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OCCASIONAL PAPER

An Early Assessment of the Civil Justice System After the Financial Crisis

Something Wicked This Way Comes?

Michael D. Greenberg • Geoffrey McGovern

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Preface

This paper examines the impact of the 2008 financial collapse on the U.S. civil justice system, based on a review of literature and data available through early 2011. It addresses, in particular, (1) state judicial branch resourcing, (2) patterns of litigation, (3) securities litigation and enforcement, (4) trends in the legal services industry, and (5) legal aid and the provision of legal services. The paper also comments on data needs for studying the civil justice system and raises policy questions for future research.

This research should be of interest to policymakers, judges, judicial clerks and administrators, law partners and in-house counsel, and other stakeholders concerned with the performance and institutions of the civil justice system and the legal services economy in the United States and around the world.

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Summary

The financial collapse of 2008 has had a lasting, disruptive effect on many aspects of the U.S. economy. Whenever unforeseen economic disruptions produce widespread losses, there will predictably be some civil justice system aftereffects as people seek compensation for those losses. The shock of the financial collapse arguably may have had a deep justice system impact: The subsequent erosion in state budgets has placed stress on court mechanisms at the same time that particular kinds of litigation, such as disputes over foreclosure, seem to have increased.

In 2009 and 2010, RAND researchers engaged in a series of investigations and conversations that focused on the impact of the financial crisis on various facets of the civil justice system. This paper provides a snapshot of several of these facets, from the initial years of the post-2008 "collapse era" to early 2011. We focus, in particular on (1) state judicial branch resourcing, (2) patterns of litigation, (3) securities litigation and enforcement, (4) trends in the legal services industry, and (5) legal aid and the provision of legal services. We formulated this list of topics based on aspects of justice system performance that we felt were particularly important, incorporating input from the RAND Institute for Civil Justice Board of Overseers and our RAND colleagues; we targeted areas with anecdotal evidence of an impact associated with the financial crisis and for which we were able to identify public sources of information to draw a picture of the short-run effects of the financial crisis. Beyond providing a summary overview, this paper also comments on the availability of descriptive data on the civil justice system and poses related policy questions that future studies might address.

The most fundamental insight we can offer, based on this yearlong research effort, is that it is still very early in the game to draw firm conclusions about what the ultimate effects of the financial crisis will be. Between 2008 and 2010, there were observable blips and inflection points in several elements of civil justice performance and resourcing, such as the volume of home foreclosure filings and the level of federal and state funding for legal aid services. These sorts of blips, and the potential for longer-run sequelae with public policy significance, deserve closer empirical scrutiny over time. Our chief observation at present is that limited and low-quality data across many dimensions of civil justice system performance will hamper any future empirical efforts. Consequently, we suggest a set of priorities for future civil justice data collection activities. Our second observation is that the financial crisis, although itself a transient event, may also be a marker for a more fundamental transition in the posture of government and in the broad availability of public-sector resources in the United States. If indeed that proves to be true, then narrow causal questions about the effects of the financial crisis on the civil justice system may eventually prove to be tangential and less important than the simple ability to trace the system's performance and resourcing empirically over time. It is our hope

that this paper makes the case for undertaking the latter effort as a high priority for empirical legal research in the future.

State Court Funding

Available summary data from the National Center for State Courts (NCSC) suggest that many state court systems experienced both stress and funding reductions in 2009 and 2010. Whether these developments can be attributed to the financial crisis, however, is less clear. Results from our examination of seven years of official appropriations budgeting data for each of several selected state court systems were surprising: They did not reflect the broad downturn in judicial branch funding that has been described by NCSC and anecdotally reported elsewhere. We discovered, in reading the annual reports published by the state court systems, that (1) those systems involve financial and accounting complexities that are difficult to parse from the reports themselves, and (2) in some instances, the official budget data are difficult to reconcile with the official narrative describing the same budgets. Given that anecdotes continue to accumulate that state courts are facing serious fiscal problems, we think that further investigation into the financing mechanisms of state courts—and better accounting data describing their actual resourcing levels—are high priorities for future research.

Patterns of Civil Litigation

Descriptive data suggest recent increases in civil litigation volume in many trial courts, possibly associated with the financial collapse. In particular, federal bankruptcy and state foreclosure filings have surged. Moreover, according to NCSC data, the number of national civil claims in the state courts rose for the entire decade from 1999 to 2008, and similar trends were observed in California, Florida, Illinois, New York, Pennsylvania, and Texas. Unfortunately, the NCSC statistics on state court litigation include a data lag of two years, so, at present, it is impossible to determine whether the trend through 2008 has been sustained more recently. Further analyses of trends in state court funding might be complemented by additional administrative data describing court processes, caseloads, and resources. Overburdened, underfunded state courts may find it difficult to effectively administer justice when faced with ever-mounting demands. Future empirical research studies can and should investigate these concerns.

Securities Litigation

The published summary data on securities litigation suggest that the financial crisis has had a mixed impact on justice system activity in the area of securities litigation. Five-year trends through 2009 show that some indicators of securities litigation activity rose in 2007 and 2008, corresponding to an increasing volume of cases related to the crisis. Per the Stanford Securities Class Action database, for example, new securities class action suits increased in volume during 2007 and 2008, but the new suits began to subside in 2009, and the downward trend reportedly continued in early 2010. Meanwhile, government enforcement activity, as reflected in U.S. Securities and Exchange Commission settlements, apparently did not tick upward as a

result of the financial crisis (at least as reflected in data from NERA, an independent consulting firm). Finally, insurance industry consulting firm Advisen's database and annual summary statistics tracking "securities litigation" show an upward trend in the overall volume of litigation since 2005—a period not limited to the crisis of 2007 and 2008. Taken together, these various data sources suggest that there may have been a securities litigation surge associated with the financial crisis but that this has manifested in complex and inconsistent ways across different snapshots of the justice system.

Legal Services Industry

In the wake of the financial crisis, a variety of anecdotal and government sources suggest that legal services employment plunged, legal budgets dried up, and companies and law firms looked for new ways to economize on legal services. According to the U.S. Census Bureau, the legal services industry shed 50,000 jobs between 2007 and 2009, returning to 2003 employment levels. Whether the direct effects of the financial crisis will produce longer-lasting shifts in the legal services industry remains an open but compelling question. The financial crisis in 2008 may have accelerated longer-term trends toward alternative billing arrangements, legal process outsourcing, alternative firm ownership structures, and third-party litigation financing arrangements, but these changes began before the crisis. Going forward, it will be important to consider how these changes in the legal economy and services market affect the legal profession and the broader civil justice system. New developments in firm and in-house employment of lawyers, law firm business models, and the ownership of law firms may have significant consequences for the operation of business enterprises and for the justice system. Perhaps our most practical observation concerning these various topics is that basic data on legal services innovation are scarce. Consequently, there may be important opportunities for future civil justice research to address these data needs and to better document emerging business practices and related outcomes in the legal services sector.

Provision of Legal Aid Services

Based on our review, the general U.S. outlook for legal aid services (i.e., subsidized legal counsel provided to low-income persons in connection with a range of civil matters) appears grim. At the same time that the demand for various forms of legal assistance appears to be on the rise, funding for those services has come under increasing pressure and legal aid programs have felt the squeeze on their operating budgets. Taken together, this increased demand for legal aid services and funding coupled with a diminished supply may reduce access to the justice system for low-income earners in ways that disproportionately affect the most vulnerable members of society. This aspect of the civil justice system could be a major focus area for future research.

Recommendations for Future Civil Justice Research

Taken as a whole, our review on the financial collapse and the civil justice system suggests three potential angles for a future research agenda. First, there are several possibilities for new

major data collection. For example, better data are needed on court system budgets, securities litigation, and legal outsourcing and alternative fee arrangements. Second, the impact of the financial collapse invites a focus on the judiciary and the legal profession, as well as on outcomes and process measures pertaining to civil litigation itself. Finally, we believe that the top priority for new civil justice research involves a deeper examination of judicial branch resourcing and financing across the states. Better data on resourcing, and a better taxonomy for state court system financing mechanisms, could offer a much clearer picture of the operating "strain" on the civil justice system going forward. We also believe that such financing information could be combined with various judicial branch administrative performance measures to explore how court systems respond to austerity and the ultimate impact of austerity on litigation volume and outcomes.

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A fronte praecipitium a tergo lupi.

Abbreviations

AOUSC	Administrative Office of the U.S. Courts
BAPCPA	Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
DOJ	U.S. Department of Justice
FY	fiscal year
IOLTA	interest on lawyer trust accounts
LPO	legal process outsourcing
LBR	RAND Law, Business, and Regulation
LSC	Legal Services Corporation
MSCAD	Master Significant Case and Action Database
NAICS	North American Industry Classification System
NCSC	National Center for State Courts
SCAC	Securities Class Action Clearinghouse
SEC	U.S. Securities and Exchange Commission
TPLF	third-party litigation financing
USSC	U.S. Sentencing Commission

CHAPTER ONE

Introduction

The financial collapse of 2008 has had a lasting, disruptive effect on many aspects of the U.S. economy and on society more broadly. Whenever unforeseen economic disruptions produce widespread losses, there will predictably be some civil justice system aftereffects as people seek opportunities to compensate for those losses. The shock of the financial collapse arguably may have had a deeper justice system impact: The subsequent erosion in state budgets has placed stress on courts at the same time that particular categories of litigation, such as disputes over foreclosure, appear to have experienced heightened demand.

In 2009 and 2010, RAND researchers examined the impact of the financial crisis on various facets of the civil justice system. The research staff and the RAND Institute for Civil Justice Board of Overseers discussed how activity in the civil justice system might serve as an index of broader economic disruption felt elsewhere. Our intent was to examine widespread concerns that the financial crisis may pose a threat to the functioning of the justice system itself, particularly in light of the continuing economic downturn and fiscal problems that have become the "new normal" of the Great Recession.[1] This paper provides a snapshot assessment of several dimensions of civil justice system performance, from the initial years of the post-2008 period through early 2011.

One immediate question we asked in framing this exploratory project was, given the reality of the financial collapse, what kinds of civil justice system effects warrant examination the most? Are we primarily concerned with particular categories of litigation or disputes? Are we interested in simply gauging the volume of cases flowing through the system? What about examining the functional properties of the justice system, such as the speed with which cases are resolved or the resources that are available to handle those cases? Are there pertinent conclusions to be drawn about the impact on people who actually work within the justice system (e.g., lawyers and judges), access to legal aid for the indigent, or emerging trends in litigation financing or legal outsourcing? Upon reflection, we concluded that we are actually interested in all of these areas. Or, to put it another way, the full story of the financial collapse and the civil justice system is a complex one, with many categories of effects that affect the law and policy

[1] Throughout this paper, we use the expressions *financial crisis* and *financial collapse* to refer to the immediate events of 2007 and 2008, particularly the mortgage meltdown, the acute liquidity crunch, the failure of several major financial institutions (including Bear Stearns and AIG), and the aggressive intervention of the Federal Reserve to recapitalize banks through the Troubled Asset Relief Program (TARP). We also use the expressions *Great Recession* and *subsequent economic downturn* to refer more broadly to the sustained recession, fiscal deficits, and eroding labor and capital markets that appear to be a lasting and ongoing phenomenon post-2008. Although this paper focuses primarily on the impact of the financial crisis on the civil justice system, a question we return to repeatedly is whether recent effects in this area are better understood as resulting from the "crisis" (i.e., a transient event), or instead as reflecting the initial stage of a longer-lasting economic downturn (i.e., the "Great Recession").

communities. The purpose of this paper is not to present the results of an in-depth analysis focusing on any one of these areas but, rather, to give some descriptive feel for the impact of the financial crisis across several of them. This lens offers a different, more narrative kind of insight than is available through an exclusive focus on a single category of civil justice effects or on a specific policy problem or relationship.

Based on our review of the relevant literature and conversations with members of the RAND Institute for Civil Justice Board of Overseers, we chose to focus this study on five aspects of civil justice system performance and effects, each of which plausibly might have been affected by the financial crisis and the subsequent economic downturn: (1) state judicial branch resourcing, (2) patterns of litigation, (3) securities litigation and enforcement, (4) trends in the legal services industry, and (5) legal aid and the provision of legal services. We formulated this list of topics based on aspects of justice system performance that we felt were particularly important. We targeted areas with anecdotal evidence of an impact associated with the financial crisis and for which we were able to identify public sources of information sufficient to draw a picture of the short-run effects of the financial crisis. Obviously, this list of civil justice topic areas is not comprehensive. We notably deal with some narrower areas of interest, such as foreclosure and bankruptcy proceedings, under the broader heading of "patterns of litigation." Some other topics of potential interest, such as administrative measures of court performance (e.g., case backlogs, velocity of processing), we simply chose to reserve for future study.

In approaching the civil justice impact of the financial crisis in this way, we had three aims in mind. First, we attempted to draw a basic descriptive picture for each of several facets of the civil justice system, particularly as the effects of the financial crisis took hold. In this paper, we both present our initial findings and reflect on what those findings show. To fulfill our first aim, we undertook a broad review of publicly available information and literature, published reports compiled by authorities elsewhere, and related descriptive data. It turns out that for some aspects of civil justice system performance, abundant summary information and secondary data are available. For other aspects of system performance and policy, however, this turns out not to be the case. Some important descriptive and analytical questions concerning the impact of the crisis may simply be opaque, given currently available sources of data.

The fundamental scarcity of information regarding some aspects of the justice system led, in turn, to the second aim of our study, which was to familiarize ourselves with some of the descriptive data available to address the impact on the civil justice system and their associated limitations and shortcomings. A priority of the RAND Institute for Civil Justice over the past three decades has been to collect original data on civil justice system outcomes and processes that would otherwise be difficult to measure. The impact of the financial crisis invites us to revisit and reassert this priority. To what extent do we have the data we need to paint a basic picture of civil justice system effects? What are some of the major data gaps? Are any of these gaps important to address from a policy perspective, and are they in areas where the RAND Institute for Civil Justice and other organizations might make a contribution to public discourse by improving or supplementing current data collection efforts?

Finally, the most important aim of this project was to generate a new set of policy questions that future empirical research might explore. The current study does not involve a deep empirical analysis of primary data but, rather, reviews descriptive findings and recent trends across multiple dimensions of civil justice system performance. In reflecting on these findings, however, we repeatedly found ourselves asking new questions, about both key relationships that might be important to policy and emerging civil justice system trends that might herald

new policy concerns for the future. Thus, our chief interest in the current study was to identify questions that cannot presently be answered but that might become the focus of future empirical investigation. Some of those questions pertain to the longer-term effects of the financial crisis, while others do not. But all represent considerations and potential priorities for new research.

Organization of This Paper

The remainder of this paper is organized into five chapters corresponding to each of the major topics that we reviewed over the course of our study: state judicial branch resourcing, patterns of litigation, securities litigation and enforcement, the legal services industry, and the provision of legal aid. Each chapter summarizes descriptive civil justice system performance trends, comments on the availability (and limits) of the relevant data, and presents our thoughts about implications for policy and future empirical studies. In Chapter Seven, we integrate our findings across topic areas and offer some additional suggestions for what the emerging civil justice system trends might mean and the priorities they suggest for new areas of research.

CHAPTER TWO

State Court Funding

Perhaps the most obvious dimension of the fallout from the financial crisis has been its impact on state governments and their budgets. The collapse and the recession that followed have arguably hit the states more than once since 2007–2008: first through the effect on tax revenues via the erosion of the states' tax base and then again through the impact on state public pension funds, credit ratings, and so on. Meanwhile, federal stimulus spending, which initially helped blunt the impact of the financial crisis on the states, has now largely ebbed away. The fiscal environment in which the states operate is currently very tight and, in light of growing pressure on the federal government to address its own deficit and debt problems, likely to grow tighter. This combination of factors has led to new concerns about the future of state governments and traditionally state-funded programs in an era of austerity (Johnson, Oliff, and Williams, 2010; Pew Center on the States, 2010).

Descriptive studies of broad trends in state budgeting, and of the functional impact of austerity on different programs and aspects of state government, go well beyond concerns about the civil justice system. Nevertheless, fiscal and budgeting issues raise the distinct possibility that court systems, like many other parts of state government, will face major cuts in the future. Recent media reports suggest that budget cuts have already become a serious problem for court systems in many states.[1] And anecdotal evidence suggests that state court systems have begun to enact a range of cuts as a result.

California offers perhaps the most well-documented case of a state judicial system in crisis. Faced with $350 million in budget cuts for fiscal year (FY) 2012, the California courts, by some accounts, have been reeling from the effects of the financial crisis (Judicial Council of California, 2011). Among the measures being taken across the state is the closing of the Grover Beach branch of the San Luis Obispo County Superior Court (Cooley, 2011) and 25 courtrooms in San Francisco County (McKinley, 2011). Additionally, 329 Los Angeles court employees were laid off (Dolan and Kim, 2011), with another 1,000 layoffs projected over the next three years (Dinzeo, 2011).

We sought to obtain objective data and accounts of the current situation in the state judiciaries. Our search took us to the National Center for State Courts and, ultimately, to the states' own annual reports. The information we discovered suggests that there is ample opportunity for research that unravels the Gordian knot of state judicial funding mechanisms. Basic research on judicial funding is likely needed before the budget crisis can be fully understood.

[1] See, for example, "State Courts at the Tipping Point," 2009; Dolan and Kim, 2011; LeBlanc, 2011; Stashenko and Wise, 2011; and Blose, undated.

Data on State Court Resourcing and Administration

There are two easily accessible sources of summary descriptive information on budgets and resourcing for U.S. state court systems.

National Center for State Courts Data

First, the National Center for State Courts (NCSC) actively tracks fiscal and budgetary information on the court systems in all 50 states. NCSC commissioned a state-by-state breakdown of budget information from an independent consultant in 2009; more recently, it provided updated information for FY 2010 on its website. NCSC does not appear to archive historical data on state court resourcing and has not published any descriptive summaries of such data for earlier years. Consequently, NCSC data have limited value in painting a picture of budget trends at the state level and do not permit us to look at resourcing of the courts prior to the 2008 collapse.[2]

The 2009 NCSC report, *Assessment and Overview of State Court Budget Summaries* (Hall, 2009), was compiled by an outside consulting firm. It drew on several sources of court administrative data, including two NCSC surveys of the state courts and several other NCSC indexes and summaries of state court information available on the NCSC website. The report consisted of a state-by-state breakdown of budgeting and appropriations information, focusing on fiscal years 2009 and 2010. The descriptive information on state budgets and cuts to court funding is not reported in a consistent way across the states, making direct interstate comparisons of resourcing levels problematic. More recently, NCSC sought to update the fiscal and budgeting information for each of the states on its website, focusing on the 2010–2011 fiscal period. It is unclear how the 2010 updates were generated, nor are the findings fully consistent with the earlier NCSC consultant's report from 2009.[3] We believe that the various inconsistencies likely reflect legitimate accounting and fiscal complexities inherent in this kind of data, rather than any deficiency in NCSC's approach to compiling or summarizing the data.

State Court Administrative Reports

The other major avenue for obtaining descriptive information on state court budgets involves drawing from the annual administrative reports that most state court systems publish, describing and benchmarking their own performance each year. The state courts are varied in terms of the administrative data they collect on themselves and how much of these data they make publicly available. Despite this variation, these state court system reports allowed us to generate a picture of budgeting trends (or, perhaps more precisely, trends in appropriations dedicated to the judicial branch) going back before the 2008 collapse.

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[2] We did contact NCSC directly to get clarification on when it began collecting resourcing data on the state courts. We were told that the current effort did, in fact, begin with the 2009 independent consultant's report mentioned here. In the past few years, NCSC has compiled new annual data via a survey sent to the court administrators in each of the 50 states. The most recent round of NCSC summary information on state court resourcing for 2011 recently became available through its website (see NCSC, 2011).

[3] Again, based on a phone call to NCSC, the 2009 and 2010 data on state court resourcing were derived from a survey sent to the chief court administrators in each of the 50 states. NCSC used a similar approach in connection with its 2011 update on state court resourcing. This kind of annual survey approach might help explain some of the inconsistency in the narrative descriptions of state-level court resourcing reported from year to year, since there is no guarantee that survey respondents will be fully consistent in how they answer similar survey items in subsequent years.

Results

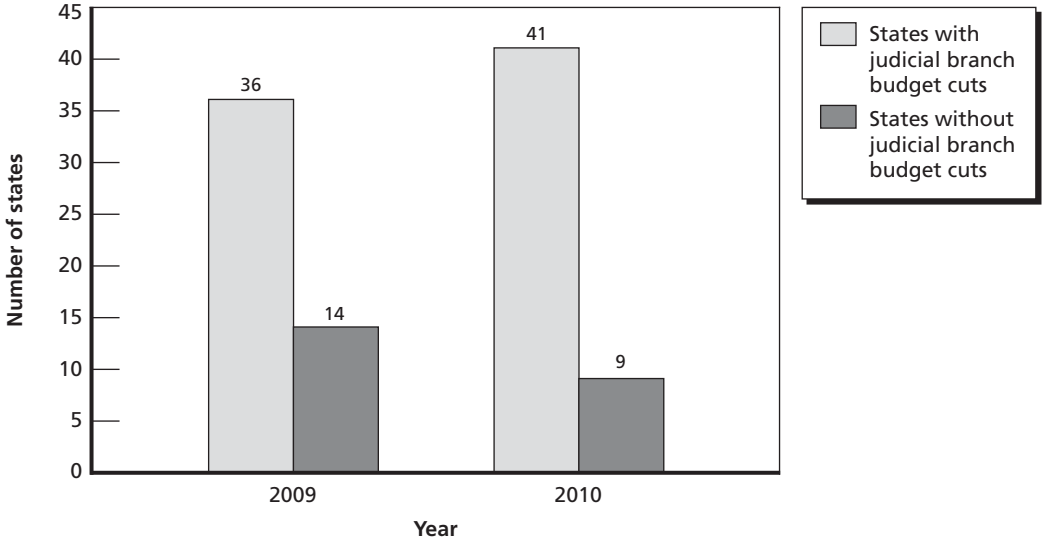
National Center for State Courts Data Show Declining Court Resources

The 2009 NCSC report paints a fairly bleak picture of state court system resourcing across the country (see Figure 2.1). More than 40 states reported having made or planned for budget cuts in FY 2009 or 2010 (or both). Only eight states maintained their appropriations and budgets for the courts in both years: Alaska, Arkansas, Louisiana, Maryland, North Dakota, South Dakota, Texas, and West Virginia. And even for those states, the NCSC findings may not tell the full story, since some court systems are funded primarily at the county or municipal level, and NCSC's consultant may not have consistently captured related fiscal information.

For the 42 states that reportedly reduced funding to their state court systems in 2009 or 2010 or both, many made fairly deep cuts. Cuts of tens or even hundreds of millions of dollars were reported in California, Colorado, Florida, Illinois, and Oregon. Many other states described serious resourcing cuts in percentage terms, including Kansas, Kentucky, Michigan, Mississippi, Nevada, New Jersey, North Carolina, Pennsylvania, Rhode Island, and Utah. In many of these cases, resourcing cuts of 5 percent or more were reported by NCSC for either or both of 2009 and 2010.

In the states that imposed serious resource cuts on their court systems, a variety of austerity measures were reportedly implemented to try to stem the funding shortfalls. So, for example, states that froze or restricted hiring in their court systems included Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Iowa, Kansas, Maine, Massachusetts, South Carolina, and Wisconsin. Salary freezes or restrictions were put into place in Arizona, California, and Oklahoma, while actual salary cuts were apparently made in Delaware, Florida, and North Carolina. Personnel furloughs or reduced operations of actual court facilities were implemented in California, Connecticut, Florida, Iowa, North Carolina, Oregon, and Vermont. And many states contemplated or implemented reductions (or layoffs) of court

Figure 2.1
States with and Without Judicial Branch Budget Cuts in 2009 and 2010



SOURCE: NCSC data.

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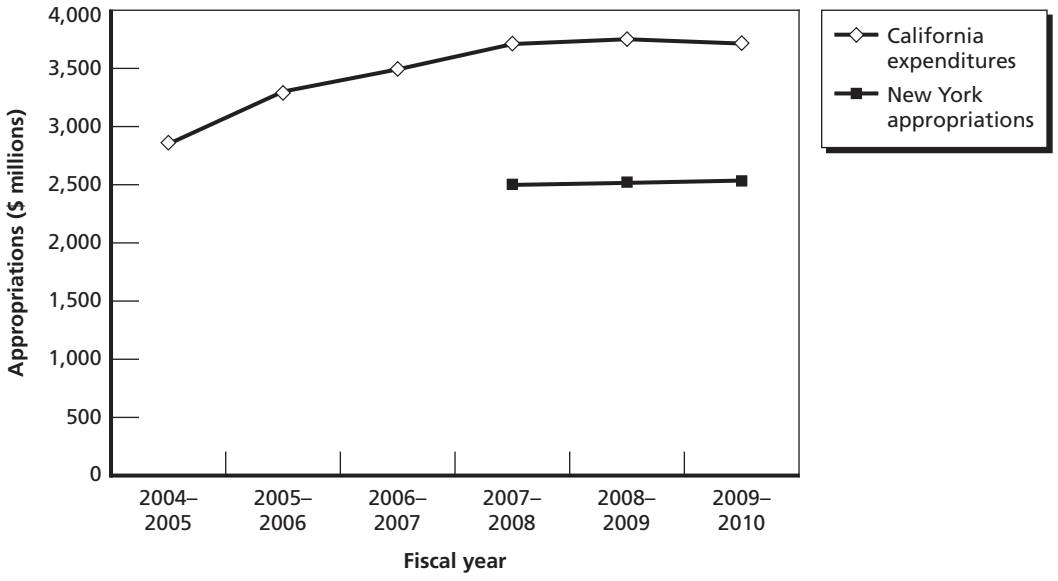
system personnel, including Arizona, California, Colorado, Florida, Kentucky, Oregon, South Carolina, and Utah. Other flavors of state austerity measures were also discussed in the 2009 NCSC report, including various cuts to court operations, the reduction or deferral of new technology acquisition programs, consolidation of administrative functions, and reduced or skeleton staffing of some court facilities and functions. The most recent NCSC update on these issues, compiled for 2010–2011, paints a picture of austerity and cost-cutting that is similarly severe and suggests that cuts in budgeting and services are continuing to occur.

Court Resourcing Information on Selected States Shows More Ambiguous Funding Trends

Most of the 50 states publish annual reports that describe the status and operation of their state court systems and judicial branches. Many of these reports include summary information on resourcing or annual legislative appropriations to the judicial branch. Although state court systems vary widely in how much accounting detail they disclose in their annual reports—and in how they format this information—it is nevertheless possible to use the annual reports to retrieve archival budget data for many of the states, going back at least several years. For our investigation, we retrieved the annual reports for the state court systems in California, New York, Florida, Illinois, Pennsylvania, and Texas, going back to calendar year 2004. We chose these states because they include several of the largest state court systems in the United States and have historically been very influential. We present trend lines on judicial branch resourcing data for each of those states, based on the annual aggregate budget numbers that each state published in its own reports.

Figure 2.2 shows the resourcing trends for California and New York. The first point to observe is that New York only began to include a budget and finance disclosure in its annual report in 2007; thus, we are unable to draw a resourcing trend line for earlier years in New York. Also, New York has chosen to disclose an annual resourcing figure based on appropriations approved by the legislature, whereas California has disclosed "judicial branch expendi-

Figure 2.2
Annual Judicial Branch Funding: California and New York



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tures" based on an annual "proposed governor's budget." It is not clear whether these different approaches to accounting are directly comparable; neither New York nor California has been forthcoming in providing details about accounting methods in their annual public reports.

Figure 2.2 suggests that the aggregate judicial budget in California experienced growth over much of the past six years but that FY 2008–2009 may have been an inflection point, with a cut in resources occurring in the last fiscal year shown. California's 2010 annual report includes a narrative summary on funding that asserts a very different story. It says that California's "court system received significant funding reductions in both [of the most recent] fiscal years" (Judicial Council of California, 2010, p. 15). The report also says that the judicial branch faced "an unprecedented $414 million reduction in FY 2009–10." We are unable to explain or reconcile the discrepancy between these statements and the trend shown in Figure 2.2, given that the latter is based on tabular summary data on the judicial budget that were also published by California's state court system. NCSC's 2009 funding report on California indicates that the judicial branch budget was "reduced by $256 million in FY 2008–09" and "reduced by over $500 million in FY 2009–10" (Hall, 2009).

From these discrepancies, we draw three conclusions. First, the official budget data from the annual California reports appear to be incomplete and difficult to reconcile. Second, there are likely multiple ways to account for financial allocations, actual appropriations, and projected budgets at the state court level, and different approaches may convey a very different view of resourcing. Third, the California courts have apparently experienced a dramatic resourcing cut that is not reflected in the budget trend line that we depict in Figure 2.2.[4]

With regard to New York, Figure 2.2 suggests that state appropriations to the court system have basically been flat over the most recent three-year period. This is consistent with NCSC's commentary on New York from 2009, which observed that New York was "not projecting a budget reduction in FY10" (Hall, 2009). This being said, we do not have a good budget trend line for the pre-crisis period in New York, and it is unclear whether the state experienced earlier growth in its court system budget or appropriations in earlier years, similar to what apparently took place in California in 2004–2006.

Figure 2.3 shows the resourcing trends for Florida and Pennsylvania. Here, it is worth noting that Pennsylvania has not published an annual court system report since 2008, so its resourcing data are unavailable for the 2009–2010 fiscal year.

Figure 2.3 suggests that judicial branch appropriations for Pennsylvania drifted upward during the five-year interval from 2004 through 2008. This picture is consistent with NCSC's commentary in 2009 that the Pennsylvania court system appropriation was not reduced in FY 2008–2009, but, according to that report, a major reduction in the appropriation was being contemplated for FY 2009–2010. Assuming that to be true, then the most recent (missing) year of official Pennsylvania data in Figure 2.3 would reveal an inflection point with regard to judicial branch resourcing. With regard to Florida, Figure 2.3 paints another picture. State appropriations for the Florida judicial branch drifted upward through FY 2007–2008, then spiked sharply downward in FY 2008–2009—superficially at least, in conjunction with the impact of the financial crisis. This is consistent with NCSC's commentary on court system funding in Florida.

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[4] The latter is also affirmed by more recent news stories, which indicate that California enacted further dramatic cuts to the state trial court system in summer 2011 (Dolan and Kim, 2011).

Figure 2.3
Annual Judicial Branch Funding: Florida and Pennsylvania

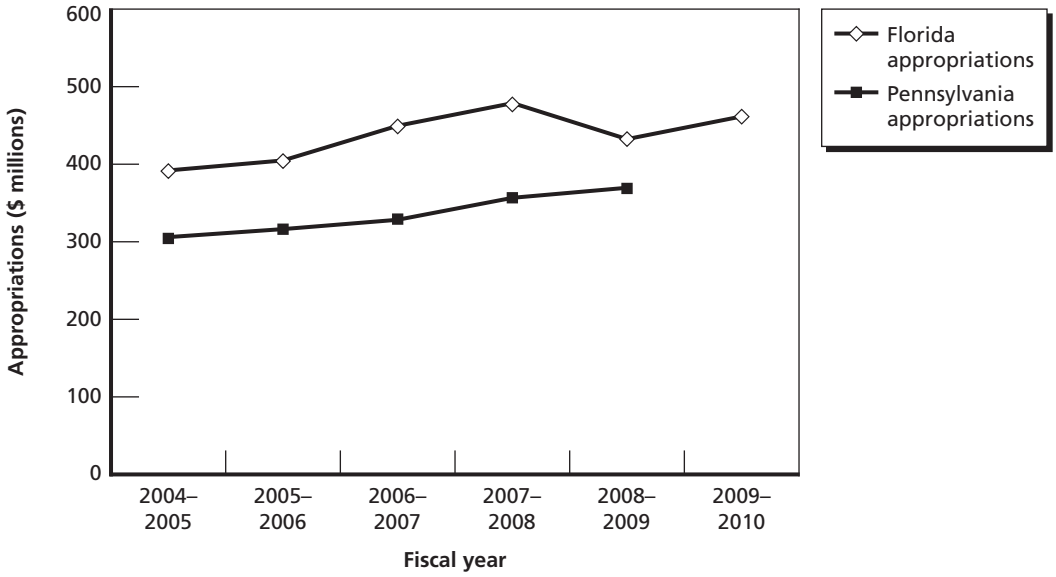

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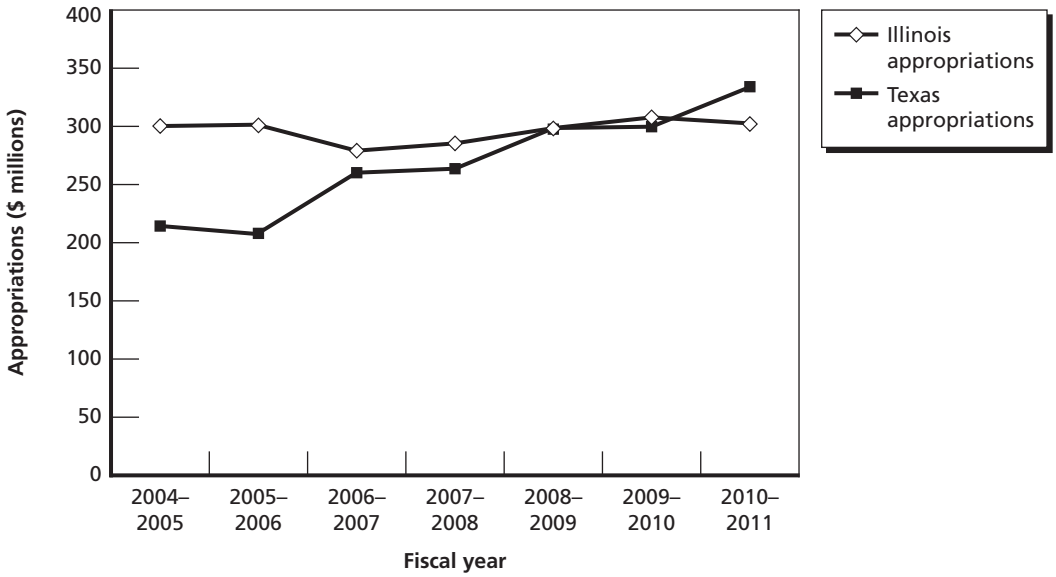
Figure 2.4 shows the resourcing trends for Illinois and Texas. Here, the trend lines are striking in that they do not show an inflection point or a sharp drop-off in resourcing in the post-2008 period. The state judicial branch budget appropriation in Illinois appears to have remained fairly stable in the seven-year period from 2004 to 2010, while the budget appropriation in Texas appears to have been growing during the same time frame. Two key findings emerge. First, the trends in Illinois and Texas highlight the importance of fiscal subtleties that

Figure 2.4
Annual Judicial Branch Funding: Illinois and Texas, 2004–2010



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we have not explicitly considered or attempted to control for in our analysis. In particular, both states fund a large portion of their court systems through county- and local-level financing mechanisms, which apparently are not included in the published budget numbers. Second, state-level differences (e.g., in demographics and population) would have to be considered carefully in any attempt to interpret the meaning of different budgeting trends across states.

Discussion

One of the most important avenues by which the financial crisis might affect the civil justice system is through its impact on funding to state court systems. In turn, reduced funding to the courts could put the judicial function of government under increasing stress. In practice, the available snapshot data from NCSC suggest that many state court systems are indeed experiencing both stress and reductions in their funding. Whether that fiscal reality can be attributed with precision to the financial crisis, however, is less clear. The results of our attempt to pull official appropriations budgeting data for several selected state court systems was somewhat surprising in that the data did not reflect the broad downturn in judicial branch funding that has been described by NCSC and widely reported elsewhere. However, those data systems involve financial and accounting complexities that are very difficult to parse from the reports themselves, and, in some instances, the official budget data are difficult to reconcile with the official narrative describing the same budgets. Meanwhile, given that anecdotes continue to accumulate that state courts are facing serious fiscal problems, further investigation into the financing anatomy of the state courts and better accounting data describing their actual resourcing levels are high priorities for future research.

This being said, there are several important questions about state judicial branch funding that cannot be answered with currently available NCSC summary data on the state courts. First, what impact did the financial crisis itself have in driving budget cuts in state court systems? That question can be addressed only by looking at resourcing data over a period of several years, going back before the impact of the crisis in 2008 (and prior to the available NCSC summaries on state court system budgets). Second, to what extent can any resourcing shortfalls in state courts be tied to the impact of other administrative performance measures, such as case backlogs or speed of resolving cases? Although there is anecdotal evidence to suggest that resourcing shortfalls have led to performance problems in court systems in at least some parts of the United States,[5] analysis on this point would require more precise data than are currently available on several aspects of court system administration and resourcing. This kind of analysis could be a target of opportunity for future civil justice system research.

We also suspect that narrower questions regarding how the financial crisis itself (i.e., the 2007–2008 mortgage meltdown and credit crunch) affected judicial branch funding may be less important than a broader question: How will long-run government debt, budget deficits, and austerity measures contribute to court system resourcing difficulties in the future? The financial crisis may have been a precipitating factor in the fiscal problems now facing the states, but those fiscal problems have other antecedents as well and may long outlive the current financial crisis. Resourcing to the courts offers an important performance metric to track in its own

[5] Again, see, for example, "State Courts at the Tipping Point," 2009; Dolan and Kim, 2011; LeBlanc, 2011; Stashenko and Wise, 2011; and Blose, undated.

right, given this historical and economic context. In light of the likelihood that fiscal environments may be hostile into the foreseeable future, the impact of waning resources on what the courts actually do—and how they do it—could have profound policy implications for the civil justice system going forward. Will courts have to cut their operations, prioritize some categories of cases over others, and draw more heavily on fee-based funding from litigants who make use of the system? What would that mean for access to justice, injury compensation, and dispute resolution? Future civil justice research will need to address such questions.

CHAPTER THREE

Patterns of Civil Litigation

In the previous chapter, we presented a summary of recent trends in resourcing for state court systems. Our intuition is that the supply of judicial services and the ultimate capacity of the trial courts are constrained by state budgets. Consequently, we reviewed recent evidence pertaining to possible budget distress. From a public policy perspective, however, we were equally interested in the effects of the financial collapse on the demand for judicial services and on the volume of new litigation claims brought before the courts. In the wake of the collapse, a broad range of individuals, businesses, state governments, and municipalities may have distinct legal claims arising from different aspects of the crisis and its secondary effects. The potential for increased civil litigation in this context, particularly when combined with the likelihood of shrinking judicial branch budgets, could strain court systems. In the extreme, the combination of increasing demand and dwindling supply could result in a "perfect storm" for state courts—and one with the potential to rage for an extended period.

In this chapter, we construct a descriptive snapshot of recent patterns of civil litigation in state and federal courts in the years immediately surrounding the financial collapse. The first step involved obtaining overall case filing data for a selection of key states and federal jurisdictions.[1] Here, we present these data to the extent that they are available.[2] We also dug deeper into the available summary data and extracted special types of cases that seemed especially likely to have experienced increased demand as a consequence of the financial collapse. Among the various categories of non-criminal litigation handled by trial courts, bankruptcies and foreclosures are potentially the most relevant categories.[3] Here, again, data availability issues arise. The federal statistics on bankruptcies are good in terms of consistency and timeliness of publication. By contrast, state foreclosure data are not consistently reported, at least at present, across the states we studied.

Despite the limits and problems of the current data sets and mechanisms for capturing litigation activity in the trial courts (and particularly across states), the available data suggest

[1] Civil case filings are a logical starting point for a top-level analysis, but they are not conclusive. It may well be the case that the quantity of case filings is a less important indicator of the effect of the financial crisis than is the nature of those filings. This possibility may be an appropriate topic of future research.

[2] One of the basic problems inherent to litigation and case rate data published by the state courts is that there is significant lag time in the public release of that data, often a year or more from when the cases are actually filed in the courts. Moreover, there is also considerable variation across states in the types of litigation data that are tracked at the trial court level. These limitations are inherent to state trial court and litigation data, and any analysis of such data (including our own) should be interpreted accordingly.

[3] Note that various types of securities litigation also seemed to be highly relevant here. We address the topic of securities litigation separately in Chapter Four.

that for state civil litigation generally, and for federal bankruptcy and state foreclosure cases in particular, courts across the nation are seeing marked increases in the volume of claims and their workload. If there is indeed a trend toward increased litigation volume against a backdrop of dwindling judicial branch budgets, then the state courts may face growing challenges with regard to case management, staffing, prioritization of limited resources, and maintaining overall access to justice for would-be litigants.

National Center for State Courts Data Show That the Civil Litigation Caseload Has Trended Upward Since Well Before the Collapse

One of the most important implications of the financial collapse for the civil justice system involves the effect of the collapse on new civil claims and court filings and, by extension, on the overall demand for litigation and judicial services in the United States. To investigate whether the collapse and economic downturn may have spurred increased litigation activity, we traced recent trends in aggregate civil case filings in both state and federal courts. Note that this examination alone cannot prove whether any particular aspect of the financial collapse was the direct cause of a putative increase in litigiousness or litigation volume. Nevertheless, this kind of descriptive snapshot offers evidence as to whether the rate of civil claims and litigation filings ticked *up* after the collapse.

The best resource for recent descriptive information on litigation volume in state trial courts is (once again) NCSC. We gathered several years of civil case filing data on several state court systems across the United States.[4] NCSC compiles such data from year to year and across the states through its Court Statistics Project. It also publishes an annual report, *State Court Caseload Statistics*, which offers an extensive set of annual descriptive summaries on various slices of civil litigation activity as captured by the state trial courts. We draw heavily on NCSC's summary snapshots and survey data on court filings in the discussion that follows.

Figure 3.1 presents information that we compiled from NCSC's annual civil caseload reports from 2003 to 2008 for California, Florida, Illinois, New York, Pennsylvania, and Texas. For this rough-cut assessment of civil case filing trends in the years leading up to the financial collapse, we summed the number of civil filings reported to NCSC by each state in each year. While this crude method glosses over differences across states in reporting practices and demographics, it does indicate an unadjusted multiyear litigation trend for these states.

Since 2005, civil case filings in all six states appear to have trended upward during the period from 2003 to 2008, although the magnitude of the trend differs considerably from state to state. It is particularly noteworthy that all the states but Illinois reported an uptick in civil filings from 2007 to 2008. Unfortunately, an analysis of the lasting impact of the collapse

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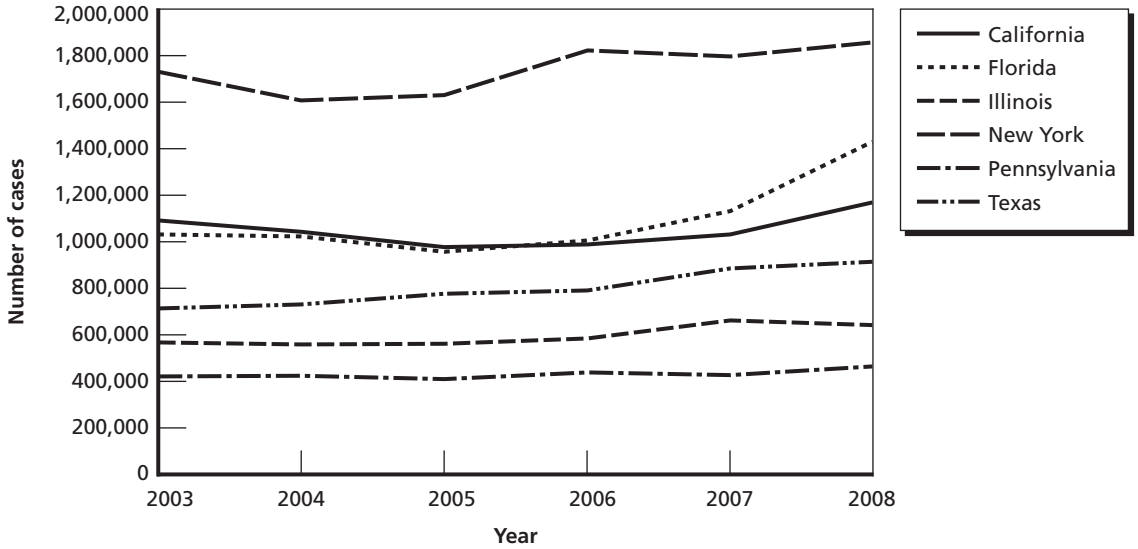
[4] Per NCSC, "civil" cases are defined as "those that involve tort, contract, real property, small claims, probate, mental health, and civil appeals" (NCSC, 2010, p. 24). NCSC defines its civil case unit of analysis as follows:

> A petition or civil complaint begins a civil case in most trial courts. The civil complaint alleges the facts and legal grounds upon which the plaintiff bases a claim for legal redress and requests that legal action begin. The statistics reported in the [NCSC] Caseload Summary Matrix are a count of cases, not plaintiffs, defendants or legal issues/causes of action. A civil case with multiple parties or multiple causes of action is counted as one case. (NCSC, undated, p. 6).

We interpret this to mean that any civil complaint or petition would be included as one "unit" in NCSC's count of civil filings.

Figure 3.1
Civil Case Filings in Selected States, 2002–2008



SOURCE: NCSC data.
RAND *OP353-3.1*

would require additional civil litigation case filing data for at least 2009 and 2010—data that are not currently available through NCSC. As a consequence, it remains to be seen whether the upward drift in civil litigation volume in California, Florida, Illinois, New York, Pennsylvania, and Texas has been sustained in more recent years.

NCSC data offer some additional insight into recent state-level trends in civil case filings, aggregating trial court data across the states to reveal a national trend. According to NCSC's report on 2008 state court caseloads, nationwide civil case filing rates increased by 29 percent during the decade from 1999 to 2008, by 15 percent between 2005 and 2008, and by 7 percent from 2007 to 2008 (NCSC, 2010, p. 24). By comparison, NCSC reported that nationwide criminal filings rose by only 3 percent during the four-year period from 2005 through 2008. These findings suggest a long-standing trend toward increasing civil (but not criminal) litigation volume, dating back well before the onset of the collapse. Per NCSC, a population-adjusted version of the national civil claims rate from 1999 to 2008 still reflected a similar trend of increasing claims volume, rising by 16 percent during that interval. One additional bit of descriptive information provided by NCSC offers some insight into the components of the civil litigation trend. For a subset of 13 states, NCSC decomposed the civil claims rate into discrete underlying trends in tort and contracts claims and found that contracts claims rose substantially over the decade from 1999 to 2008 (by 63 percent), while tort claims actually fell (by 6 percent) (NCSC, 2010, p. 27).

What can we conclude from all of this? First, there are significant data limitations and interpretive difficulties associated with this type of analytical effort. Second, the available information suggests that the volume of civil claims in state trial courts is rising and has been for some time. Although the most recent data (from 2008) suggest a continuing uptick in civil claims possibly associated with the financial collapse, it is not clear that that uptick is distinct from the background trend, and more recent data (from 2009 and 2010) remain unavailable to show whether any financial collapse-related effect has been sustained. The NCSC data also

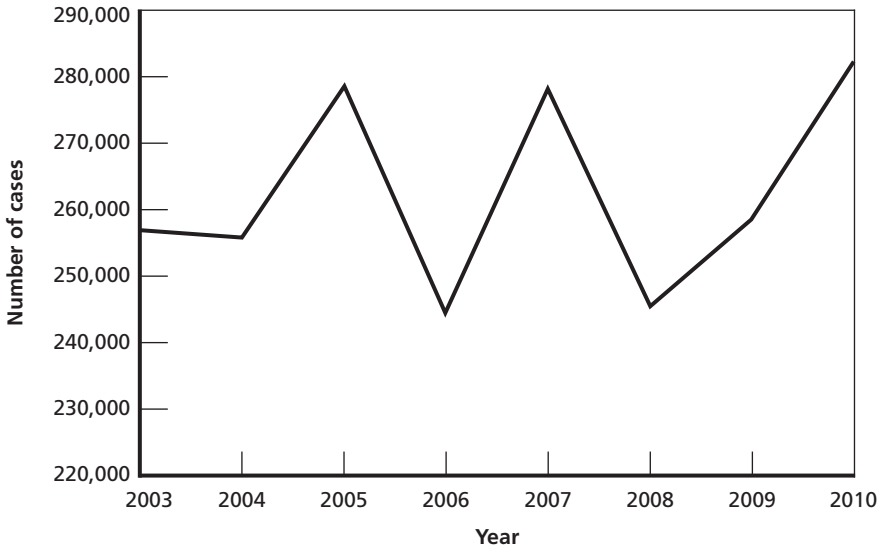
offer reason to believe that the longer-term trend toward increasing litigation volume is specific to civil filings (as distinct from criminal filings, for example). Better and more current data, and a more detailed analysis, will be needed to support a nuanced assessment of the lasting impact of the financial collapse on civil claims filings in state courts across the country.

Federal Civil Case Filings Show a Mixed Picture of Activity in the Wake of the Financial Collapse

Federal data on civil case filings permit a more detailed summary by case type and are current through 2010. While these federal filings represent only a small percentage of the nation's overall litigation profile, federal filing data nevertheless set a benchmark for data availability and consistency. Figure 3.2 is derived from data published by the Administrative Office of the U.S. Courts (AOUSC) and traces the multiyear volume in all civil case filings across U.S. federal jurisdictions.[5] As shown, there does not appear to have been any clear upward or downward trend in federal civil filings in 2003–2010, although the number of claims rose in 2009 and 2010 following a drop in 2008. Whether the last two years of increasing civil claims volume has any direct relationship to the financial collapse, and whether it will prove to be a sustained trend in future years, remains to be seen.

Figure 3.3 decomposes the aggregate AOUSC trend in federal civil claims into several narrower categories of litigation, including contracts cases and tort cases. The pattern in claims across these various categories is complex and difficult to interpret, but, at least according to the most recent year of available data, federal tort claims appear to be on the rise.

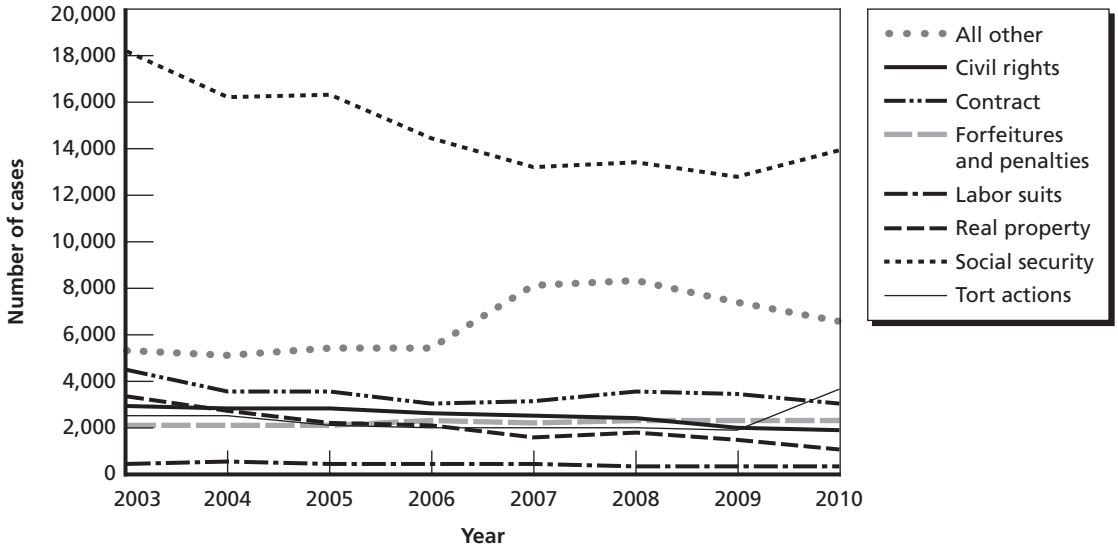
Figure 3.2
Aggregate Civil Case Filings in Federal Courts, 2003–2010



SOURCE: Data from AOUSC, undated(c).
RAND *OP353-3.2*

[5] Annual caseload statistics are available on the AOUSC website (see AOUSC, undated[c]).

Figure 3.3
Civil Case Filings in Federal Courts, by Type of Claim, 2003–2010



SOURCE: Data from AOUSC, undated(c).
RAND *OP353-3.3*

Several observations are worth making about the federal litigation data from AOUSC. The first is that there is no unambiguous trend toward increased civil claims in the federal data, nor is there any clear spike associated with the financial collapse in 2008. Second, the federal data present a very different picture from the state civil claims data. There is no particular reason that federal and state litigation trends ought to move in tandem with each other, and, in fact, they may differ considerably, both in the nature of the underlying substantive disputes and in the types of cases that qualify for federal diversity jurisdiction. For the purposes of investigating the aftereffects of the financial collapse, we do note that some specific categories of litigation are likely to involve federal causes of action (particularly in securities litigation and bankruptcy). We explore securities litigation in more detail in Chapter Four; in the following section, we investigate bankruptcy filings (which constitute a unique and distinct category of civil litigation).

Bankruptcy Data Show Increased Filing Volume Since the Passage of the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005

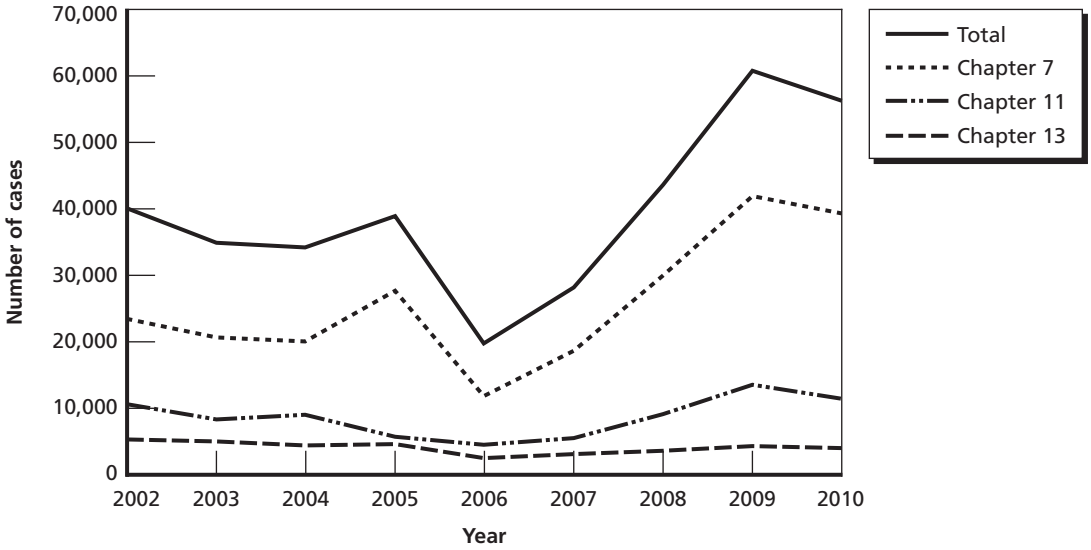
Given the broad economic effects of the financial collapse and the ensuing hit to consumer and business lines of credit, one particularly important area of litigation activity for our purposes is bankruptcy filing over the past several years. As financial pressure accumulated in the years following the collapse, one might very reasonably expect to see a corresponding blip in bankruptcy filings, by both individuals and businesses. AOUSC records bankruptcy filings in the U.S. court system separately from general civil case filings (which are shown in

Figures 3.2 and 3.3). Figure 3.4 plots the published AOUSC data on the last several years of business bankruptcy filings for which data were available.[6]

One of the most striking aspects of Figure 3.4 is the decline in the number of business bankruptcies filed in the middle of the period from 2002 to 2010. Between 2005 and 2006, the total number of business bankruptcy filings plummeted, halving to just under 20,000 cases. The likely cause was the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA; Pub. L. 109-8), which, among other things, strengthened certain creditors' rights with respect to payments made in the normal course of business, clarified reclamation rights for goods delivered to an insolvent party, and established new small-business debtor reporting requirements. Following the passage of BAPCPA, the occurrence of Chapter 7 and Chapter 11 filings trended higher, but the ramp-up appears to have plateaued in 2010. The upward surge in bankruptcy filings might merely have been a regression to a mean following the passage of BAPCPA: In 2005, many businesses may have rushed to file before BAPCPA imposed stricter limits (and perhaps higher costs) on bankrtupcy petitioners. Or, perhaps, the bankruptcy effects of the financial collapse began to manifest as early as 2007. In any event, it seems reasonable to assume that the trend of increasing bankruptcies in 2008 and 2009 might have been related, at least in part, to economic hardships resulting from the financial crisis.

AOUSC data on personal bankruptcy filings between 2002 and 2010 show a pattern similar to that of business bankruptcies (see Figure 3.5). Once again, the striking drop-off from 2005 to 2006 is most likely the effect of the 2005 passage of BAPCPA (and the run-up

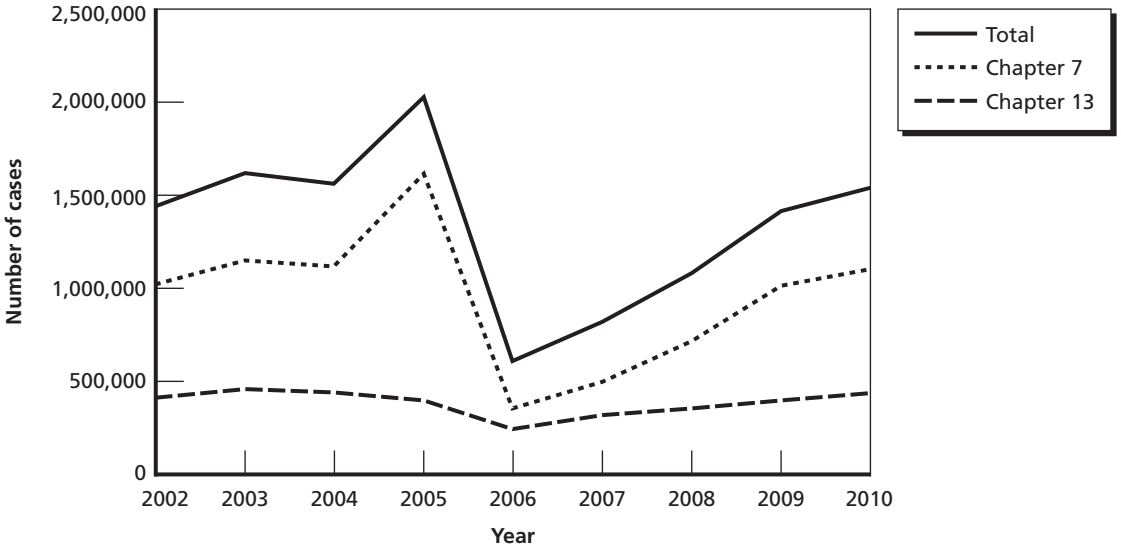
Figure 3.4
U.S. Business Bankruptcy Filings, 2002–2010



SOURCE: Data from AOUSC, undated(b).
RAND *OP353-3.4*

[6] We used AOUSC data for the 12-month period ending in December (see AOUSC, undated[b]). Note that AOUSC tracks several categories of bankruptcy claims, based on the chapter of the bankruptcy code under which any particular case is filed. Major categories of bankruptcy include liquidation under Chapter 7, reorganization under Chapter 11, and adjustment of individual debts under Chapter 13. See AOUSC, undated(a), for a more in-depth discussion of these categories.

Figure 3.5
U.S. Consumer Bankruptcy Filings, 2002–2010



SOURCE: Data from AOUSC, undated(b).
RAND *OP353-3.5*

from 2004 to 2005 could be evidence of a "race to file" before the new provisions took effect). The consumer bankruptcy reforms made it more difficult and costly for households to declare bankruptcy under Chapter 7's debt discharge shield. While a drop-off in filings is to be expected after the reform, the post-2005 springback to near historically high levels of household bankruptcy filings superficially suggests that, even with stricter legal requirements, pressure from the financial collapse and Great Recession may have contributed to a sharp uptick in consumer insolvency. Although the rate of increase in consumer bankruptcies abated somewhat from 2009 to 2010, the trajectory still appears to be moving higher (though very recent anecdotes suggest that the number of consumer bankruptcies may now be in decline; see, e.g., Bernard, 2011).

Taken together, the personal and business bankruptcy data from AOUSC appear consistent with the hypothesis that the financial collapse and economic downturn are associated with increased rates of bankruptcy filing. Whether the financial collapse strictly "caused" the uptick in bankruptcy rates, whether the recent trends will continue into the future, and whether these trends represent a substantial incremental draw on court time and resources in the federal system remain unclear. Future empirical research on bankruptcy litigation post-2005, and on the adequacy of existing bankruptcy laws and courts in handling the increased flow of cases during the collapse, is needed to address these issues.

State Foreclosure Filings Appear to Have Increased in Connection with the Collapse

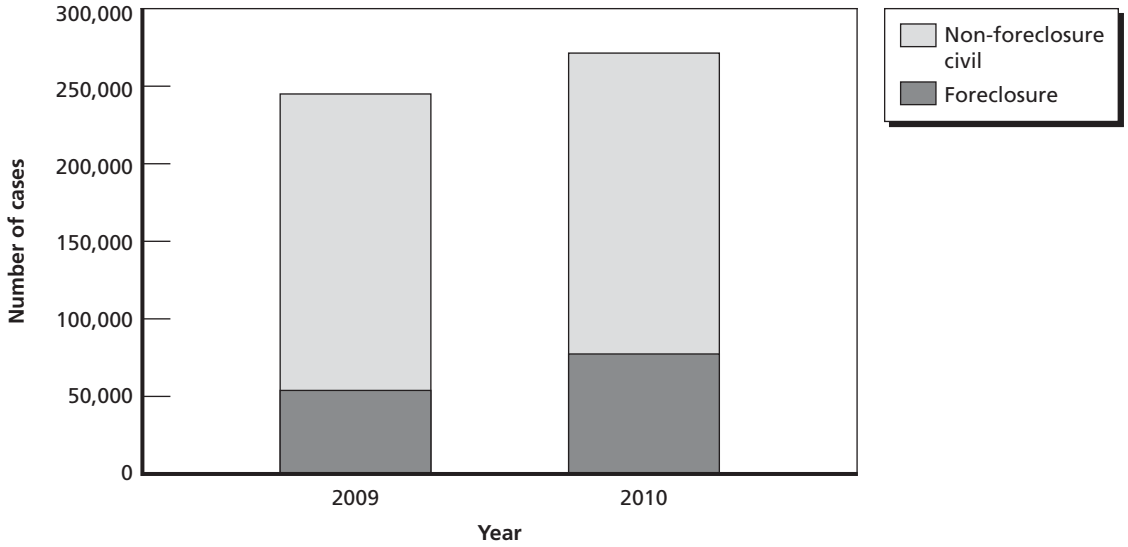
Finally, another major category of litigation with regard to the financial collapse involves mortgage foreclosure proceedings targeted against delinquent homeowners. Foreclosure cases are handled on the state (rather than federal) level. As we mentioned, NCSC data indicate that

state civil caseloads in recent years have broadly reflected an increase in the number of contract cases coming before trial courts. Among these contract cases, we suspect that many may, in fact, have been related to mortgage foreclosures. Some states, like Wisconsin and Connecticut, reported dramatic increases in foreclosure filings between 2006 and 2008 (i.e., increases of 55 and 114 percent, respectively, according to NCSC data). Across nine U.S. states and territories where NCSC specifically tracked the volume of foreclosure claims between 2006 and 2008, the aggregate increase in such filings was 55 percent (NCSC, 2010, p. 32).[7]

Evidence of increasing foreclosure activity in recent years is not confined to the states in the NCSC sample. New York, for example, reported an increasing foreclosure caseload in the most recent years examined in our study. Figure 3.6 shows the proportion of trial cases in that state that involved foreclosure-related suits in 2009 and 2010.

Without a doubt, substantial court resources may be needed to meet the foreclosure challenge in states that require judicial approval before a home can be foreclosed on (e.g., New York). If the judicial resourcing challenges we mentioned in Chapter Two turn out to be lasting and widespread, then the foreclosure-related strain on some state courts may be acute. We suspect that other states may be facing problems similar to those confronting New York. It is unclear, however, whether similarly detailed data on foreclosures are available directly from most other states.

Figure 3.6
New York Trial Court Pending Caseload: Non-Foreclosure Civil Cases and Foreclosures, 2009 and 2010



SOURCE: Data from Pfau, 2010.
RAND *OP353-3.6*

[7] NCSC included nine states or territories in this average: Connecticut, Iowa, Kansas, New Jersey, North Dakota, Oregon, Puerto Rico, Utah, and Wisconsin.

Discussion

Available descriptive data suggest a recent trend toward increased civil litigation volume in many trial courts, possibly associated with the aftereffects of the financial collapse. In particular, federal bankruptcy and state foreclosure filings have grown, consistent with the Great Recession's destructive wake. According to NCSC summary data, the number of national civil claims in state courts was on the rise for the entire decade from 1999 to 2008. Unfortunately, the NCSC statistics on state court litigation include a lag of two years, so it is impossible to determine whether the trend through 2008 has been sustained more recently.

The descriptive data on trends in civil claims filings might be more valuable when used analytically in concert with information about court processes, caseloads, and resources. Overburdened, underfunded state courts may find it difficult to administer effective justice when faced with mounting demands. Future empirical research studies could be designed to investigate these concerns in greater detail and with far greater rigor. Meanwhile, the likelihood of increasing demands for judicial branch services and simultaneously decreasing revenues invites new questions about how courts across the country are adapting to cope with the challenge. When faced with these pressures, are there innovations and lessons learned about court management that could be instructive for other jurisdictions? For mortgage foreclosures, in particular, we wonder whether judicial involvement helps or hinders the process, relative to the experiences of non–judicial foreclosure states.

With regard to bankruptcy, we note that there is another substantive question that could be explored as well. The BAPCPA statutory revisions enacted in 2005, originally designed to prevent consumer abuse of debt discharges, may or may not have been well tuned for handling a financial crisis of the type and magnitude that occurred in 2008. The volume of bankruptcy filings has now returned to pre-BAPCPA rates, so it may well be worthwhile to study the effect of those statutory revisions, how they influenced the behavior of consumers and businesses during the financial collapse, and what the ramifications of different bankruptcy policy choices are likely to be in terms of the volume of filings and the interests of different groups of stakeholders in the bankruptcy system.

CHAPTER FOUR

Securities Litigation and Enforcement

In the wake of the financial collapse, litigation involving securities claims, shareholder suits, and allegations of corporate misgovernance spiked upward. Various financial (and other) institutions that were negatively affected by the crisis might have mismanaged risk, provided deficient disclosures, engaged in fraud, or otherwise failed in their duties to protect shareholder interests. The crisis also revealed a series of high-value Ponzi schemes masquerading as legitimate hedge fund investments—schemes that came apart with closer accounting scrutiny and loss of market liquidity and that ultimately left their investors with billions of dollars in losses (Wayne, 2009). Given that the direct impact of these events resulted in large numbers of persons with arguably compensable injuries, it seems likely that many have sought redress through the civil justice system. Securities litigation involves a direct channel of potential impact between the financial crisis and the civil justice system in which alleged corporate wrongdoing spins into demands for compensation, which the civil justice system then needs to resolve.

There are several threshold questions to examine here. First, are there any published or publicly available data to describe broad patterns in these types of litigation, both before and after the financial crisis? If so, what do those data show with regard to the impact of the crisis? Are there any gaps in the available data on this broad category of litigation that should be addressed? And what trends and analytical relationships concerning securities litigation and corporate misgovernance most warrant investigation in the future?

Stanford Securities Class Action Clearinghouse Data Show a Spike in Securities Class Actions

The Stanford Securities Class Action Clearinghouse (SCAC) has actively compiled filings and data on federal securities class actions (i.e., actions filed in federal courts alleging securities fraud) since 1996.[1] Annual summary reports of SCAC data on litigation trends are published and distributed online by Cornerstone Research, an economic consulting firm that provides expert testimony on financial matters in complex litigation (Cornerstone Research, 2010a, 2010b). The SCAC database is updated on an ongoing basis with new case filings; at the time of our study in early 2011, SCAC data were available through mid-2010.

As with any civil justice data set that attempts to count instances of mass litigation, the SCAC database has made some basic assumptions about what constitutes a "unit" of litigation: Two or more filed suits against the same defendant(s), based on the same underlying allega-

[1] The SCAC database and background information are available through Stanford Law School.

tions, generate only one case record. SCAC notably does not capture state law claims, or claims litigated in state courts. Thus, it provides a narrow window on a specifically defined slice of securities litigation—but an interesting slice, for the purpose of assessing the impact of the financial crisis on the civil justice system.

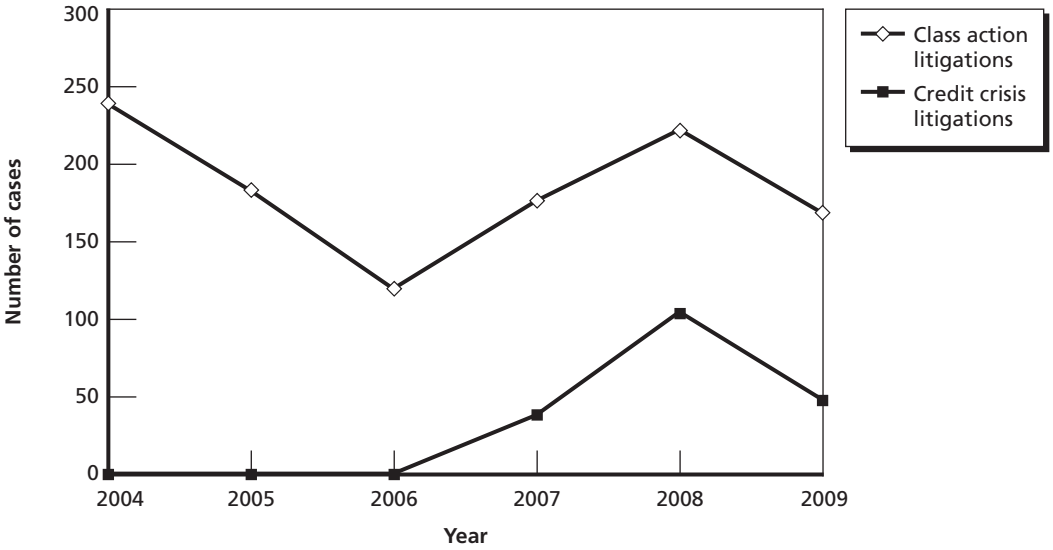
According to data abstracted from SCAC and the most recent annual summary report by Cornerstone, there was a spike in federal securities class action litigation in 2007–2008, but that spike subsided in 2009 and largely disappeared in 2010 (see Figure 4.1). The ten-year average count of federal securities class actions was 197 for the period from 1997 to 2008; the trend line dipped to 119 in 2006 (the lowest annual value observed in any year covered by SCAC), prior to the onset of financial crisis–related litigation beginning in 2007. Early statistics for the first half of 2010 indicated that only 71 new class actions were filed, a pace that suggests that the recent downward drift in annual litigation volume is continuing.

Consonant with the crisis-related litigation spike shown in Figure 4.1, other SCAC statistics suggest that financial services was the most targeted sector in securities class actions in 2009, with asset management firms being the most targeted category. According to "heat map" indexes generated by Cornerstone, financial firms dominated the S&P 500 as targets in securities class action lawsuits in 2008 and 2009, in terms of both the number of companies involved and the market capitalization they represented.

U.S. Securities and Exchange Commission and Department of Justice Enforcement in Securities Cases Shows No Clear Increase in Activity

Another category of securities litigation that is less directly related to the impact of the financial crisis on the civil justice system but equally deserving of consideration involves the enforce-

Figure 4.1
Federal Class Action Trends, 2004-2009



SOURCES: Data abstracted from tables in the SCAC database as of August 20, 2010, and summary reports by Cornerstone Research (2010a, 2010b).

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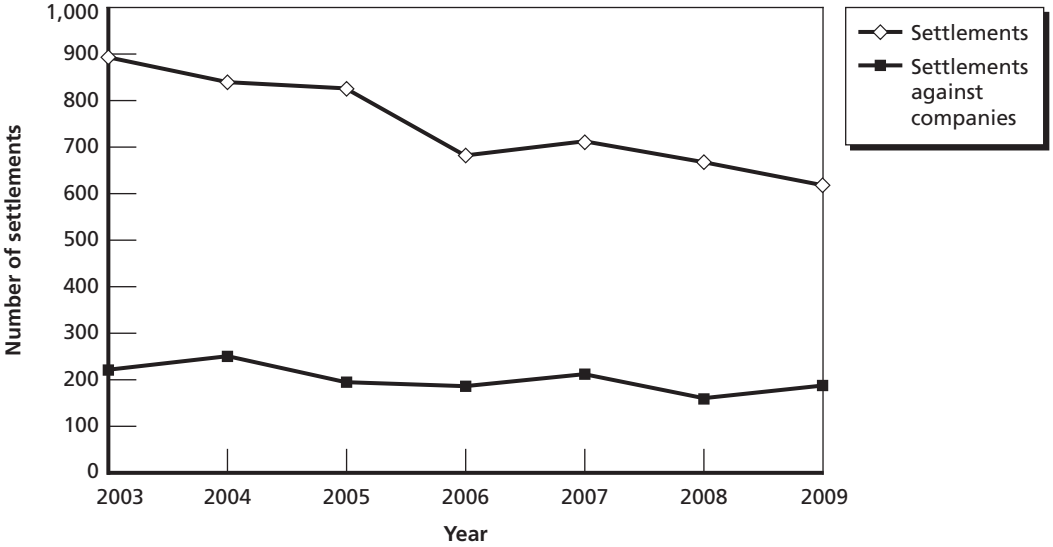
ment efforts of the U.S. Securities and Exchange Commission (SEC). Interestingly, the independent consulting firm NERA has been tracking SEC settlements in securities cases for the past decade; these data are summarized in periodic reports. The most recent NERA report on SEC settlements provides an update through mid-2010 (Overdahl, Buckberg, and Larsen, 2010; see also Larsen, Buckberg, and Lev, 2008).

Annual NERA statistics on the volume of SEC settlements in recent years suggest that the overall settlement count (which includes actions against both companies and individuals) has diminished somewhat since 2003, while the count of settlements with corporations has remained fairly flat (see Figure 4.2). There does not seem to have been any observable jump in SEC settlement activity corresponding to the impact of the financial crisis in 2007–2009. Of course, myriad factors enter into the volume of SEC settlements, including the intensity and pace of SEC investigations and prosecutions and the willingness of the SEC and defendants to enter into settlement, as well as any putative changes in the underlying occurrence of fraud or misconduct in the broader market. At least superficially, though, the financial crisis does not appear to have been associated with increased activity.

NERA's report on SEC settlement activity provides only limited insight into the types of cases that are involved in SEC settlements and does not seek to address or quantify factors that might give rise to observed patterns in settlement volume. This is possibly an area in which future research or data collection would be worthwhile. Regardless, the available SEC settlement statistics are pertinent as at least an indirect marker of potential civil justice system activity: SEC investigations can give rise to civil as well as criminal claims in the courts, and injuries related to SEC claims can often spawn private litigation for damages as well.

Of course, there are various other types of law enforcement and administrative activity that are also pertinent to claims of corporate wrongdoing, with a possible civil justice system impact. The U.S. Department of Justice (DOJ) notably undertakes prosecutions in connection

Figure 4.2
Number of SEC Settlements by Year, 2003–2009



SOURCE: Data abstracted from Overdahl, Buckberg, and Larsen, 2010.

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with criminal violations of federal law perpetrated by organizations. Although these are criminal cases by definition, they nevertheless correspond to events that might, in many instances, be connected with civil claims and litigation as well. Unfortunately, DOJ (via the Bureau of Justice Statistics) does not publish summary data on criminal prosecutions of organizations. The U.S. Sentencing Commission (USSC), by contrast, does capture statistics on criminal sentencing for organizations convicted of wrongdoing under Chapter 8 of the Federal Sentencing Guidelines. The most recent annual reports from USSC summarizing these statistics, as of this writing, only covered the period through fiscal year 2009; in addition, it is not clear whether USSC captures data on the full universe of cases in which organizational offenders receive federal criminal sentencing. Available USSC summary statistics do indicate that instances of criminal sentencing for organizations became more common between 2004 and 2006 but then tailed off again between 2007 and 2009. According to USSC, there were 130 organizations that received Chapter 8 sentences in 2004, 217 that received such sentences in 2006, 198 in 2008, and 149 in 2010 (the most recent year for which data were available; see USSC, 2006, 2008, and 2010).

In a related vein, administrative deferred prosecution agreements and corporate integrity agreements are additional potential indicators of organizational wrongdoing and related regulatory and enforcement activity. These sorts of agreements represent diversionary efforts by federal prosecutors (and other administrative officials) and are aimed at remedying alleged misconduct and faulty corporate compliance mechanisms without recourse to formal trial or the courts. Based on our recent review, DOJ does not appear to track or publish statistics on the deferred prosecution agreements that it has entered into in connection with allegations of corporate crime; the most recent major scholarly article on this topic dates to 2008 and does not include a statistical breakdown of the occurrence of such agreements, much less data that would be pertinent to an examination of the corporate compliance climate before and after the financial collapse. In contrast, the U.S. Department of Health and Human Services does maintain an electronic database of corporate integrity agreements entered into by health care organizations as a condition of nonprosecution for alleged misconduct. This database could be studied for patterns of enforcement activity and offers another category of data that could be relevant to an analysis of subsequent claims and private litigation in the civil justice system.

Advisen Data Show That Securities Litigation Is on the Rise

In addition to the Stanford SCAC database and Cornerstone reports describing federal securities class action litigation, there are various other consulting firms that attempt to track and report on broader patterns in securities litigation in the United States. A prominent example is Advisen, an insurance industry consulting firm that tracks new U.S. securities class action, securities fraud, derivative action, and breach of fiduciary duty suits through its Master Significant Case and Action Database (MSCAD).[2] Advisen acknowledges that how it defines "cases" and "counting rules" plays an important role in its data and in observed patterns of securities litigation; the firm indicates that it collects data on securities class actions filed in state courts (in contrast to SCAC) and that complaints that name multiple corporate defendants are

[2] For additional information on the types of cases included in MSCAD, see Advisen (2009, 2010).

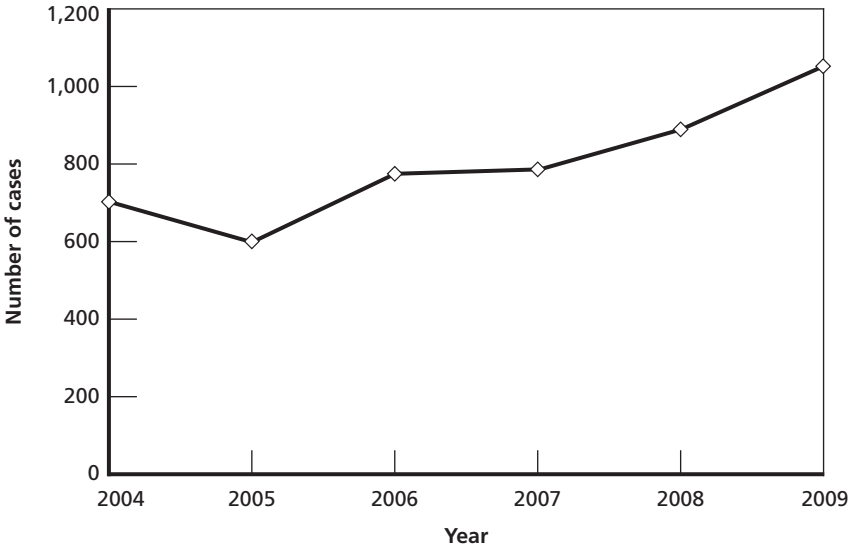
counted as a separate "cases" against each defendant. As is the case with SCAC, many of the details of how litigation data are collected and counted by Advisen remain obscure.

Advisen's statistics suggest that the number of new securities-related cases being filed annually has been on the rise since 2005 (see Figure 4.3). It also acknowledges the decline in the number of securities class action lawsuits reported by SCAC but indicates that that decline has been more than offset by increases in other categories of securities litigation, notably securities fraud cases (which, per Advisen, are dominated by government-initiated litigation) and cases concerning the breach of fiduciary duty. The most recent Advisen report notes, in particular, a surge in securities litigation in the second quarter of 2010, connected with several high-profile events, including the government investigation of Goldman Sachs, the Deepwater Horizon oil catastrophe, and the Upper Big Branch coal mine explosion (Advisen, 2010).

Discussion

For several reasons, securities litigation is an important aspect of the civil justice impact of the financial crisis. First, the financial crisis inflicted losses on many investors, often arguably as a result of corporate mismanagement, breach of fiduciary duty by directors, or failure to disclose material risks. Securities-related lawsuits allow us to trace the direct impact of these sorts of injuries on the civil justice system in the form of plaintiff claims to recover damages. On one level, these claims may be a gauge of stress or activity within the justice system, and of the pressure that the financial crisis placed on it. On another level, if poor compliance, faulty risk management, and lapses in board oversight contributed to the crisis, then securities litigation

Figure 4.3
Number of Securities Cases, 2004–2009



SOURCE: Data from Advisen, 2010, p. 1.
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arguably represents an important counterweight and response to those excesses.[3] Tracking securities litigation activity offers a window on that response, deterrence and compensation in the justice system, and the incentives faced by executives and boards moving into the future. Finally, securities litigation offers an opportunity to reflect carefully on the data challenges involved in tracking litigation activity in an important substantive area in the civil justice system. Our basic ability to count cases and claims, and to quantify related trends, is notably limited by available data resources—and the justice system itself is not designed to facilitate transparency for this kind of assessment and oversight.

The published summary data on securities litigation suggest that the financial crisis has had a mixed impact on justice system activity. At least in looking at five-year trends through 2009, some indicators of securities litigation activity showed an upward blip in 2007 and 2008, corresponding to an increasing volume of cases related to the crisis. According to the SCAC database, for example, new securities class action suits did increase in volume in 2007 and 2008, but the new suits had already begun to subside by 2009, and the downward trend reportedly continued in early 2010. Meanwhile, government enforcement activity, as reflected in SEC settlements, apparently did not tick upward as a result of the financial crisis, at least as shown in NERA's tracking data. Rather, the number of SEC settlements appears to have gradually declined from 2003 to 2009 or remained fairly flat during that interval, depending on whether we focus on all SEC settlements or only those that involved corporations as the defendant. Finally, Advisen's MSCAD data and annual summary statistics tracking "securities litigation" show an upward trend in overall litigation volume since 2005—a window not limited to the intense financial crisis period of 2007 and 2008. Advisen suggests that the observed trend does reflect a 2007–2008 uptick in securities class action cases, but that even as class action activity subsequently waned, other flavors of securities cases (including securities fraud claims brought by the government) increased in volume to offset the difference. Taken together, these various data sources suggest a securities litigation surge associated with the financial crisis, but it manifests in complex and inconsistent ways across different snapshots of the justice system.

These sorts of trends also highlight the fact that available data concerning securities litigation and claims are limited. The single best public data resource appears to be Stanford's SCAC database, which represents a major ongoing effort to collect information about new federal securities class actions. Although this resource includes a public document archive and annual reports summarizing broad trends, it is not set up to share coded data on litigation events for research purposes. And while NERA and Advisen summary reports that track other aspects of securities litigation provide some insight into trends, they offer only limited insight into the methods used to compute the trends and no access to the underlying data. What seems clear is that compiling and coding data on litigation and enforcement activity is a major challenge, and basic questions (such as how to define a "unit" for the purpose of counting claims) have been answered differently by different consulting firms.

The review of summary reports from Advisen, Cornerstone, and NERA also raises a basic question about the appropriate scope of interest for tracking "securities litigation" cases. In this regard, Advisen is tracking a much broader swath of litigation than is Cornerstone, for example. If future research seeks to examine civil justice claims of corporate misconduct, executive

[3] Regarding the argument that inadequate compliance and board oversight might have played a role in the financial collapse, see discussion in Greenberg (2010).

mismanagement, and failures in board oversight more broadly, then perhaps data for tracking breach of duty claims under state corporate law are also needed. At present, there is no comprehensive, easy-to-access resource for tracking the occurrence of all claims related to securities law violations and corporate misconduct, nor for tracking the intensity of related government litigation, enforcement activities, and settlement efforts. Building new data resources along these lines would represent a major investment of time and energy without the active participation of the courts and government agencies.

Given the foregoing, we believe that there are several priority next steps for potential civil justice research concerning securities litigation and the fallout from the financial crisis. Specific ideas along these lines include the following:

- *Build a database to track SEC settlements and DOJ deferred prosecution agreements.* Government enforcement activity is an important element in the litigation of securities violations and allegations of corporate misconduct. Tracking the volume of such activity is an important research contribution; coding and describing basic aspects of settlements could also offer new insights into the development of substantive law and the way in which enforcement agencies are trying to influence the regulated community.
- *Code and analyze data from Stanford's SCAC database.* SCAC offers a repository of documents connected with a comprehensive set of securities class action filings. Researchers could take those documents and code an analysis file to describe each documented litigation in a way that could support statistical analyses. This is probably the easiest kind of data project that could be undertaken on securities litigation, and a coding effort could focus on areas different from those of the Cornerstone database (e.g., by describing in more detail the types of claims made in litigation, the participants involved, the procedural posture, and so on).
- *Investigate the volume of securities litigation activity over longer periods and in a multivariate context.* In looking for the effects of the financial crisis on the civil justice system, one of the challenges is in determining the implications of volatility in annual litigation volume statistics. One frame of reference could involve looking back at litigation rates over a longer period and assessing recent fluctuations in longer-term baseline performance. Another frame of reference could involve building analytical models to look at volume in securities litigation and trying to account for changes over time in terms of other explanatory factors (e.g., broader enforcement activity, market performance, high-profile crisis events, changes in law). This kind of analytic effort would require good data on some aspect of securities litigation as a first step.
- *Investigate whether poor oversight performance by boards, or failures in corporate compliance and ethics programs, contributed to the financial crisis.* This has been one of the central questions in debates over the crisis and the alleged failures in the corporate community that led up to it. In principle, researchers might construct a project to look for and code these sorts of allegations, either in claims or settlement documents, and examine whether any recent shift in such allegations is evident against longer-term trends. Findings might be useful both as a historical examination of what went wrong during the crisis and in assessing the civil justice and enforcement response to the crisis over time.

CHAPTER FIVE

Legal Services Industry

The financial collapse and credit market freeze beginning in late 2008 have had lasting economic ramifications that stretch far beyond financial markets and firms. Business operations for firms in many sectors, notably including the legal services economy, have been adversely affected by the collapse. Particularly for large law firms that conduct a mixture of business, litigation, and corporate practice, a litany of anecdotes suggest numerous ill effects. Many law firms struggled in 2008 and 2009 to find the credit necessary to leverage their business operations, and several major firms either collapsed or merged during that period.[1] Many corporate in-house counsel, meanwhile, have watched their legal expenses grow while they face corporate pressures to trim legal expenditures (Haynes, 2008; Hechler, 2011). And of course, as has been widely reported, legal services employment suffered a particularly severe blow in recent years (see, e.g., Jones, 2009; ALM, undated).

Are any of these reactions in the legal services sector likely to be of lasting consequence to the business community or policymakers? Or are these side effects of the financial collapse simply one-off events? Could the impact of the financial collapse have triggered a permanent shift in the legal economy, fundamentally changing the market for legal services or the legal profession? Or will the industry weather the storm only to return to its pre-crisis status quo? These questions will take years to answer fully because the impact of the collapse and the Great Recession is ongoing, and the longer-term effects remain to be seen. What we do know, however, is that in the short term, several aspects of employment and business practice in the legal services sector appear to be in flux, in ways at least superficially connected to the financial collapse and the economic downturn that followed.

This chapter examines recent events and trends in the market for legal services and presents a picture of the short-term effects of the collapse. In particular, our aim is to assess whether there are any observable and potentially quantifiable indicators of a changing legal services economy post-crisis. While substantial new data collection would be necessary for a comprehensive investigation of the effects of the collapse, we can offer a descriptive snapshot of some recent trends in legal services employment and staffing, business models and client relations, and firm organization related to capital finance. In many of these areas, there has been an acceleration of developments with clear pre-crisis roots.

[1] Prominent examples of firm dissolutions among Am Law 100 firms (as designated by *American Lawyer*) included Heller Ehrman; Thacher, Proffitt & Wood; and Thelen LLP. For further details, see Li (2011).

Legal Services Employment Trends: Has the Crisis Reversed a Decade of Growth?

The legal services sector not only contributes billions of dollars to the U.S. economy, but it also has been a steady generator of professional jobs in recent decades. Steady, that is, until the advent of the financial crisis. As transactional work dried up and corporate legal budgets shrank, large corporate and multiservice law firms felt an acute pinch. The employment model that leveraged highly priced new associates began to suffer as influential firms stopped hiring new law school graduates and dismissed junior associates and even some partners (Segal 2011).

How deep were the cuts in large law firm employment in the United States during the financial crisis? By one informal estimate, more than 14,940 employees were laid off by major law firms between January 1, 2008, and late November 2010.[2] These numbers represent "back-of-the-envelope" calculations, but they probably capture the trend accurately. More comprehensive and official U.S. Department of Commerce data on legal services employment demonstrate the broader hit to legal services employment during the crisis. Table 5.1 presents the total employment (full time and part time) in the legal services industry from 1998 through 2009.[3] After steady growth for almost a decade, total legal services employment peaked in 2007, the year before the financial crisis began. From that high until the end of 2009, the legal services sector in the United States contracted by more than 4 percent, shedding 55,000 professional jobs and dropping to employment levels not seen since 2003. The fact that large law firms bore such a large share of the employment losses may well be a reflection on their reliance on the financial services industry for much of their business. This also raises a question—one that we cannot answer at present—about the effect of the financial crisis on employment in solo-practice and smaller law firm settings. Were the employment losses proportionate across different types and sizes of firms and within "in-house" legal settings? Or were smaller, local, and regional firms using a more diversified and less vulnerable approach to their business practices and revenue models?

The rightmost column of Table 5.1 shows the value generated by the legal services industry as a component of gross domestic product (GDP), again, per summary data published by the U.S. Commerce Department, as a secondary statistic to gauge the impact of the financial crisis on the legal profession as a whole. Unlike the employment figures, the peak value occurs during the year of the crisis (2008). This suggests, among other things, that law firms ramped up productivity by generating greater value with fewer employees in 2008. The ability to eke out gains and maintain higher profits per partner at larger firms might have sharpened law firm managers' focus on cost-saving maneuvers and efforts to increase efficiency by reducing the number of "non-vital" attorneys and support staff.

In light of the realignment of the legal services market since 2007, and the apparent reorientation toward downsizing and cost saving in at least some parts of that market, we decided

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[2] Tracking layoffs is a difficult business, and there are no airtight statistics on the full extent of the recession's impact on legal services employment. The figure cited here comes from *Law Shucks*, a legal blog, which estimates that 5,829 lawyers and 9,120 staff lost their jobs at major law firms between January 1, 2008, and November 29, 2010 ("Layoff Tracker," undated).

[3] The Department of Commerce data are based on NAICS (North American Industry Classification System) Code 5411 ("Legal Services"), which includes the categories "Offices of Lawyers" (54111) and "Other Legal Services" (54119). NAICS coding definitions are established by the U.S. Census Bureau. For a full description of the statistics tracked, see U.S. Census Bureau (2002).

Table 5.1
Legal Services Employment and Value Added to GDP, 1998–2009

Year	Total Employment (thousands of employees)	Value Added to GDP ($ millions)
1998	985	120,183
1999	1,008	127,955
2000	1,022	138,527
2001	1,053	147,957
2002	1,074	153,874
2003	1,099	163,531
2004	1,113	180,701
2005	1,124	194,498
2006	1,129	201,858
2007	1,133	215,320
2008	1,123	225,606
2009	1,083	219,167

SOURCE: Data from the U.S. Department of Commerce, Bureau of Economic Analysis, 1998–2009.

NOTE: Value added is the contribution to the nation's GDP by the legal services sector (NAICS Code 5411).

to look in more detail at some of the ways in which legal services are now being provided to the corporate and business community. During any economic downturn, firms may need to realign their services with client demands. We wondered whether the downturn in legal services employment has spurred (or reflects) a fundamental shift in practitioners' assumptions about the business of law. Among several related questions, we wanted to know whether and how the managers of firms (both large and small) have adapted to the changing business environment by exploring or enacting changes to legal staffing. We think it is useful to consider the future of legal practice both from the perspective of clients (particularly general counsel) and from that of law firm management. In the wake of the 2008 collapse, there is reason to believe that both clients and law firms have been affected in their business models and practices.

The Future of the Billable Hour: Are Alternative Fee Arrangements on the Rise?

On the client side, one perennial concern is the billable hour. For years, in-house counsels have questioned the appropriateness of using billable hours as the primary method for pricing and paying for outside legal services, since that practice creates an incentive for law firms to maximize the number of hours billed, rather than the value of the services they provide. While the desire of general counsels for an alternative to conventional billable hour fees has been longstanding, the soft legal market beginning in 2008 may have put business clients in a better position to negotiate new fee arrangements. As a 2009 *Forbes* article put it, "The sudden lack

of liquidity [coming from the crisis] has led to a dearth of transactions, killing demand for many legal services. At the same time, clients facing their own financial pressures are increasingly scrutinizing budgets and demanding more value for their legal expenses" (Knowledge@ Wharton, 2009).

Several public reports are available from legal consultants regarding the use of alternative fee structures (see, e.g., Passarella, 2009). In 2010, the legal consulting firm Altman Weil released a survey of U.S. firms' experiences with alternative fee arrangements, collecting responses from a small sample of firms with more than 50 attorneys (Clay and Seeger, 2010). The study found that nearly 95 percent of the surveyed firms used some form of alternative fee arrangement in connection with their corporate and business clients. Moreover, nearly 60 percent of firms offering alternative fee arrangements reportedly did so because of client demands rather than as a proactive attempt to offer an array of payment options to meet client needs. When asked whether non-hourly billing would be adopted as standard practice or as a temporary trend in light of the events of 2009, more than 78 percent of respondents said that non-hourly billing was a permanent fixture. Similar or complementary findings have been generated in several other surveys of law firms and in-house counsel on alternative fee arrangements (e.g., ALM, 2011; Association of Corporate Counsel, 2010). Despite these findings, some commentary has suggested that many "alternative fee arrangements" merely represent discounted hourly rates rather than a break from the fundamental billable hour structure (Green, 2010). While those types of discounts are surely appreciated by corporate clients, such off-the-top reductions may not compel the realignment of incentives between counsel and client that other alternative payment schemes might provide.[4]

Despite the anecdotal perception that demand for alternative fee arrangements may have grown stronger following the 2008 collapse, there are no publicly available longitudinal data to evaluate such claims. Comprehensive empirical data on the market penetration of alternative fee arrangements, and the demonstrable benefits of those arrangements to corporate clients, are lacking. Yet, given the demand-side interest in novel financing arrangements in the provision of corporate legal services, future research in this area could be very timely. Trade publications and anecdotal evidence suggest that many corporate general counsel offices are eager to explore alternative fee arrangements and view conventional legal billing as unsustainable (see Association of Corporate Counsel, 2010). Better and more systematic information about the availability and limitations of different alternative fee structures could be useful to legal practitioners and clients alike.

Consistent with the foregoing, one potential angle for future research might be to investigate general counsel experiences and attitudes toward the current slate of fee arrangements being offered in the legal services industry. Another might seek to pin down the fraction of corporate legal services currently paid for through alternative fee arrangements, the categories of legal work that are well addressed by such arrangements, and the actual types of alternative fee structures that are being used in the industry. Core empirical research and data-gathering efforts are needed to move the discussion of alternative fee arrangements beyond anecdote and

[4] The Association of Corporate Counsel has developed a taxonomy of alternative value-based fee arrangements. Its publication *ACC Value-Based Fee Primer* (2010) presents results from a survey of corporate in-house counsel on the need for better value from outside counsel and provides a description of some alternative fee arrangements that might be explored (e.g., fixed fee per deliverable; flat fee per time period). The association's initial work provides a sound basis for investigations of the benefits of specific alternative arrangements in practice and, further, the system-wide effects of their use (on caseload, settlement rates, case management, resolution, and other areas).

conjecture and toward observable phenomena that can be objectively measured and systematically described. Related research has the potential to be of considerable value to the corporate community in helping to optimize the consumption of legal services and make those services more responsive to the people who pay for them.

Law Firm Staffing: Outsourcing Is on the Rise

Related to the drive for lower-cost (but high-quality) legal services, some law firms are now rethinking how they staff their corporate clients' projects, turning from a permanent cadre of young associates to more temporary hires. Among the more interesting developments in this vein are the greater reliance on domestic contract legal work and the use of "offshore" legal services providers in other countries, such as India.

The degree of legal outsourcing may have increased significantly during and in the wake of the 2008 financial crisis. The use of contract attorneys for routine tasks, such as document review, due diligence, and contract management, is nothing new to the legal services industry. The American Bar Association has explicitly endorsed the use of freelance legal work, or legal process outsourcing (LPO), since 2008 (in Formal Opinion 08-451), and in 2010, it clarified the requirements for freelance attorney skills, knowledge, and ethical conduct. Notably, the American Bar Association's standards and endorsement leave the outsourcing door wide open for domestic and international legal services providers that meet the standards.

Descriptive data on the use of contract attorneys and outsourced legal talent are even scarcer than data on alternative fee arrangements. Nevertheless, available snapshots of the legal services employment market during and after the financial collapse seem to indicate that many firms embraced the cost savings that freelance attorneys can provide. According to a July 2010 press release by the Association for Legal Career Professionals, for the graduating law class of 2009, "a far higher percentage of this class reported employment that was temporary, with 41 percent of public interest jobs reported as being temporary, 30 percent of business jobs being reported as temporary, 69 percent of academic jobs being reported as temporary, and even 8 percent of the private practice jobs being reported as temporary. *Overall, nearly 25 percent of all jobs were reported as temporary*" (emphasis added).

Of course, even under traditional legal services employment models, some of these positions were expected and understood to be temporary. Judicial clerkships, for example, typically last no more than a few years before clerks depart for prominent and often lucrative positions in practice or academia. But other temporary legal positions may be far less desirable—and particularly so in the difficult post-2008 employment market. The 2010 Altman Weil survey also asked firms about their staffing strategies. According to the report, "When asked about other staffing alternatives, firms expressed a growing enthusiasm for contract lawyers. In 2009, 39 percent of law firms reported using contract lawyers. In 2010, 53 percent will or might do so; and 52 percent expect that contract lawyers will become a permanent part of their staffing plans" (Clay and Seeger, 2010). These statistics suggest that temporary contract positions in private law practice may be less costly and more productive for firms to offer, at the margin, than many traditional associate positions would be.

The international component to legal outsourcing may be even more important. India has taken a lead in providing low-cost legal services to clients overseas. According to a 2010 *New York Times* article, "Revenue at India's legal outsourcing firms is expected to grow to $440 mil-

lion this year, up 38 percent from 2008, and should surpass $1 billion by 2014" (Timmons, 2010). The growth in international outsourcing has also caught the attention of established legal service providers in the United States. Thomson Reuters, the business information company and publisher of Westlaw, announced in late 2010 its purchase of the largest Indian LPO, Pangea3 (see Pangea3, 2010). At least in principle, the unique combination of traditional legal services and LPO services could dramatically alter the way in which many legal services are provided to the business community.[5]

Tracking the use of freelance legal contractors and outsource firms, both domestically and internationally, has the potential to offer new insights into the changing nature of the legal economy and may, in turn, lead to even more important questions about the impact of this shift in the employment model on the production of, and demand for, legal services. A focus on trends in outsourcing may also highlight current ambiguities in the quality of those services. Even more basically, given the growth of new forms of legal staffing and process outsourcing, it seems appropriate to inquire about what it is that LPO firms actually do. How do they differ from law firms? How do they interact with existing firms and general counsel? Are there important ethical or professional concerns that have yet to be considered in connection with the emerging shift to contractors and LPO firms?

It is not difficult to imagine a future world in which a large segment of the market for business legal services might migrate overseas to low-cost contractors and outsourcing firms, in a manner analogous to call centers, technical support operations, and other similar administrative and support functions. Whether that future actually comes to pass, and what the long-run implications might be, remains to be seen. For the time being, what seems clear is that legal outsourcing is a practice that is gaining momentum and interest, and one that warrants further attention.

Law Firms Are Changing: Non-Lawyer Partners and Legal Financing

Several other emerging trends that may strike deeply at the legal services industry affect firm-level organization. Of particular concern is the way firms gain access to the working capital necessary to operate as day-to-day businesses. Two international events that predate the financial crisis may have set the stage for a new era in thinking about the nature of legal business: the first public offering of shares in an Australian law firm (Slater & Gordon) on the Australian stock exchange and the passage of the UK's Legal Services Act of 2007, which opened law firms to "alternative business structures," including non-lawyer equity partners. While these developments predate the financial crisis, their international significance and novel approach to raising firm capital amidst the credit crunch have sparked debate as to whether similar law firm organizational reform is appropriate in the United States (Maher and Davis, 2011; Dance, 2008).

Allowing equity participation and investment by non-lawyers in U.S. law firms would represent a major departure from traditional law firm ownership structures and might raise concerns about the professional identity and ethical commitment of the lawyers working in

[5] In fact, the growth of international LPO firms conjures images of outsourcing similar to that of call centers, technical support, and manufacturing services. Whether outsourcing of legal services on a massive scale is practical or desirable, and whether it raises a new set of concerns or problems for the corporate community and the legal profession, remains to be seen.

those firms.[6] Do such equity arrangements increase the likelihood of a collision between corporate or partnership obligations to non-lawyers and the traditional professional standards and responsibilities of lawyers in the firms? That question remains open, although the Australian and UK experience going forward may begin to offer some useful insights and pertinent data. In any event, international innovations in firm-level legal finance have sparked interest in the United States but little sustained research, mainly because the direct impact of the UK and Australian innovations is remote and there has been no immediate move to emulate the UK and Australian innovations stateside.

In a parallel development to the emergence of non-lawyer equity stakeholders in law firms overseas, third-party litigation financing (TPLF, sometimes called "alternative litigation financing") has also risen in prominence and has become an alternative to traditional methods used by firms to tap credit markets and partner equity. TPLF approaches to litigation finance allow non-lawyers to invest in and provide capital to litigation-related activities in which they otherwise would have no direct involvement or stake. Sometimes, these arrangements take the form of "reverse contingency fees," when lower hourly rates are offered in exchange for a percentage bonus for a successful outcome. TPLF practices have become mired in debate, and some have called alternative financing arrangements "disastrous," fearing that they might fuel a boom in additional litigation activity.[7] TPLF has become an active area of RAND research independent of the financial crisis (see RAND Institute for Civil Justice, undated; Garber, 2010; McGovern et al., 2010), even as the crisis may have injected new interest and momentum into TPLF entrepreneurship. Public information on the use and prevalence of such arrangements among U.S. firms is lacking but could be gathered to support an empirical overview study of the emergence and impact TPLF as a potentially transformative factor in the legal services market and in civil litigation financing.

Discussion

Collateral economic effects from the financial collapse have disrupted industry sectors far removed from financial services, with the legal services industry being prominent among them. In the wake of the financial crisis, legal services employment plunged, legal budgets dried up, and firms and corporations sought innovative ways to provide legal services more efficiently. In this respect, the short-term effects of the crisis are probably less interesting than the long-term implications, and there is the potential for acceleration in trends toward alternative billing arrangements, LPO activities, alternative firm ownership structures, and TPLF arrangements, all of which had very visible pre-crisis antecedents. As Burke and McGowan (2011, p. 6) argue, "[T]he recent economic downturn is not the root cause of [the legal profession's] challenges. The recession simply laid bare economic forces that have been building for some time, and compelled greater responsiveness to those forces."

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[6] However, it should be noted that non-lawyer equity ownership of firms is permitted in the District of Columbia. See *D.C. Rules of Professional Conduct*, 5.4(b) (District of Columbia Bar, 2007). It was the only jurisdiction that allowed such non-lawyer ownership at the time of this writing.

[7] In 2009, the American Bar Association formed a committee to investigate the ethics of alternative financing. It subsequently formed a working group in 2010 to assess "potential pitfalls" associated with third-party financing arrangements. The U.S. Chamber of Commerce (2009) has urged a ban on all third-party financing in the United States.

Going forward, these changes in the legal economy and services market may have profound effects on the legal profession and the broader civil justice system. What might these changes mean for civil representation and dispute resolution, for example, if legal process work is widely outsourced to other countries? Will changes in the way that corporate legal work is carried out and paid for "flow through" to business and tort litigation, and to the firms and individuals who carry out those litigation processes? What would be the long-term impact on the volume and outcomes of civil litigation, particularly if efficiency savings of several orders of magnitude were realizable to corporate clients (or defense-side law firms) as a result of nascent changes in legal staffing? These are questions without empirical answers, given the newness of these changes. Yet, the accelerating impact of the financial crisis, and related pressures for legal services innovation and reform, may inject new urgency into these considerations.

Perhaps our most practical observation concerning these various topics is that basic data collection and empirical information concerning various aspects of legal services innovation appear to be very limited at present. Future analytical efforts and input to the business and policy communities will depend on better data collection and more systematic observation concerning the legal services industry than are currently available. Consequently, there may be important opportunities for future civil justice research to address this need and to better document the prevalence of emerging business practices and related outcomes in the legal services sector. We believe that better data collection and observation will be prerequisites for any future empirical investigations concerning innovation in the business of the law, as well as related implications for the policy and business communities.

CHAPTER SIX

Provision of Legal Aid Services

The financial crisis has been a disaster for many lower-income Americans. Job losses, persistent unemployment, and home foreclosures were among the harms meted out during the financial crisis and Great Recession, and the impact is disproportionately likely to reach lower-income earners. As we noted in Chapter Three, there is also burgeoning evidence that some of these harms are working their way into the justice system, through increased foreclosure filing rates in many states, for example.

Another dimension of the civil justice impact of the financial crisis may well involve its effect on the funding and provision of legal aid services. In contrast to criminal law cases, in which indigent defendants are constitutionally entitled to representation by counsel, there is no constitutional right to a civil attorney, even in potentially high-stakes proceedings such as foreclosures, seizures of property, or divorce. This means that civil representation and legal advice in these situations must be purchased by (or provided to) low-income individuals, or else those persons must go without legal counsel. In some instances in which legal aid services are simply not available, the consequence may be to require low-income persons to represent themselves in court proceedings (i.e., *pro se*). By implication, lower-income persons who are unable to obtain counsel through legal aid may operate at a disadvantage in many types of proceedings and, as a threshold matter, may be less likely to seek help or redress through the justice system in resolving civil disputes.

For the purposes of this research, we consider several questions regarding the availability and use of legal aid services in the wake of the financial collapse. In particular, the financial collapse could have had a negative impact on funding for, and the supply of, legal aid services to persons in need. Likewise, the collapse may also have affected the demand for some types of legal aid services, particularly with regard to service lines related to mortgage foreclosure and personal bankruptcy. In this chapter, we offer a summary review of recent trends pertaining to demand for legal aid services, the supply of those services, and funding available to support those services. There is at least some evidence to suggest that demand for legal aid has risen in the wake of the crisis, even as funding has eroded. This combination of increasing demand and declining resources for legal aid is potentially troubling and raises basic questions about access to justice. The combination also suggests the potential for a secondary level of impact on the courts, to the extent that large numbers of *pro se* litigants will impose greater administrative demands and costs on court operations.[1]

[1] A *pro se* litigant is someone who advocates on his or her own behalf in the courtroom, rather than being represented by a lawyer. Because *pro se* litigants are often unfamiliar with law and courtroom procedures, they may impose greater administrative burdens on courts and judges than litigants represented by counsel.

Demand for Legal Aid Appears to Be on the Rise Since the Financial Collapse

The financial crisis and the Great Recession had the direct impact of reducing personal income and wealth for many individuals—an effect that was likely more acutely felt by low-income earners. Furloughs, layoffs, foreclosures, rising rents and fuel costs, and persistent unemployment have all been part of the destruction wreaked by the Great Recession. These financial pressures not only produce strain on families (which may, itself, contribute to a range of civil claims and causes of action) but can also qualify people for legal assistance programs based on income levels. There are now record numbers of Americans who qualify for government-funded legal assistance programs (Legal Services Corporation, undated).[2]

It remains to be seen whether those record numbers of qualifying individuals are actually filing civil legal claims and whether those claims are being addressed with support from legal aid. The best attempt to date to study this issue was made by the Legal Services Corporation (LSC),[3] which published two reports on the "justice gap." The first was released in September 2005, before the financial crisis, and the second was published in September 2009, well after the collapse of Bear Stearns and in the midst of the post-collapse economic downturn. Table 6.1 presents corresponding summary statistics on unmet need in legal aid services from the 2005 and 2009 reports.[4] The LSC data suggest ample unmet legal need: Roughly half of the people seeking legal aid were turned away because of a lack of program funds.

But this unmet need was already a condition prior to the financial crisis. Did the economic collapse stoke even greater need for public legal services? Curiously, the LSC data do not show an increase in aggregate unmet need post-crisis relative to pre-crisis levels. In fact, LSC-subsidized institutions and legal aid providers seemed to be handling fewer cases and turning away fewer people in 2009 than they were in 2005.

This being said, there are nevertheless several reasons that the LSC data might not reflect the whole situation or might mask the magnitude of the "justice gap" in the wake of the financial collapse. As LSC notes, once news that its service providers are fully booked reaches needy populations, it is possible that some people then forgo seeking help from those providers. Moreover, these data only represent people seeking help from LSC-funded organizations. Other legal aid service providers that do not receive LSC funds might present a different picture with regard to the demand for services and unmet need. The LSC data also invite the question of whether the number of LSC-subsidized institutions changed from 2005 to 2009, or whether the profile of those institutions changed. Changes in funding flows and decisions by LSC could easily conceal the effects on unmet need, unless LSC held constant the number

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[2] Eligibility for legal services provided by one of the Legal Services Corporation's affiliates is keyed to incomes at or below 125 percent of the federal poverty threshold.

[3] According to its website, LSC is a long-standing, non-profit organization that is the largest provider of civil legal aid in the United States. It distributes most of its funding through grants to independent legal aid programs, performs compliance reviews to ensure that the grants are appropriately spent, and operates under the governance of a board of directors appointed by the U.S. Congress and the President (LSC, undated; see also Pub. L. 93-355, 1974).

[4] LSC uses a three-part methodology to document the current unmet need for civil legal representation. We discuss only one aspect of that methodology here because the other two are either not consistent over the two reports or do not span the period following the financial collapse. The LSC data of interest involve national counts of people turned away by LSC-funded legal aid providers because of a lack of funding. LSC asked its grantee organizations to count the number of clients turned away *due to a lack of capacity* over the same two-month period (March to May) in both 2005 and 2009. These counts were then used to project an annual unmet need indicator for each of those years.

Table 6.1
Estimated Unmet Civil Legal Need, 2005 Versus 2009

	12-Month Projection of Unmet Cases		Number of Cases in Which Service Was Provided	
Type of Legal Problem	**2005**	**2009**	**2004**	**2008**
Consumer	129,798	98,214	107,040	108,404
Education	12,234	8,874	6,830	6,839
Employment	46,122	42,264	18,986	26,896
Family	504,312	391,038	383,484	312,046
Juvenile	15,804	18,780	8,291	15,143
Health	24,660	22,230	27,780	30,802
Housing[a]	143,904	113,706	218,688	219,592
Foreclosure	NA	21,766	NA	9,920
Income	59,634	49,236	113,252	98,257
Individual	34,998	39,216	12,267	13,250
Miscellaneous	114,372	139,062	44,449	48,006
Total	1,085,838	944,386	941,067	889,155

SOURCE: Data from LSC, 2005, 2009.
NOTE: NA = not applicable.
[a] 2009 data exclude foreclosure cases.

and types of affiliated grant recipients. We are unable to address any of these technical issues definitively here.

Another proxy measure for assessing the amount of unmet legal need (and, hence, potential demand for legal aid services) is the rate of *pro se* representation in civil cases. A 2009 NCSC report included survey findings about judicial perceptions of trends in party self-representation. The NCSC survey revealed that 60 percent of state court judges described having seen an increase in cases with *pro se* litigants (Zorza, 2009, p. 9). In our own conversations with judges, we too have heard anecdotal accounts that the prevalence of *pro se* litigation is on the rise. If indeed this does reflect a broader trend, it suggests that parties with civil legal disputes are trying to economize by handling their own cases without professional representation, perhaps in some instances because of the inability to pay for a private attorney. When viewed in conjunction with the LSC data, increasing rates of *pro se* litigation may also indicate that some low-income litigants are either unaware of public legal services or else do not view those services as a viable option for their legal needs.[5]

Meanwhile, other anecdotal evidence suggests that unmet legal need is both large and rising in at least some parts of the United States. For example, the *National Law Journal* has reported that the Legal Aid Society in New York City experienced increased demands in domestic violence, health, employment, and housing cases, to the tune of 16 percent, 40 per-

[5] One possible explanation for a lack of awareness is that the financial crisis may have generated civil legal problems for a new segment of the population that was not used to seeking public support.

cent, 30 percent, and 20 percent, respectively, from the beginning of the recession through July 2009 (Savner, 2010). The same article cites increased legal aid demands statewide in Maryland (with a 60-percent increase from 2008 to 2010) and a whopping 700-percent increase in demand reported by Community Legal Services of Mid-Florida. In a similar vein, the Brennan Center for Justice reported that the Legal Aid Society of Cleveland saw a 35-percent increase in calls requesting assistance in 2008 over the level observed in previous years. The society anticipated being able to handle only about 10 percent of the total volume of calls it received (Brennan Center for Justice, 2010, p. 15).

In sum, although patterns in the demand for legal aid services are complex and difficult to assess unambiguously with available data, there is at least some evidence to suggest that (1) substantial levels of unmet demand have continued for years, (2) *pro se* litigation may be on the rise across the United States, and (3) legal aid service providers in some locations have reported substantial increases in the demand for their services in the wake of the financial collapse. In a complementary vein, according to the U.S. Government Accountability Office (2010, p. 1), "Because of the recent economic recession and accompanying increase in housing foreclosures, LSC grantees' services are in high demand." Whether strong demand for legal aid services can be met in the current economic climate raises another set of concerns about funding.

Legal Aid Providers Face Funding Challenges

If indeed the demand for legal aid services is on the rise, the ability of legal services providers to meet that need becomes both more important and, given an assumption of fixed resources, more problematic. Yet, the same financial crisis that may have driven recent increases in demand may simultaneously be eroding the capacity of legal services organizations to perform their work. The effects on funding for legal services programs can be traced to declining state budgets, historically low interest rates on charitable endowment funds, and the diminished largesse of wealthy individuals and foundations.

There are four main methods for funding public legal services for civil cases. The first is through state and local government subsidies. The second is through federal funding distributed by LSC. The third is through charitable and philanthropic contributions. The fourth is through state programs that distribute the interest earned on monies held by attorneys for their clients in escrow and trust accounts (so-called interest on lawyer trust accounts, or IOLTA).

We think it is likely that each of these funding streams has been negatively affected by the financial crisis. Although we are unable to document it here, widespread state and local fiscal problems in the wake of the financial collapse probably resulted in reduced appropriations to legal services providers over time. Similar cuts to federal funding for legal aid appear very likely as well. Although annual federal funding for LSC trended modestly upward during the decade from 2000 to 2010, the House Appropriations Committee recently announced a proposal to cut LSC's funding to pre-2000 levels, despite increased demand on its network of service providers (Levi, 2011). In a complementary vein, philanthropic donations in the United States also reportedly declined across the board in 2008 and 2009 (the initial period following

the financial collapse), although we were unable to locate information specifically describing trends in charitable donations to legal aid agencies and providers.[6]

The final channel of financing for legal aid services involves revenues generated from IOLTA programs, a unique and important way to fund indigent legal services. It too appears to have suffered in the wake of the financial crisis. IOLTA programs aggregate the accrued interest on, for example, real estate escrow accounts, and then use the funds for legal aid services.[7] All 50 states and the District of Columbia have IOLTA programs designed to help fund legal aid services.[8] However, the amount of money generated by the underlying lawyer escrow accounts is directly tied to general interest rates offered by the banks. As interest rates plummeted following the financial crisis, funding for legal aid via IOLTA dried up. LSC, which supplements the money some grant recipients receive from state IOLTA programs, reported, "The National Association of IOLTA Programs reports that IOLTA revenue will be about $93 million [in 2009], a dramatic 67 percent decline from 2008, when [nationwide] IOLTA revenue was nearly $284 million" (Barnett, 2009, p. 7). Other recent media accounts have affirmed that IOLTA revenues to legal aid programs have been substantially curtailed in many states (see, e.g., Sloan, 2011).

The IOLA Fund of the State of New York offers a startlingly specific example of declining interest income on IOLTA accounts due to a joint decrease in escrow account balances and plunging interest rates. According to December 2009 testimony by the chairman of the board of trustees for the IOLA Fund of the State of New York, the average interest rate paid on the trust accounts at a sample of large New York banks dropped from 2.25 percent in 2007 to just over 1 percent in 2008, and to 0.31 percent by the end of FY 2009. In turn, those reductions translated to a cut in available IOLTA funding for legal aid providers in New York from nearly $32 million in 2008 to less than $8 million in 2009 (Romano, 2009, p. 3). The chairman described this situation as "stark" and closely connected to broader interest rate fluctuations "precipitated by the economic crisis and the seizure of the credit markets that began last fall" (Romano, 2009, p. 3).

Taken collectively, the effects of the crisis on all the sources of funding for legal aid providers have likely been acute, as reflected in recent anecdotal accounts of service providers themselves. For example, the Legal Services Funding Alliance, a network of New York civil legal services providers, reported that as of May 2010, two offices had closed completely, 44 attorney positions had been lost, and offices had had to scale back the number of legal areas

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6 See, e.g., Center on Philanthropy at Indiana University, 2010.

7 New York State's IOLTA program provides this description of the process:

> Attorneys routinely receive funds to be held in trust for future use. If these funds are large in amount or to be held for a long period of time, the attorney customarily deposits the money in a certificate of deposit or other interest bearing account in the name of, and for the benefit of, the client. However, in the case of deposits which are small in amount or are short term in duration, it is impractical to establish separate interest bearing accounts. . . .
>
> The IOLA program requires attorneys to open IOLA accounts for the deposit of these nominal or short term funds. These otherwise idle funds are then pooled to generate interest income which is forwarded directly from the financial institution to the IOLA Fund. The Fund, which is administered by a 15 member Board of Trustees, awards grants to civil legal service providers. (IOLA Fund of the State of New York, undated)

8 According to the Nebraska Lawyer Trust Account Foundation (undated), 13 states have opt-out programs, two have voluntary programs, and 37 have mandatory programs. For a listing of state programs and contact information, see Commission on Interest on Lawyers' Trust Accounts, American Bar Association (undated).

(including bankruptcy and family law) for which they provide counsel (Legal Services Funding Alliance, 2010).

Discussion

Based on our review, the general outlook for legal aid services across the United States appears grim. At the same time that the demand for various forms of legal assistance appears to be on the rise, funding for those services has come under increasing pressure and legal aid programs have felt the adverse effects of the financial crisis on their operating budgets. Taken together, this increased demand for legal aid services and funding coupled with a diminished supply may reduce access to the justice system for low-income earners in ways that disproportionately affect the most vulnerable members of society. This aspect of the civil justice system could be a major focus area for empirical research in the future.

However, available data on funding for legal aid services and on the unmet demand for civil representation are patchy and limited. Legal aid data for the post-collapse period (i.e., 2010 and beyond), in particular, are only beginning to become available, and the long-run effect of the new economic environment on legal aid institutions remains to be seen. At present, we know little about how legal aid service providers (and the states) are coping with and adapting to the reality of decreased operating budgets. Plausibly, some states and service providers may be piloting novel policy solutions to help deliver services in innovative ways. Or the situation may simply be bleak: Unmet need may be translating into an increasing prevalence of unresolved issues and unaddressed grievances among low-income populations. More detailed investigation would be needed to explore these possibilities.

What seems clear is that the current system for legal aid provision in the United States is susceptible to threats on both the supply side and the demand side in the wake of financial downturns. The Great Recession has been particularly hard on low-income earners. Unfortunately, in the wake of the collapse, the programs that are in place to provide access to justice regardless of ability to pay seem to be suffering from their own financial hardships. The policy ramifications of diminished legal aid, in terms of what the civil justice system actually accomplishes and whom it serves, present a troubling set of questions for society.

CHAPTER SEVEN

Conclusions

The financial collapse in 2008 found its origins in wildly opportunistic and fraudulent mortgage lending practices, the securitization of the resulting bad loans, and the eventual deterioration of large financial firms and markets (Financial Crisis Inquiry Commission, 2011). In the years since 2008, economic fallout from the collapse has been widespread and has moved far beyond the financial services sector where the crisis initially erupted. Based on our review of evidence concerning several facets of civil justice system activity, processes, and participants, some effects from the financial crisis have indeed been felt in recent years. There are preliminary data to suggest that demands on some parts of the civil justice system have increased, that funding for state courts may now be trending downward, and that there have been disruptions in the legal services economy, in the provision of legal aid, and (perhaps more ominously) in the operation and staffing of courts in some places. It remains to be seen whether all these effects can be attributed with precision to the financial collapse or whether some of the effects reflect longer-run emerging trends, particularly as government institutions move into a mode of austerity and deficit reduction.

The impact of the financial crisis on the civil justice system raises another category of concerns, beyond any insight that it offers about the financial collapse itself. Given that the civil justice system has finite resources and a limited surge capacity, the effect of heightened economic stress and litigation is a critical concern: The justice and legal systems are important social institutions, apart from the resolution of any particular (financial crisis–related) disputes or the compensation of any corresponding injuries. Long-run strain in the operation of the civil justice system, or changes in its basic function and institutional characteristics, could have serious policy ramifications going forward. Thus, perhaps the most important question concerning the impact of the financial collapse on the civil justice system is whether there is any preliminary evidence for these sorts of stress-related changes, particularly those representing more than a momentary post-2008 blip. The findings presented here are suggestive, although not dispositive, that some such changes may indeed be occurring.

The most fundamental insight we can offer, based on our work over the course of a year, is that it is still very early in the game to draw firm conclusions about what the ultimate civil justice effects of the financial crisis will prove to be. Our chief observation is that limited and low-quality data across many dimensions of civil justice system performance will hamper future empirical efforts to trace the lasting effects of the crisis and Great Recession. Consequently, we suggest a series of priorities for future data collection. We (and others) will be able to assess the impact on civil justice institutions over time only given adequate and consistent data on relevant dimensions of system performance and resourcing. We think that generating and analyzing such data ought to represent a high priority for the research and civil justice

communities at a time when anecdotal accounts herald the likelihood of stress and ill effects in multiple parts of the system.

State Court Funding

Further investigation into the financing mechanisms of state courts—and more detailed accounting data describing their actual resourcing levels—are high priorities for future research.

- *There is evidence to suggest that funding for many state court systems has indeed been reduced since 2008.* Media anecdotes about funding cuts in many state court systems have notably been affirmed by the most recent NCSC survey findings and reports.
- *Data on state court budgets and funding levels are spotty and difficult to interpret.* When we attempted to construct our own five- to seven-year budget trend for the judicial branch in each of several states, we rapidly discovered that (1) the mechanisms of appropriation and court system financing are not directly comparable across states; (2) those mechanisms are difficult to identify from the annual reports released by the states; (3) in some instances, published judicial branch financial statements are difficult to reconcile with the official narrative text describing the same budgeting information; and (4) we were unable to show a consistent post-collapse hit to court system budgets across the six states that we investigated in detail.
- *The anatomy and physiology of state court resourcing are high priorities for future research.* Given that the broad financial outlook for the states is growing increasingly bleak, our findings suggest a need for deeper investigation of state court financing mechanisms and challenges, as well as better sources of relevant accounting data. Moreover, in light of the austerity measures that many state court systems are now adopting, we also think that there is a need to investigate more closely the relationship between judicial branch resourcing levels and various administrative measures of court system performance and outcomes.

Patterns of Civil Litigation

Descriptive data suggest recent increases in civil litigation volume in many state trial courts, possibly associated with the financial collapse. Overburdened, underfunded state courts may find it difficult to effectively administer justice when faced with ever-mounting demands. Future empirical research studies can and should investigate these concerns.

- *Some specific categories of state and federal litigation do appear to have spiked in the wake of the collapse.* Federal bankruptcy and state foreclosure proceedings, in particular, fall into this category.
- *The volume of state civil claims broadly appears to have trended upward over the past decade and into 2008.* Fundamental limitations in available data make interstate comparisons difficult with regard to litigation volume and characteristics. Because of this data lag, state court litigation statistics are currently unavailable for the most recent years following the financial collapse.

- *A priority for future research is whether any of the recent trends in post-collapse litigation volume will prove to be lasting.* Another priority area is whether state court system resourcing levels will have any demonstrable impact on civil litigation trends over time—particularly as courts husband limited resources and seek to prioritize some categories of litigation over others.

Securities Litigation

The published summary data on securities litigation suggest that the financial crisis has had a mixed impact on justice system activity. These sources suggest that there may have been a surge in litigation associated with the financial crisis but that this has manifested in complex and inconsistent ways across different snapshots of the justice system. For this reason, this area should be a priority for future research.

- *There is some evidence to suggest a financial crisis–related spike in some pertinent securities litigation data sets and metrics.* In particular, securities class action lawsuits spiked upward in 2007 and 2008, according to statistics drawn from Stanford's SCAC database.
- *Different sources of data and analysis on securities litigation and enforcement activity produce inconsistent results, however.* The various descriptive data sources concerning securities litigation are collectively somewhat spotty and tend to produce different snapshots depending on which categories of cases or activities are included and how they are defined.
- *A top priority for research could involve new data collection efforts connected with various aspects of securities litigation and enforcement activity in the future.* We also think that a high priority for future analytic work could involve an analysis of the connection between securities litigation volume and compliance and ethics practices (and shortcomings) within firms, particularly in the context and wake of the financial collapse.

Legal Services Industry

Basic data on legal services innovation are scarce. There may be important opportunities for future civil justice research to address these data needs and to better document emerging business practices and related outcomes in the legal services sector.

- *In reviewing recent material and descriptive data on the legal economy, we observed that the financial collapse appears to have put new pressure on emerging trends in legal outsourcing, alternative fee arrangements, and alternative models for law firm and litigation financing.* These trends have the potential to dramatically affect the people who work in the legal system, corporations that regularly purchase legal services, and (perhaps) the quality and nature of services provided by the system as a whole.
- *Apart from the labor statistics now being compiled by the Bureau of Labor Statistics, there is little systematic information being collected on these various legal services phenomena.* Particularly with regard to outsourcing and alternative fee arrangements, we believe that there are opportunities for new data collection and analysis that could be very useful to the business and legal communities.

Provision of Legal Aid Services

Based on our review, the general U.S. outlook for legal aid services appears grim. This sector of the civil justice system could be a major focus area for future research.

- *Available information suggests that there has been a post-collapse spike in demand for at least some categories of legal aid services (e.g., foreclosure), while there is also some evidence to suggest that the avenues of financing for those services are under increasing pressure.* To the extent that this is accurate, it means that civil legal services and the justice system may become less available to some of the most vulnerable members of society.
- *Data concerning various aspects of the demand and financing for legal aid services are sparse.* Much of the available data come from the federal Legal Services Corporation. Some aspects of the financing of legal aid services, as through state IOLTA programs, are impossible to track other than through whatever data are being collected by agencies or nongovernment organizations at the state level.
- *Future research to document the gap between supply and demand in legal aid services could address basic considerations of equity and access to the justice system.* Access to justice in connection with a broad range of noncriminal issues could become increasingly important in the future, to the extent that ongoing fiscal problems place continued pressure both on the general labor market and on the traditional sources of financing for legal aid.

Taken as a whole, what does our review of the financial collapse and the civil justice system suggest about potential angles for a future research agenda? First, it suggests that there are several possibilities for major new data collection initiatives (e.g., on court system budgets, securities litigation, legal outsourcing, and alternative fee arrangements). Second, the impact of the financial collapse invites us to focus new research efforts on the judiciary and the legal profession, as well as on outcomes and process measures pertaining to civil litigation itself. We think that there is much fertile ground for new empirical research here, particularly with regard to the impact of the lasting fiscal downturn on the institutions and business models embedded in the civil justice system. Finally, we believe that the top priority for new research involves a deeper examination of judicial branch resourcing and financing across the states. Better data on resourcing, and a better taxonomy for state court system financing mechanisms, could offer a much clearer picture of the operating strain on the civil justice system going forward. We also believe that financing information could be combined with various judicial branch administrative performance measures in a new generation of studies exploring how court systems respond to austerity and what the ultimate impact of austerity on litigation volume and outcomes appears to be.

The advent of the financial collapse in 2008, and the civil justice effects in the years that have followed, leads us to an important final question: Is the collapse best viewed as a momentary inflection point, or a *sui generis* event, in the context of long-run civil justice system trends? Or is the collapse instead the "starting gun" for a broad environmental change as a new era of fiscal downsizing begins to touch on all aspects of the courts and their functions? As of late 2011, it was simply too early to say for certain. Nevertheless, underlying data about judicial branch resourcing, austerity, and realignment will surely be important areas to monitor over the course of the next decade. In particular, the likelihood that courts and judges will be asked to do more with less, and to do so over a sustained period, will invite a host of new ques-

tions and policy problems. Will the meaningfulness of basic constitutional parameters for the judicial branch and civil justice system be diluted, absent committed funding to allow those parameters to be fully expressed? Will the shifting nature of the civil justice system lead to new mechanisms and responsibilities for private parties in the resolution of civil disputes? The importance of addressing these sorts of big-picture questions is clear, but finding the answers will require a combination of future empirical studies and new data-gathering efforts.

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