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March 23, 2015

Honorable Trent Franks
Chair, Subcommittee on the Constitution
and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Honorable Steve Cohen
Ranking Member, Subcommittee on the
Constitution and Civil Justice
Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Re: Lawsuit Abuse Reduction Act of 2015

Dear Chairman Franks and Ranking Member Cohen:

I am writing to express the opposition of the American Bar Association to H.R. 758, the Lawsuit Abuse Reduction Act of 2015, and request that this letter be included in the record of the March 17, 2015, hearing on the legislation.

H.R. 758 seeks to amend Rule 11 of the Federal Rules of Civil Procedure by rolling back critical improvements made to the Rule in 1993. The legislation would reinstate a mandatory sanction provision that was adopted in 1983 and eliminated a decade later after experience disclosed its unintended, adverse consequences. It also would eliminate the “safe harbor” provision added in 1993, which allows parties and their attorneys to avoid Rule 11 sanctions by withdrawing frivolous claims within 21 days after a motion for sanctions is served. And finally, rather than authorizing judges only to impose sanctions to deter future litigation abuses, H.R. 758 would require judges to impose monetary sanctions in an amount sufficient to reimburse the prevailing party for reasonable attorneys’ fees and litigation costs attributable to the frivolous claim.

The ABA opposes enactment of H.R. 758 for three main reasons. First, it would circumvent the procedures Congress itself has established for amending the Federal Rules of Civil Procedure. Second, there is no demonstrated evidence that the existing Rule 11 is inadequate and needs to be amended. And third, by ignoring the lessons learned from ten years of experience under the 1983 mandatory version of Rule 11, Congress incurs the substantial risk that the proposed changes would impede the administration of justice by encouraging additional litigation and increasing court costs and delays.

I. Congress Should Respect the Rules Enabling Act Process

As a threshold matter, the ABA opposes the legislation because it circumvents the Rules Enabling Act, established by Congress to assure that amendment of the Federal Rules occurs

only after a comprehensive and balanced review is undertaken by the judiciary with input from all relevant communities.

The Rules Enabling Act provides that evidentiary and procedural rules in the first instance are considered and drafted by advisory and standing committees of the Judicial Conference of the United States. Proposed changes are suggested by judges, clerks of court, lawyers, professors, individuals, and organizations. Suggestions are placed on the advisory committee's agenda, and a determination is made to accept, reject, or defer action on the suggestion. If the advisory committee votes to recommend an amendment to the rules, the next step involves publication and distribution of the proposed rule to more than 10,000 individuals. After considering public comments and making appropriate changes, the committees submit it the Judicial Conference for approval and then to the U.S. Supreme Court. If supportive, the Supreme Court transmits the proposed rule or amendment to Congress, which retains the ultimate power to reject, modify, or defer any proposed change.

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

In stark contrast, H.R. 758 proposes to amend the Federal Rules over the objections of the judiciary on an ad hoc basis that relies on anecdotes rather than science-based evidence and fails to examine how the proposed changes will affect the administration of justice.

II. There is No Empirical Evidence that Rule 11 is Inadequate and Needs to be Amended

Proponents state that the legislation is needed to stem the growth in frivolous lawsuits, which, according to the March 17 written statement of the National Federation of Independent Business, have "created a legal climate that hinders economic growth and hurts job creation." The underlying message appears to be that frivolous lawsuits have contributed significantly to the perceived explosive growth in the number of civil lawsuits in state and federal courts and the rising costs associated with civil litigation.

To substantiate their views, proponents primarily offer anecdotal evidence of memorable frivolous lawsuits. Their assertions are not backed by science-based research that frivolous lawsuits are on the rise or that the current Rule 11 is ineffective in deterring future frivolous filings. Moreover, many of the anecdotes relied on arise from cases brought in state courts and would not be affected by the federal rules change proposed in this legislation. While anecdotal stories of litigation abuse and resulting financial ruin may be riveting, they are an inadequate substitute for concrete empirical data of lawsuit abuse.

As noted in testimony presented to the House Judiciary Subcommittee on the Constitution by Professor Lonny Hoffman in 2011, numerous empirical studies by neutral observers do not support notions of skyrocketing litigation abuse in federal courts. These studies are in line with the experience of federal district judges. In 2005, the Federal Judicial Center (FJC) conducted a survey of federal district judges to gather information about their experiences with Rule 11. FJC concluded that almost all of the judges reported that in their experience groundless civil litigation is a small or at most a moderate problem, and 84 percent said that the problem was the same or smaller than it was before Rule 11 was amended.

There simply is no proof that the problems with groundless litigation have gotten worse since the 1993 amendments went into effect. In fact it is more likely that problems have abated because Rule 11's safe harbors provision provides an incentive to withdraw frivolous filings at the outset of litigation. In addition, according to Professor Danielle Kie Hart and other researchers, after the current version of Rule 11 went into effect, there was an increased incidence of sanctions' being imposed under other sanction rules and laws, including 28 U.S.C. Sec. 1927, as well as pursuant to the court's inherent power -- evidence that no rule change occurs in a procedural vacuum.

Those integrally involved in the civil justice system also have not expressed concern that Rule 11 needs to be amended or that frivolous lawsuits pose a serious problem. In 2010, the Judicial Conference Civil Rules Advisory Committee hosted a major two-day conference at Duke University School of Law designed to examine complaints about the costs, delays, and burdens of civil litigation in the federal courts and to explore the most promising opportunities to improve federal civil litigation. Over two hundred judges, lawyers, academics and justice system users, including members of the business community and defense bar, participated in the seminar, and 70 experts presented empirical research, analytical papers, pilot projects, and proposals for civil litigation reform. (The ABA Section of Litigation participated in the conference and made a presentation.) What is important to this discussion is that no research paper or participant suggested that frivolous lawsuits were a problem or that Rule 11 was inadequate and needed to be amended.

III. There is Substantial Risk that the Proposed Changes Would Impede the Administration of Justice by Encouraging Additional Litigation and Increasing Court Costs and Delays

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

During the decade that the 1983 version of the Rule requiring mandatory sanctions was in effect, an entire industry of litigation revolving around Rule 11 claims inundated the legal system and wasted valuable court resources and time. The Judicial Conference of the United States, in a 2004 letter to Representative James Sensenbrenner who was then chair of the Judiciary Committee, stated that mandatory application of Rule 11 had "created a significant incentive to file unmeritorious Rule 11 motions by providing a possibility of

March 23, 2015

Page 4 of 4

monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers; and provid[ed] little incentive...to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit.”

These sentiments were reiterated in a 2013 letter from the Honorable David Campbell, chair of the Advisory Committee on Civil Rules, to House Judiciary Committee ranking member Representative Conyers, which warned that the legislation would create a cure far worse than the problem that it was meant to solve by reinstating the 1983 version that proved contentious and diverted so much time of the bench and the bar.

The 1983 version of Rule 11 was premised on anecdotal information rather than on comprehensive empirical data analyzed through the prism of those most familiar with the federal courts. It was ill-conceived and its unintended adverse consequences have been well-documented. We urge this Congress to avoid making the same mistake.

III. Conclusion

Our objective in opposing the enactment of H.R. 758 is not to stifle discourse over the underlying issues. While we do not believe that Rule 11 requires amendment, we respect that some Members of Congress are deeply concerned that frivolous lawsuits are adversely affecting the administration of justice and believe that their concerns and proposed solutions deserve a full and robust examination. The best way to accomplish this is to defer to the Rules Enabling Act process established by Congress. This will assure that the development of any remedial proposal to amend the Federal Rules is based on a comprehensive and evidence-based analysis of the issues and proposed solutions.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman