

**UNITED STATES DISTRICT COURT
ALFRED A. ARRAJ UNITED STATES COURTHOUSE
DENVER, COLORADO**

**Boyd N. Boland
United States Magistrate Judge**

303-844-6408

MEMORANDUM: Jury Verdicts 2008

This memorandum analyzes the jury verdicts¹ returned in civil cases in the District of Colorado during calendar year 2008 and the efforts made to settle those cases.

A. OVERVIEW

Twenty-nine civil jury trials occurred in calendar year 2008, and 2,838 civil actions were filed. The ratio of cases tried to cases filed is 1.0%.² The comparison is imprecise because none of the cases tried in 2008 was filed then. The date of filing of each civil case that went to a jury trial in 2008 is set out below:

<u>Year Filed</u>	<u>No. Tried in 2008</u>
2000	1
2003	2
2004	2
2005	5
2006	13
2007	6

The average time from the date a case was filed until trial was 31 months, or approximately two and one-half years. The shortest time from filing to trial in 2008 was 15 months. Eleven of the 29 cases (38%) were tried within two years of filing.

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 2008, there were also 16 civil trials to the court and 20 criminal trials. Consequently, a total of 65 civil and criminal matters were tried in the District of Colorado.

The number of jury trials in 2008 decreased by nearly 20% when compared to trials in 2007. The number of civil jury trials in each of the last seven years follows:

<u>Year</u>	<u>No. of Cases Filed</u>	<u>No. of Civil Jury Trials</u>	<u>Rate of Trials</u>
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 2008 than were plaintiffs. Defendants prevailed in 17 of the 29 jury trials, or 59% of the time. Plaintiffs prevailed in 12 cases, or 41% of the time. Rates of success for the last six years are set out below:

<u>Year</u>	<u>No. of Civil Jury Trials</u>	<u>Plaintiffs Prevailed</u>	<u>Defendants Prevailed</u>
2008	29	12 (41%)	17 (59%)
2007	36	15 (42%)	21 (58%) ³
2006	38	24 (63%)	14 (37%)
2005	35	23 (66%)	11 (31%) ⁴
2004	51	25 (49%)	26 (51%)
<u>2003</u>	<u>47</u>	<u>26 (55%)</u>	<u>21 (45%)</u>
TOTAL	236	125 (52%)	110 (47%)

³In one case tried in 2007, the verdict for the defendant included an award of \$16,000,000 on a counterclaim.

⁴In 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.

The largest verdict awarded in 2008 was \$14,320,283, and the smallest verdict was \$0. The average verdict awarded in 2008 was \$1,876,994, and the median⁵ verdict was \$240,000.

The following chart reports the amounts of the jury verdicts in 2008, from high to low:

	Amount	Type of Case
1	\$14,320,283	intellectual property: patent infringement
2	4,810,000	fraud/tortious interference with contract
3	1,679,616	intellectual property: patent infringement
4	582,145	employment: 1st Amendment
5	509,057	personal injury: falling merchandise
6	240,000	employment: disability
7	200,000	employment: race/retaliation
8	86,000	employment: retaliation
9	55,000	employment: retaliation
10	25,000	employment: retaliation
11	16,830	personal injury: ski accident
12	0	RLUIPA
	\$22,523,931	TOTAL

⁵The median is the point in the middle of a distribution. Half the verdicts exceeded the median and half were less than the median.

Active district judges presided over 13 jury trials; senior judges presided over 14 jury trials; a circuit judge presided over one jury trial; and one jury trial proceeded before a magistrate judge. A breakdown of the trials by presiding judge follows:

Judge	Type of Case	Outcome	Amount of Verdict
WYD	1. employment: public policy	D	--
	2. employment: 1st Amendment	D	--
MSK	1. personal injury: ski accident	P	\$16,830
	2. employment: retaliation	P	25,000
	3. civil rights: excessive force	D	--
REB	1. RLUIPA	P	0
	2. employment: race/retaliation	P	200,000
	3. employment: race/gender	D	--
	4. employment: gender/retaliation	D	--
	5. employment: retaliation	D	--
	6. insurance: bad faith	D	--
	7. Real Estate Settlement Act	D	--
CMA	1. employment: retaliation	P	86,000
RPM	1. intellectual property: patent	P	14,320,283
	2. intellectual property: patent	P	1,679,616
	3. employment: retaliation	P	55,000
	4. employment: breach of contract	D	--
	5. negligent hiring/supervision	D	--
	6. false imprisonment/malicious prosecution	D	--
	7. RICO	D	--
ZLW	1. employment: gender/retaliation	D	--
JLK	1. qui tam	D	--
WDM	1. personal injury: falling merchandise	P	509,057
	2. employment: 1st Amendment	P	582,145
	3. employment: disability	P	240,000
	4. employment: gender	D	--
	5. products liability	D	--
DME	1. fraud/tortious interference with contract	P	4,810,000
CBS	1. FELA	D	--

A total of 181 trial days were devoted to civil jury trials. The longest trial lasted 15 days; the shortest was two days. The average length of trial was 6.2 days. The most common trial lengths were four and five days, with seven trials respectively. The lengths of the trials are specified in **Table 1**.

C. BREAKDOWN BY NATURE OF CLAIM

The jury trials conducted in 2008 fell into 11 categories based on the nature of the plaintiff's claim:

Category	No. of cases	% of cases tried
Employment	14	48%
Negligence	4	14
Intellectual Property	2	7
Intentional Torts	2	7
Breach of Contract	1	3
Civil Rights	1	3
Qui Tam	1	3
FELA	1	3
Real Estate Settlement Act	1	3
RICO	1	3
RLUIPA	1	3

At least 18 of the 29 cases tried involved claims which permitted the award of attorney fees to a prevailing plaintiff. The plaintiffs won only six of the 18 cases (33%). The court refused to award attorney fees in one case. Attorney fees have been awarded to prevailing plaintiffs in two employment cases, in the amounts of \$130,622 and \$77,541 respectively.

Costs were awarded in 14 cases: five times to plaintiffs and nine times to defendants. The average amount of costs awarded in all cases was \$6,445. The average costs awarded to

plaintiffs was \$1,842, and the average costs awarded to defendants was \$9,002. Each side was ordered to bear its own costs in two cases; three cases settled before the court ruled on the issue of costs; and seven cases remain pending.

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

1. Employment

Fourteen of the 29 jury trials involved employment claims (48%). Employment cases historically have made up approximately 13% of the court's filings. Thus, a disproportionately large number of employment cases went to trial in 2008.

The plaintiffs prevailed in six of the 14 employment cases (43%); the defendants prevailed in eight cases (57%).

The verdicts in employment cases ranged from a high of \$582,145 to a low of \$25,000. The average plaintiff's verdict in an employment case was \$198,024. The amounts of the plaintiffs' verdicts in employment cases, from high to low, are set out below:

Nature of Claim	Amount of Verdict
1st Amendment	\$582,145
Disability	240,000
Race	200,000
Retaliation	86,000
Retaliation	55,000
Retaliation	25,000
TOTAL	\$1,188,145

Of the 14 employment cases tried, four alleged retaliation (29%); three alleged gender discrimination (21%); two alleged race discrimination (14%); two alleged discrimination based on the exercise of First Amendment rights (14%); one alleged discrimination in violation of

public policy (7%); one alleged disability discrimination (7%); and one alleged breach of an employment contract (7%).

An analysis of the employment cases is contained in **Table 3**.

The employment claims most frequently tried during the last seven years were retaliation (28 cases) and gender (27 cases). The historical trial results of the various employment claims asserted during the last seven years are analyzed below:

Nature of Claim	Cases Tried	Cases Won by Plaintiffs	Plaintiffs' Success Rate
Gender	27	14	52%
Retaliation	28	18	64%
Disability	17	8	47%
Race/National Origin	17	6	35%
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	1	0	0%

2. Negligence

Four of the 29 jury trials (14%) involved negligence claims. Two alleged personal injury, including one ski accident and one injury from falling merchandise; one alleged products liability; and one alleged negligent hiring. The plaintiffs won the personal injury cases, and the defendants won the other negligence cases.

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

Nature of Claim	Prevailing Party	Amount of Verdict
Personal injury (falling merchandise)	P	\$509,507
Personal injury (ski accident)	P	16,830
Products liability	D	--
Negligent hiring	D	--

The average plaintiff's verdict in a negligence case was \$263,169. An analysis of the negligence cases is contained in **Table 4**.

3. Intentional Torts

Two of the 29 jury trials (7%) involved intentional torts: the first alleged fraud and tortious interference with contract, and the second alleged false imprisonment and malicious prosecution. The plaintiff won the fraud case and was awarded \$4,810,000. The defendant won the false imprisonment/malicious prosecution case.

4. Intellectual Property

Two of the 29 trials (7%) involved intellectual property claims, both alleging patent infringement. The plaintiffs prevailed in both cases and were awarded damages of \$14,320,283 and \$1,679,616 respectively. The average intellectual property verdict was \$7,999,950.

Plaintiffs have fared exceptionally well in intellectual property cases tried in this district. In the last seven years, there have been 16 intellectual property cases tried, and the plaintiffs prevailed in 14 of them (88%). The historical results over the last seven years follow:

Nature of Claim	Cases Tried	Cases Won by Plaintiffs	Plaintiffs' Success Rate
Patent Infringement	7	7	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%

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
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 ⁶
Total	142,462,223

The average verdict over the last seven years is \$10,175,873; the median verdict is \$1,850,000.

⁶The plaintiff sought statutory damages only, which were awarded by the trial judge and not the jury.

5. Breach of Contract

Only one jury trial (3%) involved a claim for breach of contract, alleging bad faith breach of an insurance contract. The defendant prevailed.

6. Civil Rights (other than employment)

Civil rights cases (other than employment) accounted for one of the 29 trials (3%). The plaintiff alleged the use of excessive force. The defendant prevailed.

Historically, civil rights cases have been among the most difficult for plaintiffs to win. In the last seven years, 41 civil rights cases have been tried to juries. The plaintiffs won ten cases (24%), and the defendants prevailed in 31 (76%). The largest verdict in a civil rights case was \$1,000,000, involving the unlawful arrest of a state judge. (That verdict ultimately was reversed on appeal.) The smallest verdicts were for \$1. The plaintiffs' verdicts over the last seven 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	1,500
Equal protection	630
Unlawful arrest	1
Excessive force	1

The average verdict in the civil rights cases over the last seven years is \$122,363. The median verdict is \$6,500. When the anomalous \$1 million verdict (which was reversed) is taken

out of the equation, the average verdict is \$24,848, and the median verdict is \$5,000.

7. Federal Statutory Claims

A total of five cases were brought under different federal statutes, as follows:

Nature of Claim	Prevailing Party	Amount of Verdict
RLUIPA	P	\$ 0
FELA	D	--
Real Estate Settlement Procedures Act	D	--
RICO	D	--
Qui Tam	D	--

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 *infra*, several of the judgments entered in 2008 varied substantially from the jury verdicts underlying them.

In one patent infringement case, the district judge entered judgment as a matter of law in favor of the defendant, nullifying the plaintiff's jury verdict in the amount of \$1,679,616.

In an employment case alleging race discrimination, the jury awarded damages of \$200,000; the district judge added attorney's fees of \$130,622; and judgment was entered in an amount exceeding \$330,000.

In another employment case, asserting retaliation, the jury awarded damages of \$25,000; the district judge added attorneys fees of \$77,541; and judgment was entered in an amount exceeding \$102,000.

E. SETTLEMENT EFFORTS

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

In 2008, the magistrate judges conducted 622 settlement conferences, and 388 cases settled at or after the conference. The ratio of cases settled to conferences held is 62%. An analysis of the settlement conferences on a judge-by-judge basis is set out below:

Judge	Conferences Held
MJW	99
BNB	102
CBS	102
MEH	130
KLM	91
KMT	91
GJR	3
DLW	4
Total	622

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 ten of the 29 cases tried (34%) no settlement conference was held, and in four of those cases there was no reference to a magistrate judge for settlement purposes. In an additional six cases (21%) the defendants refused to make settlement offers. Thus, in 16 of the 29 cases tried (55%), either no settlement conference was held or the defendant refused to make a settlement offer.

1. Cases Where No Settlement Conference Was Held

In ten of the 29 cases tried (34%) no settlement conference was held. Four of those cases were not referred to a magistrate judge for settlement. In six cases, although referred, no conference was held. The plaintiffs prevailed in six cases (60%) where no settlement conference was held, and the defendants prevailed in four (40%).

The cases where no settlement conference was held are detailed in **Table 5**.

2. Cases Where Defendant Offered Zero

In six of the 29 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 all six cases; the plaintiffs refused to make a demand in three of the cases. The defendants prevailed in four of the six cases (66%) where no offer was made.

There were three verdicts in excess of \$1 million in 2008, and no settlement conference was held in any of those cases.

3. Average Verdict/Settlement Offer

The average verdict in all cases tried (regardless of whether the plaintiff or defendant won) was \$776,687. By contrast, the average amount offered by defendants in settlement was \$31,224.

4. Cases Settling At Trial

Startlingly, seven cases settled less than one week before trial or after the trial began. Viewed differently, 7 of 36 cases (19%) that reached the eve of trial settled before a verdict was

returned. This fact raises doubts about the frequent complaint that cases settle because of the delay or expense associated with reaching trial.

F. CONCLUSION

The District of Colorado continues to experience the phenomenon of the “vanishing trial,” with only 29 civil cases (1.0%) being tried to juries in 2008. Defendants fared better at trial than did plaintiffs, with plaintiffs prevailing in only 12 of the 29 trials (41%). The average plaintiff’s verdict was \$1,876,994, and the median verdict was \$240,000, demonstrating that primarily complex and very large claims proceed to trial.

Settlement was the overwhelmingly preferred form of case resolution, with 388 cases settling at or after a court-sponsored settlement conference. Surprisingly, even those cases which reach the eve of trial frequently settle. Seven of the 36 cases (19%) ready for trial settled less than one week before trial or after the trial began.

TABLE 1: Lengths of Trials

<u>Length of Trial</u>	<u>No. of Trials</u>	<u>Total Trial Days</u>
15 days	1	15
12	1	12
10	2	20
9	1	9
8	4	32
7	1	7
6	3	18
5	7	35
4	7	28
3	1	3
2	1	<u>2</u>
		181 Total Trial Days

Average trial length: 6.2 days

TABLE 2: Costs Awarded

Type of Case	Prevailing Party	Verdict	Costs Awarded
Employment: retaliation	D	--	\$ 8,096
retaliation	P	\$ 86,000	3,112
retaliation	P	25,000	368
race	D	--	2,350
race	P	200,000	2,001
gender	D	--	5,238
1st Amendment	D	--	1,421
Negligence: personal injury	P	509,057	1,042
personal injury	P	16,830	2,688
negligent hiring	D	--	10,903
products liability	D	--	3,803
Intellectual Property: patent	P	1,679,616	15,551
Breach of Contract: insurance bad faith	D	--	17,395
Civil Rights: excessive force	D	--	16,262

TABLE 3: Employment Case Summary

Number of employment cases	14
Plaintiff's verdicts	6 (43%)
Defense verdicts	8 (57%)
Plaintiff's verdicts high to low	
1.	\$582,145
2.	240,000
3.	200,500
4.	86,000
5.	55,000
6.	<u>25,000</u>
TOTAL:	\$ 1,188,145
Average:	198,124
Median:	200,000

1st Amendment
disability
race
retaliation
retaliation
retaliation

By Nature of Claim:

Retaliation:

Number of cases:	4
Plaintiff's verdicts:	3 (75%)
1.	\$86,000
2.	55,000
3.	25,000
Average:	\$37,018
Defense verdicts:	1 (25%)

Gender:

Number of cases:	3
Plaintiff's verdicts:	0 (0%)
Defense verdicts:	3 (100%)

Race:

Number of cases:	2
Plaintiff's verdicts:	1 (50%)
1.	\$200,000
Defense verdicts:	1 (50%)
Amount of verdict:	\$ 39,500

1st Amendment:

Number of cases:	2
Plaintiff's verdicts:	1 (50%)
1. \$582,145	
Defense verdicts:	1 (50%)

Violation of Public Policy:

Number of cases:	1
Plaintiff's verdicts:	0 (0%)
Defense verdicts:	1 (100%)

Disability:

Number of cases:	1
Plaintiff's verdicts:	1 (100%)
1. \$240,000	
Defense verdicts:	0 (0%)

Breach of Contract:

Number of cases:	1
Plaintiff's verdicts:	0 (0%)
Defense verdicts:	1 (100%)

TABLE 4: Negligence Case Summary

Number of cases		4
Plaintiff's verdicts		2 (50%)
Defense verdicts:		2 (50%)
Plaintiff's verdicts high to low		
1.	\$ 509,057	personal injury: falling merchandise
2.	16,830	personal injury: ski accident
TOTAL:	\$ 525,887	
Average:	262,944	

By Nature of Claim:

Negligence:

Number of cases:	2
Plaintiff's verdicts:	2 (100%)
1.	\$525,887
2.	16,830
Average: \$262,944	
Defense verdicts:	0 (0%)

Products Liability:

Number of cases:	1
Plaintiff's verdicts:	0 (0%)
Defense verdicts:	1 (100%)

Negligent hiring:

Number of cases:	1
Plaintiff's verdicts:	0 (0%)
Defense verdicts:	1 (100%)

TABLE 5: No Settlement Conference Held

Total instances:	10
Plaintiff's verdicts:	6 (60%)
Defense verdicts:	4 (40%)
Average plaintiff's verdict:	\$ 3,593,159
Median verdict:	\$ 1,679,616

By Nature of Claim:

Type of Case		Verdict
Negligence		
1. personal injury	P	\$ 509,057
2. negligent hiring	D	--
Intentional Tort		
1. fraud: tortious interference	P	4,810,000
2. false imprisonment	D	--
Intellectual Property		
1. patent infringement	P	\$14,320,283
2. patent infringement	P	1,679,616
Employment		
1. disability	P	240,000
Civil Rights		
1. excessive force	D	--
RLUIPA	D	--
RICO	D	--