CIVIL JUSTICE & NATIONAL ADVOCACY

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MEMORANDUM IN OPPOSITION TO S. 237
THE "LAWSUIT ABUSE REDUCTION ACT OF 2017 (LARA)

LARA would hamstring federal judges by removing all discretion to award sanctions, chill the filing of meritorious claims, and burden federal courts with unnecessary satellite litigation.

Introduction and Summary

S. 237, the "Lawsuit Abuse Reduction Act of 2017 (LARA)," would 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." In March, the bill passed the House (H.R. 720) along a largely party-line vote.[1]

Under Rule 11, judges currently 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LARA would reinstate a federal rule put into effect in 1983 that was so unworkable it was rescinded in 1993. As described by 80 public interest organizations in their letter of opposition to the House bill, "among those problems were: the rule had a chilling effect on the filing of meritorious civil rights, employment, environmental, and consumer cases; the rule was overused in civil rights cases as sanctions were sought and imposed against civil rights plaintiffs more than against any other litigants in civil court; and the rule burdened the already strained federal court system with satellite litigation over compliance with the rule. These burdens adversely affected cases of all types, including business-to-business civil litigation."[2]

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[1] http://clerk.house.gov/evs/2017/roll158.xml. Three Democrats supported the bill; five Republicans opposed.
[2] https://centerjd.org/content/group-letter-us-house-representatives-opposing-civil-justice-bills

Moreover, the 1993 amendments, which fixed these problems, "[b]y all empirical accounts … have been tremendously successful."[3] There is absolutely no reason to change this rule.

Background

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.[4] Indeed, the Judicial Conference now warns, "the 1983 version of Rule 11 resulted in serious unintended consequences, chiefly an explosion of satellite litigation . . . [and] a significant increase in abusive litigation."[5] Explained law professor and Rule 11 scholar Lonny Hoffman in 2011 testimony,[6]

> 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.

Once Rule 11 was fixed with the 1993 amendments, the "satellite litigation" problem "essentially disappeared."[7]

Moreover, while the 1983 rule was in effect, a disproportionate amount of abusive satellite litigation was brought against plaintiffs in civil rights cases. Specifically, "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."[8] One study found, for example, that, "civil rights cases made up 11.4% of Federal cases filed" but that "22.7% of the cases in which sanctions had been imposed were civil rights cases."[9]

In fact, notes the House Committee Report, "[t]he late Robert L. Carter, United States District Judge for the Southern District of New York and, before that, one of the lawyers representing

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[3] See, e.g., Dissenting Views, U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017).

[4] 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).

[5] Letter from David G. Campbell, U.S. District Judge, D. Ariz., Chair, Advisory Committee on Rules of Practice and Procedure, & John Bates, U.S. District Judge, D.D.C., Chair, Advisory Committee on Civil Rules, to John Conyers, Jr., Ranking Member, referenced in U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017).

[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.

[7] Georgene M. Vairo, "Rule 11 and the Profession," 67 *Ford. L. Rev*. 589 (1998).

[8] 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).

[9] Ibid.

the plaintiffs in *Brown v. Board of Education*, considered changes like [those found in LARA] and remarked, 'I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in Brown] would have been delayed for a decade had my colleagues and I been required, upon pain of potential sanctions, to plead our legal theory explicitly from the start.'"[10] Indeed, while the 1983 rule was in effect, the threat of mandatory sanctions and potentially costly satellite litigation was empirically demonstrated to have a chilling effect on the filing of meritorious cases.[11]

House Judiciary Committee members who oppose LARA wrote in their dissenting views in the House Report[12] that LARA would "greatly increas[e] the amount, cost, and intensity of civil litigation, provide more grounds for unnecessary delay and harassment in the courtroom, and, most importantly, chill legitimate civil rights claims." They called LARA a "reckless attempt" to change federal rules "over the objections of the Judicial Conference, in complete disregard of the Conference's firsthand experience with the 1983 rule." That rule, on which LARA is based, was an "utter failure" and changed in 1993 by Judicial Conference, "after years of careful consideration, research, experience, and public comment." The current Rule 11 "by most accounts, has been a success." There is no reason to change this rule.

LARA Opponents

As noted above, LARA is strongly opposed by the Judicial Conference of the United States, as well as by the American Bar Association,[13] Rule 11 scholars,[14] and numerous labor, civil rights, consumer, environmental, legal and other public interest organizations.[15]

Moreover, "85 percent [of federal judges surveyed in 2005] viewed 'groundless litigation' as no more than a small problem in their courtrooms and 91 percent opposed the proposed requirement that sanctions be imposed for every Rule 11 violation."[16] Also, "85 percent strongly or moderately supported Rule 11's safe harbor provision; and 84 percent disagreed with the proposition that an award of attorneys' fees should be mandatory for every Rule 11 violation." And "87 percent of the judges surveyed wanted the current Rule 11 to remain in force, and only 4 percent expressed support for the amendments that [LARA] now proposes to make."[17]

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[10] Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988, 137 U. PA. L. REV. 2179, 2193 (June 1989), cited in Dissenting Views, U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017).

[11] 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

[12] Dissenting Views, U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017).

[13] http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2017feb1_lara_l.authcheckdam.pdf

[14] See, e.g., Dissenting Views, U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017).

[15] https://centerjd.org/content/group-letter-us-house-representatives-opposing-civil-justice-bills

[16] David Rauma & Thomas E. Willging, Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure, Federal Judicial Center (2005) referenced in U.S. House Committee on Judiciary, *Lawsuit Abuse Reduction Act of 2017 (to Accompany H.R. 720),* H. Rpt. 115-16 (2017).

[17] Ibid.