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112TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 112–174

LAWSUIT ABUSE REDUCTION ACT OF 2011

JULY 21, 2011.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 966]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 966) to amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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99–006

The Amendment

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".

SEC. 2. ATTORNEY ACCOUNTABILITY.

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

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

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

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

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

Purpose and Summary

The Lawsuit Abuse Reduction Act of 2011 ("LARA") would prevent frivolous lawsuits and help dispel the legal culture of fear that has come to permeate American society. The bill, which was introduced in the House by Congressman Lamar Smith and by Senator Chuck Grassley in the Senate on March 9, 2011, would restore the teeth Federal Rule of Civil Procedure 11 once had to deter frivolous Federal lawsuits.

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

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

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[1] Indeed, under the pre-1993 Rule 11, sanctions were imposed on defendants for having raised frivolous defenses. In *SEC v. Keating,* 1992 WL 207918, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 96,906 (C.D.Cal.1992), the court imposed sanctions of the defendant Charles Keating because 12 of 14 "shotgun" defenses were "patently frivolous." Sanctions were also imposed on defendants for filing inappropriate Rule 11 motions, *see Berger v. Iron Workers,* 843 F.2d 1395 (D.C. Cir. 1988) (affirming in part per curiam 7 Fed. Rules Serv. 3d 306 (D.D.C. 1986)), and also for filing frivolous or harassing counterclaims. *See Aetna Insurance v. Meeker,* 953 F.2d 1328 (11th Cir. 1992) (affirming district court Rule 11 sanction of defendants for pursuing frivolous counterclaims of negligent salvage and conversion). In *Swanson v. Sheppard,* 445 N.W.2d 654 (N.D.1989), for example, the court imposed Rule 11 sanctions on the defendant because the defendant counterclaimed "simply to discourage the plaintiff from continuing with his cause of action." Sanctions were imposed on defendants for failing to conduct a reasonable inquiry into the legal basis for their Rule 12(b)(6) motion to dismiss. In *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.,* 603 F Supp at 341–42 Rule 11 sanctions on defendants' counsel on the ground that counsel failed to conduct a reasonable inquiry into the legal basis for the Rule 12(b)(6) motion to dismiss, stating "Defendants failed to cite a single case or authority in their two-page memorandum [in support of the motion]. Apparently, they completely ignored the firmly established precedents directly contradictory to their position. No doubt exists that [defend-

Additionally, the bill expressly provides that "Nothing in" the changes made to Rule 11 "shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution."

Background and Need for the Legislation

In his 2011 State of the Union Address, President Obama said "I'm willing to look at other ideas to bring down costs, including one that Republicans suggested last year: medical malpractice reform to rein in frivolous lawsuits." Given President Obama now claims to support reforms that limit frivolous lawsuits in the context of health care, there is no principled reason he should not also support limits on frivolous lawsuits in other contexts as well, including limits on frivolous lawsuits in Federal court.

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

SECTION 2 OF THE LAWSUIT ABUSE REDUCTION ACT

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

In 1990, the Judicial Conference's Advisory Committee on Civil Rules undertook a review of Rule 11 and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed that Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the 1983 version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then-current form (80.4%).[3]

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ants'] counsel failed to conduct the 'reasonable inquiry' that Rule 11 requires to ensure that a motion 'is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . .'" *Id.* at 341–42. *See also Steele v Morris,* 608 F. Supp. 274 (S.D.W.Va. 1985) (court granted the plaintiff's motion for Rule 11 sanctions to be imposed upon the defendant, concluding that the defendant's counsel failed to make reasonable inquiry into both the facts and the law before filing a motion to dismiss in this case which alleged, among other things, that the plaintiff suffered emotional distress due to the defendant's willful, deliberate, and outrageous conduct). Sanctions were also imposed on defendants when they were found to have ignored firmly established precedent. In *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.,* 603 F. Supp. 339, 341–42 (S.D.N.Y. 1985), Rule 11 sanctions were imposed because defendants "completely ignored the firmly established precedents directly contradictory to their position." And in *Smith v. United Transp. Union Local 81,* the court imposed Rule 11 sanctions where the defendants frivolously maintained a lawsuit by ignoring relevant law, relying on irrelevant law, and basing arguments on vacated cases. 594 F. Supp. 96, 101 (S.D. Cal. 1984).

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

[3] Federal Judicial Center Final Report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States (May 1991). A subsequent survey conducted by the Federal Judicial Center in June 1995, consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that disallowed monetary compensation for victims

Continued

Despite this wide judicial support for a strong Rule 11, in 1991 the Civil Rules Advisory Committee included provisions to weaken Rule 11 in a much broader package of proposed amendments to the Federal Rules. The change to Rule 11 was driven largely by the desire to avoid "satellite litigation" of Rule 11 issues that could burden allegedly overworked judges.[4] (But of course, any rule that punishes people for filing frivolous lawsuits must have procedures for determining whether or not the filing is frivolous. Otherwise, the rule would operate as a pure "loser pays" rule in which the losing side paid a penalty simply because they lost the case.) The proposed changes were then sent to the Supreme Court for approval or modification. Exercising what it viewed to be a very limited oversight role,[5] the Supreme Court approved the proposed changes without substantive comment in April, 1993.

In a strongly worded dissent on the Rule 11 changes, Justice Scalia correctly anticipated that the proposed revision would eliminate a "significant and necessary deterrent" to frivolous litigation, stating "the overwhelming approval of the Rule by the Federal district judges who daily grapple with the problem of litigation is enough to persuade me that it should not be gutted."[6] Justices Scalia and Thomas properly dissented from the transmittal of the amendments to Rule 11 to Congress, arguing that "[t]he proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor' within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all."[7]

Rule 11 as it existed prior to the 1993 amendments was very popular with Federal judges. The Federal Judicial Center ("FJC") was commissioned to conduct empirical studies and surveys on the

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of frivolous lawsuits were a bad idea. In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again. *See* Shapard *et. al.,* Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure at 5 (Federal Judicial Center 1995).

[4] It is worth noting that 282,307 civil cases were filed in Federal district courts in the 1-year period ending March 31, 2010 (an increase of 9.2% over the 258,535 civil cases filed during that period the prior year). *See* Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics, March 31, 2010, available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C00Mar10.pdf (Table C, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12–Month Periods Ending March 31, 2009 and 2010). Opponents caution that between 1983 and June 1993, when the prior version of Rule 11 was in effect, approximately 7,000 judicial opinions referencing Rule 11 were reported—an average of 700 decisions per year. If LARA were to result in Rule 11 filings akin to those filed under the pre-1993 rules, then only 1 in 400 Federal civil cases filed (0.25%) would be associated with a reported Rule 11 decision (700 out of 282,307 civil cases filed). These cases, of course, would be disbursed among 94 Federal judicial districts and 677 district court judges along with many senior judges. See http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx.

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

[6] *Id.* at 11.

[7] 146 F.R.D. 401, 507–08 (1993).

operation of the old Rule 11,[8] and in a survey of all Federal trial judges, the FJC found that 80% were of the opinion that the old Rule 11 had had an overall positive effect and should not be changed.[9] Congress needs to restore those positive effects once again.

After the proposal to gut Rule 11 was forwarded to Congress, there was a 7-month period under the Rules Enabling Act in which the Congress had the authority to make changes, but time ran out before Congress could stop these damaging amendments to Rule 11.[10]

Section 2 of LARA would restore teeth to Rule 11 once again.

In particular, Section 2 of LARA would:

- Require monetary sanctions against lawyers who file frivolous lawsuits. Indeed, a survey conducted by the Federal Judicial Center in June, 1995, consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that prohibited monetary compensation for victims of frivolous lawsuits were a bad idea. In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again.[11] LARA would do just that.
- Reverse the 1993 amendments to Rule 11 that made Rule 11 sanctions discretionary rather than mandatory. Because today, under a weak Rule 11, sanctions in frivolous cases are not mandatory, there is little incentive for a victim of a frivolous lawsuit to spend time and money seeking Rule 11 sanctions. Deterrence cannot be achieved without certain punishment. While a court should have discretion to fashion an appropriate sanction based on the circumstances of the violation, litigants making frivolous claims should not be allowed the opportunity to escape sanctions entirely.
- Reverse the 1993 amendments to Rule 11 that allow parties and their attorneys to avoid sanctions for making frivolous claims and demands by withdrawing them within 21 days after a motion for sanctions has been filed. Justice Scalia correctly pointed out that such amendments would in fact encourage frivolous lawsuits: "In my view, those who file frivolous suits and pleadings should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule, parties will be able to file thoughtless, reckless, and

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

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

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

[11] *See* Shapard *et. al.,* Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure, supra note 3, at 5.

harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty."[12] LARA would get rid of the "free pass" lawyers have to file frivolous lawsuits under today's Rule 11.

It is important to remember that nothing in LARA changes the current standard by which frivolous lawsuits are judged. That is, under LARA, the standard a judge will use to determine whether a case is frivolous will remain as it has been, namely a determination that:

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

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

Further, LARA expressly provides that "Nothing in" the changes made to Rule 11 "shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution."

FRIVOLOUS LITIGATION HAS A CORROSIVE EFFECT ON AMERICAN CULTURE AND VALUES, THREATENING AMERICA'S CHURCHES, SCHOOLS, DOCTORS, SPORTS, PLAYGROUNDS, FRIENDLY RELATIONS, AND EVEN THE GIRL SCOUTS AND OTHER FAMILY INSTITUTIONS

Frivolous litigation has a corrosive effect on American culture and values, threatening America's churches, schools, doctors, sports, playgrounds, friendly relations, even the Girl Scouts and other family institutions, and everyone else.

As Philip Howard has pointed out, due to an onslaught of frivolous lawsuits "[l]egal fear has become a defining feature of our culture."[13] The values crisis caused by lawsuit abuse reaches all parts of American society.

Although LARA would only amend the Federal court rule on frivolous lawsuits, state rules are often amended to track the changes

[12] *Id.*

[13] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 11.

in the Federal rules because a system of generally uniform rules in both state and Federal courts makes filing the proper papers for lawyers less confusing.[14] Consequently, the following list includes examples of frivolous lawsuits in both state and Federal court under the expectation that many states would amend their state rules on frivolous lawsuits to reflect the rules in LARA were LARA to become Federal law, just as states did just that when the Federal rules on frivolous lawsuits were last changed.[15]

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[14] The 1993 change to Rule 11 may show the likely impact of amending the rule through LARA on state rules of civil procedure. After amendment of Rule 11 in 1993, at least 13 states and the District of Columbia amended their rules to conform to the Federal rule. In some states, this change occurred within 1 or 2 years of the amendment of the Federal rule. In others, it took 7 or more years for the state to catch up through their rule-amendment process. These states include Delaware (1995), District of Columbia (1995), Hawaii (2000), Minnesota (2000), Missouri (1994), Nevada (2005), New Jersey (1994/96), North Dakota (1996), Tennessee (1995), Utah (1997), Vermont (1996), West Virginia (1998), Wisconsin (1998), and Wyoming (1994). Arkansas and Florida also partially modified their state equivalents to add the "safe harbor" provided by the Federal rule in 1997 and 2002, respectively.

States often make such changes because their policy is to maintain consistency with the Federal rules to avoid forum shopping and to benefit from the interpretation of the rules by Federal courts. For example, the notes to Rule 11 of the Nevada Rules of Civil Procedure with respect to its 2005 amendment state that "[t]he rule is amended to conform to the Federal rule, as amended in 1993, in its entirety." Similarly, Tennessee's 2003 amendment of its Rule 11 notes that "Amended Rule 11 tracks the Federal version." The notes to Wisconsin's 1998 amendment of the state equivalent to Rule 11 provide that "[j]udges and practitioners will now be able to look to applicable decisions of Federal courts since 1993 for guidance in the interpretation and application of the mandates of FRCP 11 in Wisconsin."

In fact, in adopting the 1993 version of Federal Rule 11, some states noted that they did not experience significant problems with the prior rule, but would nevertheless adopt the 1993 Federal amendments as a matter of their policy of maintaining consistency with the Federal rules. The Advisory Committee notes following Minnesota Rule of Civil Procedure 11.01 may best explain the policy: "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." Vermont noted with its 1996 amendment of Rule 11 that it "experienced far less difficulty" than the Federal courts in administering the pre-1993 version of Rule 11, but it would conform to the Federal rule to "substantially improve the practice."

[15] Many states' rules of civil procedure are modeled after Federal Rule 11, and therefore also do not require sanctions for the filing of frivolous lawsuits. See Ark. R. Civ. P. 11 (Arkansas), Addition to Reporter's Notes, 1997 Amendment ("The rule has been amended by designating the former text as subdivision (a) and by adding new subdivision (b), which is based [on] Rule 11(c)(1) of the Federal Rules of Civil Procedure, as amended in 1993 . . . New subdivision (b) provides that requests for sanctions must be made as a separate motion, rather than simply be included as an additional prayer for relief in another motion. The motion for sanctions is not to be filed until at least 21 days, or other such period as the court may set, after being served. . . ."); Minn. R. Civ. P. 11.04 (Minnesota), Advisory Committee Comments, 2000 Amendments ("Rule 11 is amended to conform completely to the Federal rule. . . . On balance, the Committee believes that the amendment to 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 . . ."); N.D. R. Civ. P. 1 (North Dakota), Explanatory Note ("As will become readily apparent from a reading of the rules, they are the Federal Rules of Civil Procedure adapted, insofar as practicable, to state practice."); N.D. R. Civ. P. 11 (North Dakota), Explanatory Note ("Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Rule 11."); Tenn. R. Civ. P. 11 (Tennessee), Advisory Commission Comment to 1995 Amendment ("Amended Rule 11 tracks the current Federal version. Sanctions no longer are mandatory, and non-monetary sanctions are encouraged. The 21-day safe harbor provision allows otherwise sanctionable papers to be withdrawn, thereby escaping sanctions."); Utah R. Civ. P. 11 (Utah), Advisory Committee Note ("The 1997 amendments conform state Rule 11 with Federal Rule 11."); Vt. R. Civ. P. 11 (Vermont), Reporter's Notes to 1996 Amendment ("Rule 11 is amended to conform to the 1993 amendment of Federal Rule 11."). In addition, state courts also often rely on Federal court decisions when interpreting their rules. See e.g. Gray v. Washington, 612 A.2d 839, 842 (D.C. 1992); Bryson v. Sullivan, 412 S.E.2d 327, 332 (N.C. 1992); Bryant v. Joseph Tree, Inc., 829 P.2d 1099, 1104–05 (Wash. 1992) (en banc). Sanctions for frivolous filings are also not mandatory in 38 states and the District of Columbia. See Ala. R. Civ. P. 11 (Alabama); Alaska R. Civ. P. 11 (Alaska); Ark. R. Civ. P. 11 (Arkansas); Cal.C.C.P. § 128.5 (California); C.R.C.P. 11 (Colorado); C.G.S.A. § 52–190a (Connecticut); Del. R. Sup. Ct. R. 33 (Delaware); D.C. R. Civ. P. 11 (D.C.); Fla. R. Civ. P. 1.150 (Florida); Hi. R. Civ. P. 11 (Hawaii); Il. C. S. Sup. Ct. R. 137 (Illinois); In. St. Trial Rule 11 (Indiana); La. Civ. Code Ann. Art. 864 (Louisiana); Me. R. Civ. P. 11 (Maine); Md. Rule 1–311 (Maryland); Mass. R. Civ.

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RECENT FRIVOLOUS FEDERAL LAWSUITS IN WHICH NO SANCTIONS WERE IMPOSED

What follows is a list of recent frivolous Federal lawsuits in which no sanctions were imposed because Federal Rule 11 as it currently exists does not require sanctions for the filing of frivolous lawsuits. LARA would likely change the outcome in these cases and punish lawyers who file frivolous lawsuits.

- Karen McBrien twice filed claims alleging that Federal agencies have her under surveillance and have conducted biomedical and genetic experiments on her. In dismissing the lawsuits as frivolous, the court found that "[c]laims describing fantastic or delusional scenarios fall into the category of cases whose factual contentions are clearly baseless." *McBrien v. United States,* No. 09–2432 (D.D.C. Feb. 26, 2010); *McBrien v. FBI,* No. 09–0197, 2009 WL 260043 (D.D.C. Feb. 3, 2009). Nevertheless, Ms. McBrien moved for reconsideration, which the court denied, and appealed her case to the D.C. Circuit. The court allowed her to appeal *in forma pauperis* without paying the ordinary filing fee. On November 24, 2010, the D.C. Circuit finally dismissed the case for lack of prosecution by the plaintiff. At no point did the trial or appellate court impose any penalty on the plaintiff for the frivolous litigation.
- In July 2009, three New Jersey residents, backed by the vegan advocacy group Physicians Committee for Responsible Medicine (PCRM) and its "Cancer Project," filed a class action lawsuit in Essex County, New Jersey against several hot dog manufacturers claiming they were exposed to carcinogens by eating hot dogs. None of the plaintiffs had actually developed cancer. The lawsuit was filed in coordination with an anti-hot dog billboard and television advertising campaign, which many criticized as alarmist and unsupported by science. The lawsuit sought damages in the amount of the total cost of their hot dog purchases and a requirement that the companies place a new label on packages and advertising reading: "WARNING: CONSUMING HOT DOGS AND OTHER PROCESSED MEATS INCREASES THE RISK OF CANCER." Six months after the case was moved to Federal court, U.S. District Court Judge Jose Linares dismissed the case. *O'Donnell v. Kraft Foods Inc.,* No.2:09-cv-04448–JLL–CCC (D. N.J. Mar. 18, 2010).
- Rhonda Nichols claimed a wild bird "attacked" her while in a home improvement store's outdoor garden center in Fairview Heights, Illinois, causing head injuries. She never reported the 2005 incident to the Lowe's store, but sued for at

P. 11 (Massachusetts); Minn. R. Civ. P. 11.03 (Minnesota); Miss. R. Civ. P. 11 (Mississippi); Miss. Code Ann. § 11–55–5 (Mississippi); Mo. S. Ct. R. 55.03 (Missouri); Neb. R. Civ. P. St. § 25–824 (Nebraska); N.H. Sup. Ct. R. 59 (New Hampshire); N.J.S.A. § 2A:15–59.1 (New Jersey); N.M.R. Dist. Ct. R. Civ. P. 1–011 (New Mexico); N.D. R. Civ. P. 11 (North Dakota); Ohio R. Civ. P. 11 (Ohio); 12 Okl. St. Ann. § 2011 (Oklahoma); Or. R. Civ. P. 17 (Oregon); Pa. R. Civ. P. 1023.1 (Pennsylvania); Pa. R. Civ. P. 1023.4 (Pennsylvania); R.I. R. Civ. P. 11 (Rhode Island); S.C. R. Civ. P. 11 (South Carolina); Tenn. R. Civ. P. 11.03 (Tennessee); Tex. Civ. Prac. & Remedies Code § 10.004 (Texas); Utah R. Civ. P. 11 (Utah); Vt. R. Civ. P. 11 (Vermont); Va. Sup. Ct. R. 1:4 (Virginia); Va. Sup. Ct. R. 4:1 (Virginia); Wash. R.Civ. P. 11 (Washington); W.Va. R. Civ. P. 11 (West Virginia); W.S.A. § 802.05 (Wisconsin); Wyo. R. Civ. P. 11 (Wyoming).

least $100,000 in damages claiming negligence and a violation of the Illinois Animal Control Act. Due to Lowe's stores' incorporation in North Carolina, the case was removed to Federal court. Nichols claimed that the wild birds created a dangerous condition on the property and that Lowe's failed to exercise ordinary care to ensure that the premises were reasonably safe and failed to prevent the birds from entering the garden center. In January 2006, U.S. District Judge William Stiehl ruled that a "reasonable plaintiff" either would have noticed the birds or understood that contact with them was possible in any outdoor area with plants. The final line of the ruling: "Each party shall bear its own costs." *Nichols v. Lowe's Home Center, Inc.,* No. 05–CV–376–WDS (S.D. Ill. Jan. 3, 2006).

- Sherry Wall, the owner of 95-pound Doberman Pinscher that constantly got loose and frightened her neighbors, brought a lawsuit against a Milwaukee suburb. She claimed the local government violated her constitutional rights by telling the local humane society to hold the roaming dog as a stray, after which it held the dog for 60 days before returning it to the owner. After the trial court dismissed the case, the owner appealed. A panel of the U.S. Court of Appeals for the Seventh Circuit found that a neighborhood squabble over a dog is "nuisance litigation" that has no place in Federal court and ordered the owner to show "why she should not be sanctioned for making a frivolous argument in a meritless case." It does not appear from the court docket that it ultimately entered sanctions of any kind. *Wall v. Brookfield,* 406 F.3d 458 (7th Cir. 2005).
- After watching an episode of the reality TV show Fear Factor on NBC in December 2004, Austin Aitken, a part-time paralegal from Cleveland, filed a handwritten lawsuit suing the network for $2.5 million. He said the sight of contestants eating blended rats disgusted him so much that his health suffered. He claimed the show raised his blood pressure, made him dizzy, and caused him to vomit. He also became so disoriented, he said he ran into a doorway "causing suffering, injury and great pain." He then followed up by requesting that the court order NBC to "cease and desist" from publicizing the absurd lawsuit. U.S. District Judge Lesley Wells called the lawsuit frivolous as it lacked even an arguable legal claim, and warned Mr. Aitken against filing an appeal. The court, however, did not award NBC its defense costs. In fact, despite dismissing the lawsuit as frivolous, the court granted Aitken's request for an exemption from paying ordinary filing fees. *Aitken v. NBC Television Network,* No. 1:04cv02574 (N.D. Ohio Feb. 25, 2005).
- After her father obtained full custody over her and her younger sisters in a divorce action, Sarah Schottenstein sued her father and his employer for violations of the Eighth Amendment prohibition on cruel and unusual punishment and Fourteenth Amendment deprivation of liberty without due process, and for habeas corpus relief. One of her attorneys signed the complaint without reading it, the other re-

fused to withdraw it and prolonged the litigation by filing an amended complaint. The court found the lawsuit frivolous, given that the lawsuit was against private parties, not the state. Nevertheless, due to Rule 11's discouragement of awarding sanctions as compensation for unwarranted litigation expenses, the court only sanctioned the attorneys $21,503.50 and $1,131.75, respectively, of the defendant's nearly $75,000 in costs. It did so despite finding that his defense costs were not only reasonable, but "lower than those typically charged by attorneys at comparable law firms" in the area. *Schottenstein v. Schottenstein,* 230 F.R.D. 355 (S.D.N.Y. 2005).

- When the government tried to foreclose on their home, Donald and Gloria Beaner came up with a creative approach. They sued the United States, claiming that their mortgage was fraudulent because the government never provided them with "legal tender" or "real money" as defined by the U.S. Constitution. Only silver or gold would do, they claimed. Although the couple had engaged in a pattern of filing frivolous lawsuits and the court had previously rejected their claims and urged them to voluntarily dismiss their complaint, they prolonged the litigation. Yet, despite wasting the time of the judges and lawyers, the court imposed only a sanction of $500 apiece. *Beaner v. United States,* 361 F. Supp.2d 1063 (D. S.D. 2005).

FEDERAL FRIVOLOUS LAWSUITS IN WHICH CURRENT RULE 11'S 21-DAY "FREE PASS FOR FRIVOLOUS LAWSUITS" HARMED THOSE BEING SUED

Rule 11's "safe harbor" requires a person who is hit with a frivolous claim to hire an attorney to draft a motion for sanctions, but provide a copy of the motion to the offender 21-days before filing the request. During that time, the offender can withdraw the frivolous claim with no penalty whatsoever. Due to this safe harbor, many frivolous claims are never seen by courts. Failure to strictly comply with the technical requirements of the safe harbor provisions results in a denial of sanctions, as occurred in the following cases. LARA would prevent such injustices by getting rid of the 21-day safe harbor rule for frivolous lawsuits.

- A couple who borrowed over $1 million, then defaulted, brought a lawsuit against the lenders asserting a civil rights claim as members of a protected class of "consumers looking to build their dream home," conspiracy, and other claims. Although a plaintiff was put on notice by two defendants of its frivolous complaint, and refused to withdraw it, a third defendant, that had not provided notice of an intent to seek sanctions until several months later, could not obtain any relief. *Holgate v. Baldwin,* 425 F.3d 671, 677 (9th Cir. 2005).
- An online diamond seller sued a rival for infringement of a patent by "listing, selling, offering for sale, and facilitating the sale of diamonds." The defendants sent the plaintiffs two letters warning that they would seek attorneys' fees and costs pursuant to Rule 11 if they did not voluntarily dismiss their patent claim. The plaintiffs did not do so. Two months later, after discovery, the plaintiff dismissed its claim, and

the court did so with prejudice. The court held, however, that the defendant could not obtain sanctions because only serving a motion, not a letter, will fulfill the 21-day notice requirement of Rule 11. *Diamonds.net LLC v. Idex Online, Ltd.,* 254 F.R.D. 475 (S.D.N.Y. 2008).

RECENT FRIVOLOUS STATE LAWSUITS IN WHICH NO SANCTIONS WERE IMPOSED

While LARA itself does not affect state law regarding frivolous litigation, as described above, many states voluntarily amend their own state rules on frivolous litigation to mirror the Federal rules. If states followed LARA, the following frivolous lawsuits filed in state court would likely be appropriately punished.

- Lindsay Lohan sought $100 million from E–Trade for use of the name "Lindsay" in reference to a female baby in a commercial aired during the Super Bowl. Lohan's name was never mentioned in the ad. Lohan filed a lawsuit, however, in the Nassau County Supreme Court in the New York, claiming that the public knows her by the singular name, like Oprah or Madonna, and that referring to the baby as a "milk-aholic" directly references her life. Lohan claimed $50 million in compensatory damages, as well as $50 million in exemplary (punitive) damages. The case was not thrown out of court as frivolous, but settled in September 2010 for an undisclosed sum. An E*Trade spokeswoman said "It was a simple business decision. We always have to consider the cost and time involved in litigation, and we are pleased to have the matter behind us."
- In October 2009, Yvette Gorzelany, Joanna Obiedzinski, and Paulina Pakos sued in New Jersey Superior Court in Bergen County over their appearance in photographs included in the book "Hot Chicks with Douchebags." The plaintiffs were not identified in photo captions, which were taken at a club, or discussed anywhere in the entire book. They brought claims for intentional and negligent infliction of emotional distress, conspiracy to commit fraud, invasion of privacy, unfair competition under a nonexistent statute described as the Business and Professional Code Section 17200 (a cut and paste error from the frequently abused California law of that name), defamation and "humiliation" (another nonexistent claim). Four months later, a New Jersey judge threw out the suit, finding that the book was obviously an attempt at satire and that the plaintiffs had no actionable claim.
- In 2005, Roy Pearson Jr, an administrative law judge in Washington, D.C., sued a family-owned dry cleaning shop for $67 million, later reduced to $54 million, for allegedly losing his pants. Pearson claimed the Chung family failed to live up to "satisfaction guaranteed" and "next day service" signs displayed in the store. After more than 2 years of litigation, Pearson's lawsuit was tried before a D.C. Superior Court judge who ruled for the Chungs. Judge Judith Bartnoff ordered Pearson to pay the family's litigation costs and noted that she would consider awarding attorneys' fees after still more motions and hearings. Pearson, however, continued to

prolong the litigation through 2008 and into 2009 until the District's highest court finally denied Pearson's appeal and request for rehearing. Meanwhile, the South Korean immigrants closed their store and decided against pursuing reimbursement of $83,000 in defense costs. Pearson was denied reappointment as an Administrative Law Judge due to his lack of "judicial temperament." He then brought a Federal lawsuit against the city for the loss of his job, which he again lost, but continued until the D.C. Circuit denied his appeal in May 2010.

- While shopping at an open air mall in Skokie, Illinois in 2004, Marcy Meckler had just left the Tiffany & Co. jewelry store and was walking to Nordstrom when she "had a squirrel jump up and attach itself to her leg," according to the lawsuit she filed nearly 2 years later in Cook County Circuit Court. She claimed that the mall was responsible for "encouraging the squirrel" to be in its courtyard and for "failing to warn the plaintiff of the squirrel's presence." She originally sued for common law negligence, but later added a claim under the Illinois Animal Control Act, which imposes strict liability on the "owner" of an animal that attacks a person without provocation. The lawsuit demanded in excess of $50,000 for the severe injuries she experienced "while frantically attempting to escape from the squirrel and detach it from her leg." Cook County Circuit Court Judge Kathy M. Flanagan allowed Meckler to amend her complaint twice, but dismissed the case with prejudice on the third attempt in a July 2007 ruling.

FRIVOLOUS LAWSUITS AFFECT EVERYONE: CHURCHES

In response to litigation against a church after a parishioner committed suicide, churches have begun implementing policies discouraging counseling by ministers. Instead, parishioners are being referred to secular psychologists and other therapists.[16] According to a recent *Newsweek* cover story, "The Rev. Ron Singleton's door is always open. That way, when the Methodist minister of a small congregation in Inman, S.C., is counseling a parishioner, his secretary across the hall is a witness in case Singleton is accused of inappropriate behavior. (When his secretary is not around, the reverend does his counseling at the local Burger King.) Singleton has a policy of no hugging from the front; just a chaste arm around the shoulders from the side. And he's developed a lame little hand pat to console the lost and the grieving. The dearth of hugging is 'really sad,' he says, but what is he going to do? He could ill afford a lawsuit." [17]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: SCHOOLS

A poll found that "[n]early 8 in 10 teachers (78%) said students are quick to remind them that they have rights or that their parents can sue." [18]

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[16] *Id.* at 32.
[17] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars," *Newsweek* (December 15, 2003) at 43.
[18] Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" (May 2004) at 2–3.

The Supreme Court's 1975 *Goss v. Lopez*[19] decision extended Federal due process rights to student discipline and literally made every school discipline decision a potential Federal case. According to *Newsweek:*

> "Legal fear" is just as intense in the educational system. Many Americans sense that schools have become chaotic and undisciplined over time and the quality of teachers has declined. Many teachers say that the joy has gone out of their jobs. What's not generally known is the role of courts and Congress in creating these problems by depriving teachers and principals of the freedom to use their own common sense and best judgment. Thanks to judicial rulings and laws over the past four decades, parents can sue if their kids are suspended for even a single day—for any reason—without adequate "due process."[20]
>
> Unruly students sense the teachers' fear and their own empowerment. "A kid will be acting out in class, and you touch his shoulder, and he'll immediately come back with 'Don't touch me or I'll sue,' or, 'You don't have any witnesses'," says Rob Wiel, who taught high-school math and coached football and baseball in the Denver suburbs for 20 years before retiring recently.[21]

In New Jersey, "[a] state judge . . . threw out a lawsuit filed by an Atlantic County man who said assigned seating in a school lunchroom violated his 12-year-old daughter's right to free speech. Superior Court Judge Valerie Armstrong said Galloway Township school administrators had the right to impose the restriction to maintain order and safety in a cafeteria that serves 260 students in each of four 30-minute lunch periods."[22]

According to the *St. Petersburg Times:*

> In Pinellas County [Florida], two Palm Harbor University High School baseball players sued the school district claiming they were wrongly booted from school because of a roughhousing incident that occurred on a team road trip. In Hillsborough County, Robinson High School senior Nicole "Nikki" Youngblood filed suit after her picture was left out of the school yearbook when she refused to wear a feminine drape instead of a shirt and tie as she wished. These two cases only scratch the surface of lawsuits filed against local public school districts on an almost daily basis. More and more, offenses that used to be settled inside the schoolhouse now end up at the courthouse. *The result, educators say, is less money for learning. "We spend millions and millions on attorney fees every year that has nothing to do with the classroom," said Wayne Blanton, executive director of the Florida School Boards Association. "Every lawsuit we have to defend is money that doesn't get to the classroom." . . . "Lots of people file suit," said Crosby Few, Hillsborough School Board attorney. "A lot of them are frivo-*

[19] 419 U.S. 565 (1975) (holding imposition of suspensions without preliminary hearings violated students' due process rights guaranteed by Fourteenth Amendment).
[20] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars," *Newsweek* (December 15, 2003) at 48.
[21] *Id.* at 49.
[22] John Curran, "Judge Rejects a Rights Suit Over School's Lunch Seating," *The Philadelphia Inquirer* (July 20, 2004) at B4.

> *lous."* . . . In the book, Judging School Discipline: The Crisis of Moral Authority, the authors argue that the hundreds of lawsuits challenging school disciplinary procedures have hurt the quality of public education. One of the authors, Richard Arum, an associate professor of sociology at New York University, said just the threat of lawsuits keeps teachers from taking charge of their classrooms.[23]

And as the *Arizona Republic* has reported:

> Scottsdale School Board member Christine Schild has called the legal fees "outrageous." . . . Legal bills for the 2003–04 school year are estimated to be as high as $675,000. This is the highest amount in recent years, and possibly ever . . . Large school districts routinely spend thousands of dollars each year on attorneys. The most common expenses are for student expulsion hearings and employee discipline . . . [D]ay-to-day legal expenses involving disputes with employees and student discipline are not covered by insurance and come out of the operating budget.[24]

Thanks to frivolous lawsuits, "in America, hugging or, indeed, even a pat on the back is now considered so dangerous that teachers can't do it."[25] According to Lynn Maher of the New Jersey chapter of the National Education Association ("NEA"), "Our policy is basically don't hug children."[26] The guidelines of the Pennsylvania chapter of the NEA urge teachers to do no more than "briefly touch" a child's arm or shoulder.[27]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: DOCTORS

According to *Newsweek:*

> Dr. Sandra R. Scott of Brooklyn, N.Y., has never been sued for malpractice, but that doesn't keep her from worrying. As an emergency-room doctor, she often hears her patients threaten lawsuits—even while she's treating them. "They'll come in, having bumped their heads on the kitchen cabinet, and meanwhile I'll be dealing with two-car crashes," she says. "And if they don't have the test they think they should have in a timely fashion, they'll get very angry. All of a sudden, it's 'You're not treating me, this hospital is horrible, I'm going to sue you'."[28] "I'm only a human being," she says. "I'm an educated physician but the miracles are out of my hands."[29]
>
> When Dr. Brian Bachelder moved back to Mt. Gilead, Ohio, to practice family medicine in 1984, he hoped to emulate the country doc who'd treated him as a kid . . . But in recent years, Bachelder, 49, has watched litigation reshape his practice. Last December, facing malpractice premiums that soared

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[23] Melanie Ave, "Lawsuits Drain School Dollars," *St. Petersburg Times* (February 2, 2004) (emphasis added).

[24] Anne Ryman, "Baracy to Pick In-house Attorney for School District," *The Arizona Republic* (July 8, 2004) at 1.

[25] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 5.

[26] *Id.* at 5.

[27] *Id.* at 5.

[28] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars," *Newsweek* (December 15, 2003) at 43–44.

[29] *Id.* at 51.

> from $12,000 in 2000 to $57,000 in 2003, Bachelder decided to lower his bill by cutting out higher-risk procedures like vasectomies, setting broken bones and delivering babies—even though obstetrics was his favorite part of the practice . . . Today the threat of litigation hangs over nearly every move Bachelder makes, changing the very nature of his relationship with patients. He worries that the slightest mistake could provoke a lawsuit. "Anything less than perfection is malpractice," he says. Even in confronting the most common ailments—headaches or ear infections—Bachelder must consider the possibility of a rare and devastating disease. He often orders expensive tests—not just to rule out the worst, but also to bolster his case before a potential jury . . . Bachelder's fear of lawsuits isn't just theoretical—he's been sued a half-dozen times in his 20-year career. In one case, Bachelder referred a boy with a bladder problem to a urologist. The urologist operated, and the patient subsequently sued; Bachelder was also named in the complaint. He was eventually dropped from the case, but not before his liability insurance paid out $40,000 in legal fees.[30]

> The most dangerously incompetent doctors often remain in place for many years, in part because employers fear wrongful-dismissal lawsuits by fired doctors even more than malpractice suits by their victims.[31]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: SPORTS

The *New Yorker* reports on how diving boards and U.S. Olympic diving medals have both become a thing of the past due to frivolous lawsuits: "After a golden age in the seventies . . . the American pool has suffered a gradual decline: thanks, for the most part, to concerns about safety and liability, diving boards have been removed and deep ends undeepened. . . . Such developments have consequences. . . . In the last two Olympics, medal counts for [once-dominant] American divers reached their lowest levels since the 1912 Games."[32]

According to *Newsweek:*

> Ryan Warner is a volunteer who runs an annual softball tournament in Page, Ariz., that usually raises about $5,000 to support local school sports programs. But not this year. A man who broke his leg at a recent tournament sliding into third base filed a $100,000 lawsuit against the city, and Warner fears he may be named as a defendant. "It's very upsetting when you're doing something for the community, not making any money for yourself, to be sued over something over which you had no control," he says. So Warner canceled the tournament.[33]

> Parents, on behalf of their children, increasingly sue not only for physical injuries, but for "hurt feelings" when they don't make a team, says John Sadler of Columbia, S.C., who insures amateur sports leagues . . . If a ref steps into a fight, he can

[30] Debra Rosenberg, "Hard Pill to Swallow," *Newsweek* (December 15, 2003) at 46.
[31] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars," *Newsweek* (December 15, 2003) at 48.
[32] Field Maloney, "Cannonball!" *New Yorker,* Talk of the Town (September 8, 2004).
[33] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars," *Newsweek* (December 15, 2003) at 44.

> be sued if one of the players he is holding back takes a punch. If the ref doesn't intervene, he can be sued for allowing the fight to go on.[34]
>
> Even apparently innocent soccer moms are at risk. In Jupiter, Fla., one mother volunteered to pick up a pizza for the team. She drove over the foot of a child who, left unattended, had run into the road. The police did not even give the woman a ticket. But the parents of the child sued the mother and the soccer league and tried to sue the city, the refs and various sponsors.[35]

Other examples include the following. In Vestavia Hills, Alabama, the father of Laura Brooke Smith "sued [the] school district, saying his daughter's rejection from the high school cheerleading squad despite professional coaching has caused her humiliation and mental anguish."[36] A student was barred from participating in her high school's cheerleading tryouts "as punishment for passing a profane note on a . . . school bus in 2003." In response, her father hired a lawyer and filed a lawsuit "saying the punishment violated his daughter's constitutional rights." An appeals court dismissed the lawsuit, agreeing with school officials that students "do not have a constitutional right to participate in extra-curricular activities."[37]

In North Haven, Connecticut, the "families of two high school sophomores have filed a Federal lawsuit over the school's decision to drop them from the drum majorette squad."[38]

And in Pennsylvania, "[a] teenager, who felt she was destined for greatness as a softball player, has filed a $700,000 lawsuit against her former coach, alleging his 'incorrect' teaching style ruined her chances for an athletic scholarship."[39]

ABC News reported that:

> When his 16-year-old son didn't get the most valuable player award, Michel Croteau didn't get upset. He hired a lawyer and sued his son's youth hockey league to the tune of more than $200,000 . . . The Croteaus are not alone. In the last year, parents have filed more than 200 non-injury-related sports lawsuits against coaches, leagues and school districts in the United States, according to Gil Fried, a University of New Haven professor who specializes in sports law . . . The Butzke family sued the Comsewogue, N.Y., school district because their eighth-grade daughter was taken off the varsity high school soccer team. The Branco family took legal action against the Washington Township, N.J., school district after their son, David, was cut from the junior varsity basketball team . . . The Rubin family sued California's New Haven Unified School District for $1.5 million because their son got kicked off the varsity basketball team . . . The family felt James Logan High

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[34] *Id.* at 49.
[35] *Id.*
[36] Fox News (May 31, 2001).
[37] Kelly Melhart, "Court Dismisses Suit over Punishment," *Fort Worth-Star Telegram* (April 19, 2005).
[38] Ann DiMatteo, "Families Sue Over Unfair Twirl Tryouts," *The New Haven Register,* May 18, 2001.
[39] Dave Sommers, "Legal Pitch," *The Trentonian,* May 1, 2001.

> School Coach Blake Chong may have cost their son not just a scholarship, but an NBA career.[40]

In 1999, even major league baseball issued a directive to players that they should no longer throw foul balls to eager fans in the stands because there might be a lawsuit if someone got hurt trying to recover a souvenir.[41] Yet another lawsuit was filed against Major League Baseball for injuries resulting from being hit by a practice ball before Game One of the 2000 World Series.[42]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: PLAYGROUNDS

The lawsuit culture is even changing the traditional American landscape: playgrounds are increasingly removing seesaws for fear of liability.[43] According to *Newsweek:*

> Playgrounds all over the country have been stripped of monkey bars, jungle gyms, high slides and swings, seesaws and other old-fashioned equipment once popularized by President John F. Kennedy's physical-fitness campaign. The reason: thousands of lawsuits by people who hurt themselves at playgrounds. But some experts say that new, supposedly safer equipment is actually more dangerous because risk-loving kids will test themselves by, for instance, climbing across the top of a swing set. Other kids sit at home and get fat—and their parents sue McDonald's.[44]

As Philip Howard has written, "just letting a claim go to a jury . . . will affect whether seesaws stay in playgrounds all across America."[45]

Today, a brochure from the National Program for Playground Safety advises: "Seesaw use is quite complex because it requires two children to cooperate and combine their actions," and now "there is a trend to replace [them] with spring-centered seesaws."[46] A culture of legal fear is actually reducing the opportunities of American children to burn calories in playgrounds.

And according to one recent article:

> Andrea Levin is grateful that Broward County schools care about her daughter's safety. But this year when they posted a sign that demanded "no running" on the playground, it seemed like overkill. "I realize we want to keep kids from cracking their heads open," said Levin, whose daughter is a Gator Run Elementary fifth grader in Weston. "But there has to be a place where they can get out and run." Broward's "Rules of the Playground" signs, bought from an equipment catalogue and displayed at all 137 elementary schools in the district, are just one of several steps taken to cut down on injuries and the lawsuits they inspire. "It's too tight around the equipment to be

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[40] ABCNews.com Report, "Blame the Coach? Angry Parents Take School Coaches to Court" (August 7, 2003).

[41] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 46.

[42] Zach Haberman, "Fan Blinded by Ball Sues Yanks for $5M," *The New York Post* (April 11, 2005).

[43] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 3.

[44] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars," *Newsweek* (December 15, 2003) at 44.

[45] Philip K. Howard, *The Collapse of the Common Good* (New York: 2001) at 58.

[46] U.S. Consumer Product Safety Commission, Handbook for Public Playground Safety, Pub. No. 325 at 23.

running," said Safety Director Jerry Graziose, the Broward County official who ordered the signs. "Our job was to try to control it." How about swings or those hand-pulled merry-go-rounds? "Nope. They've got moving parts. Moving parts on equipment is the number one cause of injury on the playgrounds." Teeter-totters? "Nope. That's moving too." Sandboxes? "Well, I have to be careful about animals" turning them into litter boxes. Cement crawl tubes? "Vagrants. The longer they are, the higher possibility that a vagrant could stay in them. We have shorter ones now that are made out of plastic or fiberglass." Broward playgrounds aren't the only ones to avoid equipment that most adults remember. Swings, merry-go-rounds, teeter-totters and other old standards are vanishing from schools and parks around the country, according to the National Program for Playground Safety . . . Since 1999, Broward County schools paid out about $561,000 to settle 189 claims for playground accidents, about 5 percent of the amount the district spent on all injury claims in that time. To keep those numbers low, Graziose said, he needs to keep thinking of ways to make playgrounds safe . . . "To say 'no running' on the playground seems crazy," said [Broward County School Board Member Robin] Bartleman, who agreed to be interviewed on a recent outing at Everglades. "But your feelings change when you're in a closed-door meeting with lawyers." . . . The girls tried out the horizontal ladder and balance beam for a few minutes before settling on a game of stacking plate-size dirt chunks into a neat pile . . . Bartleman, the only board member with children in elementary school, created a subcommittee this year to suggest ways to redesign school playgrounds. Safety is important, she said, but there's got to be a way to make Broward's playgrounds more interesting than dirt. "I would have never thought about this until my daughter came up to me 1 day and said 'Momma, I hate going to that playground,'" she said.[47]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: GOOD DEEDS

According to the *Chicago Daily Herald:*

By day, Dave Peterson works with diagnostic multiplexers and beam shakers to maintain the Fermi National Accelerator Laboratory's antiproton source. But at dawn and dusk the Geneva resident drags a homemade snowplow behind his daughter's Pacific Electra mountain bike, clearing a 16-inch wide section of the Fox River Trail as he rides to and from work in Batavia. Because he rides at a time when few are watching, he's become something of a local legend the last two winters, a Bigfoot. "It's one of those weird things that has touched a nerve with a lot of people," Peterson said. A whole lot. In fact, many of the path's regulars have come to expect it to be clear—and that has put Peterson's plowing on hiatus. The county has asked him to stop because if there's an expectation that the trail will be plowed, there's a greater chance for litigation, said Kane County Forest Preserve District operations supervisor Pat

[47] Chris Kahn, "In the Pusuit of Safety, Teeter-totters and Swings Are Disappearing from Playgrounds," *The Sun-Sentinel* (July 18, 2005).

> McQuilkin. "If a person falls, you are more liable than if you had never plowed at all. Crazy world," wrote AnnMarie Fauske, the district's community affairs director, in response to a letter to Peterson. "Unfortunately, the times we are in allow for a much more litigious environment than common sense would dictate." . . . "There is something I can do here," Peterson said. "I can use my skills as an engineer to make life easier for the little old ladies who walk on the path." But the forest preserve worries that if they take a wrong step and fall, those little old ladies might decide to sue.[48]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: THE GIRL SCOUTS

The Girl Scouts in Metro Detroit alone have to sell 36,000 boxes of cookies each year just to pay for liability insurance.[49] According to former Girl Scout Laurie Super [of Downington, Pennsylvania], "[i]t's getting harder to sell [cookies] . . . Our local Wawa stores said they couldn't let the girls set up their booth anymore, because of liability issues."[50]

FRIVOLOUS LAWSUITS AFFECT EVERYONE: SANTA CLAUS

Even Santa Claus lives under a constant threat of legal harassment. As the *Los Angeles Times* quoted one Santa Claus, "When I started doing this years ago, I never even thought about liability . . . But Santas have a pretty good chance of getting sued . . ."[51]

FRIVOLOUS LAWSUITS AFFECT EVERYONE:
A LEGAL CULTURE OF FEAR STIFLES COMMON SENSE

The corrosive effects of lawsuit abuse were recently summarized by *Newsweek:*

> Americans will sue each other at the slightest provocation. These are the sorts of stories that fill schoolteachers and doctors and Little League coaches with dread that the slightest mistake—or offense to an angry or addled parent or patient—will drag them into litigation hell, months or years of mounting legal fees and acrimony and uncertainty, with the remote but scary risk of losing everything . . . *Americans don't just sue big corporations or bad people. They sue doctors over misfortunes that no doctor could prevent. They sue their school officials for disciplining their children for cheating. They sue their local governments when they slip and fall on the sidewalk, get hit by drunken drivers, get struck by lightning on city golf courses—and even when they get attacked by a goose in a park (that one brought the injured plaintiff $10,000). They sue their ministers for failing to prevent suicides. They sue their Little League coaches for not putting their children on the all-star team. They sue their wardens when they get hurt playing basketball in prison. They sue when their injuries are severe but self-inflicted, when their hurts are trivial and when they have not suffered at all.* Many of these cases do not belong in court.

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[48] Garrett Ordower, "County Tells Bicyclist Thanks, But Stop Plowing Trail," *The Chicago Daily Herald* (February 21, 2004).
[49] *See* "Fine Filers of Frivolous Lawsuits," *The Detroit News* (February 24, 2004).
[50] Julia Moskin, "Crave Thin Mints?" *The New York Times* (March 14, 2004).
[51] J.R. Moehringer, "Ho! Ho! Is More Like Uh-Oh," *The Los Angeles Times* (December 23, 2004).

> But clients and lawyers sue anyway, because they hope they will get lucky and win a jackpot from a system that allows sympathetic juries to award plaintiffs not just real damages—say, the cost of doctor's fees or wages lost—but millions more for impossible-to-measure "pain and suffering" and highly arbitrary "punitive damages." (Under standard "contingency fee" arrangements, plaintiffs' lawyers get a third to a half of the take.) . . . Many Americans sue because they have come to believe that they have the "right" to impose the costs and burdens of defending a lawsuit on anyone who angers them, regardless of fault or blame. The cost to society cannot be measured just in money, though the bill is enormous, an estimated $200 billion a year, more than half of it for legal fees and costs that could be used to hire more police or firefighters or teachers.[52]
>
> [T]he time may come when ordinary Americans recognize that for every sweepstakes winner in the legal lottery, there are millions of others who have to live with the consequences—higher taxes and insurance rates, educational and medical systems seriously warped by lawsuits, fear and uncertainty about getting sued themselves.[53]

ADDITIONAL EXAMPLES OF FRIVOLOUS LAWSUITS

The following are more typical examples of the frivolous lawsuits that have tormented innocent Americans.[54]

- According to Reuters, "A lawsuit against . . . U.S. weather forecasters . . . over the South Asian tsunami disaster is fueling calls for greater curbs on what critics say are frivolous cases brought by lawyers out to make a quick buck. The suit, brought on behalf of a group of tsunami victims, 'perfectly illustrates' the need for U.S. laws to hold lawyers liable for the economic damages they inflict on those they sue, said legal scholar Lester Brickman."[55] The petition was filed in Federal court in Manhattan.[56]
- Barbara Streisand sued the California Coastal Records Project, which took thousands of pictures of the California coastline intended to protect the state's shoreline. The photographs are made available free of charge to state and local governments, university researchers, conservation organizations, and others. Streisand sued because a picture of her

[52] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 44–45.

[53] *Id.* at 51. Although the American Trial Lawyers Association has vociferously attacked the *Newsweek* article, *Newsweek* stands solidly by its report, stating "NEWSWEEK received a large volume of mail from trial lawyers critical of our cover story. We stand by the story as both accurate and fair. The criticisms are for the most part easily refuted with material in the public record." *Newsweek,* "Mail Call" (January 12, 2004).

[54] Britain's most senior judges, the Appellate Committee of the House of Lords, has branded Britain's U.S.-style claims system an "evil" that interferes with civil liberties and freedom in a landmark ruling in a compensation case. In the case of *Tomlinson v. Congleton Borough Council,* [2003] U.K.H.L. 47 (2003), the Appellate Committee stated "The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. Of course there is some risk of accidents arising out of the joie de vivre of the young, but that is no reason for imposing a grey and dull safety regime on everyone."

[55] Gail Appleson, "Tsunami Suit Shows Need to Curb Lawyers, Critics Say," Reuters (March 8, 2005).

[56] *Id.*

Malibu estate (her mansion composed only 3% of one photo among thousands) was posted on the public interest organization's Web site. She sued for $50 million (five separate claims for $10 million each), but on May 10, 2004, Streisand was ordered to pay the people she sued $154,000 in legal fees they accrued defending against her ridiculous lawsuit.[57]

- According to the *Indianapolis Star,* "Indiana drivers who get into wrecks with someone who is talking on a cell phone can forget about suing the phone's manufacturer. The Indiana Court of Appeals on Friday dismissed an Evansville lawsuit in which Terry L. Williams tried to do just that after a March 2002 traffic crash. Williams collided with Kellie Meagher, who was allegedly talking on a Cingular Wireless phone. In the lawsuit, Williams alleged Cingular knew—or should have known—that Meagher would use the phone while driving. Vanderburgh Superior Court Judge Mary Margaret Lloyd dismissed Cingular from the suit. After the dismissal, Williams asked the judge to reconsider, citing new evidence that included a 'Blondie' cartoon strip in which Blondie, while talking on a cell phone, caused an accident. But the Evansville judge was unmoved. Now an appellate court also agrees that Cingular was not liable."[58]
- According to the *Albany Times Union,* "The spectacle of American spending always gets a little silly in the holiday season, but shoppers over the next few weeks will be hard-pressed to match the performance last year of Antoinette Millard. She ran up bills of almost $1 million in New York luxury stores like Cartier and Barneys, and, according to court papers, Millard is now suing American Express for improperly soliciting her to sign up for a big-spender's credit card, her purchasing weapon of choice."[59]
- In April, 1995, Carl and Diana Grady sued Frito Lay claiming that Dorito chips stuck in Charles Grady's throat and tore his esophagus. The Gradys wanted to present the "expert" testimony of Dr. Charles Beroes to support their claim that Doritos are inherently dangerous and negligently designed. Beroes' research included pressing Doritos onto a scale until the tip snapped off, and measuring the amount of time it took saliva to soften the Doritos. None of Beroes' tests involved chewing. After 8 years of costly litigation, the Pennsylvania Supreme Court threw out the case, noting that Dr. Beroes' tests "smacked of a high school science fair project and did not bear any relationship to the reality of the . . . consumption of foodstuffs."[60] Justice Saylor pointed out in his concurring opinion "the common sense notion that it

[57] *See* Jennifer Pittman, "The Blame Game" *The Silicon Valley/San Jose Business Journal* (January 9, 2004); Kenneth R. Weiss, "Streisand Sues Over Photograph of Her Coast Home on Web Site," *The Los Angeles Times* (May 30, 2003) at B1; Streisand v. Adelman, Case No. SC077257 (Sup. Ct. Los Angeles Cty.) (complaint filed May 30, 2003); Streisand v. Adelman, Case No. SC077257 (Sup. Ct. Los Angeles Cty.) (ruling on submitted matters: Motion to Tax Costs and Motion for Attorneys; Fees).

[58] Kevin Corcoran, "Court: Don't Blame Cell-Phone Maker for Crash," *The Indianapolis Star* (June 5, 2004).

[59] Steve Lohr, "Buying Easy, Paying Hard," *Times Union* (December 5, 2004) at A1.

[60] *Grady v. Frito-Lay, Inc.,* 839 A.2d 1038, 1042 (Pa. 2003) (citing *Grady v. Frito-Lay, Inc.,* 2000 WL 33436367, at *2) (Pa.Com.Pl. April 3, 2000)).

is necessary to properly chew hard foodstuffs prior to swallowing."[61]

- After 3 years of litigation, an appeals court finally held that the survivor of a crash cannot sue an airline for punitive damages when the pilots did not intentionally crash the plane. At midnight on June 1, 1999, during a severe thunderstorm, a fully loaded American Airlines jet crashed while trying to land in Little Rock, Arkansas. Eleven people died, including the pilot. Two passengers sued seeking compensatory and punitive damages. A U.S. district court judge ruled that "uncontroverted evidence" showed the pilots had a good faith belief that the plane could be landed safely.[62] Upholding the district court's decision, Judge Morris Arnold held that no reasonable jury could find that the members of the flight crew crashed the plane on purpose. Judge Morris wrote, "[s]tated differently, we hold that no reasonable jury could find that the members of the flight crew knew, or ought to have known, in light of the surrounding circumstances, that their conduct would naturally and probably result in injury."[63]
- After 5 years of litigation, the Nevada Supreme Court dismissed the appeal of Lane Holmes, who sued the Turtle Stop in Las Vegas, claiming a cup caused him to suffer leg burns from dripping hot coffee.[64] The court upheld the decision of the trial court that ruled "[t]he danger is open and obvious."[65]
- A woman in Knoxville, Tennessee, sought $125,000 in damages against McDonald's, claiming a hot pickle dropped from a hamburger, burning her chin and causing her mental injury. Her husband also sued for $15,000 for loss of consortium.[66]
- On September 3, 2003, a Federal district judge in New York threw out for a second time a lawsuit filed on behalf of obese children claiming McDonald's Corporation was legally responsible for their over-consumption of food.[67] The court earlier noted the national ramifications of the complaint and the requested damages, stating "McDonalds has also, rightfully, pointed out that this case, the first of its kind to progress far enough along to reach the stage of a dispositive motion, could spawn thousands of similar 'McLawsuits' against restaurants . . . The potential for lawsuits is even greater given the numbers of persons who eat food prepared at other restaurants in addition to those serving fast food."[68]

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[61] *Grady v. Frito-Lay, Inc.,* 839 A.2d 1038, 1053 (Pa. 2003) (Saylor, J., concurring).

[62] *In re: Aircraft Accident at Little Rock, Arkansas on June 1, 1999,* 231 F.Supp. 852, 879 (E.D.Ark. 2002).

[63] *In re: Aircraft Accident at Little Rock, Arkansas on June 1, 1999,* 351 F.3d 874, 878–79 (8th Cir. 2004).

[64] *Holmes v. Turtle Stop, Inc.,* 62 P.3d 1165 (Nev. 2000).

[65] Cy Ryan, "Court Says Warning About Hot Coffee Unnecessary," *The Las Vegas Sun* (July 11, 2000).

[66] *See* Randy Kenner, "Lawsuit on Hot Pickle Draws Attention Around the Globe," *Knoxville News-Sentinel* (October 10, 2000) at A1.

[67] *See Pelman v. McDonald's Corp.,* S.D.N.Y. 02 Civ. 7821 (RWS), at 34–35 (September 3, 2003).

[68] *Pelman v. McDonald's Corp.,* 237 F.Supp.2d 512, 518 (S.D.N.Y. 2003).

- The Michigan Court of Appeals threw out a case brought by Richard Overton, who "pointed to defendant's television advertisements featuring Bud Light as the source of fantasies coming to life, fantasies involving tropical settings, and beautiful women and men engaged in unrestricted merriment. Plaintiff sought monetary damages in excess of $10,000, alleging that defendant's misleading advertisements had caused him physical and mental injury, emotional distress, and financial loss."[69]
- In Florida, a woman sued Universal Studios for $15,000 for "extreme fear, emotional distress and mental anguish" because the theme park's annual haunted house was too scary.[70]
- After over 3 years of litigation, Georgia's Court of Appeals held that the day trading firms where Mark Barton invested before embarking on a shooting rampage are not liable for the victims' injuries and deaths. A unanimous panel on the court stated "We find this case is one in which the issue of proximate cause is so plain, palpable and indisputable as to demand summary judgment for the defendants."[71] The court noted that it was "troubled by the implication that the list of defendants potentially liable for any person's violence, if sparked by economic misfortune, would be limited only by the number of stock brokers, investment advisers, lawyers, business partners, lottery ticket sellers, etc., whom the assailant blamed for his financial losses."[72]
- After a decade of litigation, Texas' 1st Court of Appeals reversed a $43 million judgment against a car manufacturer in a products liability suit that alleged a defective seat belt caused the 1992 drowning death of a woman with a blood-alcohol level of 0.17 who failed to escape from her Honda Civic when it became submerged under water.[73]
- The family of a man who died on a fishing trip sued the Weather Channel for $10 million, claiming that the man relied on the channel's forecast for his safety. In dismissing the case, the Miami Federal court stated that if forecasters were held accountable, "the duty could extend to farmers who plant their crops based on a forecast of no rain, construction workers who pour concrete or lay foundation based on the forecast of dry weather, or families who go to the beach for the weekend."[74]
- A West Virginia man who fell down an escalator at an airport finally dropped a lawsuit filed against US Airways over the accident. According to the Associated Press, "The lawsuit in circuit court in Fort Myers alleged the airline didn't warn Floyd Shuler, 61, about the adverse affects of drinking alcohol on a plane. Shuler said in a news release from Wheeling, W.Va., that he didn't intend for the suit to be filed. 'I learned

[69] *Overton v. Anheauser-Busch Co.,* 517 N.W.2d 308, 309 (Mich. App. 1994).
[70] Tim Barker, "Universal Fall Leads to Lawsuit," *Orlando Sentinel* (January 5, 2000) at C1.
[71] *Brown v.All-Tech Investment Group,* 2003 WL 23315394 (Ga. App.) at *5.
[72] *Id.* at *7, n.5.
[73] *Honda of America Manufacturing, Inc. v. Norman,* 104 S.W.3d. 600 (Tex. App. 2003).
[74] *See* "Storm Death Is Not Weatherman's Fault," *New York Post* (March 29, 1999) at 84.

about the filing of the lawsuit against US Airways . . . along with everyone else,' Shuler said. 'It was never my intent to take on the airline industry. I apologize for any inconvenience this has caused US Airways.' Shuler's attorney, Paul Kutcher, did not return a phone call from The Associated Press seeking comment. The suit . . . said US Airways was negligent by failing to warn Shuler that the effects of alcohol are greater at night on airline passengers. The suit also alleged that the company did not properly maintain the escalator at Southwest Florida International Airport when he fell down it on Aug. 28, 1999, and it sought damages in excess of $15,000." [75]

- Several months after the Escondido, California library's resident cat attacked Richard Espinosa's 50-pound Labrador-mix assistance dog, Espinosa filed a $1.5-million claim against the city, alleging that he was harmed due to the dog's injuries. According to the legal papers filed, Espinosa claimed his Federal and state constitutional rights were violated and that ". . . the defendants actions and subsequent inactions caused Espinosa to suffer significant lasting, extreme and severe mental anguish and emotional distress including, but not limited to, terror, humiliation, shame, embarrassment, mortification, chagrin, depression, panic, anxiety, flashbacks, nightmares, loss of sleep . . ." [76] According to the *North County Times,* "It took a jury little more than 2 hours of deliberation Friday to reject a claim from a man that the city of Escondido violated his civil rights when a cat living in a city library attacked his assistance dog more than 3 years ago . . . Espinosa originally asked for $1.5 million in compensation and damages . . . During jury selection Wednesday, Judge Hofmann excused four potential jurors who said they felt the case was 'frivolous' and that they could not be impartial. Others also said the case was without merit, but said they could look beyond that feeling. 'After that first juror said the word "frivolous," and so did the next five, I thought the whole panel should have been thrown out,' Espinosa said . . . The city offered twice to settle with Espinosa, including one offer of $1,000. Espinosa declined. Nelson was unable to estimate how much the city spent defending itself against Espinosa's allegations, but he said it was a considerable sum. He also said the case could drag on for months or years if Espinosa does appeal." [77]
- In Ohio, Hamilton County Commissioner Todd Portune sued the Bengals and the National Football League claiming the team violated its stadium lease by failing to be competitive. The complaint, which also named the other 31 NFL franchises as defendants, alleges fraud, civil conspiracy, antitrust violations and breach of contract.[78]

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[75] Associated Press, "Man Drops Suit Filed Against Airline After He Drank Booze, Fell," *USA Today* (April 4, 2004).
[76] Chuck Shepherd, "News of the Weird," *The Orlando Weekly* (August 30, 2001).
[77] Teri Figueroa, "Jury Rejects Claim by Man in Attack on Dog by Library Cat," *The North County Times* (January 20, 2004).
[78] Terry Kinney, "Commissioner Sues Bengals, NFL," (Associated Press January 31, 2003).

- After 3 years of litigation, the Nebraska Supreme Court upheld a lower court ruling and found Ford Motor Co. and Bridgestone/Firestone Inc. not liable for the death of a woman killed by a man who gave her a lift after she got a flat tire. The woman's parents claimed in the lawsuit that a Firestone Wilderness AT tire on their daughter's Ford Explorer failed, setting off the chain of events that resulted in her death. The Nebraska court said the companies could not have foreseen the murderer's criminal acts.[79]

ABSURD WARNING LABELS REQUIRED BY FRIVOLOUS LAWSUITS

Today, testaments to the age of frivolous lawsuits are written on all manner of product warnings that aim to prevent obvious misuse. One warning label on a toilet brush states "Do not use for personal hygiene."[80] A label on a snow sled says "Beware: sled may develop a high speed under certain snow conditions." A 5-inch brass fishing lure with three hooks is labeled "Harmful if swallowed." A warning on an electric router made for carpenters states "This product not intended for use as a dental drill." A warning label on a baby stroller cautions "Remove child before folding." A sticker on a 13-inch wheel on a wheelbarrow warns "Not intended for highway use." A dishwasher carries the warning "Do not allow children to play in the dishwasher." A manufactured fireplace log states "Caution—Risk of Fire." A household iron contains the warning "Never iron clothes while they are being worn."[81] And a cardboard car sun shield that keeps sun off the dashboard warns "Do not drive with sun shield in place."[82]

What follows are some pictorial displays of wacky warning labels required by our frivolous lawsuit culture.

[79] Kevin O'Hanlon, "Court: Faulty Tire Didn't Cause Murder," the Associated Press (August 8, 2003).

[80] David N. Goodman, "Toilet Brush Warning Wins Consumer Award," The Associated Press (January 6, 2005).

[81] Sonny Garrett, "Warning: People Are as Dumb as You Think," *The Baxter Bulletin* (April 17, 2004) (compiling list from Michigan Lawsuit Abuse Watch in Annual Wacky Warning Label Contest).

[82] Larry D. Hatfield, "Dumbest Warning Labels Get their Due," *The San Francisco Chronicle* (January 24, 2002).

PICTORIAL DISPLAYS OF ABSURD WARNING LABELS REQUIRED BY FRIVOLOUS LAWSUITS

4. Never operate this appliance if it has a damaged cord or plug, if it is not working properly, if it has been dropped, damaged, or dropped into water. Return the appliance to a Conair service center for examination and repair.

5. Keep the cord away from heated surfaces. Do not pull, twist, or wrap line cord around dryer, even during storage.

6. Never block the air openings of the appliance or place it on a soft surface, such as a bed or couch, where the air openings may be blocked. Keep the air openings free of lint, hair, and the like.

7. Never use while sleeping.

8. Never drop or insert any object into any opening or hose.

9. Do not use outdoors or operate where aerosol (spray) products are being used or where oxygen is being administered.

10. Do not use an extension cord to operate dryer.

The Vanishing Fabric Marker is ideal for the quilter. It is perfect for the short time project and a safe way of marking.

Be sure to replace cap when not in use to avoid drying out of ink.

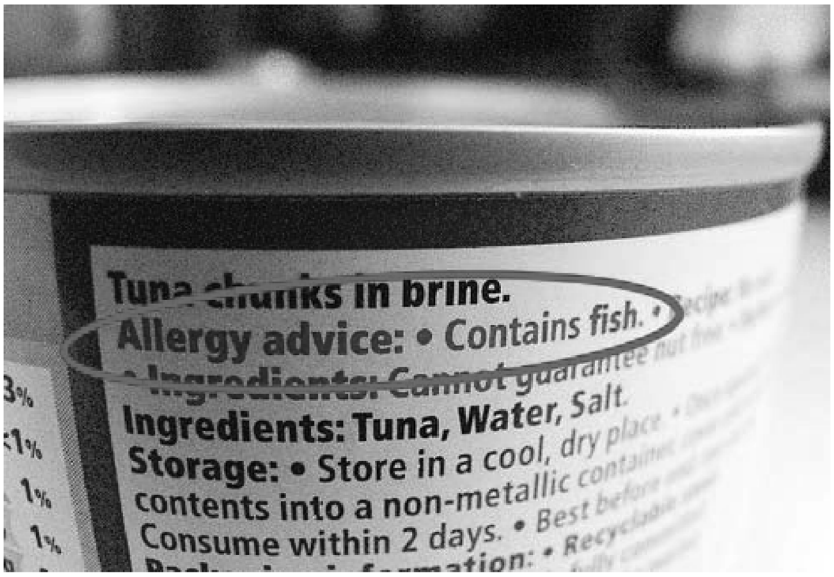
Test on a spare piece of fabric to assure satisfactory results.

The Vanishing Fabric Marker should not be used as a writing instrument for signing checks or any legal documents, as signatures will fade or disappear completely.

WARNING: THIS PRODUCT MOVES WHEN USED.
EXERCISE CAUTION AND COMMON SENSE WHEN RIDING.
• Do not ride on sloped area • Use all necessary

Plug-and-Playlists
iPod shuffle makes syncing a piece of cake. Cupcake, even. Use the optional Dock to connect to your computer or just plug iPod shuffle directly into a USB port on any computer(4). Then drag and drop individual songs, Autofill your favorite playlists or Autofill your iPod shuffle with a random sampling from your music library. Since iPod shuffle automatically charges while syncing, it stays ready for your next adventure.

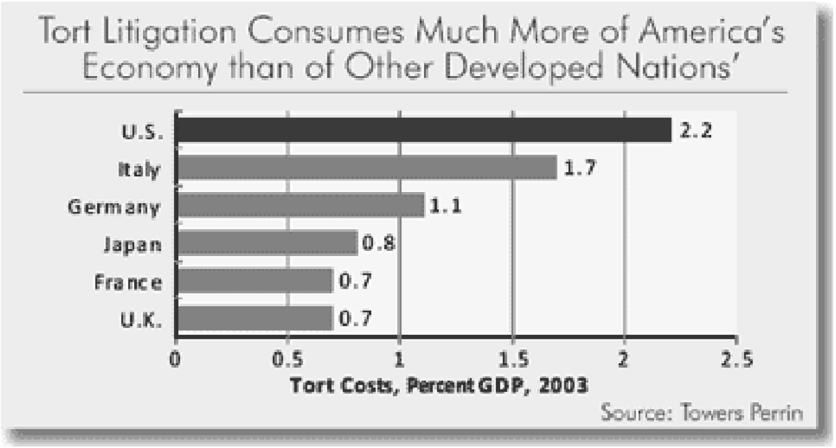
1. Music capacity is based on 4 minutes per song and 128Kbps AAC encoding.
2. Do not eat iPod shuffle.
3. Rechargeable batteries have a limited number of charge cycles and may eventually need to be replaced. Battery life and number of charge cycles vary by use and settings. See www.apple.com/batteries for more information.
4. Some computers require either the optional iPod shuffle Dock or a USB cable extender (sold separately).

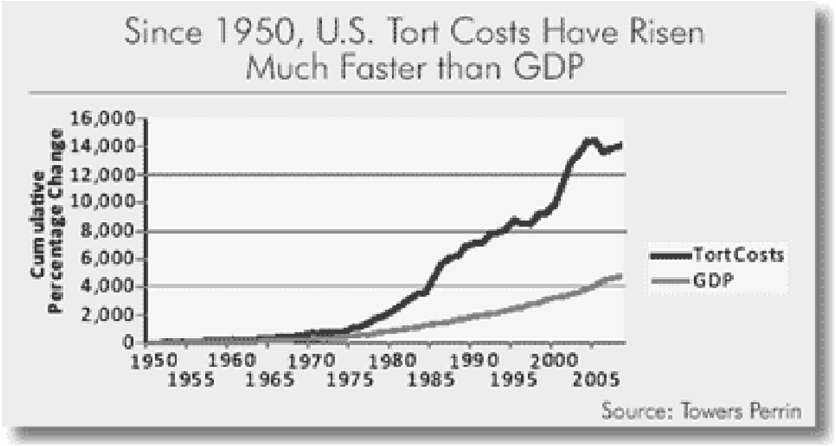


THE COSTS LAWSUITS IMPOSE ON SOCIETY

The annual direct cost of American tort litigation—excluding much securities litigation, punitive damages, and the multibillion-dollar settlement reached between the tobacco companies and the

states in 1998—exceeds $250 billion, almost 2 percent of gross domestic product,[83] as illustrated in the following charts:





It should be emphasized that statistics do not capture the very real experiences of victims of lawsuit abuse, and this debate is not principally about aggregate statistics regarding the number of law-

[83] *See* Towers Perrin, 2009 Update on U.S. Tort Cost Trends 5 (2009), http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12–8_09.pdf (costs as of 2008). As noted by Manhattan Institute fellow Walter Olson:

> [The Towers Perrin] studies are particularly useful in assessing long-term trends in liability-cost burdens (since long-term data will tend to transcend the vagaries of passing hard/soft markets) and in international comparisons (since well-defined liability insurance markets exist in other advanced countries and can be subjected to comparable metrics). Perhaps for those very reasons, and because the figures are widely acknowledged within the industry as having a high degree of accuracy in measuring what they set out to measure, the [Towers Perrin] numbers have been furiously attacked by organized trial lawyers and their allies.

Walter K. Olson to PointofLaw.com, http://www.pointoflaw.com/archives/2008/11/tillinghasttowe.php (Nov. 21, 2008, 11:14 EST). For a response to these criticisms, see Posting of James R. Copland to PointofLaw.com, http://www.pointoflaw.com/archives/000877.php (Jan. 19, 2005, 19:11 EST); *see also* Towers Perrin, Corrections and Clarifications (2005), http://www.towersperrin.com/tillinghast/pdf/response_0517.pdf.S6601

suits filed. The costs of America's lawsuit culture are staggering. As chronicled by Sebastian Mallaby in the *Washington Post:*

> The most complete study of the tort system's cost comes from the consulting firm Tillinghast-Towers Perrin. Tillinghast's clients are mainly insurers, which are at loggerheads with the trial bar, so you may mistrust its data. Nonetheless, Tillinghast has published seven updates to its original 1985 study, refining its methodology along the way. Its numbers are the best available. And they are stunning . . . the really shocking thing is where the billions went. Injured plaintiffs—the fabled little guys for whom the system is supposedly designed—got less than half the money. According to Tillinghast's 2002 data, plaintiffs' lawyers swallowed 19 percent of the $233 billion. Defense lawyers pocketed an additional 14 percent, and other administrative costs, mainly at insurance firms, accounted for a further 21 percent. The legal-administrative complex thus guzzled fully 54 percent of the money in the tort system, or $126 billion. That's 43 times as much as the Federal Government has budgeted this year to combat the global AIDS pandemic. No other system for compensating misfortune has such outrageous administrative costs. To guard against the possibility of sickness, people buy medical insurance. The health insurance industry, justly regarded as a paper-clogged nightmare, has administrative costs of 14 percent. To guard against the danger of disability, we have the Social Security program. The overhead for the Social Security disability system is around 3 percent. If you want a really good number to set against the 54 percent overhead in the tort system, just take a look at Medicare. Its overhead is about 2 percent. So the tort system's administrative costs are a scandal . . . Measured as a share of GDP, America's tort system is more than twice as expensive as it was in 1960, twice as expensive as the current systems in France or Canada, and three times as expensive as the system in Britain. A reasonable goal for the American tort system is to halve it.[84]

As columnist Stuart Taylor, Jr., has observed:

> The most recent [National Center for State Courts] report states that its (incomplete) data "indicate a 40 percent increase in tort filings" from 1975 to 2002. Census figures indicate that the population increase from 1975 to 2002 was about 33 percent. So tort filings per capita have not declined by 8 percent since 1975; they have increased somewhat . . . And although the tort system's inflation-adjusted direct costs per capita did decline modestly during the 1990's, they soared by a stunning 14.4 percent in 2001 and another 13.3 percent in 2002, to an estimated 2002 total of $233 billion. The tort system consumes 2.2 percent of GDP in the U.S.—almost four times the percentage in 1950; more than triple the 0.6 percent in the United

[84] Sebastian Mallaby, "The Trouble with Torts," *The Washington Post* (January 10, 2005) at A17. *See also* U.S. Tort Costs: 2004 Update: Trends and Findings on the Cost of the U.S. Tort System, Towers Perrin Tillinghast (2004) ("Looking ahead, we anticipate growth in U.S. tort costs to range from 5% to 8% in 2005, with a midpoint of 6.5% We expect a similar increase in 2006.").

Kingdom; and more than double the 0.8 percent in Japan, France, and Canada.[85]

According to the Economic Report of the President, "The expansive tort system has a considerable impact on the U.S. economy. Tort liability leads to lower spending on research and development, higher health care costs, and job losses."[86] And according to the Council of Economic Advisers, "the United States tort system is the most expensive in the world, more than double the average cost of other industrialized nations."[87] The direct costs of medical malpractice claims jumped by an average of 11.9 percent a year from 1975 to 2002.[88]

Of the costs of tort litigation, only 22 cents on the dollar went to compensate alleged victims' economic losses; almost as much (19 cents) went to their lawyers; 24 cents went to payments for inherently unquantifiable noneconomic losses, mainly pain and suffering; 14 cents went to defense costs; and 21 cents went to insurance overhead costs.[89]

A report by Judyth Pendell, Senior Fellow at the AEI–Brookings Joint Center for Regulatory Studies, and Paul Hinton, Vice President of NERA Economic Consulting, has concluded that "[t]he tort liability price tag for small businesses in America is $88 billion a year" and that "[s]mall businesses bear 68 percent of business tort liability costs, but take in only 25% of business revenue."[90] The small businesses studied in the report account for 98% of the total number of businesses with employees in the United States.[91] A more recent study found the tort liability price tag for small businesses in 2008 was $105.4 billion dollars.[92]

Without the serious threat of punishment for filing frivolous lawsuits, innocent individuals and companies will continue to face the harsh economic reality that simply paying off frivolous claimants through monetary settlements is often cheaper than litigating the case. If it costs $10,000 to defend yourself in court against frivolous

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[85] Stuart Taylor, Jr., "'False Alarm' by Stephanie Mencimer [Washington Monthly, Oct. 2004]—A Response by Stuart Taylor, Jr. [Newsweek, National Journal]," available at http://www.overlawyered.com/pages/taylormencimerwashingtonmonthly.html.

[86] Economic Report of the President (February 2004) at 203.

[87] Council of Economic Advisers, "Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System" (April 2002) at 1.

[88] Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update: Trends and Findings on the Costs of the U.S. Tort System, at 2.

[89] *Id.* at 17. According to an analysis of a report by the National Center for State Courts by *Newsweek*'s Stuart Taylor, Jr., although tort filings declined by 9 percent from 1992 to 2001, almost all of that decline came in routine car-crash lawsuits. The report shows that medical malpractice claims increased by 24 percent from 1992–2001 and that total tort filings soared by 40 percent from 1975 to 2001, despite a dip during the 1990's. *See* Stuart Taylor, Jr. Response to ATLA's Claims, available at http://www.overlawyered.com/archives/000708.html. Chief Justice Rehnquist released new data on January 1, 2004, showing an 8 percent drop in civil filings in fiscal year 2003, "primarily as a result of decreases in personal injury/product liability cases involving asbestos (such filings had soared 98 percent the previous year)." William H. Rehnquist, 36 The Third Branch 1 (January 2004), 2003 Year-End Report on the Federal Judiciary, Chapter III, n.5. *See also* Economic Report of the President (February 2004), at 204–05 ("The number of injuries handles by the tort system has increased along with expenditures. The number of filings per capita started to rise in the early 1980's and peaked in the mid-1980's, at least in the 16 states for which data on lawsuit filings are available between 1975 and 2000. Much of the decline in filings since 1985 appears to have occurred in California, where medical liability reforms included a $250,000 limit for noneconomic damages that was found constitutional in 1985.").

[90] Judyth Pendell and Paul Hinton, Liability Costs for Small Business U.S. Chamber Institute for Legal Reform, June, 2004 at 1 ("small business" defined as "those with less than $10 million in annual revenue and at least one employee in addition to the owner").

[91] *Id.*

[92] "Tort Liability Costs for Small Businesses," U.S. Chamber Institute for Legal Reform (2010) at 11, available at www.instituteforlegalreform.com/get__ilr__doc.php?docId=1044.

charges, it makes financial sense to settle the case for $9,000, even if you weren't at fault in any way. This perverse dynamic not only results in legalized extortion, but it leads to increases in the insurance premiums all individuals and businesses must pay.[93]

POLLS AND EXPERT OPINION OVERWHELMINGLY SUPPORT LEGISLATION BARRING FRIVOLOUS LAWSUITS

We all pay for frivolous lawsuits through higher prices as consumers and through higher taxes as taxpayers.

A poll found that 83% of likely voters believe there are too many lawsuits in America, 76% believe lawsuit abuse results in increased prices for goods and services, and 65% said they would be more likely to vote for congressional candidates who supported curbs on lawsuit abuse.[94] Another poll found that 73% of Americans support *requiring* sanctions against attorneys who file frivolous lawsuits.[95]

Small businesses rank the cost and availability of liability insurance as second only to the costs of health care as their top priority,[96] and both problems are fueled by frivolous lawsuits.

When *Business Week* wrote an extensive article on what the most effective legal reforms would be, *Business Week* stated that what's needed is "Penalties That Sting." As *Business Week* recommends, "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 (CRAC), an obscure branch of the courts, made penalties optional. This needs to be reversed . . . by Congress."[97]

FRIVOLOUS LAWSUITS AGAINST INNOCENT VICTIMS HAVE BECOME COMMONPLACE, ESPECIALLY THREATENING SMALL BUSINESSES AND HEALTH CARE

Because existing rules against frivolous lawsuits are ineffective, as one commentator has pointed out, "The right to sue has been exploited by lawyers. They can gamble on taking cases on a contingency basis because they need only win 1 in 10 to score the big judgment that will make up for the other losses."[98]

Small businesses and workers suffer. For instance, the nation's oldest ladder manufacturer, family-owned John S. Tilley Ladders Co. of Watervliet, New York, near Albany, filed for bankruptcy pro-

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[93] Opponents of reform often claim that contingency fees—agreements by which personal injury attorneys are allowed a percentage cut from any monetary damages awarded to their client—provide a "screening mechanism" that weeds out frivolous cases. The argument used is that personal injury attorneys will not take frivolous cases because doing so would leave them with no monetary recovery. The perverse dynamic outlined above, along with the fact that filing fees are usually no more than a hundred dollars and additional defendants can be named in the lawsuit at no extra charge, makes clear that contingency fee agreements provide no effective screening mechanism at all since personal injury attorneys can simply take advantage of the legal costs they impose on defendants simply in virtue of their filing a case to extort money from those they sue.

[94] *See* American Tort Reform Association, "National Poll on Tort Reform" (February 27, 2003).

[95] *See* Insurance Research Council, "IRC Study Finds Strong Support for Wide Variety of Civil Justice Reform Measures" (April 5, 2004) at 4.

[96] Bruce D. Phillips, "Small Business Problems and Priorities" (National Federation of Independent Business Research Foundation, June 2004).

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

[98] Mortimer B. Zuckerman (Editorial) "Welcome to Sue City, U.S.A." *U.S. News & World Report* (June 16, 2003) at 64.

tection and sold off most of its assets due to litigation costs. Founded in 1855, the Tilley firm could not handle the cost of liability insurance, which had risen from 6% of sales a decade ago to 29%, even though the company never lost an actual court judgment. "We could see the handwriting on the wall and just want to end this whole thing," said Robert Howland, a descendant of company founder John Tilley.[99]

As Bernie Marcus, co-founder and former chairman of The Home Depot, has described, "An unpredictable tort system casts a shadow over every plan and investment. It is devastating for start-ups. The cost of even one ill-timed abusive lawsuit can bankrupt a growing company and cost hundreds of thousands of jobs. CEOs and their boards are forced to lower their aspirations and hold back on innovations to manage defensively. This is holding our nation back from competing effectively in the global marketplace and offshore competition is seriously cutting into market share for U.S. companies." [100]

Doctors and patients suffer. Before the 1960's, only one physician in seven had ever been sued in their entire lifetime,[101] whereas today's rate is about one in seven physicians sued per year.[102]

Further, the Harvard Medical Practice Study found that over half of the filed medical professional liability claims they studied were brought by plaintiffs who suffered either no injuries at all, or, if they did, such injuries were not caused by their health care providers, but rather by the underlying disease.[103] The researchers found that, of the 47 medical malpractice claims they studied that resulted in litigation,[104] "[i]n 14 cases, the physicians reviewed the record and found no adverse event. For most of these cases, the physicians examined the outcome and concluded that the cause was the underlying disease rather than medical treatment . . . In these 14 cases, our physician reviewers took a stand opposite to that of the plaintiff-patient's expert." [105] Further, the reviewers found that in an additional 10 cases an adverse event occurred, but there was no negligence on the part of the health care provider.[106] Of the 47 claims filed that the researchers analyzed, less than half demonstrated any actual negligence, and many demonstrated no discernable injury.[107]

RESPONSE TO FEDERAL JUDICIAL CENTER 2005 SURVEY

The Federal Judicial Center's 2005 survey of U.S. district court judges ("FJC 2005 Survey") will no doubt be misused by opponents

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[99] Carrie Coolidge, "The Last Rung; The Tort System Takes Down a 149-year-old Ladder Manufacturer," *Forbes* (January 12, 2004) at 52.

[100] Washington Legal Foundation, "Conversations With . . ." (Fall 2004).

[101] *See* "Opinion Survey of Medical Professional Liability," JAMA 164:1583–1594 (1957).

[102] *See* R. Bovbjerg, "Medical Malpractice: Problems & Reforms," The Urban Institute, Intergovernmental Health Policy Project (1995).

[103] *See* Harvard Medical Practice Study to the State of New York, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York at 11–5 (1990) ("[T]he tort system imposes the costs of defending claims on [health care] providers who may not even have been involved in an injury, let alone a negligent injury.").

[104] *See id.* at 7–1.

[105] *See id.* at 7–33.

[106] *See id.* at 7–33.

[107] *See also* Paul Weiler, *et al.*, A Measure of Malpractice (1993) at 71 ("[Of those 47,] 10 claims involved hospitalization that had produced injuries, though not due to provider negligence; and another three cases exhibited some evidence of medical causation, but not enough to pass our probability threshold. That left 26 malpractice claims, more than half the total of 47 in our sample, which provided no evidence of medical injury, let alone medical negligence.").

of legal reform as evidence that frivolous lawsuits are "not a problem." The survey of the Federal Judicial Center shows nothing of the sort.

The Lawsuit Abuse Reduction Act would largely restore Federal Rule of Civil Procedure 11 to what it was before it was made toothless in 1993. Rule 11, *prior* to the adoption of weakening amendments in 1993, which eliminated mandatory and serious sanctions against those who filed frivolous lawsuits, was widely popular among Federal judges, and it served to significantly limit lawsuit abuse. In 1990, the Judicial Conference's Advisory Committee on Civil Rules (the same organization that requested the FJC 2005 Survey) undertook a review of Rule 11 at the time and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed, based on their experience under both a weaker and stronger Rule 11, that a stronger Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the stronger version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then-current form (80.4%).[108] Note that of the 751 judges surveyed in 1990, 583 responded, roughly twice times as many as responded to the FJC's 2005 Survey.

Enter the Federal Judicial Center's 2005 survey, *which only 278 judges responded to, and in which half of the judges surveyed (and over half of the judges that responded to the survey) had no experience with the stronger version of Rule 11.* As the FJC 2005 Survey states, "the Center E-mailed questionnaires to two random samples of 200 district judges each . . . One sample comprised solely judges appointed to the bench before January 1, 1992 . . . *[t]he other sample comprised solely judges appointed to the bench after January 1, 1992."*[109] The FJC report keeps secret the dates on which the respondent judges first came to serve on the bench, so we have no way of knowing whether any of those judges had any significant experience as judges under the stronger Rule 11 that was in effect the decade before 1993. Appendix A of the FJS 2005 Survey states that "all judges in the first group [of 200 out of 400 surveyed] would have had at least 1 year on the bench before the 1993 amendments to Rule 11 went into effect." That provides little comfort that any significant number of the judges surveyed had any significant experience under the stronger Rule 11. So the survey is fundamentally flawed in that we have no reason to believe it included any significant number of judges who had any significant experience under the stronger Rule 11.

Further, the FJC Report found that even of the Federal judges surveyed, 55% indicated that the purpose of Rule 11 should be both deterrence and compensation.[110] The Lawsuit Abuse Reduction Act would fulfill both purposes. And a full 85% of the Federal judges surveyed in the FJC 2005 Survey reported that "groundless litigation in Federal civil cases on [their individual] docket" was a "problem."

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[108] 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).

[109] FJC 2005 Survey, at 2.

[110] FJC 2005 Survey at 2.

Of course, legislators should take the opinions of this very small, and flawed, sample of judges for what it is, namely the views of a group of people who do not suffer in any direct way the costs of frivolous, abusive lawsuits. Those who do suffer those costs, including the large financial costs of nuisance lawsuits filed for their settlement value—namely the small business community—overwhelmingly support the Lawsuit Abuse Reduction Act. The National Federation of Independent Business, for example, has made passing the Lawsuit Abuse Reduction Act their top legislative priority. The small business community rejects the absurd notion today the amount of frivolous lawsuits filed are "just right."

When sanctions for filing frivolous lawsuits are not mandatory, as they are not mandatory now, those who are the victims of frivolous lawsuits have no incentive to litigate the frivolous nature of the claims against them because there is currently no guarantee that even if the claims against them are found to be frivolous they will be compensated for the harm caused by those frivolous claims. What happens instead is that, today, the victims of frivolous lawsuits are routinely extorted to settle the case for certain sums just below those what would be necessary to litigate the case to judgment, at which point the case drops out of the dockets of the very judges who were surveyed by the FJC. (Note also that the very small number of judges surveyed by the FJC were not asked whether groundless litigation was generally a problem.)

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

> This action is one of dozens of similar bootless actions filed in twenty-three district courts across the United States on behalf of uninsured and indigent patients, wherein Plaintiffs argue, without basis in law, that private non-profit hospitals are required to provide free or reduced-rate services to uninsured persons . . . *This orchestrated assault on scores of nonprofit hospitals, necessitating the expenditure of those hospitals' scares resources to beat back meritless legal claims, is undoubtedly part of the litigation explosion that has been so well-documented in the media.* E.g., Walter K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991); Philip K. Howard, The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom (2001) . . . For the foregoing reasons, the Defendants' motions to dismiss the above-captioned actions are granted in their entirety with prejudice. The Clerk of the Court shall mark these actions closed and all pending motions denied as moot.[111]

Judges are unlikely to view frivolous litigation as a problem because such cases rarely reach the bench. An overwhelming number of cases settle before trial. When a frivolous claim is filed, one of two things occur under the current Rule 11: either the small business challenges the plaintiff and the plaintiff simply withdraws the claim and walks away (as they are allowed to do under the current Rule 11); or the small business settles rather than proceed with a

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

motion for sanctions because it is unlikely that the court will fully reimburse it for the cost of defending against the frivolous claim, and the cost of defending against the claim is more than the expense of settlement.

The current situation favors judges, not small businesses who are harmed by the litigation. Under the current Rule 11, judges are relieved of their obligation to consider whether or not a case is frivolous. They do not need to hold a hearing on whether the case is frivolous and impose sanctions because, as a matter of practice, the current Rule 11 allows frivolous lawsuits to be withdrawn (with no reimbursement to the victim of the suit) or settled (for just under the cost of defending against it). While this is convenient for judges, it is not fair to small businesses.

Everyone who sits back for a moment and reflects will understand that a limitless variety of frivolous lawsuits clog our courts in ways they did not previously. Judges, like frogs in a pot of boiling water, are not those most likely to appreciate the costs of frivolous lawsuits. Judges don't feel the painful costs of frivolous lawsuits, and as they have sat as judges over the last decade they have only seen the standards of how frivolous lawsuits should be treated erode over time, starting with the explicitly forgiving nature of the toothless Rule 11 that was enacted in 1993. It's time courts were made to take the harm caused by frivolous lawsuits seriously again—by making sanctions for filing frivolous lawsuits mandatory, not discretionary, on the part of the judge—and to empower the victims of frivolous lawsuits with the certainty that they will be compensated for the frivolous lawsuits they suffer under. Only the Lawsuit Abuse Reduction Act can help free all Americans from the fear they feel today under the constant threat of frivolous lawsuits.

Finally, the Federal judiciarytends to oppose any legal reforms it does not itself propose. For example, the Federal judiciary also opposed the Class Action Fairness Act, legislation that overwhelmingly passed Congress and became law several years ago.[112]

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

Hearings

The Committee's Subcommittee on the Constitution held 1 day of hearings on the need for H.R. 966, on March 11, 2011. Testimony was received from Elizabeth A. Milito, NFIB Small Business Legal Center; Professor Lonny Hoffman, University of Houston Law Center; and Victor E. Schwartz, Shook, Hardy & Bacon, L.L.P., with additional material submitted by other individuals and organizations.

Committee Consideration

On July 7, 2011, the Committee met in open session and ordered the bill H.R. 966 favorably reported with an amendment, by a roll-call vote of 20 to 13, a quorum being present.

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

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 966.

1. An amendment offered by Mr. Johnson that would have added back to Rule 11 the 21-day safe harbor provision. Defeated 12 to 15.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Chabot			
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King			
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe			
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Total	12	15	

2. An amendment offered by Ms. Jackson Lee to give courts discretion to determine the appropriate sanction. Defeated 12 to 19.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Lungren		X	
Mr. Chabot		X	
Mr. Issa			
Mr. Pence		X	
Mr. Forbes			
Mr. King			
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Conyers, Jr., Ranking Member	X		
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Total	12	19	

Committee Oversight Findings

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

New Budget Authority and Tax Expenditures

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

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 966, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 18, 2011.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 966, the "Lawsuit Abuse Reduction Act of 2011."

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

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 966—Lawsuit Abuse Reduction Act of 2011.

H.R. 966 would amend Rule 11 of the Federal Rules of Civil Procedure to require courts to impose appropriate sanctions on attorneys, law firms, or parties who file frivolous lawsuits and to require them to compensate parties injured by such conduct. (Courts currently may, but are not required to, impose such sanctions.)

Under the legislation, any monetary sanction imposed under Rule 11 would be paid by the parties to the suit. Thus, CBO estimates that enacting the legislation would result in no significant cost to the Federal Government. H.R. 966 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

H.R. 966 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of State, local, or tribal governments.

The CBO staff contact for this estimate is Martin von Gnechten. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 966 will reduce frivolous litigation in Federal courts.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 966 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section-by-Section Analysis

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

Sec. 1. Short title. Section 1 sets forth the short title of the bill as the "Lawsuit Abuse Reduction Act of 2011."

Sec. 2. Attorney Accountability. Section 2 restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11, removes Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed, and requires monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim. It also contains a rule of construction that states "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 law, or under the Constitution."

Changes to the Federal Rules of Civil Procedure Made by the Bill, as Reported

Changes to the Federal Rules of Civil Procedure made by the bill, as reported, are shown as follows (existing rule proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing rule in which no change is proposed is shown in roman):

RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing Pleadings, Motions, and other Papers; Representations to the Court; Sanctions

(a) * * *

* * * * * * *

(c) SANCTIONS.—

(1) IN GENERAL.—If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court [may] *shall* impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) MOTION FOR SANCTIONS.—A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under [Rule 5, but it must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.] *Rule 5.*

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(4) NATURE OF A SANCTION.—A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly [situ-

ated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.] *situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted for effective deterrence, an order directing payment of a penalty into the court.*

* * * * * * *

Dissenting Views

I. INTRODUCTION

H.R. 966, the "Lawsuit Abuse Reduction Act" (LARA), rolls back the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure—imposing mandatory sanctions and eliminating the 21-day safe harbor provision. Although LARA is flawed in many ways, most issues with this legislation boil down to two concerns. First, it will raise the amount, cost, and intensity of civil litigation and provide more grounds for unnecessary delay and harassment in the courtroom. Second, a return to the 1983 regime will chill legitimate civil rights claims.

Ordinarily, when the Majority proposes legislation to limit access to the civil justice system, reasonable minds can disagree as to the extent of the damage the bill will cause. This, however, is not the case with H.R. 966, the "Lawsuit Abuse Reduction Act" (LARA). This legislation will turn back the clock to a time when the Federal Rules of Civil Procedure limited judicial discretion, discouraged civil rights cases, and permitted "satellite" litigation to run wild. We oppose H.R. 966 because a decade of past practice proves that it will have a disastrous impact on the administration of justice.

LARA is also opposed by the Alliance for Justice, the American Bar Association, the Center for Justice and Democracy, the Consumer Federation of America, the NAACP, the National Employment Lawyers Association, the National Women's Health Network, the National Consumer Voice for Quality Long-Term Care, Public Citizen, and the U.S. Public Interest Research Group. In addition, LARA is opposed by the Judicial Conference of the United States, the principal policymaking body for the judicial branch charged with proposing amendments to the Federal Rules of Civil Procedure under the careful, deliberate process outlined in the Rules Enabling Act.[1]

For the reasons set forth herein, we respectfully dissent.

[1] 28 U.S.C. §§ 2701–2077.

II. SUMMARY OF THE BILL AND ITS PROBLEMATIC PROVISIONS

The "Lawsuit Abuse Reduction Act of 2011" marks the third time that Chairman Smith has introduced a bill to roll back the 1993 amendments to Rule 11.[2] The bill changes Rule 11 in three ways:

- It takes away the discretion of the court and makes sanctions mandatory in cases of Rule 11 violations.
- It removes the 21-day safe harbor provision. Parties will no longer have the ability to correct or withdraw a filing before Rule 11 proceedings commence.
- It replaces the description of available sanctions. Under the current rule, sanctions are designed for deterrence; monetary sanctions are rare and, if imposed, most likely to be paid to the court as a penalty. After LARA, monetary sanctions are *mandatory* and must include, *at the very least,* payment of court costs and attorneys' fees to the other party.

This last proposal appears to reach significantly past the 1983 rule, which stated that an "appropriate sanction . . . *may* include an order to pay the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney's fee."[3] In contrast, LARA *requires* that sanctions include, at minimum, an order to pay court costs and attorneys' fees.

The rule of construction, as amended in markup, states that nothing in the bill may be "construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution." This provision is a reaction to evidence that the 1983 version of Rule 11 effectively barred plaintiffs from bringing civil rights and anti-discrimination claims. It is unclear, however, how this provision would prevent defendants from tying up civil rights cases in Rule 11 satellite litigation to delay or drive up legal costs.

The Judicial Conference has warned that "legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a 'cure' far worse than the problem it is meant to solve."[4] Moreover, "no serious problem has been brought to the Rules Committees' attention. . . . There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench."[5] The American Bar Association also considers LARA "to be ill-advised and unnecessary."[6] Among other objections, the ABA believes that LARA's "premise is not based on an empirical foundation, and the proposed amendments ignore lessons learned."[7]

In 2005, as the House prepared to vote on an earlier version of LARA, the Federal Judicial Center conducted a survey of 278 Fed-

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[2] *See* Lawsuit Abuse Reduction Act of 2004, H.R. 4571, 108th Cong. (2004); Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. (2005).

[3] Fed. R. Civ. P. 11 (1983) (repealed 1993) (emphasis added).

[4] Letter from Lee H. Rosenthal, U.S. Dist. Judge, S.D. Tex., and Mark R. Kravitz, U.S. Dist. Judge, D. Conn., to Chairman Lamar Smith, H. Comm. on the Judiciary (Mar. 14, 2011).

[5] *Id.*

[6] Letter from Thomas M. Susman, Director, Governmental Affairs Office, American Bar Association, to Chairman Trent Franks, Subcomm. on the Constitution, H. Comm. on the Judiciary (Mar. 11, 2011).

[7] *Id.*

eral judges to discern their views on Rule 11. The results were overwhelmingly in favor of the rule as amended in 1993:

- 85 percent of the judges surveyed viewed "groundless litigation" as no more than a small problem in their courtrooms;
- 91 percent opposed the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 85 percent strongly or moderately supported Rule 11's safe harbor provision; and
- 84 percent disagreed with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation.[8]

In the end, 87 percent of the judges surveyed wanted Rule 11 to stay as amended in 1993. Only 4 percent expressed support for the amendments proposed by Judiciary Republicans.[9]

III. H.R. 966 UNDOES SIGNIFICANT IMPROVEMENTS TO RULE 11

Rule 11 of the Federal Rules of Civil Procedure requires "[e]very pleading, written motion, and other paper" to be "signed by at least one attorney of record."[10] By signing, the attorney certifies: (1) the paper is not "presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;" (2) any claims "are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;" (3) all factual contentions have "evidentiary support" or "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery;" and (4) any denials of factual contentions are "warranted on the evidence" or "reasonably based on belief or a lack of information."[11] If a court determines that Rule 11 has been violated, a wide range of sanctions is available.[12]

Since it first took effect in 1938, Rule 11 has been amended only twice. H.R. 966 attempts to sidestep the Judicial Conference and amend the rule for a third time.

A. The 1938 Rule

In its original form, Rule 11 required attorneys to sign pleadings and to certify that, to the best of their "knowledge, information, and belief," each pleading was well-grounded.[13] The court held sole discretion over the imposition of sanctions.[14] During the 45 years this version of the rule was in effect, the courts ruled on only 19 Rule 11 motions, found a violation of the rule only 11 times, and

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[8] David Rauma & Thomas E. Willging, *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure,* Federal Judicial Center (2005).
[9] *Id.*
[10] FED. R. CIV. P. 11(a).
[11] FED. R. CIV. P. 11(b).
[12] FED. R. CIV. P. 11(c).
[13] Fed. R. Civ. P. 11 (1938) (repealed 1983).
[14] *Id.*

imposed sanctions in only 3 cases.[15] This version of Rule 11 was seldom used and largely ignored.[16]

1. The 1983 Amendment

The 1983 Advisory Committee on Civil Rules recognized that, "in practice, Rule 11 has not been effective in deterring abuses."[17] In an attempt to curb an increase in the number and rising costs of civil suits, the Advisory Committee added significant teeth to the sanction provisions. The amended rule required attorneys to conduct a "reasonable inquiry" into the factual and legal merits of every document submitted in court, and mandated sanctions if courts found attorneys in violation of this responsibility.[18]

Instead of deterring unnecessary litigation, the 1983 amendment became a "font of rancor" between parties in civil suits.[19] The nineteen Rule 11 filings between 1938 and 1983 gave way to almost 7,000 reported cases during the decade the 1983 rule was in effect.[20] A 1989 study showed that roughly one-third of all Federal civil lawsuits involved Rule 11 "satellite" litigation.[21] Roughly one-fourth of all cases on the docket were burdened by Rule 11 actions that did not result in sanctions.[22] Attorneys now had a double duty: "one to try the case, and the other to try the opposing counsel."[23] Commentators criticized the 1983 rule for spawning a veritable "cottage industry" of Rule 11 litigation.[24]

In 1992, the Advisory Committee held two public hearings on proposed amendments to Rule 11. The Committee noted that "widespread criticisms of the 1983 version of the rule, though frequently exaggerated or premised on faulty assumptions, were not without some merit."[25] It found that the rule "tended to impact plaintiffs more frequently and severely than defendants," occasionally "created problems for a party which seeks to assert novel legal contentions," and provided "little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law."[26] Other studies found that sanctions were disproportionately imposed against plaintiffs in civil rights and anti-discrimination cases.[27]

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[15] 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).

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

[17] FED. R. CIV. P. 11 (1983) Advisory Committee's note to the 1983 amendment.

[18] FED. R. CIV. P. (1983) (repealed 1993).

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

[20] Hoffman, *supra* note 16, at 727.

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

[22] *Id.*

[23] *Id.*

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

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

[26] *Id.*

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

2. The 1993 Amendment

In 1993, the Advisory Committee amended several key aspects of Rule 11. It removed virtually all financial incentive for a party to pursue nuisance Rule 11 sanctions, or to defend against them to the bitter end. Still in effect today, this version of Rule 11 sets a more objective standard for attorney behavior—i.e., courtroom activity must be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of a new law."[28] Sanctions are to be imposed only at the discretion of the court, and must be limited to "what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[29] Because the purpose of Rule 11 is "to deter rather than to compensate," monetary sanctions, if imposed, "should ordinarily be paid into the court as a penalty."[30] Only in exceptional cases should payment be made to those injured by the violation and, even then, "any such award . . . should not exceed the expenses and attorneys' fees for the services directly and unavoidably caused by the violation of the certification requirement."[31] A 21-day "safe harbor" provision allows a litigant to withdraw or amend any offending document before the court continues with Rule 11 proceedings.[32]

By all empirical accounts, the 1993 amendments have been tremendously successful. The Sixth Circuit observed that the Advisory Committee "anticipated that civility among attorneys and between bench and bar would be furthered by having attorneys communicate with each other and with an eye toward potentially resolving their difference prior to court involvement."[33] In the lower courts, the safe harbor provision has had "the salutary effect of providing the appropriate due process considerations to sanction litigation, reducing Rule 11 volume and eliminating abuses proscribed by this rule."[34]

IV. H.R. 966 UNDERMINES THE JUDICIAL CONFERENCE'S DELIBERATIVE PROCESSES AS REQUIRED UNDER THE RULES ENABLING ACT.

For most of the past century, Congress has trusted the Federal judiciary to make its own procedural rules. H.R. 966 abrogates that trust.

In 1922, Congress tasked the Judicial Conference of the United States to serve as the principal policymaking body for the judicial branch.[35] Federal statute requires the Conference to conduct "a continuous study of the operation and effect" of the rules of procedure, and propose changes to the rules "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable defense and delay."[36]

In 1934, Congress passed the Rules Enabling Act, which authorizes the Federal judiciary to prescribe its own rules of practice, pro-

[28] FED R. CIV. P. 11(b)(2).
[29] *Id.* at 11(c)(4).
[30] FED R. CIV. P. 11 Advisory Committee's note to 1993 amendment.
[31] *Id.*
[32] FED R. CIV. P. 11(c)(1).
[33] *Ridder v. City of Springfield,* 109 F.3d 288, 294 (6th Cir. 1997).
[34] *Photocircuits Corp. v. Marathon Agents, Inc.,* 162 F.R.D. 449, 452 (E.D.N.Y. 1995).
[35] *Id.* § 331.
[36] *Id.*

cedure, and evidence.[37] The Judicial Conference has taken on this responsibility as well. Specifically, the Conference assigns these matters to its Committee on Rules of Practice and Procedure and its advisory committees, which recommend proposed changes to the rules "as may be necessary to maintain consistency and otherwise promote the interest of justice."[38] Each committee is composed of Federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.[39] The process for amending rules of procedure is deliberate and exhaustive:

> The pervasive and substantial impact of the rules on the practice of law in the Federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to 3 years for a suggestion to be enacted as a rule. . . .
>
> [C]omments received from this extensive and thorough public examination are studied very carefully by the committees and generally improve the amendments. The committees actively encourage the submission of comments, both positive and negative, to ensure that proposed amendments have been considered by a broad segment of the bench and bar.[40]

This careful process gives Congress the opportunity to reject, modify, or defer changes before they take effect.[41] In stark contrast, H.R. 966 is a reckless attempt to amend the rules directly, over the objections of the Judicial Conference and without input from experts or practitioners.

V. MANDATORY SANCTIONS LEAD TO INCREASED LITIGATION.

Supporters of H.R. 966 want to curb a perceived increase in frivolous litigation. The actual effect of the legislation, however, will be to increase litigation. Under the LARA regime, with mandatory sanctions and no opportunity to correct mistakes, the parties to a lawsuit have every incentive to file Rule 11 complaints and seek out court costs and legal fees and obvious motives to defend against such actions to the bitter end. This dynamic is more than theoretical. Under the 1983 version of the rule, "satellite" litigation aimed at Rule 11 sanctions flourished.

The Judicial Conference also recognizes that LARA is a step backwards. The 1983 version of Rule 11 was amended because it "spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism."[42] Reinstituting mandatory sanctions would create conflicts of interest between lawyers and their clients and exacerbate tensions between competing attorneys.[43] Moreover, the changes would

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[37] 28 U.S.C. §§ 2071 *et seq.*
[38] 28 U.S.C. § 2073(b).
[39] "A Summary for the Bench and Bar: The Federal Rules of Practice and Procedure," Admin. Office of the U.S. Courts, Oct. 2010, *available at* http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx.
[40] *Id.*
[41] 28 U.S.C. §§ 2074, 2075.
[42] Letter from Rosenthal & Kravitz, *supra* note 4.
[43] *Id.*

create "disincentive to abandon or withdraw a pleading or claim that lacked merit—and thereby admit error—after determining that it no longer was supportable in law or fact"[44] Since the adoption of the 1993 amendments, the Conference had observed "a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings."[45]

Elizabeth A. Milito, a representative of the National Federation of Independent Business, testified before the Subcommittee on Constitution that frivolous lawsuits create a "climate of fear" for small businesses. However, the NFIB surveyed 3,530 of its members in 2008 on the biggest threats facing small business.[46] Out of 75 possible concerns surveyed, "cost and frequency of lawsuits/threatened suits" ranked 65th.[47] More than a third of respondents found that the threat of lawsuits were "not a problem" at all.[48]

In the final analysis, the "climate of fear" for small businesses is based almost entirely on anecdotal evidence—and even this is thin. In 2004, 2005, and again 2011, the Majority cited to the single example of a ladder company in upstate New York "that was forced to sell of most of its assets because of litigation costs."[49] That characterization does not square with the facts of the bankruptcy as it was originally reported: although insurance premiums had risen considerably, the ladder company was profitable until "competition from bigger companies using foreign labor . . . became unbearable."[50] Moreover, the company "wasn't even sued all that much."[51] The "climate of fear" is unsubstantiated, and small businesses should be far more concerned with a return to the climate of hostility engendered by the 1983 rule.

VI. H.R. 966 WILL HAVE A CHILLING IMPACT ON CIVIL RIGHTS CASES

Because civil rights cases often involve an "argument for the extension, modification, or reversal of existing law or the establishment of a new law," they were particularly susceptible to Rule 11 before the 1993 amendments. A 1991 Federal Judicial Center study found that "[t]he incidence of Rule 11 motions or *sua sponte* orders is higher in civil rights cases than in some other types of cases."[52] Another study showed that "civil rights cases made up 11.4% of Federal cases filed" but that "22.7% of the cases in which sanctions had been imposed were civil rights cases."[53] Under the 1983 rule, civil rights cases were clearly disadvantaged.

H.R. 966 would restore this regime and provide no recourse for appeal when sanctions are imposed. The Honorable Robert L. Car-

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[44] *Id.*
[45] *Id.*
[46] Bruce D. Phillips & Holly Wade, "Small Business Problems & Priorities," National Federation of Independent Business Research Foundation (June 2008).
[47] *Id.* at 18.
[48] *Id.* at 14.
[49] *Markup of H.R. 966, The Lawsuit Abuse Reduction Act of 2011, before the H. Comm. on the Judiciary,* 112th Cong. (July 7, 2010) (statement of Rep. Smith, Chairman, H. Comm. on the Judiciary). See also H. R. Rep. No. 108–682, at 12 (2004); H. R. Rep. No. 109–123, at 14 (2005).
[50] Carrie Coolidge, "The Last Rung, The Tort System Takes Down a 149-year-old Ladder Manufacturer," *Forbes* (Jan. 12, 2004), at 52.
[51] *Id.*
[52] Elizabeth C. Wiggins, *et al., Special Issue on Rule 11,* FJC Directions No. 2, at 10 (Nov. 1991).
[53] Lawrence C. Marshall, *et al., The Use and Impact of Rule 11,* 86 NW. U.L. REV. 943, 971–75 (1992).

ter, United States District Court Judge for the Southern District of New York, considered changes like these and remarked:

> I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown v. Board of Education*] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start.[54]

And, as one witness testified before the Judiciary Committee in 2004, "A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be discouraging civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported abuse in an area of law, personal injury tort, found to have less abuse than other areas."[55]

The bill's rule of construction, as amended in Committee by Mr. Scott, states: "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, or under the Constitution."[56] This provision is new to this version of LARA, and is intended to address the undisputed effect of the 1983 rule on civil rights litigation. This intent is to be applauded.

We note, however, that the 1983 rule was also facially neutral with respect to the development of novel legal claims. The rule of construction does nothing to prevent defendants from wielding Rule 11 as a weapon against legitimate plaintiffs, tying up civil rights cases in long and costly satellite litigation. Past practice shows that abuse of Rule 11 need not be overt.

For all these reasons, we respectfully dissent.

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MIKE QUIGLEY.
TED DEUTCH.

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[54] Symposium, *The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988,* 137 U. PA. L. REV. 2179, 2193 (June 1989).

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

[56] Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. § 2(b) (2011).