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Pro-Business and Anti-Efficiency: How Conservative Procedural "Innovations" Have Made Litigation Slower, More Expensive, and Less Efficient

J. Douglas Richards & Michael B. Eisenkraft [1]

As detailed in a recent popular book by Jacob Hacker & Paul Pierson, recent decades have brought to America a well-orchestrated political campaign to favor the economic interests of large corporations over those victimized by torts and other wrongful corporate acts.[2] Hallmarks of that campaign have included propagandistic messaging from the United States Chamber of Commerce and others about such supposedly widespread phenomena as "nuisance suits," "frivolous litigation," "class action abuse," "hydraulic pressure to settle," and the like.[3] The Chamber of Commerce has even gone so far as to release multiple movie trailers, for exhibition in connection with feature films, which consisted largely of propaganda about "costly and frivolous" lawsuits.[4]

Respected commentators who have scrutinized these claims about the litigation process have generally found them to possess little or no factual foundation. For example, Professor Arthur Miller observed "the picture generally portrayed is incomplete and is distorted by a lack of definition and empirical data regarding the alleged negative aspects of federal litigation. This generates rhetoric that often reflects ideology or economic self-interest, rather than reality."[5] Other academic observers have made similar observations.[6]

In fact, not only do these claims completely lack their own affirmative empirical foundation, but they are strongly contradicted by empirical studies that have actually been done. In particular, a 2009 study conducted by the Federal Judicial Center (FJC) found that median costs of discovery, including attorneys' fees, constituted only 1.6% of the reported stakes for

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[2] JACOB S. HACKER AND PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS, (2010).

[3] *See* J. Douglas Richards, *Heart of Darkness: A Satirical Commentary,* 66 NEW YORK UNIVERSITY ANNUAL SURVEY OF AMERICAN LAW, 569, 576 (2011).

[4] *See Id*. ("The Chamber of Commerce released four movie trailers, for exhibition in connection with feature films, which presented one-sided propaganda concerning allegedly 'costly and frivolous' lawsuits. Kimberly Atkins, *Now Playing at Your Local Theater: Tort Reform Videos!* D.C. DICTA (Apr. 29, 2009), http://lawyersusaonline.com/dcdicta/2009/04.").

[5] Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010).

[6] *See, e.g.,* Open Access to Courts Act of 2009: Hearing on H.R. 5115 Before the Subcomm. On Courts and Competition Policy, H. Comm. On the Judiciary, 111th Cong. (2009) (written testimony of Joshua P. Davis, Professor, Univ. of San Francisco Sch. Of Law) ("As far as I know—and I have a spent a considerable amount of time and effort researching the issue—there is no empirical evidence that plaintiffs often file and defendants often settle antitrust claims that have no significant merit.").

plaintiffs in civil litigation, and only 3.3% of the reported stakes for defendants. Recent commentary has pointed out these FJC findings are broadly consistent with decades of other empirical work.[7] In the face of this stark disconnect between available empirical evidence and the common rhetoric about litigation costs, it is difficult to quarrel with the conclusion of that commentary that, rather than reflecting realities in the courtroom, the "cost and delay" rhetoric that one so commonly encounters reflects only a self-serving propagandistic "narrative" driven primarily by the "structure of the legal profession and financial interests of routine corporate defendants."[8]

Although political groups that support corporate accountability through litigation have made some efforts, such as the film "Hot Coffee," to counter the effect of Chamber of Commerce propaganda, those groups have had vastly less funding, and vastly less influence over the public imagination, than those who have disseminated overheated rhetoric about litigation costs in the first place.

Analysis of recent *amici* submissions regarding *certiorari* petitions to the Supreme Court vividly illustrates this point. According to a recent study by Adam Chandler, the pro-business Chamber of Commerce was—by a wide margin—the largest filer of *amicus* briefs in support of granting *certoriari*.[9] They were not alone. According to the study, the list of top *amicus* filers is dominated by groups that are "pro-business and anti-regulatory groups," with those groups—including the Chamber of Commerce, the Cato Institute, the Washington Legal Foundation, the Voice of the Defense Bar, the National Association of Manufactures, the Pharmaceutical Research and Manufacturers of America, and more like them—making up over 75 percent of the top sixteen filers of *amicus* briefs.[10] Bottom line, according to the data, "as the Court shapes its docket, it hears conservative voices far more often than liberal ones, and the disparity is growing."[11]

As a result, overblown assertions are now routinely made about such supposed problems as "abusive lawsuits" and out-of-control legal expenses without any examples of real-world cases that exemplify the asserted "abuse," much less any form of substantiation for the claims about legal process made by the conservative forces If one searches pieces written by defense counsel that deal with this topic, there will be very little real-world substantiation of hyperbolic claims typically made about the scope of problems with litigation costs. The degree to which defense counsel tend to dominate the narrative in legal circles with overblown rhetoric about supposedly out-of-control legal costs in all likelihood reflects the reality that defense counsel in high-stakes litigation heavily outnumber plaintiffs' counsel and they align themselves with the interests of the corporate client base that they seek to cultivate as clients by propagating unsubstantiated rhetoric that might support the curtailment of access to the courts by plaintiffs in civil cases. Of

[7] *See* Danya Shocair Reda, The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions, 90 Oregon L. Rev. 1085 (2012).

[8] Id. at 1091.

[9] Adam Chandler, Cert-Stage Amicus "all stars": Where are they Now?," http://www.scotusblog.com/2013/04/cert-stage-amicus-all-stars-where-are-they-now/ (last visited May 4, 2013).

[10] *Id.*

[11] *Id.*

course, it is far more palatable for defense counsel to point the finger of blame for discovery costs at the rules of civil procedure than on their own litigation and billing practices.

One pernicious consequence of this one-sided public messaging has been to convince many conservative members of the judiciary that diverse procedural innovations are needed in order to counter the supposed runaway litigation costs and "lawsuit abuse." A recent article co-authored by noted conservative jurist and law and economics academic Richard A. Posner confirmed that the Supreme Court has become more business friendly, based upon a data-set of all 1759 Supreme Court decisions in the 1946 through 2011 Terms of Court in which a business entity was on one side of the case and in which a non-business entity expected to have an adverse view of business, such as a union or the government, was on the other.[12]

Specifically, the study found that the "Roberts Court is much friendlier to business than either the Burger or Rehnquist Courts, which preceded it."[13] Confirming these empirical results[14], Erwin Chemerinsky, a prominent constitutional law scholar and dean of the law school at the University of California, Irvine, recently observed that the "Roberts court is the most pro-business courts since the mid-1930's."[15]

To achieve innovations favorable to these influential business interests, conservative jurisprudence has introduced numerous procedural novelties to the litigation process. Because most of those innovations have been made on an *ad hoc* basis, however, they have often made civil litigation much more costly, often hugely duplicative, and sometimes seemingly interminable, thereby only compounding the problems of cost and delay that they often were ostensibly intended to solve.

A principal thrust of many of these conservative innovations has been to require increasingly rigorous and repetitive merits evaluations of civil cases at nearly every conceivable procedural stage. Thus, under some interpretations of the case law, courts are now required effectively to evaluate facts and evidence for the purpose of reaching conclusions about probable merits of cases on a motion to dismiss under Rule 12(b)(6), on motions for class certification, on *Daubert* motions, and again on summary judgment—before even reaching any trial.

While at each of these stages there remains more traditional case law indicating that full merits evaluation is not necessary, there is also a growing body of case law in each area that tends to suggest that the required merits evaluation at each stage must be highly intrusive and even "rigorous." For instance, in *In re Hydrogen Peroxide Antitrust Litig.*,[16] the Third Circuit arguably

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[12] Lee Epstein, William M. Landes, & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1450 (2013).5r

[13] *Id.* at 1471.

[14] The Posner study's estimation of the Roberts Court's pro-business tilt underestimates its severity by not factoring in the importance of cases. For instance, *AT&T Mobility LLC v. Concepcion*, 179 L. Ed. 2d 742 (2011) ("*Concepcion*"), which opened the door for corporations to evade class action lawsuits via arbitration agreements, is unquestionably one of the most momentous Roberts Court decisions. Under Posner's simple methodology, *Concepcion* would be cancelled out by any decision that cut against corporate interests, no matter how insignificant

[15] Adam Liptak, *Corporations Find a Friend in the Supreme Court,* N.Y. TIMES, May 4, 2013, http://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html?hpw&_r=0 (last visited, May 8, 2013).

[16] *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, (3d Cir. 2008).

took the novel position that determining whether a class should be certified calls for plaintiffs to resolve certain merits issues—which they would have to litigate *again* at trial:

> Because the decision whether to certify a class requires a thorough examination of the factual and legal allegations, the court's rigorous analysis may include a preliminary inquiry into the merits and the court may consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take. A contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact. Although the district court's findings for the purpose of class certification are conclusive on that topic, they do not bind the fact-finder on the merits.[17]

There has been scant recognition anywhere in the case law of the degree to which this repeated merits evaluation compounds the costs of the proceedings, in view of the need for attorneys, courts, and experts to prepare and analyze time-consuming briefs and expert reports again and again over and over with regard to essentially the same merits issues.

In candid moments, many members of the judiciary with experience managing complex cases acknowledge that such repetitive processes have greatly magnified judicial burdens on the trial courts. Even the most candid members of the judiciary will often be reticent, however, to recognize the resulting strong judicial temptation to find cases wanting at one or another of these repetitive stages, for the simple purpose of bringing hugely burdensome and repetitive proceedings to an end.

In part because such duplicative merits evaluation procedures make little practical sense, one consequence of these developments has been confusingly divergent judicial language about whether, and to what extent, actual evaluation of merits issues is appropriate. *Twombly* and *Iqbal* are leading examples of this phenomenon, since the opinions in both cases protest that their requirement of "plausibility" is not a probability requirement, even while simultaneously professing to find a lack of plausibility in the specific cases at hand in part based on posited "equally likely" explanations in a way that cannot reasonably be understood in any way other than a "probability" analysis.[18]

Similar internal contradiction is present in recent First Circuit jurisprudence concerning the "standing" of a plaintiff to bring claims on behalf of a putative class. Puzzlingly, the First Circuit held that "Rule 23 criteria can still be used as a required tool for shaping the scope of a class action without abandoning the notion that Article III creates some outer limit based on the incentives of the named plaintiffs to adequately litigate issues of importance to them."[19] In other words, a plaintiff's ability to represent a class may have to be determined twice—once on standing grounds at the motion to dismiss stage and again at class certification, apparently using largely duplicative legal standards.[20]

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[17] *Id.*, 317-318 (internal citations and quotation marks omitted).

[18] *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), ("The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."), quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

[19] *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 770 (1st Cir. 2011).

[20] *Id.*

The wide divergence of legal standards about the extent of required fact-finding, at every procedural stage, further compounds the cost and expense of the proceedings due to the lack of clarity about what is needed from the attorneys, in terms of the level of evidentiary detail of their presentations, as well as what is expected of the trial court. Because the attorneys' professional risk is greater if they mistake the necessary detail of the evidence, attorneys at every stage have a structural incentive to over-litigate merits issues at every stage, resulting both in increased expense, and in eventual acquiescence to a perceived requirement for oppressively detailed and repetitive fact-finding by the court.

Likewise, courts concerned about the record on an appeal have a corresponding incentive to engage in potentially unnecessary degrees of fact-finding, in order to inoculate their decisions against reversal by a panel that will apply an often unknown legal standard as to what type and degree of duplicative fact-finding was needed. As a result of these institutional incentives, procedural rulings that at one time might have been resolved quickly and inexpensively now frequently consume the months and even years that in earlier times were sufficient to dispose of an entire case, greatly multiplying the expense and delay that attends complex civil cases.

For the most part, the developments described above have occurred through *ad hoc* judicial decision-making, rather than by formal changes to the Federal Rules of Civil Procedure through the rulemaking process. One would hope that to the extent the Standing Committee on Federal Rules of Civil Procedure considers any similar procedural changes, it would do so only after carefully scrutinizing and evaluating the rhetoric about "lawsuit abuse" and the like that is offered to support such changes.

In particular, one would hope that the Standing Committee would heed the call of Professor Miller, that "if assumptions about litigation costs, judicial management, and abusive use of the system are driving pretrial process changes, the policymakers must strive to understand these matters fully and appraise what is real and what is illusion before the procedure is altered any further."[21]

Unfortunately, however, current indications suggest that such an effort is not being made. Specifically, the Standing Committee is currently in the process of considering possible sweeping revisions to Rule 26 based largely on rhetoric that has been presented to it without any substantial empirical or analytical basis. Specifically, the Standing Committee has relied on three pieces of literature that are essentially unsubstantiated corporate propaganda:

1. In a "study" called *Litigation Cost Survey of Major Companies*, the conservative Lawyers for Civil Justice, Civil Justice Reform Group, and U.S. Chamber Institute for Legal Reform presented their "findings" to the Committee on Rules of Practice and Procedure Judicial Conference of the United States at the 2010 Conference on Civil Litigation at Duke Law School (May 10-11, 2010) ("Duke Conference"). This study is made up of unverified, self-reported, and self-interested statistics provided by a small number of very large corporations in response to a survey

[21] Miller, *supra* note 5, at 54.

"developed by organizations whose member companies are concerned about the impact of litigation costs on their ability to compete in a global economy."

2. Similarly, a RAND study entitled *The Cost of Producing Electronic Documents in Civil Lawsuits: Can It Be Sharply Reduced Without Sacrificing Quality?* was based on information provided by "eight very large companies in diverse industries that were willing, with assurance of confidentiality, to provide information about their discovery expenses in 57 large-volume cases."

3. Finally, additional proposals are endorsed by the Microsoft Corporation in an August 31, 2011 letter to the Chair of the Advisory Committee on Civil Rules, based on its asserted experiences in litigation against it.

It is important to note that members of the Standing Committee on Civil Rules are appointed by Chief Justice John Roberts. In the Posner article referenced above, Chief Justice Roberts was identified as the second most pro-business justice since 1946.[22] It should not be surprising that Chief Justice Roberts' appointments to the Standing committee collectively reflect the pro-business stance of Justice Roberts, and accordingly give wide deference to assertions made by the Chamber of Commerce and other similar organizations. This makes it less likely that the rhetoric that is used to justify radical procedural innovations will be subjected to an appropriate degree of rational and empirical evaluation.

This problem is particularly disturbing given that the cornerstone of the changes currently being proposed in Rule 26—a requirement of so-called "proportionality" to justify any and all discovery that is permitted in civil cases—will expand even further the number of times courts are invited to evaluate the merits of cases in a repetitive fashion. In determining "proportionality," the currently proposed revisions to Rule 26 would require courts to consider several factors, including the "importance of the issues at stake in the action," and "whether the burden or expense of the propose discovery outweighs its likely benefit."

However, it is difficult to see how such questions of "importance" and "likely benefit" could be decided without adding still another fundamental procedural stage, early in a case, at which yet another determination will need to be made about likely merits of a case. Those questions will likely require briefing, possible expert testimony, and fact-finding by the courts for each of these issues, adding yet another hugely expensive and duplicative exercise to the existing repetitive and duplicative processes that are increasingly being required in nearly any substantial civil case. Moreover, as illustrated by the FJC study described above, in the vast majority of cases currently extant – discovery costs are in proportion to the amount at stake. If there are "outlier" cases where discovery costs outweigh the sum at stake in the lawsuit, that can and should be dealt with by the District Court in that individual case and not be dealt with through sweeping changes to the Federal Rules.

Ironically, it seems clear that the most straightforward way to reduce unnecessary burdens and costs of litigation would be to curtail or eliminate many of the business-friendly "reforms" and court decisions that have been imposed by the Roberts court and other

[22] The article gives the honor of being the most pro-business justice of the modern Court era to Justice Roberts' colleague, Justice Alito. *See* Epstein, Landes & Posner, *supra* note 10, at 1450.

conservative jurists, and return civil litigation more toward its traditional model, in which initial procedures were intended to deal only with relatively simple, procedural questions, and the entire process was essentially designed to prepare merits issues for resolution either on a motion for summary judgment or at trial.

Contrary to widely propagated but fictitious notions, unlike many corporate defendants and most corporate defense counsel, plaintiffs generally want to get their case before a fact-finder as quickly and inexpensively as possible. Helping them attain this end without repetitive prior evaluations of a case's merits would promote judicial efficiency and reduce litigation expenses for all parties as well as for the courts.