TRIAL PRACTICE

THE LITIGATION EXPLOSION MYTH AND THE CONFUSION ABOUT COURT CONGESTION

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Litigation is not keeping pace with increases in population, according to state records.

For years some politicians and insurance dominated research groups have complained that lawyers are causing the delays that some of our courts have experienced.

The charge is simply false.

Virtually everyone believes there is a deluge of cases because certain financial interests that would gain from limiting access to courts have misled the public into believing that "too many" lawyers are filing "too many" cases which have resulted in a legal logjam. Unfortunately for them the facts do not support their theory.

Statistical records maintained by the California Judicial Council confirm there is no litigation explosion. In fact, the number of cases being filed is decreasing relative to the increases in California's population.

In 1970 California's population was 19,973,470. That figure grew to 23,668,562 in 1980. Since 1980 California's population has continued to grow at an annual rate of approximately 2 percent and 1985 estimates by the state Department of Finance place today's population near 26,000,000.

The recently released 1984 Report of the California Judicial Council shows that during the last seven years total annual civil filings increased by only 17,000 cases, from 523,391 during 1976-77 to 540,510 in 1982-83. This is a far cry from what has been described as "an explosion of litigation caused by too many lawyers."

In fact, the data in recent years show actual decreases in court filings.

Civil filings reached a peak in California during 1978-79, but thereafter decreased, as the following figures from the 1984 Report of the Judicial Council of California show:

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FISCAL YEAR	SUPERIOR COURT FILINGS
1976-77	523,391
1977-78	534,686
1978-79	551,393
1979-80	521,068
1980-81	532,556
1981-82	532,190
1982-83	540,510

Although there has been little change in the number of lawsuits filed in 1976-77 and in 1982-83, during the same time the population of California rose from 21,900,000 to 25,110,000.

If 21,900,000 people filed 523,391 lawsuits in 1976-77, 25,110,000 people living in California in 1983 reasonably could be expected to have filed at least a proportionate number of suits, or approximately 600,000 new cases. As it turned out, only 540,510 cases were filed.

On this evidence it could be argued that Californians are losing interest in turning to the courts to solve disputes, but most probably the decline simply is the sign of a healthy economy.

During good economic times, both individuals and businesses are enjoying economic success and work out their differences without resorting to courts. It is during economic down-turns, when money is tight, that litigation increases.

Civil filings mirror the ebb and flow of the economy. Because California allows up to four years for the filing of some suits, the litigation spawned by a depressed economy is not seen in the courts until several years afterwards.

Beginning in 1974 and ending in mid-1977, the annual rate of increase in civil filings was 9%. During the preceding period the economy was plagued by recession, unemployment and gasoline shortages. Those economic dislocations are evidenced by the later increase in civil filings, clearly a trailing indicator for the economy.

Following the recovery of the economy, a decrease in Superior Court filings could be expected and did in fact occur.

The myth that court congestion is caused by greedy people and greedy lawyers was created by those who would prefer that citizens never use a court to resolve problems. Lawsuits do not emerge from a vaccum. Rather, they arise out of human problems and relationships. It is impossible to discuss litigation without appreciating the impact of technology, increased social expectations, and changing economic conditions.

There are few questions or social problems in the United States which do not eventually find their way before our courts. That is because our legal system reflects the most vital aspects of our society and the virtually exclusive reliance upon the law to solve every problem.

Unsophisticated observers often conclude that there is a tidal wave of litigation because of court congestion. Their simplistic solution is to merely limit access to our courts.

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tiff has obtained a judgment by default and the insurance company is attempting to deny coverage by claiming a lack of cooperation on the part of its insured, the burden is on the insurance company to show that it has been prejudiced by the lack of cooperation on the part of its insured.

In *Campbell vs. Allstate Insurance Company* (1963) 60 Cal.2d 303; 32 Cal.Rptr. 827, the plaintiff had obtained a default judgment against the defendant's insured. The defendant's insured did not communicate with the defendant at all except to send it a telegram the day of the accident indicating that an accident had happened and indicating where his automobile was located. Eventually, the defendant's insured was served with a Summons and Complaint and a copy was sent to the defendant. The court, in holding that prejudice was not shown, states:

> The facts indicate that plaintiffs were innocent of fault, that Hammer (defendant's insured) was negligent, and that defendant would have been liable on its policy even if Hammer had cooperated with it. Id., at p. 306

However, in *Hull vs. Travelers Insurance Companies* (1971) 15 Cal. App.3d 304; 93 Cal.Rptr. 159, the insurance company did show prejudice because the facts indicated that there was a "substantial likelihood" that the defendant's insured would have prevailed had he cooperated with the insurance company. Therefore, unless liability is clear, it would be a good idea for the plaintiff to send a copy of the complaint to the defendant's insurance company before a default is obtained. Otherwise, he may be stuck with an uncollectable judgment.

CONCLUSION

When obtaining a judgment conclusion by default, it is imperative that the plaintiff cross all his T's and dot all his I's. However, if the plaintiff is careful in obtaining his default and default judgment, he stands a good chance at protecting it against the attacks of a defendant who has chosen to ignore the court's process. ■

LITIGATION EXPLOSION MYTH

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Plans to limit or penalize a person's right to have a case heard by a jury of peers are routinely presented in the Legislature.

In 1984, the president of the State Bar of California actively promoted a plan to penalize litigants by forcing them to pay their opponents attorney's fees if they failed to accurately guess what a jury would award them if they exercised their Constitutional right to a jury trial.

Such cavalier proposals by "bar leaders" should be publicly condemned by all attorneys.

Court congestion is not caused by victims seeking to assert their rights.

In the 1970's, all California counties were forced to follow new criminal laws that required more court time. Many counties reacted by simply transferring criminal cases to civil judges. Fewer civil judges then were available to hear civil cases. Unfortunately many counties continued using old practices and ignored new calendar management techniques. As a result, whatever backlog they had was made worse. That is why these counties continued to fall further behind.

Counties that have enjoyed an up-to-date trial calendar and little court congestion have led the way in modern calendar management.

Alleviating congestion in courts where cases must wait five years to come to trial will require a temporary re-allocation of judicial resources, the adoption of the best court management practices and some incentives to encourage settlement.

But under our present system, many wrongdoers gain an advantage by forcing a victim to endure five-year delays and the system rewards defense delaying tactics, especially when the interest earned on the funds reserved for settlement or judgment exceeds the defense attorney's fees.

One incentive that was recently implemented in Connecticut is pre-judgment interest. Under Connecticut law, interest at the rate of ten percent begins running from the date the complaint is filed. Defendants have nothing to gain by delaying discovery and trial and in significant cases are well advised to promptly seek settlement.

California needs to re-examine its priorities. A system of justice that makes a victim's rights secondary to wrongdoer's financial interest is ill-conceived. It is time for reform. ■