

# ARTICLE

## THE CASE AGAINST THE LAWSUIT ABUSE REDUCTION ACT OF 2011

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### TABLE OF CONTENTS

I.	INTRODUCTION.....	546
II.	EXTENSIVE EMPIRICAL RESEARCH ON RULE 11 DEMONSTRATES THAT A RETURN TO THE 1983 VERSION OF THE RULE WOULD INCREASE COSTS AND DELAYS AND FOSTER GREATER LITIGATION ABUSE.....	550
A.	<i>The 1983 Version of the Rule Produced an Avalanche of Unwelcome Satellite Litigation.....</i>	551
B.	<i>The 1983 Rule Was Applied Inconsistently and Inequitably .....</i>	553
1.	<i>Civil Rights and Employment Discrimination Plaintiffs, in Particular, Were Impacted the Most Severely Under the 1983 Version of Rule 11....</i>	553
2.	<i>Plaintiffs Were Targets of Sanctions Far More Often than Defendants and Were Sanctioned at Strikingly Higher Rates.....</i>	557
C.	<i>The 1983 Version of Rule 11 Increased Costs and Delays by Encouraging Rambo-Like Litigation Tactics .....</i>	559

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D. <i>The 1983 Version of Rule 11 Was Not an Effective Means for Reducing Cost, Delay, and Abusive Litigation Activity .....</i>	559
III. THERE IS NO SUPPORT FOR THE ASSERTION THAT THE 1993 AMENDMENTS CAN BE BLAMED FOR ANY PROBLEMS THAT DO EXIST WITH FEDERAL CIVIL LITIGATION .....	560
IV. LARA IS NOT NEEDED BECAUSE THERE ARE MANY AVAILABLE ALTERNATIVES FOR MANAGING CIVIL LITIGATION COSTS AND ABUSES .....	564
V. THERE IS NO CREDIBLE EVIDENCE OF A LITIGATION CRISIS TO JUSTIFY THE PROPOSED REFORMS .....	569
A. <i>The Lawsuit Abuse Arguments Made by LARA's Supporters .....</i>	570
B. <i>The Incidence of "Frivolous" Litigation .....</i>	571
C. <i>Assertions Regarding Discovery Costs and Abuse .....</i>	580
VI. CONCLUSION .....	583

## I. INTRODUCTION

On March 9, 2011, Lamar Smith, Chairman of the House of Representatives Committee on the Judiciary, introduced H.R. 966, the Lawsuit Abuse Reduction Act.<sup>1</sup> On the same day Charles Grassley, the ranking Republican member of the Senate Judiciary Committee, sponsored an identical measure in the upper chamber.<sup>2</sup> Animated by concern over rising costs and abuses in federal civil cases, the bills stiffen penalties against lawyers who file sanctionable papers in federal court by legislatively amending Rule 11 of the Federal Rules of Civil Procedure, the general certification and sanctions standard for federal civil cases.<sup>3</sup>

This is not the first time that Congress has tried to reform the federal sanctions rule as a means of curbing litigation costs and abuse. Since 1995, bills regularly have been introduced that would toughen Rule 11, but to date, none have been successfully enacted.<sup>4</sup>

1. Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. (2011).

2. Lawsuit Abuse Reduction Act of 2011, S. 533, 112th Cong. (2011).

3. FED. R. CIV. P. 11; H.R. 966; H.R. REP. NO. 112-174, at 2-3, 6, 19-20 (2011).

4. See, e.g., Lawsuit Abuse Reduction Act of 2005, H.R. 420, 109th Cong. § 2 (2005) (sponsored by Rep. Lamar Smith) (requiring the assessment of "reasonable expenses" in line with the 2004 version of the bill); Lawsuit Abuse Reduction Act of 2004, H.R. 4571, 108th Cong. § 2 (2004) (enacted) (requiring a court to impose "appropriate sanction[s]," including

However, buoyed by sweeping victories last November that gave Republicans majority control of the House and a much greater voice in the Senate,<sup>5</sup> the prospects for legislative reform of Rule 11 are better now than they have ever been before.

Enacted in 1938 as part of the original rules, Rule 11 remained unchanged for half a century.<sup>6</sup> Then, in 1983, spurred by perceptions of a growing litigation crisis, judicial rulemakers proposed significant amendments to the rule.<sup>7</sup> One of the most important changes was that the rule was made mandatory so that courts were required “to impose sanctions whenever a violation of the rule was found to have occurred.”<sup>8</sup> This and other amendments in 1983 signaled that the rule was now meant to hold lawyers more accountable for improper conduct in federal cases.<sup>9</sup> It soon became apparent, however, that the 1983 version of Rule 11 not only failed to deter groundless litigation practices but actually led to greater litigation costs and abuses in many cases by incentivizing voluminous, wasteful satellite litigation over sanctions. Finally convinced that the 1983 experiment with Rule 11 was ill-advised,

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reasonable expenses, on a party in violation of Rule 11); *Frivolous Lawsuit Prevention Act of 1997*, S. 400, 105th Cong. § 2 (1997) (“A sanction imposed for violation of this rule may consist of reasonable attorneys’ fees and other expenses incurred as a result of the violation . . . .”); *Attorney Accountability Act of 1995*, H.R. 988, 104th Cong. § 4 (1995) (“A sanction imposed for a violation of this rule shall be sufficient to deter repetition of such conduct . . . .”). The 2005 version passed in the House on October 27, 2005, by a vote of 228 to 184, with 21 members not voting. *H.R. 420: Lawsuit Abuse Reduction Act of 2005*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=h109-420> (last visited Aug. 16, 2011). The 2005 version never made it to a vote in the Senate. See Matthew G. Vansuch, *Icing the Judicial Hellholes: Congress’ Attempt to Put Out “Frivolous” Lawsuits Burns a Hole Through the Constitution*, 30 SETON HALL LEGIS. J. 249, 265 (2006) (“[T]he bill died when the Senate failed to take any action on it during the term.”). Legislation did pass amending Rule 11 for securities cases. See *Private Securities Litigation Reform Act of 1995*, Pub. L. No. 104-67, 109 Stat. 737, 742 (1995) (codified at 15 U.S.C. § 77z-1(c) (2006)) (providing for mandatory sanctions when a court finds a violation of Rule 11); Charles W. Murdock, *Why Not Tell the Truth?: Deceptive Practices and the Economic Meltdown*, 41 LOY. U. CHI. L.J. 801, 829 (2010) (describing the Private Securities Litigation Reform Act of 1995 as “one of the few alleged ‘accomplishments’ to come out of Newt Gingrich’s ‘Contract with America’”).

5. See OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 2, 2010, at 60 (compiled by Karen L. Haas, 2011), available at [http://clerk.house.gov/member\\_info/electionInfo/2010election.pdf](http://clerk.house.gov/member_info/electionInfo/2010election.pdf) (documenting an increase of six Republican Senators and sixty-four Republican Representatives from the 111th Congress to the 112th).

6. GEORGENE M. VAIRO, RULE 11 SANCTIONS 8 (Richard G. Johnson ed., 3d ed. 2004); see Lonny S. Hoffman, *The Lawsuit Abuse Reduction Act: The Legislative Bid to Regulate Lawyer Conduct*, 25 REV. LITIG. 719, 722–30 (2006) (discussing the history of Rule 11, from its adoption in 1938 to its first amendment in 1983, and beyond).

7. Hoffman, *supra* note 6, at 726–27; VAIRO, *supra* note 6, at 8, 10.

8. Hoffman, *supra* note 6, at 727; FED. R. CIV. P. 11 (1988).

9. See Hoffman, *supra* note 6, at 727 (describing the purpose of the 1983 amendments as “punishing inappropriate and excessive behavior”); VAIRO, *supra* note 6, at 8–11 (explaining the varied purposes of the numerous 1983 amendments to Rule 11).

rulemakers amended the rule again a decade later to soften its sharpest edges.<sup>10</sup> Although most in the legal profession welcomed the 1993 amendments, some thought the revisions to the rule weakened a powerful deterrent against wrongful litigation practices.<sup>11</sup> Seizing on these concerns, the Republican Party made reform of Rule 11 one of the highlighted parts of the sweeping legislative reforms they proposed in the Contract with America leading up to the 1994 mid-term elections.<sup>12</sup>

With awareness of this history, and frustrated by their repeated failures over the last fifteen years to stiffen penalties against lawyers, sponsors introduced the Lawsuit Abuse Reduction Act of 2011 (LARA) with high hopes of finally succeeding in their ambitions. The first of the changes LARA makes to Rule 11 is to require the imposition of sanctions whenever the district judge finds that the rule was violated, mirroring the mandatory form of the 1983 version of the rule.<sup>13</sup> This sanction provision is a significant change to existing law. Indeed, except for the decade in which the 1983 version of Rule 11 was in force, federal judges have always been vested with discretion to decide which violations of the rule warrant punishment and which do not.<sup>14</sup> LARA's second retrogressive reform eliminates the existing safe harbor provision in the current rule.<sup>15</sup> The safe harbor, put in place in 1993, protects against the imposition of sanctions if the filing alleged to be in violation of the

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10. FED. R. CIV. P. 11(c) (1994); *see* FED. R. CIV. P. 11 1993 advisory committee's notes (placing greater restraints on the mandatory imposition of sanctions for the purpose of reducing their frequency in federal courts).

11. *See* VAIRO, *supra* note 6, at 37 (noting that a majority of the U.S. Supreme Court approved of the 1993 amendments to Rule 11 immediately after their adoption); Hoffman, *supra* note 6, at 729–30 (citing a 2005 study by the Federal Judicial Center as support for the proposition that the overwhelming majority of polled federal judges favored the 1993 amendments).

12. Originally labeled the Common Sense Legal Reform Act (CSLRA) in the Contract with America, *see* Republican Members of the House of Representatives, *Republican Contract with America*, UNITED STATES HOUSE OF REPRESENTATIVES, <http://www.house.gov/house/Contract/CONTRACT.html> (last visited July 11, 2011), the introduced bill was ultimately named the Attorney Accountability Act of 1995. Attorney Accountability Act of 1995, H.R. 988, 104th Cong. (1995); *see also* Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 700, 721–22 (1995) (characterizing the Contract with America as the “centerpiece” of the Republican strategy during the 1994 campaigns and highlighting the CSLRA’s amendments to Rule 11).

13. Lawsuit Abuse Reduction Act of 2011, H.R. 966, 112th Cong. § 2(a)(1) (2011).

14. *See generally* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE 1–10, 19–33 (3d ed. 2000) (detailing the origins of Rule 11 as “limited in scope” and “rarely invoked,” the 1983 “mandatory sanctions” period, and the subsequent softening of the rule by the 1993 amendments); *see also* VAIRO, *supra* note 6, at 9 (explaining that federal judges only imposed sanctions “in the most compelling situations” prior to the 1983 amendments).

15. H.R. 966 § (2)(a)(2).

rule is withdrawn in a timely manner.<sup>16</sup> The third reform would make the sanctions rule even more potent than it was thirty years ago. The proposed legislation does so by adding an express proviso authorizing—the better word may be *encouraging*—judges to award monetary sanctions, including attorney's fees and costs incurred by the other side, when the rule is violated.<sup>17</sup> This change departs drastically not only from current law but even from that earlier version of the rule inasmuch as compensation never has been the express purpose of the rule.<sup>18</sup> Indeed, one of the main criticisms of the 1983 version of Rule 11 that prompted its revision was that, notwithstanding that rulemakers intended the rule to be for deterrence, litigants and courts frequently misused it for compensatory, cost-shifting purposes.<sup>19</sup>

Aware that the political winds are pointing in LARA's favor, my objective in this short paper is to articulate the strongest arguments against the proposed legislation. My hope is that this work will contribute to the upcoming public debate over the reform legislation. Briefly summarized, the paper presents the following arguments. Part II argues that the proposed legislation would not only fail to resolve the problems asserted to justify its passage, but would actually increase costs and delays in federal court and foster greater litigation abuse. In Part III, I argue that there is no empirical support for the assertion that the 1993 amendments to Rule 11 can be blamed for whatever problems exist today with federal civil litigation. Part IV makes the case that LARA's passage is not needed because there are many available alternatives for managing federal civil litigation costs and abuses. Finally, in Part V, I demonstrate that the assertions made by LARA's sponsors regarding the extent of costs and abuse in federal civil litigation are greatly exaggerated, and that there is no credible evidence to justify LARA's passage. Although

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16. FED. R. CIV. P. 11(c)(2); JOSEPH, *supra* note 14, at 23. The 1993 Advisory Committee Notes state:

The rule continues to require litigants to "stop-and-think" before initially making legal or factual contentions. It also, however, emphasizes the duty of candor by subjecting litigants to potential sanctions for insisting upon a position after it is no longer tenable and by generally providing protection against sanctions if they withdraw or correct contentions after a potential violation is called to their attention.

FED. R. CIV. P. 11 1993 advisory committee's notes.

17. H.R. 966 § (2)(a)(3).

18. FED. R. CIV. P. 11 1993 advisory committee's notes; VAIRO, *supra* note 6, at 78; see also JOSEPH, *supra* note 14, at 4–5 (characterizing the original purpose of Rule 11 as applying only to "willful" behavior, lacking a "real bite" for the first forty-five years of its existence).

19. FED. R. CIV. P. 11 1993 advisory committee's notes; Tobias, *supra* note 12, at 707.

this latter argument may turn out to have little traction in public debates over the legislation, it may be more effectively invoked in support of the institutional argument that this sort of procedural reform is best considered through the more deliberative Rules Enabling Act process. Reasonable legislators may be convinced by the available evidence that they should put aside efforts to revise the sanctions rule and to continue to rely on judicial rulemakers, as they have for many years, to monitor the state of civil litigation and consider reforms of the rules, as necessary, for managing federal civil litigation.

**II. EXTENSIVE EMPIRICAL RESEARCH ON RULE 11  
DEMONSTRATES THAT A RETURN TO THE 1983 VERSION OF THE  
RULE WOULD INCREASE COSTS AND DELAYS AND FOSTER  
GREATER LITIGATION ABUSE**

A vast body of empirical evidence has been collected relating to the 1983 version of Rule 11. As Georgene Vairo observes in her leading treatise on Rule 11, "Few amendments to the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11."<sup>20</sup> As a result, we are fortunate today not to have to consider amendments to the rule in the same empirical vacuum in which the rulemakers in 1983 previously operated. There have been at least nine major empirical studies and numerous reports of the 1983 version of Rule 11.<sup>21</sup> Several books, a great many law review

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20. VAIRO, *supra* note 6, at 2.

21. *E.g.*, STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, at 5–6, 95–100 (1989); COMM'N ON PROFESSIONALISM, AM. BAR ASS'N, ".... IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 42 (1986); CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 68–69 (1999); SAUL M. KASSIN, FED. JUDICIAL CTR., AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 45 (1985); N.Y. STATE BAR ASS'N, REPORT OF THE COMMITTEE ON FEDERAL COURTS: SANCTIONS AND ATTORNEYS' FEES 7 (1987); DAVID RAUMA & THOMAS E. WILLGING, FED. JUDICIAL CTR., REPORT OF A SURVEY OF UNITED STATES DISTRICT JUDGES' EXPERIENCES AND VIEWS CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, at 5–15 (2005); SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N, REPORT OF THE PROFESSIONALISM COMMITTEE: TEACHING AND LEARNING PROFESSIONALISM 33 (1996); JOHN SHAPARD ET AL., FED. JUDICIAL CTR., REPORT OF A SURVEY CONCERNING RULE 11, FEDERAL RULES OF CIVIL PROCEDURE, at 1–2 (1995); ELIZABETH C. WIGGINS & THOMAS E. WILLGING, FED. JUDICIAL CTR., RULE 11: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES §§ 1A–1D (1991); THOMAS E. WILLGING, FED. JUDICIAL CTR., THE RULE 11 SANCTIONING PROCESS 13 (1988) [hereinafter FJC 1988 STUDY]; Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 NW. U. L. REV. 943, 950–51 (1992); Section of Litig., Am. Bar Ass'n, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 106–08 (1988); Elizabeth C. Wiggins, Thomas E. Willging

articles, and a myriad of legal and lay newspaper stories have also examined it.<sup>22</sup> Of course, there were also literally thousands of reported judicial opinions on the subject,<sup>23</sup> though more than anything else these probably serve best to underscore the difficulties wrought by the 1983 amendments. In any event, drawing on all of these sources today, there is much we can say with a great deal of certainty about the 1983 Rule 11 experience. Indeed, the available empirical evidence is so persuasive that it has produced a remarkable degree of agreement across the political spectrum that the 1983 sanctions rule was one of the most ill-advised procedural experiments ever tried. This moment is one of those occasions, regrettably rare, when we do not have to legislate blindly; history can be our guide.

#### A. *The 1983 Version of the Rule Produced an Avalanche of Unwelcome Satellite Litigation*

If the objective was to substantially increase the sheer volume of requests for sanctions, then by that measure the 1983 version of Rule 11 certainly did not disappoint. In less than ten years, the rule generated nearly 7,000 reported sanctions decisions.<sup>24</sup> And those were just the cases that were easily identified because they were reported. When unreported decisions are taken into account, the actual amount of Rule 11 activity dwarfed the reported figures, as the country's most respected legal practitioner on the subject, Greg Joseph, has emphasized.<sup>25</sup> Indeed, a task force organized by the Third Circuit to study Rule 11 by looking at both reported and unreported cases found that in the Third Circuit less than 40% of the Rule 11 decisions were published or available on Lexis or Westlaw.<sup>26</sup> The

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& Donna Stienstra, *Special Issue on Rule 11*, 2 FJC DIRECTIONS 3, 11 (1991); Thomas E. Willging, *Past and Potential Uses of Empirical Research in Civil Rulemaking*, 77 NOTRE DAME L. REV. 1121, 1147–48 (2002); *see also* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT *passim* (1992) (discussing attorney discipline by the courts).

22. E.g., David F. Herr & Nicole Narotzky, *Sanctions in Civil Litigation: A Review of Rules 11, 26(g), 30(d), and 37, Section 1927, Inherent Power, Appellate Rule 38, and Section 1912 and Pending Legislative Changes*, in 1 ALI-ABA COURSE OF STUDY: CIVIL PRACTICE AND LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS 285, 297–309 (2007); JOSEPH, *supra* note 14, at 5–19; VAIRO, *supra* note 6, at 6–8; David Margolick, *At the Bar: Has the Profession's Attempt to Curb Ludicrous Litigation Actually Boomeranged?*, N.Y. TIMES, Mar. 11, 1998, at B11.

23. Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 625–26 (1998).

24. *Id.*

25. BURBANK, *supra* note 21, at 59.

26. *Id.*

contrast with the paucity of decisions under the original version of Rule 11 could not have been sharper. Moreover, these figures also stand in contrast with the marked drop off in Rule 11 cases since the 1993 amendments to Rule 11 went into effect (more on that, in Part III, below).

Sanctions practice took on a life of its own under the 1983 rule. After passage of the 1983 amendments, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer's (or both lawyers') alleged noncompliance with the rule. One side would move to sanction his opponent who might respond, in kind, by filing a sanctions motion on the basis that the filing of the original sanctions motion was, itself, sanctionable.<sup>27</sup> And on and on it would go. All of this would take place as a side show to the trial of the case itself, with limited resources and time spent dealing with these tertiary sanctions issues. Georgene Vairo summarized the "avalanche" of satellite litigation unleashed by the 1983 amendments:

Beginning in 1984, the volume of cases decided under the rule increased dramatically. By the end of 1987, the number of reported Rule 11 cases had plateaued. Even though the number of reported cases leveled off, motions under the amended rule continued to be made routinely, especially by defense counsel, as many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings. Indeed, one study found that in a one-year period, almost one-third of the respondents to the survey reported being involved in a case in which Rule 11 motions or orders to show cause were made. The same study showed that almost 55% of the respondents had experienced either formal or informal threats of Rule 11 sanctions.<sup>28</sup>

The reasons that explain the significant increase in sanctions motions that occurred are varied but certainly at least include that Rule 11 in its 1983 form came to be seen—contrary to the rulemakers' intent—as a fee-shifting device that could be used for compensatory purposes. In consequence, even the rule's strongest backers began to realize that the satellite litigation the rule was causing, and the compensatory fee-shifting effect that

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27. Marc Goodman, Note, *A Uniform Methodology for Assessing Rule 11 Sanctions: A Means to Serve the End of Conserving Public and Private Legal Resources*, 63 S. CAL. L. REV. 1855, 1858 (1990).

28. Vairo, *supra* note 23, at 598.

the frequent award of monetary damages was producing, were greatly troubling developments.<sup>29</sup>

### *B. The 1983 Rule Was Applied Inconsistently and Inequitably*

*1. Civil Rights and Employment Discrimination Plaintiffs, in Particular, Were Impacted the Most Severely Under the 1983 Version of Rule 11.* The available empirical evidence persuasively demonstrates the profound discriminatory effects of the 1983 version of Rule 11. Sanctions were sought and imposed against civil rights and employment discrimination plaintiffs, in particular, more often than other litigants in the civil courts, with the greatest disparities in treatment observed in the first five years of the amended rule's existence. In a study conducted in 1988, researchers with the Federal Judicial Center (FJC) found that civil rights and employment discrimination plaintiffs were the subject of sanctions motions more than 22% of the time, well out of proportion to the percentage of such cases filed.<sup>30</sup> Civil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time sanctions were sought, a significantly higher rate than in cases against other kinds of plaintiffs.<sup>31</sup>

One reason why civil rights claimants and other resource-poor plaintiffs, like employment discrimination claimants, faced much tougher treatment under the 1983 rule is that, as applied by many courts, the 1983 version was used as a cost-shifting device. The Advisory Committee itself eventually realized that under the 1983 rule, the poorest victims and their lawyers faced the greatest threat from monetary sanctions. In its discussions about amending the rule to overcome the prior experience, the Advisory Committee recognized the particular problem cost-shifting could create in "cases involving litigants with greatly disparate financial resources."<sup>32</sup> In addition, the 1993 Advisory Committee

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29. See, e.g., William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017–18, 1020 (1988) (observing that the 1983 version of Rule 11 has "spawned" an "excessive amount of litigation activity" and that while the drafters warned about this "satellite litigation," nevertheless the "avalanche of [R]ule 11 cases suggests that the warning is being ignored" and separately critiquing courts that regard the rule as having a "straight fee-shifting" purpose); VAIRO, *supra* note 6, at 55 (discussing the changed view of a proponent of the 1983 amendments).

30. FJC 1988 STUDY, *supra* note 21, at 161 (noting that civil rights cases accounted for 22.3% of the published Rule 11 cases, but comprised only 7.6% of all case filings).

31. VAIRO, *supra* note 6, at 50.

32. See Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1787 (1992) ("[C]ost-shifting awards should be the exception, rather than the norm, for sanctions" (quoting Letter from Judge Sam C. Pointer, Jr., Chairman, Advisory Committee, to Judge Robert E. Keeton, Chairman, Standing Committee 2–5 (May 1, 1992))).

Notes make reference to the problems posed by cost-shifting for "an impecunious adversary."<sup>33</sup>

The 1983 experience also reflects that judges disproportionately enforced the prefiling factual investigation requirement of the rule against civil rights plaintiffs and their lawyers.<sup>34</sup> In many of these decisions, sanctions were awarded even though factual information vital to asserting a claim was in the sole possession of the defendant. There are many illustrations of this perverse problem, as Professor Carl Tobias carefully documented in a series of penetrating articles about the rule's disparate impact on civil rights claimants.<sup>35</sup> Professor Tobias recognized that lack of access to proof was a problem that bedeviled these claimants especially:

Civil rights actions, in comparison with private, two-party contract suits, implicate public issues and involve many persons. Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.<sup>36</sup>

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33. FED. R. CIV. P. 11 1993 advisory committee's notes.

34. Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 492-94 (1989).

35. See, e.g., *id.* at 492-96 (criticizing courts for enforcing "the command as to reasonable prefiling legal inquiry" more vigorously against civil rights plaintiffs "even though much information important to stating a claim . . . seemed to be in the defendants' possession and available only through discovery"); Carl Tobias, *Certification and Civil Rights*, 136 F.R.D. 223, 227 (1991) (noting that inconsistent judicial application of Rule 11 and the expenses of litigation disadvantage civil rights plaintiffs); Carl Tobias, *The 1993 Amendments to Federal Rule 11*, 70 IND. L.J. 171, 176 (1994) (crediting a pair of public interest attorneys for helping to raise awareness that the 1983 amendments "disproportionately affect[ed] civil rights plaintiffs and other public interest litigants"); Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 445 (1992) (arguing that Rule 11 has "disadvantaged civil rights plaintiffs and attorneys the most"); Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 859-60 (1992) [hereinafter Tobias, *Reconsidering Rule 11*] (opining that the 1983 amendments adversely affected civil rights plaintiffs and counsel due to the disproportionate filing and granting of sanctions motions against them); Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105, 106-09 (1991) (explaining that an "acute lack of time and money" made civil rights plaintiffs particularly vulnerable under the 1983 amendments); Carl Tobias, *Reassessing Rule 11 and Civil Rights Cases*, 33 HOW. L.J. 161, 162-63, 165-66 (1990) (claiming that courts' vigorous application of the 1983 amendments had "chilling effects on civil rights plaintiffs and attorneys" between August 1983 and mid-1988); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 302-06 (1989) (describing the "adverse implications" on civil rights plaintiffs that resulted from the 1983 amendments).

36. Tobias, *supra* note 34, at 495-96.

As he documented, courts often did not take the imbalance in access to proof into account in deciding whether to impose sanctions under the 1983 version of the rule.<sup>37</sup> One illustration of this is *Johnson v. United States*, a case involving the sexual assault of an infant, in which the dissent took the majority to task for imposing an unrealistic pleading burden on the plaintiff, given her obvious lack of access to proof before discovery:

The [majority] opinion notes that the complaint does not state facts indicating that Ojeda had “committed past offenses or manifested previous aberrant behavior that his employers should have detected.” . . .

Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda’s personnel file, is in the government’s control, but it usually would be regarded as quasi-confidential and unavailable to an outsider. As a practical matter, therefore, plaintiff’s attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a “Catch 22” barrier: no information until litigation, but no litigation without information.<sup>38</sup>

A still further factor that contributed to the discriminatory impact of the 1983 version of Rule 11 was that a sanctions legal standard is inherently flexible, which is to say it is highly susceptible to different interpretations. Of course, indeterminacy is not unique to sanctions rules, but for reasons that are perhaps still not entirely understood, the failure of the law in this area to develop evenly and coherently fell particularly hard on civil rights and employment discrimination plaintiffs.<sup>39</sup> As discussed below in Part III, these problems would have continued to exist with the 1993 rule but for the adoption of the safe harbor provision in that rule, which ameliorates at least some of the harsh effects of the rule’s inherent indeterminacy.

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37. *Id.* at 492–98.

38. *Johnson v. United States*, 788 F.2d 845, 847 (2d Cir. 1986); *Id.* at 856 (Pratt, J., dissenting).

39. See VAIRO, *supra* note 6, at 14, 17 (offering employment discrimination plaintiffs as particularly susceptible to chilling under the 1983 amendments); see also Tobias, *supra* note 34, at 494–95 (explaining that “rarefied, academic, [and] technical” implementation of the 1983 amendments has forced civil rights plaintiffs “to plead with greater factual specificity to protect against possible sanction motions”).

Finally, it is worthwhile to say something about an additional factor involved in some civil rights cases that triggered disproportionate sanctions under the 1983 version of the rule: that is, the assertion by some of these claimants of novel theories of law. Although it is not clear how often civil rights claimants in the 1980s asserted legal theories that can be correctly characterized as “novel,” the available empirical evidence demonstrates that judges were not very good at distinguishing legitimate assertions of new legal theories from failures to conduct adequate prefiling investigations.<sup>40</sup> What is also clear is that judges applying the 1983 rule were less likely to give civil rights claimants the benefit of the doubt, especially in the first five years after the rule’s amendment.<sup>41</sup>

Further, the empirical evidence also suggests that the 1983 version of Rule 11 deterred the filing of meritorious cases. When asked, a substantial number of lawyers who were surveyed (nearly 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11, they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.<sup>42</sup> Based on similar survey results it obtained in its 1988 study, the FJC researchers were led to conclude that “whether it can be classified as a chilling effect or not, lawyers reported a cautionary effect of Rule 11.”<sup>43</sup>

A last, related lesson to mention from the 1983 experience with Rule 11 is that by allowing sanctions to be sought after a case had been resolved on the merits, the 1983 rule further exacerbated the rule’s discriminatory impact. One of the leading researchers in the civil litigation field, Thomas Willging, was the first to recognize that application of the rule was subject to the problem of “hindsight bias,” as it is often called.<sup>44</sup> In his 1988 study of Rule 11 for the FJC, Willging commented that when sanctions are sought contemporaneously with or after the dismissal of a case on the

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40. See FJC 1988 STUDY, *supra* note 21, at 175 (discussing the need for judges to review pleadings in the light seen by the attorney at the time of filing, as opposed to in hindsight, so as to avoid abusing Rule 11).

41. See generally Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs After the 1993 Amendments*, 37 VAL. U. L. REV. 1, 3, 11 (2002) (discussing the “disproportionate impact” the 1983 amendments had on civil rights plaintiffs, public interest attorneys, and pro bono attorneys); see also Tobias, *supra* note 34, at 490–93 (observing that civil rights plaintiffs and attorneys were targeted and sanctioned at a much higher rate than non civil rights plaintiffs in the five years following the enactment of the 1983 amendments).

42. Marshall, Kritzer & Zemans, *supra* note 21, at 961 & n.54.

43. FJC 1988 STUDY, *supra* note 21, at 167.

44. *Id.* at 87–88 & n.182.

merits, “there may be a tendency to merge the sanctions issue with the merits” and that “[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions.”<sup>45</sup> Another keen observer, Professor Charles Yablon, made the same point some years later:

A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive.<sup>46</sup>

“Like a reader who already knows how the mystery turns out,” Yablon analogized, “she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling. This hindsight can affect a judge’s view of what constitutes ‘reasonable inquiry.’”<sup>47</sup> By conflating how the case ultimately was resolved with what should have been a cabined assessment of what the party knew (or should have known) at the time of filing, the 1983 rule increased the risk that a civil rights or employment discrimination claimant would be sanctioned. Thankfully, this problem was ameliorated by the 1993 amendments and, specifically, the addition of the safe harbor provision in Rule 11(c).

*2. Plaintiffs Were Targets of Sanctions Far More Often than Defendants and Were Sanctioned at Strikingly Higher Rates.* The evidence also shows that under the 1983 version of Rule 11, plaintiffs were more often the target of sanctions motions than defendants. Far more troubling, the empirical evidence also shows that plaintiffs were sanctioned at strikingly higher rates. Notwithstanding possible legitimate explanations for the findings, the sheer magnitude of the disparity raises serious questions of fairness in terms of how the rule was applied that must be confronted.

A 1988 study found that plaintiffs were the target of sanctions motions in 536 of the 680 cases examined (or 78.8% of the total).<sup>48</sup> Of the reported Rule 11 cases, a violation was found 57.8% of the

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45. *Id.* at 87–88.

46. Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 78 (1996).

47. *Id.*

48. Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200 (1988).

time.<sup>49</sup> However, the 1988 study found that plaintiffs were ruled to be in violation of Rule 11 more frequently (46.9%) than defendants (10.9%).<sup>50</sup> The Third Circuit task force also found that under the 1983 version of the rule, plaintiffs overall were more likely to be sanctioned than defendants (finding a 3:1 ratio of sanctions imposed).<sup>51</sup> The starker disparities were revealed by a later study conducted by the FJC in 1991 which looked at both reported and unreported cases in five different judicial districts.<sup>52</sup> Examining the cases in which sanctions were imposed, the FJC researchers found that plaintiffs were sanctioned at astonishingly higher rates than defendants. The table below from the 1991 FJC study<sup>53</sup> illustrates the disparities:

**Table 20**  
Orders imposing Rule 11 sanctions: targeted “side” of litigation

	D. Ariz.	D. C.	N.D. Ga.	E.D. Mich.	W.D. Tex.
<b>Number of rulings imposing sanctions against:</b>					
Plaintiff's side	35	17	34	33	34
Defendant's side	3	5	4	8	21
Other	6	0	4	0	1
<b>Total</b>	<b>44</b>	<b>22</b>	<b>42</b>	<b>41</b>	<b>56</b>
<b>As percentage of all rulings imposing sanctions</b>					
Plaintiff's side	80%	77%	81%	80%	61%
Defendant's side	7%	23%	9%	20%	38%
Other	14%	0%	9%	0%	2%

Whatever may be said about these findings, it is difficult to credibly defend a rule that produces such strikingly disparate results. Unavoidably, the findings raise serious fairness concerns about how the 1983 version was applied.

49. *Id.*

50. *Id.*

51. BURBANK, *supra* note 21, at 65.

52. WIGGINS & WILLING, *supra* note 21, §§ 3A–3E.

53. *Id.* § 1B tbl.20. Other statistics in the 1991 FJC study shed additional light on this disparity. In the District of Arizona, the “percentage of rulings imposing sanctions pursuant to motions that targeted the plaintiff” was 35%, while the imposition rate against defendants was a mere 5%. *Id.* § 3A, at 10. The District of the District of Columbia (27% imposition rate against plaintiffs; 12% against defendants), Northern District of Georgia (34% imposition rate against plaintiffs; 7% against defendants), Eastern District of Michigan (35% imposition rate against plaintiffs; 22% against defendants), and Western District of Texas (36% imposition rate against plaintiffs; 23% against defendants) mirror this trend. *Id.* § 3B, at 9, § 3C, at 11, § 3D, at 11, § 3E, at 11–12.

*C. The 1983 Version of Rule 11 Increased Costs and Delays by Encouraging Rambo-Like Litigation Tactics*

Yet another unfortunate result of the 1983 amendments is that they increased costs and delays by encouraging “[t]he Rambo-like use of Rule 11 by too many lawyers,” as Professor Georgene Vairo explained.<sup>54</sup> Similarly, in their treatise, *The Law of Lawyering*, Geoffrey Hazard and William Hodes note that it was frequently said by critics of the 1983 rule that it “has been a major contributing factor in the rise of so-called ‘Rambo tactics’ and the breakdown of civility and professionalism.”<sup>55</sup>

Representative of a view many shared at the time, one court in 1991 bemoaned the incentive the rule provided to litigators “to bring Rule 11 motions and engage in professional courtesy, preventing prompt resolution of disputes, the trial court’s primary function.”<sup>56</sup> Another emphasized the distraction that the volume of satellite litigation over sanctions motions produced, commenting that “[t]he amendment of Rule 11 . . . has called forth a flood of . . . collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves . . .”<sup>57</sup> The sentiment was widely felt. The FJC’s 1991 study found that more than half of the federal judges and lawyers surveyed thought that the 1983 version of Rule 11 made the problems of incivility among lawyers much worse.<sup>58</sup> The findings of the 1992 survey by the American Judicature Society showed that even higher percentages of lawyer respondents believed the 1983 version of the rule put great strain on relations among lawyers.<sup>59</sup>

In light of the rulemakers’ professed desire in 1983 to improve the efficiency of civil litigation process, it is ironic that, by encouraging Rambo-litigation tactics by lawyers during this unfortunate decade, the 1983 version of Rule 11 had the effect of increasing costs and delays and impeding efficient merit-based resolution of cases.

*D. The 1983 Version of Rule 11 Was Not an Effective Means for Reducing Cost, Delay, and Abusive Litigation Activity*

Finally, and independently of the unintended consequences the rule’s amendments produced, the empirical evidence also

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54. Vairo, *supra* note 23, at 592, 647.

55. GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* § 27.9, at 27-20 (Supp. 2007).

56. Giorgio Morandi, Inc. v. Texport Corp., 139 F.R.D. 592, 594 (S.D.N.Y. 1991).

57. Hot Locks, Inc. v. Ooh La La, Inc., 107 F.R.D. 751, 751 (S.D.N.Y. 1985).

58. WIGGINS & WILLGING, *supra* note 21, § 2A, at 9-10 & tbl.8.

59. Marshall, Kritzer & Zemans, *supra* note 21, at 950, 964.

shows that there is little reason to put faith in the assertion that the 1983 version of Rule 11 was effective in addressing the perceived cost, delay, and abuse problems that prompted reformers to act. A 1991 FJC study revealed that few judges polled thought the 1983 version of the rule was "very effective" in deterring groundless pleadings.<sup>60</sup> The FJC's 1995 study of Rule 11 similarly found that most federal judges and lawyers were opposed to returning Rule 11 to its 1983 version.<sup>61</sup> As will be seen below, a more recent study (in 2005) found even higher levels of consensus among judges that the 1983 version was not an effective means for reducing costs and delays and for addressing abusive litigation conduct.<sup>62</sup> Instead, judges and others in the profession report that separate procedural tools, including active judicial management of cases and expeditious rulings on motions to dismiss at the pleading stage or for summary judgment, are much more effective for dealing with the problems of cost, delay, and groundless litigation.<sup>63</sup>

### III. THERE IS NO SUPPORT FOR THE ASSERTION THAT THE 1993 AMENDMENTS CAN BE BLAMED FOR ANY PROBLEMS THAT DO EXIST WITH FEDERAL CIVIL LITIGATION

We have seen the serious difficulties that attended the 1983 revision of Rule 11. In the next Part, I will show that LARA can also be opposed on the ground that sponsors fail to demonstrate that the 1993 amendments to Rule 11 can be blamed for any problems that do exist today with federal civil litigation.

In the years after the 1983 amendments of Rule 11 went into effect, criticism of it grew in volume and intensity.<sup>64</sup> By 1989, the Advisory Committee could not ignore the criticisms any longer. The Advisory Committee commissioned a second study by the FJC to evaluate the rule.<sup>65</sup> Then, in the summer of 1990, the

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60. See WIGGINS & WILLGING, *supra* note 21, § 2A, at 16 tbl.15 (finding that only 22.7% of judges viewed Rules 11 sanctions as "very effective").

61. See SHAPARD ET AL., *supra* note 21, at 6 tbl.5 (finding that less than 30% of all judges and attorneys surveyed believed that a court "should be required to impose a sanction when a violation is found").

62. See RAUMA & WILLGING, *supra* note 21, at 14 tbls.12 & 13 (showing that 81% of all responding judges believed that Rule 11 "is just right as it now stands" and only 5% preferred the 1983 version of Rule 11).

63. See *infra* Part IV (advocating other laws, inherent court power, the discovery rules, and other measures as existing, effective alternatives to LARA).

64. Comm. on Rules of Practice and Procedure, Judicial Conference of the United States, *Call for Written Comments on Rule 11 of the Federal Rules of Civil Procedure and Related Rules*, 131 F.R.D. 335, 344 (1990); VAIRO, *supra* note 6, at 15.

65. Comm. On Rules of Practice and Procedure, Judicial Conference of the United States, *supra* note 64, at 337, 345; WIGGINS & WILLGING, *supra* note 21, § 1A, at 1.

Committee announced a “Call for Comments” from the bench and bar, which produced more criticisms and suggestions than the Committee had ever received before in its half-century existence.<sup>66</sup> One of the primary criticisms lodged was that the 1983 version actually made the problem of costly litigation worse because of all of the satellite sanctions litigation unrelated to the merits of the underlying case.<sup>67</sup> A second, frequently voiced complaint was that the 1983 rule was applied nonuniformly and inconsistently by judges.<sup>68</sup> A third and fourth theme echoed over and over again was, respectively, that the rule disproportionately hurt civil rights plaintiffs and their counsel, and that the rule worsened civil relations among lawyers.<sup>69</sup>

In February 1991, the Committee held a public hearing in which testimony from judges, lawyers, and academics was taken.<sup>70</sup> The criticism had a powerful effect on the Committee, which promptly issued an interim report that concluded that “in light of the intensity of criticism—the process of possible revision should not be delayed.”<sup>71</sup> The criticisms of the 1983 version of Rule 11, the Advisory Committee concluded, “have sufficient merit to justify considering specific proposals for change.”<sup>72</sup> Accompanying its 1992 recommendation that the rule be amended again to remedy the prior revisions made, the Advisory Committee commented that among its many unfortunate effects, the 1983 version of Rule 11 “impacted plaintiffs more frequently and severely than defendants.”<sup>73</sup> All too often, it resulted in the imposition of monetary sanctions, which had the effect of turning the rule into a *de facto* “cost-shifting” rule, a result that incentivized lawyers to abuse the sanctions rule. Occasionally, the rule proved problematic for those asserting novel legal theories or claims for which more factual discovery was necessary, and it disincentivized lawyers from backing away from positions they could no longer support. In addition, the rule sometimes caused conflicts between attorneys and clients and, more frequently, among lawyers.<sup>74</sup>

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66. VAIRO, *supra* note 6, at 15–20.

67. *Id.* at 13–14.

68. *Id.* at 17.

69. See generally *id.* at 15–20 (providing an overview of the Advisory Committee’s “Call for Comments” and describing the findings of the Interim Report).

70. *Id.* at 808.

71. *Id.* at 19.

72. *Id.*

73. *Id.* at 20; Letter from Judge Sam C. Pointer, Chair of the Advisory Comm. on Civil Rules, to Judge Robert E. Keeton, Chair of the Standing Comm. on Rules of Practice and Procedure (May 1, 1992), *excerpt reprinted in* VAIRO, *supra* note 6, at 836–37.

74. VAIRO, *supra* note 6, at 20.

In light of their concerns, the rulemakers amended the rule in 1993 to ameliorate the documented effects of the prior version. What is most critical to point out here is that, in backing away from the 1983 version, the rulemakers did not regress to the pre-1983 rule, but instead sought “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.”<sup>75</sup> Said more simply, the rulemakers improved upon the rule so that the rampant and abusive Rule 11 motion practices were curtailed while ensuring that the rule still could deter unwanted litigation practices.

One of the key changes in 1993 was to replace the mandate that sanctions must be imposed if a violation of the rule is found with a grant of discretion to federal judges to decide when to impose sanctions, and to what extent.<sup>76</sup> Additionally, if sanctions were to be imposed, the 1993 amendments emphasized that the purpose of sanctions is deterrence, not compensation.<sup>77</sup> This latter reform was significant because it was designed to discourage the incentive that the prior rule created to seek sanctions for monetary gain.

A further, key reform in 1993 was the addition of what is known as the “safe harbor” provision, which protects against the imposition of sanctions if the filing alleged to be sanctionable is withdrawn in a timely manner. The safe harbor does not protect against court-imposed sanctions or from the various other rules, statutes, and disciplinary authorities beyond Rule 11 that can be invoked to deter and punish counsel who act wrongfully in civil litigation.<sup>78</sup> Nevertheless, the addition of the safe harbor has been credited with successfully reducing the incidence of abusive Rule 11 sanctions practice, a salutary result felt especially by those claimants who were impacted most severely by the 1983 rule.<sup>79</sup> The addition of the safe harbor is also significant because it

75. 150 CONG. REC. 18,352 (2004) (statement of Hon. F. James Sensenbrenner, Jr., Chairman, Comm. of the Judiciary) (quoting Letter from Leonidas Ralph Mecham, Secretary, Judicial Conference of the United States to Hon. F. James Sensenbrenner, Jr.).

76. FED. R. CIV. P. 11 1993 advisory committee’s notes (“The court has significant discretion in determining what sanctions, if any, should be imposed for a violation, subject to the principle that the sanctions should not be more severe than reasonably necessary to deter repetition of the conduct by the offending person or comparable conduct by similarly situated persons.”).

77. *Id.*

78. *Id.*

79. See Yablon, *supra* note 46, at 600, 605 (crediting the 1993 revisions for reducing the frequency of sanctions filed for frivolous litigation); Tobias, *Reconsidering Rule 11*, *supra* note 35, at 876 (“A true safe harbor, if workable, affords needed protection for parties with scant resources or those who pursue nontraditional, close, unpopular, or political cases.”).

fundamentally alters one key problem observed with the 1983 version of Rule 11—namely, that it had the effect of disincentivizing the withdrawal of sanctionable filings because, as the Advisory Committee put it, “parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”<sup>80</sup>

Beyond these specific points, experience since 1993 has shown that the current rule works admirably well and has engendered little complaint. The evidence shows that the rate of filing of sanctions motions has dropped off considerably post-1993. While lawyers are still sanctioned for wrongful conduct under Rule 11, there is no longer a scourge of frivolous Rule 11 motions being filed.<sup>81</sup> At the same time, this drop in meritless Rule 11 motion practice has not been accompanied by an increase in groundless litigation practices. To this point in particular, evidence gathered by several researchers, including Danielle Kie Hart, demonstrates that after the current version of Rule 11 went into effect in 1993, there was an increased incidence of sanctions being imposed under other laws, including 28 U.S.C. § 1927 and pursuant to the court’s inherent powers.<sup>82</sup> Meanwhile, Rule 11 has continued to be used as a means of regulating wrongful lawyer conduct that contravenes the rule. Consider, for instance, the data from one of the most active federal judicial districts. In the Southern District of New York, in the same time period that there were slightly fewer than two hundred § 1927 motions for sanctions, there were nearly twice as many Rule 11 motions sought.<sup>83</sup> This one example, which typifies the patterns found in other districts, underlines that both Rule 11 and other existing sanctioning and disciplinary laws are available for addressing wrongful lawyer conduct. Finally, as I discuss further in Part IV, we must also be mindful that beyond sanctions rules and laws, other—and far more effective—tools exist for dealing with cost and delay in litigation that are regularly employed by courts in managing their dockets.

Judges and lawyers overwhelmingly report that they oppose attempts to restore Rule 11 to its 1983 form. The FJC’s 1995 study of Rule 11 showed that a majority of judges and lawyers are opposed to amending Rule 11 to bring back the 1983 version of the

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80. FED. R. CIV. P. 11. 1993 advisory committee’s notes.

81. See VAIRO, *supra* note 6, at 36–37 (observing increased restraint by litigators and courts in seeking Rule 11 sanctions).

82. Danielle Kie Hart, *And the Chill Goes On—Federal Civil Rights Plaintiffs Beware: Rule 11 vis-à-vis 28 U.S.C. § 1927 and the Court’s Inherent Power*, 37 LOY. L.A. L. REV. 645, 660–62 (2004).

83. *Id.* at 661 tbl.1.

rule.<sup>84</sup> Then a 2005 survey conducted by the FJC even more starkly illustrated the strong support within the profession that the current version of Rule 11 enjoys.<sup>85</sup> More than 80% of the 278 district judges surveyed shared the view that "Rule 11 is needed and it is just right as it now stands."<sup>86</sup> An even higher percentage (87%) preferred the existing rule to the 1983 version.<sup>87</sup> Equally strong support (86%) existed for the safe harbor provision in Rule 11(c), while more than 90% opposed changing the rule to make the imposition of sanctions mandatory for every Rule 11 violation.<sup>88</sup>

#### IV. LARA IS NOT NEEDED BECAUSE THERE ARE MANY AVAILABLE ALTERNATIVES FOR MANAGING CIVIL LITIGATION COSTS AND ABUSES

By focusing exclusively on Rule 11, LARA's sponsors overlook the fact that both the existing Rule 11, as well as many other provisions in the existing rules, serve the purpose of managing federal litigation and deterring, punishing, and otherwise addressing abusive litigation practices. Of course, problems with particular cases still exist and, unavoidably, will always exist. Rules, alone, cannot eliminate all difficulties. However, the fundamental point that LARA's sponsors miss is that existing rules can and are used effectively by courts every day to adequately monitor federal civil cases.

Since the focus of LARA is on sanctioning lawyers, we can start there. Existing Rule 11 requires that all factual contentions that are plead must contain "evidentiary support."<sup>89</sup> When a pleading is brought without evidentiary support, sanctions can be sought and imposed if the pleader does not withdraw the offending allegations.<sup>90</sup> Moreover, Rule 11 is not the only source of legal authority for regulating lawyer conduct. Rule 26(g), which was enacted in 1983 as part of the same package of amendments that stiffened Rule 11, imposes a steep certification obligation on lawyers with regard to discovery disclosures, requests, responses, and objections.<sup>91</sup> The provision was designed as a "deterrent to both

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84. See SHAPARD ET AL., *supra* note 21, at 4 (reporting that nearly 70% of both judges and attorneys support the safe harbor provision contained within the 1993 amendments).

85. RAUMA & WILLGING, *supra* note 21, at 12–15.

86. *Id.* at 2.

87. *Id.* at 14.

88. *Id.* at 5, 7.

89. FED. R. CIV. P. 11.

90. *Id.*

91. FED. R. CIV. P. 26(g); see FED. R. CIV. P. 26(g) 1983 advisory committee's notes (discussing enactment of 1983 Rule 11 amendment).

excessive discovery and evasion" and to require lawyers "to stop and think about the legitimacy of a discovery request, a response thereto, or an objection."<sup>92</sup> Although the 1983 version of Rule 11 was repealed, under Rule 26(g) sanctions are still mandatory for violations of this section.<sup>93</sup> In addition, after a motion to compel has been filed, sanctions for discovery abuse can be imposed under Rule 37.<sup>94</sup> More broadly still, lawyers are regulated through other law, including 28 U.S.C. § 1927, as well as under an array of other, even more specific provisions.<sup>95</sup> Of course, the court also possesses inherent power to impose sanctions when they are deemed appropriate.<sup>96</sup> In sum, there are a plethora of authorities by which lawyers are held accountable and may be sanctioned when their conduct warrants it, under existing law. These authorities, which LARA sponsors have failed to acknowledge, cannot be squared with the bald assertion that the existing Rule 11 is inadequate for regulating lawyer conduct in the federal courts.

But sanctions rules are far from the only means for managing litigation costs and abuses. The discovery rules themselves provide powerful means for controlling costs and abuses. For more than a decade, Rule 26 has required that parties make mandatory disclosures at various stages in the case.<sup>97</sup> These mandatory disclosures are expressly designed to reduce discovery costs and avoid unnecessary skirmishes over groundless objections to routine discovery.<sup>98</sup> Moreover, while the rules obviously contemplate liberal discovery, important restrictions exist on discovery rights. For instance, presumptive limits on the amount of discovery now exist, including limits on the number of written interrogatories and the number and length of oral depositions.<sup>99</sup>

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92. FED. R. CIV. P. 26(g) 1983 advisory committee's notes.

93. FED. R. CIV. P. 26(g); FED. R. CIV. P. 11 1993 advisory committee's notes; *see* Hart, *supra* note 82, at 649–50 (noting that the 1983 version of Rule 11 was "substantially amended" in 1993).

94. FED. R. CIV. P. 37(b).

95. *See generally* Herr & Narotzky, *supra* note 22, at 50–52, 79–83, 89–92 (detailing the power judges possess to regulate lawyer conduct under FED. R. CIV. P. 30(d) and 28 U.S.C. §§ 1912, 1927).

96. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 43–46 (1991) (discussing scope of inherent powers); Hart, *supra* note 82, at 653–54 (noting the court's inherent powers to sanction).

97. *See* FED. R. CIV. P. 26(a)(1)–(3) (mandating initial disclosure, disclosure of expert testimony, and pretrial disclosure); FED. R. CIV. P. 26 1993 advisory committee's notes (discussing introduction of mandatory initial disclosures in 2000).

98. FED. R. CIV. P. 26 1983 advisory committee's notes; FED. R. CIV. P. 26 1993 advisory committee's notes; FED. R. CIV. P. 26 2000 advisory committee's notes.

99. *See* FED. R. CIV. P. 30(a)(2), (d)(2) (requiring leave of court to bypass strict time and number requirements for oral depositions); FED. R. CIV. P. 33(a) (limiting

Even more specifically, the rules authorize judges to protect parties from unnecessarily expensive and burdensome discovery. One way this goal is accomplished is by the foundational requirement in Rule 26(b)(2) that the discovery sought must be proportional with the burden imposed. Thus, when the “discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive,” the court has wide discretion to limit the discovery sought.<sup>100</sup> So too can it limit discovery when it is sought too late in the case.<sup>101</sup> Perhaps most importantly, Rule 26(b)(2)(C)(iii) provides that discovery can be limited when “the burden or expense of the proposed discovery outweighs its likely benefit.”<sup>102</sup>

Another vital provision by which discovery is controlled is Rule 26(c), which allows for the entry of protective orders to protect against “annoyance, embarrassment, oppression, or undue burden or expense.”<sup>103</sup> For instance, if documents are sought that cover a period of time longer than relevant to the claims in the case that has been brought, a protective order can be issued.<sup>104</sup> The rule also protects against production of information protected by, for example, trade secret protection. Courts effectively employ this rule to protect against discovery abuses.<sup>105</sup>

Even before the discovery phase, there are many procedural tools available for managing litigation and, where appropriate, dismissing cases even before the discovery stage is reached. If a pleading is filed that is too vague to understand, Rule 12(e) is available. If a pleader files a pleading that “is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading,” this rule authorizes an order directing the party to plead a more definite statement of the claim.<sup>106</sup>

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the number of allowable written interrogatories to twenty-five, absent leave from the court).

100. FED. R. CIV. P. 26(b)(2).

101. See FED. R. CIV. P. 26(b)(2)(C)(ii) (requiring a court to limit discovery upon the determination that “the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought”).

102. FED. R. CIV. P. 26(b)(2)(C)(iii).

103. FED. R. CIV. P. 26(c).

104. FED. R. CIV. P. 26(c); see Todd David Peterson, *The Timing of Minimum Contacts*, 79 GEO. WASH. L. REV. 101, 125 (discussing trial court’s decision to issue protective order limiting scope of discovery to six-year period).

105. See, e.g., Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 364–65 (D. Md. 2008) (utilizing Rule 26(b)(2)(c) to outline a discovery plan intended to avoid “excessive or overly burdensome” discovery while maintaining the integrity of the adversary system).

106. FED. R. CIV. P. 12(e). Another rule that can be used as a vehicle for testing the sufficiency of pleadings (with an eye toward achieving early dismissal in appropriate cases) is Rule 7. This rule authorizes the court to order the plaintiff to file a reply, something that is not

Separate from vagueness, Rule 12(b)(6) is another powerful procedural rule for obtaining dismissal before discovery. Indeed, it is nothing short of astonishing that in urging Rule 11's amendment, LARA's proponents do not mention that in the last few years the Supreme Court has increased the availability of dismissals before discovery under Rule 12(b)(6).<sup>107</sup> The decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* were justified by the Court—and, not coincidentally, hailed by these same reformers—precisely because the motion to dismiss for failure to state a claim was seen as the appropriate rule for filtering out groundless cases before they reach the pleading stage.<sup>108</sup>

Beyond existing rules, the Judicial Conference continues to monitor the state of civil litigation practice through its Standing Committee and Advisory Committee.<sup>109</sup> The Judicial Conference remains closely engaged in the effort to ensure the federal courts are run efficiently and fairly. Consider, as one important example, the major Conference held last summer at Duke University that was organized by the Advisory Committee for the Civil Rules.<sup>110</sup> That Conference exemplifies the Advisory

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normally required, but can be made necessary when the defendant's answer raises defenses that warrant a further reply. *See FED. R. Crv. P. 7* ("[I]f the court orders one, a reply to an answer [is allowed]."). This may occur, for instance, when a qualified immunity defense is raised. *See, e.g.*, *Zion v. Nassan*, 727 F. Supp. 2d 388, 404–05 (W.D. Pa. 2010) (applying Rule 7(a)(7) to order the plaintiffs to file a reply to the defendant's answers in a qualified immunity context).

107. *See generally* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 17–34 (2010) (examining the Supreme Court's enhanced "plausibility pleading" standard, as enunciated in *Twombly* and *Iqbal*); *see also* Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1231–32 (2008) (identifying high discovery costs as the Court's motivation for "more rigorously intercept[ing] cases at the pleading stage").

108. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948–50, 1959 (2009) (describing Rule 12(b)(6)'s purpose as the filter for cases where insufficient facts are plead); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–57 (2007) (explaining that 12(b)(6) motions are appropriate when the allegations are factually groundless); *see Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 2–4 (2009) (statement of Rep. Sensenbrenner) (assessing the *Iqbal* decision favorably); 150 Cong. Rec. H7,098–100 (2004) (daily ed. Sept. 14, 2004) (statement of Rep. Sensenbrenner) (urging passage of Lawsuit Abuse Reduction Act of 2004).

109. *See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*, UNITED STATES COURTS, <http://www.uscourts.gov/rulesandpolicies/federalRulemaking/RulemakingProcess/JudicialConfProcedures.aspx> (last visited July 24, 2011).

110. For a summary of the Conference, and links to all of the Conference materials, see 2010 CONFERENCE ON CIVIL LITIGATION, [http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h\\_RoomHome/4df38292d748069d0525670800167212?OpenDocument](http://civilconference.uscourts.gov/LotusQuickr/dcc/Main.nsf/h_RoomHome/4df38292d748069d0525670800167212?OpenDocument) (last visited July 11, 2011).

Committee's serious focus on rulemaking and its commitment to solicit and receive input from the rich diversity of experience in the profession. Having heard concerns about costs, delays, and burdens of civil litigation in the federal courts, the Advisory Committee designed the Conference "as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation."<sup>111</sup> The result of these efforts was the production of a large body of empirical data, as well as much thoughtful commentary and discussions, by a diverse group of individuals and organizations.

One of the clearest messages the Committee took away from the Duke Conference was that participants (who represented a wide range of lawyers, business interests, judges, and academics) believed that better utilization of existing tools was vital for effective case management and weeding out of nonmeritorious litigation. The report of the Advisory Committee following the Conference makes this point:

Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.<sup>112</sup>

Of course, there was also measured support expressed for revising some of the existing rules (with the discussion primarily focused on the rules governing pleading and discovery practice), though even here most participants recognized that the existing procedural framework was fundamentally sound.<sup>113</sup> What may be most relevant, for present purposes, is that although the two-day Conference was attended by more than two hundred observers and invited guests (a group which included many members of the business community and defense bar), not a single one of the participants expressed any support—either in oral statements made at the Conference or in their written submissions—for

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111. JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES & COMM. ON RULES OF PRACTICE & PROCEDURE, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 1 (2010), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/2010%20report.pdf>.

112. *Id.* at 5.

113. *See id.* (noting that a consensus was reached at the Conference that "while rule changes alone cannot address the problems, there are opportunities for useful and important changes . . . [and] there is no general sense that the 1938 rules structure has failed. . . . [T]he time has not come to abandon the system and start over").

strengthening Rule 11 along the lines contemplated by the proposed legislation.<sup>114</sup>

The lack of any serious discussion at the Conference about amending Rule 11 is not the least bit surprising. Although there are certainly strong divisions within the profession over civil litigation reform, the well-known experience with the prior rule has produced remarkable agreement across the political spectrum that the rule committee's decision in 1983 was an "ill-considered, precipitous step," as Professor George Cochran once succinctly described it.<sup>115</sup>

#### V. THERE IS NO CREDIBLE EVIDENCE OF A LITIGATION CRISIS TO JUSTIFY THE PROPOSED REFORMS

The 1983 version of Rule 11 came as part of a package of amendments to the Federal Rules of Civil Procedure that rulemakers hoped would reduce unnecessary costs and abuses that were then perceived to exist in civil litigation in the federal courts.<sup>116</sup> That there was little credible evidence either to support the need for these rule reforms or to justify use of the sanctions rule to manage litigation cost and abuse hardly gave pause to reformers.<sup>117</sup> More sobering still is that they came despite contemporary warnings of the dire consequences that would likely follow the rule's amendment. As Margaret Sanner and Carl Tobias have previously observed, "premising modification [of Rule 11] on anecdotal information, rather than empirical data systematically gathered, analyzed and synthesized by experts, can have unintended and often detrimental consequences for judges, lawyers and parties."<sup>118</sup> Perhaps one of the most important lessons, then, from our prior Rule 11 experience is that reform of civil litigation should be based on sound data, not anecdote or, worse still, political posturing. This is a lesson for which there is apparently need for frequent reminders.

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114. See *id.* at 1–6 (lacking any mention of support for strengthening Rule 11 with augmented sanction penalties and instead focusing on alternative methods of increasing attorney accountability and litigation efficiency).

115. George Cochran, *The Reality of "A Last Victim" and Abuse of the Sanctioning Power*, 37 LOY. L.A. L. REV. 691, 692–95 (2004).

116. See Margaret L. Sanner & Carl Tobias, *Rule 11 and Rule Revision*, 37 LOY. L.A. L. REV. 573, 575, 577 (2004) (explaining that the 1983 amendments to Rule 11 were a part of "an integrated set of revisions" to the Federal Rules with the goal of increasing attorney accountability through sanctions, stricter factual inquiry, and stricter certification requirements).

117. See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, 59 BROOK. L. REV. 841, 844 (1993) (noting that the 1983 amendments were promulgated in an "empirical vacuum").

118. Sanner & Tobias, *supra* note 116, at 588.

#### A. *The Lawsuit Abuse Arguments Made by LARA's Supporters*

Echoing similar concerns about lawsuit abuse and unnecessary costs and delays that animated advocates for reform of Rule 11 in the early 1980s, LARA's proponents today similarly urge that the legislation is needed to combat the problems that they perceive to bedevil civil litigation. Advocates for stiffening the sanctions rule assert that there are too many lawsuits and, more to the point, too many "frivolous" suits. On this account, because the costs (primarily discovery costs) of defending against those suits are so great, defendants settle cases without regard to their actual merit. Consider, for instance, Chairman Smith's published remarks issued with LARA's introduction:

Plaintiffs' lawyers can file frivolous suits, no matter how absurd the claims, without any penalty. Meanwhile defendants are faced with the choice of years of litigation, high court costs and attorneys' fees or a settlement. Our legal system encourages frivolous lawsuits while defendants are left paying the price even when they are innocent. Many of these cases have cost innocent people and business owners their reputations and hundreds of thousands of dollars.<sup>119</sup>

These complaints are well-worn and often repeated themes that have been trumpeted for many years by the same pro-business interest groups, like the U.S. Chamber of Commerce, the Pacific Research Institute (PRI), and others.<sup>120</sup> For instance, one of the most frequently cited studies that purported to calculate litigation abuse costs is a 2003 report by Tillinghast-Towers Perrin, an insurance industry consulting firm. The Tillinghast report claimed, *inter alia*, that the annual "costs" of the American tort system were \$233 billion in 2002, a finding that has been frequently cited by litigation reformers.<sup>121</sup> For anyone familiar with the literature, then, it came as no surprise that Senator Grassley referenced the Tillinghast study in the same press release that was issued with LARA's introduction in 2011:

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119. Press Release, Representative Lamar Smith, Smith & Grassley Introduce Lawsuit Abuse Reduction Act (Mar. 9, 2011), <http://judiciary.house.gov/news/Statement%20Lawsuit%20Abuse.html> [hereinafter Smith Press Release].

120. J. Douglas Richards, *Heart of Darkness: A Satirical Commentary*, 66 N.Y.U. ANN. SURV. AM. L. 569, 576 (2010); see Terry Carter, *Tort Reform Texas Style*, 92 A.B.A. J. 30, 34 (2006) (noting that the PRI named Texas as the most business-friendly legal environment after it enacted strict tort reform measures in 2003).

121. TILLINGHAST-TOWERS PERRIN, U.S. TORT COSTS: 2003 UPDATE 1 (2003), available at [http://www.towersperrin.com/tillinghast/publications/reports/2003\\_Tort\\_Costs\\_Update/Tort\\_Costs\\_Trends\\_2003\\_Update.pdf](http://www.towersperrin.com/tillinghast/publications/reports/2003_Tort_Costs_Update/Tort_Costs_Trends_2003_Update.pdf); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENVER U. L. REV. 77, 85 n.33 (1993).

Every year, billions of dollars are wasted on frivolous lawsuits, costing jobs and damaging the economy. According to one analysis, the 2002 tort system's direct costs were \$233 billion, the equivalent of a 5 percent tax on wages. Today that number is even higher; the annual direct cost of American tort litigation exceeds \$250 billion.<sup>122</sup>

From the premise that the judicial system is inundated with too many cases that defendants are often forced to settle without regard to their underlying merit, the critical move that LARA's supporters then make is to link these problems to the sanctions rule. LARA's supporters today assert that Rule 11 was "watered down in 1993, resulting in the current crisis of widespread lawsuit abuse."<sup>123</sup> By restoring Rule 11 to its stricter 1983 form, they argue that LARA would "hold attorneys accountable for lawsuit abuse."<sup>124</sup> "Without the serious threat of punishment for filing frivolous lawsuits," they maintain, "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."<sup>125</sup>

As previously observed, the question is not whether civil litigation in the federal courts is problem-free. It obviously is not. There are many deficiencies that need addressing, both as to individual litigation and systemically. However, the best available empirical evidence demonstrates that the strident assertions made by LARA's proponents regarding the costs and abuses in federal civil litigation are unsupportable. In Section B, below, I outline some of the leading empirical work on frequency of "frivolous" litigation. Finally, in Section C, the last section of the paper, I summarize the available evidence regarding discovery costs and practices.

### *B. The Incidence of "Frivolous" Litigation*

To be sure, empiricists have recognized the profound difficulties in adequately assessing the incidence of "frivolous" litigation, largely because of subjective disagreements over the definition.<sup>126</sup> Nevertheless, there is an abundance of high-quality research, to which anyone interested in reliable data may turn,

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122. Smith Press Release, *supra* note 119.

123. *Id.*

124. *Id.*

125. *Id.*

126. See Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 528 (1997) (noting that obstacles to doing empirical work on the subject of "frivolous" suits include "the lack of a clear and generally accepted definition of a 'frivolous suit'" and "the tricky problem of how to determine whether any given suit is frivolous").

that shows the claims of LARA's supporters are, at the least, greatly exaggerated. The predominant view in the literature is that there is no credible evidence that has been presented that "frivolous" litigation poses a serious problem.<sup>127</sup> Some of the best-known works exposing the absence of hard proof in the claims of tort reformers are by Marc Galanter,<sup>128</sup> but there are quite a few other works to consult as well.<sup>129</sup>

Stephen Burbank, Sean Farhang, and Herbert Kritzer have concisely summed up the state of academic research on the problem of "frivolous" litigation in a recent paper discussing private law enforcement. As they observe, "[c]areful

127. See HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* 75 (1991) (detailing the complete lack of evidence to support claims that large numbers of "frivolous" lawsuits are brought every year); Bone, *supra* note 126, at 596 (noting that there is "no hard empirical evidence bearing on the nature or seriousness of the problem [of frivolous litigation]"); David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1101 (2006) ("Academics who write about frivolous lawsuits generally concede that there is no evidence indicating they are a serious problem."); Galanter, *supra* note 121, at 83–90 (discrediting a number of the sources relied on by proponents of litigation reform as "marked by an utterly cavalier treatment of facts, a use of sources that would shame any first year law student, and an absence of any serious attempt to make a disciplined assessment of what is going on in the world"); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 163 & n.2 (2000) (citing to multiple secondary sources to support the proposition that complaints of "frivolous litigation" are not "well placed"); Herbert M. Kritzer, *The English Experience with the English Rule: How "Loser Pays" Works, What Difference it Makes, and What Might Happen Here* 12 n.35 (Inst. for Legal Studies, Working Paper No. 11-4, 1992) ("I know of no evidence on what proportion of cases filed are arguably frivolous; the frivolous case debate is sustained primarily through anecdotes.").

128. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 726–36 (1998) (explaining the truth behind tort reformers' repeated tales of outrageous jury awards); Galanter, *supra* note 1271, at 83–90 (providing criticism of the methodologies employed by many "cost of litigation" studies and reports); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109–12 (1996) (calling into question the "erroneous perception of the jury's pro-plaintiff bias" as contrary to actual results); Marc Galanter, *The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921, 938–42 (discrediting claims that product liability cases jeopardize American industry by highlighting the prominence of asbestos litigation within the product liability docket).

129. See, e.g., TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 1–5 (2005) (arguing there is too much medical malpractice instead of too much medical malpractice litigation); Theodore Eisenberg, *U.S. Chamber of Commerce Liability Survey: Inaccurate, Unfair, and Bad for Business*, 6 J. EMPIRICAL LEGAL STUD. 969, 974–77 (2009) (presenting evidence that the U.S. Chamber of Commerce Survey of State Liability is substantively inaccurate due to biased methodology); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1152–56 (1992) (denouncing "policy-makers, scholars, and other commentators" for condemning the behavior of the civil justice system when evidence to support such condemnation is lacking); Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1469–75 (2007) (labeling popular notions of medical malpractice as "myths").

studies demonstrate that the ‘litigation explosion’ and ‘liability crisis’ are largely myths.”<sup>130</sup>

The predominant academic view about the incidence of “frivolous” litigation is consistent with the views of a vast majority of federal judges.<sup>131</sup> In 2005, in the same survey in which the FJC asked federal judges their views of current Rule 11, they also asked judges to assess how much of a problem “frivolous” cases were in the federal courts. What the FJC researchers found was that 85% of judges thought frivolous lawsuits were either “[n]o problem,” a “[v]ery small problem,” or a “[s]mall problem.”<sup>132</sup>

Despite the absence of any credible evidence to support their charges, LARA’s supporters, following the U.S. Chamber of Commerce and other pro-business groups, assert that the problem of “frivolous” litigation is serious and getting worse.<sup>133</sup> One of the most frequently cited sources is the Chamber’s annual survey of corporate counsel, which ranks states according to their “litigation climate,” which is meant to measure, according to the Chamber, “how reasonable and balanced the states’ tort liability systems are perceived to be by U.S. business.”<sup>134</sup> The Chamber’s work has been subject to powerful criticism by leading academic commentators. They have compellingly detailed the substantive inaccuracies and methodological flaws in the Chamber’s annual survey.<sup>135</sup> Other studies that purport to measure the “costs” that result from a

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130. Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement of Statutory and Administrative Law in the United States (And Other Common Law Countries)* 29 (Univ. Pa. Law Sch., Working Paper No. 11-08, 2011) (alteration in original) (quoting Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009)).

131. See RAUMA & WILLGING, *supra* note 21, at 14 (finding that only 3% of surveyed federal district judges view “groundless litigation” to be a “large or very large problem”).

132. *Id.* at 4 tbl.1.

133. See 157 CONG. REC. S1509–10 (daily ed. Mar. 9, 2011) (statement of Sen. Chuck Grassley) (decrying the “billions of dollars wasted on frivolous lawsuits” and offering LARA as a solution).

134. U.S. CHAMBER INST. FOR LEGAL REFORM, RANKING THE STATES LAWSUIT CLIMATE: 2010 STATE LIABILITY SYSTEMS RANKING STUDY 2 (2010), available at <http://www.instituteforlegalreform.com/images/stories/documents/pdf/lawsuitclimate2010/2010LawsuitClimateReport.pdf>; see also, e.g., Matt Blunt, *How Missouri Cut Junk Lawsuits*, WALL ST. J., Sept. 22, 2009, at A23 (crediting tort reform for allowing Missouri to move up the Chamber’s ranking); Nathan Koppel, *Empirical Holy War: Cornell Law Prof Takes on Chamber of Commerce*, WALL ST. J. LAW BLOG (Sept. 24, 2009, 4:51 PM), <http://blogs.wsj.com/law/2009/09/24/empirical-holy-war-cornell-law-prof-takes-on-us-chamber-of-commerce/> (describing the Chamber’s rankings as “somewhat influential”).

135. See, e.g., Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Their Judges*, 58 DUKE L.J. 1313, 1316–17 (2009) (describing the Chamber’s survey as “opaque” by “reflect[ing] judgments of various individuals who do not necessarily have good judgment, express their views sincerely, or take account of all relevant considerations”); Eisenberg, *supra* note 129, at 970 (attacking the Chamber’s survey as “methodologically flawed” and “provid[ing] little useful information”).

litigation system plagued by nonmeritorious cases have also been critically skewered.

One of the most frequently cited sources of support for claims regarding nonmeritorious litigation is the PRI's 2007 report, *Jackpot Justice: The True Cost of America's Tort System*. In it, PRI researchers estimated that America's tort system produced \$589 billion dollars each year in "excessive tort litigation."<sup>136</sup> The PRI's study has been wholly discredited for, *inter alia*, being misleading and methodologically absurd.<sup>137</sup> Richard Posner called the report's cost estimates to be "fictitious."<sup>138</sup> As Baker, Kritzer, and Vidmar have shown, a critical failure of the PRI researchers was that they purported to look only for "costs" and did not even try to consider in their calculations any potential benefits that result from the existing tort system.<sup>139</sup> Indeed, the PRI authors expressly observed that they did not explore the benefits of the tort system, even though they acknowledged that "there are many."<sup>140</sup> Baker, Kritzer, and Vidmar sum up the problem concisely:

Instead they focus on the tort system as a "massive transfer system" that takes from businesses and gives to individuals, without considering if those individuals are deserving of compensation or if business fails to compensate large numbers of individuals whom they injure.

Thus, from the very outset the research was fatally flawed: it started with a clear agenda and made assumptions and decisions that would advance that agenda.<sup>141</sup>

Ignoring the benefits of litigation is a critical oversight. As other researchers have demonstrated, there are a number of examples that can be cited as instances in which litigation led not only to safer products and service practices but also aided business development. For instance, Hyman and Silver have

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136. LAWRENCE J. MCQUILLAN ET AL., PAC. RESEARCH INST., JACKPOT JUSTICE: THE TRUE COST OF AMERICA'S TORT SYSTEM 35 (2007), available at [http://www.pacificresearch.org/docLib/20070327\\_Jackpot\\_Justice.pdf](http://www.pacificresearch.org/docLib/20070327_Jackpot_Justice.pdf).

137. See generally Tom Baker, Herbert Kritzer & Neil Vidmar, *Jackpot Justice and the American Tort System: Thinking Beyond Junk Science* 2–9 (William Mitchell Coll. of Law, Paper No. 95, 2008), available at <http://ssrn.com/abstract=1152306> (rejecting the PRI study as lacking data from "prestigious academic publication[s]" and having not undergone any peer review by unbiased experts).

138. Richard Posner, *Is the Tort System Costing the United States \$865 Billion a Year?*, BECKER-POSNER BLOG (Apr. 1, 2007, 7:22 PM), <http://www.becker-posner-blog.com/2007/04/is-the-tort-system-costing-the-united-states-865-billion-a-year--posner.html>.

139. Baker, Kritzer & Vidmar, *supra* note 137, at 6, 14.

140. MCQUILLAN ET AL., *supra* note 136, at 2.

141. Baker, Kritzer & Vidmar, *supra* note 137, at 2.

demonstrated how tort lawsuits against anesthesiologists led to safer anesthesia practices.<sup>142</sup> More broadly, Viscusi and Moore examined 186 different industries to try to measure the effects of “liability costs” on product research and development and innovation. What they found was that in 175 of the 186 industries examined, litigation costs had either no effect or a positive effect on product research and development and innovation.<sup>143</sup> Only in the remaining eleven industries did they find any evidence that tort claims could negatively impact product development.<sup>144</sup> Indeed, the Viscusi and Moore study is important because, as Baker, Kritzer, and Vidmar have shown, it was misused by the PRI researchers in *Jackpot Justice*.

In thinking about the overall frequency of tort litigation activity one may also consider the findings of a recent study by the nonpartisan National Center for State Courts (NCSC). The NCSC work effectively debunks assertions made that the total amount of tort litigation is increasing. The NCSC found that tort filings actually have fallen 25% from 1999 to 2008, and that there were on average nine contract actions filed for every tort action in 2008.<sup>145</sup> Over the same time period, the biggest increase in cases was contract filings (63%), suggesting that if there has been any sort of “litigation explosion” it is because business entities are suing each other more.<sup>146</sup> Of new cases in 2008, torts comprised only 4.4% of the civil cases.<sup>147</sup> Medical malpractice cases accounted for just 2.8% of tort caseloads in 2008.<sup>148</sup> As the NCSC researchers explained, “[d]espite their continued notoriety, rarely does a medical malpractice caseload exceed a few hundred cases in any one state in one year.”<sup>149</sup> The NCSC work further substantiates that these same trends can be found in product liability cases, which dropped

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142. David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 917–21 (2005).

143. See Baker, Kritzer & Vidmar, *supra* note 137, at 6 (criticizing the figure of 175 out of 186 arrived at by Viscusi and Moore).

144. See W. Kip Viscusi & Michael J. Moore, *Product Liability, Research and Development, and Innovation*, 101 J. POL. ECON. 161, 181 (1993) (“[T]here are 11 industry groups beyond the point at which liability costs exert a negative effect on innovation.”).

145. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 27 (2010).

146. *Id.*

147. *Id.* at 26.

148. *Id.* at 31.

149. *Id.*

4% between 1997 and 2006 and comprised just 4% of the tort caseload in 2006.<sup>150</sup>

The NCSC work is consistent with one of the most frequently cited academic papers in the medical malpractice literature. Looking at a database of closed claims by the Texas Department of Insurance (which requires insurance carriers to file with them reports of closed malpractice claims), Black, Silver, Hyman, and Sage found no evidence to support critics' claims that in recent years there had been an "explosion" in medical malpractice cases.<sup>151</sup> They found that the number of claims paid out for more than \$25,000 did not increase during the time period covered (1990–2002).<sup>152</sup> The number of claims paid out for under \$25,000 actually decreased.<sup>153</sup> Based on their research, the authors concluded: "[the] evidence suggests that no crisis involving malpractice claim outcomes occurred."<sup>154</sup> Similar results were obtained by Vidmar, Lee, MacKillop, McCarthy, and McGwin in their 2005 study of a comparable dataset maintained by the Florida Department of Health.<sup>155</sup>

It is also worthwhile to consider that surveys of business owners do not bear out the assertions made by representative business organizations that have been cited by LARA's supporters. Consider, for instance, a 2006 survey by the National Association of Manufacturers (NAM) of its manufacturer members. The NAM survey results revealed that "fear of litigation" was the lowest ranked concern cited by its members.<sup>156</sup> This was not the only

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150. NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2007, at 17 (2008) (study compared the caseload data of nine states).

151. See Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 209, 229–31 (2005) (finding that the number of large paid medical malpractice claims per year from 1988 to 2002 was relatively stable, especially when adjusted for population growth).

152. *Id.* at 230–31.

153. *Id.* at 233–34.

154. *Id.* at 209–10.

155. See Neil Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, 54 DEPAUL L. REV. 315, 332–34 (2005) (noting a lack of a consistent increase in total medical malpractice claims from 1990 to 1997 and relatively no increase in per capita paid claims from 1999 to 2003).

156. *National Manufacturing Week 2006 Annual Survey Results*, NAT'L ASS'N OF MFRS., (Dec. 13, 2006) (on file with Houston Law Review). The NAM survey question was: "Please rate the following factors in terms of their negative impact on your company's operations (with 1 representing the greatest negative impact and 10 the least)." *Id.* Respondents to the survey answered as follows:

2.9 Cost of non-wage compensation

3.5 Cost of materials used in production

4.0 Inability to raise prices

4.1 Energy prices

survey by a business organization to find that litigation ranked at the bottom of business concerns. A 2008 survey conducted by the National Federation of Independent Business (NFIB) similarly found no support for the assertion that costs and frequency of lawsuits (or threatened lawsuits) was a high concern. In fact, the survey results reflected that lawsuits were one of the very last concerns for most of its members. “Costs and [f]requency of [l]aw [s]uits/[t]hreatened [s]uits” ranked 65th (out of 75 concerns) on a ranking of small business problems, by importance.<sup>157</sup> As the NFIB survey made clear, most NFIB members had not been named as a defendant in a lawsuit in the previous five years (only 11% had, according to the survey).<sup>158</sup> These survey findings are at odds with the testimony given by a representative of NFIB who testified in favor of LARA at the March 10, 2011, hearing before the House Subcommittee. The 2008 NFIB survey casts serious doubt on the central theme emphasized by its representative at the hearing when she asserted that lawsuits and “fear of lawsuits” have “tremendous negative effects . . . on the millions of small business owners in America today.”<sup>159</sup>

One of the key subjects in which the assertions of tort reformers find little substantiation in the literature concerns the incentive structure for plaintiff’s lawyers to file weak cases. As Henry Farber and Michelle White have put it, plaintiff’s lawyers working on a contingency fee basis have “a strong incentive to screen prospective plaintiffs and to accept only cases having sufficiently high expected value.”<sup>160</sup> Herbert Kritzer’s work on the incentives plaintiff’s lawyers have to screen weak cases is well-known.<sup>161</sup> Other researchers have reached similar

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- 5.0 Foreign competition
- 6.1 Taxes
- 6.3 Cost of wages
- 6.4 Shortage of qualified workers
- 7.4 Regulations/corporate governance rules (Sarbanes–Oxley)
- 7.8 Fear of litigation

*Id.*

157. BRUCE D. PHILLIPS & HOLLY WADE, NAT’L FED’N OF INDEP. BUS. RESEARCH FOUND., SMALL BUSINESS PROBLEMS AND PRIORITIES 43–47 tbl.6 (2008), available at <http://www.nfib.com/Portals/0/ProblemsAndPriorities08.pdf>.

158. *Id.* at 18.

159. *Lawsuit Abuse Reduction Act: Hearing on H.R. 966 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 12 (2011) (prepared statement of Elizabeth Milito, Senior Executive Counsel, National Federation of Independent Business, Small Business Legal Center).

160. Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND J. ECON. 199, 200 (1991).

161. See HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE

conclusions.<sup>162</sup>

Additionally, a recently completed study by David Kwok of U.C. Berkeley of *qui tam* actions filed under the False Claims Act offers related but slightly different insights.<sup>163</sup> FCA *qui tam* actions would seem to be a perfect breeding ground for the kind of frivolous litigation activity that LARA's proponents assert pervades the civil justice system. The financial incentives for bringing an FCA *qui tam* action are powerful: a successful *qui tam* relator (as plaintiffs in these cases are called) can recover up to 30% of any recovery eventually obtained.<sup>164</sup> And recoveries can be substantial, thanks to the statute's treble damages provisions.<sup>165</sup> The lawyers who do this work do so almost always on a contingency fee basis, leaving the FCA relator with virtually no skin in the game. Perhaps most significantly, one bringing a *qui tam* action need not possess standing to sue; that is, they themselves need not have been injured in order to maintain suit.<sup>166</sup> This procedural exception to one of the foundational requirements for maintaining suit is said to be justified on the ground that it increases the likelihood that fraud against the government will be discovered and remedied.<sup>167</sup> Taken together, FCA *qui tam* actions would seem to be precisely where you would expect to find a high percentage of nonmeritorious cases being filed, given these various litigation-inducing ingredients.

Kwok's insight was that FCA *qui tam* actions could shed some much needed light on the debate over how frequently

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LEGAL PRACTICE IN THE UNITED STATES 74 (2004) (concluding that lawyers are hesitant to accept cases with "dubious liability or a lack of damages"); Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 22–23 (1997) (explaining why contingency fee lawyers act as gatekeepers by rejecting a large number of potential cases); Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, 70 WIS. LAW. 10, 63 (1997) (labeling contingent fee lawyers as "gatekeepers to the civil justice system" by declining more cases than they accept); Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 754–57 (2002) (dispelling the myth that contingency fee lawyers will "represent virtually anyone who calls on the telephone or walks in the door").

162. See Hyman & Silver, *supra* note 127, at 1103 & n.52 (2006) (recounting a study that concluded that plaintiff's lawyers decline representation on the vast majority of calls they receive (citing LaRae I. Huycke & Mark M. Huycke, *Characteristics of Potential Plaintiffs in Malpractice Litigation*, 120 ANNALS INTERNAL MED. 792, 796 (1994))).

163. David Kwok, Does Private Enforcement Attract Excessive Litigation? Evidence from the False Claims Act (May 5, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1832934](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832934).

164. 31 U.S.C. § 3730(d)(2) (2006).

165. 31 U.S.C. § 3730(d)(2) (2006); Kwok, *supra* note 163.

166. Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 771, 774 (2000).

167. Linda J. Stengle, *Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act*, 33 DEL. J. CORP. L. 471, 475 (2008).

nonmeritorious lawsuits are filed by repeat litigants because of a unique feature of the statutory scheme—this feature requires the government to review each private action filed to decide whether it wants to intervene and assume control of the case.<sup>168</sup> The Department of Justice (DOJ) intervenes only in about one out of every four FCA *qui tam* cases but, when it does, the government succeeds (meaning there is a favorable settlement or judgment) a whopping 95% of the time.<sup>169</sup> Because the government gets to pick which cases to prosecute, Kwok argued that DOJ intervention could be seen as a proxy for a meritorious case. Of course, the government's decision not to intervene could be for a whole host of reasons. For instance, a case might be clear on liability but damages might not be significant enough to justify devoting government resources to the action. Or, liability might be clear, but collecting from the defendant might be deemed unlikely. All that said, Kwok's point was that if a firm files many cases in which the government rarely intervenes, one can reasonably surmise that it is regularly pursuing a strategy of filing as many cases as it can with little regard for their merit. The hope is that by filing in high volume, they will get a few positive hits. They would, in other words, be following a pretty classic description of the ambulance-chasing, frivolous-lawsuit-filing lawyer.

Although the FCA's *qui tam* provisions seem to invite this sort of unashamed litigation strategy, what Kwok discovered when he looked at the data he collected is that there were virtually no law firms that filed large numbers of cases.<sup>170</sup> To be sure, it is possible that centralized DOJ review actually deters the repeat players from filing multiple weak cases, but the low incidence of DOJ intervention to terminate cases may suggest otherwise. Moreover, on average, as firms file more cases, their success at getting the government to intervene increases.<sup>171</sup> The rising intervention rate is significant because it suggests that firms get better, over time and with more experience, at bringing better cases. The rising intervention rate powerfully suggests, then, that law firms do not generally regard it as a sustainable strategy to just file any FCA *qui tam* action, regardless of merit. Certainly, no evidence exists that such a strategy is being

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168. See Kwok, *supra* note 163 (explaining that centralized review by the Department of Justice, coupled with its “right of first refusal . . . provides a common reference point to evaluate cases”).

169. *Id.* As of September 2009, the Department of Justice had intervened in only 1,134 of 3,920 *qui tam* cases since 1986. *Id.*

170. *Id.*

171. See *id.* (demonstrating that the government intervention rate “rises steadily over time” as firms file more *qui tam* actions).

followed by the repeat player firms in this field. Taken together, these findings led Kwok to the following conclusions:

Despite the opportunity [that FCA *qui tam* actions offer] for firms to proceed with a low-effort, high volume case strategy, most firms do not seem to be following such an approach. Instead, the repeat player firms typically maintain good track records as to intervention percentages. Instead, the repeat player firms typically maintain good track records as to intervention percentages. These firms seem to understand government enforcement interests. Furthermore, a surprising number of one-shot law firms are prominently successful in their efforts. The Department of Justice similarly has the opportunity to dismiss weak cases promptly, yet it rarely uses this power. Although the data cannot rule out less visible forms of influence upon the case filing process, the evidence suggests an equilibrium in which law firms and the DOJ attempt to cooperate.<sup>172</sup>

In sum, Kwok's work suggests that in a field in which one could reasonably predict lawyers would be incentivized to file as many cases as possible without regard to their merit, the data show that lawyers do not routinely follow such a strategy. To the contrary, the firms that practice most heavily in this field appear to improve their ability to screen for meritorious cases over time.

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In sum, the claim that the federal courts are inundated with "frivolous" lawsuits is unsubstantiated by the available empirical evidence. Consequently, the burden lies heavily on LARA's supporters to come forward with credible evidence of a problem in order to justify amending the existing sanctions rule.

### C. Assertions Regarding Discovery Costs and Abuse

The available empirical evidence also fails to support assertions made that discovery costs and abuses are excessive throughout all or even most federal civil cases. Nearly all of the prior empirical research has shown that discovery is rarely problematic for the vast majority of cases.<sup>173</sup> Nevertheless, as Linda Mullenix once famously observed, the "pervasive myth of discovery abuse" endures.<sup>174</sup> Indeed, although surveys of

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172. *Id.*

173. See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 770, 780 (2010) (collecting and discussing prior studies).

174. Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive*

businesses and their lawyers have indicated that discovery costs can often run as high as 70% of the total costs of litigation, the empirical evidence to support such impressionistic observations is nonexistent. As two of the leading empirical researchers of discovery costs in civil litigation have succinctly put it, the widely-held belief that disproportionate discovery costs (disproportionate to the value of the case) bedevil most civil litigation “has never been supported by a single empirical study.”<sup>175</sup>

The most recent and comprehensive study of civil discovery in the federal courts was conducted by Lee and Willging at the Federal Judicial Center. Their 2009 study examined 3,550 closed cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008.<sup>176</sup> The researchers intentionally drew their sample to not include the kinds of cases in which discovery is rarely used. Instead, they sought to include every case that had lasted for at least four years and every case that was actually tried.<sup>177</sup> The purpose of drawing the sample this way was to look at cases in which one would reasonably predict there would have been significant discovery. What the study found is that plaintiffs reported \$15,000 as the median total costs in cases that had at least some discovery.<sup>178</sup> The corresponding figure for defendants was \$20,000.<sup>179</sup>

What is most important about these figures is not that they are lower—probably much lower—than they “myth of pervasive discovery abuse” would have led most of us to expect. Rather, it is that these costs represent about 1.6% of the stakes for plaintiffs and 3.3% for defendants.<sup>180</sup> Indeed, as Lee and Willging subsequently explained, their 2009 study made clear that the value of a case—the monetary stakes of the lawsuit—are the primary factor that explains discovery costs. And, as the above figures demonstrate, the 2009 FJC study found that “costs are generally proportionate to [case] stakes,” even though critics maintain that discovery costs are out of control.<sup>181</sup>

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*Discovery Abuse and the Consequences of the Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1397–99 (1994); Linda S. Mullenix, *The Pervasive Myth of Pervasive Discovery Abuse: The Sequel*, 39 B.C. L. REV. 683 *passim* (1998).

175. Lee & Willging, *supra* note 173, at 781, 786–87.

176. EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 77 (2009).

177. *Id.*

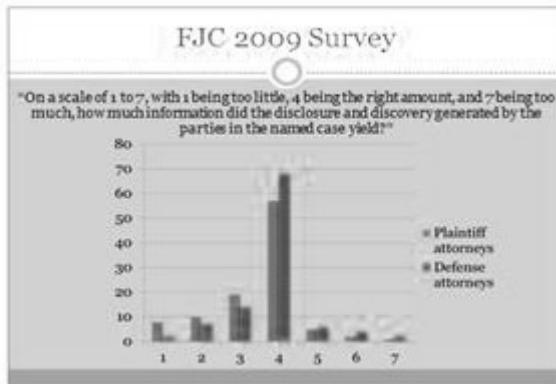
178. *Id.* at 36.

179. *Id.*

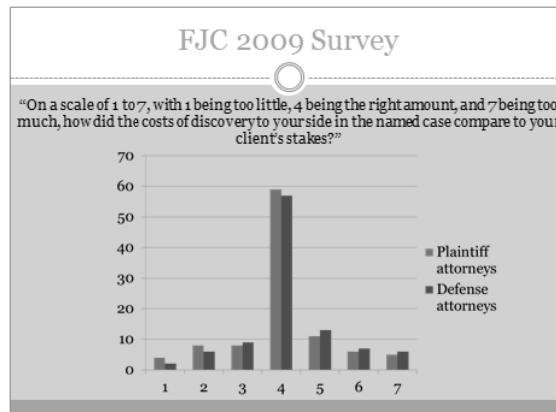
180. *Id.* at 43.

181. Lee & Willging, *supra* note 173, at 771–75 (noting, *inter alia*, that “the case-based

Surveys of lawyers about their experiences with discovery costs and practices similarly do not support the assertions made by LARA's supporters about the burdens of civil discovery. The FJC found that a majority of attorneys surveyed disagreed with a statement that discovery is routinely abused in federal courts.<sup>182</sup> As the following graph shows, substantial majorities of both plaintiff and defense lawyers answered that discovery yielded the "right amount" of information.<sup>183</sup>



Similarly, most lawyers reported that the costs of discovery were proportional to the value of their client's stakes in the case.<sup>184</sup>



In more than 70% of the cases involving electronic discovery, plaintiff and defense lawyers reported no problems related to production of electronically-stored information.<sup>185</sup> More broadly,

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surveys provide empirical evidence of greater proportionality in the relationship of discovery costs to stakes than one would predict based on the complaints raised by critics of the Federal Rules".

182. LEE & WILLGING, *supra* note 176, at 3.

183. *Id.* at 27.

184. *Id.* at 27–28 & fig.14 (slide images were created by the Author).

185. *Id.* at 24 & fig.11 (slide images were created by the Author).

the FJC survey found that a majority of defense lawyers and a near majority of plaintiff's lawyers believed that discovery costs had "no effect" on case settlement.<sup>186</sup> Most lawyers also disagreed that the federal rules should be revised to limit discovery in general.<sup>187</sup> Upwards of 70% of all respondents agreed (or "strongly agreed") with the statement: "The procedures employed in the federal courts are generally fair."<sup>188</sup> In short, the most recent and comprehensive empirical research shows that the assertion that rampant discovery costs plague most federal cases simply is not supported by the data.

## VI. CONCLUSION

Because of what we know today about the history of Rule 11, there is a remarkable degree of agreement among judges, lawyers, legal scholars, and litigants across the political spectrum that the 1983 amendment of Rule 11 was one of the most ill-advised procedural experiments ever tried. In proposing to disinter this ignominious rule, the legislation ignores all that we have learned from that failed experiment. Addressing costs and delays is everyone's concern, but as prior experience shows, the proposed legislation would substantially worsen those costs and delays, not lessen them. For those concerned about improving the functioning of the civil litigation system, the sounder course is to follow the advice given by a former Solicitor General of the United States (about another recent legislative proposal) and "permit the Judicial Conference of the United States to continue to monitor the situation and respond if need be through the time-honored judicial rulemaking process established by Congress."<sup>189</sup> Put another way, Congress should allow judicial rulemakers to continue to do their work and explore, instead, more productive ways to improve the administration of justice.

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186. *Id.* at 32–33 & fig.19.

187. *See id.* at 60–61 & fig.35 (reporting that nearly 71% of plaintiff lawyers and 44% of defense lawyers disagreed or strongly disagreed with the statement, "The Rules should be revised to limit discovery in general").

188. *Id.* at 69–70 & fig.44.

189. *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 176 (2009) (statement of Gregory G. Garre, Former Solicitor General of the United States).