Appeal from Jury or Judge Trial: Defendants' Advantage

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The prevailing "expert" opinion is that jury verdicts are largely immune to appellate revision. Using a database that combines all federal civil trials and appeals decided since 1988, we find that jury trials, as a group, are in fact not so special on appeal. But the data do show that defendants succeed more than plaintiffs on appeal from civil trials, and especially from jury trials. Defendants appealing their losses after trial by jury obtain reversals at a 31% rate, while losing plaintiffs succeed in only 13% of their appeals from jury trials. Both descriptive analyses of the results and more formal regression models dispel explanations based on selection of cases and instead support an explanation based on appellate judges' attitudes toward trial-level adjudicators. That is, these attitudes make the appellate court more favorably disposed to the defendant than are the trial judge and the jury. The especially large difference between appellate court and trial jury dispositions probably stems from the appellate judges' sizable misperceptions about the jury.

1. Introduction

Real life is full of surprises. Empirical studies of litigation certainly deliver their share. Recent jury studies, especially, have dashed prior beliefs. In an earlier article, for example, we showed that in civil

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practice the plaintiffs' trial win rates before jury and before judge differ significantly but in surprising directions (Clermont and Eisenberg, 1992). In categories like product liability and medical malpractice cases, plaintiffs prevail at a much lower rate before juries than they do before judges. Lengthy analysis established that this difference is owing not to differences between jury and judge as adjudicator, but instead to the attorneys' misperceptions about juries. The attorneys expect the jury to be pro-plaintiff and therefore submit to the jury a set of cases with a weaker chance of the plaintiff's winning, producing losing cases disproportionately.

So what happens on appeal? As usual, opinions abound, although here they are somewhat less consistent than those at the trial level. The prevailing "expert" opinion is that jury verdicts are largely immune to appellate revision. "Do not waste much time analyzing jury verdicts," the wisdom goes, for "appellate challenges to jury findings rarely succeed" (Somerville, 1992, p. 25).[1] The lessons reverberate back to the beginning of the process, when expert advice on initially choosing between jury and judge trial sometimes turns on the supposed sacrosanctity of jury outcomes on appeal.[2]

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1. Initial empirical forays have tended to contradict the experts' views of jury sacrosanctity, however: "More jury verdicts than judge verdicts are appealed and more are reversed," so defendants prefer jury trial (Green, 1930, p. 410). See also McLauchlan (1973, p. 467), a flawed study suggesting some appellate court willingness to overturn jury verdicts. Schnapper (1989) conducted a one-year survey of published appeals courts' opinions involving federal appeals that challenged jury verdicts on the evidence. Of the 208 decisions, 102 sustained the challenge. On this thin basis, he inferred that appellate judges were becoming much more willing to overturn jury verdicts and attributed this willingness to growing social and political differences between appellate judges and trial jurors.

2. See, for example, Haydock and Sonsteng (1991, p. 81): "Appellate courts are much less likely to overturn the factual findings of a jury than those of a trial judge because the standards of review are higher in a jury case." Richardson (1983, p. 66) tries further to explain the supposed reality: "Thus it is that the non-prejudicial error rule, the limited ability of appellate courts to correct error after a general verdict in jury-tried cases without a remand and new trial, and unconscious endeavors to economize judicial time and everyone's expense all tend to prevent satisfactory review of some jury verdicts. The rules of law, though seemingly inflexible, are bent—either that or the ruling below is shunted into an enlarging area of trial-judge discretion. A significantly different approach is made in the review of non-jury cases where facile remedies for error are at hand."

Systematic empirical testing of such views was not feasible heretofore. Accordingly, we did not pursue jury and judge data to the appellate level in our earlier article (Clermont and Eisenberg, 1992, p. 1134, n.29). Only in fiscal year 1988 did the Administrative Office of the United States Courts start including the district court docket number in its appeals courts data set. We can now thereby build a bridge between the Administrative Office's data on civil trials and its appellate data. No one has done that before.

We have, then, a new database with which to work. It enables us to see that, contrary to the pronounced expertise, civil jury trials as a group are not so special on appeal. But it also shows that defendants succeed surprisingly more than plaintiffs on appeal from civil trials, and especially from jury trials. Defendants appealing their losses after trial by jury obtain reversals at a 31% rate, while losing plaintiffs succeed in only 13% of their appeals from jury trials.

In the three principal sections of this article, we shall further (1) describe our methods, (2) recount our observations, and (3) forward some explanations. The appellate playing field seems unlevel. The primary explanations are based on appellate judges' attitudes toward trial-level adjudicators and on the influence of the selection of cases for appeal. We show that both descriptive analyses of the results and more formal regression models support the attitudinal explanation.

2. Methods

Gathered by the Administrative Office of the United States Courts, assembled by the Federal Judicial Center, and disseminated by the Inter-university Consortium for Political and Social Research, the data convey the outcomes of all cases terminated in the federal courts since fiscal year 1970. When any civil case terminates in a federal district court or court of appeals, the court clerk transmits to the Administrative Office a form containing information about the case.[3] The forms include data regarding the names of the parties, the subject matter category and the

3. See Administrative Office (1985, Title 2, pp. 18–28) and Administrative Office (1989, Ch. 1, pp. 7–43). For a complete description of the Administrative Office database, see Inter-university Consortium for Political and Social Research (1998). For an evaluation of this database, see Clermont and Eisenberg (1998, pp. 585–87).

jurisdictional basis of the case, the origin of the case in the district as original or as removed or transferred, the amount demanded, the dates of filing and termination in the district court or the court of appeals, the procedural stage of the case at termination, the procedural method of disposition, and, if the court entered judgment or reached decision, who prevailed. Thus, the computerized database, compiled from these forms, contains all the millions of federal civil cases over many years from the whole country.

We needed to limit this huge database to those cases that would best reveal the effect of appeal on outcome of civil jury and judge trials. Therefore, we limited the set to cases terminated in fiscal years 1988–97, since these were the years that allowed tracing cases from trial to appellate level.[4] Moreover, we used only the thirteen tort and contract case categories studied in our earlier jury article, which were the sizable categories that most clearly lead to a choice between jury and judge trial (Clermont and Eisenberg, 1992, pp. 1135–36).[5] The thirteen case categories tellingly divide into personal-injury categories (Airplane Personal Injury; Federal Employers' Liability; Assault, Libel, and Slander; Marine Personal Injury; Other Personal Injury; Motor Vehicle; Product Liability; and Medical Malpractice) and non–personal injury categories (General Contract, Torts to Personal Property, Torts to Land, Negotiable Instruments, and Fraud).[6]

Then we had to clean up this smaller data set. We eliminated duplicate case records, and adjusted for cross, consolidated, and reopened appeals—with insubstantial effect.[7] We made these refinements to limit

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For easy access to part of this database, see Eisenberg and Clermont (1998), a web site that is discussed in Eisenberg and Clermont (1996a).

4. In order to pick up those appeals that had not yet terminated by September 30, 1997, and thereby accurately to calculate the appeal rate, we added the set of appellate cases pending in fiscal year 1997. We could do this because court clerks transmit a form upon each case filing, as well as upon each case termination.

5. This narrowing of focus involved eliminating cases in which the United States was the defendant, as usually no jury right there exists. This time, however, we did not drop cases because the datum of amount demanded was missing.

6. Within the two groups, the categories appear in ascending order by win ratio, which is the plaintiffs' trial win rate in judge trials over their trial win rate in jury trials (Clermont and Eisenberg, 1992, p. 1137).

7. That is to say, running similar analyses without making these refinements yielded essentially the same results, but we do not report them here.

the set to those cases for which we could reliably match district and appellate court data.

We finally were ready to match the district data to the appellate data, doing so by requiring identity of the district court's docket number and filing date in the district data set and the appellate data set. Our ultimate aim was to compute the appeal rate and, among the decided appeals, the reversal rate.

First, the appeal rate is, in general, the percentage of terminated district court cases that reach the appellate court docket. If one limits the focus to judgments in the district court for either plaintiff or defendant, one can calculate a plaintiffs' appeal rate and a defendants' appeal rate. If the judgment was for plaintiff, we initially inferred that the defendant was the appellant. However, examining the parties' names revealed that more than a quarter of the appeals from judgment for plaintiff have a dissatisfied plaintiff as appellant. So, we then simply discarded those appeals from judgment for plaintiff in which the plaintiff is appellant or the defendant is appellee.[8] Thus, by looking at the remaining appeals, we are more truly comparing appeals by plaintiffs and defendants from judgments entered against them. So, the *appeal rate* is the percentage of district court judgments formally for one side that the other side puts on the appellate court docket.

Second, the *reversal rate* is the percentage of those remaining appeals that reach a decisive outcome and that emerge as reversed rather than affirmed. We define the appellate outcome of "reversed" as comprising the three codes for reversed, remanded, and affirmed in part and reversed in part, while we narrowly define "affirmed" as comprising only the codes for affirmed and dismissed on the merits. One can readily calculate a plaintiffs' reversal rate and a defendants' reversal rate.

8. If we were somehow to treat rather than discard that special category of appeals—appeals by plaintiffs from judgment for plaintiff—the effect would be to raise the defendants' appeal rate, because the denominator (plaintiffs' wins at trial) would decrease. Moreover, if we were to recognize that these cases and others might involve plaintiff trial losses despite the formal judgment for plaintiff, the effect would be to lower the plaintiffs' trial win rate. (Incidentally, the reversal rate for that special category of appeals is virtually identical to the defendants' reversal rate.)

3. Observations

3.1. Overall Results

Jury and judge trials. As to the jury or judge distinction on appeal, none of the prior opinion on jury sacrosanctity proves correct. The fact is that jury trials on appeal, overall, are not that special. Considering judgments for plaintiff or defendant after a completed trial, Table 1 shows that jury and judge trials both experience an appeal rate of about 21% and a reversal rate also of about 21%. Nothing striking distinguishes jury trials from judge trials, from the overall vantage.[9]

This result is more than superficially surprising. If litigants think that jury trial results are hard to overturn on appeal, one would expect them to appeal only their strongest cases. One would thus expect for jury trials a lower appeal rate and maybe a higher reversal rate. But one sees neither. This absence of jury/judge differences gives an inkling that selection of cases for appeal does not work as usually theorized.

Affirmance rate. The striking result in the overall trial data is the high affirmance rate of 79%, complementing the reversal rate of 21%. All judgments for plaintiff or defendant, both tried and nontried, show an 81% affirmance rate.[10]

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9. The first couple of lines of Table 1 make it look as if jury trials are slightly less likely to be appealed than judge trials. But in fact jury trials might be slightly more likely to be appealed. A regression of the appealed variable—with other independent variables of case category, plaintiff win at trial, year, district, status as a reopened appeal or not, and origin status as original, removed, or transferred—gives the independent variable of jury trial a coefficient of .028 with $p = .519$. The positive coefficient suggests that the characteristic of jury trial, relative to judge trial, increases the likelihood of appeal, albeit insignificantly. The percentage data of Table 1 masks this effect because of factors such as the preponderance of highly appealed contract cases among judge trials. The regression technique controls for such factors. If jury trials were in fact to produce more appeals than judge trials, the reason might be their greater legal complexity. Also, jury trials are reversed insignificantly more, despite the facts that a jury verdict on appeal has already been subject to trial-judge correction and that judicial factfinding is theoretically more open to appellate review than jury factfinding. A similar regression of the affirmed variable gives the jury trial variable a coefficient of $-.062$ with $p = .655$. See Green (1930, p. 405): "The chances for reversible error due to the treacherous steps of the extended process of jury trial are so great." More complete regression models of appeal and affirmance appear in section 4.3.

10. See Table 5. Compare Songer and Sheehan (1992, p. 240): 84% affirmance rate, in 4281 hand-coded cases from three circuits in calendar year 1986. Our rate of

Table 1. Appeals from Federal Civil Trials by Jury or Judge, for Fiscal Years 1988–97, Further Distinguished by Plaintiff or Defendant Win at Trial

	Jury Trials	**Judge Trials**	**Totals**
Overall number of trial judgments	15,157	6,258	21,415
Appeal rate	20.21	22.42	20.85
Affirmances and reversals	1,465	678	2,143
Reversal rate	20.82	20.50	20.72
Number of plaintiff trial wins	7,737	3,770	11,507
Defendants' appeal rate	19.85	19.50	19.74
Affirmances and reversals	623	311	934
Defendants' reversal rate	31.14	22.83	28.37
Number of defendant trial wins	7,420	2,488	9,908
Plaintiffs' appeal rate	20.58	26.85	22.15
Affirmances and reversals	842	367	1,209
Plaintiffs' reversal rate	13.18	18.53	14.81

At first glance, this high affirmance rate might seem unsurprising. One might expect a high affirmance rate because of appellate deference to the district court's result (Clermont, 1987, pp. 1126–31). One might even expect a high affirmance rate when review is de novo, because of the tendency of experts to agree at about a 75% rate (Clermont and Eisenberg, 1992, pp. 1153–54). Combining expert agreement with appellate deference would push the expected affirmance rate even higher. Appellate judges should and do lean toward affirmance as the usual course.

However, if the high affirmance rate is owing in part to those deference and expertise factors, why do the parties not take them into account and settle all but the close appeals? The usual brand of selection theory says

affirmance may seem high compared to some reports. For example, see Eisenberg and Schwab (1989, pp. 517–18): 66% affirmance rate, even when cases affirmed in part and reversed in part were disregarded. Compare Wheeler et al. (1987, pp. 437–38): 60% affirmance rate in state supreme courts. Our rate is higher because we are looking at all appeals rather than merely at published appeals, which are skewed toward reversals. If we were to limit our sample to those appeals producing published opinions, our affirmance rate would drop from 81% to 64%.

that appeals should act like trials.[11] Case selection should therefore whittle down that high affirmance rate. Appeals that clearly favor either the appellant or the appellee should tend to be dropped or settled readily, because both sides can save costs by so acting on their full knowledge of the case. Difficult appeals falling close to the applicable decisional criterion tend not to settle, because the parties are more likely to disagree substantially with respect to their predicted outcomes. These unsettled, difficult appeals entailing divergent expectations fall more or less equally on either side of the decisional criterion, regardless of both the position of that criterion and the underlying distribution of disputes. Case selection, then, should leave for appellate adjudication a residue of unsettled appeals exhibiting some nonextreme affirmance rate. Indeed, under simplifying assumptions, and as a limiting implication, selection theorizing would even predict a 50% affirmance rate.[12] That is clearly wrong, as the data prove. And that fact teaches two important lessons.

11. See Priest and Klein (1984, p. 54), who claim their model "applies indistinguishably to trial and appellate disputes." Priest and Klein do note that, on appeal, the parties' interest in precedent may create differential stakes. However, if defendants have a greater interest in precedent, then defendants should appeal less often, which is not a pronounced effect in our data. So the factor of precedent making appears minimal in these ordinary tort and contract categories under study.

12. A subvariety of selection theory that stresses asymmetric information, rather than divergent expectations, does predict extreme win rates. This subvariety, nicely described in Waldfogel (1998, pp. 451–52), posits that one side of the litigation is better informed than the other as to expected outcome, leading to a one-sided selection of cases for adjudication and hence an extreme win rate that disfavors the uninformed side. Thus, on appeal, one could argue that the appellants are better informed and so settle their weak cases, resulting in a very high affirmance rate. Three reasons exist to dismiss asymmetric information as the explanation of the 80% affirmance rate, however. First, some empirical study suggests that asymmetric-information effects play themselves out in the early settlement and adjudication stages of the litigation process, disappearing by the time of trial. See Waldfogel (1998, pp. 466–74), but compare Osborne (1999b, pp. 399–400), who shows that an asymmetric-information disadvantage for contingency fee plaintiffs persists through trial. It is conceivable that asymmetric information might somehow reappear on appeal from completed trials. But renewed asymmetric information is unlikely. As both sides on appeal will be working from the same record and a delimited law, no reason exists to posit renewed asymmetric information. All the information should be on the table at the stage of appeal, so quite simply there remains no place for asymmetric information. Second, asymmetric-information theory predicts case-category-specific effects, with win rates varying with those categories in which plaintiffs *or* defendants tend as a group to be relatively well informed. Thus, tort categories exhibit low pretrial plaintiffs' win rates, whereas contract categories show high rates. But the data on appeal do not show case-

First, the elevated affirmance rate suggests that settlement is not effective at the appellate stage in weeding out clear cases. If every case underwent appeal, one would expect about an 80% affirmance rate because of reviewer's deference and because of experts' agreement. In fact, only a fraction of cases undergo appeal, and yet one still sees an 80% affirmance rate. It seems as if the parties have chosen, by whatever selection method they employ, a set of cases to appeal that functions, at least with regard to overall affirmance, as if it were a random sampling. In sum, case selection seems to have limited effect in systematically filtering the cases for adjudication on appeal.

Why would that be? Perhaps the failure to filter out clear appeals is owing to appeals' not being very costly (Posner, 1996, p. 195).[13] After slogging through trial, the small cost and effort in appealing must seem comparatively insignificant. Trial leaves the winner feeling vindicated; the aggrieved loser, wanting justice at long last. More than a fifth of the parties decide that they may as well stagger to the finish line, almost regardless of the chances on appeal. Something telling emerges in the countless scenes on the evening news in which losers immediately proclaim on the courthouse steps their intentions to appeal. Simply put, an 80% affirmance rate suggests that the law should consider reform aimed at the efficiency of forcing the would-be appellant to pause.[14] An obvious reform candidate would involve shifting attorneys' fees on appeal to a losing appellant,

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category-specific effects (see note 18). Third, asymmetric-information theory predicts an extreme rate, but an 80% affirmance rate resembles the underlying mass of disputes constituting possible appeals. Asymmetric information does not move the affirmance rate from the rate expected if the parties appealed all judgments. Instead, the selection of cases for appeal seems to reflect little or no systematic filtering on the basis of case strength.

13. Other possible explanations for the many unsuccessful appeals include that the appellants' motivation is not error correction but the pursuit of a fairer process or simple satisfaction (see Barclay, 1999a, pp. 1–5; Barclay, 1999b). Compare Osborne (unpublished), who empirically suggests that federal appeals courts are not very effective in correcting errors. There is, indeed, considerable room for debate on why society provides an appellate system, as well as on why parties utilize it (see Barclay, 1999a, p. 7; Carrington, Meador, and Rosenberg, 1976, pp. 2–4). These debates, however, do not illuminate why defendants have such an advantage on appeal.

14. See Shavell (1995, pp. 385, 421, 424), who suggests a need for increased fees.

which would seem a fair condition of access to a second court for a party already found to be in the wrong.[15]

Second, for the purposes of our study, the elevated affirmance rate suggests, although it does not by itself prove,[16] that we can interpret the resulting data in a straightforward way. Selection theory often renders outcome data ambiguous (Clermont and Eisenberg, 1998, pp. 588–91). Because the set of cases selected for litigation can be a biased sample of the underlying mass of disputes, it can be difficult to conclude anything by looking at outcome data. Here, however, as case selection on appeal appears more or less consistent with randomness, the outcome data become easier to interpret. If defendants were to prevail more often than plaintiffs on appeal, for example, that result would suggest that appellate courts favor defendants more than trial courts do.

3.2. Defendants' Advantage

Defendants' appeal and reversal rates. Upon losing after a completed trial, defendants appeal slightly less often than do plaintiffs.[17] Table 1 shows in its totals that defendants appeal 20% of their losses and plaintiffs

15. See generally Field, Kaplan, and Clermont (1997, pp. 167–69). Unless a statute or rule authorizes fee shifting on appeal, and such provisions are rare, attorneys' fees on appeal are currently not taxable as costs. See Speiser (1973, sec. 12:21), and compare Federal Rule of Appellate Procedure 38 on frivolous appeal. See also Wright, Miller, and Cooper (1999, pp. 678–79): "Nevertheless imposition of sanctions for a frivolous appeal is decidedly the exception rather than the rule. Courts do not want to discourage appeals that might prove meritorious, even though the chances for their success seem weak."

16. For further proof of the ineffectiveness of case selection at the appellate level, see sections 4.2–4.3. Indeed, there our formal modeling of the selection process confirms that the straightforward interpretation of the data is correct.

17. A regression of the appealed variable—with other independent variables of case category; jury trial; year of district court termination; district; status as a reopened appeal or not; and origin status as original, removed, or transferred—gives the independent variable of plaintiff win at trial a coefficient of $-.207$ with $p < .0005$. A more complete regression model of appeal appears in section 4.3. The difference between plaintiffs' and defendants' appeal rates is statistically significant, but less than telling. First, the regression coefficient is small, indicating a small difference. Second, as Table 5 will show, plaintiffs appeal much more than defendants from pretrial judgments, but by trial this difference has largely disappeared. Third, the defendants' appeal rate is understated, because it is the percentage of all formal judgments for plaintiff taken by defendant to the appellate court, but some of the unattacked judgments are really plaintiff losses at trial (see note 8).

appeal 22%. The rates are quite close. By the time the docket has dwindled to tried cases, plaintiffs and defendants are almost equally inclined to litigate further, and they appeal at about the same rate.

Much more interestingly, upon appealing a loss after a completed trial, defendants succeed much more often than do plaintiffs on plaintiffs' appeals.[18] Table 1 shows in its totals that defendants reverse 28% of their losses but plaintiffs reverse only 15%. In other words, the overall reversal rate of 21% masks some significant differences between defendants and plaintiffs. It appears that appellate courts are exhibiting concern that the trial court favored the plaintiff.[19]

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18. A regression of the affirmed variable—with other independent variables of case category; jury trial; year; district; status as a reopened appeal or not; and origin status as original, removed, or transferred—gives the independent variable of plaintiff win at trial a coefficient of −.753 with $p < .0005$. Indeed, this plaintiff-win variable is the only variable left by this advanced stage of the litigation process that has an important effect on reversal rate. Here are some of the regression results, with the independent variable, coefficient, and significance, respectively. Jury trial, −.062, .655; Plaintiff win, −.753, .000; Year of termination, −.037, .093; Constant, 4.917, .020. For all results, chi-squared (109) = 181.17; $p >$ chi-squared = .00005; pseudo r-squared = 0.0830; log likelihood = −1,000.922. A more complete regression model of affirmance appears in section 4.3.

19. First, instead of comparing the plaintiffs' reversal rate on their appeals with the defendants' comparable rate, we can calculate the quite different measure of the plaintiffs' success rate on plaintiffs' and defendants' appeals combined, to which the defendants' success rate would be complementary. The plaintiffs' success rate is the percentage of plaintiff wins—be they reversals on plaintiffs' appeals or affirmances on defendants' appeals—among all appeals with a decisive outcome. This appellate success rate is an analogue to the trial win rate. In fact, the plaintiffs' success rate on appeal correlates strongly with plaintiffs' win rate at trial. The clearly positive correlation between appellate success rate and trial win rate shows that the appellate system works rationally overall, with strong plaintiffs performing strongly on appeal. That is, it shows that categories with high plaintiffs' win rates at trial tend to have high plaintiffs' success rates on appeal. Second, for all categories the plaintiffs' success rate on appeal is lower than the trial win rate. So, plaintiffs are performing worse on appeal than at trial. Indeed, in most categories, the plaintiffs are prevailing in fewer than half the appeals. Interestingly, if the trial win rate lies below 50%, the appellate success rate tends to be almost equal; as the trial win rate exceeds 50%, the appellate plaintiffs' success rate tends to drop increasingly below the trial plaintiffs' win rate. These bifurcated tendencies push the trial and appellate composite rate of finally prevailing toward 50%. This bifurcation effect shows that the parties, in selecting cases for litigation, rationally view the cases in the context of the whole litigation process, taking the probability of their success on appeal into account. That is, when we say that the parties tend to litigate only the close cases, we mean close not only in terms of trial outcome, but even more so in terms of final outcome after any appeal. Third, this bifurcation

This reversal-rate advantage of defendants does not depend on particular categories of cases. As Table 2 shows, every category but Negotiable Instruments exhibits the same pattern. Defendants fare better on appeal than do plaintiffs. The defendant/plaintiff differences within the larger categories are significant.[20] Negotiable Instruments, although exhibiting an insignificant difference, may be the exception that proves the rule. This case category usually involves financial institutions seeking to enforce written promises to pay. This category is peculiar in several regards. With its image of a substantial plaintiff relying on documentary proof, it is the category least likely to inspire fear of pro-plaintiff bias at the trial court level. More objectively, it is the category with the smallest percentage of its trials being by jury. Although its defendant and plaintiff reversal rates for judge trials are 11% and 33%, respectively, Negotiable Instruments sees the more typical rates of 38% and 20% for jury trials.

Moreover, this reversal-rate advantage of defendants does not depend on the type of party. For the numerous diversity cases, we can distinguish corporate from individual plaintiffs and defendants.[21] Corporate

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effect differs from the "refraction effect" posited in Clermont and Eisenberg (1998, pp. 590–91) and proven in Waldfogel (1998, pp. 471–74). The refraction effect describes the tendency of clear cases to drop out as litigation progresses, so that the win rates at the various pretrial stages progressively close in on some nonextreme trial win rate. For the refraction effect, the appropriate appellate analogue to the trial win rate is the affirmance rate, as it measures the performance of the initiator of the dispute on appeal. If the district court refraction effect were to continue through appeal, the result would be an affirmance rate edging closer yet to 50%. However, the affirmance rate is in fact very elevated, because the selection of cases for appeal does not continue to filter out more of the clear cases. Instead, the appellate stage seems to mark an altogether fresh start in the case selection process.

20. Differences between the categories may look intriguing, but one cannot reject the hypothesis that case category is irrelevant to defendants' and plaintiffs' reversal rates (see note 18). In the bivariate probit models reported in the Appendix tables, a test of the hypothesis that the case-category coefficients are jointly zero yields high p-values, so one cannot reject that hypothesis.

21. Similarly, we can distinguish the U.S. as plaintiff from all other plaintiffs by using the jurisdictional-basis code. Like corporations, governmental plaintiffs appeal more and obtain more reversals. Governmental plaintiffs appeal at a rate of 31.34%, compared to nongovernmental plaintiffs' appeal rate of 22.11%. Governmental plaintiffs reverse at a rate of 50.00%, compared to nongovernmental plaintiffs' reversal rate of 14.57%. However, the number of such governmental cases in our data set is small, and we eliminated all cases with the U.S. as defendant (see note 5).

Table 2. Reversal Rates after Federal Civil Trials, for Fiscal Years 1988–97, Distinguished by Case Category

Case Category	Overall Reversal Rate	Defendants' Appeals		Plaintiffs' Appeals		Significance of D-P Differential
		Affirmances and Reversals	Reversal Rate	Affirmances and Reversals	Reversal Rate	
Airplane Personal Injury	27.27	2	50.00	9	22.22	.491
Federal Employers' Liability	13.04	24	16.67	45	11.11	.709
Assault, Libel, Slander	23.81	20	40.00	22	9.09	.030
Marine Personal Injury	18.49	30	26.67	89	15.73	.186
Other Personal Injury	17.75	144	27.78	211	10.90	.000
Motor Vehicle	15.06	48	25.00	118	11.02	.031
Product Liability	21.52	144	38.19	265	12.45	.000
Medical Malpractice	16.87	14	21.43	69	15.94	.697
General Contract	23.42	414	25.85	316	20.25	.079
Torts to Personal Property	22.86	16	31.25	19	15.79	.424
Torts to Land	11.11	8	25.00	10	0.00	.183
Negotiable Instruments	21.15	41	19.51	11	27.27	.681
Fraud	33.33	29	41.38	25	24.00	.249

parties appeal more[22] and obtain more reversals.[23] But corporate defendants fare better than corporate plaintiffs as appellants, just as individual defendants fare better than individual plaintiffs as appellants. So, "haves" may do better than "have nots" on appeal because of more skill and greater resources,[24] but there is a separate defendants' advantage worthy of study.[25]

Jury and judge trials. Returning to the theme of differences between jury and judge, Table 1 shows that jury wins by plaintiff are, relative to jury wins by defendants, heavily reversed, whereas jury wins by defendant are relatively solid.[26] The defendant and plaintiff reversal rates for jury trials are 31% and 13%, respectively. These results are highly statistically significant.[27] Judge trials show the same pattern to a lesser degree. Here the defendant and plaintiff reversal rates are 23% and 19%, respectively.[28] It appears that appellate courts are exhibiting special concern that the jury favored the plaintiff.[29]

The insight that the appellate courts could be leaning toward undoing trial court and jury trial favoring of plaintiffs would predict a perceptible difference between personal injury case categories and non–personal

22. Corporate plaintiffs appeal at a rate of 28.47%, compared to individual plaintiffs' appeal rate of 20.19%. Meanwhile, corporate defendants appeal at a rate of 22.39%, compared to individual defendants' appeal rate of 17.11%.

23. Corporate plaintiffs reverse at a rate of 21.51%, compared to individual plaintiffs' reversal rate of 12.48%. Meanwhile, corporate defendants reverse at a rate of 27.51%, compared to individual defendants' reversal rate of 23.95%.

24. See Songer and Sheehan (1992, pp. 253–55). Compare Wheeler et al. (1987, pp. 438–39, 442–44) on the smaller advantage of "haves" in state supreme courts.

25. When we add governmental-plaintiff, corporate-plaintiff, and corporate-defendant status as independent variables, with the appropriate interaction variables, to the regression reported in note 18, the coefficient of the plaintiff-win variable actually increases in absolute value from $-.753$ to $-.868$, while remaining highly significant. Thus, a separate effect tied to defendant/plaintiff status definitely exists.

26. Schnapper (1989, p. 250) finds similarly that in his jury cases, the defendants managed to reverse at a 53% rate, whereas the plaintiffs managed only 23%.

27. The significance, by Fisher's exact, is $p < .0005$.

28. The significance is $p = .182$. We used our earlier jury article's definition for judge trial as procedural progress being coded 8. We also experimented with using the arguably finer definition of disposition method coded 9 and procedural progress not equaling code 6 (Eisenberg and Clermont, 1996b, p. 178, n.10), but this change had an insubstantial effect.

29. We could break down the jury trial variable, in the regression reported in note 18, into separate variables for plaintiff and defendant wins before jury and judge. That step confirmed the message of Table 1 and its statistical significance.

injury case categories, as the latter type rests less on the format of little victim against big defendant. The appellate courts, the prediction runs, stand ready to counteract pro-plaintiff bias in personal injury cases. They especially mistrust the jury. So, the biggest differential between defendants' and plaintiffs' reversal rates should be for personal injury jury cases, and the smallest should be for non–personal injury judge cases. Table 3 bears this prediction out. Its first rows show that the differential between defendants' and plaintiffs' reversal rates is 19% for personal injury jury trials, whereas the differential disappears for non–personal injury judge trials.[30] Corroboratively, the same pattern shows up in the governmental, corporate, foreign, and out-of-state data presented in the rest of Table 3.[31] In each situation in which the trial court, and especially

30. The defendant and plaintiff reversal rates for jury and judge trials combined are 30.75% and 12.44%, respectively, for personal injury, and 26.38% and 19.95% for non–personal injury. The results here are basically consistent with those previously reported for constitutional tort actions, tried and nontried, where defendants are much more successful in obtaining reversals than are plaintiffs, but the difference disappears in the control group of non–civil rights cases (Eisenberg and Schwab, 1989, pp. 516-19), defendant and plaintiff reversal rates being 48% and 38%, respectively, in nonprisoner constitutional tort actions, 69% and 48% in prisoner constitutional tort actions, and 33% and 35% in the control group. Incidentally, in our data the jury and judge reversal rates for defendants and plaintiffs combined are 18.97% and 17.07% for personal injury, and 25.48% and 21.99% for non–personal injury. The overall reversal rate is 18.66% for personal injury, and 23.62% for non–personal injury.

31. The governmental data rely on the jurisdictional-basis code. We can distinguish the U.S. as plaintiff from all other plaintiffs. In suits brought by those two types of plaintiff, we can then compare defendant and plaintiff reversal rates after jury and judge trial. The hypothesis is that appellate courts might suspect trial courts of favoring nongovernmental plaintiffs. The other data come only from diversity cases, where party status is coded. For these cases we can distinguish corporate from individual parties, non-American from American parties, and Americans domiciled in the forum state from out-of-state Americans. We can then compare reversal rates. First, we can compare rates for suits brought by individuals against Americans to suits brought by corporations against the same type of defendant; the hypothesis is that appellate courts might suspect trial courts of favoring individual plaintiffs. Second, we can compare rates for suits brought by Americans against Americans to suits brought by foreigners against the same type of defendant; the hypothesis is that appellate courts might suspect trial courts of favoring domestic plaintiffs. Third, we can compare rates for suits brought by Americans against foreigners to suits brought by foreigners against Americans; the hypothesis remains that appellate courts might suspect trial courts of favoring domestic plaintiffs more than foreign plaintiffs. Fourth, we can compare rates for suits brought by in-state Americans against out-of-state Americans to suits brought by out-of-state Americans against in-state Americans; the hypothesis is that appellate courts might suspect trial courts of favoring local plaintiffs more than nonlocal plaintiffs.

Table 3. Reversal Rates after Federal Civil Trials by Jury or Judge, for Fiscal Years 1988–97, Distinguished by Type of Case

	Jury Trials						Judge Trials					
	Ds' Reversal Rate		Ps' Reversal Rate				Ds' Reversal Rate		Ps' Reversal Rate			
Type of Case	*n*	%	*n*	%	D-P Differential	Significance	*n*	%	*n*	%	D-P Differential	Significance
Personal injury	369	31.17	680	12.35	18.82	.000	57	28.07	148	12.84	15.23	.013
Non–personal injury	254	31.10	162	16.67	14.43	.001	254	21.65	219	22.37	−0.72	.911
Nongovernmental plaintiff	614	31.43	841	13.20	18.23	.000	298	23.49	360	17.78	5.71	.080
Governmental plaintiff	9	11.11	1	0.00	11.11	.999	13	7.69	7	57.14	−49.45	.031
Individual v. domestic	347	27.38	537	11.36	16.02	.000	111	27.03	138	13.04	13.99	.006
Corporate v. domestic	103	30.10	80	18.75	11.35	.088	102	22.55	81	24.69	−2.14	.861
Domestic v. domestic	450	28.00	617	12.32	15.68	.000	213	24.88	219	17.35	7.53	.060
Foreign v. domestic	19	26.32	16	18.75	7.57	.700	25	8.00	14	21.43	−13.43	.329
Domestic v. foreign	67	47.76	83	18.07	29.69	.000	23	26.09	30	16.67	9.42	.501
Foreign v. domestic	19	26.32	16	18.75	7.57	.700	25	8.00	14	21.43	−13.43	.329
In-stater v. out-of-stater	286	30.42	385	9.87	20.55	.000	121	24.79	126	15.08	9.71	.078
Out-of-stater v. in-stater	93	20.43	145	16.55	3.88	.492	68	23.53	59	18.64	4.89	.524

the jury, might be suspected of showing pro-plaintiff bias, the appellate courts step in to favor the defendant.

4. Explanations

4.1. Attitudinal Explanation

Defendants' high reversal rate. Of course, many biases, off the merits, affect outcome at trial and on appeal (LoPucki and Weyrauch, 2000). The starkly higher reversal rate for defendants implies decisional bias. That is, an attitudinal bias regarding plaintiffs and defendants seems to be at work in our data, as trial and appellate courts are differing systematically.

On the one hand, the trial court might be pro-plaintiff because of natural empathy with a victim and a willingness to dip into a defendant's deep pockets. Trial courts might also focus overly on the case immediately before them and shun any long-term view (Clermont, 1987, pp. 1139–42; Tversky and Kahneman, 1982, pp. 163–65, 174–78). Meanwhile, the appellate court is not so naturally pro-plaintiff, as it deals with a cold record and is "pro-law" in attitude. Appellate judges are also more constrained by the opinion-writing task and the force of precedent, just as they are more concerned with the future effect of their decisions (Tigar, 1993, p. 8). So, trial courts should be pro-plaintiff relative to appellate courts.

On the other hand, an improper pro-plaintiff tilt of the trial court may exist only or mainly in the appellate court's imagination. By imagining a trial court tilt, the appellate courts may lead themselves into pro-defendant behavior. In a more affirmative way, the appellate judges may be relatively pro-defendant because of social and political differences from trial courts.

The differing reversal rates therefore imply merely that the trial court *either* is pro-plaintiff *or* is seen by the appellate court as being pro-plaintiff. Which court is being realistic and which court is showing bias: is the trial court biased in favor of the plaintiff, or is the appellate court overcorrecting in the other direction? This question generates an empirical inquiry: is the trial court exhibiting the particular bias of being pro-plaintiff?

In fact, researchers have conducted empirical studies on this point, and the studies show little pro-plaintiff bias at the trial level (Lempert, 1998,

pp. 454–55; Saks, 1998, pp. 229–30; Vidmar, 1998, pp. 868–71). The studies "contradict popular media portrayals of modern American culture as pro-plaintiff" (Vidmar, 1998, p. 870). Indeed, the process's insiders who are actually adjudicating the cases appear to do a reasonably neutral job.

Thus, the defendants' high reversal rate more likely results in large part from outsiders' misperceptions of the trial process than from bias within the trial process. That is, the suspected cause is the appellate courts' misperceptions of the trial court as pro-plaintiff and their consequent favoring of defendants on appeal.[32]

Before development of our data, researchers had not studied this particular possibility of appellate courts' misperceptions. But we do know that persistent misperceptions of the liability crisis pervade the populace and the profession (Clermont and Eisenberg, 1992, pp. 1149–51, 1172; Glaberson, 1999). They imagine a biased and incompetent trial system handing vast sums over to undeserving plaintiffs.[33] Why should appellate judges, who remain human after all, be immune?[34] If litigating attorneys fall prey to misperceptions, then the more distanced appellate judges should be even more susceptible to misperceptions about the adjudicators. Attorneys' misperceptions are subject to the correction of actual adjudication, but appellate judges are free to exercise their biases without any check. If they believe that the trial court has improperly favored the plaintiff, they can simply reverse on the defendant's appeal, without further check.

One can well imagine in these days that when a defendant has managed to eke out a victory, an appellate court may think—as the rest of us do when reading a newspaper report of the case—that this defendant must really have been innocent, indeed outrageously accused. So the plaintiff faces an uphill battle to overturn the outcome, on whatever grounds. Just

32. Although almost all circuits (all except the DC Circuit) show the defendants' higher reversal rate, some show it insignificantly and others show it substantially. These variations in local culture are consistent with an attitudinal explanation.

33. See, for example, Cantor (1997, p. 227): "In American courts—with juries wanting to sock it to big corporations with seemingly infinitely deep pockets, and lax or populist or incompetent judges letting the liability bar run riot—anything can happen."

34. See Robertson (1999, pp. 150–51): "I want desperately to excise from my judging all legally impermissible thoughts. I concede here only my suspicion that I am as fallen in my judicial duties as in other dimensions of my life."

as easily imagined is that when our trial system rewards yet another plaintiff, an appellate court may start as suspicious of the judgment. The defendant faces a receptive audience on appeal. We have all lost some faith in our trial system (Resnik, 1986), and those—such as appellate judges—in a position to work "reform" would be apt to act, or rather lean, in accordance with their beliefs.

We are not forwarding a simplistic political explanation for this difference between appellate and trial courts. After all, Presidents Reagan and Bush appointed approximately equal proportions of judges to the courts of appeals *and* to the district courts.[35] Moreover, political leanings seem not to affect judicial decisions in run-of-the-mill cases,[36] as opposed to politically charged cases.[37] So, in our data, it is not that appellate judges differ politically from trial judges, but that they as a group see the trial courts' output differently. Likewise, we are not proposing a conspiracy theory of concerted action by appellate judges. Instead, we are invoking the not unlikely notion that appellate judges entertain some of the same misperceptions as the populace.

What kind of appellate leaning, specifically, is this article envisaging? The tobacco litigation provides examples.[38] To date, every trial court judgment awarding damages for smoking liability has suffered reversal (Meier, 1999).[39] Illustrative is the Florida state jury verdict for a million

35. See Goldman (1993, p. 295), which shows that Reagan-Bush judges constituted 61% of the appeals courts' bench and 60% of the district courts' bench in 1992.

36. See Ashenfelter, Eisenberg, and Schwab (1995). Compare Blume and Eisenberg (1999), which shows little effect of mode of becoming judge, in death penalty cases; and compare Sisk, Heise, and Morriss (1998, pp. 1465–70), which shows little effect of party affiliation, in cases on sentencing guidelines.

37. See Pinello (1999), which shows the influence of judges' political leanings, but using cases on civil rights, criminal justice, and economic regulation; Revesz (1999), which shows the influence of DC circuit judges' political leanings on environmental regulation cases; and Tiller and Cross (1999), which shows the influence of judges' political leanings on appellate outcome in discrimination and environmental cases.

38. Tobacco is not a unique example. The media defendants who lost the recent Jenny Jones verdict announced immediately their plans to appeal. A news magazine predicted the outcome: "There's a good chance they could be successful. Appellate courts tend to be more protective than juries of the media—which is why about 80% of jury verdicts in libel cases end up getting reversed" (Cohen, 1999, p. 70).

39. Of course, tobacco's perfect record will likely not last forever. The recent massive shift in public attitude against tobacco should eventually reach the appellate judges (Ieyoub and Eisenberg, 2000).

dollars awarded Angela Widdick against Brown & Williamson.[40] There the appellate court reversed for failure to transfer venue from Duval County to Palm Beach County (*Brown & Williamson Tobacco Corp. v. Widdick,* 1988; see "Florida," 1999). The appellate court did not get into the facts—indeed, it mysteriously failed even to mention the jury verdict—but found a legal ground to undo the outcome. More generally, a judicial predisposition or suspicion would increase the chances of an appellate court's locking onto some such legal error, and thereby overturning a plaintiff's victory.

A converse example would be the celebrated Woburn toxic tort case. The federal trial judge there led the jury to a verdict for the defendant (*Anderson v. Beatrice Foods Co.*, 1990). Despite tragic facts and questionable rulings that were appealing enough to make the later trip to the bestseller list and to Hollywood as *A Civil Action*, the court of appeals affirmed.[41] More generally, by some such technique as finding no abuse of discretion, an appellate court could indulge a leaning to overlook even serious error and thereby uphold a defendant's victory.

In sum, even discounting for the baleful effects of hindsight, we would have found it quite surprising if the data did not show a defendants' advantage on appeal. The appellate judges tend to act on their perceptions of the trial courts' being pro-plaintiff. That tendency would be appropriate if the trial courts were in fact biased in favor of the plaintiff. But as empirical evidence accumulates in refutation of trial court bias, the appellate judges' perceptions appear increasingly to be misperceptions. If that is the fact, this article's data on appellate leaning in favor of the defendant become a cause for concern.

Jury and judge differences. Consider now the special contrast between jury trials and judge trials. The defendants' advantage is much more pro-

40. The illustration could as easily be a federal case, tried by a judge. See, for example, *Irving v. United States* (1998). Extraordinarily, in the fourth trip of this civil case to the court of appeals, the court sua sponte ordered rehearing en banc in order to overturn a million-dollar judgment for "horrific injuries in a workplace accident" caused in 1979 by OSHA's negligence (*Irving*, p. 157). After resolving the unasserted and close legal question, the appellate court applied the discretionary function exception to the FTCA in order to reverse (Webster, 1999).

41. See Harr (1996): "To Schlichtmann, it was apparent that the appeals court wanted to clean up the allegations of malfeasance without in any way disturbing the verdict."

nounced for jury trial. A defendant jury win is sacrosanct, but a plaintiff jury win is surprisingly fragile. These observations provide the strongest evidence in support of our explanation in terms of appellate bias.

Does the defendants' especially high reversal rate mean that juries actually act more pro-plaintiff than trial judges do? This is unlikely. The trial judge has had the opportunity to correct serious jury mistakes.[42] Moreover, considerable research indicates that juries are not substantially different from judges (see Clermont and Eisenberg, 1992, pp. 1151–56; Helland and Tabarrok, 2000; Osborne, 1999a, pp. 197–98; Vidmar, 1998, pp. 868–70, 884–85; and compare Posner, 1999, pp. 1487–502). Indeed, "virtually no evidence exists to support the prevailing ingrained intuitions about juries," but instead "the evidence, such as it is, consistently supports a view of the jury as generally unbiased and competent" (Clermont and Eisenberg, 1992, pp. 1151–52). Yet appellate courts treat jury trials very differently from judge trials. It therefore seems likely that appellate judges' misperceptions are the explanation.

Plaintiffs' jury wins meet much more suspicion than do defendants' jury wins. After all, such appellate misperceptions of juries should not be too surprising, given how widespread these misperceptions are.[43] Most professional people hold antijury views, and the appellate judges are in a position to put them into action.

Jury trials meet much more suspicion of pro-plaintiff bias than do judge trials. Again, such a differential should not be too surprising. It is not simply that appellate judges may view juries as the sickest organ of a sick trial system (Clermont and Eisenberg, 1992, p. 1125). It is also that appellate judges naturally incline to attribute bias to lay juries more than to fellow judges, with whom, after all, they identify (Rachlinski, unpublished). Moreover, the fact that trial judges explain their decisions, while juries do not, may influence the appellate judges.

In sum, our thesis is simple: misperceptions exist, and they have effects. Widespread misperceptions of the trial process exist. These misperceptions affect appellate outcome.

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42. The data used here reflect any such correction in their report of who finally won in the district court.

43. See Saks (1998, pp. 243–45), but compare Hannaford, Dann, and Munsterman (1998, pp. 247–51), which documents trial judges' approving view of the jury.

4.2. Selection Explanations

Differential stakes. A selection theorist inclines toward explaining outcome patterns in terms of variations in the cases filtered into the adjudicative system. For example, the theorist would predict appeal rates based on the parties' differential stakes. The side with more at stake should be willing to settle their weakest cases, so giving them a higher win rate (Clermont and Eisenberg, 1998, p. 589). The plaintiffs' win rate at trial in our thirteen categories is 54%, with that slight elevation presumably owing to the plaintiffs' higher stakes.[44] Selection theory correspondingly predicts that the side with the lower stakes would appeal more. Thus, defendants should appeal more. But they do not, in our data.

Another "fly in the ointment" for selection theory is that plaintiffs, whose higher stakes supposedly make them selective about which cases to contest on appeal, should then show the same heightened success rate on appeal as at trial. As this is decidedly not so in our data, we have further proof that selection is not the driving force on appeal. Instead, the appellate stage marks a fresh start in the case selection process, a clean break from the trial stage.[45] Moreover, any selection of cases for appeal seems overall to reflect little or no systematic filtering on the basis of case strength.[46]

Settlement process. A selection theorist might next try to explain the defendants' high reversal rate by hypothesizing that the parties' incentives to drop and settle appeals differ in other ways. The defendant-appellants would face victorious plaintiffs inclined to settle to preserve some of their victory, while the plaintiff-appellants would face victorious defendants

44. It is, however, not so clear that differential stakes exist. The defendants' greater success rate on appeal drives their trial and appellate composite rate of finally prevailing closer to 50% (see note 19). That is, the plaintiffs may win more at trial, but the defendants' success on appeal pushes the composite rate toward 50%. The parties view the court system as a unitary process, leading to that composite rate of about 50%. This convergence suggests that whole-system rationality rather than differential stakes explains the plaintiffs' elevated trial win rate, as well as the defendants' high rate of appeal. See also note 8 (suggesting that the plaintiffs' trial win rate may be overstated anyway), and note 11 (suggesting that the higher stakes might shift to the defendants on appeal).

45. See note 19.

46. See note 12 and accompanying text.

unwilling to settle having once been vindicated. All that is probably accurate, but the selection theorist must persist to suppose that the losing defendants could therefore settle their weakest appeals and that the victorious defendants would stonewall the appealing plaintiffs on settlement. This strategic behavior on the part of defendants is somewhat improbable, because losing defendants are inclined to bring and prolong fairly hopeless appeals simply in order to delay the day of reckoning. Nevertheless, the selection theorist could persist in arguing that the lopsided eagerness of plaintiffs to settle and some subsequent strategic bargaining of defendants would increase relatively the defendants' reversal rate on appeal—although this effect would have to be considerable to offset the aforementioned effect of differential stakes in increasing the plaintiffs' reversal rate on appeal.

Such a fall-back argument based on selection theory is ultimately unconvincing, given our data. First, the disappearance of the defendants' reversal rate advantage in non–personal injury judge trials—and the same pattern that appears in the governmental, corporate, foreign, and out-of-state trials in Table 3—suggests that the difference lies in the appellate judges' decisions rather than in the parties' settlement process. The plaintiffs' lopsided eagerness to settle and the defendants' strategic bargaining should remain the same in non–personal injury cases and in judge-tried cases, yet the defendant effect diminishes. The decisional bias explanation, however, nicely explains this diminished defendant effect, while surviving predictable counterarguments based on differences in the lawyers involved and their fees.[47] Second, regressions show that, by the

47. First, the selection theorist could counterargue that in going from personal injury to non–personal injury cases, the shift from contingency fee to hourly fee and the decrease in risk aversion make the plaintiffs' lawyers less eager to settle, while the possibility of defendants' lawyers' enjoying an asymmetric-information advantage decreases. The data support a slight shift in plaintiffs' settlement activity, in that the plaintiffs' appeal rate goes from 19.92% for personal injury cases to 28.31% for non–personal injury cases. Nevertheless, the critical part of the counterargument is the defendants' supposedly effective bargaining, and of that there can be no proof. Moreover, this selection theorist's counterargument does not begin to explain the observed differences between jury and judge trials. Second, the same counterargument, as well as a similar data pattern, exists for individual and governmental actions and for individual and corporate actions. Here, however, the likelihood that individuals are more litigious than governments and corporations (Eisenberg and Farber, 1997, 1999) undercuts the selection theorist's counterarguments about settlement. (Admittedly, the litigious-

time of disposition on appeal, the only important variable is who won after completed trial.[48] On the one hand, the insignificance of other variables suggests that case selection on appeal functions largely as a random sampling, rather than a systematic screening. On the other hand, the significance of the plaintiff-win variable indicates an unperceived difference between appellate and trial courts. The regressions indicate that appellate favoring of the defendant is a consistent tendency.

Defendant and plaintiff differences. When pushed, a selection theorist might baldly assert that plaintiffs' appeals fail more than defendants' appeals simply because plaintiffs differ from defendants: perhaps, defendants select their appeals rationally, while plaintiffs select their appeals emotionally.[49] Analogously, defendants might select which of their losses to appeal on a cost-benefit basis (Posner, 1985, pp. 7–10), while losing plaintiffs might reflect their disappointment in the process by seeking to be heard fully on appeal, regardless of their chances of reversal (Barclay, 1999a, pp. 12–14). Subsequent settlement while on appeal, with some such brand of one-sided strategy, would only increase the defendants' edge. Thus, defendants do better as appellants because they have stronger cases.

This final argument is somewhat in the nature of a restatement of the empirical results, but is nonetheless unconvincing. First, no evidence

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individual hypothesis generally accounts poorly for the present appellate data, probably because of the limited filtering role of settlement on appeal.) Third, the selection theorist's counterargument further weakens in explaining the data on foreigners and out-of-staters. No reason exists to expect them to be less eager to settle or better informed. Fourth, just as there is little empirical support for pro-plaintiff bias in the trial court, there is little or no evidence that biases against governments, corporations, foreigners, or out-of-staters exist in fact (Clermont and Eisenberg, 1996; Galanter, 1974; Hans, 1998). Thus, it seems much more likely that appellate misperceptions, rather than selection effect, explain the patterns in Table 3.

48. See note 18.

49. This hypothesis is similar to the asymmetric-information theory discussed in note 12. Alternatively, the hypothesis could run along any of several other dimensions. For example, defendants might have better lawyers than do plaintiffs—but see Wheeler et al. (1987, pp. 432–37), who empirically rebut this hypothesis. For another example, defendants might tend to be "entrepreneurial" in nature and so focus on the instant case, while plaintiffs might be more heavily in the "social welfare" camp focused on long-run reform or in some narrower interest group. See Rathjen (1978, pp. 401–02), who describes these general categories.

exists in our data set for the premise that plaintiffs differ from defendants in rationality in a way that survives the settlement process. Our plaintiffs, after all, have a win rate of 54% at trial. Second, this rationality argument would likely forecast much higher appeal rates by plaintiffs, but plaintiffs' and defendants' appeal rates hardly differ. Rationality differences also fail to explain the pattern of Table 3 regarding personal injury, governmental, corporate, foreign, and out-of-state trials.[50] Third, any rationality difference between the parties would presumably be highly dependent on case category, because prior work has repeatedly shown that win rates vary greatly with the parties' different characteristics in the various case categories (e.g., Clermont and Eisenberg, 1992, pp. 1137–38). Yet the regressions reveal no case-category-specific effects.[51] And again, the only important regression variable is who won. Consequently, appellate favoring of the defendant remains the better explanation.

4.3. Evaluating Explanations by Modeling Appeal

A choice, then, exists between our favored attitudinal explanation and the standard selection explanations. A more formal model should inform that choice. Such a model of appellate outcome requires accounting for the selection introduced by the decision to appeal. We thus employ bivariate probit models that account for both the decision to appeal and the outcome of those trials that are appealed.

Modeling the decision to appeal. What variables should such a model include? Straightforward economic theory forecasts that the likelihood of appeal increases as the stakes of a case increase. We account for case stakes as follows: if the plaintiff won at trial and a nonzero award is reported, that award is deemed to be the case stakes. If a nonzero award

50. Again, in an attempt to explain a part (but only a part) of Table 3, the selection theorist could counterargue that in going from an hourly fee to a contingency fee, the personal injury plaintiffs' lawyers would become more eager to appeal weak cases: for the small cost of appeal, the unsuccessful contingency fee lawyer might change a zero paycheck into a sizable fee. Compare note 47 (rebutting a similar counterargument based on willingness to settle). But of course that lawyer is footing the cost of appeal, unlike an hourly plaintiffs' lawyer. And in the absence of a contingency fee, the plaintiff rather than the lawyer faces the same tempting balance of a small cost for a big return from appeal.

51. See note 20.

is not reported or if the plaintiff lost at trial, the stakes cannot be observed from the trial outcome. So, if the case data contain a nonzero amount demanded, that demand is treated as the stakes. All amounts awarded and demanded are adjusted for inflation to 1997 dollars, and all positive amounts are transformed to logs. If neither a nonzero award nor a nonzero demand exists for a case, the case is represented by a dummy variable, "missing stakes," equal to one in such cases and equal to zero in all cases for which an award or demand exists. Stakes are thus coded as missing in 23.01% of the cases with trial judgments. Running the same models while omitting cases with missing stakes produced no material effect on the principal results.

We expect that prospects on appeal also influence the decision to appeal. For each circuit, case category, and trial outcome, we compute an overall affirmance rate. For example, the affirmance rates in the 6th Circuit for product liability trials won by defendants and plaintiffs, respectively, are 92% and 62%. Holding other factors constant, we expect parties to be more reluctant to appeal trial losses in circuits with higher affirmance rates for their situation. If there are too few observations within a circuit to compute a meaningful affirmance rate, the parties face increased uncertainty about the appellate outcome. We expect this increased uncertainty to correlate with increased appeal rates. So, if there are fewer than ten observations within a circuit, we represent the increased uncertainty by a dummy variable, "missing affirmance rate," equal to one in such cases and equal to zero in all cases for which a meaningful affirmance rate can be computed.[52]

Case categories affect the routing of cases to jury and judge trial and display sharply different trial outcomes (Clermont and Eisenberg, 1992, pp. 1137–38, 1167–70). To control for case category, we use a dummy variable for each of our thirteen case categories. Because individuals, corporations, and the government differ in their propensity to litigate and other characteristics, they may well differ in their inclination to appeal. We therefore use dummy variables for corporate-plaintiff,

52. We also ran models that replaced missing affirmance rate with the national affirmance rate. They did not lead to results materially different from those reported here.

corporate-defendant, and governmental-plaintiff status.[53] The origin of a district court case, whether it originated as an original matter in the trial court or by transfer or removal, has been shown to influence trial outcomes (Clermont and Eisenberg, 1998, pp. 606–7). We include these variables in the model of the decision to appeal. The decision to appeal may vary with the times, so we include the year of termination as a control for any linear time trend in the data.[54]

The parties' perceptions about how the appellate court reacts to jury trials compared to judge trials, and to plaintiff wins compared to defendant wins, may affect the decision to appeal. We therefore include dummy variables representing whether the trial was before jury or judge, and whether plaintiff or defendant prevailed.

Modeling the appellate outcome. What variables should this model include? First, in modeling the appellate outcome of affirmance or reversal, the explanatory variables of primary interest are those characterizing jury versus judge status and trial outcome. Our prior discussion and Table 3 suggest that plaintiffs should be less likely to obtain reversals than defendants in both jury and judge trials involving personal injuries but only in jury trials involving non–personal injury cases. Second, some other factors—such as case category, corporate or government status, origin of case, and year—seem obvious candidates for inclusion in the appellate outcome model in light of their importance in affecting trial outcomes. Third, to capture intercircuit differences in inclination to affirm, we include dummy variables for each circuit. To account for the possible nonindependence of cases decided in the same district, we treat cases as clustered at the district level, resulting in adjusted standard errors.

Table 4 reports the results of the key variables in the appellate outcome portion of three models. The full models are reported in the Appendix tables, together with summary statistics for the variables. The first model includes cases from all thirteen case categories and shows that plaintiffs are less likely than defendants to obtain reversal after a judge trial.[55] It

53. We also ran models that included interaction terms between litigant status and which party won at trial. They did not lead to results materially different from those reported here.

54. We also ran models that included dummy variables for each year. They did not lead to results materially different from those reported here.

55. Coefficient $= -.287$; $p = .022$.

Table 4. Bivariate Probit Models of Appellate Outcome and the Decision to Appeal

Outcome Equation	All Cases	Personal Injury	Non–Personal Injury
Trial outcome variables (defendant won judge trial = reference category)			
Plaintiff won judge trial	−0.287*	−0.760***	0.154
	(0.125)	(0.163)	(0.143)
Defendant won jury trial	0.098	−0.121	0.254*
	(0.093)	(0.096)	(0.123)
Plaintiff won jury trial	−0.491***	−0.695***	−0.149
	(0.097)	(0.126)	(0.133)
Other variables, and the Selection Equation, are reported in the Appendix			
ρ	0.513	0.805***	−0.592
	(0.325)	(0.091)	(0.252)
Number of observations	21,398	14,021	7,377
Number of outcome observations	2,143	1,254	889

Notes: Dependent variable in outcome equation is affirmance of trial result; dependent variable in selection equation is whether outcome of appeal was observed. Robust standard errors are in parentheses.
* $p < .05$.
** $p < .005$.
*** $p < .0005$.

also shows that plaintiffs are less likely than defendants to obtain reversal after a jury trial. A test of the significance of the difference between the dummy variables "defendant won jury trial" and "plaintiff won jury trial" is significant beyond the .0005 level.

The difference between personal injury and non–personal injury affirmance rates is important to our analysis. So Table 4 reports two additional models: one limited to personal injury cases and one limited to non–personal injury cases. The variables are basically the same as in the first model, except the case-category dummy variables change to reflect the limitations to personal injury and non–personal injury cases. In addition, we omit from the personal injury model the dummy variable representing the government as plaintiff. Table 4 shows that the plaintiff/defendant effect is substantially stronger in personal injury cases than in non–personal injury cases. The personal injury model shows that plaintiffs are much less likely than defendants to obtain reversal after a judge trial.[56] Plaintiffs are also much less likely than defendants to obtain

56. Coefficient = −.760; $p < .0005$.

reversal after a jury trial. A test of the significance of the difference between the dummy variables "defendant won jury trial" and "plaintiff won jury trial" is significant beyond the .0005 level.

In the non–personal injury model, the difference between plaintiffs and defendants in judge trials disappears and even changes sign.[57] But the significant difference between plaintiffs and defendants in jury trials persists. A test of the significance of the difference between the dummy variables "defendant won jury trial" and "plaintiff won jury trial" in this model is significant at the .002 level. In short, although the plaintiff/defendant difference in reversal rate is present in personal injury trials before both juries and judges, it is present in non–personal injury trials only in cases tried before juries.

Implications. With respect to the effect of selection on the outcome models, the first model and the non–personal injury model show rho (ρ), a measure of the correlation in the error terms in the selection and outcome equations, to be insignificant or of borderline significance. In these two models, one thus cannot reject the hypothesis that the error terms are uncorrelated and that a simple logit or probit model may suffice. In other words, our results on outcome are not a consequence of selection.

However, ρ is highly significant in the personal injury model. This suggests the need to account for selection and the desirability of modeling personal injury cases separately from non–personal injury cases. Specific results of the selection equation, reported in the Appendix, suggest that the forces affecting selection do differ in personal injury cases and non–personal injury cases.[58] In personal injury cases, some signs exist that case selection on appeal deserves consideration in modeling appellate outcome. But accounting for those selection forces leaves intact the conclusion of a defendants' advantage on appeal.

4.4. Nontrial Setting

The absence of overall jury/judge differences and the very elevated affirmance rate first suggested the general ineffectiveness of case selection

57. Coefficient = .154; $p = .284$.

58. Although both the personal injury and non–personal injury models show stakes to correlate positively and significantly with the decision to appeal, the relation between affirmance rates and the decision to appeal is of opposite sign but significant in the two models.

Table 5. Appeals from Federal Civil Cases and Judgments, for Fiscal Years 1988–97, Further Distinguished by Plaintiff or Defendant Win Below

	Nontried Cases	Nontried Judgments	Pretrial-Motion Judgments	Trial Judgments
Overall number	622,011	85,251	38,390	21,415
Appeal rate	2.96	11.89	21.36	20.85
Affirmances and reversals	9,123	5,598	4,619	2,143
Reversal rate	19.95	18.13	17.93	20.72
Number of plaintiff wins	N/A	54,862	13,870	11,507
Defendants' appeal rate		3.86	9.29	19.74
Affirmances and reversals		894	567	934
Defendants' reversal rate		21.25	19.22	28.37
Number of defendant wins	N/A	30,389	24,520	9,908
Plaintiffs' appeal rate		26.38	28.19	22.15
Affirmances and reversals		4,704	4,052	1,209
Plaintiffs' reversal rate		17.54	17.74	14.81
Significance of D-P differential	N/A			
Appeal rate		.000	.000	.000
Reversal rate		.009	.381	.000

on appeal in explaining the data. The preceding sections have further shown that selection theory poorly explains the defendants' advantage. Here, we explore a few litigation settings that precede the end of trial, in search of further evidence on the explanatory choice between selection effect and decisional bias.

Settlements play such a big part in the early stages of litigation that one cannot conclude much about the appeal rate from cases not resulting in judgment. The lack of an appeal may reflect only the fact of settlement. Nevertheless, the first numerical column of Table 5 gives for nontried cases among the thirteen categories a rather low figure for the appeal rate, but a normal reversal rate.[59]

In nontried *judgments* among the thirteen categories, as presented in the second numerical column of Table 5, the norm is that plaintiffs appeal much more, and get fewer reversals, than defendants. The pattern continues with the pretrial-motion outcomes in the third numerical column. The plaintiffs' pretrial-motion win rate in the trial court is low. Plaintiffs

59. In this first numerical column, "appeal rate" means the percentage of nontried, terminated district court cases that reach the appellate court docket. "Reversal rate" means the percentage of those appeals that reach a decisive outcome and that emerge as reversed rather than affirmed.

appeal their numerous pretrial-motion losses proportionately more than defendants appeal their losses. It seems likely that losing plaintiffs are not so apt to give up at this early stage, whereas victorious plaintiffs may be willing to settle to avoid appeal. This leads to plaintiffs' getting fewer reversals. The pro-defendant tilt in the appellate court may also generate fewer reversals for plaintiff-appellants.

The common element before and after trial, then, is the defendants' considerable success on appeal. An appellate court inclination in defendants' favor best explains this observation.

5. Conclusion

The defendants' higher reversal rate stems from real but hitherto unappreciated differences between appellate and trial courts. The appellate court is more favorable to the defendant than is the trial judge and the jury. While the fairly small difference between appellate and trial judges likely is owing to the appellate court's misperception of trial court bias, it may be owing to the appellate court's relative decisional remoteness or it could even be a mere selection effect. However, the big difference between appellate court and trial jury is more surely owing to the appellate judges' sizable misperceptions regarding the jury.

Just as our earlier article on "trial by jury or judge" had practical lessons for litigants to correct their misconceptions about the jury, this article on "appeal from jury or judge trial" contains lessons for appellate judges. Any suppositions about trial court and jury biases should cease to affect appellate decisions. Each appellate judge could approach that goal by realizing some views to be misperceptions and recognizing their undesirable role in decision making.

Appendix

Table A1. Bivariate Probit Models of Appellate Outcome and the Decision to Appeal

	All Cases	Personal Injury	Non–Personal Injury
Outcome Equation			
Trial outcome variables (defendant won judge trial = reference category)			
Plaintiff won judge trial	−0.287*	− 0.760***	0.154
	(0.125)	(0.163)	(0.143)
Defendant won jury trial	0.098	−0.121	0.254*
	(0.093)	(0.096)	(0.123)
Plaintiff won jury trial	−0.491***	−0.695***	−0.149
	(0.097)	(0.126)	(0.133)
Circuit dummy variables (D.C. Circuit = reference category)			
1st Circuit	0.353***	0.147**	0.404
	(0.069)	(0.054)	(0.296)
2nd Circuit	0.339*	0.071	0.546
	(0.167)	(0.102)	(0.320)
3rd Circuit	0.621***	0.260	0.691*
	(0.157)	(0.149)	(0.308)
4th Circuit	0.503***	0.214*	0.641*
	(0.113)	(0.091)	(0.321)
5th Circuit	0.576***	0.306***	0.636*
	(0.090)	(0.076)	(0.294)
6th Circuit	0.624***	0.302**	0.645
	(0.122)	(0.116)	(0.345)
7th Circuit	0.368**	0.055	0.505
	(0.122)	(0.153)	(0.282)
8th Circuit	0.507***	0.302*	0.519*
	(0.107)	(0.129)	(0.259)
9th Circuit	0.504***	0.240	0.599
	(0.128)	(0.148)	(0.313)
10th Circuit	0.514***	0.306**	0.526
	(0.082)	(0.101)	(0.281)
11th Circuit	0.435***	0.256**	0.432
	(0.089)	(0.081)	(0.255)
Case-category dummy variables			
General contract	reference	—	reference
	—	—	—
Fraud	−0.310*	—	−0.267
	(0.143)	—	(0.150)
Negotiable instruments	0.012	—	0.000
	(0.261)	—	(0.173)

Table A1. Continued

	All Cases	Personal Injury	Non–Personal Injury
Torts to land	0.410	—	0.411
	(0.344)	—	(0.323)
Torts to personal property	−0.176	—	0.140
	(0.219)	—	(0.220)
Airplane personal injury	−0.540	−0.610*	—
	(0.362)	(0.301)	—
Assault, libel, slander	0.019	0.122	—
	(0.194)	(0.170)	—
Federal employers' liability	0.234	0.230	—
	(0.205)	(0.141)	—
Marine personal injury	−0.046	−0.058	—
	(0.126)	(0.100)	—
Medical malpractice	−0.053	−0.069	—
	(0.156)	(0.112)	—
Motor vehicle	0.032	−0.049	—
	(0.180)	(0.112)	—
Other personal injury	0.031	reference	—
	(0.129)	—	—
Product liability	−0.087	−0.016	—
	(0.086)	(0.089)	—
Year of termination	−0.031**	−0.048***	−0.006
	(0.011)	(0.011)	(0.017)
Case-origin dummy variables (original jurisdiction = reference category)			
Transferred to district court	−0.151	−0.136	−0.071
	(0.154)	(0.156)	(0.220)
Removed to district court	−0.050	0.030	−0.179
	(0.076)	(0.073)	(0.111)
Litigant-characteristic dummy variables			
Governmental plaintiff	0.151	—	0.008
	(0.228)	—	(0.232)
Corporate plaintiff	−0.069	−0.060	−0.049
	(0.102)	(0.133)	(0.097)
Corporate defendant	0.135	0.118	0.047
	(0.072)	(0.073)	(0.100)
Constant	2.323*	3.629**	1.536
	(1.053)	(1.052)	(1.496)

Table A1. Continued

	All Cases	Personal Injury	Non–Personal Injury
Selection Equation			
Trial outcome variables (defendant won judge trial = reference category)			
Plaintiff won judge trial	−0.366***	−0.504***	−0.237**
	(0.072)	(0.095)	(0.079)
Defendant won jury trial	−0.108*	−0.103	−0.161*
	(0.045)	(0.063)	(0.066)
Plaintiff won jury trial	−0.290***	−0.412***	−0.138
	(0.066)	(0.089)	(0.073)
Circuit affirmance rate	−0.354	−0.817***	1.443*
	(0.340)	(0.197)	(0.582)
Missing affirmance rate	−0.671*	−0.989***	0.818
	(0.268)	(0.170)	(0.633)
Stakes	0.067***	0.062***	0.067***
	(0.009)	(0.012)	(0.012)
Missing stakes	0.369***	0.312**	0.394***
	(0.061)	(0.090)	(0.086)
Case-category dummy variables			
General contract	reference	—	reference
	—	—	—
Fraud	0.331*	—	0.226
	(0.159)	—	(0.493)
Negotiable instruments	0.296	—	0.141
	(0.224)	—	(0.503)
Torts to land	0.346	—	0.245
	(0.191)	—	(0.482)
Torts to personal property	0.076	—	−0.027
	(0.134)	—	(0.459)
Airplane personal injury	−0.290	−0.174	—
	(0.255)	(0.239)	—
Assault, libel, slander	0.438*	0.560***	—
	(0.179)	(0.152)	—
Federal employers' liability	0.205	0.351**	—
	(0.140)	(0.118)	—
Marine personal injury	0.007	0.163*	—
	(0.089)	(0.080)	—
Medical malpractice	0.108	0.215	—
	(0.138)	(0.117)	—
Motor vehicle	−0.139	0.029	—
	(0.075)	(0.064)	—
Other personal injury	−0.177***	reference	—
	(0.177)	—	—

Table A1. Continued

	All Cases	Personal Injury	Non–Personal Injury
Product liability	−0.054	0.109*	—
	(0.047)	(0.050)	—
Year of termination	−0.019**	−0.024***	−0.010
	(0.006)	(0.007)	(0.008)
Case-origin dummy variables (original jurisdiction = reference category)			
Transferred to district court	−0.054	−0.047	−0.040
	(0.084)	(0.124)	(0.115)
Removed to district court	−0.055	−0.056	−0.033
	(0.036)	(0.044)	(0.063)
Litigant-characteristic dummy variables			
Governmental plaintiff	0.068	—	0.116
	(0.110)	—	(0.118)
Corporate plaintiff	0.045	0.108	0.009
	(0.039)	(0.072)	(0.044)
Corporate defendant	0.024	0.015	0.056
	(0.026)	(0.032)	(0.046)
Constant	0.661	1.425*	−1.611
	(0.641)	(0.669)	(0.840)
ρ	0.513	0.805***	−0.592
	(0.325)	(0.091)	(0.252)
Number of observations	21,398	14,021	7,377
Number of outcome observations	2,143	1,254	889
log likelihood	−7, 748.125	−4, 589.833	−3, 121.286

Notes: Dependent variable in outcome equation is affirmance of trial result; dependent variable in selection equation is whether the outcome of appeal was observed. Robust standard errors are in parentheses.

* $p < .05$.

** $p < .005$.

*** $p < .0005$.

Table A2. Descriptive Statistics of Variables in Bivariate Probit Models

Variable	*n*	Mean	Standard Deviation	Minimum	Maximum
Affirmed	2,143	0.793	0.405	0	1
Defendant won judge trial	21,398	0.116	0.320	0	1
Plaintiff won judge trial	21,398	0.176	0.381	0	1
Defendant won jury trial	21,398	0.346	0.476	0	1
Plaintiff won jury trial	21,398	0.361	0.480	0	1
D.C. Circuit	21,393	0.021	0.143	0	1
1st Circuit	21,393	0.049	0.216	0	1
2nd Circuit	21,393	0.062	0.241	0	1
3rd Circuit	21,393	0.076	0.265	0	1
4th Circuit	21,393	0.102	0.303	0	1
5th Circuit	21,393	0.196	0.397	0	1
6th Circuit	21,393	0.090	0.287	0	1
7th Circuit	21,393	0.063	0.243	0	1
8th Circuit	21,393	0.097	0.296	0	1
9th Circuit	21,393	0.084	0.277	0	1
10th Circuit	21,393	0.075	0.263	0	1
11th Circuit	21,393	0.085	0.278	0	1
General contract	21,398	0.271	0.444	0	1
Fraud	21,398	0.022	0.146	0	1
Negotiable instruments	21,398	0.022	0.146	0	1
Torts to land	21,398	0.007	0.084	0	1
Torts to personal property	21,398	0.023	0.150	0	1
Airplane personal injury	21,398	0.012	0.110	0	1
Assault, libel, slander	21,398	0.014	0.117	0	1
Federal employers' liability	21,398	0.036	0.187	0	1
Marine personal injury	21,398	0.062	0.241	0	1
Medical malpractice	21,398	0.041	0.198	0	1
Motor vehicle	21,398	0.131	0.338	0	1
Other personal injury	21,398	0.194	0.395	0	1
Product liability	21,398	0.165	0.371	0	1
Year of termination	21,398	91.491	2.925	87	97
Governmental plaintiff	21,398	0.013	0.111	0	1
Corporate plaintiff	21,398	0.151	0.358	0	1
Corporate defendant	21,398	0.456	0.498	0	1
Circuit affirmance rate	13,510	0.794	0.120	0	1
Missing affirmance rate	21,398	0.369	0.482	0	1
Stakes (thousands) (log)	16,474	5.601	2.163	0	10.111
Missing stakes	21,398	0.230	0.421	0	1
Transferred to district court	21,398	0.029	0.168	0	1
Removed to district court	21,398	0.229	0.420	0	1

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