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The Clinton Administration and Civil Justice Reform

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Governor Bill Clinton was inaugurated as the President of the United States last month. The federal courts are one area of critical significance to the nation in which the Chief Executive can play a major role in important substantive and procedural policymaking. Moreover, President Clinton, as a former law professor and Arkansas Attorney General, may be particularly interested in issues involving the federal courts.

The Clinton Administration will have to address numerous issues that implicate the federal courts throughout its tenure, but especially during the first year in office. Some of these questions, such as the abolition of diversity jurisdiction, seem to be raised perennially. Other issues, such as budgeting for the federal courts, which assumed great significance for the federal judiciary when Congress appropriated $370 million less than the courts requested last year, must be treated annually. Certain questions, such as federal judicial selection, will demand prompt attention, because President Clinton must expeditiously fill more than one hundred vacant judgeships.

Finally, a number of areas involve multi-faceted issues, which will need treatment with varying degrees of immediacy. One such field is civil justice reform, both in numerous substantive areas and in the field of federal civil procedure. Because civil justice reform will present an array of issues which the Clinton Administration must address in 1993, those questions and their resolution warrant analysis. This essay undertakes that effort.

The paper initially provides a general overview of the substance and procedure of civil justice reform. The essay then examines the substantive aspects of the reform, emphasizing products liability and product regulation. The piece next emphasizes numerous procedural features of civil justice reform, because the Clinton Administration probably will have to address more of those dimensions during its initial year in office.

### I. General Overview

Civil justice reform has both substantive aspects, such as changes in the law that governs products liability, and procedural features, such as modification of rules which cover the resolution of civil litigation. As a general proposition, President Clinton seems unlikely to undertake striking new initiatives in the field of civil justice reform, either of a substantive or a procedural nature, at least in the early days of his administration. Improving the economy will be President Clinton's foremost domestic priority, and civil justice reform probably will yield no economic quick fixes and may afford relatively few economic benefits even in the long term.

Nevertheless, some dimensions of the reform, such as more cooperative discovery and certain forms of alternative dispute resolution (ADR), like arbitration and mediation, could reduce litigation costs and delays, which would be good for the economy. For example, improvements in the way that discovery is conducted might effect savings, because discovery disputes are a
substantial impediment to the expeditious resolution of civil lawsuits, while excessive discovery contributes significantly to unacceptable expense. Increased employment of alternative means of resolving controversies could correspondingly effect great savings by removing civil cases altogether from the federal courts, thereby reducing expenditures of judicial resources.

II. Substantive Reform: Products Liability and Product Regulation

A. Products Liability

Mr. Clinton's experience as a state governor probably means that he will be predisposed to leave the development of substantive products liability law with the fifty states, which have traditionally assumed nearly complete responsibility in this field, as in most areas, of tort law. Candidate Clinton's substantial backing from trial lawyers who vehemently oppose federal products liability legislation also makes it unlikely that he would support products liability initiatives at the federal level.

This anticipated lack of executive branch interest in federalization may be matched by the vacuum in congressional leadership which the defeat of Senator Robert Kasten (R-Wis.) has created. Senator Kasten had been the foremost proponent of federal products liability legislation, and his stewardship nearly brought such legislation to a vote in the United States Senate during 1992. Administration disinterest and this apparent dearth of legislative leadership will combine to relegate federal products liability legislation to the back burner in the near term.

If the Clinton Administration decides to leave the development of substantive products liability with the states, this resolution would be appropriate in light of the longstanding traditional treatment of the area. It also is important to remember that the American Law Institute (ALI) recently decided to commission the development of a Restatement of Torts Third, a preeminent feature of which will be reformulation of Section 402A.

In 1965, the Institute adopted Section 402A of the Second Restatement of Torts, which provided for strict liability in tort. That formulation of liability quickly swept the country, is embodied in some form in the products law of nearly all fifty jurisdictions, and is the section of the Restatement of Torts which has had the most profound influence on the development of substantive tort law.

B. Other Areas of Tort Law

Reform in other substantive areas of tort law apparently will remain primarily with the states, although “tort reform” efforts in these fields recently have come to a virtual standstill. The Clinton Administration probably will have no greater interest in federalizing issues, such as medical malpractice, caps on compensatory damages, and restrictions on punitive damages than products liability. Once again, this approach appears proper, as all of these substantive matters traditionally have been left with the states.

C. Product Regulation

The regulation of consumer products is another field which is closely related to product liability law, but an area that is more removed from substantive civil justice reform. The approach that President Clinton will take to product regulation remains less clear. Appreciation that too stringent or improper regulation in certain areas, such as new drug development and the environment, could slow the economic recovery and have other detrimental side effects may give the Clinton Administration pause.
After all, the principal promise that Candidate Clinton made was to improve the nation's stalled economy, pledging to focus on this domestic problem like a laser beam. Pundits have predicted that the Clinton Administration will impose increased regulation and that this will detrimentally affect the economy. The issue of regulation, accordingly, poses a dilemma for President Clinton.

If the Clinton Administration regulates too stringently it may risk delaying, or even losing, the opportunity to improve the American economy, thus jeopardizing the support of many citizens who elected Mr. Clinton President. If the Clinton Administration regulates with insufficient rigor, it could alienate numerous constituencies which voted for President Clinton and a number of powerful members of the House and Senate who have become increasingly frustrated with the failures of deregulation.

The President should resolve these difficulties with a strong dose of the pragmatism that served him well in the campaign and during the transition period. Mr. Clinton and his advisers need to analyze the areas in which regulation is statutorily-prescribed or could be effective, rigorously assess regulation's comparative efficacy, and adopt solutions which are appropriately tailored to the circumstances found. Fundamental aspects of this effort will be finely-calibrated treatment, which determines whether regulation is warranted and, if so, precisely what regulation will afford the most benefits and impose the fewest disadvantages.

Deregulation apparently functioned poorly in some fields which involve public safety, health, and the environment. For example, reduced regulation of workplaces has exposed workers to greater risk, leading to deaths and severe injuries. President Clinton must reregulate or provide stricter enforcement in these areas. Deregulation or decreased regulation has been effective in some fields that implicate public safety, health and the environment. Differentiated systems for approving new drugs can be very effective. For instance, the Food and Drug Administration should rely on fast tracks for considering and approving experimental drugs that treat life-endangering and fatal diseases, such as AIDS.

Whether regulation will prove efficacious and, if so, what exact character and degree of regulation will be effective remain unclear in a number of additional fields. These include some aspects of product safety in which alternatives to stringent regulation may increase safety and decrease expense. These fields will warrant additional close assessment.

In the final analysis, the Clinton Administration appears likely to pursue some moderate regulatory course that seeks to strike an appropriate balance between concerns for public health, safety, and welfare on the one hand and the economy on the other. This approach could be workable, especially if President Clinton leaves the development of substantive products liability law with the fifty states and if tort reform does not additionally erode the rights of individuals whom defective products injure.

### III. Procedural Reform

On the procedural side of civil justice reform, the Clinton Administration will want to analyze closely and comprehensively several initiatives that were previously instituted. Nonetheless, it currently appears that President Clinton will have available rather limited opportunities to affect substantially certain aspects of these earlier efforts. Moreover, the primacy that the Clinton Administration has assigned to economic recovery and the marginal likelihood that procedural reforms will provide either prompt or significant economic returns mean that President Clinton probably will not introduce bold initiatives in this area.

#### A. The Civil Justice Reform Act of 1990
The Civil Justice Reform Act (CJRA) of 1990 and its nascent implementation warrant comparatively brief treatment here, as the statute and its effectuation have been examined elsewhere. Congress passed the legislation out of concern over litigation abuse, particularly during discovery, in civil cases; increasing cost and delay in these suits; and shrinking access to federal courts. The measure requires that every federal district court promulgate by December of this year a civil justice expense and delay reduction plan, the purposes of which are to “facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.”

Thirty-four of the ninety-four districts issued civil justice plans before December 31, 1991, thereby qualifying for designation as Early Implementation District Courts (EIDC). These trial courts assumed that status in July 1992, when the Judicial Conference of the United States officially designated the districts as EIDCs. Although the CJRA requires that the courts annually evaluate the condition of their “civil and criminal dockets with a view to determining appropriate additional actions that may be taken ... to reduce cost and delay in civil litigation and to improve” litigation management practices, some EIDCs have not compiled annual assessments.

The sixty districts which the Judicial Conferences did not designate as EIDCs have been actively participating in civil justice planning. The Western Districts of Missouri and Texas, however, were the only courts that finalized their civil justice plan during 1992. It now appears that relatively few districts will issue their plans prior to the statutory deadline of December 1993.

In short, implementation of the CJRA has proceeded reasonably well. It has been a worthwhile, but somewhat controversial, experiment in reducing cost and delay in civil litigation. Nevertheless, the judicial branch remains in the early stages of effectuating the statute. These factors mean that there are comparatively few actions which President Clinton can now take on this civil justice reform front.

He should support the ongoing efforts to experiment and evaluate rigorously those procedures being employed to ascertain which are most effective. The Clinton Administration should also cooperate with Senator Joseph Biden (D-Del.), who was a chief proponent of the CJRA and has been closely monitoring its implementation. When all of the EIDCs complete their annual assessments, the Clinton Administration ought to analyze the evaluations, because they should provide a rather clear picture of the Act's early implementation. The annual assessments may suggest promising approaches for statutory amendment, even though Congress might be unwilling to entertain any major modifications until the legislation has been more fully implemented.

B. Access to Justice Act

The Clinton Administration may also have to consider how it should treat the Access to Justice Act, a bill introduced at the Bush Administration's behest in February 1992 and which could be reintroduced in 1993. Certain aspects of the legislation, such as its provision for expanded reliance on ADR, would replicate the 1990 Act. Additional features, such as prescription of pre-complaint notice, would resemble requirements included in executive branch reforms instituted by the Bush Administration, which are examined in the following subsection of this essay. Still other facets of the bill, such as provision for fee-shifting, are highly controversial. These factors explain why the Clinton Administration probably will, and should, take little interest in the proposal and why it was not even scheduled for a hearing in 1992.

C. Executive Branch Civil Justice Reform
Ironically, the earliest, most difficult decisions that President Clinton must confront involve the Bush Administration's efforts to implement civil justice reform in the Executive Branch. President Clinton must act rather promptly, because this endeavor was initiated through a 1991 Executive Order and subsequent Justice Department guidance, which remain in effect until the Clinton Administration modifies them. President Clinton need not proceed hastily, however, as the requirements that the Order and guidelines imposed on government attorneys have not yet been completely implemented.

In October 1991, President Bush promulgated Executive Order 12778. Its most salient aspects are “reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases.” In January 1992, the Justice Department issued a memorandum which affords interim guidance to administrative agencies and government attorneys on the Order's prescriptions that cover the conduct of government civil lawsuits.

The Bush Administration Justice Department originally intended to finalize this guidance after receiving comments last July from agencies and government lawyers on their experiences with the new procedures. The Department's Ad Hoc Committee, which has convened since the November election, planned to have final guidelines prepared for issuance by the end of 1992, and the Attorney General signed them in January 1993.

Clinton Administration officials responsible for formulating policy in the area of civil justice reform should closely evaluate the procedures included in the Order, scrutinize their implementation thus far, survey the input that government attorneys provided in July assess the new guidance, and ascertain the procedures' comparative effectiveness. Whether those procedures will ultimately achieve the goal of reducing delay and expense in civil cases is unclear.

Tentative assessment indicates that the Order was sufficiently well-considered and prescribed enough procedures which appear efficacious to warrant rigorous analysis aimed at determining exactly how effective the procedures actually will be. For instance, requiring government counsel to expedite the resolution of civil cases by engaging in early, voluntary exchange of information, in settlement conferences, and in other forms of alternative dispute resolution, such as mediation, may decrease cost and delay in government litigation, should provide valuable information on the efficacy of certain procedures, and could serve as a model for private dispute resolution.

In contrast, the Order's provision pertaining to sanctioning encourages government counsel to seek sanctions more often. That activity could increase expense and delay through unwarranted satellite litigation and by increasing incivility among attorneys. Moreover, the Justice Department had previously pursued an appropriately-measured sanctions policy. With information in hand from assessing the Order and its early implementation, the Clinton Administration can make well-informed judgments about which aspects of the Order should be retained, which features ought to be discarded, and which remain unclear or show promise.

The new administration might also want to survey CJRA implementation, through, for example, examination of the EIDCs' annual assessments, to ascertain whether any procedures adopted warrant application to government attorneys. The administration should similarly evaluate additional procedures, such as summary jury trials and other types of alternative dispute resolution, with which a number of districts experimented before the CJRA's passage.

The above factors mean that the wholesale rejection of executive branch civil justice reform which President Bush initiated would be unwarranted at this time, although the Bush Administration may have instituted this program primarily for political purposes. Moreover, President Clinton should carefully review that effort, continue selective experimentation with those procedures which proved efficacious or appeared promising, and prescribe any additional measures that he believes would improve the conduct of civil litigation in which the government participates.
Conclusion

President Clinton has a valuable opportunity to make significant public policy for the federal courts. The area of civil justice reform is one important field in which his administration will have to implement decisions in 1993. If the new government follows the suggestions above, it should be able to improve the civil justice system by reducing cost and delay.

Footnotes

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aa1 Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, the Courts Administration Division of Administrative Office of the U.S. Courts for providing valuable information, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.


See supra notes 3-9 and accompanying text. This approach may not be appropriate, however, because these rights have already been eroded significantly.


See Tobias, *Oversight*, supra note 13, at 56.

See, e.g., Letter to Allen Sharp, Chief Judge, United States District Court for the Northern District of Indiana, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992); Letter to John F. Gerry, Chief Judge, United States District Court for the District of New Jersey, from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management (July 30, 1992).


See Civil Justice Expense and Delay Reduction Plan for the United States District Court of the Western District of Missouri (Apr. 30, 1992); Civil Justice Expense and Delay Reduction Plan, United States District Court for the Western District of Texas (Nov. 30, 1992).


See supra notes 18-19 and accompanying text.


See infra notes 27-33 and accompanying text.


See Memorandum, *supra* note 29.


See Tobias, Roadmap, supra note 13, at 510 (examples of innovative procedures that could decrease expense or delay.)


144 F.R.D. 437
Five members of the Senate Judiciary Committee introduced the Judicial Amendments Act of 1994 on August 18, as Congress was fighting over the crime bill, health care reform, and many additional pressing issues as well as rushing toward its Labor Day recess. ¹ Senator Joseph Biden (D-Del.), Chair of the Senate Judiciary Committee, Senator Howell Heflin (D-Ala.), Chair of the Subcommittee on Courts and Administrative Practice, and Senator Charles Grassley (R-Iowa), Senator Orrin Hatch (R-Utah) and Senator Arlen Specter (R-Pa.), ranking minority members of the Senate Judiciary Committee, sponsored the legislation, which the Senate enacted that day and sent to the House of Representatives. ²

On October 7, the House of Representatives passed the measure as received, following considerable political wrangling in which certain members of the House Judiciary Committee attempted to insert provisions governing subjects, such as authorization to build more federal courthouses, that they favored. ³ At the eleventh hour, pragmatism seemingly prevailed, and Congress enacted this legislation, which extends three programs that are important to the functioning of the federal courts. ⁴ This essay briefly examines the new statute in an attempt to familiarize federal court judges, lawyers and parties, as well as other individuals and entities that may be interested in the operations of the courts, with the enactment.

The 1994 Judicial Amendments Act reauthorizes several initiatives that have become significant to the ongoing work of the federal judiciary. Section two of the measure extends for three years the authorization of the Judiciary Automation Fund, section three extends until the end of 1997 the authorization for court-annexed arbitration in twenty federal district courts, and section four extends for one year the RAND Corporation's study of experimentation in ten pilot district courts under the Civil Justice Reform Act (CJRA) of 1990.

Congress created the Judiciary Automation Fund in 1989 to provide a multi-year source of funding for the judiciary's development and implementation of a long range plan to automate the courts, in hopes of improving their efficiency. ⁵ The 1994 legislation requires modifications in the Fund which respond to a recent General Accounting Office study that criticized some features of the Fund's functioning. ⁶ For instance, the legislation conditions reauthorization on the courts' development of a strategic business plan identifying the purposes of judicial automation. ⁷ The Fund has been a worthwhile endeavor and, as improved by the new changes, it should be even more valuable. Moreover, the federal bench strongly supported the Fund's continuation. Congress, therefore, appropriately decided to reauthorize the Fund.

Section three extends for three years pilot programs involving mandatory court-annexed arbitration which are presently operating in ten selected federal districts ⁸ and involving voluntary court-annexed arbitration that are currently functioning
in ten additional districts. The statute also authorizes the remaining seventy-four districts to adopt voluntary court-annexed arbitration. This type of alternative dispute resolution (ADR) apparently works well, especially in relatively simple, routine cases that have small monetary amounts at stake, although this and other forms of ADR can be expensive. The three-year extension implements the suggestions of the Judicial Conference of the United States, the federal courts' policymaking arm, and is apparently a balanced approach.

The fourth section extends for one year the RAND Corporation's study of experimentation with procedures for reducing expense and delay. Completion of that study has been delayed primarily because unanticipated difficulties slowed implementation of the procedures being assessed in numerous pilot and comparison districts. RAND believed that one-fifth of the cases which it is evaluating would not have been completed by the statutory deadline and that these are the very type of complex lawsuits that are most difficult to resolve and at which the CJRA is aimed. RAND estimates that less than eight percent of the cases would remain unresolved at the conclusion of an additional year. Congress properly decided to extend this deadline. Having expended substantial resources on this nationwide experiment with cost and delay reduction procedures, Congress sensibly provided for capturing that cohort of cases which is most likely to inform future reform efforts.

Senators Grassley and Heflin, when introducing the bill in the Senate, observed that additional legislation governing ADR and civil justice reform may be warranted in the future and that the Clinton Administration would issue reform recommendations next year. Representative William J. Hughes (D-NJ), Chair of the House Judiciary Subcommittee on Intellectual Property and Judicial Administration, during discussion on the floor expressed disappointment that more comprehensive court improvements legislation, particularly governing court-annexed arbitration, was not passed in 1994, and expressed the sincere hope that Congress would revisit the issue in 1995 when the Justice Department would present a civil justice reform package. The Congress wisely deferred consideration of a thoroughgoing court improvements measure until the convening of the 104th Congress, because inadequate time remained in the second session of the 103d Congress to consider carefully comprehensive legislation.

Relatively few suggestions for implementing the 1994 Judicial Amendments Act are warranted, because the legislation continues programs that have already been functioning rather effectively and the statute is comparatively straightforward. As to the Judiciary Automation Fund, the courts should be attentive to the General Accounting Office criticisms and to the statutory strictures governing long range management and business plans. As to ADR, the twenty courts with reauthorized programs should insure that ADR is rigorously evaluated, so that informed decisions can be made regarding the future use of ADR. As to the RAND study, the pilot and comparison districts should do everything possible to facilitate RAND's collection, analysis and synthesis of the maximum accurate data.

Both the Senate and the House acted properly in adopting the Judicial Amendments Act of 1994. That measure will guarantee the uninterrupted continuation of three programs which have proved to be very beneficial to the federal courts. If the federal judiciary implements the statute in accord with the modest suggestions above, the courts should be able to improve the operation of these programs.

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Footnotes

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See 140 CONG.REC. S12,104, 12,107 (daily ed. Aug. 18, 1994).


See Pub.L. No. 103-420, 108 Stat. 4343, 4345 § 3 (1994). These courts are the District of Arizona, the Middle District of Georgia, the Western District of Kentucky, the Northern District of New York, the Western District of New York, the Northern District of Ohio, the Western District of Pennsylvania, the District of Utah, the Western District of Virginia, and the Western District of Washington.


See Terence Dunworth & James S. Kakalik, Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990, 46 STAN.L.REV. 1303, 1322 (1994). The ten pilot courts experimenting with the procedures are the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. The experience in these courts is being compared with that in ten comparison courts. Those courts are the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York and the Middle District of Pennsylvania.

See 140 CONG.REC. S12,104, 12,105 (statement of Senator Heflin).

See id.

See id. at S12,105 (statement of Senator Heflin); id. at S12, 106 (statement of Senator Grassley).

See 140 CONG.REC. H11,295, 11,296.
H.R. 4357, 103d Cong., 2d Sess. (1994) is an example of more comprehensive legislation.

See supra notes 6-7 and accompanying text.

See supra notes 8-9 and accompanying text. The RAND study is the type of rigorous evaluation that we have in mind. See supra note 11 and accompanying text.

See supra note 12 and accompanying text.

159 F.R.D. 649
The United States House of Representatives recently passed the Attorney Accountability Act of 1995. Section 2 of the measure would modify existing Federal Rule of Civil Procedure 68 by prescribing two-way fee-shifting in diversity cases. Section 3 of the bill would amend Federal Rule of Evidence 702 in ways that limit expert testimony, ostensibly to increase “honesty in testimony.” Section 4 of the legislation would substantially revise the 1993 amendment of Federal Rule of Civil Procedure 11, effectively returning to the 1983 version of the provision. This essay emphasizes section 4 of the Attorney Accountability Act, because I believe that its enactment is inadvisable for many of the same, and certain additional, reasons as passage of sections 2 and 3 are unwarranted.

Section 4 of the Attorney Accountability Act would make four significant changes in the 1993 amendment of Federal Rule of Civil Procedure 11. The modifications would eliminate a provision which prescribes safe harbors for potential violators, would specifically make Rule 11 applicable to discovery, would make mandatory judicial imposition of sanctions for Rule violations, and would require that sanctions which judges levy compensate parties injured by Rule violations. Most striking about these changes is that they would legislatively reverse four important features of the 1993 amendment of Federal Rule 11 less than two years after the provision's substantial revision.

The United States Supreme Court and the other entities—such as the Judicial Conference of the United States, the Conference's Committee on Rules of Practice and Evidence, and the Advisory Committee on the Civil Rules—which are responsible for amendment of the Federal Rules, decided to revise Rule 11 in 1993 for numerous reasons. Perhaps most significant, the 1983 amendment of Rule 11 had proved to be the most controversial revision in the half-century history of the Federal Rules.

The major purpose of the 1983 amendment had been to deter frivolous litigation by encouraging lawyers to “stop and think” before filing papers and by requiring that judges impose sanctions when attorneys and litigants contravened Rule 11. The Advisory Committee Note which attended the revision reaffirmed the idea that deterrence was the modification's principal objective, but the amendment's language and the note were confusing because they stated that judges could award litigation costs, including attorney's fees, for Rule violations. Many lawyers seized on this ambiguity and invoked the Rule to seek the recovery of litigation expenses, and numerous judges were responsive to these requests, making attorney-fee shifting the sanction of choice.

Counsel's pursuit of reimbursement engendered much unnecessary, costly satellite litigation unrelated to the merits of cases. Unclear wording in the 1983 revision and the amendment's inconsistent judicial construction and application concomitantly led
to unwarranted expense and delay. Some lawyers also used Rule 11 for tactical purposes, such as threatening less powerful parties with the provision.

Many of the above considerations disadvantaged, and even had chilling effects on, resource-poor litigants, such as civil rights plaintiffs. Rule 11 was invoked against, and sanctions were imposed on, these parties more often than any other category of federal civil litigant, and judges levied large sanctions on some civil rights plaintiffs. These factors chilled the enthusiasm of the litigants whose lack of resources and power makes them risk-averse and susceptible to Rule 11’s invocation.

The entities which were responsible for the 1993 amendment of Rule 11 apparently had several major objectives in revising the provision. The rule revisors meant to reduce Rule 11’s invocation and concomitant satellite litigation by decreasing incentives to rely on Rule 11. Five ways in which the revisors sought to achieve these goals were by amending the 1983 Rule to provide for safe harbors, to make Rule 11 inapplicable to discovery, to make discretionary judicial sanctioning, to emphasize that deterrence was Rule 11’s primary purpose, and to limit sharply the situations in which compensatory sanctions could be awarded. It is important to emphasize that passage of section 4 of the Attorney Accountability Act would reverse all of these decisions of the rule revisors.

Congressional enactment of section 4, therefore, would increase incentives to invoke Rule 11, multiply satellite litigation involving the provision, and enhance chilling effects attributable to Rule 11. The changes that section 4 makes would also increase expense and delay in federal civil litigation, thereby violating the express purpose of an earlier Congress in passing the Civil Justice Reform Act of 1990. The modifications would adversely affect individual parties, lawyers and judges as well as the civil justice system.

Perhaps less obvious, but equally important, passage of section 4 would effectively reverse the conscientious, several-year effort of the rule revisors and their expert advisors to improve Rule 11. The rule revisors commissioned an extensive study of Rule 11; assiduously wrote numerous draft changes of the 1983 Rule; sought, received, reviewed, and were responsive to voluminous public comment; and attempted to draft an amendment that was as clear and fair as possible. In the final analysis, the 1993 amendment substantially improved the 1983 version, while the rule revision process which led to the 1993 revision represented the type of open, rational process which the Congress contemplated in modifying that process in the 1988 Judicial Improvements and Access to Justice Act.

In short, the passage of section 4 could reinstitute the precise phenomena that the national rule revisors considered so problematic and carefully worked to exclude from Rule 11 less than two years ago. Enactment would require that judges, lawyers and parties master and implement a new Rule 11 shortly after it had been substantially amended. Passage could also eviscerate the 1993 revision before it has had an opportunity to work and before the Federal Judicial Center, an important research arm of the federal courts, has even had a chance to study the 1993 amendment’s efficacy. Moreover, enactment would discourage the national rule revision entities which expended great effort on crafting an improved Rule 11 and members of the public who actively participated in the amendment process. Finally, and perhaps most importantly, passage may seriously compromise the national rule revision process at a time when it has become increasingly vulnerable.

The United States Senate will soon consider section 4 of the Attorney Accountability Act which would substantially change Rule 11 less than two years after its significant, well-considered amendment by the national rule revisors. The specific modifications that section 4 would implement are inadvisable because they promise to reinstitute the very problems, such as satellite litigation and chilling effects, which the 1993 amendment of Rule 11 was intended to ameliorate. Adoption of section 4 would also have
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detrimental effects on the national rule revision process. The Senate, therefore, should scrutinize section 4 and be absolutely certain that it would greatly improve the 1993 revision of Rule 11 before passing section 4.

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Footnotes

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See H.R. 988, supra note 1, § 2; see also FED.R.CIV.P. 68.


See H.R. 988, supra note 1, § 4; see also 1993 amendment of FED.R.CIV.P. 11; 1983 amendment of FED.R.CIV.P. 11.

For example, the application of sections 2 and 4, if passed, could lead to satellite litigation and chilling effects. See infra notes 13–19 and accompanying text. The passage of sections 3 and 4 could correspondingly have adverse effects on the relevant rule revision entities, the Advisory Committee on Federal Rules of Evidence and the Advisory Committee on the Civil Rules.

See H.R. 988, supra note 1, § 4.


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14 See, e.g., Burbank, supra note 13, at 1930–31; Tobias, supra note 8, at 1776.

15 See, e.g., Tobias, Reconsidering, supra note 7, at 876–77; see also Nelken, supra note 12, at 1327, 1340.


17 See, e.g., Nelken, supra note 12, at 1327, 1340; Vairo, supra note 16, at 200–01.


19 See Tobias, supra note 13, at 495–98; Vairo, supra note 16, at 200–01.

20 I rely substantially in this paragraph on Tobias, Revision, supra note 7; Tobias, supra note 8.

21 See FED.R.CIV.P. 11(c)-(d), reprinted in 146 F.R.D. at 421–23; see also Tobias, supra note 8, 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.


23 See Tobias, Revision, supra note 7; Tobias, Reconsidering, supra note 7; Carl Tobias, Rule Revision Roundelay, 1992 WIS.L.REV. 236.

24 See Tobias, Revision, supra note 7; Tobias, Reconsidering, supra note 7; Carl Tobias, Rule Revision Roundelay, 1992 WIS.L.REV. 236.


160 F.R.D. 275