

NOTE

DELAWARE'S RESPONSE TO INEFFICIENT, COSTLY COURT SYSTEMS AND A COMPARISON TO FEDERAL REFORM

I. INTRODUCTION

"[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."¹

- Judge Learned Hand

As evidenced by the above quote, Judge Learned Hand noted the inadequacies of the American legal system as early as 1921.² Over the past several decades, two issues troubling the legal system have been identified: cost and delay.³ The problem of judicial inefficiency has prompted legislation on the federal and state levels,⁴ including statutory reform in Delaware designed to expedite commercial litigation in superior court.⁵

¹Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform*, 57 *FORDHAM L. REV.* 253, 255 (1988) (quoting Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 *LECTURES ON LEGAL TOPICS* 87, 105 (Ass'n of the Bar of the City of New York 1926)).

²*Id.*

³"In many courts, litigants must wait for years to resolve their disputes. . . . In short, civil litigation costs too much and takes too long." JUSTICE FOR ALL, REDUCING COSTS AND DELAY IN CIVIL LITIGATION, REPORT OF A TASK FORCE 1 (1989) [hereinafter *BROOKINGS*]. "The mandate of the Commission is to propose legislation for the Governor's review which addresses the 'litigation crisis' The crisis has been fueled, in part, by long civil trial delays and extraordinarily expensive discovery costs." COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, REPORT TO THE GOVERNOR 1 (1994). "One such belief is that the amount of time procedures take to provide substantive justice affects our perception of the quality of justice." Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 *FORDHAM L. REV.* 833, 834 (1994).

⁴See Judicial Improvements Act of 1990, Pub. L. No. 101-650, §§ 101-105, 104 Stat. 5089, 5089-137 (1990) (including Civil Justice Reform Act as well as other reforms in the federal court system); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089, 5089-98 (1990) (codified in 28 U.S.C. §§ 471-482 (1994)) (manifesting Congressional recognition of the deleterious impact of cost and delay in the federal district courts). The CJRA comprises title I of the Judicial Improvements Act of 1990. See *id.*

⁵The Delaware Summary Proceedings Act, Administrative Directive No. 96, 1994, Supreme Court of Delaware (codified in DEL. SUPER. CT. R. 124-31).

In order to deal with these problems on the national level, the United States Congress, in 1990, passed the Civil Justice Reform Act (CJRA).⁶ Congress developed these reforms in response to the same problems plaguing most jurisdictions: increased costs and delay.⁷ In 1989, Senator Joseph Biden of Delaware prompted the Brookings Institute to publish recommendations for the alleviation of delay and high costs in the federal courts.⁸ These recommendations were used to develop legislation which was introduced in the United States Senate as the CJRA.⁹

To address these same problems on the state level, the Delaware Summary Proceedings Act (DSPA), referred to as "Summary Proceedings," was the product of the Delaware Commission on Major Commercial Litigation Reform.¹⁰ The DSPA was formally passed by the State General Assembly in 1994 and focuses on expediting business and commercial litigation.¹¹

This note will discuss the CJRA and its components. It will continue by then describing the new Delaware Summary Procedures Act and the reasons for its development in the context of Delaware corporate law. A comparison will follow of the DSPA and the CJRA. Finally, the note will analyze the feasibility of the DSPA and question its effectiveness as a solution to the problems now facing Delaware Superior Court.

II. THE PROBLEMS OF COST AND DELAY

Litigants have consistently complained about the length of civil lawsuits and the inefficiencies of the American legal system.¹² Protracted

⁶Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102, 104 Stat. 5089 (1990) (codified in 28 U.S.C. §§ 471-482 (1994)).

⁷Johnston, *supra* note 3, at 839. In the Brookings task force report, "[t]he majority of the recommendations concerned changes in procedure, i.e., steps that courts and judges could take to reduce cost and delay in civil litigation." *Id.* (footnote omitted).

⁸*Id.* at 837.

⁹*Id.* at 839. "Less than six months after the Brookings task force issued its report, Senator Biden introduced his initial version of the CJRA in the Senate on January 25, 1990." *Id.*

¹⁰The Commission was established by Executive Order No. 7, and signed by Governor Thomas R. Carper on May 20, 1993.

¹¹S. Res. 28, 137th Gen. Assembly (1994). The DSPA was subsequently adopted by the Delaware judiciary. See Interim Rules Governing Actions Subject to Summary Proceedings for Commercial Disputes, DEL. SUPER. CT. R. 124-31 (1995).

¹²BROOKINGS, *supra* note 3, at 1.

litigation is detrimental to the parties involved.¹³ Yet, it is not uncommon for a suit to be settled several years after the disputed event.¹⁴ Furthermore, justice may be sacrificed as the period of time for the completion of a lawsuit increases. While contrary to principles of fundamental fairness, parties may experience a significant financial burden years before the litigation is resolved.¹⁵ In addition, cases may weaken with time because witnesses may die or memories may fade over time.¹⁶ Litigants who have experienced this delay are often forced to settle for a lesser sum than they would have had the trial taken place sooner.¹⁷ Consequently, it is of paramount importance to have timely and efficient trials.

Costs are also a problem within the court system.¹⁸ Often the expense of a trial can keep those with only modest resources out of the courtroom.¹⁹ The extreme cost of litigation is largely due to the discovery process.²⁰ Discovery can be used strategically to disable adversaries.²¹ When the Federal Rules of Civil Procedure were amended in 1980, Justice Powell commented on the adverse effects of the discovery process:

[A]ll too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay

¹³Kaufman, *supra* note 1, at 255. "The primary impact of the expense and delay in private civil litigation is felt by the blameless defendant or plaintiff." *Id.*

¹⁴BROOKINGS, *supra* note 3, at 1.

¹⁵Kaufman, *supra* note 1, at 256. "[C]ompensation is deferred far past the time when the injured plaintiff was plagued by medical and other expenses and most urgently needed the money." *Id.*

¹⁶Faye Riva Cohen, *Advantages of Alternative Dispute Resolution*, THE LEGAL INTELLIGENCER, Feb. 3, 1993, at 4. "[W]ith a standard wait of five to seven years, plaintiffs or their witnesses can die or disappear or have their memories impaired by age, disease or passage of time." *Id.* See, e.g., Kaufman, *supra* note 1, at 256.

¹⁷BROOKINGS, *supra* note 3, at 5-6.

¹⁸"In short, civil litigation costs too much. . . . The high costs of litigation burden everyone." *Id.* at 1. "The sheer monetary cost of seeking judicial relief may well be the greatest barrier to court access." Kaufman, *supra* note 1, at 255.

¹⁹See Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1 (1992) (recognizing the disparate impact of discovery expenses).

²⁰BROOKINGS, *supra* note 3, at 1. "Much of the expense may be attributed to liberalized discovery under the Federal Rules of Civil Procedure." Kaufman, *supra* note 1, at 255. The author then relates an anecdote from the Second Circuit where one case ended up having over 1,200 depositions with more than 150,000 pages of transcript. *Id.*

²¹Kaufman, *supra* note 1, at 255.

or unbearable expense denies justice to many actual or prospective litigants. . . . [T]he discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.²²

The strain of high costs and lengthy litigation is taxing on corporations. The Brookings task force found that money spent on lawsuits hampers the ability of companies to develop better products and offer better services to the public at a lower cost.²³ In addition, members of the legal profession recognize the necessity for reform in the civil justice system.²⁴ This information leads to the fundamental conclusion that the American court system is slow and expensive. Ultimately, however, individuals and corporations will bear this burden equally.

²²Amendments to Federal Rules of Civil Procedure, 446 U.S. 995, 1000-01 (1980) (Powell, J., dissenting).

²³BROOKINGS, *supra* note 3, at 5. The report finds that spending excessive amounts on litigation necessarily exhausts profits. *Id.* Other adverse effects include distraction of corporate officials away from their managerial duties in order to spend time on the litigation. *Id.*

²⁴Louis Harris and Associates was commissioned by the Foundation for Change to survey civil litigators on the problems of cost and delay. Robert E. Litan, *Speeding Up Civil Justice*, 73 JUDICATURE 162 (1989). The survey was conducted in 1988 and involved over 1000 participants. *Id.* The study made conclusions on several issues. First, corporate counsel and federal judges think the cost of litigation has increased "greatly" in recent years. *Id.* Second, an ordinary citizen's access to the judicial system is most likely hindered by these high costs. *Id.* Third, the most important cause of high costs is abuse of the discovery process by attorneys. *Id.* Finally, most of the participants agree that there needs to be more judicial control over the discovery process. *Id.*

This survey has been criticized by commentators. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1410-13 (1994). Professor Mullenix argued:

Although the Harris survey purports to contain important statistical information about the perceived problems in the administration of civil justice, in the end it represents nothing more than soft social science—an exceedingly inadequate foundation on which to base reform of the entire system of federal civil procedure. A close examination of the Harris survey demonstrates why it provided such a poor basis for every subsequent civil justice reform initiative.

Id. at 1412. The Brookings report is also criticized because it was based on the Louis Harris survey. *Id.* at 1415-16.

A. Delaware's Unique Dilemma

Delaware is well known as a corporate haven,²⁵ and it has been successful in attracting businesses for many reasons. Two notable reasons are the Delaware Court of Chancery and the knowledgeable members of the Delaware judiciary.²⁶ Delaware also has a financial interest in companies incorporating within its borders because of lucrative franchise taxes.²⁷ Therefore, Delaware has a vested interest in keeping present corporations in the state and in continuing to attract new ones.

B. Alternative Dispute Resolution: A Remedy for Cost and Delay

In response to the obstacles of high cost and delay, a trend has recently developed for corporations to seek alternative methods to resolve disputes.²⁸ Corporate executives have stated that the length and costs of

²⁵See S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976). "The present position of Delaware's General Corporation Law as the most popular of such laws in the United States is attributable to many factors, some of which have their roots in the distant past." *Id.* (footnote omitted). "[I]n July 1967, Delaware was signing up new corporations at an average of about 300 a month. . . . [Delaware is now] chartering new corporations at a record rate of 800 a month." Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 890-91 (1969) (quoting N.Y. TIMES, Jan. 12, 1969, § 1 (News), at 57, col. 1).

As evidence of Delaware's success in this regard, almost 60% of the Fortune 500 companies are incorporated in Delaware, and one-half of the 30 Dow Jones Industrial Average corporations are Delaware corporations. COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 2. There are close to 215,000 total corporations incorporated in Delaware; the equivalent of almost one corporation in the state for every three residents in the state. *Id.* at 1.

²⁶See Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 283-85 (1976). Professor Seligman states that the success lies "not [in] her statute alone, but rather [in] the manner in which her judiciary interprets it." *Id.* at 284. Professor Cary suggested that the only public policy left in Delaware was the "objective of raising revenue." William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 684 (1974). Cary also noted that judicial decisions seem to have been handed down with the motive of creating a "favorable climate" for corporations. *Id.* at 670.

²⁷COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 2. "The annual Delaware corporate franchise tax paid by these corporations accounts for more than \$255 million or 22% of the State's annual revenues." *Id.*

²⁸Paul L. Friedman, *Alternative Dispute Resolution*, WASH. LAW., Jan.-Feb. 1987, at 4. "What started ten years ago . . . has more recently become a national movement . . ." *Id.* "[T]he Alternative Dispute Resolution system . . . is being performed by 600 services . . . nationwide." Faye Riva Cohen, *Alternative Dispute Resolution — A Legal Utopia*, LEGAL INTELLIGENCER, Feb. 2, 1993, at 8. "While ADR is not without its detractors, the trend will be toward more, not less, ADR in our courts." Shelby F. Grubbs, *A Brief Survey of Court*

litigation in America are undermining business' ability to compete worldwide.²⁹

To deal with the debilitating problems in the legal system, many companies are turning to alternative dispute resolution (ADR).³⁰ ADR has several characteristics which are favorable to corporations. First, ADR generally provides a quicker method for resolving disputes than traditional litigation.³¹ Consequently, this reduces costs.³² Second, ADR reduces the uncertainty of litigation³³ because ADR removes unpredictable

Annexed ADR: Where We Are and Where We Are Going, TENN. B.J., Jan./Feb. 1994, at 20, 25 (footnote omitted). "Businesses and insurance carriers are increasingly seeking to reduce the costs of civil litigation." Cohen, *supra* note 16, at 4.

²⁹Cohen, *supra* note 16, at 21.

³⁰Alternative Dispute Resolution is a "variety of methods that can be used to resolve disputes more quickly and less expensively than through traditional courtroom litigation." Friedman, *supra* note 28, at 4.

Imagine a legal system where lawsuits are resolved within eight weeks . . . ; where legal costs are fixed and average approximately \$2,000 per case; where litigants choose the procedural form the proceedings will take; where litigants select the judges deciding their cases; and where the verdicts are final and binding. . . . This . . . currently exists nationwide and is known as Alternative Dispute Resolution.

Cohen, *supra* note 28, at 8. "There are three ADR options available. They are (1) structured settlement negotiations, (2) mediation, and (3) arbitration." Isaac D. Benkin, *Alternative Dispute Resolution*, ELEC. WORLD, July 1993, at 9, 12. Structured negotiation clauses are commonly used because they set ground rules for negotiations in advance. *Id.* at 12. "A structured negotiations clause may specify when the negotiations take place, how many sessions must be held before an impasse is declared, who must attend the sessions, and what information the parties will exchange in advance." *Id.* "In the mediation process, parties work with a third-party neutral mediator to resolve their differences, but agreement on the outcome is voluntary." *Id.* "Unlike mediation, arbitration imposes a resolution on the parties involved — whether or not [sic] they like it. An arbitrator listens to informal presentations from each side and then announces an award that is enforced by the courts . . ." *Id.* at 12.

³¹See Benkin, *supra* note 30, at 9. "ADR is usually completed in six months or less, even in the most complex cases." *Id.* Courtroom litigation, on the other hand, can go on for many years and amass huge legal fees.

³²*Id.* "[ADR] produces a speedier and, therefore, less expensive, resolution to a controversy." *Id.* "[A]lternative dispute resolution proceedings have proliferated as less costly and faster alternatives to litigating in our courts." COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 3. "Although there is, as yet, little empirical data demonstrating that ADR does, in fact, result in speedier, more expeditious, and less expensive resolution of civil disputes, there is no question that the public, and particularly the business community, thinks it does." Grubbs, *supra* note 28, at 25 (footnote omitted).

³³Ellen Joan Pollock, *Mediation Firms Alter the Legal Landscape*, WALL ST. J., Mar. 22, 1993, at B1. "Imagine a legal system in which companies could put their disputes before judges of their choice, get speedy decisions, avoid the uncertainty of jury verdicts and keep legal bills to a minimum." *Id.*

and hostile juries from the process.³⁴

A third advantage of ADR is confidentiality.³⁵ A business may not want its competitors or customers to know that it is involved in a legal dispute,³⁶ given the potential damage to its reputation.

A fourth benefit of ADR is that its use reduces the burden on both attorneys and judges.³⁷ Moreover, crowded court dockets may experience a reduction,³⁸ because ADR takes cases which would have been litigated in court, and removes them from the court system.

Another advantage of ADR is that business relations are more likely to be maintained.³⁹ During a lawsuit, a corporation may experience an erosion in its business associations.⁴⁰ Through the use of ADR, however, businesses are more likely to remain friendly, because the two sides will be devoted to finding a mutually agreeable result.⁴¹ To that end, hostility is held to a minimum and business relationships are preserved.⁴²

³⁴COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 2. "American business is increasingly turning to private alternatives in order to cope with . . . runaway juries hostile to business" *Id.* "Interest in ADR generally stems from dissatisfaction with the judicial system. . . . [Litigants] are disenchanted with runaway jury verdicts and the uneven quality of justice offered by the courts." Stephen P. Younger, *Structuring ADR Proceedings*, 210 N.Y. L.J. 1 (1993).

³⁵Cohen, *supra* note 16, at 4. "[Corporations] also appreciate the privacy and confidentiality factors since most businesses do not want their competitors, customers, suppliers or franchisers to know about their lawsuits." *Id.*

³⁶*Id.*

³⁷*Id.* "ADR can reduce [the] burden [of a heavy caseload], enabling defense attorneys to devote quality time to their larger cases." *Id.* "Plaintiffs' lawyers increasingly appreciate ADR because it allows them to serve their clients more effectively by producing a quicker resolution to the problem without adding extra expenses." *Id.* "Courts realize they need help and are in favor of mediation because it reduces their potential workload." *Id.*

³⁸*Id.* "The court system in most jurisdictions is severely overburdened, resulting in prohibitive costs to process a claim, both in time and money." *Id.* In one jurisdiction, "[t]he civil case backlog is approximately 27,000 cases. . . . Multiply this situation by other court systems in the country and the problem becomes obvious — larger backlogs are clogging the court system." Cohen, *supra* note 28, at 8.

³⁹Cohen, *supra* note 16, at 4. "[ADR] also can preserve business relationships which a more traditional form of suit can destroy." *Id.*

⁴⁰*Id.*

⁴¹Benkin, *supra* note 30, at 10. "Ongoing business relationships between the participants are more likely to remain on a friendly basis after going through the ADR process than would be the case if those same parties had spent the time suing each other in a court, or litigating before an administrative agency." *Id.*

⁴²Pollock, *supra* note 33, at B2.

One final advantage of ADR is its ease of use. ADR is easy to use because corporate litigation usually involves issues and principles which are based on objective standards.⁴³

ADR can be successful if three qualifications are met. First, both sides must be committed to settling the conflict.⁴⁴ Where the parties have voluntarily committed themselves to the process, a willingness to resolve the dispute is intimated. Second, the parties must believe information has been exchanged in good faith during the discovery process.⁴⁵ ADR will not work if one side believes they were either given insufficient information or dealt with unfairly. Finally, the mediator must command complete respect from both sides.⁴⁶ If this is not achieved, a resolution will be impossible because one side is not likely to seriously consider offers by the other side. When these three conditions are satisfied, the potential for savings is unlimited.⁴⁷

III. CIVIL JUSTICE REFORM ACT OF 1990

Several years prior to Delaware's enactment of the DSPA, the United States Congress attempted to address and rectify the problems of cost and delay in the federal court system. With that goal in mind, Congress commissioned a study by the Brookings Institute to investigate and analyze the problem.⁴⁸ The Brookings Institute arrived at the same conclusion as many other groups and scholars, namely that the costs and delays in the federal court system were far too great.⁴⁹ Based on the

⁴³The Honorable Bruce M. Van Sickle, *Open Letter*, 70 N.D. L. REV. 227, 227 (1994).

⁴⁴Benkin, *supra* note 30, at 10.

⁴⁵*Id.*

⁴⁶*Id.*

⁴⁷*See* Pollock, *supra* note 33, at B1. "Since 1990, 406 companies . . . saved more than \$150 million in legal fees and expert-witness costs by using litigation alternatives" in cases with over \$5 billion in dispute. *Id.*

⁴⁸Johnston, *supra* note 3, at 837. The task force was given the job of "'develop[ing] a set of recommendations to alleviate the problems of excessive cost and delay' in civil litigation." *Id.* (quoting BROOKINGS, *supra* note 3, at vii). This directive was prompted by Senator Joseph Biden in 1988. *Id.*

⁴⁹The Brookings Institute task force was also dissatisfied with the civil justice system in the United States.

This task force has come together out of the belief, borne out by the collective experience of its members, that the problems of cost and delay in our civil justice system are serious and in need of immediate attention by all those who participate in and are affected by it.

BROOKINGS, *supra* note 3, at 5. "Through its recommendations for procedural reform, the Brookings task force hoped to provide participants in the civil justice system with the 'proper incentives' to minimize cost and delay." Johnston, *supra* note 3, at 839.

results of this study, Senator Joseph Biden of Delaware introduced what came to be known as the CJRA.⁵⁰

A. *Administration of Cost and Delay Under the CJRA*

The CJRA has a much broader scope than the DSPA, because it applies to ninety-four geographically and procedurally diverse federal district courts. In recognition of the variety of costs and inefficiencies tormenting the federal district courts, a decentralized, discretionary approach was adopted.⁵¹ Each of the ninety-four districts were required to develop their own individual plans for reducing costs and delay.⁵²

This discretion was afforded the districts due to the diverse logistical problems among the districts.⁵³ However, this approach is not without criticism. One concern is that inconsistencies will arise between districts and hinder the reciprocal transfer of lawsuits between districts.⁵⁴

⁵⁰Johnston, *supra* note 3, at 839. "Less than six months after the Brookings task force issued its report, Senator Biden introduced his initial version of the CJRA in the Senate on January 25, 1990." *Id.*

⁵¹BROOKINGS, *supra* note 3, at 12. "The expense and delay patterns for civil cases vary across different federal district courts." *Id.*

⁵²"[A]t the heart of the CJRA lies the requirement that each district court implement a 'civil justice expense and delay reduction plan' by December 1, 1993." Johnston, *supra* note 3, at 840 (footnote omitted).

The stated purpose of this requirement is "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." Despite this broadly stated purpose, the [CJRA] concentrates on only two of the announced goals — the reduction of cost and delay.

Id. at 840-41 (footnote omitted) (quoting 28 U.S.C. § 471 (Supp. IV 1992)). Some commentators do not believe the importance of the CJRA lies with the implementation of the Plans at all. Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 378-79 (1992). These commentators are concerned that the CJRA has "effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch." *Id.* at 379.

⁵³BROOKINGS, *supra* note 3, at 11. The Brookings task force explained: "[O]ur recommendations take account of the diversity of caseloads and types of litigations across different federal jurisdictions. Accordingly, we do not advocate the adoption of a uniform set of reform suggestions to be applied by all district courts throughout the nation." *Id.*

⁵⁴Johnston, *supra* note 3, at 842 n.53. The author states that one criticism of this discretionary approach is that "it may lead to a multitude of local rules inconsistent with the uniformity in procedure among district courts which the original drafters of the Federal Rules of Civil Procedure sought to achieve." *Id.* Another such criticism of this approach is that "[a]t the most pragmatic level, the grassroots local advisory groups are destined to create problematic local rules, measures, and programs." Mullenix, *supra* note 52, at 379. The author refers to the first procedural revolution in 1938 which resulted in the adoption of the Federal Rules of Civil Procedure as a "careful, informed study that leads to the adoption and amendment of

Uniformity has been sacrificed in order to design specific solutions to the problems of each individual district.

The CJRA plan called for mandatorily appointed advisory groups in each district to oversee the reform process.⁵⁵ This advisory group had the specific task of conducting a "thorough assessment" of the court and the reasons why their district had high costs and delays.⁵⁶ The advisory groups were to base their findings, to some extent, on the assessment of several factors set forth by the CJRA.⁵⁷ The judges in each district were granted the ultimate discretion to devise their own plan,⁵⁸ which included the option of consulting with the advisory groups.⁵⁹ Yearly reassessments of the plan instituted by each court were required, including consultation with the advisory group.⁶⁰

Although each district had the discretion to implement a separate plan, this discretion was not absolute. The findings and recommendations of the Brookings Institute were also to be considered in the development of each plan.⁶¹ Included in the Brookings recommendations were certain "*principles and guidelines* of litigation management and cost and delay reduction."⁶² Along with these principles, "litigation management and

simple rules that are uniform throughout the country." *Id.* at 380. The author goes on to say that "[t]he reforms the [CJRA] mandates are not conducive to careful, informed study of the Federal Rules of Civil Procedure." *Id.*

⁵⁵Johnston, *supra* note 3, at 841. Each advisory group was appointed by the chief judge in each district and was comprised of "attorneys and other persons who are representative of major categories of litigants in such court." *Id.* (quoting 28 U.S.C. § 478(b) (Supp. IV 1992)). This was done because Congress believed that the users of the system could better critique the system and make suggestions that would make it more efficient. *Id.*

⁵⁶*Id.* at 842.

⁵⁷*Id.* The factors include: (1) the conditions of the district court's civil and criminal dockets; (2) the identification of trends in case filings and in demands placed on court resources; (3) court procedures, the way in which litigants and their attorneys conduct litigation, and their effects on cost and delay; and (4) the impact of new legislation on the courts and reduction of costs and delay. 28 U.S.C. § 472(c)(1)(A)-(D) (1994).

⁵⁸Johnston, *supra* note 3, at 842.

⁵⁹*Id.* at 842 n.54 (citing 28 U.S.C. § 473(a) (Supp. IV 1992)).

⁶⁰*Id.* at 843 (citing 28 U.S.C. § 475 (Supp. IV 1992)).

⁶¹*See id.* at 843 n.60. "The methods of cost and delay reduction found in the [CJRA] are consistent with the recommendations for procedural reform made in the Brookings report." *Id.*

⁶²28 U.S.C. § 473(a) (1994) (emphasis added). This section mandates that the following principles be considered by the districts in the process of formulating their plans. Section 473(a) provides for:

(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation

cost and delay reduction *techniques*" were also included in the recommendations.⁶³ The overall emphasis of the CJRA lies within these litigation management and procedural controls. Congress, however, failed to make the use of these principles and techniques mandatory in the district courts' plans,⁶⁴ despite pressure to the contrary.⁶⁵ The proposed

and disposition of the case;

(2) early and ongoing control of the pretrial process through involvement of a judicial officer in —

(A) assessing and planning the progress of a case;

(B) setting early, firm trial dates, . . . ;

(C) controlling the extent of discovery . . . ; and

(D) setting . . . deadlines for filing motions . . . ;

(3) for all cases that the court . . . determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences . . . ;

(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

(6) authorization to refer appropriate cases to alternative dispute resolution programs

28 U.S.C. § 473(a).

⁶³See 28 U.S.C. § 473(b) (1994) (emphasis added). Section 473(b) also provides for the consideration of the following techniques by the districts in the formulation of their respective plans:

(1) . . . counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) . . . each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) . . . all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

28 U.S.C. § 473(b).

⁶⁴Johnston, *supra* note 3, at 845. "The language of the CJRA does not require district

use of these litigation management techniques and principles is where the similarity between the federal CJRA and the DSPA is found.

Two further constructive aspects of the CJRA are the use of the "pilot program"⁶⁶ and the development of ten "comparable" districts.⁶⁷ Ten districts were chosen as "pilot" districts to implement a required plan to reduce cost and delay.⁶⁸ First, these experimental districts were required to implement the six principles of cost and delay reduction by the end of 1991, and then retain these principles until the end of 1994.⁶⁹ The remaining districts were required to implement their plans by the end of 1993.⁷⁰ These districts were closely monitored and used as a resource in determining whether to require the adoption of the six principles of cost and delay reduction in the other districts.⁷¹

Contrary to the pilot program, the comparable districts were granted full discretion when developing their own plans.⁷² After these "comparable" districts designed their own plans, they were compared to the "pilot program" districts in order to evaluate the effectiveness of required implementation as opposed to discretionary implementation.⁷³

The Judicial Conference of the United States considered several factors in determining whether a mandatory program would be more effective than a discretionary one.⁷⁴ It was necessary to study the practical implications of the six principles, in conjunction with the

courts to adopt its principles or techniques of cost and delay reduction." *Id.*

⁶⁵*Id.* "Whether Congress should have required each district court to adopt specific methods of cost and delay reduction was one of the most hotly contested issues surrounding passage of the [CJRA]." *Id.*

⁶⁶Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105, 104 Stat. 5089, 5097-98 (1990).

⁶⁷Civil Justice Reform Act of 1990, § 105(c)(1).

⁶⁸Civil Justice Reform Act of 1990, § 105.

⁶⁹Civil Justice Reform Act of 1990, § 105(b)(3).

⁷⁰Johnston, *supra* note 3, at 840.

⁷¹Civil Justice Reform Act of 1990, §§ 105(c)(1), 105(c)(2)(A). "Perhaps most importantly, the pilot program report also must contain a recommendation as to whether some or all of the district courts should be required to include in their Plans the [CJRA]'s principles of cost and delay reduction." Johnston, *supra* note 3, at 847-48.

⁷²Civil Justice Reform Act of 1990, § 105(c)(1). "[T]en 'comparable' districts were created for which adoption of the [CJRA]'s principles of cost and delay reduction had been 'discretionary'." Johnston, *supra* note 3, at 847.

⁷³Civil Justice Reform Act of 1990, § 105(c)(1). "In addition, the report must compare the experiences of the pilot districts with the experiences of ten 'comparable' districts" Johnston, *supra* note 3, at 847.

⁷⁴Johnston, *supra* note 3, at 846. "The Judicial Conference program generally supported the goals underlying the CJRA." *Id.* See also 28 U.S.C. § 471 (1994) ("The plan may be a plan developed by . . . the Judicial Conference of the United States.").

specific problems each district was facing, before requiring their use.⁷⁵ Furthermore, the Conference wished to avoid legislative intrusion if these principles were only going to be marginally effective when put into practice.⁷⁶

B. *Outlook of the CJRA*

The CJRA was initially well received. The deadline imposed by the CJRA was December 1993, at which time each district was required to have implemented its respective plan.⁷⁷ By the end of 1991, thirty-four of the ninety-four districts had already implemented their plans,⁷⁸ including the District of Delaware.⁷⁹ The speed at which the cost and delay reduction plans were developed manifests the considerable attention these issues were afforded in both the federal and state judiciaries.

The most controversial aspect of the CJRA was the degree to which each district was given latitude in the development of its own plan.⁸⁰ Granted, some level of discretion was appropriate given the vast number of districts involved and the diverse reasons for high costs and delay in each district. The solutions, therefore, had to vary if the program was to be successful.⁸¹ Despite the discretionary nature of the program, the aim was certainly not a system totally devoid of cohesiveness. The strong suggestion that the districts consider the principles and techniques for cost and delay reduction will lend consistency to the whole project.

Similar to the DSPA, the CJRA addresses the speed at which a case moves through the legal system.⁸² The concern that justice may not

⁷⁵See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 105(c)(2)(A), 104 Stat. 5089, 5098 (1990). The pilot program report must also contain "a recommendation as to whether some or all district courts should be required to include in their expense and delay reduction plans the [CJRA's] principles" of cost and delay reduction. Civil Justice Reform Act of 1990, § 105(c)(2)(A).

⁷⁶Johnston, *supra* note 3, at 845 n.66. Noting objections to requiring use of the principles of cost and delay reduction in the district court's plans, and characterizing the CJRA as an "unwise legislative intrusion into procedural matters that are properly the province of the judiciary." *Id.*

⁷⁷*Id.* at 840.

⁷⁸Biden, *supra* note 19, at 13.

⁷⁹*Id.* at 13 n.50.

⁸⁰See *supra* notes 64-65 and accompanying text.

⁸¹See *supra* note 53 and accompanying text.

⁸²28 U.S.C. § 471 (1994). "The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes." *Id.* (emphasis added). See also *infra* note 86 and accompanying text (addressing the speed at which a case will move

be adequately served by simply quickening the pace at which cases are adjudicated is shared by all who participate in the court system.⁸³ Furthermore, debate surrounds both the CJRA and the DSPA as to whether speed will decrease the costs of litigation.⁸⁴ The CJRA and the DSPA may succeed in alleviating the burden on court dockets; however, this may be accomplished at the expense of the rights and liberties of the parties.⁸⁵

IV. DELAWARE SUMMARY PROCEDURES ACT

A. *The Mechanics of the DSPA*

The DSPA sets strict guidelines for expediting commercial cases through the legal process. The goal of the DSPA is completion of litigation within ten to twelve months of the filing of the complaint.⁸⁶ There are some initial requirements which must be met in order to use summary procedures. First, each party must consent to the use of summary proceedings.⁸⁷ One method of obtaining a party's consent is to include a provision mandating the use of the DSPA in the contract.⁸⁸

in the court system under the DSPA).

⁸³American Bar Association Commission on Standards of Judicial Administration, *Standards Relating to Trial Courts* 93, § 252 commentary, at 95 (1976). A commentary to the ABA 1976 Standards states, "The administration of a system of time standards must, however, avoid becoming entirely mechanical. . . . The consequence is not only the impairment of the quality of justice but also loss of efficiency" *Id.*

⁸⁴See *infra* notes 139-40 and accompanying text.

⁸⁵See *infra* note 140 and accompanying text.

⁸⁶See DEL. SUPER. CT. R. 124-31. If all of the time limits are added together, the duration of the case will last nine or ten months. For a witness trial, the time comprises a little more than 10 months: one month for the answer (Rule 126(a)); six months for discovery (Rule 127(h)); five day trial within two months of the close of discovery (Rule 130(b)); an additional ten days for the submission of post-trial briefs (Rule 130(b)); and within 30 days after the trial, the decision (Rule 130(c)). For a brief trial, the time amounts to almost 11 months: one month for an answer (Rule 126(a)); six months for discovery (Rule 127(h)); one month for plaintiff's brief (Rule 129(a)(1)); one month for answering brief (Rule 129(a)(2)); two weeks for a reply brief (Rule 129(a)(3)); oral arguments within one week of the close of this period (Rule 130(a)); and within one month of either the submission of the final brief or last oral argument, a decision (Rule 130(c)). DEL. SUPER. CT. R. 124-31.

⁸⁷DEL. SUPER. CT. R. 124(b). "Any matter . . . shall be subject to expedited proceedings under these Rules when the parties . . . have consented, by written agreement or stipulation." *Id.*

⁸⁸DEL. SUPER. CT. R. 124(b); see also Gregory P. Williams, *Summary Procedures Enacted in Delaware for Major Commercial Litigation*, INSIGHTS, Aug. 1994, at 31 (noting that "[i]n most cases, the parties will have included in their contract a provision which requires that

Once a provision to use the DSPA is included, both parties are deemed to have consented to the application of summary proceedings in case of a dispute. Consequently, the DSPA can be implemented in the same way that parties contract for the use of ADR.⁸⁹

The second requirement is that the amount in controversy must exceed \$1 million.⁹⁰ Cases involving large amounts of money are usually in court for many years because of the potential financial impact on each party. The DSPA attempts to prevent parties from exploiting the discovery process and postponing litigation indefinitely to avoid a potentially costly, adverse judgment.

Finally, a corporation bringing an action pursuant to the DSPA relinquishes certain rights generally afforded private parties. First, the parties are precluded from an award of punitive damages,⁹¹ and second, the DSPA does not provide for jury trials.⁹² In addition, claims asserting personal, mental, or physical injury are excluded under the DSPA.⁹³ Given the ambivalent character of these factors, cases are more likely to remain consistent if decided at a bench trial. This is especially true in recognition of the expertise of the Delaware judiciary in the area of corporate law.

Under the DSPA, a suit is commenced with the filing and serving of a complaint.⁹⁴ The first page of the complaint must state that the lawsuit will be tried under the DSPA.⁹⁵ The complaint must also "contain a statement of the amount in controversy . . . , a statement that one of the parties is a Delaware citizen, corporation or other business entity, and a statement that the defendant has agreed to submit to the Court's jurisdiction for Summary Proceedings."⁹⁶ A suit pending in the Superior

any litigation arising from the contract be litigated as a Summary Proceeding"). *Id.*

⁸⁹See Cohen, *supra* note 16, at 4. "In most cases, parties who agree to the inclusion of an ADR clause in a contract will relinquish their right to litigate and appeal this claim in the public court system." *Id.*

⁹⁰DEL. SUPER. CT. R. 124(b).

⁹¹DEL. SUPER. CT. R. 124(b). Decisions on punitive damages are usually made in subsequent hearings. This process takes more time and increases costs because each party then argues separate issues for punitive damages.

⁹²DEL. SUPER. CT. R. 124(b). Often a jury will take a substantial amount of time to deliberate and come to a verdict. Jury Instructions and deliberations are time consuming, and unreliable, hostile, and hung juries are also possible. See COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 2, 6 (recognizing potential for corporations to be seen as "big business," and disliked by the general citizenry); *supra* note 34 and accompanying text (indicating potential for hostile juries as reason companies may turn to ADR).

⁹³DEL. SUPER. CT. R. 124(b).

⁹⁴DEL. SUPER. CT. R. 125(a)(1).

⁹⁵DEL. SUPER. CT. R. 125(a)(3).

⁹⁶DEL. SUPER. CT. R. 125(a)(3).

Court of Delaware may be converted to a summary proceeding if both parties and the transferor court consent.⁹⁷ Furthermore, an action pending in any other court or jurisdiction in the state may be transferred to superior court for summary proceedings if the suit could have been initiated under the DSPA.⁹⁸ After the conversion takes place, a schedule for the remainder of the case is established.⁹⁹

An answer must be filed within thirty days of the service and filing of the complaint.¹⁰⁰ Any reply to the answer, such as a response to a counterclaim, must be served within twenty days after service of the counterclaim.¹⁰¹ In response to a complaint or counterclaim, a party may move to dismiss the claim instead of serving an answer.¹⁰²

The length of each brief is limited by statute. The opening and answering briefs are limited to twenty-five pages and the reply brief is limited to ten pages.¹⁰³ There is an option to have the decision rendered on the briefs or to have a decision rendered on the basis of oral arguments.¹⁰⁴ The decision will be delivered, or the court will provide an estimate of when the decision will be made, within thirty days of the filing of the final briefs or of the oral arguments.¹⁰⁵

The DSPA mandates the exchange of certain information between parties.¹⁰⁶ The plaintiff must disclose all pertinent information to be relied on at trial, a list of potential trial witnesses, and a list of all persons consulted in preparation of the complaint.¹⁰⁷ The plaintiff has only seven days to disclose this information to the defense after the conclusion of the

⁹⁷DEL. SUPER. CT. R. 125(b)(1).

⁹⁸DEL. SUPER. CT. R. 125(b)(1).

⁹⁹DEL. SUPER. CT. R. 125(b)(2).

¹⁰⁰DEL. SUPER. CT. R. 126(a).

¹⁰¹DEL. SUPER. CT. R. 126(b).

¹⁰²DEL. SUPER. CT. R. 126(c). A motion to dismiss the claim and a brief accompanying it must be served within 30 days of the service of the complaint. DEL. SUPER. CT. R. 126(c). If the motion to dismiss is in response to a counterclaim, the motion to dismiss and the brief must be served within 20 days of the service of the counterclaim. DEL. SUPER. CT. R. 126(c). If a party opposes the motion to dismiss, an answering brief in opposition is due within 15 days after the service of the motion and the accompanying brief. DEL. SUPER. CT. R. 126(c). A brief supporting the motion to dismiss is due within 10 days of the service of the answering brief. DEL. SUPER. CT. R. 126(c).

¹⁰³DEL. SUPER. CT. R. 126(c).

¹⁰⁴DEL. SUPER. CT. R. 126(c).

¹⁰⁵DEL. SUPER. CT. R. 126(c).

¹⁰⁶DEL. SUPER. CT. R. 127(a).

¹⁰⁷DEL. SUPER. CT. R. 127(a).

complaint and answer period.¹⁰⁸ The defense then must provide this same information within thirty days of filing an answer.¹⁰⁹

The issues that have plagued courts for decades are the outrageous costs and time invested in the discovery process.¹¹⁰ Discovery, if not controlled, can be a lengthy process for lawyers and an expensive process for clients.¹¹¹ The DSPA imposes strict time limits on the discovery process in order to prevent the problems of cost and delay.¹¹² If the time limits are too strict, however, information may not be obtained and the pursuit of justice may be impaired. The DSPA limits the time allowed for discovery in an attempt to preserve the importance of the discovery process while addressing its ills.¹¹³

The total time allotted for the discovery process under the DSPA is 180 days.¹¹⁴ In addition to the mandatory discovery schedule imposed under the DSPA, the discovery process is expedited in several other ways.¹¹⁵ First, each party is limited to ten written interrogatories, with a maximum of twenty days to respond.¹¹⁶ Second, any document which has been requested is due within thirty days of the request and must be presented at that time for inspection.¹¹⁷ Third, each party is allowed only four depositions, which must begin within sixty days of the answer period.¹¹⁸ All of the depositions must be completed within 120 days of the filing of the last answer.¹¹⁹ Fourth, each party is allowed only ten requests for admissions.¹²⁰ Finally, all mandatory information must be promptly supplemented when a party receives new information.¹²¹

¹⁰⁸DEL. SUPER. CT. R. 127(a).

¹⁰⁹DEL. SUPER. CT. R. 127(a).

¹¹⁰*See supra* notes 20-22 and accompanying text.

¹¹¹*See supra* notes 20-21 and accompanying text.

¹¹²DEL. SUPER. CT. R. 127.

¹¹³DEL. SUPER. CT. R. 127. *See also* COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 6. It was clearly contemplated that "this procedure include limited and expedited discovery." *Id.*

¹¹⁴DEL. SUPER. CT. R. 127(h). This is a relatively short period of time since an expedited trial is usually given an 18 month timetable, at least half of which is consumed in the discovery process. *See* American Bar Association Judicial Administration Division, Standards of Judicial Administration Volume II: *Standards Relating to Trial Courts* 77 (1992) (compiling statistics on relative length of civil cases).

¹¹⁵DEL. SUPER. CT. R. 127(b)-(f).

¹¹⁶DEL. SUPER. CT. R. 127(b).

¹¹⁷DEL. SUPER. CT. R. 127(c).

¹¹⁸DEL. SUPER. CT. R. 127(d).

¹¹⁹DEL. SUPER. CT. R. 127(d).

¹²⁰DEL. SUPER. CT. R. 127(e).

¹²¹DEL. SUPER. CT. R. 127(f).

The DSPA further manages delay in the legal system by precluding motions for summary judgment.¹²² Summary judgment motions are often tremendously time consuming and costly.¹²³ Despite the low success rate of these motions, litigants often file them on the unlikely chance that they may be granted.¹²⁴ Because motions for summary judgment detain trials and add to costs, the DSPA disallows such motions.

Under the DSPA, the parties must choose which type of trial to pursue: a traditional trial with witnesses or a trial on the briefs and oral arguments.¹²⁵ If a traditional trial with witnesses is chosen, it is scheduled between thirty and sixty days after the close of discovery and lasts no longer than five days.¹²⁶ The time at trial must be equitably divided between the parties, absent a contrary court order.¹²⁷ The parties must then submit post-trial briefs within ten days of the close of trial,¹²⁸ in which they recommend findings of fact and conclusions of law to the court.¹²⁹

If the parties wish to waive their right to a witness trial and proceed with a trial on the briefs, they must notify the court within seven days of the close of discovery.¹³⁰ If the parties so elect, the plaintiff's briefs are due within thirty days of the close of discovery.¹³¹ The defendant's answering brief¹³² and the plaintiff's reply to the answering brief are subsequently due within fifteen days of the service of the answering brief.¹³³ Oral arguments for a modified brief trial are scheduled within one week of the close of the briefing period.¹³⁴ If the case proceeds according to the DSPA schedule, the trial should be completed in approximately ten to twelve months.¹³⁵

¹²²DEL. SUPER. CT. R. 128.

¹²³Williams, *supra* note 88, at 32.

¹²⁴*Id.*

¹²⁵DEL. SUPER. CT. R. 130.

¹²⁶DEL. SUPER. CT. R. 130(b).

¹²⁷DEL. SUPER. CT. R. 130(b).

¹²⁸DEL. SUPER. CT. R. 130(b).

¹²⁹DEL. SUPER. CT. R. 130(b). The post-trial briefs can be no more than 50 pages in length. DEL. SUPER. CT. R. 130(b).

¹³⁰DEL. SUPER. CT. R. 129(a).

¹³¹DEL. SUPER. CT. R. 129(a)(1).

¹³²DEL. SUPER. CT. R. 129(a)(2).

¹³³DEL. SUPER. CT. R. 129(a)(3).

¹³⁴DEL. SUPER. CT. R. 130(a). The trial may be conducted simply on the submission of the briefs if the oral argument is waived by the parties and the court consents. DEL. SUPER. CT. R. 130(a).

¹³⁵*See supra* note 86.

B. *The Future of Summary Proceedings*

Through the DSPA, Delaware's judiciary and legislature have indicated their willingness to respond to the needs of parties who participate in the state's judicial system.¹³⁶ The objective of the time limits which the DSPA places on certain activities is to compel an accelerated end to trial.¹³⁷ However, Delaware must be careful that it is not unduly aggressive in dealing with the problems of cost and delay.

One potential problem may be that the guidelines will produce a procedure which is overly expeditious. The concern is that there may not be enough time to prepare and present a competent case, particularly when there are large sums of money at stake and a quick resolution may not necessarily be prudent.¹³⁸

Furthermore, this process may not alleviate rising costs. Corporations may be forced to place additional staff on each case in order to meet the strict time constraints of the DSPA.¹³⁹ Previously, one or two lawyers may have been able to gather all the material necessary to present a case, but now with the expedited discovery proceedings, many more lawyers may be needed to meet the strict deadlines. Employing several more attorneys on one case, rather than only one or two, may increase the costs of litigation.¹⁴⁰ Therefore, the DSPA may not cause a reduction in costs at all.

Judicial management has been posited as a potential remedy for the problem of inefficiency in the courts.¹⁴¹ Judicial management is not

¹³⁶COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 1. "The work of the Commission is consistent with the comprehensive review of the Delaware judicial system, . . . and the desire to assure that the Delaware court system . . . remains responsive to the needs of Delaware's citizens." *Id.*

¹³⁷*See supra* note 86; *see also supra* notes 94-134 and accompanying text (explaining the applicable timing measures under the DSPA).

¹³⁸Johnston, *supra* note 3, at 877-78. As one commentator noted:

Aphorism can match aphorism: "justice delayed is justice denied" but "haste makes waste." . . . [S]ome time clearly is necessary for parties to develop their claims and defenses in the processing of civil litigation. . . . Moreover, a speedy resolution to an adverse judgment, rendered incorrectly because of time limits on preparation and presentation, is of no value to the losing party.

Id. (footnotes omitted).

¹³⁹*Id.* at 879. Additional "expenditures" may have to be made to prepare a case fully under strict time constraints. *Id.* These expenditures may include extra personnel. *Id.*

¹⁴⁰*Id.* at 878. "[T]hey also may not be able to afford the *multiple resources necessary to fully develop their case* on a more compressed schedule." *Id.* (emphasis added).

¹⁴¹BROOKINGS, *supra* note 3, at 3. "[J]udges should take a more active role in managing their cases" *Id.*

expressly placed into the DSPA but is implicitly woven into it.¹⁴² The DSPA provides for a panel of judges to oversee the activities of the parties and set schedules for discovery and trial.¹⁴³ The panel consists of four judges, two from the superior court and two from the court of chancery.¹⁴⁴ Under the DSPA, after the case is designated as a summary proceeding, one judge is assigned to each case.¹⁴⁵ This allows the judge to closely oversee each stage of the process.¹⁴⁶

In designing the DSPA, the legislature incorporated the advice of judges, attorneys, scholars and corporate consumers of the Delaware legal system.¹⁴⁷ The result is a set of guidelines aimed at producing well-structured, expedited corporate litigation.¹⁴⁸ Some drawbacks, however, may arise in the area of time constraints. Also, it is unclear whether costs will actually decrease under the DSPA. Nevertheless, the DSPA is an aggressive attempt by the state of Delaware to respond to the needs of its corporate citizens and add a new dynamic to commercial litigation.¹⁴⁹

¹⁴²The role of the judge in the dispute process can be seen in the context of transfers and conversions. DEL. SUPER. CT. R. 125(b). The court is to set a schedule for the rest of the trial within 15 days of the transfer or conversion. DEL. SUPER. CT. R. 125(b)(2). If necessary, the court may step in and alter the 180 day discovery limit. DEL. SUPER. CT. R. 127(h). Presumably, this is so the court can keep a watchful eye over any extended discovery procedures. The court, by request of the parties, may label a case as complex. DEL. SUPER. CT. R. 130(d). Thus, complex cases may not be subject to the limits of this statute, but are limited by a schedule entered by the court. DEL. SUPER. CT. R. 130(d). The parties, prior to a witness trial, are required to submit to the court a pre-trial outline of their claims, the witnesses and other evidence and legal principles that each side contends support those claims, and any stipulated facts. DEL. SUPER. CT. R. 130(b). Presumably, this is to expedite the actual trial process and make it run as efficiently as possible.

¹⁴³See DEL. SUPER. CT. R. 124-131. See also COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 5-6.

¹⁴⁴COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 5-6.

¹⁴⁵*Id.* at 6. "After the dispute is submitted to the panel, a single judge is assigned to the case." *Id.*

¹⁴⁶*Id.*

¹⁴⁷*Id.* at 11-12. "The Commission . . . sent a draft of the proposed statute and a questionnaire to approximately 150 corporate counsel," in addition to seeking comments from the judiciary and members of the Delaware Bar Association. *Id.* at 12, 15.

¹⁴⁸COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 5. The DSPA "combines the most desirable features of arbitration, traditional litigation and preliminary injunction practice so that business people can achieve fast and cost-effective resolution of disputes before sophisticated jurists." *Id.*

¹⁴⁹*Id.* at 13. "The reaction of [Delaware corporations] has been uniformly positive . . . [A]ll have supported the Commission's work, have complimented the proposed statute and have concluded that businesses would find such a statute very useful." *Id.*

V. A COMPARISON OF FEDERAL AND STATE REFORMS

A. *Principles of Cost and Delay Reduction*

Both the Summary Proceedings Act of Delaware and the federal CJRA attempt to address the problems of cost and delay in the legal system and provide a solution to these problems.¹⁵⁰ The statutes, however, have different motives for accomplishing this goal. Delaware seeks to address problems primarily borne by corporations in the hopes of maintaining corporate confidence in the Delaware state courts and deterring corporations from looking to ADR.¹⁵¹ The federal government has a strong interest in restoring faith in a faltering judicial system.¹⁵² Despite the differing focus of these two pieces of legislation, there are enough similarities for a comparison of their potential effectiveness.

The DSPA deals exclusively with the effects of cost and delay on the state court level.¹⁵³ In Delaware, the legislature and judiciary were apprised of the specific problems which the superior court faced and tailored the legislation accordingly.¹⁵⁴ The CJRA, on the other hand, attacked the problem on a much larger scale.¹⁵⁵ Recognizing the different factors causing high costs and delay in the federal courts, Congress drafted the CJRA to deal with ninety-four different district courts.¹⁵⁶ The CJRA took a different approach because of the magnitude and

¹⁵⁰See COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3 (describing the findings of the Governor's Commission on Major Commercial Litigation Reform and applying the cost and delay problems in the context of Summary Proceedings). See also Johnston, *supra* note 3, at 839 (describing the Brookings Institute report which states the reasons of cost and delay for prompting the CJRA).

¹⁵¹See *supra* notes 27-29 and accompanying text; COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 1-3 (describing Delaware's interest in enacting Summary Proceedings Act).

¹⁵²Johnston, *supra* note 3, at 877. In a discussion of the consequences of delay, the author notes that two consequences are "the fostering of disrespect for the judicial system[,] . . . [and] the erosion of the effect of law." *Id.*

¹⁵³DEL. SUPER. CT. R. 124. "These rules shall govern the procedure in the Superior Court of the State of Delaware" *Id.*

¹⁵⁴COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 1. The mandate of the Commission is to propose legislation . . . which addresses the "litigation crisis" The work of the Commission is consistent with the comprehensive review of the Delaware judicial system, . . . and the desire to assure that the Delaware court system . . . remains responsive to the needs of Delaware's citizens [A] citizenry [which] includes nearly 215,000 corporations.

Id.

¹⁵⁵See *supra* note 52 and accompanying text.

¹⁵⁶See *supra* note 53.

multiplicity of specific problems present in the federal court system. This explains why the DSPA was very detailed and explicit, while the CJRA allotted wide discretion to the federal districts.

The CJRA set forth six principles and techniques for reducing costs and delays in courts.¹⁵⁷ These principles and techniques are the common thread which ties the plans of the district courts together under the CJRA. While the legislation merely suggests that the districts consider these principles and techniques when instituting their individual Plans,¹⁵⁸ Congress hoped that many districts would incorporate these or similar principles in order to achieve some consistency in nationwide judicial reform.¹⁵⁹

The overall guidelines of the DSPA are most similar to the second principle of cost and delay reduction set forth in the CJRA.¹⁶⁰ In general, this principle deals with the time required to adjudicate a case. The second principle states that the goal is to control the pre-trial process.¹⁶¹ As the principle recognizes, a schedule for pre-trial procedure is necessary because the litigation process could extend indefinitely without some control.

Both the CJRA and Delaware's Summary Proceedings implement this principle through regulation of the discovery process. Under the CJRA, this takes the form of a voluntary exchange of information dubbed "cooperative" discovery.¹⁶² Cooperative discovery neither imposes strict time limits on the length of discovery nor specifies what information must be exchanged.¹⁶³ To give substance to this broad statement, district

¹⁵⁷See *supra* notes 62-63.

¹⁵⁸Johnston, *supra* note 3, at 843. "[T]he [CJRA] requires consideration of six identified principles and guidelines of litigation management and cost and delay reduction." *Id.*; see also *supra* note 64 (noting the failure of the CJRA to require adoption of the six principles and techniques).

¹⁵⁹Johnston, *supra* note 3, at 847 n.72. "Even when the language in the CJRA was changed to make adoption of the . . . principles discretionary, Congress continued to advocate adoption of the principles and techniques of cost and delay reduction set forth in the [CJRA]." *Id.*

¹⁶⁰28 U.S.C. § 473(a)(2) (1994). This section states that there should be ongoing control of the pre-trial process by judges in setting early firm trial dates, controlling the extent of discovery, and setting firm deadlines for the filing of motions. *Id.* The purpose of the DSPA is to include "limited and expedited discovery, limited and expedited motion practice and prompt disposition of matters by the court" COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 6.

¹⁶¹See *supra* note 62; 28 U.S.C. § 473(a)(2) (1994).

¹⁶²28 U.S.C. § 473(a)(4) (1994).

¹⁶³See Johnston, *supra* note 3, at 845 (noting that language of CJRA does not require parties to adopt specific methods of cost and delay reduction).

courts must presumably develop their own systems to exchange information.

Whereas the CJRA makes only marginal attempts to control discovery, Delaware's approach sets specific deadlines for each aspect of discovery. The DSPA's version of cooperative discovery includes mandatory exchange of certain information within seven days of the defendant's answer.¹⁶⁴ Litigants must, under the DSPA, update this information in a timely fashion if the information changes at any time thereafter.¹⁶⁵ The DSPA also requires discovery to be completed within 180 days.¹⁶⁶ These strict guidelines will help limit the abuse of the discovery process perpetuated by parties using it for strategic gains in litigation.¹⁶⁷

Although the DSPA has taken more control over discovery than the CJRA, both pieces of legislation have correctly focused on discovery as the major cause of delay. By addressing the major catalyst, these two approaches go a long way toward relieving the courts, both in Delaware and on the federal level, from these pressing problems. Controlling discovery enables the courts to regulate the entire process and keep problems to a minimum.

These two attempts at reform also take distinct approaches in addressing complex litigation. The first principle of cost and delay reduction in the CJRA treats cases differently based on their complexity, potential litigation time, and resources required.¹⁶⁸ Congress's approach requires the districts to take a closer look at each case to determine what is necessary for the proper adjudication of the claim. Under the principles in the CJRA, the court or a judicial officer may categorize a particular case as "complex."¹⁶⁹ This concern about complex cases is well-founded because these types of cases presumably take longer to decide and, thus, are more expensive. In recognition of this, the CJRA provides for closer control and monitoring of such concerns as discovery, issue spotting, and settlement to assure just and speedy determination of

¹⁶⁴DEL. SUPER. CT. R. 127(a). Under the DSPA, litigants are required to provide all documents which each party intends to rely on at trial and a list of witnesses each party intends to call at trial. DEL. SUPER. CT. R. 127(a).

¹⁶⁵See DEL. SUPER. CT. R. 127(f).

¹⁶⁶DEL. SUPER. CT. R. 127(h).

¹⁶⁷See *supra* notes 20-21 and accompanying text (listing costs of discovery abuse).

¹⁶⁸28 U.S.C. § 473(a)(1) (1994). This principle provides for "differential treatment of civil cases that tailors the level of . . . case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required." 28 U.S.C. § 473(a)(1).

¹⁶⁹28 U.S.C. § 473(a)(3) (1994).

complicated matters.¹⁷⁰ Although this method may be slightly more time consuming now, it should be more efficient in the long run. Time limits are tailored to each case, thereby preventing runaway litigation. At the same time, the CJRA also allows flexibility so that each case may be tried in a just and timely manner.

Conversely, every case under the DSPA must adhere to the same guidelines.¹⁷¹ This uniform treatment fails to recognize that all commercial cases are not the same.¹⁷² Some cases may need more time and attention than others, depending on the variables involved. In these circumstances, the need for attentive judicial management should outweigh the interest in limiting the time involved. This was done to a certain extent in the DSPA, but should have been stressed as a larger part of the solution.

The DSPA provides for judicial control over "complex" cases if the parties request that the court intervene.¹⁷³ The proceedings are then no longer subject to the standard time constraints of the DSPA. This judicial management involves the preparation of a trial schedule and assumption of immediate control over cases to prevent procedural problems.¹⁷⁴ In this manner, the DSPA uses judicial management when dealing with complex cases, but little more than time limitations when dealing with ordinary type cases.

One concern with Delaware's legislation is that commercial litigation, by its nature, is often complex. This may lead to overuse of the DSPA's classification for complex cases. Such overuse may result in compliance with the time limits under the DSPA to become the exception and the close judicial management which accompanies "complex" cases to become the rule. Although this does not entirely defeat the DSPA's purpose of expediting litigation, it does demonstrate that judicial management should have been stressed to a greater degree in the DSPA.

¹⁷⁰28 U.S.C. § 473(a)(3)(A)-(C) (1994). These sections state that there will be a series of conferences at which a judicial officer will "explore[] the parties' receptivity to, and the propriety of, settlement[.] . . . identify or formulate[] the principle issues[.] . . . [and] prepare[] a discovery schedule." 28 U.S.C. § 473(a)(3)(A)-(C).

¹⁷¹DEL. SUPER. CT. R. 130(d). "The schedule for trial or decision after trial or on motion to dismiss shall not be extended unless the assigned judge certifies that: due to complexity the ends of justice will not be served or the case cannot reasonably adhere to the time limits because of its complexity. DEL. SUPER. CT. R. 130(d).

¹⁷²See BROOKINGS, *supra* note 3, at 11 (stating "our recommendations take account of the diversity of types of litigations across different federal jurisdictions").

¹⁷³DEL. SUPER. CT. R. 130(d).

¹⁷⁴See COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 9-10.

The principles underlying the DSPA and the CJRA emphasize keeping the pre-trial and trial processes moving in order to bring a dispute to conclusion quickly. They also attack the most important contributor to high costs, inflated discovery. To this end, both pieces of legislation have language tailored to promote discovery's basic purpose, the exchange of information. Despite this common goal, both statutes utilized very different schemes to reign in the discovery process. The federal legislation, demonstrating Congress' intent that judicial management should play an important role in making the system more efficient, explicitly discusses case management by judicial officers. Under the DSPA, however, case management is not as prevalent. Delaware's approach demonstrates its concern with the speed of litigation and the hope that with speed comes efficiency. Although Delaware's scheme also gives the court control over the litigation, it does so at the cost of rigid time constraints that allow little breathing room for litigants.

B. *Techniques of Cost and Delay Reduction*

As already stated, the CJRA and DSPA are formulated to promote the speedy resolution of litigation. Under the federal legislation, the defining principles are applied in a set of "techniques" recommended to the district courts.¹⁷⁵ A consistent theme of facilitating the settlement and resolution of litigation short of trial runs through the techniques.¹⁷⁶ By comparison, the DSPA contains no such specific recommendations. The Delaware provisions place less emphasis on early dispute resolution and direct more attention toward retaining litigation within the Delaware court system.¹⁷⁷

The techniques of cost and delay reduction describe specific conduct consistent with the principles previously set forth under the CJRA.¹⁷⁸ These techniques focus on ending disputes as soon as possible and reducing delay and costs of litigation through any means available.¹⁷⁹ For example, the first technique suggests that parties be required to present discovery case management plans at a pretrial conference.¹⁸⁰ This and the other five techniques focus on a parties' ability to enter into

¹⁷⁵See 28 U.S.C. § 473(b) (1994).

¹⁷⁶See 28 U.S.C. § 473(b).

¹⁷⁷See COMMISSION ON MAJOR LITIGATION REFORM, *supra* note 3, at 1.

¹⁷⁸Johnston, *supra* note 3, at 845; *see also* 28 U.S.C. § 473(b) (1994).

¹⁷⁹28 U.S.C. § 473(b) (1994). *See supra* note 63.

¹⁸⁰See 28 U.S.C. § 473(b)(1) (1994). This mechanism operates in accordance with the other discovery limiting measures discussed earlier in this article. *See supra* text accompanying notes 162-66.

binding settlements prior to trial. One way in which this is accomplished is to require that negotiations be conducted by representatives with authority to bind the parties to a settlement.¹⁸¹ Another important aspect of the techniques requires the party, as well as counsel, to sign requests for extensions of any trial deadlines.¹⁸² A fourth important measure included in the techniques is the provision allowing for the "neutral evaluation" early in the litigation process of the legal and factual issues which form the basis of the case.¹⁸³ Finally, the fifth technique imposes a virtual requirement to attempt to settle all disputes prior to trial.¹⁸⁴ The proffered technique directs a representative with binding authority for each party to be present or immediately available whenever a settlement conference is to be held.¹⁸⁵ Thus, as envisioned by the task force, these procedural techniques "will preserve the fairness objectives of our civil justice system while at the same time reducing both cost and delay."¹⁸⁶

The DSPA does not specifically address the issues of early settlement, judicial conferencing, or "mandatory" settlement conferences. The DSPA simply allows the court to monitor and limit any extensions on the time frame already provided for in the legislation.¹⁸⁷ Delaware has apparently imposed severe timing restrictions in order to preserve its favorable position with corporate litigants in the state.¹⁸⁸ The DSPA, however, does not discourage settlement prior to trial. To do this would defeat the purpose of any legislation attempting to expedite the legal process.

¹⁸¹28 U.S.C. § 473(b)(2) (1994).

¹⁸²28 U.S.C. § 473(b)(3) (1994). This requirement is consistent with the recommendations of the task force that helped create the CJRA. See BROOKINGS, *supra* note 3, at 22. This rule serves the CJRA's objective of fixing early trial dates to assure speedy resolution of litigation. *Id.*

¹⁸³28 U.S.C. § 473(b)(4) (1994). This technique had its origin in the task force report. See BROOKINGS, *supra* note 3, at 23. In a "neutral evaluation," the parties and a court representative meet to discuss the suitability of resolving the case through some form of ADR. 28 U.S.C. § 473(b)(4). The reasoning in support of the use of "neutral evaluations" is the substantial long-term cost savings it can produce for the courts by reducing the number of cases that proceed to trial. BROOKINGS, *supra* note 3, at 23.

¹⁸⁴28 U.S.C. § 473(b)(5) (1994).

¹⁸⁵28 U.S.C. § 473(b)(5). The CJRA imposes this requirement to prevent delay caused by attorneys invoking the often-repeated excuse of "I'll get back to you after I speak with my client." See BROOKINGS, *supra* note 3, at 26.

¹⁸⁶BROOKINGS, *supra* note 3, at 10.

¹⁸⁷DEL. SUPER. CT. R. 130(d). The assigned judge must certify any extensions made to the time constraints already in place. *Id.*

¹⁸⁸See S. Res. 28, 137th Gen. Assembly (1994).

ADR is taking cases and corporations away from the Delaware court system.¹⁸⁹ In trying to combat the effect ADR is having on its corporate citizens, Delaware stands to benefit from applying these federally created techniques to its own legislation. Corporations need not turn to private ADR in order to retain the benefits of speed and efficiency. For instance, if early judicial conferencing is implemented, some cases could be resolved prior to trial. The early judicial conferencing would provide a quick, inexpensive means to end a dispute akin to ADR. The parties, especially corporate citizens of Delaware, would have access to the renowned Delaware judiciary even though not involved in a formal trial.

Delaware's interest in making its courts a more desirable forum than private ADR is heightened when one considers the potential losses to the state if its efforts fail. First, commercial litigants may lose faith in the Delaware courts due to the high costs and duration of litigation. Second, if the court system is no longer appealing, these companies may find themselves with no reason to maintain their status as Delaware corporations. Unwilling to absorb such losses, Delaware has taken the first step to combat private ADR by passing this new legislation.

VI. CONCLUSION

Costs and delay represent compelling problems affecting our nation's federal and state court systems. Delaware, like many states, has reform efforts in place. Delaware is especially cognizant of its position because it derives so much of its revenue from corporations which litigate and incorporate in the state. If corporations use private ADR, they can go anywhere to resolve their disputes. Delaware currently offers many benefits to its corporate citizens, few of which are more valuable than its responsive judicial system. Thus, Delaware cannot allow its judicial system to be the cause of unrest among its inestimable corporate citizenry.

Delaware has addressed these issues by recently passing the Delaware Summary Proceedings Act for commercial disputes. The DSPA places strict time restraints on the litigation process, with an emphasis on discovery procedures. In this respect, Delaware has focused its attack on the core of the problem. The DSPA attempts to eliminate

¹⁸⁹COMMISSION ON MAJOR COMMERCIAL LITIGATION REFORM, *supra* note 3, at 1-2. The report discusses the "litigation crisis" which is causing many corporations to turn to private alternatives. *Id.* at 2.

abuses in the discovery process and emphasizes the information sharing aspects of discovery.

Adjudication will proceed relatively quickly under the DSPA. Speed, however, may not be the only answer if cases are pushed through the system in a routine and unconscious fashion. Judicial management operates, at least to some extent, to monitor cases brought under the DSPA. The CJRA, however, has used judicial management generously to solve the very same problems burdening the federal courts.

Flexibility, a characteristic stressed by the CJRA, as opposed to the DSPA's strict approach, may be the answer to the problem in resolving complex litigation on an expedited basis. Commercial cases are often complex, and the Delaware statute treats complex cases only as an exception. Some flexibility in the framework, akin to that provided by the federal counterpart, would be advantageous to Delaware's approach. If adequate attention is given to individual cases, then Delaware will not suffer the flight of corporations, a result these very efforts are directed at preventing.

Finally, a lawsuit which has been adjudicated quickly is not necessarily a less expensive lawsuit. If too great an emphasis falls on meeting strict deadlines, then the time savings may be outweighed by the cost of conducting litigation at such a frantic pace. Ideally, a balance needs to be achieved where the same resources can be used to adjudicate a suit more quickly than in the past, without sacrificing the rights of the parties.

Delaware recognized that there was a problem with its court system. It responded quickly and efficiently to develop an alternative for corporations within its own state court system. The federal courts implemented their own reform efforts that, while less ambitious in their goals, were appropriate for the scale of the task undertaken. Time and money, the forces that led to the enactment of the DSPA and CJRA, will ultimately determine whether these efforts succeed.

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