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July 23, 2013

Honorable Lamar Smith
Chair, Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Honorable John Conyers, Jr.
Ranking Member, Committee on the Judiciary
U.S. House of Representatives
Washington DC, 20515

Re: Lawsuit Abuse Reduction Act of 2013

Dear Chairman Smith and Ranking Member Conyers:

I am writing to express the opposition of the American Bar Association to H.R. 2655, the Lawsuit Abuse Reduction Act of 2013, which is scheduled for markup by your committee this week.

H.R. 2655 seeks to amend Rule 11 of the Federal Rules of Civil Procedure through the legislative process by reinstating a mandatory sanctions provision, which was adopted in 1983 and eliminated a decade later when Rule 11 was revised to make the imposition of sanctions discretionary after experience disclosed its unintended, adverse consequences. H.R. 2655 also would eliminate the so-called “safe harbor” provision, adopted 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.

It is important to point out that avoidance of Rule 11 sanctions does not preclude imposition of other sanctions. Rule 11 is part of a complex, coordinated, and sometimes overlapping system that governs court administration. A judge may invoke other rules of procedure, statutes, or its own inherent authority to prevent frivolous or non-meritorious lawsuits from going forward and to impose sanctions when appropriate.

The ABA opposes enactment of H.R. 2655 for three main reasons. First, it would circumvent the procedures Congress itself has established for amending the Federal Rules of Civil Procedure. Second, there is no demonstrated evidence that the existing Rule 11 is inadequate and needs to

be amended. And, third, by ignoring the lessons learned from ten years of experience under the 1983 mandatory version of Rule 11, Congress incurs the substantial risk that the proposed changes would impede the administration of justice by encouraging additional litigation and increasing court costs and delays.

As a threshold matter, the ABA opposes the legislation because it circumvents the Rules Enabling Act, a balanced and inclusive process established by Congress to assure that amendment of the Federal Rules occurs only after a comprehensive review is undertaken.

The Rules Enabling Act provides that evidentiary and procedural rules or amendments in the first instance will be considered and drafted by committees of the Judicial Conference of the United States. Thereafter, they will be subject to thorough public comment and reconsideration, and then, if approved by the Judicial Conference, will be submitted to the U.S. Supreme Court for its consideration and promulgation. Finally, proposed rules or amendments will be transmitted by the Supreme Court to Congress, which retains the ultimate power to reject, modify, or defer any rule or amendment before it takes effect.

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

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

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

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

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significant incentive to file unmeritorious Rule 11 motions by providing a possibility of monetary penalty; engender[ed] potential conflicts of interest between clients and lawyers; and provid[ed] little incentive...to abandon or withdraw a pleading or claim – and thereby admit error – that lacked merit.”

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

In conclusion, we are not aware of any compelling evidence supporting the need to revise Rule 11. If, however, you believe amendment is in order, we strongly urge that you defer to the Rules Enabling Act process established by Congress to assure a comprehensive, evidence-based, and dynamic examination of the issues and proposed remedies.

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

Cc: Members of the House Committee on the Judiciary