2002

The Expiration of the Civil Justice Reform Act of 1990

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Recommended Citation
The Expiration of the Civil Justice Reform Act of 1990

Carl Tobias

Ever since the United States Congress passed the Civil Justice Reform Act of 1990 (CJRA), a minor mystery of federal court jurisprudence has been whether – and if so, precisely when – that significant and controversial legislation expired. The measure instituted unprecedented nationwide experimentation with procedures that lawmakers intended to decrease cost and delay in civil litigation, but the statute’s implementation additionally balkanized federal practice and procedure.

Several important phenomena contributed to this mystery. First, the legislation, as enacted initially, was unclear. The CJRA required that all ninety-four federal district courts promulgate civil justice expense and delay reduction plans not later than three years from the December 1990 date on which the legislation took effect, while simultaneously authorizing every district to experiment for seven years following this December 1990 effective date.

I wish to thank Christopher Bryant, Briant Platt, and Margaret L. Sanner for valuable suggestions; Angeline Garbett for processing this piece; and Jim Rogers for generous, continuing support. Errors that remain are mine.


2. See Patrick E. Longan, Congress, the Courts, and the Long Range Plan, 46 AM. U. L. REV. 625, 665-66 (1997) (observing that sunset provision of CJRA "merely permits each district to cease operating under its plan," and arguing that "Congress should require each district to cease using its individualized plan once the national implications of the experiments are clear") (emphasis added); Carl Tobias, Did the Civil Justice Reform Act of 1990 Actually Expire?, 31 U. MICH. J.L. REFORM 887 (1998) (arguing that Congress or Judicial Conference should resolve uncertainty surrounding sunset provision of CJRA by proclaiming expiration of CJRA).

date with approaches that each court believed would save cost and time. Nevertheless, the statute failed to provide specifically for expiration at the conclusion of the seven-year time frame that the legislation prescribed.

Second, an October 6, 1997 congressional enactment, which occurred several months before the December 1997 date upon which the statute ostensibly would expire, exacerbated the lack of clarity in the CJRA. The new legislation explicitly authorized indefinite continuation of the civil case reporting requirements that section 476 of the CJRA imposed. Moreover, the 1997 enactment expressly stated that six of the seven other sections in the CJRA would expire. These expiring provisions included section 472, prescribing the development and implementation of civil justice expense and delay reduction plans; section 473, describing the contents of those plans; section 474, providing for circuit court and United States Judicial Conference oversight of district court statutory effectuation; and section 475, requesting periodic district court assessments of CJRA implementation.


5. Civil Justice Reform Act of 1990 (codified as amended at 28 U.S.C. §§ 471-82 (1994)); see Longan, supra note 2, at 665 (arguing that CJRA's sunset provision is not strong enough, as it merely permits district courts to cease operating under local plans); Tobias, supra note 2, at 891 (analyzing whether CJRA actually expired).


7. See Act of Oct. 6, 1997 § 2 (adding to CJRA provision that requirements of 28 U.S.C. § 476 "shall remain in effect permanently"); see also 28 U.S.C. § 476 (requiring Administrative Office of the U.S. Courts to disclose publicly number and case names of all motions pending for longer than six months, of all bench trials submitted for longer than six months, and of all cases still pending after three years); 143 CONG. REC. S8528 (daily ed. July 31, 1997) (statement of Sen. Biden) (stating that "[t]his very effective reporting requirement will expire in December unless Congress acts"); Tobias, supra note 2, at 892-93 (discussing extension of section 476). See generally Charles Gardner Geyh, Adverse Publicity As a Means of Reducing Judicial Decision-Making Delay: Periodic Disclosure of Pending Motions, Bench Trials and Cases Under the Civil Justice Reform Act, 41 CLEV. ST. L. REV. 511 (1993) (arguing that perpetual continuation of section 476 is justified, as section 476 appears to have achieved desired effect of reducing time for resolution of motions, bench trials, and cases).


9. See 28 U.S.C. §§ 472-75 (explaining civil justice expense and delay reduction plans); Act of Oct. 6, 1997 § 2 (observing that sections 472-75 would remain in effect for seven years.
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also encompassed section 477, asking the Judicial Conference to create a model civil justice cost and delay reduction plan for use by the district courts; and section 478, calling for district courts to establish advisory groups, which would assist the judges in assembling these plans. However, the 1997 legislation did not mention the CJRA’s eighth section, section 471, the provision instructing district courts to adopt civil justice expense and delay reduction plans. There were multiple interpretations of Congress’s failure to address section 471 in the 1997 enactment while specifically enumerating all seven remaining sections of the 1990 statute. Perhaps the most plausible construction was that legislators intended for section 471 to remain in effect and not to expire.

Senators and representatives now have clarified this uncertainty by explicitly providing in section 206 of the Federal Courts Improvement Act of 2000 for section 471 of the CJRA to expire. A rule revision proceeding that the United States Supreme Court completed in 2000 suggests that the Justices may have anticipated Congress’s action or may have considered that the statute already had expired. In the 2000 amendments to the Federal Rules of Civil Procedure, the Supreme Court omitted the express authorization it had accorded in 1993, which had allowed the federal district courts to modify or


11. See Act of Oct. 6, 1997 § 2 (failing to mention section 471); 28 U.S.C. § 471 (requiring district courts to implement civil justice expense and delay reduction plans); see also Tobias, supra note 2, at 892-93 (discussing omission of section 471 from CJRA amendment).

12. See Longan, supra note 2, at 665 (observing that sunset provision permits, but does not require, courts to cease operating under CJRA plans); Tobias, supra note 2, at 892 (observing that omission of section 471 could evidence congressional intent for section 471 not to expire). But see Biden, supra note 4, at 1294 (stating that at termination of experimental period, uniformity will return to federal judicial system); cf. Tobias, supra note 2, at 893 (affording arguments that suggest section 471 expired in 1997).


to refuse to apply certain important federal discovery provisions.15 The Advisory Committee Notes accompanying the 2000 federal rules revisions concomitantly admonished that the Supreme Court had withdrawn the permission for district divergence from the federal discovery rules in an effort to rectify or to ameliorate the national inconsistency in procedure that the 1993 amendment and the CJRA had created.16

Many of the above developments have increased conflicts substantially between local procedural mandates and numerous applicable federal rules, especially those governing civil procedure, and have enhanced disuniformity among the ninety-four federal district courts. For example, a significant number of cost- and time-saving measures that districts inserted in their civil justice expense and delay reduction plans contravened analogous Federal Rules of Civil Procedure. Courts premised the adoption and enforcement of inconsistent local strictures on the CJRA, which encouraged districts to employ mechanisms that would conserve resources and time, and on the 1993 federal rules revisions, which empowered and invited courts to reject or change several federal discovery amendments.17 A majority of districts

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16. *See Court Rules, supra* note 14, at 384 (observing that "[t]he Rule 26(a)(1) initial disclosure provisions are amended to establish a nationally uniform practice"); *see also id.* at 391 (observing that "[a] subdivision (b)(2) is amended to remove the previous permission for local rules that establish different presumptive limits on these discovery activities").

17. *See 28 U.S.C. § 471 (1994)* (requiring each district court to implement civil justice expense and delay reduction plan); 1993 Amendments, *supra* note 15, at 629 (observing that 1993 Federal Rules' authorization of local variations was meant to accommodate CJRA provisions); *see also* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal
accepted these invitations by eschewing or by modifying the federal proviso that covered mandatory prediscovery, or automatic disclosure. Other courts imposed related local discovery commands and additional requirements that departed from analogous federal rules or acts of Congress. The CJRA and the 1993 federal rules amendments also effectively suspended the nascent implementation of responsibilities for promoting uniformity imposed on district courts and on circuit judicial councils by the Judicial Improvements and Access to Justice Act (JIA) of 1988 as well as by Federal Rule of Appellate Procedure 47, Federal Rule of Bankruptcy Procedure 9029, Federal Rule of Civil Procedure 83, and Federal Rule of Criminal Procedure 57. The JIA

Courts, 45 Duke L.J. 929, 1006 (1996) (arguing that Judicial Conference should revise Federal Rules of Civil Procedure to eliminate all authorizations for local court deviations from federal rules); Robel, supra note 1, at 1455-64 (discussing scope of local rules that CJRA authorizes); supra notes 4 and 15 (discussing implementation of CJRA).

18. See Donna Stienstra, Fed. Judicial CTR., Implementation of Disclosure in United States District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, at 5, reprinted in 182 F.R.D. 304, 310 (1998) (reporting that forty-five district courts had opted out of Rule 26(a)(1), seven of remaining districts had significantly revised rule). Compare D. Mont. R. 200-S(a) (mandating initial discovery requirements different from corresponding federal rule), and W.D. Wash. CR 26 cmt. (observing that Western District of Washington has chosen to opt out of analogous federal rule requiring mandatory initial disclosure of certain information), with 1993 Amendments, supra note 15, at 606-12 (amending federal discovery rule to require mandatory initial disclosure of certain information, except as provided by local rule). See generally Tobias, supra note 1, at 1614 (remarking on various reactions, largely negative, of district courts to Rule 26(a)(1)).

19. See Carrington, supra note 17, at 930 (observing that Eastern District of Texas's rules are "substantially more coercive" than Federal Rules of Civil Procedure). Compare Fed. R. Civ. P. 68 (describing offer of judgment local rule), with U.S. District Court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan art. 6(9) (1991) (describing offer of judgment and deviating from Rule 68 in following ways: attorney's fees are incurred if final judgment is less than amount of offer by 10%, rather than less than or equal to amount of offer; attorney's fees accrue upon rejection of offer, rather than on making of offer, and government may opt out of compliance with this rule); compare 28 U.S.C. § 636 (1994) (discussing jurisdiction, powers, and temporary assignment of magistrate judges and requiring consent to be given freely), with U.S. District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan 3-4 (1991) (requiring consent to magistrate judge jurisdiction unless litigant gives timely notice of objection to jurisdiction). See Carrington, supra note 17, at 987-96 (arguing that CJRA does not authorize courts to change requirements in Rule 68); Robel, supra note 1, at 1452-54 (observing potential clash between CJRA and Federal Rules of Civil Procedure, and arguing that CJRA neither compels nor authorizes local rules inconsistent with Federal Rules of Civil Procedure); Tobias, supra note 3, at 1416-22 (discussing CJRA's suggestion that courts may adopt local rules contrary to Federal Rules of Civil Procedure and detailing courts' implementation of such rules).

and the respective federal rules requested that the districts and the councils undertake periodic review of local provisions for consistency and redundancy with federal rules and statutes, and that they abolish or alter any local measures that were conflicting or repetitive. 21 The districts and councils seemingly discontinued oversight because they found little reason to scrutinize inconsistent strictures that the CJRA and the 1993 Federal Rules of Civil Procedure revisions ostensibly authorized and because the JIA budgeted no funds for performing review. All of the developments surveyed, therefore, have made federal civil practice more fragmented now than at any time since the Supreme Court’s 1938 adoption of the original Federal Rules of Civil Procedure, 22 whose central purposes were the institution and maintenance of a national, uniform procedural regime. 23


22. 1 F.R.D. LV (1938) (setting forth text of Federal Rules of Civil Procedure as promulgated in 1938); see Linda S. Mullenix, The Counter-Reformation in Procedural Justice, 77 MINN. L. REV. 375, 380 (1992) (remarking that CJRA is "at war with the concept of uniform procedural rules" adopted in 1938 by Federal Rules of Civil Procedure); Robel, supra note 1, at 1448 (stating that "if. . . courts have won the power they believe the CJRA granted them, the uniformity and simplicity that distinguish federal practice under the national procedural rules are threatened more seriously than at any time since the 1938 enactment of the Federal Rules"); Carl Tobias, Civil Justice Reform Sunset, 1998 U. ILL. L. REV. 547, 548 (1998) (stating that "the federal rules' fundamental tenets, such as uniformity and simplicity, are now more eroded than at any time since the Supreme Court first promulgated those rules in 1938").

Several significant consequences follow from lawmakers' decision to pass section 206 of the Federal Courts Improvement Act of 2000, a proviso which clarifies that the 1990 civil justice reform legislation has expired.\textsuperscript{24} One result is that the federal district courts no longer may rely on the CJRA as a source of power, allowing them to prescribe local procedures that conflict with corresponding federal rules or with United States Code provisions. Of course, this conclusion derives additional support from the 2000 federal rules revisions, which expressly rescinded authorization for local discovery mandates that diverged from their federal counterparts.\textsuperscript{25} All ninety-four courts, accordingly, must eliminate any local measures that they had instituted under the CJRA.\textsuperscript{26} Most courts now have abrogated these strictures. For instance, the Eastern District of California specifically withdrew local discovery requirements that it had applied pursuant to the 1990 legislation or to the 1993 federal rules amendments before the December 2000 date on which the 2000 federal rules revisions became effective.\textsuperscript{27} The Central District of California, the District of Nevada, and the Southern District of New York concomitantly repealed similar local provisos on December 1, 2000,\textsuperscript{28} while the Northern District of California and the District of Montana rescinded related local commands during 2001.\textsuperscript{29}


\textsuperscript{25.} See COURT RULES, supra note 14, at 385 (observing that "[t]he amendments remove the authority to alter or opt out of the national disclosure requirements by local rule, invalidating . . . local rules . . . that purport to create exemptions from – or limit or expand – the disclosure provided under the national rule").

\textsuperscript{26.} See id. (observing that 2000 amendments invalidate local rules contradictory to Federal Rules of Civil Procedure).

\textsuperscript{27.} See E.D. CAL. R., available at http://207.41.18.73/caed/staticother/page_459.htm (last visited Apr. 17, 2002) (showing elimination of local rule 26-252, which set forth local limitations on discovery and which district court had promulgated and had enforced pursuant to 1993 federal rules amendments).


\textsuperscript{29.} See Changes to the Local Rules of the Court (N.D. Cal. 2001), available at http://www.cand.uscourts.gov (last visited Apr. 17, 2002) (releasing notice of changes in local rules "to bring them in conformity to the recent modifications in the Federal Rules of Civil Proce-
The federal district courts and the circuit judicial councils also should revitalize and thoroughly effectuate duties that the JIA, as well as the federal appellate, bankruptcy, civil, and criminal rules, imposed by scrutinizing all local procedures for uniformity and redundancy with federal rules and statutes and by changing any local provisions that conflict or are repetitious. The Civil Justice Reform Act of 1990 and the 1993 federal rules amendments had essentially suspended implementation of these responsibilities, which the districts and councils should comprehensively effectuate as soon as practicable. Senators and representatives might correspondingly appropriate sufficient resources for the district courts and the councils to discharge those important duties. Moreover, Congress or the Supreme Court should seriously consider prescribing a 1991 proposed revision to Federal Rule of Civil Procedure 83, as well as incorporating this suggested modification into the analogous federal appellate, bankruptcy, and criminal provisos that pertain to local requirements. The decade-old recommended amendment would have authorized district courts to experiment for a five-year period with promising, inconsistent local measures if the districts secured approval from the Judicial Conference. The Judicial Conference Committee on Rules of Practice and Evidence, which is one of the principal rule revision entities, withdrew that
1991 proposal, apparently out of deference to contemporaneous testing under the 1990 civil justice reform legislation and has not subsequently revived this approach, which would balance the needs for expanding experimentation and for enhancing uniformity.  

A provision in the Federal Courts Improvement Act of 2000 clearly states that the CJRA has officially expired. If those individuals and institutions responsible for federal practice and procedure implement the suggestions proffered above, they probably would improve practice by increasing consistency between local requirements and federal rules and statutes.
