

Jury-Trial Demands in Terminated Civil Cases,
Fiscal Years 2010–2019

Prepared for the Judicial Conference Advisory Committee on Civil Rules

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Executive Summary

The Judicial Conference Advisory Committee on Civil Rules is currently considering amending Federal Rules of Civil Procedure 38 and 39 related to the Seventh Amendment right to jury trial. To inform the advisory committee's discussions, this report summarizes findings on jury-trial demands from court electronic records for civil cases terminated in fiscal years 2010–2019 (inclusive). Findings include:

- 0.7% of civil cases terminated during or after a jury trial during the study period.
- Jury-trial demands were recorded in half of civil cases (50%).
- Jury trials occur in 1.3% of cases in which a jury-trial demand is recorded.
- Jury trials occur rarely in cases in which no jury-trial demand is recorded (0.1%).
- The jury-trial demand rate varies by jurisdictional basis of a case, origin of a case, type of case, and the representation status of the parties.

Background

The Seventh Amendment preserves the right to trial by jury in civil cases in federal court. But a jury trial is not the default setting in the Federal Rules of Civil Procedure. Rule 38 requires the parties to affirmatively demand a jury trial in order to preserve their Seventh Amendment right of trial by jury in civil cases. Failure to properly serve and file a jury-trial demand results in a waiver of the constitutional right. The Advisory Committee on Civil Rules is currently reviewing whether this default setting should be reversed and has requested information related to jury-trial demands drawn from court electronic records. This report is limited to precoronavirus pandemic data, analyzing civil cases terminated in fiscal years 2010–2019 (inclusive), as it is outside the scope of this report to determine the pandemic's impact, if any, on jury-trial demands.

Jury-Trial Demands in Court Electronic Records

Rule 39(a) requires that, when a jury-trial demand has been made pursuant to Rule 38, “the action must be designated on the docket as a jury action.” In practical terms, this means that jury-trial demand information is available in court electronic records. For all civil cases terminated in the district courts in fiscal years 2010–2019 inclusive (N = 2,819,570), for example, court records indicate that a jury trial was demanded by at least one party in 50% of closed cases and not demanded in 49%, with 1% missing. The category of “all civil cases,” of course, includes cases that would not normally be tried to a jury, including cases against the United States¹ and habeas corpus cases. More information on case characteristics associated with jury-trial demands is presented in the next section.

1. “The Seventh Amendment right to a jury trial does not apply in actions against the Federal Government,” *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981), although Congress can authorize jury trials by statute, *id.* at 160–61.

One concern with the civil rules’ default setting is that it insufficiently protects the constitutional guarantee, creating situations in which parties inadvertently waive their Seventh Amendment right to trial by jury. Rule 39(b) provides discretion for the court on motion to “order a jury trial on any issue for which a jury might have been demanded,” but many courts require “some cause beyond mere inadvertence . . . to permit an untimely demand.”² Court records were examined to determine how often jury trials occur in civil cases when a jury-trial demand is not recorded. Regardless of whether a jury trial is demanded, of course, very few civil cases terminate after the start of a jury trial. For fiscal years 2010–2019, only 0.7% of closed civil cases terminated during or after³ a jury trial (a total of 20,047 civil cases over the ten-year period). As can be seen in Table 1, terminated civil cases in which a jury-trial demand was recorded were much more likely to terminate during or after a jury trial (1.3%) than cases in which a jury-trial demand was not recorded (0.1%), but jury trials did occur in the latter category of cases. It is likely that the court ordered a jury trial despite waiver, pursuant to Rule 39(b), in many of these cases.⁴

Table 1: Civil Cases Terminating During or After Jury Trial by Jury-Trial Demand, FYs 2010–2019 (N = 2,819,570)

Jury-Trial Demand Recorded	Percentage of All Civil Terminations	N	Percentage Terminating During or After Jury Trial	N
Yes	50%	1,420,881	1.3%	18,178
No	49%	1,374,134	0.1%	1,205
Missing	1%	24,555	2.7%	664
All	100%	2,819,570	0.7%	20,047

For the 1% of cases in which the jury-trial demand information was missing from court records for fiscal years 2010–2019, fully 2.7% terminated after the start of a jury trial—which translates to 664 jury trials in cases in which no jury-trial demand information was recorded. Without more research, it is impossible to know in how many of these cases the court ordered a jury trial despite waiver and in how many the court records should have reflected a properly made jury-trial demand. But at minimum, the absence of a jury-trial demand in the court records is not determinative of whether a jury trial occurs.

Table 2 includes civil cases that terminated after the start of any trial (including bench trials). Fully 85% of cases that terminated by trial and in which a jury-trial demand was recorded

2. *Chen v. Hunan Manor Enter., Inc.*, 340 F.R.D. 85, 88 (S.D.N.Y. 2022) (quotation omitted).

3. This includes incomplete jury trials (e.g., the case settled before the jury verdict). Note, however, that incomplete jury trials represent only about one in ten cases in which a jury trial starts.

4. In other words, a civil case in which a jury-trial demand was recorded was “only” thirteen times more likely to reach a jury trial and not infinitely more likely, as would be the case if no jury trials were ever conducted in cases in which a demand was not recorded.

terminated during or after a jury trial, as opposed to during or after a bench trial (15%). But note that 18% of cases in which a jury-trial demand was not recorded terminated during or after a jury trial. In other words, almost one in five trials that started in cases in which a jury-trial demand was not recorded was before a jury. Moreover, one-third of cases (33%) terminating during or after a trial in which the jury-trial demand was missing terminated during or after a jury trial. These findings are difficult to square with the view that courts are not ordering jury trials despite waivers, at least in some subset of cases.

Table 2: Civil Cases Terminating During or After Jury or Bench Trial, by Jury-Trial Demand, FYs 2010–2019 (N = 28,890)

Jury-Trial Demand Recorded	During or After Jury Trial	During or After Bench Trial	N
Yes	85%	15%	21,321
No	18%	82%	6,578
Missing	33%	67%	991
All	69%	31%	28,890

Case Characteristics Associated with Jury-Trial Demands

As mentioned in the previous section, the Seventh Amendment right to a jury trial in civil cases does not extend to all cases in federal court, including cases against the United States. As can be seen in Table 3, which is broken out by the basis of jurisdiction, United States defendant cases have the lowest rate of jury-trial demands (7%), and diversity-of-citizenship cases, based on state law, have the highest rate (67%). It is clear from Table 3 that the largest category, cases based on federal-question jurisdiction, includes large swaths of cases in which jury trials do not occur—for example, habeas corpus proceedings brought by state prisoners.

Table 3: Jury-Trial Demands by Basis of Jurisdiction, Terminated Civil Cases, FYs 2010–2019

Basis of Jurisdiction	Demand	No Demand	Missing	N
Federal Question	53%	46%	1%	1,472,058
Diversity of Citizenship	67%	32%	1%	896,584
United States Defendant	7%	92%	< 1%	384,053
United States Plaintiff	17%	82%	1%	68,622
All	50%	49%	1%	2,819,570

Given that the highest jury-trial demand rate observed in Table 3 was among diversity-of-citizenship jurisdiction cases, there should also be a high jury-trial demand rate among cases removed from the state courts.⁵ Table 4 shows the jury-trial demand rate by origin of the case (excluding reopened cases and appellate remands). The jury-trial demand rate is, indeed, relatively high for removals to federal court (70%), but the highest jury-trial demand rate is among multi-district litigation (MDL) cases directly filed in the transferee district (94%). MDL cases are often filed in the transferee district for the purpose of providing the transferee court with the authority to try the case. In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* (1998),⁶ the Supreme Court held that 28 U.S.C. § 1407 transfer is limited to pretrial proceedings, but nothing prevents an MDL court from trying cases filed directly in the district after centralization.⁷ In contrast, MDL cases transferred pursuant to § 1407 have a relatively low jury-trial demand rate (30%). Original proceedings and interdistrict (non-MDL) transfer cases have jury-trial demand rates comparable to federal-question cases in general (both at 49%).

Table 4: Jury-Trial Demand Rate by Origin, Terminated Civil Cases, FYs 2010–2019

Case Origin	Percentage in Which Demand is Recorded	N
Original Proceeding	49%	2,085,418
Removal from State Court	70%	329,921
Interdistrict Transfer	49%	51,234
MDL Transferred to Transferee District	30%	211,860
MDL Directly Filed in Transferee District	94%	30,710

To shed more light on the jury-trial rate by case type, Table 5 shows the jury-trial demand rate for the eighteen largest nature-of-suit codes; each of these nature-of-suit codes accounted for at least 2% of terminated cases during fiscal years 2010–2019.

5. Jury-trial demands in removals from state court are governed by Fed. R. Civ. P. 81(c)(3).

6. 523 U.S. 26. *See also* Melissa J. Whitney, Bellwether Trials in MDL Proceedings 11–13 (Fed. Jud. Ctr. 2019).

7. The data on direct-filed MDL cases is somewhat limited because this origin code did not exist prior to July 1, 2016. It should also be noted for the 30,710 cases in this category of cases, *only five* are recorded in court electronic records as having terminated after a jury trial (0.0002%). It appears that bellwether trials do not appear in the court data as jury-trial terminations. It seems likely that there would have been more than five bellwether trials among the MDL direct-file cases terminated 2016–2019.

Table 5: Jury-Trial Demand Rate for 18 Largest Nature-of-Suit Codes, Terminated Civil Cases, FYs 2010–2019

Nature-of-Suit Code	Percentage in Which Demand is Recorded	N
Insurance (110)	63%	97,473
Other Contract Actions (190)	55%	125,951
Other Personal Injury (360)	84%	93,383
Product Liability-Personal Injury (365)	94%	262,946
Product Liability-Pharm./Med. Device (367)	98%	67,358
Asbestos Product Liability (368)	9%	155,882
Other Civil Rights (440)	69%	156,134
Civil Rights (Jobs) (442)	85%	132,933
Consumer Credit (480)	85%	94,230
Prisoner Petition-Vacate Sentence (510)	< 1%	80,975
Prisoner Petition-Habeas Corpus (530)	1%	187,547
Prisoner-Civil Rights (550)	38%	179,912
Prisoner-Prison Conditions (555)	45%	92,727
Fair Labor Standards Act (710)	80%	75,601
Employee Retirement Income Security Act (791)	12%	76,819
D.I.C.W./D.I.W.W. (863)	1%	79,160
S.S.I.D. (864)	1%	86,626
Other Statutory Actions (890)	60%	93,481

The lowest jury-trial demand rates are observed for prisoner petitions brought under 28 U.S.C. §2254 (state-prisoner, non-capital habeas) and §2255 (vacate federal sentence), nature-of-suit codes 510 and 530; Social Security disability appeals, 863 and 864; asbestos cases, 368; and ERISA cases, 791. The highest jury-trial demand rates are observed in the product liability nature-of-suit codes.

The jury-trial demand rate also varies by the representation status of the parties (see Table 6); cases in which all parties are represented by counsel have much higher rates of jury-trial demands than cases in which there is at least one self-represented party. There is obviously overlap between case types with low jury-trial demand rates—e.g., noncapital habeas petitions (in Table 5)—and the incidence of self-represented parties.

Table 6: Jury-Trial Demand by Representation Status, Terminated Civil Cases, FYs 2010–2019

Representation Status	Percentage in Which Demand is Recorded	N
No Self-Represented Parties	59%	2,040,110
Self-Represented Plaintiffs	27%	708,472
Self-Represented Defendants	36%	59,257
Self-Represented Plaintiffs and Defendants	36%	11,731

Conclusion

Jury-trial demands were recorded in half of civil cases terminated in fiscal years 2010–2019 (inclusive), though only 0.7% of civil cases were terminated during or after a jury trial. Jury trials occur at a higher rate for cases in which a jury-trial demand is recorded (1.3%). However, jury trials also occur in cases in which no jury-trial demand appears in court electronic records (0.1%). The absence of a jury-trial demand in court records may not necessarily be indicative of no demand, however, making it difficult to know the true jury-trial demand rate.