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Benefits and Costs of Civil Justice Reform

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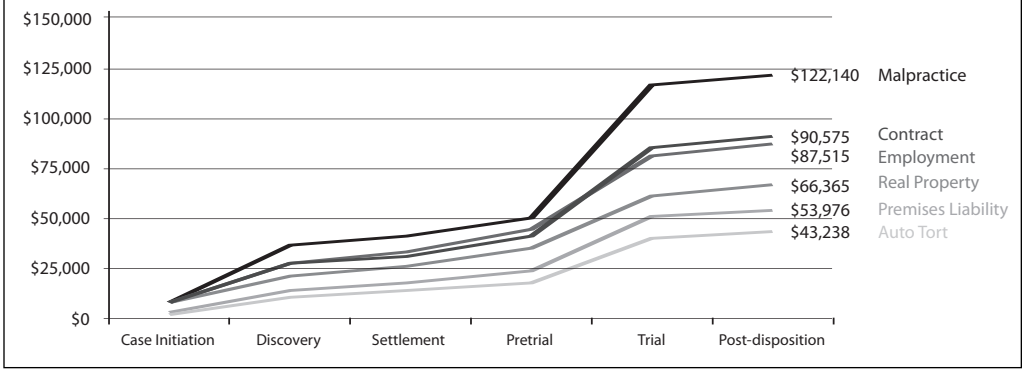
For more than a century, excessive costs and delays have been a chronic complaint about the American civil justice system. Although some states took steps to improve civil case processing in the past, most of those efforts had only a negligible effect, if any, and few were able to sustain those effects over time. Recently, however, a number of states have implemented civil justice reforms that couple changes in procedural rules with improved civil case automation and staffing models that offer new hope for significant improvements in civil case processing. This paper focuses on four reforms implemented in the Eleventh Judicial Circuit Court of Florida (Miami-Dade); in Strafford and Carroll counties, New Hampshire; and statewide in Utah and Texas.[1]

The working assumption for all four reforms was that streamlining the litigation process, providing more effective oversight, and reducing opportunities for satellite litigation would save litigants both time and money without compromising fairness. Assessing the impact of the reform on time is a fairly straightforward task. Time-to-disposition is a standard measure that courts have used for decades to assess performance. Many states have adopted explicit time standards for civil cases based on either the *Model Time Standards for State Trial Courts*[2] or state-specific time standards. Most states also monitor clearance rates to identify backlogs before they become excessive.[3]

Monetary savings, in contrast, have historically been difficult to estimate due to lawyers' reluctance to disclose the details of client financial transactions. In 2013, the National Center for State Courts (NCSC) surveyed experienced attorneys about the amount of time expended to complete litigation tasks and used those responses to generate estimates of legal and expert witness fees for a variety of civil case cases (Figure 1).[4] Trials were the single most expensive stage of litigation, followed by discovery, pretrial preparation, case initiation, and settlement negotiations. Theoretically, therefore, civil justice reforms that streamline discovery and that promote non-trial case resolution could reasonably be expected to reduce litigation costs. Cases that were disposed by summary judgment or trial would also benefit from a streamlined process that reduced discovery and pretrial costs. This article describes findings from the evaluations of those reforms and, where possible, combines estimates of costs expended in civil litigation with data from these evaluations to offer preliminary estimates of the cost savings to litigants.

Figure 1: Median Costs of Litigation by Case Type



ELEVENTH JUDICIAL CIRCUIT COURT OF FLORIDA

The 2008-2009 economic recession precipitated a spike in mortgage foreclosure actions across the country. In Florida, mortgage foreclosure cases increased by 233 percent between 2006 and 2009 statewide, and by 276 percent in the Eleventh Judicial Circuit Court (Miami-Dade). Traditional case management had been performed by judges, who examined the needs of

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Footnotes

1. The Eleventh Judicial Circuit Court collected data on the impact of its approach to the Florida foreclosure crisis to satisfy requirements imposed by state and local legislators as a condition of receiving additional funding. The other three reforms were rigorously evaluated by the National Center for State Courts (NCSC).
2. The *Model Time Standards for State Trial Courts* were adopted by the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management, and the ABA House of Delegates in August 2011. Richard Van Duizend et al., Model Time Standards for State Trial Courts (2011).
3. Clearance rates reflect the number of outgoing (closed) cases as a percentage of income (newly filed) cases. *See* CourTools Measure 2 (2005).
4. The study reported estimated costs at the 25th, 50th and 75th percentiles (the interquartile range) for cases disposed at different stages of litigation. For each of the case types studied, litigation costs doubled from the 25th to the 50th percentile, and then doubled again from the 50th to the 75th percentile, resulting in a surprisingly broad range of costs at every stage of litigation. Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers,* Voir Dire 22 (Spring 2013).

cases one by one as each case was presented by attorneys. The foreclosure crisis turned that model upside down, as attorneys had more cases than they could manage and quality control was erratic. To address the crisis, the Eleventh Judicial Circuit Court obtained funding to develop a case management system featuring four distinct tiers of processing and oversight: technology, clerical staff, skilled (professional) staff, and judicial staff.

The design of this staffing model was based on two key premises. First, judicial involvement in case management produces momentum toward resolution only if the case is in a position to move to the next stage in litigation at the time the judge is asked to intervene. Second, a judge is the most expert, highly trained, and expensive human resource in the court system. Thus, the intent of the staffing model was to ensure that judges would not perform routine case reviews that could be performed by less expensive court staff. Each staffing tier was assigned tasks that matched the training level of the individuals employed in that capacity. The staffing model was implemented in two divisions of the Circuit Court to address the backlog of foreclosure cases in 2011.

The court collected data for evaluation purposes on the clearance rates for all divisions managing mortgage foreclosure cases. The clearance rate for the two divisions using the staffing model was nearly double (281%) compared to the division that did not employ the staffing model (145%). Moreover, newly filed cases were disposed considerably faster under the staffing model. Nearly two-thirds of cases (62%) were disposed within 12 months compared to 45 percent of cases in the division that did not employ the staffing model. Eighty percent (80%) of newly filed cases were disposed within 18 months compared to only half (52%) of cases in the division that did not employ the staffing model.

The NCSC has not developed time and cost estimates for mortgage foreclosure cases, so it is not possible to estimate the financial impact of the staffing model on litigant costs. But it is reasonable to assume that the reduced disposition time translates to a reduction in litigant costs overall, particularly when the reduced disposition time is due to increased court oversight of litigant filings to prevent court hearings from taking place on cases in which the litigants are unprepared to proceed. While court hearings are necessarily expensive events, those costs are considerably more justifiable when they move the case toward resolution than when they merely result in a continuance to allow the parties more time to prepare.

NEW HAMPSHIRE PAD PILOT RULES

The New Hampshire reforms involved implementation of the Proportional Discovery/Automatic Disclosure (PAD) Rules on a pilot basis in two counties effective October 1, 2010. The rules were expected to change litigation practice in a number of ways, but the most significant changes involved changing the pleading requirement from a notice pleading to a fact-pleading standard and the introduction of a mandatory disclosure requirement. The change in the fact-pleading standard was expected to reduce the time to disposition, mostly by reducing the amount of time expended on case initiation and discovery. The introduction of the mandatory disclosure requirement was expected to reduce the amount of time needed to complete discovery, which in turn would reduce overall time to disposition, as well as reduce the incidence of satellite litigation involving discovery disputes.[5]

Ironically, neither of the expected effects of the PAD Rules ultimately occurred. Anecdotal reports suggested that the cases were getting underway somewhat faster due to the new rules, but were not actually resolving at a faster rate. A possible reason was that the PAD Rules replaced a requirement for an in-court case-scheduling conference with a requirement that attorneys submit a joint case-scheduling order, but did not expressly impose expectations for timeliness. Consequently, attorneys adopted the same time frames for completing litigation tasks that they had before the rules went into effect.

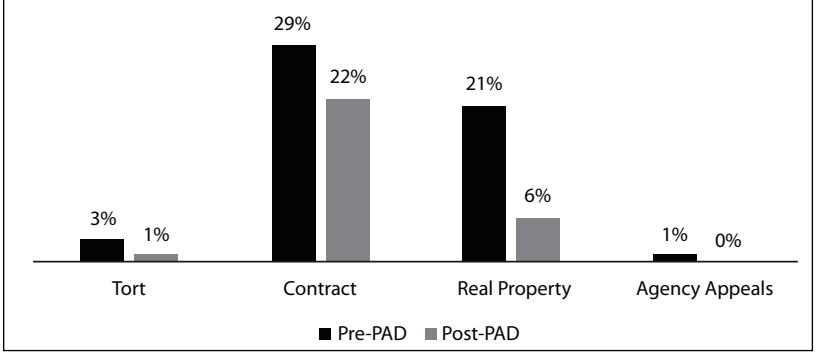
The PAD Rules likewise did not affect the rate of discovery disputes, which arose in approximately one-tenth of civil cases in both the pre-implementation and post-implementation periods. These rates do not, on their face, suggest an overly litigious legal culture in which lawyers routinely complain of excessive discovery demands. This does not discount the possibility that discovery disputes occur, but if they are generally resolved without court involvement, they would be difficult to control through procedural rules.

An unexpected impact of the PAD Rules was a decrease in the rate of default judgments from 19 percent to 12 percent overall, which was attributed to the increased amount of information disclosed about the plaintiff's claims under a fact-pleading standard. This effect was observed across all case categories (Figure 2). Yet the reduction in default rates did not uniformly translate to increased rates of other dispositions. Tort cases, for example, were more likely to be dismissed or withdrawn under the PAD rules, but there was no increase in judgment rates and a slight decrease in settlement rates. Contract cases experienced a significant increase in formal judgment rates that corresponded almost exactly with the decrease in default rates. Real property cases experienced a significant increase in both settlement and formal judgments rates under the PAD rules, but no difference was observed in the dismissal rate. For agency appeals, the decrease in the default rate was relatively modest, but the dismissal rate decreased by almost half (37 percent to 19 percent) and the judgment rate nearly doubled (12 percent to 23 percent).

Looking at these effects through the lens of litigation costs might reasonably prompt the conclusion that litigant costs had increased in many cases. By making an appearance, defendants

5. The NCSC evaluation compared key case-processing events and outcomes for civil cases filed before and after implementation of the PAD Rules. Debt collection and tort cases comprised nearly two-thirds of the civil caseloads in those samples (34% and 29%, respectively). NCSC staff also interviewed key stakeholders involved in the development and implementation of the PAD Pilot Rules, as well as attorneys who had litigated cases under the PAD Pilot Rules, but who were not involved in their development. Paula Hannaford-Agor et al., New Hampshire: Impact of the Proportional Discovery/Automatic Disclosure (PAD) Pilot Rules (August 19, 2013).

Figure 2: Default judgment rate before and after implementation of NH PAD Pilot Rules



would naturally incur the costs of filing an answer and otherwise engaging in discovery, pretrial motions, and possibly trial proceedings. Except for cases in which the plaintiff filed a motion to dismiss or to withdraw the case, plaintiffs likewise would have to take additional steps beyond filing a motion for a default judgment. Based on NCSC's "Civil Litigation Cost Model Project" (CLCM) litigation cost estimates, the additional median costs incurred by the plaintiff in settling cases that would have resulted in a default judgment before the PAD Rules could range up to $800 in a debt collection case, $12,000 in an automobile tort case, $14,400 in a premises liability case, and nearly $20,000 in a real property case.[6] Yet, by providing sufficient information on which the defendant can assess the legitimacy of the plaintiff's claims, the PAD rules evidently made it worthwhile for defendants to respond to the lawsuit rather than accepting a default judgment. Like the mortgage foreclosure staffing model implemented by the Eleventh Judicial Circuit Court in Florida, the New Hampshire PAD rules introduced a procedural reform that increased the likelihood that meaningful litigation would take place, ostensibly improving the likelihood of a just outcome.

UTAH RULE 26 EVALUATION

The Utah civil justice reforms focused exclusively on the discovery stage of litigation. Amendments to Rule 26 and other rules governing discovery were implemented on a statewide basis on November 1, 2011. The rules introduced an explicit proportionality requirement in discovery, shifted the burden of demonstrating the relevance and proportionality of discovery requests to the party requesting discovery, and established three distinct "discovery tiers" with a presumptive scope of discovery based on amount-in-controversy for each tier. The amended rules also introduced a mandatory disclosure requirement and an expedited process for resolving discovery disputes.[7] The anticipated impact of the Rule 26 revisions included decreased time to complete discovery and a corresponding decrease in time to disposition in contested cases,[8] a decrease in the frequency of discovery disputes, and a reduction in associated litigation costs.

The revisions to Rule 26 significantly decreased the time to disposition for all case types and at all discovery tiers in the post-implementation sample of cases. The most immediate impact occurred in debt collection cases involving amounts-in-controversy less than $50,000 (Tier 1), which disposed at significantly faster rates beginning within 90 days after filing. Non-debt collection cases and civil cases alleging damages greater than $50,000 also disposed at faster rates, but only beginning 12 months after filing.

Another impact of the discovery reforms was the manner in which civil cases disposed. Across all case types and discovery tiers, civil cases were more likely to settle, rather than be disposed by judgment, following implementation of the reforms. The single largest effect occurred in non-debt collection cases alleging damages less than $50,000, for which settlement rates increased by more than two-thirds. Civil cases alleging damages more than $50,000 also settled at significantly higher rates (Figure 3).

Cases that settle avoid the costs associated with proceeding to a disposition by summary judgment or trial. Based on the NCSC costs estimates, for example, parties in a non-debt collection contract case that settled rather than seeking a trial judgment would save as much as $58,000 each in litigation costs. If the parties could settle without formal settlement negotiations or ADR, they could save up to an additional $17,000 per side. These estimates assume that the settlement occurs after discovery is complete; however, the NCSC evaluation also found that more than half (54%) of the cases in the Utah evaluation resolved before discovery was complete. In fact, one-third of civil cases had no discovery other than mandatory disclosures. Moreover, fewer discovery disputes were filed following the Rule 26 revisions. Although it is not possible to quantify those savings in precise terms, reducing the amount of discovery and associated opportunities for disputes over discovery suggests the potential for additional savings of up to $12,000.

TEXAS EXPEDITED ACTIONS RULES

The Texas Expedited Actions Rules, which became effective on March 1, 2013, impose restrictions on civil cases valued $100,000 or less. The rules specify an expedited timeline for discovery and trial in which discovery commences immediately upon filing and must be concluded within 180 days of

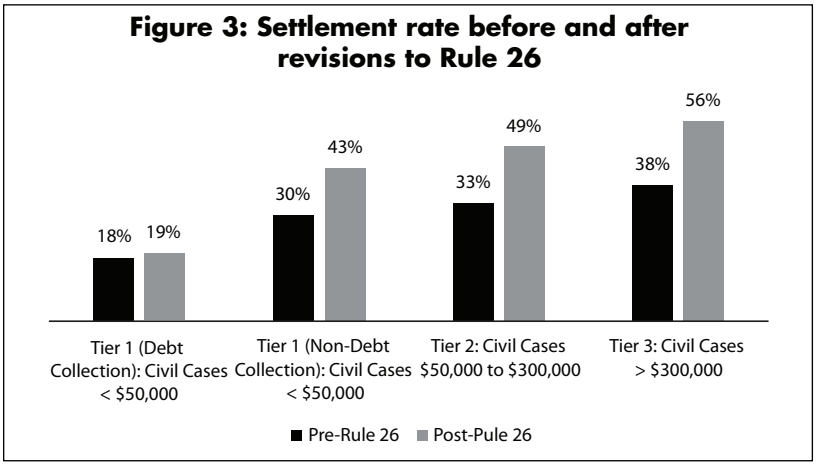
6. Automobile tort and premises liability cases comprised 45 percent of tort cases, and debt collection cases comprised 72 percent of contract cases in the New Hampshire caseload.
7. For the evaluation, the NCSC analyzed case-level data for all cases filed January 1 to June 30, 2011 (pre-implementation sample) and January 1 to June 30, 2012 (post-implementation sample). The NCSC also surveyed attorneys who filed cases in the post-implementation sample and conducted focus groups with Utah district court judges. The attorney surveys collected information about discovery practices that would not ordinarily be documented in the case management system, attorney opinions about the Rule 26 revisions, and estimates of the amount of time expended on various litigation tasks for different types of cases.
8. Discovery does not occur in uncontested cases. Consequently, the NCSC evaluation focused only on cases in which an answer or other responsive pleading was filed.

serving the first discovery request. The trial must be scheduled no later than 90 days after the completion of discovery. The rules also significantly restrict the scope of discovery to no more than 6 hours of oral depositions for all witnesses, no more than 15 written interrogatories, no more than 15 requests for production, and no more than 15 requests for admissions. Finally, the rules impose restrictions on court-ordered ADR. The NCSC evaluated the impact of the rules on contested cases filed in the courts at law in five urban counties.[9]

Like the Utah Rule 26 revisions, implementation of the Texas Expedited Actions Rules resulted in significantly increased settlement rates. Overall, the proportion of cases disposed by settlement increased from 49 percent to 66 percent, with commensurate decreases in summary judgment and trial rates. The settlement rate for commercial contract cases increased by more than half (54%), followed by debt collection cases (34%) and automobile tort cases (5%). In addition to increased settlement rates, settlements occurred on average (median) five months earlier than settlements that occurred before implementation of the expedited actions rules. More than one-third of the cases resolved with no formal discovery over than mandatory disclosures. Based on the NCSC estimates, the cost savings associated with settling cases with little or no formal discovery, rather than proceeding to summary judgment or trial, ranges from just over $1,000 in debt collection cases to as much as $70,000 per side in commercial contract disputes.

The increase in settlement rates was greatest in contract cases, which comprised more than two-thirds of the civil caseload in the NCSC evaluation. The settlement rate in non-automobile tort cases decreased, however, due to a significant increase in trial rates.[10] Moreover, nearly half of attorneys reported that it would have been economically feasible to bring the case to trial, even in cases that ultimately settled, which accomplished an explicit objective of the rules to ensure that parties who wanted a trial on the merits could afford to do so. Thus, while the increase in trial rates for those cases would result in up to $45,000 in increased costs per side, litigants may view those costs as warranted to secure a fair outcome.

Figure 3: Settlement rate before and after revisions to Rule 26



CONCLUSIONS

The four civil justice reforms discussed above have been the focus of intense interest by judicial and legal policymakers. Many of the concepts embodied in these reforms have been incorporated in the Recommendations of the CCJ Civil Justice Improvements Committee as necessary components of state court efforts "to promote the just, prompt, and inexpensive resolution of civil cases."[11] Three of these reforms focus on discrete aspects of contemporary civil litigation (e.g., pleading, discovery, caseflow management), while the Texas approach was somewhat more comprehensive in scope.

The precise nature of the impact of these reforms varied somewhat from jurisdiction to jurisdiction, but all of them ultimately had a positive effect on the manner of disposition, time to disposition, or other key case performance measures. For example, the Utah and Texas reforms both resulted in substantial increases in settlement rates. All the reforms except the New Hampshire PAD Rules dramatically reduced disposition times. Increased settlement rates and reduced time to disposition intuitively support predictions of greatly reduced litigation costs. Cases that settle relatively early in the litigation process avoid the costs associated with expensive court proceedings such as summary judgment hearings and bench or jury trials. Of course, these effects would not apply to all cases and likely differ by jurisdiction and by case type. The impact of the New Hampshire PAD Rules is unusual insofar that the primary impact was a significant reduction in the default judgment rate. This results in a larger proportion of

9. The analysis focused on cases that either settled or were resolved by summary judgment, or bench or jury trial, or were pending at the time data collection concluded. The pre-implementation sample consisted of cases filed between July 1 and December 31, 2011, and the post-implementation sample consisted of cases filed between July 1 and December 31, 2013. The NCSC also surveyed attorneys who filed cases under the revised rules, focusing on attorney opinions about the new rules and documenting case information that is not ordinarily reflected in the case management system. To supplement the case-level and attorney survey data, research staff from the Texas Administrative Office of the Courts and students from Baylor University Law School conducted in-depth interviews with judges, case coordinators, and attorneys who had experience with the rules. Like the Utah Rule 26 revisions, implementation of the Texas Expedited Actions Rules resulted in a significant shift from cases resolved by judgment to cases resolved by settlement and a significant decrease in the time to disposition. Attorneys reported high compliance with the rules, even with greatly restricted scope of discovery.
10. Cases disposed by summary judgment or trial appeared to take longer to dispose. Upon closer examination, however, it became apparent that the increased settlement rate was taking place in relatively uncomplicated contract cases that previously would have been disposed by bench trial early in the case. Only the more complex contract and tort cases remained for trial, and although these cases needed comparatively more time for discovery and pretrial motions, they were still being tried earlier than comparable cases before the expedited actions rules were enacted.
11. Conference of the Chief Justices, *CCJ Civil Justice Improvements Committee, Call to Action: Achieving Civil Justice for All* 16 (2016).

defendants filing an appearance to contest the plaintiff's claims, which would necessarily incur additional litigation costs and time for both sides.

Perhaps the most important point about these reforms is that they provide incentives to litigants to engage in more meaningful litigation activities. Mandatory disclosures, for example, displace much of the need for traditional discovery practice as well as minimize opportunities for disputes to arise. An accelerated time frame for completing key stages of litigation prompts litigants to focus on the issues that form the crux of the dispute. And delegating routine case management to court staff facilitates more targeted and meaningful judicial involvement in the case, providing incentives for parties to prepare adequately for routine court deadlines and events. Consequently, when litigation activity takes place resulting in some cost to litigants, those costs are presumably incurred with the intent to bring the case to a fair outcome.

There are, of course, several additional questions related to the premise that litigation costs should only be incurred for tasks that are truly necessary to resolve the case. The first is whether the litigants themselves believe that the value of any individual task associated with the litigation justifies its actual costs. Although civil justice reforms may reduce litigation costs, it does not necessarily follow that litigants will agree that the value of those tasks outweighs the cost.[12] A second question is whether litigants have sufficient information about the likely outcome of the litigation with which to make an informed judgment about undertaking various litigation tasks. A related question is whether litigants are given the opportunity to give informed consent to the anticipated costs of litigation before they are actually incurred. None of these questions are addressed in this article, but the types of civil justice reforms discussed here render those questions more salient insofar that litigants can have greater confidence that any costs expended in litigation are more likely to ensure a meaningful litigation experience than before.

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12. *See, e.g.*, John M. Greacen, *How Fair, Fast, and Cheap Should Courts Be? Instead of Letting Lawyers and Judges Decide, New Mexico Asked Its Customers,* 82 JUDICATURE 287 (MAY-JUNE 1999).