TESTIMONY OF

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before

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

U.S. HOUSE OF REPRESENTATIVES

on

H.R. 758, the Lawsuit Abuse Reduction Act

March 17, 2015

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

Introduction

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

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

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

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

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

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

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

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

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

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

[6] *Id*.

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

The Failed Experiment of the 1983 Rule 11

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

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

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

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

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

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

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

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

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

[11] *Id*.

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

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

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

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

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

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

[15] *Id*.

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

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

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

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

[17] Georgene Vairo, *Rule 11 and the Profession,* 67 Fordham L. Rev. 589, 591 (1998).
[18] Federal Judicial Center, The Rule 11 Sanctioning Process 74 (1988).

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

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

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

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

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

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

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

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

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

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

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

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

[26] FJC Study, at 87-88.

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

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

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

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

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

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

Invasion of Authority Rightly Belonging to the Judiciary

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

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

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

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

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

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

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

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

[30] *Id*. at 3.

[31] *Id*.

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

[33] *Id*.

[34] *Id*. at 4.

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

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

H.R. 758 Would Require Sanctions in Successful Cases

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

[35] *Id*. at 5.

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

[37] *Id*. at 8.

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

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

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

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

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

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

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

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

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

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

Fanciful Accusations about the Cost of the Tort System

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

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

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

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

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

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

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

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

[44] *Id*. at 2.

[45] *Id*. at 3.

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

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

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

Conclusion

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

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

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