December 11, 2013

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: H.R. 2655, the Lawsuit Abuse Reduction Act of 2013

Dear Chairman Leahy and Ranking Member Grassley:

We write to present the views of the Federal Bar Association (the "FBA") concerning H.R. 2655, the Lawsuit Abuse Reduction Act of 2013, as referred to the Senate Judiciary Committee following passage by the House of Representatives on November 14, 2013. The FBA includes more than 16,000 lawyers who practice in the federal courts. We promote the sound administration of justice and the integrity, quality and independence of the judiciary.

The FBA opposes H.R. 2655 because it would unnecessarily eliminate judicial discretion in the adjudication of litigation by prematurely mandating the imposition of sanctions and preventing a party from withdrawing challenged pleadings on a voluntary basis within a reasonable time.

We appreciate the desire of Congress to improve the federal civil justice system and to discourage the abusive use of litigation in our federal courts. Unfortunately, H.R. 2655, as drafted, would likely repeat an unwelcome decade of contentiousness from 1983 to 1993 that existed within the federal bar, spawned by a version of Rule 11 that is strikingly similar to H.R. 2655 today. That experience demonstrated that the requiring of sanctions for every violation of Rule 11 can quickly become a tool of abuse in civil litigation. The potential for unlimited numbers of filings for Rule 11 sanctions will likely only increase unnecessary gamesmanship and litigiousness in civil litigation.

As the Rules Committee of the Judicial Conference of the United States noted in its letter of July 23, 2013 to Chairman Goodlatte of the House Judiciary Committee, the imposition of mandatory sections under the 1983 version of Rule 11 contributed to abusive litigation tactics in several ways. Members of the federal bar experienced how the previous rule became a tool of abuse:

- It created a significant incentive to file unmeritorious Rule 11 motions, by providing a greater hope of possibly receiving money. Some aggressive

lawyers were known to file Rule 11 motions in response to virtually every filing;

- The same aggressive lawyers also used Rule 11 motions as a weapon to create conflicts of interest – or at least, the potential appearance of conflict – between their opposing lawyers and clients, when the opposing lawyer was forced to respond personally to accusations of having violated Rule 11;

- The increasing number of unmeritorious Rule 11 motions led to more and unnecessary tensions between opposing lawyers, which in turn fueled a decline in civility and professionalism in litigating other aspects of the lawsuit; and

- The rule provided a disincentive to abandon or withdraw a pleading or claim that lacked merit – thereby admitting error and risking sanctions – even after determining that it no longer was supportable in law or fact.

The changes made in 1993 to Rule 11 have remedied those problems, in part by providing the safe-harbor provision that allows time for withdrawing a challenged pleading or other paper before any motion for sanctions can be filed. Rule 11, as it stands today, works and should not be revised in the manner contemplated by H.R. 2655.

Thank you very much for considering these views. If you or your staff would like to discuss them, I hope you will not hesitate to contact Bruce Moyer, Government Relations Counsel of the FBA, at (301) 452-1111.

Sincerely,

Karen Silberman
Executive Director

West Allen
Chair, Government Relations Committee