

...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE
& DEMOCRACY
****NEWS****

Dear Friend,

This issue of *Impact* grew out of the recent series of groundbreaking fact sheets that we produced, which we call "Snapshot of Civil Justice."

With the election of so many new legislators and other officials around the country, we knew it would be important to start educating lawmakers, opinion leaders, the media and the public at large about the importance of the civil justice system, and to help counter the many myths that currently influence public opinion. We hope our fact sheets are an important first step.

While much of this information presents a national perspective, CJ&D is also developing some state-specific information to assist at the local level. If you are interested in more information about that, please let us know.

CJ&D will be producing many new studies, fact sheets and white papers from this year, please stay tuned. And let us know how we can be of more assistance to you in the fight to preserve the civil justice system.

Thank you!

Joanne Doroshow
Executive Director

IN THIS ISSUE: BY THE NUMBERS

Tort Litigation- Under Control

Contrary to much conventional wisdom about the civil justice system, a significant body of empirical evidence shows the rather the "exploding," tort cases are declining. Very few who are injured actually sue, and of the few who do file cases, very few end up in court.

According to data from Court Statistics Project, a joint project of the National Center for State Courts, the State Justice Institute and the Bureau of Justice Statistics of the Department of Justice, tort filings have been declining since 1990. On the other hand, contract suits, usually

between businesses, are growing.

Only about three percent of civil cases filed in "unified courts" (where all civil cases are heard) and 17 percent of



"general jurisdiction courts" (which hear only certain types of cases) are tort cases. In 2004, tort cases accounted for only five percent of general civil cases in unified

courts in six states reporting, while contract cases comprised 27 percent. Tort cases were even outnumbered by probate cases. What's more, only four percent of tort cases were for medical malpractice; only seven percent involve product liability claims (non-asbestos).

According to the U.S. Justice Department, in federal courts from 1985-2003, the number of tort trials fell by 79 percent.

Moreover, securities fraud class actions case filings are at an all-time low. According to a 2007 report by the
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Juries - Safeguarding Democracy

Civil juries are competent, responsible and rational, and their decisions reflect continually changing community attitudes about corporate responsibility and government accountability. Here is what the data shows:

First, jury verdicts are far lower than commonly believed. The overall median damages award in tort jury trials declined 56 percent from \$64,000 in 1992 to

\$28,000 in 2001, according to the most recent data studied by the U.S. Department of Justice. The median final award of \$28,000 in tort jury trials did not differ statistically from the median of \$23,000 in tort bench trials (decided by a judge).

In medical malpractice cases, according to Public Citizen's analysis of National Practitioner Data Bank (NPDB) data, "the annual average payment for a med-

ical malpractice verdict has not exceeded \$1 million in real dollars since the beginning of the NPDB. The average payment for a medical malpractice verdict in 1991 was \$284,896. In 2005, the average was \$461,524. Adjusting for inflation, however, shows that the average is actually declining. The 2005 average adjusted for inflation is only \$260,890 - a decline of 8 percent since 1991."

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Tort Litigation- Under Control *continued...*



Stanford Law School Securities Class Action Clearinghouse, a joint project between Stanford Law School and Cornerstone Research, “The number of securities fraud class actions filed in 2006 was the lowest ever recorded in a calendar year since the adoption of the Public Securities Litigation Reform Act (PSLRA) of 1995.... The study reports securities fraud class actions decreased by 38 percent since 2005, plunging from 178 filings to just 110, making [2006] numbers nearly 43 percent lower than the ten-year historical average of 193.”

Moreover, contrary to popular myth, few injured Americans file lawsuits. According to Rand's Institute for Civil

Justice, only 10 percent of injured Americans ever file a claim for compensation and only two percent file lawsuits.

In the medical malpractice area, between 44,000 and 98,000 Americans die each year (and 300,000 are injured) due to medical errors in hospitals alone, according to the Institute of Medicine. Yet eight times as many patients are injured as ever file a claim; 16 times as many suffer injuries as receive any compensation.

A recent Harvard School of Public Health study that examined 1452 closed claims concluded that “[p]ortraits of a malpractice system that is stricken with frivolous litigation are overblown.” The study found that most injuries resulting in claims were caused by medical error, and that those that weren't were, nevertheless, not “frivolous” claims.

Professors David A. Hyman and Charles Silver said in their article *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, “With about ten times as many injuries as malpractice claims, the only conclusion possible is that

injured patients rarely file lawsuits.”

Moreover, the vast majority of tort cases that are filed are resolved by neither juries nor judges. In 2004, the Court Statistics Project found that of the states they studied, the median percentage of civil cases disposed of by trial was one-half of one percent. No state reported a jury trial rate of over four percent. Bench trials were more common, yet still rarely accounted for more than four percent of civil dispositions. The number of tort trials decided by a jury fell 23 percent from 1992 to 2001. And in federal court, the percentage of tort cases concluded by trial in U.S. District Courts declined from 10 percent in the early 1970's to only 2 percent in 2003, according to the U.S. Justice Department.

Similarly with regard to medical malpractice cases, a Harvard closed claims study reported in the *New England Journal of Medicine* in 2006 found that only fifteen percent of claims were decided by trial verdict. The vast majority of true medical malpractice cases settle. And as Duke Law professor Neil

Vidmar, who has extensively studied medical malpractice litigation, recently testified in the U.S. Senate, “Research on why insurers actually settle cases indicates that the driving force in most instances is whether the insurance company and their lawyers conclude, on the basis of their own internal review, that the medical provider was negligent.... In interviews with liability insurers that I undertook in North Carolina and other states, the most consistent theme from them was: 'We do not settle frivolous cases!'”

Vidmar further testified, “Without question the threat of a jury trial is what forces parties to settle cases. The presence of the jury as an ultimate arbiter provides the incentive to settle but the effects are more subtle than just negotiating around a figure. The threat causes defense lawyers and the liability insurers to focus on the acts that led to the claims of negligence.

Indeed, the jury is a hallmark of our democracy, ultimately ensuring the fairness of our civil justice system.

Punitive Damages Are Rare

Contrary to popular myth, juries rarely award punitive damages. Yet you would never know that by reading the news.

Punitive damages, which are imposed in cases of egregious misconduct, are awarded in less than one percent of all civil cases. And according to the U.S. Justice Department, punitive damages were awarded in only 5.3 percent of tort cases.

A study by Professor Steven Garber found that news coverage of verdicts was more likely if punitive damages were part of the award, appearing in 21.3 percent of all reports of verdicts.

According to Garber, “an award of roughly \$ 2 million that includes a punitive component is as likely to receive newspaper coverage as a \$25 million award that is entirely compensatory. Holding total damages constant ... the probability of a newspaper article is 3.5 to 5.5 times higher if a component of the damages is punitive.” After looking at three different TV news databases, Garber also discovered that despite very little television coverage of tort verdicts, “virtually all of the television coverage we found was triggered by verdicts that included unusually large punitive damages awards.”

Juries - Safeguarding Democracy *continued...*

What's more, contrary to popular notions, it is difficult for victims to win tort cases before juries. In 2001, the most recent year studied by the U.S Department of Justice, plaintiffs won only 50.7 percent of tort cases before juries, compared to 64.7 percent before judges. According to the Harvard School of Public Health, as reported in the *New England Journal of Medicine*, patients in medical malpractice cases "rarely won damages at trial, prevailing in only 21 percent of verdicts as compared with 61 percent of claims resolved out of court.

Moreover, consistent empirical studies show juries to be competent, effective, and fair decision makers able to handle complex cases, and they are not anti-business; in fact, the opposite is true. Jury researcher and professor Valerie P. Hans, in her book *Business on Trial*, found that jurors "expressed concern about the effect of an award on the business defendant" and that jurors are "often suspicious and ambivalent toward people who bring lawsuits against business corporations."

According to Hans, "...[m]ost business litigants in the cases that were part of this study were described in a neutral or positive light. In a minority of cases, jurors levied some harsh comments against particular business defendants, but to the extent that I could determine through

"Contrary to popular notions, it is difficult for victims to win tort cases before juries."

interviews, their criticism seemed to be linked largely to trial evidence of business wrongdoing rather than to jurors' preexisting anti-business hostility. In fact, general attitudes toward business were only modestly related, at best, to judgments of business wrongdoing."



Despite this evidence, corporations and their insurers have been at the forefront of attacks on civil juries over the years. These business interests seek to limit their liability exposure by proposing to take compensation judgments away from juries. They seek to limit the power and authority of the civil jury, and in some cases, to replace the civil jury system with a statutory structure - like so-called "health courts - over which their political action committee money can have more control. But as the late U.S. Supreme Court Chief Justice William Rehnquist once wrote, "The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence.... A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded."

Lawyers' And Their Income

According to the Bureau of Labor Statistics, the median income of all lawyers in 2004 was \$94,930. By comparison, the median income for doctors ranged from \$156,010-\$321,686, depending upon specialty, and \$129,920 for dentists.

Moreover, a 33 percent contingency fee is most commonly charged by lawyers, according to a carefully-designed, systematic study of contingency practices in this country by Professor Herbert Kritzer. Kritzer found that figure to apply to 92 percent of the cases he studied. Five percent of the cases called for fees of 25 percent or less, 2 percent specified fees around 30 percent, and only 1 percent specified fees exceeding 33 percent.

Similarly, a comprehensive study by professors Theodore Eisenberg, Cornell Law School and Geoffrey P. Miller, New York University School of Law, who looked at 370 class action lawsuits that settled between 1993 and 2002, "found that median attorneys' fees were only 21.9 percent - even less than the typical 33 percent."



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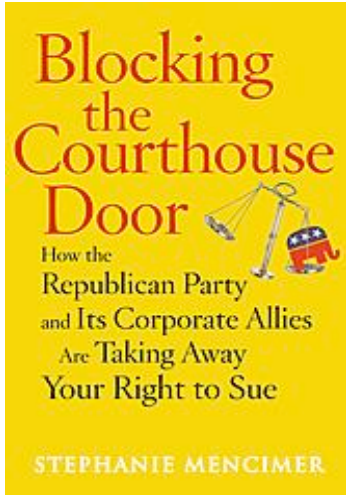
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Mencimer is a contributing editor of the Washington Monthly, and was previously an investigative reporter for the Washington Post and staff writer for Legal Times. She won the 2000 Harry Chapin Media Award for reporting on hunger and poverty.

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