

Anti-Plaintiff Bias in the New Federal Rules of Civil Procedure

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Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 **U. Cin. L. Rev.** 1083 (2015), available at [SSRN](#).

On December 1, 2015, several major amendments to the Federal Rules of Civil Procedure took effect. Some of these changes might, at first glance, seem dry and technical, such as shortening the time to serve process. Other changes, such as the addition of a so-called “proportionality” standard to the scope of discovery, have been the subject of heated debate in the months since the changes were proposed.

While it might be tempting to dismiss all but the most controversial amendments as nothing more than footnotes in a new casebook, each of these amendments are part and parcel of anti-plaintiff trends in procedural rulemaking. Patricia Moore’s article should be required reading for any professor preparing to teach the new rules, because it combines a clear and practical outline to each of the rule changes with an incisive critique of the substance of the changes and the process by which they were promulgated.

The first part of the article details each amendment, explaining how each rule has changed and the impetus for the revision. Her writing provides more than a glorified “redlining” of the old and new texts. Her analysis includes examples of how the old rules worked in practice, and how the amendments might change the litigation landscape. She concludes that, with only one exception (Rule 34), each amendment exposes clear anti-plaintiff bias and will likely generate anti-plaintiff results. She also cites to the record of committee discussions and testimony that point to some uncomfortable conflicts of interest among committee members and the members of the defendants’ bar urging these changes. Moore is methodical in considering each amendment in turn, but also groups them together in three larger categories that give a sense of the ideological motivations of the rulemakers.

Having documented the amendments, Moore turns to two broad critiques of the process. The first takes aim at the committee’s claim that the amendments are supported by empirical evidence. This was a powerful assertion, as the existence of empirical evidence suggested that the changes were driven by objective data rather than the subjective ideological preferences of committee members. Moore demonstrates that not all data are created equal. The data that peppered the committee deliberations and reports consisted primarily of opinion surveys. In other words, the “empirical” evidence mounted by the committee was little more than an objective representation of essentially subjective viewpoints. Beyond critiquing the committee’s own data, Moore collects data and studies that do not support the committee’s positions—which the committee all but ignored.

The second critique of the rulemaking process focuses on the ideological make-up of the committee and the Duke conference that was the springboard for the current round of changes. She demonstrates that, while plaintiffs’ voices were not completely absent, their position is underrepresented on the committee and was poorly represented at the conference and hearings on the proposed changes. Along with Suja Thomas’s [Op-Ed](#) criticizing the Duke conference for allowing corporate interests to more or less dictate

the interpretation and implementation of these rules, Moore's article provides a much-needed rejoinder to any academic or practitioner inclined to view the rules and their authors as boring, technical, and disconnected from ideology.

Moore's article represents the best of practical academic scholarship. It is an article that one can turn to for the purposes of actually learning something about rules and doctrine, while at the same time providing a theoretical framework for the subject and a normative critique of the rules that it explains. I expect it will be in my catalogue of "go to" articles for a number of years, both for teaching and research purposes.

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