

# Trump NY Fraud Trial Shows Civil, Criminal Case Differences

By **David Moskowitz** (December 6, 2023)

It is hard not to be focused on the various criminal indictments that former President Donald Trump is battling: Criminal trials are more dramatic than civil trials. The former president could be the first U.S. president convicted of a crime.

But even if he is convicted, it is unlikely that he will ever be sentenced to prison, and his real estate empire and associated businesses could survive his conviction.

The Trump empire, however, is likely to be challenged by the civil fraud trial presently playing out in the New York County Supreme Court. That empire includes all the New York buildings controlled or beneficially owned by Trump, including 40 Wall Street, Trump International Hotel, Trump Park Avenue apartments, 1290 Avenue of the Americas and the penthouse apartment in the Trump Tower in Manhattan. It also includes Mar-a-Lago and various golf courses. Ten of his companies are named in the complaint.



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The plaintiff is requesting \$250 million in fines, a permanent ban on Trump and his two sons from serving as officers or directors of any business in New York, and a prohibition on Trump and his companies from acquiring real estate in New York for five years.

On Sept. 26, New York Supreme Court Justice Arthur Engoron granted summary judgment to New York on one of its seven claims. He found that Trump inflated the value of his assets in order to induce financial institutions and insurers to grant loans on favorable terms.

The judge ordered the cancellation of the business certificates of the companies named in the complaint, and he appointed a receiver to manage the dissolution of the businesses.

The remaining six causes of action in the case are the subject of the ongoing trial in which testimony should be concluded before the end of the year.

There have already been appeals to the New York Appellate Division, which granted a stay of some aspects of Justice Engoron's rulings. For example, Ivanka Trump is no longer a defendant in the case, and the receiver appointed by the trial judge cannot sell the assets before there is a final decision.

Regardless of how the trial ends, however, the case serves as a helpful reminder to companies and individuals that civil trials can be just as damaging, if not more so, than criminal trials, due to several key elements unique to civil litigation procedure, as discussed more below.

## **Key Differences Between Civil and Criminal Trials**

### ***Burden of Persuasion***

It is important to recognize the burden of persuasion is very different in a civil case than it is in a criminal case. As the Trump civil case demonstrates, it is easier to prove liability in a

civil case than to convict an individual in a criminal case.

In a civil trial, the standard for obtaining a verdict in favor of the plaintiff is the preponderance of the evidence. This standard requires only that it is more probable than not that the plaintiff — here, the state of New York — has proven its claim. It is sufficient to tip the scales toward the plaintiff's version of the facts.

Obviously, this is a much lower requirement than in a criminal case, where the standard for obtaining a conviction is that the prosecutor proves their case beyond reasonable doubt. This means that there is no other logical explanation derived from the facts other than the conclusion that the defendant committed the crime.

In other words, the prosecutor has to establish guilt to the extent of a moral certainty that precludes any other reasonable alternative.

In addition, as explained below, there is no adverse inference in a criminal trial if a defendant does not testify or does not answer relevant questions. In a civil trial, however, there may be an adverse inference.

### ***The Jury — Or Lack Thereof***

Just as important as the standard of proof is that the various criminal cases against Trump will very likely be jury trials.

There is a significant possibility of a hung jury in either or both of these cases because the verdict must be unanimous. It takes only one recalcitrant to prevent the conviction. Consequently, given Trump's extremely strong support from his base, it will be difficult to obtain a conviction because one or more of his supporters could be jurors.

There is no jury in the New York civil liability case. The failure to request a jury trial may prove to be a mistake on the part of Trump's lawyers since the decision will be made by a single judge.

The judge, Justice Engoron, seems to be very cautious in his evidentiary rulings, perhaps to avoid being reversed on an appeal. Most trial judges suffer from reversal aversion, deciding evidentiary issues in favor of the party that is more likely to lose the case.

Justice Engoron may avoid reversal of his decision by deciding objections to the admissibility of evidence in favor of the defendants.

Also, there will be no chance of the charge to the jury being an issue on appeal because there is no jury.

Since there is no jury, Justice Engoron will make findings of fact. These are very important because it is rare, and highly unlikely, that an appellate court will reverse the trial judge's findings of fact.

The most important of these findings will be based on the credibility of the witnesses. The appellate court never hears the witnesses, only reading the dry transcript of the testimony. And, even more significant in this case, they get the documents to examine, including the handwritten notes.

For instance, Jeffrey McConney, who was the former controller of the Trump

Organization, testified on Nov. 21 that he had written "DJT to get final review" on the spreadsheet used for drafting some of the financial statements at issue. This could lead to Trump and Allen Weissenberg — the company's former chief financial officer, who has already accepted some responsibility for the fraudulent statements — being liable.

Justice Engoron does not have to find any individuals responsible for the inaccurate financial statements submitted by the companies. Clearly, the companies submitted the allegedly erroneous financial statements to various lending institutions, insurers and state agencies.

The appellate judges will read the testimony in which the consultants claim they are not liable because they accepted the figures from the companies. The company officials — and this includes Trump, his two sons and the executives already mentioned, who are all defendants — blame the consultants in order to shift the liability from themselves to others. The companies have no one else to blame.

There can be no doubt that there will be appeals after the final decision of the trial court, and the New York appellate courts will have to decide if they will reverse the trial court's decision.

It is possible that the decision of the trial court will include the cancellation of Trump's New York business certificates. If this is the relief that is granted and affirmed on appeal, the receiver could then sell the Trump Organization assets in addition to requiring payment of the fines.

Given the finding of the facts in the trial court, the determination of the credibility of witnesses, and the black-and-white documents, it will be very difficult for an appellate court to reverse a potential decision finding the companies liable for their fraudulent behavior.

### ***Fifth Amendment Protection***

Some may wonder why Trump and his adult sons may choose to testify in their own defense in the civil trial. This is likely due to another key distinction between civil trials and criminal trials — that is, the differing applicability of the Fifth Amendment.

In a criminal trial, when a defendant refuses to answer a question or decides not to offer testimony based upon their Fifth Amendment right to not incriminate themselves, there is no adverse inference regarding their liability.

In a civil trial, however, if the defendant does not testify or refuses to respond to questions regarding relevant issues, there can be an adverse inference that their answers would have been detrimental to their defense.

When a defendant is faced with both a criminal trial and a civil trial that involve some of the same transactions or incidents, they must choose whether they will testify in their own defense in the civil trial, even though it might be detrimental to their defense in the criminal trial, or to focus on the criminal trial, which may prejudice their defense in the civil trial because of the adverse inference derived from their failure to testify or to answer relevant questions.

Trump and two of his sons were called as witnesses by the prosecution. They may also elect to testify as part of their defense in order to avoid the adverse inference that may arise if they fail to testify in their defense.

Trump's testimony in the civil trial may be introduced in any of the criminal trials in which he is a defendant. He and his sons may also be waiving their Fifth Amendment right to not incriminate themselves regarding issues about which they testified in the civil trial.

### ***Possibility of U.S. Supreme Court Appeal***

The final difference between the civil case and the Georgia election interference case and federal indictments relates to the possibility of an appeal being heard by the U.S. Supreme Court.

It is far more unlikely that the U.S. Supreme Court will grant a petition for a writ of certiorari from the decision of the New York Court of Appeals, the highest court in New York, than it would if there is a conviction in the criminal cases in Georgia and the federal courts.

The U.S. Supreme Court usually does not accept cases in which there is no constitutional or federal law issue. Therefore, the final decision in a civil case with no constitutional or federal law issues will be the decision of the highest court in the state, with the probability that there will be no reversal of the decision by the U.S. Supreme Court.

### **Conclusion**

Without hearing all the evidence, it would be rash to speculate on which individuals will also be liable. While testimony will conclude this year or in early 2024, we do not know when the final decision of the trial court will be delivered.

But for the reasons discussed above, the Trump companies may be held liable for the allegedly fraudulent financial statements and potentially for some or all of the other six charges.

The decision of the trial court may be modified by the New York appellate courts regarding the relief granted. If monetary relief is granted, it will likely be a substantial figure.

There are potential monetary penalties in criminal trials — for example, there have been fines imposed on the defendants who pled guilty in the Georgia case. In a civil liability case, such as the New York civil fraud trial, the monetary relief granted to the plaintiff is likely to be significantly larger than the fines in criminal cases.

The ruling could include a prohibition of doing business in New York. It could affect the reputation of the companies and their ability to finance new projects. If the decision itself does not result in the collapse of the companies, it could be the beginning of the fall of the Trump empire.

In summary, if Trump loses one or both of the criminal cases, this may affect his candidacy to be the next president. If Trump loses the New York civil trial, he could suffer a severe financial loss and even, ultimately, the collapse of his business empire.

More broadly, however, the case crystallizes some distinctions between criminal and civil trials — in particular, civil bench trials — that can be very consequential for defendants: namely, the lower "more probable than not" standard, the lack of a jury and the attendant appellate implications this entails, the differing Fifth Amendment protections, and the unlikelihood of a U.S. Supreme Court appeal.

It all serves as a helpful reminder that civil cases — and their potential outcomes — are no less important and potentially damaging than criminal prosecutions.

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