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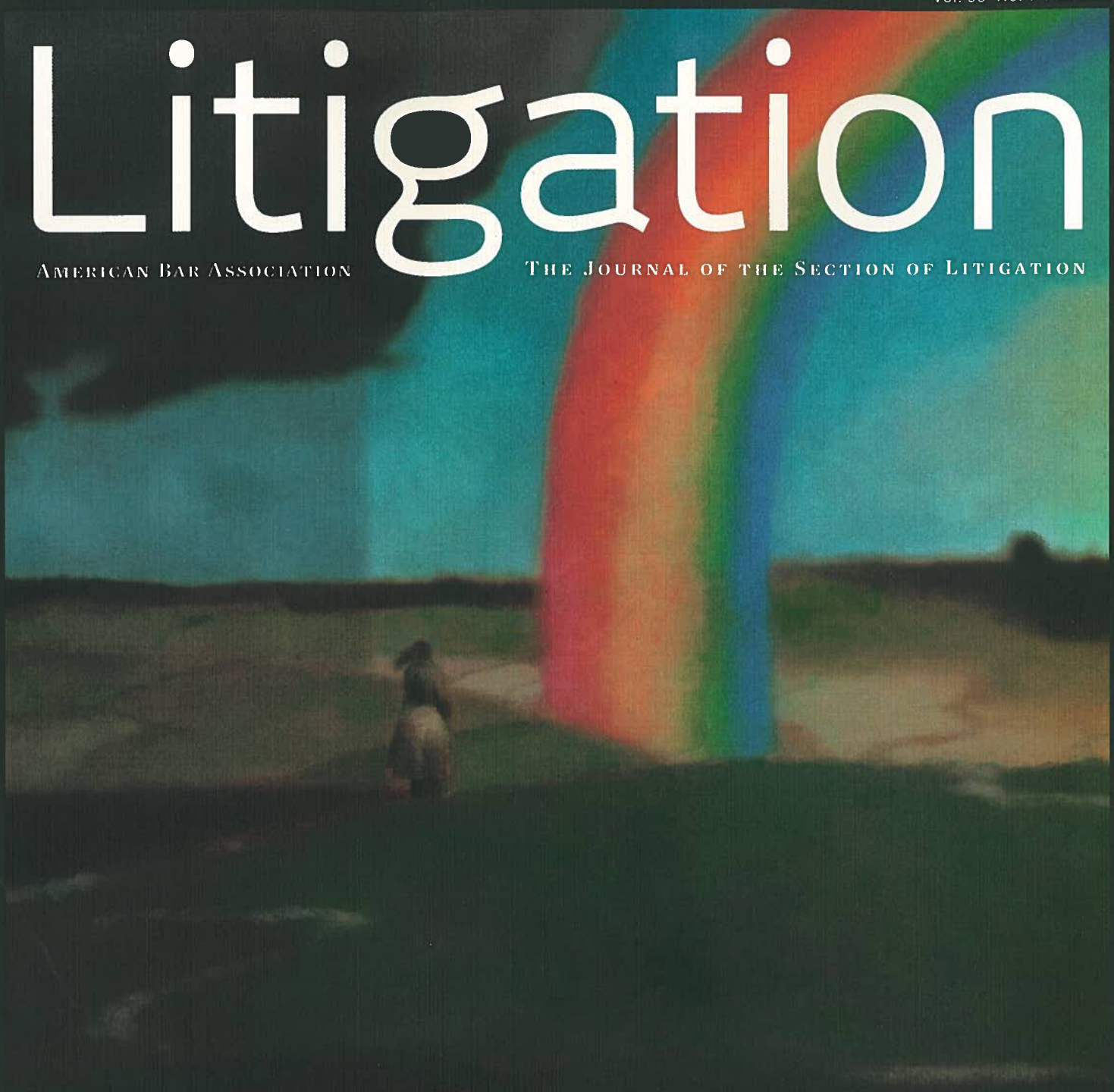

Choices

Cutting Litigation Costs Without Compromise

Where Did the Zeal Go?

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SANCTIONS

The Lawsuit Abuse Reduction Act of 2011

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If one were to gather approximately 500 reasonably intelligent, college-educated citizens in one place and ask them for ideas to improve the country, the odds that anyone would suggest reintroducing mandatory sanctions under Rule 11 of the Federal Rules of Civil Procedure are negligible. When the 500 or so citizens are members of Congress, however, anything is possible, and this is precisely what a handful of them has come up with.

The House held hearings on H.R. 966, the Lawsuit Abuse Reduction Act (LARA), in March 2011. The bill would amend Rule 11 to do four things:

- make sanctions mandatory, as they used to be;
- eliminate the 21-day safe harbor;
- change the purpose of the rule from one of deterrence alone to one with an additional compensatory goal; and
- mandate an award of attorney fees, in addition to any other sanctions the court deems appropriate.

These ideas are not new. From 1983 to 1993, Rule 11 mandated a sanction if a violation was found, there was no safe harbor, and attorney fees were the prevailing sanction. The rule was amended in 1993 to eliminate mandatory sanctions, to add the safe harbor, and to bar awards of attorney fees except when "warranted for effective deterrence."

The 1993 amendments were adopted, not due to hospitable feelings toward misconduct, but because the mandatory sanctions regime did not work. It was costly to administer—wasting enormous amounts of judges' time and litigants' money—and it produced no discernible benefits. As the past 18 years show, judges confronted with serious misconduct do not hesitate to impose sanctions, including serious financial penalties and case-ending sanctions.

Judges have never hesitated to punish bad-faith litigation abuse, and Rule 11 is in many ways irrelevant to how they do so. Judges have many other powers that they can exercise to sanction bad faith, including the inherent power of the court, 28 U.S.C. § 1927, and the contempt power. So mandating sanctions for violations of Rule 11(b)(1), to the extent it isn't superfluous, only serves to stimulate litigation in marginal cases in which someone attempts to push the boundaries of what constitutes an "improper purpose." Forcing judges to address marginal cases merely increases the likelihood that no violation will be found. The result is that the parties are forced to bear litigation costs that do not turn a profit for anyone. This effectively sanctions both sides in the absence of a violation by anyone.

There is sometimes a fine line between a meritless argument and a good-faith argument for a change in the law. Under Rule 11(b)(2), the court must decide whether a particular argument is merely unwarranted in law (and thus sanctionable) or if it amounts, instead, to a good-faith argument for a change in the law (which is not). When *Brown v. Board of Education*, 347 U.S. 483 (1954), was briefed and argued, the plaintiffs' position was arguably frivolous—a clear and unambiguous Supreme Court precedent, *Plessy v. Ferguson*, 163 U.S. 537 (1896), rejected it.

LARA attempts to address this problem by providing a rule of construction: "Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws." But this merely highlights the problem. It does not solve it. In hindsight, we know that *Brown* succeeded. But what if it had been filed the day after *Plessy* was decided? Or a year later? Or a decade? What if the plaintiffs filed suit year after year until they were vindicated?

Under Rule 11(b)(3)–(4), the judge must decide whether an asserted factual conclusion represents impermissible speculation or a permissible inference—two ends of the same continuum. There are no meaningful benchmarks available to assist the court in forming its judgment. Different judges looking at the same set of facts will come to

differing conclusions. This encourages motion practice.

Given that every violation, no matter how marginal, must be sanctioned under LARA, courts would sometimes be required to waste time engaging in extended analysis to deal with trivial matters. For example, under the 1983 rule, courts had to decide whether it was sanctionable for a lawyer to fail to read the final word-processing printout of a complaint that, due to a computer glitch, included extraneous matter. Or whether punishment was mandated for a mistake in a pleading that was clearly corrected by appended exhibits. There is no point to this sort of activity.

Once LARA eliminates the safe harbor, Rule 11 motions must be filed when served. Parties cannot thereafter control the litigation by settling or dismissing it because they can't withdraw the sanctions issue. Once it has been flagged, the judge is not merely empowered by LARA to consider a sanction but is affirmatively required to do so. Settlement is discouraged because the attempt to withdraw or settle a claim may itself be viewed as evidence of culpability on the part of the alleged offender.

Congress enacted the Rules Enabling Act, 28 U.S.C. § 2072, in recognition of the fact that the courts are best suited to adopt procedural rules that fit the countless, nettlesome factual scenarios judges face. The rules committees take their jobs seriously. They analyze alternatives meticulously. They call on leading scholars for academic insight, empiricists at the Federal Judicial Center for hard data, and judges and lawyers for a practical appreciation of problems and solutions. If Congress believes that improvements to Rule 11 are in order, it should direct the Advisory Committee on the Federal Rules of Civil Procedure to revisit it.