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What is the Settlement Rate and Why Should We Care?

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What is the Settlement Rate and Why Should We Care?

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After establishing the importance of knowledge of settlement rates, this article first shows that different research questions can yield different settlement rates. Using data gathered from about 3,300 federal cases in the Eastern District of Pennsylvania (EDPA) and the Northern District of Georgia (NDGA), differing measures of settlement emerge depending on whether one is interested in (1) settlement as a proxy for plaintiffs' litigation success, or (2) settlement as a measure of litigated disputes resolved without final adjudication. Using settlement as a proxy for plaintiff success, we estimate the aggregate settlement rate across case categories in the two districts to have been 66.9 percent in 2001–2002. Regardless of the method of computing settlement rates, no reasonable estimate of settlement rates supports an aggregate rate of over 90 percent of filed cases, despite frequent references to 90 percent or higher settlement rates. The aggregate rate for the EDPA alone was 71.6 percent and for the NDGA alone was 57.8 percent, suggesting significant interdistrict variation, which persists even within case categories. We report separate settlement rates for employment discrimination, constitutional tort, contract, and tort cases in the two districts. The highest settlement rate was 87.2 percent for tort cases in the EDPA and the lowest was 27.3 percent for constitutional tort cases in the NDGA. Our results suggest a hierarchy of settlement rates. Of major case categories, tort cases tend to have the highest settlement rates, then contract cases, then employment discrimination cases, followed by constitutional tort cases. Attorney fee structure and the nature of the parties may explain settlement rate variation. Our findings provide no evidence of a material change in aggregate settlement rates over time.

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I. Introduction

Settlement dominates outcomes of civil litigation in the United States yet surprisingly little systematic knowledge exists about settlement rates. Casual conventional wisdom often has it that about 95 percent of cases settle.[1] This may be an extrapolation from H. Laurence Ross's finding that 95.8 percent of automobile accident insurance *claims* settled.[2] However, as the literature reviewed below establishes, 95 percent is an unrealistic settlement rate for disputes leading to *case filings* in the United States. It is likely even more unrealistic for settlement rates in some other countries.[3]

Whatever uncertainty exists about settlement rates, settlement is the modal civil case outcome. Accurately assessing the settlement rate is thus of interest in its own right, but the settlement rate is also important for other reasons. Information about settlement rates helps assess how plaintiffs and defendants fare in litigation. Settlement is not only the modal litigation outcome, it is also the most common successful outcome for plaintiffs, far

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[1]E.g., Marc Galanter & Mia Cahill, "Most Cases Settle": Judicial Promotion and Regulation of Settlements, 46 Stanford L. Rev. 1339, 1339–40 (1994) ("Oft-quoted figures estimated settlement rates between 85 and 95 percent are misleading."); Gillian K. Hadfield, Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases, 1 J. Empirical Legal Stud. 705, 706 (2004) (noting the conventional wisdom that if 5 percent of cases go to trial, 95 percent of cases can be assumed to settle); Jason Scott Johnston & Joel Waldfogel, Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation, 31 J. Legal Stud. 39, 40 (2002) ("settlement rates for some type of cases—such as torts—exceeding 90 percent"); Frank E.A. Sander, The Obsession with Settlement Rates, 11 Negotiation J. 329, 331 (1995) ("95 percent of all cases filed in court are likely to settle eventually"); W. Kip Viscusi, Product and Occupational Liability, 5 J. Econ. Perspectives 71, 84 (1991) (95 percent of products liability claims that are not dropped lead to a positive out-of-court settlement). For a review of some of the empirical settlement literature, see Daniel P. Kessler & Daniel L. Rubinfeld, Empirical Study of the Civil Justice System, in 1 Handbook of Law & Economics 381–83 (A. Mitchell Polinsky & Steven Shavell eds. 2007).

[2]H. Laurence Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 179 (1980 ed.) (2,123 of 2,216 cases disposed of by settlement before trial). But settlement did not necessarily mean recovery by a claimant. No payment was received in 34 percent of the claims. Id. at 182.

[3]Kuo-Chang Huang, How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan, 5 J. Empirical Legal Stud. 197, 210 (2008) (showing settlement rates of as low as about 11 percent when each party is represented by counsel).

exceeding the number of successes at trial.[4] Trials are a small and diminishing fraction of case terminations,[5] with plaintiffs succeeding via trial in less than 5 percent of filed cases.[6] Although objective success in litigation can be difficult to define,[7] if a plaintiff is to recover something in a case seeking monetary relief, and therefore to succeed at least in part by an objective measure, recovery is far more likely to be via settlement than via trial.[8] Claims that a particular class of filed cases, such as, for example, employment discrimination cases, fare poorly, thus may largely depend on the class of cases having a low settlement rate.

Detailed information about settlement rates is additionally important to assess how often filed cases supply guidance for future adjudication. It is commonly assumed that settlement occurs in the shadow of trials, with trial outcomes needed to supply reference points for settlement discussions. However, trials are not the only case outcomes that supply litigants with information that should inform settlement negotiations. Pretrial motion practice, posttrial motions and adjustments,[9] and appellate rulings supply

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[4]Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant, 73 Cornell L. Rev. 719 (1988). Available evidence suggests that settlement is also the predominant vehicle through which U.K. accident victims succeed. Donald Harris et al., Compensation and Support for Illness and Injury 93 (1984) (in only four of 182 cases were damages recovered after a court hearing); 2 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, "Statistics and Costings" 171, 175 (HMSO 1978) (tbls. 124, 132) (75.8 percent of 7,733 personal injury claims in England and Wales in 1974 were withdrawn before hearing or settled; 83.2 percent of 1,415 personal injury claims in Northern Ireland in 1974 were withdrawn before hearing or settled).

[5]Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts, 1 J. Empirical Legal Stud. 459 (2004). For rare evidence at the county level within a state, see Robert Moog, Piercing the Veil of Statewide Data: The Case of Vanishing Trials in North Carolina, 6 J. Empirical Legal Stud. 147 (2009).

[6]Galanter, supra note 5.

[7]E.g., Schwab & Eisenberg, supra note 4. For a study providing information about the terms of settlements, see Minna J. Kotkin, Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements, 64 Wash & Lee L. Rev. 111 (2007).

[8]Schwab & Eisenberg, supra note 4.

[9]David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver & William M. Sage, Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988–2003, 4 J. Empirical Legal Stud. 3 (2007).

information that should also inform settlement decisions. And settlement itself can and does occur at any stage: before trial as is widely recognized, after trial, and during the appellate process.[10]

Limited information about settlement patterns may contribute to poor decisions about whether to accept settlement offers, a common occurrence in cases that go to trial. Studies consistently show a high incidence of erroneous decisions by plaintiffs and defendants with respect to settlement decisions in tried cases.[11] Limited settlement rate information also limits comparing litigation outcomes and arbitration outcomes. With settlement being a common outcome of both litigation and arbitration,[12] comparing the outcomes of the two adjudicatory modes requires reasonable settlement information about both.

This article makes two contributions to the settlement rate literature. First, the article highlights the need to carefully articulate the purpose for which settlement rates are of interest. No single, agreed method of computing settlement rates exists because judgment calls exist how about to translate a range of formal case outcomes into the dichotomous characterization of settled or not settled. There may not even be a single "best" measure of the settlement rate. The specific research question being considered can influence what should and should not be counted as a settlement.

Second, using data gathered from about 3,300 cases in two large federal districts, the Eastern District of Pennsylvania (EDPA) and the Northern District of Georgia (NDGA), we explore how differing measures of

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[10]E.g, Theodore Eisenberg & Michael Heise, Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal, 38 J. Legal Stud. (forthcoming 2009).

[11]Randall A. Kiser, Martin A. Asher & Blakeley B. McShane, Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations, 5 J. Empirical Legal Stud. 551 (2008); Samuel Gross & Kent Syverud, Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial, 90 Mich. L. Rev. 319 (1991); Samuel Gross & Kent Syverud, Don't Try: Civil Jury Verdicts in a System Geared to Settlement, 44 UCLA L. Rev. 51 (1996); Jeffrey Rachlinski, Gains, Losses and the Psychology of Litigation, 70 S. Cal. L. Rev. 113 (1996).

[12]Theodore Eisenberg & Elizabeth Hill, Employment Arbitration and Litigation, 58 Disp. Resol. J. 44, 52 (Nov. 2003–Jan. 2004) (tbl. 1), full version published in ADR & the Law (20th ed. 2006) (showing settlement rates in the 40 percent to 50 percent range for American Arbitration Association employment disputes). Recent notable declines in investor success in securities arbitration cases have been attributed by the securities industry to brokerage firms increasingly settling stronger investor claims. Laurence S. Schultz, Storm Clouds in Arbitration, 1685 PLI/Corp 351, 358–59 (2008) (noting explanation for decline in claimant arbitration success rates).

settlement emerge depending on whether one is interested in (1) settlement as a proxy for plaintiffs' litigation success, or (2) settlement as a measure of litigated disputes resolved without final adjudication. Using settlement as a proxy for plaintiff success, we estimate the aggregate settlement rate across case categories in the two districts to have been 66.9 percent in 2001–2002. The aggregate rate for the EDPA alone was 71.6 percent and for the NDGA alone was 57.8 percent. We also report separate settlement rates for employment discrimination, constitutional tort, contract, and tort cases in the two districts. We find heterogeneous rates across case categories, with constitutional tort cases consistently having a low settlement rate and tort cases consistently having a high settlement rate. We also find significant interdistrict variation within case categories.

Section II of this article identifies issues in defining settlement rates that should help in interpreting the description of prior empirical research on settlement rates. Section III describes this article's data and methods. Section IV presents the empirical results, which are discussed in Section V. Section VI concludes.

II. Definitions and Prior Empirical Research on Settlement Rates

Before describing prior research on settlement rates, we address logically antecedent definitional issues. Categorizing case outcomes for purposes of computing settlement rates is necessary both to understand and compare prior research and to articulate coherent research questions using our data.

A. Mapping Dispositions onto Settlements

As Kevin Clermont observed, the definition of what constitutes a settlement is "critical"[13] in studying settlement rates. Ross's 95.8 percent settlement rate included cases in which injured parties recovered nothing because they simply dropped their claims. Clermont adopted an analogous definition of settlements, which emphasized settled cases' difference from contested

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[13]Kevin M. Clermont, Litigation Realities Redux, 84 Notre Dame L. Rev. (forthcoming May 2009).

judgments, regardless of which party prevailed. He defined settlement "to include the plaintiff's abandonment or the defendant's concession, as well as compromise by private negotiations or through ADR."[14] This definition includes default judgments and claims dismissed for lack of prosecution as settlements. If one's primary interest in the settlement rate is to distinguish what one terms settled cases from cases terminating as the result of contested proceedings, the Ross and Clermont approaches serve this interest well.

If, however, one's primary interest in settlement is as a proxy for a plaintiff's success, a different characterization of case dispositions may be appropriate. For example, cases in which plaintiffs recover nothing but do not require contested adjudication, such as cases dismissed for lack of prosecution, are no more successful than cases in which plaintiffs recover nothing as the result of a contested motion or trial.

So in reviewing the settlement rate literature, it is important to track which dispositions a study treats as settlements. It is also important to articulate which cases are included in the denominator of a settlement rate calculation—that is, which cases are counted as having been terminated. Since Clermont and Stewart Schwab's is the first study we discuss, we use it to address basic issues that arise in ascribing case outcomes to settlement or nonsettlement.

Clermont and Schwab's report of settlement rates is based on data on federal court case terminations gathered by the Administrative Office of the U.S. Courts (AO) from 1979 to 2006. They reported on both employment discrimination cases and other civil cases and find that about 70 percent of both groups of cases terminated by settlement.[15] The numerator—the number of cases coded as settling—clearly should include cases coded by the AO as settlements. For purposes of their analysis, Clermont-Schwab also coded as settlements (and thus also in the numerator in computing the settlement rate) case terminations that the AO data recorded as having the following dispositions: (1) Dismissals: want of prosecution, (2) Judgment on:

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[14]Id. See also Jay. P. Kesan & Gwendolyn G. Ball, How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes, 84 Wash. U. L. Rev. 237, 265 (2006) ("Classifying the manner in which cases are resolved is a surprisingly difficult task.").

[15]Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse? 3 Harv. L. & Pol'y Rev. 1 (forthcoming 2009).

default, (3) Judgment on: consent, (4) Dismissals: voluntarily, (5) Dismissals: other, and (6) Judgment on: statistical closing.[16]

These six AO case disposition codes likely include some cases in which plaintiffs recovered a positive amount and some that did not. "Dismissals: want of prosecution" likely include cases in which plaintiffs simply decided not to pursue the matter and recovered nothing. Under the Ross-Clermont approach, they could be regarded as a category of settlement—the cases were resolved without adjudication regardless of whether plaintiffs failed to recover, but to proxy the plaintiffs' success rate, such cases cannot easily be grouped with traditional settlements in which plaintiffs receive something. Some of the cases with "Dismissals: voluntarily" and "Dismissals: other" designations may simply reflect plaintiffs' decisions to possibly refile at a later date or to not pursue the litigation. Default judgments also seem less likely to reflect settlements than defendants beyond the reach of the court or defendants who are judgment proof. They are in a sense resolved without adjudication and therefore reasonably included as settlements in a computation focusing on whether adjudication occurred. And they are favorable to plaintiffs, even if many default judgments are ultimately not collectible. However, they lack a consensual element that seems reasonable to require in measuring settlement as a proxy for plaintiff success.

The denominator in a settlement rate calculation also raises issues. AO dispositions of transfer to another district, remand to state court, transfer to a panel on multidistrict litigation, remand to a U.S. agency, stay pending arbitration, stay pending bankruptcy, and statistical closing could all be viewed as ambiguous with respect to settlement as a possible outcome. Cases

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[16]Id. The AO disposition codes are: 0 = Transfer/remand: transfer to another district, 1 = Transfer/remand: remanded to state court, 2 = Dismissals: want of prosecution, 3 = Dismissals: lack of jurisdiction, 4 = Judgment on: default, 5 = Judgment on: consent, 6 = Judgment on: motion before trial, 7 = Judgment on: jury verdict, 8 = Judgment on: directed verdict, 9 = Judgment on: court trial, 10 = Transfer/remand: multidistrict litigation, 11 = Transfer/remand: remanded to U.S. Agency, 12 = Dismissals: voluntarily, 13 = Dismissals: settled, 14 = Dismissals: other, 15 = Judgment on: award of arbitrator, 16 = Judgment on: stayed pending bankruptcy, 17 = Judgment on: other, 18 = Judgment on: statistical closing, 19 = Judgment on: appeal affirmed (magistrate judge), 20 = Judgment on: appeal denied (magistrate judge). See the codebook for Inter-University Consortium for Political & Soc. Research [ICPSR], Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2001), and the codebooks for related federal court databases in subsequent years. E.g., ICPSR, Federal Court Cases: Integrated Data Base, 2007, ICPSR Study No. 22300 (2008). Clermont & Schwab note that "Code 3 switched in usage about 1991 from voluntary dismissal to dismissal for lack of jurisdiction, so we grouped its earlier usage with settlement, but its usage in 1991 and later with nontrial adjudication." Clermont & Schwab, supra note 15.

with these dispositions have not settled as of the coding of the AO disposition, but they also have not had an initial alternative adjudicative disposition. They may settle before dismissal or trial; we just do not know as of the time of coding. This ambiguity could argue for excluding some of these dispositions from the settlement rate denominator. But this approach, though we adopt it for some calculations below, has the limitation that cases with such dispositions might yet settle.[17]

B. Other Studies of Aggregate Settlement Rates

The breadth of the Clermont-Schwab analysis—all terminated federal cases for more than 25 years—cannot feasibly be duplicated in studies that seek a more precise measure of settlement by assessing individual cases by inspecting case records. Their analysis's breadth comes at a tradeoff for depth. Relying exclusively on AO coding can be risky,[18] especially with respect to disposition codes used to assess settlement.[19] Hadfield, also using federal data, sampled cases, inspected individual docket sheets for year 2000 cases, and reported federal court settlement rates for civil case terminations (other than student loan and prisoner cases[20]) of 64 percent in 1970 and 42.5 percent in 2000, and of 66.5 percent in 1970 and 62.6 percent in 2000 for all final terminations.[21] Hadfield noted that terminated cases can include several categories of nonfinal dismissals.[22] She distinguished between

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[17]Clermont and Schwab treated statistical closings as settlements. Clermont & Schwab, supra note 15. The unresolved nature of some dispositions counsels in favor of methods that treat these dispositions as censored for purposes of modeling settlement, but not excluding them. Due to this censoring, Cox survival models may be the most suitable in a regression context. E.g., D.R. Cox & David Oakes, Analysis of Survival Data (1984). For purposes of this article, we do report below alternative settlement rate calculations based on variations in numerator and denominator treatment discussed here.

[18]Theodore Eisenberg & Margo Schlanger, The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis, 78 Notre Dame. L. Rev. 1455 (2003).

[19]Hadfield, supra note 1.

[20]Excluded student loan and prisoner cases consist of AO case category codes 510, 520, 530, 535, 540, 550, 555, 150, 151, 152, and 153. Hadfield, supra note 1, at 713 n.9, 723 n.17.

[21]These rates combine the settled and consent categories in Hadfield, supra note 1, at 730 (tbl. 7).

[22]Id. at 709.

mere terminations and "final" terminations. Final terminations, as reported by Hadfield, do not include cases terminated (1) by transfer to another district or consolidation with other cases, (2) by a stay for a bankruptcy proceeding, (3) by closure for inactivity, or (4) by dismissal without prejudice to allow a plaintiff to refile elsewhere or to include other claims, or to allow the parties to pursue settlement discussions.[23] Hadfield's final termination rates are reasonably close to the Clermont-Schwab 70 percent rates though somewhat lower, with the difference possibly explained by decisions about precisely which dispositions to count as settlements, as discussed in Section II.A.

Eisenberg and Schwab studied the outcomes of about 1,800 nonprisoner constitutional tort cases, prisoner constitutional tort cases, and a control group of noncivil rights cases filed in fiscal year 1980–1981 in three large federal districts (Central District of California (CDCA), EDPA, and NDGA).[24] They excluded from settlement rate calculations transferred and pending cases, cases involving district court review of agency action, cases in which the primary issue was removal, bankruptcy cases, actions reviewing arbitration, cases suspended for statistical purposes, actions to enforce summonses or quash subpoenas, and forfeiture actions.[25] They counted as settlements cases in which the parties expressly settled, the court granted a stipulated dismissal, or the plaintiff dismissed the case voluntarily. They reported settlement rates of 45 percent in nonprisoner constitutional tort cases, 17 percent in prisoner constitutional tort cases,[26] and 73 percent in a control group of noncivil rights cases.[27] The control group 73 percent settlement rate is similar to but slightly higher than the Clermont-Schwab all-case-category rate and somewhat higher than the Hadfield aggregate final termination rate. The exclusion of noncivil rights cases from the control group, with their low settlement rates and high

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[23]Id.

[24]Schwab & Eisenberg, supra note 4, at 721. See also Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 Cornell L. Rev. 641 (1987).

[25]Schwab & Eisenberg, supra note 4, at 732–33 n.51.

[26]Schwab and Eisenberg suggested that the prisoner case success rate they observed may be too high due to the uncertainty about success in cases that are withdrawn, voluntarily dismissed, and the like. Id. at 730 n.42.

[27]Id. at 733 (tbl. IV).

frequency, might have pushed the Eisenberg-Scwhab 73 percent rate above the rates reported by Hadfield and Clermont-Schwab.

The 1983 Civil Litigation Research Project (CLRP) reported on settlements in samples of cases from five federal courts and five state courts in the same locales for cases terminated in 1978.[28] Comparability with other studies is somewhat limited because the CLRP treated dismissals (not including dismissals pursuant to motions) as settlements.[29] Nevertheless, Table 1 shows the settlement rates and 95 percent confidence intervals for each court. The settlement rates are reasonably consistently in the 60 percent to 75 percent range, with the Philadelphia federal court confidence interval suggesting a higher rate and the New Mexico state court confidence interval suggesting a lower rate.

C. Case Category and Case Quality Variation in Settlement Rates

The CLRP noted that settlements may vary by type of case as well as by locale. The authors suggested that tort cases may be expected to have the highest settlement rates, after domestic relations cases, and that public law cases might be expected to generate more trials.[30] The CLRP data showed that 75 percent of tort cases were not adjudicated compared to 63 percent of contract/commercial cases, and 43 percent of civil rights/civil liberties/discrimination cases.[31]

The Eisenberg-Schwab and CLRP results suggest substantial heterogeneity in settlement rates across case categories. In another article based on the 1980–1981 data, Eisenberg-Schwab also reported success rates that provide an upper limit on settlement rates in federal employment discrimination cases in the districts studied. Employment cases based on Title VII of the Civil Rights Act of 1964 or on 42 U.S.C Section 1981, a civil rights statute dating from the Civil Rights Act of 1866, both showed settlement rates of less

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[28]D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, Civil Litigation Research Project: Final Report, Part A, at I-58, I-72 (1983) (tbl. 5) [hereinafter CLRP].

[29]Id. at I-72.

[30]Id. at I-73.

[31]Herbert M. Kritzer, Adjudication to Settlement: Shading in the Gray, 70 Judicature 161, 164 (1986) (tbl. 2). Domestic relations cases were not adjudicated 61 percent of the time. Id.

Table 1: Settlement Rates for Cases Terminated in 1978 (Percent)

	Federal Courts					*State Courts*				
	Milw	*LA*	*Phil*	*So Car*	*N Mex*	*Milw*	*LA*	*Phil*	*So Car*	*N Mex*
Settlement %	64	64	79	74	68	58	65	64	72	42
95% CI	56–71	56–71	71–85	67–81	61–75	51–65	57–73	56–72	64–79	35–49
N of cases	172	158	151	155	173	189	158	147	150	196

NOTE: CI = confidence interval.

SOURCE: Civil Litigation Research Project and authors' calculations.

than 50 percent,[32] results consistent with the 45 percent settlement rate observed in nonprisoner constitutional tort cases. In a study of constitutional tort cases based on 42 U.S.C. Section 1983 filed in the CDCA in 1975 and 1976, Eisenberg reported case outcomes indicating settlement rates of 56 of 140 (40 percent) for the 1975 cases and of 41 of 136 (30 percent) for the 1976 cases.[33] These rates increase to 42 percent and 34 percent, respectively, if one excludes nonfinal dispositions from the denominator. Settlement rates in prisoner cases were approximately zero.[34] In an important employment discrimination study, Nielsen et al. analyzed 1,672 cases filed in seven federal districts from 1988 through 2003.[35] They reported an aggregate rate of early settlement of 49.8 percent and of late settlement of 7.7 percent, for a total settlement rate of 57.5 percent (95 percent confidence interval = 55.1 percent to 59.9 percent). This is reasonably consistent with the 50 percent rate reported for 1980–1981 employment cases by Eisenberg and Schwab.

Other studies confirm that, consistently with CLRP expectations voiced more than 25 years ago, civil rights case settlement rates are substantially lower than the settlement rates in tort cases. Studies of tort litigation, including Ross's automobile claim study, regularly report settlement/success rates of about 70 percent to 80 percent in filed cases.[36] A Bureau of Justice

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[32]Theodore Eisenberg & Stewart Schwab, The Importance of Section 1981, 73 Comell L. Rev. 596, 600 (1988) (tbl. II). The less than 50 percent settlement rate is based on reported success rates of 50 percent or less. Success rates included cases in which plaintiffs succeeded either at trial or via settlement. A case counted as successful if (1) the plaintiff wins after trial or on a motion for summary judgment; (2) the partres settle; (3) the court grants a stipulated dismissal; or (4) the plaintiff dismisses the case voluntarily. Id. at 600 n.26.

[33]Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 Cornell L. Rev. 482, 550–51 (1982) (App. tbls. I, II). Cases with express settlements, stipulated dismissals, and dismissals by plaintiffs are counted as settlements.

[34]Id. at 554 (tbl. V).

[35]Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Uncertain Justice: Litigation Claims of Employment Discrimination in the Contemporary United States, paper presented at the Third Annual Conference on Empirical Legal Studies, Ithaca, Sept. 12–13, 2008.

[36]Alfred F. Conard et al., Automobile Accident Costs and Payments: Studies in the Economics of Injury Reparation 155–56 (1964); Ross, supra note 2, at 217 (showing no trial in 284 out of 377 automobile cases involving lawsuits); Patricia M. Danzon & Lee A. Lillard, Settlement Out of Court: The Disposition of Medical Malpractice Claims, 12 J. Legal Stud. 345, 365 (1983); Marc A. Franklin, Robert H. Chanin & Irving Mark, Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation, 61 Colum. L. Rev. 1, 10–11, 13–14 (1961); Murray L.

Statistics report using data on state court tort cases resolved in 1991–1992 in 45 of the 75 largest counties reported an aggregate tort case settlement rate of 73 percent, with no tort subcategory having a settlement rate of less than 65.8 percent.[37] Thus, the high Philadelphia federal settlement rate in the CLRP data in Table 1 may be attributable to it having the highest fraction (48 percent) of tort cases among federal courts in the CLRP study.[38] Similarly, the low CLRP New Mexico state court settlement rate shown in Table 1 may be attributable to it having the lowest fraction (31 percent) of tort cases among state courts in the study. The high federal Philadelphia rate is also consistent with our findings below for the EDPA. However, even in tort cases, the settlement rate can vary substantially. A multicounty comprehensive study of state court tort claims filed in Georgia from 1994 to 1997 found a settlement rate of only about 55 percent.[39]

Studies of antitrust cases similarly suggest some success, through settlement or otherwise, in 75 percent to 80 percent of cases.[40] A study of aviation

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Schwartz & Daniel B. Mitchell, An Economic Analysis of the Contingent Fee in Personal Injury Litigation, 22 Stan. L. Rev. 1125, 1155 n.45 (1970). For evidence of a high settlement rate for accident cases in the United Kingdom, see Harris et al., supra note 4, at 46 (247 accident victims consulted a lawyer; 198 obtained damages); Royal Commission, supra note 4, at 171, 175 (tbls. 124, 132) (74 percent and 83 percent of personal injury claims in England and Wales, and Northern Ireland, respectively, did not reach judgment after full hearing).

[37]Bureau of Justice Statistics Bulletin: Civil Justice Survey of State Courts, 1992: Tort Cases in Large Counties 3 (1995) (tbl. 2). The BJS rate counted voluntary dismissals as settlements, cases dismissed for failure to prosecute or failure to serve the complaint as nonsettlements, and cases settled (less than 1 percent) after a directed verdict or during or after trial as nonsettlements. Id.

[38]CLRP, supra note 28, at I-71 (tbl. 4).

[39]Thomes A. Eaton, David B. Mustard, & Suzette M. Talevico, The Effects of Seeking Punitive Damages on the Proccesing of Tort Claims, 34 J. Legal Stud. 343, 351 (2005).

[40]See William Baxter, The Political Economy of Antitrust, in the Political Economy of Antitrust: Principal Paper by William Baxter 16, 17 (R. Tollison ed. 1980) (tbl. 1-1); Jeffrey M. Perloff & Daniel L. Rubinfeld, Settlements in Private Antitrust Litigation, in Private Antitrust Litigation 149, 163 (L. White ed. 1988); Steven C. Salop & Lawrence J. White, Private Antitrust Litigation: An Introduction and Framework, in id. at 3, 10–11. In an early study of class and derivative actions, the success rate in filed disputes was close to the 80 percent figure. See Thomas M. Jones, An Empirical Examination of the Resolution of Shareholder Derivative and Class Action Suits, 60 B.U.L. Rev. 542, 545 (1980) (75.3 percent of suits led to some recovery). But see F. Wood, Survey and Report Regarding Derivative Suits 32 (1944), as reported in Alfred F. Conard, A Behavioral Analysis of Directors' Liability for Negligence, 1972 Duke L.J. 895, 901 n.21 (lower success rate in filed cases).

accident litigation covering major U.S. airline accidents from 1970 to 1984 reported a settlement rate of 86 percent with the rate being 87 percent if settlements in tried cases are included.[41] A study of patent cases found likely settlement rates ranging from 65 percent to 68 percent for the years 1995, 1997, and 2000.[42]

Even within a case category, a single settlement rate provides incomplete information. The best available evidence is that within-category settlement rates are highly sensitive to the merits of the case. Philip Peters reviewed medical malpractice studies that explored the relation between the standard of care and settlement rates. Cases with good medical care tended to have settlement rates around 10 percent to 20 percent in studies that coded three levels of care (good, uncertain, poor), with sometimes higher rates (up to 43 percent) in studies that coded two levels of care (good and poor).[43] Cases with poor care had settlement rates ranging from 77 percent to 95 percent with the exception of a 1991 Harvard study (56 percent settlement rate in cases with poor care with a litigation sample size of only 46 cases), which alone found no relation between the settlement rate and care quality.[44]

Other area-specific studies confirm the association between settlement outcomes and the quality of case. Ross's study of automobile cases concluded that "in conformity with the formal law, payment is related both to apparent liability and to the degree of injury or economic loss."[45] Securities class action settlements are consistently found to be associated with the merits of claims.[46] So a full picture of settlement rates would account for case quality

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[41]James S. Kakalik et al., Costs and Compensation Paid in Aviation Accident Litigation xii, 30 & n.15 (1988).

[42]Kesan & Ball, supra note 14, at 273–75.

[43]Philip G. Peters, What We Know About Malpractice Settlements, 92 Iowa L. Rev. 1783, 1796, 1803 (2007) (tbls. 1, 2).

[44]Id.

[45]Ross, supra note 2, at 230. This statement is based on all claims and not just those leading to lawsuits.

[46]James D. Cox, Randall S. Thomas & Lynn Bai, There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vanderbilt L. Rev. 355, 384 (2008) (The claim that settlements in securities class actions are not sensitive to the merits "is not only debunked here but flatly rejected by other studies that find that settlements range widely and that the strength of the complaint matters—likely a lot.").

as well as other factors. Strong filed cases tend to settle; weak ones do not. But information on case quality is not available for the cases in this study.

D. Interdistrict Variation

Geographical variation in case outcomes is the norm.[47] A prior study that included the districts and cases studied here showed substantial variation across districts in summary judgment rates.[48] The CLRP data showed an aggregate settlement rate range of 42 percent to 72 percent in state courts and 64 percent to 79 percent in federal courts. We therefore should be sensitive to interdistrict differences, even in a study of two districts. However useful a single, aggregate, settlement rate might be, case outcome studies should account for case category and locale even if one cannot account from court records for the strength of a case.

III. Data and Methods

The data analyzed here are from cases filed and terminated in the EDPA and NDGA (Atlanta office) in 2001–2002.[49] The districts were chosen because they were included in a study of cases decided 20 years earlier and using them would promote possible comparisons over time. The data have three components for each of two time periods in the two district courts. The components are employment discrimination cases (AO case category code 442[50]), other civil rights cases (AO code 440) (referred to here as constitutional tort cases because they are dominated by actions brought under 42

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[47]E.g., Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman & Martin T. Wells, The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 631 (1997).

[48]Theodore Eisenberg & Charlotte Lanvers, Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts, Cornell Law School Research Paper No. 08-022, available at http://ssrn.com/abstract=1138373.

[49]The NDGA has four offices in which federal cases may be filed. The Atlanta office has the most cases.

[50]For a description of Administrative Office case category codes, see Federal Court Cases: Integrated Data Bases, supra note 16.

U.S.C. Section 1983[51]), and a comparison group of noncivil rights cases further broken down into tort, contract, and a residual category of cases.

Information was gathered using the federal courts' Public Access to Court Electronic Records system (PACER)[52] for the two largest federal civil rights case categories: all employment discrimination cases and all constitutional tort cases *terminated* from July 8, 2001 through January 7, 2002.[53] As a comparison group, information was also gathered on 317 noncivil rights cases in the NDGA as follows: the 317 cases were a random sample of 1,149 terminations in the NDGA. Every third case (beginning randomly at the first terminated case) of the 1,149 terminations was included except the following AO case categories that appeared in the data were excluded from the comparison group and skipped if they were randomly selected: Social Security appeals, U.S. seizures of property, student loans, incorporation of foreign judgments, and residual statutory actions (AO codes 863–865, 625, 690, 152, 890[54]). All civil rights and prisoner cases were excluded from the comparison group (AO codes 441, 442, 443, 510–555). In the EDPA, the comparison group for this time period consisted of 380 cases out of 2,332 terminations, with the same exclusions from the comparison group. In the EDPA, every sixth case was included in the comparison group sample, with the same exclusions as in the NDGA.

The second time period for the EDPA and NDGA covered all cases *filed* from January 8, 2002 through July 8, 2002. All employment discrimination and constitutional tort cases were again included. For the NDGA, the random comparison group, again using every third case, consisted of 331 out of 1,084 noncivil rights filings during the seven-month 2002 time period. The same AO case code categories that were excluded from the six-month 2001 time period were also excluded from the comparison group of cases

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[51]For a breakdown of cases classified as constitutional tort cases, see Schwab & Eisenberg, supra note 4, at 735 (tbl. V).

[52]See http://pacer.psc.uscourts.gov/.

[53]The time periods were chosen based on the date of the Supreme Court's decision in *Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184 (2002), decided on Jan. 8, 2002. This research was originally focused on exploring the effect of that case on disability law doctrine.

[54]Code 890 is a residual category that includes a broad range of "other statutory actions." Those actions that fit into case categories otherwise included in the study, but that were coded as 890, were included in the sample.

used for the 2002 time period. For the EDPA, the random comparison group, using every sixth case, consisted of 393 cases out of 2,471 terminations with the same case category exclusions as in the other comparison groups.

Data were coded from docket sheets and complaints available via PACER. Thus, the case category, time-related information such as date of filing and date of disposition, and the case's disposition, including information suggesting a settlement, were obtained directly from court records. Useable disposition information was found for 3,328 cases. Each case's disposition was initially recorded using a free text field. Docket sheets for cases with uncertain initial disposition codes were reinspected and, if appropriate, recoded. The field was then analyzed and assigned one of the dispositions reported in Table 2.

Uniquely coding case outcomes based on court docket information, as expected, proved difficult. Clearly, some disposition categories overlap, such as "Failure to state a claim or other Rule 12 ruling" and "Summary judgment, judgment on pleadings, motion before trial." Part of the overlap is attributable to courts using nonunique terminology for what may be the same disposition in different cases.

For present purposes, the important distinction is between cases that settled and those that did not. Uncertainty exists in coding for this dichotomy because of the multiple dispositions that may represent settled cases, as represented by the six settlement categories reported in Table 2. Most of the categories coded as settlements are based on inferences without express information that a case settled. Some of these cases likely did not settle but, absent first-hand knowledge of the cases, settlement was the most likely outcome. Some of the cases coded as not settled in other categories likely did settle but one cannot infer that from the docket information. Additional uncertainty is attributable to possible coding error. Furthermore, additional cases likely settled after some formal adjudication, including trial and notice of appeal, occurred.[55] For purposes of the settlement rates reported here, we do not count these as settlements because the cases resolved after a formal ruling materially affected the likelihood of plaintiffs' success or failure.

Some further coding refinement is needed to explore the two different meanings of settlement explored here. For the different meanings of

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[55]Eisenberg & Heise, supra note 10; Hyman et al., supra note 9.

Table 2: Case Disposition Codes Used, EDPA and NDGA, 2001–2002

Disposition	*Number of Cases*	*% of Sample*
Arbitration enforced	13	0.39
Bankruptcy	22	0.66
Bench ruling/trial	60	1.80
Consolidated	25	0.75
Default judgment	55	1.65
Dismissal/withdrawal to allow refiling	2	0.06
Enforce other district judgment	3	0.09
Failure to comply with order or miscellaneous procedural failure	47	1.41
Failure to serve or failure to prosecute	157	4.72
Failure to state a claim or other Rule 12 ruling	38	1.14
In forma pauperis case denied or dismissed	108	3.25
Jury trial	65	1.95
Lack of jurisdiction	26	0.78
Miscellaneous orders without settlement	55	1.65
Moot	10	0.30
Motion to dismiss, other	132	3.97
Other withdrawal, no evidence of settlement	8	0.24
Pending/undetermined	26	0.78
Referred to arbitration or mediation	23	0.69
Remanded	102	3.06
Settled	702	21.09
Settled MDL	9	0.27
Settlement inferred, Rule 41(a)(1)	383	11.51
Settlement inferred, by stipulation	227	6.82
Settlement inferred, consent judgment/order	58	1.74
Settlement inferred, voluntary dismissal	402	12.08
Statistical or administrative closing	26	0.78
Summary judgment, judgment on pleadings, motion before trial	404	12.14
Transferred	140	4.21
Total	3,328	100

NOTE: Sample consists of employment discrimination cases, constitutional tort cases, and a random sample of noncivil rights cases, excluding Social Security appeals, U.S. seizures of property, student loans, incorporation of foreign judgments, and residual statutory actions (AO codes 863–865, 625, 690, 152, some 890 (see note 54 supra)) and all cases with AO codes 441, 442, 443, 510–555. Time period covered includes cases filed from January 8, 2002 to July 8, 2002 or cases terminated from July 8, 2001 to January 7, 2002.

SOURCE: PACER.

settlement, the key disposition codes needed for the refined analysis, such as default judgment, transferred, and remanded, are reasonably clear. Additional coding information about the data is reported elsewhere.[56]

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[56]Eisenberg & Lanvers, supra note 48.

Because the 2001 and 2002 subsamples were selected differently—one based on terminated cases and one based on filed cases—one possible concern is that they produce heterogeneous samples that cannot reasonably be combined. We therefore explored the relation between the settlement rates in the 2001 and 2002 subsamples for the two districts. With one exception, the 95 percent confidence intervals for the settlement rates overlap for each of the five components of the 2001 and 2002 samples (employment, constitutional tort, other, contract, and tort), within each district. The one exception is that the tort settlement rate in the EDPA was significantly higher in cases terminated before 2002 than in cases filed in 2002, rising from 79.8 percent in the earlier group to 92.0 percent in the later group of cases. For most purposes, it is reasonable to combine the 2001 and 2002 samples though we should be careful about inferences based on the EDPA tort cases that may be sensitive to time of filing.

IV. Results

We first report on the sensitivity of results to the choice of settlement rate measures discussed in Section II. Settlement rates based on this study are then presented.

A. The Importance of Definitions

Assuming reliability in coding case dispositions, we noted above that nontrivial questions arise in defining settlement rates. The results we first report illustrate how settlement rates vary depending on the choice of cases to include in the rate calculation.

Table 3 describes the settlement rates in our sample of 3,328 cases using settlement as a proxy for plaintiff success. Within the plaintiff-success approach to settlement, the table demonstrates the consequences of the choice of what cases to include in the settlement rate calculation. The "Settlement Rate 1" column excludes from the denominator in the settlement rate calculation cases that have no definitive outcome and may be settled or otherwise resolved at a future time or in a different forum. These nonterminating dispositions consist of cases on hold due to bankruptcy proceedings, cases being resolved via arbitration, cases remanded to state court, cases transferred to another federal district, cases closed by the AO for statistical purposes but that presumably could revive, cases consolidated with

Table 3: Case Categories, Number of Cases, and Settlement Rates as Proxies for Plaintiff Success, EDPA and NDGA, 2001–2002

District	*Case Category*	*Number of Cases (for Settlement Rate 1)*	*Settlement Rate 1 (%); (95% CI) (Excludes Nonterminating Cases)*	*Settlement Rate 2 (%); (95% CI)*
EDPA	Employment disc.	415	82.4; (78.7–86.1)	77.0; (73.1–80.9)
EDPA	Constitutional tort	580	45.0; (40.9–49.1)	42.4; (38.5–46.3)
EDPA	Other	169	63.3; (56.0–70.6)	54.0; (47.1–61.0)
EDPA	Contract	170	65.3; (58.1–72.5)	55.8; (48.9–62.7)
EDPA	Tort	274	87.2; (83.3–91.2)	64.8; (59.9–69.7)
NDGA	Employment disc.	542	55.5; (51.3–59.7)	52.7; (48.6–56.8)
NDGA	Constitutional tort	275	27.3; (22.0–32.6)	24.8; (19.9–29.6)
NDGA	Other	207	57.0; (50.2–63.8)	51.5; (45.0–58.0)
NDGA	Contract	160	72.5; (65.6–79.4)	58.9; (52.0–65.8)
NDGA	Tort	174	63.8; (56.6–71.0)	50.0; (43.4–56.6)

NOTE: "Other" terminations and filings were a random sample of noncivil rights cases, excluding Social Security appeals, U.S. seizures of property, student loans, incorporation of foreign judgments, and residual statutory actions (AO codes 863–865, 625, 690, 152, some 890 (see note 54 supra)) and all cases with AO codes 441, 442, 443, 510–555. CI = confidence interval. Time period covered includes cases filed from January 8, 2002 to July 8, 2002 or cases terminated from July 8, 2001 to January 7, 2002. Settlement Rate 1 excludes from the settlement rate denominator cases with nonterminating dispositions; Settlement Rate 2 includes in the settlement rate denominator cases with nonterminating dispositions. Number of cases for Settlement Rate 2 totals 3,328.

SOURCE: PACER.

other cases, and other infrequent nonterminating dispositions. "Settlement Rate 2" includes the nonterminating cases in the denominator in the settlement rate calculation. It is the settlement rate one could arrive at if focusing on how each filing is disposed of and counting as a settlement only dispositions that appear to be settlements without accounting for the known uncertainty in outcomes for nonterminating dispositions. Since Settlement Rate 2 has a larger denominator than Settlement Rate 1, it is always lower than Settlement Rate 1, with the difference peaking at over 22 percent for EDPA tort cases.

Table 4 shifts the definition of settlement rate to the rate of disputes resolved without adjudication. The difference between this measure and Table 3's measure is in the treatment of cases terminated as the result of dismissals for lack of prosecution, dismissals for failure to effectuate service of process, or default judgments. These are cases in which no meaningful disputed adjudication has occurred but the case has been effectively terminated. Including these cases as settlements provides a measure of settlement as an alternative to adjudication and is closer to the approach used by Ross

Table 4: Case Categories, Number of Cases, and Settlement Rates as Proxies for Nonadjudicated Terminations, EDPA and NDGA, 2001–2002

District	*Case Category*	*Number of Cases (for Settlement Rate 1)*	*Settlement Rate 1 (%); (95% CI) (Excludes Nonterminating Cases)*	*Settlement Rate 2 (%); (95% CI)*
EDPA	Employment disc.	415	83.9; (80.3–87.4)	78.4; (74.5–82.2)
EDPA	Constitutional tort	580	50.6; (46.5–54.7)	47.6; (43.6–51.6)
EDPA	Other	169	76.3; (69.9–82.8)	65.2; (58.5–71.8)
EDPA	Contract	170	76.5; (70.1–82.9)	65.3; (58.7–72.0)
EDPA	Tort	274	89.0; (85.3–92.8)	66.1; (61.3–71.0)
NDGA	Employment disc.	542	65.9; (61.9–69.9)	62.5; (58.5–66.5)
NDGA	Constitutional tort	275	37.9; (32.1–43.6)	34.3; (28.9–39.7)
NDGA	Other	207	70.2; (64.0–76.5)	63.4; (57.2–69.7)
NDGA	Contract	160	79.4; (73.1–85.7)	64.5; (57.8–71.2)
NDGA	Tort	174	72.1; (65.4–78.8)	56.4; (49.8–62.9)

NOTE: "Other" terminations and filings were a random sample of noncivil rights cases, excluding Social Security appeals, U.S. seizures of property, student loans, incorporation of foreign judgments, and residual statutory actions (AO codes 863–865, 625, 690, 152, some 890 (see note 54 supra)) and all cases with AO codes 441, 442, 443, 510–555. CI = confidence interval. Time period covered includes cases filed from January 8, 2002 to July 8, 2002 or cases terminated from July 8, 2001 to January 7, 2002. Settlement Rate 1 excludes from the settlement rate denominator cases with nonterminating dispositions; Settlement Rate 2 includes in the settlement rate denominator cases with nonterminating dispositions. Number of cases for Settlement Rate 2 totals 3,328.

SOURCE: PACER.

in reporting a settlement rate of over 95 percent. However, this approach obviously abandons linking settlement to plaintiff success. Dismissals for lack of prosecution cannot reasonably be regarded as successful.

Table 4 shows the sensitivity of settlement rates to the treatment of nonadjudicative terminations. Settlement Rate 1 and Settlement Rate 2 noticeably differ for tort cases, employment discrimination cases, other cases, and contract cases in the EDPA. They also significantly differ for contract cases and tort cases in the NDGA.

We believe that the settlement rate that excludes nonterminating dispositions (Settlement Rate 1) is a more realistic proxy for plaintiff success. Since that is our primary interest in settlement rates in this article, we will use Settlement Rate 1 and settlement as a proxy for plaintiff success, the method used to compute Table 3, in the analyses that follow.

B. Settlement Rates by District and Case Category

Settlement rates tend to be discussed in aggregate terms, as if a single settlement rate such as, for example, 95 percent, can reflect all case

Table 5: Aggregate Settlement Rates: EDPA and NDGA, 2001–2002

	Percent Settled	*95% Confidence Interval*	*Number of Cases*
EDPA & NDGA aggregated	66.9	64.7–69.0	2,966
EDPA aggregated	71.6	68.8–74.4	1,608
NDGA aggregated	57.8	54.9–60.8	1,358

NOTE: Time period covered includes cases filed from January 8, 2002 to July 8, 2002 or cases terminated from July 8, 2001 to January 7, 2002. Settlement rate excludes from the settlement rate denominator cases with nonterminating dispositions. Settlement rates and confidence intervals account for sample design.

SOURCE: PACER.

outcomes. As the settlement rate literature shows, this is an oversimplification. Nevertheless, a single aggregate rate can facilitate discussion or comparison. So our initial report is of aggregate settlement rates that encompass all the studied nonterminating cases.

In aggregating across the two districts and case categories, the complex observational sample constructed suggests the use of weights in the statistical analysis because the probability of a case being included in the sample varied by district, case category, and time.[57] In the results below, probability weights are used where appropriate, with the weight assigned to a case being the inverse of the probability of the case being in the sample.

Table 5 reports the aggregate results. If one seeks a single rate to summarize case outcomes, Table 5 suggests it should be about 67 percent, or two-thirds of terminated cases. However, the table also shows that a single aggregate rate may be misleading. The aggregate estimate for the EDPA is 71.6 percent and for the NDGA is 57.8 percent, about 14 percent less than the EDPA. The 95 percent confidence intervals do not overlap, indicating that the districts have statistically significantly different settlement rates. Table 3 suggests that the differing rate is not an artifact of different case category mixes, as three of five case categories have statistically significantly lower settlement rates (Settlement Rate 1) in the NDGA.

Table 3 reports settlement rates by case category, but it does not aggregate the case categories across districts. Table 6 does that but it should be read with the cautionary note that combining rates across districts may not always be appropriate.

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[57]See Roderick J. Little, To Model or Not to Model? Competing Modes of Inference for Finite Population Sampling, 99 J. Am. Statistical Ass'n 546 (2004).

Table 6: Aggregate Settlement Rates: EDPA and NDGA, 2001–2002 by Case Category

	Percent Settled	*95% Confidence Interval*	*Number of Cases*
Employment discrimination	67.2	64.3–70.0	957
Constitutional tort	39.3	36.1–42.5	855
Other	60.9	55.7–66.1	376
Contract	67.6	62.2–73.0	330
Tort	81.6	78.1–85.1	448

NOTE: Time period covered includes cases filed from January 8, 2002 to July 8, 2002 or cases terminated from July 8, 2001 to January 7, 2002. Settlement rate excludes from the settlement rate denominator cases with nonterminating dispositions. Settlement rates and confidence intervals account for sample design.

SOURCE: PACER.

With that caveat, we note that the settlement rate in tort cases is statistically significantly higher than the rate in other case categories. The settlement rate in constitutional tort cases is statistically significantly lower than the settlement rate in any other class of cases. The aggregate tort settlement rate is not substantially different from the 70 percent to 80 percent rate often reported in the settlement literature discussed above. The employment discrimination settlement rate is higher than that reported by Eisenberg-Schwab for 1980–1981 or by Nielsen et al. This likely is attributable to the districts (especially the EDPA) included in this study, as explored in Section V. The low settlement rate in constitutional tort cases is consistent with earlier results from Eisenberg-Schwab and Eisenberg.

C. Settlement Rates by Category of Employment Discrimination Case

The substantial interdistrict difference in employment discrimination case settlement rates suggests looking more deeply for the source of the difference. Employment discrimination cases are heterogeneous. Differences in case outcome characteristics have been observed between types of employment discrimination cases.[58] Table 7 reports settlement rates for race, sex,

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[58]David B. Oppenheimer, Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities, 37 U.C. Davis L. Rev. 511 (2003).

Table 7: Class of Employment Discrimination Cases and Settlement Rates, EDPA and NDGA, 2001–2002

District	*Case Category*	*Percent Settled*	*95% Confidence Interval*	*Number of Cases*
EDPA	Race	79.3	71.6–86.9	111
EDPA	Sex	85.8	79.3–92.4	113
EDPA	Age	77.9	67.8–88.0	68
NDGA	Race	51.6	44.9–58.4	213
NDGA	Sex	61.6	54.5–68.7	185
NDGA	Age	59.6	45.8–73.4	52

NOTE: Time period covered includes cases filed from January 8, 2002 to July 8, 2002 or cases terminated from July 8, 2001 to January 7, 2002. Settlement rate excludes from the settlement rate denominator cases with nonterminating dispositions. Settlement rates and confidence intervals account for sample design.

SOURCE: PACER.

and age cases for the two districts.[59] The pattern within districts is reasonably consistent. No settlement rate within each district differed statistically significantly from another settlement rate in the district. The most noticeable within-district effect is the low settlement rate, 51.6 percent, in NDGA race cases. The pattern across districts is consistent in its difference within case category. The three classes of employment discrimination cases in NDGA each had a noticeably lower settlement rate than the three classes of cases in EDPA. Two of the differences are statistically significant, with the age case difference nearly so and less likely to achieve statistical significance due to a lower number of cases.

What happens to the nonsettling NDGA cases? We report elsewhere a much higher rate of summary judgment in NDGA employment discrimination cases than in EDPA employment cases. The summary judgment rate for race discrimination cases in the NDGA was 28.2 percent compared to 9.9 percent in the EDPA.[60] The summary judgment rate for sex discrimination cases in the NDGA was 22.0 percent compared to 4.3 percent in the EDPA.

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[59]Disability and other categories of employment discrimination cases are not included in Table 6. For discussion of disability and other employment discrimination case categories, see Charlotte L. Lanvers, Different Federal District Court, Different Disposition: An Empirical Comparison of ADA, Title VII, Race and Sex, and ADEA Employment Dispositions in the Eastern District of Pennsylvania and the Northern District of Georgia, 16 Cornell J. L. & Pub. Pol'y 381, 395 (2007).

[60]Summary judgment rates in these data are discussed in Eisenberg & Lanvers, supra note 48. Rates reported here use the same denominator as is used to compute settlement rates.

And the rate for age discrimination cases in the NDGA was 28.3 percent compared to 11.6 percent in the EDPA. Thus, about 60 percent of the difference in race case settlement rates, over 70 percent of the difference in sex case rates, and over 80 percent of the difference in age case rates is explained by the differences in summary judgment rates. NDGA employment discrimination case plaintiffs suffer summary judgment more and settle less than EDPA cases.

V. Discussion

Our results, plus those in prior settlement research, suggest a hierarchy of settlement rates by case category. Of major case categories consisting of tort, contract, employment discrimination, and constitutional tort, tort cases tend to have the highest settlement rates, then contract cases, then employment discrimination cases, followed by constitutional tort cases. If contract cases serve as a kind of reference category, tort cases have relatively high settlement rates and the two civil rights categories have relatively low rates. We discuss the high and low rate categories in turn.

A. Tort Cases

The aggregate tort settlement rate we find is not substantially different from the 70 percent to 80 percent rate often reported in the prior tort settlement literature. The association between the use of contingent fees and tort litigation[61] may suggest why tort settlement rates tend to be higher than settlement rates in other case categories. Although the theoretical literature on the relation between fee arrangements and settlement rates is ambiguous,[62] plaintiffs' contingent fee attorneys have little incentive to bring weak cases with low prospects of recovery other than likely rare high-risk, high-potential payoff cases. Hourly pay fee arrangements, which are more

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[61]E.g., Herbert M. Kritzer, The Impact of Fee Arrangement on Lawyer Effort, 19 Law & Soc'y Rev. 251, 264 & n.17 (1985) (showing that "most tort plaintiffs hire lawyers on a contingent fee basis" and that a much smaller fraction of contract plaintiffs do so). But note the United Kingdom shows a high settlement rate for accident cases in a system with fee rules that differ from the U.S. rules. Harris et al., supra note 4, at 46, 93; Royal Commission supra note 4, at 171, 175.

[62]See Herbert M. Kritzer, Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say? 80 Tex. L. Rev. 1943, 1947–48 (2002).

prevalent in contractual contexts, have different economic incentives and attorneys benefit from case activity regardless of outcome. In addition, contingent fee attorneys have an economic incentive "to obtain a respectable settlement with relatively slight effort . . . ."[63]

The link between obtaining a settlement (or victory at trial) and attorney compensation creates a powerful incentive to screen cases. The available empirical evidence is that plaintiffs' tort attorneys substantially screen cases and accept a minority of opportunities to represent clients. Herbert Kritzer's study of Wisconsin attorneys reported an overall contingency fee case acceptance rate of 34 percent.[64] For high-volume practices, the acceptance rate dropped off sharply to 8 percent.[65] Stephen Daniel's and Joanne Martin's survey of Texas plaintiffs' lawyers found that, depending on attorneys' average case size, a range of about one-third to less than 20 percent of calls led to representation contracts.[66] The median acceptance rate for firms with the largest cases (mean case value greater than $200,000[67]) was 10 percent.[68] If contingency fee tort attorneys effectively screen based on the merits of cases more than hourly attorneys, and if settlement is a reasonable proxy for case success, the high tort settlement rate may suggest that filed tort cases are, on average, more meritorious than other classes of cases.

However, the full explanation cannot be that simple. Results vary substantially, tort case settlement rates differ by about 18 percent across our two districts, and the difference is statistically significant. The tort case settlement

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[63]Kevin M. Clermont & John D. Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529, 536 (1978). For a review of evidence concerning the effects of fee arrangements on attorney effort, see Kritzer, supra note 62, at 1968–69) (little evidence of different time spent on matters between hourly and contingent fee attorneys); Herbert M. Kritzer, Fee Arrangements and Negotiation, 21 Law & Soc'y Rev. 341, 346 (1987) (evidence from negotiations shows the "overriding importance of money in the demands of the contingent fee lawyer" compared to the hourly fee lawyer).

[64]Herbert M. Kritzer, Seven Doqqed Hyths Concerning Contingeng Fees, 80 Wash. U. L. Q. 739, 755 (2002).

[65]Id. at 756.

[66]Stephen Daniels & Joanne Martin, It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas, 80 Tex. L. Rev. 1781, 1789 (2000).

[67]Id. at 1786.

[68]Id. at 1789.

rate we find is significantly higher than the settlement rate for other classes of cases in the EDPA but not in the NDGA. Eaton et al.'s thorough study of Georgia state court tort cases reported a settlement rate of less than 60 percent.[69] Even if the results from the bulk of other studies suggest that the EDPA may be more representative on this issue than is the NDGA, the interdistrict variation suggests either that plaintiffs bring cases with different average merits in the two districts, or that the judges treat the cases brought differently, or some combination of the two. The former explanation is difficult to study but the latter can be assessed by exploiting the random assignment of cases to assess the relation between individual judges and case outcomes. This is a promising topic for future work, although evidence in other studies suggests no consistent association between individual judge and case outcome in the mass of civil cases.[70] For now we merely note the plausible association between contingency fee use and relatively high settlement rates.

B. Constitutional Tort Cases

In both districts studied here, and in earlier studies reviewed above, constitutional tort case settlement rates are low compared to other large classes of civil litigation. Constitutional tort cases combine at least three factors that may contribute to low settlement rates. First, constitutional tort cases are eligible for fee shifting under 42 U.S.C. Section 1988(b). It is possible that fee shifting, which in practice operates in favor of plaintiffs but not defendants, encourages more lawsuits, including less meritorious ones. However, evidence suggested that enactment of civil rights case fee shifting did not result in noticeable increases in civil rights case filings[71] and earlier work

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[69]Eaton et al., supra note 39.

[70]Compare Orley Ashenfelter, Theodore Eisenberg & Stewart J. Schwab, Politics and the Judiciary: The Influence of Judicial Background on Case Outcomes, 24 J. Legal Stud. 257 (1995); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. Rev. 1377, 1463–65 (1998); Denise M. Keele, Robert W. Malmsheimer, Donald W. Floyd & Lianjun Zhang, An Analysis of Ideological Effect in Published Versus Unpublished Judicial Opinions, 6 J. Empirical Legal Stud. 213 (2009); Max M. Schanzenbach, Racial and Sex Disparities in Sentencing: The Effect of District-Level Judicial Demographics, 34 J. Legal Stud. 57 (2005), with Max M. Schanzenbach & Emerson H. Tiller, Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence, 23 J. L. Econ. & Org. 24 (2007).

[71]Schwab & Eisenberg, supra note 4, at 760.

suggested that those "who think there are many valid [constitutional tort] claims without remedy must reassess the efficacy of the existing fee mechanism to promote constitutional remedies."[72]

The fee-shifting statute explanation is additionally questionable because constitutional tort lawyers may have as strong an incentive to screen cases as do contingency fee lawyers. Most constitutional tort plaintiffs likely are unable to afford substantial hourly rates so the lawyer usually knows that recovery of a fee depends on success, not on putting in billable hours of work. Section 1988(b) shifts the source of the funding for plaintiff's attorney from the client recovery to the defendant, though even here the settlement may require that the plaintiff's attorney be paid out of the recovery.[73] Failure carefully to screen should be about as devastating to constitutional tort attorneys as it is to pure contingent fee attorneys.[74]

Second, constitutional tort cases usually require action under color of law and state action.[75] Governments or their officials, therefore, are usually defendants in such cases. Prior studies suggest that governmental litigants differ in their behavior and case processing than other litigants.[76] And the plaintiffs in constitutional tort cases, which often involve encounters with the police,[77] may not be the strongest candidates for jury or judge sympathy.[78] These distinct characteristics, we suspect, contribute to the low observed settlement rates in constitutional tort cases. For now we suggest that the

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[72]Id. at 781.

[73]Evans v. Jeff D., 475 U.S. 717 (1986).

[74]Earlier work shows that the bulk of civil rights litigation is by private attorneys and not by institutional actors such as the ACLU or the NAACP. Schwab & Eisenberg, supra note 4, at 767–68.

[75]E.g., Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).

[76]Theodore Eisenberg & Henry Farber, The Government as Litigant: Further Tests of the Case Selection Model, 5 Am. L. & Econ. Rev. 94 (2003); Herbert M. Kritzer, The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts, in In Litigation: Do the "Haves" Still Come Out Ahead? (Herbert M. Kritzer & Susan Silbey eds. 2003); Schwab & Eisenberg, supra note 4.

[77]Schwab & Eisenberg, supra note 4, at 735 (tbl. V) (156 of 513 constitutional tort cases involved actions against the police).

[78]Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447 (1978).

nature of the defendant in constitutional tort cases may be the most plausible explanation for low settlement rates.

Third, constitutional tort cases have by far the highest rate of in forma pauperis filings. Over 10 percent of constitutional tort filings (102 of 903) were unsuccessful in forma pauperis cases. No other case category had even 1 percent of filings in forma pauperis.

So careful screening should drive settlement rates up while the government as defendant and in forma pauperis filings are expected to drive settlement rates down. The experienced attorney likely knows governmental defendants' reluctance to settle, which should in turn influence case acceptance. This should tend to diminish settlement rate differences between constitutional tort cases and other cases, yet they persist and are substantial.

C. Employment Discrimination Cases

A substantial literature suggests that employment discrimination cases fare poorly compared to other classes of cases.[79] If settlement rates are a proxy for success rates, our results provide mixed support for this poor performance. In the NDGA, the employment case settlement rate was significantly lower than the contract case settlement rate and noticeably lower than the tort case settlement rate. In the EDPA, however, employment cases settled at rates higher than contract cases and not significantly different than tort cases. The aggregate employment case settlement rate for the two districts was significantly lower than the rate for tort cases but not lower than the rate for contract cases. This absence of difference is consistent with Clermont and Schwab's report of long-term federal employment discrimination case settlement rates that are not noticeably different from settlement rates in other classes of cases.[80]

However, the interdistrict difference we find has not been stable over time. The interdistrict variation in employment cases led us to reexamine data from an earlier study of these districts. This interdistrict variation was not found in a study that included the EDPA and the NDGA for cases filed in 1980–1981, where both districts showed low employment case settlement

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[79]E.g., Clermont & Schwab, supra note 15; Kevin M. Clermont & Theodore Eisenberg, Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments, 2002 Ill. L. Rev. 947; Theodore Eisenberg, Appeal Rates and Outcomes in Tried and Non-Tried Cases, 1 J. Empirical Legal Stud. 659 (2004).

[80]Clermont & Schwab, supra note 15.

rates.[81] The employment case settlement rates found in Nielsen et al.'s major study[82] suggest that such cases have low settlement rates compared to other studies' reports of settlement rates.

To further explore the pattern of employment case settlement rates compared to other cases and to reduce the sensitivity of our results to the two districts studied in detail, we used the computerized AO data for the time period of this study to explore comparative settlement rates in employment cases, contract cases, and personal injury tort cases. The AO disposition codes are insufficiently reliable to support precise estimates of absolute levels of settlement rates[83] and we suspect that the rates we derive using the AO disposition codes are generally too high. But, assuming random limitations in the coding scheme or its application, the AO data can provide insights into the relative settlement rates across case categories. Since our two-district data and prior work leave the status of employment cases somewhat uncertain, we use the AO data to help locate employment cases in the settlement rate hierarchy.

Table 8 shows, for each federal circuit, the settlement rate in employment discrimination cases (AO code 442), the general AO contract case category (AO code 190), and personal injury tort cases (AO codes 310–368). The pattern strongly supports the notion that employment cases settle less frequently than contract or tort cases. In every circuit, the settlement rate was lower in employment cases than in the other two case categories. In 11 of 12 circuits,[84] the employment case settlement rate was statistically significantly different from the tort settlement rate and the contract rate, with only the small D.C. and First Circuits failing to achieve statistical significance ($p < 0.05$) in comparison with both contract and tort cases, as shown by the 95 percent confidence intervals in the table. In nine circuits, the difference between employment and contract cases was significant at $p < 0.01$ and in 10 circuits the difference between employment and tort cases was significant at $p < 0.01$.

Further analysis of the Third Circuit (the circuit in which the EDPA is located) cases by district suggests that the EDPA pattern we observe for

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[81]Eisenberg & Schwab, supra note 70, at 600 (tbl. II). That source reports on Title VII case results combined for the EDPA, the NDGA, and the CDCA. Inspection of the data files used for that study showed no meaningful interdistrict variation.

[82]Nielsen et al., supra note 35.

[83]Hadfield, supra note 1.

[84]Computerized case outcome information is not available for the Federal Circuit.

Table 8: Settlement Rates by Circuit, Administrative Office Data, 2001–2002

Circuit	*Case Category*	*Proportion Settled*	*Lower 95% CI*	*Upper 95% CI*	N
DC	Employment	0.659	0.589	0.729	176
DC	Contract	0.702	0.609	0.795	94
DC	Tort	0.748	0.671	0.825	123
1	Employment	0.796	0.743	0.848	225
1	Contract	0.871	0.837	0.905	372
1	Tort	0.841	0.808	0.874	478
2	Employment	0.706	0.677	0.735	943
2	Contract	0.836	0.815	0.858	1,124
2	Tort	0.862	0.843	0.881	1,284
3	Employment	0.809	0.782	0.836	828
3	Contract	0.840	0.817	0.863	1,000
3	Tort	0.958	0.952	0.964	4,116
4	Employment	0.720	0.691	0.749	921
4	Contract	0.852	0.829	0.875	911
4	Tort	0.787	0.763	0.811	1,131
5	Employment	0.738	0.712	0.764	1,065
5	Contract	0.791	0.767	0.816	1,074
5	Tort	0.871	0.856	0.885	2,061
6	Employment	0.743	0.716	0.771	982
6	Contract	0.817	0.790	0.844	802
6	Tort	0.876	0.857	0.894	1,197
7	Employment	0.737	0.712	0.762	1,208
7	Contract	0.831	0.804	0.858	750
7	Tort	0.829	0.800	0.858	650
8	Employment	0.723	0.694	0.752	906
8	Contract	0.829	0.797	0.860	549
8	Tort	0.800	0.770	0.830	685
9	Employment	0.769	0.746	0.793	1,219
9	Contract	0.830	0.810	0.850	1,322
9	Tort	0.832	0.813	0.851	1,446
10	Employment	0.795	0.765	0.824	721
10	Contract	0.824	0.791	0.858	490
10	Tort	0.879	0.855	0.903	686
11	Employment	0.802	0.784	0.820	1,945
11	Contract	0.865	0.842	0.888	881
11	Tort	0.883	0.862	0.903	939

NOTE: CI = confidence interval. Includes personal-injury tort categories (AO codes 310–368), the general contract category (AO code 190), and employment discrimination cases (AO code 442). AO disposition codes 5, 12, 13, and 14 are counted as settlements; codes 3, 6, 7, 8, 9, 15, 17, 19, and 20 are counted as nonsettlements. Other disposition codes are excluded. For AO disposition coding, see note 16 supra. Time period covered includes cases filed from January 1, 2002 to July 1, 2002 or cases terminated from July 1, 2001 to December 31, 2001.

SOURCE: Inter-University Consortium for Political and Social Research, Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2001), and subsequent studies in that series.

Table 9: Settlement Rates, EDPA Compared to Other Third Circuit Districts, Administrative Office Data, 2001–2002

District	*Case Category*	*Proportion Settled*	*Lower 95% CI*	*Upper 95% CI*	N
EDPA	Employment	0.887	0.853	0.921	336
EDPA	Contract	0.839	0.804	0.874	416
EDPA	Tort	0.983	0.978	0.987	3,472
Other 3d Cir. dists.	Employment	0.756	0.718	0.794	492
Other 3d Cir. dists.	Contract	0.841	0.811	0.870	584
Other 3d Cir. dists.	Tort	0.825	0.795	0.854	644

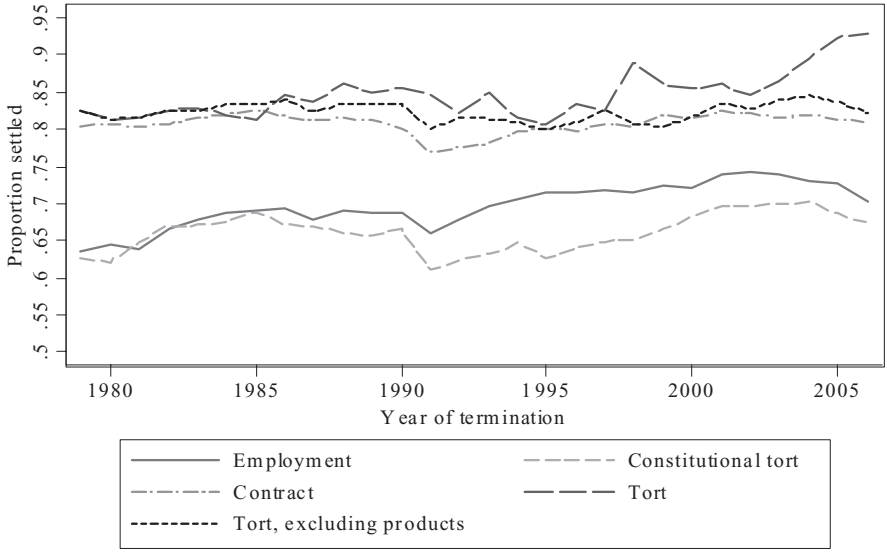
NOTE: CI = confidence interval. Includes only Third Circuit cases consisting of personal-injury tort categories (AO codes 310–368), the general contract category (AO code 190), and employment discrimination cases (AO code 442). AO disposition codes 5, 12, 13, and 14 are counted as settlements. AO disposition codes 3, 6, 7, 8, 9, 15, 17, 19, and 20 are counted as nonsettlements. Other disposition codes are excluded. Time period covered includes cases filed from January 1, 2002 to July 1, 2002 or cases terminated from July 1, 2001 to December 31, 2001. For AO disposition coding, see note 16 supra.

SOURCE: Inter-University Consortium for Political and Social Research, Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2001), and subsequent studies in that series.

employment cases is atypical. Table 9 compares the settlement rates for the EDPA with the settlement rates in other Third Circuit districts combined. It shows that in the EDPA, the settlement rate in employment cases exceeded that in contract cases. But, in the other Third Circuit districts, the settlement rate in employment cases was statistically significantly lower than both contract cases and tort cases. The EDPA settlement rate pattern differs from that in every other circuit as well as the aggregate results for the other districts within the Third Circuit.

Figure 1 extends the comparison of settlement rates to all federal terminations from 1979 through 2006. We again rely on the federal data not for the absolute level of settlement but for the relative settlement rates across case categories. These AO data show a consistent pattern over time. Tort cases have the highest settlement rate and employment discrimination cases and constitutional tort cases have lower settlement rates. The largest persistent gap is between the pairs of categories—contract and tort cases on the one hand and employment discrimination and constitutional tort cases on the other. A smaller but persistent gap since the 1990s persists between employment discrimination cases and constitutional tort cases. Since the mid-1990s a substantial gap also exists between tort cases and contract cases. A separate line for tort cases excluding products liability cases shows that the recent tort-contract gap is attributable to products cases. A few large aggregate products case settlements appear to be driving this trend.

Figure 1: Settlement rate over time, federal courts by major case category.



NOTE: Includes personal-injury tort categories (AO codes 310–368), the general contract category (AO code 190), and employment discrimination cases (AO code 442). AO disposition codes 5, 12, 13, and 14 are counted as settlements. AO disposition codes 3, 6, 7, 8, 9, 15, 17, 19, and 20 are counted as nonsettlements. Other disposition codes are excluded. For AO disposition coding, see note 16 supra. Time period covered includes cases filed from January 1, 2002 to July 1, 2002 or cases terminated from July 1, 2001 to December 31, 2001.
SOURCE: Inter-University Consortium for Political and Social Research, Federal Court Cases: Integrated Data Base, 1970–2000, ICPSR Study No. 8429 (2001), and subsequent studies in that series.

Taking a step back from the broader-based AO data, the pattern of relatively low employment discrimination settlement rates is widespread and the EDPA, in the time period covered by this study, appears to be an outlier in this respect. On balance, the weight of the empirical evidence supports lower employment case settlement rates in most places but not a monolithic pattern.

To the extent that employment cases have a low settlement rate, what are possible explanations? It is unlikely that employment attorneys fail to substantially screen their cases on the merits. As in the case of constitutional tort cases, fee shifting exists and the lawyers likely look to recovery or to the defendant for their fee. However, a highly paid employee plaintiff may be able to pay an hourly rate. Nevertheless, one report has it that plaintiffs' counsel accept only 5 percent of the employment discrimination claims

brought to them by prospective clients,[85] a case acceptance rate lower than that reported for plaintiffs' tort attorneys. So substantial screening likely is occurring and the question remains why employment discrimination attorneys bring a disproportionately large fraction of unsuccessful cases.

D. Intercategory Merits

One possible explanation for low settlement rates in employment and constitutional tort cases is the behavior of potential plaintiffs. Perhaps civil rights victims are more prone to seek vindication in court, and bring, on average, weaker cases than tort or contract plaintiffs. Attorney screening might only partially stem the tide of a weaker set of claims, leaving a residue of weaker cases that result in lawsuit filings. The weaker civil rights cases filed would be expected to lead to lower observed settlement rates. On this view, the difference in settlement rates reflects differences in the merits of cases filed, not difference in their treatment once filed.

However, what we know about claiming rates does not support this thesis. According to data from the CLRP, 18.7 percent of tort disputes resulted in litigation compared to only 3.9 percent of discrimination disputes and 11.9 percent of disputes with government.[86] The tort rate likely is driven up by motor vehicle cases, which have higher claiming rates than other tort cases.[87] But our data and the CLRP data include motor vehicle cases so a greater propensity to claim in such cases should manifest itself in the observed settlement rates. A 1967 study of lawyer use in Detroit showed a near-zero rate of lawyer use in employer-employee disputes.[88] A 1994 ABA study found that lawyers were consulted less frequently in employment-

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[85]William M. Howard, Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen? 50 (no. 4) Disp. Resol. J. 40, 45 (Oct.–Dec. 1995).

[86]David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 87 (1983) (tbl. 1); Herbert M. Kritzer, To Lawyer or Not to Lawyer, Is That the Question? 5 J. Empirical Legal Stud. 877, 891 (2008) (fig. 6). For evidence of low claiming rates by U.K. accident victims, see Harris et al., supra note 4, at 46 (14 percent of accident victims consulted a lawyer; 12 percent obtained damages); Royal Commission, supra note 4, at 20 (tbl. 12) (only 1 percent of personal injury claims reach the courts).

[87]Deborah Hensler et al., Compensation for Accidental Injuries in the United States 123–25 (RAND ICJ 1991).

[88]Kritzer, supra note 86, at 880 (fig. 1).

related matters than in personal/economic injury matters.[89] A similar relationship has been found in studies in Australia, Canada, Japan, and the United Kingdom.[90] The net result is that the weight of evidence suggests that civil rights victims may be less likely to litigate than other victims, leaving little evidence that their claims are on average objectively weaker, and that the cases' poor quality explains lower settlement rates.

Furthermore, what we know about employment cases suggests that in-court treatment is at least part of the source of poorer performance. The pattern of employment case outcomes persists from the pretrial stage through the appellate stage. Employment cases have fewer early terminations than other cases, a much lower plaintiff win rate on pretrial motions than other cases, a much lower plaintiff win rate at trial than other cases, a much lower win rate in judge trials than in jury trials of employment cases, a higher trial rate than other cases, a strong anti-plaintiff effect on appeal, and a diving number of filings.[91] Clermont and Schwab observe that all of this is consistent with employment case plaintiffs facing a tough row to hoe in court, maybe even more than they perceive as reflected by the bench trial win rate. But mainly the parties, including the defendant, are aware of the tilted playing field and yet these numbers persist.

Factors not considered here also could contribute to varying settlement rates across districts, case categories, and time. But the key factor, not easily explored, is the objective quality of the cases brought. Outside the medical malpractice area, where ex-post reviews of medical records can lead to reasonable assessments of case quality, we have little objective evidence of the quality of cases filed, and even less objective evidence about possible intercategory case quality.

VI. Conclusion

Research on case outcomes tends to be dominated by studies of trial outcomes. This is both because trials are more visible than other case outcomes and because better information is available about trial outcomes. But most

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[89]Id. at 889 (fig. 5).

[90]Id. at 892–95, 897–98 (figs. 7–9, 11, 12).

[91]Clermont & Schwab, supra note 15.

cases that succeed do so via settlement and most cases that fail are resolved by pretrial dismissals. If we want to know how litigants and cases of different types fare, we need better information about, and more study of, settlements and dismissals. Explanations of trial court litigation outcomes are inadequate unless they include the dominant trial court outcome, settlement, which is also the most frequent outcome that is associated, albeit imperfectly, with litigant success.

Perhaps because relatively little systematic information is available about settlements, discussions of settlement rates tend to be overly simplistic. The 95 percent settlement rate often claimed finds little support in actual practice. The quest for a single settlement rate, or even a single reasonable definition of settlement, may be futile. Different research questions can lead to different, but similarly respectable, computations of the settlement rate. If a single settlement rate is to be invoked, it should be that about two-thirds of civil cases settle, as suggested by the CLRP data in Table 1, covering cases decided 30 years ago, and by our in-depth study of two federal districts covering more recent cases. Although methodologies differ across studies, this rate is reasonably consistent with Hadfield's final termination results, Clermont-Schwab's results, and Eisenberg-Schwab's results, as discussed in Section II.B. The pool of results spanning more than 20 years of cases provides no evidence of a materially increasing settlement rate over time.

Serious settlement research needs to move beyond interest in "the" settlement rate. Settlement rates focused on plaintiff success vary significantly by district and case category. Reasonable evidence exists that settlement rates in tort cases tend to be higher than in most other classes of cases and that settlement rates in civil rights cases tend to be lower than in other classes of cases. A settlement hierarchy exists and describing and understanding the hierarchy is important to understanding whether and why some classes of cases fare more poorly than others.