

## A Rare But Scary Thing: More on Franchise Jury Trials

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**A**t the risk of offending many readers, I offer this not so humble opinion: trying a lawsuit, especially to a jury, is the ultimate expression of the lawyer's art and craft. On an intimate stage before a live audience, no second takes available, the trial lawyer is the producer, director, occasional bit player, and sometimes star of a play with no fixed script and an ending entirely unknown, until the jury knocks on the door and returns to the box to deliver its news. Even when that news is bad, or downright devastating, it is a privilege to participate in the jury system, a cornerstone of our democracy that requires even the most powerful among us to stand before average citizens and answer for their conduct.

Trying jury cases is also a whole lot of fun (for the lawyers), but the opportunities are now rare in all types of civil litigation, including franchise disputes. Nevertheless, juries, and the disquieting prospect of facing them, have strongly affected franchising, for on the infrequent occasions when franchise cases do get before juries, the likelihood of a large franchisee verdict is high, and franchisor fear of juries has produced some of the most important—and contentious—franchise agreement terms.<sup>1</sup>

### Jury Trials Are Rare<sup>2</sup>

In the modern American legal system, in federal and state courts, in all types of cases, the chances of any civil action being tried to a jury are extraordinarily small. During the twelve months ending September 30, 2000, for example, 259,234 civil actions terminated in the U.S. district courts.<sup>3</sup> Only 1.45 percent of those cases ended during or after a jury trial.<sup>4</sup>

Of the actions classified as “federal question,” which would include most antitrust cases, a slightly higher percentage—1.9 percent—involved a jury trial.<sup>5</sup> Diversity actions reached jury trials at about the same rate (1.88 percent). The



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category of diversity cases most likely to include franchise disputes, entitled “other contracts,” had a slightly higher jury trial rate of 2.25 percent.<sup>6</sup>

The most recent data for state courts are incomplete, but are consistent with the federal court statistics and with an earlier, comprehensive study of state court civil litigation.<sup>7</sup> According to the National Center for State Courts, in the eighteen states reporting for 1999, general jurisdiction courts disposed of 945,615 general civil filings. There were 105,781 trials, accounting for just 11.19 percent of the dispositions, but only 14,105 jury trials: 1.56 percent of the total dispositions, and only about 15.7 percent of all trials.<sup>8</sup> In 1996, the twenty-three states reporting disposed of 1,028,574 civil actions—7.14 percent by trials, but only 1.75 percent by jury trials<sup>9</sup> (which represented about 24.45 percent of the trial total).

The dearth of civil jury trials is not a recent phenomenon. From 1961 to 1991, as federal court civil terminations more than quadrupled, the number of jury trials increased by only about 66 percent, producing the steady decline in “percentage of terminations that are jury trials,” a trend that continued through the September 30, 2000, statistics.

### Jury Trials in Franchise Cases Are No Exception

In an effort to gather reliable information on the frequency of franchise jury trials, I had formal jury verdict research performed, and myself conducted an informal (decidedly unscientific) poll of active franchise litigators. Both sources show that, as in all other types of civil litigation, jury trials in franchise cases are few and far between.

The formal research reviewed the comprehensive jury verdict databases on Westlaw and LEXIS<sup>10</sup> and the business franchise database on LEXIS, searching for any derivation of “franchise.” As with all verdict searches, it is impossible to tell how accurately the results reflect the frequency of jury trials. If, for example, a case was settled during trial, it is not included in this census. Moreover, verdict services often depend upon the self-promotion of lawyers involved in the case. If counsel for a prevailing party was content with victory alone and thus did not report the result, that case may have evaded this search. Finally, it is possible that this review also missed certain relevant cases because particular courts or services did not characterize the franchise disputes before them as such (e.g., in litigation involving dealers or distributors).

Owing to these constraints, the results of this verdict search may flunk the test of statistical reliability, but they are interesting and worthy of discussion nonetheless, particularly

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because they appear to be consistent with larger data samples for civil litigation in general.

As a reality check on the verdict search, I polled sixteen lawyers whom I know are regularly involved in franchise litigation to learn how many jury cases they and others in their firms had tried in the last decade. The results of this informal poll (not all responded) were consistent with the computerized verdict search and with all reports on general trends in civil litigation: there are very few jury trials.

The formal search identified only 105 jury verdicts since 1990 in lawsuits between franchisees and franchisors. A franchisee (or several) was the plaintiff in eighty-seven of those cases. Sixty-one of these were tried in state court, and only twenty-six in federal court. Of the eighteen actions with franchisor plaintiffs, twelve were in state court and six were in federal court. One hundred five cases represent, of course, a tiny percentage of all the disputes between franchisors and franchisees pending during the last decade, and it is possible that this sample understates the actual extent of franchising jury trials. But even the most prominent franchise litigators, with national practices, have not tried many jury cases during this period. The following are some examples.<sup>11</sup>

- One highly successful firm that exclusively represents franchisees, dealers, and distributors, and handles matters all over the country, has tried just five franchise cases to jury verdict in the last ten years. (The firm also tried some nonfranchise jury cases during this period.)
- Partners at a prominent East Coast firm, which is principal outside counsel to a large group of franchise systems and also frequently represents automobile companies in dealer disputes, have started jury trials in just five franchise cases in the last ten years, and only two went to verdict (one in a motor vehicle case, the other a termination/collection action for a lodging franchisor).
- A plaintiff's lawyer in a thinly populated Upper Midwest state has tried four jury cases to verdict, none involving a business format franchise. (The plaintiffs were all terminated equipment dealers.)
- Partners at a major Upper Midwest firm, which represents many well-known franchisors, have tried two franchise jury cases to jury verdict in the last decade.

Based upon my personal experience and the polling for this article, one explanation for the paucity of jury trials in franchise disputes is the widespread use of arbitration clauses in franchise agreements. Most franchise litigators responding to my inquiry reported that the vast majority of their trials were in arbitration. For instance, the first firm cited above, which tried just five franchise cases to jury verdict in the last ten years, tried twenty arbitrations to award in the same period.

## Plaintiff Win Rates and Verdict Ranges

In a comprehensive study of 1992 statistics compiled by the National Center for State Courts, "[p]laintiff win rates var[ie]d sharply by type of case. Overall, plaintiffs [were] successful in 49 percent of tort jury trials,"<sup>12</sup> but that percentage varied substantially by specific category (e.g., car accidents, premises liability, medical malpractice).<sup>13</sup> "Plaintiffs won 63 percent of contract cases."<sup>14</sup> The RAND Institute for Civil Justice Study of trends in civil jury verdicts since 1985 (assessing data through 1994), concluded that, while "across all cases, plaintiffs win slightly more than half . . . [t]hey are most successful in automobile personal injury and business cases, winning approximately 66 percent of both types of cases."<sup>15</sup> The RAND study included among "business cases" all "breach of contract disputes, including employment, sales, lease and consumer disputes, business torts, and other non-personal injury disputes." The report does not break the "business case" category down any further. The inclusion of employment and consumer disputes may explain, in part, the high plaintiff success rate. Also, it is possible that these cases are less likely to involve insurance companies directing the litigation, and that insurers are better than businesspeople at assessing cases before trial and managing their risks by settling the probable losers.

The median (average) verdicts in business cases ranged widely among the various jurisdictions studied. For example, in 1990-94, the median award in a business case in Los Angeles County was \$509,000. In King County, Washington, it was \$267,000; in Nassau County, New York, \$154,000; and in St. Louis County, Missouri, only \$29,000.<sup>16</sup> These statistics

presumably reflect differences in both the types of cases tried (including the magnitude of damage claims) and juror attitudes in the various venues.

## Further Results of the Franchise Verdict Search

The results of the franchise verdict search track the RAND study's conclusions about all business cases. For the eighty-seven verdicts identified where the franchisee was plaintiff, the franchisee prevailed 71 percent of the time. That percentage remained the same whether the franchisee was asserting contract, tort, or statutory claims. However, the franchisee verdict rate was different for state and federal courts. In the twenty-six federal actions going to verdict with a franchisee as plaintiff, the franchisee prevailed 61 percent of the time. Franchisee plaintiffs won 75 percent of the sixty-one state court suits that went to verdict.

It is difficult to know what, if anything, to make of this apparent disparity in outcomes between state and federal litigation. It bears repeating that both samples are very little. It

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is impossible to know, moreover, whether the forum was in any way outcome determinative in these cases without access to certain unavailable facts. We do not know, for example, the initial universes of cases in either forum—how many suits franchisees filed against franchisors, in state and federal courts respectively. We do not know the percentages of matters that terminated by dispositive motion, or the settlement rates, for franchise cases in either state or federal courts. We also do not know if there were material differences in the nature of the cases on the merits (e.g., types of claims that franchisees tend to file in state court) that might also help explain the different franchisee success rates. In addition, when franchisors were plaintiffs, they won verdicts 83 percent of the time, including 75 percent of the time in state court. Again, however, the census was small—only eighteen verdicts—and it is therefore difficult to know what significance, if any, to attach to this statistic. (We do know that sixteen of the eighteen cases were contract disputes. Of those sixteen, the franchisor claimed unpaid royalties and fees in eleven of them.)

As Neil Vidmar wrote in *The Performance of the Civil Jury: An Empirical Perspective*,<sup>17</sup>

Plaintiff win rate data must be interpreted with extreme caution. Not only do they obscure pretrial settlements from some defendants, perhaps leading plaintiffs to pursue cases involving stronger or weaker cases of liability against defendants, they also ignore potential differences in the quantum and quality of expert evidence at trial, lawyering skills, the parties' or insurers' incentives to settle versus to go to trial, and a number of other factors. Without knowledge about how and why the small percentage of trial cases emerge from the other law suits that are settled or dismissed, and without knowledge of actual trial evidence, win rates can provide us with only limited information.<sup>18</sup>

The same is obviously true of average verdicts and of appellate reversal rates, but I report them nonetheless, recognizing the limitations of the data, because this is to my knowledge the best information available. The average verdict<sup>19</sup> in the eighty-seven cases where franchisee plaintiffs prevailed was \$933,720—\$891,302 in the state court actions and \$1,037,998 in the federal cases. In this sample, there was a marked difference in reversal rates between state and federal courts. Of the sixty-two state court verdicts for franchisees, only three were reversed (4.8 percent), but seven of the sixteen federal court verdicts for franchisees were overturned on appeal (almost 44 percent).

### **The “Litigotiation” Phenomenon and Its Application to Franchising**

“For a truly exceptional event, jury trials receive an extraordinary amount of attention”<sup>20</sup> from academics and the media, and generate high anxiety for many lawyers and their clients. Given the miniscule, and persistently dropping, percentage of civil cases that ever reach a jury, some might argue that all this energy is misplaced. They would be wrong. Deciding specific cases is only one of the civil jury's crucial roles as the American justice system has evolved, because “[j]ury trial outcomes” also “define the bargaining range for the vast majority of cases that settle.”<sup>21</sup> Marc Galanter, a professor at

the University of Wisconsin Law School, has coined the term “litigotiation” to describe this additional, “regulatory” function of the jury:

The civil jury is largely an American institution. Are we the last to discard an obsolete institution? Or do we know something that other countries do not know? To decide whether civil juries are a good thing, one has to ask what juries are supposed to do. I would answer that basically they do two things. Distributively, they decide cases. Collectively, they generate a body of knowledge that fuels the American system of “litigotiation.” I use this neologism as a reminder that this is a system in which only a minority of eligible claims are made and only a minority of these proceed to disposition by trial; the vast majority are resolved by settlement, abandonment or ruling in an earlier stage. It is important to recall that America does not have two systems, one of litigation and one of negotiation, but a single system of “litigotiation”—that is, of contesting claims in the vicinity of courts, where recourse to the full process of adjudication is an infrequent occurrence but at every stage an important option and threat . . .

. . .

The jury casts a shadow across the wider arena of claims, maneuvers, and settlements by communicating signals about what future juries might do. Of course, the jury is not the only source of these predictive shadows, which are cast not only by legal decisions but also by costs, delay, risk, party capability, and so forth.

The transmission and reception of these signals is a crucial aspect of the jury. As an institution, the reality of juries includes the images of them held by lawyers, judges, insurers, litigants and wider audiences. Juries are present as a threat and as a supply of markers, both variously interpreted.<sup>22</sup>

From this perspective, even though the percentage of cases terminated by jury trial continues to decline, the jury's significance as a “transmitter of signals”<sup>23</sup> looms ever larger, for in absolute terms, “there are more trials, more relevant markers and symbols, more information, and more problems of retrieving, collating and interpreting these signals.”<sup>24</sup>

Galanter's insights apply to all types of civil litigation. In franchising, however, the specter of jury trials, and the desire to avoid them, has an effect far greater than simply the prevalence and dollar amount of negotiated settlements. Because franchising involves long-term relationships governed by detailed written contracts, franchise “litigotiation” starts much earlier, with the risk management provisions of the franchise agreement, each of which is, at bottom, a jury-avoidance mechanism. Arbitration clauses, forum selection clauses, jury trial waivers, damage caps, punitive damage waivers—the franchisor's prime motive for each of these contract terms is either to avoid a jury entirely, get before a jury in a forum perceived as more likely to be hospitable, or dramatically limit the relief that any jury can award.

This risk management effort has in turn spawned new, expanding bodies of case law, as franchisees have challenged enforcement of these contract terms, and courts have developed occasionally complex tests to determine enforceability.<sup>25</sup> Thus, no matter how infrequent jury verdicts in franchise cases may be,<sup>26</sup> the jury's “regulatory function” pervades the franchise relationship from the outset.<sup>27</sup>

## Endnotes

1. I do not mean to suggest that franchisors and their counsel have always made considered judgments about contract terms after studying concrete evidence of jury behavior. Most of the jury-avoidance contract clauses discussed below are probably the product of instinct, knee-jerk reactions, or habit. The available data on jury verdicts are unlikely to persuade franchisors to abandon these clauses, however.

2. Brian J. Ostrom et al., *A Step Above Anecdote: A Profile of the Civil Jury in the 1990s*, 79 JUDICATURE 233, 234 (1996).

3. *Judicial Business of the United States Courts*, 2000 ANN. REP. OF THE DIRECTOR, Table C-4A.

4. *Id.* Only 2.2 percent of the cases reached any form of trial. sixty-five percent of the trials were before juries, a substantially higher portion than in state courts, where, based on the reported statistics, a majority of trials are to the bench.

5. *Id.* at Table C-4.

6. *Id.*

7. See Ostrom, *supra* note 2, at 234.

8. *Manner of Disposition for General Civil Filings in General Jurisdiction Courts*, NAT'L CENTER FOR ST. CTS. (1999).

9. *Manner of Disposition for General Civil Filings in General Jurisdiction Courts*, NAT'L CENTER FOR ST. CTS. (1996).

10. The databases are a collection of verdict reporting services from across the United States.

11. To help readers assess whether I have any standing to hold forth on this subject, here are the personal statistics: From 1991 to date, I have finished jury selection in twelve cases. Three of those cases settled before the evidence started, one settled during trial, and eight went to verdict. But only two of the verdicts (and one of the eleventh-hour settlements) were in cases involving a franchisor, and one of those was a landlord-tenant action. Most of the jury trials that went to verdict were in medical malpractice actions. Most of my trials in franchise cases have been in arbitration.

12. Ostrom, *supra* note 2, at 235.

13. *Id.*

14. Neil Vidmar, *The Performance of the Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 15, at 852 (1998).

15. Erik Moller, *Trends in Civil Jury Verdicts Since 1985*, RAND INST. FOR CIV. JUST. at XV (1996). The RAND study analyzed verdicts over a nine-year period in sixteen counties in six states, including Los Angeles and San Francisco Counties, the two largest counties in New York, King County (Seattle), Washington, and Harris County (Houston), Texas. The verdict "patterns [did] not vary materially across time or jurisdiction." *Id.*

16. *Id.* at Table A-6, pp. 48-49.

17. Vidmar, *supra* note 14.

18. *Id.* at 851-52.

19. The two highest and lowest verdict amounts were excluded from these computations.

20. Ostrom, *supra* note 2, at 234.

21. *Id.* As Ostrom, et al. observed, jury trials also "provide insight into the risk preference of different types of litigants," and "are just . . . generally interesting because they showcase the apex of the American Legal System." *Id.*

22. Marc Galanter, *The Regulatory Function of the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61-62 (Robert E. Litan ed., 1993).

23. *Id.* at 74.

24. *Id.*

25. For a discussion of the enforceability of these risk management clauses, see Edward W. Dunham, *Enforcing Contract Clauses Designed to Manage Franchisor Risk*, 19 FRANCHISE L.J. 91 (Winter 2000).

26. Franchisor executives and counsel obviously do not react just to outcomes in their own cases, or to results in franchise litigation alone. Every news report about an eye-popping verdict, regardless of subject matter, reinforces skittishness among those already feeling it.

27. This process is not unique to franchising, of course. Ten years ago, for instance, physicians did not typically describe making patient care decisions for "medico-legal reasons." Today, that is common parlance, and medical malpractice claims (past jury verdicts against others and the potential for future litigation against them) affect many doctors' practices every day, from what they now feel compelled to note in the medical record to the range of procedures that they are willing to perform.