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Abstract. The claim that frivolous litigation is an “epidemic” plaguing our civil justice system strikes a chord with many Americans. Legal ethicists and other academics have responded by emphasizing that incidents like the McDonald’s coffee case are distorted by sensationalist media coverage and, more fundamentally, that they are not representative of civil litigation. Against the backdrop of this persistent social controversy, Rule 11 of the Federal Rules of Civil Procedure has been twice significantly amended in the last 30 years—in 1983 and 1993. The most recent amendments in 1993 did not quell political concern about frivolous litigation. Indeed, as recently as 2005 Congress sought to circumvent the normal rule revision process via the Advisory Committee and resurrect something significantly similar to, though harsher than, the more strict 1983 version of the Rule. In this essay I argue that the discourse surrounding the Lawsuit Abuse Reduction Act of 2005 elucidates an important problematic facet within the frivolous litigation controversy. The problem is more than bad media coverage or even some legislative grandstanding, it results from a failure to understand how the Rule operates in practice. But, to date, no study has compared case data under both of Rule 11’s recent instantiations. Accordingly, this essay offers a novel empirical study of the Northern District of California and its experience under both sets of rules. My findings indicate that the 1993 amendments have well served their intended purpose of deterring both frivolous litigation and needless collateral litigation over sanctions, without opening the courthouse doors to a flood of baseless suits. Thus, at least for this jurisdiction, there is no justification to revive a more draconian version of the Rule.

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INTRODUCTION

“It used to be that when someone spilled hot coffee on their lap, they called themselves clumsy. Nowadays they call themselves a lawyer. Attorneys, those dolled-up devil’s advocates, have created the notion that we can all win the legal lottery by suing over situations that could have otherwise been resolved by turning the other cheek—a gesture that now could spark a sexual harassment suit.

Let’s face it, lawyers are the primary culprits of our legal culture of cashing in. They have turned our courts into comedy clubs with acts like the New York couple who sued for damages after getting hit by a subway train while having sex on the tracks, or the worker who was fired for sexual harassment after discussing with a female coworker the plot of a racy Seinfeld episode.

What does it say about a profession that has spawned so many jokes about its ethics? By the way, what is the difference between a catfish and a lawyer? One is a scum-sucking, bottom-feeding scavenger. The other is a fish.”

The epigraph resonates with many Americans. Broadly speaking, we worry that frivolous litigation now plagues the justice system and that lawyers are often the “primary culprits” for creating this plight. References to the now-infamous McDonald’s coffee case, ambulance chasers, and other outlandish cases bolster the claims of those concerned with law reform, which often means punishing lawyers for their role in corrupting the justice system. It’s no surprise, then, that many believe that we now face an “epidemic” of frivolous litigation requiring strong medicine as a cure. Yet, the “media’s delight in profiling loony litigation,” to legal ethicists, is more smoke than fire. They argue that the “basis for this diagnosis is largely anecdotal,” and, instead, relies upon “news as vaudeville”: the aberrant, amusing ‘tort tales,’” like the McDonald’s case.

These simultaneously well understood but divergent views reflect deeper social tension over the appropriate role of litigation in our society. On one hand, situated within a system of conflict-resolution, frivolous litigation is anathema because there is no dispute to be resolved; the only thing at stake is someone trying to make a cheap buck by exploiting legal rules. On the other, frivolous suits are hard to deal with because defining “frivolous” is often difficult, especially in areas where facts are disputed or the law is complex and, more fundamentally, access to justice is a fundamental part of our system that should not be denied because of a few bad apples. The “reality” between litigation abuse and the indeterminacy of “frivolous,” especially in complex or close cases, probably lies somewhere in the middle of these two poles.

3 Id. at 450 (internal citations omitted).
4 For a history on how the procedural rulemaking process is imbedded with an emphasis on access to justice that has been forgotten, but can be fixed, see Brooke D. Coleman, Recovering Access: Rethinking the Structure of Civil Rulemaking, 39 New Mexico L. Rev. 261 (2009).
5 Judge Schwarzer sums up sums up the issues well: “The growing cost, complexity and burdensomeness of civil litigation has been a serious concern to judges, lawyers, and the public. There is no single cause nor is there a single remedy for this problem. But there is considerable opinion, supported by at least anecdotal evidence, that misuse and abuse of the litigation process have
but, regardless, the dispute reminds us that, as lawyers, we play a unique role in this conflict and should thereby be mindful of ways to resolve it. But how?

If the problem can be characterized as media misinformation, then we should confront these institutions and urge more accurate, contemplative dissemination the “actual facts” about surrounding potentially polemical controversies.\(^6\) (There are reasons, though, to be skeptical of whether this could actually happen.\(^7\) Even if this were completely effective, it would not, of course, resolve our social problem; we must also prevent the litigation of suits that are actually frivolous. Nor would it necessarily remedy the more systemic worry that private individuals are still able to bankrupt corporations through filing of meritless suits (though this claim is itself contestable\(^8\)). More narrowly, though, what would effectively police the lawyer’s role in bringing baseless suits, but would simultaneously permit zealous advocacy of those legitimately aggrieved. Mirroring the ABA’s Model Rule of Professional Conduct 3.1,\(^9\) that is the stated goal of Federal Rule of Civil Procedure 11.

In addition to other methods for regulating attorney conduct,\(^10\) Rule 11 empowers federal courts to sanction attorneys for frivolous filings and is meant to screen out the types of cases this paper began with. Rule 11, however, comes with its own set of controversies. After going largely unused until 1983, the Rule was amended to make sanctions mandatory, but problems with “satellite litigation” and concerns about chilling civil rights plaintiffs, amongst others, led to significant revision in 1993.\(^11\)

\(^{6}\) See id. at 454-55 (discussing the McDonald’s case and the “misleading factual accounts” that permeated the media regarding this case”); see also id. at 454 n.52 (citing other accounts of the McDonald’s case). For more examples of loony suits and efforts to debunk these stories, 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, 250 n.1 (2006) (noting that many stories are not “factually correct” or are “simply urban legends”), or Mark Galanter, *An Oil Strike in Hell: Contemporary Legends about the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998).

\(^{7}\) As the sources in the foregoing footnote indicate (and there are legions more), many have complained about the media’s bias, its inaccuracy, and the ability of so-called “news” outlets to report information intended to polarize and shape public perception for political or profit-based gain. Though scholars have attempted to measure media bias, its inaccuracy, and the ability of so-called “news” outlets to report information intended to polarize and shape public perception for political or profit-based gain.

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\(^{10}\) Courts can also sanction attorneys according to their inherent power over the court, see Chambers v. NASCO Inc., 501 U.S. 32 (1991), other procedural rules, see Fed. R. Civ. P. 26(g)(3) or Fed. R. Civ. P. 37, and other provisions of the US Code, see, e.g., 18 U.S.C. § 1927 (unreasonable or vexations multiplication of proceedings).

\(^{11}\) Courts can also sanction attorneys according to their inherent power over the court, see Chambers v. NASCO Inc., 501 U.S. 32 (1991), other procedural rules, see Fed. R. Civ. P. 26(g)(3) or Fed. R. Civ. P. 37, and other provisions of the US Code, see, e.g., 18 U.S.C. § 1927 (unreasonable or vexations multiplication of proceedings).
Since the 1993 amendments to the Rule, however, debates have persisted. Should sanctions be mandatory? Discretionary? Designed to punish or deter? And the list goes on. Unsurprisingly, the public media-based debate mentioned above carries over into the Rule 11 context. Notably, many judges and practitioners appear satisfied with the 1993 compromise, and the amount of litigation in federal courts over the past ten years has declined. But, perceiving frivolous litigation epidemically, critics continued to argue that “[f]rivolous lawsuits bankrupt individuals, ruin reputations, drive up insurance premiums, increase health care costs, and put a drag on the economy.”13 As a result, U.S. Rep. Lamar Smith (R-TX.) proposed the Lawsuit Abuse Reduction Act (LARA) in 2004 and 2005, claiming that LARA was necessary to “restore confidence to America’s justice system.”14 LARA set out to contain these frivolous suits through repudiating the 1993 amendments to Rule 11 by, amongst other changes, making sanctions mandatory rather than discretionary and abolishing its 21-day “safe harbor,” and emphasizing the compensatory, instead of deterrent, function of the rule. LARA also proposed other novel punitive measures like a 3-strikes rule, and control over any claims filed in state court “affecting interstate commerce.”

What makes the LARA experience interesting though, is what the legislators relied upon when trying to figure out whether to revert back to something like the 1983 Rule. Instead of relying upon sophisticated reports from the Office of Management and Budget, or empirical studies addressing the way the rules have operated in practice the debate was filled with anecdote and, at times, grandstanding.15 While cynics might argue that this is just how current legislation works, or that legislators often rely upon broadly expressed social perception, one reason that more detailed analysis was not examined was because it does not exist. We have very few data points to consider when evaluating the 1993 rule against its 1983 counterpart, and information as that might help sculpt versions of the Rule.

This paper aims to take a modest step at beginning to fill this gap by examining how the 1993 Rule has operated in comparison with its predecessor. For context, I use the debates over the now-stalled Lawsuit Abuse Reduction Act of 2005, as evidence of the struggle with defining the scope of Rule 11; one that is likely to persist. From there, I conduct a novel empirical study of the actual operation of Rule 11 along the life of its two primary instantiations. To attempt to limit the number of external variables that might affect the operation of the rule, and to allow a qualitative discussion and comparison of the Rule’s two versions I focus on one jurisdiction—the Northern District of California—and examine the entire lineage of cases16 under the two discretionary sanctions, new standards of liability, inapplicability to discovery, the safe harbor, limitations on sanctions, sua sponte sanctions, etc.).

14 Id.
15 This problem, however, is not new. For an account of the lack of certainty, research, and knowledge regarding Rule 11’s previous amendments see Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. PA. L. REV. 1925, 1927 (1989) (arguing that the Advisory Committee “knew little about experience under the original Rule, knew little about the perceived problems that stimulated the efforts leading to the two packages of Rules amendments in 1980 and 1983, knew little about the jurisprudence of sanctions, and knew little about the benefits of sanctions as a case management device” (internal footnotes omitted).
16 Though empirical studies on Rule 11 have been quite extensive, few of them focus on case data, but instead rely on Survey data from judges and practitioners. While this data are useful, I aim to get beyond perception and into the “reality” of R11 as it operates in the district court in actual cases.
rules. Of the many studies done on Rule 11, none, to my knowledge analyzes case-data from the same jurisdiction in-depth to determine what effect, if any, the 1993 amendments have had on Rule 11 operation.\(^{17}\)

My goal, at core, is to disclose the operation of Rule 11 and present a cogent picture of the way that Rule 11—the frivolity regulator for lawyers—has changed over time. Is public perception right that there are tons of McDonalds-like cases consuming federal dockets? Are lawyers abusing the safe harbor? Should lawmakers be worried that Rule 11 adversely impacts certain cases more than others? Have judges deemed a filing or motion frivolous, but nonetheless decided against sanctioning (using the discretion provided by the 1993 version of the rule)? Once these questions are answered, I posit, we can then begin to make a prescription about what we ought to do with respect to frivolous litigation and then hopefully clarify the attendant problem of defining exactly what frivolous means.\(^{18}\)

In brief, I found that the 1993 amendments served their stated purpose by looking at the rate at which parties were sanctioned when Rule 11 was raised—they decreased from 25% to 14%. To evaluate how to interpret this significant change, I looked at the proportion of cases actually sanctioned under the two versions of the rule, with careful attention to civil rights claims, and conclude that we should continue to be worried about these types of claims, though, the overrepresentation of these claims might actually represent a good thing for civil rights plaintiffs, who may no longer be chilled from raising close-cases or novel claims. More broadly, after analyzing how the Rule has been applied under both regimes, I conclude that we should be wary of proposals that aim to make the Rule more confining, stringent, or punitive like the 1983 Rule.

To better contextualize the perception-reality problem at the congressional level, Part I describes the issues and information that lead to the 1993 amendments, and then uses the discussions of LARA to demonstrate the types of concerns raised under the guise of reforming Rule 11, which illustrates the need for this study. Part II uses the Northern District of California to study instances of frivolous litigation and considers all of the published (and unpublished where available) cases involving Rule 11 sanctions between the 1993 amendments to Rule 11 and the 2005 passage of LARA in the House of Representatives. This section uses these data to identify cases involving the safe harbor,\(^{19}\) filings deemed frivolous but nonetheless not

\(^{17}\) Two articles come close. See 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 (2002); Hirt, supra note 11, at 1025-1044 (analyzing cases under 1993 amendments). Hirt’s study is a great starting point, but also limited. While he tells us that he studied over “700 decisions reported through Westlaw and Lexis,” he does not tell us (1) how these cases were selected, (2) whether he considered unpublished decisions available online, (3) what search terms were used and (4) within what time parameters. Similarly, Professor Hart’s piece excellently points out inter-circuit inconsistencies in the application of the Rule to civil rights plaintiffs, but does not provide a full analysis and discussion of the 1983 and 1993 versions of the rule. I more fully consider the breadth of empirical knowledge regarding Rule 11, and Hirt and Hart’s articles, below in infra Part II.

\(^{18}\) Research in this area is quite limited. See Samuel J. Levine, Seeking a Common Language for the Application of Rule 11 Sanctions: What is “Frivolous”? 78 NEB. L. REV. 677 (1999); Sanford Levinson, Frivolous Cases: Do Lawyers Really Know Anything at All? 24 OSGOOD HALL L.J. 353 (1986). Defining “frivolous” has always been a difficult part of Rule 11 jurisprudence. “Indeed, as the Ninth Circuit candidly conceded, despite its best efforts to articulate a standard for frivolousness, it was ‘fully aware that no combination of abstract words may correctly apply to every case.’” Levine, supra, at 686 (citing []). However, for a well done example of this, see Robert G. Bone, Modeling Frivolous Suits, 145 U. PA. L. REV. 519 (1997), and Maureen Armour, Rethinking Judicial Discretion: Sanctions and the Comumdrum of the Close Case, 50 S.M.U. L. REV. 493 (1997).

\(^{19}\) Though I concede that the best way to measure the Safe Harbor effect would be to look at entire dockets and filings for this time, there’s also been no in-depth analysis looking at whether or not the Safe Harbor has come up in
sanctioned, and classifies cases along subject matter and temporal lines. Part III concludes by considering some of the broader implications of Rule 11 amendments and the relationship between Rule 11 and other procedural devices (Rule 8, especially after Iqbal, in particular).^{20}

Before moving on, however, three caveats are in order. First, this paper focuses exclusively on litigation in federal courts. Because many states have their own different rules, and LARA sought primarily to amend the Federal Rules of Civil Procedure, I focus on federal litigation.^{21} This raises a major problem with frivolous litigation reformation: most personal injury tort litigation takes place in state, not federal court.^{22} Second, my study is restricted to cases searchable in the Westlaw database. In the past, some have lamented that relying on published cases may distort our picture of Rule 11.^{23} Yet, though some Rule 11 activity is surely omitted, using this database to provide a baseline for itself allows the change in the operation of the rule to be borne out. Third, throughout this paper, I quote and refer to the text of Rule 11 in its 1993 iteration. Though the Rule has been recently amended—along with the entire FRCP—for stylistic changes, these were not meant to change the operation of the Rule.^{24}

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The only study on the Safe Harbor invoked “quick and dirty empirical research.” Charles Yablon, *Hindsight, Regret and Safe Harbors In Rule 11 Litigation*, 37 Loy. L.A. L. Rev. 599, 614 (2004). Though “quick and dirty” Professor Yablon’s Lexis search provides insight into the total number of cases involving Rule 11 sanctions from 1988-2002. The only tenuous causal inference, however, is whether or not we can attribute a decline in rule 11 sanctions and motions to the Safe Harbor or other facets of the Rule. This paper hopes to pick up where Yablon left off and analyze not just the numerical trends over time, but actually evaluate the cases being used as data points.

^{20} *See* Fed. R. Civ. P. 8(a) (providing that a pleading need only “contain (1) a short and plain statement of the grounds upon which the court’s jurisdictions depends . . . [and] (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks”); Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) (ratcheting-up the factual showing that needs to be made under Rule 8, away from the “notice-pleading” regime that motivated the rule’s adoption); *see also* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (setting the stage for Iqbal’s expansive holding).

^{21} While obviously important, this limitation does not mean that the implications for frivolous litigation found here have no overlap in state courts. *See* Judith A. McMorrow, *Rule 11 and Federalizing Lawyer Ethics*, 1991 B.Y.U. L. Rev. 959, 960 (“Despite its application solely to cases before federal courts, Rule 11 has begun to change the discussion about what constitutes proper attorney conduct.”); Georgene Vairo, *Rule 11 and the Profession*, 67 Fordham L. Rev. 589, 598 (1999) (claiming that there may be “no better example” than Rule 11 “of how the law of civil procedure has influenced the legal profession”). Also, for a comparative study of sanctions litigation in state and federal court see Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical Comparative Study* 75 Marq. L. Rev. 313 (1992).

^{22} The fact that so much tort litigation occurs in state courts makes this fact interesting for the debate over LARA. In particular, 26 states have adopted the 1983, harsher, version of the rule, though some states have toyed with variants of the safe harbor. *Restatement (Third) of the Law Governing Lawyers* § 110 cmt. c, at 176-78. I return to this problem *infra* when discussing LARA itself.

^{23} *See*, e.g., Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 Judicature 147 Oct.–Nov. 1990, at 147 (“The results of the survey [of judges, magistrates, and lawyers in the Northern District] indicate that Rule 11 has been used to seek sanctions against opposing counsel far more often than the number of published opinions in the Northern District would indicate.”).

^{24} Some have already cast doubt on the limits of such a “stylistic” change, but, for the purposes of this paper, which compares past operation of the rule, using the version of the rule being construed in the cases is more appropriate. *See* Michael C. Dorf, *Meet the New Federal Rules of Civil Procedure: Same as the Old Rules?*, Findlaw.com (Jul. 18, 2007), available at http://writ.corporate.findlaw.com/dorf/20070718.html. Regarding Rule 11, Dorf’s summary of the problems associated with rule changes is strikingly accurate: Both the 1983 and 1993 amendments to Rule 11—along with other provisions regarding such matters as pleading and discovery—remain a source of controversy because they implicate an inevitably political tradeoff: Strict rules protect against the filing of frivolous lawsuits but also screen out some meritorious lawsuits, while loose rules have the opposite package of costs and benefits.” *Id.*
I. PERCEPTION: FRIVOLOUS LITIGATION AND LAWYER’S GONE WILD.

A. An Epidemic?

Former President George W. Bush claimed that “we must protect small business owners and workers from the explosion of frivolous lawsuits that threaten jobs across America.”25 Similarly, evidence of the perceived problems with litigation can be seen in media outlets, jokes, and even some court cases. The American Tort Reform Association (ATRA)—one of the most powerful groups calling for litigation reform—lists “looney [sic] lawsuits” prominently.26 Some recent headlines, acquired from national media, read:

- Women Files $20M Long-Shot Casino Suit,27
- Blue Man Group show makes one Chicago theatergoer see red: Man sues troupe over ‘esophagus cam’ use,28 and
- Mother suing herself for son’s injuries in crash with ambulance.29

When looked at closely, however, it not obvious why each case is necessarily frivolous. First, in the casino case, though the headline implies that the low odds of prevailing necessarily makes the case frivolous or loony. As described, the women was suing the casino arguing that she was addicted and should have been stopped from gambling, not given more lines of credit. This might sound weird, but some states have paternalistic laws protecting Gamblers and even the IRS has acknowledged that an addict may have limited tax liability when the casino is at fault. Second, for the Blue Man Group, the plaintiff claims they forced a camera down his throat against his will. Barring complete fabrication—Rule 11(b)(2) in federal court30—having a camera shoved down one’s throat certainly is not frivolous. Finally, for the ambulance crash case, while the headline might, at first, seem odd, when one thinks about what is actually happening—a mother suing herself on behalf of an infant who could not otherwise obtain an attorney—the case seems less problematic. Certainly, as a matter of public policy, we want the interest of the infant to be taken care of.

For these cases, then, Professor Rhode’s complaint of “too much sweeping rhetoric and too little careful factual analysis”31 seems applicable. But, “[t]hese colorful anecdotes regularly make their way through the media and into the American psyche, helped by an organized public relations campaign that decries the ‘litigation explosion’ and greedy trial lawyers.”32 Thus, we are left with the spread of “legal hypochondria” via “argument by anecdote” on one side, and the cries of those seeking to debunk these claims —often armed with their own anecdotes—on the

27 Wayne Parry, Women Files $20M Long-Shot Casino Suit, WASHINGTON POST, Mar. 9, 2008. This suit is probably, one might conjecture, especially “looney” because the women filing suit was a prominent lawyer before becoming addicted to gambling.
28 Michael Higgins, Blue Man Group show makes one Chicago theatergoer see red: Man sues troupe over ‘esophagus cam’ use, CHICAGO TRIBUNE, Jan. 24, 2008.
30 Fed. R. Civ. P. 11(b)(1). (pleadings must not be “presented for any improper purpose, such as to harass”).
31 Rhode, supra note 2, at 475.
32 Vansuch, supra note 6 at 251; see also id. at nn. 1-2 (outlining interested groups like ATRA, Common Good, and The Committee for Justice for All).
other. My goal here is not to debunk anecdotes; that has already been done. Instead, I aim to demonstrate that this type of, often troubling, discourse (without much deliberation) begins in the public sphere and affects actual legislative ends, not, as it should, reasoned discourse grounded in facts and the reality on the ground. The debate surrounding the LARA is illustrative, but before making the link between public perception and government legislation, for context on more narrow Rule 11 dispute the next Part quickly sketch the Rule’s well-rehearsed.

B. Rule 11’s Rollercoaster Past.

Given that the “growing cost, complexity, and burdensomeness of civil litigation ha[d] been a serious concern to judges, lawyers, and the public,” the Advisory Committee made substantial revisions to several rules of civil procedure in both 1980 and 1983. After going basically unused since its 1937 adoption, the 1983 amendments were “intended to reduce the reluctance of courts to impose sanctions.” Where before, Rule 11 emphasized the “striking” of a pleading that lacked sufficient support or was interposed for delay (based upon a subjective, “good-faith” standard) the 1983 rule imposed “sanctions” for the filing of any paper presented without a “reasonable inquiry” to ensure that “it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” To further emphasize a judge’s power to impose sanctions, the then-new Rule mandated that, upon finding a violation, the court “shall impose . . . an appropriate sanction.” In all, the amendments (1) reduced the standard for finding a violation from bad faith to objective reasonableness, (2) permitted the court itself to raise the question of Rule 11, (3) made sanctions mandatory, and (4) expressly permitted monetary sanction.

The amendments worked. As Professor Vario quickly noted, “[a]ny fear that the amended Rule 11 would be as little used as a basis for imposing sanctions as its predecessor and other

34 Marc Galanter has been the loudest voice to this end, see Galanter supra note 6; Galanter supra note 33
37 Fed. R. Civ. P. 11 (Advisory Committee Notes). On the lack of usage before 1983 see Risinger, Honesty in Pleading and Its Enforcement: Some “Striking” Problems with Federal Rule of Civil Procedure 11, 61 Minn. L. Rev. 1 (1976) (reporting that between its 1938 adoption and 1976 that rule 11 motions had been filed in only nineteen reported cases.). An interesting related legal history question might be to study the types of controls on improper pleadings in the writ or field code systems. Professor Risinger takes a preliminary step down this road by noting the alterations to historical practice that Rule 11’s adoption signified: “The rule widely followed under ‘Field Code’ pleading systems that all pleadings had to be supported by a verifying affidavit, is specifically abolished. The old equity rule requiring sworn testimony to overcome an answer, which inevitably resolved one-on-one swearing contests in favor of a defendant, is also abolished.” Id. at 6-7; see also Schwarzer, supra note 5 at 183 (discussing Rule 11’s relationship to Equity Rules 24 and 21).
39 Id. (emphasis added).
40 This summary is derived from Vairo, supra note 36, at 193.
sanctions provisions has proved totally unfounded.41 But, did they work too well? Criticisms of the new rule quickly mounted and were generally based on three types of claims: (1) the new sanctions spawned a “cottage industry” of satellite litigation over the sanctions themselves, diverting attention and money away from the merits (if there were any) of the dispute; (2) the new rule deterred the filing of meritorious cases because of the in terrorem effect of the new Rule; and, relatively, (3) plaintiffs, and civil rights plaintiffs in particular, were disproportionately targeted for Rule 11 sanctions.

These criticisms, among others, lead to a number of empirical studies that attempted to paint a picture of how the newly amended Rule worked in practice.42 Some studies considered sanction rates, while other interviewed lawyers on the ground for their reactions to the amendments, and they nearly all concluded that the rule was too harsh; the pendulum had swung too far from hard to prove and totally unused, to easier to prove and used too frequently. In light of these studies, one commentator argued that “one is left with the impression that the real reason for a tough approach to the rule is to combat the few cosmic anecdotes about nightmare litigations.”43 Accordingly, it was time to go back to the drawing board.

1. The 1993 Amendments to Rule 11.

In light of this firestorm of complaints and empirical research, Rule 11 was again amended in 1993 to “remedy problems that [had] arisen in the interpretation and application of the 1983 revision of the rule.”44 This time, the Advisory Committee placed “greater constraints on the imposition of sanctions” to reduce the number of sanctions motions filed, yet sought to retain the principle that attorneys and pro se litigants “have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1.”45 To effectuate this intent, the 1993 revisions made sanctions discretionary (by changing “shall” to “may”), and subject to other limitations. Specifically, the 1993 revisions created a 21-day “safe harbor” for parties to withdraw a paper

41 Vairo, supra n. 36, at 199; see Id. (“Between August 1, 1983 and December 15, 1987, 688 Rule 11 decisions have been reported, 496 district court opinions and 192 circuit court opinions.”); see also Unterreiner, A Uniform Approach to Rule 11 Sanctions, 97 YALE L.J. 901, 901 (noting that over 1,000 Rule 11 cases had been reported in the first five years the 1983 amendments) For a more thorough description of these changes see infra n.36.
filed, *after receiving notice* from the opposing party of their intent to seek Rule 11 sanctions.\textsuperscript{46} For instance, where before, a party could file a Rule 11 motion immediately upon the submission of a frivolous paper, now a party must first send notice and wait 21 days for the opposing party to withdraw their filing before officially moving for sanctions. Any paper withdrawn in these 21 days, therefore, is effectively safe-harbored from being sanction. Sua sponte sanctions, however, do not have this requirement, though a judge is now required to issue an order to show cause why sanctions should not be ordered—an order that will “ordinarily be issued only in situations that are akin to a contempt of court.”\textsuperscript{47}

The 1993 amendments also resolved arguments about the purpose of sanctions, and amended the standards for finding a violation. Regarding the purpose, the 1993 revisions made clear that Rule 11 is not meant to compensate or punish, but, instead, limits sanctions to “what is sufficient to *deter repetition of such conduct*,” while also emphasizing the availability, and importance of, *non*monetary sanctions.\textsuperscript{48} In changing the standards for a violation, the 1993 amendments replaced the term “good faith” with “nonfrivolous” regarding arguments for the “extension, modification, or reversal of existing law” while adding “the establishment of new law” to the permissible range of nonfrivolous arguments.\textsuperscript{49} These changes, therefore, sought to strike a balance between the deterrence of frivolous litigation, but used procedural safeguards and revised standards to limit the potential for deterring meritorious claims (which would thereby permit injustice without a remedy).\textsuperscript{50} Finally, the 1993 amendments also allowed the filing of factual contentions absent evidentiary support, as long as they are likely to have evidentiary support after discovery, and removed discovery-related behavior from the scope of the rule (resting sanctions under FRCP 26 or 37 instead).

2. Experience Under the 1993 Version of Rule 11

Unlike the 1983 revisions to Rule 11, the 1993 amendments did not set off a flurry of empirical studies to discern whether the changes have had their intended effect.\textsuperscript{51} After Professor Hirt’s relatively ad-hoc, but informative, analysis in 1999 and Professor Hart’s 2002 sample of district court and appellate court decisions that reveal circuit splits and continued inconsistency under the Rule nationally, it was not until a 2004 symposium on Rule 11 that significant


\textsuperscript{47} Fed. R. Civ. P. 11(c)(1)(B) & (2)(B); id. advisory committee’s note to 1993 amendment.

\textsuperscript{48} Id. at (c)(2). The Advisory Committee noted that the shift from “good faith” to “nonfrivolous” establishes an objective standard, intended to eliminate any “empty-head pure-heart” justification for patently frivolous arguments.” Fed. R. Civ. P. 11 (Advisory Committee Comments, 1993 Amendments). Amongst other changes meant to “soften” the bite of Rule 11, this change reflects the continuing urgency of avoiding frivolous litigation and avoiding some of the ongoing problems with a lack of a “reasonable inquiry” into the factual basis for arguments, despite the fact that the client and/or attorney might be offended or feel an injustice has been done. See id.

\textsuperscript{49} Cf. Hart, *supra* note ___ at 26-27 (noting that the “Advisory Committee appears, to a large extent, to have relied heavily on procedure to mitigate the Rule’s chilling effects”).

empirical and scholarly attention was again focused on the Rule. But even these studies, however, did not engage in the same type of empirical research that followed the 1983 revisions.

By far, the 21-day safe-harbor provision received the most attention. Indeed, as discussed below, LARA would get rid of this procedural protection, but, problematically, testing whether or not the safe-harbor has been abused is difficult. Charles Yablon has made a valuable attempt at this task. First, Yablon observed that the safe-harbor requirement, if implemented strictly, has the consequence of preventing Rule 11 motions to be made after the merits of the dispute have been adjudicated, which has the effect of reducing the potential for hindsight bias upon the disposition of the sanctions issue (e.g., a judge is more likely to award sanctions after adversely granting summary judgment). This reduction in hindsight bias, Yablon argues, has the attendant effect of raising the standard for finding a violation of Rule 11, which reduces the in terrorem effect of the rule and allowed litigants to litigate more freely. If correct, Yablon’s comments are a double-edged sword. On the one hand, plaintiffs’ advocates, like the American Association for Justice (formerly the American Trial Lawyers Association), saw the relaxation of Rule 11 as necessary to seek justice for society, i.e., to pursue novel claims for the “establishment of new law.”

Yet, Yablon’s argument also implies that the American Tort Reform Association is right; the 1993 revisions permit actually frivolous suits to continue to occupy the time of courts and parties beyond what would be permitted under the 1983 version of the Rule. On balance, though, (especially the typical length of most litigation) potentially protracting a suit by 21-days may be insignificant. To measure the safe harbor’s potential effect, Yablon engages in a concededly

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52 For the “Happy (?) Birthday: Rule 11” symposium articles see 37 LOY. L.A. L. REV. 515-924 (2004). Coincidentally (or maybe not), this was around the time that Representative Smith and other LARA proponents began to organize their legislative reform push.


54 See, e.g., Hart, supra note __ at 32-34 (claiming that “by far the most significant amendment was the addition of the safe harbor provision” because (1) it provides immunity to those who use it, (2) it should reduce the number of Rule 11 motions (thereby reducing satellite litigation), (3) the safe harbor ameliorates other harsh aspects of the rule (e.g., each claim, as opposed to the whole pleading, must be nonfrivolous), and (4) the safe harbor reduces the chilling effects of the prospect of sanctions).

55 Id. at 604-05; see also id. at 621 (“Yet, I believe the 1993 amendments had precisely the effect of making it significantly more difficult to win a Rule 11 motion. The amendments did so, however, not primarily by changing the substantive standard under Rule 11(b), but by changing the time at which such motions can be made pursuant to 11(c) and, in particular, by making it impossible for defendants to file such motions after the courts adjudicate the merits of the claim.”) (emphasis added).

56 See American Association for Justice (AAFJ), ‘Frivolous’ Lawsuit News, http://www.justice.org/pressroom/facts/frivolous/index.aspx. The AAFJ claims: Special interests like big tobacco, the insurance industry, HMOs, and drug companies have mounted multi-million dollar campaigns against the civil justice system and Constitutional right to trial by jury. As part of those campaigns, companies and corporate lobbyists hype bogus numbers and questionable studies, make exaggerated and untrue claims about so-called “frivolous” lawsuits, and fall back on age-old stereotypes about trial lawyers.

The truth is that judge's already have the authority”—under "Rule 11”—to throw out a frivolous lawsuit and sanction the attorney before the case even gets started. It's time to fight myths with facts. Id.
loose empirical analysis, and finds that the number of cases where sanctions are mentioned or moved-for have fallen nationally over time. This reduction in Rule 11 instances, when combined with the postulate that the only certain type of frivolous filers would actually be deterred by the Rule, allows Yablon to argue that the safe-harbor has, to some extent, achieved its goals.

While helpful, Yablon’s study provides only a possible glimpse into a hard to measure effect: the number of filings that have been withdrawn on account of receiving the 21-day notice. Likewise, other studies scholars have noted inconsistent application of the safe-harbor between circuits (and sometimes within a circuit) but our knowledge of how this provision actually operates is still limited. Though still beyond the ambit of this paper, given the safe harbor’s importance, where possible, I attempt to measure the effect of the safe-harbor generally and specifically, by observing the cases where a court has refused to consider a Rule 11 motion because the procedural safeguards of the rule were not followed.

Finally, two important studies—both by the Federal Judicial Center—tap into another important group’s impressions of Rule 11 use: federal judges. The first, which also interviewed practicing attorneys, and was conducted shortly after the 1993 amendments went into effect, was in response to “proposals that would in large measure reverse the 1993 amendments.” The results of the survey indicated that “a notable majority of judges (70%) and attorneys (68% overall: 61% of defendants’ attorneys and 80% of plaintiffs attorneys) indicated that they moderately or strongly support it.” Similarly, a majority of judges surveyed (52%) responded that they thought Rule 11 is needed, and is “just right” after the 1993 amendments.

The second FJC study, conducted in 2005, which was in direct response to LARA, concluded even more strongly (with 87% of judges surveyed) that the 1993 version of the rule would be preferable to either the 1983 version or LARA’s proposed changes. “Approximately of 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem.” Regarding the safe harbor provision, the 2005 study made very interesting findings:

Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.

In short, both the FJC and academic studies of the 1993 version of Rule 11 support the claim that “[m]ost credible observers believe that the 1993 revisions of Rule 11 have had a substantial

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57 Yablon, supra note __ at 614 (“I embarked on my on quick and dirty empirical research.”).
58 Id. at 614-15.
59 This claim has been substantiated to some extent, as the Third, Fifth, Sixth, and Ninth Circuits have interpreted the safe-harbor to preclude sanctions motions after the final disposition of a suit. See Hart, supra note __ at 49-61.
60 See id. at 632-43.
62 Id. at 2.
63 Id. at 7. For attorney-respondents, however, though a clear majority of plaintiffs’ attorneys find the 1993 amendments are “just right,” defense attorneys were evenly split between deeming the rule “just right” and those who think it needed further modification to increase its deterrent effect, even at the expense of deterring some meritorious filings. Id.
64 2005 FJC STUDY, supra note 12, at 2.
65 Id. at 3.
66 Id. at 5 (citing 2005 FJC STUDY, supra note 12, at 4).
impact not just in reducing Rule 11 motions and Satellite litigation, but have actually diminished, or at least prevented any rise, in the numbers of baseless or frivolous claims being pursued in federal courts.\(^{67}\)

In short, to many, the 1993 amendments worked! They struck a balance between draconian fear and frivolity, and between maintaining the status quo while permitting slow changes in law to occur.

**B. The Lawsuit Abuse Reduction Act**

Despite the relative satisfaction that many have regarding the 1993 Amendments, Rule 11—like many of the Federal Rules of Civil Procedure (e.g., Rule 26 discovery or Rule 23 class actions)—remains a Rule in contest. In an ever-evolving civil justice system these conflicts are bound to arise, and will often be met with controversy. And this is good for democracy: “that’s the way it has always been” is not, itself, a justification for maintaining a given rule. What’s important, though, is that when deliberating about these issues, we have actual deliberation with attention to facts, not hyperbole or self-serving anecdotes based in bias or fear, not reality. For Rule 11, The Lawsuit Abuse Reduction Act (LARA) illustrates a glimpse into the Rule’s current controversy, its perceived problems, and, more important for present purposes, helps identify areas requiring academic attention.

1. **Specific Perception.**

So, what did the proponents of LARA perceive that “most credible observers” missed? To answer this question, and to analyze what type of information was relied upon, I looked to LARA’s legislative history.

In 2004, when LARA was first proposed, Congressman Smith argued that LARA would “bring our tort system back to reality” and, claimed that the tort system costs “American consumers well over $200 billion a year.”\(^{68}\) Representative Smith bolstered this claim by citing examples of “lawsuit abuse” of the sort mentioned earlier (e.g., a lawsuit against McDonald’s on the claim that a hot pickle had burned a women’s chin and caused mental injury).\(^{69}\) Of particular interest here, Smith also cites a poll that apparently found that 83% of likely voters believe that there are too many lawsuits in America, while 76% also believe that lawsuit abuse causes higher prices for goods and services.\(^{70}\) Thus, Smith appealed to what “average Americans have to say about frivolous lawsuits.”\(^{71}\) Meanwhile, just over two months before LARA passed in the House, the Department of Justice reported that the number of federal tort trials fell by almost 80% between 1985 and 2003.\(^{72}\) These statements confirm that there is an apparent gap between the way many experts (the DOJ, federal judges) view frivolous litigation (generally, not a significant concern) and the way that the public (or at least those responding in these polls) do.

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\(^{67}\) See id. at 605; Yablon, supra note ___ at (arguing that most big groups are concerned more with asbestos litigation than frivolous suits).


\(^{69}\) Id.

\(^{70}\) Id.

\(^{71}\) Id.

Similarly, other representatives speaking in support for LARA, sought to draw on public perceptions about litigation abuse. In particular, Representative Sessions, also of Texas, invoked an article written by recent democratic presidential nominee John Edwards who argued that “lawyers who bring frivolous lawsuits should face tough mandatory sanctions with the ‘3-strikes’ penalty.” The implication here was clear: Edwards is a trial lawyer, and if he thinks we need harsher penalties, then you should think harsher penalties are needed.

Critics of LARA, however, were not convinced. In particular, and in addition to comments concerned about abandoning the Rules Enabling Act’s method for rule change, one opponent argued that LARA represented “foolish, misguided special interest legislation,” that was not about the “real issues” American people faced but, instead, was “a cynical ploy” that was “all about distraction.” This distraction, to Representative McGovern, was to mask the protection of corporations from lawsuits, not to improve the lives of American people.

Back on the other side of the coin, Smith introduced LARA as necessary to prevent “nuisance lawsuits,” which make a “mockery of the judicial system” by filing suits without a legitimate basis only for the purpose of obtaining a large settlement. This, to Representative Smith, “is legalized extortion. It is lawsuit lottery.” Ironically, Smith claimed further revisions to Rule 11 would make a lawyer “think twice” before filing a frivolous suit—which, of course, was the specific intention of the 1983 and 1993 revisions, which have been found effective in several studies of the Rule. Yet, proponents continued that we need to get back to the “old-fashioned principles of personal responsibility and get away from this new culture where people play the victim and blame others for their problems,” because LARA would “rein-in lawsuit-happy litigators by restoring mandatory sanctions.” While true for federal courts, it is important, again, to recall that a majority of states, where most personal injury tort suits are filed, still have something like the 1983 Rule on the books, serving as a further indication that actual practice did not inform the consideration of the bill.

Unsurprisingly, given the foregoing, other than a story about the John S. Tilley Ladders Company in New York and a citation to a Business Week article arguing that tort reform requires “Penalties That Sting,” the proponents of LARA cited little evidence or empirical basis for their claims. Opponents of LARA, however, (1) requested support for the proponents’ allegations, and, surprisingly, (2) provided factual basis beyond anecdotes to oppose the bill. For instance, Representative Moran of Virginia voiced “reluctant opposition” to LARA because it skirts the Rules Enabling Act and because of a “concern that this bill will not deter frivolous lawsuits. Despite the anecdotes my colleagues have offered, there is no empirical evidence that Rule 11, which this bill seeks to change, is not working. In fact, recent studies indicate that frivolous

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73 Id. (remarks of Rep. Session, Tx. (quoting John Edwards, [title] Newsweek, [date]) (emphasis added)).
74 For a detailed account of the Federal Rulemaking procedure, and how it might be changed, see Coleman, supra note 4.
75 Id. (remarks of Rep. McGovern, Mass.)
76 Id.; see also FREQUENT FILLERS, supra note 8(describing the number of frivolous suits involving corporations).
77 Id.; see, e.g., Georgene Vairo, Rule 11 and the Profession, 67 FORDHAM L. REV. 589, 621 (1998) (discussing a good consequence of Rule 11’s revisions as causing attorneys to stop and think before submitting a filing (citing Marshall et al., supra note 42, at 964; Burbank, supra note 42, at 75-76)).
78 Id. (remarks of Rep. Keller, Fl.).
79 Id. (remarks of Rep. Chabot, Oh.).
80 See id. (remarks of Rep. Smith, TX.); Mike France et al., How to Fix the Tort System, BUSINESS WEEK (Mar 14, 2005), available at http://www.businessweek.com/magazine/content/05_11/b3924601.htm.
litigation is declining."

Similarly, Representative Kind, of Wisconsin, cited a Public Citizen study regarding the numbers of corporations filing frivolous litigation, and more presciently, I posit, noted that Congress has "a short-term memory problem." He noted that "[t]his [mandatory sanctions version of the rule] has been tried between 1983 and 1993, and the rules were changed because it was not working . . . [i]t had a disproportionate impact on the filing of civil rights actions in this country."  

Finally, one other wrinkle in the legislative history bears mentioning. One proposed amendment to LARA would be to insert the 3-strikes provision into LARA, but not adopt other changes, discussed more fully below, that LARA embodied. Thus, even those concerned with the chilling effect on civil rights litigation, but who, nonetheless, remained worried about tort reform sought a compromise that could not garner support. Now-speaker-of-the-House Pelosi's comments exemplify the frustration of some of these representatives: "We all agree that if there are frivolous lawsuits, those who bring them should pay a price. That we will have a three-strikes-you-are-out for doing that is a very important provision in the substitute. The substitute seeks to stop the madness that exists on the floor of this house when it is used as a venue to promote special interests in our country."  

In sum, proponents of LARA, without much empirical grounding, sought to significantly revise Rule 11, while opponents fought most of these changes by echoing many of the concerns that initially prompted the 1993 revisions.

2. The Text itself

The Lawsuit Abuse Reduction Act, H.R. 420, proposed several important and novel changes. In Section 2, on "attorney accountability" the LARA proposed a return to the 1983 version of the rule by reintroducing “shall” instead of “may” whenever a judge finds that a frivolous filing has been made. Thus, its first big move is to remove discretion from judges. The second aspect of this “attorney accountability” required an elimination of the safe harbor provision. Third, §2 sought to clarify the purpose of sanctions, yet again. Instead of limiting sanctions to an amount “sufficient to deter repetition of such conduct or comparable conduct by others,” and emphasizing “directives of a nonmonetary nature, an order to pay a penalty into court,” or, reasonable attorneys’ fees, LARA proposed removing mention of nonelementary sanctions or funds being paid to the court, and, instead, would require that the “parties that were injured by such conduct” be compensated.  

Though the aforementioned changes shall be the focus of my study it’s worth mentioning, some of the other amendments LARA would have made. First, the LARA sought to make Rule 11 applicable to cases filed in state courts “affecting interstate commerce.” This calculus is supposed to be “based on an assessment of the costs to the interstate economy, including the loss of jobs.” In short, LARA sought to hijack state court procedure under the guise of the Commerce Clause. The Act, therefore, would force courts to wrestle with the thorny issues attempting to make United States v. Lopez and Gonzales v. Raich consistent. Commentators have already jumped on this problem. Matthew G. Vansuch, takes a quite aggressive stance toward the unconstitutional nature of this provision. On its face, it is rather odd to think that under Lopez

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83 Id. at 9323 (remarks of Rep. Kind, Wis.).  
84 Id. at 9325 (remarks of Rep. Pelosi, Cal.).  
85 H.R. 420, § 2.  
86 See Appendix A.  
87 Vansuch, supra note 6; see id. at
(and Morrison), which found congressional fact-finding woefully inadequate, that it would be constitutional for Congress to abdicate the fact-finding for each suit to the institutionally incompetent courts. As another commentator put it, even if constitutional, “it is highly unusual for the Congress to attempt to regulate state procedure. . . . [T]here is a difference between power and judgment and the important question is whether LARA is an unnecessary and excessive intervention into state court procedural practice.”

Indeed, several justices on the current court would likely hold that State Sovereignty, as reflected in the Eleventh Amendment, and the Structure of Article III would prevent the Supremacy Clause from extending this far. Related to State Sovereignty, LARA would also disturb a significant portion of the precedent that presumes, and relies upon, and understanding of the constitution protecting state’s power to enact their own procedural rules, with Erie and its progeny at the forefront. This provision also raises a Tenth Amendment issue. Under rationale of New York and Printz, LARA likely violates the anti-commandeering principle limiting Congressional power over state political branches.

Four other changes were proposed. First, a “three-strikes” rule requiring year-long suspension of attorneys who violate Rule 11. Unsurprisingly, there is not much work done about whether specific lawyers being frequently sanctioned, though my study of the Northern District of California did turn up one such attorney. Second, LARA proposed to create a presumption of a Rule 11 violation for repeatedly re-litigating the same issue. Third, LARA proposed to give Rule 11 a jurisdictional function by including a clause to prevent forum-shopping in personal injury claims. Finally, the Act proposed heightened sanctions for document destruction in pending federal court proceedings.

* * *

This examination of LARA and its legislative history exemplifies the structure and substance of our continued social discussion about how to formulate Rule 11. The legislative history reveals a deeper gap between how even our legislators (like the public at-large) perceive frivolous litigation, and what might be happening on the ground. The “might” is significant. Unlike the 1983 Amendments, we do not have a robust picture of how the 1993 Amendments are working, especially relative to their predecessors. It is likely, and probably a good thing, that Rule 11 will be revisited, though LARA itself failed. When that happens, we need a good picture

90 Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938). State’s plenary power over their courts and certainly their procedural rules can be seen in so-called “reverse-Erie cases,” where federal courts look to state procedural law, e.g., Klaxon Co. v. Stentor Elec. Mfg. Co., Inc., 313 U.S. 487 (1941), and even when state procedural rules treat federal claims differently than they would be treated if filed in federal court. See Johnson v. Fankell, 520 U.S. 911 (1997) (no interlocutory appeal for denial of qualified immunity for § 1983 suit which could have also been filed in federal court and received such an appeal via procedural rules applicable in the federal forum).
91 Extending the Tenth Amendment this far is the logical extension of New York, which prevented legislative commandeering, and Printz, which prevented it via the executive. New York v. United States, 505 U.S. 144 (1992); 521 U.S. 898 (1997). Presumably the same would be true for commandeering the courts, especially because the principle expressed in Printz and New York rests upon political accountability. These issues might be especially thorny for state court judges, who are often elected. On this issue, see also Vansuch, supra note 6, at 273-281.
92 But see Joy, supra note 53 at 811 (finding that only five lawyers were sanction in multiple cases in a survey of 274 Rule 11 cases); see also id. (noting that “[i]t is not often that one encounters a recidivist violator of Rule 11 of the Federal Rules of Civil Procedure.” (quoting ) looking at only a few attorneys who’ve been sanctioned more than once under the amended rule.
of how the Rule has worked in practice. Indeed, if we expect the Advisory Committee or our legislative representatives to effectively avoid the “sensationalist media accounts” or misleading impressions of the civil litigation system, this data is crucial.

Against this backdrop, I attempt to provide one modest step toward understanding the operation of the different versions of Rule 11 through a study of the Northern District of California.

II. EMPIRICAL STUDY OF THE NORTHERN DISTRICT OF CALIFORNIA

As the Ninth Circuit Rule 11 Study Committee—which studied the effects of the 1983 version of Rule 11—noted, I have come to “understand the tremendous difficulty in measuring the effect of a Federal Rule of Civil Procedure. Designing a meaningful study is difficult . . . [and] controlling for other variables that might also explain results is often problematic.”93 Nonetheless, in what follows I examine the Northern District of California and hope to provide insight into how the amended Rule has been actually used. Some studies have looked at the Ninth Circuit and the Northern District, but none has given us what we really want going forward: a view of how the 1993 version has been applied in relation to the 1983 version of the rule.94

Before proceeding though, two interesting conclusions of prior related studies bear mentioning. First, though many judges and practitioners generally see the safe harbor as a good compromise, the Ninth Circuit Rule 11 Study Committee initially opposed it on the belief that “allowing such a ‘safe harbor’ could encourage the reckless filing of frivolous pleadings” and because the behavior sought to be deterred—“occupying the time of the court and the litigant—is not necessarily cured by withdrawal within 21 days.”95 Second, Professor Nelken’s survey of attorneys in the Northern District suggests that “Rule 11 has been used to seek sanctions against opposing counsel far more often than the number of published opinions in the Northern District would indicate.”96 While I acknowledge there are certainly constraints to looking at case data, for a comparative view, using similar sources (cases) provides a rich basis for inference, and, as a first step, can provide a jumping point for subsequent studies.97 In short, I aim to fulfill one request of the Ninth Circuit Study Committee: To provide a “[m]ore detailed” study “as to the actual practice with Rule 11 in the district courts within the circuit”98

A. Study Design & Methodology

94 Id.; Nelken, supra note 42; Marshall et al., supra note 42.
95 NINTH CIRCUIT REPORT, supra note 93, at 4-5.
96 Nelken, supra note 42, at 147 (emphasis added).
97 One of these constraints is that the Northern District might not be typical. It could be more “liberal” or “conservative” relative to other district courts and, with the Ninth Circuit creating its precedent, the way in which it applies Rule 11 might differ from another district court operating in another Circuit. While measuring these factors is beyond the ambit of this paper, looking at one court should provide a relatively good sample of how the Rule worked relative to its preceding version, especially given that it would be under a single Court of Appeals. That is, while drawing on a broader national sample might better reflect a left-right bias (should it exist) amongst district court, it would not account for differences in Circuit Precedent.
98 RULE 11 IN THE NINTH CIRCUIT, supra note __.
When considering how best to approach the task of conducting meaningful observations from Rule 11 activity several important decisions were made. First, instead of drawing a sample of Rule 11 cases nationally, or even within one circuit, I chose to hone in on a particular jurisdiction because this focus allows a 1:1 basis for comparison where intervening factors—like changes in circuit precedent or local issues—might apply equally to multiple sets of cases.

To begin, it was first necessary to find some type of baseline for analyzing the impacts of the 1993 version of Rule 11. Though the several studies described above might have been able to approximate this baseline, analyzing operation under the 1983 version of the rule in one jurisdiction provides a much stronger basis for inference. Accordingly, Westlaw was searched to include all cases involving “Rule 11,” “Fed R. Civ. P.” and “Federal Rule of Civil Procedure 11” between August, 1 1983—when the 1983 version became effective—and December 1, 1993 the effectiveness date of the new amendments. To account for the criticisms (and limitations) of previous studies that published opinions disclose only part of the universe of Rule 11 activity I sought to isolate unpublished opinions and determine whether or not a search now might give us more information than previous studies (e.g. the Nelkin study in 1990, and the Third Circuit study in 1989) on both the 1993 version and the 1983 version of the rule. Similar steps were performed for analyzing the 1993 operation of the rule, which was limited to December 1, 1993 and October, 27, 2005—the date LARA was passed in the House. As Table I demonstrates, the inclusion of unpublished decisions in the Westlaw database was significant.

<table>
<thead>
<tr>
<th>“Rule 11” Cases: Raw Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>1983 Version (baseline)</td>
</tr>
<tr>
<td>Published</td>
</tr>
<tr>
<td>Unpublished</td>
</tr>
<tr>
<td>Total</td>
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</tbody>
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Once these cases were compiled, they were analyzed on the basis of case type, moving party, grant rates, the type of Rule 11 violation (or frivolousness) at issue, among other variables.

B. Results

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99 One potential variable that this study omits, however, is changes based on the judicial makeup of the Northern District. See Kassin, supra note ___, at 31-34 (noting that sanction rates closely correlated to judges own rationale for imposing sanctions—deterrence, punishment, compensation, or some combination thereof). Using all cases from a single jurisdiction, however, hopes to mitigate the impact of this variable because the judges are bound by the same precedent and to each other’s cases.

100 Specifically the search conducted was: (“Rule 11” & PR(“N.D. Cal.”) & DA(aft 7/31/1983 & Bef 12/1/1993)) in the DCTA database which exclusively searches the federal district courts in California (last performed 3/8/08).

101 To do this I added % CI(slip no not unpub! unreport! table), which limited the results to published opinions alone. Thus the entire query was: "RULE 11" & PR("N.D. CAL.") & da(aft 7/31/1983 & bef 11/30/1993) % ("LOCAL RULE 11") % ("CLAYTON V. YLST") % CI(SLIP NO NOT UNPUB! UNREPORT! TABLE). Thanks to Professor Daniel E. Ho for this limiting search.

102 The initial 1993 version search, in database DCTA, was; "RULE 11" & PR("N.D. CAL.") & DA(AFT 11/30/1993 & BEF 10/28/2005) % ("LOCAL RULE 11") % CI(SLIP NO NOT UNPUB! UNREPORT! TABLE).

103 Because the basis for my analysis of Rule 11 activity is not the case, or even a motion, some cases, all involving dueling plaintiff and defendant motions are double counted in subsequent calculations. Thus, the total number of “instances” for the 1983 version is 106, while 160 was the final tally for its 1993 counterpart, resulting in 266 “cases” as the basis for deriving observations from.
Inferences should be made with care. And changing legal rules should not be done hastily. That said, the results of this study do not lend support to the argument that frivolous litigation relative to practice under the 1983 version of Rule 11 has skyrocketed or that the 1993 Rule has exacted an unreasonable toll on unwitting and undeserving defendants. To continue with the LARA example, the data do not bear out the claims made by proponents of the legislation. The 1993 amendments have generally served their purpose; and balanced the pendulum. As with all legal rules, though, we could have it another way.

First, as Figure 1 illustrates, the overall sanction rate reduced substantially from 25% under the old rule to 14% under the new rule, a statistically significant change.104 This near-half reduction in the rate of sanctions might suggest that (1) judges are wielding wide discretion and sanctioning less or (2) that the types of instances where Rule 11 have actually increased, though not rising to the level of an official motion. As I discuss below, the data suggest the later inference. For reformers, therefore, the problem is not that making Rule 11 discretionary alone is what has reduced the rate of imposition, but that judges are actually involved in more Rule 11 activity, outside of motions, and thereby impacting various stages of litigation. Because civil rights cases and pro se litigants figure so prominently in society and the debates surrounding Rule 11, both for academics and legislators, my analysis of the results specifically focuses on these important case types.105

I discuss the results, and implications thereof, across six general categories: (1) sanction rates and proportions by case type; (2) who raises the Rule 11 issue and against which party; (3) the types of parties (e.g. corporations, individuals, government, etc.); (4) the type of Rule 11 frivolousness asserted (i.e. improper purpose, no factual basis, or without legal support), and attendant types of sanction denials; (5) other sanction activity over time (e.g. 28 U.S.C. § 1927, court’s inherent power, etc.); and (6) analyzing the reasons why the court declined to impose sanctions.

1. Sanction Rates and Proportions.

The relationship between the proportion of cases where Rule 11 is raised and the rate of sanction for these cases sheds light on which types of cases, if any, are being over or under deterred. More specifically, looking at whether cases make-up a small proportion of the total cases, but account for a higher number of the cases where sanctions are imposed might provide a glimpse into whether or not a specific type of case is being “chilled,” and to what extent, if any, this effect has changed under the new and old version of the Rule. Importantly, I argue, over-representation alone is not sufficient to prove deterrence, or impermissible targeting of certain case types.

Take, for example, the criticism of the old Rule as having a disproportionate impact on civil rights plaintiffs and a “chilling effect” on the attorneys willing to bring these claims. This problem alone, to some, was enough to make LARA—which sought to reinstate many of the 1983 provisions—objectionable.106 Yet, the data used to fuel many of these claims, however,

104 Significance based on performance of a t-test, which resulted in a p-value of 0.03.
105 Kassin’s study also paid pro se plaintiffs specific attention. See Kassin supra note ___, at 41-43 (describing the effects of the 1983 version of Rule 11 on pro se litigants an noting that, in his study at least, “pro se litigants . . . were held to the same standard of inquiry as a lawyer was, and as such, they were just as likely to have received sanctions,” though judges tended to refer to this failure more favorable and including this as a factor for deciding the magnitude of the sanction.)
106 See, e.g., 151 Cong Rec. H9312-02 (2005) (Comments of Rep. Stark) (discussing how “[p]rior to 1993, defendants in civil rights cases would file a crushing number of motions alleging frivolous actions on the part of the
may provide an inadequate basis for this claim, of which I am admittedly sympathetic. Professor Nelken, for example, noted that “[a]lthough civil rights cases accounted for only 7.6% of the civil filings between 1983 and 1985, 22.3% of the rule 11 cases involve civil rights claims,” and that this “disproportionate number of civil rights cases in which rule 11 sanctions have been considered . . . must give pause to the civil rights bar.”

While disproportion with the total number of filings of that case type might signal a problem, too much cannot be drawn from this disproportion alone because it presumes that all types of cases have the same innate probability of being sanctioned. That is, relying on a disproportion of filings to Rule 11 activity presumes that all cases are equally likely to involve frivolous claims. While this might certainly be the case when we consider race, where disproportion can be more easily attributed to discrimination or other ills because all races should be “created equal,” not all civil suits are similarly situated. To perceive disproportion alone as a problem we must believe that all types of cases share the same probability of being (non)frivolous, an assumption which often goes overlooked and under-analyzed.

**Figure 1: Sanction Rate by Case Type**

Looking at the sanction rate against the proportional rate of cases involving Rule 11 activity for the old rule and the 1993 version of the rule, however, provides a strong basis for plaintiff in a blatant attempt to delay the case,” which should be avoided because “[j]ustice delayed is justice denied”; *Id.* (Comments of Rep. Schiff) (discussing an amendment to LARA to add a civil-rights exemption to mandatory sanctions and its proposed 3-strikes rule).


See Appendix C for how cases type designations were made.

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what to make of the disproportion certain case types involving Rule 11 activity relative to the proportion of cases filed by that type. As Figure 2 indicates, the proportion of civil rights cases involving Rule 11 actually rose under the new rule (from 22% to 32%), yet, this is only half the story. As Figure 1 illustrates, the rate of sanction for civil rights cases actually declined despite their increased proportion. Taken together, therefore, the increased proportion with declining sanction rate supports the inference that the chilling effect of Rule 11 has declined. If plaintiffs feel freer to file borderline cases or cases including a “nonfrivolous argument of the extension, modification, or reversal of existing law or the establishment of new law”109 we might expect their proportion of Rule 11 activity to increase only if the rule did not have a significant in terrorem effect against filing a claim.

One other finding, however, cuts in both ways. The sanction rate for civil rights cases declined by roughly the same margin as the overall sanction rate (10%), which suggests (1) parties are, in general, less likely to actually be sanctioned under the rule and (2) civil rights plaintiffs are even less likely to be sanctioned under the new rule because the proportion of cases increased. To some, however, the fact that the sanction rate for civil rights cases did not decline relative to the other case types implies that Rule 11 is “still chilling after all these years” despite the changes.110 The fact, that Civil Rights cases remain 10% above the overall sanction rate suggests that the chilling effect persists because alleviation of this effect would require some combination of the rate of sanction to decline more than other case-types, as Contracts cases did under the two versions of the rule (from 35% to 14%), or a reduction in the number of cases sanctioned relative to the number of civil rights filings (the metric Nelken used above).

Figure 2. Overall Proportion of Cases by Type.

109 Fed. R. Civ. P. 11(b)(2). See also Nelken, supra note 42, at 150 (discussing Northern District attorneys, and civil rights lawyers mixed beliefs on whether Rule 11 had chilled legal some legal claims).
Looking beyond the scope of civil rights cases provides a better, though still murky, view of how the 1993 amendments have played out. First, of cases with a significant drop in sanction rates (contracts, non-personal-injury torts and securities fraud cases—comparing their proportional representation is varied. While the difference between the number of contracts and securities cases is insignificant (from 25% to 22% for contracts and from 13% to 8% for securities), the number of tort suits dropped 11%. One potential explanation for this dichotomy might be that tort suits are now being significantly deterred by the threat of Rule 11. A problem with drawing this inference, however, arises from the fact that most tort claims are based in state law and find themselves in federal court. Importantly, however, despite the increased proportion of diversity jurisdiction claims with Rule 11 activity under the new rule, the rate of sanction for these cases and their federal question counterparts under either version of the rule.

Further, in examining the fraud/property cases the rate of sanction was relatively static—20% under the old rule and 17% under the new version—but, like civil rights suits, property cases increased in proportion (from 21% to 28%). As discussed below, looking beyond these types to the types of plaintiffs and defendants involved in the cases—most individual and pro se plaintiffs file civil rights suits, while most corporate plaintiffs are engaged in property litigation—might provide insight into who is apparently abusing the litigation process and, accordingly, who (if anyone) should be explicitly considered when debating whether or not Rule 11 is serving the values it is meant to achieve.

Specifically, while the proportion of diversity jurisdiction cases rose under the 1993 rule, from 21% to 40%, the sanction rates did not significantly vary; under the 1983 version diversity cases were sanctioned at a 22% rate and federal question cases were sanctioned at 28%, while under the 1993 version of the rule diversity cases had a slightly higher rate of 18% over federal question cases at 12%. This difference, however, was not significant. Based on a t-test with a resultant p-value of .5618.
Two final caveats regarding sanction rates are in order. First, tough stark on Table 3, too much shouldn’t be made of the seemingly giant increase in personal injury tort suits; under the 1993 rule there were only 4 and only 5 under the 1983 version.

Second, as Figure 3 indicates, one problem with a case study of this type is tracking getting a consistent sample of Rule 11 behavior over time. To attempt to get a smooth picture of Rule 11 activity over time a 3 year floating average was used to create Figure 3. The red line indicates the dividing point of cases in the study applying the 1983 version of the Rule and those operating under the 1993 amendments. The division occurs later than one might expect because three cases actually published after the effectiveness date of the 1993 amendments used the 1983 version of the rule, and because of the natural delay between the imposition of a new legal rule and instances where that rule is invoked and subsequently published in a judicial decision.

Despite these problems, however, the experience under the 1983 version of Figure 3 may adequately reflect the common story relating to the 1983 amendments: Commentators and judges initially invoked Rule 11 with great acclaim, but, over time, problems were realized and the changes once praised were now deplored. Accordingly, once the Federal Judicial Center began the public comment process on Rule 11 and academics began to report on the failings of the 1983 amendments one might expect a significant drop in sanctions behavior, a reevaluation, and then a reinstitution, though under different standards of Rule 11 behavior. As one commenter posited, “[m]ost of the difficulties in implementing Rule 11 can be ascribed to judicial uncertainty about the principal purpose of the 1983 amendment.” Importantly, if uncertainty can be attributed to a decline in sanction rates, as judges might not feel comfortable imposing sanctions in the face of uncertainty, the rise after 1990 is consistent with the renewed certainty and uniformity about Rule 11’s purposes and functions that came from four important Supreme Court precedents published in this time period.

Figure 3: Sanctions Over Time

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2. Who Moves? And Against Which Party?

One important assumption behind the arguments of those advocating tort reform, quite naturally emphasize pleadings and plaintiffs (and their lawyers) while perceiving defendants as the victims of frivolous litigation. In an article aimed at influencing the upcoming 1993 amendments Professor Vairo argued that Rule 11 might be viewed as a defendant’s tool. This “defendant’s tool” criticism has two elements. First, it’s noted that most Rule 11 activity is directed (or targeted) toward plaintiffs, and, secondly, that there is a “disparate rate of sanction” based upon movant type in favor of defendants.

a. Plaintiffs as Targets

To capture the first aspect of this criticism I tracked the “moving” party for each instance of Rule 11 activity. Importantly, the Court vs. Party quadrant of Figure 3 captures (1) all instances of Rule 11 activity and (2) an adjusted picture of Rule 11 activity taken by excluding any instance where Rule 11 sanctions were mentioned as doctrinal references or, more significantly, warnings from the court. Thus, under the old rule 79% of Rule 11 activity was raised by the parties, while this number was reduced to 69% under the new regime. As the adjusted figures demonstrate, however, when warnings and doctrine are removed the party-based

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115 Vairo, supra note 43, at 483-84 (concluding that studies on the 1983 version of the rule “illustrate a serious imbalance in the rule, favoring defendants at the expense of the plaintiff and her attorney”)

116 See, e.g., Nelken supra note 107, at 1328 (noting that “[w]here the parties sought sanctions, defendants were most active,” while the implications of the [1983 amendments] of rule 11 may have escaped the plaintiffs’ bar”); Lawrence Marshall et al., supra note 42, at 953-53, Tab.2. (reporting that “it would be expected that plaintiffs would be the more likely target of sanctions”)

117 Vairo, supra note 43, at 484 (“The disparate rate of sanction must be eliminated to avoid the appearance and existence of unfairness to one “side” of the litigation equation.”); Nelken, supra note 107, at 1328 (advocating more active Rule 11 scrutiny for defendant’s recitation of a “laundry list of affirmative defenses,” general denials, and other prefiling inquiry into statements within the answer”).
activity increases to 90%, and the court-initiated activity becomes only 9%. Interestingly, in this sample of cases none of the court-based activity under the old rule involved activity that required adjustment. Thus, when warnings are excluded, the 1993 rule saw over a 10% decrease in court-based activity. What the non-adjusted figures demonstrate, however, is that under the new rule judges have become more adept to raise Rule 11 as a warning to parties. Many of these instances involved plaintiffs being granted leave to amend their complaints who were reminded of their obligations under the rule. For lawyers, and lawmakers, this suggests that the amended Rule might accurately be less of a deterrent to the filing of cases close to the Rule 11 boundary and that the in terrorem effect of the 1983 amendments have subsided. Thus, judges under the new regime remind parties of their obligations under Rule 11 because it may no longer be used as a tactic of delay or significant focus of parties litigating.

Figure 4: Who Moves?

Yet, as the rest of Figure 3 makes clear, most Rule 11 activity is directed toward plaintiffs. The upper-right quadrant indicates that plaintiffs’ motions have increased slightly increased under the new rule, but this change may not be significant, and, more importantly, when combined with the court’s consistent plaintiff-centered action (lower left) the total movement rate for all Rule 11 activity reveals that plaintiffs remain the prime targets (lower right). The social significance of Rule 11 activity being focused on plaintiffs, by itself, should not be alarming. If, as the new rule and the Supreme Court declare, Rule 11 serves primarily to

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118 See, e.g., []
119 A t-test of this relationship revealed a 95% confidence interval of -0.22927292 to 0.06198985, which indicates that this change might, in fact, be random.
120 Fed. R. Civ. P. 11(c)(2) (limiting sanctions to “what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated) (emphasis added); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,
deter frivolous filings then, as first movers, and those who determine which of the many disputes that never enter federal courts actually do, we might think that it’s not necessarily problematic that Rule 11 activity is directed at plaintiffs.

Further, this comports with what many people, and the media, seem to take issue with in regards to perceived over-litigiousness. What’s appalling to some is not necessarily that Stella Liebeck asked McDonald’s to pay for her injuries; it was the lawsuit she filed to do so. Similarly, in the typical (potentially frivolous) slip-n-fall suit, negative responses are not based on some notion that the Mom n’ Pops grocery shouldn’t pay the injured individuals medical costs, but that they should not be subject to litigation for such a trifle.121

From the lawyer’s perspective, I posit, we ought to be divided about the plaintiff-centered invocation of Rule 11. When, for example, commentators cite the Brown or Bakke,122 they typically describe the fact that these plaintiffs could “seek a remedy from a federal court without fear of punishment.”123 Though I agree we should absolutely be worried about deterring these types of suits, a hidden virtue of the fact that so much Rule 11 activity is plaintiff focused is that it demonstrates that plaintiffs continue to bring claims to advance new law or challenge existing structures. Several cases in this study, for example, include Rule 11 activity where the court explicitly declares that the plaintiffs have made good faith arguments for the modification of existing, or creation of new, law in areas where the law is unclear.124 At the same time, however, we ought to be worried about the neutrality of procedural rules with respect to parties, and legal rules that exacerbate differentials in relative power between parties are cause for concern.125

b. Plaintiffs Disproportionately Sanctioned?

The second vein of the Rule 11 as “defendant’s tool” argument hones in on the uneven rate of sanction between plaintiffs and defendants. This argument is usually based on a comparison of the ratio of plaintiffs to defendants sanctioned and hones on this disparity.126 Given the disproportionate number of plaintiff-targeted Rule 11 activity these ratios are not surprising. So, to analyze the differential sanction rate between plaintiffs and defendants in a different manner I compared the success rate of plaintiffs relative to defendants under each version of the rule. Interestingly, under the 1983 version of Rule 11 defendant’s motions and plaintiffs motions had about the same sanction rate (29-30%)127 In stark contrast, however, under the 1993 version plaintiffs motions were successful only 11% of the time while defendant’s enjoyed a success rate of 21%.

393 (1990) (“[T]he central purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the Rules Enabling Act’s grant of authority, streamline the administration and procedure of the federal courts.”) (emphasis added).
121 Cf. De minimis non curat lex (“The law does not concern itself with trifles.”).
122 Brown v. Board of Education, 347 U.S. 483 (1954); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Conley v. Gibson, 355 U.S. 41 (1957). In both of these cases plaintiffs challenged existing law by in important ways. Linda Brown challenged the latent inequality of Plessy v. Ferguson, 163 U.S. 537 (1896), while Alan Bakke successfully challenged the quota-based affirmative action program at a University of California medical school.
123 Vairo, Rule 11: Where we are and Where We Are Going, supra note __, at __.
124 Cases
126 See Nelken, supra note 43, at 483, 483 n.48 (describing FJC data finding a “plaintiff-defendant sanction ratio” of 80% to 7%, 77% to 23%, 81% to 9%, 80% to 20%, and 61% to 38%); these percentages adjust all activity by removing one defendant-raised doctrinal comparison to Rule 11 and another threat made by defendant’s to move for Rule 11 sanctions.
Several potential inferences might be drawn from these results. First, as to be expected, they affirm an overall decreased rate of sanction under the rule; so far, so good. Second, the observed gap between plaintiffs and defendants might indicate that plaintiffs are, if fact, worse off under the new rule. This conclusion seems doubtful given the fact that a majority of plaintiffs attorneys have consistently indicated that the new rule is more equitable than its former version.\textsuperscript{128} A second way to interpret the data, however, is to consider the experience of satellite litigation under the old rule.\textsuperscript{129} If more cases featured “dueling” Rule 11 motions, or a “cottage industry” of litigation around the whether or not paper filings were frivolous, one might expect plaintiffs to be more active in filing responsive Rule 11 motions and, accordingly, more likely to have their motion granted by convincing a judge that the defendant’s initial Rule 11 motion was, in fact, in violation of the rule itself. Assuming that this type of behavior has decreased,\textsuperscript{130} we might expect that the Rule 11 motions to provide a more accurate, though discouraging, picture of success on Rule 11 motions by party type.

3. What Type of Lawyer? Client-Type Trends in Sanctions

In addition to looking merely at whether or not Rule 11 activity is defendant or plaintiff focused, the types of plaintiffs and defendants more fully informs how we might assess the problem of frivolous litigation. If, as some claim, sham lawsuits are ruining our country, bankrupting businesses, etc. we typically identify the plaintiff as some un-deserving plaintiff represented by an equally undeserving lawyer out to strike it rich in the “legal lottery.” Importantly, however, the results here, and elsewhere,\textsuperscript{131} indicate that corporate litigation might also be a substantial part of the sham litigation worry.

\textbf{Figure 5:} Plaintiff and Defendant Types\textsuperscript{132}

\textsuperscript{128} See John Shapard et al., \textit{Report of A survey Concerning Rule 11, Federal Rules of Civil Procedure}, FEDERAL JUDICIAL CTR. 7 (1995) (reporting that 41% of plaintiffs surveyed feel that “Rule 11 is needed, and it is just right as it now stands”);
\textsuperscript{129} Professor Tobais, for example, contends that “[t]he 1983 version fostered much costly, unwarranted satellite litigation over its phrasing and the magnitude of sanctions that courts imposed while increasing incivility among lawyers.” Carl Tobias, \textit{The 1993 Revision of Federal Rule 11}, 70 IND. L.J. 171 (1994); cf. Viaro, \textit{supra} note 43, at 480-82 (discussing the “cottage industry” that the 1983 amendments spawned).
\textsuperscript{130} Though not statistically significant, the results of my study indicate that there are fewer cases under the new rule where plaintiffs and defendant’s move simultaneously seek sanctions against each other. Specifically: in 8% (or 7 of 88 cases) under the 1983 rule had dueling motions, while only 2% (or 3 of 134 cases) under the 1993 version did.
\textsuperscript{131} See FRENQUENT FILERS, \textit{supra} note 8.
\textsuperscript{132} See Appendix C for coding methods for party types.
Figure 5 supports (at least) two interesting inferences. First, though a bit quirky, the reduction in proportion of individual plaintiffs under the 1993 version (from 57% under the old rule to 40% under the 1993 version) indicates that more litigation is taking place elsewhere. Accordingly, when relative proportions are compared between the new and old rules the proportional gap between individual and corporate plaintiffs is diminished. To be exact, where under the 1983 version, there is a 24% gap between individual and corporate plaintiffs, that margin shrinks to 15% under the new rule—a 9% reduction. In terms of social perception, this fact should give us reason to pause. If corporate litigants are an increasingly large portion of frivolous litigants the notion of the personal injury suit or ambulance chasing lawyer ought not be the only archetype for questionable lawyer practices. Our society—individuals, lawyers, and lawmakers—ought to consider this substantial element of ongoing frivolous litigation in our federal courts.

133 Based on a t-test, the change between proportions of individual plaintiffs is statistically significant (p-value = 0.003225), or, at least not random.
134 Nor is this trend new. As the table below indicates, business vs. business litigation has been present throughout both iterations of Rule 11. Likewise, under both versions of the rule businesses are, in fact, targeted by individual plaintiffs.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>When Plaintiff is a business?</td>
<td>(n=40)</td>
<td>(n=35)</td>
</tr>
<tr>
<td>Defendant, Small Bus.</td>
<td>5%</td>
<td>0%</td>
</tr>
<tr>
<td>Defendant, Big Bus.</td>
<td>73%</td>
<td>77%</td>
</tr>
<tr>
<td>Defendant, Gov.</td>
<td>8%</td>
<td>6%</td>
</tr>
<tr>
<td>Defendant, Individual</td>
<td>18%</td>
<td>14%</td>
</tr>
<tr>
<td>Defendant, Nonprofit</td>
<td>5%</td>
<td>7%</td>
</tr>
<tr>
<td>When Plaintiff is an individual?</td>
<td>(n=64)</td>
<td>(n=60)</td>
</tr>
</tbody>
</table>
Second, as the upper left quadrant indicates, a majority of Rule 11 activity involves private defendants. This might have two, contrasting, implications. On one hand, the perceived abuses of the litigation system toward businesses might have some merit. That is, given their frequency as defendants in cases with Rule 11 activity this may imply a correlative indication that Rule 11 should be even further amended, with LARA-like changes, to prevent this disproportionate representation of businesses in potentially frivolous litigation. A second implication, however, might be that corporate defendants actually create Rule 11 activity. If these defendants are more likely to seek sanctions than their individual or governmental counterparts as defendants, they would properly make-up a disproportionately larger portion of defendant’s involved in cases including some Rule 11 activity. Testing this hypothesis, however, proved difficult.135


Assuming that the 1993 amendments have, in fact, significantly weakened Rule 11 such that frivolous litigation might continue at (or increase to) excessive levels, I hypothesized that we should see an increase in the pursuit of other sanctions mechanisms for essentially the same relief: get out of my hair with that pesky lawsuit. That is, assuming that parties would use legal rules to curb frivolous litigation, we might expect that the weakening of a previously strong rule might cause parties to compensate for this change by complementing Rule 11 sanctions with other sanctions provisions—like 28 U.S.C. § 1927136 or Rule 37137—that remained unchanged. I sought to test this hypothesis in two ways: (1) examining the overall increases in other sanctions activity over time, and (2) evaluating the types of other sanctions sought under both versions of the rule.

First, analyzing the overall rate of additional sanctions being raised along with Rule 11 over time might demonstrate to what extent, if at all, parties compensated for the perceived “watering down” of Rule 11. Figure 5 displays the alternative sanction activity for the Northern District cases. By far, most of cases where Rule 11 is invoked do not involve any other sanction activity (illustrated by the green line on top). The blue and red lines represent cases where other sanction devices were merely mentioned and those that where a judge imposed sanctions under an alternative basis. The black line represents the sum combination of cases where other sanctions were sought and those where they were actually imposed to provide a picture of the

| Defendant, Small Bus. | 5% | 5% |
| Defendant, Big Bus. | 58% | 65% |
| Defendant, Gov. | 28% | 30% |
| Defendant, Individual | 19% | 17% |
| Defendant, Nonprofit | 6% | 13% |

135 Looking through the dockets of some cases, I posited, might help identify trends like this, but was ultimately unavailing. At best, one could place observers in trial courts to observe behavior or hope for some smoking-gun memo or email obtained through discovery or inadvertently disclosed, which is beyond the scope of this inquiry.

136 Section 1927 reads: “Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

137 Fed. R. Civ. P. 37(b) (providing sanctions for discovery abuses).
overall frequency of alternative sanctions activity. As above, the black line in the center demarcates cases applying the two versions of Rule 11. Finally, when considering Figure 5, it bears keeping in mind that cases where other sanctions are imposed need not necessarily be cases where judges impose Rule 11 sanctions. In fact, under the 1993 version of the rule in 9 of the 25 cases (or 36%) where the court chose not to sanction a party under Rule 11, the court, instead reprimanded parties through by imposing sanctions.

Figure 6: Other Sanctions Over Time.

Table 1: Non-Rule 11 Sanction Activity

138 For instance in x the carefully distinguished sanctions under § 1927 and Rule 11, finding the behavior at issue sanctionable under the former provision but not the latter. Unfortunately, this careful distinguishing is anything but uniform. See, e.g., Einardt v. Stone, 1996 WL 532114 (N.D. Cal. 1996) (considering sanctions under Rule 11 for removal misconduct, which should be considered under 28 U.S.C. 1447; Gonick v. Drexel Burnham Lambert, Inc., 711 F. Supp. 981 (1988) (considering sanctions but failing to delineate whether they are imposed under Rule 11 or § 1927).

139 The number of and rate of this situation was smaller under the 1983 operation of the rule. Specifically, in only 2 of 11 cases (or 18%) where the court did not impose sanctions did the court rule under another provision instead. The table below presents the full case numbers for this search.

<table>
<thead>
<tr>
<th>Other Sanctions</th>
<th>1983 Version</th>
<th>1993 Version</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Discussed</td>
<td>Imposed</td>
</tr>
<tr>
<td>Rule 11 Grant</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Rule 11 Deny</td>
<td>11</td>
<td>3</td>
</tr>
</tbody>
</table>

140 Graph is plotted using 3-year floating averages of case numbers to attempt to best capture the substitution effect.
### Other Sanction activity

<table>
<thead>
<tr>
<th></th>
<th>1983 (n=106)</th>
<th>1993 (n=154)</th>
</tr>
</thead>
<tbody>
<tr>
<td>None at all</td>
<td>80% (n=85)</td>
<td>73% (n=117)</td>
</tr>
<tr>
<td>Discussed (excl. imposed)</td>
<td>13% (n=14)</td>
<td>14% (n=22)</td>
</tr>
<tr>
<td>Imposed</td>
<td>7% (n=7)</td>
<td>13% (n=21)</td>
</tr>
<tr>
<td>Combined</td>
<td>20% (n=21)</td>
<td>27% (n=43)</td>
</tr>
</tbody>
</table>

Drawing conclusions from the sanction activity over time, however, is difficult. While Figure 5 does indicate that most Northern District cases in the study mentioned no other sanctioning device, tracking behavior over time—especially while attempting to control for the effect that Rule 11 caused—indicates only a slight correlation with sanction activity after the 1993 amendments. After the clear spike just after the amendments (perhaps due, in part, to the fears that the new Rule was too weak) the number of cases (even with the floating average) seem to level out into something close to the pre-1993 amended rule behavior. While there might be a slight increasing trend over time (i.e. between 1996 and 2005) under the new rule, attributing this change to the amendments is, at best, a stretch. Finally, comparing non-Rule 11 sanctions behavior under the two rules, represented in Table 1, elucidates an 8% increase in the combined measure, reflected by an attendant decrease in the percentage of cases (from 80% to 72%) without alternative sanctions requests.\(^{141}\)

A second way to examine what compensation effect (if any) might correlate with the 1993 amendments is to examine the types of alternative sanction activity during the pre and post amendment period. As noted above, the 1993 amendments specifically made discovery disputes,\(^{142}\) which should potentially mean that parties concerned with frivolous filings would invoke Rule 26 or Rule 37 along with Rule 11 motions depending on the type of conduct being regulated. Taking this into account, and responding to the trends elucidated by reading all the cases, as Table 2 demonstrates, non-Rule 11 sanctions were divided amongst § 1927 (providing sanctions for vexatious multiplication of litigation), § 1447 (sanctions for improper removal to federal court from state court), Rule 37 and 26 (providing sanctions for discovery abuses), sanctions pursued under courts “inherent power” to sanction parties for poor litigation conduct, and any other sanction provisions (mostly state law).\(^{143}\)

What’s most telling about the types of sanctions under both versions of Rule 11 is how much did not change. Discovery-related motions stayed at about the same rate and made up about the same proportion of non-Rule 11 sanction activity of the cases in the study. Similarly, and despite being reaffirmed between the amendments,\(^{144}\) sanctions under the court’s inherent power remained static. Two trends, however, are worth noting.

First, the significant decrease in §1927 motions relative to other cases with non-Rule 11 sanctions indicates that parties substituted away from this sanction mechanism. While there are certainly many variables that contributed to this change, one might be the doctrinal difference between Rule 11 and § 1927 over time. Specifically, and discussed more fully below, like §1927 sanctions the pre-1983 amended version of Rule 11 required subjective bad faith, which was replaced with the more permissive objective reasonableness standard now employed. The

\(^{141}\) This result, however, is not statistically significant. P-value =.1060 following t-test.

\(^{142}\) See Fed. R. Civ. P. 11(d) (“Inapplicability to Discovery.”)

\(^{143}\) Though I also tracked cases for sanctions under Rule 56(g) for filing affidavits in support of a summary judgment motion in bad faith, there were too few to warrant inclusion here; 2 cases under the 1993 version and zero under the 1983 version.

implementation of this standard into the jurisprudence of the Northern District, however, was not immediate or consistent.\textsuperscript{145} As such, we’d expect more §1927 requests to accompany Rule 11 requests during the period of uncertainty, rather than when—like the time after the 1993 amendments—the objective reasonableness standard has been entrenched, demarcating the jurisprudence (at least formally) for these two sanction types.

Second, though not reflected well in the numbers themselves the increased proportion of §1447 sanctions requests amongst both the number of overall cases (from 4% to 8%) and relative to other non-Rule 11 sanctions motions (from 21% to 28%) is palpable. Increasingly, cases involving Rule 11 activity also include disputes about subject matter jurisdiction and venue. To the extent that “forum shopping” was, and is, a worry of LARA proponents and other tort reformers, there might be some validity to their complaints. However, like the perceptions related to Rule 11, we should caution against assuming that these are the personal injury plaintiffs, or, more broadly, individual plaintiffs at all, using litigation to cripple corporate actors.\textsuperscript{146}

Table 2: Non-Rule 11 Sanction Activity by Type\textsuperscript{147}

<table>
<thead>
<tr>
<th>Type of Other Sanctions</th>
<th>1983</th>
<th>1993</th>
</tr>
</thead>
<tbody>
<tr>
<td>§1927 (overall case rate)</td>
<td>12% (n=95)</td>
<td>9% (n=137)</td>
</tr>
<tr>
<td>% of other sanction</td>
<td>58% (n=19)</td>
<td>33% (n=39)</td>
</tr>
<tr>
<td>§1447 (overall)</td>
<td>4% (n=95)</td>
<td>8% (n=137)</td>
</tr>
<tr>
<td>% of other sanction</td>
<td>21% (n=19)</td>
<td>28% (n=39)</td>
</tr>
<tr>
<td>Rule 37/26 (overall)</td>
<td>4% (n=95)</td>
<td>5% (n=137)</td>
</tr>
<tr>
<td>% of other sanction</td>
<td>21% (n=19)</td>
<td>18% (n=39)</td>
</tr>
<tr>
<td>Inherent Power (overall)</td>
<td>7% (n=95)</td>
<td>6% (n=137)</td>
</tr>
<tr>
<td>% of other sanction</td>
<td>32% (n=19)</td>
<td>21% (n=39)</td>
</tr>
<tr>
<td>Other Sanction (overall)</td>
<td>2% (n=95)</td>
<td>7% (n=137)</td>
</tr>
<tr>
<td>% of other sanction</td>
<td>16% (n=19)</td>
<td>23% (n=39)</td>
</tr>
</tbody>
</table>

Thus, though there might be a slight increase in non-Rule 11 sanctions activity in cases operating under the 1993 rule, there has not been a change that would indicate that parties feel like Rule 11 is so weakened that in order to supplement it, other sanctions motions are necessary. In terms of perception, therefore, we might view this as a reason to think that the 1993 amendments have not so weakened Rule 11’s ability to deter frivolous filings that parties overwhelmingly compensate through other motions. Importantly, the foregoing omits consideration of two important factors related to our ability to measure the substitution effect. First, a better way to measure this hypothesized effect would be to observe non-Rule 11 sanctions motions directly (i.e. has the overall number of 1447 or Rule 26 substantially increased since the 1993 amendments, and, second, because what this substitution hypothesis really

\textsuperscript{145} Compare case; case; case with.
\textsuperscript{146} Though most §1447 cases involved individuals against businesses, the §1447 sanctions were not uniformly imposed or raised against plaintiffs.
\textsuperscript{147} Based on a t-test comparing other sanctions under both versions of the rule, with a 95% confidence interval of just under .3 and a p-value of 0.08567, the only statistically significant change is between the proportion of § 1927 sanctions.
attempts to measure parties cognitive response to the changed rule looking at cases (as opposed to survey data) provides only a partial glimpse into what “strategy” litigants may employ when considering sanctions.


One of the principle difficulties with curbing “frivolous” litigation is determining exactly what frivolous means. Examining frivolity provides much needed focus to the popular discourse on excessive litigation. To clarify “frivolous” I observed two variables: (1) types of frivolity as they correlate to the strictures of Rule 11 itself, and (2) how the Court treats various instances where Rule 11 is raised but, nonetheless, sanctions are not ordered.

Rule 11 itself attempts to clarify this elusive concept by identifying four areas where an attorney must perform “an inquiry reasonable under the circumstances” to certify that the paper: (1) is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) contains claims and defenses that are “warranted by existing law or a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) includes only “allegations or other factual contentions [that] have evidentiary support”; and (4) asserts only “denials of factual contentions [that] are warranted on the evidence.” In short, Rule 11 divides frivolous filings into those filed for the wrong reason, without a basis in the law, lack a factual basis, or deny claims without warrant. As such, I analyzed Rule 11 activity along these four types and noted the cases where the frivolity was claimed but a specific basis was not mentioned or discernable.

I hypothesized two trends regarding frivolousness types; one general and one specific. First, at a fairly high level of generality, because defining “frivolous” can frequently be difficult we should expect to see reliance, where possible, on the abstract invocation of something as frivolous rather than a specification of what might make that filing or claim frivolous. In economic terms, defining what frivolous means in easy cases—which are obviously frivolous or clearly not—imposes an undue transaction cost on a decision. As such, where they can, judges and parties will avoid this cost. Second, of the specific iterations of frivolity governed by Rule 11, I anticipated most cases that are specified to allege an inadequate factual basis for their claims, as this might seem to be the easiest and most frequent type of sanctioned case.

Figure 6 illustrates my findings.

**Figure 6: Proportion and Sanction Rate by Frivolity Types**

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148 Sandy Levinson’s article title captures this sentiment exactly: *Friovolous Cases: Do Lawyers Really Know Anything at All?*. Levinson, supra note 18.

149 For coding cases by Rule 11 issue type (purpose, fact, law, or denials), I included not only cases that mentioned, for example, 11(b)3 but any that rested the sanctions discussion on the lack of factual basis.

150 This concern is echoed in Rule 9(b) which requires “pleading with particularity” factual contentions alleging fraud or mistake. Further, the notion of “sham litigation” seems to rest on a claim that because of misaligned costs (i.e. filing a complaint vs. responding to serious allegations of fraud), parties assert violations without a factual basis. While many of these cases might also be asserted under the “improper purpose” limitation of 11(b)(1), they seem more aptly placed under lacking a factual basis because, though technically on an “objective reasonableness” standard, improper purpose often involves reliance on subjective beliefs about attorney or client motivation.

151 Because there were so few 11(b)(4) denial cases, this category is excluded from Figure 6.
As expected, under both rules instances where they type of Rule 11 violation allege was unspecified made up a majority of Rule 11 activity. Of cases where the basis for Rule 11 activity was unspecified the overwhelming majority of them, under both iterations of the rule, were denials of sanctions, rather than grants. This supports the transaction cost hypothesis regarding frivolity: especially when declining to impose rule 11 sanctions, the costs of not specifying what type of frivolity has been asserted outweigh the benefits of specifying it where unnecessary. Yet, unexpectedly, instances asserting no factual basis did not substantially outnumber other specified categories. This finding is especially odd when the sanction-rate is compared for a lack of factual basis between the two rules. The over 40% decline in sanction rate between the two rules, however, is striking, and may signify the development of the notion of frivolousness over time. That is, if the 1983 amendments were spawned in part because of a worry about factually unreasonable papers being filed in court, we might see this as a shift from that notion, to a more refined view of what frivolity entails. One key problem with drawing this inference, however, is the study’s inability to control for all of the factually baseless claims that are now meted out through the PSLRA. Finally, another implication of the increased cost of specifying what type of frivolous conduct a party is worried about when raising Rule 11 is that sanction rates are much higher for specified activity than when they type of violation is unspecific.

Coming back to LARA and bridging the gap between socially perceived frivolous litigation and the activity actually taking place in the court, some lessons are discernable from the foregoing. First, there is a tangible benefit to identifying what it is that makes a particular case or instance frivolous. Courts respond better (i.e. sanction conduct more frequently) when the type of violation is specified. Perhaps, like courts, our public discourse would be enriched if speakers were more specific as to what exactly they think makes a particular claim “frivolous.” But, while a clear delineation of what frivolous means in social discourse is too lofty a goal (at specifically, for the 1983 version 85% (n=54) of unspecified cases were denials, while 95% (n=85) were unspecified under the new rule. Additionally, even removing the court’s warnings, 95% (n=75) of Rule 11 Activity under the 1993 rule was still unspecified. 152
least for this paper), increasing the specificity of frivolousness motivating proposed legislation or in-court legal disputes is an appropriate and important step for judges, practitioners, and legislators to be mindful of.

6. Deny Type

Monitoring the different types of information the Northern District cases provided when the Rule 11 was raised but sanctions were not ordered provides another way of examining frivolity. Indeed, analyzing the types of instances where the court declines to impose provides insight into whether or not there’s a legitimate basis for claiming (1) that Rule 11 should be amended to make sanctions mandatory and increase the likelihood of sanction, or (2) that the safe harbor provision is being abused.

First, the experience in the Northern District supports the claim that judges have not abused their discretion under the 1993 version of the Rule. Though most cases denying sanctions provided no specific basis for doing so, in only 4.5% of all denials did the judge use their discretion to not impose sanctions, of all cases under the 1993 rule, that percentage shrinks to an insignificant 3.8% of all cases involving Rule 11 activity. This finding of judicial propriety is bolster by the fact that the 1993 version of the rule (maybe to account for its reduced in terrorem effect) increasingly warned parties, mostly plaintiffs amending complaints, of their obligation to bear in mind Rule 11. Specifically, while warnings made up 19% of instances where sanctions were not imposed under the 1983 version, this number increased to 25% under the new rule.

Second, the safe harbor has been used effectively to protect parties from motions, and thereby its effectiveness as a procedural safeguard has worked, though determining whether its being abused by parties withdrawing papers after receiving the required notice remains an open question. Under the 1993 version of the rule nearly 17% of the denials were based upon the procedural requirements of Rule 11 not being followed. Typically, these involved instances where the Rule 11 motion was not made separate from other motions, as the new rule requires, or where the parties did not provide the 21 day notice. Strict adherence to the safe harbor, as Yablon argued above, has the effect of reducing the chilling effect that Rule 11 might have upon plaintiffs who file possibly frivolous papers, but need more time (say through discovery) to determine whether or not the factual assertions in their complaint can be proved.

CONCLUSION

In the foregoing I have argued that too often discussion of “frivolous litigation” centers on anecdotal evidence, instead of a good picture of how it is frivolity is actually treated in courts. As a manner of regulating lawyers, Rule 11 has changed the profession. Pre-filing investigations have risen under the re-vamped Rule 11 regime. Lawyers now “stop-and-think” where they might not have otherwise. Satellite litigation is no longer its own “cottage industry.” In short, the experience in the Northern District provides little basis to the proponents of the LARA, who claim that litigation abuse is now an epidemic.

The implications of this procedural debate should not be overlooked. It is well acknowledged that the in terrorem effect of sanctions may stifle the progression of the law (and some critics would err on the side of over deterrence, than permit potentially frivolous claims in

\[153\] This finding is statistically significant, based upon a t-test, with a p-value of .0001278.
court). The Advisory Committee realized this by emphasizing that the “rule is not intended to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” Thus, one of the most important subparts of Rule 11 is 11(b)(2), which explicitly exempts a “nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” Though 11(b)(2) is meant to “eliminate an ‘empty-head pure-heart’ justification for patently frivolous arguments, a litigant who has “researched the issues and found some support for its theories even in minority opinion, in law review articles, or though consultation with other attorneys” should be taken into account when considering whether a sanctionable violation exists.

As Georgene Vairo aptly notes: “There once was a time when people like J.D. Conley [of Conley v. Gibson] . . . Linda Brown [of Brown v. Board of Education], or Alan Bakke [of Bakke v. Regents of California] could feel free to seek a remedy from a federal court without fear of punishment.” All of these important people were able to challenge the law and change the course of the law. Would it have been frivolous for Linda Brown to file her suit the day after Plessy? Probably. But 10 years? It’s hard to say. The bigger point, however, is that if we rule with sanctions and potentially draconian punishments we may effectively stall legal progress and freeze law in its imperfect form. While merely “procedural” Rule 11, and its interpretation acts as a regulator on the substantive movement of the law. At a minimum, therefore, further revision to such an important and (dare I say) outcome determinative-procedural rule should not be made in haste or in response to anecdotes, but only upon deliberation with careful attention to the role that the amorphous spectrum of arguments from frivolous to colorable to meritorious plays in shaping the rights, obligations, and privileges of social actors.

Finally, though this study has focused on Rule 11, procedural rules do not work in isolation. And, in this regard, Rule 11 and Rule 8, which sets-forth the minimum requirements for a pleading to survive a dismissal motion, are closely aligned. While the 1993 Amendments provided more flexibility on the back end, Rule 8 operates as an ex ante filter. Recently, the Supreme Court ratcheted up the ex ante requirements in Ashcroft v. Iqbal, requiring that plaintiffs point to facts that, previously, they might have been able to merely allege and then prove after some discovery. Such a move changes the balance struck within the 1993 Amendments—novel claims become more difficult, and less likely to survive the inevitable 12(b)(6) motion. To some, this is great: it is another way of limiting potentially meritless litigation. On the other hand, though, Iqbal might act in a functionally equivalent manner of the 1983 Amendments to Rule 11 by deterring those with credible claims (11(b)(2) type claims) from even filing in the first place.154 Before Iqbal Rule 11 provided a way for judges and the parties to regulate abusive claims while simultaneously allowing litigation to proceed in a manner consistent with our discovery rules. A strong 12(b)(6) motion undermines both, and, in my view—which prioritizes access to courts—this would be a tragedy.

APPENDIX


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

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

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

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.
(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.
(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

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

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).
(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.
(3) **Order.** When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) **Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

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**Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

*****

3. **LARA**

109th CONGRESS
1st Session
H. R. 420

IN THE SENATE OF THE UNITED STATES
October 31, 2005

Received; read twice and referred to the Committee on the Judiciary

AN ACT

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

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

SECION 1. SHORT TITLE.

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

37
SEC. 2. ATTORNEY ACCOUNTABILITY.

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

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

(2) in paragraph (1)(A)--

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

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

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

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

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

SEC. 4. PREVENTION OF FORUM-SHOPPING.

(a) In General- Subject to subsection (b), a personal injury claim filed in State or Federal court may be filed only in the State and, within that State, in the county (or if there is no State court in the county, the nearest county where a court of general jurisdiction is located) or Federal district in which--

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

(A) resides at the time of filing; or

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

(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred;
(3) the defendant's principal place of business is located, if the defendant is a corporation; or

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

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

(c) Definitions- In this section:

(1) The term `personal injury claim'--

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

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

(C) does not include a claim against a debtor in a case pending under title 11 of the United States Code that is a personal injury tort or wrongful death claim within the meaning of section 157(b)(5) of title 28, United States Code.

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

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

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

SEC. 5. RULE OF CONSTRUCTION.

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

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

(a) Mandatory Suspension- Whenever a Federal district court determines that an attorney has violated Rule 11 of the Federal Rules of Civil Procedure, the court shall determine the number of times that the attorney has violated that rule in that Federal district court during that attorney's career. If the court determines that the number is 3 or more, the Federal district court--
(a) In General- In any Rule 11 of the Federal Rules of Civil Procedure proceeding, a court may not order that a court record not be disclosed unless the court makes a finding of fact that identifies the interest that justifies the order and determines that that interest outweighs any interest in the public health and safety that the court determines would be served by disclosing the court record.

(b) Applicability- This section applies to any record formally filed with the court, but shall not include any records subject to--

(1) the attorney-client privilege or any other privilege recognized under Federal or State law that grants the right to prevent disclosure of certain information unless the privilege has been waived; or

(2) applicable State or Federal laws that protect the confidentiality of crime victims, including victims of sexual abuse.
Appendix B: Code Book

**Case Types:** Cases were divided among 7 types: (1) “Civil Rights,” including all § 1983 claims against government officials and claims civil rights statutes like §1981 or Title VII; (2) “Contracts” cases include claims of breach of contract, breach of implied warranty, etc. (3) “Personal Injury Torts” were isolated though, mainly because of venue, the number of these was very small (1983, n=5; 1993, n=4); (4) “Other Torts” (e.g. negligent misrepresentation, wrongful death); (5) “Property” includes intellectual property claims and also fraud and RICO claims; (6) “Other” includes claims brought under state law (e.g. California’s Fair Equal Housing Act) and other federal statutes (e.g. the Clean Water Act); (7) “Securities” were removed from the “property” category because of their unique status because of the PSLRA. Private Securities Litigation Reform Act of 1995

**Party Types:** Because party types are not mutually exclusive (i.e. a fraud suit might sue both the individual broker and the company that she worked for), percentages among these classifications may exceed or fall beneath one hundred. However, where suits were clearly against one entity and an individual was named merely because of their position (e.g. naming the town Mayor in a § 1983 action against the town), the case was classified as against a government agent, and not an individual as well.

**Plaintiff Categories:** (1) individuals represented by lawyers; (2) pro se plaintiffs, proceeding *in forma pauperis* or otherwise without counsel; (3) corporations, any company large or small suing on behalf of a corporate interest; (4) government plaintiffs include any action filed where the United States is the plaintiff; (5) nonprofits includes both impact litigation firms, like the ACLU, but also unions and political parties.

**Defendant Categories:** (1) Small Businesses, this category is limited to businesses clearly residing within a state and locally owned; admittedly a tough distinction to draw cogently between big businesses. Importantly, for purposes of this study focusing the types of businesses that people *perceive* as small and those companies LARA proponents were most concerned with attempts to isolate this variable. (2) Big Businesses include any corporation of other for-profit business not in category 1. As above, (3) represents any government agent, (4) individuals are private parties with representation, while (5) nonprofits include unions and political parties.

Appendix D: Supplemental Tables

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<td>Contracts</td>
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<tr>
<td>P.I. Tort</td>
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<tr>
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<th>1993 (n=4)</th>
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*Individual* and *Nonprofit* categories are not directly comparable due to different sample sizes.