Resurrect Rule 11

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Over the past few years tort reform advocates have realized significant victories at the state and even federal levels. States have successfully enacted reforms that seek to limit the destructive effects of frivolous suits and unmerited damage awards. Several states have capped non-economic and punitive damage awards and abolished joint and several liability.[1] At the federal level, significant class action reform was enacted in 2005.[2] These reforms should help reduce the costs associated with the nation's tort system over time. Yet, most of these reforms are geared to cases requesting larger damage awards. Little has been done to curb frivolous and unwarranted "nuisance" suits from being threatened or filed. Federal Rule of Civil Procedure 11 ("Rule 11") was implemented to help keep frivolous and unwarranted litigation out of the courts. The rule, which sanctions attorneys for filing frivolous lawsuits, has been amended twice since its inception in 1938.[3] But no iteration has satisfied the public, attorneys, and politicians, all.

The rule initially confined attorneys to generally attest that pleadings were made in good faith. In 1983, it was expanded to impose significant penalties on lawyers who filed frivolous actions, including damages and attorneys' fees.[4] In some cases, the attorney would be referred to the bar for administrative hearings.[5] Currently, Rule 11 is a benign instrument that does not require judges to take action in the face of an obvious violation of the rule, and, as a result, is seldom used.[6] Rule 11 was once derided as an obstacle to civil rights plaintiffs and "creative lawyering," which dictated penalties that otherwise free-handed judges would determine.[7] Now it is scoffed at by some as a paper tiger—a useless weapon against careless and baseless lawsuits.

The problems with civil litigation in this country are real and measurable. There is an economic cost for a system that does little to discourage worthless lawsuits, which are filed to bully settlements out of defendants who cannot afford to fight long legal battles. Rule 11 currently does not sufficiently deter or punish the filing of frivolous claims, and it is often branded as merely paying lip service to policing dishonest or lazy attorneys. This could add to the negative impression that many Americans have for the legal system and its practitioners. This article will discuss the evolution of Rule 11 and assess various recommendations for how it could be strengthened.

The Costs of a Weak Rule 11

It is no secret that the costs of America's tort system are great. A 2002 study by the Small Business Administration Office of Advocacy found that the direct economic cost of tort litigation in the U.S. was about $223 billion,[8] or over two percent of the nation's Gross Domestic Product that year.[9] A 2007 Pacific Research Institute study puts the figure at $865.37 billion annually, once indirect costs like healthcare expenditure, losses in innovation, and stockholder wealth are taken into account.[10] In addition, a 2006 Towers Perrin Tillinghast study found that, from 1950 to 2005, the average annual increase in aggregate tort costs was 9.5%, while the average annual increase in GDP was only 7.1%.[11]

Small businesses, or those which are least capable of fending off frivolous suits, bear a significant burden. In 2005, the direct cost to businesses with annual revenue of less than $10 million was $98 billion, up from $83 billion in 2002.[12] For small businesses and their employees, these costs have severe consequences. A Harris Interactive study for the U.S. Chamber Institute for Legal Reform found that 34% of small business owners have had lawsuits filed against them in the last ten years, and 46% have been threatened with lawsuits.[13] Of those surveyed, 96% believed that frivolous lawsuits were a problem for their businesses, and 63% believed that they were a "major problem."[14]

Out of the hundreds of thousands of civil lawsuits filed in the U.S. each year, the vast majority are settled out of court.[15] Many of these lawsuits fall under the so-called "nuisance-value settlement" problem, which describes the process by which defendants will settle lawsuits, no matter how frivolous, because the cost of doing so is less than the cost of fighting the suit in court.[16]

Evolution of the Rule

Rule 11 promised to help curb such abuse. Promulgated in 1938, the rule held attorneys accountable for the pleadings they signed. A lawyer's signature certified that he or she "has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay."[17] Courts could strike pleadings found to be signed in bad faith and the offending lawyer could be penalized with "appropriate disciplinary action."[18]

The initial rule generally was left on the shelf. Rule 11 motions were filed in only nineteen reported cases from 1938 to 1976.[19] Of those cases, courts issued sanctions in only three.[20] Courts rarely enforced the rule, in large part because standards of conduct and penalties for non-compliance were vague.[21] Moreover, attorneys hesitated to evoke Rule 11 against fellow lawyers.[22] Meanwhile, the per capita costs of the U.S. tort system, adjusted for inflation, more than quadrupled from 1950 to 1980.[23] Observers watched this massive expansion of tort liability with growing concern. Over time, there arose a consensus among legal professionals, including Chief Justice Warren Burger, that the rule was not working and should be changed.[24]

In 1983, the Advisory Committee on Civil Rules of the Judicial Conference declared that, "in practice, Rule 11 has not been effective in deterring abuses."[25] The Committee extended

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the application of the rule and made it easier to enforce. The new rule required lawyers to perform a reasonable inquiry into the factual and legal basis of any signed filing,[26] and explicitly prohibited filings for any improper purpose. If a judge determined that a lawyer failed to comply, the rule mandated that the judge impose sanctions, a significant change from the discretionary sanctions of the old rule.[27]

Nearly seven thousand Rule 11 opinions were published under the 1983 version the following decade.[28] A study by American Judicature found that Rule 11 violations were alleged in a third of federal civil suits filed in the six years after the change.[29] Furthermore, over half of all respondents said that either formal or informal threats of Rule 11 sanctions had been made against them.[30]

The American Judicature findings and pressure from civil litigators spurred the Advisory Committee in 1993 to once again revise the rule. They argued that the 1983 rule "tended to impact plaintiffs more frequently and severely than defendants," "occasionally had created problems for a party which seeks to assert novel legal contentions," and "provide[d] little incentive, and perhaps a disincentive, for a party to abandon positions after determining they are no longer supportable in fact or law."[31] As a result, the Committee rolled back the provisions that it deemed necessary only ten years earlier. Gone were mandatory sanctions, replaced with discretionary punishments limited to those that would be "sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."[32] Rather than require that filings be based upon evidentiary support, the 1993 rule only requires that the existence of such support be "likely."[33] Finally, the 1993 rule includes a "safe harbor" provision that allows attorneys twenty-one days to withdraw dubious filings before opposing counsel can invoke Rule 11.[34] Despite the furor that erupted among conservative lawyers, legislators, and jurists, this more forgiving version of Rule 11 is in effect today.

Restoring a Rule that Works

The U.S. Supreme Court has declared that "baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay."[35] To help protect against frivolous cases that either end in a quick settlement or clog the courts, many have called for restoring the teeth to Rule 11. Specifically, sanctions should be made mandatory, the "safe harbor" provision should be removed, and there should be a requirement that evidence support all papers signed by an attorney when they are filed.

Advocates maintain that Rule 11 should impose mandatory sanctions for non-compliance. It is true that mandatory sanctions under the 1983 version of Rule 11 resulted in significant satellite litigation. Yet, by 1987, the number of cases decided under Rule 11 had leveled.[36] By 1991, over 80 percent of judges felt that the rule should be preserved.[37] Furthermore, while it is impossible to tell how many cases or filings Rule 11 deterred, one can surmise that the number was significant. Fifty-five percent of attorney respondents to the AJS Study reported being subject to sanctions or the threat of sanctions under Rule 11.[38] All studies and surveys concerning the effects of the 1983 rule showed that it forced attorneys to "stop and think" and conduct "significantly more prefiling research than they had before Rule 11 was amended."[39]

Reform proponents similarly suggest that the "safe harbor" provision should be repealed. Although the 1993 rule's "safe harbor" provision curbed Rule 11 litigation significantly, it also succeeded in encouraging frivolous filings, particularly of the nuisance-settlement variety. As Justice Scalia predicted, "parties will be able to file thoughtless, reckless, and harassing pleadings, secure in the knowledge that they have nothing to lose: if objection is raised, they can retreat without penalty."[40] The U.S. Supreme Court seemed to presciently warn against such a policy when it wrote that "even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal."[41] Ironically, the Advisory Committee itself previously held the same view.[42]

Finally, Rule 11 could, as some propose, require filings to be backed by evidence. In the absence of such a requirement, attorneys can file suits without regard to the facts in hope of a quick settlement or the discovery of useful evidence in the future. Prior to 1993, over 60% of lawyers performed more thorough prefiling investigations, declined to file pleadings, or acted affirmatively in some other way due to the threat of sanctions under Rule 11.[43] As one scholar noted, with so many attorneys altering their behavior in the face of that threat, "there may have been a lot of lawyers acting unprofessionally before the 1983 amendments, which in turn confirms that existing mechanisms for enforcing professional standards were not working… It is likely that the rule did indeed raise the level of lawyering across a broad spectrum of practice."[44]

CONCLUSION

The diminution of Rule 11 sanctions after the 1993 change was not the result of lawyer self-discipline, but of judges failing to pursue Rule 11 claims when they are not compelled. Opponents of reform argue that a return to the 1983 rule will once again clog the courts with Rule 11 litigation. This may be so, though the Advisory Committee has stated that "widespread criticisms of the 1983 version of the rule… [are] frequently exaggerated or premised on faulty assumptions."[45] But the question is whether passing over reform on workload grounds would mean that an effective law had been stricken because too many people broke it. As the costs of America's civil litigation system continue to rise, the interests of justice demand that the judiciary and the legal profession continue to scrutinize whether Rule 11 is a fair mechanism for curbing frivolous litigation attacks on individuals and businesses.

Endnotes

1 *See generally* S.B. 281, 124th Leg. (Ohio 2003); S.B. 80, 125th Leg. (Oh. 2003); H.B. 145, 2006 Leg. (Fl. 2006); S.B. 6, 1988 Leg. (Fla. 1988); H.B. 775, 1999 Leg. (Fla. 1999); S.B. 28, 75 (R) Leg. (Tex. 1995); S.B. 25, 75 (R) Leg. (Tex. 1995); H.B. 13, 2004 Leg. (Miss. 2004).

2 Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711-15 (2005).

3 Fed. R. Civ. P. 11 (1938) (amended 1983); Fed. R. Civ. P. 11 (1983) (amended 1993).

4 Fed. R. Civ. P. 11 (1983).

5 *Id.*

6 Fed. R. Civ. P. 11

7 *See* Aaron Hiller, *Rule 11 and Tort Reform: Myth, Reality, and Legislation*, 18 Geo. J. Legal Ethics 809, 813 (2005).

8 Small Business Administration Office of Advocacy, Impact of Litigation on Small Business, No. 265, 3 (2005).

9 Executive Office of the President of the United States, Budget of the United States Government: Historical Tables Fiscal Year 2002, *available at* http://www.gpoaccess.gov/usbudget/fy02/hist.html.

10 *See* Lawrence J. McQuillan, Hovannes Abramyan, & Anothony P. Archie, Pacific Research Institute, Jackpot Justice: The True Cost of America's Tort System, 28 (2007), *available at* http://special.pacificresearch.org/pub/sab/entrep/2007/Jackpot_Justice/Jackpot_Justice.pdf.

11 Towers Perrin Tillinghast, 2006 Update on U.S. Tort Cost Trends, 3 (2006), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=TILL/USA/2006/200611/Tort_2006_FINAL.pdf

12 NERA Economic Consulting Study, Small Business Studies Release, 1.

13 Harris Interactive, Small Business: How the Threat of Lawsuits Impacts Their Operations, 7, 16 (2007), *available at* http://etseq.law.harvard.edu/images/uploads/lawsuitbusiness.pdf.

14 *Id.* at 21.

15 *See* Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared To Settlement*, 44 UCLA L. Rev. 1, 2 (1996).

16 *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. Rev. 1849, 1851 (2004).

17 Fed. R. Civ. P. 11, quoted in 1983 Amendments.

18 *Id.*

19 *See* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rules of Civil Procedure 11*, 61 Minn. L. Rev. 1, 34-35 (1976).

20 *Id.* at 36-37.

21 21 *See* Georgene Vairo, *Rule 11 and the Profession*, 67 Fordham L. Rev. 589, 596 (1998).

22 *Id.*

23 23 *See* Towers Perrin Tillinghast, *supra* note 11, at 5.

24 H.R. Rep. No. 104-62, at 9 (1995).

25 Fed. R. Civ. P. 11 (1983) advisory committee's note to 1983 amendment.

26 Fed. R. Civ. P. 11 (1983).

27 *Id.*

28 *See* Vairo, *supra* note 21, at 626.

29 *See* Lawrence C. Marshall et al., *Public Policy: The Use and Impact of Rule 11*, 86 N.W.U.L. Rev. 943, 952-53 (1992) [*hereinafter* AJS Study].

30 *Id.* at 952, 954-56.

31 Letter to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure, reprinted in 146 F.R.D. 519, 523 (1993).

32 Fed. R. Civ. P. 11 (b)(c)(2).

33 Fed. R. Civ. P. 11 (b)(3).

34 Fed. R. Civ. P. 11 (c)(1)(A).

35 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990).

36 *See* Vairo, *supra* note 21, at 598.

37 *See* John Shapard, et al., Federal Judicial Ctr., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure, at § 2A.

38 *See* AJS Study, *supra* note 26, at 954-56.

39 Peter Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 Loyola L.A. L. Rev. 765, 782 (2004) (quoting Vairo, *supra* note 21, at 621).

40 Antonin Scalia, Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 508 (1993).

41 *Cooter & Gell*, 496 U.S. at 398.

42 *See* Scalia, *supra* note 40.

43 AJS Study, *supra* note 29, at 961.

44 Vairo, *supra* note 21, at 622-23.

45 *See* Letter to Honorable Robert E. Keeton, *supra* note 31.