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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

PRELIMINARY PLAN

CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN

Effective January 2, 1992

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INTRODUCTION

For two hundred years the citizens of the United States have cherished their system of civil justice as one of the cornerstones of a free and democratic society. The civil justice system protects individual rights by providing all Americans an opportunity to be heard in an impartial court of law.

In recent years, however, all three branches of government and the private sector have decried the fact that the civil legal system has become burdened with excessive costs and delays. Overuse and abuse of the system threaten the ability of the courts to provide equal justice for all. Essentially unrestrained civil litigation exacts an ever increasing toll on the domestic economy and on American companies attempting to compete in a world market.

The expense of civil litigation today as a practical matter results in denial of access to the courts for a significant segment of our society. Also, many cases of marginal merit settle in order to avoid oppressive costs of litigation. A principal cause for the escalation of cost is the overuse and abuse of discovery.

In most cases one or more parties are represented by counsel whose fee practice is to charge for legal services by the hour without regard to results obtained. The fee practice of charging for "billable hours" creates an economic conflict between lawyer and client. Another significant factor that contributes to excessive discovery is the concern lawyers have that they may be criticized or held legally accountable if they fail to exhaust every means at their disposal.

We are presented with the challenge of bringing costs under control so that our society may enjoy the benefits of a civil justice system that is affordable, timely, and fair.

Congress has responded to the challenge by enacting **THE CIVIL JUSTICE REFORM ACT OF 1990,** 28 U.S.C. §471 *et seq.*, ("the Act"). The Act requires each United States district court to implement a civil justice expense and delay reduction plan to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolution of civil disputes.

The courts have responded by proposing changes to the Federal Rules of Civil Procedure and the Executive has responded by recommending fifty specific changes to our current legal system. See **PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM (1991).**

This court has appointed an advisory group in accordance with 28 U.S.C. §478. After consideration of the advisory group's

See Article II of Part II

recommendations, and after independent consideration, this court has concluded that the congressionally mandated goals of reducing expense and delay in civil cases necessitates the elimination of some hearings and procedures, imposition of limits and standardization of others, and the creation of a multi-door courthouse to permit the parties to have access to several different methods for resolving their disputes.

The United States District Court for the Eastern District of Texas adopts the following **CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN.** This plan shall apply to all civil cases filed on or after January 2, 1991, and may, at the discretion of the individual judicial officer, apply to cases then pending.

PART ONE

ARTICLE ONE: DIFFERENTIAL CASE MANAGEMENT - TRACKING AND PRESUMPTIVE DISCOVERY LIMITS

Upon the filing of each case, the Court will assign the case to one of six tracks. Each track will carry presumptive discovery limits as set forth below. These limits shall govern the case and may not be changed by the parties or their attorneys by agreement or otherwise. The judicial officer to whom the case is assigned may, upon good cause shown, expand or limit the discovery.

TRACK ONE: No discovery

TRACK TWO: Disclosure only

TRACK THREE: Disclosure plus 15 interrogatories, 15 requests for admission, depositions of the parties, and depositions on written questions of custodians of business records for third parties.

TRACK FOUR; Disclosure plus 15 interrogatories, 15 requests for admissions, depositions of the parties, depositions on written questions of custodians of business records for third parties, and three other depositions per side (i.e., per party or per group of parties with a common interest.)

TRACK FIVE: A discovery plan tailored by the judicial officer to fit the special management needs of the case.

TRACK SIX: Specialized treatment and program as determined by the judicial officers.

ARTICLE TWO: DUTY OF DISCLOSURE

When required by this Plan, the duty of disclosure means the following:

(1) Initial Disclosure

(a) Each party shall, without awaiting a discovery request, provide to every other party:

(i) The name and, if known, the address and telephone number of each person likely to have

information that bears significantly on any claim or defense, identifying the subjects of the information;

(ii) The name and, if known, the address and telephone number of each person likely to have information that bears in any way on any claim or defense. This list shall be separate and distinct from the list required in subparagraph (i) above;

(iii) A copy of, or a description by category and location, all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense;

(iv) A copy of, or a description by category and location, all documents, data compilations, and tangible things in the possession, custody or control of the party or that bears in any way on any claim or defense. These things shall be disclosed separately and distinctively from those things required to be disclosed in subparagraph (iii) above;

(v) A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34, the documents or other evidentiary material on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(vi) For inspection and copying as under Rule 34, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) Timing of Disclosure

Unless the judicial officer directs otherwise, or the parties otherwise stipulate with the judicial officer's approval, these disclosures shall be made as follows:

(i) by a plaintiff within 30 days after service of an answer to its complaint or removal of the action from state court,

whichever occurs last;

(ii) by a defendant within 30 days after serving its answer to the complaint or removal of the action from state court, whichever occurs last; and, in any event

(iii) by any party that has appeared in the case within 30 days after receiving from another party a written demand for accelerated disclosure accompanied by the demanding party's disclosures.

(c) No Excuses

A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures-except with respect to the obligations under clause (iii) above.

(2) Disclosure of Expert Testimony:

(a) In addition to the disclosures required in paragraph (1), each party shall disclose to every other party any evidence which the party may present at trial under Rules 702, 703, and 705, Federal Rules of Evidence. This disclosure shall be in the form of a written report prepared and signed by the witness that includes a complete statement of all opinions to be expressed and the basis and reasons therefor, the data or other information relied upon in forming such opinions; any exhibits to be used as a summary of or support for such opinions; the qualifications of the witness; and a listing of any other cases in which the witness has testified as an expert at trial or in deposition within the preceding four years. When listing the cases in which the witness has testified as an expert, the disclosure shall include the styles of the cases, the courts in which the cases were pending, the cause numbers, and whether the testimony was in trial or deposition.

(b) Unless the judicial officer designates a different time, this disclosure shall be made at least 90 days before the date the case has been directed to be ready for trial, or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another under paragraph (2) (a), then disclosure shall be made within 30 days after such disclosure is made.

(c) By order in the case, the judicial officer may alter the type or form of disclosures to be made with respect to particular experts or categories of experts, such as treating physicians.

(3) Pretrial Disclosure.

(a) In addition to disclosures required in the preceding paragraphs, each party **shall** provide to every other party information regarding the evidence that the disclosing party may present at trial other that solely for impeachment purposes, as follows:

(i) The name and, if not previously provided, the address and telephone number, of each witness, separately identifying those whom the party expects to present at trial and those whom the party may call if the need arises;

(ii) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if taken by video, a transcript of the pertinent portions of such deposition testimony; and

(iii) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(b) Timing and Objections

Unless otherwise directed by the judicial officer, those disclosures **shall** be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the judicial officer, other parties **shall** serve and file

(i) any objections that deposition testimony designated under subparagraph (a)(ii) cannot be used under Rule 32(a), and

(ii) any objection to the admissibility of the materials identified under subparagraph (a)(iii).

Objections not so made, other than under Rules 402-403 of the Federal Rules of Evidence, **shall** be deemed waived unless excused by the judicial officer for good cause shown.

(4) Form of Disclosures, Meeting, Filing

The disclosures required by the preceding paragraphs shall be made in writing and signed by the party or counsel in

accordance with Rule 11 and shall constitute a certification that, to the best of the signer's knowledge, information and belief, such disclosure is complete and correct as of the time it is made. If feasible, counsel **shall** meet to exchange disclosures required by paragraphs (1) and (3); otherwise such disclosures **shall** be served as provided by Rule 5. The parties **shall** file a prompt notice with the court that the required disclosure has taken place.

(5) Duty to Supplement

After disclosure is made pursuant to this article, each party is under a duty to reasonably supplement or correct its disclosures if the party obtains information on the basis of which it knows that the information disclosed was either incomplete or incorrect when made, or is no longer complete or true.

ARTICLE THREE: MANAGEMENT CONFERENCE

(1) Timing

Within 120 days after issues have been joined, the judicial officer assigned to cases in Tracks 3, 4 and 5 **shall** convene a management conference.

(2) Attorney Responsibility Prior to Management Conference

Prior to the management conference, attorneys for each party **shall** make the required disclosures, **shall** have completed the depositions, if any, of the parties, and **shall** have met and conferred with the other attorneys in the action concerning stipulations of fact and issues to be tried.

(3) Scope of Management Conference

At the management conference, the judicial officer shall address each of the following items:

(a) confirm or modify track assignment;

(b) establish deadlines for filing of motions;

(c) determine issues to be tried;

(d) identify witnesses who will testify at trial;

(e) establish deadlines for approval of proposed expert witnesses;

(f) determine the efficacy of referring the case to alternative dispute resolution;

(g) determine feasibility of a settlement conference and the timing of such conference, if any;

(h) establish a firm trial date;

(i) consider establishing a time limit for trial;

(j) discuss litigation cost estimates with the parties and counsel;

(k) invite offers of judgment

(l) discuss any other matter appropriate for the case.

(4) Attendance

The management conference shall be attended by an attorney of record with full authority to make decisions and agreements that bind the client. Except in extraordinary circumstances, the court expects that attorney to be the one who will actually try the case. The conference should also be attended by the party or a representative of the party who has authority to settle.

ARTICLE FOUR: MOTION PRACTICE

(1) Leave of court must be obtained before a motion may be filed. A copy of the proposed motion must accompany the motion for leave to file. The following motions are excepted from the Rule.

(a) injunctive relief,

(b) dismissal based upon immunity, 28 U.S.C. §§ 1406 and 1915(d), or Fed. R. Civ. Pro. 12(b),

(c) summary judgment under Fed. R. Civ. Pro. 56, and

(d) judgment on the pleadings under Fed. R. Civ. Pro. 12(c).

(2) Motions permitted to be filed without leave of court in subsection (1) shall not exceed eight pages including authorities.

(3) Motions filed by the parties shall be determined by the judicial officer as soon as practicable.

ARTICLE FIVE: ATTORNEYS' FEES

With elimination of much of the traditional discovery and motion practice, as well as eliminating some procedures and hearings and standardizing others, the Court has attempted to reduce the cost and expense of litigation for those litigants who retain counsel on an hourly fee basis. However, no such reduction from these measures will inure to the benefit of litigants who retain counsel on a contingency fee basis. The Court, therefore, adopts the following maximum fee schedule for contingency fee cases (whether filed originally in this court or removed from state court);

(1) Cases filed and settled before verdict:

A fee of 25% of the settlement value.

(2) Cases tried to a verdict:

A fee of 33 1/3% of the total award or settlement, if settled after the verdict.

(3) Expenses:

Expenses incurred by attorneys that are directly related to the costs of litigation of individual cases shall be deducted from the award or settlement before any calculation distribution is made for attorneys' fees. No deduction is permitted for general office overhead expenses. Moreover, attorneys are prohibited from charging interest on any money advanced for expenses.

ARTICLE SIX: MISCELLANEOUS MATTERS

(1) Pretrial Orders

Pretrial orders **shall** be prepared for each case in Tracks 3, 4 and 5. These pretrial orders will be standardized and used by each judicial officer. The standardized form can be found in Appendix A of this Plan.

(2) Docket calls

Traditional docket calls are abolished. Each judicial officer shall endeavor to set early and firm trial dates which will eliminate the need for multiple-case docket calls.

(3) Conformity of Local Rules

Any existing local rule not in conformity to this Plan will be revised to conform.

(4) Inconsistencies in the Federal Rules of Civil Procedure

To the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling.

(5) Depositions

Deposition of witnesses or parties shall be taken on weekdays and may not last longer than six hours, unless otherwise authorized by the court. No deposition shall be taken on a weekend or holiday without approval of the judicial officer. Except when invoking the Fifth Amendment privilege against self-incrimination, or invoking attorney / client privilege, attorneys are prohibited from instructing the deponent not to answer a question or how to answer a question. Any other objections shall be made at trial.

(6) Alternative Dispute Resolution

If the judicial officer determines that the case probably will benefit from alternative dispute resolution, the judicial officer shall have discretion to refer the case to:

(a) court-annexed mediation in accordance with the court's mediation plan.

(b) voluntary mini-trial or summary jury trial before a judicial officer; or

(c) other alternative dispute resolution programs designated for use in this district

(7) Motion for Continuances or Extensions

Requests for extensions of deadlines for completion of discovery or for postponement of the trial shall be signed by the attorney of record and the party making the request.

(8) Offer of Judgment

At the Management Conference or anytime thereafter, a party may make a written offer of judgment. If the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected.

"Litigation costs" means those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition

costs and fees for expert witnesses.

The party who makes an offer of judgment **shall** set forth the deadline by which the offer must be accepted. The deadline must be reasonable. If the offer is not accepted in writing by the deadline, the offer is deemed rejected on that day.

If the difference between the rejected offer and final judgment is not significant, then, in the judicial officer's discretion, this rule can be disregarded.

(9) Docket Control Order Modification

The Docket Control Order produced at the Management Conference may be modified at any time thereafter by the judicial officer to whom the case is assigned.

(10) Plan Modification

The Plan may be modified by the court after consultation with the Advisory Group.

PART TWO

ARTICLE ONE: PRINCIPLES AND TECHNIQUES CONSIDERED BUT NOT ADOPTED

Section 473 of the Civil Justice Reform Act of 1990 requires that each court consider and may include in the plan adopted certain principles and techniques to reduce the cost and delay in litigation. The following principles and techniques were considered by this Court but not adopted:

(1) "[A] requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reason for their failure to do so."

One of the causes of delayed and expensive litigation is the fact that heretofore attorneys have driven the litigation process without active intervention by judicial officers. In order to come to terms with this problem, the guiding force in fashioning a case management plan should be the judicial officer assigned to the case.

(2) "[A] neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation."

While there are potential advantages of this technique, there was simply no support for the concept--either by the Advisory Group or by the judicial officers of this district. At the management conference, alternate dispute resolution techniques will be discussed. These techniques will include mediation, mini-trials and summary jury trials. These techniques are a better and more reliable substitute for a neutral evaluation program.

ARTICLE TWO: ADVISORY GROUP RECOMMENDATION

This article shall be completed after the Advisory Group has had the opportunity to consider the Courts' preliminary plan and after the Court has had an opportunity to consider the Advisory Group's recommendations.

CONCLUSION

This Plan has been adopted in the full spirit of the goals and objectives expressed in the Civil Justice Reform Act of 1990. The administration of justice will be enhanced and improved by the implementation of this Plan, and those citizens who seek to resolve their disputes in this Court will not be unduly delayed nor barred from the courthouse by undue and unnecessary costs and expenses.

Many of the provisions of this Plan are untested and will surely need fine tuning, or, perhaps, radical change as they play themselves out in the reality of the courtroom. The Plan is hereby ADOPTED.

So ORDERED this _____ day of December, 1991.

ROBERT M. PARKER, CHIEF JUDGE