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IMAGINED CONVERSATIONS: A SERIES

The Decline *in* Federal Civil Trials

by D. Brock Hornby

*The first in a series of imagined
conversations about federal courts among
friends who once were law school classmates
and now are well along in their legal careers. ▶*



[THE CAST OF CHARACTERS]

Lang Fell, a federal courts law professor

Coar Dappel, a federal circuit judge

Nielsen Prius, a federal district judge

Madge Strait, a federal magistrate judge

Talagud Storey, a federal trial lawyer

Linda Gate, a federal practitioner

Ward Smith, a transactional lawyer

Manny G. Risk, a corporate general counsel

[THE SCENE]

The first conversation takes place in the chambers of Federal District Judge Nielsen Prius. Prius enters chambers from the courtroom door behind his desk, doffs his black robe, and tosses it over a chair. His classmates are seated at a table...

NIELSEN PRIUS [APOLOGETICALLY]

Welcome, fellow classmates. Sorry I'm late. I had to take a last-minute guilty plea so that a criminal jury panel need not come to the courthouse tomorrow. I bring the apologies of Chip Terleven who has convened an emergency bankruptcy hearing.

I hope you are as enthusiastic about this meeting as I am. We are old friends — transformed over the years into lawyers, law professor, federal trial and appellate judges — who can benefit by discussing and critiquing what we do. Maybe collectively we'll acquire some new insights. The rules for our conversations are simple: no holds barred, no offense taken, just a candid discussion of professional practices and assumptions. I've asked our classmate, Lang Fell, now a federal courts law professor, to get the ball rolling on our first topic, the drastic decline in the number of civil trials in federal courts.

LANG FELL

Thanks, Nielsen. Talagud, years ago you used to try a lot of civil cases in federal court, but now you say you have few federal trials. Why the change?

TALAGUD STOREY

Lang, I love to try cases — it's why I became a lawyer. I love the process and the adrenaline rush that accompanies it. But these days I have very few federal civil trials. The reasons are seated around this conference table, from company general counsel like Manny, to federal lawyers like Linda who focus

A NOTE FROM THE AUTHOR: The words are mine, but the ideas expressed are not. I have gathered them from the legal literature, from conversations with judges, lawyers, and academics over three decades, and most recently from the rich presentations at a first-rate conference on The State and Future of Civil Jury Trials conducted by the Civil Jury Project at NYU School of Law on Sept. 11, 2015, https://www.youtube.com/playlist?list=PLJkLD_s9pYaZqu-OjE3n1HUeYrqsYMAiL, particularly the insights of Professors Akhil Reed Amar, Renee Lettow Lerner, and Arthur R. Miller; District Judge William G. Young; and Attorney Robert R. Gasaway. My direct quotations of Judge Young and Professor Amar also come from the conference.

on discovery and motion practice in preference to trials, to magistrate judges and trial judges like Madge and Nielsen who raise obstacles to civil trials, to appellate judges like Coar who make the law complex. I'd like to hear what they say about why they discourage civil trials before I chime in.

FELL

All right, Talagud, I'll come back to you. Let's start with the judges instead. Nielsen, from your perspective as a seasoned trial judge, why has the number of federal civil trials declined so precipitously?

PRIUS

As Talagud intimates, we judges are partly responsible, but only partly. When federal courts were overwhelmed by trials in the '80s and '90s, many judges strong-armed settlement and, with help from the Civil Rules Committee amending the Federal Rules of Civil Procedure, took steps designed to "manage" crushing dockets. Even today, the Rules Committee continues to tweak the Rules to encourage judicial management. But in that period of crowded dockets, federal judges also experimented with every available technique in an effort to move cases to resolution, including devices like summary jury trials, corporate mini-trials, and early neutral evaluation, a few of which are now almost forgotten. I'll admit that some of what judges incorporated into their local rules and standing orders made it difficult and expensive for lawyers to try civil cases in federal court.

FELL

Madge, you federal magistrate judges were a big part of that management effort when the Article III judges were all tied up in trials and sentencings. What was your role?

MADGE STRAIT

Federal trial judges pleaded with us to find a way to resolve large numbers of civil cases without trial, because the judges simply didn't have trial days available. So we called the lawyers into court for status conferences periodically, painted a dire picture of the likelihood of reaching a trial date any time soon, and tried to jawbone them into settlement, or mediation, or even motion practice that would narrow the issues, hoping that settlement would then follow. We were conscientiously trying to resolve disputes in an environment where there was minimal judge time to actually try all the civil cases on the docket. But we were increasing litigation expenses and complexity by our recurrent conferences, and our actions undoubtedly sent the message to lawyers that federal courts were not particularly hospitable to civil trials.

PRIUS

Trial and magistrate judges' actions were only part of what was happening then, Lang. The financial stakes in federal court ▶

“ [M]y discovery and pretrial preparation are geared toward pretrial events that culminate in the summary judgment dance and settlement.

were getting higher and higher as Congress increased the jurisdictional floor for diversity-jurisdiction cases from \$10,000 to \$50,000 in the 1980s, then to \$75,000 in the 1990s; as more federal cases invoked complicated science, economics, and engineering; and as class actions proliferated. Many cases required expert witnesses and, in a series of decisions, the Supreme Court instructed trial judges to carefully screen such testimony. The result was extensive discovery and motion practice concerning experts, their science and techniques, their past activity as an expert witness, and any economic interest that their testimony might further. Both trial preparation and trial itself became very expensive. More recently, the astounding growth of digital information has generated huge discovery expense in some cases, and magistrate judges have been called upon to spend a lot of time with the lawyers, the parties, and their IT experts to manage that. All those factors have driven up the price of lawsuits and trials.

LINDA GATE

Something else was going on as well. Thirty years ago, aside from business arbitration, alternative dispute resolution (ADR) providers were few and far between in many parts of the country. Academic enthusiasts began to push the concept of a “multi-door courthouse” that would provide a choice of methods to resolve disputes. Congress got into the act through the Civil Justice Reform Act of 1990 and later ADR legislation to ensure that ADR options were available in federal court. Law schools started to teach ADR, some organizations started promoting it to companies, and soon lawyers and others began to offer ADR services. Now there are ADR providers on every street corner. And arbitration clauses started to appear in consumer contracts everywhere, for everything from cellphones to credit cards to stock purchases to consumer software.

FELL

I’m glad you spoke up, Linda, because I was about to call on you. Talagud intimated that you are active in federal trial court but that you do not try cases. What does that mean?

GATE

It means that I, and lawyers like me, are the backbone of federal civil practice today. For cases that won’t be arbitrated, we are the ones who draft the complaints and answers, litigate the motions to dismiss and the class-certification motions, engage in the discovery practice, conduct the expert depositions, handle the *Daubert* and summary judgment motions and, if the case is still alive after all that, counsel mediation or settlement. Trial lawyers like Talagud look down their noses at us, but we have become the focus of federal court work in civil cases.

FELL

Well, Linda, are you engaging in all that activity in preparation for trial?

GATE

Candidly, no. I don’t expect a trial. If I am acting for a defendant, I am trying to get a decision in the defendant’s favor by motion, without the risk of a trial, or to make the case so expensive for the plaintiff’s lawyer that a low-ball settlement is possible. If I am representing a plaintiff, I am trying to demonstrate the strength and value of my client’s case to enhance settlement prospects and thereby get a recovery without the risk of a trial, appeal, and delayed payment. So my discovery and pretrial preparation are geared toward pretrial events that culminate in the summary judgment dance and settlement.

PRIUS

Before you leave us judges, Lang, I want to emphasize that the orchestrated judicial push to discourage trials is past. Now most federal trial judges welcome civil trials; after all, trials of all kinds are why we became judges. I no longer seek settlement conferences, although I will do one when asked. I tell the lawyers and their clients that I would love to preside at their trial. But still the cases settle. Sometimes I think that the tort reform movement scared the country about jury verdicts. The size of the jury verdict, unless it is small, is always the headline or the first paragraph of the online story.

FELL

One more question, Nielsen and Madge, before I turn to others. The number of federal magistrate judges has grown significantly, and I understand that the federal courts could not handle their caseloads without them. Why the growth, and does the growth bear any relationship to the vanishing trial?

PRIUS

Congress has not enacted omnibus judgeship legislation in decades, partly on account of the interparty rivalry over which political party will control the selection of the new judges. But Congress has been willing to fund the judiciary to appoint new magistrate judges on a merit-selection basis with no party politics involved. Without those magistrate judges, Lang, the federal courts would not be able to function.

STRAIT

Magistrate judges do carry an important part of the criminal and civil caseload. Part of the beauty of the magistrate judge system is that districts can use magistrate judges in varying ways, fitting the usage to the particular needs of each district. In some districts, magistrate judges are on the wheel for initial random case assignment just like district judges. In districts where magistrate judges have more specialized duties, most of us encourage district judges to assign us a chunk of civil motion practice like motions to dismiss and motions for summary judgment because we enjoy the intellectual challenge they pose. Some district judges decline to make such assignments, but when judges do give us substantive motions, lawyers tell me that having magistrate judges involved actually increases the cost of litigation because it creates one more level of review where lawyers must prepare and file legal memoranda. I doubt that extra expense is significant to the cost of federal civil litigation, but it could be a factor.

FELL

Back to you, Talagud. If Nielsen is correct, that most federal judges no longer discourage civil trials, why aren't trials coming back? Why aren't you trial lawyers actively trying cases?

STOREY

I still want to hear Manny's general counsel insights, Lang, but let me give part of the answer, "confessing error" like Nielsen and Madge did. One response is that these days many federal lawyers like Linda lack solid trial experience and are therefore hesitant to actually try a federal case. Hell, lawyers like Linda don't even set foot inside the federal courthouse. They file all their lawsuit "papers" electronically, and too many federal judges seldom entertain oral argument.

And candidly, even in the heyday of trials, many "trial" lawyers didn't really want to go to trial. A trial lawyer leads a difficult life, with scheduling unpredictability, motel or hotel living for days on end, working nonstop while the trial is on, dealing with huge stress — it's tough on family life and on blood pressure. Sure, there is a wonderful high when you win a substantial jury verdict, but disappointment and client resentment when you lose (and someone always loses!). I love to try cases but I can't now — and couldn't 30 years ago — say the same for a lot of my colleagues.

But I think the most important component in the decline of trials is that clients no longer want to take the risk of what a jury will do. In fact, many are afraid of juries. Something certain, as in a settlement, usually appeals more to plaintiffs than the risk that the jury may award them nothing. Same thing for defendants: they prefer a fixed, manageable amount to pay over the risk of a huge, company-threatening verdict and the distraction and expense of the trial process. Clients are far more in charge these days than they once were.

PRIUS

I mentioned the fear of jury verdicts. But it's not just jury trials that have declined. Bench trials in federal court also are greatly reduced in numbers. Talagud, why do you and your clients avoid even bench trials?

STOREY

Nielsen, you federal trial judges are no longer the only game in town. These days we can find more attractive alternatives that are also cheaper and faster. You judges won't let us select the dates for proceedings, unlike arbitrators who want our return business. You schedule hearings to fit your schedule regardless of ours, and, what is worse, you put us on a trailing list or, if you do give us a firm trial date, you renege if you have a criminal case you have to try. And you do everything in public! When I represent defendants who want to protect their business reputations, they want everything under wraps. Sometimes plaintiffs do as well, if the case will involve private details of their lives or experiences. Plus you feds won't let us choose our judge and you insist on being generalists. With arbitration we can choose our judge and ensure that she is knowledgeable in the area and not biased or lazy. In arbitration, the rights of appeal are limited, thereby cabining costs and delay. Same for mediation: We choose the mediator, and when it's over, it's over. Those are some of the reasons why our clients choose ADR over trials. You feds just can't compete!

But I'd like to ask Manny a question. Manny, why won't you and other corporate counsel let lawyers like me try your cases to verdict anymore?

MANNY G. RISK

Talagud, unlike you and your fellow trial lawyers, we don't go to court because we enjoy the experience of a public trial. We simply want a fair and economical resolution of our disputes. We consider every avenue to that end, and we choose the one that best serves our interest. Very seldom is that a federal trial in open court.

STOREY

Fair enough, and that economic assessment affects both sides. Plaintiffs' lawyers no longer file the kinds of cases they used to because they are better able to predict what it will cost them to pursue a case. Entrepreneurial lawyering, together with time ▶

“General counsels, insurance companies, corporate defendants — all are data-driven and risk avoiders, and they will not allow their lawyers to spend a small fortune to try a case that is not worth the expense.

and expense data, has produced better management of cases overall, including knowing when settlement is better than trial. The same is true on the defense side. General counsels, insurance companies, corporate defendants — all are data-driven and risk avoiders, and they will not allow their lawyers to spend a small fortune to try a case that is not worth the expense.

RISK

Exactly. In fact, most institutional defendants such as corporations and insurance companies have made a virtual science of risk management, especially if they are repeat players in court. They know when to hold and when to fold, and general counsels like me are always watching to avoid excessive risk, or litigation whose expense exceeds the value. Talagud mentioned entrepreneurial lawyering, and I want to talk more about that. When a generous jury verdict against a company hits the news media, entrepreneurial lawyers come out of the woodwork to file copycat cases, hoping to share in the bonanza. Defendants therefore are always looking not only at what is a fair resolution of a particular dispute, but also at how it will affect the entire portfolio of cases that they have or can expect. That is one of the reasons that we want to settle or arbitrate in private. Arbitration and mediation are cheaper and faster, and, unlike in court, arbitration and mediation let us keep all these matters confidential. Likewise, in lawsuit settlements, we use nondisclosure agreements. I might also mention that a trial's focus on what actually happened is often not the most helpful focus in a business dispute, and mediation can instead steer the parties' attention toward how to improve things going forward.

FELL

Aren't the expense and speed differences between arbitration and federal court that Talagud mentioned a few moments ago overstated? Linda, you do a lot of federal pretrial work. Is discovery overwhelming in federal court? Are the federal courts slow?

GATE

In some cases, digital information discovery can be overwhelming. But empirical data show that the monumental discovery expense people talk about actually involves only a small percentage of the cases. Lawyers who arbitrate tell me that discovery is increasing in arbitration and that arbitration is becoming more expensive. As for speed, I do know that arbitration is not always speedier than a lawsuit, certainly not in federal courts that have rocket dockets. But there are federal courts, especially border courts dealing with immigration and drug offenses, where it is difficult to move a civil case to resolution, and there arbitration is undoubtedly more efficient. I also have the sense that a lot of small businesses that serve consumers are plugging into their contracts arbitration or mediation clauses that they have found online, thinking that ADR will be cheaper for them in a dispute and that they won't necessarily have to hire a lawyer.

RISK

Cost and speed may not always be the strongest arguments in favor of arbitration, but secrecy and ability to choose the adjudicator remain very important. On secrecy, let me be explicit that our greatest concerns as defendants these days are consumer and class-action lawsuits. One generous, publicized verdict generates extensive and expensive copycat litigation by lawyers looking for fees. If we have a dispute that is just between two companies, or another type of dispute that is a “one-off,” I am much more willing to go to trial. Courts are fine for those disputes because I can expect an unbiased and careful judge, and I am not concerned about the multiplier effect. But where a particular lawsuit may be representative of hundreds or thousands of other claims, I have to manage the multiplier effect. To respond to an earlier question, that is why companies use arbitration clauses in their consumer contracts and why I try to get rid of class actions and comparable matters before there is a precedent that will generate the deluge. And let's face it, not many consumers pursue arbitration, with or without a lawyer.

You know, arbitrators and mediators actively market themselves and point out the effectiveness of what they do. I don't remember a federal trial judge ever asking for my business or marketing the advantages of a federal court for dispute resolution. Federal courts just sit back and expect all disputes to come to them as they used to, but the world has changed. As someone said earlier, judges are no longer the only game in town for civil disputes, and they never will be again. I learned in law school about ADR, and I learned then that it was cheaper, quicker, and more predictable. That is still the mantra of the general counsels whom I know. Indeed, many corporations signed a pledge many years ago to try ADR first, in preference to litigation. What we know for certain is that trying a case in federal court will be hugely expensive.

STOREY

Manny may be onto something in his comment about the indifference or aloofness of federal courts. When we do come to court, my clients and I often feel like we are barely tolerated. We have to go through an airport-style metal detector, give up our cell phones, sometimes go through a pat-down, and then sit and wait for the judge. We have to stand up every time the judge comes into a room, call him or her “your honor,” and make sure not to offend in any way. The arbitrators and mediators we pay to work for us don’t put us through those humiliations. The process outside of court is all much more businesslike and down-to-earth. I understand that with the kinds of criminal cases that federal courts process, security is necessary, but the whole federal court package sure can be off-putting and antiquated for civil disputes in the 21st century.

PRIUS

Do you think we federal judges could get more trials if we devised simpler and quicker procedures for smaller-stakes cases, limiting discovery and motion practice? Would those cases then get tried?

STOREY

I doubt it. As Manny has suggested, litigation expense is only one of the many elements driving the trend away from trial.

FELL

I’m beginning to get it — a host of factors collectively discourage federal civil trials. But look at what we are losing with the civil jury trial’s decline. Usually people who have performed jury service end up with greater confidence in their country’s system of justice. Some scholarship even suggests that they are more likely to vote than other citizens. As Judge William Young tells his juries, “Every single jury trial is both a test and a celebration of the rights of a free people to govern themselves.” The jury system has been a unique element of American democracy, a central idea of the bill of rights — grand jury, criminal petit jury, and civil jury — and the civil jury even has its own separate amendment, the Seventh. The framers did not see juries as simply a way to resolve disputes, but as part of a functioning democratic republic that involved citizens directly in the application of laws and in restraining officials. In the 1830s Tocqueville famously remarked that jury service helped educate American citizens about their laws and about how their government operates. It may be the only opportunity some citizens have to participate in government. Are we really going to lose all that?

PRIUS

With the decline in trials, I have noticed that fewer law school and high school classes actually visit my courtroom to watch justice at work. Watching a civil jury trial is, in Professor

Akhil Amar’s words, watching jurors, judges, lawyers, litigants, and witnesses “reaching out for justice.” I fear that we federal judges will not have the same moral authority without citizen juries partnering with us. Jury trials have been part of our history: John Adams was a trial lawyer; Abraham Lincoln was a trial lawyer; the entertainment media continue to reflect jury trials as part of American culture. This decline in civil jury trials is a huge loss to our principles of popular sovereignty in a democratic republic.

RISK

Those are stirring words, Lang and Nielsen, and jury service probably does amount to a good civics lesson, although many jurors pay dearly for it in delays, wasted time, and inadequate compensation. But my company, and defendants like it, are focused on the bottom line and on risk avoidance in particular cases. Even with the Seventh Amendment, it is a private choice whether to arbitrate, mediate, go to jury or bench trial, or settle; parties will not sacrifice their economic concerns for the good of civics. And let’s not be too romantic about our jury trial history. Remember, civil jury trials have basically disappeared in other common law countries like England, Canada, Australia, and New Zealand. I’m not aware that their democracies have suffered as a result.

COAR DAPPEL

As an appellate judge, I have been silent in this discussion and, contrary to Talagud’s suggestion at the outset, I don’t try to make the law complex; federal law already is complex. But let me ask this question from my perspective: With more cases going to mediation and arbitration, aren’t we losing an important avenue of law development, where appellate judges like me pronounce and elaborate upon the law? Arbitrators and mediators don’t fill that role.

RISK

I have the same answer for you as I gave Nielsen, Coar: That’s not my and my company’s problem.

STOREY

Coar, I’m not sure that your concern is well-founded. Last time I looked at Westlaw and Lexis, it seemed to me that you judges are putting out more legal verbiage now than at any time in history, and the last thing that needs to concern us is an insufficient quantity of judicial opinions. Since you feds have become more hospitable to summary-judgment motions, even trial judges now are writing an abundance of opinions. I do wish that all of you would write opinions that made future case outcomes more predictable, but that’s a topic for another conversation.



“I’m not sure that the American tradition of public trial as live theater — where everyone sees all the testimony, then expectantly awaits a jury’s decision in real time — will survive.

WARD SMITH

I will wait for that conversation because, although this one is fascinating, as a transactional lawyer I don’t really have anything to contribute on this topic. But I do note that arbitration clauses seem to be occupying the field in consumer contract cases. I think that Coar therefore has a point. Even though there may be a lot of judicial verbiage in the ether, we may be losing the judicial voice in the particular category of consumer contracts.

DAPPEL

There is another consequence of the decline of trials. When we appellate judges review trial outcomes, we give enormous deference to the jury verdict or to the judge’s findings of fact. But when we review dismissals or summary judgments, the deference disappears altogether.

FELL

Talagud mentioned the writing of opinions on summary-judgment motions. Is part of the reason for the decline in trials the fact that more cases are being disposed of by summary judgment or motions to dismiss under the Supreme Court’s recently tightened pleading standards?

PRIUS

Lang, I am aware of that assertion in some of the academic discussions, but I’m skeptical. Everything I see on my docket tells me that even if I denied more summary-judgment motions or denied more motions to dismiss, those cases still would settle, rather than go to trial. The dismissal and summary-judgment hurdle certainly affects the settlement value of the case and the plaintiffs’ ability to recover, but I don’t think it appreciably reduces the number of cases that actually make it to trial.

STOREY

Here is one more reason why there are fewer trials today. There are whole categories of cases that we generally don’t try any longer, like automobile accidents or FELA railroad injuries, because we have abundant data on what they are worth and settle them accordingly. Simply put, we can do the math. When new laws come on the books that give people new rights, then they usually do generate trials until once again lawyers and litigants have enough data to evaluate the risks. So when the EEOC adopted sexual harassment regulations in 1980 and when the ADA went into effect in the 1990s, those laws generated lawsuits and trials. There hasn’t been a new blockbuster federal law with a private cause of action in a long time. If and when there is another, then you can expect a resurgence of trials, at least for a while.

GATE

Lang, the volume of civil trials may not come back, but the availability of federal civil trials remains an essential element of what lawyers and litigants do. It is true that we resolve cases mostly by other means, but that resolution occurs in the shadow of the federal system of justice. Federal civil trials must remain as a default mechanism.

FELL

But without a significant volume of contemporaneous civil trials and verdicts, Linda, you, Talagud, and Manny may be relying on numbers that are out of date because of their age — or worse, current verdicts that, if you had more of them, you would recognize as outliers, not representative. So the settlement numbers you all use actually may be skewed.

RISK

I really think that looking backward, trying to bring back civil trials as they once were, is not productive in the final analysis. We should be looking to the future. The expense and logistical difficulties of assembling everyone in one room at one time are being overcome by technological advances that allow people to interact from remote locations, and our assumptions as oldsters about the centrality of physical face-to-face interaction are not shared widely by young people. Perhaps one defect in the “collective wisdom” of this group is that we have no one from the youngest generation. Online companies have developed ways to engage in dispute resolution within their community of users online, even including blind negotiation techniques that are quite creative. Now offline companies like mine are looking carefully at the utility of online resolution for other types of disputes. I’m not sure that the American tradition of public trial as live theater — where everyone sees all the testimony, then expectantly awaits a jury’s decision in real time — will survive.

FELL

Whew! Federal trial courts seem to face an unmeetable challenge. Congress and the Supreme Court demand that they do everything in public. Congress directs that they give criminal cases priority. The Rules Enabling Act and the Rules Committees mandate certain rules concerning discovery and class actions. As long as courts were the only game in town, none of that mattered. But the judiciary and Congress in the '80s and '90s provided an environment in which ADR providers established themselves. For civil disputes in today's world, federal trial courts have become sort of like the U.S. Post Office — once a monopoly and essential, but now struggling to compete with private providers like FedEx and UPS who can offer services that the Post Office cannot. Alternatives like mediation and arbitration are federal courts' FedEx and UPS. Sometimes private providers can fulfill the dispute-resolution role — not civic education, but dispute resolution — at least as effectively as courts, but for less money and with fewer undesired side effects.

PRIUS

This is all very depressing. Lang has talked about the negative effect on American democracy as citizens more and more lack the experience of serving as jurors. I think the downside of the decline in trials goes even farther than that. Yes, there may be a gain in cost or efficiency, but I fear the loss of public trials, jury or nonjury. I recognize Manny's concern about copycat lawsuits, but arbitration, mediation, and the strong pressure to settle allow a cover-up of corporate misbehavior, of product defects, and of abusive governmental or police behavior. I also worry what the lack of trials will do to the opportunity to train young lawyers to conduct the trials that do remain and what it will do to federal judicial selection as candidates for federal judge-ships come to realize that in many districts they really won't be conducting civil trials.

FELL

Friends, I'm sure there is much more that could be said on this topic, but we have run out of time. I don't see how this train can be turned around. Nielsen, what do you think lies ahead for you and your federal trial judge colleagues so far as civil trials are concerned?

PRIUS

We simply must do our best with what we have, which is what the Constitution, Congress, and the President assign us, and the disputes that people and entities bring us. Federal judges ought to do a better job of accommodating lawyers and litigants. Judges can't increase juror pay, but we can increase our efforts to make jurors' lives pleasant during their service and to teach them. Other steps are up to Congress, the Supreme Court, or perhaps an executive agency — Congress by legislation to limit arbitration in consumer cases, for example, or to limit its secrecy, or to pay jurors more; the Supreme Court by re-examining whether its expansive interpretation of the Federal Arbitration Act is historically justified; the Consumer Financial Protection Bureau by limiting the use of arbitration clauses in consumer transactions subject to its jurisdiction.

RISK

Don't pin your hopes on congressional or Supreme Court action, Nielsen, and even if the Consumer Financial Protection Bureau should act to limit consumer arbitration clauses, don't expect a wholesale resurrection of civil trials. What you have now is the new reality. Get used to it!



D. BROCK HORNBY has been a federal trial judge in Maine since 1990 and has presided at trials in other districts within the First Circuit. He has also been a federal magistrate judge, law professor, state supreme court justice and private practitioner in general practice.

