

Jury Verdicts 2009

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This memorandum analyzes the jury verdicts¹ returned in civil cases in the District of Colorado during calendar year 2009 and efforts to settle those cases.

A. OVERVIEW

Thirty-four civil cases were tried to jury verdicts in 2009, while 3,042 civil actions were filed. The ratio of cases tried to cases filed is 1.1%.²

The comparison is imprecise because none of the cases tried in 2009 was filed then. The date of filing of each civil case tried to a verdict in 2009 is set out below:

<u>Year Filed</u>	<u>No. Tried in 2009</u>
2008	4
2007	15
2006	9
2005	1
2004	1
2003	0
2002	1
2001	0
2000	1
1999	2

The average time from the date a case was filed until trial was 38.7 months, or

¹It is important to distinguish between a jury's verdict and the judgment ultimately entered by the court. Except as noted, and particularly with the exception of Part D, *infra*, this memorandum is concerned with verdicts and not with judgments.

²In 2009, there were also eight civil trials to the court and 18 criminal trials. Consequently, a total of 60 civil and criminal matters were tried in the District of Colorado. In 2008, there were a total of 65 civil and criminal trials. The total number of trials decreased by 8% from 2008 to 2009.

approximately three and one-quarter years. The shortest time from filing to trial in 2009 was 15 months. Twelve of the 34 cases (35%) were tried within two years of filing.

The number of civil jury trials increased slightly for the first time in four years. The number of civil jury trials to verdict in each of the last eight years is reported below:

Year	No. of Cases Filed	No. of Civil Jury Trials	Rate of Trials
2009	3,042	34	1.1%
2008	2,838	29	1.0
2007	2,726	36	1.3
2006	2,607	38	1.5
2005	2,679	35	1.3
2004	2,698	51	1.89
2003	2,672	47	1.75
2002	2,464	52	2.1

B. TRIAL OUTCOMES: VERDICT AMOUNTS

Defendants were more successful at trial in 2009 than were plaintiffs. Defendants prevailed in 16 of the 34 jury trials (47%); plaintiffs prevailed in 15 cases (44%). There were an unprecedented three split verdicts, where the plaintiff prevailed in whole or in part on its claims and the defendant prevailed in whole or in part on its counterclaims. Rates of success for the last seven years are set out below:

<u>Year</u>	<u>No. of Civil Jury Trials</u>	<u>Plaintiffs Prevailed</u>	<u>Defendants Prevailed</u>	<u>Split Verdicts</u>
2009	34	15 (44%)	16 (47%) ³	3 (9%)
2008	29	12 (41%)	17 (59%)	0
2007	36	15 (42%)	21 (58%) ⁴	0
2006	38	24 (63%)	14 (37%)	0
2005	35	23 (66%)	11 (31%) ⁵	1 (3%)
2004	51	25 (49%)	26 (51%)	0
2003	47	26 (55%)	21 (45%)	0
TOTAL	270	139 (51%)	126 (47%)	4 (1%)

The largest verdict awarded in 2009 was \$5,350,000, and the smallest verdict was \$0. The average verdict⁶ awarded in 2009 was \$1,270,249, and the median⁷ verdict was \$156,159. The following chart reports the amounts of the jury verdicts in 2009 from high to low:

³In one case tried in 2009, the verdict for the defendant included an award of \$5,350,000 on a counterclaim.

⁴In one case tried in 2007, the verdict for the defendant included an award of \$16,000,000 on a counterclaim.

⁵In 2005, there was one split verdict, with the plaintiff being awarded \$57,672 on his claim for invasion of privacy and the defendant being awarded \$140,520 on its counterclaim for breach of the duty of loyalty.

⁶In calculating the average verdict in 2009, I included the net award in the split verdict cases and the amount awarded to a defendant (insured) on its counterclaim for breach of insurance contract. In one case damages were severed, and I have excluded the stipulated judgment because no damages were awarded by a jury.

⁷The median is the point in the middle of a distribution. Half the verdicts exceeded the median and half were less than the median.

Rank	Amount	Type of Case
1	\$5,350,000	intellectual property: patent infringement
2	5,350,000	breach of insurance contract (counterclaim)
3	4,132,000	negligence: seat belt
4	3,000,000	employment: retaliation
5	1,392,000	negligence: sumo wrestler suit
6	1,197,322	breach of construction contract
7	850,000	employment: race
8	666,963	negligence: camp heater
9	424,483	tax deficiency
10	156,169	breach of construction contract
11	140,001	employment: breach of contract
12	81,003	breach of oil and gas contract
13	80,000	intellectual property: fraud re patent (counterclaim)
14	27,822	qui tam
15	10,753	Fair Labor Standards Act
16	4,177	Equal Credit Opportunity Act
17	1,791	Civil Rights: First Amendment
18	0	intellectual property: Lanham Act
	\$22,864,484	TOTAL

Active district judges presided over 15 jury trials; senior judges presided over 14 jury trials; and visiting judges presided over five trials. No case was tried by a magistrate judge. A breakdown of the trials by presiding judge follows:

Judge	Type of Case	Prevailing Party	Amount of Verdict
WYD			
1	IP: fraud re patent; assignment of patent	split	P: \$ 5,000 D: 85,000
2	civil rights: excessive force	D	--
3	civil rights: deprivation of property (non-prisoner)	D	--
RPM			
1	employment: retaliation	P	\$3,000,000
2	negligence: camp heater	P	666,963
3	civil rights: 1st Amendment	P	1,791
4	IP: Lanham Act	P	0
5	breach contract: insurance	P	severed ⁸
6	employment: gender	D	--
7	civil rights: cell assignment	D	--
8	negligence: medical malpractice	D	--
JLK			
1	employment: breach contract	P	140,001
2	qui tam	P	27,822
LTB			
1	IP: patent infringement	P	5,350,000
2	employment: race	P	850,000
3	breach of construction contract	P	156,169
WDM			
1	civil rights: retaliation	D	--
MSK			
1	tax deficiency	P	424,483
2	civil rights: 8th Amendment (sexual contact)	D	--
REB			
1	negligence: seat belt	P	4,132,500
PAB			
1	negligence: sumo suit	P	1,392,600
2	Equal Credit Opportunity Act	P	4,177
3	negligence: auto accident	D	--

⁸Post-trial the parties stipulated that the damages were \$13,564,235. The trial judge added interest in the amount of \$9,135,221, and judgment was entered in the amount of \$22,699,456.

Judge	Type of Case	Prevailing Party	Amount of Verdict
CMA			
1	Fair Labor Standards Act	P	10,753
2	breach insurance contract (counterclaim)	D	5,350,000
3	employment: gender	D	--
4	employment: 1st Amendment	D	--
5	negligence: ski accident	D	--
6	Sarbanes Oxley	D	--
	VISITING JUDGES:		
RJC			
1	breach construction contract	split	P: 1,728,323 D: 531,001
2	breach insurance contract	D	--
DLR			
1	civil rights: excessive force	D	--
TJM			
1	breach contract	split	P: 104,260 D: 23,257
TDL			
1	civil rights: retaliation	D	--

A total of 195 trial days were devoted to civil jury trials in 2009. The longest trial lasted 14 days (the seat belt case); the shortest was two days. The average length of a trial was 5.6 days. The most common trial lengths were four (8 cases) and five days (7 cases). The lengths of the trials are specified in **Table 1**.

Cases alleging negligence took the longest to try, averaging 7.8 days per trial. Civil rights (other than employment) trials were the shortest, lasting 4.25 days on average. Trial lengths broken down by nature of the claim are set out below:

Nature of Case	Average Trial Length (days)
Negligence	7.8
Misc. Statutes	6.6
Intellectual Property	6.0
Contract	5.5
Employment	5.0
Civil Rights	4.25

Interestingly, the average length of trial where the plaintiff prevailed was 7.1 days. By contrast, those trials where the defendant prevailed lasted only 4.5 days on average.

C. BREAKDOWN BY NATURE OF CLAIM

The jury trials conducted in 2009 fell into 10 categories based on the nature of the plaintiff's claim:

Category	No. of cases	% of cases tried
Civil Rights	8	24%
Employment	6	18
Breach of Contract	6	18
Negligence	6	18
Intellectual Property	3	9
Equal Credit Opportunity Act	1	3
Fair Labor Standards Act	1	3
Qui Tam	1	3
Sarbanes Oxley	1	3
Tax Deficiency	1	3

At least 22 of the 34 cases tried involved claims which permitted the award of attorney fees to a prevailing plaintiff. The plaintiffs won 11 of the 22 cases (50%). The court refused to award attorney fees in one case. Attorney fees have been awarded to prevailing plaintiffs in four cases, as follows:

Type of Case	Verdict	Atty Fees Awarded
Employment: retaliation	\$3,000,000	\$105,000
Equal Credit Opp Act	4,177	40,414
FLSA	10,753	98,800
Qui Tam	27,822	9,274 (attorneys fees and costs)

The award of attorney fees is pending in three cases. Three cases settled before the attorney fees issue was decided.

Costs were awarded in 22 cases: nine times to plaintiffs and 13 times to defendants. The court refused to award costs in three cases. The average amount of costs awarded in all cases was \$5,061. Costs are pending in two cases.

An analysis of the costs awarded is contained in **Table 2**.

1. Civil Rights (other than employment)

Civil rights cases (other than employment) accounted for eight of the 34 trials (24%). The plaintiff prevailed in one civil rights case (12.5%); the defendants prevailed in seven of the cases (87.5%).

Six of the civil rights cases were brought by prisoners. Two cases, however, did not relate to prisoner rights.

In the first non-prisoner case, the plaintiff alleged that a county commissioner retaliated against him for exercising his First Amendment right of free speech. The plaintiff prevailed and was awarded damages of \$1,791.

In the second non-prisoner case, the plaintiff (a business) alleged that the City of Wheat Ridge deprived it of the property right to operate its business. Wheat Ridge prevailed.

The trial outcomes in the civil rights cases based on the nature of the claim asserted are set out below:

Nature of Claim	Prevailing Party	Amount of Verdict
1. Retaliation: First Amendment	P	\$1,791
2. Deprivation of property	D	--
3. Retaliation (prisoner)	D	--
4. Retaliation (prisoner)	D	--
5. Excessive force	D	--
6. Excessive force	D	--
7. 8th Amendment: cell assignment	D	--
8. 8th Amendment: sexual contact	D	--

Historically, civil rights cases have been among the most difficult for plaintiffs to win. In the last eight years, 49 civil rights cases have been tried to juries. The plaintiffs won eleven cases (22%), and the defendants prevailed in 38 (78%). The largest verdict in a civil rights case was \$1,000,000, involving the unlawful arrest of a state judge. (That verdict was reversed on appeal.) The smallest verdicts were for \$1. The plaintiffs' verdicts over the last eight years are as follows:

Nature of claim	Amount of verdict
Unlawful arrest	\$1,000,000
Unreasonable search	190,000
Excessive force	10,000
Unlawful arrest	10,000
Unreasonable search	6,500
Unlawful arrest	5,000
Retaliation: 1st Amendment	1,791
Retaliation	1,500
Equal protection	630
Unlawful arrest	1
Excessive force	1

The average verdict in a civil rights case over the last eight years is \$111,402. The median verdict is \$5,000. When the anomalous \$1 million verdict (which was reversed) is taken out of the equation, the average verdict is \$22,542, and the median verdict is \$5,000.

2. Employment

Six of the 34 jury trials involved employment claims (18%). Employment cases historically make up approximately 13% of the court's filings, but usually 40% of the jury trials. The decline in the percentage of employment cases proceeding to trial in 2009 to only 18% of the cases tried is significant.

The plaintiffs prevailed in three of the six employment cases (50%); the defendants prevailed in three cases (50%).

The verdicts in employment cases ranged from a high of \$3,000,000 to a low of \$140,000. The average plaintiff's verdict in an employment case was \$1,330,000. The amounts of the plaintiffs' verdicts in employment cases, from high to low, are set out below:

Nature of Claim	Amount of Verdict
Retaliation	\$3,000,000
Race	850,000
Breach of Contract	140,001
TOTAL	\$3,990,001

Of the six employment cases tried, three alleged retaliation (50%); one alleged gender discrimination (17%); one alleged race discrimination (17%); and one alleged breach of an employment contract (17%).

In the last eight years, 116 employment cases have been tried to verdict. The employment claims most frequently tried were retaliation (31 cases) and gender (28 cases). The historical trial results of the various employment claims asserted during the last eight years are analyzed below:

Nature of Claim	Cases Tried	Cases Won by Plaintiffs	Plaintiffs' Success Rate
Retaliation	31	19	61%
Gender	28	14	50%
Disability	17	8	47%
Race/National Origin	18	7	39%
Age	8	3	38%
Public Employee	6	4	66%
Religion	2	2	100%
Public Policy Violation	2	1	50%
FMLA	1	1	100%
Luring	1	0	0%
Breach of Contract	2	1	50%

3. Negligence

Six of the 34 jury trials (18%) in 2009 involved negligence claims. Three alleged products liability (a seat belt; a sumo suit; and a camp heater); one was a ski lift accident; one involved an auto accident; and one alleged medical malpractice. The plaintiffs won the three products liability cases, and the defendants prevailed in the other cases.

The trial outcomes, based on the nature of the claims, are listed below:

Nature of Claim	Prevailing Party	Amount of Verdict
Products liability		
1. seat belt	P	\$4,132,500
2. sumo suit	P	1,392,600
3. camp heater	P	666,963
ski lift	D	--
auto accident	D	--
medical malpractice	D	--

The average plaintiff's verdict in a negligence case was \$2,064,021.

4. Breach of Contract

Six of the 34 trials (18%) involved claims for breach of contract. Three of the six alleged breach of an insurance contract, and three involved non-insurance contracts. Overall, the plaintiffs prevailed in two of the six (33%) contract cases; the defendants prevailed in two (33%); and there were two split verdicts (33%).

The plaintiff (insured) prevailed in one case alleging breach of an insurance contract. The defendant (insurance company) prevailed in a second case. In the third case, the plaintiff (insurance company) lost its declaratory judgment claim, and the defendant (insured) prevailed on its breach of insurance contract counterclaim.

The plaintiff won the first non-insurance contract case, alleging breach of a construction contract, and was awarded damages of \$156,169. The verdicts were split in the other two non-insurance contract cases. In the first, another construction case, the plaintiff was awarded \$1,728,323 on a theory of unjust enrichment, and the defendant received \$531,001 on its counterclaim for breach of a trust fund. In the second split verdict, involving an oil and gas transaction, the plaintiff received a verdict of \$104,260 on a negligent misrepresentation claim, and the defendant was awarded \$23,257 on its breach of contract counterclaim.

The trial outcomes are listed below:

Nature of Claim	Prevailing Party	Amount of Verdict
Insurance Contract		
1.	P	damages severed
2.	D	--
3.	D	\$5,350,000 (counterclaim)
Construction contract		
1.	P	156,169
2.	split: P	1,728,323
	D	531,001
Oil and gas		
	split: P	104,260
	D	23,257

5. Intellectual Property

Three of the 34 trials (9%) involved intellectual property claims. The plaintiff prevailed in the single patent infringement case and received a verdict of \$5,350,000. The plaintiff also prevailed in a Lanham Act case alleging false designation of origin, but was awarded zero damages.

The third case resulted in a split verdict. The issue involved ownership of patent rights. The plaintiff was awarded \$5,000 on a fraud by deceit claim, and the defendant received a verdict of \$85,000 on his false representation claim.

The chart reflects the trial outcomes:

Nature of Claim	Prevailing Party	Amount of Verdict
Patent Infringement	P	\$5,350,000
Lanham Act	P	0
Patent Rights	split: P (fraud)	5,000
	D (misrepresentation)	85,000

Plaintiffs have fared exceptionally well in intellectual property cases tried in this district. In the last eight years, there have been 19 intellectual property cases tried, and the plaintiffs prevailed in 16 of them (84%). The historical results over the last eight years follow:

Nature of Claim	Cases Tried	Cases Won by Plaintiffs	Plaintiffs' Success Rate
Patent Infringement	8	8	100%
Trademark Infringement	4	2	50%
Breach of Non-Disclosure	1	1	100%
Piracy	1	1	100%
Theft of Trade Secrets	2	2	100%
Copyright Infringement	1	1	100%
Lanham Act	1	1	100%

The verdicts in these cases have ranged as follows:

Nature of Claim	Amount of Verdict
Patent infringement	\$51,000,000
Misappropriation of trade secrets	41,980,131
Trademark infringement	15,199,936
Patent Infringement	14,320,283
Breach of non-disclosure	9,340,000
Patent Infringement	5,350,000
Trademark infringement	4,462,000
Patent infringement	1,850,000
Patent Infringement	1,679,616
Patent infringement	1,205,000
Patent infringement	728,484
Copyright infringement	511,910
Misappropriation of trade secret	100,000
Patent infringement	74,863
Piracy	10,000 ⁹
Lanham Act	0
Total	147,812,223

The average verdict over the last eight years in an intellectual property case is \$9,238,250; the median verdict is \$1,850,000.

⁹The plaintiff sought statutory damages only, which were awarded by the trial judge and not the jury.

6. Federal Statutory Claims

A total of five cases were brought under varying federal statutes in 2009, as follows:

Nature of Claim	Prevailing Party	Amount of Verdict
Equal Credit Opportunity Act	P	\$4,177
Fair Labor Standards Act	P	10,753
Qui Tam	P	27,822
Sarbanes Oxley	D	--
Tax Deficiency	P	424,483

D. JUDGMENTS VARYING SUBSTANTIALLY FROM THE VERDICT

Although this memorandum is concerned primarily with jury verdicts, as distinguished from judgments entered by a judge, *see* note 1 *supra*, several of the judgments entered in 2009 varied substantially from the jury verdicts underlying them.

In an employment case the jury awarded the plaintiff \$3 million. The judge reduced the damage award to \$389,877 and awarded attorney fees of \$105,000, for a total award of \$494,877.

In the products liability case involving a camp heater, the judge awarded pre-judgment interest of \$184,636 to the damages of \$666,963, for a total of \$851,599.

The largest judgment in 2009 arose from a breach of insurance contract case. The case was filed in 2002 and was on remand from the circuit court. Damages were severed, and the jury determined that the defendant insurance company was liable. Thereafter, the parties stipulated that the loss was \$13,564,235; the trial judge awarded pre-judgment interest of \$9,135,221; and judgment was entered in the amount of \$22,699,456.

In the patent infringement case, the jury awarded damages of \$5,350,000. Pre-judgment interest of \$1,137,920 was added, for a total award of \$6,487,920. The plaintiff's request for attorney fees and costs was denied.

Two of the cases brought under miscellaneous federal statutes are examples of the attorney fees tail wagging the dog. In the first case, the jury awarded damages of \$4,177. Later, attorney fees of \$40,414 were awarded, for a total of \$44,591.

In a case alleging violations of the Fair Labor Standards Act, the jury found for the plaintiff and awarded damages of \$10,753. The judge awarded liquidated damages, doubling the award to \$21,506, and awarded attorney fees of \$98,800, for a total of \$120,306.

E. SETTLEMENT EFFORTS

Trials are the exception; most cases are resolved by settlement.

In 2009, the magistrate judges conducted 718 settlement conferences, as follows:

Judge	Conferences Held
MJW	118
BNB	96
CBS	123
MEH	172
KLM	107
KMT	86
LTM	7
DLW	9
Total	718

Cases are more likely to go to trial if no settlement conference is held or if one party refuses meaningfully to participate in settlement discussions. In 12 of the 34 cases tried (35%) no settlement conference was held, and in five of those there was no reference to a magistrate judge for settlement purposes. In an additional six cases (18%) the defendants refused to make settlement offers. Thus, in 18 of the 34 cases tried (53%), either no settlement conference was held or the defendant refused to make a settlement offer.

1. Cases Where No Settlement Conference Was Held

In 12 of the 34 cases tried (35%) no settlement conference was held. Five of those cases were not referred to a magistrate judge for settlement. In seven cases, although referred, no conference was held. The plaintiffs prevailed in five cases (42%) where no settlement conference was held, and the defendants prevailed in seven (58%).

The cases where no settlement conference was held are detailed in **Table 3**.

2. Cases Where a Party Offered Zero

In seven of the 34 cases tried (21%), settlement conferences were held but one or both parties refused to make any settlement offer. The defendants refused to make an offer in three cases; the plaintiff refused to make a demand in one case; and neither side made an offer in three cases. The defendants prevailed in four cases (57%); the plaintiffs prevailed in two cases (29%); and one case resulted in a split verdict (14%).

3. Cases Where the Verdict Exceeded Opponent's Last Settlement Offer

The plaintiffs received verdicts exceeding the defendants' last offers in ten of the 15 cases where the plaintiffs prevailed. In five cases no settlement conference was held; in one case a conference was held but the defendant made no offer; and in four cases the defendants made offers, but the verdicts awarded exceeded the offers.

In the ten cases where verdicts exceeded the defendants' last settlement offer, the average verdict was \$1,612,346, while the average settlement offer was only \$37,750.

4. Cases Where Defendant's Settlement Offer Exceeded the Verdict

In seven cases the defendants offered to pay in settlement more than was awarded through trial. Four of the seven cases involved defense verdicts. In two cases, however, the plaintiff prevailed but the verdict was less than the defendant's last settlement offer.

5. Average Verdict/Settlement Offer

The average verdict in all cases tried (regardless of whether the plaintiff or defendant won) was \$672,515.¹⁰ By contrast, the average amount offered by defendants in settlement was \$81,529.

6. Cases Settling At Trial

Five cases settled less than one week before trial or after the trial began. Viewed differently, five of 39 cases (13%) that reached the eve of trial settled before a verdict was returned. This fact raises doubts about the accuracy of the frequent complaint that cases settle because of the delay or expense associated with reaching trial.

¹⁰In calculating this average, I have included the net award in the split verdict cases and the amount awarded in the insurance case where the defendant (insured) prevailed on its counterclaim.

F. CONCLUSION

The District of Colorado continues to experience the phenomenon of the “vanishing trial,” with only 34 civil cases (1.1%) being tried to jury verdicts in 2009. Defendants fared better at trial than did plaintiffs, with plaintiffs prevailing in 15 of the 34 trials (44%) and defendants prevailing in 16 cases (47%). The average verdict was \$1,345,030, and the median verdict was \$156,159.

TABLE 1: Lengths of Trials

<u>Length of Trial</u>	<u>No. of Trials</u>
14 days	1
9	2
8	3
7	3
6	4
5	7
4	8
3	5
2	1

189 Total Trial Days

Average trial length: 5.6 days

TABLE 2: Costs Awarded

Type of Case	Prevailing Party	Verdict	Costs Awarded
Civil Rights			
1. Prisoner: retaliation	D	--	\$1,476
2. excessive force	D	--	5,471
3. 8th Amendment: sexual contact	D	--	955
Employment			
1. retaliation	P	\$3,000,000	3,996
2. gender	D	--	2,443
3. 1st Amendment: retaliation	D	--	6,136
4. gender	D	--	2,072
5. breach of contract	P	140,001	6,065
Negligence			
1. product liability: sumo suit	P	1,392,600	11,009
2. product liability: camp heater	P	666,963	4,077
3. ski lift accident	D	--	3,109
4. auto accident	D	--	10,348
5. medical malpractice	D	--	9,170
Contract			
1. insurance	P	severed	9,481
2. insurance	D	5,350,000 (counterclaim)	7,089
3. insurance	D	--	13,364
4. construction	P	156,169	5,000
Intellectual Property			
1. patent infringement	P	5,350,000	denied
2. Lanham Act	P	0	denied
3. patent rights	split	80,000 (net to P)	1,837
Misc. Statutes			
1. Equal Credit Opportunity Act	P	4,177	375
2. FLSA	P	10,753	2,727
3. Sarbanes Oxley	D	--	14,304
4. tax deficiency	P	424,483	6,025

TABLE 3: No Settlement Conference Held

Total instances:	12
Plaintiff's verdicts:	5 (42%)
Defense verdicts:	7 (58%)
Average plaintiff's verdict:	\$1,042,063
Median verdict:	666,963

By Nature of Claim:

Type of Case		Verdict
Civil Rights		
1. prisoner retaliation	D	\$ --
2. excessive force	D	--
3. 8th A: cell assignment	D	--
4. 8th A: sexual contact	D	--
Employment		
1. retaliation	P	3,000,000
2. retaliation	D	--
3. gender	D	--
4. breach of contract	P	140,001
Negligence		
1. products liability: sumo suit	P	1,392,600
2. products liability: camp heater	P	666,963
3. medical malpractice	D	--
FLSA	P	10,753