
REMAPPING DEBATE

Asking "Why" and "Why Not"

Business-killing cuts to state court systems

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Oct. 3, 2012 — Across the United States, “business uses the courts far more than anyone else,” explained Frank B. Cross, a professor of business law at the University of Texas at Austin. And among those cases, “the vast majority is business-to-business.” Most common among these, Cross said, are breach of contract and fraud cases that involve any product or service — office equipment, software, the work of an accountant — that doesn’t live up to the contract’s promise. Another frequent problem comes when one company misses one or more payments to another. If the unpaid firm doesn’t have ready access to courts, Cross said, that firm’s financial stability is put at risk. “A working court system is absolutely essential to business,” he concluded.

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Due to increasingly severe budget cuts, more and more state court systems have become dysfunctional in the last few years. According to [data](#) from the National Center for State Courts (NCSC), a nonprofit research, consulting, and advocacy group, 42 state legislatures reduced their state court budgets between 2008 and 2011. A variety of cutbacks ensued — including staff layoffs, reductions in courthouse hours, and pay cuts for courthouse personnel — and many state judicial systems have consequently slowed down (see visualization on page five). The NCSC’s data show that since 2008, 29 states have seen an increase in case backlogs, and 15 states have experienced an increase in the time it takes for cases to go from filing through resolution.

“Let’s say I’m in a business-to-business dispute over intellectual property,” Joseph Dunn, former California senator and current executive director of the State Bar of California, explained. If the case drags on for years as opposed to months, even if the aggrieved business is otherwise healthy and eventually wins, “No investor is willing to put money down.” The pendancy of litigation can make a company seem like an unwise bet. “Banks and investors looking for a good return will avoid this kind of risk,” Dunn said. He explained that in California, before the cuts, a typical intellectual property dispute would have taken 12 months to resolve. “Now it’s three to five years,” he said. These longer wait times “have become deadly to the business community.”

Cutting muscle, not fat

“In any system if you’re a legislator and you say we’re going to cut 5 percent from the budget, the fact is that doesn’t affect everyone in the same way,” explained Gregory Hurley, an analyst at the NCSC. “If you’re [the Fish and Game Department], you can cut the amount of fuel, you can drive less for the next year. If you’re a court system, you don’t have that equipment. What you have are staff, and if your budget gets cut, you have to start letting people go.”

Roy Weinstein, managing director of Micronomics Inc., an economic research and consulting firm that has produced two reports (see [here](#) and [here](#)) on the effects of underfunding state courts, explained that the direct victims of judicial system budget cuts are “the people who service those courtrooms... the court reporter who used to work there, the bailiff or two who used to work there, the court clerk who used to work there — they’re gone.”

It is a simple formula that has been repeated in state after state: fewer judicial clerks and other support staff equal less administrative work and case management getting done. With fewer people literally moving things through the system, the system becomes sclerotic. And judges — lacking the clerks they need to help with research and associated tasks — become overburdened. Those judges take longer to decide motions and to schedule trials.

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Businesses paying more of the bill

In many court systems that have had their budgets cut, courts are passing more of their costs onto litigants. In Superior Court in San Francisco, court reporters used to be provided for free in civil cases — important because, among other things, a transcript is needed if a party wishes to appeal. Last year, the court shifted that cost to the litigants themselves in most civil cases. The daily court reporter’s bill can easily exceed \$1,000.

A particularly common stratagem to compensate for reduced state funding is to increase filing fees. Since 2008, according to the NCSC, 26 states have increased their filing fees.

For example, in California, among the hardest hit state courts in the country, [basic filing](#) fees for a civil case have climbed from \$335 in 2008 to \$435 in 2012. For more complex cases, which are frequently business-against-business disputes, the filing fees have almost doubled, surging from \$550 in 2008 to \$1,000 today. On top of the basic filing charge, there are other fees assessed at various phases of a case, such as for filing motions.

In 2009, Florida raised its [filing fees](#) for disputes involving less than \$50,000 by over 30 percent. Fees for disputes involving between \$50,000 and \$250,000 increased from \$295 to \$900, and disputes involving higher sums have had their fee surge from \$295 to \$1,900. One Democratic senator from the state, Maria Sachs, told Remapping Debate that she thinks the courts should be almost entirely funded through fees.

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Last May, Alabama's state lawmakers [approved](#) a significant increase to civil case filing fees. For disputes involving more than \$50,000, the fee increased 15 percent; in cases involving smaller amounts, the fee has jumped by 25 percent. The measure was supported by wide majorities in both the house and senate. Democratic State Senator William Beasley was among them. "The fee system is a good mechanism to fund the court system because, that way, the people who are using the court system are paying the fees," he told Remapping Debate.

But some question the wisdom of this strategy. "The higher the filing fees are, the more costs that are shifted from the judicial branch to the actual litigants almost to the point of it becoming a 'you-use-it, you-pay-for-it' scenario," said Dunn, the head of the California Bar Association. "As states have moved away from taxpayer support of the judiciary to fee-based revenue support, you are pricing the judicial system out of reach of many startup companies and smaller companies."

So how much additional delay is there?

California has seen the country's steepest cuts in its state court funding, in dollar terms: over \$300 million in fiscal year 2011-2012 alone. If [planned cuts](#) for the upcoming fiscal year go through, another \$544 million would be stripped from the state judiciary. The effects of these cuts are being felt throughout the state.

According to Michael Burke, a defendant-side civil litigator in San Francisco, "It used to be you could get [a motion hearing] within the normal notice period, usually 21 days. You could just call up and get a date," Burke said. But now, "It could be two or three months."

John Kithas, a San Francisco attorney, who has been in civil practice for almost 40 years, currently has a case that's stuck in the earliest phases, even though it was filed nine months ago. While charging that some delays are due to stalling by his adversaries, Kithas was certain that budget reductions were part of the problem. "It's been almost a year and we haven't learned anything" he said incredulously. In the past, he asserted, he would be at this same phase in litigation after only a month or two. "In this case we're out there for [nearly] a year, we have almost no discovery turned over to us," he said. "We're probably looking at another year before trial."

Burke said there are many steps along the way where a case can get held up thanks to fewer courthouse resources. “There are all sorts of things throughout litigation that the court has to sign off on. It could be a ruling on a motion. It could be approving a settlement,” he explained. “There’s no end to what the court needs to approve by way of order or ruling during the process of litigation,” he said. And the delay caused by the cuts “just bogs everything down.”

In fiscal year 2011-2012, Alabama’s legislature shrunk its court funds by almost 9 percent, the largest percentage cut of any state that year.

In that year, Sue Bell Cobb, the state’s chief justice, who acts as the administrative head of the judiciary, [ordered](#) courthouses to close on Fridays. And needing to cut still more, she reduced by half the number of weeks that jury trials (“jury weeks”) were available to civil litigants. By mid-2012, budget cuts had led to clerk staff being thinned in the majority of Alabama’s courthouses.

“In the civil setting they did away with most law clerks and courtroom deputies,” recounted Lee Benton, a business attorney in Birmingham. “That means a judge gets a brief from both sides but he’s having to do all his research personally. It dumps a much heavier caseload on a judge, and that delays him in issuing a decision.”

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According to G. Bartley Loftin III, a Madison County, Alabama, lawyer, who focuses primarily on commercial litigation, “When you have a client come in and say, ‘We have this situation how long is it going to take?’ and when you say, ‘18 to 24 months,’” he explained, “a lot of them are shocked at the time it may take.” Loftin has observed this slowdown increasing as court budgets shrink. “There’s a direct link to underfunding,” he said.

“Businesses are already in a fragile position these days,” Benton said. “If you’re already on the banana peel, [litigation delay] just pushes you over the edge.”

Short-term and long-term losses in productivity

All the time and energy that a business owner has to devote to a legal case is time and energy not spent on running that business. And the increased delays have made the problem worse.

Daniel Bean, a business litigator in Jacksonville, Florida, who has been practicing for almost 20 years, sees this a lot. “When we tell people what the value of a case is or how much you’re going to spend on us, I say, ‘Well you also have to figure out how much time loss you’re going to have for your clients,’” he explained. “And so the longer the case takes, the more of a distraction it is,” he said.

Roy Weinstein, the managing director of Micronomics, said that the economic impact of court delays on businesses is substantial. According to his analysis, lawsuits in Los Angeles that used to take twelve months can now take over five years. “Doesn’t it cost you something over that extra five-and-a-half years if you don’t have use of that [contested] money?” Weinstein asked. “You couldn’t expand your business, you couldn’t pay your bills, you couldn’t hire new employees, you couldn’t do your marketing, your advertising.”

STATE COURT SYSTEMS BEING CUT ALMOST EVERYWHERE

View the impact of budget cuts on state courts, by category



See the interactive map [here](#).

When a business is caught up in a lawsuit, it may well be harder for it to secure a line of credit or additional capital investment, Weinstein said.

The degree to which such losses are material to a particular business, of course, depends on the depth of a firm’s resources and the size of the dispute in relation to those resources. Large corporations typically have ample cash reserves, in-house counsel, and the ability to hire and deploy large numbers of outside lawyers. Smaller companies, on the other hand, are more at risk of suffering financial distress as a lawsuit stretches out, especially if the matter at issue is central to the company’s revenues.

Michael Freed, a commercial litigation attorney in Florida, had a client victimized by this very problem. His client won the case — but not before going out of business. “They became insolvent,” Freed explained. “The length of time it took to get [to trial] was too much.” Once the trial was finally held, it took the judge nine months to issue the ruling. “You never can point to just one thing,” Freed said about the causes of the company’s demise. But, he said, “The consequences of delays in a business case are severe.”

Jose Rojas, another Florida business lawyer, said business people themselves are often shortsighted. “It’s an irony,” he said. “I think most business owners tend to be conservative fiscally and are in favor of the concept of ‘cut-don’t-spend, less taxes,’ that it’s good for business because you don’t spend money. On one level, there’s certainly appeal to that. But on the other level, where those cuts affect some of the very mechanisms that help facilitate business, then those cuts are really *not* helpful to business. They’re really counterproductive to the whole business process.”

Increased attorneys' fees

As a case drags on longer because of a slower-functioning judicial system, attorneys' fees go up, too. "The longer a lawsuit goes on, the more expensive it becomes. There's no question of that," said Bean, the Jacksonville, Florida, attorney.

This is primarily because too many hearings and trials are now often scheduled at the same time. These overbooked dockets invariably result in some litigants making a court appearance only to have their matters put off ("continued") to a later date. The hurry-up-and-wait problem can repeat itself multiple times, and is an increasingly common phenomenon according to all the judges and lawyers with whom Remapping Debate spoke.

John Whitcombe, the managing partner of a Los Angeles law firm in practice for almost 15 years, frequently sees the effects of these forces on his clients. He told Remapping Debate about a case he'd just concluded. "It should have been a one-day trial with seven hours of testimony. Instead it stretched out over two weeks," he said. "We have a business client that's in the court every single day for those two weeks, out of his business. We've got lawyers there billing for ten-hour days when they have really only effectively done anything for three or four hours a day, but their presence has been required for ten hours a day. So the whole system runs up costs at a rate of 200 to 300 percent over what they ought to be," he explained.

State Senator Tom Harman (R-Ca.) did see functioning courts as vital to business. "It does rank pretty high when a business is thinking about either relocating to California or leaving California."

Meritorious cases not getting filed

To what extent do businesses that have genuine grievances throw up their hands and accept their losses because of the prospect of increased delays and higher costs?

Dunn, the California State Bar Association executive director, said this chilling effect is real, but difficult to quantify. "It occurs more than we [in the legal system] care to admit," he said.

This phenomenon stays relatively hidden save for anecdotal accounts. As Dunn pointed out, companies that avoid litigation because it's too expensive don't like to draw attention to that fact. Using an intellectual property case as an example, Dunn said, "If you can't afford to defend the intellectual property that you've built your startup company around, as an investor I'm not so sure I have a comfort level that you've got the ability to operate at all. It just sends a signal to the investor community that you are very, very weak."

Frank P. Cross, the business law professor from Texas, said he sees how these barriers to the courts could make businesses think twice about seeking litigation, even for cases that have clear merit. If budget cuts continue, Cross said, this chilling effect will become more widespread, adding, “I don’t think it’s that bad — yet.”

But perhaps it already is in Birmingham, Alabama. Presiding Judge J. Scott Vowell of Jefferson County said that this year he has observed a sharp drop in civil cases filed. The number is down by about 30 percent from last year, and he attributes it to the delays and higher costs. “Normally in hard times economically we would expect an increase in new case filings — you have more mortgage foreclosures and collections on credit cards and increased collection on debts. But we’re not seeing these cases,” he said. Judge Vowell thinks such disputes are as common as ever, but that people are avoiding court. And this worries him. “I don’t think it’s a good thing to not have a jury of their peers to decide their disputes,” he explained. “That’s central to a democratic government.”

No help from “business-friendly” state legislators

Michael Bennett, a Republican state senator in Florida who sits on the state’s budget committee, and serves on its subcommittee on criminal and civil justice appropriations, holds himself out as pro-business. On his website, he explains that this was a motivation for his seeking office: “I saw the government putting up roadblocks to business and felt I could make a difference.”

“It should have been a one-day trial with seven hours of testimony. Instead it stretched out over two weeks,” said John Whitcombe, the managing partner of a Los Angeles law firm. “The whole system [now] runs up costs at a rate of 200 to 300 percent over what they ought to be.”

But, despite Florida’s courts experiencing reduced operating hours, increased fines and backlogs, and staff layoffs, Sen. Bennett doesn’t think the courts are underfunded. Neither does he believe that court delays in resolving business disputes present an obstacle to attracting business to the state. Bennett said that he has experienced court delays in connection with his own businesses, but insisted that those delays were due to poor docket management and judges’ lenient granting of extensions to lawyers, not lack of funding.

In Alabama, State Senator Paul Sanford, who represents Madison County, is another pro-business advocate. Sanford’s most recent campaign [website](#) stated that Alabama must “aggressively [compete] with other states to bring new industry to our state through tax incentives and other perks so that Alabama will remain a breeding ground for business opportunity and job growth.”

Sen. Sanford, who chairs the Job Creation and Economic Development Committee, insisted that court delays don't impede the state's economy. He didn't deny that delays exist and that they could create difficulties for companies, but said he was not personally aware of particular businesses suffering from the problem.

Sen. Sanford acknowledged that courts serve a vital government function, and said he believes that his state's courts need more funding. But he also said the courts need to cope with budget cuts via belt-tightening and seeking even greater efficiencies.

Judge Vowell was less sanguine, describing a sense of desperation his colleagues have had about the imposed cuts. The resistance of lawmakers to increased taxes to fund the courts, he said, "is a reflection of this attitude that government is bad and taxes are bad, that we can get needed government services without paying for them."

Judge Vowell said he couldn't imagine what additional belt-tightening Sen. Sanford was referring to. "I've told people if they can find any waste I'd sure like to know about it," he said.

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Tom Harman, a Republican state senator representing Orange County, California, who received a "Legislator of the Year" award in June, 2012 from the California Business Properties Association, took a more nuanced view than his legislative counterparts in Florida and Alabama. Harman did see functioning courts as vital to business. "It does rank pretty high when a business is thinking about either relocating to California or leaving California," Sen. Harman said.

In Harman's view, the state bears responsibility for adequately funding the courts. He also acknowledged that California state courts need more money, and that the legislature currently isn't providing enough.

But, he said, that money should be diverted from other programs and agencies rather than from increased revenues. "I'm opposed to raising taxes," he said. "I think there's a good argument that other departments, other agencies could cut back their spending substantially."

A "cut-don't-spend" approach garners instinctive support from many business people, said Jose Rojas, a Florida business lawyer, but, "when those cuts affect some of the very mechanisms that help facilitate business," they are "really counterproductive to the whole business process."

A different view comes from California State Senator Loni Hancock, a Democrat who chairs the budget subcommittee on corrections, public safety and the judiciary. “I look at the state budget, which has steadily decreased during my entire 10 years in the state legislature, and I say there’s nothing left to cut,” she said.

Sen. Hancock said she believes the courts should be fully funded, and taxes should be raised to fulfill that goal. “I have seen people stand up on the floor of our legislature and say, ‘You can spend your money better than government can.’ Well, yes, maybe so — if you don’t need a court system. Or you don’t need a great university. Or you don’t need a good public school for your kids,” she said. “But if you do need all those things that’s why we pool our money together to buy those things, and that’s called paying taxes.”

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