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Re: Lawsuit Abuse Reduction Act of 2013

Dear Representative:

I am writing on behalf of the American Bar Association to urge you to oppose H.R. 2655, the Lawsuit Abuse Reduction Act of 2013, which is scheduled for consideration by the House this week.

H.R. 2655 seeks to amend Rule 11 of the Federal Rules of Civil Procedure by reinstating a mandatory sanctions provision that was adopted in 1983 and rescinded a decade later after experience clearly demonstrated that it was having the opposite intended effect and, in fact, was causing an increase in non-meritorious lawsuit filings. The current Rule 11, which was adopted in 1993, provides for discretionary imposition of sanctions and includes a "safe harbor" provision that allows parties and their attorneys to avoid Rule 11 sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served. It is important to keep in mind that Rule 11 is not the only tool available to impose sanctions: a court may invoke other rules of procedure, statutes, or its own inherent authority to prevent frivolous or non-meritorious lawsuits from going forward and to impose sanctions when appropriate.

The ABA opposes enactment of H.R. 2655 for three main reasons. First, it would circumvent the procedures Congress itself has established for amending the Federal Rules of Civil Procedure. Second, there is no demonstrated evidence that the existing Rule 11 is inadequate and needs to be amended. And, third, by ignoring the lessons learned from ten years of experience under the 1983 mandatory version of Rule 11, Congress incurs the substantial risk that the proposed changes would impede the administration of justice by encouraging additional litigation and increasing court costs and delays.

Congress passed the Rules Enabling Act to establish a rigorous, inclusive, multi-step process for amending the Federal Rules. It provides that evidentiary and procedural rules or amendments in the first instance will be considered and drafted by committees of the Judicial Conference of the United States. Thereafter, they will be subject to thorough public comment and reconsideration, and then, if approved by the Judicial Conference, will be submitted to the U.S. Supreme Court for its consideration and promulgation. Finally, proposed rules or amendments will be

transmitted by the Supreme Court to Congress, which retains the ultimate power to reject, modify, or defer any rule or amendment before it takes effect.

This time-proven process is predicated on respect for separation-of-powers and recognition that: (1) rules of evidence and procedure are matters of central concern to the judiciary, lawyers, and litigants and have a major impact on the administration of justice; (2) each rule constitutes one small part of a complicated, interlocking system of court administration procedures, all of which must be given due consideration whenever Rules changes are contemplated; and (3) judges have expert knowledge and a critical insider's perspective with regard to the application and effect of the Federal Rules.

There is no dispute that the filing of frivolous claims and defenses is an important issue. We do, however, disagree with assertions that there has been a significant increase in the filing of non-meritorious litigation in the 20 years since Rule 11 was revised to permit the discretionary imposition of sanctions. As noted last year in testimony presented to the House Subcommittee on the Constitution by Professor Lonny Hoffman, numerous empirical studies by neutral observers do not support notions of skyrocketing litigation abuse. While anecdotal stories of litigation abuse and resulting financial ruin can be riveting, they are the exception and an inadequate substitute for concrete empirical data of lawsuit abuse. Experience under the 1983 Rule bears witness to that.

According to academics and court administration scholars who have testified before the past several Congresses, while there was little credible evidence to suggest the need for the Rule prior to its adoption, multiple empirical studies of the experience under the 1983 Rule documented its many ill-effects.

During the decade that the 1983 version of the Rule requiring mandatory sanctions was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time. The Judicial Conference of the United States, in a 2004 letter to Rep. James Sensenbrenner, who was then chair of the Judiciary Committee, stated that mandatory application of Rule 11 had "created a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers; and provid[ed] little incentive…to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit."

Even if frivolous lawsuits have increased in recent years – a proposition lacking in empirical support – there is no evidence that the proposed changes to Rule 11 would deter the filing of non-meritorious lawsuits. In fact, past experience strongly suggests that the proposed changes would encourage new litigation over sanction motions and would thus increase, not reduce, court costs and delays. This is a costly and completely avoidable outcome.

Our objective in opposing the enactment of H.R. 2655 is not to stifle discourse over the underlying issues. While we do not believe that Rule 11 requires amendment, we respect that some Members of Congress are deeply concerned that frivolous lawsuits are adversely affecting

the administration of justice and believe that their concerns and proposed solutions deserve a full and robust examination, which was not undertaken prior to introduction of H.R. 2655. Therefore, even if you believe that a widespread lawsuit-abuse problem exists, we urge you to reject this bill and defer to the Rules Enabling Act process established by Congress. This will assure a comprehensive and evidence-based development of any remedial proposal that involves amending the Federal Rules.

Sincerely,

Thomas M. Susman