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# **BRIEFING BOOK**

## **TORT LITIGATION: BY THE NUMBERS**

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## PART 1: FILINGS AND TRIALS

### TORT CASES ARE A SMALL PERCENTAGE OF CIVIL CASELOADS

- Tort cases represent only seven percent (7%) of civil cases in state courts, and consist “primarily of automobile tort (40%) [cases]...”<sup>1</sup>
- “Although medical malpractice and product liability cases often generate a great deal of attention and criticism, they comprise...less than 1% of the total civil caseload....”<sup>2</sup>
- These rates are consistent with other recent National Center for State Courts (NCSC) data.<sup>3</sup>

### CONTRACT CASES, PRIMARILY DEBT COLLECTION LAWSUITS, DOMINATE CIVIL CASELOADS

- Contract and small claims cases comprise 80 percent of civil caseloads.<sup>4</sup> More specifically, “slightly less than two-thirds (64%) of the cases are contract disputes,” with contract caseloads consisting “primarily of debt collection (37%), landlord/tenant (29%), and foreclosure (17%) cases.” And “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.”<sup>5</sup>
- As NCSC explains, “The picture of contemporary litigation that emerges ... 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.”<sup>6</sup>

### TORT CASE FILINGS ARE DROPPING WHILE CONTRACT CASES ARE INCREASING

- Long-term NCSC data show a 63 percent *increase* in contract litigation in 13 states from 1999 to 2008. In contrast, tort filings *fell* by 25 percent in those same states during the same ten-year period.<sup>7</sup>
- From 2005 to 2010, “contract caseloads increased 52 percent (10.5% per annum), much of it occurring in 2008 with the onset of the recession,” (*e.g.*, debt collections, foreclosures) in the general jurisdiction courts of 9 states reporting. In addition, between 2001 and 2010, incoming contract caseloads increased 65 percent in those same courts. Moreover, between 2007 and 2008, the average increase in contract cases among the 9 states reporting was 22 percent.<sup>8</sup>

## **CONTRARY TO POPULAR MYTH, FEW INJURED AMERICANS FILE LAWSUITS**

- As NCSC recently found, “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, international treaties, and legislative requirements that litigants exhaust administrative remedies in state or federal agencies before seeking court review have also proliferated in recent years.”<sup>9</sup>
- The latest Rand Institute for Civil Justice analysis of how many injured people file lawsuits found that only 10 percent of injured Americans ever file a claim for compensation, which includes informal demands and insurance claims. Only two percent file lawsuits.<sup>10</sup>
- Academics generally concede there is no evidence that “frivolous” lawsuits are a problem.<sup>11</sup>

## **THE VAST MAJORITY OF TORT CASES ARE RESOLVED WITHOUT JUDGE OR JURY**

- “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.”<sup>12</sup>
- These rates are consistent with other recent NCSC data.<sup>13</sup>

## **THE CIVIL JUSTICE SYSTEM IS BECOMING INCREASINGLY PRIVATIZED; COURTROOM TRIALS ARE DRAMATICALLY DECLINING**

- According to NCSC, “The proportion of civil cases disposed by trial has decreased dramatically over the past 40 years.”<sup>14</sup> As the U.S. Department of Justice (DOJ) found, between 1996 and 2005, the number of tort trials concluded in state courts in the nation’s 75 most populous counties *dropped* by 31.5 percent. Among the tort case types, product liability registered one of the largest declines – falling by 46.7 percent.<sup>15</sup>
- “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.”<sup>16</sup>
- “[M]any routine consumer and commercial transactions (e.g., utility contracts, financial services agreements, health-care and insurance contracts, commercial mergers, and employment contracts) now specify that future disputes must be resolved by mediation or binding arbitration. The rise of the Internet economy has also spurred the development of online dispute resolution forums for major Internet-based companies such as E-bay, PayPal, and Amazon. 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.”<sup>17</sup>

- NCSC also warned that “[r]eductions 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.”<sup>18</sup>

## PART 2: HOW VICTIMS FARE

### PREVAILING PARTIES WIN MODEST AWARDS IN CIVIL CASES

In its most recent study, NCSC found that, “[w]ith rare exceptions, the monetary value of cases disposed in state courts is quite modest. . . . 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.”<sup>19</sup>

### IT IS DIFFICULT FOR VICTIMS TO PREVAIL OR WIN MONETARY DAMAGES IN TORT CASES

- Seventy-five percent of tort judgments were less than \$12,200.<sup>20</sup> In addition, NCSC found that “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%).”<sup>21</sup>
- In a 2005 national sample of state courts of general jurisdiction, half of plaintiff winners in tort trials were awarded \$24,000 or less in damages.<sup>22</sup> Another sample of long-term data from state trials in the nation’s 75 most populous counties shows that plaintiff median damage awards in tort trials have been consistently low – \$38,000 in 1996, \$30,000 in 2001 and \$31,000 in 2005.<sup>23</sup> With specific regard to verdicts by juries, there has been a steep decline: the median damage amount decreased by 53.5 percent, from \$71,000 in 1992 to \$33,000 in 2005.<sup>24</sup>
- In its most recent study, NCSC discovered that judgments exceeded \$0 in 11 percent of tort cases, “which may be interpreted as a very rough proxy for the plaintiff win rate,” although this rate “likely underestimate[s] the actual rate at which plaintiffs prevailed, but it is not known by how much.”<sup>25</sup>
- A DOJ study found that plaintiffs prevailed in 51.3 percent of tort cases before juries, while winning before judges 56.2 percent of the time. (DOJ found no statistically significant difference in win rates between bench and jury trials for tort cases.)<sup>26</sup>

## PUNITIVE DAMAGES ARE RARELY AWARDED IN TORT CASES AND ARE MODEST IN AMOUNT

In 2005, punitive damages were awarded in only 3 percent of tort cases with plaintiff winners; for contract cases, it was 8 percent. The median punitive damage award to plaintiff winners for all tort cases was \$55,000. In contract cases, the median was higher – \$69,000.<sup>27</sup>

## HIGH JURY VERDICTS ARE FREQUENTLY REDUCED AFTER TRIAL

- According to DOJ, in 2005, compensatory damages awarded to plaintiff winners were reduced in 15 percent of tort trials, with such awards being reduced by 40 percent on average.<sup>28</sup>
- In a study of post-trial activity for a sample of verdicts in California and New York, Rand’s Institute for Civil Justice reported that “both settlement and appeal are more common in cases with larger jury verdicts” and “often lead to substantial reductions in the amount defendants ultimately pay to plaintiffs.”<sup>29</sup> As Cornell University Law Professor Valerie P. Hans and Duke University Law Professor Neil Vidmar explain in *American Juries: The Verdict*, “The fact that the jury verdict is not the end of litigation is often overlooked in discussions of the role of the jury.”<sup>30</sup>

## ADDITIONAL CHALLENGES FOR PLAINTIFFS, RAISING CONSTITUTIONAL CONCERNS

- **Heightened pleading standard.** As NCSC found, “In federal courts, plaintiffs must now allege sufficient facts to allow a trial judge to determine the plausibility of a claim. 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.”<sup>31</sup>
- **Expert evidence determinations.** According to NCSC, “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. This process has raised Seventh Amendment concerns related to judges usurping the jury’s role in making determinations about the weight of expert evidence.”<sup>32</sup>

## OTHER CIVIL JUSTICE CONCERNS

- **Budget cuts.** As NCSC explained, “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-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.”<sup>33</sup>
- **Distorted perceptions.** NCSC also concluded that there is a “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.”<sup>34</sup>

## NOTES

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<sup>1</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>. The report examines approximately five percent of civil cases disposed in state courts nationally between July 1, 2012 and June 30, 2013.

<sup>2</sup> Ibid.

<sup>3</sup> See, e.g., National Center for State Courts, “2013 Civil Caseloads – Trial Courts: 2013 Statewide Tort Caseloads and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro); National Center for State Courts, “2012 Civil Caseloads – Trial Courts: 2012 Statewide Tort Caseloads and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro); Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*; (National Center for State Courts 2012), [www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/Home\\_Page/csp\\_2012.ashx](http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/Home_Page/csp_2012.ashx); Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads* (National Center for State Courts 2011), <http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf>; Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* (National Center for State Courts 2010), <http://www.courtstatistics.org/OtherPages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx>. See also, National Center for State Courts, “2013 Civil Caseloads – Trial Courts: 2013 Statewide Medical Malpractice Caseloads and Rates,”

[http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro); National Center for State Courts, “2012 Civil Caseloads – Trial Courts: 2012 Statewide Medical Malpractice Caseloads and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro).

<sup>4</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Robert C. LaFountain and Cynthia G. Lee, “Medical Malpractice Litigation in State Courts” (April 2011), [www.courtstatistics.org/FlashMicrosites/CSP/images/ch-18-1.pdf](http://www.courtstatistics.org/FlashMicrosites/CSP/images/ch-18-1.pdf).

<sup>8</sup> National Center for State Courts, “Contract Caseloads Climb for Fifth Consecutive Year” <http://www.courtstatistics.org/Civil/2012W4CIVIL.aspx>.

<sup>9</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>10</sup> Rand Institute for Civil Justice, *Compensation for Accidental Injuries in the United States* (1991).

<sup>11</sup> Much research in this area has been in the area of medical malpractice. See, e.g., Theodore Eisenberg, “The Empirical Effects of Tort Reform,” *Research Handbook on the Economics of Torts*, Forthcoming; Cornell

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Legal Studies Research Paper No. 12-26, April 1, 2012, <http://ssrn.com/abstract=2032740> (“Evidence from medical malpractice studies finds no robust evidence that frivolous suits are common...”); David A. Hyman and Charles Silver, “Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid,” 59 *Vand. L. Rev.* 1085 (May 2006), [http://faculty.law.miami.edu/mcoombs/documents/Hyman\\_Silver.pdf](http://faculty.law.miami.edu/mcoombs/documents/Hyman_Silver.pdf) (citing Chris Guthrie, “Framing Frivolous Litigation: A Psychological Theory,” 67 *U. Chi. L. Rev.* 163, 163 n.2 (2000) (“citing sources recognizing dearth of hard evidence showing frivolous lawsuits are a serious problem”). *See also*, Testimony of Duke Law School Professor Neil Vidmar before the U.S. Senate Committee on Health, Education, Labor and Pensions, Hearing on “Medical Liability: New Ideas for Making the System Work Better for Patients,” June 22, 2006, <http://help.senate.gov/imo/media/doc/vidmar.pdf> (“There is a widespread belief that injured patients sue at the drop of a hat . . . In fact, the opposite appears to be true.”)

<sup>12</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>13</sup> *See, e.g.*, National Center for State Courts, “2013 Civil Caseloads – Trial Courts: 2013 Tort Jury Trials and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro); National Center for State Courts, “2012 Civil Caseloads – Trial Courts: 2012 Tort Jury Trials and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro). *See also*, National Center for State Courts, “2013 Civil Caseloads – Trial Courts: 2013 Medical Malpractice Jury Trials and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro); National Center for State Courts, “2012 Civil Caseloads – Trial Courts: 2012 Medical Malpractice Jury Trials and Rates,” [http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP\\_Intro](http://www.ncsc.org/Sitecore/Content/Microsites/PopUp/Home/CSP/CSP_Intro).

<sup>14</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>15</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>16</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>23</sup> *Ibid.*

<sup>24</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Civil Bench and Jury Trials in State Courts, 2005,” NCJ 223851 (October 2008)(revised April 9, 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/cbjtsc05.pdf>.

<sup>25</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>26</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>27</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Punitive Damage Awards in State Courts, 2005,” NCJ 2233094 (March 2011), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdasc05.pdf>.

<sup>28</sup> U.S. Department of Justice, Bureau of Justice Statistics, “Tort Bench and Jury Trials in State Courts, 2005,” NCJ 228129 (November 2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/tbjtsc05.pdf>.

<sup>29</sup> Seth A. Seabury, “Case Selection after the Trial: A Study of Post-Trial Settlement and Appeal,” RAND Working Paper No. WR-638-ICJ (May 2009), [http://www.rand.org/content/dam/rand/pubs/working\\_papers/2009/RAND\\_WR638.pdf](http://www.rand.org/content/dam/rand/pubs/working_papers/2009/RAND_WR638.pdf).

<sup>30</sup> Valerie P. Hans and Neil Vidmar, *American Juries: The Verdict*. Amherst, NY: Prometheus Books (2007).

<sup>31</sup> National Center for State Courts, *The Landscape of Civil Litigation in State Courts* (November 2015), <http://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*