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# Spencer: Chief Justice John Roberts and the Loss of Access to Justice

*A. Benjamin Spencer*

Devotees of federal judicial procedure were pleased to find that U.S. Supreme Court Chief Justice John G. Roberts committed the entirety of his 2015 Year-End Report on the Federal Judiciary to procedure in the federal courts. It may sound like an arcane topic, but civil cases are the most common kind of case heard by federal courts, and civil procedure offers a set of rules to help ensure fairness for people seeking justice in response to corporate wrongdoing, among other matters. Unfortunately — but, alas, not surprisingly — the chief justice’s musings only confirmed that the liberal ethos that once animated our unique approach to federal civil litigation has been soundly put to rest.

In December, after approval by the Supreme Court and congressional acquiescence, new amendments to the rules that govern procedure for private litigation in the federal courts took effect, the result of a five-year effort by the Judicial Conference of the United States to overhaul federal litigation. In his report, Roberts praised the changes, which were aimed at curtailing the expense and delay often thought to accompany federal litigation. The amendments, report the chief justice, require litigants to “work together, and with the court, to achieve prompt and efficient resolutions of disputes” and impose “reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.” Now, writes Roberts, “lawyers must size and shape their discovery requests to the requisites of a case” and be limited to “what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery.”

Along with changes sharply curtailing the ability of courts to impose sanctions for the loss of certain discoverable material and the elimination of forms that guided litigants on how to state their claims in compliance with the rules, the chief justice concludes, “The 2015 civil rules amendments are a major stride toward a better federal court system.”

Cooperation. Proportionality. Curtailing expense and delay. Eliminating unnecessary and wasteful discovery. Who could disagree with reforms that pursue such laudable goals?

But that’s what is deceiving about this latest move to reshape federal litigation procedure and similar efforts that preceded it. Those responsible for reforming such procedure over the past 40 or so years have been masters at employing neutral-sounding principles in service of rules that in truth restrict the ability of the injured and the wronged from accessing courts to vindicate their legal rights.

The purpose of discovery in litigation is for the parties to exchange information that could assist each side in making their case. Typically, in David versus Goliath situations, the defendant is the party with most if not all of the significant information to be discovered. Preserving, reviewing and producing such information can be costly and time-consuming for large corporations and — even worse — can

reveal evidence of liability. Corporate defendants have thus complained to their legislative representatives and to those in command of the federal civil rulemaking process that the rules must be changed to protect them against such discovery.

So Roberts and the committee of judges and lawyers that craft the rules have obliged. Now, discovery will be narrower in scope than before. Pesky document requests that defendants believe are too expensive to be justified can be rebuffed. And if defendants happen to “accidentally” or even recklessly lose documents that would have helped plaintiffs prove their claims, the rules will now shield them from any meaningful consequences. That is the import of the most recent amendments the chief justice praises.

These changes are in line with a long string of moves by the rulemakers and the Supreme Court to restrict access to justice — whether it be limiting the power of class action lawsuits, enforcing arbitration agreements that make claims unenforceable, or raising the bar for what information plaintiffs must present in order to initiate a claim in federal court.

The consequence of these and other similar reforms is not more fairness but less enforcement of important legal rules that govern the conduct of corporations and others in our society. We rely on private enforcement to deter and remedy corporate violations of consumer protection, products liability, securities, anti-discrimination and other laws. But this enforcement is becoming increasingly untenable as the Supreme Court and rulemakers persist in erecting barriers to initiating and maintaining a viable lawsuit in federal court.

The great Chief Justice John Marshall said it rightly when he wrote, “The very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection.” Roberts and those supporting these and prior reforms of this ilk should ask themselves whether these changes are truly making our federal judicial system one that lives up to Marshall’s standard.

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