United States District Court
Northern District of California
San Francisco, California 94102

Chambers of
Robert F. Peckham
United States District Judge

April 18, 1990

M E M O R A N D U M

TO: MEMBERS OF SUBCOMMITTEE ON CIVIL JUSTICE REFORM ACT OF 1990

FROM: BOB PECKHAM

As indicated yesterday, I am transmitting the joint statement of the four New York bar groups. Chief Judge Oakes was kind enough to fax me a copy.

RFP:ojm
Enclosure

c: Chief Judge Clark (w/encl.)
L. Ralph Mecham "
Magistrate Brazil "
Robert Feidler "
Karen Siegel "

0799h PAMELA JARVIS
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APRIL___, 1990

JOINT STATEMENT OF:

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

THE FEDERAL BAR COUNCIL

THE NEW YORK COUNTY LAWYERS ASSOCIATION

THE NEW YORK STATE BAR ASSOCIATION

CONCERNING THE PROPOSED CIVIL JUSTICE REFORM ACT OF 1990, S. 2027, H.R. 3839

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Introduction

No participant in the civil litigation process -- plaintiff, defendant, judge or lawyer -- is likely to object to the stated goals of the proposed Civil Justice Reform Act of 1990: "to promote the just, speedy and inexpensive determination of civil actions."* It does not follow, however, that these goals will be furthered by all of the means prescribed in the Act.

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* Preamble, Civil Justice Reform Act of 1990 (the "Act"), S. 2027/H.R. 3839. The Act was introduced in the United States Senate on January 25, 1990 by Senator Joseph B. Biden, Jr.

Fax to Judge Pratt 4/17 415-566-6147

We believe that a number of factors, including the proliferation of federal causes of action, the persistently large number of unfilled judicial vacancies, and the recent surge of criminal (especially drug-related) prosecutions have led to increased delays in the civil justice system. The Act, however, does not directly address these root causes. Instead, the Act superimposes a new, nationwide procedural apparatus, without expanding judicial resources or reducing the ever-increasing demands placed on them.

While the Act ostensibly permits each district court to formulate its own procedures, the Act mandates many aspects of these procedures, even though there is little or no empirical data on the effectiveness or side-effects of these mandatory features. We are concerned that some of the Act's provisions may be ineffective and, indeed, that some of them may exacerbate the problems they are intended to redress.

At the same time, we welcome new ideas for increasing the efficiency of the civil litigation process. Therefore, we recommend that the Act be limited, in the first instance, to a pilot program that would be undertaken in small number of districts with different types of caseloads, so that the Act's impact under different circumstances could be evaluated. [We would also urge Congress to continue its study and consideration of ways to achieve the Act's laudable goals.]

Analysis of the Act

We agree with the Act's basic premise that active judicial intervention in the pretrial process can enhance efficiency and reduce delay and expense. We also agree with the Act's emphasis on alternative dispute resolution, early neutral evaluation and phased discovery as methods for achieving these goals. In addition, we favor the Act's provisions for judicial training programs on case management, the preparation of a Manual for Litigation Management which will "set forth basic management tools as well as provide commentary on what experience has taught about the effective use of such tools," and the establishment of automated dockets in districts that do not yet have them. (§ 475(a), § 476, § 479)

We do, however, question the efficacy of other provisions of the Act, e.g., the assignment of cases to pre-set scheduling "tracks" instead of having judges and magistrates set schedules on a case-by-case basis; the requirement that courts set firm trial dates even though they are flooded with criminal cases that necessarily have priority; and the requirement that "case management" conferences (which are akin to the pretrial conferences now mandated by Rule 16 of the Federal Rules of Civil Procedure) be presided over by judges instead of magistrates. We are also concerned that certain provisions of the Act could have unintended adverse effects, e.g., the imposition of deadlines for deciding motions, which

could affect the quality and clarity of judicial decision-making and increase the burdens on appellate courts.

The centerpiece of the Act is its requirement that every federal district court in the United States formulate and implement a system of "differentiated case management," also known as "case tracking." Every lawsuit would be assigned to one of several tracks, based on an assessment of the complexity of the case. Each district would be able to determine certain features of its own tracking system, e.g., the number of tracks and the amounts of time prescribed by each track for the completion of discovery and for trial. Other features, however, would be mandatory in every district.

For example, each track must set "presumptive time limits" for completion of discovery, except that in cases on the "complex" track, the judge may identify a "date certain" by which a final discovery cutoff date will be set. (§ 471(b)(6)(A) and (b)(6)(A)(iii)) In most cases, there must be a mandatory "discovery-case management conference," which must be "presided over by a judge and not a magistrate." (§ 471(b)(3)) At the conference, the judge must, inter alia: (i) prepare a "discovery schedule and plan" consistent with the track's presumptive deadlines; (ii) fix the time to file, hear and decide all motions, in accordance with "time guidelines" established by each court; (iii) fix the dates for additional pretrial conferences, including the final pretrial conference;

and (iv) fix a "time certain" for trial, except in "complex" cases, where the court must try to tell parties how long after the completion of discovery the trial will occur, and must, not later than 120 days before the discovery cutoff, set a date for trial. (§ 471(b)(3)(C), (E), (F), (G); § 471(b)(5)(B))

While we are in favor of certain aspects of the Act, especially its emphasis on early judicial intervention in the case management process, we believe that the following items should be reconsidered before they are imposed on the entire federal district court system:

-- Mandatory Case Tracking In Every Court. The case tracking concept is already embodied in Rule 16 of the Federal Rules of Civil Procedure. Under Rule 16, as amended in 1983, the judge or magistrate in each case is required to hold a scheduling conference and issue an order that limits the time to join other parties, amend the pleadings, file and hear motions, and complete discovery. The scheduling order may also include dates for pretrial conferences and a trial date. Thus, Rule 16 provides for individualized case management, based on the judge or magistrate's assessment of the complexity of the case and the needs and resources of the parties.

Because the tracks mandated by the Act embody pre-set deadlines, they are, by design, less flexible than the Rule 16 approach. Deadlines for completion of discovery may be extended only by order of the court for good cause shown, "such

as [that] subsequent discovery will not delay trial." (§ 471(b)(6)(B)(i)) All requests for discovery extensions must be signed by both the client and the attorney. (§ 471(b)(6)(B)(ii)) Each district's case management system "may" include a provision for extending the trial date in "complex" cases by order of court for good cause shown, but it is not required to do so. (§ 471(b)(5)(B)) There is no provision for the extension of trial dates in non-complex cases. To the extent that the tracks leave less room for the exercise of judicial discretion based on the particular circumstances of the case, they seem contrary to the Act's fundamental premise that effective case management should be tailored to the needs of each case.*

Moreover, under the Act, the initial track assignment is not made by a judicial officer, but by the clerk of the court or "designated track coordinator," subject to later reconsideration by the judge if a party is dissatisfied with the initial track assignment. (§ 471(b)(2)) The initial assignment is to be based on "an expanded civil cover sheet." (Id.) In our view, a judge or magistrate who has reviewed the

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* Compared to Rule 16(b)(5), which provides that the scheduling order may be modified upon a showing of good cause, the Act seems to contemplate stricter adherence to the deadlines it seeks to impose. To the extent that the Act contemplates the same level of flexibility as now exists under Rule 16, it is unclear why the Act would be more effective than Rule 16 in reducing delay.

complaint and responsive pleadings and has met with the parties' counsel is far more likely to set an appropriate schedule than is a clerk or other person who has nothing before him but the complaint and even an "expanded" civil cover sheet.

There does not appear to be any empirical data on the extent to which the 1983 amendments to Rule 16 have reduced delay and expense. There is, however, anecdotal evidence that in courts where Rule 16 is adhered to, there is significantly less delay. Indeed, the sponsors of the Act have cited that anecdotal evidence in support of the legislation.

In light of the significant differences between the individualized case management approach embodied in Rule 16 and the utilization of standardized tracks required by the Act, the success of Rule 16 in some courts does not necessarily mean that the Act will be likewise successful. Indeed, the opposite may be true. We also question whether there has been sufficient analysis of the factors that make Rule 16 effective in reducing delay in some courts but apparently not in others. There does not appear to be any data to support the proposition that, in the courts where Rule 16 is not being adhered to, the Act is any more likely than Rule 16 to be effective.

Indeed, the dearth of empirical evidence in support of case tracking is a source of serious concern. We know of no federal court which has utilized a tracking system of the kind contemplated by the Act. The case tracking experiments that we

are aware of in some state courts have had only limited success.* Nor is it at all clear that what might be effective in expediting state court caseloads would necessarily

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* In support of the Act, its sponsors have cited a differentiated case management ("DCM") pilot program commenced in Bergen County, New Jersey, in 1986. An assessment report issued in 1988 by New Jersey's Administrative Office of the Courts stated that the "philosophy" and "procedures" of DCM were sound, but raised a number of significant questions. [cite] For example, the report found "slippage" in the program, i.e., the percentage of cases that met the program's dispositional goals decreased as the program matured. Id. at ___. In addition, noting that 75% of all cases were assigned to the "standard" track, the report questioned whether subjecting all those cases "to the same set of deadlines and the same type of court intervention truly results in the type of differentiated case management originally contemplated." Id. at ___. The report recommended that further differentiation be considered "in order to guard against the standard track merely becoming the new 'bread line' of cases stacked up while waiting their turn for trial." Id. at ___.

In 1988, New Jersey expanded DCM to Camden County. One year later, Civil Presiding Judge Rudolph Rossetti of the Camdem County Court reported an "overall impression" from the court's DCM staff that "DCM is working and has been implemented in a relatively smooth manner." [cite] At the same time, however, the Camden County DCM Committee issued a report noting an increase in motion practice and concluding that "[i]t appears that the DCM program has increased litigants' costs without affording relief from the necessity of motion practice. It is perceived that motion practice may have increased, or at least been intensified because of the need to ensure completion of discovery within the discovery periods." [cite] The report also stated that "[t]he standard track discovery period appears to be unrealistic because of the vast differences in the cases assigned to it. Unless the discovery period is extended for all standard track cases or more complex cases excluded, DCM will not provide a 'ready' case at the end of the discovery period." [cite]

lend itself to federal litigation.* In our view, there is not enough empirical data to warrant the nationwide imposition of case tracking in every federal district court. We would therefore urge the sponsors of the Act to amend it so to provide, in the first instance, for a pilot program in a limited number of courts.

-- Firm Trial Dates. We agree with the premise of the Act that firm trial dates would be beneficial to civil litigants. When trials are postponed, plaintiffs with meritorious claims wait longer for relief, and defendants with good defenses are subjected to continued uncertainty and, in some instances, continued adverse publicity. Both sides may be forced to incur the expense of having counsel re-prepare witnesses and repeat other trial preparation activities. In addition, imminent trials often precipitate settlements, so firm trial dates would presumably be more effective in this regard.

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* [For example, the New Jersey court system is significantly different from the federal system, e.g., in general, judges do not simultaneously carry civil and criminal caseloads, and civil motions are heard on a "master calendar" basis, not by a judge assigned to the case for all purposes. In addition, in Bergen County, approximately 95% of all cases fall into the "expedited" and "standard" tracks, for which case management conferences are not required. Thus, there is far less judicial involvement than is contemplated under the Act and Rule 16, which require conferences in all but the simplest cases.]

However, in part because of the heavy and ever-expanding criminal caseloads in many federal districts and the fact that the Speedy Trial Act [cite] requires these cases to be given priority over civil cases, firm trial dates may not be achievable.* A number of judges have stated that it has been months -- and in some instances years -- since they have had time to try anything but criminal cases. If supposedly firm trial dates set under the Act are in fact subject to repeated postponement, the cost to the litigants of re-preparing the case will increase and the credibility of the system will ultimately suffer.

[We also note that the Act contemplates that trial dates in "complex" cases will be less firm than those in simpler cases. To the extent that this approach will tend to push the more complex cases further toward the end of the line, we are concerned that (i) important issues that need to be resolved by the courts will be further delayed and (ii) litigants in complex cases may be compelled to put their cases on a less appropriate track.]

-- Deadlines For Deciding Motions. The Act does not provide any mechanism for enforcing the required deadlines for

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* We understand that the Act's sponsors are considering exempting from the Act the districts with the heaviest criminal caseloads. It is not clear how these districts would be chosen, or by whom.

judges to decide motions, although it does mandate that each judge's pending undecided motions and caseload progress be published regularly. We question whether this would, in practice, generate pressure on judges to decide motions within the deadlines, but assuming that it would, we are concerned that the deadlines may be counterproductive.

Dispositive motions (e.g., motions for partial or complete summary judgment) can be a major factor in simplifying and expediting cases, and avoiding unnecessary discovery. Deadlines, however, may motivate judges to take the "safe" route of denying such motions, or even to discourage parties from making them in the first place. Judges may also be inclined to write fewer and less detailed opinions, which could in turn cause an increase in appeals. In addition, even on non-dispositive motions, opinions may give the parties guidance as to the judge's views, which helps to focus the litigation as it progresses and may be conducive to settlement. Opinions are likewise important to the development of the law, and provide guidance to lawyers and clients which may keep them out of the litigation process altogether.

We understand that a primary purpose of the deadlines for deciding motions is to prevent costly discovery from continuing while potentially dispositive motions are pending. That concern could be more directly addressed by rules that encourage judges to consider staying discovery until such

motions are decided. Such stays could be granted for limited periods and revisited at intervals (e.g., 30 or 45 days) after expiration of the original stay. In addition, in order to expedite the disposition of motions, it might be helpful to assign an additional law clerk to each judge and magistrate, increase the use of magistrates generally, and increase the use of pre-motion conferences.

Prompt decisions on motions can, in our view, do much to reduce delay and expense in the civil litigation process. It would be undesirable, however, if speedy decisions were achieved at the expense of the other goals of motion practice. Accordingly, we believe a pilot program to assess the effects of such deadlines would be appropriate before they are mandated in all federal district courts.

-- Limiting the Role of Magistrates. The Act's bar against magistrates presiding over the initial discovery-case management conference in all cases (and subsequent monitoring conferences in "complex" cases) seems contrary to the Act's stated purpose of expediting the civil litigation process, especially since magistrates are not subject to the heavy criminal caseloads that judges have to carry. We understand that strong opposition has already been voiced against the Act's provisions on magistrates, and that the Act's sponsors

are considering amending the Act to provide for greater utilization of magistrates in the civil litigation process.

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In sum, we believe that the Act has meritorious goals, and that some of its methods may be helpful in achieving those goals. At this time, however, we believe that nationwide imposition of the Act would be premature, and we urge that the Act be limited to a pilot program in the first instance.

We would be happy to discuss this joint statement with you and answer any questions you may have. Our respective organizations can be contacted as follows:

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The Federal Bar Counsel:
(insert names and numbers)

The New York County Lawyers Association:
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