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Carl W. Tobias

University of Richmond, ctobias@richmond.edu

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SHOULD MONTANA ADOPT A CIVIL JUSTICE REFORM ACT?

Carl Tobias*

Civil justice reform in the federal government has become highly controversial. Each branch of the federal government apparently is vying to outdo the others in the field of civil justice reform. Congress passed the Civil Justice Reform Act of 1990 (CJRA)¹ to reduce expense and delay in federal civil litigation, and the federal judiciary has been implementing that statute since late 1990. In December, 1991, the Montana Federal District Court became one of thirty-four federal districts which issued civil justice expense and delay reduction plans to qualify for designation as Early Implementation District Courts (EIDC) under the CJRA.²

During October, 1991, the Bush Administration, in the name of civil justice reform, imposed numerous, relatively burdensome requirements on government counsel who litigate civil cases.³ Moreover, the Administration has introduced in Congress civil justice reform proposals that are unlikely to pass in 1992.⁴ The Administration has also developed model civil justice reform legislation which it is urging the states to adopt.⁵

These developments in the federal sphere mean that the 1993 session of the Montana Legislature probably will consider some form of civil justice reform legislation for the Montana state court system. This essay evaluates whether the legislature should pass a civil justice reform statute. The paper first briefly examines the complications in civil litigation which led Congress to enact the

* Professor of Law, University of Montana. I wish to thank Sally Johnson and Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Cowley Endowment and the Harris Trust for generous, continuing support. Errors that remain are mine.

1. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-82 (Supp. 1992)).

2. See United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan (Dec. 1991) [hereinafter Plan]. See also Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(c) (statutory provision for EIDCs); Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (list of thirty-four EIDCs). See generally Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91 (1992) (analysis of Montana civil justice plan) [hereinafter *Civil Justice Plan*].

3. See Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (1991). See also Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,778, 57 Fed. Reg. 3,640 (1992). See generally Carl Tobias, *Civil Justice Reform Roadmap*, 143 F.R.D. (forthcoming Oct. 1992).

4. See S. 2180, 102nd Cong., 1st Sess. (1992); H.R. 4155, 102nd Cong., 1st Sess. (1992). See generally Tobias, *supra* note 3.

5. Civil Justice Reform Model State Amendments (1992).

Civil Justice Reform Act of 1990. It then analyzes whether the Montana Legislature should adopt a civil justice reform measure. Because the piece finds that relatively few reasons for passing such legislation apply to the Montana state court system, the paper recommends that the Montana Legislature proceed cautiously in the area of civil justice reform.

Congress enacted the Civil Justice Reform Act of 1990 to rectify or ameliorate alleged abuse in the civil litigation system, increased expense and delay in civil cases, and declining access to the federal courts.⁶ Numerous federal judges, led by Chief Justices Warren Burger and William Rehnquist, had been asserting for nearly two decades that there was a litigation explosion and abusive behavior in the litigation and discovery processes.⁷

The dearth, if not the complete absence, of these problems in the Montana state system constitutes the most compelling argument against adoption of a state civil justice reform statute. The Montana state district courts experience little litigation or discovery abuse, most civil lawsuits in the system are rather inexpensively and promptly resolved, and lawyers and litigants have comparatively unrestricted access to the state courts. Indeed, important features that make the state court forum so attractive for Montana practitioners and parties are the relative ease of access and the comparatively uncomplicated procedures that govern the disposition of civil lawsuits, thereby facilitating their expeditious resolution. In short, the Montana state civil justice system now appears to be operating efficaciously and to be avoiding or minimizing the very difficulties that prompted federal civil justice reform: growing litigation and discovery abuse, increasing costs and delays associated with civil actions, and decreasing court access.

The existence and magnitude in the federal courts of the phenomena identified immediately above have been highly controversial.⁸ I recognize, therefore, that some observers may dispute the

6. See Senate Comm. on Judiciary, *Judicial Improvements Act of 1990*, S. REP. NO. 416, 101st Cong., 2d Sess. 103 (1990), reprinted in 1990 U.S.C.C.A.N. 6802, 6804-05. See generally Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (Summer 1991).

7. 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* (A. Leo Levin & Russell Wheeler eds. 1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975); *Dissent From Order Amending the Federal Rules of Civil Procedure*, 446 U.S. 997, 1000 (1980). See generally Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 287-89 (1989).

8. See, e.g., Don J. DeBenedictis, *ABA Releases Civil Justice Plan*, A.B.A.J., Apr. 1992, at 30; Marc Galanter, *Public View of Lawyers*, TRIAL, Apr. 1992, at 71; Randall

assertions that the phenomena are absent or relatively inconsequential in the Montana state civil justice system. Little data, however, currently indicate that the Montana state courts are experiencing these complications. Nonetheless, if the legislature chooses to explore civil justice reform, it ought to collect, assess and synthesize information on the problems before acting. Should the Montana Legislature find that the difficulties are present to any meaningful degree, the legislature ought to ascertain precisely their nature and prevalence before prescribing measures which could prove as onerous as those that have been adopted under the rubric of federal civil justice reform. For instance, the Montana Federal District Court is requiring that practitioners file more papers and participate in a greater number of activities, which could increase the expense of civil litigation.⁹

There are many reasons why the Montana Legislature should cautiously approach civil justice reform. Most important are the ideas already mentioned: the dearth of data regarding the existence of the complications that motivated federal civil justice reform and the lack of information on the character or size of problems, if there are any difficulties. The absence of relevant material should lead the legislature to exercise special caution before legislating in the area of civil justice reform. For example, it is virtually impossible to prescribe effective procedures for remedying or limiting difficulties that have not been precisely identified.

Even if more data on the Montana state civil justice system were available, and the information showed that there are significant problems, additional reasons would warrant caution. The implementation of new procedures will be expensive. The Montana state civil justice system will incur costs in developing and proposing for public comment new procedures, in analyzing public input and in revising the proposals, and in promulgating the new procedures. Moreover, expense, confusion and uncertainty will attend implementation of the new procedures, as judges and lawyers become aware of the procedures and master and integrate them with existing procedures. Furthermore, it now appears that the procedures which Congress has prescribed, and numerous EIDCs have adopted, vary substantially in terms, for example, of their efficacy and cost.

Many of these factors suggest that the Montana Legislature

Samborn, *The Battle Escalates on Reform*, NAT'L L.J., Mar. 2, 1992, at 1.

9. See, e.g., Plan, *supra* note 2, at 10-13 (requiring that attorneys file pre-discovery disclosure statements and attend preliminary pretrial conferences). See generally Tobias, *Civil Justice Plan*, *supra* note 2, at 92-93.

should await the results of federal implementation of civil justice reform. If the legislature wishes to institute civil justice reform before federal experimentation is concluded,¹⁰ it at least should defer action until early implementation and assessment in the EIDCs has been completed.¹¹ The Montana Legislature must await analysis of early implementation in the Montana Federal District,¹² because the similar nature of the legal cultures in the District and the Montana state system will make the evaluation particularly relevant.

The legislature should also proceed cautiously, because the Montana Rules of Civil Procedure afford sufficient flexibility for the state courts to experiment with many of the procedures that are included under the rubric of civil justice reform. Montana Rule 16 apparently permits judges to employ certain Alternative Dispute Resolution (ADR) techniques, such as settlement conferences,¹³ while the Montana discovery rules may allow the imposition of several requirements similar to those now implemented under federal civil justice reform.¹⁴ Indeed, a number of state district courts have already experimented with some of these mechanisms.¹⁵ Moreover, state rule of civil procedure 83 allows district judges to respond to local conditions in their courts by adopting procedures that resemble the ones instituted in federal civil justice reform.¹⁶ This provision could be a fruitful source for limited local experimentation undertaken to implement civil justice reform. For example, if a district were experiencing delay or discovery or litiga-

10. The national experiment is scheduled to "sunset" in December, 1997. See Judicial Improvements Act of 1990, tit. I, Pub. L. No. 101-650, § 103(b)(2).

11. This should occur by 1994. See also *supra* text accompanying note 2.

12. See 28 U.S.C. § 475 (Supp. 1992) (requiring courts to assess annually civil justice reform efforts). See generally Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239 (1992).

13. Compare MONT. R. CIV. P. 16(a)(5), (c)(7) with 28 U.S.C. § 473(a)(6) (Supp. 1992) (provision for ADR). The State Bar Board of Trustees recently suggested that the Commission on Uniform District Court Rules adopt a rule that would authorize district judges to implement mandatory mediation. See Letter from George L. Bousliman, Executive Director, State Bar of Montana, to John Grant, Chairman, Commission on Uniform District Court Rules (June 24, 1992) (copy on file with author).

14. Compare MONT. R. CIV. P. 26-33 with 28 U.S.C. § 473(a)(3)-(5) (provision for discovery).

15. See, e.g., Bart Erickson, *[A]DR is the Latest Way to "Settle Out of Court,"* MONT. LAWYER, Apr. 1991, at 3. Some state courts have experimented with voluntary settlement weeks. Several districts have relied on MONT. R. CIV. P. 53 to appoint special masters who preliminarily hear numerous forms of cases, including family disputes.

16. See MONT. R. CIV. P. 83. See also Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendment of Federal Rule of Civil Procedure 83, reprinted in 137 F.R.D. 53, 152 (1991) (proposal to revise comparable federal rule to permit greater experimentation).

tion abuse, it might employ on a restricted basis one of the congressionally-suggested techniques for treating the identified problems.¹⁷

Finally, if the Montana Legislature feels compelled to adopt a civil justice reform statute during its 1993 session, the legislature ought to consider several factors. It should attempt to assemble and analyze as much relevant data as possible on the problems which civil justice reform purports to cure. The legislature then ought to prescribe techniques that are tailored to the complications which the Montana state civil justice system is experiencing. It should also authorize individual districts or judges to take into account and adopt those procedures that seem most effective for reducing expense and delay in civil litigation in their own courts. The Montana Legislature can rely on the Civil Justice Reform Act of 1990, selectively passing only the provisions that are most applicable to the state civil justice system. For instance, prescription of some of the eleven principles, guidelines and techniques in the federal statute might be appropriate for Montana.¹⁸ The legislature as well may want to consider certain aspects of the "Civil Justice Reform Model State Amendments" that the Bush Administration has developed.¹⁹ Several of the effective features afforded, however, resemble those in the 1990 federal legislation.²⁰ A number of the remaining facets are inadvisable or controversial,²¹ and Congress has rejected on policy grounds some of the procedures, such as fee shifting to prevailing parties.²²

In sum, the Montana Legislature should proceed cautiously in

17. See 28 U.S.C. § 473 (a)-(b) (Supp. 1992). See also *supra* notes 13 & 14.

18. This depends, of course, on what legislative investigation of the state civil justice system reveals. Experimentation with ADR seems appropriate, because some districts are already employing certain forms of it. See note 15 and accompanying text. In contrast, differentiated case management currently appears less appropriate. See 28 U.S.C. § 473(a)(1) (Supp. 1992). This seems so, because cases filed in Montana state courts apparently are more homogeneous and less complex than those pursued in federal courts.

19. See *supra* note 5 and accompanying text.

20. This is true of the proposals relating to the "multi-door courthouse" and the "pre-trial settlement conference." See Civil Justice Reform Model State Amendments, *supra* note 5, at 11-17, 37-39.

21. This is true of the proposals relating to "core disclosure and discovery" and to "facilitating summary judgment." See *id.* at 21-28, 43-46. See, e.g., Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 12 (discovery disclosure controversial).

22. See Civil Justice Reform Model State Amendments, *supra* note 5, at 55-59 (provision for "award of attorney's fees to prevailing party"). Congressional opposition to this procedure is one important reason why the Bush Administration's federal legislative proposals are unlikely to pass. See *supra* note 4 and accompanying text. See generally Mark S. Stein, *Is One-Way Fee Shifting Fairer Than Two-Way Fee Shifting?*, 141 F.R.D. 351 (1992).

the field of civil justice reform. Few of the problems that motivated Congress to pass federal legislation now appear applicable to the Montana state courts. If the legislature believes that the state civil justice system is experiencing difficulties which warrant treatment with procedures prescribed under the umbrella of civil justice reform, it should consider whether experimentation with existing procedures will rectify or ameliorate these complications. Should the Montana Legislature find that present measures are inadequate, it ought to adopt legislation which is narrowly tailored to any complications that currently plague the Montana state courts. The legislature can draw on procedures prescribed in the Civil Justice Reform Act of 1990 or the model state proposal.