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## Mandating Rule 11 Sanctions? Here We Go Again!

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# Mandating Rule 11 Sanctions? Here We Go Again!

Edward D. Cavanagh\*

## *Abstract*

The House of Representatives has passed H.R. 720, a bill that would amend Rule 11 of the Federal Rules of Civil Procedure by re-instituting mandatory sanctions for Rule 11 violations and essentially restoring Rule 11 to its contents under the 1983 amendments to the Federal Rules of Civil Procedure. The legislation would mandate imposition of monetary sanctions and eliminate any restrictions on when a Rule 11 motion could be filed. The bill would thus scuttle the 1993 Amendments, which (1) entrusted the sanctions decision to the sound discretion of the trial court; (2) provided a 21-day safe harbor period that barred the filing of any sanctions motion until 21 days after the Rule 11 motion had been served; and (3) required that the sanction imposed be fashioned so as to deter future Rule 11 transgressions. Accordingly, H.R. 720 would deny trial courts leeway both in deciding whether to impose sanctions and in designing the sanction in a given case.

This article argues that: (1) the case for re-instituting mandatory sanctions has not been made, and the drafters of the bill point to no developments in federal civil litigation during the past 25 years that call for mandatory sanctions under Rule 11; (2) mandatory sanctions are counterproductive in that they serve to increase costs, lead to delays in resolution of cases, and create a hostile litigation environment; (3) mandatory sanctions are fundamentally unfair; and (4) any changes in Rule 11 are best made through rule-making rather than legislation. In the end, mandatory sanctions create more problems than they solve.

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*I. Introduction*

The House of Representatives has passed H.R. 720, the Litigation Abuse Reduction Act of 2017, which essentially restores Rule 11 to its content prior to the 1993 Amendments to the Federal Rules of Civil Procedure.<sup>1</sup> Specifically, the bill (1) makes sanctions mandatory where a Rule 11 violation has been found; (2) eliminates the 21-day safe harbor period that allowed an offending party to correct or withdraw a “challenged paper, claim, defense, contention, or denial,”<sup>2</sup> once a sanctions motion had been served by an adversary; and (3) mandates the imposition of monetary

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<sup>1</sup> See Lawsuit Abuse Reduction Act of 2017, H.R. 720, 115th § 16 (detailing the new Federal Rules of Civil Procedure Rule 11).

<sup>2</sup> FED. R. CIV. P. 11(c)(2).

sanctions where Rule 11 violations have been found.<sup>3</sup>

The new bill would thus eliminate the discretion that courts now possess under the 1993 Amendments in deciding whether to impose sanctions.<sup>4</sup> Equally important, by mandating the imposition of monetary sanctions,<sup>5</sup> the new bill robs the courts of any leeway in fashioning the remedy for particular Rule 11 violations. Under both the 1983 and 1993 versions of Rule 11, courts had broad discretion in determining the appropriate penalties for a Rule 11 transgression.<sup>6</sup> The 1983 Amendments did not identify compensation as an underlying goal of the sanction process, but fee-shifting quickly became the sanction of choice in Rule 11 cases.<sup>7</sup>

The 1993 (and current) version of Rule 11 does authorize fee-shifting as a sanction.<sup>8</sup> The current rule makes clear, however, that deterrence—not compensation—is the end goal of the sanctioning process and that any sanctions imposed under Rule 11 “must be limited to what suffices to *deter* the repetition of the conduct or comparable conduct by others similarly situated.”<sup>9</sup> To that end, the current rule also specifically authorizes non-monetary sanctions, as well

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<sup>3</sup> See Lawsuit Abuse Act of 2017 (strengthening the sanction process for Rule 11 violations).

<sup>4</sup> Compare Lawsuit Abuse Act of 2017 (mandating sanctions), with Fed. R. Civ. Pro. 11(c)(1), (4) (“[T]he court *may* impose an appropriate sanction . . . . The sanction may include nonmonetary directives; an order to pay a penalty into court; or . . . an order directing payment . . . of the reasonable attorney’s fees and other expenses directly resulting from the violation.” (emphasis added)).

<sup>5</sup> Lawsuit Abuse Act of 2017.

<sup>6</sup> See FED. R. CIV. P. 11 advisory committee’s notes to 1983 amendments (stating that “the court should have the discretion to impose sanctions”).

<sup>7</sup> See N.Y. State Bar Ass’n., *Report of the Special Committee to Consider Sanctions for Frivolous Litigation in State Courts*, 18 FORDHAM URB. L.J. 1, 5 (1990) (recommending fee-shifting as the appropriate sanction of choice).

<sup>8</sup> See Fed. R. Civ. P. 11(c)(2), (4) (allowing shifting of reasonable attorney’s fees).

<sup>9</sup> Fed. R. Civ. P. 11(c)(4) (emphasis added).

as monetary penalties payable to the court.<sup>10</sup> In mandating monetary sanctions as compensation to a party aggrieved by a Rule 11 violation, H.R. 720 breaks new ground and goes far beyond the 1983 version of Rule 11 that it purports to restore.

### I. *The Case Against H.R. 720*

The re-imposition of mandatory sanctions is a bad idea and should be rejected for the following reasons: (1) there is no demonstrated need to turn back the clock and re-adopt mandating sanctions;<sup>11</sup> (2) mandatory sanctions are counterproductive and harmful to the litigation process;<sup>12</sup> (3) mandatory sanctions are fundamentally unfair and would create the same problems that the 1993 Amendments sought to resolve;<sup>13</sup> and (4) mandatory sanctions undermine the role of the judiciary in creating rules of practice and procedure in the federal courts pursuant to the Rules Enabling Act.<sup>14</sup>

#### A. *No Need for Mandatory Sanctions*

Proponents of H.R. 720 have not made the case for re-institution of mandatory sanctions. The current discretionary standard for Rule 11 sanctions has been in place for nearly a

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<sup>10.</sup> *Id.*

<sup>11.</sup> *See infra* notes 15–37 and accompanying text (discussing the lack of demonstrable need for a change to the current Rule 11 regime).

<sup>12.</sup> *See infra* notes 38–44 and accompanying text (explaining the social costs and harm to the litigation process that would arise as a result of the proposed amendments to Rule 11).

<sup>13.</sup> *See infra* notes 45–57 and accompanying text (describing how the amendment would create the same problems that the 1993 amendment tried to resolve and continues to resolve).

<sup>14.</sup> *See infra* notes 58–63 and accompanying text (discussing the lack of unity between the proposed amendments and the text and goals of the Enabling Act).

quarter-century.<sup>15</sup> Yet, neither the bill nor its accompanying House Report cites any developments in the federal civil justice system since 1993 that would warrant a shift from the present standard.<sup>16</sup> Nor does the House Report cite any empirical studies suggesting that frivolous litigation is on the rise in the federal courts in recent years.<sup>17</sup> Indeed, the record support for H.R. 720 is so thin as to be almost invisible.

Even assuming that frivolous litigation has been on the uptick since 1993, there is no factual basis for the assumption that mandatory sanctions will curb the filing of baseless lawsuits. The more likely scenario is that introduction of mandatory sanctions will trigger widespread satellite litigation that will increase the cost of litigation, delay the ultimate resolution of cases, and thereby have precisely the opposite result than intended by the legislation.<sup>18</sup> As the Judicial Conference of the United States has observed:

The facts do not support any assumption that mandatory sanctions deter frivolous filings. A decade of experience with the 1983 mandatory sanctions demonstrated that it failed to provide meaningful relief from the litigation behavior it was meant to address, and instead generated wasteful satellite litigation that had little to do with the merits of cases. The 1983 version of Rule 11 required sanctions for every violation of the rule, and quickly became a tool of abuse. Aggressive filings of Rule 11 sanctions motions required expenditure of

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<sup>15</sup>. Rule 11 as it currently stands has remained as written since the 1993 amendments. *See* FED. R. CIV. P. 11 advisory committee's notes to the 1993 amendments (providing the language for the current rule).

<sup>16</sup>. *See* Lawsuit Reduction Act of 2017, H.R. 720, 115th Cong. § 16 (making no mention of developments that would warrant a change to Rule 11 as previously stated).

<sup>17</sup>. *See id.* (making not reference to a rise in frivolous litigations).

<sup>18</sup>. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., LETTER TO BOB GOODLATTE 1-4 (2015), <https://www.afj.org/wp-content/uploads/2015/04/Judicial-Conference-Letter.pdf> (objecting to the 2015 proposed amendments of H.R. 758).

tremendous resources on Rule 11 battles having nothing to do with the merits of the case and everything to do with strategic gamesmanship. Many Rule 11 motions in turn triggered counter-motions seeking Rule 11 sanctions as a penalty for filing of the original Rule 11 motion.<sup>19</sup>

Similarly, the American Bar Association has challenged the assumption that mandatory sanctions would deter baseless litigation, noting that “it is more likely that problems have abated because Rule 11’s safe harbor provides an incentive to withdraw frivolous filings at the outset of litigation.”<sup>20</sup>

The case for mandatory sanctions set forth in the House Report is unpersuasive. The “facts” relied on are ancient; the most recent “data” are from 2005 and most of the cited materials are over 20 years old.<sup>21</sup> Some is anecdotal; none addresses the federal civil justice system as it functions today.<sup>22</sup> The House Report also cites to studies describing judges attitudes towards sanctions rather than the efficacy of mandatory sanctions.<sup>23</sup> Heavy reliance is placed on Justice Scalia’s dissent at the time the Supreme Court promulgated amended Rule 11 in 1993.<sup>24</sup>

Essentially, Justice Scalia argued two points. First, he asserted that federal civil justice system had been functioning effectively under a mandatory sanctions regime and that therefore no change was needed.<sup>25</sup> Further, he asserted that

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<sup>19.</sup> *Id.* at 1–2.

<sup>20.</sup> See SUSMAN, ABA URGES YOU TO OPPOSE PASSAGE OF H.R. 720, THE LAWSUIT ABUSE REDUCTION ACT 2 (2017), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/HR%20720\\_March%202017.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/HR%20720_March%202017.authcheckdam.pdf) (objecting to H.R. 720).

<sup>21.</sup> See H.R. REP. NO. 115-16, at 1–3 (2017) (explaining the need for H.R. 720).

<sup>22.</sup> See *id.* (providing outdated data).

<sup>23.</sup> See *id.* at 3 (“In 1990 . . . an overwhelming majority of Federal judges believed that Rule 11 did not impede the development of the law (95%) . . .”).

<sup>24.</sup> See *id.* at 4 (citing J. Scalia’s “strongly worded dissent on the Rule 11 changes”).

<sup>25.</sup> See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, *reprinted in* 146 F.R.D. 401, 509 (1993) (“I

mandatory sanctions under Rule 11 had successfully deterred baseless litigation without creating significant satellite litigation.<sup>26</sup> He also cited a Federal Judicial Center study that had concluded that “80 percent of district judges believe that Rule 11 has had an overall positive effect and should be retained in its present form, 95 percent believe the rule has not impeded development of the law, and about 75 percent said the benefits justify the expenditure of judicial time.”<sup>27</sup> Of course, how federal judges viewed the impact and efficacy of mandatory sanctions in 1993 is largely irrelevant as to whether mandatory sanctions are needed in 2017. Moreover, Justice Scalia’s view on the impact of mandatory sanctions is at odds with the findings of the Advisory Committee on Civil Rules that led to the abnegation of mandatory sanctions.<sup>28</sup>

Second, Justice Scalia argued that the 1993 Amendments would again make Rule 11 a paper tiger as it was prior in 1983, urging that the amendments would make Rule 11 “toothless, by allowing judges to dispense with sanctions, by disfavoring compensation for litigation expenses and by providing 21-day safe harbor within which, if the party accused of a frivolous filing withdraws the filing, he is entitled to escape with no sanctions at all.”<sup>29</sup> The second argument, like the first, is unavailing. First, introduction of discretionary sanctions does not eliminate the courts’ power to address baseless litigation; it simply provides district judges flexibility to treat alleged Rule 11 transgressions

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would not have registered this dissent if there were convincing indication that the current Rule 11 regime is ineffective, or encourages excessive satellite litigation. But there appears to be general agreement, reflected in a recent report of the advisory committee itself, that Rule 11, as written, basically works.”) (Scalia, J., dissenting in part).

<sup>26.</sup> *See id.* at 509–10 (“[T]he overwhelming approval of the Rule by the federal district judges who daily grapple with the problem of litigation abuse is enough to persuade me that it should not be gutted as the proposed revision suggests.”).

<sup>27.</sup> *Id.* at 509.

<sup>28.</sup> *See id.* at 523 (“The Advisory Committee is unanimous that, to the extent these changes may be viewed as ‘weakening’ the rule, they are nevertheless desirable.”).

<sup>29.</sup> *Id.* at 507–08.



on a case by case basis.<sup>30</sup> Second, if the real problem is that judges are willing to tolerate frivolous lawsuits, then sanctions, whether mandatory or discretionary, will have little real-world effect on baseless litigation.

Third, deterrence of baseless litigation—not compensation to victims—is the proper goal of Rule 11 sanctions.<sup>31</sup> Scalia’s view that compensation trumps deterrence—and H.R. 720’s language mandating monetary sanctions—create perverse incentives for alleged victims of frivolous lawsuits to extend actions and run up large legal bills (which offending party would be forced to pay), instead of moving to dismiss the offending claim at the earliest opportunity.<sup>32</sup>

Fourth, the 21-day safe harbor provision is a mechanism that affords an offending party one last opportunity to stop and think before it decides to move the litigation forward and perhaps thereby obviating the need for judicial intervention.<sup>33</sup> The safe harbor is not, as Justice Scalia suggests, an open invitation to engage in abuse of process.<sup>34</sup> Indeed, the American Bar Association has reached an opposite conclusion, “it is more likely that problems have abated because Rule 11’s safe harbor provides

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<sup>30.</sup> See Lawsuit Abuse Reduction Act of 2017, H.R. 720, 115th Cong. § 16 (granting judges discretion in Rule 11 sanctions).

<sup>31.</sup> See *supra* note 9 and accompanying text (stating that deterrence is the goal of Rule 11 sanctions).

<sup>32.</sup> See SUSMAN, *supra* note 20 (“[P]ast experience strongly suggests that the proposed changes would encourage new litigation over sanction motions, thereby increasing, not reducing, court costs and delays. This is a costly and completely avoidable outcome.”)

<sup>33.</sup> See FED. R. CIV. P. 11 advisory committee’s notes to 1983 amendments (“Under the former rule, parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11; under the revision, the timely withdrawal of a contention will protect a party against a motion for sanctions.”).

<sup>34.</sup> See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, *reprinted in* 146 F.R.D. 401, 508 (1993) (“To take the last first: In my view, those who file frivolous suits and pleadings should have no ‘safe harbor.’ The Rules should be solicitous of the abused (the courts and the opposing party), and not of the abuser.”).

an incentive to withdraw frivolous filings at the outset of litigation.”<sup>35</sup>

Fifth, perhaps the strongest reason for rejecting Justice Scalia’s position is that the parade of horrors that he envisioned in the wake of the adoption of the 1993 Amendments simply has not materialized. Sanctions filings have declined significantly compared to pre-1993 levels but without any discernible trend in the filing of baseless lawsuits.<sup>36</sup> This is not to say that frivolous lawsuits are never filed. Rather, the post-1993 sanctions experience clearly demonstrates that discretionary sanctions do not aid and abet baseless litigation.<sup>37</sup>

### *B. Mandatory Sanctions Are Counterproductive*

Mandatory sanctions come at a cost, and that cost outweighs any perceived benefits.<sup>38</sup>

#### *1. Litigation Costs*

Mandatory sanctions will increase—not decrease—litigation costs. The decade of experience under the 1983 version of Rule 11 amply demonstrates that mandatory sanctions promote satellite litigation on the issue of whether Rule 11 has been violated.<sup>39</sup> Rule 11 motions take time and cost money to prepare, litigate, and adjudicate. These motions thus add to the overall costs of litigation and delay the resolution of a given controversy on the

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<sup>35</sup>. SUSMAN, *supra* note 20, at 2.

<sup>36</sup>. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., *supra* note 18, at 3 (“The amended Rule has produced a marked decline in Rule 11 satellite litigation without any noticeable increase in frivolous filings.”).

<sup>37</sup>. See *id.* at 3–4 (detailing a list of findings from a survey of the Federal Judicial Center that demonstrates that discretionary sanctions are, generally, working and desirable).

<sup>38</sup>. See *infra* notes 39–44 (demonstrating various social costs to the proposed amendments to Rule 11).

<sup>39</sup>. See *id.* at 3 (“The Advisory Committee concluded that Rule 11’s cost-shifting provision created an incentive for too many unnecessary Rule 11 motions.”)

merits.<sup>40</sup> Rule 11 motions also deflect the court's attention from the substantive law issues before it.

## 2. Toxicity of Rule 11 Motions

Rule 11 motions interject an element of toxicity into judicial litigation that tends to undermine both collegiality and respect for the court.<sup>41</sup> Once a Rule 11 motion is made, incentives among adversaries to cooperate, or even behave civilly, diminish significantly; that, in itself, can impede the progress of the litigation.<sup>42</sup> Parties may cease communication directly with each other and speak through the court. Once this happens, parties dig in and meaningful settlement discussions become impossible.<sup>43</sup> Moreover, sanctions motions undermine the court's essential role as a neutral umpire.<sup>44</sup> No matter how the court rules on a sanctions motion, it will have offended one or both parties.

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<sup>40.</sup> See SUSMAN, *supra* note 20, at 1 (By enacting H.R. 720, "Congress incurs the substantial risk that the proposed changes will harm litigants by encouraging additional litigation and increasing court costs and delays.").

<sup>41.</sup> See Sam Glover, *Dealing with Rule 11 Threats and Motions*, Lawyerist.com, <https://lawyerist.com/66663/dealing-with-rule-11-threats-and-motions/> (last visited May 15, 2017) (discussing the issues surrounding Rule 11 threats and motions) (on file with the Washington and Lee Law Review).

<sup>42.</sup> See generally *id.*

<sup>43.</sup> See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, *reprinted in* 146 F.R.D. 401, 592 (1993) ("Parties settling a case should not be subsequently faced with an unexpected order from the court leading to monetary sanctions that might have affected their willingness to settle or voluntarily dismiss a case.").

<sup>44.</sup> See 46 AM. JUR. 2D *Judges* § 129 (2009) ("There is a strong presumption that judges are impartial participants in the legal process . . . . The law presumes that a judge is unbiased and unprejudiced.").

*C. H.R. 720 Would Create The Same Problems That Arose Under The 1983 Version Of Rule 11*

The House Bill would raise—and not address—the very same problems that led the Supreme Court to eliminate mandatory sanctions through the 1993 Amendments to Rule 11.<sup>45</sup>

*1. Perverse Incentives*

By mandating monetary penalties for Rule 11 violations through fee shifting, H.R. 720 would re-introduce the profit motive into Rule 11 proceedings.<sup>46</sup> In a perfect world, defense counsel, faced with a lawsuit that it deems baseless, would immediately contact plaintiff's counsel, raise the Rule 11 concerns, and seek consensual dismissal of the action. Under H.R. 720, however, defense counsel is strongly encouraged to seek its attorney's fees as a remedy for a Rule 11 infraction.<sup>47</sup> Rather than move for immediate dismissal of the purportedly baseless claim, defense counsel has a strong incentive to invest substantial time and effort in defending the meritless action by conducting extensive (and costly) discovery eventually leading to a summary judgment motion.<sup>48</sup> That additional work, leads to higher legal fees and hence stiffer sanctions.

To eliminate this strategic behavior, the 1993 amendments made clear that deterrence—not compensation—was the goal of

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<sup>45.</sup> See *infra* notes 46–57 and accompanying text (discussing how the amendment would create the same problems that the 1993 amendment tried to resolve and continues to resolve).

<sup>46.</sup> See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, *reprinted in* 146 F.R.D. 401, 592 (1993) (discussing the changes of the 1993 amendment, which is designed to reduce “fee-shifting”).

<sup>47.</sup> See *id.* at 524–25 (“[For] the expenses incurred in presenting or opposing a Rule 11 motion, the published draft provides the court with discretion to award fees to the prevailing party: this is needed to discourage non-meritorious Rule 11 motions without creating a disincentive to the presentation of motions that should be filed.”)

<sup>48.</sup> See *supra* note 32 and accompanying text (predicting increase in Rule 11 motions and costs and delays associated with them).

the sanctions process.<sup>49</sup> Although the 1993 Amendments still permit fee-shifting, that practice is discouraged.<sup>50</sup> More importantly, H.R. 720, by mandating monetary sanctions, goes way beyond restoring Rule 11 to its pre-1993 status. The 1983 version of Rule 11 was silent on the issue of monetary sanctions and, as noted, was unclear as to whether compensation should even be a goal of the sanctions process.<sup>51</sup> H.R. 720 is thus a marked departure from Rule 11 as promulgated in 1983, which left remedies for Rule 11 violations to the sound discretion of the court.

## 2. *Chilling Meritorious Litigation*

Another lesson of history lost on the drafters of H.R. 720 is that mandatory sanctions are likely to over deter to the point of chilling meritorious lawsuits.<sup>52</sup> Although Rule 11 is both transsubstantive and party neutral, some studies on the implementation of the 1983 amendments suggested that sanctions motions may well be deterring legitimate civil rights actions.<sup>53</sup> Mandatory monetary sanctions would deter lawsuits that advocate novel positions, at odds with existing law. There is little reason to believe that this pattern will not re-emerge if H.R. 720 becomes law.

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<sup>49.</sup> See *supra* note 9 and accompanying text (stating that deterrence is the primary aim of Rule 11 sanctions).

<sup>50.</sup> SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, *reprinted in* 146 F.R.D. 401, 592 (1993).

<sup>51.</sup> See *supra* note 6 and accompanying text (discussing the role of discretion in the issuing of sanctions.)

<sup>52.</sup> See N.Y. State Bar Ass'n, *supra* note 7, at 7–8 (expressing concern about a chilling effect in access to the courts without actually solving the problem of frivolity in filings).

<sup>53.</sup> See, e.g., Stephen B. Burbank, *The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11: An Update*, 19 SETON HALL L. REV. 511, 521–23 (1989) (discussing the disparate effect on civil rights plaintiffs arising from Rule 11 motions).

### 3. *Will Mandatory Sanctions Be Uniformly Administered?*

In theory, mandating sanctions would promote uniformity of Rule 11 enforcement standards and lessen uncertainty that arguably exists in a discretionary regime.<sup>54</sup> Again, history suggests the opposite conclusion. Under the 1983 version of Rule 11, sanctions were not uniformly implemented. Some judges were outspoken critics of Rule 11 and refused to impose sanctions.<sup>55</sup> Others were “sanctioning judges” who were willing, if not eager, to impose Rule 11 sanctions.<sup>56</sup> Thus, the decision as to whether or not to impose sanctions would turn on the attitude of individual judges toward sanctions rather than the wording of Rule 11 itself.<sup>57</sup> Again, there is no guarantee that amending Rule 11 will change the attitudes of judges toward mandatory sanctions.

More importantly, piling mandatory monetary penalties on top of mandatory sanctions robs judges of flexibility to address problems on a case by case basis. The cookie cutter approach of H.R. 720 has a surface appearance of fairness but may produce unduly harsh results in individual cases. Moreover, H.R. 720 may encourage bully tactics by deep-pocket defendants against impecunious plaintiffs.

#### *D. Case Law Developments Make Mandatory Sanctions Unnecessary*

Judicial decisions since the 1993 Amendments make mandatory sanctions unnecessary. In *Twombly*,<sup>58</sup> the Supreme Court raised the bar for pleadings in federal court and made it easier for courts to toss cases at the motion to dismiss stage. The Court in *Twombly* recognized the burden imposed on litigants by

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<sup>54.</sup> See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, reprinted in 146 F.R.D. 401, 508 (1993) (explaining the issues with the discretionary powers when granted to judges).

<sup>55.</sup> See N.Y. State Bar Ass’n, *supra* note 7, at 8 (describing the concerns surrounding arbitrary punishment).

<sup>56.</sup> See *id.* (discussing “sanctioning judges”).

<sup>57.</sup> See *id.* (detailing the type of judges who impose sanctions).

<sup>58.</sup> Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 566 (2007)

costly discovery.<sup>59</sup> The court urged district judges to be sensitive to the high cost of discovery and assigned district judges the role of gatekeeper to assure the only plausible claims are permitted to move onto the discovery process.<sup>60</sup> Although *Twombly* was controversial when decided in 2007, both courts and litigants have become comfortable with its holding.<sup>61</sup> Courts are no longer hesitant to dismiss claims at the pleading stage.<sup>62</sup> In the post-*Twombly* world, the notion that baseless cases are infecting federal dockets throughout the country and forcing defendants to incur needless and costly discovery is without factual support.<sup>63</sup>

*E. H.R. 720 is An Unwise Intrusion By Congress*

Unquestionably, Congress has the power to create rules of practice and procedure in the federal courts. Under the Rules Enabling Act,<sup>64</sup> Congress shares this power with the Supreme Court, which may promulgate rules of practice and procedure in the federal courts, subject to Congressional veto. Rule 11 in all of its iterations was adopted by the Supreme Court pursuant to the rulemaking process.<sup>65</sup> That fact does not bar Congress from acting on Rule 11, but that course would be imprudent.

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<sup>59.</sup> See *id.* at 557–58 (recognizing the extreme costs of litigation generally).

<sup>60.</sup> See *id.* at 558–59 (recognizing the need to stop frivolous cases before discovery).

<sup>61.</sup> See William H.J. Hubbard, *The Effects of Twombly and Iqbal* (U. of Chicago, Public Law Working Paper 591, 2017) (“[T]here is evidence that lawyers changed their pleading and motion practice in the wake of those cases.”).

<sup>62.</sup> See generally *id.* (showing the adjustments made to *Twombly* in the legal world since the decision).

<sup>63.</sup> See *supra* notes 15–37 and accompanying text (discussing the deficiencies in the House Report reasoning for the need for change to Rule 11).

<sup>64.</sup> 28 U.S.C. § 2072 (2012).

<sup>65.</sup> See SUPREME COURT OF THE U.S., AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURES AND FORMS, reprinted in 146 F.R.D. 401, 405 (1993) (“[The Court is] authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.”).

First, Rule 11 is a vehicle for policing the conduct of attorneys and their clients in federal court on a day-to-day basis.<sup>66</sup> This is no small task. Judges are far better situated than legislators to determine on a daily basis whether or not litigants are prosecuting frivolous claims or asserting baseless defenses designed to frustrate the fundamental goals of the Federal Rules “to secure the just, speedy and inexpensive determination” of claims and defenses in federal court.<sup>67</sup> In particular, judges are best positioned to understand all the nuances of litigation and to decide on a case-by-case basis whether attorneys or their clients have violated Rule 11.<sup>68</sup> Accordingly, Congress should leave both the substance of Rule 11 and its enforcement to the courts.

Second, H.R. 720, in imposing mandatory monetary penalties, goes far beyond its 1983 predecessor.<sup>69</sup> This more ambitious rule seems aimed not only at limiting baseless litigation but also at limiting litigation generally. Rather than implement Rule 11 as a vehicle for litigation reform, Congress might identify the areas of substantive law in need of reform and address this area specifically as it has done in the securities area. Mandatory sanctions on top of such targeted reform efforts are legislative overkill.

## II. Conclusion

The Senate should not act on this bill. There is no demonstrated need for mandatory sanctions, and prior experience in a mandatory sanctions regime has demonstrated that mandatory sanctions create more problems than they solve.

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<sup>66.</sup> *See id.* (“These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty . . . They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”)

<sup>67.</sup> FED. R. CIV. P. 1

<sup>68.</sup> *See* WILLIAM G. YOUNG, JOHN R. POLLETS, & CHRISTOPHER POREDA, 19 MASS. PRAC., EVIDENCE § 102.1 (3d ed.) (“In civil litigation . . . the judge is thrust into the ongoing discussions between the parties and obtains a great deal of his information about the case from his exercise of the mediating role.”).

<sup>69.</sup> *See supra* notes 6 and 53 and accompanying text (discussing the nature of the proposed amendments to Rule 11 in contrast with Rule 11 as it existed prior to 1993).



