# The Lawsuit Abuse Reduction Act: A Sound Federal Reform

*By Sherman Joyce**

A great deal of attention is given to litigation that results in nine-figure awards or outrageous class action settlements. These cases garner intense media attention and, on occasion, even serve as fodder for Jay Leno or David Letterman.

For a small business, however, even mundane litigation with far fewer dollars on the line can be a serious concern. This litigation can often be the difference between a viable and successful business and one that ends up shutting its doors. Armed with a small filing fee and little more time than it takes to fill out a form complaint, just about anyone can file a lawsuit against a small business. It costs much more, however, for a small business to defend against lawsuits in a legal system that is rigged, in effect, to allow for frivolous claims and legal extortion.

Small business owners lost their weaponry against frivolous lawsuits when Federal Rule of Civil Procedure 11 was changed in 1993. The change rendered Rule 11 less potent by allowing judges to refuse to sanction a lawyer, even after finding a claim frivolous. It also established a 21-day "safe harbor" that gives the plaintiffs' lawyers a free pass to withdraw frivolous pleadings without sanction. They can simply change the words of the pleading, file it again, and so it goes on.

The 1993 changes are not limited to the federal courts. They also triggered automatic, similar changes in state rules in a number of jurisdictions. As a result, plaintiffs' lawyers can force small businesses to settle cases for amounts just under the expected cost of defending against a claim. To small business owners, the cost of settling these claims can have devastating effects.

According to a 2005 report by the National Federation of Independent Business Research Foundation, the median total cost to a small business to settle a legal dispute is about $5,000. Businesses often have few options to recoup these costs as raising prices is not always an option. Instead, small business owners are driven to cut operating expenses by laying off employees or, even, in extreme cases, to close their operations.

In addition to dealing with the direct financial impact imposed by settlement costs, small businesses also face the loss of profits associated with the time spent defending against the claim. Oftentimes, small business owners are extensively involved in all aspects of litigation, forcing them to take time away from running their company, which can ultimately affect their bottom line. Even if a small business is able to survive the financial repercussions of a frivolous claim, it still can be adversely affected by the substantial emotional hardship on the owners and potentially change the tone of the business for years to come.

**A Tool to Stem Frivolous Claims**

The Lawsuit Abuse Reduction Act (LARA), H.R. 420, addresses head-on the problems associated with frivolous lawsuits. LARA, which is supported by over 330 organizations, will help rein in frivolous claims by restoring mandatory sanctions on attorneys, law firms, or parties who file frivolous lawsuits and by abolishing the "safe harbor" provision that allows parties and their attorneys to avoid sanctions during the 21-day window allowed by the 1993 changes to Rule 11 of the Federal Rules of Civil Procedure. In addition, the legislation will permit monetary sanctions including reimbursement of reasonable attorney's fees and litigation costs in connection with frivolous lawsuits and extend Rule 11's provisions preventing frivolous lawsuits to apply to state cases in which a state judge finds that the case substantially affects interstate commerce by threatening jobs and economic losses to other states.

LARA also builds on the provisions in the federal Class Action Fairness Act of 2005 (CAFA) that were intended to stop litigation tourism to "Judicial Hellholes." Judicial Hellholes are jurisdictions in which plaintiffs enjoy an unfair (and often very considerable) advantage over defendants. Personal injury lawyers seek out these places because they know that they will likely be able to procure a positive outcome in their courts—an excessive verdict or settlement, a favorable precedent, or both. LARA allows a plaintiff to file a personal injury case where he or she resides at the time of the filing, resided at the time of the alleged injury, or the place where the alleged injury occurred. LARA also allows for claims to be filed where the defendant's principal place of business is located or where the defendant resides if the defendant is an individual.

**Staying Consistent with Federalism Principles**

Under LARA, state court judges would be responsible for determining whether a claim has substantial impact on interstate commerce. That is the trigger that requires application of the federal rule. These would be cases that threaten to bankrupt a multi-state industry, risk loss of out-of-state jobs, or could have a major impact on the interstate economy. Of equal importance is the fact that state court judges would retain total power to determine whether or not a claim or defense was frivolous and, if it was, what sanction should be applied against the attorney who brought the frivolous claim. LARA gives judges an extra tool that enables them to keep their courts fair and balanced.

The goal of LARA's other major provision—putting a stop to litigation tourism—also is consistent with basic principles of federalism. State courts should not be overrun by claims of individuals who do not live, work, or pay taxes in the state or county unless the claim arose there. This litigation tourism floods local courts with lawsuits more appropriately heard in other jurisdictions, increasing the workload of state court judges and diverting limited judicial

resources. It delays justice for local residents whose cases compete for judicial time with those cases that have no relation to the forum.

The CAFA solved a major inequity by allowing interstate class actions to be removed to federal court. We have learned recently, however, that some plaintiffs' attorneys are voiding CAFA's reach by limiting the number of claimants in a case to ninety-nine. It is imperative that we address this inequity, which allows plaintiffs' lawyers to take advantage of a Judicial Hellhole through litigation tourism. As the debate on LARA continues, addressing these scenarios will be central to the effort.

LARA offers an opportunity to solve some of the worst problems in today's civil justice system while respecting the prerogative of state court judges. Supported by a united business community, LARA already has passed the U.S. House of Representatives with bipartisan support and now heads to the Senate for consideration. Now is the time to build upon tort reform successes from this past year and keep pushing for the passage of LARA to address litigation tourism and the No. 1 civil justice concern of small businesses and many others: frivolous lawsuits.

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