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# Lawsuit Abuse Reduction Act of 2005

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## Summary

H.R. 420, 109th Congress, the Lawsuit Abuse Reduction Act of 2005, was reported by the House Judiciary Committee on June 14, 2005 (H.Rept. 109-123), and passed by the House on October 27, 2005. H.R. 420 would strengthen Rule 11 of the Federal Rules of Civil Procedure, and would narrow the choice of venues for personal injury actions, other than class actions, brought in state and federal courts. The bill's Rule 11 provisions would apply to all civil actions, not just tort actions. Rule 11 provides for sanctions against parties who file frivolous claims or defenses, or who file a paper for any improper purpose.[1]

## Rule 11

Rule 11 of the Federal Rules of Civil Procedure currently provides that federal courts "may" impose sanctions upon attorneys, law firms, or parties who, among other things, file frivolous claims or defenses, or file "a pleading, written motion, or other paper . . . for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[2] The sanctions that a court may impose include "an order to pay a penalty into court," or, if "warranted for effective deterrence, an order directing payment" to the opposing party "of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." Such sanctions "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."

Rule 11(d) provides that Rule 11 does "not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." H.R. 420 as introduced would have repealed Rule 11(d), but the reported and passed versions of the bill would not.

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[1] H.R. 420, 109th Congress, as introduced, is identical to H.R. 4571, 108th Congress, as introduced. The two bills were no longer identical as reported and passed by the House.

[2] The Federal Rules of Civil Procedure appear in title 28, U.S. Code.

Section 2 of H.R. 420 would amend Rule 11 so that a court "shall," rather than "may," impose sanctions when appropriate. In addition, section 2 would eliminate the right of a party to avoid sanctions by withdrawing its improper filing within 21 days after the opposing party has filed a motion for sanctions. Section 2 would also eliminate the court's option of ordering the violator to pay a penalty into court, and would leave as the only authorized sanction a payment to the opposing party or parties of their reasonable expenses, including a reasonable attorney's fee. Sanctions would no longer be "limited to what is sufficient to deter repetition; rather, sanctions "shall be sufficient to deter repetition . . . and to compensate the parties that were injured."[3]

(To some extent, H.R. 420 would return Rule 11 to the form it had before 1993, when it provided that the court "shall" impose sanctions when appropriate, when it did not provide for a party to withdraw its improper filing, and when it did not explicitly authorize a court to order a violator to pay a penalty into court.)

Section 3 of H.R. 420 would make Rule 11 applicable to civil actions in state courts, provided that the court determines that the civil action substantially affects interstate commerce.[4] (The word "substantially" was added in committee.) "Such court shall make such determination based on an assessment of the costs to the interstate economy, including the loss of jobs, were the relief requested granted." The bill does not specify the extent of the costs to the interstate economy that the civil action would have to have for Rule 11 to apply.[5]

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[3] It does not appear that this change would authorize a court to order a sanction in an amount that is more than sufficient to accomplish these purposes. This is because sanctions would be limited to reasonable expenses, including a reasonable attorney's fee. A court could apparently order a sanction of less than the full amount of reasonable expenses, if it determines that such lower amount would be sufficient to accomplish the prescribed purposes.

[4] Though state courts are sometimes required to follow federal procedures when implementing federal laws, it is much less common for state courts to be required to follow federal procedures when implementing state laws. Anthony J. Bellia Jr., *Federal Regulation of State Court Procedures*, 110 Yale L.J. 947, 959-64 (2001). Although some commentators have suggested that the latter practice violates precepts of federalism, *see id.* at 970-83, the Supreme Court has not extended Tenth Amendment doctrine to prohibit this practice. *See* New York v. United States, 505 U.S.144, 178-79 (1992); Printz v. United States, 521 U.S. 898, 907 (1997).

[5] Traditionally, the invocation of the language "affects interstate commerce" as a limiting factor for application of a statute is intended to make the reach of a statute consistent with Congress's powers under the Commerce Clause. *See* U.S. Const., Art. I, § 8, cl. 3. The language in H.R. 420, however, appears to be narrower than Congress's power to regulate commerce in some instances, and in excess of it in others. For instance, the statute does not allow for aggregation of the effect on commerce of all activities regulated under the provisions, s*ee* Gonzales v. Raich, 125 S. Ct. 2195 (2005); Wickard v. Filburn, 317 U.S. 111 (1942), but instead requires that each lawsuit have such an effect. Yet, the provision would also appear to apply to all civil actions, even if the underlying cause of action did not arise from a commercial activity and thus might not be within Congress's commerce clause authority. *See* United States v. Lopez, 514 U.S. 549, 564 (1995); Anthony J. Bellia Jr., *supra* note 4, at 964-75.

## Venue

Federal law currently provides that, in federal court, a civil action may "be brought only in (1) the judicial district where any defendant resides, if all defendants reside in the same State, [or] (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." If there is no district in which the action may otherwise be brought, then, if the action is founded solely on diversity of citizenship (i.e., is based solely on state law), it may be brought in a judicial district in which any defendant is subject to personal jurisdiction, or, if the action is not founded solely on diversity of citizenship, it may be brought in a judicial district in which any defendant may be found.[6] A corporation is deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.[7]

Section 4 of H.R. 420 would prescribe new rules of venue for personal injury claims, other than class actions,[8] and these rules would apply in both state and federal courts.[9] Venue refers to the place within a state in which a lawsuit may be filed. H.R. 420 would permit a personal injury claim to "be filed only in the State and, within that State, in the county (or Federal district) in which" (1) the plaintiff resides at the time of filing or resided at the time of injury; "(2) the alleged injury or circumstances giving rise to the personal injury claim allegedly occurred; (3) the defendant's principal place of business is located, if the defendant is a corporation; or (4) the defendant resides, if the defendant is an individual."[10]

It would appear, in certain circumstances, that the proposed Act would preclude litigation in United States courts that would be authorized under current law. For instance, as noted, federal tort law currently allows suits against corporate tortfeasors anywhere in the United States that such corporation is subject to personal jurisdiction,[11] such as where a corporation engages in business.[12] Thus, if a corporation has stores, factories, offices, or property anywhere in the United States, this would mean that a federal suit might be

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[6] 28 U.S.C. § 1391(a), (b).

[7] 28 U.S.C. § 1391(c).

[8] Section 4(c) of the bill would define "personal injury claim" to exclude class actions.

[9] Unlike Section 3, Section 4 does not contain language limiting its application to cases affecting interstate commerce, raising the issue of whether the scope of the statute exceeds Congress's authority under the Commerce Clause. *See* note 5, *supra*. In addition, section 4 would raise the federalism issue mentioned in note 4, *supra*.

[10] The reported version of the bill added "(4)" and limited the applicability of "(3)" to corporations. The House-passed version added that "if there is no State court in the county," then venue would be in "the nearest county where a court of general jurisdiction is located."

[11] 28 U.S.C. § 1391(a), (c).

[12] The establishment of personal jurisdiction relates to whether a defendant has availed itself of the privileges of doing business in a states. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. 102, 109 (1987).

brought against it in one of the judicial districts where such activity occurs or property resides.[13]

Under H.R. 420, however, such suits are limited to where a plaintiff resides, where the injury occurred, or to a corporate defendant's principal place of business. Since due process requires that a defendant have sufficient minimum contacts with a forum to establish jurisdiction before a suit can be brought in that court,[14] the first two categories may, in some instances, be precluded by the Constitution.[15] Take, for example, a corporation that does business in some, but not all, federal judicial districts, and that has its principal place of business outside the United States. A plaintiff who resides in and was injured in a district in which the corporation does not have a business presence can, under current federal law, simply sue in another judicial district where the corporation does do business. Under H.R. 420, however, the lack of minimum contacts would preclude suit under the first two categories (where a plaintiff resides or where the injury occurred), and would preclude suit under the third category (defendant's principal place of business), since that place is not within a judicial district. In such a case, enactment of H.R. 420 apparently could result in a plaintiff's being left without a judicial forum in the United States for his or her tort claim.[16]

Section 4(b) addresses situations where injuries occur in more than one forum. Implicitly referring to "(2)" in the above list, section 4(b) provides: "If a person alleges that the injury or the circumstances giving rise to the personal injury claim occurred in more than one county (or Federal district), the trial court shall determine which State and county (or Federal district) is the most appropriate forum for the claim."[17] The section

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[13] The presence of activities which would indicate that a defendant was doing business in a state might include the presence of stores, offices, agents, employees, or property in a state or advertising or soliciting business therein. Asahi Metal Industry Co. v. Superior Court of California, 480 U.S. at 105-06 (1987).

[14] There must be sufficient minimum contacts between a defendant and a state (or a federal district) that asserts jurisdiction over the defendant in a lawsuit in order for such a case to be sustained. *Id.* at 109.

[15] The fact that a plaintiff resides in a particular jurisdiction would not generally provide sufficient minimum contacts for bringing a suit in that jurisdiction, nor would the fact that an injury or circumstances giving rise to that injury occurred in that forum generally provide sufficient minimum contracts.

[16] Even if the defendant's principal place of business were in the United States, the state it was in might be inconvenient to the plaintiff. For example, if a plaintiff resided in Maryland and was injured in Maryland, but a defendant had no contact with Maryland, then the plaintiff could not sue in Maryland. If the defendant's principal place of business was in California but the defendant also had an office in Virginia, then, under existing federal law, the Maryland plaintiff could sue in either Virginia or California. Under H.R. 420, the plaintiff could sue only in the presumably less convenient California.

[17] Suppose that a person bringing a claim chooses venue based on (1) or (3), and a person — who apparently may be either the plaintiff or the defendant — alleges that the injury or the circumstances giving rise to the personal injury claim occurred in more than one county (or federal district). Would the trial court nevertheless determine the most appropriate forum for the claim, or would its authority in this respect be limited to situations in which a person bringing

(continued...)

continues: "If the court determines that another forum would be the most appropriate forum for a claim, the court shall dismiss the claim. Any otherwise applicable statute of limitations shall be tolled beginning on the date the claim was filed and ending on the date the claim is dismissed under this subsection."[18]

Section 5 of H.R. 420 provides that sections 2 and 3 of the bill shall not "be construed to bar or impede the assertion or development of new claims or remedies under Federal, State, or local civil rights law." This provision does not appear to mean that sections 2 and 3 would not apply in civil rights cases.

## Committee- and Floor-Added Provisions

In addition to making various changes mentioned above, the reported version of H.R. 420 added sections 6, 7, and 8 to the bill, and the House-passed version revised section 7 and added section 9. Section 6 provides that, if a federal district court determines that an attorney, during his career, has violated Rule 11 in that federal district court three or more times, the federal district court "shall suspend that attorney from the practice of law in that Federal district court for one year," and may suspend him or her for any additional period that it considers appropriate.

Section 7 of the House-passed bill provides, in full, "Whenever a party presents to a Federal court a pleading, written motion, or other paper, that includes a claim or defense that the party has already litigated and lost on the merits in any forum on final decisions not subject to appeal on 3 consecutive occasions, and the claim or defense involves the same plaintiff and the same defendant, there shall be a rebuttable presumption that the presentation of such paper is in violation of Rule 11 of the Federal Rules of Civil Procedure."

Section 8 provides that any person who attempts to impede a court proceeding through the intentional destruction of relevant documents would be punished with mandatory civil sanctions, held in contempt of court, and, if a lawyer, referred to the appropriate state bar associations for disciplinary proceedings.

Section 9 provides that, in any Rule 11 proceeding, "a court may not order that a court record not be disclosed unless the court makes a finding of fact that identifies the interest that justifies the order and determines that that interest outweighs any interest in the public health and safety that the court determines would be served by disclosing the court record." Section 9 would apply "to any record formally filed with the court," but would not apply to any records subject to the attorney-client privilege or any other privilege that grants the right to prevent disclosure, and would not apply to any record

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[17] (...continued)
a claim chooses venue based on (2)? H.R. 420 does not answer this question.

[18] This provision might present a problem for a plaintiff who filed his claim on the final day of the statute of limitations. If his claim was dismissed, then, even though the statute of limitations would have stopped running on the date the claim was filed, it would nevertheless have to be refiled on the very day that it was dismissed. If the plaintiff had filed his claim before the final day, but nevertheless near the end of the statute of limitations, then he would have the same problem to a lesser degree.

subject to a law "that protect[s] the confidentiality of crime victims, including victims of sexual abuse."

## Pros and Cons

H.R. 420 is tort reform legislation, but it is also more than that because its Rule 11 provisions would apply to all civil lawsuits. Pro-business groups reportedly argue that proposed revisions to Rule 11 are needed to curb what they describe as a flood of frivolous lawsuits.[19] The committee report accompanying the bill states that, "due to an onslaught of frivolous suits, '[l]egal fear has become a defining feature of our culture,'" affecting not only businesses, but churches, schools, sports, and playgrounds, and other cultural and social institutions.[20]

Some experts, however, claim that there is little evidence that the 1993 changes to Rule 11, which H.R. 420 is designed to undo, increased the number of meritless claims.[21] Some defend the1993 amendment that allows a party to withdraw an improper filing within 21 days on the ground that, before that amendment, parties traded accusations of meritless claims, giving rise to additional litigation.[22]

Applying rules of federal civil procedure, such as Rule 11 and rules of venue, to state court is unusual. Supporters of the bill might argue that, if these rules, as H.R. 420 would amend them, would be desirable in federal courts, then they would also be desirable in state courts. Opponents of the bill might argue that applying federal rules of civil procedure in state courts constitutes undue interference with matters that should be left to the states. In addition, the bill's venue provisions apparently could leave some plaintiffs without recourse to suit in a court in the United States.[23]

Finally, we note that Congress has delegated to the Supreme Court the power to prescribe the Federal Rules of Civil Procedure (28 U.S.C. § 2072), and does not generally amend them itself. Reportedly, "such revisions are first considered during a lengthy review process by committees of judges and attorneys that the Supreme Court appoints."[24] One critic of the bill has called it "another attempt to undermine the rule-making authority of the judiciary."[25] In response, a supporter of the bill might note that the Supreme Court would not have the authority to make the Federal Rules of Civil Procedure or federal venue rules applicable to state courts.

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[19] *CQ Today* (Sept. 8, 2004), p. 7.

[20] H.Rept. 109-123, 109th Cong., 1st Sess. (2005), at 5.

[21] *Id.*

[22] *Id.*

[23] *See* note 16, *supra*.

[24] *CQ Today* (Sept. 9, 2004), p. 10.

[25] This critic also contends that "[t]he bill unwisely eliminates judicial discretion and transforms permissive sanctions into mandatory ones." Christopher M. Fairman, "A frivolous new bill ignores lessons learned from Rule 11," *Legal Times*, June 13, 2005, p. 76.

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