TESTIMONY OF

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Before

THE HOUSE JUDICIARY COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

Regarding

AN OVERSIGHT HEARING:

"SAFEGUARDING AMERICANS FROM A LEGAL CULTURE OF FEAR: APPROACHES TO LIMITING LAWSUIT ABUSE"

and

THE LAWSUIT ABUSE REDUCTION ACT OF 2004,

H.R. 4571

JUNE 22, 2004

Mr. Chairman, thank you for inviting me today to share my views regarding "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse." There is a dire need for legislation to address this very problem, and H.R. 4571, the Lawsuit Abuse Reduction Act of 2004, is a positive step toward that goal.

By way of background, I have been an active participant in the development of personal injury or 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 25 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* (10th ed., 2002).

I have had a deep interest in improving our civil justice system and currently serve as General Counsel to the American Tort Reform Association, on whose behalf I am testifying today. I wish to make clear that the views I am expressing today are my own.

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. 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 over a decade ago. The client, who runs a successful Irish pub, called me because a barrage of frivolous claims threatened her business. For example, an individual who alleged that he had been served alcoholic beverages when he was

already inebriated brought a claim against the pub. The individual drove while intoxicated, and was involved in an automobile accident. He sued the pub. Police records showed, however, that he had visited numerous bars. Omitted from the list was my client's place of business.

Working with the pub's own 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. Unfortunately, that would not be likely to occur today because, as I will show, the rules against frivolous lawsuits have been materially weakened.

This is what occurs today when a small business is hit with a frivolous claim. The defendant contacts a lawyer, usually one supplied by his insurer. The defendant's lawyer would call the plaintiff's lawyer, and suggest that there is proof that the plaintiff was never at the client's establishment. The plaintiff's lawyer could respond, "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 – if it fights the case and a judge allows the case to go to a jury, and the jury renders a verdict above policy limits, the insurer could be subject to a claim by its insured for wrongful failure to settle. On the other hand, if the insurer settles such a case, over time such action will cause the defendant's insurance costs to increase exponentially. Because there is currently no swift and sound sanction against frivolous claims, the "death by a thousand cuts" will continue. It can destroy a small business.

The scenario just outlined makes clear why the alleged "screening effect" of the contingency fee does not work. In debates, some plaintiffs' lawyers often say that the contingency fee screens out frivolous claims. As plaintiffs' lawyers have said, "Why would a personal injury lawyer bring a claim on a contingency fee, when he knows it is baseless; he will not recover any money." In the real world, this is not true. It costs little more than a $100 filing fee and often takes little more time than generating a form complaint to begin a lawsuit. Additional defendants, who may have nothing to do with the case, can be named at no charge, as in the case of my client. It costs much more for a small business to defend against it. The system is rigged to allow, in effect, legal extortion.

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

Slightly more than ten years ago, the Federal Rules Advisory Committee, an extension of the federal judiciary which has the primary responsibility to formulate the Federal Rules of Civil Procedure, announced an amended and weakened Rule 11. 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 now abandoned version of Rule 11 had not impeded development of the law.[1] Eighty percent found that the prior rule had an overall positive effect and should not be changed.[2] Three-quarters of those judges surveyed felt that the former Rule 11's benefits in deterring frivolous lawsuits and compensating those victimized by such

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[1] 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.

[2] *See id.*

claims justified the use of judicial time.[3] 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."[4] 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. The first is that the Advisory Committee decisions about rule changes are reviewed by the Supreme Court of the United States. That occurred after Rule 11 was weakened. But when the weakened Rule 11 was transmitted by the Supreme Court to Congress for its consideration, Chief Justice William 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."[5] 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."[6] Justices Scalia and Thomas went even further, and 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

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[3] *See id.*

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

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

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

all."[7] The bottom line is that the Supreme Court corrective against unsound rule changes did not work in this instance.

The Federal Rules Enabling Act:
The Place for Final Correction May Not Work

The Federal Rules Enabling Act of 1938 created a system where Congress delegated its power to the Federal Rules Advisory Committee to formulate Federal Rules of Civil Procedure. Congress has maintained the ultimate authority to change proposals from the Federal Rules Advisory Committee. In the mid-1970s, it did so with respect to the Federal Rules of Evidence. But with the system established in 1938, Congress only has seven months to make a "correction."[8] Apart from matters of urgent national concern, it is rare in 2004 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.[9]

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

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

8 *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).

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

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

11 *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.[12] Those opposing the bill, however, felt that there had not yet been adequate time to determine the effectiveness of the amended rule in practice.[13]

It is now more than a decade 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 society.

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

Sanctions Against Frivolous Claims Will Not Impede Justice

Some consumer groups have argued that placing sanctions 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."[14] They also include claims that are not "warranted by existing law"[15] or those with an absence of factual or evidentiary basis.[16] But they do not include claims based on "nonfrivolous argument[s] for the extension, modification, or reversal of existing law

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

13 *See* H. REP. NO. 104-62, at 33 (dissenting views).

14 Fed. R. Civ. Proc. 11(b)(1).

15 *Id.* 11(b)(2).

16 *Id.* 11(b)(4).

or the establishment of new law."[17] This last point is important, because certain groups have argued, incorrectly, that sanctions against frivolous claims will stifle the growth of law. The very words of Rule 11 allow for growth, but not for frivolous extensions of the law.

What Representative Smith's Bill Does, and Why it is Sound

Chairman Sensenbrenner, Representative Lamar Smith of Texas has introduced a vitally needed bill that restores Rule 11 to its strength and purpose prior to the 1993 changes. That bill, the Lawsuit Abuse Reduction Act of 2004, H.R. 4571, reverses the 1993 amendments that made sanctions discretionary rather than mandatory. Unfortunately, the 1993 amendments allowed judges to ignore or forget sanctions. For that reason, irresponsible personal injury lawyers could game the legal system: They knew that it would be unlikely that they would have to pay for bringing frivolous claims.

The 1993 amendments also allowed unscrupulous plaintiffs' attorneys to play the game, "heads I win and tails you lose." They could bring a frivolous claim and hope that they could succeed in getting an unjust settlement just as I outlined above. But if a Rule 11 motion was brought against the personal injury lawyer, they had 21 days to withdraw their lawsuit without the imposition of any sanction. When the 1993 amendments weakening Rule 11 were admittedly rubber stamped, as I have indicated, Justice Scalia dissented from the process, noting that,

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[17] *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

> 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.[18]

Finally, Representative Smith's proposed legislation wisely reverses the 1993 amendments to Rule 11 that prohibited money sanctions for discovery abuses. Perhaps more than any other abuse that has become worse in the last decade has been the rampaging, harassing abuse of discovery. A small or even a large business could be devastated by such activity. They are often asked to produce materials that have nothing to do with the merits of the case. It is another weapon to force an unfair settlement. An example is going on now in Madison County, Illinois. There, a plaintiff's lawyer in an asbestos case is trying to "discover" the names of civil justice organizations to which the defendants are affiliated, and how much money is given to those organizations. This information has absolutely nothing to do with the case before the Madison County court. We desperately need the legal power to stop such discovery abuses.

The Domino Effect of the Modifications in Rule 11

If the 1993 weakening of Rule 11 only affected the federal courts, that would be bad enough. In that regard, it has had a domino effect on state procedures because many states routinely accept modifications to the Federal Rules of Civil Procedure and implement them into their state's law.[19] There is some general wisdom to such

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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

18 *Id*. at 508.

19 For example, when Minnesota revised its own Rule 11 to conform to the 1993 amendment of the federal rule, the state advisory committee commented:

provision, so that state procedural rules will not vary between state and federal courts. In this instance, that general wisdom resulted in state courts being unwittingly led into the same problem that face federal courts – they lacked adequate force to stop frivolous claims.

Hopefully, if Representative Smith's legislation were enacted into law, it might trigger reversals of the 1993 amendments in some states. But a number of states may not be covered by that process. For that reason, Representative Smith's bill covers state court decisions that involve interstate commerce. That will assure that those state courts use their power to impose sanctions against frivolous claims. This aspect of Representative Smith's bill is needed because if only federal courts receive the power to block frivolous claims, much of the lawsuit abuse problem would continue unabated.

Frivolous Claims Sanctions and Loser Pays Distinguished

Some have advocated that judges in the United States adopt a "loser pays" system. Under the "loser pays" system, the party who loses must pay the other party's attorney's fees. There is a great deal of controversy about such a process. Some believe that it could chill bringing legitimate lawsuits because plaintiffs would fear having to pay very large defense costs. Regardless of the merits of the "loser pays" argument,

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> While Rule 11 has worked fairly well in its current form . . ., the federal rules have been amended and 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.

Minn. R. Civ. Proc. 11, Advisory Comm. Comments – 2000 Amendments; *see also* N.D. R. Civ. Proc. 1 ("Scope of Rules"), Explanatory Note ("As will become readily apparent from a reading of these rules, they are the Federal Rules of Civil Procedure adapted, insofar as practicable, to state practice.") and Rule 11, Explanatory Note ("Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Rule 11."); Tenn. R. Civ. Proc. 11, Advisory Comm'n Comment 1995 (noting that Tennessee amended its Rule 11 to track the 1993 federal revision, despite the fact that the state had seen not seen widespread abuse of the previous rule).

it is important to note that Rule 11 comes into play long before a jury is ever impaneled. The decision about whether a claim is frivolous is in the hands of a judge. As I indicated by quoting the Rule, it only applies when the claim has no basis in existing law or any reasonable extension of that law.

Mr. Chairman, in sum, for the United States economy, the wellbeing of our legal system and the preservation of small business, the strength of Rule 11 needs to be reinforced now.

Stopping Litigation Tourists from Visiting Judicial Hellholes

Apart from dealing with frivolous claims, Representative Smith's bill addresses a major problem in our current national judicial system: forum shopping. Forum shopping occurs when what I call "litigation tourists" are guided by their attorneys into bringing claims in what the American Tort Reform Association ("ATRA") has called "judicial hellholes™."

As indicated in ATRA's Judicial Hellholes Report, which I ask to be made part of the record, there are certain jurisdictions in the United States where law is not applied even-handedly to all litigants. The words carefully chiseled on the top of the Supreme Court, "Equal Justice Under Law," are ignored in practice. As ATRA's "Judicial Hellholes"™ Report documents, a few courts in the United States consistently show "a systematic bias against defendants, particularly those located out of the state."[20] Objective observers are remarkably candid about the nature of these "Judicial Hellholes™." For example, some are located in West Virginia. Former West Virginia

[20] American Tort Reform Association, "Bringing Justice to Judicial Hellholes 2003" at ix, *available at* <http://www.atra.org/reports/hellholes/report.pdf>.

Court Justice and currently plaintiff's lawyer Richard Nealey said that when he sat on the Court,

> As long as I am allowed to redistribute wealth from out-of-state companies to injured state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families and their friends will re-elect me . . . It should be obvious that the in-state local plaintiff, his witnesses and his friends, can all vote for the judge, while the out-of-state defendants cannot be relied upon [even] to send a campaign donation.[21]

My friend and very prominent Mississippi plaintiff's lawyer, Dickie Scruggs, did not disagree with ATRA's designation that some places are judicial hellholes. He disagreed with what they should be called.

As he stated,

> What I call the "magic jurisdiction," … [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money . . . . These cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is.[22]

While comedians may make fun of what goes on in these hellholes, they thwart the fundamentals of basic justice and fairness. As the ATRA Report documents, the hellholes have become a powerful magnet for out-of-state plaintiffs that have absolutely nothing to do with a local judicial hellhole jurisdiction. The plaintiff was not injured in the

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[21] Richard Nealey, The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts, 462 (1998).

[22] Asbestos for Lunch, Panel Discussion at the Prudential Securities Financial Research and Regulatory Conference, (May 9, 2002), in Industry Commentary (Prudential Securities, Inc., N.Y., New York) June 11, 2002, at 5.

jurisdiction, he never lived in the jurisdiction and he does not work in the jurisdiction. He has absolutely nothing to do with the place. With the guidance of his plaintiff's attorney, he is a pure "litigation tourist." The litigation tourist is only there to sue.

Litigation tourists do not help the states that they visit. They pay no taxes, only burdening the courts of that state that are paid for by local taxpayers. They delay justice to those who live there.

Fortunately, some states that have been a haven for judicial hellholes, such as Mississippi, have recently enacted local legislation to block litigation tourists. If we were to wait for state-by-state action on this issue, however, it could be decades before – if ever – the situation is properly corrected. Frequently, the plaintiffs' lawyers who bring these out-of-state cases have local and very strong political power to thwart even the most basic of reforms that would stop the very worst type of forum shopping.

What Mr. Smith's bill provides is what is needed: a national solution to end unjustifiable forum shopping to "judicial hellholes™". It does so with equity and justice. It allows a plaintiff to file a case where he resides at the time of filing, or where he resided at the time of the alleged injury, or the place where circumstances giving rise to the injury occurred and also in the defendant's principal place of business.

For the welfare of our economy and basic fairness in our legal system, your bill to prevent reckless forum shopping should be enacted now.

I thank you very much for the opportunity to testify today.