1997

Contemplating the End of Federal Civil Justice Reform in Montana

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CONTEMPLATING THE END OF FEDERAL CIVIL JUSTICE REFORM IN MONTANA

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In continuation of the series of essays analyzing and documenting federal civil justice reform,[1] this essay first provides an update on developments in civil justice reform nationally and in the United States District Court of Montana (Montana District). The essay then stresses the continuing work of the Ninth Circuit District Local Rules Review Committee and additional issues relating to case assignments in the Montana District. Finally, the essay takes a glimpse into the future.

I. CIVIL JUSTICE REFORM UPDATE

A. National Developments

A small number of national developments in federal civil justice reform occurred since I reported on reform in the last issue of the *Montana Law Review*.[2] In that issue, I assessed ongoing experimentation with procedures for reducing cost and delay that the Montana District and the remaining ninety-three districts have conducted under the Civil Justice Reform Act (CJRA) of 1990.[3] Since then, many of the thirty-four Early Implementation District Courts (EIDC)—of which the Montana Dis-

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1. Carl Tobias, *Ongoing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 511 (1996) [hereinafter Tobias, *Ongoing*]; Carl Tobias, *Continuing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 143 (1996) [hereinafter Tobias, *Continuing*]; Carl Tobias, *Refining Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 539 (1995) [hereinafter Tobias, *Refining*]; Carl Tobias, *Re-evaluating Federal Civil Justice Reform in Montana*, 56 MONT. L. REV. 307 (1995); Carl Tobias, *Evaluating Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 449 (1994); Carl Tobias, *Recent Federal Civil Justice Reform in Montana*, 55 MONT. L. REV. 235 (1994) Carl Tobias, *More on Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 357 (1993); Carl Tobias, *Updating Federal Civil Justice Reform in Montana*, 54 MONT. L. REV. 89 (1993); Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992); Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992); Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433 (1991).

2. *See* Tobias, *Ongoing*, *supra* note 1, at 512-14.

3. *See id.* at 512-13.

trict is one—and virtually all of the remaining sixty courts that are not EIDCs have continued experimenting with procedures for reducing expense and delay and have continued analyzing those measures' efficacy.[4]

I also reported in the last issue that the United States House of Representatives had passed three bills: the Attorney Accountability Act (AAA), the Securities Litigation Reform Act (SLRA), and the Common Sense Product Liability and Legal Reform Act (PLLRA).[5] The Senate did not pass the AAA. The Senate passed a measure intended to reform securities litigation that was practically identical to the House SLRA bill.[6] President Clinton vetoed the reform legislation and Congress subsequently overrode his veto. A House-Senate Conference Committee agreed on a compromise version of a products liability reform bill,[7] the President vetoed it as well, but Congress failed to muster the requisite votes to override. None of the measures would have specifically changed the CJRA; however, they might have significantly affected civil justice reform.

The RAND Corporation finished a draft of its study of the pilot districts during August and is currently scheduled to complete its study of experimentation with expense and delay reduction procedures in the ten pilot districts during early 1997. The FJC has completed a draft of its assessment of similar procedures being employed in five demonstration districts. The final draft of this study is now scheduled for completion in early-1997, because the Federal Courts Improvement Act of 1996 extended the date by which the Judicial Conference of the United States

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4. All districts had to issue civil justice expense and delay reduction plans by December 1993. *See* Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(1), 104 Stat. 5089, 5096 (1990); *see also* Annual Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania (1996) (analyzing CJRA procedures).

5. *See* Attorney Accountability Act, H.R. 988, 104th Cong. (1995); Common Sense Product Liability and Legal Reform Act, H.R. 956, 104th Cong. (1995); Securities Litigation Reform Act, H.R. 1058, 104th Cong. (1995). These effectively comprise the Common Sense Legal Reforms Act, H.R. 10, 104th Cong. (1995), the ninth tenet in the Republican Party's Contract With America; *see also* Tobias, *Refining*, *supra* note 1, at 541-42. *See generally* Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

In this article, I only minimally examine the securities measure, which Congress passed over President Clinton's veto, because I treated it a year ago in the *Montana Law Review*, the products liability proposal because I considered it in the most recent issue of the *Montana Law Review*, and the AAA because I analyzed it in both of those issues of the *Montana Law Review*.

6. *See* S. 240, 104th Cong. (1995).

7. *See* H.R. CONF. REP. NO. 104-481 (1996).

must report to Congress on pilot and demonstration district court experimentation, from December 31, 1996 to June 30, 1997.[8]

B. Montana Developments

The Ninth Circuit District Local Rules Review Committee (LRRC) was established in 1994 under the auspices of the Ninth Circuit Judicial Council and its Chief District Judges Committee.[9] As I reported in the last issue,[10] the LRRC is surveying local procedures of the fifteen districts which are situated in the Ninth Circuit to ascertain whether they conflict with, or replicate, the Federal Rules of Civil Procedure or provisions in the United States Code.[11]

The Committee accorded initial responsibility for reviewing the local procedures in all of the districts to LRRC members, law professors, court personnel, and practicing attorneys. One or several individuals in every district have been assessing for consistency and replication all local rules and general orders which have the effect of local rules. Any procedures that the reviewers find to be conflicting or duplicative are being compiled and evaluated with explanations for the findings. The Committee is designating, but not analyzing, all possibly inconsistent and redundant measures that courts have prescribed under the CJRA because the Act can be interpreted as providing authority to adopt measures which conflict with federal rules or statutes[12] and because the CJRA and procedures prescribed thereunder are scheduled to expire in 1997.[13]

When reviewers complete evaluations of procedures in specific districts, the LRRC examines the compilations and sends

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8. *See* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 608, 110 Stat. 3847, 3860 (1996).

9. I rely substantially in the remainder of this subsection on Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995) and on my experience as a member of the LRRC; *see also* Tobias, *Continuing*, *supra* note 1, at 147-48.

10. *See* Tobias, *Ongoing*, *supra* note 1, at 514-15.

11. *See* 28 U.S.C. § 332(d)(4) (1994); *see also* FED. R. CIV. P. 83. Rule 83's 1995 amendment also requires that local procedures not duplicate federal rules and Acts of Congress, and the LRRC is attempting to implement this requirement. *See id.*

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

13. *See* Judicial Improvements Act of 1990 § 103(b)(2), 28 U.S.C § 471 note (1994).

them to each district's judicial officers for their responses. The Committee next assesses the districts' responses and makes recommendations as to possible abrogation or alteration of particular procedures to the Ninth Circuit Judicial Council. The Committee has finished this assessment for fourteen districts. The Circuit Judicial Council will soon decide whether to abolish or modify the procedures.

The LRRC has now concluded its analysis of my initial review in the Montana District, which the judicial officers of the Montana District were simultaneously considering. The judges have responded, and the Committee has evaluated that response and has made suggestions to the Ninth Circuit Judicial Council. The LRRC completed most of its duties in early 1997.

In April 1996, a panel of the Ninth Circuit found that the Montana District's opt-out provision for securing consent to magistrate judge jurisdiction in civil cases conflicted with 28 U.S.C. § 636.[14] The court held that it would "not infer consent from silence because such consent does not meet the required 'clear and unambiguous manifestation' standard."[15] The Montana provision remains in effect; however, the magistrate judges may be satisfying the case and the statutory requirement by informing lawyers and litigants of the opportunity to consent during scheduling conferences.[16]

On October 9, 1996, the Article III judges of the Montana District adopted a general order which controls "case assignments for all matters filed in any division of the court on or after October 1, 1996, until otherwise modified by order of the Chief Judge."[17] The order includes numerous specifics; however, it essentially allocates civil and criminal cases among Article III judges and magistrate judges in the five divisions of the court in ways that reflect Judge Paul G. Hatfield's assumption of senior status and Judge Donald W. Molloy's assumption of the active judgeship left vacant when Judge Hatfield took senior status. For example, "civil cases in the Billings Division shall be assigned to Chief Judge Jack D. Shanstrom and to Magistrate

14. *See* Laird v. Chisholm, No. 94-35710, 1996 WL 205487 (9th Cir. Apr. 26, 1996).

15. *See Laird*, 1996 WL 205487, at *2 (citing *In re* San Vicente Med. Partners Ltd., 865 F.2d 1128, 1130 (9th Cir. 1989)); *see also* Excel Ind. v. Eastern Express, 72 F.3d 126 (4th Cir. 1995) (affording similar holding).

16. Telephone interview with Leif B. Erickson, U. S. Magistrate Judge for the Montana District (Nov. 6, 1996); *see also* D. MONT. R. 105-2(d).

17. Assignment of Cases General Order No. 2, at 1 (D. Mont. Oct. 9, 1996).

Judge Richard W. Anderson in accordance with the Local Rules," and each judicial officer is to be assigned fifty percent of those cases, "except as otherwise provided by statute."[18] It is important to observe that, by using the phrase "in accordance with the Local Rules," civil case assignments in the Billings division and the remaining divisions presumably leave in effect the opt-out provision that the Ninth Circuit held invalid.[19]

II. A GLANCE INTO THE FUTURE

A. National

Many of the federal district courts will continue experimenting under the CJRA with a number of measures that are meant to reduce expense or delay in civil litigation. More determinative conclusions respecting the procedures' efficacy must await additional testing, particularly in the districts that are not EIDCs and which have been enforcing and analyzing the techniques for a shorter period. The RAND Corporation's study of pilot district experimentation[20] and the Federal Judicial Center study of the demonstration district program[21] are scheduled to be completed in early 1997.[22] The Judicial Conference in turn must submit its reports and recommendations to Congress on the two programs by June 30, 1997[23] so that Congress can determine before December 1, 1997 whether the Civil Justice Reform Act should sunset.

Should members of Congress introduce proposed legislation in the 105th Congress which resembles the AAA and the products liability reforms that the 104th Congress considered, the 105th Congress ought to reject those aspects of the proposals which cover procedure and fee shifting, because they either will detrimentally affect the normal national process for amending Federal Rules of Civil Procedure or will improperly limit access to federal court.[24] If Congress is not convinced that the measures will have these effects or decides to proceed for other rea-

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18. *See id.* at 2.

19. *See id.*; *see also supra* notes 14-16 and accompanying text.

20. *See* Judicial Improvements Act of 1990 § 105(c), 28 U.S.C. § 471 note (1994).

21. *See id.* § 104(c), 28 U.S.C. § 471 note (1994).

22. Telephone interview with Donna Stienstra, Research Division, Federal Judicial Center (Nov. 18, 1996).

23. *See supra* note 8 and accompanying text.

24. For additional examination of the earlier proposed legislation and recommendations for treating it, see Tobias, *Ongoing*, *supra* note 2.

sons, Congress ought to delete those provisions that will disrupt ongoing reform efforts, such as experimentation under the CJRA.

B. Montana

The Montana District should revise the provision for securing consent to magistrate judge jurisdiction in civil cases in its local rules to reflect the provision's recent invalidation by the Ninth Circuit.[25] The easiest way to achieve this would be to replace the current procedure with one that better guarantees voluntary affirmative consent to jurisdiction.[26] The Montana District ought to evaluate the provision covering automatic disclosure to ascertain whether it is functioning effectively.[27] The Montana District should consider beginning to prepare some form of final assessment of experimentation under the CJRA since 1990 in the district and might want to insure that all relevant information on experimentation is collected, analyzed, synthesized, and preserved.

III. CONCLUSION

All ninety-four federal district courts are continuing to experiment with techniques for reducing expense and delay in civil litigation and assessing the measures' efficacy. The 105th Congress could enact additional legal reforms; however, passage would be unwarranted. The Montana District should revise its procedure for securing consent to magistrate judge jurisdiction in civil cases to comply with a recent Ninth Circuit decision which invalidated the Montana local rule. The court should also evaluate the effectiveness of its automatic disclosure requirements and consider preparing a final analysis of CJRA experimentation.

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25. *See supra* notes 14-16 and accompanying text.
26. *See supra* note 16 and accompanying text.
27. *See* Tobias, *Continuing*, *supra* note 1, at 149-50.