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LAWSUIT ABUSE REDUCTION ACT OF 2004

SEPTEMBER 13, 2004.—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

DISSENTING VIEWS

[To accompany H.R. 4571]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 4571) to amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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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 2004".

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 (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."; 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.

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. ENHANCED SANCTIONS FOR DOCUMENT DESTRUCTION.

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

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

PURPOSE AND SUMMARY

The Lawsuit Abuse Reduction Act of 2004 ("LARA"), H.R. 4571, was introduced by Rep. Lamar Smith. H.R. 4571 will restore the teeth that Federal Rule of Civil Procedure 11 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 that a case would have national economic consequences that affect interstate commerce. The bill would also prevent forum shopping, the harmful 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. 4571 would prevent forum shopping by requiring that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, or where the defendant's principal place of business is located.

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) allow sanctions for abuses of the discovery process (the process by which lawyers on each side request information from the other side prior to trial), (5) apply Rule 11's provisions to state cases that a state judge finds affect interstate commerce, (6) require that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, or where the defendant's principal place of business is located; (7) apply a "three strikes and you're out" rule to attorneys who commit Rule 11 violations in Federal district court; and (8) impose mandatory civil sanctions for willful and intentional document destruction intended to obstruct a pending court proceeding.

H.R. 4571 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 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." Civil rights claims are thereby exempted from the bill's Rule 11 provisions.

BACKGROUND AND NEED FOR THE LEGISLATION

H.R. 4571 will prevent frivolous lawsuits and help dispel the legal culture of fear that has come to permeate American society.

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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 on 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).

FRIVOLOUS LITIGATION HAS A CORROSIVE EFFECT ON AMERICAN CULTURE AND VALUES, THREATENING AMERICA'S CHURCHES, SCHOOLS, DOCTORS, SPORTS, PLAYGROUNDS, FRIENDLY RELATIONS, AND EVEN THE GIRLS SCOUTS AND OTHER FAMILY 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 even a single day—for any reason—without adequate "due process."[7]

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[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).
[7] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 48.

> 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 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

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[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).

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]

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'."[15] "I'm only a human being," she says. "I'm an educated physician but the miracles are out of my hands."[16]
>
> 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 expensive 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

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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.
[15] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 43–44.
[16] *Id.* at 51.

> not before his liability insurance paid out $40,000 in legal fees.[17]
>
> 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.[18]

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." [19]

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.[20]
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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.[21]
>
> 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 soccer league and tried to sue the city, the refs and various sponsors.[22]

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." [23]

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[17] Debra Rosenberg, "Hard Pill to Swallow" *Newsweek* (December 15, 2003) at 46.
[18] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 48.
[19] Field Maloney, "Cannonball!" *New Yorker,* Talk of the Town (September 8, 2004).
[20] Stuart Taylor, Jr. and Evan Thomas, "Civil Wars" *Newsweek* (December 15, 2003) at 44.
[21] *Id.* at 49.
[22] *Id.* at 49.
[23] Fox News (May 31, 2001).

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."[24]

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."[25]

ABC News reported 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.[26]

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.[27]

Playgrounds

The lawsuit culture is even changing the traditional American landscape: playgrounds are increasingly removing seesaws for fear of liability.[28] 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.[29]

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[24] Ann DiMatteo, "Families Sue Over Unfair Twirl Tryouts," *The New Haven Register,* May 18, 2001.

[25] Dave Sommers, "Legal Pitch," *The Trentonian,* May 1, 2001.

[26] ABCNews.com Report, "Blame the Coach? Angry Parents Take School Coaches to Court" (August 7, 2003).

[27] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (2001) at 46.

[28] *Id.* at 3.

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

As Philip Howard has written, "just letting a claim go to a jury . . . will affect whether seesaws stay in playgrounds all across America."[30]

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."[31] 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 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.[32]

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.[33] 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."[34]

Everyone

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

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[30] Philip K. Howard, *The Collapse of the Common Good* (New York: 2001) at 58.
[31] U.S. Consumer Product Safety Commission, Handbook for Public Playground Safety, Pub. No. 325 at 23.
[32] Garrett Ordower, "County Tells Bicyclist Thanks, But Stop Plowing Trail," *The Chicago Daily Herald* (February 21, 2004).
[33] *See* "Fine Filers of Frivolous Lawsuits," *The Detroit News* (February 24, 2004).
[34] Julia Moskin, "Crave Thin Mints?" *The New York Times* (March 14, 2004).

> 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 arbitrary "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.[35]
>
> [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.[36]

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.

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

[36] *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).

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.[37] Another poll found that 73% of Americans support requiring sanctions against attorneys who file frivolous lawsuits.[38]

Small businesses rank the cost and availability of liability insurance as second only to the costs of health care as their top priority,[39] and both problems are fueled by frivolous lawsuits.

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."[40]

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.[41]

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."[42] The small businesses studied in the report account for 98% of the total number of businesses with employees in the United States.[43]

Doctors and patients suffer. Before the 1960s, only one physician in seven had ever been sued in their entire lifetime,[44] whereas today's rate is about one in seven physicians sued *per year*.[45]

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 pro-

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

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

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

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

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

[42] 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").

[43] *Id.*

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

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

viders, but rather by the underlying disease.[46] The researchers found that, of the 47 medical malpractice claims they studied that resulted in litigation,[47] "[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."[48] 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.[49] Of the 47 claims filed that the researchers analyzed, less than half demonstrated any actual negligence, and many demonstrated no discernable injury.[50]

EXAMPLES OF FRIVOLOUS LAWSUITS

Here are just a few examples of the frivolous lawsuits that have tormented innocent Americans.[51]

- 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.[52]
- 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

[46] *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.").

[47] *See id.* at 7–1.

[48] *See id.* at 7–33.

[49] *See id.* at 7–33.

[50] *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.").

[51] 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."

[52] *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).

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."[53]

- 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."[54] Justice Saylor pointed out in his concurring opinion "the common sense notion that it is necessary to properly chew hard foodstuffs prior to swallowing."[55]
- 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.[56] 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 circumstances, that their conduct would naturally and probably result in injury."[57]
- 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

[53] Kevin Corcoran, "Court: Don't Blame Cell-Phone Maker for Crash," *The Indianapolis Star* (June 5, 2004).
[54] *Grady* v. *Frito-Lay, Inc.,* 839 A.2d 1038, 1042 (8th Cir. 2003) (citing *Grady* v. *Frito-Law, Inc.,* 2000 WL 33436367, at *2) (Pa.Com.Pl. April 3, 2000)).
[55] *Id.* at 1053 (Saylor, J., concurring).
[56] *In re: Aircraft Accident at Little Rock, Arkansas on June 1, 1999,* 231 F.Supp. 852, 879 (E.D.Ark. 2002).
[57] *Id.* at 878–79.

from dripping hot coffee.[58] The court upheld the decision of the trial court that ruled "[t]he danger is open and obvious."[59]

- 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.[60]
- 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.[61] 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."[62]
- 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."[63]
- 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.[64]
- 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 defendants."[65] 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

[58] *Holmes* v. *Turtle Stop, Inc.,* 62 P.3d 1165 (2000).
[59] Cy Ryan, "Court Says Warning About Hot Coffee Unnecessary," *The Las Vegas Sun* (July 11, 2000).
[60] *See* Randy Kenner, "Lawsuit on Hot Pickle Draws Attention Around the Globe," *Knoxville News-Sentinel* (October 10, 2000) at A1.
[61] *See Pelman* v. *McDonald's Corp.,* S.D.N.Y. 02 Civ. 7821 (RWS), at 34–35 (September 3, 2003).
[62] *Pelman* v. *McDonald's Corp.,* 237 F.Supp.2d 512, 518 (S.D.N.Y. 2003).
[63] *Overton* v. *Anheauser-Busch Co.,* 517 N.W.2d 308, 309 (Mich. App. 1994).
[64] Tim Barker, "Universal Fall Leads to Lawsuit," *Orlando Sentinel* (January 5, 2000) at C1.
[65] *Brown* v.*All-Tech Investment Group,* 2003 WL 23315394 (Ga. App.) at *5.

advisers, lawyers, business partners, lottery ticket sellers, etc., whom the assailant blamed for his financial losses."[66]

- After a *decade* of litigation, Texas's 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.[67]
- 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."[68]
- 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."[69]
- 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 not limited to, terror, humiliation, shame, embarrassment, mortification, chagrin, depression, panic, anxiety, flashbacks, nightmares, loss of sleep . . ."[70] According to the *North County Times*, "It took a jury little more than 2 hours of de-

[66] *Id.* at *7, n.5.
[67] *Honda of America Manufacturing, Inc.* v. *Norman,* 104 S.W.3d. 600 (2003) (Tex.App. 1st.).
[68] *See* "Storm Death Is Not Weatherman's Fault," *New York Post* (March 29, 1999) at 84.
[69] Associated Press, "Man Drops Suit Filed Against Airline After He Drank Booze, Fell," *USA Today* (April 4, 2004).
[70] Chuck Shepherd, "News of the Weird," *The Orlando Weekly* (August 30, 2001).

liberation 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." [71]

- 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.[72]
- 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.[73]

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." 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 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

[71] Teri Figueroa, "Jury Rejects Claim by Man in Attack on Dog by Library Cat," *The North County Times* (January 20, 2004).
[72] Terry Kinney (the Associated Press) "Commissioner Sues Bengals, NFL" (January 31, 2003).
[73] Kevin O'Hanlon, "Court: Faulty Tire Didn't Cause Murder," the Associated Press (August 8, 2003).

clothes while they are being worn."[74] And a cardboard car sun shield that keeps sun off the dashboard warns "Do not drive with sun shield in place."[75]

THE COSTS OF FRIVOLOUS LITIGATION

It should be emphasized that statistics do not capture the very real experiences of victims of lawsuit abuse that people 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 1990s, 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,[76] 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.[77]

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."[78] 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."[79] The direct costs of medical malpractice claims jumped by an average of 11.9 percent a year from 1975 to 2002.[80]

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.[81]

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[74] 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).

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

[76] 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.

[77] *Id.* at 1.

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

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

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

[81] *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 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

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."[82] The small businesses studied in the report account for 98% of the total number of businesses with employees in the United States.[83]

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.[84]

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 that were he to defend himself, such a plaintiff would withdraw.[85]

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

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liability reforms included a $250,000 limit for noneconomic damages that was found constitutional in 1985.").

[82] 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").

[83] *Id.*

[84] 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.

[85] 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).

contention that he was not legally responsible for harm done to the plaintiff or that no harm was actually done."[86] 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.[87]

Personal injury lawyers can always extort money from innocent victims by filing nuisance lawsuits for their settlement value. H.R. 4571 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. 4571: 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.

Section 2 of LARA: Attorney Accountability

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 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%).[88]

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 litiga-

[86] *Id.* at 10.
[87] *Id.* at 4.
[88] 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.

tion" 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,[89] the Supreme Court approved the proposed changes 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."[90] 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."[91]

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,[92] 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.[93] We need to restore those positive effects once again.

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.[94]

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 pro-

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[89] 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).

[90] *Id.* at 11.

[91] 146 F.R.D. 401, 507–08 (1993).

[92] 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).

[93] 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).

[94] 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.

hibited 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. 4571 would allow monetary penalties against parties who file 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.[95] H.R. 4571 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."*[96] 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."[97] And Senator Edwards's campaign issued a statement saying Senator Edwards "believes that we need a national system in place that will weed out the meritless lawsuits without taking away patients' rights."[98] H.R. 4571 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

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

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

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

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

nothing to lose: If objection is raised, they can retreat without penalty."[99] H.R. 4571 would get rid of the "free pass" lawyers have to file frivolous lawsuits under today's Rule 11.

- *Reverse the 1993 amendments to Rule 11 that prohibit sanctions for discovery abuses.* Monetary sanctions for frivolous and harassing conduct during the course of discovery should be allowed if circumstances warrant. ("Discovery" is the term used to describe the process by which parties are made to exchange information each side requests from the other prior to trial.) A study conducted by the American Judicature Society found that discovery was at issue in over 19% of the motions that were filed under the original Rule 11, prior to the 1993 amendments, when discovery abuses were sanctionable.[100]

It is important to remember that nothing in H.R. 4571, the Lawsuit Abuse Reduction Act, changes the current standard by which frivolous lawsuits are judged. That is, under H.R. 4571, 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 allow 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." Civil rights claims are thereby exempted from the bill's Rule 11 provisions.

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 deter-

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

[100] *See* Marshall, Kritzer, and Zeamans, "The Use and Impact of Rule 11," 86 N.W.U.L.Rev. 943, 951–55 (discovery abuse was cited as the reason for 19.2% of formal Rule 11 activity not leading to sanctions and 14.9% of activity resulting in sanctions).

mines, 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,[101] 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.)[102]

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,

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[101] *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).

[102] *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 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").

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 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.

H.R. 4571'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." [103] 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.[104] H.R. 4571 addresses a problem directly analogous to the prime example 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,[105] 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 affects interstate commerce based on an assessment of the costs to the interstate economy, including the loss of jobs, "were the relief

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

[104] 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.

[105] *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").

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.[106] 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." [107] 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." [108]

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:

> 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. [109]

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

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

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

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

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

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 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 "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.[110]

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." Civil rights claims are thereby exempted from the bill's provisions governing the application of Rule 11 in cases with 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 and has made about $844 million from lawsuits against tobacco companies.[111] 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

[110] 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.

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

> 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." [112]

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.[113]

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 friends, can all vote for the judge, while the out-of-state defendants can't even be relied upon to send a campaign donation." [114]

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. Section 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,[115] 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

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[112] 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).

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

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

[115] *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").

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." [116] 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 people in multiple states. It is the duty of Congress to prevent such unfairness.[117]

Jurisdictions with "magic jurisdiction" reputations include the following:

- *Madison County, Illinois.* Twice, the *Chicago Tribune* crowned Madison County a "jackpot jurisdiction." [118] 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." [119] 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." [120] 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

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

[117] 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.

[118] 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.

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

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

potential influence on people's careers that is has become very difficult to limit it in any way."[121] That same judge has also said *"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."*[122]

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.[123]

Asbestos cases, in particular, find their way to Madison County Circuit Court at an astonishing rate. Madison County (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.[124] 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.[125]

- *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."[126] 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.[127]
- *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.[128] In this small, rural county, the number of plaintiffs far exceeds the num-

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[121] *Id.*

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

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

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

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

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

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

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

ber of residents.[129] The national media, including the *Los Angeles Times*,[130] *The New York Times*,[131] and the Washington Times,[132] 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 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.[133]

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.[134] 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." [135]

In recent years, the 22nd Judicial Circuit has handed out numerous awards of $100 million or more.[136]

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.[137]

- *West Virginia, particularly Kanawha County.* Litigation activity has increased 53.6% more rapidly in West Virginia

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[129] *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.").

[130] *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.

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

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

[133] *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.*

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

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

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

[137] *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).

than in the nation as a whole over the last 10 years.[138] 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." [139]

- *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." [140] 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 physicians and hospitals.[141] 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.[142]
- *City of St. Louis, Missouri.* St. Louis City Circuit Court is reportedly "the place to be" if you are a plaintiff.[143] Plaintiffs move cases to St. Louis City because "St. Louis City is a better venue," according to one St. Louis plaintiffs' attorney.[144] 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." [145]
- *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." [146]

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

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

[140] 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.

[141] *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).

[142] *See id.* at 32.

[143] *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).

[144] *Id.*

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

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

Amendments Adopted at Committee

Two amendments 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. Scott, imposes mandatory civil sanctions that are comparable to those available under Rule 37 [147] of the Federal Rules of Civil Procedure, in addition to other civil sanctions otherwise applicable, for the willful and intentional destruction of documents sought in [148] a pending civil court proceeding, and highly relevant to such proceeding, with the willful intent to obstruct such proceeding. The amendment applies its rule to proceedings in both state and Federal court.

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.[149]

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." [150] This assertion is contradicted by the Judicial Conference's Advisory Committee on

[147] Rule 37 of the Federal Rules of Civil Procedure already imposes mandatory sanctions for failure to comply with required discovery disclosures, following an opportunity to be heard. *See* Fed. R. Civ. P. 37(a)(4) ("Expenses and Sanctions"). All courts also already have inherent powers to sanction parties for abusive practices, including willful transgressions of discovery procedures, such as document destruction. *See, e.g., Capellupo* v. *FMC Corp.,* 126 F.R.D. 545, 550 (1989) ("[T]he Court relies on its inherent power to regulate litigation, preserve and protect the integrity of proceedings before it, and sanction parties for abusive practices.") (citing cases); *Chambers* v. *NASCO, Inc.,* 501 U.S. 32, 43 (1991) ("It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court because they are necessary to the exercise of all others.") (citations and quotations omitted). Generally, sanctions are appropriate when a party destroys discoverable material which the party knew or should have known was relevant to pending, imminent, or reasonably foreseeable litigation. *See* Jamie S. Gorelick *et al.*, Destruction of Evidence § 3.8, at 88 (1989). Rule 37 also allows the court to forego sanction (defined as "pay[ment] to the moving party [of] the reasonable expenses incurred in making the motion [for sanctions], including attorney's fees") under various circumstances, including if the nondisclosure was "substantially justified," or "other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(a)(4)(A). The amendment adopted by the Committee requires the sanctions be "commensurate" with those in Rule 37 and therefore under the amendment the same standards and safeguards for applying sanctions under Rule 37, or substantially similar state procedures, must be applied.

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

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

[150] Judicial Conference Letter, at 1.

Civil Rules's own survey. That committee undertook a review of Rule 11, in its pre-1993 form, 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 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%).[151] 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."[152]

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."[153] In response, first, any unmeritorious Rule 11 motion could itself result in sanctions (and thereby be deterred) under Rule 11.[154] 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 discouraged 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.[155]

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."[156] 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."[157] 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.

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[151] 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).

[152] Judicial Conference Letter, at 2.

[153] *Id.* at 2.

[154] *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).

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

[156] Judicial Conference Letter, at 2.

[157] *Id.* at 2.

Surely if restoring teeth to Rule 11 results in some tension between lawyers, it is justified by helping to allow all Americans to live 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." [158] 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." [159] 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 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 "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." [160] However, Congress has never relinquished its constitutional authority to create and alter the rules of Federal court procedure,[161] 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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[158] *Id.* at 2.
[159] *Id.* at 3.
[160] *Id.* at 1.
[161] *See* U.S. Const. Art. I, § 8, cl. 9; Art. III, § 1, cl. 1; Art. III, § 2, cl. 2.

HEARINGS

The full Committee on the Judiciary held a hearing on H.R. 4571 and the issue of "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse" on June 22, 2004. Testimony was received from Victor Schwartz, General Counsel, American Tort Reform Association; Philip Howard, Chair, Common Good; Karen R. Harned, Executive Director, National Federation of Independent Business; and Theodore Eisenberg, Professor of Law, Cornell Law School, with additional material submitted by individuals and organizations.

COMMITTEE CONSIDERATION

On September 8, 2004, the Committee met in open session and ordered favorably reported the bill H.R. 4571 with amendment by a recorded vote of 18 yeas to 10 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. 4571 .

1. Mr. Keller offered an amendment that would require the suspension of attorneys from practice when they commit 3 or more Rule 11 violations in Federal court. The Keller amendment was amended by a Berman second degree amendment that provided for attorney appeals which was adopted by voice vote. By a rollcall vote of 20 yeas to 6 nays, the Keller amendment, as amended, was agreed to.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde	X		
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon			
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan			
Mr. Delahunt		X	
Mr. Wexler			
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	20	6	

2. Mr. Nadler offered an amendment that would have mandated that state courts follow certain procedures before sealing records or subjecting them to a protective order. By a rollcall vote of 8 yeas to 17 nays, the amendment was defeated.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde		X	
Mr. Coble		X	
Mr. Smith			Pass
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot	X		
Mr. Jenkins		X	
Mr. Cannon			
Mr. Bachus		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Ms. Hart		X	
Mr. Flake			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Carter		X	
Mr. Feeney		X	
Mrs. Blackburn			
Mr. Conyers			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan			
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez	X		
Mr. Sensenbrenner, Chairman		X	
Total	8	17	1 pass

3. Motion to report H.R. 4571, as amended, was agreed to by a rollcall vote of 18 yeas and 10 nays.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde	X		
Mr. Coble	X		
Mr. Smith	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Jenkins	X		
Mr. Cannon			
Mr. Bachus	X		
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Ms. Hart	X		
Mr. Flake			
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Carter	X		
Mr. Feeney	X		
Mrs. Blackburn	X		
Mr. Conyers			
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters			
Mr. Meehan			
Mr. Delahunt		X	
Mr. Wexler		X	
Ms. Baldwin		X	
Mr. Weiner			
Mr. Schiff		X	
Ms. Sánchez		X	
Mr. Sensenbrenner, Chairman	X		
Total	18	10	

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. 4571, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

SEPTEMBER 13, 2004.

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. 4571, the Lawsuit Abuse Reduction Act of 2004.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Lanette J. Walker (for federal costs), and Melissa Merrell (for the state and local impact).

Sincerely,

DOUGLAS HOLTZ-EAKIN,
Director.

Enclosure.

H.R. 4571—Lawsuit Abuse Reduction Act of 2004

H.R. 4571 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. 4571 would not affect direct spending or revenues.

H.R. 4571 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act 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 ($60 million in 2004, adjusted annually for inflation). The bill contains no new private-sector mandates.

The CBO staff contacts for this estimate are Lanette J. Walker (for federal costs), and Melissa Merrell (for the state and local impact). This estimate was approved by Robert A. Sunshine, 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. 4571 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) allow sanctions for abuses of the discovery process (the process by which lawyers on each side request information from the other side prior to trial), (5) apply Rule 11's provisions to state cases a state judge finds affect interstate commerce, (6) require that personal injury cases be brought only where the plaintiff resides, where the plaintiff was allegedly injured, or where the defendant's principal place of business is located; (7) apply a "three strikes and you're out" rule to attorneys who commit Rule 11 violations in Federal district court; and (8) impose mandatory civil sanctions for willful and intentional document destruction willfully intended to obstruct a pending court proceeding.

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, § 8 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following discussion describes H.R. 4571 as reported by the Judiciary 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; allow monetary sanctions, including attorneys' fees and compensatory costs, against any party making a frivolous claim; and allow sanctions for abuses of the discovery process (the process by which lawyers on each side request information from the other side prior to trial).

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 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. 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. Enhanced Sanctions for Document Destruction. This section provides that provides for mandatory civil sanctions that are commensurate with those available under Rule 37 of the Federal Rules of Civil Procedure, in addition to other civil sanctions otherwise applicable, for the willful and intentional destruction of documents sought in a pending civil court proceeding, and highly relevant to such proceeding, with the willful intent to obstruct such proceeding. The amendment applies to proceedings in both state and Federal court.

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 vio-

lated, 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 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.*

(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.] *Rule 5.* If warranted, [the court may award] *the court 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.*

* * * * * * *

[(d) INAPPLICABILITY TO DISCOVERY.—Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.]

AGENCY VIEWS

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

July 9, 2004

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

Dear Mr. Chairman:

On behalf of the Judicial Conference, I write to urge you to reconsider your position on the "Lawsuit Abuse Reduction Act of 2004" (H.R. 4571). Section 2 of the bill would reinstitute a rule eliminated in 1993 upon the recommendation of the Judicial Conference, approval by the Supreme Court, and after review by Congress, because of the serious problems it engendered during a ten-year period of operation. Section 2 also would amend Rule 11 of the Federal Rules of Civil Procedure in a manner inconsistent with the longstanding Judicial Conference policy opposing direct amendment of the federal rules by legislation. Section 3 of H.R. 4571 would apply the revised federal Rule 11 to certain state court actions, while section 4 would amend the venue standards governing the filing of tort actions in both the federal and state courts. Sections 3 and 4 implicate federal-state comity interests and raise important policy and practical concerns.

Section 2

Section 2 would directly amend Civil Rule 11 to remove a court's discretion to impose sanctions on a frivolous filing and eliminate the rule's "safe-harbor" provisions. The bill undoes amendments to Rule 11 that took effect on December 1, 1993, and would bring back the provisions that were first introduced in 1983 and removed from the rule in 1993, after a decade of signally bad experiences with the operation and effects of the 1983 rule.

Like H.R. 4571, the 1983 version of Rule 11 required sanctions for every violation of the rule. It spawned thousands of court decisions and generated widespread criticism. The rule was abused by resourceful lawyers, and an entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship

and little to do with underlying claims. Rule 11 motions came to be met with counter motions that sought Rule 11 sanctions for making the original Rule 11 motion.

Some of the other serious problems caused by the 1983 amendments to Rule 11 included:

(1) creating a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty;
(2) engendering potential conflict of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;
(3) exacerbating tensions between lawyers; and
(4) 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.

The 1993 amendments to Rule 11 were designed to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. 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. The 1983 Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee on Civil Rules (Advisory Committee) reviewed a significant number of empirical examinations of the 1983 Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987. The Advisory Committee took note of several book-length analyses of Rule 11 case law.

The 1991 Federal Judicial Center survey noted that most federal judges believed that the 1983 version of Rule 11 had positive effects. But the study also noted that most judges found several other methods more effective than Rule 11 in handling such litigation and, most significantly, that about one-half of the judges reported that Rule 11 exacerbates behavior between counsel. After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial, calling for a change in the rule.

The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process (28 U.S.C. §§ 2071-2077).

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated. A majority of the judges and lawyers, both plaintiffs' and defendants' lawyers, believed that groundless litigation was handled effectively by judges.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Judicial Conference rules committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. Section 2 of H.R. 4571 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. Section 2, indeed, in some ways seems to go beyond the provisions that created serious problems with the 1983 rule. It may cause even greater mischief. Rule 11 in its present form has proven effective and should not be revised.

Sections 3 and 4

Section 3 would extend the new requirements of a mandatory Rule 11 to all state court litigation that the state court deems, on motion, to affect interstate commerce. Two features of this provision stand out. First, it would directly regulate the practice and procedure of state courts, mandating a federal standard for the imposition of sanctions for the filing of frivolous or ungrounded complaints and other papers in state court. At present, states have been free to adopt their own rules of practice, including a version of Rule 11, if a state so chooses. Second, section 3 does not specify the actions to which it would apply. Rather, it imposes on state judges a broad generalized test to determine whether or not federal Rule 11 would apply in a given case. If enacted, this section could affect the cost and duration of a very large number of civil actions in state courts.

Section 4 seeks to prevent forum shopping by specifying the places where a plaintiff may bring a "personal injury" claim by imposing a federal standard for determining the venue of state law personal injury claims, in both state and federal court. Such a federal standard would displace existing state venue rules or statutes. It would also significantly alter the statutes in title

28, United States Code, that now govern venue (section 1391) and transfer of venue (section 1404) in the federal courts.

The Judicial Conference opposes the enactment of H.R. 4571 for the reasons stated above as to section 2. Sections 3 and 4 would make important changes in the administration of civil justice in both federal and state courts. The Judicial Conference has not had the opportunity to formally assess the advisability or impact of these sections, but notes that they may substantially affect federal-state comity interests and raise important policy and practical concerns.

The Judicial Conference greatly appreciates your consideration of its views. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

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

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, SEPTEMBER 8, 2004

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

The Committee met, pursuant to notice, at 10:00 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. [Chairman of the Committee] presiding.

Chairman SENSENBRENNER. The Committee will be in order, a working quorum is present and pursuant to notice I will now call up the bill H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004" for purposes of mark up and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point. And the Chair recognizes the gentleman from Texas, Mr. Smith, for 5 minutes to explain the bill.

[The bill, H.R. 4571, follows:]

I

108TH CONGRESS
2D SESSION

H. R. 4571

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

IN THE HOUSE OF REPRESENTATIVES

JUNE 15, 2004

Mr. SMITH of Texas (for himself, Mr. SENSENBRENNER, Mr. FORBES, Mr. GREEN of Wisconsin, Mr. GALLEGLY, Mr. CHABOT, Mr. GARRETT of New Jersey, Mr. KING of Iowa, Mr. DELAY, Mr. FRANKS of Arizona, Mr. CULBERSON, Mr. KELLER, Mr. CARTER, Mr. PEARCE, Mr. CALVERT, and Mr. GOODLATTE) 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 2004".

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 (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."; 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.

○

Mr. SMITH. Mr. Chairman, I am not sure my speaker is working. Oh, there it is. Mr. Chairman, frivolous lawsuits harm our economy and threaten to bankrupt business owners. This is especially true of small business owners who do not have the money to fund prolonged lawsuits. The alarming spread of frivolous lawsuits has made a mockery of our legal system. For example, 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. Of course many Americans have legitimate legal grievances from someone wrongly disfigured during an operation, to a company responsible for contaminating a community's water supply. Americans deserve their day in court. No one who deserves justice should be denied justice. However, the gaming of the system by some lawyers makes the cost of doing business rise and draws down the integrity of the judicial system.

Let me give some examples. The chief executive officer of San Antonio's Methodist Children's Hospital was sued after he stepped into a patient's hospital room and asked how he was doing. Of course the jury cleared him of any wrongdoing. 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 threw out the case, writing that there is, quote, a common sense notion that it is necessary to properly chew hard foodstuffs prior to swallowing. End quote.

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

Today almost any party can bring any suit in practically any jurisdiction. That is 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 have filed 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. It is always someone else's fault. Defendants on the other hand can unfairly lose their careers, their businesses and their reputations; in short, they can lose everything.

This is not justice and there is a remedy. Change Federal Rule of Civil Procedure 11. The Lawsuit Abuse Reduction Act 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. 4571 if either 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 attorney's fees of the party who was the victim of the frivolous claim.

In addition, this legislation removes the provision that currently allows an attorney to file a frivolous pleading and then withdraw

it within 21 days. Attorneys now have no incentive to avoid filing frivolous pleadings because they can simply withdraw the pleading to avoid sanctions.

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

Finally, 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.

I might add, Mr. Chairman, that the presidential and vice presidential candidates all agree that we would be a better and a more prosperous America if we discouraged frivolous lawsuits. The Lawsuit Abuse Reduction Act is sensible reform that will help restore confidence in America's justice system.

Mr. Chairman, I will yield back.

Chairman SENSENBRENNER. Who wishes to give the Democratic opening statement?

Mr. SCOTT. I have——

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

Mr. SCOTT. Mr. Chairman, I have an amendment when the time comes.

Chairman SENSENBRENNER. Okay. Without objection, all Members may place opening statements in the record at this point. Are there amendments? The gentleman from Florida, Mr. Keller.

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. 4517 offered by Mr. Keller of Florida. At the end of the bill insert the following new section. Section.

[The amendment follows:]

AMENDMENT TO H.R. 4571

OFFERED BY MR. KELLER OF FLORIDA

At the end of the bill, insert 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) 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. Mr. Chairman, I would ask unanimous consent that the amendment be considered as read.

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

Mr. KELLER. Thank you, Mr. Chairman. I am offering a three strikes and you are out amendment to deal with frivolous lawsuits. I would like to begin by quoting from Senator John Edwards of North Carolina and I am holding here an article that he wrote for Newsweek magazine on December 15, 2003, where he said, quote, frivolous lawsuits waste good people's time and hurt the real victims.

That is why I have proposed to prevent them. Lawyers who bring frivolous cases should face tough mandatory sanctions with a three strikes penalty.

Also, in *The Washington Post*, on May 20, 2003, Senator John Edwards of North Carolina wrote an editorial where he said, quote, lawyers who file frivolous cases should face tough mandatory sanctions. Lawyers who file three frivolous cases should be forbidden to bring another suit for the next 10 years.

In other words, three strikes and you are out. On the good advice of Senator Edwards, I have prepared a three strikes and you are out amendment. If an attorney were to be found by a particular Federal District Court to have filed three frivolous lawsuits, this amendment would automatically suspend that attorney from practicing law in that particular Federal District Court for 1 year, and require that that attorney petition for reinstatement after that year under such procedures and conditions as that court may prescribe. This is an automatic 1-year suspension, less severe than even what John Edwards proposed of 10 years.

And so I would ask my colleagues in the spirit of bipartisanship and the good advice of myself and Senator John Edwards to accept this amendment, and I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I had two questions of the author of the amendment. It seems on its surface like a good amendment. But is a finding by a Federal judge of a Rule 11 violation, that the suit or the motion is frivolous, is that an appealable decision?

Mr. KELLER. It would be governed under the existing rules of Rule 11.

Mr. BERMAN. I am sure it would. Is it appealable?

Mr. KELLER. I don't know. Do you know?

Anything that you would normally be able to appeal under Rule 11 you would be able to appeal. Anything that you wouldn't be able to appeal under Rule 11 you wouldn't be able to appeal. We are not changing any appellate rules. It is a much narrower——

Mr. BERMAN. I am asking a factual question. If you don't know the answer, I understand because I don't know the answer and that is why I am asking. Is it——

Chairman SENSENBRENNER. Will the gentleman yield?

Mr. BERMAN. Sure.

Chairman SENSENBRENNER. Final orders are appealable under the Federal Rules of Civil Procedure and my guess is that if a Rule 11 violation has been found to occur the court would dismiss the action and impose sanctions in Rule 11 and that would be a final order.

Mr. BERMAN. That is what I would have thought and I appreciate the clarification.

Mr. WATT. Would the gentleman yield?

Mr. BERMAN. I would be happy to yield.

Mr. WATT. Unfortunately, it is not quite that clear. If the decision results in a final order of dismissal, the case would be appealable. But this amendment seems to go far beyond that to deal with discovery violations, argument violations, and those things are interlocutory decisions by a court, and quite often don't get resolved at all on any final basis. The case goes on. That order or decision having been entered on a procedural basis, the case goes on. The case may get appealed at some point, but seldom would that be the grounds for appeal, nor would it be appealable on an interlocutory basis, so—it is his time.

Mr. BERMAN. I would be happy to yield. Let me just—I am not so concerned whether there is interlocutory appeal. I am just trying to deal with the factual—the situation where a particular judge in a particular case on three different occasions in that case, for reasons perhaps of animus towards the counsel has made a Rule 11 finding. At some point is that subject to being reversed on appeal? Not necessarily before the end of the case, but in other words, would the attorney be suspended from practice before he would have a chance to contest the abuse of discretion, the finding that there was a Rule 11 violation?

Mr. WATT. The point that I am making is that seldom would there be an appeal on a procedural motion of that kind because the case would continue. Suppose you have a finding that a frivolous argument is made. The case continues.

Mr. BERMAN. Sure.

Mr. WATT. And that one item never gets appealed because the case goes on. You can't stop the case right there in the middle of that particular thing, take an appeal of that order.

Mr. BERMAN. I understand.

Mr. WATT. Because it is an interlocutory order.

Mr. BERMAN. I guess the question for the author of the amendment, Rick, if—would you be willing to adjust your amendment to ensure that before the suspension is affected the lawyers had a chance to have a review of the finding three times—it could occur in one case. This applies, as somebody mentioned, to discovery motions, to other kinds of pleadings, and just—it would keep—essentially would keep the thrust of your amendment, but allow their, the actual suspension to be delayed until such time as the counsel has had a chance to review that finding on appeal.

Mr. KELLER. Let me tell you where I share your sympathies and let me tell you what my concerns are about what you are asking. Okay, the idea that an attorney is about to be barred from practicing in a particular Federal District Court for 1 year because a judge has found three separate times.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. BERMAN. I would ask unanimous consent for 2 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. BERMAN. Okay.

Mr. KELLER. Will the gentleman yield?

Mr. BERMAN. Yes.

Mr. KELLER. I understand at that point, when it is final he should be allowed to appeal, and it is my understanding from talking with staff that he would have that existing right under Rule 11. But the reason I am concerned about broadening this, I made this so narrow, specifically to come within the confines of what Senator Edwards was talking about and to avoid controversy, that if we are now talking about changing the Federal Rules of Civil Procedure with respect to an appellate rights under Rule 11 I think would unnecessarily broaden the amendment and make it more controversial than less controversial.

Mr. BERMAN. Reclaiming my time, I am not suggesting changing the appellate rights. I am suggesting that the suspension not be implemented until the appeal of that—of the finding is deferred. Obviously, if three such findings could occur in one case, you don't intend that in the middle of that case even though it has not resulted in the dismissal of the case. It is about a specific pleading, it is about a specific discovery request——

Mr. KELLER. Will the gentleman yield?

Mr. BERMAN. Yes.

Mr. KELLER. Because right now I don't see any case law that would cause me concerns about the appellate rights, I am not willing to amend it at this point. If after this amendment is adopted between now and the time it comes to the floor there is a reason to adjust it in the spirit of fairness I will certainly work with you and ask for a manager's amendment.

Mr. BERMAN. Okay. And then my second question, I notice you only apply this to Federal actions. You don't seek to control what States do with attorneys who engage in frivolous motions and frivolous suits.

Mr. KELLER. That is correct.

Mr. BERMAN. In State courts. What was your reason for not doing that?

Mr. KELLER. Well, and not only is it Federal action, it is a particular Federal district court like in Florida. If you have three frivolous suits in the middle district court that would apply. If you have two in the middle and one in the south it wouldn't apply. The reason is I wanted it narrow and clean. Customarily the practice of disciplining and suspending attorneys and barring them is a State issue, and I——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. KELLER. That should be the case.

Chairman SENSENBRENNER. Has once again expired.

Mr. COBLE. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Mr. Chairman, move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. COBLE. And Mr. Chairman, I will not consume 5 minutes. I think the gentleman from Florida's amendment and the bill comes under the heading of reform, and on reform, particularly as it applies to capping damages, I have consistently voted against capping damages, Mr. Chairman, because I believe philosophically damages should be exclusively reserved for juries. This bill, however, is a different cat. And I am inclined to—while I support the bill and I am inclined to support the gentleman from Florida's amendment on the ground that, as he pointed out in his statement, frivolous lawsuits serve no good purpose and create inestimable mischief. I want to ask the gentleman from Florida a question to be sure I am reading this correctly.

Mr. KELLER. Yes, sir.

Mr. COBLE. Rick, this—you have separated this as to district. In North Carolina, for example, we have three Federal districts.

Mr. KELLER. That is right.

Mr. COBLE. They would not be cumulative. If I brought a frivolous lawsuit in the Eastern District, for example, and two in the middle district I would not be penalized at that point. Am I correct about that?

Mr. KELLER. That is correct, sir.

Mr. COBLE. Very well. I support the bill and the amendment, Mr. Chairman. Yield back.

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I thank the Chairman for the time. I would just say to the gentleman that it does appear that he has tried to narrow this, but in the process of trying to narrow it he really has the potential of creating a very serious problem because you are talking about a potential interaction between one particular judge in one case and a lawyer in that case and nobody outside that case, so basically you end up with a situation where a judge who has a particular animus, either toward the case that the lawyer has filed or toward a particular lawyer, is going to be the final and sole arbiter of whether that lawyer gets disbarred. And I will give you a real life example so that you will know exactly what my concern is with this amendment, and hopefully Mr. Coble would know this also.

In a civil rights case in North Carolina a particular judge, because he didn't like the civil rights case, not because the lawyers were out of line in any way, decided that he was going to do everything that he could to frustrate that case. This amendment leaves that judge as the final and sole arbiter of whether a lawyer gets disbarred in that case. That is not something that you should be doing. And because these are procedural findings, not substantive findings on the final outcome of a case, they are not appealable immediately so that the lawyer could actually be disbarred before the case even gets resolved in the final analysis by any court of appeal. There is no parallel judge in that judicial district who could overrule one particular judge because there is no way to appeal over to another judge. There is no appellate judge who can review this because it is an interlocutory procedural order. And you have set

up a situation where one lawyer, one judge with a particular animus in a case, can ruin the whole legal career of a lawyer without any possibility of appeal, and that is just going way overboard and I don't think—I mean, I can't support that.

Mr. KELLER. Will the gentleman yield?

Mr. WATT. Yeah, I am happy to yield to you.

Mr. KELLER. We are not talking about disbarring anybody. We are talking about a 1-year suspension and it is far narrower with the——

Mr. WATT. Well, I suppose you think that is not important to a particular lawyer who practices in one judicial district that is equivalent to a disbarment of that lawyer, and the abuse is even more pronounced in this case because it typically is going to be some lawyer who——

Mr. KELLER. Will the gentleman yield?

Mr. WATT. —who is constantly bringing cases that some judge doesn't like and if the judge sees the opportunity to get rid of that lawyer for a year, then the next year they are going to come back and do the same thing and they will be gone for a second year. And in many States lawyers don't practice in but one judicial district as a practical matter. So you can talk about this as some theoretical rhetorical issue, but this is a practical problem that you have created that gives a judge absolute final authority to say to a lawyer you can't practice in my court this year and when you come back next year I am going to start it over again because I will find you did something frivolous in that case.

I am happy to yield to the gentleman.

Mr. KELLER. Well, thank you. And I may not have enough time here.

Chairman SENSENBRENNER. The gentleman's time has expired. For what purpose does the gentleman from Wisconsin, Mr. Green, seek recognition?

Mr. GREEN. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GREEN. Mr. Chairman, in listening to the comments of my colleague on the other side of the aisle, I am sure that Senator Edwards considered such things and maybe he decided that the quickest way to avoid the problems the gentleman raises is not to file frivolous claims. I yield the balance of my time to the gentleman from Florida.

Mr. WATT. Will the gentleman yield to me for just one response?

Mr. KELLER. I thank the gentleman for yielding.

Chairman SENSENBRENNER. The time belongs to the gentleman from Wisconsin.

Mr. KELLER. Mr. Watt, I am not under any pretense that whatever I am going to say is going to convince you here. But just to respond to a couple of issues, first, another lawyer from North Carolina, Senator Edwards, wanted to ban you for 10 years from filing lawsuits anywhere. We are talking about a suspension of 1 year in that particular district court. Now, your objection to that, saying, well, maybe a judge may not like you and what if this judge on three separate occasions found that not only is he going to grant this motion for summary judgement against the plaintiff attorney's client. He is also going to enter a Rule 11 and wouldn't that be

awful because one particular judge doesn't like an attorney and therefore this is a bad situation. I would respond to just bring you to the real world, and you and I both practice law. You may be a plaintiff's attorney who does civil rights cases, I may be a defense attorney who does civil rights cases, and in any particular Federal District Court there is going to be some judges that are going to be more likely to grant a summary judgement and some more that are likely to let it go to jury trial. So in any particular case you may have a judge who doesn't like you, you feel, or who is too tough in granting dismissals or summary judgments and once you have the final order entered that can be appealed. The likelihood that you will have three separate judicial findings that there was a frivolous case filed and then they are upheld on appeal, and the person is only suspended for 1 year, that that being unjust, I think is relatively remote. The likelihood of preventing frivolous lawsuits because they will think twice about filing suits is relatively great.

So I think the benefits outweighs whatever risk you are bringing, and I would just point out that it is a lot narrower and more focused than the other Member of Congress from North Carolina, and I would urge my colleagues to support this motion.

Mr. WATT. Would the gentleman yield?

Mr. KELLER. Yes, I would yield. Or I am sorry.

Mr. GREEN. Yes, I would yield time to the gentleman from North Carolina.

Mr. WATT. I would just say you are in the Judiciary Committee practicing politics. I am in the Judiciary Committee trying to assess the practical impact. I don't much care what John Edwards said in some political context, in some other context that had nothing to do with the point that I am raising here, had nothing to do with the civil rights case, had nothing to do with anything else that we are talking about the practical consequences of the way you have drafted this amendment. Now, you can either practice national politics, in which case you know damn well you know you have no intention of using John Edwards as any kind of an authority on any kind of issue. You can practice national politics, or you can do what this Committee is supposed to do, which is to look at the practical consequences of how these things play out in court. And my point to you is the practical consequences of your political posturing can be devastating in the real world in a real life situation. And if you want to do that, go right ahead.

Mr. GREEN. Reclaiming my time, it is a pity if Senator Edwards was indeed political posturing. I thought he was making a valid point with respect to our judicial system. I further yield time to the gentleman from Florida.

Mr. KELLER. I thank the gentleman for yielding and at this time I would ask unanimous consent that the article that Senator Edwards wrote for *Newsweek* on December 15, 2003 and the articles he wrote for *The Washington Post* of May 20, 2003 be submitted into the record without objection.

Chairman SENSENBRENNER. Without objection.

[The articles referred to follow:]

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May 20, 2003 Tuesday
Final Edition

SECTION: EDITORIAL; Pg. A19

LENGTH: 818 words

HEADLINE: Let's Keep Doctors in Business

BYLINE: John Edwards

BODY:

The rising cost of malpractice insurance for doctors is getting in the way of good health care. In rural areas, some specialists can no longer afford to practice, and patients can't get the care they need. We need to fix this problem now, and we need to fix it in a way that is consistent with the doctors' own Hippocratic Oath: First, do no harm.

Unfortunately, President Bush's proposed prescription comes straight off the insurance companies' wish list: a sharp limit on the compensation these companies have to pay children and parents who have been blinded, paralyzed or otherwise severely injured. The victims who make the least money will suffer the most under this plan. The harm to the kinds of families I represented as a lawyer for nearly 20 years will be enormous.

What the president's proposal won't do is work. Insurance premiums have spiked recently because of insurance companies' losses on their investments, not their losses to victims. In fact, about half the states already have some limits on victim compensation, yet premiums in states with caps average about the same as premiums in states without caps. California finally controlled rates not by attacking victims -- that didn't work -- but by reforming the insurance industry and rolling back premium increases.

We need a real solution that frees doctors from crippling insurance costs -- without preventing the most badly injured victims from receiving the compensation they deserve.

That real solution has three elements. Most important, we need to crack down on price gouging by the industry. We also need aggressive action against frivolous lawsuits that don't belong in court -- not against the serious lawsuits that bring help to the most badly injured. And finally, we need to reduce the number of medical errors, many made by a very small fraction of the medical profession.

(1) The most critical step is reforming the insurance industry. Today insurance companies use slow and burdensome processes to discourage both doctors and patients from filing legitimate claims. Worse still, these companies can fix prices and divvy up the country in order to drive up their profits. Even when companies don't explicitly collude, they set their rates based on a trade-group loss calculation that they know other companies will follow. In any other industry, this kind of conduct would be subject to scrutiny under the antitrust laws. But an obscure 1945 law gives insurance companies a broad antitrust exemption. Because of the insurance lobby's influence, Congress has even blocked the Federal Trade Commission from investigating insurance company rip-offs. These special privileges must go.

(2) Next, we need to prevent and punish frivolous lawsuits. Most lawyers are responsible advocates for their clients, but the few who aren't hurt the real victims, undercutting the credibility of the legal system and clogging our courts. For all his talk about frivolous lawsuits, President Bush does nothing to address them. He's got it backward -- instead of cracking down on irresponsible behavior and baseless cases, he's targeting serious victims who win in court and are believed by juries.

Before a lawyer can bring a medical malpractice case to court, we should require that he or she swear that an expert doctor is ready to testify that real malpractice has occurred. Lawyers who file frivolous cases should face tough, mandatory sanctions. Lawyers who file three frivolous cases should be forbidden to bring another suit for the next 10 years -- in other words, **three strikes and you're out.**

(3) Finally, we can reduce malpractice premiums by helping to reduce malpractice. The Institute of Medicine found that at least 44,000 people die from preventable medical errors every year. In medicine, as in law, a few people cause the most problems: Only 5 percent of doctors have paid malpractice claims more than once since 1990. This same 5 percent are responsible for more than half of all claims paid. One part of the problem is state medical boards whose discipline is as lax as state bar associations'. We need to provide resources and incentives for boards to adopt real standards on the "three strikes" model. At the same time, we need to encourage doctors to report more medical errors voluntarily, so we can learn more about systemic problems.

Together these measures will give relief to most doctors who are suffering under the staggering weight of insurance premiums. But where premiums still cause shortages of medical care, Washington must provide a temporary subsidy so good doctors can continue their essential work. We shouldn't be padding insurers' profits and hurting people who have already suffered immensely, as the president proposes. But we should be protecting good doctors and the patients who depend on them.

The writer, a Democratic senator from North Carolina, is seeking his party's nomination for president.

LOAD-DATE: May 20, 2003

Justice

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.

Juries: 'Democracy in Action'

BY SEN. JOHN EDWARDS

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.

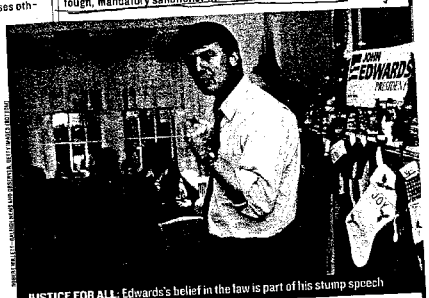
But there was no question that these were risks worth taking for Jennifer. The other side was counting on the Campbells to walk away intimidated, but they were wrong. A jury eventually agreed, and awarded the Campbells enough to make sure Jennifer's parents would never have to worry about her care.

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.



JUSTICE FOR ALL: Edwards's belief in the law is part of his stump speech

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.

I believe in the courts as a place for ordinary people to be heard when other institutions have failed them.
—SEN. JOHN EDWARDS

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

'I spent two decades standing up for people. There was nothing frivolous about the families who came to me for help.'

Mr. KELLER. I would also point out that I have to take Senator Edwards at face value, assuming he was genuine in wanting to ban frivolous lawsuits, that it wasn't just some sham political stunt to try to cover the fact that he doesn't like caps and I take him at his word. I am genuine. He is genuine. This is a good faith idea, and I ask everyone to vote for this amendment. Yield back the balance of my time.

Chairman SENSENBRENNER. The Chair would admonish all Members that it is a violation of the rules to call into question the motivations of Members of either this body or the other body.

Gentleman from California, for what purpose do you seek recognition?

Mr. BERMAN. Mr. Chairman, I have an amendment to the amendment.

Chairman SENSENBRENNER. The Clerk will report the amendment to the amendment.

The CLERK. Mr. Chairman, I don't have an amendment.

Chairman SENSENBRENNER. There is no amendment at the desk.

Mr. BERMAN. There should be a perfecting amendment offered by Mr. Berman. It is at the desk right now.

Chairman SENSENBRENNER. That is not the desk.

Mr. BERMAN. It is a desk. It is not that desk.

Chairman SENSENBRENNER. Amendments will be submitted to the Clerk so they can be read by the Clerk. The Clerk will read the amendment.

The CLERK. Amendment—perfecting amendment offered by Mr. Berman to the Keller amendment to H.R. 4571. Add the following new section a(3). (3), an attorney has the right to appeal any suspension described by this section and the suspension shall not take place pending such appeal.

[The amendment follows:]

Perfecting Amendment Offered by
Mr. Berman

Add the following new section a(3):

"(3) an attorney has the right to appeal any suspension described by this section and the suspension shall not take place pending such appeal."

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes in support of his perfecting amendment.

Mr. BERMAN. Yes, Mr. Chairman, I take Mr. Keller's comments at face value and in responding to Mr. Watt, he said I don't think an amendment which says three findings of frivolous conduct by the attorney approved, supported continued or maintained after an appeal should allow that attorney to avoid any suspension, and this simply makes clear that there is an appeal of the suspension and the suspension doesn't take place pending the appeal.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. KELLER. Move to strike the last word.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. BERMAN. I yield back.

Chairman SENSENBRENNER. Gentleman from Florida.

Mr. KELLER. I will accept the amendment.

Mr. BERMAN. Thank you.

Chairman SENSENBRENNER. The question is on agreeing to the Berman amendment to the Keller amendment. Gentleman from—those in favor will say aye. Opposed no. The ayes appear to have it. The ayes have it. And the perfecting amendment by Mr. Berman to the Keller amendment is agreed to.

The question now is on the adoption of the Keller amendment, as amended.

Gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, notwithstanding the amendment that was just adopted, you still have the first two strikes that you can be placed on the edge even with the frivolous findings. The suspension of the attorney for one violation may be appropriate, it may not be appropriate for just a minor offense. This is not only the filing of the lawsuit, but also anything that goes on in the middle of the lawsuit, a filing, a failure to provide information on a timely basis, anything can result in a Rule 11. And some of the findings of a violation of Rule 11 may be minor, in fact you may just get a warning. Three—two warnings early in your career and a third warning 20 years later should not result in—even if the warning is well taken, should not result as a mandatory, with no discretion, suspension from practice for a year. I would hope that we would defeat the bill.

Mr. KELLER. Will the gentleman yield?

Mr. SCOTT. Excuse me. I yield to the gentleman from Florida.

Mr. KELLER. I think it is fine the way it is. And whatever concerns you may have about injustice, we tried to be reasonable and accommodate by giving you an immediate appeal. So I think by taking the last amendment that should alleviate your concerns.

Mr. SCOTT. Reclaiming my time, the immediate appeal is for the third strike, not the first two. And the finding may in fact be valid. It is just a very minor technical offense for which a warning would be appropriate, not a 1-year suspension.

I yield to the gentleman from North Carolina.

Mr. WATT. Can I just ask the gentleman a question? Your amendment says shall determine the number of times that the attorney has violated that rule in that Federal District Court during that attorney's career. What is your intention with respect to—how would you define that Federal court?

Mr. KELLER. Will the gentleman yield?

Mr. WATT. Would it be the North Carolina Federal courts? Would it be the Western District, the Eastern District? Would it be that particular——

Mr. KELLER. Will the gentleman yield?

Mr. WATT. Yeah.

Mr. KELLER. I don't know the names of your districts in North Carolina, but if you——

Mr. WATT. There are three in North Carolina.

Mr. KELLER. Okay, let me just use Florida because it also has three. You have a northern district, a middle district and a southern district. You would have to be found in the middle district

three times to have violated Rule 11. If you were found two times in the middle district and one time in the southern district, this would not apply, the suspension. I am defining a district court as it reads, that District Court.

I yield back.

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. The question is on the Keller amendment, as amended by the Berman amendment. Those in favor will say aye.

Mr. SMITH. May we have a rollcall vote on that?

Chairman SENSENBRENNER. Those in favor will say aye. Opposed no. The ayes appear to have it.

Mr. SMITH. May we have a rollcall vote?

Chairman SENSENBRENNER. rollcall will be ordered. The question is on agreeing to the amendment offered by the gentleman from Florida, Mr. Keller, as modified by the perfecting amendment of the gentleman from California, Mr. Berman. 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.

Mr. HYDE. Aye.

The CLERK. Mr. Hyde votes aye.

Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble votes aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith votes aye.

Mr. Gallegly.

[no response.]

The CLERK. Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte votes aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot votes aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins votes aye.

Mr. Cannon.

[no response.]

The CLERK. Mr. Bachus.

[no response.]

The CLERK. Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler votes aye.

Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green votes aye.

Mr. Keller.

Mr. KELLER. Aye.

The CLERK. Mr. Keller votes aye.

Ms. Hart.

Ms. HART. Aye.

The CLERK. Ms. Hart votes aye.

Mr. Flake.
[no response.]
The CLERK. Mr. Pence.
[no response.]
The CLERK. Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes votes aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King votes aye.
Mr. Carter.
Mr. CARTER. Aye.
The CLERK. Mr. Carter votes aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye.
Mrs. Blackburn.
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn votes aye.
Mr. Conyers.
[no response.]
The CLERK. Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman votes aye.
Mr. Boucher.
[no response.]
The CLERK. Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren votes aye.
Ms. Jackson Lee.
[no response.]
The CLERK. Ms. Waters.
[no response.]
The CLERK. Mr. Meehan.
[no response.]
The CLERK. Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt votes no.
Mr. Wexler.
[no response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin votes no.
Mr. Weiner.
[no response.]
The CLERK.Mr. Schiff.

Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez votes no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Sensenbrenner votes aye.
Chairman SENSENBRENNER. Members in the chambers who wish to cast or change their vote. Gentleman from Alabama, Mr. Bachus.
Mr. BACHUS. Mr. Chairman, I vote aye.
The CLERK. Mr. Bachus aye.
Chairman SENSENBRENNER. Further Members in the chamber who wish to cast or change their vote? If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 20 ayes and six noes.
Chairman SENSENBRENNER. And the amendment is agreed to. Are there further amendments.
Mr. NADLER. Mr. Chairman.
Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler.
Mr. NADLER. Mr. Chairman, I have an amendment at the desk.
Chairman SENSENBRENNER. The Clerk will report the amendment.
The CLERK. Amendment to H.R. 4571 offered by Mr. Nadler. At the end of the bill insert the following section. Availability of court records. (a), in general, 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 in writing that identifies the interest that justifies the order and that determines that the order is no broader than necessary to protect the interest. (b), applicability. This section applies to any court record including a record obtained through discovery whether or not formally filed with the Court in any Federal or State court.
[The amendment follows:]

AMENDMENT TO H.R. 4571
OFFERED BY M__. Nadler

At the end of the bill, insert the following:

SEC. ___. AVAILABILITY OF COURT RECORDS.

(a) IN GENERAL.—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 in writing that identifies the interest that justifies the order and that determines that the order is no broader than necessary to protect that interest.

(b) APPLICABILITY.—This section applies to any court record, including a record obtained through discovery, whether or not formally filed with the court, in any Federal or State court.

Mr. SMITH. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. Point of order is reserved. The gentleman from New York is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, this is the same amendment I offered to a bill 2 years ago when you said that you thought it was a very constructive amendment and you are pleased to support it and I said I would like to take yes for an answer and the amendment was adopted. But the bill was not.

What the amendment says is that—well, let's put it this way. Very often in civil litigation someone may have an unsafe product or an unsafe procedure, and rather than go to trial they settle with the plaintiff and they pay the plaintiff a certain amount of money because the plaintiff was damaged by this unsafe product, but a condition of the settlement which the plaintiff agrees to, because he or she is getting the money, is that the records will be sealed and no one will ever talk about it. And this perpetuates the situation where the unsafe product is continued to be marketed and nothing changes.

Now, clearly the—when you are involving health services the secrecy 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. It requires that a judge must make a finding of fact where a gag order is requested. If the judge finds that the privacy interest is broader than the public interest because there may be a legitimate privacy interest, then the judge must allow the gag order and the secrecy. But if the judge finds that the public interest and the health and safety of the situation outweighs the privacy interest claim, then the judge will not issue or will not approve the gag order. When it comes to health and safety, public access to medical malpractice lawsuit materials is absolutely essential. When it comes to public safety, public access to knowledge that a given product is unsafe is essential because otherwise it may not be changed. If the public knows as a result that a given car is unsafe or whatever, the manufacturer will have pressure to fix it up rather than simply bear the cost of settlement of litigation every so often. So this amendment balances the public interest and knowledge and public knowledge of admitted safety defects with the privacy interest that a manufacturer or someone else may actually have and says that the judge decides in each case that the privacy interest outweighs the public interest and therefore he will okay the privacy agreement or that the public safety and health interest outweighs the privacy interest and therefore he won't. And therefore, I urge my colleagues to vote for this amendment, and I hope the Chairman will agree with himself 2 years ago that this is a wise amendment.

Ms. LOFGREN. Would the gentleman yield?

Mr. NADLER. Yes, I will.

Ms. LOFGREN. I agree with the intent of this amendment and I think whenever there is litigation that affects health and safety, product liability issues, you are absolutely correct. A phenomenon that has occurred in California in the last several years, however, is impacted potentially by this amendment, and it is situations where you have competitors who are filing litigation primarily to

discover trade secrets. It has nothing to do with the kind of litigation you are discussing. And there has been a lot of discussion in the California legislature about this very issue, and how to make sure that the real object of the litigation isn't actually to discover something that should not be discovered. And I think that if we adopt this amendment we need to make clear, I would prefer actually that it be in the amendment but perhaps we could just do it in report language, that there is a presumption that if it is not a health and safety issue, but merely a trade secret, that great deference should be given to protecting trade secret.

Mr. NADLER. Reclaiming my time.

Ms. LOFGREN. I certainly would.

Mr. NADLER. If the gentlelady would yield, we give the judge the discretion in any case where the gentlelady is describing. The public interest and publicity would not outweigh the interest in privacy, and that is exactly the way this amendment is drafted for that reason.

Ms. LOFGREN. I understand that. But what we have discovered in California, and it is really a Silicon Valley issue in large part, is that in the course of discovery, because the courts are so overburdened, that it has become a huge issue in terms of even the judicial calendar and in the discovery issue, which is why I was struggling to figure out a way to offer an amendment to this. But I wasn't able to do so. The California legislature has not in the course of 2 years.

So I just wanted to raise the issue, and perhaps we could give guidance to the judiciary in our——

Mr. NADLER. Reclaiming my time.

Chairman SENSENBRENNER. The gentleman's time has expired. Does the gentleman wish to pursue his point of order?

Mr. SMITH. Mr. Chairman, I do wish to pursue the point of order.

Chairman SENSENBRENNER. Gentleman from Texas will state his point of order.

Mr. SMITH. Okay. Mr. Chairman, let me say at the outset that this may well be a good amendment and well intentioned. However, it is not relevant to the underlying piece of legislation and therefore is not germane. This amendment deals primarily with the sealing of court records whereas the underlying legislation deals with frivolous lawsuits. So I don't believe this particular amendment is germane. It may be worthy at another time, with another bill, but here it is not germane and I will——

Mr. BERMAN. Would the gentleman yield?

Mr. SMITH. And I will be happy to yield to the gentleman from New York.

Mr. NADLER. Are you going to offer this?

Mr. SMITH. Or the gentleman from California.

Mr. BERMAN. If the gentleman would yield.

Chairman SENSENBRENNER. The proper procedure on a point of order is for Members to seek recognition.

Mr. SMITH. Okay. I will yield back the balance of my time.

Chairman SENSENBRENNER. Gentleman from California.

Mr. BERMAN. I would just like to say that unfortunately this bill doesn't simply deal with frivolous lawsuits. It opens up to—this bill has a provision regulating venue determinations in State courts having nothing to do with frivolous lawsuits. This bill goes unfortu-

nately far beyond the issue of Rule 11 and frivolous lawsuits. And I just think the Members of the Committee should understand that it has additional provisions in this bill that have no relationship either to Rule 11 or frivolous lawsuits and in fact seeks to decide what historically has always been State law decisions about which county you can bring a lawsuit in in a personal injury case for reasons that I truly don't understand and will look forward to hearing from you as author of it later on.

Chairman SENSENBRENNER. Anybody else wish to be heard on the point of order? Gentleman from New York.

Mr. NADLER. Mr. Chairman, I would suggest—first of all, I agree with Mr. Berman. The amendment is not out of order for the reasons that he stated. But I think we can even clarify that because I am willing to narrow the amendment and simply say in any case concerning Rule 11 or forum shopping, a court, et cetera, and that I think would obviate any problem that Mr. Smith may have.

Chairman SENSENBRENNER. Does the gentleman withdraw the amendment?

Mr. NADLER. I would like to amend the amendment.

Chairman SENSENBRENNER. Well, the Chair has to rule on the point of order first.

Mr. NADLER. I will withdraw the amendment.

Chairman SENSENBRENNER. The amendment is withdrawn. Are there further amendments?

Mr. NADLER. Yes. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from New York.

Mr. NADLER. I have an amendment, the same amendment with the words "in any case concerning Rule 11 or forum shopping" after the words "In General."

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to H.R. 4571 offered by Mr. Nadler. At the end of the bill insert the following: "section. Availability of court records. In general."

[The amendment follows:]

AMENDMENT TO H.R. 4571
OFFERED BY M__. Nadler

At the end of the bill, insert the following:

SEC. ___. AVAILABILITY OF COURT RECORDS.

(a) IN GENERAL.—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 in writing that identifies the interest that justifies the order and that determines that the order is no broader than necessary to protect that interest.

(b) APPLICABILITY.—This section applies to any court record, including a record obtained through discovery, whether or not formally filed with the court, in any Federal or State court.

In any case concerning rule 11 or forum shopping

Mr. NADLER. At that point, right after the words "In General," "In any case concerning Rule 11 or forum shopping," and then just read the rest.

The CLERK. "a court may not order that a court record"——

Mr. NADLER. Mr. Chairman. I make——

The CLERK. —"be sealed or subjected to a protective order . . ."

Mr. NADLER. Mr. Chairman, I move to waive the reading of the rest of the amendment.

Chairman SENSENBRENNER. Well, are there copies of the amendment for Members of the Committee? Because we have never waived the reading of an amendment——

Mr. NADLER. Then I withdraw the motion.

Chairman SENSENBRENNER. Okay. The Clerk will continue to read.

The CLERK. —"or that access to that record be otherwise restricted, unless the court makes a finding of fact in writing that identifies the interest that justifies the order and that determines that the order is no broader than necessary to protect that interest.

"(b) Applicability. This section applies to any court record, including a record obtained through discovery, whether or not formally filed with the court, in any Federal or State court."

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

Mr. NADLER. Thank you, Mr. Chairman. I won't take 5 minutes because I explained the point of the amendment before. I think Members of the Committee in the prior year recognized the merit of the amendment. The Chairman certainly did. And I think that the addition of these words at the beginning of the amendment, in any case, limiting its applicability to any case concerning Rule 11 or forum shopping, should satisfy any validity to the point of order. I don't think the point of order was valid in any event because of what Mr. Berman said. But certainly limiting it to cases concerning Rule 11 or forum shopping certainly makes it germane to the bill.

I yield back.

Chairman SENSENBRENNER. The gentleman yield back.

Mr. NADLER. Yes, I do.

Chairman SENSENBRENNER. Gentleman from Texas.

Mr. SMITH. Mr. Chairman, if you have accepted this amendment in past years, I don't have any objection to the amendment now.

Chairman SENSENBRENNER. The gentleman yield back?

Mr. SMITH. And I will yield back.

Chairman SENSENBRENNER. The question is on agreeing to the second Nadler amendment. Those in favor will say aye. Opposed no. The noes appear to have it.

Mr. NADLER. Mr. Chairman, there was one no. I would ask for the ayes and nays.

Chairman SENSENBRENNER. rollcall was ordered. Those in favor of the amendment offered by the gentleman from New York will as your names are called answer aye. Those opposed no. And the Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. No.

The CLERK. Mr. Hyde votes no.

Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble votes no.
Mr. Smith.
Mr. SMITH. Pass.
The CLERK. Mr. Smith passes.
Mr. Gallegly.
[no response.]
The CLERK. Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte votes no.
Mr. Chabot.
[no response.]
The CLERK. Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins votes no.
Mr. Cannon.
[no response.]
The CLERK. Mr. Bachus.
[no response.]
The CLERK. Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler votes no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green votes no.
Mr. Keller.
Mr. KELLER. No.
The CLERK. Mr. Keller votes no.
Ms. Hart.
Ms. HART. No.
The CLERK. Ms. Hart votes no.
Mr. Flake.
[no response.]
The CLERK. Mr. Pence.
[no response.]
The CLERK. Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes votes no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King votes no.
Mr. Carter.
Mr. CARTER. No.
The CLERK. Mr. Carter votes no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no.
Mrs. Blackburn.
[no response.]
The CLERK. Mr. Conyers.
[no response.]
The CLERK. Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman votes aye.
Mr. Boucher.
[No response.]

The CLERK. Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler votes aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. Pass.
The CLERK. Ms. Lofgren passes.
Ms. Jackson Lee.
[No response.]
The CLERK. Ms. Waters.
[No response.]
The CLERK. Mr. Meehan.
[No response.]
The CLERK. Mr. Delahunt.
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt votes aye.
Mr. Wexler.
[No response.]
The CLERK. Ms. Baldwin.
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin votes aye.
Mr. Weiner.
[No response.]
The CLERK.Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez votes aye.
Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Sensenbrenner votes no.
Chairman SENSENBRENNER. Further Members in the Committee wish to cast or change their vote? The gentlewoman from California.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.
Chairman SENSENBRENNER. Gentleman from California, Mr. Gallegly.
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly, no.
Chairman SENSENBRENNER. Gentleman from Alabama, Mr. Bachus.
Mr. BACHUS. No.
The CLERK. Mr. Bachus, no.
Chairman SENSENBRENNER. Further Members who wish to cast or change their votes? Gentleman from Ohio, Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye.
Chairman SENSENBRENNER. The Clerk will report.

The CLERK. Mr. Chairman, there are 8 ayes, 17 noes.

Chairman SENSENBRENNER. The amendment is not agreed to.

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

Mr. SCOTT. Mr. Chairman, I have an amendment at the desk, SD-010.XML, with interdelineations.

Chairman SENSENBRENNER. The Clerk will report that amendment.

The CLERK. Amendment to H.R. 4571 offered by Mr. Scott. At the end of the bill, insert the following: Section 'blank'. Enhanced sanctions for document destruction.

(a) In General. Whoever willfully and intentionally——

[The amendment follows:]

H.L.C.

AMENDMENT TO H.R. 4571

OFFERED BY MR. Scott

At the end of the bill, insert the following:

SEC. ___. 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 fined under title 18, United States Code, or imprisoned for not more than five years, or both.~~

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

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

Mr. SCOTT. Thank you, Mr. Chairman. Mr. Chairman, this deals with people who willfully and intentionally destroy documents that are subject to discovery. The bill—the amendment as originally introduced had criminal sanctions. Those have been removed and it leaves it to civil, just civil penalties for destroying documents sought and relevant to the proceeding.

I would hope that the amendment would be adopted.

Mr. SMITH. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from Texas, Mr. Smith.

Mr. SMITH. Mr. Chairman, I think this is a good amendment. I know it is well-intentioned and to the best of my knowledge the gentleman from Virginia has in fact made the changes that we suggested. Is that correct?

The only question I have for the gentleman from Virginia deals with a word in the second sentence of section (a) which now reads "whosoever willfully and intentionally influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede." the word "endeavors" could be vague, even unconstitutionally vague, and if the gentleman is satisfied with that, I would still support the amendment. But I don't want the amendment to be found unconstitutional because of too vague of a word.

Mr. SCOTT. I would ask unanimous consent that "endeavors" be changed to "attempts."

Chairman SENSENBRENNER. Without objection.

Mr. SCOTT. And thank the gentleman.

Mr. SMITH. And Mr. Chairman, I support the amendment and recommend that we adopt it.

Chairman SENSENBRENNER. The question is on agreeing to the amendment offered by the gentleman from Virginia, Mr. Scott. Those in favor will say aye. Opposed aye. The ayes appear to have it. The ayes have it. The amendment is agreed to.

Are there further amendments? The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Mr. Chairman, I don't have an amendment. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. And I won't take 5 minutes, Mr. Chairman. I just want to express that I think we are making a mistake if we pass this bill and go back to a situation where we have removed discretion from judges once again. We have been through this over and over again. There seems to be a consistent tug of war between whether we think we as legislators can decide what procedural consequences should take place in a courtroom without giving judges any discretion and control over their courtrooms, or whether judges are better positioned to do that. I think we have consistently politicized that and that the right decision was made originally when we went away from this back in 1993 to give judges more discretion and not make these penalties mandatory.

Judges have the authority to prevent frivolous lawsuits, prevent frivolous conduct in their courts, and I think we ought to allow them to do that. When we cast these broad "one size fits all" rules and make a certain course of action mandatory in every single case, we are ignoring what is just in cases, and I think judges are

better positioned to know that, observing the conduct in their courtroom and making good, judicious decisions about it.

Now, do judges make bad decisions sometimes? Yes, they do, but I think we are about to make a bad decision by telling every judge in America that you must have a mandatory consequence for something that is going on in your case, in your courtroom. And it may have the reverse effect because it may make judges less likely to find that there was frivolous actions around the edges so that they don't get into this mandatory situation. I think we are seeing that in mandatory sentencing now, and I think we are making a real serious mistake to go in this direction.

And I will yield back.

Chairman SENSENBRENNER. Gentleman from California, Mr. Berman, for what purpose do you seek recognition.

Mr. BERMAN. Move to strike the last word.

Chairman SENSENBRENNER. Gentleman is recognized for 5 minutes.

Mr. BERMAN. Mr. Chairman, I don't entirely agree with my friend from North Carolina on the subject. I think there is a great deal of discretion remaining. The court has the discretion to decide whether or not a particular pleading or motion is frivolous and by its very nature that involves a great deal of discretion in the judge. And then, unlike mandatory sentencing, which provides whole minimum sentences regardless of the factual situation or of the particular case, this allows the judge to decide the appropriate sanction. There is no effort to say that a finding of rule 11 violation has a minimum financial burden or an automatic suspension or disbarment.

So I think there is a part of this bill that makes a great deal of sense, and I also think it answers. I think, giving Rule 11 teeth deals with the issue of abuse of the process. I think it is a far better approach than some of the tort reform measures that I have seen pushed through this Committee. My concern, and the reason I have to vote no on this bill is because of the provisions that are unrelated to Rule 11. All of a sudden, in a bill that is packaged as a bill dealing with frivolous lawsuits, there are all these rules on venue, not just in Federal court, but in State courts.

I don't know if a particular State rule on where you can bring a personal injury action is appropriate or not appropriate. The notion that we are now going to automatically amend 50 State laws and rules of State courts on venue for personal injury actions, even where they are said to involve interstate commerce, makes no sense to me whatsoever, absent some compelling case that all 50 of these States have inappropriate rules that allow what the sponsors call forum shopping.

What happens in a—let's assume Boeing, the principal office is in Chicago, the product is manufactured in the State of Washington, and designed in the State of Washington. A plaintiff who resides in North Carolina wants to bring a lawsuit where Boeing has most of its operations in the State of Washington, where the particular plane was manufactured on a products liability theory. The notion that that is the inappropriate place because it is not where the injury occurred, and it is not where the plaintiff resides, and it is not where Boeing's principal office is, maybe that is right and maybe it isn't.

The notion that we are going to, in one fell swoop, automatically restrict in any other place where you can bring that action, without any demonstration that it is simply for the purposes of finding a judge that is plaintiff-oriented, especially when there is nothing done here to limit the ability of Defendants to remove to Federal Court any cases, shows, I think, a bias on one side of an issue and conflict.

So, I would implore the sponsor of the bill, my friend from Texas, to limit this to sections 1, 2 and 3, and to eliminate section 4, which opens up a whole can of worms, has nothing to do with frivolous lawsuits, and seeks to amend personal and State court personal injury actions in cases involving interstate commerce in a way that we have no idea what it means in terms of which county in a particular State you can bring this action in.

If you proceed with this, I have no doubt you have the votes to pass it in the House and out of this Committee. But once again, you will have overreached. You have a good idea, but you can't resist adding more and more on to it, and this will be another in a trail of 10 years of bills put out in the name of reform that never come into law, and they never do, whether it is class action, medical malpractice, joint and several liability or all of the dozens of other cases, elimination of Federal jurisdiction that you try because you, even when you have a reasonable idea, you add on stuff and go too far and make it another one-house bill.

Take out Section 4 on forum shopping, make that the subject of a separate hearing in the appropriate Subcommittee of Judiciary about whether it is appropriate, and move ahead with your efforts on Rule 11, and you will have my support.

Mr. CHABOT. Will the gentleman yield?

Mr. BERMAN. I would happy to.

Mr. CHABOT. I think the gentleman—the point is most of these don't become law because they get blocked by the trial lawyers over in the other body. That is what happens.

Mr. BERMAN. No. I will give you—if I may reclaim my time.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. Does the gentleman from California want 2 additional minutes?

Mr. BERMAN. I would like one additional minute.

Chairman SENSENBRENNER. Without objection. You may have 5.

Mr. BERMAN. I will let Mr. Delahunt seek recognition. With that offer, I can't——

Chairman SENSENBRENNER. Does the gentleman yield back his additional minute?

Mr. BERMAN. I do.

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. I yield to the gentleman from California as much time as he may consume.

Mr. BERMAN. To simply characterize it in that fashion, as trial lawyers defeating the bill in the Senate, that demeans the integrity of a lot of different people. When you come forward on medical mal-

practice legislation, and you make some cases regarding different aspects of abuse and reasons why healthcare costs could be contained, but you will not look at any of the provisions or moderate any of those provisions regarding what the cap should be or how you should deal with the collateral source rule.

When you deal with class actions in a fashion that essentially removes State role and any meaningful fashion without providing any kinds of balance, you go too far. One day you will get the message that you keep having one House bill because you always add stuff on. Deal with the merits of the forum shopping issue. Why does that need to be in here? You promote it as a Rule 11 bill in effort to give Rule 11 some teeth to deal with the frivolous lawsuits and then you have to add this other section—which raises a whole series of other questions—which involves really an unprecedented intrusion into Federalism by seeking to regulate how State laws, State legislatures and State courts decide venue issues on personal injury cases handled in State courts.

Why? Why go that far? You are risking a partisan, more of a partisan fight here and a sure death in the Senate. It isn't simply because of a particular interest group's lobbying. It is because you guys never let a reasonable idea be enough. You always want to push it further, go to an extreme in order to make a point, a point that I don't think you are making very well.

I yield back.

Mr. DELAHUNT. I am reclaiming my time. I would just like to associate myself with the remarks of the gentleman from California.

I think there is opportunity, and I think there is opportunity and I think he has articulated well to address some of the concerns that have been mentioned by proponents. But, again, there is simply an overreaching effort here. I am not going to suggest it is for political motives, but some would infer that it might be.

Mr. WATT. Would the gentleman yield to me so I can suggest that?

Mr. DELAHUNT. I will yield to the gentleman from North Carolina for purposes of a suggestion.

Mr. WATT. I think it is quite obvious that they would rather have the issue than a bill that does some constructive things to reduce frivolous lawsuits——

Mr. DELAHUNT. Well, reclaiming my time——

Mr. WATT. —instead of blaming that on somebody in the Senate, but—so, I don't think I am hesitant to suggest that that is the case.

Mr. DELAHUNT. Well, reclaiming my time.

As I look down the list of the bills that we are considering here today, one might describe the agenda as the frivolous anti-Plaintiff legislative day in the Judiciary Committee. I mean, we all know what this is about. It is about an election cycle.

But I really do think that, you know, there are opportunities are as put forth by Members such as Mr. Berman, where there could be a consensus and where good sound public policy could be crafted. The direction that we are going, we might as well just simply eliminate the jurisdiction of State courts.

Why don't we just simply file an amendment to the Constitution, the United States Constitution, repealing—if the gentleman from North Carolina could help me, what is the States rights amend-

ment of the U.S. Constitution, because I knew you were the Chair of that caucus?

Mr. SCOTT. What is the question again?

Mr. DELAHUNT. Well, if the gentleman had been listening to me, I think it is the 10th amendment.

Mr. WATT. I try to tune out all of that, a good portion of the morning, but go ahead.

Mr. DELAHUNT. Well, is it the 10th amendment that invests in States' certain rights, that reserve certain rights?

Mr. WATT. Last time I checked. I think they may have repealed it by now.

Mr. DELAHUNT. At least in terms of the Federalism as it applies to the judicial systems of the States and the Federal Government, the direction that we have been going in, since I served in this Committee is de facto elimination, a repeal of the 10th amendment as it applies——

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. SCHIFF. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff, has had very little to say today.

Mr. SCHIFF. I thank you for not applauding that.

Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. My colleague from Massachusetts poses the question of why don't we just stop fooling around and remove the jurisdiction of the State courts. The problem with that is we have already moved to remove the jurisdiction of the Federal courts. We did that last month.

And pretty soon, we will be left with no jurisdiction of any court. I have often remarked in Committee my concern about the degradation of relationship between this Congress and the courts in general. In addition to the concern raised by my colleague from California, Mr. Berman, over really an impressive interference with the venue decisions that are made by the States and in the State courts, I am also troubled by the intrusion that we are making and the way we are making it into the Federal courts promulgations of rules over their own procedures.

We passed in Congress some years ago the rules enabling act that establish certain procedures for how rules would be adopted in the Federal courts. Under those congressionally-mandated procedures, those new rules will, in the first instance be considered and drafted by the U.S. Judicial conference, thereafter be submitted for public comment and reconsideration, then be submitted to the U.S. Supreme Court for consideration and promulgation, and finally they are sent to Congress which retains the power to veto any rule before it goes into effect.

We have bypassed all of that. In fact, in section 2 of this bill gone way beyond bypassing that; in fact, we are reversing exactly that process that was actually undertaken. This section 2 of the bill was something that was enacted in 1983, evidently caused great problems within the judiciary, and then was undone in 1993. The judicial conference has written to the Congress with respect to this bill that undoing the rule 1993 Rule 11 amendments, even though no

serious problem has been brought to the judicial conference rules attention would frustrate the purpose and the intent of the Rules Enabling Act.

Section 2 of H.R. 4571 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. Section 2 indeed, in some ways, seems to go beyond the provisions that created serious problems with the 1983 rule. It may cause even greater mischief. Rule 11 in its present form has proven effective and should not be revised. That is what the judicial conference has to say.

Basically, what we are contemplating here, and, frankly, when I first read this proposal, it struck me at a gut level as something very worthwhile consideration. I didn't know the history of it. When you look at the history of it, you read that this was tried for 10 years and that it spawned a cottage industry where someone would file the Rule 11 motion, the opposing counsel would then file the Rule 11 motion on the Rule 11 motion, and you would have litigation over whose Rule 11 motion should succeed. That when there were mandatory attorneys' fees and mandatory imposition of sanctions, that basically you end up creating this cottage industry in Rule 11 motions. Revenue, the bench says this was a waste of time. In fact, the bench said it created more dollars of unnecessary litigation.

Now that is, I would admit, a kind of counterintuitive result. I would not have anticipated that. But that has been the experience of the judiciary, and, to my experience, no one has contradicted that. No one has said the evidence the judiciary put forward, the surveys of judges were somehow wrong in error, missed the point or that the judicial conference now takes a different point of that.

Mr. SMITH. Would the gentleman from California yield.

Mr. SCHIFF. I would be delighted to yield.

Mr. SMITH. I want to point out a couple or surveys that were done that the gentleman may not be aware of. For example, in 1990 the judicial conference surveyed 750 Federal judges and found that 95 percent believed that Rule 11—this is the pre-1993 rule—did not impede development of the law. 80 percent of the judges believed the rule should not—excuse me, 80 percent of the judges believed the rule should have been retained in its then current form.

Furthermore, they did another poll after the rule was repealed. This survey was done in 1985 and in that survey, two-thirds of the judges, two thirds of the defense attorneys, and 66 percent of the other attorneys supported restoring Rule 11's compensatory function once again. So we may be looking at different surveys, but clearly the judges themselves felt that the original revenue was a good rule and regretted changing it.

Chairman SENSENBRENNER. The time of the gentleman from California has expired.

Mr. SCHIFF. Mr. Chairman, may I request 2 additional minutes.

Chairman SENSENBRENNER. Without objection.

Mr. SCHIFF. I appreciate the author's comments, but again, turning to the views expressed by the judicial conference, "experience with the amended rule since 1993 has demonstrated a market decline to Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings."

In June 1995, the Federal Judicial Center conducted a survey of 1130 lawyers, 148 judges, on the effect of the 1993 Rule 11 amendments. 580 attorneys, 120 judges responded. The center found general satisfaction with the amended rule. It also found that more than 75 percent of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated. A majority of the judges and lawyers, both Plaintiffs and Defendant's lawyers believed that groundless litigation was handled effectively by judges.

So I don't understand the disparity in our statistics. But I also don't understand why if, the judges do feel, that the rule should go back to the form it was in before the 10-year bad experience, that the judicial conference is not recommending that course, is not initiating the rules, enabling act procedures.

Why they are opposing Congress bypassing their process and their point of view. So, again, the gentleman—this doesn't seem at odds with what we are hearing directly from the judicial conference. I would be more than interested in having the judicial conference come and testify and maybe explain the statistics shortsighting and in preparation for this hearing.

And I thank the gentleman for the additional time and yield back.

Chairman SENSENBRENNER. Are there further amendments?

Mr. WATT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. I ask unanimous consent that the letter from the Secretary of the Judicial Conference of the United States,[1] dated July 9, 2004 from which Mr. Schiff was reading, be made a part of the record.

Chairman SENSENBRENNER. Without objection.

The gentleman from Texas.

For what purpose do you seek recognition?

Mr. SMITH. Mr. Chairman, I have a unanimous consent request that the letter from the American Tort Reform Organization be made a part of the record as well as a list, as well of those organizations requesting the Lawsuit Reduction Act. Those organizations would include the American Medical Association, National Association of Manufacturers, National Federation of Independent Businesses, National Restaurant Association and the Chamber of Congress.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Thank you. Without objection.

[The material referred to follows:]

[1] *See* "Agency Views."

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August 27, 2004

Hon. James Sensenbrenner
Chairman,
Committee on the Judiciary
U.S. House of Representatives
2138 Rayburn House Office Building
Washington, D.C. 20515

Hon. John Conyers, Jr.
Ranking Minority Member,
Committee on the Judiciary
U.S. House of Representatives
2426 Rayburn House Office Building
Washington, D.C. 20515

Re: Hearing on H.R. 4571, the "Lawsuit Abuse Reduction Act of 2004"

Dear Chairman Sensenbrenner and Representative Conyers:

During the June 22, 2004, oversight hearing, "Safeguarding Americans from a Legal Culture of Fear: Approaches to Limiting Lawsuit Abuse," before the House Judiciary Committee, Representative Conyers asked me as a witness, in my capacity as counsel to the American Tort Reform Association (ATRA), whether Philip Morris was a member of ATRA. I indicated that it was a member. Representative Conyers then pointed out that Philip Morris was not included on ATRA's sample member list. I responded that I appreciated his observation, and would look into the matter.

After looking into the matter, I learned that Philip Morris was listed under its new corporate name, Altria. The Altria name is still gaining public recognition but it was, in fact, listed. Mr. Conyers' inquiry, however, prompted me to consider whether the existing ATRA sample member list was truly representative of the broad spectrum of ATRA's membership. After a review of the list, I concluded that it needed to be revised. With help from ATRA's staff, the list has been updated. I have enclosed the revised list for your files and use at future hearings.

With appreciation,

Victor E. Schwartz
General Counsel, American Tort Reform Association

Enclosure

cc (w/out enc.): Sherman Joyce, Esq., President, American Tort Reform Association

Geneva
Houston
Kansas City
London
Miami
New Orleans
Orange County
Overland Park
San Francisco
Tampa
Washington, D.C.

116320v1

ATRA **American Tort Reform Association**
1101 Connecticut Ave, NW ■ Suite 400 ■ Washington, DC 20036
(202) 682-1163 ■ Fax: (202) 682-1022 ■ www.atra.org

Sample List of ATRA Membership

3M Company
Altria Corporate Services/Kraft Foods
ASFE
Advance Medical Technology Association
American Academy of Orthopaedic Surgeons
American Association of Neurological Surgeons
American Blood Centers
American Chemistry Council
American College of Obstetricians & Gynecologists
American College of Surgeons
American Council of Engineering Companies
American Furniture Warehouse
American Health Care Association
American Institute of Architects
American Legislative Exchange Council
American Medical Association
American Society of Mechanical Engineers
Anheuser Busch Companies
Associated Wire Rope Fabricators
Baxter
Boeing
Bunn Brothers Ltd
Caterpillar
City of New York Law Department
Cooper Industries
Court Security Systems
CSX Transportation
DaimlerChrysler Corporation
Defense Research Institute
Delmar Emergency Specialists
DeWald Northwest Company
diaDexus, Inc.
Doctor's Company
Erickson Retirement Communities
Harleysville Insurance Companies
Juvenile Products Manufacturers
Kenyon Plastering, Inc.
Koch Industries
Lovell Safety Management Co.
Manhattan Orthopaedics, PC
NCH Corporation
National Association of Home Builders
National Federation of Independent Businesses
National Fuel Gas Distribution Corporation
New York Blood Centers
New York Life Insurance
Nexcare Heathcare Systems LLC
PPM Services
Pennsylvania Medical Society
Pfizer
Pharmaceutical Research and Manufacturers of America
Physician Insurers Association of America
Rio Grande Valley Chamber
Roller Skating Association, Intl.
Scandia Family Fun Center
SeamCraft
Small Aircraft Manufacturers Association
SnowSports Industries America
State Farm
Taussig Corporation
TRW Automotive
Wood Machinery Manufacturers of America
Wyeth
Z-World Inc.

Endorsements

L.A.R.A. Coalition:

ACA International General
American International Auto Dealers Association
American Medical Association
American Tort Reform Association
Citizens for Civil Justice Reform
Industry Minerals Association – North America
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Federation of Independent Businesses
National Restaurant Association
U.S. Chamber of Commerce, Institute for Legal Reform

Are there further amendments? If there are no further amendments. The question occurs on the motion to report the bill H.R. 4571 favorably as amended.

All in favor say will say aye.

Aye.

Opposed no.

No.

Ayes appear to have it.

Mr. SMITH. Mr. Chairman, I would like a rollcall vote.

Chairman SENSENBRENNER. rollcall is ordered.

Those in favor of the motion to report H.R. 4571 favorably as amended will as your name is called answer aye.

Those opposed, no.

And the clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. Aye

The CLERK. Mr. Hyde votes aye.

Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble votes aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith votes aye.

Mr. Gallegly.

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly votes aye.

Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte votes aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot votes aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins votes aye.

Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus votes aye.

Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler votes aye.

Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green votes aye.

Mr. Keller.

Mr. KELLER. Aye.

The CLERK. Mr. Keller votes aye.

Ms. Hart.

Ms. HART. Aye.

The CLERK. Ms. Hart votes aye.

Mr. Flake.

[no response.]

The CLERK. Mr. Pence.

[no response.]

The CLERK. Mr. Forbes.

Mr. FORBES. Aye.
The CLERK. Mr. Forbes votes aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King votes aye.
Mr. Carter.
Mr. CARTER. Aye.
The CLERK. Mr. Carter votes aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye.
Mrs. Blackburn.
Mrs. BLACKBURN. Aye.
The CLERK. Mrs. Blackburn votes aye.
Mr. Conyers.
[no response.]
The CLERK. Mr. Berman
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no.
Mr. Boucher.
[no response.]
The CLERK. Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no.
Ms. Jackson Lee.
[no response.]
The CLERK. Ms. Waters.
[no response.]
The CLERK. Mr. Meehan.
[no response.]
The CLERK. Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt votes no.
Mr. Wexler.
[no response.]
The CLERK. Ms. Baldwin
Ms. BALDWIN. No.
The CLERK. Ms. Baldwin votes no.
Mr. Weiner.
[no response.]
The CLERK.Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff votes no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Mr. Chairman.

Chairman SENSENBRENNER. Aye.

The CLERK. Mr. Chairman votes aye.

Chairman SENSENBRENNER. Members in the Chamber who wish to cast or change their votes.

The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. No, please.

The CLERK. Mr. Wexler, no.

Chairman SENSENBRENNER. Further Members who wish to cast or change their votes. If not, the clerk will report.

The CLERK. Mr. Chairman, there are 18 ayes and 10 noes.

Chairman SENSENBRENNER. Then 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 incorporating the amendments adopted here today. Without objection the Chairman is moved to go to conference pursuant to House rules. Without objection the staff is directed to make any technical and conforming changes. That all Members will be given 2 days as provided by the House rules in which to submit additional supplementing or minority views.

DISSENTING VIEWS

We strongly oppose H.R. 4571, the so-called "Frivolous Lawsuit Reduction Act."

The legislation will have a significant, adverse impact on the ability of civil rights plaintiffs to seek recourse in our courts, will operate to benefit foreign corporate defendants at the expense of their domestic counterparts, and will massively skew the playing field against injured victims. This sweeping overhaul of our civil justice system is being completed on the thinnest conceivable record of a single cursory hearing and 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 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. For these and the reasons set forth herein, we dissent from this legislation.

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 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 plaintiffs may "only" be filed in the state and county (or federal district) where the plaintiff resides,

[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.

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

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

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 pursuing 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.

Section 6, added to the bill by an amendment offered by Mr. Keller, requires judges to sanction an attorney if the court determines that the attorney has violated Rule 11 three times in his or her entire career (a so-called "three strikes and you're out" provision). The required sanction is suspension from the practice of law in that district court for at least one year. This sanction appears to apply retroactively, to violations that occurred before their new statute takes effect.

Finally, Section 7, added to the bill by an amendment offered by Mr. Scott, provides for enhanced penalties for parties who destroy documents concerning a legal proceeding.

I. The Rule 11 and the "Three Strikes and You're Out" provision will have a chilling impact on civil rights actions

By requiring a mandatory sanctions regime that would apply to civil rights cases, H.R. 4571 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 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." Another study showed that "civil rights cases 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."[4]

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 fling 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."[5]

[4] Lawrence C. Marshall et. al., The Use and Impact of Rule 11, 86 Nw. U.L. Rev. 943 (1992).
[5] Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report, 62 OHSLJ 1568, (2001).

As Professor Theodore Eisenberg, Professor of Law, Cornell University testified before the House Judiciary Committee, "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 discouraging 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." [6]

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." [7]

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.

For similar reasons we object to Section 6, added to the bill in the markup by Rep. Keller, which provides that if a court finds that an attorney has violated Rule 11 three times, the court must suspend the attorney from practice for at least one year. We object to this provision because like the Majority's Rule 11 changes, it will have a chilling effect on civil rights cases. Here the impact could well be worse than the Rule 11 amendments, because there is no rule of construction concerning civil rights to mitigate the harm to any extent. Even more egregiously, as drafted, the three strikes penalty would appear to apply on a retroactive basis. This means a civil rights attorney could have his license suspended for violations that occurred before this penalty regime even existed.[8]

Finally, H.R. 4571 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

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

[7] 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).

[8] Mr. Keller (R–FL) claims that he offered this provision because it is based on language offered by Senator Edwards, who introduced a bill with Senator Durbin providing for a "three strikes and you're out" attorney sanctions regime for medical malpractice cases. S. 1374, 108th Cong. (2004). The problem with this line of argument is that the Senate Republicans rejected the Edwards proposal. Moreover, the Edwards proposal specifies that upon the third frivolous filing, the judge is required to refer the attorney to disciplinary proceedings. It does not mandate a one-year suspension, but rather leaves that decision to the State Bar.

would unreasonably be subject to sanctions, and even suspension, without appeal contrary to the purpose of Rule 11.

II. The sweeping new forum shopping provision will unfairly benefit foreign corporations to the disadvantage of their U.S. competitors and unfairly omits business litigation from its scope

A. Section 4 will benefit foreign corporations

We are particularly offended by Section 4 of the bill, which would recast state and federal court jurisdiction and venue in personal injury cases.

Our most significant concern is that 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.[9] This means 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 if often the case, any suit against the foreign company would be banned by H.R. 4571. 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.

The bill forces this absurd result because it is drafted from the premise that every personal injury suit is brought against a business defendant headquartered in the U.S. In the real world, of course, this is not the case. The result is that not only do foreign corporations receive a financial windfall under the bill, but so does every possible defendant who is not a U.S. corporation. Thus legal actions brought against individuals who do not have minimum contacts with the state the victim resides in or is injured in, but do have contacts with other states, would be barred by H.R. 4571. Similarly, personal injury cases brought against aliens, foreign

[9] 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 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 effect on interstate commerce.

states, and state and federal officials all would be much harder, if not impossible, to pursue if H.R. 4571 were to become law.[10]

B. Section 4 will place victims at a significant litigation disadvantage compared with corporate defendants

It is difficult to consider H.R. 4571 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." We are aware of 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? Nexus to the plaintiff? The defendant? 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.

Beyond this, mandating dismissal would seem to be an extreme and costly remedy as compared to simply transferring the case to another court. It is also unclear from the drafting whether or not 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 and stick an inappropriate second court with a case that does not belong there. Or, 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. It is also unclear whether a dismissal is appealable, which could cause huge delays. 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 delays because it requires the state court to make another time consuming and costly determination before accepting or dismissing the case. Again, these delays should not bother a defendant, but what about a victim who may be in drastic need of medical attention and expenses?

Beyond this, 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.[11] 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

[10] It is instructive to consider Title 28, Section 1391 of the United States Code, which governs venue in federal courts, provides for jurisdiction when the action is based on diversity of citizenship or federal question, and specifies where the suit may be filed if the defendant is a corporation, if the defendant is an alien, if the defendant is an officer or employee of the United States or any agency, acting in his official capacity, or if the defendant is a foreign state. By contrast, most of these categories of defendants are simply ignored by Section 4 of H.R. 4571.

[11] America's Litigious Businesses, September 2004, study on file with Judiciary Committee.

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.[12] If the Majority believes so strongly in the efficacy of this forum shopping provision, why are they unwilling to apply it across the board?

CONCLUSION

We are happy to work with the Majority in reigning in frivolous lawsuits, but surely we can go after the frivolous cases without harming the ability of civil rights actions to be brought. We are willing to consider the issue of forum shopping, if it can be documented, but surely we can do better than passing legislation which so explicitly benefits foreign corporations at the expense of their U.S. counterparts and so massively tilts the playing field in favor of defendants. We urge the Majority to reconsider this ill-timed and ill-considered legislation.

JOHN CONYERS, Jr.
ROBERT C. SCOTT.
MAXINE WATERS.
TAMMY BALDWIN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
ROBERT WEXLER.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.

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[12] 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.