THE BIDEN BILL AND BEYOND

CASE MANAGEMENT

NEW AND OLD TECHNIQUES AND CONCEPTS

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It is one of the peculiarities of the warfare between reform and the status quo that is thoughtlessly governed by a double standard. Whenever a reform measure is proposed, it is often defeated when its opponents discover a flaw in it. As Kingsley Davis has pointed out, worshipers of the status quo sometimes imply that no reform is possible without unanimous agreement, an implication contrary to historical fact. As nearly as can be made out, automatic rejection of reform is based on one of two unconscious assumptions: (1) that the status quo is perfect; or (2) that the choice we face is between reform and no action; if the reform is imperfect, we should presumably take no action at all, while we wait for a perfect proposal.

But we can never do nothing. That which we have done for thousands of years is also action. It also produces evils. Once we are aware that the status quo is action, we can then compare its discoverable advantages and disadvantages with the predicted advantages and disadvantages of the proposed reform, discounting as best we can for our lack of experience. On the basis of such a comparison, we can make a rational decision which will not involve the unworkable assumption that only perfect systems are tolerable.

Injustice is preferable to ruin.

Attachment II

THE CIVIL JUSTICE REFORM ACT OF 1990
S. 2027
(The Biden Bill)

Description and Preliminary Analysis

THE OBJECTIVES OF THE LEGISLATION

1. Reduce the expense of civil litigation (cost burdens on parties).

2. Reduce delay (time from filing to disposition).

3. Increase the time judges have to devote to deciding important motions and to presiding at trial.

4. Pressure all judges to engage, from very early in the pretrial period, in analytically assertive, pro-active case management, establishing well-thought-out case development plans that are tailored to the specific needs of individual cases, plans designed to prevent unnecessary and unfocused pretrial activity by counsel and to posture each case for disposition by settlement or adjudication as quickly and as efficiently as possible.

5. Assure that "much-needed dialogues" will occur between bench, bar, and the public about how federal courts are handling their civil business and about which procedural methods should be implemented to enable the system to resolve disputes fairly and as quickly and inexpensively as possible.

COMMENTS:

A. *Some of the means the bill would impose would tend to defeat the bill's objectives (see below).*

B. *Some of the means the bill would impose would represent radical departures from current federal practices and have not been tested in federal courts (see below). Experiments with some of these methods in state courts have not shown, conclusively, that they yield net positive effects even in those courts.*

KEY PROVISIONS OF THE BILL IN ITS CURRENT FORM (WITH COMMENTARY)

1. Require every district court to implement case tracking systems. Sec. 471(b)

Each court would be compelled to adopt such a system as part of the "civil justice expense and delay reduction plan" that each court would be compelled to develop. Districts would have some flexibility in developing criteria for deciding which cases are assigned to each track, and in developing some of the specific rules and time frames for each track, but each tracking system would be required to include the following:

a. Every civil action must be assigned to an appropriate processing track, and the initial track designation shall be made at the time of filing. Sec. 471(b)(2)

(1) While each court may determine for itself who initially will select the track for each case, the bill seems to assume that this decision will not be made by the assigned judge, but by the clerk of the court or a "designated track coordinator."

(2) Disputes about the initial track assignment are to be presented first to the clerk, track coordinator, or other person whom the court has delegated the task of making the initial track assignments.

(3) Appeals of the initial track assignment shall be heard by the assigned judge, who, when ruling, must include a statement of reasons.

COMMENTS:

A. *In many cases in federal court it would be very difficult to make reliable track assignment decisions at the time of filing. There are significant differences between profiles of civil dockets in state courts (that have adopted tracking systems) and federal courts. In federal courts, litigation tends to be more complicated, and much smaller percentages of civil cases fall into predictable patterns, as might the straightforward contract and tort cases that make up larger percentages of the filings in state courts. Moreover, the shape/complexity of cases often change dramatically after filing, e.g., as defendants assert numerous affirmative defenses and counterclaims and implead additional parties, against whom plaintiffs, in turn, assert additional claims. If the track assignment cannot be reliably made at the time of filing, why make it then? Why not postpone that decision until the first status conference, where much more will be known about the case?*

B. *Clerical personnel are not qualified to make even the initial tracking assignments. These would be difficult decisions even for a judge. Nor are clerical personnel qualified to hear and resolve, in the first instance, disputes about such assignments. If a "track coordinator" were used to make the initial track assignments, judges might gradually become reluctant to second-guess (over-rule) the coordinator's decisions, either because the judges assumed that the coordinator had developed expertise in this business, or to discourage lawyers from appealing the coordinator's decisions, or to maintain the coordinator's morale. Any tendency by judges to defer to the coordinator's decisions would work to defeat one of the principal purposes of this legislation: to encourage judges to analyze actively the needs of each individual case in order to tailor pretrial plans to meet those individual needs.*

C. *The "tracking" system contemplated in the bill is based in large measure on experiments in state courts in New Jersey. Proponents of that system acknowledge that its implementation has "system-wide implications . . . It dictates new organization, forms, procedures and recordkeeping systems. In many instances it changes the roles of staff and judges." Bakke and Solomon, Case Differentiation: An Approach to Individualized Case Management, 73 Judicature 17, 18 (June-July 1989). One dimension of these contemplated changes in roles is that court staff, not judges, assume much greater responsibility for monitoring all cases other than those assigned to the "complex" track. Track coordinators are encouraged to initiate contacts with attorneys to try to resolve "problems in completing discovery or complying with other cases deadlines." And attorneys are encouraged "to contact the coordinator for information or to discuss problems bearing on case progress. The track coordinator and the civil case manager attempt to find a solution short of referring the case to the motions judge." Id., at 20. Thus, except in cases assigned to the "complex" track, the systems on which the bill is modeled contemplate shifting the primary locus of monitoring and management responsibility away from judges and toward staff. This shift would discourage the kind of active, individualized case management by judges that other parts of the bill try to encourage.*

b. Each track shall be governed by "distinct and explicit rules, procedures and timeframes for the completion of discovery and for trial." Sec. 471(b)(1)(B)

(1) There shall be a separate presumptive time limit for completion of discovery in each track.

(2) The rules regulating the discovery process shall be "track-specific," meaning that courts must decide separately for each track what limits should be imposed on the volume of discovery, whether and how discovery should be "phased" (apparently meaning whether discovery should be

divided into two or more phases and, if so, in what order different discovery tools should be used in each of the phases), and how information might be exchanged voluntarily.

(3) There shall be separate presumptive time guidelines in each track for both filing and ruling on "substantive and discovery motions."

(4) There shall be a separate presumptive timeframe by which cases shall be brought to trial for each track. (It is not clear whether the requirement for establishing such timeframes also applies to the "complex litigation" track.)

COMMENTS:

A. *It is not clear how much discretion this tracking scheme intends to leave in each judge to tailor case development plans to fit the needs of particular cases, but if substantial discretion remains, what is the value of the tracks? Is a tracking system worth all the effort that will go into it, if it leaves individual judges with substantial discretion?*

On the other hand, a system that leaves judges with relatively little discretion would defeat the statute's goal of encouraging judges to develop case management plans in response to the particular situations presented by individual cases.

B. *Judges who perceive that one of the purposes of the bill is to free up more of their time for deciding important motions and presiding at trials might conclude that the purpose of having these elaborate tracks is to relieve judges of the responsibility of tailoring case development plans to meet the specific needs of individual cases. This tendency would be intensified if, as a result of other portions of the bill, systems for measuring judicial productivity are implemented that emphasize the number of motions, the number of written opinions, and the number of trials each judge is involved in.*

C. *One of the principal assumptions underlying the bill is that "the same set of generic procedures need not, and should not, apply to all types of cases." Exactly the opposite proposition has served as the conceptual centerpiece of the Federal Rules of Civil Procedure. Since the 1930's, most courts and commentators have believed that the federal courts will function best if governed by one, uniformly applicable set of relatively simple rules, rules that leave individual judges and lawyers considerable room to fashion case-development programs to fit the specific needs of individual cases. A radical departure from this premise should be made only if it is clear that such a departure is necessary and wise. Since there have been no experiments in federal courts with the kind of mechanical tracking system envisioned in S.*

2027, it is impossible to know whether it would be wise to adopt such a system. Moreover, the principal proponents of "tracking" systems in state courts concede that the "brief duration of these projects forecloses presentation of substantial findings at this time." Bakke and Solomon, Case Differentiation, supra, at 21. Thus, even in state courts it is not clear that these new approaches to "caseflow management" will have a net positive effect. It also seems improvident for Congress to force such a radical departure from a judicially designed and operated system without first soliciting extensive and direct input from the judiciary. Moreover, legislatively imposing such a major procedural change would have severe consequences for the vitality of the rule-making process within the judicial branch. It would be profoundly inconsistent with the processes Congress itself has established through the Rules Enabling Act, processes that have helped preserve a healthy comity and respect between the legislative and judicial branches for six decades.

D. There is a risk that people would use deviations from the time standards established for the different tracks to criticize individual judges or courts unfairly, or to justify further intrusions into judicial business. There also is a risk that people would make unfair comparisons between different courts with respect to the time standards or compliance with them. This risk is especially acute for courts that are disproportionately burdened with criminal matters; to pass judgment on the time frames within which they conclude their civil work without taking into account the impact of their criminal docket on their resources would be profoundly unfair.

2. In all cases except those assigned to the track reserved for "expedited or simple litigation," the bill would require the assigned judge to conduct a "mandatory discovery-case management conference" within 45 days of the first appearance (by answer or otherwise) by any defendant. Sec. 471(b)(3)

   a. Magistrates would be prohibited from conducting such conferences, but would be encouraged to attend them in cases where the assigned judge contemplated assigning responsibility for some pretrial matters to a magistrate. Sec. 471(b)(3)

      Magistrates also would be prohibited from conducting any of the "series of monitoring conferences" that would be required in cases assigned to the track for complex litigation. Sec. 471(b)(3)(I)

COMMENTS:

A. *Completely precluding these uses of magistrates is unwise and unjustified. It is not at all clear that in every district, especially those with heavy criminal dockets, district judges would have the time to conduct meaningful case management or monitoring conferences. It is likely that the value of such conferences depends less on the status of the officer conducting them than on the quality of thinking and the amount of time the judicial officer devotes to them. The results of the Harris poll, which was commissioned to lead to informed deliberations about this bill, contradict the bill's provisions with respect to magistrates. The Harris poll showed that "the majority [in every responding group] feel that increasing the use of magistrates would do more to improve the discovery process than decreasing the use of magistrates." Procedural Reform of the Civil Justice System, Louis Harris and Associates Inc., March 1989, at 45. Similarly, only about five percent of all respondents felt that "excessive referral by judges of discovery matters to magistrates" was a major cause of cost and delay in the current system. Id., at 33.*

B. *Time pressures on judges and magistrates, and schedule constraints, would make it impossible in all but a few of the most complex cases to have both a judge and a magistrate present for the discovery-case management conferences.*

C. *The bill reflects no appreciation of the fact that in some courts parties often consent to the jurisdiction of magistrates for all purposes, including trial. It makes no sense to preclude magistrates from directly exercising important case management functions in such cases.*

Moreover, because of its negative implications about magistrates, the bill as drafted would discourage parties from considering the advantages of consenting to magistrate's jurisdiction. By decreasing consents to magistrate's jurisdiction the bill would increase burdens on district judges, thus tending to defeat its own purposes.

b. The bill would change Rule 16 by requiring the judge, in each discovery-case management conference, to (among other things): Sec. 471(b)(3)

(1) enter a discovery plan and schedule, including a discovery cut-off date, that is consistent with the presumptive time limits and other controls that have been established (in the district-wide plan) for the track to which particular case has been assigned.

(2) fix dates for filing, hearing and ruling on motions that are consistent with the presumptive timetables that have been established for the track to which the case has been assigned.

(3) except for complex litigation, fix a trial date that is consistent with the timetables for the track to which the case has been assigned.

(4) identify the principal issues and consider bifurcation or staged resolution of them.

(5) explore the parties' receptivity to settlement.

(6) fix the dates for additional pretrial conferences.

COMMENTS:

A. *There is considerable support in the bench and bar for the proposition that assertive case management, begun early in the pretrial period, is critical to containing the costs and expediting the disposition of civil litigation. See recent Harris poll. Thus the goal of encouraging more active case management is laudable. There appear to be many aspects of the Biden legislation, however, that would tend to defeat this purpose.*

B. *Requiring district judges, when trying to tailor case development plans to the needs of individual cases, to work within boundaries and time standards set for whole categories of lawsuits, could discourage some judges from focusing on the details of individual cases and could inhibit the creativity and limit the flexibility that are the hallmarks of the best judicial case managers.*

C. *This kind of legislative superimposition on Rule 16 imperils the vitality of the rule-making process. This statute would dictate the content of a rule that regulates only matters that clearly are procedural. It is unwise for Congress to end-run the rule-making process that it has sanctioned, a process in which judges work closely with lawyers and scholars and that includes Congressionally-mandated vehicles for generating extensive inputs from all interested parties in the form of reactions to proposed rule changes.*

c. In cases assigned to the "expedited or simple litigation" track, the judge would have discretion to decide whether to hold a discovery case-management conference, but, within 45 days of the first appearance by any defendant, would be required to enter a "standard order scheduling": Sec. 471(b)(4)

(1) discovery and discovery cut-off,

(2) dates for filing and deciding substantive and discovery motions, and

(3) the trial date.

All the dates set in this early scheduling order would have to be consistent with the presumptive timetables that have been established in the district-wide plan for the expedited litigation track.

COMMENTS:

A. It may not be feasible to enter such orders within 45 days of the first defendant's first appearance. First appearances may not be "answers," and without answers it may be impossible to determine what the basic parameters of the suit will be. Moreover, even in simple cases all parties may not have appeared within the time frame here contemplated.

B. It may not be feasible to fix dates by which all motions must be decided.

3. Every district would be required to adopt a "civil justice expense and delay reduction plan" within 12 months, and any district that failed to do so would be required to implement a model plan that the Judicial Conference and the Federal Judicial Center would have developed within six months. Sec. 471(a)(1) and Sec. 472(b)

COMMENTS:

A. There could be a bad fit between the needs and resources of some districts and a nationally developed model plan.

B. Imposing a plan developed in Washington could harm local morale.

C. Courts on whom a plan was imposed might not comply with its terms. It is far from clear what could be done to district courts that did not comply. It is unhealthy for our system to have rules in place that clearly are ignored.

a. The bill would require such plans to apply to all civil proceedings. But, as noted above, the same rules would not apply to every track, and there could be a special track for simple or expedited matters. Even in that track, however, magistrates could not fix schedules or host case management conferences.

COMMENTS:

This system would force many courts to change dramatically the way they handle certain routine matters, e.g., government collection cases, social security matters, and prisoner petitions.

b. The bill [Sec. 471(b)] would require each district plan to include:

(1) the kind of case tracking system described above,

(2) discovery-case management conferences (presided over by a district judge, not a magistrate) in all cases except those assigned to the expedited track,

(3) issuance of scheduling orders within 45 days of the first defendant's first appearance in all cases assigned to the expedited track,

(4) a "comprehensive program . . . that would make available [in appropriate cases] the full range of alternative dispute resolution mechanisms,"

(5) an early neutral evaluation program,

(6) regular publication of pending undecided motions and caseload progress for each individual judge to enhance judicial accountability. Sec. 471(b)(13)

From a subsequent section of the bill, section 475(b), it appears that courts would be required to publish quarterly reports "listing all pending submitted motions before each judge that are unresolved for more than 30, 60, and 90 days, and all succeeding 30-day increments."

Each court also would be required to include in these quarterly reports data indicating "the aging" of each judge's caseload in each of the tracks, the number of written opinions, and the number of bench and jury trials conducted by each judge.

COMMENTS:

The statute fails to indicate what use, if any, would be made of this information by the judiciary.

(7) Procedures for periodic review of functions performed in the district by magistrates (to determine which tasks should be performed by district judges and which by magistrates).

c. Within the "well-defined and uniformly applied parameters" set forth above, the "specific details" of each district's plan shall be developed "by" a planning group or similar advisory committee with representative membership from the bench, the bar, and the "public." Each of the major categories of litigants that appear in the court shall be represented. Sec. 471(a)(2)

COMMENTS:

A. *The bill as drafted appears to empower groups of lawyers and lay people to impose procedural rules and specific time standards on district courts. Whether Congress has this kind of power to delegate, and, if so, whether Congress can delegate this power in this way (conferring it on a group of unaccountable private citizens who would dictate procedural details to district courts), raises significant constitutional questions.*

Section 472(a)(1), which covers development of the national model plan, deals with bar and citizen input in a much less controversial way, simply requiring "consultation" with people in the categories that would make up the planning groups at the district level. This suggests that the drafters may not have intended to empower the local planning groups in the way the language of section 471(a)(2) implies.

B. *The "dialogue" that the bill assumes is "much needed" should occur before it is decided (by Congress or the courts) to impose the radical procedural changes embodied in this legislation. The dialogues might produce good ideas that are not consistent with the methods prescribed by the bill, but the bill would prohibit even experimenting with any such ideas. Moreover, designing, implementing, and operating these plans will consume a great deal of time and will be very expensive. It makes little sense to commit all these resources before the dialogues occur and before we are sure, by conducting carefully monitored experiments, that the methods the bill would impose will have the desired effects.*

C. *The people who would be required to participate in the dialogues have been largely disenfranchised by the detailed prescriptive content of this legislation. (Much of what the local groups are supposed to discuss appears to have been decided in advance by Congress.) It is conceivable, for example, that some local planning groups would conclude that there is no significant backlog or delay problem in their district, and that case management methods currently being used should be continued.*

D. *Real, un-cabined dialogue between bench and bar (with inputs from representatives of clients) could be very useful to many district courts. Many courts have found that such advisory committees can be sources of significant procedural ideas and can contribute substantially to the health of the relationship between bench and bar. In some courts, such committees have designed, operated, and staffed important ADR programs. District courts should be encouraged to set up and to capitalize on contributions from such committees.*

d. Each district shall submit its "plan" to the Council of its Circuit and to the Judicial Conference. Each submittal shall be accompanied by a statement "explaining how such plan complied with" the statute's requirements. Sec. 471(c)

Each Circuit Council must evaluate each district's plan to make sure it complies with the statute's requirements. Circuit Councils must modify or abrogate district plans to the extent necessary to assure that the plans satisfy the bill's requirements. Sec. 471(d)

The Judicial Conference, either on its own initiative or in response to an appeal by a district court of a Circuit Council's actions, may determine whether particular district plans comply with the legislation. Sec. 471(e)

COMMENTS:

This system would represent a more rigid bureaucratization of power over how individual trial judges and courts manage their procedural affairs than has been customary in the federal system. It could threaten the creativity and morale of trial courts and could give disproportionate power over pretrial matters to appellate judges, some of whom have had no experience as a trial judge.

4. Every court would be required to develop and implement a "transition program for handling any backlog of cases" within the district. Each such plan would have to be reported to the Administrative Office. Sec. 474

a. The legislation would require each plan to include, among other things, "an analysis of current judicial productivity." Sec. 474(a)

COMMENTS:

Measuring accurately and usefully "judicial productivity" will be a most challenging task. Legislation that forces publication of potentially misleading figures, like simple ratios consisting of cases assigned divided by cases terminated, could do great harm to the morale of judges who care deeply about the quality of the work they do. Moreover, simple ratios like these would be very unfair to judges who are required to spend the vast majority of their time on criminal matters. Great differences between the profiles of caseloads in different districts also could make simplistic approaches like this dangerously misleading.

b. In preparing its transition program, each court would be required to prepare a backlog index, i.e., "the ratio of the number of civil cases pending on January 1 of the preceding full calendar year divided by the number of civil cases disposed of during that year." Each court would be required to report its backlog index to the Administrative Office. Sec. 474(c)

COMMENTS:

Such indexes could be misleading and unfair because they apparently would count every kind of civil case equally (e.g., as the statute is drafted, no distinction would be made between a student loan case and a securities class action).

5. The Judicial Conference shall prepare a Manual for Litigation Management which shall, among other things, describe and analyze the relative effectiveness of different expense and delay reduction plans and of various management tools. Sec. 476

COMMENTS:

Analyzing the relative effectiveness of different case management plans and tools is a Herculean task that probably would take years, but would be most useful if well done. A less ambitious sourcebook that simply described the various ways different courts and judges attack the problems of cost and delay would be a valuable contribution.

6. Congress would authorize $10,000,000 for the automation necessary to implement the expense and delay reduction plans, and $5,000,000 to assist district courts in developing and implementing these plans and to support other work made necessary by the bill. Sec. 477

Congress also would authorize $1,000,000 to support the training and research work the Federal Judicial Center would be required to perform under the statute. Sec. 480

COMMENTS:

Preliminary estimates developed by the Administrative Office indicate that the cost of implementing S. 2027 in its present form is far in excess of the amounts contemplated by the bill. Because the funding provided in the legislation is so woefully inadequate, courts could not create and operate the systems (electronic and personnel) demanded by the bill without draining much needed resources from other spheres. Moreover, it is highly unlikely that implementing the systems called for in the bill as drafted would deliver services to users of the federal courts that could begin to justify massive expenditures. There are much more productive ways to spend this money.