114TH CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
114–246

LAWSUIT ABUSE REDUCTION ACT OF 2015

SEPTEMBER 8, 2015.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 758]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 758) to amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

CONTENTS

Purpose and Summary

The Lawsuit Abuse Reduction Act of 2015 ("LARA") would prevent frivolous lawsuits and help dispel the legal culture of fear that has come to permeate American society. The bill, which was introduced in the House by Congressman Lamar Smith and by Senator Chuck Grassley in the Senate on February 5, 2015, would restore the teeth Rule 11 of the Federal Rules of Civil Procedure once had to deter frivolous Federal lawsuits.

LARA would (1) restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11, (2) remove Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed, and (3) require monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim.

LARA applies to cases brought by individuals as well as businesses (both big and small), including business claims filed to harass competitors and illicitly gain market share, and to both plaintiffs and defendants.[1]

Additionally, the bill expressly provides that "Nothing in" the changes made to Rule 11 "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."

Background and Need for the Legislation

In his 2011 State of the Union Address, President Obama said "I'm willing to look at other ideas to bring down costs, including one that Republicans suggested last year: medical malpractice reform to rein in frivolous lawsuits." Since President Obama now

[1] Indeed, under the pre-1993 Rule 11, sanctions were imposed on defendants for having raised frivolous defenses. In *SEC v. Keating,* 1992 WL 207918, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,906 (C.D.Cal.1992), the court imposed sanctions of the defendant Charles Keating because 12 of 14 "shotgun" defenses were "patently frivolous." Sanctions were also imposed on defendants for filing inappropriate Rule 11 motions, s*ee Berger v. Iron Workers,* 843 F.2d 1395 (D.C. Cir. 1988) (affirming in part per curiam 7 Fed. Rules Serv. 3d 306 (D.D.C. 1986)), and also for filing frivolous or harassing counterclaims. *See Aetna Insurance v. Meeker,* 953 F.2d 1328 (11th Cir. 1992) (affirming district court Rule 11 sanction of defendants for pursuing frivolous counterclaims of negligent salvage and conversion). In *Swanson v. Sheppard,* 445 N.W.2d 654 (N.D.1989), for example, the court imposed Rule 11 sanctions on the defendant because the defendant counterclaimed "simply to discourage the plaintiff from continuing with his cause of action." Sanctions were imposed on defendants for failing to conduct a reasonable inquiry into the legal basis for their Rule 12(b)(6) motion to dismiss. In *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.,* 603 F Supp 339 (S.D.N.Y. 1985), the court sua sponte imposed Rule 11 sanctions on defendants' counsel on the ground that counsel failed to conduct a reasonable inquiry into the legal basis for the Rule 12(b)(6) motion to dismiss, stating "Defendants failed to cite a single case or authority in their two-page memorandum [in support of the motion]. Apparently, they completely ignored the firmly established precedents directly contradictory to their position. No doubt exists that [defendants'] counsel failed to conduct the 'reasonable inquiry' that Rule 11 requires to ensure that a motion 'is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. . . .'" *Id.* at 341–42. *See also Steele v Morris,* 608 F. Supp. 274 (S.D.W.Va. 1985) (court granted the plaintiff's motion for Rule 11 sanctions to be imposed upon the defendant, concluding that the defendant's counsel failed to make reasonable inquiry into both the facts and the law before filing a motion to dismiss in this case which alleged, among other things, that the plaintiff suffered emotional distress due to the defendant's willful, deliberate, and outrageous conduct). Sanctions were also imposed on defendants when they were found to have ignored firmly established precedent. In *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.,* 603 F. Supp. 339, 341–42 (S.D.N.Y. 1985), Rule 11 sanctions were imposed because defendants "completely ignored the firmly established precedents directly contradictory to their position." And in *Smith v. United Transp. Union Local 81,* the court imposed Rule 11 sanctions where the defendants frivolously maintained a lawsuit by ignoring relevant law, relying on irrelevant law, and basing arguments on vacated cases. 594 F. Supp. 96, 101 (S.D. Cal. 1984).

claims to support reforms that limit frivolous lawsuits in the context of health care, there is no principled reason he should not also support limits on frivolous lawsuits in other contexts as well, including limits on frivolous lawsuits in Federal court.

A letter written by someone filing a frivolous lawsuit, which became public, concisely illustrates how the current lack of mandatory sanctions for filing frivolous lawsuits leads to legal extortion. That letter to the victim of a frivolous lawsuit states "I really don't care what the law allows you to do. It's a more practical issue. Do you want to send your attorney a check every month indefinitely as I continue to pursue this?" [2]

When *Business Week* wrote an extensive article on what the most effective legal reforms would be, *Business Week* stated that what is needed are "Penalties That Sting." As *Business Week* recommends, "[g]ive judges stronger tools to punish renegade lawyers. Before 1993, it was mandatory for judges to impose sanctions such as public censures, fines, or orders to pay for the other side's legal expenses on lawyers who filed frivolous lawsuits. Then the Civil Rules Advisory Committee (CRAC), an obscure branch of the courts, made penalties optional. This needs to be reversed . . . by Congress." [3]

THE 1993 AMENDMENTS TO RULE 11

Rule 11 of the Federal Rules of Civil Procedure, as originally adopted and prior to the adoption of weakening amendments in 1993, was widely popular among Federal judges and served to significantly limit lawsuit abuse.

In 1990, the Judicial Conference's Advisory Committee on Civil Rules undertook a review of Rule 11 and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed that Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the 1983 version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then-current form (80.4%).[4]

Despite this wide judicial support for a strong Rule 11, in 1991 the Civil Rules Advisory Committee included provisions to weaken Rule 11 in a much broader package of proposed amendments to the Federal Rules driven largely by the desire to avoid "satellite litigation" of Rule 11 issues that could burden allegedly overworked

---

[2] *See* http://pubcit.typepad.com/clpblog/2011/02/javelin-marketing-seeks-to-suppress-criticism-of-its-insurance-leads-sales.html.

[3] Mike France, "Special Report—Tort Reform: How to Fix the Tort System," *Business Week* (March 14, 2005) at 76.

[4] 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). A subsequent survey conducted by the Federal Judicial Center in June, 1995, consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that disallowed monetary compensation for victims of frivolous lawsuits were a bad idea. In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again. *See* John Shapard *et. al.,* Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure at 5.

judges.[5] (But of course, any rule that punishes people for filing frivolous lawsuits must have procedures for determining whether or not the filing is frivolous. Otherwise, the rule would operate as a pure "loser pays" rule in which the losing side paid a penalty simply because they lost the case.) The proposed changes were then sent to the Supreme Court for approval or modification. Exercising what it viewed to be a very limited oversight role,[6] the Supreme Court approved the proposed changes without substantive comment in 1993.

In a strongly worded dissent on the Rule 11 changes, Justice Scalia correctly anticipated that the proposed revision would eliminate a "significant and necessary deterrent" to frivolous litigation, stating "the overwhelming approval of the Rule by the Federal district judges who daily grapple with the problem of litigation is enough to persuade me that it should not be gutted."[7] Justices Scalia and Thomas properly dissented from the transmittal of the amendments to Rule 11 to Congress, arguing that "[t]he proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor' within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all."[8]

Rule 11 as it existed prior to the 1993 amendments was very popular with Federal judges. The Federal Judicial Center ("FJC") was commissioned to conduct empirical studies and surveys on the operation of the old Rule 11,[9] and in a survey of all Federal trial judges, the FJC found that 80% were of the opinion that the old Rule 11 had had an overall positive effect and should not be changed.[10] Congress needs to restore those positive effects once again.

After the proposal to gut Rule 11 was forwarded to Congress, there was a 7-month period under the Rules Enabling Act in which

---

[5] It is worth noting that 282,307 civil cases were filed in Federal district courts in the 1-year period ending March 31, 2010 (an increase of 9.2% over the 258,535 civil cases filed during that period the prior year). *See* Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics* (March 31, 2010) (Table C, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending March 31, 2009 and 2010). Opponents caution that between 1983 and June 1993, when the prior version of Rule 11 was in effect, approximately 7,000 judicial opinions referencing Rule 11 were reported—an average of 700 decisions per year. If LARA were to result in Rule 11 filings akin to those filed under the pre-1993 rules, then only 1 in 400 Federal civil cases filed (0.25%) would be associated with a reported Rule 11 decision (700 out of 282,307 civil cases filed). These cases, of course, would be disbursed among 94 Federal judicial districts and 677 district court judges. *See* http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx.

[6] While the Supreme Court is authorized to "prescribe" the general rules of Federal court practice and procedure, *see* Judicial Improvements and Access to Justice Act, 28 U.S.C. §2072(a), in fact it has been the general practice of the Supreme Court to merely act as a conduit for the rule changes and rely on the Judicial Conference to make the decisions in this area. As pointed out in the House Judiciary's Committee Report on H.R. 988 in the 104th Congress, Justice White believed that, as a matter of practice, the role of the Supreme Court is to "transmit the Judicial Conference recommendations without change and without careful study as long as there is no suggestion that the committee system has not operated with integrity." Indeed Chief Justice Rehnquist's April 22, 1993 letter conveying the rules to the Speaker states: "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 amendments in the form submitted." H.R. Rep. No. 104–62, at 11, n.14 (1995).

[7] 146 F.R.D. 401, 507, 509–10 (1993).

[8] *Id.* at 507–08.

[9] Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules as Amended in 1983 (August 1990), reprinted in 131 F.R.D. 335 (1990).

[10] Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in Georgene M. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. at 1–8 to 1–10 (2d ed. 1991).

the Congress had the authority to make changes, but time ran out before Congress could stop these damaging amendments to Rule 11.[11]

THE LAWSUIT ABUSE REDUCTION ACT ("LARA")

Section 2 of LARA would restore teeth to Rule 11 once again. In particular, Section 2 of LARA would:

- Require monetary sanctions against lawyers who file frivolous lawsuits. Indeed, a survey conducted by the Federal Judicial Center in June of 1995 consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that prohibited monetary compensation for victims of frivolous lawsuits were a bad idea. In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again.[12] LARA would do just that.
- Reverse the 1993 amendments to Rule 11 that made Rule 11 sanctions discretionary rather than mandatory. Because today, under a weak Rule 11, sanctions in frivolous cases are not mandatory, there is little incentive for a victim of a frivolous lawsuit to spend time and money seeking Rule 11 sanctions. Deterrence cannot be achieved without certain punishment. While a court should have discretion to fashion an appropriate sanction based on the circumstances of the violation, litigants making frivolous claims should not be allowed the opportunity to escape sanctions entirely.
- Reverse the 1993 amendments to Rule 11 that allow parties and their attorneys to avoid sanctions for making frivolous claims and demands by withdrawing them within 21 days after a motion for sanctions has been filed. Justice Scalia correctly pointed out that such amendments would in fact encourage frivolous lawsuits: "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, 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."[13] LARA would get rid of the "free pass" lawyers have to file frivolous lawsuits under today's Rule 11.

It is important to remember that nothing in LARA changes the current standard by which frivolous lawsuits are judged. That is,

[11] Under the Rules Enabling Act, Congress has 7 months to act on the proposed rules; if Congress does not act, the proposed rules become law. *See* 28 U.S.C. § 2074(a). Despite the introduction of H.R. 2979 in the 103rd Congress by Carlos J. Moorhead, which would have delayed the effective date of the proposed changes to Rule 11, and a companion bill in the Senate, no formal action was taken in the Democrat-controlled House, and the revisions went into effect on December 1, 1993. The House later passed H.R. 988 in the 104th Congress—which, among other things, would have restored Rule 11 to its original form—by a vote of 232–193, but it was not taken up in the Senate.

[12] *See* John Shapard *et. al.,* Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure at 5.

[13] *Id.*

under LARA, the standard a judge will use to determine whether a case is frivolous will remain as it has been, namely a determination that:

- the case is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Only cases that fail to meet the criteria outlined above will be subject to Rule 11 sanctions under LARA. The baseless nature of arguments by reform opponents that Rule 11 somehow stifles growth in the law is belied by the fact that Rule 11 explicitly allows for growth in the law, but not for *frivolous* arguments for extensions of the law.

Further, LARA expressly provides that "Nothing in" the changes made to Rule 11 "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."

RESPONSE TO FEDERAL JUDICIAL CENTER 2005 SURVEY

The Federal Judicial Center's 2005 survey of U.S. district court judges ("FJC 2005 Survey") will no doubt be misused by opponents of legal reform as evidence that frivolous lawsuits are "not a problem." The survey of the Federal Judicial Center shows nothing of the sort.

The Lawsuit Abuse Reduction Act would largely restore Rule 11 of the Federal Rules of Civil Procedure to what it was before it was made toothless in 1993. Rule 11, *prior* to the adoption of weakening amendments in 1993, which eliminated mandatory and serious sanctions against those who filed frivolous lawsuits, was widely popular among Federal judges, and it served to significantly limit lawsuit abuse. In 1990, the Judicial Conference's Advisory Committee on Civil Rules (the same organization that requested the FJC 2005 Survey) undertook a review of Rule 11 at the time and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed, based on their experience under both a weaker and stronger Rule 11, that a stronger Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the stronger version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule

should be retained in its then-current form (80.4%).[14] Note that of the 751 judges surveyed in 1990, 583 responded, roughly twice as many as responded to the FJC's 2005 Survey.

Enter the Federal Judicial Center's 2005 survey, *which only 278 judges responded to, and in which half of the judges surveyed (and over half of the judges that responded to the survey) had no experience with the stronger version of Rule 11.* As the FJC 2005 Survey states, "the Center E-mailed questionnaires to two random samples of 200 district judges each. . . . One sample comprised solely judges appointed to the bench before January 1, 1992 . . . *[t]he other sample comprised solely judges appointed to the bench after January 1, 1992."*[15] The FJC report keeps secret the dates on which the respondent judges first came to serve on the bench, so we have no way of knowing whether any of those judges had any significant experience as judges under the stronger Rule 11 that was in effect the decade before 1993. Appendix A of the FJC 2005 Survey states that "all judges in the first group [of 200 out of 400 surveyed] would have had at least 1 year on the bench before the 1993 amendments to Rule 11 went into effect." That provides little comfort that any significant number of the judges surveyed had any substantial experience under the stronger Rule 11. So the survey is fundamentally flawed in that we have no reason to believe it included a meaningful number of judges who had any significant experience under the stronger Rule 11.

Further, the FJC 2005 Survey found that even of the Federal judges surveyed, 55% indicated that the purpose of Rule 11 should be both deterrence and compensation.[16] The Lawsuit Abuse Reduction Act would fulfill both purposes. And a full 85% of the Federal judges surveyed in the FJC 2005 Survey reported that "groundless litigation in Federal civil cases on [their individual] docket" was a "problem."

Of course, legislators should take the opinions of this very small, and flawed, sample of judges for what it is, namely the views of a group of people who do not suffer in any direct way the costs of frivolous, abusive lawsuits. Those who do suffer those costs, including the large financial costs of nuisance lawsuits filed for their settlement value, including the small business community, overwhelmingly support LARA.

When sanctions for filing frivolous lawsuits are not mandatory, which they are not now, those who are the victims of frivolous lawsuits have no incentive to litigate the frivolous nature of the claims against them because there is no guarantee that even if the claims against them are found to be frivolous they will be compensated for the harm caused by those frivolous claims. What happens instead is that the victims of frivolous lawsuits are routinely extorted to settle the case for certain sums just below those that would be necessary to litigate the case to judgment, at which point the case drops out of the dockets of the very judges who were surveyed by the FJC.

---

[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] FJC 2005 Survey, at 2.

[16] FJC 2005 Survey at 2.

Just a couple weeks before the FJC 2005 Survey was released, here is what U.S. District Judge Loretta Preska had to say about the current state of Federal litigation:

> This action is one of dozens of similar bootless actions filed in 23 district courts across the United States on behalf of uninsured and indigent patients, wherein Plaintiffs argue, without basis in law, that private non-profit hospitals are required to provide free or reduced-rate services to uninsured persons . . . *This orchestrated assault on scores of nonprofit hospitals, necessitating the expenditure of those hospitals' scares resources to beat back meritless legal claims, is undoubtedly part of the litigation explosion that has been so well-documented in the media.* E.g., Walter K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991); Philip K. Howard, The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom (2001) . . . For the foregoing reasons, the Defendants' motions to dismiss the above-captioned actions are granted in their entirety with prejudice. The Clerk of the Court shall mark these actions closed and all pending motions denied as moot.[17]

Judges are unlikely to view frivolous litigation as a problem because such cases rarely reach the bench. An overwhelming number of cases settle before trial. When a frivolous claim is filed, one of two things occur under the current Rule 11: either the small business challenges the plaintiff and the plaintiff simply withdraws the claim and walks away (as they are allowed to do under the current Rule 11); or the small business settles rather than proceed with a motion for sanctions because it is unlikely that the court will fully reimburse it for the cost of defending against the frivolous claim, and the cost of defending against the claim is more than the expense of settlement. The current situation favors judges, not small businesses or others who are harmed by the litigation.

Finally, the Federal judiciary apparently has a flat policy of opposing *any* legal reforms that it does not itself propose.[18] Under that policy, for example, the Federal judiciary also opposed the Class Action Fairness Act, legislation that overwhelmingly passed Congress and became law 10 years ago.[19]

In the end, it is the American people and their duly-elected representatives, not unelected judges appointed for life, who should be determining the appropriate punishments for those who file frivolous lawsuits.

Hearings

The Committee's Subcommittee on the Constitution and Civil Justice held a hearing on H.R. 758 on March 13, 2015.

---

[17] *Kolari v. New York-Presbyterian Hospital,* 2005 WL 710452 (S.D.N.Y.).

[18] *See* letter from Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Hon. John Conyers, Jr. (July 23, 2013) at 1 (stating the Judicial Conference opposes legislation that "contravenes the longstanding Judicial Conference policy opposing direct amendment of the Federal rules by legislation"), available at http://democrats.judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/JudConf130723.pdf.

[19] The Class Action Fairness Act passed the Senate by a vote of 72–26, and the House by a vote of 279–149.

Committee Consideration

On April 15 and May 14, 2015, the Committee met in open session and ordered the bill H.R. 758 favorably reported without amendment, by a rollcall vote of 19 to 13, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 758.

1. Amendment #1, offered by Mr. Conyers, to exempt cases brought under the Constitution of the United States or any civil rights laws from the bill's coverage. This amendment was defeated by a rollcall vote of 10 to 18.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)			
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)			
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)			
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. DelBene (WA)	X		
Mr. Jeffries (NY)			
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	10	18	

2. Amendment #2, offered by Ms. Jackson Lee, to strike the mandatory sanctions provision of the bill. This amendment was defeated by a rollcall vote of 14 to 18.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)	X		
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)	X		
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	14	18	

3. Amendment #3, offered by Mr. Johnson, to condition the date on which the legislation would take effect on its approval by the Judicial Conference of the United States. This amendment was defeated by a rollcall vote of 12 to 18.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)		X	
Mr. Gohmert (TX)		X	
Mr. Jordan (OH)		X	
Mr. Poe (TX)			
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)			
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	12	18	

4. Amendment 4, offered by Mr. Cicilline, to strike the bill's elimination of the 21-day safe harbor provision in the current Rule 11 of the Federal Rules of Civil Procedure. This amendment was defeated by a rollcall vote of 12 to 18.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman		X	
Mr. Sensenbrenner, Jr. (WI)		X	
Mr. Smith (TX)		X	
Mr. Chabot (OH)		X	
Mr. Issa (CA)		X	
Mr. Forbes (VA)		X	
Mr. King (IA)			
Mr. Franks (AZ)			
Mr. Gohmert (TX)			
Mr. Jordan (OH)		X	
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)		X	
Mr. Gowdy (SC)		X	
Mr. Labrador (ID)		X	
Mr. Farenthold (TX)		X	
Mr. Collins (GA)		X	
Mr. DeSantis (FL)			
Ms. Walters (CA)		X	
Mr. Buck (CO)		X	
Mr. Ratcliffe (TX)		X	
Mr. Trott (MI)		X	
Mr. Bishop (MI)		X	
Mr. Conyers, Jr. (MI), Ranking Member	X		
Mr. Nadler (NY)	X		
Ms. Lofgren (CA)	X		
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)	X		
Mr. Johnson (GA)	X		
Mr. Pierluisi (PR)	X		
Ms. Chu (CA)	X		
Mr. Deutch (FL)	X		
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Jeffries (NY)	X		
Mr. Cicilline (RI)	X		
Mr. Peters (CA)	X		
Total	12	18	

5. Motion to report H.R. 758 favorably to the House. The motion was agreed to by a rollcall vote of 19 to 13.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Goodlatte (VA), Chairman	X		
Mr. Sensenbrenner, Jr. (WI)	X		
Mr. Smith (TX)	X		
Mr. Chabot (OH)	X		
Mr. Issa (CA)	X		
Mr. Forbes (VA)	X		
Mr. King (IA)			
Mr. Franks (AZ)	X		
Mr. Gohmert (TX)	X		
Mr. Jordan (OH)	X		
Mr. Poe (TX)		X	
Mr. Chaffetz (UT)			
Mr. Marino (PA)	X		
Mr. Gowdy (SC)	X		
Mr. Labrador (ID)	X		
Mr. Farenthold (TX)	X		
Mr. Collins (GA)	X		
Mr. DeSantis (FL)			
Ms. Walters (CA)	X		
Mr. Buck (CO)	X		
Mr. Ratcliffe (TX)	X		
Mr. Trott (MI)	X		
Mr. Bishop (MI)	X		
Mr. Conyers, Jr. (MI), Ranking Member		X	
Mr. Nadler (NY)		X	
Ms. Lofgren (CA)		X	
Ms. Jackson Lee (TX)			
Mr. Cohen (TN)		X	
Mr. Johnson (GA)		X	
Mr. Pierluisi (PR)		X	
Ms. Chu (CA)		X	
Mr. Deutch (FL)		X	
Mr. Gutierrez (IL)			
Ms. Bass (CA)			
Mr. Richmond (LA)			
Ms. DelBene (WA)		X	
Mr. Jeffries (NY)		X	
Mr. Cicilline (RI)		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Peters (CA)		X	
Total	19	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 758, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 20, 2015.

Hon. BOB GOODLATTE, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 758, the "Lawsuit Abuse Reduction Act of 2015."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marin Burnett, who can be reached at 226–2860.

Sincerely,

KEITH HALL,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 758—Lawsuit Abuse Reduction Act of 2015.

As ordered reported by the House Committee on the Judiciary on May 14, 2015.

H.R. 758 would amend Rule 11 of the Federal Rules of Civil Procedure to require courts to impose appropriate sanctions on attorneys, law firms, or parties who file frivolous lawsuits and require them to compensate parties injured by such conduct. Under current law, courts may, but are not required to, impose such sanctions.

Under the legislation, any monetary sanction imposed under Rule 11 would be paid by the parties to the suit. Thus, CBO estimates that implementing the bill would result in no significant effect on the Federal budget. Enacting H.R. 758 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 758 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Marin Burnett. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

Duplication of Federal Programs

No provision of H.R. 758 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Disclosure of Directed Rule Makings

The Committee estimates that H.R. 758 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 758 will reduce frivolous litigation in Federal courts.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 758 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Lawsuit Abuse Reduction Act of 2015."

Sec. 2. Attorney Accountability. Section 2 restores mandatory sanctions for filing frivolous lawsuits in violation of Rule 11, removes Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed, and requires monetary sanctions, including attor-

neys' fees and compensatory costs, against any party making a frivolous claim. It also contains a rule of construction that states, "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."

Dissenting Views

INTRODUCTION

H.R. 758, the "Lawsuit Abuse Reduction Act of 2015" (LARA), would turn back the clock to a time when Rule 11 of the Federal Rules of Civil Procedure discouraged civil rights cases, restricted judicial discretion, and engendered vast amounts of time-consuming and costly "satellite" litigation. In essence, H.R. 758 would reinstate the version of Rule 11 in effect between 1983 and 1993. That decade of experience showed what a disastrous impact the 1983 rule had on the administration of justice, the result of which caused the Federal judiciary to adopt the current Rule 11. Current Rule 11 sets forth standards pertaining to filings and other submissions to Federal courts by attorneys and parties and gives courts the discretion to impose sanctions should those requirements be violated. By contrast, H.R. 758 reinstates the 1983 rule's mandatory imposition of sanctions for any violation of Rule 11's provisions and removes the current safe-harbor allowing the withdrawal of an allegedly offending submission. Additionally, the bill would mandate the payment of attorneys' fees and costs to the prevailing party on any Rule 11 sanction motion for purposes of compensation rather than deterrence, going well beyond the 1983 rule.

Our principal concerns with H.R. 758 are that: (1) there is no demonstrated need for the bill; (2) the 1983 version of Rule 11, which the bill would reinstate, functioned as a font of rancor between parties and exponentially increased the volume and cost of civil litigation in Federal courts because mandatory sanctions with no safe-harbor led to increased litigation; (3) the bill would have a chilling impact on civil rights cases, notwithstanding its rule of construction; and (4) the bill would undermine the Judicial Conference's deliberative processes for amending procedural rules under the Rules Enabling Act.[1] In sum, H.R. 758 would accomplish the opposite of its stated purpose by greatly increasing the amount, cost, and intensity of civil litigation, provide more grounds for unnecessary delay and harassment in the courtroom, and, most importantly, chill legitimate civil rights claims.

Not surprisingly, the Judicial Conference of the United States, the principal policymaking body for the judicial branch charged with proposing amendments to the Federal Rules of Civil Procedure under the careful, deliberate process outlined in the Rules Enabling Act, opposes H.R. 758, noting that "legislation that would restore the 1983 version of Rule 11 would create a cure worse than the problem it is meant to solve."[2] In addition, the American Bar

[1] 28 U.S.C. §§ 2071–77 (2015).

[2] Letter from Hon. Jeffrey S. Sutton, United States Circuit Judge, Sixth Circuit, Chair, Committee on Rules of Practice and Procedure, & Hon. David G. Campbell, United States District Judge, District of Arizona, Chair, Advisory Committee on Civil Rules to Chairman Bob Good-

Association[3] and numerous consumer and environmental groups strongly oppose the measure, including Public Citizen,[4] the Alliance for Justice, the Center for Justice and Democracy, Committee to Support the Antitrust Laws, the Consumer Federation of America, Consumers Union, Defenders of Wildlife, Earthjustice, People for the American Way, the National Association of Consumer Advocates, the National Consumer Law Center, the National Employment Lawyers Association, the National Women's Health Network, the U.S. Public Interest Research Group.[5]

For the reasons set forth herein, we respectfully dissent.

DESCRIPTION AND BACKGROUND

DESCRIPTION

Every pleading, written motion or other paper submitted to a court must be signed by the attorney of record or by the party, if unrepresented by counsel, pursuant to Rule 11(a) of the Federal Rules of Civil Procedure.[6] Rule 11(b) provides that by presenting such signed document to the court, the attorney or party is deemed to certify "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 any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
>
> (3) the factual contentions have evidentiary support or, if specifically so identified, will likely 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, if specifically so identified, are reasonably based on belief or a lack of information.[7]

Should a court determine that a party has violated these requirements, Rule 11(c) authorizes the court to impose sanctions.[8] A motion for sanctions must specifically describe the allegedly violative

---

latte (R-VA), H. Comm. on the Judiciary (Apr. 23, 2015) (on file with the H. Comm. on the Judiciary Democratic staff) [hereinafter "Judicial Conference 2015 letter"].

[3] Letter from Thomas M. Susman, Director, Governmental Affairs Office, American Bar Association, to Chairman Trent Franks (R-AZ) & Ranking Member Steve Cohen (D-TN), Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Mar. 23, 2015) (on file with the H. Comm. on the Judiciary Democratic staff) [hereinafter "ABA 2015 letter"].

[4] Letter from Lisa Gilbert, Director, and Christine Hines, Consumer and Civil Justice Counsel, Public Citizen Congress Watch Division, to Chairman Trent Franks (R-AZ) & Ranking Member Steve Cohen (D-TN), Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary (Mar. 16, 2015) (on file with the H. Comm. on the Judiciary Democratic staff) [hereinafter "Public Citizen letter"].

[5] Letter from Ralph Nader and 16 Consumer and Environmental Groups to Chairman Bob Goodlatte (R-VA) & Ranking Member John Conyers, Jr. (D-MI), H. Comm. on the Judiciary (Apr. 13, 2015) (on file with the H. Comm. on the Judiciary Democratic staff) [hereinafter "Groups 2015 letter."]

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

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

[8] Fed. R. Civ. P. 11(c)(1).

conduct and be served upon the offending entity, but such motion may not be filed if the challenged submission is withdrawn or corrected within 21 days after service of such motion.[9] This is the Rule's so-called "safe harbor" provision. Rule 11(c) gives the court discretion to award reasonable attorneys' fees and expenses to a prevailing party[10] and specifies that a sanction must be limited to what is sufficient to deter repetition of the conduct at issue or comparable conduct by others and may include nonmonetary directives, the payment of a penalty, or the award of attorneys' fees and expenses to the moving party directly resulting from the violation.[11]

H.R. 758 amends Rule 11(c) in several ways. First, it removes a judge's discretionary authority to impose sanctions for a Rule 11 violation by making sanctions mandatory. Second, it eliminates Rule 11(c)(2)'s "safe harbor" provision, which currently allows the target of a Rule 11 motion for sanctions to withdraw or correct the paper, claim, defense, contention, or denial that is the subject of the motion for sanctions within 21 days after service. Third, it amends Rule 11(c)(4) to require that a sanction not only deter repetition of the conduct at issue, but also compensate parties injured by such conduct. It further amends Rule 11(c)(4) to require a court to include as part of any Rule 11 sanction the payment of the moving party's reasonable attorneys' fees, costs, and other expenses incurred as a direct result of the Rule 11 violation. Currently, the award of such expenses as part of a Rule 11 sanction is discretionary. Finally, H.R. 758 includes a rule of construction stating that nothing in the bill or any amendment made by it can be construed to bar or impede the assertion or development of new legal theories, including under civil rights laws or the United States Constitution.

BACKGROUND

I. THE JUDICIAL CONFERENCE'S DELIBERATIVE PROCESSES UNDER THE RULES ENABLING ACT

For most of the past century, Congress has trusted the Federal judiciary to make its own procedural rules. In 1922, Congress tasked the Judicial Conference of the United States to serve as the principal policymaking body for the judicial branch.[12] Federal statute requires the Conference to conduct "a continuous study of the operation and effect" of the rules of procedure, and propose changes to the rules "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable defense and delay."[13]

In 1934, Congress passed the Rules Enabling Act, which authorizes the Federal judiciary to prescribe its own rules of practice, procedure, and evidence.[14] In practice, the judiciary takes on this responsibility through the Judicial Conference of the United States. Specifically, the Conference assigns these matters to its Committee on Rules of Practice and Procedure and its advisory committees, which recommend proposed changes to the rules "as may be nec-

[9] Fed. R. Civ. P. 11(c)(2).
[10] Fed. R. Civ. P. 11(c)(3).
[11] Fed. R. Civ. P. 11(c)(4).
[12] 28 U.S.C. § 331 (2015).
[13] *Id.*
[14] 28 U.S.C. §§ 2071 *et seq.* (2015).

essary to maintain consistency and otherwise promote the interest of justice."[15] Each committee is composed of Federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.[16]

The process for amending rules of procedure is very deliberative and exhaustive:

> The pervasive and substantial impact of the rules on the practice of law in the Federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes 2 to 3 years for a suggestion to be enacted as a rule. . . .
>
> [C]omments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar.[17]

This careful process also gives Congress the opportunity to reject, modify, or defer rules changes before they take effect.[18]

II. FEDERAL RULE OF CIVIL PROCEDURE 11

In its original form, Rule 11 required attorneys to sign pleadings and to certify that, to the best of their "knowledge, information, and belief," each pleading was well-grounded.[19] The court had sole discretion over the imposition of sanctions.[20] During the 45 years that this version of the rule was in effect, the Federal courts ruled on just 19 Rule 11 motions for sanctions, found a violation of the Rule only 11 times, and imposed sanctions in three cases.[21] The 1938 version of Rule 11 was seldom used and largely ignored.[22]

In 1983, the Advisory Committee on Civil Rules (Advisory Committee) recognized that, "in practice, Rule 11 has not been effective in deterring abuses."[23] In an attempt to curb an increase in the number and rising costs of civil suits, the Advisory Committee substantially revised the Rule's sanction provisions. The amended rule required attorneys to conduct a "reasonable inquiry" into the factual and legal merits of every document submitted in court, and mandated sanctions if courts found attorneys in violation of this responsibility.[24]

---

[15] 28 U.S.C. § 2073(b) (2015).

[16] *A Summary for the Bench and Bar: The Federal Rules of Practice and Procedure,* Admin. Office of the U.S. Courts, Oct. 2010, available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx.

[17] *Id.*

[18] 28 U.S.C. §§ 2074, 2075 (2015).

[19] Fed. R. Civ. P. 11 (1938) (repealed 1983).

[20] *Id.*

[21] Peter A. Joy, *The Relationship Between Civil Rule 11 & Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers,* 37 Loy. L.A. L. Rev. 765, 765–66 (2004).

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

[23] Fed. R. Civ. P. 11 (1983) Advisory Committee's note to the 1983 amendment.

[24] Fed. R. Civ. P. (1983) (repealed 1993).

Nevertheless, the 1983 amendments, instead of deterring unnecessary litigation, became a "font of rancor" between parties in civil suits.[25] As compared to the mere 19 Rule 11 filings between 1938 and 1983, nearly 7,000 motions for sanctions were made during the decade that the 1983 rule was in effect.[26] A 1989 study showed that roughly one-third of all Federal civil lawsuits involved Rule 11 "satellite" litigation[27] and approximately one-fourth of all cases on the docket involved Rule 11 actions that did not result in sanctions.[28] As a result, attorneys had a double duty: "one to try the case, and the other to try the opposing counsel."[29] Commentators criticized the 1983 rule for spawning a veritable "cottage industry" of Rule 11 litigation.[30]

In 1992, the Advisory Committee held two public hearings on proposed amendments to Rule 11. The Committee noted that "widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit."[31] It found that the rule "tended to impact plaintiffs more frequently and severely than defendants," occasionally "created problems for a party which seeks to assert novel legal contentions," and provided "little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law."[32] Other studies found that sanctions were disproportionately imposed against plaintiffs in civil rights and anti-discrimination cases.[33]

In 1993, the Advisory Committee amended several key aspects of Rule 11. It removed virtually all financial incentives for a party to pursue nuisance Rule 11 sanctions, or to defend against them to the bitter end. Still in effect today, this version of Rule 11 sets a more objective standard for assessing attorney behavior, i.e., courtroom activity must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law."[34]

Sanctions may be imposed only at the discretion of the court and must be limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[35] Because Rule 11's purpose is "to deter rather than to compensate," monetary sanctions, if imposed, "should ordinarily be paid into the court as a penalty."[36] Only in exceptional cases should payment be

---

[25] Don J. DeBenedictis, *Rule 11 Snags Lawyers: Critics Charge Ruling Will Discourage Civil Rights Cases,* 77 A.B.A. J. 16 (1999).

[26] *See* Hoffman at 727.

[27] *Uncertain and Certain Litigation Abuses, 2004: Hearing on Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse before the H. Comm. on the Judiciary,* 108th Cong. (2004) (statement of Theodore Eisenberg, Professor, Cornell Law School).

[28] *Id.*

[29] *Id.*

[30] Carl Tobias, *The 1993 Revision to Federal Rule 11,* 70 Ind. L.J. 171, 173–74 (1994) (noting statistics on growth in Rule 11 practice).

[31] Letter from the Honorable Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to the Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 1, 1992), reprinted in 146 F.R.D. 519 (1993) (transmitting proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and accompanying Committee Notes).

[32] *Id.*

[33] See Carl Tobias, *Rule 11 and Civil Rights Litigation,* 37 Buff. L. Rev. 485 (1989); Margaret L. Sanner & Carl Tobias, *Rule 11 & Rule Revision,* 37 Loy. L.A. L. Rev. 573 (2004); Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-á-vis 28 U.S.C. Sec. 1927 and the Court's Inherent Power,* 37 Loy. L.A. L. Rev. 645 (2004).

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

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

[36] Fed. R. Civ. P. 11, Advisory Committee's note to 1993 amendment.

made to those injured by the violation and, even then, "any such award . . . should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement."[37] A 21-day "safe harbor" provision allows a litigant to withdraw or amend any offending document before the court continues with Rule 11 proceedings.[38]

By all empirical accounts, the 1993 amendments have been tremendously successful. For example, the Sixth Circuit observed that the Advisory Committee "anticipated that civility among attorneys and between bench and bar would be furthered by having attorneys communicate with each other and with an eye toward potentially resolving their difference prior to court involvement."[39] In the lower courts, the safe harbor provision has had "the salutary effect of providing the appropriate due process considerations to sanction litigation, reducing Rule 11 volume and eliminating abuses proscribed by this rule."[40]

CONCERNS WITH H.R. 758

I. THERE IS NO DEMONSTRATED NEED FOR THIS LEGISLATION

H.R. 758's proponents seek to roll back significant improvements to Rule 11 made by the 1993 amendments even though there is no evidence that there are problems with the current sanctions regime. Writing in opposition to H.R. 758, the Judicial Conference warned that "legislation that would restore the 1983 version of Rule 11 would create a cure worse than the problem it is meant to solve."[41] The Judicial Conference further noted that "current rules give judges tools to deal with frivolous pleading, including the imposition of sanctions where warranted" and that the current Rule 11 "has produced a marked decline in Rule 11 satellite litigation without any noticeable increase in frivolous filings."[42] In its letter, the Conference observed that "judges on the front lines—those who must contend with frivolous litigation and apply Rule 11—strongly believe that the current rule works well." The Conference cited in support a 2005 survey of Federal trial judges conducted by the Federal Judicial Center which found that the judges overwhelmingly preferred the current Rule 11 to the 1983 version and that they believed that frivolous litigation had not increased since promulgation of current Rule 11.[43]

The American Bar Association (ABA) has similarly observed that "there is no demonstrated evidence that the existing Rule 11 is inadequate and needs to be amended."[44] The ABA warns that "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."[45]

---

[37] *Id.*
[38] Fed. R. Civ. P. 11(c)(1).
[39] Ridder v. City of Springfield, 109 F.3d 288, 294 (6th Cir. 1997).
[40] Photocircuits Corp. v. Marathon Agents, Inc., 162 F.R.D. 449, 452 (E.D.N.Y. 1995).
[41] Judicial Conference 2015 letter.
[42] *Id.*
[43] *Id.*
[44] ABA 2015 letter.
[45] *Id.*

In the 2005 Federal Judicial Center survey that the Judicial Conference cited in its letter, 85 percent of the judges surveyed viewed "groundless litigation" as no more than a small problem in their courtrooms and 91 percent opposed the proposed requirement that sanctions be imposed for every Rule 11 violation.[46] In addition, 85 percent strongly or moderately supported Rule 11's safe harbor provision; and 84 percent disagreed with the proposition that an award of attorneys' fees should be mandatory for every Rule 11 violation.[47] Most notably, 87 percent of the judges surveyed wanted the current Rule 11 to remain in force, and only 4 percent expressed support for the amendments that H.R. 758 now proposes to make.[48]

Elizabeth Milito, on behalf of the National Federation of Independent Businesses (NFIB), testified before the Subcommittee on Constitution and Civil Justice at a hearing on H.R. 758 held earlier this year that frivolous demand letters and lawsuits impose disproportionately high costs on small businesses.[49] Yet, NFIB's own survey of 3,856 of its members, conducted in 2012, shows that this is not a major concern. The survey, which asked them to rank among 75 concerns the biggest threats facing small business, ranked the concern, "cost and frequency of lawsuits/threatened suits," 71 out of 75 concerns, which was *down* six places from NFIB's previous survey in 2008.[50] In fact, almost 39 percent of respondents said that the threat of lawsuits was "not a problem" at all.[51]

In the final analysis, the "climate of fear'" for small businesses is almost entirely anecdotal and, in some instances, lacking any evidentiary basis. For example, the Majority—in 2004, 2005, 2011 and 2013—repeatedly blamed "litigation costs" as causing the demise of a ladder manufacturing company in upstate New York.[52] In truth, the company was profitable even though its insurance premiums had risen considerably. It ultimately failed, however, because "competition from bigger companies using foreign labor . . . became unbearable."[53] Moreover, the company "wasn't even sued all that much."[54] Rather than fearing frivolous lawsuits, a far greater and more realistic concern that small businesses will face is how H.R. 758 would return Federal litigation to the costly and time-consuming climate of hostility engendered by the 1983 rule.

II. MANDATORY SANCTIONS AND LACK OF A SAFE HARBOR PROVISION WOULD LEAD TO INCREASED LITIGATION AND COSTS

While there is no empirical support to justify a change to Rule 11, its history clearly illustrates why, after a decade of real-world

---

[46] David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure,* Federal Judicial Center (2005).

[47] *Id.*

[48] *Id.*

[49] *H.R. 758, the "Lawsuit Abuse Reduction Act of 2015": Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 114th Cong. 11–12 (2015) [hereinafter "2015 Hearing"].

[50] Holly Wade, Small Business Problems & Priorities, National Federation of Independent Business Research Foundation, at 14, 19 (Aug. 2012).

[51] *Id.* at 14.

[52] H.R. Rep. No. 113–255, at 33 (2013); H.R. Rep. No. 112–174, at 34–35 (2011); H.R. Rep. No. 109–123, at 14 (2005); H.R. Rep. No. 108–682, at 12 (2004).

[53] Carrie Coolidge, *The Last Rung, The Tort System Takes Down a 149-year-old Ladder Manufacturer,* FORBES (Jan. 12, 2004), at 52.

[54] *Id.*

experience, the Judicial Conference rejected the approach proposed in H.R. 758 and adopted the current version of Rule 11. Although H.R. 758's supporters claim to want to curb a perceived increase in frivolous litigation, the actual effect of the legislation will be to increase litigation. Under the bill, which imposes mandatory sanctions and offers no opportunity to correct mistakes, the parties to a lawsuit will have every incentive to file Rule 11 sanctions motions and seek court costs and legal fees, which would be mandatory rather than discretionary as is currently the case. Parties also would have obvious incentives to defend against such actions to the bitter end. This dynamic is more than theoretical. Under the 1983 version of the rule, "satellite" litigation aimed at Rule 11 sanctions flourished.

Based on its firsthand experience with the 1983 version of Rule 11 and the many problems it engendered, the Federal courts clearly recognize that H.R. 758 is a major step backwards. The Judicial Conference amended the 1983 version of Rule 11 because it "generated wasteful satellite litigation that had little to do with the merits of cases" and because the mandatory sanctions "quickly became a tool of abuse."[55] Moreover, "aggressive filings of Rule 11 sanctions motions required expenditure of tremendous resources on Rule 11 battles having nothing to do with the merits of the case and everything to do with strategic gamesmanship," which, in turn "triggered counter-motions seeking Rule 11 sanctions as a penalty for filing of the original Rule 11 motion."[56] Reinstituting mandatory sanctions would create conflicts of interest between lawyers and their clients and exacerbate tensions between competing attorneys.[57]

Similarly, the ABA noted in its letter to the Committee opposing H.R. 758 that "past evidence 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."[58] The ABA quoted a 2004 letter from the Judicial Conference to the Committee which stated that mandatory application of Rule 11 "'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.'"[59] The ABA further noted that 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 consequences have been well-documented."[60] H.R. 758 restores a highly problematic rule, notwithstanding a decade of evidence and prior experience with its flawed provisions.

Representative Sheila Jackson Lee (D-TX) offered an amendment that would have eliminated H.R. 758's provision mandating the

---

[55] Judicial Conference 2015 letter.
[56] *Id.*
[57] *Id.*
[58] ABA 2015 letter.
[59] *Id.* (quoting Letter from the Judicial Conference of the United States to Chairman James Sensenbrenner, Jr., H. Comm. on the Judiciary (2004)).
[60] *Id.*

award of reasonable attorneys' fees and costs and restoring judicial discretion to award such fees and costs in an effort to reduce the risk of runaway satellite litigation. The Committee rejected this amendment by a 14 to 18 vote.[61]

As another way to mitigate the risk of satellite litigation, Representative David Cicilline (D-RI) offered an amendment that would have restored the current safe-harbor provision in Rule 11 that allows a party to withdraw an allegedly frivolous submission within 21 days after service of a Rule 11 sanctions motion. The Committee rejected this amendment by a 12 to 18 vote.[62]

To highlight the potential for a tremendous increase in litigation costs that H.R. 758's amendments to Rule 11 would spawn, Representative Steve Cohen (D-TN) offered an amendment that would have delayed the bill's effective date until the Administrative Office of the United States Courts and the Attorney General of the United States submitted reports to the House and Senate Judiciary Committees assessing the resources burden on courts and the potential litigation costs on the government and private parties imposed by H.R. 758. The Committee rejected this amendment by voice vote.[63]

III. H.R. 758 WILL HAVE A CHILLING EFFECT ON CIVIL RIGHTS CASES

The avalanche of satellite litigation and the associated increase in litigation costs and resource burdens that the 1983 rule fueled—and which H.R. 758 will fuel—undoubtedly will have a chilling effect on all civil litigation in Federal court, including employment, environmental, and consumer rights cases.[64] The 1983 rule, however, had a particularly adverse impact on civil rights cases. In light of the fact that civil rights cases often involve an "argument for the extension, modification, or reversal of existing law or the establishment of a new law," they were particularly susceptible to Rule 11 before the 1993 amendments. A 1991 Federal Judicial Center study found that the "incidence of Rule 11 motions or *sua sponte* orders is higher in civil rights cases than in some other types of cases."[65] Another study showed that "civil rights cases made up 11.4% of Federal cases filed" but that "22.7% of the cases in which sanctions had been imposed were civil rights cases."[66] Under the 1983 rule, civil rights cases were clearly disadvantaged.

H.R. 758 would restore this problematic regime and provide no recourse for appeal when sanctions are imposed. The late Robert L. Carter, United States District Judge for the Southern District of New York and, before that, one of the lawyers representing the plaintiffs in *Brown v. Board of Education,* considered changes like these and remarked, "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown*] would have been delayed for a decade had my colleagues

---

[61] Unofficial Tr. of Markup of H.R. 758, the Lawsuit Abuse Reduction Act (LARA) of 2015, by the H. Comm. on the Judiciary, 114th Cong. 47 (May 14, 2015) [hereinafter Markup Tr.].
[62] *Id.* at 84.
[63] *Id.* at 56.
[64] Groups 2015 letter; Public Citizen 2015 letter.
[65] Elizabeth C. Wiggins, *et al., Special Issue on Rule 11,* Federal Judicial Center Directions No. 2, at 10 (Nov. 1991).
[66] Lawrence C. Marshall, *et al., The Use and Impact of Rule 11,* 86 NW. U.L. Rev. 943, 971–75 (1992).

and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start." [67]

As Robert Peck, President of the Center for Constitutional Litigation, testified earlier this year at the hearing on H.R. 758, the plaintiffs in both *Brown v. Board of Education* [68] and *National Federation of Independent Business v. Sebelius* [69] (the constitutional challenge to the Affordable Care Act) would likely have faced Rule 11 sanctions under the 1983 version of Rule 11 had it been in effect at the time these actions were filed, given the then-novel nature of their arguments.[70] He further observed that H.R. 758's rule of construction would not protect civil rights claims because it does nothing to address the primary problem for civil rights cases, i.e., the inability to develop sufficient facts absent compulsory discovery. Typically, such facts become available only after a case has been filed, a filing that, in turn, may not happen given H.R. 758's potential chilling effect on civil rights cases.[71] For this reason, he described the rule of construction as "ineffective window dressing that does not solve the problem that its drafters apparently concede is real." [72]

These major problems with the approach taken in H.R. 758 have long been recognized. Similar concerns were voiced by Professor Theodore Eisenberg of Cornell Law School at a hearing held before the Committee in 2004:

> A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be discouraging civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported abuse in an area of law, personal injury tort, found to have less abuse than other areas.[73]

Representative Jerrold Nadler (D-NY) highlighted another potential way that H.R. 758 could have a disproportionate impact on civil rights claims. During the Subcommittee hearing on the bill, he observed that the Committee report in support of LARA from a prior Congress cited as an example of "frivolous" litigation a lawsuit filed by a high school student after her picture was left out of her school yearbook when she refused to wear feminine clothing.[74] He then asked Mr. Peck whether, in light of the fact that 14 states have laws that prohibit discrimination based on gender identity, the student's claims may be worthy of judicial consideration even if they are novel or untested, but could nonetheless be sanctionable under the bill. Mr. Peck answered that it was entirely possible that such a claim could be sanctionable.[75] In short, whether a claim is

---

[67] Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988,* 137 U. Pa. L. Rev. 2179, 2193 (June 1989).
[68] 347 U.S. 483 (1954).
[69] 132 S.Ct. 2566 (2012).
[70] 2015 Hearing at 23, 32 (statement of Robert S. Peck, President, Center for Constitutional Litigation, P.C.).
[71] *Id.* at 40.
[72] *Id.*
[73] *Uncertain and Certain Litigation Abuses, 2004: Hearing on Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse Before the H. Comm. on the Judiciary,* 108th Cong. (2004) (statement of Theodore Eisenberg, Professor, Cornell Law School).
[74] 2015 Hearing at 62.
[75] *Id.* at 63.

"frivolous" or not, particularly in the civil rights context, is very much open to argument.

The sponsors of H.R. 758 argue that the bill's rule of construction responds to these concerns. We disagree. This rule of construction, which provides that nothing in the bill "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,"[76] fails to prevent defendants from wielding Rule 11 (as amended by H.R. 758) as a weapon against legitimate plaintiffs and tying up civil rights cases in long and costly satellite litigation. While the intent of this provision is to address the undisputed effect of the 1983 Rule on civil rights litigation—an intent that is to be applauded—the 1983 Rule was also facially neutral with respect to the development of novel legal claims, and yet it nonetheless had a disproportionate impact on civil rights claims.

For these reasons, Ranking Member John Conyers, Jr. (D-MI) offered an amendment that simply would have exempted constitutional and civil rights cases from H.R. 758. The Committee, however, rejected this amendment by a 10 to 18 vote.[77]

IV. H.R. 758 UNDERMINES THE RULES ENABLING ACT PROCESS

H.R. 758 departs from the well-established and successful approach that Congress itself authorized in empowering the Federal judiciary to make its own procedural rules based on the judiciary's day-to-day, real-world experience with the application of those rules. Clearly, Congress retains the power to review those rules and to accept, modify, or reject any proposed changes pursuant to the extensive Rules Enabling Act process. Yet, this is a power that Congress rarely uses. Indeed, it was telling that when Subcommittee Ranking Member Cohen asked witnesses during the legislative hearing on this bill for an example of when Congress directly amended a court procedural rule, none of the witnesses could cite a single example.[78] Nevertheless, H.R. 758 recklessly attempts to amend a Federal civil procedure rule directly, over the objections of the Judicial Conference, in complete disregard of the Conference's firsthand experience with the 1983 rule.

To highlight the importance of the Rules Enabling Act process and the inappropriateness of H.R. 758's attempt to circumvent that prudential process, Representative Hank Johnson (D-GA) offered an amendment that conditioned the bill's effective date on the Judicial Conference having the opportunity to review the changes to Rule 11 proposed by H.R. 758 using the Rules Enabling Act process, to approve such amendments, and to submit the results of its review to the House and Senate Judiciary Committees. The Committee rejected this amendment by a 12 to 18 vote.[79]

CONCLUSION

H.R. 758 seeks to reinstate a version of Rule 11 that was widely recognized to have been an utter failure during the decade it was in place. The Judicial Conference, after years of careful consider-

[76] Lawsuit Abuse Reduction Act of 2015, H.R. 758, 114th Cong. § 2(b) (2015).
[77] Markup Tr. at 27.
[78] 2015 Hearing at 60.
[79] Markup Tr. at 73.

ation, research, experience, and public comment, adopted the current Rule 11, which, by most accounts, has been a success. The individuals and businesses served by our legal system do not need to incur the substantially increased expense and delay associated with a regime imposed by H.R. 758 that will foster satellite litigation aimed at seeking and opposing Rule 11 sanctions. Parties entitled to vindicate their civil rights deserve to have their claims heard without the threat of Rule 11 motions intended to harass and intimidate. Nonetheless, proponents of H.R. 758 disregard these significant concerns and now seek to repeat history with a flawed mandatory sanctions regime.

For these reasons, and those discussed above, we respectfully dissent and urge our colleagues to reject this flawed legislation.

MR. CONYERS, JR.
MR. NADLER.
MS. JACKSON LEE.
MR. COHEN.
MR. JOHNSON, JR.
MS. CHU.
MR. DEUTCH.
MR. GUTIERREZ.
MS. BASS.
MR. RICHMOND.
MR. JEFFRIES.
MR. CICILLINE.

○