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# Reforming Common Sense Legal Reforms

Carl W. Tobias

*University of Richmond*, [ctobias@richmond.edu](mailto:ctobias@richmond.edu)Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>Part of the [Civil Procedure Commons](#)

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## Reforming Common Sense Legal Reforms

CARL TOBIAS\*

The Contract With America figured prominently in the Republican Party's victories in the 1994 congressional races. During the opening days of the 104th Congress, therefore, approximately one hundred sponsors introduced the Common Sense Legal Reforms Act (CSLRA), which embodied several measures that comprised the Contract's ninth precept.<sup>1</sup> The only constituent of this package of proposals which actually became law was the Private Securities Litigation Reform Act (PSLRA).<sup>2</sup> Both Houses of Congress did pass products liability reform bills but lacked the requisite votes to override President Bill Clinton's veto.<sup>3</sup> The House of Representatives approved the Attorney Accountability Act (AAA), which would have modified the substantial 1993 amendment in Federal Rule of Civil Procedure 11 governing sanctions; Federal Rule 68 covering offers of judgment; and an evidentiary requirement that the Supreme Court interpreted in 1993.<sup>4</sup>

The Republican Party captured additional seats in the Senate and retained a slight majority in the House of Representatives in the 1996 elections; however, the Grand Old Party has insufficient votes to override vetoes which might be exercised by President Clinton, who won re-election. It was, thus, unclear that Republicans would reintroduce a products liability bill or the AAA, or would offer other substantive or procedural reform measures. Although the leaders of both political parties made conciliatory overtures immediately after the 1996 elections,

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\* Professor of Law, University of Montana. I wish to thank Peggy Sanner and Hank Waters for valuable suggestions; Cecelia Palmer and Charlotte Wilmerton for processing this piece; as well as Ann and Tom Boone and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. See H.R. 10, 104th Cong. (1995).

2. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (to be codified in scattered sections of 15 U.S.C.) [hereinafter PSLRA].

3. See H.R. 956, 104th Cong. (1995); S. 565, 104th Cong. (1995); see also John E. Yang, *House Fails to Override Liability Veto*, WASH. POST, May 10, 1996, at A23.

4. See H.R. 988, 104th Cong. (1995); see also FED. R. CIV. P. 11(c); FED. R. CIV. P. 68; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Republican members introduced several important legal reform proposals at the outset of the 105th Congress. These measures would individually and synergistically have important impacts on considerable federal civil litigation and the civil justice system. For example, the proposals' sponsors apparently introduced the measures with minimal understanding of how they could affect several significant, continuing public and private reform efforts, most notably the Civil Justice Reform Act (CJRA) of 1990 which is scheduled to sunset in 1997.

The reforms' passage, therefore, might have numerous adverse impacts, such as further fragmenting the already fractured character of federal civil procedure. Some of the proposals' strictures could even have effects opposite from those which sponsors intended and those expressly prescribed in the CJRA by, for instance, increasing cost and delay in civil litigation. The new measures, thus, may be symptomatic of much that is presently wrong with the civil justice process and might exacerbate certain problems. Notwithstanding several of the complications enumerated, Congress's composition apparently affords opportunities for bipartisan cooperation which could lead to the adoption of legal reforms. The above factors mean that the recently introduced proposals deserve analysis. This Article undertakes that effort.

This Article's first section describes the background of the new legal reforms, emphasizing those ongoing public and private initiatives with which important aspects of the recent measures may conflict. The second section descriptively evaluates the substantive and procedural provisions of the PSLRA and the latest proposals and examines the detrimental impacts which these strictures may have on continuing reform efforts, particular cases, and the civil justice system.

This section determines that numerous requirements in the measures alone and together could adversely affect plaintiffs and parties with limited resources or power, such as civil rights litigants by, for example, restricting their access to federal court. The proposals individually and in combination might also have deleterious impacts on the civil justice process. They may conflict with ongoing reform endeavors, and increase complexity and disuniformity in federal civil procedure, which will correspondingly impose greater expense and delay.

The third section, accordingly, offers recommendations for the future, which principally involve attempts to resolve problems that the recent measures present. These suggestions primarily call upon Congress to reject the AAA and the products liability proposal or delay passage of their prescriptions which would have the disadvantageous effects delineated above while rescinding, or discontinuing implementa-

tion of, the PSLRA's provisions that are having those impacts. If Congress believes that the two new reforms' effectuation will not have, and that the PSLRA has not had, detrimental effects on continuing initiatives, considerable civil litigation, or the civil justice system, or if it decides to proceed for different reasons, Congress must at least evaluate other possibilities. For instance, Congress should attempt to harmonize the proposals' requirements with ongoing reform efforts, namely the CJRA which may expire soon.

## I. THE ORIGINS AND DEVELOPMENT OF LEGAL REFORMS

Those legal reforms that constitute the backdrop against which the sponsors of the recent measures drafted and introduced the proposed legislation require relatively thorough examination in this essay, even though their origins and development have been rather comprehensively evaluated elsewhere.<sup>5</sup> Comparatively extensive treatment is warranted because most of the earlier reforms have lengthy, complicated histories, and these enhance comprehension of the recent proposals, especially by showing how legislators who introduced them apparently did so with minimal appreciation of the prior efforts. This section mainly explores procedural reforms, by initially examining the processes for promulgating and amending federal civil procedures and implicating federal civil justice reform, and secondarily considers substantive reforms, by evaluating initiatives relating to products liability law.

### A. *Procedural Reforms*

#### 1. *Processes for Promulgating and Amending Federal Procedures*

Congress adopted the Rules Enabling Act of 1934, which empowered the Supreme Court to promulgate rules of practice for civil litigation in the federal district courts, after years of controversial discussion.<sup>6</sup> The Court named the original Advisory Committee on the Civil Rules (Advisory Committee) that consisted of fourteen practicing attor-

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5. See, e.g., Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Act*, 46 STAN. L. REV. 1589 (1994).

6. See Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version at 28 U.S.C. §§ 2071-2077 (1994)). See generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

neys and law faculty during 1935.<sup>7</sup> This group concluded its draft of the Federal Rules of Civil Procedure in 1937. The Court subscribed to the requirements essentially as tendered, and the strictures took effect during 1938.<sup>8</sup> The Committee intended to draft procedures which would be simple, uniform, and trans-substantive and which would promote prompt, economical, and merit-based resolution of civil disputes.<sup>9</sup> The Federal Rules required that all federal district courts employ the same procedures;<sup>10</sup> however, Rule 83 authorized each district to prescribe local procedures, which could erode the uniform, simple procedural scheme which the drafters envisioned.<sup>11</sup>

The Federal Rules appeared to function effectively for the initial three decades after their adoption,<sup>12</sup> but several developments fostered increasing dissatisfaction with the procedures by the mid-1970s. Numerous judges and practitioners and a few commentators asserted that the federal courts were encountering a litigation explosion in which lawyers and litigants were pursuing substantial numbers of suits, too many of which lacked merit.<sup>13</sup> Certain judges and attorneys were troubled by abuse of the civil justice system and suggested that courts sanction those who perpetrated abuse, while critics claimed that the uniform, simple procedural regime embodied in the Rules encouraged these problems.<sup>14</sup> A number of observers also expressed concern about

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7. See, e.g., Subrin, *supra* note 6, at 970-73; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272-73 (1989).

8. See, e.g., Subrin, *supra* note 6, at 970-93; Tobias, *supra* note 7, at 273.

9. See, e.g., Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986); Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649-51 (1981).

10. See, e.g., Subrin, *supra* note 9, at 1650; Tobias, *supra* note 7, at 274-75.

11. See FED. R. CIV. P. 83 (authorizing districts to adopt local rules that are not inconsistent with the Federal Rules). That restriction has been honored in the breach. See 1985 amendment of FED. R. CIV. P. 83, advisory committee's note.

12. See Symposium, *The Federal Rules of Civil Procedure*, 58 COLUM. L. REV. 435 (1958). See generally Resnik, *supra* note 9, at 516; Tobias, *supra* note 7, at 277-78.

13. See, e.g., Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 23 (A. Leo Levin & Russell Wheeler eds., 1979); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE, *supra*, at 211-12; see also Tobias, *supra* note 7, at 287-89 (reviewing debate over litigation explosion).

14. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Scalia, J., dissenting); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984).

complications attributable to the proliferation of local procedures.<sup>15</sup> Some of these strictures, an overwhelming majority of which federal districts have adopted since 1975, conflicted with the Federal Rules of Civil Procedure, requirements in the United States Code, or local provisions in additional federal districts.

The Judicial Conference of the United States, which is the federal courts' policymaking arm, invoked several responses to these concerns. The Conference orchestrated promulgation of the 1983 revisions to Federal Rules 7, 11, 16, and 26, which were meant to be an integrated package that would expand lawyers' duties as officers of the court and increase judicial control over civil litigation, especially in the pretrial process.<sup>16</sup> Rules 16 and 26 respectively enhanced courts' power during pretrial conferences and discovery.<sup>17</sup> The revisions authorized judges to impose sanctions for the Rules' violations, while Rule 11 commanded judges to sanction those who did not perform reasonable prefilings inquiries or who filed inadequate papers.<sup>18</sup>

The Judicial Conference responded in two ways to the complications presented by local procedural proliferation. The Conference sponsored Rule 83's revision that permitted districts to adopt or revise local rules, only after affording public notice and opportunity for comment, and prescribed individual judges' standing orders which contravened the Federal Rules or local rules.<sup>19</sup> The Conference also established the Local Rules Project which collected and evaluated 5000 local rules, many of which conflicted with the Federal Rules, and numerous additional local requirements that governed practice in the districts.<sup>20</sup>

A number of judges, lawyers, and writers evinced mounting dissatisfaction with the national rule revision process, and congressional ac-

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15. See, e.g., N.D. CAL. R. 235-7, reprinted in Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 776-77 & n.30 (1981). See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

16. See Order Amending Federal Rules of Civil Procedure, 461 U.S. 1097 (1983) [hereinafter 1983 Order]; Subrin, *supra* note 9, at 1650. See generally ARTHUR R. MILLER, *THE 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY* (1984).

17. See 1983 Order, 461 U.S. at 1097.

18. See *id.*

19. See FED. R. CIV. P. 83.

20. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PROCEDURE 1 (1989); see also Daniel R. Coquillette et al., *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62 (providing summary of Local Rules Project).

tivity probably reflected this concern.<sup>21</sup> During 1973, Congress intervened in that process by passing legislation which replaced the Federal Rules of Evidence that the Supreme Court had promulgated, thus vitiating much work of Judicial Conference committees.<sup>22</sup> During 1974, Congress postponed for one year the date on which revised Federal Rules of Criminal Procedure were to become effective.<sup>23</sup> In the 1980s, Congress altered the Court's amendment of Federal Rule of Civil Procedure 4.<sup>24</sup>

Five decades after the initial Federal Rules of Civil Procedure took effect, Congress enacted the Judicial Improvements Act (JIA) of 1988. The JIA was meant to modernize and open the national and local procedural amendment processes.<sup>25</sup> The legislation was intended to improve federal rule revision and to revitalize, and restore the primacy of, the national rule amendment process by opening it to enhanced public participation, essentially assimilating the procedures to notice-comment rulemaking under the Administrative Procedure Act.<sup>26</sup> Congress concomitantly attempted to reduce local procedural proliferation by imposing requirements on the promulgation and modification of local procedures which were analogous to those for Federal Rule revision.<sup>27</sup> The legislation also required that every circuit judicial council periodically review for consistency all local procedures and abrogate or change those considered to conflict.<sup>28</sup>

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21. See Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976); see also WINIFRED R. BROWN, JUDICIAL CONFERENCE OF THE U.S., FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES (1981); Tobias, *supra* note 5, at 1598.

22. See H.R. REP. NO. 100-889, at 27-29 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5987-89; see also Pub. L. No. 93-595, 88 Stat. 1926 (1974). In 1993, an Advisory Committee on Federal Rules of Evidence was reactivated. See 150 F.R.D. 330 (1994); see also 147 F.R.D. 282 (1993).

23. See Pub. L. No. 93-361, 88 Stat. 397 (1974); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579 (1975). Congress has since frequently intervened to "delay the effective date of, disapprove, or modify rules and amendments." H.R. REP. NO. 100-889, at 27, reprinted in 1988 U.S.C.C.A.N. 5982, 5987.

24. See Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983) (codified as amended at 28 U.S.C. § 2071 (1994)); see also Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 NOTRE DAME L. REV. 733 (1988) (analyzing prospects for Rule 4 reform).

25. See Tobias, *supra* note 5, at 1599; see also 28 U.S.C. §§ 2071(b), 2073 (1994); H.R. REP. NO. 100-889, at 27, reprinted in 1988 U.S.C.C.A.N. 5982, 5987. See generally Mullenix, *supra* note 5, at 830-32.

26. See 5 U.S.C. §§ 551-559 (1994); see also 28 U.S.C. §§ 2071(b), 2073 (1994).

27. See 28 U.S.C. § 2071 notes (1994). Districts were to appoint advisory committees and to apply public notice and comment procedures.

28. See *id.* § 332(d)(4); see also *id.* § 2071(c)(1).

The initial test of the JIA's changes in the national rule revision process led to adoption of the 1993 Federal Rules revisions.<sup>29</sup> I emphasize Rule 11's 1983 amendment because it became the most controversial modification in the Federal Rules' history and because one of the recent reform proposals would substantially change the 1993 amendment, essentially reinstituting the 1983 version.<sup>30</sup> Rule 11's 1983 revision proved controversial when many lawyers seized on confusion regarding the amendment's primary purpose and invoked the Rule to seek recovery of attorneys' fees, while numerous judges granted those requests and made attorney-fee shifting the preferred sanction.<sup>31</sup> The pursuit of compensation encouraged much costly, unnecessary satellite litigation unrelated to the merits of lawsuits,<sup>32</sup> as did the revision's ambiguous wording and inconsistent judicial construction.<sup>33</sup> Lawyers also used Rule 11 for tactical purposes, such as threatening less powerful parties in ways that were meant to discourage their avid pursuit of litigation.<sup>34</sup> These considerations disadvantaged, and even chilled the enthusiasm of, resource-poor litigants, such as civil rights plaintiffs.<sup>35</sup> The 1983 revision apparently offered certain advantages, such as deterring the filing of frivolous cases.<sup>36</sup>

The national rule revisors, especially the Advisory Committee, which had primary responsibility for developing proposals for changes in the Rules, seemed to effectuate faithfully and efficaciously the JIA's

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29. See Supreme Court of the United States, Amendments to the Federal Rules of Civil Procedure and Forms, reprinted in 146 F.R.D. 401 (1993) [hereinafter 1993 Amendments].

30. Rule 26's 1993 revision to impose automatic disclosure was important. See *infra* notes 49-53. Rule 4 was also substantially changed. See *supra* note 24 and accompanying text.

31. See ELIZABETH WIGGINS ET AL., FEDERAL JUDICIAL CTR., RULE 11: FINAL REPORT TO ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES § 1B, at 9 (1991) (stating that attorneys' fees were sanction of choice); Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986) (discussing confusion).

32. See, e.g., Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1927-28 (1989); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 514 (1988-89).

33. See, e.g., Burbank, *supra* note 32, at 1930-31; Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1776 (1992).

34. See, e.g., Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 876-77 (1992); see also Nelken, *supra* note 31, at 1327, 1340.

35. See, e.g., Nelken, *supra* note 31, at 1327 (suggesting that Rule 11 is invoked, and sanctions levied, against these plaintiffs more often than any class of civil litigant); Tobias, *supra* note 32, at 503-06; Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988).

36. See, e.g., Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479 (1990); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988).



strictures relating to the revision process. The Committee was responsive to public criticism of its draft proposals and apparently made good faith efforts to improve them.<sup>37</sup> The Advisory Committee wrote numerous drafts, conscientiously consulted public input, and attempted to develop the fairest, clearest change conceivable.<sup>38</sup> Indeed, the Committee's efforts constitute the type of open, responsive amendment process and rational decisionmaking which Congress contemplated when modifying the rule revision process in the 1988 Act.<sup>39</sup> Notwithstanding the Committee's laudable efforts, many individuals and groups continued to criticize the 1993 revision.<sup>40</sup> For instance, Supreme Court Justice Antonin Scalia, who dissented from the Supreme Court's transmittal of the amended Rule, claimed that it would "eliminate a significant and necessary deterrent to frivolous litigation."<sup>41</sup>

The 1993 amendment significantly improved the 1983 revision. The 1993 modification has reduced incentives to invoke Rule 11 improperly and concomitantly decreased cost and delay attributable to satellite litigation. For example, the 1993 version has a safe harbor for parties that purportedly contravene the Rule, entrusts sanctioning for violations of the provision to judicial discretion, and severely circumscribes those situations in which judges can levy the sanction of attorney's fees.<sup>42</sup> The 1993 revision was a balanced, efficacious compromise, given the pragmatic restraints on rule revision, such as the need to satisfy constituencies as diverse as the federal bench and plaintiffs' and defense attorneys.<sup>43</sup>

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37. It even inverted the normal rule revision sequence for Rule 11 by requesting public comment before drafting a proposal. See Committee on Rules of Practice and Procedure of the Judicial Conf. of the U.S., Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, 131 F.R.D. 344, 345 (1990).

38. See Committee on Rules of Practice and Procedure of the Judicial Conf. of the U.S., Proposed Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 419, 460 (July 1992) [hereinafter 1992 Proposed Amendments]; see also Tobias, *supra* note 34, at 859-65; Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 IND. L.J. 171 (1994) [hereinafter Tobias, 1993 Revision].

39. See *supra* notes 25-26 and accompanying text. See generally Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993).

40. See Tobias, 1993 Revision, *supra* note 38, at 186-88.

41. 1993 Amendments, *supra* note 29, at 507-10 (dissenting statement).

42. See FED. R. CIV. P. 11(c), reprinted in 146 F.R.D. at 421-23; see also Tobias, *supra* note 33, at 1783-88. Anecdotal evidence suggests that the amendment has had its intended effects. See Laura Duncan, *Sanctions Litigation Declining*, A.B.A. J., Mar. 1995, at 12.

43. Since 1990, the Committee has been drafting a major revision of Rule 23 governing class actions and recently issued a draft. See Committee on Rules of Practice and Procedure of the Judicial Conf. of the U.S., Preliminary Draft of Proposed Amendment to Federal Rule of

The strictures respecting local rule revision in the 1988 JIA have received rather limited implementation.<sup>44</sup> Practically all of the ninety-four districts have appointed local advisory committees. Numerous courts have formalized processes for adopting and revising local procedures and have opened them to public involvement, while some districts have prescribed new, or amended existing, local procedures pursuant to the processes. A few courts have implemented the JIA's mandates relating to local procedural proliferation.<sup>45</sup> For example, a tiny number of districts have attempted to restrict local procedures, and virtually none have abrogated or changed conflicting local requirements. The Seventh and Ninth Circuit Judicial Councils may be the only ones which have abolished or modified local district procedures. Several factors probably explain this implementation. Perhaps most significant, civil justice reform initiatives, primarily instituted by Congress in the 1990 CJRA, essentially suspended the efforts of local rules committees and circuit judicial councils which might have treated local proliferation.

## 2. Federal Civil Justice Reform

Congress passed the CJRA of 1990 out of increasing concern about expense and delay in civil litigation.<sup>46</sup> The measure mandated that each district prescribe a civil justice expense and delay reduction plan, which might include eleven statutorily provided procedures, primarily governing judicial case management, discovery and alternatives to dispute resolution (ADR), and additional techniques which could save cost or time.<sup>47</sup> The CJRA implicitly encouraged districts to apply measures which conflict with the Federal Rules, provisions in the United States Code, and strictures in other courts.<sup>48</sup> Numerous districts adopted vary-

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Civil Procedure 23, reprinted in 167 F.R.D. 523, 535 (1996). See generally Symposium, *The Institute of Judicial Administration Research Conference on Class Actions*, 71 N.Y.U. L. REV. 1 (1996).

44. I rely substantially in this paragraph on Tobias, *supra* note 5, at 1604-06, and Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995).

45. See Tobias, *supra* note 5, at 1604-06.

46. See *id.*; 28 U.S.C. §§ 471-482 (1994).

47. See 28 U.S.C. § 473 (1994). Districts adopted plans by December 1993 and then experimented. See *id.* § 471 notes. The CJRA also created new entities, circuit review committees, to monitor district implementation and assigned the Judicial Conference similar duties. See *id.* § 474; see also Tobias, *supra* note 15, at 1406-11.

48. See 28 U.S.C. § 473 (1994); see also *id.* § 2071 (requiring local rules to be "consistent with Acts of Congress" and Federal Rules). See generally Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996); Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447 (1994).

ing combinations of the prescribed procedures, and some courts applied additional measures pursuant to the twelfth open-ended provision. For example, quite a few districts relied on the enumerated prescriptions, particularly those governing discovery, to adopt inconsistent local procedures which implemented automatic disclosure, a novel and controversial discovery mechanism.<sup>49</sup>

Experimentation with disclosure became especially troubling because the national rule revisors were simultaneously proposing an amendment to Federal Rule 26 which would have imposed disclosure nationwide.<sup>50</sup> The revision entities eventually prescribed a Federal Rule amendment which was meant to accommodate CJRA experimentation by allowing all ninety-four districts to alter the provision or to reject it.<sup>51</sup> Because Congress did not change the revision transmitted and many districts had apparently failed to plan for other contingencies, much confusion arose.<sup>52</sup> Districts adopted numerous variations of disclosure, and some courts eschewed it; these developments have increased inconsistency, expense, and delay.<sup>53</sup>

The Eastern District of Texas most boldly and expressly asserted its authority to promulgate conflicting local procedures by proclaiming that, insofar as the "Federal Rules of Civil Procedure are inconsistent with [the Court's] Plan, the Plan has precedence and is controlling."<sup>54</sup> The district adopted and held valid against challenge a settlement offer provision which conflicted with Rule 68.<sup>55</sup>

The problems that arose when all ninety-four districts adopted a broad array of disparate procedures were exacerbated because many judges have inconsistently interpreted the provisions, and some did not

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49. See, e.g., U.S. DIST. & BANKR. COURT FOR THE DIST. OF IDAHO, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 10-11 (Dec. 19, 1991); U.S. DIST. COURT FOR THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4-5 (Dec. 17, 1991).

50. See Committee on Rules of Practice and Procedure of the Judicial Conf. of the U.S., Proposed Amendments of Federal Rules of Civil Procedure, reprinted in 137 F.R.D. 53, 87-88 (1991) [hereinafter 1991 Proposed Amendments]; see also Tobias, *supra* note 5, at 1611.

51. See 1993 Amendments, *supra* note 29, at 431; see also Tobias, *supra* note 5, at 1612.

52. See Tobias, *supra* note 5, at 1612-14.

53. See *id.* at 1614-15.

54. U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9 (Dec. 20, 1991).

55. See *id.* at 8; see also *Friends of the Earth v. Chevron Chem. Co.*, 885 F. Supp. 934 (E.D. Tex. 1995) (upholding validity of Civil Justice Expense and Delay Plan procedure adopted under the CJRA, despite the fact that it differs from the Federal Rules). But see *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261 (5th Cir. 1997) (invalidating local attorney fee-shifting rule adopted under the CJRA because CJRA did not authorize it). See generally Carrington, *supra* note 48.

apply certain measures which their courts had prescribed.<sup>56</sup> Lawyers and litigants have also encountered problems finding, comprehending, and complying with the relevant local requirements.<sup>57</sup> These developments, particularly the increasingly complicated and disuniform nature of federal civil procedure, have apparently increased cost and delay in civil litigation. This has been true for most attorneys and parties, but it has especially disadvantaged those with few resources or those that litigate in multiple districts.<sup>58</sup> The developments also show how the 1990 CJRA's implementation essentially suspended effectuation of those aspects of the 1988 JIA which were meant to treat local procedural proliferation.<sup>59</sup> For example, circuit judicial councils might have been reluctant to scrutinize, much less abrogate, conflicting local strictures which the 1990 statute seemed to authorize.<sup>60</sup> Indeed, the Sixth Circuit Council suspended its review of local rules pending the receipt of greater guidance from Congress, the Judicial Conference, or case law on whether the CJRA superseded the Federal Rules.<sup>61</sup>

## B. *Substantive Reforms*

### 1. *Products Liability*

The fifty states have traditionally articulated and changed substantive products liability law. State supreme courts have assumed major responsibility for enunciating and altering products liability doctrine, primarily through case law and common law development.<sup>62</sup> The 1965

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56. See Tobias, *supra* note 5, at 1621.

57. See *id.*; Tobias, *supra* note 15, at 1422-25.

58. See Tobias, *supra* note 15, at 1422-25; see also Tobias, *supra* note 32, at 495-98.

59. See *supra* notes 27-28, 44-45 and accompanying text.

60. The CJRA also created analogous entities, circuit review committees, and assigned them similar oversight responsibilities. See *supra* note 47 and accompanying text.

61. See United States Court of Appeals for the Sixth Circuit, Minutes of the Meeting of the Judicial Council 4-5 (May 4, 1994); see also Carl Tobias, *A Sixth Circuit Story*, 23 FLA. ST. U. L. REV. 983 (1996) [hereinafter Tobias, *Sixth*]. The Bush Administration experimented with civil justice reform in the executive branch. See Exec. Order No. 12,778, 3 C.F.R. 359 (1991), reprinted in 28 U.S.C. § 519 (1994). See generally Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993). President Clinton essentially subscribed to this effort. See Exec. Order No. 12,988, reprinted in 61 Fed. Reg. 4,729 (1996). Executive Branch civil justice reform is less relevant to the issues that I analyze in this essay. Many ideas above regarding federal procedural revision processes and civil justice reform may be relevant to analogous processes and reforms in many states; however, they have less applicability to the issues treated in this essay. See Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 717 (1995) [hereinafter Tobias, *Common Sense*].

62. See WILLIAM PROSSER & W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 677-724 (5th ed. 1984).

adoption of the Restatement of Torts Second section 402A by the American Law Institute (ALI) greatly affected products liability law, and its formulation of the strict liability basis literally swept the country.<sup>63</sup> Nearly all of the states have adopted some variation of the Restatement articulation; however, a few follow the common law enunciation of strict liability which the California Supreme Court adopted in *Greenman v. Yuba Power Products*.<sup>64</sup> Many state legislatures have passed statutes which alter certain features of the case law doctrine of strict products liability or which codify some aspects of the Restatement formulation.<sup>65</sup>

The strict liability base of products liability has been rather controversial. Numerous courts and some commentators have apparently found the strict manner in which liability has been imposed for products defects too inflexible.<sup>66</sup> Manufacturers and other defendants have claimed that strict liability unfairly exposes them to excessive liability, substantially elevates the cost of insurance, and complicates efforts to design, manufacture, advertise, and sell products.<sup>67</sup>

The ALI recently approved a Restatement Third of Torts governing products liability.<sup>68</sup> The drafts produced by the project's reporters, working with a group of advisors, proved to be somewhat controversial for several reasons.<sup>69</sup> Numerous observers claimed that the Restatement's proposed language limited too greatly the strict liability base and could even return products liability law to negligence in certain

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63. See RESTATEMENT (SECOND) OF TORTS § 402A (1965); PROSSER & KEETON, *supra* note 62, at 694 (asserting section 402A swept the country); Oscar S. Gray, *The Draft ALI Products Liability Proposals: Progress or Anachronism?*, 61 TENN. L. REV. 1105, 1109 (1994) (same).

64. 377 P.2d 897 (Cal. 1963). The State of Alaska follows *Greenman*. See, e.g., Shanks v. Upjohn, 835 P.2d 1189, 1194 (Alaska 1992).

65. See, e.g., MT. CODE ANN. §§ 27-1-719 to -720 (1979); N.J. STAT. ANN. §§ 2A:58C-1 to C-5 (West 1989). See generally WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 808 (9th ed. 1994).

66. See, e.g., Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (Mich. 1984) (applying a pure negligence, risk-utility test in products liability action when liability is predicated on defective design); Grundberg v. Upjohn, 813 P.2d 89 (Utah 1991) (holding manufacturer of FDA-approved drugs immune from strict liability claims based on design defects due to the inherent dangerousness of prescription drugs); James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 271-73 (1990).

67. See, e.g., PETER HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 37-41 (1991).

68. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Official Draft, 1997).

69. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Draft No. 1, 1993); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Tentative Draft No. 1, 1993).

respects.<sup>70</sup> Additional critics asserted that some phrasing of the provision and aspects of its attendant commentary did not restate the law, which they contend prescribes strict liability.<sup>71</sup> After several relatively contentious floor debates, the ALI membership agreed to adopt the reporters' work product.<sup>72</sup>

## 2. Fee Shifting

Fee shifting can be described as substantive or procedural. However, it warrants terse treatment here because no pure fee-shifting provision appeared in the final versions of any legal reforms that the 104th Congress considered.<sup>73</sup> The American Rule which, absent statute or contract, prohibits the losing litigant from paying the winning party's attorney's fees, has traditionally governed fee shifting.<sup>74</sup> Congress has generally left fee shifting to the states, but it has passed some 200 statutes which prescribe fee shifting.<sup>75</sup> Most of these measures provide for fee shifting to encourage the pursuit of litigation which vindicates significant social policies. For example, Congress has inserted fee-shifting provisions in civil rights legislation to promote suit by individuals and groups who have suffered discrimination and to deter those who may discriminate from doing so. Congress has also prescribed fee shifting in environmental statutes to facilitate environmental cleanup or

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70. See, e.g., Gray, *supra* note 63, at 1113; Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631, 695-96 (1995).

71. See, e.g., Howard Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 TENN. L. REV. 1173 (1994); Larry S. Stewart, *The American Law Institute and Products Liability: "Restatement or Reform"?*, TRIAL, Sept. 1994, at 29-30.

72. See *ALI Wraps Up Product Liability Project*, 65 U.S.L.W. 2777 (1997); *ALI Hesitates On Lawyer Liability, Products Liability Restatement Efforts*, 62 U.S.L.W. 2734, 2735-36 (1994). Efforts to pass federal products liability legislation before 1995 deserve limited treatment as they are less relevant to the issues treated in this Article. See, e.g., Products Liability Fairness Act, S. 687, 103d Cong., 1st Sess. (1993); see also Tobias, *Common Sense*, *supra* note 61, at 718 n.98.

73. See Tobias, *Common Sense*, *supra* note 61, at 726, 729-31; see also H.R. 988, 104th Cong. § 2 (1995) (proposing limited fee shifting under Rule 68); *infra* note 85 and accompanying text (creating presumption of fee-shifting for Rule 11 violations in securities litigation).

74. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975); *Hall v. Cole*, 412 U.S. 1, 4-5 (1973); see also John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 15 (Winter 1984).

75. See *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting); see also John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1588 (1993).

to prevent pollution.<sup>76</sup>

Concerns, including the litigation explosion, litigation abuse, manufacturers' exposure to liability in products liability cases mentioned above,<sup>77</sup> and basic fairness and increased litigation costs seem to underlie proposals which would require losing parties to pay their opponents' legal fees. A valuable example is the CSLRA's fee-shifting provision which would have empowered judges to award prevailing litigants in diversity cases reasonable attorneys' fees and to exercise judicial discretion not to assess fees or to reduce their amount when special conditions made awards unfair.<sup>78</sup>

## II. CRITICAL ANALYSIS OF THE NEW LEGAL REFORM PROPOSALS

This section selectively analyzes the strictures included in the recent legal reforms. I descriptively evaluate the provisions, attempt to provide the reasons for the requirements' inclusion, and critically assess the strictures, especially in terms of their possible impacts on continuing reforms. I first analyze the Private Securities Litigation Reform Act, the only aspect of the Common Sense Legal Reforms Act which became law, because this statute illustrates the effects that the new measures may have. I then consider the recent proposals.

### A. *Private Securities Litigation Reform Act of 1995*

The securities litigation reform legislation is intended to change securities lawsuits in numerous important ways.<sup>79</sup> The statute's features which are most relevant to the issues examined in this essay are the imposition of special pleading, sanctions, and class action requirements. Congress meant for the modifications to restrict the amount of abusive securities litigation, particularly lawsuits which are lawyer-driven or are brought to extract settlements.

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76. See, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (1994); Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1994); see also Tobias, *supra* note 7, at 313-17; Vargo, *supra* note 75, at 1587-89.

77. See *supra* notes 13-14, 16-18, 67 and accompanying text.

78. See H.R. 10, 104th Cong. § 101 (1995).

79. See PSLRA, *supra* note 2. See generally Willard T. Carleton et al., *Securities Class Action Lawsuits: A Descriptive Study*, 38 ARIZ. L. REV. 491 (1996); John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, 51 BUS. LAW. 975 (1996); Joel Seligman, *The Private Securities Reform Act of 1995*, 38 ARIZ. L. REV. 717 (1996).

The PSLRA requires that plaintiffs satisfy heightened pleading standards in cases pursued under the 1933 and 1934 securities laws.<sup>80</sup> For example, a plaintiff must "specifically plead with particularity each statement alleged to have been misleading," setting forth in detail the reason why the statement is misleading, while a plaintiff, when making an allegation premised on information and belief, "must state with particularity all facts in [its] possession on which the belief is formed."<sup>81</sup> Specialized pleading conflicts with the general notice pleading system of the Federal Rules, which the Supreme Court recently reaffirmed, and erodes the Rules' trans-substantive nature.<sup>82</sup> Imposing more burdensome pleading has apparently discouraged plaintiffs from bringing fraud claims and undermined the securities statutes' purposes.

The PSLRA also stays all discovery pending the resolution of motions to dismiss or for summary judgment to prevent the imposition of unnecessary discovery costs on defendants.<sup>83</sup> This stricture, in conjunction with particularized pleading, creates a "catch-22" for plaintiffs analogous to the one which arose under Rule 11's 1983 revision:<sup>84</sup> the PSLRA demands that plaintiffs plead with specificity, yet suspends discovery, thereby denying access to the very information that plaintiffs may need to so plead, much less to prove their cases. Moreover, sec-

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80. See PSLRA, *supra* note 2, § 101; see also 15 U.S.C. §§ 77, 78 (1994); H. CONF. REP. NO. 104-369, at 41 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 740. See generally Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675 (1996).

81. H. CONF. REP. NO. 104-369, at 41 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 740; see also *Marksman Partners v. Chantal Pharm. Corp.*, 927 F. Supp. 1297 (C.D. Cal. 1996) (finding heightened standards satisfied). See generally Paul M. Tyrrell & George L. de Verges, *A Chilling Effect: The Impact of the Motion to Dismiss Under the Private Securities Litigation Reform Act of 1995*, 173 F.R.D. 556 (1997).

82. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993); see also Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992) (discussing trans-substantivity); Tobias, *supra* note 7, at 296-301 (discussing notice pleading regime). Federal Rule 9(b) does require that plaintiffs plead allegations of fraud with particularity, an idea that the PSLRA's sponsors purportedly intended to capture. See H. CONF. REP. NO. 104-369, at 41 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 740.

83. See PSLRA, *supra* note 2, § 101; see also H. CONF. REP. NO. 104-369, at 32 (1995), reprinted in 1995 U.S.C.C.A.N. 730, 731; *Medhekar v. United States Dist. Ct. for the N.D. Cal.*, 99 F.3d 325 (9th Cir. 1996) (interpreting discovery provision to include automatic disclosure). See generally John F. Olson et al., *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 BUS. LAW. 1101, 1135-42 (1996); Tyrrell & de Verges, *supra* note 81, at 558.

84. See, e.g., *Johnson v. United States*, 788 F.2d 845, 856 (2d Cir. 1986) (Pratt, J., dissenting); *Rodgers v. Lincoln Towing Serv.*, 771 F.2d 194 (7th Cir. 1985). See generally Tobias, *supra* note 32, at 493-95.



tion 101 modifies the sanctioning provision of Federal Rule 11 in several ways to deter abusive securities cases. Most importantly, the PSLRA provides that the "court shall include in the record specific findings regarding compliance by each party and each attorney [with] each requirement of Rule 11(b) . . . as to any complaint, responsive pleading, or dispositive motion," while the statute creates a presumption that prevailing parties will recover "all attorney's fees and costs incurred in the entire action" when litigation is found to be abusive.<sup>85</sup>

Section 101 of the PSLRA includes other requirements which are intended to prevent allegedly abusive practices that have been associated with securities class action litigation.<sup>86</sup> For instance, certain of the legislation's strictures are meant to "encourage the most capable representatives of the plaintiff class to participate in class action litigation and to exercise supervision and control of the lawyers for the class."<sup>87</sup>

These provisions for class actions and sanctions may impose several disadvantages which are analogous to those produced by particularized pleading. The strictures could dissuade many potential plaintiffs and their counsel from pursuing actions and undermine the securities legislation's objectives, while the mandates further erode the Federal Rules' trans-substantive character. The possibly corrosive impacts on national rule revision seem equally important. Legislating special requirements for class actions may disrupt or at least undercut the half-decade effort of the national revision entities and their expert advisors to analyze Rule 23 closely, to conscientiously draft modifications in the class action mechanism, and to circulate and seek public input on several drafts.<sup>88</sup> The partial amendment of Rule 11 so soon after the revisors meticulously changed the provision in 1993 could also discourage them.<sup>89</sup>

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85. H. CONF. REP. NO. 104-369, at 39 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 738; *see also* PSLRA, *supra* note 2, § 101. The mandatory Rule 11 review will consume scarce resources of judges, lawyers, and litigants. *See generally* Olson et al., *supra* note 83, at 1132-34; Richard M. Phillips et al., *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks And Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1045-48 (1996).

86. *See* PSLRA, *supra* note 2, § 101; *see also* H. CONF. REP. NO. 104-369, at 41 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 740. *See generally* Phillips et al., *supra* note 85, at 1039-41, 1048-50.

87. H. CONF. REP. NO. 104-369, at 39 (1995), *reprinted in* 1995 U.S.C.C.A.N. 730, 738; *see also* PSLRA, *supra* note 2, § 101; *In re* Cephalon Sec. Litig., No. CIV.A. 96-CV-0633, 1996 WL 515203, at \*1 (E.D. Pa. Aug. 27, 1996) (permitting appointment of multiple lead plaintiffs).

88. *See supra* note 43.

89. *See supra* notes 30-43 and accompanying text.

The imposition of numerous new strictures on securities litigation has apparently limited access to federal courts in additional ways which resemble those assessed earlier. As with civil justice reform, attorneys and clients must learn about, comprehend, and satisfy the requirements prescribed which will consume scarce time and resources.<sup>90</sup> Similar to the 1983 revision of Federal Rule 11, the institution of new commands will probably encourage considerable unnecessary, costly satellite litigation implicating the mandates' meaning and application.<sup>91</sup> Some anecdotal information indicates that plaintiffs have initiated fewer federal securities class actions and may have pursued less vigorously those cases filed.<sup>92</sup>

## B. *Attorney Accountability Act of 1995*

### 1. *Rule 11 Modification*

The AAA would have altered Rule 11's 1993 revision by making the imposition of sanctions mandatory, not discretionary, thus reinstituting the 1983 formulation, and by specifically stating that the sanctions awarded would be sufficient to "compensate the parties that were injured" as well as adequate to deter.<sup>93</sup> A few justifications seem to underlie the modifications which the AAA would institute.<sup>94</sup> First, the changes should deter lawyers and litigants whom a number of judges, attorneys, and parties believe might be tempted to violate Rule 11. Second, the alterations would apparently offer sufficient incentives for those harmed by Rule violations to invoke the provision. The modifications concomitantly reinforce the foregoing concepts by removing judicial discretion not to levy sanctions generally or for compensatory reasons.

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90. See *supra* notes 57-58 and accompanying text.

91. See *supra* notes 31-33 and accompanying text. See SECURITIES & EXCH. COMM'N, REPORT TO THE PRESIDENT AND THE CONGRESS ON THE FIRST YEAR OF PRACTICE UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT OF 1995 (1997) [hereinafter SEC REPORT].

92. See Interview with Mark Gitenstein, Attorney with Mayer, Brown & Platt, in Washington, D.C. (Jan. 2, 1997); see also SEC REPORT, *supra* note 91; Hope Viner Samborn, *Fear of Filing*, A.B.A. J., May 1997, at 28. But see *Study Indicates No Decline in Federal Securities Class Suits*, Sec. Reg. & L. Rep. (BNA) (Nov. 27, 1996).

93. H.R. 988, 104th Cong. § 1 (1995); see also 1983 amendment of FED. R. CIV. P. 11, reprinted in 97 F.R.D. 195, 197 (1983) (making mandatory judicial imposition of sanctions).

94. I rely substantially in this paragraph on the dissenting statement to 1993 Amendments, *supra* note 29, at 507-10 (dissenting statement); *Hearing on H.R. 10 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary* (testimony of Debra Ballen, Senior Vice President, American Insurance Ass'n) (Feb. 6, 1995); see also Duncan, *supra* note 42, at 12.

Several problems accompany the proposals that sanctioning be mandatory and that judges award sanctions to reimburse injured parties. The provision would revive the most troubling aspects of the 1983 revision of Rule 11 and the precise features which the national rule revisors meant the 1993 amendment to eliminate or ameliorate. These include the incentives to use Rule 11 for compensatory and strategic reasons, which can foster unwarranted, costly satellite litigation and which can have chilling effects on some litigants, namely resource-poor parties.<sup>95</sup> The two alterations may reinstitute the 1983 version's other disadvantages, such as the Rule's threat and retreat dimension, the provision's tendency to try attorneys not cases, and the increased incivility that it seemed to provoke.<sup>96</sup> Those problems would adversely affect litigants, counsel, and judges in specific lawsuits and the civil justice system.

Congressional enactment of these changes in Rule 11 might have even more deleterious impacts on the national rule revision process.<sup>97</sup> Rule 11's 1993 modification evolved from an effort in which the revisors clearly denominated a complication, carefully assessed it, drafted proposed alterations, solicited and examined much public comment, and prodigiously wrote drafts that they thought were responsive to public input and constituted the fairest, clearest provision which could be assembled. The amendment ultimately adopted represented the finest effort of the revision committees and their expert advisors to address equitably and fully all of the interests that the changes would implicate and to fashion an effective compromise. The procedures followed—inviting public scrutiny, thoroughly evaluating public input, and drafting proposed modifications in light of those recommendations—embodied the kind of open, rational decisionmaking process that Congress contemplated when passing the 1988 JIA.

Legislative change of two important, carefully-considered dimensions of the revisors' concerted efforts to improve Rule 11 so recently after the provision's substantial amendment and before it has even had an opportunity to operate would be unwarranted and detrimental. Congressional reversal would directly undercut one of the JIA's central

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95. See *supra* notes 31-36 and accompanying text.

96. See INTERIM REPORT OF THE COMM. ON CIVILITY OF THE SEVENTH FED. JUDICIAL CIRCUIT 20-21 (Apr. 1991) (asserting idea regarding Rule 11 and civility); Tobias, *supra* note 33, at 1785 (asserting all three propositions).

97. In this paragraph, I rely substantially on *supra* notes 30-43 and accompanying text.

purposes, making the national rule revision process paramount again.<sup>98</sup> Essential, peremptory legislative modification of such a controversial provision following so quickly upon gargantuan endeavors to reformulate it could eviscerate national rule amendment, additionally crippling those procedures at a time of substantial susceptibility and demoralizing many participants in the 1993 revision effort.<sup>99</sup>

Enactment of this section of the AAA would also continue inadvisable, disruptive congressional intervention in the rule amendment process.<sup>100</sup> In 1995, the American Bar Association (ABA) House of Delegates actually promulgated a resolution urging Congress to reject the suggested changes in Rule 11 because modifications of Federal Rules "should be left to the existing rulemaking bodies."<sup>101</sup> Passage of the AAA's Rule 11 alterations could concomitantly extend the unwise practice of too frequent procedural policymaking by Congress that adoption of the 1988 JIA and 1990 CJRA typifies.<sup>102</sup>

## 2. Rule 68 Modification

Another section of the AAA would have amended Rule 68 by permitting courts to require parties that reject offers of judgment but recover less than those offers at trial to pay the reasonable attorneys' fees of their opponents in diversity cases, although judges would have discretion not to levy such fees or to decrease the amount when special circumstances make awards unjust.<sup>103</sup> "Reasonable attorney's fees" are the "actual cost incurred by the nonprevailing party for an attorney's fee payable to an attorney in connection with [the] claim" or a "reasonable cost that would have been incurred," had the party not signed a contingency fee agreement.<sup>104</sup> Fairness is one justification for this pro-

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98. See *supra* notes 25-26 and accompanying text.

99. Some observers think that the revisors' inclusion of a local option provision in the disclosure revision severely eroded their credibility and national uniformity and simplicity. See, e.g., Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 REV. LITIG. 49 (1994); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993); see also *supra* notes 50-57 and accompanying text.

100. See *supra* notes 22-24, 88-89 and accompanying text.

101. Brad Bole, *Congress Again Takes Up "Legal Reform"*, LITIG. NEWS, Feb.-Mar. 1995, at 1, 6; interview with Brad Bole, Echevarria Law Firm, in Tampa, FL (Feb. 27, 1995).

102. See Tobias, *supra* note 5, at 1599-1604; *supra* notes 25-28, 46-61 and accompanying text.

103. See H.R. 988, 104th Cong. § 2 (1995). Similar proposals were introduced in the first session of the 105th Congress, but none were passed. See H.R. 903, 105th Cong., 1st Sess. (1997); H.R. 2603, 105th Cong., 1st Sess. (1997).

104. H.R. 988, 104th Cong. § 2 (1995).

posal because it enables defendants to seek recovery of attorneys' fees from plaintiffs who receive smaller awards at trial than they were offered in settlement. A second is that the prospect of having to pay adversaries' attorneys' fees will encourage settlements and save resources of litigants and the court system.

The foremost criticism of the modification is that it contravenes the premises, primarily involving access to courts, which underpin the long-standing American Rule. Indeed, the ABA's sustained support for open court access and opposition to "across the board 'loser pays' without regard to subject matter" led the Association to admonish that Congress reject this provision of the AAA.<sup>105</sup> The fee-shifting measure could restrict access by fostering much unwarranted, costly satellite litigation. For example, questions about how injunctive relief, which plaintiffs frequently secure in public law litigation, compares with monetary offers of judgment under Rule 68 and what reasonable attorneys' fees are under many statutory schemes have engendered considerable satellite litigation, some of which have even been resolved by the Supreme Court.<sup>106</sup> This provision might limit access in cases which are close, complex, difficult or costly to prove, or in which possible plaintiffs have little power or money because the exposure to liability for opponents' attorneys' fees will chill potential litigants' enthusiasm for filing or vigorously pursuing litigation. Parties that may function as private attorneys-general in enforcing products safety, consumer or natural resources protection statutes or policies may be particularly vulnerable to the impacts reviewed in this paragraph.<sup>107</sup>

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105. Bole, *supra* note 101, at 6.

106. See, e.g., *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 488 U.S. 815 (1989); *City of Riverside v. Rivera*, 477 U.S. 561 (1986); see also Tobias, *supra* note 7, at 310-16.

107. Plaintiffs operate as private attorneys-general by, for example, pursuing cases over pollution which the Environmental Protection Agency regulates with insufficient rigor. See Tobias, *supra* note 7, at 314-17. See generally Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988). This proposal arguably interferes with state prerogatives. Insofar as fee-shifting is a matter of state substantive law, it would federalize an area which traditionally (and perhaps for constitutional reasons) has been left to the states. The Supreme Court has stated that attorney fees are a matter of state substantive law. See *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991); see also *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827 (1990). A similar proposal was introduced in the first session of the 105th Congress, but it did not pass. See H.R. 903, 105th Cong., 1st Sess. (1997).

### 3. *Modification of Federal Rule of Evidence 702*

The AAA's third section would have revised Federal Rule of Evidence 702 by limiting expert testimony, ostensibly to increase "honesty in testimony."<sup>108</sup> The provision would make admissible a witness's opinion which was premised on scientific knowledge only if the court concludes that it is (1) based on scientifically valid reasoning, and (2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in Rule 403.<sup>109</sup>

These strictures could frustrate the efforts of plaintiffs in complicated products liability, environmental cases, and other forms of litigation which require testimony on complex scientific questions to locate experts who can testify and to prove their cases. The revision might also complicate the efforts of plaintiffs in these lawsuits to operate as private attorneys-general<sup>110</sup> and to vindicate significant purposes of some environmental legislation. The Supreme Court recently considered issues implicating expert testimony that so closely involve those which this provision affects that it could simply be an effort to overrule the Court's decision.<sup>111</sup>

Most importantly, a legislative change of Federal Rule of Evidence 702, as with Federal Rule of Civil Procedure 11, would conflict with a continuing reform effort. The recommended modifications in Rule 702 appear appropriate for examination in the ordinary course of the rule amendment process. In the 1990s, the national revision entities entertained the possibility of revising Rule 702, but failed to institute the alterations that the AAA would effect.<sup>112</sup> Congressional amendment of an evidentiary provision would seriously compromise the principal purpose in recently assembling an Advisory Committee on Rules of Evidence<sup>113</sup> and could even harm this entity's credibility before the committee could prove its value.<sup>114</sup> In fact, when the ABA opposed legis-

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108. H.R. 988, 104th Cong. § 3 (1995).

109. *See id.*

110. *See supra* note 107 and accompanying text.

111. *See* *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

112. *See* 1991 Proposed Amendments, *supra* note 50, 137 F.R.D. at 156 (proposing amendment); *see also* Supreme Court of the U.S., Amendments to Federal Rules of Evidence, Excerpt from the Report of the Judicial Conf. Comm. on Rules of Practice and Procedure, reprinted in 147 F.R.D. 275, 282 (1993) (stating that the proposed amendment of Rule 702 was referred to the new Advisory Committee). *See generally* Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Sound; It Should Not Be Amended*, 138 F.R.D. 631 (1991).

113. *See supra* note 22.

114. *See supra* note 112.

lative revision of Rule 702, the organization stressed that alteration of the "Federal Rules of Evidence should be left to the existing rulemaking bodies."<sup>115</sup>

### C. *Products Liability Reform*

The products liability reform measures which the 104th Congress considered would have significantly changed substantive products liability law, while the major proposal that the 105th Congress is examining will do so. Most important to this Article are restrictions on seller liability for harm which is ascribed to defective products in numerous circumstances<sup>116</sup> and requirements that plaintiffs only recover punitive damages when they prove by clear and convincing evidence that defendants acted with "conscious, flagrant indifference to the rights of safety of others" and that such damages generally be capped.<sup>117</sup> The major rationale for limiting seller liability is that plaintiffs sue sellers in a large percentage of products lawsuits, but sellers are ultimately held liable in few cases.<sup>118</sup> The principal reason for restricting punitive damage awards is that allowing juries to assess the damages, especially pursuant to ambiguous or overly lenient criteria, can expose defendants to enormous liability.

One problem with reducing sellers' liability is that it could eliminate any local defendants and the only parties that might eventually be found liable for plaintiffs' harm.<sup>119</sup> The difficulty with limiting punitive damages is the loss of punishment and deterrence that can result in situations when defendants deserve such treatment. These and additional aspects of the products liability measure could restrict federal court access and impose other disadvantages, such as reducing the number of lawsuits in which plaintiffs act as private attorneys-general.<sup>120</sup> Insofar

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115. Bole, *supra* note 101, at 6.

116. See H.R. 956, 104th Cong. § 103(B) (1995). A similar proposal was introduced in the first session of the 105th Congress, but it did not pass. See S. 648, 105th Cong., 1st Sess. § 103 (1996).

117. H.R. 956, 104th Cong. § 108 (1995); see S. 648, 105th Cong., 1st Sess. § 108 (1996). Congress deleted from the final version of H.R. 956 provisions, such as a special Rule 11 for products cases, which were more "procedural" in nature. See Tobias, *Common Sense*, *supra* note 61, at 732-33; see also H.R. 956, 104th Cong. § 107 (1995) (prescribing special ADR procedures); S. 648, 105th Cong., 1st Sess. § 107 (1996) (same).

118. See PROSSER ET AL., *supra* note 65, at 795 n.4.

119. The limitation on joint liability for noneconomic damages could exacerbate this situation. See H.R. 956, 104th Cong. § 110 (1995); see S. 648, 105th Cong., 1st Sess. § 110 (1996).

120. See *supra* notes 107, 110 and accompanying text.

as the proposal's provisions would modify products liability substantive law, they could also interfere with the ALI's recently-completed section 402A of the Restatement Third.<sup>121</sup>

### III. SUGGESTIONS FOR THE FUTURE

A number of ideas which I explored above suggest that Congress must eschew or delay passage of the AAA and the products liability reform measure while reconsidering, and perhaps modifying, the PSLRA. During the first session of the 105th Congress, Congress should have scrutinized CJRA experimentation, clearly prescribed the statute's expiration, and facilitated the JIA's revitalization and comprehensive implementation. Although the first session of Congress did not institute these actions, the second session should.

#### A. *Rejecting, Postponing, or Modifying Legal Reforms*

##### 1. *Effects on Continuing Reforms*

Passage of the AAA and the products liability proposal would, as the PSLRA's adoption did, complicate, disrupt, or threaten several continuing reform efforts. The CJRA's enactment, a mere two years after the JIA's passage, exemplifies both the need to be cautious and the dangers of legislating without accounting for prior reform initiatives. Congress adopted the 1988 JIA because the federal bench and Congress recognized that local procedural proliferation was complicating civil practice and undercutting the national rule revision process which had served the nation well for a half-century. However, Congress passed the 1990 CJRA, essentially suspending those features of the JIA which Congress intended to address proliferation and restore the primacy of the national amendment process, before they could even be effectuated. The AAA's enactment could, like the PSLRA's passage, have similar impacts on those aspects of the JIA that Congress meant to revitalize the national revision process.

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121. See *supra* notes 68-72 and accompanying text. The proposal's advocates favor the prompt uniformity and certainty which passage would afford, even though the measure would cover only a small percentage of situations. The proponents may also be concerned that state courts and legislatures will not adopt the Restatement Third, although advocates should favor the Restatement's broader applicability, particularly its treatment of critical issues, such as design defect and duty to warn. Finally, to the extent that the measure treats substantive products liability law and punitive damages awards, which have traditionally been matters of state law, it may interfere with the prerogatives of state supreme courts and legislatures.



When Congress passed the 1995 PSLRA, it legislated before Rule 11's significant 1993 revision was thoroughly implemented, without reflecting on the expert evaluations of CJRA experimentation which Congress commissioned or assessing the reports and recommendations it requested that the Judicial Conference prepare.<sup>122</sup> Congressional adoption of the AAA before May 1997 would have had similar effects. The PSLRA's imposition of special Rule 11 sanctions and Rule 23 class action requirements in securities litigation did, and the AAA's enactment would, constitute direct legislative amendment of the Federal Rules while bypassing the carefully-crafted national revision procedures. Thus, like the PSLRA, the AAA would frustrate Congress' own efforts in the 1988 JIA to restore the primacy of that process. If Congress adopted the products liability reform bill today, the measure could adversely affect the ALI's new Restatement Third covering products liability.<sup>123</sup>

## 2. *Effects on the Civil Justice System and on Specific Cases*

The adoption of new and often conflicting procedural strictures and the interference with ongoing reform initiatives will impose greater complexity, cost, and delay on the civil justice process and in civil lawsuits. Judges must master, construe, and enforce the requirements, while counsel and litigants will have to find, comprehend, and satisfy them. Indeed, CJRA experimentation in all ninety-four districts with its diverse measures for reducing expense and delay and the large number of 1993 Federal Rules revisions, some of which authorized local variations from the Federal amendments, have apparently exceeded the patience of judges, attorneys, and parties for procedural modification. The PSLRA's enactment, and the AAA's adoption, seem likely to exacerbate procedural overload. Many of the substantive and procedural commands in the PSLRA, the AAA, and the products liability bill individually, but especially together, could also have adverse impacts on particular civil suits. For example, the AAA's proposed changes in Federal Rules 11 and 68 would probably limit federal court access for those lawyers and litigants whose dearth of power and resources makes them risk averse, as the PSLRA's mandates may have.

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122. See 28 U.S.C. § 471 notes (1994). The Conference considered but did not initiate national rule revision for CJRA procedures that were efficacious. See Judicial Conf. of the U.S., Final Report on the Civil Justice Reform Act of 1990, at 2, 18 (1997) [hereinafter Judicial Conf. Report]; see also *id.*; see *infra* note 126.

123. See *supra* notes 68-72, 121 and accompanying text.

In short, the imposition of new strictures and the interference with continuing reforms, which can be attributed to the PSLRA and which could result from the AAA and the products liability measure, may well have effects that are diametrically opposed to those which Congress intended in passing the JIA and the CJRA. They may further erode the primacy of the national revision process that the JIA was meant to restore, while increasing the cost and delay the CJRA was supposed to reduce.<sup>124</sup>

*B. Rejecting, Postponing, or Modifying Legal Reforms That Conflict With Ongoing Initiatives*

Congress may find that the PSLRA does not, and that the AAA and the products liability reform proposal would not, have deleterious effects on continuing initiatives, individual suits, or the civil justice system; or that other reasons warrant against proceeding. If Congress so finds, it must seriously explore additional options. Congress at least should rescind or discontinue implementing the PSLRA's provisions which do conflict and reject, or postpone adopting those features of the AAA and the products liability measure that will interfere with ongoing reforms until the initiatives have ended, their efficacy has been evaluated, and decisions regarding the efforts' future have been made.

By the end of 1997, all of the federal district courts had essentially finished the most far-reaching experimentation with mechanisms for decreasing cost and delay ever undertaken, while the RAND Corporation, the FJC, and the ninety-four districts had systematically assembled, assessed, and synthesized an unprecedented quantity of empirical material regarding the experimentation's efficacy. During January 1997, the RAND Corporation issued its report on experimentation in the ten pilot courts, and the FJC released its study of the five demonstration districts.<sup>125</sup> By May, the Judicial Conference had submitted to Congress

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124. The Chair of the ABA Litigation Section summarized much above in describing similar measures considered by the 104th Congress as a "sort of hodgepodge attempt to address perceived problems with the legal system. Quick and dirty solutions shouldn't be imposed where a more thoughtful approach is clearly called for." Bole, *supra* note 101, at 6.

125. See JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996); DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (FJC 1997); see also 28 U.S.C. § 471 notes (1994) (prescribing experimentation and evaluation).

its reports and recommendations on the two programs.<sup>126</sup> In 1997, the remaining seventy-nine districts effectively completed experimentation and were able to afford a sense of many measures' efficacy. Once this experimentation has been rigorously evaluated and Congress has scrutinized the Conference reports and suggestions, it can make better-considered determinations respecting specific strictures included in the PSLRA, the AAA, and the products liability proposal, as well as the effectiveness of numerous procedures for decreasing expense and delay. Moreover, the future of national rule revision and of the civil justice system should be considered.<sup>127</sup>

### C. Experimentation

Congress could also investigate the possibility of authorizing future experimentation. Congress must keep in mind that every state has instituted, or is experimenting with, a plethora of reforms,<sup>128</sup> while many federal districts have applied numerous experimental mechanisms, the efficacy of which Congress will soon be evaluating. Moreover, nascent experience with the PSLRA's strictures, such as the special Rule 11 and Rule 23 requirements, suggest they have limited the filing and avid pursuit of securities litigation.

Should Congress find these endeavors insufficient, it could provide for additional efforts. For example, Congress might prescribe experimentation with the AAA's offer of judgment provision in a few federal courts for a set time, even though this approach may disadvantage certain parties in those districts or encourage forum shopping.<sup>129</sup> The project could be premised on prior programs, such as experimentation

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126. See Judicial Conf. Report, *supra* note 122. Congress asked the Conference to suggest whether measures receiving pilot court experimentation should apply more broadly. If the Conference had so suggested, it was to initiate rule revision. However, the Conference rejected expansion. It therefore had to "identify alternative, more effective cost and delay reduction programs," and it might use rule revision to implement its decision. CJRA, § 105(c)(2)(c); see also Judicial Conf. Report, *supra*, at 2-4, 18; 28 U.S.C. § 471 notes (1994). The Conference only had to report on the demonstration program results. See *id.*; see also *supra* note 122; *infra* note 137 and accompanying text.

127. Congress should remember that a lack of empirical data probably led to the two most controversial Federal Rules revisions—Rule 11's 1983 change and Rule 26's 1993 modification imposing automatic disclosure. See, e.g., Burbank, *supra* note 32, at 1925-27; Walker, *supra* note 39, at 456-59; see also *supra* notes 30-35, 50-53 and accompanying text.

128. See *supra* note 61.

129. One district conducted CJRA experimentation with a similar measure, and Congress should consult this experience. See *supra* note 55 and accompanying text.

with court-annexed arbitration or with CJRA procedures.<sup>130</sup> Congress might also facilitate wider experimentation by prescribing a 1991 proposed amendment in Federal Rule 83 that the national rule revisors withdrew.<sup>131</sup>

#### D. *Reasons for Suggestions*

Several reasons, which are sufficiently important to warrant recapitulation here, suggest Congress not adopt strictures in the AAA or the products liability proposal which will adversely affect ongoing reform initiatives, specific cases, or the civil justice system. They also suggest Congress abrogate the PSLRA's requirements which do so. The provisions may sacrifice advantages that could be gleaned from the reforms while imposing more complications, expense, and delay in civil suits and on the civil justice process. For example, the AAA's amendment of Federal Rule 11 in ways that would reinstitute phenomena such as costly, unwarranted satellite litigation and chilling the enthusiasm of civil rights plaintiffs, which the national revision entities considered so problematic and meticulously sought to eliminate from the Rule only four years ago, would undercut the 1993 amendment before it was completely implemented and evaluated.<sup>132</sup> Adoption of this modification and that proposed for Rule 68 would circumvent the national revision procedures and would further and unnecessarily erode this process at a time when its longstanding authority and respect have been seri-

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130. See 28 U.S.C. §§ 651-658 (1994); see also Pub. L. No. 105-53, § 1, 111 Stat. 1173 (1997). See generally BARBARA S. MEIERHOEFER, FEDERAL JUDICIAL CENTER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (1990). The work must be coordinated with the CJRA's conclusion. For example, CJRA measures that had promise but were not effective enough to warrant national application may deserve future experimentation.

131. Districts with Judicial Conference approval could have experimented for five years with inconsistent procedures. See 1991 Proposed Amendments, *supra* note 50, 137 F.R.D. at 153. See generally Tobias, *supra* note 5, at 1616, 1633. Congressional intervention in rule revision is generally unwise. However, legislative revision of Rule 83 may be appropriate because issues of authority are implicated. See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1585-87 (1991); see also Carrington, *supra* note 48, at 1006; see also *infra* notes 142-44 and accompanying text (analyzing proposal's benefits).

132. See *supra* notes 30-43, 93-102 and accompanying text. The PSLRA's imposition of a special Rule 11 may have already had similar, but narrower, effects. See *supra* notes 85, 89 and accompanying text. The PSLRA's imposition of special class action strictures could complicate the ongoing effort to amend Rule 23. See *supra* notes 43, 86-88 and accompanying text.

ously compromised.<sup>133</sup> The passage of a federal products liability statute might correspondingly undermine the ALI's attempts to improve the Restatement of Torts and conflict with state efforts which are directed at products liability.<sup>134</sup>

#### E. *A Postscript on the PSLRA*

I analyzed above numerous reasons why the PSLRA's passage was ill-advised; however, certain of those ideas deserve emphasis here because they inform understanding of the disadvantages that could result from the reforms which the 105th Congress is presently considering. Perhaps most significant, the PSLRA has eroded ongoing efforts to restore the primacy of the national amendment process by altering aspects of nine Federal Rules. Indeed, the national revision entities have intensively scrutinized several of these provisions, namely Rules 11 and 23, in the ordinary course of rule amendment and approved, or proposed, their extensive modification. The partial legislative revisions in numerous Federal Rules that the PSLRA effects, thus, might have undermined attempts to revitalize the national amendment process by avoiding it and by authorizing strictures which differ from existing Federal Rules.

Many onerous substantive and procedural requirements that the PSLRA imposes have complicated efforts of plaintiffs to plead and prove securities fraud, partly by restricting their access to relevant information. The need to find, understand, and comply with the new strictures, particularly procedures which depart from the Federal Rules, has also increased expense and delay in maintaining securities fraud actions. The above phenomena have apparently discouraged the institution and vigorous pursuit of those cases and have frustrated realization of the securities laws' purposes. These factors can dissuade potential plaintiffs from enforcing the statutes and acting as private attorneys-general to vindicate the public interest in reducing securities fraud by punishing or deterring its perpetrators.<sup>135</sup>

Congress, therefore, might want to reconsider, and even modify, the PSLRA. However, numerous members of that body may resist revisiting a statute so soon after enactment when it could be difficult to as-

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133. See *supra* notes 99-101 and accompanying text; see also *infra* Part III.E (suggesting PSLRA has similarly bypassed and possibly eroded process).

134. See *supra* notes 62-72, 121 and accompanying text.

135. See *supra* notes 107, 110 and accompanying text.

certain with sufficient certainty the precise effects of the legislation's implementation. If Congress finds reevaluation and possible amendment premature today, it must authorize an expert entity, such as the FJC, the Administrative Office of the United States Courts (AO), or the RAND Corporation to undertake a careful study of the PSLRA's impacts. Once relevant empirical data have been systematically assembled, analyzed, and synthesized, Congress should decide whether legislative change is warranted.<sup>136</sup>

#### F. *A Postscript on the 1990 CJRA and the 1988 JLA*

I am not advocating that the 105th Congress ignore the concerns which prompted its members to reintroduce the AAA and the products liability reform measure and the 104th Congress to pass the PSLRA. On the contrary, the 100th and 101st Congresses prescribed a blueprint for the future that is responsive to certain of the questions implicated. Indeed, the need to decide whether the CJRA actually did sunset in December 1997 affords an excellent opportunity for addressing the issues.

The 105th Congress must continue evaluating the Judicial Conference reports and recommendations regarding the pilot and demonstration programs which the Conference premised substantially on the RAND and FJC studies. Congress should seriously consider how to resolve the CJRA's fate because the Conference tendered its reports in May 1997 and Congress has had considerable time to study it.<sup>137</sup> Congress could consult the RAND and FJC findings, which indicate that experimentation with the CJRA-prescribed procedures offered no discernable

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136. Judges, when interpreting and applying the PSLRA, must attempt to harmonize the intent of the 104th Congress in passing the statute and of prior Congresses in enacting earlier securities laws. For example, courts should be sensitive to, and prevent, the abusive litigation practices which the PSLRA was intended to treat. Judges must also anticipate and stop the above problems which frustrate potential plaintiffs' pursuit of securities fraud claims. Such difficulties can erode vigorous private enforcement of the securities statutes.

137. See Judicial Conf. Report, *supra* note 122; see also 28 U.S.C. § 471 notes (1994). Congress could independently evaluate the RAND and FJC analyses, collect its own data from the pilot, demonstration or other courts or work with the FJC or the AO which have carefully monitored implementation since 1990. However, such legislative efforts might prove duplicative and wasteful because Congress may lack sufficient resources and expertise and it has not closely monitored CJRA effectuation. Congress did pass legislation which extends the reporting requirements relating to case dispositions in section 476 of the CJRA, but it is unclear what effect the 1997 measure has on the 1990 CJRA's expiration. See Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997).

benefit in terms of important parameters, namely cost or delay reduction, litigant satisfaction, and fairness, but that judges who employ sound judicial case management practices can save time and perhaps expense.<sup>138</sup>

These determinations of RAND and the FJC suggest that Congress should allow the CJRA to sunset and fully implement the JIA's purposes of limiting local procedural proliferation and conflicting requirements while restoring the primacy of national rule revision. Congress can best facilitate the thorough effectuation of the JIA's goals of restricting proliferation and inconsistency by appropriating sufficient resources for those entities which must review local procedures to discharge their duties effectively.<sup>139</sup>

If CJRA experimentation yielded any procedures that are very efficacious in reducing cost or delay and warrant national application, those measures could be included in the Federal Rules through the normal amendment process.<sup>140</sup> Mechanisms that limited cost or delay, but which were insufficiently effective to deserve nationwide implementation or as to which uncertainty remains, may be designated for future experimentation.<sup>141</sup> Experimentation might also proceed pursuant to a 1991 proposed change in Federal Rule 83 that the national revision entities withdrew.<sup>142</sup> This proposal could capitalize on experience and could encourage local creativity in designing promising experimental procedures. It would also maintain a measure of control in a centralized, expert entity which might coordinate the districts' work by, for instance, limiting the number of inconsistent local procedures and promoting experimentation with optimally diverse measures. The approach could prove peculiarly efficacious in facilitating experimentation with case management techniques, which were apparently the most successful

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138. See KAKALIK ET AL., *supra* note 125, at 1; STIENSTRA ET AL., *supra* note 125; see also Edward D. Cavanagh, *Congress' Failed Attempt to Spur Court Efficiency: The Legacy of the Civil Justice Reform Act*, LEGAL TIMES, Nov. 25, 1996.

139. See Tobias, *Sixth*, *supra* note 61; see also *supra* p. 560 (suggesting that Congress revitalize national revision process by eschewing legislative revision of Federal Rules which PSLRA and AAA exemplify because this bypasses and erodes process). The courts of appeals, the Judicial Conference and judges, acting alone and through their districts, should attempt to limit proliferating local procedures.

140. In this sentence and the next, I rely on *supra* notes 122 and 126.

141. Judges individually, or through the Conference, should (1) identify which procedures, especially case management measures, deserve which treatment; (2) preserve applicable CJRA data; and (3) compile annual assessments that evaluate all relevant effects of CJRA experimentation.

142. See *supra* note 131 and accompanying text.

CJRA procedures,<sup>143</sup> because judges frequently develop the mechanisms to treat varying local conditions, so that the measures can differ substantially across districts.<sup>144</sup>

### CONCLUSION

The 104th Congress considered the AAA and several products liability proposals; however, the only legal reform which in fact became law was the Private Securities Litigation Reform Act. The PSLRA has had, and the recently-reintroduced AAA and products liability bill could have, a number of detrimental impacts on continuing reform efforts, specific lawsuits, and the civil justice process. Congress should rescind the PSLRA's provisions that have had these effects, or at the least, suspend implementation of the statute's strictures which interfere with ongoing initiatives. In the meantime, it should reject the AAA and the products liability measure or delay adoption of their requirements that could conflict with continuing reforms.

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143. See *supra* note 138 and accompanying text.

144. See Robel, *supra* note 48, at 1484; see also *supra* notes 129-30 and accompanying text (suggesting that Congress might authorize experimentation with the AAA's provisions, as with court-annexed arbitration, but should proceed cautiously because this could erode national rule revision which can better consider the prescriptions). The AAA's thorough evaluation above means that it warrants little elaboration here. Most important, all three of its provisions can be considered best in the normal rule revision process, which legislative amendment would bypass and erode. The products liability reform measure presents a closer question principally because the alternatives available appear less satisfactory. See *supra* note 121.



