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REPORT
109–123

LAWSUIT ABUSE REDUCTION ACT OF 2005

JUNE 14, 2005.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 420]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 420) to amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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39–006

THE AMENDMENT

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2005".

SEC. 2. ATTORNEY ACCOUNTABILITY.

Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) by amending the first sentence to read as follows: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.";

(2) in paragraph (1)(A)—

(A) by striking "Rule 5" and all that follows through "corrected." and inserting "Rule 5."; and

(B) by striking "the court may award" and inserting "the court shall award"; and

(3) in paragraph (2), by striking "shall be limited to what is sufficient" and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and inserting "shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.".

SEC. 3. APPLICABILITY OF RULE 11 TO STATE CASES AFFECTING INTERSTATE COMMERCE.

In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action substantially affects interstate commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted. If the court determines such action substantially affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

SEC. 4. PREVENTION OF FORUM-SHOPPING.

(a) IN GENERAL.—Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which—

(1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—

(A) resides at the time of filing; or

(B) resided at the time of the alleged injury;

(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred;

(3) the defendant's principal place of business is located, if the defendant is a corporation; or

(4) the defendant resides, if the defendant is an individual.

(b) DETERMINATION OF MOST APPROPRIATE FORUM.—If a person alleges that the injury or circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection.

(c) DEFINITIONS.—In this section:

(1) The term "personal injury claim"—

(A) means a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative

party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and

(B) does not include a claim brought as a class action.

(2) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, but not any governmental entity.

(3) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, and any other territory or possession of the United States.

(d) APPLICABILITY.—This section applies to any personal injury claim filed in Federal or State court on or after the date of the enactment of this Act.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.

SEC. 6. THREE-STRIKES RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.

(a) MANDATORY SUSPENSION.—Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that attorney's career. If the court determines that the number is 3 or more, the Federal district court—

(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and

(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.

(b) APPEAL; STAY.—An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.

(c) REINSTATEMENT.—To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

SEC. 7. PRESUMPTION OF RULE 11 VIOLATION FOR REPEATEDLY RELITIGATING SAME ISSUE.

Whenever a party attempts to litigate, in any forum, an issue that the party has already litigated and lost on the merits on 3 consecutive prior occasions, there shall be a rebuttable presumption that the attempt is in violation of Rule 11 of the Federal Rules of Civil Procedure.

SEC. 8. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.

(a) IN GENERAL.—Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding—

(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and

(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.

(b) APPLICABILITY.—This section applies to any court proceeding in any Federal or State court that substantially affects interstate commerce.

PURPOSE AND SUMMARY

The Lawsuit Abuse Reduction Act of 2005 ("LARA"), H.R. 420, was introduced by Rep. Lamar Smith. H.R. 420 will restore the teeth to Federal Rule of Civil Procedure 11 it once had to deter frivolous Federal lawsuits. It would also extend Rule 11's protections to prevent frivolous lawsuits in state courts when state judges determine a case would have national economic consequences that affect interstate commerce. The bill would also prevent forum shopping, the nefarious practice by which personal injury attorneys bring lawsuits in courts that notoriously and consistently hand down astronomical awards even when the case has little or no connection to the court's jurisdiction. H.R. 420 would prevent forum shopping by requiring that personal injury cases be brought only

in the plaintiff's place of residence, where the plaintiff was allegedly injured, where the defendant's principal place of business is located, or where the defendant resides.

LARA would: (1) restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11; (2) remove Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed; (3) allow monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim; (4) apply Rule 11's provisions to state cases a state judge finds affect interstate commerce; (5) require that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, where the defendant's principal place of business is located, or where the defendant resides; (6) apply a "three strikes and you're out" rule to attorneys who commit Rule 11 violations in Federal district court; (7) impose mandatory civil sanctions for document destruction intended to obstruct a pending court proceeding; and (8) provide that if a party attempts to relitigate a losing claim more than three consecutive times, there shall be a rebuttable presumption that Rule 11 has been violated.

H.R. 420 applies to cases brought by individuals as well as businesses (both big and small), including business claims filed to harass competitors and illicitly gain market share. The bill also applies to both plaintiffs and defendants.[1]

The bill also expressly provides, in Section 5, that "Nothing in" the changes made to Rule 11 "shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." The development of civil rights claims is thereby explicitly protected under the bill's Rule 11 provisions.

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[1] Under the pre-1993 Rule 11, sanctions were imposed on defendants for having raised frivolous defenses. In *SEC v. Keating,* 1992 WL 207918, [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶96,906 (C.D.Cal.1992), the court imposed sanctions of the defendant Charles Keating because 12 of 14 "shotgun" defenses were "patently frivolous." Sanctions were also imposed on defendants for filing inappropriate Rule 11 motions; *See Berger v. Iron Workers,* 843 F.2d 1395 (D.C. Cir. 1988) (affirming in part per curiam 7 Fed. Rules Serv. 3d 306 (D.D.C. 1986)); and also for filing frivolous or harassing counterclaims. *See Aetna Insurance v. Meeker,* 953 F.2d 1328 (11th Cir. 1992) (affirming district court Rule 11 sanction of defendants for pursuing frivolous counterclaims of negligent salvage and conversion). In *Swanson v. Sheppard,* 445 N.W.2d 654 (N.D.1989), for example, the court imposed Rule 11 sanctions on the defendant because the defendant counterclaimed "simply to discourage the plaintiff from continuing with his cause of action." Sanctions were imposed on defendants for failing to conduct a reasonable inquiry into the legal basis for their Rule 12(b)(6) motion to dismiss. In *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.,* 603 F. Supp. 339 (S.D.N.Y. 1985), the court sua sponte imposed Rule 11 sanctions on defendants' counsel on the ground that counsel failed to conduct a reasonable inquiry into the legal basis for the Rule 12(b)(6) motion to dismiss, stating "Defendants failed to cite a single case or authority in their two-page memorandum [in support of the motion]. Apparently, they completely ignored the firmly established precedents directly contradictory to their position. No doubt exists that [defendants'] counsel failed to conduct the 'reasonable inquiry' that Rule 11 requires to ensure that a motion 'is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . .'" *Id.* at 341–42. *See also Steele v Morris,* 608 F. Supp. 274 (S.D.W.Va. 1985) (court granted the plaintiff's motion for Rule 11 sanctions to be imposed upon the defendant, concluding that the defendant's counsel failed to make reasonable inquiry into both the facts and the law before filing a motion to dismiss in this case which alleged, among other things, that the plaintiff suffered emotional distress due to the defendant's willful, deliberate, and outrageous conduct). Sanctions were also imposed on defendants when they were found to have ignored firmly established precedent. In *National Survival Game, Inc. v. Skirmish, U.S.A., Inc.,* 603 F. Supp. 339, 341–42 (S.D.N.Y. 1985), Rule 11 sanctions were imposed because defendants "completely ignored the firmly established precedents directly contradictory to their position." *See also Smith v. United Transp. Union Local 81,* 594 F. Supp. 96, 101 (S.D. Cal. 1984) (Rule 11 sanctions imposed where defendants frivolously maintained suit by ignoring relevant law, relying on irrelevant law, and basing arguments on vacated cases).

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 420 will prevent frivolous lawsuits and help dispel the legal culture of fear that has come to permeate American society.

FRIVOLOUS LITIGATION HAS A CORROSIVE EFFECT ON AMERICAN CULTURAL AND SOCIAL INSTITUTIONS

As Philip Howard has pointed out, due to an onslaught of frivolous lawsuits "[l]egal fear has become a defining feature of our culture."[2] This values crisis caused by lawsuit abuse reaches all parts of American society:

Churches

In response to litigation against a church after a parishioner committed suicide, churches have begun implementing policies discouraging counseling by ministers. Instead, parishioners are being referred to secular psychologists and other therapists.[3] According to a recent Newsweek cover story, "The Rev. Ron Singleton's door is always open. That way, when the Methodist minister of a small congregation in Inman, S.C., is counseling a parishioner, his secretary across the hall is a witness in case Singleton is accused of inappropriate behavior. (When his secretary is not around, the reverend does his counseling at the local Burger King.) Singleton has a policy of no hugging from the front; just a chaste arm around the shoulders from the side. And he's developed a lame little hand pat to console the lost and the grieving. The dearth of hugging is 'really sad,' he says, but what is he going to do? He could ill afford a lawsuit."[4]

Schools

A recent poll found that "[n]early 8 in 10 teachers (78%) said students are quick to remind them that they have rights or that their parents can sue."[5]

The Supreme Court's 1975 *Goss v. Lopez*[6] decision extended Federal due process rights to student discipline and literally made every school discipline decision a potential Federal case. According to *Newsweek:*

> "Legal fear" is just as intense in the educational system. Many Americans sense that schools have become chaotic and undisciplined over time and the quality of teachers has declined. Many teachers say that the joy has gone out of their jobs. What's not generally known is the role of courts and Congress in creating these problems by depriving teachers and principals of the freedom to use their own common sense and best judgment. Thanks to judicial rulings and laws over the past four decades, parents can sue if their kids are suspended for

[2] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 11.
[3] *Id.* at 32.
[4] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 43.
[5] Public Agenda, "Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?" (May 2004) at 2–3.
[6] 419 U.S. 565 (1975) (holding imposition of suspensions without preliminary hearings violated students' due process rights guaranteed by Fourteenth Amendment).

> even a single day—for any reason—without adequate "due process."[7]
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> Unruly students sense the teachers' fear and their own empowerment. "A kid will be acting out in class, and you touch his shoulder, and he'll immediately come back with 'Don't touch me or I'll sue,' or, 'You don't have any witnesses,'" says Rob Wiel, who taught high-school math and coached football and baseball in the Denver suburbs for 20 years before retiring recently.[8]

In New Jersey, "A state judge . . . threw out a lawsuit filed by an Atlantic County man who said assigned seating in a school lunchroom violated his 12-year-old daughter's right to free speech. Superior Court Judge Valerie Armstrong said Galloway Township school administrators had the right to impose the restriction to maintain order and safety in a cafeteria that serves 260 students in each of four 30-minute lunch periods."[9]

According to the St. Petersburg Times:

> In Pinellas County [Florida], two Palm Harbor University High School baseball players sued the school district claiming they were wrongly booted from school because of a roughhousing incident that occurred on a team road trip. In Hillsborough County, Robinson High School senior Nicole "Nikki" Youngblood filed suit after her picture was left out of the school yearbook when she refused to wear a feminine drape instead of a shirt and tie as she wished. These two cases only scratch the surface of lawsuits filed against local public school districts on an almost daily basis. More and more, offenses that used to be settled inside the schoolhouse now end up at the courthouse. *The result, educators say, is less money for learning. "We spend millions and millions on attorney fees every year that has nothing to do with the classroom," said Wayne Blanton, executive director of the Florida School Boards Association. "Every lawsuit we have to defend is money that doesn't get to the classroom." . . . "Lots of people file suit," said Crosby Few, Hillsborough School Board attorney. "A lot of them are frivolous."* . . . In the book, Judging School Discipline: The Crisis of Moral Authority, the authors argue that the hundreds of lawsuits challenging school disciplinary procedures have hurt the quality of public education. One of the authors, Richard Arum, an associate professor of sociology at New York University, said just the threat of lawsuits keeps teachers from taking charge of their classrooms.[10]

And as the *Arizona Republic* has reported:

> Scottsdale School Board member Christine Schild has called the legal fees "outrageous." . . . Legal bills for the 2003–04 school year are estimated to be as high as $675,000. This is the highest amount in recent years, and possibly ever . . . Large school districts routinely spend thousands of dollars each year

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[7] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 48.
[8] *Id.* at 49.
[9] John Curran, "Judge Rejects a Rights Suit Over School's Lunch Seating," *The Philadelphia Inquirer* (July 20, 2004) at B4.
[10] Melanie Ave, "Lawsuits Drain School Dollars" *St. Petersburg Times* (February 2, 2004) (emphasis added).

> on attorneys. The most common expenses are for student expulsion hearings and employee discipline . . . [D]ay-to-day legal expenses involving disputes with employees and student discipline are not covered by insurance and come out of the operating budget.[11]

Thanks to frivolous lawsuits, "in America, hugging or, indeed, even a pat on the back is now considered so dangerous that teachers can't do it."[12] According to Lynn Maher of the New Jersey chapter of the National Education Association ("NEA"), "Our policy is basically don't hug children."[13] The guidelines of the Pennsylvania chapter of the NEA urge teachers to do no more than "briefly touch" a child's arm or shoulder.[14]

Salon.com has chronicled the threat frivolous lawsuits pose to a successful program designed to get children to exercise more by walking or bike riding to school. According to *Salon.com:*

> [A] new program is rising to the top in the bike-walk hierarchy. It's called Safe Routes to School, a rapidly expanding 4-year-old effort that coordinates transportation, health and education agencies to get children walking and biking to school. Statewide Safe Routes programs are already underway in California, Washington and Wisconsin, and the pending reauthorization of the highway and transit bill, TEA-3, contains a $1 billion appropriation for a Federal Safe Routes to School program.
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> "It has the potential to become one of the best ways to improve conditions for walking and biking," said Clark, describing the broad cross-section of Safe Routes supporters, including parents, including parents and teachers, health agencies and urban planners. "There's an unassailable coalition."
>
> Sharon Roerty, director of community programs at the National Center for Bicycling and Walking in Bethseda, Md., concurs. "Safe Routes to School means a better walking and biking environment for everyone," she said. "We picked schools because that's a motherhood and apple pie. But it could be a senior center; it could be a train station."
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> But if Safe Routes to School is a case study in successful grassroutes organizing, the story behind it also unfolds as a classic—and damning—parable of contemporary American culture .. . . Wendi Kallins, project manager for the Marin County SR2S program, which has become a national model for the burgeoning movement, says parents routinely cite safety as the main reason they prevent their kids from walking or biking to school. But more often than not, parents' safety arguments are like falling down the rabbit hole; plunge deeper, and it gets curiouser and curiouser. Fifty percent of the children hit by cars near schools are hit by vehicles driven by parents of other students, according to the National Highway Traffic Safety Administration. Researchers for the Marin County program found

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[11] Anne Ryman, "Baracy to Pick In-house Attorney for School District," *The Arizona Republic* (July 8, 2004) at 1.

[12] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 5.

[13] *Id.* at 5.

[14] *Id.* at 5.

> that up to 30 percent of morning traffic is caused by parents driving their children to school. (These figures have since been validated in other parts of the country.) . . .
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> Fast forward to the 21st century, where liability insurance for kids who walk or bike to school has become one of the major challenges facing SR2S advocates. In 2002, the Environmental Protection Agency funded a $96,000 Portland project to develop a Walking School Bus—in which groups of kids walk designated routes to school under adult supervision—at a local elementary school. Organizers spent months mapping safe routes, conducting outreach to parents, and running criminal background checks on senior citizens volunteers, only to have the project collapse in the absence of liability coverage for kids who might become injured or go missing. A senior-citizen-led walking school bus in Larkspur, Calif. Met with a similar fact, according to Kallins.
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> "The fact that one would have to even consider kindly senior citizens being sued for walking kids to school says a lot about out culture," she observed.[15]

Doctor's Offices

According to *Newsweek:*

> Dr. Sandra R. Scott of Brooklyn, N.Y., has never been sued for malpractice, but that doesn't keep her from worrying. As an emergency-room doctor, she often hears her patients threaten lawsuits—even while she's treating them. "They'll come in, having bumped their heads on the kitchen cabinet, and meanwhile I'll be dealing with two car crashes," she says. "And if they don't have the test they think they should have in a timely fashion, they'll get very angry. All of a sudden, it's 'You're not treating me, this hospital is horrible, I'm going to sue you.'" [16] "I'm only a human being," she says. "I'm an educated physician but the miracles are out of my hands." [17]
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> When Dr. Brian Bachelder moved back to Mt. Gilead, Ohio, to practice family medicine in 1984, he hoped to emulate the country doc who'd treated him as a kid . . . But in recent years, Bachelder, 49, has watched litigation reshape his practice. Last December, facing malpractice premiums that soared from $12,000 in 2000 to $57,000 in 2003, Bachelder decided to lower his bill by cutting out higher-risk procedures like vasectomies, setting broken bones and delivering babies—even though obstetrics was his favorite part of the practice . . . Today the threat of litigation hangs over nearly every move Bachelder makes, changing the very nature of his relationship with patients. He worries that the slightest mistake could provoke a lawsuit. "Anything less than perfection is malpractice," he says. Even in confronting the most common ailments—headaches or ear infections—Bachelder must consider the possibility of a rare and devastating disease. He often orders ex-

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[15] Linda Baker, "Walk to School, Yes, But Don't Forget Your Lawyer," *Salon.com* (October 13, 2004).

[16] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 43–44.

[17] *Id.* at 51.

> pensive tests—not just to rule out the worst, but also to bolster his case before a potential jury . . . Bachelder's fear of lawsuits isn't just theoretical—he's been sued a half-dozen times in his 20-year career. In one case, Bachelder referred a boy with a bladder problem to a urologist. The urologist operated, and the patient subsequently sued; Bachelder was also named in the complaint. He was eventually dropped from the case, but not before his liability insurance paid out $40,000 in legal fees.[18]

The most dangerously incompetent doctors often remain in place for many years, in part because employers fear wrongful-dismissal lawsuits by fired doctors even more than malpractice suits by their victims.[19]

Sports

The *New Yorker* reports on how diving boards and U.S. Olympic diving medals have both become a thing of the past due to frivolous lawsuits: "After a golden age in the seventies . . . the American pool has suffered a gradual decline: thanks, for the most part, to concerns about safety and liability, diving boards have been removed and deep ends undeepened. . . . Such developments have consequences. . . . In the last two Olympics, medal counts for [once-dominant] American divers reached their lowest levels since the 1912 Games."[20]

According to *Newsweek:*

> Ryan Warner is a volunteer who runs an annual softball tournament in Page, Ariz., that usually raises about $5,000 to support local school sports programs. But not this year. A man who broke his leg at a recent tournament sliding into third base filed a $100,000 lawsuit against the city, and Warner fears he may be named as a defendant. "It's very upsetting when you're doing something for the community, not making any money for yourself, to be sued over something over which you had no control," he says. So Warner canceled the tournament.[21]
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> Parents, on behalf of their children, increasingly sue not only for physical injuries, but for "hurt feelings" when they don't make a team, says John Sadler of Columbia, S.C., who insures amateur sports leagues .. If a ref steps into a fight, he can be sued if one of the players he is holding back takes a punch. If the ref doesn't intervene, he can be sued for allowing the fight to go on.[22]
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> Even apparently innocent soccer moms are at risk. In Jupiter, Fla., one mother volunteered to pick up a pizza for the team. She drove over the foot of a child who, left unattended, had run into the road. The police did not even give the woman a ticket. But the parents of the child sued the mother and the

[18] Debra Rosenberg, "Hard Pill to Swallow" *Newsweek* (December 15, 2003) at 46.
[19] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 48.
[20] Field Maloney, "Cannonball!" *New Yorker,* Talk of the Town (September 8, 2004).
[21] *Id.* at 44.
[22] *Id.* at 49.

> soccer league and tried to sue the city, the refs and various sponsors.[23]

Other examples include the following. In Vestavia Hills, Alabama, the father of Laura Brooke Smith "sued [the] school district, saying his daughter's rejection from the high school cheerleading squad despite professional coaching has caused her humiliation and mental anguish." [24]

In North Haven, Connecticut, the "families of two high school sophomores have filed a Federal lawsuit over the school's decision to drop them from the drum majorette squad." [25]

A student was barred from participating in her high school's cheerleading tryouts "as punishment for passing a profane note on a . . . school bus in 2003." In response, her father hired a lawyer and filed a lawsuit "saying the punishment violated his daughter's constitutional rights." An appeals court dismissed the lawsuit, agreeing with school officials that students "do not have a constitutional right to participate in extra-curricular activities." [26]

And in Pennsylvania, "[a] teenager, who felt she was destined for greatness as a softball player, has filed a $700,000 lawsuit against her former coach, alleging his 'incorrect' teaching style ruined her chances for an athletic scholarship." [27]

ABC News reports that:

> When his 16-year-old son didn't get the most valuable player award, Michel Croteau didn't get upset. He hired a lawyer and sued his son's youth hockey league to the tune of more than $200,000 . . . The Croteaus are not alone. In the last year, parents have filed more than 200 non-injury-related sports lawsuits against coaches, leagues and school districts in the United States, according to Gil Fried, a University of New Haven professor who specializes in sports law . . . The Butzke family sued the Comsewogue, N.Y., school district because their eighth-grade daughter was taken off the varsity high school soccer team. The Branco family took legal action against the Washington Township, N.J., school district after their son, David, was cut from the junior varsity basketball team . . . The Rubin family sued California's New Haven Unified School District for $1.5 million because their son got kicked off the varsity basketball team . . . The family felt James Logan High School Coach Blake Chong may have cost their son not just a scholarship, but an NBA career." [28]

In 1999, even major league baseball issued a directive to players that they should no longer throw foul balls to eager fans in the stands because there might be a lawsuit if someone got hurt trying to recover a souvenir.[29] Yet another lawsuit was filed against

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[23] *Id.* at 49.
[24] Fox News (May 31, 2001).
[25] Ann DiMatteo, "Families Sue Over Unfair Twirl Tryouts," *The New Haven Register,* May 18, 2001.
[26] Kelly Melhart, "Court Dismisses Suit over Punishment," *Fort Worth-Star Telegram* (April 19, 2005).
[27] Dave Sommers, "Legal Pitch," *The Trentonian,* May 1, 2001.
[28] ABCNews.com Report, "Blame the Coach? Angry Parents Take School Coaches to Court" (August 7, 2003).
[29] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 46.

Major League Baseball for injuries resulting from being hit by a practice ball before Game One of the 2000 World Series.[30]

Playgrounds

The lawsuit culture is even changing the traditional American landscape: playgrounds are increasingly removing seesaws for fear of liability.[31] According to *Newsweek:*

> Playgrounds all over the country have been stripped of monkey bars, jungle gyms, high slides and swings, seesaws and other old-fashioned equipment once popularized by President John F. Kennedy's physical-fitness campaign. The reason: thousands of lawsuits by people who hurt themselves at playgrounds. But some experts say that new, supposedly safer equipment is actually more dangerous because risk-loving kids will test themselves by, for instance, climbing across the top of a swing set. Other kids sit at home and get fat—and their parents sue McDonald's.[32]

As Philip Howard has written, "just letting a claim go to a jury . . . will affect whether seesaws stay in playgrounds all across America."[33]

Today, a brochure from the National Program for Playground Safety advises: "Seesaw use is quite complex because it requires two children to cooperate and combine their actions," and now "there is a trend to replace [them] with spring-centered seesaws."[34] A culture of legal fear is actually reducing the opportunities of American children to burn calories in playgrounds.

Good Deeds

According to the *Chicago Daily Herald:*

> By day, Dave Peterson works with diagnostic multiplexers and beam shakers to maintain the Fermi National Accelerator Laboratory's antiproton source. But at dawn and dusk the Geneva resident drags a homemade snowplow behind his daughter's Pacific Electra mountain bike, clearing a 16-inch wide section of the Fox River Trail as he rides to and from work in Batavia. Because he rides at a time when few are watching, he's become something of a local legend the last two winters, a Bigfoot. "It's one of those weird things that has touched a nerve with a lot of people," Peterson said. A whole lot. In fact, many of the path's regulars have come to expect it to be clear—and that has put Peterson's plowing on hiatus. The county has asked him to stop because if there's an expectation that the trail will be plowed, there's a greater chance for litigation, said Kane County Forest Preserve District operations supervisor Pat McQuilkin. "If a person falls, you are more liable than if you had never plowed at all. Crazy world," wrote AnnMarie Fauske, the district's community affairs director, in response to a letter to Peterson. "Unfortunately, the times we are in allow

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[30] Zach Haberman, "Fan Blinded by Ball Sues Yanks for $5M," *The New York Post* (April 11, 2005).
[31] *Id.* at 3.
[32] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 44.
[33] Philip K. Howard, *The Collapse of the Common* Good (New York: 2001) at 58.
[34] U.S. Consumer Product Safety Commission, Handbook for Public Playground Safety, Pub. No. 325 at 23.

> for a much more litigious environment than common sense would dictate." . . . "There is something I can do here," Peterson said. "I can use my skills as an engineer to make life easier for the little old ladies who walk on the path." But the forest preserve worries that if they take a wrong step and fall, those little old ladies might decide to sue.[35]

The Girl Scouts

The Girl Scouts in Metro Detroit alone have to sell 36,000 boxes of cookies each year just to pay for liability insurance.[36] According to former Girl Scout Laurie Super [of Downington, Pennsylvania], "[i]t's getting harder to sell [cookies] . . . Our local Wawa stores said they couldn't let the girls set up their booth anymore, because of liability issues."[37]

Santa Clause

Even Santa Claus lives under a constant threat of legal harassment. As the *Los Angeles Times* quoted one Santa Claus, "When I started doing this years ago, I never even thought about liability . . . But Santas have a pretty good chance of getting sued . . ."[38]

Everyone

The corrosive effects of lawsuit abuse were recently summarized by *Newsweek:*

> Americans will sue each other at the slightest provocation. These are the sorts of stories that fill schoolteachers and doctors and Little League coaches with dread that the slightest mistake—or offense to an angry or addled parent or patient—will drag them into litigation hell, months or years of mounting legal fees and acrimony and uncertainty, with the remote but scary risk of losing everything . . . *Americans don't just sue big corporations or bad people. They sue doctors over misfortunes that no doctor could prevent. They sue their school officials for disciplining their children for cheating. They sue their local governments when they slip and fall on the sidewalk, get hit by drunken drivers, get struck by lightning on city golf courses—and even when they get attacked by a goose in a park (that one brought the injured plaintiff $10,000). They sue their ministers for failing to prevent suicides. They sue their Little League coaches for not putting their children on the all-star team. They sue their wardens when they get hurt playing basketball in prison. They sue when their injuries are severe but self-inflicted, when their hurts are trivial and when they have not suffered at all.* Many of these cases do not belong in court. But clients and lawyers sue anyway, because they hope they will get lucky and win a jackpot from a system that allows sympathetic juries to award plaintiffs not just real damages—say, the cost of doctor's fees or wages lost—but millions more for impossible-to-measure "pain and suffering" and highly arbi-

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[35] Garrett Ordower, "County Tells Bicyclist Thanks, But Stop Plowing Trail," *The Chicago Daily Herald* (February 21, 2004).
[36] *See* "Fine Filers of Frivolous Lawsuits," *The Detroit News* (February 24, 2004).
[37] Julia Moskin, "Crave Thin Mints?" *The New York Times* (March 14, 2004).
[38] J.R. Moehringer, "Ho! Ho! Is More Like Uh-Oh," *The Los Angeles Times* (December 23, 2004).

> trary "punitive damages." (Under standard "contingency fee" arrangements, plaintiffs' lawyers get a third to a half of the take.) . . . Many Americans sue because they have come to believe that they have the "right" to impose the costs and burdens of defending a lawsuit on anyone who angers them, regardless of fault or blame. The cost to society cannot be measured just in money, though the bill is enormous, an estimated $200 billion a year, more than half of it for legal fees and costs that could be used to hire more police or firefighters or teachers.[39]
>
> [T]he time may come when ordinary Americans recognize that for every sweepstakes winner in the legal lottery, there are millions of others who have to live with the consequences—higher taxes and insurance rates, educational and medical systems seriously warped by lawsuits, fear and uncertainty about getting sued themselves.[40]

As Will Rogers once observed, Americans are "letting lawyers instead of their conscience be their guide."

POLLS SHOW AMERICANS OVERWHELMINGLY SUPPORT LEGISLATION BARRING FRIVOLOUS LAWSUITS

We all pay for these frivolous lawsuits through higher prices as consumers and through higher taxes as taxpayers.

A recent poll found that 83% of likely voters believe there are too many lawsuits in America, 76% believe lawsuit abuse results in increased prices for goods and services, and 65% said they would be more likely to vote for congressional candidates who supported curbs on lawsuit abuse.[41] Another poll found that 73% of Americans support *requiring* sanctions against attorneys who file frivolous lawsuits.[42]

Small businesses rank the cost and availability of liability insurance as second only to the costs of health care as their top priority,[43] and both problems are fueled by frivolous lawsuits.

When *Business Week* wrote an extensive article on what the most effective legal reforms would be, Business Week stated that what's needed is "Penalties That Sting." As Business Week recommends, "Give judges stronger tools to punish renegade lawyers. Before 1993, it was mandatory for judges to impose sanctions such as public censures, fines, or orders to pay for the other side's legal expenses on lawyers who filed frivolous lawsuits. Then the Civil Rules Advisory Committee (CRAC), an obscure branch of the

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[39] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 44–45.

[40] *Id.* at 51. Although the American Trial Lawyers Association has vociferously attacked the *Newsweek* article, *Newsweek* stands solidly by its report, stating "NEWSWEEK received a large volume of mail from trial lawyers critical of our cover story. We stand by the story as both accurate and fair. The criticisms are for the most part easily refuted with material in the public record." *Newsweek,* "Mail Call" (January 12, 2004).

[41] *See* American Tort Reform Association, "National Poll on Tort Reform" (February 27, 2003).

[42] *See* Insurance Research Council, "IRC Study Finds Strong Support for Wide Variety of Civil Justice Reform Measures" (April 5, 2004) at 4.

[43] Bruce D. Phillips, "Small Business Problems and Priorities" (National Federation of Independent Business Research Foundation, June 2004).

courts, made penalties optional. This needs to be reversed . . . by Congress."[44]

The Class Action Fairness Act, which recently became law,[45] prohibits forum shopping when the case is styled as a class action. The same policy should apply to individual lawsuits as well, and LARA would fill that gap in policy. As *The Wall Street Journal* said in a recent editorial, "One suggestion is blending class action reform with the Lawsuit Abuse Reduction Act (LARA), a related measure that also passed the House last year. LARA would also reduce forum shopping and frivolous personal injury claims and fine lawyers who bring them."[46]

FRIVOLOUS LAWSUITS AGAINST INNOCENT VICTIMS HAVE BECOME COMMONPLACE, ESPECIALLY THREATENING SMALL BUSINESSES AND HEALTH CARE

Because existing rules against frivolous lawsuits are ineffective, as one commentator has pointed out, "The right to sue has been exploited by lawyers. They can gamble on taking cases on a contingency basis because they need only win 1 in 10 to score the big judgment that will make up for the other losses."[47]

Small businesses and workers suffer. This year, the nation's oldest ladder manufacturer, family-owned John S. Tilley Ladders Co. of Watervliet, New York, near Albany, filed for bankruptcy protection and sold off most of its assets due to litigation costs. Founded in 1855, the Tilley firm could not handle the cost of liability insurance, which had risen from 6% of sales a decade ago to 29%, even though the company never lost an actual court judgment. "We could see the handwriting on the wall and just want to end this whole thing," said Robert Howland, a descendant of company founder John Tilley.[48]

A recent report by the AEI-Brookings Joint Center for Regulatory Studies has concluded that "The tort liability price tag for small businesses in America is $88 billion a year" and that "Small businesses bear 68 percent of business tort liability costs, but take in only 25% of business revenue."[49] The small businesses studied in the report account for 98% of the total number of businesses with employees in the United States.[50]

As Bernie Marcus, co-founder and former chairman of The Home Depot, has described, "An unpredictable tort system casts a shadow over every plan and investment. It is devastating for start-ups. The cost of even one ill-timed abusive lawsuit can bankrupt a growing company and cost hundreds of thousands of jobs. CEOs and their boards are forced to lower their aspirations and hold back on innovations to manage defensively. This is holding our nation back from competing effectively in the global marketplace and offshore

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[44] Mike France, "Special Report—Tort Reform: How to Fix the Tort System," *Business Week* (March 14, 2005) at 76.

[45] Public Law No. 109–2.

[46] "Tort Reform Roadmap," *The Wall Street Journal* (editorial) (January 27, 2005) at A12.

[47] Mortimer B. Zuckerman (Editorial) "Welcome to Sue City, U.S.A." *U.S. News & World Report* (June 16, 2003) at 64.

[48] Carrie Coolidge, "The Last Rung; The Tort System Takes Down a 149-year-old Ladder Manufacturer," *Forbes* (January 12, 2004) at 52.

[49] Judyth Pendell and Paul Hinton, "Liability Costs for Small Business" (U.S. Chamber Institute for Legal Reform, June, 2004) at 1 ("small business" defined as "those with less than $10 million in annual revenue and at least one employee in addition to the owner").

[50] *Id.*

competition is seriously cutting into market share for U.S. companies."[51]

Doctors and patients suffer. Before the 1960s, only one physician in seven had ever been sued in their entire lifetime,[52] whereas today's rate is about one in seven physicians sued per year.[53]

Further, the Harvard Medical Practice Study found that *over half* of the filed medical professional liability claims they studied were brought by plaintiffs who suffered either no injuries at all, or, if they did, such injuries were not caused by their health care providers, but rather by the underlying disease.[54] The researchers found that, of the 47 medical malpractice claims they studied that resulted in litigation,[55] "[i]n 14 cases, the physicians reviewed the record and found no adverse event. For most of these cases, the physicians examined the outcome and concluded that the cause was the underlying disease rather than medical treatment . . . In these 14 cases, our physician reviewers took a stand opposite to that of the plaintiff-patient's expert."[56] Further, the reviewers found that in an additional 10 cases an adverse event occurred, but there was no negligence on the part of the health care provider.[57] Of the 47 claims filed that the researchers analyzed, less than half demonstrated any actual negligence, and many demonstrated no discernable injury.[58]

EXAMPLES OF FRIVOLOUS LAWSUITS

Here are just a few examples of the frivolous lawsuits that have tormented innocent Americans.[59]

- According to Reuters, "A lawsuit against . . . U.S. weather forecasters . . . over the South Asian tsunami disaster is fueling calls for greater curbs on what critics say are frivolous cases brought by lawyers out to make a quick buck. The suit, brought on behalf of a group of tsunami victims, 'perfectly illustrates' the need for U.S. laws to hold lawyers liable for the economic damages they inflict on those they sue,

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[51] Washington Legal Foundation, "Conversations With . . ." (Fall 2004).

[52] *See* "Opinion Survey of Medical Professional Liability," JAMA 164:1583–1594 (1957).

[53] *See* R. Bovbjerg, "Medical Malpractice: Problems & Reforms," The Urban Institute, Intergovernmental Health Policy Project (1995).

[54] See Harvard Medical Practice Study to the State of New York, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York at 11–5 (1990) ("[T]he tort system imposes the costs of defending claims on [health care] providers who may not even have been involved in an injury, let alone a negligent injury.").

[55] *See id.* at 7–1.

[56] *See id.* at 7–33.

[57] *See id.* at 7–33.

[58] *See also* Paul Weiler, *et al.,* A Measure of Malpractice (1993) at 71 ("[Of those 47,] 10 claims involved hospitalization that had produced injuries, though not due to provider negligence; and another three cases exhibited some evidence of medical causation, but not enough to pass our probability threshold. That left 26 malpractice claims, more than half the total of 47 in our sample, which provided no evidence of medical injury, let alone medical negligence.").

[59] Recently, Britain's most senior judges, the Appellate Committee of the House of Lords, branded Britain's U.S.-style claims system an "evil" that interferes with civil liberties and freedom in a landmark ruling in a compensation case. In the case of *Tomlinson v. Congleton Borough Council,* [2003] U.K.H.L. 47 (2003), the Appellate Committee stated "The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen. Of course there is some risk of accidents arising out of the joie de vivre of the young, but that is no reason for imposing a grey and dull safety regime on everyone."

said legal scholar Lester Brickman."[60] The petition was filed in Federal court in Manhattan.[61]

- Austin Aitken filed a lawsuit against NBC's "Fear Factor" television program. Austin Aitken told the Associated Press that he watches "Fear Factor" often and had no problem with past installments in which the reality show's participants ate worms and insects in pursuit of a $50,000 prize—but eating rats went "too far." Aitken says he became "dizzy and lightheaded" and vomited after watching contestants eat rats. He also ran into a doorway because he was disoriented, "causing suffering, injury and great pain." Aitken's lawsuit asks for $2.5 million as compensation. "I just put any figure," he told the Associated Press.[62]
- U.S. District Judge Loretta Preska had to say about the current state of Federal litigation: "Plaintiffs here have lost their way; they need to consult a map or a compass or a Constitution because Plaintiffs have come to the judicial branch for relief that may only be granted by the legislative branch. This action is one of dozens of similar bootless actions filed in twenty-three district courts across the United States on behalf of uninsured and indigent patients, wherein Plaintiffs argue, without basis in law, that private non-profit hospitals are required to provide free or reduced-rate services to uninsured persons . . . This orchestrated assault on scores of nonprofit hospitals, necessitating the expenditure of those hospitals' scares resources to beat back meritless legal claims, is undoubtedly *part of the litigation explosion that has been so well-documented in the media* . . . For the foregoing reasons, the Defendants' motions to dismiss the above-captioned actions are granted in their entirety with prejudice. The Clerk of the Court shall mark these actions closed and all pending motions denied as moot."[63]
- Barbara Streisand sued the California Coastal Records Project, which took thousands of pictures of the California coastline intended to protect the state's shoreline. The photographs are made available free of charge to state and local governments, university researchers, conservation organizations, and others. Streisand sued because a picture of her Malibu estate (her mansion composed only 3% of one photo among thousands) was posted on the public interest organization's Web site. She sued for $50 million (five separate claims for $10 million each), but on May 10, 2004, Streisand was ordered to pay the people she sued $154,000 in legal fees they accrued defending against her ridiculous lawsuit.[64]

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[60] Gail Appleson, "Tsunami Suit Shows Need to Curb Lawyers, Critics Say," Reuters (March 8, 2005).

[61] *Id.*

[62] "Viewer Sues NBC Over Rat-Eating Fear Factor," Associated Press (January 6, 2005).

[63] *Kolari v. New York-Presbyterian Hospital,* 2005 WL 710452 (S.D.N.Y.), at *1–*2, *14.

[64] *See* Jennifer Pittman, "The Blame Game" *The Silicon Valley/San Jose Business Journal* (January 9, 2004); Kenneth R. Weiss, "Streisand Sues Over Photograph of Her Coast Home on Web Site," *The Los Angeles Times* (May 30, 2003) at B1; Streisand v. Adelman, Case No. SC077257 (Sup. Ct. Los Angeles Cty.) (complaint filed May 30, 2003); *Streisand v. Adelman,* Case No. SC077257 (Sup. Ct. Los Angeles Cty.) (ruling on submitted matters: Motion to Tax Costs and Motion for Attorneys; Fees).

- According to the *Indianapolis Star,* "Indiana drivers who get into wrecks with someone who is talking on a cell phone can forget about suing the phone's manufacturer. The Indiana Court of Appeals on Friday dismissed an Evansville lawsuit in which Terry L. Williams tried to do just that after a March 2002 traffic crash. Williams collided with Kellie Meagher, who was allegedly talking on a Cingular Wireless phone. In the lawsuit, Williams alleged Cingular knew—or should have known—that Meagher would use the phone while driving. Vanderburgh Superior Court Judge Mary Margaret Lloyd dismissed Cingular from the suit. After the dismissal, Williams asked the judge to reconsider, citing new evidence that included a 'Blondie' cartoon strip in which Blondie, while talking on a cell phone, caused an accident. But the Evansville judge was unmoved. Now an appellate court also agrees that Cingular was not liable."[65]
- In April, 1995, Carl and Diana Grady sued Frito Lay claiming that Dorito chips stuck in Charles Grady's throat and tore his esophagus. The Gradys wanted to present the "expert" testimony of Dr. Charles Beroes to support their claim that Doritos are *inherently dangerous* and negligently designed. Beroes' research included pressing Doritos onto a scale until the tip snapped off, and measuring the amount of time it took saliva to soften the Doritos. None of Beroes' tests involved chewing. After *eight years* of costly litigation, the Pennsylvania Supreme Court threw out the case, noting that Dr. Beroes' tests "smacked of a high school science fair project and did not bear any relationship to the reality of the . . . consumption of foodstuffs."[66] Justice Saylor pointed out in his concurring opinion "the common sense notion that it is necessary to properly chew hard foodstuffs prior to swallowing."[67]
- After *three years* of litigation, an appeals court finally held that the survivor of a crash cannot sue an airline for punitive damages when the pilots did not intentionally crash the plane. At midnight on June 1, 1999, during a severe thunderstorm, a fully loaded American Airlines jet crashed while trying to land in Little Rock, Arkansas. Eleven people died, including the pilot. Two passengers sued seeking compensatory and punitive damages. A U.S. district court judge ruled that "uncontroverted evidence" showed the pilots had a good faith belief that the plane could be landed safely.[68] Upholding the district court's decision, Judge Morris Arnold held that no reasonable jury could find that the members of the flight crew crashed the plane on purpose. Judge Morris wrote, "[s]tated differently, we hold that no reasonable jury could find that the members of the flight crew knew, or ought to have known, in light of the surrounding cir-

[65] Kevin Corcoran, "Court: Don't Blame Cell-Phone Maker for Crash," *The Indianapolis Star* (June 5, 2004).

[66] *Grady v. Frito-Lay, Inc.,* 839 A.2d 1038, 1042 (8th Cir. 2003) (citing *Grady v. Frito-Lay, Inc.,* 2000 WL 33436367, at *2) (Pa.Com.Pl. April 3, 2000)).

[67] *Id.* at 1053 (Saylor, J., concurring).

[68] *In re: Aircraft Accident at Little Rock, Arkansas on June 1, 1999,* 231 F.Supp. 852, 879 (E.D.Ark. 2002).

cumstances, that their conduct would naturally and probably result in injury." [69]

- After *five years* of litigation, the Nevada Supreme Court dismissed the appeal of Lane Holmes, who sued the Turtle Stop in Las Vegas, claiming a cup caused him to suffer leg burns from dripping hot coffee.[70] The court upheld the decision of the trial court that ruled "[t]he danger is open and obvious." [71]
- A woman in Knoxville, Tennessee, sought $125,000 in damages against McDonald's, claiming a hot pickle dropped from a hamburger, burning her chin and causing her mental injury. Her husband also sued for $15,000 for loss of consortium.[72]
- On September 3, 2003, a Federal district judge in New York threw out for a second time a lawsuit filed on behalf of obese children claiming McDonald's Corporation was legally responsible for their over-consumption of food.[73] The court earlier noted the national ramifications of the complaint and the requested damages, stating "McDonalds has also, rightfully, pointed out that this case, the first of its kind to progress far enough along to reach the stage of a dispositive motion, could spawn thousands of similar 'McLawsuits' against restaurants . . . The potential for lawsuits is even greater given the numbers of persons who eat food prepared at other restaurants in addition to those serving fast food." [74]
- The Michigan Court of Appeals threw out a case brought by Richard Overton, who "pointed to defendant's television advertisements featuring Bud Light as the source of fantasies coming to life, fantasies involving tropical settings, and beautiful women and men engaged in unrestricted merriment. Plaintiff sought monetary damages in excess of $10,000, alleging that defendant's misleading advertisements had caused him physical and mental injury, emotional distress, and financial loss." [75]
- In Florida, a woman sued Universal Studios for $15,000 for "extreme fear, emotional distress and mental anguish" because the theme park's annual haunted house was too scary.[76]
- After over *three years* of litigation, Georgia's Court of Appeals held that the day trading firms where Mark Barton invested before embarking on a shooting rampage are not liable for the victims' injuries and deaths. A unanimous panel on the court stated "We find this case is one in which the issue of proximate cause is so plain, palpable and indisputable as to demand summary judgment for the defend-

[69] *Id. at 878–79.*
[70] *Holmes v. Turtle Stop, Inc.,* 62 P.3d 1165 (2000).
[71] Cy Ryan, "Court Says Warning About Hot Coffee Unnecessary," *The Las Vegas Sun* (July 11, 2000).
[72] *See* Randy Kenner, "Lawsuit on Hot Pickle Draws Attention Around the Globe," *Knoxville News-Sentinel* (October 10, 2000) at A1.
[73] *See Pelman v. McDonald's Corp.,* S.D.N.Y. 02 Civ. 7821 (RWS), at 34–35 (September 3, 2003).
[74] *Pelman v. McDonald's Corp.,* 237 F.Supp.2d 512, 518 (S.D.N.Y. 2003).
[75] *Overton v. Anheauser-Busch Co.,* 517 N.W.2d 308, 309 (Mich. App. 1994).
[76] Tim Barker, "Universal Fall Leads to Lawsuit," *Orlando Sentinel* (January 5, 2000) at C1.

ants."[77] The court noted that it was "troubled by the implication that the list of defendants potentially liable for any person's violence, if sparked by economic misfortune, would be limited only by the number of stock brokers, investment advisers, lawyers, business partners, lottery ticket sellers, etc., whom the assailant blamed for his financial losses."[78]

- After a *decade* of litigation, Texas' 1st Court of Appeals reversed a $43 million judgment against a car manufacturer in a products liability suit that alleged a defective seat belt caused the 1992 drowning death of a woman with a blood-alcohol level of 0.17 who failed to escape from her Honda Civic when it became submerged under water.[79]
- The family of a man who died on a fishing trip sued the Weather Channel for $10 million, claiming that the man relied on the channel's forecast for his safety. In dismissing the case, the Miami Federal court stated that if forecasters were held accountable, "the duty could extend to farmers who plant their crops based on a forecast of no rain, construction workers who pour concrete or lay foundation based on the forecast of dry weather, or families who got to the beach for the weekend."[80]
- A West Virginia man who fell down an escalator at an airport finally dropped a lawsuit filed against US Airways over the accident. According to the Associated Press, "The lawsuit in circuit court in Fort Myers alleged the airline didn't warn Floyd Shuler, 61, about the adverse affects of drinking alcohol on a plane. Shuler said in a news release from Wheeling, W.Va., that he didn't intend for the suit to be filed. 'I learned about the filing of the lawsuit against US Airways . . . along with everyone else,' Shuler said. 'It was never my intent to take on the airline industry. I apologize for any inconvenience this has caused US Airways.' Shuler's attorney, Paul Kutcher, did not return a phone call from The Associated Press seeking comment. The suit . . . said US Airways was negligent by failing to warn Shuler that the effects of alcohol are greater at night on airline passengers. The suit also alleged that the company did not properly maintain the escalator at Southwest Florida International Airport when he fell down it on Aug. 28, 1999, and it sought damages in excess of $15,000."[81]
- Several months after the Escondido, California library's resident cat attacked Richard Espinosa's 50-pound Labrador-mix assistance dog, Espinosa filed a $1.5-million claim against the city, alleging that he was harmed due to the dog's injuries. According to the legal papers filed, Espinosa claimed his Federal and state constitutional rights were violated and that ". . . the defendants actions and subsequent inactions caused Espinosa to suffer significant lasting, extreme and severe mental anguish and emotional distress including, but

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[77] *Brown v. All-Tech Investment Group,* 2003 WL 23315394 (Ga. App.) at *5.
[78] *Id.* at *7, n.5.
[79] *Honda of America Manufacturing, Inc. v. Norman,* 104 S.W.3d. 600 (2003) (Tex.App. 1st.).
[80] *See* "Storm Death Is Not Weatherman's Fault," *New York Post* (March 29, 1999) at 84.
[81] Associated Press, "Man Drops Suit Filed Against Airline After He Drank Booze, Fell," *USA Today* (April 4, 2004).

not limited to, terror, humiliation, shame, embarrassment, mortification, chagrin, depression, panic, anxiety, flashbacks, nightmares, loss of sleep . . .'' [82] According to the North County Times, ''It took a jury little more than 2 hours of deliberation Friday to reject a claim from a man that the city of Escondido violated his civil rights when a cat living in a city library attacked his assistance dog more than 3 years ago . . . Espinosa originally asked for $1.5 million in compensation and damages . . . During jury selection Wednesday, Judge Hofmann excused four potential jurors who said they felt the case was 'frivolous' and that they could not be impartial. Others also said the case was without merit, but said they could look beyond that feeling. 'After that first juror said the word ''frivolous,'' and so did the next five, I thought the whole panel should have been thrown out,' Espinosa said . . . The city offered twice to settle with Espinosa, including one offer of $1,000. Espinosa declined. Nelson was unable to estimate how much the city spent defending itself against Espinosa's allegations, but he said it was a considerable sum. He also said the case could drag on for months or years if Espinosa does appeal.'' [83]

- In Ohio, Hamilton County Commissioner Todd Portune sued the Bengals and the National Football League claiming the team violated its stadium lease by failing to be competitive. The complaint, which also named the other 31 NFL franchises as defendants, alleges fraud, civil conspiracy, antitrust violations and breach of contract.[84]
- After *three years* of litigation, the Nebraska Supreme Court upheld a lower court ruling and found Ford Motor Co. and Bridgestone/Firestone Inc. not liable for the death of a woman killed by a man who gave her a lift after she got a flat tire. The woman's parents claimed in the lawsuit that a Firestone Wilderness AT tire on their daughter's Ford Explorer failed, setting off the chain of events that resulted in her death. The Nebraska court said the companies could not have foreseen the murderer's criminal acts.[85]
- According to the *Albany Times Union,* ''The spectacle of American spending always gets a little silly in the holiday season, but shoppers over the next few weeks will be hard-pressed to match the performance last year of Antoinette Millard. She ran up bills of almost $1 million in New York luxury stores like Cartier and Barneys, and, according to court papers, Millard is now suing American Express for improperly soliciting her to sign up for a big-spender's credit card, her purchasing weapon of choice.'' [86]
- The Court of Appeals of Indiana had this to say about a recent lawsuit brought by a man who sued his cell phone com-

[82] Chuck Shepherd, ''News of the Weird,'' *The Orlando Weekly* (August 30, 2001).
[83] Teri Figueroa, ''Jury Rejects Claim by Man in Attack on Dog by Library Cat,'' *The North County Times* (January 20, 2004).
[84] Terry Kinney (the Associated Press) ''Commissioner Sues Bengals, NFL'' (January 31, 2003).
[85] Kevin O'Hanlon, ''Court: Faulty Tire Didn't Cause Murder,'' the Associated Press (August 8, 2003).
[86] Steve Lohr, ''Buying Easy, Paying Hard,'' *Times Union* (December 5, 2004) at A1.

pany because he got in an accident while using it in his car. The court stated:

> With respect to Cingular, the complaint alleged: "That at the time of this collision the defendant Meagher was utilizing a telephone furnished by Cingular Wireless. That Cingular Wireless was negligent in furnishing a cellular phone to Meagher when it knew, or should have known, that it would be used while the user operated a motor vehicle." . . . A cellular phone does not cause a driver to wreck a car. Rather, it is the driver's inattention while using the phone that may cause an accident . . . For example, many items may be used by a person while driving, thus making the person less attentive to driving. It is foreseeable to some extent that there will be drivers who eat, apply make up, or look at a map while driving and that some of those drivers will be involved in car accidents because of the resulting distraction. However, it would be unreasonable to find it sound public policy to impose a duty on the restaurant or cosmetic manufacturer or map designer to prevent such accidents. It is the driver's responsibility to drive with due care. Similarly, Cingular cannot control what people do with the phones after they purchase them. To place a duty on Cingular to stop selling cellular phones because they might be involved in a car accident would be akin to making a car manufacturer stop selling otherwise safe cars because the car might be negligently used in such a way that it causes an accident . . . Ultimately, sound public policy dictates that the responsibility for negligent driving should fall on the driver. Legislation has already been drafted to address the issue of cellular phone use while driving and to place the responsibility on the driver to refrain from doing so. We are confident that the legislature is taking appropriate measures to protect public safety, and that is both its right and duty." [87]

TODAY'S PRODUCT WARNINGS ARE A SAD TESTAMENT TO THE LEGAL CULTURE OF FEAR

Today, testaments to the age of frivolous lawsuits are written on all manner of product warnings that aim to prevent obvious misuse. A label on a snow sled says "Beware: sled may develop a high speed under certain snow conditions." [88] One warning label on a toilet brush states "Do not use for personal hygiene." [89] A 5-inch brass fishing lure with three hooks is labeled "Harmful if swallowed." A warning on an electric router made for carpenters states "This product not intended for use as a dental drill." A warning

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[87] *Williams v. Cingular Wireless,* No. 82A01–0312–CV–476 (Ct. App. Ind. June 4, 2004), at 2, 7–9.

[88] As one commentator has remarked, "yet another popular sledding hill" closed in Methuen, Massachusetts because nobody wants to "assume the risk of paying damages for anyone who gets hurt. Of course, in a world with common sense, [we] wouldn't have to worry about it." Taylor Armerding, "Liability, Litigation Make Sled Tracks Disappear," *Gloucester Daily Times* (December 28, 2004).

[89] David N. Goodman, "Toilet Brush Warning Wins Consumer Award," The Associated Press (January 6, 2005).

label on a baby stroller cautions "Remove child before folding." A sticker on a 13-inch wheel on a wheelbarrow warns "Not intended for highway use." A dishwasher carries the warning "Do not allow children to play in the dishwasher." A manufactured fireplace log states "Caution—Risk of Fire." A household iron contains the warning "Never iron clothes while they are being worn."[90] And a cardboard car sun shield that keeps sun off the dashboard warns "Do not drive with sun shield in place."[91]

THE COSTS OF FRIVOLOUS LITIGATION

It should be emphasized that statistics do not capture the very real experiences of victims of lawsuit abuse that constituents suffer, and this debate is not about aggregate statistics regarding the number of lawsuits filed.

However, requiring sanctions when judges find lawsuits are frivolous will surely deter many frivolous cases from being brought. That will be a good thing, considering the cost of today's tort system to Americans is staggering. After leveling off during the 1990's, the system's direct costs soared by a stunning 14.4% in 2001 and another 13.3% in 2002, to a 2002 total of $233 billion, the equivalent of a 5% tax on wages,[92] according to a report released by Tillinghast-Towers Perrin, which publishes the most definitive trend statistics on tort system costs. Inflation-adjusted direct U.S. tort costs per person have shot from $89 in 1950 to $809 in 2002.[93]

The costs of America's lawsuit culture are staggering. As chronicled by Sebastian Mallaby in *The Washington Post:*

> The most complete study of the tort system's cost comes from the consulting firm Tillinghast-Towers Perrin. Tillinghast's clients are mainly insurers, which are at loggerheads with the trial bar, so you may mistrust its data. Nonetheless, Tillinghast has published seven updates to its original 1985 study, refining its methodology along the way. Its numbers are the best available. And they are stunning . . . the really shocking thing is where the billions went. Injured plaintiffs—the fabled little guys for whom the system is supposedly designed—got less than half the money. According to Tillinghast's 2002 data, plaintiffs' lawyers swallowed 19 percent of the $233 billion. Defense lawyers pocketed an additional 14 percent, and other administrative costs, mainly at insurance firms, accounted for a further 21 percent. The legal-administrative complex thus guzzled fully 54 percent of the money in the tort system, or $126 billion. That's 43 times as much as the Federal Government has budgeted this year to combat the global AIDS pandemic. No other system for compensating misfortune has such outrageous administrative costs. To guard against the possibility of sickness, people buy medical insurance. The health insurance industry, justly regarded as a paper-clogged nightmare, has administrative costs

[90] Sonny Garrett, "Warning: People Are as Dumb as You Think," *The Baxter Bulletin* (April 17, 2004) (compiling list from Michigan Lawsuit Abuse Watch in Annual Wacky Warning Label Contest).

[91] Larry D. Hatfield, "Dumbest Warning Labels Get their Due," *The San Francisco Chronicle* (January 24, 2002).

[92] Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update: Trends and Findings on the Costs of the U.S. Tort System, at 1. Tillinghast's reports on tort system costs are funded internally.

[93] *Id.* at 1.

> of 14 percent. To guard against the danger of disability, we have the Social Security program. The overhead for the Social Security disability system is around 3 percent. If you want a really good number to set against the 54 percent overhead in the tort system, just take a look at Medicare. Its overhead is about 2 percent. So the tort system's administrative costs are a scandal . . . Measured as a share of GDP, America's tort system is more than twice as expensive as it was in 1960, twice as expensive as the current systems in France or Canada, and three times as expensive as the system in Britain. A reasonable goal for the American tort system is to halve it.[94]

As columnist Stuart Taylor, Jr., has observed:

> The most recent NCSC [National Center for State Courts] report states that its (incomplete) data "indicate a 40 percent increase in tort filings" from 1975 to 2002. Census figures indicate that the population increase from 1975 to 2002 was about 33 percent. So tort filings per capita have not declined by 8 percent since 1975; they have increased somewhat . . . And although the tort system's inflation-adjusted direct costs per capita did decline modestly during the 1990's, they soared by a stunning 14.4 percent in 2001 and another 13.3 percent in 2002, to an estimated 2002 total of $233 billion. The tort system consumes 2.2 percent of GDP in the U.S.—almost four times the percentage in 1950; more than triple the 0.6 percent in the United Kingdom; and more than double the 0.8 percent in Japan, France, and Canada.[95]

According to the Economic Report of the President, "The expansive tort system has a considerable impact on the U.S. economy. Tort liability leads to lower spending on research and development, higher health care costs, and job losses."[96] And according to the Council of Economic Advisers, "the United States tort system is the most expensive in the world, more than double the average cost of other industrialized nations."[97] The direct costs of medical malpractice claims jumped by an average of 11.9 percent a year from 1975 to 2002.[98]

Of the $233 billion total, only 22 cents on the dollar went to compensate alleged victims' economic losses; almost as much (19 cents) went to their lawyers; 24 cents went to payments for inherently unquantifiable noneconomic losses, mainly pain and suffering; 14 cents went to defense costs; and 21 cents went to insurance overhead costs.[99]

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[94] Sebastian Mallaby, "The Trouble with Torts," *The Washington Post* (January 10, 2005) at A17. *See also* U.S. Tort Costs: 2004 Update: Trends and Findings on the Cost of the U.S. Tort System, Towers Perrin Tillinghast (2004) ("Looking ahead, we anticipate growth in U.S. tort costs to range from 5% to 8% in 2005, with a midpoint of 6.5% We expect a similar increase in 2006.").

[95] Stuart Taylor, Jr., "'False Alarm' by Stephanie Mencimer [Washington Monthly, Oct. 2004]—A Response by Stuart Taylor, Jr. [Newsweek, National Journal]," available at http://www.overlawyered.com/pages/taylormencimerwashingtonmonthly.html.

[96] Economic Report of the President (February 2004) at 203.

[97] Council of Economic Advisers, "Who Pays for Tort Liability Claims? An Economic Analysis of the U.S. Tort Liability System" (April 2002) at 1.

[98] Tillinghast-Towers Perrin, U.S. Tort Costs: 2003 Update: Trends and Findings on the Costs of the U.S. Tort System, at 2.

[99] *Id.* at 17. According to an analysis of a report by the National Center for State Courts by *Newsweek*'s Stuart Taylor, Jr., although tort filings declined by 9 percent from 1992 to 2001, almost all of that decline came in routine car-crash lawsuits. The report shows that medical

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A recent report by Judyth Pendell, Senior Fellow at the AEI-Brookings Joint Center for Regulatory Studies, and Paul Hinton, Vice President of NERA Economic Consulting, has concluded that "The tort liability price tag for small businesses in America is $88 billion a year" and that "Small businesses bear 68 percent of business tort liability costs, but take in only 25% of business revenue."[100] The small businesses studied in the report account for 98% of the total number of businesses with employees in the United States.[101]

Without the serious threat of punishment for filing frivolous lawsuits, innocent individuals and companies will continue to face the harsh economic reality that simply paying off frivolous claimants through monetary settlements is often cheaper than litigating the case. If it costs $10,000 to defend yourself in court against frivolous charges, it makes financial sense to settle the case for $9,000, even if you weren't at fault in any way. This perverse dynamic not only results in legalized extortion, but it leads to increases in the insurance premiums all individuals and businesses must pay.[102]

The incentives for personal injury lawyers to file meritless nuisance lawsuits for their settlement value are clear. As leading commentators from Harvard Law School have described the situation under current law:

> [T]he plaintiff may choose to file a claim at some (presumably small) cost. If the defendant does not then settle with the plaintiff and does not, at a cost, defend himself, the plaintiff will prevail by default judgment . . . Given the model and the assumption that each party acts in his financial interest and realizes the other will do the same, it is easy to see how nuisance suits can arise. By filing a claim, any plaintiff, and thus the plaintiff with a weak case, places the defendant in a position where he will be held liable for the full judgment demanded unless he defends himself. Hence, the defendant should be willing to pay a positive amount in settlement to the plaintiff with a weak case—despite the defendant's knowledge

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malpractice claims increased by 24 percent from 1992–2001 and that total tort filings soared by 40 percent from 1975 to 2001, despite a dip during the 1990's. *See* Stuart Taylor, Jr. Response to ATLA's Claims, available at http://www.overlawyered.com/archives/000708.html. Chief Justice Rehnquist released new data on January 1, 2004, showing an 8 percent drop in civil filings in fiscal year 2003, "primarily as a result of decreases in personal injury/product liability cases involving asbestos (such filings had soared 98 percent the previous year)." William H. Rehnquist, 36 The Third Branch 1 (January 2004), 2003 Year-End Report on the Federal Judiciary, Chapter III, n.5. *See also* Economic Report of the President (February 2004), at 204–05 ("The number of injuries handles by the tort system has increased along with expenditures. The number of filings per capita started to rise in the early 1980's and peaked in the mid-1980's, at least in the 16 states for which data on lawsuit filings are available between 1975 and 2000. Much of the decline in filings since 1985 appears to have occurred in California, where medical liability reforms included a $250,000 limit for noneconomic damages that was found constitutional in 1985.").

[100] Judyth Pendell and Paul Hinton, "Liability Costs for Small Business" (U.S. Chamber Institute for Legal Reform, June, 2004) at 1 ("small business" defined as "those with less than $10 million in annual revenue and at least one employee in addition to the owner").

[101] *Id.*

[102] Opponents of reform often claim that contingency fees—agreements by which personal injury attorneys are allowed a percentage cut from any monetary damages awarded to their client—provide a "screening mechanism" that weeds out frivolous cases. The argument used is that personal injury attorneys will not take frivolous cases because doing so would leave them with no monetary recovery. The perverse dynamic outlined above, and the fact that filing fees are usually no more than a hundred dollars and additional defendants can be named in the lawsuit at no extra charge, makes clear that contingency fee agreements provide no effective screening mechanism at all since personal injury attorneys can simply take advantage of the legal costs they impose on defendants simply in virtue of their filing a case to extort money from those they sue.

> that were he to defend himself, such a plaintiff would withdraw.[103]

These commentators point out that defendants will always have to suffer extortion through nuisance lawsuits because "to defeat a claim, the defendant will have to engage in actions that are frequently more expensive than the plaintiff's cost of making the claim, for the defendant will have to gather evidence supporting his contention that he was not legally responsible for harm done to the plaintiff or that no harm was actually done."[104] The same commentators offer the following illustration:

> Suppose, for instance, that the plaintiff files a claim and demands $180 in settlement. The defendant will then reason as follows. If he settles, his costs will be $180. If he rejects the demand and does not defend himself, he will lose $1000 by default judgment. If he rejects the demand and defends himself, the plaintiff will withdraw, but he will have spent $200 to accomplish this. Hence, the defendant's costs are minimized if he accepts the plaintiff's demand for $180; and the same logic shows that he would have accepted any demand up to $200. It follows that the plaintiff will find it profitable to file his nuisance claim; indeed, this will be so whenever the cost of filing is less than the defendant's cost of defense.[105]

Personal injury lawyers can always extort money from innocent victims by filing nuisance lawsuits for their settlement value. H.R. 420 will prevent such extortion by giving victims an opportunity they do not have now to get financial compensation for the costs they are forced to bear by legal tormentors filing frivolous lawsuits.

H.R. 420: THE LAWSUIT ABUSE REDUCTION ACT ("LARA")

What follows is a discussion of the need for The Lawsuit Abuse Reduction Act ("LARA"), which was introduced by Congressman Lamar Smith on June 15, 2004.

Section 2 of LARA: Attorney Accountability

As President Bush has stated, "We have a responsibility to confront frivolous litigation head on."[106] The Lawsuit Abuse Reduction Act of 2005 ("LARA"), H.R. 420, would do just that by providing for appropriate sanctions against frivolous lawsuits.

Federal Rule of Civil Procedure 11 ("Rule 11"), as originally adopted and prior to the adoption of weakening amendments in 1993, was widely popular among Federal judges, and it served to significantly limit lawsuit abuse.

In 1990, the Judicial Conference's Advisory Committee on Civil Rules undertook a review of Rule 11 and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed that Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the 1983 version of

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[103] D. Rosenberg and S. Shavell, "A Model in which Suits are Brought for their Nuisance Value," 5 International Rev. of Law and Economics 3, 3 (June 1985).
[104] *Id.* at 10.
[105] *Id.* at 4.
[106] CBS: Evening News (February 18, 2005).

Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then-current form (80.4%).[107]

Despite this wide judicial support for a strong Rule 11, in 1991 the Civil Rules Advisory Committee included provisions to weaken Rule 11 in a much broader package of proposed amendments to the Federal Rules driven largely by the desire to avoid "satellite litigation" of Rule 11 issues that could burden allegedly overworked judges. The proposed changes were then sent to the Supreme Court for approval or modification. Exercising what it viewed to be a very limited oversight role,[108] the Supreme Court approved the proposed changes in ministerial fashion and without substantive comment in April, 1993.

In a strongly worded dissent on the Rule 11 changes, Justice Scalia correctly anticipated that the proposed revision would eliminate a "significant and necessary deterrent" to frivolous litigation, stating "the overwhelming approval of the Rule by the Federal district judges who daily grapple with the problem of litigation is enough to persuade me that it should not be gutted."[109] Justices Scalia and Thomas properly dissented from the transmittal of the amendments to Rule 11 to Congress, arguing that "[t]he proposed revision would render the Rule toothless, by allowing judges to dispense with sanction, by disfavoring compensation for litigation expenses, and by providing a 21-day 'safe harbor' within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanction at all."[110]

Rule 11 as it existed prior to the 1993 amendments was very popular with Federal judges. The Federal Judicial Center ("FJC") was commissioned to conduct empirical studies and surveys on the operation of the old Rule 11,[111] and in a survey of all Federal trial judges, the FJC found that 80% were of the opinion that the old Rule 11 had had an overall positive effect and should not be changed.[112] We need to restore those positive effects once again.

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[107] 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). A subsequent survey conducted by the Federal Judicial Center in June, 1995, consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that disallowed monetary compensation for victims of frivolous lawsuits were a bad idea. In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again. *See* John Shapard *et. al.,* Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure at 5.

[108] While the Supreme Court is authorized to "prescribe" the general rules of Federal court practice and procedure, *see* Judicial Improvements and Access to Justice Act, 28 U.S.C. § 2072(a), in fact it has been the general practice of the Supreme Court to merely act as a conduit for the rule changes and rely on the Judicial Conference to make the decisions in this area. As pointed out in the House Judiciary's Committee Report on H.R. 988 in the 104th Congress, Justice White believed that, as a matter of practice, the role of the Supreme Court is to ". . . transmit the Judicial Conference recommendations without change and without careful study as long as there is no suggestion that the committee system has not operated with integrity." Indeed Chief Justice Rehnquist's April 22, 1993 letter conveying the rules to the Speaker states: "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 amendments in the form submitted." H.R. Rep. No. 104–62, at 11, n.14 (1995).

[109] *Id.* at 11.

[110] 146 F.R.D. 401, 507–08 (1993).

[111] Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules as Amended in 1983 (August 1990), reprinted in 131 F.R.D. 335 (1990).

[112] Interim Report on Rule 11, Advisory Committee on Civil Rules, reprinted in Georgene M. Vairo, Rule 11 Sanctions: Case Law Perspectives and Preventive Measures, App. at 1–8 to 1–10 (2d ed. 1991).

After the proposal to gut Rule 11 was forwarded to Congress, there was a 7-month period under the Rules Enabling Act in which the Congress had the authority to make changes, but time ran out before Congress could stop these damaging amendments to Rule 11.[113]

Section 2 of LARA would restore teeth to Rule 11 once again.

In particular, Section 2 of LARA would:

- *Allow monetary sanctions against parties that file frivolous lawsuits.* Shockingly, the 1993 amendments to Rule 11 prohibited any monetary sanctions against parties who filed frivolous lawsuits. Rule 11 currently states that "[m]onetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)," and subdivision (b)(2) requires lawyers to certify that the case they're bringing is "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." H.R. 420 would require monetary penalties against parties who file frivolous lawsuits that cause economic harm to the victims of frivolous lawsuits. Indeed, a survey conducted by the Federal Judicial Center in June, 1995, consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that prohibited monetary compensation for victims of frivolous lawsuits were a *bad idea.* In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again.[114] H.R. 420 would do just that.
- *Reverse the 1993 amendments to Rule 11 that made Rule 11 sanctions discretionary rather than mandatory.* Because today, under a weak Rule 11, sanctions in frivolous cases are not mandatory, there is little incentive for a victim of a frivolous lawsuit to spend time and money seeking Rule 11 sanctions. Deterrence cannot be achieved without certain punishment. While a court should have discretion to fashion an appropriate sanction based on the circumstances of the violation, litigants making frivolous claims should not be allowed the opportunity to escape sanctions entirely. Even Senator John Edwards has written in *Newsweek* that "[L]awyers who bring frivolous cases should face tough, mandatory sanctions."[115] Senator Edwards also said on Meet the Press that "I feel very strongly that we need real and enforceable penalties for frivolous lawsuits that may be filed in this country."[116] And Senator Edwards' campaign issued a statement

[113] Under the Rules Enabling Act, Congress has 7 months to act on the proposed rules; if Congress does not act, the proposed rules become law. *See* 28 U.S.C. § 2074(a). Despite the introduction of H.R. 2979 in the 103rd Congress by Carlos J. Moorhead, which would have delayed the effective date of the proposed changes to Rule 11, and a companion bill in the Senate, no formal action was taken in the Democrat-controlled House, and the revisions went into effect on December 1, 1993. The House later passed H.R. 988 in the 104th Congress—which, among other things, would have restored Rule 11 to its original form—by a vote of 232–193, but it was not taken up in the Senate.

[114] *See* John Shapard *et. al.,* Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure at 5.

[115] John Edwards, "Juries: 'Democracy in Action,'" *Newsweek* (December 15, 2003) at 53.

[116] NBC News, "Meet the Press" (May 5, 2002) (transcript).

saying Senator Edwards "believes that we need a national system in place that will weed out the meritless lawsuits without taking away patients' rights."[117] H.R. 420 would do exactly that.

- *Reverse the 1993 amendments to Rule 11 that allow parties and their attorneys to avoid sanctions for making frivolous claims and demands by withdrawing them within 21 days after a motion for sanctions has been filed.* Justice Scalia correctly pointed out that such amendments would in fact *encourage* frivolous lawsuits: "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, 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."[118] H.R. 420 would get rid of the free pass' lawyers have to file frivolous lawsuits under today's Rule 11.

It is important to remember that nothing in H.R. 420, the Lawsuit Abuse Reduction Act, changes the current standard by which frivolous lawsuits are judged. That is, under H.R. 420, the standard a judge will use to determine whether a case is frivolous will remain as it has been, namely a determination that:

- the case is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
- the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Only cases that meet the criteria outlined above will be subject to Rule 11 sanctions under the Lawsuit Abuse Reduction Act. The baseless nature of arguments by reform opponents that Rule 11 somehow stifles growth in the law is belied by the fact that Rule 11 explicitly allows for growth in the law, but not for *frivolous* arguments for extensions of the law.

Further, LARA expressly provides that "Nothing in" the changes made to Rule 11 "shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." The development of civil rights claims is thereby explicitly protected in the bill's Rule 11 provisions.

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[117] John Stossel, "Lawyers and the Little Guy," ABCNews.com ("Give Me a Break" commentary on ABC News' 20/20) (July 23, 2004).

[118] H.R. Rep. No. 104–62, at 11–12 (1995).

Section 3 of LARA: Applying Rules Against Frivolous Lawsuits to State Cases Affecting Interstate Commerce

Section 3 of LARA would extend Rule 11's provisions preventing frivolous lawsuits to state cases in which the state court determines, based on an analysis of the relief requested, that the case would affect interstate commerce. (For the most part, states' rules of civil procedure are modeled after Federal Rule 11,[119] and sanctions for frivolous filings are not mandatory in 38 states and the District of Columbia, just as they are not mandatory under the Federal Rule 11.[120])

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[119] *See* Arkansas Rule 11, Addition to Reporter's Notes, 1997 Amendment ("The rule has been amended by designating the former text as subdivision (a) and by adding new subdivision (b), which is based [on] Rule 11(c)(1) of the Federal Rules of Civil Procedure, as amended in 1993 . . . New subdivision (b) provides that requests for sanctions must be made as a separate motion, rather than simply be included as an additional prayer for relief in another motion. The motion for sanctions is not to be filed until at least 21 days, or other such period as the court may set, after being served . . .); Minn. R. Civ. P. 11.04 (Minnesota), Advisory Committee Comments, 2000 Amendments ("Rule 11 is amended to conform completely to the Federal rule . . . On balance, the Committee believes that the amendment to the Rule to conform to its Federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and Federal practice . . ."); N.D. R. Civ. P. 1 (North Dakota), Explanatory Note ("As will become readily apparent from a reading of the rules, they are the Federal Rules of Civil Procedure adapted, insofar as practicable, to state practice."), N.D. R. Civ. P. 11, Explanatory Note ("Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Rule 11."); Tenn. R. Civ. P. 11 (Tennessee), Advisory Commission Comment to 1995 Amendment ("Amended Rule 11 tracks the current Federal version. Sanctions no longer are mandatory, and non-monetary sanctions are encouraged. The 21-day safe harbor provision allows otherwise sanctionable papers to be withdrawn, thereby escaping sanctions."); Utah R. Civ. P. 11 (Utah), Advisory Committee Note ("The 1997 amendments conform state Rule 11 with Federal Rule 11."); Vt. R. Civ. P. 11 (Vermont), Reporter's Notes to 1996 Amendment ("Rule 11 is amended to conform to the 1993 amendment of Federal Rule 11."); W. Va. R. Civ. P. 11 (West Virginia) (West Virginia's Rule 11 as amended effective April 1, 1998, is identical to the current Federal Rule 11); Wyo. R. Civ. P. 11 (Wyoming) (Wyoming's Rule 11 is identical to the current Federal Rule 11); Restatement (Third) of the Law Governing Lawyers § 170 reporter's note to cmt. c (Tentative Draft No. 8, 1997). State courts also often rely on Federal court decisions when interpreting their rules. *See, e.g., Gray v. Washington,* 612 A.2d 839, 842 (D.C. 1992); *Bryson v. Sullivan,* 412 S.E.2d 327, 332 (1992); *Bryant v. Joseph Tree, Inc.,* 829 P.2d 1099, 1104–05 (Wash. 1992) (en banc).

[120] *See* Alabama Rule of Civil Procedure 11; Alaska Rule of Civil Procedure 11; Arkansas Rule of Civil Procedure 11; Cal.C.C.P. § 128.5 (California); C.R.C.P. Rule 11 (Colorado); C.G.S.A. § 52–190a (Connecticut); De.R.S.Ct. Rule 33 (Delaware); D.C.R.R.C.P. Rule 11 (D.C.); Fl.St. R.C.P. Rule 1.150 (Florida); Hi.R.R.C.P. Rule 11 (Hawaii); Il.C.S.S.Ct. Rule 137 (Illinois); In.St. Trial P. Rule 11 (Indiana); L.S.A.-C.C.P. Art. 864 (Louisiana); Me.R.R.C.P. Rule 11 (Maine); Md.Rules, Rule 1–311 (Maryland); Massachusetts Rules of Civil Procedure (Mass.R.Civ.P.), Rule 11; Minnesota Rules of Civil Procedure, Rule 11.03; Ms.R.R.C.P. Rule 11; Miss. Code Ann. § 11–55–5 (Mississippi); Missouri Supreme Court Rule 55.03; Ne.R.Civ.Pro.St. § 25–824 (Nebraska); N.H.R.Super.Ct. Rule 59 (New Hamphsire); N.J.S.A. 2A:15–59.1 (New Jersey); N.M.R.Dist.Ct.R.C.P. Rule 1–011 (New Mexico); N.D.R.R.C.P. Rule 11 (North Dakota); Ohio Civ.R. Rule 11; 12 Okl.St.Ann. § 2011 (Oklahoma); Or.R.R.C.P. O.R.C.P. 17 (Oregon); Pa.R.C.P. No. 1023.1; Pa.R.C.P. No. 1023.4 (Pennsylvania); R.I.R.R.C.P. Rule 11 (Rhode Island); Rule 11, S.C.R.C.P. (South Carolina); Tn.R.R.C.P. Rule 11.03 (Tennessee); Texas Civil Practice & Remedies Code § 10.004; Ut.R.R.C.P. Rule 11 (Utah); Vt.R.R.C.P. Rule 11 (Vermont); Va.R.S.S.Ct. Rule 1:4; Va.R.S.Ct. Rule 4:1 (Virginia); Wa.R.Super.Ct.Civ. Cr. 11 (Washington); W.V.R.R.C.P. Rule 11 (West Virginia); W.S.A. 802.05 (Wisconsin); Wy.R.R.C.P. Rule 11 (Wyoming).

In the remaining states various exceptions to the sanctions rule allow frivolous filings to go unpunished and undeterred. *See* Arizona Rules of Civil Procedure, Rule 11(a) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct" as under Federal Rule 11); Ga.St. § 9–15–14 (Georgia) (standard is that frivolous pleading must include claims or defenses no court anywhere could be reasonably expected to accept); Id.R.R.C.P. Rule 11 (Idaho) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct"); I.C.A. Rule 1.413 (Iowa) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct"); Ks.R.R.C.P. Code 60–211 (Kansas) (does not apply to abusive discovery requests and only "appropriate" sanction required in other cases, not a sanction "sufficient to deter repetition of such conduct"); Ky.St.R.C.P. Rule 11 (Kentucky) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct," and state rule postpones ruling on frivolous pleadings until after entry of final judgement); Mi.R.R.C.P.M.C.R. 2.114 (Michigan) (bars punitive damages for frivolous pleadings); Mt.R.R.C.P. Rule 11 (Montana) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct"); Nv.St.R.C.P. Rule 11 (Nevada) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct"); N.Y.C.P.L.R. § 8303–a (New York) (sanctions limited to civil personal injury and property damage claims and subject to a $10,000

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Congress—under its constitutional authority in Article I, Section 8 to regulate interstate commerce—has a responsibility to require state judges to conduct their own analysis, upon motion of parties, to determine whether, based on the relief requested (including potentially huge monetary damage requests) the case is such that it would affect interstate commerce by threatening to bankrupt a multi-state industry, by risking the loss of out-of-state jobs, or by otherwise incurring costs to the interstate economy. Where a case filed in state court substantially affects interstate commerce, as determined by a state judge, it is entirely appropriate that national attorney accountability rules should govern. Liability litigation, under existing rules, presents a serious threat to state autonomy. Manufacturers have no practical way of keeping their products out of certain states. Personal injury lawyers, on the other hand, get to choose their own forum and law. As a result, the jurisdictions most friendly to personal injury lawyers can unfairly impose the costs of their rules on the entire country and redistribute income from out-of-state parties to in-state parties. As one commentator has stated, "Products liability cases have surged since 2001 to an anticipated 25,700 cases in 2004 and now make up nearly 10 percent of all Federal civil filings. In particular, the estimated 24,100 cases dealing with personal injuries continues to grow and now account for 94 percent of all products liability cases."[121]

H.R. 420's application of Rule 11 to state cases that affect interstate commerce is entirely consistent with federalism principles. James Madison, in Federalist No. 42, described the purpose of the Commerce Clause as follows: "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former."[122] That is, Madison foresaw the problem in which products or services would be made to cost more to consumers in one state because other states those products and services passed through would levy duties on them. That is precisely the problem today: some states, by allowing frivolous lawsuits to be brought for unlimited damages in cases involving products or services that touch their jurisdictions are raising the costs of providing those products and services to out-of-state customers, resulting in higher prices and lost jobs across multiple states or nationwide. It is the duty of Congress to prevent such unfairness.[123] H.R. 420 addresses a problem directly analogous to the prime ex-

limit); N.C.St.R.C.P. § 1A–1, Rule 11 (North Carolina) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct"); S.D.C.L. § 15–6–11(b) (South Dakota) (only "appropriate" sanction required, not a sanction "sufficient to deter repetition of such conduct").

[121] Kevin Stehr, "Spot the Litigation Trends," *Legal Times* (October 7, 2004).

[122] *The Federalist Papers,* Federalist No. 22 (Madison) at 267–68 (Clinton Rossiter ed., 1961).

[123] James Madison, according to his own notes of what he argued at the Constitutional Convention (he referred to himself in the third person), made clear that Congress must have the power to regulate commerce in this manner: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' . . . He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority." Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787 (Jonathan Elliot, ed. 1845) (as reported by James Madison, notes of May 31, 1787) at 548.

ample James Madison used when describing the need for the Constitution's Commerce Clause.

Congress unquestionably has the authority to regulate economic activities that "affect" interstate commerce,[124] and such a provision would have state judges themselves determine whether the case before them affected interstate commerce and national interests that would trigger a Federal rule against frivolous lawsuits.

Further, requiring state courts to determine whether a case substantially affects interstate commerce based on an assessment of the costs to the interstate economy, including the loss of jobs, "were the relief requested granted" is likely to deter trial lawyers from grossly inflating the size of damages requested (which are designed to pressure unfair settlements) because doing so will increase the chances that their case will be found to affect interstate commerce, thus triggering the application of Federal Rule 11's provisions preventing frivolous lawsuits. This provision takes personal injury attorneys requesting vast damages at their word regarding what damages might be appropriate, but then holds them to account for those requested damages by making them subject to an analysis of the interstate economic costs were such damages to be awarded. University of Chicago law professor Cass Sunstein, along with Nobel Prize winner Daniel Kahneman, have compiled research from studies involving more than 8,000 jury-eligible citizens in Illinois, Colorado, Texas, Arizona, and Nevada that shows that juries give higher awards when personal injury attorneys simply demand higher amounts.[125] As Philip Howard has written, "A great thing about bringing lawsuits in modern America is that it's so easy to threaten the adversary's entire livelihood. One stroke of a finger on the lawyer's word processor, and damages go from $100,000 to $1,000,000. Three more keystrokes, and we're suing for a billion dollars. This is fun . . . Damages claimed today are completely arbitrary. Just stick your finger in the air and threaten someone with any number that comes to mind."[126] Section 3 of LARA will deter personal injury lawyers from making ridiculous claims for astronomical damages.

How ridiculous can damages claims get? In Michigan, a woman who had a $5 fingernail repair job done at a local salon filed a lawsuit for $500,000 or more in damages, claiming a beautician nicked her finger with cuticle scissors. The woman's lawyer said "The $500,000 figure isn't necessarily what we'll get [in court]. It's to put some attention to the case, and to how important we consider it."[127]

The following exchange between a 60 Minutes correspondent and Caesar Barber, who sued various restaurants for damages related to his overconsumption of their products, also illustrates the frivolous rationales behind gigantic damages claims:

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[124] *See* Kenneth Thomas, CRS Report for Congress, Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power (September 5, 2003) at 7 (stating that Congress can regulate "economic activities which 'affect' commerce").

[125] *See* Cass Sunstein and Reid Hastie, *Punitve Damages: How Juries Decide* (University of Chicago Press 2002) at 62.

[126] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 59.

[127] Chad Halcom, "Woman Files $500,000 Lawsuit for 'Ruined' Fingernail," *The Macomb Daily* (February 5, 2003).

CAESAR BARBER: I'm saying that McDonald's affected my health. Yes, I am saying that.

RICHARD CARLETON (CBS News, 60 Minutes): So what do you want in return?

CAESAR BARBER: I want compensation for pain and suffering.

RICHARD CARLETON But how much money do you want?

CAESAR BARBER: I don't know . . . maybe $1 million. That's not a lot of money now.[128]

Section 3 of LARA is not likely to be abused for several reasons. Any party that fears it may run afoul of Rule 11 sanctions for filing frivolous pleadings will not move the court to determine if the case substantially affects interstate commerce. Further, any party that does not fear sanctions under Rule 11 will only request that a state court rule on whether the case substantially affects interstate commerce in rare circumstances. This is because, first, no one is required under LARA to make such a request to a state court if they do not want to, and second, because the burden will be on any party who decides to move for a determination that the case "substantially affects interstate commerce" to show just that, and that will not be an easy case to make, especially in smaller cases. The end result will be that motions will be made under Section 3 of LARA only in those cases in which large amounts of money are at stake with clear interstate effects and only by those parties who have very strong reasons to believe the court system is being abused by a party filing frivolous pleadings. In such cases, it is entirely appropriate that a Federal rule sanctioning lawsuit abuse be available.

Section 3 of LARA would serve national economic interests by focusing attention on the jobs costs of frivolous litigation. The provision would provide that the interstate economy, including workers and jobs, when potentially negatively affected, should be protected by a rule prohibiting frivolous claims. The provision provides that if your lawsuit in state court asks for damages that will cost jobs in other states, and your lawsuit is determined to be frivolous, you'll have to pay for the costs of that frivolous lawsuit.[129]

Further, LARA expressly provides that "Nothing in section 3 . . . shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." The development of civil rights claims is thereby explicitly protected in the bill's provisions governing the application of Rule 11 in cases with substantial interstate effects.

Section 4 of LARA: Preventing Forum-Shopping for Favorably-minded Judges

One of the nation's wealthiest personal injury attorneys is Richard "Dickie" Scruggs, who sued asbestos companies in the 1980s

[128] "Food Fight," CBS News "60 Minutes" (Australia) (September 15, 2002) (transcript).

[129] Such a provision will not result in state cases being removed to Federal court, as a Federal standard does not confer Federal question jurisdiction in the absence of Congressional creation of a Federal cause of action. Under Supreme Court precedent, Congress has given the lower courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that Federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of Federal law. Federal question jurisdiction exists only if plaintiffs' right to relief depends necessarily on a substantial question of Federal law. *See Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 807 n.2 (1986); 28 U.S.C. § 1331.

and has made about $844 million from lawsuits against tobacco companies.[130] Here is what Scruggs said about what he calls "magic jurisdictions:"

> "What I call the 'magic jurisdiction,'. . . [is] where the judiciary is elected with verdict money. The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're popul[ists]. They've got large populations of voters who are in on the deal, they're getting their [piece] in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. The plaintiff lawyer walks in there and writes the number on the blackboard, and the first juror meets the last one coming out the door with that amount of money . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is." [131]

Personal injury lawyers often file cases in places that have no connection to the case. They file their cases where court procedures and the law are systematically applied in an unfair manner against defendants, including in jurisdictions with reputations for high damage awards and lower standards for the admissibility of expert testimony.[132] A recent poll found that 46% of judges said donations influenced their judicial decisions.[133]

After Texas enacted legislation restricting forum shopping there, personal injury lawyers began eying its neighbor, Oklahoma, as the next best place to bring their lawsuits. The smoking gun on this issue is an undated "Dear ATLA Colleague" letter sent by Oklahoma attorney Stratton Taylor to the Association of Trial Lawyers of America. Mr. Taylor is also President Pro Tempore Emeritus of the Oklahoma State Senate, and a current member of the state legislature. In his letter, Senator Taylor leads, "With recent events that have occurred in Texas, you may be looking to file cases in Oklahoma." [134] Only Congress can protect all Americans from unfair forum shopping no matter where it occurs.

West Virginia State Supreme Court Justice Richard Neely candidly described one of the reasons behind this phenomenon in a book: "As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me . . . It should be obvious that the instate local plaintiff, his witnesses and his

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[130] Tom Wilemon, "Social Ties Bind Political Elite," *The Biloxi Sun Herald* (October 13, 2002) at 10.

[131] Richard "Dickie" Scruggs, "Asbestos for Lunch Panel Discussion" at the Prudential Securities Financial Research and Regulatory Conference (May 9, 2002) (quoted in Industry Commentary (Prudential Securities, Inc., N.Y., New York) (June 11, 2002) at 5).

[132] *See generally,* American Tort Reform Association, "Bringing Justice to Judicial Hellholes" (2003).

[133] Editorial, "Getting Politics Out of the Courts," *Business Week* (September 27, 2004) at 140 ("In a poll of 894 elected judges conducted in 2001and 2002 by a nonpartisan watchdog group, 46% said donations influenced their judicial decisions.").

[134] Letter from Stratton Taylor to "ATLA Colleague" (undated) (on file with the House Committee on the Judiciary).

friends, can all vote for the judge, while the out-of-state defendants can't even be relied upon to send a campaign donation." [135]

While businesses are hauled into court all over the country, local personal injury lawyers work with the same judges day after day, contribute to their election campaigns, and routinely socialize with them.

Section 4 of LARA will help ensure that lawsuits have a logical connection with the jurisdiction in which they are heard.[136] Section

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[135] Richard Neely, The Product Liability Mess: How Business Can Be Rescued From The Politics of State Courts 4, 62 (1998).

[136] These anti-forum shopping provisions would not do anything to preclude lawsuits against foreign companies that are not already precluded by the Due Process Clause of the Constitution under current law. On October 8, 2004, Rep. Lamar Smith, in the Congressional Record, made the following statement dispelling false allegations to the contrary regarding a version of this legislation that passed the House during the 108th Congress in the form of H.R. 4571:

> Mr. Speaker, September 14 2004, the House debated and passed H.R. 4571, the Lawsuit Abuse Reduction Act, a bill I authored to help prevent frivolous lawsuits and the notorious practice of forum shopping from ruining America's small businesses. In the midst of floor debate on H.R. 4571, the Congressional Research Service issued a self-described "rush memorandum" dated September 14, 2004, to the minority staff of the House Judiciary Committee, which stated "H.R. 4571 does provide an option for filing a lawsuit where a business has a principal place of business . . . However, if a defendant's principal place of business was not in the United States, then this option could not be exercised in a United States court. Consequently, it would appear that in certain circumstances, a United States citizen or resident injured in this country would not have a judicial forum in the United States in which to seek relief." This statement left the misleading impression that H.R. 4571, were it to become law, would somehow make it more difficult to bring some personal injury lawsuits in the United States. Not surprisingly, the misleading impression left by the CRS memorandum was exploited by those on the opposite side of the aisle in the midst of debate on H.R. 4571, and later by the press. For example, a report in CongressDaily/A.M. describing debate on H.R. 4571 stated "Many Democrats . . . cited a Congressional Research Service memorandum advising lawmakers that the bill could prevent U.S. citizens from having their cases heard in a U.S. court if the defendant's main place of business is located in a foreign country. Rep. Jay Inslee, D-Wash., sarcastically called the legislation 'the Foreign Corporation Protection Act.'" Those statements are deeply misleading, and here's why. In fact, nothing in H.R. 4571 would prevent cases from being brought against foreign defendants that are not already precluded under current law. I wrote to CRS requesting a clarification of current law, and I received the following response: "Under the Due Process Clause, a foreign corporation that had its principal place of business overseas, engaged in little or no economic activity in the United States, and did not otherwise subject itself to the jurisdiction of the United States, could not be subject to the jurisdiction of the various state courts. If such a corporation engaged in a tortious activity such as manufacturing a defective product, then a plaintiff would be unable to bring an action in a state court forum for such tortious activity, even if the product caused an injury in the United States. In such a case, an injured party would be required to seek compensation in the courts of another country." This makes clear that while some Members on the other side of the aisle claimed that H.R. 4571, if enacted, would preclude certain lawsuits from being brought that could be brought under current law, the Due Process Clause of the Constitution has precluded under current law, and would continue to preclude under H.R. 4571, some plaintiffs from bringing an action in a state court forum against a foreign defendant for tortious activity in certain circumstances, even if the product caused an injury in the United States. The bottom line is that H.R. 4571 would do nothing to change current law in that regard. Indeed, no legislation could change current law in that regard since the constitutional requirements of the Due Process Clause cannot be changed by legislation. In fact, the venue statute of the gentleman from Washington Mr. Inslee's own state provides that "An action . . . for the recovery of damages for injuries to the person or for injury to personal property may be brought, at the plaintiffs option, either in the district in which the cause of action, or some part thereof, arose, or in the district in which the defendant, or, if there be more than one defendant, where some one of the defendants, resides at the time the complaint is filed." That venue standard is for all practical purposes the same as that provided in H.R. 4571. H.R. 4571 provides that a personal injury lawsuit could be brought in any state where the person bringing the claim resides at the time of filing or resided at the time of the alleged injury, any state where the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred, or where the defendant's principal place of business is located. Insofar as opponents of H.R. 4571 have a complaint regarding the inability to bring certain lawsuits against foreign corporations in the United States, their complaint is with the Constitution's Due Process Clause, and not with H.R. 4571, which simply reflects the same standard that prevails among the state's venue laws, subject of course to the Due Process Clause of the Constitution. If a foreign corporation's contacts with the United States are so minimal as to make it unconstitutional under the Constitution's Due Process Clause to subject them to suit in the United States regardless of whether the venue criteria of H.R. 4571—or of any State venue

4, by requiring plaintiffs to bring their cases where they live or where they were injured, or where the defendant's principal place of business is located, would help stop forum-shopping. It would also allow a court to refuse to hear a case if there is a more appropriate forum, including a different state, in which the case could and should be heard. By strengthening the rules governing venue and forum non conveniens, courts can help ensure that cases are heard in a court that has a logical connection to the claim, rather than a court that is expected to produce the highest award for the plaintiff.

Section 4 of LARA would also prevent situations in which floods of cases by non-residents interfere with in-state residents' access to timely justice.

Congress unquestionably has the authority to regulate economic activities that "affect" interstate commerce,[137] and forum shopping clearly has a substantial affect on interstate commerce by allowing opportunities for personal injury lawyers to exploit lax venue and forum non conveniens rules to pick and choose those courts with a reputation for consistently awarding near-limitless awards. Section 4 of the Lawsuit Abuse Reduction Act clearly applies to economic activities, as the definition of "personal injury claim" is a claim "to recover" for a person's personal injury. Such a provision is entirely consistent with federalism principles. James Madison, in Federalist No. 42, described the purpose of the Commerce Clause as follows: "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former." [138] That is, Madison foresaw the problem in which products or services would be made to cost more to consumers in one state because other states allowed the companies that manufactured those products or supplied those services to be sued in those other states even when the facts and circumstances of the lawsuit had no connection to those states. When personal injury attorneys are allowed to bring cases in certain states and county courts that have a reputation for being most favorable to granting the most lucrative awards, the costs imposed on companies by such awards must be passed on to consumers nationwide. That is precisely the problem today: some states, by allowing lawsuits to be brought in local jurisdictions even when the facts and circumstances of the case have no connection to such local jurisdictions, are raising the costs of providing products and services to out-of-state customers, resulting in higher prices and lost jobs to

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statute—are met, there is nothing a legislature can do by statute to remedy that situation. To help set the record straight, I am submitting for the record both my letter to CRS requesting a clarification, and the CRS memorandum I received in response.

150 Cong. Rec. E1839–01 (October 6, 2004) (attaching September 16, 2004 letter from Rep. Lamar Smith to Kenneth R. Thomas, Legislative Attorney, American Law Division, Congressional Research Service, and Mr. Thomas' letter in response of October 4, 2004).

[137] *See* Kenneth Thomas, CRS Report for Congress, Federalism, State Sovereignty and the Constitution: Basis and Limits of Congressional Power (September 5, 2003) at 7 (stating that Congress can regulate "economic activities which 'affect' commerce").

[138] *The Federalist Papers,* Federalist No. 22 (Madison) at 267–68 (Clinton Rossiter ed., 1961).

people in multiple states. It is the duty of Congress to prevent such unfairness.[139]

Jurisdictions with "magic jurisdiction" reputations include the following:

- *Madison County, Illinois.* Twice, the *Chicago Tribune* crowned Madison County a "jackpot jurisdiction."[140] As the newspaper recognized, "[t]he number of suits has shot through the roof, and local newspapers sport advertisements looking for the local plaintiff who can provide a convenient excuse to file in Edwardsville . . . [T]he Madison County phenomenon also provides a dramatic illustration of the potential for poor public policy when things get carried away."[141] A retired Madison County Judge has said "Eventually, because of the money created through the plaintiffs bar and the power that money brings, I believe there became an idea that the system was beholden to the plaintiffs bar."[142] Retired Madison County judge John DeLaurenti has said that it took Madison County four decades to earn its reputation, "but now, it is so big with so much money and potential influence on people's careers that is has become very difficult to limit it in any way."[143] That same judge has also said *"I don't know if it's a Judicial Hellhole, but just figure it out. When people come from hither and thither to file these cases, there's gotta be an inducement, doesn't there? They're not coming to see beautiful Madison County."*[144]

  Madison County judges are infamous for their willingness to take cases from across the country, with little or no local connection, and hand down decisions that regulate entire industries nationwide. Madison County's over-eagerness to hear cases from other parts of the state has even been criticized by the Supreme Court of Illinois. Both the Madison County Circuit Court and the Fifth District Court of Appeals have been reversed many times in cases in which they denied defendants' motions to transfer venue. In January 2002, the Supreme Court of Illinois counted fourteen cases since 1995 in which it ordered the Madison County Circuit Court to transfer venue. In another ten cases, the Supreme Court ordered the Fifth District to consider vacating its denial of a defendant's forum non conveniens motion.[145]

  Asbestos cases, in particular, find their way to Madison County Circuit Court at an astonishing rate. Madison Coun-

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[139] James Madison, according to his own notes of what he argued at the Constitutional Convention (he referred to himself in the third person), made clear that Congress must have the power to regulate commerce in this manner: "Whether the States are now restrained from laying tonnage duties depends on the extent of the power 'to regulate commerce.' . . . He was more & more convinced that the regulation of Commerce was in its nature indivisible and ought to be wholly under one authority." Debates on the Adoption of the Federal Constitution in the Convention Held at Philadelphia in 1787 (Jonathan Elliot, ed. 1845) (as reported by James Madison, notes of May 31, 1787) at 548.

[140] Editorial, "A Madison County Jackpot," *The Chicago Tribune* (April 2, 2003), at 22; Editorial, "The Judges of Madison County," *The Chicago Tribune* (September 6, 2002) at 22.

[141] Editorial, "The Judges of Madison County," *The Chicago Tribune* (September 6, 2002) at 22.

[142] David Bailey (Reuters), "Illinois County Court a Corporate 'Hellhole,'" (October 5, 2003).

[143] *Id.*

[144] Marin Kasindorf, "Robin Hood is Alive in Court, Say Those Seeking Lawsuit Limit," *USA Today* (March 8, 2004) at A1 (emphasis added).

[145] *See First National Bank v. Guerine,* 764 N.E.2d 54, 64–66 (Ill. 2002) (appendix).

ty (population 259,000) now hosts more mesothelioma claims than New York City (population 8,000,000), and a nine member law firm with one office in Madison County claims to handle more mesothelioma cases than any firm in the country.[146] This is because, according to former Carter Administration U.S. Attorney General Griffin Bell, its judges accept cases from throughout the state and place them on extraordinarily expedited schedules that do not provide defendants with adequate time to prepare for trial.[147]

Madison County's newspapers have called Madison County "lawyer heaven,"[148] a "jackpot jurisdiction," a "hotbed of megabucks litigation," a "local slot machine," and "the most magic of all" magic jurisdictions.[149]

- *Jefferson County (Beaumont), Texas.* *The Austin American-Statesman* has recognized that "[o]ver the past few decades, personal injury lawyers have claimed this territory as their own, establishing Beaumont, Port Arthur, Orange, and nearby towns as an enclave where . . . juries often pass down sizable judgments."[150] As a result, huge verdicts against doctors have caused medical professional liability insurance rates to soar, sending Jefferson County neurosurgeons, obstetricians, and other doctors fleeing the area.[151]
- *22nd Judicial Circuit (Copiah, Claiborne and Jefferson Counties), Mississippi.* Fayette, the county seat of Jefferson County, Mississippi, was dubbed the "jackpot justice capital of America" by CBS's 60 Minutes program.[152] In this small, rural county, the number of plaintiffs far exceeds the number of residents.[153] The national media, including the *Los Angeles Times,*[154] *The New York Times,*[155] and the *Washington Times,*[156] have all recognized the Jefferson County phenomenon. In November 2002, the CBS News program, "60 Minutes," devoted a program to explaining why Mississippi's 22nd Judicial Circuit, which includes Copiah, Claiborne, and Jefferson County is a favorite place for plaintiffs' lawyers to flock from all over the Nation. After the airing of

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[146] *See* "Asbestos Case Leads to $5.1 Million, Sanction," *National Law Journal* (December 2, 2002) at A4.

[147] *See* Griffin B. Bell, "Asbestos & the Sleeping Constitution," 31 Pepp.L. Rev. 1, 8 (2003).

[148] Editorial, "Lawsuit Heaven," *St. Louis Post-Dispatch* (January 13, 2003) at B6.

[149] Greg Burns, "Lawyers Bring an International Class Action to Rural Madison County . . . Why? Because It's the Lawsuit Capital," *The Chicago Tribune* (March 8, 2004) at 1; Christi Parsons, "Downstate County is a 'Plaintiff's Paradise,'" *The Chicago Tribune* (June 17, 2002) at 1; Amity Shlaes, "Commentary, Big Judgments, Bigger Mistakes: Legal Windfalls in Madison County Demonstrate the Need to Limit Forum Shopping of Class Action Lawsuits," *The Chicago Tribune* (June 29, 2004) at 15; Editorial, "A Madison County Jackpot," *The Chicago Tribune* (April 2, 2003) at 22.

[150] David Pasztor, "As Quinn Laid to Rest, Mourners Contemplate Irony of His Slaying," *The Austin American-Statesman* (June 16, 2002) at A1.

[151] *See* Andrea Wright, "Beaumont, Texas, Area Loses Doctors to High Cost of Malpractice Insurance," *Knight-Ridder Tribune Business News* (November 6, 2001).

[152] Transcript, "Jackpot Justice," 60 Minutes (November 25, 2002).

[153] *See* Robert Pear, "Mississippi Gaining as Lawsuit Mecca," *The New York Times* (August 20, 2001) at A1 ("Jefferson County, with 9,740 residents, is a small county, but litigation there is a big business. An affidavit . . . said that more than 21,000 people were plaintiffs in Jefferson County from 1995 to 2000.").

[154] *See* Ken Ellingwood, "Mississippi Curbs Big Jury Awards Caps on Liability Verdicts Are Seen as Pro-Business: Critics Say Companies Will be Less Accountable," *The Los Angeles Times* (December 4, 2002) at A1.

[155] *See* Robert Pear, "Mississippi Gaining as Lawsuit Mecca," *The New York Times* (August 20, 2001) at A1.

[156] *See* Tim Lemke, "Best Place to Sue?" *The Washington Times* (June 30, 2002) at A1.

the 60 Minutes program, Media General Operations, which owns the local CBS-affiliate, the 60 Minutes producers, and several individuals who commented in the program, found themselves named as defendants in a $6.4 billion defamation lawsuit in Jefferson County.[157]

One small business, Bankston Drug Store, has been called "ground zero" in the pharmaceutical litigation business because, as the only pharmacy in Jefferson County, it has been named in hundreds of lawsuits alleging the defective manufacture of consumer prescription drugs in order to bring a large, out-of-state pharmaceutical company into local court.[158] The costs are real, and staggering. As Ms. Bankston explained, "I've searched record after record and made copy after copy for use against me . . . I've had to hire personnel to watch the store while I was dragged into court on numerous occasions to testify. I have endured the whispers and questions of my customers and neighbors wondering what we did to end up in court so often. And I have spent many sleepless nights wondering if my business would survive the tidal wave of lawsuits cresting over it." [159]

In recent years, the 22nd Judicial Circuit has handed out numerous awards of $100 million or more.[160]

And in June 2003, it was reported that the Federal Bureau of Investigation was probing possible judicial corruption in South Mississippi as well as the multimillion-dollar awards in Jefferson County.[161]

- *West Virginia, particularly Kanawha County.* Litigation activity has increased 53.6% more rapidly in West Virginia than in the nation as a whole over the last 10 years.[162] Current West Virginia Chief Justice Larry Starcher has been quoted as saying, "I have a hard time not being lenient, as a jurist, on behalf of those people." [163]
- *Philadelphia, Pennsylvania (Court of Common Pleas).* The impact of extraordinary awards is most noticed in Pennsylvania in the healthcare industry, where, according to *The Philadelphia Inquirer,* "hitting the 'malpractice lottery' is a made-for-Philadelphia phrase." [164] According to a 2003 study by the Pew Charitable Trusts, Pennsylvania is in one of the worst situations in the nation regarding the provision of affordable professional medical liability insurance for physi-

[157] *See* "Judge Dismisses Two Mississippi Defendants from '60 Minutes' Defamation Lawsuit," *Mercury News* (July 3, 2003). The lawsuit was filed by two former jurors who were offended by the program. *See id.*

[158] *See* Jerry Mitchell, "Jefferson County Ground Zero for Cases," *The Clarion-Ledger* (June 17, 2001) at A1.

[159] Tom Wilemon, "Judicial Probe Looking at Big Jury Awards," *Sun Herald* (July 12, 2003).

[160] *See* Betty Liu, "The Poor Southern County That's Big on Lawsuits," *Financial Times* (August 20, 2001).

[161] See Tom Wilemon, "Judicial Probe Looking at Big Jury Awards," *Sun Herald* (July 12, 2003); Tom Wilemon and Beth Musgrave, "Indictments Cast Doubt on Trial Lawyers, Mississippi Justice System," *Sun Herald* (July 26, 2003).

[162] *See* West Virginia Chamber of Commerce, Perryman Study, "Negative Impact On The Current Civil Justice System On Economic Activity In West Virginia" (February 2003).

[163] Court Watch, West Virginia Chamber of Commerce (July 2003).

[164] Josh Goldstein, "Malpractice Lawsuits Thrive in City; Still, Few are Filed, and Few are Decided by a Jury," *Philadelphia Inquirer* (December 10, 2001) at A1.

cians and hospitals.[165] The report shows that, in Philadelphia, plaintiffs are twice as likely to win jury trials as in the rest of the nation and a substantial percentage of cases result in verdicts greater than $1 million.[166]

- *City of St. Louis, Missouri.* St. Louis City Circuit Court is reportedly "the place to be" if you are a plaintiff.[167] Plaintiffs move cases to St. Louis City because "St. Louis City is a better venue," according to one St. Louis plaintiffs' attorney.[168] Even Missouri Supreme Court Judge Michael Wolff has recognized that "[t]he preponderance of anecdotal evidence is that jurors in the city of St. Louis are far more favorably disposed toward injured plaintiffs' claims than are their counterparts in suburban St. Louis County or in most other counties in the state." [169]
- *Eagle Pass, Texas.* According to the *San Antonio Express-News,* "L. Wayne Scott, a professor at St. Mary's University Law School . . . who has mediated civil cases in Eagle Pass, estimates defendants there are roughly 10 times more likely to lose than in conservative Dallas and two or three times more likely to fall than in San Antonio . . . Indeed, the prospect of facing a jury in Eagle Pass—where Mayor Joaquin L. Rodriguez also is one of the city's top plaintiff's attorneys—frequently makes companies more willing to settle and in higher amounts than they would agree to in other venues." Local plaintiff's attorney Earl Herring says that a case worth $10,000 in Eagle Pass would be "worth $500 in Uvalde." [170]
- *Hampton County, South Carolina.* Examples of the forum shopping that is rampant in Hampton County include the following. Michigan-based General Motors and Ohio-based Cooper Tire faced a lawsuit in Hampton County simply because their products are sold in the county; the plaintiff lived 90 miles away and the accident occurred 350 miles away in Tennessee.[171] In another case, a Beaufort County resident sued Continental Airlines because she was injured during a rough landing on a flight between Savannah, Georgia, and New Jersey, claiming that the airline does business in Hampton County because it sells tickets over the Internet.[172]

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[165] *See* Randall R. Bovbjerg and Anna Bartow, "Understanding Pennsylvania's Medical Malpractice Crisis: Facts About Liability Insurance, The Legal System, and Health Care in Pennsylvania" (Pew Charitable Trusts 2003).

[166] *See id.* at 32.

[167] *See* Roland Klose, "Venue's on the Menu For Lawyers Trying to Take a Bite of Doe Run, St. Louis is the Place to Be," *Riverfront Times* (April 10, 2002); Tim Bryant, "Question of Merging City, County Jury Pools is Revived; State Supreme Court Judge Suggested Move Last Year," *St. Louis Post-Dispatch* (November 27, 2002) at B1 (discussing the suggestion by Missouri Supreme Court Judge Michael Wolff of joining the juror pools of St. Louis City and County because plaintiffs' lawyers are known for trying to get their personal injury cases into St. Louis City Circuit Court for a more sympathetic jury, to make the issue of venue less important).

[168] *Id.*

[169] *See State ex rel. Linthicum,* 57 S.W.3d 855, 859 (Mo. 2001) (Wolff, J., concurring in part, dissenting in part).

[170] Greg Jefferson, "Eagle Pass Remains Known as Plaintiff's Attorney Paradise," *The San Antonio Express News* (November 2, 2003).

[171] *See* Michael Freedman, "Home Court Advantage," Forbes (June 10, 2002) at 74.

[172] *See* Editorial, "Wide-open Venue Law Undermines Confidence in Court," The State (April 10, 2003) at A16.

Amendments Adopted at Committee

Three amendments adding additional provisions to the H.R. 420 were adopted at Committee. The first, offered by Mr. Keller, applies a "three strikes and you're out" rule to attorneys who commit Rule 11 violations in Federal district court. The amendment provides that whenever a Federal district judge determines an attorney has violated Rule 11 of the Federal Rules of Civil Procedure three or more times within that Federal district court, the court shall suspend that attorney from practice of law in that Federal district court for 1 year, and may suspend that attorney from practice of law in that Federal district court for any additional period the court considers appropriate. Under such provision, an attorney has the right to appeal any such suspension, and such suspension shall not take place pending such appeal. Further, to be reinstated to the practice of law in a Federal district court after completion of such suspension, the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

A second amendment, offered by Mr. Nadler, imposes mandatory civil sanctions that are commensurate with those available under Rule 11 of the Federal Rules of Civil Procedure, in addition to other civil sanctions otherwise applicable, for the intentional destruction of documents sought in[173] a pending civil court proceeding, and highly relevant to such proceeding, with the intent to obstruct such proceeding. The amendment applies its rule to proceedings in Federal court, and in state courts where the court proceeding substantially affects interstate commerce.

A third amendment, offered by Mr. Scott, provides that whenever a party presents to a Federal court, or to a State court in a proceeding that substantially affects interstate commerce, a pleading, written motion, or other paper, that includes a claim, defense, or other legal contention that the party has already litigated and lost on the merits in any forum in final decisions not subject to appeal on 3 consecutive occasions, there shall be a rebuttable presumption that the presentation of such paper is in violation of Rule 11 of the Federal Rules of Civil Procedure.

RESPONSE TO JUDICIAL CONFERENCE LETTER ON H.R. 4571, THE LAWSUIT ABUSE REDUCTION ACT

On July 9, 2004, the Judicial Conference of the United States sent a letter to the Committee regarding H.R. 4571, the version of H.R. 420 the House of Representatives passed during the 108th Congress.[174]

The letter states that Section 2 of H.R. 4571 would reinstitute provisions to Rule 11 that were removed in 1993, and that such provisions were removed "because of the serious problems it engendered during a 10-year period of operation."[175] This assertion is contradicted by the Judicial Conference's Advisory Committee on Civil Rules's own survey. That committee undertook a review of Rule 11, in its pre-1993 form, and asked the Federal Judicial Cen-

[173] The term "sought in" as used in the amendment means sought pursuant to the rules of the relevant Federal or state court proceeding.

[174] Letter from Leonidas Ralph Mecham, Secretary, United States Judicial Conference, to Chairman F. James Sensenbrenner (July 9, 2004) ("Judicial Conference Letter").

[175] Judicial Conference Letter, at 1.

ter to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed that Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the 1983 version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then-current form (80.4%).[176] Indeed, the letter from the Judicial Conference admits as much with the cursory statement that "The 1991 Federal Judicial Center Survey noted that most Federal judges believed that the 1983 version of Rule 11 had positive effects."[177]

Despite this survey conducted at the behest of the Judicial Conference itself, the letter cites four "serious problems" caused by the 1983 amendments to Rule 11.

The first is that the 1983 amendments to Rule 11 resulted in "creating a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty."[178] In response, first, any unmeritorious Rule 11 motion could itself result in sanctions (and thereby deterred) under Rule 11.[179] Second, yet another survey conducted by the Federal Judicial Center contradicts the assertion that the option of monetary penalties under Rule 11 caused problems. A survey conducted by the Federal Judicial Center in June, 1995, consisting of 148 Federal judges and over 1,000 trial attorneys found that the 1993 amendments that disallowed monetary compensation for victims of frivolous lawsuits were a bad idea. In that survey, two-thirds of judges (66%), defense attorneys (63%), and other attorneys (66%), and even a substantial portion of plaintiff's attorneys (43%), supported restoring Rule 11's compensatory function once again.[180]

The second problem the Judicial Conference letter cites is that the 1983 amendments to Rule 11 resulted in "engendering potential conflict of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference."[181] In response, it is entirely appropriate that an attorney advise withdrawing claims a client wants to make *when those claims are frivolous.*

The third problem the Judicial Conference letter cites is that the 1983 amendments to Rule 11 resulted in "exacerbating tensions between lawyers."[182] In response, whatever tensions the amendments may have caused lawyers, the threat of frivolous lawsuits today has created a legal culture of fear that has come to permeate all of American society, threatening common sense judgments everywhere, from churches, to playgrounds, to schools, to doctors' offices, to small businesses nationwide, and everywhere in between. Surely if restoring teeth to Rule 11 results in some tension between lawyers, it is justified by helping to allow all Americans to live

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[176] 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).
[177] Judicial Conference Letter, at 2.
[178] *Id.* at 2.
[179] *See Berger v. Iron Workers,* 843 F.2d 1395 (D.C. Cir. 1988) (affirming in part per curiam 7 Fed. Rules Serv. 3d 306 (D.D.C. 1986)) (imposing sanctions for filing inappropriate Rule 11 motions).
[180] *See* John Shapard *et. al.,* Federal Judicial Center, Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure at 5.
[181] Judicial Conference Letter, at 2.
[182] *Id.* at 2.

their lives free of the constant fear that their every innocent move could result in a devastating frivolous lawsuit.

The fourth problem the Judicial Conference letter cites is that the 1983 amendments to Rule 11 resulted in "providing little incentive, and perhaps a distinct disincentive, to abandon or withdraw a pleading or claim—and thereby admit error—that lacked merit after determining that it no longer was supportable in law or fact." [183] In response, the argument that mandatory sanctions deter offenders from retracting offending conduct is no more persuasive than the argument that stealing again and again should be allowed, provided each time the thief gets caught he or she returns the stolen goods; except in this case the argument is even weaker, since under the current Rule 11, the money victims of frivolous lawsuits are forced to spend to defend themselves, or to prepare to defend themselves, against frivolous claims is not even returned when an attorney is called to the carpet for filing a frivolous pleading: rather, such attorney need only withdraw the pleading and suffer no penalty whatsoever.

The letter from the Judicial Conference also states that, if Section 3 of H.R. 4571 is enacted, it "could affect the cost and duration of a very large number of civil actions in state courts." [184] In response, Section 3 of H.R. 4571 is not likely to be abused for several reasons. Any party that does not fear sanctions under Rule 11 will only request that a state court rule on whether the case substantially affects interstate commerce in rare circumstances. This is because, first, no one is required under H.R. 4571 to make such a request to a state court if they do not want to, and second, because the burden will be on any party who decides to move for a determination that the case "substantially affects interstate commerce" to show just that, and that will not be an easy case to make, especially in smaller cases. The end result will be that motions will be made under Section 3 of H.R. 4571 only in those cases in which large amounts of money are at stake with clear interstate effects and only by those parties who have very strong reasons to believe the court system is being abused by a party filing frivolous pleadings. In such cases, it is entirely appropriate that a Federal rule sanctioning lawsuit abuse be available. Section 3 of H.R. 4571 would serve national economic interests by focusing attention on the employment costs of frivolous litigation. The provision would provide that the interstate economy, including workers and jobs, when potentially negatively affected, should be protected by a rule prohibiting frivolous claims.

Finally, the Judicial Conference letter states that H.R. 4571 is "inconsistent with the longstanding Judicial Conference policy opposing direct amendment of the Federal rules by legislation." [185] However, Congress has never relinquished its constitutional authority to create and alter the rules of Federal court procedure,[186] and it has a duty to do so to address pressing problems, in this case the threat of frivolous lawsuits that affect all aspects of American society.

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[183] *Id.* at 2.
[184] *Id.* at 3.
[185] *Id.* at 1.
[186] *See* U.S. Const. Art. I, § 8, cl. 9; Art. III, § 1, cl. 1; Art. III, § 2, cl. 2.

RESPONSE TO THE FEDERAL JUDICIAL CENTER'S 2005 SURVEY

The Federal Judicial Center recently issued a survey of U.S. district court judges ("FJC 2005 Survey") regarding Rule 11 and the problem of frivolous lawsuits.[187]

As explained above, the Lawsuit Abuse Reduction Act would largely restore Federal Rule of Civil Procedure 11 to what it was before it was made toothless in 1993. Rule 11, prior to the adoption of weakening amendments in 1993 which eliminated mandatory and serious sanctions against those who filed frivolous lawsuits, was widely popular among Federal judges, and it served to significantly limit lawsuit abuse. In 1990, the Judicial Conference's Advisory Committee on Civil Rules (the same organization that requested the FJC 2005 Survey) undertook a review of Rule 11 at the time and asked the Federal Judicial Center to conduct an empirical study of its operation and impact. The survey of 751 Federal judges found that an overwhelming majority of Federal judges believed, based on their experience under both a weaker and stronger Rule 11, that a stronger Rule 11 did not impede development of the law (95%); the benefits of the rule outweighed any additional requirement of judicial time (71.9%); the stronger version of Rule 11 had a positive effect on litigation in the Federal courts (80.9%); and the rule should be retained in its then-current form (80.4%).[188] Of the 751 judges surveyed in 1990, 583 responded, roughly twice times as many as responded to the FJC's 2005 Survey.

In the Federal Judicial Center's latest survey, only 278 judges responded to, and half of the judges surveyed (and over half of the judges that responded to the survey) had no experience at all with the stronger version of Rule 11. As the FJC 2005 Survey states, "the Center E-mailed questionnaires to two random samples of 200 district judges each . . . One sample comprised solely judges appointed to the bench before January 1, 1992 . . . *[t]he other sample comprised solely judges appointed to the bench after January 1, 1992.*"[189] The FJC report keeps secret the dates on which the respondent judges first came to serve on the bench, so we have no way of knowing whether any of those judges had any significant experience as judges under the stronger Rule 11 that was in effect the decade before 1993. Appendix A of the FJS 2005 Survey states that "all judges in the first group [of 200 out of 400 surveyed] would have had at least 1 year on the bench before the 1993 amendments to Rule 11 went into effect."[190] That provides little comfort that any significant number of the judges surveyed had any significant experience under the stronger Rule 11. So the survey is fundamentally flawed in that we have no reason to believe it included any significant number of judges who had any significant experience under the stronger Rule 11.

Further, the FJC 2005 Survey found that even of the Federal judges surveyed, 55% indicated that the purpose of Rule 11 should

[187] David Rauma and 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) (hereinafter "FJC 2005 Survey").

[188] 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).

[189] FJC 2005 Survey, at 2.

[190] *Id.* at 16 (Appendix A).

be both deterrence and compensation,[191] and the Lawsuit Abuse Reduction Act would fulfill both purposes.

Of course, Federal judges themselves do not suffer in any direct way the costs of frivolous, abusive lawsuits. Those who do suffer those costs, including the large financial costs of nuisance lawsuits filed for their settlement value—namely the small business community—overwhelmingly support the Lawsuit Abuse Reduction Act. The National Federation of Independent Business, for example, has made passing the Lawsuit Abuse Reduction Act their top legislative priority. The small business community rejects the notion today the amount of frivolous lawsuits filed are "just right." In just a few months, a coalition of over 100 organizations, called the Lawsuit Abuse Reform Coalition ("LARC"), came together to support LARA's common sense reforms.

When sanctions for filing frivolous lawsuits are not mandatory, as they are not mandatory now, those who are the victims of frivolous lawsuits have no incentive to litigate the frivolous nature of the claims against them because there is currently no guarantee that even if the claims against them are found to be frivolous they will be compensated for the harm caused by those frivolous claims. What happens instead is that, today, the victims of frivolous lawsuits are routinely extorted to *settle* the case for certain sums just below those what would be necessary to litigate the case to judgment, at which point the case drops out of the dockets of the very judges who were surveyed by the FJC.

Judges are unlikely to view frivolous litigation as a problem because such cases rarely reach the bench. An overwhelming number of cases settle before trial. When a frivolous claim is filed, one of two things occur under the current Rule 11: either the small business challenges the plaintiff and the plaintiff simply withdraws the claim and walks away (as they are allowed to do under the current Rule 11); or the small business settles rather than proceed with a motion for sanctions because it is unlikely that the court will fully reimburse it for the cost of defending against the frivolous claim, and the cost of defending against the claim is more than the expense of settlement.

The current situation favors judges, not small businesses who are harmed by the litigation. Under the current Rule 11, judges are relieved of their obligation to consider whether or not a case is frivolous. They do not need to hold a hearing on whether the case is frivolous and impose sanctions because, as a matter of practice, Rule 11 requires frivolous lawsuits to be withdrawn (with no reimbursement to the victim of the suit) or settled (for just under the cost of defending against it). While this is convenient for judges, it is not fair to small businesses.

Everyone who sits back for a moment and reflects will understand that a limitless variety of frivolous lawsuits clog our courts in ways they did not in decades gone be. Judges do not feel the painful costs of frivolous lawsuits, and as they have sat as judges over the last decade they have only seen the standards of how frivolous lawsuits should be treated erode over time, starting with the explicitly forgiving nature of the toothless Rule 11 that was enacted in 1993. It is time courts were made to take the harm caused

[191] FJC 2005 Survey at 2.

by frivolous lawsuits seriously again—by making sanctions for filing frivolous lawsuits mandatory, not discretionary, on the part of the judge—and to empower the victims of frivolous lawsuits with the certainty that they will be compensated for the frivolous lawsuits they suffer under. Only the Lawsuit Abuse Reduction Act can help free all Americans from the fear they feel today under the constant threat of frivolous lawsuits.

Finally, the Federal judiciary has a history of opposing any legal reforms it does not itself propose. For example, the Federal Judicial Center has also opposed the Class Action Fairness Act,[192] which overwhelmingly passed Congress and which became law earlier this year.[193]

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 420 during the 109th Congress.

COMMITTEE CONSIDERATION

On May 25, 2005, the Committee met in open session and ordered favorably reported the bill H.R. 420 with an amendment by a recorded vote of 19 yeas to 11 nays, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of Rule XIII of the Rules of the House of Representatives, the Committee notes that the following rollcall votes occurred during the committee"s consideration of H.R. 420.

1. Mr. Conyers offered an amendment that would have provided that the Act would not apply to manufacturers, sellers, or trade associations that, on or after the date of enactment of the Act, shifts or transfers employment positions or facilities to a location outside the United States. By a rollcall vote of 11 yeas to 17 nays, the amendment was defeated.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte			
Mr. Chabot			
Mr. Lungren		X	
Mr. Jenkins		X	
Mr. Cannon		X	
Mr. Bachus			
Mr. Inglis		X	
Mr. Hostettler		X	
Mr. Green			
Mr. Keller		X	
Mr. Issa		X	
Mr. Flake			

[192] *See* Letter from Ralph Mecham, Secretary, Judicial Conference of the United States (Mar. 26, 2003).

[193] The Class Action Fairness Act passed the Senate by a vote of 72 to 26, and the House by a vote of 279 to 149. It became Public Law No. 109–2.

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Pence		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Feeney		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Conyers	X		
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan	X		
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Smith (Washington)			
Mr. Van Hollen	X		
Mr. Sensenbrenner, Chairman		X	
Total	11	17	

2. Motion to report H.R. 420 with an amendment in the nature of a substitute was agreed to by a rollcall vote of 19 yeas and 11 nays.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Chabot	X		
Mr. Lungren	X		
Mr. Jenkins	X		
Mr. Cannon	X		
Mr. Bachus	X		
Mr. Inglis	X		
Mr. Hostettler	X		
Mr. Green			
Mr. Keller	X		
Mr. Issa	X		
Mr. Flake			
Mr. Pence	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Feeney	X		
Mr. Franks	X		
Mr. Gohmert	X		
Mr. Conyers		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Meehan		X	
Mr. Delahunt			
Mr. Wexler			
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Smith (Washington)			
Mr. Van Hollen		X	
Mr. Sensenbrenner, Chairman	X		
Total	19	11	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of Rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of Rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of Rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of Rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 420, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 3, 2005.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 420, the "Lawsuit Abuse Reduction Act of 2005."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Gregory Waring (for Federal costs), who can be reached at 226–2860, and Melissa Merrell (for the State and local impact), who can be reached at 225–3220.

Sincerely,

DOUGLAS HOLTZ-EAKIN.

Enclosure

cc:

Honorable John Conyers, Jr.
Ranking Member

H.R. 420—Lawsuit Abuse Reduction Act of 2005.

H.R. 420 would amend Rule 11 of the Federal Rules of Civil Procedure to require courts to impose appropriate sanctions on attorneys, law firms, or parties who file frivolous lawsuits and to require them to compensate parties injured by such conduct. (Courts currently may, but are not required to, impose such sanctions.) In addition, the bill would require certain personal injury claims to be filed in a court where the person bringing the claim lives, where the alleged injury occurred, or where the defendant's business is located.

Under the legislation, any monetary sanction imposed under Rule 11 would be between the parties to the suit. Thus, CBO estimates that enacting the legislation would result in no cost or savings to the Federal Government. H.R. 420 would not affect direct spending or revenues.

H.R. 420 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA) because it would preempt certain State laws governing court procedures. Specifically, it would require State judges to determine whether certain liability lawsuits affect interstate commerce and apply Federal civil procedures for frivolous lawsuits to those cases. CBO estimates that the cost of complying with that mandate would be minimal and well below the threshold established in that act ($62 million in 2005, adjusted annually for inflation). The bill contains no new private-sector mandates as defined in UMRA.

The CBO staff contacts for this estimate are Gregory Waring (for Federal costs), who can be reached at 226–2860, and Melissa Merrell (for the State and local impact), who can be reached at 225–3220. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of Rule XIII of the Rules of the House of Representatives, H.R. 420 would: (1) restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11 of the Federal Rules of Civil Procedure; (2) remove Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed; (3) allow monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim; (4) apply Rule 11's provisions to state cases a state judge finds substantially affects interstate commerce; (5) require that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, where the defendant's principal place of business is located, or where the defendant resides; (6) apply a "three strikes and you're out" rule to attorneys who commit Rule 11 violations in Federal district court; (7) impose mandatory civil sanctions for document destruction intended to obstruct a pending court proceeding; and (8) provide that if a party attempts to relitigate a losing claim more than three consecutive times, there shall be a rebuttable presumption that Rule 11 has been violated.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of Rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 3 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes the bill as reported by the Committee.

Sec. 1. Short title. This section provides that the Act may be cited as the "Lawsuit Abuse Reduction Act of 2004."

Sec. 2. Attorney Accountability. This section would restore mandatory sanctions for filing frivolous lawsuits in violation of Rule 11; remove Rule 11's "safe harbor" provision that currently allows parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing frivolous claims after a motion for sanctions has been filed; and require monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim and causing economic harm to the victim of a frivolous lawsuit.

Sec. 3. Applicability of Rule 11 to State Cases Affecting Interstate Commerce. This section applies Rule 11's provisions to state cases a state judge finds substantially affect interstate commerce, including by costing jobs in other states.

Sec. 4. Prevention of Forum-Shopping. Subsection (a) of this section requires that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured (or where the circumstances giving rise to the injury allegedly occurred) or where the defendant's principal place of business is located, or where the defendant resides. Subsection (b) of this section provides that if a person alleges that the injury or circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection. Subsection (c) of this section provides the definition of terms used in section 4.

Sec. 5. Rule of Construction. This section provides that nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.

Sec. 6. Three-Strikes Rule for Suspending Attorneys Who Commit Multiple Rule 11 Violations. This section provides that whenever a Federal district judge determines an attorney has violated Rule 11 of the Federal Rules of Civil Procedure three or more times within that Federal district court, the court shall suspend that attorney from practice of law in that Federal district court for 1 year, and may suspend that attorney from practice of law in that Federal district court for any additional period the court considers appropriate. Under such provision, an attorney has the right to appeal any such suspension, and such suspension shall not take place pending such appeal. Further, to be reinstated to the practice of

law in a Federal district court after completion of such suspension, the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

Sec. 7. Presumption of Rule 11 Violation for Repeatedly Relitigating Same Issue. This section provides that whenever a party presents to a Federal court, or to a State court in a proceeding that substantially affects interstate commerce, a pleading, written motion, or other paper, that includes a claim, defense, or other legal contention that the party has already litigated and lost on the merits in any forum in final decisions not subject to appeal on 3 consecutive occasions, there shall be a rebuttable presumption that the presentation of such paper is in violation of Rule 11 of the Federal Rules of Civil Procedure.

Sec. 8. Enhanced Sanctions for Document Destruction. This section provides that provides for mandatory civil sanctions that are commensurate with those available under Rule 11 of the Federal Rules of Civil Procedure, in addition to other civil sanctions otherwise applicable, for the intentional destruction of documents sought in a pending civil court proceeding, and highly relevant to such proceeding, with the intent to obstruct such proceeding. The amendment applies to proceedings in Federal court, and in state courts when the proceedings substantially affect interstate commerce.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, existing law in which no change is proposed is shown in roman):

RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(a) * * *

* * * * * * *

(c) SANCTIONS.—**[**If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.**]** *If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.*

(1) HOW INITIATED.—

(A) BY MOTION.—A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5[, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected]. If warranted, the court [may] *shall* award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

* * * * * * *

(2) NATURE OF SANCTION; LIMITATIONS.—A sanction imposed for violation of this rule [shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

[(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

[(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.] *shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.*

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MAY 25, 2005

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:02 a.m., in Room 2138, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will come to order. A working quorum is present.

[Intervening business.]

Chairman SENSENBRENNER. Pursuant to notice, I now call up the bill H.R. 420, the "Lawsuit Abuse Reduction Act of 2005," for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point.

[The bill, H.R. 420, follows:]

I

109TH CONGRESS
1ST SESSION

H. R. 420

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 26, 2005

Mr. SMITH of Texas (for himself, Mr. DELAY, Mr. CHABOT, Mr. PAUL, Mr. GREEN of Wisconsin, Mr. HERGER, Mr. KELLER, Mr. KING of Iowa, Mr. SHAYS, Mr. CANNON, Mr. BRADY of Texas, Mr. NORWOOD, Mr. NEUGEBAUER, Mr. CHOCOLA, Mr. MILLER of Florida, Mr. FEENEY, Mr. FORBES, Mr. GARY G. MILLER of California, Mr. CULBERSON, Mr. GARRETT of New Jersey, Mr. LEACH, Mr. KLINE, Mr. GALLEGLY, Mr. OTTER, Mr. JONES of North Carolina, Mr. KENNEDY of Minnesota, Mrs. MYRICK, Mr. MCCAUL of Texas, Mr. BOOZMAN, Mr. FRANKS of Arizona, Mr. SENSENBRENNER, Mr. GOODLATTE, Mr. FERGUSON, Mr. WILSON of South Carolina, Mr. BRADLEY of New Hampshire, Mr. CALVERT, Mr. FORTUÑO, Mr. KIRK, and Mrs. JO ANN DAVIS of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2005".

SEC. 2. ATTORNEY ACCOUNTABILITY.

Rule 11 of the Federal Rules of Civil Procedure is amended—

(1) in subdivision (c)—

(A) by amending the first sentence to read as follows: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to the other party or parties to pay for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.";

(B) in paragraph (1)(A)—

(i) by striking "Rule 5" and all that follows through "corrected." and inserting "Rule 5."; and

(ii) by striking "the court may award" and inserting "the court shall award"; and

(C) in paragraph (2), by striking "shall be limited to what is sufficient" and all that follows through the end of the paragraph (includ-

ing subparagraphs (A) and (B)) and inserting "shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee."; and

(2) by striking subdivision (d).

SEC. 3. APPLICABILITY OF RULE 11 TO STATE CASES AFFECTING INTERSTATE COMMERCE.

In any civil action in State court, the court, upon motion, shall determine within 30 days after the filing of such motion whether the action affects interstate commerce. Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted. If the court determines such action affects interstate commerce, the provisions of Rule 11 of the Federal Rules of Civil Procedure shall apply to such action.

SEC. 4. PREVENTION OF FORUM-SHOPPING.

(a) IN GENERAL.—Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or Federal district) in which—

(1) the person bringing the claim, including an estate in the case of a decedent and a parent or guardian in the case of a minor or incompetent—

(A) resides at the time of filing; or

(B) resided at the time of the alleged injury; or

(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred; or

(3) the defendant's principal place of business is located.

(b) DETERMINATION OF MOST APPROPRIATE FORUM.—If a person alleges that the injury or circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim. If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was

filed and ending on the date the claim is dismissed under this subsection.

(c) DEFINITIONS.—In this section:

(1) The term "personal injury claim"—

(A) means a civil action brought under State law by any person to recover for a person's personal injury, illness, disease, death, mental or emotional injury, risk of disease, or other injury, or the costs of medical monitoring or surveillance (to the extent such claims are recognized under State law), including any derivative action brought on behalf of any person on whose injury or risk of injury the action is based by any representative party, including a spouse, parent, child, or other relative of such person, a guardian, or an estate; and

(B) does not include a claim brought as a class action.

(2) The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, but not any governmental entity.

(3) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the

United States Virgin Islands, Guam, and any other territory or possession of the United States.

(d) APPLICABILITY.—This section applies to any personal injury claim filed in Federal or State court on or after the date of the enactment of this Act.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in section 3 or in the amendments made by section 2 shall be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law.

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Chairman SENSENBRENNER. The chair recognizes the gentleman from Texas, Mr. Smith, the sponsor of the legislation, to explain the bill.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, H.R. 420 will deter frivolous litigation. Our country's values and its economy are under attack from unnecessary lawsuits. Americans sue over the slightest offense. Schoolteachers, doctors, Little League coaches, Girl Scout troop leaders often fear that the slightest offense to an angry parent or patient will result in years of litigation. In addition to intimidating members of our Nation's communities, frivolous lawsuits harm our economy and threaten to bankrupt business owners as well. The alarming spread of frivolous lawsuits has made a mockery of our legal system. Frivolous suits are brought despite no evidence that shows negligence on the part of the defendant. These are nuisance lawsuits, but costly to the defendants.

Many Americans have legitimate legal grievances and deserve their day in court. Justice should not be denied to those who deserve it. However, some lawyers game the system, which drives up the cost of doing business and drives down the integrity of the judicial system.

For example, the CEO of San Antonio's Methodist Children's Hospital was sued after he stepped into a patient's hospital room and asked how the patient was doing. A jury cleared him of any wrongdoing.

In a New Jersey Little League game, a player lost sight of a flyball because of the sun. He was injured when the ball hit him in the eye. The coach was forced to hire a lawyer after the boy's parents sued, and the coach was forced to settle the case for $25,000.

A Pennsylvania man sued the Frito-Lay Company claiming that Doritos chips were inherently dangerous after one stuck in his throat. After 8 years of costly litigation, the Pennsylvania Supreme Court finally threw out the case, writing that there is "a commonsense notion that it is necessary to properly chew hard foodstuffs prior to swallowing."

Today almost any party can bring any suit in practically any jurisdiction because plaintiffs and their attorneys have nothing to lose. All they want is for the defendant to settle. This is legalized extortion. It is lawsuit lottery.

Some Americans file lawsuits for reasons that can only be described as absurd. They sue a theme park because its haunted houses are too scary, they sue the weather channel for an inaccurate forecast, and they sue McDonald's claiming a hot pickle dropped from a hamburger caused a burn and mental injury. Our national motto might as well be, When in doubt, file a lawsuit. While plaintiffs have nothing to lose and everything to gain by working the system this way, defendants, on the other hand, often stand to lose everything. They can unfairly lose their careers, their businesses, and their reputations. This is not justice.

But the good news is that there is a remedy. Change Federal Rule of Civil Procedure 11. The Lawsuits Abuse Reduction Act does just that. It requires judges to sanction plaintiffs who file frivolous lawsuits merely to extort financial settlements, as well as defendants who unnecessarily prolong the process. Under H.R. 420, if ei-

ther party feels they have been subject to a frivolous claim or pleading, they can file a motion with the court for sanctions. If the judge determines that the claim was frivolous, then the sanctions imposed can include an order to pay the attorneys fees of the party who was the victim of the frivolous claim.

Also, if a State judge determines that a frivolous lawsuit has a significant impact on interstate commerce, the judge could sanction the litigants by using rule 11.

Finally, Mr. Chairman, this legislation prevents forum-shopping. It requires that personal injury claims only be filed in the State, county, or Federal district where the plaintiff resides, where the injury occurred, or in the State or county where the defendant's principal place of business is located. This provision addresses the growing problem of attorneys who shop around the country for judges who routinely award plaintiffs excessive amounts.

Mr. Chairman, the Lawsuit Abuse Reduction Act is sensible reform that will help restore confidence in our economy, our communities, and in our justice system as well.

And Mr. Chairman, I will yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you very much.

The reason I ask what are the reasons that so many organizations oppose this bill, including the United States Judicial Conference, the National Association for the Advancement of Colored People, the Alliance for Justice, Public Citizen, People for the American Way, the American Association of People with Disabilities, the Lawyers Committee for Civil Rights in Law, the American Bar Association, the National Conference on State Legislatures, National Partnership for Women, the National Women's Law Center, the Center for Justice and Democracy, Consumers Union, the National Association of Consumer Advocates, and the NAACP Legal Defense Fund—well, it's because this legislation would have an adverse impact on the ability of civil rights plaintiffs to seek recourse in the courts. And by requiring a mandatory sanctions regime that would apply in these kinds of cases, H.R. 420 will chill many legitimate and important civil rights actions.

This is due to the fact that much, if not most, of the impetus for the 1993 changes stem from abuses by defendants in civil rights cases, namely, civil rights defendants were choosing to harass civil rights plaintiffs by filing a series of rule 11 motions intended to slow down and impede cases that clearly had merit.

Now, although the bill states that the proposed rule 11 changes shall not be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, and local civil rights law, the language does not clearly and simply exempt civil rights and discrimination cases, as should be the case. Determining what a new claim or remedy is could be a daunting and complex issue for most of the courts and clearly does not cover all civil rights cases in any event.

Section 4. The forum-shopping provision would operate to provide a litigation and financial windfall to foreign corporations at the expense of their domestic competitors.

This is because instead of permitting claims to be filed wherever a corporation does business or has some contact, as most State

long-arm statutes, so called, provide, the bill only permits the suit to be brought where the defendant's principal business is located. In the case of a foreign corporation that obviously wouldn't exist inside the United States.

So if a United States citizen is harmed by a product produced or manufactured by a foreign competitor, under this measure proposed, the harmed citizen would likely have no recourse against a foreign corporation, whereas he or she would have recourse against a comparable United States company.

This is unfair to both our citizens and to our corporations that are in competition, and so that's why we have this long list—and I didn't mention them all—or organizations who don't have an ax to grind, who are not being partisan, who are trying to give us their point of view, and I'm happy to have had this chance to let you know how many people are hoping that the majority of us will turn back the Lawsuit Abuse Reduction Act of 2005.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Without objection, all Members' opening statements will appear in the record at this point.

Are there amendments? Gentleman from Florida.

Mr. KELLER. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 420 offered by Mr. Keller of Florida. At the end of the bill add the following new section.

Mr. KELLER. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, so ordered, and the gentleman from Florida is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO H.R. 420

OFFERED BY MR. KELLER OF FLORIDA

At the end of the bill, add the following new section:

SEC. ____. THREE-STRIKES RULE FOR SUSPENDING ATTORNEYS WHO COMMIT MULTIPLE RULE 11 VIOLATIONS.

(a) MANDATORY SUSPENSION.—Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that attorney's career. If the court determines that the number is 3 or more, the Federal district court—

(1) shall suspend that attorney from the practice of law in that Federal district court for 1 year; and

(2) may suspend that attorney from the practice of law in that Federal district court for any additional period that the court considers appropriate.

(b) APPEAL; STAY.—An attorney has the right to appeal a suspension under subsection (a). While such an appeal is pending, the suspension shall be stayed.

(c) REINSTATEMENT.—To be reinstated to the practice of law in a Federal district court after completion of a suspension under subsection (a), the attorney must first petition the court for reinstatement under such procedures and conditions as the court may prescribe.

Mr. KELLER. Thank you, Mr. Chairman. This is a three-strikes-and-you're-out amendment. I'd like to explain it, give a brief history of it, and talk about why it's needed.

The three-strikes-and-you're-out amendment, essentially says this. If a Federal judge determines that an attorney has violated rule 11 in that Federal District Court three times, the attorney shall be suspended from practicing law in that Federal District Court for 1 year. It is the identical language that was used in the last Congress. At Mr. Berman's request during the last markup, we added language to this provision that says the attorney may appeal the suspension and that the suspension shall be stayed during the appeal. This is the identical language that I'm offering today, the

same language that passed this Committee by a 20 to 6 vote, and passed the House as part of the Lawsuit Abuse Reduction Act.

Let me walk through just a brief history of the three-strikes-and-you're-out concept, and I have a chart over to my right that some of you will be able to see, others on the TV. Let me tell you who supports it. First, George W. Bush. On February 9, 2000 he issued a campaign press release where he said, quote, "As President I will bring common sense to our courts and curb frivolous lawsuits. If a lawyer files three junk lawsuits he'll lose the right to appear in Federal Court for 3 years, three strikes and you're out."

The Austin American Statesman, the local newspaper, the next day on February 10, 2000 said, quote, "Bush's plan includes stiffer penalties for lawsuits determined by judges to be frivolous, including a three strikes you're out rule for lawyers who repeatedly file such claims."

This enjoys bipartisan support. Former Senator John Edwards, himself a personal injury attorney for many years before of course becoming a U.S. Senator and Democratic nominee for Vice President, said to Newsweek on December 15, 2003: Frivolous lawsuits waste good people's time and hurt the real victims. Lawyers who bring frivolous cases should face tough mandatory sanctions with a three strikes penalty.

Senator John Kerry, the Democrat nominee for President, told the Associated Press 1 month before the election on October 10, 2004: Lawyers who file frivolous cases would face tough mandatory sanctions including a three-strikes-and-you're-out provision that forbids lawyers who file three frivolous cases from bringing another suit for the next 10 years.

Yesterday, Tuesday, May 24 at approximately 3:00 p.m., I personally met with the President of the United States in his residence at the White House. And I handed him this quote that you see on the chart, and asked him, "Mr. President, do you still stand by this and support three-strikes-and-you're-out?" He told me, yes, he stands by the three-strikes-and-you're-out concept, yes, he supports three-strikes-and-you're-out, and yes, that language of three-strikes-and-you're-out will not be vetoed.

Action by Congress on this identical amendment was as follows last time. This Committee on September 8 approved it 20 to 6; 100 percent of Republicans present voted for it, several Democrats voted for it including Mr. Berman, Ms. Lofgren and Mr. Schiff. It then comfortably passed the U.S. House of Representatives, a part of the underlying Lawsuit Abuse Reduction Act, with 16 Democrats voting for it.

In a nutshell let me explain why it's needed. Under existing rule 11 law, if a court determines that there's a rule 11 violation, the court may impose a sanction and may determine the type of sanction. Under Chairman Lamar Smith's base bill, there is a good improvement. Under this bill the judge shall impose a sanction if there's a violation, but he may determine what those sanctions are. He may award expenses which could be 50 cents sanction for postage and photocopying expenses. He may award attorneys' fees which is substantially more, or he may determine that a verbal reprimand is sufficient to deter repetition of the bad conduct and no compensation is needed.

The base bill needs additional teeth. 50 cents or a verbal reprimand won't get some attorneys' attention. A three-strikes-and-you're-out penalty will. The goal of the three-strikes-and-you're-out legislation is to prevent frivolous lawsuits from being filed in the first place. The three-strikes-and-you're-out concept to crack down on frivolous lawsuits is a common sense bipartisan idea that deserves our support again today. It's supported by President Bush, Senator Edwards, Senator Kerry, this Committee and the U.S. House, and I ask my colleagues once again to vote yes on the three-strikes-and-you're-out amendment.

Mr. Chairman, before yielding back I ask unanimous consent to include in the record the articles and press release I referenced earlier from President Bush, Senator John Edwards and Senator Kerry regarding three-strikes-and-you're-out.

Chairman SENSENBRENNER. Without objection.

[The information follows:]

December 15, 2003, U.S. Edition

SECTION: COVER STORY: JUSTICE; Pg. 53

LENGTH: 687 words

HEADLINE: Juries: 'Democracy in Action'

BYLINE: By Sen. John Edwards; Edwards, U.S. senator for North Carolina and a Democratic candidate for president, practiced law for nearly 20 years.

HIGHLIGHT:
The **civil jury system, John Edwards** argues, is good for America. He ought to know. A veteran trial lawyer on a case that confirmed his belief in the true meaning of justice.

BODY:
I'll never forget the first time I met Jennifer Campbell. A charming, determined 5-year-old, she couldn't walk or feed herself, and still needed a playpen. Because of a doctor's terrible mistake, she was born with permanent brain damage. I met her loving, determined parents, who were hoping for a way to help pay for her costly care, and to make sure other families wouldn't suffer as they had. Back then, in 1985, I was a young North Carolina lawyer starting to build a name as someone willing to take cases others rejected as long shots. This case was exactly that. The insurance companies were skilled at making cases like this "go away." The Campbells had no money, and the trial would be long, complicated and expensive. If we lost, neither the Campbells nor I would receive a dime.

But there was no question that these were risks worth taking for Jennifer. The other side was counting on the Campbells to walk away intimidated, but they were wrong. A jury eventually agreed, and awarded the Campbells enough to make sure Jennifer's parents would never have to worry about her care.

These days it's fashionable for people to complain that the courts are clogged with frivolous lawsuits, and to dismiss the legal profession as a bastion of greed. In a nation as large as ours, it isn't difficult to find an outrageous case here and there. They draw publicity, and it's easy to come away with the impression that the court system is hopelessly broken.

I can tell you from long experience that it is not. Before I was elected to the United States Senate, I spent nearly two decades as a lawyer standing up for people who needed a voice. During that time, I worked on hundreds of cases, big and small. I'm proud of the work I did, and the people I represented. There was nothing frivolous about the families who came to me for help. Like the Campbells, many were in very difficult places in their lives. Often, they found themselves up against powerful opposition--insurance companies, large corporations--who had armies of lawyers to represent them. Giving them a chance for justice was very important to me. I was more than just their lawyer. I cared about them. Their cause was my cause.

And that's what good lawyers--I would say most lawyers--do for their clients all the time. I am a strong believer in the courts as a place for ordinary people to be heard, often when other institutions have failed them. People have criticized

the jury system, saying jurors can't be trusted to consider the facts. I couldn't disagree more. Juries are a vital example of democracy in action. The people who sit on juries are the same people who decide who the president should be. People who are entrusted to choose the leader of the free world are capable of weighing evidence in a courtroom--and they do, every day across America. I found again and again that they take their service seriously, and follow the law even when the law is at odds with what they personally believe.

That's not to say the system is perfect. Frivolous lawsuits waste good people's time and hurt the real victims. That's why I have proposed to prevent them: Lawyers in medical-malpractice lawsuits, for example, should have to bring their cases to independent experts who certify that the complaints have merit before they are filed. And lawyers who bring frivolous cases should face tough, mandatory sanctions, with a "three strikes" penalty.

The solution isn't to restrict access to the courts, or to cap awards. Those steps wouldn't stop the bad cases. They would leave modest families like the Campbells struggling to pay for the negligence of others.

But it isn't just about money. Lawsuits often have results that reach well beyond the courtroom. Just one example of many: because of the Campbells' case, hospitals in North Carolina began changing their procedures to make sure the kind of mistakes that injured Jennifer were less likely to happen again. By any measure, you can certainly call that justice.

Edwards, U.S. senator for North Carolina and a Democratic candidate for president, practiced law for nearly 20 years.

GRAPHIC: PHOTO: Justice for all: Edwards's belief in the law is part of his stump speech

LOAD-DATE: December 9, 2003

Presidential Campaign Press Materials

February 9, 2000

GEORGE W. BUSH

TYPE: PRESS RELEASE

LENGTH: 528 words

HEADLINE: GOVERNOR BUSH PROPOSES BOLD AGENDA TO REFORM AMERICA'S CIVIL JUSTICE SYSTEM

BODY:
GOVERNOR BUSH PROPOSES BOLD AGENDA TO REFORM AMERICA,S CIVIL JUSTICE SYSTEM Vows to restore fairness and balance to the legal system

NEWBERRY, SC - Promising to bring order in the courts, Texas Governor George W. Bush today proposed a series of bold reforms to America s civil justice system to end costly frivolous lawsuits- He made the proposal in a roundtable discussion with small business owners.

"We need real reform of our federal courts Governor Bush said. "Too Often, Our courts aren't serving the people, they are serving the lawyers- Legitimate case's are getting lost in clogged courts. Frivolous lawsuits are threatening jobs and delaying access to the courts for these who have legitimate claims. As President, I will bring common sense to our courts and curb frivolous lawsuits,"

Governor Bush outlined five specific steps to restore fairness and balance to the legal system;

- Toughening penalties for frivolous lawsuits, including payment of the other side's legal fees. Also, if a lawyer files three junk lawsuits, he'll lose the right to appear in federal court for three years: "Three strikes and you're out" Governor Bash also proposed a Teacher Protection Act to shield teachers, principals and school board members from meritless federal lawsuits.

- A Fair Settlement Rule. Under Governor Bush's proposal, when one side rejects a reasonable offer to settle and does much worse at trial, they will have to pay the other side's trial expenses.

- Less "court-shopping It will be harder for lawyers to shop around for courts friendlier to their side of the case. No more manipulating the courts for tactical advantage.

- A Client's Bill of Rights. Lawyers, as officers of the court have an ethical duty to keep their fees reasonable. Governor Bush's plan will allow clients to challenge their lawyer's bill in federal court, and require attorneys to disclose their ethical obligation to charge reasonable fees and the potential range of those fees.

- Reasonable fees for lawyers acting on behalf of the public. Some private lawyers have made hundreds of millions of dollars in grossly excessive fees under contract with state governments. Money above and beyond reasonable fees belongs to the taxpayers. As President, Governor George W. Bush will end this abuse by extending the 'excess benefit"

provision of the tax code to private lawyers who contract with states and municipalities. The reasonableness of the fees will be determined by the standard judicial "lodestar" method of multiplying the number of hours worked by a reasonable hourly rate and appropriate risk factor.

" I am a reformer who gets results," Governor Bush added. - When I ran for Governor, I made legal reform a key part of my campaign. Once elected, I went to work riot away. I worked closely with a Democratic legislature, and we passed some of the strongest legal reforms in America. As a result, lawsuits are down. And Texans have saved nearly $ 3 billion in insurance premiums."

Governor Bush concluded: "Mat is my record, a record of results. That is my platform. And if I a-in fortunate enough to be your president, that will be my legacy.'

CONTACT: ARI FLEISHER 512-637-7777

LOAD-DATE: February 10, 2000

Austin American-Statesman (Texas)

February 10, 2000, Thursday

SECTION: News; Pg. A7

LENGTH: 643 words

HEADLINE: Bush aims at federal tort reform

BYLINE: Scott S. Greenberger

BODY:
Hoping to reinforce his new "reform" message with an issue that was a winner in his campaign for governor six years ago, Republican presidential front-runner George W. Bush on Wednesday unveiled a plan to curb frivolous federal lawsuits.

Changing the way that Texas courts assign blame and award damages in lawsuits involving civil wrongs known as torts was one of Bush's four main themes in his 1994 gubernatorial contest against Ann Richards. In 1995, he helped guide seven tort reform bills through the Texas Legislature. Although the specifics of those measures differ from Wednesday's proposal, the overarching goal is the same: make it harder for plaintiffs to win high-dollar damages against companies, doctors and insurers.

To counter Arizona Sen. John McCain's surge, the Bush campaign this week began referring to their candidate as a "reformer with results." The tort reform issue fits neatly into that theme, since Bush indisputably followed through on his 1994 campaign promise. In doing so, he overcame the trial lawyers, a powerful Democratic constituency.

"Too often, our courts aren't serving people, they are serving the lawyers," Bush said. "Frivolous lawsuits are threatening jobs and delaying access to the courts for those who have legitimate claims."

But consumer advocates worry that the changes would make it easier for businesses to get away with selling products and services that hurt people. Ralph Nader accused Bush of "cozying up to corporate power-brokers and wrongdoers" for campaign cash.

Bush's plan includes stiffer penalties for lawsuits determined by judges to be frivolous, including a "three strikes, you're out" rule for lawyers who repeatedly file such claims. It also would require parties who reject a pretrial settlement offer, and who ultimately lose their case or receive substantially less at trial, to pay the other party's costs, including legal fees. The plan would make it easier for cases to be moved from state to federal courts, which are generally viewed as friendlier to defendants.

Bush also proposed a "Client's Bill of Rights" that would allow federal courts to hear challenges to attorneys' fees. A vociferous opponent of the $3.3 billion fee that Texas paid private lawyers in the state's tobacco lawsuit, Bush would force private attorneys to return any "excessive" fees to government. He also pledged to issue an executive order prohibiting federal agencies from paying contingency fees.

In unveiling his plan at a roundtable discussion with small-business owners at Newberry College in Newberry, S.C.,

Bush argued that Texas tort reforms have saved consumers and businesses nearly $3 billion since 1995. Fewer large insurance claims have translated into lower insurance rates for consumers, businesses and doctors, he says. Business groups say the changes have boosted the Texas economy by transforming the state from the "lawsuit capital of the world" into a place where the civil justice system is predictable and consistent.

Nelson Litterst of the National Federation of Independent Business applauded the Bush plan, saying that even the threat of lawsuits can put small companies out of business. But some question the benefits of tort reform in Texas, and worry about taking it to the federal level.

"The savings are going to doctors, manufacturers and big business, but consumers are seeing very small savings if they're seeing any at all," Dan Lambe of Texas Watch, a research group, said of the 1995 changes.

Lambe referred to a recent report by former Texas Insurance Commissioner J. Robert Hunter that suggests the state's tort reform efforts have had a minimal impact on insurance rates. The report, for the Consumer Federation of America, said premiums for coverages affected by tort reform increased 8.2 percent from 1995 through 1998.

(FROM BOX)

LOAD-DATE: February 11, 2000

THREE STRIKES AND YOU'RE OUT

"As President, I will bring common sense to our courts and curb frivolous lawsuits ... if a lawyer files three junk lawsuits, he'll lose the right to appear in federal court for three years: 'Three strikes and you're out.' "

George W. Bush
Campaign Press Release
February 9, 2000

"Bush's plan includes stiffer penalties for lawsuits determined by judges to be frivolous, including a 'three strikes, you're out' rule for lawyers who repeatedly file such claims."

The Austin American-Statesman
February 10, 2000

"Frivolous lawsuits waste good people's time and hurt the real victims ... lawyers who bring frivolous cases should face tough, mandatory sanctions with a 'three strikes' penalty."

Former Sen. John Edwards
Newsweek
December 15, 2003

"Lawyers who file frivolous cases would face tough, mandatory sanctions, including a 'three strikes and you're out' provision that forbids lawyers who file three frivolous cases from bringing another suit for the next 10 years."

Sen. John Kerry
The Associated Press
October 10, 2004

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, this is one of the—this mandatory provision on line 11 is the troubling part. The change in present law is simply that if a 1-year suspension in practice is the appropriate sanction, the judge can issue whatever sanction he wants under a contempt of court citation. If a 1-year suspension doesn't make any sense, then this mandatory minimum requires it. The judge has great latitude, Mr. Chairman, on what he can do to someone who is in contempt of court. He doesn't need a mandatory suspension as part of that.

I would hope that we would defeat this amendment, allow the judge to use common sense and not force the judge to impose sanctions when the sanctions in fact violate common sense. This amendment would force the judge to violate common sense if it's an inappropriate punishment, and therefore it's inappropriate and I yield back the balance of my time.

Ms. JACKSON LEE. Mr. Chairman—would you yield?

Mr. SCOTT. I yield to the gentlelady from Texas.

Ms. JACKSON LEE. I thank the distinguished gentleman.

Let me just say that I take issue. I'd like to read in full context the statements of Senator Kerry and Senator Edwards, but I think that—I'm not sure where the 6 votes came from, but I think that this is a slap in the face of justice, and I'd hope my colleagues would consider opposing this amendment.

I agree with my colleague from Virginia that the judges already have the discretion, and frankly, that anyone who has practiced in Federal courts will now, that judges don't tolerate frivolous cases and have their own ways of sanction. This added extra burden simply closes the door of the courthouse to people who are the least empowered.

I would ask the gentleman rhetorically, and I'd be delighted—it's not my time—is whether or not we have frivolous defenses. I frankly believe that we should have equal time. Frivolous plaintiffs and petitioners, frivolous defenses, and they occur on many occasion.

So I'd ask my colleagues to consider the devastating aspect of this as it relates to an equal access to the courthouse and as well that this is redundant and repetitive because judges already have the authority. I yield back.

Mr. SCOTT. Reclaiming my time, and I would like to take the opportunity, Mr. Chairman, to offer into the record a resolution from the Conference of Chief Justices and a letter from the Judicial Conference of the United States, which says—which refers to a report that they did that makes it clear that the vast majority of Federal judges believe that the proposed changes to rule 11 will not help deter litigation abuses but will increase satellite litigation costs and delays. They point out that the bill will amend rule 11 to restore the 1983 version of the rule 11 by removing a court's discretion to impose sanctions on a frivolous filing, and by eliminating rule 11's—the present rule's safe harbor provisions.

The Judicial Conference opposed the Lawsuit Abuse Reduction Act of 2004, the predecessor to H.R. 420. The Conference based its position on the problems caused by the 1983 version of rule 11, which H.R. 420 would restore. The Conference noted these problems: one, the problems were creating a significant incentive to file unmeritorious rule 11 motions by providing a possibility of monetary penalty, endangering potential—engendering potential conflict of interest between clients and their lawyers who advised withdrawal of particular claims, but despite the client's preferences; exacerbation of tensions between lawyers; and providing little incentive and perhaps a distinct disincentive to abandon or withdrawal and thereby admit error on pleadings or a claim after determining that it was no longer supported by the facts.

Finally, the judges' experience of the 1993 version of the rule 11, which would point to marked decline in rule 11 satellite litigation without any noticeable increase in the number of frivolous filings, H.R. 420 would effectively reinstate the 1983 version of the rule proved so contentious and wasted so much time and energy of the bench and bar.

I'd ask unanimous consent that these two letters, Mr. Chairman, be entered into the record.

Chairman SENSENBRENNER. Without objection.

[The information follows:]

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEONIDAS RALPH MECHAM
Secretary

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

May 17, 2005

Honorable F. James Sensenbrenner, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am pleased to provide you with a copy of the Federal Judicial Center's *Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure*. The report was prepared at the request of the Judicial Conference's Advisory Committee on Civil Rules to provide information as part of the Advisory Committee's study of proposals introduced in Congress to amend Rule 11. The report makes it clear that the vast majority of federal district judges believe that the proposed changes to Rule 11 will not help deter litigation abuses, but will increase satellite litigation, costs, and delays.

Since 1995, legislation has regularly been introduced that would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The 1993 change followed several years of examination and was made on the Judicial Conference's recommendation, with the Supreme Court's approval, and after Congressional review. The 1983 provision was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address and generated wasteful satellite litigation that had little to do with the merits of a case. On January 26, 2005, Representative Lamar Smith introduced the Lawsuit Abuse Reduction Act of 2005 (H.R. 420). The bill would restore the 1983 version of Rule 11, undoing the amendments to Rule 11 that took effect in December 1993. The enclosed report shows a remarkable consensus among federal district judges supporting existing Rule 11 and opposing its amendment.

In 1983, Rule 11 was amended to require judges to impose sanctions for violations that could include attorneys' fees. The 1983 version of Rule 11 was intended to address certain improper litigation tactics by providing some punishment and deterrence. The effect was almost the opposite. The 1983 rule presented attorneys with financial incentives to file a sanction motion. The rule was abused by resourceful lawyers. A "cottage industry" developed that churned tremendously wasteful satellite sanctions litigation that had everything to do with

strategic gamesmanship and little to do with the underlying claims or with the behavior the rule attempted to regulate. Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion. The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism.

The 1993 amendments to Rule 11 were designed to remedy major problems shown by experience with the 1983 rule, allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions, but still provide a meaningful sanction for frivolous pleadings. The rule establishes a "safe harbor," providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. Rule 11 does not supplant other remedial actions available to sanction an attorney for a frivolous filing, including punishing the attorney for contempt, employing sanctions under 28 U.S.C. § 1927 for "vexatious" multiplication of proceedings, or initiating an independent action for malicious prosecution or abuse of process.

H.R. 420 would amend Rule 11 to restore the 1983 version, by removing a court's discretion to impose sanctions on a frivolous filing and by eliminating the rule's safe-harbor provisions. The Judicial Conference opposed the Lawsuit Abuse Reduction Act of 2004 (H.R. 4571), the predecessor of H.R. 420. The Judicial Conference based its position on the problems caused by the 1983 version of Rule 11, which H.R. 420 would restore. The Judicial Conference noted that these problems included:

- creating a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty;
- engendering potential conflict of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;
- exacerbating tensions between lawyers; and
- providing little incentive, and perhaps a distinct disincentive, to abandon or withdraw – and thereby admit error on – a pleading or claim after determining that it no longer was supportable in law or fact.

The Advisory Committee on Civil Rules regularly monitors the operation of the Civil Rules, inviting the bench, bar, and public to inform it of any problems. The Committee stands ready to address any deficiency in the rules, including Rule 11. Although the Committee is mindful of Congressional concerns about frivolous filings addressed in pending legislation, the Committee has not received any negative comments or complaints on existing Rule 11 from the bench, bar, or public. To gain a clearer picture of the operation of Rule 11, the Committee asked the Federal Judicial Center to survey the experience of the trial judges who must apply the rules. The survey sought responses from judges with experience under the 1983 version as well as judges serving only after the 1993 version was adopted. The results of the Federal Judicial

Center's survey show that judges strongly believe that Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The survey's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicate that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 or H.R. 420);
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;
- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and
- 72 percent believe that addressing sanctions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The judges' experiences with the 1993 version of Rule 11 point to a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. H.R. 420 would effectively reinstate the 1983 version of Rule 11 that proved so contentious and wasted so much time and energy of the bar and bench. Rule 11 in its present form has proven effective and should not be revised. The findings of the Federal Judicial Center underscore the federal district judges' united opposition to legislation amending Rule 11. I urge you on behalf of the Judicial Conference to oppose legislation amending Rule 11.

The Judicial Conference appreciates your consideration of its views. If you have any questions, please feel to contact me. I may be reached at (202) 273-3000. If you prefer, you may have your staff contact Karen Kremer, Counsel, Office of Legislative Affairs, Administrative Office of the United States Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

Enclosure

cc: Honorable John Conyers, Jr., Ranking Democrat
Members of the Committee on the Judiciary of the House of Representatives

CONFERENCE OF CHIEF JUSTICES

Resolution 26

In Opposition to Federal Usurpation of State Court Authority as Guaranteed by the United States Constitution

WHEREAS, the Conference of Chief Justices has long committed itself to protect and strengthen independent state judicial proceedings as a central part of the federal system of American Government; and

WHEREAS, the Conference has consistently taken strong issue with any efforts that threaten the independence and integrity of state judicial systems; and

WHEREAS, the United States House of Representatives approved the "Lawsuit Abuse Reduction Act of 2004" (H.R. 4571) in the 108th Congress, which contravenes the fundamental principles of federalism; and

WHEREAS, Section 3 of H.R. 4571, which would mandate a new Federal Rule 11 in all state litigation where a state court determines, on motion, that the action "affects interstate commerce," may violate the authority of state governments and courts guaranteed by the United States Constitution; and

WHEREAS, Section 4 would establish federal mandated venue and jurisdiction rules for all state personal injury cases, and such comprehensive reforms in state litigation should occur in and through state courts and legislatures which are situated to determine and control the impact of reform within their own communities;

NOW, THEREFORE, BE IT RESOLVED that the Conference strongly opposes legislation like H.R. 4571 that would drastically change the traditional state role in determining ethics, jurisdiction and venue rules in state litigation.

Adopted as proposed by the Professionalism and Competence of the Bar Committee of the Conference of Chief Justices at the 28th Midyear Meeting on January 26 2005.

Mr. SCOTT. And I yield back the balance of my time.

Mr. WEINER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.

Mr. WEINER. Mr. Chairman, I'd be inclined to support Mr. Keller's thrust, except I'm concerned that—I'm not quite sure I understand why this isn't going to lead to a whole spate of additional litigation around these rule 11 proceedings. If all of these things now have a mandatory penalty and the base bill takes away discretion from a judge, you are going to have—and this was described briefly by Mr. Scott—it seems to me that you're going to have all kinds of litigation within litigation over rule 11 proceedings. Whereas now that a judge can essentially say what Ms. Jackson

Lee suggested, "This is baloney, I'm dismissing this claim because it's frivolous. Let's move on." Or allow a safe harbor where a lawyer could withdraw a claim if they had second thoughts about it.

It seems we are taking mandatory sanctions and then making them even more final with Mr. Keller's proposed amendment, and I think it's just going to lead people just to dig in and litigate to the Nth degree every one of these rule 11 proceedings. And I'm not sure that that's going to do anything other than just clog up the courts with a whole different set of litigation.

Now, if we didn't have H.R. 420 in front of us and Mr. Keller said, "I want to follow the quotes that are on that board from some other famous people," and say, "Listen, let's have a three-strikes-and-you're-out," I would be inclined to say, you know what? That's not a bad idea. If you have discretion, and when people are showing that discretion, they continually rule that at a particular attorney is operating outside of rule 11, that seems like okay. But if you have a scenario like this, I think what's going to wind up happening with the bill, even without Mr. Keller's amendment, is you are going to have all kinds of litigation based on rule 11 proceedings.

And you know what? We have a certain level of experience with this in the pre-1993 rules, where we kind of experimented with this ethos to see how it would work, and I think the country decided, you know what, this isn't working so great; let's go back to the idea of giving some discretion to judges.

The irony is just too sweet for me. You know, here it is the Republicans in the Senate and the President of the United States are putting in all of these judges that suit their political ideology, and now they're saying, we don't trust them at all to make any of these decisions. We're going to put in guys that we like. We're going to say how great they are, their great jurisprudence they've demonstrated, what great temperament they have, and at every possibility we, with mandatory minimums or provisions like this that take away any discretion from a judge to run his or her courtroom, we seem to be saying we don't trust them to do a very good job.

Why don't we create good judges? Why don't we have good laws as best we can, and then let's let these judges kind of figure out the way to deal with the sanctions within their courtroom, because they might know much better than we, and I tell you something, I think that the Keller amendment is going to reinforce what is a defect in this bill, which is that we take away discretion from the people that should have it, and we take away the right of someone sitting on the bench to have an expeditious proceeding, and that doesn't even—we're not even touching on the whole idea of like, you know, everything is novel to begin with, every new case creates a certain level of novelty to begin with.

And if people were afraid to bring novel claims, then we wouldn't—perhaps no one would have thought to sue for civil rights violations, no one would have thought to sue for the tobacco lobby or others that turned out to be ground-breaking proceedings that now everyone believes are not frivolous at all, but actually make some sense.

So let's give back the responsibility for the courts to the judges and——

Mr. CANNON. Would the gentleman yield?

Mr. WEINER. Yeah. Let me just make one rhetorical flourish if you don't mind.

I also think that we should acknowledge as elected officials that a couple of hundred thousand people vote for us, that we think they're smart enough to figure out. Why is it that we assume they're too dumb to figure anything else out? Why is the only decision we think they're right about is the one that put us in Congress, and we don't trust the idea that you can have a jury that knows what they're doing or a judge that knows what they're doing?

And I'll be glad to yield to my friend from Utah.

Mr. CANNON. I thank the gentleman. Three quick points. In the first place, in response to Ms. Jackson Lee's question, as I understand this bill, it does deal with defenses, frivolous defenses as well as other things.

Mr. Weiner, I'm deeply concerned about the same kinds of things you're concerned about, and suspect that this will actually lead to a great deal of litigation, I think you said litigation to the Nth degree, and that is—that's a possibility. The problem is that judges have had the discretion to do fines under rule 11 for a very long time, and almost none have happened. And so I'm concerned about getting to a point where we motivate them to be thinking about this and then rethink the rule at some time in the future. But there are many frivolous lawsuits that don't have a response.

And then finally, I would just point out to the gentleman that we're actually not worried about the new judges that this Administration would appoint, but the judges that have been appointed in the past, some by both Administrations of both parties. Thank you.

Mr. WEINER. If I can have unanimous consent of an additional minute just to respond?

Chairman SENSENBRENNER. Without objection.

Mr. WEINER. Let me just say it's—I guess so then it was last year's citizens that weren't smart enough to figure out, but this year's have finally sorted it out in electing all of us.

But let me just say this. You know, there is a couple of ways that you can look at the idea that there aren't a lot of sanctions under rule 11. Call me crazy. One of the ways might be that a judge in a courtroom decided, you know what, this wasn't a frivolous case? You have different interpretations of the outcome. You have different interpretations of the evidence. But you do have judges that might say there aren't that many frivolous cases.

Now it could just be—call me crazy—that there aren't as many frivolous lawsuits as you and the President and some would have us believe, and that's further argument for why we don't need this bill, and I'll be glad to——

Chairman SENSENBRENNER. The time of the gentleman has once again expired.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman. If I could try to put a different kind of garnish on this rhetorical flourish.

I actually think strengthening rule 11 is the right way to go. The majority party wants to go every which way in the name of dealing with, quote, "frivolous lawsuit." They want to remove State causes of action. They want to put arbitrary limits on damages. They want to preempt courts from jurisdiction. It seems to me the concept of

rule 11 and strengthening it is the right way to deal with what I am sure are frivolous lawsuits, frivolous defenses, frivolous motions. The Keller amendment makes sense to me in the form that it's written now because in the end of the day it may be a mandatory three strikes, but it is the judge who in his or her discretion will decide whether or not rule 11 has been violated, and consequences will only flow from those judicial findings.

And by the way, for the people who file frivolous rule 11 motions, they are subject to a rule 11 motion. So there is a deterrent to frivolous rule 11 motions.

What I disagree with and what I think the majority party and my friend the gentleman from Texas are doing here, is they are—instead of focusing on strengthening rule 11 and creating a system of sanctions for violations of rule 11, all of a sudden they're grabbing all kinds of other things. We should be regulating conduct in the Federal courts. To go into State cases that happen to affect interstate commerce, which is—and the only reason you have that limitation is because constitutionally the bill would be presumably flawed constitutionally if you didn't put such a limit in. And to get into every single State legislature's, State judicial council's effort to regulate the filing of frivolous State actions and frivolous State motions makes no sense to me whatsoever.

And to regulate what the sanction should be and how many sanctions there are at the State level makes no sense to me at all, that that's an appropriate area for the States. Once again the party of State's rights is federalizing everything they can think of for no reason.

And then getting into what State venue rules for personal injury cases, why in heaven's name are we doing that? What is the purpose. I came in late. Maybe in the original arguments there was a series of fact-based justifications for the Federal Congress intruding on State venue rules, but I don't think so.

I'll vote for the Keller amendment because I think it makes sense, but I'm sure thinking this bill as a whole is a massive intrusion on historic State court prerogatives, and I also will predict that this bill in this form will never survive in the other body, and secondly, that you'll have missed an opportunity to deal with strengthening rule 11 as the logical deterrent to frivolous action instead of all these efforts to wipe away jurisdiction and preempt—provide Federal preemption, all the other overreaches that the majority party seems to make on these issue, and you're going to lose the opportunity to deal with what to me makes the most sense, which is providing a meaningful rule 11 for Federal actions.

I yield back.

Chairman SENSENBRENNER. The question is on the amendment—the gentleman from Florida, Mr. Wexler?

Mr. WEXLER. Just seems to be a little bit of a discrepancy and I was wondering if I could ask Mr. Keller if he could clear it up. The gentleman from Utah indicated that it was his belief that the amendment does apply equally—I don't want to paraphrase him, but I believe he said he believes the amendment does apply equally to three frivolous defenses as it would to three frivolous claims by plaintiffs.

Mr. KELLER. Would the gentleman yield?

Mr. WEXLER. Yes.

Mr. KELLER. Yes. Rule 11, section (b)(2) is unchanged by my amendment, and yes, it applies to defenses as well, so a defense attorney who repeatedly files frivolous defenses would also be subject to the same suspension.

Mr. WEXLER. Under the same set of rules?

Mr. KELLER. Same set, identical.

Mr. WEXLER. Okay. Thank you.

Mr. GOHMERT. Mr. Chairman, if I could move to strike the last word very——

Chairman SENSENBRENNER. The gentleman from Texas recognized for 5 minutes.

Mr. GOHMERT. This will be very brief. Rule 11 says if a pleading, motion or other paper is signed in violation of this rule, it applies to pleadings filed in the lawsuit, to motions. I appreciate the gentleman from New York's repeated invitation to call him crazy, but—— [Laughter.]

But if one looks at this, you realize it applies to defense motions. He had a concern that it would create more litigation when someone was sanctioned for filing a frivolous suit the third time or frivolous pleading the third time, and the fact is that anybody that files one of those in a case that's clearly frivolous will subject themselves to further sanction.

And I can tell you from State court discovery rules, where it took me three times of sanctioning people for discovery abuse to where people didn't do it any more. And it cut out tremendous amount of frivolous motions, and they were from both plaintiff and defense side. This will help cut out unnecessary filings from both sides. And I support this amendment and original motion.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Florida, Mr. Keller. All those in favor will say aye.

Opposed no?

The ayes appear to have it. The ayes have it. The amendment is agreed to.

For what purpose does the gentleman from Texas, Mr. Smith, seek recognition?

Mr. SMITH OF TEXAS. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 420 offered by Mr. Smith of Texas. Page 2, strike line 2 and all that follows through line 12 on page 3, and insert the following. Section 2——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from Texas is recognized for 5 minutes.

[The amendment follows:]

AMENDMENT TO H.R. 420

OFFERED BY MR. SMITH OF TEXAS

Page 2, strike line 2 and all that follows through line 12 on page 3 and insert the following:.

SEC. 2. ATTORNEY ACCOUNTABILITY.

Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) by amending the first sentence to read as follows: "If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the attorney, law firm, or parties that have violated this subdivision or are responsible for the violation, an appropriate sanction, which may include an order to pay the other party or parties for the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper, that is the subject of the violation, including a reasonable attorney's fee.";

(2) in paragraph (1)(A)—

(A) by striking "Rule 5" and all that follows through "corrected." and inserting "Rule 5."; and

(B) by striking "the court may award" and inserting "the court shall award"; and

(3) in paragraph (2), by striking "shall be limited to what is sufficient" and all that follows through the end of the paragraph (including subparagraphs (A) and (B)) and inserting "shall be sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, and to compensate the parties that were injured by such conduct. The sanction may consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the filing of the pleading, motion, or other paper that is the subject of the violation, including a reasonable attorney's fee.".

Page 3, line 17, insert "substantially" before "affects".

Page 3, line 21, insert "substantially" before "affects".

Page 4, line 11, strike "or".

Page 4, line 14, strike "or".

Page 4, line 16, strike the period and insert ", if the defendant is a corporation; or".

Page 4, after line 16 insert the following:

(4) the defendant resides, if the defendant is an individual.

Mr. SMITH OF TEXAS. Mr. Chairman, this amendment will improve the bill in several ways. First, it makes a technical fix in the wording of section 2 to clarify that appropriate sanctions against the filer of a frivolous lawsuit may include an order to pay the other party or parties for their reasonable expenses incurred as a direct result of the filing of their frivolous lawsuit.

Second, the amendment excludes discovery requests and responses from being sanctioned under rule 11. Some sanctions for discovery abuse are already available under current law in Federal Rule 37. To include discovery abuse under rule 11 sanctions would be duplicative in many instances and cause unnecessary confusion.

Third, it will amend section 3 of the bill so that mandatory sanctions will apply to frivolous lawsuits that a State judge determines,

quote, "substantially affects," end quote, interstate commerce. This change was made to track the language used in the most recent Supreme Court decisions regarding Congress's interstate commerce powers.

Last, section 4 is amended to clarify that if a defendant is an individual person rather than a corporation, that defendant may be sued where they reside among the other appropriate sites for a lawsuit as provided in the underlying bill.

Mr. Chairman, I would also like to have unanimous consent to add the names of over 120 organizations that have endorsed this underlying bill, most recently the American Medical Association.

[The information follows:]

Lawsuit Abuse Reform Coalition

1101 Connecticut Avenue, NW, Suite 400, Washington, D.C. 20036
202-682-1163 (phone) 202-682-1022 (fax)

Members as of June 2, 2005

Air Conditioning Contractors of America
Advanced Medical Technology Association
Alabama Civil Justice Reform Committee
American Apparel and Footwear Association
American Automotive Leasing Association
American Boiler Manufacturers Association
American Business Conference
American Council of Engineering Companies
American Home Furnishing Alliance
American Insurance Association
American International Automobile Dealers Association
American Legislative Exchange Council
American Machine Tool Distributors Association
American Rental Association
American Road & Transportation Builders Association
American Supply Association
American Trucking Associations
American Tort Reform Association
American Veterinary Distributors Association
American Wholesale Marketers Association
Associated Builders & Contractors
Associated Equipment Distributors
Associated Wire Rope Fabricators
Association for High Technology Distribution
Association of Equipment Manufacturers
Association of Pool & Spa Professionals
AMT—The Association for Manufacturing Technology
Automotive Aftermarket Industry Association
Aviation Distributors & Manufacturers Association
Bay Area Citizens Against Lawsuit Abuse
Central California Citizens Against Lawsuit Abuse
Citizens Against Lawsuit Abuse of Central Texas
Civil Justice Association of California
Cleaning Equipment Trade Association
Coalition for Uniform Product Liability Law
Colorado Civil Justice League
Construction Industry Round Table
Copper & Brass Service Center Association
East Texans Against Lawsuit Abuse
The Employers Association
Equipment Leasing Association
Healthcare Distribution Management Association

Gasses and Welding Distributor Association
Heating, Air Conditioning & Refrigeration Distributors International Association
Illinois Civil Justice League
Illinois Lawsuit Abuse Watch
Independent Electrical Contractors
Independent Insurance Agents & Brokers of America, Inc.
Independent Sealing Distributors
Industrial Compressor Distributors Association
Industrial Supply Association
International Association of Plastics Distributors
International Foodservice Distributors Association
International Furniture Suppliers Association
International Housewares Association
International Safety Equipment Association
International Sanitary Supply Association
International Truck Parts Association
Jackson Area Manufacturers Association
Lawn and Garden Marketing and Distribution Association
Los Angeles Citizens Against Lawsuit Abuse
Los Angeles Fastener Association
Manufactured Housing Institute
Manufacturers' Association of Northwest Pennsylvania
Material Handling Equipment Distributors Association
Mechanical Contractors Association of America
Metals Service Center Institute
Michigan Lawsuit Abuse Watch
Mississippi Manufacturers Association
Montana Chamber of Commerce/Montana Liability Coalition
Motor & Equipment Manufacturers Association
Motorcycle Industry Council
National Association of Chemical Distributors
National Association of Convenience Stores
National Association of Electrical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Mutual Insurance Companies
National Association of Wholesaler-Distributors
National Council of Chain Restaurants of the National Retail Federation
National Electrical Contractors Association
National Federation of Independent Business
National Marine Distributors Association
National Paint & Coatings Association
National Pest Management Association
National Propane Gas Association
National Restaurant Association
NRF—The National Retail Federation
National Roofing Contractors Association
National Shooting Sports Foundation
NAHAD—The Association for Hose & Accessories Distributors
NPES—The Association for Suppliers of Printing, Publishing

and Converting Technologies
National Small Business Association
North American Horticultural Supply Association
Northern California Citizens Against Lawsuit Abuse
The Oklahoma State Chamber
Orange County Citizens Against Lawsuit Abuse
Outdoor Power Equipment & Engine Service Association
Outdoor Power Equipment Institute
Outdoor Power Equipment Aftermarket Association
Packaging Machinery Manufacturers Institute
Pet Industry Distributors Association
Petroleum Marketers Association of America
Plumbing-Heating-Cooling Contractors Association
Post Card and Souvenir Distributors Association
Printing Industries of America
Property Casualty Insurers Association of America
Rio Grande Valley Partnership
Rubber Manufacturers Association
Safety Equipment Distributors Association, Inc
San Diego County Citizens Against Lawsuit Abuse
San Diego Employers Association
Scaffold Industry Association
Security Hardware Distributors Association
Silicon Valley Citizens Against Lawsuit Abuse
Small Business Legislative Council
SMC Business Councils
Specialty Equipment Market Association
Society of American Florists
Texas Civil Justice League
Textile Care Allied Trades Association
Tire Industry Association
Truck Renting and Leasing Association
U.S. Chamber of Commerce
U.S. Chamber Institute for Legal Reform
Valve Manufacturers Association
Waste Equipment Technology Association
West Virginia Motor Truck Association
Western Association of Fastener Distributors
Wood Machinery Manufacturers of America

The Lawsuit Abuse Reform Coalition (LARC) was formed by a broad spectrum of organizations representing small businesses to work for enactment of the federal Lawsuit Abuse Reduction Act (LARA), H.R. 420. This common sense legislation would help put an end to personal injury lawyers gaming the civil justice system by filing frivolous lawsuits and forum shopping abuses that threaten American businesses and their employees. The American Tort Reform Association serves as the Executive Secretariat for LARC. Information about LARC can be found at www.atra.org.

Chairman SENSENBRENNER. Without objection.

Mr. SMITH OF TEXAS. Mr. Chairman, finally, just to alleviate the concerns of some of my colleagues and also to set the record straight, I'd like to just read a short finding of a 1990 poll that was taken by the Federal Judicial Center. This was a survey of 751 Federal judges, and it found that an overwhelming majority of Federal judges believed, based on their experience under both a weaker and a stronger rule 11, that a stronger rule 11 did not impede development of the law, 95 percent; the benefits of the rule outweighed any additional requirement of judicial time, 72 percent; the stronger version of rule 11 had a positive effect on litigation in the Federal courts, 81 percent; and the rule should be retained in its then current form, 80 percent. Note that of the 751 judges surveyed in 1990, 583 responded in this very positive way.

Mr. SCOTT. Would the gentleman yield? What year was that?

Mr. SMITH OF TEXAS. That was 1990. And if I can anticipate maybe the next question that's coming, Mr. Chairman, and as long as I have time remaining, let me say that the Federal Judicial Center's recent 2005 survey of U.S. district court judges will be misused by opponents of legal reform as the evidence of frivolous lawsuits are not a problem. However, the survey of the Federal Judicial Center shows nothing of the sort, and let me give a little bit of historical background here.

The Lawsuit Abuse Reduction Act would largely restore Federal Rule of Civil Procedure 11 to what it was before 1993. Prior to the adoption of weakening amendments in that year, which eliminated mandatory and serious sanctions against those who file frivolous lawsuits, rule 11 was widely popular among Federal judges, and it served to significantly limit lawsuit abuse. And in regard to the 2005 survey, the most recent one, only 278 judges responded to that Federal Judicial Center's latest survey. Half of the judges surveyed and over half of the judges that responded to the survey had no experience with the stronger version of rule 11. They had nothing to compare it to.

I would also say that that survey—and this skewed the results—included specifically a sample of over 200 district judges who were appointed to the bench after January 1, 1992. So that skewed the results as well.

Mr. Chairman, I will yield back——

Mr. BERMAN. Would the gentleman yield?

Mr. SMITH OF TEXAS.—the balance of my time.

Mr. BERMAN. Would the gentleman yield?

Mr. SMITH OF TEXAS. Mr. Chairman, I will yield to the gentleman from California, Mr. Berman.

Mr. BERMAN. Did either the 1990 survey or the 2005 survey indicate that the Federal judges believed that Federal Rule 11, which only applied to Federal cases, should be mandated on every State in the country and all State courts involving any lawsuit——

Mr. SMITH OF TEXAS. I'll reclaim my time——

Mr. BERMAN.—affecting interstate commerce?

Mr. SMITH OF TEXAS.—and say to the gentleman from California, the survey questions were pretty clear and the results of the judges' feelings were pretty clear, too. There was no question that resulted in less than about an 80 percent positive reaction to rule 11——

Mr. BERMAN. I'll take that as an answer that they did not——

Mr. SMITH OF TEXAS. I don't know whether they polled on that specific question or not.

Mr. SCOTT. Will the gentleman yield? Will the gentleman yield?

Mr. SMITH OF TEXAS. I'll be happy to yield to the gentleman from Virginia, yes.

Mr. SCOTT. Maybe I missed something. You said the 1990 survey—if it was taken in 1990, they wouldn't have had an opportunity to compare the 1983 version to the 1993 version. The 2005 survey presumably allows them to compare both the 1983 and '93. The overwhelming preference was to leave——

Chairman SENSENBRENNER. The time of the gentleman has expired. Without objection, he will be given an additional minute.

Mr. SCOTT. Thank you. The overwhelming preference is to leave things as they are, having been improved in 1993. Wouldn't the 1995 survey, with a lot of judges presumably having experience with both rules, be more valuable?

Mr. SMITH OF TEXAS. Let me reclaim my time. That's exactly the point I was making a while ago. In the 1995 survey, by specific direction, there were 200 judges that had no experience whatsoever with the former strong interpretation of rule 11, and that's why that result was totally skewed, and that's why the earlier survey was much more accurate. And I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Texas, Mr. Smith. Those in favor will say aye? Opposed, no?

The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments? The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

Mr. NADLER. This is the one that says "ban on concealment."

The CLERK. Amendment to H.R. 420, offered by Mr. Nadler of New York. At the end of the bill, add the following new section: Section-Ban on Concealment of Unlawful Conduct. (1) In General.—In any case concerning rule 11——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from New York will be recognized for 5 minutes.

[The amendment follows:]

Amendment to H.R. 420
Offered by Mr. Nadler of New York

At the end of the bill, add the following new section:

Sec. __. BAN ON CONCEALMENT OF UNLAWFUL CONDUCT.

(1) In General.—In any case concerning Rule 11 or forum shopping, a court may not order that a court record be sealed or subjected to a protective order, or that access to that record be otherwise restricted, unless the court makes a finding of fact that identifies the interest that justifies the order and determines that that interest outweighs any interest in the public health and safety that the court determines would be served by not sealing or restricting the court record.

Mr. NADLER. Thank you. Mr. Chairman, this is—this is similar to—it's a modified version of the amendment I've offered the last few years, which the Chairman supported not last year but the year before last. Very often in civil litigation, the company may have an unsafe product or an unsafe procedure, and rather than go to trial, the company settles with the plaintiff. The company usually pays the plaintiff a certain amount of money because the plaintiff was injured by this unsafe product. Many times the condition of the settlement is that the records will be sealed and no one will ever talk about it. So both the plaintiff and the defendant go to the judge and say, Your Honor, we have a settlement to the case, and we both ask that you seal the record, and the judge will order the record sealed because both cases have asked—both sides have asked for it.

Unfortunately, this often perpetuates a situation where the unsafe product is continued to be marketed and nothing changes because the company making the unsafe profit—product has, in effect, bought into a cover-up. This type of settlement in secrecy often keeps vital health and safety information out of the public's reach. It leads to more needless injuries and deaths caused by defective products.

Secrecy orders should not be enforced unless they meet stringent standards to protect the public interest. This amendment is tailored to address the problem.

Now, it is different from last year's amendment. Last year's amendment required that a judge in the case concerning rule 11 must make a finding of fact where a gag order is requested, and if he finds that the privacy interests outweigh—that the privacy interest outweighs the public interest, then the judge must allow the gag order and the secrecy.

Here it says—in this amendment we've said that the court may not order that a court record be sealed or subjected to a protective order unless the court makes a finding of fact that identifies the interest that justifies the order and determines that that interest outweighs any interest in the public health and safety that the court determines would be served by not sealing or restricting the court record.

So we've made the amendment somewhat more restrictive than last year's amendment after some discussions with Mr. Smith. This does not prohibit the sealing of the record. This simply says that if you want the record sealed, the judge takes a look at the interest

why you say the record should be sealed, and at any public interest for public health and safety, limited to public health and safety, and he makes a determination which outweighs the other. And I think it's in the public interest, and I would hope that the amendment could be supported.

Mr. SMITH OF TEXAS. Would the gentleman yield?

Mr. NADLER. I will.

Mr. SMITH OF TEXAS. Mr. Chairman, I just want to say that I think the gentleman from New York makes a number of good points, or at least a sufficiently number of good points so that he and I can come to an agreement on an amendment that might be acceptable to the Chairman between now and the floor. And so I appreciate the gentleman withdrawing the amendment and look forward to working him—with him in good faith to a good resolution.

Mr. NADLER. Well, thank you. Reclaiming my time, Mr. Smith makes the assumption that I will withdraw the amendment. It is indeed a good assumption. On that understanding that we'll work on it between now and the floor, I will withdraw the amendment, and I thank the gentleman.

Chairman SENSENBRENNER. And before the amendment is withdrawn, let the Chair state that he's amenable to helping the two gentlemen work it out.

Mr. NADLER. I appreciate that, sir.

Chairman SENSENBRENNER. The amendment is withdrawn.

Are there further amendments? The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 420, offered by Mr. Scott of Virginia. At the end of the bill, add the following new section: Sectionpresumption of Rule 11 Violation for Repeatedly Relitigating Same Issue. Whenever a party attempts to——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read, and the gentleman from Virginia is recognized for 5 minutes.

[The amendment follows:]

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AMENDMENT TO H.R. 420

OFFERED BY MR. SCOTT OF VIRGINIA

At the end of the bill, add the following new section:

SEC. ___. PRESUMPTION OF RULE 11 VIOLATION FOR REPEATEDLY RELITIGATING SAME ISSUE.

Whenever a party attempts to litigate, in any forum, an issue that the party has already litigated and lost on the merits on 3 consecutive prior occasions, ~~in that forum or any other forum,~~ there shall be a rebuttable presumption that the attempt is in violation of Rule 11 of the Federal Rules of Civil Procedure.

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May 18, 2005 (9:44 AM)

Mr. SCOTT. Mr. Chairman, a lot has been said about the increase in frivolous lawsuits. I offer this amendment to ensure that we truly rein in frivolous lawsuits without harming the ability of legitimate cases to be brought and to actually ascertain whether we're serious about frivolous lawsuits.

A few months ago, a national spotlight was focused on a case in which the defendant had successfully defended himself—his case 19 separate times and survived multiple court reviews, all with judgments in his favor. However, the plaintiffs continued to retry the same case, forcing the defendant to repeatedly defend himself and expend huge amounts of time and money for his defense.

Mr. Chairman, that case is perhaps the best example of why this amendment should be adopted. When a case has been decided on the merits numerous times and each time the plaintiff receives an adverse decision, at some point the decision should be taken as conclusive. Bringing the case yet another time in another court is simply an abuse. It is a waste of the court's time and resources, and it is unfair to the person who has repeatedly won the case, and yet is again required to defend it, expending even more time and money.

Therefore, I propose that after three consecutive adverse decisions on the merits, a person attempting to file yet another claim on the same issue be saddled with a rebuttable presumption of a rule 11 violation.

Now, it's important to note that this presumption is rebuttable because we want to allow common sense in appropriate circumstances. But if we are going to prevent lawsuit abuse, we ought not allow an innocent victim to be subjected to unnecessary and repeat litigation time and time again.

I urge my colleagues to support this amendment.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH OF TEXAS. Mr. Chairman, first of all, let me compliment the gentleman from Virginia for a particularly creative amendment. It is so creative, in fact, that it has caught the Chairman's attention, and he recommends that we accept the amendment, and I will go along with his recommendation.

Mr. Chairman, I yield back the balance of my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye? Those opposed, no?

The ayes appear to have it. The ayes have it, and the amendment is agreed to.

Are there further amendments? If there are—the gentleman from New York, Mr. Nadler.

Mr. NADLER. Yes, I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the other amendment at the desk.

The CLERK. Amendment to H.R. 420, offered by Mr. Nadler. At the end of the bill, add the following new section: Section-Enhanced Sanctions for Document Destruction. (a) In General.—Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and high relevant to, that proceeding—(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under rule 37 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and (2) shall be held in——

Mr. SMITH OF TEXAS. Mr. Chairman, I'll reserve a point of order.

Chairman SENSENBRENNER. Okay. A point of order is reserved. Without objection, the amendment is considered as read and subject to the reservation.

[The amendment follows:]

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AMENDMENT TO H.R. 420

OFFERED BY MR. Nadler

At the end of the bill, add the following new section:

SECTION ___. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.

(a) IN GENERAL.—Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding—

(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under Rule 37 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and

(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.

(b) APPLICABILITY.—This section applies to any court proceeding in any Federal or State court.

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May 17, 2005 (1:02 PM)

Chairman SENSENBRENNER. The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, in this bill that deals with lawsuit abuse, this is a type of abuse in lawsuits that can be very destructive. When corporations knowingly destroy documents and take actions to hide evidence of their wrongful conduct, they must be held accountable. Delays during litigation provide ample opportunities for wrongdoers to destroy documents that are essential to proving the claims against them. Because this conduct can result in the complete inability to hold these defendants accountable for their wrongful acts,

parties that engage in such flagrantly bad conduct, destroying relevant and incriminating documents, must be severely sanctioned.

The document destruction amendment to H.R. 420 would provide mandatory sanctions to anyone who hinders a court proceeding by intentionally destroying documents relating to that proceeding.

Consider some of the examples where, once a corporation became aware of the claims against it and the information sought by the claimant, they knowingly destroyed documents, for example, Enron. Enron allowed corporate executives to sell stock options at huge profit while prohibiting employees from diversifying their 401(k) investments and conspired to hide financial information. This resulted in the $1.3 billion loss to thousands of employees. Despite engaging in this conduct, company executives shredded documents and destroyed evidence of their actions in an attempt to avoid culpability.

Arthur Andersen. The accounting company Arthur Andersen was caught destroying documents in a class action case filed in Texas against Enron by retirees of Enron who were losing their pensions. Retirees had to endure a discovery delay of near one and a half years because of the special rules that apply to securities lawsuits. It was during this delay that Arthur Andersen deliberately destroyed key documents necessary for the employees to prove their case.

WorldCom. In the case of WorldCom, the Securities and Exchange Commission learned from their experiences with the Enron case and hired a corporate monitor in order to reduce the chance that key documents would be destroyed. "'On day one, we filed the lawsuit against WorldCom, and on day two, we forged an agreement for a corporate monitor,' Mr. Breslin said. We wanted to react to some of our experiences at Enron. We wanted to make sure there was no document destruction in WorldCom and no excessive compensation paid to executives at the same time." That's a quote from the New York Law Journal of October 7 of last year.

So in all these cases we see deliberate destruction of documents while the SEC's spending a lot of money because they expect deliberate destruction of documents, and we ought to—obviously deliberate destruction of relevant documents in a lawsuit is subversive of justice, subversive of the rights of the other party, whether they be plaintiff or defendant. It can go either way. And so this amendment to increase the sanctions, to put real teeth into the sanctions against the destruction of relevant court documents would seem to be indicated and would seem to fit squarely within this bill on frivolous lawsuits.

I therefore urge my colleagues to adopt the amendment. I yield back.

Chairman SENSENBRENNER. Does the gentleman from Texas insist upon his point of order?

Mr. SMITH OF TEXAS. Mr. Chairman, I do.

Chairman SENSENBRENNER. The gentleman will state his point of order.

Mr. SMITH OF TEXAS. Thank you, Mr. Chairman.

Mr. Chairman, this amendment is too broad because it simply goes beyond rule 11. Therefore, it's not germane, and I insist on my point of order despite the fact that the amendment is well intended.

Chairman SENSENBRENNER. Will the gentleman repeat what he just said?

Mr. SMITH OF TEXAS. The mike is on. Mr. Chairman, I want to make the point again that this amendment is non-germane because the substance of the amendment goes beyond rule 11. It deals with rule 37 and, therefore, it's too broad, therefore, it's not germane, and for that reason I insist on my point of order, as well intended as the amendment might be.

Chairman SENSENBRENNER. The gentleman from New York.

Mr. NADLER. I seem to recall that there are aspects of this bill that go beyond rule 11.

Mr. BERMAN. Would the gentleman yield?

Mr. NADLER. Certainly.

Mr. BERMAN. How could any amendment to a bill that takes every State court action and subjects it to Federal rules about rule 11 be—how could any amendment be too broad for that bill?

Mr. SMITH OF TEXAS. If the gentleman will yield, once again, there is nothing in the underlying bill that deals with rule 37. But to answer the gentleman's question, his own point was way too broad. It doesn't deal with every State court. It only deals with State courts that had that substantial connection to interstate commerce. So just as the gentleman's statement was too broad, so is the amendment too broad, and for that reason non-germane.

Chairman SENSENBRENNER. The Chair is prepared to rule. In the opinion of the Chair, the amendment offered by the gentleman from New York is not germane for two reasons:

First of all, the bill proposes to amend rule 11 of the Federal Rules of Civil Procedure. The amendment offered by the gentleman from New York makes no reference to rule 11 of the Federal Rules of Civil Procedure; rather, it makes reference to rule 37 of the Federal Rules of Civil Procedure.

Secondly, the underlying bill is applicable to Federal court actions and State court actions that affect interstate commerce. The amendment offered by the gentleman from New York does not have the restriction on State court actions that apply to interstate commerce, but all State court actions.

For the reasons the Chair has stated, the point of order is sustained.

Are there further amendments?

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. NADLER. Mr. Chairman?

Mr. CONYERS. I yield.

Mr. NADLER. Mr. Chairman, I ask for—I appeal the ruling of the Chair.

Chairman SENSENBRENNER. The question is——

Mr. SMITH OF TEXAS. Mr. Chairman I'll——

Chairman SENSENBRENNER. The gentleman from Texas.

Mr. SMITH OF TEXAS. I'll move to table the motion, Mr. Chairman.

Chairman SENSENBRENNER. The question is on tabling the motion to appeal the decision of the Chair. Those in favor of tabling will say aye? Opposed, no?

The ayes appear to have it. The ayes have it. The appeal is tabled.

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Michigan.

Mr. CONYERS. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 420, offered by Mr. Conyers. Page 6, after line 5, insert the following new section (and redesignate succeeding sections accordingly). Section 5. Limitation. The provisions of this act do not apply——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

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AMENDMENT TO H.R. 420

OFFERED BY MR. CONYERS

Page 6, after line 5, insert the following new section (and redesignate succeeding sections accordingly):

SEC. 5. LIMITATION.

The provisions of this Act do not apply to an action against a manufacturer, seller, or trade association that, on or after the date of the enactment of this Act, shifts or transfers employment positions or facilities to a location outside the United States.

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May 24, 2005 (12:46 PM)

Chairman SENSENBRENNER. The gentleman from Michigan will be recognized for 5 minutes.

Mr. CONYERS. Thank you, Mr. Chairman.

This amendment provides that the provisions of this act will not apply to an action against a manufacturer, seller, or trade association that, after this measure is passed, shifts or transfers employment positions or facilities to a location outside of the United States. It's an anti-outsourcing amendment to the measure. I offer this to prevent companies that outsource American jobs overseas from benefiting from the liability protections in the legislation. And this provision would send a clear, unambiguous signal that if one is selling a product or service made in the U.S.A. and wanted to continue to receive the extralegal liability protections in this country, then the company cannot continue to outsource jobs. And I think we at least owe this much to American workers everywhere.

This amendment allows ourselves to state that we can't continue to reward those countries that outsource jobs abroad with tax benefits, with Government contracts, and with new legal benefits. Companies, for example, Travelocity, that close their United States-based facilities and outsource jobs abroad cause workers their jobs and their livelihood and contribute to the ever-rising unemployment rate.

Furthermore, these actions perpetrate a fraud on our citizens. They think they're buying products made in the United States, but the product is really frequently made overseas.

Do we really want to reward those companies by increasing their liability protections? And so we, in order to get a grip on the subject of outsourcing, before our economy is permanently damaged, which it already has been—we've lost approximately $4 billion in American wages, and this is expected to increase to a staggering $136 billion over the next 15 years.

And so I urge my colleagues to join me in protecting Americans and American jobs and not reward outsourcing companies with increased liability protections. Please accept this amendment, and I return my time.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Michigan, Mr. Conyers. Those in favor will say aye? Opposed, no?

The noes appear to have it. The noes have it. The amendment is not agreed to.

Are there——

Mr. CONYERS. Yes, a record vote.

Chairman SENSENBRENNER. A record vote is requested. The question is on agreeing to the Conyers amendment. Those in favor will, as your names are called, answer aye, those opposed no, and the clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. No.

The CLERK. Mr. Coble, no. Mr. Smith?

Mr. SMITH OF TEXAS. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

[No response.]
The CLERK. Mr. Chabot?
[No response.]
The CLERK. Mr. Lungren?
Mr. LUNGREN. No.
The CLERK. Mr. Lungren, no. Mr. Jenkins?
Mr. JENKINS. No.
The CLERK. Mr. Jenkins, no. Mr. Cannon?
Mr. CANNON. No.
The CLERK. Mr. Cannon, no. Mr. Bachus?
[No response.]
The CLERK. Mr. Inglis?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler, no. Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. No.
The CLERK. Mr. Keller, no. Mr. Issa?
Mr. ISSA. No.
The CLERK. Mr. Issa, no. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. No.
The CLERK. Mr. Pence, no. Mr. Forbes?
Mr. FORBES. No.
The CLERK. Mr. Forbes, no. Mr. King?
Mr. KING. No.
The CLERK. Mr. King, no. Mr. Feeney?
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no. Mr. Franks?
Mr. FRANKS. No.
The CLERK. Mr. Franks, no. Mr. Gohmert?
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Berman?
Mr. BERMAN. Aye.
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye. Mr. Watt?
[No response.]
The CLERK. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
[No response.]
The CLERK. Mr. Meehan?
[No response.]

The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Ms. Sánchez?
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
[No response.]
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their votes? The gentleman from South Carolina, Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no.
Chairman SENSENBRENNER. Further Members who wish to cast—the gentleman from Massachusetts, Mr. Meehan?
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote? If not, the clerk will report. The gentleman from North Carolina, Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Chairman SENSENBRENNER. The gentlewoman from California, Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Chairman SENSENBRENNER. The gentleman from Maryland, Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote?
Mr. NADLER. Mr. Chairman?
Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.
Mr. NADLER. How am I recorded?
The CLERK. Mr. Chairman, Mr. Nadler is an aye.
Mr. NADLER. I'm recorded in the affirmative?
The CLERK. Yes, sir.
Mr. NADLER. Thank you.
The CLERK. Mr. Chairman.
Chairman SENSENBRENNER. The clerk will report.
The CLERK. Mr. Chairman, there are 11 ayes and 17 noes.
Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments? If there are no further amendments—the gentleman from New York.

Mr. NADLER. I will have in about a minute, as soon as it comes back from the typist, an amendment.

Well, I can—Mr. Chairman, I can move to strike the last word in the meantime.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes. Maybe he can tell us about his amendment before——

Mr. NADLER. Yes, the amendment is identical to the amendment I introduced a few moments ago on draft—on prohibiting—on sanctioning destruction of relevant court documents, with two changes. One, in accordance with the ruling of the Chair, it limits its application to Federal courts and State courts that substantially affect interstate commerce, the exact language of Mr. Smith's amendment, and, therefore, would not be out of order on that count. And, secondly, it talks about sanctions in rule 11 rather than rule 37. Rule 11 sanctions are not as broad as rule 37 sanctions, but they're sufficient for the job, we think. So that would eliminate the other grounds for ruling the amendment out of order.

Substantively, it's the same amendment and we'll now have to address the substance of the amendment. This amendment says that we will apply sanctions to a party in a lawsuit—and I see the amendment has just arrived.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. NADLER. Yes, I will.

Chairman SENSENBRENNER. Are there further amendments? The gentleman from New York.

Mr. NADLER. Thank you. This amendment——

Chairman SENSENBRENNER. Does the gentleman from New York have an amendment at the desk?

Mr. NADLER. I have an amendment at the desk.

Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment to H.R. 420, offered by Mr. Nadler. At the end of the bill, add the following new section: Section-Enhanced Sanctions for Document Destruction. (a) In General——

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

[The amendment follows:]

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AMENDMENT TO H.R. 420
OFFERED BY MR. Nadler

At the end of the bill, add the following new section:

SECTION ___. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.

(a) IN GENERAL.—Whoever influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, a pending court proceeding through the intentional destruction of documents sought in, and highly relevant to, that proceeding—

(1) shall be punished with mandatory civil sanctions of a degree commensurate with the civil sanctions available under ~~Rule 37~~ Rule 11 of the Federal Rules of Civil Procedure, in addition to any other civil sanctions that otherwise apply; and

(2) shall be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings.

(b) APPLICABILITY.—This section applies to any court proceeding in any Federal or State court that substantially affects interstate commerce

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May 17, 2005 (1:02 PM)

Chairman SENSENBRENNER. The gentleman from New York will be recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. As you can see, it makes two changes in the previous amendment, rule 11 sanctions instead of rule 37 sanctions, and limits it to State courts that substantially affect interstate commerce.

So we should now debate the substance of the bill, since the two grounds ruling it—of the amendment, the two grounds ruling it out of order are no longer applicable.

The substance is very simple. Someone who is sued or for that matter is a plaintiff in a lawsuit should not deliberately and know-

ingly destroy relevant documents that the other party will have a right to see in order to frustrate proof.

This was done, as I said, in the Enron situation, in WorldCom, Arthur Anderson, and we've all read of situations. This is a fraud on the court. It's a fraud on the other side. It's against justice. I can't imagine why anyone would support deliberate destruction of relevant court documents by people who knowingly destroy them because they know that they are relevant. And this simply says that they should be sanctioned under rule 11 and in addition to whatever obviously not quite effective enough sanctions we have under current law.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. NADLER. I yield back.

Chairman SENSENBRENNER. The gentleman from Texas.

Mr. SMITH OF TEXAS. Mr. Chairman, on your recommendation, which is to accept the amendment, I will do so as well, but I wouldn't want to encourage individuals from the other side to think this is going to be a habit any time soon.

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. SMITH OF TEXAS. Yes. I'll be happy to yield.

Chairman SENSENBRENNER. Well, if the gentleman will yield, I will concur that this is not a habit-forming amendment.

Mr. NADLER. We appreciate that, sir.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. SMITH OF TEXAS. Yes, I yield back.

Chairman SENSENBRENNER. The question is on agreeing to the amendment offered by the gentleman from New York, Mr. Nadler. Those in favor will say aye.

Opposed no.

The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments? If there are no further amendments, a reporting quorum is present.

The question occurs on the motion to report the bill H.R. 420 favorably as amended. All in favor will say aye.

Opposed no.

The ayes appear to have it. The ayes have it, and the motion to report favorably is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute——

Mr. CONYERS. Record vote, sir.

Chairman SENSENBRENNER. Oh. Okay. Those in favor of reporting the bill favorably as amended will as your names are called answer aye. Those opposed no, and the Clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH OF TEXAS. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye. Mr. Lungren?
Mr. LUNGREN. Aye.
The CLERK. Mr. Lungren, aye. Mr. Jenkins?
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye. Mr. Cannon?
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye. Mr. Bachus?
[No response.]
The CLERK. Mr. Inglis?
Mr. INGLIS. Aye.
The CLERK. Mr. Inglis, aye. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye. Mr. Green?
[No response.]
The CLERK. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Mr. Issa?
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye. Mr. Flake?
[No response.]
The CLERK. Mr. Pence?
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye. Mr. Forbes?
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye. Mr. King?
Mr. KING. Aye.
The CLERK. Mr. King, aye. Mr. Feeney?
[No response.]
The CLERK. Mr. Franks?
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye. Mr. Gohmert?
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye. Mr. Conyers?
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no. Mr. Berman?
Mr. BERMAN. No.
The CLERK. Mr. Berman, no. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. No.
The CLERK. Mr. Nadler, no. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, aye. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
[No response.]
The CLERK. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. No.
The CLERK. Ms. Waters, no. Mr. Meehan?
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no. Mr. Delahunt?
[No response.]

The CLERK. Mr. Wexler?
[No response.]
The CLERK. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no. Ms. Sánchez?
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no. Mr. Smith?
[No response.]
The CLERK. Mr. Van Hollen?
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no.
The CLERK. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the chamber who wish to cast or change their vote. The gentleman from Florida, Mr. Feeney?
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or—the gentleman from Alabama, Mr. Bachus.
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus, aye.
Chairman SENSENBRENNER. Further Members who wish to cast or change their vote. If not the Clerk will report.
The CLERK. Mr. Chairman, there are 19 ayes and 10 noes.
Chairman SENSENBRENNER. And the motion to—the gentleman from New York, Mr. Weiner.
Mr. WEINER. How am I recorded?
The CLERK. Mr. Chairman, Mr. Weiner is not recorded.
Mr. WEINER. No, Mr. Chairman.
The CLERK. Mr. Weiner, no.
Chairman SENSENBRENNER. The Clerk will report again.
The CLERK. Mr. Chairman, there are 19 ayes and 11 noes.
Chairman SENSENBRENNER. And the motion to report favorably as amended is agreed to. Without objection, the bill will be reported favorably to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today. Without objection, the staff is directed to make any technical and conforming changes and all Members will be given 2 days as provided by the House rules in which to submit additional dissenting supplemental or minority views.
[Intervening business.]
Chairman SENSENBRENNER. The Chair would like to thank the Members and staff for their patience. We have completed a very ambitious agenda today. There will be no markup tomorrow because the agenda has been completed, and the Committee stands adjourned.
[Whereupon, at 3:43 p.m., the Committee was adjourned.]

ADDITIONAL VIEWS

Mr. Chairman, I would like to submit for the record the votes I would have made had I not been unavoidably absent from the markup proceeding on H.R. 420, May 25, 2005.

On rollcall #10, the Conyers Amendment #010 to H.R. 420 I would have voted no.

On rollcall #11 the Motion to Report H.R. 420 I would have voted aye.

MARK GREEN.

DISSENTING VIEWS

We oppose H.R. 420 because it will not reduce frivolous lawsuits but will increase the costs of litigation at the state and Federal level, significantly increase the complexity of all cases, set back the cause of civil rights, and confuse entirely Federal and state law concerning personal jurisdiction and venue. This sweeping overhaul of our civil justice system predicated on the thinnest conceivable record, with no hearing and on the basis of a few anecdotes and hypothetical concerns.

The legislation is opposed by numerous civil rights, consumer and judicial groups, including the United States Judicial Conference, the NAACP, Public Citizen, the Alliance for Justice, People for the American Way, the American Association of People with Disabilities, the Lawyers' Committee for Civil Rights Under Law, the Conference of Chief Justices, the American Bar Association, the National Conference on State Legislatures, National Partnership for Women, National Women's Law Center, the Center for Justice & Democracy, Consumers Union, National Association of Consumer Advocates, USAction, U.S. PIRG, and the Legal Defense Fund. The legislation is also opposed by several law professors who specialize in civil procedure, including Thomas Rowe of Duke Law School, Christopher Fairman at Ohio State University, Moritz College of Law, and Jonathan Siegel at George Washington University Law School.

For the reasons set forth herein, we respectfully dissent.

DESCRIPTION OF LEGISLATION

Section 2 of the bill makes a number of changes to Rule 11 of the Federal Rules of Civil Procedure concerning attorney sanctions for improper pleadings and motions.[1] First, it would revert to the pre-1993 rules by removing a court's discretion to impose sanctions on improper and frivolous pleadings (*e.g.,* it makes the sanctions mandatory, rather than discretionary). Second, it would eliminate the current "safe harbor" provision permitting attorneys to withdraw improper or frivolous motions 21 days after they are challenged by opposing counsel.[2] Third, it would eliminate the provision providing that the sanction rules do not apply to discovery violations.[3]

Section 3 of the bill applies this new Federal Rule 11 to state cases that affect interstate commerce and requires the judges to

[1] Since these changes amend the Federal Rules of Civil Procedure, they are all subject to modification or revision by the Federal judiciary pursuant to the Rules Enabling Act. *See* 28 U.S.C. §§ 2071–2077 (2004).

[2] Currently, no withdrawal right exists for court-initiated sanctions.

[3] Such violations are already subject to mandatory sanctions under Rule 26 (g) of the Federal Rules.

make this determination within 30 days after the filing of the motion for sanctions.

Section 4 of the bill alters both Federal and state jurisdiction and venue rules. It provides that suits may "only" be filed in the state and county (or Federal district) where the plaintiff resides, where the injury took place, or where the defendant's principal place of business is located. As such, it eliminates the possibility of a harmed victim pursing a corporate defendant where it is incorporated and in many states where it is found to be doing business. It also contains a "most appropriate forum" provision, which mandates dismissal of the lawsuit (rather than transfer) if the court determines another forum "would be the most appropriate forum."

Section 5 of the bill is a rule of construction, stating that the proposed Rule 11 modifications are not to be construed to bar or impede the assertion or development of "new claims or remedies under the civil rights laws."

I. MANDATORY SANCTIONS WILL HARM CIVIL RIGHTS ACTIONS:

By requiring a mandatory sanctions regime that would apply to civil rights cases, H.R. 420 will chill many legitimate and important civil rights actions. This is due to the fact that much, if not most, of the impetus for the 1993 changes stemmed from abuses by defendants in civil rights cases—namely that civil rights defendants were choosing to harass civil rights plaintiffs by filing a series of rule 11 motions intended to slow down and impede meritorious cases.

For example, a 1991 Federal Judicial Study: *The Federal Judicial Center's Study of Rule 11* found that "The incidence of Rule 11 motions or *sua sponte* orders is higher in civil rights cases than in some other types of cases."[4] Another study showed that "civil rights case made up 11.4% of Federal cases filed, [and] that 22.7% of the cases in which sanctions had been imposed were civil rights cases."[5]

Another recent study found that "revisions to Rule 11 (the 1993 amendments) alleviate what was perceived as the rule's disproportionate impact on civil rights plaintiffs. Under the 1983 version, both the fact that sanctions were mandatory and that there was a significant risk that a large attorney fee award would be the sanction of choice were believed to have had a stifling effect on the filing of legitimate civil rights claims. . . . Furthermore, there is ample evidence to suggest that plaintiffs and civil rights plaintiffs in particular, were far more likely than defendants to be the targets of Rule 11 motions and the recipients of sanctions."[6]

As Professor Theodore Eisenberg, Professor Law, Cornell University testified before the House Judiciary Committee during the hearing on H.R. 4571 in the 108th Congress, "A Congress considering reinstating the fee-shifting aspect of Rule 11 in the name of tort reform should understand what it will be doing. It will be dis-

[4] John Shepard et al., Fed. Jud. Ctr., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure 11 (1995). The Federal Judicial Center is the educational and research arm of the Federal judiciary. *See* 28. U.S.C. § 620 (2004).

[5] Lawrence C. Marshall et al., *The Use and Impact of Rule 11,* 86 Nw. U. L. Rev. 943 (1992).

[6] *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report,* 62 OHSLJ 1555, 1568 (2001).

couraging the civil rights cases disproportionately affected by old Rule 11 in the name of addressing purported abuse in an area of law, personal injury tort, found to have less abuse than other areas."[7]

A good example of the effect of this rule on civil rights cases was cited by the Honorable Robert L. Carter, United States District Court Judge for the Southern District of New York, when he stated: "I have no doubt that the Supreme Court's opportunity to pronounce separate schools inherently unequal [in *Brown v. Board of Education*] 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."[8]

The language in the bill that purports to mitigate the damage to civil rights cases is not sufficient to alleviate our concerns. Section 5 of the bill states that the proposed Rule 11 changes shall not be construed to "bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." The problem is the language does not clearly and simply exempt civil rights and discrimination cases, as should be the case. Determining what a "new claim or remedy" is will be a daunting and complex issue for most courts and clearly does not cover all civil rights cases in any event.

Finally, H.R. 420 does not provide an attorney with the ability to appeal a Rule 11 sanction. History has demonstrated that civil rights lawsuits are extremely unpopular, particularly in certain parts of the country where some judges almost automatically consider civil rights cases frivolous. In such courts, plaintiffs' attorneys would unreasonably be subject to sanctions, and even suspension, without appeal contrary to the purpose of Rule 11.

II. FEDERAL JUDGES OPPOSE THESE CHANGES TO RULE 11:

The Federal judiciary—the individuals most affected by these changes to Rule 11—oppose changes to Rule 11 that would make sanctions mandatory rather than discretionary. On May 17, 2005, the Judicial Conference of the United States wrote a letter to Chairman Sensenbrenner stating, in no uncertain terms, that "the proposed changes to Rule 11 will not help deter litigation abuses, but will increase satellite litigation, costs, and delays."[9] The letter includes a report by the Federal Judicial Center: "Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure." The report, prepared at the request of the Judicial Conference's Advisory Committee on Civil Rules, surveyed trial judges who apply the rules. The survey included judges who have had experience under both the 1983 version and the 1993 version, as well as judges with expe-

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[7] *Uncertain and Certain Litigation Abuses, 2004: Hearings on Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse, Before the House Comm. on the Judiciary,* 108th Cong. (2004) (statement of Theodore Eisenberg, Professor, Cornell University).

[8] Symposium, The 50th Anniversary of the Federal Rules of Civil Procedure, 1938–1988, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights,* 137 U. Pa. L. Rev. 2179, 2193 (June 1989).

[9] Letter from Leonidas Ralph Mecham, Secretary, U.S. Judicial Conference, to Honorable F. James Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, May 17, 2005.

rience under the 1993 version only.[10] As the letter states, the report "shows a *remarkable consensus* among Federal district judges supporting existing Rule 11 and opposing its amendment."[11]

Specifically, "the survey's findings include the following highlights:

- More than 80 percent of the 278 district judges surveyed indicate that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 or H.R. 420);
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;
- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the Federal bench, and 54 percent noting that such litigation has remained relatively constant; and
- 72 percent believe that addressing sanctions for discovery abuse in rule 26(g) and 37 is better than in Rule 11."[12]

As the Federal Judicial Center's study shows, "federal district judges [are] united [in] opposition to amending Rule 11."[13]

III. THE FORUM SHOPPING PROVISION WILL UNFAIRLY BENEFIT FOREIGN CORPORATIONS TO THE DISADVANTAGE OF THEIR U.S. COMPETITORS:

Section 4 of the bill would recast state and Federal court jurisdiction and venue in personal injury cases. The provision would operate to provide a litigation and financial windfall to foreign corporations at the expense of their domestic competitors. This is because, instead of permitting claims to be filed wherever a corporation does business or has minimum contacts, as most state long-arm statutes provide, Section 4 only permits the suit to be brought where the defendant's principal place of business is located.[14] This means

[10] *Id.* at 2.
[11] *Id.* (emphasis added).
[12] *Id.* at 3.
[13] *Id.*
[14] As a threshold, it is quite problematic even determining how the forum shopping provision would apply. Depending upon the meaning of the term "only" in the phrase "may be filed only in the state . . . ," the provision could be read as (1) creating a new grant of jurisdiction and venue, or (2) merely limiting the current rules to the specified new rules. If it is a new grant of jurisdiction and venue, the section would serve to authorize suits wherever plaintiffs reside or were injured, even if there are no minimum contacts with the defendant. This would lead to an explosion in cases, and would decimate years of Supreme Court decisions holding that defendants may only be sued where jurisdiction lies (*Pennoyer v. Neff,* 20 A.L.R. 3d (1201)) or where the defendant has minimum contacts (*International Shoe Co. v Washington,* 326 U.S. 310 (1945)). If the provision operates as a limit on the current rules, it would represent a significant Federal usurpation of state court rules, possibly in violation of the Commerce Clause and the

that it will be far more difficult to pursue a personal injury or product liability action against a foreign corporation in the United States.

Consider the case of a U.S. citizen that is harmed by a product produced or manufactured by a foreign competitor. If that foreign company transacts business or has minimum contacts in a state other than the state of the plaintiff's residence or where the injury occurred, as is often the case, any suit against the foreign company would be banned by H.R. 420. In other words, the harmed U.S. citizen would have no recourse against a foreign corporation, whereas he or she would have recourse against a comparable U.S. corporation. This is unfair to both the U.S. citizen and all U.S. companies that compete against the foreign firm. It is hard for us to understand why the Congress would want to pass a law that grants foreign companies such a financial windfall at the expense of U.S. firms.

IV. SECTION 4 WILL PLACE VICTIMS AT A SIGNIFICANT LITIGATION DISADVANTAGE COMPARED WITH CORPORATE DEFENDANTS:

It is difficult to consider H.R. 420 as even-handed litigation reform, when it is drafted to so obviously benefit corporate defendants. Consider the operation of subsection (b), requiring a court to dismiss properly filed legal claims if it determines another forum would be "the most appropriate." There is no legal precedent for a court having such open-ended authority to dismiss lawful actions. The problems and unfairness with this provision are many. First, of course, is the ambiguous, open-ended wording. The legislation gives absolutely no guidance as to what a court is to take into account in determining which court is "most appropriate." Is it nexus to the injury, the plaintiff, the defendant or the bulk of other claims? Until this issue is worked out, significant hardships will no doubt result. While defendants do not mind waiting, the confusion would work a significant disadvantage to harmed victims in immediate need of compensation. Moreover, beyond this ambiguity, mandating dismissal would seem to be an extreme and costly remedy as compared to simply transferring the case to another court.

Section 4 suffers from an overall ambiguity in drafting. First, it is unclear whether the finding of the first court that a second court is most appropriate binds the second court under general rules of preclusion. If it is binding, the first court might make an egregious error that would inappropriately transfer a case to a second court a case, leaving that the parties no recourse. However, if the decision is not binding, then plaintiffs' lawsuits could get bounced around by a string of courts, all asserting that another court is most appropriate. Further adding to confusion, it is also unclear whether a dismissal is appealable, which could cause huge delays.

Tenth Amendment. *See, e.g., United States v. Morrison,* 529 U.S. 598 (2000) and *United States v. Lopez,* 514 U.S. 549 (1995), striking down the Violence Against Women Act and the Gun Free School Zone Act as unconstitutional, holding that Congress lacked the authority to pass laws that have only an attenuated affect on interstate commerce. This point is highlighted in a letter analyzing the bill from Professor Christopher Fairman of the Ohio State University, Moritz College of Law. In his letter, Professor Fairman states that "the venue provision of section 4 has absolutely no constitutional anchor. Quite simply, Congress does not have the authority under the Constitution to impose a venue statute on personal injury litigants who file their claims in state court."

Even more problematic, the provision is unclear as to whether the statute of limitations would be tolled during such appeal (the statute is tolled until the claim is dismissed under the bill, but what about afterwards until a new claim is filed?). The provision will also cause delay because it requires the state court to make another time consuming and costly determination before accepting or dismissing the case. Again, while these delays may not burden a defendant, plaintiffs, who may be in drastic need of medical attention and expenses, are deprived of timely adjudication of their claims.

Moreover, it seems fundamentally unfair for Section 4 to apply only to personal injury lawsuits when studies show that business lawsuits are far more prevalent and costly. In fact, a study by Public Citizen shows that businesses file four times as many lawsuits as do individuals represented by trial lawyers.[15] Another paper, reported by the National Law Journal in November 2003, showed that of the top ten jury verdicts rendered thus far that year, 8 of the 10 involved businesses suing other businesses—accounting for $3.12 billion of the total $3.54 billion awarded by the ten juries. Only two of the ten cases were brought by individuals for personal injuries.[16] If the Majority believes so strongly in the efficacy of this forum shopping provision, they should be willing to apply it across the board.

CONCLUSION

Says one briefing book for House Republicans: "attacking trial lawyers is admittedly a cheap applause line, but it works. It's almost impossible to go too far when it comes to demonizing lawyers."[17] H.R. 420, The "Lawsuit Abuse Reduction Act of 2005," is single-mindedly obsessed with a litigation crisis that simply does not exist. All empirical evidence suggests that the number of lawsuits are declining, that jury awards are shrinking, and that the costs of litigation to small businesses and to the overall American economy are slight if at all significant. H.R. 420 would confuse Federal jurisdiction jurisprudence, have a chilling effect on civil rights litigation, and enact sweeping changes to the Federal judiciary with little discussion or deliberation. For these reasons, we respectfully dissent.

DESCRIPTION OF AMENDMENTS OFFERED AT MARKUP

During the markup four amendments were offered by Democratic Members:

1. Nadler Amendment

Description of Amendment: The amendment would prohibit a court from ordering a court record sealed or subjected to a protective order, or otherwise to restrict access to taht record, unless the court makes a finding of fact that identifies the interest that justifies the order and determines that the interest outweighs any in-

[15] America's Litigious Businesses, September 2004, study on file with Judiciary Committee.
[16] It is worth noting that Public Citizen's survey of the 100 most recent decisions by Federal judges finding Rule 11 violations found that businesses were almost twice as likely as personal injury plaintiffs to be sanctioned for engaging in frivolous litigation.
[17] Frank Lutz, *Language of the Twenty-First Century* (1997)

terest in the public health and safety that the court determines would be served by not sealing or restricting the court record.

Vote on Amendment: The amendment was withdrawn after Representative Nadler and Representative Smith agreed to work on the language before the bill comes up before the full House.

2. Scott Amendment

Description of Amendment: The amendment would rein in frivolous lawsuits without harming the ability of legitimate cases to be brought. The amendment proposed that after three consecutive adverse decisions on the merits, a person attempting to file yet another claim on the same issue be saddled with a rebuttable presumption of a Rule 11 violation. The amendment would have applied to the Terri Schiavo case, in which multiple courts ruled against the plaintiffs.

Vote on Amendment: The amendment was agreed to by voice vote.

3. Nadler Amendment

Description of Amendment: The amendment provides that whoever influences, obstructs or impedes, or endeavors to influence, obstruct or impede, a pending court proceeding through the intentional destruction of documents sought in and highly relevant to that proceeding shall (1) be punished with mandatory civil sanctions and (2) be held in contempt of court and, if an attorney, referred to one or more appropriate State bar associations for disciplinary proceedings. The amendment applies to any court proceeding in Federal or State court.

Vote on Amendment: The amendment was agreed to by voice vote.

4. Conyers Amendment

Description of Amendment: The amendment would exempt from the provisions of the Act actions against a manufacturer, seller, or trade association that, on or after the date of enactment, shifts or transfers employment positions of facilities to a location outside the United States. The amendment was designed to ensure that companies that relocate offshore do not receive the benefit of the liability limitations in the Act.

Vote on Amendment: The amendment was defeated by a party-line vote of 17–11. Ayes: Representatives Conyers, Berman, Nadler, Scott, Watt, Waters, Meehan, Weiner, Schiff, Sánchez, Van Hollen. Nays: Representatives Sensenbrenner, Coble, Smith, Gallegly, Lungren, Jenkins, Cannon, Inglis, Hostettler, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. SCOTT.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.

ROBERT WEXLER.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
CHRIS VAN HOLLEN.

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