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LAWSUIT ABUSE REDUCTION ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION
AND CIVIL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 758

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CONTENTS

MARCH 17, 2015

Page

THE BILL

H.R. 758, the "Lawsuit Abuse Reduction Act 3

OPENING STATEMENTS

The Honorable Trent Franks, a Representative in Congress from the State of Arizona, and Chairman, Subcommittee on the Constitution and Civil Justice 1
The Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice 5
The Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary 9

WITNESSES

Elizabeth Milito, Senior Executive Counsel, NFIB Small Business Legal Center
Oral Testimony 11
Prepared Statement 13
Robert S. Peck, President, Center for Constitutional Litigation, PC
Oral Testimony 23
Prepared Statement 25
Cary Silverman, Partner, Shook, Hardy & Bacon LLP
Oral Testimony 44
Prepared Statement 46

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

Material submitted by the Honorable Steve Cohen, a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on the Constitution and Civil Justice 7
Material submitted by the Honorable Ted Deutch, a Representative in Congress from the State of Florida, and Member, Subcommittee on the Constitution and Civil Justice 66

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of Ralph Nader 95
Letter from the American Bar Association (ABA) 96
Response to Questions for the Record from Robert S. Peck, President, Center for Constitutional Litigation, PC 100

LAWSUIT ABUSE REDUCTION ACT OF 2015

TUESDAY, MARCH 17, 2015

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:06 a.m., in room 2141, Rayburn Office Building, the Honorable Trent Franks, (Chairman of the Subcommittee) presiding.

Present: Representatives Franks, Goodlatte, Gohmert, Cohen, Nadler, and Deutch.

Staff Present: (Majority) Paul Taylor, Subcommittee Chief Counsel; Tricia White, Clerk; (Minority) James Park, Minority Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee on the Constitution and Civil Justice will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time. Good morning.

Currently, Rule 11 of the Federal Rules of Civil Procedure sets out one of the most basic requirements for litigation in Federal court, that papers filed with a Federal district court must be based on both the facts and the law.

That is to say, anytime a litigant signs a filing in Federal court, they are certifying that "to the best of the person's knowledge, information, and belief" the filing is accurate, based on the law or reasonable interpretation of the law, and is brought for a legitimate purpose.

Now, this is a simple requirement, one that both sides to a lawsuit must abide by, if we are to properly have a functional Federal court system. However, under the current Federal procedure rules, there is no requirement that a failure to comply with Rule 11 results in sanctions for the party that filed that frivolous lawsuit. The fact that litigants can violate Rule 11 without penalty significantly reduces the deterrent effect of Rule 11.

This harms the integrity of the Federal courts and forces both plaintiffs and defendants to spend money to respond to frivolous claims and arguments with no guarantee of compensation when the claims against them are found frivolous by a Federal judge.

The Lawsuit Abuse Reduction Act corrects this flaw by requiring that Federal district court judges impose sanctions when Rule 11 is violated. It will relieve litigants from the financial burden of hav-

ing to response to frivolous claims by requiring those who violate Rule 11 to reimburse the opposing party reasonable expenses incurred as a direct result of the violation.

Furthermore, the legislation eliminates Rule 11's 21-day safe harbor provision, which currently gives litigants a free pass to make frivolous claims so long as they withdraw those claims if the opposing side objects within 21 days. As Justice Scalia correctly pointed out when Rule 11 was gutted in 1933, "Those who file frivolous suits and pleadings should have no safe harbor. Parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose. If objection is raised, they can retreat without penalty."

Now although this legislation makes changes to Rule 11, it is important to recognize that nothing in this legislation changes the standard by which courts determine whether a pleading or a filing violates Rule 11. Courts will apply the same legal standard they currently apply to determine if a filing is frivolous under the rule.

So in the end, all this legislation really does is make the technical and conforming changes to Rule 11 necessary to make sanctions mandatory rather than discretionary. Victims of frivolous lawsuits are just as deserving of compensation as any other victim, and there is no reason those who are the victims of frivolous lawsuits in Federal court should be the only litigants to go without compensation when they prove their injuries in court.

According to Federal Rules of Civil Procedure, the goal of the rules is to ensure that every action and proceeding in Federal court be determined in a "just, speedy, and inexpensive" manner. That goal is best served through mandatory sanctions for violating the simple requirements of Rule 11 that every filing be based on both the law and the facts.

And finally, this bill has been introduced in the House and Senate in previous Congresses. This Congress is different. For the first time, this bill has been introduced in the Senate by the Chairman of the Senate Judiciary Committee himself, Senator Charles Grassley, who is a leading advocate for the rights of victims, including the victims of frivolous lawsuits.

With that, I look forward to hearing from all of our witnesses today, and I would now recognize the Ranking Member of the Subcommittee, Mr. Cohen from Tennessee, for his opening statement.

[The bill, H.R. 758, follows:]

I

114TH CONGRESS
1ST SESSION

H. R. 758

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 5, 2015

Mr. SMITH of Texas (for himself, Mr. GOODLATTE, Mr. FRANKS of Arizona, Mr. FARENTHOLD, and Mr. CHABOT) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2015".

SEC. 2. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in paragraph (1), by striking "may" and inserting "shall";

(2) in paragraph (2), by striking "Rule 5" and all that follows through "motion." and inserting "Rule 5."; and

(3) in paragraph (4), by striking "situated" and all that follows through the end of the paragraph and inserting "situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a non-monetary nature, or, if warranted for effective deterrence, an order directing payment of a penalty into the court.".

(b) RULE OF CONSTRUCTION.—Nothing in this Act or an amendment made by this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution of the United States.

○

Mr. COHEN. Thank you, Mr. Chair.

Today, we consider H.R. 758, titled the "Lawsuit Abuse Reduction Act of 2015." It is substantially identical to bills we considered in the 112th and 113th Congresses, and we have considered even earlier versions of this bill going back at least a decade. Given this fact, I have this Bill-Murray-like feeling of being here before in Groundhog Day.

H.R. 758, like its predecessors, is a solution in search of a problem that would threaten to do more harm than good, if enacted. H.R. 758 would restore the 1983 version of Rule 11 of the Federal Rules of Civil Procedure by making sanctions for Rule 11 mandatory and eliminating the current safe-harbor provision that allows a party to withdraw or correct any allegedly offending submission to the court within 21 days after service of submission.

Safe harbor is important. The Chair in his opening remarks said it just guarantees that people have recourse. Well, they have recourse, but it is up to the judge's determination, and it is important that the judge have that discretion, I think.

Moreover, the bill would go beyond the 1983 rule by requiring the court to award these reasonable attorney's fees and costs. I am all in favor of Rule 11, and sanctioning attorneys that violate such with frivolous lawsuits. But right now, they are discretionary, in the court's discretion. And we have judges for a reason, and they have more intimate knowledge of the facts and the circumstances and the attorneys involved in the safe-harbor option.

No empirical evidence suggests there is a need, really, to change Rule 11. In fact, there were good reasons why the Judicial Conference of the United States amended the 1983 Rule 11. And for these same reasons, H.R. 758 is ill-advised.

The 1983 rule caused excessive litigation. Many civil cases had a parallel track of litigation, referred to as satellite litigation, over Rule 11 violations, because having mandatory sanctions and no safe harbor provisions caused parties on both sides to litigate the Rule 11 matter to the bitter end, so courts become more loaded with crowded dockets.

The dramatic increase in litigation spawned by the 1983 rule not only resulted in delays in resolving the underlying case, it increased costs for the litigants, but also strained our judicial resources. It is clear H.R. 758 will result in more, not less, litigation and impose a greater burden on the judiciary.

Ultimately, the type of Rule 11 sanctions regime that H.R. 758 envisions will only favor those with the money and resources to fight expensive and drawn-out litigation battles. H.R. 758 also threatens judicial independence by removing that discretion that judges presently have in determining whether or not to impose sanctions. It circumvents the painstakingly thorough rules-enabling act process by recklessly attempting to amend the rules directly, even over the Judicial Conference's objections.

I would like each of our witnesses to tell me a precedent where rather than our process being that the courts recommend and propose rules and we approve or disapprove, where we in the Congress have in the past changed the rules by legislation without the courts submitting rules. It is definitely a deviation in the process of the judiciary making the rules, with the check and balance of the legis-

lature approving or disapproving. We can disapprove a rule or recommend, but I believe it is extremely rare.

And I look forward to our experts telling me where the legislature has specifically made a law that changed a rule without the judiciary coming forth on that.

We know the 1983 rule had a disproportionally chilling impact on civil rights cases, and that is most concerning to me and to others. And there is no reason to think H.R. 758 will not have such a similar chilling effect.

We just came through the reenactment of the Selma march. We have seen so many failures in our legislative and political system, to where we haven't moved forward on civil rights; we moved backward. And what happened in Selma, we need to see that we have vigorous enforcement of civil rights and voting rights. And this could be a chilling effect on civil rights cases that depend sometimes on novel arguments for the extension, modification, or reversal of existing laws that have brought us into the 21st century.

Not surprisingly, the Federal Judicial Center found that the incidence of Rule 11 motions was higher in civil rights cases than other type of cases when the 1983 rule was in place, notwithstanding the fact that the 1983 rule was neutral on its face.

Even a landmark case like the *Brown v. Board of Education* argument may have been delayed or may not have been pursued to its conclusion had our H.R. 758 changes to Rule 11 been in effect at the time. Certainly, the legal arguments in that case were novel and not based on existing law. At a minimum, defendants could have used Rule 11, as amended by H.R. 758, as a weapon to dissuade the plaintiffs or weaken their resolve.

The Judicial Conference of the United States, the policymaking arm of the Federal judiciary, opposed legislation substantially identical to H.R. 758 last conference. Similarly, the American Bar Association in the past, and a coalition of groups concerned about justice—the Alliance for Justice, Consumer Federation of America, the National Consumer Law Center, and the National Employment Lawyers—previously opposed the measure.

I ask unanimous consent to add a letter in opposition sent to the Subcommittee by Public Citizen dated March 16 be submitted into the record, and I appreciate that.

Mr. FRANKS. Without objection.

[The information referred to follows:]

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

March 16, 2015

The Honorable Trent Franks, Chairman
The Honorable Steve Cohen, Ranking Member
House Judiciary Subcommittee on the Constitution and Civil Justice
Washington, DC 20515

Re: Hearing: H.R. 758, The "Lawsuit Abuse Reduction Act"

Dear Chairman Franks and Ranking Member Cohen:

Public Citizen, a national nonprofit consumer advocacy organization with more than 350,000 members and supporters urges the subcommittee to heed past lessons and reject H.R. 758, the "Lawsuit Abuse Reduction Act." It is a deceptively named bill that would reduce Americans' access to justice.

If passed, the bill would return the litigation process to a time when a former version of Rule 11 of the Federal Rules of Civil Procedure, a federal court rule that provides guidelines for courts to punish attorneys and their clients for breaking rules of procedure, was used by corporate defendants to prolong and create sideshow litigation.

The legislation would make sanctions in litigation mandatory if a court finds that a filing in a case is trivial, effectively removing federal judges' discretion to decide how to handle claims. It will also remove the "safe harbor" provision from the current rule that gives lawyers the opportunity to correct or withdraw filings with the court if they might face a Rule 11 challenge.

Rule 11 has been amended twice – once in 1983 and a second time in 1993 to reverse several flaws in the first amendment after it became clear it wasn't working. The 1983 version of Rule 11 removed judges' discretion for imposing sanctions. Instead of reducing litigation and its costs, the 1983 version increased them and spurred satellite litigation within cases to argue points about the sanctions that were irrelevant to the underlying claims, expending extra time, energy and money by the court and parties in cases.

Studies have documented how mandatory Rule 11 sanctions were used disproportionately against consumer (particularly civil rights) attorneys and those attempting to extend the law in support of unpopular causes. The previous Rule had a chilling effect on lawsuits

brought by workers, consumers and seniors against corporate misconduct. Removing judges' discretion on sanctions would discourage novel but potentially meritorious claims and legal arguments, such as claims from public interest and pro bono lawyers representing the interests of social groups seeking to change their legal status and rights.

The 1993 (and current) version, that was adopted by the Rules Committee appointed by Chief Justice William Rehnquist and approved by the Rehnquist Court, gives judges appropriate discretion to sanction parties. Under current Rule 11, parties are encouraged to cooperate and to fix problems without necessitating a motion for sanctions.

The proposed Rule 11 changes in H.R. 758 will make federal litigation more complicated, costly, and inaccessible to consumers and employees. We urge the committee to reject this legislation.

Sincerely,

Public Citizen, Congress Watch division

Christine Hines
Consumer and Civil Justice Counsel

Lisa Gilbert
Director

Mr. COHEN. H.R. 758 takes away judicial discretion, which is so needed, and would result in more litigation rather than less.

I urge my colleagues to oppose and yield back the balance of nonexistent balance of time.

Mr. FRANKS. And I thank the gentleman.

And I now yield to the Chairman of the Committee, Mr. Goodlatte of Virginia.

Mr. GOODLATTE. Well, thank you, Mr. Chairman.

H.R. 758, the "Lawsuit Abuse Reduction Act OF 2015," would restore mandatory sanctions for frivolous lawsuits filed in Federal court. Many Americans may not realize it, but today, under what is called Rule 11 of the Federal Rules of Civil Procedure, there is no requirement that those who file frivolous lawsuits pay for the unjustified legal costs they impose on their victims, even when those victims prove to a judge the lawsuit was without any basis in law or fact.

As a result, the current Rule 11 goes largely unenforced, because the victims of frivolous lawsuits have little incentive to pursue additional litigation to have the case declared frivolous when there is no guarantee of compensation at the end of the day.

H.R. 758 would finally provide light at the end of the tunnel for the victims of frivolous lawsuits by requiring sanctions against the filers of frivolous lawsuits, sanctions which include paying back victims for the full costs of their reasonable expenses incurred as a direct result of the Rule 11 violation, including attorneys' fees.

The bill also strikes the current provisions in Rule 11 that allow lawyers to avoid sanctions for making frivolous claims and demands by simply withdrawing them within 21 days. This change eliminates the free pass lawyers now have to file frivolous lawsuits in Federal court.

The lack of mandatory sanctions leads to the regular filing of lawsuits that are clearly baseless. For example, a man sued a small-business owner for violations of Federal regulations in a parking lot he doesn't own or lease. A woman had her car repossessed and then filed a $5 million Federal lawsuit for the half tank of gas she had left in the car. A high school teacher sued a school district, claiming it discriminated against her because she has a phobia, a fear of young children. Her case was dismissed by the Equal Employment Opportunity Commission, but that didn't prevent her from filing a Federal lawsuit.

These real yet absurd cases have real-life consequences for their victims. But the victims of lawsuit abuse are not just those who are actually sued. Rather, we all suffer under a system in which innocent Americans everywhere live under the constant fear of a potentially bankrupting frivolous lawsuit.

As the former chairman of The Home Depot company has written, an unpredictable legal system casts a shadow over every plan and investment. It is devastating for startups. The cost of even one ill-timed abusive lawsuit can bankrupt a growing company and cost hundreds of thousands of jobs.

The prevalence of frivolous lawsuits in America is reflected in the absurd warning labels companies must place on their products to limit their exposure to frivolous claims. A 5-inch brass fishing lure with three hooks is labeled "harmful if swallowed." In a warning

label on a baby stroller, the caution is "remove child before folding." A sticker on a 13-inch wheel on a wheelbarrow warns, "not intended for highway use." A household iron contains the warning, "never iron clothes while they are being worn." And a cardboard car sun shield that keeps sun off the dashboard warns, "do not drive with sun shield in place."

In his 2011 State of the Union address, President Obama said, quote, "I am willing to look at other ideas to rein in frivolous lawsuits." Mr. President, here it is, a one-page bill that would significantly reduce the burden of frivolous litigation on innocent Americans.

I thank the former Chairman of this Committee, Lamar Smith, for introducing this simple, common-sense legislation that would do so much to prevent lawsuit abuse and restore Americans' confidence in the legal system.

I look forward to hearing the testimony of our witnesses, and I yield back.

Thank you, Mr. Chairman.

Mr. FRANKS. And I thank the gentleman.

And without objection, other Members' opening statements will be made part of the record.

So let me now introduce our witnesses. Good morning to all of you.

Our first witness is Elizabeth Milito, the senior executive counsel with the National Federation of Independent Business' Small Business Legal Center. Previously, she has worked for the U.S. Department of Veterans Affairs where she focused on employment and labor matters, a former editor of Notes and Comments for the Maryland Law Review, and a graduate of the University of Maryland's School of Law. Ms. Milito is responsible for managing cases and legal work for the NFIB Small Business Legal Center and working on labor and employment policy.

Glad to have you here.

Our second witness is Robert Peck, president of the Center for Constitutional Litigation. Mr. Peck has taught constitutional law and State constitutional law at the George Washington University Law School and American University Washington College of Law as a member of adjunct faculty. He is a co-chair of the Lawyers Committee of the National Center for State Courts, and a delegate in the American Bar Association's House of Delegates.

Welcome, sir.

Our third witness is Cary Silverman, a partner at the Shook, Hardy & Bacon Law firm in Washington, D.C. Mr. Silverman's public policy work focuses on civil justice reform, and he has published over 25 articles in prominent law journals. He is a recipient of the Burton Award for Excellence in Legal Writing, and an adjunct professor at the George Washington University Law School, where he earned his J.D. and master's of public administration.

Welcome, sir.

Each of the witnesses' written statements will be entered into the record in its entirety, so I would ask that each of you summarize his or her testimony in 5 minutes or less. And to help you stay within that time, there is a timing light in front of you. The light will switch from green to yellow, indicating that you have 1 minute

to conclude your testimony. When the light turns red, it indicates that the witness's 5 minutes have expired.

And before I recognize the witness, it is the tradition of the Subcommittee that they be sworn, so if you would please stand and be sworn.

Do you solemnly swear that the testimony that you are about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

You may be seated.

Let the record reflect that the witnesses answered in the affirmative.

So I would now recognize our first witness, Ms. Milito. And, Ms. Milito, if you would make sure you turn that microphone on before speaking.

TESTIMONY OF ELIZABETH MILITO, SENIOR EXECUTIVE COUNSEL, NFIB SMALL BUSINESS LEGAL CENTER

Ms. MILITO. Thank you, Mr. Chairman, and distinguished Subcommittee Members for inviting me to provide testimony regarding the impact lawsuits, and particularly frivolous lawsuits, have on small businesses.

While specific stories of lawsuit abuse vary from business to business, there is one reoccurring theme: This country's legal climate hinders economic growth and hurts job creation.

Due to this, NFIB's members and small-business owners throughout the country are fed up with the inability to pass meaningful legal reform. When it comes to lawsuits and small business, today I wish to highlight four things.

First, small businesses are easy targets for frivolous lawsuits. Sophisticated attorneys do not sue NFIB members. Instead, small businesses are more likely to be sued by smalltime lawyers, who threaten cookie-cutter lawsuits that are expected to be settled immediately.

One of the most prevalent forms of lawsuit abuse occurs when plaintiffs or their attorneys are merely trolling for cases. A plaintiff or an attorney will travel from business to business, looking for violations of a particular law. In such cases, the plaintiff is generally not as concerned with correcting the problem as she is with extracting a settlement from a small-business owner. In many instances, the plaintiff's attorney will initiate the claim, not with a lawsuit, but with a demand letter, requesting immediate settlement.

In California, attorneys have been known to rake in several million dollars a year fleecing small-business owners with these sorts of schemes. Ann Kinner, who owns Seabreeze Books & Charts in Point Loma, California, is one such small-business owner and an NFIB member who has been targeted by frivolous litigation.

Kinner's store has been sued twice for ADA violations. She went to court, fought, and won both these lawsuits. But the defense has cost her $10,000, money she could have used, in her words, to pay a new employee for half a year. In Kinner's words, "The only people who win in these cases are the lawyers."

Two, small businesses settle and avoid going to court. When a conflict arises, small businesses or the insurer on their behalf will

likely pay rather than fight a claim, whether there is a meritorious defense or not. Calculating attorneys know that they can extort settlements from small businesses by threatening to sue. Small businesses simply cannot absorb the costs of a legal battle as easily as larger businesses or, for that matter, the cost of paying damages if they should lose in the end.

This means that, in many cases, the small-business owner may be risking financial ruin if the owner refuses to settle. Since there is no guarantee that, at the end of the fight, the defendant will prevail, small-business owners often rationally opt to avoid the costs of litigation by agreeing to settle claims that they believe to be without merit. Indeed, they will rationally decide to settle cases where they realize that the probable cost of litigation will exceed the benefit of winning in court.

Three, small businesses pay more to fight frivolous claims. While NFIB members are loath to write a check to settle what they perceive to be a frivolous claim, they express as much, if not more, frustration with the time spent defending against a lawsuit. In the end, of course, time is money to a small-business owner.

Once the suit is settled, however, the small-business owner will pay with higher insurance premiums. Typically, it is a fact that the small-business owner settled a case, for any amount, which drives up the insurance rates. It does not matter if the business owner was ultimately found liable.

Many small-business owners understand this dynamic and, as a result, will settle claims without notifying their insurance carrier. As such, small businesses annually pay over $35 billion out of pocket to settle these claims.

Four, small businesses support common-sense legal reform like H.R. 758. In crafting solutions here, we must acknowledge the practical circumstances of the small-business owner threatened with protracted legal battle. Regardless of whether the plaintiff's claims are meritorious, the small-business owner faces a difficult, and often impossible, dilemma: Settle or risk everything.

For this reason, NFIB has championed the Lawsuit Abuse Reduction Act, which focuses on tightening sanctions for frivolous lawsuits. This is the best reform, to date, to rein in the bottom feeders that target small business.

Simply put, NFIB believes that this bill will help disincentive both plaintiff and defense attorneys from taking brash and cavalier legal positions that result in frivolous and protracted litigation.

We are hopeful through your deliberations you can strike the appropriate balance to protect those who are truly harmed and the many unreported victims of our Nation's civil justice—America's small businesses.

Thank you very much, and I look forward to answering any questions you might have.

[The prepared statement of Ms. Milito follows:]

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

NFIB
The Voice of Small Business®.

House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

March 17, 2015

"Lawsuit Abuse Reduction Act of 2015"

Thank you, Mr. Chairman and distinguished Committee members for inviting me to provide testimony regarding the impact lawsuits, and particularly frivolous lawsuits, have on small business. My name is Elizabeth Milito and I serve as Senior Executive Counsel of the National Federation of Independent Business (NFIB) Small Business Legal Center. The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business" the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

Although our country's judicial system has much to be lauded, small business owners staring down a lawsuit find it hard to appreciate any praise of the courts. The United States is one of the most litigious nations in the world. How bad is it? It's bad. Four in five voters (78 percent) believe there are *too many* lawsuits in the U.S.[1] More than 15 million lawsuits are filed every year.[2] While some of these lawsuits have merit, many do not and these lawsuits are costing each and every one of us. And the news is particularly dire for small business owners, for whom the stakes are high and profit margins are razor thin.

Three-quarters of all small business owners in America are concerned they might be the target of a frivolous or unfair lawsuit.[3] Of those who are most concerned, six in ten say the fear of lawsuits makes them feel more constrained in making

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[1] Americans Speak on Lawsuit Abuse, Conducted by Luce Research (August 2012), available at http://atra.org/sites/default/files/documents/ATRA%20SOL%20Voter%20Survey%20Summary%20FINAL.pdf.

[2] Joseph Shade, *The Oil & Gas Lease and ADR: A Marriage Made in Heaven Waiting to Happen*, 30 Tulsa L.J. 599, 656 (1995) ("More than 15 million lawsuits are filed every year in the United States. Between 1964 and 1984 the per capita rate at which law suits were filed tripled.") (citing Peter Lovenheim , Mediate, Don't Litigate 3 (1989)).

[3] "Small Businesses: How the Threat of Litigation Impacts Their Operations," U.S. Chamber Institute for Legal Reform, 2007.

business decisions generally, and 54 percent say lawsuits or the threat of lawsuits forced them to make decisions they otherwise would not have made.[4]

While specific stories of lawsuit abuse vary from business to business, there is one reoccurring theme: this country's legal climate hinders economic growth and hurts job creation. Due to this, NFIB's members and small business owners throughout the country are fed up with the inability to pass meaningful legal reforms. Therefore, NFIB applauds the Committee for holding this hearing in order to focus on the problem of lawsuit abuse.

When it comes to lawsuits and small business, I will highlight four things:

1. **Small businesses are easy targets for lawsuits.** Sophisticated attorneys do not sue NFIB members. Small businesses are more likely to be sued by small-time lawyers who threaten cookie-cutter lawsuits that are expected to be settled immediately. Small businesses fear being sued more than actually having been sued.

2. **Small businesses settle and avoid going to court.** When a conflict arises, small businesses or the insurer on their behalf will likely pay rather than fight a claim, whether there's a meritorious defense or not.

3. **Small businesses pay more to fight frivolous claims.** Small businesses care about liability insurance rates because these rates directly impact their razor thin margins. And fighting a legal claim costs small business owners a disproportionate amount of time and money as compared to their larger counterparts.

4. **Small businesses support commonsense legal reform like the "Lawsuit Abuse Reduction Act."** Our members support efforts to curb punitive damages, limit non-economic damages, forum shopping and other 'traditional' civil justice reform proposals. But more than anything, small business owners tend to be practical and logical and support reforms that get to the heart of small business litigation problems. For this reason, NFIB has championed the "Lawsuit Abuse Reduction Act," which focuses on tightening sanctions for frivolous lawsuits. This is the best reform, to date, to rein in the "bottom feeders" that target small business.

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[4] *Id.*

1. Small Businesses are Easy Targets for Lawsuits

We would all like to think that attorneys comply with the highest ethical standards; unfortunately, that is not always the case. In my experience, this seems particularly true of plaintiffs' attorneys who bring lower-dollar suits – the type of suits of which small businesses are generally the target.

One of the most prevalent forms of lawsuit abuse occurs when plaintiffs or their attorneys are merely trolling for cases. A plaintiff, or an attorney, will travel from business to business, looking for violations of a particular law. In such cases, the plaintiff generally is not as concerned with correcting the problem as he or she is in extracting a settlement from the small business owner. In many instances the plaintiff's attorney will initiate the claim, not with a lawsuit, but with a "demand" letter. In my experience, plaintiffs and their attorneys find "demand" letters particularly attractive when they can file a claim against a small business owner for violating a state or federal statute.

The scenario works as follows: an attorney will send a one and a half to two-page letter alleging the small business violated a particular statute. The letter states that the business owner has an "opportunity" to make the whole case go away by paying a settlement fee up front. Time frames for paying the settlement fee are typically given. In some cases, there may even be an "escalation" clause, which raises the price the business must pay to settle the claim as time passes. So, a business might be able to settle for a mere $2,500 within 15 days, but if it waits 30 days, the settlement price "escalates" to $5,000. Legal action is deemed imminent if payment is not received.

In California, attorneys have been known to rake in several million dollars a year fleecing small business owners with these schemes. One particular attorney, Harpreet Brar, received hundreds of settlements of $1,000 or more from "mom and pop" stores throughout the state after suing them for minor violations of the state business code.[5] Mr. Brar sued many of these businesses for allegedly collecting "point-of-sale" device fees from his wife without proper disclosure signs.

Ann Kinner, who owns Seabreeze Books & Charts in Point Loma, CA is one such business owner and an NFIB member targeted by frivolous litigation. Kinner's store has been sued twice for ADA violations. She went to court, fought and won both lawsuits. But the defense cost her $10,000, money she could have used to hire a new employee. Kinner knows many businesses in her town subjected to identical claims. And most business owners, according to her, get the demand letter and fold because they cannot afford to hire a lawyer and defend the business. In Kinner's words, "the only people who win in these cases are the lawyers."

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[5] http://www.californiawagelaw.com/wage_law/2006/02/harbreet_brar_g.html.

Of course, it is important to give victims of injustice their day in court. But lawsuit abuse victimizes those who are sued. And by lawsuit abuse, I am referring to those claims where a plaintiff's attorney asserts a flimsy claim to get some money, to get more money than is fair, or sues a business that had little or no involvement but might have money. In all of these instances, small businesses must expend substantial resources to defend the business or risk the prospect of default judgments against them.

2. Small Businesses Settle and Avoid Going to Court

When a business is facing an abusive lawsuit, it is often far less expensive simply to settle the lawsuit rather than incur steep legal fees fighting it in court. While the targeted business saves money in the short term, these quick settlements encourage unscrupulous attorneys to continue shaking down small businesses with more lawsuits.

In trolling for cases, plaintiffs' attorneys know that small business owners do not have in-house counsels to inform them of their rights, write letters responding to allegations made against them, or provide legal advice. Without a standing army of attorneys ready to address legal problems, small business owners are more vulnerable to lawsuits, as they often delay seeking counsel—for financial reasons—until a lawsuit has already been filed. And in many cases the business simply lacks the resources needed to hire an attorney or—for that matter—the time and energy that may be required to fight a lawsuit. Small businesses also cannot pass on to consumers the increased costs of liability insurance or pay large lawsuit awards without suffering losses.[6] These factors make small businesses particularly vulnerable targets for plaintiffs seeking to exact an easy settlement.

Calculating attorneys know that they can extort settlements from small businesses by threatening to sue. This is true of larger businesses to a certain extent as well; however, we must remember that the typical small business operates on razor thin margins and maintains fewer assets and less insurance coverage than larger businesses. Small businesses simply cannot absorb the costs of a legal battle as easily as larger businesses—or for that matter the cost of paying damages if they should lose in the end.

This means that—in many cases—the small business owner may be risking financial ruin if the owner refuses to settle. And the plaintiffs' bar knows that most small business owners realize that the costs of fighting a legal battle often outweigh the benefit to be had in mounting a defense. Indeed, at NFIB, on a near-daily basis, I speak with small business owners facing serious legal issues,

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[6] Damien M. Schiff and Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 98-99, 109-113 (2012) (discussing the financial difficulties facing small business owners when legal problems arise, and the financial disincentives against protecting their legal rights).

who are nonetheless hesitant to seek out legal counsel because business owners know (and fear) what attorneys charge. The business owners also know that litigation is always a gamble, no matter how outlandish a lawsuit may be.

Since there is no guarantee that, at the end of the fight, the defendant will prevail, small business owners often rationally opt to avoid the costs of litigation by agreeing to settle claims that they believe to be without merit. Indeed they will rationally decide to settle in cases where they realize that the probable cost of litigation will exceed the benefit of winning in court.

3. Small Businesses Pay More to Fight Frivolous Claims

The costs of tort litigation are staggering, especially for small businesses. The tort liability price tag for small businesses in 2008 was $105.4 billion dollars.[7] Small businesses shoulder a disproportionate percentage of the load when compared with all businesses. For example, small businesses pay 81 percent of liability costs but only bring in 22 percent of the total revenue.[8] It is not surprising that many small business owners "fear" getting sued, even if a suit is not filed.[9]

Lawsuits - threatened or filed - impact small business owners. In eleven years at NFIB, I have heard story after story of small business owners spending countless hours and sometimes significant sums of money to settle, defend, or work to prevent a lawsuit. And while our members are loath to write a check to settle what they perceive to be a frivolous claim,[10] they express as much, if not more, frustration with the time spent defending against a lawsuit. In the end, of course, time is money to a small business owner.

Settling a matter at the urging of their insurer can be particularly troublesome in the current system. In most cases, if there is any dispute of fact, the insurer will perform a cost-benefit analysis. If the case can be settled for $5,000, the insurer is likely to agree to the settlement because generally it is less expensive than litigating, even if the small business owner would ultimately prevail in the suit. This is often referred to as the "nuisance" value of a case, which plaintiffs'

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[7] "Tort Liability Costs for Small Businesses," U.S. Chamber Institute for Legal Reform, 2010, at 11. In its 2009 report, "2009 Update on U.S.Tort Cost Trends,"Tillinghast/Towers Perrin forecast that tort costs would reach $183.1 billion in 2011 for all businesses with NERA Economic Consulting estimates that, in 2011, $152 billion will fall on small businesses.

[8] *Id.*

[9] *Id.* at 7-8.

[10] For the small business owner with 10 employees or less, the problem is the $5,000 and $10,000 settlements, not the million dollar verdicts. When you consider that many of these small businesses only net $40,000 - $60,000 a year, $5,000 paid to settle a case immediately eliminates about 10 percent of a business' annual profit.

lawyers have grown particularly apt at calculating so that it is less expensive for either the insurer or small business to settle than to pay to defend a lawsuit. As a result, the vast majority (9:1) of cases settle leaving small business owners dissatisfied because they want to fight these claims, but it ends up being significantly more costly even if they do prevail.[11]

Once the suit is settled, however, the small business owner must pay higher business insurance premiums. Typically, it is the fact that the small business owner settled a case, for any amount, which drives insurance rates up; it does not matter if the business owner was ultimately held liable after a trial. Many small business owners understand this dynamic, and as a result, will settle claims without notifying their insurance carriers. As such, small businesses annually pay $35.6 billion out of pocket to settle these claims.[12]

But there are other costs as well; the time and energy wasted defending meritless claims and the damage to an innocent business's reputation which is not automatically remedied just because the court dismisses a lawsuit. Small business owners threatened with lawsuits often would prefer to fight in order to prove their innocence. They do not appreciate the negative image that a settlement bestows on them or on their business. Settling a meritless case causes the business to look guilty, and some prospective customers cannot be easily convinced otherwise. Yet, unfortunately, the reality is that small business owners often have no choice but to settle, accept their losses and try to move on when threatened with a lawsuit.

Of course, for those small business owners who chose to stand on principle when they know they are in the right, there is no easy road. To vindicate their rights, they must prove their innocence in court. Business owners, like Ms. Kinner, almost universally state that defending a meritless suit occupies their daily attention and costs them many sleepless nights.

4. Small Businesses Support Common Sense Legal Reform Like the "Lawsuit Abuse Reduction Act"

Substantive reforms limiting tort liabilities or setting evidentiary and recovery standards would certainly help disincentive plaintiffs' attorneys from taking brash and cavalier legal positions. But, in crafting solutions here, we must acknowledge the practical circumstances of the small business owner threatened with protracted legal battle. Regardless of whether the plaintiff's claims are meritorious, the small business defendant faces a difficult—and often impossible—dilemma. Settle or risk everything. For this reason, NFIB has

[11] NFIB National Small Business Poll, "Liability," William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 2 (2002) at 1.

[12] "Tort Liability Costs for Small Businesses," U.S. Chamber Institute for Legal Reform, 2010, at 11.

championed the "Lawsuit Abuse Reduction Act," which focuses on tightening sanctions for frivolous lawsuits. This is the best reform, to date, to rein in the "bottom feeders" that target small business.

LARA would put teeth back into the federal Civil Procedure Rule 11. Rule 11 sets forth requirements that attorneys must meet when bringing a lawsuit and *permits* judges to sanction attorneys if they do not meet those conditions. Specifically, Rule 11 requires every pleading to be signed by at least one attorney.[13] It also states that when an attorney files a pleading, motion, or other paper with a court he or she is "certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [that:]

(1) it is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, . . . are warranted by existing law or by a nonfrivolous argument for [a change] of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, . . . are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, . . . are reasonably based on a lack of information or belief."[14]

Importantly, it also provides attorneys with a 21-day window to withdraw a frivolous lawsuit after opposing counsel provides notice of intent to file a motion for sanctions. This is commonly referred to as Rule 11's "safe harbor" provision.[15]

Rule 11, in its current form, is the product of revisions made in 1993. These revisions rendered it nothing more than a "toothless tiger." The current rule places small businesses that are hit with a frivolous lawsuit in a lose-lose situation. In order to challenge a lawsuit as frivolous, a small business owner must pay a lawyer to draft a separate motion for sanctions that they cannot actually present to a court, but, due to the "safe harbor" provision, must first be sent to the plaintiff's attorney. This expense is in addition to filing an answer to the complaint. If the plaintiff's attorney withdraws the frivolous complaint within 21 days, then the small business that went through the time and expense of defending against it has no opportunity to be made whole. A judge will never consider the issue. If the plaintiff's attorney proceeds with the frivolous lawsuit, despite notice that the small business will seek Rule 11 sanctions, then the small business still has very little chance at recovery for two reasons. First, under

[13] Fed. R. Civ. P. 11(a).

[14] *Id.* at 11(b).

[15] *Id.* at 11(c)(1)(A).

current Rule 11, even if a judge finds a lawsuit is indeed frivolous, imposition of sanctions, in any form or amount, is entirely discretionary. There is no assurance that a judge will take action. Second, Rule 11 discourages judges from imposing sanctions for the purpose of reimbursing a defendant for the costs of a frivolous lawsuit by limiting sanctions "to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." As a result, unscrupulous attorneys, out to make a quick buck, know that the odds of being sanctioned under Rule 11 are remote. They receive something more like a "get out of jail free" card when they bring frivolous lawsuits.

LARA would remedy this and other problems by eliminating the "safe harbor" provision, making Rule 11 sanctions mandatory when an attorney or other party files a lawsuit before making a reasonable inquiry, and removing language that discourages judges from awarding reasonable attorneys' fees and costs to compensate small businesses that are victims of frivolous lawsuits. And, importantly, LARA makes it fair to both sides since the sanctions would also apply to frivolous defenses raised by small business owners.

Given the tremendous costs of litigation, and the inevitable risk that a plaintiff might prevail if the case goes before a sympathetic jury or an errant judge, small business defendants are rationally discouraged from vindicating their rights. For these reasons, plaintiff attorneys have a perverse incentive to threaten or initiate a legal action, even when the plaintiff has only an outside chance of recovery in court. They know that the majority of cases settle, and that even outlandish claims sometimes "stick" in court. So why not move forward with questionable claims? Indeed, this perverse incentive is the root cause of litigation abuse. And it remains a nationwide problem both in terms of the economic impact it has on business and in terms of the culture of fear that it fosters in the business community. So long as this remains true, plaintiffs' attorneys will inevitably weigh the benefits of pursuing a questionable claim as outweighing the risks.

Accordingly, we encourage passage of the "Lawsuit Abuse Reduction Act," which will encourage plaintiffs, defendants, and attorneys on both sides to make prudent decisions and discourage cavalier and abusive positions in litigation. Public policy should encourage attorneys to prudently assess the viability of their clients' potential claims *before* initiating a lawsuit or a fabricated defense.

Conclusion

Lawsuits hurt small business owners, new business formation, and job creation. The cost of lawsuits for small businesses can prove disastrous, if not fatal, and threaten the growth of our nation's economy by hurting a very important segment of that economy, America's small businesses. On behalf of America's small business owners, I thank this Committee for holding this hearing and providing us with a forum to tell our story.

We are hopeful that through your deliberations you can strike the appropriate balance to protect those who are truly harmed and the many unreported victims of our nation's civil justice system – America's small businesses.

Sincerely,

Elizabeth Milito, Esq.
NFIB Small Business Legal Center

Mr. FRANKS. Thank you, Ms. Milito.

And I now recognize our second witness, Mr. Peck. Please turn on your microphone, sir, before speaking.

TESTIMONY OF ROBERT S. PECK, PRESIDENT, CENTER FOR CONSTITUTIONAL LITIGATION, PC

Mr. PECK. Thank you, Mr. Chair.

The 1983 rule was a failed experiment that caused some of the strongest judicial advocates of mandatory sanctions to reverse course and support its internment. Judge William Schwarzer, who also served as head of the Federal Judicial Center, originally supported the changes but later saw that it was used for tactical purposes, multiplied proceedings, caused waste and delay, and increased tensions between the parties. It made the job of judges harder.

The Judicial Conference, which opposes this legislation, has told this Committee that the 1983 experiment spawned a cottage industry of tremendously wasteful satellite litigation that was all about strategic gamesmanship. It is a typical defense tactic to take a case away from the substance of the dispute, delay resolution, and outwait the patience and resources of the injured party who is desperate to be compensated for his or her injuries.

The mandatory nature of the 1983 version encouraged this. The discretionary nature of the current rule caused much of that churning to evaporate.

Many lawsuits have multiple counts. Success on any one of them is success. The 1983 version of Rule 11 had the perverse effect of causing post hoc review of the counts that did not succeed, resulting in sanctions against the prevailing parties. A discretionary approach to sanctions allows a judge to separate the wheat from the chaff and only sanction when warranted.

Sometimes a novel but difficult cause of action fails, but helps illuminate the merits of a sister cause of action pleaded together. As I stated in my written testimony, both *Brown v. Board of Education* and *National Federation of Independent Business v. Sebelius*, the Obamacare challenge of 2012, would likely have faced Rule 11 motions under the 1983 regime, but not under the current approach.

The switch to the 1993 rule did not cause frivolous lawsuits to be filed. Judges have reported that little changed in filings, and, in fact, they may have improved.

Truly frivolous cases are still sanctioned. Judges have the same authority that this bill would require of them, and the requirement of making it mandatory sort of indicates that judges, who really have very little patience for someone who wastes their time and are ready to invoke sanctions, are basically not trusted to act with the discretion that the current rule allows. They have that authority, and they can award attorneys' fees and costs under the current regime.

Sanctions are not always the best result. The distrust I mentioned is exacerbated by the distrust of the process set out by the Rule's Enabling Act. Rather than allow the courts to determine how to govern their own proceedings, H.R. 758 would directly amend Rule 11, cutting the judiciary out of the process altogether.

It is not hard to imagine the protests that this body would make if the judiciary did the same as to how Congress conducted its own proceedings.

Despite claims that civil rights cases, in particular, were not adversely affected once judges got the hang of the 1983 rule, the devastating impact on civil rights cases was palpable. The drop off could be explained by fewer cases, only the slam-dunks being filed, because of fear of sanctions.

Even if advocates are right, that judges eventually are going to be less harsh on civil rights cases, we have a new generation of judges now who would go through the same growing pains that the 1983 version had, thereby harming the constitutional right of access to the courts.

The safe harbor language in H.R. 758 for civil rights in statuary-based claims does nothing to alleviate the problem. It merely repeats the same standard that applies to all cases, regardless of how the lawsuit is filed.

I suggest that today's Iqbal and Twombly standard for pleadings sufficiently protects against ill-considered lawsuits, making the comparisons between 1983 and 1993 academic. The plausibility standard basically supercharges the 1993 rule.

I urge the Committee to reject this proposal, which seeks to return to what Professor Stephen Burbank accurately described as an irresponsible experiment with court access. Its enactment will only expose Americans to more harmful products and misconduct by diminishing the opportunity to hold those responsible accountable.

We would not know about the ignition switch defect in GM vehicles that took lives if the 1983 rule, the rule that this bill would re-establish, was in effect, because the case was filed on a theory that there was a problem with the steering wheel. Compulsory discovery unearthed the ignition switch problem.

In addition, this legislation would add to the cost of litigation, not lower it, as the vast number of cases affected will not be sanctionable.

The double counting, wildly inaccurate figures this Committee received that purport to reflect the cost of the tort system instead reflect the cost to maintain the insurance system plus the money that goes into it. It does not provide helpful or relevant information.

Judges and attorneys overwhelmingly, plaintiff and defense, support the rule as it is written today. I urge you not to alter it.

[The prepared statement of Mr. Peck follows:]

TESTIMONY OF

ROBERT S. PECK
President
Center for Constitutional Litigation, P.C.

before

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

U.S. HOUSE OF REPRESENTATIVES

on

H.R. 758, the Lawsuit Abuse Reduction Act

March 17, 2015

I thank Chairman Goodlatte for the invitation I received last week to appear before this Subcommittee to testify today on H.R. 758, the Lawsuit Abuse Reduction Act. I also extend my thanks to Chairman Franks and Ranking Member Cohen for having me here today.

Introduction

To introduce myself, I am president of the Center for Constitutional Litigation, P.C., a Washington, D.C. law firm I founded in 2001. Our law firm primarily represents plaintiffs in appellate proceedings, although we have also represented parties in trial courts and our clients have occasionally included defendants. Our practice has taken us to jurisdictions throughout the country and the level of court has ranged from limited jurisdiction state trial courts all the way up to the Supreme Court of the United States.

I have also taught constitutional law at the law schools at American and George Washington universities. I currently chair the Board of Overseers of the RAND Institute for Civil Justice, the first person with a primarily plaintiffs practice to do so. I have served on the Board of Directors of the National Center for State Courts, as well as co-chair of its Lawyers Committee, and again was the first person with a plaintiff's practice to hold those offices. I am a member of the American Bar Association's House of Delegates and the Council of its Tort Trial and Insurance Practice Section. I am a board member and on the executive committee as well for Justice at Stake. I am also a past president of the U.S. Supreme Court Fellows Alumni Association. I am appearing today only on behalf of myself and not in any representative capacity for my law firm or anyone else.

While this committee continues to be told by various advocates about the litigiousness of our society and the millions of lawsuits filed each year, the fact remains that we have seen a steady decline in tort filings and a startling drop in the number of jury trials in civil cases throughout the

country. The National Center for State Courts reports that incoming cases generally declined 9.4 percent from 2008 to 2012 in the nation's state courts and that civil cases in those same courts declined 7.7 percent during that same period.[1] Meanwhile, the number of jury trials continues to drop precipitously, despite its existence as a central feature of our civil justice system.[2] Even though we are not nearly as litigious as commentators make us out to be, let us keep in mind that we are talking today about civil cases filed in federal court. In 2014, 295,310 civil cases were filed in federal court in the fiscal year that just ended.[3] Of that amount, 32,537 were removed from state courts.[4] Some 60,675 were prison petitions, 178,961 were actions authorized by federal law, and only 78,319 were tort actions that were brought by and against private parties.[5] Civil rights cases authorized by federal law numbered 35,307, although the federal government was involved in 1,527 of those.[6] Thus, this bill addresses a relatively small number of civil cases.

Yet, despite its salutary–sounding name, H.R. 758 would expose Americans to harmful actions and products by diminishing the opportunity to hold those responsible accountable. If

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[1] National Center for State Courts, Court Statistics Project, Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads 7-8 (2014).

[2] *See* Hon. Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial,* 4 Fed. Cts. L. Rev. 99, 101 (2010) (discussing "the vanishing jury trial"); Hon. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution,* 40 Suffolk U. L. Rev. 67, 73 (2006) (the "civil jury trial has all but disappeared").

[3] Administrative Office of the U.S. Courts, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2013 and 2014 (Table C), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/C00Sep14.pdf.

[4] *Id.*, U.S. District Courts—Civil Cases Filed, by Origin, During the 12-Month Periods Ending September 30, 2010 Through 2014 (Table C-6), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/C08Sep14.pdf.

[5] *Id.*, U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Periods Ending September 30, 2013 and 2014 (Table C-2), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2014/appendices/C02Sep14.pdf.

[6] *Id.*

enacted, it will add to the cost of litigation from both parties' perspective, as well as drain resources from the judicial branch. And it will accomplish these problematic feats by invading authority that rightfully resides in the judicial branch. It is remarkable that a measure as short and simple as H.R. 758 could wreak such havoc, but my assessment of what it would do is not the product of speculation, but instead lessons learned by the experience of having been there, done that, and from strong, consistent empirical literature that supports that experiential assessment.

The Failed Experiment of the 1983 Rule 11

As members of this Subcommittee know, the judiciary experimented with Rule 11 in 1983 by adopting the essential provisions that H.R. 758 would readopt. During its nearly decade-long existence, that version of the rule generated more than 7,000 reported sanctions.[7] In a number of notable cases, sanctions were issued in cases where the sanctioned party prevailed ultimately, thereby denying the frivolousness that had been the basis of the sanctions.

Whenever a new or modified rule is put into place, it is in the competitive nature of the adversarial system for lawyers to test its applicability and tactical usefulness.[8] When faced with information that a lawsuit was in the offing, lawyers used the threat of Rule 11 sanctions to discourage opposing counsel from filing cases in the first place, causing many to drop the claim or to settle for nominal damages. These cases went away, not because the case was frivolous, but because the difficulty of factual issues. Civil rights plaintiffs could not prove necessary elements of their cases without the aid of compulsory discovery. Often, the smoking gun proving

[7] Reported sanctions remain only a portion of the universe of all sanctions . It is fair to assume that the 7,000 number represents the tip of the iceberg, with a great mass submerged and out of view. A task force formed by the U.S. Court of Appeals for the Third Circuit investigated this question, finding that reported decisions represented only two-fifths of Rule 11 sanctions issued. Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11 (1989).

[8] *See* Hon. William W. Schwarzer, *Rule 11 Revisited,* 101 Harv. L. Rev. 1013, 1018 (1988) (acknowledging the "readiness of lawyers to resort to any device available to exert pressure on their opponents.").

discrimination was hidden within the defendant's sole possession. When civil rights plaintiffs were unable to demonstrate that factual basis for their complaints at the outset the threat of Rule 11 sanctions became all too real. Today, a plausibility standard for pleadings is now in place,[9] making it even more likely that these cases would find a mandatory Rule 11 sanction requirement to constitute a nearly insuperable obstacle to vindicating our civil rights laws.

In fact, Rule 11 created satellite litigation with a vengeance. The Director of the Administrative Office of the U.S. Courts, Ralph Meachem, in a letter to Rep. Sensenbrenner as chair of the Judiciary Committee on behalf of the Judicial Conference declared that the 1983 version of Rule 11 spawned a "cottage industry . . . that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims."[10] Director Meachem added, "Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion."[11]

Sanctions motions became routine, in much the same way I know that every case I file will be met with a motion to dismiss. It is the knee-jerk reaction to a lawsuit because defendants never believe they have done anything wrong. The 1983 version of Rule 11 provided defendants with another way to render the litigation more expensive for the plaintiff to pursue so that a smaller settlement amount would become more attractive. Defense lawyers, because they are paid on an hourly basis, have a perverse incentive to drag litigation out; plaintiffs lawyers, usually paid on a contingency-fee basis, have incentives to reach a resolution as soon as possible. Dilatory tactics

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[9] *See Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007).

[10] Letter from Leonidas Ralph Meachem, Secretary, Judicial Conference of the United States to Rep. James Sensenbrenner, Chairman, Committee on the Judiciary (May 17, 2005), published in 151 Cong. Rec. 23978 (Oct. 27, 2005).

[11] *Id.*

by defense counsel only makes litigation more expensive to their clients and to a plaintiff. That type of delay and expense was a notable strategy of the tobacco industry in the days that they still denied that smoking and cancer were linked because a plaintiff's lawyer could not sustain a lawsuit as long as a wealthy defendant could.[12]

It serves no purpose toward resolution of the case to force a plaintiff to further elucidate the factual and legal justification for the lawsuit in a Rule 11 proceeding, only to have to do so again on the merits when the substance of the action is considered. It multiplies expert costs. That Rule 11 motions became routine was demonstrated by survey that showed during a one-year period, 55 percent of respondents had been threatened with Rule 11 motions, while nearly a third were forced to face Rule 11 proceedings.[13]

This misuse of Rule 11 convinced Judge William Schwarzer, who had been a great proponent of the 1983 change that the change had been a mistake. He decried the way that Rule 11 had "added substantially to the volume of motions," led to "waste and delay," and carried "the potential for increased tension among the parties and with the court."[14] He added, "when lawyers go to war under rule 11, litigation tends to become less manageable."[15] One leading scholar, Professor Stephen Burbank, described the fiasco of the 1983 version of the rule as an "irresponsible

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[12] A federal court quoted a memorandum from an R.J. Reynolds general counsel advising their litigation counsel that the: "aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his." *Haines v. Liggett Grp.*, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993).

[13] Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 Nw. U. L. Rev. 943, 952 (Table 1) (1992).

[14] Schwarzer, 101 Harv. L. Rev. at 1018.

[15] *Id.*

experiment with court access."[16] In fact, Professor Georgene Vairo, who has probably delved into Rule 11 more deeply than anyone else, wrote the 1983 version of "Rule 11 met with more controversy than perhaps any other Federal Rule of Civil Procedure."[17]

As this Subcommittee knows, civil rights cases in particular suffered under the 1983 version of Rule 11. Sanctions were assessed against civil rights plaintiffs more frequently than others, with the Federal Judicial Center finding that 28 percent of civil rights plaintiffs were sanctioned.[18] In fact, motions to sanction were granted against civil rights plaintiffs 70 percent of the time.[19] Most who studied this disparity recognized that the sanctions in civil rights cases were largely the product of disparate resources between low-income civil-rights plaintiffs and their better-resourced defendants, as well as civil rights plaintiffs' inability to develop necessary facts before filing a complaint and obtaining necessary internal documents from the defendant that proved their allegations.[20]

If the 1983 version of Rule 11 been applicable, the litigation that uncovered the General Motors ignition switch defect now linked to 65 deaths would have been the subject of Rule 11 motions. The lawsuit that unlocked the puzzle was initially filed on the theory that the young woman's crash that resulted in her death was due to a defect in the power steering. Only after significant discovery was the ignition switch problem, which GM knew about all along, identified

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[16] Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium,* 59 Brook. L. Rev. 841, 844 (1993).

[17] Georgene Vairo, *Rule 11 and the Profession,* 67 Fordham L. Rev. 589, 591 (1998).

[18] Federal Judicial Center, The Rule 11 Sanctioning Process 74 (1988).

[19] Georgene M. Vairo, Rule 11 Sanctions: Case Law, Perspectives and Preventative Measures 50 & n.68 (2004).

[20] *See, e.g.,* Carl Tobias, *Rule 11 and Civil Rights Litigation,* 37 Buff. L. Rev. 485, 493-96 (1989).

as the cause of the crash. While that is a notable, recent case, one can just as easily look to some of the most watched cases of our time that started out with little hope of success.

The most important case of the past century, *Brown v. Board of Education,*[21] was filed as a class action in 1951 and was, on its face, not regarded as the ideal vehicle to argue that separate was not equal and that the well-entrenched precedent of *Plessy v. Ferguson,* 163 U.S. 537 (1896), had to be overturned. As the evidence developed in the federal district court showed, "the physical facilities, the curricula, courses of study, qualification and quality of teachers, as well as other educational facilities in the two sets of schools [were] comparable" between the all-white and all-African-American schools.[22] In a mandatory-sanctions Rule 11 world, defense lawyers would have argued that there was no factual basis to argue that separate was not in fact equal. It is not fanciful that I suggest that Brown would have faced Rule 11 sanctions. Judge Robert Carter, who had been part of Thurgood Marshall's legal team in *Brown,* expressed "no doubt" that 1983's version of Rule 11 would have precluded the initiation of the lawsuit. Hon. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights,* 137 U. Pa. L. Rev. 2179, 2192-93 (1989).

I also feel compelled to point out that *National Federation of Independent Business v. Sebelius,*[23] the constitutional challenge to the Patient Protection and Affordable Care Act, was regarded by a number of scholars as frivolous. Professor Timothy Jost of Washington and Lee University Law Professor urged Rule 11 sanctions against the challengers and reimbursement of the federal government for the cost of defending the Act when the challenges were first filed because they represented "shockingly shoddy lawyering," involved a "pleading whose key claims

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[21] 347 U.S. 483 (1954).
[22] *Brown v. Board of Education,* 98 F. Supp. 797, 798 (D. Kan. 1951), *rev'd,* 347 U.S. 483 (1954).

[23] 567 U.S. ___, 132 S.Ct. 2566 (2012).

are without support in the law and the facts," and made arguments that are "simple nonsense."[24] Former Reagan Administration Solicitor General Charles Fried echoed Jost's assessment, calling the basis for the challenge "complete nonsense."[25] Though the Supreme Court upheld the Act against this attack, no one now could call the lawsuits frivolous.

Much too often, what constitutes a frivolous lawsuit is often in the eyes of the beholder, and judicial discretion, as in the current rule, is plainly warranted. Under the 1983 version of the rule, the sanctions were frequently considered after judgment had been rendered. The result of a case is not determinative of whether it was frivolous or not, particularly as there are a wide variety of factors that could produce an adverse result even when the claim or defense is fundamentally meritorious. If results determined frivolousness, then every case would result in sanctions because every case has a winner and a loser. As the lead researcher for the Federal Judicial Center observed, "there may be a tendency to merge the sanctions issue with the merits," as a result of a hindsight effect.[26] Yet, Rule 11 is about whether the pleading, *ex ante,* was without sufficient factual or legal support to have made the claim.

The 1983 Rule 11 also contributed vastly to a lowering of civility and professionalism among lawyers. I am usually quite proud of my fellow lawyers. We can fight zealously for our clients' interests and still shake hands at the end. We can accommodate our opponent's clients' needs or that of their counsel to modify the schedule, work on projects for the betterment of the law together, and tap each other to speak at conferences intended to educate our opponents. Yet,

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[24] Timothy Stoltzfus Jost. *Sanction the 18 State AGs.* Nat'l L.J. (Apr. 12, 2010), http://www.law.com/jsp/nlj/legaltimes/PubArticleFriendlyLT.jsp?id=1202447759851&slreturn=1.

[25] Alexander Bolton, "GOP Views Supreme Court as Last Line of Defense on Health Reform," The Hill. http://thehill.com/homenews/senate/89547-republicans-view-supreme-court-as-last-line-of-defense-on-healthcarereform.

[26] FJC Study, at 87-88.

the mandatory sanctions regime of 1983 produced suspicion and over-the-top accusations that were inconsistent with a properly functioning civil justice system. One court observed that it created incentives to "engage in professional discourtesy, preventing prompt resolution of disputes."[27] Commentators have described the 1983 experiment as ushering in a new era of incivility and unprofessionalism within the legal profession.[28]

In light of all that experience, the Advisory Committee on Civil Rules held extensive hearings, asked the Federal Judicial Center to study the issues, and received a vast amount of comments from judges and lawyers. They concluded that it was necessary to amend Rule 11, amendments that yielded its current version. This version should not be mistaken for a paper tiger. Currently, utilizing the same criteria to determine if a filing is baseless, judges have the discretion to impose sanctions, in addition to the fact that judges always have inherent authority to manage the litigation process before them and sanction improper claims, defenses, and tactics. Judges are not reluctant to do so where warranted, but also recognize that, alternate theories that depend on how the facts play out are not frivolous when only one of several prevail. They understand that raising questions rather than sanctions about merely colorable claims can narrow the issues and help the parties focus on a very real dispute between them that a court may properly resolve. Sanctions under the present-day Rule 11 seek deterrence, now and in the future. Malicious prosecution lawsuits and other means remain available to seek compensation when punishment is appropriate. Moreover, the safe-harbor provision adopted assures a quick disposition of a

[27] *Morandi v. Texport Corp.*, 139 F.R.D. 592, 594 (S.D.N.Y. 1991).

[28] Geoffrey Hazard, Jr. & W. William Hodes, 1 The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct 3.1:205 (Supp. 1994).

questionable filing. Often, a defendant will have information, only obtainable through discovery, that enables a plaintiff to understand that no liability lies and dismissal should occur..

For example, I once received a call from a school principal. A very successful religious liberty group had filed an action against his school and had held a well-covered press conference to announce the filing of this lawsuit. The principal, whose school board attorneys had no knowledge of the underlying law, could not help him. As he explained over the telephone what he had done, I realized that he had complied fully with the law, and that the lawsuit was based on mistaken assumptions about the facts. I was able to call the attorney who had filed the lawsuit and provide documentation about what the school had actually done. The following day, the lawsuit was voluntarily dismissed, though, this time, without a press conference. There could have been no better result. If it had not been for the safe-harbor provision, I am certain that those who filed the lawsuit would have continued it, in hopes of finding some grounds to continue to pursue it, because the voluntary dismissal would have been taken by the court as an admission to a Rule 11 violation.

Invasion of Authority Rightly Belonging to the Judiciary

That brings us to today's proposal before this Subcommittee. H.R. 758 seeks to amend Rule 11 directly, in contravention of the Rules Enabling Act of 1934, 28 U.S.C. § 2072, which pertinently provides:

> The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

The Rules Enabling Act might best be described as a treaty between the legislative and judicial branches, allocating authority over the rules that govern proceedings in court. Just as Congress would properly resist judicial interference with the rules by which it conducts business, the

judiciary, as a co-equal branch of government, should not be subservient to Congress in devising the rules by which it conducts its business, namely, the trial of cases or controversies. While the Constitution is not explicit here, both branches have inherent authority to do what is necessary for it to function. When one branch steps over the line by prescribing internal functioning, it raises profound separation of powers issues.

The Rules Enabling Act establishes a demanding process for amending the Federal Rules. In accordance with it, committees of the Judicial Conference of the United States, the governing body of our federal courts, consider proposals and initiate their own, drafting those changes to the rules they find warranted. Afterwards, the proposals are subject to thorough public comment and reconsideration. The recent amendments to the rules governing discovery received more than 2,300 comments and were the subject of three public hearings. On the basis of the comments received, the proposals were further refined. After being approved by the Civil Rules Committee, the proposed amendments then went to the Judicial Conference for approval, followed by the Supreme Court of the United States, which separately considered and then promulgated them. Even after that further consideration, under the Act, the Supreme Court transmits them to Congress, which retains the authority to reject, modify, or defer any rule or amendment before it takes effect.

That process deserves this Subcommittee's respect. It is considerate of the underlying separation-of-powers concerns that motivated approval of the Rules Enabling Act in the first place. It allows for the views of consumers of the system, not just lawyers and judges, but litigants as well, to be heard. It assures that rules changes do not occur on an ad hoc basis, but only through a process that considers the complex and interconnecting nature of procedural rules.

Let us be clear. The vast majority of judges and lawyers support Rule 11 in its current form. A 1995 survey of judges and lawyers found that the new rule was well supported.[29] Sixty percent of judges, 61 percent of defense counsel, and 89 percent of plaintiffs' lawyers believed that groundless litigation was a small to nonexistent problem.[30] In light of the 1993 amendment, respondents were asked whether they saw a change in behavior. Rather than report that the floodgates to baseless litigation had opened, 85 percent of judges said there had been no change, meaning that the 1993 version was at least as effective as the 1983 version, or that the situation had actually improved. The judges were joined in that assessment by 70 percent of defense lawyers and 72 percent of plaintiff lawyers.[31] As for the safe-harbor provision, it garnered the support of 70 percent of the judges, 71 percent of defense counsel, and 80 percent of plaintiff counsel. When the Federal Judicial Center returned to the subject in 2005, the survey revealed that support for the 1993 Rule had grown even stronger. More than 80 percent of judges responding agreed that "Rule 11 is needed and it is just right as it now stands."[32] In considering alternatives, 87 preferred the current Rule 11, while only five percent preferred the 1983 version.[33] As to whether groundless litigation was a problem, 85 percent responded that it was only a small to nonexistent problem, a 25-percentage point increase over the survey 10 years earlier.[34] Eighty-five percent said the 1993 amendments either was as effective as the 1983 Rule in deterring baseless litigation or improved

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[29] Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (1995).

[30] *Id.* at 3.

[31] *Id.*

[32] Federal Judicial Center, Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure 2 (2005).

[33] *Id.*

[34] *Id.* at 4.

the situation.[35] Eighty-six percent of judges supported the safe-harbor provision; 60 percent overall and 65 percent of judges commissioned since 1992 gave it strong support.[36] Importantly, when sanctions were warranted, 84 percent of judges opposed an award of attorney fees to the supposedly injured party.[37]

Congress should defer to this overwhelming judgment. Imposition of this change to Rule 11 cannot help but recall the experiences that caused those who drafted our Constitution to provide for judicial independence. The Framers regarded the guarantee of access to the courts, along with separation of powers, as a necessary response to experiences in which legislatures "played fast and loose with the very structure of the judiciary; meddled constantly in judicial affairs, nullified court verdicts, vacated judgments, remitted fines, dissolved marriages, and relieved debtors of their obligations almost with impunity."[38] As Justice Scalia put it, "[t]his sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution."[39] There is no need for this bill, and there are strong constitutional imperatives weighing against it.

H.R. 758 Would Require Sanctions in Successful Cases

One of the perverse effects of the mandatory sanction rule in H.R. 758 is that it would inevitably result in sanctions against parties who prevail. Litigation can be very complex. A single incident can give rise to multiple statutory and common law violations. Because a party cannot

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[35] *Id.* at 5.

[36] *Id.* at 5-6.

[37] *Id.* at 8.

[38] Henry Steele Commager, The Empire of Reason 214 (1977).

[39] *Plaut v. Spendthrift Farms, Inc.,* 514 U.S. 211, 221 (1995).

split their claims, but must bring them all in one lawsuit, different causes of action are pled at the same time. It is not unusual to have five separate causes of action within a single lawsuit. A plaintiff prevails in the lawsuit if any one of the causes of action is successful. Yet, it is possible that one cause of action, due to novelty, could be dismissed at the outset, even if it depends on colorable arguments made in good faith. A decision in the plaintiff's favor on one may preclude favorable decisions on the other, overlapping causes of action. Thus, a plaintiff who wins the case would likely face Rule 11 motions, for which the judge has no discretion, over the four causes of action that failed. Only in topsy turvy world – and the world that H.R. 758 would usher in – would the prevailing party be subject to sanctions for bringing baseless litigation.

The problem is probably even more acute where the factual predicates for the lawsuit exist only in the control of the defendant. Our civil justice system is predicated on that pleadings provide "general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial."[40] Often, the key information that is essential to the lawsuit exists only in a defendant's possession. Because of statutes of limitation and repose, because interviews with potential witnesses provide conflicting information, and because compulsory discovery is not available until a lawsuit is filed, plaintiffs may need to name parties as defendants who may later be excused from the case as having no responsibility for the injury, may need to plead alternative cause of actions, only one of which the facts developed at trial ultimately support, and even adjust their theory of the case in light of discovery, much as the GM ignition cases had to.

None of that is vexatious behavior meriting sanctions but is a product of the truth-seeking obligations and limitations of our system.

The New Safe-Harbor for Civil Rights Cases Will Be Ineffective

[40] *Hickman v. Taylor,* 329 U.S. 495. 501 (1947).

The drafters of H.R. 758 have heard and understood the criticism that the 1983 Rule disproportionately affected civil rights cases and have attempted to ameliorate that adverse impact with a rule of construction. It states that the Act shall not be construed

> to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution of the United States.[41]

This rule of construction is fundamentally meaningless. Rule 11 already instructs courts that it does not prohibit "a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.[42] This part of the rule remains intact under H.R. 758. Moreover, every case brought in federal court is based on a federal, state or local law. What does the rule of construction add? It certainly does not say that civil rights cases should be treated any differently than other cases based on law. It also fails to address the primary problem that civil rights cases faced: an inability to develop facts supporting the action without the aid of compulsory discovery, which is available only after a case is filed. The recent changes to the rules of discovery, which attempt to relieve some of the discovery burdens on defendants and which go into effect in December, only exacerbate the problem for civil rights and other plaintiffs. The rule of construction will not help them and will only assure a repeat of the disastrous consequences of the 1983 experiment. Simply put, the rule of construction amounts to ineffective window dressing that does not solve the problem that its drafters apparently concede is real.

Fanciful Accusations about the Cost of the Tort System

In the past as this legislation came under consideration, and I suspect again today, advocates will bemoan the costs and burden on the economy that our tort system entails. To do so,

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[41] H.R. 758, § 2(b), 114th Cong., 1st Sess. (2015).

[42] Fed. R. Civ. P. 11(b)(2).

they march out numbers that cannot be taken seriously. Many rely upon data compiled by an insurance industry consulting firm, Towers Watson, which puts out reports on "U.S. Tort Cost Trends." Yet, what it tallies up are:

- insurance benefits paid from injuries caused by insureds; and,
- costs of handling insurance claims, including legal representation of insureds, as well as insurance company overhead.[43]

Moreover, the report itself recognizes that it makes "no attempt" "to measure or quantify the benefits of the tort system, or conclude that the costs of the U.S. tort system outweigh the benefits, or vice versa."[44] Also, the report makes plain that some of its estimates are based on guesswork. The result is a report on the expenses of the insurance industry without the reductions that properly should be calculated for industry profits. In the 2011 report, it admits that the increase between 2009 and 2010 is "attributable to the April 2010 Deepwater Horizon drilling rig explosion and resulting oil spill in the Gulf of Mexico."[45] This "estimate" is not a reliable figure about the tort system.

Nor is the U.S. Chamber Institute for Legal Reform's "Tort Liability Costs for Small Businesses," which starts with the Towers Watson (previously Tillinghast/Towers Perrin) numbers and adds to it the costs of insurance to businesses of different sizes and estimates of liability costs not covered by insurance.[46] Thus, the estimates proffered are the costs of the insurance industry to operate, the costs of business to buy insurance industry products, and the payouts that compensate those wrongfully injured. That does not represent the costs of the tort system, double counts

[43] Towers Watson, U.S. Tort Cost Trends: 2011 Update 8 (2012).

[44] *Id.* at 2.

[45] *Id.* at 3.

[46] U.S. Chamber Inst. For Legal Reform. Tort Liability Costs for Small Businesses 8 (2010).

premiums that are paid and then allocated to pay liabilities, and ignores the savings, profits and benefits of insurance, which must properly be accounted for in any scheme. No accounting system properly ignores the other side of the ledger.

Moreover, if I run into your parked car, causing $1,000 worth of damage, the tort system is not costing me that money. I am responsible for the damage I caused; the tort system merely enforces that responsibility. My premiums help me pay that responsibility, and my insurer is paying out money it contracted to expend on my behalf in return for those premiums. I save money, and the insurer profits from this system of spreading risk. To count this as a lamentable cost of the tort system is simply wrong.

Conclusion

The 1983 version of Rule 11 chilled lawyers from bringing meritorious cases that were not obvious slam dunks but that cried out for resolution in the justice system.[47] It was used too often against seemingly weak but potentially meritorious claims and, with particularly devastating effect, against civil rights claims. The judiciary and the legal profession overwhelmingly support the amendments that went into effect in 1993 that this legislative proposal seeks to undo. H.R. 758 is not needed. The case for it is weak, while experience teaches that its passage would have calamitous consequences, increasing the expense of litigation, distracting parties and judges from the substance of cases, and slowing the progress of justice in the courts. The same conduct prohibited prior to 1993 is prohibited by the post-1993 version of Rule 11, and the courts have adequate tools to deal with baseless litigation. Directing judges to conduct themselves mechanically, rather than to exercise judgment will not make litigation better, while a congressional amendment to a rule of civil procedure tramples on authority that is properly

[47] Lawrence C. Marshall, Herbert M. Kritzer, & Frances Kahn Zemans, *The Use and Impact of Rule 11,* 86 Nw. U.L. Rev. 943 (1992).

exercised by the judicial branch. Moreover, restricting court access, as this bill would do, is inconsistent with fundamental constitutional principles that emphasize the importance of expansive access to the courts. Let us not forget the many merits of our civil justice system. A concern for assuring access to that system in line with constitutional values, rather than restrictions on access, ought to be this Subcommittee's animating principle. I urge the Subcommittee to reject the bill and return this ill-considered experiment to the dustbin of history.

Mr. FRANKS. Thank you, Mr. Peck.

And I would now recognize our third and final witness, Mr. Silverman.

And, sir, if you would make sure that microphone is on.

TESTIMONY OF CARY SILVERMAN, PARTNER, SHOOK, HARDY & BACON LLP

Mr. SILVERMAN. Good morning, Mr. Chairman, Ranking Member Cohen, and Members of the distinguished Subcommittee. Thank you for the opportunity to present testimony today on behalf of the U.S. Chamber's Institute for Legal Reform.

The civil justice system is established to provide a remedy to a person who was wrongfully injured, to make that person whole. But what happens when the system is misused to harm someone, when it is transformed from righting a wrong to inflicting one? This happens when a person files a lawsuit to harass or extort someone, "I'll sue you." It also happens when a lawyer takes a reckless or cavalier attitude, deciding to sue first and then research the law or investigate what actually occurred later.

Now victims of frivolous lawsuits have no meaningful remedy. They are not made whole for the very real losses that they incur as a result of a wrongful act. It is a problem that stems from the Federal rules.

The simple act of filing a short, plain statement of the claim, all that is needed to file a complaint, compels the person on the receiving end to respond. For an ordinary person or a small business, as Ms. Milito has shown, that means quickly hiring a lawyer and finding the money to pay the lawyer for his services. Lawyers are expensive. Dealing with the lawsuit means time away from work and lost income. It is stressful.

Most of your constituents would be shocked to learn that, if they are hit with a lawsuit that has no basis whatsoever in law or fact, they have near zero chance of recovering a penny of their expenses, even if they can prove to a judge that the case was baseless or brought in bad faith, even if the case is certain to be thrown out.

This is how Rule 11 works in practice. You can be the judge of its fairness.

Let us say John Small is served with a $100,000 lawsuit by a tourist who claims that while visiting D.C. 2 years earlier, he tripped and fell in the 5th and N Street market. John has no recollection of this person or anyone else falling in his store. John now needs to hire an attorney to defend his family and his business from the lawsuit. The attorney quickly discovers that the plaintiff visited a store across town at 5th and N Northeast, not John's store at 5th and N Northwest.

Nevertheless, the plaintiff's lawyer will not drop the claim. "Let the court sort it out," he says. John's attorney tells his client that he should be able to get the case dismissed.

Best-case scenario, John is looking at about $12,000 in legal fees for the cost of the initial investigation, preparing an answer, preparing a motion to dismiss, and appearing at any status conferences and hearings.

The only way to seek recovery of his expenses is to file a motion for sanctions. This seems worthwhile to John until he learns three facts about Federal Rule 11.

First, his attorney must draft a motion for sanctions, separate from the motion to dismiss, and share it with the plaintiff's lawyer before he can file it. This is more lawyer time and money, maybe about $5,000.

Once the plaintiff's attorney receives the motion, he can then choose to withdraw the lawsuit. A judge will never see the motion. John will not have his day in court to ask for reimbursement. The plaintiff's lawyer walks away without consequence. The motion and money spent goes in the trash.

Second, even if the plaintiff's attorney continues to pursue the lawsuit and the judge actually finds the case frivolous, the court may choose not to impose any sanction at all.

Third, if the court does find a sanction appropriate, the rule prohibits the judge—we were talking about discretion here—the rule prohibits the judge from using sanctions for the purpose of reimbursing John's legal expenses. The court could simply require the plaintiff's lawyer to pay a small penalty to the court to deter future misconduct. That is what the rule says.

The plaintiff's lawyer has asked for $10,000 to make the case go away, an amount just under the cost of litigation. John's attorney will give him three options. Option one, let us try to settle this case for $5,000 without incurring more costs for you, and you can move on with your life and your business. Option two, let us fight this lawsuit and be vindicated, but you will have to pay at least $12,000 in unrecoverable legal fees to get it dismissed. Third, let us seek dismissal and sanctions. You will incur closer to $20,000 in legal fees but you will have a very small chance of recovering some of them.

Individuals, business owners, and their insurers routinely face this choice. Most settle and cut their losses. Some fight for dismissal on principle. Very few seek sanctions today.

What choice would your constituents make?

LARA restores a remedy for victims of lawsuit abuse and ensures that judges have an opportunity to consider whether claims and defenses are frivolous.

Thank you.

[The prepared statement of Mr. Silverman follows:]

Statement of the U.S. Chamber of Commerce

BY: Cary Silverman, Partner, Shook, Hardy & Bacon L.L.P.
On Behalf of the U.S. Chamber Institute for Legal Reform

ON: The Lawsuit Abuse Reduction Act, H.R. 758

TO: U.S. House of Representatives Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice

DATE: March 17, 2015

1615 H Street NW | Washington, DC | 20062

The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

Testimony of Cary Silverman
On Behalf of
The U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform
The Lawsuit Abuse Reduction Act, H.R. 758

Chairman Franks, Ranking Member Cohen, and distinguished Members of the Subcommittee, thank you for inviting me to testify today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, faster, and fair for all participants. I appreciate the opportunity to testify in support of the Lawsuit Abuse Reduction Act, H.R. 758. This bill is needed to provide those who suffer real losses due to a frivolous lawsuit with an opportunity to seek reimbursement of their attorneys' fees in court.

The Problem:
It is Easy to Bring a Frivolous Lawsuit, but Costly to Get it Dismissed

The civil justice system is established to provide a remedy to a person who was wrongfully injured – to make that person whole. This is the principle underlying many federal laws providing a private right of action, such as for employment discrimination. It is also the basis for state tort and consumer laws applied by federal courts under diversity jurisdiction. But what happens when the civil justice system itself is misused to harm someone – when it is transformed from righting a wrong to inflicting one?

Frivolous lawsuits come in many shapes and sizes. Such lawsuits are sometimes brought purely to harass a person or get a payday from a business where there is no legitimate claim. A frivolous lawsuit can come from a disgruntled employee, an unhappy customer, or an unpleasant neighbor. They can assert laughable legal theories that are clearly not supported by law or predicated on facts. Frivolous lawsuits also occur when a lawyer takes a reckless or cavalier attitude, deciding to "sue everyone" first and then research the law for a valid claim or investigate what actually occurred later.

Unfortunately, victims of frivolous lawsuits have no meaningful remedy. They are not made whole for the very real losses they incur as a result of a wrongful act. It is a problem that stems from the federal rules.

In our civil justice system, the simple act of filing a "short, plain statement of the claim"—all that is needed to file a complaint—compels the person on the receiving end to respond.[1] For an ordinary person or small business, that means quickly hiring a lawyer and finding the money to pay for his or her services. Lawyers are expensive. Dealing with the

[1] *See* Fed. R. Civ. P. 8(a)(1). The summons informs the recipient that failure to file a timely answer may result in the court entering a default judgment against the defendant for the amount of money demanded in the Complaint. Fed. R. Civ. P. 4(a)(1)(E).

lawsuit means time away from work and lost income. It is stressful. As the great Judge Learned Hand wrote, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."[2]

It costs thousands of dollars and often years of litigation to defend against a frivolous claim and eventually have a court dismiss it.[3] Most of your constituents would be shocked to learn that if they are hit with a lawsuit that has no basis whatsoever in law or fact or even a reasonable argument for extension of the law – they have nearly no chance of recovering a penny of these expenses. This is true even if they can prove to the judge that the case was baseless or brought in bad faith. This is true even if the case is certain to be, and ultimately is, thrown out.

Defending against a single frivolous lawsuit can bankrupt an individual or small business. At the very least, it strains families and siphons resources from businesses that would have otherwise supported jobs and investment. The Lawsuit Abuse Reduction Act (LARA) provides victims of frivolous lawsuits with a fair and reasonable opportunity to be made whole.

Would Your Constituents Seek Sanctions Under the Current System?

Here is how the current Federal Rule governing frivolous claims, Rule 11, works in practice. You can judge its fairness. John Small is served with a $100,000 lawsuit by a tourist who claims that while he was visiting our nation's capital, two years earlier, he tripped and fell in the 5th and N Market. John has no recollection of this person or anyone else falling in his store.

John now needs to hire an attorney to defend his family and his business from the lawsuit. He hires a local lawyer at $250 per hour. The attorney investigates the complaint and quickly discovers that the plaintiff visited a convenience store across town at 5th and N NE, not John's store in NW. Nevertheless, the plaintiff's lawyer will not drop the claim.

John's attorney tells him that he should be able to get the case dismissed. He estimates that doing so will take about 50 hours of his time, which would cover his initial investigation, filing an answer, filing a motion to dismiss, and appearing at any status conferences and hearings. Best-case-scenario, if the court quickly dismisses the case, John's attorney says he is looking at about $12,000 in legal fees and costs. If the court allows the case to move into discovery, then the cost will rise significantly. John is informed by his attorney that the only way to seek recovery of his expenses is to request sanctions.

This seems worthwhile to John until he learns three facts about Rule 11.

First, John learns that his attorney needs to draft a motion for sanctions, separate from the motion to dismiss,[4] and share it with the plaintiff's lawyer before he can file it.[5] It is not enough

[2] Judge Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter (1926).

[3] *See, e.g.*, Letter of national medical associations to Timothy F. Geithner, Secretary of the Treasury, Sept. 1, 2010 (estimating the cost of obtaining dismissal of a meritless medical malpractice claim at $22,000).

[4] Fed. R. Civ. P. 11(c)(2) ("A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b).).

for John's lawyer to call opposing counsel, as would occur in a discovery dispute. Nor is it sufficient to send a letter briefly outlining why the lawsuit is frivolous and should be withdrawn, as a plaintiff would similarly use a demand letter before undertaking the time and expense to prepare a complaint. John's lawyer estimates that the sanctions motion and any hearing would require an additional 20 hours of his time ($5,000). Once the plaintiffs' attorney receives the motion, the lawyer has three weeks to choose to withdraw the lawsuit.[6] A judge will never see the motion. John will not have his day in court to ask for reimbursement. The plaintiffs' lawyer walks away without consequence. The motion, and money spent preparing it, goes in the trash bin.

Second, even if the plaintiffs' attorney continues to pursue the lawsuit and the judge finds the case frivolous, the court may choose not to impose any sanction at all.[7]

Third, if the court does find sanctions appropriate, the judge may not use sanctions for the purpose of reimbursing John's legal expenses. As the rule expressly states, a sanction "must be *limited* to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[8] Rather than require the plaintiffs' lawyer to pay John's expenses, the court may order the attorney to pay a penalty to the court.[9] In fact, the commentary to the rule states, that "[s]ince the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty."[10] The court can order the plaintiff to pay some or all of John's attorney's fees, but only if "warranted for effective deterrence."[11] John can prove he was injured by wrongful conduct. He can show how much money he paid in attorneys' fees. And he may still get little or nothing.

John is told that the plaintiff's lawyer has asked for $10,000, an amount just under the anticipated cost of litigation, to "make the case go away." His attorney gives three options: (1) try to settle the case regardless for $5,000 without incurring more costs and get on with his life; (2) fight the lawsuit and "win" with at least $12,000 in unrecoverable legal fees, or (3) seek dismissal and sanctions with the very uncertain chance of recovery of some or all of his defense costs, but pay $5,000 more.

Individuals, business owners, and their insurers routinely face this choice. Most settle, cut their losses, and free themselves of the stress of the lawsuit. Some people fight for dismissal

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[5] *Id.* ("The motion must be served under Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.").

[6] *Id.*

[7] Fed. R. Civ. P. 11(c)(1) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court *may* impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.") (emphasis added).

[8] Fed. R. Civ. P. 11(c)(4).

[9] *Id.*

[10] *See* Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules—1993 Amendment.

[11] Fed. R. Civ. P. 11(c)(4).

on principle at their own expense. Very few people use Rule 11 to seek sanctions. What choice would you or your constituents make?

As I discuss in more detail later, LARA would restore protections to victims of lawsuit abuse by strengthening Rule 11's enforcement provisions. Specifically, LARA would eliminate the current "safe harbor" that allows lawyers to file frivolous claims without threat of sanction because they can withdraw the suit without penalty. This bill would also reinstitute mandatory sanctions when a judge finds a claim or defense frivolous. Additionally, LARA would provide victims of lawsuit abuse with reimbursement of reasonable attorney's fees and litigation costs that are directly attributable to the frivolous claim.

The 1993 Revision: A Mistaken Overreaction

Before 1983, the version of Rule 11 that had been in place was rarely used. It provided that "[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good support for it; and that it is not interposed for delay." If the rule is "not signed" or "signed with intent to defeat the purpose of the rule," the pre-1983 version of Rule 11 authorized the court only to strike the pleading as "sham and false" and "proceed as though the pleading had not been served." The pre-1983 version of Rule 11 was ineffective. It required a showing of subjective intent – bad faith – on the part of an attorney, which is an extremely difficult burden to meet. The Federal Rules Advisory Committee, an extension of the federal judiciary that has the primary responsibility to formulate the federal rules, found that this version of the rule, in practice, "had not been effective in deterring abuses."[12] The Committee amended the rule to "reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."[13]

The 1983 change to Rule 11 was significant. The rule was entirely rewritten. The rule included a new standard defining the type of conduct subject to sanctions. As with any new law, the years that followed included cases in which courts considered these new terms and applied them in specific factual and legal circumstances. As that body of precedent grew, both litigants and judges better understood the law. A 1990 survey of 751 judges found that 95% of judges believed that version of Rule 11 in place at that time, which LARA would restore, did not impede development of the law.[14] Nearly three-quarters of judges surveyed felt that the stronger Rule 11's benefits in deterring frivolous lawsuits and compensating those victimized by such claims justified the use of judicial time involved in resolving such motions.[15] Four out of five judges surveyed believed that the stronger Rule 11 had a positive effect on litigation and should be retained in its then-current form.[16] This was a study of nearly all federal judges at the time,

[12] *See* Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules—1983 Amendment (citing 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1971)).

[13] *Id.* (citation omitted).

[14] Federal Judicial Center, Final Report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, May 1991.

[15] *See id.*

[16] *See id.*

those who dealt with the problem of lawsuit abuse on a day-to-day basis under the stronger (LARA) version of Rule 11.

Nevertheless, as the 1983 rule was taking hold, the Federal Rules Advisory Committee reversed course. While it did not return to the pre-1983 version of the rule, it recommended changes that considerably weakened the weaponry against frivolous lawsuits. The changes, adopted in 1993, effectively nullified the existing rule through a series of barriers to its use and provisions that penalized those who invoked it.

The 1993 changes did not alter the definition of "frivolous." Then and now, Rule 11 provides for sanctions against (1) those who file claims or defenses for an improper purpose, such as to harass or cause unnecessary delay or needlessly increase the cost of litigation; (2) include claims or defenses that are not warranted by existing law or a reasonable argument for extending, modifying, or reversing existing law or for establishing new law; (3) allege facts that lack an evidentiary basis or are not likely to have an evidentiary basis even after a reasonable opportunity for further investigation of discovery; or (4) make unwarranted denials of factual contentions.[17]

The 1993 amendment rendered these standards toothless, however, by making three key changes:

1. The amendment added a 21-day "safe harbor" that gives lawyers a free pass to withdraw frivolous pleadings without consequence;

2. The amendment provided that a judge—after finding a claim or defense is frivolous—does not have to impose an appropriate sanction; and

3. The amendment substantially reduced the likelihood that a sanction, when imposed, would reimburse a person for expenses incurred to defend against a frivolous claim or defense. It provided that sanctions may only be used to deter misconduct and not be used for the purpose of compensating an injured party.

The Advisory Committee itself recognized that while there was some legitimate criticism of Rule 11's application, such criticism was "frequently exaggerated or premised on faulty assumptions."[18] The Advisory Committee has made many sound decisions, but it did not do so when it revised Rule 11 in 1993.

There are in place so-called "systems for correction of mistakes" made by the Federal Rules Advisory Committee, but they did not work well when Rule 11 was changed. The first potential correction system occurs when the U.S. Supreme Court reviews the Advisory Committee decisions about rule changes. But when the weakened Rule 11 was transmitted by the Supreme Court to Congress for its consideration, Chief Justice Rehnquist included a telling disclaimer: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these

[17] Fed. R. Civ. P. 11(b).

[18] *Amendments to Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401, 523 (1993).

amendments in the form submitted."[19] Justice White warned that the Court's role in reviewing proposed rules is extremely "limited" and that the Court routinely approved the Judicial Conference's recommendations "without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity."[20]

Justices Scalia and Thomas went further and in almost unprecedented action, criticized the proposed amendment to Rule 11 as "render[ing] the Rule toothless by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by a providing a 21-day 'safe harbor' [entitling] the party accused of a frivolous filing . . . to escape with no sanction at all."[21] Justice Scalia observed: "In my view, those who file frivolous suits and pleadings, should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule [11], parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty."[22]

Under the Federal Rules Enabling Act (REA) system, Congress has just seven months to intervene in a rule change before it takes effect.[23] Apart from matters of urgent immediate national concern, it is rare that this body enacts legislation in such a short period. Despite the introduction of legislation in both the House and Senate to delay the effective date of the proposed changes to Rule 11, time ran out before Congress could act and the revisions went into effect on December 1, 1993.[24] Shortly after the revised Rule 11 took effect, Congress again attempted to repeal the Federal Rules Advisory Committee's action to weaken Rule 11.[25] By that time, some practitioners had already referred to the new Rule 11 as a "toothless tiger."[26] The repeal passed the House.[27] Those opposing the bill, however, felt that there had not yet been adequate time to determine the effectiveness of the amended rule in practice.[28]

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[19] *Id. at* 401 (1993) (transmittal letter).

[20] *Id.* at 505 (Statement of White, J.).

[21] *Id.* at 507-08 (Scalia, joined by Thomas, J.J., dissenting).

[22] *Id.* at 508.

[23] *See* 28 U.S.C. § 2074(a) (providing that the Supreme Court transmits to Congress proposed rules by May 1, and that such rules take effect no earlier than December 1 of that year unless otherwise provided by law).

[24] *See* H.R. 2979 and S. 1382, 103rd Cong., 1st Sess. (1993).

[25] *Attorney Accountability Act of 1995*, H.R. 988, § 4, 104th Cong, 1st Sess. (1995).

[26] *See, e.g.*, Cynthia A. Leiferman, *The* 1993 *Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger*, 29 TORT & INS. L.J. (Spring 1994) (concluding that "[o]n balance, the changes made appear likely to undermine seriously the deterrent effect of the rule").

[27] Role No. 207, 104th Cong., 1st Sess. (Mar. 7, 1997) (passed by a recorded vote of 232-193). The Senate did not act on H.R. 988.

[28] *See* H. Rep. No. 104-62, at 33 (dissenting views).

LARA Would Restore the Stop-and-Think Requirement and
Provide Those who are Harmed With a Remedy

Rule 11 was intended to require litigants to "stop-and-think" before initially making legal or factual contentions. Instead, the 1993 changes encourage a "sue first, check the facts or law later" mentality. It deprived injured individuals compensation, a change that most judges and trial attorneys, including plaintiffs' lawyers, thought was a bad idea.[29]

LARA would reverse these changes by abolishing the "safe harbor" for frivolous claims, reinstituting mandatory sanctions when a judge finds a claim or defense frivolous, and providing victims of lawsuit abuse with reimbursement of reasonable attorney's fees and litigation costs that are directly attributable to the frivolous claim.

Judges Can Fairly and Efficiently Decide Rule 11 Motions

Judges routinely decide motions, as the docket sheet of any federal court case that moves forward will show. Judges are perfectly capable of fairly deciding and efficiently ruling on motions brought under Rule 11 in the ordinary course of judicial business.

Most cases are decided or settled before trial – often in significant part on the outcome of motions. Federal courts consider motions to remand cases removed from state court. They decide motions to amend complaints, motions to grant additional time to file a response, and motions to compel discovery. They hear motions in limine addressing whether offered evidence is admissible at trial. They rule on motions to dismiss and motions for summary judgment. They decide whether to certify class actions or bifurcate trials. Those are just some of the common pretrial motions. Of course, when cases do reach trial, there are additional motions followed by an array of post-trial motions.

Nevertheless, you are likely to hear opponents refer to Rule 11 as resulting in "satellite" litigation. This argument is far-fetched. Opponents use this term to place motions that would hold lawyers accountable for their conduct in a negative light. They contend that deciding whether a claim or defense is frivolous is "peripheral" to the litigation or "distracts" the court from the merits of the case. There are three core problems with this argument.

First, it is unclear why a Rule 11 motion is fundamentally different from any other motion under the federal rules. As noted, judges routinely rule on a variety of procedural, evidentiary, and other motions. The word "motion" appears about 280 times in the Federal Rules of Civil Procedure and that is not including the Federal Rules of Evidence. It would be impossible to count the number of motions to remand a removed case to state court, the number of motions asking judges to evaluate whether an expert's testimony is based on sound science, and motions to dismiss or for summary judgment. Judges decide them everyday. The judiciary

[29] *See* John Shapard et al., Federal Judicial Center, Report of Survey Concerning Rule 11, Federal Rules of Civil Procedure, at 5-6 (1995) (finding based on survey of 148 federal judges and 1,100 trial attorneys that two thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and nearly half of plaintiffs' attorneys (43%), supported restoring Rule 11's compensatory function.

does not grind to a halt. There is no other place in the federal rules aside from Rule 11 that requires a party to provide opposing counsel with a motion before a court can even consider it.[30]

Second, while there will inevitably be some degree of litigation over the imposition of sanctions, consider the alternative: a system in which an individual or business hit with a lawsuit that has no reasonable basis in law or fact has no effective means to recover thousands of dollars in needless defense costs. As a practical matter, he or she is often forced to settle regardless of the merits. This is a far greater injustice than providing litigants with the opportunity to ask the court to determine whether a filing is frivolous or not.

Third, the amount of litigation over whether a claim is frivolous under the stronger version of Rule 11 is often exaggerated by opponents of LARA. They frequently cite a study finding that there were approximately 7,000 reported Rule 11 court rulings in the decade between 1983 and 1993.[31] That is an average of 700 decisions each year. This number should be placed in context. It is the equivalent of 7.5 reported cases per federal district court per year (there are 94 U.S. District courts), or 1 reported decision for each federal district court judge per year (there are 677 federal district court judges). Even if the total number of sanctions rulings (including unreported decisions) is substantially higher than 700 per year, such litigation is insignificant when one considers that about 300,000 civil cases are filed and disposed of in federal district courts each year.[32] There is no reason federal judges cannot handle these motions in the ordinary course of judicial business.[33] If a judge finds that a Rule 11 motion lacks merit, it only takes one word to respond: Denied.[34]

Congressional Action is Warranted

Rule 11 is fundamentally different than other rules of procedure. It addresses the ability of a person who has been wronged to seek compensation for a financial loss. While opponents may contend that changes to Rule 11 should be left to the REA process, the availability of recovery for an injury is a matter of public policy for which Congress, as elected representatives, is in the best position to make a judgment.

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[30] The rules provide a "meet and confer requirement" for discovery disputes. *See* Fed. R. Civ. P. 26(c) (meet-and-confer requirement before seeking protective order); 37(a) (meet-and-confer requirement before filing a motion to compel discovery). This is far less burdensome and expensive than preparing a motion that, at the option of the opposing party, may not be filed with the court.

[31] *See* Lonny Sheinkopf Hoffman, *The Lawsuit Abuse Reduction Act: The Legislative Bid to Regulate Lawyer Conduct*, 25 Rev. Litig. 719, 722 (2006).

[32] Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014 (Table C, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending Mar. 31, 2014.

[33] The pre-1993 version of Rule 11 proposed by LARA remains in effect in at least a dozen states without indication of a satellite litigation problem. Although several states changed their rule on sanction to conform to federal Rule 11 after it was weakened, states including Arizona, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Montana, North Carolina, South Dakota, Texas, and Virginia retain the prior rule. Many other states do not provide a "safe harbor" and mandate imposition of sanctions on those who bring frivolous claims.

[34] Rule 11 requires a judge to issue an opinion only when ordering sanctions. *See* Fed. R. Civ. Proc. 11 (c)(6) ("An order *imposing* a sanction must describe the sanctioned conduct and explain the basis for the sanction.) (emphasis added).

The REA recognizes that it is helpful for the judiciary to take the lead role in developing rules of procedure for conducting litigation, given its expertise on the day-to-day workings of the court. This makes sense for the vast majority of rules that are procedural in nature such as those governing formatting of documents, filing deadlines, the form of pleadings, conducting discovery, when protective orders should be issued or settlements sealed, when cases should be dismissed, and serving process, among others.

Congress certainly has authority to change rules outside the REA process. Article I, Section 8, of the U.S. Constitution provides Congress with authority to "constitute Tribunals inferior to the Supreme Court." This power includes setting rules setting procedure and governing attorney conduct in federal courts. Congress enacted the REA in 1934, through which it delegated its constitutional power to make rules for federal courts to the Judicial Conference of the United States. Congress retains the ultimate authority to design Federal Rules.

In fact, Congress has in many instances acted outside the REA process when it finds that public policy supports allowing a party in litigation to recover attorneys' fees. For example, the Private Securities Litigation Reform Act of 1995 imposes mandatory sanctions on those who bring abusive litigation with a presumption that the opposing party is entitled to recover his or her reasonable attorneys' fees and costs.[35] Congress has also provided that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and veraciously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[36]

Many other federal laws provide prevailing parties with the ability to recover attorneys' fees and costs in certain types of litigation.[37] As a unanimous U.S. Supreme Court reaffirmed in 2011, federal law already authorizes a court to award attorney's fees in certain types of civil rights actions "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation" for attorney costs that would not have been incurred in absence of the frivolous claims.[38]

Judges Will Have Significant Discretion When Deciding Rule 11 Motions

Under the current version of Rule 11, lawyers can use the "safe harbor" to preclude judges from considering whether a claim or defense was frivolous. LARA would restore the ability of judges to consider such claims.

Judges would have significant discretion in deciding sanctions motions under LARA. First and foremost, judges would decide whether a claim or defense is frivolous. If there is a

[35] 15 U.S.C. § 78u-4(c).

[36] 28 U.S.C. § 1927.

[37] *See, e.g.*, 15 U.S.C. § 78r(a) (liability for misleading statements in securities statements); 42 U.S.C. §§ 1988(b) (civil rights actions), 2000e-5(k) (unlawful employment practices).

[38] *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

borderline case, judges are likely to give litigants the benefit of the doubt. They are likely to use their power to sanction sparingly.

Judges would also have discretion in determining the appropriate sanction. LARA limits reimbursement of attorneys' fees to "reasonable expenses incurred as a direct result of the violation." This language both limits the recovery to fees directly stemming from a frivolous claim or defense (as there may be multiple claims or defenses in a lawsuit) and requires the fees awarded to be reasonable. Judges have experience awarding fees and will not rubber stamp the amount sought by a litigant. Finally, LARA gives judges discretion to require the offending party to pay a fine into the court, in addition to reimbursing reasonable attorneys' fees, if the court finds such a penalty necessary for effective deterrence.

Opponents may contend that making an award of attorneys' fees "mandatory" when a claim or defense is found frivolous eliminates judicial discretion. In tort or consumer litigation, however, these same groups would expect a judge to award damages when a person has proven an injury due to the misconduct of another. That is justice – it is not handcuffing judges.

Sanctions Against Frivolous Claims Will Not Impede Justice

Some interest groups have argued that putting sanctions in place against frivolous claims will somehow impede justice and hurt ordinary people. This is simply not true. If we look to the words of Rule 11, frivolous claims include those "presented for improper purpose" or to "harass or cause unnecessary delay or needless increase in the cost of litigation."[39] They also include claims that lack a factual or evidentiary basis.[40] But they do not include claims based on "nonfrivolous argument[s] for the extension, modification, or reversal of existing law or the establishment of new law."[41] The very words of Rule 11 allow for development of the law. H.R. 758 does not alter this flexible language and continues to allow litigants to argue for changes in the law.

Some have expressed concern that the manner in which judges implemented the pre-1993 version of Rule 11 disproportionately impacted civil rights plaintiffs.[42] The bill is sensitive to this concern. In response, the bill explicitly instructs courts that "Nothing in this Act or an amendment made by this Act shall be construed to bar or impede the assertion or development of

[39] Fed. R. Civ. Proc. 11(b)(1).

[40] *Id.* 11(b)(4).

[41] *Id.* 11(b)(2).

[42] Even the 1983 changes to Rule 11 initially had a disproportionate impact on civil rights plaintiffs, by 1988, a survey conducted by the Federal Judicial Center as well as other scholarship demonstrated that courts were construing Rule 11 more favorably to most litigants and practitioners, especially civil rights plaintiffs. *See* Carl Tobias, *Reconsidering Rule 11*, 46 U. Miami L. Rev. 855, 860-61, 864-65 (1992) (citing Thomas Willging, Deputy Research Director of the Federal Judicial Center, Statement at Advisory Committee Meeting, Washington, D.C. (May 23, 1991); Elizabeth Wiggins et al., Rule 11: Final Report to Advisory Committee on Civil Rules of the Judicial Conference of the United States, § 1D, at 1 (Federal Judicial Ctr. 1991)). This led even some critics with "the general impression that Rule 11's implementation was not as problematic as many civil rights plaintiffs and attorneys had contended." Tobias, *supra*, at 864-65.

new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution of the United States."

The "Bring Me More Data" Argument

Perhaps, the most virulent argument against LARA has focused on data. "Bring me data that shows millions of frivolous claims" and maybe I will support LARA. I call that the "bucket of steam" argument. It simply cannot be done.

Since there is no effective remedy for a frivolous claim, and defending a case through a motion to dismiss will require thousands of dollars, individuals, small businesses, and insurers may make the unfortunate but understandable decision to settle after receiving a demand letter. They know that going to court will cost more than ceding to the plaintiffs' lawyers' settlement demand. A stronger Rule 11 will limit this sort of practice because everyone will then know that the threat of a frivolous lawsuit is just a baseless threat. In other words, the lawyer will be disinclined to follow through on the demand letter and file such a frivolous lawsuit when the target will then be able to move for sanctions, have a court decide the issue, and award fees.

Some federal judges may also share with you that they rarely see a frivolous claim in their courts and understandably so. As I have discussed, the current Rule 11's "safe harbor" allows the plaintiff's attorney to withdraw the claim before it is ever brought to the attention of the court. Moreover, since Rule 11 strongly disfavors the use of sanctions to provide compensation to an injured party, and requires the movant to face additional expense to prepare a motion that may never be heard, very few litigants use it. Instead, as noted earlier, they settle or seek dismissal, rather than request a remedy for the frivolous claim or defense.

LARA Applies to Both Plaintiffs and Defendants

Finally, there is a misconception among those who are familiar with LARA, but have not closely read the bill or the text of the current Rule 11, that its changes to Rule 11 only apply to frivolous lawsuits filed by plaintiffs' lawyers. Rule 11 actually applies to both claims and defenses that have no basis in law or fact.[43] "Every pleading, written motion, and other paper" filed in court—whether filed by a plaintiff or defendant—must meet Rule 11's requirements.[44] LARA does not change the Rule's application to defendants and the bill will equally provide a remedy for plaintiffs who are harmed by frivolous litigation tactics by defendants.

For example, between 1983 and 1993, federal courts applied Rule 11 to order defendants to pay the legal costs of plaintiffs in a variety of circumstances. Courts imposed such sanctions when they found that defendants filed unsupported or harassing counterclaims, denied allegations that the defendant knew to be true, raised frivolous defenses, failed to conduct a reasonable inquiry into the facts or law before filing a motion to dismiss, or ignored adverse precedent or applicable law in pleadings. Such sanctions are rarely imposed on defendants today under the present form of Rule 11.

[43] Fed. R. Civ. Proc. 11(b)(2).

[44] Fed. R. Civ. Proc. 11(a).

* * *

Mr. Chairman, in sum, victims of frivolous lawsuits in federal court are the only victims of wrongdoing who -- even when they prove their case to a judge and jury -- can be denied compensation. That is wrong, and the Lawsuit Abuse Reduction Act would correct that. It ensures that judges have an opportunity to consider whether claims and defenses are frivolous, and, if so, it would provide those who are injured with a fair remedy: reimbursement of reasonable legal costs that directly result from wrongful conduct.

Again, thank you for inviting me to testify. I am happy to answer any questions you may have.

Mr. FRANKS. Thank you all for your testimony. We will now proceed under the 5-minute rule with questions, and I will begin by recognizing myself for 5 minutes.

Ms. Milito, we hear anecdotal stories of small businesses being forced to settle lawsuits for $5,000 or $10,000, not because there is any merit to the plaintiff's case, but because it is simply cheaper to settle than to defend against a lawsuit.

In your experience, in addition to your testimony, can you elaborate? Does this occur? And if so, will the Lawsuit Abuse Reduction Act change this reality for at least some cases brought in or removed to Federal court?

Ms. MILITO. Thank you for that question, Mr. Chairman, and yes, absolutely.

The passage of the bill would benefit small-business owners in many ways, and I want to go back to actually your word in your opening statement about the deterrent effect of the bill, and that is really so important. The business owners whom I represent and speak with on a near daily basis don't want to be in court, period. They don't want to be threatened with a lawsuit, but they don't want to be in court, period.

And the simplicity of this bill is just that it is going to force attorneys, again both plaintiff attorneys and defense attorneys, to do their homework, and, as you said, before they file a paper in court, ensure that it is based on facts and law.

I think it will really do a lot to deter these kinds of frivolous claims that might lead to a lawsuit, and deter attorneys from making these settlement demands, because of knowing that they can't file a suit afterwards, a frivolous claim afterwards. So I think it will have a very big impact on small businesses.

Mr. FRANKS. Thank you.

Mr. Silverman, recently, a prominent consumer advocate, Ralph Nader, described the Lawsuit Abuse Reduction Act as, quote, "evenhanded," in that it would apply sanctions to both plaintiffs and defendants when they make frivolous claims or defenses.

Can you help me understand why a gentleman with the perspective of Ralph Nader would describe this bill as, quote, "evenhanded"?

Mr. SILVERMAN. Well, Mr. Chairman, I think that even very knowledgeable people sometimes have the misconception that Rule 11 only applies to frivolous claims brought by plaintiffs. But Rule 11 is actually an extremely balanced rule.

If you look at its text, it applies to victims of frivolous litigation on both sides. It applies to any pleading, written motion, or other paper, whether it is filed by a plaintiff or a defendant. And a plaintiff's factual contentions must have evidentiary support, just as a defendant's claims of denial of facts must be based on evidence. Claims and defenses must be warranted by existing law.

Plaintiffs can't file lawsuits to harass others, just as defendants cannot use delay tactics for purposes of litigation. That is all covered by Rule 11, and I think if you look at the case law between 1983 and 1993, you will see many cases, many Rule 11 sanctions, brought against defendants, as well.

Mr. FRANKS. Thank you, sir. Let me just follow up.

One of the concerns raised by mandatory sanctions is that they will potentially chill plaintiffs from being able to bring legitimate cases. Isn't the bar fairly high, in terms of what the courts would consider a frivolous claim? I mean, a frivolous claim isn't frivolous simply because the plaintiff loses. Can you elaborate on that?

Mr. SILVERMAN. Thank you, Mr. Chairman. Yes, that is correct.

Plaintiffs with legitimate claims really should have no concern about LARA. Rule 11 sets a very high standard for a violation. It is not simply losing on a motion to dismiss. There has to be either an improper purpose shown—harassment or delay. There has to be no basis in fact, or no basis even after a legitimate chance for discovery, and no basis in the law or a reasonable argument for a change in the law.

And judges have significant discretion under the current rule and under LARA to decide whether those standards apply. Judges are lawyers, too, and they are very reluctant to impose sanctions on a party's lawyer for not meeting these standards. They take a very hard look and take the responsibility very seriously.

Mr. FRANKS. Well, thank you. And I will now yield 5 minutes to Mr. Cohen for questions.

Mr. COHEN. Thank you, Mr. Chair.

First, I asked each of you to consider telling me when there had been another instance where the Congress had initiated a law, a rule, without the courts requesting it.

Ms. Milito, can you give me an example?

Ms. MILITO. I cannot and I would be happy to——

Mr. COHEN. Mr. Silverman, can you give me an example?

Mr. SILVERMAN. Well, Mr. Cohen, there are examples——

Mr. COHEN. What are they?

Mr. SILVERMAN [continuing]. Of situations where Congress has intervened when they found that fee shifting is supported by public policy. And those are not in the rules themselves, but they are in the statutes.

Mr. COHEN. The answer is no. The answer is no. You know of no rule that has been passed this way.

Mr. SILVERMAN. No rule.

Mr. COHEN. Mr. Peck?

Mr. PECK. The only time that Congress has ever suggested any kind of procedural change is when it is intermingled with a new substantive cause of action. No general rules.

Mr. COHEN. Thank you, sir.

Ms. Milito, in your statement, you said, quote, unquote, "Smalltime lawyers bring these cases." As a self-practicing attorney, and I know lots of them, how do you define "smalltime lawyer"?

Ms. MILITO. I am talking about the lawyers that are printing out form complaints and maybe only changing the business name. Lawyers that are not doing their homework before they file a——

Mr. COHEN. I would submit to you, that is—I don't know what you meant, but "smalltime lawyer" I find offensive to many lawyers who have small practices, who are smalltime businesspeople. They are small-business people and they work hard, and they work by the rules, and they bring cases, and they don't boilerplate. I would

submit that you should try to find a better term than "smalltime lawyers."

Ms. MILITO. My intent was not to offend any attorneys. We, certainly, have many members at NFIB who are attorneys, and we have members at NFIB who——

Mr. COHEN. Thank you. Thank you very much.

Ms. MILITO [continuing]. Practice plaintiff——

Mr. COHEN. Mr. Peck or anybody else here, are you all familiar with the examples that the Chair gave about an ironing board warning that you shouldn't iron while clothes are on? And a fishing lure that you shouldn't ingest it? Or a wheelbarrow shouldn't be on the highway? Did the courts order that, because of a smalltime lawyer or some other lawyer that went into court and got some kind of a judgment? Or is that just a manufacturer being overboard?

Mr. PECK. I am not aware of any case where liability was assessed for the failure to provide a warning of that nature.

What we have found in studies that have been published in various law reviews is that often when these warnings appear, they are the result of in-house counsel making a suggestion to their company, saying, "Let's use something like this so that there is no chance anyone can get it wrong." This is, of course, over-lawyering.

Mr. COHEN. Mr. Silverman, the American Bar Association and the Federal Judicial Conference both oppose LARA. Neither are known to be great apologists for trial lawyers or smalltime lawyers. In the 2005 Federal Judicial Center, more than 80 percent of judges who responded agreed that Rule 11 is just right in its current form. Only 5 percent favored the 1983 revision.

Why should Congress not defer to the judgment of the judiciary?

Mr. SILVERMAN. Mr. Cohen, Rule 11 is different, and LARA is different than other Federal rules. Unlike other rules that deal with changing the number of days for filing a complaint or an answer, how many interrogatories you can have, time limits, et cetera, it is not a purely procedural rule. This is a rule that deals with providing rights and remedies of people. It is something that Congress does——

Mr. COHEN. I know what Rule 11 is, but the courts are all against it. If the Judicial Conference is against it, and the Bar Association is against it, why should we go against the expert logic and come up with something that——

Mr. SILVERMAN. They weren't against it when the rule was in effect. If you look back, there was a 1990 study where 95 percent of judges said, and this was a survey of all of the judges, and 75 percent actually responded. Ninety-five percent said it did not impede development of the law. Three-quarters said that the benefit in deterring frivolous lawsuits and compensating those who are harmed outweighed the use of judicial time to decide the motions. And 4 out of 5 said it had a positive effect on litigation.

Now, there are other studies, which others have cited here, and those are later. They are small——

Mr. COHEN. And the Judicial Conference 3 years later recommended a change.

Mr. SILVERMAN. They did recommend the change——

Mr. COHEN. But they don't recommend a change now. But you are submitting we should go against the Judicial Conference now?

Mr. SILVERMAN. The Judicial Conference knows a lot about the procedures, the mechanics of the courts, but this is an area that involves rights and remedies. And it is a good place——

Mr. COHEN. This is an area where we should forget the courts and appeal to the thoughts of the public that think all judges are bad, that all government is bad, and we should kill the judges. This is what you are saying, that we shouldn't listen to the judges on this; we should listen to the public that says the judges are bad, the lawyers go first, and all that.

Mr. SILVERMAN. That is—that is——

Mr. FRANKS. Mr. Silverman, you didn't say anything about killing the judges, did you?

Mr. SILVERMAN. I certainly did not.

Mr. FRANKS. I just wanted to——

Mr. COHEN. Shakespeare did that.

Mr. SILVERMAN. In fact, I would like more discretion than they have today to look at these cases.

Mr. COHEN. Ms. Milito, small business said this is a very minor problem they have. They rated it, in surveys, the lower three or four out of 75 problems that they had with business. Cost and frequency of lawsuits, threatened lawsuits, was 71st out of a possible 75 in a survey taken in 2012 by the NFIB.

Why is it such an important issue when it is 71st out of 75?

Ms. MILITO. I am going to start off with a quote Mr. Silverman used in his testimony. Judge Learned Hand said, "I should dread a lawsuit beyond almost anything short of sickness and death." If today you were told you had a terminal illness, I bet it would become your number one problem and priority. And as with a lawsuit, most of the members I speak with don't even think of it until it is staring them in the face.

Mr. COHEN. Well, Ms. Milito, I don't have cancer right now, but I am concerned about it, and I am frightened of it and the prospect in the future of all the illness. And I think if it was a major thing for small business because it could happen, it would rank higher than 71st out of 75th.

And I yield back the balance of my time.

Mr. FRANKS. And I thank the gentleman.

I now recognize Mr. Nadler, the gentleman from New York, for 5 minutes.

Mr. NADLER. I thank you.

Mr. Peck, one of the points against LARA is that it makes sanctionable, arguably, the use of novel legal theories, which could be considered frivolous, and that implicates, in particular, civil rights lawsuits. The Committee report from last Congress cited the case Nicole "Nikki" Youngblood, who, "filed suit after her picture was left out of the school yearbook when she refused to wear a feminine drape instead of a shirt and tie as she wished," as an example of a frivolous claim.

To date, there are 14 States with laws that address discrimination against students based on gender identity. While the majority clearly considered Nikki to be an example of a frivolous lawsuit, might this be an example of a valid civil rights claim worthy of ju-

dicial consideration? Doesn't this highlight the potential chilling effect on civil rights claims? And by the same token, might the claim in *Loving v. Virginia* on mixed-race marriages or, in fact, when the same-sex marriage case brought before the Supreme Court, I forget how many decades ago, was dismissed as absurd. And now the Supreme Court has ruled differently.

Might all of these things be barred and sanctionable under LARA, under this bill?

Mr. PECK. It is entirely possible that they would be. We often get fractured versions of the facts that underlie cases when they are used as examples like this. But let me give you two examples from my own experiences, two cases that I am currently working on.

In one, I am representing the City of Miami in a Fair Housing Act case that it brought against various banks. Los Angeles has also brought similar cases. In Los Angeles, the cases are in Federal Court. The ruling was against the motion to dismiss and the cases are going to trial. In Miami, the judge found a precedent that not even the banks had cited and said that there is no basis for the city to have standing here and that this was a frivolous argument.

If this rule was in effect, the City of Miami would have been sanctioned for bringing this suit, which is approved by a U.S. Supreme Court case, which upheld the standing of municipalities to bring these kinds of lawsuits. We are now in the 11th Circuit on that case.

A second case that I want to bring up, on Saturday, I received a petition for certiorari. Actually, it was two petitions for certiorari filed by Walmart out of a Pennsylvania case. These are cases in which Walmart lost wage and hour class actions, but they are not sure whether they are supposed to be appealing from the Pennsylvania Supreme Court's decision or the Pennsylvania Superior Court, so they filed two petitions for certiorari and asked the court to sort out what they should do, in an abundance of caution.

If LARA were in effect, it would seem mandatory that one of those petitions was frivolous.

Mr. NADLER. Thank you. Let me just ask, before I switch to a different topic, such lawsuits as *Citizens United v. Federal Election Commission*, the *District of Columbia v. Heller* on the Second Amendment, *Commonwealth of Virginia v. Sebelius* that went to the Supreme Court on the Affordable Care Act, could not all these cases have been considered frivolous and sanctionable, given the novel legal theories underlying them? All these cases, of course—well, go ahead.

Mr. PECK. Yes. And you know, in each of those instances, people made claims that the theory behind them was ridiculous, was frivolous. And as a result, even in the Obamacare case, you had law professors urging the government to seek sanctions.

If this mandatory rule were in effect, they would seek sanctions, and we would have seen hearings on the sanctions rather than——

Mr. NADLER. Okay, thank you. And talking about hearings on the sanctions, during the decade that the 1983 version of Rule 11 was in effect, which this bill would seek to reinstate, at least a quarter of all cases of the Federal civil docket were burdened by Rule 11 proceedings that did not result in sanctions. Almost every case had two cases, a sanctions case as well as the underlying case.

Based on our experience with the 1983 version of the rule, and for that matter with the 1993 revision, do you think that this bill, if enacted, God forbid, would lead to a lot more rather than less litigation?

Mr. PECK. It is not only my judgment but it is the judgment of the Judicial Conference.

Mr. NADLER. So the Judicial Conference judged that this would be increasing litigation, increasing court costs for all involved.

Let me ask Mr. Silverman, on what basis are they wrong? And how are we making the whole system cheaper by increasing litigation, so that every lawsuit, a large majority of lawsuits, have Rule 11 hearings and litigation appended to them?

Mr. SILVERMAN. Mr. Nadler, thank you. It is a pleasure to be before you today as Brooklyn native, so I want to thank you for your service.

Satellite litigation, there was a lot of concern about that. I understand those concerns. And some of it——

Mr. NADLER. There was a reality to it, not just a concern.

Mr. SILVERMAN. Some of it stemmed from the change in the rule in 1983. It was very different before that.

But there are a couple of factors I would ask you to consider. First, I think we have to look at why is a Rule 11 motion different from other types of motions that the courts decide every day. If you look at any Federal court docket, there are going to be motions for summary judgment, for dismissal, for expert testimony, issues for venue, jurisdiction, what have you.

Judges decide those motions in the routine course of business, and if they find that it lacks merit, as with a Rule 11 motion, all they have to say is one word, "denied," and they move on with it.

I think we also should consider the alternatives to allowing the motion, which is a system where a person who believes they were harmed by a frivolous lawsuit or defense has no way of bringing that before the judge.

In terms of the satellite litigation issue and the numbers I have seen, I know in Mr. Peck's testimony and I have seen it cited in other places, that there were something like 7,000 sanctions motions in the period where the stronger rule was in effect. But you have to look at that in context. That was over a 10-year period. There were almost 700 Federal judges.

Mr. NADLER. My time has expired. I want to say one sentence in response to what you said, and that is the reason it is different is that a motion to dismiss or motion for summary judgment is on the same underlying questions, whereas a Rule 11 proceeding is an entirely different question than the underlying questions. So it is a whole different fact consideration.

I yield back. Thank you.

Mr. FRANKS. And I would, certainly, defer to the gentleman's expertise in novel legal theories.

And I would now recognize gentleman from Florida, Mr. Deutch, for 5 minutes.

Mr. DEUTCH. Thank you, Mr. Chairman.

Mr. Peck, can we just back up for a second? When the Rules Advisory Committee amended Rule 11 in 1993, it gave courts discre-

tion to impose sanctions, and noted that the purpose of the sanctions was to deter bad conduct, not to reward the other party.

Why did the Rules Advisory Committee give courts this discretion, which this bill would take away? And why was the purpose deterrence rather than compensation?

Mr. PECK. Well, first of all, the courts do not want frivolous filings, and so that is the reason for the deterrence factor. And what the Committee did was say, here the filing of these motions are something that we will determine but not every motion and every filing is necessarily of the same nature. They don't have the same qualities to it. They may be better remedied by instruction to the jury that they are allowed to infer something because of this filing. And that often can be more devastating to a case than not. So there is flexibility because different sanctions are appropriate for different types of filings.

But second of all, the courts retain inherit power to shift costs, if they want to. So it didn't have to be in the rules, and courts continue to use that power.

Mr. DEUTCH. And then looking ahead, Mr. Silverman, you had cited a survey to support the 1983 version, a survey from 1991. But obviously, at this point, we acknowledge that the Judicial Conference opposes restoring mandatory Rule 11 sanctions.

Federal judges overwhelmingly support Rule 11 as it currently exists. Your study is from 1991, which you use to show that the old system worked. But in 2005, the Judicial Center issued a report entitled, "Report of a Survey of U.S. District Judges' Experiences and Views Concerning Rule 11." More than 80 percent of the judges said that Rule 11 is needed as is, is just right, and is just right as it now stands. Eighty-seven percent of the judges who responded preferred the current version of Rule 11. And just 5 percent preferred the version of Rule 11 that existed between 1983 and 1993. And only 4 percent preferred the version of Rule 11 as proposed in the Lawsuit Abuse Reduction Act.

Ninety-one percent opposed the requirement that sanctions be imposed for every Rule 11 violation. And 84 percent disagreed with the proposition that an award of attorney's fees should be mandatory for every violation. Eighty-five percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule.

Before getting to the question, Mr. Chairman, I ask for unanimous consent to submit the 2005 Federal Judicial Center report in the record.

Mr. FRANKS. Without objection.

[The information referred to follows:]

Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure

David Rauma & Thomas E. Willging

FJC Project Team:
George Cort
Vashty Gobinpersad
Maria E. Huidobro

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Contents

Introduction 1
Summary of Results 2
Results 3
Frequency of Groundless Litigation 3
"Safe Harbor" Provision and Rule 11 Activity 5
Rule 11 Sanctions 7
Three Strikes 9
Application of Rule 11 to Discovery 12
How to Control Groundless Litigation? 13
Conclusion 15
Appendix A: Method 16
Appendix B: Questionnaire 18

Introduction

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to design and implement a survey of a representative national sample of federal district judges. The purpose of the survey was to gather information about the judges' experiences with Rule 11 of the Federal Rules of Civil Procedure as well as to elicit their opinions about recent proposals in Congress to amend Rule 11. The chair of the Advisory Committee and the committee's reporters helped develop the questionnaires. Center staff conducted the survey and analyzed the results during December 2004 and January 2005.

As currently written, Rule 11 expressly authorizes judges to impose sanctions on lawyers and parties who present to a district court a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

In the 108th Congress, the House of Representatives passed H.R. 4571, the Lawsuit Abuse Reduction Act of 2004,[1] which would have amended Rule 11. That bill would have provided for mandatory sanctions for violations, repealed the safe harbor, and required judges to order the offending lawyer or party to compensate the opposing party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would have reversed three amendments to Rule 11 adopted through the rulemaking process in 1993: to convert mandatory sanctions to discretionary sanctions, to create a safe harbor, and to deemphasize attorney fee awards. The proposed legislation also would have introduced a requirement that a district court suspend an attorney's license to practice in that district for one year if the attorney was found to have violated Rule 11 three or more times in that district.

The survey was designed, in part, to elicit district judges' views based on their experience with the 1993 amendments. The Advisory Committee was particularly interested in having the survey identify any differences in the views of district judges concerning the current Rule 11, the legislative pro-

1. H.R. 4571, 108th Cong. 2d Sess. (2004). The House version was introduced in the Senate on Sept. 15, 2004, referred to the Committee on the Judiciary, and was not the subject of a vote.

posal, and the pre-1993 version of Rule 11. The pre-1993 version differs from the legislative proposal in significant ways, particularly in its treatment of attorney fees as a discretionary, not a mandatory, sanction for a violation of Rule 11.

On December 10, 2004, the Center E-mailed questionnaires to two random samples of 200 district judges each. District Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, provided a cover letter for the E-mail. One sample comprised solely judges appointed to the bench before January 1, 1992, who would be expected to have had considerable experience with the pre-1993 version of Rule 11. The other sample comprised solely judges appointed to the bench after January 1, 1992, who would be expected to have had most of their judicial experience working with the 1993 amended version of Rule 11. Judge Rosenthal sent a follow-up E-mail on January 3, 2005. Of the 400 judges, 278 responded, a rate of 70%. Appendix A explains the methods used to select the samples. Appendix B contains a composite copy of the two questionnaires used in the survey.

Summary of Results

More than 80% of the 278 district judges indicated that "Rule 11 is needed and it is just right as it now stands." In evaluating the alternatives, 87% of the respondents preferred the current Rule 11, 5% preferred the version in effect between 1983 and 1993, and 4% preferred the version proposed in H.R. 4571.

Judges' opinions about specific provisions in Rule 11 and the proposed legislation followed a similar pattern. The results indicated that relatively large majorities of the judges who responded to our survey have the following views about Rule 11:

- 85% strongly or moderately support Rule 11's safe harbor provision;
- 91% oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84% disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation; and
- 72% believe that having sanctions for discovery in Rules 26(g) and 37 is best.

A majority of the judges (55%) indicated that the purpose of Rule 11 should be both deterrence and compensation; almost all of the other judges (44%) indicated that deterrence should be the sole purpose of Rule 11.

The views of judges who responded to the survey are likely to be related to their estimation of the amount of groundless civil litigation they see in their own docket, especially when focusing on cases where the plaintiff is represented by counsel. Approximately 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem. About 3% view groundless litigation brought by plaintiffs who are represented by counsel as a large or very large problem. For 54% of the judges who responded, the amount of groundless litigation has remained relatively constant during their tenure on the federal bench. Only 7% indicated that the problem is now larger. For 19%, the amount of groundless civil litigation has decreased during their tenure on the federal bench, and for 12% there has never been a problem.

Results

The Advisory Committee was especially interested in having a survey that was designed to inquire about district court judges' experience with Rule 11 as well as to solicit judges' opinions about the current Rule 11 relative to the proposed changes contained in the legislation. Those interests shaped the organization and content of the survey questionnaires. The survey results in this section of the report are presented in tables and text in the order in which the questions appeared on the survey instrument. The title of each table states the question asked of the judges, and the response categories are a shorthand version of the responses called for in the questionnaire. The preface of each questionnaire indicated in bold type that "This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel." Many of the questions were modeled on questions asked of judges in a 1995 Center survey.[2] In order to facilitate comparisons between the findings of the 1995 survey and the current survey, we present applicable results of both surveys with appropriate references.

Frequency of Groundless Litigation

The questionnaire first asked judges about their perception of any problems with groundless litigation and whether such problems, if they exist, had

2. John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (Federal Judicial Center 1995) [hereinafter FJC 1995 Rule 11 Survey].

changed since Rule 11 was last amended in 1993. Table 1 shows that 85% of the judges described any perceived problem with groundless litigation as being no more than a small one. Among judges commissioned before January 1, 1992, this figure was over 75%; the figure was almost 90% for judges commissioned after that date. In our 1995 study, 40% of the judges indicated that the problem with groundless litigation was moderate to very large;[3] only 15% believed this to be the case in the current study.

Table 1
Responses to Question 1.1, Is there a problem with groundless litigation in federal civil cases on your docket?

Possible Answer	All Judges (*N*=276)[4]	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
No problem	15%	13%	16%
Very small problem	38%	31%	43%
Small problem	32%	34%	30%
Moderate problem	12%	16%	9%
Large problem	2%	2%	2%
Very large problem	1%	3%	0%
I can't say	0%	1%	0%

The questionnaire next asked whether such problems, if they exist, had changed since Rule 11 was last amended in 1993. Table 2 shows that about 7% said that the problem had increased. More than half said that the problem was the same, and 12% said that there has never been a problem. Judges commissioned after January 1, 1992, were more likely to say that there has never been a problem but, if there is a problem, it is about the same as it was during their first year on the bench.

3. *Id.* at 3.

4. *N* refers to the number of judges who answered the question. The value of *N* varies across tables because of differences in the number of judges who answered a particular question. Percentages in columns with results for all judges are weighted to reflect the fact that, by drawing two samples independently from two groups of judges, we have a stratified sample. In this case, weighted results for the entire sample are appropriate. Weighting is unnecessary for results reported separately by group. Finally, as a result of rounding, column percentages may not sum to 100.

Table 2
Responses to Question 1.2, Is the current problem (if any) with groundless litigation in civil cases on your docket smaller than, about the same as, or larger now than it was

before Rule 11 was amended? (asked of pre-1992 judges) *or*

during your first year as a federal district judge? (asked of post-1992 judges)

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
There has never been a problem	12%	9%	14%
The problem is much smaller now than it was then	8%	11%	6%
The problem is slightly smaller now than it was then	11%	14%	9%
The problem is the same now as it was then	54%	48%	59%
The problem is slightly larger now than it was then	6%	5%	7%
The problem is much larger now than it was then	1%	2%	1%
I can't say	7%	11%	4%

"Safe Harbor" Provision and Rule 11 Activity

The questionnaire asked judges if they supported or opposed the Rule 11 "safe harbor" provision, which was added as part of the 1993 amendments. Table 3 shows that 86% of the judges said they supported it, with the majority of the judges expressing strong support. Table 3 also shows somewhat stronger support among judges commissioned after 1992. This subgroup has very little or no experience with the pre-1993 version of Rule 11, which did not include the safe harbor provision. Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.[5]

5. FJC 1995 Rule 11 Survey, *supra* note 2, at 4.

Table 3
Responses to Question 2.1, Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Strongly support	60%	53%	65%
Moderately support	26%	25%	26%
Moderately oppose	6%	9%	3%
Strongly oppose	4%	5%	2%
I find it difficult to choose	4%	6%	3%
I can't say	1%	1%	1%

The questionnaire contained a follow-up question for the pre-1992 judges about changes in Rule 11 activity as a result of the addition of the safe harbor provision. Judges commissioned prior to 1992 were asked how the safe harbor provision has affected the amount of Rule 11 activity since the provision went into effect in 1993. Table 4 shows that 45% of these judges reported that Rule 11 activity had decreased, either slightly or substantially, and 29% reported that activity was about the same. Only 5% reported increases in Rule 11 activity, and 21% indicated that they could not give a definitive answer to this question. Similarly, judges commissioned after 1992 were asked about Rule 11 activity since their first year on the bench. Table 4 shows that almost two-thirds of the post-1992 judges reported that Rule 11 activity had remained about the same, 22% reported decreases, and 7% reported increases.

Table 4
Responses to Question 2.2,

How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? (asked of pre-1992 judges) *or*

Since your first year as a district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket? (asked of post-1992 judges)

Possible Answer	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=148)
Increased substantially	1%	0%
Increased slightly	4%	7%
About the same	29%	65%
Decreased slightly	17%	12%
Decreased substantially	28%	10%
I can't say	21%	6%

Rule 11 Sanctions

The current version of Rule 11 allows a district judge to impose sanctions for violations of the rule, at his or her own discretion, with the purpose of deterring similar conduct in the future. H.R. 4571 would require sanctions for every violation, with the purpose of compensating the injured party for reasonable expenses and attorney fees as well as to deter repetitions of such conduct.

The judges were asked first whether sanctions, monetary or nonmonetary, should be required. Table 5 shows that 91% said that sanctions should not be required. Among judges commissioned before 1992, 86% said sanctions should not be required; for judges commissioned after 1992 the figure was 95%. In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so now.[6]

6. *Id.* at 6.

Table 5
Responses to Question 3.1, Should the court be required to impose a monetary or nonmonetary sanction when a violation is found?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	9%	13%	5%
No	91%	86%	95%
I can't say	0%	1%	0%

Judges were next asked whether an award of attorney fees, sufficient to compensate the injured party, should be mandatory when a sanction is imposed. Table 6 shows that 84% of the judges said no. The result is approximately the same whether the judges were commissioned before or after 1992. The percentage of judges favoring mandatory attorney fees for Rule 11 violations was 15% in both the 1995 and 2005 surveys.[7]

Table 6
Responses to Question 3.2, When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	15%	14%	16%
No	84%	85%	83%
I can't say	1%	1%	1%

Regarding the proposed legislation's inclusion of financial compensation as a general purpose for Rule 11, judges were asked what should be the purpose of Rule 11. Almost 100% of the judges said that a purpose of Rule 11 should be deterrence. Their views were split on the role of compensation. The results in Table 7 reveal that slightly more than half, 55%, said that the purpose should be deterrence *and* compensation; 44% said that the purpose should be deterrence, with compensation if needed for the sake of deterrence. Reading the Table 7 results in light of the opinions expressed in

7. *Id.*

Table 5 and 6, it appears that most judges who favor compensating the opposing party do not favor such compensation in all cases and do not necessarily favor compensation in the form of attorney fees. In the 1995 survey, 66% of the judges thought that Rule 11 should include both compensatory and deterrent purposes.[8]

Table 7
Responses to Question 3.3, What should the purpose of Rule 11 sanctions be?

Possible Answer	All Judges (*N*=275)	Judges Commissioned Before 1/1/92 (*N*=126)	Judges Commissioned After 1/1/92 (*N*=149)
Deterrence (& compensation if warranted)	44%	40%	46%
Compensation only	0%	1%	0%
Both deterrence & compensation	55%	58%	53%
Other	1%	1%	1%

Three Strikes

Under the proposed legislation, when an attorney violates Rule 11 the federal court would determine how many times that attorney had violated Rule 11 in that court during the attorney's career. If that attorney had committed three or more violations, the court would suspend for one year the attorney's license to practice in that court.

To gauge the frequency with which this portion of the proposed Rule 11 might be invoked, judges were asked whether they had encountered an attorney with three or more violations in their district. Table 8 shows that 77% of the judges reported that they had not. Of the remaining 23%, more than half were not sure if they had encountered an attorney with three or more violations. Judges commissioned before 1992 were more likely to say they had encountered such an attorney. This result may, of course, be largely the result of their longer time on the bench.

8. *Id.*

Table 8
Responses to Question 4.1, In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	11%	15%	8%
No	77%	71%	81%
I can't say	12%	14%	11%

At present, the efforts and methods required to enable courts to track attorney violations, in order to apply the proposed legislation's "three strikes" provision, are unknown. Judges were asked for their views, which are reported in Table 9. The choices were not mutually exclusive: Judges could check more than one response and therefore the percentages do not sum to 100. The most frequent response, given by 48% of the judges, was that a new database would be required to track Rule 11 violations. Examination of prior docket records was the next most frequent response, given by 35% of the judges. Only 4% said that little or no additional effort would be required, and nearly one-third (32%) were unsure about what would be needed to apply the three strikes provision.

Table 9
Responses to Question 4.2, In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Little or no additional effort	4%	3%	5%
Examining prior docket records for past violations	35%	35%	34%
Creating a new database for Rule 11 violations	48%	53%	44%
An affidavit or declaration from each attorney	19%	17%	20%
Other court action	3%	2%	3%
I can't say	32%	29%	34%

Judges were next asked their views on the impact of the proposed three strikes provision in deterring groundless litigation relative to the cost of implementation and in light of their courts' existing procedures for disciplining attorneys. Table 10 shows that 40% felt that the cost of implementation would exceed the deterrent value, while 25% of the judges felt that the value of the deterrent effect would exceed the cost of implementation. However, 27% were unsure about the tradeoff between cost and deterrent effect. Judges commissioned after 1992, compared with those commissioned earlier, were more likely to view the cost as exceeding the value of the proposed legislation and were less likely to view the deterrent value as exceeding the cost. They were also more likely to express uncertainty over the tradeoff.

Table 10
Responses to Question 4.3, Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Value of the deterrent effect would greatly exceed its cost	16%	15%	16%
Value of the deterrent effect would somewhat exceed its cost	9%	11%	7%
Value of the deterrent effect would about equal its cost	9%	13%	7%
Cost of implementing the proposal would somewhat exceed the value of the deterrent effect	10%	6%	13%
Cost of implementing the proposal would greatly exceed the value of the deterrent effect	30%	32%	28%
I can't say	27%	23%	30%

Application of Rule 11 to Discovery

The proposed legislation would extend Rule 11's application to discovery-related activity. Standards and sanctions for discovery are currently covered by Federal Rules of Civil Procedure 26(g) and 37, and the proposed legislation would augment these rules with an expanded Rule 11. The sampled judges were asked their opinion on the best combination of rules and sanctions. Table 11 shows that 72% of the judges (compared with 48% in 1995)[9] feel that the best option is the current version of Rule 11; 14% favored the proposed legislation. Judges commissioned after 1992 were a little more likely to favor the current version of the rule than judges commissioned before 1992.

9. *Id.* at 7.

Table 11
Responses to Question 5, Based on your experience, which of the following options do you believe would be best?

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=149)
Sanctions provisions contained only in Rules 26(g) and 37	72%	68%	75%
Sanctions provisions contained in Rules 26(g), 37, and 11	13%	15%	12%
Sanctions provisions consolidated in Rule 11	5%	7%	3%
No significant difference among the three options	5%	6%	4%
I can't say	5%	5%	5%

How to Control Groundless Litigation?

To gauge judges' overall views on the proposed legislation and on controlling groundless litigation, the judges were asked whether Rule 11 should be modified. Table 12 shows their responses to the given options. The great majority of judges (81%) said that Rule 11 is just right as currently written. In 1995, 52% of the judges indicated that the same version of Rule 11 was just right as written. In 2005, there were differences among judges depending on when they were commissioned: 71% of judges commissioned before 1992 agreed that the current Rule 11 is just right, compared with 89% of judges commissioned afterwards. There was almost no support for modifying Rule 11 to reduce the risk of deterring meritorious filings, and only some support, primarily among the longer-serving judges, to modify Rule 11 to more effectively deter groundless filings.

Table 12
Responses to Question 6, Based on your view of how effective or ineffective these other methods are, how, if at all, should Rule 11 be modified?

Possible Answer	All Judges (*N*=270)	Judges Commissioned Before 1/1/92 (*N*=124)	Judges Commissioned After 1/1/92 (*N*=146)
Modified to increase its effectiveness in deterring groundless filings	13%	21%	7%
Rule 11 is just right as it now stands	81%	71%	89%
Modified to reduce the risk of deterring meritorious filings	1%	2%	1%
Rule 11 is not needed	1%	2%	1%
I can't say	3%	4%	3%

Finally, the judges were asked which version of Rule 11 they would prefer to have if and when they have to deal with groundless litigation. Given the choice among the current version of Rule 11, the pre-1993 version, or the proposed legislation, 87% of the judges preferred the current version. The percentages for surveyed judges commissioned before and after 1992 are 83% and 91%, respectively. There was little support expressed for either the pre-1993 version or the version contained in H.R. 4571.

Table 13
Responses to Question 7, Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion, or other paper in violation of Rule 11 standards. Which approach would you prefer in dealing with groundless litigation?

Possible Answer	All Judges (*N*=271)	Judges Commissioned Before 1/1/92 (*N*=123)	Judges Commissioned After 1/1/92 (*N*=148)
The current Rule 11	87%	83%	91%
The 1983–1993 version of Rule 11	5%	7%	4%
The proposed legislation	4%	7%	2%
I can't say	4%	4%	3%

Conclusion

Based on their experiences in managing groundless civil litigation in their own courts, federal district judges find the current Rule 11 to be well suited to their needs. Almost all of the judges reported that, in their experience, groundless civil litigation is a small or at most a moderate problem. District judges' views on proposed changes to Rule 11 appear to be consistent with their experiences on the federal bench. Substantial majorities of the responding judges said, in effect, that none of the proposals for changing Rule 11—that is, proposals for mandatory sanctions, mandatory attorney fee awards, removal of the safe harbor, and application of Rule 11 to discovery disputes—would resolve problems that district judges are experiencing.

Appendix A
Method

Separate forms of the questionnaire were E-mailed by Center staff with a cover letter from the chair of the Advisory Committee to two samples of active and active-senior federal district court judges. The samples, each one of 200 judges, were separately and randomly selected from within two groups of judges defined by their commission date. Judges commissioned before January 1, 1992, formed one group; judges commissioned on or after that date formed the other. This date was selected in order that all judges in the first group would have had at least one year on the bench before the 1993 amendments to Rule 11 went into effect. This group of judges received a form of the questionnaire that, where necessary, asked them to use their pre-1993 period on the bench as a basis for comparison. The second group of judges received a questionnaire that instead asked them to use their first year on the bench as their basis for comparison. A composite of the two versions of the questionnaire is contained in Appendix B.

In order to quickly and easily convert the returned questionnaires into data files, Center research staff used special software to produce and read the questionnaires. Each of the two forms of the questionnaire was converted to Portable Document Format (PDF) and sent via E-mail to the 400 sampled judges. Each judge's file was named using a sequential, numbered ID that was used to track returned questionnaires for follow-up purposes. Upon receipt of the file, the judges were able to open the PDF file, answer the questions, save the file, and return it via E-mail. The software that produced the files was used to convert the returned questionnaires to a data file for analysis. Judges were also given the option of printing the PDF file, completing it, and faxing it to a fax server at the Center. Of the 280 responses received, 44 were returned via E-mail; the remainder were returned via fax. The questionnaires were sent on December 9, 2004, and a reminder was sent on January 3, 2005, to judges who had not yet responded. The response rates for the two samples were different. Post-1992 judges were more likely to return the questionnaire (74%) than were pre-1992 judges (64%).

The sample procedure described above produced a stratified sample in which the judges' commission dates defined the strata. In order to correctly interpret results for the sample of all judges, when reported, these data were weighted to reflect the fact that different sampling fractions were used for

the different strata. Results reported separately by strata do not require weighting.

Appendix B
Questionnaire

The questionnaire sent to judges commissioned before January 1, 1992 is reproduced below. Questions 1.2 and 2.2 differed in the version sent to judges commissioned on or after that date. The differences are indicated by bracketed text. Bold and underlined text was in that format in the original questionnaires.

RULE 11 SURVEY

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of <u>your own</u> experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation.*

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

a) There is no problem.
b) There is a very small problem.
c) There is a small problem.
d) There is a moderate problem.
e) There is a large problem.
f) There is a very large problem.
g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? [Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was during your first year as a federal district judge?] Please mark one.

a) There has never been a problem.
b) The problem is much smaller now than it was then.
c) The problem is slightly smaller now than it was then.
d) The problem is the same now as it was then.
e) The problem is slightly larger now than it was then.
f) The problem is much larger now than it was then.
g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

a) I strongly support Rule 11's safe harbor provision.
b) I moderately support Rule 11's safe harbor provision.
c) I moderately oppose Rule 11's safe harbor provision.
d) I strongly oppose Rule 11's safe harbor provision.
e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.
f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? [Since your first year as a federal district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket?] Please mark one.

a) Rule 11 activity has increased substantially
b) Rule 11 activity has increased slightly
c) Rule 11 activity has remained about the same
d) Rule 11 activity has decreased slightly
e) Rule 11 activity has decreased substautially
f) I can't say

3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only wheu necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be <u>required</u> to impose a monetary or nonmonetary sanctiou when a violation is found? Please mark one.

a) Yes
b) No
c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.
b) No, an award of attorney fees should not be mandatory.
c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

a) deterrence (and compensation if warranted for effective deterrence)
b) compensation only
c) both compensation and deterrence
d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

a) Yes
b) No
c) I can't say

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Mark all that apply.

a) Obtaining such information would require little or no additional effort
b) Obtaining such information would require examining prior docket records for past violations
c) Obtaining such information would require creating a new database for Rule 11 violations
d) Obtaining such information would require an affidavit or declaration from each attorney
e) Obtaining such information would require other court action (specify) _____
f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11.Please mark one:

a) The value of the deterrent effect would greatly exceed its cost
b) The value of the deterrent effect would somewhat exceed its cost
c) The value of the deterrent effect would about equal its cost
d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
d) There is no significant difference among the three options.
e) I can't say.

6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
b) Rule 11 is needed, and it is just right as it now stands.
c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings).
d) Rule 11 is not needed.
e) I can't say.

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The **version** of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motiou or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

a) I prefer the current Rule 11
b) I prefer the 1983-1993 version of Rule 11
c) I prefer the proposed legislation
d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

The Federal Judicial Center

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

Mr. DEUTCH. I appreciate that.

So other than your statement before that this is something you would like Congress to address, why should we consider the 1991 results relevant when in 2005, with a lot of experience, the judges who actually deal with Rule 11 have determined that it works the way it is now?

Mr. SILVERMAN. I appreciate your question. I think it is important to look at the 1991 survey, not just because it was the most extensive of the surveys that had been conducted, but because these were judges who actually had several years' experience with the former rule.

The 2005 survey, half of the judges that were included never actually were—they were appointed after the new rule, the current rule, was in effect. So they never saw how the rule——

Mr. DEUTCH. They didn't know. The overwhelming majority of judges, 87 percent who prefer the current version, since some of them had only become judges since the rule changed, their opinions don't matter on this?

Mr. SILVERMAN. Actually, there are two areas where I think all of the surveys are consistent. I think they are consistent even if you look at the 2005 and the 1995 and the older one I cited, all the judges say that a compensatory function, compensatory——

Mr. DEUTCH. Mr. Silverman, I am sorry. I am running out of time.

But I just want to be clear. I am not looking for consistency in the surveys. I am trying to understand why we should discard the overwhelming support for the system the way it is now, moving forward.

But let me just finish with Mr. Peck.

Mr. Peck, you had raised some concerns about what this change would do to civil rights cases and you mentioned *Brown v. Board of Education*. Could you elaborate a bit on how that case, in particular, might have been impacted if this change had been in place then?

Mr. PECK. As you know, the issue was whether separate was not really equal. And the evidence that was produced in the case showed that the Topeka, Kansas, schools were actually substantially equal, in facility, in quality of teachers, in the curriculum, in what they provided to both Black and White children. Robert Carter, who served as a Federal district court judge in New York for many years, was part of that litigation team.

It was his judgment that if the 1983 version of it was in effect, *Brown* would have received sanctions. They would have been fearful of bringing the case and may have waited another 10 years before it happened.

Mr. DEUTCH. Right.

And, Mr. Chairman, this country would look very different than it does today. I thank you, and I yield back.

Mr. FRANKS. I thank the gentleman.

And I thank all of you. And this would conclude today's hearing.

Without objection, all Members will have 5 legislative days to submit additional written materials and written questions for the witnesses, or additional materials for the record.

We would again thank the witnesses and the Members and the audience.

With that, this hearing is adjourned.

[Whereupon, at 11:02 a.m., the hearing was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

CENTER FOR STUDY OF RESPONSIVE LAW
P.O. BOX 19367
WASHINGTON, D.C. 20036

Statement by Ralph Nader Regarding the "Lawsuit Abuse Reduction Act"

I have always been opposed to legislation that would impose mandatory rules on judges, whether sentencing or sanctions, plaintiffs or defense.

Besides juries, judges are the only people in courtrooms who hear and evaluate evidence and they should have the discretion to decide individual cases, not absentee legislators.

-Ralph Nader, March 17, 2015, Washington, DC

Thomas M. Susman
Director
Governmental Affairs Office

AMERICAN BAR ASSOCIATION
1050 Connecticut Avenue, NW - Suite 400
Washington, DC 20036
(202) 662-1760
FAX: (202) 662-1762

March 23, 2015

Honorable Trent Franks
Chair, Subcommittee on the Constitution
and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Honorable Steve Cohen
Ranking Member, Subcommittee on the
Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Re: Lawsuit Abuse Reduction Act of 2015

Dear Chairman Franks and Ranking Member Cohen:

I am writing to express the opposition of the American Bar Association to H.R. 758, the Lawsuit Abuse Reduction Act of 2015, and request that this letter be included in the record of the March 17, 2015, hearing on the legislation.

H.R. 758 seeks to amend Rule 11 of the Federal Rules of Civil Procedure by rolling back critical improvements made to the Rule in 1993. The legislation would reinstate a mandatory sanction provision that was adopted in 1983 and eliminated a decade later after experience disclosed its unintended, adverse consequences. It also would eliminate the "safe harbor" provision added in 1993, which allows parties and their attorneys to avoid Rule 11 sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served. And finally, rather than authorizing judges only to impose sanctions to deter future litigation abuses, H.R. 758 would require judges to impose monetary sanctions in an amount sufficient to reimburse the prevailing party for reasonable attorneys' fees and litigation costs attributable to the frivolous claim.

The ABA opposes enactment of H.R. 758 for three main reasons. First, it would circumvent the procedures Congress itself has established for amending the Federal Rules of Civil Procedure. Second, there is no demonstrated evidence that the existing Rule 11 is inadequate and needs to be amended. And third, by ignoring the lessons learned from ten years of experience under the 1983 mandatory version of Rule 11, Congress incurs the substantial risk that the proposed changes would impede the administration of justice by encouraging additional litigation and increasing court costs and delays.

I. Congress Should Respect the Rules Enabling Act Process

As a threshold matter, the ABA opposes the legislation because it circumvents the Rules Enabling Act, established by Congress to assure that amendment of the Federal Rules occurs

only after a comprehensive and balanced review is undertaken by the judiciary with input from all relevant communities.

The Rules Enabling Act provides that evidentiary and procedural rules in the first instance are considered and drafted by advisory and standing committees of the Judicial Conference of the United States. Proposed changes are suggested by judges, clerks of court, lawyers, professors, individuals, and organizations. Suggestions are placed on the advisory committee's agenda, and a determination is made to accept, reject, or defer action on the suggestion. If the advisory committee votes to recommend an amendment to the rules, the next step involves publication and distribution of the proposed rule to more than 10,000 individuals. After considering public comments and making appropriate changes, the committees submit it the Judicial Conference for approval and then to the U.S. Supreme Court. If supportive, the Supreme Court transmits the proposed rule or amendment to Congress, which retains the ultimate power to reject, modify, or defer any proposed change.

This time-proven and exhaustive process is predicated on respect for separation-of-powers and recognition that: (1) rules of evidence and procedure are matters of central concern to the judiciary, lawyers, and litigants and have a major impact on the administration of justice; (2) each rule constitutes one small part of a complicated, interlocking system of court administration procedures, all of which must be given due consideration whenever rules changes are contemplated; and (3) judges have expert knowledge and a critical insider's perspective with regard to the application and effect of the Federal Rules.

In stark contrast, H.R. 758 proposes to amend the Federal Rules over the objections of the judiciary on an ad hoc basis that relies on anecdotes rather than science-based evidence and fails to examine how the proposed changes will affect the administration of justice.

II. There is No Empirical Evidence that Rule 11 is Inadequate and Needs to be Amended

Proponents state that the legislation is needed to stem the growth in frivolous lawsuits, which, according to the March 17 written statement of the National Federation of Independent Business, have "created a legal climate that hinders economic growth and hurts job creation." The underlying message appears to be that frivolous lawsuits have contributed significantly to the perceived explosive growth in the number of civil lawsuits in state and federal courts and the rising costs associated with civil litigation.

To substantiate their views, proponents primarily offer anecdotal evidence of memorable frivolous lawsuits. Their assertions are not backed by science-based research that frivolous lawsuits are on the rise or that the current Rule 11 is ineffective in deterring future frivolous filings. Moreover, many of the anecdotes relied on arise from cases brought in state courts and would not be affected by the federal rules change proposed in this legislation. While anecdotal stories of litigation abuse and resulting financial ruin may be riveting, they are an inadequate substitute for concrete empirical data of lawsuit abuse.

As noted in testimony presented to the House Judiciary Subcommittee on the Constitution by Professor Lonny Hoffman in 2011, numerous empirical studies by neutral observers do not support notions of skyrocketing litigation abuse in federal courts. These studies are in line with the experience of federal district judges. In 2005, the Federal Judicial Center (FJC) conducted a survey of federal district judges to gather information about their experiences with Rule 11. FJC concluded that almost all of the judges reported that in their experience groundless civil litigation is a small or at most a moderate problem, and 84 percent said that the problem was the same or smaller than it was before Rule 11 was amended.

There simply is no proof that the problems with groundless litigation have gotten worse since the 1993 amendments went into effect. In fact it is more likely that problems have abated because Rule 11's safe harbors provision provides an incentive to withdraw frivolous filings at the outset of litigation. In addition, according to Professor Danielle Kie Hart and other researchers, after the current version of Rule 11 went into effect, there was an increased incidence of sanctions' being imposed under other sanction rules and laws, including 28 U.S.C. Sec. 1927, as well as pursuant to the court's inherent power -- evidence that no rule change occurs in a procedural vacuum.

Those integrally involved in the civil justice system also have not expressed concern that Rule 11 needs to be amended or that frivolous lawsuits pose a serious problem. In 2010, the Judicial Conference Civil Rules Advisory Committee hosted a major two-day conference at Duke University School of Law designed to examine complaints about the costs, delays, and burdens of civil litigation in the federal courts and to explore the most promising opportunities to improve federal civil litigation. Over two hundred judges, lawyers, academics and justice system users, including members of the business community and defense bar, participated in the seminar, and 70 experts presented empirical research, analytical papers, pilot projects, and proposals for civil litigation reform. (The ABA Section of Litigation participated in the conference and made a presentation.) What is important to this discussion is that no research paper or participant suggested that frivolous lawsuits were a problem or that Rule 11 was inadequate and needed to be amended.

III. There is Substantial Risk that the Proposed Changes Would Impede the Administration of Justice by Encouraging Additional Litigation and Increasing Court Costs and Delays

Even if frivolous lawsuits have increased in recent years, there is no evidence that the proposed changes to Rule 11 would deter the filing of non-meritorious lawsuits. In fact, past experience strongly suggests that the proposed changes would encourage new litigation over sanction motions, thereby increasing, not reducing, court costs and delays. This is a costly and completely avoidable outcome.

During the decade that the 1983 version of the Rule requiring mandatory sanctions was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time. The Judicial Conference of the United States, in a 2004 letter to Representative James Sensenbrenner who was then chair of the Judiciary Committee, stated that mandatory application of Rule 11 had "created a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of

monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers; and provid[ed] little incentive…to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit."

These sentiments were reiterated in a 2013 letter from the Honorable David Campbell, chair of the Advisory Committee on Civil Rules, to House Judiciary Committee ranking member Representative Conyers, which warned that the legislation would create a cure far worse than the problem that it was meant to solve by reinstating the 1983 version that proved contentious and diverted so much time of the bench and the bar.

The 1983 version of Rule 11 was premised on anecdotal information rather than on comprehensive empirical data analyzed through the prism of those most familiar with the federal courts. It was ill-conceived and its unintended adverse consequences have been well-documented. We urge this Congress to avoid making the same mistake.

III. Conclusion

Our objective in opposing the enactment of H.R. 758 is not to stifle discourse over the underlying issues. While we do not believe that Rule 11 requires amendment, we respect that some Members of Congress are deeply concerned that frivolous lawsuits are adversely affecting the administration of justice and believe that their concerns and proposed solutions deserve a full and robust examination. The best way to accomplish this is to defer to the Rules Enabling Act process established by Congress. This will assure that the development of any remedial proposal to amend the Federal Rules is based on a comprehensive and evidence-based analysis of the issues and proposed solutions.

Sincerely,

Thomas M. Susman

Response to Questions for the Record from Robert S. Peck, President, Center for Constitutional Litigation, PC

Questions for the Record from Ranking Member Steve Cohen for the Hearing on H.R. 758, the "Lawsuit Abuse Reduction Act of 2015"
March 17, 2015

Questions for Robert Peck

1. **Your fellow witnesses described hypothetical situations to illustrate how, in their view, Rule 11 currently works or might work going forward. In your view, were their illustrations an accurate description of reality or of how H.R. 758 might impact Rule 11's application going forward?**

The other witnesses who presented at the March 17th hearing described two separate hypothetical situations, neither of which were realistic or provided a basis to support enactment of H.R. 758.

Ms. Milito imagined an attorney demand letter, sent pre-suit, about a statutory violation, supposedly in the hope of obtaining a settlement without having to sue. Of course, H.R. 758 would not cover that situation, as it only applies to court filings. Moreover, her hypothetical involved a statutory violation that gives rise to a private right of action which, by definition, cannot be considered a frivolous lawsuit. A legislature, whether it is the Congress of the United States or a state general assembly, enacted the statute and concluded that such a violation should be actionable, no matter how insignificant the offender may imagine the infringement to be. The legislature's judgment on significance prevails here.

Interestingly, Ms. Milito supplemented her hypothetical with an example of a one-time California lawyer who used the demand letter approach to secure $1,000 settlements over minor statutory violations. The lawyer she identified to support her hypothetical, however, was disbarred in 2008 after a very brief career as a member of the California Bar. *See* http://members.calbar.ca.gov/fal/Member/Detail/206460. That attorney's tactic of using a California consumer protection law largely against nail salons resulted in a complaint filed against him in 2003 (after only three years in practice) by the California Attorney General "to obtain an order to make him stop filing lawsuits under California's unfair competition law." *People ex rel. Lockyer v. Brar,* 115 Cal. App. 4th 1315, 1316, 9 Cal. Rptr. 3d 844, 845 (2004). He was suspended from practice shortly after that complaint was filed. Plainly, that ex-attorney's misconduct was unusual, rather than typical, was violative of lawyer ethics rules, rather than business as usual, and resulted in disbarment, rather than suggest a course of action that others might emulate. It is telling that the activities that resulted in his disbarment are more than a decade old, that Ms. Milito offered no more contemporary example, that her only example was one that resulted in severe punishment, and that did not involve the federal courts, which this bill addresses exclusively. Her example actually seems to refute the need for the legislation.

I would also be remiss if I did not emphasize that H.R. 758 would not reach either Ms. Milito's hypothetical or her California example. The hypothetical involved a demand letter, rather

rule of construction, would establish a limited safe harbor for "the assertion or development of new claims" pursuant to "Federal, State, or local laws." According to Ms. Milito's hypothetical, the asserted claim was based on a statutory violation. If the rule of construction in H.R. 758 has any meaning, something I questioned at the hearing, then it would appear to provide some protection against the mandatory sanctions if the cases she imagined were actually filed in federal courts. In other words, the safe-harbor provision would make H.R. 758 inapplicable.

Mr. Silverman's hypothetical was equally unavailing. His fictional example involved a tourist in the District of Columbia suing a small business over a slip and fall. Such an incident would not be a federal case to which H.R. 758 would apply. A slip and fall is not a federal cause of action. In addition, the claim he described was insufficient, monetarily, to invoke federal diversity jurisdiction. H.R. 758, if enacted, would not be applicable. Instead, the hypothetical case would be subject to the District of Columbia's separate rules of civil procedure. The District's courts are not bound in its interpretation its rules by the federal courts' interpretations of the federal rules. *Bazata v. Nat'l Ins. Co. of Washington,* 400 A.2d 313, 314 n. (D.C. 1979). *See also Smith v. Bayer Corp.,* --- U.S. ---, 131 S. Ct. 2368, 2377-78 (2011) (recognizing that even identically worded state rules do not require a lockstep approach to that taken by the same federal rule).

Mr. Silverman's tale also depends on a factual assumption that is difficult to credit: the lawsuit is based on facts that are entirely false. He posits that the owner of the small business does not recall anyone falling in his establishment, so, he asks us to assume that no injury occurred. Yet, a real slip-and-fall is not a frivolous case. Whether the store owner knew or did not know of the incident is not determinative of whether it happened. Many people injured will take their injury in stride, notify no one, and only later learn that their continued pain or disability is more serious than they had realized. After medical bills pile up or their health insurer insists that an action be brought to recover its costs, the injured party might bring an action. Eyewitnesses, including store employees, may be available to attest to the incident.

Despite his hypothetical's inapplicability to H.R. 578, Mr. Silverman's point seemed to be that if the lawyer filing a false claim is called on it and withdraws the lawsuit in response, the defendant will have gone to considerable expense to defend himself without the ability to recoup costs. Here, as well, his hypothetical does not reflect reality. Most businesses have liability insurance through which an attorney is assigned and paid for the owner's defense. As a result, any out of pocket expenses are *de minimis* and do not mount up as Mr. Silverman has suggested. Even he were accurate and there was no insurance coverage, he described a defense counsel who was gouging the small business owner client by putting in unnecessary hours to make the case go away. If he were being efficient, counsel would have presented the facts his client supplied to him to the opposing counsel right at the start. Under Mr. Silverman's hypothetical this was sufficient to cause the plaintiff's lawyer to withdraw the lawsuit. All the other efforts he described were unnecessary and only raised costs. A simple letter containing the facts known to the owner is usually sufficient to set the record straight, without having to undertake other filings, if the plaintiff's claim is really based on an erroneous foundation. Moreover, even if H.R. 758 was enacted and were somehow applicable to this imagined scenario, no rational judge would order payment of the defendant's attorney fees beyond what it should have cost to send the letter I just described, as all the other actions taken by defense counsel was mere padding of the bill.

2. Ms. Milito claims that plaintiffs' attorneys often troll for cases, looking for any potential violations of a law in order to extract a settlement. She raises particular concern about the use of demand letters and the pressure that some businesses feel to settle a case once it has been filed. What is the purpose of a demand letter?

A demand letter is a means of communicating a claim to a potential defendant to see whether the parties can agree to a settlement without the expense and contentiousness of litigation. It notifies a potential defendant to the facts alleged to have occurred, permits the defendant to investigate the allegations, and, if borne out, offer a settlement that allows the parties to move on with their lives without having to respond in court. On the other hand, where the potential defendant finds that the facts do not support the claim, that party benefits by being able to present to the claimant an alternative version of what happened, including that another party was responsible for the injury to the plaintiff. Often, such a presentation can result in the demand evaporating and no lawsuit being filed. Of course, if the parties are in dispute about the facts, a lawsuit may take still place, but the demand letter has benefited the defendant by giving early notice of the claim and allowing the defendant to prepare a defense that much earlier.

The use of demand letters for those purposes is codified in a number of statutes, where legislatures made the determination that providing this type of early notice is a good practice. For example, Congress requires that an agency sued for negligence under the Federal Tort Claims Act provide the agency with notice and a demand of a sum certain. 28 U.S.C. §§2401 & 2675(b). In addition, many small claims courts require that a demand letter be sent before a case might be considered by the court. States have also required a notice of intent to sue in certain cases. A number of states, for example, require a presuit notice of intent to sue in medical-malpractice cases, based on the legislature's determination that it has the salutary effects of avoiding litigation or preparing a defendant for litigation when unavoidable. *See, e.g.,* Fla. Stat. sec. 766.106. In many of these situations, the defendant is permitted limited discovery to investigate the claim before a lawsuit is filed. *See* Fla. R. Civ. P. 1.650.

Obviously, demand letters are a very civilized way to start a conversation about potential liability, can help avoid the substantial costs of litigation, and are favored by a number of legislatures, including the Congress, in a significant number of disputes, including tort claims against the federal government.

3. If there are any points made by your fellow witnesses that you would like to respond to but did not have the opportunity to do so during the hearing, please do so here.

The only thing I would add at this time is that Mr. Silverman's use of older polls of judges on the merits of the 1983 version of Rule 11 should not be regarded as helpful to consideration of H.R. 758 for three basic reasons. First, even the judges who supported that approach to Rule 11 would be appalled at the idea that a federal rule of civil procedure would be forced upon the judiciary through legislation. The judiciary has consistently held that control over their own domain, including the manner in which lawsuits are conducted, is of transcendent importance. Second, the modern judiciary, which would be called up to implement any revised rule, overwhelmingly supports the 1993 version of Rule 11 and explicitly reject the version that H.R. 758 would restore. Third, while Mr. Silverman claimed, without any discernible basis, that the

judiciary was eventually learned to implement H.R. 758 in a less draconian manner than the way it was first implemented, we must keep in mind that a new generation of judges would be called upon to implement H.R. 758. Even the idea that they might have to undergo a learning curve and that some people's constitutional right of access to the courts would be adversely affected, even for a short period of time, should be reason enough that this legislation should be rejected. The constitutional value of access to justice ought to trump any other consideration.

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