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Assistant Secretary for Planning and Evaluation
Office of Disability, Aging and Long-Term Care Policy



EVALUATION OF EARLY OFFER REFORM OF MEDICAL MALPRACTICE CLAIMS:

FINAL REPORT

June 2006

Office of the Assistant Secretary for Planning and Evaluation

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I. EXECUTIVE SUMMARY

Many observers have concluded that the medical malpractice litigation system needs improvement. Medical malpractice cases are extremely complicated, requiring proof of injury, proof of the health care provider's fault, and determination of economic and noneconomic damages. Some claimants who are injured through medical error receive significant awards or settlements, but often after long delay. In addition, the current system entails transaction costs, so that substantial shares of the medical malpractice insurance premium dollars go for litigation expenses and insurer overhead. Although many states have enacted medical malpractice litigation system reforms, such as caps on the amount of noneconomic damages, other reforms may have a more fundamental effect on medical malpractice litigation than these reforms. This report analyzes one specific alternative proposal, referred to as "early offers," by assessing its performance using a database of actual malpractice claims.

Early offers provide a structured process for resolving medical malpractice cases shortly after they have been filed. If the defense chooses to do so, it may make a statutorily-defined financial offer, which the claimant can accept or reject. To comply with the early offer statute, the offer must completely cover the claimant's economic damages plus appropriate attorneys' fees. If the offer is rejected, the claimant's burden of proof at any subsequent trial is increased. If the defense does not make an offer, the current system applies.

The basic goal of the early offer approach is to improve the performance of the system. For claimants, the advantage of the approach is that if they accept the offer, they are assured of compensation for their economic damages within six months after filing a claim, instead of the approximately 2-3 years that cases now require. For insurers and providers, if the offer is accepted, the damages amount paid is generally less than under the present tort system. Litigation expenses will be less, both for plaintiffs and defendants. There is also more predictable and prompter compensation for claimants' attorneys than the current system provides. For claimants, defendants, and insurers, the early offer proposal reduces the uncertainty associated with the outcome of a prolonged litigation.

The analysis presented in this report indicates that early offers are likely to generate significant insurer savings through reduced payments for noneconomic damages. It will also reduce attorneys' fees for both parties. Other things being equal, these savings could allow insurers to reduce premiums for malpractice insurance, thus enabling health care providers to reduce their fees. Ultimately, consumers, employers, and governments could benefit from reduced health insurance premiums and the reduced cost of care.

Data

This report uses medical malpractice data on closed claims from Texas and Florida to assess the performance of the early offer proposal. The primary analyses use the data provided by the Texas Department of Insurance because of their greater comprehensiveness. The report uses malpractice data from Florida data to impute data not included, or with incomplete information, in the Texas files. The Texas data are from the time period 1988-2002, before Texas modified its medical malpractice law in 2003, which significantly limited the award of noneconomic damages. Thus the data reflect the potential operation of an early offer law in a state without caps on noneconomic damages.

The Texas data involve all claims that were closed for an award or settlement greater than \$10,000. The Texas data document that most claims are settled, with fewer than 1 percent of the settlements or awards the result of trial verdicts. The distribution of closed claims is highly skewed. One percent of the claims involve awards or settlements greater than \$5 million, and 10 percent are greater than \$1 million, but 38 percent of the awards or settlements are between \$10,000 and \$100,000. The median closed claim has a settlement amount or court award of \$156,707. Thirty-three percent of the closed claims involve the death of the victim and an additional 14 percent involve serious nonfatal injuries. Twenty-one percent involve children under age 18.

The average, as opposed to the median, claim involves a settlement or award of \$458,000, of which 28 percent is allocated for economic loss. Only 3 percent of cases involve exemplary damages, with the average settlement or award in those cases being \$1,190,000, of which 21 percent is for economic loss. Another 4 percent of cases involve a settlement or award of \$404,000, but no economic loss. The vast majority of cases (97 percent) do not involve exemplary damages, with an average settlement or award of \$434,000 and an estimated economic loss of \$124,000 (28 percent of the settlement or award). The settlement or award includes claimant's attorney fees, normally set at one-third of any payment.

Methodology

The early offer proposal is a legal reform approach designed to provide prompt coverage of claimants' economic losses and to reduce litigation costs.¹ Under the early offer proposal for medical malpractice claims, within 180 days after a claim is filed, liability insurers for health care providers (hereafter referred to as insurers and providers) may offer claimants a payment equal to the claimant's net economic loss (i.e., the loss beyond any other insurance applicable to the claim), plus reasonable legal fees, but nothing for pain and suffering damages. If the claimant does not accept this offer, the claimant can proceed with a normal tort claim for both economic and

¹ This theoretical model differs in several key ways from the U.S. Department of Health and Human Services (HHS) early offer pilot program, which attempts on a voluntary basis to promptly resolve claims that have been submitted to HHS for alleged medical malpractice by its employees or at HHS-sponsored community health centers.

noneconomic damages, but the legal standards of both the burden of proof and level of misconduct applied to the claim would be raised, and the claimant would have to prove the defendant's gross negligence beyond a reasonable doubt.

Insurers would decide whether to make an early offer by comparing the cost of the early offer to their expected cost under normal tort rules if the claim is not settled under the early offer proposal. This expected cost would equal the net economic damages (medical expense and wage loss but, as stated, not pain and suffering) plus an allowable payment of the claimant's lawyers, which as an illustrative calculation is presumed to be 10 percent of the value of the early offer. That is, the insurer will make an offer if the expected liability and litigation costs if the claim is not settled under the early offer proposal are greater than the net economic damages and allowable claimant's legal fees.

Thus, the insurer will make an early offer when the amount of the early offer is less than the insurer's expected exposure from a full-scale tort claim. This formulation assumes that insurers act in a rational economic manner, are risk-neutral, and value payoffs according to their expected value. This report emphasizes the amounts that would be saved by insurers by making early offers, since such savings are a prerequisite to making early offers. But savings to insurers do not necessarily imply losses to claimants of an identical magnitude. Some of the savings are in terms of lowered transactions costs, such as attorneys' fees, which will be reduced. Although claimants lose their normal recourse to full-scale tort litigation, such litigation has inherent uncertainties, delays, and transaction costs, as well as legal fees, which are deducted from any payment. Under the early offer proposal, claimants lose any rights only after they are guaranteed prompt payment of medical expenses and wage losses, plus reasonable attorney's fees.

Calculation of potential savings from the early offer reform requires a reference point for the computations. Three different points are possible using the Texas data: the insurer's initial reserve set aside for payment of the claim, its final reserve, and the ultimate settlement or award. Both initial and final reserves include estimated defense attorneys' fees, but the final reserve may be the most useful reference point because it is calculated at a point when more is known about the actual settlement or award and about actual defense attorneys' fees. However, the savings computed from this reference point involves several key assumptions. Most notably, we must assume that the defense correctly estimates the expected value of the claim, and that the claimant accepts the early offer if one is made. An alternative reference point is the initial reserve. This measure proved to be less useful in the analyses, as many insurers typically underestimate this amount, thus making an early offer less likely.

Results

If the final reserve is the appropriate reference point for computing savings, the early offer reform could generate substantial savings. For those claims for which an

early offer is desirable, the average insurer savings are \$550,000 if based on the final reserve. Overall, insurers would find it desirable to make an early offer in 97 percent of the cases.

This report contains additional information on the early offer reform, including the likely impacts by type of injury (fatality, serious injury, etc.), and by whether deductions for collateral sources are included. If economic damages are reduced by deductions for other insurance, the results will be similar. The report also explores the effect of setting minimum amounts for cases of serious injury or death. A minimum of, say, \$250,000 would often result in higher payments to the claimant if the offer were accepted than under the basic early offer computations. However, the higher the minimum offer, the less likely the insurer would be to make an offer, therefore reducing the savings from the reform.

Conclusion

Based on the assumptions used in this report, the early offer reform could lead to insurer savings and speedy resolution of many cases if it were adopted. The main benefit to the claimant of the early offer reform is that if an offer is made and accepted, the claimant receives assurance of payment that covers their economic damages approximately six months after the claim is filed. For the average case, payment will be received approximately two years sooner than under the current system.

The disadvantage to the claimant of accepting the early offer is that the possibility of receiving noneconomic damages is eliminated. Since noneconomic damages often involve greater sums than economic damages, this loss is significant. In about 3 percent of the cases, the possibility of punitive plus noneconomic damages remains more likely if the offer is rejected and the claimant wins a verdict, but victory would not be assured since the burden of proof would be greater than it is now.

Insurers would only make offers in cases where the expected value of the outcome would result in savings. However, no offer for less than the amount of economic damages, plus appropriate attorney's fees, would gain the advantages of an early offer under the statute.

The extent to which these savings would be passed on through lower malpractice insurance premiums is unknown. However, assuming a competitive marketplace, one would expect that to happen.

2. THE EARLY OFFER PROPOSAL

The early offer proposal is a legal reform approach designed to provide prompt coverage of claimants' economic losses and to reduce litigation costs. Under the early offer proposal for medical malpractice claims, within 180 days after a claim is filed, liability insurers for health care providers, who hereafter will be referred to as insurers and providers, may offer claimants a payment equal to the claimant's net economic loss (i.e., the loss beyond any other insurance applicable to the claim) plus reasonable legal fees. If the claimant does not accept this offer, the injured victim can proceed with a normal tort claim for both economic and noneconomic damages, but the legal standards of both the burden of proof and level of misconduct applied to the claim would be raised, and the claimant would have to prove gross negligence beyond a reasonable doubt.

Insurers would decide whether to make an early offer by comparing the cost of the early offer to their expected cost under normal tort rules if the claim is not settled under the early offer proposal; this expected cost would equal the net economic damages (medical expense and wage loss but not pain and suffering) plus an allowable payment of the claimant's lawyers, which as an illustrative calculation is presumed to be 10 percent of the value of the early offer. That is, the insurer will make an offer if:

Expected liability and litigation costs if the claim is not settled under the early offer proposal > Net economic damages + allowable claimant's legal fees.

Thus, in keeping with an assumption that insurers act in a rational economic manner, the insurer will make an early offer when the amount of the early offer is less than the insurer's expected exposure from a full-scale tort claim. Note that this formulation assumes that insurers are risk-neutral. Throughout this report we emphasize the amounts that would be saved by insurers by making early offers, since such savings are a prerequisite to making early offers. But savings to insurers do not necessarily imply losses to claimants of an identical magnitude. Some of the savings are in terms of lowered transactions costs, as attorneys' fees will be reduced. Although claimants lose their normal recourse to full-scale tort litigation, such litigation has inherent uncertainties, delays, and transaction costs imposed on the plaintiffs, wholly apart from the legal fees. In addition, under the early offer proposal, plaintiffs lose any rights only after they are guaranteed prompt payment of medical expenses and wage losses, plus reasonable attorney's fees.

Early offer proposals can differ in several key points: the percentage share of the award allocated for the claimant's legal expenses, the existence of an offset for collateral insurance payments, and the presence of a minimum payment level for different classes of injuries. In this report, we examine a base case early offer proposal and explore some representative sensitivity analyses, recognizing that our analysis does not exhaust all potentially attractive variants of the early offer approach.

This report uses Texas and Florida medical malpractice data on closed claims to assess the performance of the early offer proposal. The primary analyses use the Texas data because of their greater comprehensiveness, but we also use the Florida data to impute data not included, or with incomplete information, in the Texas files. The Texas data are from the time period 1988-2002, before Texas modified its medical malpractice law in 2003 by, among other things, limiting noneconomic damages to \$500,000. The effect of such modifications on post-2002 Texas cases is beyond the review of this study. Note too the data used herein is based on the final award or settlement actually paid, whether by settlement, trial, or appellate decision.

We structure the empirical analysis by considering issues in the following order. First, we describe the calculation of the components of the early offer proposal: namely, the insurer's reserve set aside to pay the claim, as calculated both early and later in the claims process; actual settlement amounts and court awards; and claimant's economic losses. We then calculate both the number of cases for which an early offer is attractive to the insurer as well as the average insurer savings if an early offer were in fact made and accepted. We perform the calculations by analyzing the data in two ways: by injury type (e.g., fatality or serious injury), and by type of damages (e.g., whether exemplary damages were reported, whether only noneconomic damages were reported, and whether both noneconomic and economic), but not exemplary, damages were reported, which is the more typical situation. The empirical assessment also examines alternative assumptions to include the effect of: (a) \$100,000, (b) \$250,000, or (c) \$500,000 minimum payment amounts for deaths and serious injuries, and the effect of including offsetting collateral sources in determining net economic damages as part of the early offer. We also calculate how much time is saved if an early offer is made and accepted for each of these alternative specifications. In addition, we examine the effect on litigation cost savings, which consist mostly of attorneys' fees, for both claimants and insurers.

Note that throughout this report, all dollar values are adjusted to 2002 dollars using the Consumer Price Index for All Urban Consumers. In addition, Appendix A provides additional selected descriptive characteristics of the Texas Closed Claim sample, including information on the distribution of total settlements or court awards, while Appendix B provides detailed information on construction of variables from the Texas data.²

² Note also that we use standard statistical terms throughout this report. For convenience, the definitions of these terms are as follows: The sample mean, also called the average, is calculated by summing the data values and dividing by the total number of data values. Percentiles are values that indicate how many data values are below and how many are above the given percentile value. For example, 30 percent of the data values lie below the 30th percentile, and 70 percent of the data values lie above the 30th percentile. The median, which is equivalent to the 50th percentile, is the value at which half the data values are larger than the median and half are smaller than the median. The standard deviation is a measure of "dispersion" of the data values, which will be discussed in the second paragraph of the text below concerning Panel C of Table 1. The formula for standard deviation can be found in any basic statistics book.

3. EARLY OFFERS AND THE MEDICAL MALPRACTICE CONTEXT

3A. The Medical Malpractice Context

Numbered Item i and Item ii below present some of the main criticisms of current medical malpractice law.³ We do not purport to establish the validity of these criticisms, but we review them here to identify both the impetus for reform proposals as well as the role that the early offer proposal discussed herein can play in addressing these criticisms. Numbered Items iii-xi below relate the early offer proposal studied in this report to the medical malpractice reform debate. Sections 4-8 of the report then present the financial effects of such a reform.

i. Many observers view the current system of tort liability for personal injury as unworkable and in need of fundamental reform. Under the current system, a claimant must prove two difficult elements: the defendant's fault, and the financial value of noneconomic damages, mostly for pain and suffering. In medical malpractice cases, determining fault is often especially complex, given the intricacies of medical decision contexts and the probabilistic consequences of medical interventions and their interaction with underlying patient characteristics. As a result, the system is subject to uncertainties that allow many injured patients to receive little or nothing while comparably injured others are paid much more than their economic losses. One earlier finding indicated that only 28 cents of the medical malpractice premium reaches claimants, and of that, only 12.5 cents goes to compensate for the actual expenses incurred by patients, with the rest going to legal fees, insurance overhead, and the like.⁴ All this uncertainty in turn generates substantial transaction costs (mostly legal fees on both sides, documented in this report) and long delays in any payment that is made (often up to 2-3 years, as we show). In the end, the liability insurance system does not result in prompt payment to many needy victims; rather, it is a system of prolonged, unpredictable, expensive fights over whether claimants are deserving and/or what payment they deserve--a system that may operate to the detriment of health care professionals and seriously injured patients.

ii. The present system of tort liability insurance for medical injuries may lead to the anomalous result of providing the least protection to those who need it most: seriously

³ For a brief presentation of the inadequacies of current medical malpractice law, see Jeffrey O'Connell & Andrew S. Boutros, *Treating Medical Malpractice Claims Under A Variant of the Business Judgment Rule*, 77 *Notr. D. L. Rev.* 373, 374-83 (2002). Two recent works, while purporting to rebut criticisms of medical malpractice law, nonetheless acknowledge its inadequacies in proposing substantial reforms, in the first instance even proposing a variant of early offers to reduce exposure to pain and suffering damages. See David A. Hyman and Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?* 90 *Cornell L. Rev.* 893, 986-87, 992 (2005); Tom Baker, *The Medical Malpractice Myth* 90, 163-64; 172-74 (2005).

⁴ Jeffrey O'Connell, *An Alternative to Abandoning Tort Liability* 60 *Minn. L. R.* 501 506-09 (1976).

injured parties whose medical expenses and wage losses exceed any applicable private or public insurance coverage. The present legal system in effect tells patients that they may be paid something, but only years from now and only after paying any recovery lawyers' fees of 30 percent or higher.

The tort system imposes far fewer risks on the various medical malpractice liability participants who are not seriously injured victims. Health care providers typically have protection through their liability insurance coverage, and their insurers are protected by their risk-spreading, strengthened by actuarial calculations. Defense lawyers are paid, win or lose. Claimants' lawyers have little incentive to take a case unless they are confident it is likely to lead to an expected payment in excess of their expenses and opportunity costs. Even if the risk of nonpayment for any given claim is high, the claimant's lawyer can minimize this risk by taking multiple cases to assure portfolio diversification, a form of protection denied to the seriously injured victim, who normally will have only one such claim in a lifetime. Finally, the less seriously injured are protected more by the very fact of their lesser losses which may, in turn, be covered by their own health insurance or sick leave.

iii. The early offer reform addresses the main shortcomings of the current system. Before considering the benefits of early offers, it is useful to review their structure. Under such an approach, a defendant has the option (not the obligation) to offer an injured patient, within 180 days after a claim is filed, periodic payment of the claimant's net economic losses as they accrue.⁵ Economic losses under an early offer statute must cover medical expenses, including rehabilitation plus lost wages, to the extent that all such costs are not already covered by other insurance ("collateral sources"), plus an additional 10 percent attorney's fee. Therefore, a defendant cannot make a lesser or "low ball" offer and still be covered by the statute. Nor is there any need for a court to determine whether the early offer is fair. The early offer statute defines the fairness of the offer, similar to a workers' compensation statute for workplace accidents.

If an early offer is made and accepted, that, of course, settles the claim. If the defendant decides not to make an early offer, the injured patient can proceed with a normal tort claim for medical expense and wage loss plus pain and suffering. Alternatively, if the claimant declines an early offer in favor of litigation: (1) the standard of proof of misconduct is raised, allowing payment only where "gross negligence" is proven; and (2) the standard of proof is also raised, requiring proof of such misconduct beyond a reasonable doubt (or at least by clear and convincing evidence).

iv. Consider a typical case to illustrate how the early offer law would work. A patient has been injured in the course of treatment. If the patient wins in court, she would be

⁵ For purposes of our analysis, we assume that periodic payments have the same present value as the net economic loss. Admittedly, periodic versus lump-sum payment can pose its own problems when claimants have medical expenses and other burdens that are not distributed evenly across time. But early offers are really a form of major medical/disability insurance which is payable periodically. Also the problems of periodic payment are often avoided by the parties' agreeing to a lump-sum settlement, as is often done under workers' compensation. Finally, periodic payments avoid a final evaluation of the early offer when it is made (except for computing the claimant's attorney fees of 10 percent of the value of the offer to pay economic loss).

awarded \$1 million, but given the risks of litigation, she has only a 50 percent chance of winning. Roughly calculated, the patient has a claim worth about \$500,000 (50 percent chance at \$1 million). Assume the cost of setting aside a corpus of money to pay the patient's net economic losses as they accrue is projected at about \$250,000 (an often realistic assumption, as the following report demonstrates). The health care provider's insurer would likely make the early offer, \$250,000 being clearly less than \$500,000. The patient would likely accept, given that under the early offer proposal the plaintiff will have the normally insuperable burden of proving her doctor guilty of gross negligence beyond a reasonable doubt.

Now assume a change in the facts: same patient, same health care provider, and the same possible \$1 million verdict. But here assume this patient's chances of winning are only one in ten, with an expected value of \$100,000 (one-tenth of \$1 million). Here the defendant's insurer would not make an early offer, \$100,000 being clearly less than \$250,000.

v. The fear of potentially higher costs to insurers under this early offer scheme is avoided because no defendants need make an offer if they would not do so without this statute. Claimants cannot demand an early offer. Thus, defendants will make an offer only when it makes economic sense for them to do so, as shown in the example above and in Section 2.

vi. Will insurance companies thereby just "cherry pick" claims by making lower payments to clearly deserving claimants? Because of the uncertainty and cost of determining both liability and pain and suffering damages under present tort law, it is likely, as indicated in Item iv above and the report itself below, that defendants in medical malpractice cases will make prompt early offers in many cases even when liability is unclear.

vii. The proposal would affect injury victims in many ways that are advantageous. While injury victims would lose their recourse to full-scale tort litigation, they would reduce their uncertainty, delays, and transaction costs. Moreover, they would lose their current tort litigation recourse only when they are guaranteed prompt payment of their actual economic losses plus attorney's fees. These prompt and certain payments will be especially advantageous to those seriously injured patients whose losses have outstripped other applicable coverage. Many claimants will, however, receive lower payment amounts unless there is a high minimum payment amount.

viii. Several factors make it unattractive for early offers to be made voluntarily without an early offer statute. Defendants today 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 may often enable defendants to bargain down even claimants clearly entitled to tort damages because the latter may need immediate money for accrued and accruing medical bills and wage loss. Furthermore, defendants may fear that an early offer to settle for claimants' net economic loss will be seen as a signal of weakness and encourage claimants and their lawyers to seek an even larger settlement

than originally sought. This mirrors the position of claimants and their lawyers, who similarly fear that an early offer to settle only for economic loss would be deemed an admission of weakness in their cases, resulting in either no payment or less than that otherwise sought.

ix. Early offers will be a viable mechanism only if defendants, not claimants, are allowed to make binding early offers. To see this, consider the alternative situation in which claimants and their counsel make binding early offers instead of defendants. If defendants are thereby bound by the early offer reform, then claimants would have the incentive to make nonmeritorious or marginal claims. But defendants, as the parties making payment, when confronted with clearly meritless or very marginal claims, will pay nothing and make no early offer, as shown in the example above. On the other hand, when faced with potentially meritorious claims, defendants will have an incentive to explore whether the statutorily-defined early offer involves less expected cost than a full-scale tort suit with all its uncertainty and transaction costs. Thus, only defendants have the appropriate incentives to distinguish carefully between arguably meritorious and clearly nonmeritorious claims in order to reduce costs by promptly paying the required minimum benefits in suitable cases.

x. There are also several rationales for why damages for pain and suffering are not included in the early offer reform. The uncertainty of determining both liability and damages for noneconomic damages is the key to understanding the inefficiencies of tort law and to framing a balanced solution that attempts to be fair to both injured patients and health care providers. As stated above, pain and suffering damages are indeterminate and highly volatile. Under an early offer system, the prospect of an award of pain and suffering damages still serves as a means of internalizing health care providers' medical mishaps by providing an incentive to make early offers covering essential economic losses. These offers will provide prompt compensation to many victims of injuries that accompany the delivery of medical services. In effect, the threat of paying damages for pain and suffering, rather than the actual payments, will better serve injured patients as well as the public interest.

Pain and suffering damages also differ from economic damages from the standpoint of insurance. Because accidents and illnesses generally reduce the marginal utility of income, people do not generally find it desirable to purchase pain and suffering insurance.⁶ Indeed, no such general insurance market has emerged.⁷ In contrast, risk-averse individuals will desire full insurance of their economic losses, which is the focal point of the early offer proposal.

Because personal injury claims alone among all other damage claims routinely entail damages for both economic and noneconomic losses, defendants are uniquely

⁶ See W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 Michigan Law and Policy Rev 141 (1996).

⁷ For the point that uninsured motorists' coverage is a unique "first-party" insurance that includes payment for pain and suffering, see Steven P. Croley & Jon D. Hansen, *The Nonpecuniary Costs of Accident: Pain-and-Suffering Damages in Tort Cases*, 108 Harv. L. Rev. 1785 (1995).

positioned not only to make, but also to enforce by early offers, socially attractive settlements for only economic loss. In nonpersonal injury claims, where only economic damages are at stake, no comparably fair means are available to sanction a claimant who refuses to accept an offer of only a portion of the total losses claimed.

xi. A complete no-fault plan for medical injuries does not seem feasible. It is difficult to define in advance when no-fault benefits should be paid for injuries that arise from medical treatment. Under no-fault auto insurance policies, an accident victim is compensated for an injury “arising out of the ownership, maintenance, or use of a motor vehicle.” Under workers’ compensation laws, an industrial accident victim is compensated for an “injury arising out of, and in the course of, employment.” It is not feasible, however, to force all health care providers to pay patients for any and all adverse events arising in the course of medical treatment. It is often impossible to determine whether a patient was injured by the treatment rendered, or whether the adverse condition after treatment was just a normal extension of the condition which prompted treatment in the first place. A health care provider could not be expected to pay every patient whose condition worsens after treatment. Thus such a comprehensive *ex ante* no-fault solution seems unworkable, and therefore unavailable. The proposed early offer system for medical accidental injuries enables, when the facts are much better known, *ex post* comparisons of the cost of a tort claim versus that of an early offer, and so we conclude that this system is a workable, economical, equitable, and simplifying solution.

3B. Some Operational Features of the Early Offer Plan

It is useful to address some questions regarding the time frame for operation of the early offer plan. Is the 180-day period too short a time for the defendant to decide to make an early offer? In general, insurers already compute their initial reserve amounts in a much shorter period, and the preliminary discovery process would be accelerated by the early offer structure. In addition to doing research to decide whether to bring a claim, claimants and their lawyers can also take their time and press any discovery they deem necessary before responding to any early offer.

Court approval of the terms of an accepted early offer will no more be required than is court approval of the terms of a workers’ compensation case. Of course, there may be later disputes after an early offer settlement regarding what is due periodically as losses accrue in the future, but that may happen under workers’ compensation or any major medical/disability policy extending into the future. Courts now routinely review settlements in minors’ cases, a practice that presumably will continue.

An early offer settlement is no worse than lump-sum court awards in dealing with seemingly difficult questions, such as whether the claimant’s condition might change. The parties also might agree to a structured settlement. In the case of death, the survivors would be due the amount, if any, that the decedent’s earnings would have been expected to provide as support. Note that the Michigan no-fault auto law with its

large wage loss coverage extending to the hundreds of thousands of dollars has been able to deal effectively with such matters.

The limit on claimant attorneys' fees to 10 percent of the value of the early offer is a representative but plausible example. This percentage is based on a comparison of the almost uniform minimum of one-third of the value of a full-scale tort settlement or verdict and the claimant's attorney fees under no-fault workers' compensation, which are often limited to 10 percent above a minimum payment.

Note further that by definition there will be no trial expenses under early settlements. Note too that: (1) the early settlement will also greatly diminish pretrial expenses, and (2) the 10 percent fee for claimant's counsel would be exacted only after deducting any other expenses. Because the Texas data do not provide information on these expenses, we assume for purposes of the calculations that they are sufficiently small enough to be ignored in our estimates. If the 10 percent fee is manifestly too low because of special circumstances, claimant's counsel can petition the court for an augmentation that will be payable by the early offerer.

3C. Overview of the Effects of Early Offers: Case Study of Serious Nonfatal Injuries

This overview briefly describes the results of a statistical analysis of the early offer proposal described above and relates these results to the current medical malpractice outcomes. As indicated above, these statistics are based on extensive medical malpractice closed claim data required to be filed by pertinent insurers in Texas, which is supplemented by similar data from Florida.

The category of cases covered in our overall study includes fatalities, serious nonfatal injuries, and less serious cases. For brevity, the discussion in this overview is limited to "serious nonfatal injuries," defined as brain damage and spinal cord injury and complications. The economic losses for the 1,938 cases in this category that do not report exemplary damages average \$430,225 [see, after the appendices, Table 1, Panel B, Row b, Column (4)]. Hereafter references to all such numbered tables will appear in the format 1Bb(4)]. That figure of \$430,224 far exceeds comparable figures for fatal injuries and less serious nonfatal injuries.

The key to estimating the effect of early offers, as set forth in Item iv of Section 3A above, is comparing the amount an insurer sets aside early on to pay a given tort claim (called the initial reserve) versus the amount that would be required to pay the claimant's net economic loss plus attorney fees. If the former is greater than the latter, an early offer will likely be made. (The report also uses the insurer's final reserve and the ultimate payout for such a comparison.) The presence of collateral sources will also affect whether an early offer is made.

Basing the insurers' decision on initial reserves, and assuming there is no collateral source offset, of the 1,938 claimants suffering serious nonfatal injuries paid under tort law (excluding 521 claims reporting exemplary damages in the damages breakdown⁸), 1,055 (or 54 percent) would be tendered early offers under the proposed statute [2Bb(1)]. Such claimants would be paid on average 2.37 years (859 days) faster than under tort law [4Bb(1)], with total litigation costs reduced by an average of \$225,200 per claim [6Bb(1)]. The savings to insurers from paying such claims would average \$578,788 per claim [2Bb(1)]. On the debit side, this average payment would reduce payment to such claimants by \$321,583, with only 2.75 percent of claimants receiving more under an early offer than under a tort claim [7Bb(1)]. Claimants may receive more under early offers if most of their damages under the current system are economic loss, from which one-third is deducted for attorneys' fees. These figures raise a question: given that early offers cover essential losses with far lower payments by insurers (and presumably with a resultant reduction, at least in the long run, in medical malpractice premiums), is the greater promptitude and certainty of such payments under early offers worthwhile? In this connection, note also the effect of deducting payees' coverage from their own collateral sources on the savings of insurers in calculating whether to make an early offer: this effect leads to an average savings of \$583,989 deducting collateral sources [3Bb(1)], versus savings of \$578,788 without such a deduction [2Bb(1)]. These values are similar because collateral sources account for only 20-28 percent of economic damages, which in turn comprise only one-third of total damages. Although collateral sources may be available more quickly than payment under current tort law, collateral sources provide only a small share of total economic loss.

To lessen discrepant payments under early offers compared to payments under tort law for those suffering serious nonfatal injuries (or death), a provision could be added to an early offer statute requiring that an early offer provides a minimum payment, either payment of net economic loss or a minimum of \$250,000. (Also listed in the report is the effect of minimums of \$100,000 and \$500,000.) The number of claimants suffering serious but nonfatal injuries who lose an amount of compensation under the \$250,000 option is reduced from 1,055 to 498, with the percentage of claimants gaining in compensation rising from 2.75 percent to 29.12 percent [7Bb(1) and 7Bf(1)]. On the other hand, the number of serious nonfatal injury cases receiving early offers would be reduced from 1,055 to 498, with the remaining claimants consigned to the current tort claim system [2Bb(1) and 2Bf(1)].

Finally, it should be noted that the data from Texas is limited to paid claims, and so cannot be used to estimate the number of claims not being paid at common law that would be paid under an early offer statute. But such payments might be made if just the costs of defending a claim, plus even the relatively small risk of an adverse verdict,

⁸ For claims that settle without a court decision, insurers are requested to report the breakdown of damages into its four components of economic, noneconomic, exemplary, and prejudgment interest only if in the opinion of the individual completing the form, the settlement was influenced by demand for or possible award of one of the latter three damages components. The 521 claims noted above are claims for which a positive value is entered for exemplary damages.

would exceed the claimant's net economic loss. The smaller the insurer's reserve in any given case, the less likely that would seem. But herein lies an important element of the report: it indicates the initial (or early) dollar reserve allocated to pay a claim are often greatly underestimated compared to a claim's ultimate value for those claims that are paid. In the connection, the report shows that for nonfatal serious injuries, the average initial reserve was \$578,209 [1Bb(1)], compared to an actual settlement/award of \$1,257,676 [1Bb(3)]. Note further, as stated earlier, that only \$430,225 of that average settlement award consisted of the claimant's economic loss [1Bb(4)], indicating how comparatively attractive for insurers early offers will be based on the cost of paying only economic loss versus full damages. Because both final reserves and ultimate payouts are larger than initial reserves, insurers are more likely to make early offers if the decision is based on final reserves and ultimate payout. This results in more early offer payees, prompter payment, lower litigation costs, and lower overall costs [2Bb(2)(3), 4Bb(3), 6Bb(2)(3), and 3Bb(2)(3) respectively], as shown by the following lettered Exhibits:

EXHIBIT A	
Number of Early Offer Payees, Based on:	
Initial Reserve	1,186
Final Reserve	1,915
Payout [3Bb(1)(2)(3)]	1,938
Days Saved, Based on:	
Initial Reserve	1,055
Final Reserve	1,893
Payout [4Bb(1)(2)(3)]	1,932
Litigation Cost Savings, Based on:	
Initial Reserve	\$225,200
Final Reserve	\$333,671
Payout [6Bb(1)(2)(3)]	\$560,406
Overall Savings to Insurers, Based on:	
Initial Reserve	\$583,989
Final Reserve	\$1,469,950
Payout [3Bb(1)(2)(3)]	\$1,176,792

The outcome comparisons for payees under early offers based on initial reserve, final reserves, and ultimate payout are as follows:

EXHIBIT B	
Average Claimant Reductions, Based on:	
Initial Reserve	\$321,583 (2.75% gaining)
Final Reserve	\$357,452 (4.91% gaining)
Actual Payout [7Bb(1)(2)(3)]	\$357,364 (5.33% gaining)
Average Claimant Reductions With \$250,000 Minimum, Based on:	
Initial Reserve	\$488,548 (29.12% gaining)
Final Reserve	\$371,583 (33.06% gaining)
Actual Payout [7Bf(1)(2)(3)]	\$405,252 (29.03% gaining)

Requiring a minimum payment may increase average claimant reductions in compensation because the mix of claims affected by early offers changes. Such a minimum reduces the number of claims eligible for an early offer (compared to paying only net economic losses), with the result that the altered mix of cases entails only higher value claims.

The important point here is that the larger the final reserve or payment compared to the initial reserve, the greater the incentive for insurers to set a more realistic and therefore higher initial reserve, leading in turn to more and higher early offers. In this connection, it should be noted that insurers' final reserve for claims involving serious nonfatal injury averages \$1,892,127, which is much closer to the average settlement/award of \$1,257,676 than the average initial reserve of \$578,209 [1Bb(2)(3)(1)].⁹ Note that insurers currently do not have knowledge of the later reserve or final payout at the time they are making the initial reserve. However, if the early offer proposal is adopted, insurers would have an incentive to do a more refined analysis of a claim at an early stage than they do at present. Even without adjusting the initial reserve values to reflect the likely greater research that will occur in an early offer regime, the data still seem to indicate widespread opportunities for successful early offers.¹⁰

⁹ Adding defense costs to the settlement/award would bring these numbers even closer.

¹⁰ For an economic model of the cost and other effects of the early offer proposal being analyzed here and illustrative examples showing very similar results, see Jeffrey O'Connell, Jeremy Kidd and Evan Stephenson, *An Economic Model Costing "Early Offers" Medical Malpractice Reform* 35 N. Mex. L. Rev. 259, 264-70 (2005).

4. BUILDING BLOCKS OF THE EARLY OFFER PROPOSAL

4A. Expected Overall Insurers' Costs

As indicated, the maximum that an insurer would be willing to offer to resolve a claim under the early offer proposal is determined by the insurer's expected liability and litigation costs of proceeding with the claim under normal tort law. This expectation, of course, takes into account the probability of settling the claim or losing the case at trial. These probabilities are incorporated in the reserve amounts, but since we only have data on claims for which there was payment, the payment or settlement amount calculations are not weighted by any probabilities. Because insurers get to decide whether to make an early offer, we focus on the key value affecting that decision, which is the amount the defendant would have expected to pay for the claim in the absence of the early offer proposal.

As indicated above, in our calculations we use three different reference measurements to estimate the basis for that decision. The first measure is the insurer's initial reserve amount set aside for possible payment in the tort case. The second measure is its final reserve amount set aside for the same case. The third measure is the actual amount of the settlement or court award in the case, plus associated legal defense expenses. (Note again, the use of the second or third measure to decide on the feasibility of an early offer assumes greater foresight on the part of the insurer.) The Texas closed claim data used here reports initial and final reserve divided into indemnity reserve (i.e., reserve for payments) and expense reserve (i.e., reserve for all claim-related defense expenses). The expense reserve information allows us to consider alternative assumptions about reductions in expected legal defense expenses arising out of an early offer. The closed claim data also separately reports both total "allocated loss expenses" and allocated legal expenses and administrative expenses assigned to a given case.

Texas requires that insurers submit information on claims with bodily injury payments of at least \$10,000. Payments over \$25,000 are reported on a long form, and payments under this amount, but at least for \$10,000, are reported on a short form.¹¹ The years for which Texas data are available to us are 1988-2003. We use data for the years 1988-2002, before Texas modified its medical malpractice law in 2003. The supplemental data stems from Florida which has two medical malpractice closed claim data sets, the archival data set from 1975 to mid-July 1999, and the current data set from mid-July 1999 to 2003. Until 1997, Florida insurers were required to report all closed claims, even those with zero payment. After that time, insurers were only

¹¹ Neil Vidmar and his colleagues, while indicating flaws, for the purposes of their study nonetheless acknowledge the Texas data as "the best available." Neil Vidmar *et al.*, *Uncovering the "Invisible" Profile of Medical Malpractice Litigation*, 54 DePaul L. Rev. 315, 319-22 (2005).

required to report claims with a nonzero payout, though there continued to be some voluntary reporting of zero claims.

The primary insurer (the principal one in the case) submits the Texas closed claim form to the Texas Department of Insurance (TDI). The primary insurer reports its reserve based on its expected payment, and also reports information on its actual payment as well as what any other insurers of defendant parties contributed to the settlement or award. This means that the reported reserve corresponds to the portion of the claim the primary insurer expects to pay while the total settlement or court award pertains to the actual full payment of the claim. As an example, suppose there are two insured providers defending a medical malpractice case, a doctor and a hospital, and suppose the doctor's insurer (the primary insurer) paid \$250,000 and the hospital's insurer paid \$100,000. Each insurer would then submit a closed claim form to the TDI, reporting both its own payment and the payment by the other party's insurer, and would also report the total amount of the settlement or court award as \$350,000. For 66 percent of the Texas claims, the primary insurer paid the full amount of the settlement or court award,¹² with the remaining 34 percent of the claims reporting that more than one payer contributed to the settlement.¹³

All the insurers involved in any given case should generally find making an early offer attractive and consequently join in making an early offer. Otherwise any nonofferer is left facing a claimant now seeking both economic damages, with no collateral source offset, and noneconomic damages, with this case in addition being financed by payment from another insurer's early offer. Thus we assume that the insurers can be treated as a collective entity and that in practice any division of the costs among the insurers will be later handled through arbitration. Assuming then that the early offer will be a collective venture among the applicable insurers, the pertinent reserve values to determine the willingness to pay for the early offer are the projected amounts for all insurers, not simply that for the primary insurer. To obtain this projection, we scaled up the primary insurer reserve amount by the size of the total settlement or award, divided by the payment by the primary insurer plus any deductible. In particular, we multiplied the reserve amounts by the ratio of the response in the Texas long form closed report claim to question 12a7 (pertaining to the total final amount of settlement or court award) divided by the sum of the values in question 12a1 and 12a2 (pertaining to the amounts paid by the primary insurer plus any deductible paid by the insured provider) (see Appendix B for question 12).

¹² There are 158 claims in which the primary insurer reported zero payment. Per the TDI staff, these are claims in which the primary insurer paid the claim but was fully reimbursed by a deductible paid by the insured also reported on the closed claim form, and the reserve amounts include this value on the deductible line in the reporting form to TDI. Per TDI staff, the reported reserve corresponds to the sum of the primary insurer payment plus any deductible payment.

¹³ Payments by other parties are not always known to the primary insurer and so, although the amount paid by the primary insurer is accurate, there may be other contributors. Thus, total amounts may understate the true total amount of settlement or court award. The TDI flags duplicate claims reported within the same year. A claim is a "duplicate" if there is more than one insurer for the same injury. The TDI identifies 926 duplicates in the 16,437 claims. Note that it is important to identify duplicates in tracking overall trends in medical malpractice payments, but it is not relevant in making a comparison of reserve to economic loss as we do here.

4B. Defense Legal Expense

Not all of the defense legal expenses will be saved if an early offer is accepted because some costs must be incurred to evaluate the claim preparatory to deciding whether to make an early offer. To assess the share of costs that would be saved, we adopted an approach that is consistent with the proposal's projected treatment of a claimant's legal fees. Assuming the usual claimant's attorney legal fee would be one-third of any normal tort award or settlement, the presumed early offer proposal payment of 10 percent of net economic loss as a claimant's legal expenses provides payment of 10/33 of the otherwise normal contingency fee as a part of the early offer. Making a parallel share assumption for insurers, we assume that the fraction 10/33 of defense legal expenses will be incurred before the early offer is accepted. If the insurer chooses instead to litigate the claim, it will incur this 10/33 fraction of defense costs plus the remaining 23/33 fraction. Thus, by settling a claim based on an early offer, the insurer saves the 23/33 fraction of legal expenses. As with reserves, we scale up the primary insurer defense legal expenses.

In our calculation of whether an early offer is desirable, the maximum an insurer would be willing to offer is the expected tort settlement or award plus this 23/33 defense cost share. If the early offer is accepted, the only defense costs that count as "insurer savings" are the 23/33 share amount because, as indicated, the other defense costs will already have been incurred.

4C. Net Economic Loss

Of the 16,437 claims in the Texas Closed Claim data set, 5,733 reported a breakdown of the damages into four possible categories: (1) economic damages (which, net of collateral sources, are payable under an early offer); (2) noneconomic damages (which are not payable under an early offer); (3) exemplary damages (the possible presence of which includes cases when an early would more likely be declined); and (4) prejudgment interest (which will be largely eliminated because of the promptness of early offer payments).¹⁴ For cases in which the breakdown of economic damages is included in the Texas data, we use that damages amount. For all other cases, we use the average economic damages share calculated using the Florida medical malpractice data. In particular, we distinguish four different economic damages share values based on injury type (fatal/nonfatal) and age (under age 18/18 and over). The economic damages shares of the total award are as follows: 0.359, nonfatal <age 18 (i.e., nonfatal

¹⁴ The actual breakdown is reported for court awards and is an estimate as contemplated in the settlement for those without court decisions. Per TDI staff, for cases that settled out of court, the breakdown is only asked to be reported if, *in the opinion of the individual completing the form*, the settlement was influenced by a demand or possible award of noneconomic, or exemplary damages, or prejudgment interest. [Italics added.] Also per TDI staff, this is the best and only information available using Texas closed claim data on the components of damage awards, granted that most insurers do not record information with even this level of detail.

for those age 18 or younger); 0.156, nonfatal \geq age 18; 0.345, fatal $<$ age 18; 0.246, fatal \geq age 18. Because age and injury type are not reported for the TDI short form claims, we use the same economic share for all short form claims of 0.348, calculated as the weighted average of the economic damages share for all nonfatal claims.¹⁵ Because our interest in the early offer plan is to compensate for economic loss, and because the Florida data does not report either exemplary (or punitive) damages or prejudgment interest as separate categories, we also do not provide imputed noneconomic or exemplary damages or prejudgment interest. To provide more information on the allocation of damages into the four categories, we report detailed information on the distribution of economic damages, noneconomic damages, exemplary damages, prejudgment interest, and the total settlement court award in Table 1, Panel C, for the 5,733 claims in which a breakdown is reported.

Although the TDI long form allows reports of whether any collateral sources were available to the injured party, claimants are not required to report such sources to the insurer. Investigation of these data suggests that reports of collateral sources were incomplete.¹⁶ We therefore imputed the percent of economic loss offset by collateral sources under the early offer proposal using the Florida medical malpractice data, which provides more complete information on collateral sources. For claims with positive economic loss in the Florida data, we calculated the share of economic loss that will be offset by collateral sources as the sum of the percent of total recovery from the following insurance categories: Health, Disability, Workers' Compensation, Automobile,¹⁷ and Medicare. We then translated this percentage into a dollar value based on the total economic loss. The average percent collateral offset for the different classes of cases is then calculated as the average dollar value of collateral offset divided by the total economic loss, calculated for each of the four age/fatality categories used to impute economic loss. The specific collateral source fractions of economic loss are as follows: 0.249, nonfatal $<$ age 18; 0.281, nonfatal \geq age 18; 0.213, fatal $<$ age 18; 0.199, fatal \geq age 18. Because age and injury type are not reported for the TDI short form claims, we use the same collateral source offset for all short form claims of 0.264, calculated as the average for all nonfatal claims.

¹⁵ The indemnity cap is \$25,000 for short form closed claim reports, so the injuries are unlikely to entail death or serious injury.

¹⁶ While 40 percent of the claims reported on the long form indicate at least one payment by a collateral source, the estimated collateral source offset using the share of economic loss offset by collateral sources in the Florida data yields an estimate of only 4.8 percent. This value is far below the collateral source share calculated directly from the Florida data, which is a more reasonable 25 percent as indicated in the figures at the end of the paragraph in which the signal for this endnote appears. It is this latter figure we use.

¹⁷ Although the Florida data documentation does not state this explicitly, we assume the "automobile" category is limited to "first-party" automobile coverages such as no-fault or medical pay coverage.

5. SPECIAL CONSIDERATIONS: EXEMPLARY DAMAGES AND MINIMUM PAYMENT

5A. Exemplary Damages

Claimants who do not accept an early offer must show that the provider's conduct was grossly negligent, which is variously but similarly defined in several states, in order to collect full tort damages. A useful measure of whether claimants would anticipate if this higher legal standard could be met, and therefore opt out of the early offer settlement choosing instead to litigate, would be whether exemplary damages in the tort settlement or court award are reported to the TDI. For purposes of our analysis we assume that all claims in which there are such reports of exemplary damages will opt out of the early offer and that all claims without exemplary damages will be in a position to accept an early offer if one is made.

In practice, some claimants who ultimately might have received exemplary damages may choose to accept the early offer, since there is substantial uncertainty as to whether such damages will be awarded. Likewise, some claimants who ultimately will not receive exemplary damages will choose to reject the early offer because they overestimate their chances of receiving such damages. Based on these assumptions, we distinguish claims that report exemplary damages from those that do not, and we indicate the results under the early offer proposal with and without these claims. Only 521 of the 16,437 claims in Panel A of Table 1 thus involved exemplary damages, or about three percent of the claims [1Aa(5), e(5)].

5B. Minimum Payment for Death or Serious Injuries

Another feature in the proposal arises from the treatment of serious tort claims in which economic damages would be small, though noneconomic losses substantial. Deaths to children and older people with no or low levels of earnings would, for example, tend to produce few economic damages, though the nonpecuniary costs to the survivors would of course be large. As a result, we explore two alternative approaches to treating serious claims, which we define as deaths, amputations, brain injuries, and spinal cord injuries. These were the claim categories in the TDI data with the largest amounts of noneconomic damages. First, what would the damages be if we valued the claim based on the actual net economic damages incurred, and second, what would the damages be if we set a floor of \$250,000, or alternatively of \$100,000 or \$500,000, as the minimum amount of damages payable in such serious cases?

6. FINDINGS

6A. Reserve and Awards

We begin by reporting insurers' initial and final reserve, the total settlement or court award, and claimants' economic loss. Table 1, Panel A, Column 1 reports the average projected initial reserve amounts using the multiplication factor described above in Section 4A, which scales up the reserve amount to reflect total payments by multiple parties. Column 2, Table 1 reports average projected final reserve amounts. Column 3, Table 1 reports the average total settlement or court award actually made for the claim. Column 4 reports average economic loss. Column 5 reports the sample size for each row. The difference between Column 3, Total Settlement or Court Award, in Panel A of Table 1 and Column 4 of that table equals the sum of noneconomic damages, prejudgment interest, and, where applicable, exemplary damages. Panel B of Table 1 reports the same information as Panel A, except that it is by injury type rather than claims report categories. Panel C of Table 1 reports the breakdown and distribution of awards into these categories for the 5,733 claims reporting such a breakdown. Panel D of Table 1 reports reserve, total settlement or court award, and legal expenses for the 66 percent of claims in which the primary carrier paid the full amount.

In Panel A of Table 1 (as well as in Panel A of the subsequent tables), the rows of the table stratify the sample into four groups to show how different types of claims in the TDI data are handled by the early offer proposal. It is important to remember that only about one-third of the claims report a breakdown of damages into the four possible categories of damages, namely, economic damages, noneconomic damages, exemplary damages, and prejudgment interest. The largest group is composed of claims that do not report the allocation of damages into these four categories. For these claims, we impute economic damages using methods discussed above in Section 4C. These claims are indicated by the row heading "Imputed economic damages" and appear in Row d of Panel A in each of Tables 1-7. For those claims that do report the breakdown into the four categories of damages, one group is composed of claims with exemplary damages as well as other damages. We analyze these exemplary damages cases separately as we assume that these claimants will not accept an early offer and will go to full-scale litigation. These claims are indicated by the row heading "Exemplary damages reported" and appear in Row a of Panel A in each of Tables 1-7.¹⁸ The next group is composed of claims for which neither exemplary damages nor economic damages were reported. For these claims, all damages amounts paid by the insurer were noneconomic and/or prejudgment interest. These claims are indicated by the row heading "No exemplary damages, economic damages reported as zero" and appear in Row b of Panel A in each of Tables 1-7. Thus, under an early offer proposal that pays

¹⁸ Of the 16,437 claims in the dataset, only 25 reported exemplary damages as part of a court award. Most of the court awards were subsequently reduced. But the value we use for the total settlement or court award is the final payment, not the original court award, and whether a claim is included in the row "exemplary damages reported" is based on whether exemplary damages are reported in the breakdown of the actual settlement or award, not on whether the original court award included exemplary damages.

economic damages only, claimants with zero economic damages would receive zero payments. We analyze these claims separately because, first, these claims will be most affected by a minimum payment requirement in the early offer proposal, and second, without a minimum payment, such claimants gain nothing from the early offer and will have the most incentive to pursue litigation. The final group is composed of claims with positive economic loss reported. Such claims typically also report noneconomic loss and/or prejudgment interest. These claims are indicated by the row heading “No exemplary damages, positive economic damages reported” and appear in Row c of Panel A in each of Tables 1-7.

Table 1, Row a consists of the 521 cases for which exemplary damages are reported. As is apparent, these cases involve the largest stakes of any of the subsamples in the table. Row b pertains to the 645 cases in which there were both no exemplary damages nor reported economic damages. For example, there might be only damages for pain and suffering. Granted these cases would all receive zero payment under an early offer approach with no payment minimum, but with a payment minimum of \$100,000, \$250,000 or \$500,000, all of these cases will be compensated. Row c consists of the 4,567 cases in which there were no mention of exemplary damages, but economic damages were reported. Row d reports the cases for which there is no damages breakdown but for which we imputed the economic damages share using the imputation procedure employing the Florida data discussed in Section 4C. Row e reports the pooled set of results for all claims.

Several patterns are noteworthy. The exemplary damages cases in Row a have the highest values for every reserve or loss value in the table. The other entries tend to be more similar in terms of reserve and award values, with the largest amounts being for cases in Row c for which positive economic damages are reported. For every row in the table, the projected initial reserves in Column 1 are below the total settlements or court awards in Column 3, which in turn are smaller than the projected final reserve in Column 2. But one thing to note is that the reserve amounts in Table 1 include defense expense reserves, which are mainly legal expenses, in addition to indemnity reserves, whereas the settlement or court award values in Table 1 do not take such expenses into account. These expenses will be considered in Table 2.

It may be puzzling that the initial reserves are so much lower than the final reserve, but there are several possible explanations of this difference. The fact that initial reserves are well below final reserves does not necessarily imply that insurers are under-reserving on average with their initial reserve amounts, though that may well be the case as indicated in scholarly literature.¹⁹ The cases observed in the data set are the successful claims that led to insurer payouts. If, for example, the insurer reserves

¹⁹ That there may be systematic errors in loss reserving is well documented. Weak insurers have a tendency to under-reserve to make their financial soundness appear brighter. See Kathy Ruby Petroni, *Optimistic Reporting in the Property-Casualty Insurance Industry*, 15 J. of Accounting and Economics 485 (1992). In addition, the amount of reported reserves may be affected by income smoothing objectives and tax concerns. See Jennifer J. Ganer and Jeffrey Paterson, *Managing Insurance Company Financial Statements to Meet Regulatory and Tax Reporting Goals*, 16 Contemporary Accounting Research 207 (1999), and Elizabeth V. Grace, *Property-Casualty Insurer Reserve Errors: A Theoretical and Empirical Analysis*, 57 J. of Risk and Insurance 28 (1990).

the same amount for claims of a particular type with this amount corresponding to the average claim costs, then the claims that are ultimately successful will be under-reserved initially, while the unsuccessful claims will exhibit over-reserving. Thus, the selection of claims for inclusion in the data set could alone account for the observed pattern without any bias in the reserving practices. Moreover, as the claim matures, the insurer will learn more about the claim, distinguishing which claims in this overall claims category are those with the highest expected losses.

Even apart from that, however, an expert claims manager at a major medical malpractice insurer confirms the scholarly literature mentioned above; namely, that initial under-reserving is generally pervasive in this field. Indeed he thinks it the leading cause of financial failure among medical malpractice insurers. To that extent, it should be noted here that a crucial element of the early offer plan is that it provides insurers with much more incentive than they now have to reserve more realistically very early on (i.e., within 180 days). Indeed, today defendants have an incentive to delay the whole process, thereby hoping to weaken the bargaining power of needy claimants.

Panel B of Table 1 reports information by nature of injury, excluding claims reporting exemplary damages because, as indicated, we assume such claims will most likely lead to claimants' opting out of an early offer. Information on the nature of injury is reported on the Texas long form and enables us to distinguish fatalities and serious nonfatal injuries (brain damage, spinal cord injury, amputation) from other nonfatal injuries. Overall, 47 percent of the cases for which the injury type is given are either death or serious nonfatal injuries.²⁰ The Texas short form does not record the nature of the injury. Because claims reported on the short form represent damage payments under \$25,000, it is probable that these claims do not represent cases with death or other serious injury, and so these claims are grouped with nonfatal, nonserious injuries in the table.

In each instance the column headings for Panel B, Table 1 are the same as Panel A of Table 1, but the rows are different. Row a in Panel B provides information for all fatality claims, Row b for the serious nonfatal claims, and Row c for all other nonfatal injuries and short form claims. Row d provides values for all claims excluding those with exemplary damages. In terms of empirical magnitudes, the serious nonfatal injuries in Row b of Panel B involve the largest reserve amounts and settlement or award amounts. Indeed, this is the only category for which the average settlement or court award is above \$1 million. The average economic loss for this category remains substantial but is well under \$500,000.

Panel C of Table 1 reports the 10th, 25th, 50th, 75th, and 90th percentiles of the distribution of total damages and the damages components, as well as the mean and standard deviation of each category of damages for the 5,733 cases for which the breakdown is provided. For the average settlement or court award of \$592,316, most is for noneconomic damages with an average of \$344,875, with economic damages of

²⁰ See Appendix B ($33.14 + 13.97 = 47.11$).

\$181,330 on average. Exemplary damages and prejudgment interest together account for a combined share of only slightly over 10 percent of the total settlement award.

The skewed nature of the damages distribution is evident from the results in Panel C. For economic damages, the mean value of \$181,330 is almost six times larger than the median value of \$33,021, which is shown at the 50th percentile, indicating the substantial influence of some unusually large claims on the mean. For example, the total economic damages value at the 90th percentile is \$396,256. The data's broad damages variability is further reflected in the large value of the standard deviation of \$613,140 for economic damages shown in the bottom row of Panel C, Table 1. This variability in turn is consistent with the certainty provided by early offers being attractive to risk-averse plaintiffs. The patterns of high variability exhibited by the noneconomic damages distribution and that of total settlements and awards are similar.

Exemplary damages and prejudgment interest are zero for most cases, but are significant when they do come into play. At the 90th percentile the value of exemplary damages is zero, but the overall mean is \$41,579, indicating that a small number of cases have substantial exemplary damages. Similarly, prejudgment interest has a value of zero through the 75th percentile, with a 90th percentile value of \$34,711 and a mean value of \$24,533. In other words, for most cases neither exemplary damages nor prejudgment interest come into play, but the average effect over all cases does matter.

Panel D of Table 1 provides the counterpart of Panel A for the claims paid entirely by the carrier. Thus, for these claims the complications raised by multiple parties do not arise. Focusing on these claims indicates that for claims for which exemplary damages are reported, final reserve are very similar to the value of the settlement or court award. However, for all claims combined the initial reserve is less than half of the total settlement or court award, while the final reserve is about one-third greater than the actual settlement or award.

6B. Early Offer Outcomes Without Collateral Source Offset

At the outset it should be noted that Table 2 and Table 3 (and all subsequent tables) concern cases where an early offer will be made, whereas Table 1 concerns all cases where tort payment was made. Appendix C provides an example of the calculations for the values reported in Table 2 and Table 3 (and all subsequent tables), as these numbers cannot be derived from Table 1. With that in mind, as indicated earlier, whether insurers will choose to make an early offer and how much they will save relative to the current medical malpractice regime depends on the maximum amounts that they would be willing to offer under the present tort regime minus the amounts that they would have to pay under the early offer regime. We refer to these amounts as the "insurer savings" stemming from the early offer plan, meaning that compared to the current system, the early offer proposal will save insurers these amounts. (But, as discussed below, insurer savings do not equal the reduced amount of payments to claimants.) These results are reported in Table 2 and Table 3, where the results in

Table 2 do not deduct collateral sources to calculate economic damages, and the results in Table 3 make this deduction in order to calculate net economic loss. The columns in Table 2 and Table 3 report insurer savings calculated from different assumptions about the insurer's expected costs. In Column 1 of each table, the insurer savings are calculated using projected initial indemnity (i.e., damages) reserve; in Column 2 the insurer savings are calculated using projected final indemnity reserve, and in Column 3 the insurer savings are calculated using the actual total settlement or court award. In calculating economic loss plus legal fees, we assume, as pointed out above, that the early offer plan sets legal fees of the claimant, as a surrogate for a reasonable fee, at 10 percent of the value of the tendered economic loss. Thus, the legal fee payment is in addition to economic loss rather than being deducted from the loss payment as is done under the current tort regime. Table 2 reports the average insurer savings when they are positive (or zero) based on the following calculations:

Column (1), Rows a - d:²¹

Insurer Savings = Projected (initial indemnity reserve + 23/33 initial expense reserve) – 1.1 economic loss.

Column (2), Rows a - d:

Insurer Savings = Projected (final indemnity reserve + 23/33 final expense reserve) – 1.1 economic loss.

Column (3), Rows a - d:

Insurer Savings = Total settlement or court award + 23/33 total allocated loss adjustment expenses – 1.1 economic loss.

Table 3 reports the corresponding insurer savings replacing “economic loss” with “net economic loss,” calculated as economic loss minus the collateral source offset. We also calculate these insurer savings based on the assumption of a minimum payment of \$100,000, \$250,000 or \$500,000 for fatalities and serious nonfatal injuries, with these values reported in Rows e-h of Panel B in Table 2 and Table 3.

In Table 2 and Table 3, the bracketed values refer to sample size, and the dollar numbers in each entry correspond to the average insurer savings under the early offer plan for the category conditional on it being desirable for the insurer to make an early offer. For example, in Table 2, Panel A, the entry in Row c, Column 1 indicates that based on the initial reserve, it is desirable for the insurer to make an early offer in 2,753 of the 4,567 cases in this category (claims with no exemplary damages reporting positive economic damages). If the claimants were to accept, the average insurer savings compared to the current medical malpractice payout would be \$325,973 based on the initial reserve. The counterpart deducting collateral sources is reported in Table 3 with the entry in Table 3, Panel A, Row c, Column 1 indicating that deducting collateral sources increases the number of claims in which an early offer based on the initial reserve would be attractive for insurers to 3,034 claims, with the average insurer savings from the early offer dropping slightly to \$323,824. This decline in the average savings occurs despite the inclusion of a collateral source offset because of the

²¹ For a numerical example, see Appendix C.

expanded number of claims for which an early offer would be made. Note that the insurer savings reported in Row b of both Table 2 and Table 3 are identical because this row reports claims with zero economic damages and so there is no collateral source offset.

Row e in Panel A of Table 2 provides a summary of statistics for all claims. Out of the 16,437 claims, making an early offer is desirable for 11,383 claims based on the initial reserve amount, for 15,895 claims based on the final reserve amount, and for 16,409 claims based on the actual award or settlement. The greatest insurer savings are for the projected final reserve approach, where for the claims in which an offer is desirable the average insurer savings is \$549,871.

Panel B of Table 2 provides information for the same columns of early offer scenarios by nature of injury, excluding claims reporting exemplary damage, but including a variant of the analysis in which there is a minimum payment of \$100,000, \$250,000, or \$500,000 for death or serious injury. The effect of the minimum payment on the desirability of making an early offer is substantial. For the fatalities, based on the initial reserve amount, which is reflected in Row a and Column 1 of Panel B of Table 2, an early offer is desirable for 3,074 cases out of the 4,609 fatalities. But as the results in Row e indicate, with a \$250,000 minimum an early offer is attractive to insurers in fewer cases -- 1,124. Lowering the minimum payment to \$100,000 raises the number of claims for which an early offer is attractive to insurers to 2,036 claims (reported in Row g, Column 1.) Much the same pattern is observed for serious nonfatal injuries in Row f, with the early offer based on the projected initial reserve attractive in 498 cases compared to the Row b number of 1,055 when there is no \$250,000 minimum, and 808 claims with a minimum of \$100,000. Interestingly, the imposition of the minimum payment increases the average savings per case. That seemingly paradoxical result can be traced to the change in the mix of claims for which an early offer is desirable. As the minimum payment amount is increased, it is desirable for insurers to make an early offer for fewer claims. Once a \$250,000 or even a \$100,000 minimum is imposed, it is only the very high stakes claims for which the insurer will find an early offer attractive. Raising the payment minimum consequently reduces the number of claims in which an early offer will be made but increases the average savings for this altered mix of cases. These are the claims that have a large level of noneconomic damages, while under the early offer regime the insurer only pays net economic damages, subject to a minimum, plus an allowance for attorney fees. (The same phenomenon applies to the effect of minimum payments on claimant losses recorded in Table 7).

6C. Collateral Sources

Table 3 repeats the analysis of Table 2 deducting imputed collateral sources from economic loss. Naturally enough, the early offer proposal will be attractive to insurers more often when collateral sources are offset from economic loss. But although collateral sources offset about 25 percent of economic loss, the effects are generally

similar to the Table 2 findings, with the largest increase in savings occurring when insurers are basing the attractiveness of the claim on final reserves.

6D. Time Saved

Table 4 and Table 5 report time saved by acceptance of the early offer proposal under the assumption that offers will be made and accepted in 180 days. Claimants will obviously benefit from quicker payment. The early offer proposal will expedite payments by about two years, and for some categories such as that shown in Table 4, Panel B, Row f for serious nonfatal injury (where prompt payment is especially needed), the payment is expedited by about two and a half years.

6E. Litigation Cost Savings

The main quantifiable gain in efficiency from the early offer proposal is the savings in litigation costs. There are of course other efficiency gains that are more difficult to assess, such as the benefit of reduced payment uncertainty. As discussed in Section 4B, for insurers we estimate the litigation cost savings based on the fraction 23/33 of the reserve for legal expenses or actual legal expenses, depending on whether the calculations in Table 6 are based on reserves (Columns 1 and 2) or actual expenditures (Column 3). The initial reserve for legal expenses does not account for the fact that incurring these expenses will not be immediate. We convert these estimates to a present value (PV) assuming a 3 percent interest rate and a time period equal to the time period savings under the early offer proposal. For the other litigation cost estimates, we assume that no discounting is needed. In all cases, for claimants we estimate the litigation cost savings as 0.23 of what the total settlement or award would have been in the absence of the early offer proposal.

The specific equations used to calculate litigation cost savings reported in Table 7 are as follows:

Column (1), Rows a - d:

Litigation cost savings = $0.23 * \text{Total settlement or court award} + \text{PV}(23/33 * \text{initial expense reserve})$

Column (2), Rows a - d:

Litigation cost savings = $0.23 * \text{Total settlement or court award} + 23/33 * \text{final expense reserve}$

Column (3), Rows a - d:

Litigation cost savings = $0.23 * \text{Total settlement or court award} + 23/33 * \text{attorney expenses}$

As the estimates in Table 6 indicate, the litigation cost savings are substantial, as these average savings are over \$100,000 per claim for every category in Panel A of Table 6, except for one of the estimates based on the initial reserve amount. As the

analogous distribution in Panel B of Table 6 indicates, the cases for which the litigation cost savings are under \$100,000 are for the nonfatal injuries that are not serious (as defined in Section 4A) and claims reported on the short form (which are for claims under \$25,000). Even this category for less serious claims in Row c of Panel B in Table 6 has average litigation cost savings ranging from \$50,085 to \$108,737.

6F. Gains or Losses to Claimants

The effect of different early offer proposal structures on different categories of claims can be assessed as well. Under the current tort system we assume that claimants receive two-thirds of the total settlement or award, with the remaining one-third going to attorney fees. The early offer plan compensates claimants for net economic damages, which must in turn be inflated to account for their quicker payment, which, as indicated, we do using a 3 percent interest rate.

Table 7 indicates the effect of early offers on claimants in terms of the average net gain or loss in dollars paid. Each cell also provides in parentheses the percentage of claimants in each group who will gain from the early offer approach. Consider the effect on all claims in Row e of Panel A in Table 7. The percentage of claimants who gain in dollar payout is 4 percent or less, with an average loss of \$134,601-\$161,663, but the results in Panel B of Table 7 indicate that the imposition of a minimum payment amount can substantially increase the percentage of claimants who benefit. The percentage of cases involving a fatal injury that would be better off under the early offer proposal is as high as 45 percent for a \$250,000 minimum and 59 percent for a \$500,000 minimum.

7. EFFECTS ON THE NUMBER OF CLAIMS AND DETERRENCE

An important question is whether more or fewer claims will be paid under an early offers regime. We are not able to answer this question, in part because the Texas data are limited to paid claims, so we do not have a basis for analyzing the number of claims unpaid at common law that are likely to be payable by early offers. In this section we discuss some of the issues that affect the number of claims under early offers relative to the number of claims under the current tort regime.

From the standpoint of defendants' incentives, compared to present system the early offer regime will reduce the costs of settling a claim, including defense costs. Claimants will also be more willing to settle than under the present regime so that in terms of the theoretical structure of the settlement process, settlement of any given claim should be more likely than at present.

But a premise of the early offer regime is that defendants are not required to make an offer in any claim, including for claims not likely to be paid now. Data other than our own indicate that some 60 percent of medical malpractice claims now brought are closed without payment.²² Our sample shows that 31 percent of all claims now being paid will not lead insurers to make an early offer based on the analysis using initial reserves [2Ae(1); $11,383/16,437 = 69\%$]. If early offers are calculated on the basis of final reserves or actual payout, the percentage of claims now paid that would also be paid under early offers rises to 98 percent and almost 100 percent respectively [2Ae(2)(3)].

A key factor that will affect the attractiveness of making early offers would be high defense costs, especially for serious nonfatal injuries [6Bb(1)-(3)], as discussed in Section 3B. If any claim is serious enough that defense costs, coupled with even a relatively small risk of an adverse verdict, exceed the claimant's net economic loss, an early offer might be forthcoming. But insurers may be reluctant to make offers based primarily on avoiding defense costs because that may affect their bargaining position for other claims. On the other hand, two informal estimates by medical malpractice defense counsel, one in a big firm, the other in a small one, indicate they would be inclined to recommend early offers in about 80 percent of the cases they were currently defending.²³

From the claimant's perspective, any claim not likely to have been initiated prior to the early offer regime where the claimant's attorney received a one-third share of a full award will probably not become more attractive when the payment of legal fees is

²² Don Dewees, et al., *Exploring The Domain of Accident Law* 425 (1996).

²³ One discussion was with William Ginsburg, Esq., Durham, N.C. (April 1996); the other anonymous. The model in O'Connell *et al.*, *supra* note 9, indicates that more claims will be paid under an early offers regime but "the increase...will be too small to effect the savings..." *Id.* at 37, nn. 126, 127.

limited to 10 percent of only the economic loss. The main offsetting influence is that payments to attorneys will be more immediate and entail less work.

On this subject of more claims under early offers, it is important to emphasize that a key premise of an early offer regime is to make better use of medical malpractice dollars now being expended, not to increase them. This is based on the perception that medical malpractice costs are already high. Although others often call for higher premiums in order to pay the many smaller claims not now being pursued due to high litigation costs,²⁴ that is a much vaster social undertaking than the early offer proposal entails.

The issue of more -- or fewer -- claims, along with reduced costs, raises the question of more or less deterrence of unsafe delivery of health care under an early offer regime. In the first place there is currently no consensus regarding whether the present medical malpractice regime effectively deters lapses by health care providers.²⁵ At least the early offer approach will be an improvement on the present system in providing timely and certain compensation with lower litigation costs, goals much more readily accomplished than improved deterrence. But incentives for responsible care will be provided as long as there is substantial internalization of the costs of medical mistakes. The certainty and greater promptitude of these internalizing payments under early offers will also enhance deterrence compared to the current system in that deterrence to be effective must be swift and certain.

²⁴ E.g., Tom Baker, *supra* note 2, at 172-79.

²⁵ For a review of some of the literature challenging the deterrent effects of current medical malpractice law, *see* Jeffrey O'Connell & Christopher Pohl, *How Reliable is Medical Malpractice Law?* 12 Jn. L & Health 359-75 (1997-98); for a contrary view *see* David A. Hyman & Charles Silver, *supra* note 2 at 914-47.

8. CONCLUSION

This report has analyzed the quantifiable effects of the early offer reform of medical malpractice liability insurance. This approach will greatly reduce insurer costs, provide payments to injured patients much more effectively and quickly, and lower transaction costs.²⁵ The report has analyzed the effect of a particular early offer proposal under three different assumptions regarding its expected costs based on insurers' initial reserve, final reserve, and actual awards or settlements. We explored the effect of subtracting collateral payments or not, as well as the introduction of different minimum payments ranging from \$100,000 to \$500,000 for fatalities and serious injuries. These differences influence the net gains or losses of the parties, with these effects varying by injury type. Because of the substantial role played by noneconomic damages, insurers usually reap greater net financial benefits than do claimants. But claimants with serious injuries and great financial need, for whom any insurance mechanism should be particularly concerned, may prefer the early offer payment, particularly, but not only, if there is a high minimum payment. In this connection, note that the level of collateral sources available to claimants is relatively low, as shown in Table 3, Panel B compared to Table 2, Panel B, (both in Section 6A above). This indicates how few financial resources claimants typically have while waiting for any tort payment. Indeed, for all early offer payees, in contrast to tort law receipt of compensation occurs almost two years earlier on average. For all injury categories and all the variants referred to above, there are also savings in both overall insurer costs and litigation costs averaging hundreds of thousands of dollars per case. Such savings in turn will reduce medical malpractice insurance premiums in the long run.²⁶

²⁵ As may be apparent, the early offers proposal analyzed here could be applied both more narrowly or broadly than to medical malpractice claims, (e.g., to only natal or surgical cases or to all personal injury claims).

²⁶ For documentation of the effect of medical malpractice losses on premiums, see among others, Patricia Born and W. Kip Viscusi, *The Distribution of the Insurance Market Effects of Tort Liability Reform*, Brookings Papers on Economic Activity, 1998, 55 (1998).

TABLES

TABLE 1. Projected Reserve, Total Settlement or Court Awards, and Economic Loss						
PANEL A: By Damages Category						
	(1) Projected Total Initial Reserve (\$)	(2) Projected Total Final Reserve (\$)	(3) Total Settlement or Court Award (\$)	(4) Economic Loss (\$)	(5) N	
a. Exemplary damages reported	599,128	1,486,955	1,190,432	249,636	521	
b. No exemplary damages, economic damages reported as zero	276,400	686,232	404,272	0	645	
c. No exemplary damages, positive economic damages reported	318,298	797,046	550,641	199,147	4,567	
d. Imputed economic damages	233,865	633,695	385,721	98,828	10,704	
e. All claims	270,572	708,189	457,779	127,604	16,437	
PANEL B: By Injury Type, Excluding Claims Reporting Exemplary Damages						
	(1) Projected Total Initial Reserve (\$)	(2) Projected Total Final Reserve (\$)	(3) Total Settlement or Court Award (\$)	(4) Economic Loss (\$)	(5) N	
a. Fatality	366,497	822,464	490,373	123,023	4,609	
b. Serious nonfatal injury	578,209	1,892,127	1,257,676	430,225	1,938	
c. Other nonfatal injuries and short form claims	141,476	363,766	235,541	60,473	9,369	
d. All claims without exemplary damages	259,817	682,697	433,796	123,609	15,916	
PANEL C: Distribution of Damages for Claims in Which Breakdown is Report (N = 5,733)						
Distributional Characteristics	(1) Economic Damages (\$)	(2) Noneconomic Damages (\$)	(3) Exemplary Damages (\$)	(4) Prejudgment Interest (\$)	(5) Total Settlement or Court Award (\$)	
10 th percentile	0	15,237	0	0	33,626	
25 th percentile	10,000	39,626	0	0	72,095	
50 th percentile	33,021	112,087	0	0	203,162	
75 th percentile	121,390	323,950	0	0	544,052	
90 th percentile	396,256	800,000	0	34,711	1,325,772	
Mean	181,330	344,875	41,579	24,533	592,316	
Standard deviation	613,140	777,297	330,858	146,451	1,336,522	
PANEL D: Reserves, Total Settlement or Court Awards, Legal Expenses, and Economic Loss for Claims Paid Entirely by Carrier						
	(1) Total Initial Reserve (\$)	(2) Total Final Reserve (\$)	(3) Total Settlement or Court Award (\$)	(4) Legal Expenses (\$)	(5) Economic Loss (\$)	(6) N
a. Exemplary damages reported	132,944	446,585	448,400	52,858	98,639	279
b. No exemplary damages, economic damages reported as zero	136,479	338,118	236,147	50,756	0	433
c. No exemplary damages, positive economic damages reported	118,389	326,287	272,480	41,341	94,435	2,912
d. Imputed economic damages	88,443	252,745	181,209	40,577	42,037	7,186
e. All claims	99,583	280,979	214,892	41,507	55,929	10,810

TABLE 2. Average Insurer Savings from Early Offer Proposal			
PANEL A			
	(1) Insurer Savings Based on Initial Reserve if Positive (\$) [N]	(2) Insurer Savings Based on Final Reserve if Positive (\$) [N]	(3) Insurer Savings Based on Total Settlement or Court Award if Positive (\$) [N]
a. Exemplary damages reported [521]	650,021 [337]	1,214,004 [501]	1,097,922 [521]
b. No exemplary damages, economic damages reported as zero [645]	263,464 [645]	639,002 [645]	519,298 [645]
c. No exemplary damages, positive economic damages reported [4,567]	325,973 [2,753]	587,982 [4,262]	431,855 [4,539]
d. Imputed economic damages [10,704]	209,649 [7,648]	497,173 [10,487]	380,071 [10,704]
e. All claims [16,437]	253,869 [11,383]	549,871 [15,895]	422,661 [16,409]
PANEL B: By Injury Type, Excluding Claims Reporting Exemplary Damages			
	(1) Insurer Savings Based on Initial Reserve if Positive (\$) [N]	(2) Insurer Savings Based on Final Reserve if Positive (\$) [N]	(3) Insurer Savings Based on Total Settlement or Court Award if Positive (\$) [N]
a. Fatality [4,609]	388,282 [3,074]	652,102 [4,522]	483,062 [4,605]
b. Serious nonfatal injury [1,938]	578,788 [1,055]	1,367,003 [1,893]	1,057,924 [1,932]
c. Other nonfatal injuries and short form claims [9,369]	125,276 [6,917]	289,058 [8,979]	224,041 [9,351]
d. All claims without exemplary damages [15,916]	241,783 [11,046]	528,257 [15,394]	400,517 [15,888]
e. Fatality -- minimum \$250,000 [4,783]	791,456 [1,124]	790,815 [2,937]	620,139 [2,655]
f. Serious nonfatal injury -- minimum \$250,000 [2,022]	1,054,531 [498]	1,666,090 [1,440]	1,338,290 [1,395]
g. Fatality -- minimum \$100,000 [4,783]	525,055 [2,036]	659,236 [4,182]	498,556 [4,084]
h. Serious nonfatal injury -- minimum \$100,000 [2,022]	716,723 [808]	1,418,017 [1,789]	1,110,130 [1,796]
i. Fatality -- minimum \$500,000 [4,783]	1,306,106 [549]	1,043,995 [1,722]	787,494 [1,504]
j. Serious nonfatal injury -- minimum \$500,000 [2,022]	1,527,611 [305]	2,026,416 [1,082]	1,600,094 [1,049]
NOTE: Insurer Savings calculated as: (1) Projected (initial indemnity reserve + 23/33 initial expense reserve) - 1.1 economic loss. (2) Projected (final indemnity reserve + 23/33 final expense reserve) - 1.1 economic loss. (3) Total settlement or court award + 23/33 total allocated loss adjustment expenses - 1.1 economic loss.			

TABLE 3. Average Insurer Savings from Early Offer Proposal, Deducting Collateral Sources			
PANEL A			
	(1) Insurer Savings Based on Initial Reserve if Positive (\$) [N]	(2) Insurer Savings Based on Final Reserve if Positive (\$) [N]	(3) Insurer Savings Based on Total Settlement or Court Award if Positive (\$) [N]
a. Exemplary damages reported [521]	639,751 [364]	1,264,541 [505]	1,165,304 [521]
b. No exemplary damages, economic damages reported as zero [645]	263,464 [645]	639,022 [645]	519,298 [645]
c. No exemplary damages, positive economic damages reported [4,567]	323,824 [3,034]	630,716 [4,353]	484,553 [4,567]
d. Imputed economic damages [10,704]	209,756 [8,302]	520,681 [10,536]	406,129 [10,704]
e. All claims [16,437]	253,275 [12,345]	578,724 [16,039]	456,423 [16,437]
PANEL B: By Injury Type, Excluding Claims Reporting Exemplary Damages, and Deducting Collateral Sources			
	(1) Insurer Savings Based on Initial Reserve if Positive (\$) [N]	(2) Insurer Savings Based on Final Reserve if Positive (\$) [N]	(3) Insurer Savings Based on Total Settlement or Court Award if Positive (\$) [N]
a. Fatality [4,609]	377,562 [3,325]	675,489 [4,547]	509,956 [4,609]
b. Serious nonfatal injury [1,938]	583,989 [1,186]	1,469,950 [1,915]	1,176,792 [1,938]
c. Other nonfatal injuries and short form claims [9,369]	126,613 [7,470]	303,920 [9,072]	241,659 [9,369]
d. All claims without exemplary damages [15,916]	241,533 [11,981]	556,429 [15,534]	433,219 [15,916]
e. Fatality -- minimum \$250,000 [4,783]	790,282 [1,155]	808,053 [2,946]	642,089 [2,658]
f. Serious nonfatal injury -- minimum \$250,000 [2,022]	1,090,175 [539]	1,777,735 [1,458]	1,478,867 [1,399]
g. Fatality -- minimum \$100,000 [4,783]	523,228 [2,123]	679,416 [4,196]	521,717 [4,088]
h. Serious nonfatal injury -- minimum \$100,000 [2,022]	739,657 [882]	1,520,832 [1,809]	1,230,625 [1,802]
i. Fatality -- minimum \$500,000 [4,783]	1,300,175 [560]	1,060,139 [1,724]	807,780 [1,505]
j. Serious nonfatal injury -- minimum \$500,000 [2,022]	1,574,848 [329]	2,156,585 [1,094]	1,762,019 [1,052]
NOTE: Insurer Savings calculated as:			
(1) Projected (initial indemnity reserve + 23/33 initial expense reserve) - 1.1 economic loss.			
(2) Projected (final indemnity reserve + 23/33 final expense reserve) - 1.1 economic loss.			
(3) Total settlement or court award + 23/33 total allocated loss adjustment expenses - 1.1 economic loss.			

TABLE 4. Average Time Saved in Days from Early Offer Proposal			
PANEL A			
	(1) Days Saved if Early Offer Based on Initial Reserve [N]	(2) Days Saved if Early Offer Based on Final Reserve [N]	(3) Days Saved if Early Offer Based on Total Settlement or Court Award [N]
a. Exemplary damages reported [521]	781 [337]	713 [501]	709 [521]
b. No exemplary damages, economic damages reported as zero [645]	697 [645]	697 [645]	697 [645]
c. No exemplary damages, positive economic damages reported [4,567]	699 [2,753]	753 [4,262]	733 [4,539]
d. Imputed economic damages [10,704]	702 [7,648]	737 [10,487]	732 [10,704]
e. All claims [16,437]	709 [11,383]	713 [15,895]	730 [16,409]
PANEL B: Time Saved by Injury Type, Excluding Claims Reporting Exemplary Damages			
	(1) Days Saved if Early Offer Based on Initial Reserve [N]	(2) Days Saved if Early Offer Based on Final Reserve [N]	(3) Days Saved if Early Offer Based on Total Settlement or Court Award [N]
a. Fatality [4,609]	724 [3,074]	738 [4,522]	734 [4,605]
b. Serious nonfatal injury [1,938]	859 [1,055]	899 [1,893]	899 [1,932]
c. Other nonfatal injuries and short form claims [9,369]	680 [6,917]	708 [8,979]	694 [9,351]
d. All claims without exemplary damages [15,916]	709 [11,046]	740 [15,394]	731 [15,888]
e. Fatality -- minimum \$250,000 [4,783]	741 [1,124]	762 [2,937]	756 [2,655]
f. Serious nonfatal injury -- minimum \$250,000 [2,022]	877 [498]	927 [1,440]	930 [1,395]
g. Fatality -- minimum \$100,000 [4,783]	707 [2,036]	739 [4,182]	737 [4,084]
h. Serious nonfatal injury -- minimum \$100,000 [2,022]	872 [808]	906 [1,789]	910 [1,796]
i. Fatality -- minimum \$500,000 [4,783]	709 [549]	760 [1,722]	752 [1,504]
j. Serious nonfatal injury -- minimum \$500,000 [2,022]	844 [305]	918 [1,082]	909 [1,049]

TABLE 5. Average Time Saved in Days from Early Offer Proposal, Deducting Collateral Sources			
PANEL A			
	(1) Days Saved Early Offer Based on Initial Reserve [N]	(2) Days Saved if Early Offer Based on Final Reserve [N]	(3) Days Saved if Early Offer Based on Total Settlement or Court Award [N]
a. Exemplary damages reported [521]	715 [364]	711 [505]	709 [521]
b. No exemplary damages, economic damages reported as zero [645]	697 [645]	697 [645]	697 [645]
c. No exemplary damages, positive economic damages reported [4,567]	704 [3,034]	750 [4,353]	732 [4,567]
d. Imputed economic damages [10,704]	718 [8,302]	737 [10,536]	732 [10,704]
e. All claims [16,437]	714 [12,345]	738 [16,039]	729 [16,437]
PANEL B: By Injury Type, Excluding Claims Reporting Exemplary Damages, and Deducting Collateral Sources			
	(1) Days Saved Early Offer Based on Initial Reserve [N]	(2) Days Saved if Early Offer Based on Final Reserve [N]	(3) Days Saved if Early Offer Based on Total Settlement or Court Award [N]
a. Fatality [4,609]	726 [3,325]	738 [4,547]	734 [4,609]
b. Serious nonfatal injury [1,938]	867 [1,186]	898 [1,915]	898 [1,938]
c. Other nonfatal injuries and short form claims [9,369]	683 [7,470]	706 [9,072]	694 [9,369]
d. All claims without exemplary damages [15,916]	713 [11,981]	739 [15,534]	730 [15,916]
e. Fatality -- minimum \$250,000 [4,783]	742 [1,155]	763 [2,946]	756 [2,658]
f. Serious nonfatal injury -- minimum \$250,000 [2,022]	874 [539]	926 [1,458]	929 [1,399]
g. Fatality -- minimum \$100,000 [4,783]	705 [2,123]	739 [4,196]	737 [4,088]
h. Serious nonfatal injury -- minimum \$100,000 [2,022]	875 [882]	905 [1,809]	909 [1,802]
i. Fatality -- minimum \$500,000 [4,783]	715 [560]	760 [1,724]	752 [1,505]
j. Serious nonfatal injury -- minimum \$500,000 [2,022]	841 [329]	916 [1,094]	908 [1,052]

TABLE 6. Average Litigation Cost Savings from Early Offer Proposal

PANEL A			
	(1) Litigation Costs Reduced if Insurer Savings Based on Initial Reserve are Positive (\$) [N]	(2) Litigation Costs Reduced if Insurer Savings Based on Final Reserve are Positive (\$) [N]	(3) Litigation Costs Reduced if Insurer Savings Based on Total Settlement or Court Award are Positive (\$) [N]
a. Exemplary damages reported [521]	235,775 [337]	300,666 [501]	455,889 [521]
b. No exemplary damages, economic damages reported as zero [645]	104,912 [645]	132,272 [645]	208,007 [645]
c. No exemplary damages, positive economic damages reported [4,567]	107,159 [2,753]	159,332 [4,262]	224,725 [4,539]
d. Imputed economic damages [10,704]	71,947 [7,648]	118,895 [10,487]	191,777 [10,704]
e. All claims [16,437]	87,181 [11,383]	136,010 [15,895]	209,915 [16,409]
PANEL B: By Injury Type, Excluding Claims Reporting Exemplary Damages			
	(1) Litigation Costs Reduced if Insurer Savings Based on Initial Reserve are Positive (\$) [N]	(2) Litigation Costs Reduced if Insurer Savings Based on Final Reserve are Positive (\$) [N]	(3) Litigation Costs Reduced if Insurer Savings Based on Total Settlement or Court Award are Positive (\$) [N]
a. Fatality [4,609]	106,993 [3,074]	146,945 [4,522]	240,492 [4,605]
b. Serious nonfatal injury [1,938]	225,500 [1,055]	333,671 [1,893]	560,406 [1,932]
c. Other nonfatal injuries and short form claims [9,369]	50,085 [6,917]	79,643 [8,979]	108,737 [9,351]
d. All claims without exemplary damages [15,916]	82,648 [11,046]	130,651 [15,394]	201,849 [15,888]
e. Fatality -- minimum \$250,000 [4,783]	185,259 [1,124]	196,320 [2,937]	372,914 [2,655]
f. Serious nonfatal injury -- minimum \$250,000 [2,022]	404,064 [498]	420,837 [1,440]	751,975 [1,395]
g. Fatality -- minimum \$100,000 [4,783]	135,615 [2,036]	155,974 [4,182]	266,963 [4,084]
h. Serious nonfatal injury -- minimum \$100,000 [2,022]	280,887 [808]	351,160 [1,789]	600,235 [1,796]
i. Fatality -- minimum \$500,000 [4,783]	253,634 [549]	260,873 [1,722]	550,996 [1,504]
j. Serious nonfatal injury -- minimum \$500,000 [2,022]	546,911 [305]	522,211 [1,082]	949,709 [1,049]
NOTE: Litigation costs saved calculated as: (1) 0.23* Total settlement or court award + PV(23/33*initial expense reserve). (2) 0.23* Total settlement or court award + 23/33*final expense reserve. (3) 0.23* Total settlement or court award + 23/33*attorney expenses.			

TABLE 7. Average Gains or Losses to Claimants from Acceptance of Early Offer Proposal			
PANEL A			
	(1) Claimant Gain or Loss if Early Offer Decision Based on Initial Reserve (\$ [N] (percent positive)	(2) Claimant Gain or Loss if Early Offer Decision Based on Final Reserve (\$ [N] (percent positive)	(3) Claimant Gain or Loss if Early Offer Decision Based on Total Settlement or Court Award (\$ [N] (percent positive)
a. Exemplary damages reported [521]	-456,343 [337] (1.48%)	-493,785 [501] (2.59%)	-494,558 [521] (3.07%)
b. No exemplary damages, economic damages reported as zero [645]	-252,656 [645] (0.0%)	-252,656 [645] (0.0%)	-252,656 [645] (0.0%)
c. No exemplary damages, positive economic damages reported [4,567]	-152,458 [2,753] (7.12%)	-154,840 [4,262] (11.78%)	-147,702 [4,539] (12.10%)
d. Imputed economic damages [10,704]	-104,039 [7,648] (0.0%)	-142,973 [10,487] (0.0%)	-142,751 [10,704] (0.0%)
e. All claims [16,437]	-134,601 [11,383] (1.77%)	-161,663 [15,895] (3.24%)	-159,611 [16,409] (3.44%)
PANEL B: By Injury Type, Excluding Claims Reporting Exemplary Damages			
	(1) Claimant Gain or Loss if Early Offer Decision Based on Initial Reserve (\$ [N] (percent positive)	(2) Claimant Gain or Loss if Early Offer Decision Based on Final Reserve (\$ [N] (percent positive)	(3) Claimant Gain or Loss if Early Offer Decision Based on Total Settlement or Court Award (\$ [N] (percent positive)
a. Fatality [4,609]	-171,079 [3,074] (1.40%)	-186,155 [4,522] (2.48%)	-185,483 [4,605] (2.61%)
b. Serious nonfatal injury [1,938]	-321,583 [1,055] (2.75%)	-357,452 [1,893] (4.91%)	-357,364 [1,932] (5.33%)
c. Other nonfatal injuries and short form claims [9,369]	-74,195 [6,917] (1.79%)	-89,520 [8,979] (3.31%)	-87,350 [9,351] (3.49%)
d. All claims without exemplary damages [15,916]	-124,785 [11,046] (1.77%)	-150,854 [15,394] (3.26%)	-149,627 [15,888] (3.46%)
e. Fatality -- minimum \$250,000 [4,783]	-162,354 [1,124] (41.10%)	-127,692 [2,937] (45.45%)	-170,266 [2,655] (37.51%)
f. Serious nonfatal injury -- minimum \$250,000 [2,022]	-488,548 [498] (29.12%)	-371,583 [1,440] (33.06%)	-405,252 [1,395] (29.03%)
g. Fatality -- minimum \$100,000 [4,783]	-173,004 [2,036] (24.21%)	-160,067 [4,182] (26.52%)	-171,523 [4,084] (22.65%)
h. Serious nonfatal injury -- minimum \$100,000 [2,022]	-372,861 [808] (18.81%)	-353,744 [1,789] (20.35%)	-361,717 [1,796] (18.82%)
i. Fatality -- minimum \$500,000 [4,783]	-102,813 [549] (53.55%)	-53,969 [1,722] (59.06%)	-136,904 [1,504] (50.13%)
j. Serious nonfatal injury -- minimum \$500,000 [2,022]	-564,263 [305] (35.41%)	-375,841 [1,082] (41.87%)	-429,863 [1,049] (37.65%)

APPENDIX A: SELECTED SAMPLE CHARACTERISTICS OF THE TDI

	N	Percent
Long form	14,563	88.60
Short form	1,874	11.40
Total number of claims	16,437	100.00
Damages components reported	5,733	34.88
Exemplary damages reported	521	3.17
Primary insurer payment = total settlement or court award	10,283	62.56
Primary insurer payment + deductible = total settlement or court award	10,810	65.77
Multiparty claim	9,418	57.30
Duplicate report within same year	926	5.63

Age and Injury Characteristics -- Long Form Claims						
	All Cases		Death		Serious injury	
	N	Percent	N	Percent	N	Percent
All ages	14,563	100.0	4,826	33.14	2,034	13.97
Age < 18	3,024	20.76	862	17.86	1,126	55.36
Age 18 or older	11,539	79.24	3,964	82.14	908	44.64

Distribution of Total Settlements or Court Awards*	
	Percent
\$10,000 - \$100,000	37.90
\$100,001 - \$500,000	40.52
\$500,001 - \$1,000,000	11.26
\$1,000,001 - \$5,000,000	9.28
> \$5,000,000	1.04

* Median settlement or court award is \$156,707. Mean settlement or court award is \$457,779.

APPENDIX B: ADDITIONAL INFORMATION ON VARIABLE CONSTRUCTION FROM THE TDI

Variable	Question Number	Comments/Explanations
Age	2, long form only	Used to impute economic share of settlement using Florida data. Average economic share calculated for all cases used for short form claims.
Type of injury	4, long form only	<p>Grouped into 3 categories by severity: fatalities; serious injuries (amputation, brain damage, or spinal cord injury); all other nondeath, nonserious injuries. Because multiple injuries can be reported, some cases reporting death or serious injury also report other injuries. As reported in the 2002 Annual Report of TDI (p. 13), the injury types with the largest median settlement amount are brain damage (\$450,000), spinal cord injuries (\$350,000), death (\$300,000), and amputation (\$240,000).</p> <p>Because injury type is not reported on the short form, we group short form claims in the early offer analysis with nondeath, nonserious injuries. Given the indemnity cap of \$25,000 for short form reports, the injuries are unlikely to be death or serious injury.</p>
Policy type	7a4	Cases are selected if policy type is medical professional liability. See Phase I report for discussion at text, note 19.
Reserves	8a - 8f	<p>Primary carriers reported initial and final reserves for indemnity and expenses corresponding to their payment reported in question 12a1. As reported in the 2002 Annual Report (p. 11), some insurers included expense reserves with indemnity reserves. This means that total reserves reported in 8c and 8f may be more reliable than the components reported in 8a, 8b, 8d, and 8e.</p> <p>For cases in which primary carrier reports zero payment in 12a1, reserves correspond to payment reported in 12a2. For cases involving a self-insured entity, reserves correspond to the sum of 12a1 and 12a2.</p> <p>Per conversation with TDI staff, the relevant comparison of reserves in 8a - 8f is to the sum of 12a1 and 12a2 for all claims.</p>
Attorney employed	9	Attorneys were employed by the plaintiff in 98 percent of the claims and by the insurer in 94 percent of the claims. For simplicity, we assume all claims will employ an attorney.
Legal stage	10a	The question identifies stage of legal system at which a settlement was reached or an award made.

Variable	Question Number	Comments/Explanations
Damage components	11b2 a - e, 11d3 a - e, 11e3 a - e	<p>For some claims, total damage amounts are reported in four components: economic losses, noneconomic losses, exemplary damages, and prejudgment interest. Claims settled by court verdict or settled after a court verdict are required to report this breakdown. Claims settled out of court report the breakdown only if, in the opinion of the individual completing the form, the settlement was influenced by a demand for or possible award of noneconomic, exemplary damages, or prejudgment interest.</p> <p>For these amounts, we use the TDI calculated variables reported in Columns 184 - 188, labeled ECONOMIC, NONECO, EXEMP, and INTEREST.</p> <p>For claims not reporting the breakdown, we use Florida data to impute economic loss as a fraction of the total court award or settlement amount. The fractions are as follows: 0.359, nonfatal <age 18; 0.156, nonfatal \geq age 18; 0.345, fatal < age 18; 0.246, fatal \geq age 18. Because age and injury type are not reported for short form claims, we use the same economic share for all short form claims of 0.348, calculated as the weighted average for all nonfatal claims. The average are based on numbers reported in Table 5A and Table 5B of the Phase I report.</p>
Payments	12a1 - 7	<p>Payments are reported by the primary carrier and are reported as amount paid by primary carrier (12a1); amount paid by the insured, due to deductible (12a2); amount paid by excess carrier (12a3); amount paid by the insured due to settlement or award in excess of policy limits (12a4); amount paid by other insurers on behalf of other defendants (12a5); amount paid by other defendants that were not insured (12a6). The total amount of settlement or court award is reported in 12a7 and is the sum of the numbers reported in 12a1 - 12a6.</p> <p>As reported in the 2002 Annual Report (p. 3 - 4), the total settlement amount may be incomplete because carriers report only known settlement amounts paid to the claimant. Specifically, p. 4 states: "Reports indicating involvement of other contributing parties may not have included the other contributing parties' payments in the total settlement amount." Respondents were asked to indicate "unknown" when they did not know amount paid by other parties. As an example, our calculations show that the amount paid by other insurers on behalf of other defendants was reported as "unknown" for 460 claims, and the corresponding dollar amount was recorded as zero.</p>

Variable	Question Number	Comments/Explanations
Collateral sources	14a, b, c1 - c6, long form only	<p>The form asked whether workers' compensation was available to the injured party (14a); whether the respondent was aware of any other collateral sources available to the injured party (14b); and for those indicating yes to 14b, to select those sources that were available from a list of collateral sources (medical insurance; disability insurance; social security disability/ supplementary security benefits; Medicare, Medicaid; sick leave; other). The values of these collateral sources are not reported. Furthermore, as reported in the 2002 Annual Report (p. 6), claimants were not required to make collateral source information available to insurers, so the data may not report all cases when collateral sources were available, leading to a lower than accurate value of the role of collateral sources.</p> <p>We therefore impute collateral sources offset using Florida data reporting percentage payments for corresponding collateral source categories and stratified by age and fatality. We calculate the share of economic loss offset by each of the five collateral sources reported in the data, then calculate the dollar value that applies to each claim, then take the average in each of the four categories. The collateral source offsets are as follows: 0.249, nonfatal <age 18; 0.281, nonfatal ≥ age 18; 0.213, fatal < age 18; 0.199, fatal ≥ age 18. Because age and injury type are not reported for short form claims, we use the same collateral source offset for all short form claims of 0.264, calculated as the weighted average for all nonfatal claims.</p> <p>We examine the comprehensiveness of the collateral source reporting in Texas and magnitude of possible underreporting by matching percentage payment reported in the Florida data to the presence of collateral sources reported in the Texas data. The categories reported in both the Texas data and the Florida data are Medicare/Medicaid, health insurance, and workers' compensation. If the claimant in the Texas data had such coverage we assigned the percentage payment reported in the Florida data. The resulting average collateral source offset would be only 4.8 percent, a number far lower than calculated using the FL data. See note 5 above.</p>
Legal expenses	17a - 17d	<p>The amount paid to outside defense counsel is reported in 17a, allocated expense for in-house counsel is reported in 17b, allocated loss adjustment expenses such as court costs and stenographers are reported in 17c, with the total allocated loss adjustment expense reported in 17d. As reported in the 2002 Annual TDI Report (p. 7), cost containment expenses are not reported on the closed claim forms and so the expenses incurred to settle the claim are understated.</p>
Elapsed time	ET1B1G	<p>Elapsed time between date reported to insurer and date claim closed, calculated by TDI from 1b and 1g.</p>

APPENDIX C: EXAMPLE OF DERIVATION OF VALUES REPORTED IN TABLE 2

This example is based on serious fatal injuries (excluding claims reporting exemplary damages) and calculations using the initial reserve amount.

$$\text{Insurer Savings} = \text{Projected (initial indemnity reserve + 23/33 initial expense reserve) - 1.1 economic loss.}$$

	(1) All Serious Nonfatal Injury Claims -- See Table 1	(2) Serious Nonfatal Injury Claims with Early Offer Based on Initial Reserve -- Table 2
a. Number of claims	1,938	1,055
b. Projected total initial reserve	\$578,209	\$887,110
c. Projected initial indemnity reserve	\$493,258	\$764,598
d. Projected initial expense reserve	\$84,951	\$122,512
e. Economic loss	\$430,225	\$246,543
Average savings		\$578,788

Inserting numbers from Column 2, using the equation from Section 6B,

$$\text{Insurer Savings} = \text{Projected (initial indemnity reserve + 23/33 initial expense reserve) - 1.1 economic loss, as indicated in the text, or using the numbers above,}$$

$$= \text{Projected initial indemnity reserve} + (23/33) \times \text{Projected initial expense reserve} - 1.1 \times \text{economic loss}$$

$$= \$764,598 + (23/33) \times \$122,512 - 1.1 \times \$246,543$$

$$= \$578,788$$

ATTACHMENT

LONG FORM

TEXAS DEPARTMENT OF INSURANCE

Texas Commercial Liability Insurance Closed Claim Report Indemnity Payments of \$25,000 or More

Company Name & Address:	_____	Always Complete

NAIC Company Code:	_____ NAIC Group Code:	Always Complete
Claim File Identification:	_____	Always Complete
Form Completed By:	_____ Tel: _____	
Form Reviewed By (Coordinator):	_____ Tel: _____	Always Complete

**LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE**

NAIC Company Code: _____ NAIC Group Code: _____

- 1.** a. Date of Injury _____ Always Complete
MM / DD / YYYY
- b. Date reported to insurer _____ Always Complete
MM / DD / YYYY
- c. Date suit filed _____ Complete if suit filed
MM / DD / YYYY
- d. Date of trial or final trial setting _____ Complete if trial held
MM / DD / YYYY
- e. Date of settlement _____ Always Complete
MM / DD / YYYY
- f. Date of jury award _____ Complete if rendered
MM / DD / YYYY
- g. Date claim was closed _____ Always Complete
MM / DD / YYYY
- 2.** Age of injured person at the time of the injury:
(Indicate months only if child is less than one year of age) _____ Always Complete
Years Months
- 3.** a. Was injured person employed at the time of the loss?
 _____ Always Complete
Y/N
- b. If 3.a if "Y", was the injury work-related? _____ Do not respond if 3.a is "N"
Y/N
- 4.** Type of injury: Always Complete
Select all that apply
- a. Death _____
- b. Amputation _____
- c. Burns (heat) _____
- d. Burns (chemical) _____
- e. Systemic poisoning (toxic substance) _____
- f. Systemic poisoning (other) _____
- g. Eye injury (blindness) _____
- h. Respiratory condition _____
- (Question #4 is continued on page 2)

**LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE**

NAIC Company Code: _____ NAIC Group Code: _____

(Question #4 continued)

- i. Nervous condition.....
- j. Hearing loss or impairment.....
- k. Circulatory condition.....
- l. Multiple injuries (broken limbs, lacerations, contusions).....
- m. Back injury.....
- n. Skin disorder.....
- o. Brain damage.....
- p. Scarring.....
- q. Spinal cord injuries (including paraplegia and quadriplegia).....
- r. Other _____
(Give Brief Description)

5. How did the injury occur? Always Complete
Select all that apply

- a. Off road vehicle.....
- b. Air transportation.....
- c. Railway.....
- d. Other motor vehicle.....
- e. Complications, misadventures of surgical/medical care.....
- f. Falls.....
- g. Drowning.....
- h. Use of defective product.....
- i. Fire.....
- j. Firearm.....
- k. Pollution or long-term exposure to toxic material.....
- l. Explosions.....
- m. Use of agricultural machinery.....
- n. Oil & gas extractions.....
- o. Other _____
(Give Brief Description)

6. a. Where did the injury occur? Always Complete
(Choose either 1 or 2 and then complete the applicable item below) Enter either 1 or 2

- 1. Texas _____ County _____ Complete if Texas
(City Name) (County Name)
- 2. Other _____ Complete if not Texas
(Brief Location, i.e.: Off-shore, Name of State, etc.)
- b. If Texas, enter county code where the injury occurred _____ Complete if 6.a. is "1".
- c. Enter the county code where suit was initially filed..... Complete if suit filed

(Question #6 is continued on page 3)

LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE

NAIC Company Code: _____ NAIC Group Code: _____

(Question #6 continued)

d. Enter the county code where the case was tried _____ Complete if trial started

7. Policy Information

a. Policy Type _____ Always Complete

Choose one

1. Mono-line general liability
2. Commercial auto liability
3. Texas commercial multiperil (Sec. II liab.; include TCPP & TBOP)
4. Medical professional liability
5. Other professional liability

b. Policy Form _____ Always Complete

Choose one

1. Occurrence
2. Claims Made

c. Business Class _____ Always Complete

Choose one

1. Agriculture
2. Mining
3. Manufacturer of chemical & allied products
4. Medical products manufacturers
5. Drug manufacturers
6. Other products manufacturers
7. Transportation
8. Wholesale-retail trade
9. Municipal/public liability
10. Schools (public & private)
11. Daycare centers
12. Liquor liability
13. Non-profit organizations
14. Construction firms
15. Oil wells & drillings
16. Apartments, townhouse & condominiums
17. Office
18. Churches

(Question #7 is continued on page 4)

**LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE**

NAIC Company Code: _____ NAIC Group Code: _____

(Question #7 continued)

- 19. Physicians & surgeons
- 20. Dentists
- 21. Oral surgeons
- 22. Hospital
- 23. Nursing Home
- 24. Professionals – lawyers
- 25. Professionals – D&O
- 26. Other _____
(Give Brief Description)

d. Policy limits for bodily injury: Always Complete
Indicate the limit for individual bodily injuries with all zeroes shown in the response. Do not use slashes or abbreviations in the response

Complete all that apply:

- 1. Per person (commercial auto only)..... \$ _____
- 2. Per occurrence/accident..... \$ _____
- 3. Combined single limit \$ _____

8. a. Indicate the initial reserve first established for the indemnity portion of the claim after investigation of the claim or review of the file. Do not report formula or fast track reserves..... \$ _____ **Answer 8a – 8f
in whole dollars**

Always Complete

b. Indicate the initial reserve first established for expenses relating to the claim after investigation of the claim or review of the reserves..... \$ _____

Always Complete

c. Indicate (a + b)..... \$ _____

Always Complete

d. Indicate the reserve for the indemnity portion of the claim just before the file was closed..... \$ _____

Always Complete

e. Indicate the reserve for expenses relating to the claim just before the file was closed \$ _____

Always Complete

f. Indicate (d + e)..... \$ _____

Always Complete

9. a. Was an attorney employed by the plaintiff? _____
(Y/N)

Always Complete

b. Was an attorney (outside or in-house) employed by the insurer?.....
(Y/N)

Always Complete

c. Was an attorney employed by the insured?.....
(Y/N)

Always Complete

**LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE**

NAIC Company Code: _____ NAIC Group Code: _____

10. a. At what stage of the legal system was a settlement reached or an award made? _____ Always Complete

Choose One

1. Alternative dispute resolution with no suit filed
2. No suit filed
3. Alternative dispute resolution after suit filed
4. Suit filed but settlement reached before trial
If you choose 1, 2, 3 or 4, complete items 11.a, 11.e, 12.a, 12.c, 13.c, 13.d, 13.e, 14, 15, 16 and 17.
5. During trial, but before court verdict
If you choose 5, complete items 10.c, 11.a, 11.e, 12.a, 12.c, 13.c, 13.d, 13.e, 14, 15, 16 and 17.
6. Court verdict
If you choose 6, complete items 10.b, 10.c, 10.e, 11.a, 11.b, 12.a, 12.c, 13.a, 13.b, 13.e, 14, 15, 16 & 17.
7. Settlement reached after court verdict
If you choose 7, complete items 10.b, 10.c, 10.e, 11.a, 11.b, 11.c, and 11.d. Also complete 12.a, 12.c, 13.a, 13.b, 13.e, 14, 15, 16 and 17.
8. Settlement reached after appeal was filed
If you choose 8, complete items 10.b through 10.f, and 11.a through 11.c. If item 11.c is "Y", then complete 11.d. Also complete 12.a, 12.c, 13.a, 13.b, 13.e, 14, 15, 16 and 17.
9. Case dismissed or summary judgment
If you choose 9, contact the Texas Department of Insurance for further instructions.

b. If a court verdict is indicated, indicate the result by choosing one of the following _____

Choose One

1. Directed verdict for the plaintiff
2. Directed verdict for the defendant
3. Judgment notwithstanding the verdict for the plaintiff
4. Judgment notwithstanding the verdict for the defendant
5. Judgment for the plaintiff
6. Judgment for the defendant
7. For plaintiff, after appeal
8. For defendant, after appeal
9. All others

c. If the case went to trial, was it _____

Choose One

1. Trial by judge and jury
2. Trial by judge alone

d. If appealed, who requested the appeal _____

Choose One

1. Plaintiff
2. Defendant

(Question #10 is continued on page 6)

**LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE**

NAIC Company Code: _____ NAIC Group Code: _____

(Question #10 continued)

e. Did the court order a remittitur? _____
Y/N

f. If yes, indicate the amount by which the original award was reduced _____ \$ _____

11. a. Indicate the amount of the final demand by claimant or attorney for claimant _____ \$ _____

Always Complete

b. 1. If the case was closed as a result of a court verdict or settled after a court verdict, what was the amount of the court verdict? _____ \$ _____

If there is no court verdict, please skip to item 11.e.

2. How was this amount distributed between:
Complete all that apply

Round to whole dollars

- a. Economic losses _____ \$ _____
- b. Non-economic losses _____ \$ _____
- c. Exemplary damages _____ \$ _____
- d. Prejudgment interest _____ \$ _____
- e. Total _____ \$ _____

c. Was the total amount paid as a result of the settlement after a court verdict different from the amount stated in the court verdict? _____
(Y/N)

d. 1. If "Y", what was the amount of the settlement after the court verdict? _____ \$ _____

2. Was this settlement influenced by a demand for or possible award of non-economic, exemplary damages, or prejudgment interest? _____
(Y/N)

3. If yes, estimate the amount of the following as contemplated in your settlement:

Round to whole dollars

- Complete all that apply
- a. Economic losses _____ \$ _____ *
 - b. Non-economic losses _____ \$ _____ *
 - c. Exemplary damages _____ \$ _____ *
 - d. Prejudgment interest _____ \$ _____ *
 - e. Total _____ \$ _____

* Indicates that the question calls for your most candid expert opinion

(Question #11 is continued on page 7)

**LONG FORM
TEXAS CLOSED CLAIM REPORT
INDEMNITY PAYMENTS OF \$25,000 OR MORE**

NAIC Company Code: _____ NAIC Group Code: _____

(Question #11 continued)

- e. 1. If no suit was filed or the claim was closed before reaching court or before reaching a court decision, what was the amount of the settlement? \$ _____
- Item 11.e.1 must agree with item 12.a.7 if there is no court verdict
2. Was this settlement influenced by a demand for or possible award of non-economic exemplary damages or prejudgment interest?..... _____ (Y/N)
- If item 11.e.2 is "N" do not respond to item 11.e.3
3. If yes, estimate the amount of the following as contemplated in your settlement: Round to whole dollars
- Complete all that apply
- | | | |
|-------------------------------|----|---|
| a. Economic losses | \$ | * |
| b. Non-economic losses | \$ | * |
| c. Exemplary damages | \$ | * |
| d. Prejudgment interest | \$ | * |
| e. Total | \$ | |

- 12. a.** Please indicate the following dollar amounts as applicable to this claim A response is required in item 12.a.1 or 12.a.2.

- Complete all that apply Round to whole dollars
- | | | |
|--|----|--|
| 1. Amount paid by the primary carrier | \$ | |
| 2. Amount paid by the insured, due to deductible | \$ | |
| 3. Amount paid by the excess carrier (indicate "unknown" when applicable) | \$ | |
| 4. Amount paid by the insured due to settlement or award in excess of policy limits (indicate "unknown" when applicable) | \$ | |
| 5. Amount paid by other insurers on behalf of the other defendants (indicate "unknown" when applicable) | \$ | |
| 6. Amount paid by other defendants that were not insured (indicate "unknown" when applicable) | \$ | |
| 7. Total amount of settlement or court award..... | \$ | |
- Item 12.a.7 requires a response. Do not include "unknown".

* Indicates that the question calls for your most candid expert opinion

(Question #12 is continued on page B)

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(Question #12 continued)

- b. Please provide the following information for each of the other insurers contributing to the total settlement in this claim:

	Company Name	NAIC Co. Number	Amount Paid
1.	_____	_____	\$ _____
2.	_____	_____	\$ _____
3.	_____	_____	\$ _____
4.	_____	_____	\$ _____
5.	_____	_____	\$ _____
6.	_____	_____	\$ _____

- c. Are any other defendants still in litigation relative to this claim? _____ Always Complete
(Y/N)

- 13.** a. In cases that closed due to a court verdict or settlement after a court verdict, did the judgment provide or joint and several liability in regard to any defendant? _____ Complete items 13.a and 13.b only if there is a court verdict
(Y/N)

- b. Complete the following table for cases that closed due to a court verdict or settlement reached after a court verdict: Round to whole dollars

	Percent of Fault Assigned by Court Verdict To	Total Amount Paid or Awarded by a Court Verdict	Total Amount Paid in Settlement After Verdict
1. Injured party	_____ %	-----N/A-----	-----N/A-----
2. Your insured	_____ %	\$ _____	\$ _____
3. Other insured defendants	_____ %	\$ _____	\$ _____
4. Other uninsured defendants	_____ %	\$ _____	\$ _____
5. Total verdict amount.....		\$ _____	
6. Total pay out amount in settlement after verdict.....			\$ _____

- c. In cases that were settled before a court verdict, did the doctrine of joint and several liability impact the settlement? _____ Complete item 13.c if there is not a court verdict
(Y/N)

(Question #13 is continued on page 9)

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(Question #13 continued)

d. Indicate the following for cases that were settled before a court verdict.

Complete item 13.d if there is not a court verdict.

Round to whole dollars

	Estimated % of Fault Assigned To	Total Amount Paid in Settlement
1. Injured party	%*	-----N/A-----
2. Your insured	%*	\$ _____
3. Other insured defendants	%*	\$ _____
4. Other uninsured defendants	%*	\$ _____
5. Total payout		\$ _____

e. 1. How many other defendants were there?

If there are no other defendants, then leave blank

(enter the applicable alpha character from below in the space provided)..... _____

Choose one

- A. One
- B. Two
- C. Three
- D. Four
- E. Five
- F. Six
- G. More than six

2. Indicate the following for the other defendants:

Complete if 13.e.1 is answered

Complete all that apply

	How Many Insured Defendants?	How Many Uninsured Defendants?
a. Municipal.....	_____	_____
b. Government other than municipal	_____	_____
c. Business	_____	_____
d. Industrial	_____	_____
e. Non-profit organizations.....	_____	_____
f. Hospital.....	_____	_____
g. Physicians & surgeons.....	_____	_____
h. Other health care providers.....	_____	_____
i. All others.....	_____	_____

Please indicate numbers. Do not use "X" marks or check marks.

* Indicates that the question calls for your most candid expert opinion

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NAIC Company Code: _____ NAIC Group Code: _____

- 14. a.** Was workers' compensation available to the injured party? _____
(Y/N) Always Complete
- b.** Are you aware of any other collateral sources available to the injured party? _____
(Y/N) Always Complete
- c.** If 14.b is "Y", indicate which of the following sources were available:
- Select all that apply
- 1. Medical insurance _____
 - 2. Disability insurance _____
 - 3. Social security disability/supplementary security benefits _____
 - 4. Medicare, Medicaid _____
 - 5. Sick leave _____
 - 6. Other _____
- 15. a.** Are you aware of any lawsuit(s) which has (have) been filed under rights of subrogation, contribution or indemnification in connection with this claim? _____
(Y/N) Always Complete
- b.** If 15.a is "Y", indicate your status in that suit: _____
- Choose one
- 1. Plaintiff
 - 2. Defendant
 - 3. Not Involved
 - 4. Both
- 16. a.** Was a structured settlement used in closing the claim? _____
(Y/N) Always Complete
- b.** If 16.a is "Y", please complete the following: Round to whole dollars
- 1. Immediate payment _____ \$
 - 2. Present value of projected total future payment (price of an annuity if purchased) _____ \$
 - 3. Total award or settlement (1 + 2) _____ \$ 16.b.3 must equal item 12.a.7 if 16.a is "Y".
 - 4. Indicate the total projected future pay out _____ \$
- c.** Was a structured settlement used to pay the plaintiff's attorney's fee? _____
(Y/N) Always Complete

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NAIC Company Code: _____ NAIC Group Code: _____

- | | | | |
|------------|--|----------|--|
| 17. | a. Indicate the amount paid to outside defense counsel..... | \$ _____ | Round to whole dollars. |
| | b. Indicate any allocated expense for in-house defense counsel..... | \$ _____ | |
| | c. Indicate the amount of other allocated loss adjustment expenses, such as court costs and stenographers..... | \$ _____ | |
| | d. Indicate the total allocated loss adjustment expense (a + b + c)..... | \$ _____ | 17.d must equal the sum of items 17.a. through 17.c. |

Additional Comments (optional):