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## REFINING FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias\*

I re-evaluated the experimentation that the Montana Federal District Court and additional districts have performed under the Civil Justice Reform Act (CJRA) of 1990 in the most recent issue of this journal.<sup>1</sup> I reported that civil justice reform at the national level had been relatively quiescent since I canvassed national developments in the previous issue of the *Montana Law Review*.<sup>2</sup> All ninety-four federal districts were continuing to experiment with mechanisms for decreasing cost and delay in civil litigation and were continuing to assess the efficacy of those procedures.<sup>3</sup> I correspondingly discussed the Judicial Amendments Act of 1994 that extended for a year the CJRA's deadlines for the Judicial Conference to submit a report to Congress and the RAND Corporation to complete a study on the pilot program whereby ten districts experimented with six litigation management and cost and delay reduction procedures prescribed by the statute.<sup>4</sup>

I also reported that Chief Judge Paul Hatfield sought the views of the CJRA Advisory Group and the Local Rules Committee on the possible revision of the court's local rules. After con-

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\* Professor of Law, University of Montana. I wish to thank Jerry Lynch and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. I am especially grateful to Ann and Tom Boone for their generous gift which recognizes the value of scholarship. I serve on the Advisory Group that the United States District Court for the District of Montana has appointed under the Civil Justice Reform Act of 1990; however, the views expressed here and errors that remain are mine.

1. See Carl Tobias, *Re-evaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307 (1995) [hereinafter Tobias, *Re-evaluating*]. This is the most recent installment of a series of articles that document and analyze developments in federal civil justice reform in Montana. See Carl Tobias, *Evaluating Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 449 (1994) [hereinafter Tobias, *Evaluating*]; Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235 (1994); Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357 (1993); Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993); Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992); Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992); Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 438-51 (1991).

2. See Tobias, *Re-evaluating*, *supra* note 1, at 308-11; see also Tobias, *Evaluating*, *supra* note 1, at 451-53.

3. See Tobias, *Re-evaluating*, *supra* note 1, at 308-09.

4. See Tobias, *Re-evaluating*, *supra* note 1, at 309-10; see also 28 U.S.C. § 473(a) (Supp. V 1993).

sultation with both entities, the Chief Judge decided that the Montana district should prepare a complete set of local rules amendments in light of the 1993 Federal Rules revisions.<sup>5</sup> Chief Judge Hatfield, therefore, finalized proposals to amend the local rules and circulated them to Judge Charles Lovell and Judge Jack Shanstrom in November. I suggested that the district intended to publish the proposed local rules revisions for public comment in early 1995.

Since I last reported on civil justice reform, two important developments have occurred. The House of Representatives passed three bills—the Attorney Accountability Act (AAA), the Securities Litigation Reform Act (SLRA), and the Common Sense Product Liability and Legal Reform Act (PLLRA).<sup>6</sup> None of these measures directly modifies the CJRA, although the bills could significantly affect civil justice reform. The second important development is that the Montana Federal District Court formally proposed the local rules revisions for public comment. This essay undertakes the evaluation of these new developments in civil justice reform.

The essay first provides an update of pertinent developments respecting civil justice reform nationally and in the Montana district. The essay emphasizes House passage of three important measures relevant to civil justice reform and the proposed local rules amendments which the Montana district issued. The piece then affords a look into the future.

## I. CIVIL JUSTICE REFORM UPDATE

### A. *National Developments*

Virtually no new developments in federal civil justice reform at the national level that involve the district courts have occurred since I last reported on reform.<sup>7</sup> All thirty-four Early Implementation District Courts (EIDC), including the Montana district, and the remaining sixty districts that are not EIDCs

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5. See Tobias, *Re-evaluating*, *supra* note 1, at 314; see also United States District Court for the District of Montana, Proposed Amendments to Local Rules (Oct. 1994).

6. See Attorney Accountability Act, H.R. 988, 104th Cong., 1st Sess. (1995); Common Sense Product Liability and Legal Reform Act, H.R. 956, 104th Cong., 1st Sess. (1995); Securities Litigation Reform Act, H.R. 1058, 104th Cong., 1st Sess. (1995). These effectively comprise the Common Sense Legal Reforms Act, H.R. 10, 104th Cong., 1st Sess. (1995), the ninth tenet in the Republican Party's Contract with America.

7. See Tobias, *Re-evaluating*, *supra* note 1, at 308-09.

have continued experimenting with mechanisms for decreasing cost and delay and have continued to assess those procedures' effectiveness.<sup>8</sup> In the latest issue of the *Montana Law Review*, I explained that the CJRA required the Judicial Conference to submit to Congress by December 31, 1995 a report on the demonstration program<sup>9</sup> and that Congress had not extended this deadline in the 1994 Judicial Amendments Act.<sup>10</sup> Legislation was recently introduced in the Senate that would extend the deadline for a year.<sup>11</sup>

During the week of March 6, the House of Representatives passed the AAA, the SLRA, and the PLLRA.<sup>12</sup> This legislation could significantly affect federal civil justice reform, but it is unclear whether Congress will enact any of the bills. They, therefore, warrant brief treatment here. Section 2 of the AAA would modify the settlement offer provision in current Federal Rule of Civil Procedure 68 by prescribing fee-shifting in diversity cases.<sup>13</sup> Section 3 of the legislation would change Federal Rule of Evidence 702 in ways that limit expert testimony, ostensibly to increase "honesty in testimony."<sup>14</sup> Section 4 would alter the 1993 revision of Federal Rule of Civil Procedure 11 by eliminating safe harbors, making the provision applicable to discovery, and making sanctions' imposition mandatory and compensatory.<sup>15</sup>

The SLRA would modify securities litigation in numerous ways. Most important to the issues treated here, the legislation would impose special pleading and class action requirements in securities cases and would require losing parties to pay prevailing litigants' attorney's fees in certain of those actions.<sup>16</sup> The PLLRA would institute a number of important changes in prod-

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8. All districts had to issue civil justice expense and delay reduction plans by December 1993. See Civil Justice Reform Act, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5096 (1990).

9. The program requires that the Western District of Michigan and the Northern District of Ohio experiment with systems of differentiated case management and that the Northern District of California, the Northern District of West Virginia and the Western District of Missouri experiment with various methods of reducing cost and delay, including alternatives to dispute resolution (ADR). See Civil Justice Reform Act, Pub. L. No. 101-650, § 104(b)(1)-(2), (d), 104 Stat. 5097 (1990).

10. See Pub. L. No. 103-420, § 4, 108 Stat. 4343, 4345 (1994).

11. See S. 464, 104th Cong., 1st Sess. (1995).

12. I rely substantially in the remainder of this subsection on Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

13. See H.R. 988, *supra* note 6, § 2; see also FED. R. CIV. P. 68.

14. See H.R. 988, *supra* note 6, § 3; see also FED. R. EVID. 702.

15. See H.R. 988, *supra* note 6, § 4; see also FED. R. CIV. P. 11.

16. See H.R. 1058, *supra* note 6, §§ 2-4.

ucts liability law. The legislation would restrict seller liability in numerous instances, permit punitive damages awards only upon proof of actual malice by clear and convincing evidence, and require that punitive damages be capped.<sup>17</sup> The bill would also impose several defenses to products liability cases and a special Rule 11 that covers frivolous products suits.<sup>18</sup> The measure prohibits strict liability actions for commercial loss, includes a statute of repose, and limits the liability of health care providers and drug manufacturers.<sup>19</sup>

### B. Montana Developments

On March 30, the Montana district issued proposed amendments to its local rules and sought public comment on the proposals.<sup>20</sup> Most of the proposals are inconsequential or involve style, but several are significant and substantive. One modification would essentially reinstate the automatic disclosure procedure that the district instituted in April 1992.<sup>21</sup> The proposed amendment also provides that sanctions "may be imposed for violation of Rule 200-5(a) [and] shall be imposed in accordance with the prescriptions" of Federal Rules 11 and 37.<sup>22</sup>

The other important modification implicates the provision for the co-equal assignment of civil suits with the opportunity to opt out and have Article III judges hear cases that were initially

17. See H.R. 956, *supra* note 6, §§ 102, 201.

18. See H.R. 956, *supra* note 6, §§ 104-105.

19. See H.R. 956, *supra* note 6, §§ 101, 106, 201, 203. When this essay went to press in May, the Senate had passed a streamlined version of H.R. 956. See S. 565, 104th Cong., 1st Sess. (1995). That legislation did not include the provisions in H.R. 988 and H.R. 1058, and the Senate had not passed legislation that was analogous to either H.R. 988 or H.R. 1058. However, the Senate did seem likely to pass legislation that is analogous to H.R. 1058. See S. 240 104 Cong., 1st Sess. (1995).

20. United States District Court for the District of Montana, Proposed Amendments to Local Rules (Apr. 1995) [hereinafter 1995 Proposals].

21. See 1995 Proposals, Rule 200-5, *supra* note 20, at 18-20. Compare D. MONT. R. 200-5(a) with United States District Court for the District of Montana, Order in the Matter of Local Rules of Civil Procedure 2-3 (Jan. 25, 1994). The new proposal makes two minor modifications in the 1992 version of subsections (iii) and (iv) of Rule 200-5. The proposal replaces "identity" with more precise requirements that the disclosing party provide the "name, and, if known, the address and telephone number of each individual known or believed to have discoverable information about the claims or defenses, and a summary of that information." 1995 Proposals, Rule 200-5(a)(iii), *supra* note 20, at 19. The proposal also provides that the disclosing party may provide a copy of documents instead of a description. See 1995 Proposals, Rule 200-5(a)(iv), *supra* note 20, at 19.

22. See 1995 Proposals, Rule 200-5(a)(4), *supra* note 20, at 19.

assigned to magistrate judges.<sup>23</sup> The proposal would require that litigants exercise the option to request an Article III judge “not later than twenty days from the date notification of assignment to the magistrate judge is filed by the Clerk of Court.”<sup>24</sup> The district has solicited the views on these proposed amendments of the Montana Bar and the public, and these comments were supposed to be “received by the Clerk of Court no later than May 8.”<sup>25</sup>

## II. A GLANCE INTO THE FUTURE

### A. National

All 94 districts will continue applying numerous measures that are intended to decrease cost or delay. More conclusive determinations regarding the procedures’ effectiveness will have to await additional experimentation, principally in the courts that are not EIDCs. If Congress extends demonstration district experimentation, the Federal Judicial Center and the Judicial Conference should capitalize on the extra time. Congress should reject those aspects of the AAA, the SLRA and the PLLRA that govern procedure and fee shifting because they will disrupt normal procedural revision processes or CJRA experimentation or will improperly restrict federal court access.<sup>26</sup> If Congress is not persuaded that the legislation will have these impacts or decides to proceed for other reasons, Congress should at least delete those provisions that will disrupt continuing reform initiatives, such as CJRA experimentation.

### B. Montana

The Montana district’s consultation with the CJRA Advisory Group and the Local Rules Committee before proposing amendments in the local rules was advisable. The proposed revision in automatic disclosure could cause confusion.<sup>27</sup> The proposal would essentially revert to the 1992 articulation after less than

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23. See 1995 Proposals, Rule 105-2(d), *supra* note 20, at 2-3.

24. See 1995 Proposals, Rule 105-2(d), *supra* note 20, at 3.

25. United States District Court for the District of Montana, Notice, Proposed Amendments to the Rules of Procedure of the United States District Court for the District of Montana (Mar. 30, 1995).

26. For more analysis of this legislation and suggestions for treating it, see Tobias, *supra* note 12.

27. See *supra* notes 21-22 and accompanying text.

eighteen months of experience with a disclosure provision premised more closely on the 1993 Federal Rule amendment.<sup>28</sup> Because both the new proposal and the 1994 enunciation provide advantages and impose disadvantages, it may be preferable to retain the 1994 provision, which at least contributes to national procedural uniformity.

The proposed amendment's inclusion of a specific sanctioning provision may be unnecessary and confusing.<sup>29</sup> The 1993 amendments of Federal Rules 26(g) and 37 expressly prescribe sanctions for disclosure violations.<sup>30</sup> The reference to Federal Rule 11 in the Montana District's proposal fosters complication because Rule 11's 1993 amendment includes numerous procedural requirements, such as safe harbors, that differ from those in Rules 26(g) and 37.<sup>31</sup> Moreover, the 1993 amendment of Rule 11(d) expressly states that the rule does "not apply to disclosures and discovery requests, responses, objections and motions that are subject to the provisions of Rules 26 through 37."<sup>32</sup>

The proposed amendment's change in the opt-out provision, which specifically provides a twenty-day period for requesting assignment to an Article III judge, could avoid the problem of demands that were exercised rather late in litigation after a magistrate judge had handled the case to that point.<sup>33</sup> The judges in the district may want to institute measures which avoid any perception that they might unfavorably view the assertion of any such demands.<sup>34</sup>

### III. CONCLUSION

Every district, including Montana, is continuing to experiment with cost and delay reduction measures and evaluating their effectiveness. Congress may extend the deadlines for completing the study of, and report and recommendations on, the demonstration program. An extension should enhance their accuracy. Congress might also pass legal reform legislation, although

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28. See Tobias, *Re-evaluating*, *supra* note 1, at 314.

29. See *supra* note 22 and accompanying text.

30. See FED. R. CIV. P. 26(g), 37.

31. See FED. R. CIV. P. 11.

32. See FED. R. CIV. P. 11. Because the Montana District's provision for disclosure is stricter than Federal Rule 26(a), it could be argued that disclosure in the district is not "subject to the provisions of Rules 26 through 37" and, therefore, that special provision for sanctioning through Rule 11 is appropriate.

33. See Tobias, *Re-evaluating*, *supra* note 1, at 314-15.

34. See Tobias, *Re-evaluating*, *supra* note 1, at 315.

enactment would be unwise. The Montana district has proposed amendments of the local rules, and the judges are now considering the public comments on these proposed revisions.



