CENTER FOR JUSTICE DEMOCRACY
CJ&D
at NEW YORK LAW SCHOOL

IMPACT

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...news, views and reviews from the Center for Justice & Democracy

CENTER FOR JUSTICE & DEMOCRACY **NEWS**

Dear Friends,

It's finally spring! We're pretty happy about that. I know you are too.

This spring we wrap up our first full clinic year at New York Law School. Our students have worked on some exciting things! They have prepared written testimony for congressional hearings, submitted comments to federal agencies, prepared and distributed materials to congressional leaders and state legislators, worked with plaintiff firms and contributed to social media and blogs.

Their work has covered a wide range of issues, including: drug industry liability; arbitration and class actions; worker safety; nursing home abuse; emergency room negligence; asbestos; and so on.

In our clinic, students learn how to frame issues and gain valuable career skills in fields like research, writing, communication, and presentation. Their papers join CJ&D's list of national publications that are widely distributed to opinion leaders, public officials, journalists, and organizations across the country.

Our NYLS clinic is a great opportunity for students, and for us, too. We will miss our students, but we look forward to next year!

Sincerely,
Joanne Doroshow
Executive Director

IN THIS ISSUE: FEDERAL RULES

DANGEROUS CHANGES TO PRE-TRIAL DISCOVERY RULES

The Federal Rules of Civil Procedure (FRCP) govern how civil lawsuits are conducted in U.S. district courts – how cases are commenced, what types of pleadings are allowed, the timing and method of discovery, how trials are conducted, what remedies are available to injured parties and other procedural issues. These rules have the force and effect of law. Federal courts almost always use the FRCP as their rules of procedure; most states have adopted rules based on the FRCP.

The FRCP have undergone many changes since their inception over 75 years ago. Yet the pre-trial discovery revisions being proposed today by the Judicial Conference Advisory Committee on Civil Rules ("Advisory Committee") are unprecedented: they would significantly undermine the ability of injured victims to seek justice in civil court by making it easier for corporate wrongdoers to hide documents and other information that plaintiffs seek to help build their case. They also endanger the principles of fairness and equal access that are the bedrock of our civil justice system.

Take the suggested amendment to Rule 26(b), which would require judges to make scope-of-discovery rulings via a five-pronged proportionality test that places a severe burden on plaintiffs who often have limited resources. As Alliance for Justice (AFJ) wrote in a November 7, 2013 web

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THE SUPREME COURT IS DECIMATING VICTIMS' ACCESS TO JUSTICE

The Rules Enabling Act established a mechanism for changes to the Federal Rules of Civil Procedure: the federal judiciary prescribes amendments, which are then subject to Congressional review. More specifically, they must be analyzed by the Judicial Conference's Standing Committee, the Judicial Conference (the federal judiciary's principal policy-making body, which is chaired by the Chief Justice of the United States and includes the chief judge of each judicial circuit, the Chief Judge of the Court of International Trade and a district judge from each regional judicial circuit) and ultimately the U.S. Supreme Court. If the Supreme Court supports the revisions, they will become part of the FRCP unless Congress passes legislation to veto, amend or delay the pending rules. Congress has seven months to act after Supreme Court approval.

Unfortunately, the Supreme Court has opted to bypass this process and repeatedly used its decisions to reinterpret the Federal Rules in ways that make it much more difficult for victims to access justice through the civil courts. As Professor Arthur Miller told a U.S. Senate subcommittee on November 5, 2013, "[T]he last quarter century has seen a dramatic shift in the way the federal courts, especially the United States Supreme Court, have interpreted and applied the Federal Rules and decided a number of other procedural matters. This shift has led to the in-

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post, "Employees alleging sex discrimination, for example, might demand detailed information on salaries for male and female employees doing comparable work. The new rule would require plaintiffs to provide far more evidence that discovery requests are necessary – but, of course, that evidence often is in the documents the plaintiffs are trying to discover. The new rule also would upset decades of precedent and invite disputes over the meaning of the new language."

There are similar problems with language added to Rule 26(c), which would enable courts to allocate discovery expenses among the parties. In comments submitted to the Advisory Committee on March 1, 2013, Public Justice said, "The longstanding understanding that underlies the rules has been that the party in control of documents and information is in the best position to produce them. Shifting the expense to the requesting party, which has no control over the way the responding party chooses to maintain its information, facilitates discovery evasion and encourages producing parties to generate inflated estimates of the cost of making evidence available."

Proposed changes to Rules 30, 31, and 33 would also severely restrict the amount of information victims have access to before trial via depositions and interrogatories. As AFJ wrote in November 4, 2013 comments to two Judicial Conference committee chairs, the new amendments, if adopted, will "increase the difficulty plaintiffs face when pursuing litigation against powerful corporate defendants. Frequently in such circumstances, much of the evidence needed to prove the plaintiff's case is in the hands of the wrongdoer. By limiting discovery in such a restrictive manner, it is likely that more cases will be dismissed in the preliminary stages of litigation due to plaintiffs' inability to procure that necessary evidence to proceed to trial." The result, concluded AFJ, will be a "profound chilling effect on whether potential plaintiffs decide to bring these suits in the first instance because it is not economically practical to pursue a case with a high probability of being dismissed."

The suggested revision to Rule 36 would create yet another roadblock for victims who turn to the civil courts for accountability. The proposal sets a limit of 25 requests for admission, in other words, restricts plaintiffs' ability to settle basic facts, such as the specific date a product was purchased or an employee was fired, before trial. This is a major change since it imposes a limit where one currently does not exist, plus it replaces a low-cost method of discovery with a process that requires more time and expense on establishing facts during litigation, a process that would be especially burdensome to plaintiffs with limited resources.

All these proposed rule changes have been denounced by consumer and other public interest advocacy groups since the revisions were made public in August 2013. For example, Sherrilyn Ifill, President and Director-Counsel of the NAACP Legal Defense and Educational Fund, told a U.S. Senate subcommittee on November 5, 2013 that the amendments "will, if adopted, undermine the ability of many Americans, and especially plaintiffs in civil rights cases, to obtain relief through the federal courts." As Ifill explained, "The discovery process, which serves an important role in a vast array of civil litigation, is especially vital in civil rights actions. Plaintiffs in civil rights cases often are not, at the start of litigation, in possession of the information they need to fully substantiate their allegations, and so they rely extensively on the discovery process. In many civil rights cases, most, if not all, of the pertinent information required for proving discrimination is within the exclusive province of the defendant – through its agents, employees, records, and documents."

New York University Law Professor Arthur R. Miller, one of the nation's foremost experts on civil procedure, also testified at the Senate hearing. He said, "The current proposals limiting the availability of discovery that are the subject of this hearing should be seen as the latest impediment to citizen access to meaningful civil justice in our federal courts. … They reflect the significant turning away from the vision of the original Federal Rules of a relatively unfettered and self-executing discovery regime – a true commitment to 'equal access to all relevant data.'"

Two days after the Senate hearing, Alliance for Justice Director of Justice Programs, Michelle Schwartz, warned the Advisory Committee during a public hearing that "a number of the proposed amendments to the Federal Rules will only magnify the barriers that already exist for those seeking justice. In particular, we are concerned about changes to Rules 26(b), 30, 31, 33, and 36. By limiting discovery, these changes would

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DANGEROUS CHANGES TO PRE-TRIAL DISCOVERY RULES

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further serve to: discourage victims from going to court; discourage lawyers from taking victims' cases; and privilege parties with money and power." Schwartz added, "I have heard it suggested that these proposed amendments are 'minor' and would have little effect. That may be true in cases where the parties have equal power and resources, but where a victim with few resources is coming up against a powerful corporation, the impact will be anything but small."

In that same hearing, Daniel C. Hedlund, now President of the Committee to Support the Antitrust Laws (COSAL), testified that in complex antitrust cases, plaintiffs are "faced with substantial information asymmetry: defendants (and third parties) have the bulk of the relevant information regarding the market, the product, and the alleged conduct, while plaintiffs tend to be on the outside looking in at the outset of a case."

The U.S. Equal Employment Opportunity Commission (EEOC) echoed similar concerns in a January 9, 2014 public hearing. EEOC General Counsel David Lopez told the Advisory Committee, "[I]n cases involving individuals, in cases involving low-wage workers where there's a tremendous amount of discovery required, often to obtain fact witnesses within the control of the employer, we think that this will be a real burden."

The AARP Litigation Foundation (ALF) voiced fears about these rules in December 16, 2013 comments to the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee"). So did the Center for Justice & Democracy in February 4, 2014 comments. Legal scholars have also weighed in, with over 170 law professors endorsing comments submitted by six colleagues to the Standing Committee on February 5, 2014 that urged rejection of the proposed discovery limits.

The public comment period regarding the proposed amendments closed on February 15, 2014. The Standing Committee will now decide whether they should be tossed out, revised or passed on to the Judicial Conference for review. These discovery revisions should be rejected at the very least because there are no empirical data to justify them. What is evident, however, is that such amendments would cause widespread harm: they would prevent internal information about corporate wrongdoing from being disclosed to victims – who might be unable to build needed evidence to prove their case – and to the public, including

policy and advocacy groups, who might never learn core facts about corporate malfeasance and any related dangers to public health and safety.

As Professor Miller told the Senate subcommittee on November 5, 2013, "I don't think the current focus on gatekeeping, early termination, and posting procedural stop signs befits the American civil justice system. To me this is a myopic field of vision that completely fails to undertake a comprehensive exploration of other possibilities for dealing with assertions of 'cost,' 'abuse,' and 'extortion,' let alone even make an in depth evaluation of how real of these charges are. Our courts, rulemakers, and Congress should focus on how to make civil justice available to promote our public policies – by deterring those who would violate them and by providing efficient procedures to compensate those who have been damaged by their violation."

CONGRESS AND FEDERAL RULE 11

On November 14, 2013, the U.S. House of Representatives passed H.R. 2655, the so-called "Lawsuit Abuse Reduction Act" (LARA), to significantly change Rule 11, which currently gives judges the discretion to decide when to enforce sanctions against attorneys who file lawsuits without adequate pre-filing investigation or for improper purposes.

If enacted, the bill would: 1) mandate stiff penalties for lawyers who file suits with errors; 2) eliminate the possibility of canceling sanctions against parties and their attorneys if the filing is withdrawn in a timely manner; and 3) require judges to award monetary sanctions, including attorney fees and costs incurred by the other side, when the rule is violated.

As a coalition of national consumer groups, including CJ&D, wrote in a letter dated July 22, 2013 to U.S. House Judiciary Committee Chair Bob Goodlatte, "Rule 11 of the Federal Rules of Civil Procedure currently provides that judges may use their discretion to impose sanctions as a means to deter abuses in the signing of pleadings, motions, and other court papers. H.R. 2655 seeks to make major, substantive changes to Rule 11, forcing a return to earlier problems that were fixed in 1993 amendments to the Rule and bypassing both the Judicial Conference of the United States and the

U.S. Supreme Court in the process." The coalition concluded, "In times of an understaffed federal judiciary, Congress should be looking for ways to decrease, not increase wasteful burdens on the courts, and also should avoid rules changes that have a discriminatory impact on civil rights, employment, environmental and consumer cases."

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creasingly early termination of cases prior to trial often without any real consideration of the merits. This is the result of the judicial erection of a series of procedural stop signs. Indeed, civil trials, especially jury trials, are very few and far between."

Below are examples of recent U.S. Supreme Court decisions that have not only trampled the democratic rulemaking process established by the Rules Enabling Act but also undermined the FRCP, effectively closing the courthouse door to untold numbers of injured victims.

American Express Co. v. Italian Colors Restaurant (2013)

Here, the Court ruled that Federal Rule 23 does not create a non-waivable right to seek class certification when statutory rights have been violated. As Justice Kagan wrote in her dissent, "The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled. So the Court does not consider that Amex's agreement bars not just class actions, but 'other forms of cost-sharing . . . that could provide effective vindication.'"

Wal-Mart v. Dukes (2011)

The Court raised the standard for establishing class certification under Federal Rule 23, burdening plaintiffs with more discovery than was previously required. As of September 2013, according to *ProPublica*, "*The Dukes* decision has already been cited more than 1,200 times in rulings by federal and state courts, a figure seen by experts as remarkable. Jury verdicts have been overturned, settlements thrown out, and class actions rejected or decertified, in many instances undoing years of litigation. The rulings have come in every part of the country, in lawsuits involving all types of companies, including retailers (Family Dollar Stores), government contractors (Lockheed Martin Corp.), business-services providers (Cintas Corp.), and magazines (Hearst Corp.). The aftershocks have been felt in many kinds of lawsuits beyond the employment field, as well."

AT&T Mobility v. Concepcion (2011)

In this case, the Court said that companies have a unilateral right to ban class actions by inserting class action waivers into arbitration clauses in contracts, essentially allowing such provisions to replace the class action procedural strictures outlined in Federal Rule 23 as to size, scope and location of disputes. In a March 7, 2013 press release, Public Citizen reported that since *Concepcion* "more than 100 potential class actions have been dismissed and sent to arbitration… . This has happened even when the judge states that the cases may be best suited to proceed as class actions."

Ashcroft v. Iqbal (2009)

Here, the Court imposed a new "plausibility standard" on all civil pleadings that requires judges to use their own "judicial experience and common sense" in "[d]etermining whether a complaint states a plausible claim for relief…." This placed an even higher burden on what victims must initially show in order to avoid having their case tossed. "The Iqbal decision now requires plaintiffs to come forward with concrete facts at the outset, and it instructs lower court judges to dismiss lawsuits that strike them as implausible," explained the *New York Times* in a July 20, 2009 article. "In the new world, after Iqbal, a lawsuit has to satisfy a skeptical judicial gatekeeper," where "federal judges will now decide at the very start of a litigation whether the plaintiff's accusations ring true, and they will close the courthouse door if they do not." According to the *NYT*, judges cited *Iqbal* more than 500 times within two months of the decision. As Justice Ruth Bader Ginsburg told a group of federal judges in June 2009, "In my view, the Court's majority messed up the Federal Rules."

CONGRESS AND FEDERAL RULE 11 continued…

U.S. Representative John Conyers (D-Mich.) and his colleagues wrote a strong dissent in the October 30, 2013, U.S. House Judiciary Committee Report on LARA. Said Conyers, "H.R. 2655 is a reckless attempt to amend the rules directly, over the objections of the Judicial Conference. H.R. 2655 seeks to reinstate a rule that was widely recognized to have been a failure during the decade it was in place. The Judicial Conference, after years of careful consideration, research, experience, and public comment, adopted the current rule, which, by most accounts has been a success. By contrast, this bill is being rushed through with virtually no consideration. No hearings have been held in this Congress, and no in-depth research and public comment of the kind available to the Judicial Conference as part of its rulemaking has been sought or offered by the proponents of this legislation."

LARA's mandatory sanction regime clearly benefits corporate interests while inflicting further injury on those who have already been violated. As Conyers and his colleagues explained, "We oppose H.R. 2655 because a decade of past practice proves that it will have a disastrous impact on the administration of justice. Most notably, this misguided legislation will raise the amount, cost, and intensity of civil litigation and provide more grounds for unnecessary delay and harassment in the courtroom." Without question, Congress should not allow LARA to go any farther.