ROBERT E. KOHN

U.S. Judicial Conference Against Legislation to Encourage Sanctions Motions

DEBATE IS PENDING over pending legislation that would encourage and promote motions for sanctions in federal courts. A bill called the Lawsuit Abuse Reduction Act of 2011 (H.R. 966) was reported from the House Judiciary Committee in July 2011.

As I write this article in mid-November, the bill is expected to be voted on by the House of Representatives before the end of 2011; a related bill in the Senate (S. 533) is not expected to pass during this Congress. Both bills would repeal parts of Rule 11 of the Federal Rules of Civil Procedure that have been in force since 1993, when the Judicial Conference of the United States proposed the current provisions and the Supreme Court approved them.

Such legislation would return federal courts to the "Rambo" style of sanctions motion practice that characterized the previous unsuccessful experiment in regulating litigation conduct primarily through Rule 11 sanctions rather than through sound judicial supervision. That experiment began in 1983 and ended with the adoption of the current 1993 provisions, and we already know the results of that experiment. Key committees of the Judicial Conference oppose the legislation and repeating that failed experiment.

Federal judges oppose returning to the pre-1993 version of Rule 11. Under every version of the rule, judges have possessed authority to impose sanctions against a litigant or a lawyer who files a complaint, an answer, or a motion without a reasonable factual investigation or an adequate legal basis. But before the 1993 revision (which the bills seek to repeal), Rule 11 was itself a tool for the court system that could be "abused by resourceful lawyers"—according to a letter dated March 14, 2011, from the Committee on the Rules of Practice and Procedure and also the Advisory Committee on the Federal Rules of Civil Procedure, the two committees of the Judicial Conference with responsibility for amending the rules. Under the pre-1993 version of the rule, the letter explains, "[a]n entire 'cottage industry' developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims." As a result, "Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion."

The bills now pending in the House and Senate would bring a return to that wasteful era in two ways. First, the proposed legislation would eliminate a provision adopted in 1993 that currently allows a party to withdraw a challenged pleading or motion on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. *See* Fed. R. Civ. P. 11(c)(2). Thus, under the bills, there would no longer be a safe harbor provision that allows an adverse party to withdraw or modify a challenged pleading or other paper before a sanctions motion can be filed or otherwise presented to the court.

Second, the pending bills would revoke a major part of judicial discretion over the award of sanctions under Rule 11. Before 1983 and after 1993 (when the current version of Rule 11 became effective), federal judges have been able to exercise their discretion over choosing the kinds of different sanctions that fit each particular case. But the pending proposals would specify that, in addition to any other sanctions the court might impose, the court *must* order the offending party or attorney "to pay to the [other] party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs." In doing so, the bill would repeal the current provision in Rule 11(c)(2) that fees and costs "may" be awarded "if warranted."

Each of those proposals would return our courts—and litigants—to a time when the civility of the legal profession suffered a much-lamented decline. Actually, the pending bills would take us beyond the wasteful and uncivil era of 1983–1993 by adopting an even more unwise provision—one that would invite parties to pursue optional "punitive" monetary awards, to be paid into the court by opposing counsel or adverse parties, "if warranted for effective deterrence." We should not expect parties or their counsel to make cost-effective and reasonable choices about overall case strategy, discovery tactics, or settlement when they are entangled in the kind of confrontation that any sanctions motion tends to encourage. For that reason, the Judicial Conference committees oppose legislative proposals to eliminate judicial discretion in the imposition of sanctions for frivolous litigation, including proposals to revise Rule 11 of the Federal Rules of Civil Procedure, by imposing mandatory sanctions and preventing a party from withdrawing challenged pleadings on a voluntary basis within

a reasonable time. I am also proud to report that the FBA is monitoring this legislation and is actively involved in advocating on behalf of federal attorneys and judges on issues of importance to FBA members. **TFL**

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local legal services organizations, and law school legal service clinics and programs, licensed and qualified attorneys may offer their services to state and federal courts for special appointments. One example is the Limited Appointment Settlement Project initiated by Judge Morton Denlow in the Northern District of Illinois. Through this program, pro se parties in federal civil litigation who agree to engage in voluntary settlement conferences get the assistance of lawyers and the lawyers get experience in interviewing and counseling, and negotiating and advocating on behalf of, clients—skills that are important to every attorney.

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