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# Common Sense and Other Legal Reforms

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# ESSAY

## Common Sense and Other Legal Reforms

*Carl Tobias\**

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I am a member of the Advisory Group that the United States District Court for the District of Montana appointed under the Civil Justice Reform Act of 1990 and of the Local District Rules Review Committee that the Ninth Circuit Judicial Council named under the Judicial Improvements and Access to Justice Act of 1988. However, the views expressed in this Essay and the errors that remain are mine.

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## I. INTRODUCTION

The Contract with America (the "Contract") was the centerpiece of the Republican Party's strategy in the 1994 congressional campaigns. The Common Sense Legal Reforms Act ("CSLRA") was the ninth tenet and a critical constituent of the Contract, which the Republican Party promised that the new Congress would vote upon within one hundred days. Once the Grand Old Party swept into office, capturing the House of Representatives for the first time in four decades, many members of Congress were expressly committed to honoring the Contract with America. Accordingly, nearly one hundred Republican sponsors introduced the Common Sense Legal Reforms Act during the initial week of the 104th Congress, and the measure rapidly progressed through the House of Representatives.<sup>1</sup>

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1. See H.R. 10, 104th Cong., 1st Sess. (Jan. 4, 1995). The Republican Party leadership decided against attempting to pass H.R. 10 in one bill as introduced. Many provisions included in H.R. 10, therefore, now appear in numerous other pieces of legislation. See, for example, Common Sense Product Liability Reform Act, H.R. 917, 104th Cong., 1st Sess. (Feb. 13, 1995); Common Sense Product Liability and Legal Reform Act, H.R. 956, 104th Cong., 1st Sess. (Feb. 15, 1995); Attorney Accountability Act, H.R. 988, 104th Cong., 1st Sess. (Feb. 16, 1995); Securities Litigation Reform Act, H.R. 1058, 104th Congress, 1st Sess. (Feb. 27, 1995). The Republicans have discarded virtually none of the original constituents of H.R. 10, however. Congress will consider and may ultimately adopt most of the provisions of the CSLRA as components of other legislation that passed the House of Representatives during the week of March 6, 1995. See H.R. 956, H.R. 988, and H.R. 1058. For convenience of analysis, I primarily treat the proposals included in the CSLRA (H.R. 10), supplementing that evaluation with assessment of specific aspects of the recently passed legislation which are most relevant to the issues examined in this Essay. Nevertheless, I realize that certain features of the measures that the House adopted improved H.R. 10 as originally introduced. I intend to emphasize numerous systemic factors that the legislation implicates, rather than to catalog comprehensively the particular constituents of the legislation, even while recognizing that the whole may be more than the sum of its parts.

This legislation would impose procedural and substantive reforms that could significantly affect much federal civil litigation and could have substantial systemic impacts on the civil justice process. For instance, the measure's advocates drafted and introduced the proposed legislation with little apparent appreciation for how it might conflict with a number of ongoing public and private reform initiatives, such as an earlier Congress's Civil Justice Reform Act of 1990 and the American Law Institute's efforts to adopt a Third Restatement of Torts governing products liability.

The bill's enactment, therefore, could additionally complicate the increasingly complex civil justice system. Indeed, certain of the measure's provisions may impose greater expense and delay in civil litigation, thereby exacerbating numerous current problems rather than producing the reforms' ostensible purpose of ameliorating the difficulties. These phenomena mean that the Common Sense Legal Reforms Act warrants analysis. This Essay undertakes that effort.

Part II of this Essay examines the backdrop against which the proponents of the Common Sense Legal Reforms Act drafted the legislation. The Part emphasizes those continuing public and private law reform efforts with which many provisions of the measure promise to conflict.

Part III descriptively analyzes the specific procedural and substantive requirements of the CSLRA and considers particular provisions' adverse effects on individual cases, ongoing reform initiatives, and the civil justice system. The Part finds that numerous statutory prescriptions will have deleterious impacts on plaintiffs and resource-poor litigants by, for instance, restricting their federal court access. The act may also disrupt continuing civil justice reform efforts, thus enhancing complexity and disuniformity in federal civil procedure and concomitantly increasing litigation cost and delay.

Part IV affords suggestions for the future. These recommendations principally urge Congress to reject or delay the passage of the Common Sense Legal Reforms Act. If Congress remains unpersuaded that the legislation will have numerous detrimental effects on much civil litigation and on the broader civil justice system, or if Congress

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At the time that this Essay went to press in early April, the Senate Committee on Commerce, Science, and Transportation was preparing to mark up and vote on the Product Liability Fairness Act of 1995, S. 565, 104th Cong., 1st Sess. (Mar. 15, 1995), which is the Senate analogue of H.R. 956, while Senator Orrin Hatch, the Chair of the Senate Judiciary Committee, was introducing the Civil Justice Fairness Act of 1995, S. 672, 104th Cong., 1st Sess. (Apr. 4, 1995), which essentially combines the provisions of H.R. 956 and H.R. 988.

chooses to proceed for other reasons, it should at least consider additional options. For example, Congress should not enact the CSLRA provisions that will conflict with ongoing reform initiatives.

## II. BACKGROUND OF LEGAL REFORMS

The origins and development of the numerous legal reforms which comprise the backdrop against which the sponsors of the Common Sense Legal Reforms Act developed the proposed legislation warrant comparatively comprehensive treatment in this Essay, although that background has been rather extensively assessed elsewhere.<sup>2</sup> Relatively thorough examination is justified because most of the initiatives have long, rich, and complex histories that inform understanding of the CSLRA, particularly by illustrating how those who drafted the new measure apparently did so without fully taking into account earlier endeavors. This Part primarily examines procedural reforms, by considering initiatives that relate to the processes for adopting and revising federal civil procedures and by studying certain federal civil justice reforms, and secondarily explores substantive reforms, principally by treating efforts regarding products liability law.

### A. Procedural Reforms

#### 1. Processes for Adopting and Revising Federal Procedures

After decades of contentious debate, Congress passed the Rules Enabling Act of 1934, which authorized the United States Supreme Court to prescribe rules of practice for civil cases in the federal district courts.<sup>3</sup> The next year, the Court appointed the original Advisory Committee on the Civil Rules ("Advisory Committee"), which included

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2. See generally Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. Rev. 795 (1991); Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Act*, 46 Stan. L. Rev. 1589 (1994).

3. Rules Enabling Act, Pub. L. No. 73-415, 48 Stat. 1064 (1934), codified at 28 U.S.C. §§ 2071-77 (1988 & Supp. 1993). For additional discussion of this act's origins and implications, see generally Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1987); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270 (1989). I rely substantially in this section on Tobias, 46 Stan. L. Rev. 1589.

fourteen practitioners and law professors.<sup>4</sup> The Advisory Committee completed its draft of the Federal Rules of Civil Procedure ("the Rules") in 1937, the Supreme Court approved the package as submitted essentially intact, and the Rules became effective in 1938.<sup>5</sup>

The members of the Advisory Committee meant to rectify the difficulties posed by common law and code procedure, such as their very technical character.<sup>6</sup> The drafters sought to write a procedural code that would be simple, uniform, and trans-substantive; that would foster the expeditious, inexpensive disposition of civil cases; and that would encourage merits-based resolution of disputes.<sup>7</sup> The Federal Rules required every federal district court to apply identical procedures.<sup>8</sup> Rule 83, however, provided an exception; it permitted each district to adopt local procedures which were not inconsistent with the Federal Rules, thereby enabling the courts to undermine the uniform, simple procedural system that the Rules had instituted.<sup>9</sup>

The Federal Rules seemed to work reasonably well during the thirty years following their adoption.<sup>10</sup> Numerous developments, however, led to growing dissatisfaction with the Rules by the mid-1970s. Many judges and attorneys and a small number of writers claimed that the federal courts were experiencing a litigation explosion in which parties were filing too many cases, too few of which had

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4. See, for example, Subrin, 135 U. Pa. L. Rev. at 971-73; Tobias, 74 Cornell L. Rev. at 273.

5. See Subrin, 135 U. Pa. L. Rev. at 970-73; Tobias, 74 Cornell L. Rev. at 273.

6. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L. Rev. 433, 439 (1986) (discussing the technical character of common law and code procedure and the liberality of F.R.C.P. pleading requirements); Subrin, 135 U. Pa. L. Rev. at 956-61 (discussing the technical character of common law and code procedure and the "pro-simplicity theme" proposed by committee members). See also Rescoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. Rep. 395, 405-06 (1906) (calling for elimination of "sporting theory" of justice). See generally Charles E. Clark, *Procedure—The Handmaid of Justice* (West, 1965).

7. See generally Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 Yale L. J. 718 (1975). See also Judith Rosnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. Chi. L. Rev. 494, 502-15 (1986); Stephen N. Subrin, *A New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1649-51 (1981); Tobias, 74 Cornell L. Rev. at 272-77 (cited in note 3). See also Resnik, 53 U. Chi. L. Rev. at 498-99, 508 (recounting difficulties of discerning intent of drafters who worked half-century ago); Tobias, 74 Cornell L. Rev. at 274 (same).

8. See, for example, Subrin, 67 A.B.A. J. at 1650; Tobias, 74 Cornell L. Rev. at 274-75.

9. See F.R.C.P. 83 and Advisory Committee Note (finding that the restriction on adoption of inconsistent local procedures has been honored in the breach).

10. See generally Symposium, *The Federal Rules of Civil Procedure: 1938-1958*, 58 Colum. L. Rev. 435 (1958); Resnik, 53 U. Chi. L. Rev. at 515-16 (cited in note 7); Tobias, 74 Cornell L. Rev. at 277-78 (cited in note 3).

merit.<sup>11</sup> Some judges and lawyers expressed concern about abuse of the civil litigation process and urged courts to sanction attorneys and parties who engaged in this activity, while a number of critics asserted that the uniform, simple, flexible regime instituted in the Federal Rules made possible these complications.<sup>12</sup>

The proliferation of local procedures became another significant source of growing discontent with federal civil procedure.<sup>13</sup> Many of these local requirements, most of which have been prescribed during the last two decades, are inconsistent with the Federal Rules of Civil Procedure, provisions of the United States Code, or local procedures in other federal districts.

The Judicial Conference of the United States, the policymaking arm of the federal courts, responded to these concerns in several ways. The conference supported the adoption of the 1983 amendments to Federal Rules 7, 11, 16, and 26. The revisions were intended to be an integrated package that would increase attorneys' responsibilities to act as officers of the court and enhance judicial control over civil litigation, particularly during the pre-trial process.<sup>14</sup> Rules 16 and 26 respectively increased judicial authority during pre-trial conferences and discovery.<sup>15</sup> The amendments to Rules 16 and 26 em-

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11. See, for example, Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, in A. Leo Levin and Russell Wheeler, eds., *The Pound Conference: Perspectives on Justice in the Future* 23 (West, 1979); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, in Levin and Wheeler, eds., *The Pound Conference* at 211-12. See also Tobias, 74 Cornell L. Rev. at 287-89 (reviewing debate over litigation explosion).

12. See, for example, *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639, 642-43 (1976) (upholding sanctions imposed for disobedience of discovery orders and recognizing importance of penalizing and deterring discovery abuse); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975) (decrying the extensive discovery available in securities litigation); *Order Amending the Federal Rules of Civil Procedure*, 446 U.S. 997, 1000 (1980) (Powell, J., Stewart, J., and Rehnquist, J., dissenting) (disagreeing with the Order's modification of the F.R.C.P. as too modest to limit the Rules' potential abuse). See generally Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 Minn. L. Rev. 1 (1984) (giving several reasons for the inefficiency of the current judicial process).

13. See, for example, N.D. Cal. R. 235-7, reprinted in Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 Cal. L. Rev. 770, 776-77 n.30 (1981) (prescribing preliminary meetings, preparation of pretrial order by attorneys rather than judge, and other procedural details). See generally Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 Ariz. St. L. J. 1393 (1992).

14. See *Order Amending Federal Rules of Civil Procedure*, 461 U.S. 1097 (1983). See also Subrin, 67 A.B.A. J. at 1650 (cited in note 7) (arguing that the amended rules would increase attorneys' responsibilities and judicial control and would complicate civil procedure). See generally Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 Rutgers L. Rev. 933 (1991) (discussing the effects of the 1983 amendments on civil litigants); Arthur R. Miller, *The 1983 Amendments to the Federal Rules of Civil Procedure: Promoting Effective Case Management and Lawyer Responsibility* (Fed. Judicial Center, 1984) (discussing the background, integrated nature, and objectives of the 1983 amendments).

15. See *Order Amending Federal Rules of Civil Procedure*, 461 U.S. 1097, 1102, 1104 (1983).

powered judges to impose sanctions for those provisions' violation, while Rule 11 mandated that judges sanction those who failed to conduct reasonable pre-filing inquiries or who filed deficient papers.<sup>16</sup>

The Judicial Conference provided two responses to the problems posed by local procedural proliferation. It supported the 1985 amendment of Rule 83, specifically requiring that districts adopt or amend local rules only after affording public notice and opportunity for comment and which required that individual judges' standing orders not conflict with the Federal Rules or with local rules.<sup>17</sup>

The conference also created the Local Rules Project to assemble and analyze all local procedures.<sup>18</sup> The project undertook a thoroughgoing study and reported that the district courts had promulgated five thousand local rules, many of which contravened the Federal Rules, and that there were thousands of additional local prescriptions that governed local practice.<sup>19</sup> The conference reacted to the project's findings by issuing an order that asked all federal districts to conform these local procedures to the Federal Rules.<sup>20</sup>

Some judges, attorneys, and commentators expressed growing concerns with the rule revision processes themselves.<sup>21</sup> Congressional activity may reflect some of this dissatisfaction. During 1973, Congress intervened in the national procedural amendment process and nullified considerable work of Judicial Conference committees by enacting legislation that replaced the Federal Rules of Evidence that had been adopted by the Supreme Court the preceding year.<sup>22</sup> In

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16. Id. at 1100.

17. F.R.C.P. 83.

18. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Report of the Local Rules Project: Local Rules on Civil Practice 1* (Sept. 1989). See generally Daniel R. Coquillette, Mary P. Squiers, and Stephen N. Subrin, *The Role of Local Rules*, 75 A.B.A. J. 62 (Jan. 1989) (providing summary of Local Rules Project).

19. See *Report of the Local Rules Project* at 1. See also Coquillette, Squiers, and Subrin, 75 A.B.A. J. at 62-65 (discussing the significance of the proliferation of local rules).

20. See Telephone Interview with Mary P. Squiers, Project Director, Local Rules Project (Feb. 21, 1992); Telephone Interview with Stephen N. Subrin, Consultant, Local Rules Project (Feb. 15, 1992).

21. See generally Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 Colum. L. Rev. 905 (1976) (suggesting reforms to the exercise of judicial rulemaking powers); Winifred R. Brown, *Federal Rulemaking: Problems and Possibilities* (Fed. Judicial Center, 1981) (outlining the rulemaking process and criticizing proposals for change). See also Tobias, 46 Stan. L. Rev. at 1598 n.55 (cited in note 2) (discussing Congress' intervention in national rule revision).

22. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975). See also Judicial Improvements and Access to Justice Act, H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 27-29 (Aug. 26, 1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5987-89 (describing congressional



1974, Congress postponed for a year the date on which the amended Federal Rules of Criminal Procedure were to take effect.<sup>23</sup> During the early 1980s, Congress rewrote a revision of Federal Rule of Civil Procedure 4 that the Court had promulgated.<sup>24</sup>

One half-century after the original Federal Rules of Civil Procedure became effective Congress passed the Judicial Improvements and Access to Justice Act ("JIA") of 1988, which was "intended to modernize, regularize and open the national and local procedural amendment processes."<sup>25</sup> The statute was meant to restore the primacy of, and reinvigorate, the national rule revision process by opening it to greater public involvement, effectively analogizing the process to notice-comment rulemaking under the Administrative Procedure Act.<sup>26</sup>

Congress in the JIA correspondingly attempted to ameliorate the proliferation of local procedures by placing strictures on their adoption and revision that were similar to those for Federal Rule

intervention by enacting legislation replacing the Federal Rules of Evidence); Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (1975).

In September 1992, the Judicial Conference, the policymaking arm of the federal courts, suggested that Chief Justice William Rehnquist reactivate an Advisory Committee on Federal Rules of Evidence. In the winter of 1993, Chief Justice Rehnquist appointed the committee, which Judge Ralph K. Winter chairs and which Professor Margaret Berger serves as reporter. The committee held its initial meeting in May, 1993. Telephone Interview with John Rabiej, Chief, Rules Support Staff, Administrative Office of the U.S. Courts (March 23, 1995). See generally 150 F.R.D. 330 (1994) (affording Advisory Committee membership); 147 F.R.D. 282 (1993) (recommending approval of the amendments to the federal rules of evidence and that proposed amendment of Rule 702 be referred to new Advisory Committee on Federal Rules of Evidence). See also Edward R. Becker and Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, The Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 Geo. Wash. L. Rev. 857 (1993).

23. Act of July 30, 1974, Pub. L. No. 93-361, 88 Stat. 397 (1974), codified at 18 U.S.C. § 3771 (1988 & Supp. 1993); Howard Lesnick, *The Federal Rule-Making Process: A Time for Re-examination*, 61 A.B.A. J. 579, 579 (1975). See Judicial Improvements and Access to Justice Act, H.R. Rep. No. 100-889, 100th Cong., 2d Sess. 27 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 5987 (noting that after 1973 Congress frequently interceded to "delay the effective date of, disapprove, or modify rules and amendments").

24. See Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983); Paul D. Carrington, *Continuing Work on the Civil Rules: The Summons*, 63 Notre Dame L. Rev. 733, 733 (1988) (discussing prospects for reform in F.R.C.P. 4).

25. Tobias, 46 Stan. L. Rev. at 1599 (cited in note 2). See also 1988 U.S.C.C.A.N. at 5987 (outlining the purposes and providing legislative history of the JIA); 28 U.S.C. §§ 2071(b), 2073 (1988 & Supp. 1993) (defining court rulemaking authority). See generally Mullenix, 69 N.C. L. Rev. at 830-32 (cited in note 2) (discussing the democratization of the rulemaking process effected by JIA's passage).

26. See 5 U.S.C. §§ 551-59 (1988 & Supp. 1993) (prescribing administrative procedures particularly for notice-comment rulemaking); 28 U.S.C. §§ 2071(b), 2073 (1988 & Supp. 1993) (defining court rulemaking powers).

amendment.<sup>27</sup> The legislation imposed public notice and comment procedures on all of the districts and required every district to name a local rules committee to advise all judges of the court in prescribing and modifying local rules.<sup>28</sup> The statute also required each of the twelve circuit judicial councils to review periodically all local procedures for consistency and to change or abolish those deemed inconsistent.<sup>29</sup>

The first test of the JIA modifications to the national rule revision process was the adoption of the 1993 Federal Rules amendments.<sup>30</sup> I concentrate on the revision in Rule 11 because its 1983 amendment became the most controversial change in the Federal Rules' history and because the Common Sense Legal Reforms Act would fundamentally alter the 1993 amendment, effectively reinstating the 1983 version.<sup>31</sup>

The 1983 modification of Rule 11 was controversial for several reasons. That revision's principal purpose was to deter frivolous litigation by encouraging attorneys to "stop and think" before filing papers. The Advisory Committee Note which accompanied the amendment confirmed that deterrence was the revision's primary objective,<sup>32</sup> but the revision also provided that judges might award litigation expenses, including attorney's fees, when the Rule was contravened.<sup>33</sup> Numerous lawyers seized on this confusion regarding the provision's compensatory purpose and invoked the Rule in an effort to recover attorney's fees, while a number of judges were responsive to these requests and made attorney fee-shifting the sanction of choice.<sup>34</sup>

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27. See Historical and Revision Notes to 28 U.S.C. § 2071 (1988 & Supp. 1993) (noting that Congress imposed broad responsibilities on federal judiciary to achieve uniformity of rules).

28. See *id.* (imposing public notice procedures).

29. 28 U.S.C. § 332(d)(4) (1988). See also 28 U.S.C. § 2071(c)(1) (1988 & Supp. 1993).

30. *Amendments to the Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401 (1993) ("1993 Amendments").

31. See notes 118-29 and accompanying text. The 1993 amendment of Rule 26 to impose automatic disclosure was also quite significant. See notes 59-62 and accompanying text. Rule 4 was substantially revised as well. See note 24 and accompanying text.

32. See F.R.C.P. 11, 1983 Advisory Committee's Note, reprinted in 97 F.R.D. 165, 199-200 (1983) (stressing the new amendment's detorrent function).

33. 1983 amendment of F.R.C.P. 11; F.R.C.P. 11, 1983 Advisory Committee's Note, reprinted in 97 F.R.D. 165, 198 (1983).

34. See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 *Georgetown L. J.* 1313, 1327, 1340 (1986) (discussing confusion); Elizabeth Wiggins, Thomas Willging, and Donna Stientra, *Rule 11: Final Report to Advisory Committee On Civil Rules of the Judicial Conference*

The pursuit of compensation fostered much expensive, unnecessary satellite litigation unrelated to the merits of lawsuits.<sup>35</sup> Unclear phrasing and inconsistent judicial interpretation of the amendment correspondingly contributed to satellite litigation.<sup>36</sup> Some counsel also employed Rule 11 for strategic purposes, such as threatening less powerful litigants in ways that were intended to discourage their vigorous pursuit of litigation.<sup>37</sup>

Many of the above factors disadvantaged resource-poor litigants, such as civil rights plaintiffs.<sup>38</sup> Rule 11 was invoked against, and sanctions were levied on, civil rights plaintiffs more often than any other class of federal civil litigant,<sup>39</sup> and judges correspondingly imposed large sanctions on some of them.<sup>40</sup> The possibility of Rule 11 sanctions chilled the parties, whose lack of resources and power made them risk-averse and vulnerable to the Rule's invocation.<sup>41</sup> The 1983 amendment did afford some benefits, such as deterring the pursuit of frivolous litigation.<sup>42</sup>

The national rule revision entities—particularly those, such as the Advisory Committee, which had principal responsibility for developing proposals for rules amendments—faithfully and carefully implemented the JIA's requirements respecting the revision process. During August 1991, the Advisory Committee issued a preliminary draft of proposed amendments and sought and received much public comment in writing and in two public hearings.<sup>43</sup> The committee was

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of the United States § 1B at 9 (Fed. Judicial Center, 1991) (stating that attorney's fees were sanction of choice).

35. See, for example, Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buff. L. Rev. 485, 514 (1989). See also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. Pa. L. Rev. 1925, 1943-54 (1989) (addressing the need for lawyers and clients to exercise restraint in consuming judicial resources with Rule 11 litigation).

36. Burbank, 137 U. Pa. L. Rev. at 1930-31; Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 Iowa L. Rev. 1775, 1776 (1992).

37. See, for example, Carl Tobias, *Reconsidering Rule 11*, 46 U. Miami L. Rev. 855, 876-77 (1992) (discussing Rule 11's "threat and retreat" aspect). See also Nelken, 74 Georgetown L. J. at 1327, 1340 (cited in note 34) (noting the high level of Rule 11 motions in civil rights cases).

38. Id.; Tobias, 37 Buff. L. Rev. at 503-06 (cited in note 35) (referring to the Rule's "chilling effect"); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-01 (1988) (same).

39. Nelken, 74 Georgetown L. J. at 1327, 1340; Vairo, 118 F.R.D. at 200-01.

40. See, for example, *Blue v. United States Department of the Army*, 914 F.2d 525, 548-49 (4th Cir. 1990); *In re Kunstler*, 914 F.2d 505, 513-21 (4th Cir. 1990).

41. See Tobias, 37 Buff. L. Rev. at 495-98 (cited in note 35); Vairo, 118 F.R.D. at 200-01 (cited in note 38).

42. Arthur R. Miller, *The New Certification Standard Under Rule 11*, 130 F.R.D. 479, 503-05 (1990); William W. Schwarzer, *Rule 11 Revisited*, 101 Harv. L. Rev. 1013, 1014-15 (1988).

43. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments of Federal Rules of Civil Procedure and the Federal Rules of Evidence*, reprinted in 137 F.R.D. 53 (1991) ("Preliminary Draft of

responsive to public criticism and apparently made good faith efforts to improve the drafts. It even inverted the usual rule revision sequence for Rule 11 by soliciting public comment prior to drafting a proposal.<sup>44</sup>

Notwithstanding the Committee's thorough evaluation of the 1983 amendment, its responsiveness to public input, and its attempt to write a new Rule that would fairly treat all federal civil litigants,<sup>45</sup> most parties which would have been affected by the preliminary draft of Rule 11 expressed dissatisfaction with the proposal.<sup>46</sup> For instance, resource-poor litigants found that the draft was insufficiently responsive to the difficulties of satellite litigation and chilling effects. Defense counsel were troubled by the draft's restrictions on recovery of attorney's fees for Rule violations.

The Advisory Committee responded to this criticism by writing several additional drafts and by attempting to develop the fairest, clearest revision possible.<sup>47</sup> Indeed, the committee endeavors represent the type of open, responsive revision process and rational decisionmaking that Congress envisioned when changing the rule revision process in the 1988 Act.<sup>48</sup>

Despite the committee's commendable efforts, numerous individuals and interests continued to oppose the 1993 revision.<sup>49</sup> The most prominent critic was Supreme Court Justice Antonin Scalia, who dissented from the Supreme Court's transmittal of the amended

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*Proposed Amendments*"). See also Randall Samborn, *U.S. Civil Procedure Revisited*, 14 Nat'l L. J. 1, 12-13 (May 4, 1992) (discussing preliminary draft and public comment). See generally Hon. William J. Hughes, *Congressional Reaction to the 1993 Amendments to the Federal Rules of Civil Procedure*, 18 Seton Hall Legis. J. 1 (1993).

44. See Advisory Committee on Civil Rules of the Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules, as Amended in 1983*, 131 F.R.D. 344, 345 (1990) ("*Call for Written Comments*").

45. See Tobias, 46 U. Miami L. Rev. at 861-65 (cited in note 37) (discussing these aspects of the committee's actions); *Call for Written Comments*, 131 F.R.D. at 345 (outlining the committee's plan and goals concerning public comments on the 1983 amendment).

46. I rely substantially in this paragraph on Tobias, 46 Stan. L. Rev. at 1608 (cited in note 2). See also Carl Tobias, *Rule Revision Roundelay*, 1992 Wis. L. Rev. 236, 236-39 (describing dissatisfaction with preliminary draft in a letter to the editors).

47. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Proposed Amendments to Federal Rules of Civil Procedure 46* (July 1992); Tobias, 46 U. Miami L. Rev. at 859-65 (cited in note 37); Carl Tobias, *The 1993 Revision of Federal Rule 11*, 70 Ind. L. J. 171, 176-88 (1994) (tracing the process employed in drafting the amended Rule).

48. See notes 25-26 and accompanying text. See generally Mullenix, 69 N.C. L. Rev. 795 (cited in note 2); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 Geo. Wash. L. Rev. 455 (1993).

49. See Tobias, 70 Ind. L. J. at 186-88 (cited in note 47) (discussing the Supreme Court and Congressional objections).

Rule, contending that it would "eliminate a significant and necessary deterrent to frivolous litigation."<sup>50</sup>

In the final analysis, the 1993 revision of Rule 11 is significantly better than the 1983 amendment. The 1993 revision includes a safe harbor for parties who allegedly contravene the Rule, specifically excludes discovery from the provision's purview, entrusts sanctioning for Rule violations to judicial discretion, and sharply restricts those instances in which courts can impose the sanction of attorney's fees.<sup>51</sup> Therefore, the 1993 version should decrease incentives to invoke the Rule improperly and correspondingly reduce expense and delay ascribed to satellite litigation. The new Rule 11 is a balanced, workable compromise, given the restraints on rule revision, such as the need to satisfy constituencies as diverse as the federal judiciary and plaintiffs' and defense counsel.

The 1988 JIA requirements relating to local rule revision have received limited implementation as compared to the national rule amendment provisions exemplified by the 1993 modification of Rule 11.<sup>52</sup> Most of the ninety-four districts have named local rules committees. A number of districts have formalized processes for promulgating and changing local procedures and have opened the processes to public participation, while some have adopted new, or revised, existing local procedures pursuant to the processes.

Only a small number of districts have effectuated the JIA's mandates relating to local procedural proliferation.<sup>53</sup> For instance, a minuscule number of courts have attempted to limit local procedural requirements, and virtually none have modified inconsistent local procedures. The Seventh Circuit Judicial Council may be the sole council that has modified or abrogated conflicting local requirements.

Numerous considerations probably explain the limited effectuation of this aspect of the Judicial Improvements Act. Perhaps most important, as discussed in detail below, civil justice reform initiatives, principally instituted by Congress in the Civil Justice Reform Act ("CJRA") of 1990, but also by the Executive Branch in

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50. See *Amendments to the Federal Rules of Civil Procedure and Forms*, reprinted in 146 F.R.D. 402, 507-10 (1993) (Scalia, J., dissenting) ("Dissenting Statement").

51. See F.R.C.P. 11(c)-(d), reprinted in 146 F.R.D. at 421-23; Tobias, 77 Iowa L. Rev. at 1783-88 (cited in note 36). Anecdotal evidence suggests that the amendment has had its intended effects. See Laura Duncan, *Sanctions Litigation Declining*, 81 A.B.A. J. 12, 12 (March 1995).

52. I rely substantially in this paragraph on Tobias, 46 Stan. L. Rev. at 1604-06 (cited in note 2); Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 Wash. & Lee L. Rev. 359 (1995).

53. I rely substantially in this paragraph on Tobias, 46 Stan. L. Rev. at 1605. See also Tobias, 52 Wash. & Lee L. Rev. at 366 (affording examples in Fourth Circuit).

Executive Order 12,778 issued in 1991, effectively suspended the efforts of judges, districts, local rules committees, and circuit judicial councils that might have treated local procedural proliferation.

## 2. Federal Civil Justice Reform

### a. Congressional Civil Justice Reform

Congress passed the Civil Justice Reform Act of 1990 out of growing concern over increasing cost and delay in civil litigation.<sup>54</sup> The legislation required that all ninety-four districts adopt civil justice expense and delay reduction plans. These plans could include eleven statutorily-prescribed procedures—principally relating to judicial case management, discovery, and alternatives to dispute resolution (“ADR”)—and any other measures that would decrease cost or delay.<sup>55</sup> The CJRA also created circuit review committees to monitor district court implementation and assigned the Judicial Conference similar responsibility.<sup>56</sup>

The legislation implicitly encouraged courts to adopt procedures that conflict with the Federal Rules, provisions in the United States Code, and requirements in other districts.<sup>57</sup> Most of the courts prescribed permutations of the eleven statutorily-enumerated measures, and numerous courts promulgated other procedures pursuant to a twelfth, open-ended provision. For instance, a number of districts relied on the eleven listed prescriptions to adopt local procedures which implemented automatic, or mandatory pre-discovery, disclosure, a controversial, nontraditional discovery technique.<sup>58</sup>

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54. See 28 U.S.C. §§ 471-82 (1988 & Supp. 1993). I rely substantially in this subsection on Tobias, 46 Stan. L. Rev. at 1601-04.

55. See 28 U.S.C. § 473 (1988 & Supp. 1993). All districts were to adopt plans by December 1, 1993, and to experiment with procedures for three years. See Notes on Implementation of Plans accompanying 28 U.S.C. § 471 (1988 & Supp. 1993).

56. See 28 U.S.C. § 474 (1988 & Supp. 1993); Tobias, 24 Ariz. St. L. J. at 1406-11 (cited in note 13).

57. See 28 U.S.C. § 473 (1988 & Supp. 1993). See generally Lauren K. Rebel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 Stan. L. Rev. 1447 (1994). The Rules Enabling Act states that local rules must be “consistent with Acts of Congress” and the Federal Rules of Civil Procedure. See 28 U.S.C. § 2071(a) (1988 & Supp. 1993).

58. See, for example, United States District and Bankruptcy Court for the District of Idaho, *Expense and Delay Reduction Plan* 10-11 (Dec. 1, 1991); United States District Court for the Eastern District of New York, *Civil Justice Expense and Delay Reduction Plan* 4-5 (Dec. 17, 1991).

This experimentation with disclosure became particularly problematic because the national rule revisors were simultaneously considering an amendment to Federal Rule 26 that would have imposed disclosure nationwide.<sup>59</sup> The revision entities ultimately adopted a Federal Rule amendment that was intended to accommodate CJRA experimentation with disclosure by permitting all ninety-four districts to vary the provision or to reject it.<sup>60</sup> Because Congress failed at the eleventh hour to delete the Rule 26 amendment prescribing disclosure, and because numerous districts apparently failed to plan for other contingencies, considerable confusion arose.<sup>61</sup> Districts eventually adopted a broad array of disclosure procedures and a number of courts eschewed disclosure; these developments have increased inconsistency, cost, and delay.<sup>62</sup>

The Eastern District of Texas most boldly and clearly asserted district court authority to adopt inconsistent local procedures when it declared that, insofar as the "Federal Rules of Civil Procedure are inconsistent with [the Court's] Plan, the Plan has precedence and is controlling."<sup>63</sup> The district imposed a maximum fee schedule for contingent fee cases not governed by fee-shifting legislation, although the Supreme Court has specifically proclaimed that Congress, not the judiciary, is to allocate the costs of litigation.<sup>64</sup>

The difficulties created by the adoption of a broad range of disparate procedures in the ninety-four districts have been compounded by inconsistent judicial construction of the provisions and by the refusal of a number of judges to apply some measures which their courts have adopted.<sup>65</sup> Attorneys and parties have also experienced

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59. *Preliminary Draft of Proposed Amendments*, 137 F.R.D. at 87-88 (cited in note 43). See also Tobias, 46 Stan. L. Rev. at 1611 (cited in note 2) (discussing the circumstances surrounding the Advisory Committee's preliminary draft prescribing automatic disclosure).

60. 1993 Amendments, 146 F.R.D. at 431 (cited in note 30). See also Tobias, 46 Stan. L. Rev. at 1612 (suggesting that the Advisory Committee changed its position to accommodate efforts proceeding under the CJRA).

61. Tobias, 46 Stan. L. Rev. at 1612-14.

62. *Id.* at 1614-15.

63. See United States District Court for the Eastern District of Texas, *Civil Justice Expense and Delay Reduction Plan* 9 (Dec. 20, 1991).

64. *Id.* at 7-8. See *Kaiser Aluminum & Chemical Corporation v. Bonjorno*, 494 U.S. 827, 834-35 (1990) (concluding that the "allocation of the costs accruing from litigation is a matter for the legislature, not the courts"); *Alyeska Pipeline Service Company v. The Wilderness Society*, 421 U.S. 240, 247, 262, 271 (1975) (stating that distribution of litigation costs and attorney's fees is for Congress rather than for courts).

65. Tobias, 46 Stan. L. Rev. at 1621 (cited in note 2).

considerable difficulty locating, understanding, and complying with the applicable local requirements.<sup>66</sup>

The increasingly complex and disuniform state of federal civil procedure has increased the expense and delay of federal civil litigation. All parties, but particularly those with limited resources and those who participate in litigation in multiple districts, have experienced cost and delay.<sup>67</sup>

These developments also show how the 1990 CJRA's implementation essentially suspended those features of the 1988 JIA which were intended to address local procedural proliferation.<sup>68</sup> For instance, circuit judicial councils may well have been reluctant to scrutinize, much less abolish, inconsistent local procedures that the 1990 statute apparently authorized.<sup>69</sup> Indeed, the Sixth Circuit Judicial Council suspended its review of local rules pending guidance from Congress, the Judicial Conference, or case law on whether the CJRA took precedence over the Federal Rules of Civil Procedure.<sup>70</sup>

### *b. Executive Branch Civil Justice Reform*

The Administration of President George Bush briefly experimented with civil justice reform in the executive branch.<sup>71</sup> The President issued Executive Order 12,778 on October 23, 1991, and the order took effect in January 1992.<sup>72</sup> During that month, the United States Justice Department promulgated preliminary guidelines to help federal administrative agencies and government attorneys implement the executive order, and in January 1993 the department

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66. *Id.* See also Tobias, 24 *Ariz. St. L. J.* at 1422-25 (cited in note 13) (discussing the implications of "increased balkanization" and of locating, understanding, and complying with local requirements for the participants in federal civil litigation).

67. See Tobias, 24 *Ariz. St. L. J.* at 1422-23; Tobias, 37 *Buff. L. Rev.* at 495-98 (cited in note 35) (discussing particular problems for litigants with limited resources, such as numerous civil rights plaintiffs).

68. See notes 27-29, 52-53 and accompanying text.

69. The CJRA also created analogous entities, circuit review committees, and assigned them similar oversight responsibilities. See note 56 and accompanying text.

70. See United States Court of Appeals for the Sixth Circuit, *Minutes of the Meeting of the Judicial Council* 4-5 (May 4, 1994). See also Tobias, 52 *Wash. & Lee L. Rev.* at 365-66 (cited in note 52) (describing implementation in the Fourth Circuit).

71. I rely substantially in this subsection on Carl Tobias, *Executive Branch Civil Justice Reform*, 42 *Am. U. L. Rev.* 1521 (1993).

72. See Exec. Order No. 12,778, § 10, 3 *C.F.R.* 359, 367 (1991) (stating that order is effective 90 days after signing).



finalized the guidelines.<sup>73</sup> The order and the accompanying guidelines include numerous expense- and delay-reduction procedures that apply to the government when it participates in federal civil litigation; those strictures which are most relevant to the issues considered in this Essay will be examined.

Section 1(a) of Executive Order 12,778 requires attorneys for the government to undertake reasonable efforts to notify potential defendants of the government's intent to file suit while affording the persons an opportunity to settle the dispute.<sup>74</sup> The timing and content of reasonable efforts must be tailored to the circumstances of individual cases, and government counsel need not provide notice in unusual instances, such as situations when notice would tactically disadvantage the United States.<sup>75</sup>

Section 1(d)(4) of the Executive Order covers the disclosure of core information.<sup>76</sup> This subsection requires that government lawyers offer to engage in the mutual exchange of certain significant information early in civil suits.<sup>77</sup> Attorneys can only make these offers when no dispositive motions are pending, when other litigants agree to exchange similar material, and when the court will enter the agreement as a stipulated order.<sup>78</sup>

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73. *Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,778*, 57 Fed. Reg. 3640 (1992) ("Preliminary Memorandum"); *Memorandum of Guidance on Implementation of the Reforms of Executive Order No. 12,778*, 58 Fed. Reg. 6015 (1993) ("Memorandum"). The Department of Justice only issued this memorandum on January 25, 1993, five days after the inauguration of William Jefferson Clinton as the forty-second President of the United States. *Id.* at 6015.

74. See Exec. Order No. 12,778, § 1(a), 3 C.F.R. at 360 (cited in note 72). See also *Preliminary Memorandum*, 57 Fed. Reg. at 3641 (stating that notice may be provided either by agency or litigating counsel for purpose of settling dispute).

75. See *Preliminary Memorandum*, 57 Fed. Reg. at 3641 (stating that notice is not needed when it would defeat purpose of litigation); *Memorandum*, 58 Fed. Reg. at 6016 (cited in note 73) (noting that agency efforts to resolve disputes prior to litigation can afford requisite notice and stating that government counsel need not repeat notice unless additional notice would be productive).

76. See Exec. Order No. 12,778, § 1(d)(1), 3 C.F.R. at 361 (cited in note 72) (noting that "core information" includes names and addresses of people having relevant information and location of relevant documents); *Preliminary Memorandum*, 57 Fed. Reg. at 3641-42 (discussing § 1(d)(1) of order, which requires government counsel to make reasonable efforts to reach agreement with opposing parties regarding exchange of information).

77. Exec. Order No. 12,778, § 1(d)(1), 3 C.F.R. at 361. See *Preliminary Memorandum*, 57 Fed. Reg. at 3641-42 (discussing requirement that government attorneys must offer to exchange certain information at early stage of litigation).

78. *Preliminary Memorandum*, 57 Fed. Reg. at 3641-42. See also *Memorandum*, 58 Fed. Reg. at 6017 (cited in note 73) (suggesting that agreement between parties, unless local practice warrants otherwise, should be by consent order to guarantee court enforcement).

Section 1(e) of the Executive Order mandates that government counsel introduce only dependable expert testimony.<sup>79</sup> The attorneys must rely on experts who have specialized knowledge, who have performed research, or who have other expertise in the applicable field and have premised their decisions on explanatory theories which are accepted by at least a substantial minority of experts in the area.<sup>80</sup>

Section 1(h) requires that government counsel offer to enter agreements with their opposition, prescribing two-way fee-shifting to the extent permitted by applicable law.<sup>81</sup> Because the Attorney General's review of relevant authority indicated that no legislation specifically authorized such agreements,<sup>82</sup> the Justice Department instructed government lawyers that they should not offer to enter these agreements until Congress enacts legislation or the Attorney General affords the requisite authority.<sup>83</sup>

Several factors complicate efforts to ascertain precisely how executive branch civil justice reform has been implemented. First, the Bush Administration did not fully effectuate the reforms adopted because the Justice Department only finalized its guidelines in the Administration's waning days.<sup>84</sup> Second, the Clinton Administration has left the Executive Order in effect and has made no affirmative

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79. Exec. Order No. 12,778, § 1(e), 3 C.F.R. at 361-62 (cited in note 72). See also *Preliminary Memorandum*, 57 Fed. Reg. at 3642-43 (noting that existing widely used practice among government attorneys to employ only reliable experts enhances government's position in litigation).

80. See Exec. Order No. 12,778, § 1(e), 3 C.F.R. at 361-62 (describing proper use of expert testimony, defining reliable expert testimony, and requiring litigation counsel to engage in mutual disclosure of expert witness information to extent other party agrees to comparable disclosure).

81. See Exec. Order No. 12,778, § 1(h), 3 C.F.R. at 362-63 (requiring that in civil litigation involving disputes over federal contracts pursuant to 41 U.S.C. §§ 601-613 or in any civil litigation initiated by United States, litigation counsel shall offer to enter agreement whereby losing party pays prevailing party's legal fees and costs); *Preliminary Memorandum*, 57 Fed. Reg. at 3643 (cited in note 73) (noting that order directs Attorney General to review legal basis for fee-shifting agreements).

82. See *Preliminary Memorandum*, 57 Fed. Reg. at 3643 (observing absence of legislative authority for fee-shifting agreements).

83. *Id.* at 3643. The department correctly resolved this issue. The Supreme Court recently declared that the "allocation of the costs accruing from litigation is a matter for the legislature, not the courts." *Kaiser Aluminum*, 494 U.S. at 835. Moreover, Congress has expressly rejected two-way fee-shifting while passing nearly 200 statutes prescribing one-way fee-shifting. See *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (appendix to opinion of Brennan, J., dissenting).

84. See note 73 and accompanying text.

decision respecting the reform,<sup>85</sup> although a Justice Department Task Force on Civil Justice Reform has been studying, and will soon issue recommendations regarding the administration's position on, civil justice reform.<sup>86</sup>

It is possible, nonetheless, to afford some rather generalized insight into the implementation of executive branch civil justice reform.<sup>87</sup> Because government lawyers have undertaken only limited effectuation of the Executive Order and the Justice Department guidelines, the efforts thus far may be characterized as somewhat sporadic.<sup>88</sup> Although individual lawyers have varied in the rigor and seriousness with which they have implemented the reform, there has been more, albeit limited, compliance within the Justice Department than among federal agencies or United States Attorneys' offices.<sup>89</sup> Experimentation with the different facets of executive branch reform has also been variable. For example, government lawyers have effectuated more comprehensively the aspects of the order that resemble federal procedural rules.<sup>90</sup> Government attorneys have correspondingly implemented ADR less broadly because of lingering concerns over how best to effectuate the alternatives.<sup>91</sup>

The checkered status of implementation of executive branch civil justice reform has had detrimental effects similar to those resulting from civil justice reform pursuant to the CJRA. For instance, the possibility that additional procedural requirements might apply in civil cases involving the government further complicates federal civil procedure by requiring that parties find, master, and conform to those requirements. Insofar as the executive branch strictures apply, they increase complexity, disuniformity, expense, and delay and may thwart efforts to limit local procedural proliferation.<sup>92</sup>

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85. This is premised on conversations with numerous individuals, principally lawyers who work in the Department of Justice and in Congress, who are familiar with the administration's civil justice reform efforts.

86. See *id.*

87. See *id.*

88. I rely substantially in the remainder of this paragraph on Tobias, 42 Am. U. L. Rev. at 1538-39 (cited in note 71).

89. Telephone Interview with Jeffrey Axelrad, Director of Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C. (Jan. 29, 1993).

90. Telephone Interview with Timothy Naccarato, Special Counsel to the Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C. (Jan. 29, 1993).

91. Telephone Interview with Jeffrey Axelrad (cited in note 89).

92. In these ways, executive branch reform resembles reform under the CJRA. See notes 54-70 and accompanying text. The Bush Administration also proposed civil justice reform legislation that included numerous provisions that were similar to those in Executive Order

### 3. A Note on State Procedures and State Civil Justice Reform

Many of the above ideas regarding federal procedural revision processes and federal civil justice reform may have applicability to analogous processes and reforms in the states. For instance, a number of state court systems have modelled their civil procedure rules on the Federal Rules of Civil Procedure and have premised their rule amendment schemes on the federal system.<sup>93</sup>

Many jurisdictions have correspondingly participated in some form of civil justice reform.<sup>94</sup> Numerous states have created "futures commissions" to plan for their courts and civil litigation,<sup>95</sup> while most jurisdictions have experimented with a broad range of procedures for expediting cases and reducing litigation costs.<sup>96</sup> These procedural revision processes and reforms are accorded little additional treatment in this Essay because they are less relevant than the federal processes and reforms to the CSLRA and to the issues treated here and because they vary significantly.<sup>97</sup>

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12,778. See Access to Justice Act of 1992, S. 2180, 102d Cong., 2d Sess. (Feb. 3, 1992). See also Tobias, 42 Am. U. L. Rev. at 1540-41 (cited in note 71) (analyzing S. 2180).

93. See generally John P. Frank, *Local Rules*, 137 U. Pa. L. Rev. 2059 (1989) (discussing the advantages of having state rules which conform to the Federal Rules). See also John B. Oakley and Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1377-78 (1986) (same); Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. Pa. L. Rev. 2237, 2237 (1989) (stating that "within almost every state, a procedure based on the Federal Rules governs most types of civil litigation"); Subrin, 67 A.B.A. J. at 1650 (cited in note 7) (discussing the fact that proponents of the Rules Enabling Act of 1934 argued that the uniform Federal Rules would be a model adopted by the states).

94. I rely substantially in this paragraph on Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 Stan. L. Rev. 1553 (1994).

95. See generally Supreme Judicial Court of Massachusetts, *Reinventing Justice 2022: Report of the Chief Justice's Commission on the Future of the Courts* (1992). See also Ira Pilchen and Sandra Retcliff, *American Judicature Society, The Future and the Courts: Conducting State Court Futures Activities* (A.J.S., 1993); James A. Dator and Sharon J. Rodgers, *State Justice Institute and American Judicature Society, Alternative Futures for the State Courts of 2020* (A.J.S., 1991).

96. States have conducted much of this experimentation in the broad areas of case management, discovery, and alternative dispute resolution. See Sherman, 46 Stan. L. Rev. at 1556-87 (cited in note 94). The state experimentation thus resembles federal civil justice reform, but numerous states commenced their efforts earlier than the federal endeavors. See notes 54-92 and accompanying text; Sherman, 46 Stan. L. Rev. at 1556-60 (discussing certain differences between federal and state court civil justice reform efforts).

97. For a striking example of a provision in the new legislation which substantially intrudes on state procedural prerogatives, see notes 170, 174, 178 and accompanying text. The material below on substantive reforms alludes to certain aspects of the processes and reforms. See notes 99-117, 154-79 and accompanying text. For more treatment of state civil justice reform, see generally Sherman, 46 Stan. L. Rev. 1553. Finally, it is important to remember that, insofar as the civil procedures applied in federal and state courts within specific states

## B. Substantive Reforms

### 1. Products Liability

The articulation of, and change in, substantive products liability law has traditionally been the province of the states.<sup>98</sup> State supreme courts have assumed primary responsibility for creating and modifying products liability doctrine, principally through common law development.<sup>99</sup> The American Law Institute's issuance of the Restatement of Torts (Second) Section 402A in 1965 profoundly influenced the direction of products liability law, and Section 402A's formulation of the strict liability base for products liability literally swept the nation.<sup>100</sup> More than forty states have subscribed to the Restatement articulation or to the common law enunciation of strict liability that the California Supreme Court formulated in *Greenman v. Yuba Power Products*.<sup>101</sup> Numerous state legislatures have adopted statutes which codify or change certain features of the Restatement

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differ, this phenomenon additionally complicates the efforts of practitioners in those states to practice in both court systems. See Subrin, 67 A.B.A. J. at 1650 (cited in note 7); Oakley and Coon, 61 Wash. L. Rev. at 1377-78 (cited in note 93).

98. Efforts that have been undertaken to convince Congress to pass federal products liability legislation deserve only limited treatment in this essay as they have somewhat less relevance to the issues treated here. For more than a decade, members of Congress have introduced a number of federal product liability bills, although none has passed. See, for example, Product Liability Reform Act, S. 687, 103d Cong., 1st Sess. (Mar. 31, 1993) (noting that product liability has traditionally been left to states); 138 Cong. Rec. S13145 (Sept. 10, 1992) (statement of Senator Kasten) (noting that a number of Senators had been working for years on product liability reform); David G. Savage, *Senate Defeats Federal Product Liability Law Legislation*, L.A. Times D1 (Sept. 11, 1992). The proposals have addressed a broad range of issues relating to products liability. The most important provisions govern the basis for imposing liability, but additional significant aspects cover statutes of limitation and repose, proof, defenses, and punitive damages, among others. See, for example, Product Liability Reform Act, S. 687, 103d Cong., 1st Sess. (Mar. 31, 1993) (seeking to create uniform national standards of product liability law governing such issues as product seller liability, awards of punitive damages, and time limits for liability). See also Product Liability Reform Act, Report of the Senate Commerce Committee on S. 687, S. Rep. No. 103-203, 103rd Cong., 1st Sess. 20-58 (Nov. 20, 1993) (providing summary of major provisions of S. 687 as well as a section-by-section analysis of the bill's major provisions); note 102 and accompanying text (discussing state legislative reforms).

99. I rely substantially here on William Prosser and W. Page Keeton, *The Law of Torts* 677-724 (West, 5th ed. 1984). See generally Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. Rev. 1 (1995).

100. See Restatement (Second) of Torts § 402A (1965); Prosser and Keeton, *The Law of Torts* at 694 (asserting that § 402A swept the country).

101. 59 Cal. 2d 57, 377 P.2d 897 (1963). Alaska is one jurisdiction that follows *Greenman*. See *Clary v. 5th Avenue Chrysler Center*, 454 P.2d 244, 247-48 (Alaska 1969); *Shanks v. Upjohn*, 835 P.2d 1189, 1194 (Alaska 1992).

formulation or which modify various aspects of the case law doctrine of strict products liability.<sup>102</sup>

The strict liability base of products liability has been controversial. Some courts and a few writers have found the strict manner in which liability has been imposed for product defects too inflexible.<sup>103</sup> Manufacturers and other potential defendants have asserted that strict liability unfairly exposes them to excessive liability, substantially raises the cost of insurance, and complicates efforts to design, manufacture, advertise, and sell products.<sup>104</sup>

The American Law Institute recently decided to draft a Restatement Third of Torts governing products liability.<sup>105</sup> The ALI commissioned Professor James Henderson and Professor Aaron Twerski to serve as reporters for the project.<sup>106</sup> The reporters, working with a group of advisors, completed a draft, which the Institute considered at its annual meeting in May 1994.<sup>107</sup>

The draft tendered proved to be controversial for several reasons. A number of observers contended that the proposed language of the Restatement limited too sharply the strict liability base and possibly returned products liability law to negligence in several respects.<sup>108</sup> Concomitant criticisms were that certain phrasing of the

102. See, for example, Mont. Code Ann. §§ 27-1-719, 720 (1993); N.J. Stat. Ann. §§ 2A:58C-1 to C-5 (West, 1987). See generally John W. Wade, Victor E. Schwartz, Kathryn Kelly, and David F. Partlett, *Prosser, Wade and Schwartz's Cases and Materials on Torts* 807-08 (Foundation, 9th ed. 1994).

103. See, for example, *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W. 2d 176, 185-86 (1984) (adopting negligence based risk-utility test in product liability actions predicated on design defects); *Grundberg v. Upjohn*, 813 P.2d 89, 92 (Utah 1991) (holding that sellers of certain unavoidably unsafe products should not be held strictly liable for "unfortunate consequences arising from their use"); Sheila Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 644-49 (1980) (criticizing application of strict liability standard to design defect claims); James Henderson and Aaron Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 271-89 (1990) (arguing that negligence should emerge as prevailing theory in failure to warn cases).

104. See, for example, Peter Huber, *Liability: The Legal Revolution and Its Consequences* 3-10 (Basic Books, 1988) (cataloging costs associated with current product liability "tax"); W. Kip Viscusi, *Reforming Products Liability* 14-41 (Harvard U., 1991) (outlining dimensions of liability crisis). See also Teresa Moran Schwartz, *Prescription Products and the Proposed Restatement (Third)*, 61 Tenn. L. Rev. 1357, 1360 (1994).

105. See Restatement (Third) of the Law, Torts: Products Liability, Tentative Draft No. 1 (April 12, 1994) ("Tentative Draft No. 1").

106. See Henry J. Reske, *Experts Tackle Torts Restatement*, 78 A.B.A. J. 18, 18 (Aug. 1992). See generally James A. Henderson and Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 Cornell L. Rev. 1512 (1992).

107. See Tentative Draft No. 1 (cited in note 105).

108. See, for example, Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 Vand. L. Rev. 631, 688-91 (1995); Gerald F. Tietz, *Strict Products*

provision and some of its accompanying commentary failed to restate the law, which currently provides for strict liability.<sup>109</sup> After rather contentious floor debate, the ALI membership agreed in principle that the reporters should continue in the general direction that they were proceeding and that the entire body would reconsider the draft at its May 1995 annual meeting.<sup>110</sup>

## 2. Fee-Shifting

Although fee-shifting may be characterized as substantive or procedural, it warrants brief examination here. Fee-shifting has traditionally been governed by the American Rule which, absent statute or contract, requires each party to pay its own attorney's fees.<sup>111</sup> Congress has generally left fee-shifting to the states, although it has passed approximately two hundred statutes which provide for fee-shifting, almost exclusively in federal question cases.<sup>112</sup> Most of this legislation prescribes fee shifts to encourage the pursuit of certain forms of litigation which vindicate important social policies. For instance, Congress has inserted fee-shifting provisions in civil rights statutes to facilitate litigation by individuals and groups who have suffered discrimination and to deter those who might discriminate from doing so. Congress has similarly prescribed fee-shifting in

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*Liability, Design Defects and Corporate Decision-Making: Greater Deterrence Through Stricter Process*, 38 Vill. L. Rev. 1361, 1362-63 (1993). See also Jerry Phillips, *The Proposed Products Liability Restatement: A Misguided Revision*, 10 Touro L. Rev. 151, 181 (1993).

109. See, for example, Larry S. Stewart, *The American Law Institute and Products Liability: "Restatement or Reform"?*, Trial 29-30 (Sept. 1994); Telephone Interview with Gerald F. Tietz, Professor of Law, Temple University and ALI member (March 23, 1995). See generally Reland F. Banks and Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 Or. L. Rev. 411 (1993) (arguing that draft of § 402A fails to reflect existing law). See also Jerry J. Phillips, *Achilles' Heel*, 61 Tenn. L. Rev. 1265, 1265 (1994) (asserting that the two reporters' writings over the last two decades indicate "conservative penchant toward negligence and manufacturer-protective rules").

110. See *ALI Hesitates On Lawyer Liability, Product Liability Restatement Efforts*, 62 U.S.L.W. 2734, 2735-36 (1994); Stewart, Trial at 29-30. See also Restatement (Third) of the Law, Torts: Products Liability, Tentative Draft No. 2 (March 13, 1995).

111. See, for example, *Alyeska Pipeline*, 421 U.S. at 257 (noting general rule that litigants pay their own attorney's fees); *Hall v. Cole*, 412 U.S. 1, 4-7 (1973) (discussing circumstances under which fee-shifting may occur, notwithstanding American Rule of disfavoring award of attorney's fees). See also John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, L. & Contemp. Probs. 9, 13-27 (Winter 1984) (tracing development of American Rule). See generally John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567 (1993) (discussing exceptions to the American Rule).

112. See note 83; Vargo, 42 Am. U. L. Rev. at 1587-89 (noting that, notwithstanding the American Rule, a large number of federal and state statutes provide for fee-shifting).

natural resources legislation to facilitate environmental cleanup or to prevent pollution.<sup>113</sup>

Proposals which would require losing parties to pay their opponents' legal fees are grounded on the above concerns, such as the litigation explosion, litigation abuse, and manufacturers' substantial exposure in products liability cases,<sup>114</sup> as well as arguable concerns involving fairness and increased litigation expenses. An example is the provision for fee-shifting that the Bush Administration included in its legislative proposal for civil justice reform.<sup>115</sup> The proposal was premised on the recommendations of the Council on Competitiveness Working Group on Civil Justice Reform and appeared in that entity's August 1991 report.<sup>116</sup> The fee-shifting provision would have entitled the prevailing litigant to recover attorney's fees "only to the extent that such party prevailed on any position or claim advanced during the action."<sup>117</sup>

### III. CRITICAL ANALYSIS OF THE COMMON SENSE LEGAL REFORMS ACT

This section selectively analyzes the reform proposals that the sponsors of the Common Sense Legal Reforms Act have included in the legislation. I descriptively evaluate the provisions, attempt to provide the reasons for their inclusion in the CSLRA, and critically assess their requirements, particularly in terms of potential effects on ongoing procedural and substantive reforms.

#### A. Rule 11

Section 104(B) of the CSLRA, which passed the House of Representatives as Section 4 of the Attorney Accountability Act ("AAA") on March 7, 1995, would modify the 1993 amendment of Rule 11 in several important ways.<sup>118</sup> Section 104(B) of the CSLRA would

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113. See, for example, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988) (allowing prevailing party to claim attorney's fees); Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1988) (allowing for reasonable attorney's fees where appropriate). See also Tobias, 74 Cornell L. Rev. at 313-17 (cited in note 3); Vargo, 42 Am. U. L. Rev. at 1587-89.

114. See notes 11-12, 14-16, 104 and accompanying text.

115. S. 2180 § 3 (cited in note 92). See also notes 81-83 and accompanying text.

116. President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* 15-27 (G.P.O., 1991).

117. S. 2180 § 3 (cited in note 92).

118. H.R. 10 § 104(B) (cited in note 1); H.R. 988, § 4 (cited in note 1). See also note 120 and accompanying text (describing two important additions included in H.R. 988).



have made judicial imposition of sanctions mandatory, rather than discretionary, thereby reverting to the 1983 formulation, and would have expressly provided that the sanctions for rule violations, in addition to being "sufficient to deter," would be adequate to "compensate the parties that were injured."<sup>119</sup> Section 4 of the AAA retains those requirements and would eliminate the provision in Rule 11's 1993 amendment for safe harbors—which requires that targets have notice of their alleged violations and twenty-one days to modify or withdraw them—and would specifically make Rule 11 applicable to discovery.<sup>120</sup>

Several arguments support the changes that Section 104(B) and Section 4 would institute.<sup>121</sup> First, the alterations would have greater deterrent effect on those who might be tempted to contravene Rule 11. Second, the modifications will afford increased incentives for parties injured by Rule violations to invoke the provision.

Numerous complications attend the proposals to change the 1993 revision of Rule 11 by eliminating safe harbors, making the provision applicable to discovery, and making sanctioning compulsory and compensatory. The legislation would reinstitute the most problematic features of the 1983 amendment of Rule 11—the very aspects that the national rule revisors intended the 1993 revision to ameliorate. These include the incentives to invoke Rule 11 for compensatory and tactical objectives, which can lead to unnecessary, expensive satellite litigation and which can chill the enthusiasm of certain parties, especially resource-poor litigants.<sup>122</sup> Adoption of the changes could revive additional detrimental dimensions of the 1983 revision: the provision's threat and retreat aspect, its tendency to try lawyers rather than cases, and the increased incivility that necessarily attended the 1983 amendment's invocation.<sup>123</sup> These

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119. H.R. 10 § 104(B). See also 1983 amendment to F.R.C.P. 11, reprinted in 97 F.R.D. at 197 (making mandatory judicial imposition of sanctions).

120. See H.R. 988, § 4 (cited in note 1); note 51 and accompanying text (describing relevant aspects of Rule 11's 1993 amendment).

121. I rely substantially in this paragraph on Dissenting Statement, 146 F.R.D. at 507-10 (cited in note 50); Floor Debate on H.R. 988, 141 Cong. Rec. H2663, H2664, H2675 (March 6, 1995) (WL 89571) (statements of Reps. Moorhead and Goodlate); Hearing on H.R. 10 Before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary (testimony of Debra Ballen, Senior Vice President, American Insurance Association) (Feb. 6, 1995). See also Duncan, 81 A.B.A. J. at 12 (cited in note 51) (discussing decline of sanctions litigation due to the 1993 amendment of Rule 11).

122. See notes 32-41 and accompanying text.

123. See Tobias, 77 Iowa L. Rev. at 1785 (cited in note 36) (asserting all three propositions); Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit 20-21 (April 1991) (asserting idea regarding Rule 11 and civility).

difficulties would adversely affect parties, attorneys, and judges in individual cases and the civil justice system as a whole.

As damaging as the above complications might be, congressional passage of the legislation could have even more devastating impacts on the national rule revision process.<sup>124</sup> The 1993 amendment of Rule 11 resulted from a process in which the national revision entities clearly identified a problem, carefully studied the difficulty, drafted a proposal for change, solicited and considered much public input, and laboriously drafted several additional proposals that the revisors believed were responsive to public comment and represented the fairest, clearest amendment which could be developed. The revision eventually promulgated constituted the best effort of the various committees and their expert advisors to treat equitably all of the interests that the amendment would affect and to adopt a workable compromise. The procedure that the rule revision entities employed—inviting public scrutiny, fully considering public input, and rewriting proposed changes in light of those suggestions—constituted the type of open, reasoned decisional process that Congress envisioned in enacting the 1988 JIA.

Congressional reversal of four critical, well-considered features of the improved Rule 11 within two years of the amendment's promulgation and before it has even had an opportunity to work would be unfortunate, inadvisable, and deleterious for several reasons. Legislative reversal would directly contravene one of the JIA's major purposes, restoration of the primacy of the national rule revision process.<sup>125</sup> Fundamental, preemptory congressional change in such essential provisions of such a controversial rule following so closely upon the conclusion of herculean efforts to improve the provision could deal a crippling blow to the cause of national rule revision, additionally wounding that process at a time of great vulnerability<sup>126</sup>

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124. I rely substantially in this paragraph on notes 25-26, 30-31, 43-51, and accompanying text.

125. See notes 25-26 and accompanying text. Legislative reversal would concomitantly complicate federal civil litigation even more by requiring that attorneys closely monitor congressional legislation affecting procedure and learn about, understand, and comply with major changes in a controversial Federal Rule less than two years after its substantial revision.

126. Some observers and I believe that the national rule revisors' decision to include an opt-out provision in the disclosure amendment was a self-inflicted wound that seriously undermined national uniformity and simplicity. See, for example, Lauren K. Robel, *Mandatory Disclosure and Local Abrogation: In Search of a Theory for Optional Rules*, 14 Rev. Litig. 49, 51, 61 (1994) (arguing for more cautions by Advisory Committee and for nationally uniform discovery rules). See generally Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139 (1993).

and demoralizing many who participated in the 1993 rules amendment process.

Passage of the legislation would also extend the unwise, disruptive practice of congressional intervention in the rule revision process.<sup>127</sup> Indeed, the American Bar Association House of Delegates adopted a resolution admonishing Congress to reject the proposed modifications in Rule 11 because "changes in the Federal Rules of Civil Procedure . . . should be left to the existing rulemaking bodies."<sup>128</sup> Enactment of the legislation would correspondingly extend the inadvisable practice of overly frequent congressional intervention in procedural policymaking, which passage of the 1988 and 1990 statutes epitomized.<sup>129</sup>

### B. Securities Litigation Reform Act

Title II of the CSLRA, which passed in the House of Representatives as the Securities Litigation Reform Act ("SLRA") on March 8, 1995, would change securities litigation in a number of significant ways.<sup>130</sup> The components of the proposed legislation which are most relevant to the issues treated in this Essay are the

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127. See notes 22-24, 59-62, and accompanying text.

128. See Brad Bole, *Congress Again Takes Up "Legal Reform"*, *Litigation News* 1, 6 (Feb.-March 1995); Telephone Interview with Brad Bole, Echevarria Law Firm, Tampa, Fla. (Feb. 27, 1995).

129. See Tobias, 46 *Stan. L. Rev.* at 1599-1604 (cited in note 2) (discussing the 1988 Judicial Improvements Act and the 1990 Civil Justice Reform Act); notes 25-29, 54-70, and accompanying text (same). Section 104 of the CSLRA also includes a subsection titled "Truth in Attorneys' Fees." H.R. 10 § 104(a) (cited in note 1). That subsection provides that it is the "sense of the Congress that each state should require" all practicing attorneys who are being paid on a contingency fee basis to disclose to their clients the actual services performed and the exact number of hours worked. H.R. 10 § 104(a)(1)-(2). The ostensible purpose of these requirements is to make lawyers more accountable to their clients. The strictures would probably be expensive and difficult to enforce, while they may interfere with the attorney-client relationship. The final concern apparently led the ABA Litigation Section to oppose the concepts. See Bole, *Litigation News* at 6 (noting that there was strong opposition to the disclosure policy expressed at the Winter Council/Committee Chairs Meeting). The requirements, therefore, might complicate the efforts of certain potential plaintiffs, such as resource-poor individuals who have suffered personal injuries, to secure counsel, and may restrict federal court access. The subsection might also have some effect on experimentation involving contingency fees under the CJRA. See note 64 and accompanying text. These proposed requirements would not interfere with state prerogatives because the legislation would appropriately defer to the states in adopting and implementing the strictures. The House did not include this subsection in H.R. 988 as it passed. See notes 142-47, 154-62, and accompanying text (discussing additional provisions included in H.R. 988).

130. See H.R. 10 §§ 201-08; H.R. 1058 (cited in note 1). For a sense of the debate in legal academia over the validity of securities litigation, see generally Joseph A. Grundfest, *Why Disimply?*, 108 *Harv. L. Rev.* 727 (1995); Joel Seligman, *The Merits Still Matter: A Rejoinder to Professor Grundfest's Comment, Why Disimply?*, 108 *Harv. L. Rev.* 748 (1995).

imposition of special pleading and class action strictures in securities cases and the requirement that losing litigants pay prevailing parties' attorneys' fees in certain lawsuits. The changes are apparently intended to limit the amount of securities litigation, particularly the cases that are lawyer-driven or that are brought to extract settlements.

Section 204 of the CSLRA and Section 4 of the SLRA would place on plaintiffs specialized pleading requirements relating to scienter in actions brought under Section 10(b) of the Securities Exchange Act of 1934.<sup>131</sup> Mandating more rigorous pleading could discourage plaintiffs from pursuing fraud claims and erode somewhat the statute's purposes. The imposition of particularized pleading may conflict with the general notice pleading regime of the Federal Rules, which the Supreme Court recently reaffirmed, and undermines the Rules' trans-substantive character.<sup>132</sup>

Section 202 of the CSLRA would have required the appointment of a guardian ad litem or a plaintiff steering committee in securities class actions to prevent "lawyer-driven litigation,"<sup>133</sup> while Section 2 of the SLRA retains plaintiff steering committees.<sup>134</sup> Section 203 of the CSLRA proposed additional strictures, such as the requirements that named plaintiffs have "meaningful investment[s]" in class suits and that plaintiffs file no more than five actions during any three-year period to prevent "abusive practices that foment litigation,"<sup>135</sup> and Section 3 of the SLRA retains the numerical prohibition on litigation.<sup>136</sup> These strictures could have certain disadvantages similar to those that specialized pleading entails. If enacted, the requirements may dissuade potential plaintiffs from bringing actions

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131. H.R. 10 § 204; see also Securities Exchange Act of 1934, 15 U.S.C. §§ 78 et seq (1988 & Supp. 1993).

132. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (stating that courts may not require a "heightened pleading standard"); Carl Tobias, *The Transformation of Trans-Substantivity*, 49 Wash. & Lee L. Rev. 1501 (1992) (discussing trans-substantivity); Tobias, 74 Cornell L. Rev. at 296-301 (cited in note 3) (discussing notice pleading regime). Federal Rule 9(b), which governs the pleading of fraud or mistake, is the only provision in the federal rules that requires specialized pleading, but the SLRA would impose more stringent pleading requirements. See generally Marcus, 86 Colum. L. Rev. at 447-48 (cited in note 6).

133. H.R. 10 § 202 (cited in note 1).

134. Section 2 does not include the guardian ad litem requirement. See H.R. 1058, § 2 (cited in note 1).

135. H.R. 10 § 203 (cited in note 1).

136. Section 3 does not include the meaningful investments requirement. See H.R. 1058 § 3 (cited in note 1). See also Pamela Coyle, *When Bigger Isn't Better*, A.B.A. J. 66, 72 (March 1995).

and undercut the Securities Act's objectives while eroding the trans-substantive nature of Federal Rule 23.

The potentially corrosive effects on national rule revision appear more important, however. The adoption of special requirements governing class actions could disrupt or at least undermine the efforts of the Advisory Committee, its expert advisors, and the public—to study Rule 23 conscientiously, to draft carefully comprehensive changes in the class action device, and to circulate and seek comment on several drafts—which have been proceeding for most of this decade.<sup>137</sup>

Section 3 of the SLRA could also make losing parties hable for the attorney's fees that their adversaries incur. This fee-shifting provision is intended to afford an additional means of preventing "abusive practices that foment litigation,"<sup>138</sup> but it would probably discourage plaintiffs from pursuing actions that could vindicate the Securities Act's goals.<sup>139</sup>

The imposition of numerous new requirements in securities litigation may restrict access to federal courts in other ways that are similar to those examined earlier. As with civil justice reform, lawyers and parties will have to learn about, understand, and conform to the strictures, at the cost of scarce time and resources.<sup>140</sup> As with the 1983 amendment of Rule 11, the imposition of new requirements will probably foster considerable expensive, unnecessary satellite litigation involving the strictures' meaning and application.<sup>141</sup>

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137. Since the early 1990s, the Advisory Committee has worked assiduously on a proposal that could comprehensively modify Federal Rule 23 governing class actions. See generally Rebert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 Rev. Litig. 79 (1994). See also *id.* at 109-12 (reproducing current proposed amendment of Rule 23); *id.* at 80-81 (recounting three-decade history of controversy involving Rule 23 and proposals for its reform). The committee has commissioned the Federal Judicial Center ("FJC"), an important research arm of the federal courts, to undertake a thorough study of the class action device. Telephone Interview with Thomas Willging, Deputy Research Director and Principal Researcher on Class Action Study, FJC (Mar. 1, 1995). The committee has also developed several draft proposals of an amendment, has sought input on those proposals from knowledgeable experts, conducted a meeting devoted solely to Rule 23 in February 1995, and will probably publish a formal proposal in the next year. See Bone, 14 Rev. Litig. at 80 n.3.

138. See H.R. 10 § 203 (cited in note 1); H.R. 1058 § 3 (cited in note 1). The fee-shifting provision in H.R. 10 is less flexible than the one in H.R. 1058, which requires that the judge determine that the losing party's position was not substantially justified, that imposing fees and expenses on the loser would be just, and that the cost of the fees and expenses to the prevailing party would be substantially burdensome or unjust. Of course, this phrasing could foster satellite litigation over its meaning.

139. This provision, therefore, would have effects analogous to the strictures on securities litigation that were discussed above. See notes 131-36 and accompanying text.

140. See notes 65-67 and accompanying text.

141. See notes 35-36 and accompanying text. H.R. 1058 includes a number of provisions that were not in H.R. 10; however, they are less relevant to the issues treated in this Essay.

*C. Federal Rule of Evidence 702*

Section 102 of the CSLRA and Section 3 of the AAA would amend Federal Rule of Evidence 702 in ways that restrict expert testimony, ostensibly to increase "honesty in testimony."<sup>142</sup> Section 102 would make admissible a witness's opinion testimony when premised on scientific knowledge only if the court decides that the opinion is "(1) based on scientifically valid reasoning; and (2) sufficiently reliable so that the probative value of such evidence outweighs the dangers specified in rule 403."<sup>143</sup> Section 3 of the AAA retains the second clause, changes the first clause to "scientifically valid and reliable," and adds a new clause requiring that there be a "valid scientific connection to the fact it is offered to prove."<sup>144</sup>

These requirements would probably complicate the efforts of plaintiffs in cases that require testimony on novel or complex scientific issues, such as products liability and environmental litigation, to find experts who will testify and to prove their cases. This could frustrate the efforts of plaintiffs in products liability and environmental cases to function as private attorneys-general<sup>145</sup> and of certain environmental plaintiffs to vindicate important purposes of environmental statutes. The Supreme Court recently addressed issues involving expert testimony that are so closely related to those which the legislation implicates that the provision may merely be an attempt to overturn the Court's ruling.<sup>146</sup>

Perhaps most significant, congressional amendment of Federal Rule of Evidence 702 would conflict with an ongoing reform initiative. The suggested changes in Rule 702 seem perfectly appropriate for

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142. See H.R. 10 § 102 (cited in note 1); H.R. 988 § 3 (cited in note 1).

143. See H.R. 10 § 102.

144. H.R. 988 § 3 (cited in note 1). See also note 138 (suggesting that phrasing would foster satellite litigation).

145. Plaintiffs function as private attorneys-general by, for instance, filing litigation involving drugs or pollutants that the Food and Drug Administration or the Environmental Protection Agency choose not to regulate or regulate with insufficient rigor. See Tobias, 74 Cornell L. Rev. at 314-17 (cited in note 3) (discussing private attorneys-general in a civil rights context). See generally Bryant Garth, et al., *The Institution of the Private Attorney General: Perspectives From an Empirical Study of Class Action Litigation*, 61 S. Cal. L. Rev. 353 (1988) (discussing private attorneys-general in a class action context). The phrasing employed in Section 3 of the AAA would also foster considerable satellite litigation over its meaning.

146. See *Daubert v. Merrell Dow Pharmaceuticals*, 113 S. Ct. 2786, 2794, 2799 (1993) (holding that the Federal Rules of Evidence provide the standard for admitting expert scientific evidence in a federal trial). See generally Symposium, *Scientific Evidence After the Death of Frye*, 15 Cardozo L. Rev. 1745-2294 (1994); Symposium, *The Impact of Science and Technology on the Courts*, 43 Emory L. J. 867-1122 (1994).

treatment in the normal course of the rule revision process. Indeed, during the 1990s, the national revision entities considered amending Rule 702, while, in 1993, the Judicial Conference Committee on Rules of Practice and Procedure referred the proposed alteration of the provision to the newly-appointed Advisory Committee on Rules of Evidence.<sup>147</sup>

Legislative revision of this evidentiary rule would seriously compromise the major purpose in recently constituting an Advisory Committee on Rules of Evidence<sup>148</sup> and might undercut the committee before it has had an opportunity to prove whether it is worthwhile.<sup>149</sup> In fact, the American Bar Association, when opposing congressional amendment of Rule 702, emphasized that modification in the "Federal Rules of Evidence should be left to the existing rulemaking bodies."<sup>150</sup>

#### D. Notice Requirement

Section 105 of the CSLRA would require that plaintiffs afford defendants actual notice "specifying the particular claims alleged . . . and the amount of damages claimed" thirty days before plaintiffs could file certain federal civil suits.<sup>151</sup> An important rationale for this stricture is that defendants who have such notice will be encouraged to settle cases prior to their filing. The ostensible purpose of the notice requirement, therefore, is to reduce the quantity of federal civil litigation.

The thirty-day notice stricture would be unnecessary, ineffective, or detrimental in the overwhelming majority of situations in which plaintiffs contemplate civil suit. In those potential cases which are likely to settle because, for example, defendants have substantial exposure based on clear liability or significant damages, it is already good litigation practice for plaintiffs to notify defendants. For law-

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147. See *Preliminary Draft of Proposed Amendments*, 137 F.R.D. at 156 (cited in note 43); Supreme Court of the United States, *Amendments to Federal Rules of Evidence, Excerpt from the Report of the Judicial Conference Committee on Rules of Practice and Procedure*, reprinted in 147 F.R.D. 275, 282 (1993) (stating that Judicial Conference Committee on Rules of Practice and Procedure "decided to refer the proposed amendment of Rule 702 to the new Advisory Committee"). See generally Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence is Soured; It Should Not Be Amended*, 138 F.R.D. 631 (1991).

148. See note 22.

149. See note 147.

150. See Bole, *Litigation News* at 6 (cited in note 128). The legislation might also conflict with ongoing executive branch reform relating to the government's reliance on expert witnesses. See notes 79-80 and accompanying text.

151. H.R. 10 § 105 (cited in note 1). The notice provision is not included in the three bills that passed the House during the week of March 6, 1995. Brief treatment is warranted here because the Senate could revive notice and because executive branch reform includes it.

suits which will probably not settle, plaintiffs will have to participate in a fruitless, time-consuming, and expensive gesture that will prove ineffective. In some instances, the notice may afford defendants certain tactical advantages, and in the worst cases it will provide defendants thirty additional days in which to destroy potentially damaging evidence.

The limited information that is available on a similar notice mechanism which has been experimented with under executive branch civil justice reform confirms most of the propositions above.<sup>152</sup> This material suggests that the notice measure has had limited efficacy.<sup>153</sup> Finally, the differences between the executive branch notice technique and the strictures in Section 105 of the CSLRA mean that the two reforms could create confusion, expense, and delay by imposing inconsistent requirements in some civil cases.

#### *E. Fee-Shifting in Diversity Cases*

Section 101 of the Common Sense Legal Reforms Act authorized judges to award reasonable attorney's fees to prevailing parties in diversity cases and to exercise their discretion not to award such fees or to reduce the amount when special circumstances make awards unjust.<sup>154</sup> The Securities Litigation Reform Act retains somewhat similar provisions,<sup>155</sup> while Section 2 of the Attorney Accountability Act replaces the fee-shifting requirement in section 101 of the CSLRA with a settlement offer provision that would modify current Federal Rule 68 by prescribing fee-shifting in diversity cases.<sup>156</sup>

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152. See notes 74-75 and accompanying text.

153. This assertion is premised on conversations with a number of individuals who are familiar with executive branch civil justice reform.

154. H.R. 10 § 101 (cited in note 1).

155. See notes 138-39 and accompanying text.

156. H.R. 988 § 2 (cited in note 1). H.R. 10's fee-shifting provision is treated here because it would have effects that are somewhat similar to fee-shifting in the SLRA and to the settlement offer provision in the AAA. The Advisory Committee proposed an amendment to Rule 68 during 1983 and 1984, but it withdrew that proposal in the face of strong opposition. See Tobias, 74 Cornell L. Rev. at 310-19 (cited in note 3).

Since the late 1980s, the Advisory Committee has been informally considering an amendment to Rule 68; however, it has not officially published a proposed amendment. Judge William Schwarzer recently suggested an amendment in Rule 68 which prescribes fee-shifting, but that proposal includes more safeguards, such as exemptions for class actions, than the AAA provision does. See generally William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 *Judicature* 147 (1992).



Section 101 of the CSLRA provides that "reasonable attorney's fees" are the "actual cost incurred by the nonprevailing party for an attorney's fee payable to an attorney in connection with [the] claim" or a "reasonable cost that would have been incurred," had the party not signed a contingency fee agreement.<sup>157</sup> One reason proffered for this proposal is that it is fairer to permit parties that prevail in diversity cases to seek recovery of attorney's fees. Another is that the possibility that losing litigants will have to pay their opponents' attorney's fees serves as a necessary deterrent to the pursuit of frivolous actions.<sup>158</sup>

The most important criticism of Section 101 of the Common Sense Legal Reforms Act is that it contradicts the premises, principally implicating court access, that underlie the longstanding American Rule. Indeed, the ABA's "longtime support for access to courts and [opposition to] across the board 'loser pays' without regard to subject matter" led the association to request that Congress reject Section 101.<sup>159</sup> Section 2 of the Attorney Accountability Act would have similar, albeit somewhat less harsh, effects, even though the provision lacks certain safeguards that have attended other proposals to amend Rule 68.<sup>160</sup>

The fee-shifting and settlement offer proposals might limit federal court access by engendering considerable unnecessary, expensive satellite litigation. For instance, under numerous other statutory schemes, questions regarding who is a prevailing party and what constitutes reasonable attorney's fees have fostered much satellite litigation, some of which has even reached the Supreme Court.<sup>161</sup> Section 101 of the CSLRA and Section 2 of the AAA could also reduce access in cases that are close, complex, or difficult or expensive to prove, or in which potential plaintiffs have little power or

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157. H.R. 10 § 101 (cited in note 1). Section 2 of the AAA includes similar language, which is equally susceptible to inconsistent interpretation and has similar propensities to foster satellite litigation over its meaning.

158. Similar ideas seem to support Section 2 of the AAA. It may be fairer to allow plaintiffs that "prevail" by exceeding the settlement offer at trial and defendants that prevail by limiting plaintiffs' recovery to less than the settlement offer at trial to seek attorney's fees, while the prospect of having to pay opponents' fees could deter the pursuit of frivolous claims or at least encourage settlements.

159. Bole, *Litigation News* at 6 (cited in note 128).

160. It does have some safeguards, such as exemptions for claims seeking equitable relief. See H.R. 988 § 2 (cited in note 1); note 156 (discussing proposal with greater safeguards).

161. See *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782, 788-93 (1989) (discussing eligibility for fee award as prevailing party under Civil Rights Attorney's Fees Awards Act); *City of Riverside v. Rivera*, 477 U.S. 561, 577-80 (1986) (defining reasonable attorney's fee under the Civil Rights Attorney's Fees Act). See also note 51 and accompanying text.

money, because the exposure to liability for adversaries' attorney's fees will chill possible parties' enthusiasm for filing or vigorously pursuing litigation. Moreover, there is substantial difference between losing a close case on the merits and pursuing frivolous litigation. Parties who might serve as private attorneys-general in enforcing product safety, environmental, or consumer protection laws or policies may be especially susceptible to the effects examined in this paragraph.<sup>162</sup>

Insofar as the legislation prescribes fee-shifting in diversity cases, it might also interfere with state prerogatives. To the extent that provision for attorney fee-shifting is considered to be a matter of state substantive law, Section 101 of the Common Sense Legal Reforms Act would federalize an important area which traditionally (and perhaps for constitutional reasons) has been left to the states.<sup>163</sup> Moreover, passage of Section 2 of the Attorney Accountability Act, like the proposals to amend Federal Rule 11 and Federal Evidentiary Rule 702, would detrimentally affect the national rule revision process.<sup>164</sup> For example, congressional amendment of Rule 68 would avoid the national revision process and its provision for careful study of proposed changes in the rules and for public notice and comment, thereby subverting a critical purpose of the 1988 Judicial Improvements Act.<sup>165</sup>

#### *F. Products Liability*

Section 103 of the CSLRA would have instituted several rather significant reforms of substantive products liability law.<sup>166</sup> The aspects of that section which are most important to this Essay are the limitations on seller liability in numerous situations<sup>167</sup> and the

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162. See note 145 and accompanying text.

163. The Supreme Court has stated that attorney's fees are a matter of state substantive law. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51-55 (1991) (recognizing that fee-shifting rules are a substantive state policy); *Alyeska Pipeline*, 421 U.S. at 259 n.31 (same); notes 81-83 and accompanying text (arguing that Section 101 could have interfered with executive branch civil justice reform experimentation with attorney fee-shifting had Attorney General not found lack of government authority to enter into fee-shifting agreements).

164. See notes 118-29, 142-50, and accompanying text; notes 159-60 and accompanying text.

165. For instance, well-considered proposals to amend Rule 68 have been developed and are currently being considered by the Advisory Committee. See notes 156 and 160; notes 124-29 and accompanying text.

166. See H.R. 10 § 103 (cited in note 1).

167. *Id.* § 103(B).

requirements that punitive damages only be awarded upon proof of actual malice by clear and convincing evidence and that such damages be capped.<sup>168</sup> The Common Sense Product Liability and Legal Reform Act ("PLLRA") essentially retains these provisions and introduces a number of additional substantive and procedural changes.<sup>169</sup> The new features of that bill which are most relevant to this Essay are the imposition of defenses to products liability actions and a special Rule 11 governing frivolous products litigation.<sup>170</sup>

The reasons advanced for restricting seller liability are that sellers are sued in a substantial percentage of products cases but are found liable in only a tiny number.<sup>171</sup> The rationale for imposing limitations on punitive damages is that permitting juries to award these damages, particularly under unclear or insufficiently rigorous standards, unfairly exposes defendants to excessive liability.<sup>172</sup> The reasons afforded for the alcohol-use, misuse, and alteration defenses are to encourage more careful consumer use of products and to limit defendants' exposure to liability to situations which defendants can control.<sup>173</sup> Imposition of a special Rule 11 in products actions is justified by the ostensible need to deter frivolous suits.<sup>174</sup>

Restricting seller liability can deprive plaintiffs of local defendants that have profitted from the sale of allegedly defective products; in some cases, these are the only parties that plaintiffs may be able to hold responsible for their injuries.<sup>175</sup> The problem with

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168. Id. § 103(C). See generally Michael Rustad and Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269 (1993) (providing historical and empirical information on punitive damages). See generally Symposium, *Punitive Damages Awards in Product Liability Litigation: Strong Medicine or Poison Pill?*, 39 Vill. L. Rev. 353 (1994).

169. H.R. 956 (cited in note 1).

170. Id. §§ 103-104 (imposing defenses); id. § 105 (governing frivolous products litigation). Section 106 includes a statute of repose; Section 102B precludes strict liability actions for commercial loss; Section 107 prescribes litigation involving foreign products; Section 201 limits punitive damage awards against drug manufacturers; and Section 202 limits liability of health care providers.

171. See Wade, Schwartz, Kelly, and Partlett, *Prosser, Wade and Schwartz's Cases and Materials on Torts* at 795 n. 4 (cited in note 102).

172. Similar ideas underlie limitations on liability for health care providers and drug manufacturers. See note 170.

173. The latter reason and fairness principles ostensibly support the imposition of a statute of repose and limitations on drug manufacturer and health care provider liability. See note 170; *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470, 482-83 (1988) (recognizing majority rule of negligence for prescription drug manufacturers).

174. See note 170; notes 32-42, 118-29, and accompanying text.

175. The limitation on joint liability for noneconomic damages could exacerbate this situation. H.R. 10 § 103(D) (cited in note 1); H.R. 956 § 203 (cited in note 1). Section 102 of H.R. 956 makes sellers liable when manufacturers are not subject to service or cannot pay judgments, while making sellers liable for express warranties. The defenses and the statute of

imposing limitations on punitive damages in products liability and medical malpractice cases is the loss of deterrence and punishment that could be realized in those instances in which they are warranted. These, and other, components of Section 103 of the CSLRA and of the PLLRA may reduce federal court access and have related adverse effects, such as limiting the number of cases in which plaintiffs serve the positive function of private attorneys-general, as mentioned above.<sup>176</sup>

The provisions of Section 103 and of the PLLRA will probably have additional detrimental impacts that are analogous to some deleterious effects which other aspects of these two measures and features of the AAA and the SLRA would impose. Substantive and procedural products liability law, including punitive damages awards, has traditionally been a matter of state law. For instance, limiting recovery for commercial loss to contractual and commercial remedies would modify the substantive law of approximately five states which provide for strict liability in tort.<sup>177</sup> Insofar as Section 103 of the CSLRA and the provisions of the PLLRA address these issues, they will interfere with the prerogatives of state supreme courts and legislatures. Perhaps the most egregious example of the legislation's intrusive nature is its imposition of a special Rule 11 in products liability cases even for states that have eschewed the adoption of a Rule 11 modelled on Federal Rule 11.<sup>178</sup> To the extent that the legislation would change the substantive law of products liability, it will also disrupt the ongoing efforts of the American Law Institute to finalize Section 402A of the Restatement Third.<sup>179</sup> Finally, the congressional proposals cover only a small percentage of the issues that arise in products liability litigation so that none of the bills introduced will afford the type of national, uniform system of products

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repose will complicate the recovery efforts by plaintiffs, many of whom have been badly injured when using in reasonably foreseeable ways products which manufacturers might have designed more safely.

176. See notes 145, 162, and accompanying text. The restrictions on noneconomic damages and the limitations on drug manufacturers' liability could disproportionately disadvantage women pursuing mass tort remedies. See Thomas Koenig and Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 Wash. L. Rev. 1, 1-5 (1995). See also notes 170, 173, and 175.

177. See, for example, *Thompson v. Nebraska Mobile Homes*, 198 Mont. 461, 647 P.2d 334, 337 (1982); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 267 A.2d 305, 312-13 (1965). See generally *East River S.S. Co. v. Delaval Transamerica, Inc.*, 476 U.S. 858 (1986).

178. New York and Massachusetts have not adopted such a Rule 11. See also note 170.

179. See notes 105-10 and accompanying text.

liability law which some of the legislation's proponents have advocated.

#### IV. SUGGESTIONS FOR THE FUTURE

Congress should reject or delay the adoption of the Common Sense Legal Reforms Act and the Attorney Accountability Act, the Securities Litigation Reform Act, and the Common Sense Product Liability and Legal Reform Act that passed the House of Representatives during the week of March 6, 1995, for numerous reasons stated above. Perhaps most important, implementation of the CSLRA and the other legislation will interfere with, disrupt, or jeopardize a number of ongoing reform initiatives. Congressional passage in 1990 of the Civil Justice Reform Act within two years of the Judicial Improvements Act's enactment trenchantly illustrates the risks of legislating without sufficient appreciation of earlier reforms. Even though the federal judiciary and Congress had identified local procedural proliferation as an important problem, and although Congress had passed the 1988 JIA to address specifically this difficulty, Congress enacted the 1990 CJRA, which effectively suspended those aspects of the JIA which were meant to treat proliferation before they were even implemented.

If Congress passes the CSLRA, the AAA, the SLRA, or the PLLRA now, the legislation will interfere with some features of the Civil Justice Reform Act before they have been fully implemented and certainly before the results of procedural experimentation under the CJRA have been thoroughly evaluated. Passage of the CSLRA or the other legislation would disrupt additional continuing reform efforts, such as the national rule revisors' endeavors to amend Federal Rule of Civil Procedure 23 and the American Law Institute's attempt to adopt a Restatement (Third) of Torts.<sup>180</sup>

The interference with these reforms and the imposition of new requirements will increase complexity, expense, and delay in federal civil litigation. The federal judiciary will have to interpret and apply the strictures, while attorneys and parties must discover, understand, and comply with the requirements. Indeed, CJRA experimentation and the recently-adopted 1993 Federal Rules amendments may have exhausted the tolerance of the bench and bar for procedural change;

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180. See notes 105-10, 137, and accompanying text.

the passage of the CSLRA, the AAA, the SLRA, or the PLLRA could well constitute systemic overload.

Congress should also reject or delay the enactment of the Common Sense Legal Reforms Act and the other legislation because many of the legislation's procedural and substantive requirements will have adverse effects in specific civil cases. For instance, the provisions in the CSLRA and in the AAA relating to Rule 11, to fee-shifting, and to settlement offers will restrict court access for lawyers and parties whose lack of power and money makes them risk averse. The impacts of disrupting processes and of imposing new requirements mentioned in the three paragraphs above will have similar effects, such as increasing expense and delay, in many individual lawsuits. Indeed, the Chair of the American Bar Association Litigation Section aptly summarized many of the ideas already stated when he characterized the proposed reforms as a "sort of a hodgepodge attempt to address perceived problems with the legal system. Quick-and-dirty solutions shouldn't be imposed where a more thoughtful approach is clearly called for."<sup>181</sup>

If Congress believes that the CSLRA or the other legislation will have few detrimental effects in particular cases, on continuing reforms, or on the civil justice process, or if it decides to proceed for additional reasons, Congress should seriously consider several alternatives. Congress should not adopt the legislation's provisions that will disrupt ongoing reform endeavors or it should at least suspend passage until current efforts have terminated and their results have been analyzed.

In less than a year, the ninety-four districts will have essentially concluded the most ambitious experimentation with civil expense and delay reduction procedures in the history of the federal courts, while the RAND Corporation will have systematically collected, analyzed, and synthesized an enormous amount of empirical information on the efficacy of this experimentation.<sup>182</sup> Congress will be able to undertake considerably more informed decision making regarding certain requirements in the Common Sense Legal Reforms Act, the Attorney Accountability Act, the Securities Litigation Reform

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181. Bole, *Litigation News* at 6 (cited in note 128) (quoting David C. Weiner).

182. See Notes on Implementation of Plans accompanying 28 U.S.C. § 471 (1988 & Supp. 1993) (prescribing experimentation and evaluation). See generally Terence Dunworth and James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 *Stan. L. Rev.* 1303 (1994) (providing preliminary results of RAND's evaluation of the pilot program).

Act, and the Common Sense Product Liability and Legal Reform Act once Civil Justice Reform Act experimentation has been completed and rigorously assessed. Congress should remember that efforts to revise the Federal Rules without sufficient empirical data may have yielded several of the most controversial amendments in the Rules' half-century history.<sup>183</sup> Awaiting the conclusion of the CJRA initiative could afford the concomitant benefit of rectifying or ameliorating the problems created by local procedural proliferation. Implementation of the Judicial Improvements Act's aspects which were directed at these complications, features which the CJRA essentially suspended, might be revived and concluded.<sup>184</sup>

Congress should not enact requirements in the CSLRA or the other legislation that will conflict with continuing reform endeavors for a number of reasons. The requirements' effectuation might forfeit benefits to be derived from the reform efforts, could disrupt those initiatives, and may increase complexity, cost, and delay in civil cases. For instance, the adoption of special procedures for securities class actions could frustrate and even sacrifice the considerable effort expended to date on Rule 23's comprehensive amendment.<sup>185</sup> The revision in the CSLRA and the AAA of Federal Rule 11 in ways that would reinstitute the very phenomena which the national rule revisers found so troubling and assiduously labored to exclude from the provision less than two years ago would eviscerate the 1993 amendment before the revision had an opportunity to work.<sup>186</sup> Moreover, institution of the changes would unnecessarily compromise the national revision process at a critical juncture, when the authority and respect that it has long enjoyed have been seriously threatened.<sup>187</sup> Legislating in the substantive area of products liability could undercut the American Law Institute's efforts to craft an improved Restatement of Torts Third and interfere with state initiatives in the area of products liability.<sup>188</sup>

Congress might also want to consider the advisability of encouraging experimentation with certain of the requirements included in the Common Sense Legal Reforms Act and the other legislation.

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183. See Burbank, 137 U. Pa. L. Rev. at 1925-27 (cited in note 35); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery, Abuse and the Consequences for Unfounded Rulemaking*, 46 Stan. L. Rev. 1393 (1994); Walker, 61 Geo. Wash. L. Rev. at 456-59 (cited in note 48). See also notes 31-41, 57-61, and accompanying text.

184. See notes 27-29, 52-70, 90, and accompanying text.

185. See notes 130-41, and accompanying text.

186. See notes 32-51, 118-29, and accompanying text.

187. See note 129 and accompanying text.

188. See notes 99-110, 166-79, and accompanying text.

Congress should remember that many states are currently experimenting with numerous reforms.<sup>189</sup> If Congress believes that these efforts are inadequate, it might want to sponsor some initiatives. For instance, Congress could prescribe experimentation with the thirty-day notice requirement or with fee-shifting that involves settlement offers in diversity cases in certain federal districts for a fixed period, although such experimentation might unfairly penalize some litigants in those courts or foster forum shopping. This program might be modeled on earlier projects involving court-annexed arbitration, which proceeded in numerous federal districts,<sup>190</sup> or on CJRA experimentation. Congress could correspondingly provide for broader experimentation by adopting a 1991 proposed amendment in Federal Rule 83 which the national rule revisors withdrew.<sup>191</sup>

## V. CONCLUSION

The Common Sense Legal Reforms Act, and the Attorney Accountability Act, the Securities Litigation Reform Act, and the Common Sense Product Liability and Legal Reform Act that passed the House of Representatives during the week of March 6, 1995, would institute numerous procedural and substantive reforms that would have many adverse effects in individual cases, on continuing reform initiatives, and on the civil justice system. Congress should not pass this legislation, or should at least suspend those provisions which would interfere with ongoing reforms until these efforts have concluded.

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189. See notes 93-97 and accompanying text.

190. 28 U.S.C. §§ 651-58 (1988). See generally Barbara S. Meierhoefer, *Court-Annexed Arbitration in Ten District Courts* (Fed. Judicial Center, 1990) (examining arbitration in the mandatory pilot programs).

191. I have suggested that congressional intervention in Rules revision is generally inadvisable. Nevertheless, congressional adoption of this change in Rule 83 may be appropriate because the rule revision entities had already proposed the amendment and because it would be preferable to have congressional authorization for this specific change. See A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. Pa. L. Rev. 1567, 1585-87 (1991). Districts that secured Judicial Conference approval would have been able to experiment for not greater than five years with local rules that conflicted with Federal Rules. *Preliminary Draft of Proposed Amendments*, 137 F.R.D. at 153 (cited in note 43). See also Tobias, 46 Stan. L. Rev. at 1616, 1633 (cited in note 2) (discussing the proposed 1991 amendment in Rule 83).