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HOW THE "LAWSUIT ABUSE REDUCTION ACT OF 2017" WILL BE USED TO BLOCK CIVIL RIGHTS CASES

The "Lawsuit Abuse Reduction Act of 2017" (LARA) would significantly change Rule 11 of the Federal Rules of Civil Procedure, which deals with the authority of judges to sanction attorneys for filing frivolous "claims, defenses, and other legal contentions."[1] LARA would remove judges' discretion to impose sanctions and instead:

- Mandate that judges impose sanctions without regard to the particular facts or circumstances of a case;
- Mandate the types of sanctions that judges would be forced to impose; *and*
- Eliminate Rule 11's common sense 21-day "safe harbor" provision, which allows attorneys to correct mistaken pleadings, claims or contentions without fear of sanctions.

In 1983, the Judicial Conference's Advisory Committee on Civil Rules experimented with a rule similar to LARA, but rescinded it in 1993 after many problems and nearly universal criticism.[2] One major criticism was, "In light of the fact that civil rights cases often involve an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."[3] This conclusion was based on both empirical data and reported cases during that period.[4]

This fact sheet examines a sample of reported civil rights cases during the decade when a LARA-type rule was in effect. It comes with two notes of caution. First, as noted by one Rule 11 scholar, this kind of analysis cannot show the full impact of a mandatory sanction rule since "it is difficult to determine how many meritorious cases have not been brought or will never be brought because of fears about Rule 11."[5] Second, as explained by another legal scholar,[6]

> [T]here is a difficulty in evaluating the chilling effect of rule 11 by reading case reports. Without access to the pleadings, or to the parties' supporting papers, the court's opinion is the only source from which to discern the issues. A judge awarding sanctions is often advocating the correctness of his decision and is likely to do so by shaping the presentation of facts convincingly.

With that in mind, the following are a few examples of cases where mandatory Rule 11 sanctions were imposed against civil rights plaintiffs during the period of 1983 through 1993.

Rodgers v. Lincoln Towing Services, 771 F.2d 194 (7th Cir. 1985)

This case involved civil rights allegations against the Chicago police, the city of Chicago and a towing company over an incident where the victim was arrested and detained for vandalism and from which he was ultimately acquitted. The district court dismissed the case and imposed Rule 11 sanctions without a hearing, ignoring statements from the lawyers that "they did extensive research before filing the amended complaint and thought they had adequate legal grounds for the multitude of claims they made."[7] The 7th Circuit affirmed the sanctions. As one scholar pointed out after the case, "Given the difficulty of 'proving' the policies or beliefs of the defendants without access to discovery, the award of rule 11 sanctions for inadequate factual inquiry in a case like Rodgers is questionable and may well have a chilling effect."[8]

Eastway Constr. Corp. v. New York, 637 F. Supp. 558 (E.D.N.Y. 1986)

A contractor sued New York City and others for federal antitrust and civil rights violations after the company was denied access to various NYC-sponsored redevelopment projects. The district court dismissed the lawsuit but denied defendant's motion for attorney fees under Rule 11 because it found the contractor's claims were not frivolous. The 2nd Circuit remanded the case for determination on Rule 11 fees. On remand, the district court reluctantly imposed sanctions, stating, "In accord with the mandate of the Court of Appeals, attorney's fees must be awarded in this case" even though "the case was brought in good faith" and the conduct of plaintiffs' counsel was "exemplary."

Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073 (7th Cir. 1987)

After Cook County awarded a food contract to Canteen Corp., Szabo Food Service unsuccessfully sued for racial discrimination. Canteen then sought attorney fee sanctions under Rule 11, which the district court denied. However, Canteen appealed and the 7th Circuit remanded the case to a new district court judge for Rule 11 determinations. One judge strongly dissented, writing, "I would be more restrained than my brethren in handing out sanctions for civil rights claims. For the chilling effect of today's decision will reach as tellingly to the most meritorious such claim as to the least."

Thomas v. Capital Security Services, 836 F.2d 866 (5th Cir. 1988)(en banc)

Security officers each filed a charge of discrimination against Capital with the Equal Employment Opportunity Commission (EEOC) after the company discharged them from their positions. Following an EEOC investigation, the employees were issued a right-to-sue letter. In October 1984, the workers filed a class action complaint, alleging that Capital had engaged in numerous racially- and sexually-motivated discriminatory practices. After discovery, the employees' attorneys chose not to request class certification and the case proceeded as a consolidated action by four former employees. The district court ultimately ruled in favor of

Capital, a judgment that was upheld on appeal. However, Capital moved for Rule 11 sanctions, seeking over $58,000 in fees and costs. While the lower court denied this, the 5th Circuit reversed and remanded the case back for sanctions, arguing that there are "no longer any 'free passes' for attorneys and litigants who violate Rule 11. Once a violation of Rule 11 is established. The rule mandates the application of sanctions."[9]

NOTES

[1] Fed. R. Civ. P. 11, http://www.uscourts.gov/sites/default/files/rules-of-civil-procedure.pdf

[2] *See*, *e.g.*, Hearing on H.R. 966, the Lawsuit Abuse Reduction Act, Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112 Cong. (2011) (testimony of Lonny Hoffman, George Butler Research Professor of Law, University of Houston Law Center), http://judiciary.house.gov/_files/hearings/pdf/Hoffman03112011.pdf; Georgene M. Vairo, "Rule 11 and the Profession," 67 *Ford. L. Rev.* 589 (1998), http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3514&context=flr

[3] *See* Dissenting Views, U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017), https://www.congress.gov/congressional-report/115th-congress/house-report/16/1

[4] *See, e.g.,* Georgene M. Vairo, Rule 11 Sanctions: Case Law, *Perspectives and Preventive Measures, 3rd Edition*. American Bar Association (2004), discussing Elizabeth C. Wiggins and Thomas E. Willging, Rule 11: Final Report to the Advisory Committee on Civil Rules of the Judicial Conference of the United States (Fed. Jud. Ctr. 1991), American Judicature Society, Rule 11 in Transition: The Report of the Third Circuit Task Force on Fed. R. Civ. P. 11 (1989) and Thomas E. Willging, The Rule 11 Sanctioning Process (Fed. Jud. Ctr. 1988).

[5] Georgene M. Vairo, *Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures, 3rd Edition*. American Bar Association (2004), discussing American Judicature Society, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Fed. R. Civ. P. 11* (1989), Georgene M. Vairo, "Rule 11: A Critical Analysis," 118 F.R.D. 189 (1988) and Thomas E. Willging, *The Rule 11 Sanctioning Process* (Fed. Jud. Ctr. 1988).

[6] Melissa Lee Nelken, "Sanctions Under Amended Federal Rule 11 – Some 'Chilling' Problems in the Struggle Between Compensation and Punishment," 14 *GEO. L. J.* 1313 (1986), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1575&context=faculty_scholarship

[7] *Rodgers v. Lincoln Towing Services,* 596 F. Supp. 13 (N.D. Ill. 1984).

[8] Melissa Lee Nelken, "Sanctions Under Amended Federal Rule 11 – Some 'Chilling' Problems in the Struggle Between Compensation and Punishment," 14 *GEO. L. J.* 1313 (1986), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1575&context=faculty_scholarship

[9] *See* Georgene M. Vairo, *Rule 11 Sanctions: Case Law, Perspectives and Preventive Measures, 3rd Edition*. American Bar Association (2004), discussing *Thomas v. Capital Security Services, Inc*., 812 F.2d 984 (5th Cir. 1987).