



TEXAS CENTER
—★—
FOR THE JUDICIARY

Trends in Commercial Litigation
Collin J. Cox
Yetter Coleman LLP
2016 Civil Justice Conference

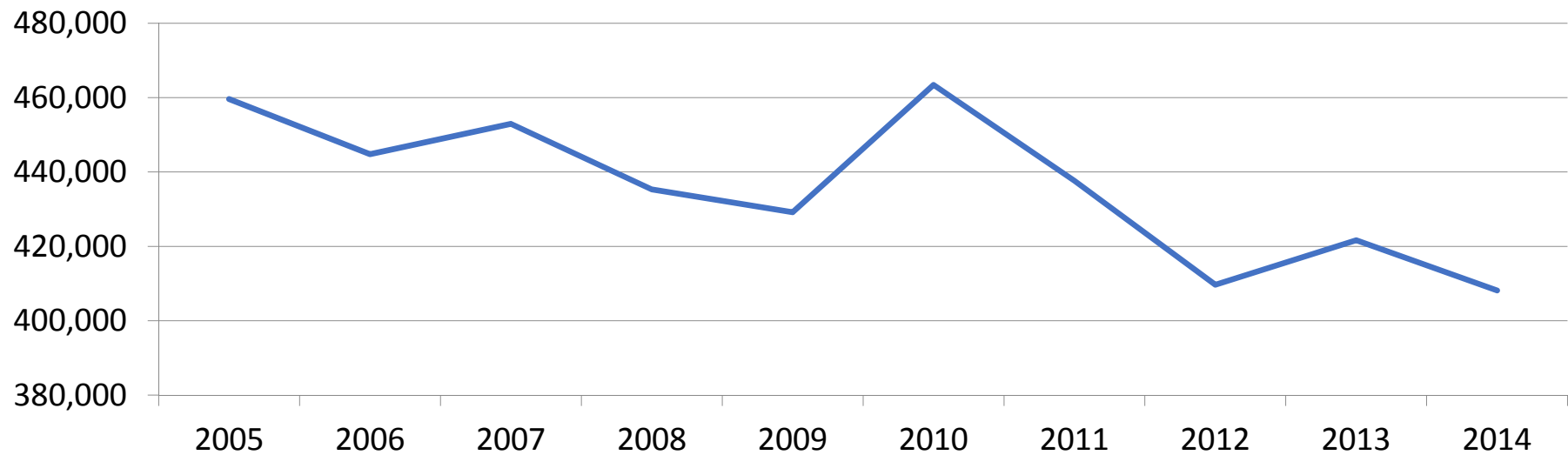


CASE FILING TRENDS: TEXAS STATE AND FEDERAL COURTS



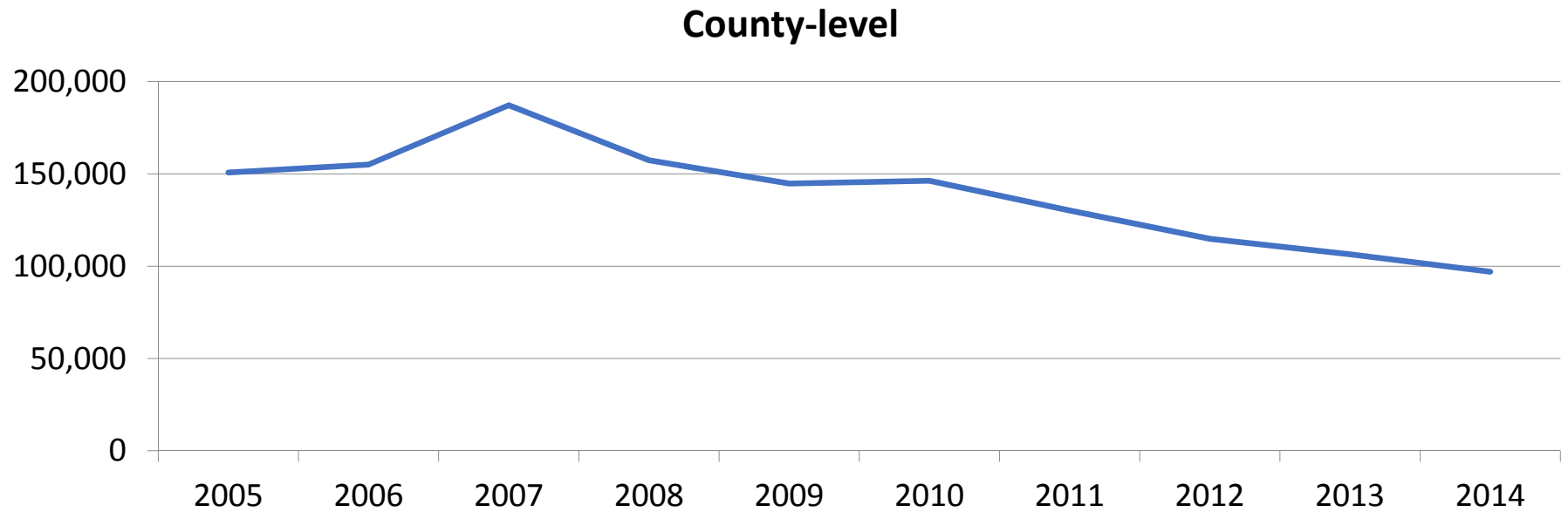
District Court Filings (Civil & Family) Decline

District-level



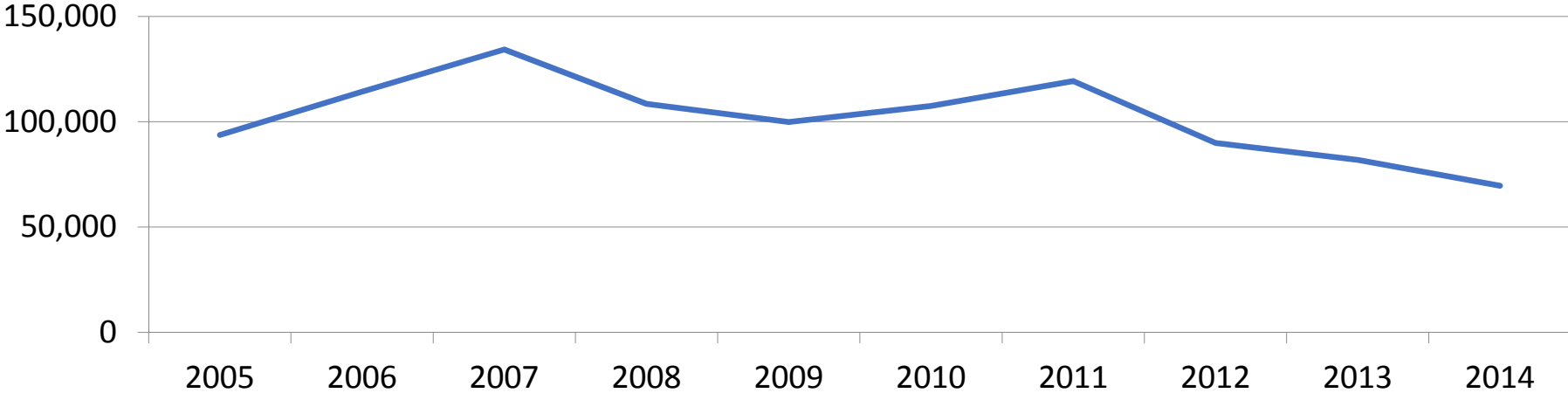
Source: Texas Office of Court Administration

County Court Filings Also Fall



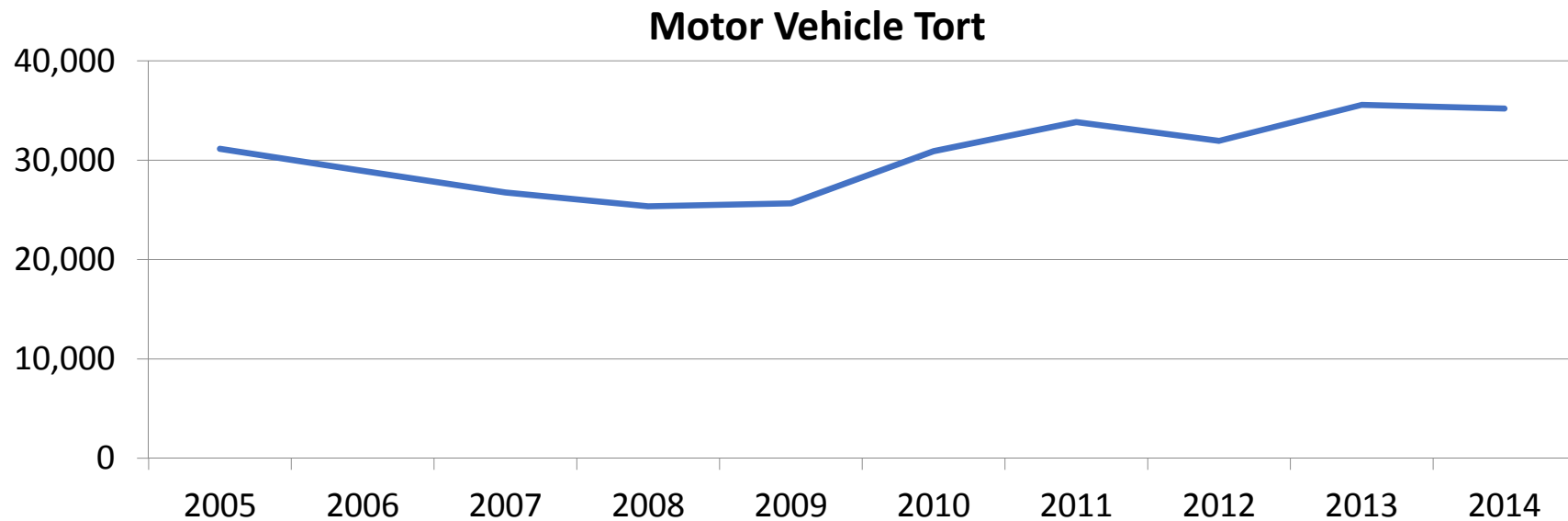
Source: Texas Office of Court Administration

Fewer Contract Suits



Source: Texas Office of Court Administration

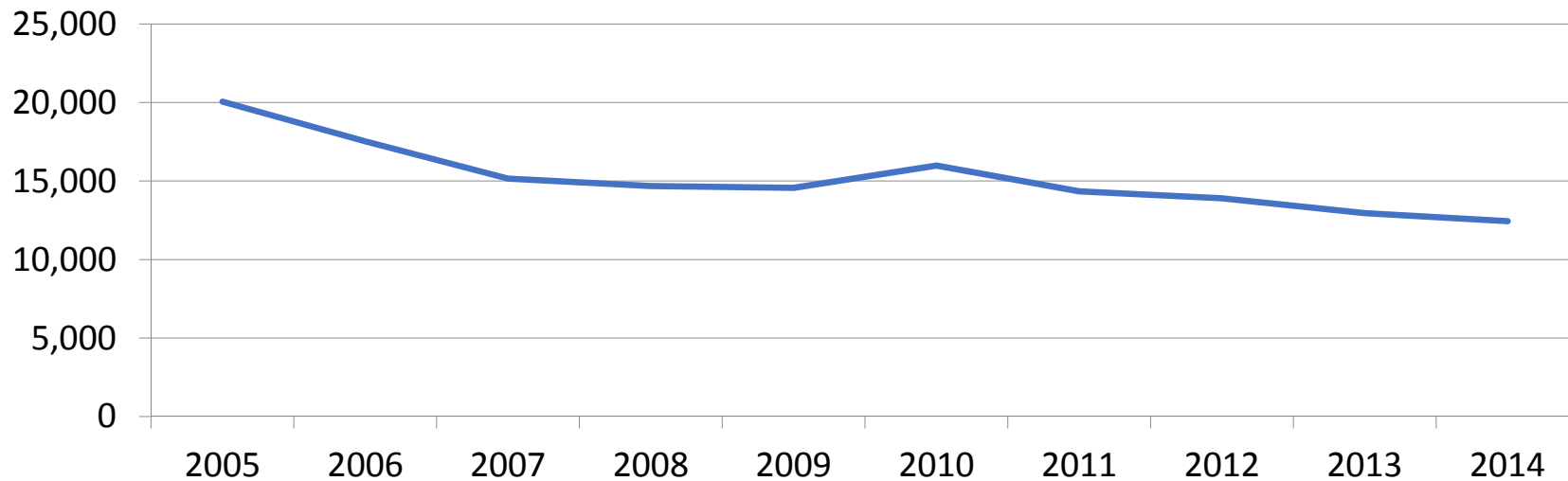
More Actions for Motor Vehicle Torts



Source: Texas Office of Court Administration

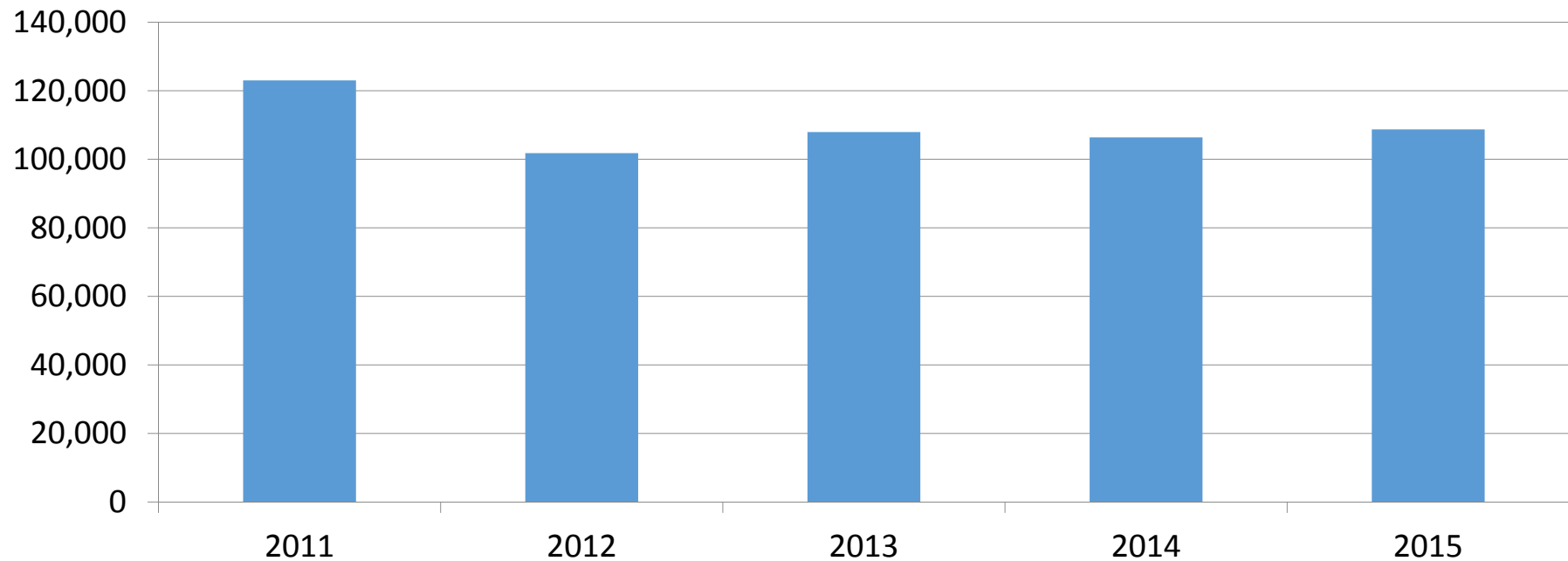
... But Other Tort Actions Decline

Non-Motor Vehicle



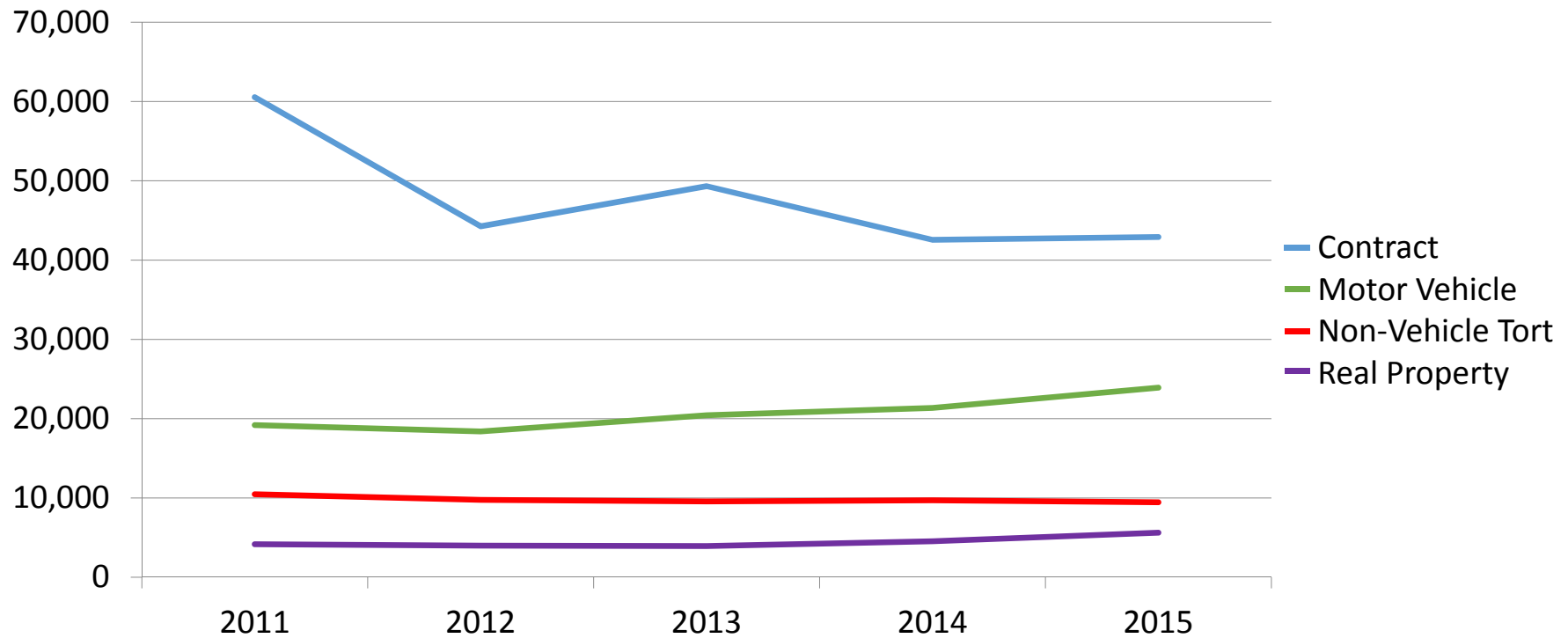
Source: Texas Office of Court Administration

Similar Trend: District Court Civil Cases, 2011-15



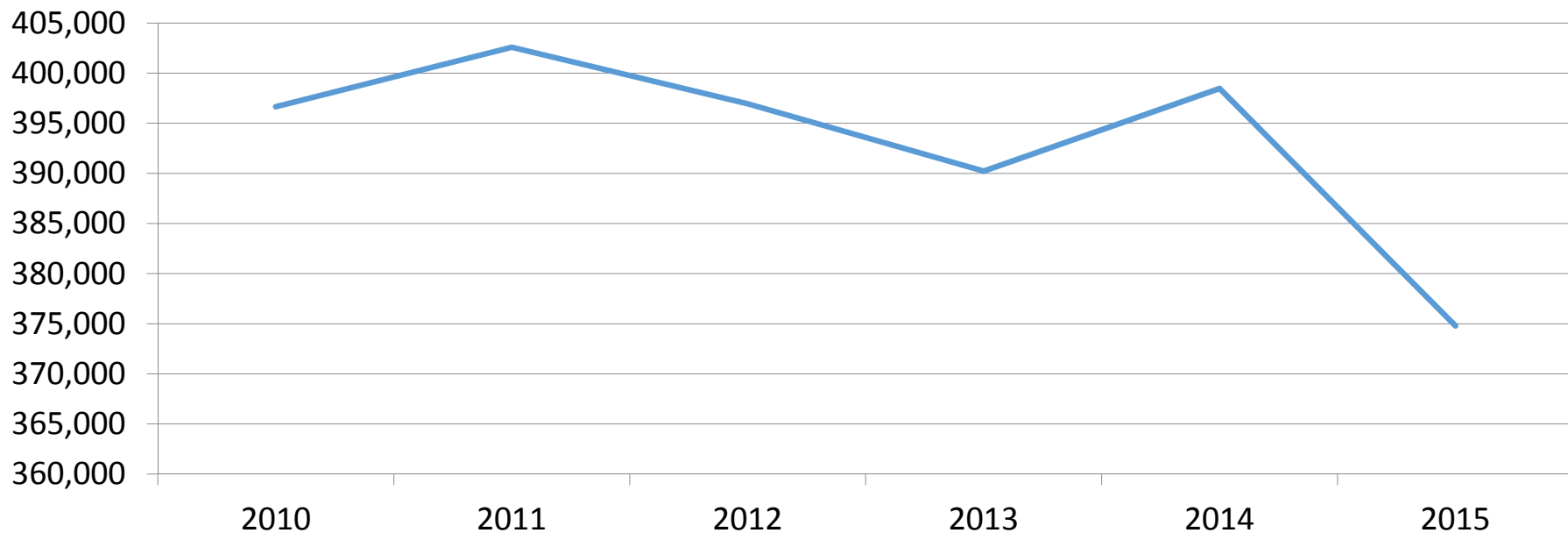
Source: Texas Office of Court Administration

Different Trends, Last 5 Years



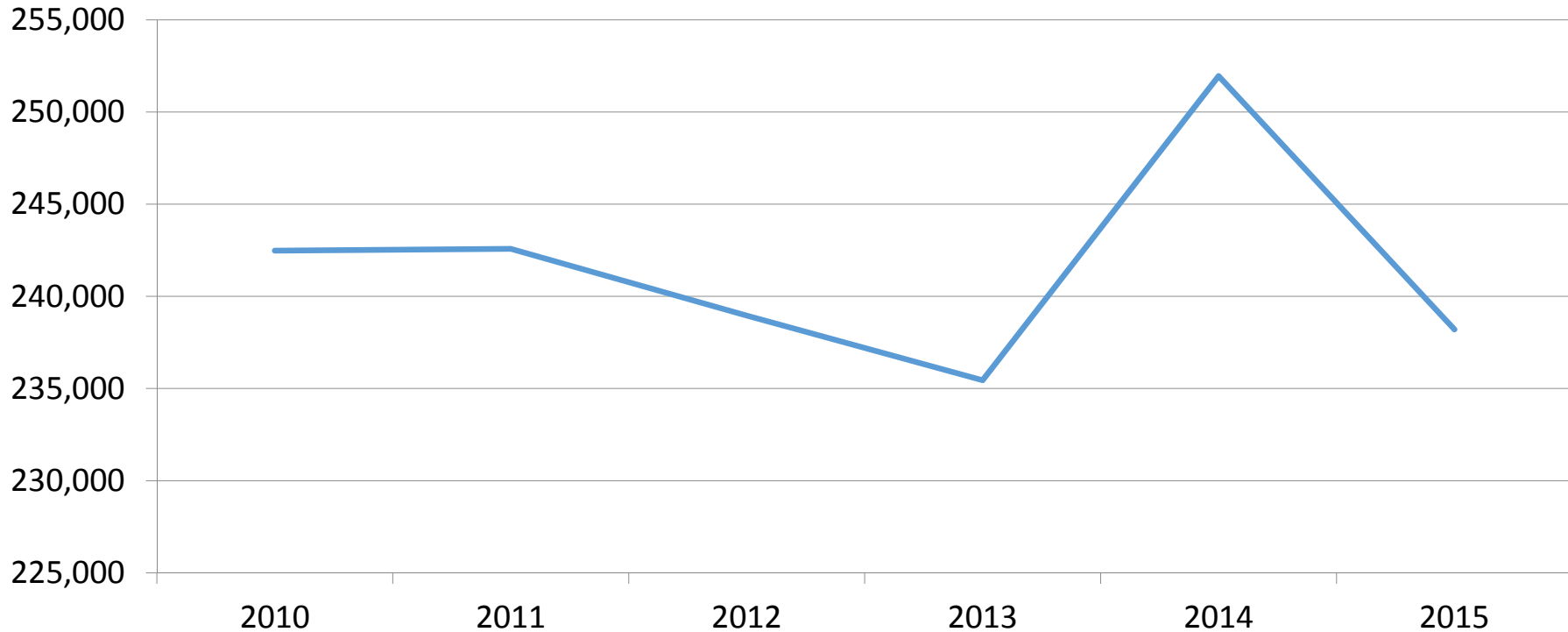
Source: Texas Office of Court Administration

Declining Nationwide Federal Court Filings (Civil and Criminal)



Source: Federal Court Management Statistics

But New Private Civil Actions Stable



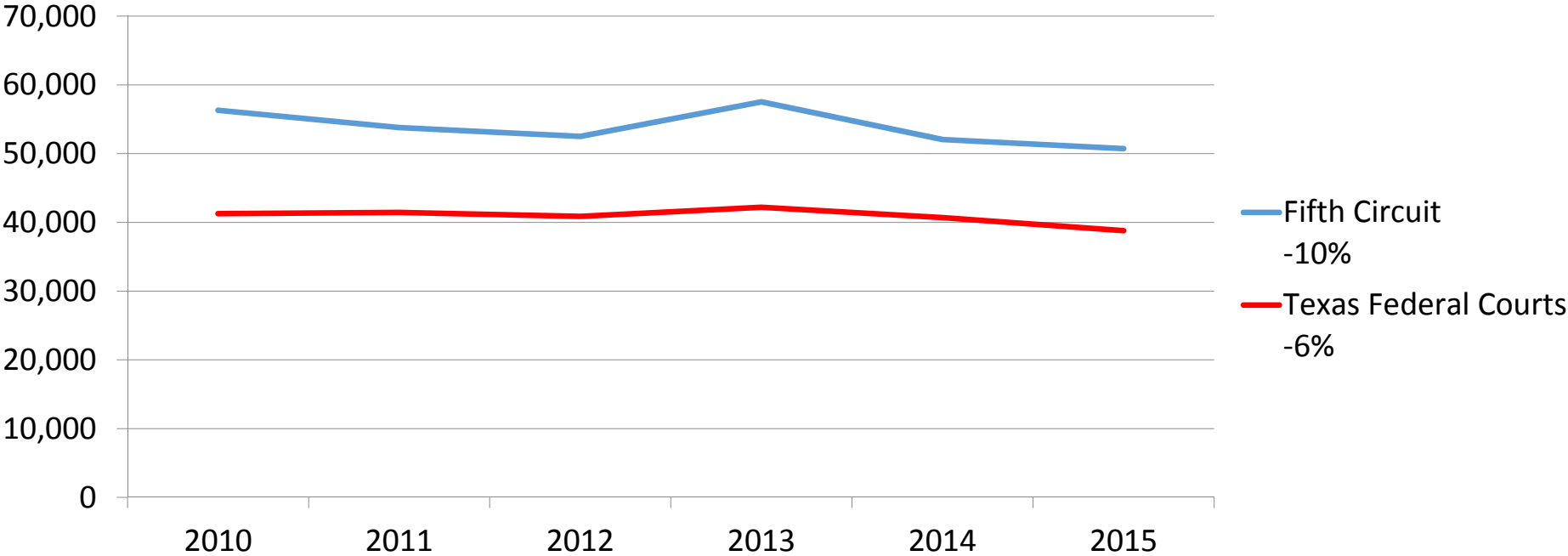
Source: Federal Court Management Statistics

Nationwide Civil Case Filings Percentage Change Over Time

	Since 2006	Since 2011	Since 2014
Total Filings	15.4	-4.3	-7.3
Federal Question Cases	11.6	6.6	-1.0
Diversity of Citizenship Cases	41.1	-18.8	-16.8
U.S. Defendant Cases	-0.4	4.2	-5.4
U.S. Plaintiff Cases	-35.5	-33.7	-12.9

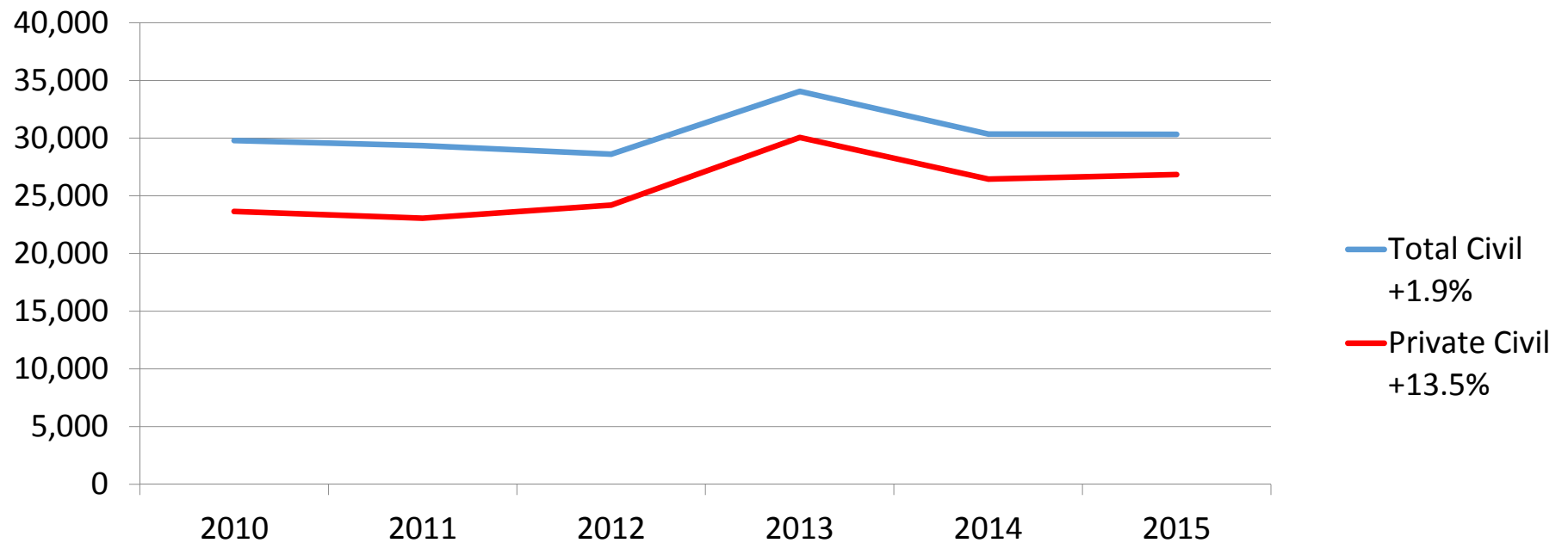


Fifth Circuit and Texas New Filings Drop Slightly (Civil and Criminal)



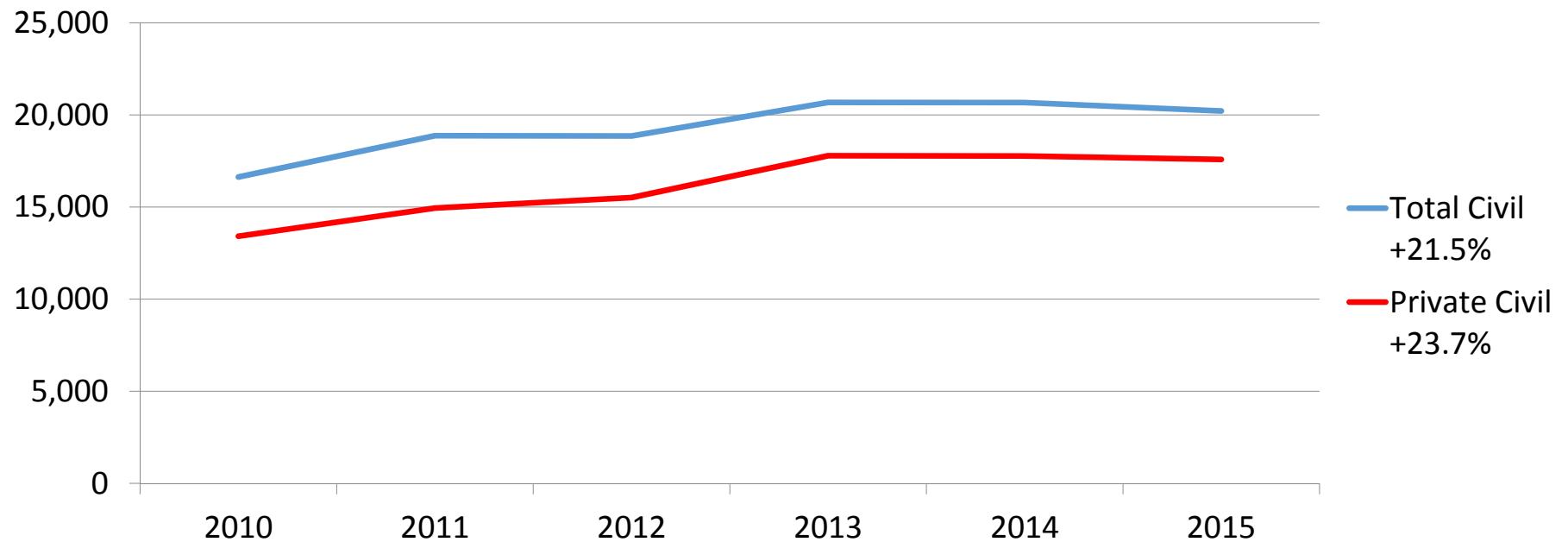
Source: Federal Court Management Statistics

New Civil Actions Versus Private Civil Actions in the Fifth Circuit, 2010-15



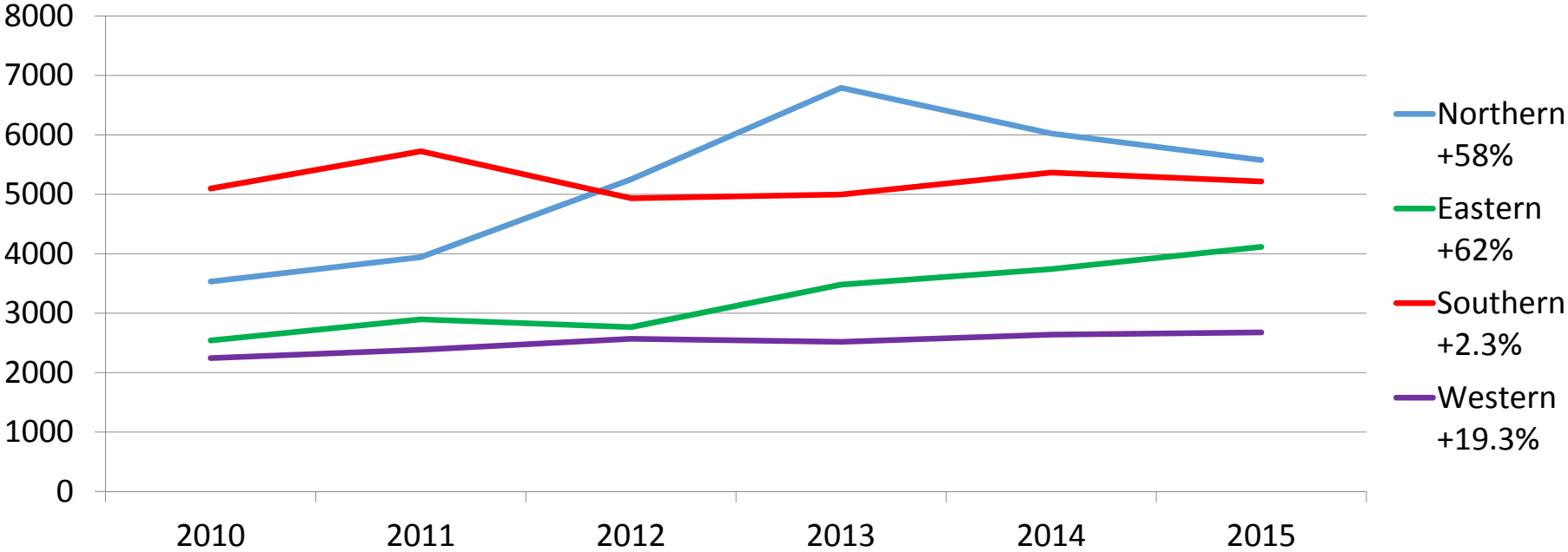
Source: Federal Court Management Statistics

Total New Civil Actions Versus Private Civil Actions in Texas Federal Courts, 2010-15



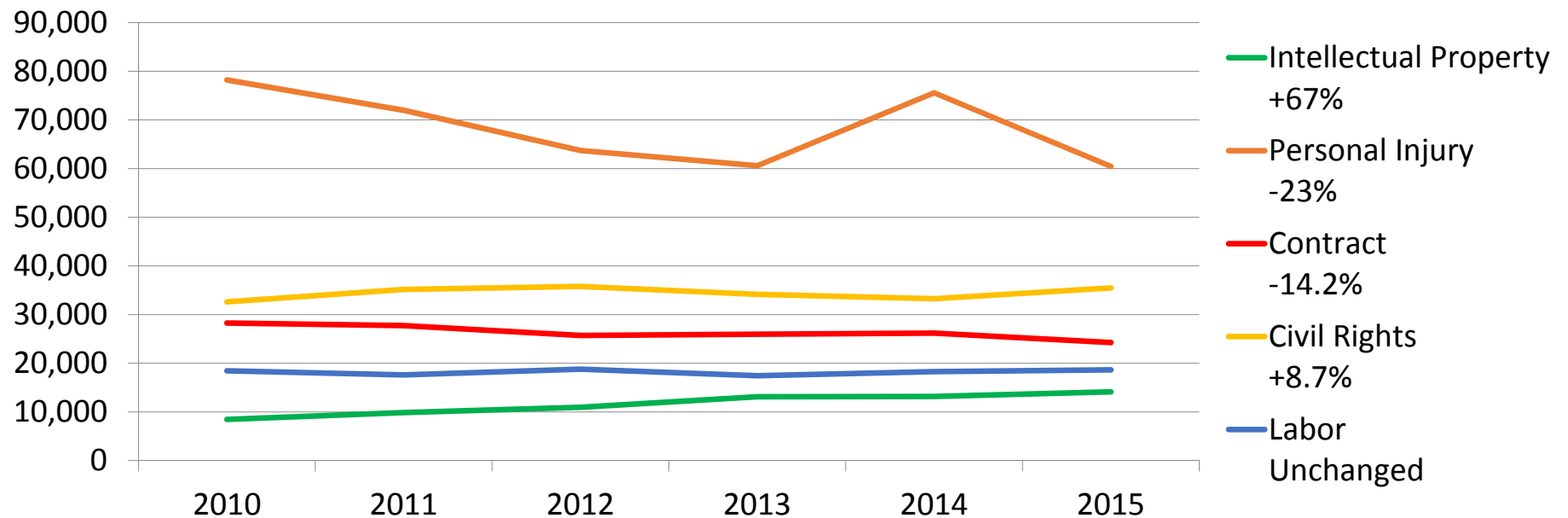
Source: Federal Court Management Statistics

Private Civil Actions: Texas Federal Courts By District, 2010-15



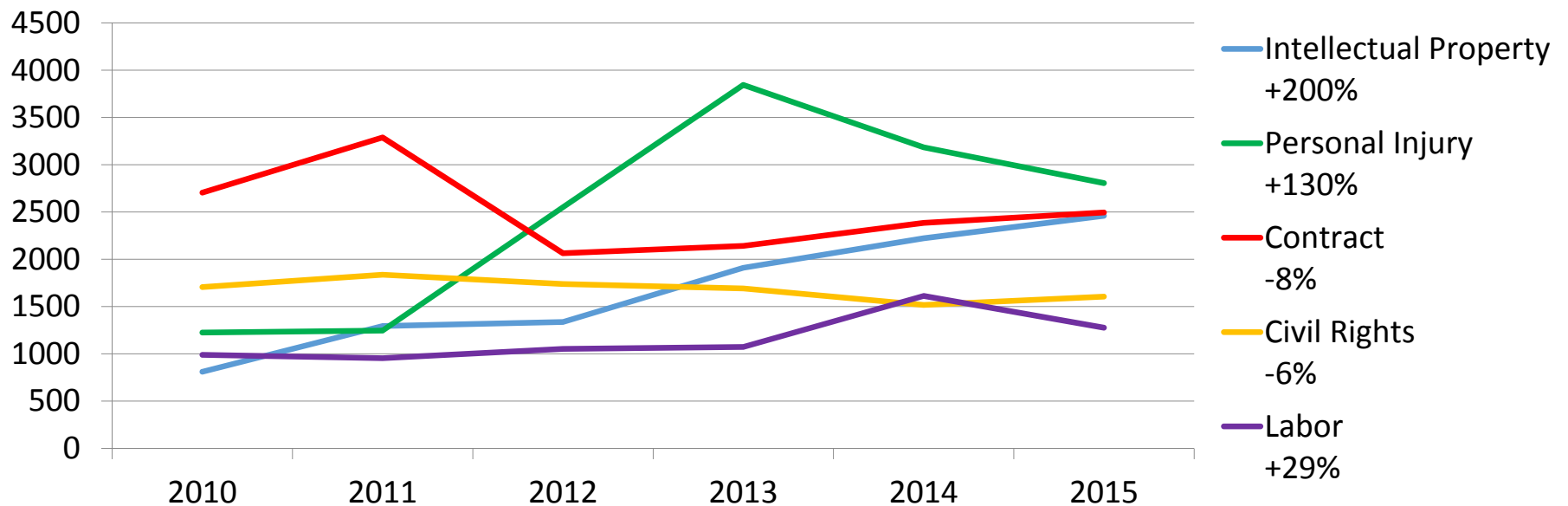
Source: Federal Court Management Statistics

Nature of Claims – All Federal Private Actions, 2010-15



Source: Federal Court Management Statistics

Nature of Claims – Texas Federal Courts 2010-15



Source: Federal Court Management Statistics



EMERGING LEGAL TRENDS



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Agreements to Agree

- Parties can enter contracts to make future contracts – “agreements to agree” – where they have agreed as to all *material and essential* terms of the future contract.
- Where essential terms of the future contract are omitted, the agreement will be unenforceable.
- Courts strongly disfavor implying terms of future contracts.



Agreements to Agree: *Fischer v. CTMI*

- Agreement to agree was enforceable where Fischer sold his tax consulting business to CTMI and payments would be based on certain future agreements as to how much work CTMI performed.
- The Court asked whether the terms of the future agreement were “sufficiently definite” to be enforceable – seemingly a lower standard than prior case law would suggest.
- Case shows new willingness to imply reasonable terms in enforcing a future contract.



Texas Uniform Trade Secrets Act (TUTSA)

- Provides for injunctive relief and damages.
- Damages include actual loss and unjust enrichment.
- Punitive damages available in amount not exceeding twice any award of monetary damages if misappropriation is willful and malicious.
- Displaces conflicting tort and other restitutionary remedies, but not contractual remedies, criminal remedies, or civil remedies not based on misappropriation of a trade secret.

Texas Uniform Trade Secrets Act (TUTSA)

- *In re M-I L.L.C.* (pending Tex.) – Do “reasonable measures” to protect secrecy of trade secrets at injunction hearing include exclusion from courtroom of all defendant corporate representatives other than outside counsel, experts, and defendant former employee?



Texas Uniform Trade Secrets Act (TUTSA)



- Under TUTSA §134A.002, does an employee entrusted with trade secrets pursuant to an ongoing employment arrangement acquire that information through “improper means”? At least three federal courts have answered no.

Economic Loss Rule

- **Bars Tort Actions:**
 - In **products liability** actions, where losses from an occurrence arise from failure of a product and the damage or loss is limited to the product itself.
 - In **contract** actions, where the damages arise from the breach of the contractual relationship.



Economic Loss Rule

LAN/STV v. Eby Constr. (Tex. 2014):

- Rejected broad pronouncements and recognized “no easy answers.”
- Rationales for economic loss rule: defer to contract and avoid indeterminate liability.
- Allowing contractor to sue architect would disrupt “web of contracts.”



Economic Loss Rule

Greater Certainty Post-LAN/STV?

- *A&H Prop. v. GPM Engn'g* (Tex. App. 2015) – claim against designer barred where no property damage and risk allocated by contract.
- *Trebuchet Siege v. Pavecon* (Tex. App. 2014) – property owner claim against subcontractor barred because only breach was contract duty.
- *Clark v. PFPP* (Tex. App. 2015) – suit by purchaser of stolen car against dealership barred, citing concern of indeterminate liability.
- *McCaig v. Wells Fargo* (5th Cir. 2015) – not applicable because TDCA contemplates contract between consumer and debt collector.

Covenants Not to Compete

The Dog That Still Barks?

- “Otherwise Enforceable Agreement”
 - *Hunn v. Dan Wilson Homes* (5th Cir. 2015) – common law duty not to disclose confidential information not sufficient.
 - *Lazer Spot v. Hiring Partners* (Tex. App. 2012) – no consideration specified for signing contract.



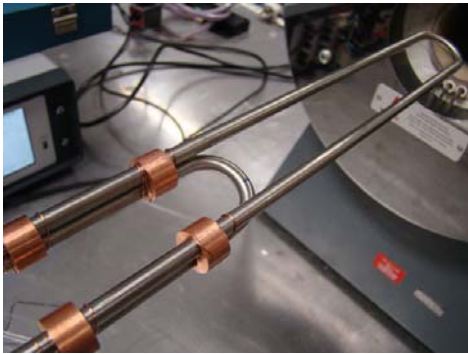
Covenants Not to Compete

Breaking New Ground on Injunctions?

- §15.50 does not preempt common law requirements for temporary injunction.
- But should courts consider enforceability of covenant?
- Traditional rule says no.
- Recent 2014 cases indicate appropriate under some circumstances.



Covenants Not to Compete: Narrow Is Better



Daily Instruments Corp. v. Heidt (S.D. Tex.)

- Noncompete covenant extending to U.S. and anywhere else upheld.
 - Reactor thermometry field was “very narrow.”
 - Employee’s knowledge of employer’s confidential information was “extensive.”
 - Limitations extended only to kind of work performed in last two years.

Shareholder Relations

- *Ritchie* held §11.404 only allows receivership and no common law tort for shareholder oppression.
- *In re Mandel* (5th Cir. 2014) – usurping business opportunities, creating competitor, misusing litigation sufficient grounds for receivership.
- *TENT Consultants* (Tex. App. 2015) – fact issue where defendants refused audit, rejected inspection of books, excluded plaintiff from corporate opportunities.



Shareholder Relations

Ritchie Round 2:

- Plaintiff prevailed at trial on claim for breach of informal fiduciary duty.
- On remand, COA reversed:
 - Plaintiff testified treated like outsider from start.
 - Told “you’ll never get any money in this family.”
 - Jury finding of domination and control by majority shareholder did not alone establish relationship of trust.
- Rule 53.7(f) motion granted Feb. 23, 2016.



Tortious Interference

- ***HMC v. Keystone* (Tex. 2014)**

- No “but-for” causation, reversing \$39M tortious interference verdict.
- In letter, HMC claimed breach of lease, causing buyer to walk away.
- Even if “really devastating” and “blew up the deal,” no but-for causation.
- At most, “substantial factor in bringing about harm.”



Tortious Interference

- How to show “reasonable probability” of business relationship?
 - *Alliantgroup, LP v. Solanji* (Tex. App. 2014) – “continuing client” but no current contract insufficient.
 - *Cooper v. Harvey* (N.D. Tex. 2015) – MTD denied where plaintiff alleged specific details of distribution agreement.
 - *Impala v. Dallas Safari* (N.D. Tex. 2014) – proper to consider few competitors.



Arbitration



- TAA and FAA can both govern arbitration agreements in Texas.
- TAA is only preempted in certain circumstances, if the FAA would enforce an agreement the TAA would not.
- But Texas state law controls whether a valid, enforceable agreement to arbitrate was made.

Arbitration: *Nelson v. Watch House*

- If one side can change an arbitration agreement, it is illusory unless:
 - The power extends only to prospective claims;
 - The changes apply equally to both sides' claims; and
 - There is advance notice.
- Texas Supreme Court previously held that the first factor alone might be sufficient to render the agreement enforceable.
- *Nelson* suggests all three factors have to be present.



Litigation Finance

Major Players:

- Gerchen Keller Capital LLC – \$1.4B AUM
- Harbour Litigation Funding – \$585M AUM
- Burford Capital LLC – \$500M+ AUM
- IMF Bentham – claims \$1.6B in settlements



Litigation Finance: Potential Pitfalls

- **Usury** – No usury if not a loan; and not a loan if no obligation to repay funder.
 - Red flag if recovery is “sure thing.”
- **Champerty** – Beware arrangements involving financially desperate plaintiffs and investor control of litigation.
 - Red flag if assignee not real party in interest.



Litigation Finance



2013 Proposed Texas Legislation:

- Applies to individual consumers
- Funding companies must register with State
- No say in settlement or case development
- Contracted amount to be fixed, not based on %
- Communications with funder privileged
- Transaction not deemed a loan
- House bill not reported out of committee

Litigation Finance

State Developments:

- Colorado – advances to tort plaintiffs are “loans” and subject to consumer code (Colo. 2015)
- Arkansas – places consumer litigation lenders under usury laws; maximum 17% rate
- Oklahoma – applies consumer credit code; no role in conduct or settlement of case
- Tennessee – sets charges and fees; right of rescission; no assignment; three-year max period



Attorney Immunity



- Affirmative defense protecting attorneys from liability to non-clients.
- “Attorneys are authorized to practice their profession, to advise their clients and interpose any defense or supposed defense, without making themselves liable for damages.”
Kruegel v. Murphy (Tex. App. 1910).

Attorney Immunity



Troice v. Proskauer Rose, L.L.P. (5th Cir. 2016)

- Attorney made representations to SEC in filings and investigation regarding Stanford Financial.
- Investors asserted state law claims vs. firm.
- District court applied “fraud exception.”
- Fifth Circuit reversed:
 - “Classic examples” of attorney representing client.
 - Immunity applies to claims brought by third parties.

Attorney Immunity

- When is attorney “discharging duties”?
 - Acquiring and reviewing confidential documents; warning opponent of risk of disclosure – *Highland Capital v. Looper Reed* (Tex. App. 2016).
 - Disbursing settlement funds per client -- *U.S. Bank v. Sheena* (Tex. App. 2015).
 - Taking acts to facilitate mortgage transfer, even if authority disputed – *Smith v. Bank of America* (W.D. Tex. 2016).





LEGISLATIVE DEVELOPMENTS

Forum Non Conveniens



- Under old CPRC §71.051(b)(e), FNC factors inapplicable to Texas-resident exception.
- No dismissal if legal resident plaintiff properly joined and one single occurrence.
- *In re Ford* (Tex. 2014):
 - Fatal accident in Mexico involving foreign national and Texas resident.
 - Suit in Texas, joined by resident beneficiaries.
 - Those resident beneficiaries were “plaintiffs” for purposes of the FNC analysis.

Forum Non Conveniens

Amended CPRC §71.051(e) (eff. June 6, 2015):



- Retains exception for plaintiff who is legal resident or derivative plaintiff of legal resident.
- But if action involves non-resident plaintiffs, court makes separate FNC determination.
- “Plaintiff” excludes parties who are not derivative claimants of legal resident.
- Applies to personal injury/wrongful death.



Net Worth Discovery

- New CPRP §41.0115 -- Discovery of net worth evidence only on motion, notice, and hearing.
- Applies to cases filed after Sept. 1, 2015.
- Court must find substantial likelihood of success on merits of claim for exemplary damages.
- Order must authorize least burdensome method.
- Appellate review limited to motion record.



Texas Water Code

- Restricts recoveries in suits brought by local governments for environmental violations.
- Local government recovery capped at \$2.15M, with remainder to State.
- Sets factors to be considered, using §7.053.
- Limitations period of 5 yrs. from earlier of TCEQ notice or filing of enforcement action.
- Aimed at Harris County?
- Effective Sept. 1, 2015.

