

Empirical Legal Studies in America

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Agenda for 4th Class

- Contracts
 - Florencia Marotta-Wurgler, What's in a Standard Form Contract? An Empirical Analysis of Software License Agreements (2007)
 - 10 minute Break
- Non-quantitative studies
 - Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry (1992)
 - 10 minute break
- File review
 - David Studdert et al., Claims, Errors, and Compensation Payments in Medical Malpractice Litigation (2006)
 - 10 minute break
- Exam
 - Multiple choice
 - Open book
 - 10:45-11:45

Review of 3rd Class

- Panel data: Crime
 - John J. Donohue & Justin Wolfers, Uses and Abuses of Empirical Evidence in the Death Penalty Debate (2005)
- Event studies
 - Sanjai Bhagat & Roberta Romano, Event Studies and the Law (2002)
 - Klerman & Mahoney, The Value of Judicial Independence (2005)
- Cross-Country Studies
 - Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, The Economic Consequences of Legal Origins (2008)
 - Klerman, Mahoney, Spamann & Weinstein, Legal Origin or Colonial History? (2011)
 - Klerman & de Figueiredo, Legal Origin from Outer Space (in progress)

Contracts

Florencia Marotta-Wurgler

What's in a Standard Form Contract?
An Empirical Analysis of Software
License Agreements (2007)



Design

- 647 software license EULAs
 - EULA = End-User License Agreement
- Analyzed 23 key terms
 - Whether more or less favorable to seller than "default" rule
 - Uniform Commercial Code
 - Can licensee transfer license to 3rd party?
 - Is there a waiver of warranties?
 - Are there limitations on seller damages for breach or defect?
 - Is there a choice-of-forum clause?
 - Is there a choice-of-law clause?
- Bias index
 - How many terms more favorable to seller than default

Conclusions

- Most terms biased toward seller
 - Average bias index score of 6
- Common pro-seller terms
 - No transfer. 93%
 - Disclaimer of implied warranty. 90%
 - Disclaimer of consequential damage. 89%
- Common pro-consumer terms
 - Maintenance & support
- Contracts with bigger companies more pro-seller
- Contracts with younger firms more pro-seller
- Products targeted toward consumers NOT more pro-seller than products targeted toward businesses

Discussion

- Do you have any questions about Florencia Marotta-Wurgler's study?
- Could you conduct a similar study in China?
 - What do you think you would find?
- Are there types of contracts you think would be good to study?

Non-quantitative studies

Lisa Bernstein

Opting Out of the Legal System:
Extralegal Contractual Relations in the
Diamond Industry (1992)



Private Ordering

- Rules and enforcement without the state or legal system
- Coase (1974)
 - Private provision of light houses
- Ellickson (1989)
 - Whalers developed norms for property rights in whales
 - Critique of "legal centrism"
 - Hypothesis of "wealth-maximizing norms"
- Umbeck (1977)
 - Early California gold mines
 - Early miners developed and enforced property rights in gold mines
- Benson (1989)
 - Medieval law merchant

Bernstein Study

- Contracts in diamond industry
- Interviewed participants
- Important US participants are members of the NY Diamond Dealers Club
 - ~2000 Manufacturers, wholesalers, and brokers
 - All members agree to submit disputes to binding arbitration
- Different contract rules
 - Oral contracts enforceable, even for large sales
 - Would violate US Statute of frauds, if >\$500
 - Offers binding without consideration
- Arbitration system
 - Secret
 - Arbitrators are other members of the NY Diamond Dealers Club
 - Decisions within 10 days

Bernstein Study II

- Remedies
 - Monetary compensation
 - Sometimes fine to charity in excess of harm to other party
 - Sometimes public apology
- Enforcement
 - Public posting of decision, if not complied with
 - On all bourses worldwide
 - Suspension or expulsion from Diamond Dealers Club
 - Not through court
 - Although possible in theory and law
- Why not use regular courts?
 - Secrecy, speed, expertise
 - Court damages probably too low, b/c hard to calculate lost profits

Discussion

- Do you have any questions about Lisa Bernstein's study?
- Are there industries in China where they have set up arbitration systems similar to the New York Diamond Dealers Club?
- Are there legal topics in China that you think would be best researched through non-quantitative methods?

File Review

David Studdert et al.

Claims, Errors, and Compensation
Payments in Medical Malpractice
Litigation (2006)



Controversy over Medical Malpractice

- Medical malpractice litigation
 - Patient who thinks she has been injured by doctor's negligence can sue the doctor
 - Damages can be very high – over \$1,000,000
- Doctors usually purchase insurance
 - But insurance can be very expensive: tens of thousands of dollars
- Doctors argue that system is arbitrary
 - They are held liable when they have done nothing wrong
 - Juries don't understand medicine and just want to compensate injured people
 - Makes health care more expensive
 - But does not deter negligence

Harvard Medical Practice Study

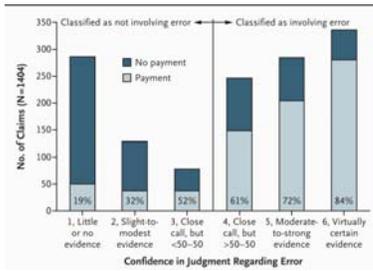
- Examined 31,000 randomly selected hospital records
 - Evaluated by doctors for evidence of negligence
 - Results compared to court records
- 3 main conclusions
 - Most people injured by negligent care do not sue
 - Negligent injury is 7 times more common than medical malpractice suits
 - Most suits involve doctors who were not negligent
 - Only 17% of suits involved negligent doctors
 - Litigation outcomes not correlated with negligence
- Very controversial
 - Last 2 conclusions probably wrong
 - Study looked only at hospital records
 - But negligence often not recorded
 - Study classified care as negligent only if 2 doctors agreed that negligent

Studdert Study

- Doctor review of 1452 insurance claim files
- Most claims involved negligent injury
 - 3% No injury
 - 37% no error (negligence)
 - So 60% involved injury resulting from error (negligence)
- Legal process relatively accurate
 - If no error or injury, no compensation 84% of time
 - If injury and error, compensation 73% of time

Studdert Study

- Legal process relatively accurate
 - If no injury, compensation only 16% of time
 - If injury but not error, then compensation only 28% of time
 - If injury and error, compensation 73% of time



Studdert Study III

- Litigation and administration very expensive
 - \$376 million in compensation to plaintiffs
 - \$73 million in defense costs (lawyers etc)
 - \$132 million in plaintiff costs (contingency fee of 35%)
- Conclusion
 - Harvard study wrong to conclude that
 - Most suits involve no negligent injury
 - No relationship between outcomes and negligence
 - Most suits involve negligent injury
 - Although 40% do not
 - Strong correlation between outcomes and negligence
 - But errors about 25% of time

Discussion

- Do you have any questions about the Studdert study?
- Do you have any criticisms of the Studdert study?
- Could a similar study be conducted in China?
What do you think it would find?

Exam

10:45-11:45

Open book. You can look at your notes, the articles, my slides, or handouts.
