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We Won't See You in Court: The Era of Tort Lawsuits Is Waning

State restrictions, increasing cost and a long campaign by businesses has discouraged plaintiffs



The Sedgwick County Courthouse in Wichita, Kan. The state has moved to curb tort litigation. PHOTO: ALAMY

By

Joe Palazzolo

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Americans, reputed to be the most litigious people in the world, are filing far fewer lawsuits.

Fewer than two in 1,000 people—the alleged victims of inattentive motorists, medical malpractice, faulty products and other civil wrongs—filed tort lawsuits in 2015, an analysis of the latest available data collected by the National Center for State Courts shows. That is down sharply from 1993, when about 10 in 1,000 Americans filed such suits.

A host of factors are fueling the decline, including state restrictions on litigation, the increasing cost of bringing suits, improved auto safety and a long campaign by businesses to turn public opinion against plaintiffs and their lawyers.

The nationwide ebb in lawsuits, which confounds the public perception of courts choked with tort claims, has broad ramifications for businesses, doctors, patients, lawyers and the courts themselves.

Companies and insurers on the receiving end of such lawsuits welcome the decline of what they regard as a lawsuit culture in which lawyer-driven litigation increases costs to both business and consumers.

Trade groups that represent these firms have long pushed for laws to raise the bar for filing lawsuits and rein in damages, portraying a large chunk of tort litigation as a drag on the economy that burns scarce judicial resources.

Lisa Rickard, president of the U.S. Chamber Institute for Legal Reform, an arm of the U.S. Chamber of Commerce, says that while state measures have “weeded out some frivolous lawsuits,” litigation abuse remains a problem. “The American public wholeheartedly agrees there are too many lawsuits in the country,” she says.

At the same time, the falling number of tort filings, coupled with the broader decline in civil jury trials, has some judges concerned that Americans with garden-variety cases no longer see courts as an affordable way to seek redress for their injuries.

“People are just not filing cases like they used to. They are not seeking trials like they used to,” says Senior Judge Gregory Mize of the District of Columbia Superior Court, a local trial court. “It’s so expensive and time-consuming.”



Senior Judge Gregory Mize of the District of Columbia Superior Court, shown swearing in a district official, says filing lawsuits has become “expensive and time-consuming.” PHOTO: CAROLYN KASTER/ASSOCIATED PRESS

The Conference of Chief Justices, an association of state judicial leaders, has been working on tweaks to the civil justice system that officials hope will make many cases move more quickly and cost less. Judge Mize is assisting the committee studying the issue.

Torts are civil wrongs that cause someone to suffer loss or harm. Most tort lawsuits seek damages for negligence rather than deliberate injury and fall into one of three categories: auto cases, medical malpractice or product liability.

Tort lawsuits now account for less than 5% of all civil filings in state courts. Contract cases, including those filed by corporate plaintiffs such as debt collectors and banks foreclosing on homeowners, have increased in number and now represent about half of all civil cases.

Most civil cases are filed in state courts—more than 15 million in 2015, compared with 281,608 cases brought in federal courts that year, according to federal statistics and data collected by the National Center for State Courts, a research center for state courts.

Federal courts have seen an increase in some types of mass tort cases in recent years, but the reality in state courts, where about 98% of all cases are filed, contrasts sharply with public perception of civil dockets awash in tort lawsuits. An election-night poll last November by Public Opinion Strategies showed that 87% of voters agreed that there are “too many lawsuits filed in America.”

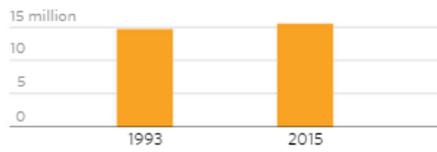
Tort filings spiked in the 1980s, prompting the formation of groups like the American Tort Reform Association in 1986 and triggering a wave of legislation meant to impose new requirements for filing lawsuits or to reduce monetary awards to plaintiffs.

Tort cases declined from 16% of civil filings in state courts in 1993 to about 4% in 2015, a difference of more than 1.7 million cases nationwide, according to an analysis of annual reports from the National Center for State Courts. Those estimates are based on case percentages recorded by more than 20 states that track tort filings.

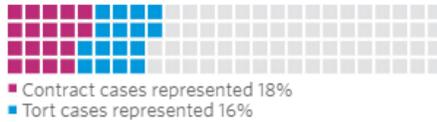
The Fall of the Tort

Tort lawsuits have declined sharply over the past two decades, while contract suits have increased.

Total civil filings in state courts

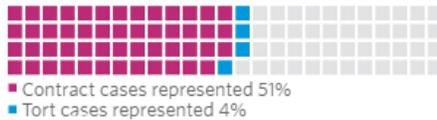


1993*



Contract cases per capita: 1 for every 99 people
Tort cases per capita: 1 for every 111 people

2015**



Contract cases per capita: 1 for every 41 people
Tort cases per capita: 1 for every 522 people

*In general jurisdiction courts in 23 states
**In general jurisdiction courts in 22 states
Source: National Center for State Courts

Contract cases—a category that includes debt collection, foreclosure and landlord-tenant disputes—grew from 18% of the civil docket to 51%, according to the center’s data.

Anthony Sebok, a torts professor at Benjamin N. Cardozo School of Law in New York, contends the public perception of tort filings has never matched reality. Even at peak growth in the mid-1980s, tort cases amounted to about 20% of civil filings in state courts, on average.

“We as a society seem to be OK with plaintiffs when they are debt collectors coming in and using the court system more than they used to, but we somehow instinctively think it’s a bad thing when victims of accidents come in and do the same thing,” he says.

Ms. Rickard of the U.S. Chamber said an increase in single lawsuits bundled with multiple plaintiffs could be a factor in the decline in tort filings. Most courts don't distinguish between lawsuits filed by individuals or by groups, counting both as one filing in their statistics.

A study last year by the National Center for State Courts found that nearly two-thirds of tort cases involve automobiles. Motor-vehicle deaths and hospitalizations from crash injuries have declined since the 1990s, likely contributing to fewer lawsuits, legal experts say.

Researchers at Northwestern University and the University of Illinois recorded a 57% nationwide decline in malpractice claims paid by doctors or their insurers between 1992 and 2012, and a similar drop in the number of malpractice lawsuits. Claims of less than \$50,000 fell the most, perhaps because increasing litigation costs made many lower-value cases too expensive to pursue, the researchers said.



The Tarrant County Courthouse in Fort Worth, Texas. A study shows that tort cases have declined in the state. PHOTO: MAX FAULKNER/ZUMA PRESS

In Texas, the number of tort cases fell 27% between 1995 and 2014, according to another study. The decline for non-auto-accident tort cases over that period was 60%, the study said.

Stephen Daniels, a research professor at the American Bar Foundation who co-wrote the Texas study, says advocates of lawsuit restrictions have succeeded in making many tort cases economically impossible for trial lawyers to bring.

Plaintiffs' lawyers typically front the cost of litigation and take their fees on the back end, usually one-third of whatever their clients recover.

In tort lawsuits, damages come in three varieties. Economic damages are meant to make the plaintiff whole. They cover lost wages, medical costs or other economic harms caused by others. Noneconomic damages ameliorate intangible harms such as pain and suffering, while punitive damages are meant to punish and deter.

More than 30 states have capped damages in medical malpractice or other cases since the 1970s, according to the Center for Justice & Democracy, a group that opposes such laws. In 2003, Texas capped damages in medical-malpractice cases at \$250,000.

Meanwhile, costs have increased for medical records and the expert witnesses often needed to testify about medical treatment, lawyers and legal experts say. Many states require medical-malpractice plaintiffs to file an expert report with or soon after their lawsuit. Total costs often reach thousands of dollars, trial lawyers say.

Economic damages are tied to lost wages and income. Plaintiffs' lawyers told Mr. Daniels and co-researcher Joanne Martin they no longer could afford to represent retirees and stay-at-home parents as clients in medical-malpractice cases, or even unemployed people as clients in some auto-accident cases, "because they wouldn't get sufficient damages, and cases are expensive," Mr. Daniels says.

In Kansas, which moved to curb tort litigation, tort filings fell by 45% between 2000 and 2015, according to the National Center for State Courts.

Noneconomic damages have been capped by the state for decades, most recently at \$300,000 under a 2014 law, and Kansas plaintiffs have to request permission from a judge to file for punitive damages. Other changes in litigation rules also have lowered damages in Kansas and elsewhere, lawyers and legal experts say.

Craig Kennedy, a Wichita lawyer who represents insurers, says his practice has shifted from litigation to mediation as more cases settle before a lawsuit. Legal costs have increased for insurers, too, he says, and both sides have a greater incentive to handle matters without litigation.

Mike Fleming, a plaintiffs' lawyer at Kapke & Willerth LLC in the Kansas City area, says that as legal expenses have increased, insurers have gained an advantage in cases involving minor injuries that would normally lead to about \$10,000 to \$15,000 in damages.

“They play hardball with a lot of these smaller, soft-tissue claims,” Mr. Fleming says, because insurers know trial lawyers will often balk at spending \$5,000 or more to recover a relatively small sum. “They are going to offer \$7,500, take it or leave it.”

It’s unclear how often alleged torts are resolved outside courts, but data from the insurance industry show that the percentage of bodily-injury claims that lead to lawsuits has been declining since the 1990s.

Arbitration may be siphoning some tort cases from the courts. Judges have steered personal-injury claims out of court based on mandatory-arbitration clauses contained in contracts entered into by patients, employees, home buyers and others, according to Elizabeth Thornburg, a law professor at Southern Methodist University in Dallas.

Insurance company practices can also affect decisions about whether to sue.



Josh Johnson with his daughter before leaving a hospital in Duluth, where she was treated for injuries sustained at a Minnesota camp in 2014. PHOTO: JOHNSON FAMILY

Josh Johnson and Patricia Perryman wanted to sue the YMCA after their daughter nearly died, they say, from injuries sustained at a summer camp in Minnesota in 2014. A storm blew in the first night and toppled a tree onto the tent in which she was sleeping because the cabins were full, Ms. Perryman says. Their daughter suffered four broken ribs, a collapsed lung and nerve damage.

Mr. Johnson and Ms. Perryman wanted to recover their out-of-pocket expenses, including their insurance deductible, and future medical costs associated with their daughter’s injuries. Mr. Johnson says their

insurer, Blue Cross Blue Shield, told them that any money they recovered from a lawsuit would first go to reimbursing the insurer for about \$138,000 in medical costs it paid for their daughter's treatment.

They would have to sue the YMCA, an organization that "does a lot of good," Mr. Johnson says, for hundreds of thousands of dollars to get enough to pay their attorney and make themselves whole. The Johnsons decided against it.

The YMCA declined to comment, and Blue Cross Blue Shield didn't respond to requests for comment.

The slump in tort filings coincides with dwindling membership in some state trial-lawyer associations. It follows a decadeslong public-relations campaign highlighting wrongdoing by trial lawyers, including a 2008 guilty plea by Mississippi plaintiffs' lawyer Richard Scruggs on a charge of conspiring to bribe a judge.

In 1994, a jury awarded nearly \$3 million to a 79-year-old woman who sued [McDonald's](#) after spilling coffee in her lap and burning herself badly. The verdict was reduced, and the parties eventually settled. The American Tort Reform Association portrayed the case as the embodiment of lawsuit abuse.

"Let's do word association," says Sean Harris, a Columbus-based plaintiffs' lawyer and president-elect of the Ohio Association for Justice, a trial lawyer group. "What word comes to mind when I say 'frivolous'?" "Lawsuit" is the word most people think, he says. "If we go to trial, we know that we are going to face a hostile jury."

A committee appointed by the Conference of Chief Justices recently concluded that state judicial systems are getting fewer cases because many disputes cost more to litigate than they are worth. A study conducted for the group found that 0.2% of civil cases resulted in judgments of more than \$500,000, while most tort cases ended in judgments of \$12,000 or less.

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