MARCH 6, 1990

OPENING STATEMENT
SEN. JOSEPH R. BIDEN, JR.
HEARINGS ON S.2027, THE CIVIL JUSTICE REFORM ACT

TODAY THE COMMITTEE BEGINS ITS HEARINGS ON THE CIVIL JUSTICE REFORM ACT OF 1990, LEGISLATION TO REDUCE COSTS AND DELAYS IN CIVIL LITIGATION AND SECURE FOR ALL OF OUR CITIZENS THE OPPORTUNITY TO HAVE THEIR CIVIL DISPUTES RESOLVED FAIRLY, PROMPTLY AND INEXPENSIVELY.

I INTRODUCED THIS LEGISLATION AND INITIATED THE TWO-YEAR, IN-DEPTH STUDY THAT PRECEDED IT BECAUSE LITIGATION COSTS AND DELAYS BURDEN EVERYONE AND SERVE NO ONE: RICH OR POOR, INDIVIDUAL OR CORPORATION, PLAINTIFF OR DEFENDANT.

FOR THE MIDDLE CLASS OF THIS COUNTRY IN PARTICULAR, THE COURTHOUSE DOOR IS RAPIDLY BEING SLAMMED SHUT. ACCESS TO THE COURTS -- ONCE AVAILABLE TO EVERYONE -- HAS BECOME, FOR MIDDLE AMERICA, A LUXURY THAT ONLY OTHERS CAN AFFORD.

THAT FACT CAME THROUGH LOUD AND CLEAR IN A RECENT LOUIS HARRIS SURVEY, WHEN A SUBSTANTIAL MAJORITY OF MORE THAN 1,000 EXPERIENCED LITIGATORS AND FEDERAL TRIAL JUDGES SAID THAT THE HIGH COST OF LITIGATION UNREASONABLY IMPEDES ACCESS TO THE COURTS BY THE ORDINARY CITIZEN.

FOR AMERICAN BUSINESSES, THE SITUATION ISN'T MUCH BETTER:

- CORPORATE AMERICA SPENDS $20 BILLION EVERY YEAR ON OUTSIDE COUNSEL DEFENDING LAWSUITS;

- INSURANCE EXPERTS TELL ME THAT LEGAL TRANSACTION COSTS -- THAT IS, THE COSTS OF DEFENDING A CASE -- ARE GROWING FASTER THAN ACTUAL LIABILITY COSTS;

- AND FOR SOME FORTUNE 100 COMPANIES, IT'S NOT UNUSUAL TO SEE OUTSIDE COUNSEL EXPENSES OF OVER $30 MILLION A YEAR, AND IN ONE CASE WELL OVER $100 MILLION A YEAR.

TOO MUCH MONEY IS WASTED ON A SYSTEM THAT SERVES NO ONE -- EXCEPT OUR ECONOMIC COMPETITORS, WHO BENEFIT BY OUR SQUANDERING OF RESOURCES ON DOCUMENT PRODUCTION AND DEPOSITIONS INSTEAD OF RESEARCH AND DEVELOPMENT.

THE CIVIL JUSTICE REFORM ACT OF 1990 ATTACKS THE COST AND DELAY PROBLEM STRAIGHT UP AND HEAD ON.

IT COMBINES WHAT THE EXPERTS CONSIDER TO BE THE ESSENTIAL INGREDIENTS FOR A COMPREHENSIVE REFORM PROGRAM. AND IT PROVIDES A MODEST BUT CRITICALLY NEEDED AMOUNT OF FUNDS TO ENSURE THAT THE PROGRAM CAN BE IMPLEMENTED.

BASED ON THE PRINCIPLE THAT TRUE REFORM CAN ONLY BE ACHIEVED IF IT PROCEEDS FROM "THE BOTTOM UP" RATHER THAN "THE TOP DOWN," THE LEGISLATION REQUIRES EVERY FEDERAL DISTRICT COURT TO DEVELOP A "CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN."

THE LEGISLATION IDENTIFIES THE CHIEF COMPONENTS THAT MUST BE IN EACH PLAN, BUT LEAVES IT TO EVERY DISTRICT TO FILL IN THE SPECIFICS OF THE PLAN BASED ON ITS OWN PARTICULAR NEEDS. AS JUDGE ENSLEN , WHO WE'LL HEAR FROM LATER THIS MORNING, POINTED OUT IN HIS WRITTEN STATEMENT, CALLING FOR DISTRICT-WIDE INPUT, IS THE BEST WAY TO ENSURE DISTRICT-WIDE SOLIDARITY FOR IMPROVING THE CIVIL JUSTICE SYSTEM.

SOME OF THE MOST IMPORTANT COMPONENTS THAT MUST BE IN EVERY DISTRICT COURT PLAN ARE:

- A SYSTEM FOR TRACKING EVERY CASE BY ITS COMPLEXITY, SO THAT THE MORE COMPLEX A CASE, THE MORE IT HAS TO BE CLOSELY MANAGED BY THE JUDGE;

- SPECIFIC TIME FRAMES FOR THE COMPLETION OF THE DISCOVERY PROCESS, SO THAT RATHER THAN HAVING DISCOVERY GO ON AND ON IN CASES AT GREATER AND GREATER COST, EVERY CASE WILL BE SUBJECT TO A SPECIFIC CUT-OFF DATE;

- FIRM TRIAL DATES, WHICH MANY EXPERTS BELIEVE IS THE SINGLE MOST EFFECTIVE DEVICE FOR ENCOURAGING PROMPT AND WELL-FOCUSED CASE DEVELOPMENT;

- PROCEDURES FOR GETTING THE MOST IMPORTANT ISSUES RESOLVED FIRST, SO THAT MONEY ISN'T SPEND GETTING INFORMATION ON ISSUES THAT WILL NEVER BE THE FOCUS OF THE CASE;

- AND PROCEDURES TO ENSURE THAT THE FULL PANOPLY OF MEANS FOR RESOLVING A CASE -- FROM WHAT THE EXPERTS CALL "ALTERNATIVE DISPUTE RESOLUTION" TO THE TRADITIONAL TRIAL ON THE MERITS -- IS MADE AVAILABLE TO EVERYONE.

IN A NUTSHELL, THOSE ARE SOME OF THE KEY PROVISIONS THAT THE EXPERTS BELIEVE WILL REDUCE COSTS AND DELAYS.

IN THE FINAL ANALYSIS, WHEN CASES COST SO MUCH AND TAKE SO LONG THAT SOME PEOPLE CAN'T USE THE COURTS AT ALL AND THOSE WHO CAN USE THEM FIND THEIR POCKETBOOKS DEPLETED AT RECORD PACE, WE HAVE A CRISIS OF MAJOR DIMENSIONS.

THE CIVIL JUSTICE REFORM ACT IS A RESPONSE TO THAT CRISIS.

IT IS THE PRODUCT OF HARD WORK AND CAREFUL STUDY, AND IT ENCOMPASSES WHAT THE CIVIL JUSTICE EXPERTS BELIEVE WILL WORK.

IT IS SUPPORTED BY THE CHAIRMEN AND RANKING REPUBLICAN MEMBERS OF BOTH THE SENATE AND HOUSE JUDICIARY COMMITTEES -- A SHOW OF BIPARTISAN SUPPORT THAT ATTESTS, IN MY VIEW, TO THE SEVERITY OF THE PROBLEM AND THE PRESSING NEED FOR THE REFORM MEASURES PROPOSED.

IF ENACTED, IT WILL HELP ENSURE THAT CIVIL DISPUTES ARE RESOLVED FAIRLY, PROMPTLY AND LESS EXPENSIVELY. THAT IS WHAT OUR CITIZENS RIGHTLY EXPECT, AND THAT IS WHAT OUR CITIZENS RIGHTLY DESERVE.

I LOOK FORWARD TO TODAY'S HEARING AND TO THE TESTIMONY OF OUR DISTINGUISHED WITNESSES.

STATEMENT OF PATRICK HEAD,
VICE PRESIDENT AND GENERAL COUNSEL
OF FMC CORPORATION

Before the Committee on the Judiciary
United States Senate
March 6, 1990

S. 2027: A Welcome Step Toward Reducing Civil Litigation Costs

STATEMENT OF PATRICK HEAD,
VICE PRESIDENT AND GENERAL COUNSEL
OF FMC CORPORATION

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S. 2027: A Welcome Step Toward Reducing Civil Litigation Costs

Introduction

Good Morning. My name is Patrick Head and I am Vice President and General Counsel of FMC Corporation. FMC is headquartered in Chicago and our business involves such diverse activities as mining, manufacturing, chemical production, and a substantial amount of defense contracting. In addition to my duties as General Counsel of FMC, I have served as chair of a lawyers' committee of the Business Roundtable supporting substantive reform of our judicial system; and also as a member of the Brookings Institution Task Force responsible for the report upon which S. 2027 is based.

S. 2027 is a much needed breath of fresh air for our often stagnant, sluggish civil justice system. I find it particularly invigorating because, quite frankly, I didn't anticipate the broad-based, non-partisan support its provisions have received from this Congress. I was equally impressed while on the Brookings Task Force at how quickly consensus was reached about these same ideas -- consensus among representatives from diverse organizations such as consumer groups, corporations, the plaintiff's bar, civil rights groups, large law firms, the academic community, and even state and federal judges. Having

The two most onerous costs we incur under the current system involve discovery excesses and the length of time it takes to move a case through the system. These costs are particularly onerous because they are completely unnecessary -- that is, they make no positive contribution toward the outcome of a case.

When I say discovery excesses, I'm not referring to abuses that could be sanctioned under Rule 11 -- those abuses are an entirely separate problem. By discovery excesses I mean the hundreds of thousands of pages of documents produced, and hundreds of depositions taken, that are not relevant to the real issues in a case. Lawyers are trained to leave no stone unturned, and are naturally inclined to be nit-pickers about the smallest detail. They seek these documents and take these depositions not to advance resolution of the real conflict as much as to ensure that other issues are not present.[3] The fruits of these efforts to verify the absence of issues don't end up at trial or at a settlement conference -- they end up in cardboard boxes filling thousands of rooms at some storage facility.

Don't interpret this to mean I believe lawyers should be less thorough or precise in their work. My point is that the issues involved in a case often need focus and clarification up

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[3] "The Federal Rules of Civil Procedure have altered dramatically the natural cost-benefit calculation that once had imposed some restraint on the seeker of information, encouraging instead a better-safe-than-sorry approach to discovery decisions that makes the cardinal rule: when in doubt, discover." Miller, The Adversary System: Dinosaur or Phoenix, 69 Minn. L. Rev. 1, 17 (1984); see Rosenberg, Federal Rules of Civil Procedure in Action: Assessing Their Impact, 137 U. Pa. L. Rev. 2197, 2203-04 (1989).

defendant large corporations actually benefit from procedural delays in the legal system, and therefore, would not be interested in streamlining the civil process. According to this theory, it is to the "deep pocket" corporation's advantage to delay because the plaintiff may give up or decide to settle for substantially less than was actually claimed. The representatives of these groups that sat on the Brookings Task Force were rather surprised when we came out in favor of these reforms.

These groups failed to recognize several points that make it equally as advantageous for a large corporation to proceed quickly to the merits of a case as it often is for plaintiffs. First, FMC has an excellent winning record at trial and on appeal. Clearly, we would rather win quickly and pay nothing to the plaintiff than bog down the case in procedural maneuvers that keep our legal resources tied up indefinitely and end in some nuisance payment to the plaintiff. Second, even in cases where the plaintiff is likely to prevail, the money FMC would save by putting off payment as long as possible is rarely worth the extra legal expenses, the diversion of resources from more productive activities, and the management difficulties these delays create. Finally, as Professor Hazard of Yale put it, "I see little in the Federal Rules [of Civil Procedure] that on balance helps defendants. . . . Modern products liability, toxic tort, and environmental litigation would be simply inconceivable without the combination of liberal pleading, liberal joinder, and liberal

1. Mandatory Discovery Conferences - § 471(b)(3).

The mandatory discovery conference proposed in S. 2027 has the potential to alleviate some of our most significant problems regarding discovery by substantively involving the judge in the case shortly after the first responsive pleading is filed. In almost all cases, this will occur before any significant discovery takes place. We see several benefits emerging from this provision.

First, we heartily approve of involving all the final decision-makers at this critical meeting. Section (b)(3) anticipates that this meeting will result in decisions that focus discovery efforts in a particular direction, that narrow the issues in the case, or that result in bifurcation of issues for separate trial under Rule 20(b). These decisions can alter the course of the entire dispute and may even be outcome determinative in some cases. The attorneys representing the parties should have the authority to bind their respective clients if the decisions made at the meeting are to have any value. It is equally important to have an Article III judge present, because of the substantive nature of this meeting, to ensure that the agreements reached will be upheld throughout the litigation.[5]

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[5] Indeed, there are constitutional implications to the presence of an Article III judge at such a conference: "A federal magistrate who performs [the function of an Article III judge] is a judge exercising the judicial power of the United States -- without the tenure guarantees of Article III. The consent of the (continued...)

motions, section (b)(3)(E) would force judges to assume personal responsibility for keeping a case on schedule. Such a provision should prevent reoccurrence of our 10-month wait for a decision on a motion.

Finally, one of the most needed changes that this provision will make will be to require these conferences in almost all cases. Many judges and courts embraced the concept of early pre-trial conferences years ago. Unfortunately, some did not. From our collective experiences in those courts that have used pre-trial conferences, we learned how effective they can be at expediting the overall process. The relatively small investment of judicial time at the beginning of even a simple case yields large dividends as the case proceeds. Thus, it makes great sense to make pre-trial conferences the standard throughout the entire federal court system.

2. Setting a Time Certain for Trial - § 471(b)(5).

Nothing ends procrastination and delay quite as effectively as a deadline rapidly approaching. When we engage in broad, open-ended discovery, we can easily lose sight of the event discovery is meant to facilitate -- trial. If we are facing a firm trial date, we know what we must do to be ready on that date. Further, from a management perspective, we can't afford to invest time and resources in an activity until that activity seems relatively certain to occur. Until we have a trial date, there is little pressure to set priorities, and even some

tort disputes, many involve very complex issues and multiple parties. The only effective way for any manager to resolve complex problems is to break them down into parts and develop specific plans tailored to handle each part. Courts and lawyers use these same techniques for analyzing substantive legal issues, so it makes sense to apply the technique to massive procedural problems as well.

4. Discovery Processes Tied to Case Complexity - §471(b)(7).

One of the virtues of S. 2027 is its recognition that all lawsuits are not equal in size and complexity, even if they are all equal in merit and the right to access to the courts. One of the interesting phenomena I have observed at FMC is occasional confusion on the part of plaintiffs between the size and complexity of their claim against us, and the size and complexity of our organization. From time to time, the attorneys representing a plaintiff with a small contract or employment-related claim against us start papering us with motions and discovery requests that could make document production in the AT&T divestiture case appear modest. Because they are suing a large, profitable corporation, they think their suit has grown exponentially in complexity. While that simply isn't true, they act as if it is. It sometimes takes significant resources for us to make clear to both the plaintiff and the court that a slip-and-fall case is nothing more than that.

litigation process and the significance of pre-trial proceedings to the fair resolution of the case.

S. 2027 Would Benefit More Than FMC's Bottom-Line.

1. S. 2027 Would Increase Uniformity Among District Courts

Like any large corporation, we end up in courts all over the United States. One of our costs of doing business is the preparation that must be done to identify and comply with diverse local court rules. While differences between state and federal court rules may be the price we pay for a federal system, I can't attribute any particularly noble idea to the costs we incur because of differences among the local rules of the federal district courts. Consequently, any procedural reform that would increase procedural uniformity among federal courts would represent a direct savings to us.

Although S. 2027 does not mandate uniform timetables such as those set forth in the Federal Rules of Civil Procedure, it does require every federal court and judge to adopt <u>some</u> timetable for moving cases through the system. Once these timetables are in place, they will greatly facilitate our ability to allocate legal resources to our cases based on these timetables. Right now, if my best trial lawyer is assigned to a case in which trial is pending, but for which no trial date has been set, I am reluctant to commit that lawyer to another very important case in which I know an early trial date will be set.

Under S. 2027, once a trial date was set, I would know it was firm. If a trial date was not yet set, but the discovery

2. Public Participation in Cost and Delay Reduction Planning.

Just as we welcomed the opportunity to participate in these hearings today, we welcome the chance to voice our concerns and extend our help to the courts charged with developing cost and delay reduction plans under S. 2027. One of the most unique qualities of S. 2027 is the fundamentally fair way in which it accomplishes its purpose -- it distributes responsibility for improving the civil justice system among all those who participate in that system. Judges and administrative personnel within the judicial system are public servants and as such, have official responsibility for the proper administration of the system. However, litigants who use the system have an obligation to help improve it as well.

I can envision a number of ways in which the public planning or advisory groups established by S. 2027 can assist the courts as they develop these plans. These groups could meet with court officials prior to any actual drafting of the plans to help flesh out the issues that should be considered. Court personnel could draft plans based on the issues identified and then ask the groups for comment on how the drafts resolve those issues.

In the alternative, the courts could assign responsibility for researching and drafting different sections of the plans to individual judges, and assign court personnel and planning group members to assist the judges. Each judge could then assign planning group members responsibility for gathering information from the community relevant to that section. For example, Judge

and changes in our businesses that should improve the situation. One thing is certain, if we do not attempt to identify the causes and try to find solutions there can be no hope of improvement.

The federal courts are experiencing problems of their own. The complexity of the cases on their dockets has increased significantly, and the sheer number of cases they must decide has grown steadily. This has led to overcrowded dockets, increased costs to litigants, and increased delays in resolving legal disputes. Only one thing is certain -- if nothing is done about these problems they will not get better.

One effort to address the problems was the creation of the Federal Courts Study Committee, which will issue its final recommendations shortly. This legislation is another effort. Some highly respected members of the legal community have balked at the idea of judges assuming a managerial role over the cases assigned to them, claiming it undercuts the adversarial model of litigation in which the judge is a neutral decision-maker.[10] Others, including distinguished jurist and legal scholar Judge Robert E. Keeton, have recognized the inevitability of increased judicial supervision of cases and seek ways to make the transition more agreeable.[11]

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[10] See, e.g., McCargo v. Hendrick, 545 F.2d 393 (4th Cir. 1976); Resnick, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494 (1986).

[11] Judge Keeton finds the term "managerial judge" somewhat distasteful. He sought a more appropriate label in the thesaurus and came up with the label of shepherd. "Envision, . . . zealous trial advocates who enter the courtroom thinking, "Our judge is our shepherd. She leadeth us to a speedy and just determination
(continued...)

the precision with which inadmissible evidence is kept from the jury's collective ears? These are the traditional functions of judges, functions which sound very much like management activity to a corporate lawyer like me. Extending the range of situations in which judges exercise these judicial functions to an earlier stage of the trial process does not change the nature of the function itself. The only thing S. 2027 is meant to change is the costs related to the exercise of these judicial functions.

Statement of Bill Wagner

Immediate Past President

of the

Association of Trial Lawyers of America

Before the

Senate Committee on the Judiciary

on S. 2027

March 6, 1990

Mr. Chairman, the Association of Trial Lawyers of America (ATLA) appreciates the opportunity to comment on S. 2027, the Civil Justice Reform Act of 1990. As you know, as President of ATLA during 1988 and 1989, I was an active participant, and ATLA was an active participant, in the work of the Civil Justice Project of the Foundation for Change. It was that Project that led to the Justice for All report on which much of S. 2027 is based.

For the record, Mr. Chairman, I would like to include the text of a Resolution adopted unanimously by ATLA's Board of Governors at its most recent meeting on January 23. Thank you.

The text of the Resolution follows:

Whereas the Trial Lawyers of America fully support the civil justice system to provide fair and just resolution of disputes and,

Whereas delay in the fair and just resolution of personal injury and wrongful death claims is especially punitive to those persons making such claims who are often economically unable to reasonably sustain themselves during any prolonged delay in receiving fair compensation for their losses and,

Whereas unreasonable and unnecessarily costly procedures are particularly onerous to those same persons and,

Whereas the proposed procedures outlines in the report titled "JUSTICE FOR ALL: Reducing Costs and Delay in Civil Litigation" appear to be procedures which would promote efficiency and reduce transaction costs without in any way limiting the substantive rights of tort victims and appear to be procedures which would fairly and in a balanced manner expedite the resolution of civil claims and, in a balanced manner reduce the costs of reaching fair and just solutions for all parties to civil litigation,

Now therefore be it resolved that The Association of Trial Lawyers of America endorses the concepts proposed by the task force in its report titled "JUSTICE FOR ALL: Reducing Costs and Delay in Civil Litigation" insofar as it embraces procedures which promote efficiency and reduce transaction costs without in any way limiting the substantive rights of tort victims.

Approved by said Association's Board of Governors on the 23 day of January, 1990.

PREPARED STATEMENT OF
STEPHEN B. MIDDLEBROOK
SENIOR VICE PRESIDENT AND GENERAL COUNSEL
AETNA LIFE & CASUALTY
ON S.2027, THE CIVIL JUSTICE REFORM ACT OF 1990
BEFORE THE COMMITTEE OF THE JUDICIARY
OF THE UNITED STATES SENATE

I am Steve Middlebrook, Senior Vice President and General Counsel of Aetna Life & Casualty, and I am testifying today on behalf of the American Insurance Association (AIA). The AIA is a national trade association representing 226 property/casualty insurers, including Aetna's properly/casualty subsidiaries. AIA's member companies are involved in civil litigation in numerous and substantial ways. Most typically, they provide the legal defense when their policyholders are sued. They also are involved as direct parties to litigation when they pursue their policyholders' rights through subrogation; when they are contesting the scope of their coverage with policyholders; and when they involve themselves, as do other corporations, in general commercial litigation.

I served on the Brookings Task Force on Civil Justice Reform. The AIA heartily endorses the reforms we have proposed in our report Justice for All, and the AIA equally supports S.2027, the Civil Justice Reform Act of 1990, which would require the implementation of the Brookings reform measures.

In these remarks, I will focus on how the reforms in S.2027 can produce meaningful and appropriate cost savings. Much of what I have to say draws upon my own experience and the experience of many others at Aetna who are involved in our litigation.

Those of us who consistently participate in or are affected by the civil justice system have long felt the need for substantial repair. But, until recently, we have relied mostly on personal observation and incomplete data to conclude that of the billions of dollars being spent on civil litigation, too few are being paid to compensate the injured and too much is being paid to support the process. We have long believed, too, that even those dollars that do reach the injured get there much too late in the day.

Over the past few years, however, there has been a quantum leap in the data. We can now speak with much more authority on the full dimensions of the problems. The Institute for Civil Justice, the National Center for State Courts, and the Federal Judicial Center have provided us with concrete

measurements of the system's inefficiency. It is now generally accepted that huge percentages of the money spent in this system -- on average 50% -- go to the cost of delivering the product rather than the product itself. And in some districts it takes five years or longer to make that delivery. (I understand that more complete summaries of these findings, as well as considerable additional data, have been furnished to the Committee.)

AIA recognizes that any effort to move the courts toward greater efficiency must be consistent with the transcendent societal value of equitable treatment of the parties, as well as the interests of society at large. Hard and fast rules that cannot adjust, when appropriate, to the special needs and unique circumstances of the parties do not constitute progress. Procedural changes that are only designed to facilitate the speedy resolution of mass tort cases, with little regard for a fair and impartial hearing of the facts, will do a great disservice to society if they result in financial collapse, loss of jobs, and the removal or unavailability of needed products and services.

The reforms proposed in The Civil Justice Reform Act of 1990 have been carefully planned to avoid these pitfalls. They leave judicial discretion intact. Indeed, they <u>enhance</u> the ability of the judiciary to take firm control of cases, earlier, and with more information.

There are numerous ways in which these procedural reforms can help federal judges eliminate waste and promote the early settlement of cases. Let me mention just a few.

* Although roughly 95 percent of all lawsuits settle, as opposed to going through to verdict, a substantial number settle very late in the process...on the courthouse steps or even during trial. This means that the parties will have already incurred all of the costs of discovery and most of the costs of trial preparation.

  In cases where the facts or underlying law do not unequivocally favor one party, early settlements usually serve the interests of all parties. They serve <u>plaintiffs' interests</u> because delayed compensation otherwise imposes a financial hardship on injured parties and their families. They serve <u>defendants' interests</u> because it is otherwise stressful and disquieting to live with the continued uncertainty of open-ended liability.

And, contrary to the myth that insurers prefer to delay settlement to maximize investment income on dollars set aside to pay compensation, we find that delayed settlements usually increase legal fees more than any possible revenue we gain from investment.

Put simply, we unequivocally applaud any system that fosters early and fair settlement.

Several features of S.2027 increase the likelihood of early settlement.

- First, a staged discovery process, combined with an early settlement conference, puts the nuts and bolts of each case before the parties and the judge early in the process and in a cost effective manner.

- Second, setting firm trial dates as early as practical also forces the parties to come to grips with the case much sooner than is now the case.

- Last, the requirement that a court official discuss with the parties early on in the proceedings the possibility of alternative dispute resolution (ADR) techniques enhances the likelihood that those techniques will be used. At least two existing barriers to ADR would be removed:

    1. Court-recommended ADR would eliminate the need for one of the litigating parties (or the insurer) to step forward with the same suggestion, thereby avoiding any perception of weakness in that party's position;

    2. Court-recommended ADR would eliminate the natural distrust that most adversaries have for any proposals initiated by the other.

* S.2027 targets two specific circumstances in which the current waste of counsel resources can be significantly mitigated. First, having judges set firm trial dates should decrease trial postponements and thereby avert situations where counsel must "re-prepare" to keep the issues and the facts fresh in their minds. Second, requiring judges to establish firm motion hearing dates should help focus on requested discovery that will become irrelevant after the motion is resolved.

* S.2027 requires judges to identify or formulate the principal issues in contention and, in appropriate cases, provide for the staged resolution or bifurcation

of issues at trial. AIA's experience with severing issues for trial has been that it can be a very cost effective and fair way to manage a trial.

The most common severance is of liability from damages, with liability heard first. If the jury finds for the defendant, the trial terminates. This saves all the costs associated with the hearing of damages. Many judges indicate that after a finding for the plaintiff on the liability issue, the parties are likely to settle, also producing a saving. This reform is particularly significant, for it not only represents a savings for the parties, but of the resources of the courts as well.

In conclusion, AIA believes that The Civil Justice Reform Act of 1990 is a significant step toward a overcoming gross inefficiency in our civil litigation system. Although it is not possible to estimate how much these reforms could save, faithful implementation should make savings dramatic. We commend those Members of the Congress who are sponsoring this legislation and those who now choose to support it.

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STATEMENT OF CHARLES STEPHEN RALSTON
DEPUTY DIRECTOR-COUNSEL
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
REGARDING S. 2027, THE CIVIL JUSTICE REFORM ACT OF 1990

I would first like to thank the Chair for the opportunity to give the views of the NAACP Legal Defense and Educational Fund, Inc., on S. 2027, the Civil Justice Reform Act of 1990. The Legal Defense Fund is pleased to be able to give the Bill its full support. We believe that it will achieve a number of needed reforms in the working of federal district courts throughout the nation, and will thereby do much to achieve the goal of "just, speedy and inexpensive determination" of civil actions in the federal courts.

Our support certainly could be expected, since Barry Goldstein, the former Director of the Legal Defense Fund's Washington office, was a member of the Brookings Task Force on Civil Justice Reform convened at the request of Senator Biden. However, our support for reform of the civil justice system is also based on our extensive and long-standing experience litigating in the federal courts.

The Legal Defense Fund was founded fifty years ago; over this period, the vast majority of our work has been in federal courts in more than thirty states, from New York to California, and from Florida to Washington. Most of our caseload is civil, and virtually all of it is as plaintiffs' lawyers. We have a current docket of over 500 cases, with nearly 100 in active litigation in district court in cases being prepared for or in trial. Most of these cases are brought under the various federal civil rights statutes.

Contributions are deductible for U.S. income tax purposes.

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is not part of the National Association for the Advancement of Colored People (NAACP) although LDF was founded by the NAACP and shares its commitment to equal rights. LDF has had for over 30 years a separate Board, program, staff, office and budget.

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Plaintiffs' lawyers in civil rights cases are faced with some unique problems. The most important is that in, for example, an employment discrimination case, virtually all of the relevant evidence is in the control of the defendant. In our cases, the defendant will be a major corporation, a state or local governmental body, or that most difficult of opponents, the federal government. The only way we can get at the evidence essential to proving our case[1] is through discovery. Obviously it is to the defendant's interest to prolong and make as difficult as possible the discovery process.

For these reasons, the Bill's provisions that would result in the establishment both of firm discovery schedules and mechanisms to ensure effective and complete discovery are particularly welcome. It is essential, of course, that the proper balance is struck between controlling undue discovery and ensuring adequate discovery. Therefore, a district court judge must have the flexibility to adjust discovery schedules as well as the scope of discovery depending on the type of case and the relative positions of the parties. To again use the typical fair employment case as an example, the court must take into account that the employer will necessarily have virtually all of the relevant documents. Thus, the plaintiff must be allowed to do substantially more discovery than will the defendant. To give another example, in a recent case against a federal agency, the agency insisted on taking the depositions of hundreds of Black employees who were members of the plaintiff class, even though their accounts of their individual employment situations would not even be relevant unless and until there was a finding of discrimination against the class as a

[1]Recent decisions of the Supreme Court have imposed a substantially heavier burden on plaintiffs in fair employment cases. *See, e.g., Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989) and *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

whole. Literally hundreds of attorneys' hours were consumed (in a case that would take fourteen years from filing until trial) in doing discovery that might turn out to be completely unnecessary.

We also welcome the provisions that would require that firm trial dates be set early. With rare exceptions, civil rights plaintiffs do not want delay. In two of our employment cases -- again against federal agencies -- between ten and fourteen years elapsed before trial. To some degree, this was caused by a shortage of judges in the particular district. To a larger degree, it was caused by the all too typical litigation tactics of federal defendants, which is to fight everything to the death. In the meantime, a number of our clients -- who were low-paid federal employees seeking justice from their own government -- died. In another case, in contrast, also against a federal agency, the district judge set an early trial date shortly after the case was filed, and stuck to it with one adjournment (because the *government* was not ready for trial), and the case was decided less than three years after it was filed. Finally, we have found that many defendants (again, particularly the federal government) will not negotiate seriously for a settlement unless faced with a trial date that they know the court will hold them to. Obviously, the surest way to achieve just resolutions speedily and inexpensively is through settlements fairly arrived at.

In addressing these specific aspects of reform of the civil justice system, I do not mean to limit in anyway our endorsement of the Bill. The Legal Defense Fund supports wholeheartedly both the goals of the Civil Justice Reform Bill of 1990, and the means it sets out to achieve those goals.

CSR