Statement of the U.S. Chamber of Commerce

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ON: The Lawsuit Abuse Reduction Act, H.R. 758

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Testimony of Cary Silverman
On Behalf of
The U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform
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Chairman Franks, Ranking Member Cohen, and distinguished Members of the Subcommittee, thank you for inviting me to testify today on behalf of the U.S. Chamber of Commerce and the U.S. Chamber Institute for Legal Reform ("ILR"). The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than three million companies of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system. ILR is an affiliate of the Chamber dedicated to making our nation's overall civil legal system simpler, faster, and fair for all participants. I appreciate the opportunity to testify in support of the Lawsuit Abuse Reduction Act, H.R. 758. This bill is needed to provide those who suffer real losses due to a frivolous lawsuit with an opportunity to seek reimbursement of their attorneys' fees in court.

The Problem:
It is Easy to Bring a Frivolous Lawsuit, but Costly to Get it Dismissed

The civil justice system is established to provide a remedy to a person who was wrongfully injured – to make that person whole. This is the principle underlying many federal laws providing a private right of action, such as for employment discrimination. It is also the basis for state tort and consumer laws applied by federal courts under diversity jurisdiction. But what happens when the civil justice system itself is misused to harm someone – when it is transformed from righting a wrong to inflicting one?

Frivolous lawsuits come in many shapes and sizes. Such lawsuits are sometimes brought purely to harass a person or get a payday from a business where there is no legitimate claim. A frivolous lawsuit can come from a disgruntled employee, an unhappy customer, or an unpleasant neighbor. They can assert laughable legal theories that are clearly not supported by law or predicated on facts. Frivolous lawsuits also occur when a lawyer takes a reckless or cavalier attitude, deciding to "sue everyone" first and then research the law for a valid claim or investigate what actually occurred later.

Unfortunately, victims of frivolous lawsuits have no meaningful remedy. They are not made whole for the very real losses they incur as a result of a wrongful act. It is a problem that stems from the federal rules.

In our civil justice system, the simple act of filing a "short, plain statement of the claim"—all that is needed to file a complaint—compels the person on the receiving end to respond.[1] For an ordinary person or small business, that means quickly hiring a lawyer and finding the money to pay for his or her services. Lawyers are expensive. Dealing with the

[1] *See* Fed. R. Civ. P. 8(a)(1). The summons informs the recipient that failure to file a timely answer may result in the court entering a default judgment against the defendant for the amount of money demanded in the Complaint. Fed. R. Civ. P. 4(a)(1)(E).

lawsuit means time away from work and lost income. It is stressful. As the great Judge Learned Hand wrote, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death."[2]

It costs thousands of dollars and often years of litigation to defend against a frivolous claim and eventually have a court dismiss it.[3] Most of your constituents would be shocked to learn that if they are hit with a lawsuit that has no basis whatsoever in law or fact or even a reasonable argument for extension of the law – they have nearly no chance of recovering a penny of these expenses. This is true even if they can prove to the judge that the case was baseless or brought in bad faith. This is true even if the case is certain to be, and ultimately is, thrown out.

Defending against a single frivolous lawsuit can bankrupt an individual or small business. At the very least, it strains families and siphons resources from businesses that would have otherwise supported jobs and investment. The Lawsuit Abuse Reduction Act (LARA) provides victims of frivolous lawsuits with a fair and reasonable opportunity to be made whole.

Would Your Constituents Seek Sanctions Under the Current System?

Here is how the current Federal Rule governing frivolous claims, Rule 11, works in practice. You can judge its fairness. John Small is served with a $100,000 lawsuit by a tourist who claims that while he was visiting our nation's capital, two years earlier, he tripped and fell in the 5th and N Market. John has no recollection of this person or anyone else falling in his store.

John now needs to hire an attorney to defend his family and his business from the lawsuit. He hires a local lawyer at $250 per hour. The attorney investigates the complaint and quickly discovers that the plaintiff visited a convenience store across town at 5th and N NE, not John's store in NW. Nevertheless, the plaintiff's lawyer will not drop the claim.

John's attorney tells him that he should be able to get the case dismissed. He estimates that doing so will take about 50 hours of his time, which would cover his initial investigation, filing an answer, filing a motion to dismiss, and appearing at any status conferences and hearings. Best-case-scenario, if the court quickly dismisses the case, John's attorney says he is looking at about $12,000 in legal fees and costs. If the court allows the case to move into discovery, then the cost will rise significantly. John is informed by his attorney that the only way to seek recovery of his expenses is to request sanctions.

This seems worthwhile to John until he learns three facts about Rule 11.

First, John learns that his attorney needs to draft a motion for sanctions, separate from the motion to dismiss,[4] and share it with the plaintiff's lawyer before he can file it.[5] It is not enough

[2] Judge Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter (1926).

[3] *See, e.g.,* Letter of national medical associations to Timothy F. Geithner, Secretary of the Treasury, Sept. 1, 2010 (estimating the cost of obtaining dismissal of a meritless medical malpractice claim at $22,000).

[4] Fed. R. Civ. P. 11(c)(2) ("A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b).).

for John's lawyer to call opposing counsel, as would occur in a discovery dispute. Nor is it sufficient to send a letter briefly outlining why the lawsuit is frivolous and should be withdrawn, as a plaintiff would similarly use a demand letter before undertaking the time and expense to prepare a complaint. John's lawyer estimates that the sanctions motion and any hearing would require an additional 20 hours of his time ($5,000). Once the plaintiffs' attorney receives the motion, the lawyer has three weeks to choose to withdraw the lawsuit.[6] A judge will never see the motion. John will not have his day in court to ask for reimbursement. The plaintiffs' lawyer walks away without consequence. The motion, and money spent preparing it, goes in the trash bin.

Second, even if the plaintiffs' attorney continues to pursue the lawsuit and the judge finds the case frivolous, the court may choose not to impose any sanction at all.[7]

Third, if the court does find sanctions appropriate, the judge may not use sanctions for the purpose of reimbursing John's legal expenses. As the rule expressly states, a sanction "must be *limited* to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated."[8] Rather than require the plaintiffs' lawyer to pay John's expenses, the court may order the attorney to pay a penalty to the court.[9] In fact, the commentary to the rule states, that "[s]ince the purpose of Rule 11 sanctions is to deter rather than to compensate, the rule provides that, if a monetary sanction is imposed, it should ordinarily be paid into court as a penalty."[10] The court can order the plaintiff to pay some or all of John's attorney's fees, but only if "warranted for effective deterrence."[11] John can prove he was injured by wrongful conduct. He can show how much money he paid in attorneys' fees. And he may still get little or nothing.

John is told that the plaintiff's lawyer has asked for $10,000, an amount just under the anticipated cost of litigation, to "make the case go away." His attorney gives three options: (1) try to settle the case regardless for $5,000 without incurring more costs and get on with his life; (2) fight the lawsuit and "win" with at least $12,000 in unrecoverable legal fees, or (3) seek dismissal and sanctions with the very uncertain chance of recovery of some or all of his defense costs, but pay $5,000 more.

Individuals, business owners, and their insurers routinely face this choice. Most settle, cut their losses, and free themselves of the stress of the lawsuit. Some people fight for dismissal

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[5] *Id*. ("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.").

[6] *Id*.

[7] Fed. R. Civ. P. 11(c)(1) ("If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court *may* impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.") (emphasis added).

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

[9] *Id*.

[10] *See* Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules—1993 Amendment.

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

on principle at their own expense. Very few people use Rule 11 to seek sanctions. What choice would you or your constituents make?

As I discuss in more detail later, LARA would restore protections to victims of lawsuit abuse by strengthening Rule 11's enforcement provisions. Specifically, LARA would eliminate the current "safe harbor" that allows lawyers to file frivolous claims without threat of sanction because they can withdraw the suit without penalty. This bill would also reinstitute mandatory sanctions when a judge finds a claim or defense frivolous. Additionally, LARA would provide victims of lawsuit abuse with reimbursement of reasonable attorney's fees and litigation costs that are directly attributable to the frivolous claim.

The 1993 Revision: A Mistaken Overreaction

Before 1983, the version of Rule 11 that had been in place was rarely used. It provided that "[t]he signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good support for it; and that it is not interposed for delay." If the rule is "not signed" or "signed with intent to defeat the purpose of the rule," the pre-1983 version of Rule 11 authorized the court only to strike the pleading as "sham and false" and "proceed as though the pleading had not been served." The pre-1983 version of Rule 11 was ineffective. It required a showing of subjective intent – bad faith – on the part of an attorney, which is an extremely difficult burden to meet. The Federal Rules Advisory Committee, an extension of the federal judiciary that has the primary responsibility to formulate the federal rules, found that this version of the rule, in practice, "had not been effective in deterring abuses."[12] The Committee amended the rule to "reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of the attorney and reenforcing those obligations by the imposition of sanctions."[13]

The 1983 change to Rule 11 was significant. The rule was entirely rewritten. The rule included a new standard defining the type of conduct subject to sanctions. As with any new law, the years that followed included cases in which courts considered these new terms and applied them in specific factual and legal circumstances. As that body of precedent grew, both litigants and judges better understood the law. A 1990 survey of 751 judges found that 95% of judges believed that version of Rule 11 in place at that time, which LARA would restore, did not impede development of the law.[14] Nearly three-quarters of judges surveyed felt that the stronger Rule 11's benefits in deterring frivolous lawsuits and compensating those victimized by such claims justified the use of judicial time involved in resolving such motions.[15] Four out of five judges surveyed believed that the stronger Rule 11 had a positive effect on litigation and should be retained in its then-current form.[16] This was a study of nearly all federal judges at the time,

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[12] *See* Fed. R. Civ. P. 11, Notes of Advisory Committee on Rules—1983 Amendment (citing 6 Wright & Miller, *Federal Practice and Procedure: Civil* §1334 (1971)).

[13] *Id*. (citation omitted).

[14] Federal Judicial Center, Final Report on Rule 11 to the Advisory Committee on Civil Rules of the Judicial Conference of the United States, May 1991.

[15] *See id.*

[16] *See id.*

those who dealt with the problem of lawsuit abuse on a day-to-day basis under the stronger (LARA) version of Rule 11.

Nevertheless, as the 1983 rule was taking hold, the Federal Rules Advisory Committee reversed course. While it did not return to the pre-1983 version of the rule, it recommended changes that considerably weakened the weaponry against frivolous lawsuits. The changes, adopted in 1993, effectively nullified the existing rule through a series of barriers to its use and provisions that penalized those who invoked it.

The 1993 changes did not alter the definition of "frivolous." Then and now, Rule 11 provides for sanctions against (1) those who file claims or defenses for an improper purpose, such as to harass or cause unnecessary delay or needlessly increase the cost of litigation; (2) include claims or defenses that are not warranted by existing law or a reasonable argument for extending, modifying, or reversing existing law or for establishing new law; (3) allege facts that lack an evidentiary basis or are not likely to have an evidentiary basis even after a reasonable opportunity for further investigation of discovery; or (4) make unwarranted denials of factual contentions.[17]

The 1993 amendment rendered these standards toothless, however, by making three key changes:

1. The amendment added a 21-day "safe harbor" that gives lawyers a free pass to withdraw frivolous pleadings without consequence;

2. The amendment provided that a judge—after finding a claim or defense is frivolous—does not have to impose an appropriate sanction; and

3. The amendment substantially reduced the likelihood that a sanction, when imposed, would reimburse a person for expenses incurred to defend against a frivolous claim or defense. It provided that sanctions may only be used to deter misconduct and not be used for the purpose of compensating an injured party.

The Advisory Committee itself recognized that while there was some legitimate criticism of Rule 11's application, such criticism was "frequently exaggerated or premised on faulty assumptions."[18] The Advisory Committee has made many sound decisions, but it did not do so when it revised Rule 11 in 1993.

There are in place so-called "systems for correction of mistakes" made by the Federal Rules Advisory Committee, but they did not work well when Rule 11 was changed. The first potential correction system occurs when the U.S. Supreme Court reviews the Advisory Committee decisions about rule changes. But when the weakened Rule 11 was transmitted by the Supreme Court to Congress for its consideration, Chief Justice Rehnquist included a telling disclaimer: "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these

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

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

amendments in the form submitted."[19] Justice White warned that the Court's role in reviewing proposed rules is extremely "limited" and that the Court routinely approved the Judicial Conference's recommendations "without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity."[20]

Justices Scalia and Thomas went further and in almost unprecedented action, criticized the proposed amendment to Rule 11 as "render[ing] the Rule toothless by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by a providing a 21-day 'safe harbor' [entitling] the party accused of a frivolous filing . . . to escape with no sanction at all."[21] Justice Scalia observed: "In my view, those who file frivolous suits and pleadings, should have no 'safe harbor.' The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser. Under the revised Rule [11], parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: If objection is raised, they can retreat without penalty."[22]

Under the Federal Rules Enabling Act (REA) system, Congress has just seven months to intervene in a rule change before it takes effect.[23] Apart from matters of urgent immediate national concern, it is rare that this body enacts legislation in such a short period. Despite the introduction of legislation in both the House and Senate to delay the effective date of the proposed changes to Rule 11, time ran out before Congress could act and the revisions went into effect on December 1, 1993.[24] Shortly after the revised Rule 11 took effect, Congress again attempted to repeal the Federal Rules Advisory Committee's action to weaken Rule 11.[25] By that time, some practitioners had already referred to the new Rule 11 as a "toothless tiger."[26] The repeal passed the House.[27] Those opposing the bill, however, felt that there had not yet been adequate time to determine the effectiveness of the amended rule in practice.[28]

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

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

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

[22] *Id*. at 508.

[23] *See* 28 U.S.C. § 2074(a) (providing that the Supreme Court transmits to Congress proposed rules by May 1, and that such rules take effect no earlier than December 1 of that year unless otherwise provided by law).

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

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

[26] *See, e.g*., Cynthia A. Leiferman, *The* 1993 *Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger*, 29 TORT & INS. L.J. (Spring 1994) (concluding that "[o]n balance, the changes made appear likely to undermine seriously the deterrent effect of the rule").

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

[28] *See* H. Rep. No. 104-62, at 33 (dissenting views).

LARA Would Restore the Stop-and-Think Requirement and Provide Those who are Harmed With a Remedy

Rule 11 was intended to require litigants to "stop-and-think" before initially making legal or factual contentions. Instead, the 1993 changes encourage a "sue first, check the facts or law later" mentality. It deprived injured individuals compensation, a change that most judges and trial attorneys, including plaintiffs' lawyers, thought was a bad idea.[29]

LARA would reverse these changes by abolishing the "safe harbor" for frivolous claims, reinstituting mandatory sanctions when a judge finds a claim or defense frivolous, and providing victims of lawsuit abuse with reimbursement of reasonable attorney's fees and litigation costs that are directly attributable to the frivolous claim.

Judges Can Fairly and Efficiently Decide Rule 11 Motions

Judges routinely decide motions, as the docket sheet of any federal court case that moves forward will show. Judges are perfectly capable of fairly deciding and efficiently ruling on motions brought under Rule 11 in the ordinary course of judicial business.

Most cases are decided or settled before trial – often in significant part on the outcome of motions. Federal courts consider motions to remand cases removed from state court. They decide motions to amend complaints, motions to grant additional time to file a response, and motions to compel discovery. They hear motions in limine addressing whether offered evidence is admissible at trial. They rule on motions to dismiss and motions for summary judgment. They decide whether to certify class actions or bifurcate trials. Those are just some of the common pretrial motions. Of course, when cases do reach trial, there are additional motions followed by an array of post-trial motions.

Nevertheless, you are likely to hear opponents refer to Rule 11 as resulting in "satellite" litigation. This argument is far-fetched. Opponents use this term to place motions that would hold lawyers accountable for their conduct in a negative light. They contend that deciding whether a claim or defense is frivolous is "peripheral" to the litigation or "distracts" the court from the merits of the case. There are three core problems with this argument.

First, it is unclear why a Rule 11 motion is fundamentally different from any other motion under the federal rules. As noted, judges routinely rule on a variety of procedural, evidentiary, and other motions. The word "motion" appears about 280 times in the Federal Rules of Civil Procedure and that is not including the Federal Rules of Evidence. It would be impossible to count the number of motions to remand a removed case to state court, the number of motions asking judges to evaluate whether an expert's testimony is based on sound science, and motions to dismiss or for summary judgment. Judges decide them everyday. The judiciary

[29] *See* John Shapard et al., Federal Judicial Center, Report of Survey Concerning Rule 11, Federal Rules of Civil Procedure, at 5-6 (1995) (finding based on survey of 148 federal judges and 1,100 trial attorneys that two thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and nearly half of plaintiffs' attorneys (43%), supported restoring Rule 11's compensatory function.

does not grind to a halt. There is no other place in the federal rules aside from Rule 11 that requires a party to provide opposing counsel with a motion before a court can even consider it.[30]

Second, while there will inevitably be some degree of litigation over the imposition of sanctions, consider the alternative: a system in which an individual or business hit with a lawsuit that has no reasonable basis in law or fact has no effective means to recover thousands of dollars in needless defense costs. As a practical matter, he or she is often forced to settle regardless of the merits. This is a far greater injustice than providing litigants with the opportunity to ask the court to determine whether a filing is frivolous or not.

Third, the amount of litigation over whether a claim is frivolous under the stronger version of Rule 11 is often exaggerated by opponents of LARA. They frequently cite a study finding that there were approximately 7,000 reported Rule 11 court rulings in the decade between 1983 and 1993.[31] That is an average of 700 decisions each year. This number should be placed in context. It is the equivalent of 7.5 reported cases per federal district court per year (there are 94 U.S. District courts), or 1 reported decision for each federal district court judge per year (there are 677 federal district court judges). Even if the total number of sanctions rulings (including unreported decisions) is substantially higher than 700 per year, such litigation is insignificant when one considers that about 300,000 civil cases are filed and disposed of in federal district courts each year.[32] There is no reason federal judges cannot handle these motions in the ordinary course of judicial business.[33] If a judge finds that a Rule 11 motion lacks merit, it only takes one word to respond: Denied.[34]

Congressional Action is Warranted

Rule 11 is fundamentally different than other rules of procedure. It addresses the ability of a person who has been wronged to seek compensation for a financial loss. While opponents may contend that changes to Rule 11 should be left to the REA process, the availability of recovery for an injury is a matter of public policy for which Congress, as elected representatives, is in the best position to make a judgment.

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[30] The rules provide a "meet and confer requirement" for discovery disputes. *See* Fed. R. Civ. P. 26(c) (meet-and-confer requirement before seeking protective order); 37(a) (meet-and-confer requirement before filing a motion to compel discovery). This is far less burdensome and expensive than preparing a motion that, at the option of the opposing party, may not be filed with the court.

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

[32] Administrative Office of the U.S. Courts, Federal Judicial Caseload Statistics 2014 (Table C, U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Period Ending Mar. 31, 2014.

[33] The pre-1993 version of Rule 11 proposed by LARA remains in effect in at least a dozen states without indication of a satellite litigation problem. Although several states changed their rule on sanction to conform to federal Rule 11 after it was weakened, states including Arizona, Idaho, Iowa, Kansas, Kentucky, Louisiana, Michigan, Montana, North Carolina, South Dakota, Texas, and Virginia retain the prior rule. Many other states do not provide a "safe harbor" and mandate imposition of sanctions on those who bring frivolous claims.

[34] Rule 11 requires a judge to issue an opinion only when ordering sanctions. *See* Fed. R. Civ. Proc. 11 (c)(6) ("An order *imposing* a sanction must describe the sanctioned conduct and explain the basis for the sanction.) (emphasis added).

The REA recognizes that it is helpful for the judiciary to take the lead role in developing rules of procedure for conducting litigation, given its expertise on the day-to-day workings of the court. This makes sense for the vast majority of rules that are procedural in nature such as those governing formatting of documents, filing deadlines, the form of pleadings, conducting discovery, when protective orders should be issued or settlements sealed, when cases should be dismissed, and serving process, among others.

Congress certainly has authority to change rules outside the REA process. Article I, Section 8, of the U.S. Constitution provides Congress with authority to "constitute Tribunals inferior to the Supreme Court." This power includes setting rules setting procedure and governing attorney conduct in federal courts. Congress enacted the REA in 1934, through which it delegated its constitutional power to make rules for federal courts to the Judicial Conference of the United States. Congress retains the ultimate authority to design Federal Rules.

In fact, Congress has in many instances acted outside the REA process when it finds that public policy supports allowing a party in litigation to recover attorneys' fees. For example, the Private Securities Litigation Reform Act of 1995 imposes mandatory sanctions on those who bring abusive litigation with a presumption that the opposing party is entitled to recover his or her reasonable attorneys' fees and costs.[35] Congress has also provided that "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and veraciously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."[36]

Many other federal laws provide prevailing parties with the ability to recover attorneys' fees and costs in certain types of litigation.[37] As a unanimous U.S. Supreme Court reaffirmed in 2011, federal law already authorizes a court to award attorney's fees in certain types of civil rights actions "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation" for attorney costs that would not have been incurred in absence of the frivolous claims.[38]

Judges Will Have Significant Discretion When Deciding Rule 11 Motions

Under the current version of Rule 11, lawyers can use the "safe harbor" to preclude judges from considering whether a claim or defense was frivolous. LARA would restore the ability of judges to consider such claims.

Judges would have significant discretion in deciding sanctions motions under LARA. First and foremost, judges would decide whether a claim or defense is frivolous. If there is a

[35] 15 U.S.C. § 78u-4(c).

[36] 28 U.S.C. § 1927.

[37] *See, e.g.,* 15 U.S.C. § 78r(a) (liability for misleading statements in securities statements); 42 U.S.C. §§ 1988(b) (civil rights actions), 2000e-5(k) (unlawful employment practices).

[38] *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

borderline case, judges are likely to give litigants the benefit of the doubt. They are likely to use their power to sanction sparingly.

Judges would also have discretion in determining the appropriate sanction. LARA limits reimbursement of attorneys' fees to "reasonable expenses incurred as a direct result of the violation." This language both limits the recovery to fees directly stemming from a frivolous claim or defense (as there may be multiple claims or defenses in a lawsuit) and requires the fees awarded to be reasonable. Judges have experience awarding fees and will not rubber stamp the amount sought by a litigant. Finally, LARA gives judges discretion to require the offending party to pay a fine into the court, in addition to reimbursing reasonable attorneys' fees, if the court finds such a penalty necessary for effective deterrence.

Opponents may contend that making an award of attorneys' fees "mandatory" when a claim or defense is found frivolous eliminates judicial discretion. In tort or consumer litigation, however, these same groups would expect a judge to award damages when a person has proven an injury due to the misconduct of another. That is justice – it is not handcuffing judges.

Sanctions Against Frivolous Claims Will Not Impede Justice

Some interest groups have argued that putting sanctions in place against frivolous claims will somehow impede justice and hurt ordinary people. This is simply not true. If we look to the words of Rule 11, frivolous claims include those "presented for improper purpose" or to "harass or cause unnecessary delay or needless increase in the cost of litigation."[39] They also include claims that lack a factual or evidentiary basis.[40] But they do not include claims based on "nonfrivolous argument[s] for the extension, modification, or reversal of existing law or the establishment of new law."[41] The very words of Rule 11 allow for development of the law. H.R. 758 does not alter this flexible language and continues to allow litigants to argue for changes in the law.

Some have expressed concern that the manner in which judges implemented the pre-1993 version of Rule 11 disproportionately impacted civil rights plaintiffs.[42] The bill is sensitive to this concern. In response, the bill explicitly instructs courts that "Nothing in this Act or an amendment made by this Act shall be construed to bar or impede the assertion or development of

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[39] Fed. R. Civ. Proc. 11(b)(1).

[40] *Id*. 11(b)(4).

[41] *Id*. 11(b)(2).

[42] Even the 1983 changes to Rule 11 initially had a disproportionate impact on civil rights plaintiffs, by 1988, a survey conducted by the Federal Judicial Center as well as other scholarship demonstrated that courts were construing Rule 11 more favorably to most litigants and practitioners, especially civil rights plaintiffs. *See* Carl Tobias, *Reconsidering Rule 11*, 46 U. Miami L. Rev. 855, 860-61, 864-65 (1992) (citing Thomas Willging, Deputy Research Director of the Federal Judicial Center, Statement at Advisory Committee Meeting, Washington, D.C. (May 23, 1991); Elizabeth Wiggins et al., Rule 11: Final Report to Advisory Committee on Civil Rules of the Judicial Conference of the United States, § 1D, at 1 (Federal Judicial Ctr. 1991)). This led even some critics with "the general impression that Rule 11's implementation was not as problematic as many civil rights plaintiffs and attorneys had contended." Tobias, *supra*, at 864-65.

new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution of the United States."

The "Bring Me More Data" Argument

Perhaps, the most virulent argument against LARA has focused on data. "Bring me data that shows millions of frivolous claims" and maybe I will support LARA. I call that the "bucket of steam" argument. It simply cannot be done.

Since there is no effective remedy for a frivolous claim, and defending a case through a motion to dismiss will require thousands of dollars, individuals, small businesses, and insurers may make the unfortunate but understandable decision to settle after receiving a demand letter. They know that going to court will cost more than ceding to the plaintiffs' lawyers' settlement demand. A stronger Rule 11 will limit this sort of practice because everyone will then know that the threat of a frivolous lawsuit is just a baseless threat. In other words, the lawyer will be disinclined to follow through on the demand letter and file such a frivolous lawsuit when the target will then be able to move for sanctions, have a court decide the issue, and award fees.

Some federal judges may also share with you that they rarely see a frivolous claim in their courts and understandably so. As I have discussed, the current Rule 11's "safe harbor" allows the plaintiff's attorney to withdraw the claim before it is ever brought to the attention of the court. Moreover, since Rule 11 strongly disfavors the use of sanctions to provide compensation to an injured party, and requires the movant to face additional expense to prepare a motion that may never be heard, very few litigants use it. Instead, as noted earlier, they settle or seek dismissal, rather than request a remedy for the frivolous claim or defense.

LARA Applies to Both Plaintiffs and Defendants

Finally, there is a misconception among those who are familiar with LARA, but have not closely read the bill or the text of the current Rule 11, that its changes to Rule 11 only apply to frivolous lawsuits filed by plaintiffs' lawyers. Rule 11 actually applies to both claims and defenses that have no basis in law or fact.[43] "Every pleading, written motion, and other paper" filed in court—whether filed by a plaintiff or defendant—must meet Rule 11's requirements.[44] LARA does not change the Rule's application to defendants and the bill will equally provide a remedy for plaintiffs who are harmed by frivolous litigation tactics by defendants.

For example, between 1983 and 1993, federal courts applied Rule 11 to order defendants to pay the legal costs of plaintiffs in a variety of circumstances. Courts imposed such sanctions when they found that defendants filed unsupported or harassing counterclaims, denied allegations that the defendant knew to be true, raised frivolous defenses, failed to conduct a reasonable inquiry into the facts or law before filing a motion to dismiss, or ignored adverse precedent or applicable law in pleadings. Such sanctions are rarely imposed on defendants today under the present form of Rule 11.

[43] Fed. R. Civ. Proc. 11(b)(2).

[44] Fed. R. Civ. Proc. 11(a).

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Mr. Chairman, in sum, victims of frivolous lawsuits in federal court are the only victims of wrongdoing who -- even when they prove their case to a judge and jury -- can be denied compensation. That is wrong, and the Lawsuit Abuse Reduction Act would correct that. It ensures that judges have an opportunity to consider whether claims and defenses are frivolous, and, if so, it would provide those who are injured with a fair remedy: reimbursement of reasonable legal costs that directly result from wrongful conduct.

Again, thank you for inviting me to testify. I am happy to answer any questions you may have.