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# ONGOING FEDERAL CIVIL JUSTICE REFORM IN MONTANA

Carl Tobias\*

## I. INTRODUCTION

In the most recent issue of the *Montana Law Review*,<sup>1</sup> I evaluated continuing experimentation that the Montana Federal District Court and other districts have performed under the Civil Justice Reform Act (CJRA) of 1990. I also analyzed several proposed legal reforms which the Republican Party included in its Contract With America, and I discussed the Ninth Circuit Judicial Council's review of local procedures. I stated that the Montana Federal District Court had finalized a set of local rule amendments in light of the 1993 Federal Rules revisions.<sup>2</sup> Moreover, I reported that the United States House of Representatives had passed three bills - the Attorney Accountability Act (AAA), the Securities Litigation Reform Act (SLRA), and the Common Sense Product Liability and Legal Reform Act (PLLRA).<sup>3</sup> I also

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\* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and Ann and Tom Boone and the Harris Trust for generous, continuing support. I serve on the Ninth Circuit District Local Rules Review Committee and on the Advisory Group that the United States District Court for the District of Montana has appointed under the Civil Justice Reform Act of 1990; however, the views expressed here and errors that remain are mine.

1. See Carl Tobias, *Continuing Federal Civil Justice Reform in Montana*, 57 MONT. L. REV. 143 (1996) [hereinafter Tobias, *Continuing*]. This is the most recent installment of a series of articles which document and analyze developments in federal civil justice reform in Montana. See Carl Tobias, *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, 437-51 (1991).

2. See United States District Court for the District of Montana, Order, Amendments to the Rules of Procedure of the United States District Court for the District of Montana (1995); see also Tobias, *Continuing*, *supra* note 1, at 146-47.

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

observed that the Senate had passed securities litigation reform legislation, that President Bill Clinton had vetoed the measure and that Congress had overridden this veto. Furthermore, the United States Senate had passed a product liability reform bill; however, it had failed to pass the AAA. None of the measures would specifically modify the CJRA, but they could significantly affect civil justice reform.

Since my last report, the District Local Rules Review Committee (LRRC) which the Ninth Circuit Judicial Council appointed has continued its assessment of the local rules of the circuit's fifteen districts to ascertain whether they are inconsistent with, or duplicate, the Federal Rules of Civil Procedure and federal statutes. This Committee has concomitantly completed the initial phase of its review of the Montana District's local procedures.

On the national front, a House-Senate Conference Committee agreed on a compromise version of a products liability reform measure;<sup>4</sup> however, President Clinton vetoed the bill and Congress lacked the necessary votes to override. These recent developments in civil justice reform deserve examination. This essay undertakes that effort.

The essay initially provides an update of pertinent developments respecting civil justice reform in the United States and in the Montana Federal District Court. The paper emphasizes the agreement of House and Senate conferees on a products liability reform measure which involves civil justice reform and the work of the Ninth Circuit Local Rules Review Committee. The essay concludes with a brief glance into the future.

## II. CIVIL JUSTICE REFORM UPDATE

### A. *National Developments*

Virtually no new developments in federal civil justice reform at the national level that implicate the district courts have occurred since I considered reform in the last issue of the *Montana Law Review*.<sup>5</sup> All thirty-four Early Implementation District Courts (EIDC), of which the Montana Federal District Court is one, and the remaining sixty courts which are not EIDCs have continued experimenting with measures for decreasing expense

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4. See CONFERENCE COMM. REP. ON H.R. 956, COMMON SENSE PRODUCT LIABILITY LEGAL REFORM ACT OF 1996, H.R. REP. NO. 104-481, 104th Cong., 2d Sess. (1996).

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

and delay and have continued assessing the effectiveness of those procedures.<sup>6</sup>

The House of Representatives passed the AAA, the SLRA and the PLLRA in early 1995.<sup>7</sup> The Senate passed a measure intended to reform securities litigation that was practically identical and a bill governing products liability litigation which was somewhat similar later that year.<sup>8</sup> These proposals could significantly affect federal civil justice reform. However, I minimally examine the securities measure because I treated it in the most recent issue of the *Montana Law Review* and I briefly consider the AAA because Congress will probably not pass that proposal and even if it does President Clinton will veto the measure.

The Attorney Accountability Act would change Federal Rule of Civil Procedure 68's settlement offer provision by prescribing fee shifting in diversity cases and would alter Federal Rule of Evidence 702 by limiting expert testimony.<sup>9</sup> The measure would correspondingly make more stringent the 1993 revision in Federal Rule of Civil Procedure 11 by omitting safe harbors, applying the amendment to discovery, and commanding courts to impose compensatory sanctions.<sup>10</sup> The Senate has failed to pass this bill.

The securities enactment institutes numerous changes in securities litigation. Most relevant to the issues examined here, the legislation requires elevated pleading, imposes special class action strictures in securities suits and mandates that losers pay prevailing litigants' attorney's fees in certain of those cases.<sup>11</sup> The Senate passed a bill that was analogous to the SLRA in June, and a conference committee agreed on a measure in December, 1995. The President vetoed this proposal, but the House and the Senate voted to override that veto.

The PLLRA would have made a number of modifications in

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

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

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

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

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

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

products liability law. For instance, the measure would have restricted seller liability in certain situations and would have sharply limited the circumstances in which punitive damages were available.<sup>12</sup> The bill would concomitantly have afforded several defenses to products liability actions and prescribed a special Rule 11 covering frivolous products suits.<sup>13</sup> The measure would also have prohibited strict liability cases for commercial loss, included a statute of repose, and limited the liability of health care providers and drug manufacturers.<sup>14</sup> During May of 1995, the Senate passed a measure that was considerably more lenient than the House legislation,<sup>15</sup> and a conference committee only recently harmonized the substantially different versions.<sup>16</sup>

The compromise measure retained certain limitations on liability for noneconomic loss, punitive damages and marketing chain entities while including several defenses and a statute of repose.<sup>17</sup> The measure omitted the special Rule 11 for frivolous products liability cases and the restrictions on liability for health care providers and drug manufacturers.<sup>18</sup> Both Houses of Congress passed the compromise version; however, President Clinton vetoed the measure and Congress failed to override that veto.<sup>19</sup>

### B. Montana Developments

The Ninth Circuit Local Rules Review Committee was created in 1994 under the aegis of the Ninth Circuit Judicial Council and the Chief District Judges Committee of that entity.<sup>20</sup> The LRRC must review local procedures of the fifteen districts located in the Ninth Circuit for consistency with, and for duplication of, the Federal Rules of Civil Procedure and requirements in the

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

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

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

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

16. See CONFERENCE REPORT, *supra* note 4.

17. See H.R. 956, 104th Cong., 2d Sess., §§ 103-06, 108, 110 (1996); see also *supra* notes 12-14 and accompanying text.

18. See H.R. 956, *supra* note 17; see also *supra* notes 13-14 and accompanying text.

19. See *House Fails to Override Liability Veto*, WASH. POST, May 10, 1996, at A23.

20. 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.

United States Code.<sup>21</sup>

The Committee assigned initial responsibility for examining the local procedures in every district to Committee members, law professors, court personnel and practicing attorneys. One or a small number of individuals in each district are reviewing for inconsistency and duplication all local rules and general orders that have the effect of local rules. Any rules which the reviewers find to be inconsistent or duplicative must be compiled and analyzed with explanations for the findings. The Committee is identifying, but not assessing, all potentially conflicting and duplicative procedures which have been adopted under the CJRA because the statute can be viewed as affording authority to prescribe inconsistent procedures<sup>22</sup> and because the legislation, and procedures adopted thereunder, are scheduled to sunset in 1997.<sup>23</sup> When reviewers finish compiling possibly inconsistent or duplicative procedures in particular districts, the Committee considers the compilations and forwards them to every district's judicial officers for their responses. These reviews have been completed in a majority of the Ninth Circuit's districts. The Committee next evaluates the districts' responses and makes suggestions as to possible abolition or modification of specific procedures to the Ninth Circuit Judicial Council. The Committee will soon undertake this analysis for some one-fourth of the districts. The Circuit Judicial Council will ultimately determine whether to abrogate or alter the procedures.

I am responsible for performing the initial review in the Montana District. My research assistant and I began conducting this examination in Autumn 1995, and we completed the review in early 1996. The LRRC will soon complete its evaluation of the review, which the judicial officers of the Montana District are simultaneously considering. The judges are to respond, and when the LRRC receives their response, the Committee will analyze it and make recommendations to the Judicial Council. The LRRC plans to conclude the entire review process during 1996.

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21. See 28 U.S.C. § 332(d)(4) (1988 & Supp. V 1993); 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 FED. R. CIV. P. 83.

22. See *Friends of the Earth, Inc. 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).

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

## III. A GLANCE INTO THE FUTURE

A. *National*

All the federal districts will continue experimenting under the CJRA with numerous mechanisms which are intended to decrease cost or delay in civil litigation. More conclusive determinations regarding the procedures' effectiveness must await additional testing, especially in the districts that are not EIDCs and that have been applying and assessing the measures for less time. The RAND Corporation study of the pilot district program<sup>24</sup> and the Federal Judicial Center study of the demonstration district experimentation<sup>25</sup> are scheduled for completion in September.<sup>26</sup> The Judicial Conference then must make reports and recommendations to Congress on the two efforts by December 1996,<sup>27</sup> so that Congress can decide whether the Civil Justice Reform Act ought to expire.

On the legislative front, Congress should reject those aspects of the AAA and products liability reforms that govern procedure and fee shifting because they will adversely affect the normal national process for revising rules or will improperly restrict federal court access.<sup>28</sup> If Congress is not persuaded that the measures will have these impacts or chooses to go forward for other reasons, Congress should omit those provisions which will disrupt continuing reform efforts, such as experimentation under the CJRA.

B. *Montana*

The Montana Federal District Court properly decided to amend its local rules after soliciting public comment on the proposed changes.<sup>29</sup> The district should assess the provisions governing automatic disclosure and the opt-out procedure for civil case assignments to determine whether those mechanisms are

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24. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 105(c), 104 Stat. 5089, 5098.

25. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 104(c), 104 Stat. 5089, 5097.

26. Telephone conversation with Donna Stienstra, Research Division, Federal Judicial Center (Apr. 18, 1996).

27. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, §§ 104(d), 105(c), 104 Stat. 5089, 5097-98.

28. For additional examination of this proposed legislation and suggestions for treating it, see Tobias, *Common Sense supra* note 7.

29. See *supra* note 2.

operating effectively.<sup>30</sup> The Montana Federal District Court should also continue working closely with the LRRC in its review of the court's local procedures for possible inconsistency or duplication by responding to the Committee's initial report on the district's procedures.

#### IV. CONCLUSION

All ninety-four federal districts are continuing to experiment with measures for decreasing cost and delay in civil suits and evaluating the procedures' effectiveness. Congress could pass additional legal reforms; however, adoption would be inadvisable. The Montana District has finalized amendments in its local rules, and the court should assess for efficacy the disclosure and opt-out provisions. The district has also received and is considering the Local Rules Review Committee's initial review of the district's local procedures.

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30. See Tobias, *Continuing*, *supra* note 1, at 149-50.