DEVELOPMENTS UNDER THE 1983 AMENDMENTS TO FED. R. CIV. P. 11

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I. INTRODUCTION

Federal Rule of Civil Procedure 11 is the primary source of sanctions in federal court for abuses of the litigation process. In form, Rule 11 is a rule that operates when an attorney or party signs a pleading, motion, or other paper. The rule requires that all such papers be signed by an attorney representing a party or, in the case of pro se litigants, by the party acting pro se. The Rule then provides for sanctions when pleadings, motions, or other papers are not signed, or when they are signed in violation of the standards imposed by the Rule. [Rule 11, as amended in 1983, is reprinted in the appendix to this paper.]

Defects (discussed below) in the operation of Rule 11 prior to 1983 produced the amendments that are the subject of this paper. The amendments were circulated to the bench and bar in June 1981 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 90 F.R.D. 451, 462 (1981). After public hearings and comments from the legal profession, the Rule was modified. See 97 F.R.D. 190-94 (explaining the modifications). The amendments were then promulgated by the Supreme Court under 28 U.S.C. § 2072 on April 28, 1983, and became effective on August 1, 1983. The amendments to Rule 11 are explained in section II, below, and the decisions interpreting the Rule since 1983 are discussed in section III.

II. 1983 AMENDMENTS TO FED.R.CIV.P. 11

A. Problems With Old Rule 11

Original Rule 11 provided that every pleading of a party represented by an attorney had to be signed by at least one attorney of record; parties not represented by an attorney were also required to sign their pleadings. The signature of an attorney constituted a certificate that the attorney had read the pleading, that to the best of the attorney's knowledge, information, and belief there was good ground to support it, and that it was not interposed for delay. Rule 11 further provided that if a pleading was not signed, or was signed with intent to defeat the purpose of the rule, it could be stricken as sham and false. If an attorney "willfully" violated the rule, he or she could be subjected to "appropriate" disciplinary action. Similar action was possible if "scandalous" or "indecent" matter were inserted in a pleading.

Experience with Rule 11 indicated that it was ineffective in deterring abuses. See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 198 (1983). Several problems existed with the original Rule:

(1) The terms of the Rule applied only to pleadings, leading to confusion about its applicability to motions and other papers;

(2) The terms of the Rule made the certification requirement applicable only to attorneys, not to parties unrepresented by attorneys. See 5 Wright & Miller, Federal Practice and Procedure § 1331, at 496 [hereafter Wright & Miller];

(3) The "good ground to support" standard of the original Rule was not clear; for example, it was not clear whether there existed a duty on an attorney to investigate the facts and the law before signing a pleading, and if so, what quality of investigation was required;

(4) The original Rule was incomplete; it listed only "delay" as an improper purpose for which a pleading might be "interposed" illegitimately (in addition to lack of good ground to support the pleading);

(5) The range of available and appropriate sanctions that might be imposed for a violation of the original rule was not clear; and

(6) The sanctions for inclusion of scandalous and indecent matter in a pleading were redundant.

B. Analysis of the 1983 Amendments

1. Application of Rule 11 to Motions and Other Papers.

Technically, the standards of Rule 11 were always applicable to motions and other papers. Fed. R. Civ. P. 7(b)(2) provided, prior to 1983, that the rules applicable to captions, signing, and other matters of form of pleadings applied to all motions and other papers provided for by the rules. This made the standards of Rule 11 applicable to motions and other papers, such as discovery papers. See Advisory Committee Note to Amended Rule 7, 97 F.R.D. 196 (1983). However, because Rule 11 itself only mentioned "pleadings," there arose some confusion about the propriety of sanctions in cases, e.g., of improper motion practice. To eliminate this confusion, Rule 11 was amended to apply explicitly to motions and other papers. In addition, Fed. R. Civ. P. 7(b) was amended in 1983 to add the following subsection (3): "All motions shall be signed in accordance with Rule 11." 97 F.R.D. 196 (1983). The reference to "other papers" in amended Rule 11 literally includes discovery papers, but the certification requirement as applied to discovery papers is

governed by new Fed. R. Civ. P. 26(g), also added in 1983. See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 201; Fed. R. Civ. P. 26(g), 97 F.R.D. 215-16.

2. Certification Requirement Applied to Parties as well as Attorneys.

Amended Rule 11 requires that a party who is not represented by an attorney must sign his pleading, motion, or other paper. Furthermore, the certification requirement of Rule 11 (discussed in subsection 3, below) is now explicitly made binding on unrepresented parties who sign pleadings, motions, and other papers. However, in determining whether an unrepresented party has violated the certification standard, the court has discretion to take account of the problems that may confront an unrepresented subscribing party. See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 199 (1983); 2A Moore's Federal Practice ¶ 11.02[2], at 11-13 (1984) [hereafter Moore's].

3. The Certification Standard.

The 1983 amendment to Rule 11 altered the certification that results from signing a pleading, motion, or other paper. Under the original Rule, signing a pleading, etc., constituted a certificate that there was good ground to support the pleading and that it was not interposed for delay. Under the amended Rule the signature of an attorney or party constitutes a certificate that to the best of his or her "knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." See Rule 11 as amended, appendix.

The new standard is designed to accomplish several things. First, the standard of the amended Rule makes it clear that there is an affirmative duty on a person signing a pleading or other paper to investigate the facts and the law before filing. "The standard is one of reasonableness under the circumstances." Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 198 (1983). This is a more stringent standard than imposed by original Rule 11, which simply required that an attorney not act in bad faith when certifying a pleading. See id. at 198-99; Nemeroff v. Abelson, 620 F.2d 339 (2d Cir. 1980). This "bad faith" standard did not necessarily involve any affirmative duty of investigation. See 5 Wright & Miller, § 1333, at 499-500. However, although the new standard will be triggered by a greater range of circumstances than the old one, the Advisory Committee Note to the amended Rule makes it clear that the standard is not designed "to chill an attorney's enthusiasm in pursuing factual or legal theories."

> The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or other paper was submitted. Thus, what constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer; whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

97 F.R.D. at 199.

In addition to imposing a reasonable duty of investigation upon a person signing a pleading, motion, or other paper, amended Rule 11 provides that the person's signature constitutes a certificate that the pleading, etc. is not interposed for any improper purpose, such as delay, harassment, or needless increase in the cost of litigation. The amended Rule thus expands the improper purposes for which a pleading might be interposed; "delay" is still included, as under old Rule 11, but harassment and needless increase of expense have been explicitly added to the Rule as proscribed purposes. It should be noted that the new Rule is open-ended; that is, the Rule states that a pleading may not be interposed for "any improper purpose, such as . . . ." (Emphasis supplied.) Presumably, therefore, a court might find a paper has been interposed for an improper purpose other than one of the three listed, though it is not clear from the text of the rule or the Advisory Committee Note what such a purpose might be. This should produce no difficulty, however, since "harassment," which is specifically listed in the rule seems broad enough to encompass all sorts of abusive practices. [See the discussion of scandalous and indecent matter in the subsection 4, below, on sanctions.]

4. Sanctions.

Original Rule 11 provided that if a pleading was not signed, or was signed with the intent to defeat the purpose of the Rule, it might be stricken as sham and false and the action could proceed as if the pleading had not been served. This provision was removed by the 1983 amendments, because it was rarely used and the decisions under the provision tended to confuse the issue of attorney honesty with the merits of the action. Thus, the issues that arose under this provision can better be dealt with under Fed. R. Civ. P. 8 (General Rules of Pleading), 12 (Defenses and Objections -- When and How Presented By Pleading or Motion -- Motion for Judgment on the Pleadings) & 56 (Summary Judgment). See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 199 (1983), and authorities there cited. The amended Rule now provides that if a pleading, etc. is not signed, it shall be stricken unless it is signed promptly after the omission is

called to the attention of the pleader or movant. Thus the Rule now recognizes, as it always should have, that a failure to sign is often a technical defect, which, in light of "the basic policy of the federal rules to adjudicate actions on their merits rather than on procedural niceties" should be curable. See 5 Wright & Miller § 1334, at 501.

Also eliminated by the 1983 amendments was the provision of old Rule 11 referring to scandalous or indecent matter. The reference was deleted as unnecessary because Fed. R. Civ. P. 12(f) already provides for a motion to strike scandalous or indecent matter. However, as the Advisory Committee Note indicates, the presence of scandalous or indecent matter in a pleading or other paper is a strong indication that it has been interposed for an improper purpose. See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 199 (1983). When this is so, an appropriate sanction may be imposed under the last sentence of Rule 11. (See below).

This last sentence of amended Rule 11 contains one of the Rule's most important provisions -- the sanctions that may be imposed upon an attorney or party who signs a pleading in violation of the Rule. Old Rule 11 provided that for a willful violation of the Rule an attorney could be subjected to appropriate disciplinary action. (This was in addition to, or instead of, striking the offending pleading as sham or false.) This provision has been eliminated. Instead, Rule 11 now provides that if a pleading, etc. is signed in violation of the Rule the court shall, upon motion or its own initiative, 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 the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee. Several points should be noted about this new provision:

(a) If Rule 11 is violated, the court must impose a sanction, though the nature of the sanction, as well as who it will be imposed upon, is left to the court's discretion;

(b) Although the former reference to the willfulness of an attorney's conduct has been removed from the Rule, the court may take willfulness into account in determining who the sanction should be imposed upon and how severe the sanction should be. See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 200 (1983).

(c) Even though an attorney signs a paper that violates the Rule, it may be appropriate nevertheless to impose a sanction on a party; for example, if a client is aware of or responsible for procedural steps taken in bad faith through an attorney, a sanction may be imposed upon the client (as well as the attorney).

Cf. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977).

(d) The amended Rule makes it clear that the court may act on its own motion in imposing sanctions;

(e) The amended Rule now includes specific mention of the costs and fees sanction, thus explicitly encouraging the use of this sanction for violations of the rule. See Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 198 (1983).

(f) Other sanctions, e.g., disbarment of an attorney, contempt, etc., remain proper under amended Rule 11, as they were under the under the old Rule. See 5 Wright & Miller, § 1334, at 503-04.

(g) The time when sanction should be imposed is left to the discretion of the trial judge, although "it is anticipated that in the case of pleadings the sanctions issue under Rule 11 normally will be determined at the end of the litigation, and in the case of motions at the time when the motion is decided or shortly thereafter." Advisory Committee Note to Amended Rule 11, 97 F.R.D. at 200-01 (1983).

(h) The procedure utilized in imposing sanctions is also within the discretion of the trial judge. Obviously, it must comport with due process by affording adequate notice and an opportunity to be heard. However, the particular format to be followed will depend on the circumstances of the case, and the judge's participation in the proceedings will often provide her with full knowledge of the relevant facts "and little further inquiry will be necessary." Id. at 201.

5. Unchanged Portions of Rule 11.

Rule 11 has always stated, and continues to state, that verification of pleadings is unnecessary unless specifically provided for by rule or statute. An example of a situation in which pleadings must be verified under the Federal Rules is a derivative action by shareholders under Fed. R. Civ. P. 23.1. See Generally 5 Wright & Miller, § 1335, at 506-07 for a listing of other rules and statutes that require verification.

Rule 11 has always stated, and continues to state, that "[t]he rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished."

III. THE DECISIONS INTERPRETING AMENDED RULE 11

Amended Rule 11 requires two kinds of investigation by an attorney or party who signs a paper covered by the rule: (1) a factual investigation and (2) an investigation into the applicable law. As noted in the preceding section, the quality of investigation required in both instances is an investigation that is reasonable under the circumstances. "In determining what is reasonable, the standard generally applied is that of a competent attorney." See 2A Moore's ¶ 11.02[3], at 11-17. As one might expect, sanctions are most often imposed for failure to make an adequate investigation into the law and less frequently for failure to investigate the facts. See id. at 11-22.

In addition to requiring a reasonable investigation into the facts and the law before signing a paper, Rule 11 requires that the paper not be interposed for any improper purpose. This requirement imposes an independent basis for sanctions, even when the reasonable investigation requirements of Rule 11 have been satisfied. See id. at 11-24 - 11-25.

In discussing the cases interpreting amended Rule 11, subsection A will cover decisions dealing with the general standard of diligence required under the rule, subsection B will deal with cases imposing sanctions for failure to make a reasonable investigation into the facts, subsection C will describe cases imposing sanctions for failure to make a proper investigation into the law, subsection D will cover the improper purpose requirement, subsection E will discuss the kinds of sanctions that may be imposed under the rule, subsection F will discuss the case law dealing with upon whom the sanctions may be imposed, and subsection G will discuss recent developments in the procedures for obtaining sanctions under Rule 11. Heavy emphasis is placed upon decisions within the Eighth Circuit, although some cases from other circuits are also discussed.

A. The Standard of Diligence Required Under Rule 11

The decisions under Rule 11 widely agree that the subjective bad faith standard of the old Rule is improper under the 1983 amendments to the Rule. Instead, "[t]he standard by which courts are to judge conduct challenged under Rule 11 is one of objective reasonableness." Hartman v. Hallmark Cards, Inc., 833 F.2d 117, 124 (8th Cir. 1987). See also Kurkowski v. Volker, 819 F.2d 201 (8th Cir. 1987)(good faith of pro se litigant does not prevent sanctions); Rauenhorst v. United States, 104 F.R.D. 588 (D. Minn. 1985). But see Wise v. Pea Ridge School Dist. No. 109, 675 F. Supp. 1524 (W.D. Ark. 1987) (stating that although plaintiffs' claims had little merit, they were not so unwarranted as to show a lack of good faith). In determining what is reasonable, the standard generally applied is that of a competent attorney." 2A

Moore's § 11.02[3], at 11-17. See also Dreis & Crump Mfg. Co. v. International Ass'n of Machinists, 802 F.2d 247 (7th Cir. 1986). As the cases discussed in later subsections will indicate, this standard is flexible enough to allow the courts to take into account the circumstances faced by a party or attorney who signs a pleading, motion, or other paper in violation of the Rule. For example, in denying sanctions, courts have taken into account factors such as the youth and inexperience of counsel and the extent to which he had to rely on his clients for factual information. See, e.g., Wise v. Pea Ridge School Dist. No 109, supra. But clearly the absence of any prefiling investigation will result in the imposition of sanctions.

Rule 11 only applies when a pleading, motion, or other paper is signed in violation of the reasonable investigation or improper purpose standards of the rule. The Eighth Circuit Court of Appeals has held that a settlement agreement is not a pleading, motion, or other paper within the language of the rule, at least when the settlement agreement is not submitted to the court. "Rule 11 proceedings were never intended to resolve disputes between parties as to whether a settlement agreement has been breached, nor are Rule 11 proceedings intended to determine misrepresentation questions where the misrepresentation is not reflected in a pleading, motion, or paper filed with the district court." See Addvono v. World Hockey Ass'n., 824 F.2d 617, 621 (8th Cir. 1987).

Similarly, Rule 11 has been held inapplicable to papers filed in the courts of appeals; the Rule is exclusively applicable to proceedings in the district courts. See In re Grand Jury Proceedings Relative to Perl, 838 F.2d 304 (8th Cir 1988).

In Burull v. First National Bank of Minneapolis, 831 F.2d 788 (8th Cir. 1987), the Eighth Circuit also held that when a complaint contains several counts that are legally or factually meritless, but the plaintiff's action taken as a whole is factually and legally substantial enough to reach a jury, Rule 11 sanctions may not be imposed. "Rule 11 directs sanctions 'only when the "pleading, motion, or other paper" itself is frivolous, not when one of the arguments in support of a pleading or motion is frivolous.'" Id. at 789. See also Murphy v. Business Cards Tomorrow, 854 F.2d 1202 (9th Cir. 1988); Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir. 1986); Martinez, Inc. v. H. Landau & Co., 107 F.R.D. 775 (D. Ind. 1985). Cf. Say Electric, Inc. v. International Brotherhood of Electrical Workers, Local 292, No. 2460 (D. Minn. July 19, 1985) (WESTLAW, DCTU Database) (Rule 11 sanctions not awarded because plaintiff's argument not totally frivolous).

This result, while superficially supported by the language of Rule 11, is highly questionable. The purposes of Rule 11 are deterrence, punishment, and compensation. See generally, Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L.J. 901, 905

(1988). When a party is forced to meet numerous frivolous claims or defenses inserted into a blunderbuss pleading, even when one claim or defense turns out to be substantial enough to get to trial, the purposes of the rule will be undermined unless sanctions are imposed.

Other courts have, correctly, rejected this approach and imposed sanctions for partially frivolous papers. See Melrose v. Shearson/American Express, Inc., 120 F.R.D. 668 (N.D. Ill. 1988) (defendant was sanctioned in the amount of $37,212 for filing a summary judgment motion that was granted as to only one count of a multiple count complaint and denied as to all the other counts and as to defendant's counterclaims).

It should be noted that Rule 11 sanctions may not be imposed on a party or the party's attorney who files a state court pleading that would violate Rule 11 if the state action is later removed. Only actions in violation of the Rule after removal may be sanctioned. See Kirby v. Allegheny Beverage Corp., 811 F.2d 253 (4th Cir. 1987); Meadow Ltd. Partnership v. Meadow Farm Partnership, 816 F.2d 970 (4th Cir. 1987).

Other cases discussing the standard of diligence required under Rule 11 are: Aetna Casualty & Surety Co. v. Fernandez, 830 F.2d 952 (8th Cir. 1987); Bass v. Southwestern Bell Telephone, Inc., 812 F.2d 44 (8th Cir. 1987); Baden v. Craig-Hallum, Inc., 115 F.R.D. 582 (D. Minn. 1987); Bigalk v. Federal Land Bank Ass'n, 107 F.R.D. 210 (D. Minn. 1985); Price v. Viking Press, Inc., 654 F. Supp. 1038 (D. Minn. 1987).

B. Failure to Make a Reasonable Factual Investigation

As stated earlier, fewer cases impose sanctions under Rule 11 for failure to make a reasonable prefiling investigation into the facts than for failure to investigate the applicable law. The reasons for this are several.

When the Federal Rules of Civil Procedure were promulgated and became effective in 1938, one of the primary purposes of the Rules was to institute a system of simplified "notice pleading." The idea was, partly, that the pleading stage of the litigation should be deemphasized as a means of exchanging factual information between the parties about the details of the case, since discovery could do this job much more efficiently and effectively. One aspect of this idea as applied to plaintiffs was that there would be situations in which the plaintiff and his or her attorney would have a good faith belief that a valid claim existed on the facts in their possession, but could not be certain because essential facts necessary to determine the validity of the claim absolutely would be in the possession of the defendant. Therefore, the Rules allow plaintiffs to institute the action and proceed to the discovery stage of the litigation to develop the details of the claim as long as they are doing the best they can under the circumstances.

Nothing in the 1983 amendments to Rule 11 has altered this notice pleading philosophy of the Federal Rules. Thus, the reasonable prefiling investigation of the new Rule must be interpreted in light of the overall notice pleading philosophy of the Rules. When this is done, it becomes plain that Rule 11 cannot realistically mandate a quality of factual investigation that would, in all cases, require the plaintiff's attorney to confirm absolutely the existence of all of the facts necessary to prove the plaintiff's claim before filing the complaint. At least in situations where critical information is in the exclusive possession of the defendant, therefore, the overall philosophy of the Federal Rules requires that no sanctions be imposed for merely filing a complaint that turns out to be factually unmeritorious.

In addition, there will be other situations in which an attorney who signs a pleading should not be sanctioned under Rule 11. The most common situation of this sort will occur when the attorney must rely on information provided by the attorney's client and that information later turns out to be false. See 97 F.R.D. at 199.

Nevertheless, the courts can and do impose sanctions in a variety of cases for failure to make the reasonable factual investigation required by Rule 11. In Aetna Casualty & Surety Co. v. Fernandez, 830 F.2d 952d (8th Cir. 1987), sanctions were approved against an insurance company that brought an action which was barred by the statute of limitations. Despite the fact that the defendant warned the plaintiff that the action was time-barred, the defendant made no factual investigation that would have brought the case within an exception to the statute.

Similarly, in Van Berkel v. Fox Farm and Road Machinery, 581 F. Supp. 124 (D. Minn. 1984), Rule 11 sanctions were ordered when the plaintiff's attorney failed to make an investigation that would have determined the date on which the accident that was the basis of the suit occurred. Although the defendant sent proof to the attorney as to the true date of the accident and requested that the action be dismissed, the attorney did not dismiss the action and was sanctioned. See also Fisher v. CPC Int'l, Inc., 591 F. Supp. 228 (W.D. Mo. 1984).

In Baker v. Citizens State Bank, 661 F. Supp. 1196 (D. Minn. 1987), the court imposed sanctions under Rule 11 in part for failure to inquire into facts that would have indicated that the plaintiffs lacked standing for much of the relief that they sought in the action.

In Deretich v. City of St. Francis, 650 F. Supp. 645 (D. Minn. 1986), Rule 11 sanctions were imposed in an action in which the court conceded that the plaintiff may have reasonably believed that his action was well-founded at the time he commenced it. The reason for the sanctions was that the plaintiff continued to litigate the action unreasonably after it

should have become plain through the plaintiff's extensive discovery that the action was factually unmeritorious.

To like effect is Bastien v. R. Rowland Co., 116 F.R.D. 619 (E.D. Mo. 1987), affirmed Lupo v. Stemmler, ___F.2d___ (8th Cir. No. 87-2296 September 20, 1988), in which Rule 11 sanctions were imposed when, on the eve of trial after four years of discovery, plaintiffs had been unable to develop proof for their claims and summary judgment was granted against them and affirmed on appeal.

Likewise, in EEOC v. Blue & White Service Corp., No. 17034 (D. Minn. May 18, 1987) (WESTLAW, DCTU Database), the court imposed Rule 11 sanctions on the defendant in part for asserting defenses after plaintiff's discovery had demonstrated such defenses to be false.

In Doe v. Hennepin County, No. 4996 (D. Minn. Dec. 18, 1985) (WESTLAW, DCTU Database), the court denied Rule 11 sanctions even though the plaintiff's attorney failed to make an adequate factual investigation before filing a motion. The court noted that the motion was not entirely without factual basis, but admonished the attorney to be more cautious in the future.

In Hasty v. PACCAR, Inc., 583 F. Supp. 1577 (E.D. Mo. 1984), the court suggested that the defendant make a motion for Rule 11 sanctions because the plaintiff's counsel failed to make a reasonable inquiry into the facts or the law supporting the exercise of personal jurisdiction over the defendant.

C. Failure to Make a Reasonable Investigation of the Law

Numerous cases impose Rule 11 sanctions for failure to make a reasonable investigation into the applicable law before filing a pleading, motion, or other paper. Failure to make a reasonable investigation into the law is a violation of Rule 11 for which sanctions are often imposed on the attorney representing a party. However, Rule 11 is not designed to punish or deter "creative advocacy." Thus, the Rule provides that sanctions are not appropriate when a pleading, motion, or other paper is supported either by existing law, or by a good faith argument for the extension, modification, or reversal of existing law.

Thus, in Hufsmith v. Weaver, 817 F.2d 455 (8th Cir. 1987), the Eighth Circuit held that Rule 11 sanctions were inappropriate in a case in which the plaintiff had made a good faith argument that a certain legal doctrine should not be extended to the plaintiff's claim. Although a prior Eighth Circuit decision had made the plaintiff's argument meritless, that decision was handed down after the plaintiff had taken its position in the district court.

Similarly, in O'Connell v. Champion International Corp., 812 F.2d 393 (8th Cir. 1987), the Eighth Circuit held Rule 11 sanctions inappropriate when, although the plaintiffs' action was

held barred by limitations, the plaintiffs had made nonfrivolous arguments for avoiding the limitations bar.

However, in Baker v. Citizens State Bank, 661 F. Supp. 1196 (D. Minn. 1987), the court imposed Rule 11 sanctions in part because the plaintiff's attorney failed to make an inquiry into the limitations law applicable to plaintiff's claims. Although the court conceded that the plaintiff might have been able to make a good faith argument that one claim should not have been barred, all the other claims were clearly time-barred.

In Farmer v. Wilkinson, No. 3960 (D. Minn. March 20, 1986)(WESTLAW, DCTU Database), the court imposed Rule 11 sanctions on one of the pro se litigants in the case, because the litigant had filed a previous case on the same grounds and that previous case had been dismissed. This, the court stated, should have alerted the litigant in question that the complaint did not present any valid federal claims.

In Fisher v. CPC International, Inc., 591 F. Supp. 228 (W.D. Mo. 1984), the court sanctioned both attorney and client under Rule 11 on a number of grounds, including failure to make a reasonable investigation into the law. The court cited various frivolous legal arguments made by the plaintiff's attorney, at one point describing the legal reasoning in the case as "atrocious." However, two specific legal grounds also cited by the court as the basis for sanctions were statute of limitations and res judicata.

In Glenn v. Farmers & Merchants Ins. Co., 649 F. Supp. 1447 (W.D. Ark. 1986), the court imposed Rule 11 sanctions on the plaintiff's attorney for failing to make a "minimal effort" to discover the law on claims of bad faith, intentional infliction of emotional distress, and punitive damages against the defendant insurance company.

In Hasty v. PACCAR, Inc., 583 F. Supp. 1577 (E.D. Mo. 1984), the court suggested that the defendant move for Rule 11 sanctions because the plaintiff had failed to make a reasonable investigation into the law applicable to establish personal jurisdiction over the defendant. The plaintiff merely cited to state venue and joinder statutes, which were irrelevant to the personal jurisdiction inquiry.

In LUCHA, Inc. v.Goeglein, 575 F. Supp. 785 (E.D. Mo. 1983), the defendants and their attorneys were sanctioned under Rule 11 for filing a frivolous motion to dismiss the plaintiff's complaint. The grounds of the motion were failure to state a claim upon which relief could be granted, absence of diversity of citizenship, lack of the proper jurisdictional amount in controversy, improper venue, lack of personal jurisdiction, and forum non conveniens, all of which the court described as unsupported and frivolous.

In Saturn Systems, Inc. v. Saturn Corp., 659 F. Supp. 868 (D. Minn. 1987), the court imposed Rule 11 sanctions on the plaintiff's counsel for failure to make an adequate prefiling inquiry into whether venue would be proper in Minnesota. Although defendant's counsel sent plaintiff's counsel a list of authorities indicating that venue was clearly improper in Minnesota and requesting dismissal of the action, the plaintiff's counsel persisted in maintaining the action in an improper venue and was sanctioned.

In Solloway v. Ellenbogen, 121 F.R.D. 29 (S.D.N.Y. 1988), Rule 11 sanctions were ordered in a case in which the plaintiff attempted to base subject matter jurisdiction on the existence of diversity of citizenship between the parties. However, the jurisdictional statement of the plaintiff's complaint alleged that both plaintiffs and two defendants were citizens of New York. This violated the complete diversity requirement of Strawbridge v. Curtis, 7 U.S. (3 Cranch) 267 (1806).

D. Filing for an Improper Purpose

In contrast to the objective requirement of a reasonable prefiling investigation into the facts and the law, Rule 11's requirement that a pleading, motion, or other paper not be "interposed for any improper purpose" focuses on the subjective intent of the signer of the pleading, etc. Most cases involving an improper purpose seem also to involve violations of the reasonable investigation requirement of the rule. Nevertheless, the Rule is clear that the improper purpose requirement is an independent basis for sanctions, which can theoretically result in liability even when a pleading, motion, or other paper is well grounded in fact and law. See 2A Moore's ¶ 11.02[3], at 11-24 - 11-25.

Rule 11's language is open-ended. Any improper purpose can be the basis for sanctions. However, the Rule gives harassment, delay, and needless increase in the cost of litigation as specific examples of improper purposes for which a pleading, motion, or other paper may not be filed. See In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985)(increase in costs); Miller v. Affiilated Financial Corp., 600 F. Supp. 987 (D. Ill. 1984)(delay); United States v. Allen L. Wright Dev. Corp., 667 F. Supp. 1218 (N.D. Ill. 1987)(delay).

In Bastien v. R. Rowland & Co., 116 F.R.D. 619 (E.D. Mo. 1987), affirmed Lupo v. Stemmler ___F.2d___(8th Cir. No. 87-2297 Sept. 20, 1988), the court imposed sanctions in the form of an award of $100,000, which represented only part of the opposing party's attorney's fees. Part of the award was ordered paid by the plaintiffs and part by their attorney. The action in question had gone through four years of discovery without the plaintiffs developing any proof of their claims. The court stated:

> Upon consideration of the record in this case the Court concludes that plaintiffs' counsel conducted the litigation in a manner that escalated costs unnecessarily and vexatiously. Whether or not a competent attorney could form a reasonable belief as to the viability of the original complaint, the conduct of the litigation from the time this Court inherited the file in 1985, which comprises the bulk of the filings, was frivolous and abusive and not directed toward the "just, speedy and inexpensive determination of the action," . . .
>
> Id. at 621.

In Cohen v. Virginia Electric & Power Co., 788 F.2d 247 (4th Cir. 1986), the court imposed sanctions on the plaintiff and his attorney for filing a motion to amend the complaint in the case with the intention of withdrawing the motion if the defendant opposed it. This was classified as an improper purpose, even though the court recognized that there was a legal basis for the claims asserted in the amended complaint.

Similarly, in EEOC v. Blue & White Service Corp., No. 17034 (D. Minn. May 18, 1987) (WESTLAW, DCTU Database), the court imposed Rule 11 sanctions in the form of attorney's fees on both defendant and defense counsel, stating: "Defendant and defense counsel continued this litigation, engendering vexatious and unreasonable delay, right up until April 1987. Under the totality of the circumstances in this case, therefore, . . . the assertion of defendant and defense counsel that this litigation was conducted in good faith is unpersuasive." Id. at p. 10.

In Hearld v. Barnes & Spectrum Emergency Care, 107 F.R.D. 17 (E.D. Tex. 1985), the court, on its own motion, imposed a $5,000 fine, payable to the clerk of the district court, on the plaintiff's attorney for concealing from the court the lack of complete diversity of citizenship between the parties. Similarly, in Itel Containers International Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96 (D.N.J. 1985), the court imposed Rule 11 sanctions on both the defendant and defendant's counsel for filing an answer in which the defendant attempted to delay the disposition of the action by not answering the jurisdictional allegations of the complaint in order to conceal the absence of diversity jurisdiction from the court and the plaintiff.

In IDENT Corp. of America v. Wendt, 638 F. Supp. 116 (E.D. Mo. 1986), the court ordered defendants to pay the plaintiff's expenses and attorney's fees for filing an unmeritorious removal petition. The facts surrounding the filing of the removal petition led the court to conclude that it was filed in violation of the improper purpose standard of Rule 11:

> [T]he Court cannot ignore the circumstances

> surrounding the filing of this removal petition. On April 28, 1986, a hearing was commenced before [the state court] on plaintiff's request for a preliminary injunction. After some three hours of testimony and documentary evidence, court was adjourned until 1:30 p.m. the following day. After appearing 15 minutes late, defendant's counsel informed the court and plaintiff that a counterclaim and removal petition had been filed. The petition for removal stated that the grounds were based on defendants' federal cause of action in its counterclaims. After apparently researching the law, defendants discarded the counterclaim argument and attempt to establish federal court jurisdiction on the basis of a re-characterization of plaintiff's state law claims. The Court finds defendants' arguments meritless and their conduct deserving of sanctions. It is obvious that defendants sought only to delay the administration of justice by disrupting the state court proceedings already in progress.
>
> Id. at 118.

See also Davis v. Veslan Enterprises, 765 F.2d 494 (5th Cir. 1985) (imposing sanctions on a nonresident defendant who removed an action from state to federal court one day before a hearing before the state court on the plaintiff's motion for judgment on the verdict, thus delaying improperly the impostion of the state court judgment in order to save the defendant a substantial amount of interest on the judgment).

In Miller v. United States, 604 F. Supp. 804 (E.D. Mo. 1985), the court ordered the plaintiffs to pay defendant's costs and attorney's fees in an action brought for the refund of an income tax penalty assessed by the IRS after it determined that plaintiffs' tax return was frivolous. In addition to characterizing the plaintiffs' claims as raised in bad faith and vexatiously, the court stated that plaintiffs intended the claims to impede the enforcement of the income tax laws.

E. Kinds of Sanctions Permissible Under Rule 11

Rule 11 requires the court to impose "an appropriate sanction" when the Rule is violated. As stated in an earlier section, the sanctions permissible under old Rule 11, such as contempt and disbarment, remain appropriate under the amended Rule. However, Rule 11 now specifically mentions the imposition of costs and attorney's fees of the opposing party as a permissible sanction under Rule 11. The intent of the drafters of the amended Rule was to encourage the imposition of costs and attorney's fees as a sanction.

The intent of the drafters has been fulfilled in this respect. Virtually all of the cases discussed in the previous

subsections involve the imposition of the sanction of costs and attorney's fees on the violating party. Sometimes the sanctions are imposed on the client, sometimes on the attorney representing the client, and sometimes on both, apportioned as the court deems appropriate under the circumstances. Indeed, it is difficult to find cases imposing any other sanction under the amended Rule. Nevertheless, such cases do exist.

In one interesting decision, the defendant sought dismissal of a wrongful death action because of the persistent failure of the plaintiff's attorney to make a reasonable investigation of the facts. The court, while indicating that the sanction of dismissal might be appropriate in some cases, refused the defendant's request on the grounds that the case involved events occurring as many as twenty-five years ago and the principal witness to those events was now deceased. However, the court did indicate that, while these circumstances would excuse the plaintiff from the usual quality of investigation before discovery, there would be a point when, after discovery had progressed, the attorney should have knowledge whether the action was well grounded in fact. See Touchstone v. G.B.Q. Corp., 596 F. Supp. 805 (E.D. La. 1984).

In a recent decision, the Third Circuit instructed the district court to consider a number of mitigating circumstances in calculating the total amount of the monetary sanction that should be imposed on lawyers who have violated Rule 11. These factors included the lawyer's ability to pay the sanction, the fact that the lawyer had already been subject to adverse press scrutiny as a result of the district court's sanction, and the fact that the attorney had been subject to at least one other disciplinary action. The court also stated:

> [W]hile a monetary sanction, such as attorney's fees, is clearly an acceptable choice of deterrent, courts must be careful not to impose monetary sanctions so great that they are punitive - or that might even drive the sanctioned party out of practice. Other proceedings such as disbarment exist to weed out incompetent lawyers. Rule 11 was not enacted for this purpose, but rather to provide deterrence for abuses of the system of litigation in federal district courts.

Doering v. Union County Board of Chosen Freeholders, ___F.2d___, 57 U.S.L.W. 2181 (3d Cir. 1988).

See also Hearld v. Barnes & Spectrum Emergency Care, 107 F.R.D. 17 (E.D. Tex. 1985) (discussed in subsection D, above, in which the court imposed a $5,000 fine on the plaintiff's attorney for concealing the absence of subject matter jurisdiction from the court).

F. Upon Whom May Sanctions be Imposed Under Rule 11

As stated in the previous subsection, Rule 11 gives the court discretion to impose sanctions upon either a party or the attorney representing a party or both. This includes authorization to impose sanctions on pro se litigants when appropriate. There follows a listing of cases categorized according to whether sanctions were imposed on attorneys, parties, both attorneys and parties, or pro se litigants.

1. Sanctions on Parties

IDENT Corp. of America v. Wendt, 638 F. Supp. 116 (E.D. Mo. 1986).

2. Sanctions on Attorneys

Baker v. Citizens State Bank, 661 F. Supp. 1196 (D. Minn. 1987); Glenn v. Farmers & Merchants Ins. Co., 649 F. Supp. 1447 (W.D. Ark. 1986); Hasty v. PACCAR, Inc., 583 F. Supp. 1577 (E.D. Mo. 1984); Hearld v. Barnes & Spectrum Emergency Care, 107 F.R.D. 17 (E.D. Tex. 1985); Saturn Systems, Inc. v. Saturn Corp., 659 F. Supp. 868 (D. Minn. 1987); Van Berkel v. Fox Farm & Road Mach., 581 F. Supp. 1248 (D. Minn. 1984).

3. Sanctions on Both Parties and Attorneys

Bastien v. R. Rowland & Co., 116 F.R.D. 619 (E.D. Mo. 1987); Deretich v. City of St. Francis, 650 F. Supp. 645 (D. Minn. 1986); EEOC v. Blue & White Service Corp., No. 17034 (D. Minn. May 18, 1987)(WESTLAW, DCTU Database); Fisher v. CPC Int'l, Inc., 591 F. Supp. 228 (W.D. Mo. 1984); Itel Containers Int'l Corp. v. Puerto Rico Marine Management, Inc., 108 F.R.D. 96 (D.N.J. 1985); Lucha v. Goeglein, 575 F. Supp. 785 (E.D. Mo. 1983).

4. Sanctions on Pro Se Litigants

Kurkowski v. Volker, 819 F.2d 201 (8th Cir. 1987); Mullen v. Galati, 843 F.2d 293 (8th Cir. 1988); In re Tyler, 839 F.2d 1290 (8th Cir. 1988); Bigalk v. Federal Land Bank Ass'n., 107 F.R.D. 210 (D. Minn. 1985)(sanctions not imposed on pro se litigant who was "sincere"); Eckert v. Lane, 678 F. Supp. 773 (W.D. Ark. 1988); Farmer v. Wilkinson, No. 3960 (D. Minn. March 20, 1986)(WESTLAW, DCTU Database); Miller v. United States, 604 F. Supp. 804 (E.D. Mo. 1985); Westridge v. Allstate Ins. Co., 118 F.R.D. 617 (W.D. Ark. 1988).

G. Procedure

As stated in an earlier section, the procedure utilized in obtaining sanctions, including the timing of the imposition, is left to the discretion of the trial judge. The Advisory Committee notes to the amended Rule state that, ordinarily, it is expected that in the case of pleadings the appropriateness of a sanction will be determined at the end of the litigation, and in the case of motions when the motion is decided or shortly thereafter. However, a recent decision from the United States District Court for the District of Nebraska indicates that there will be time limits on the ability to obtain sanctions. In Robinette v. City of Lincoln, No. 59643 (D. Neb. June 3,

1988)(WESTLAW, DCTU Database), the court held that, although the plaintiff's claim warranted Rule 11 sanctions, sanctions would not be awarded because the defendant's motion for sanctions was untimely. Although the court recognized that Rule 11 contains no cut off date for the imposition of sanctions, it stated:

> While I am hesitant to say that no sanctions should be awarded if a motion for sanctions is not filed before appeal time has run, my inclination is to think that a cutoff date in most situations must be the end of the time for appeal. A time three months after that appears to me to be excessive. It means that a motion filed then cannot be a consideration to be weighed in the balance regarding appeal. Indeed, the preferred practice, I should think, is to notify opposing counsel as early as reasonably can be that sanctions will be or may be sought. That procedure allows opposing counsel to use the possibility of sanctions as a factor in making future decisions of procedure and substance.

Id. at 2.

Attorneys should be aware, however, that questions of timing are sometimes controlled by local rule. For example, in Lupo v. R. Rowland & Co., ___F.2d___(8th Cir. No. 87-2296, Sept. 22, 1988), the imposition of Rule 11 sanctions was challenged in part on the ground that Rule 30 of the local rules of the District Court for the Eastern District of Missouri requires claims for attorney's fees to be filed no later than 21 days from the entry of judgment on the merits. It was asserted that this rule was violated because the request for fees was filed more than 21 days after the entry on the docket noting the granting of summary judgment in the action. This was rejected by the Eighth Circuit on the grounds that the docket entry was not entry of a final judgment, because Fed. R. Civ. P. 58 requires every judgment to be set forth on a separate document, which had not been done in the case until at least April 21, 1986, when the district court filed its memorandum and order. This memorandum and order was also not technically a final judgment, but the court observed that the district court had probably intended that the entry of judgment was to occur with the filing of the memorandum and order. In any case, because a previous appeal had been taken by the complaining parties and those parties had not complained about the issue, the court held that they had waived their right to do so on the second appeal. Likewise, the court also held that the Rule 11 motion was not a motion to amend the judgment under Federal Rule 59(e), and thus did not have to be filed within 10 days of the entry of the judgment.

See also Lenoir v. Tannehill, 660 F. Supp. 42 (S.D. Miss. 1986) (holding that a claim for sanctions under Rule 11 could not be raised by counterclaim, but had to be raised by motion).

IV. CONCLUSION

When the 1983 amendments to Rule 11 became effective, there was widespread skepticism as to their effectiveness in deterring abuse of the litigation process. The skepticism was based in part upon doubt whether lawyers would seek Rule 11 sanctions against other lawyers and whether judges would be willing to impose sanctions in appropriate cases. It is still uncertain whether Rule 11 will ultimately be effective to deter the abuses at which it is aimed, or whether more effective measures will have to be devised.

However, it can no longer be doubted that lawyers will seek sanctions against other lawyers for abuse of the litigation process, or that judges will be willing to impose sanctions in appropriate cases. As the cases in the preceding section should demonstrate, Rule 11 sanctions are widely sought and imposed in a large variety of cases. Now that the question of willingness to seek and impose sanctions has been answered in favor of the Rule 11 process, perhaps the next question that should be addressed by both lawyers and judges is whether the most frequently sought sanction - costs and attorney's fees - should be buttressed by more severe sanctions against chronic violators of the rule.

RECENT COMMENTARY ON AMENDED RULE 11

Baron, Stepping Aboard the Rule 11 Bandwagon, 35 Clev. St. L. Rev. 249 (1987).

Battey & Dorsey, Rule 11 Sanctions: Some Current Observations, 33 S. Dak. L. Rev. 207 (1988).

Bloomstein, Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure, 21 Akron L. Rev. 289 (1988).

Burbank, Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power, 11 Hofstra L. Rev. 997 (1983).

Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483 (1986-87).

Johnson &. Cassady, Frivolous Lawsuits and Defensive Responses to Them -- What Relief is Available, 36 Ala. L. Rev. 927 (1985).

Maute, Sanctions: Are They Changing the Litigation Game Rules?, 24 Trial 67 (1988).

Schwarzer, Rule 11 Revisited, 101 Harv. L. Rev. 1013 (1988).

Vano, Rule 11: A Critical Analysis, 118 F.R.D. 189 (1988).

Note, Has a "Kafkaesque Dream" Come True? Federal Rule of Civil Procedure 11: Time for Another Amendment, 67 B.U. L. Rev. 1019 (1987).

Note, Rule 11: Has the Objective Standard Transgressed the Adversary System?, 38 Case West L. Rev. 279 (1987).

Note, An Attorney's Primer on Federal Rule of Civil Procedure 11, 23 Tulsa L. J. 149 (1987).

Note, A Uniform Approach to Rule 11 Sanctions, 97 Yale L. J. 901 (1988).

APPENDIX

Rule 11.

SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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.

As amended 1983, 1987.