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A PRACTITIONER'S COMMENTARY ON THE ACTUAL USE OF AMENDED RULE 11

REMARKS OF MELVYN I. WEISS*

Before I get into my intended comments, I would like to address Judge Duffy's remarks. I enjoy hearing Judge Duffy because I know he is sincere and intelligent, although I sometimes disagree with him. He believes in what he stands for even though he knows that others may disagree with him. But nevertheless, he asserts his position, and usually in a very forceful manner. Sometimes he even takes a position, as a judge, knowing that he may be in disagreement with the Circuit Court of Appeals, presumably a jurisdiction to which he is beholden. But as a judge with strong feelings and strong beliefs, he stakes out his position irrespective of what the circuit court may do. I respect that. There are others, however, who would disagree with a district court rendering decisions without giving more regard to what the higher court may do. I don't agree with that view and apparently neither does Judge Duffy.

So too there are lawyers who have strong beliefs, and are willing to present them in spite of long odds against their views being accepted. Lawyers are trained to be creative and to be aggressive for their clients. It is that process that brings about meaningful changes in the law, changes which society requires in order to move forward. Unfortunately, I believe Rule 11 may stifle this evolutionary process. If lawyers become inhibited because of concern over the imposition of sanctions, we all become losers.

I most resent Rule 11 because it pits lawyer against lawyer in a very unseemly way, in the wrong arena, and in a public spectacle.¹²² I travel all over the country and I see all kinds of lawyers from all kinds of backgrounds. They are not all brilliant, they are not all successful and sometimes their judgments may even be wrong. But for the most part, and with very few exceptions, they take their responsibility to their client very seriously. If they err, it is because they may take those responsibilities too seriously. Sure they are aggressive, but usually not for their own pocketbooks. Very few lawyers with whom I have had contact think in terms of pocketbook issues when they take positions in court. They do it because they have sincere beliefs in their arguments, and in their fiduciary duty to get a proper result for their client. To characterize these actions in the terms that we have just heard, I think is not fair.

As I stated at one of the luncheons, the judicial system requires a co-

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122. See Patton, *New Rules Intended to Streamline Pretrial Process*, *Legal Times*, May 16, 1983, at 17, col. 2; Vairo, *supra* note 1, at 65. But see Schwarzer, *supra* note 77, at 183-84 (rejecting some of these concerns).

operative atmosphere among lawyers.¹²³ Settlement is the most effective and cheapest way to get rid of a case; and without having settlements in the percentages that we do I don't think it would be possible for the judicial system to work. What Rule 11 does is inject in an atmosphere that is already a hostile one, an additional adversarial proceeding that will only exacerbate that hostility and reduce the possibilities for settlement. Professionals have to control emotions, they have to calm their clients, they have to interact with one another and they have to present themselves to the court, sometimes aggressively but always in control. When you get into this Rule 11 business, it creates an atmosphere that too easily causes the lawyers to lose control. It is very difficult to be attacked by another lawyer with respect to veracity and competence, and continue to maintain the kind of relationship in that proceeding that is necessary for that proceeding to conclude in a proper way. One must wonder whether it is an effective way to get at the problems that are perceived to exist. I think it is not.

I happen to be in basic disagreement with those who complain there is something wrong with the number of lawsuits that are instituted. Presumably a perceived excess of litigation is part of the justification for having Rule 11. I believe our society is a great society, in part, because we have access to the courts as we do. I don't think there are very many people in this country who would want to trade our system for a system that doesn't provide adequate means for individuals to seek redress for injuries inflicted on them by others.

We live in a complex society where a lot of people live under very frustrating circumstances. Government is remote. Virtually everyone who has a profound impact on an individual's life is remote. Whether they be individuals who buy securities in the stock market, or buy products in the supermarket, people are dependent on the conduct of others with whom they have no direct contact. We are far from the horse and buggy age, when most of the lawsuits arose as a result of one-on-one transactions.

Commercial conduct has evolved so that people rely on conduct of unknown third persons to live their lives peacefully, without improper economic intrusion and in good health. But as communications increased and the legislatures opened the doors to the courtroom, the opportunity was afforded to get into the bowels of these third parties, and to see what was really influencing economic well-being, good health and peaceable co-existence. And we are still learning. We are learning about

123. See Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of Punishment*, 57 St. John's L. Rev. 680, 717 (1983) ("Often, punishing lawyers will change the atmosphere in which a judge works from one of cooperation to one that is combative and less effective in bringing controversies to just, speedy, and inexpensive resolutions."); Weinstein, *Remarks at the Annual Judicial Conference Second Judicial Circuit of the United States*, 93 F.R.D. 675, 785 (1981) ("In my opinion, any system that requires force, that doesn't revolve around the collegial consensus of the bar and the courts about what is right . . . is not working properly.")

the horrendous impacts of dump sites¹²⁴ that are so toxic that they most probably will give rise to future genetic damage; automobiles that are put on the road with parts that will cause serious injury or death¹²⁵ and a parade of other horrors. It is not easy to get to the bottom of these situations. But it is very important to give people out there a sense that there is somebody who will get to the bottom for them—or fight City Hall for them, if you will. I will leave to Judge Sifton, a story that he told us at the luncheon yesterday that is on point.

I just don't like what Rule 11 does in this already difficult environment. I am not going to dwell on personal experiences, but I will tell you one thing, attacks by lawyer upon lawyer will start off slowly and escalate rapidly. You know, lawyers are timid about suing other lawyers. Make no mistake about it, this kind of motion is just like suing a lawyer. You are in effect suing a lawyer and trying to get money from that lawyer and cause that lawyer to be sanctioned. And the more reported decisions awarding sanctions,¹²⁶ the more we are going to see of these motions.

I have a motion with me that was made against my firm last week, out in San Francisco, by a major law firm, against which we litigate frequently. I happen to think that law firm is going to get killed with this motion but that is beside the point. The reason it brought the motion, you know, is because it goes to its client and it tells its client this motion is available. It so informs its client because that is its responsibility as an attorney. And the client who is being sued for fraud says, get the bastard and use any means available. Find any way you can to get the bastard. If a decision is obtained awarding sanctions, it is an invitation for the next ten lawyers to make similar motions and then the ten lead to a hundred motions, which will then lead to thousands of motions and ultimately we are really going to see clogged courtrooms.

124. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1038 (2d Cir. 1985) (hazardous waste dump in Glenwood Landing, N.Y.); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 970-71 (2d Cir. 1984) (Love Canal); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1067-68 (D. Colo. 1985) (Rocky Mountain Arsenal). See generally H.R. Rep. No. 1016, 96th Cong., 2d Sess. 17-21, reprinted in 1980 U.S. Code Cong. & Ad. News 6119 (discussing Comprehensive Environmental Response, Compensation and Liability Act of 1980, commonly known as "Superfund"); Comment, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. Pa. L. Rev. 1229, 1229-80 (1982) (discussing liability under Superfund).

125. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 776-78, 174 Cal. Rptr. 348, 361-62 (1981) (Ford Pinto gas tank explosion); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 369, 161 A.2d 69, 75 (1960) (Plymouth steering system failure); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 390-91, 111 N.E. 1050, 1053 (1916) (defective wheel).

126. For example, in the Second Circuit, there were seven published opinions that concerned sanctions under the new Rule 11 in 1983. In 1984 there were 32. See Memorandum from Mary Sue Henifin to Standish Forde Medina, Jr., *A Preliminary Analysis of Reported Decisions Applying the 1983 Amendments to Rules 11, 16, and 26 of the Federal Rules of Civil Procedure* app. B, at B-2 to -9 (Aug. 8, 1984) (available in the files of the *Fordham Law Review*). It must also be noted that many sanctions are imposed without written opinions. See *id.* at 4.

To another point—why should I, representing a plaintiff filing a lawsuit, be subjected to the vagaries of judges, some of whom can be very arbitrary and, believe it or not, not very clever. Many judges, like it or not, don't know what is going on and a lot of them have deep-seated biases and are out to get particular lawyers. And boy, Rule 11 is some tool to do it with. Why should any lawyer have to subject him or herself in front of such judges, in the beginning of the lawsuit, with questions such as—what did you do to satisfy yourself as to every fact in this 60-page complaint—which was so pleaded because of purported Rule 9(b) particularity requirements.¹²⁷ If a firm then gets sanctions against it as my firm did in *Goldman v. Belden*¹²⁸ in upstate New York in the federal district court up there, it is subjected to having that decision cited against it in forums all over the country. Every time my firm made a motion for certification of a class, that decision was cited. How much damage did that do to my firm?

Now let's look at the law firm that made that motion and got the sanctions against us. In its appellate brief before the Second Circuit, cognizant of Rule 11, that law firm wrote the following: "Moreover the present suit has all the characteristics of a 'strike' suit against which the Supreme Court warned in *Blue Chip Stamps* Plaintiff clearly hopes that the defense of the suit and particularly the discovery process will be so demoralizing, intrusive and expensive that his target will agree to a payoff no matter how unsubstantiated his charges of fraud."¹²⁹ Having libeled all of my partners as "strike suitors," is that not grounds for a Rule 11 motion? Our adversary made a Rule 11 motion against us and where was it to end, with a retaliatory Rule 11 motion? What were we to do? My firm decided—to hell with it, just beat the attack as we did, send our adversary back home with a reversal and reconfront that same judge and just go on with business. My question is, however, can business then continue as usual? Unfortunately, what was injected in the case was

127. See Fed.R. Civ. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). There is some suggestion, however, that Rule 9(b) does not apply in federal securities law cases because those actions are distinguishable from common law fraud cases. See *Jackson v. Daniels*, [1984-85 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,045, at 91,207-08 (D.N.M. April 12, 1985).

128. See *Goldman v. Belden*, 580 F. Supp. 1373, 1381-82 (W.D.N.Y. 1984) (imposing sanctions against plaintiff and his attorneys, Mr. Weiss' firm, for allegedly filing an action for fraud without foundation), *vacated*, 754 F.2d 1059 (2d Cir. 1985). On appeal, the Second Circuit found that the complaint sufficiently stated a claim and therefore "the imposition of sanctions pursuant to Rule 11 cannot stand." *Goldman v. Belden*, 754 F.2d 1059, 1071-72 (2d Cir. 1985).

129. Brief for Defendants-Appellees at 30, *Goldman v. Belden*, 754 F.2d 1059 (2d Cir. 1985). See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-44 (1975) (concerning the Court's fear of "vexatious litigation" which could be instituted by plaintiffs with weak claims in order to extract settlements). *But see Phillips Petroleum Co. v. Shutts*, 105 S. Ct. 2965, 2974 (1985) (class actions permit litigation in a suit with common questions when proper joinder is unavailable due to the number of plaintiffs; class actions permit "plaintiffs to pool claims which would be uneconomical to litigate individually").

poison, and it may not be excisable. It is unfortunate, but true, that a get-even mentality, not healthy in a litigation, will frequently result.

Making Rule 11 motions is bad, it is evil, and it is going to hurt us all and adversely affect the judicial process. Our reputations within the community will not be enhanced and we're are going to rue the day it was adopted. It can only further erode public confidence in our system of justice.