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Did the Civil Justice Reform Act of 1990 Actually Expire?

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DID THE CIVIL JUSTICE REFORM ACT OF 1990 ACTUALLY EXPIRE?

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The Civil Justice Reform Act of 1990 (CJRA) was intended to reduce the expense and delay associated with federal district court litigation by requiring courts to study and adopt new procedures. The CJRA's gains, however, may be erased by the uncertainty surrounding its sunset provision. Professor Tobias argues that Congress or the Judicial Conference should resolve the uncertainty by proclaiming that the CJRA has expired, thus forcing districts to abrogate procedures inconsistent with the Federal Rules of Civil Procedure.

INTRODUCTION

On December 1, 1990, President George Bush signed into law the Civil Justice Reform Act (CJRA) of 1990.[1] The CJRA instituted unprecedented nationwide experimentation with procedures for reducing cost and delay in federal civil litigation. Pursuant to the CJRA, all ninety-four federal district courts undertook comprehensive evaluation of their circumstances, such as the size and complexity of caseloads, and adopted and implemented various measures which were intended to save expense and time.[2] Some of the procedures that districts employed were efficacious and decreased cost or delay.[3] Additional features of the experimentation were less beneficial, however, and certain aspects even had detrimental impacts. For example, numerous districts promulgated or enforced measures which conflicted with the Federal Rules of Civil Procedure (FRCP), United States Code (U.S.C.) provisions, and strictures

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1. Judicial Improvements Act of 1990 tit. I, § 103(a), Pub. L. No. 101-650, 104 Stat. 5089, 5090–98 (codified as amended at 28 U.S.C. §§ 471–482 (1994)).

2. *See infra* notes 3–5 and accompanying text.

3. *See infra* note 45 and accompanying text.

in other courts.[4] Districts also prescribed CJRA requirements through civil justice expense and delay reduction plans, procedures of individual judges, and unwritten local practices or understandings.[5] These phenomena may even have increased cost and delay in federal civil litigation by complicating the efforts of attorneys and parties to find, master, and satisfy local requirements.[6]

Now that December 1, 1997, the date on which the CJRA was ostensibly scheduled to expire, has come and gone, judges, lawyers, and litigants in every federal district court across the country should ask whether the legislation actually expired. The answer to this question has significant theoretical and policy implications for the future of federal civil procedure and important pragmatic consequences for federal civil practice. For instance, if the statute expired, measures adopted pursuant to the legislation, especially those imposed in civil justice expense and delay reduction plans or those that are inconsistent with the FRCP or Acts of Congress, are no longer applicable. If the CJRA did not expire, procedures prescribed under the statute remain effective. Until the issue of whether the CJRA expired on December 1, 1997 is definitively resolved, confusion and uncertainty among participants in federal civil litigation will persist.

The difficulties considered above indicate that whether the CJRA in fact expired last December warrants analysis. This Article undertakes that effort. It initially affords a brief examination of the developments which led to the current situation. Part II assesses whether the statute in fact expired on December 1, 1997. The final section offers suggestions for the future, concluding that either Congress or the Judicial Conference should act to end the uncertainty.

I. ORIGINS AND DEVELOPMENT OF THE PRESENT SITUATION

Congress passed the CJRA in 1990, and the legislation became effective on December 1 of that year.[7] The statute

4. *See infra* notes 11–14 and accompanying text.

5. *See* Carl Tobias, *Improving the 1988 and 1990 Judicial Improvement Acts*, 46 STAN.L.REV. 1589, 1618 (1994).

6. *See id.* at 1620–21.

7. Judicial Improvements Act of 1990 tit. I, § 103(a), Pub. L. No. 101-650, 104 Stat. 5089, 5089 (codified as amended at 28 U.S.C. §§ 471–482 (1994)); *see also* Carl

required all ninety-four federal districts to develop civil justice cost and delay reduction plans which were to include measures for saving expense and time in civil lawsuits.[8] The districts were to consider, and could adopt, eleven congressionally prescribed principles, guidelines, and techniques of litigation management and cost and delay reduction.[9] The legislation also proffered a twelfth open-ended provision which authorized courts to employ any other measure that might prove efficacious in limiting expense or delay.[10]

Numerous districts implemented the CJRA by promulgating or applying local strictures which were inconsistent with the FRCP and other federal statutes, or local rules in the remaining district courts.[11] Perhaps most notorious was the Eastern District of Texas. This court's civil justice expense and delay reduction plan explicitly and forcefully declared that "[t]o the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."[12] For example, the court adopted an offer of judgment provision which conflicted with FRCP 68.[13] Other districts promulgated or applied inconsistent local requirements, but few courts prescribed the strictures as clearly or

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Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1402–03 (1992).

8. *See* 28 U.S.C. § 471 (1994). *See generally* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990 and the 1993 Amendments to the Federal Rules of Civil Procedure: Can Systemic Ills Afflicting the Federal Courts Be Remedied by Local Rules?*, 67 ST. JOHN'S L. REV. 721 (1993) (describing and evaluating the reform measures of the CJRA).

9. *See* 28 U.S.C. § 473(a)(1)–(6), (b)(1)–(5) (1994).

10. *See id.* § 473(b)(6). Congress intended to encourage broad experimentation with numerous procedures and to include measures which proved effective in the FRCP. *See* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1292–96 (1994). *See generally* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1464–70 (1994) (analyzing the rulemaking power given to local courts under the CJRA).

11. *See Tobias*, *supra* note 7, at 1416–18. Some of these conflicting measures, however, covered discovery, and certain 1993 FRCP amendments expressly empowered districts to use inconsistent local procedures to govern discovery. *See, e.g.*, FED. R. CIV. P. 26(a)(1); *see also infra* notes 41–42 and accompanying text.

12. U.S. DIST. COURT FOR THE E. DIST. OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 11 (1991) [hereinafter TEXAS PLAN]; *see also* Tobias, *supra* note 5, at 1620.

13. *See* TEXAS PLAN, *supra* note 12, at 12; *see also* FED. R. CIV. P. 68. *See generally* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929 (1996) (describing the conflicts between the Federal Rules and the Texas plan).

enforced them as aggressively as the Eastern District of Texas.[14]

Congress provided for periodic assessment of the experimentation conducted by the federal district courts. The CJRA required that every court annually evaluate the effectiveness of the measures that the district applied.[15] Congress also called for an "independent organization with expertise in the area of Federal court management" to perform a thorough analysis of procedures being enforced in the pilot program implemented by ten districts under the CJRA.[16] Moreover, Congress requested that the Judicial Conference of the United States (Judicial Conference), the federal courts' policymaking component, in consultation with the Federal Judicial Center (FJC) and the Administrative Office of the United States Courts (Administrative Office), the research arms of the federal courts, comprehensively assess the efficacy of procedures which five districts applied in the statutorily prescribed demonstration program.[17] Congress concomitantly asked that the Judicial Conference submit reports on both projects and a recommendation on the pilot effort. The Judicial Conference tendered these reports and the suggestion to Congress in May 1997.[18]

Unfortunately, the Judicial Conference did not explicitly state, in either these reports or the recommendation, whether the CJRA actually expired on December 1, 1997. The first session of the 105th Congress recessed in November 1997 without

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14. *See* Carrington, *supra* note 13, at 965.

15. *See* 28 U.S.C. § 475 (1994). *See, e.g.*, U.S. DIST. COURT FOR THE DIST. OF MONTANA, ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (1994) [hereinafter MONTANA ANNUAL ASSESSMENT]; ANNUAL REPORT OF THE ADVISORY GROUP OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY (1996).

16. 28 U.S.C. § 471 note. *See generally* JAMES S. KAKALIK ET AL., JUST, SPEEDY AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) (analyzing and evaluating the effectiveness of the CJRA).

17. *See* 28 U.S.C. § 471 note. The FJC actually undertook the study. *See* DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 (1997).

18. *See* JUDICIAL CONFERENCE OF THE U.S., THE CIVIL JUSTICE REFORM ACT OF 1990 FINAL REPORT: ALTERNATIVE PROPOSALS FOR REDUCTION OF COST AND DELAY ASSESSMENT OF PRINCIPLES, GUIDELINES AND TECHNIQUES (1997), *reprinted in* 175 F.R.D. 62 (1997) [hereinafter JUDICIAL CONFERENCE REPORT]. The Conference attached the RAND Corporation's study as Appendix A and the FJC study as Appendix B to the report. *See generally* Edward D. Cavanagh, *The Civil Justice Reform Act of 1990:* Requiescat in Pace, 173 F.R.D. 565, 588 (1997) (discussing the report's treatment of the RAND study).

definitively resolving this question. Moreover, most districts have continued to apply local procedures which they adopted under the CJRA. Thus, whether the legislation expired last December, remains an important question.

II. ANALYSIS OF WHETHER THE CJRA EXPIRED

The CJRA was apparently scheduled to expire on December 1, 1997.[19] The statute expressly states in section 103(a) that the "requirements set forth in sections 471 through 478 of title 28, United States Code [the CJRA] . . . shall remain in effect for seven years after . . . [the December 1, 1990 enactment date]."[20] The relevant legislative history of the 1990 statute is sparse and somewhat ambiguous. Congress stated:

> Subsection (b)(2) subjects section 471 through 478 of the Civil Justice Reform Act to a seven-year sunset provision so that those sections can be thoroughly tested. Upon the expiration of the seven-year period following enactment, Federal district courts are no longer required to operate pursuant to the civil justice expense and delay reduction plans mandated by title I. Congress and the courts will then have a chance to evaluate those provisions and, if warranted, reauthorize them.[21]

Congress, therefore, apparently intended that the federal districts could discontinue applying the cost and delay reduction procedures on December 1, 1997. Congress also seems to have contemplated that the legislative and judicial branches would make an affirmative decision about the reauthorization of the CJRA and the future of the measures which courts employed pursuant to the enactment.[22] However, the first session of the 105th Congress recessed in mid-November without conclusively resolving the issue of the statute's continuing applicability.

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19. I rely in this subsection on Patrick Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U. L. REV. 625, 665 (1997); *see also* Tobias, *supra* note 5, at 1601–04, 1617–23.

20. § 103(a), 104 Stat. at 5096.

21. S. REP. NO. 101-416, at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6852–53 (emphasis added); *see also* Longan, *supra* note 19.

22. *See supra* text accompanying note 21.

Congress did take some relevant action before recessing. It passed legislation that specifically authorized continuation of the case reporting requirements of section 476 of the CJRA.[23] This provision of the CJRA requires the Administrative Office to prepare semiannual public statistical summaries regarding the status of motions and bench trials that have been pending for more than six months and of cases that have been pending longer than three years.[24] In the same 1997 statute, Congress also deleted section 476, which included strictures on reporting, and section 471, which mandated that districts adopt civil justice expense and delay reduction plans, from the list of the CJRA's provisions which section 103(a) of the CJRA stated were to "remain in effect for seven years after" the December 1, 1990 date of CJRA passage.[25] The deletion of section 476 reinforces the argument that Congress intended to extend the reporting requirements. Apart from this change, the 1997 legislation essentially left section 103(a) as Congress adopted it in 1990.[26]

The 1997 statute actually created additional ambiguity by deleting section 471, which commanded districts to describe civil justice expense and delay reduction plans, from the list of provisions whose requirements section 103(a) of the CJRA specifically stated were to remain in effect until December 1, 1997.[27] This 1997 legislative action could evidence congressional intent to extend authorization for civil justice plans and the procedures which districts included in those plans past December 1, 1997, as with the reporting requirements of section 476.[28] Discussions with staff members of the Judiciary Committees of the United States Senate and the House of Representatives, however, suggest that the omission of section 471 from the list of sections enumerated in the 1997 provision was inadvertent.[29] Therefore, Congress apparently intended

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23. *See* Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997).

24. *See id.*

25. *See id.* (amending § 103(a), 104 Stat. at 5096); *see also supra* notes 20–21 and accompanying text.

26. *Compare* Act of Oct. 6, 1997 § 2, 111 Stat. at 1173 *with* § 103(a), 104 Stat. at 5096.

27. *See* Act of Oct. 6, 1997 § 2, 111 Stat. at 1173; *see also supra* notes 20–21 and accompanying text.

28. Congress also approved the indefinite continuation of court-annexed arbitration in twenty districts which had been experimenting with this form of ADR because that experimentation was scheduled to expire in 1997. *See* Act of Oct. 6, 1997 § 1, 111 Stat. at 1173.

29. *See* Telephone Interview with David Schanzer, Counsel, Senate Judiciary Comm. (Dec. 5, 1997) (on file with the *University of Michigan Journal of Law Reform*);

that section 471, like sections 472 through 475 and 477 through 478, would only remain in effect until December 1, 1997 and would not be extended like section 476.[30]

A final piece of relevant information is the explanation afforded by Senator Joseph R. Biden, Jr. (D-Del.) for offering the 1997 proposal to extend the CJRA's reporting strictures: "This very effective reporting requirement will expire in December unless Congress acts."[31] Senator Biden's statement suggests his belief that the commands related to reporting, and perhaps other important aspects of the 1990 Act, namely the requirements imposed by the sections enumerated in section 103(a), would have expired on December 1, 1997 without legislative action. A single senator's observation regarding one provision of a statute nearly seven years after the enactment's passage would ordinarily be considered relatively unauthoritative. The statement, however, assumes considerable significance because Senator Biden, who served as the chair of the Senate Judiciary Committee in 1990, was the chief proponent of the CJRA and the sponsor of the amendment that became section 2 of the 1997 statute, which extended the CJRA's reporting requirements and addressed section 103(a) of the CJRA.[32]

In the November 1997 edition of *The Third Branch*, the newsletter of the federal courts, the Administrative Office announced that "most of the provisions of the Civil Justice Reform Act of 1990 (CJRA) will expire December 1, 1997."[33] As the statute's expiration approached, the Administrative Office

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Telephone Interview with Vince Garlock, Counsel, House Judiciary Comm. (Dec. 5, 1997) (on file with the *University of Michigan Journal of Law Reform*).

30. Section 103(a) could also be read to mean that districts and the Administrative Office of the U.S. Courts need not comply with any "continuing duties" which the CJRA imposed after the December 1, 1997 date had passed. Illustrative is section 471's requirement to implement a plan; section 475's requirement to assess district experimentation annually; and section 476's requirement to report certain information. *See* § 103(a), Pub. L. No. 101-650, 104 Stat. at 5090–94. The 1997 statute extended the reporting requirements, but the other two continuing duties arguably expired. Section 103(a), however, does not clearly state that plans expire, meaning that plans retain the CJRA's imprimatur until Congress affirmatively acts or districts choose to discontinue operating under plans. *Id.* at 5096.

31. 143 CONG. REC. S8528 (daily ed. July 31, 1997) (statement of Sen. Biden).

32. *See* 143 CONG. REC. S8614-15 (daily ed. July 31, 1997); *see also* Act of Oct. 6, 1997, Pub. L. No. 105-53, § 2, 111 Stat. 1173; *supra* notes 23–25, and accompanying text. Some of Senator Biden's writing also suggests that he believed that the statute expired on December 1, 1997. *See, e.g.*, Biden, *supra* note 10, at 1294; *see also* Joseph R. Biden, Jr., *Introduction to Symposium on the Civil Justice Reform Act*, 67 ST. JOHN'S L. REV. i-vi (1993).

33. *The Civil Justice Reform Act of 1990 Sunsets Next Month*, THIRD BRANCH, Nov. 1997, at 6.

offered advice to district courts about numerous issues, including continued application of those procedures adopted in civil justice cost and delay reduction plans:

> Courts should be aware that if their civil justice expense- and delay-reduction plans were implemented pursuant to the CJRA alone, rather than through a court order or local rule, their authority will sunset with the act. Therefore, these courts may consider adopting their plans pursuant to the authority of 28 U.S.C. § 2071(e), which allows for the immediate adoption of rules, and start the formal rule-making process promptly thereafter.[34]

This information, which offers the view of an important research arm of the federal courts, may clarify the question regarding the effect that the passing of the December 1 date had on the CJRA and on measures adopted in plans pursuant to the legislation. The advice, however, does not address applicability of local requirements promulgated under the 1990 enactment that are inconsistent with the FRCP or federal statutes.

The most plausible reading of the CJRA's phrasing and legislative history, and the best interpretation of the congressional action and the Judicial Conference silence reviewed above, is that the failure to reauthorize or extend more clearly the statutory program means that the enactment expired on December 1. Because the CJRA's language, which provides that the Act's major requirements "shall remain in effect for seven years" is rather clear, it is arguably unnecessary to consult the accompanying legislative history.[35] Even if the statutory wording were more ambiguous, the relevant legislative history is relatively unclear and, therefore, comparatively unreliable.[36] Finally, Congress expressed a policy in favor of a nationally uniform civil procedure in the 1988 Judicial Improvements and Access to Justice Act (JIA),[37] as did the Supreme Court in the 1995 revi-

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34. *Id.*

35. *See, e.g.*, United States v. Gonzalez, 117 S. Ct. 1032, 1035 (1997) ("Given the straightforward statutory command, there is no reason to resort to legislative history."); Darby v. Cisneros, 509 U.S. 137, 147 (1993) (noting that recourse to legislative history is unnecessary if the statutory text is unclear).

36. Experience with similar provisions in other statutes suggests that courts find a legislative failure to reauthorize on the expiration date means that the Act has expired. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 59–68 (1982). *See generally* SUTHERLAND STAT. CONST. § 34 (5th ed. 1993).

37. 28 U.S.C. § 2071(a) (1994).

sion to FRCP 83, which proscribed the adoption of local measures that conflict with the FRCP or U.S.C. provisions.[38] Because the 1990 CJRA has arguably expired, this policy favoring national uniformity should have precedence over interpretations of the CJRA that would permit the continued application of inconsistent local procedures.

If this construction is correct, any procedures which the ninety-four districts promulgated or applied pursuant to the CJRA, and which conflict with the FRCP or U.S.C. provisions, have also expired.[39] Measures included in local rules that courts prescribed or enforced under the CJRA which are consistent with the FRCP or federal statutes remain applicable, because both the Rules Enabling Act and FRCP 83 authorize the districts to issue and apply local rules that comport with the FRCP and the U.S.C.[40] One significant exception to the propositions regarding inconsistent local measures, premised partly on the CJRA, are the provisions in certain 1993 FRCP amendments, principally governing discovery, which empower district courts to promulgate and implement procedures that vary from the FRCP.[41] Illustrative is the prescription in FRCP 26(a)(1) for mandatory pre-discovery disclosure, whereby many districts have applied local requirements which depart from those included in FRCP 26(a)(1).[42]

An informal survey of the federal districts indicates that few courts have abrogated, or intend to abolish, conflicting local procedures adopted pursuant to the CJRA.[43] This can be explained principally by judges' and attorneys' understandable

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38. *See* FED. R. CIV. P. 83; *see also* Tobias, *supra* note 5, at 1620–27; *infra* note 47 and accompanying text. *See generally* Robel, *supra* note 10, at 1468–69.

39. *See* 28 U.S.C. § 2071(a); FED. R. CIV. P. 83. *See generally* Robel, *supra* note 10, at 1468–69.

40. *See* 28 U.S.C. § 2071(a); FED. R. CIV. P. 83; *see also supra* note 38 and accompanying text. *See generally* Tobias, *supra* note 5, at 1600–01, 1604–06.

41. *See, e.g.*, FED. R. CIV. P. 26(b)(2), (d), (f).

42. *Compare* FED. R. CIV. P. 26(a)(1) *with* D. MONT. R. 200–5(a) and LOCAL RULES W.D. WASH. CR 26. *See also* DONNA STIENSTRA, IMPLEMENTATION OF DISCLOSURE IN UNITED STATES DISTRICT COURTS, WITH SPECIFIC ATTENTION TO COURTS' RESPONSES TO SELECTED AMENDMENTS TO FEDERAL RULE OF CIVIL PROCEDURE 26 (1998) (analyzing districts' treatment of disclosure); JUDICIAL CONFERENCE REPORT, *supra* note 18, at 6, 34 (proposing that the Conference Committee on Rules of Practice and Procedure reevaluate the need for national consistency in applying FRCP 26(a) in its continuing reexamination of discovery and determine whether the benefits of national uniformity in applying FRCP 26(a) outweigh the advantages of locally-developed measures).

43. This survey was premised on conversations with judges, lawyers, and parties who participate in civil litigation in numerous districts, and on an evaluation of numerous districts' local procedures.

reluctance to eliminate familiar and efficacious measures.[44] For example, some districts' increased reliance on magistrate judges, various alternative dispute resolution (ADR) practices, and telephonic conferences for resolving disputes, has saved time and resources.[45]

Until Congress or the Judicial Conference conclusively clarifies whether the CJRA has actually expired, confusion over the applicability of inconsistent local procedures prescribed pursuant to the CJRA will continue. For instance, counsel and parties may experience difficulty in ascertaining whether local measures adopted under the CJRA remain effective after December 1, 1997 and, if so, whether they exist in local rules, civil justice expense and delay reduction plans, standing orders, individual-judge practices, or informal understandings.[46] Attorneys and litigants may correspondingly encounter problems determining whether local procedures conflict with the FRCP, Acts of Congress, or requirements of other federal districts and, if so, whether they must comply with the local measures.

Absent action by either Congress or the Judicial Conference, local strictures which are inconsistent with the FRCP or U.S.C. provisions will continue to apply in numerous districts. Of course, the Circuit Judicial Councils could invoke the 1988 JIA, or FRCP 83, to eliminate or modify local requirements that contravene the FRCP or federal legislation, but few councils have rigorously discharged this responsibility and they appear unlikely to do so in the future.[47] Attorneys and litigants who have been disadvantaged by application of conflicting local measures adopted under the CJRA may also challenge the

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44. *See generally* Longan, *supra* note 19, at 665 ("Local judges and lawyers who drafted the plans may have substantial stakes in their continued operation.").

45. Illustrative as to magistrate judges are MONTANA ANNUAL ASSESSMENT, *supra* note 15, at 3–4; REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990 7, 17–18 (1991). Illustrative as to ADR is STIENSTRA ET AL., *supra* note 17, at 215–82. Illustrative as to telephonic conferences are ANNUAL REPORT OF THE ADVISORY GROUP OF THE DISTRICT OF MAINE PURSUANT TO THE CIVIL JUSTICE REFORM ACT 2 (1996); STIENSTRA ET AL., *supra* note 17, at 10. I realize that courts might be able to premise increased reliance on these methods on authority other than that in the CJRA. *See, e.g.*, 28 U.S.C. §§ 636, 651–58 (1994); FED. R. CIV. P. 16.

46. The Administrative Office advised the districts that measures included in plans would expire on December 1. *See supra* text accompanying notes 33–34.

47. *See* 28 U.S.C. §§ 332(d)(4), 2071(c)(1) (1994); FED. R. CIV. P. 83 (authorizing district courts to make and amend rules). *See generally* Carl Tobias, *A Sixth Circuit Story*, 23 FLA. ST. U. L. REV. 983 (1996); Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359 (1995).

procedures' validity. They might argue that the statute expired in December 1997, thus, the districts lack the requisite authority to continue enforcing inconsistent local strictures. These lawyers and parties could also rely upon a recent Fifth Circuit opinion which invalidated a fee-shifting provision that a district court had prescribed pursuant to the CJRA.[48] The Fifth Circuit found that the statute "did not grant district courts the discretion to use fee shifting as a cost and delay reduction technique . . . "[49]

III. SUGGESTIONS FOR THE FUTURE

Congress or the Judicial Conference should expeditiously resolve the uncertainty about the expiration of the CJRA because lingering doubt related to the continuing applicability of the statute and local procedures adopted under the legislation complicates federal civil practice. Congress originally passed the statute in 1990 and is thus the preferable entity to address this confusion. Congress should state clearly whether the legislation has expired and reauthorize specifically the statutory features that have been efficacious.[50] Congress at least must correct the inadvertent omission of CJRA section 471 from the provisions which it apparently intended would expire on December 1, 1997.[51]

If Congress does not act, the Judicial Conference should attempt to clarify the issue by expressly stating that the CJRA has expired and that inconsistent measures applied pursuant to the legislation must be abolished. The Conference should then inform all ninety-four district courts of its position. Most of the districts probably would comply with the Judicial Conference's resolution of this question because the Conference, as the policy making arm of the federal courts, speaks with considerable authority on issues of court administration and

48. *See* Ashland Chem., Inc. v. Barco, Inc., 123 F.3d 261 (5th Cir. 1997); *see also* Aldrich v. Bowen, 130 F.3d 1364 (9th Cir. 1997); Friends of the Earth, Inc. v. Chevron Chem. Co., 885 F. Supp. 934 (E.D. Tex. 1995); Carrington, *supra* note 13; Robel, *supra* note 10.

49. *Barco*, 123 F.3d at 268.

50. For instance, the Judicial Conference called for continuation of the advisory group process because it facilitated the participation of litigants and lawyers in the administration of justice in every district. *See* JUDICIAL CONFERENCE REPORT, *supra* note 18, at 18–20; *see also* 28 U.S.C. § 478 (1994).

51. *See supra* notes 32–36 and accompanying text.

statutory interpretation.[52] Finally, should Congress or the Conference fail to act, each district should attempt to reduce confusion by abrogating local procedures prescribed under the CJRA which conflict with the FRCP or federal legislation.

CONCLUSION

Although the seven-year experiment with CJRA procedures which was designed to decrease expense and delay in civil litigation has apparently concluded, considerable uncertainty remains about whether the statute actually expired on December 1, 1997. Congress or the Judicial Conference should promptly resolve this lingering doubt over the legislation's continuing applicability because the resulting uncertainty complicates federal civil practice.

52. *See* 28 U.S.C. § 331 (1994). *See generally* Tracy Edler Leduc, *A Judicial Conference Primer*, FED. LAW., Mar./Apr. 1997, at 66 (giving a general overview of the functions of the Judicial Conference).