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A Business Approach to Litigation Facing Reality – Fewer Trials By Bernard J. Berry, Jr.

During the past holiday season we all received greeting cards many of which wished us “Peace in the New Year”. When one thinks of lawsuits and lawyers, it does not conjure up images of peace. However, there are trends and developments having to do with actual trials that I thought would interest you and provide you with food for thought as we commence the new year.

An American Bar Association study shows that between 1962 and 2002, the percentage of federal, civil cases resolved by trial plummeted from 11% to 1.8%. The number of trials per year during the same 1962-2002 period dropped 20% starting at 5,800 and then falling to 4,500. Another example of the foregoing is that during the past year, the amount of civil and criminal trials heard by federal judges in New Jersey was 12 as compared to an average of 20 in 1965. What is startling about the foregoing numbers is that the amount of litigation from 1962 to 2002 has increased from roughly 50,000 to nearly 260,000 matters initiated. Moreover, the average amount of cases federal judges handled in New Jersey in 1965 was just above 200, while the average in the year 2002 was 385 cases.

State court findings are similar. While we do not have isolated numbers available for New Jersey, in an American Bar Association study of 22 states, which included New Jersey, the number of jury trials dropped from 1975 to 2001 from 25,000 to 19,000. Interestingly, the number of cases resolved by those same courts without a trial tripled to more than 3,000,000 in 2001. All of the foregoing information was reported in the *New Jersey Law Journal* of December 22, 2003.

Our Interpretation of the Statistics

While the author of the ABA report, Marc Galanter, a professor emeritus at the University of Wisconsin Law School, did not reach any formal conclusions regarding the reasons behind these figures, there are some well-known factors that have contributed to the decline in trials.

- Cost and time expenditures. GH&C has found that any business person who has been involved with a lengthy litigation process (including extensive depositions, document productions, interrogatories, expert witnesses, motion practices, trial court hearings) can attest to the level of frustration he/she feels when the matter is ultimately settled either just before or at the time of the commencement of the trial. Clearly, this frustration drives parties to, at times, radically alter their pre-trial disposition and settle cases that they may have otherwise litigated to the bitter end. So, while clients want results, they may not be inclined to incur the cost and expend the time it takes to have their day in court.

