

U.S. Suits Multiply, But Fewer Ever Get To Trial, Study Says

By Adam Liptak

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On television and in the popular imagination, lawsuits and prosecutions end in trials, in open court before a jury. In reality, according to a new study, trials have become quite uncommon.

In 1962, the study says, 11.5 percent of all civil cases in federal court went to trial. By last year, that number had dropped to 1.8 percent. And even though there are five times as many lawsuits today, the raw number of civil trials has dropped, too. They peaked in 1985 at 12,529. Last year, 4,569 civil cases were tried in federal court.

"What's documented here," William G. Young, the chief judge of the Federal District Court in Boston, said in a telephone interview, "is nothing less than the passing of the common law adversarial system that is uniquely American."

The percentage of federal criminal prosecutions resolved by trials also declined, to less than 5 percent last year from 15 percent in 1962. The number of prosecutions more than doubled in the last four decades, but the number of criminal trials fell, to 3,574 last year from 5,097 in 1962.

The study, based on data compiled by the federal court system, was prepared by Marc Galanter, who teaches law at the University of Wisconsin and the London School of Economics, for the American Bar Association.

"This is a cultural shift of enormous significance," said Arthur Miller, a law professor at Harvard.

Opinions vary on whether the shift is a positive one. Negotiated settlements may satisfy both sides in a way a win-or-lose trial cannot, and pretrial dismissals of cases by judges may avoid needless trials of frivolous claims. Both of these alternatives to trial are less cumbersome, less expensive and more efficient.

On the other hand, some studies suggest that individuals suing companies fare considerably better before juries than they do in settlements and before judges, meaning that a decline in the number of trials may hurt plaintiffs with valid claims.

Judges, scholars and lawyers gathered over the weekend in San Francisco for a bar association symposium to discuss the study. Among the possible explanations for what the meeting's organizers call "the vanishing trial" is a growing antagonism to trials by lawyers and judges, who consider them costly and risky. They prefer negotiated settlements and pretrial determinations by judges based only on paper submissions.

"There is a striking philosophical, ideologically driven view that is hostile to trials," said Judge Patrick E. Higginbotham of the United States Court of Appeals for the Fifth Circuit, in New Orleans. He attributed the view to those who prefer mediation to adjudication.

Others view the trend as progress.

"If a trial occurs," said Samuel R. Gross, a law professor at the University of Michigan, "it usually means a whole lot of efforts by a whole lot of people have failed."

Paul Butler, a law professor at George Washington University, disagreed. He said the loss of this form of dispute resolution was a devastating one. "Nobody does trials like Americans," Professor Butler said. "We made it an art form. It's almost as fundamental a part of our culture as jazz or rock 'n' roll."

Data from the state courts, which handle most lawsuits, are less complete and harder to interpret. Legal experts at the National Center for State Courts have studied the available data and say the patterns in them, particularly as they concern jury trials as opposed to those before only judges, are broadly consistent with those in the federal courts.

Judge Higginbotham recalled his life as a federal trial judge in Texas a quarter-century ago. "When I went on the bench," he said, "we tried cases. I sometimes had three juries deliberating."

In 1962, the average federal judge conducted 39 trials a year, including both civil and criminal cases. These days, that number has fallen to 13. Judges spend the rest of their time doing such things as supervising the exchange of information between parties, deciding pretrial motions and urging or approving settlements and plea bargains.

The dearth of trials has resulted in a sort of vicious circle. Many lawyers who call themselves litigators have little trial experience, which may in turn make them wary of taking cases to trial.

"We're almost moving into a barrister model," said Patricia Lee Refo, an Arizona lawyer and official of the American Bar Association, referring to the separate caste of lawyers who try cases in Britain.

On the criminal side, there is almost no dispute that the falling number of trials in the federal courts is because of the revisions in sentencing laws. Defendants who insist on a trial can face much longer sentences than those who accept a plea bargain.

The civil trend is harder to explain, and legal experts have many theories.

Some point to the rise of arbitrations and other less formal means of resolving disputes. Though the number of cases filed in court has continued to increase, it may be that some sorts of cases have gone to other forums. Injury and contract cases, which represented 74 percent of all federal civil trials in 1962, accounted for 38 percent last year, according to Professor Galanter. Those categories of cases, he said, have largely been replaced by employment discrimination and other civil rights cases, which now represent a third of all federal civil trials.

The sheer complexity and cost of litigation, others say, make settlements more attractive. The cost of a trial can exceed the cost of a settlement, giving defendants an incentive to settle. Plaintiffs and their lawyers, on the other hand, often prefer the certainty of a settlement to the possibility of recovering nothing at trial.

"The striking problem," Professor Gross said, "is that we have generated a procedure that is way too expensive if actually employed."

But Gillian Hadfield, a law professor at the University of Southern California, said settlements might actually be in decline.

"We need to follow up on this initial study to confirm these numbers," Professor Hadfield said, "but at this point it looks as though the percentage of cases terminated in settlement has fallen by between 10 and 15 percentage points, from approximately 50 percent in 1970 to between 35 and 40 percent during the 1980's and 1990's."

By contrast, she continued, "nontrial adjudications" -- written decisions by judges typically based only on papers submitted by the parties -- have risen to 50 percent from 32 percent since 1970.

Professor Miller said such judicial decisions can be troubling.

"We speak glowingly of letting people have their day in court," he said. "Now they have their day on papers."