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OUR NEW NORMAL? HOW COVID-19 ACCELERATED PRE-PANDEMIC TRENDS IN STATE COURT LITIGATION

*Paula Hannaford-Agor**

INTRODUCTION

The COVID-19 pandemic completely upended the American civil justice system. For several months beginning in March 2020, emergency “stay-at-home” orders closed state and local courthouses to the public.¹ Moratoriums on eviction, mortgage foreclosure, and consumer debt collection actions prevented litigants from resolving existing cases or filing new cases in state courts.² Scheduled court hearings were postponed or canceled while judges and lawyers scrambled to adopt a variety of videoconferencing technologies to undertake some litigation tasks. Meanwhile, the public health and economic disruption from the pandemic led many civil justice stakeholders to predict a surge in new civil cases, including commercial contract, insurance disruption, and employment disputes, as well as business receivership and bankruptcy petitions.³

After a relatively brief period, as judges and lawyers acclimated to the “new normal,” many courts were able to resume routine civil proceedings, such as motions hearings, case management conferences, and status conferences. State courts, which had traditionally been slow to adopt new technologies, suddenly acquired new software, adopted court rules to accommodate remote proceedings, and trained judges and court staff to use these platforms, often from the comfort of their new home offices. As Michigan Chief Justice Bridget McCormack famously noted: “This pandemic was not the disruption that any of us wanted, but it may be the disruption we needed to transform our judi-

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1. The National Center for State Courts maintains an archive of emergency orders issued by state courts in responses to the COVID-19 pandemic at <https://nationalcenterforstatecourts.app.box.com/s/bqbql3fjlpw5bt87j6nnbocxlq9fgpzf>. See generally *Court Orders*, NAT'L CTR. FOR STATE COURTS, <https://nationalcenterforstatecourts.app.box.com/s/bqbql3fjlpw5bt87j6nnbocxlq9fgpzf> (last visited Feb. 23, 2022).

2. *Id.*

3. See *infra* notes 56–59 and accompanying text.

ciary into a more accessibl[e], transparent, efficient and customer-friendly branch of government.”⁴ Evidentiary hearings, however, have raised serious logistical challenges for both in-person and remote proceedings.⁵ In particular, courts’ inability to resume civil bench and jury trials has created large backlogs of civil cases in many jurisdictions. Ironically, most cases would not have ultimately resolved by trial, but uncertainty about when it might be possible to schedule a trial discouraged many litigants from engaging in meaningful settlement negotiations.

Because the pandemic disrupted the civil justice system so quickly and thoroughly, many civil stakeholders have missed the significance of preexisting trends in civil litigation that are equally disruptive, if not more so. Civil caseloads have changed dramatically over the past thirty years with respect to the types of cases routinely filed in state courts and how those cases ultimately resolve. For much of the past two decades, state court and bar leaders have implemented and assessed the impact of a variety of reform efforts to improve civil case processing, prevent delay, reduce litigation costs, and improve access to justice. The most recent and most comprehensive effort included a set of thirteen recommendations adopted by the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) in July 2016 to reduce cost and delay and assure fairness in civil litigation.⁶ For the next three years, a variety of state courts across the country implemented the recommendations on a pilot basis with generally successful results.⁷ The lessons learned from these pilot projects offer a path through the backlogs and disruptions of the pan-

4. *Technology Brought ‘Much-needed Change’ to Judicial System, Michigan Supreme Court Chief Justice Tells Congress*, PUB. INTEREST (June 25, 2020, 2:33 PM), <https://www.mlive.com/public-interest/2020/06/technology-brought-much-needed-change-to-judicial-system-michigan-supreme-court-chief-justice-tells-congress.html>.

5. *See, e.g.*, JOINT TECH. COMM., JTC QUICK RESPONSE BULLETIN: MANAGING EVIDENCE FOR VIRTUAL HEARINGS VERSION 1.0, 10, 12 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/42814/2020-07-27-Managing-Evidence-for-Virtual-Hearings-002.pdf; NAT’L CTR. FOR STATE COURTS, CONSTITUTIONAL CONCERNS RELATED TO JURY TRIALS DURING THE COVID-19 PANDEMIC VERSION 3.0 (2021), https://www.ncsc.org/__data/assets/pdf_file/0034/57886/Constitutional-Concerns-Related-to-Jury-Trials-During-the-COVID-19-Pandemic.pdf [hereinafter CONSTITUTIONAL CONCERNS].

6. *See generally* CIVIL JUSTICE IMPROVEMENTS COMM., CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016), https://www.ncsc.org/__data/assets/pdf_file/0029/19289/call-to-action_-achieving-civil-justice-for-all.pdf [hereinafter CALL TO ACTION]; CIVIL JUSTICE IMPROVEMENTS COMM., RESOLUTION 8: IN SUPPORT OF THE CALL TO ACTION AND RECOMMENDATIONS OF THE CIVIL JUSTICE IMPROVEMENTS COMMITTEE TO IMPROVE CIVIL JUSTICE IN STATE COURTS (2016), https://ccj.ncsc.org/__data/assets/pdf_file/0017/23480/07272016-support-call-action-recommendations-cji.pdf.

7. *See infra* note 101 and accompanying text.

demic and into a new and better future. This Article briefly summarizes thirty years of research conducted by the National Center for State Courts (NCSC) on civil litigation in state courts, highlighting the most important trends for contemporary civil justice stakeholders. It then describes the impact of the COVID-19 pandemic on civil caseloads and its implications for civil case processing. It concludes with a description of the civil justice reforms endorsed by CCJ and COSCA to address pandemic-related backlogs and to ensure a more effective civil justice system.

I. THREE DECADES OF NCSC RESEARCH ON THE AMERICAN CIVIL JUSTICE SYSTEM

For more than fifty years, the NCSC has occupied a central role in supporting the administration of justice in state courts, including research on caseload statistics and effective case management practices.⁸ Large-scale research studies designed to understand and improve the civil justice system have been a key focus for the past three decades. These include four iterations of the *Civil Justice Survey of State Courts* (*Civil Justice Survey*) in 1992, 1996, 2001, and 2005,⁹ respectively, and a more recent study entitled *The Landscape of Civil Litigation in State Courts* (*Civil Landscape*).¹⁰ Although the NCSC undertook many other studies related to civil litigation during this period,¹¹ these five

8. Since its founding in 1971, the mission of the NCSC is to promote the rule of law and to improve the administration of justice in state courts and in courts around the world. See *Mission and History*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/about-us/mission-and-history> (last visited Aug. 31, 2021).

9. The U.S. Department of Justice, Bureau of Justice Statistics, began with a contract with the NCSC to collect data about civil cases disposed in the general jurisdiction trial courts in forty-five of the seventy-five most populous counties in the United States. See *Civil Justice Survey Data*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/services-and-experts/areas-of-expertise/civil-justice/civil-justice-survey/civil-justice-survey-data> (last visited Feb. 23, 2022). The scope of the *Civil Justice Surveys* expanded in subsequent iterations to address post-judgment motions and appeals as well as greater geographic diversity. *Id.*

10. *The Landscape of Civil Litigation in State Courts* (2015) was funded by a grant from the State Justice Institute to inform the deliberations of the CCJ Civil Justice Improvements Committee. PAULA HANNAFORD-AGOR ET AL., *THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS* i (2015), https://www.ncsc.org/_data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [hereinafter *CIVIL LANDSCAPE*].

11. See, e.g., PAULA HANNAFORD-AGOR ET AL., *NEW HAMPSHIRE: IMPACT OF THE PROPORTIONAL DISCOVERY/AUTOMATIC DISCLOSURE (PAD) PILOT RULES* (2013), https://www.ncsc.org/_data/assets/pdf_file/0022/26680/12022013-civil-justice-initiative-new-hampshire.pdf; PAULA HANNAFORD-AGOR & CYNTHIA G. LEE, *UTAH: IMPACT OF THE REVISIONS TO RULE 26 ON DISCOVERY PRACTICE IN THE UTAH DISTRICT COURTS* (2015), https://www.researchgate.net/publication/316276418_Utah_Impact_of_the_Revisions_to_Rule_26_on_Discovery_Practice_in_the_Utah_District_Courts; PAULA HANNAFORD-AGOR & SCOTT GRAVES, *TEXAS: IMPACT OF THE EXPEDITED ACTIONS RULES ON THE TEXAS COUNTY COURTS AT LAW* (2016), <https://www.txcourts.gov/media/1437615/texasimpactoftheexpeditedactionsrulespdf.pdf>; PAULA

studies collectively provide the broadest perspective on the civil justice system. The following summary describes the data and methods employed for each study.

The 1992 *Civil Justice Survey* was undertaken by the NCSC through a contract with the Bureau of Justice Statistics of the U.S. Department of Justice to study tort, contract, and real property cases in state courts.¹² Although other researchers had conducted studies of civil litigation for discrete case types or in limited geographic jurisdictions,¹³ this was the first attempt to document case characteristics and outcomes in a nationally representative sample of general civil cases. The study was prompted, in part, by growing concerns about the “litigation explosion” and reports of frivolous lawsuits and unreasonable judgments awarded against deep-pocket civil defendants.¹⁴ Based on documents recorded in casefiles, reviewers collected detailed information from a sample of nearly 30,000 civil cases disposed in the twelve-month period ending June 30, 1992, in the general jurisdiction trial court in forty-five of the seventy-five most populous counties in the United States.¹⁵ That study estimated that approximately 3% of gen-

HANNAFORD-AGOR ET AL., SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS (2012), <https://ncsc.contentdm.oclc.org/digital/collection/juries/id/253/>; PAULA L. HANNAFORD-AGOR ET AL., EVALUATION OF THE CENTERS FOR COMPLEX LITIGATION PILOT PROGRAM (2003), <https://www.courts.ca.gov/documents/compcivilpub.pdf>; ALBERT SHENG & PAULA HANNAFORD-AGOR, MASS TORT MANAGEMENT IN STATE AND FEDERAL COURTS: A CASE STUDY OF THE PHENYLPROPANOLAMINE (PPA) LITIGATION (2006), <https://cdm16501.contentdm.oclc.org/digital/collection/civil/id/52>. The NCSC also publishes annual reports on state court caseloads, which are archived at <https://www.courtstatistics.org/csp-annual-caseload-reports> and shorter publications on discrete issues related to court caseloads, including civil cases available at https://www.courtstatistics.org/other-pages/caseload_highlights. See generally *CSP Annual Caseload Reports*, COURT STATISTICS PROJECT, <https://www.courtstatistics.org/csp-annual-caseload-reports> (last visited Feb. 23, 2022); *Caseload Highlights*, COURT STATISTICS PROJECT, https://www.courtstatistics.org/other-pages/caseload_highlights (last visited Feb. 23, 2022).

12. Documentation on the data and methods employed in the *Civil Justice Survey* is available from the U.S. Department of Justice, Bureau of Justice Statistics, at <https://bjs.ojp.gov/data-collection/civil-justice-survey-state-courts-cjssc#documentation-0>. See *Civil Justice Survey of State Courts (CJSSC)*, BUREAU OF JUSTICE STATISTICS, <https://bjs.ojp.gov/data-collection/civil-justice-survey-state-courts-cjssc#documentation-0> (last visited Mar. 3, 2022).

13. See, e.g., Stephen Daniels & Joanne Martin, *Don't Kill the Messenger 'Till You Read the Message: Products Liability Verdicts in Six California Counties, 1970-1990*, 16 JUST. SYS. J. 69, 69 (1993); Michael J. Saks, *Malpractice Misconceptions and Other Lessons about the Litigation System*, 16 JUST. SYS. J. 7, 7 (1993); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 178 (1989).

14. See Roger A. Hanson et al., *A Dialogue on Tort Litigation in the States: The Williamsburg Report*, 18 ST. CT. J., Fall 1994, at 5, 7.

15. The study employed stratified sampling methods to enable researchers to estimate civil case characteristics and outcomes in general civil cases in the seventy-five most populous counties. CAROL J. DEFRAnces ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 11

eral civil cases were disposed by trial (2% jury trial, 1% bench trial)¹⁶ while the majority (62%) were settled by the parties.¹⁷

Due to the small proportion of cases disposed by trial, in 1996 the NCSC employed the same study methods to collect data on bench and jury trials and to investigate the extent to which those case characteristics and outcomes might be subject to variation over time or across study sites.¹⁸ It did not replicate the study for cases that disposed by non-trial means.¹⁹ The costs associated with data collection on the scale of the 1992 *Civil Justice Survey* were deemed excessive given the limited information available in case files, and a general consensus that non-trial dispositions were less interesting and less concerning than trial outcomes that were driving the national debate about the need for civil justice reform.²⁰

The third and fourth iterations of the *Civil Justice Survey* focused on tort, contract, and real property cases disposed in 2001 and 2005, respectively.²¹ The 2001 study employed the same study methods, but changes in county population growth recorded by the 2000 decennial census prompted the substitution of one of the study sites with two additional sites.²² In addition to case characteristics and outcomes at the trial level, the 2001 study also documented post-trial activity, including appeals from trial judgments. The 2005 study expanded the sample of participating sites from large, urban courts to a nationally representative sample of 160 state trial courts.²³ In addition to collecting individual case data about cases disposed by bench or jury trial,

(1995), <https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/cjcavilc.pdf> [hereinafter DeFRANCES ET AL., LARGE COUNTIES].

16. An estimated 10,237 cases were disposed by bench trial in the 1992 *Civil Justice Survey* (analysis of original dataset on file with the author).

17. DeFRANCES ET AL., LARGE COUNTIES, *supra* note 15, at 1.

18. The 1996 *Civil Justice Survey* employed the same stratified sampling methods in the same courts as the 1992 study. CAROL J. DeFRANCES ET AL., CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, 17 (1999), <https://bjs.ojp.gov/content/pub/pdf/ctcvlc96.pdf>.

19. *Id.* at 18.

20. Personal communication with Brian Ostrom, Project Dir. for the 1996 *Civil Justice Survey of State Courts* (Sept. 10, 2021).

21. THOMAS H. COHEN & STEVEN K. SMITH, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, 1 (2004), <https://bjs.ojp.gov/content/pub/pdf/ctcvlc01.pdf>; LYNN LANGTON & THOMAS H. COHEN, CIVIL BENCH AND JURY TRIALS IN STATE COURTS, 2005, 1 (2008), <https://bjs.ojp.gov/content/pub/pdf/cbjtsc05.pdf>.

22. Norfolk County, Massachusetts, was no longer among the seventy-five most populous counties. It was replaced with Mecklenburg County, North Carolina, and El Paso County, Texas. COHEN & SMITH, *supra* note 21, at 11.

23. LANGTON & COHEN, *supra* note 21, at 11.

the 2005 study also collected aggregate data about non-trial case dispositions.²⁴

The most recent NCSC study of civil litigation was conducted to inform the deliberations of the Civil Justice Improvements Committee of the CCJ.²⁵ The *Civil Landscape* examined data from all civil cases disposed between July 1, 2012, and June 30, 2013, in state trial courts with civil jurisdiction in ten large, urban counties.²⁶ The NCSC deliberately selected counties in which the general jurisdiction courts participated in the 1992 *Civil Justice Survey* to compare trends over time.²⁷ In addition, the dataset included cases disposed in limited jurisdiction courts, which typically comprise the majority of civil caseloads.²⁸ The resulting dataset included more than 925,000 cases, including small claims and “other civil” cases in addition to the tort, contract, and real property cases that were the focus of the *Civil Justice Surveys*.²⁹

The scope and methods employed in the *Civil Landscape* study differed from the *Civil Justice Survey* in several important respects. First, instead of reviewing case files, an extremely time-consuming and expensive process, NCSC researchers obtained data extracted from the courts’ case management systems (CMS).³⁰ The quality of CMS data has improved over time but is generally less precise than the coding employed in the *Civil Justice Surveys*.³¹ For example, most of the *Civil Landscape* courts could identify the category of case (tort, contract,

24. See U.S. Dep’t of Justice, CIVIL JUSTICE SURVEY OF STATE COURTS, 2005, 5 (2011), <https://www.icpsr.umich.edu/web/NACJD/studies/23862#>.

25. CALL TO ACTION, *supra* note 6, at 4–5, 8. The CCJ Civil Justice Improvements Committee was created in response to a CCJ Resolution at its 2013 midyear meeting. *Id.* at 5. The Committee had the responsibility of:

[D]eveloping guidelines and best practices for civil litigation based upon evidence derived from state pilot projects and from other applicable research, and informed by implemented rule changes and stakeholder input; and making recommendations as necessary in the area of caseload management for the purpose of improving the civil justice system in state courts.

Id.

26. CIVIL LANDSCAPE, *supra* note 10, at iii.

27. *Id.* at 14.

28. State courts reported approximately six million new civil filings in general jurisdiction courts in 1992 compared to nine million new civil filings in limited jurisdiction courts. BRIAN J. OSTROM ET AL., STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1992, 6, 8 (1994).

29. CIVIL LANDSCAPE, *supra* note 10, at 16 & n.49.

30. *Id.* at 14.

31. *Id.* at 22. Although domestic relations and probate cases are generally classified as civil cases for the purposes of court administration, the *Civil Landscape* study excluded these case types from analysis. *Id.* at 16. The NCSC subsequently published a similar report, *Landscape of Domestic Relations Litigation in State Courts*. See generally PAULA HANNAFORD-AGOR ET AL., FAMILY JUSTICE INITIATIVE: THE LANDSCAPE OF DOMESTIC RELATIONS CASES IN STATE COURTS (2018), <https://iaals.du.edu/publications/landscape-domestic-relations-cases-state-courts>.

real property, small claims, or “other civil”), but did not consistently describe case types with more detailed subcategories.³² Case disposition codes posed even greater challenges insofar that they typically reflected the procedural significance of the disposition but not necessarily the manner of disposition.³³

By expanding the scope of its focus to general civil cases disposed in limited jurisdiction courts, the *Civil Landscape* provided a picture of the entire civil caseload, allowing “apples-to-apples” comparisons that previously were challenged by differences in organization structure and jurisdictional authority across states.³⁴ In Florida, for example, a consumer debt collection case seeking damages of \$6,000 could only be filed as a contract case in the County Court, which has exclusive jurisdiction for cases valued up to \$15,000; it could not be filed as a small claims case, however, because the maximum value of small claims cases is \$5,000.³⁵ Texas, in contrast, has three tiers of trial courts with jurisdiction over civil cases.³⁶ The same consumer debt collection case could be filed either as a contract case in the District Court (general tier with jurisdiction for cases \$201 and over), or as a contract case in the County Court (limited tier with jurisdiction up to \$200,000), or as either a contract case or a small claims case in the Justice Court (limited tier with jurisdiction up to \$10,000 including small claims up to \$10,000).³⁷

Finally, the *Civil Landscape* included case types other than the tort, contract, and real property cases that were the primary focus of the *Civil Justice Survey*. As became evident from the *Civil Landscape* analyses, small claims and the ubiquitous “other civil” cases comprise a substantial portion of civil caseloads and thus compete with tort, contract, and real property cases for judicial time and attention.

II. CHANGES IN CIVIL CASE CHARACTERISTICS AND OUTCOMES FROM 1992 TO 2015

Both the 1992 *Civil Justice Survey* and the *Civil Landscape* documented civil case characteristics and outcomes for all manners of disposition. Table 1 compares case categories for the two studies through

32. CIVIL LANDSCAPE, *supra* note 10, at 18–19.

33. *Id.* at 19–20.

34. *Id.* at 10–13.

35. PAULA HANNAFORD-AGOR, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS: EXAMINING DEBT COLLECTION, LANDLORD/TENANT AND SMALL CLAIMS CASES, CASELOAD HIGHLIGHTS 2 (2019) [hereinafter CASELOAD HIGHLIGHTS].

36. *State Court Structure Charts: Texas*, COURT STATISTICS PROJECT, https://www.courtstatistics.org/state_court_structure_charts/texas (last visited Feb. 25, 2022).

37. CASELOAD HIGHLIGHTS, *supra* note 35, at 2.

an apples-to-apples comparison of the 1992 data and the 2015 data for tort, contract, and real property cases disposed in general jurisdiction courts as well as the entire *Civil Landscape* dataset reflecting cases disposed in both general and limited jurisdiction courts.³⁸ In the 1992 *Civil Justice Survey*, 12% of contract caseloads consisted of debt collection cases, 7% of mortgage foreclosure cases, and 2% of landlord/tenant cases. Across the entire civil caseload in 2015, an estimated 37% of contract cases were debt collection cases, 29% were landlord/tenant, and 17% were mortgage foreclosure cases.³⁹

TABLE 1: PROPORTION OF CASES DISPOSED

	1992 Civil Justice Survey	2015 Civil Landscape*	2015 Civil Landscape**
Tort	49%	12%	7%
Contract	48%	86%	64%
Real Property	3%	2%	1%
Small Claims	n/a	n/a	16%
Other Civil	n/a	n/a	9%
Unknown	n/a	n/a	3%

* Tort, Contract, and Real Property in General Jurisdiction Courts only

** All Case Categories, All Courts

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Two observations are immediately apparent from these comparisons. First, small claims and “other civil” cases comprise a full 25% of civil caseloads in the 2015 *Civil Landscape* study. The exclusive focus on tort, contract, and real property cases in general jurisdiction courts in the 1992 *Civil Justice Survey* ignored the significant volume of cases that are regularly filed in state courts, including a variety of appeals from state and local administrative agencies and cases involving criminal or domestic-related matters, such as civil stalking petitions, grand jury matters, habeas corpus petitions, and bond matters.

The other startling observation is that general civil caseloads in 1992 were almost equally divided between tort and contract cases with a very small sliver of real property cases making up the remaining portion of the caseload. By 2015, however, tort cases had decreased to only 12% of general jurisdiction caseloads while contract cases had nearly doubled. The NCSC reviewed case filings over the same period

38. Data in Table 1 are based on DEFRANCES ET AL., LARGE COUNTIES, *supra* note 15; CIVIL LANDSCAPE, *supra* note 10.

39. CIVIL LANDSCAPE, *supra* note 10, at 19.

40. Data in Table 1 are based on DEFRANCES ET AL., LARGE COUNTIES, *supra* note 15; CIVIL LANDSCAPE, *supra* note 10.

to determine the cause of this dramatic shift.⁴¹ It found that the proportion of contract cases routinely fluctuates over time in response to economic conditions, but it has remained relatively flat when viewed on a per capita basis.⁴² Tort cases, in contrast, have largely evaporated from state courts.

The economic realities of contemporary civil litigation suggest one explanation for the dominance of contract cases. For plaintiffs, state courts essentially function as a monopoly insofar that securing a judgment from a court of competent jurisdiction is the only legal mechanism for enforcing payment of the award through post-judgment garnishment or asset seizure proceedings. The majority of claims asserted in tort cases, in contrast, is likely to involve insurance coverage for the defendant, which provides greater incentives for litigants to settle claims and a mechanism for judgments and settlement agreements to be paid. Indeed, in the vast majority of incidents giving rise to tort claims, the existence of a robust and highly regulated insurance market largely precludes the need to file cases in court at all.⁴³

Not surprisingly, the dramatic shift in the caseload composition from tort to contract cases affected the distribution of disposition types (Table 2).⁴⁴ Settlement was by far the most common manner of disposition in the 1992 *Civil Justice Survey*, but the proportion of cases in which a settlement was definitively identified as the manner of disposition decreased to just 12% in general jurisdiction courts and to 10% across the entire civil caseload in the *Civil Landscape* dataset.⁴⁵ The CMS data in the *Civil Landscape* did not consistently indicate the basis for a dismissal (e.g., dismissed by the court for failure to prosecute, withdrawn by the plaintiff),⁴⁶ so it is possible that some dismissals were settlements. However, even if all were assumed to be settlements, the settlement rate would still have fallen from 62% to 45% from 1992 to 2015.⁴⁷

41. CIVIL LANDSCAPE, *supra* note 10, at 36.

42. *Id.*

43. *Id.* at 35 n.88 (citing an Insurance Research Institute report that states that only 8% of automobile insurance claimants ultimately filed suit in court).

44. Data in Table 2 are based on DEFANCES ET AL., LARGE COUNTIES, *supra* note 15; CIVIL LANDSCAPE, *supra* note 10.

45. CIVIL LANDSCAPE, *supra* note 10, at 21.

46. *Id.* at 19–20.

47. *Id.* at 21.

TABLE 2: MANNER OF DISPOSITION

		2015 Civil Landscape*	2015 Civil Landscape**
Settlement	62%	12%	10%
Default Judgment	14%	9%	20%
Dismissed	11%	33%	35%
Other Disposition	8%	1%	1%
Summary Judgment	4%	<1%	1%
Jury Trial	2%	<1%	<1%
Bench Trial	1%	3%	3%
Unspecified Judgment	n/a	35%	26%
Unknown Disposition	n/a	7%	4%

* General Jurisdiction Courts only

** All Case Categories, All Courts

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There was a corresponding increase in judgment rates but not due to any obvious increase in the actual adjudication of cases on the merits. Instead, many of the *Civil Landscape* courts reported manner of disposition simply as “judgment” with no other indicators to suggest that the parties had reached a settlement (e.g., stipulated judgment) or that the case had been adjudicated (e.g., summary judgment, judgment on the pleadings).⁴⁹ Contract cases had the highest rates of both default judgments and unspecified judgments, which led NCSC researchers to conclude that some proportion, and likely a substantial proportion, of unspecified judgments were default judgments, especially in consumer debt, landlord/tenant, and small claims cases.⁵⁰

Another major change in civil litigation is the dramatic increase in self-representation rates. In 1992, the overwhelming majority of both plaintiffs and defendants were represented by attorneys.⁵¹ Two decades later, plaintiff representation has only fallen slightly, but defendant representation in general jurisdiction courts has decreased by more than one-third in tort cases, more than half in real property cases, and more than three-quarters in contract cases (Table 3).⁵² Sur-

48. Data in Table 2 are based on DeFRANCES ET AL., *LARGE COUNTIES*, *supra* note 15; *CIVIL LANDSCAPE*, *supra* note 10.

49. *CIVIL LANDSCAPE*, *supra* note 10, at 20.

50. *Id.* at 22.

51. Data from the 1992 *Civil Justice Survey* indicate that 98.8% of plaintiffs and 96.6% of defendants were represented by attorneys (analysis of original dataset on file with the author).

52. Data in Table 3 are based on analysis of the 1992 *Civil Justice Survey of State Courts* dataset (on file with author); *CIVIL LANDSCAPE*, *supra* note 10. The 1992 *Civil Justice Survey*

prisingly, small claims cases have similar disparities in representation status.⁵³ The asymmetry of representation between plaintiffs and defendants, even in small claims courts, raises serious questions about the substantive fairness of outcomes in those cases.⁵⁴

TABLE 3: REPRESENTATION STATUS

	1992 Civil Justice Survey			2015 Civil Landscape*			2015 Civil Landscape**		
	% Plaintiff Represented	% Defendant Represented	% Both Parties Represented	% Plaintiff Represented	% Defendant Represented	% Both Parties Represented	% Plaintiff Represented	% Defendant Represented	Parties Represented
	Tort	98%	98%	97%	97%	65%	63%	97%	67%
Contract	99%	95%	94%	95%	22%	21%	96%	23%	20%
Real Property	98%	95%	94%	95%	41%	40%	95%	45%	39%
Small Claims		n/a			n/a		76%	13%	13%
Other Civil		n/a			n/a		78%	36%	25%

* Tort, Contract, and Real Property in General Jurisdiction Courts only
 ** All Case Categories, All Courts

III. PANDEMIC IMPACTS AND STATE COURT RESPONSE

Judicial policymakers anticipated substantial disruptions to civil litigation in response to the widespread economic impact of stay-at-home orders and other restrictions on business operations that began in March 2020 and extended through the remainder of the year and into 2021 in some states. Cases involving complex commercial claims were expected to increase dramatically, including claims related to breach

measured representation status based on whether any party was represented by counsel at any time during the litigation (statement based on personal knowledge of author). The NCSC *State Court Guide to Statistical Reporting* now recommends that representation status be measured based on whether a party was *self-represented* either at any time during the life of the case or, if the case management system does not capture that information, at disposition. NAT'L CTR. FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING 34 (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0026/23984/state-court-guide-to-statistical-reporting.pdf. The *Civil Landscape* employed the *State Court Guide* methodology to measure representation status (statement based on personal knowledge of author). As a result of the differing definitions, the 1992 *Civil Justice Survey* statistics on representation status may inflate the proportion of litigants who were represented by counsel. CIVIL LANDSCAPE, *supra* note 10, at 31–32.

53. Lawyers were permitted to represent clients in small claims cases in seven of the ten counties that participated in the *Civil Landscape*. CIVIL LANDSCAPE, *supra* note 10, at 32 n.84. More than three-quarters of plaintiffs were represented, suggesting that small claims courts may have become the forum of choice for lawyers representing institutional plaintiffs, especially in debt collection cases, seeking an expedited and low-cost resolution. *Id.* at 32. Based on judgment awards, an estimated 85% of debt collection cases in the *Civil Landscape* sample could have been filed as small claims cases in their participating courts. CASELOAD HIGHLIGHTS, *supra* note 35, at 6.

54. HANNAH E. M. LIEBERMAN & PAULA HANNAFORD-AGOR, TRENDS IN STATE COURTS: SPECIAL FOCUS ON FAMILY LAW AND COURT COMMUNICATIONS, OVERALL COURT IMPROVEMENTS: MEETING THE CHALLENGES OF HIGH-VOLUME CIVIL DOCKETS 91 (2016), https://www.ncsc.org/__data/assets/pdf_file/0027/25578/meeting-the-challenges.pdf.

55. Data in Table 3 are based on analysis of the 1992 *Civil Justice Survey* dataset (on file with author); CIVIL LANDSCAPE, *supra* note 10.

of contract,⁵⁶ business interruption insurance,⁵⁷ and commercial real estate leases.⁵⁸ Businesses that were deemed “essential” and thus exempt from lockdown orders faced threats of lawsuits from employees about working conditions, especially related to health and safety precautions.⁵⁹ Similar increases in case filings were predicted in consumer cases, especially in landlord/tenant, consumer debt collection, and mortgage foreclosure cases.

Remarkably, few of these predictions materialized as of September 2021. The COVID-19 Complaint Tracker⁶⁰ reports just under 12,000 complaints filed since the beginning of the pandemic (Table 4).⁶¹ For comparison purposes, state courts reported that 14.3 million general civil cases were filed in 2018,⁶² of which approximately 2.7 million (19%) were likely to involve claims related to tort, real property, commercial contract or disputes involving consumer contracts other than debt collection, landlord/tenant, or mortgage foreclosure.⁶³ That is, COVID-19-related cases filed since March 2020 account for approximately 0.5% of general civil cases that would ordinarily be filed annually.⁶⁴

56. *COVID-19 Complaint Tracker*, HUNTON ANDREWS KURTH, <https://www.huntonak.com/en/covid-19-tracker.html> (last visited Jan. 9, 2022).

57. *Covid Coverage Litigation Tracker — An Insurance Law Analytics Tool*, INS. LAW CTR., <https://cclt.law.upenn.edu/> (last visited Jan. 9, 2022).

58. See, e.g., Gregory D. Call et al., *Commercial Lease Disputes During the Ongoing Pandemic: The Second Wave*, CROWELL (Sept. 15, 2021), <https://www.retailconsumerproducts.com/2021/09/commercial-lease-disputes-during-the-ongoing-pandemic-the-second-wave/>.

59. *COVID-19 Labor & Employment Litigation Tracker*, LITTLER MENDELSON P.C., <https://www.littler.com/publication-press/publication/covid-19-labor-employment-litigation-tracker> (last visited Jan. 9, 2022).

60. The COVID-19 Complaint Tracker, developed by Hunton Andrews Kirth LLP, reports primarily on corporate, commercial, and industrial litigation related to the pandemic. See *COVID-19 Complaint Tracker*, *supra* note 56.

61. *Id.*

62. The NCSC Court Statistics Project reported 16.4 million new civil filings in 2018, including probate/estate and mental health cases. NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD DIGEST: 2018 DATA 7 (2020), https://www.courtstatistics.org/_data/assets/pdf_file/0014/40820/2018-Digest.pdf.

63. See generally CIVIL LANDSCAPE, *supra* note 10.

64. See generally *id.*

TABLE 4: COVID-19 COMPLAINTS FILED IN COURT (2/23/2022)*

Labor & Employment	3,387	25%
Insurance	1,980	14%
Civil Rights	2,001	14%
Other Claim	2,870	21%
Contract disputes	974	7%
Real Property	926	7%
Habeas/Conditions of Confinement	838	6%
Consumer Cases	827	6%
TOTAL	13,803	

* Source: COVID-19 Complaint Tracker, Hunton Andrews Kirth LLP

It is likely that some litigation was prevented, or at least substantially delayed, by provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).⁶⁶ For example, it has disbursed nearly \$800 billion for the Paycheck Protection Program (PPP) to help small businesses retain their workforce employed during the pandemic.⁶⁷ The CARES Act also included enhanced unemployment benefits for workers who lost employment due to stay-at-home orders that shuttered many small businesses,⁶⁸ and implemented a nationwide eviction and residential mortgage foreclosure moratorium to protect tenants and homeowners who fell behind on rent and mortgage payments due to the pandemic.⁶⁹ Proposals to shield businesses from legal liability were ultimately excluded from the CARES Act and other federal pandemic legislation,⁷⁰ but several states have enacted such protections.⁷¹

Other types of general civil cases may have been entirely prevented by the pandemic itself. Many businesses quickly transitioned to re-

65. See *COVID-19 Complaint Tracker*, *supra* note 56.

66. The CARES Act, passed by Congress on March 27, 2020, included \$2.2 trillion in economic stimulus funding. See Coronavirus, Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat 281 (2020); see also *What's in the \$2 Trillion Coronavirus Relief Package?*, COMM. FOR A RESPONSIBLE FED. BUDGET (Mar. 25, 2020), <https://www.crfb.org/blogs/whats-2-trillion-coronavirus-relief-package>.

67. U.S. SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM (PPP) REPORT: APPROVALS THROUGH 5/31/2021, 2 (2021), https://www.sba.gov/sites/default/files/2021-06/PPP_Report_Public_210531-508.pdf.

68. CARES Act § 2102.

69. CARES Act §§ 4022, 4024.

70. The Health, Economic Assistance, Liability Protection, and Schools Act, proposed by Senate Republicans as S.1624, included liability protections to create a safe harbor for businesses, schools, hospitals, and nonprofit organizations that follow government guidelines to protect public health and safety. S. 4317, 116th Cong. § 122 (2020).

71. *50-State Update on COVID-19 Business Liability Protections*, HUSCH BLACKWELL (Mar. 18, 2021), <https://www.huschblackwell.com/newsandinsights/50-state-update-on-covid-19-business-liability-protections>.

mote platforms to continue their operations during mandatory stay-at-home orders, likely preventing automobile accidents during morning and evening commutes.⁷² Similarly, businesses that were closed to the public faced significantly lowered risk for premises liability claims. Finally, some industries, especially insurance carriers, learned from previous near-misses and had already mitigated their risk of pandemic-related legal liability.⁷³ According to the COVID Coverage Litigation Tracker,⁷⁴ for example, insurance carriers have prevailed overwhelmingly in business interruption cases, in large part because many carriers added virus exclusion provisions to business interruption policies in the early 2000s in the wake of the SARS epidemic.⁷⁵

Of course, the impact of stay-at-home orders also affected court operations, especially for courts that had not previously adopted robust electronic filing systems. Many court facilities were entirely closed to the public. Courts that still relied heavily on paper-based processes at the beginning of the pandemic could not accept filings for new cases or even routine motions and disclosures that would normally be filed with the court.⁷⁶ Even in jurisdictions with robust electronic filing systems in place, lawyers experienced similar disruptions to law firm op-

72. Approximately one in four fatal traffic accidents occur during morning or evening rush hours. *Fatal Commuter Crashes: Analyzing Driving Fatalities During Rush Hour*, INJURY CLAIM COACH, <https://www.injuryclaimcoach.com/fatal-commuter-crashes.html> (last visited Jan. 10, 2022).

73. See generally DIANE P. HORN & BAIRD WEBEL, BUSINESS INTERRUPTION INSURANCE AND COVID-19 (2021), <https://crsreports.congress.gov/product/pdf/IN/IN11295>.

74. The COVID Coverage Litigation Tracker is an online data analytics tool created by Professor Tom Baker at the University of Pennsylvania Law School. The tool uses software developed by LexisNexis to identify insurance coverage cases filed in state and federal courts. See *About the Covid Coverage Litigation Tracker*, INS. LAW CTR., <https://cclt.law.upenn.edu/about/> (last visited Feb. 25, 2022).

75. 2,152 business interruption cases have been filed as of February 2022. *Trial Court Rulings on the Merits in Business Interruption Cases*, INS. LAW CTR., <https://cclt.law.upenn.edu/judicial-rulings/> (last visited on Feb. 23, 2022). As of February 23, 2022, 818 cases have been resolved (approximately 38%). *Id.* In 536 cases, a virus exclusion policy was in place (65%) and insurance carriers prevailed in motions to dismiss or summary judgment motions in 92% of those cases. *Id.* In cases without virus exclusion provisions, insurance carriers prevailed in 84% of cases. *Id.*; Jay Hauser, *State Courts Not Jumping on the Federal Bandwagon*, INS. L. CTR. (July 21, 2021), <https://cclt.law.upenn.edu/2021/07/21/state-courts-not-jumping-on-the-federal-bandwagon/>; Erik Knutsen & Jeff Stempel, *Knutsen & Stempel on the Federal Court Rush to Judgment*, INS. L. CTR. (July 25, 2021), <https://cclt.law.upenn.edu/2021/07/25/knutsen-stempel-on-the-federal-court-rush-to-judgment/>; Sean Bissey, *Learning from NatCats: Is the Onslaught of Cases Yet to Come?*, INS. L. CTR. (July 14, 2020), <https://cclt.law.upenn.edu/2020/07/14/learning-from-natcats-is-the-onslaught-of-cases-yet-to-come/>.

76. Forty-two states issued at least one statewide order limiting in-person access to courthouses to all but a limited number of cases or emergencies. Email from William Raftery, NCSC Senior Knowledge & Info. Servs. Analyst, to author, summarizing the impact of statewide administrative orders related to courthouse access during the COVID-19 pandemic (Feb. 23, 2022). To view the archive of state court administrative orders, see *Court Orders*, NAT'L CTR. FOR

erations that temporarily halted routine litigation activities.⁷⁷ The net result in state courts was a dramatic decrease in general civil filings in 2020.⁷⁸ Based on data reported by twelve states to the NCSC Court Statistics Project, for example, annual filings dropped by nearly one-third.⁷⁹

TABLE 5: CIVIL FILINGS IN 12 STATES

	2019	2020	% Increase / Decrease
January	347,594	352,882	102%
February	298,777	310,785	104%
March	316,605	261,752	83%
April	324,276	118,957	37%
May	339,518	153,608	45%
June	318,850	211,406	66%
July	345,209	226,230	66%
August	375,050	239,061	64%
September	337,272	246,031	73%
October	355,090	246,649	69%
November	302,809	219,295	72%
December	312,428	241,749	77%
TOTAL	3,973,478	2,828,405	71%

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STATE COURTS, <https://nationalcenterforstatecourts.app.box.com/folder/107499992296?s=bqbjl3fjlpw5bt87j6nnbocxlq9fgpzf> (last visited Feb. 25, 2022).

77. See, e.g., Katie Stancombe, *Working Through It: Law Firms Scramble to Practice Remotely Amid Pandemic*, IND. L. (Apr. 1, 2020), <https://www.theindianalawyer.com/articles/working-through-it-law-firms-scramble-to-practice-remotely-amid-pandemic>.

78. DIANE ROBINSON & SARAH GIBSON, PANDEMIC CASELOAD HIGHLIGHTS: COURT FILINGS AND DISPOSITIONS, 2019-2020, 3 (2021), https://www.courtstatistics.org/_data/assets/pdf_file/0022/61519/2020_4Q_pandemic.pdf.

79. *Id.* at 3; see also *Pandemic Caseloads*, COURT STATISTICS PROJECT, <https://www.courtstatistics.org/interactive-data-displays-nav-cards-first-row/pandemic-data> (last visited Jan. 10, 2022).

80. See *Pandemic Caseloads*, *supra* note 79.

Despite lower filing rates, civil case dispositions were similarly affected by the pandemic. Dispositions trailed filings in all but four months from January 2020 through June 2021 (Table 6).⁸¹ The gap between filings and dispositions reflects the clearance rate, which ideally should be at or close to 100% to maintain a stable case inventory.⁸² Clearance rates that routinely fall below 100% may lead to backlogs.⁸³ The clearance rate for these twelve states averaged 98% from January 2020 through June 2021, resulting in a net increase of more than 97,000 cases in the active pending caseload.⁸⁴

TABLE 6: FILINGS AND DISPOSITIONS FOR 12 STATES (JAN. 2020 TO JUNE 2021)

		Filings	Dispositions	Clearance Rate	Net Change in Active Pending Cases
2020	Jan	352,882	352,160	100%	722
	Feb	310,785	322,097	104%	-10,590
	Mar	261,752	254,694	97%	-3,532
	Apr	118,957	115,486	97%	-61
	May	153,608	125,298	82%	28,249
	Jun	211,406	219,073	104%	20,582
	Jul	226,230	200,702	89%	46,110
	Aug	239,061	228,530	96%	56,641
	Sep	246,031	249,732	102%	52,940
	Oct	246,649	262,971	107%	36,618
	Nov	219,295	211,677	97%	44,236
	Dec	241,749	211,398	87%	74,587
2021	Jan	242,280	221,398	91%	95,469
	Feb	220,942	201,039	91%	115,372
	Mar	269,028	248,707	92%	135,693
	Apr	222,949	216,903	97%	141,739
	May	228,256	273,093	120%	96,902
	Jun	218,389	217,938	100%	97,353

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For several reasons, the increased size of civil caseloads and the continued inability of courts to resume full operations portend significant challenges for state courts in the coming months and possibly years. The first and most obvious challenge is the likelihood of significant civil case backlogs in state courts, which is where many courts

81. *Id.*

82. NAT'L CTR. FOR STATE COURTS, COURTOOLS, CLEARANCE RATES: MEASURE 2, 1 (2005), https://www.courttools.org/_data/assets/pdf_file/0012/7320/courttools-measure-2-clearance-rates.pdf.

83. *Id.*

84. See *Pandemic Caseloads*, *supra* note 79.

85. *Id.*

find themselves today. In the parlance of court performance measures, backlogs refer to the proportion of cases pending beyond established time standards, which describe timeframes in which most cases should be fully disposed.⁸⁶

Timeliness in case processing is related to, but not synonymous with, clearance rates. One limitation of clearance rates, for example, is that they do not specify the age of cases being disposed in any given month. It is possible, therefore, for a court to maintain equilibrium between filings and dispositions (100% clearance rate) but to do so in a way that either focuses on disposing older cases, as more recently filed cases languish, or focuses on newly filed cases while older cases continue to languish. By the same token, it is possible for courts to close many cases within time standards but still have new case filings outpace dispositions. For courts to timely address backlog while also processing newly filed cases, clearance rates in excess of 100% are necessary. Exacerbating the problem of existing backlogs is the high likelihood of dramatically increased filings in the coming months from cases that could have been filed previously but were not due to pandemic-related factors (e.g., eviction and foreclosure cases until moratoriums expire, commercial breach of contract and consumer debt collection cases when economic stimulus funding is exhausted). Some types of cases may not ultimately be filed because the circumstances giving rise to litigation did not occur (e.g., automobile tort and premises liability cases). Nevertheless, the difference in filings between 2019 and 2020 shown in Table 5 is the potential size of the “shadow cases” that might still be filed in 2021 or beyond.⁸⁷ For these

86. Many states have adopted the *Model Time Standards for State Courts* or some variation on those standards. To view state time standards, see *Case Processing Time Standards*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/cpts> (last visited Feb. 25, 2022). In 2011, the *Model Time Standards for State Courts* was endorsed by the Conference of Chief Justices, the Conference of State Court Administrators, the National Association for Court Management, and the American Bar Association. See RICHARD VAN DUIZEND ET AL., MODEL TIME STANDARDS FOR STATE TRIAL COURTS iii (2011), https://www.ncsc.org/_data/assets/pdf_file/0032/18977/model-time-standards-for-state-trial-courts.pdf. The *Model Time Standards* specify that 75% of general civil cases should be fully disposed within 180 days of filing, 90% should be fully resolved within 365 days, and 98% should be fully disposed within 540 days. *Id.* at 12. In addition, 75% of summary civil cases (e.g., small claims) should be fully disposed within 60 days, 90% within 90 days, and 98% within 180 days. *Id.* at 17. Using Table 6 as an illustration, if these states were complying with the *Model Time Standards*, 264,662 of the cases filed in January 2020 (75%) should have been included among the 1,388,808 cases disposed between January and June 2020 and an additional 52,932 cases should have been disposed by December 31, 2020. By June 30, 2021, no more than 5,434 cases (2%) of the 352,882 cases filed in January 2020 should have still been pending.

87. Tbl. 5, *supra* note 80.

twelve states alone, these shadow cases could add more than 1 million new cases to the existing civil caseload.

To avoid significant civil backlogs, state courts have two options, both of which face long odds of succeeding: they must either increase the speed at which they process cases, or they must increase the resources dedicated to processing cases. With respect to the first option, case processing time depends heavily on predetermined timeframes over which the court has little or no control. Each state, for example, establishes mandatory deadlines for plaintiffs to serve defendants (typically sixty to ninety days but up to six months in Hawaii) and for defendants to file an answer in response to the complaint (typically twenty-one to thirty days). The addition of supplemental parties (e.g., through crossclaims, counterclaims, or third-party claims) extends these deadlines even further. The parties have control over the speed at which these tasks take place, but the court cannot unilaterally shorten the deadlines to make the pleading process faster. Even after the case is fully joined—that is, all named parties have been served and have had an opportunity to respond—they will still need some reasonable time period (typically four to twelve months) to conduct discovery, engage in settlement negotiations or alternative dispute resolution, or file dispositive motions. Only after these efforts have concluded, and assuming the parties have not settled the case, can the court schedule the case for trial and final disposition.

Traditionally, courts have used the trial date as the benchmark for the intermediate deadlines in the case. A typical case management order, for example, will set a proposed trial date and then specify that dispositive motions be filed no less than sixty days before trial, that mediation or other alternative dispute resolution processes be completed no less than thirty days before trial, etc.⁸⁸ Only a tiny proportion of civil cases is ultimately disposed by trial. In the *Civil Landscape*, for example, only 3.4% of cases were resolved by bench trial and 0.1% by jury trial.⁸⁹ For a much larger proportion of cases, however, the looming threat of a firm trial date becomes the primary motivating factor to incentivize parties to complete routine litigation tasks.

During the COVID-19 pandemic, the specter of a firm trial date became a proverbial paper tiger as trials were largely suspended

88. For recommended contents of a civil case scheduling order, see, e.g., FED. R. CIV. P. 16(b)(3).

89. CIVIL LANDSCAPE, *supra* note 10, at 25. The overwhelming majority of bench trials took place in consumer debt collection, landlord/tenant, and small claims cases in limited jurisdiction courts. CASELOAD HIGHLIGHTS, *supra* note 35, at 3–4, 6.

across most of the country due to the risk to public health and safety.⁹⁰ Since courthouses have reopened to the public, some courts have resumed jury trials with the use of facemasks, social distancing, and other Centers for Disease Control and Prevention-recommended safety measures.⁹¹ However, minimizing the number of people in the courtroom at any one time necessarily limits the number of trials that can begin simultaneously and lengthens the amount of time needed to select individual juries. Overall, the new procedures have greatly reduced trial rates compared to pre-pandemic court operations.⁹² Even in those courts, speedy trial requirements often gave priority to criminal trials over civil trials. Other courts creatively pilot-tested remote bench and jury trials, often with remarkable success,⁹³ but questions concerning the constitutionality of remote trials, the difficulty of surmounting logistical and technical challenges, and general skepticism about lawyers' ability to advocate effectively in an online forum kept most courts from pursuing this option in earnest.⁹⁴ The upshot is that

90. Trials, especially jury trials, are the single most labor-intensive event that take place in court. They typically require dozens of people—the judge, lawyers, parties, a court reporter, court clerk, bailiff, and prospective jurors—to gather in a relatively small, enclosed courtroom for long hours over several days.

91. For examples of administrative orders related to court operations during the pandemic, see *Pandemic-related Administrative Orders*, NAT'L CTR. FOR STATE COURTS, <https://www.ncsc.org/newsroom/public-health-emergency/orders> (last visited Feb. 25, 2022).

92. See Bridget McCormack & David Slayton, *All Things Jury* (2020) (presentation from the Annual Meeting of the Conference of Chief Justices and Conference of State Court Administrators) (slides available at <https://nationalcenterforstatecourts.box.com/s/jyxy-ignehafql7nv0fgubxk5s6mazixc>). Despite safety measures, more than a few trials resulted in mistrials after one or more trial participants tested positive for COVID-19. See, e.g., Tommy Witherspoon, *McLennan County Child Sex Abuse Trial Bumped After Witnesses Contract COVID-19*, WACO TRIBUNE-HERALD (Aug. 16, 2021), https://wacotrib.com/news/local/crime-and-courts/mclennan-county-child-sex-abuse-trial-bumped-after-witnesses-contract-covid-19/article_906f23c0-fead-11eb-9a52-0f77f3a07d40.html; Jane Harper, *Ex-Norfolk Sheriff Became "Buds" with Contractors, Former Jail Official Says; 2nd Juror Sent Home for COVID-19 Exposure*, THE VIRGINIAN-PILOT (Aug. 17, 2021, 6:37 PM), <https://www.pilotonline.com/news/crime/vp-nw-mccabe-defense-begins-20210817-ln53skqm7zbode2xydzdldaxdoq-story.html>; Angela Morris, *15 Infections, Mistrial: How Litigants are Filing for Continuances After Texas Jury Trial Spread COVID-19*, TEX. LAWYER (Nov. 19, 2020, 5:02 PM), <https://www.law.com/texaslawyer/2020/11/19/15-infections-mistrial-how-litigants-are-filing-for-continuances-after-texas-jury-trial-spread-covid-19/?sreturn=20220011220041>.

93. DAVID SLAYTON, *JURY TRIALS DURING THE COVID-19 PANDEMIC: OBSERVATIONS AND RECOMMENDATIONS 1* (2020), <https://www.txcourts.gov/media/1449880/jury-trials-during-covid-19.pdf>; N.J. Courts, *Virtual Civil Jury Trials During COVID-19* (Jan. 2021) (presentation by the N.J. Courts) (slides available at <https://www.njcourts.gov/public/assets/virtualciviljurytrial-scovid19.pdf>); Michael Pressman, *Remote Jury Trials: Reporting on Judge Matthew W. Williams's Experiences in King County, Washington*, 6 JURY MATTERS (Civ. Jury Project, New York, N.Y.), Feb. 2021, <https://myemail.constantcontact.com/Revised-February-Newsletter-of-the-Civil-Jury-Project.html?soid=1127815376566&aid=FJrQJeDY8E4>.

94. CONSTITUTIONAL CONCERNS, *supra* note 5, at 3.

trial date certainty continues to be a formidable pinch point in the ability of state courts to tackle civil case backlogs.

The other option for addressing civil case backlogs is to increase the resources allocated for civil case processing, although preexisting facility and staffing constraints make this at least as challenging as efforts to increase the speed of civil litigation. Each courthouse has a defined number of courtrooms, a limited number of judges and court staff that can be assigned to each courtroom, and a limited number of hours in which court hearings and conferences can be scheduled. When faced with backlogs in the past, many courts have simply dedicated extra time and effort to whittle down the caseload to more manageable levels. These efforts can usually only be sustained for relatively brief periods without risking burnout by judges and court staff and increased rates of procedural and substantive errors, depriving parties of a just outcome to the case.

Further complicating the task of calendaring cases for hearings is the unforeseen and quite remarkable impact that transitioning to videoconference hearings has had on litigant participation rates.⁹⁵ Before COVID-19, the failure-to-appear rate on many court calendars, especially high-volume dockets, was often greater than appearance rates. Consequently, courts would routinely schedule dozens or even hundreds of cases for a morning calendar with great confidence that all the relevant participants would appear in only a small handful of cases. To the surprise of many, allowing litigants to participate using remote technology has greatly increased appearance rates. Ostensibly, online participation is more convenient and cost-effective than having to take time away from work and family to attend an in-person court hearing. Although this development is normatively good in terms of increased access to justice, hearings in which all relevant parties participate necessarily take more time, which further limits the number of cases that can reasonably be scheduled for any given calendar.

IV. A PATH FORWARD

State court policymakers are already discussing ways to supplement existing resources (e.g., increased use of senior judges, special masters, work-sharing arrangements across jurisdictions within states). While these approaches have been successful in the past, they were usually employed to address backlogs on a local or regional level but never on

95. NAT'L CTR. FOR STATE COURTS, CONDUCTING FAIR AND JUST REMOTE HEARINGS: A BENCH GUIDE FOR JUDGES 1 (2020), https://www.ncsc.org/_data/assets/pdf_file/0025/51784/Remote-Hearing-Bench-Guide.pdf.

the scale required by the COVID-19 pandemic. More urgently needed than supplemental resources, however, are ideas for improving civil case management on a more systematic and comprehensive level that will serve courts and the public long beyond the current public health crisis.

Fortunately, a comprehensive set of recommendations designed to address the contemporary landscape of civil litigation had already been developed, pilot-tested, and promulgated before the pandemic arrived. In 2016, CCJ and COSCA endorsed the report of the CCJ Civil Justice Improvements Committee, which proposed a set of thirteen recommendations designed to reduce cost and delay and ensure procedurally fair outcomes across the entire depth and breadth of the contemporary civil justice system (CJI Recommendations).⁹⁶ The CJI Recommendations adopted as their first principle that the court, not the parties or lawyers, is responsible for setting the pace of civil litigation (Recommendation 1).⁹⁷ From that uncompromising position, they presented a comprehensive framework featuring:

- A pathway approach based on the concept of proportionality in which both civil rules and court resources are matched to the unique needs of each case (Recommendations 2–6);⁹⁸
- A radically different staffing model for civil case processing that delegates substantial responsibility for routine case management to specially trained professional staff, supported by effective case automation, permitting judges to focus on tasks that require their unique training and expertise (Recommendations 7–10);⁹⁹ and
- A renewed focus on high-volume calendars that comprise the vast majority of contemporary civil caseloads, especially improved access for self-represented litigants, and greater attention to uncontested cases and greater scrutiny of claims to ensure procedural fairness for litigants (Recommendations 11–13).¹⁰⁰

Since their adoption, state and local court policymakers have pilot-tested and evaluated the CJI Recommendations to assess their impact on civil case processing.¹⁰¹ Entire state judicial branches have em-

96. See generally CALL TO ACTION, *supra* note 6.

97. *Id.* at 16–17.

98. *Id.* at 18–27.

99. *Id.* at 27–33.

100. *Id.* at 33–38.

101. LYDIA HAMBLIN & PAULA HANNAFORD-AGOR, EVALUATION OF THE CIVIL JUSTICE INITIATIVE PILOT PROJECT (CJIPP): IMPLEMENTED BY THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA i (2019), https://www.ncsc.org/_data/assets/pdf_file/0013/26230/cjipp-final-evaluation-

braced the CJI Recommendations, appointing task forces to work on statewide implementation plans.¹⁰² Those courts that have already taken steps to implement the CJI Recommendations understand just how valuable the CJI framework is likely to be for navigating the post-pandemic civil justice system. The framework recognizes the substantial changes in civil caseload characteristics and outcomes over the past thirty years and embraces the types of innovations that proved so indispensable during the pandemic. As state courts confront the magnitude of civil case backlogs, it is essential to remember that courts cannot judge their way out of the pandemic; they can only manage their way out. The CJI Recommendations provide a constructive path forward.

report.pdf; COURTNEY BROSCIOUS & SHELLEY SPACEK MILLER, EVALUATION OF THE CIVIL JUSTICE INITIATIVE PILOT PROJECT (CJIP): IMPLEMENTED BY THE 22 JUDICIAL CIRCUIT COURT, McHENRY COUNTY, ILLINOIS i (2019), https://www.ncsc.org/__data/assets/pdf_file/0018/26604/civil-justice-initiative-evaluation-book-2.pdf; COURTNEY BROSCIOUS ET AL., EVALUATION OF A DEMONSTRATION PILOT PROJECT OF THE CIVIL JUSTICE INITIATIVE: IMPLEMENTED BY THE FULTON COUNTY MAGISTRATE COURT 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0020/25481/fcmc-cji-report.pdf.

102. BRITTANY K.T. KAUFFMAN & BROOKE H. MEYER, TRANSFORMING OUR CIVIL JUSTICE SYSTEM FOR THE 21ST CENTURY: THE ROAD TO CIVIL JUSTICE REFORM 1 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/36424/IAALS-113-Transforming-Civil-Justice_FINAL.pdf.