



CENTER FOR JUSTICE & DEMOCRACY
185 WEST BROADWAY
NEW YORK, NY 10013
TEL: 212.431.2882
centerjd@centerjd.org
<http://centerjd.org>

FACTS ABOUT “LARA”– AN ANTI-CIVIL JUSTICE BILL THAT DEFIES COMMON SENSE

Congress is considering a bill called the “Lawsuit Abuse Reduction Act” (LARA).¹ The bill would amend Rule 11 of the Federal Rules of Civil Procedure. Rule 11 provides judges with authority to sanction attorneys for filing frivolous “claims, defenses, and other legal contentions.” Under the Rule, judges have the power to decide, on a case-by-case basis, the appropriateness of sanctions and what those sanctions should be.

Under LARA, Congress would directly interfere with judges’ authority and discretion in several ways. The bill would require imposition of sanctions without regard to the particular facts or circumstances of a case. It would mandate the types of sanctions that judges would be forced to impose. And it would eliminate Rule 11’s common sense 21-day “safe harbor” provision, which currently allows attorneys to correct mistaken pleadings, claims or contentions without fear of sanctions.

LARA is opposed by the Judicial Conference of the United States,² the American Bar Association³ and a host of public interest organizations.⁴

LARA would reinstate a rule put into effect in 1983 that was so unworkable it was rescinded in 1993.

- In 1983, the Judicial Conference of the United States – “the principal policy making body concerned with the administration of the U.S. Courts”⁵ – experimented with a rule similar to LARA but rescinded it (with modifications) in 1993 after many problems and nearly universal criticism.⁶
- As Professor Lonny Hoffman of the University of Houston Law Center⁷ explained in 2011 U.S. House testimony, “Indeed, there is a remarkable degree of agreement among judges, lawyers, legal scholars and litigants across the political spectrum that the **1983** amendment of Rule 11 was one of the most ill-advised procedural experiments ever tried.”⁸
- Similarly, Robert S. Peck, President of the Center for Constitutional Litigation, testified in 2015, that “[t]he judiciary and the legal profession overwhelmingly support the amendments that went into effect in **1993** that [LARA] seeks to undo.”⁹
- According to a 2005 survey of federal judges conducted by the Federal Judicial Center, 91 percent of federal judges opposed mandatory sanctions as required by LARA, and 86 percent supported the current 21-day “safe harbor” provision.¹⁰ Moreover, “[a]s 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.”¹¹

The 1983 rule, which LARA replicates, had a chilling effect on the filing of meritorious cases and a disproportionate impact on civil rights cases.

- Rule 11 was amended in 1993 because of the earlier version’s “disproportionate impact on plaintiffs, its chilling effect, and its possible overuse in civil rights cases.”¹²
- Specifically, “[w]hen asked, a substantial number of lawyers who were surveyed (approximately 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11 they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.”¹³
- Empirical data showed that sanctions were sought and imposed against civil rights plaintiffs more than against any other litigants in civil court,¹⁴ specifically “more than 28 percent of the time, well out of proportion to the percentage of such cases filed.”¹⁵ Moreover, “[c]ivil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time in which sanctions were sought, a significantly higher rate than in cases with other kinds of plaintiffs.”¹⁶

History shows that LARA would further burden the strained federal court systems and increase – not decrease – the transaction costs of litigation.

- The 1983 version of Rule 11, which is similar to LARA, “triggered an avalanche of ‘satellite litigation.’ Beginning in 1984, the volume of cases decided under the rule increased dramatically.”¹⁷
- Explained Professor Lonny Hoffman in testimony, “Sanctions practice took on a life of its own after the 1983 rule. After passage of the new rule, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer’s (or both lawyers’) alleged noncompliance with the rule.”¹⁸
- Once Rule 11 was fixed with the 1993 amendments, the “satellite litigation” problem “essentially disappeared.”¹⁹

In considering LARA, Congress is circumventing the process that Congress itself established for promulgation of U.S. federal court rules.

- The Rules Enabling Act²⁰ directs the U.S. Supreme Court – not Congress – to prescribe general rules of practice and procedure for the federal courts. As the ABA notes, the purpose of the Rules Enabling Act is to “assure that amendment of the Federal Rules occurs only after a comprehensive and balanced review is undertaken by the judiciary.”²¹ LARA “proposes to amend the Federal Rules over the objections of the judiciary on an ad hoc basis that relies on anecdotes rather than empirically based evidence and fails to examine how the proposed changes will affect the administration of justice.”²²

- Both the 1983 and 1993 amendments to Rule 11 used the proper process set out in the Rules Enabling Act, with hearings and consideration by the Supreme Court and Congress. LARA would bypass this entire process in order to reinstate a system that was a proven failure.

NOTES

¹ H.R. 758; S. 401 (114 Cong.)

² Letter to the Honorable Bob Goodlatte, Chairman, House Judiciary Committee, from Hon. Jeffrey S. Sutton, United States Circuit Judge, Chair, Committee on Rules of Practice and Procedure, and Hon. David G. Campbell, United States District Judge, Chair, Advisory Committee on Civil Rules (April 13, 2015).

³ http://www.americanbar.org/content/dam/aba/uncategorized/GAO/25mar2015_opposehr758.authcheckdam.pdf.

⁴ <http://www.afj.org/wp-content/uploads/2015/04/H.R.-758-LARA-Letter.pdf>.

⁵ <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx>.

⁶ 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).

⁷ <http://www.law.uh.edu/faculty/main.asp?PID=179>.

⁸ 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) (emphasis added), <http://judiciary.house.gov/files/hearings/pdf/Hoffman03112011.pdf>.

⁹ Hearing on H.R. 758, the Lawsuit Abuse Reduction Act, Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114 Cong. (2015) (testimony of Robert S. Peck, President, Center for Constitutional Litigation) (emphasis added), <http://judiciary.house.gov/cache/files/89eec990-a106-45e8-ad4b-eff6d6d931e7/peck-03172015.pdf>.

¹⁰ <http://www.uscourts.gov/news/TheThirdBranch/05-06-01/DistrictJudgesOpposeRule11Changes.aspx>.

¹¹ Hearing on H.R. 758, the Lawsuit Abuse Reduction Act, Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary, 114 Cong. (2015) (testimony of Robert S. Peck, President, Center for Constitutional Litigation) (citing 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)), <http://judiciary.house.gov/cache/files/89eec990-a106-45e8-ad4b-eff6d6d931e7/peck-03172015.pdf>.

¹² Georgene M. Vairo, “Rule 11 and the Profession,” 67 *Ford. L. Rev.* 589 (1998).

¹³ 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>.

¹⁴ [http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/\\$file/rule11study.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/$file/rule11study.pdf).

¹⁵ 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>.

¹⁶ *Id.* (citing Thomas E. Willging, The Rule 11 Sanctioning Process (Fed. Jud. Ctr 1988) at 74). *See also*, Georgene M. Vairo, “Rule 11 and the Profession,” 67 *Ford. L. Rev.* 589 (1998).

¹⁷ Georgene M. Vairo, “Rule 11 and the Profession,” 67 *Ford. L. Rev.* 589 (1998).

¹⁸ 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>, [http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/\\$file/rule11study.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule11study.pdf/$file/rule11study.pdf).

¹⁹ Georgene M. Vairo, “Rule 11 and the Profession,” 67 *Ford. L. Rev.* 589 (1998).

²⁰ Rules Enabling Act of 1934, 28 U.S.C. § 2072.

²¹ http://www.americanbar.org/content/dam/aba/uncategorized/GAO/25mar2015_opposehr758.authcheckdam.pdf.

²² *Ibid.*