Once again, the U.S. House of Representatives is targeting frivolous lawsuits. But the bill headed to the House floor is so unnecessary, so unconstitutional, and so... well, frivolous that its sponsors should be grateful there’s no equivalent of Rule 11 for Congress.

In May, the House Judiciary Committee began its markup on H.R. 420, the Lawsuit Abuse Reduction Act. On May 25, LARA passed the Judiciary Committee and now is headed to the House floor for consideration. It’s a stripped-down reincarnation of a bill that swept through the House last fall only to perish in Senate committee.

Like last year’s model, LARA is a full-frontal assault on the Federal Rules of Civil Procedure and another attempt to undermine the rule-making authority of the judiciary.

The stated purpose of LARA is to prevent the filing of frivolous lawsuits. According to a press release issued by the bill’s chief sponsor, Rep. Lamar Smith (R-Texas): “The filing of frivolous suits by attorneys across the nation has made a mockery of our legal system. Instead of concentrating on real cases that need timely rulings, our courts today are forced to wade knee-deep in a pool of false claims and unscrupulous plaintiffs. These suits have increased insurance premiums and raised health care costs.”

It’s this perception that’s meritless, not the lawsuits. While rising insurance and health care costs may be real, the link to litigation isn’t. The two most recent empirical studies—one from Texas, the other from Illinois—reach the same conclusion: The likely cause of insurance premium spikes is insurance market dynamics, not litigation. In the end, “frivolous litigation” is simply the label that Smith and others give to types of lawsuits they don’t like.

The most compelling evidence of the absence of a frivolous litigation problem doesn’t come from academic research, but from the federal judiciary itself.

The Federal Judicial Center, the research arm of the federal courts, recently surveyed a representative sample of federal judges. On the issue of frequency of groundless litigation, 85 percent responded that it was either a small problem, a very small problem, or no problem at all. Those who deal with these claims on a daily basis barely get their shoes wet, much less “wade knee-deep in a pool of false claims.”

AN UNWANTED SOLUTION

Despite the absence of a real problem, LARA proposes a solution sure to hamstring the federal judiciary by tinkering with the chief tool currently used to control such claims—Rule 11 sanctions. The bill unwisely eliminates judicial discretion and transforms permissive sanctions into mandatory ones. It removes the “safe harbor” provision that currently allows parties to avoid sanctions if they withdraw the challenged filing within 21 days of notice. Further, LARA transforms the very nature of sanctions from deterrence to compensation. Finally, it expands the reach of Rule 11 to cover discovery disputes.

What makes LARA so astounding is that these provisions were already in place for a decade and subsequently rejected because of their negative effects. For nearly half a century, Rule 11 was seldom used. Then, in 1983, it was amended to encourage courts to use their power to sanction. In Rule 11’s 1983 incarnation, sanctions became mandatory after a finding of violation. Rule 11 was amended to encourage courts to use their power to sanction. In Rule 11’s 1983 incarnation, sanctions became mandatory after a finding of violation. Rule 11 was broadened to apply to discovery motions. Instead of being paid to the court, monetary sanctions were commonly paid to the other party, creating a litigation incentive. Rule 11 was dormant no more.

It didn’t take long for Rule 11 to become a tool for abuse. The problems under the 1983 version are well-documented. Litigation costs increased as Rule 11 motion practice took on a life of its own. Fear of mandatory sanctions created a chilling effect that dissuaded parties from raising even meritorious claims and defenses.
As post-1983 research documents, the burden of the rule fell disproportionately on plaintiffs, especially civil rights plaintiffs such as those alleging discrimination or police brutality. Although the cause of this is disputed, the reality of the increased likelihood of sanction deterred civil rights plaintiffs from raising novel arguments for fear of sanction.

After a thorough review using the rulemaking process, Rule 11 was amended in 1993 to include many of the beneficial provisions that LARA now seeks to strip away. The 1993 amendments gave the District Court the flexibility to determine whether sanctions were appropriate and what form they should take. Deterrence became the stated purpose of the rule, instead of compensation; monetary sanctions generally were to be paid to the court. Discovery motions, already subject to sanctions, were removed from Rule 11 altogether. Explicit provision was made for litigants to have notice and an opportunity to respond before sanctions were imposed. The beneficial effects of these changes have been to reduce Rule 11 litigation and equalize the burden of the rule on plaintiffs and defendants.

LARA will undo these valuable provisions with predictable results. Rule 11 litigation will increase. The mandatory nature of sanctions, the explicit provision for compensation to parties, and the lure of attorney fees will create a financial incentive to litigate the applicability of sanctions.

By extending coverage to discovery, the bill would result in new rounds of motion practice over whether Rule 11, discovery sanctions under Rule 26(g) and Rule 37, or both should apply. And the chilling effect would return because of the combination of mandatory sanctions with the abolition of the safe-harbor provision. The harm would, of course, fall disproportionately on plaintiffs.

Congress should reject these back-to-the-future amendments to Rule 11. Again, listening to our federal judges is wise. The Federal Judicial Center survey reveals that 87 percent of the federal judiciary favors the current version of Rule 11; the reforms proposed by LARA are preferred by only 4 percent. Nothing is more compelling.

MISERY DOESN'T NEED COMPANY

LARA’s meddling with the federal courts is bad enough, but it also purports to apply the newly revised Federal Rule 11 to state cases. Under LARA, in “any civil action in State court,” state court judges must determine within 30 days “whether the action affects interstate commerce.” If it does, Federal Rule 11 applies. Who knew that state courts were being flooded with frivolous interstate commerce cases?

On its face, this provision is unconstitutional. While Congress has the power to regulate interstate commerce under Article I, Section 8, it has no constitutional authority to pre-empt state rules of civil procedure. There is simply no constitutional basis to require the state court to hold the initial hearing. Instead, LARA is a gross encroachment on federalism and state control over the states’ own judicial systems.

Even if you could overlook the dubious constitutionality, the extension to state cases is still a bad idea. It would yield more litigation and confusion. Because of the broad application to “any civil action,” state court judges could be inundated with such mandatory requests for determination.

And how are they to decide whether a case “affects interstate commerce”? The bill provides slim guidance. The court is directed to assess the costs to the interstate economy—including job loss. What quantum of job loss is necessary? How are other factors to be weighed in the new interstate commerce equation? Is the determination to be based on the pleadings alone? Is discovery stayed or encouraged on the motion? It is easy to envision the judicial confusion—and litigant uncertainty—generated by this test alone.

AN AFFRONT TO FEDERALISM

LARA doesn’t stop with the unconstitutional extension of Rule 11 to state court actions; it tacks on a final provision targeting supposed forum shopping. The bill singles out personal injury claims—wherever filed—and applies a new venue provision to them.

If a party alleges that the injury or circumstances giving rise to the injury claim occurred in more than one jurisdiction, the court then engages in a determination of the “most appropriate” forum. LARA provides absolutely no guidance on how this determination is to be made. It is clear on the remedy: “If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim.”

This provision is subject to an even more compelling constitutional challenge. While at least the penumbra of interstate commerce exists with the Rule 11 extension, the venue provision has absolutely no constitutional anchor. Quite simply, Congress does not have the authority under the Constitution to impose a venue statute on personal injury litigants who file their claims in state court. It is an egregious affront to federalism if an automobile accident in Ohio involving Ohio residents which includes a claim of back injury suddenly is subject to a federal statutory venue mandate.

A RULE 11 FOR CONGRESS?

By targeting a nonexistent problem with an unwanted solution, LARA is the archetype of frivolous legislation, the congressional equivalent of the abuses that Rule 11 was meant to prevent in the courts. The problem, however, goes beyond its effects on court procedure. LARA reflects a growing congressional willingness to usurp the self-governance of the federal judiciary.

In 1934, Congress passed the Rules Enabling Act allowing the federal courts essentially to set rules for themselves. This statute ensures that Federal Rules take effect only after an extensive deliberative process involving a Rules Advisory Committee, the public, the Judicial Conference, the Supreme Court, and, finally, Congress. The Federal Rules provide for a uniform procedure in all civil actions—one that is flexible, simple, clear, and efficient.

LARA is a congressional bypass of the Rules Enabling Act. By eschewing the formal rule-making process, this bill escapes scrutiny by the bench, the bar, and the public. A congressional hearing on the bill, like the one on May 25, is useful. But it is not a substitute for the type of deliberate consideration and review that the rule-making process of the Rules Enabling Act provides.

As the late Charles Alan Wright, a leading scholar on civil procedure and the federal courts, once wrote: “It cannot be doubted that legislative regulation [of the courts with procedural rules] is less satisfactory than regulation by court-made rules.” His words still ring true today.

Christopher M. Fairman is an associate professor of law at the Ohio State University Moritz College of Law. He specializes in issues of civil procedure, legal ethics, and their intersection.