

Letters

On Settlement and Litigation

Dear Mr. Epstein:

Your article in the Spring, 1984, issue of *Law School Record*, "Settlement and Litigation: Of Vices Individual and Institutional" is an excellent analysis of many of the problems literally clogging our litigation system. The Michigan Supreme Court has been involved in rewriting the Michigan Court Rules, last revised in 1963, and I have critiqued the proposed new rules for some of the very same reasons you are critical of modern procedure. I am in the unique position of seeing every piece of premises, property, products liability, wrongful detention, and other public liability litigation filed against this corporation each year. I continue to handle litigation in our local county while supervising it around the country and have become acutely aware of the general practice of using procedural rules to harass settlement in marginal and non-liability cases.

I have sent a copy of the article to the clerk of the Michigan Supreme Court and commended it to his office and to the justices of the court as worth reading.

C. Bruce Taylor, J.D. '66
Attorney, Public Liability
K Mart Corporation
Troy, Michigan

Dear Editor:

Continuing a colloquy we began in first year Contracts, I should like to respond to Professor Epstein's article on "Settlement and Litigation" in the Spring 1984 issue.

Both as a Quaker, and as a Legal Services attorney often without funds to conduct adequate discovery, I wholeheartedly agree with the article's concern to promote informal settlement where prolonged and expensive litigation is not in the public interest.

However, one critical sub-thesis of the article appears to me oversimplified, namely, the contention that litigiousness has been uselessly fostered by the erosion of traditional "bright line" rules that he claims

structure both primary behavior and litigation. In place of such *per se* rules based on overt behavior, Professor Epstein argues, there has been a rise of substantive tests that turn either on the reasonableness of conduct or the motive of the parties, with a concomitant increase in the frequency and severity of litigation.

The article gives examples from several areas of substantive law about which I do not know enough to comment. I shall comment on one example, the erosion of the "termination at will" doctrine that where employment is for an indefinite period an employee may be discharged at any time and for any reason.

There is no doubt that this rule is in process of erosion. I believe that in most if not all Western industrialized nations the tendency is to require an employer to demonstrate good cause before an employee may be legally terminated.

This new rule, as it becomes fixed, will be just as "bright" and just as easy for potential litigants to understand so as to calculate their conduct accordingly, as is the bright line rule of termination at will that it replaces.

The difference is that the old rule has come to be perceived as unfair to employees, a variant of Anatole France's remark that the law in its majesty permits rich and poor alike to sleep under bridges. Thus the old rule is being changed for the sake of what Professor Epstein terms the "social good." Yet if Professor Epstein were to be heeded, all bright line rules expressing unjust social relationships would tend to be cast in concrete for all time, or at least until a legislature was prepared to replace the old bright line rule with a new one.

What is happening in the area of employment contracts is the common law process whereby society feels its way from one bright line rule to another by way of an intermediate period of experimentation and, necessarily, uncertainty. I suspect that Professor Epstein and I would agree that this is a process of social change often preferable to legislative fiat.

Staughton Lynd, J.D. '76
Northeast Ohio Legal Services
Youngstown, Ohio

Mr. Epstein replies:

To Mr. Taylor, I can say only that I am glad what I have written strikes a responsive chord in someone who is on the firing line of day-to-day litigation.

My response to Mr. Lynd must be a bit more extensive. The critical error in his letter is the failure to distinguish between the transitional costs incurred in switching from one legal rule to another, and the costs of a given legal rule once it is adopted. Mr. Lynd sensibly urges that the costs of transition are in this instance not sufficient to prevent the abrogation of the at-will rule.

Nonetheless, Mr. Lynd's point misconceives my central argument, which was that even if the transitional costs in switching from the at-will rule were zero, for-cause employment contracts should not be required as a matter of law. The at-will rule should be retained because typically it best responds to the demands of both sides to the contract at the time of formation. Both sides share the gain in a rule that operates with little judicial discretion and with low administrative costs. Both sides have under the at-will contract the ability to vary the level of payment of services, and in the limit to quit or to fire. In most cases these unilateral sanctions provide a far more effective safeguard against abuse, whether by employer or employee, than the elaborate and multi-faceted inquiry that any wrongful discharge rule must necessarily spawn.

The contract at-will cannot be discredited by showing that it will yield abuses in individual cases; every legal rule has that failing. Instead, it must be shown that the level of abuse in private markets is so high as to justify the enormous costs (including those associated with employee abuse of the new legal system) that the cumbersome, state imposed wrongful discharge rules necessarily entail. It is this burden that advocates of wrongful discharge, including Mr. Lynd, wholly fail to carry. (I have given a more detailed analysis of my position in an article, "In Defense of the Contract at Will," that will appear in the Fall 1984 issue of the *University of Chicago Law Review*.) ■