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The History and Purposes of Rule 11

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REMARKS OF JOHN F. CANNON*

My familiarity with the Rule is born of a period of membership on a Federal Courts Committee when the proposed amendments to the Rules were before the Committee for comment. As Paul Batista said, the City Bar, along with many other bar associations, opposed the adoption of the new Rule. It said in its 1981 report that, "Our Committee recommends against adoption of the amendments, on the grounds that (1) they effect little or no substantive change in powers that the district courts already have to control abuse; and (2) that if existing powers to impose sanctions, issue protective orders, and hold discovery and pre-trial conferences have indeed been ineffective, a different approach is required."⁵⁰ "We think," it goes on, "that abuses in pleading[s], motion practice and discovery can be deterred by more effective judicial control [at] all stages of the litigation, including the discovery stage."⁵¹

I was one of a minority on the Committee who, in the words of the report, "endorse[d] the Advisory Committee's principal recommendations based upon a view of the problem which [was] well stated by Justice Powell who, with Justices Stewart and Rehnquist, dissented from the adoption of the August 1, 1980 amendments to the Rules on the basis that they were half measures only. Calling for more far-reaching reforms he wrote that, 'Delay and excessive expense now characterize a large percentage of all civil litigation,' and that, 'Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.'"⁵²

I and others on the Committee felt that was the way the problem should be described, that the proposed amendment appeared to some extent calculated to move in the right direction, but we nevertheless objected that not enough was being done in other directions. We said we believed that "the Advisory Committee's principal recommendations are warranted by the seriousness of the problem,"⁵³ and we were "not alarmed by the possibilities [of] collateral litigation."⁵⁴ We objected instead, "to the Advisory Committee's failure to pursue the implications of its proposals and consider changes as well to present rules and practices regarding summary judgment and the scope,"⁵⁵ rather than simply the conduct, "of discovery."⁵⁶

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50. N.Y.C. Bar Ass'n, *Report by the Committee on Federal Courts of the Association of the Bar of the City of New York on Proposed Amendments to the Federal Rules of Civil Procedure*, in 194 Association of the Bar of the City of New York Reports 2808-2 (1981).

51. *Id.* at 2808-3.

52. *Id.* at 2808-4 (quoting *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 522, 523) (effective 1980) (Powell, J., dissenting)).

53. *Id.* at 2808-5.

54. *Id.*

55. *Id.*

56. *Id.*

That background, and I think Judge Carter's description of the history,⁵⁷ seem to raise the first question, and perhaps two years experience is not a long enough time. But do we see, do the bench and the bar perceive, that the delay and abuse problems that were the genesis of these amendments have been affected, or are they likely to be affected to any appreciable extent by the rules as they are being administered?

In that connection I would again briefly quote from Judge Newman's recent Cardozo lecture,⁵⁸ some evidence that at least as far as he is concerned, at this early time, that the major problem has not disappeared. In calling for major changes he said, among other things,

I doubt that we should retain our current rule that lets a pleading remain in court if any set of facts can be remotely imagined that might be proven to support its allegations. We need not return to the days of Chitty's pleadings, but we could insist that complaints contain assertions of the essential facts. If the claim survives dismissal, I doubt that any discovery should be permitted in some cases, and, where needed, I doubt that depositions should be permitted beyond two or three, limited to one hour, that interrogatories should be permitted beyond five or ten, and that any but precisely identified documents need be searched for and produced. Once discovery is complete[d], I doubt that we should confine the use of summary judgments as rigidly as we now do.⁵⁹

Whether or not the Rule has actually helped is, as I say, the threshold question. The second question, and I think the one that will be addressed to the greater extent tonight, is whether it is being applied fairly. On the decided cases under Rule 11, some of our speakers this evening I understand will be addressing the statistics.⁶⁰ But it has been developed at our two luncheons, as far as one's sense of the merits of the decisions, that in most cases, with some exceptions, there was no quarrel with the determination that the lawyers went too far or not far enough in some situation, and that some sanctions were appropriate. But the real questions that trouble one have to do with the fact—and I think there was reasonable unanimity among the judges who addressed this—that notwithstanding the "shall" language of the Rule, the judges do perceive it as quite discretionary.

There are some judges that simply don't like to get into it, and there are others who will be more likely to get into it. There was also a comment made about the difference in attitudes of the litigating parties toward invoking Rule 11; it was commented that in some circumstances where there appeared to be good ground for making a Rule 11 motion, none appeared to have been made. That seems to me to relate to the

57. See *supra* notes 4-45 and accompanying text (Remarks of Robert L. Carter).

58. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 40 *Rec. A.B. City N.Y.* 12 (1985).

59. *Id.* at 23-24.

60. See *infra* notes 86-99 and accompanying text (Remarks of A. Simon Chrein).

economic futility in certain litigation of going after another lawyer who may indeed have violated Rule 11. With respect to the Rule 11 proceeding itself, it takes too much client time and money to pursue such an issue and the economic rewards at the other end are not appreciable enough.

One other thing that I would like to mention that was developed at the two luncheons has to do with, again, the problem of possible abuse in the application of the Rule. A California case, actually a case that was put to the group, involved a situation in which sanctions were imposed by a judge after he told the plaintiff at several successive pretrial conferences that settlement was a wise idea and had invited him to read Rule 11.⁶¹ At the one luncheon where that case was put, nobody paid any attention to what the judge had done, whereas at the other luncheon—when the case was put to support the suggestion that some judges use, or abuse, Rule 11 in connection with settlement efforts—real surprise was expressed regarding that case.

One direct comment, and my final comment, on what Judge Carter had to say is that, consistently with my brethren on the Federal Courts Committee four years ago, I am not really sure that the standard of Rule 11 is more “focused” now than it was. The old good faith standard is still in there with respect to the legal aspects of any pleading or motion. The “reasonableness of the inquiry” sounds somewhat like a separate standard, but to my mind with a good faith standard, the most important aspect of the application of any good faith standard, in the consideration of whether the party claiming to believe something, or claiming honestly to have thought he had a good motion or pleading, is that you look at what he did to satisfy himself. There is no other way really to determine good faith, which is a subjective thing, otherwise than by looking at the surrounding circumstances, and that includes the reasonableness of the inquiry that was made. I don’t think—to refer to one of the cases Judge Carter cited as part of the history (*Nemeroff v. Abelson*)⁶²—that we yet know whether under new Rule 11 it is a sufficient inquiry into facts to say, “I read them in the Wall Street Journal.”

61. See *Huettig & Schromm, Inc. v. Landscape Contractors Council*, 582 F. Supp. 1519 (N.D. Cal. 1984).

62. 620 F.2d 339 (2d Cir. 1980).