

HOW CASES ARE RESOLVED: A STATISTICAL ANALYSIS OF THE TRIALS, SUMMARY JUDGMENTS, AND SETTLEMENTS IN THE DISTRICT OF COLORADO

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In calendar year 2007, there were 2,726 civil actions filed in the District of Colorado; 2,735 cases were closed; but there were only 36 jury trials. What happened to the rest of the cases? Surprisingly, case dispositions are something of a mystery:

It is often said that 90 percent to 95 percent of all civil cases are settled. This “statistic” is incorrect, however. It is a faulty inference from the fact that approximately five percent of the cases filed in federal court reach trial. Some of the cases that do not reach trial are adjudicated through motions to dismiss or for summary judgment, however, some are remanded or transferred, and some are voluntarily dismissed without settlement. . . . [A]n estimate from the Administrative Office of the United States Courts [indicates] that 35 percent of civil cases in federal courts are disposed of by motion to dismiss or for summary judgment. Adding these to the approximately 5 percent of cases that go to trial means that only about 60 percent are settled or voluntarily dismissed. . . . While it is true that most civil suits are settled, the figure is nowhere near the 90 to 95 percent figure that has passed into procedure folklore, and is more likely in the neighborhood of 60 to 70 percent.²

The purpose of this paper is to address what is known of the disposition of cases in the District of Colorado.

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²See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 524 (1991) (internal notes omitted).

I. TRIALS

A. Overview

Thirty-six civil jury trials occurred in 2007. During the same time there were 2,726 civil actions filed. The ratio of cases tried to cases filed is 1.3%.³

The comparison is imprecise because none of the cases tried in 2007 was filed then. To the contrary, the date of filing of each case that went to trial in 2007 is set out below:

<u>Year Filed</u>	<u>No. Tried in 2007</u>
2001	2
2002	2
2003	4
2004	8
2005	15
2006	5

The average time from the date a case was filed until trial was 33 months, or slightly less than three years. The time to trial decreased by nine months over 2006, when the average time to trial was 42 months. The shortest time from filing to trial in 2007 was 14 months. Eleven of the 36 cases (31%) were tried within two years of filing.

The number of cases tried in 2007 decreased slightly over the previous year. The number of civil jury trials in each of the last six years follows:

<u>Year</u>	<u>No. of Cases Filed</u>	<u>No. of Civil Jury Trials</u>	<u>Rate of Trials</u>
2007	2,726	36	1.3 %
2006	2,607	38	1.5
2005	2,679	35	1.3
2004	2,698	51	1.89
2003	2,672	47	1.75
2002	2,464	52	2.1

³There were also ten civil trials to the court and 19 criminal trials. Consequently, a total of 65 civil and criminal matters were tried in this district.

B. Trial Outcomes: Verdict Amounts

Reversing a two year trend, defendants were more successful at trial in 2007 than were plaintiffs. Defendants prevailed in 21 of the 36 jury trials, or 58% of the time. Plaintiffs prevailed in 15 cases, or 42% of the time. Rates of success for the last five years are set out below:

<u>Year</u>	<u>No. of Civil Jury Trials</u>	<u>Plaintiffs Prevailed</u>	<u>Defendants Prevailed</u>
2007	36	15 (42%)	21 (58%) ⁴
2006	38	24 (63%)	14 (37%)
2005	35	23 (66%)	11 (31%) ⁵
2004	51	25 (49%)	26 (51%)
<u>2003</u>	<u>47</u>	<u>26 (55%)</u>	<u>21 (45%)</u>
TOTAL	207	113 (55%)	93 (45%)

The largest verdict awarded in 2007 was \$41,980,131, and the smallest verdict was \$1.00. The average verdict was \$5,749,021,⁶ and the median⁷ verdict was \$511,910. The chart reports the amounts of the jury verdicts in 2007, from high to low:

⁴In one case in 2007, the verdict for the defendant included an award of \$16,000,000 on a counterclaim.

⁵In 2005, there was one split verdict, with the plaintiff being awarded \$57,672 on his claim for invasion of privacy and the defendant being awarded \$140,520 on its counterclaim for breach of the duty of loyalty.

⁶I have included among the verdicts the \$16,000,000 awarded to a defendant on its counterclaim.

⁷The median is the point in the middle of a distribution. Half the verdicts exceeded the median and half were less than the median.

	Amount	Type of Case
1	\$41,980,131	Intellectual Property: Trade Secret
2	16,000,000	Breach of Management Contract* *awarded to the defendant on its counterclaim
3	15,199,936	Intellectual Property: Trademark
4	7,555,886	Qui Tam
5	4,337,611	Negligence: Product Liability
6	3,225,000	Employment: Gender
7	1,980,000	Negligence: Personal Injury (auto crash)
8	511,910	Intellectual Property: Copyright
9	380,000	Negligence: Product Liability
10	368,125	Breach of Contract/Fraud
11	211,740	Breach of Insurance Contract
12	150,000	Employment: Retaliation
13	39,500	Employment: Disability
14	37,500	Breach of Distributorship Contract
15	7,000	Employment: Retaliation
16	1	Breach of Contract
	\$91,984,340	TOTAL

Active district judges presided over 23 jury trials; senior judges presided over 11 jury trials; and two jury trials proceeded before magistrate judges. A breakdown of the trials by presiding judge follows:

Judge	Type of Case	Outcome	Amount of Verdict
Nottingham	1. Employment: Disability	P	\$ 39,500
	2. Civil Rights: Excessive Force	D	--
	3. Civil Rights: Excessive Force	D	--
Babcock	1. Negligence: Product Liability	P	4,337,611
	2. Employment: Retaliation	D	--
	3. Civil Rights: Excessive Force	D	--
Daniel	1. Intellectual Property: Trademark	P	15,199,936
	2. Breach of Contract/Fraud	P	368,125
	3. Employment: Gender	D	--
	4. Employment: Breach of Contract	D	--
	5. Civil Rights: Duty to Protect	D	--
Miller	1. Employment: Gender	P	3,225,000
	2. Personal Injury	D	--
	3. Breach of Fiduciary Duty	D	--
Krieger	1. Negligence: Personal Injury (auto)	P	1,980,000
	2. Employment: Retaliation	P	7,000
	3. Employment: Race	D	--
	4. Employment: Race	D	--
	5. Employment: Age	D	--
	6. Employment: Gender	D	--
	7. Civil Rights: Excessive Force	D	--
Blackburn	1. Negligence: Medical Malpractice	D	--
Figa	1. Qui Tam	P	7,555,886
Matsch	1. Breach of Management Contract	D	counterclaim: 16,000,000
	2. Intellectual Property: Copyright	P	511,910
	3. Breach of Insurance Contract	P	211,740
	4. Employment: Retaliation	P	150,000
	5. Employment: Retaliation	P	37,500
	6. Employment: Gender	D	--
	7. Negligence: Medical Malpractice	D	--
Kane	1. Intellectual Property	P	41,980,131
	2. Breach of Contract	P	1
	3. Breach of Sales Contract	D	--
Weinshienk	1. Civil Rights: Retaliation	D	--
Boland	1. Employment: Disability	D	--
Hegarty	1. Negligence: Product Liability	P	380,000

A total of 198 trial days were committed to civil jury trials in 2007. This is a decrease of 59 days as compared with 2006, when there were 257 trial days. The longest trial lasted 22 days; the shortest was two days. The average length of a trial was 5.5 days. The most common trial lengths were three and four days, with eight trials respectively.

C. Breakdown By Nature of the Claim

The jury trials conducted in 2007 fell into six categories based on the nature of the plaintiff's claim:

Category	No. of cases	% of cases tried
Employment	13	36%
Breach of Contract	6	17
Negligence	6	17
Civil Rights	6	17
Intellectual Property	3	8
Fiduciary Duty	1	3
Qui Tam	1	3

At least 19 of the 36 cases tried involved claims which allowed for the award of attorneys' fees to a prevailing plaintiff. The plaintiffs won only 4 of the 19 cases (21%). Although it is too early to know the amounts of attorneys fees awarded in these cases, in 2006 attorney fees were awarded in four cases, in an average amount of \$271,513

Costs were awarded in 18 cases: seven times to plaintiffs and 11 times to defendants. The average amount of costs awarded in all cases was \$9,178. The average costs awarded to plaintiffs was \$17,745; and the average costs awarded to defendants was \$3,726.

1. Employment

Thirteen of the 36 jury trials involved employment claims (36%). Employment cases made up only approximately 4% of the cases filed, however.⁸ Thus, a disproportionately large number of employment cases went to trial in 2007.

The plaintiffs' prevailed in four of the 13 employment cases (31%), and the defendants prevailed in nine cases (69%).

The verdicts in employment cases ranged from a high of \$3,225,000 to a low of \$7,000. The average plaintiff's verdict in the employment cases was \$855,375. The amounts of the employment verdicts, from high to low, are set out below:

Nature of Claim	Amount of Verdict
Gender	\$3,225,000
Retaliation	150,000
Disability	39,500
Retaliation	7,000
TOTAL	\$3,421,500

Of the 13 employment cases tried, four alleged gender discrimination (31%); three alleged disability discrimination (23%); three alleged retaliation (23%); two alleged race discrimination (15%); and one alleged age discrimination (8%).

An analysis of the employment cases tried in 2007, broken down by the nature of the claim asserted, is set out below:

⁸U.S. District Court--Judicial Caseload Profile, prepared by the Administrative Office of the United States Courts, for the 12-Month Period Ending September 30, 2007.

Gender:

Number of cases: 4
Plaintiff's verdicts: 1 (25%)
Defense verdicts: 3 (75%)

Amount of verdict: \$3,225,000

Retaliation:

Number of cases: 3
Plaintiff's verdicts: 2 (66%)
Defense verdicts: 1 (33%)

Amounts of verdicts:

1. \$ 150,000
2. 7,000

TOTAL: \$ 157,000 AVG: \$ 78,500

Disability:

Number of cases: 3
Plaintiff's verdicts: 1 (33%)
Defense verdicts: 2 (67%)

Amount of verdict: \$ 39,500

Race:

Number of cases: 2
Plaintiff's verdicts: 0
Defense verdicts: 2 (100%)

Age:

Number of cases: 1
Plaintiff's verdicts: 0
Defense verdicts: 1 (100%)

The employment claims most frequently asserted during the last six years were gender and retaliation, 24 and 23 cases respectively. The historical trial results of the various employment claims asserted during the last six years are analyzed below:

Nature of Claim	Cases Tried	Cases Won by Plaintiffs	Plaintiffs' Success Rate
Gender	24	14	58%
Retaliation	23	15	65%
Disability	16	7	44%
Race/National Origin	15	5	33%
Age	8	3	38%
Public Employee	4	3	75%
Religion	2	2	100%
Public Policy Violation	1	1	100%
FMLA	1	1	100%
Luring	1	0	0%

2. Breach of Contract Claims

Seven jury trials (19%) involved claims for breach of contract. Four cases resulted in verdicts for the plaintiffs (57%), and three cases resulted in verdicts for the defendants (43%). In one case, the defendant prevailed and was awarded \$16 million on its counterclaim. The verdicts, from high to low, are as follows:

Nature of claim	Amount of verdict
Management	(on defendant's counterclaim) \$16,000,000
Real Estate Listing	368,125
Insurance	211,740

Distributorship	37,500
Telecommunications	1

The average verdict (including the defendant's award on its counterclaim) in the breach of contract cases was \$3,323,473, and the median verdict was \$211,740.

An analysis of the contract cases is set out below:

Number of contract cases	7
Plaintiff's verdicts	4 (88%)
Defense verdicts*	3 (12%)

*includes one case where the defendant was awarded \$16,000,000 on its counterclaim

Verdicts high to low		
1.	\$16,000,000*	management
2.	368,125	breach/fraud
3.	211,740	insurance
4.	37,500	distributorship
5.	1	telecommunications
		*awarded to the defendant on its counterclaim
TOTAL:	\$ 16,617,366	
Average:	3,323,473	
Median:	211,740	

3. Negligence

Six of the 36 jury trials (17%) involved negligence claims. Two asserted claims based on products liability; two involved personal injuries resulting from auto accidents; and two involved claims of medical malpractice. The plaintiffs won three of the cases (50%), and the defendants won three (50%), as follows:

Nature of claim	Prevailing party	Amount of verdict
Products Liability	P	\$ 4,337,611
Products Liability	P	380,000
Auto Accident	P	1,980,000
Auto Accident	D	--

Medical Malpractice	D	--
Medical Malpractice	D	--

The average plaintiff's verdict in a negligence case was \$2,232,537, and the median verdict was \$1,980,000.

An analysis of the negligence cases broken down by the nature of the claims follows:

Products Liability:

Number of cases: 2
 Plaintiff's verdicts: 2 (100%)
 Defense verdicts: 0

Amounts of verdicts:

1. \$ 4,337,611
 2. 380,000

TOTAL: \$ 4,717,611 AVG: \$ 2,358,806

Personal Injury:

Number of cases: 2
 Plaintiff's verdicts: 1 (50%)
 Defense verdicts: 1 (50%)

Amount of verdict: \$1,980,000

Medical Malpractice:

Number of cases: 2
 Plaintiff's verdicts: 0
 Defense verdicts: 2 (100%)

4. Civil Rights (other than employment)

Civil rights cases (other than employment) accounted for six of the 36 trials (17%). Four cases involved claims of excessive force; one case involved a claim of retaliation; and one case involved a claim of failure to protect resulting in death. All six cases resulted in defense verdicts.

Historically, civil rights cases have been among the most difficult for plaintiffs to win. In the last six years, 40 civil rights cases have been tried to juries. The plaintiffs won ten cases

(25%), and the defendants prevailed in 30 (75%). The largest verdict in a civil rights case was \$1,000,000, involving the unlawful arrest of a state judge. That verdict ultimately was reversed on appeal. The smallest verdicts were for \$1. The plaintiffs' verdicts over the last six years are as follows:

Nature of claim	Amount of verdict
Unlawful Arrest	\$1,000,000
Unreasonable Search	190,000
Excessive Force	10,000
Unlawful Arrest	10,000
Unreasonable Search	6,500
Unlawful Arrest	5,000
Retaliation	1,500
Equal Protection	630
Unlawful Arrest	1
Excessive Force	1

The average verdict in the civil rights cases over the last six years is \$122,363. The median verdict is \$6,500.

5. Intellectual Property

Three of the 36 trials (8%) involved intellectual property claims--one each for misappropriation of trade secrets, trademark infringement, and copyright infringement. The plaintiffs prevailed in all three cases, as follows:

Nature of Claim	Amount of Verdict
Misappropriation of Trade Secret	\$41,980,131
Trademark Infringement	15,199,936
Copyright Infringement	511,910
Total	\$57,691,977

The average verdict in an intellectual property case in 2007 was \$19,230,659, and the median verdict was \$15,199,936.

Plaintiffs have fared exceptionally well in intellectual property cases tried in this district. In the last six years, there have been fourteen intellectual property cases tried, and the plaintiffs prevailed in twelve of them (86%). The historical results over the last six years follow:

Nature of Claim	Cases Tried	Cases Won by Plaintiffs	Plaintiffs' Success Rate
Patent Infringement	5	5	100%
Trademark Infringement	4	2	50%
Breach of Non-Disclosure	1	1	100%
Piracy	1	1	100%
Theft of Trade Secrets	2	2	100%
Copyright Infringement	1	1	100%

The verdicts in the intellectual property cases have ranged, from high to low, as follows:

Nature of Claim	Amount of Verdict
Patent Infringement	\$51,000,000
Misappropriation of Trade Secrets	41,980,131
Trademark Infringement	15,199,936
Breach of Non-Disclosure	9,340,000
Trademark Infringement	4,462,000
Patent Infringement	1,850,000
Patent Infringement	1,205,000
Patent Infringement	728,484
Copyright Infringement	511,910
Misappropriation of Trade Secret	100,000
Patent Infringement	74,863
Piracy	10,000 ⁹
Total	126,462,324

The six year average verdict is \$10,538,527; the median is \$1,850,000.

6. Qui Tam

One qui tam case involving oil and gas royalties due to the government was tried to a jury in 2007. The plaintiffs prevailed and were awarded damages of \$7,555,886.

D. Judgments Varying Substantially From the Verdict

Although the focus here is primarily on jury verdicts, as distinguished from the judgment entered by a judge, the judgments ultimately entered varied significantly from the juries' verdicts

⁹The plaintiff sought statutory damages only in this case, which were awarded by the trial judge and not a jury.

in eight cases tried in 2007. Specifically, the trial judges awarded back pay in two employment cases, substantially increasing the awards:

Nature of Claim	Verdict	Judgment
Retaliation	\$150,000	\$ 313,675
Disability	39,500	54,850

In two negligence cases, the trial judges substantially reduced the juries' verdicts, as follows:

Nature of Claim	Verdict	Judgment
Product Liability (hose)	\$ 4,337,611	\$ 2,168,805
Personal Injury (auto)	1,980,000	1,406,875

And in each of the three intellectual property cases, the judgments entered were substantially less than the verdicts awarded:

Nature of Claim	Verdict	Judgment
Trade Secrets	\$ 41,980,131	\$ 25,266,381
Trademark	15,199,936	4,946,128
Copyright	511,910	117,500

II. SUMMARY JUDGMENTS

A. Overview

Judges entered orders resolving motions for summary judgment in 268 of the 2,735 cases (10%) terminated in 2007.¹⁰ By comparison, in 2005 summary judgment motions were ruled on in 311 of the 2,810 cases closed (11%); and in 2006 summary judgment motions were ruled on in 252 of the 2,895 cases closed (9%).

In 117 instances in 2007, the cases were terminated as a result of the summary judgment rulings.¹¹ Consequently, 117 of the 2,735 cases (4.3%) terminated ended through the grant of summary judgment. Looked at differently, 117 of the 268 cases (44%) where summary judgment motions were decided were terminated as a result of the ruling.

Summary judgment was granted in whole or in part in 174 cases, including the 117 cases terminated by summary judgment and 57 additional cases where summary judgment was granted

¹⁰This analysis springs from a computer generated report, entitled *Motions for Summary Judgment Satisfied*, prepared by the Clerk of the Court. The report was designed to sort all cases and isolate those where motions for summary judgment were ruled on in 2007. The report identified the 268 cases analyzed here. The docket sheet for each of the 268 cases identified was then examined to obtain more information and to verify the results of the orders on summary judgment.

¹¹The number of cases resolved by summary judgment in the District of Colorado (117 cases, or 4.3% of the caseload) is below the number anticipated by scholars and reported in other studies. Professor Judith Resnick of Yale University has estimated that “35 percent of civil cases in federal courts are disposed of by motion to dismiss or for summary judgment.” *See* Alexander, *supra* note 2 at 524. A study conducted by the Federal Judicial Center indicated that in 2000, summary judgment motions were filed in 20% of federal cases, and terminated 7.7% of the pending cases. Joe S. Cecil, Dean P. Miletich & George Cort, *TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS*, pp. 3-4 (Nov. 2001).

in part but the case was not fully resolved.¹² In other words, the moving party was completely or partially successful in 174 of the 268 cases (65%) where summary judgment motions were decided.

Motions for summary judgment were denied in their entirety and on the merits in 62 of the 268 cases (23%) where motions were decided. An additional 32 motions were stricken or denied without prejudice based on technical errors.¹³ This is a substantial increase from 2006, when only 15 motions were denied for technical reasons.

The results of the summary judgment motions ruled on in 2007 are summarized in the following table:

¹²Summary judgment has been characterized as “especially encouraged in complex cases in which issues of fact may metastasize if the court does not take action to confine the dispute and proscribe costly overextension of discovery and trial.” Samuel Issacharoff and George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L. J. 73, 74 n.9 (1990). In fact, however, the 57 motions granted in part but which were not fully dispositive only limited the issues presented at trial because virtually all of the motions were decided after discovery had been completed.

¹³Judges Nottingham, Daniel, Miller, Krieger, and Blackburn have established detailed practice standards concerning the format of summary judgment motions. This is consistent with a national trend:

The increase in summary judgment activity also is evidenced by the recent growth of local district court rules regulating the procedure, and in their stepped-up enforcement. These rules tend to focus on improving the efficiency of motion practice, for example, by requiring separate filings identifying controverted and uncontroverted facts.

Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U.L. REV. 982, 1051-52 (2003).

Motions for Summary Judgment Determined	268
Cases Terminated by Summary Judgment	117 (44%)
Motions Granted In Part, Narrowing Issues	57 (21%)
Motions Denied In Their Entirety On the Merits	94 (23%)

Although one purpose of the summary judgment procedure is to expedite the determination of cases, at least where the motion is granted, it is not clear that this purpose is being achieved.¹⁴ In 2007, the average time from the filing of a motion for summary judgment until its determination was 6.7 months.¹⁵ Most summary judgment motions are filed shortly after the close of discovery (usually 30 days), and generally approximately one year after the case was filed. Consequently, the motions appear to have been ruled on approximately 20 months or more after the case was filed. The average time from the filing of a case to trial in the District of Colorado in 2007 was 33 months, and 11 cases were tried within 24 months or less.

¹⁴This is not a novel observation. To the contrary:

[M]any critics have questioned whether the decisions [on summary judgment motions] really will produce gains in efficiency, pointing out that summary judgment motions take time to prepare, support, and decide . . ., often slow a case's forward progress, and typically save time only when granted.

Miller, *supra* note 13, at 1047.

¹⁵The time required for deciding summary judgment motions in this district has been declining steadily. In 2006, the average time to decision was 7.5 months; in 2005, it was 9.4 months.

The modern summary judgment procedure traces its roots to England and the Summary Procedure on Bills of Exchange Act of 1855.¹⁶ As originally implemented, the summary procedure was designed to benefit plaintiffs by accelerating debt actions on overdue bills and notes where the debtor could not dispute the existence of the debt.¹⁷ Although England's historic summary procedure was designed to protect merchants from sham defenses, there is no doubt that the modern summary judgment motion under Rule 56, Fed. R. Civ. P., is a defendant's tool utilized primarily to eliminate meritless claims.¹⁸ The experience in the District of Colorado confirms this fact, where 105 of the 117 (90%) cases terminated through summary judgment resulted in judgments for the defendants. Only twelve cases (10%) terminated by summary judgment favored the plaintiffs.

The number of summary judgment motions filed over the past three years has declined slightly, from a high of 302 in 2005 to 268 filed last year. This is a decrease of 11%. Meanwhile, the percentage of cases ending through summary judgment has increased from 37% to 44%, which is an increase of seven percentage points. This trend of fewer motions, but of a higher quality, should be viewed favorably.

¹⁶Gregory A. Gordillo, *Summary Judgment and Problems In Applying the Celotex Trilogy Standard*, 42 CLEV. S. L. REV. 263, 266 and n.13 (1994).

¹⁷See Miller, *supra* note 13, at 1016.

¹⁸See Gordillo, *supra* note 16, at 278, 281.

The number of motions filed and their outcomes over the last three years are summarized in the chart:

Year	No. of Motions	Cases Terminated	For Plaintiff	For Defendant
2007	268	117 (44%)	12 (10%)	105 (90%)
2006	252	103 (41%)	9 (9%)	94 (91%)
2005	302	111 (37%)	9 (9%)	102 (91%)

B. Breakdown By Nature of the Claim

In 2007, motions for summary judgment were most commonly utilized in employment cases, where 79 of the 268 motions (29%) arose. Thirty-six of the 79 employment cases (46%) were terminated by summary judgment.

Motions for summary judgment were ruled on in 63 civil rights cases, and 30 of the cases (48%) were terminated as a result.¹⁹

Four other categories of cases involved ten or more cases where an order on summary judgment was entered. In cases involving insurance contract disputes, motions for summary judgment were ruled on in 39 cases, and 15 cases (38%) were terminated; summary judgment motions were ruled on in 17 cases based on contracts other than insurance contracts, and six cases (35%) were terminated; 13 motions involving intellectual property disputes were ruled on, with five (38%) cases terminating; and 10 motions involving personal injury claims were ruled on, with two (20%) cases terminating.

District judges entered the orders in 253 of the 268 cases (94%) where summary judgment motions were decided. In 40 of those 268 cases (15%), however, the district judges were

¹⁹Studies have shown that “[h]igher rates of summary judgment are especially notable in civil rights cases.” Cecil, *supra* note 11, at 1.

reviewing recommendations made by magistrate judges. The district judges accepted the recommendation *in toto* in 33 instances (83%); accepted the recommendation in part and rejected it in part in five instances (13%); and rejected the recommendation outright only once (3%).

Magistrate judges entered orders ruling on motions for summary judgment in nine cases (3%) involving consent jurisdiction under 28 U.S.C. § 636(c). Finally, magistrate judges entered orders concerning summary judgment motions in an additional six cases, generally denying the motions without prejudice as moot following an order allowing amendment of a complaint.

A breakdown of the outcomes of summary judgment motions by nature of the claim is contained in the table:

Nature of Claim	No. of Motions Filed	Cases Terminated
Employment	79	36 (46%)
Civil Rights	63	30 (48%)
Insurance Contracts	39	21 (54%)
Contracts (Other than insurance)	17	4 (24%)
Intellectual Property	13	3 (23%)
Personal Injury (Negligence)	10	2 (20%)
RICO	5	2 (40%)
ERISA	5	3 (60%)
Defamation	5	2 (40%)
Tax	4	2 (50%)
Federal Tort Claims Act	4	3 (75%)
Truth In Lending Act	4	1 (25%)
Securities Fraud	3	0
Freedom of Information Act	2	1 (50%)
Foreclosure	2	1 (50%)
Fair Labor Standards Act	2	1 (50%)
Nat'l Enviro. Prot. Act	1	1 (100%)
PUC Rates	1	1 (100%)
Fraud	1	0
Title IX	1	1 (100%)
Clean Water Act	1	0
Legal Malpractice	1	1 (100%)
Resource Conser. Recov. Act	1	0
Fair Housing Act	1	0
Condemnation	1	0
Medicare	1	1 (100%)

III. SETTLEMENTS

Trials are the exception. Most cases are resolved by settlement.

In 2007, the magistrate judges conducted 603 settlement conferences, and 430 cases settled at or after the settlement conference. The ratio of cases settled to conferences held is 71%, and the ratio of cases settled to cases filed is 16%.

Cases are more likely to go to trial if no settlement conference is held or if one party refuses meaningfully to participate in settlement discussions. In nine of the 36 cases tried no settlement conference was held. In an additional seven cases the defendant refused to make a settlement offer. Thus, in 15 of the 36 cases tried (42%), either no settlement conference was held or the defendant refused to make a settlement offer.

A. Cases Where No Settlement Conference Was Held

In nine of the 36 cases tried (25%) no settlement conference was held. Six cases were not referred to a magistrate judge for settlement. In three cases, although referred, no conference was held; in one of these, the plaintiff simply failed to appear at the conference and was sanctioned for his misconduct. The plaintiffs prevailed in five cases (56%) where no settlement conference was held, and the defendants prevailed in four (44%).

The cases where no settlement conference was held are detailed below:

Total instances:	9
Plaintiff's verdicts:	5 (56%)
Defense verdicts:	4 (44%)
Average plaintiff's verdict:	\$ 4,219,752
Median verdict:	\$ 511,910

By Nature of Claim:

Type of Case	Verdict
Employment	
1. gender	defense
Breach of Contract	
1. management	\$16,000,000 (on a counterclaim)
2. insurance	211,740
3. distributorship	37,500
4. sale of defective goods	defense
5. royalties	defense
Negligence	
1. product liability	\$ 4,337,611
2. medical malpractice	defense
Intellectual Property	
1. copyright infringement	\$ 511,910

B. Cases Settling At Trial

Startlingly, 13 cases settled less than one week before trial or after the trial began.

Viewed differently, 13 of the 49 cases (27%) that reached the eve of trial settled before the matter was submitted to the jury. This fact raises doubts about the frequent complaint that cases settle because of the delay or expense associated with reaching trial.

C. The Settlement Database

The magistrate judges maintain a settlement database to assist in their settlement efforts. The database compiles the amounts paid in settlement and the time from the filing of a case to its settlement. The cases are categorized based on the nature of the plaintiff's claim. Although the

average amounts of settlements are maintained confidentially, the average time from the filing of an employment discrimination case to its settlement, broken down by the nature of the plaintiff’s claim, is contained in the chart:

Nature of the Claim	Months from Filing to Settlement
Age Discrimination	17.6
Disability Discrimination	14
Gender Discrimination	11.8
Race Discrimination	8.5
Retaliation	6
Public Employee	17.8

D. Why Cases Settle

In my view, cases settle not because “the federal judiciary has adopted an anti-adjudication and pro-settlement agenda” or because of “judicial exhaustion”,²⁰ and not because of unreasonable delay in reaching trial or the unavailability of a trial. Cases settle because the parties believe that a resolution of the dispute by agreement rather than coercion is preferable. It certainly is true that “filing a lawsuit is often merely a tactical move to pressure the other party to negotiate”²¹

Primarily, cases settle because the parties want to save money and avoid the uncertainty of litigation. In those employment cases where the damages are limited, due to the plaintiff’s efforts to mitigate or otherwise, or where the outcome on the merits is especially uncertain, costs of discovery and trial may well exceed the likely recovery, discounted for risk. In addition,

²⁰Judith Resnick, *Failing Faith: Adjudicatory Procedure In Decline*, 53 U.CHI.L.REV. 494, 556 (1986); Judith Resnick, *Trial As Error, Jurisdiction As Injury: Transforming the Meaning of Article III*, 113, HARV.L.REV. 924, 928 (2000).

²¹Marc Galanter and Mia Cahill, “*Most Cases Settle*”: *Judicial Promotion and Regulation of Settlements*, 46 STAN L. REV. 1339, 1352 (1994).

defendants frequently are willing to pay in settlement the amount they otherwise would incur in attorneys' fees and costs. Consequently, a substantial number of cases are resolved at approximately the cost of defense.

A second reason cases settle is that generally the only relief available through trial is the award of money damages, while settlement affords the parties other options. Principal among them is the ability to compromise. Trials are characterized by a "winner-take-all" outcome. In most cases, the fundamental issue of liability can be resolved only by a verdict for one party or the other. In a settlement, by contrast, the parties are free to compromise their positions, avoiding the "zero-sum game of adjudication."²²

In addition, attending a settlement conference, as compared to a trial, and resolving a dispute by agreement rather than by judicial coercion, is viewed more favorably by many litigants. According to studies conducted by others:

Mediation was less intimidating and more understandable, giving participants the opportunity to explain their side, to explore all issues, and to vent and dissipate anger. Some 66.6 percent of the mediated parties reported that they were completely or mostly satisfied with their overall experiences, compared to only 54 percent of the adjudicated parties. Mediated parties deemed their settlements fair 67.1 percent of the time; adjudicated parties only 59 percent of the time.²³

Most cases settle. As a lawyer develops a case strategy, this reality should not be

²²Kevin C. McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 37 U.C.L.A. L. REV. 833, 845 n. 47 (1990) (internal citation omitted).

²³Galanter and Cahill, *supra* note 21, at 1355-56.

forgotten. Discovery, the use of expert witnesses, and motion practice, while important in those cases which are resolved on the merits, should not be used in a manner that makes settlement more difficult or impossible. Lawyers should take advantage of court sponsored settlement conferences and should do so as soon as is reasonable under the circumstances. Settling, and settling early, preserves limited judicial resources. It also saves money and reduces inconvenience and emotional wear-and-tear on clients.

IV. CONCLUSION

I have analyzed the trials, rulings by summary judgment, and settlements in an attempt to understand how the more than 2,500 cases filed each year in the District of Colorado are resolved. I end, however, where I began, with the observation that case dispositions are something of a mystery. Research reveals that there were 2,726 civil cases filed in the District of Colorado in 2007, and 2,735 cases were terminated. Thirty-seven of the cases terminated (1.4%) were tried to juries, and ten were tried to the court (<1%). An additional 117 cases (4.3%) were terminated through summary judgment. Another 434 (16%) cases were settled at or after court-sponsored settlement conferences. Thus, the termination of 598 cases (22%) can be traced to trial, disposition on summary judgment, or settlement after a court-sponsored conference. No data is readily available concerning the disposition of the remaining 2,137 cases (78%), however.