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CONTINUING FEDERAL JUSTICE REFORM IN MONTANA

Carl Tobias*

I. INTRODUCTION

I analyzed refinements in the experimentation which the Montana Federal District Court and other districts have conducted under the Civil Justice Reform Act (CJRA) of 1990 and I assessed certain proposed legal reforms which the Republican Party included in its Contract With America in the last issue of the *Montana Law Review*.¹ I reported that the Montana Federal District Court had prepared a set of local rule changes in light of the 1993 Federal Rules amendments and that the district had formally proposed those modifications for public comment.² I also reported that the United States House of Representatives had 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).³ I explained that none of those proposals would specifically alter the

* Professor of Law, University of Montana. I wish to thank Jim Hughes and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. I serve on the Ninth Circuit District Local Rules Review Committee and 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, *Refining Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 539 (1995) [hereinafter Tobias, *Refining*]. This essay is the most recent installment of a series of articles which document and analyze developments in federal civil justice reform in Montana. See Carl Tobias, *Re-evaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307 (1995) [hereinafter Tobias, *Re-evaluating*]; Carl Tobias, *Evaluating Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 449 (1994); 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, 437-51 (1991).

2. See Tobias, *Refining*, *supra* note 1, at 542-43; see also Tobias, *Re-evaluating*, *supra* note 1, at 314; United States District Court for the District of Montana, Proposed Amendments to Local Rules (Oct. 1994).

3. 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; see also Tobias, *Refining*, *supra* note 1, at 541-42.

CJRA, even though the measures might have important effects on civil justice reform.

The Montana Federal District Court recently finalized the proposed amendments in the local rules which became effective in September, 1995. Moreover, the Ninth Circuit Judicial Council has appointed a District Local Rules Review Committee (LRR) which is evaluating the local rules of the circuit's fifteen districts for consistency with, and duplication of, the Federal Rules of Civil Procedure and Acts of Congress. That Committee has correspondingly begun its review of the Montana District's procedures.

The Congress enacted, and has overridden President Bill Clinton's veto of, securities litigation reform legislation. The United States Senate passed a product liability reform bill, although it has not passed the AAA. The Congress has also enacted the Civil Justice Reform Act Amendment Act of 1995 that extends for a year the CJRA's deadlines for the Judicial Conference to tender a report to Congress, and the Federal Judicial Center to finish a study, on the demonstration program. This program requires five districts to experiment with differentiated case management (DCM) and with various expense and delay reduction procedures which the CJRA prescribes.⁴ These new developments in civil justice reform warrant assessment. This essay undertakes that effort.

The paper initially affords an update of relevant developments relating to civil justice reform in the United States and in the Montana Federal District Court. The essay stresses congressional enactment of securities litigation reform legislation, Senate passage of a product liability reform measure, the legislation that extends demonstration district experimentation, the Montana District's local rules amendments, and the Ninth Circuit Local Rules Review Committee efforts. The paper next offers a look into the future.

4. See Pub. L. No. 104-33, 109 Stat. 292 (1995); see also 28 U.S.C. § 473 (Supp. V 1993). The Western District of Michigan and the Northern District of Ohio must experiment with DCM and the Northern District of California, the Northern District of West Virginia and the Western District of Missouri must experiment with various techniques for decreasing expense and delay, including alternatives to dispute resolution (ADR). See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104, 104 Stat. 5089, 5097.

II. CIVIL JUSTICE REFORM UPDATE

A. *National Developments*

Very few new developments in federal civil justice reform nationally which implicate the district courts have transpired since I examined reform in the most recent issue of the *Montana Law Review*.⁵ Each of the thirty-four Early Implementation District Courts (EIDC), including the Montana district, and the other sixty courts that are not EIDCs have continued experimenting with techniques for reducing expense and delay and have continued to analyze those measures' efficacy.⁶

The House of Representatives passed the AAA, the SLRA and the PLLRA during early 1995.⁷ The Senate passed a bill governing securities litigation that was nearly identical and a measure covering products liability litigation that was somewhat analogous subsequently in 1995.⁸ These proposals could have important impacts on federal civil justice reform. Nonetheless, I accord the AAA and the PLLRA rather limited examination in this essay because it remains uncertain whether Congress will pass and whether President Clinton will sign either the PLLRA or the AAA.

The Attorney Accountability Act would alter Federal Rule of Civil Procedure 68's settlement offer requirement by providing for fee shifting in diversity cases and would modify Federal Rule of Evidence 702 by restricting expert testimony.⁹ The bill would also make stricter the 1993 amendment in Federal Rule of Civil Procedure 11 by deleting safe harbors, applying the revision to discovery, and mandating the imposition of sanctions which must be compensatory.¹⁰ The Senate has not passed this proposal.

The securities legislation requires a number of reforms in securities litigation. Most significant to the issues considered in this essay, the act imposes elevated pleading and special class

5. See Tobias, *Refining*, *supra* note 1, at 540-42.

6. All districts had to issue civil justice expense and delay reduction plans by December 1993. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5089, 5096.

7. I rely substantially in the remainder of this subsection on Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995); see also Tobias, *Refining*, *supra* note 1, at 541-42.

8. See S. 240, 104th Cong., 1st Sess. (1995); S. 565, 104th Cong., 1st Sess. (1995).

9. See H.R. 988, *supra* note 3, §§ 2-3; see also FED. R. CIV. P. 68; FED. R. EVID. 702.

10. See H.R. 988, *supra* note 3, § 4; see also FED. R. CIV. P. 11.

action requirements in securities cases and commands losers to pay prevailing parties' attorney's fees in some of those lawsuits.¹¹ The Senate passed a bill that resembled the SLRA in June, and a conference committee reached agreement in December, 1995. President Clinton vetoed the measure; however, both Houses of Congress overrode that veto in December.

The PLLRA would make numerous modifications in products liability law. For example, the bill would limit seller liability in a number of situations, sharply restrict punitive damages awards and cap awards of the damages.¹² The measure would also provide several defenses to products liability suits and impose a special Rule 11 governing frivolous products cases,¹³ while the proposal proscribes strict liability suits for commercial loss, includes a statute of repose, and restricts the liability of health care providers and drug manufacturers.¹⁴ In May, the Senate passed a bill which was so much more lenient than the House legislation that a conference committee was only recently named to attempt to reach compromise on the disparate versions.¹⁵

In the most recent issue of the *Montana Law Review*, I reported that several senators had introduced a bill which would have extended the deadline in the CJRA that required the Judicial Conference to tender to Congress by December 31, 1995 a report on the demonstration program.¹⁶ In October 1995, the Civil Justice Reform Act Amendment Act of 1995, which extended the demonstration program for another year, became law.¹⁷

B. Montana Developments

In March 1995, the Montana Federal District Court proposed revisions in its local rules and solicited public input on the proposals.¹⁸ Most of the suggested amendments were rather insignificant or implicated style, although a few were important and substantive. One change would have effectively reinstated

11. See H.R. 1058, *supra* note 3, § 101.

12. See H.R. 956, *supra* note 3, §§ 102, 201.

13. See H.R. 956, *supra* note 3, §§ 104-05.

14. See H.R. 956, *supra* note 3, §§ 101, 106, 202.

15. See S. 565, *supra* note 8.

16. See S. 464, 104th Cong., 1st Sess. (1995); see also Tobias, *Refining*, *supra* note 1, at 541.

17. Pub. L. No. 104-33, 109 Stat. 292 (1995); see also Margaret Sanner & Carl Tobias, *The Civil Justice Reform Act Amendment Act of 1995*, 164 F.R.D. (forthcoming Apr. 1996).

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

the automatic disclosure requirements that the district had adopted in April 1992.¹⁹ The new proposal also stated 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 37.²⁰

Another significant alteration involved provision for the equal assignment of civil cases with the opportunity for litigants to opt out and have Article III judges hear suits which were first assigned to magistrate judges.²¹ The proposal required that parties 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."²² The court sought public comments on the proposed revisions which were due in May.²³ The district made no changes in the two important procedures examined above and recently finalized the entire package of proposals, giving them an effective date of September 5, 1995.²⁴ Copies of the new local rules are available in the offices of the clerk of court.

The Ninth Circuit Local Rules Review Committee was established in 1994 under the auspices of the Ninth Circuit Judicial Council and the Chief District Judges Committee of that body.²⁵ The LRRC is charged with reviewing local procedures of the circuit's fifteen districts for consistency with the Federal Rules of Civil Procedure and with United States Code provisions.²⁶

The Committee has assigned initial responsibility for reviewing the procedures in each district to Committee members, law professors, court personnel and practitioners. One or two individ-

19. See 1995 Proposals, Rule 200-5, *supra* note 18, 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).

20. See 1995 Proposals, Rule 200-5(a)(4), *supra* note 18, at 19.

21. See *id.* at 2-3.

22. See *id.* at 3.

23. 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 (1995).

24. See United States District Court for the District of Montana, Order, Amendments to the Rules of Procedure of the United States District Court for the District of Montana (1995).

25. I rely substantially in the remainder of this subsection on Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995) and on my experience as a member of the LRRC.

26. See 28 U.S.C. § 332(d)(4) (1988 & Supp. V 1993); see also FED. R. CIV. P. 83. The 1995 amendment of Rule 83 also requires that local procedures not be duplicative of Federal Rules and Acts of Congress, and the LRRC is attempting to implement this requirement. See FED. R. CIV. P. 83.

uals in each district are reviewing for inconsistency and duplication all local rules and general orders which have the effect of local rules. Any rules which are found to be inconsistent or duplicative are being compiled and analyzed with explanations for the findings. The Committee will designate, but will not analyze, all potentially inconsistent and duplicative procedures that have been prescribed pursuant to the CJRA because that legislation may be read as granting authority to adopt inconsistent procedures²⁷ and because the statute, and procedures adopted thereunder, are scheduled to expire in 1997.²⁸

Once initial reviewers complete compilations of possibly inconsistent or duplicative procedures in specific districts, the Committee will consider and forward the compilations to each district's judicial officers for their responses. The Committee will then review the districts' responses and make recommendations regarding possible abrogation or modification of particular procedures to the Ninth Circuit Judicial Council. That entity will in turn decide whether to abolish or change the procedures.

I have responsibility for conducting the initial review in the Montana District. My research assistant and I began reviewing this Autumn the local rules which became effective in September. Chief Judge Hatfield has generously supplied copies of all general orders adopted by the district since 1982. We are planning to complete this initial review by early 1996. We shall forward the results of the review to the LRRC which will evaluate the report. Upon receipt of the review, the LRRC will analyze the review and will send it to the judicial officers of the Montana District for their response. Upon receipt of the judges' response, the LRRC will review it and make recommendations to the Judicial Council. The LRRC hopes to complete the entire review process by mid-1996.

27. See *Friends of the Earth v. Chevron Chem. Co.*, 885 F. Supp. 934 (E.D. Tex. 1995); see generally Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1995); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589 (1994).

28. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(2), 104 Stat. 5089, 5096.

III. A GLANCE INTO THE FUTURE

A. *National*

Each of the 94 districts will continue applying under the CJRA many procedures that are meant to reduce expense or delay in civil litigation. More definitive conclusions as to the measures' efficacy must await greater experimentation, particularly in the courts which are not EIDCs and which have been experimenting for less time. The congressional decision to extend the demonstration district experimentation means that the Federal Judicial Center, which is evaluating the program, and the Judicial Conference which must report to Congress on it, should take advantage of the additional time.

Congress ought to jettison the features of the AAA and products liability reforms which cover procedure and fee shifting because they will disrupt the ordinary, national process for amending rules or will inappropriately limit federal court access.²⁹ Should Congress not be convinced that the bills will have these effects or decide to proceed for other reasons, Congress must reject those provisions that will disrupt ongoing reform efforts, such as CJRA experimentation.

B. *Montana*

The Montana Federal District Court properly sought and considered public comment before it finalized proposed revisions in the local rules. The automatic disclosure amendment effectively reinstates the 1992 formulation with which judicial officers and federal court practitioners should be familiar.³⁰ The revision's inclusion of a sanctioning provision seems unnecessary and might be confusing.³¹ The 1993 revision in Federal Rule 37 specifically prescribes sanctions for disclosure violations,³² and the allusion in the local rule to Federal Rule 11 could lead to complications because Rule 11's 1993 revision includes numerous procedures which differ from those in Rule 37.³³ If the disclo-

29. For additional examination of this legislation and suggestions for treating it, see Tobias, *supra* note 7.

30. See *supra* note 19 and accompanying text; see also Tobias, *Re-evaluating*, *supra* note 1, at 314.

31. See *supra* note 20 and accompanying text.

32. See FED. R. CIV. P. 37.

33. See FED. R. CIV. P. 11. For example, the 1993 amendment of rule 11 includes a safe harbor.

sure rule fosters problems, the court should amend the provision or allow it to sunset in 1997.

The local rule revision modifying the opt-out provision which affords a twenty-day period for seeking assignment to an Article III judge should avoid difficulties posed by requests which were exercised rather late in a case after a magistrate judge had treated the suit to that point.³⁴ The Montana District should also continue cooperating with the LRRRC in its review of the court's procedures for possible inconsistency and duplication.

IV. CONCLUSION

All of the districts are continuing to experiment with expense and delay reduction procedures and assessing their efficacy. Congress has properly extended the deadlines for concluding the analysis of, and report on, experimentation in the demonstration districts, and this should improve their quality. Congress has passed securities litigation reform legislation and Congress may well enact additional legal reforms; however, passage would be inadvisable. The Montana District has finalized revisions in its local rules with which federal court practitioners must now be familiar, and the court is working closely with the Local Rules Review Committee in reviewing the district's local procedures.

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