

# LAWSUIT ABUSE REDUCTION ACT

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HEARING  
BEFORE THE  
SUBCOMMITTEE ON THE CONSTITUTION  
OF THE  
COMMITTEE ON THE JUDICIARY  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED TWELFTH CONGRESS  
FIRST SESSION

ON

**H.R. 966**

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MARCH 11, 2011

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# LAWSUIT ABUSE REDUCTION ACT

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FRIDAY, MARCH 11, 2011

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

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

Present: Representative Franks, Smith, Forbes, King, Nadler, and Scott.

Staff present: (Majority) Paul Taylor, Subcommittee Chief Counsel; Zach Somers, Counsel; Sarah Vance, Clerk; (Minority) David Lachmann, Subcommittee Staff Director; Jason Everett, Counsel; and Veronica Eligan, Professional Staff Member.

Mr. FRANKS. The Subcommittee will come to order.

Thank you all for being here.

We have called this hearing because some of the changes, the 1993 amendments made to rule 11 of the Federal Rules of Civil Procedure, need to be revisited.

Rule 11 provides for one of the most basic requirements for litigation in Federal court, that papers filed with the 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 that they are certifying to the best of the person's knowledge, information, and belief formed after reasonable inquiry that the filing is accurate, based on the law or reasonable interpretation of the law, and is brought for a legitimate purpose. This is such a simple requirement but one that both sides to a lawsuit must abide by if we are to properly have a functioning Federal court system.

However, under the current Federal procedural rules, a failure to comply with rule 11 does not necessarily result in imposition of sanctions. The fact that litigants can violate rule 11 without penalty significantly reduces the deterrent effect of rule 11 itself, which harms the integrity of the Federal courts and leads to both plaintiffs and defendants being forced to respond to frivolous claims and arguments.

The Lawsuit Abuse Reduction Act corrects this flaw by requiring that Federal district court judges impose sanctions when rule 11 is violated. Mandatory sanctions will more strongly discourage litigants from making frivolous claims in Federal court, and it will also relieve litigants from the financial burden of having to respond to frivolous claims as the legislation requires those who violate rule

11 to reimburse the opposing party reasonable expenses incurred as a direct result of the violation.

Additionally, the legislation eliminates rule 11's 21-day safe harbor which gives litigants a free pass to make frivolous claims so long as they withdraw those claims if the opposing party objects.

As Justice Scalia correctly pointed out while dissenting from the 1993 rule's change, he said, "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, while this legislation makes changes to rule 11, it is important to recognize that nothing in this legislation changes the standard by which the courts determine whether a pleading or a filing violates rule 11. Courts will apply the same legal standard they have applied since 1993 to determine if a filing runs afoul of rule 11. Thus, all the legislation really does is to make the technical and conforming changes to rule 11 necessary to make sanctions mandatory rather than discretionary. In Justice Scalia's words, it is simply about making rule 11 a significant and necessary deterrent to frivolous litigation rather than a toothless rule.

According to the first rule of the 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." I believe that this goal will be well served through a mandatory sanctions provision for violating the simple requirements of rule 11 that every filing be based on both the law and the facts.

I look forward to hearing from our witnesses.

And I now recognize the Ranking Member of the Subcommittee, the gentleman from New York, Mr. Nadler, for 5 minutes for his opening statement.

[The bill, H.R. 966, follows:]

112TH CONGRESS  
1ST SESSION

# H. R. 966

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

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IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

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## A BILL

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

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Lawsuit Abuse Reduc-  
5 tion Act of 2011”.

6 **SEC. 2. ATTORNEY ACCOUNTABILITY.**

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

9 (1) in paragraph (1), by striking “may” and in-  
10 serting “shall”;

1           (2) in paragraph (2), by striking “Rule 5” and  
2 all that follows through “motion.” and inserting  
3 “Rule 5.”; and

4           (3) in paragraph (4), by striking “situated”  
5 and all that follows through the end of the para-  
6 graph and inserting “situated, and to compensate  
7 the parties that were injured by such conduct. Sub-  
8 ject to the limitations in paragraph (5), the sanction  
9 shall consist of an order to pay to the party or par-  
10 ties the amount of the reasonable expenses incurred  
11 as a direct result of the violation, including reason-  
12 able attorneys’ fees and costs. The court may also  
13 impose additional appropriate sanctions, such as  
14 striking the pleadings, dismissing the suit, or other  
15 directives of a nonmonetary nature, or, if warranted  
16 for effective deterrence, an order directing payment  
17 of a penalty into the court”.

18       (b) RULE OF CONSTRUCTION.—Nothing in this Act  
19 shall be construed to bar or impede the assertion or devel-  
20 opment of new claims, defenses, or remedies under Fed-  
21 eral, State, or local laws, including civil rights laws.

○

Mr. NADLER. Thank you, Mr. Chairman.

It is *deja vu* all over again. After a brief hiatus, we are back to legislation supposedly aimed at preventing frivolous litigation, but which would in fact revive a rule that gave birth to an entire litigation industry operating in tandem with normal civil litigation. The revised rule 11 proposed here would take us back to the failed 1983 rule which the courts rightly rejected after a decade of catastrophic experience. Moreover, this legislation goes even beyond the text of the 1983 rule broadening the flawed mandatory sanctions even further.

Rule 11 of the Federal Rules of Civil Procedure serves a vital role in maintaining the integrity of our legal system. As the Rules Committee noted in 1993, “since 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 to the court as a penalty. However, under unusual circumstances, deterrence may be ineffective unless the sanction not only requires the person violating the rule to make a monetary payment, but also directs that some or all of this payment be made to those injured by the violation. Accordingly, the rule authorizes the court, if requested in a motion and if so warranted, to award attorney’s fees to another party.”

While the sponsor has expressed a desire to limit unnecessary litigation, the experience with the old rule 11 was the exact opposite. Rule 11 litigation became a routine part of civil litigation, infecting more than one-third of all cases. Rather than serving as a disincentive, the old rule 11, which would be restored by this legislation, actually made the system considerably more litigious. In the decade following the 1983 amendments, there were almost 7,000 reported rule 11 cases becoming part of approximately one-third of all Federal civil lawsuits. Civil cases frequently, in better than a third of all cases, became two cases: one on the merits and the other dueling rule 11 allegations. The drain on the courts’ and the parties’ resources caused the Judicial Conference to revisit the rule and adopt the changes this bill would now have us undo.

When this Committee considered an earlier version of this legislation in 2005, the Judicial Conference wrote to then Chairman Sensenbrenner that the bill would undo, “the 1993 rule 11 amendments even though no serious problems has been brought to the Judicial Conference Rules Committee’s attention,” and the bill, “in some ways seems to go beyond the provisions that created serious problems with the 1983 rule. It may even cause greater mischief. Rule 11 in its present form has proven effective and should not be revised.”

When we were considering what became the 2005 amendments to the Bankruptcy Code, the original legislation—the original draft of the legislation, I should say—contained a provision that would have required the imposition of mandatory penalties under bankruptcy rule 9011, the corollary to rule 11. That language was specifically rejected in 2005 and does not appear in the public law. The court is given the appropriate discretion to craft sanctions as appropriate, even though the rest of the legislation stripped the bankruptcy courts of discretion in numerous other areas. Congress

thought better of that inflexible, unworkable rule. We were right then and we should consider this proposal in the same light.

Small businesses, just like all businesses, are concerned about baseless lawsuits. I do not know anyone who wouldn't be. But just to keep the situation in perspective, I would also note that in a June 2008 survey of its members by the National Federation of Independent Business, "The Voice of Small Business," their membership ranked, quote, costs and frequency of lawsuits and threatened suits 65th of their 75 top concerns; 36.7 percent responded that this was not a problem while only 7.3 percent called it, quote, critical. Whatever NFIB in Washington may say, I think it is pretty clear that its membership, actual small business people, have a healthy perspective on the issue.

Mr. Chairman, the courts have ample authority under the current rule 11 to sanction conduct that undermines the integrity of our legal system, but this legislation is the wrong solution in search a problem. By taking us back to a time when rule 11 actually promoted routine, costly, and unnecessary litigation, this bill is a cure far worse than the disease. We know what this rule does because we lived with it and the courts rightly rejected it nearly 20 years ago. We should benefit from that experience and reject this legislation.

I thank you and I yield back the balance of my time.

Mr. FRANKS. Well, thank you, Mr. Nadler.

I now recognize the Chairman of the full Judiciary Committee, the distinguished gentleman from Texas, Mr. Smith, for 5 minutes for his opening statement.

Mr. SMITH. Thank you, Mr. Chairman, and Mr. Chairman, I appreciate your having this hearing, I think, on one of the most important subjects of the year and also on a subject that I think can do a world of good for a lot of individuals and business owners in the United States.

Mr. Chairman, on Wednesday I reintroduced H.R. 966, The Lawsuit Abuse Reduction Act. On the same day Senator Chuck Grassley, the Ranking Member of the Senate Judiciary Committee, introduced the same bill in the Senate.

The Lawsuit Abuse Reduction Act, otherwise known as LARA, is just over a page long, but it would help restore much needed rationality to all civil cases brought in Federal court by requiring mandatory sanctions against those who file frivolous lawsuits.

In recent years, frivolous lawsuits have been filed in Federal court against the Weather Channel for failing to accurately predict storms, against businesses for the actions of wild birds who flew onto their premises, and against television shows who claimed that some people were too scary. More and more playgrounds are shutting down because of liability concerns, and then fast food companies are sued in Federal court because inactive children gain weight.

Newsweek reported that frivolous lawsuits have become so prevalent in America that children are learning to abuse the legal system as well. One teacher who taught for 20 years before retiring said, "a kid will be acting out in class and you touch his shoulder and he will immediately come back with, don't touch me or I'll sue."

These cases, and many like them, have wrongly cost innocent people and business owners their reputations and even hundreds of thousands of dollars. The annual direct cost of American tort litigation alone now exceeds over \$250 billion a year.

When Business Week wrote an extensive article on what the most effective legal reforms would be, it stated what is needed are penalties that sting. As Business Week recommended, “give 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, an obscure branch of the courts, made penalties optional. This needs to be reversed by Congress.”

Just a few years ago, the Nation’s oldest ladder manufacturer, a family-owned business near Albany, New York, filed for bankruptcy protection and sold off most of its assets due to litigation costs, even though the company had never actually lost a court judgment.

As Bernie Marcus, co-founder and former chairman of the Home Depot has described, “an unpredictable legal system cast a shadow over every plan and investment. It is devastating for startups. The costs of even one ill-timed abusive lawsuit can bankrupt a growing company and cost hundreds of thousands of jobs.”

In his 2011 State of the Union Address, President Obama said, “I am willing to look at other ideas to rein in frivolous lawsuits.” I hope the President will act on those words, and I hope he is watching today.

LARA would require monetary sanctions against lawyers who file frivolous lawsuits. It would reverse the 1993 amendments to rule 11 that made rule 11 sanctions discretionary rather than mandatory. It would also reverse the 1993 amendments that allow parties and their attorneys to avoid sanctions by making frivolous claims and demands but by withdrawing them within 21 days after a motion for sanctions has been filed. So LARA would get rid of the free pass lawyers have now to file frivolous lawsuits in Federal court.

LARA also would restore mandatory sanctions for frivolous lawsuits without changing the current standard by which frivolous lawsuits are judged.

Further, LARA expressly provides that nothing in the changes it makes 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. Consequently, the development of civil rights law would not be affected in any way by LARA.

LARA applies evenhandedly 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. The bill also applies to both plaintiffs and defendants.

Anyone who opposes frivolous lawsuits should support a one-page bill that provides for mandatory sanctions when a judge finds a case to be frivolous.

Mr. Chairman, although I look forward to hearing from the witnesses today, I regret I am not going to be able to stay because of a Steering Committee meeting called by the Speaker that I need

to attend in a matter of minutes. But once again, I appreciate your having this hearing and I appreciate the witnesses who are here.

I yield back.

Mr. FRANKS. Well, thank you, Mr. Smith.

I would now recognize the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers, for 5 minutes for his opening statement. It looks like Mr. Conyers is not here. He was here a moment ago.

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

We have a very distinguished panel of witnesses today. Each of the witnesses' written statements will be entered into the record in its entirety. And I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony, and when the light turns red, it signals that 5 minutes has expired.

Our first witness is Elizabeth Milito. Ms. Milito serves as senior executive counsel with the National Federation of Independent Business, Small Business Legal Center, a position she has held since March of 2004. Ms. Milito came to NFIB from the Department of Veterans Affairs where she defended VA hospitals in Maryland, the District of Columbia, and West Virginia in employment and labor lawsuits and was responsible for training and counseling managers on fair employment and HR practices. She has an extensive background in tort, medical malpractice, employment and labor law. And we are glad to have you here, Ms. Milito.

Our second witness is Lonny Hoffman. Mr. Hoffman is the George Butler Research Professor of Law at the University of Houston Law Center. Professor Hoffman is a specialist on procedural law in Federal and State courts and has authored numerous Law Review articles. He has testified before Congress and at the state level, served on numerous professional committees and organizations, and he is a member of the Supreme Court of Texas Rules Advisory Committee and editor-in-chief of *The Advocate*, a quarterly journal published by the Litigation Section of the State Bar of Texas. And welcome, Professor.

Our third and final witness is Victor Schwartz. Mr. Schwartz is a partner at the law firm of Shook, Hardy & Bacon, where he is the chairman of the public policy group and maintains an active appellate practice. Before entering the full-time practice of law, Mr. Schwartz was a professor and dean at the University of Cincinnati College of Law. For more than 2 decades, Mr. Schwartz has been co-author of the most widely used torts casebook in the United States, "Prosser, Wade and Schwartz's Torts." Additionally, he is the author of the leading text, "Comparative Negligence," and has written over 150 Law Review articles. Welcome, Professor.

So without objection, all Members will have 5 legislative days within which to submit materials for the record.

And before I recognize the witnesses, it has been the tradition of the Constitution Committee that they be sworn in. So if you will all stand and raise your right hand.

[Witnesses sworn.]

Mr. FRANKS. Thank you all very much.

I now recognize our first witness, Elizabeth Milito.

**TESTIMONY OF ELIZABETH MILITO,  
NFIB SMALL BUSINESS LEGAL CENTER**

Ms. MILITO. Thank you, Mr. Chairman and distinguished Subcommittee Members. My name is Elizabeth Milito and I serve as senior executive counsel with the National Federation of Independent Business Small Business Legal Center.

NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses and represents about 350,000 member businesses nationwide. The typical NFIB member employs 10 people and reports gross sales of about \$500,000 a year.

We applaud the Subcommittee for holding this hearing on the problem of lawsuit abuse.

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

In my experience, the greatest abuses occur in lower dollar suits which often target small businesses. In many instances, an attorney will just take a client at his word, performing little, if any, research regarding the validity of a plaintiff's claim. As a result, small business owners must take time and resources out of their business to do the plaintiff's attorney's homework. They must prove their innocence in cases where a few hours of research at most would lead the attorney to conclude that the lawsuit was unjustified.

Small businesses are a target a frivolous suits because lawyers understand they can be more likely than a larger corporation to settle a case rather than litigate it. Small businesses do not have in-house counsels to inform them of their rights, to write letters responding to allegations made against them, or to provide legal advice. They do not have the resources needed to hire an attorney to fight small claim lawsuits. And often they do not have the power to decide whether or not to settle a case. The insurer makes that decision for them.

In addition to the financial costs of settling a case are the incalculable psychological costs. Small business owners threatened with lawsuits often would prefer to fight in order to prove their innocence. Settling a meritless case causes the business to look guilty.

Frivolous lawsuits take many forms, but I would categorize them into four types. Pay me now or I will see you in court. Let's not the law get in our way. Somebody has to pay it. It might as well be you. And yellow page lawsuits.

Pay me nor or I will see you in court often involves a demand letter. Demand letters are particularly attractive when the plaintiff can sue a small business for violating a State or Federal statute. The letter alleges the small business violated a particular statute, and at some point the letter says that the small business has an opportunity to make the whole thing go away by paying a settlement fee up front, the sooner, the better. If these demands are not met, the letter threatens a lawsuit.

Let's not let the law get in our way. While most attorneys adhere to the ethical standards to which they have been sworn to uphold, there are instances where attorneys fall short and fail to research the validity of the plaintiff's claim and may even fail to review the statute they allege the defendant violated.

Somebody has to pay and it might as well be you. This is where the plaintiff may have been harmed but is suing the wrong person. This is what happened to NFIB member Hugh Froedge. Froedge's business was named in a personal injury lawsuit after the plaintiff was injured at work. Although there was no evidence that Froedge's belt conveyor caused the plaintiff's injuries, the lawsuit took 11 years to resolve. In the end, Froedge's insurance company decided to settle the matter, even though Froedge believed he was not culpable and would have preferred to fight.

In yellow page lawsuits, hundreds of defendants are named and it is their responsibility to prove they are not culpable. Plaintiffs name defendants by using vendor lists or even lists from Yellow Pages of businesses operating in a particular area or during a particular time. For example, an NFIB member has been targeted in asbestos litigation. The family-owned commercial construction business was founded over 40 years ago and has been targeted in recent years in asbestos litigation as manufacturers have gone bankrupt, leaving a void of solvent defendants. As a result, attorneys are now trolling for construction firms that existed in the 1960's and are still in existence today regardless of whether the plaintiff had any connection to the firm. Still, to get to dismissed from these cases, the NFIB member regularly spends thousands of dollars in attorney's fees and discovery costs.

Legislation is sorely needed to reform our Nation's civil justice system. H.R. 966, recently introduced by Representative Lamar Smith, would be particularly helpful in curbing, if not stopping, many of the types of suits I have described. It would put teeth back into rule 11.

Thank you for inviting me to testify today.

[The prepared statement of Ms. Milito follows:]

Prepared Statement of Elizabeth Milito



**House of Representatives Committee on the Judiciary  
Subcommittee on the Constitution**

on the date of

March 11, 2011

on the subject of

H.R. 966 "the Lawsuit Abuse Reduction Act"

Thank you, Mr. Chairman and distinguished Committee members for inviting me to provide testimony regarding the tremendous negative effects lawsuits, and particularly the fear of lawsuits, are having on the millions of small business owners in America today. 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 about 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 federal policy makers often view the business community as a monolithic enterprise, it is not. Small business owners have many priorities and often limited resources. Being a small business owner means, more times than not, you are responsible for everything – NFIB members, and hundreds of thousands of small businesses across the country, do not have human resource specialists, compliance officers, or attorneys on staff. For small business owners, even the threat of a lawsuit can mean significant time away from their business – time that could be better spent growing their enterprise and employing more people.

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. In many instances, a plaintiff's attorney will just take a client at his word, performing little, if any, research regarding the validity of the plaintiff's claim. As a result, small business owners must take time and resources out of their business to prove they are not liable for whatever "wrong" was theoretically committed. As one small business owner recently remarked to me, "What happened to the idea that in this country you are innocent until proven guilty?"

Although that mantra refers to a defendant's rights in our criminal justice system, problems with our civil justice system can no longer be ignored. It is incumbent

upon the attorney representing a plaintiff to get the facts straight **before** sending a threatening letter or filing a lawsuit, not after the letter is sent or the lawsuit is filed. Sadly, due in large part to the ineffectiveness of Rule 11 in its current form, we have a legal system in which many plaintiffs' attorneys waste resources and place a significant drain on the economy by making the small business owner do the plaintiff's attorney's homework. It often is up to the small business owner to prove no culpability in cases where a few hours of research, at most, would lead the attorney for the plaintiff to conclude that the lawsuit is unjustified.

The NFIB Legal Center applauds the Committee for holding this hearing in order to focus on the problem of frivolous lawsuits.

### **Frivolous Lawsuits Create a Climate of Fear for America's Small Businesses**

A few years ago, the national media focused much attention on the outlandish \$65 million lawsuit filed against a District of Columbia dry cleaner for a missing pair of pants. As outrageous as the facts of this suit are, it is not outrageous that the defendant is a small business. The fact is that NFIB members, and the millions of small businesses across the country, are prime targets for these types of suits because they do not have the resources to defend against them. Small businesses cannot pass on to consumers the costs of liability insurance or pay large lawsuit awards without suffering losses.

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.<sup>1</sup> 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.<sup>2</sup> It is not surprising that many small business owners "fear" getting sued, even if a suit is not filed.<sup>3</sup> That possibility – the fear of lawsuits – is supported by an NFIB Research Foundation National Small Business Poll, which found that about half of small business owners surveyed either were "very concerned" or "somewhat concerned" about the possibility of being sued.<sup>4</sup> The primary reasons small business owners fear lawsuits are: (1) their industry is vulnerable to suits; (2) they are often dragged into suits in which they have little or no responsibility; and (3) suits occur frequently.<sup>5</sup>

<sup>1</sup> "Tort Liability Costs for Small Businesses," U.S. Chamber Institute for Legal Reform, 2010, at 11.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 7-8.

<sup>4</sup> NFIB National Small Business Poll, "Liability," William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 2 (2002).

<sup>5</sup> *Id.* at 1.

### **The Impact of Frivolous Lawsuits on Small Business**

Make no mistake about it – lawsuits (threatened or filed) impact small business owners. In my seven 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,<sup>6</sup> 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.

Small business is the target of so many of these frivolous suits because trial lawyers understand that a small business owner is more likely than a large corporation to settle a case rather than litigate. 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. They do not have the resources needed to hire an attorney nor the time to spend away from their business fighting many of these small claim lawsuits. And often they do not have the power to decide whether or not to settle a case – the insurer makes that decision.

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’ lawyers have grown particularly apt at calculating so that it is less expensive for either the insurer or small business 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.<sup>7</sup>

Once the suit is settled, 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. Not surprisingly, NFIB research has shown that the majority of small employers believe that the biggest problem with business insurance today is cost.<sup>8</sup> Many

<sup>6</sup> 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.

<sup>7</sup> NFIB National Small Business Poll, “Liability,” William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 2 (2002) at 1.

<sup>8</sup> NFIB National Small Business Poll, “Business Insurance,” William J. Dennis, Jr., NFIB Research Foundation Series Editor, Vol. 2, Issue 7 (2002).

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.<sup>9</sup>

In addition to the financial costs of settling a case, there are incalculable psychological costs. 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 can not be easily convinced otherwise.

Of course, it is important to give victims of injustice their day in court. However, it is also important to remember that frivolous lawsuits victimize those who are sued. Small businesses that are wrongfully sued must expend substantial resources to defend meritless claims or must risk the prospect of default judgments against them. 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 claim is successfully defended or dismissed.

NFIB members to whom I have spoken almost universally state that defending these meritless suits occupies their daily attention and costs them many sleepless nights. Some mention that the hassle of dealing with these frivolous suits make them question why they remain in business when they can simply work for someone else and avoid such harassment. Often times these suits take years to resolve. NFIB members cannot recoup this time and the damage to their businesses' reputation and goodwill cannot be easily repaired. So while plaintiffs' rights should be protected, so should the rights of innocent defendants – justice demands it.

### **Frivolous Lawsuits Come in Many Shapes and Sizes**

Frivolous lawsuits take different forms, and I will highlight several types of suits that have been brought to my attention. I place these suits into four categories – “Pay me now or I’ll see you in court”; “Let’s not let the law get in our way”; “Somebody has to pay, and it might as well be you”; and “Yellow Page lawsuits.”

#### **“Pay me now or I’ll see you in court”**

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

<sup>9</sup> “Tort Liability Costs for Small Businesses,” U.S. Chamber Institute for Legal Reform, 2010, at 11.

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. 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. Mr. Brar sued many of these businesses for allegedly collecting "point-of-sale" device fees from his wife without proper disclosure signs.

Also in California, three lawyers working for the Trevor Law Group, a Beverly Hills law firm, made small fortunes shaking down thousands of small business owners. Specifically, the law firm targeted more than 2,000 auto-repair shops in California for "unfair business practices." These attorneys, like Mr. Brar, used broad consumer protection statutes (which have subsequently been invalidated) to go after those people considered most likely to settle – our nation's small business owners.

#### **"Let's not let the law get in our way"**

While most attorneys adhere to the ethical standards to which they have sworn to uphold, there are instances where attorneys fall short and fail to research the validity of the plaintiff's claim and may even fail to review the statute that they allege the defendant violated.

An example involves NFIB member Michael Saunders, who has been inundated for over a year by letters demanding that his company repay invoices to a now bankrupt company. The letters threaten legal action if the invoices are not repaid. The bankruptcy code only allows the trustee to recover payments made within 90 days of a company filing for bankruptcy. However, many of these invoices were for work done by Mr. Saunders's company years before the company went bankrupt. Other invoices are for work done after the company emerged from bankruptcy protection.

The attorneys for the trustee were kind enough to offer Mr. Saunders's company a discount for paying by a certain date. Mr. Saunders's company, however, had no obligation to repay the invoices. Since the payments made by Mr. Saunders's company were not within the statutory period, the demands were totally improper. If the attorneys making the demands even did a simple inspection, they would have discovered that demanding repayment in these instances was wrong. The attorneys either did not check, or did not care to abide by the law. It is a common tactic of bankruptcy trustees to make demands of so-called "preference payments" even if the payments in question do not meet the statutory definition. It is either illegal scheming or at the very least lazy lawyering.

Even though the demands were improper, that was not the end of the story. Mr. Saunders still had to respond to the demands because if he did not then default judgments would be entered against him. So he had to expend substantial legal fees to dispense with completely meritless claims. In fact, he claims that his legal expenses are essentially what the letters demanded he repay.

**"Somebody has to pay, and it might as well be you"**

These frivolous suits are the type in which the plaintiff may have been harmed, but is suing the wrong person. For example, Bob Carnathan, an NFIB member, owns Smith Staple and Supply Co., a small nail and staple fastening business located in Harrisburg, Pennsylvania. Mr. Carnathan's business leases space in a strip mall. After a snowstorm, one of the tenants in the complex was walking across the parking lot when he slipped and fell on the icy pavement injuring his back and head. The medical bills from his injury totaled a little over \$3,000. The man sued every tenant in the complex, as well as the landlord and the developer, for \$1.75 million. Mr. Carnathan was sued even though he was not at fault because his rent included maintenance on the facilities and grounds.

After two years of endless meetings and conference calls, Mr. Carnathan learned that his business was released from the lawsuit. He says that there is no compensation for the time that he was forced to spend away from his business to fight this unfair lawsuit. Mr. Carnathan firmly believes that "the smaller your business, the more you are impacted when a frivolous lawsuit lands on your doorstep."

NFIB member Hugh Froedge's 11-year fight against a personal injury claim also highlights the frustration of small business owners. Froedge's business was named in a personal injury lawsuit after the plaintiff was found trapped between the machine he was working with and a belt conveyer sold by Mr. Froedge's company. Mr. Froedge's business was sued along with a number of other companies in a case that alleged \$7 million in damages. There was no evidence that Mr. Froedge's belt conveyer caused the plaintiff's injuries and, in fact, OSHA held the plaintiff's employer responsible. Mr. Froedge could also prove that the

plaintiff's employer had rewired the other machine and disregarded important workplace safety measures. However, all of the other entities named in the lawsuit went bankrupt, leaving Mr. Froedge's business as the only defendant.

The lawsuit took 11 years to resolve. In the end, Mr. Froedge's insurance company decided to settle the matter, even though Mr. Froedge believed he was not culpable and would have preferred to fight. In fact, his mother wanted to sell everything to fight this case. However, the insurance company made the decision for them.

### **"Yellow Page Lawsuits"**

These lawsuits are more commonly found in class action cases. In these cases, hundreds of defendants are named in a lawsuit, and it is their responsibility to prove that they are not culpable. In many cases, plaintiffs name defendants by using vendor lists or even lists from the Yellow Pages of certain types of businesses (e.g., auto supply stores, drugstores) operating in a particular jurisdiction.

Unfortunately, NFIB Member Lou Baribeau, knows these tactics all too well. Mr. Baribeau's company manufactures water tanks. Water tanks are rated depending on what pressure they are designed to handle. A company bought one of Mr. Baribeau's tanks from a reseller. That tank, while in perfect working order, was not designed to work under the pressure that the company was going to put on it. Additionally, the government inspector did not make sure that the system was up to code and passed it. Tragically, yet not surprisingly, the system malfunctioned and a maintenance person was badly injured.

Mr. Baribeau's company was sued as part of a class action. Mr. Baribeau was sued simply because his water tank was involved, regardless of whether the water tank was the reason the accident occurred. As he put it, "innocence has nothing to do with it." The case went on for a year, and legal expenses forced the parties to settle. Mr. Baribeau was forced to pay \$5,000 just to make it go away.

Another NFIB member has been targeted in asbestos litigation. The family-owned commercial construction business, which was founded over 40 years ago, has been named in over 10 asbestos lawsuits. According to the member, his company has been targeted in recent years as many asbestos manufacturers have gone bankrupt leaving a void of solvent defendants. As a result, attorneys are now trolling for construction firms that existed in the 1960s and that are still in existence, and preferably with deep pockets, today.

The NFIB member, who wishes to remain anonymous for fear publicity surrounding his company's involvement in asbestos litigation will cause more attorneys to target the business, has never been sued by an employee – all suits

have been filed by individuals who allege that the NFIB member company was one of potentially dozens of subcontractors on a particular job site where the plaintiff worked and was allegedly exposed to an asbestos product. In several instances, it was later shown the plaintiff could never have worked at a site alongside the NFIB member, such as when exposure allegedly occurred at a marine construction site or before the company even existed. Still, to get dismissed from these cases the NFIB member spends thousands of dollars in attorney's fees and discovery costs.

### **Solutions for Small Business**

These stories demonstrate that lawsuit abuse is alive and well in the United States, and small businesses are too often the victims. It is for this reason that legislation is sorely needed to reform our nation's civil justice system. H.R. 966, recently introduced by Representative Lamar Smith, will help eliminate many of the types of suits I have described or, at the very least, provide a fair opportunity for small-business victims of frivolous lawsuits to receive reimbursement of their legal costs.

H.R. 966 would put teeth back into 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.<sup>10</sup> 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."<sup>11</sup>

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.<sup>12</sup>

<sup>10</sup> Fed. R. Civ. P. 11(a).

<sup>11</sup> *Id.* at 11(b).

<sup>12</sup> *Id.* at 11(c)(1)(A).

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 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.

H.R. 966 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.

**Conclusion**

Frivolous 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. We must work together to find and implement solutions that will stop this wasteful trend. 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

## **CORE VALUES**

**We believe deeply that:**

Small business is essential to America.

Free enterprise is essential to the start-up and expansion of small business.

Small business is threatened by government intervention.

An informed, educated, concerned, and involved public  
is the ultimate safeguard for small business.

Members determine the public policy positions of the organization.

Our employees and members, collectively and individually, determine the success of  
the NFIB's endeavors, and each person has a valued contribution to make.

Honesty, integrity, and respect for human and spiritual values are important  
in all aspects of life, and are essential to a sustaining work environment.

# **NFIB**

The Voice of Small Business.

Mr. FRANKS. Mr. Hoffman?

**TESTIMONY OF LONNY HOFFMAN, PROFESSOR,  
UNIVERSITY OF HOUSTON LAW CENTER**

Mr. HOFFMAN. Chairman Franks, Ranking Member Nadler, Members of the Committee, everyone is concerned with costs and delays in Federal court, but the proposed legislation will not solve the problems that are said to exist. To the contrary, it can confidently be said, contrary to the sponsor's intentions, that this bill will actually increase cost and delays and foster greater litigation abuse.

The source of this confidence is the vast body of empirical evidence that has been collected relating to the 1983 version of rule 11, the model on which this bill is based. That empirical evidence is so persuasive that it has produced a remarkable degree of agreement across the political spectrum that the 1983 amendment of rule 11 was one of the most ill-advised procedural experiments ever tried.

Because of the existence of this research, which incidentally I cite in my prepared statement at length for the Committee's review, there is much that we can learn from our past. Yet, in proposing this regressive reform of rule 11, the bill fails to heed what the history has to offer.

One sobering lesson from that history is that the 1983 rule was frequently misused as a compensatory fee-shifting device and that this was one key trigger for the frivolous satellite litigation over sanctions that followed. This point is particularly relevant today since the bill that the Committee has before it emphasizes compensation as an expressly authorized objective of the rule. It is likely, therefore, that the proposed legislation will actually make things even worse than they were in 1983. After all, we witnessed a scourge of meritless rule 11 motions even though deterrence, not compensation, was the rulemakers' intended goal back then, and there was no express reference to compensation in the text of that rule.

The bottom line on this point is this. It is difficult to see that anyone who is concerned over costs, delays, and abuse could support legislation that, as our history teaches, is almost certain to lead to substantially greater costs, delays, and abuse in the Federal courts.

A second and last lesson from history I want to highlight today is perhaps more sobering of all. The empirical evidence persuasively shows the profound discriminatory effects of the 1983 rule. Civil rights claimants, in particular, were impacted most severely. There are numerous reasons why this is so, but we know that one is that, as noted, the '83 rule was often misused as a cost-shifting tactic. These claimants, who are frequently resource-poor, faced the greatest threat from the monetary sanctions that could be and were imposed under that rule.

Thankfully many, though not all, of the discriminatory effects against civil rights claimants and others were ameliorated by the 1993 amendments to rule 11 and especially its inclusion of a safe harbor provision. This result likely explains, at least in part, the overwhelming support that the current rule enjoys, as a number of

surveys of Federal judges and lawyers has consistently shown. And again, I cite all of these surveys in my prepared remarks for the Committee's consideration.

In conclusion, it is instructive to recollect that judicial rule-makers remain actively involved in monitoring the state of civil litigation in the Federal courts and can be relied upon to do their work. For those who are concerned about costs and delays, the sounder course is to set this legislation aside and look for more productive ways to improve the administration of justice.

Thank you.

[The prepared statement of Mr. Hoffman follows:]

Prepared Statement of Lonny Hoffman  
George Butler Research Professor of Law  
University of Houston Law Center

Hearing on H.R. 966, the Lawsuit Abuse Reduction Act

Before the Committee on the Judiciary  
Subcommittee on the Constitution  
United States House of Representatives

March 11, 2011

**INTRODUCTION**

Chairman Franks, Vice-Chairman Pence, Ranking Member Nadler and members of the Committee: Thank you for inviting me to testify today on H.R. 966, the Lawsuit Abuse Reduction Act.

The proposed legislation would not effectively address the problems asserted to justify its passage. Worse still, a vast body of empirical evidence relating to the 1983 version of Rule 11 of the Federal Rules of Civil Procedure—the model on which this bill is based—strongly suggests that the legislation’s passage would negatively impact the administration of justice. Indeed, there is a remarkable degree of agreement among judges, lawyers, legal scholars and litigants across the political spectrum that the 1983 amendment of Rule 11 was one of the most ill-advised procedural experiments ever tried. In proposing to disinter this ignominious rule, the legislation ignores all that we have learned from that failed experiment. Addressing costs and delays is everyone’s concern but, as prior experience shows, the proposed legislation would substantially worsen those costs and delays, not lessen them. For those concerned about improving the functioning of the civil litigation system, the sounder course is to follow the advice given by a former Solicitor General of the United States (about another recent legislative proposal) and “permit the Judicial Conference of the United States to continue to monitor the situation and respond if need be through the time-honored judicial rulemaking process established by Congress.”<sup>1</sup> Put another way, this Committee should allow judicial rulemakers to continue to do their work and explore, instead, more productive ways to improve the administration of justice.

By way of introduction, I am the George Butler Research Professor of Law at the University of Houston Law Center. My scholarship and teaching interests are focused on civil procedural law and the means by which that law influences judicial access. In addition, I am currently engaged, among other projects, in work examining how the law regulates lawyer conduct. One of my longstanding goals as a legal scholar has been to encourage legislators and courts toward greater clarity in thinking about what policy purposes ought to animate jurisdictional and procedural law, and how those objectives can best be accomplished. I have previously been invited to appear before another subcommittee of the House Judiciary Committee. On that occasion I testified with regard to H.R. 5281, the Removal Clarification Act of 2010. Thereafter, citing my comments at the hearing, the Chairman subsequently introduced a revised version of the bill that was passed by the House of Representatives. I appear before this Committee in my individual capacity. As university guidelines require, I attest that my testimony is not authorized by, and should not be construed as reflecting on, the position of the University of Houston.

On Wednesday, March 8, 2011 I was formally invited to testify before this Committee and I have submitted this written statement in advance of my oral remarks at the hearing. Because of the short time I had to prepare this statement, I have prepared a bibliography of sources at the end of my statement. I commend these sources to the Committee as a supplement to my written statement and remarks at the oral hearing.

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<sup>1</sup> Statement of Gregory G. Garre, Hearing on “Has the Supreme Court Limited Americans’ Access to Courts?” before the Senate Comm. on the Judiciary, 111<sup>th</sup> Cong., December 2, 2009, at 2.

## I. FEDERAL RULE OF CIVIL PROCEDURE 11: FROM ITS ORIGINS TO ITS AMENDMENT IN 1983

To understand both the limitations with and serious dangers of enacting this Bill, it is instructive to turn back to the context in which Rule 11 was amended in 1983. The 1983 version of Rule 11 came as part of a package of amendments to the FRCP. Rulemakers intended the various changes to reduce unnecessary costs and abuses then perceived to exist in civil litigation in the federal courts. That there was little credible evidence either to support the need for these rule reforms or to justify use of the sanctions rule to manage litigation cost and abuse hardly gave pause to reformers. While we know now that the 1983 changes fundamentally and negatively impacted civil litigation practice in the federal courts, it is sobering to reflect that the proposed amendments to Rule 11 came in an empirical vacuum, as many scholars have noted.<sup>2</sup> More sobering still is that they came despite contemporary warnings of the dire consequences that would likely follow the rule's amendment.

From its original adoption in 1938, Rule 11 has always required that lawyers sign the papers they file in federal court, but before 1983 the rule was rarely used to regulate lawyer conduct. One commentator counted less than twenty reported Rule 11 decisions between the years 1938 to 1976, and even fewer occasions when sanctions were actually awarded.<sup>3</sup> Concerned by the infrequency with which the rule was utilized to regulate lawyer conduct, as well as by a perception that litigation costs and abuses were spiraling upward, rulemakers were catalyzed to act. The amended version of Rule 11 in 1983 was made applicable to every "pleading, motion and other paper" and it provided that the signature of a lawyer (or a pro se party) would constitute a certificate that the filed "to the best of the signer's knowledge, information and belief, "formed after reasonable inquiry", that the paper filed was "well grounded in fact and is warranted by existing law (or a good faith argument for the law's extension modification or reversal). Certainly, one of the most significant revisions in 1983 was to make the imposition of sanctions mandatory upon a finding the rule had been violated, a major departure from the discretionary language of the original version.

Before the 1983 amendments to Rule 11 were enacted, a number of critics prophesized that the proposed changes would result in satellite litigation over how to correctly interpret the new rule. From where we sit today, we know that these dire predictions turned out to be true, exceeding even the critics' worst fears.

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<sup>2</sup> There has since been extensive research calling into doubt the perceptions of the problems that were said to justify the 1983 amendments. See, e.g., Marc Galanter, *The Life and Times of the Big Six; or the Federal Courts Since the Good Old Days*, 1988 WISC. L. REV. 921 (1988); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 83-90 (1993); Marc Galanter, *Real World Torts: An Antidote to Aneecdot*, 55 MD. L. REV. 1093, 1109-12 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147 (1992). See also generally Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844 (1993).

<sup>3</sup> 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), in *Symposium: Happy (?) Birthday Rule 11*, LOY. L.A. L. REV. (Winter 2004)

## II. WHAT WE KNOW OF THE 1983 RULE 11 EXPERIENCE

“Few amendments to the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11,” observed Georgene Vairo (Loyola Los Angeles School of Law), a legal scholar at the forefront of Rule 11 study for the last quarter century, at the outset of her much-relied upon 2004 treatise.<sup>4</sup> As a result, we are fortunate today not to have to consider amendments to the rule in the same empirical vacuum in which the rulemakers in 1983 previously operated. There have been nine major empirical studies of the 1983 version of Rule 11.<sup>5</sup> Several books, a great many law review articles, and a myriad of legal and lay newspaper stories have also examined it.<sup>6</sup> Of course, there were also literally thousands of reported judicial opinions on the subject, though more than anything else these probably serve best to underscore the difficulties wrought by the 1983 amendments. In any event, drawing on all of these sources today, there is much we can say with a great deal of certainty about the 1983 Rule 11 experience.

## A. The 1983 version of the rule produced an avalanche of unwelcome satellite litigation.

If the objective was to substantially increase the sheer volume of requests for sanctions, then by that measure the 1983 version of Rule 11 certainly did not disappoint. In less than ten years, the rule generated over 7,000 reported sanctions decisions. And those were just the cases that were easily identified because they were reported. When unreported decisions are taken into account, the actual amount of Rule 11 activity dwarfs the reported figures, as the country’s most respected legal practitioner on the subject, Gregory P. Joseph has emphasized in his acclaimed treatise.<sup>7</sup> Indeed, a task force organized by the Third Circuit to study Rule 11 by looking at both reported and unreported cases found definitive proof that the reported cases were far from the entire story. The task force discovered that in the Third Circuit less than 40% of the Rule 11 decisions were published.<sup>8</sup> The contrast with the paucity of decisions under the original version of Rule 11 could not have been sharper. Moreover, these figures also stand in contrast with the marked drop off in Rule 11 cases since the 1993 amendment to Rule 11 went into effect (more on that, below).

Sanctions practice took on a life of its own under the 1983 rule. After passage of the new rule, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer’s (or both lawyers’) alleged noncompliance with the rule. One side would move to sanction his opponent who might respond, in kind, by filing a sanctions motion on the basis that the filing of the original sanctions motion was, itself, sanctionable. And on and

<sup>4</sup> GEORGENE M. VAIRO, *RULE 11 SANCTIONS: CASE LAW, PERSPECTIVES AND PREVENTATIVE MEASURES* 2 (A.B.A. 2004).

<sup>5</sup> See authorities cited in Appendix: Bibliography of Additional Sources to Consult, Reports, Surveys and Studies (at the end of this statement).

<sup>6</sup> See authorities cited in Appendix: Bibliography of Additional Sources to Consult, Books; Law Review Symposia and Articles.

<sup>7</sup> GREGORY P. JOSEPH, *SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE* (3<sup>rd</sup> ed. 2000 & Supp. 200x).

<sup>8</sup> *RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11* (American Judicature Society 1989) (Stephen Burbank, principal author) (hereinafter “THIRD CIRCUIT TASK FORCE REPORT”).

on it would go. All of this would take place as a side show to the trial of the case itself, with limited resources and time spent dealing with these tertiary sanctions issues. Geogene Vairo summarized the “avalanche” of satellite litigation unleashed by the 1983 amendment:

Beginning in 1984, the volume of cases decided under the rule increased dramatically. By the end of 1987, the number of reported Rule 11 cases had plateaued. Even though the number of reported cases leveled off, motions under the amended rule continued to be made routinely, especially by defense counsel, as many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings. Indeed, one study found that in a one-year period, almost one-third of the respondents to the survey reported being involved in a case in which Rule 11 motions or orders to show cause were made. The same study showed that almost 55% of the respondents had experienced either formal or informal threats of Rule 11 sanctions.<sup>9</sup>

The reasons that explain the significant increase in sanctions motions that occurred are varied but certainly at least include that Rule 11 in its 1983 form came to be seen—contrary to the rulemakers’ intent—as a fee-shifting device that could be used for compensatory purposes. In consequence, even the rule’s strongest backers began to realize that the satellite litigation the rule was causing, and the compensatory fee-shifting effect that the frequent award of monetary damages was producing, were greatly troubling developments. *See, e.g.,* William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017-18, 1020 (1988) (observing that the 1983 version of Rule 11 has “spawned” an “excessive amount of litigation activity” and that while the drafters warned about this “satellite litigation” nevertheless the “avalanche of rule 11 cases suggests that the warning is being ignored” and separately critiquing courts that regard the rule as having a “straight fee-shifting” purpose).

B. The 1983 Rule was applied inconsistency and inequitably.

1. Civil rights and employment discrimination plaintiffs, in particular, were impacted the most severely under the 1983 version of Rule 11.

The available empirical evidence persuasively demonstrates the profound discriminatory effects of the 1983 version of Rule 11. Sanctions were sought and imposed against civil rights and employment discrimination plaintiffs, in particular, more often than other litigants in the civil courts, with the greatest disparities in treatment observed in the first five years of the rule’s existence. In a study conducted in 1988, researchers with the Federal Judicial Center found that civil rights and employment discrimination plaintiffs were the subject of sanctions motions more than 28% of the time, well out of proportion to the percentage of such cases filed.<sup>10</sup> Civil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time in which sanctions were sought, a significantly higher rate than in cases against other kinds of plaintiffs.<sup>11</sup>

<sup>9</sup> Geogene M. Vairo, *Rule 11 and the Profession*, 67 *FORD L. REV.* 589, 598 (1998).

<sup>10</sup> THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* (Fed. Jud. Ctr. 1988) at 74 (noting, *e.g.*, that civil rights cases accounted for 22.3% of the published Rule 11 cases, but comprised only 7.6% of all case filings) (hereinafter “FJC 1988 Study”).

<sup>11</sup> VAIRO, *RULE 11 SANCTIONS*, *supra* note 4, at 50 & n.68.

One reason why civil rights claimants and other resource-poor claimants, like employment discrimination claimants, faced much tougher treatment under the 1983 rule is that, as applied by many courts, the 1983 version was used as a cost-shifting device. The Advisory Committee itself eventually realized that under the 1983 rule the poorest victims and their lawyers faced the greatest threat from monetary sanctions. In its discussions about amending the rule to overcome the prior experience, the Advisory Committee recognized the particular problem cost-shifting could create “in cases involving litigants with greatly disparate financial resources.”<sup>12</sup> Further to this point, the 1993 Advisory Committee Notes make reference to the problems posed by cost-shifting for “an impecunious adversary.”

The 1983 experience also reflects that judges disproportionately enforced the pre-filing factual investigation requirement of the rule against civil rights plaintiffs and their lawyers.<sup>13</sup> In many of these decisions, sanctions were awarded even though factual information vital to asserting a claim was in the sole possession of the defendant. There are many illustrations of this perverse problem, as Professor Carl Tobias (University of Richmond School of Law) carefully documented in a series of penetrating articles about the Rule’s disparate impact on civil rights claimants.<sup>14</sup> Professor Tobias recognized that lack of access to proof was a problem that bedeviled these claimants especially:

Civil rights actions, in comparison with private, two-party contract suits, implicate public issues and involve many persons. Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.<sup>15</sup>

As he documented, courts often did not take the imbalance in access to proof into account in deciding whether to impose sanctions under the 1983 version of the Rule. One illustration of this is *Johnson v. U.S.*, a case involving the sexual assault of an infant, in which the dissent took the majority to task for imposing an unrealistic pleading burden on the plaintiff, given her obvious lack of access to proof before discovery:

The [majority] opinion notes that the complaint does not state facts indicating that Ojeda had ‘committed past offenses or manifested previous aberrant behavior that his employers should have detected.’ ... Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda’s personnel file, is in the government’s control, but it usually would be regarded as quasi-confidential

<sup>12</sup> See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 Iowa L. Rev. 1775, 1787 (1992) (quoting letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee to Judge Robert E. Keeton, Chairman, Standing Committee 2-5 (May 1, 1992)).

<sup>13</sup> See Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 Buff. L. Rev. 485, 493-94 (1989).

<sup>14</sup> See, e.g., *id.* at 493-94 and 495-96; see also *The 1993 Revision of Federal Rule 11*, 70 Ind. L.J. 171 (1994); *Environmental Litigation and Rule 11*, 33 Wm. & Mary L. Rev. 429 (Winter 1992); *Reconsidering Rule 11*, 46 U. Miami L. Rev. 855 (1992); *Rule Revision Roundtable*, 1992 Wis. L. Rev. 236 (1992); *Certification and Civil Rights*, 136 F.R.D. 223 (1991); *Rule 11 Recalibrated in Civil Rights Cases*, 36 Vill. L. Rev. 105 (1991); *Reassessing Rule 11 and Civil Rights Cases*, 33 How. L.J. 161 (1990); and *Public Law Litigation, Public Interest Litigants and the Federal Rules of Civil Procedure*, 74 Cornell L. Rev. 270 (1989).

<sup>15</sup> *Id.* at 495-96.

and unavailable to an outsider. As a practical matter, therefore, plaintiffs' attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a "Catch 22" barrier: no information until litigation, but no litigation without information.<sup>16</sup>

Beyond the Catch 22 problem of "no information until litigation, but no litigation without information," a still further factor that contributed to the discriminatory impact of the 1983 version of Rule 11 was that a sanctions legal standard is inherently flexible, which is to say it is highly susceptible to different interpretations. Of course, indeterminacy is not unique to sanctions rule, but for reasons that are perhaps still not entirely well understood, the failure of the law in this area to develop evenly and coherently fell particularly hard on civil rights and employment discrimination plaintiffs.<sup>17</sup> As discussed below, these problems would have continued to exist with the 1993 rule but for the adoption of the safe harbor provision in that rule which ameliorates at least some of the harsh effects of the rule's inherent indeterminacy.

Finally, it is worthwhile to say something about an additional factor involved in some civil rights cases that triggered disproportionate sanctions under the 1983 version of the rule: that is, the assertion by some of these claimants of novel theories of law. Although it is not clear how often civil rights claimants in the 1980s asserted legal theories that can be correctly characterized as "novel," the available empirical evidence demonstrates that judges were not very good at distinguishing legitimate assertions of new legal theories from failures to conduct adequate prefiling investigations. What is also clear is that judges applying the 1983 rule were less likely to give civil rights claimants the benefit of the doubt, especially in the first five years after the rule's amendment.<sup>18</sup>

Further, and relatedly, the empirical evidence also suggests reason to be concerned that the 1983 version of Rule 11 deterred the filing of meritorious cases. When asked, a substantial number of lawyers who were surveyed (approximately 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11 they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.<sup>19</sup> Based on similar survey results it obtained in its 1988 study, the FJC researchers were led to conclude that "whether it can be classified as chilling or not, lawyers reported a cautionary effect of Rule 11."<sup>20</sup>

A last, related lesson from the 1983 experience with Rule 11 to mention here is that by allowing sanctions to be sought after a case had been resolved on the merits, the 1983 rule

<sup>16</sup> Johnson v. U.S. 788 F.2d 845, 856 (2d. Cir.) (Pratt, J., dissenting), *cert. denied*, 479 U.S. 914 (1986).

<sup>17</sup> VAHO, RULE 11 SANCTIONS, *supra* note 4, at 12-14; *see also* Tobias, *supra* note 13 at 495.

<sup>18</sup> *See generally* Danielle Kie Hart, Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments, 37 Val. U. L. Rev. 1, 11 (2002); *see also* Tobias, *supra* note 13 at 492-93.

<sup>19</sup> Lawrence C. Marshall, Herbert M. Kritzer, & Frances Kahn Zemans, The Use and Impact of Rule 11, 86 Nw. U. L. Rev. 943 (1992) (hereinafter "AJS 1992 Study").

<sup>20</sup> FJC 1988 Study, *supra* note 10, at 167.

further exacerbated the rule's discriminatory impact. One of the leading researchers in the civil litigation field, Thomas Willging, was the first to recognize that application of the rule was subject to the problem of "hindsight bias," as it is often called. In his study of Rule 11 for the Federal Judicial Center, Willging commented that when sanctions are sought contemporaneously with or after the dismissal of a case on the merits, "there may be a tendency to merge the sanctions issue with the merits," and that "[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions."<sup>21</sup> Another keen observer, Professor Charles Yablon (Benjamin N. Cardozo School of Law), made the same point some years later:

A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive.<sup>22</sup>

"Like a reader who already knows how the mystery turns out," Yablon analogized, "she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling. This hindsight can affect a judge's view of what constitutes 'reasonable inquiry.'"<sup>23</sup> By conflating how the case ultimately was resolved with what should have been a cabined assessment of what the party knew (or should have known) at the time of filing, the 1983 rule increased the risk that a civil rights or employment discrimination claimant would be sanctioned. Thankfully, this problem was ameliorated by the 1993 amendment and, specifically, the addition of the safe harbor provision in Rule 11(c).

2. Plaintiffs were targets of sanctions far more often than defendants and were sanctioned at strikingly higher rates.

The evidence also shows that under the 1983 version of Rule 11 plaintiffs were more often the target of sanctions motions than defendants. Far more troubling, the empirical evidence also shows that plaintiffs were sanctioned at strikingly higher rates. Even leaving to one side possible legitimate explanations for the findings, the sheer magnitude of the disparity raises serious questions of fairness in terms of how the rule was applied that must be confronted.

A 1988 study by the Federal Judicial Center found that plaintiffs were the target of the sanctions motions in 536 of the 680 cases examined (or 78.8% of the total).<sup>24</sup> Of the reported Rule 11 cases, a violation was found 57.8% of the time.<sup>25</sup> However, the 1988 FJC study found that plaintiffs were more frequently ruled to be in violation of Rule 11 (46.9%) than defendants

<sup>21</sup> FJC 1988 Study, *supra* note 10, at 87-88.

<sup>22</sup> Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11*, 37 Loy. L.A. L. Rev. 599 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

<sup>23</sup> *Id.*

<sup>24</sup> FJC 1988 Study, *supra* note 10, at 160, 175 & n.153.

<sup>25</sup> *Id.*

(10.9%).<sup>26</sup> The Third Circuit task force also found that under the 1983 version of the rule, plaintiffs overall were more likely to be sanctioned than defendants (finding a 3:1 ratio of sanctions imposed).<sup>27</sup> The starkest disparities were revealed by a later study conducted by the Federal Judicial Center in 1991 which looked both reported and unreported cases in five different judicial districts.<sup>28</sup> Examining the cases in which sanctions were imposed, the FJC researchers found that plaintiffs were sanctioned at astonishingly higher rates than defendants. The table below, which is drawn from the 1991 FJC findings,<sup>29</sup> graphically illustrates the disparities:

District 1		District 2		District 3		District 4		District 5	
P	D	P	D	P	D	P	D	P	D
80%	7%	77%	23%	81%	9%	80%	20%	61%	38%

Whatever may be said about these findings, it is difficult to credibly defend a rule that produces such strikingly disparate results. Unavoidably, the findings raise serious fairness concerns about how the 1983 version of the rule was applied.

C. The 1983 version of the rule increased costs and delays by encouraging Rambo-like litigation tactics.

Yet another unfortunate result of the 1983 amendment is that it increased costs and delays by encouraging “the Rambo-like use of Rule 11 by too many lawyers,” as Professor Georgene Vairo explained.<sup>30</sup> Similarly, in their treatise on the Law of Lawyering, Geoffrey Hazard and William Hodes note that it was frequently said by critics of the 1983 rule that it “has been a major contributing factor in the rise of so-called ‘Rambo tactics’ and the breakdown of civility and professionalism.”<sup>31</sup>

Representative of a view many shared at the time, one court in 1991 bemoaned the incentive the rule provided to litigators “to bring Rule 11 motions and engage in professional discourtesy, preventing prompt resolution of disputes, the trial court’s primary function.”<sup>32</sup> Another emphasized the distraction that the volume of satellite litigation over sanctions motions produced, commenting that “[t]he amendment of Rule 11 ... has called forth a flood of ... collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves.”<sup>33</sup> The sentiment was widely felt. The Federal Judicial Center’s 1991 study found that more than

<sup>26</sup> *Id.*

<sup>27</sup> THIRD CIRCUIT TASK FORCE REPORT, *supra* note 9, at 65.

<sup>28</sup> ELIZABETH C. WIGGINS & THOMAS E. WILLGING, RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (Fed. Jud. Cir. 1991) (hereinafter “FJC 1991 Study”).

<sup>29</sup> *Id.* at 15.

<sup>30</sup> Georgene M. Vairo, Rule 11 and the Profession, 67 Fordham L. Rev. 589, 647 (1998).

<sup>31</sup> 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).

<sup>32</sup> *Morandi v. Texport Corp.*, 139 F.R.D. 592, 594 (S.D.N.Y. 1991).

<sup>33</sup> *Hot Locks, Inc. v. Ogh La La, Inc.*, 107 F.R.D. 751, 751 (S.D.N.Y. 1985).

half of the federal judges and lawyers surveyed thought that the 1983 version of Rule 11 made the problems of incivility among lawyers much worse.<sup>34</sup> The findings of the 1992 survey by the American Judicature Society showed that even higher percentages of lawyer respondents believed the 1983 version of the rule put great strain on relations among lawyers.<sup>35</sup>

In light of the rulemakers' professed desire in 1983 to improve the efficiency of civil litigation process, it is ironic that by encouraging Rambo-litigation tactics by lawyers during this unfortunate decade the 1983 version of Rule 11 had the effect of increasing costs and delays and impeding efficient merits resolution of cases.

D. The 1983 version of Rule 11 was not an effective means for reducing cost and delay and abusive litigation activity.

Finally, and independently of the unintended consequences the rule's amendment produced, the empirical evidence also shows that there is little reason to put faith in the assertion that the 1983 version of Rule 11 was effective in addressing the perceived cost, delay and abuse problems that prompted reformers to act. A 1991 Federal Judicial Center study revealed that few judges polled thought the 1983 version of the rule was "very effective" in deterring groundless pleadings.<sup>36</sup> The Federal Judicial Center's 1995 study of Rule 11 similarly found that most federal judges and lawyers opposed to returning Rule 11 to its 1983 version.<sup>37</sup> As will be seen below, a more recent study (in 2005) found even higher levels of consensus among judges that the 1983 version was not an effective means for reducing costs, delays and addressing abusive litigation conduct. Instead, what judges and others in the profession report is that separate procedural tools, including active judicial management of cases and expeditious rulings on motions to dismiss at the pleading stage or for summary judgment, are much more effective for dealing with the problems of cost and delay and groundless litigation.

### III. ABANDONMENT OF THE 1983 VERSION AND ITS REPLACEMENT BY THE 1993 AMENDMENTS TO RULE 11

In the years after the 1983 amendments of Rule 11 went into effect, criticisms of it grew in volume and intensity. By 1989, the Advisory Committee could not ignore the criticisms any longer. The Advisory Committee commissioned a second study by the Federal Judicial Center to evaluate the rule. Then, in the summer of 1990, the committee put out a "Call for Comments" from the bench and bar. That produced more criticisms and suggestions than the committee had ever received before in its half-century existence. One of the primary criticisms lodged was that the 1983 version actually made the problem of costly litigation worse because of all of the satellite sanctions litigation unrelated to the merits of the underlying case. A second frequently voiced complaint was that the 1983 rule was applied nonuniformly and inconsistently by judges. A third and fourth theme echoed over and again was, respectively, that the rule

<sup>34</sup> FJC 1991 Study, *supra* note 28 at 9-10.

<sup>35</sup> AJS 1992 Study, *supra* note 19, at 964.

<sup>36</sup> FJC 1991 Study, *supra* note 28.

<sup>37</sup> John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure 2 (Fed. Jud. Ctr. 1995) (hereinafter "FJC 1995 Study").

disproportionately hurt civil rights plaintiffs and their counsel, and that the rule worsened civil relations among lawyers.<sup>38</sup>

In February 1991, the committee held public hearing in which testimony from judges, lawyers and academics was taken. The criticisms had a powerful effect on the committee, which promptly issued an interim report that concluded that “in light of the intensity of criticism” the process of possible revisions should not be delayed.<sup>39</sup> The criticisms of the 1983 version of Rule 11, the Advisory Committee concluded, “have sufficient merit to justify considering specific proposals for change.” Accompanying its 1992 recommendation that the rule be amended again to remedy the prior revisions made, the Advisory Committee commented that among its many unfortunate effects the 1983 version of Rule 11 impacted plaintiffs more frequently and severely than defendants; all too often resulted in the imposition of monetary sanctions, which had the effect of turning the rule into a *de facto* “cost shifting” rule, a result that incentivized lawyers to abuse the sanctions rule; occasionally proved problematic for those asserting novel legal theories or claims for which more factual discovery was necessary; disincentivized lawyers from backing off of positions they could no longer support; and sometimes caused conflicts between attorneys and clients and, more frequently, among lawyers.<sup>40</sup>

In light of their concerns, the rulemakers amended the rule in 1993 to ameliorate the documented effects of the prior version. What is most critical to point out here is that, in backing away from the 1983 version, the rulemakers did not regress to the pre-1983 rule but instead sought “to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than Rule 11 motions.”<sup>41</sup> Said more simply, the rulemakers improved upon the rule so that the rampant and abusive Rule 11 motion practices were curtailed while ensuring that the rule still could deter unwanted litigation practices.

One of the key changes in 1993 was to replace the mandate that sanctions must be imposed if a violation of the rule is found with a grant of discretion to federal judges to decide when to impose sanctions, and to what extent. Additionally, if sanctions were to be imposed, the 1993 amendments emphasized that the purpose of sanctions is deterrence, not compensation. This latter reform was significant because it was designed to discourage the incentive that the prior rule created to seek sanctions for monetary gain.

A further, key reform in 1993 was the addition of what is known as the “safe harbor” provision which protects against the imposition of sanctions if the filing alleged to be sanctionable is withdrawn in a timely manner. The safe harbor does not protect against court-imposed sanctions (or from the various other rules, statutes and disciplinary authorities beyond Rule 11 that can be invoked to deter and punish counsel who act wrongfully in civil litigation). Nevertheless, the addition of the safe harbor has been credited with successfully reducing the

<sup>38</sup> See generally VAIRO, RULE 11 SANCTIONS, *supra* note 4, at 15-20.

<sup>39</sup> *Id.* (citing sources).

<sup>40</sup> *Id.*

<sup>41</sup> Letter from Leonidas Ralph Mecham to Hon. F. James Sensenbrenner, Jr., July 9, 2004 at 2 (addressing a prior version of the legislation now before this Committee).

incidence of abusive Rule 11 sanctions practice, a salutary result felt especially by those claimants who were impacted most severely by the 1983 rule.<sup>42</sup> The addition of the safe harbor is also significant because it fundamentally alters one key problem observed with the 1983 version of Rule 11: namely, that it had the effect of disincentivizing the withdrawal of sanctionable filings because, as the Advisory Committee put it, “parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”<sup>43</sup>

Beyond these specific points, experience since 1993 has shown that the current rule works admirably well, and has engendered little complaint. The evidence shows that the rate of filing of sanctions motions has dropped off considerably post-1993. While lawyers are still sanctioned for wrongful conduct under Rule 11, there is no longer a scourge of frivolous Rule 11 motions being filed.<sup>44</sup> At the same time, this drop off in meritless Rule 11 motion practice has not been accompanied by an increase in groundless litigation practices. To this point in particular, evidence gathered by several researchers, including Danielle Kie Hart, demonstrate that after the current version of Rule 11 went into effect in 1993, there was an increased incidence of sanctions being imposed under other laws, including 28 U.S.C. §1927 and pursuant to the court’s inherent powers.<sup>45</sup> Meanwhile, Rule 11 has continued to be used as a means of regulating wrongful lawyer conduct that contravenes the rule. Consider, for instance, the data from one of the most active federal judicial districts. In the Southern District of New York, in the same time period that there were slightly fewer than two hundred §1927 motions for sanctions, there were nearly twice as many Rule 11 motions sought.<sup>46</sup> This one example, which typifies the patterns found in other districts, underlines that both Rule 11 and other existing sanctioning and disciplinary law are available for addressing wrongful lawyer conduct. Finally, as I discuss further in the concluding section, we must also be mindful that beyond sanctions rules and laws, other—and far more effective—tools exist for dealing with cost and delay in litigation and are regularly employed by courts in managing their dockets.

Judges and lawyers overwhelmingly report that they oppose attempts to restore Rule 11 to its 1983 form. The Federal Judicial Center’s 1995 study of Rule 11 showed that a majority of judges and lawyers are opposed to amending Rule 11 to bring back the 1983 version of the rule.<sup>47</sup> Then a 2005 survey conducted by the Federal Judicial Center even more starkly illustrated the strong support within the profession that the current version of Rule 11 enjoys.<sup>48</sup> More than 80% of the 278 district judges surveyed shared the view that “Rule 11 is needed and it is just right as it stands now.” An even higher percentage (87%) preferred the existing rule to the

<sup>42</sup> Charles Yablon, *Hindsight, Regret and Safe Harbors in Rule 11*, 37 Loy. L.A. L. Rev. 599 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

<sup>43</sup> Advisory Committee Note, 1993 Amendment, *reprinted in* 146 F.R.D. 577, 591 (1993).

<sup>44</sup> See generally VAIRO, RULE 11 SANCTIONS, *supra* note 4, at 36-37.

<sup>45</sup> Danielle Kie Hart, *And the Chill Goes On: Federal Civil Rights Plaintiffs Beware: Rule 11 Vis-à-vis 28 U.S.C. 1927 and the Court’s Inherent Power*, 37 Loy. L.A. L. Rev. 645 (2004), in Symposium: Happy (?) Birthday Rule 11, Loy. L.A. L. Rev. (Winter 2004).

<sup>46</sup> *Id.* at 661 (Table 1).

<sup>47</sup> See *supra* note 37.

<sup>48</sup> 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 (Fed. Jud. Ctr., 2005) (hereinafter “FJC 2005 Report”).

1983 version. Equally strong support (85%) existed for the safe harbor provision in Rule 11(c), while more than 90% opposed changing the rule to make the imposition of sanctions mandatory for every Rule 11 violation. Rather than citing to specific sections of that report, I include below a link for the Committee to access these, and many other relevant, findings from that 2005 survey.<sup>49</sup>

#### CONCLUDING COMMENTS AND OBSERVATIONS

There are many lessons to be drawn from the experience of the 1983 version of Rule 11. Perhaps one of the most important is that “premising modification [of Rule 11] on anecdotal information, rather than empirical data systematically gathered, analyzed and synthesized by experts, can have unintended and often detrimental consequences for judges, lawyers and parties,” as Professors Margaret Sanner and Carl Tobias have observed.<sup>50</sup> Instead of acting based on anecdote, this Committee has the opportunity to decide what course to follow in light of the extensive study and examination that has been done of the 1983 version of Rule 11.

That experiential evidence provides powerful reasons to anticipate that by returning to a model similar to the 1983 version of Rule 11 the proposed legislation would not address effectively the problems asserted to justify its passage. Even worse, the vast body of empirical evidence strongly suggests that the bill’s passage would negatively impact the administration of justice by again making it likely that Rule 11 would be abused. If this legislation is enacted, the 1983 experience shows that there is a real danger that Rule 11 would again be treated as a compensatory, fee-shifting rule, and thus a trigger for much of the same kind of unwelcome, inefficient and frivolous satellite litigation over sanctions that plagued the 1983-1993 decade. It is difficult to see how anyone who is concerned over litigation costs and abuses could support legislation that is likely lead to substantially greater litigation costs, abuses and delays.

Perhaps the direst concern raised by the prior experience with the rule is that the legislation, if enacted, may again usher in inconsistent and inequitable applications of the rule, with similar discriminatory effects to be felt by the same civil rights and employment discrimination claimants who suffered the most under the 1983 version of the rule.

Any decision by this committee to repeat the same mistake of the 1983 judicial rules committee in assuming a need for the proposed legislation is lamentable. That is especially so because there is no credible proof that problems with groundless litigation have gotten worse as a result of the 1993 amendments to Rule 11, despite bald assertions to the contrary.<sup>51</sup> Instead, the

<sup>49</sup> The report is available at [http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/\\$File/Rule1105.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Rule1105.pdf/$File/Rule1105.pdf).

<sup>50</sup> Margaret L. Sanner and Carl Tobias, *Rule 11 and Rule Revision*, 37 *Loy. L.A. L. Rev.* 573, 588 (2004), in Symposium: Happy (?) Birthday Rule 11, *Loy. L.A. L. Rev.* (Winter 2004).

<sup>51</sup> Of course, much of the problem with this discussion is that those who urge that we regressively return to the 1983 experience under Rule 11 make, with the same irresponsible reliance only on anecdote, wildly exaggerated claims regarding groundless litigation. Even leaving aside all that has been said about the failure of these regressive reformers to show that the 1983 version of the rule would adequately ameliorate these perceived problems, the most reliable evidence gathered by neutral observers does not support the assertions of rampant litigation costs and abuse that are frequently asserted.

Consider, as one important example, the recent closed-case study by the Federal Judicial Center of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. Emery G. Lee

continued imposition of sanctions against lawyers under the current Rule 11—as well as pursuant to other sanctions rules and statutes, and the judges’ inherent powers—contradicts the assertion that existing sanctions law is inadequate for regulating lawyer conduct in the federal courts.

Moreover, and even more critically, the Judicial Conference continues to monitor the state of civil litigation practice through its Standing Committee and Advisory Committees. It remains closely engaged in the effort to ensure the federal courts are run efficiently and fairly. Consider, as one important example, the major conference held last summer at Duke University that was organized by the Advisory Committee for the Civil Rules. That conference exemplifies the Advisory Committee’s serious focus on rulemaking and its commitment to solicit and receive input from the rich diversity of experience in the profession. Having heard concerns about costs, delays and burdens of civil litigation in the federal courts, the Advisory Committee designed the Conference, as its chair subsequently put it, “as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation.”<sup>52</sup> The result of these efforts was the production of a large body of empirical data, as well as much thoughtful commentary and discussions, by a diverse group of individuals and organizations.

One of the clearest messages the Committee took away from the Duke Conference was that participants (who represented a wide range of lawyers, business interests, judges and academics) believed that better utilization of existing tools was vital for effective case management and weeding out of nonmeritorious litigation. The Report of the Advisory Committee following the conference makes this point:

Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.<sup>53</sup>

Of course, there was also measured support expressed for revising some of the existing rules (with the discussion primarily focused on the rules governing pleading and discovery practice),

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III and Thomas E. Willging, Federal Judicial Center, *National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (2009). The researchers intentionally drew their sample to not include the kinds of cases in which discovery is rarely used. Instead, they sought to include every case that had lasted for at least four years and every case that was actually tried. The purpose of drawing the sample this way was to look at cases in which one would reasonably predict there would have been significant discovery. What the study showed, however, is that plaintiffs reported \$15,000 as the median total costs in cases that had at least some discovery. The corresponding figure for defendants was \$20,000. These findings are consistent with a prior FJC study completed in 1997.

There are many other high-quality studies to which one may refer, including the 2010 study by the nonpartisan National Center for State Courts, as well as to statistics reported by the government’s Bureau of Justice Statistics regarding case filings in both state and federal court. Time and space do not permit further discussion of this point. It is enough to say here that while problems with costs and delays in federal court remain a subject of reasonable discussion, the best empirical evidence provides no basis on which to credit the greatly exaggerated assertions often heard from regressive reformers.

<sup>52</sup> Report to the Chief Justice of the United States on the 2010 Conference on Civil Litigation, Submitted by the Judicial Conference Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, at 1.

<sup>53</sup> *Id.* at 5.

though even here most participants recognized that the existing procedural framework was fundamentally sound.<sup>54</sup> What may be most relevant, for present purposes, is that although the two-day conference was attended by more than two hundred observers and invited guests (a group which included many members of the business community and defense bar), not a single one of the participants expressed any support—either in oral statements made at the Conference or in their written submissions—for strengthening Rule 11 along the lines contemplated by the proposed legislation.

The lack of any serious discussion at the conference about amending Rule 11 is not the least bit surprising. Although there are certainly strong divisions within the profession over civil litigation reform, the well-known experience with the prior rule has produced remarkable agreement across the political spectrum that the rule committee's decision in 1983 was an "ill-considered, precipitous step," as Professor George Cochran once succinctly described it.<sup>55</sup> I urge this Committee not to take the same ill-considered, precipitous step backward in time to that unfortunate period.

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<sup>54</sup> *Id.* ("Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.")

<sup>55</sup> George Cochran, *The Reality of "A Last Victim" and Abuse of the Sanctioning Power, Rule 11 and Rule Revision*, 37 *Loy. L.A. L. Rev.* 691, 692 (2004), in Symposium: Happy (?) Birthday Rule 11, *Loy. L.A. L. Rev.* (Winter 2004).

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Mr. FRANKS. Thank you, Professor.  
Mr. Schwartz?

**TESTIMONY OF VICTOR E. SCHWARTZ,  
SHOOK, HARDY & BACON L.L.P.**

Mr. SCHWARTZ. Good morning and thank you for the invitation, Chairman Franks; Mr. Nadler, my home State Member; Mr. Scott; and Members of the Committee.

I guess lawyers can prove almost anything, but I am just going to get to the base of what actually goes on in real life.

I had a small client. Up in New Jersey, they have strong laws against frivolous claims. And she was barraged with lawsuits on dram shop acts. We found one where the fellow had stopped at numerous bars. His police report did not indicate that he stopped at her place of business. We filed a frivolous claim. She was compensated for the costs she endured. No more claims were filed against her that were phony at all. It was over. And they had strong sanctions against frivolous claims.

Frivolous claims are defined in the bill. These are not some weird hypotheticals. It is real serious stuff. You have to misstate facts, misstate law. There is no ambiguities at all. And under the current system, unfortunately, people who are engaging in this practice are not caught.

The 21-day safe harbor rule is unbelievable, but I will share with you just briefly how it works. Instead of filing a frivolous claim petition in court, you give it to the plaintiff's lawyer. You have to spend \$8,000-\$10,000 to write the motion. Then he can decide whether or not he wants to just dismiss the claim, and then 30 days later, he can file it again. The court does not even see it. So that system allows anyone, if they are unscrupulous, to game the system.

If the court actually hears a frivolous claim motion, under the current rules, it is basically a wrist slap, money going to the court, not the small business that Ms. Milito represents who now will see his or her insurance go up over a completely and totally baseless claim.

Our testimony shows that 95 percent of the judges believe that rule 11 had a positive effect on practice when the change was made. Three-quarters of them felt that the benefits of rule 11 outweighed their problems. When rule 11 was changed, all the checks and balances that we have on rules simply folded. The Supreme Court is the ultimate party to approve the rules, but as Chief Rehnquist said at the time, we really did not look at the merits of it. Earlier Chairman Smith quoted what Justice Scalia said, and that was that between somebody who is abused and an abuser, we are going to go with the people who are abused by this system and this rule change is wrong. And he was very prophetic because that is exactly what has occurred.

There is also a domino effect of rule 11. When the Federal rules change, State rules change. And as my testimony shows, in States—and it is printed there—States felt they had to change it because they want to have the same rules in the Federal courts, Mr. Forbes, as they do in the State courts to avoid forum shopping. So States, all of a sudden, were imprisoned with a rule that they did not like because the sanctions were not there. They had no problems that the professor spoke of in their State courts.

966 ends the 21-day game system and it puts penalties where they should go, on the lawyer who brings them, and the money that is lost to the small businesses who have suffered the problem of the system. It is their costs. And some of the businesses are not insured. One frivolous claim can put a small business right under after they pay for it, and they are weaponless to fight it.

There have been past, as Mr. Nadler says, considerations of prior LARA's, but we tried, and the people who drafted this learn from questions that were raised. The bill says, with respect to anything in civil rights, nothing in this act shall be construed to bar or impede the assertion of the development of new claims, defenses, remedies under State or Federal law, including civil rights laws. You could not be clearer than that.

There were federalism claims raised by some prior bills, and that has been addressed too.

I am just going to conclude with four things that have been asserted against the bill.

That LARA will prolong satellite litigation. After rule 11 in 1983 was enacted, there was a lot of litigation, but once it settled out, there was not a lot. And think of the alternative. A person has no weapon to stop a frivolous claim. In terms of basic risk-benefits in our society, which do you go with? Some litigation or no weaponry to stop a baseless claim that the President has talked about?

The sanctions will not impede justice. The rule works both ways.

And finally—and I have heard it so many times from my trial lawyer friends, plaintiffs lawyer friends, well, bring me more data to show me that it is really a problem. It is asking for a bucket of steam. As Ms. Milito says, most of these things occur with a demand letter. The frivolous claim never gets to court. Under the 21-day rule, basically the plaintiff's lawyer gets his money. It is disposed of and the frivolous claim never sees the light of day. We don't have any legal way to strike a demand letter. You can't do that. So this idea that it is not a problem because there are no great numbers of suits is just phony.

You have done a good job with this bill. It is really needed now. In this economy, the last thing we need is more businesses and others, individuals, hurt by frivolous claims.

[The prepared statement of Mr. Schwartz follows:]

**TESTIMONY OF  
VICTOR E. SCHWARTZ  
Partner  
Shook Hardy & Bacon, L.L.P.  
On behalf of  
The U.S. Chamber Institute for Legal Reform**

**Before**

**COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION**

**Regarding  
H.R. 966, THE LAWSUIT ABUSE REDUCTION ACT OF 2011**

**MARCH 11, 2011**

Chairman Franks, Ranking Member Nadler, and members of the Subcommittee, thank you for inviting me today to share my views regarding H.R. 966, "The Lawsuit Abuse Reduction Act of 2011" (LARA). There is a dire need for its enactment now.

By way of background, I have been an active participant in the development of tort law since I served as law clerk to a federal judge in 1965. I was a professor of law and dean at the University of Cincinnati College of Law. I practiced law on behalf of injured persons for fourteen years. I also served at the U.S. Department of Commerce under both Presidents Ford and Carter, and chaired the Federal Inter-Agency Task Force on Insurance and Accident Compensation. For the past 30 years, I have been a defense lawyer. I have co-authored the most widely used torts casebook in the United States, *Prosser, Wade & Schwartz's Torts* (12<sup>th</sup> ed., 2010).

I have had a deep interest in improving our civil justice system. Today, I have the privilege to testify on behalf of the U.S. Chamber Institute for Legal Reform. I wish to make clear that the views I am expressing today are my own and based on my academic and practice experience.

#### **The Problem of Frivolous Lawsuits**

The expression, "death by a thousand cuts," fits the problem of frivolous lawsuits. Most frivolous lawsuits are not high-ticket items, but relatively modest. As Ms. Milito of the National Federation of Independent Business (NFIB) will share with you today, they are brought against small businesses including mom-and-pop stores, restaurants, schools, dry cleaners, and hotels. Let's take an example that occurred to one of my clients. The client, who runs a successful Irish pub, called me because a barrage of frivolous claims threatened her business. An individual alleged that the pub served him alcoholic beverages when he was already inebriated. The individual drove while

intoxicated and was involved in a serious automobile accident. He sued the Irish pub. Police records showed, however, while he had listed numerous bars that he visited and enjoyed, he omitted the Irish pub from the list.

Working with the pub's local lawyer, we were able to get the claim dismissed and have the plaintiff's lawyer pay the legal costs generated by the frivolous claim brought by his client. Those costs were several thousand dollars. At the time, the state had a strong rule against frivolous claims. Unfortunately, that good ending is unlikely to occur in federal court today under Rule 11 of the Federal Rules of Civil Procedure. It is weak and many view it as virtually toothless. It encourages participants to game the federal civil justice system.

So, what happens today when a small business is hit with a frivolous claim? The defendant contacts his or her insurer (assuming that the small business actually has coverage for the type of lawsuit it is facing). The insurance company's counsel calls the plaintiff's lawyer, and suggests that there is proof that the plaintiff was never at the client's establishment. The plaintiff's lawyer responds, "Well, I know there is a dispute about this, and I have asked for \$50,000, but I think we can settle this for about \$10,000." The plaintiff's lawyer realizes that the cost to the insurer of defending the case will be more than \$10,000.

The defendant's insurer is then placed in a dilemma. It will cost several thousand dollars to defend the case and still more to prepare a separate motion for sanctions if it is to seek recovery of attorneys' fees and costs resulting from the frivolous claim. If the judge allows the case to go to a jury, and the jury renders a verdict above policy limits, the insurer could potentially be subject to a claim by its insured for bad faith if it does not cover the full award. If the insurer, realizing the legal trap it is in, settles such a case

and similar cases, insurance costs will increase. Because there is currently no swift and sound sanction against frivolous claims, this “death by a thousand cuts” will continue. The result over time is potentially hundreds of millions of dollars of unnecessary costs to small business and our Nation’s economy.

Earlier versions of LARA were considered in the 109<sup>th</sup> Congress. But, our economy was in a much better place then as compared to now. Today, our economy is more fragile. The need for Congressional action to stop frivolous claims is greater. As President Barack Obama observed in his State of the Union on January 25, 2011, “I am willing to look at . . . ideas to bring down costs including reform to rein in frivolous lawsuits.”

While the President was speaking of medical malpractice, as Ms. Milito of NFIB will share with you today, the real rainstorm of frivolous claims consists of the low ball, legal extortion claims aimed against small business.

#### **Why Rule 11 Does Not Work**

Under the current version of Rule 11, an individual or business has no effective recourse when hit with a frivolous claim. By “frivolous,” I mean a claim that is (1) presented for an improper purpose, such as harassment; (2) is not warranted by existing law or a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) has no basis in fact and is not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; or (4) involves denials of factual contentions not warranted based on the evidence. LARA does not alter the definition of a frivolous claim. Rule 11 also imposes a basic obligation on attorneys and unrepresented parties to undertake a reasonable investigation of the facts and law underlying a claim before filing it. Unfortunately, in

practice, the current version of Rule 11 permits attorneys to file the lawsuit first and try to back up their claims with law and fact later. There are three reasons why Rule 11 is ineffective and discourages those who are hit with a frivolous claim from seeking recovery of attorneys' fees and costs.

First, under the current rule's "safe harbor," after the defendant's lawyer prepares a motion for Rule 11 sanctions, he or she must first share it with the plaintiff's lawyer before filing it with the court. This must be a separate motion, in addition to the motion needed to dismiss the claim. The plaintiff's lawyer then has 21 days to withdraw the lawsuit without any penalty. Therefore, filing the motion for sanctions under Rule 11 may serve to only further increase the costs for a defendant.

Second, even if the plaintiff does not withdraw the claim, and the court finds that it is indeed frivolous, sanctions are entirely discretionary. The court may opt not to impose any sanction at all other than dismissing the case.

Finally, the current version of Rule 11 discourages judges from imposing sanctions for the purpose of compensating the party unfairly hit with a frivolous claim for its attorney's fees and costs. The rule provides that Rule 11 sanctions are "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Thus, a court may decide to fine the violating party in an amount that is paid into the court, but which does not make the defendant whole.

In sum, today, those that are subject to frivolous lawsuits are in a situation where their only assurance in seeking sanctions is that they will incur even more defense costs with an unlikely chance of compensation for their legal expenses.

**The Weakening of Rule 11:  
Unsound Policy Falling Between the Cracks of Correction**

The present, ineffective version of Rule 11 is a result of action taken almost two decades ago by the Federal Rules Advisory Committee, an extension of the federal judiciary that has the primary responsibility to formulate the Federal Rules of Civil Procedure. The Advisory Committee recommended weakening the rule despite the result of a survey it conducted of federal court judges, those who deal with the problem of lawsuit abuse on a day-to-day basis. That survey found that 95% of judges believed that the prior version of Rule 11, which had strict penalties against frivolous claims, had an overall positive effect on practice and procedure and should not be changed.<sup>1</sup> Three-quarters of those judges surveyed felt that the former 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.<sup>2</sup> 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."<sup>3</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> See *id.*

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 amendments in the form submitted."<sup>4</sup> 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."<sup>5</sup> Justices Scalia and Thomas went even 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."<sup>6</sup> Justice Scalia further noted:

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.<sup>7</sup>

The bottom line is that the Supreme Court corrective mechanism against unsound rule changes did not work in this instance.

**The Federal Rules Enabling Act:  
The Place for Final Correction Did Not Work in this Instance**

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<sup>3</sup> *Amendments to Federal Rules of Civil Procedure and Forms*, 146 F.R.D. 401, 523 (1993).

<sup>4</sup> *Id.* at 401 (1993) (transmittal letter).

<sup>5</sup> *Id.* at 505 (Statement of White, J.).

<sup>6</sup> *Id.* at 507-08 (Scalia, joined by Thomas, J.J., dissenting).

<sup>7</sup> *Id.* at 508.

Through the Federal Rules Enabling Act of 1934, Congress created a system where it delegated its constitutional power to make rules for federal courts to the Judicial Conference of the United States. The Judicial Conference's Federal Rules Advisory Committee formulates the Federal Rules of Civil Procedure. It is clear that Congress has a Constitutional mandate to maintain the federal courts in Article 1, Section 8. It has the ultimate authority to design Federal Rules of Civil Procedures and change proposals about the rules from the Federal Rules Advisory Committee. In the mid-1970s, it did so with respect to the Federal Rules of Evidence.

But under this system, Congress only has seven months to make a "correction."<sup>8</sup> Apart from matters of urgent immediate national concern, it is rare in 2011 that a bill can be passed by the Congress within seven months. Often, significant legislation that impacts the courts requires debate that can span one or more Congresses in order to reach consensus. 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.<sup>9</sup>

Shortly after the revised Rule 11 took effect, Congress attempted to repeal the Federal Rules Advisory Committee's action to weaken Rule 11.<sup>10</sup> By that time, some practitioners had already referred to the new Rule 11 as a "toothless tiger."<sup>11</sup> The

<sup>8</sup> 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).

<sup>9</sup> See H.R. 2979 and S. 1382, 103<sup>rd</sup> Cong., 1<sup>st</sup> Sess. (1993).

<sup>10</sup> *Attorney Accountability Act of 1995*, H.R. 988, § 4, 104<sup>th</sup> Cong, 1<sup>st</sup> Sess. (1995).

<sup>11</sup> 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").

repeal passed the House.<sup>12</sup> Those opposing the bill, however, felt that there had not yet been adequate time to determine the effectiveness of the amended rule in practice.<sup>13</sup>

Again, it is now almost two decades since the Federal Rules Advisory Committee acted to weaken Rule 11, and the problem of frivolous claims has only increased. We know the consequences that flow from the weakening of the Rule. They are adverse to our economy, especially in 2011.

Since Rule 11 was weakened, frivolous claims have led to higher health costs, job losses, and an almost total failure of attorney accountability. As officers of the court, lawyers should be accountable to basic, fair standards: they should be sanctioned if they abuse the legal system with frivolous filings.

**The Domino Effect of the Weakening of Rule 11:  
Many State Courts Followed the Fall**

For reasons of public policy, mainly to discourage forum shopping, many states tend to change their court rules when the federal rules change. This occurred with respect to the weakening of Rule 11, even when judges disagreed with that unwise change. For example, an Advisory Committee note following a 2000 amendment of Minnesota Rule of Civil Procedure 11.01 states:

Rule 11 is amended to conform completely to the federal rule. While Rule 11 has worked fairly well in its current form . . . , the federal rules have been amended to create both procedural and substantive differences between state and federal court practices. . . . On balance, the Committee believes that the amendment of the Rule to conform to its federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and federal practice unless compelling local interests or long-entrenched reliance on the state procedure makes changing a rule inappropriate.

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<sup>12</sup> Rule No. 207, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. (Mar. 7, 1997) (passed by a recorded vote of 232-193). The Senate did not act on H.R. 988.

<sup>13</sup> See H. Rep. No. 104-62, at 33 (dissenting views).

LARA can bring about welcome change by providing a model for state courts.

**What H.R. 966 Does and Why it is Sound**

Judiciary Committee Chair Lamar Smith of Texas has introduced a vitally needed bill that restores Rule 11 to its strength and purpose prior to the 1993 changes. The Lawsuit Abuse Reduction Act of 2011, H.R. 966, reverses the 1993 amendments that made sanctions discretionary rather than mandatory. It also eliminates the 21-day "safe harbor" that allows unscrupulous lawyers to game the system. Finally, LARA replaces language in the rule that discourages judges from making victims of lawsuit abuse whole with language that fully authorizes judges to order a party that brings a frivolous claim to pay the defendant's attorney's fees and costs.

**H.R. 966 Addresses Past Concerns and Focuses Like a Laser on Frivolous Claims**

When I last testified about this issue in 2004, a bill that I will call "old LARA," raised several concerns from members of the full Committee.

First, there were questions about whether the bill could stifle legal developments in the area of civil rights. The drafters of the new LARA could not be clearer. It will not do so. The bill states a rule of construction, "Nothing in 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."

Second, there were some members who raised federalism concerns that old LARA impeded states rights because it was to apply in state courts in cases involving "interstate commerce." Regardless of the merits of such concerns, new LARA applies solely in federal courts. As noted earlier in my testimony, by tradition many states change their civil procedure rules in accord with changes in the federal rules, but such changes are purely voluntary.

Third, old LARA addressed forum shopping and limited where cases could be filed. This provision had merit, but out of deference to those Members who raised federalism concerns about this provision and those who also questioned its wisdom, the drafters of the new LARA removed that provision. The result is that the new LARA focuses like a laser on helping to abate the problem of costly, frivolous claims filed in the federal courts.

#### **Four Incorrect Arguments Against LARA**

There are four repeated incorrect arguments raised against LARA.

##### **1. LARA Will Not Create Prolonged Satellite Litigation**

The first argument is that LARA will create unwarranted and inefficient satellite litigation over whether a claim is frivolous. That is untrue.

While there will be some degree of litigation over the imposition of sanctions, this Subcommittee should consider the alternative. The alternative is a system in which an individual or business hit with a lawsuit that has no reasonable basis in law or fact does not have an effective means to recover thousands of dollars in defense costs to have the case dismissed and is forced to settle regardless of the merits. I submit that this is a far greater injustice than providing litigants with the opportunity to determine whether a filing is frivolous or not.

It is vital that Congress, in examining this issue, look at the total picture in terms of costs and benefits. The simple fact is that with stronger Rule 11 sanctions, there is substantially more risk involved in making a frivolous claim because a claimant cannot just withdraw the frivolous claim without consequence. This will produce an overall result of fewer frivolous lawsuits being attempted. Any increase in the level of satellite litigation over whether a claim is frivolous would impact only that subset of claims upon

which reasonable minds could differ. It is also important to appreciate that invoking Rule 11 is at the parties' discretion; they will not expend the time and cost to pursue such sanctions unless they truly believe sanctions are warranted. Therefore, the total effect would be to reduce wasteful litigation.

## 2. 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 the ordinary consumer. This is simply not true. If we look to the words of Rule 11 of the Federal Rules of Civil Procedure and congruent state rules, frivolous claims include those "presented for improper purpose" or to "harass or cause unnecessary delay or needless increase in the cost of litigation."<sup>14</sup> They also include claims that lack a factual or evidentiary basis.<sup>15</sup> 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."<sup>16</sup> The very words of Rule 11 allow for growth of the law. H.R. 966 keeps the faith with respect to that public policy goal.

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<sup>14</sup> Fed. R. Civ. Proc. 11(b)(1).

<sup>15</sup> *Id.* 11(b)(4).

<sup>16</sup> *Id.* 11(b)(2). Some have argued that the manner in which judges implemented the pre-1993 version of Rule 11 disproportionately impacted civil rights plaintiffs. Even if this was initially the case, 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.

### 3. 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 vote for LARA. I call that the “bucket of steam” argument. Bring me a bucket of steam and I will support the bill. It simply cannot be done. This is why.

As every small business knows, frivolous claims begin with a demand letter. “My client fell in your restaurant. He was seriously injured . . .,” and so it goes. The small business gives this letter to his or her insurer. As I have indicated, the insurer often settles the baseless claim because going to court will cost more than the ultimate demand. There is no practical way to keep track of the number of these demand letters or an easy way to place legal sanctions against baseless demand letters. Demand letters are the rattlesnake’s nest of frivolous claims. You can hear them rattle, but you do not see them in court. A strong 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 lawsuit.

Some federal judges may also share with you that they rarely see a frivolous claim in their courts and understandably so. Not only do many such cases settle before a case is even filed, as I have discussed with you, the current Rule 11’s “safe harbor” allows the plaintiff’s attorney to withdraw the claim before it is ever considered in court.

A wise Member of Congress once said to me, “when an issue arises about small business, I do not turn to data, I turn to my small business constituents. If they say it’s a problem, I regard it as a problem.” As Ms. Milito of NFIB will tell you, and as I believe

your small business constituents, will tell you, there is a need for strong and reliable sanctions against those who bring frivolous claims.

**4. The "LARA Just Helps Business" Argument**

The final argument against LARA is that it just benefits business. Benefits to business are not a bad thing, especially in our current economy, but LARA will not benefit business alone. It applies to all parties to a lawsuit and sanctions both frivolous defenses as well as frivolous claims. It applies to individuals in your districts who were forced to hire a lawyer to defend against a frivolous lawsuits and who had almost no chance of recovering the thousands of dollars in attorneys' fees and court costs likely spent to have the claim dismissed.

\* \* \*

Mr. Chairman, in sum, as part of our national effort to promote our economy, jobs, eliminate needless wasteful costs, and restore very basic fairness to stop lawsuit abuse, LARA needs to be enacted now. Thank you again for inviting me to testify today and I look forward to answering any questions that the Subcommittee members may have.

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Mr. FRANKS. I want to thank the witnesses for their testimony. I will now begin the questioning by recognizing myself for 5 minutes.

Ms. Milito I will begin with you, if I could. As you know, lawsuits affect the costs and availability oftentimes of liability insurance for small businesses, and this is true, obviously, for meritless lawsuits because in many instances it will be cheaper for a small business to settle a meritless case than to defend against it in court.

In NFIB's experience, have the effects lawsuits have on the costs and availability of liability insurance forced small businesses to close their doors or not be able to expand or not be able to hire additional employees?

Ms. MILITO. Thank you. That is a good question, and the answer is yes and our experience has shown that. In a poll NFIB conducted, nearly one-quarter of small employers reported they had either been sued or credibly threatened with a lawsuit. As Mr. Schwartz pointed out, the precise dimensions of the frivolous lawsuit problem are hard to pin down, but if you ask any NFIB member whether frivolous lawsuits are a problem, they will tell you, yes, they are because even if their business has not been sued or threatened with a lawsuit or demand letter, they know a business that has.

And I think it is particularly problematic that this poll conducted by NFIB showed that over 20 percent of small business owners reported that they spend more time on liability problems and potential liability problems than such vital business activities as obtaining or repaying business loans, evaluating the competition, or looking for ways to cut costs.

I was on the phone yesterday with a member. She has not taken a paycheck out of her business for herself in over 6 months because she is concerned about meeting the payroll for her two employees. She is concerned about paying the rent. A \$5,000 settlement would put her under because that is her rent. That is her weekly payroll. So these small dollar lawsuits and demands do affect our members.

Mr. FRANKS. Thank you.

Mr. Schwartz, I am just one of your many admirers, and I wanted to ask you a—sir?

Mr. SCHWARTZ. I always have trouble with that.

Mr. FRANKS. No, no.

Mr. SCHWARTZ. But thank you, sir.

Mr. FRANKS. With the prior versions of LARA, opponents have often expressed deep concern about the act's potential to impede just causes such as landmark developments in civil rights cases because at that point in history, perhaps the legal claims might have been deemed frivolous. Would LARA, if it was in effect in the 1950's, have stifled the civil rights movement and led to the dismissal of cases such as *Brown v. Board of Education* or cases like that?

Mr. SCHWARTZ. Under the bill you put together, sir, absolutely not. The bill is crystal clear that nothing in the act is going to be there to impede the assertion or development of new law, including civil rights laws. So that is not an argument against this bill. The development of new law is right there and not blocked in any way.

Mr. FRANKS. Well, as you know, Mr. Schwartz, nothing in LARA changes the legal standard that Federal district courts apply to determine whether a litigant has violated rule 11. It is really simply

about making sanctions mandatory and clearly stating what will be included in the monetary penalty.

In the past some have, as you know, characterized these changes as draconian and argued that they will lead to delay, increased costs, and satellite litigation. And you touched on that partially, but would you expand and respond to those arguments?

Mr. SCHWARTZ. Absolutely. The criteria of rule 11 are tough as to what a frivolous claim is. We are talking about claims that have no basis in fact, and a Federal judge is going to have to make a determination about that. And I worked for a Federal judge for 2 years, a trial judge, and he was not going to find a claim has no basis in fact unless it had no basis in fact.

As far as satellite litigation is concerned, some will arise, but think of all the claims that will not be filed if there is a strong deterrent against filing them. Right now, there is none. It is paper-mache, and that deterrent will save legal costs because the cases just will not be filed against businesses and individuals when there is no basis in fact.

Mr. FRANKS. Thank you very much. My time is about up. So I am going to refer to the Ranking Member here for questions.

Mr. NADLER. I thank you, Mr. Chairman.

Professor Hoffman, during the decade that the 1983 version of rule 11 was in effect, the version that this bill would in effect bring back, at least a quarter of all cases on the Federal civil docket were burdened by rule 11 proceedings that did not result in sanctions. Based on our experience with the 1983 version of the rule and, for that matter, our experience with the 1993 revision of the rule, will this bill lead to less litigation or more litigation and why?

Mr. HOFFMAN. Thank you for your question.

As I indicated in my prepared remarks, I am concerned that this bill will lead, as the evidence shows compellingly, to a great deal more cost and delay, fostering additional abuses.

And if I could expand on that to speak even further to your point, one of the things that is astonishing is when you survey the Federal judges who are in charge of applying the rules, who were in charge back in '83, who are in charge today after the '93 amendment went into effect in applying the rules, the same Federal judges that Mr. Schwartz was speaking about a moment ago—and when they are polled—these are the people who are on the front lines who are dealing with these cases—the numbers are astonishingly against this bill.

So just to give a few of these, all of which are—and more—in my prepared statement, when asked in 2005 by a survey from the esteemed Federal Judicial Center, more than 80 percent of 278 Federal district judges agreed with this statement: rule 11 is needed and it is just right as it stands now. An even higher percentage, 87 percent, preferred the existing rule to the 1983 version, the version on which this bill is based.

Equally strong support, 85 percent, existed for the safe harbor provision that is now in the rule, while more than 90 percent oppose changing the rule to make the imposition of sanctions mandatory for every rule 11 violation.

Mr. NADLER. Okay, thank you.

Now, when the advisory committee amended rule 11 in 1993, they gave the courts discretion to impose sanctions and noted that the purpose of sanctions is to deter bad conduct, not to reward the other party. Why did they give the court this discretion, which this bill would take away? And why did they make sanctions about deterrence rather than about compensation?

Mr. HOFFMAN. So, look, let me start with the business of mandatory. First, it is vital that district courts have discretion to apply not just rule 11 but all of the critical rules, all of which are in the toolbox, and this notion, again, that was suggested that there are no other alternatives for controlling and managing litigation costs and managing the litigation system is just utterly contrary to the actual experience of litigants and judges every single day. Whether it be rule 8 on pleadings or rule 11 on sanctions or rule 12 on motions to dismiss or rule 56, we know that district judges are appropriately the ones at the front lines to handle these things, and that is exactly why the discretion needs to be there.

On compensation, as I have already said in my remarks, we know that the focus on compensation that wasn't, again, the intent of the '83 rulemakers and wasn't even in the bill was something that utterly deluged and was one of the key problems for the avalanche of satellite litigation over sanctions that followed. So we know that the monetary focus is what is drawing there. And that is why I say in my prepared remarks the concern should be even greater where this bill specifically mentions compensation as a goal to be achieved. It is offering it on a silver platter.

Mr. NADLER. Thank you.

And what are the advantages of the 21-day safe harbor provision of rule 11? Has that helped to reduce satellite litigation?

Mr. HOFFMAN. An enormous amount. The studies show that it helps across the board, though it helps especially with civil rights claims.

And actually if I could just speak to that also for a moment. This notion that the bill has in the end of it that it is going to protect against assertions of novel claims and that somehow, therefore, we can just utterly dismiss all of the strong empirical evidence on discrimination from the '83 bill is utterly misguided. We know that there were all kinds of reasons why those civil rights claimants—

Mr. NADLER. And could you comment on Mr. Schwartz's comments on the safe harbor provision that people just do this, in effect, out of court and this will prevent that?

Mr. HOFFMAN. And so that is another interesting point. If in fact, as both of the other witnesses indicated, that one of the serious problems here is that these problems happen at the demand letter stage right before there is litigation, then rule 11 has no application whatsoever to that. Right? Those problems, if they exist, will continue to exist independent of this rule. The value of the safe harbor—

Mr. NADLER. And getting rid of the safe harbor provision will not affect that?

Mr. HOFFMAN. No, because it is before there is a lawsuit. In other words, that is just to say rule 11 is inapplicable because it is prior to a lawsuit, which is an interesting point.

Mr. NADLER. Let me ask Mr. Schwartz to comment on that.

Mr. SCHWARTZ. Well, you have to connect the dots, Mr. Nadler. The fact that the demand letters are capitulated to is because there are not really strong rules against frivolous claims.

Mr. NADLER. No, no, no. But Professor Hoffman's point is that the question of the safe harbor provision is irrelevant to a demand letter sent before the litigation commences because rule 11 in any form can't reach that conduct because it isn't part of the lawsuit.

Mr. SCHWARTZ. Well, in the life that I have led, the two are connected because if a person knows that he has a weapon to sanction the lawyer who has brought the frivolous claim, they are not going to capitulate to the demand letter and make a settlement, and lawyers calculate in their own mind in the real world how much it is going to cost to defend—

Mr. NADLER. Let me just ask Professor—

Mr. SCHWARTZ [continuing]. And then they considerably lower what is in their complaint and that is how they game the system.

Mr. NADLER. And Professor Hoffman, would you comment on that? And then my time has expired.

Mr. HOFFMAN. So just to wrap up on that, two points there. So, one, the point there is that rule 11 has no application at all. It cannot be used as a sword, and although it may serve as this potential deterrent effect that Mr. Schwartz is talking about, that turns out to only be true to the extent that you have any risk at all of being sanctioned. And of course, if everything settles out of court, there is no risk whatsoever there.

The other quick point to make is I wanted to commend Chairman Franks for your memo of Thursday, March 10, and one of the points that you make there is important—again, I commend you for it—pointing out that nothing LARA changes the current standards by which frivolous lawsuits are judged. And so when Mr. Schwartz talks about this deluge and the paper-mache that exists in the current rule, none of that is addressed. And so one must assume, therefore, that the rule is fine, which is the underlying presumption that is obviously there.

Mr. NADLER. Thank you very much.

I yield back.

Mr. FRANKS. Thank you, Mr. Nadler.

And I now recognize for 5 minutes Mr. Forbes.

Mr. FORBES. Mr. Chairman, thank you for this hearing today.

Mr. FRANKS. Mr. Forbes, I don't think your microphone—

Mr. FORBES. I am sorry. Can you hear now?

I just wanted to thank our witnesses. We have a very talented panel and I appreciate your written comments.

Mr. Chairman, I would like to just kind of make some comments about what I have heard both from the dais here and from the panel.

First of all, this is not about civil rights claims. I mean, you know, basically when you cut to the chase on this, we know what this is about. If you like the plaintiffs lawyers, you don't like this legislation. If you support small- and medium-sized businesses who hire most of our constituents, you like this legislation.

One of the things I heard the Ranking Member mention is that this was a solution in search of a problem, but then I heard Mr. Hoffman say that this was not the right solution, that there is a

problem, it is just not the right solution. I remember when we brought gang legislation before this very Committee, the first comment that was made was that that was a solution in search of a problem. Where is the problem? Nobody raises the fact today that we don't have a problem with gangs and that we need to do something about it.

The other thing, Mr. Chairman, that I would just say is oftentimes—Ms. Milito, the one thing I disagree with you on is I don't think it is just the \$5,000 settlements that we are talking about. We talk about those a lot, but the real world is this. Mr. Schwartz is exactly right. We don't hear from the people that this really impacts the most. We don't get them walking in here because they are working. They are home and it is very difficult for them to come up here and sit where you are sitting and make those claims. Let me give you a real-world case that brings this home, and it wasn't a \$5,000 claim.

Several years ago, I had a constituent of mine that came to me and they were wrapped up in one of these frivolous suits. It was a tort situation that they had absolutely no liability in at all, and they were brought in as an additional party defendant to that case. They came in and they had the demand letter. They contacted the attorney and said we don't have any liability. We weren't even involved in the contract that you are talking about in the tort liability that took place. The plaintiff's attorney said, no, no, we are continuing to move forward. We are bringing all of these individuals in as party-defendants.

So they did what most small business people would do that you represent, and they said, well, we are going to turn it over to our insurance company because we have been paying all the premiums on our insurance company and let them defend it. Well, unfortunately for them, the insurance company was the reciprocal, which had filed bankruptcy and therefore wasn't there to defend them.

They then approached me and I said you need to go to a law firm and have an analysis done and see what they say. They brought me the letter back that I read, and here is the analysis. The law firm said you are absolutely right. You have zero liability in this case. We will win this case if you go to court, but it will cost you \$500,000 to defend this case. The claim is \$300,000 that is being made to you. What do you do if you are a small businessman?

And there is no disincentive for them to bring those cases and to push it and to try to get those businessmen to come up, and if they don't settle for \$300,000, it is \$50,000 or it is \$100,000, but it is oftentimes even more than that \$5,000.

So, Mr. Chairman, I think Mr. Schwartz is right. I think this is a huge incentive to stop those frivolous cases and to strike a balance that we need if we are really serious about putting America back to work and hiring and jobs instead of staying in the courtroom.

And I yield back.

Mr. FRANKS. Thank you, Mr. Forbes. I am glad you came by today.

Now I will recognize Mr. Scott from Virginia for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman.

Ms. Milito, you indicated—could you remind me what portion of your members had suits filed against them?

Ms. MILITO. In a poll NFIB conducted—and again, this was not just of NFIB members, but of all small business owners—nearly a quarter of small employers reported they had either been sued or credibly threatened with a—

Mr. SCOTT. And how many of your small businesses filed suits against somebody else?

Ms. MILITO. I do not have that information.

Mr. SCOTT. Is it fair to say that most, at one time or another, have filed suit, collection or some other kind of lawsuit? And is the fact that a suit has been filed evidence that it is necessarily frivolous?

Ms. MILITO. You are saying suits that a small business owner might file? Is that what you are asking?

Mr. SCOTT. Or might be filed against them. The fact that it is filed against them does not mean it is necessarily frivolous.

Ms. MILITO. No, you are correct. You are correct.

But what I can tell you—

Mr. SCOTT. And that small businesses file suits against other small businesses.

Ms. MILITO. Our members don't like to go court. Period. They don't like to have suits filed against them, and they don't like to file lawsuits. They don't want to get involved in litigation. Period.

Mr. SCOTT. We have heard comments about \$5,000 cases. How many of these are subject to rule 11 because they would be in Federal court?

Ms. MILITO. Well, as Mr. Schwartz—first of all, certainly our members are sued in Federal court. The asbestos litigation story that I referred to—most of those claims are occurring in Federal court. So in those yellow page lawsuits, a lot of those are in Federal court. And I do believe LARA would reach those claims.

And as Mr. Schwartz pointed out in his written statement too, many of the States' rules of civil procedure do mimic or change when the Federal rules change. So I think it would have a deterrent effect and aid small businesses.

Mr. SCOTT. The \$5,000 cases would not be affected by rule 11 in Federal court.

Ms. MILITO. Well, these aren't \$5,000 claims. These are \$5,000 settlements. The claims can be much more.

Mr. SCOTT. Thank you.

Mr. Hoffman, comments have been made about civil rights litigation. The bill has this savings clause in it that says that nothing in this act shall be construed to bar or impede civil rights cases. The present standard in rule 11 would not be affected. Is that right?

Mr. HOFFMAN. That is correct.

Mr. SCOTT. And if civil rights cases are adversely affected, this wouldn't help that situation. Is that right?

Mr. HOFFMAN. That is right, and of course, remember it has no application whatsoever when the issue that is allegedly sanctionable isn't the bringing of a novel legal theory. For instance, if the claim is you didn't do you right factual investigation, that provision has no application whatsoever.

Mr. SCOTT. And is changing existing law—if you are asking for a change in existing law, is that necessarily exempt from a sanction or is it up to the judge?

Mr. HOFFMAN. Correct. The question of whether that is sanctionable is not saved by that final provision that is in there. That is right. It is not dispositive, if that is your question.

Mr. SCOTT. But the judge gets to decide when it is frivolous and when it is not frivolous.

Ms. MILITO. The judge gets to decide whether or not rule 11 has been violated.

Mr. SCOTT. And so in 1954 when the law was fairly clear that separate but equal was the law of the land, could a court reasonably conclude that a lawsuit to change that would be frivolous?

Mr. HOFFMAN. Certainly.

Mr. SCOTT. And in the 1960's when the law of the land was that Blacks and Whites couldn't marry, that was well established law. Is that right?

Mr. HOFFMAN. That is correct.

Mr. SCOTT. Would such a filing to try to change that law be up to the judge to determine whether it was frivolous or not?

Mr. HOFFMAN. Correct.

Mr. SCOTT. In an automobile accident, just a routine automobile accident, when a filing is made, my experience is that what you get back is a general denial of liability. In a case of a rear end automobile accident, when you get a general denial, would the defendant be subject to sanctions for not admitting liability?

Mr. HOFFMAN. So rule 11 technically applies to all pleadings, all motions, and all other papers that are filed by lawyers and their parties in Federal court.

Mr. SCOTT. And so if you get a general denial and you get in this rule 11 litigation that the gentleman from New York has talked about, would the next filing be I need attorney's fees for your general denial?

Mr. HOFFMAN. The rule would technically apply to them as well. Mr. Scott, it is one of the most astonishing things that when critics talk about the deluge of inappropriate lawyering, somehow it is always a one-way street and there is no suggestion ever even considered that the defense lawyer, who is billing by the hour, might have some incentive to increase costs and delays unnecessarily.

Mr. SCOTT. And the attorney's fees, if this is applied against the defendant, would be mandatory. Is that right?

Mr. HOFFMAN. The rule would apply equally for plaintiffs and defendants.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. FRANKS. Well, with that, I want to thank all of our witnesses for their testimony today.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

And without objection, all Members will also have 5 legislative days to submit any additional materials for inclusion into the record.

And with that, again I thank the witnesses and the Members,  
and this hearing is adjourned.  
[Whereupon, at 10:59 a.m., the Subcommittee was adjourned.]

# A P P E N D I X

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## MATERIAL SUBMITTED FOR THE HEARING RECORD

### **Written Statement of Peter Lushing, Professor of Law**

Benjamin N. Cardozo School of Law  
55 Fifth Avenue, Suite 930  
New York, NY 10003

### **Statement Submitted for the Record of the House Constitution Subcommittee's March 11, 2011 Hearing on H.R. 966, the Lawsuit Abuse Reduction Act**

I am a professor of law at Benjamin N. Cardozo School of Law in New York City, where I have been on the faculty since 1976, and taught Civil Procedure for approximately a quarter of a century. I submit this statement in support of H.R. 966, the Lawsuit Abuse Reduction Act, which would amend Federal Rule of Civil Procedure 11 to restore an earlier version making sanctions for frivolous litigation mandatory.

There is endless debate over the deterrent effect of our criminal statutes, but there can be no doubt that civil litigators will make strenuous efforts to comply with the laws of procedure. These lawyers live and die, so to speak, by the Federal Rules of Civil Procedure. Sanctions for misconduct in particular have enormous power to shape the attorney's conduct, for from the outset of a case the lawyer is in the arena where enforcement of the rules takes place -- the court.

For this reason I submit that the attention paid to our busy district judges' reluctance to entertain so-called satellite litigation -- the issues raised by motions for sanctions for frivolous litigation -- is misplaced. In a word, there is so much "bang for the buck" from a rule that sanctions lawyers for poor behavior, that the impact of a mandatory sanction rule far outweighs the time demands placed on the courts in enforcing the sanctions against those lawyers who are heedless of consequences of frivolous litigation.

Punishment here will not be draconian; we can trust the judges to be careful before finding professional misconduct, and in seeking the appropriate measure of any required penalty. Rarely is there an opportunity to reform a system as easily as is now presented to Congress. Arguably our nation is over-regulated, but strict regulation of lawyers who abuse our over-burdened courts and are heedless of the damage they inflict upon innocent parties is a win-win situation for the judicial system, those honest litigants who form the vast majority of the patrons of the courts, and those individuals, businesses, and organizations who were utterly undeserving of victimization by frivolous litigation.

