K. Deisel - FYI

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

2188 UNITED STATES COURTHOUSE

75 SPRING STREET, S. W.

ATLANTA, GEORGIA 30303

CHAMBERS OF

ROBERT H. HALL, JUDGE

April 20, 1990

Mr. L. Ralph Mecham
Director, Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Ralph:

I am enclosing a copy of a letter by C. B. Rogers to Senator Biden on S.2027.

Sincerely,

Robert H. Hall

RHH/ma

Enclosure.

Sym 4/24/90

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April 18, 1990

Senator Joseph R. Biden, Jr.
221 Russell Senate Office Building
Washington, D.C. 20515

Dear Senator Biden:

I have been a practicing trial attorney in Atlanta, Georgia, since 1953. I am a Fellow of the American College of Trial Lawyers and have taught litigation techniques as an Adjunct Professor of Law at Emory University. I am the current President of the Northern District Bar Council and regularly a member of the Judicial Conference for this circuit. I write to express my profound reservations about both the assumptions and recommendations contained in S.2027, The Civil Justice Reform Act of 1990, which has been referred to the Committee on the Judiciary for consideration. I believe that if the bill is enacted as currently written, it will produce a series of unintended consequences that may make matters worse than before.

Let me first address the assumptions on which the need for legislative relief is predicated. Section 2, paragraphs (4) through (9) of the Act decry increasing litigation costs as a failure of the current system. While it is certainly true that total litigation costs have increased in recent years, this general fact is not particularly revealing. It may well be that as income and amounts in controversy have increased, disputants have been willing to spend more to see that their attorneys are better prepared for settlement negotiations or trial. If this is the case, cost--and therefore, information--containment measures may be counter-productive from the litigants' standpoint and may reduce the accuracy of judicial fact-finding. Put another way, increasing expenditures on litigation may be the litigants' solution to the problem of inadequately informed counsel and should not be constrained. In any event, increasing expenditures may not reflect any failure of the current system.

I note the effect of uncertainty on the willingness of parties to litigate. If litigants on both sides of a dispute expect that they will ultimately prevail, then they can be expected to be obdurate in settlement negotiations and to spend freely on preparation for trial. Increasing expenditures by both sides in litigation and increasing numbers of suits may well not be caused by a defect in the discovery or trial process, but rather by uncertainty with respect to final outcome. If the law were clearer and more certain in its application, the likely loser in a dispute would more quickly realize his position and could be expected sooner to drop out of the contest. Perhaps, more bright lines in the law and fewer exceptions to the exceptions would be a more fruitful approach to the perceived problem.

A second implicit assumption of the authors of the Act is that speed and cost reduction are distinct goals that can be pursued independently. This is a fallacy. Money and time are frequently substitutes for one another and can be traded off. This fact has important implications for the efficacy of the proposed Act. Specifically, the Act attempts to speed the discovery process by encouraging judges to set and preserve tight discovery deadlines. The hope is that shorter deadlines will directly reduce the delay in getting matters to trial. However, particularly given the increasing stakes involved in much civil litigation, it is not clear that shorter deadlines will lead to cost savings. The same amount of discovery can be had in less time simply by putting more lawyers and staff on the case.

It is hard to imagine that increased staffing or more frenzied preparation will result in less costly litigation. The opposite is more likely. For instance, court reporters who must produce expedited transcripts of depositions inevitably charge a "hurry up" premium. The same is true with typists, paralegals and others who must work overtime to meet deadlines. In short, when the amount in controversy warrants extra discovery, parties can be expected to employ more manpower to conduct it regardless of any reasonable

deadline. Greater speed to trial in such cases will be purchased with greater cost to litigants.[1/]

With respect, let me point out what is likely to be the gravest unintended consequence of all if the bill is enacted as written. The thrust of much of the Act is that judges need to involve themselves more directly in the discovery and settlement phases of their cases. It urges them to monitor compliance with deadlines and conduct more case-management conferences. Section 471(b)(3), for instance, provides for mandatory discovery conferences presided over by a judge and not a magistrate. In addition, Section 471(a)2 requires members of the bench in conjunction with members of the bar and public to develop expense and delay reduction plans. Unfortunately, judges have only limited amounts of time at their disposal, and time spent creating expense reduction plans, monitoring discovery, and conducting management conferences cannot be spent deliberating on motions or adjudicating cases. Once again, the Act's authors have failed to recognize an important tradeoff, i.e., that the more time a judge spends on administrative details the less time he will have to devote to judging.

Equally misguided is the proposal to publish records of various judges' backlogs in an obvious attempt to shame them into ruling more rapidly. Additional administrative requirements, the possibility of publication sanctions against judges who, for whatever reason, take more time in their deliberations, and lagging judicial salaries can only serve to make service as a judge even less attractive than it already is to the most qualified individuals.

I am further convinced of the need to minimize extra-judicial demands on our judges' time by anecdotal evidence from a circuit judge in Florida. Upon elevation to the circuit bench, a new judge in Jacksonville promised members of the local bar that he would try to rule on motions as quickly as possible. He then invited members of the bar to complain to him if he failed to meet his pledge. Within six

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[1/]Since litigants are differentially harmed by delay, it might make sense to create a market in trial dates so that some parties who do not value a quick determination of their dispute as highly as other parties could sell their trial date to the mutual benefit of all. Rather than trying to speed up the process of individual trials, we might attempt to more sensibly control the order in which trials are conducted.

months after ascending to the bench, this particular judge had several motions that he had not ruled upon in over five months. When gently rebuked for failing to meet his promise, the judge produced some simple arithmetic. He divided the number of hours per month by his total caseload and showed that he had approximately nine minutes per month to devote to each case. Stories such as this should give pause to those who would expand the administrative tasks already imposed on judicial officers.

In short, it may be that if judges are punished enough, they can unilaterally reduce case backlogs, and that if discovery is made costly enough or placed under stringent enough time constraints, we will have less of it. It is not clear, however, that this is the direction that public policy should take. Continued experimentation with alternative dispute resolution, which appears to have been particularly effective in states like Florida and Delaware, and increasing the training and number of judges available seem to be better uses for $16,000,000 than implementation of S.2027.

Respectfully,

C. B. Rogers

CBR/es
cc: Senator Edward M. Kennedy
Senator Howard M. Metzenbaum
Senator Dennis DeConcini
Senator Patrick J. Leahy
Senator Howell Heflin
Senator Paul Simon
Senator Herb Kohl