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A JOURNEY WORTHY OF DR. ZHIVAGO

Remember the efforts of the 1980's, 1990's and the 2000's to restore common sense to the civil justice system? Over the years, there have been dozens of bills addressing individual problems with the civil justice system ranging from unlimited damages to seemingly eternal liability. There were a few "omnibus" efforts including a variety of reforms. Except for a general aviation manufacturers product liability reform initiative and a securities industry initiative all met the same fate – "not this year, not this Congress." A couple of times we even came just a few tantalizing votes short in the Senate on major tort reform efforts.

With a new majority in the House, we begin the tort reform efforts anew. I have already written about the medical malpractice liability bill. Now allow me to reintroduce you to LARA.

Representative Lamar Smith (R-TX) has introduced H.R.966, Lawsuit Abuse Reduction Act of 2011 (LARA), and Senator Charles Grassley (R-IA) has introduced the companion bill S. 533.

To understand LARA, you have to be familiar with one of the Federal Rules of Civil Procedure (the rules for the federal court system), Rule 11. From 1983 until 1993, Rule 11 said in part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

In 1993 some keys changes were made, and Rule 11 currently says:

An attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation.

LARA is all about the difference between "shall" and "may."

Proponents of civil justice reform have contended that change, along with a couple of other aspects of

Rule 11, helped lead the explosion of frivolous lawsuits.

Therefore, the purpose of LARA is to put some starch back into Rule 11 and hit the lawyers where it hurts - in their wallets and pocketbooks.

LARA reverses the 1993 amendments to Rule 11 that made sanctions discretionary rather than mandatory.

In addition, LARA requires that judges impose monetary sanctions against lawyers who file frivolous lawsuits. Those monetary sanctions will include the attorney's fees and costs incurred by the victim of the frivolous lawsuit.

LARA reverses another 1993 amendment to Rule 11 that allow parties and their attorneys to avoid sanctions for making frivolous claims by withdrawing them within 21 days after a motion for sanctions has been served.

This version of LARA has one difference from its predecessors; this LARA would only amend Rule 11 of the Federal Rules of Civil Procedure. It does not attempt to force the states to use Rule 11. Earlier versions of the bill included specific requirements for state use. Dropping the states provision should remove the states' rights opposition that surrounded the earlier debates. The hope is that states would amend their rules governing frivolous lawsuits to reflect the changes implemented by LARA, just as they did when Rule 11 was last changed in 1993.

It is hard to say where in the pantheon of small business concerns with the civil justice system the anemic Rule 11 falls. My guess is probably in the middle, but I also suspect it has risen over time, as lawyers have become more effective at using the frivolous suit template du jour against more and more small business.

I do not think there is any specific data on this problem. The last general data generated by our good friends at the U.S. Chamber's Institute for Legal Reform in a study of the tort liability costs of small businesses from NERA Economic Consulting (NERA) found that:

- * The tort liability price tag for small businesses in America in 2008 was \$105.4 billion.

- * Small businesses bore 81% of business tort liability costs but took in only 22% of revenue.

- * Small businesses paid \$35.6 billion of their tort costs out of pocket as opposed to through insurance.