

# A View from the Sky

## A General Overview about Civil Litigation in the United States with Reference to the Relief in Small and Simple Matters

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### Abstract

This article, which is based on the research conducted for the General Report 'Relief in Small and Simple Matters in an Age of Austerity' presented at the XV World Congress of Procedural Law, provides a contextualised and broad overview of these phenomena in the United States. After describing the general features of the federal and state judiciaries, including its adversarial model of judging, and the importance of the jury system, the article turns its attention to discuss the factors that affect the cost of litigation in the United States, the different models of litigation funding, the available legal aid mechanisms, and the procedural tools available for handling small and simple disputes. Furthermore, this article briefly revisits the discussion about the effect of austerity on the functioning of the United States legal system on the handling of small and simple matters and ends with a brief conclusion that summarises its contribution and sketches the points for future research on this important topic.

**Keywords:** civil procedure, United States, small and simple matters

## 1 Introduction

Concerns for cost efficiency, expediency, and the simplification of the legal process have occupied the attention of policy makers, scholars, and professional legal actors for several decades. The discussion has evolved alongside an increased interest in facilitating access to justice and promoting alternative dispute resolution mechanisms, which in the United States began gaining force in the 1970s with the efforts to institutionalise

mediation and arbitration as part of the idea of the multi-door courthouse.<sup>1</sup>

The expansion of consumer protection and the recent emergence of alternative forms of litigation funding – partially in response to the shortage of public funds to support litigation – have also contributed to foster interest in the study of judicial remedies in general. Furthermore, the issue of litigation funding relates to the broader discussion about the effects that the recent cutbacks on public expenditures (austerity) have had on the civil justice system,<sup>2</sup> which in turn might help inform the debate about facilitating access to judicial relief in small and simple matters. By these, we are referring to the arrays of procedures and remedies – judicial and otherwise – devised to provide compensation for 'small claims, or uncontested monetary claims, or to resolve other small or simple matters by means of summary proceedings'.<sup>3</sup>

This article, which is based on the research conducted for the General Report 'Relief in Small and Simple Matters in an Age of Austerity' presented at the XV World Congress of Procedural Law,<sup>4</sup> provides a contextualised and broad overview of these phenomena in the United States. After describing the general features of the federal and state judiciaries, including its adversarial model of judging, and the importance of the jury system, the article turns its attention to discuss the factors that affect the cost of litigation in the United States, the different models of litigation funding, the available legal aid mechanisms, and the procedural tools available for handling legal disputes. Furthermore, this article briefly revisits the discussion about the effect of austerity on the functioning of the United States legal system and the state of affairs regarding judicial remedies in small and simple matters. The article ends with a brief con-

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1. F. Sander, 'Varieties of Dispute Processing', in *The Pound Conference: Perspectives of Justice in the Future* (A. Levin and Wheeler, eds., West, 1979), at 65; M. Hernández-Crespo, 'A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo: Exploring the Evolution of the Multi-Door Courthouse', 5(3) *University of St. Thomas Law Journal* 665 (2008), at 667.
2. See, generally, R. Marcus, 'Procedure in a Time of Austerity', 3(1) *International Journal of Procedural Law* (2013) (hereinafter: 'Marcus, Austerity').
3. X. Kramer and S. Kakiuchi, 'Relief in Small and Simple Matters in an Age of Austerity', *General Report for the XV World Congress of Procedural Law* (2015) (unpublished manuscript on file with author) (hereinafter: 'Kramer and Kakiuchi, General Report'), at 4.
4. Kramer and Kakiuchi, General Report.

clusion that summarises its contribution and sketches the points for future research on this important topic.

## 2 Describing the Institutional and Sociological Landscape

### 2.1 General Features of the Legal System of the United States

The United States legal system follows the common law tradition.<sup>5</sup> Its legislation is created at both the federal and state levels, and its judicial and government branches also operate at those two levels. Notwithstanding, the state of Louisiana and the Commonwealth of Puerto Rico have features typical of mixed jurisdictions due to their close historical ties with the civil law tradition.<sup>6</sup> Likewise, the states of New Jersey, Delaware, Tennessee, and Mississippi also have some distinctive features, namely, their separate law and equity or chancery courts.<sup>7</sup> In any case, the regulatory machinery that exists both at the federal and state levels plays a significant role in the operation of the legal system. The judicial system is divided between the federal and state systems.<sup>8</sup> At the federal level, judges are appointed by the President and are confirmed by the United States Senate pursuant to the Constitution.<sup>9</sup> Once confirmed, these judges hold their seat until they resign, die, or are removed from office by impeachment,<sup>10</sup> which in most cases implies that their appointment is for life.

State judges, on the other hand, are either appointed or elected for terms that vary according to the level of the position and by jurisdiction. Each of the fifty states, the District of Columbia, and the territories has its own way of appointing or electing judges. The methods range from gubernatorial appointment to partisan election.<sup>11</sup> The latter appointment system has stirred some controversy, and proposals have been made to limit the role of politics in the selection of judges.<sup>12</sup> Some states also allow for re-election and removal or impeachment in similar ways to the appointment process.

The main goal of the judicial system under the United States Constitution is to interpret the law and to resolve

conflicts.<sup>13</sup> Federal Courts are not allowed to give opinions unless there is a legal dispute. Some state courts are allowed to give opinions as to a pending state referendum or legislation, but their role is generally reactive, that is, they do not act unless someone prompts them to. One of the main goals of the judicial system is to resolve disputes fairly and efficiently, but the trend in American civil litigation has been towards a significant decline in the number of trials.<sup>14</sup> Scholars have devoted significant efforts to explore the causes for the decline of trial rates in the United States and have pointed out to different reasons including the courts' limited capacity to handle a large volume of cases, the priority given to criminal cases in the trial queue and the resulting neglect of civil cases, and the judges' focus on promoting settlement over anything else. Interestingly, austerity does not seem to have had any impact on the decline in the American trial rate.<sup>15</sup>

#### 2.1.1 *The Organisation of the United States Judiciary*

In organisational terms, federal courts are divided into three main categories. First, the United States District Courts, which operate at the trial level and are ninety four in total.<sup>16</sup> Second, the United States Courts of Appeals, which comprise the intermediate appellate level with regard to the district courts located within their circuit.<sup>17</sup> There is a United States Court of Appeals per each of the twelve regional circuits, and one Court of Appeals for the Federal Circuit vested with 'nationwide jurisdiction to hear appeals in specialised cases, such as those involving patent law and cases decided by the Court of International Trade and the Court of Federal Claims'.<sup>18</sup> Finally, there is the Supreme Court of the United States, which is the highest court in the country. The United States Supreme Court has jurisdiction to hear cases that rise through the state and federal systems and that involve important questions about the Constitution or federal law.<sup>19</sup> The Supreme Court receives cases through individual petitions called 'writ of certiorari', and the justices have discretion as to how many cases they accept every term. This latter number tends to be very small (usually less than 100) in comparison with the amount of petitions for review submitted every year, which may exceed 10,000.<sup>20</sup> The United States Supreme Court consists of a Chief Justice and eight

5. J.H. Merryman and R. Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (2007), at 1; H. Patrick Glenn, *Legal Traditions of the World* (2014), at 236.  
6. V. Valentine Palmer and E. Christie Reid, *Mixed Jurisdictions Compared: Private Law in Louisiana and Scotland* (2009), at 279; L. Fiol-Matta, 'Civil Law and Common Law in the Legal Method of Puerto Rico', 40 *American Journal of Comparative Law* 783 (1992).  
7. R.G. Niemi and J.J. Dick, *Guide to State Politics and Policy* (2013), at 257.  
8. Federal Judicial Center, *Overview of the U.S. Court System* (2009).  
9. Constitution of the United States of America, Article II (Appointments clause).  
10. S. Prakash and S. Smith, 'How to Remove a Federal Judge', 116 *Yale Law Journal* 72 (2006).  
11. <[www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm?state=>](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state=>)>.  
12. <[www.judicialselection.us/>](http://www.judicialselection.us/>)>.

13. This stems from the interpretation of the so-called 'case and controversy' requirement as a limitation to the exercise of judicial review by the courts found in Article III of the Constitution of the United States of America. See *DaimlerChrysler Corp v. Cuno*, 547 U.S. 332, 341 (2006).  
14. See Marcus, Austerity, above n. 2, at 148.  
15. *Id.*, at 149.  
16. <[www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx](http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx)>.  
17. <[www.uscourts.gov/about-federal-courts/court-role-and-structure](http://www.uscourts.gov/about-federal-courts/court-role-and-structure)>.  
18. <[www.supremecourt.gov/about/Circuit%20Map.pdf](http://www.supremecourt.gov/about/Circuit%20Map.pdf)>. Notwithstanding, 'the Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases, such as those involving patent laws and cases decided by the Court of International Trade and the Court of Federal Claims'. <[www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx](http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/CourtofAppeals.aspx)>.  
19. <[www.supremecourt.gov/](http://www.supremecourt.gov/)>.  
20. <[www.supremecourt.gov/faq.aspx#faq9](http://www.supremecourt.gov/faq.aspx#faq9)>.

Associate Justices selected in the same way as all other federal judges; that is, they are nominated by the President and confirmed by the Senate. Aside from hearing and deciding cases collectively, individual Justices are also responsible for deciding emergency applications involving matters – such as the deportation of an alien, granting a stay of execution, or implementing a circuit court order – from one or more circuits, which is how the federal jurisdiction is organised in geographical terms.

State courts, on the other hand, are generally established and governed by each state's constitution or authorised hereby by state legislation.<sup>21</sup> The Supreme Court of each state is generally the organ that regulates the legal profession both in terms of licensing or authorising the practice of law and the regulation of the professional conduct of lawyers.<sup>22</sup> In organisational terms, at the state level, there are trial courts, intermediate appellate courts divided by regions, and a high court of appeals, normally referred to as a Supreme Court. Not all states or territories have intermediate courts of appeals, in which case the appeals are filed directly with the corresponding state's Supreme Court.<sup>23</sup>

### 2.1.2 *Adversarial Model of Judging and the Right to a Trial by Jury*

The litigation model that prevails at both federal and state levels is adversarial.<sup>24</sup> One of its main features is that the plaintiff and defendant argue and present evidence to support their claims before a judge, whose role is to allow or reject evidence, hear and rule on motions, preside over trials, provide instructions to the jury, apply the sentences, and oversee the enforcement of all their rulings.<sup>25</sup> Judges are assigned cases using random, blind systems.<sup>26</sup> The judges are responsible for making sure that a complete record of proceedings is created. Records in small claims settings are not as extensive as in more significant cases.

The right to a trial by jury is a fundamental right in the United States at the federal level and also under the Constitution of most states. Article III, Section 2 of the United States Constitution provides that 'the trial of all crimes, except in cases of impeachment, shall be by jury';<sup>27</sup> and the Sixth and Seventh Amendments strengthen it<sup>28</sup> and expand it to civil trials.<sup>29</sup> Notwithstanding, jury trials are not available in the courts of

American Samoa as per the Samoan Constitution.<sup>30</sup> Moreover, a jury is almost never selected for small claims, which reduces the costs and simplifies the handling of this type of case. Regarding all the other cases, the size of the jury varies. Usually, 6 plus 1 or 2 alternate jurors are selected to hear the facts and make decisions based on the instructions given by the judge.<sup>31</sup> On the other hand, the trials in which the judge is the one making factual and legal findings alone are referred to as 'bench trials'.<sup>32</sup>

One of the distinctive features of the United States civil litigation system is the possibility given to the parties to request a court to compel the production of evidence during the pre-trial phase.<sup>33</sup> This procedural tool is known as 'discovery'. The breadth of the discovery process is conditioned by the significance of the matter and the rules of discovery of each jurisdiction.<sup>34</sup> Discovery plays a critical role in providing access to justice in certain types of cases, such as discrimination claims, where plaintiffs might need to obtain evidence about facts that cannot be found in public records or through an ordinary investigation. Discovery also allows each party to assess the strengths and weaknesses of their own case and their opponents. On the other hand, discovery is widely regarded as an expensive tool, which has the potential of driving up the cost of civil litigation in the United States. Another criticism of discovery is based on its potential for being used as a coercive tool by plaintiffs 'in an abusive and vexatious manner to coerce defendants into accepting quick settlements'.<sup>35</sup> Despite this criticism, one of the main undertakings of procedural law in the United States is to balance litigation costs and efficiency with the delivery of justice. In the specific case of discovery, a recent trend set by judicial decisions and legislation<sup>36</sup> has been towards restricting the use of this procedural tool, which has also stirred some controversy.<sup>37</sup> The debate surrounding discovery tools, however, only seems to affect the handling of large cases where the issues at stake warrant such an investment by the parties. Small and simple procedures are spared from such hurdle.

The dynamics of litigation regarding small and simple matters is different from what occurs in large cases. The small claims system is a creature of state courts. Defendants in these proceedings are almost always unrepresented. Moreover, of the fifty state court systems with fora for small claims, nine states do not permit lawyers to

21. <[www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts](http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts)>.

22. G. Hazard, 'State Supreme Courts as Regulators of the Profession Part III: State Supreme Court Regulatory Authority over the Legal Profession', 72(4) *Notre Dame Law Review* 1177 (1997).

23. <[www.ncsc.org/Topics/Appellate/Appellate-Procedure/Resource-Guide.aspx](http://www.ncsc.org/Topics/Appellate/Appellate-Procedure/Resource-Guide.aspx)>.

24. G. Goodpaster, 'On the Theory of American Adversary Criminal Trial', 78(1) *Journal of Criminal Law and Criminology* 119 (1987).

25. *Id.*

26. See e.g. <[https://www.nycourts.gov/courts/comdiv/ny/newyork\\_case\\_assign.shtml](https://www.nycourts.gov/courts/comdiv/ny/newyork_case_assign.shtml)>.

27. Constitution of the United States of America, Art. III, Section 2.

28. Constitution of the United States of America, Sixth Amendment.

29. Constitution of the United States of America, Seventh Amendment.

30. See *United States v. Lee*, 159 F. Supp. 2d 1241 (D.Haw.2001).

31. Sixth Amendment, 'The Required Number of Jurors', 60 *Journal of Criminal Law and Criminology* 516 (1978).

32. <[www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/209](http://www.fjc.gov/federal/courts.nsf/autoframe!openform&nav=menu1&page=/federal/courts.nsf/page/209)>.

33. Federal Rules of Civil Procedure (FRCP), Rule 37.

34. J.H. Beisner, 'Discovering a Better Way: The Need for Effective Civil Litigation Reform', 60 *Duke Law Journal* 554 (2010).

35. *Id.*

36. Federal Rules of Civil Procedure (amendment effective 1 December 2015), available at: <[www.supremecourt.gov/orders/courtorders/frcv15\\_5h25.pdf](http://www.supremecourt.gov/orders/courtorders/frcv15_5h25.pdf)>.

37. See e.g. S.B. Burbank, 'Proportionality and the Social Benefits of Discovery: Out of Sight and Out of Mind?', 34 *Review of Litigation* (2015).

Table 1 *Federal judges in the United States*

Court	Total number of judges
United States Supreme Court	9
United States Court of Appeals	179
United States District Courts (including territorial courts for the Virgin Islands, Guam, and the Northern Mariana Islands)	677
Court of International Trade	9
<b>Total</b>	<b>874</b>

Source: <[https://www.ustaxcourt.gov/rules/Title\\_III.pdf](https://www.ustaxcourt.gov/rules/Title_III.pdf)>.

participate in proceedings.<sup>38</sup> Plaintiffs, on the other hand, may be holders of an individual credit, or a large volume of cases that are not worth pursuing individually, and are thus aggregated or packaged for filing at the same time. Small and simple matters are generally self-funded by the client or taken by the lawyer on a contingency basis. Additionally, the filing and other costs generally associated with small and simple matters are insignificant, so any austerity measures imposed on the judiciary, such as budgetary cutbacks, are unlikely to have any direct effect on the handling of small and simple matters.

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### 3.1 Professional Actors: Judges and Lawyers

There are approximately 30,000 judicial officers in state courts and approximately 19,500,000 civil cases.<sup>39</sup> In 2006 alone, there was a record high of 102.4 million cases filed, reopened, and reactivated – both civil and criminal – in state courts.<sup>40</sup> Regarding the number of civil cases in state courts, they declined by 3% between 2008 and 2010.<sup>41</sup> Conversely, the use of alternative dispute resolution mechanisms appears to have experienced a significant growth.<sup>42</sup> Regarding federal judges, their total number is 874, distributed according to Table 1.

In terms of the general population of lawyers, as of April of 2013, there were approximately 1,268,011 licensed lawyers in the United States.<sup>43</sup> The total of law gradu-

ates for that year was 46,776, a slight increase from 46,364 in 2012.<sup>44</sup> The license to practice law in the United States depends on the rules set forth by each state and territory, which generally require each candidate to obtain a law degree – called a Juris Doctor degree in the United States<sup>45</sup> – pass a Multistate Professional Responsibility Examination (MPRE), and a bar examination administered by the state bar association or by the Supreme Court of each state. Once licensed to practice in one state, a lawyer may only practice in another state upon being expressly authorised either after sitting for another bar exam or pursuant to a reciprocity agreement that grants them a waiver. Likewise, appearance before federal courts requires a separate application and admission process that, in some cases, varies by district. The Supreme Court of the United States has also its own admissibility requirements,<sup>46</sup> as it does the United States Tax Court.<sup>47</sup>

### 3.2 How Much Does It Cost to Litigate in the United States?

#### 3.2.1 The Cost of Going to Court

The average cost of civil litigation varies widely from litigation involving top companies and small claims. A survey of Fortune 200 companies reported that average litigation cost was about 140 million US dollars in 2008.<sup>48</sup> The average cost of filing a small claims suit is about 30 US dollars plus the cost of process servers.<sup>49</sup> This does not cover post judgement enforcement.

38. Court Statistics Project (National Center for State Courts 2012).

39. National Center for State Court, Statistics, 2009 as reported by the Federal Judicial Center.

40. United States Department of Justice, Bureau of Justice Statistics.

41. National Center for State Courts, Court Statistics Project.

42. National Center for State Courts, Caseload Highlights, 11(3) (2005).

43. <[www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer\\_demographics\\_2013.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf)>.

44. <[www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2013\\_law\\_graduate\\_employment\\_data.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2013_law_graduate_employment_data.authcheckdam.pdf)>.

45. Notwithstanding, at least five states – California, Vermont, Virginia, Washington State, and Wyoming – still allow people who have not attended law school to take the bar exam provided that they study under a judge or practicing attorney for certain period of time. See e.g. <<http://barexam.virginia.gov/reader/readermemo.html>>. This is the traditional method by which people entered the legal profession in the United States prior to the existence of law schools.

46. <[www.supremecourt.gov/bar/baradmissions.aspx](http://www.supremecourt.gov/bar/baradmissions.aspx)>.

47. <[https://www.ustaxcourt.gov/rules/Title\\_III.pdf](https://www.ustaxcourt.gov/rules/Title_III.pdf)>.

48. Duke University Law School Conference on Civil Litigation, May 2010, Statement Submitted by Lawyers for Civil Justice, Civil Justice Reform Group, U.S. Chamber Institute for Legal Reform.

49. American Bar Association, *American Bar Association Guide to Resolving Legal Disputes: Inside and Outside the Courtroom* (2009), at 101.

There are various models used in trying to estimate the cost of civil litigation, but there are no reliable statistics. The difficulties of determining litigation costs were highlighted by the National Center for State Courts in their January 2013 report, in the following terms:

Complaints about litigation costs have likely existed for as long as the legal profession, but those costs are extremely difficult to measure. Most studies of litigation costs rely on surveys that ask lawyers to report costs in a sample of actual cases filed in court. However, many attorneys decline to respond citing attorney-client confidentiality, which undermines the reliability of study findings. Another source of information about litigation costs are insurance industry reports, but these typically fail to disclose their study methods or the assumptions built into their estimation models.<sup>50</sup>

The costs can include the type case, *i.e.* contract versus tort, and the many variables related to the lawyers involved.<sup>51</sup> The average length of litigation varies significantly based on jurisdiction and type of case. In an attempt to obtain reliable estimates of litigation costs, the National Center for State Courts developed a methodology that considered the amount of time invested by attorneys in handling a typical tort, contract, employment and real property dispute case, and applied the hourly billing rate reported by the respondents. The results of the survey for automobile tort cases, involving respondents from forty-three states, were the following:

Cases that resolve shortly after case initiation range from less than \$1,000 at the 25th percentile to \$7,350 at the 75th percentile per side for attorney fees. As the case progresses, those costs continue to accumulate. A case that settles after discovery is complete through formal settlement negotiations or ADR will range from \$5,000 to \$36,000 in attorney fees. If the case goes to trial, the total costs including expert wit-

ness fees can range from \$18,000 to \$109,000 per side.<sup>52</sup>

Regarding other types of cases considered by the same study, the reported median costs of litigation are shown in Table 2.

### 3.2.2 Fee Shifting

For many years, there has been a debate in the United States about the shifting of litigation costs in civil litigation. The default rule is that each party bears their own costs (*i.e.* the so-called American Rule), except when there is a contractual or statutory provision that allows the party prevailing in a legal dispute to receive attorney's fees and costs from the loser.<sup>53</sup> Moreover, since the 1960s, a policy geared to incentivise the filing of civil rights-related suits enabled victorious plaintiffs to recover fees, and 'the Supreme Court held that there should be a presumption in favour of such fee recoveries when plaintiffs win and against it when defendants win'.<sup>54</sup> A party prevailing against the United States may also receive attorney's fees and costs.<sup>55</sup> At the state level, there are also some statutory exceptions to the American rule regarding the shifting of fees and costs.<sup>56</sup> At a more general level, this approach has relieved pressure from the government by transferring the economic burden of litigation onto private litigants, which in turn makes the concerns for the potential effect of austerity measures on litigation less relevant.

### 3.2.3 Attorney Funding and Third-Party Funding

Similarly to what occurs in other countries, the United States legal system allows indigent litigants – *e.g.* those who cannot afford to defend themselves in court – to ask for leave to proceed in Forma Pauperis.<sup>57</sup> Notwithstanding, lawyers in the United States are also allowed to finance their clients' litigation by entering into contingency fee or other type of agreements.<sup>58</sup> More recently, a number of commercial companies have also been established with the specific purpose of providing legal funding – mainly – to plaintiffs.<sup>59</sup> Furthermore, third-party litigation finance has become a fast-growing industry,<sup>60</sup> for all categories of cases ranging from the most complex to the smaller ones, which are also benefiting from novel mechanisms, such as crowd

50. <[www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph\\_online2.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx)>.

51. See Estimating the Cost of Civil Litigation, Hannaford and Waters, Caseload Highlights, 20(1), January 2013, National Center for State Courts.

52. <[www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph\\_online2.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx)>.

53. See Rule 54(d)(1) of the Federal Rules of Civil Procedure. See *e.g.* 15 U.S.C. § 2301 et seq. (Magnuson-Moss Warranty Act).

54. Marcus, Austerity, above n. 2, at 142.

55. Equal Access to Justice Act, 28 U.S.C. § 2412.

56. See *e.g.* Section 1780(e) of the California Civil Code, and Rule 68 of the Nevada Rules of Civil Procedure.

57. 28 U.S.C. § 1915. See also Rule 39, Proceedings in Forma Pauperis, Rules of the Supreme Court of the United States; Rule 24 of the Federal Rules of Appellate Procedure.

58. A. Shajnfeld, 'A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements', 54 *New York Law School Law Review* 774 (2009/2010).

59. <<http://associationoflitigationfunders.com/>>.

60. See *e.g.* M. Steinitz, 'Whose Claim Is It Anyway? Third Party Litigation Funding', 95 *Minnesota Law Review* 1268 (2011).

Table 2 Median costs of litigation by type of case

Type of case	Median cost
Premises liability	\$54,000
Real property	\$66,000
Employment	\$88,000
Contract	\$91,000
Malpractice	\$122,000

Source: <[www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph\\_online2.ashx](http://www.courtstatistics.org/~media/microsites/files/csp/data%20pdf/csph_online2.ashx)>.

funding.<sup>61</sup> Both contingency fee arrangements and third-party funding are mainly available for large claims and not for small or simple matters. Regarding the former, because advancing her fees would only make sense to an attorney if her share in the expected recovery were large enough to cover her investment and still yield a profit. In the case of third-party funding, with perhaps the exception of the nascent crowd litigation funding mechanism,<sup>62</sup> the only worthy claims would be those in which the funder could also be able to recover their investment and still obtain a return for themselves and for any other investors that contributed to financing the case.

#### 3.2.4 Legal Aid

Since 1995, the budget for Legal Service Corporation, one of the leading sources of legal help for the poor, has suffered significant cuts. Legal service groups across the United States are chronically understaffed and under-resourced. Since the recession of 2007, many State Bar Foundations that subsidised legal services for the poor have shrunk significantly. Some unions and other groups have created legal insurance programs that allow members to obtain basic legal services in certain matters, such as divorce proceedings and wills. Like in the case of health insurance, the poor receive very limited benefits from these programs, and the government does not provide any other sources of litigation funding, thus leaving this burden to private parties. Contingency fee arrangements, which are the typical form of lawyer-based funding, as mentioned above, are common in car accident and malpractice actions but are almost universally prohibited in divorce and criminal cases. There is a major marketing system dedicated to obtaining clients on contingency, the state has no involvement in it, and any benefit or burden stays among private parties.

#### 3.2.5 Judiciary Budget

The total budget for the Judiciary in the year 2010 was 6.8 billion US dollars, and the 2012 request was 7.1 bil-

lion US dollars.<sup>63</sup> About 73% is devoted to the salaries. Regarding the formulation and approval of the judiciary budget, in addition to the bicameral United States Congress, state legislatures that operate throughout the states and territories are responsible for that jurisdiction's budget and for an extraordinary range of matters.<sup>64</sup> Polarised government due to party conflicts and so-called conservative and liberal differences make for inaction and failure to deal with practical issues.<sup>65</sup>

#### 3.2.6 Small Claims

Small claims and disputes are dealt with in the lower divisions of state trial court systems. It is often more reasonable to not hire an attorney when the amount that would be recovered is considered. There have been countrywide efforts to provide assistance to *pro se* litigants.<sup>66</sup> One of the major problems in small claims cases is the abuse by debt collection companies that has gone on for years.<sup>67</sup>

Small claim procedures are meant to be simple enough for *pro se* litigants to seek and obtain relief. Courts normally direct parties to mediation to resolve their differences in order to achieve an acceptable solution between themselves and to lessen costs. There are mechanisms in the rules for summary judgement by the court when it finds that there is no factual dispute. Many contractual disputes are also resolved through arbitration, a dispute resolution mechanism that has become increasingly popular but also controversial with regard to consumer and other small claims.<sup>68</sup> One important difference between small disputes and the larger ones is that the normally complicated discovery process and competing memoranda of law are absent from the small disputes

63. <[www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File\\_id=24a45972-f9e6-406f-940f-dac2bbbb94e](http://www.coburn.senate.gov/public/index.cfm?a=Files.Serve&File_id=24a45972-f9e6-406f-940f-dac2bbbb94e)>.

64. <[https://bulk.resource.org/courts.gov/ao/Understanding\\_Judiciary\\_Budget\\_Process.pdf](https://bulk.resource.org/courts.gov/ao/Understanding_Judiciary_Budget_Process.pdf)>.

65. <[www.americanbar.org/content/dam/aba/uncategorized/GAO/2014sept17\\_FY13and14federalcourtfunding%20.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014sept17_FY13and14federalcourtfunding%20.authcheckdam.pdf)>.

66. *Self-Help Resources for the Self-Represented Litigant*, by Deborah Showalter-Johnson, Kansas City, MO Branch Librarian & Laura Headrick, Lincoln, NE Library Assistant, April 2010.

67. M. Rezendes *et al.*, *No Mercy for Consumer & Dignity Faces a Steam Roller* (July 2006). *Boston Globe*.

68. See, J. Silver-Greenberg and M. Corkery, 'Sued over Old Debt, and Blocked from Suing Back', *The New York Times*, 22 December 2015, available at: <<http://nyti.ms/1OkKjpk>>.

61. M.A. Gómez, 'Crowd Funded Justice: On the Potential Benefits and Challenges of Crowd Funding as a Litigation Financing Tool', 49 *University of San Francisco Law Review* 307 (2015).

62. *Id.*

field. This is a result of the impracticality of hiring lawyers for small disputes, which also renders unavailable the possibility of contingency fee arrangements and other forms of financial assistance to litigate. Lawyers who represent creditors receive an advantage in this situation because *pro se* defendants usually do not know how to defend themselves adequately.

The rights of the unrepresented litigant are – in theory – protected by the court, but if one compares the difference that counsel makes in criminal proceedings and in proceedings where counsel is appointed by the court, or when legal aid or legal services attorneys are involved, one can see the developing gap in justice.<sup>69</sup> Receiving relief in administrative tribunals that handle immigration matters is a key example of the difference that being represented by counsel can make in a case.<sup>70</sup>

Using the example of the debt collector who is trying to recover what is owed to them, one must look at the industry that has developed around debt collection where the original creditor essentially sells their past due accounts for cents on the dollar and predatory collectors exploit the small claims process for profit.<sup>71</sup> While there is no question that creditors need a forum to collect delinquent debts, defendants are essentially powerless to defend themselves because of the cost of representation and the lack of resources to advocate for themselves.

To the extent that simplified procedures are available in small claims courts, plaintiffs can obtain judicial relief in a relatively expeditious process. Advances in technology, availability of alternative dispute resolution mechanisms, increased public education, and self-help programs that try to lessen the effect of uneven representation in the courts help in small claims courts.<sup>72</sup> Figures from three major states, including California,<sup>73</sup> Florida,<sup>74</sup> and Texas,<sup>75</sup> show significant use of the small claims model and suggest that, despite issues such as the abuse of debt collection tactics, the model is an effective tool for resolving small disputes.

69. *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income, Updated Report 2009*, Legal Service Corporation.

70. 'In political asylum cases, 39% of non-detained, represented asylum seekers received political asylum, compared with 14% of non-detained, unrepresented asylum seekers. Eighteen percent of represented, detained asylum seekers were granted asylum, compared to 3% of asylum seekers who lacked counsel...', Judge R.A. Katzmann, US Court of Appeals for the Second Circuit, February 2007.

71. *New York Times*, Magazine, 15 August 2014, Halpern, Jake, PAPER BOYS Inside the Dark Labyrinthine, and Extremely Lucrative World of Consumer Debt Collection.

72. National Center for State Courts, Trends in State Courts 2013 (Courts promote civics education); Suggestions on reform of the small claims process can be found in the Commonwealth of Massachusetts, District Court Department of the Trial Court, Report of the Small Claims Working Group, 1 August 2007; MFY Legal Services, Making Small Claims Court Work for New York City Workers, 2006 (An example of efforts to help the poor pursue and collect on judgments in small claims courts).

73. Judicial Council of California, '2014 Court Statistics Report', *Statewide Caseload Trends*.

74. Florida Office of State Court Administrator, 2012-2013 County Civil Dispositions, Trial Court Statistical Reference Guide.

75. Annual Statistical Report for the Texas Judiciary 2013, Justice Courts Activity Detail 1 September 2012 to 31 August 2013.

## 4 Conclusion

Certain features present in the United States civil litigation system are generally seen as facilitators of access to justice and also as promoters of the efficient handling of small and simple matters. The most salient traits are the possibility for clients to enter into contingency fee arrangements with their lawyers, the facilitation of different forms of outside litigation financing, and the possibility of allowing self-representation in small matters. These features also contribute to reduce or eliminate any potential concerns that might exist in relation to the impact of austerity on American civil litigation. Professor Marcus' appraisal about the limited effects of austerity on the functioning of the United States civil procedure still continues to be true.<sup>76</sup>

Notwithstanding, the economic downturn might have had an effect on the dwindling of a state-sponsored legal aid regime in the United States, which obviously hinders access to justice. Moreover, the enormous size and complexity of the United States judiciaries – both federal and state – and the crisis affecting the legal profession also pose obstacles that affect the functionality of the system. The upsurge of product liability and consumer-related litigation around the world, often times involving United States manufacturers and service providers on the one hand and foreign victims on the other, has given a global dimension to this problem.

We are in need of more data regarding not only the regulation but also, more importantly, the actual use of small and simple proceedings around the world. Simply put, we need to know more about the law in action and not so much about the law in the books. But looking at empirical data, we can identify any points of convergence and divergence across national legal systems, including the practical obstacles and incentives faced by litigants. With such information at hand, researches would hopefully provide adequate analysis to help policy makers be more efficient in proposing measures that improve the current state of affairs. This article has provided a very broad and somewhat simplified view of a complex regime in the largest economy of the Americas and an important player in the world. This is just a general sketch that needs to be developed and built upon. We hope to, at least, have provided the basis for further analysis, and a useful description that entices the comparison with other national regimes.

76. See Marcus, Austerity, above n. 2, at 158; See also Kramer and Kakiuchi, General Report, above n. 3, at 4.