

# Benefits and Costs of Civil Justice Reform

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By Paula Hannaford-Agor

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)<sup>1</sup>; in Strafford and Carroll Counties, New Hampshire<sup>2</sup>; and statewide in Utah<sup>3</sup> and Texas.<sup>4</sup>

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). The working assumption for all four reforms is that litigants would save money as well as time. Estimating the amount of money saved has been difficult to quantify, however, either for individual litigants or overall. This paper briefly describes the data and findings from the evaluations of those reforms, then combines estimates of costs expended in civil litigation with data from these evaluations to offer preliminary estimates of the cost savings.

## Methods and Data

The NCSC evaluations for the New Hampshire, Utah, and Texas reforms included analyses of case-level data extracted from the courts' case management systems as well as surveys of and focus groups or individual interviews with judges and lawyers. In all three evaluations, the NCSC compared case characteristics, case events, and outcomes in a sample of cases filed before and after implementation of the respective reforms. The Eleventh Judicial Circuit Court data focused primarily on case clearance rates and compliance with time standards for each of the divisions managing foreclosure cases, which were

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<sup>1</sup> In response to the mortgage foreclosure crisis in 2008-2009, the Eleventh Judicial Circuit Court of Florida (Miami-Dade) implemented a system of rigorous enforcement of civil case management rules and procedures, including enhanced case automation and additional staffing. JENNIFER D. BAILEY ET AL., ELEVENTH JUDICIAL CIRCUIT OF FLORIDA: THE CASE FOR FUNDING CIVIL CASE MANAGERS (April 1, 2016).

<sup>2</sup> In 2010, New Hampshire changed its pleading standard from notice to fact pleading and introduced mandatory disclosures and implemented those changes on a pilot basis in two counties; the changes were later adopted statewide in 2013. PAULA HANNAFORD-AGOR ET AL., NEW HAMPSHIRE: IMPACT OF THE PROCEDURAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES (Aug. 19, 2013).

<sup>3</sup> Utah implemented changes in 2011 to its discovery rules that introduced substantial restrictions on the scope and timeframe for completing discovery based on the amount-in-controversy alleged in the complaint. Those changes also flipped the burden of producing discovery from the party from whom the discovery was requested to show that the discovery should not be produced to the party requesting discovery to show that its production was necessary. PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS (April 2015).

<sup>4</sup> In 2013, Texas implemented its Expedited Actions Rules, which mandated expedited pretrial and trial procedures and limited the scope of discovery for civil cases valued less than \$100,000. PAULA HANNAFORD-AGOR & SCOTT GRAVES, TEXAS: IMPACT OF THE EXPEDITED ACTIONS RULES IN CIVIL COURTS OF LAW (*forthcoming* 2016).

reported to the agencies that provided the funding for additional case managers. Detailed information about the data and methods employed in those studies, and how they were employed in the present analysis, are described below.

#### Eleventh Judicial Circuit Court of Florida

The 2008-2009 economic recession precipitated a spike in mortgage foreclosure actions across the county. 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 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 provided that 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 human resources. Each tier had assigned tasks that matched the training level of the individuals employed in that capacity. Matching task to skill level avoids wasting judicial time on mundane reviews, resulting in a cost-effective system that produces actual momentum each time the judge sees the case. 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 of the divisions managing mortgage foreclosure cases.

#### NH PAD Pilot Rules Evaluation

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 for the purpose of this cost-benefit modeling 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 incidence of discovery disputes.

The pre-implementation sample consisted of 1,573 cases filed between July 1, 2008 and June 30, 2010; the post-implementation sample consisted of 1,374 cases filed between October 1, 2010 and September 30, 2012. Debt collection and tort cases comprised nearly two-thirds of the civil caseloads in those samples (34% and 29%, respectively). The NCSC 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.

#### Utah Rule 26 Evaluation

The Utah civil justice reforms focused exclusively on the discovery stage of litigation. Amendments to the rule were implemented on a statewide basis on November 1, 2011. They 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 a presumptive scope of discovery based on the amount-in-controversy. The amended rules also introduced a mandatory disclosure requirement and an expedited process for resolving discovery disputes. 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.

### Texas Expedited Actions Rules

The Texas Expedited Actions Rules, which became effective on March 1, 2013, imposed a number of restrictions on civil cases valued \$100,000 or less. Damages awarded in expedited cases cannot exceed \$100,000. The rules specified an expedited timeline for discovery and trial in which discovery commences immediately upon filing and must be concluded within 180 days of serving the first discovery request unless a modification of the discovery control plan is granted. The trial must be scheduled no later than 90 days after the completion of discovery. They also significantly restricted 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 imposed restrictions on court-ordered ADR that such procedures cannot exceed a half-day in duration, fees cannot exceed a total cost of twice the amount of the applicable civil filing fee, and all procedures must be completed no later than 60 days before the initial trial setting.

To conduct its evaluation, the NCSC collected case-level data from the Civil Courts of Law in five counties. 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.

### Civil Litigation Cost Model (CLCM)

The NCSC also used data from its study of litigation costs to estimate the costs and benefits of various civil justice reforms. The data included a survey administered to members of the American Board of Trial Advocates (ABOTA) in 2013 asking experienced trial lawyers to estimate the amount of time expended by senior attorneys, junior attorneys, and paralegals on a variety of litigation tasks in a “typical case” of

involving different case types.<sup>5</sup> The litigation tasks included case initiation, discovery, settlement negotiations, pretrial preparation, trial, and post-trial management. Across all of the case types, trial activities were estimated as the most time-intensive followed by discovery, pretrial, case initiation, post-disposition, and settlement activities.

The survey also collected information about the average billable hour rates for senior and junior attorneys and paralegals at each member's law firm and the number and estimated costs for retaining an expert witness for each case type. These rates were used in conjunction with the time estimates to generate estimates of the total litigation costs for each case type depending on which stage of litigation the case ultimately resolved. Estimates were reported for both the median (50th percentile) and the interquartile range (25th and 75th percentiles) of litigation expenses. Across all case types, litigation costs tended to double from the 25th to 50th percentile and to double again from the 50th to the 75th percentile. Factors that affected those estimates included law firm size, case type, case complexity, mediation, and the amount in controversy alleged in the complaint. In the Utah Rule 26 evaluation, the NCSC employed a refined version of the CLCM to generate estimates of litigation costs for the most common types of cases in the NCSC dataset.

### Caveats

Data from the three NCSC evaluations were combined with the CLCM data to estimate in monetary terms the benefits accrued to litigants from the civil justice reforms in each jurisdiction. There are some limitations to the estimates, however. The first involves differences in key fields between the two sources of data. The CLCM studies generated cost estimates for specific types of cases (e.g., automobile tort, premises liability) and specific stages of litigation that typically correspond to frequent disposition types (e.g., default judgment, settlement, summary judgment, trial judgment), but the case-level data for the three jurisdictions generally employed less granular categories for case type (e.g., personal injury) and manner of disposition (e.g., judgment), which will necessarily introduce some degree of error in the calculations.

Other complications in data analysis resulted from the specific reforms implemented in each jurisdiction. In Utah, for example, cases were assigned at filing to a discovery tier based on the amount-in-controversy alleged in the complaint. Cases valued less than \$50,000 were assigned to Tier 1, cases valued between \$50,000 and \$300,000 were assigned to Tier 2, and cases valued more than \$300,000 were assigned to Tier 3. Consequently, an automobile tort case might be assigned to any of the three discovery tiers based on the severity of the injury. The CLCM reported cost estimates for each case type, but the amount-in-controversy was not explicitly taken into account in the model.

### Findings

#### Impact of the 11th Judicial Circuit Court Staffing Model on Mortgage Foreclosure Cases

The NCSC was not involved in evaluating the impact of the staffing model on mortgage foreclosure case processing, but the court did collect data for internal assessment purposes about the effectiveness of its approach to mortgage case processing. The clearance rate for the two divisions using the staffing model

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<sup>5</sup> Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers*, VOIR DIRE 22 (Spring 2013).

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 case using the Civil Litigation Cost Model, so it is not possible to estimate the financial impact of the staffing model on litigant costs.<sup>6</sup> 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 permit the parties to prepare.

### [Impact of Revisions to Rule 26 of the Utah Rules of Civil Procedure](#)

In the Utah evaluation, the NCSC found that 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. Moreover, civil cases other than debt collection were significantly more likely to be disposed by settlement than by dismissal or judgment. The greatest impact on settlement rates occurred in non-debt collection contract cases, which increased from 29 percent before the revisions were implemented to 33 percent after implementation (a 14 percent increase overall). Settlement rates for personal injury, professional malpractice, and debt collection cases increased by 8 percent, 7 percent, and 4 percent, respectively (Figure 1).

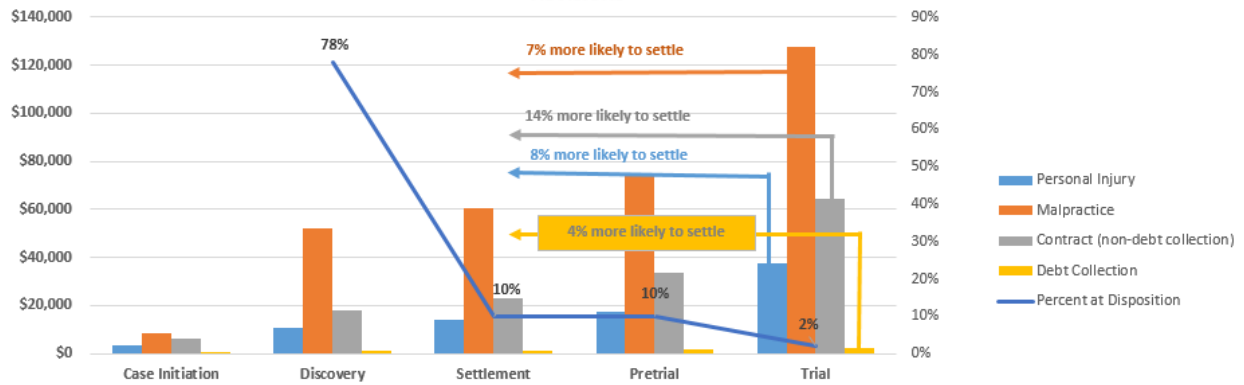
Cases that settled would avoid the costs associated with proceeding to a disposition by summary judgment or trial. For example, parties in a non-debt collection contract case that settled rather than seeking a trial judgment would save more than \$58,000 each in litigation costs. If the parties could settle without formal settlement negotiations or ADR, they could save up to an additional \$17,000 per side. These estimates assume that the settlement occurred after discovery was complete, however the NCSC evaluation also found that more than half (54%) of civil cases resolved before discovery was complete. In fact, one-third of civil cases had no discovery other than mandatory disclosures. Consequently, parties that pursued little or no discovery before settling could see additional savings of up to \$12,000. Potential savings are greatest in professional malpractice cases, followed by contract, personal injury, and debt collection cases.<sup>7</sup>

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<sup>6</sup> In some respects, mortgage foreclosure cases are similar to debt collection cases, however state law generally imposes greater procedural protections on civil claims that affect the ownership of real property including greater judicial scrutiny of such claims.

<sup>7</sup> In addition to a higher likelihood of settlement, which presumably reflects outcomes that are perceived as fairer by both parties, time to disposition decreased significantly and fewer discovery disputes were filed following the Rule 26 revisions, which suggests the potential for additional savings, although it is not possible to quantify those savings in precise terms.

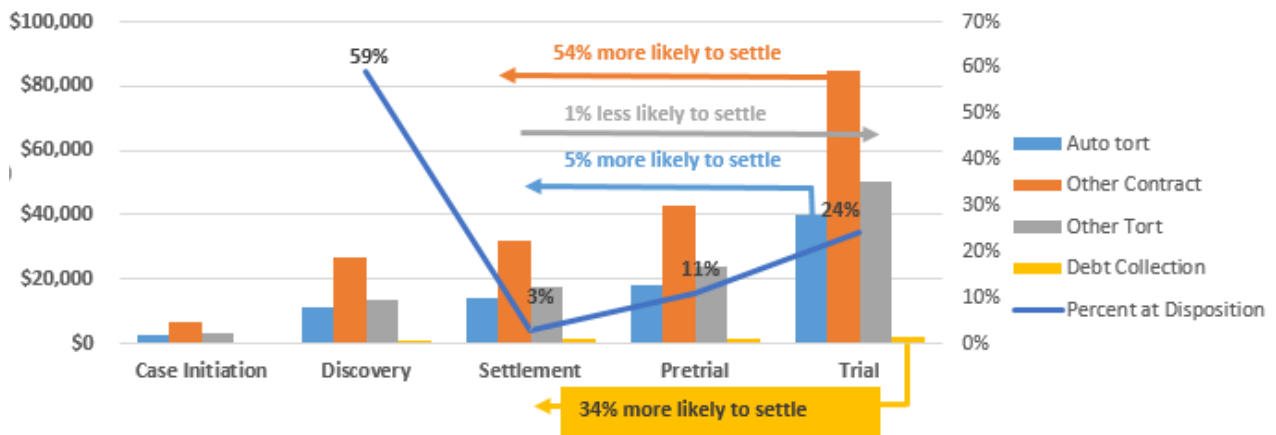
Figure 1: Estimated Cumulative Litigation Costs by Percentage of Disposition after Utah Rule 26 Revisions



### Impact of the Texas Expedited Actions Rules

Like the Utah Rule 26 revisions, implementation of the Texas Expedited Actions Rules also resulted in significantly increased settlement rates for most case types (Figure 2). 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%). Only other tort cases saw a 1 percent decline in settlement rates, due to a significant increase in trial rates (48%), especially bench trials.<sup>8</sup>

Figure 2: Estimated Cumulative Litigation Costs by Percentage at Disposition after Texas Expedited Actions Rules



In addition to increased settlement rates, those settlements occurred on average (median) 5 months earlier than settlements that occurred before implementation of the Expedited Actions Rules.<sup>9</sup> In contrast, trials occurred 4 months later on the Expedited Actions Rules. There was no difference in the

<sup>8</sup> An explicit objective of the Expedited Actions Rules was to ensure that it would be economically feasible to bring a case to trial if the parties so desired. Thus, while the increase in trial rates for other tort cases would result in increased costs for litigants, those litigants may view those costs as warranted to secure a fair outcome.

<sup>9</sup> At the 75th percentile, cases settled 7 months earlier under the Expedited Actions Rules.

proportion of cases in which discovery disputes occurred, but cases involving discovery disputes had significantly fewer filings, which suggests that disputes were resolved quickly and more definitively under the Expedited Actions Rules.

### Impact of the New Hampshire PAD Rules

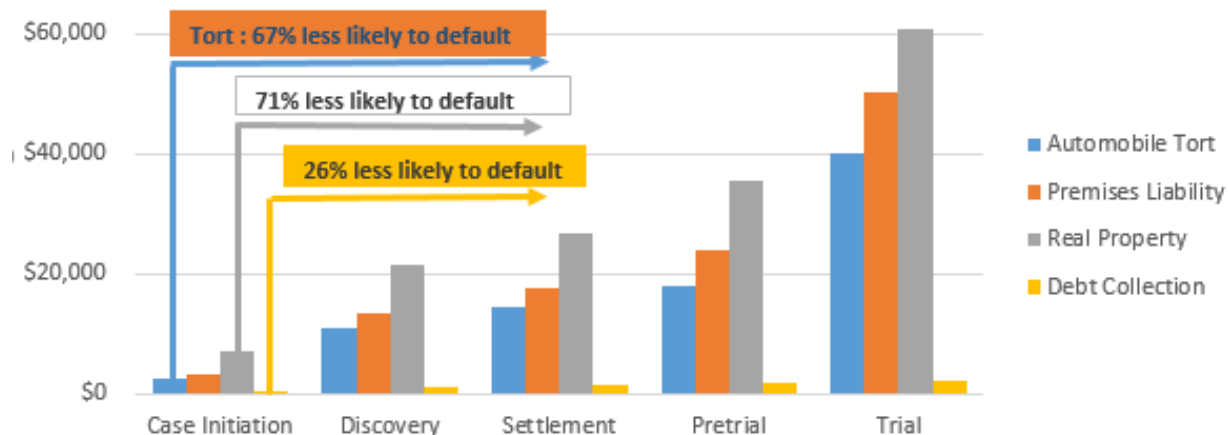
In contrast to the Utah and Texas civil justice reforms, implementation of the New Hampshire PAD Rules did not significantly reduce disposition time. Instead, half of both the pre-implementation and post-implementation cases had disposed within approximately eight months of filing, and three-quarters of both samples had disposed within approximately 14 months. The PAD Rules did, however, have an impact on the manner of disposition, which varied substantially based on case type. Default judgment rates decreased by more than one-third (from 19 percent to 12 percent overall) and this effect was observed across all case categories (Table 3). 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).

<b>Table 1: Manner of Disposition Rates</b>			
	Pre-PAD	Post-PAD	<i>p</i>
<b>Tort (n=1,135)</b>			
Default judgment	3%	1%	†
Dismissal/Withdrawal	22%	25%	<i>ns</i>
Settlement	68%	64%	<i>ns</i>
Judgment	5%	5%	<i>ns</i>
<b>Contract (n=2,289)</b>			
Default judgment	29%	22%	***
Dismissal/Withdrawal	19%	19%	<i>ns</i>
Settlement	31%	30%	<i>ns</i>
Judgment	12%	18%	***
<b>Real Property (n=156)</b>			
Default judgment	21%	6%	**
Dismissal/Withdrawal	26%	18%	<i>ns</i>
Settlement	25%	39%	†
Judgment	20%	34%	*
<b>Agency Appeal (n=177)</b>			
Default judgment	1%	0%	<i>ns</i>
Dismissal/Withdrawal	37%	19%	**
Settlement	50%	57%	<i>ns</i>
Judgment	12%	23%	*
*** <i>p</i> < .001			
** <i>p</i> < .01			
* <i>p</i> < .05			
† <i>p</i> < .10			



Looking at these effects through the lens of litigation costs might reasonably prompt the conclusion that litigant costs had increased for many cases. By making an appearance, defendants 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. Using the ABOTA data described above, the additional costs incurred in settling cases that would have resulted in a default judgment without 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 (Figure 3).<sup>10</sup> 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.

**Figure 3: Estimated Cumulative Litigation Costs after NH PAD Rules**



## Conclusions

The four civil justice reforms discussed above have been the focus of intense interest by judicial and legal policymakers. Many of 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.”<sup>11</sup> 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 some effect on the manner of disposition, time to disposition, or other key case

<sup>10</sup> 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.

<sup>11</sup> *CCJ Civil Justice Improvements Committee, Call to Action: Achieving Civil Justice for All 16* (2016).

processing measures. For example, the Utah and Texas reforms both resulted in substantial increases in settlement rates. With the exception of New Hampshire, all of the reforms dramatically reduced disposition times. These two effects are inherently related, and intuitively support predictions of greatly reduced litigation costs for cases that settled relatively early in the litigation process, thus avoiding 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. As shown in Figures 1 and 2, the impact and the estimated cost savings 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, resulting in a larger proportion of defendants filing an appearance to contest the plaintiff's claims, which would necessarily incur additional litigation costs 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. For example, they prompt litigants to focus on the issues that form the crux of the dispute and 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, two 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 the actual costs. It is possible that litigants may recognize that civil justice reforms reduce litigation costs but nevertheless believe that those costs still outweigh the value of the tasks performed on their behalf. The second question is whether litigants are given the opportunity to give informed consent to the anticipated costs of litigation before they are actually incurred. Neither of these related questions is 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.