Civil Justice Initiative

The Landscape of Civil Litigation in State Courts

NCSC
National Center for State Courts
Williamsburg, Virginia

SJI
State Justice Institute

Note: The Allegheny County Court of Common Pleas in Pittsburgh, Pennsylvania, was one of 152 courts in 10 counties that participated in the NCSC *Landscape of Civil Litigation in State Courts.* The study examined all civil cases disposed in those counties from July 1, 2012 through June 30, 2013. The resulting dataset included over 900,000 cases, approximately five percent of the total civil caseload in state courts nationally.

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We are also immensely grateful to the state courts that participated in the study. It is a gross understatement to say that state courts today are operating under enormous pressure to manage voluminous caseloads with significantly reduced resources. We recognize that it is no small task for those courts to allocate scarce resources to extract case-level data from their case management systems and, as important, to answer detailed questions about computer codes and formatting that is necessary to make sense of the data. Their willingness to do so is a testament to their commitment to maintaining the American civil justice system as a forum for the speedy, inexpensive, and just resolution of civil claims.

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Executive Summary

Much of the debate concerning the American justice system focuses on procedural issues that add complexity to civil litigation, resulting in additional cost and delay and undermining access to justice. Many commentators are alarmed by the increasing privatization of the civil justice system and particularly by the dramatic decline in the rates of civil bench and jury trials. In addition, substantially reduced budgetary resources since the economic recession of 2008-2009 have exacerbated problems in civil case processing in many state courts.

In response to these concerns, state and federal courts have implemented a variety of civil justice reform projects over the past decade. Some have focused on particular types or characteristics of civil cases such as business and complex litigation programs. Others have aimed at problematic stages of civil litigation, especially discovery. In 2013, the Conference of Chief Justices (CCJ) convened a Civil Justice Improvements Committee to assess the effectiveness of these efforts and to make recommendations concerning best practices for state courts. To inform the Committee's deliberations, the National Center for State Courts (NCSC) undertook a study entitled *The Landscape of Civil Litigation in State Courts* to document case characteristics and outcomes in civil cases disposed in state courts.

Differences among states concerning data definitions, data collection priorities, and organizational structures make it extremely difficult to provide national estimates of civil caseloads with sufficient granularity to answer the most pressing questions of state court policymakers. The sample of courts in the *Landscape* study was intentionally selected to mirror the variety of organizational structures in state courts. The resulting *Landscape* dataset consisted of all non-domestic civil cases disposed between July 1, 2012 and June 30, 2013 in 152 courts with civil jurisdiction in 10 urban counties. The 925,344 cases comprise approximately five percent (5%) of state civil caseloads nationally.

Many commentators are alarmed by the increasing privatization of the civil justice system and particularly by the dramatic decline in the rates of civil bench and jury trials.

FINDINGS

The picture of civil caseloads that emerges from the *Landscape* study is very different than one might imagine from listening to current criticism about the American civil justice system. High-value tort and commercial contract disputes are the predominant focus of contemporary debates, but collectively they comprised only a small proportion of the *Landscape* caseload. In contrast, nearly two-thirds (64%) were contract cases, and more than half of those were debt collection (37%) and landlord/tenant cases (29%). An additional sixteen percent (16%) were small claims cases involving disputes valued at $12,000 or less,

and nine percent (9%) were characterized as "other civil" cases involving agency appeals and domestic or criminal-related cases. Only seven percent (7%) were tort cases and one percent (1%) were real property cases.

To the extent that damage awards recorded in the final judgment are a reliable measure of the monetary value of civil cases, the cases in the dataset involved relatively modest sums. Despite widespread perceptions that civil litigation involves high-value commercial and tort cases, only 357 cases (0.2%) had judgments that exceeded $500,000 and only 165 cases (less than 0.1%) had judgments that exceeded $1 million. Instead, three-quarters (75%) of all judgments were less than $5,200. These values varied somewhat based on case type; three-quarters of real property judgments, for example, were less than $106,000 and three-quarters of torts were less than $12,200. For most represented litigants, the costs of litigating a case through trial would greatly exceed the monetary value of the case. In some instances, the costs of even initiating the lawsuit or making an appearance as a defendant would exceed the value of the case.

Litigation costs that routinely exceed the case value explain the low rate of dispositions involving any form of formal adjudication. Only four percent (4%) of cases were disposed by bench or jury trial, summary judgment, or binding arbitration. The overwhelming majority (97%) of these were bench trials, almost half of which (46%) took place in small claims or other civil cases. Three-quarters of judgments entered in contract cases following a bench trial were less than half of those in small claims cases ($1,785 versus $3,900). This contradicts assertions that most bench trials involve adjudication over complex, high-stakes cases.

Most cases were disposed through an administrative process. A judgment was entered in nearly half (46%) of the cases, most of which were likely default judgments. One-third of cases were dismissed, possibly following a settlement; ten percent (10%) were explicitly recorded as settlements.

Summary judgment is a much less favored disposition in state courts compared to federal courts. Only one percent (1%) were disposed by summary judgment, and most of these would have been default judgments in debt collection cases except the plaintiff pursued summary judgment to minimize the risk of post-disposition challenges.

A traditional hallmark of civil litigation is the presence of competent attorneys zealously representing both parties. One of the most striking findings in the dataset was the relatively large proportion of cases (76%) in which at least one party was self-represented, usually the defendant. Tort cases were the only ones in which a majority (64%) of cases had both parties represented by attorneys. Small claims dockets had an

At least one party was self-represented (usually the defendant) in more than three-quarters of the cases.

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unexpectedly high proportion (76%) of plaintiffs who were represented by attorneys, which suggests that small claims courts, which were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures, have become the forum of choice for attorney-represented plaintiffs in lower-value debt collection cases.

Approximately three-quarters of cases were disposed in just over one year (372 days), and half were disposed in just under four months (113 days). Nevertheless, small claims were the only case type that came close to complying with the *Model Time Standards for State Trial Courts (Standards)*. Tort cases were the worst case category in terms of compliance with the *Standards*. On average, tort cases took 16 months (486 days) to resolve and only 69 percent were disposed within 540 days of filing compared to 98 percent recommended by the *Standards*.

IMPLICATIONS FOR STATE COURTS

The picture of civil litigation that emerges from the *Landscape* dataset confirms the longstanding criticism that the civil justice system takes too long and costs too much. As a result, many litigants with meritorious claims and defenses are effectively denied access to justice in state courts because it is not economically feasible to litigate those cases. Most of the litigants who have the resources and legal sophistication to do so have already abandoned the civil justice system either preemptively through contract provisions (e.g., for consumer products and services, employment, and health care) or after filing a case in court through private ADR services. Ironically, private ADR is often provided by experienced trial lawyers and retired judges.

The vast majority of civil cases that remain in state courts are debt collection, landlord/tenant, foreclosure, and small claims cases. State courts are the preferred forum for plaintiffs in these cases for the simple reason that in most jurisdictions state courts hold a monopoly on procedures to enforce judgments. Securing a judgment from a court of competent jurisdiction is the mandatory first step to being able to initiate garnishment or asset seizure proceedings. The majority of defendants in these cases, however, are self-represented. Even if defendants might have the financial resources to hire a lawyer to defend them in

court, most would not because the cost of the lawyer exceeds the potential judgment. The idealized picture of an adversarial system in which both parties are represented by competent attorneys who can assert all legitimate claims and defenses is an illusion.

State court budgets experienced dramatic cuts during the economic recessions both in 2001–2003 and in 2008–2009, and there is no expectation among state court policymakers that state court budgets will return to pre-2008 recession levels. These budget cuts combined with constitutional and statutory provisions that prioritize criminal and domestic caseloads over civil caseloads have undermined courts' discretion to allocate resources to improved civil case management. As both the quantity and quality of adjudicatory services provided by state courts decline, it becomes questionable whether state legislators will be persuaded to augment budgets to support civil caseloads.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants with lessened standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts. Because the civil justice system directly touches everyone in contemporary American society — through housing, food, education, employment, household services and products, personal finance, and commercial transactions — ineffective civil case management by state courts has an outsized effect on public trust and confidence compared to the criminal justice system. If state court policymakers are to return to the traditional role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or even implemented incrementally through mere changes in rules of procedure. It is imperative that court leaders move with dispatch to improve civil case management with tools and methods that align with the realities of modern civil dockets to control costs, reduce delays, and ensure fairness for litigants.

Ineffective civil case management by state courts has an outsized effect on public trust and confidence.

National Center for State Courts 1971

Introduction

Concerns about the slow pace, high costs, procedural complexity, and lack of predictable outcomes associated with civil litigation have been raised repeatedly for more than a century.[1] Many of the court reform efforts of the 20th century were intended to address these concerns even as courts struggled to manage rapidly expanding criminal, family, and juvenile caseloads. After the federal judiciary adopted uniform rules of civil procedure in 1934, the vast majority of state courts followed suit, enacting state rules of civil procedure that often mirrored the federal rules verbatim. In subsequent decades, courts experimented with a variety of procedural and administrative reforms to the civil justice system including simplified evidentiary requirements for small claims cases, front-loading discovery through automatic disclosure of witnesses and other key evidence supporting each party's claims and defenses, differentiated caseflow management, increased judicial case management, and alternative dispute resolution (ADR) programs.

CHALLENGES CONFRONTING THE CIVIL JUSTICE SYSTEM

Despite the good intentions, it is clear that these efforts have either been an inadequate response to current problems or have been rendered obsolete by new challenges confronting the civil justice system. In some instances, reform efforts have even created new problems. A detailed description of the myriad issues confronting the contemporary civil justice system is beyond the scope of this report and, in any case, would merely duplicate a great deal of scholarly work. Nevertheless, a brief summary of the most common complaints and some applicable responses helps to illustrate the scope of the problem.

- **Pleadings.** The complaint and answer are the formal court documents that initiate a civil case and articulate the factual and legal basis for any claims or defenses. Increasingly, courts have moved from notice pleading, in which plaintiffs merely state the initiation of a lawsuit, to fact pleading, in which plaintiffs are required to state the factual basis for the claim. Under a fact pleading standard, defendants likewise must state the factual basis for any legal defenses they plan to raise. The rationale for fact pleading rather than notice pleading is twofold. First, because both parties have knowledge of the factual basis for their opponent's claims, they can prepare more promptly and efficiently for subsequent stages of the litigation process (e.g., discovery, settlement negotiations). Second, fact pleading is also intended to minimize frivolous litigation by requiring both parties to make a sufficient investigation of the facts before filing claims, thus preventing the expenditure of needless time, energy, and resources to defeat unsupported claims.[2] In 2009, the U.S. Supreme Court further heightened the fact pleading standard. In federal courts, plaintiffs must now allege sufficient facts to allow a trial judge to determine the plausibility of a claim.[3] This raises Seventh Amendment concerns that judicial plausibility assessments based on the factual content in pleadings will displace the role traditionally played by juries in a full evidentiary trial.[4]

[1] Roscoe Pound is credited with first raising these concerns in an address to the American Bar Association in 1906. Roscoe Pound, Address at the American Bar Association Convention: The Causes of Popular Dissatisfaction with the Administration of Justice *in* A.B.A. Rep., pt. I, 395-417 (1906).

[2] The ease with which litigants may assert legally or factually unsupported claims is a constant concern in the civil justice system. Civil justice reform leaders initially hailed efforts to impose sanctions on frivolous filings. However, many scholars have regretted the institution of such reforms due to satellite litigation over whether, in fact, the claims and/or defenses were known to be unsupported when filed. Joint comment by Helen Hershkoff et al. on Proposed Amendment to Federal Rules of Civil Procedure, to Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, 7 (Feb. 25, 2014), *available* at http://www.afj.org/wp-content/uploads/2014/02/Professors-Joint-Comment.pdf. *See* also Lonny Hoffman, *The Case Against the Lawsuit Abuse Reduction Act of 2011*, 48 HOUSTON L. REV. 545 (2011).

[3] *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (holding Iqbal's factual pleadings insufficient to state a claim); Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007) (holding a complaint insufficient absent factual context to support plausibility for relief).

[4] Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009). Scholars have also examined Seventh Amendment consequences of heightened factual pleading requirements in securities fraud actions. Allan Horwich and Sean Siekken, *Pleading Reform or Unconstitutional Encroachment: An Analysis of the Seventh Amendment Implications of the Private Securities Litigation Reform Act*, 35 SEC. REG. L. J. 4 (2007).

- **Service of process.** Traditional procedures for serving notice in civil lawsuits are functionally obsolete, especially in suits against individuals. Typical methods of serving process are riddled with inaccuracies and inadequacies. In some cases, private process service companies have undergone civil lawsuits and criminal prosecutions regarding service practices.[5] One study of process service in New York's King and Queen Counties found that personal service was achieved in only six percent of civil debt collection cases.[6] Service of process via newspaper publication and/or posting on the courthouse door seems quaint in light of technological advancements. The consequences of inadequate service are especially damaging for individuals who only learn of a case through court orders authorizing award enforcement by garnishment or asset seizure following a default judgment. Technological advancements have alleviated some of the issues surrounding inadequate service of process. Electronic service provides a method of serving process for especially difficult-to-reach parties. The cost-saving potential of electronic service is also incredibly high. However, electronic service is not without its limitations with potential controversies over receipt of service and sufficiency of notice.[7]

- **Discovery.** While opinions on excessive discovery may vary from the plaintiff to the defense bar, several national surveys report a consensus that the time devoted to discovery is the primary cause of delay in the litigation process.[8] Most state court rules and case law permit discovery for anything that might lead to admissible evidence. This results in an unfocused, and often disproportionate, approach to discovery in which lawyers fail to identify key issues and spend time and effort investigating tangential issues. This expansive nature of discovery and the resulting delays translate to increased litigation costs. In fact, there are frequent complaints that discovery costs often dwarf the value of the case.[9] The traditional law firm business model (based on the billable hour) and the lack of disciplinary action in response to excessive discovery filings encourages lawyers to do more discovery rather than smart discovery.

- **Electronically Stored Information (ESI).** Evidence needed to support claims and defenses increasingly exists only in electronic format rather than live witness testimony, papers, or other tangible objects. The costs of ESI discovery include expenses associated with processing old data, reviewer complications based on qualitative differences between paper and electronic documents, and the production of documents.[10] The expertise needed to organize, review and analyze electronic records is also very expensive, further increasing the costs of the discovery process. A lack of experience and knowledge on the part of judges and attorneys about how to assess and manage ESI discovery often leads to overly broad requests for production. The effects of over-production are especially felt in specialized areas of civil litigation such as business litiga-

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[5] *See* NEW YORK CITY BAR ASSOCIATION COMMITTEE ON NEW YORK CIVIL COURT COMMITTEE ON CONSUMER AFFAIRS, OUT OF SERVICE: A CALL TO FIX THE BROKEN SERVICE PROCESS INDUSTRY *available at* http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf; Bernice Yeung, *"Bay Area Residents Sue Process Servers for Failing to Deliver Lawsuits"* CALIFORNIA WATCH (May 24, 2012); Press Release, New York State Office of the Attorney General, The New York State Attorney General Andrew M. Cuomo Announces Guilty Plea of Process Server Company Owner Who Denied Thousands of New Yorkers Their Day in Court (Jan. 15, 2010) *available at* http://www.ag.ny.gov/press-release/new-york-state-attorney-general-andrew-m-cuomo-announces-guilty-plea-process-server.

[6] MFY LEGAL SERVICES, JUSTICE DISSERVED: A PRELIMINARY ANALYSIS OF THE EXCEPTIONALLY LOW APPEARANCE RATE BY DEFENDANTS IN LAWSUITS FILED IN THE CIVIL COURT OF THE CITY OF NEW YORK 6 (2008) *available at* http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf.

[7] Ronald Hedges, Kenneth Rashbaum, and Adam Losey, *Electronic Service of Process at Home and Abroad: Allowing Domestic Electronic Service of Process in the Federal Courts*, 4. FED. CTS. L. REV. 55, 66, 72-73 (2011).

[8] Based on responses of a national survey of the American College of Trial Lawyers, American Bar Association Litigation Section, and the National Employment Lawyers Association. Judicial responses to an accompanying survey also indicated that the time required to complete discovery was the source of the most significant delay in the litigation process. CORINA GERETY, EXCESS AND ACCESS: CONSENSUS ON THE AMERICAN CIVIL JUSTICE LANDSCAPE 11 (2011) [*hereinafter* EXCESS AND ACCESS].

[9] *See* Paula L. Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20(1) CASELOAD HIGHLIGHTS 1, 2013 [*hereinafter* CASELOAD HIGHLIGHTS].

[10] John Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 564-567 (2010).

tion. As the amount of ESI grows, concerns about costs associated with developing an efficient and effective ESI discovery process are paramount.[11]

- **Expert evidence.** Scientific or expert evidence is needed to support a growing proportion of claims in all types of civil cases with respect to both causation and damages. Procedures developed to govern the admissibility of expert evidence require judges, who are rarely subject matter experts, to make a twofold assessment: 1) the expert's qualifications to opine on a given issue and 2) whether the expert's opinion is sufficiently grounded in recognized science to be admissible in a court of law.[12] This process has raised Seventh Amendment concerns related to judges usurping the jury's role in making determinations about the weight of expert evidence.[13]

- **Mandatory alternative dispute resolution (ADR).** ADR encompasses a range of services including mediation, arbitration, and neutral case evaluation and is an integral part of virtually all civil litigation. It offers opportunities for litigants to settle their cases, usually in less time than a formal court hearing (trial) and often at less cost. Beginning in the early 1980s, many courts introduced procedural requirements that litigants engage in one or more forms of ADR, or at the very least consider doing so, especially in lower-value cases (e.g., less than $50,000).[14] ADR programs are not without their critics.[15] Some allege that mandatory ADR imposes an additional procedural hurdle on litigants and drives up the cost of litigation. Other complaints have focused on the qualifications of the professionals who conduct the ADR proceedings. The fees charged by ADR professionals also often exceed court fees.[16] Because courts must ensure the quality of their mandatory arbitration programs, there are concerns that the maintenance costs for mandatory ADR programs will pass on unnecessary costs to all litigants.

- **Summary judgment.** Summary judgment rulings in federal and state courts have broad implications for the civil justice system.[17] The resolution of a case at the early stages of litigation both halts the unnecessary continuation of litigation and contributes to the expansion of discovery. Rule changes and subsequent case law have facilitated summary judgment rulings in recent decades,[18] creating controversy as jurisprudence and rules continue to develop.[19] Variations in local rules and ruling propensities of local judges can also complicate summary judgment procedures and make the summary judgment stage a source of uncertainty for litigants.

- **Perceived unpredictability in trial outcomes, especially jury verdicts.** The proportion of civil cases disposed by trial has decreased dramat-

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[11] EXCESS AND ACCESS, *supra* note 8, at 14.

[12] Daubert v. Merrel Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), further defined the judicial gatekeeping role with respect to expert witness testimony.

[13] *See* Allan Kanner and M. Ryan Casey, *Daubert and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281 (2007-2008) (discussing the impact of the *Daubert* ruling and subsequent seventh amendment concerns in the civil justice system). While it will not alleviate constitutional concerns, better training for trial judges making expert witness determinations can help ensure more knowledgeable determinations regarding the admissibility of expert witness testimony. *See also Forensic Sciences: Judges as Gatekeepers*, in JUDGES' J. (Summer 2015) (publishing articles by scientific experts to provide knowledge to judges and lawyers to assess the reliability of expert evidence).

[14] Oregon has a mandatory ADR provision for cases under 50,000. OR. REV. STAT. § 36.400 (3) (2011). New Hampshire requires mediation in small claims cases in which the jurisdictional amount is in excess of $5,000. N.H. Cir. Ct. R, Dist. Div. 4.29. Some jurisdictions classify certain summary jury trial programs as ADR programs. For examples of jurisdictions in which summary jury trials are classified as ADR programs, *see* PAULA HANNAFORD-AGOR et al., SHORT, SUMMARY, & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012) [*hereinafter* SHORT, SUMMARY & EXPEDITED].

[15] Michael Heise, Why ADR Programs Aren't More Appealing: An Empirical Perspective (Cornell Law Faculty Working Paper No. 51) *available at* http://scholarship.law.cornell.edu/clsops_papers/51/.

[16] RAND CORP., ESCAPING THE COURTHOUSE, RB-9020 (1994) (*available at* http://www.rand.org/pubs/research_briefs/RB9020/index1.html).

[17] *See* Brooke Coleman, *Summary Judgment: What We Think We Know Versus What We Ought to Know*, 43 LOY. U. CHI. L. J. 1 (2012) (describing various scholarship on summary judgment effects).

[18] John Langbien, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 566-568 (2012).

[19] For a succint analysis of summary judgment in the federal courts, see WILLIAM SCHWARZER et al., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS: A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1991).

ically over the past 40 years.[20] The reasons for the decline are numerous and, in some instances, quite subtle. They include increases in the availability of alternative dispute resolution (ADR) programs including contractually required binding arbitration in many consumer and employment contracts; the costs for discovery and pretrial stages of litigation, which have prompted some litigants to forego trials for a negotiated settlement; delays in scheduling trials due to the increased volume of civil cases without commensurate increases in court resources; and widespread public perceptions about the unpredictability of trial outcomes, especially in jury trials.[21] Although empirical research confirms that jury trial verdicts are actually very predictable,[22] the shift away from trial as the dominant mode of case disposition has likewise reduced the number of attorneys with jury trial experience. Consequently, attorneys are less qualified to assess the merits of their cases and to advise clients about taking cases to trial by jury.[23]

- **Lack of court resources allocated to civil justice.** Constitutional guarantees of a speedy trial in criminal cases tend to relegate civil matters to the bottom of scheduling priorities.[24] This is exacerbated in tight budgetary cycles as courts may be operating under furloughs or reduced hours, further decreasing scheduling options for civil cases. Some courts have responded by creating specialized courts, especially for business or commercial litigation, to address the recent lack of court resources. Although these dockets and courts guarantee civil litigation its own niche in court scheduling, sustaining the dockets may become challenging as there must be a sufficient case volume to justify the expenditures. Additionally, efforts to provide scheduling priorities within civil case categories might meet statutory requirements,[25] but the bulk of civil litigation is then left last in line for scheduling.

CIVIL JUSTICE IMPROVEMENT EFFORTS

The general complaint concerning these challenges is that collectively they contribute to unsustainable cost and delay in civil litigation, ultimately impeding access to justice. These problems have not been allowed to develop entirely unchecked, however. Across the country, court leaders have developed a variety of reform efforts to address issues in the civil justice system. For example, some states have designed and implemented programs targeting specific types of cases, especially related to business, commercial, or complex litigation. The California Judicial Council instituted a complex civil litigation pilot program in response to litigant concerns regarding the "time and expense needed to resolve complex cases, the consistency of decision making, and perceptions that the substantive law governing commercial transactions was becoming increasingly incoherent."[26] Fulton County, Georgia implemented a Business Court that moves complex contract and tort cases through the litigation process in half the amount of time the general docket moves the same types of cases.[27] Other states have designed and implemented more tailored projects. In 2009, Colorado began developing pilot rules and procedures for the Colorado Civil Access Pilot Project (CAPP) applicable to business actions

[20] Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIR. LEGAL ST. 459 (2004) [*hereinafter The Vanishing Trial*].

[21] The first issue of the *Journal of Empirical Legal Studies* published the papers presented at the ABA Vanishing Trial Symposium, which addressed these and other issues related to vanishing trials.

[22] *See generally* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007) (summarizing several decades of empirical research on juror decision-making in a variety of contexts and concluding that jury verdicts are largely rational and conform to the weight of the evidence presented at trial).

[23] Tracy W. McCormack & Christopher J. Bodnar, *Honesty is the Best Policy: It's Time to Disclose Lack of Jury Trial Experience*, 23 GEO. J. LEG. ETHICS 1 (Winter 2010).

[24] U.S. CONST. amend VI. State constitutions also contain provisions guaranteeing the right to a speedy trial. *See e.g.* MO. CONST. art. I, § 18(a).

[25] It should be noted that certain civil matters such as protective order hearings also have temporal scheduling requirements and supplant more generic civil matters in scheduling. For examples of these requirements *see e.g.*, N. H. REV. STAT. ANN. § 173-B:3 (2014) (setting timeline for domestic violence protective order hearing); VA. CODE ANN, § 16.1-252 (2014) (setting timeline for removal hearings in child abuse and neglect matters).

[26] Nat'l Center for St. Cts., *Complex Litigation: Key Findings from the California Pilot Program*, 3(1) CIVIL ACTION 1 (2004).

[27] Sixty-five percent faster disposition time for complex contract cases and 56 percent faster disposition time for complex tort cases. FULTON COUNTY SUPERIOR COURT, BUSINESS COURT: 2014 ANNUAL REPORT 4 (2014).

in the Colorado district courts. The CAPP program focused on developing new procedures to streamline the pretrial discovery process and minimize expert witness costs.[28] The final pilot rules were implemented in 2012 and have been authorized for application to cases filed through December 31, 2014.[29]

Similarly, New Jersey, Pennsylvania, and Texas have all undertaken efforts to coordinate the management of mass tort litigation through the promulgation of court rules. For example, the Supreme Court of New Jersey promulgated a rule enabling the unification of qualifying mass tort cases for central management purposes.[30] The rule grants the Administrative Director of the Courts the power to develop criteria and procedures for unifying the mass tort litigation, subject to approval by the Court. Complex litigation centers generally serve as the clearinghouse for such litigation. Similar coordination efforts in the form of dedicated trial calendars have also taken place for landlord/tenant and mortgage foreclosure cases.

Federal and state courts have also pursued procedural reforms on a broader scale. As discussed above, federal courts have heightened pleading standards. New Hampshire also altered their pleading standards (from notice pleading to fact pleading) in a two-county pilot program implemented in 2010. The pilot rules were subsequently adopted on a statewide basis effective March 1, 2013.[31] Statewide rule changes in Utah have altered the discovery process in a variety of ways including proportional discovery requirements and tiered discovery based on the amount in controversy.[32] Discovery reforms have also taken place in the federal courts. The Seventh Circuit Electronic Discovery Pilot Program aims to reduce the rising costs of e-discovery through a myriad of reforms and is currently in phase three of its implementation.[33]

Some federal agencies are also focusing on civil justice improvement in certain types of cases. For example, the Consumer Financial Protection Bureau (CFPB) recently issued proposed rules of procedure for debt collection cases filed in state courts to address complaints concerning venue, service of process, and disclosure of the factual basis for debt collection claims.[34] Research organizations such as the NCSC and the Institute for the Advancement of the American Legal System (IAALS) have also coordinated with pilot project jurisdictions to conduct comprehensive outcome and process evaluations of reform efforts. These implementation and evaluation reports are a crucial aspect of ensuring effective and efficient reforms of the civil justice system. This is especially the case as court leaders continue to take a proactive stance towards civil justice reform through efforts such as the Conference of Chief Justices (CCJ) Civil Justice Improvements Committee.[35]

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[28] State of Colorado Judicial Branch, A History and Overview of the Colorado Civil Access Pilot Project Applicable to Business Actions in District Court 3, *available at* http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/CAPP%20Overview%207-11-13.pdf. CORINA D. GERETY & LOGAN CORNETT, MOMENTUM FOR CHANGE: THE IMPACT OF THE COLORADO CIVIL ACCESS PILOT PROJECT (October 2014).

[29] *Id*. at 2.

[30] N. J. SUP. CT. R. 4:38A.

[31] PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES 2 (2013) [*hereinafter* NEW HAMPSHIRE PAD RULES REPORT].

[32] PAULA HANNAFORD-AGOR & CYNTHIA LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (April 2015) [*hereinafter* UTAH RULE 26 REPORT]. For a synopsis of amendments to Utah's Rules of Civil Procedure see IAALS, Utah Rules of Civil Procedure, http://iaals.du.edu/library/publications/utah-changes-to-civil-disclosure-and-discovery-rules (last visited April 14, 2014).

[33] For information on the Seventh Circuit Pilot Program see the program's website at http://www.discoverypilot.com/.

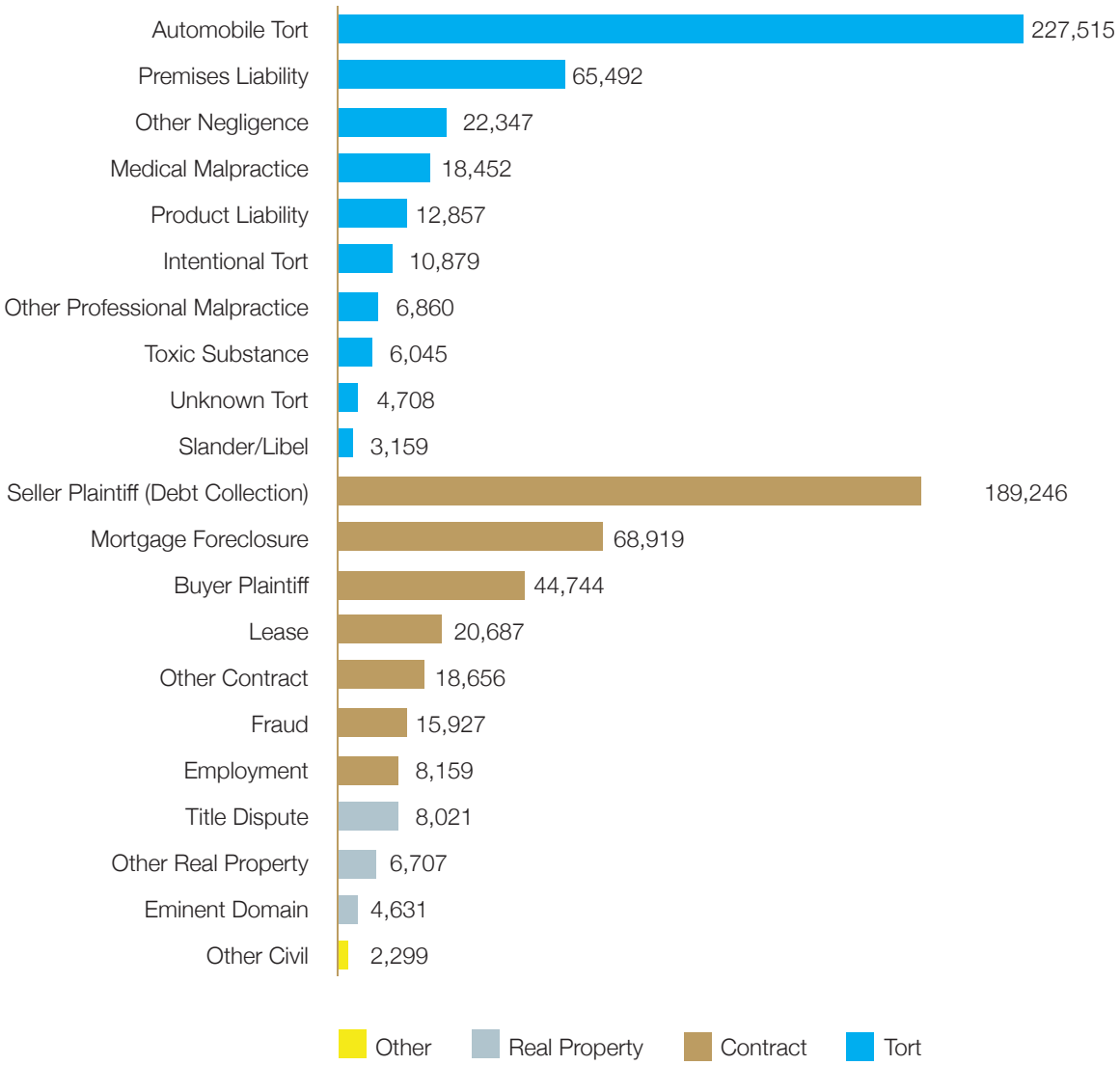
[34] Advance Notice of Proposed Rulemaking from Consumer Financial Protection Bureau, 78 Fed. Reg. 218 (proposed Nov. 12, 2013) (to be codified at 12 CFR Part 1006).

[35] In 2013, The Conference of Chief Justices created the Civil Justice Improvements Committee. The mission of the committee is to translate the lessons learned from state pilot projects, applicable research, and rule changes into guidelines and best practices for civil litigation. The committee's mandate also includes the development of caseflow management reforms for the improvement of the state court civil justice system. Committee membership was finalized in the spring of 2014 and consists of judges, lawyers, academics, researchers, and court administrators with broad expertise related to civil litigation issues. The committee membership strikes a balance between the plaintiff and defense bars, trial and appellate judges, and court administrators with case management expertise. Both the National Center for State Courts (NCSC) and the Institute for the Advancement of the American Legal System (IAALS) provide research and logistical support to the committee. The Civil Justice Improvements Committee is conducting the bulk of its work through plenary meetings and subcommittees. This report is meant to provide an overview of the current landscape of civil litigation in state courts for the committee members.

An Incomplete Picture of the Civil Justice System

The vast majority of civil cases in the United States are filed in state courts rather than federal courts.[36] However, other than the actual number of filings, and sometimes number of dispositions, detailed information about civil caseloads in the United States such as caseload composition, case outcomes, and filing-to-disposition time, is difficult to obtain. The most recent large-scale national study of civil caseloads is the 1992 *Civil Justice Survey of State Courts* (see Figure 1).[37] In that study, the NCSC collected detailed information about civil cases disposed in 1992 in the general jurisdiction courts of 45 large, urban counties

Figure 1: 1992 Civil Justice Survey of State Courts, Case Types



[36] In 2013, litigants filed approximately 16.9 million civil cases in state courts compared to 259,489 civil cases filed in U.S. District Courts. NCSC COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2013 (2015) (this estimate includes probate and mental health filings in addition to general civil filings). Federal Judicial Caseload Statistics, Table C *available at* http://www.uscourts.gov/statistics-reports/caseload-statistics-data-tables?tn=C&pn=All&t=68&m%5Bvalue%5D%5Bmonth%5D=12&y%5Bvalue%5D%5Byear%5D=2014.

[37] The *Civil Justice Survey of States Courts* was a periodic study of civil litigation funded by the U.S. Department of Justice, Bureau of Justice Statistics (BJS). The statistical frame of estimating characteristics of cases filed in state courts based on filings in a sample of the 75 most populous counties was a technique employed by BJS to estimate national trends for a number of ongoing data collection efforts. Subsequent iterations of the *Civil Justice Survey of State Courts* (1998, 2001, and 2005) have focused exclusively on case characteristics and outcomes for bench and jury trials rather than the full range of possible case outcomes.

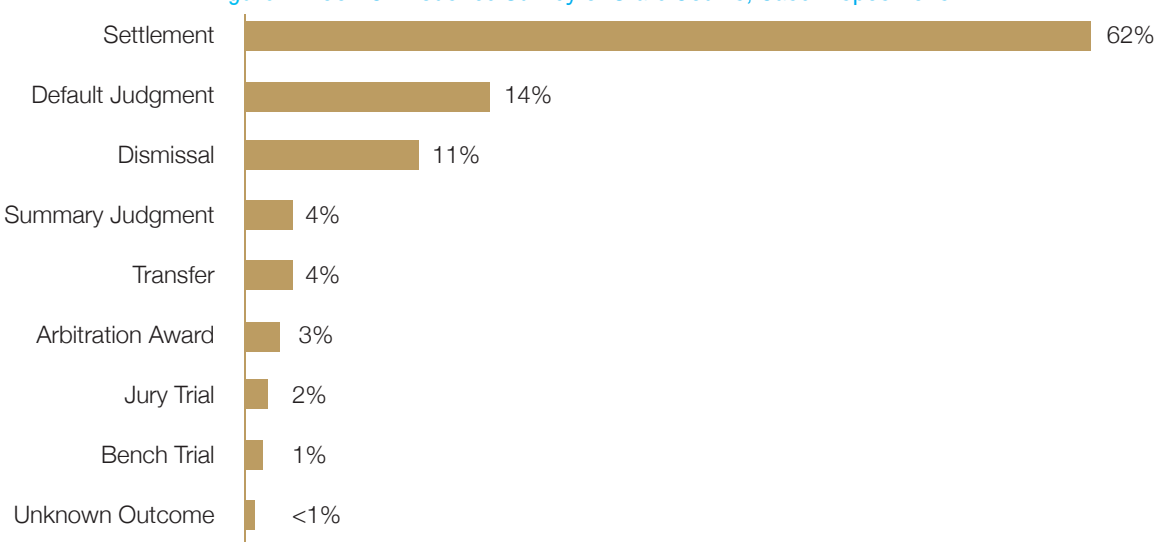
and used that information to estimate civil caseloads and case outcomes for the 75 most populous counties in the country.[38] Of more than 750,000 civil cases disposed in the 75 most populous counties, it estimated that approximately half (49%) alleged tort claims, 48 percent alleged contract claims, and two percent were real property disputes. Automobile torts were the single largest subcategory of tort cases, accounting for nearly two-thirds (60%) of all tort cases. In contrast, product liability and medical malpractice cases, which generate some of greatest criticisms of the civil justice system, reflected only four percent of total civil cases combined. More than half (52%) of the contract cases were debt collection (seller-plaintiff) cases, and mortgage foreclosures accounted for another 18 percent of total civil cases.[39]

Settlement by the parties was the single most common outcome for a civil case (62%), compared to 14 percent default judgments, 10 percent dismissals for failure to prosecute, four percent transfers to another court, four percent summary judgment, and only three percent judgments following a bench or jury trial (see Figure 2).

Subsequent iterations of the *Civil Justice Survey of State Courts* focused exclusively on bench and jury trials. Consequently, more recent descriptions of civil justice caseloads have relied on aggregate statistics reported to the NCSC as part of the Court Statistics Project as well as studies of specific issues in individual state or local courts. For a variety of reasons, these types of studies are often unable to provide definitive answers to the most commonly asked questions.

Part of the difficulty stems from the inability of many case management systems to collect and generate reports about civil caseloads. Most case management systems were initially developed to schedule and record case filings and events (e.g., hearings and trials) and report the progress of the case through the system in general terms. Although some of these

Figure 2: 1992 Civil Justice Survey of State Courts, Case Dispositions



[38] In the 1992 *Civil Justice Survey of State Courts*, the U.S. Department of Justice, Bureau of Justice Statistics employed a 2-stage stratified sample in which 45 of the 75 most populous counties were selected based on aggregate civil cases filed in 1990. For a detailed description of the sampling methodology, see CAROL J. DEFRANCIS ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 11 (July 1995). The *Civil Justice Survey of State Courts* restricted data collection to cases identified as general civil (e.g., tort, contract, and real property) in which monetary damages were sought. The data excluded cases involving equitable relief as well as probate/estate, mental health, domestic, other civil, and unknown case types.

[39] Thirty-one states permit mortgage holders to foreclose on property through an administrative procedure specified by statute without court involvement; 20 states require that foreclosures be conducted through the court. *See* REALTYTRAC, FORECLOSURE LAWS AND PROCEDURES BY STATE, http://www.realtytrac.com/real-estate-guides/foreclosure-laws/.

Figure 3: Incoming Civil Caseload Composition in 17 General Jurisdiction Courts, 2010

STATE	TOTAL INCOMING CASES	Contract 61%	Probate 11%	Small Claims 11%	Tort 6%	Real Property 2%	Mental Health 2%	All Other Civil 7%
Kansas*	193,402	81%	5%	4%	2%	1%	2%	6%
North Carolina	106,166	78%	1%	n/j	10%	3%	n/j	9%
Colorado	130,716	77%	9%	n/j	4%	1%	4%	5%
Mississippi	27,611	75%	n/j	n/j	14%	1%	n/j	11%
Missouri*	317,613	69%	7%	4%	5%	1%	5%	10%
Utah	125,670	67%	4%	15%	2%	7%	2%	4%
New Jersey	1,004,778	65%	21%	5%	6%	<1%	n/j	1%
North Dakota*	35,633	57%	14%	15%	1%	1%	5%	7%
Minnesota	**211,898**	48%	5%	24%	2%	3%	2%	16%
Maine	47,225	46%	n/j	24%	2%	1%	2%	25%
Connecticut	149,027	44%	<1%	43%	10%	1%	n/j	3%
Alabama	51,723	40%	3%	n/j	16%	1%	n/j	39%
Oregon	193,458	40%	5%	39%	3%	<1%	4%	9%
Rhode Island	11,286	38%	<1%	<1%	25%	7%	n/j	30%
New Hampshire	7,864	37%	n/j	1%	20%	5%	<1%	38%
Washington	102,813	31%	19%	n/j	9%	20%	10%	11%
Hawaii	12,998	23%	17%	n/j	9%	16%	5%	30%

Note: States in bold have a single-tiered court system. "n/j" indicates no jurisdiction over that case type.
* These states process all civil cases in their general jurisdiction court.
"All Other Civil" cases include civil appeals, habeas corpus, non-domestic restraining orders, tax cases, writs, and other civil cases.
Source: R. LaFountain et al., Examining the Work of States Courts: An Analysis of 2010 State Court Caseloads (NCSC 2012).

systems capture detailed case-level information, very few are programmed to extract and report that information in a format conducive to a broader management-oriented and case propulsion perspective.

DATA DEFINITIONS

A related issue is the relative lack of uniformity in the use of case definitions and counting rules. In most courts, the term "general civil" encompasses tort, contract, and real property filings and differentiates those cases from probate/estate, domestic relations, and mental health cases. But in many courts, court automation systems are not programmed to offer a more finely grained picture of civil caseloads. For example, Figure 3 documents civil filings from general jurisdiction courts in 17 state single-tier or general jurisdiction courts that were able to breakdown their caseloads to seven categories in 2010. The wide variation in percentages across courts and case types is largely due to differences in how those states define and count cases, differences in whether cases are filed in the general jurisdiction court or in limited jurisdiction courts (which are not reflected in the graph), and differences in state law and community characteristics that

affect the types of legal disputes that might be litigated in those states.

Similarly, courts differ with respect to how case events are counted. For example, when a civil case has been closed and is then reopened for some reason (e.g., a default judgment that is later challenged for lack of service in the original case), some courts will count the case as a new case. Other courts will count this as a reopened case and still others as the same case that was originally adjudicated. Although there is no requirement that state and local courts adopt uniform case definitions and counting rules, the NCSC Court Statistics Project has promulgated standardized data definitions and counting rules for more than three decades.[40] Courts are increasingly adopting the standards and integrating them into their case management systems to be able to compare their caseloads with those of other courts and to take advantage of more sophisticated case management tools available in newer case automation systems.

DATA COLLECTION PRIORITIES

Another factor contributing to the difficulty in obtaining a detailed national picture about the civil justice system is courts' philosophical focus on operational process rather than substantive outcomes in civil litigation. Whether an enforceable judgment had been entered in a case is generally considered operationally more important than which party prevailed in the case or what remedy the judgment actually ordered (e.g., money damages, specific performance, or injunctive relief). Those details are obviously important to the parties, and legislative and executive leaders might be interested for the purpose of informing public policy, but the primary objective of the judicial branch has always been to provide an objectively fair process for resolving disputes. Thus, focusing attention on substantive outcomes was often viewed as unseemly and potentially detrimental to public confidence in the objectivity and neutrality of the judicial branch. Documentation of case outcomes, where it existed at all, was often captured in text files in case automation systems and was consequently extremely difficult to extract and manage in an aggregate format.

Clearance rates, which traditionally express the ratio of new filings to dispositions over a given period of time, served as the primary measure of court efficiency. Clearance rates do not, however, document the amount of time expended from filing to disposition. Beginning in the mid-1970s, concerns about court delay led many prominent court and bar organizations to promulgate time standards as aspirational deadlines for resolving cases.[41] A major criticism of these standards was that they were often based on the amount of time that these organizations thought cases should take to resolve rather than the amount of time that cases actually took to resolve. For example, the national time standards promulgated by the Conference of State Court Administrators (COSCA) in 1983 specified that all civil cases resolved by jury trial should be disposed within 18 months of filing, and all non-jury civil cases should be tried, settled, or disposed within 12 months of filing. Based on the cases examined in the 1992 *Civil Justice Survey of State Courts*, however, less than half (49%) of non-jury cases met those standards and only 18 percent of jury trial cases did so. The discrepancy between the aspirational time standards and actual disposition time served as a considerable disincentive for courts to adopt those standards, much less to publish their performance based on the standards. Since then, researchers have developed and promulgated more empirically based standards including the *Model Time Standards for State Trial Courts*, which was a collaborative effort by the Conference of Chief Justices, the Conference of State Court Administrators, the American Bar Association, the National Association for Court Management, and the NCSC. The *Model Time Standards* now recommend that 75 percent of civil cases should be fully disposed within 180 days, 90 percent within 365 days, and 98 percent within 540 days.

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[40] The *State Court Model Statistical Dictionary* (1980), developed jointly by the Conference of State Court Administrators and the National Center for State Courts, was the first effort to provide a uniform set of data definitions. The Dictionary was revised in 1984 and again in 1989. The Dictionary was replaced with the *State Court Guide to Statistical Reporting* (Guide) in 2003. The most recent version of the Guide was published in 2014.

[41] For a summary of the evolution of various time standards for civil cases, *see* RICHARD VAN DUIZEND, MODEL TIME STANDARDS FOR STATE TRIAL COURTS 13-15 (2011) [*hereinafter* MODEL TIME STANDARDS].

ORGANIZATIONAL STRUCTURE

Perhaps the largest hurdle to learning about civil litigation in the state courts lies at the heart of courts as organizations. State court organizational structures are the culmination of each state's unique legal history and efforts to improve the administration of justice. Accordingly, state courts organizational structures can be as unique as the constituencies they serve. Data collection efforts must accommodate these varying structures without sacrificing data integrity and reporting. To consider how this may be done, it is imperative to fully consider the diversity of organizational structures across courts with civil jurisdiction.

Figure 4 illustrates how state courts allocate jurisdiction over civil filings among general jurisdiction and limited jurisdiction courts. The most common organizational structure (20 states) involves a single general jurisdiction court and a single limited jurisdiction court. The two courts may have exclusive jurisdiction over particular types of cases or cases involving certain amounts-in-controversy. Some states provide for over-lapping (concurrent) jurisdiction for a specified range of cases based on amount-in-controversy. Ten states and the District of Columbia have only a single-tier general jurisdiction court for general civil cases, although many of these permit local courts to organize their dockets and judicial assignments based on case type or amount-in-controversy.

The remaining states exhibit some combination of multiple general jurisdiction and limited jurisdiction courts. In most instances, these courts are situated within individual counties, municipalities, or judicial divisions encompassing multiple counties. However, a few states also maintain statewide general or limited jurisdiction courts over specific types of cases. Examples include Courts of Claims in Michigan, New York, and Ohio, which have jurisdiction over civil cases in which the state is a litigant; Water Courts in Colorado and Montana, which have jurisdiction over civil cases involving claims to water rights; and Worker's Compensation Courts in Montana and Nebraska, which have jurisdiction over administrative agency appeals.

Eleven states have a single general jurisdiction court with two or more limited jurisdiction courts. In Georgia, for example, the Superior Court is the general jurisdiction court for the state's 149 counties; the Superior Court is organized into 49 judicial circuits and has jurisdiction over tort, contract, and all real property cases as well as civil appeals from the State Courts (70 courts), the Civil Courts (in Bibb and Richmond Counties, only), and the Municipal Courts (383 courts). The State Court has concurrent jurisdiction with the Superior Court for tort and contract cases; the Civil Courts have jurisdiction over tort and contract cases up to $25,000 in Bibb County and up to $45,000 in Richmond County; the Municipal Courts have jurisdiction over small claims up to $15,000 and, in Bibb and Richmond Counties, concurrent jurisdiction with the Civil Court over tort and contract cases.

Eight states have multiple general jurisdiction courts with concurrent jurisdiction over general civil matters and one or more limited jurisdiction courts. Delaware, for example, has both a Court of Chancery, which has general jurisdiction over tort, contract, and real property cases seeking equitable relief, and a Superior Court, which has general jurisdiction over civil cases seeking money damages or other legal relief. In addition, Delaware has two limited jurisdiction courts: the Court of Common Pleas, which has jurisdiction over tort, contract, and real property cases up to $50,000, and the Justice of the Peace Court, which has jurisdiction over tort, contract, and real property cases up to $15,000.

Maine has two general jurisdiction courts — the District Court and the Superior Court — with concurrent jurisdiction over general civil matters. The primary difference in jurisdictional authority is that the District Court has exclusive jurisdiction over small claims cases (up to $6,000) and cannot conduct jury trials in general civil cases.

Figure 5 illustrates the maximum amount-in-controversy thresholds for litigants to file in limited jurisdiction courts. The thresholds range from $4,000 (Kentucky) to $200,000 (Mississippi and Texas).[42] In 18 states, the general jurisdiction and limited juris-

[42] The County Court in Mississippi has jurisdiction over tort, contract, and real property cases seeking money damages or other legal relief up to $200,000; the Chancery Court has jurisdiction over civil cases seeking equitable relief. County Courts in Texas have jurisdiction over tort, contract and real property cases up to $200,000 and the Justice Courts have jurisdiction over tort, contract, and real property up to $10,000.

Figure 4: Organization of State Court Jurisdiction over General Civil Cases

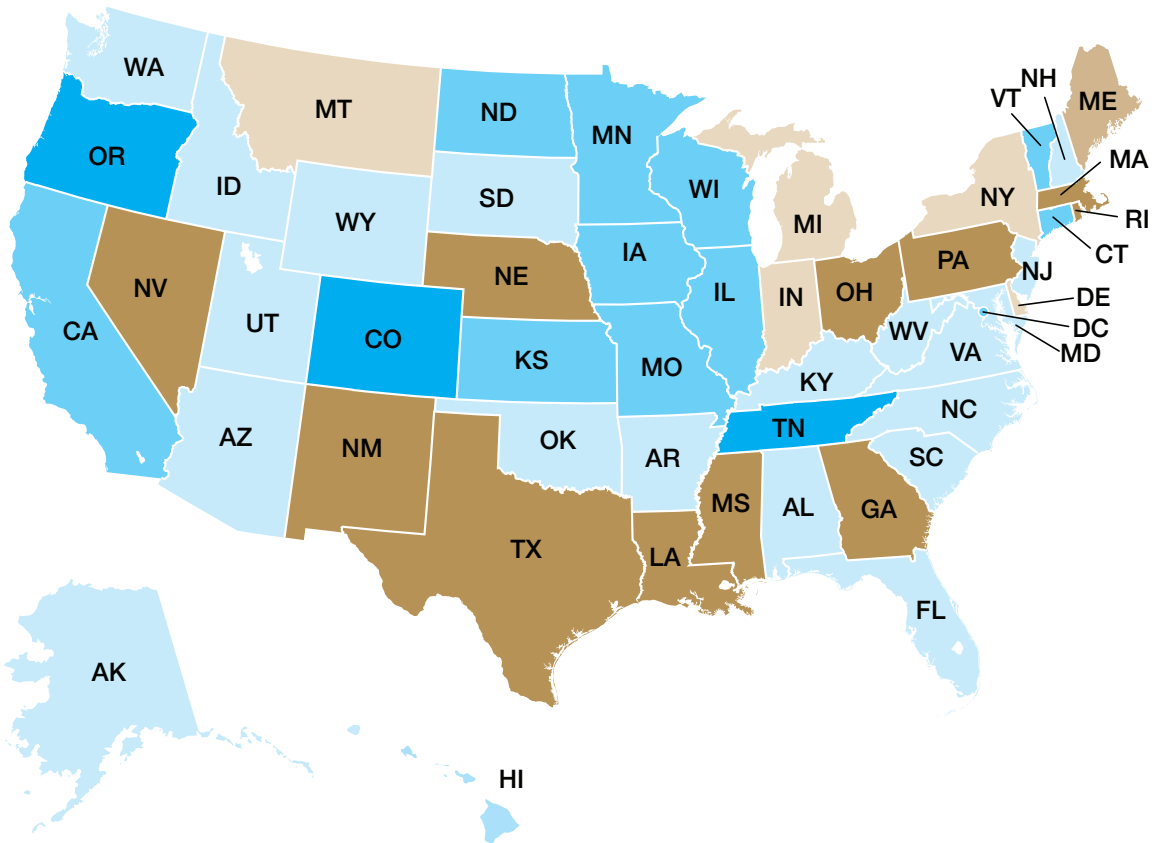
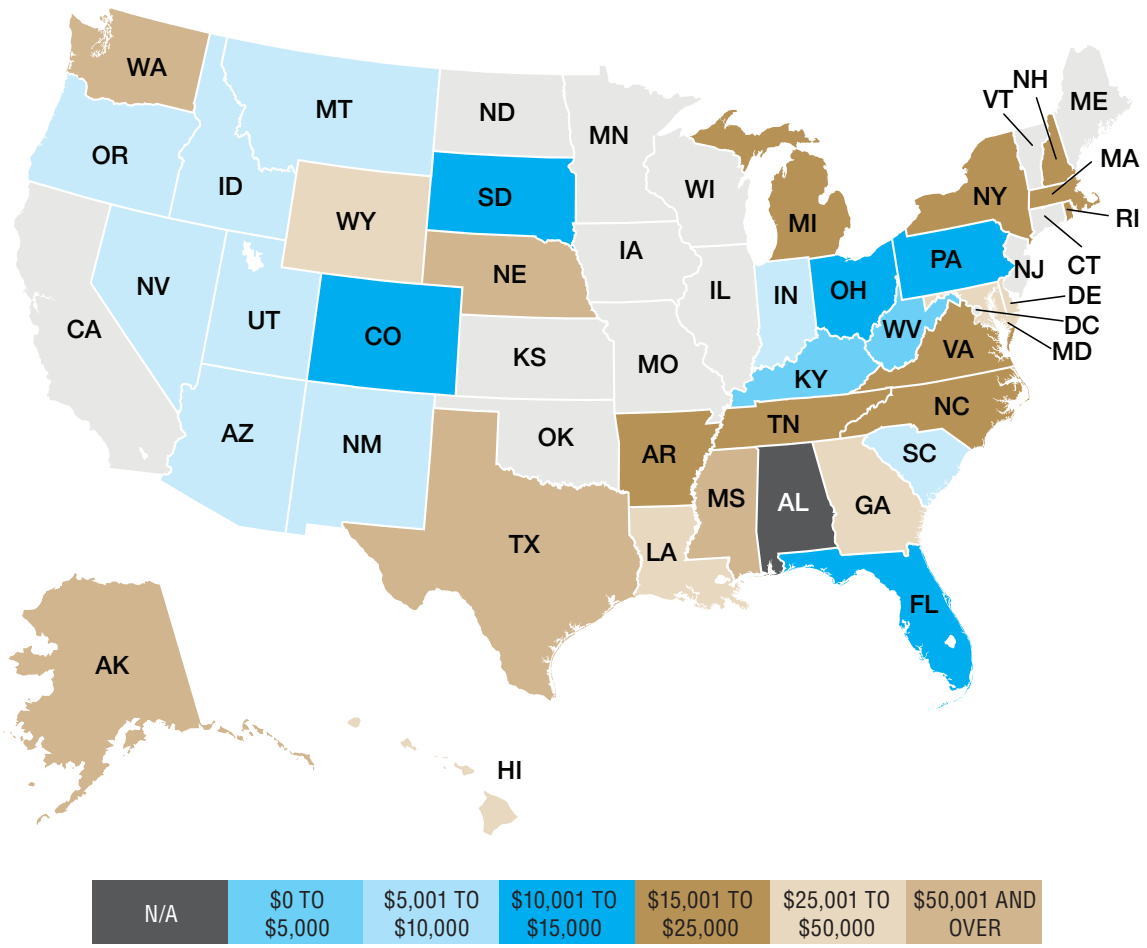


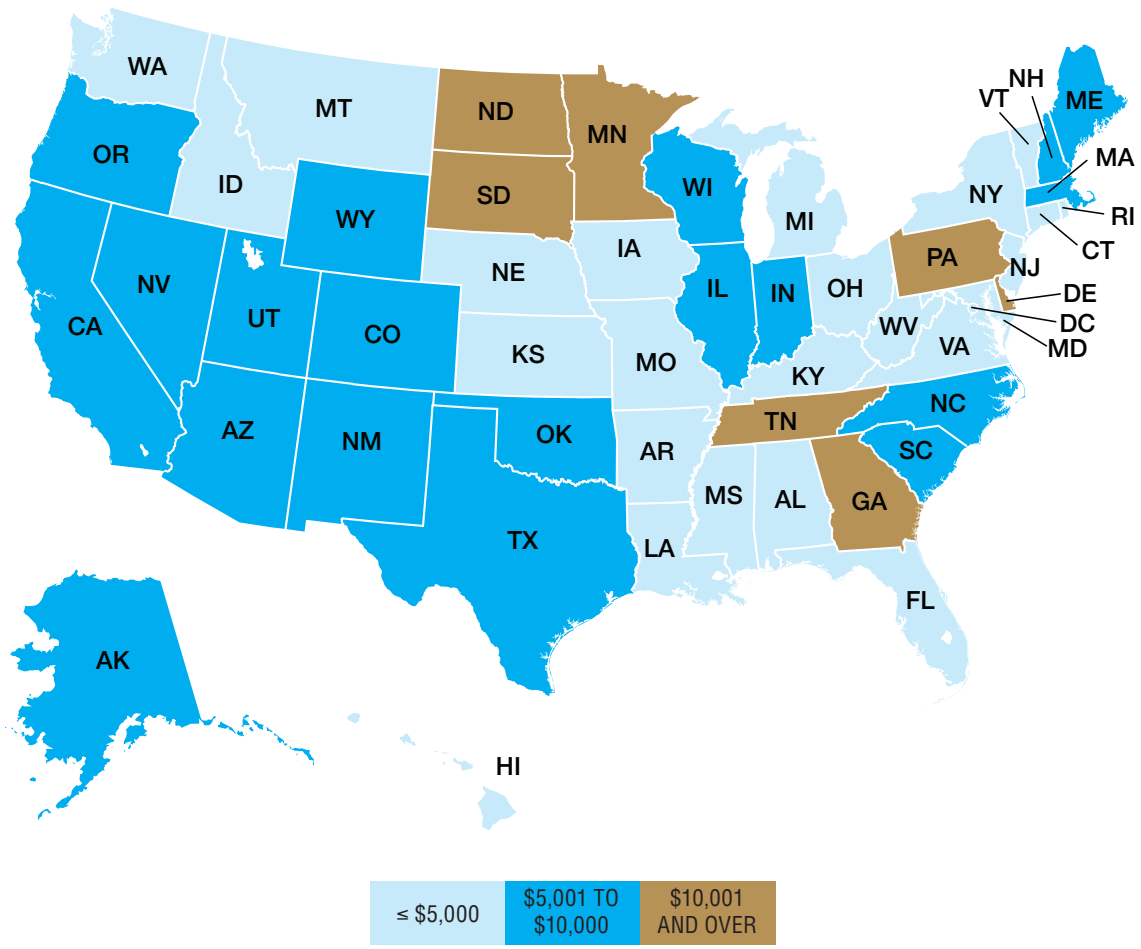
Figure 5: Maximum Amount-In-Controversy to File in Limited Jurisdiction Courts



diction courts have concurrent jurisdiction up to the amount-in-controversy threshold for the limited jurisdiction court. That is, a litigant can opt to file a case up to the threshold in either the general jurisdiction or the limited jurisdiction court in those states. Ten states have concurrent jurisdiction for civil cases with the minimum threshold for filing in the general jurisdiction court ranging from as little as $50 in Tennessee to as much as $10,000 in Alabama. In the remaining nine states, the general jurisdiction and limited jurisdiction courts each have exclusive jurisdiction for their respective caseload thresholds ranging from $4,001 in Kentucky to $52,001 in Nebraska.

States also differ with respect to the types of cases encompassed by their civil caseloads. In addition to the more widely recognized categories of tort, contract, and real property disputes, a civil case may refer to any non-criminal case including family and non-criminal juvenile matters, probate/estate and guardianship matters, mental health cases, state regulatory and local ordinance violations, traffic infractions, small claims, and appeals from state and local executive agency decisions. State general jurisdiction courts are typically authorized to hear appeals of decisions from civil cases adjudicated in limited jurisdiction courts, often on a *de novo* basis. Although some states have created general jurisdiction courts specifically for family, juvenile, or probate and estate matters, in those states that maintain only a single general jurisdiction court (single-tier courts), local courts often segregate their civil dockets to manage family, juvenile, and probate/estate cases separately from general civil cases. Nevertheless, the resources allocated to courts with broad jurisdiction over civil cases are generally shared across all case types. Most states have eliminated the distinction between law and equity for the purposes of civil procedure, but some states — notably Delaware

Figure 6: Maximum Amount-In-Controversy for Small Claims Cases



and Mississippi — maintain separate courts for law and equity at either the general jurisdiction or limited jurisdiction court level.

Small claims cases are lower-value tort or contract disputes in which litigants may represent themselves without a lawyer.[43] Most small claim dockets also involve somewhat less stringent evidentiary and procedural rules. Figure 6 illustrates the amount-in-controversy maximums for small claims cases, which range from $1,500 in Kentucky to up to $25,000 in Tennessee. In many instances, the limited jurisdiction courts have exclusive jurisdiction over small claims cases; litigants opting to file their cases in the general jurisdiction court, or in limited jurisdiction courts rather than in the small claims docket, are expected to adhere to the established procedural and evidentiary rules regardless of whether they are represented by counsel or self-represented.

All of these factors — the lack of common data definitions, differing organizational structures and subject matter jurisdiction for trial courts, and the traditional reluctance to collect and report performance measures — make it extraordinarily difficult to compile an accurate picture of civil litigation based on aggregate statistics published by state courts themselves. The only reliable method of doing so involves the extremely time-consuming and labor-intensive task of collecting case-level data from the trial courts themselves and mapping them onto a common template that facilitates both a reliable count of the cases themselves and an "apples-to-apples" comparison among courts.

[43] Small claims courts were originally developed for self-represented litigants, but states vary with respect to whether and under what conditions lawyers may appear on behalf of clients in small claims court.

Project Methodology

A perennial challenge in conducting multi-jurisdictional research using data extracted from case management systems (CMS) is to obtain data with both sufficient accuracy and granularity to be able to make reliable comparisons across jurisdictions. For several reasons, the NCSC decided to limit the potential courts from which to request data to courts with civil jurisdiction in counties that have participated in the *Civil Justice Survey of State Courts* series. First, those courts have participated in numerous NCSC research studies over the past three decades and thus are familiar with the NCSC and confident in the quality of the research conducted, which tends to improve participation rates. Likewise, NCSC staff are familiar with the CMS in those courts and confident in their ability to extract CMS data. The NCSC also had confidence that those courts would be able to produce data with sufficient case and disposition type granularity for the present study based on their previous participation in the *Civil Justice Survey of State Courts*.

To select the courts to participate in the *Landscape of Civil Litigation in State Courts*, the NCSC randomly selected 10 counties from the 45 counties that participated in all four iterations of the *Civil Justice Survey of State Courts*. The sampling design classified counties into two categories based on the organizational structure of courts with civil jurisdiction: (1) counties with a unified general jurisdiction court in which all civil cases are filed (single-tier courts); and (2) counties with one or more general jurisdiction courts and one or more limited jurisdiction courts (multi-tier courts). The intent of the sampling design was to ensure some representation of different organizational structures found in state courts. The counties that were selected are listed in Table 1. These included two counties with single-tier courts, and eight counties with multi-tier courts. Within the 10 counties were 36 courts of general jurisdiction and 116 courts of limited jurisdiction.[44]

The two single-tier courts have segmented dockets for civil cases within the unified court structure. The docket assignments for the Santa Clara County Superior Court are based on the amount in controversy: the limited civil docket includes all cases with claims valued less than $25,000 and the unlimited civil docket includes all claims $25,000 and over.[45] The Cook County Circuit Court employs different dockets for legal and equitable claims and for small claims.

Three counties have three separate tiers of trial courts with jurisdiction over civil cases.[46] Marion County, Indiana has two general jurisdiction trial courts — the Circuit Court and the Superior Court — that have concurrent jurisdiction over tort, contract, and real property cases. There is no monetary threshold for cases filed in these courts, but small claims cases up to $6,000 can be filed in any of nine Marion County Small Claims Courts.[47] Harris County, Texas has one general jurisdiction trial court (the District Court), which has jurisdiction over civil cases involving claims greater than $200 as well as exclusive jurisdiction for administrative agency appeals. The Harris County Civil Court of Law is a limited jurisdiction court with jurisdiction over civil cases involving claims up to $200,000. The Civil Court of Law also has exclusive jurisdiction over eminent domain cases in Harris County and appeals from the Harris County Justice of the Peace Court (Justice Court).[48] Finally, the Harris County Justice Court has jurisdiction over tort, contract, real property, and small claims up to $10,000. Cuyahoga County has a countywide general jurisdiction trial court (Court

[44] In the Texas judicial system, each District Court, Civil Court of Law, and Justice Court is comprised of a single judge elected to that office. In the Indiana judicial system, the Superior Court and the Circuit Court are courts of general jurisdiction that have concurrent jurisdiction over civil matters. In the Ohio judicial system, the Court of Claims is a statewide general jurisdiction court with jurisdiction over civil matters in which state agencies are named as litigants.

[45] The $25,000 monetary threshold differentiating limited from unlimited civil cases is a remnant from the court structure in place prior to 2000, when the California judicial branch unified its trial courts into a single tier. With unification, the former municipal courts, which had jurisdiction over civil cases up to $25,000, were incorporated into the county superior courts. Most courts maintained the $25,000 threshold as a familiar mechanism for case assignments.

[46] The 1816 Indiana Constitution established the Circuit Court (IND. CONST. art. 7, §8) and the Marion County Superior Court was established by statute in 2004 (IND. CODE § 33-33-49). By agreement, the Superior Court exercises exclusive jurisdiction over criminal cases and the Superior and Circuit Courts have concurrent jurisdiction over civil cases. The Circuit Court has exclusive jurisdiction for insurance reorganizations/liquidations, medical liens, and Marion County tax collection cases. The Circuit Court also supervises the Marion County Small Claims Courts.

[47] Each township in Marion County has a Small Claims Court. These courts have jurisdiction over civil cases in which the claim for damages does not exceed $6,000. Generally, a small claims case may be filed in any township's Small Claims Court, however all landlord/tenant cases must be filed in the township where the property is located.

[48] In Texas, each trial court judge is recognized as an individual "court." Consequently, there are 25 district courts, 4 civil courts of law, and 16 justice courts in Harris County. Each trial court level is supported administratively by a clerk of court.

Table 1: Counties and Courts Selected for Landscape of Civil Litigation in State Courts

COUNTY	TYPE COURTS	# COURTS	COURT NAME	SUBJECT MATTER JURISDICTION
Maricopa County, Arizona	GJC	1	Superior Court	Tort, contract and real property claims involving monetary relief $1,000 and over. Real property claims involving non-monetary relief.
	LJC	26	Justice Court	Tort, contract and real property claims involving monetary relief up to $10,000. Exclusive small claims up to $3,500.
Santa Clara County, California	SIngle Tier	1	Superior Court	All tort, contract and real property. Civil cases up to $25,000 assigned to limited civil docket; civil cases $25,000 and over assigned to unlimited civil docket. Small claims up to $10,000. Appeals from small claims decisions assigned to limited civil docket.
Miami-Dade, Florida	GJC	1	Circuit Court	Tort, contract and real property claims $15,001 and over. Appeals from County Court.
	LJC	1	County Court	Tort, contract and real property claims $5,001 to $15,000. Exclusive small claims up to $5,000.
Oahu, Hawaii	GJC	1	Circuit Court	Tort, contract and real property $5,000 and over. Exclusive mental health, probate/estate, and administrative agency appeals.
	LJC	1	District Court	Tort, contract and real property up to $40,000. Exclusive small claims up to $5,000.
Cook County, Illinois	SIngle Tier	1	Circuit Court	All tort, contract and real property. Claims involving monetary relief assigned to Law Division; claims involving non-monetary relief assigned to the Chancery Division. Small claims up to $10,000.
Marion County, Indiana	GJC	1	Superior Court	Tort, contract and real property (concurrent with Circuit Court). Appeals from Small Claims Court.
	GJC	1	Circuit Court	Tort, contract and real property (concurrent with Superior Court). Exclusive jurisdiction for insurance reorganizations/liquidation and medical liens. Exclusive jurisdiction for Marion County tax collection. Supervision of Small Claims Court of Marion County.
	LJC	9	Small Claims Court	Small claims up to $6,000.
Bergen County, New Jersey	GJC	1	Superior Court	All tort, contract, and real property. Claims involving monetary relief assigned to Law Division; claims involving non-monetary relief assigned to Chancery Division; Special Civil Part manages claims for monetary relief up to $15,000 without jury trial and exclusive small claims up to $3,000.
	LJC	1	Tax Court	Administrative agency appeals, tax cases.
Cuyahoga County, Ohio	GJC	1	Court of Common Pleas	Tort, contract and real property claims $15,000 and over. Administrative agency appeals. Exclusive mental health/probate.
	GJC	1	Court of Claims	Exclusive claims filed against the State of Ohio and claims filed under the Victims of Crime Compensation Program.
	LJC	12	Municipal Court	Tort, contract, and real property up to $15,000. Small claims up to $3,000.
Allegheny County, Pennsylvania	GJC	1	Court of Common Pleas	Tort, contract and real property, probate/estate, and administrative agency appeals.
	LJC	46	Magisterial District Court	Small claims up to $12,000.
Harris County, Texas	GJC	25	District Court	Tort, contract, and real property $201 and over. Exclusive administrative agency appeals.
	LJC	4	Civil Court of Law	Tort, contract, and real property up to $200,000. Appeals from Justice Courts. Exclusive jurisdiction over eminent domain cases in Harris County.
	LJC	16	Justice Court	Tort, contract, and real property up to $10,000. Small claims up to $10,000.

of Common Pleas) with jurisdiction over civil claims exceeding $15,000 as well as appeals from administrative agencies and mental health/probate cases. Civil claims up to $15,000 are filed in the 12 municipal courts in Cuyahoga County. In addition to these county-based courts, Ohio has a statewide Court of Claims, which has jurisdiction over civil claims in which the State is a defendant as well as claims filed in the Victims of Crime Compensation Program.

The remaining five counties in the sample each have a single general jurisdiction court and a single limited jurisdiction court. Bergen County Superior Court has exclusive jurisdiction for all general civil cases, but a separate limited jurisdiction Tax Court has jurisdiction over administrative agency appeals and tax cases. The monetary thresholds for the other four limited jurisdiction courts range from $10,000 (Maricopa County Justice of the Peace Court) to $40,000 (Oahu, Hawaii District Court). The general jurisdiction and limited jurisdiction courts in Miami-Dade maintain exclusive jurisdiction over their respective caseloads. The Miami-Dade County Court has jurisdiction over cases up to $15,000 and the Circuit Court has jurisdiction over cases exceeding $15,000. The general jurisdiction and limited jurisdiction courts in Allegheny and Maricopa Counties and Oahu have concurrent jurisdiction over some portion of their respective civil caseloads ($0 to $15,000 in Allegheny County, $1,000 to $10,000 in Maricopa, and $5,000 to $40,000 in Oahu).

All of the counties in the sample have small claims courts. The monetary thresholds for small claims range from $3,500 (Maricopa County, Arizona) to $12,000 (Allegheny County, Pennsylvania). With the exception of Bergen County, jurisdiction for small claims cases is exclusively in the limited jurisdiction courts in counties with multi-tier court structures.

In November 2013, NCSC contacted each of these courts in a letter that described the goals and objectives of the *Landscape of Civil Litigation in State Courts* study and requested their participation by providing case-level data for all non-domestic civil cases disposed in those courts between July 1, 2012 and June 30, 2013.[49] The requested data elements included the docket number, case name, case type, filing and disposition dates, disposition type, the number of plaintiffs and defendants, the representation status of the parties, and the case outcome including award amounts. NCSC project staff obtained detailed case-level data from all of the contacted courts except the Superior Court of California, Santa Clara County; the Bedford, Cleveland Heights, and South Euclid Municipal Courts in Cuyahoga, Ohio; the Ohio Court of Claims[50]; and the Decatur and Pike Township Small Claims Courts in Marion County, Indiana.[51]

Upon receipt of the case-level data, NCSC project staff formatted the individual datasets to conform to a common set of data definitions based on the NCSC *State Court Guide to Statistical Reporting*.[52] The coding process also involved aggregating some records to obtain a single code or value per case for datasets that included multiple records per case (e.g., judgment amounts, representation status). The final dataset consisted of 925,344 cases including aggregated cases from courts unable to provide case-level data. The NCSC originally intended to apply case weights to estimate civil cases, characteristics, and outcomes nationally, but was unable to generate reliable estimates due to the small sample size and the complexity of the weighting procedure. Consequently, these findings report statistics only for the courts serving these 10 counties. The counties themselves, however, reflect the variation in national court organizational structures for civil cases. Collectively, their caseloads comprise approximately five percent of general civil caseloads nationally.

[49] The *State Court Guide to Statistical Reporting* includes the following case types as non-domestic civil cases: tort, contract, real property, guardianship, probate/estate, mental health, civil appeals, and miscellaneous civil (habeas corpus, writs, tax, and non-domestic restraining orders). NAT'L CTR STATE CTS., STATE COURT GUIDE TO STATISTICAL REPORTING (ver. 2.0) 3-8 (2014) [*hereinafter* STATE COURT GUIDE].
[50] The Ohio Court of Claims was unable to identify cases originating in Cuyahoga County. NCSC staff estimated the number of cases by multiplying the proportion of the Ohio population residing in Cuyahoga County by the total cases filed in the Ohio Court of Claims for one year.
[51] The NCSC was ultimately able to obtain aggregate case information for these courts from the Administrative Office of the Courts in the respective states, which eliminated the need to select replacement counties.
[52] The *State Court Guide* provides a standardized framework for state court caseload statistics, enabling meaningful comparisons among state courts. STATE COURT GUIDE *supra* note 49.

CASELOAD COMPOSITION

Table 2 shows both the total number of disposed civil cases provided to the NCSC by court structure type and the percentage breakdown of these cases by broad case type descriptions (contract, tort, real property, small claims, and other civil). Limited jurisdiction courts within multi-tier court structures disposed of 43 percent of the total civil caseload. The single-tier courts in the sample (Santa Clara and Cook Counties) account for slightly less than one-third (31%) of the total cases and the general jurisdiction courts in multi-tier court structures account for 26 percent of the total caseload.

Across all of the courts, slightly less than two-thirds (64%) of the cases are contract disputes with the remainder of the civil caseload consisting of small claims (16%), other civil (9%),[53] tort (7%), unknown case type (4%),[54] and real property (1%). One of the most striking features is that contract cases comprise at least half of the civil caseloads across all three types of court structures, although there are some notable differences. For example, in addition to having the largest volume of cases overall, limited jurisdiction courts have the highest proportion of small claims cases (30%) and the lowest proportion of contract cases (50%). It is highly likely that many of those small claims cases are, in fact, lower-value debt collection cases (a subcategory of contract cases) that were filed as small claims cases to take advantage of simplified procedures. Tort cases have a much higher concentration in general jurisdiction courts of multi-tier court structures than in limited jurisdiction courts. This is likely due to claims for monetary damages exceeding the maximum thresholds for limited jurisdiction courts in personal injury cases.

Small claims cases constituted only six percent of the caseload in counties with single-tier courts, which is due mainly to the small proportion of small claims cases in Cook County.[55] In Santa Clara County, small claims accounted for 18 percent of the total civil caseload. Interestingly, the monetary limit on small claims cases is $10,000 in both Santa Clara and Cook

Table 2: Caseload Composition, by Court Type

		PERCENTAGE OF					
	TOTAL CIVIL CASES	CONTRACT	TORT	REAL PROPERTY	SMALL CLAIMS	OTHER CIVIL	UNKNOWN
Single Tier Courts	287,131	80	10	1	6	4	0
General Jurisdiction Courts	221,150	69	13	2	1	15	0
Limited Jurisdiction Courts	417,063	50	3	0	30	10	7
Total	925,344	64	7	1	16	9	3

[53] "Other civil" includes appeals from administrative agencies and cases involving criminal or domestic-related matters (e.g., civil stalking petitions, grand jury matters, habeas petitions, and bond claims).

[54] Nearly all of the unknown cases (99%) were filed in six of the 12 municipal courts in Cuyahoga County. Because the other six courts indicated multiple case types, and their caseload composition varied across courts, NCSC staff were unwilling to infer case types for this analysis.

[55] Small claims data were not included with the Cook County dataset, but Illinois caseload and statistical reports indicate that small claims filings and dispositions account for approximately 5 percent of the civil caseload in the Cook County Superior Court. Caseload and Statistical Reports, CASELOAD SUMMARIES BY CIRCUIT, CIRCUIT COURTS OF ILLINOIS, CALENDAR YEAR 2012 at 17.

Counties, which is considerably higher than both the average limit for counties with multi-tiered court structures ($5,938) and the actual limit in all but two of the eight counties. For some reason that may be unique to Cook County, rather than to single-tier courts generally, litigants opt to file lower-value contract cases as contract cases rather than as small claims cases.[56]

Table 3, however, documents some striking variations across counties. For example, the proportion of contract cases in Marion County, Indiana is only eight percent compared to an overall caseload average of 64 percent while small claims comprise 82 percent of the civil caseload compared to the 16 percent overall average. In Marion County, many creditors file debt collection actions in the Marion County Small Claims Courts, ostensibly due to perceptions that those courts are a more attractive venue for plaintiffs.[57] The proportion of contract cases in Cuyahoga County is also much lower (39%) than the overall average.[58]

The counties participating in this study did not consistently describe case types with more detailed subcategories, but most broke down caseloads for case types of particular local interest. Those breakdowns provide additional information about civil caseloads.

Table 3: Caseload Composition, by County

		PERCENTAGE OF					
COUNTY (STATE)	TOTAL CIVIL CASES	CONTRACT	TORT	REAL PROPERTY	SMALL CLAIMS	OTHER CIVIL	UNKNOWN
Maricopa (AZ)	53,226	78	1	0	4	16	0
Santa Clara (CA)	27,503	64	9	2	18	7	0
Miami-Dade (FL)	156,096	64	8	1	25	2	0
Oahu (HI)	22,363	64	5	0	0	30	0
Cook (IL)	259,628	82	10	1	5	3	0
Marion (IN)	75,834	8	2	0	82	8	0
Bergen (NJ)	64,068	60	8	0	4	27	0
Cuyahoga (OH)	76,970	39	7	0	6	9	38
Allegheny (PA)	34,011	55	8	2	32	4	0
Harris (TX)	155,645	72	7	1	3	16	0
Total	925,344	64	7	1	16	9	3

[56] Illinois does not permit corporations to initiate small claims cases unless they are represented by an attorney, although a corporate representative may appear to defend a small claims case. IL SUP. CT. R. ART. II, R. 282(b). The cost of retaining an attorney may negate the cost advantage of filing in small claims court.

[57] The Marion County Small Claims Courts have been the focus of intense criticism for several years due to concerns about venue shopping, lack of due process for defendants in debt collection cases, and collusion between debt collection plaintiffs and Small Claims Court judges. *See* Marisa Kwialkowski, *Judges Call for an End to Marion County's Small Claims Court System*, IndyStar (July 12, 2014) (http://www.indystar.com/story/news/2014/07/12/judges-call-end-marion-countys-small-claims-court-system/12585307/). Debt collection procedures are also the basis for a class action lawsuit alleging violations of the Fair Debt Collection Practices Act. Suesz v. Med-1 Solutions, LLC, 734 F.3d 684 (7th Cir. 2013). A Small Claims Task Force appointed by the Supreme Court of Indiana and an evaluation by the NCSC have both recommended that the Marion County Small Claims Courts be incorporated into the Superior Court to provide appropriate oversight and due process protections for litigants. *See* JOHN DOERNER, MARION COUNTY, INDIANA, SMALL CLAIMS COURTS: FINAL REPORT (July 2014); INDIANA SMALL CLAIMS TASK FORCE, REPORT ON THE MARION COUNTY SMALL CLAIMS COURTS (May 1, 2012).

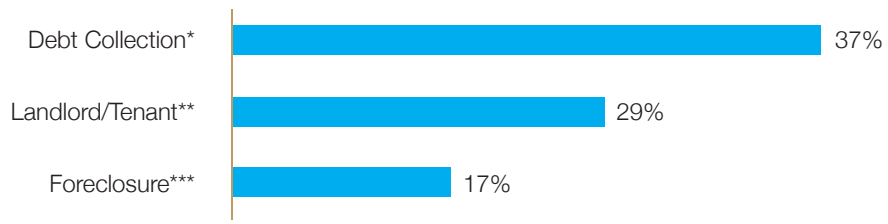
[58] It is likely that a large proportion of the unknown casetypes in the six municipal courts from Cuyahoga County that did not provide case-level data are actually contract cases.

Figures 7 and 8 illustrate the caseload composition for common subcategories of contract and tort caseloads. Contract caseloads consist primarily of debt collection (37%), landlord/tenant (29%), and foreclosure (17%), cases.[59] Tort caseloads consist primarily of automobile tort (40%) and other personal injury/property damages cases (20%).[60] Although medical malpractice and product liability cases often generate a great deal of attention and criticism, they comprise only five percent of tort caseloads (less than 1% of the total civil caseload).

CASE DISPOSITIONS

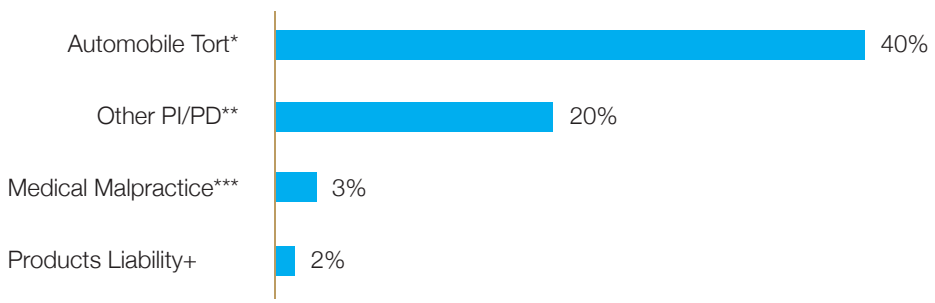
Documenting how civil cases are actually resolved is somewhat challenging due to varying disposition descriptions among case management systems. As discussed previously, courts traditionally record the procedural significance of the disposition in the case management system rather than the actual manner of disposition. Consequently, a case may be recorded as "dismissed" for a variety of reasons such as an administrative dismissal for failure to prosecute, upon motion

Figure 7: Subcategories of Contract Cases



* Not Reported by Santa Clara County
** Not reported by Marion County
*** Not reported by Santa Clara and Cuyahoga Counties

Figure 8: Subcategories of Tort Cases



* Not reported by Marion County
** Not reported by Marion and Allegheny Counties
***Not Reported by Santa Clara and Marion Counties
+ Not reported by Maricopa, Santa Clara and Marion Counties

[59] Landlord/tenant cases include claims for both eviction and collection of past due rent payments.

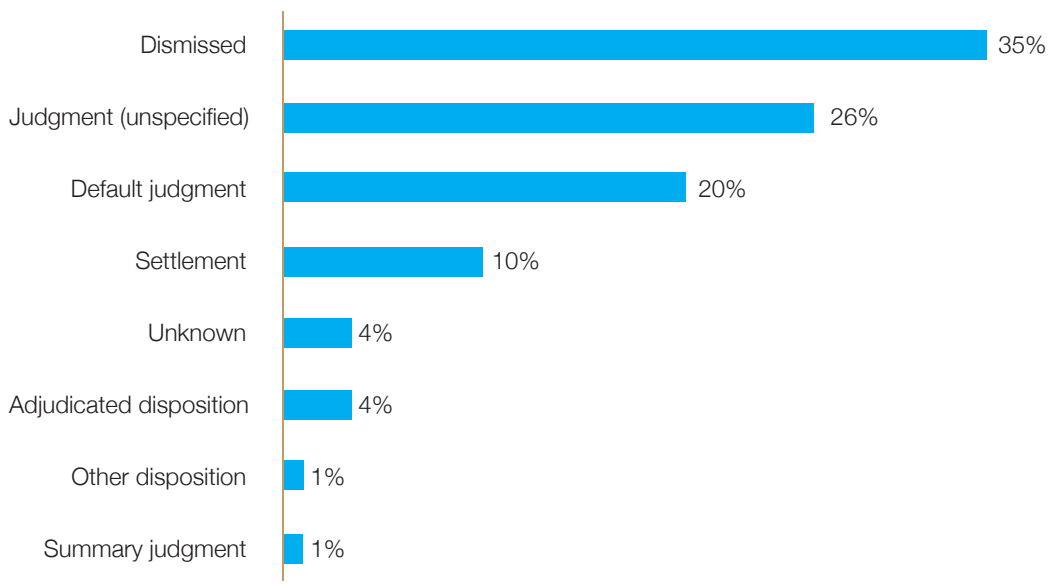
[60] "Personal injury/property damage" reflects a characteristic of the type of damages rather than the legal claim upon which relief is requested. Consequently, that term is not recognized as a unique case type by the NCSC *State Court Guide*. Nevertheless, that term is used by many courts, including courts in eight of the 10 counties participating in the *Landscape* study. Although the term is over-inclusive, it likely includes premises liability and other negligence cases.

by a litigant for withdrawal or non-suit, or upon notice that the parties have settled the case. Similarly, a case disposed by "judgment" may indicate either a default judgment or an adjudication on the merits in a bench or jury trial. Some of the courts in the *Landscape* study employed more descriptive disposition codes that provide guidance about the manner of disposition. For example, a dismissal with prejudice often indicates that the parties have settled the case while a dismissal without prejudice generally indicates either withdrawal or an administrative dismissal. Cases adjudicated on the merits usually had some notation to that effect (e.g., judgment from jury trial, judgment from nonjury trial, arbitration judgment). Nevertheless, the lack of consistency across counties with respect to the data definitions and the lack of descriptiveness for disposition codes undermines the reliability of precise estimates, especially when compared to earlier studies such as the 1992 *Civil Justice Survey of State Courts*. For this study, the NCSC coded dispositions as follows:

- Dismissal: cases recorded as withdrawal, dismissed, or dismissed without prejudice;
- Judgment (unspecified): cases recorded as judgment;
- Default judgment: cases recorded as default judgment;
- Settlement: cases recorded as settlement, agreed judgment, stipulated judgment or dismissal with prejudice;
- Summary judgment: cases recorded as summary judgment;
- Adjudicated disposition: cases recorded as disposed by jury trial, directed verdict, bench trial, or arbitration;
- Other disposition: cases recorded as change of venue, removal, transferred or bankruptcy stay; and
- Unknown disposition: cases without a specified disposition.

Keeping these caveats in mind concerning the reliability of disposition rates, Figure 9 reflects the overall disposition breakdown based on this categorization. Dismissals were the single largest proportion of dispositions, accounting for more than one-third (35%) of the total caseload. Judgments (unspecified) and default judgments were the second and third largest

Figure 9: Case Dispositions (all cases)



categories, at 26 percent and 20 percent respectively. Settlements comprised only 10 percent of dispositions. Four percent of cases were adjudicated on the merits and only one percent were disposed by summary judgment. These disposition rates are a dramatic change from the 1992 Civil Justice Survey of State Courts.[61] The dismissal rate is more than three times higher and the default rate is 42 percent higher in the *Landscape* study. The settlement rate, in contrast, is less than one-fifth of the 1992 study. Adjudicated dispositions also declined from six percent to four percent.

Some of these differences may reflect differences in how these studies were conducted. The 1992 survey examined civil cases disposed in the general jurisdiction courts of 45 large, urban counties. Although all of the counties selected for the *Landscape* study participated in the 1992 *Civil Justice Survey of State Courts*, the *Landscape* study also collected data from the limited jurisdiction courts in those counties, which accounts for almost half (43%) of the total caseload.[62] Table 4 suggests that some of the difference in disposition rates may be the result of differences in the respective caseloads of limited jurisdiction and general jurisdiction courts. Approximately one-third of the cases in the limited jurisdiction courts (32%) were disposed by default judgment, but only 18 percent of the general jurisdiction court cases were default judgments.[63] The default rate for single-tier courts was three percent, which is unrealistically low and it is likely that a substantial majority of the unspecified judgments for single-tier courts (51%) are actually default judgments.[64] Settlement rates in the single-tier and general jurisdiction courts (13% and 12%, respectively) are two times the settlement rate in the limited jurisdiction court (6%), but all are still much lower than the 62 percent settlement rate in the 1992 *Civil Justice Survey of State Courts*. It is likely that a substantial proportion of cases disposed by

Table 4: Percentage of Case Dispositions by Court Type

	SINGLE TIER	GENERAL JURISDICTION	LIMITED JURISDICTION	ALL COURTS
Dismissed	31	36	37	35
Judgment (unspecified)	50	15	16	26
Default judgment	3	18	32	20
Settlement	13	12	6	10
Adjudicated disposition	1	4	5	4
Unknown	0	13	2	4
Summary judgment	0	1	1	1
Other disposition	1	2	1	1

[61] *See* Figure 2, *supra*, at p. 7.

[62] In 2012, more than half of new civil cases were filed in limited jurisdiction courts. R. LAFOUNTAIN ET AL., EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2012 STATE TRIAL COURT CASELOADS 8 (NCSC 2014).

[63] The default rate in the 1992 *Civil Justice Survey of State Courts* was 14 percent.

[64] The Cook County Circuit Court did not include default judgment as a disposition type at all.

dismissal are also settlements rather than withdrawals or administrative dismissals.[65] Surprisingly, adjudication rates are highest in the limited jurisdiction courts (5% compared to 4% in general jurisdiction courts and 1% in single-tier courts), but two-thirds (66%) of the adjudicated dispositions are bench trials in contract, other civil, and small claims cases in limited jurisdiction courts.

In addition to differences in courts included the samples, the coding methodology employed in the two studies differed. Data for the 1992 *Civil Justice Survey* was collected through personal inspection of individual case files rather than extraction from the case management systems. Consequently, the 1992 data are more accurate and precise than the *Landscape* data. It is particularly difficult to interpret the dismissal and unspecified judgment rates in the *Landscape* dataset. Generally, litigants will request that settled cases be dismissed with prejudice to preclude the plaintiff from refiling the case in the future. Cases with that designation were classified as settlements in the *Landscape* dataset, but some cases may have been coded by court staff only as dismissals in the case management system, which would result in an inflated dismissal rate. Similarly, unspecified judgments may include a substantial proportion of cases that were actually default judgments.

Finally, the current study was undertaken shortly after this country's most significant economic recession since the Great Depression, during which state courts experienced a spike in civil case filings, especially in debt collection and mortgage foreclosure cases.[66] The disposition rates may reflect the unique economic and fiscal circumstances of state court caseloads during this period rather than more general trends. Table 5, which describes case dispositions by case type, documents substantially higher default judgment rates for contract and small claims cases (21% and 32%, respectively). Tort cases, in contrast, had substantially higher settlement and dismissal rates (32% and 39%, respectively). Real property, small claims, and other civil cases were the most likely to be adjudicated on the merits (6% for real property and other civil cases, 10% for small claims cases).

Table 5: Proportion of Case Dispositions by Case Type

	CONTRACT	TORT	REAL PROPERTY	SMALL CLAIMS	OTHER	ALL CASES
Dismissed	33	39	37	47	31	35
Judgment (unspecified)	31	11	23	10	25	26
Default judgment	21	4	13	32	7	20
Settlement	7	32	12	2	19	10
Unknown	3	8	5	0	11	4
Adjudicated disposition	3	3	6	7	6	4
Other disposition	1	3	2	1	1	1
Summary judgment	1	1	3	0	0	1

[65] Cases dismissed for failure to prosecute averaged five percent among the 17 courts in seven counties that separately identified these cases, but ranged as high as 14 percent in the general jurisdiction courts. Even if all of the dismissals in the general jurisdiction courts were settlements, it would only bring the settlement rate to 34 percent (approximately 55% of the 1992 settlement rate).

[66] LAFOUNTAIN, *supra* note 62, at 4.

Collectively, these factors suggest that the actual differences in disposition rates may be less dramatic than indicated by the differences between Figure 2 and Figure 9, but it is unlikely that they account for the entire difference. Compared to two decades ago, it seems likely that more civil cases are being disposed in a largely administrative capacity (dismissals or default judgments), resulting in lower overall settlement rates. With the exception of cases filed in limited jurisdiction courts, in which contract, other civil and small claims collectively comprise 40 percent of the total civil caseload, very little formal adjudication is taking place in state courts at all.

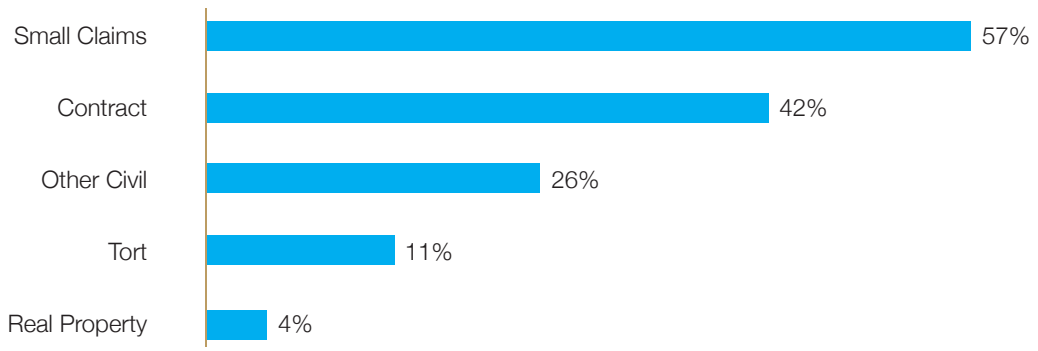
CASE OUTCOMES AND JUDGMENT AMOUNTS

The *Landscape* courts were not able to provide data documenting which party prevailed in cases that resulted in a judgment, so we are only able to infer case outcomes based on whether the judgment included a damage award. This is an imprecise measurement insofar that some judgments in which the plaintiff prevailed will include only equitable rather than monetary relief.[67]

By the same token, a judgment in which the defendant prevailed on both the original claim as well as a counterclaim against the plaintiff will also reflect a monetary award.[68] Recall also from Tables 4 and 5 that only 46 percent of cases were disposed by judgment (26% judgment (unspecified), 20% default judgment), and that rate varied considerably by case type. Only 15 percent of tort cases were disposed by judgment compared to 65 percent of small claims, 56 percent of contract cases, 45 percent of real property cases, and 32 percent of other civil cases. Figure 10 provides the proportion of judgments greater than zero, which may be interpreted as a very rough proxy for the plaintiff win rate. Given the factors discussed above, however, these rates likely underestimate the actual rate at which plaintiffs prevailed, but it is not known by how much. The estimated rates are likely to be considerably more accurate for small claims and contract cases in which the proportion of cases disposed by judgment is higher.

For the most part, the monetary values at issue in state court civil cases are relatively modest, at least

Figure 10: Proportion of Cases in which Judgment Exceeded $0



[67] A substantial proportion of real property cases, for example, involve disputed property boundaries. Judgments in such cases would determine the boundaries, but would not ordinarily award monetary damages unless the complaint alleged other claims (e.g., trespass). The *Civil Justice Survey of State Courts* series excluded cases involving equitable claims, so it is unknown what proportion of cases involve only claims seeking legal remedies.

[68] Eight percent of the trials in the 2005 *Civil Justice Survey of State Courts* involved cross claims or third-party claims. Of those cases, the defendant prevailed in 39 percent of the trials. 2005 *Civil Justice Survey of State Courts* (data on file with the authors).

in cases resulting in a formal judgment. Table 6 shows the average amount and the interquartile range[69] of the final award for cases resulting in a judgment greater than zero by court type, case type, and manner of disposition.[70] Overall, the average judgment award was less than $10,000 and the interquartile range was just $1,273 (25th percentile) to $5,154 (75th percentile). Not surprisingly, these values were lowest in limited jurisdiction courts, ostensibly due to the lower monetary thresholds for those courts. General jurisdiction courts had the highest judgment awards, while judgment amounts for single-tier courts, which manage all civil cases for their respective jurisdictions, predictably fell in between. Although some cases resulted in extremely large judgments,[71] they comprised only a small percentage of judgments greater than zero. For example, only 357 cases (0.2%) had judgments that exceeded $500,000 and only 165 cases (less than 0.1%) had judgments that exceeded $1 million.

Table 6: Judgment Amounts Exceeding $0*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Overall	**227,812**	**$9,267**	**$1,273**	**$2,441**	**$5,154**
Court Type					
General Jurisdiction	19,237	$24,117	$2,270	$5,592	$14,273
Single Tier	64,894	$18,023	$1,685	$3,029	$6,291
Limited Jurisdiction	143,681	$3,325	$1,060	$1,956	$4,085
Case Type					
Real Property	102	$157,651	$2,181	$12,789	$105,822
Tort	3,554	$64,761	$2,999	$6,000	$12,169
Other	9,704	$12,349	$749	$2,002	$4,219
Contract	160,465	$9,428	$1,251	$2,272	$4,981
Small Claims	39,517	$4,503	$1,568	$3,000	$6,000
Disposition Type					
Summary judgment	1,187	$133,411	$3,200	$6,174	$15,198
Adjudicated disposition	11,341	$15,088	$675	$1,120	$2,000
Judgment (unspecified)	96,037	$11,312	$1,340	$2,525	$5,302
Default Judgment	107,524	$5,876	$1,312	$2,442	$5,305

* Categories sorted in descending order based on the mean judgment amount.

[69] The interquartile range is the value of judgment awards at the 25th, 50th, and 75th percentiles. Because the mean (average) is often skewed by extreme outliers, the interquartile range reflects a more accurate picture of the value of typical cases for each category.

[70] Monetary damages were reported for less than half (41%) of cases that resulted in a final judgment. These cases comprise 25 percent of the entire *Landscape* caseload.

[71] The largest judgment recorded in the *Landscape* data was $84.5 million awarded in a contract case disposed in the Circuit Court of Cook County, Illinois. The case involved a dispute between a pharmaceutical company and its insurer concerning losses suffered by the pharmaceutical company due to a drug recall. At issue was whether the pharmaceutical company was covered under its insurance policy, or whether that coverage was previously rescinded. The trial court judgment in favor of the pharmaceutical company was subsequently upheld by the Illinois Court of Appeals. Certain Underwriters at Lloyds, London v. Abbott Laboratories, 16 N.E.3d 747 (Ill. App. 2014).

With respect to case types, average judgments awarded in real property cases were the highest overall ($157,651), followed by torts ($64,761), other civil cases ($12,349), contracts ($9,428), and small claims ($4,503). Although average judgments in real property cases were the highest of all of the case types, they comprised only a fraction (0.5%) of the total cases in which a judgment was entered; contracts and small claims cases comprised 82 percent of the caseload in which a judgment was entered, and 88 percent of the cases in which the judgment exceeded zero.

The monetary value of judgments is considerably lower than one would imagine from listening to debates about the contemporary justice system and largely confirms allegations that the costs of litigation routinely exceed the value of the case. In 2013, the NCSC developed a methodology — the Civil Litigation Cost Model (CLCM) — to estimate legal fees and expert witness fees in civil cases.[72] Using the CLCM, the NCSC found that in most types of civil cases, the median cost per side to litigate a case from filing through trial ranged from approximately $43,000 for automobile tort cases to $122,000 for professional malpractice cases. Indeed, in many cases the cost of litigation likely outstrips the monetary value of the case shortly after initiating the lawsuit.[73] Debt collection cases were the only exception. In a study of Utah attorneys using the CLCM, the NCSC found that the median cost per side to litigate a debt collection case through trial was $2,698.[74] Given the median judgment amount, most plaintiffs would find it economically feasible to pursue these claims, but not most defendants. There is, moreover, a fairly wide gap between the actual costs involved in resolving civil disputes and litigant expectations about what those costs should be. In 1999, for example, the New Mexico Judicial Branch conducted a series of public opinion polls, focus groups, and litigant surveys to measure the gap between the costs that litigants believe are reasonable and the actual costs in civil cases.[75] Litigants reported that the estimate of a reasonable cost for resolving their case was $3,682 on average, but actual costs were $8,385.[76]

BENCH AND JURY TRIALS

Courts reported a total of 32,124 trials as case dispositions in the *Landscape* dataset, 1,109 of which were jury trials (3%) and 31,015 were bench trials (97%).[77] Collectively, they comprised less than four percent of the entire *Landscape* dataset (0.1% jury trials, 3.4% bench trials). Jury trials were distributed about equally in the single-tier and general jurisdiction courts (49% and 45%, respectively) with only seven percent of jury trials taking place in limited jurisdiction courts. In contrast, limited jurisdiction and single-tier courts disproportionately conducted bench trials (45% and 42%, respectively) compared to only 13 percent in the

[72] CASELOAD HIGHLIGHTS, *supra* note 9.

[73] The costs per side associated with case initiation ranged from approximately $2,400 in automobile tort cases to $7,300 in professional malpractice and employment cases. *Id.*

[74] *See* UTAH RULE 26 REPORT, *supra* note 32, at 46-48.

[75] John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be?* 82 JUDICATURE 287 (May-June 1999).

[76] *Id.* at 289.

[77] The Miami-Dade Circuit and County Courts and the Marion County Superior and Circuit Courts were not able to identify cases disposed by bench or jury trial. Data from the Cook County Circuit Court did not indicate cases disposed by bench trial. The trial rates reflect only cases for courts that identified bench and jury trials.

general jurisdiction courts. As Figures 11 and 12 illustrate, over three times as many jury trials took place in tort trials (65%) as in other types of cases. Over half of all bench trials (51%) took place in contract cases, followed by other civil cases (27%), small claims (19%), tort (2%), and real property cases (1%).

Only 69 percent of the jury trials and 58 percent of the bench trials in the *Landscape* dataset included information about the final judgment amount. As noted previously, some of the bench trials may have involved equitable relief, which would explain the absence of a damage award. In other instances, judgment awards

Figure 11: Proportion of Jury Trials by Case Type

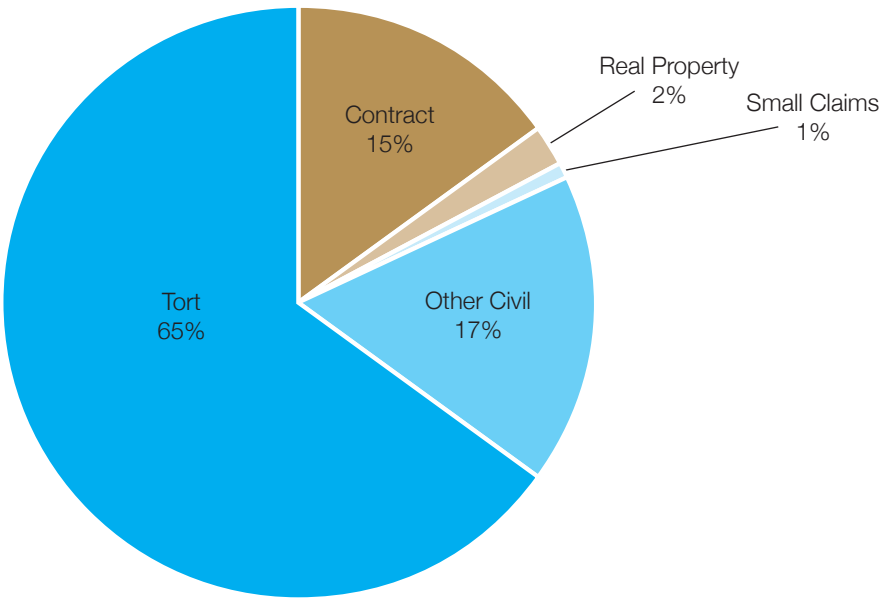
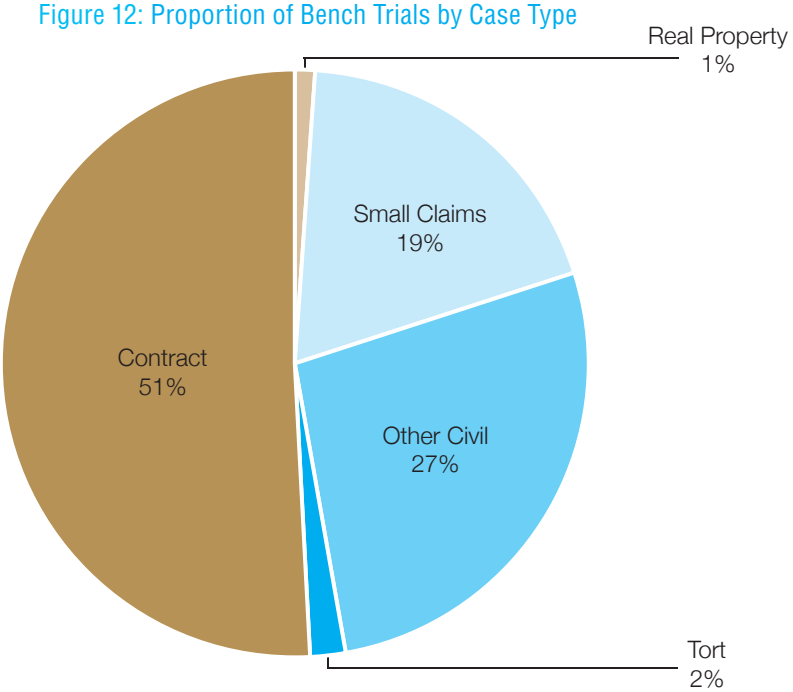


Figure 12: Proportion of Bench Trials by Case Type



were not included in the case-level data.[78] Tables 7 and 8 provide the average (mean) judgment award by case type for jury and bench trials in which the reported judgment was greater than zero. Those data highlight some important differences between bench and jury trials. First, the damage awards in jury trials are *48 or more times greater* than those in bench trials for all case types except small claims. This suggests that litigants engage in significant case selection strategies when deciding whether to try a case to a judge or jury. Tort cases, especially those involving more serious injuries and/or more egregious negligence on

Table 7: Jury Trials, Judgment Amounts Exceeding $0*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Total	**194**	**$ 1,468,554**	**$7,962**	**$31,097**	**$201,896**
Case Type					
Real Property	6	$947,589	$175,522	$370,199	$2,764,839
Contract	43	$226,635	$10,012	$48,806	$257,600
Tort	134	$2,003,776	$8,845	$30,000	$151,961
Other	9	$106,412	$2,193	$5,000	$139,232
Small Claims	2	$2,510	$1,621	$2,510	$3,400

Table 8: Bench Trials, Judgment Amounts Exceeding $0*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Total	**11,481**	**$6,408**	**$679**	**$1,131**	**$2,028**
Case Type					
Real Property	5	$19,277	$4,259	$7,826	$37,500
Tort	53	$7,300	$3,443	$8,629	$14,385
Small Claims	730	$2,749	$827	$2,000	$3,900
Other	1,498	$2,638	$200	$1,339	$3,664
Contract	9,195	$7,300	$700	$1,098	$1,785

* Categories sorted in descending order based on 75th percentile.

[78] Courts that provided judgment amount for cases disposed by trial included Cook County Circuit Court (jury trials only); Allegheny Court of Common Pleas; Bergen County Superior Court; Maricopa County Superior Court; the Euclid and Garfield Heights Municipal Courts in Cuyahoga County; Harris County Justice Court; and the Maricopa County Justice Court.

the part of the defendant that might warrant punitive damages are much more likely to be tried by a jury. Cases in which there is only limited potential for higher damage awards are more likely to be disposed by bench trial because the costs associated with a jury trial will exceed the potential award.

Second, the average jury and bench awards are heavily skewed by a very small number outlier cases. For example, compared to a mean jury award of $2 million in tort cases, 50 percent of jury awards in tort cases were $30,000 or less, and 75 percent of jury awards in tort cases were less than $152,000. Jury awards exceeded $500,000 in only 17 cases (3% of cases in which judgment exceeded zero), and exceeded $1 million in only 13 cases (2%).[79] The average judgment awarded in bench trials ($6,408) was three times more than the judgment awarded at the 75th percentile ($2,028).

Another noteworthy consideration concerning bench and jury trials is number of trials involving self-represented litigants. In the 1992 *Civil Justice Survey of State Courts*, attorneys represented both parties in 97 percent of jury trials and 91 percent of bench trials. In the trials from the *Landscape* dataset, the proportion of trials in which both parties were represented decreased to 87 percent of jury trials and 24 percent of bench trials. Restricting the analysis to general jurisdiction courts (for better comparability with the 1992 *Civil Justice Survey*) does not measurably improve the picture. Except for tort trials, defendants had representation in less than 30 percent of bench trials. In tort cases, plaintiffs were represented in 69 percent and defendants were represented in 71 percent of bench trials, resulting in only 56 percent of bench trials with both sides represented. The costs associated with bringing a case to trial may be a factor in the relatively high proportion of bench trials involving self-represented litigants in general jurisdiction courts.

TIME TO DISPOSITION

The average time from filing to disposition for cases in the Landscape dataset was 306 days (approximately 10 months); the interquartile range was 35 to 372 days (approximately 1 month to just over 1 year). Table 9 documents the average disposition time as well as the interquartile range for disposition. On average, tort cases took the longest time to resolve (486 days), followed by real property cases (428 days), other civil cases (323 days), contract claims (309 days), and small claims (175 days).

Some cases in the *Landscape* dataset had unusually long disposition times. A total of 1,252 cases (0.1%) were 10 years or older when they were finally disposed. Of the 521 cases that were 15 years or older, more than half were foreclosure cases filed in the Bergen County Superior Court. The second oldest case in the dataset, People's Trust of New Jersey v. Garra, filed in 1972 and administratively closed in 2013 (41 years), was one of these, although case records suggest that the case was actually resolved in 1998 (26 years). The oldest case was a guardianship case (coded as "Other Civil—Domestic Related"), filed in the Marion County Superior Court in 1950 (62 years).[80]

Addressing court delay has been a major focus of court improvement efforts for several decades. The most recent national effort to manage civil caseloads in a timely manner was a component of the *Model Time Standards for State Trial Courts*. The *Model Time Standards* recommend that 75 percent of general civil cases be disposed within 180 days, 90 percent within 365 days, and 98 percent within 540 days.[81]

[79] The highest jury award in the *Landscape* dataset was $80 million, awarded in a premises liability case involving an iron worker who become paralyzed from the neck down after falling headfirst from a steel beam while not using a safety harness. Bayer v. Garbe Iron Works, Inc. et al., No. 07-L-009877 (Cook Cir. Ct., Dec. 17, 2012). The trial judge subsequently reduced the $80 million verdict to $64 million.

[80] The *State Court Guide* recommends that guardianship and other cases in which an initial entry of judgment is filed, but are then reviewed on a periodic basis by a judicial officer, be coded in the case management system as "set for review" rather than leaving the case as "pending" or "open" on the court docket to avoid distorting disposition time statistics. STATE COURT GUIDE, *supra* note 49, at 4.

[81] MODEL TIME STANDARDS, *supra* note 41.

Table 9: Time to Disposition (days)*

			INTERQUARTILE RANGE		
	N	MEAN	25TH	50TH	75TH
Overall	**820,893**	**306**	**35**	**113**	**372**
Court Type					
General Jurisdiction	206,209	410	50	215	546
Single Tier	247,815	366	45	148	491
Limited Jurisdiction	366,869	206	23	72	219
Case Type					
Tort	60,460	486	165	340	640
Real Property	5,745	428	102	297	573
Other	79,077	323	26	160	401
Contract	553,271	309	28	107	371
Small Claims	110,274	175	39	70	169
Disposition Type					
Settlement	84,992	478	78	267	650
Summary judgment	5,812	441	185	321	574
Dismissal	293,466	391	49	195	544
Other disposition	7,819	323	57	149	374
Unknown disposition	16,740	316	64	147	373
Judgment (unspecified)	229,634	264	19	68	302
Adjudicated disposition	27,281	147	13	21	167
Default Judgment	155,149	132	36	70	159

* Categories sorted in descending order based on 75th percentile.

Generously speaking, it is clear from Table 10, which documents the proportion of cases disposed within these timeframes, that the *Model Time Standards* are still an aspirational goal rather than a current achievement. Overall, only the limited jurisdiction courts come close to meeting the *Model Time Standards*, with 71 percent of general civil cases disposed within 180 days, 84 percent within 365 days, and 89 percent within 540 days. General jurisdiction courts fared the worst with only 75 percent of cases disposed within 540 days.

Because contract cases comprise such a large proportion of civil caseloads, they will necessarily have an outsized effect on disposition times. Looking closely at the different subcategories of contracts, we find that debt collection cases (37% of contracts) are generally disposed quite quickly, with 91 percent closed within 180 days and 95 percent within 540 days. However, foreclosures (17% of contracts) are significant contributors to overall delay in contract

Table 10: Cases Disposed within Model Time Standard Guidelines*

		PERCENTAGE DISPOSED WITHIN		
	N	180 DAYS	365 DAYS	540 DAYS
Overall	**820,893**	**59**	**75**	**82**
Court Type				
Limited Jurisdiction	366,869	71	84	89
Single Tier	247,815	54	69	77
General Jurisdiction	206,209	45	64	75
Case Type				
Small Claims	110,274	76	88	92
Other Civil	79,077	53	73	81
Contract	553,271	61	75	81
Debt Collection	*101,089*	*91*	*94*	*95*
Foreclosure	*240,115*	*14*	*36*	*51*
Landlord/Tenant	*90,495*	*68*	*87*	*92*
Real Property	5,745	37	57	73
Tort	60,460	27	53	69
AutoTort	*26,802*	*27*	*57*	*74*
PI/PD	*13,614*	*26*	*52*	*68*
Product Liability	*1,987*	*24*	*39*	*51*
Medical Malpractice	*1,332*	*21*	*36*	*46*
Disposition Type				
Default Judgment	155,149	79	94	97
Adjudicated disposition	27,281	76	88	93
Judgment (unspecified)	229,634	67	78	84
Unknown disposition	16,740	56	75	83
Other disposition	7,819	55	75	82
Dismissal	293,466	48	66	75
Summary judgment	5,812	24	56	73
Settlement	84,992	40	59	70

* Note: Categories sorted in descending order based on cases disposed within 540 days.

cases.[82] Only 14 percent were disposed within 180 days, and slightly more than half (51%) within 540 days. Landlord/tenant cases similarly did not meet the *Model Time Standards* guidelines, although they fared considerably better than mortgage foreclosures.

Although tort cases comprise only seven percent of the *Landscape* dataset, they were the worst case category in terms of compliance with the *Model Time Standards*. Only two-thirds (69%) were disposed within 540 days. Automobile torts performed somewhat better (74% disposed within 540 days) than other subcategories of torts. Less than half of the medical malpractice and product liability cases were disposed by 540 days, ostensibly due to their evidentiary and legal complexity. Perhaps the most surprising of the disposition time analysis is the fact that even small claims cases did not fully comply with the *Model Time Standards*, although they came closer than any other broad case type. Small claims slightly exceeded the *Model Time Standards* guidelines for cases disposed within 180 days (76%), but then lost ground for cases disposed within 365 days (88%) and 540 days (92%).

The manner of disposition may also explain some of the longer disposition times. Cases disposed by summary judgment and settlement, which necessarily would be characterized by longer discovery and pretrial litigation activity, were the least likely to have closed within 540 days (73% and 70%, respectively). In contrast, almost all (97%) of the cases disposed by default judgment closed within 540 days. Although some of the dismissals were undoubtedly administrative dismissals for failure to prosecute, the relatively long timeframes to close these cases (75% disposed within 540 days) suggests that many of these may have been settlements. Nevertheless, closer supervision of these cases might have improved compliance with the *Model Time Standards*.

REPRESENTATION STATUS OF LITIGANTS

Most state court judges and court administrators can attest that the representation status of civil litigants has changed dramatically since the publication of the 1992 *Civil Justice Survey of State Courts*.[83] In that study, attorneys represented both plaintiffs and defendants in 95% of the cases disposed in general jurisdiction courts. This high level of attorney representation existed across case types; both parties were represented by attorneys in 98 percent of tort cases, 94 percent of contract cases, and 93 percent of real property cases. While plaintiffs remained overwhelmingly represented by counsel (92%) in the *Landscape* dataset, the average representation for defendants was 26 percent and the average percentage of cases in which both sides were represented by counsel was only 24 percent (see Table 11). As before, there are some striking variations across court types, case types, and disposition types.

Cases filed in general jurisdiction courts provide the most accurate comparison of the 1992 *Civil Justice Survey of State Courts* and the *Landscape* datasets. Although attorney representation for plaintiffs has declined only slightly (from 99% to 96%), attorney representation for defendants has decreased by more than half (97% to 46%), resulting in a commensu-

[82] Mortgage foreclosures were a substantial factor in the spike in civil filings following the 2008-2009 economic recession. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, Table 1194: Mortgage Originations and Delinquency and Foreclosure Rates: 1990-2010. Many state courts found themselves overwhelmed by the volume of foreclosure filings, including the Miami-Dade Circuit Court and the Maricopa County Superior Court. Subsequent complications related to mortgage servicing company record-keeping and internal foreclosure procedures may account for some of the delays apparent in these cases. Joe Adler, *OCC Offers Updates on Compliance with Foreclosure Settlement*, AMERICAN BANKER (April 30, 2014) *available at* http://www.americanbanker.com/issues/179_83/occ-offers-update-on-compliance-with-foreclosure-settlement-1067226-1.html, last visited on Aug. 24, 2015; Kate Berry, *Robo-Signing Redux: Servicers Still Fabricating Foreclosure Documents*, AMERICAN BANKER (Aug. 31, 2011) *available at* http://www.americanbanker.com/issues/176_170/robo-signing-foreclosure-mortgage-assignments-1041741-1.html?BCnopagination=1&gclid=CMWK-MmXwscCFcEUHwod0X4LRw, last visited on Aug. 24, 2015.

[83] The 1992 *Civil Justice Survey of State Courts* measured representation status based on whether any party was represented by counsel at any time during the litigation. The NCSC *State Court Guide to Statistical Reporting* now recommends that representation status be measured based on whether a party was *self-represented* either at any time during the life of the case or, if the case management system does not capture that information, at disposition. COURT STATISTICS PROJECT, *supra* note 52, at 31-32. The *Landscape* study employed the *State Court Guide* methodology to measure representation status. As a result of the differing definitions, the 1992 *Civil Justice Survey of State Courts* statistics on representation status may inflate the proportion of litigants who were represented by counsel.

Table 11: Representation Status (Percentage of Cases)*

		ATTORNEY REPRESENTING		
	N**	PLAINTIFF	DEFENDANT	BOTH
Overall	**649,811**	**92**	**26**	**24**
Court Type				
General Jurisdiction	200,789	96	46	45
Limited Jurisdiction	201,194	86	22	17
Single Tier	247,828	91	19	11
Case Type				
Tort	60,358	96	67	64
Real Property	4,970	95	45	39
Other	38,010	78	36	25
Contract	453,115	95	23	20
Small Claims	98,176	76	13	13
Disposition Type				
Summary judgment	5,266	99	62	61
Other disposition	6,428	96	54	49
Unknown disposition	27,491	93	45	42
Settlement	64,435	92	40	37
Adjudicated disposition	6,106	64	38	37
Dismissal	231,730	92	33	31
Judgment (unspecified)	205,202	90	19	16
Default Judgment	108,150	91	7	5

* Categories sorted in descending order based on both parties represented by counsel.
** Number of cases in courts that reported representation status for both parties.

[84] Lawyers were permitted to represent clients in small claims cases in seven of the 10 counties that participated in the *Landscape* study: Cook County Circuit Court, Miami-Dade County Court, Oahu District Court, Harris County Justice Courts, Marion County Small Claims Court, Bergen County Superior Court, and the 12 municipal courts located in Cuyahoga County, Ohio.

rate decrease in cases with attorney representation for both sides (96% to 45%). Not surprisingly, limited jurisdiction courts had the lowest proportion of plaintiff representation (86%), but single-tier courts had the lowest proportion of both defendant representation (13%) and overall litigant representation (11%).

Tort cases had the highest proportion of attorney representation overall (64%) and were the only case catagory in which more than half of defendants were represented (67%). Attorney representation was lowest in small claims cases (both sides represented in 13% of cases), which was expected given that these calendars were originally developed as a forum for self-represented litigants to obtain access to courts through simplified procedures. What was surprising, however, was the higher than expected proportion of small claims cases in which plaintiffs were represented by counsel (76%). This suggests that small claims courts may have become the forum of choice for many debt collection cases.[84] If so, it raises troubling concerns that small claims courts, which were originally developed as a forum in which primarily self-represented litigants could use a simplified process to resolve civil cases quickly and fairly, provide a much less evenly balanced playing field than was originally intended.

The *Landscape* data are insufficiently detailed to draw firm conclusions about the impact of attorney representation in any given case, but it is clear that it does affect case dispositions. For example, cases disposed by summary judgment had the highest proportions of attorney representation (61% with both sides represented), and likely reflects the fact that self-represented litigants would be less likely to file motions for summary judgment. Defendants in cases resolved by "other disposition" (e.g., bankruptcy stays, removal to federal court, and change of venue) were represented more than half the time (54%), again suggesting that lawyers would be more aware of and inclined to take advantage of these procedural options.

Conclusions and Implications for State Courts

The picture of contemporary litigation that emerges from the *Landscape* dataset is very different from the one suggested in debates about the contemporary civil justice system. State court caseloads are dominated by lower-value contract and small claims cases rather than high-value commercial and tort cases. Only one in four cases has attorneys representing both the plaintiff and the defendant. In addition, only a tiny proportion of cases are adjudicated on the merits, and almost all of those are bench trials in lower-value contract, small claims and other civil cases.

With rare exceptions, the monetary value of cases disposed in state courts is quite modest. Seventy-five percent (75%) of judgments greater than zero were less than $5,200. Only judgments in real property cases exceeded $100,000 more than 25 percent of the time. At the 75th percentile, judgments in small claims cases were actually greater than judgments in contract cases ($6,000 compared to $4,981). This is particularly striking given recent estimates of the costs of civil litigation. In the vast majority of cases, deciding to litigate a typical civil case in state courts is economically unsound unless the litigant is prepared to do so on a self-represented basis, which appears to be the case for most defendants.

The relatively high proportion of self-represented defendants in civil cases is also troubling. Much of the civil justice system is designed with the assumption that both parties will be represented by competent attorneys. The asymmetry of representation between plaintiffs and defendants across all of the case types — even in small claims courts — raises serious questions about the substantive fairness of outcomes in those cases.[85] Although there has been a sea change in state court policies with respect to the legitimacy of court-supported assistance to self-represented litigants, it is still a very controversial topic in many states.[86] Moreover, most of that assistance takes the form of self-help forms and general instructions for filing cases and gathering documents in preparation for evidentiary hearings. As a general rule, state codes of judicial ethics prohibit judges from giving the appearance of providing assistance, much less actually giving assistance, to a self-represented litigant.[87] This has certain implications with respect to public trust and confidence in the courts. The idealized view is that courts provide a forum in which civil litigants can negotiate effectively to resolve disputes, but also one in which Justice (with a capital J) will be done if those negotiations fail. It is fair to question the extent to which self-represented defendants are able to bargain effectively with represented litigants given unequal resources and expertise.

The economic realities of contemporary civil litigation suggest one explanation for the dominance of contract and small claims cases, which comprise 80 percent of civil caseloads in the *Landscape* courts. For plaintiffs in these cases, state courts essentially function as a monopoly insofar that securing a judgment from a court of competent jurisdiction is the only legal mechanism for enforcing payment of the award through post-judgment garnishment or asset seizure proceedings. Even so, plaintiffs must generally wait months to secure the judgment before they can initiate enforcement proceedings. The majority of claims asserted in tort cases, in contrast, are likely to involve insurance coverage for the defendant, which provides greater incentives for litigants to settle claims and a mechanism for judgments and settlement agreements to be paid. Indeed, in the vast majority of incidents giving rise to tort claims, the existence of a robust and highly regulated insurance market largely precludes the need to file cases in court at all.[88]

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[85] In 2010, the Federal Trade Commission published a report describing common problems involving unfair, deceptive, and abusive debt collection practices. FEDERAL TRADE COMMISSION, PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION (July 2010). In response to consumer complaints, the Consumer Financial Protection Bureau recently published model rules and procedures for state courts designed to curb the most frequently alleged abusive practices. CONSUMER FINANCIAL PROTECTION BUREAU, PROPOSED RULES, 78 FED. REG. 67,848 (Nov. 12, 2013) (to be codified at 12 C.F.R. pt. 1006).

[86] DEBORAH SAUNDERS, ACCESS BRIEF: SELF-HELP SERVICES (NCSC 2012).

[87] Jona Goldschmidt, *Judicial Ethics and Assistance to Self-Represented Litigants,* 28 JUST. SYS. J. 324 (2007).

[88] As just one example, the Insurance Research Institute reports that of automobile insurance claims closed in 2012, only eight percent of claimants ultimately filed suit in court. INSURANCE RESEARCH INSTITUTE, COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION (2014).

DISTORTED PERCEPTIONS OF CIVIL LITIGATION IN STATE COURTS

This reality raises the question of why perceptions of civil litigation are so distorted. One possibility is that some findings from the *Landscape* study may be at least partly attributed to ongoing effects of the 2008-2009 economic recession. For example, the large proportion of debt collection and foreclosure cases may have inflated the proportion of contract cases relative to other case types. However, the majority of those cases were filed after July 1, 2011, well after the peak of civil filings from the recession. Moreover, civil case filing statistics indicate that the proportion of contract cases routinely fluctuates over time in response to economic conditions, and rarely dips below 50 percent of civil caseloads. The relative stability of caseload compositions over time tends to counter the possibility that the *Landscape* findings are a temporary anomaly.

A more likely explanation is the focus on high-value and complex litigation by the media (especially business reports), much of which is filed in federal rather than state courts. Lower-value debt collections, landlord/tenant cases, and automobile torts involving property damage and soft-tissue injuries are rarely newsworthy. Another explanation is that perceptions are largely driven by the experiences of lawyers, who are repeat players in the civil justice system and who are much more likely to be involved in high-value and complex cases. Likewise, judges tend to focus on their experience in cases that demand a great deal of judicial attention. A final explanation for the distorted perception of civil caseloads is the institutional complexity inherent in the variety of organizational structures and jurisdictional authorities in state courts, which make it extremely difficult to document the size of civil caseloads, much less make accurate comparisons across states.

In spite of distorted perceptions, state courts do have serious problems managing civil cases. Of particular concern is the extent to which costs and delay impede access to justice. Procedural complexity is often cited as a contributing cause of cost and delay, but recent commentary suggests that uniform procedural rules that treat all cases exactly the same regardless of the complexity of the factual and legal issues underlying the dispute may be a more significant problem.[89] Most uniform rules place a great deal of discretion in the hands of lawyers to determine the extent to which each case should be litigated. The bar has largely resisted proposals to restrict that discretion on grounds that any individual case might need an exceptional amount of time or attention to resolve and therefore all cases should be managed as if they need that exceptional treatment. Courts that have imposed mandatory restrictions on lawyer discretion have tended to generate considerable pushback including the use of creative procedural techniques to exempt cases from their application.[90] Opt-in programs designed to streamline case management have often failed due to underuse.[91] As the findings from the Landscape dataset make clear, however, very few cases need as much time or attention as the rules provide and, ironically, many of them likely take longer and cost more to resolve as a result.

Another contributor to cost and delay is the traditional practice of allowing the litigants, rather than the court, to control the pace of litigation. Proponents

[89] INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, INTERIM REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND CIVIL JUSTICE AND IAALS A-2-3.

[90] After the Utah Supreme Court implemented mandatory restrictions on the scope of discovery based on the amount in controversy in November 2011, attorneys appear to have inflated the purported amount-in-controversy to secure assignment to higher discovery tiers. UTAH RULE 26 REPORT, *supra* note 32, at 10-12. The NH PAD Pilot Rules required attorneys to meet and confer within 20 days of the filing of the Answer to establish deadlines for various discovery events, alternative dispute resolution (ADR) proceedings, dispositive motions, and a trial date, and submit a written stipulation to the court to be used as the case structuring order. Although compliance with the PAD Pilot Rules was quite high, it did not have the intended effect of reducing disposition time. Because the rules did not impose restrictions on the timeframe for completing discovery and pretrial procedures, attorneys simply stipulated to the timeframes to which they were already accustomed. NEW HAMPSHIRE PAD RULES REPORT, *supra* note 31, at 7-9.

[91] Several states and local trial courts have developed opt-in programs designed to increase civil jury trial rates by offering expedited pretrial processing, but participation rates have varied considerably. *See* SHORT, SUMMARY & EXPEDITED, *supra* note 14.

of this tradition offer several justifications. First is a philosophical justification that although the civil justice system is a public forum, the cases themselves remain private disputes that should be wholly controlled by the parties. Proponents of party-driven pacing argue that the parties have more complete knowledge about the case and the attractiveness of any proposed resolution and are therefore are in a better position to determine the pace at which the case should proceed and the extent to which additional investments in litigation are worthwhile. Second, until fairly recently, most litigants were represented by attorneys who were repeat-players in the civil justice system. As such, courts have generally been more attentive to bar demands for control over case management than litigant demands for speedy, just, and inexpensive resolution of disputes.

Finally, courts historically have not had sufficient resources to effectively manage civil caseloads. The sheer volume of civil cases filed in state courts greatly overwhelms the ability of judges to provide individual attention and oversight to every case. Instead, judges focus most of their attention on the "squeaky wheels," (cases involving overly aggressive litigants clamoring for the court's attention and using extensive motions practice to disagree on every conceivable issue). Judges have few incentives to pay attention to those cases that are just quietly "pending" on the civil docket. With rare exceptions, previous recommendations concerning caseflow management have not been broadly adopted or institutionalized in state courts. Nor have courts developed case management automation to support effective caseflow management.

While most automation systems can track case filings and calendar events, they lack the ability to monitor compliance with deadlines or other court orders.[92] Case progress, therefore, depends on the litigants to inform the court that the case is in need of some judicial action (e.g., to resolve a discovery dispute, rule on a summary judgment motion, or schedule the case for trial). Furthermore, non-judicial staff serve primarily in clerical roles and rarely have either the training or the authority to undertake routine case management tasks on behalf of the judge. As a result, state courts struggle to comply with the Standards.

THE FUTURE OF THE CIVIL JUSTICE SYSTEM IN STATE COURTS?

Substantial evidence supports allegations that civil jury and bench trials have declined precipitously over the past several decades.[93] The most frequent explanation for this trend is that the cost and time involved in getting to trial make alternative methods of dispute resolution more attractive.[94] A substantial commercial industry providing ADR services (e.g., mediation, arbitration, private judging) not only actively competes with state and federal courts for business, it even relies largely on experienced trial lawyers and judges to provide those services. Not only are these methods more likely to be pursued in existing disputes, many routine consumer and commercial transactions (e.g., utility contracts, financial services agreements, healthcare and insurance contracts, commercial mergers, and employment contracts) now specify that future disputes must be resolved by mediation or binding arbitration.[95] The rise of the Internet economy has also

[92] The COSCA-NACM-NCSC Joint Technology Committee began developing Next-Gen technology standards for court automation in early 2015. JOINT TECHNOLOGY COMMITTEE, BUSINESS CASE FOR NEXT-GEN CMS STANDARDS DEVELOPMENT (June 10, 2014), http://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/BusinessCaseforNextGenCMS%20StandardsDevelopmentDRAFT7214.ashx. More effective judicial tools are also envisioned as part of the Next-Gen standards. JTC Resource Bulletin: Making the Case for Judicial Tools (Dec. 5, 2014), http://www.ncsc.org/~/media/Files/PDF/About%20Us/Committees/JTC/JTC%20Resource%20Bulletins/Judicial%20Tools%201%200%20FINAL.ashx.

[93] *The Vanishing Trial, supra* note 20.

[94] Thomas J. Stipanowich, ADR and the *"Vanishing Trial": The Growth and Impact of Alternative Dispute Resolutio*n, 1 EMPIRICAL LEG. ST. 843 (2004); Stephen C. Yeazell, Getting What We Asked For, *Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEG. ST. 943 (2004).

[95] CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT §1028(a), Section II, 6-26 (March 2015).

spurred the development of online dispute resolution forums for major Internet-based companies such as E-bay, PayPal, and Amazon.[96] A significant consequence of these trends is the growing lack of jury trial experience within the bar and increasingly the state court trial bench. This may further feed the decline in civil jury trials as lawyers and judges discourage their use due to unfamiliarity with trial practices.[97] In addition to declining trial rates, there is growing concern that many civil litigants are not filing claims in state courts at all.[98] Preemptive clauses for binding arbitration in consumer and commercial contracts divert claims away from state courts, but other factors including federal preemption of certain types of cases,[99] international treaties,[100] and legislative requirements that litigants exhaust administrative remedies in state or federal agencies before seeking court review[101] have also proliferated in recent years.

Although not related to trends in civil caseloads and disposition rates, state court budgets declined precipitously during the economic recessions in 2002-2003 and again in 2008–2009. Although most state courts experienced some recovery after the 2003 recession, there is currently no expectation among state court policymakers that state court budgets will return to pre-2008 recession levels. Moreover, state and federal constitutional and statutory provisions place higher priority on criminal and domestic caseloads in state courts, further undermining timely and effective management of civil caseloads. For the past two decades, state courts leaders have resigned themselves to doing more with less, all the while watching civil litigants move with their feet to other forums to resolve disputes or forego civil justice entirely.

These trends have severe implications for the future of the civil justice system and for public trust and confidence in state courts. The cost and delays of civil litigation greatly outpace the monetary value of most cases filed in state courts, effectively denying access to justice for most litigants and undermining the legitimacy of the courts as a fair and effective forum to resolve disputes. Reductions in the proportion of civil cases resolved through formal adjudication threaten to erode a publicly accessible body of law governing civil cases. Fewer common law precedents will leave future litigants without clear standards for negotiating civil transactions or conforming their conduct in a responsible manner. The privatization of civil litigation likewise undermines the ability of the legislative and executive branches of government to respond effectively to developing societal circumstances that become apparent through claims filed in state courts. Because the civil justice system directly touches everyone in contemporary American society — through housing, food, education, employment, household services and products, personal finance, and commercial transactions — ineffective civil case management by state courts has an outsized effect on public trust and confidence compared to the criminal justice system. If state court policymakers are to preserve the traditional role of state courts as the primary forum for dispute resolution, civil justice reform can no longer be delayed or even implemented incrementally through changes in rules of civil procedure. Instead, it will require dramatic changes in court operations to provide considerably greater court oversight of caseflow management to control costs, reduce delays, and improve litigants' experiences with the civil justice system.

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[96] Online dispute resolution services have become so widely available that an academic journal — *The International Journal of Online Dispute Resolution* — has been launched to provide practitioners with information about current initiatives and developments. *See* http://www.international-odr.com/. Pablo Cortés, *Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers*, 19 INT'L J. L. & INFORMATION TECH. 1 (2011).

[97] Paula Hannaford-Agor et al., *Trial Trends and Implications for the Civil Justice System*, 11 CASELOAD HIGHLIGHTS 6 (June 2005).

[98] The NCSC Court Statistics Project reports that civil filings have declined by 13.5% since the peak in filings in 2009. Although population adjusted filings vary periodically in response to economic conditions, there is no apparent decrease overall since 1987, the year that the NCSC began reporting these statistics.

[99] CLASS ACTION FAIRNESS ACT OF 2005, 28 USC §§ 1332(d), 1453, 1711-1715; David G. Owen, *Federal Preemption of Product Liability Claims*, 55 S.C. L. REV. 411 (2003).

[100] Joachim Pohl, *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT (2012/02).

[101] JACOB A. STEIN, ADMINISTRATIVE LAW §§ 49.01-03 (Exhaustion of Administrative Remedies) (2013).

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