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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: Legislative Report

Eleven bills were introduced in the 109th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Class Action

On February 18, 2005, the President signed the "Class Action Fairness Act of 2005" (Pub. L. No. 109-2). The legislation, which is virtually identical to a compromise class action bill considered in the last Congress, amends 28 U.S.C. § 1332 and gives federal district courts original jurisdiction over class action lawsuits based on minimal diversity of citizenship where the amount in controversy exceeds $5 million. (Jurisdiction, however, does not extend to class actions if: (1) the "primary" defendants are States, state officials, or other government entities; or (2) the number of members in the plaintiff classes is fewer than 100.) Key provisions of the legislation include:

• **Considerations for Declining Federal Jurisdiction.** The new law provides that a federal court may decline to exercise jurisdiction over a class action if more than one-third but fewer than two-thirds of the members of the plaintiff classes in the aggregate and the primary defendants are citizens of the same state in which the action was originally filed. Under the Act, a court may decline to exercise jurisdiction based on six factors, including whether: (1) the claims asserted involve matters of national or interstate interest; (2) the law of the state where the action was filed governs; (3) the class complaint was pleaded in a way to avoid federal jurisdiction; (4) the class action was brought in a forum with sufficient nexus with the plaintiff class members, the alleged harm, or the defendants; and (5) during the three-year period preceding the filing of the class action, one or more class actions asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

• **Additional Grounds When Federal Jurisdiction Cannot be Exercised.** The Act also prescribes additional grounds when a federal court cannot exercise jurisdiction over a class action, including when: (1) more than two-thirds of the members of all proposed

plaintiff classes in the aggregate are citizens of the state in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

• **Multi-District Litigation Provisions.** The Act also provides that any "mass action" removed to federal court cannot be transferred to any other court pursuant to 28 U.S.C. § 1407, unless a majority of plaintiffs request the transfer.

• **Removal of Class Actions.** The Act creates a new section 1453 governing removal of class actions. Under the new section, a court of appeals may consider an appeal from a district court's remand order if a party files an application within 7 days of the order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal is filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

• **Reports on Class Action Settlements**. The Act directs the Judicial Conference—with the assistance of the Federal Judicial Center and the Administrative Office—to prepare and transmit to the House and Senate Judiciary Committees reports recommending the best practices that courts can use to ensure: (1) fair settlements; (2) appropriate awards of attorneys' fees; and (3) class members are the primary beneficiaries of settlements.

Bankruptcy

On April 20, 2005, President Bush signed the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Pub. L. No. 109-8). The Act, which is substantially similar to bills introduced in previous Congresses, revises major portions of the Bankruptcy Code, amends directly a number of Bankruptcy Rules, and requires extensive amendments to the Bankruptcy Rules and Official Forms. The Act, with some exceptions, will take effect on October 17, 2005. Because the legislation will become effective before proposed amendments can be adopted under the normal rulemaking process, the Bankruptcy Rules Committee plans to submit to the Standing Committee for approval by the Judicial Conference proposed interim rules and forms, which address matters requiring immediate attention. Interim rules and forms will be transmitted to the courts before October 2005 with a recommendation that they be adopted.

The Bankruptcy Rules Committee also intends to consider permanent amendments to the Bankruptcy Rules and Official Forms. Any proposed amendments will be published for public comment. At the end of the comment period, the Bankruptcy Rules Committee will have had the

experience of the courts with the interim rules and forms and public comments to inform its decision-making before it recommends permanent amendments to the Bankruptcy Rules and Official Forms.

The Bankruptcy Rules Business Issues, Consumer Issues, and Forms Subcommittees met in May 2005 and will meet again immediately preceding the Standing Committee meeting next month. The bankruptcy subcommittees have also held numerous telephone conferences. The full advisory committee is scheduled to meet in August and September 2005.

Civil Rule 11

On January 26, 2005, Representative Lamar Smith introduced the "Lawsuit Abuse Reduction Act of 2005" (H.R. 420, 109th Cong., 1st Sess.). The legislation is similar to an earlier bill introduced in the last Congress and passed by the House of Representatives in September 2004 by a vote of 229-174. (H.R. 4571, 108th Cong., 2nd Sess.). H.R. 420 would: (1) reinstate sanction provisions deleted in 1993 from Civil Rule 11; (2) amend Rule 11 to require a court to impose sanctions for every violation of the rule; (3) apply amended Rule 11 to state cases affecting interstate commerce; and (4) alter the venue standards for filing tort actions in state and federal court.

At the request of the Civil Rules Committee, the Federal Judicial Center conducted a survey of 400 district court judges on Civil Rule 11 and H.R. 4571. Seventy percent of the judges surveyed responded. Of the judges who responded, 87 percent preferred the current version of Rule 11, 5 percent preferred the version of the rule in effect between 1983-1993, and 4 percent preferred the rule version as proposed by the legislation. (The survey is available on the Federal Rulemaking web site at <www.uscourts.gov/rules/newrules10.html>.) On May 17, 2005, Director Mecham sent letters, which enclosed the FJC report, to Chairman James Sensenbrenner and Chairman Arlen Specter, urging them to oppose H.R. 420. (See attached.)

In February 2005, Judge Lee Rosenthal met with Senator John Cornyn—a member of the Senate Judiciary Committee—and committee staffers to brief them on the issues and express opposition to H.R. 420. Also in February 2005, the House of Delegates of the American Bar Association adopted a resolution opposing H.R. 4571 or other similar legislation, supporting the current version of Civil Rule 11, and reaffirming its support for the Rules Enabling Act process. (See attached.) On May 25, 2005, the House Judiciary Committee marked up and favorably reported the bill.

Hearsay Exception

On March 14, 2005, Representative Randy Forbes introduced the "Gang Deterrence and Community Protection Act of 2005" (H.R. 1279, 109th Cong., 1st Sess.). Senator Dianne Feinstein introduced similar legislation—*Gang Prevention and Effective Deterrence Act of* 2005—on January 25, 2005 (S. 155, 109th Cong., 1st Sess.). H.R. 1279 expands federal jurisdiction over juvenile cases. It also would amend Evidence Rule 804(b)(6) by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000). In *Cherry*, the court held that statements made by a murdered witness may be admissible against the defendant who caused the unavailability of the witness and any co-defendant under the following circumstances: (1) the co-defendant participated directly in planning or procuring the declarant's unavailability; or (2) the declarant's unavailability was in furtherance, within the scope, and reasonably foreseeable as a necessary or natural consequence of an ongoing conspiracy. The House passed the bill on May 11, 2005, by a vote of 279-144. There has been no further action on the legislation.

Other Developments of Interest

Asbestos. On April 19, 2005, Senator Specter introduced the "Fairness in Asbestos Injury Resolution Act of 2005" (S. 852, 109th Cong., 1st Sess.). The bill—which builds on the legislation introduced in the last Congress—creates a no-fault trust fund that compensates individuals for asbestos-related injuries. The bill also establishes medical criteria, creates procedures for filing claims, provides for the solvency of the trust fund, and establishes the Office of Asbestos Disease Compensation, which will be headed by an administrator responsible for processing claims for compensation and managing the trust fund. The legislation also provides that a claimant may petition for judicial review of the administrator's decision awarding or denying compensation under the Act. (A petition for review must be filed in the circuit court where the claimant resided at the time the final order was issued. The circuit court must review any petition on an expedited basis.)

The legislation raises a number of concerns regarding the amount of the trust fund and the amount each stakeholder would be required to contribute to the fund, eligibility of claims, and steps necessary to keep the trust fund solvent. At the request of Senator Specter, Judge Edward R. Becker held numerous meetings with representatives from Congress, defendant companies, labor organizations, claimants' attorneys, and insurance companies in an attempt to broker a compromise.

In April and May 2005, the Senate Judiciary Committee held mark-up sessions on the bill. There has been no further action on the legislation.

Multi-District Litigation. On March 2, 2005, Representative Sensenbrenner introduced the "Multidistrict Litigation Restoration Act of 2005" (H.R. 1038, 109th Cong., 1st Sess.). The legislation—which is identical to a bill that passed the House of Representatives by a vote of 418-0 but was not acted upon by the Senate before the 108th Congress adjourned—passed the

House by voice vote on March 9, 2005. The legislation would amend 28 U.S.C. § 1407 to allow a judge with a transferred case in a multi-district litigation proceeding to retain it for trial or transfer it to another district in the interests of justice.

The bill is intended to fill a gap in the statute identified by the Supreme Court in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), which held that statutory authority did not exist for a district judge conducting pretrial proceedings to transfer a case to itself for trial.

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Attachments