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Some Important Causes for Settlement in American Civil Litigation

Felipe Forte Cobo
University of Georgia School of Law

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I – Introduction.

All rational man-made systems are concerned with efficiency. That is an undeniable truth. The question, thus, is when a system can be deemed efficient. In order to measure the efficiency of a civil justice system an accepted framework is cost-minimization.[1] Through this perspective, as synthetized by Kevin Clermont, civil procedure should maximize society's wealth minimizing social costs.[2] In other words, "you cannot reasonably overlook the price of pursuing justice, no matter how you wish to define justice."[3]

This analysis of efficiency through decreasing economic costs and increasing social gains is reflected in Federal Rule of Civil Procedure 1, which provides that the Federal Rules of Civil Procedure (FRCP) "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[4] By affirming justice as a goal as important as speed and cost, the drafters made it clear that these three aims are equally important for the FRCP.

The acceptance of an economic efficiency model is easier in civil litigation than criminal prosecution because of the nature of the interests at stake, usually economic and private

[a1] State Judge since March 2008, Judiciary Branch of the State of Parana – Brazil; J.D., Universidade de Sao Paulo; LL.M. Candidate 2013, University of Georgia.

[1] KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 408 (Thomson West, 2d ed. 2009); SAMUEL ISSACHAROFF, CIVIL PROCEDURE 180-82 (Foundation Press, 2005)
[2] KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 412 (Thomson West, 2d ed. 2009)
[3] KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 412 (Thomson West, 2d ed. 2009)
[4] FED. R. CIV. P. 1

ones, as opposed to concerns about life, liberty and punishment. As a consequence, civil justice is seen by many less as a search for truth, than a manner to resolve conflicts between two private parties,[5] contrasting with the criminal justice system where the nature of the interests at stake, liberty and even life, requires more than a private peace to satisfy the public perception of justice.[6] However, it is true that not all civil litigation presents purely economic and private matters. In fact, family and civil rights cases are just two examples of civil litigation that involves more than economics. For these civil disputes, as with criminal cases, justice is something more than pure economic efficiency.[7]

This paper is focused in pure economic disputes such as contract, real property and tort conflicts, in which the economic efficiency model is very accepted. In this limited

[5] Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1196 (2009) ("In suits primarily or exclusively about damages, when a defendant agrees to a large payout but professes innocence on the charges alleged, most people assume--correctly--that the defendant would not have settled had it not believed there was at least some evidentiary basis for the claim. More fundamentally, in most damages actions, the claimants are concerned less about a court finding of wrongdoing than they are about recovering compensation for their injuries. Moreover, there is a strong societal interest in obtaining the deterrent effects that come from compensation in ex post facto settlements. The notion that claimants in suits seeking exclusively or primarily damages are disserved by not obtaining a formal court finding of wrongdoing does not comport with reality in many circumstances.") (footnotes omitted); *See generally* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996) ("[T]he major structural reasons for the special importance of settlement in American litigation--scarcity of judges and abundance of lawyers, adversarial fact-finding, trial by jury--are all manifestations of a single cultural value: the preference for private ordering over public control.")

[6] Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 413 (2009) ("Most observers reasonably view criminal prosecution as a function to be performed exclusively by the state. Making charging decisions, plea bargaining, and litigating cases at trial or on appeal would all seem to be functions solely within the exclusive province of full-time government lawyers to whom we commonly refer as "prosecutors.""); *See also* Ric Simmons, *Private Plea Bargains*, 89 N.C. L. REV. 1125, 1141 (2011) ("Agreeing not to report a crime to the police in exchange for consideration is illegal under blackmail statutes in every jurisdiction in the United States, generally with potential penalties of a year or more of imprisonment.") (footnote omitted)

[7] Owen M. Fiss, *The History of an Idea*, 78 FORDHAM L. REV. 1273 (2009) (explaining why the author is skeptical with settlements as a mean for reaching justice, but always focusing in civil rights or mass litigation cases); *See also* Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement (1984)*, 78 FORDHAM L. REV. 1265, 1267 (2009) ("There are cases in which settlement is not desirable. This was apparent from my work with the NAACP Legal Defense Fund on the briefs and related negotiations among those diverse groups dedicated to eliminating racial discrimination. The two most important cases on which I worked were Brown v. Board of Education and the One Person-One Vote dispute. They required showdown litigation rather than settlement.") (footnotes omitted)

scenario, the consensual resolution of disputes is always more efficient than decisions made by a third-party decision-maker, whether from a post-trial or pre-trial perspective.

From a post-trial standpoint, whenever a third-person other than the parties themselves decides the dispute, her decision may please at best only one of them.[8] In fact, if the judgment is a full recognition of the plaintiff's or defendant's allegations, only one party will be satisfied. However, as the parties' allegations may be only partially recognized, a ruling can actually displease both parties. Because of the dissatisfaction of at least one of the parties, the legal system faces two consequences, no matter if the decision is a result of a bench or jury trial. First, the losing party will be tempted to appeal (no party will appeal if she wins or, at least, agrees with the resolution reached by a settlement).[9] According to Kevin Clermont, although 80% of the federal civil appeals are affirmed, still "[n]early one-fifth of losing parties decide that they might as well stagger to the finish line, pretty much regardless of the chances on appeal."[10] On a state level, the Bureau of Justice Statistics found that 15% of the civil trials concluded in 2005 were appealed despite of a reversal rate of approximately 20%.[11] In cases where punitive damages were awarded by state courts, the percentage of cases appealed was higher, approximately 30%.[12] Second, the losing party will be less inclined to voluntarily comply with the final resolution (after all, she probably disagrees with the result).

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[8] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLA L. REV. 1, 7 (1996) ("When a civil dispute ends in trial there is almost always a clear loser, and usually a clear winner as well.")

[9] Donald J. Farole & Thomas H. Cohen, *Appeals of Civil Trials Concluded in 2005*, BUREAU OF JUSTICE STATISTICS, 2 (Oct. 3, 2011), http://bjs.gov/content/pub/pdf/actc05.pdf ("In comparison to cases disposed by trial, settlements are unlikely to be appealed because they tend to involve the resolution of disputes that could lead litigants to seek further legal remedies.")

[10] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1972 (2009)

[11] Donald J. Farole & Thomas H. Cohen, *Appeals of Civil Trials Concluded in 2005*, BUREAU OF JUSTICE STATISTICS, 1 (Oct. 3, 2011), http://bjs.gov/content/pub/pdf/actc05.pdf (showing that from 3,970 civil trials that were appealed only 840 trial court outcomes were reversed or modified)

[12] Thomas H. Cohen & Kyle Harbacek, *Punitive Damages Awards in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 7 (Mar., 2011), http://bjs.gov/content/pub/pdf/pdasc05.pdf

Both consequences directly impact the economic efficiency of the legal system. By appealing, the losing party is contributing to overload a court of appeal's docket, increasing the consumption of time, not just for that specific case, but to all other cases on that docket. Since lengthy disputes are related to higher litigation costs,[13] appeals also increase the costs of the legal disputes, whether public (understood as the costs for the maintenance of the court itself)[14] or private (attorney's fees),[15] especially in a system like the United States which restricts litigation cost-shifting. In the federal judicial system for the one year period ending September 30, 2012 the median time interval from filling a civil appeal in a lower court to final disposition on the merits in the appellate court was 30.3 months.[16] Regarding state judicial systems, the median time interval from filling a civil appeal in a lower court to final disposition on the merits in the appellate court was 14 months.[17] By not complying with the final resolution, the losing party makes a judicial enforcement necessary, adding to a judge's docket (and this slows down

[13] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf (pointing out the results of national attorney surveys with Fellows of the American College of Trial Lawyers, Members of the American Bar Association, Section of Litigation, and Members of the National Employment Lawyers Association, which showed that 92%, 82% and 73% of each group respectively agreed with the statement "[t]he longer a case goes on, the more it costs.")

[14] *Judicial Branch Expenditures*, VIRGINIA'S JUDICIAL SYSTEM, http://datapoint.apa.virginia.gov/exp/exp_checkbook_agency.cfm?AGYCODE=125 (last visited Apr. 18, 2013) (showing that during the year of 2012 the Court of Appeals of Virginia spent $8,729,107.)

[15] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 6 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (pointing out that post-disposition activity, including any appeal activity, accounted for 8% of total median hours spent by attorneys during automobile tort litigation.)

[16] *Judicial Business of the United States Courts 2012 – Table B4A*, UNITED STATES COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/B04ASep12.pdf (last visited Mar. 16, 2013)

[17] Donald J. Farole & Thomas H. Cohen, *Appeals of Civil Trials Concluded in 2005*, BUREAU OF JUSTICE STATISTICS, 4 (Oct. 03, 2011), http://bjs.gov/content/pub/pdf/actc05.pdf

the trial of all other cases) and to the overall costs of the litigation (again public expenditures, and private spent with attorney's fees, as mentioned above).[18]

From a pre-trial perspective, settlement is the most efficient form of case disposition. For the parties, settlement always means saving litigation costs. In fact, due to the absence of a cost-shifting rule in the American civil litigation, no matter who wins, there are still unreimbursed litigation costs.[19] In this context, from the time the lawsuit is filed, both parties are already losers. In other words, the longer it takes a dispute to end, the more both parties are losing since their expenses will not be reimbursed by the so-called loser.[20] For the state, the greatest advantage of settlements under an economic efficiency model is the saving of public expenditures with courts, judges and jurors. The sooner legal disputes end, the greater the public savings.[21] According to Nora Engstrom, adjusting for inflation cost figures provided by Chief Justice Burger in 1985, the average public expenditure per trial in 2011 would roughly cost $16,300.[22]

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[18] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 745 (Thomson West, 4th ed. 2005) ("For those litigants who seek damages from their opponents, a favorable judgment on the merits may prove to be only the first skirmish in what turns out to be a very long, hard-fought battle to collect the award."); *See also* Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 6 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (pointing out how much post-disposition activity accounted for the median hours spent by attorneys during litigation: 8% for automobile tort cases; 8% for premises liability disputes; 9% for real property litigation, 8% for breach of contract cases; 7% for employment litigation; and 7% for professional malpractice cases.)

[19] STEPHEN C. YEAZELL, CIVIL PROCEDURE 292 (Wolters Kluwer Law & Business, 8th ed. 2012) ("This feature of remedial law means than an award of compensatory damages, no matter how precisely calculated, will always fall short of full compensation if plaintiff has to pay her lawyer.")

[20] Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 79 (1993) ("Most civil litigation is a negative-sum game. The outcome is a transfer, perhaps equal to zero, from the defendant to the plaintiff. This outcome appears to be zero-sum, but since litigation involves significant costs in legal fees, expert fees, and time, it becomes more efficient to settle than to litigate.")

[21] Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 149 (2010) (finding that the average public expenditure per case in the U.S. is $1,049)

[22] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 886 n.99 (2011) ("Chief Justice Burger stated that the average jury trial costs taxpayers $8300. Warren E. Burger, Opening Remarks, 62 A.L.I. Proc.

Thus the advantage of a consensual resolution of litigation resides not only in the effectiveness of the resolution, understood as the voluntary compliance with what has been determined by the parties themselves, but also in the efficiency of the legal system, expressed in a faster and less costly way to end the controversy to both the judiciary and the parties. In fact, as pointed out by Professor Kevin Clermont, "[f]rom the viewpoint of the civil justice system, settlement is a critical need. Ours is a slow and expensive procedure. The system simply would not be able to adjudicate all cases filed. We depend on the parties finding alternatives to using the system."[23] Sharing the same view, District Judge Jack Weinstein states that

> Settlements may be even more desirable in the mass commercial age in which we now live. Unsettled disputes about harms to large numbers of people across geographic and demographic lines, caused by large entities, present risks of social breakdowns without fair, timely, and efficient resolution. Time-consuming adjudication results in excessive transaction costs and unnecessary stress on individuals, families, local and national economies, and government service networks. If we persist in trying each dispute as if it were a unique horse-and-buggy collision at a muddy intersection in nineteenth-century Cairo, Illinois, businesses may be unfairly saddled with continuing litigations while individuals claiming harm may be left almost indefinitely adrift.

32, 36 (1985). Adjusted to today's dollars, this equals roughly $16,300. Inflation was calculated pursuant to CPI Inflation Calculator, supra note 90.")

[23] KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 87 (Thomson West, 2d ed. 2009)

> Most mass tort cases must be disposed of by settlement. Trying each of them would completely overwhelm the nation's courts.[24]

Settlements are more than an important tool for the economic efficiency model of the civil justice system, they are a necessity for how the American civil procedure is currently conceived. [25] There is a public interest in settling as many cases as possible. [26] That perception is supported by the actual number of cases that go to trial in the federal civil justice system, making the American civil procedure one of settlements.[27] During a 12-month period ending September 30, 2012, from the total amount of 271,385 cases terminated within the U.S. District Courts, only 3,212 (approximately 1%) reached the trial stage.[28] This low trial percentage pattern is also seen in the state judicial system. According to Michael Heise, in a study using one year of civil jury trial outcomes from 45 of the nation's 75 most populous counties, only 3.5% of civil actions

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[24] Jack B. Weinstein, *Comments on Owen M. Fiss, Against Settlement (1984)*, 78 FORDHAM L. REV. 1265, 1266 (2009)

[25] Kenneth R. Feinberg, *Reexamining the Arguments in Owen M. Fiss, Against Settlement*, 78 FORDHAM L. REV. 1171, 1172 (2009) ("The first challenge is the inefficiency of the civil justice system. If you are against settlement in any realistic way, however you define it, what is the alternative? Few can agree with Owen in terms of the practical, day-to-day running of the civil justice system. The articles you read today are about the vanishing trial, not against settlement. No one wants to go to trial. The consumers of the civil justice system do not like the costs, the inefficiencies, the uncertainties, the frustrations, or the delays. That's one practical problem that undercuts the aspirational objective.")

[26] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2-3 (1996) ("We prefer settlements and have designed a system of civil justice that embodies and express that preferences in everything from the rules of procedure and evidence, to appellate opinions, to legal scholarship, to the daily work of our trial judges. Our culture portrays trial-especially trial by jury- as the quintessential dramatic instrument of justice. Our judicial system operates on a different premise: Trial is a disease, not generally fatal, but serious enough to be avoided at any reasonable cost.") (footnotes omitted)

[27] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 449-50 (1994) ("Empirical evidence indicates that over 90 percent of cases filed are settled out of court…") (footnote omitted)

[28] *Judicial Business of the United States Courts 2012 – Table C04*, UNITED STATES COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C04Sep12.pdf (last visited Mar.16, 2013)

proceeded to a trial disposition.[29] More recently, a civil justice survey of state courts nationwide found that during the year 2005 trials accounted for approximately 3% of all tort, contract and real property dispositions in general jurisdiction courts.[30] In this scenario, it is crucial for lawyers and judges to identify the important causes for settlement. From a lawyer's perspective, the importance of understanding this phenomenon lies in the fact that most of her work will be performed as a settlement advisor, instead of as a litigator.[31] For judges, it is vital for the management of their dockets to foster the consensual resolution of disputes in order to keep the judicial dockets clear and ready for those cases that really need to be tried.[32] Even with approximately 1% of all civil cases filed within the Federal District Courts reaching the trial

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[29] Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 823 (2000) ("Only a small fraction (3.5 percent) of civil actions proceeded to a trial disposition. Because so few cases filed wind up reaching trial, it is possible that the relatively small number of civil jury cases--the focus of this study--differs systematically from the larger pool of civil disputes from which they emerge. Indeed, there are strong theoretical reasons to expect certain differences generated by a selection effect. Expectations theory predicts that objectively strong and weak civil cases will settle or conclude prior to reaching a jury trial.") (footnotes omitted)

[30] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 1 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf

[31] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1952-53 (2009) ("Shifting from the viewpoint of the system to that of the disputants, settlement is also of critical importance. For them, in the usual course, settlement is our system of justice (and for their "trial" lawyers, negotiation of settlements--and pursuit of other alternatives to litigation--is what their profession primarily entails).")

[32] Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1210-12 (2009) ("To illustrate this point, I highlight below two of the things settlement offers to litigation: docket clearance and selective case filtering…. The most conspicuous of settlement's contributions to modern litigation is its capacity to reduce the number of cases demanding judicial resources and attention. Fiss appears to imagine that docket lightening is, in fact, settlement's only contribution to our judicial system. Likening settlement to plea bargaining, he declares both of them to be undeserving of praise. At best, he says, they are realities that must be suffered under the constraints of current conditions. It is not my intention to weigh into the conversation about the morality of plea bargaining, although I may be more sympathetic to its functioning than Fiss. Instead, I acknowledge at least part of Fiss's point: settlement permits courts to function properly because of settlement's docket-management function… Settlement offers at least the prospect of filtering out the "right" cases. Of course, one might argue that settlements are, by the virtue of party autonomy, the "right" cases, by some simplistic definition. By this logic, unless some form of coercion or other improper influence operates on disputants, causing them to settle, a private settlement is evidence that the parties judged their consensual option superior to the prospects of litigation. In this mercenarily individual-rationality sense, at least, settled cases were the "right" ones to settle, and those that do not settle were the "right" ones to litigate…. But my point here is not about satisfying parties' interests. Instead my point is that litigation fulfills its public function best if it is not called upon as the method of resolving every kind of dispute.") (footnotes omitted)

stage, this small percentage of cases still wait for approximately twenty-four months to be tried.[33] Imagine what would happen if that percentage rate was higher.

Therefore, settlements in pure economic disputes are more efficient than trials whether from a private or public perspective. From a private standpoint, settlements make the dispute resolution much less expensive and faster for the parties since settlements prevent trial, appeals, and judicial enforcement. From a public standpoint, settlements save public resources such as courts, judges and jurors. Since the civil justice system must be concerned with efficiency, this paper intends to uncover some significant causes for settlement in American civil litigation in order to keep fostering consensual resolution of disputes. Considering that lower transaction costs drive parties towards settlement,[34] part II of this essay provides an overview of the American costs of legal disputes, framing several issues that might be determinative to settlements. Part III explores how two specific American procedural institutes – discovery and civil jury trial – contribute to settlements in the U.S. modern civil litigation. At the end, this paper shows that the high settlement rate observed in the American civil litigation is not an accident but a consequence of procedural tools and public policies that externalize an American predilection for settlements instead of trials.

II – Transaction Cost of American Legal Disputes

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[33] *Judicial Business of the United States Courts 2012 – Table C04,* UNITED STATES COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C04Sep12.pdf (showing that during a 12-month period only 1.2% of the total civil cases terminated within the Federal District Courts reached trial.) (last visited Mar.16, 2013)

[34] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 554 (Little, Brown and Company, 4th ed.1992) ("That cases are ever litigated rather than settled might appear to violate the principle that when transaction costs are low, parties will voluntarily transact if a mutually beneficial transaction is possible. In fact the vast majority of legal disputes are settled without going to trial; one study found that only 2 percent of automobile accident claims are actually tried. This is as economic theory would predict, but we have still to explain the small fraction that got to trial.") (footnote omitted)

Cost-minimization is the core of what can be called an economic model for civil litigation which provides a coherent and objective guideline in the attempt of determining the parties' behavior in pure economic disputes.[35] Accordingly, a party's goal is the best cost/benefit relationship which is expressed by a balance between low costs and high benefits. For this model, efficiency is achieved when a party pays the cheapest price for getting the closest she can to her optimal dispute outcome. Since settlements occur when they express a party's best cost/benefit relationship, it is important to understand the costs of legal disputes in the United States and in which ways they might be determinative of dispute outcomes.

Transaction costs of legal disputes are basically spread through bargaining costs, discovery costs[36] and litigation costs.[37] Each of these three costs will be mostly defined by court costs, attorney's fees and expert witness fees.[38] Court costs usually are filling fees, copying fees and cost for witnesses.[39] Attorney's fees are billed whether hourly, flatly or on contingency.[40] Hourly and flat billings are the most usual way for charging for legal services except for plaintiffs in personal injury cases that ordinarily use contingency fees.[41]

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[35] SAMUEL ISSACHAROFF, CIVIL PROCEDURE 108 (Foundation Press, 2005)

[36] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 11 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf (showing that half of the lawyers answering to a national attorney survey pointed out that discovery consumes at least 70% of expenditures in cases that are not tried.)

[37] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 449 (1994)

[38] *See generally* Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 1-2 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (acknowledging the preponderance of the attorney's and expert witness' fees to the total cost of the legal disputes.)

[39] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 94-95 (2005)

[40] MODEL RULES OF PROF'L CONDUCT R.1.5 (2012)

[41] STEPHEN GILLERS, REGULATION OF LAWYERS PROBLEMS OF LAW AND ETHICS 131 (Wolters Kluwer Law & Business, 9th ed. 2012) ("If we omit personal injury cases, where contingent fees predominate, flat rates and hourly billing are the most common ways lawyers charge for their services.")

Nora Engstrom provides some dollar figures for the cost of litigation in the U.S. According to her, a defendant would pay approximately $9,900 to defend each lawsuit in automobile tort litigation.[42] Providing some more figures, the Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules, based on a survey of attorneys from May to June, 2009, stated that

> For the closed cases included in the sample, the median cost, including attorney fees, was $15,000 for plaintiffs and $20,000 for defendants. For plaintiffs, reported costs ranged from $1,600 at the 10th percentile to $280,000 at the 95th percentile; for defendants, the range was from $5,000 at the 10th percentile to $300,000 at the 95th percentile.[43]

More recently, the National Center for State Courts (NCSC) released a study with several median costs of litigation depending on case type. Accordingly, the median cost of litigation for cases that progressed all way through trial and post-disposition proceedings was: for automobile tort cases – $43,000; for premises liability cases – $54,000; for real property – $66,000; for employment – $88,000; for contract – $91,000; and for professional malpractice – $122,000.[44]

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[42] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 825 (2011)
[43] Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 2 (Oct., 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf
[44] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 7 (Jan., 2013), http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx

Attorney's fees often account for the major expense in the costs of legal dispute. [45] Regarding the total value charged by a lawyer at the end of a legal dispute, attorney's fees billed by hour should not vary that much from flat or contingency fees, since they all take in account the expected amount of time required to perform a specific legal task.[46] Still, one could think that lawyers working on contingency basis would be prone to charge more because of the inherent risk of recovering nothing.[47] Surprisingly, according to a 2009 Federal Judicial Center study, "[h]ourly billing was associated with higher reported costs for plaintiff attorneys. Plaintiff attorneys charging by the hour reported costs almost 25% higher than those using other billing methods (primarily contingency fee), all else equal."[48]

Since legal fees are proportionally charged to the dispute's complexity and length,[49] time plays an important role in defining the costs of the legal dispute.[50] The math is

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[45] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 521 (Little, Brown and Company, 4th ed.1992) ("The government subsidy of litigation is modest. The main expenses – attorneys' fees – are borne entirely by the litigants."); *See also* Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 374 (2011) (discussing the different impacts of the Federal Rule of Civil Procedure 68 depending on whether it includes or not attorney's fees, "which account for the majority of litigation expenses."); *See generally* Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 1-2 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (acknowledging the attorney's preponderance to the total cost of the legal disputes, the National Center for State Courts (NCSC) has developed a method for cost estimation: the Civil Litigation Cost Model (CLCM), relying on the amount of time expended by attorneys in various litigation tasks.)

[46] STEPHEN GILLERS, REGULATION OF LAWYERS PROBLEMS OF LAW AND ETHICS 131 (Wolters Kluwer Law & Business, 9th ed. 2012) ("[F]lat fees are often hourly rates in disguise. A lawyer predicts how much time the work will require (probably estimating high) and multiplies by an hourly rate."); *See generally* STEPHEN GILLERS, REGULATION OF LAWYERS PROBLEMS OF LAW AND ETHICS 144 (Wolters Kluwer Law & Business, 9th ed. 2012) (explaining that the amount of work required is one of the factors a lawyer will take in consideration when deciding the contingency fee arrangement.)

[47] Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 367 (2011) ("A successful plaintiff's attorney will generally be entitled to a larger compensation under a contingency fee system than under an hourly rate, due to the attorney assuming the risk of receiving no payment at all.") (footnote omitted)

[48] Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis*, FEDERAL JUDICIAL CENTER, 6 (Mar., 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf

[49] MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(1) (2012) (providing for the need of reasonable fees, proportional to the time spent by the lawyer)

[50] Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis*, FEDERAL JUDICIAL CENTER, 5-7 (Mar., 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf

intuitively simple, the sooner the dispute ends, the less the party spends on attorney's fees. The Judicial Business of the United States Courts Report 2012 points out that the median time interval from filing to disposition of civil cases may vary from 7.6 months to 23.5 months, depending on whether the dispute ended before pretrial stage or at trial stage.[51] That range might provide some idea about how much the cost of legal dispute may vary, especially when the lawyer is hired on an hourly fee basis, if a case faces a full trial scenario instead of an early settlement one. Analyzing the results of a 2009 Federal Judicial Center study, Danya Shocair Reda highlights that "[u]nsurprisingly, when a case was terminated through trial, it also tended to have higher costs, around twenty-four percent higher than cases not ending in trial, all other factors being equal."[52] However, that twenty-four percent cost increasing was observed from a defendant's perspective. From a plaintiff's perspective, cases terminated by trial had even higher costs than cases that did not, approximately 53%, all else equal.[53]

Because attorney's services present a cost to the parties involved in a legal dispute and because this cost is usually proportional to the length of that dispute, the mere presence of lawyers should push the parties towards settlement, as quickly as possible, so they could save attorney's costs. On the other hand, since in practice attorneys might have a private economic interesting on longer or shorter litigation (usually depending on the fee arrangement) one might argue that they will frame the dispute to their clients in such a way so that it reflects their

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(finding that cases with longer processing times were associated with higher reported costs for plaintiffs and defendants, all else equal)

[51] *Judicial Business of the United States Courts 2012 – Table C05*, UNITED STATES COURTS, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/C05Sep12.pdf (last visited Mar. 16, 2013)

[52] Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1110 (2012)

[53] Emery G. Lee III & Thomas E. Willging , *Litigation Costs in Civil Cases: Multivariate Analysis*, FEDERAL JUDICIAL CENTER, 5 (Mar., 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf

preference towards settlement or trial.[54] In this scenario, hourly practitioners would be prone to risk their client's chances on trials,[55] while lawyers working on flat or contingency fee agreements would face a huge incentive to settle a dispute even when, according to their client's best interest, it would be better to try the case.[56] Expressing this dual role that an attorney might have towards or not a settlement, Jeffrey Rachlinski points out:

> [T]he framing model of litigation poses a powerful role for the attorney. The attorney can control the client's frame, thereby influencing settlement decisions in either direction. The attorney may or may not use this ability to serve his clients' best interests.

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[54] Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 368 (2011) ("The attorney's personal stake in the case may also encourage unethical behavior, conflicts of interest between the attorney and client, and the pursuit of unconscionably large settlements. Mistrust may corrupt the attorney-client relationship if the client receives less net compensation than anticipated, or the attorney collects a large fee relative to the work performed. If a defendant offers to settle immediately, an attorney may be tempted to accept the offer and receive a large payday for merely filing a complaint, even though the attorney knows the client is likely to receive a larger payment at the end of a lengthy and work-intensive trial.") (footnotes omitted)

[55] Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 170 (1996) ("Initially, attorneys seem to face an incentive structure that promotes wasteful litigation. To the extent that the litigation lasts longer and the parties decline to settle, attorneys make more money in fees.");

[56] Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1654-55 (1996) ("At first glance, the contingency fee seems to align the attorney's interests with that of the client. And to some extent, that is clearly true. Obviously, both the client and the contingent fee attorney have the same general interest in the outcome in the case. However, the contingent fee does not necessarily lead an attorney to devote the amount of time and effort to a case that would maximize the client's net return.

If a particular number of hours of work would result in the largest net recovery for the client, the client desires the attorney to work that amount of hours. However, the lawyer has no direct economic incentive to work that particular number of hours because her goal is to get the largest amount of recovery in the shortest amount of time. 'Lawyers on contingent fee are said to have an incentive to make a 'quick kill' before too many additional hours are spent at possibly only a marginal increase in the lawyer's fee.' Thus, the contingent fee system can create an incentive for an attorney to deprive the client of the right to make her own decisions in litigation, such as when to settle a claim. The lawyer and the client have the same interests only when the case goes to the jury; before that time the attorney actually has a strong incentive to settle the case, which could be in conflict with the plaintiff's best interests.") (footnotes omitted), *See also* Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1224-25 (2009) ("Agents sometimes negotiate settlements with which their clients are disappointed. In an ideal world, agents would understand and represent fully their principals' views of the relevant interests, parameters, tradeoffs, and opportunities. In practice, agents do not always understand their clients' priorities and underlying interests. In practice, agents sometimes have incentives at least partially at odds with some of their clients' interests. And, as a practical matter, agents cannot always bring every decision back to their clients for a new round of consultation. People do not merely hire agents for the agents' skill sets. Sometimes, a client hires an agent because the client does not have the bandwidth to do everything himself or herself. With the delegation of a task to an agent comes the risk that the agent will behave differently than the client would prefer.") (footnote omitted)

> An avaricious defense attorney who works on an hourly rate may portray all settlements as losses so as to encourage the risk-seeking proclivities of the client. After all, the defense attorney is the principle beneficiary of risk-seeking decisions in litigation. Likewise, a plaintiff's attorney, operating on a contingency fee and interested in a quick settlement, may encourage the client's inherent risk-aversion.[57]

Coincidence or not, a study conducted by Thomas Willging, Donna Stienstra, John Shapard and Dean Miletich found that "[d]isposition times were also related to the attorney's billing method. Cases in which the attorney reported billing on an hourly basis took longer than other cases."[58]

Still, Samuel Gross and Kent Syverud remember that trying a case against the client's interest violates rules of professional conduct and, as far as a survey with lawyers that have tried cases in California Superior Courts shows, conflicts of interests between attorney's and clients were not a significant cause for trials.[59] With many variables, differing from case to

[57] Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 172 (1996)
[58] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 533 (1998)
[59] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in A System Geared to Settlement*, 44 UCLA L. REV. 1, 54 (1996) ("We do not doubt that plaintiffs' attorneys and defendants' insurers sometimes act in conflict with the best interests of the parties. But we do not believe that such conflicts (strategic or otherwise) are a common cause of trials. Taking a case to trial against the interests of the client violates professional norms, and may subject the attorney or the insurance company to formal or informal sanctions. Norms and sanctions do not eliminate abuses, but they do suggest that the disfavored behavior is the exception rather than the rule. In this context, our survey data are consistent with that expectation. The attorneys we interviewed frequently said that the trial was caused by the opposition's stupidity or stubbornness, but no defense attorney said that there was no settlement because the plaintiff's attorney wanted a shot at a major verdict, and no plaintiff's lawyer said that it happened because the defendant's insurance company had little to risk at trial and was unconcerned about its insured.") (footnotes omitted)

case and perhaps from lawyer to lawyer, it is unclear whether attorneys foster settlements or not.[60]

Another specific feature of the U.S. legal system is that it provides that the parties should bear most of the costs of litigation since the expenses with evidence production and legal representation are not borne by the government.[61] Each party must pay for the expenses of its own investigation of facts. The system usually does not provide for public attorneys advocating purely private matters, not even for the needy.[62] Although pro bono legal services are encouraged by professional rules,[63] American lawyers on average provide only thirty-nine hours

[60] Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 170-71 (1996) ("Furthermore, even attorneys paid on an hourly rate may be more interested in maintaining a continuing relationship with their clients than extracting extra fees in any single case. Gilson and Mnookin also have proposed that attorneys have the ability to avoid the prisoner's dilemma that litigation creates. Thus, it is unclear whether attorneys are a positive or a negative influence on the social costs of litigation.") (footnotes omitted)

[61] Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 474-75 (1994) ("We have a system that requires the parties to bear many of the costs of litigation....Why should lawyers not be provided as a public service to any litigant who would rather trust a public lawyer than pay a private lawyer? Why should other costs of investigation and preparation not be paid according to the budget judgments of a public official? And so of discovery: Why should any part of the cost be carried by the parties, much less nonparties? There is something crude and almost offensive about rationing access to public dispute resolution by ability and willingness to pay, but we do it.")

[62] Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1228 (2009) ("In practice, modern disputants encounter a number of different barriers to court access. The most conspicuous reason disputants might not perceive themselves to have access to the courthouse stems from financial concerns. In short, litigation is expensive, and many--accurately-- perceive litigation's justice as beyond their price range."); *See generally* Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 134-35 (2010) (pointing out surveys showing that only 37% of poor households facing legal needs actually sought third party assistance in U.S. versus 65% in Scotland)

[63] MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and (b) provide any additional services through: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession. In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.")

a year of it, approximately 2% of all legal effort.[64] On the top of that, the American rule prevents the winner from recovering the whole transaction cost of the legal dispute, since it restricts cost-shifting.[65] This system has been long criticized because of its apparent unfairness. Wealth imbalance between plaintiff and defendant might be more determinative of the outcome than the merits of the dispute.[66] The argument supports that plaintiffs and defendants could use their wealth to force an unfair settlement on the weakest party, defined as the one who lacks enough economic resources to equally pursuit its rights all the way through bargaining, discovery and trial stages. That is the view of Owen Fiss, who argues that

> The disparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be less able to amass and analyze the information needed to predict the outcome of the litigation, and thus be disadvantaged in the bargaining process. Second, he may need the damages he seeks immediately and thus be induced to settle as a way of accelerating payment, even though he realizes he would get less now than he might if he awaited judgment. All plaintiffs want their damages immediately, but an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of

[64] Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 FORDHAM URB. L.J. 129, 130-31 (2010)
[65] Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 474-75 (1994) ("[T]he victor is awarded some part of the costs to an extent that depends on the nature of the litigation, while victor and vanquished each bear substantial portions of their own costs.")
[66] STEPHEN C. YEAZELL, CIVIL PROCEDURE 287 (Wolters Kluwer Law & Business, 8th ed. 2012) ("[E]ither outcome may represent surrender to financial exigency: A plaintiff gives up strong case because she cannot afford to litigate any further; a defendant offers something to make a plaintiff with a trumped-up claim go away because winning on the merits will cost more than the settlement offered.")

> the judgment. Third, the poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery. It might seem that settlement benefits the plaintiff by allowing him to avoid the costs of litigation, but this is not so. The defendant can anticipate the plaintiff's costs if the case were to be tried fully and decrease his offer by that amount. The indigent plaintiff is a victim of the costs of litigation even if he settles. [67]

Supporting this assumption, an analysis based on national surveys of attorneys, including members of the American College of Trial Lawyers ("ACTL"), the American Bar Association ("ABA") and the National Employment Lawyers Association ("NELA"), found that "in the experience of all of the attorney groups, the cost of litigation does hinder access to judicial case determination on the merits."[68] In fact, the majorities of attorneys answered that their firms would turn away cases when it is not cost-effective to handle them (accordingly, ACTL: 81%; ABA: 82%; NELA: 88%).[69] More than that, the majority also agreed that the costs

[67] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (footnote omitted)
[68] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf
[69] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf

of litigation force cases to settle that should not settle based on the merits (accordingly, ACTL: 83%; ABA: 83%; NELA: 59%).[70]

However, some scholars have advocated that a powerful tool has been more used recently to compensate that potential wealth imbalance – third-party funding of litigation.[71] Contingent-fee agreements have allowed plaintiffs who lack financial resources to hire very sophisticated law firms with economic capacity to fund expensive litigation.[72] This third-party funding has made possible huge settlements favoring those plaintiffs as it happened in the Vioxx case, settled with $4.85 billion.[73] For them, big law firms, working on contingency basis and financing the transaction costs of the legal dispute, would be an effective remedy against a wealthy defendant who would be prevented from forcing a settlement on an unfair basis just because of a plaintiff's lack of financial capacity for litigation.[74]

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[70] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf

[71] Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 367 (2011) ("To nullify these concerns, perhaps the most beneficial, and arguably most detrimental, feature of the American Rule has developed--contingent fees…. The contingency fee system ensures those with valid claims will not be discouraged from pursuing their legal rights due to personal financial limitations. In addition, contingency fees allow individual plaintiffs to challenge large institutional defendants and use litigation as a means for initiating societal reform.") (footnotes omitted)

[72] Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1180-81 (2009) ("We are hardly the first commentators to note the rise in strong, financially successful plaintiff law firms with the capacity to prosecute and fund expensive and protracted litigation. These firms are capable of litigating against the largest, most powerful defense law firms in the country") (footnotes omitted)

[73] Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1183 (2009)

[74] Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 845-46 (2000) ("When a plaintiff secures the financial backing of a lawyer, or more likely a law firm, the economic differences between the typical plaintiff (an individual) and defendant (a non-individual) erode. Put differently, in such circumstances an "individual" plaintiff benefiting from contingency fee financing begins to resemble a "non-individual" in terms of financial resources. And, as previously discussed, results in Table 6 reveal that the presence of non-individuals in civil litigation correlates with longer case disposition time.")

Samuel Gross and Kent Syverud emphasize the importance of third-party funding to legal disputes nowadays. [75] According to their empirical study with claims for monetary damages that actually went to trial in California Superior Courts (thus, incurring in all transaction costs), individual plaintiff attorneys were paid on a contingent-fee basis for 96% of the times.[76] Besides, 88% of the individual plaintiffs have the out-of-pocket costs of litigation at least partially advanced by their attorneys.[77] On the other hand, although defense attorneys were almost invariably paid by the hour, [78] 72% of all defendants had their legal fees and costs entirely paid by their insurance company.[79] In light of these numbers, they conclude:

> Thus, the typical civil jury trial is a personal injury claim by an individual against a large company, in which neither party is playing with its own money: The plaintiff is represented by an attorney whose fee and expenses will be paid out of the recovery (if any), and the defendant has an insurance policy that covers all defense costs and any likely judgment.

However, if a third-party is funding the litigation, it means that a party other than the plaintiff and the defendant possesses an economic interest at stake. Whether that situation affects settlements or not should depend on two factors. First, the attorney's compliance with the professional rules which establish the ethical duties for lawyers and conflicts of interests. As set

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[75] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 6 (1996)
[76] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15-16 (1996)
[77] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 17 (1996)
[78] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15-16 (1996)
[79] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 23-25 (1996)

forth above, a lawyer should not decide whether to settle or not based on her private interest on the case. [80] Second, the liability insurance contract which defines who has the power to accept or reject settlements, the insurer or the insured. Even from an economic standpoint, insurer and insured may have different interests on settling ot a dispute. Samuel Gross and Kent Syverud explain these different interests pointing out that:

> If the plaintiff makes a demand at or near the policy limit, the defendant will probably want to take the settlement, which is free to him, rather than risk a trial after which he might be stuck with personal liability for damages above that limit. Most liability insurance contracts, however, give the insurance company the power to accept or reject settlements, and the insurance company may prefer a trial: It cannot lose more than the policy limit one way or the other, and, for the price of trying the case, it might save itself a settlement of about that amount.[81]

Another unique feature of the American legal dispute costs is the so called "American rule". Accordingly, none of the dispute costs are subject to reimbursement by the losing party.[82] In other words, for most cases, the loser is not required to pay for the winner's expenses regarding both attorney's fees and court costs. As the American system restricts cost-

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[80] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 54 (1996) ("Taking a case to trial against the interests of the client violates professional norms, and may subject the attorney or the insurance company to formal or informal sanctions. Norms and sanctions do not eliminate abuses, but they do suggest that the disfavored behavior is the exception rather than the rule.") (footnotes omitted)
[81] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 53-54 (1996) (footnotes omitted)
[82] Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 365 (2011) ("Under the American Rule, a prevailing litigant may not recover their expenditures on fees from the opposing party.") (footnote omitted)

shifting, the plaintiff will always fall short of full compensation.[83] Because of that feature, from the time the lawsuit is filed, both parties are already losers. Moreover, since time is money, [84] the longer it takes for the dispute to come to an end, the more both parties are losing, since their expenses will proportionally increase.[85] The high costs of litigation in U.S. together with the lack of a cost-shifting rule might be the reason why it is estimated that only 46% of the total tort litigation cost goes to victims, whether as economic or non-economic damages.[86]

In this situation, the American legal restriction on cost-shifting should make parties more willing to settle the dispute since they are not going to recover the money they are investing on it.[87] However, this view is not shared by Samuel Gross and Kent Syverud to whom the American rule actually creates incentive to trials since it reduces the monetary risks to the losing party.[88] In fact, the adoption of a cost-shifting rule would make the loser pay not just for

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[83] STEPHEN C. YEAZELL, CIVIL PROCEDURE 292 (Wolters Kluwer Law & Business, 8th ed. 2012) ("This feature of remedial law means than an award of compensatory damages, no matter how precisely calculated, will always fall short of full compensation if plaintiff has to pay her lawyer.")

[84] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape,* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf (pointing out the results of national attorney surveys with Fellows of the American College of Trial Lawyers, members of the American Bar Association, Section of Litigation, and members of the National Employment Lawyers Association, which showed that 92%, 82% and 73% of each group respectively agreed with the statement "[t]he longer a case goes on the more, the more it costs.")

[85] Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis*, FEDERAL JUDICIAL CENTER, 5-7 (Mar., 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf (finding that the longer a case takes to reach termination, the higher the costs will be, all else equal: for plaintiffs, a 1% increase in case duration is associated with 0.32% increase in costs; for defendants, a 1% increase in case duration is associated with a 0.26% increase in costs.)

[86] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims,* 33 FLA. ST. U. L. REV. 89, 90 (2005)

[87] David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 609 (2005) ("To pose the argument in a slightly different manner, under the "American rule," if both parties are certain of victory, they will still settle in cases where the cost of victory at trial is more than the cost of settling; whereas, the "English rule" would encourage the litigants to proceed to trial in order to have a full recovery in the case of the plaintiff, or no loss in the case of the defendant. Thus, one may conclude that "'the likelihood of trial under the British system will be greater than under the American system.'") (footnotes omitted)

[88] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 60-61 (1996) ("The alternative to attempting to provide more information about the outcome of the case

her own expenses but also for her adversary's. Because parties are more willing to settle before high risk scenarios, changing the American rule and increasing the amount that a party may have to pay in case she loses the dispute would make both parties more willing to settle the dispute.[89] Hence, the American rule would discourage settlements.

The drafters of the Federal Rules seemed to have embraced this rationale in Rule 68,[90] which provides:

> (a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
>
> (b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
>
> (c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability

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is to alter the rules under which it is litigated. The common method is to increase the risk of trial by requiring the losing party to pay some or all of the winners' legal fees…. The result might be an overall change in the pattern of civil litigation, including, perhaps, a reduction in the number of trials.")

[89] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 60-61 (1996)

[90] FED. R. CIV. P. 68

> remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
>
> (d) PAYING COSTS AFTER AN UNACCEPTED OFFER. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made. [91]

In *Marek v. Chesny*, 473 U.S. 1, 5 (1985), the Supreme Court explained that

> The plain purpose of Rule 68 is to encourage settlement and avoid litigation. Advisory Committee Note on Rules of Civil Procedure, Report of Proposed Amendments, 5 F.R.D. 433, 483 n. 1 (1946), 28 U.S.C.App., p. 637; *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352, 101 S.Ct. 1146, 1150, 67 L.Ed.2d 287 (1981). The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.[92]

Testing that assumption, a study performed by Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons, and Erik Tallroth, evaluated the effects of increased litigation costs

[91] FED. R. CIV. P. 68
[92] Marek v. Chesny, 473 U.S. 1, 5 (1985)

on settlements.[93] Their empirical experiment with undergraduate students at George Mason University revealed that its subjects tended to behave as intended by the drafters of the FRCP. The higher the amount at risk (as if a party may have to bear both parties' expenses) the more prone they were to settle the dispute. Accordingly, the overall settlement rate under low expected cost was 58.7% against 77.7% in high cost cases.[94] This might suggest that Federal Rule 68[95] really promotes a higher compromise disposition by conditioning cost-shifting to the decline of an offer that is better to the oferee than the final trial outcome. However, most courts have not applied the cost-shifting provisions of Rule 68[96] to attorney's fees, "by far the most significant trial expenditure." [97] Because settlement rates were higher before increased costs, Professor Inglis et al. propose a broader definition of "costs" for purposes of Rule 68[98] so it also includes attorney's fees.[99] Therefore, the actual drawback of Rule 68[100] would be that the courts have narrowly construed the term "costs incurred" so it usually does not include attorney's fees.[101]

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[93] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89 (2005)

[94] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 116 (2005)

[95] FED. R. CIV. P. 68

[96] FED. R. CIV. P. 68

[97] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 95 (2005) ("In most instances, attorneys' fees, by far the most significant trial expenditure, are not recoverable under Rule 68") (footnotes omitted);

[98] FED. R. CIV. P. 68

[99] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 116 (2005) ("This suggests that high court costs create strong incentives for settlement. One possible application of this result is to increase court costs by including attorneys' fees as recoverable costs in cost-shifting rules, such as Rule 68 and section 998.")

[100] FED. R. CIV. P. 68

[101] Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 374-76 (2011) ("However, critics argue Rule 68 fails to provide a powerful incentive for parties to make and accept settlement offers because courts commonly interpret Rule 68's ambiguous language as not including attorneys' fees, which account for the majority of litigation expenses…. Several courts have refused to include attorney's fees in those costs subject to Rule 68's cost-shifting provision, even though the underlying

Whether the American rule fosters settlements or trials seems to depend on the parties' expectations about the trial outcome.[102] If there is uncertainty for both parties about the trial outcome, the American rule seems to promote more trials since the monetary risks to each party are limited to her own expenses. On the other hand, if the trial outcome is very predictable, the American rule should foster settlements because even the expected winner will prefer to settle in order to save the trial expenses. [103]

This seems to provide a good overview of the costs of American legal disputes and their interaction with the parties' behavior towards settlement. The specific costs of discovery and civil jury trial, and their relationship with settlements will be analyzed in each topic bellow, respectively.

III – Discovery and Civil Jury Trial Contributions to the High Percentage of Settlements in American Modern Civil Litigation

A) Discovery.

A.1. Pleadings and Discovery

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substantive statute expressly described attorneys' fees as costs. Circuit courts have split on whether attorneys' fees are "subject to Rule 68's cost-shifting provisions.") (footnotes omitted)

[102] David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 610 (2005) ("In the end, whether the 'English rule' decreases the frequency of settlements seems to turn on the parties' beliefs regarding the strength of their respective case.") (footnote omitted)

[103] David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 609 (2005) ("To pose the argument in a slightly different manner, under the "American rule," if both parties are certain of victory, they will still settle in cases where the cost of victory at trial is more than the cost of settling; whereas, the "English rule" would encourage the litigants to proceed to trial in order to have a full recovery in the case of the plaintiff, or no loss in the case of the defendant. Thus, one may conclude that "'the likelihood of trial under the British system will be greater than under the American system.'") (footnotes omitted)

During the nineteenth century, beginning with New York, and then followed by other states, the common law pleading system was changed in an effort to make it simpler for the parties.[104] According to this new system, known as "code pleading," because it was first drafted as the "Field Code" (New York) and followed by other state codes,[105] the pleadings would perform a guiding role, shaping the case and establishing the controversy.[106] In fact, the code formulation required litigants to bring "a plain and concise statement of the facts constituting each cause of action (defense or counterclaim) without unnecessary repetition."[107] The statement of the facts constituting each cause of action rather than the statement of the claim was essential.

This approach had its critics who argued that the rigidity of pleadings rules would cause the parties to waste time and energy fighting on technical matters of procedure rather than on the underlying facts or merits.[108] The critics were right as evidenced by the battle among lawyers, judges and doctrine to determine what should be the meaning of "facts" according to the Code. [109] Moreover, the courts could not draw a clear line between an "ultimate fact," which was deemed indispensable to the claim, and an "evidentiary fact," that should not be part of it.[110]

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[104] SAMUEL ISSACHAROFF, CIVIL PROCEDURE 20 (Foundation Press, 2005)
[105] SAMUEL ISSACHAROFF, CIVIL PROCEDURE 20 (Foundation Press, 2005)
[106] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 255 (Thomson West, 4th ed. 2005)("They argue that without a set of rules, rigidly applied, courts will be clogged with unjustified cases, some that never should have been brought, and some that cannot legitimately be defended. Trials that do take place will be sloppy affairs, admitting as evidence testimony that bears remotely at best on the true issues at stake.")
[107] N.Y.LAWS 1851, c. 479, § 1.
[108] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 255 (Thomson West, 4th ed. 2005)
[109] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 263 (Thomson West, 4th ed. 2005) ("Nevertheless, goaded on by litigious attorneys, the courts turned the "fact" pleading requirement into a nightmare that in some jurisdiction all but destroyed the effectiveness of the reform.")
[110], MARY JACK H. FRIEDENTHAL KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 263 (Thomson West, 4th ed. 2005); *See also* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 57 (2010) ("One of the primary shortcomings of Code pleading was the distinction between 'ultimate' facts, which were required to be pleaded, and 'evidentiary' facts and 'conclusions of law,' which were not to be pleaded. Those distinctions proved unworkable in practice and resulted in a level of technicality and factual detail in the pleadings that became counterproductive.") (footnotes omitted)

In response to the chaos associated with "code pleading," the U.S. Supreme Court promulgated in 1938 a different pleading system which has become known as "notice pleading."[111] In fact, Federal Rule 8[112] requires the parties to state "a short and plain statement of the claim" as opposed to the facts constituting each cause of action.[113] Now, the standard required from the parties in federal court is no longer to state facts, but to state a claim, which means that the pleadings must just be clear enough to reveal the basic nature of the dispute.[114] This lower standard is also seen in the forms in the Appendix to the Rules.

For many decades, the Supreme Court followed its precedent in *Conley v. Gibson*, 355 U.S. 41(1957), defining notice pleading as just a manner of giving fair notice of the pleader's contentions to the adversary. In *Conley v. Gibson*, the Supreme Court stated that

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this.[115]

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[111] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 267 (Thomson West, 4th ed. 2005)
[112] FED. R. CIV. P. 8
[113] FED. R. CIV. P. 8 – "(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief."
[114] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002);
[115] Conley v. Gibson, 355 U.S. 41, 47 (1957)

Recently, however, the Supreme Court has heightened the pleading requirements.[116] In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court found that the alleged parallel conduct of different companies (with the possibility of discovering more relevant facts after discovery) was not enough to present a claim for conspiracy under antitrust law.[117] The plaintiff should allege "enough facts to state a claim to relief that is plausible on its face."[118] *Twombly* created a plausibility test and an inquiry into the pleading's convincingness.[119] After some uncertainty of its applicability beyond antitrust disputes, the Supreme Court, in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), made it clear that "[t]hough *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the pleading standard 'in all civil actions and proceedings in the United States District Courts.'"[120] Despite these recent Supreme Court decisions, heightening the pleading requirements, their effects are still not fully understood.[121] However, it may be the change is minimal. First, but for civil rights cases, it has been reported that courts dismissal rates are practically the same as they were before *Twombly* and *Iqbal*.[122] Second, so far there has been no amendment to the Federal Rules of Civil Procedure nor to its forms.

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[116] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1930-31 (2009)
[117] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557 (2007) ("An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'")
[118] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (emphasis added)
[119] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1931-32 (2009)
[120] Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009)
[121] Charles B. Campbell, *Elementary Pleading*, 73 LA. L. REV. 325, 351 (2013) ("Not surprisingly, Twombly and Iqbal have triggered a wave of empirical studies attempting to quantify what, if any, impact the cases are having on civil litigation. So far, the results are conflicting and inconclusive.")
[122] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1934 (2009); *See also* Joe S. Cecil, George W. Cort, Margaret S. Williams & Jared J. Bataillon, *Motions to Dismiss for Failure to State a Claim After Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, vii (Mar., 2011), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf ("There was no increase from 2006 to 2010 in the rate at which a grant of a motion to dismiss terminated the case…)

For this paper, it is important to highlight that notice pleading still requires a lower standard of fact presentation than code pleading. Besides, even after *Twombly* the pleading requirements still fall far from detailed factual allegation.[123] In this scenario, without a strict fact pleading requirement and allowing the parties to plead according to the low standard of the simple "notice of a claim", it was (and it still is) necessary to create other tools that narrow the controverted facts and issues subject to judgment. The broad rules of discovery in the FRCP fit this role.[124] Because of the "notice pleading system," discovery has as one of its main purposes to "ascertain the issues that actually are in controversy between the parties."[125] More than that, discovery, as conceived by the Federal Rules, is fundamental to the parties to delimit which facts are really in dispute.[126] This relationship between notice pleading and discovery makes the latter essential to fostering settlement in American civil litigation. In fact, it is reasonable that knowledge of which facts are really in controversy is a premise for any meaningful discussion towards a consensual resolution of the dispute.

A.2. Information Gained Through Discovery

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[123] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) ("Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.")

[124] Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002) ("This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."); *See also* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 268 (Thomson West, 4th ed. 2005) ("The federal rules by formally including broad rules of discovery and an elaborate provision for summary judgment adequately filled any gap left by less stringent pleading requirements.") (footnotes omitted).

[125] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 398 (Thomson West, 4th ed. 2005); Also Hickman v. Taylor, 329 U.S. 495, 501 (1947) ("The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.")

[126] Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 58 (2010) ("In line with the 'liberal ethos' of the Federal Rules of Civil Procedure, pleadings were designed to ensure that case-screening mechanisms were delayed until after some fact discovery.") (footnotes omitted)

As pointed by Stephen Yeazell,

> Both state courts and the federal system have adopted broad civil discovery rules that permit a lawyer to uncover, in advance of trial, enormous amounts of information. The scope and depth of modern U.S. discovery practice make it unique among today's legal systems. This scope permits the bringing and defense of claims where all or much of the relevant information lies in the possession of the other side.[127]

According to the Federal Rules, parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, even if the information sought is not admissible at trial but is reasonably calculated to lead to the discovery of admissible evidence.[128] In this context, the scope of discovery has been construed very broadly by the courts, as one should expect in a notice pleading system.[129] In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), the Supreme Court held that

> Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. Nor is discovery limited to the merits of a case, for a variety of

[127] STEPHEN C. YEAZELL, CIVIL PROCEDURE 458 (Wolters Kluwer Law & Business, 8th ed. 2012)
[128] FED. R. CIV. P. 26(b)(1); *See* Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir. 1961) ("Rule 26(b) provides that the deponent may be examined 'regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action….' It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.")
[129] Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 425 (1st Cir. 1961) ("This rule apparently envisions generally unrestrictive access to sources of information, and the courts have so interpreted it.")

> fact-oriented issues may arise during litigation that are not related to the merits.

On the other hand, a deeper reading of the Rules shows that there are some restrictions in scope, including: privileged information, material obtained in preparation for trial, and physical or mental examinations (except if there is a good cause and the physical or mental conditions are in controversy).[130] Besides, the rules still demand some relevance regarding the sought information. For instance, in *Oppenheimer Fund, Inc.*, the Supreme Court found that would be proper to deny discovery of matters that were relevant only to claims or defenses that have been stricken because discovery must be reasonably calculated to lead to the discovery of admissible evidence.[131] These limitations, however, are not significant on the broad sweep of discovery.

The discovery under the Federal Rules of Civil Procedure is initiated with the conference of the parties, which must be held as soon as practicable and at least 21 days before the initial pretrial conference.[132] During this conference, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case.[133] If settlement is not reached and the case proceeds, then the parties must develop a proposed discovery plan.[134] Therefore, the first step of the federal discovery is to bring the parties together to make them better understand each pleading and to build a plan to discover the

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[130] 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 119-20 (West, 3d ed. 2010)

[131] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351-52 (1978) ("Discovery of matter not 'reasonably calculated to lead to the discovery of admissible evidence' is not within the scope of Rule 26(b)(1). Thus, it is proper to deny discovery of matter that is relevant only to claims or defenses that have been stricken, or to events that occurred before an applicable limitations period, unless the information sought is otherwise relevant to issues in the case.")

[132] FED. R. CIV. P. 26(f)(1)

[133] FED. R. CIV. P. 26(f)(2)

[134] FED. R. CIV. P. 26(f)(2)

facts and evidence that support their cases. As a matter of fact, the conference also gives the parties a first impression of the strength and weakness of their pleadings and provides an opportunity to at least initiate a settlement discussion.[135]

Within 14 days after this first conference,[136] the FRCP state that a party must, without awaiting a discovery request, provide to the other parties:

> (i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;
>
> (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which

[135] STEPHEN C. YEAZELL, CIVIL PROCEDURE 474 (Wolters Kluwer Law & Business, 8th ed. 2012) ("The initial round of disclosures asks each party to put its basic evidentiary cards on the table. In the process it helps each lawyer form a general idea of the case he will be facing. That may produce settlement discussions, and it also gives a very general sneak preview of the main evidentiary attractions at summary judgment and trial.")
[136] FED. R. CIV. P. 26(a)(1)(C)

> each computation is based, including materials bearing on the nature and extent of injuries suffered; and
>
> (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.[137]

This mandatory initial disclosure was introduced as part of the discovery procedure by the drafters in 1993 and its purpose was "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information…."[138] Initial disclosure, thus, is another procedural discovery tool aimed to provide to the parties an early understanding about the facts and evidence that are going to support their claims, promoting an earlier disposition of civil cases, including through settlement.[139]

Furthermore, according to the Federal Rules, the parties have six discovery devices: oral depositions, written depositions, interrogatories, production of documents and such, physical and mental examination, and requests for admission.[140] Through these tools the parties may access practically all facts and evidence that are going to be used in an eventual trial. "Thus

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[137] FED. R. CIV. P. 26(a)(1)(A)
[138] NOTES OF ADVISORY COMMITTEE FED. R. CIV. P. 26(a)(1) (1993 amendment)
[139] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 535 (1998) ("Far more attorneys reported that initial disclosure decreased litigation expense, time from filing to disposition, the amount of discovery, and the number of discovery disputes than said it increased them. At the same time, many more attorneys said initial disclosure increased overall procedural fairness, the fairness of the case outcome, and the prospects of settlement than said it decreased them.")
[140] FED. R. CIV. P. 30, 31, 33, 34, 35 and 36; KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 69-74 (Thomson West, 2d ed. 2009)

civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[141] Moreover, according to the Federal Rules the "[p]laintiff is as free to seek information relevant to a defense as he is to seek matter relevant to his or her own case."[142]

In this context, the first stage of discovery, the conference, gives both parties, at the beginning of the lawsuit, the opportunity to settle the case before further expenses are incurred. Furthermore, as discovery requests are satisfied litigants have the same information about each other, even unfavorable facts, giving them the same facts and evidence that are going to support an eventual trial. In other words, discovery puts the parties in a position of symmetrical information. Whether this equality in information fosters settlements is analyzed in the next section.

A.3. Effects of Symmetrical Information on Settlements

Initially, it is known that other factors besides pure economic efficiency may play a decisive role in a party's choice to litigate a case instead of settling it. In fact, some parties may prefer to litigate their cases as a matter of strategy, as it happens with insurance companies trying to build a tough reputation,[143] or with medical malpractice cases,[144] where the doctors have a

[141] Hickman v. Taylor 329 U.S. 495, 501 (1947)
[142] 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 272-73 (West, 3d ed. 2010)
[143] Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 U. CHI. L. SCH. ROUNDTABLE 75, 80 (1993) ("Repeat players such as insurance companies may wish to develop reputations for litigating certain types of cases in order to increase their bargaining power in future cases, or to deter frivolous suits.")
[144] Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 360 (1991) ("What does distinguish medical malpractice litigation is the proportion of zero offers. In other areas of personal injury litigation, the great majority of trials occur after the defendant has offered some settlement to the plaintiff. There were zero offers in only 15% of the vehicular

reputation to maintain, or when a new matter is posed to the court and there is a precedent to be created.[145] In all these cases, even knowing that litigation is not economically viable, parties may still want to try cases. Moreover, behavioral characteristics may play a decisive role on settlement decision. Risk-averse parties are more willing to settle than risk-seeking ones. Humans subjectively value losses more than gains, even if the monetary amount at stake is exactly the same.[146] These features bring a sort of variables to the parties' negotiations, influencing their bargaining. However, this work focuses on an economic model for the civil settlements and, thus, the parties are considered neutral to any bargain tactics as to any litigation risks. It also assumes that the parties have symmetrical stakes.

In this scenario, intuitively, there should be no reason for the parties to go to trial, increasing their costs even more, most with attorneys' fees, if they are both aware of their real chances to succeed and to fail.[147] In other words, if the parties decide to go on with the lawsuit wanting a judicial decision and paying more for that, probably it is because they have different

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negligence cases, 20% of the nonvehicular negligence cases, and 21.6% of the products liability cases. But in 60% of the medical malpractice trials in our sample, defendants made no offer at all.") (footnote omitted)

[145] Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 323-24 (1999) ("A third model of case selection, less well known, focuses on the possibility of unequal stakes, specifically in the context of the value of the precedent that results from trial. This model assumes no estimation errors, and maintains the other assumptions of the basic model. The model predicts, based on certain additional assumptions, that cases that go to trial will tend to be those in which the legal rule is inefficient or, where the parties' stakes are unequal, those cases in which the outcome is disproportionately likely to favor the 'repeat player,' that is, the party with an interest in establishing a precedent.") (footnotes omitted)

[146] John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1138 (2009) ("Jeff Rachlinski changed the standard economic literature on settlement by applying to it the findings of Kahneman and Tversky. Rachlinski's experiments indicated that when a settlement reflects the expected value of a lawsuit, plaintiffs will be far more likely to deem the settlement acceptable than will defendants. A likely explanation is that plaintiffs view the money as a gain whereas defendants view it as a loss. This makes the plaintiffs risk-averse, preferring a certain settlement to the risk of a trial; but it makes defendants risk-seeking, preferring a possible payout after adjudication to a certain but smaller one in settlement.") (footnotes omitted)

[147] Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 CASE W. RES. L. REV. 315, 319 (1999) ("From an economic perspective, it is understandable why the vast majority of cases settle. The alternative to settlement is litigation, which is generally more expensive. By settling, the parties create a "surplus" (the aggregate of the amounts each would have spent to go to trial) that they can divide between them.") (footnotes omitted)

expectations about the outcome.[148] This conclusion becomes even stronger due to the absence of a cost-shifting rule in the American civil litigation. In fact, no matter who wins, there would still be the unreimbursed cost of the litigation.[149] In this context, from the time the lawsuit is filed, both parties are already losers. As a result, the longer it takes the dispute to end, the more both parties are losing since their expenses will not be reimbursed by the so-called loser.

Given all the assumptions above, it is believed that once parties have the same expectations about the probable trial outcome they should prefer settlement rather than trial, since the longer it takes to reach the final resolution the more the parties are losing in judicial costs and attorney's fees.[150] On the other hand, different hopes regarding the future trial outcome would make them prefer to try cases. Hence, the important question is: what is it that makes the parties have the same or different expectations? The logical answer is information.[151] One builds expectations based on what he/she knows about the facts playing a causation role in this cause/consequence model where the consequence is the outcome of the possible trial. In light of this reasonable and quite simple logic, the more the parties have the same information, the more

[148] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1,16 (1984) ("Those disputes for which the true Y value [that describes the relationship between the relevant characteristics of the dispute and the decision standard] lies far from the decision standard – whether in favor of the plaintiff or defendant – are more likely to be settled than litigated. The difference between the parties' probability estimates of the outcome is likely to be small, and thus the parties are more likely to be able to agree on settlement terms in order to save litigation costs.")

[149] STEPHEN C. YEAZELL, CIVIL PROCEDURE 292 (Wolters Kluwer Law & Business, 8th ed. 2012) ("This feature of remedial law means than an award of compensatory damages, no matter how precisely calculated, will always fall short of full compensation if plaintiff has to pay her lawyer.")

[150] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 541 (Little, Brown and Company, 4th ed.1992) ("Settlement out of court is cheaper than litigation. Therefore, only if each disputant expects to do better in the litigation than the other disputant expects him to do are the parties likely to fail to agree on settlement terms that make them both consider themselves better off compared with how they anticipate faring in litigation.") (footnote omitted)

[151] Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 422-26 (1973) (showing the importance of discovery for sharing information and correcting parties' false optimism.)

they are inclined to agree about the future outcome of the litigation.[152] Once their expectations about the probable findings of the factfinder (no matter if a jury or a judge) are closely the same, their desire of reducing their losses by a faster and cheaper agreement should be stronger.

Discovery allows the parties to learn about, prior to trial, all the information that each one is seeking to use in order to convince the factfinder about its rights, correcting false optimisms and approximating their expectations to the probable trial outcome. [153] Doing so, discovery makes parties willing to settle for the economic reasons set forth above. Thus, it might be said that "[t]he first purpose of discovery is to increase the probability of settlement. This purpose is achieved by enabling the parties in a dispute to pool information so as to predict the outcomes of a trial more accurately."[154]

In order to provide a framework that measures the effects of discovery over settlements, Cooter and Rubinfeld work with the optimism/pessimism dichotomy about trial outcomes.[155] They set the premise that

> Optimism about trial will reduce the advantage that the parties perceive in settling. Relative optimism about trial exists when the judgment expected by the plaintiff exceeds the judgment expected by the defendant…. In order for settlement to be possible, the

[152] Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 426 (1973) ("A discovery provision that enables both parties to improve their estimates of the outcome of the case is thus likely to facilitate settlement.")
[153] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model of Legal Discovery*, 23 J. LEGAL STUD. 435, 442 (1994) ("Discovery not only affects the parties' average optimism and pessimism about trial, it also affects the variance in their expectations. A trial occurs in the small number of cases where the parties' expectations are drawn from the tails of the distribution representing extreme optimism about trial. As a result, a reduction in variance caused by the pooling of information can result in fewer trials.") (no footnotes)
[154] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model Of Legal Discovery*, 23 J. LEGAL STUD. 435, 439 (1994)
[155] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model Of Legal Discovery*, 23 J. LEGAL STUD. 435 (1994)

> savings in cost to the parties must exceed their relative optimism about trial….[156]

Thus, the smaller the relative optimism the more likely the parties will settle. Since in an adversarial context in order for one be right the other must be wrong, it is fair to assume that "[w]hen the parties are both optimistic (relative to the expected outcome with complete information), at least one of them is uninformed."[157] Discovery fosters settlements by correcting false optimism and by reducing the variance in the parties' expectations as to make litigation more expensive than settlement.

An empirical study performed by Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons, and Erik Tallroth about how discovery affects settlements proves the above assumptions.[158] Their experiment

> [M]odeled a lawsuit as a bargaining game between subjects interacting anonymously in the roles of plaintiff and defendant. The plaintiff initiated the suit by sending a compensation request to the defendant. The parties were then given a fixed period of time in which to negotiate a settlement. If they failed to reach an

[156] Robert D. Cooter &Daniel L. Rubinfeld, *An Economic Model Of Legal Discovery*, 23 J. LEGAL STUD. 435, 439-40 (1994)
[157] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model Of Legal Discovery*, 23 J. LEGAL STUD. 435, 436 (1994)
[158] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89 (2005)

> agreement within that time, the court imposed a decision and both parties were required to pay court costs.[159]

The subjects for the experiment were undergraduate students and received earnings based on their performance. In light of the empirical results, the study concluded that

> [S]ettlement rates declined as the difference between *Min* and *Max* [which were the lower and upper boundary for a court decision, respectively] increased. This may be due to the fact that when the difference between *Min* and *Max* is small, both parties have a high degree of certainty about the court outcome. Rational negotiators will therefore settle to avoid the court costs.[160]

On the other hand, Cooter and Rubinfeld call the attention for a negative effect of discovery on settlements. Since pessimism about trial outcome would encourage the pessimist to settle, discovery that corrects a party's pessimism should make her more willing to try the case. Therefore, discovery, by compelling the involuntary pooling of information, subtracts the informed party advantage over the uninformed one that could prejudice settlements.[161] Although Cooter and Rubinfeld's conclusions seem reasonable, the economic advantages of settlement under symmetry of information still remain. Moreover, discovery provides a safe harbor to

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[159] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 98 (2005)

[160] Laura Inglis, Kevin McCabe, Steve Rassenti, Daniel Simmons & Erik Tallroth, *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 108 (2005)

[161] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model Of Legal Discovery*, 23 J. LEGAL STUD. 435, 441-44 (1994)

parties averse to negotiate in the dark, protecting them from unfair agreements, without losing the economic incentives for settlements.

In fact, the information symmetry granted by discovery fosters not only settlements, but also provides the grounds for an agreement closer to what a judicial decision would be. Since discovery allows the parties share all the evidence that would be presented at trial, their negotiation occurs on the same basis in which the judicial decision should be constructed. As a result, the settlement tends to reflect the outcome of a fully informed trial.[162] Furthermore, as pointed out by Bruce Hay, by admitting requests for even inadmissible materials (since it could lead to admissible evidence), discovery may lead the parties to discover evidence that otherwise would remain concealed at trial.[163] Assuming that trial accuracy depends on the quantity of information available to the court, Hay concludes that discovery increases trial accuracy. Since symmetric information makes settlements reflect likely trial outcomes, by increasing trial accuracy discovery is also increasing settlement accuracy.[164]

Therefore, settlements reached after full discovery should satisfy the efficiency aimed by Federal Rule 1,[165] since they would secure a resolution that is, on the one hand, speedy and less expensive than trial and, on the other hand, as just as the likely outcome after trial. Supporting the discovery role in fair outcomes, whether by settlement or trial, Judith McKenna and Elizabeth Wiggins highlight the findings of the Columbia Project for Effective Justice, a project commissioned by the Advisory Committee on Civil Rules to conduct a field survey of

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[162] Robert D. Cooter & Daniel L. Rubinfeld, *An Economic Model Of Legal Discovery*, 23 J. LEGAL STUD. 435, 445 (1994) ("Discovery affects the perceived merits of the case by helping to eliminate biased beliefs about trial. Aligning the subjective expectations of the parties with the merits of the case makes the rational settlement correspond to the complete information judgment.")
[163] Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 497 (1994)
[164] Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 497 (1994)
[165] F. R. CIV. P 1

pretrial discovery in federal courts.[166] The researches found that 78% of the lawyers said that discovery helped a just disposition of the litigation, instead of only 21% (mostly losers at trial) said it made no difference. [167] Thus, discovery increases the quantity and the quality of settlements.

A.4. Effects of Discovery's Costs on Settlements.

As already discussed, parties may have asymmetry of information. This is a situation that can be fixed through discovery, encouraging the parties to settle for the economic reasons set forth above. Because full information settlements reflect full information trial outcomes, it is expected that settlements after discovery also should be as fair as a judicial decision. However, correcting this imbalance has a price, the discovery price. As pointed by Stephen Yeazell, "[g]ood data on the costs of discovery is hard to come by, but in some cases discovery will be a major expense. Worse, for a defendant who ultimately prevails, the costs of that discovery will sometimes represent *the* major cost of litigation."[168]

Judith McKenna and Elizabeth Wiggins did a detailed analysis for the Columbia Project for Effective Justice, a project commissioned by the Advisory Committee on Civil Rules to conduct a field survey of pretrial discovery in federal courts.[169] They pointed out the difficulties in studying discovery costs; in particular because of different attorney-fee arrangements, and variability on discovery costs depending on the type of case and party.

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[166] Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998)
[167] Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 794 (1998) ("If, however, we accept the premise that fuller exchange of relevant information is likely to lead to more just outcomes, both the Columbia Project and the Brazil study of Chicago lawyers shed some light. In the Columbia Project, researchers asked attorneys about whether they thought the use of discovery helped or hindered a just disposition. Among the lawyers, 78% said discovery helped, and 21% (mostly losers at trial) said it made no difference. Only about 1% said it was a hindrance.[29])
[168] STEPHEN C. YEAZELL, CIVIL PROCEDURE 388 (Wolters Kluwer Law & Business, 8th ed. 2012)
[169] Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785 (1998)

According to the Columbia Project findings, in antitrust actions, discovery represented 65% of plaintiffs' costs and 63% of defendants' costs, while in patent cases discovery represented 21% of plaintiffs' costs and 54% of defendants' costs.[170] The authors also referred to some studies showing a relationship between discovery incidence and the stake at the center of the case:

> Glaser found that the incidence of discovery was related to attorneys' predictions of the amount that would be recovered. Only two-thirds of respondents who predicted recovery of $2500 or less used discovery, whereas 75% of those predicting recovery between $2500 and $40,000 used discovery, and 92% of respondents predicting recovery of more than $40,000 did so. In Walker's Iowa study, the volume of discovery was related to the amount in controversy--cases with more than twenty requests were more likely to be cases with higher amounts in controversy….
>
> … Small-case attorneys used discovery less often and less intensively, devoted a lower percentage of total billable time to discovery than did large-case attorneys and committed higher percentages of their time to investigations, negotiations and trials. [171]

A more recent study commissioned by the Advisory Committee on Civil Rules, and conducted by Thomas Willging, Donna Stienstra, John Shapard and Dean Miletich

[170] Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 797 (1998)
[171] Judith A. McKenna & Elizabeth C. Wiggins, *Empirical Research on Civil Discovery*, 39 B.C. L. REV. 785, 793-94 (1998) (footnotes omitted)

("Thomas Willging et al.") found that 50% of the total cost of litigation reported by attorneys was due to discovery and that "the proportion of litigation costs spent on discovery differed little between plaintiffs and defendants."[172] Their analysis also confirms that the amount of discovery is proportional to the parties' stake.[173] However, the latest study commissioned by the Advisory Committee on Civil Rules showed a reduction of discovery cost percentage in relation to the total cost of litigation. Accordingly, "[t]he median estimate of the percentage of litigation costs incurred in discovery was 20 percent for plaintiffs and 27 percent for defendants."[174]

Discovery is an American creation related to the notice pleadings of American civil procedure. As set forth above, Federal Rule 8[175] requires the parties state "a short and plain statement of the claim," instead of "the facts that constitute each cause of action", as "code pleading" did. Even after the Supreme Court decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), heightened pleading requirements by creating the plausibility test and the inquiry into a pleading's convincingness,[176] notice pleading still is a low standard since the parties are not demanded to plead specific facts, "but only enough facts to state a claim to relief that is plausible on its face."[177] In this context, discovery plays a fundamental role by revealing the facts that are necessary to the resolution of the dispute, since this function is no longer

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[172] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998)
[173] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 531 (1998)
[174] Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 2 (Oct., 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf
[175] FED. R. CIV. P. 8
[176] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1931-32 (2009)
[177] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)

performed by the pleadings. According to Thomas Willging et al., in a national survey "85% of the attorneys said some discovery had occurred in their case."[178]

To understand the cost of discovery is to understand the role and the cost of each of its devices. The Federal Rules provide for six discovery devices: oral depositions, written depositions, interrogatories, production of documents and tangible things, physical and mental examination, and requests for admission.[179] Usually, the cheapest ones are interrogatories and requests for admission. On the other hand, the more expensive discovery devices are often written deposition, oral depositions and physical and mental examinations. Finally, production of documents might be cheap or expensive depending on the amount of documents requested and their availability. Recently, attention has been drawn to the high costs related to the production of documents in digital format. In light of so many devices, a recent Federal Judicial Center study found that the median time imposed for completion of discovery was six months.[180]

Interrogatories are provided by Federal Rule 33,[181] which allows each party to serve on any other party no more than 25 written interrogatories, including all discrete subparts, without leave of court.[182] Since answering interrogatories do not require the presence of the submitting lawyer and are made and answered in writing, with no officer participation, they are the least expensive discovery device offered by FRCP.[183] Not surprisingly, interrogatories have

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[178] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 530 (1998)
[179] FED. R. CIV. P. 30, 31, 33, 34, 35 and 36; KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 69-74 (Thomson West, 2d ed. 2009)
[180] Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 1 (Oct., 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf
[181] FED. R. CIV. P. 33
[182] FED. R. CIV. P. 33(a)(1)
[183] 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 616 (West, 3d ed. 2010) ("There is no significant expense for the party sending the interrogatories except for the time spent in preparing the questions. In addition, interrogatories are a much simpler device. There are none of the

been frequently used. According to Thomas Willging et al., 81% of the lawyers that reported some discovery activity said they engaged in interrogatories.[184] However, because the questioner cannot follow up evasive answers, and because it allows the party to prepare answers to the questions asked, its usefulness is limited to identify other evidence related to the facts rather than to prove them.[185] Hence, although interrogatories are far from being a relevant cost regarding discovery expenses, for most of the time they will not be enough to provide the sought after symmetry of information.

Another inexpensive discovery device is the request for admission. Federal Rule 36[186] states that a party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of discovery relating to facts, the application of law to fact, or opinions about either, and the genuineness of any described documents.[187] The cost for a request of admission is very low for the same reasons set forth above for interrogatories. Despite of being inexpensive, this specific device saves further discovery expense by severing the facts that are still in controversy from the ones that are not, saving investigation costs with the latter. In fact, "[t]he rule is intended to expedite the trial and to relieve the parties of the cost of proving facts that will not be disputed at trial, the truth of which is known to the parties or can be ascertained by reasonable inquiry."[188] However, in a very controversial dispute, their utility is limited and they are not going to prevent the parties from incurring major discovery costs.

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details that must be taken care of in arranging for a deposition, such as obtaining a court reporter and fixing the time and place for the examination.")

[184] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 530 (1998)

[185] STEPHEN C. YEAZELL, CIVIL PROCEDURE 477-78 (Wolters Kluwer Law & Business, 8th ed. 2012)

[186] FED. R. CIV. P. 36

[187] FED. R. CIV. P. 36(a)(1)

[188] 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 322 (West, 3d ed. 2010)

Among the most expensive discovery devices, the written deposition was first conceived as an alternative to the costs of oral deposition in situations such as when a deposed person is geographically distant from the deposing party.[189] According to Federal Rule 31,[190] a party may depose any person by written questions, including a party, without leave of court, except as provided in Rule 31(a)(2).[191] The deposition will be taken by an officer who, after taking the deponent's testimony will send it to the requesting party. The use of an officer of the court makes it a more expensive device than interrogatories. However, since a written deposition does not require the presence of the requesting party lawyer, it saves attorney's fees when compared to oral deposition.[192] Although written depositions were initially thought to be more convenient than oral depositions, because of the lower costs, only 2% of the cases use them, instead of a 49% use of oral deposition.[193] The rare use of written deposition might be explained by its clear difficulties for deposing hostile or reluctant witness.[194] But more important than the reasons for its infrequent use (compared to oral deposition) is the fact that since the cheapest deposition form is not commonly used, the average cost of discovery should increase.

Physical and mental examinations are subject to the high costs usually involved in any expert evaluation. As consequence, the specific costs are going to depend on the complexity of the medical investigation allowed by the court. Rule 35[195] has been read quite broadly and

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[189] 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 616 (West, 3d ed. 2010) ("It was initially thought that the use of depositions on written questions would be particularly convenient if the deposition is to be taken in a distant place, because of the saving in expenses.")
[190] FED. R. CIV. P. 31
[191] FED. R. CIV. P. 31(a)(1)
[192] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 426 (Thomson West, 4th ed. 2005) ("Witten depositions are used infrequently. Although they have the advantage of being less expensive than oral depositions because the attorneys need not be present, they have few of the advantages.")
[193] 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 616 (West, 3d ed. 2010)
[194] 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 616 (West, 3d ed. 2010)
[195] FED. R. CIV. P. 35

courts have authorized examinations such as X-rays, electroencephalogram, electrocardiogram, urinalysis, ophthalmological examinations, examinations of the hymen, removal of part of the contents of the stomach for analysis, psychiatric and psychological examinations etc.[196] However, the Rules provide for some checks before a court issues an order for physical or mental examination. Basically, Federal Rule 35[197] requires that the mental or physical condition is in controversy, and a showing of good cause made by the moving party.[198] Assessing the latter, the judge will "balance the desire to insure the safety and freedom from pain of the party to be examined against the need for the facts in the interest of truth and justice."[199] Although the expense of the examination will be borne by the moving party, court scrutiny might at least save her from unnecessary discovery costs. On the other hand, the same court scrutiny may also cause unpredictable costs for the requesting party. In fact, Federal Rule 35[200] does not secure to the moving party the absolute right to the choice of the physician and some courts advocate that the decision rests within the sound discretion of the court. [201] If the court appoints a professional other than the one sought by the requesting party, the cost of the examination might be different from that initially expected.

Definitely, one of the most expensive discovery devices is the oral deposition. Federal Rule 30[202] allows a party to depose any person by oral questions, including a party,

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[196] 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 281-86 (West, 3d ed. 2010)
[197] FED. R. CIV. P. 35
[198] FED. R. CIV. P. 35(a)
[199] 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 288 (West, 3d ed. 2010)
[200] FED. R. CIV. P. 35
[201] 8B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 274-78 (West, 3d ed. 2010)
[202] FED. R. CIV. P. 30

without leave of court except as provided in Rule 30(a)(2).[203] Oral depositions are expensive because, unless the parties stipulate otherwise, they must be conducted before an officer appointed or designated under Rule 28.[204] According to the California Civil Practice treatise, "[t]he largest single expense in employment litigation is typically the cost of deposition transcripts. At costs ranging from $500 to $1,000 per day of deposition testimony, it is readily apparent how these costs can quickly mount, particularly if there are numerous witnesses."[205] Furthermore, both parties' attorneys, and sometimes even the parties themselves, are going to be present during the deposition in order to participate in the examination and cross-examination of the deposed person.[206] It means more billable hours with legal services and, sometimes, even costs related to attorney and party's travels to different locations where the deposition may take place.[207] Since Federal Rule 30[208] provides each party ten depositions without leave of the court and each deposition may take one day of seven hours,[209] each party may be threatened to spend 70 hours of legal services with adverse party's depositions. And the expenses still go on. Although is not required by Federal Rules, it is wise to prepare a witness to testify at a

[203] FED. R. CIV. P. 30(a)(1)
[204] FED. R. CIV. P. 30(b)(5)
[205] Cal. Civ. Prac. Employ't Litig. (Thomson Reuters) § 1:15 (Oct., 2012)
[206] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 422 (Thomson West, 4th ed. 2005) ("The chief drawback to oral depositions is their expense. Typically, each party must pay for the time that party's attorney spend in connection with the deposition. In addition, a party will have to pay for any transcriptions of the depositions received and, perhaps, some witness fees and expenses.") (footnote omitted)
[207] Cal. Civ. Prac. Employ't Litig. (Thomson Reuters) § 1:15 (Oct., 2012) ("Defense counsel will always depose the plaintiff, which usually takes multiple days to complete, and important nonparties, typically former employees, whose testimony can reasonably be expected to be unfavorable to the employer. In addition, important witnesses residing beyond the subpoena power of the forum court cannot be compelled to attend trial. Accordingly, they should be deposed to preserve their testimony for introduction at trial…. Geographical considerations can augment the cost of depositions substantially. Particularly with larger companies, the employer may have its headquarters or significant operating offices in distant parts of the state, or out of state. The relevant decision-maker who implemented the decision leading to the adverse action may be based in any city in any state. When this occurs, the plaintiff should expect to pay a substantial amount to cover the costs of travel to take these important depositions.")
[208] FED. R. CIV. P. 30(b)(2)(A)(i)
[209] FED. R. CIV. P. 30(d)(1)

deposition.[210] This increases even more the oral deposition costs with attorney's fees and, consequently, with discovery. Despite of the high discovery costs related to oral depositions, Thomas Willging et al. note that it is still one of the most used devices, with 67% of the lawyers that engaged in formal discovery using them.[211]

The last discovery device is the production of documents. Federal Rule 34[212] provides that a party may serve on any other party a request within the scope of Rule 26(b) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the appointed items in the responding party's possession, custody, or control, and to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.[213] According to Thomas Williginig et al., it is the most frequently discovery device used by attorneys and "the activity for which the highest percentage of attorneys reported problems in their case."[214] Despite of this, the anecdotal information that production of document is one of the most costly parts of discovery is not true, since it consumes less than one third of the attorney's costs with depositions.[215]

Giving a good overview about how discovery activities relate to total litigation costs and case duration, Thomas Willging et al. state that

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[210] 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE 452 (West, 3d ed. 2010) ("Moreover, a party ordinarily had no duty to prepare a witness to testify at a deposition, although tactical and other reasons usually prompted parties to prepare their witnesses.")
[211] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 530 (1998)
[212] FED. R. CIV. P. 34
[213] FED. R. CIV. P 34(a)
[214] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998)
[215] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998)

Depositions accounted for by far the greatest amount of discovery expense that flows through the attorney (median=$3500 in cases with depositions). The next most costly types of discovery were expert disclosure and discovery (median= $1375), document production (median=$1100), and interrogatories (median=$1000). Less expense was incurred by initial disclosure (median=$750) and meeting and conferring/discovery planning (median=$600).

Document production, often said to be the most burdensome and costly part of discovery, typically involved rather modest costs, at least in regard to costs that flow through the attorney.

We examined the relationship between the above discovery activities and litigation cost and time, and we found that total hours spent in depositions is strongly correlated with the total cost of litigation. We also found that as the *percentage* of total costs attributable to document production increases, total litigation costs also increase.

Looking at the relationship between discovery activities and the duration of the litigation, we found that as the percentage of total costs attributable to depositions increased so

did case duration. On the other hand, when initial disclosure was used, case duration was shorter.[216]

Because discovery has a cost, a party wanting to settle a case may face the following dilemma: whether to settle a case when it is likely that asymmetric information exists, but saving discovery costs, or to settle it later, after costly discovery.[217] Keeping the same premises already established (that parties are neutral to any bargaining tactics as to any litigation risks and have symmetrical stakes) a party will settle a case whenever her perspective of discovery cost is bigger than her settlement cost. Therefore, discovery cost may also foster settlements.

The price of discovery and its influence on a party's will towards settlement might be one of the reasons for the success of the so-called "settlement mills." Nora Freeman Engstrom defines settlement mills as law firms "on the far end of a continuum of contemporary personal injury practice, [that] advertise aggressively and settle what are usually low-stakes personal injury claims in high volumes, typically with little attorney-client interaction and without initiating lawsuits--much less taking claims to trial."[218] Their existence is due to its savings in transaction costs, including discovery costs, since, as they file far less lawsuits than other personal injury practitioners, court costs, deposition costs, expert witness fees and

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[216] Thomas E. Willging, Donna Stienstra, John Shapard & Dean Miletich, *An Empirical Study of Discovery and Disclosure Practice Under the 1993 Federal Rule Amendments*, 39 B.C. L. REV. 525, 540 (1998)
[217] Warren F. Schwartz & Abraham L. Wickelgren, *Credible Discovery, Settlement, and Negative Expected Value Suits*, 40 RAND. J. ECON. 636, 637 (2009) ("That said, discovery, like trial itself, is costly, providing both sides an incentive to settle prior to incurring these costs. Thus, although discovery might have the potential to greatly reduce or eliminate much informational asymmetry in pretrial settlement bargaining, its cost suggests that, at least in some cases, the parties might prefer to settle under conditions of asymmetric information rather than incur discovery costs.")
[218] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 807 (2011)

attorney's expenses are not incurred.[219] These reduced costs added to the small claim size make settlements relatively certain for settlement mills because it is cheaper for the insurer to pay something instead of contesting liability.[220]

However, the most recent discussions regarding the economic burdens of discovery have been focused on the costs of producing electronically stored information (ESI). The last Federal Judicial Center study regarding the costs of civil litigation showed that "[r]espondents reported a request for production of ESI in 30 to 40 percent of cases with any discovery."[221] It also found that the median costs were higher when electronic discovery was requested.[222] Discussing this new reality, John Beisner points out that electronic discovery has significantly increased the cost of discovery since 99% of the world's information is now generated electronically with the average employee sending or receiving 135 emails each day, and approximately 36.5 trillion emails sent worldwide every year.[223] According to him,

> The harsh reality is that the costs of producing electronic documents far exceed those of producing paper documents. Unlike paper documents, electronic data must be processed and loaded into a special database before they can even be reviewed for potential relevance….
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> ….

[219] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 824-25 (2011)
[220] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 827-28 (2011)
[221] Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 1 (Oct., 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf
[222] Emery G. Lee III & Thomas E. Willging, *Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules*, FEDERAL JUDICIAL CENTER, 2 (Oct., 2009), http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf
[223] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 564 (2010)

> … One expert estimates the cost of producing a single electronic document to be as high as $4. Verizon, which has devoted considerable attention to electronic discovery issues, has estimated that producing one gigabyte of data--the equivalent of between 15,477 and 677,963 printed pages--costs between $5,000 and $7,000. But far more than a single gigabyte of data will often be at issue. Commentators opine that even a typical midsize case now involves at least 500 gigabytes of data, resulting in costs of $2.5 to $3.5 million for electronic discovery alone. Another study found that from 2006 to 2008, the average surveyed company spent between $621,880 and $2,993,567 per case on electronic discovery. At the high end, companies in the study reported average per-case discovery costs ranging from $2,354,868 to $9,759,900.[224]

In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, an employment discrimination discharge case where the employer (UBS) was accused of spoliation of evidence, UBS sustained that the cost of producing e-mails on backup tapes would be prohibitive to most litigants (estimated at the time at approximately $300,000.00).[225] In a copyright infringement lawsuit, the software company Oracle requested electronic discovery that would cost $16.5

[224] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 565-67 (2010) (footnotes omitted)

[225] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313 (S.D.N.Y. 2003) ("UBS, however, produced no additional e-mails and insisted that its initial production (the 100 pages of e-mails) was complete. As UBS's opposition to the instant motion makes clear—although it remains unsaid—UBS never searched for responsive e-mails on any of its backup tapes. To the contrary, UBS informed Zubulake that the cost of producing e-mails on backup tapes would be prohibitive (estimated at the time at approximately $300,000.00).")

million to the adverse party and would take one year to be produced.[226] Those cases might represent the far edge of the electronic discovery cost, but still they show the potential burdens of discovery, especially on corporate defendants. [227] Those figures highlight the pressures toward settlements not just within good-faith scenarios, where a thorough investigation may cost more to the party than to settle a close case, but also within bad-faith situations where discovery abuses, especially against corporate defendants, may force a party to settle unmeritorious claims.[228]

Although this situation might threaten the fairness goal sought by Federal Rule 1,[229] from a pure economic standpoint, claims, whether meritorious or unmeritorious, may settle only because discovery costs are higher than the opposing party's offer. As explained by Edward Cooper,

> We believe, and have been given an elegant model to demonstrate, that discovery can promote settlement. We know it can often increase delay and expense. We cannot really know whether the present system achieves a better blend of cost with justice by judgment and settlement than might be achieved by a dramatically

[226] *Order Re Scope of Discovery of Electronically Stored Information*, Courts Ruling and Orders, TN LAWSUIT INFORMATION (July 03, 2008), http://www.tnlawsuit.com/uploads/Order%20Re%20Scope%20of%20Discovery%20of%20Electronically%20Stored%20Information.pdf

[227] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 574 (2010) ("The unchecked rise in discovery costs has attracted the attention of corporations, which now list discovery as one of their most pressing concerns when litigation is imminent. This concern is well founded. Discovery costs in U.S. commercial litigation are growing at an explosive rate; estimates indicate they reached $700 million in 2004, $1.8 billion in 2006, and $2.9 billion in 2007. And these figures do not even account for the billions of dollars that corporations pay each year to settle frivolous lawsuits because the burdens of litigating until summary judgment or a favorable verdict are too onerous.") (footnotes omitted)

[228] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 563 (2010) ("Moreover, difficulties in managing and organizing electronic data have created opportunities for significant discovery abuse by litigants who see an opportunity to increase their opponents' costs and thereby force a settlement of litigation regardless of merit. These developments have pushed discovery to the forefront of litigation concerns for American businesses.")

[229] F. R. CIV. P 1

> different system. A system with no discovery, more trials, and less settlement might be better. Most reform discussion, however, is set in the framework of more modest proposals. Proposals to shift the costs of discovery fit into this mold.[230]

In fact, the party's dilemma (whether to settle when it is likely that asymmetric information exists, but saving discovery costs, or to settle it later, after costly discovery) would be lesser if the system provided for cost-shifting, making the requesting party or the trial loser bear the economic burden of the information discovered.[231] Federal Rule 26[232] seems to offer that alternative. According to it, the court may make any order which justice requires protecting a party from undue burden or expense that might include shifting the economic burden of discovery.[233] In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), the Supreme Court held that

> [T]he presumption is that the responding party must bear the expense of complying with discovery requests, but he may invoke the district court's discretion under Rule 26(c) to grant orders protecting him from "undue burden or expense" in doing so,

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[230] Edward H. Cooper, *Discovery Cost Allocation: Comment on Cooter and Rubinfeld*, 23 J. LEGAL STUD. 465, 465 (1994)

[231] John H. Beisner, *Discovering A Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 587 (2010) ("The American rule is perhaps the greatest single catalyst of discovery abuse, because it allows plaintiffs to impose tremendous costs on defendants at virtually no cost to themselves. The perverse incentives to which the American rule gives rise have been exacerbated considerably in recent years by the rising costs associated with electronic discovery. The American rule also encourages fishing expeditions because nothing dissuades plaintiffs from requesting virtually limitless volumes of documents and evidence. In addition, the American rule contributes to excessive discovery by encouraging parties to request information and documents from opposing parties rather than undertaking their own investigative efforts.") (footnotes omitted)

[232] FED. R. CIV. P. 26

[233] FED. R. CIV. P. 26(c)

> including orders conditioning discovery on the requesting party's payment of the costs of discovery.

However, despite of that decision, courts are still hesitant to shift the discovery cost burden.[234] In *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003) a high cost-shifting standard for e-discovery was set and has been widely followed by the courts.[235] Accordingly, "[f]or data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting *only* when electronic data is relatively inaccessible, such as in backup tapes."[236] Another solution that has been proposed in order to reduce the economic burdens of discovery (that was also used in *Zubulake*)[237] is the "sampling practice."[238] That practice is usually adopted to permit the restoring of a sample of backup tapes that could show the potential for relevant material. Based on a sample, the court would be able to better asses cost-shifting and balance the cost of production and the relevance of the information.[239] However, because courts are still reluctant to

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[234] Corinne L. Giacobbe, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257, 269 (2000) ("Although Rule 26(c) seems to provide a solution to the problem of discovery abuse surrounding requests for electronically stored data, courts have been extremely hesitant to exercise the discretion that this burden-shifting rule affords them. In the few cases that involve requests to shift the burden of cost to the requesting party, the courts have varied greatly in their reasoning, considering many different factors and emphasizing distinct considerations. Thus, it is uncertain what conditions must be present in order for a court to find a discovery request for electronically stored data unduly burdensome or expensive.") (footnotes omitted)

[235] Andrew Mast, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. S 1920*, 56 WAYNE L. REV. 1825, 1829 (2010) ("The Zubulake approach to cost-shifting is widely followed by the courts, but some commentators have criticized it as unduly restrictive, particularly with respect to its absolute 'inaccessibility' requirement. This Note joins in that criticism, and proposes new solutions.") (footnotes omitted)

[236] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003)

[237] Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) ("Second, because the cost-shifting analysis is so fact-intensive, it is necessary to determine what data may be found on the inaccessible media. Requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases.")

[238] Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719 (2012)

[239] Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 733-36 (2012) (analyzing the origins of sampling)

apply discovery cost-shifting,[240] and since "the ways in which sampling has been implemented have been inconsistent across courts…,"[241] discovery costs still present significant pressure on parties towards settlement.

B) American Civil Jury System and Settlements.

B.1. The Right to a Civil Jury Trial and Its Origins.

A very unique characteristic of the American civil system is the jury trial.[242] The jury system for civil litigation is a constitutional right of the American people in the federal courts provided by Seventh Amendment which states that

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[243]

Although the Seventh Amendment has not been extended to the states,[244] the right to a jury trial is present in almost every state constitution.[245]

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[240] Andrew Mast, *Cost-Shifting in E-Discovery: Reexamining Zubulake and 28 U.S.C. S 1920*, 56 WAYNE L. REV. 1825, 1826 (2010) ("A longstanding presumption in discovery is that the responding party bears its own costs incurred in responding to discovery requests.") (footnotes omitted)

[241] Charles Yablon & Nick Landsman-Roos, *Discovery About Discovery: Sampling Practice and the Resolution of Discovery Disputes in an Age of Ever-Increasing Information*, 34 CARDOZO L. REV. 719, 736 (2012)

[242] STEPHEN C. YEAZELL, CIVIL PROCEDURE 608 (Wolters Kluwer Law & Business, 8th ed. 2012) ("The civil trial jury flourishes only in the United States. Although we inherited the institution from English law, it is available there only in a few specialized cases (for example, in libel actions).")

[243] U.S Const. amend. VII

[244] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 508 (Thomson West, 4th ed. 2005) ("[E]ven though the right guaranteed by the Seventh Amendment has deep historical roots and is part of the foundation of the federal-court system, as evidenced by its inclusion in the Bill of Rights, it has not been made

As one may realize from the constitutional text, civil juries are for suits at common law, as opposed to suits at equity which, by the time the amendment was written, were reserved to the Courts of Chancery.[246] The dual system of courts was an English legacy for the American colonies at the dawn of the United States.[247] Nowadays, the courts of Equity no longer exist at the Federal judicial system as well as at most state judicial systems. However, for purposes of whether a party has a right to jury trial the distinction between claims at law and claims at equity still remains. [248] In fact, "the courts adopted a historical test for deciding the right to jury trial under the Seventh Amendment. Under the historical test, courts seek to give parties the same right of jury trial as they had in 1791."[249]

Most of the claims can be easily traced to well-established historical patterns.[250] The challenge is how to classify new claims and procedures that did not exist by the time of the Seventh Amendment.[251] In *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, the Supreme Court gave some guidance to the courts, stating that

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binding on the states through the due-process clause of the Fourteenth Amendment as have many other provisions in the first ten amendments of the Constitution.")

[245] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 507 (Thomson West, 4th ed. 2005) ("A similar guarantee can be found in nearly every state constitution") (footnote omitted)

[246] STEPHEN C. YEAZELL, CIVIL PROCEDURE 610 (Wolters Kluwer Law & Business, 8th ed. 2012) ("Presumably, the drafters of the Seventh Amendment were thinking of a world in which there were separate courts of law and equity, a world in which one could only 'preserve' a right to jury trial in suits at common law. Because there had never been a right to jury trial in equity, there was nothing to preserve and no right to jury trial")

[247] STEPHEN C. YEAZELL, CIVIL PROCEDURE 609 (Wolters Kluwer Law & Business, 8th ed. 2012) ("The English judicial system, whose organization was echoed by colonial courts in the period immediately before the Revolution, was divided into several jurisdictions.")

[248] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 541 (Thomson West, 4th ed. 2005) ("Since most state constitutional provisions describe the jury-trial right in terms of the same law/equity distinction embodied in the Seventh Amendment, many of the same problems of applying the historical test under a merged procedural system arise in the state courts.")

[249] STEPHEN C. YEAZELL, CIVIL PROCEDURE 610 (Wolters Kluwer Law & Business, 8th ed. 2012)

[250] STEPHEN C. YEAZELL, CIVIL PROCEDURE 611 (Wolters Kluwer Law & Business, 8th ed. 2012)

[251] STEPHEN C. YEAZELL, CIVIL PROCEDURE 612 (Wolters Kluwer Law & Business, 8th ed. 2012) ("Knottier problems emerge when one considers claims that did not exist at the time the Bill of Rights was adopted, often those created by statute")

> To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull, supra,* 481 U.S., at 417-418, 107 S.Ct., at 1835-1836 (citations omitted). The second inquiry is the more important in our analysis. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42, 109 S.Ct. 2782, 2790, 106 L.Ed.2d 26 (1989).
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> An action for breach of a union's duty of fair representation was unknown in 18th-century England; in fact, collective bargaining was unlawful. See N. Citrine, Trade Union Law 4-7 (2d ed. 1960). We must therefore look for an analogous cause of action that existed in the 18th century to determine whether the nature of this duty of fair representation suit is legal or equitable.[252]

Despite of this challenging constitutional test provided by the Supreme Court, it is important to note that Congress may guarantee jury trial to claims that otherwise should not be entitled to it. In fact, since there is no constitutional right to nonjury trial in the federal-court system, there is no obstacle to a statute that provides for trial by jury.[253] Moreover, although a

[252] Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565-66 (1990)
[253] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 517-18 (Thomson West, 4th ed. 2005) ("Because there is no constitutional right to nonjury trial in the federal-court system, nothing in the Seventh Amendment or in Article III precludes Congress from extending jury trial to non-common law actions.") (footnote omitted)

constitutional guarantee, the right to a jury trial can be waived. Federal Rule of Civil Procedure 38 provides that a party waives a jury trial unless its demand is properly served and filed according to the terms of subsection (b) and (c).[254]

Trials by jury in state courts are far more common than bench trials. According to a civil justice survey of state courts, jury trials accounted for almost 70% of the general civil trials disposed in 2005.[255] However, the same survey also showed that, as opposed to civil trials involving tort claims, 90% of which were heard before a jury, "[j]udges decided a greater percentage of business-related civil trials – contract (64%) and real property (74%) cases – than juries." [256] Moreover, "[l]itigants waived their rights to a jury trial and had their cases decided by a judge in more than 80% of contract cases involving seller plaintiff, mortgage, foreclosure, rental lease agreement, and subrogation issues."[257] Thus, the party's wish of exercising her right to a jury trial clearly varies according to the type of case.

Although a constitutional right, jury trials have been long criticized. Usually the critics focus on two issues: the unpredictability (and even the unfairness) of a decision given by a group of lay people; and the costs naturally involved in a jury trial.[258] The next sections will discuss how these jury features (unpredictability and cost) may affect settlements in the modern American civil litigation.

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[254] FED. R. CIV. P. 38(d)
[255] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 1 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf
[256] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 2 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf
[257] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 2 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf
[258] JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 508 (Thomson West, 4th ed. 2005) ("The principal lines of attack on jury trial divide along two axes. The first challenges the basic unfairness and inefficiency of trial by a group of citizens unskilled in the application of frequently particularized and difficult legal concepts; the second is concerned with the cost to the judicial system caused by the delays inherent in the jury process.")

B.2. Jury Unpredictability and Settlements.

Trials are unpredictable. That seems to be the core of Samuel Gross and Kent Syverud advice:

> Anticipate problems and avoid conflicts; if conflicts arise, resolve them privately; if at all possible, do not sue. And when lawsuits are filed, this advice is transformed into the mantra of the judge: Settle. Every day, in countless settlement conferences, trial judges retail [sic] their own versions of Learned Hand's wisdom: "They're offering you $70,000.00. A jury could give you $150,000.00, but I've seen folks just like you come up empty, lots of times. If it were me, I'd be scared; I'd take it."[259]

Pointing out the same unpredictability, Nora Engstrom states that "it is true that the tort system is known to compensate claimants with similar injuries quite differently."[260] Thus, it seems there is no doubt that trials are unpredictable.

A traditional explanation for that unpredictability is that cases that go to trial are the close ones.[261] In fact, if the parties are always looking for the best cost/benefit relationship,

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[259] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 64 (1996)

[260] Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 827 (2011)

[261] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1965 (2009) ("More specifically, disputes and cases that clearly favor either the plaintiff or the defendant tend to settle readily, because both sides can save costs by settling in light of their knowledge of the applicable law and all other aspects of the case. Difficult cases falling close to the applicable decisional criterion tend not to settle, because the parties are more likely to disagree substantially in their predicted outcomes. These unsettled close cases fall more or less equally on either side of the criterion, regardless of the position of that criterion and regardless of the underlying distribution of disputes. Thus, even if, say, a legal criterion such as strict liability highly favors plaintiffs, one might not observe a plaintiff win rate well above 50%. Instead, case selection will leave for adjudication a residue of unsettled close cases, which consequently exhibit some nonextreme equilibrium win rate.")

no defendant should try a case, adding to its costs, mostly with attorney's fees, if she knows she is going to lose it. On the other hand, the lack of a cost-shifting rule makes it interesting for the plaintiff to settle a dispute whenever the difference between the defendant's proposal and the jury's expected award is less than the trial costs. That is why according to Samuel Gross and Kent Syverud, in a study performed with cases that actually went to trial in California Superior Courts, "[t]hose law suits that are fought to the end are indeed risky, costly and unpredictable." The question is whether this unpredictability would be lower if the trial was held by a judge instead of a jury.

Whatever the answer for that question might be, parties and lawyers seem to have their own perception that juries are more unpredictable than judges.[262] Samuel Gross and Kent Syverud's advice rendered above seems to agree with that, since it portrays the unpredictability of a jury's decision. Following the same path, Charles D. Gill, Jr., Joseph A. Santos, and Curtiss L. Isler state that among the noted advantages of Alternative Dispute Resolution (ADR) it is the "avoidance of volatile and unpredictable jury awards."[263] Professor Dru Stevenson remembers that the Founders inadvertently introduced the jury unpredictability into the legal system when trying to dilute state power.[264] Accordingly,

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[262] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1964 (2009) ("Despite the research that rebuts stereotypes about juries, every day lawyers and policymakers act on the basis of those old stereotypes…. On the particular subject of jury/judge performance, elitist perceptions of a biased and incompetent jury system seem to conform to the natural order of things and can even be comforting.")

[263] Charles D. Gill, Jr., Joseph A. Santos & Curtiss L. Isler, 1 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 2:41 (West, 2012) ("The noted advantages of ADR include, but are not limited to, reduction in expenses, savings in time, retention of control of the decision-making process, preservation of business relationships, and avoidance of volatile and unpredictable jury awards.")

[264] Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 514-15 (2012) ("Modern American juries are smaller and yield the opposite effect—individual juries can be quirky, with plumbers comprising the majority in one case and stockbrokers in the next. The hours or days of jury deliberation can introduce ridiculous groupthink problems, but the inconsistent results from case to case stabilize the overall legal system, making it less susceptible to headlong movements in bad directions. The Founders, who worried more about concentrations of power in the overall system than about corruption on the incidental level, inadvertently injected this unpredictability into the legal regime.") (footnote omitted)

> The variation among petit juries means that the results of any given case are not guaranteed—a good result is not a certainty, but neither will the results be consistently bad—and the Framers understood tyranny, it seems, in terms of consistently oppressive results. They also understood that government could naturally become tyrannical without safeguards, so it seems reasonable to presume that they designed their jury system to include such mechanisms.[265]

The reasons for the public perception that juries are the "least predictable of the decision makers in the legal system"[266] are quite known. First, judges are easier to be identified than jurors whose identities are unknown until the jury-selection process.[267] As consequence, it is easier to assess a judge's history, her rulings, prior relationships and experiences.[268] Second, judges are experienced practitioners, whose decisions are deemed to be very rational, as opposed to jurors that are presumed to decide based on intuitions, personal biases, and values.[269]

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[265] Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 528 (2012)
[266] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 375 (2011)
[267] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 377 (2011) ("After the case assignment and sometimes even before, the identity of the judge who will preside over a trial is known…. [On the other hand] [e]ven if the general tendencies of a jury pool are known through a lawyer's or litigant's prior experiences or a trial consultant's systematic information, the identity of the individual jurors will only be determined at the start of the trial during the jury-selection process.")
[268] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 377 (2011) ("The judge's previous history, rulings in similar cases, and prior relationships and experiences all offer some information (whether it is useful or not) about how the judge might decide an upcoming case. None of that is known for certain before a jury trial.")
[269] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 377-78 (2011) ("Another source of the greater perceived unpredictability of juries compared to judges is that jurors are widely presumed to rely on their intuitions, personal biases, and values. In contrast, judicial decision making is said to be characterized by a rational approach. However, judges are subject to many of the same psychological tendencies that influence laypeople. Nonetheless, because of their insider positions, judges may already possess or may be able to obtain information about typical trial outcomes and going rates in particular jurisdictions. This ability to gather comparative information about other cases might lessen the likelihood of judicial variability, especially compared to juries who are left in the dark about so many things, including the going rate for particular injuries and even whether the state imposes caps or other limits on damage awards.") (footnotes omitted)

Studies, however, have demonstrated that "[j]udges and juries are in fact not so different."[270] According to Kevin Clermont, the classic work of Professors Harry Kaven and Hans Ziesel during the 1950s found a 78% agreement between judge and jury on liability issues.[271] That finding is remarkable because:

> When compared to other human decisionmakers, this 78% agreement rate proves better than the rate of agreement on dichotomous decisions between scientists doing peer review, employment interviewers ranking applicants, and physicians diagnosing patients, and almost as good as the 79% or 80% rate of agreement between judges themselves making sentencing decisions on custody or no custody in an experimental setting.[272]

Professors Valerie Hans and Theodore Eisenberg also state that "when scholars have compared the decision making of juries and judges, and other decision makers, the overall patterns appear more similar than different."[273] These findings show that, since discovery has already uncovered those cases with clear outcomes, allowing for them to settle earlier on (for the economic reasons set forth above) the cases that go to trial are the ones which outcome is difficult to predict, no matter who decides them.[274]

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[270] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1963 (2009)
[271] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1961 (2009) ("The classic work on jury and judge differences was by Professors Harry Kalven and Hans Zeisel. They addressed the reliability (the ability to treat like cases alike) of jury decisionmaking, as opposed to validity (correctness). Their questionnaires to presiding judges in some 4000 actual state and federal civil jury trials nationwide in the 1950s--asking the judges how they would decide those same cases, a decision supposedly formulated before the verdict but reported afterwards--yielded data showing a 78% agreement between judge and jury on liability.") (footnotes omitted)
[272] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1961 (2009)
[273] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 379 (2011)
[274] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 376 (2011) ("Theorizing about what cases settle and what cases go to trial, many scholars conclude that the large majority of cases with clear outcomes will settle, leaving the most ambiguous cases for trial. This subset of ambiguous cases is

Nevertheless, for purpose of settlements, more important than the truth about the jury's unpredictability is the perception parties have about it. Parties make their decisions to settle or not a case based on their expectations about the trial outcome. Even if parties misperceive jury's unpredictability, their perception directly impacts their trial expectations and, as consequence, their will to settle or not a case.[275] In this context, for purposes of settlements, what really matters is how parties perceive jury's unpredictability. Dru Stevenson holds that "[j]ury predictability is directly proportional to the likelihood of settlement; when the parties are uncertain about what the jury might decide, they are less likely to agree to a settlement, preferring to take their chances."[276] This conclusion seems to be in harmony with the economic model of civil litigation. In fact, parties settle based on their trial expectations, so they can save trial costs. [277] If the decision is unpredictable, parties are less prone to converge about the likely outcome of the case.[278] Therefore, uncertainty about trial outcome prejudices the parties' economic incentives to settle the dispute, decreasing the settlement rates.[279]

On the other hand, it must be noted that many parties and lawyers refer to jury unpredictability meaning, actually, that juries are biased towards one of the parties, what makes

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the group of cases that juries decide. The outcomes of these cases might be difficult to predict, no matter who decides them. Before the trial, some uncertainty about a case's eventual outcome will be present regardless of which decision maker is used.") (footnote omitted)

[275] Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 816 (2000) ("Bench trials' influence on settlement rates flows from the assumption that they generate more predictable outcomes than jury trials. Increased predictability in trial outcomes increases parties' information. Increased information about trial outcomes *ex ante* should stimulate more efficient negotiating and fuel case settlement rates.") (footnotes omitted)

[276] Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 532 (2012)

[277] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 555 (Little, Brown and Company, 4th ed.1992) ("Each party's best settlement offer will depend on how he expects to fare in litigation.")

[278] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 541 (Little, Brown and Company, 4th ed.1992) ("Settlement out of court is cheaper than litigation. Therefore, only if each disputant expects to do better in the litigation than the other disputant expects him to do are the parties likely to fail to agree on settlement terms that make them both consider themselves better off compared with how they anticipate faring in litigation. Uncertainty is a necessary condition of such a divergence of estimates.") (footnote omitted)

[279] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 554-560 (Little, Brown and Company, 4th ed.1992)

them more predictable than unpredictable.[280] In fact, according to Kevin Clermont, "Tort reformers and others portray juries as having a pro-plaintiff bias. Juries are believed to find liability when judges would not, to grant higher awards than judges, and to grant inappropriate punitive damages awards."[281] Since this perception also changes the parties' predictions about potential trial outcomes, it also affects settlements. However, different from what happens when the parties perceive juries as real unpredictable decisionmakers, the perception of juries as biased factfinders tends to elevate the settlement rates.[282] In fact, since parties realize that the jury is more prone to a party than to another, they should "adjust their settlement behavior to account for the increased value of the plaintiff's claim."[283] That seems to be the case with punitive damages. Especially regarding tort cases, where the punitive damage shadow is always present, the "unpredictability" (understood as a pro-plaintiff bias) of a jury punitive damage award has a decisive role in the defendant's wish for settling the dispute.[284]

Here, again, the parties' perception might be disconnected from the reality.[285] In fact, according to a civil justice survey of state courts, the percentage of litigants awarded

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[280] Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375, 378-79 (2011) ("Finally, we also have to acknowledge that when a lawyer complains about the unpredictability of juries, he or she might not be talking about predictability at all. Instead, the lawyer might be saying that juries are unfair and reach decisions against them all too often--in fact, all too predictably.")

[281] Kevin M. Clermont, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1127 (1992) (footnotes omitted)

[282] Kevin M. Clermont, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1129 (1992) ("If both parties perceive that one party has a highly favorable adjudicator, the case is unlikely to be tried.")

[283] Kevin M. Clermont, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1129 (1992)

[284] Thomas Koenig, *The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 172 (1998) ("My thesis is that even though the empirical research consistently shows that punitive damages are rare and well-controlled by the judiciary, this remedy plays a significant role in driving settlements. The empirical evidence suggests that the business community's fear of runaway punitive damages is exaggerated. However, what litigators 'define as real, becomes real in their consequences.' A belief that punitive damages are 'out of control' and randomly assessed may create a self-fulfilling prophesy as parties negotiate claims according to their perceptions of the populist behavior of juries. Anecdote, hyperbole and simple confusion may shape settlements in a more powerful way than empirical truths.") (footnotes omitted)

[285] Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109 (1996) ("While critics claim that jury verdicts are irresponsible and capricious, serious students of the jury are virtually unanimous in their high regard for the jury as a decision-maker. Undoubtedly courts could improve juror performance in many ways,

punitive damages in tort jury and bench trial did not present a detectable difference.[286] Nevertheless, parties' perception, or misperception, about juries is still relevant to settlements,[287] because parties do take in consideration who is the decisionmaker before deciding whether or not to settle a dispute, and in which basis to do so.[288] Therefore, settlement rates are directly affected by the jury system. Whether juries increase or not these rates depends on how parties conceive their unpredictability. If they perceive juries as really unpredictable decisionmakers, juries should foster trials instead of settlements since parties are less prone to converge about the likely outcome of the case. However, if parties perceive juries as pro-plaintiff biased factfinders, parties should adjust their settlement behavior in order to take this jury feature in consideration. Since that bias makes juries more predictable than unpredictable, even if this predictability is just a misrepresentation of a jury's impartiality, both parties should be more prone to converge about the probable trial outcome, increasing their chances of settling their case. Finally, it seems well accepted that, at least in tort litigation, a defendant's perception of juries as pro-plaintiff decisionmakers makes her more willing to settle than to try her case, especially in light of the threat of a punitive damage award.

B.3. The Costs of Jury Trials and Settlements.

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but researchers concur that jurors on the whole are conscientious, that they collectively understand and recall the evidence as well as judges, and that they decide factual issues on the basis of the evidence presented.") (footnotes omitted)

[286] Thomas H. Cohen & Kyle Harbacek, *Punitive Damages Awards in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 6 (Mar., 2011), http://bjs.gov/content/pub/pdf/pdasc05.pdf

[287] Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rottman, Martin T. & Wells, *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 767 (2002) ("Because juries are believed to be more unpredictable than judges, especially in high-award cases, defendants may choose to settle cases that have high probabilities of large punitive awards…. Trials in cases in which jurors' propensity to award punitive damages is strongest may never be observed. Juries are viewed as so much wilder than judges that they only rarely get to act in those cases in which their behavior would be expected to be wildest.") (footnotes omitted)

[288] Kevin M. Clermont, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1129 (1992) ("Parties adjust their settlement behavior not only in light of the applicable legal standard, but also in light of the decisionmaker, including the mode of trial.")

The trial stage of the civil litigation accounts for a great part of the transaction cost of a legal dispute, especially because of attorneys and expert witnesses' fees. In order to measure the costs of each stage of the civil procedure, the National Center for State Courts (NCSC) has developed a method for cost estimation – the Civil Litigation Cost Model (CLCM) – relying on the amount of time expended by attorneys in various litigation tasks.[289] Accordingly, cases were divided in 6 types: automobile tort, premises liability, real property dispute, breach of contract, employment dispute, and professional malpractice. Applying that model, Paula Hannaford-Argor and Nicole Waters found that "[f]or all case types, a trial is the single most time-intensive stage of litigation, encompassing between one-third and one-half of total litigation time in cases that progress all the way through trial."[290] Specifically regarding automobile tort cases, the trial stage accounted for 46% of the total median hours spent by attorneys during litigation.[291] They also pointed out that approximately 80% of the expert witness expenses are allocated to the trial stage for expert testimony.[292] A study commissioned by the Advisory Committee on Civil Rules also found that cases terminated by trial had higher costs, approximately 53% higher for plaintiffs, and 24% higher for defendants, than cases that did not

[289] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 1 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx ("To obtain reliable estimates of litigation costs, the National Center for State Courts (NCSC) has developed an alternative method of cost estimation: the Civil Litigation Cost Model (CLCM). The NCSC model relies on the amount of time expended by attorneys in various litigations tasks in a variety of civil cases filed in state courts.")
[290] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 7 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx
[291] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 6 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx
[292] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 5 n.2 (Jan., 2013), http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx

terminated by trial, all else equal.[293] The question, thus, is whether jury trials are more expensive than bench trials.

Since the transaction costs of legal disputes are proportional to the time spent by parties during the litigation, [294] the answer for which type of trial costs the most (whether trial by jury or judge) depends on their length. Two measures of time might be used here. One related to how long litigants have to wait before and after trial until the final disposition of the case, and the other related to how long the actual in-court trial lasts.[295] Regarding the first measure, a civil justice survey of state courts found that the mean case processing time from filing to disposition was 26.6 months for jury trials, as opposed to 20.8 months for bench trials.[296] However, in the federal judicial system the reality seems to be the opposite. Theodore Eisenberg and Kevin Clermont explain that in federal courts "the mean judge-tried case spends 755 days on the docket, while the mean jury-tried case terminates in 678 days. Medians tell the same story: the median judge case took 619 days and the median jury case took 566 days."[297] One reason for that difference might be that "the state courts, unlike the federal courts, are imposing waiting costs upon those who wish a jury trial and not on those who agree to a bench trial, with the effect of

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[293] Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis*, FEDERAL JUDICIAL CENTER (Mar., 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf

[294] Corina Gerety, *Excess and Access: Consensus on the American Civil Justice Landscape*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, 9 (2011), http://iaals.du.edu/images/wygwam/documents/publications/Excess_Access2011-2.pdf (pointing out the results of national attorney surveys with Fellows of the American College of Trial Lawyers, members of the American Bar Association, Section of Litigation, and members of the National Employment Lawyers Association, which showed that 92%, 82% and 73% of each group respectively agreed with the statement "[t]he longer a case goes on, the more it costs.")

[295] Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176, 1 (1996) (the authors pointed out the two types of speed measure when commenting Richard Posner's statement that "a case normally takes longer to try to a jury than to a judge....")

[296] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 8 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf

[297] Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176, 178 (1996)

discouraging jury trials."[298] Nevertheless, since the longer it takes to a case reach termination, the higher the litigation costs,[299] the answer for whether or not jury trials are more expensive than bench trials might depend on whether the case is tried in a state or federal court.

On the other hand, according to the other measure, the in-court trial length measure, jury trials seem to consume much more time from parties, lawyers, witnesses and experts than bench trials.[300] In fact, according to Theodore Eisenberg and Kevin Clermont:

> The available data generally agree that jury trials take about twice as long as judge trials, although admittedly trials on average are rather short so that the absolute difference is not great. Most of these studies do not control for the type of case but, instead, simply compare lengths of all jury trials and all judge trials. Nevertheless, rough attempts to control for the type of case confirm that jury trials take about twice as long. Certainly, most opinions agree that jury trials last longer. The theory is that the extra steps of jury trial, such as jury selection and instructions, more than consume such savings as the possible streamlining of evidence for presentation to the jury.[301]

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[298] Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1950 (2009)

[299] Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis*, FEDERAL JUDICIAL CENTER, 5-7 (Mar., 2010), http://www.fjc.gov/public/pdf.nsf/lookup/costciv1.pdf/$file/costciv1.pdf (finding that the longer a case takes to reach termination, the higher the costs will be, all else equal, for both plaintiff and defendant.)

[300] Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 815 (2000) ("Bench trials typically take less time than jury trials, thereby reducing overall case disposition time at the margins.") (footnote omitted)

[301] Theodore Eisenberg & Kevin M. Clermont, *Trial by Jury or Judge: Which Is Speedier?*, 79 JUDICATURE 176 (1996) (footnotes omitted)

In fact, according to a civil justice survey of state court, "jury trials lasted two days longer on average than bench trials."[302] The same survey also pointed out that 70% of bench trials were completed within one day, while only 13% of jury trials lasted that short.[303]

Since longer trials consume more attorney and expert witness billable hours,[304] cases tried by juries are expected to be more expensive than cases tried by judges, all else equal. Providing some jury figures, a study performed by Samuel Gross and Kent Syverud, involving cases tried in California Superior Courts, showed that the average jury trial length is nine days and the average deliberation length is nine hours.[305] In the same study, the authors deemed fair to assume an average spent of approximately $5,000 per day for each side of the dispute, for cases tried in 1990-91. [306] Accordingly, the average jury trial used to cost roughly $45,000 for each party in the beginning of the 90's.

From an economic standpoint, considering the average length of a jury trial, the prospect of a jury trial should foster more settlements than the prospect of a bench trial. According to the economic model of civil litigation, whenever parties have the same expectations about the trial outcome, they should settle the dispute in order to save the trial

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[302] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 8 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf

[303] Lynn Langton & Thomas H. Cohen, *Civil Bench and Jury Trials in State Courts, 2005*, BUREAU OF JUSTICE STATISTICS, 8 (Oct., 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf

[304] Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, Caseload Highlights, COURT STATISTICS PROJECT, 1-2 (Jan., 2013) http://www.courtstatistics.org/Other-Pages/Publications/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx (acknowledging the attorney's preponderance to the total cost of the legal disputes, the National Center for State Courts (NCSC) has developed a method for cost estimation: the Civil Litigation Cost Model (CLCM), relying on the amount of time expended by attorneys in various litigation tasks.)

[305] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 31-33 (1996)

[306] Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 44 (1996)

costs.[307] In fact, because of the American rule, which provides that each party should bear his/her own litigation costs, making even the winner fall short of full compensation, [308] both parties are economically incentivized to settle the dispute as soon as possible. Since litigants are always looking for the most efficient way to resolve their disputes, minimizing costs and maximizing gains, the higher the trial costs the more they should be prone to settle the case.[309] Because jury trials usually present higher costs than bench trials, all else equal, the threat of a jury's adjudication cost should make the parties more willing to settle their dispute.

IV – Conclusion.

All man-made systems are concerned with efficiency, including the civil justice system. This premise was adopted by the drafters of the Federal Rules of Civil Procedure when they aimed equally justice, speed and cost as goals for the interpretation and administration of the rules. An economic model for determining system efficiency is easily accepted in civil litigation of purely economic and private matters. This acceptance is due to the public perception of justice as a private peace between litigants instead of a search for truth or an opportunity for advancing public policies. Since settlements prevent public and private expenditures with trials, appeals, and judicial enforcement, they provide a faster and cheaper resolution for conflicts than

[307] George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1,16 (1984) ("Those disputes for which the true Y value [that describes the relationship between the relevant characteristics of the dispute and the decision standard] lies far from the decision standard – whether in favor of the plaintiff or defendant – are more likely to be settled than litigated. The difference between the parties' probability estimates of the outcome is likely to be small, and thus the parties are more likely to be able to agree on settlement terms in order to save litigation costs.")

[308] Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 428 (1973) ("Under the American rule a plaintiff who wins receives a net benefit equal to the difference between his stakes and his litigation expense; one who loses sustains a net loss equal to his litigation expense.")

[309] Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 418 (1973) ("Anything that reduces the plaintiff's minimum offer or increases the defendant's maximum offer, such as an increase in the parties' litigation expenditures relative to their settlement costs, will reduce the likelihood of litigation.")

a judge or jury adjudication. In this context, whether from a pre-trial or post-trial standpoint, settlements accomplish economic efficiency for both state and parties.

In light of the private and public advantages of a settlement, it is important to understand what fosters the consensual resolution of civil disputes in the United States so it may be promoted. Since economic efficiency is the most accepted model, settlements should occur when they express the best cost/benefit relationship to the parties. Therefore, in order to understand the reasons for settlements in civil litigation it is necessary to understand the costs of resolving legal disputes and the way these costs are allocated in the American civil justice system. The American attorney's fee arrangements, the lack of public finance for litigation, and the restrictions on cost-shifting altogether contribute to the American high settlement rate. Moreover, legal institutes such as discovery and civil jury trials play a decisive role in the amount of cases that settle before trial. In fact, the information symmetry caused by discovery as well as its costs drive parties towards a consensual resolution of their disputes. In the same way the threat of an unpredictable, long and expensive civil jury trial makes both parties more willing to settle than to try their case. As a result, most cases settle. Therefore, the vanishing U.S. trial is not an accident but a consequence of procedural tools and public policies that externalize an American predilection for settlements instead of trials.