A Law and Economics Approach to the California Expedited Jury Trials Act

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Yixi (Cecilia) Cheng

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Under the supervision of:

Professor Eric Talley

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ABSTRACT

On January 1, 2011, the California Expedited Jury Trials Act ("CEJTA") became effective law as part of the Code of Civil Procedure. The legislation is modeled after existing summary jury trial programs in other states, and allows parties engaged in a civil dispute to opt into an Expedited Jury Trial ("EJT") in place of a regular jury trial. Proponents maintain that the EJT will create procedural efficiency and lower costs in the civil court system by effectively limiting trial to one day. While the long-term effects of EJT's in California remain to be seen, this paper uses game theory and other economic theory to analyze how the CEJTA will affect litigant and attorney decision-making in a civil dispute, and determine whether EJT's will produce the desired effects of reducing costs and other inefficiencies.

While many advocate that the CEJTA will reduce costs to the judicial system, this paper posits an alternative possibility: an EJT option may end up increasing overall court costs by reducing the rates of out-of-court settlement, as the effective costs of trial for a disputant are now much lower, while the risk and expected gains remain the same. In this paper, economic models are constructed to represent the choices faced by the litigant. These models are tested in light of available docket data in Santa Clara County (California) and Harris County (Texas). Regression analyses on these data help illuminate whether the EJT program will be successful at reducing overall court costs. This paper thus seeks to understand the potential implications of the CEJTA on individual decision-makers (the disputant and the attorney), and on the court system as a whole.

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INTRODUCTION

Overview of EJT's

In January 2011, the California Expedited Jury Trials Act ("CEJTA"), or Assembly Bill 2284, came into effect as part of the Code of Civil Procedure sections 630.01-630.12[1]. In an effort to help the exhausted and overburdened court system, the CEJTA, modeled after the concept of summary jury trials originally used in South Carolina, allows both parties engaged in a civil dispute to opt into an Expedited Jury Trial ("EJT") in place of a regular jury trial. According to the official California Courts website, the CEJTA is meant to "[establish] an alternative, streamlined method for handling civil actions to promote the speedy and economic resolution of cases and to conserve judicial resources" (California Courts).

The EJT has the following main characteristics which attempt to cut down on wasteful procedural costs:

- Each side is limited to 3 hours to present their case to a jury of 8 (or fewer) persons, with a consensus of 6 of those persons enough for a verdict;
- Each side is limited to 3 peremptory challenges, unless there are extenuating circumstances;
- The parties waive rights to appeal and to make post-trial motions;
- The parties are able to specify a "high/low agreement" prior to trial. According to C.C.P. section 630.01, the high/low agreement is defined as "a written agreement entered into by the parties that specifies a minimum amount of damages that a plaintiff is guaranteed to receive from the defendant, and a maximum amount of damages that the defendant will be liable for, regardless of the ultimate verdict returned by the jury." This agreement is not disclosed to the jury.

The law does not limit the types of cases which qualify for an expedited trial, and EJTs are meant to be flexible, providing a viable option for even high-impact cases. Many attorneys, however, suggest it be used for cases which involve smaller damage amounts and which have relatively limited issues (McCarthy; Huston, and Roberts). Proponents believe that the EJT is most beneficial in cases where the cost of going to court is high enough to prevent litigation (McCarthy; Ehrlich 515; Goldberg, "*Practice Tips: Expedited Jury Trials Offer Innovative Tips to Reduce Costs*" 20). For

[1] The Code of Civil Procedure sections 630.01-630.12 can be read here: http://www.leginfo.ca.gov/cgi-bin/displaycode?section=ccp&group=00001-01000&file=630.01-630.12
The Chaptered text of the proposed bill can be read here: http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2251-2300/ab_2284_bill_20100930_chaptered.html

parties with small claims, incurring huge expenses for going to trial is unfeasible; plaintiffs with minor claims, even if liability is undisputed, may be financially precluded from being able to retain an attorney to take their case. Thus, some advocate that the EJT is best suited for cases which would normally be precluded from trial, involving damages between $10,000 and $30,000 (although a version of the EJT has been used in New York for cases involving damages up to $1 million) (McCarthy).

The CEJTA was supported by a wide range of interest groups, including attorneys, consumer advocacy groups, the Judicial Council, and CalChamber, which represents the state's business interests. Chris Dolan, one of the main drafters of the Act and the president of the Consumer Attorneys of California during the Act's inception, hoped that EJT's would reduce the cost of a jury trial by 80 percent, from the reduction of lawyer, court reporter, and other costs (McCarthy). Many groups, therefore, have high hopes for the legislation and believe that it will have the effect of significantly lowering litigation costs for disputants who opt into the program, and for the court system as a whole.

The EJT may be considered as a hybrid between the traditional court system and Alternative Dispute Resolution ("ADR") methods. A discussion of how, or if, EJT's fit into the general ADR landscape is attached to this thesis as an addendum.

Goals of this Paper:

The purposes of this paper are to examine the primary goals for adopting the CEJTA, and to determine whether actions taken by the disputant and the attorney will align with these goals. Whether the legislation will have the effects predicted by its proponents remains to be seen, but I contend that economic models can be used to approximate the implications of the new EJT option. My thesis thus seeks to answer two primary research questions:

(i) When and why do proponents advocate for the use of EJT's, and how do proponents understand the purpose of the Act?

(ii) Will decision-making be consistent with the legislation's goals of reducing costs (or more specifically, how will EJT's affect litigation intensity and settlement)?

In order to answer these questions effectively, I have organized the paper into two primary sections: Part I will focus on the drafters' understanding of the legislation, and will introduce two game theory models based on that understanding, and Part II will discuss procedural consequences of the EJT by using econometric analysis of data from Santa Clara County (California) and Harris County (Texas).

This project uses a multi-method approach in order to better understand the Act: (i) interviews with drafters and attorneys, (ii) game theory, and (iii) econometric analysis. Each method mutually informs the others and contributes to the overall findings: the interviews create a set of goals and considerations to help construct the game theory models. Then, the qualitative interviews and the models guide the econometric analysis by specifying where to search for and how to test the effects of the EJT.

LITERATURE REVIEW

Summary Jury Trials in South Carolina

In order to develop a theory about how to best evaluate the efficiency of the CEJTA, we must first develop criteria with which to assess it. According to the Senate Judiciary Committee, EJT's "allow parties to get their day in court, reduce parties' costs, decrease the backlog of civil cases, and more efficiently manage jury resources." The support the bill enjoys comes largely from its potential to "cut litigation costs across the board for plaintiffs, defendants, insurance carriers, and the courts" (Senate Judiciary Committee, Committee Analysis of AB 2284, at 6-9. 2010). In order to understand what this reduction in costs means, we must first look towards Summary Jury Trials, upon which EJT's are based.

Early the 1980s, courts experimented with what is known as the "summary jury trial" ("SJT") for the purpose of promoting settlement. SJT's, similar to California's EJT's, require the parties to argue cases within a single day to a reduced jury and a presiding judge. The purpose of the SJT was to facilitate pre-trial settlement by allowing disputants to gain a more accurate insight into their probabilities of success at trial (Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution" 371), since standard law and economics theory has long-since posited that the reason cases do not settle is that litigants have different estimates for their chances of winning at trial or hold private information which affect these chances (Posner, *Economic Analysis of Law* 369-371; Cooter and Ulen 445-446). Thus, SJT's were a form of ADR that was meant to be purely advisory.

In the end, SJT's did not gain popularity as they were non-binding, and parties did not have to honor the verdict. As a result, their "prospective benefits were never fully realized" (Ehrlich 517).

The gap between SJT's and EJT's had not gone unnoticed, however. A version of the SJT upon which California's EJT is based is currently being successfully used in certain counties of South Carolina. There, nearly half of all civil trials are resolved with this fast track system (Croley 1615). In Thomas Metzloff's "Reconfiguring the Summary Jury Trial," he also noted that many of those who used SJT's in South Carolina opted to make the process binding. Although not much research exists at the moment as to why the SJT was so successful, it "proved to be an efficient procedure in comparison to a conventional trial; using estimates provided by counsel, SJT trial lengths were on average approximately seventy-five percent shorter than traditional trials" (Metzloff 832).

Metzloff also made the surprising discovery that many disputants' "strategic goals were often unrelated to the supposed virtues of the SJT as a settlement process" (Metzloff 831). Many of the attorneys to whom he spoke cited reasons external to cost reduction:

> *"[Several of the attorneys] explained that their interest was a function of their client's inability to present effectively their own testimony. For example, two disputes involved young children whose parents did not want them to testify in court; the SJT provided a way to resolve the claim without their testifying. In other cases, the parties were either unappealing, inarticulate, or the attorney feared that the jury would be biased against them. In another case, the SJT was selected for its convenience in offering a firm trial date: The litigants had been forced to postpone several potential trials owing to busy travel schedule."* (Metzloff 831)

Metzloff's study demonstrates that many reasons may exist for opting into an EJT, aside from the efficiency and cost-reduction arguments commonly provided by proponents. The SJT, which here shares many relevant characteristics with the EJT, has externalities and unintended consequences that were not stressed by its proponents. It is thus crucial to try and account for any external factors affecting the decision-making process of the litigant or the attorney. In the case of the SJT, these considerations ended up playing a key role for some litigants in deciding whether or not to opt into an expedited trial. It is reasonable to expect a similar pattern to emerge in California, which is why this paper focuses heavily on the decision-making process of those involved in the Act's implementation.

Accounting for the Role of the Attorney

In "Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer," Korobkin and Guthrie hypothesized that the presence of lawyers ends up facilitating more settlements than if disputants were left to themselves. Their main arguments were that 1) lawyers are likelier to apply Expected Monetary Payoff analysis to settlement vs. trial decisions, while disputants are more susceptible to psychological factors, and 2) lawyers have the ability to persuade litigants to evaluate the settlement vs. trial decision from the lawyer's analytical perspective.

Their study showed a "systemic difference" between the actions of disputants and litigants. Korobkin and Guthrie concluded that while disputants are more likely to be swayed by sympathy or reference points (whether outcomes are coded as gains or losses), attorneys are not. The study also yielded the result that lawyers focus on expected monetary payoffs when deciding whether to proceed to trial or accept a settlement. In fact, in many of the surveys Korobkin and Guthrie received, lawyers often used expected monetary payoff calculations to decide what to do. The study also yielded a statistically significant result that lawyers have a say in litigants' choices and influence whether a case goes to trial.

Although Korobkin and Guthrie's model does not account for potential conflicts of interest which may occur between a client and his attorney, it provides strong support that the attorney has a

large influence on which types of cases are litigated. Because attorneys use expected value calculations when making suggestions, game theory may accurately model a decision to settle or proceed to trial. Thus, it is reasonable to focus on the attorneys' suggestions as a proxy for what may actually happen in a legal dispute.

Economic Framework

Existing law and economics literature about disputants' decision-making stem from a game-theoretic, wealth maximization model. According to models developed by Priest and Klein, as well as other experts like Shavell and Wickelgren, litigants weigh financial gains from each option before deciding on whatever best serves their self-interest (Priest and Klein 10-12; Shavelle "Alternative Dispute Resolution: An Economic Analysis", 1-28; Shavelle "Suit, Settlement, and Trial"; Posner, *Economic Analysis of Law* 434-441; Gould 279). Thus, a standard assumption is that disputants seek to maximize expected monetary pay-offs. This theoretical framework does not hold in real life, however. In order to account for the differences between the model and empirical data, existing literature claims that cases continue to proceed to trial despite higher costs either because 1) the disputants' utility functions contain psychological parameters (e.g. concepts of fairness) unaccounted for by the expected monetary pay-offs, or 2) the parties involved in a trial are unable to accurately estimate the strength of their cases and thus their probabilities of winning (likewise, they are unable to accurately estimate each other's probability of winning at trial). While psychological factors are also important, they are non-unique to the EJT process, so I will not be placing too much stress on them; it is unreasonable to expect that any psychological biases harbored by a disputant applies disproportionately to EJT's relative to any other procedure.

My game theory model will be based largely on the idea that information asymmetry is an important factor in determining the actions each player takes in a game. When the likelihood of winning at trial is uncertain, the disputant's calculation of his/her pay-offs will be affected. If a defendant is offering a settlement to a plaintiff, and he is unsure of what "type" of opponent he is facing, he must take a risk knowing that there is a certain threshold of settlement amounts which determines whether the plaintiff will accept or reject this offer. A model involving asymmetric information is presented in the latter half of Part I.

PART I:

Legislation Goals

PART I: LEGISLATION GOALS

In the first half of this section, I present qualitative findings from interviews that I have conducted with drafters of the legislation, and attorneys who have used or are familiar with EJT's. In the latter half of the section, I construct two game theory disputant models based on analyses of the drafters' responses.

QUALITATIVE FINDINGS

Drafter Considerations

The CEJTA officially originated in 2009, when then Chief Justice and Administrative Director of the Courts created the Small Claims Working Group to find a way to "promote… more economical resolution of cases, increase access to courts for litigants with smaller cases, and streamline jury trials in light of declining court resources" (Keilitz 63). The Group included, among others, members of the Judicial Council, the plaintiff and defense bars, the insurance industry, CalChamber, and the Consumer Attorneys of California.

After inviting speakers from South Carolina to talk about the success of the SJT's in their counties, the Working Group began a two-year long process to adapt a similar set of procedures for California. The end result, the Expedited Jury Trial, is starting to gain momentum today.

In order to understand how the proponents of the legislation view the Act, I have conducted interviews with drafters of the CEJTA. Over the course of this project, I was able to speak to two key figures involved in drafting the Act: Judge Mary Thornton House, who spearheaded the Small Claims Working Group, and Steven Goldberg, one of the few practicing attorneys involved in the drafting process.

According to both of them, the adaptation of the expedited trial for California was successful; the end product, they said, was an innovation which accomplished everything they had hoped for from the beginning. The expedited trial, which has been accused by some attorneys to favor plaintiffs, has shown no such tendency when implemented in the other states. Defense attorneys and plaintiff attorneys alike appreciate the lower risk from the high/low agreement, and, according to Goldberg, "insurance companies also [find] it very economical to have a day in trial and not [have to pay] the enormous prices of experts." After hearing about the South Carolina model and talking about how it could be adapted to California, the Working Group unanimously agreed to move it to writing.

When should the EJT be used?

The original intention of the CEJTA was to create an extremely flexible trial so that attorneys could craft their case and stipulate according to its specific needs. In the interview, Judge House stated that:

> *"The original intent (of the legislation) is flexible. So far, mostly auto cases have gone through the EJT. Now in South Carolina, there's a mixed bag of cases. In New York, the model was mostly for personal injury/auto cases. You could have a serious case, but if only 2 or 3 witnesses are there to testify to fault, then it's good for an EJT…There's no template on it; it's meant to be really flexible."*

The EJT therefore does not cater to cases where specific damage amounts are involved. According to Goldberg, the rules were written "so that the EJT could be used for *any* kind of civil trial," and not limited to any specific categories like automobile collisions, which empirically comprise the majority of the cases which have thus far undergone an expedited trial. According to an informal review of 15 EJT's conducted in LA County, almost all of the cases which have opted into an EJT in Los Angeles involved automobile matters. Judge House, in an article for *The Valley Lawyer*, called the injuries involved Minor Impact Soft Tissue ("MIST") matters (House, "The First Year of Los Angeles Expedited Jury Trials" 12).

One of the features of the EJT highlighted by the drafters includes the ability for attorneys to become more innovative and use technology while they're on the stand (giving iPads to the jurors instead of paper, for example). The EJT tries to encourage creativity by allowing attorneys to use as much technology as they feel comfortable with, and allows attorneys to stipulate about anything ranging from the timing of the trial to the rules of evidence (which are by default unchanged from those of a regular trial).

Goldberg also mentions that the EJT requires a fair amount of cooperation and trust between the opposing attorneys, as the expedited process forces them to agree on the majority of the issues and hone in on the key elements of the case.

What are the goals of the legislation?

Goldberg and Judge House were clear that the purpose of the Act was almost entirely economical, driven by a desire to reduce court backlog, free up judicial resources, and offer a cheaper alternative for litigants. Because of these economic reasons, the courts are able to resolve cases faster and thus provide a great benefit to all stakeholders in the court system.

According to Judge House, one of the common motivations shared by all the drafters is "offering litigants a low cost way of having the jury trial. Everybody wanted to have an optional, voluntary mechanism that kept the jury trial alive…. Everybody ended up with a product they were

extremely proud of." One of the goals of the legislation is thus to bring back the "vanishing civil jury trial," (House, "The First Year of Los Angeles Expedited Jury Trials" 13) as jury trials are one of the defining judicial processes of the United States. Judge House believes that allowing jurors to resolve disputes is "an incredible right that keeps our country free"—a right which is threatened by the "imperfect storm of the foundering economy…[and] shrinking resources for both the parties and the court system." (House, "Expedited Jury Trials" 9) According to Judge House:

> *"It's costing more and more to do civil cases. People have to pay for juries and court reporters, and there's a risk to jury trials now with jurors being unhappy with the economy and not wanting to serve on jury duty. A lot of employers don't want to do pay for that time anymore... and jury trials are becoming rarer and rarer."*

A law sanctioning the expedited jury trial thus brings back the relevance of an otherwise declining judicial procedure.[2]

The drafters also stressed that although the EJT uses less time, money, and resources, verdicts are supposed to remain as unbiased as they would be if they were served in a regular trial.

Has there been pushback from attorneys?

Although the EJT is gaining momentum, there is still some lack of confidence in the process by attorneys. According to Goldberg, many are resistant to the relatively short time for *voir dire*:

> *"Some attorneys don't like the fact that you only have one hour for* voir dire*. In South Carolina, lawyers don't do* voir dire*; the judges do. In California though, we're very sensitive to that. We're the second-longest* voir dire *state… The average is a day or two. In some states, it's just a couple of hours because the judges do it. So a lot of lawyers are uncomfortable being limited because of our tradition of lengthy* voir dire.*"*

Attorneys in California might therefore be more inclined to feel uncomfortable with this shortened process since they are used to spending much more time questioning the jurors prior to the start of the trial. Despite that, Goldberg believes that "they'll be won over eventually; it just takes time." This sentiment is echoed by Judge House:

> *"The pushback has more to do with the change concept. People don't think they can pick a jury in 40 minutes, but they can. Trying new things is always hard….but the word is spreading now."*

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[2] Although it was possible for litigants to stipulate to have a shortened trial without an official law, passing the CEJTA legitimizes the process and allows attorneys to see that finishing a trial within 6 hours is possible. Judge House believes the law gives credibility to attorneys encouraging a shorter trial, and protects them from potential malpractice suits. The expedited trial is thus given standard and recognition.

The drafters are therefore optimistic that as the number of EJT's continues to grow, more attorneys will be willing to try out the process and judge for themselves the merits of the program.

Attorney Considerations

As Metzloff discovered in "Reconfiguring the Summary Jury Trial," it is important to account for external considerations of the attorney, who plays a key role in the implementation of the Act. There are also many considerations unique to law firms which may not apply to disputants. An article by attorney Jesse Marr in *Verdict*, a publication by the Association of Southern California Defense Counsel, hints that there are externalities from the Act which uniquely affect law firms, such as the ability of the EJT to provide "a great opportunity for the newer attorneys in [a] firm to gain trial experience without the risk of an embarrassing verdict" (Marr 31).

In order to account for these considerations, I spoke to a few attorneys who were not involved in the drafting of the legislation. In order to find interview subjects, I searched Google for memos and articles on the CEJTA, and contacted the issuers (whether organization, person, or law firm). I also met attorneys through a conference, and some were kind enough to refer me to others or to send out an email blast to their contacts. Most of the interviewees were found through snowball sampling, as each one was eager to refer me to a colleague. In the approximately four months I had for this project, I was able to speak to 6 attorneys. All of the attorneys I spoke to had a clear idea of the goals of the Act, and understood that the EJT is a judicial innovation meant to promote efficiency.

Table 1.1 on the following page shows responses of each attorney (as Attorneys A to F) to questions relating to the goals, implementation, and perception of the CEJTA. The responses are a synthesis of what I gathered from each interview.

Table 1.1 **Attorney Perception of the CEJTA**			
Attorney & Specialty area	**# of EJT's undergone**	**Goals of legis.**	**Types of cases suitable**
(3) Plaintiffs' personal injury/wrongful death **A**	0	- reduce backlog of civil litigation	- best for litigants with limited financial means, "which means most times, litigation that involves individuals rather than businesses." - limited number of witnesses and issues ("landlord/tenant cases might be an especially great category for it.")
B	1 (auto)	- get more cases through jury trial system in a faster and more efficient manner - to be mindful of the time jurors spend	- any sort of case - 1 issue, 2 max - case should be worth <$50, 000 ("There's no hard and fast rule, but that's how it was geared.") - need 2 lawyers who will cooperate
C	3 (all auto)	- free up the courts to provide access - help deal with budget crisis in the state	- 1 or 2 issues only - no more than 5 or 6 witnesses total - almost any type of case appropriate
(1) Asbestos **D**	0	- free up courts from longer cause cases - cost-savings for litigants - increase accessibility - conserve judicial resources (specifically, jurors)	- small-value cases
(1) Gen. business **E**	0	- cost-savings for litigants and courts - "up PR for courts who have had to deal with accusations of being inaccessible to litigants"	- 2-party cases - narrow issues - low impact issues - limited issues ("1 issue already burns up a day quickly")
(1) Defense - civil tort **F**	1 (auto; was defense in one of the cases with attorney C)	- too many cases for the court system to handle - needed by all parties ("Insurance companies don't want to pay us for 5 days of trial time, and plaintiffs' attorneys want it because they don't want to waste time in trial.")	- limited issues - "Low end personal injury cases are probably the best candidates." - need 2 lawyers who will cooperate

<u>*When should the EJT be used?*</u>

Unlike the drafters I spoke to who stressed the EJT's flexibility and who were reluctant to peg-hole EJT's as being suitable for any specific type of case, the attorneys were more willing to give specific "rules" about what kinds of cases qualified for an expedited trial.

(i) Limited numbers of issues and witnesses:

According to all the attorneys interviewed, one of the most important considerations for deciding whether to opt into an expedited trial is whether the case can be resolved within the time allotted. According to Attorney B, "in order to get everything done in the time frame set forth in the statute, it has to be very issue-specific kind of case… There should be 1, *maybe* 2 issues at most."

The attorneys unanimously mentioned that both the number of issues and the number of witnesses should be limited, and almost all of the attorneys specified that the number of issues should not exceed 2. This tendency was consistent whether or not the attorney had ever participated in an EJT.

(ii) Cooperation between attorneys

Attorneys B and F also highlight a point raised by Goldberg (see p. 9): it is crucial to have two lawyers who will cooperate in order to have a successful EJT. According to attorney F:

> *"The key is to work with your opposing counsel. The more you work with the other [attorney] and find common ground on smaller issues or things you can stipulate to, the more smoothly it [the EJT] goes."*

Thus, there must be mutual trust between the attorneys in order for the EJT to be successful. Without this ability to work together, it may be very difficult for the attorneys to cover the important issues fully.

(iii) Tendency to automobile cases

Although those attorneys who have participated in an EJT all stressed that "almost any type of case would be amenable to an EJT as long as the issues or witnesses are limited" (Attorney C), this has not been realized empirically. Despite their statements, the attorneys I spoke to who have undergone an EJT have all used it for automobile cases, a pattern which is consistent with how EJT's have been used empirically. In the informal study conducted in LA County (House "The First Year of Los Angeles

Expedited Jury Trials" 12-13), 13 of 15 cases which went to an EJT were automobile cases.

The EJT was not originally structured only for automobile cases, and it is not meant to be amenable only to one case type. However, although the EJT may have many uses in other case categories, it seems to have a particular appeal for cases involving automobile accidents, perhaps because of the typically small number of issues and witnesses involved.

(iv) External Considerations

Attorney B lauds the EJT for its ability to get attorneys to hone in on the essential aspects of the case:

> *"I'm totally in favour of it because it allows me to get my cases through the system faster and it forces lawyers to—well lawyers tend to get very verbose with cases. If they're put under the microscope, then they get right to the point. Jurors don't want to sit there and be bored by irrelevant stuff. I find [the EJT] to be a huge help in getting the attorneys to cut down the flowery prose."*

Instituting a time limit might therefore be an effective way to force attorneys to concentrate on the most crucial parts of the case.

Analysis of when EJT's should be used:

In trying to gauge what kinds of cases the attorneys consider suitable for an expedited trial, we can determine whether the EJT is being used for the purposes that the drafters' initially intended. Based on the interviews, the attorneys' understanding of the goal of the CEJTA is in line with the drafter's intentions. However, there is a nuanced difference in the way EJT's are conceived by attorneys and drafters as it pertains to the kinds of cases suitable for expedited trials: while the drafters' concept of the EJT is very flexible, the attorneys believe that the applicability of the EJT is narrower, with a tendency towards specific cases. During the interviews, the drafters were quick to comment on the flexibility of the EJT, while attorneys were more comfortable listing specific conditions or case categories.

Another aspect of the EJT which the attorneys did not discuss includes the EJT's intention to encourage the use of technology (e.g. iPads) in the courtroom. Unfortunately, none of the attorneys I spoke to mentioned this creative aspect of the EJT. This may be due to the fact that this aim of the EJT has not been well-publicized; it may also reflect a tendency of the attorneys to stick to traditional modes of presentation. In the cases in which the attorneys participated, technological creativity may not have been required in order to communicate effectively with the jury.

<u>*What are the trade-offs between the EJT and a regular jury trial?*</u>

During the interview, the attorneys were asked to specify which features of the EJT they appreciated the most, and which ones they appreciated the least. They were also asked to specify whether they believed that there was any trade-off between participating in an EJT and a regular jury trial. In Table 1.2, I highlight some responses.

For those who have not conducted an EJT:

Table 1.2a **Attorney (non-EJT users) Perception of the CEJTA**

Attorney	Like	Don't like	Trade-offs
A Plaintiffs' personal injury/wrongful death	- risk mitigation from the high/low agreement	- having 8 instead of 12 jurors may throw off the dynamics of jury deliberations - less opportunity to influence jurors	- limiting # of witnesses - less time with jury
D Asbestos	- fast resolution - know date it'll be resolved; good having certainty - high/low agreement	- no time to react to surprises: "If a surprise witness or document comes up, there's no time to research, rectify or address it fully. You end up doing a lot more thinking on your feet without backup research." - time too short	- limiting # of witnesses - less time with jury ("It's hard to be asking questions in way jury would understand and remember")
E Gen. business	- finality - offers a fast resolution	- "there's a very limited amount of time" - ambivalent about high/low because it takes out the option of "fully winning"	- limiting # of witnesses - no time to react to surprises ("Very little opportunity to counter unexpected arguments.")

(i) The High/Low Agreement

The attorneys I spoke to all mentioned the high/low agreement as an important mechanism to minimize risk for both parties. Attorney A lists risk assessment and mitigation as an important factor when deciding whether to opt into an EJT. According to him, the high/low agreement is a mechanism that's underutilized by litigants now (as attorneys can stipulate to having such a damage floor/cap in a regular jury trial).

The agreement does, however, prevent the option of having a complete win, according to Attorney E:

> *"I'm ambivalent on the high/low agreement. You try cases to win them. There's no option of winning under the high/low. Your client effectively gives up an option to get a full win."*

Because opting into the agreement effectively limits the amount of damages which can be awarded, a litigant may feel dissatisfied about not being able to have a "complete" win over the other party. The process is opt-in however, and most attorneys appreciate the chance to mitigate their clients' risks.

(ii) Juror Influence

From an attorney's perspective, the EJT provides less opportunity to influence jurors. Due to the limited amount of time the attorney spends in front of the jury, Attorney A believes that it becomes "more likely that their [the jurors'] initial impressions guide the verdict in deliberations." Attorney A states that, "as a trial lawyer, you appreciate the fact that you may get several days to be able to influence the jury so as to persuade them to accept your client's version of the events."

He also raises concerns about what the limited number of jurors may mean to the dynamics of jury deliberations:

> *"Perhaps it's just once you start doing those trials with a smaller numbers of jurors that you become comfortable with that and understand the dynamics of a smaller group— but with a smaller group, there's a stronger chance that one person with one stronger opinion...(who) could affect the probability of winning. You could have one person who subconsciously has a strong disfavorable opinion against your client for whatever reason, like the client has an earring, and if he [that juror] has a strong personality, he can influence the rest of the jurors. With a larger group of people, there's less chance of that happening."*

None of the other attorneys mentioned any concern with decreasing the number of jurors however, and most stated that having fewer jurors should not significantly affect trial outcomes.

(iii) Additional Considerations

Attorney D brings up the concern that "If a surprise witness or document comes up, there's no time to research, rectify or address it fully." His comment supports Goldberg's statement that a successful EJT requires

attorneys who can trust and cooperate with each other to hone in on the key issues involved in the case. Without this element of trust, attorneys could become reluctant to choose an option which limits their opportunity to react to arguments.

For those who have conducted an EJT:

Table 1.2b **Attorney (EJT users) Perception of the CEJTA**

Attorney	**Like**	**Don't like**	**Trade-offs**
B Plaintiffs' personal injury/wrongful death (participated in 1 EJT)	- "I liked the whole idea." - high juror satisfaction	- "I wish I could get the defense to agree more to do this. They might be reluctant to agree because it's new, and defense never works on a contingency fee basis."	-none
C Plaintiffs' personal injury/wrongful death (3 EJT's)	- able to get to trial much earlier ("I can get a trial date within 6 months of filing the lawsuit… usually it's a year and a half") - "It's quick, final, very limited appellate rights, and inexpensive."	**-** being limited in jury selection ("I would want the judge to be flexible on timing for jury selection.")	- less time with jury - limiting # of witnesses
F Defense- civil tort (1 EJT)	- fast resolution: "It was done in a day; that was all that trial needed." - reduced *voir dire* and number of jurors	-"The only part that was difficult was convincing the insurance company to do a damage floor."	- less time with jury - limiting # of witnesses

Of those attorneys who have participated in an EJT, the response was very favorable; they were very satisfied with their experience and echoed similar likes, dislikes and trade-offs.

(iv) The High/Low Agreement

Unlike the attorneys who have never participated in an EJT, the attorneys who did never mentioned the high/low agreement as one of the better features of the EJT. Rather, they highlighted key features of the Act which were unrelated to risk mitigation and management. Each of the three attorneys lauded the EJT for its main purpose: offering a fast, economical resolution to a case.

The high/low agreement may not have been mentioned due to the relatively simple way in which it is chosen. All three attorneys found that

these agreements did not require further bargaining— the 'low' was usually the amount of the last settlement offer, and the 'high' was the specific insurance policy limit.

(v) Juror Selection and Satisfaction

Both attorneys C and F mentioned that one of the trade-offs to using an EJT instead of a regular jury trial is that there is less time to bond with the jurors. Although neither of them mentioned that it was too big of a trade-off, Attorney F stated that "sometimes you want a little more time with a jury to get them to know you more."

All three attorneys also reported high juror satisfaction for their cases. In the words of Attorney F:

> *"The people who are most appreciative of the system are the jurors. They're there for a much shorter time. We told them before we even did jury selection that it won't last long, and a huge weight was lifted off their shoulders. Especially in a recession, people think 'oh, I just got this job, and I don't want to screw it up by missing a week for a jury trial,' so the jurors were really glad when we told them we'd be done within the day or so. And we were."*

(vi) Limiting Witnesses

Attorneys C and F both mentioned that they had to choose to deliberately exclude an expert from testifying in front of the jury. Attorney C voiced that there is a risk of "not putting on an expert witness which (he) otherwise would, when the expert might end up helping the case." Again however, neither attorney was adamant that it was a costly trade-off. Attorney F even mentioned that the exclusion of an expert worked to his benefit:

> *"The guy [the surgeon] looked like a real jerk. I didn't want to bring [him] in as a witness into the suit because it cost a lot of money for a half day of trial testimony. I would have had to pay him $7000. Instead, I asked him to bring the records without having the doctor himself there to explain it."*

In this case, not having a witness at trial did not seem to be a costly trade-off. Attorney F's relative comfort with conducting the trial without the presence of the expert shows that it may not always be necessary to expend costs bringing every involved witness to trial.

Because both sides face time limitations, attorneys must choose to call only the most essential witnesses.

(vii) Convincing the Insurance Company to Approve a High/Low Agreement

Although business interest groups were one of the supporters of the CEJTA, defense Attorney F expressed some difficulty getting his client's insurance company to agree to a high/low agreement, since this effectively guarantees a sort of loss:

> *"The only part that was difficult was convincing the insurance company to do a floor—the insurance company didn't want to pay the guy [the plaintiff] anything."*

When asked what this reluctance implies about the insurance company's support of the CEJTA, Judge House stated that "the same carriers that are not with it [who are not supporters of the legislation] are the same carriers that are with it in New York. So it's just a matter of getting used to [the EJT]."

(viii) Additional Considerations

Similar to Metzloff's findings about summary jury trials, considerations external to cost minimization play a role in the attorney's determination of whether to go to an EJT or a regular jury trial. Attorney F discussed one such example:

> *"In my case, my client was a young guy who was working two jobs; one was night shift. He couldn't make it there for a weeklong trial. This way [with an EJT], we got him in there, and jury saw him. He wasn't an axe murderer. It personalizes our case. If we had a weeklong trial, he wouldn't have been able to have been there for more than 1 day of the trial."*

Thus, simple considerations of time and convenience also factor into the decision to go into an EJT in place of a regular trial. The jury's perception of the litigant ("…the jury saw him. He wasn't an axe murderer") or simply the schedules of the attorneys and the litigants could play an important role in that decision. In at least two of the cases mentioned by the attorneys during the interview, part of what pushed the decision to go to an EJT was a constant conflict in the attorneys' schedules.

Another consideration mentioned by Attorney C is that using an EJT allows him to "get to trial much earlier, and get a trial date within 6 months

> of filing the lawsuit… when usually [it takes] a year and a half." Attorney F also mentioned a similar experience: "If we had agreed on this [using an EJT] several months before, the judge would've reserved that [trial] date earlier and we might have been able to finish in a day instead of a day and a half."
>
> This marks another important externality imposed by the CEJTA: choosing an EJT may mean not only a faster trial, but an earlier trial date. Should the use of EJT's become more prevalent, there are two potential implications of this externality: 1) the court may be able to use smaller gaps of time more efficiently, and 2) litigants may raise questions of fairness as cases qualifying for EJT's "cut in line" of other cases that have been filed much earlier.

Analysis of trade-offs:

The trade-offs between the EJT and a regular jury trial which are listed by the attorneys provide not only insight to the EJT as a new judicial innovation, but also insight as to what attorneys value most about the jury trial. Through the attorneys' responses, it is possible to determine which aspects of the jury trial matters the most, as these are the ones attorneys might be most reluctant to sacrifice for the sake of efficiency. Understanding these responses can guide us in thinking about alternatives for the jury trial—whether the alternative is an EJT or any other new procedural method.

Goldberg points out that a large part of the attorneys' resistance to the EJT comes from the relatively short time for jury selection, as attorneys are often used to spending a long time questioning the jurors to ensure that the resulting jury is fair. Indeed, during the interviews, some attorneys mention a reluctance to give up the time for *voir dire* and bonding with the jury. Although the impact of these trade-offs may be very slight, having less time to spend with a jury or limiting the number of witnesses may imply a difference in the likelihood of winning a case in an EJT and a regular jury. Thus, attorneys highly value the ability to present a case to a panel of *impartial* strangers, and feel uncomfortable risking any part of this impartiality.

Aspects which attorneys may not value as much may include the time allotted for smaller-issue cases, as evidenced by the favorable responses to the attorneys who have conducted EJT's. According to Attorney B:

> *"I was surprised at the ease with which I was able to pull it off. I thought it was a great idea from the get-go, but I was just pleasantly surprised; it went better than I had anticipated, and I didn't feel rushed."*

Thus, it may not be necessary for attorneys to delve in as deeply into an issue as they currently do. After all, in the words of Attorney B, "jurors just want you to get to the point."

It also appears that the reduction in jury size is not considered a great sacrifice to most of the attorneys. With the exception of Attorney A, everyone seemed accepting of having a reduced jury. Many jurisdictions in the U.S. currently also require less than 12 jurors. If attorney responses to the EJT continue to be favorable, the EJT might provide support for those who are championing for a reduction in jury size.

Finally, based on the attorneys' comfort with cutting out witnesses, it may not be necessary to allow litigants to call unlimited witnesses for these relatively simpler cases, as long as both sides are subject to the same time limitations. Especially in cases where the expert testimony of some witnesses may not factor too heavily into the jurors' decisions, it may benefit the court to force both sides to choose only their most important experts.

Attorney Reservations

Despite the EJT's potential however, some attorneys are uncomfortable with the idea of having such a short trial. Attorney D commented that "it could cram too much in a very small amount of time," especially as the 3-hour limit for each side includes the time spent cross-examining the opposing party. Judge House maintains however, that this lack of faith is a natural result of any process pushing for change: "the lawyers don't think that they would be able to do the trial in that short of a time… but judges drive the trial, so if they keep people to the time limits, it'll happen." As long as the EJT has cooperation from all parties—the attorneys involved in case and the presiding judge, it may be a viable option for cases involving a small number of issues.

There is also a general feeling that the applicability of the EJT is very limited. Cases only proceed to trial when both parties are unwilling to compromise over specific issues, and Attorney A remarked that clients "don't want to have to be told that there are limitations when the parties obviously have strong convictions." Those types of cases which usually do not end up resolving or settling prior to the trial are those cases in which there is a strong disagreement. According to Attorney A:

> *"In (these) situations where a case was not able to be settled at mediation, then the stakes are very high for both sides. You're about to spend a lot of money in taking cases through to a jury trial…. and the clients don't want to be told that they can't call all the witnesses they want to. They want to have the full ability to put on the case completely without the expedited trial rules limiting them."*

Attorney E also raised an important consideration: "those cases with issues narrow enough to be easily handled by EJT's will be settled." The EJT thus targets a boundary in between simple and complicated cases. Cases that are too narrow will settle, but cases that are too broad will proceed to a long-cause trial, which means that there might not be as many eligible "takers" to the EJT as originally anticipated.

THE DISPUTANT MODELS

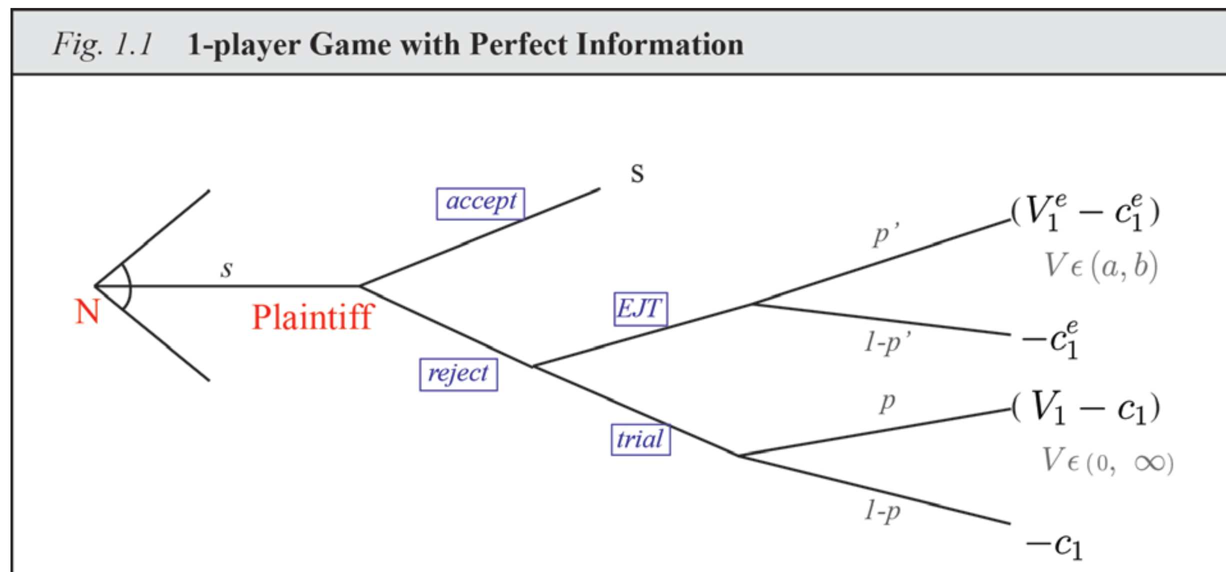
1-Player Game with Perfect Information

Given the interview responses of the drafters and the general economic motivation for expedited jury trials, we can construct a game theoretic model to illuminate potential long-term implications of the Act. According to the Korobkin and Guthrie study mentioned in the literature review, attorneys frequently use expected value calculations in order to determine the best course of action for the client. The economic model will therefore be a suitable proxy for predicting the effects of the Act.

Since the costs of going to trial are now effectively lower, those who may have been impartial between accepting a settlement and going to trial may now be likelier to opt into having an EJT instead of accepting the settlement. In a preliminary model, with costs as the only endogenous variable, I assume that only the plaintiff is filing a claim and that no award could be given to the defendant in court, as is true of most of the cases thus far which have empirically opted in an EJT. *Fig. 1.1* illustrates a 1-player game with perfect information where:

s = settlement offer
p' = probability of plaintiff winning in EJT
p = probability of plaintiff winning in regular trial
V_1^e= value of winning at EJT (or *U(damages at EJT))*
V_1 = value of winning at trial (or *U(damages at trial)*)
c_1^e = costs at EJT
c_1= costs at trial
a = damage floor; *b* = damage ceiling

Fig. 1.1 **1-player Game with Perfect Information**



In order for the plaintiff to choose settlement over an EJT…

$$EU(settlement) \geq EU(EJT)$$

Which simplifies to…

$$\frac{s + c_1^e}{v_1^e} \geq p'$$

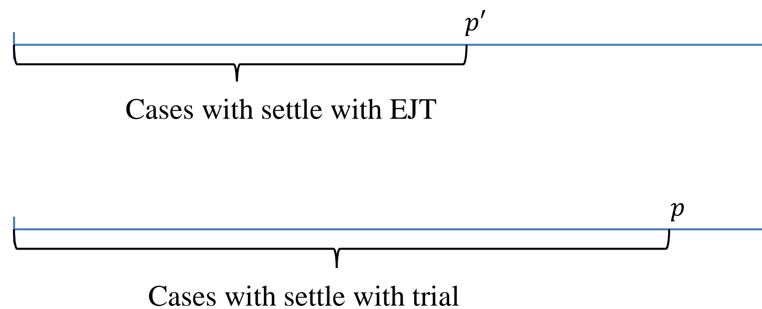
In order for the plaintiff to choose settlement over a regular trial, then…

$$EU(settlement) \geq EU(trial)$$

Which simplifies to…

$$\frac{s + c_1}{v_1} \geq p$$

Based on the qualitative interviews conducted above in which the drafters stressed that the only effective difference between expedited trials and regular trials is cost ($c_1^e < c_1$), then $p > p'$. Thus:



Note that the equilibrium probabilities here show the likelihood of each disputant choosing settlement over trial; we assume that the probabilities of winning at trial are *not* affected by whether the disputant is facing an EJT. Rather, the probabilities above represent the equilibrium probabilities at which a disputant would be inclined to settle: for a disputant to choose settlement over EJT at equilibrium, the probability of success at an EJT must be less than *p'*, and for a disputant to choose settlement over trial, the probability of success at trial must be less than *p*. Because the required $p > p'$, more cases settle with a trial than with an EJT option.[3] We assume that the only effective difference between a regular trial and an EJT is cost, as claimed by the drafters of the CEJTA, so cases are thus likelier to settle *without* an EJT option.

This model therefore predicts that the amount of settlements will be lower after the CEJTA is in effect, with more cases proceeding to expedited trials which would otherwise have been settled. This makes sense in light of attorney responses to the CEJTA, as some attorneys may view the

[3] It is also possible to think of it this way: for a disputant to choose a regular trial over a settlement, his probability of succeeding at trial must be greater than *p*. However, for him to litigate (with an EJT), the probability of success only has to be *p'*.

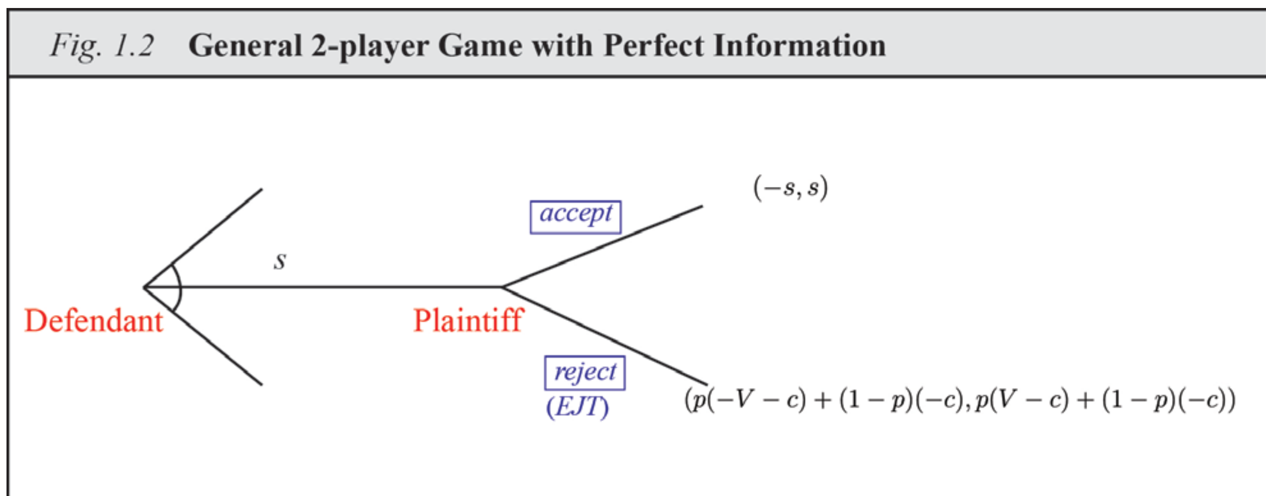
expedited trial as an opportunity to try low-value cases which would otherwise have been forced to settle (McCarthy).

Since I operate under the assumption that the only difference between a trial and an EJT is the cost incurred by each litigator, as advocated by EJT proponents, the only rational choice for a disputant would be to choose EJT's when faced with a decision between EJT and trial (for qualifying cases). Thus, the model can be simplified to a 2-player game so that the second actor (in this case, the plaintiff) only has two choices: accepting a settlement offer and receiving *s*, or rejecting a settlement offer and engage in an EJT.

Fig. 1.2 shows a 2-player game with perfect information, where:

s = settlement offer
p = the probability that the plaintiff prevails in court (alternatively, p can also be the strength of the plaintiffs' case)
V = the damages awarded (or the utility of winning in court given the amount of money won)
c = the litigation costs of going to an expedited trial (assumed to be the same for each disputant)

Fig. 1.2 **General 2-player Game with Perfect Information**



It is possible to find equilibrium values of *s* and *c*, as we did above in the 1-player model, and determine what conditions must be satisfied in order for EJT's to lead to more settlements or more trials. However, in order for the 1-player model to be true, we must assume that the plaintiff possesses perfect information about the probability of success at trial, the value of the case to the other party, and the expected litigation costs. Since this is unlikely to occur in real life, we must expand our model to include private information in a 2-player game.

2-player Dynamic Game with Asymmetric Information

We can imagine a single-round bargaining game in which one party harbors private information about the case, and thus has a more realistic probability of winning at trial. Assume that this private information adds ε to the overall probability of success at trial for the plaintiff. Only the plaintiff knows the true value of ε. The defendant can then offer a settlement amount *s* which he thinks is reasonable. However, since he does not know the value of ε and the "type" of plaintiff he is facing (whether he is facing a plaintiff with a strong case (higher or positive ε), or a weak case (lower or negative ε)), he is unsure what *s* to offer.

The plaintiff accepts when $EU_{pl}(accept) \geq EU_{pl}(reject)$, or when $s \geq (p+\varepsilon)V - c$ since the effective probability of success at trial is now $(p+\varepsilon)$. If the defendant offers the proper amount and the plaintiff accepts, the defendant receives $U_{def}(s|\varepsilon) = -s$. If the settlement amount is too small, the parties go to court and the defendant can expect to receive $U_{def}(s|\varepsilon) = \big(1 - (p+\varepsilon)\big)(-c) + (p+\varepsilon)(-V-c)$.

Solving the latter equation, we have:

$$U_{def} = \begin{cases} -s, & \varepsilon \leq \dfrac{s+c}{V} \\ -c-(p+\varepsilon)V, & \varepsilon > \dfrac{s+c}{V} \end{cases}$$

If the defendant assumes ε is uniformly distributed over an interval $[-u, u]$, the probability density function of ε is $f(\varepsilon) = \frac{1}{2u}$, and the defendant's expected payoff function is:

$$EU_{def}(s) = \int_{-u}^{u} U(s|\varepsilon) * f(\varepsilon)\, dx$$

$$= \int_{-u}^{\frac{s+c}{V}} -\frac{s}{2u} d\varepsilon + \int_{\frac{x+c}{V}}^{u} (-c-(p+\varepsilon)V)\frac{d\varepsilon}{2u}$$

$$= -s\left[\frac{\frac{s+c}{V} - (-u)}{2u}\right] - (pV+c) * \left[\frac{u - \frac{s+c}{V}}{2u}\right] - \frac{\frac{V}{2U}(\varepsilon^2)}{2}\Bigg|_{\frac{x+c}{V}}^{u}$$

$$= -\frac{s}{2u}\left[\frac{s+c}{V} + u\right] - \frac{pV+c}{2u}\left[u - \frac{s+c}{V}\right] - \frac{V}{4u}\left[u^2 - \left(\frac{s+c}{V}\right)^2\right]$$

The defendant will then choose a settlement offer which will maximize his EU:

$$\frac{dEU_{def}}{ds} = 0$$

$$0 = -\frac{1}{2u}\left(\frac{s+c}{V}\right) + \left(-\frac{s}{2u}\right)\left(\frac{1}{V}\right) - \frac{1}{2} + \frac{pV+c}{2u}\left(\frac{1}{V}\right) + \frac{2(s+c)}{4Vu}$$

$$0 = -\frac{s}{2uV} + \left(-\frac{c}{2uV}\right) - \frac{s}{2uV} - \frac{1}{2} + \frac{(pV + c) + (s + c)}{2Vu}$$

$$0 = -\frac{2s}{2uV} - \frac{c}{2uV} - \frac{1}{2} + \frac{pV + 2c + s}{2Vu}$$

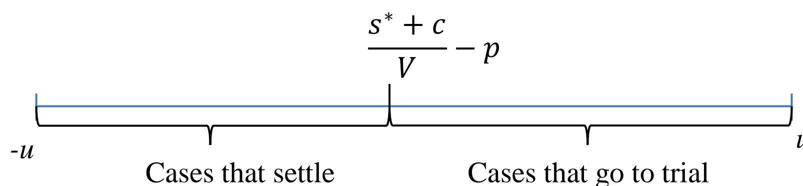
$$0 = \frac{pV + 2c + s - 2s - c}{2Vu} - \frac{1}{2}$$

$$0 = \frac{pV + c - s}{2Vu} - \frac{1}{2}$$

$$s^* = pV + c - Vu$$

$$= V(p - u) + c$$

At equilibrium, the defendant will offer settlement amount $s*$. The plaintiff accepts if $s^* \geq (p + \varepsilon)V - c$. Solving for ε, the plaintiff accepts if $\frac{s^*+c}{V} - p \geq \varepsilon$. Thus:



Because we assumed that ε is uniformly distributed over the interval $[-u, u]$, the probability of the plaintiff rejecting and going to trial given s* is:

$$P(reject|s^*) = \frac{u - \varepsilon^*}{2u}$$

$$= \frac{u - \left[\frac{s^* + c}{V} - p\right]}{2u}$$

$$= \frac{u - \frac{[V(p - u) + c] + c}{V} - p}{2u}$$

$$= \frac{u - \left(p - u + \frac{2c}{V} - p\right)}{2u}$$

$$= 1 - \frac{c}{uV}$$

The probability of settlement in this model is therefore $1 - (1 - \frac{c}{uV})$, or $\frac{c}{uV}$.

The higher the litigation costs, the more likely it is that the case settles; the higher the uncertainty and the value of the case, the more *un*likely it is that the case settles. This is consistent with existing law and economics literature (**Spier;** Fenn and Rickman; Cooter and Ulen). If we assume that the EJT targets only the parameter c and lowers the costs of litigation, the likelihood of

settlement is now lower in equilibrium. Note that we cannot say that V decreases even though EJT's target lower-value cases because the EJT itself does not *cause* this decrease; the value of the case is exogenous in this model. Thus, while it is true that settlement rates for cases appropriate for EJT's would normally settle more often (because V is lower), the EJT option actually serves to decrease the likelihood of settlement of these cases by lowering cost.

Predictions and Discussion

In "Expedited Jury Trials: It's About Time", when asked whether EJT's can lead to more trials, Judge House responds by saying that "in both New York and South Carolina, no increase occurred" (10). However, the models predict that having more trials is a real potential effect of this new legislation.[4] An intuitive way to explain this prediction is to look at the EJT as targeting cases which are on the borderline between settling and going to trial: EJT's do not target cases that are too simple because those cases would settle; they also do not target cases that are too complicated because those cases require a longer trial. This lower-cost option essentially "pushes" the cases away from settlement and towards trial by lowering the effective costs. Alternatively, cases which would have normally been precluded from trial because of prohibitive litigation costs may now proceed to trial.

The 1-player model's prediction of having more EJT's and less settlement is a direct result of the critical assumption that the only difference between a regular trial and an expedited trial is the cost for the litigants and the resource expenditure for the courts. This assumption is informed by the interview responses by the drafters of the Act: as the law was originally intended, there should be no bias for or against one side, so the probability of succeeding at an expedited trial should be the same as that of a regular jury trial ($p_{EJT} = p_{regular\ trial}$). The attorneys' interviews however, hint that the assumption may not hold true in real life. Concerns over the relatively short time for jury selection and case presentation suggest that attorneys believe that the time limitation may affect their ability to form a connection with the jurors, and therefore reduce their chance of winning. The attorneys' responses about potential trade-offs of the EJT therefore indicate that the probability of succeeding at trial for a party might differ depending on whether the case is resolved through a regular trial or an

[4] An increase in the number of trials should not in itself be condemned however, since we must view such an increase in light of important normative factors, including judicial accessibility and equality. One of the potential benefits of having more cases is that public sentiment of the court system may grow more favorable: there may be a greater sense of trust in the judicial system if there is increased access for those who would not normally be able to afford the cost of trial.

expedited one. Should the assumption be relaxed and the probabilities of success for a party at trial and at an EJT be let to differ, the models may predict different results.

The second model echoes the first. The considerations of the equilibrium condition were mentioned by the attorneys during their interviews as well: what guides the attorneys' decisions to opt into an EJT have much to do with risk (uncertainty) and the value of the case. Each element can therefore increase or decrease the likelihood of settlement. Given equilibrium offer s^*, the EJT lowers costs, leading to a lower likelihood of settlement. Again, however, this conclusion relies on several simplifying assumptions. Different specifications of each model produce different results; the simplifying assumptions proposed in this section lead to decreased settlement rates, but different assumptions may lead to the opposite conclusion. Because models cannot provide conclusive evidence for the effects of the CEJTA, we must therefore turn to empirical data to see whether the Act's goals have been realized.

Although the Act is still young, the option of having an expedited trial has an undeniable effect on the decision-making of litigants and attorneys. The interview responses and the models help determine where best to search for effects of the legislation: the game theory models developed in this section inform me as to what effects to look for (litigation intensity, settlement rates, etc.), and the interviews guide me to where to find the information (in auto cases and limited issue-type cases). The interviews and models thus serve as useful guides in orienting our thinking for *Part II: Procedural Consequences of the EJT*.

PART II:

Procedural Consequences of the EJT

PART II: PROCEDURAL CONSEQUENCES OF THE EJT

In this section, I present quantitative findings from dif-in-difs estimations. The data is harvested from the Santa Clara County and Harris County online dockets.

Litigation Intensity

Ideally, the elements in the 2-player model (cost, uncertainty, and value of the case) would be the parameters tested with the data. After calling several counties however, I realized that it would be extremely difficult to access that information for each case, as most counties do not have the information digitized. Therefore, in order to test the effects of the CEJTA, I took another approach focusing on litigation intensity.

Litigation intensity can be broadly defined as the force to which cases are pursued. If litigation intensity is very high, there is a higher cost to the court as it uses increasing resources in order to accommodate the demands of the parties. In general, if the law is effective in reducing overall litigation costs, we can expect:

1) Litigation intensity in affected jurisdictions to decrease after the Act;
2) Litigation intensity in affected subject areas and case categories to decrease after the Act.

One way to measure litigation intensity is to look at the amount of time cases remain open after they have filed; cases which are pursued more intensely can be expected to remain "Open" for a longer period of time as the parties file motions to prolong them, while cases which are pursued less intensely can be expected to become "Disposed" relatively more quickly (whether by settlements, default judgments, trial, or any other resolution).

If the conditions above are not met, the view that EJT's could lead to direct cost-savings for the courts is undermined. In this portion, I present evidence from Santa Clara County (California) and Harris County (Texas) data to determine the CEJTA's effects on how long it takes for a case to be disposed (or specifically, to settle or go to trial). Since Harris County dockets offer the same information as Santa Clara County, with cases split by comparable categories, it can be used as a suitable control in a Dif-in-Difs comparison. Unemployment rates, interest rates, and differences in income between the two counties are later factored into the analyses as controls. In the rest of the paper, I describe the data sets from both counties, present findings from the data sets, and discuss potential interpretations of the evidence.

Process description

After deciding on the two counties, I harvested data directly from their online civil dockets page with a Python web scraper created by Jeffrey Tsui.[5] In order to do a Dif-in-Difs ("DID") estimation, I collected data in 2010 and 2011, before and after the CEJTA was passed. Because of time limitations, the data do not contain demographic variables. However, the DID technique should be robust enough to account for most innate differences between the counties. For example, although Harris County is known as being a "plaintiffs' county," there is no reason to assume that this quality is more or less pronounced in 2010 or 2011. Because this tendency is expected to be unchanged in the two years, the DID will be able to absorb this difference. An essential assumption of the DID is therefore that the compositions of Santa Clara and Harris Counties remain the same from 2010 to 2011. Such an assumption is realistic and reasonable in this instance.

The scraper harvested cases from specific categories in June-August 2010 and June-August 2011 from the Santa Clara County court website. The scraped case categories include all those which would be considered eligible for EJT's (cases which could proceed to jury trials). Excluded case categories include those which do not proceed to jury trials and those which normally involve very complicated matters, such as all family law cases, asset forfeiture, collections, small claims, lodged wills, etc. A total of 7,809 civil cases were harvested from Santa Clara County. The data contained information on case category, filed date, disposed date, and filings by the parties and the court. After collecting all the data, I hand coded each case with dummy variables for whether the case was: 1) Open, 2) Settled, or 3) Resolved through trial. I used the largest sample I possibly could and removed those observations which did not have conclusive information on how the case had been resolved, and those which were resolved through default judgments (as there is no reason to expect those cases to be affected by EJT's). Additional case categories were deleted during this process (e.g. parking appeals, enforcement of judgment, private support orders). After these exclusions, the Santa Clara sample had 4,323 samples total, with 2,164 observations in 2010 and 2,159 observations in 2011. In order to simplify the process, I counted a case as settled as long as it was resolved by any method prior to becoming a full-blown trial. If the last action in a disposed case involved a summary judgment, that case was also considered settled.

In Harris County, the population of interest is those cases in the civil docket filed in June-August 2010 and June-August 2011 which would be eligible for EJT's in California. As I was gathering the data, the Harris County Court intake department informed me that, unlike the Harris District County Court, the Harris County Court mostly handled civil matters such as personal injury,

[5] The Santa Clara online civil docket: http://www.sccaseinfo.org/
The Harris County online civil docket: http://www.cclerk.hctx.net/applications/websearch/Civil.aspx

malpractice, asbestos, etc. Accordingly, most cases can opt into a jury trial. The web scraper harvested a simple random sample of 2,400 from those dates (where $n_{2010}= n_{2011}=1,200$). Because the civil docket is separate from the family docket, almost all the cases harvested from the civil docket qualified as those which would be eligible for EJT's in California. However, a few categories needed to be excluded as they would not be affected by the existence of EJT's: D.U.I's or "Civil Cases Relating to Criminal Matters" and parking appeals. After trimming down the data set and removing cases which received a default judgment or which did not have conclusive information about resolution method, I had a total of 1,825 cases from the two years. Once again, these cases were coded with dummy variables for 1) Open, 2) Settled, or 3) Resolved through trial. The same rules used in determining whether a case settled in Santa Clara County were also used here.

Synthetic Variables

Because the data were harvested in 2012, there were more cases disposed in 2010 than in 2011; since I collected the data on February 25, 2012, data from 2010 would have had more than a year and a half to be resolved, but data from 2011 would only have had 7 to 9 months. In order to correct for this bias, I used synthetic dummy variables to replace the original dummies so that cases in each year would have had the same amount of time to be disposed. For example, observations from 2010 were considered "OpenSynth" if the case would have been open had I checked the docket on February 25, 2011 (inclusive). This process thus corrects for bias by giving cases from both years the same amount of time to be disposed. Synthetic dummy variables "SettledSynth" and "TrialSynth" were also created for cases which settled and cases which went to trial, respectively.

The same reasoning applies to Harris County data. The date of collection for Harris County data was March 18, 2012, so 2010 cases in Harris County were considered synthetically open if they were not disposed by March 18, 2011. These synthetic variables are used in place of the original dummies throughout the rest of the paper, since they provide a more accurate description of the data.

In coding these dummy variables, the disposal date I used for Santa Clara was the one provided by the court. For Harris data, since the docket contains no official disposal date from the court, I used the date of the last event in the entire lawsuit. As a result, there may be a slight upward bias in the number of "OpenSynth" cases, since the last event in the suit may occur a while after the effective resolution. There is no systematic way to account for this, but there is no reason to expect that a large percentage of cases fall under this category.

DID and DDD Specifications

In order to determine whether cases are likelier to be disposed after the passage of the CEJTA, I ran ordinary least squares (OLS) regressions and probit regressions on dif-in-difs ("DID") and difference-in-difference-in-differences ("DDD") estimates. These approaches allow me to set up a natural experiment to tease out causality of the CEJTA. Each DID specification identifies different control and treatment group pairs. In the first DID, the treatment group consists of cases in Santa Clara County's jurisdiction as compared to cases under Harris County's jurisdiction. In the second DID, the treatment group refers to automobile cases as compared to subject matters which are unlikely to be affected by the legislation (all within Santa Clara County). Finally, in the DDD, I combine the two controls by including both the jurisdictional and subject matter controls. All the data were analyzed using Excel or Stata.

There is good *a priori* reason to believe that the DDD, or the "trip diff" will be the best measure of the effects of the legislation. By accounting for both control groups (Harris County and non-auto cases), it significantly lowers any risk of omitted variable bias relative to the other DID's (Wooldridge). Results of this specification are presented on pages 44-49.

In running the regressions, it is important to account for any factors aside from the CEJTA which might influence settlement rates. Any delays in settlement could be "due to the opportunity costs of the parties' delayed receipt of their gains from trade and to expenses incurred during the process" (Kennan and Wilson 45). As a result, I included three controls: the unemployment rate, the interest rate (the Libor rate), and the Case-Shiller Home Price Index, a proxy for income level differences. According to standard law and economics literature, patience and risk-aversion are factors likely to affect pre-trial bargaining (Binmore, Osborne, and Rubinstein 179-225; Cooter and Ulen), so each of the three controls selected for the regressions is meant to emulate their effects. Fluctuating interest rates affect the patience of each player and directly impact the expected gains by specifying rates at which future income is discounted (Fenn and Rickman 478-481). Wealth and unemployment rates impact local levels of risk aversion by affecting the opportunity cost of time spent bargaining.

Each DID and DDD specification is run without controls, with controls, and again with controls squared. Their addition helps "control for compositional changes" in the groups, and is standard practice with this methodology (Wooldridge). The three specifications and their results are detailed below:

1) Between Jurisdictions Estimates

$$\boldsymbol{OpenSynth = \beta_0 + \beta_1(SC) + \beta_2(After) + \beta_3(SCAfter) + \varepsilon}$$

Where:

$SC =$	1 if from Santa Clara; 0 if from Harris
$After =$	1 if filed in 2011; 0 if filed in 2010
$SCAfter =$	1 if filed in Santa Clara in 2011; 0 otherwise

$\boldsymbol{\beta_3}$, the coefficient for the interaction of Santa Clara and After (the coefficient of $SCAfter$), gives the likelihood of a 2011 Santa Clara case being open when it is evaluated approximately 7 to 9 months after the filing date. If the legislation is successful at reducing court costs, we expect that β_3 will be negative as cases dispose faster. Cases filed in Santa Clara after the enactment of CEJTA are thus likelier to become disposed by $|\beta_3|$. None of the other coefficients are particularly insightful in this case.

I also ran regressions on the following two equations in order to determine likelihood of specific methods of disposal (settlement or trial):

$$\boldsymbol{SettledSynth = \beta_0 + \beta_1(SC) + \beta_2(After) + \beta_3(SCAfter) + \varepsilon}$$

$$\boldsymbol{TrialSynth = \beta_0 + \beta_1(SC) + \beta_2(After) + \beta_3(SCAfter) + \varepsilon}$$

These regressions provide a way to test the game theory model, which implied that most effects of the legislation would be felt on settlement and trial rates. According to the model, we expect that cases settling in Santa Clara after the enactment of the CEJTA will decrease. That is, $\boldsymbol{\beta_3}$ is negative in the $SettledSynth$ estimation. Results of the regressions are displayed in *Tables 2.1* on the following pages.

Table 2.1a **BETWEEN JURISDICTIONS (OPENSYNTH)**

	Linear			**Probit**		
SC	.2438*** (.0192)	.8666*** (.2161)	1.2255*** (.3703)	.6221*** (.0510)	2.379*** (.5919)	3.3577*** (1.007)
After	.0890*** (.0266)	-.0589 (.0453)	.0180 (.1187)	.2257*** (.0589)	-.1650 (.1211)	.0275 (.3190)
SCAfter	-.0426 (.0266)	-.2404*** (.0640)	.0095 (.1540)	-.0976 (.0709)	-.6320*** (.1731)	.0215 (.4163)
Unemployment	—	-.1168 (.0748)	-3.3163*** (.8369)	—	-.2961 (.1999)	-8.7265*** (2.2681)
Unemployment^2	—	—	.1700*** (.0421)	—	—	.4488*** (.1145)
Interest rate	—	-.0087 (.0057)	-.0032 (.0428)	—	-2.116 (1.5431)	-.0125 (.1158)
Interest rate^2	—	—	.0002 (.0009)	—	—	.0006 (.0023)
CSH	—	-.0139 (.0149)	.0246 (.1137)	—	-.0430 (.0401)	.0730 (.3050)
CSH^2	—	—	-.0003 (.0004)	—	—	-.0009 (.0012)
Constant	0.4011 (.0162)	3.2783 (1.1974)	17.6538 (8.3664)	-.2504 (.0429)	7.9394 (3.2572)	45.0594 (22.4933)
R^2	.0465	.0508	.0539	.0343	.0376	.0399

The dependent variable is *OpenSynth*, a binary variable coded as "1" if the case is still open 7-9 months after it is filed.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Table 2.1b **BETWEEN JURISDICTIONS (SETTLEDSYNTH)**

	Linear			**Probit**		
SC	-.2999*** (.0178)	-.9429*** (.2001)	-1.2174*** (.3430)	-.8039*** (.0517)	-2.9302*** (.6340)	-3.9760*** (1.0687)
After	-.0976*** (.0207)	.0854** (.0420)	-.0146 (.1100)	-.2471*** (.0587)	.2927** (.1252)	.0247 (.3306)
SCAfter	.0560** (.0247)	.1873*** (.0593)	.0083 (.1427)	.1083 (.0724)	.5089*** (.1807)	.0961 (.4372)
Unemployment	—	.0243 (.0693)	2.8109*** (.7752)	—	.0351 (.2062)	8.6810*** (2.3879)
Unemployment^2	—	—	-.1483*** (.0390)	—	—	-.4611*** (.1214)
Interest rate	—	.0069 (.5294)	.0004 (.0396)	—	.0157 (.0162)	.0314 (.1213)
Interest rate^2	—	—	-.0001 (.0008)	—	—	-.0012 (.0024)
CSH	—	.0258* (.0138)	-.0701 (.1053)	—	.0906** (.0421)	-.3491 (.3102)
CSH^2	—	—	.0005 (.0004)	—	—	.0021* (.0012)
Constant	.5463 (.0150)	-2.8911 (1.1090)	-11.3071 (7.7497)	.1181 (.0426)	-11.2833 (3.4621)	-29.2085 (23.1697)
R^2	.0764	.0818	.0845	.0598	.0644	.0669

The dependent variable is *SettledSynth*, a binary variable coded as "1" if the case is settled 7-9 months after it is filed.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Table 2.1c **BETWEEN JURISDICTIONS (TRIALSYNTH)**

	Linear			**Probit**		
SC	.0561*** (.0115)	.0872 (.1303)	-.0027 (.2237)	.3850*** (.0790)	.6589 (.7851)	-.2765 (1.3598)
After	.0086 (.0134)	-.0260 (.0273)	-.0016 (.0717)	.0735 (.0950)	-.1489 (.1766)	.0528 (.4742)
SCAfter	-.0130 (.0160)	.0511 (.0386)	-.0193 (.0930)	-.0973 (.1078)	.3656 (.2522)	-.0394 (.5759)
Unemployment	—	.0917* (.0451)	.5216 (.5055)	—	.6611** (.2905)	5.3440 (3.29505)
Unemployment^2	—	—	-.0225 (.0254)	—	—	-.2379 (.1632)
Interest rate	—	.0020 (.0034)	.0035 (.0258)	—	.0176 (.0214)	.0631 (.1586)
Interest rate^2	—	—	-.0001 (.0005)	—	—	-.0011 (.0032)
CSH	—	-.0124 (.0090)	.0450 (.0687)	—	-.0912 (.0558)	.2190 (.4706)
CSH^2	—	—	-.0002 (.0003)	—	—	-.0010 (.0018)
Constant	.0526 (.0097)	.6626 (.7222)	-5.3881 (5.0541)	-1.6187 (.0703)	2.9416 (4.3944)	-42.7827 (34.3039)
R^2	.0062	.0073	.0075	.0110	.0130	.0138

The dependent variable is *TrialSynth*, a binary variable coded as "1" if the case has proceeded to trial 7-9 months after it is filed.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Although the coefficients lose much of their power after adding in the controls squared, there is some weak evidence to suggest that the disposal rates, and in particular settlement rates, actually increased after the Act. In both the linear and

probit estimates, coefficients are negative before adding the controls squared. Because the addition of controls do not dramatically boost the r^2 despite their statistical significance however, there may be reason to believe that the *OpenSynth* relationship with unemployment has an unusual distribution (e.g. shaped like a quadratic function). The *TrialSynth* DID does not provide significant nor consistent results. This is likely because the number of cases which proceeded to trial was simply not large enough for Stata to infer a relationship.

2) Between Subject Matter Estimates (Auto vs. "Non-EJT" Cases in SC County)

I also ran a separate regression to compare cases between subject matters which normally qualify for the EJT and subject matters which normally do not. I relied heavily on the attorneys' responses from Part I in order to gather a sample of cases that would be affected by the CEJTA: in the end, both because of the attorneys' stress on limiting the amount of issues involved and because of the type of cases which empirically proceeded to EJT's (see pp. 14-15), I chose to compare automobile cases in Santa Clara with "non-EJT" cases in Santa Clara. The non-EJT cases consist of case categories which typically involve a large number of issues and which do not normally qualify for an EJT, such as Construction Defect cases, Securities Litigation, Antitrust/Trade Regulation, and Other Employment.

To prepare the data, I hand coded the Santa Clara observations with an additional dummy for Auto. I omitted cases which may or may not qualify for EJT's (such as breach of contract cases). By deleting case categories whose suitability for EJT's are unclear, I am left to compare cases which are affected by EJT's (automobile cases) to cases which are not affected by EJT's (the non-EJT cases). The total number of observations left after this process is 2,256. Of those, 672 were auto cases.

Because the CEJTA is likelier to affect decision-making in automobile cases than in non-EJT cases, a DID between the subject matters uncovers the true effects of the legislation. I ran the following DID:

$$\boldsymbol{OpenSynth = \beta_0 + \beta_1(Auto) + \beta_2(After) + \beta_3(AutoAfter) + \varepsilon}$$

Where:

$Auto =$ 1 if automobile case; 0 otherwise
$After =$ 1 if filed in 2011; 0 if filed in 2010
$AutoAfter =$ 1 if automobile case filed in 2011; 0 otherwise

Essentially, if there is a large difference in the amount of cases which are open in the automobile category as compared to the "non-EJT" categories, we know that the difference is due to the CEJTA, as it is the only legislation disproportionately affecting that specific group of cases. Therefore, if cases in the qualifying subject matter resolve more quickly after the Act is passed ($\boldsymbol{\beta_3}$ is negative), then the CEJTA is a cost-saving innovation.

The same variables were also regressed on $SettledSynth$ and $TrialSynth$ to determine any specific effects. Results of the regressions are displayed in *Tables 2.2* on the following pages. Some of the coefficients have been omitted because of collinearity.

Table 2.2a **BETWEEN SUBJECT MATTER (OPENSYNTH)**

	Linear			Probit		
Auto	-.0090 (.0295)	-.0092 (.0294)	-.0092 (.0294)	-.0255 (.0852)	-.0260 (.0858)	-.0270 (.0859)
After	.0402* (.0225)	-.1265 (.1298)	-.3833 (.6147)	.1180* (.0660)	-.3075 (.3938)	-1.2441 (1.937)
AutoAfter	.0024 (.0416)	.0046 (.0414)	.0040 (.0415)	.0056 (.1216)	.0102 (.1222)	.0103 (.1224)
Unemployment	—	.3942** (.1546)	-3.559 (9.040)	—	1.2096** (.4705)	-9.712 (28.5205)
Unemployment^2	—	—	.1818 (.4166)	—	—	.4986 (1.3135)
Interest rate	—	.0086 (.0099)	-.0756 (.1879)	—	**2.9236** **(2.9795)**	-.2451 (.5956)
Interest rate^2	—	—	.0016 (.0034)	—	—	.0050 (.0108)
CSH	—	-.0916*** (.0264)	**Om.**	—	-.2748** (.0792)	-.2488** (.1134)
CSH^2	—	—	-.0003 (.0001)	—	—	**Om.**
Constant	.6926 (.0161)	8.8525 (2.1037)	24.5730 (49.5666)	.5032 (.0465)	24.5872 (6.2145)	84.3813 151.3108
R^2	.0021	.0157	.0158	.0017	.0129	.0130

The dependent variable is *OpenSynth*, a binary variable coded as "1" if the case is still open 7-9 months after it is filed. Some variables have been omitted because of collinearity.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Table 2.2b **BETWEEN SUBJECT MATTER (SETTLEDSYNTH)**

	Linear			Probit		
Auto	.0216 (.0293)	.0222 (.0292)	.0218 (.0292)	.0615 (.0854)	.0649 (.0861)	.0650 (.0862)
After	-.0325 (.0224)	.1858 (.1289)	.3840 (.6104)	-.0967 (.0663)	.4998 (.3970)	1.2638 (1.9372)
AutoAfter	-.0101 (.0414)	-.0125 (.0411)	-.0115 (.0412)	-.0269 (.1218)	-.0339 (.1225)	-.0330 (.1227)
Unemployment	—	-.3659** (.1535)	3.6521 (8.9759)	—	-1.1218** (.4720)	9.7086 (28.5066)
Unemployment^2	—	—	-.1858 (.4137)	—	—	-.4969 (1.3130)
Interest rate	—	-.0055 (.0099)	.0682 (.1866)	—	-.0195 (.0300)	.2216 (.5950)
Interest rate^2	—	—	-.0013 (.0033)	—	—	-.0044 (.0108)
CSH	—	.0891*** (.0262)	**Om.**	—	.2677*** (.0794)	.2395** (.1134)
CSH^2	—	—	.0003** (.0001)	—	—	**Om.**
Constant	.2949 (.0160)	-7.9159 (2.0887)	-23.8272 (49.2136)	-.5393 (.0468)	-24.8808 (6.2281)	-83.1094 (151.2285)
R^2	.0019	.0172	.0173	.0016	.0142	.0143

The dependent variable is *SettledSynth*, a binary variable coded as "1" if the case is settled 7-9 months after it is filed. Some variables have been omitted because of collinearity.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Table 2.2c **BETWEEN SUBJECT MATTER (TRIALSYNTH)**

	Linear			Probit		
Auto	-.0125** .0051	-.0130** (.0051)	-.01263** (.0051)	**Om.**	**Om.**	**(did not converge)**
After	-.0077** .0039	-.0592*** (.0224)	-.0007 (.1060)	-.3473* (.2104)	-2.7880** (1.3509)	
AutoAfter	.0077 .0071	.0080 (.0071)	.0076 (.0072)	**Om.**	**Om.**	
Unemployment	—	-.0283 (.0267)	-.0935 (1.5583)	—	-1.494 (2.004)	
Unemployment^2	—	—	.0040 (.0718)	—	—	
Interest rate	—	-.0030* (.0017)	.0073 (.0324)	—	-.1464 (.1145)	
Interest rate^2	—	—	-.0002 (.0006)	—	—	
CSH	—	.0025 (.0046)	**Om.**	—	.1325 (.3485)	
CSH^2	—	—	.0000 (.0000)	—	—	
Constant	.0125 .0028	.0634 (.3627)	.2542 (8.544)	-2.240 (.1215)	-.1161 (27.4548)	
R^2	.0043	.0076	.0082	.0181	.0529	

The dependent variable is *TrialSynth*, a binary variable coded as "1" if the case has proceeded to trial 7-9 months after it is filed. Some variables have been omitted because of collinearity.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Here, the data did not yield any statistically significant results for the coefficient to *AutoAfter*. Although the signs of the coefficients are consistent across all the linear models after adding in controls, the magnitude of the coefficients are very weak (all < 0.02). Thus, no conclusion can be reached as to whether the

automobile cases in Santa Clara in 2011 dispose faster than any other case which does not fit those criteria. The relatively weak results may be due to the small amount of data being compared in this portion. The addition of controls also does not dramatically boost the r^2.

3) Trip Diff (Difference-in-difference-in-differences)

The DDD provides a more robust analysis of the effects of the legislation by combining the control groups from the DID's above. In the Between Jurisdictions DID, a change occurring simultaneously between the two counties at the same time as the treatment (the CEJTA) compromises the accuracy of the results. Likewise, in the Between Subject Matter specification, a change other than the CEJTA may have simultaneously disproportionately affected the automobile cases. The DDD, the preferred specification in this instance, is a robust way to measure the effects of the legislation because it is unlikely that another reform occurred at the same time as the CEJTA that targeted only Santa Clara County, and which applied disproportionately to the same subject matter within Santa Clara County (automobile cases).

Thus, in combining the groups, the DDD manages to hone in on where the effects of the legislation is expected to be felt. It is an accurate estimation so long as no other change affecting only automobile cases in Santa Clara County occurs simultaneously as the CEJTA.

The Trip Diff specification I ran was:

$$\boldsymbol{OpenSynth} = \boldsymbol{\beta_0} + \boldsymbol{\beta_1}(\boldsymbol{SC}) + \boldsymbol{\beta_2}(\boldsymbol{After}) + \boldsymbol{\beta_3}(\boldsymbol{SCAfter}) + \boldsymbol{\beta_4}(\boldsymbol{Auto}) + \boldsymbol{\beta_5}(\boldsymbol{SCAuto}) + \boldsymbol{\beta_6}(\boldsymbol{AutoAfter}) + \boldsymbol{\beta_7}(\boldsymbol{AutoSCAfter}) + \boldsymbol{\varepsilon}$$

Where:

$SC =$ 1 if from Santa Clara; 0 if from Harris
$After =$ 1 if filed in 2011; 0 if filed in 2010
$SCAfter =$ 1 if Santa Clara case filed in 2011; 0 otherwise
$Auto =$ 1 if automobile case; 0 otherwise
$SCAuto =$ 1 if automobile case in Santa Clara; 0 otherwise
$AutoAfter =$ 1 if automobile case filed in 2011; 0 otherwise
$AutoSCAfter =$ 1 if automobile case filed in Santa Clara in 2011; 0 otherwise

$\boldsymbol{\beta_7}$, the coefficient for the interaction of *Auto*, *SC,* and *After*, is expected to be negative if automobile cases in Santa Clara filed in 2011 are likelier to be disposed 7 to 9 months after the filing date than other types of cases which do not fit those criteria. $\boldsymbol{\beta_3}$ and $\boldsymbol{\beta_5}$ also act as good indicators of whether cases filed in Santa Clara in 2011 and auto cases filed in Santa Clara have a higher likelihood of resolution 7 to 9 months after the filing date. Their signs should be the same as that of $\boldsymbol{\beta_7}$.

I also ran the regression on *SettledSynth* and *OpenSynth*. Results of the regressions are displayed in *Tables 2.3* on the following pages. Some of the coefficients have been omitted because of collinearity.

Table 2.3a **TRIPDIFF (OPENSYNTH)**

	Linear			Probit		
SC	.2501*** (.0206)	.8646*** (.2158)	1.2637*** (.3697)	.6378*** (.0552)	2.379*** (.5933)	3.462*** (1.0093)
After	.0687*** (.0239)	-.0818* (.0461)	-.0130 (.1189)	.1758*** (.0635)	-.2227* (.1234)	-.0501 (.3211)
SCAfter	-.0216 (.0287)	-.2275*** (.0647)	.0527 (.1544)	-.0470 (.0766)	-.6041*** (.1757)	.1327 (.4195)
Auto	.1210** (.0479)	.1243*** (.0478)	.1257*** (.0478)	.3071** (.1262)	.3184** (.1267)	.3222** (.1268)
SCAuto	-.0753 (.0557)	-.0812 (.0556)	-.0781 (.0555)	-.1821 (.1481)	-.1988 (.1486)	-.1905 (.1488)
AutoAfter	.1225* (.0668)	.1213* (.0667)	.1296* (.0666)	.3266* (.1797)	.3204** (.1801)	.3422* (.1802)
AutoSCAfter	-.1270 (.0779)	-.1263 (.0778)	-.1369* (.0777)	-.3319 (.2111)	-.3278 (.2116)	-.3561* (.2119)
Unemployment	–	-.1294* (.0748)	-3.5625*** (.8367)	–	-.3300 (.2015)	-9.4180*** (2.2826)
Unemployment^2	–	–	.1822*** (.0421)	–	–	.4830*** (.1151)
Interest rate	–	-.0096* (.0057)	-.0049 (.0427)	–	-.0236 (.0155)	-.0168 (.1163)
Interest rate^2	–	–	.0002 (.0009)	–	–	.0007 (.0023)
CSH	–	-.0120 (.0149)	.0077 (.1138)	–	-.0381 (.0403)	.0288 (.3070)
CSH^2	–	–	-.0002 (.0004)	–	–	-.0007 (.0012)
Constant	.3878 (.0174)	3.1724 (1.1953)	20.0186 (8.3772)	-.2851 (.0464)	7.6867 (3.2661)	51.4912 (22.6233)
R^2	.0521	.0566	.0601	.0384	.0419	.0445

The dependent variable is *OpenSynth*, a binary variable coded as "1" if the case is still open 7-9 months after it is filed.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Table 2.3b **TRIPDIFF (SETTLEDSYNTH)**

	Linear			Probit		
SC	-.3189*** (.0191)	-.9865*** (.1998)	-1.2897*** (.3424)	-.8612*** (.0561)	-3.0810*** (.6364)	-4.2029*** (1.0729)
After	-.0793*** (.0222)	.1073** (.0426)	.0224 (.1101)	-.2014*** (.0631)	.3509*** (.1275)	.1228 (.3326)
SCAfter	.0378 (.0266)	.1871*** (.0600)	.0037 (.1430)	.0582 (.0785)	.5101*** (.1835)	.0954 (.4407)
Auto	-.0700 (.0444)	-.0731* (.0443)	-.0739* (.0442)	-.1781 (.1261)	-.1866 (.1266)	-.1878 (.1265)
SCAuto	.1528** (.0516)	.1583*** (.0515)	.1555*** (.0514)	.4274*** (.1485)	.4444*** (.1491)	.4362*** (.1491)
AutoAfter	-.1032* (.0619)	-.0991 (.0618)	-.1065* (.0617)	-.2791 .(1796)	-.2671 (.1800)	-.2861 (.1800)
AutoSCAfter	.1021 (.0722)	.0978 (.0720)	.1069 (.0720)	.2986 (.2118)	.2858 (.2124)	.3103 (.2126)
Unemployment	–	.0420 (.0693)	2.8734*** (.7750)	–	.0801 (.2076)	8.8220*** (2.400)
Unemployment^2	–	–	-.1502*** (.0390)	–	–	-.4649*** (.1220)
Interest rate	–	.0077 (.0053)	.0046 (.0396)	–	.0176 (.0163)	.0436 (.1218)
Interest rate^2	–	–	-.0002 (.0008)	–	–	-.0014 (.0024)
CSH	–	.0248* (.0138)	-.0573 (.1054)	–	.0893** (.0423)	-.3210* (.3121)
CSH^2	–	–	.0005 (.0004)	–	–	.0020 (.0012)
Constant	.5525 (.0161)	-2.936 (1.1068)	-12.5566 (7.7596)	.1341 .0459	-11.5551 (3.4746)	-32.0920 (23.3019)
R^2	.0815	.0873	.0900	.0641	.0691	.0715

The dependent variable is *SettledSynth*, a binary variable coded as "1" if the case is settled 7-9 months after it is filed.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

Table 2.3c **TRIPDIFF (TRIALSYNTH)**

	Linear			**Probit**		
SC	.0688*** (.0124)	.1329 (.1295)	.0314 (.2221)	.4215*** .0818	.8853 .8163	-.1615 1.4044
After	.0106 (.0143)	-.0250 (.0276)	-.0075 (.0714)	.0814 .0979	-.1554 .1825	.0168 .4865
SCAfter	-.0156 (.0172)	.0384 (.0388)	-.0579 (.0928)	-.1058 .1114	.3082 .2593	-.2428 .5943
Auto	-.0510* (.0287)	-.0512* (.0287)	-.0518* (.0287)	-.8203** .3746	-.8224** .3752	-.8322** .3769
SCAuto	-.0776** (.0333)	-.0771** (.0333)	-.0775** (.0334)	Om.	Om.	–
AutoAfter	-.0193 (.0400)	-.0222 (.0400)	-.0231 (.0400)	Om.	Om.	–
AutoSCAfter	.0244 (.0466)	.0278 (.0467)	.0293 (.0467)	Om.	Om.	–
Unemployment	–	.0866* (.0449)	.7058 (.5028)	–	.6436** .2982	6.6382** 3.3873
Unemployment^2	–	–	-.0328 (.0253)	–	–	-.3072* .1680
Interest rate	–	.0021 (.0034)	.0011 (.0257)	–	.0180 .0221	.0545 .1638
Interest rate^2	–	–	.0000 (.0005)	–	–	-.0011 .0033
CSH	–	-.0132 (.0089)	.0490 (.0684)	–	-.0976* .0575	.2490 .4809
CSH^2	–	–	-.0002 (.0003)	–	–	-.0011 .0018
Constant	.0598 (.0104)	.8139 (.7171)	-6.5042 (5.0341)	-1.5548 .0728	3.9051 4.5542	-50.8838 35.0857
R^2	.0252	0.0261	.0266	.0181	.0200	.0213

The dependent variable is *TrialSynth*, a binary variable coded as "1" if the case has proceeded to trial 7-9 months after it is filed.

* = significant at 10% level (1-tailed test)
** = significant at 5% level
*** = significant at 1% level

Unemployment: Rates not seasonally adjusted. From http://data.bls.gov/cgi-bin/surveymost
Interest rate: Libor interest rates from http://www.global-rates.com
CSH: Using Case-Shiller Home Price Index from http://www.standardandpoors.com

The DDD offers some evidence that the disposal rates (and, in particular, settlement rates) increased after the introduction of the CEJTA. Across the entire row, the coefficients for *AutoSCAfter* in *Table 2.3a* are negative, which means that a case is less likely to be open after 7 to 9 months if it is an automobile case filed in Santa Clara County in 2011. The signs of the coefficients for *AutoSCAfter* are also consistent with the coefficients for *SCAfter* and *SCAuto*: generally, cases filed in Santa Clara in 2011 and automobile cases in Santa Clara tend to dispose faster.

Specifically, automobile cases filed in Santa Clara County in 2011 are approximately 12% likelier to be disposed than other cases 7 to 9 months after they are filed (from *Table 2.3a*). Although the coefficients are not statistically significant, cases appear both to settle faster and go to trial faster: automobile cases filed in Santa Clara County in 2011 are around 10% likelier to settle (*Table 2.3b*) and 2% likelier to proceed to trial (*Table 2.3c*) than any other cases 7 to 9 months after they are filed. Again however, it is important to note that the r^2 values did not dramatically increase after the addition of controls.

Summary of Findings & Implications for Future Research

The preferred specification in this case, the Trip Diff, gives some indication that both disposal and settlement rates have increased after the Act, leading to potential cost-savings for the judicial system. The signs for the relevant coefficients are consistent after adding in controls, and there is reasonable evidence to believe that automobile cases filed in Santa Clara County in 2011 are likelier to settle than any other cases which do not fit those criteria.

A crucial assumption of the dif-in-difs method is that the composition of the two groups being examined remains the same over the entire period of study. In this case, there is no reason to believe that there have been any dramatic changes in the composition of the two counties, nor in the innate characteristics of the auto and non-EJT type cases, especially as controls were added for major economic changes (unemployment rate, interest rate, and income levels).

The accuracy of the DID estimates also rely on nothing else changing between the two groups at the same time as the CEJTA. While my own research did not indicate that there were any new policies which may have affected the method of resolution in the two counties, it is possible that some other reform existed, as time constraints prevented me from devoting too much time to this portion of the project. While the Trip Diff mitigates the chance of any serious omitted variable bias by specifying very exact controls, the DID's are more susceptible to such a bias. As mentioned earlier, a potential issue with just estimating the Between Jurisdiction DID is that other policies aside

from the CEJTA could be uniquely affecting Santa Clara County in 2011. Likewise, the resolution methods of automobile cases analyzed by the Subject Matter DID may have changed for some reason other than the CEJTA. Knowing this, future research can improve the reliability of the first two estimates (the DID's) by making sure that the effects of any new legislation in 2011 cannot be confounded with the effects of the CEJTA.

Again because of time limitations, I was unable to spend as much time as I would have liked to search for control groups for the Between Jurisdiction DID. While Harris County was the best I could find in the time I was allotted, it would have been ideal to find a control group which more closely resembled Santa Clara County. This may be difficult to do however, as it is crucial that the two counties share similar docket systems which provide similar data. Finally, simply doing the research later after the EJT receives more publicity could give more definitive results.

Overall, the Trip Diff is a salient and trustworthy specification for evaluating procedural effects of the CEJTA. After hand coding for all the variables, a trend emerges: (i) contrary to the predictions of the game theory model, the CEJTA does seem to lead to a decrease in litigation intensity in the affected case categories, and (ii) automobile cases in Santa Clara County do tend to settle faster after the Act was passed.

CONCLUSION

Although some attorneys still have reservations about the short time allocated for the EJT, those who have participated in the process were very satisfied with their experience, and lauded it for its ability to reduce time and monetary costs for their clients and themselves. The attorneys' responses in Part I therefore demonstrate an optimistic and clear understanding of the goals of the legislation, and indicate that the Act has potential to reduce costs for the state. Aside from these findings however, it is also important to think about the long-term implications of the EJT program, and the effect it may have on future judicial innovations:

Throughout the project, my original question about the consequences of the legislation has ballooned into something larger: the recent passage of the CEJTA tells us not only what we seek to change in the jury trial, but also what we value about it. It is therefore my hope that this paper sheds light on which features of the jury trial we value as a society, and provide some guidance for future jury trial innovations.

Based on the interview responses, the attorneys value the time allocated for *voir dire*, as the shortened *voir dire* is perhaps the only feature of the CEJTA for which attorneys have expressed concern. From the interview with Judge Mary House, it is also evident that we value the jury trial itself as an important procedure unique to the United States: one of the motivating reasons for the creation of the CEJTA is the declining popularity of the jury trial due to prohibitive costs. The very idea of a jury trial, in which strangers can determine the fate of a case, is therefore near and dear to our concept of justice.

The attorneys' positive experiences with the CEJTA also highlight some features of the jury trial which may be redundant. First, because limited concerns were raised about the 12-person jury, it is possible that the "magic number" can be reduced in future jury trial innovations. Second, the attorneys' responses show that it is sometimes unnecessary to bring in so many experts and witnesses, as long as the playing field is level and their opposing attorney also does not have the opportunity to do so. Their comfort with restricting their arguments in order to have a shorter trial hints at a possible "arms race" mentality between parties in regular trials: perhaps part of the reason jury trials are normally so long is that the attorneys feel required to keep adding witnesses and experts for their clients even if they aren't necessary, as *not* doing so would put them at a disadvantage relative to the other side. Finally, based on the positive responses of the attorneys who have participated in the program, it may not be necessary to allocate as much time to jury trials as we think, especially for cases which involve limited issues.

Part II also gives some consistent evidence that the CEJTA gave rise to a reduction in resolution time, whether by trial or settlement. These cost-savings are at present quite minimal however, due to the small number of cases which have thus far undergone an expedited trial. Overall, the DDD gives some indication that litigation intensity has decreased after the passage of the CEJTA, suggesting that the Act may indeed lead to cost reductions for the court system, and that decision-making by the attorneys and the litigants are consistent with the Act's goals. To that extent, the effect is not consistent with the game theory models. While the models from Part I gave a pessimistic view, the empirical data allow me to be more optimistic about the efficacy of the program.

Although work still remains to be done before we can fully understand the effects of the legislation, the interview responses and especially the regressions provide some hope that the CEJTA could accomplish its goals and increase efficiency for the court system as a whole. The legislation is off to a good start, garnering more supporters as attorneys become acquainted to the idea that some cases simply do not require a full trial. Much like the South Carolina model before it, the California EJT provides another worthy template for what may come. Thus, in the words of Attorney B, "the EJT worked better than what I'd even anticipated!"

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ADDENDUM

EJT's as a form of ADR

The ADR movement in the US has expanded since the 1960s, when the amount of cases which can be litigated grew and started to overburden the court system (Goldberg, "Dispute Resolution" 3-4). Despite its humble community beginnings, the ADR movement quickly gained momentum following complaints regarding the inefficiencies of the court and the costs of litigation (Edwards 668). The idea of a multi-door courthouse in which disputants could find specific legal processes tailored to each case evolved in the late 1970s, and "represented the duality of purposes associated with ADR—efficiency and docket-clearing potential, as well as a claim for a better quality of justice with designated processes providing more tailor-made solutions to legal problems" (Menkel-Meadow 1616).

The goals of the ADR movement have never been very cohesive, but most supporters adhere to a few main arguments. Some advocates claim that the lower costs in ADR allow the underprivileged or minorities to have access to justice, as those populations frequently have the least amount of resources to litigate. Others claim that ADR is more conducive to fostering long-lasting relationships. Many stress, however, that the use of ADR over litigation reduces the amount of money and the total time spent on resolving a dispute (Edwards 669-669).

It is on this latter point that I focus, since it is the one with which EJT's align more directly. Determining whether an EJT is a form of ADR is in itself a challenge. Although Goldberg, one of the drafters, maintains that the expedited trial is not considered a form of ADR, its focus on cost minimization and efficiency is in line with general ADR goals, and many attorneys who were interviewed considered it as such (or as a hybrid).

The original SJT from which South Carolina's model developed is considered a form of ADR, as the trials were created with the intention of facilitating settlement (Posner, "The Summary Jury Trial and Other Methods of Alternative Dispute Resolution). Whether the California EJT is considered ADR may have to do with relevant features it shares with its predecessors. Like many forms of ADR, EJT's were born as a response to an overburdened court system and, like ADR, garnered much support because of their potential to address court inefficiencies. Despite the formal court setting in which it's conducted, the EJT was created for the main purpose of finding a quicker, more efficient resolution to the expensive, full-blown trial. According to proponents, it is also meant to be extremely flexible, a feature which aligns with ADR goals of creating a more "tailor-made" solution to legal disputes.

It is thus possible to think of the EJT as a hybrid between the traditional court system and as a form of ADR, with dual goals of preserving justice while maximizing efficiency in court. This however, is a conflict in itself, as the ADR system grew largely from a desire to *reduce* the number of cases litigated in courts. Reductions in caseloads are often viewed as an indication that ADR is becoming more successful (Hensler 166-167), but the CEJTA seems to introduce the idea that some of the perks of ADR (cost and time reduction) can exist within the courtroom. Because EJT's are conducted in a trial setting with all the formalities of a court, it arguably more closely resembles a trial than a form of ADR. Thus, it is also possible to view EJT's as an *opposing* force to ADR, creating yet another venue to expend judicial resources, instead of allowing parties to negotiate outside of court.

During my interviews with the attorneys, I asked each one whether they considered the EJT to be a type of ADR. Their responses are listed below:

Table 3. **Attorney's Consideration of the EJT as a form of ADR**

Attorney & Specialty area	**# of EJT's undergone**	**Consider as ADR?**
A (plaintiffs' personal injury)	0	Yes: "I do consider it a form of ADR. It is an alternative to the traditional civil jury trial that would otherwise be necessary if an expedited jury trial was not selected by the parties."
B (plaintiffs' personal injury)	1 (auto)	No: "It's a *trial;* very formal… Normally we have a facilitator in ADR to go back and forth; this is a *jury* trial."
C (plaintiffs' personal injury)	3 (all auto)	No: "It's basically litigants who want a jury trial getting it in a much quicker format, but it's not a form of ADR. The main reason I feel that is because *you* are in it [the EJT]. In ADR, you have 1 arbitrator making a decision. In expedited jury format, you have 8 *jurors* making a decision. It's not a professional arbitrator but 8 folks in the community."
D (Asbestos)	0	Complements ADR goals: "It's less effective than ADR because it's costlier and more formal. You leave the case in the hands of strangers, and there's an increased risk element because it's a jury trial."
E (Gen. business)	0	Yes: "It's cheaper, better, faster- all goals of ADR approaches. But it leaves ultimate decision in the hands of strangers."
F (Defense- civil tort)	1 (auto; was defense in one of the cases with attorney C)	No: "It's a real trial. As opposed to arbitration where sitting with an arbitrator, (you) get (the) experience of speaking with a jury and standing as opposed to sitting. (You) lose some 'wow factor' if you're sitting in arbitration."

Some of the attorneys maintained that the EJT was not a form of ADR due to the fact that the EJT uses a jury instead of a mediator or arbitrator to reach a decision. However, many attorneys conceded that there are elements of ADR in the process, because of its stress on cost reduction. Some also voiced that existing ADR methods may dampen the effects of the EJT. Attorney E, who has not yet participated in an EJT, asked during the interview, "If there's mediation, why do you even need to go to an EJT? I think it [mediation] is trumping the whole thing…because that process [mediation] remains within the control of litigants." Attorney D also commented on the increased risk of going to an EJT instead of choosing a conventional ADR method, asserting that leaving the case in the "hands of strangers leads to an increased risk element."

In my interviews with the drafters, I also asked whether they considered the EJT to be a form of ADR. As here, no conclusive response was reached. Goldberg states that it "could be argued that [the EJT is] a form of ADR, but ADR doesn't usually use a jury," highlighting again that the expedited jury trial relies on an impartial group of 8 people, instead of a single stranger that the parties may encounter during mediation or arbitration. Judge House also mentions that EJT's could be a sort of "ADR tool because they're not appealable…[and] this form [of trial] is an alternative to a typical 12-person jury trial." Goldberg also mentioned that, in more conventional ADR methods like mediation or arbitration, both sides end up "splitting the baby" and walk away dissatisfied; expedited jury trials offer a chance for one side to feel completely content, and the other to at least incur less risk with the high/low agreement.

Their responses again highlight how EJT's possess elements which might make them an important force for or against the ADR movement. It is unclear at this point how EJT's fit into the ADR landscape, if at all. Regardless of how the EJT is officially considered however, whether the expedited trial ends up being a complement to the goals of ADR or a force against them will be largely determined by its ability to promote efficiency in the court system.