment and decisionmaking behavior . . . is the degree to which a decisionmaker is held accountable for his or her decisions. Accountable and unaccountable decisionmakers often act differently."[43] This is not to say that accountability is a panacea for cognitive biases or that all people react the same way to every type of accountability; however, in some situations, accountability ameliorates cognitive biases by encouraging self-criticism and reexamination.[44]

Individual tort plaintiffs can look only to themselves, but corporate (and therefore insurance company) employees at every level are disciplined by the market appraising their services. Since intra- and inter-company markets hold insurance company employees accountable, these markets discipline insurance company decisionmakers and reduce the effect of their cognitive biases by inducing self-criticism and reexamination. They have at least the possibility of mitigating some biases and improving their performance in appraising the value of claims. But plaintiffs are not held responsible to any outside competition and lack even the possibility of this type of judgment-enhancing accountability. If plaintiffs fail to appraise the true value of their claims, no competitive market for plaintiffs exists to hold a plaintiff accountable.

Even if accountability does not significantly correct the biases of any given insurance company employee on any given claim, a corporate decisionmaker who routinely fails can still be *replaced* with someone more successful. Indeed, whole companies that fail to see the difference between strong and weak tort claims can be driven out of business by superior competition. Because personal injury claims generally cannot be sold (except to the defendant), any failure of plaintiffs, no matter how egregious, to appraise the value of their claims

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42. *See generally* Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77 (1997).

43. Mitchell, *supra* note 21, at 110.

44. *Id.* at 111–12.

can never result in the substitution of a new and more successful decisionmaker. Again, plaintiffs are accountable only to themselves, which means, in effect, plaintiffs are not technically accountable at all.[45]

Nor does the assistance of a lawyer sufficiently counterbalance the plaintiff's lack of accountability, which in fact seems to underscore another problem with plaintiffs' capacity to appraise their claims. The plain fact is plaintiffs' attorneys also are not all that accountable to outside markets or, realistically, even to their clients.[46] True, plaintiffs generally have the legal right to dismiss their lawyers.[47] But the average plaintiff is scarcely in a position to monitor and control the more knowledgeable lawyer. This releases the lawyer, as well, from much outside accountability. Consider, for example, the almost complete lack of disciplinary actions by'bar associations against personal injury lawyers despite formidable evidence of unfair practices.[48] Much is also made of the conflicts of interest between personal injury lawyers and their clients, which can lead to an attorney to push for "the brass ring," as opposed to accepting a certain and adequate settlement, or, conversely, settling contrary to the client's interests in order to spend much less time on the case and thereby receive a much higher per hour return.[49] Markets do not appear to subject such lawyers to much discipline because the market for personal injury lawyers (unlike the market for insurance company decisionmakers) is simply not price competitive.[50] Because, then, insurance companies, in contrast, *are* disciplined by market competition, they are strongly inclined to correct inaccurate biases or suffer punishment through competition. But plaintiffs, answering to no one but themselves for their cognitive bi-

45. *See* Mitchell, *supra* note 21, at 110 (noting that "[a]ccountability within the context of judgment and choice refers to the implicit or explicit expectation that one may be called on to justify one's beliefs, feelings, and actions to others" (citing Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effect of Accountability*, 125 PSYCHOL. BULL. 255, 255 (1999)). This definition of accountability does not contemplate accountability to oneself. One could point to a breadwinner/claimant's accountability to his/her dependents but it is scarcely comparatively enforceable.

46. *See* O'CONNELL, *supra* note 14, at 43–47. *See also supra* notes 43–44 and accompanying text (observing that lawyers are rarely disciplined for their misconduct, and that the market for contingent fee-financed litigation is not price competitive).

47. *See, e.g., In re* Lydig's Will, 187 N.E. 298, 298 (1933) ("A client has an absolute right to discharge his attorney with or without cause at any time . . . .").

48. *See* Lester Brickman, *Contingency Fee Abuses, Ethical Mandates and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339, 1357 (1996).

49. *See* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price-Competitive?*, 25 CARDOZO L. REV. 65, 84 (2003).

50. *Id.*

ases, are comparatively ill-equipped to make utility-maximizing decisions through outside accountability.

Note also that plaintiffs and their lawyers are under little if any constraint to moderate their claims for more than adequate payment, whereas insurance company personnel are in general under some constraints to moderate their desire for less than adequate payment: Unlike claimants and their lawyers, for insurance personnel earning the good will of the public is a factor (admittedly diluted by other considerations) in their claim practices. In other words, claimants and their lawyers have no comparable incentive to win anyone's good will by their restraint.

Also, insurance companies in every state are subject to regulatory discipline for clearly improper behavior.[51] Since that discipline is by no means always forthcoming, no outside regulatory control exists for claimants and rarely, if ever, for their lawyers given the massive reluctance of either judges or bar associations to exert any discipline.

VI. Conclusion

If one assumes that prompt, periodic payment of an injured claimants' net economic loss is generally optimal, then early offers statutes properly allocate responsibility for making early offers to defendants in malpractice and other personal injury claims. As previously noted, defendants are normally companies that insure providers of goods and services. They desire to maximize the value of their companies. The early offers alternative extends to insurers an opportunity to maximize their value by resolving claims before they reach expensive, uncertain, and lengthy litigation. The price for avoiding the tort system is to pay plaintiffs immediately for their net economic loss as it accrues—which is a huge improvement for plaintiffs as a class over the current uncertainty, delay, and transaction costs. In the end, plaintiffs and defendants can both share the gains from exiting the current tort system.

In sum, the parties best suited to calculate the costs and benefits of making statutorily defined early offers are corporate defendants. Defendants alone have sufficient incentive to distinguish meritorious from non-meritorious claims. In addition, corporate entities probably suffer less than injured tort victims from cognitive biases. By relying on corporations—constrained by the statutory requirements of the early offers plan—to compute the crucial calculations, in the aggregate and for a huge majority of individual complaints, both sides benefit.

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51. Robert E. Keeton & Alan I. Widiss, Insurance Law 938–39 (1988).