Jury Trials Trending Down In Texas Civil Cases

BY JUSTICE NATHAN L. HECHT

The number of jury trials is dwindling and has been for years in Texas, in the federal courts, and in other jurisdictions around the country. In Texas, the decline is especially pronounced in civil cases not involving family law or juveniles — what I'll refer to simply as civil cases. The causes are unclear, and whether the development is good or bad (I think it's bad) is being debated. But like it or not, if the present trend continues, the civil justice system will soon be profoundly different. Fewer jury trials means fewer trial lawyers and judges and, in time, a diminution in the public civil justice system and the common law.[1]

For Texas district courts, statutory county courts, and probate courts — "trial courts" for purposes of this article — contrast the fiscal years ending in 1986 and 2005.[2]

In 1986, 532 trial courts disposed of about 1.17 million cases, 10,775 (0.92 percent) by verdict. Of 2,208 average dispositions per court, 20.3 were by jury verdict, and of that number, roughly 12 (59 percent) were in criminal cases, seven (34 percent) were in civil cases, and the rest (7 percent) were in family law and juvenile cases.

In 2005, 665 trial courts (25 percent more) disposed of a little more than 1.6 million cases (37 percent more),[3] but there were 5 percent *fewer* jury verdicts — only 10,227 (0.64 percent). Since dispositions increased while the number of jury trials decreased, the rate[4] fell even more sharply — 30 percent (from 0.92 percent to 0.64 percent). Of 2,419 average dispositions per court (efficiency was up nearly 10 percent), 15.4 were by jury verdict, and, of that number, roughly 11 (72 percent) were in criminal cases, while only three (20 percent) were in civil cases.

In sum: for criminal cases, dispositions increased 45 percent, and the number of jury verdicts increased 15 percent (6,386 to 7,344), while the rate fell 21 percent (1.06 percent to 0.84 percent). For civil cases, dispositions decreased 1 percent, the number of jury verdicts decreased 45 percent (3,639 to 2,015), and the rate fell 44 percent (1.15 percent to 0.64 percent).

The federal courts have had a similar experience, which was the subject of a 2003 symposium conducted by the American Bar Association's Litigation Section. The centerpiece of that meeting was a study conducted by University of Wisconsin Law School Professor Marc Galanter titled *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts.*[5]

In 1985, 500 district courts disposed of 268,070 civil cases, with 6,253 (2.33 percent) by verdict. In 2002, 615 district courts disposed of 258,876 civil cases, 3.4 percent fewer, with only 3,006 (1.16 percent) by verdict. The number and rate of jury verdicts in civil cases had declined by more than half.

In 1990, 541 district courts disposed of 56,519 criminal cases, with 6,181 (10.9 percent) by verdict. In 2002, 615 district courts disposed of 76,827 criminal cases, 36 percent more, with only 2,655 (3.5 percent) by verdict. The number of jury verdicts in criminal cases had declined 57 percent and the rate by more than two-thirds.

In 2002, a federal court tried to a jury, on average, 4.9 civil cases and 4.3 criminal cases.[6]

Data for the state court systems, when available at all, is difficult to compile and compare, but the National Center for State Courts has prepared information on 21 states with over half the national population for the period from 1976 to 2002.[7] Professor Galanter summarized that information this way:

> Although the state data is less comprehensive, it is sufficiently abundant to indicate that the trends in state court trials generally match those in the federal courts. In both there is a decline in the percentage of dispositions that are by jury trial and bench trial. In both there is a decline in the absolute number of jury trials and bench trials. In the federal courts, non-jury trials have declined even more dramatically than jury trials; in the state courts, it is jury trials that are shrinking faster.[8]

What is causing this trend?[9]

For criminal cases, the consensus seems to be that the precipitous decline in federal trials has been due largely to the sentencing guidelines, which make outcomes more certain and

impose risks on defendants for opting for trial. In Texas, by contrast, where sentencing procedures have remained largely constant, the rate of jury trials in criminal cases has not fallen nearly as sharply. Professor Galanter was unable to find a significant increase in the length or expense of jury trials in criminal cases.

For civil cases, various explanations have been offered for the decline in the number of jury trials, but no consensus has developed:

- **Pretrial expense and delay.** Civil litigation is expensive, and a large component of the expense is discovery. Discovery is often crucial in achieving just results, but much of the time and money spent in discovery is wasted, and usually that is the other lawyer's fault. Despite efforts to streamline discovery procedures, there has been little reduction in cost. Improving discovery without impairing it has proven hard. With fewer trials, the wait has been virtually eliminated.

- **Unpredictability and higher stakes.** Encouraged by stories of "runaway juries," the distinct perception among defendants is that the risks of loss in civil litigation do not fall within reasonable bounds and thus should be avoided if at all possible. From the plaintiff's perspective, the stories are plainly exaggerated, remedies provide only reasonable compensation, and the risks are necessary to encourage settlement. The rift seems to be growing.

- **Arbitration.** Since the U.S. Supreme Court wrote in 1984 that "[i]n enacting [the Federal Arbitration Act], Congress declared a national policy favoring arbitration,"[10] arbitration has mushroomed. Institutional litigants, usually defendants, view arbitration as less expensive, even though the evidence is inconclusive, less risky, even without a right of appeal, and more favorable for strategic reasons. Even plaintiffs' lawyers, who generally deplore the migration to arbitration, often insist on arbitrating disputes with clients. The sustained growth in arbitration may reflect a popular view that it is a preferred dispute resolution system.

- **Mediation.** Not much used before 1986, mediation is now a prerequisite to trial in many Texas and federal courts. Its success in helping resolve disputes is undoubtedly a positive development in civil litigation, but questions remain whether judicial pressure to mediate is too high and reflects an anti-trial disposition. And the cost of mediation adds to the expense of litigation, but it is not clear whether the addition is significant.

- **Substantive law changes.** Tort reform and changes in workers' compensation laws have certainly affected the number of jury trials in Texas, but neither can fully account for the decrease, and neither explains the similar decline in jury trials in other jurisdictions where such changes have not occurred.

- **Procedural law changes.** Summary judgments have increased in federal courts,[11] but while the Texas rule was broadened in 1997 to match the federal rule, civil-case summary judgments in Texas district courts (the only data available) have declined in number and rate, from 6,600 (1.45 percent of dispositions) in 1986 to 4,271 (0.78 percent) in 2005. The addition of *Daubert* hearings has, of course, added to the expense of litigation, although there is nothing to show that the addition is significant overall.

- **Case management.** There has been some concern expressed in the trial bar that the emphasis on judicial management of dockets has turned judges into supervisors and resulted in a bias against trials. But effective case management has made courts much more efficient.

- **Fewer lawyers with trial skills.** The trial bar has also expressed concern that with fewer cases going to trial, fewer lawyers will develop trial skills, creating a spiral effect. On the other hand, the need for arbitration counsel may promote the development of similar skills.

The decline in the number of jury trials has been pronounced and prolonged. It does not appear to be circumstantial or cyclical. If it continues, the need for trial lawyers, trial judges, appellate judges, and even the common-law system will diminish. An increasingly private dispute resolution system with no right of appeal will leave a vacuum in the development of the law that can only be filled with legislation, and evolution toward a civil-law system like that used in most of the rest of the world will eventually be irreversible.

The bar's investments in extolling the jury system and improving its operation are worthwhile, but if the public is paying attention, it does not appear to be convinced. In business terms, the civil jury trial is losing its market, and recovery will require more than a slicker advertising campaign.

I think if progress is to be made, the bench and trial bar must engage in an earnest, substantive, candid, open, and determined dialogue with groups of all stripes interested in the civil justice system and with public representatives. Preservation of the justice system enshrined in our constitutions, with public participation through the jury system, is worth every effort the legal system can muster.

Notes

1. I wrote on this subject at greater length last year in *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 SO. TEX. L. REV. 163 (2005). This article updates and summarizes that one, which contains supporting materials not repeated here due to space constraints.
2. Data for Texas courts is collected and reported annually by the Office of Court Administration and is available back to 1996 on its website (www.courts.state.tx.us/oca/).
3. Between 1986 and 2005, the annual number of dispositions increased 45 percent for criminal cases (from 601,200 to 870,224), and an astonishing 57 percent for family law cases (from 241,128 to 379,091). Sadly, juvenile case dispositions nearly tripled (from 15,436 to 45,775). Civil-case annual dispositions fell about 1 percent (from 316,748 to 313,462).
4. By rate I mean the percentage of dispositions by jury verdict.
5. 1 J. EMPIRICAL LEGAL STUD. 459 (2004). The study was based on data collected by the Administrative Office of the U.S. Courts.
6. Professor Galanter's study showed a decrease in all trials, jury and non-jury, in federal courts. From 1962 to 2002, the number of district courts more than doubled, as did the annual number of criminal-case dispositions, and the annual number of civil-case dispositions quintupled, but the annual number of trials — jury and non-jury — was down 21 percent (from 5,802 to 4,569) for civil cases and 30 percent (from 5,097 to 3,574) for criminal cases. The decrease in the number of trials annually was steeper in the latter part of the period: 55 percent for criminal trials since 1990, and a remarkable 64 percent for civil trials since 1985. 1 J. EMPIRICAL LEGAL STUD. at 532-534, 554, 560.
7. *Id.* at 506.
8. *Id.* at 510.
9. For a more detailed analysis, I refer the reader to my earlier article, which attempted to review much of the literature on the subject. 47 SO. TEX. L. REV. at 171-181.
10. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).
11. 1 J. EMPIRICAL LEGAL STUD. at 483-484.

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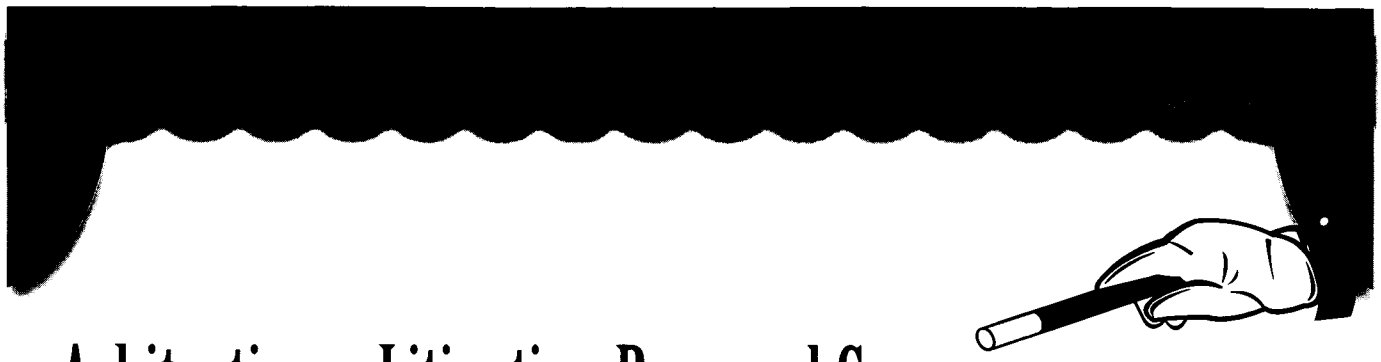

Arbitration v. Litigation Pros and Cons: What Business Lawyers Need to Know

BY ILEANA BLANCO AND TANYA C. EDWARDS

Many business lawyers — especially those who represent international clients — harbor deep-seated concerns with the American jury system as a forum for dispute resolution. Haunted by visions of runaway juries and misunderstandings of highly publicized verdicts such as the "McDonald's Hot Coffee"[1] case, they routinely insist on arbitration as the dispute resolution mechanism in contracts for their clients. This article addresses some of the pros and cons of arbitration versus litigation.

The Judicial Forum

Parties to international contracts in particular have legitimate concerns about the partiality of the local judiciary. However, before selecting arbitration as your dispute resolution mechanism, it is important to determine in what forum you are likely to land if disputes arise. As jurisdiction is determined by the circumstances of the particular case, parties will either be placed before a federal judge with a lifetime appointment, an elected state judge, or possibly an appointee of the government whose permanent tenure is subject to a referendum. Their case may be decided by the judge in a bench trial or by a jury. Juries are another indeterminate component of the litigation process. A jury is selected at random, oftentimes from a list of registered voters. It is expected that the jury pool reflects the makeup of the local population. Thus, jury members come from varying ethnicities, races, and educational and economic backgrounds. Although jurors are paid for doing their civic duty, payment is minimal. As an alternative, attorneys can consider exploring jury waiver agreements in lieu of arbitration.

Perceived Advantages of Arbitration

Arbitration is the preferred method of alternative dispute resolution for foreign investors and international investment guarantee/insurance agencies. For international transactions, arbitration in a neutral forum provides the hope of reducing bias and avoiding parallel lawsuits in different countries. Moreover, unlike trials, arbitration proceedings are closed to the public. Plaintiffs therefore lose the advantage of trying the case before the public and perhaps publicly tarnishing the reputation of the parties involved before proceeding to a trial on the merits. In addition, the arbitrator's decision is not published and does not provide a binding precedent for future cases.

The panel is usually composed of arbitrators who are experienced professionals in the relevant industry. Panelists often include retired or active lawyers with legal expertise in the field of interest. Unlike judges, the panelists have familiarity with the nuances of a particular area of law based on years of experience. Because of their unique experience, panelists often have an enhanced image of participants in the international community as fair, sophisticated, and attractive investment partners. This knowledge also provides an advantage over having your case decided by a jury that lacks expertise in what can be a highly complex and technical case.

International clientele may be especially inclined toward arbitration in order to maintain control over the procedure and proceedings given that arbitration is a creature of contract. Some of the most important factors that parties can control through arbitration include: (i) the place of arbitration for neutrality, enforceability, and convenience considerations; (ii) the identity of the arbitrator; (iii) the language in which the arbitration is to be conducted; and (iv) the applicable substantive and procedural law that will govern the proceedings. Arbitration generally offers enormous variation in the mechanisms used to establish the facts and the law. Thus, parties entering an arbitration agreement may want to specify as much as possible with regard to discovery, i.e., that the arbitrators have the authority to compel various types of discovery. While this provision will not be conclusive if a subpoena is challenged in court, it will at least constrain the other arbitral party from objecting.

In litigation, the final decision is subject to revision by way of appeals at multiple jurisdictional levels. However, in arbitration, the claims and enforceability of the award can be defined by the contract. Thus, foreign investors prefer arbitration, which has at least the perception that awards are final and can rarely be appealed. For example, in Texas, there are only two