UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
2188 UNITED STATES COURTHOUSE
75 SPRING STREET, S. W.
ATLANTA, GEORGIA 30303

CHAMBERS OF
ROBERT H. HALL, JUDGE

April 13, 1990

Mr. L. Ralph Mecham
Director, Administrative Office of the
United States Courts
Washington, D.S. 20544

Dear Ralph:

I am enclosing a copy of a letter from me to Senator Sam Nunn concerning S.2027. A similar letter was written to Senator Wyche Fowler.

Sincerely,

Robert H. Hall

RHH/ma
Enclosure

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ROBERT H. HALL, JUDGE

April 13, 1990

Honorable Sam Nunn
Georgia State Senator
303 Dirksen Building
Washington D.C. 20510

Dear Sam:

I am writing to bring Senate Bill 2027, the "Civil Justice Reform Act of 1990", to your attention.

S.2027, based on a Brookings Institution study conducted by a task force of law professors, lawyers, and former judges, was introduced by Senator Biden on January 25, 1990. The stated purpose of the bill is "[t]o require certain procedural changes in United States district courts in order to promote the just, speedy and inexpensive determination of civil actions, and for other purposes." The basic premise of the Justice Reform Act of 1990 is that the quality, speed, and expense of civil justice will be improved only by legislatively forcing the earlier and more participatory involvement of trial judges in civil litigation.

District court judges generally construe S.2027 as an attempt to constrain the judiciary and to direct the operation of the federal trial courts. At no point prior to introduction of the bill did the task force consult with the Judicial Conference of the United States or the Federal Judges Association. The District Judges in the Northern, Middle, and Southern Districts of Georgia are unanimously opposed to S.2027. The Judicial Conference and the Federal Judges Association are also opposed to S.2027. The provisions of S.2027 are in conflict with the findings of the Report of the Federal Courts Study Committee, issued April 2, 1990.

The Federal Courts Study Committee was created by the Congress in 1988 for the specific purpose of studying and making recommendations to Congress on improvements in the Federal Judicial System. Its membership included Senators, Members of the House, active federal judges and lawyers. During 1989 and 1990, the Federal Courts Study Committee held hearings throughout the United States at which testimony from

judges, lawyers, and members of the public was received. It is, therefore, especially surprising that the proponents of S.2027 chose neither to confer with the Federal Courts Study Committee nor to inform the Study Committee of their intention to introduce the bill. I mention this as being illustrative of the open manner in which the Federal Courts Study Committee operated as distinguished from the approach taken by the proponents of S.2027.

As presently written, S-2027 focuses on the following three areas:

I. Differentiated Case Management

The proposed act would impose a system of differentiated case management requiring an assessment of the length and complexity of cases filed, as well as the assignment of cases to "appropriate processing tracks." Cases in each "track" would be treated differently with respect to matters such as time limits for discovery and trial. In commenting on tracking proposals, the Federal Courts Study Committee concluded:

> Such techniques are worthy of further consideration, but more study is needed to learn whether tracking or much more individualized case management is generally preferable for the federal civil caseload. In any event, case management programs should be so organized as to retain significant decisions in the hands of judicial officers and ensure sufficient flexibility to accommodate the needs of individual cases.

The Northern District of Georgia considered and rejected the establishment of different discovery limits for different categories of cases seven years ago. The court's experience since then has demonstrated that group discovery limits are not necessary. Rather, it is more desirable that all cases be subject to the same short discovery period with judges granting requests for discovery extensions on a case by case basis and retaining the discretion to limit the purposes for which discovery is extended, if appropriate.

S.2027 also mandates the use of an expanded civil cover sheet and requires that track assignments be made at the time of filing, apparently by the Clerk of Court or some other non-judicial court employee. The judge would resolve disputes over the assignment of a particular case to its track.

It is very difficult, if not impossible, for anyone, particularly a non-judicial officer, to make a reliable determination as to the estimated time it will take to prepare a particular case for trial at the time of filing. The shape and/or complexity of cases often change after filing, as defendants assert affirmative defenses and counterclaims and as additional parties are impleaded. The two-step assignment process proposed by S.2027 can be expected to generate disputes between parties, thereby delaying resolution of the lawsuit.

Furthermore, the district courts already have in effect procedures for identifying complex cases. The civil cover sheet used in this district requires a plaintiff at the time of filing the complaint to list every party to the action, to describe the nature of the suit, to estimate the length of trial, to state whether the suit is a class action, and to indicate whether related cases are pending in this district.

II. Increased Court Involvement in Pretrial Procedures

A. Discovery

S.2027 contemplates that the more active involvement of Article III judges will expedite the pretrial process by setting deadlines, limiting discovery abuses, encouraging settlements, and accelerating trial dates. It requires Article III judges to schedule a mandatory discovery conference for each civil action. The practice of asking magistrates to review initial discovery matters would no longer be permitted. At the discovery conference, the judge would be required to explore the propriety of settlement, identify issues in contention, and set deadlines for the completion of discovery and for the filing and resolution of motions, and set dates for additional pretrial conferences and trial.

Procedures already in effect in the district courts are sufficient to manage the discovery process. For example, the Northern District of Georgia limits discovery in all cases to four months. Attorneys are not allowed to extend the discovery period by agreement among themselves and specific requirements are set for motions requesting extensions of time for discovery. The court guards against the abusive use of discovery by limiting the number of interrogatories to 40, counting subparts as separate interrogatories, and limiting oral depositions to a maximum length of six hours. S.2027 also calls for a limitation on the frequency with which discovery motions are filed. The Northern District of Georgia addressed this problem successfully by requiring the attorney to certify that he or she had made a good faith effort to resolve the discovery dispute by conference with opposing counsel before filing the motion to compel. By requiring the attorneys to talk, many discovery problems are resolved without intervention of the court.

Rules 11 and 37 of The Federal Rules of Civil Procedure provide the district court with a wide range of sanctions against litigants intent on abusing the discovery process. Requiring Article III judges to participate in a mandatory discovery conference in all but a limited number of cases is an inefficient and unnecessary use of a judge's time.

S.2027 also requires that a series of monitoring conferences be held for cases designated as complex, and that procedures be developed for streamlining the discovery process in such cases. Federal Rule of Civil Procedure 26(f) authorizes a judge to call a discovery conference at any time he chooses once the action has commenced. Federal Rule 26(f) also guarantees any requesting party a conference with the judge for the purpose of establishing a discovery schedule and plan and addressing other matters necessary to the proper execution of discovery procedures, provided certain guidelines stated in Rule 26 have been followed. While Rule 26 does permit the judge to combine this discovery conference with the pretrial conference authorized in Federal Rule of Civil Procedure 16, it specifically protects the rights of the party whose request prompted the Rule 26 discovery conference. These federal rules, together with the discovery protections accorded parties by the local court rules discussed above,

render the special monitoring provisions for complex cases contained in S.2027 unnecessary.

B. Case Management

S.2027 expresses the concern that not all courts have procedures which seek to minimize delay and expense. However, the Judicial Conference Committee charged with developing a set of model local rules has reported that every jurisdiction in the country has promulgated local rules, and that 93 jurisdictions have rules addressing the requirements of Federal Rule 16.

Federal Rules of Civil Procedure 16, which was amended with the approval of Congress in 1983, mandates that certain actions be undertaken to insure that civil cases are not unnecessarily delayed. Rule 16 requires that the trial judge enter a scheduling order no later than 120 days after the complaint is filed. This limits the time for joining new parties and amending the pleadings, filing and hearing motions, and completing discovery. Other matters are listed as appropriate, but not required, for inclusion in the scheduling order.

The judges in this district adhere to these requirements and utilize these procedures. When Rule 16 was amended to require the scheduling order, the Northern District of Georgia combined a courtwide standardized scheduling order form with its Preliminary Statement form. The combined Preliminary Statement and Scheduling Order must be filed jointly by attorneys in every civil case filed in this court, except that pro se litigants are permitted to file separate statements. Once the information on the submitted form is reviewed, the judge imposes appropriate time limits which control, henceforth, actions in that case. There may be isolated instances in the district courts in which judges do not adhere to the local procedural rules. However, an additional and largely duplicative layer of statutorily required procedures will not change that behavior.

C. Settlement

The provisions of S.2027 regarding the promotion of settlements are also duplicative of existing practices and are therefore unnecessary. For example, the Northern District of Georgia requires lead counsel for all parties to confer to discuss settlement both during discovery and within 10 days after the close of discovery. The rule requires attorneys to communicate all offers of settlement to their clients and to submit timely reports of the conferences to the court. The court provides attorneys a specific standardized form to use in making these reports. The first settlement conference may be by telephone, but the second settlement conference must be an in-person meeting between lead counsel. Settlement procedures are strictly enforced by this court; they have proved to be effective tools in promoting settlement.

D. Trial Delays

Courts can curb unwarranted delays in the setting of trial dates in a number of ways. Tying the judge to a fixed trial date set early in the litigation is simply not necessary or practical. Attorneys trying civil cases in the Northern District of Georgia are required to submit jointly a proposed consolidated pretrial order no later than 30 days after the close of discovery. The court has incorporated a standard pretrial order form into its local rules. Attorneys are not permitted to vary the form nor are they allowed to reserve the right to amend by agreement the pretrial order after it has been signed by the judge. The pretrial order contains 30 very specific entries relating to trial and trial preparation matters. Once the judge has signed the pretrial order, the case is ready for trial. The general time between the signing of the pretrial order and the actual commencement of trial in this court is five to eight weeks. This does not seem to be an excessive delay and, in fact, I am not aware of any complaints from attorneys regarding dilatory trial dates.

The federal rules, local rules, and orders discussed above demonstrate that judges in this court do become thoroughly involved in the management of a case at its inception and their involvement continues throughout trial.

It is the practice of this court to adhere strictly to the deadlines set out in its discovery, scheduling, and pretrial orders. S.2027 does not increase the benefits gained from the judge's involvement.

III. Other Proposals For Reducing Delays and Expenses

In addition to the requirements already discussed, S.2027 requires each court to prepare reports listing unresolved motions pending for longer than 30 days and to develop programs for alternative dispute resolution. All these procedures and programs are to be included in a "civil justice expense and delay reduction plan" which each district would be required to adopt within 12 months from the effective date of S.2027.

S.2027 requires the court to obtain the participation of lawyers and other citizens in the drafting of its Plan. Empowering groups of lawyers and lay people to impose procedural rules and specific time standards on district courts raises significant constitutional questions regarding Congress' authority to delegate power to such groups in this manner. Any district court failing to implement a plan would have a model plan developed by the Federal Judicial Conference imposed on it.

S.2027 also provides that the circuit judicial council will review a court's submitted Plan to determine compliance of the Plan with S.2027. This proposed review system represents a more rigid bureaucratization of power over how individual trial judges and courts manage their procedural affairs than has been customary in the federal system. It could threaten the creativity and morale of trial courts and could give disproportionate power over pretrial matters to appellate judges, some of whom have had no experience as a trial judge. The risk of imposition of a nationally-developed model plan without any adjustments to suit the needs and resources of the individual district is also undesirable. Such an imposition could result in courts electing simply to ignore the model plan. S.2027 is vague as to the sanctions for noncompliance and it is not constitutionally clear what could be done to district courts that did not comply.

Under present regulations from the Administrative Office of the United States Courts, every district court must file reports listing motions which have been pending before a judge for longer than 60 or 90 days. The reports detail the type of motion and the reason for the delay. The Administrative Office also requires a report listing all cases pending for more than three years. Accelerating this requirement to a 30 day listing is unreasonable. In my opinion, it is unlikely that a judge who routinely has trouble meeting his or her 60-day list will be further motivated by a 30-day list requirement.

The thoughtful review and adjudication of a motion takes time. Should a judge rush decision on a complicated summary judgment motion on which work began 15 days into the 30-day period just to avoid the embarrassment or public ridicule of having the motion included on his 30-day, pending motions list? Alternatively, is it desirable for judges to give priority attention each month to the more complex motions so that, if time gets short, a perfunctory decision can be issued on the simpler motions submitted?

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

With regard to alternative dispute resolution programs, the Northern District of Georgia studied in 1984 the results of federally-funded pilot projects utilizing the mini-trial, summary trial, court-annexed arbitration, and mediation procedures which were conducted in district courts in Connecticut, Pennsylvania, and elsewhere. The Federal Judicial Center report analyzing these projects was critical of the success of the programs, and this court consequently deferred further consideration of the matter. In 1989, the court asked its attorney advisory panel whether the bar of the

Northern District of Georgia would like for this court to adopt a mandatory arbitration program similar to that being utilized in the state courts of Georgia. The advisory panel responded that the bar did not support adoption of such a program. Most district courts are probably not opposed to alternative means of dispute resolution provided the programs are proven effective before being generally implemented. The recommendations of S.2027 do not provide this assurance.

CONCLUSION

As the Federal Courts Study Committee concluded, "... to require highly specific case management plans for all federal districts would be unwarranted micro-management of the courts." The science of case management is a relatively new field. The districts in this nation vary greatly in such things as caseload, geography, and legitimate local preferences. Because of these factors, it is important that the districts retain considerable flexibility both to experiment with different procedures and then to adapt the management techniques and plans to their local conditions.

S.2027 is described by its proponents as assuring the active participation of the trial judge in the individualized management of each case. However, except for those cases assigned to the "complex" track, S.2027 shifts the primary locus of monitoring and management responsibility away from judges and toward staff.

Furthermore, it is unwise for Congress to end-run the existing, long-established rulemaking process, sanctioned by Congress, in which judges work closely with lawyers and scholars to generate extensive inputs from all interested parties regarding proposed rule changes. The Congressionally-created Federal Courts Study Committee is another good example of a consensus approach to achieving improvements in the judicial process. S.2027 represents a kind of legislative superimposition, particularly on Federal Rule of Civil Procedure 16, which imperils the vitality of the rulemaking process. Specifically, S.2027 dictates the content of Federal Rule 16, a rule that regulates only matters that clearly are procedural.

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

The suggestion in S.2027 that funds should be allocated to promote case management training programs for judges is a good one. Problems with unnecessary delay and expense may be aggravated by a judge's lack of formal training in case management. The expansion of current judicial education programs to include a new curriculum on management techniques would undoubtedly result in greater court efficiency.

In my opinion, S.2027 does not merit your support. Please do not hesitate to contact me if I can answer any questions or be of further assistance.

Sincerely,

Robert H. Hall

RHH/ma

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

May 3, 1990

Honorable Robert H. Hall
United States District Court
2188 United States Courthouse
75 Spring Street, S.W.
Atlanta, Georgia 30303

Dear Judge Hall:

Thank you for your letter of April 13, 1990, enclosing a copy of your excellent letter to Senator Nunn on S.2027 ("The Biden Bill").

So that you will be up-to-date with relation to the Biden Bill, I have enclosed a copy of the 14-Point Program on case management which was overwhelmingly adopted by the Judicial Conference last week.

Sincerely,

L. Ralph Mecham
Director

Enclosure