Fordham Law Review

Volume 54 | Issue 1 Article 4

1985

The Actual Operation of Amended Rule 11

A. Simon Chrein

THE ACTUAL OPERATION OF AMENDED RULE 11

*REMARKS OF A. SIMON CHREIN**

In discussing the actual operation of the Rule, I think it wise to divide my presentation into three parts. First I will deal very briefly with my own experiences with pleadings and with my magistrate's eye view of lawsuits and their quality and merit. I will then deal with statistics that were generated by the Second Circuit Committee on the Pretrial Phase of Civil Cases[63] as well as by Professor Vairo[64] of Fordham which will tend to reflect trends and the application of the rule. I will then deal very briefly with the types of cases in which sanctions are almost often imposed.

A magistrate of course has very little opportunity to impose sanctions for frivolous pleadings. Those matters are resolved at a higher level.[65] However, the magistrates in the Eastern District do have considerable exposure to lawsuits during their pretrial phase and do have an opportunity either in settlement discussions or in scheduling conferences to discuss the pleadings with counsel. Thus, we are able to gauge whether or not the amendments to Rule 11 have had the in terrorem effect that the Advisory Committee Notes suggest that they should have.[66] Since the adoption of the amendments,[67] I have seen a number of cases in which a strict application of the Rule might very well mandate sanctions. I do not include in my discussion cases drawn by pro se litigants.[68] Though there is case law sanctioning pro se litigants, I don't feel it is applicable here because we are dealing essentially with the Rule 11 requirement that an attorney certify pleadings and I would like to focus on Rule 11 violations as they affect the work product of attorneys.

In initial scheduling conferences I very often find suggestions that attorneys have brought cases, the merits of which they are not certain,

---

* Magistrate, United States District Court for the Eastern District of New York.

63. Memorandum from Timothy Cone to Standish Forde Medina, *A Supplemental Analysis of Reported Decisions Applying the 1983 Amendments to Rules 11, 16 and 26 of the Federal Rules of Civil Procedure* (Feb. 22, 1985) (available in the files of the Fordham Law Review) [hereinafter cited as Second Circuit Committee Report].

64. In his remarks, Magistrate Chrein relied on unpublished statistics provided to him by Professor Georgene M. Vairo of Fordham Law School. These statistics have since been updated and published. *See* Vairo, *supra* note 1, at 55.

65. *See, e.g.*, Rubin v. Buckman, 727 F.2d 71, 73 (3d Cir. 1984) (court of appeals remanding to district court to consider whether sanctions should be imposed); Heimbaugh v. City of San Francisco, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984) (district court imposing costs).

66. *See* Fed. R. Civ. P. 11 advisory comm. note.

67. The amendments became effective on August 1, 1983. Fed. R. Civ. P. 11.

68. *See, e.g.*, Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1126 (S.D. Tex.), *appeal dismissed mem.*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 105 S. Ct. 1849 (1985); Heimbaugh v. City of San Francisco, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984).

only to avoid the effects of a soon maturing statute of limitations. This often surfaces in product liability cases and in personal injury cases where an attorney will tell me, in the presence of opposing counsel—when asked to answer a simple interrogatory explaining his theory of liability or to indicate whether or not he will have an expert who will establish a certain point which would be an essential ingredient of his case—that this particular occurrence or accident could not have happened but for some legal fault. "So therefore I assume there was legal fault." A strict application of the rule might very well mandate the award of sanctions in that case. Presumably the attorney sophisticated and knowledgeable of the rules would not have signed the pleading on the basis of research as skimpy as this.

Candid statements are made in settlement conferences which of course I take with an assurance of confidentiality which very often goes further. That, "Well, my client was injured and it looked like a fairly large target of opportunity so I brought the lawsuit." Unfortunately or fortunately, depending on your perspective, I can do nothing about that because representations made to me during settlement conferences are made with the understanding that they are given to me in confidence and I do not feel it appropriate to breach those confidences.[69] But again, you might even argue that such representations may not be violations of the rule.

In *Friedgood v. Axelrod*,[70] a prisoner brought a lawsuit claiming that he was exposed to asbestos during his work in the prison.[71] Opposing counsel, representing the attorney general of the State of New York, advised counsel who was appearing for that prisoner that there was conclusive evidence and conclusive factual data to disclose that this prisoner could never have gone within striking distance of an asbestos hazard.[72] When the attorney persisted in the lawsuit an application was made for sanctions.[73] The application was denied by the district judge on the grounds that the attorney might not have had, under the pressure of time, sufficient opportunity to familiarize himself with the case.[74] He was not bound to rely on the representations of opposing counsel even if they were buttressed by convincing and objective data.[75] An attorney's persisting with a suit that might have a weak factual premise is justified if the attorney, again though this is a case brought since the passage of the amendments, if the attorney subjectively could have felt that he might

69. *Cf.* United States v. Cianfrani, 448 F. Supp. 1102, 1107-08 (E.D. Pa.) (enumerating pretrial procedures not open to public), *rev'd on other grounds*, 573 F.2d 835 (3d Cir. 1978).

70. 593 F. Supp. 395 (S.D.N.Y. 1984).

71. *Id.* at 396.

72. *Id.* at 396-97.

73. *Id.* at 397.

74. The defendants' attorney did not show the plaintiff's attorney photographs and blueprints that cast doubt on the representations of his client until the afternoon before the evidentiary hearing). *See* 593 F. Supp. at 397.

75. *See id.* at 398.

have proof of those facts.[76]

I have seen a number of cases filed claiming diversity jurisdiction in which the pleadings themselves indicate that both parties are citizens of the same state. The case had to be filtered through the clerk's office. It had to be filtered through a magistrate. It had to be assigned to a judge. But I have never seen sanctions imposed in such cases. I have seen cases where a very brief exploration of the facts would demonstrate without any ambiguity that there is no jurisdictional basis for the case in a federal court but no sanctions have been imposed. More frequently, I have seen knee-jerk affirmative defenses that seem to suggest quite strongly that an attorney has taken out a form book and indicated that the statute of limitations has run or that service has not been properly effected. I have never seen sanctions imposed in those cases.

Now, you may say, "Well, you are imagining, you are a magistrate and you don't dismiss cases, you don't strike pleadings. Of course you don't see the imposition of sanctions." But I do follow these cases and I am aware of motions to dismiss. I am aware of motions to strike pleadings and that sanctions are seldom imposed. Sometimes in conversation with counsel I suggest that the pleadings may be overly ambitious, suggestive of a possible excess sanctionable under Rule 11. I have yet to see a lawyer who has indicated to me that he would press for the imposition of sanctions. I have seen lawyers frequently take the position that they will move for a dismissal or to strike defenses.

The lawyers seem to be reluctant to press for the imposition of sanctions and I have the sense, and this is my own visceral sense, that today's beneficiary of a Rule 11 sanction might find himself in the dock tomorrow and he might hesitate to press his luck in that area.[77] I also have the sense that lawyers are pragmatic and they hope that sooner or later the case can be settled and that filing for sanctions against the opposing counsel would certainly poison the well of settlement. I also suspect that lawyers might, as indicated by Mr. Cannon, have the sense that, "What is the use? We can apply for sanctions and it might generate more expense in satellite litigation but it will produce very little benefit."[78]

The Advisory Committee Note indicates that the mandatory language in the Rule 11 revisions should remove inhibitions on judges in awarding sanctions.[79] The transmittal letter from the Chairman of the Advisory Committee indicates that even with the risk of satellite litigation, sanctions may be justified if they tend to deter meritless pleadings.[80] The statistics that have been made available to me and the cases that I have

76. *See id.*

77. *See* Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985) ("Lawyers may not want to inhibit their own freedom by calling their opponents' practices into question.").

78. See *supra* notes 50-59 and accompanying text (Remarks of John F. Cannon).

79. *See* Fed. R. Civ. P. 11 advisory comm. note.

80. *See* Manfield Letter, *supra* note 3, at 191-92.

read suggested very strongly that there is presently a trend towards the accelerated use of sanctions, but that sanctions are awarded in a minority of cases.[81] Perhaps a growing minority of cases, but a minority of cases. I would state as a caution that it is difficult to make an accurate statistical survey in this area as sanction applications and orders, I would assume, in the main go unrecorded.[82] In the few cases that address the question of sanctions, those sanctions are not central to the case. They appear as a tag along to a decision otherwise disposing of the case on the merits.[83] I would assume that sanction opinions are not written unless the author judge feels that they would provide some useful precedent. The type of situation that gives rise to an application to sanction a lawyer might very well be a case which the district judge feels will provide very little useful precedent. There might be an inhibition to address sanctions at length because of a judge's sense that he would rather not unduly embarrass counsel through mentioning him in his opinion as the author of a meritless pleading.[84] I would also note in passing that a monetary sanction imposed against an attorney can always be rescinded by a higher court.[85] But unflattering language about a lawyer somehow will stick if it appears in an opinion and judges might hesitate even to reprimand the lawyer in an opinion for going overboard in pleadings that would be meritless under Rule 11.

A compendium of reported cases and opinions that appear in Lexis and Westlaw was prepared for the Second Circuit Committee on the Pretrial Phase of Civil Cases. Their statistics indicate the frequency and use of sanctions from the amendments to the rule in August, 1983 until January 30, 1985.[86] That compendium reflects that 132 cases, and bear in mind these statistics end as of January 30, 1985, of those 132 cases there were fifty-two grants of sanctions.[87] Of those fifty-two grants of sanctions, twenty of those cases were in the Northern District of Illinois, the Southern District of New York and the Eastern District of New York.[88] Professor Vairo's statistics indicate that the Southern District and the Eastern District of New York account for 20% of the awards of Rule 11 sanctions nationally.[89] The Northern District of Illinois accounts for 10%[90] and the two metropolitan districts in California, the Northern District and the Central District of that state, account for 10% of sanc-

81. *See* Second Circuit Committee Report, *supra* note 63, app. A, at 4-5.
82. *See id.*
83. *See, e.g.*, Rubin v. Buckman, 727 F.2d 71, 73 (3d Cir. 1984); Badillo v. Central Steel & Wire Co., 717 F.2d 1160, 1166-67 (7th Cir. 1983); Heimbaugh v. City of San Francisco, 591 F. Supp. 1573, 1577 (N.D. Cal. 1984).
84. *See* Schwartzer, *supra* note 77, at 202.
85. *See* Philips Business Sys. v. Executive Communications Sys., 744 F.2d 287, 291-92 (2d Cir. 1984).
86. *See* Second Circuit Committee Report, *supra* note 63, at 1.
87. *See id.* app. E.
88. *See id.*
89. Vairo, *supra* note 1, at 74.
90. *Id.*

tions.[91] I would suggest that this concentration of sanction cases can be accounted for by the fact that these are busy metropolitan districts. These courts might feel the press of a burgeoning caseload and therefore might be more ready to react to what they perceive as an abuse of the court system by attorneys.[92]

If you are concerned with whether plaintiffs or defendants are the more convenient targets for the award of sanctions, the figures that were generated for the Second Circuit Committee indicate that of 106 applications for sanctions against plaintiffs, forty-seven were granted, forty-four were denied and there were fifteen warnings.[93] Of the thirty-three applications against defendents, seventeen were granted, ten were denied and six resulted in warnings.[94] I have been given a list noting each of the cases and I do notice, and Professor Vairo would tend to agree with my sense, that there was an accelerated willingness to award sanctions.

At first there was a little trickle of water through the dike and apparently a brick or two has become dislodged, though I don't think anybody has to worry seriously about drowning in a sea of sanctions.[95] There was also one fee award noted in the Committee's statistics for the frivolous making of a motion for sanctions. Professor Vairo noticed,[96] and there may be some reason to suspect that this does not necessarily represent the trend, but there were eight cases which suggest that somebody was trying to send a particular message in Indiana, in which taxpayers who brought suit were punished.[97] These are clients punished for bringing such a suit where the court perceived the suit as an effort to delay the payment of taxes.[98]

If you are concerned about whether sanctions will be imposed against attorneys, attorneys and clients, or the client alone, Professor Vairo's statistics indicate seventy-six cases in which it is possible to identify the object of sanctions. Thirty-seven cases involve sanctions against the attorneys alone, three involve sanctions against the client alone, thirteen involve sanctions against both.[99] I would suggest that a problem does surface in connection with the question of whether or not sanctions are appropriately awarded against attorneys or imposed against the client

91. *Id.*
92. *See id.*
93. *See* Second Circuit Committee Report, *supra* note 63, app. D.
94. *Id.*
95. *Id.*
96. Vairo, *supra* note 1, at 119.
97. *See* Stelly v. Commissioner, 761 F.2d 1113, 1115-16 (5th Cir.) (per curiam), *cert. denied*, 106 S. Ct. 149 (1985); Johnson v. United States, 607 F. Supp. 347, 349-50 (E.D. Pa. 1985); Miller v. United States, 604 F. Supp. 804, 805-06 (E.D. Mo. 1985); Eske v. Hynes, 601 F. Supp. 142, 144 (E.D. Wis. 1985); McKinney v. Regan, 599 F. Supp. 126, 129-30 (M.D. La. 1984); Snyder v. IRS, 596 F. Supp. 240, 252 (N.D. Ind. 1984); Young v. IRS, 596 F. Supp. 141, 151-52 (N.D. Ind. 1984); Cameron v. IRS, 593 F. Supp. 1540, 1557-58 (N.D. Ind. 1984), *aff'd*, 773 F.2d 126 (7th Cir. 1985).
98. See *supra* note 97.
99. *See* Vairo, *supra* note 1, at 117-21.

alone, though the Advisory Committee Note expresses the sentiment that it is not the purpose of these amendments to in any way impinge on the attorney-client privilege.[100] I question whether or not an attorney, when having to defend himself against the charge that he has certified to the reasonable belief that the factual allegations in a pleading or a motion are correct, that such an attorney might find it difficult to place the blame on his client. Unlike the case of a collateral attack on a criminal conviction, or a professional malpractice suit, here the attorney is still in league with his client, there has been no waiver of the attorney-client privilege and it could very well be that the attorney might have been told something by a client that might have been disproved either in discovery or at trial, and the attorney would be totally helpless to point the finger to his client and say, "I am relying upon what I was told and I had a reasonable basis to rely upon that." But that topic would be best reserved for another discussion.

If you are concerned with the types of cases in which sanctions are awarded, I have gone through the sanction cases that were provided me and I have chosen examples of recurring patterns of sanction awards. Sanctions will be more likely imposed in situations where a relatively powerful party will use its economic leverage to oppress an economically disadvantaged opponent. An illustrative citation would be *Philips Business Systems v. Executive Business Systems*,[101] an Eastern District of New York case. Another case, again I don't want to seem parochial, but coincidentally it is also from the Eastern District of New York, no doubt a fount of all wisdom. Although *Zimmerman v. Schweiker*[102] might be more appropriately chargeable to the Equal Access to Justice Act,[103] many of the same concerns and considerations were included in the court's reasoning that would surface in a Rule 11 case. Another way of ensuring yourself punishment would be to deliberately misrepresent the law. Sanctions were awarded against an attorney citing a dissent in a Supreme Court decision clearly on point against him and that one, if you are interested, is *Fisher v. CPC International, Inc.*[104]

Sanctions are often awarded in consideration of an attorney's experience—either in terms of the number of years admitted to practice or the degree of specialization and expertise he presumably has—as being inconsistent with the type of pleading offered. One case would be *Huettig & Schromm, Inc. v. Landscape Contractors Council*[105] and also *Rubin v. Long Island Lighting Co.*[106] I would also suggest a caution, and perhaps it is an editorial comment, that if an attorney who the court feels should

100. *See* Fed. R. Civ. P. 11 advisory comm. note.
101. 570 F. Supp. 1343, 1351 (E.D.N.Y. 1983), *modified*, 744 F.2d 287, 292 (2d Cir. 1984) (reversing fee award).
102. 575 F. Supp. 1436, 1441-42 (E.D.N.Y. 1983).
103. 28 U.S.C.A. § 2412 (Supp. 1985).
104. 591 F. Supp. 228, 236 (W.D. Mo. 1984).
105. 582 F. Supp. 1519, 1522 (N.D. Cal. 1984).
106. 576 F. Supp. 608, 615 (E.D.N.Y. 1984).

know better is to be sanctioned for an ambitious pleading or perhaps for an innovative pleading, we might run the hazard of discouraging growth in the law and creativity on the part of counsel. Many principles that are now well established in the law were the result of what could have very well have been deemed thirty or forty years ago to be frivolous pleading. I know the Advisory Committee does speak in terms of a disinclination to punish innovative counsel.[107] But this is not my topic so I will hit it and run. But there is a suggestion that if sanctions are awarded against a lawyer who is presumably expert in his field for filing a pleading that is deemed meritless by the judge analyzing that pleading then there is a danger of perhaps denying access to the court to certain types of claims that might ultimately, in an evolving climate, be shown to have great merit.

Another area where sanctions have been repeatedly imposed is where a party has persisted in bringing repeated harassing lawsuits against the same target. This has often been the case in pro se litigant matters but also in the case of counsel generated pleadings. Examples would be *Taylor v. Prudential-Bache Securities, Inc.*[108] and *Tedeschi v. Smith Barney, Harris Upham & Co.*[109] Even if a pleading is deemed consistent with existing law or reasonable at the inception of the lawsuit, sanctions have occasionally been awarded where an attorney persists in a position after discovery should have disclosed the want of virtue or the want of merit in the particular position taken. An example of that would be *Steinberg v. St. Regis/Sheraton Hotel*,[110] and again I suppose the old law case of *Nemeroff v. Abelson*.[111]

I guess one might say that like many other corrective measures Rule 11 seeks to address an abuse. The Rule as well as the cases and commentaries fortunately shows a deference to innovative lawyers and litigants and shows respect for the attorney-client privilege. Hopefully, the Rule will strike a balance between the need to curtail abuse of the courts and the legal system and at the same time not stifle creativity and vitality in the law.

---

107. *See* Fed. R. Civ. P. 11 advisory comm. note.
108. 594 F. Supp. 226, 228 (N.D.N.Y.), *appeal dismissed mem.*, 751 F.2d 371 (2d Cir. 1984).
109. 579 F. Supp. 657, 663 (S.D.N.Y. 1984), *aff'd per curiam*, 757 F.2d 465 (2d Cir. 1985).
110. 583 F. Supp. 421, 425 (S.D.N.Y. 1984).
111. 704 F.2d 652, 659-60 (2d Cir. 1983).